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CRIMINAL LAW

CRIMINAL LAW—CIVIL CONTEMPT FOR REFUSAL TO ANSWER

A witness who refuses to answer questions before a competent examiner may be committed to civil jail under New York Civil Practice Act Section 406(3) as a means of compelling him to answer.[1] Since in civil and criminal contempt cases, courts have held that an answer may be so false and evasive as to be equivalent to no answer at all, the problem arises as to what test shall be applied in determining whether or not a given answer is sufficient and not equivalent to a refusal under Section 406(3). Considering the problem in *People v. McCloskey*[2] three judges of the Court of Appeals, in an opinion by Judge Froessel, adopted the rule that answers are sufficient when they are unequivocal and clear enough so that if they are shown to be false, the witness would clearly be guilty of perjury. When such answers are given there is no refusal to answer within the meaning of Section 403(3). Three judges, in an opinion by Judge Burke, took the position that "incredible, evasive, inconsistent testimony designed to thwart the legitimate object of the inquiry does not constitute . . ." an answer.[3]

Frank and Costenze Valenti were called before the Temporary State Commission of Investigation to answer twenty-six questions based on their presence at the alleged gangland meeting at Apalachin. After refusal to answer on the ground of possible self-incrimination they were granted immunity from prosecution.[4] Because of their continued refusal to answer they were ordered to civil jail for an indefinite period under authority of Section 406(3). The order was affirmed.[5] After seven months in jail they requested an opportunity to answer the same questions, but after their reappearance before the Commission they were refused release on the ground that their answers on their face indicated unequivocally that they were unworthy of belief. The witnesses then sought release on writs of *habeas corpus,* but the Trial Court upheld the commitment and dismissed the writs.[6] On appeal, the Appellate Division ordered the release of Frank "on the ground that his answers to the 26 questions [were] not so palpably false and evasive as to be tantamount to the avoidance of giving answers . . .", whereas, Costenze was not ordered released "because his purported answers [were] palpably false and evasive, designed to obstruct and having the effect of obstructing the inquiry and avoiding the

1. N.Y. CIV. PRAC. ACT § 406(3): "If the person . . . refuses without reasonable cause to be examined, or to answer a legal and pertinent question . . . may commit the offender to jail, there to remain until he submits to do the act which he was so required to do or is discharged according to law."

2. People v. McCloskey, 6 N.Y.2d 390, 189 N.Y.S.2d 898 (1959).

3. *Id.* at 405, 910.

4. N.Y. PEN. LAW § 2447. Constitutionality tested in People v. De Feo, 284 App. Div. 622, 131 N.Y.S.2d 806 (1st Dep't 1954), *rev'd on other grounds* 308 N.Y. 595, 127 N.E.2d 592 (1955).

5. Commission of Investigation v. Lombardozzi, 7 A.D.2d 48, 180 N.Y.S.2d 496 (1st Dep't 1958), *aff'd* 5 N.Y.2d 1026, 184 N.Y.S.2d 550 (1959).

6. People v. McCloskey, 186 N.Y.S.2d 798 (Sup. Ct. 1959).

giving of answers to the commission."[7] The Court of Appeals, in result, affirmed the Appellate Division's orders, three judges holding for release of both, three for holding both, and Judge Desmond approving the distinction found by the Appellate Division on the ground that Costenze's answers "were on their face not only false but so clearly evasive and obstructive as to amount to a refusal to answer at all and so were contemptuous and contumacious as a matter of law."[8]

Among other things, an answer may be true, false, or evasive. If it is true justice is served. If the court thinks the answer is false the action to be taken is to accuse the witness of the crime of perjury,[9] and on that issue he "is entitled to a trial by jury under the safeguards of the criminal law."[10] False testimony before a court is not punishable by civil or criminal contempt.[11] Contempt in the context of this discussion comes within the area of a *refusal* to answer. Summary punishment by incarceration is allowed as a remedial and coercive procedure where a witness has refused to answer a question.[12] The witness is said to hold the key to his freedom in that he may answer at any time and be released.[13] New York courts have recognized "[w]ith respect to both civil and criminal contempt . . . that under certain circumstances a response to a question may be so false and evasive as to be equivalent to no answer at all."[14]

In the *McCloskey* case Judge Froessel decided that since there is sufficient parallel of purpose between contempt proceedings and Section 406 proceedings —in that "committment is remedial and coercive, and the recalcitrant witness holds the key to his freedom,"—the rules developed in relation to the distinction between the merely false answer and the evasive answer in the former should be applied to the latter.[15] "The problem is to give meaningful content

7. People v. McCloskey, 8 A.D.2d 74, 185 N.Y.S.2d 952 (1st Dep't 1959).
8. *Supra* note 2 at 406, 910.
9. N.Y. PEN. LAW § 1620 *et seq.*
10. *Supra* note 2 at 398; Foster v. Hastings, 263 N.Y. 311, 189 N.E. 229 (1934).
11. Fromme v. Gray, 148 N.Y. 695, 43 N.E. 215 (1896) on civil contempt; People v. De Feo, *supra* note 4.
12. N.Y. JUDICIARY LAW § 750: "A court of record has power to punish for criminal contempt, a person guilty [of a] (5) Contumacious and unlawful refusal to be sworn as a witness; or, after being sworn, to answer any legal and proper interrogatory." § 751 states that the punishment may be imprisonment not exceeding thirty days. N.Y. PEN. LAW § 600: "A person who commits a contempt of court, of any one of the following kinds, is guilty of a misdemeanor: (6) Contumacious and unlawful refusal to be sworn as a witness, or, after being sworn, to answer any legal and proper interrogatory"; N.Y. JUDICIARY LAW § 753: "Power of courts to punish for civil contempts.—A court of record has power to punish, by fine and imprisonment, or either, . . . refusing or neglecting to answer as a witness." § 774: Length of Imprisonment.—Where the misconduct proved consists of an omission to perform an act or duty which is yet in the power of the offender to perform, he shall be imprisoned only until he has performed it. . . ." The duration may be for a period during which there has been a refusal to answer; People v. Davidson, 35 Hun. 471 (1885).
13. *Supra* note 2 at 399, 904.
14. *Id.* at 398; Foster v. Hastings, *supra* note 10; Finkel v. McCook, 247 App. Div. 57, 286 N.Y. Supp. 755 (1st Dep't 1936), *aff'd* 271 N.Y. 636, 3 N.E.2d 460 (1936).
15. *Supra* note 2 at 399, 904.

to the distinction between the false answers and the answer that is so false and evasive as to be tantamount to no answer at all."[16] Judge Froessel sought to avoid some of the more subjective tests by focusing "exclusively on the internal content of the witness's answers," that is, "if the witness directly responds with unequivocal answers, which are clear enough to subject him to a perjury indictment, then he has made a *'bona fide* effort to answer' and may not be summarily committed for refusing to answer."[17] Depending on his answering skill, it would seem that this test might permit a witness to escape the burden of having to tell the truth. Although a witness may tell the truth without fear of prosecution where immunity has been granted, he may so fear gangland reprisals and loss of community reputation that he would rather fabricate or indulge in half-truths. In view of this test, the witness may attempt to serve his own ends by outright fabrication, risking a jury trial for perjury in exchange for freedom from indefinite civil incarceration.[18] The other alternative under this test is for him to tell the truth but mentally reserve much of the "incriminating" information, avoiding, on the surface, the appearance of being evasive. If the actor is skilled he literally burdens the examiner with a presumption that the witness has made answer so long as there is a quantity of clear and unequivocal utterance. Judge Burke's test gives wider scope to the examiner to use collateral information to determine whether or not an answer has been evasive and obstructive of the process of getting at the truth. This seems more like a "quality" test, and, perhaps, meets the needs of justice more satisfactorily.

The "meaningful content [of] the distinction" between a false answer and an evasive one perhaps lies in the sanctions. If the witness is forced to perjure (assuming he will not tell the truth), he has the jury trial and other safeguards of due process to protect him. On the issue of refusal to answer Judge Froessel was mindful that, "[b]y keeping relators in prison until they supply answers which satisfy the commission and the courts, they are not only being sentenced to conceivable life imprisonment, without a trial by jury or any of the other traditional rights which the law accords to a defendant, but they are in effect being compelled to admit they committed perjury in giving the answers they did. Such an arbitrary deprivation of liberty makes a hollow mockery of the 'due process of law' requirement."[19] Perhaps it is incorrect to say that the clear and unequivocal test seeks to give a witness a way out of a dilemma by permitting him to make merely some sort of clear unequivocal answer which justifies removal of the threat of civil incarceration. Where a grant of immunity after one has claimed the privilege against self-incrimination extends only to

16. *Ibid.*
17. *Id.* at 405; Matter of Michael, 326 U.S. 224 (1945).
18. Note the dual risk of perjury and contempt: "In order to punish perjury . . . as a contempt there must be added . . . the further element of obstruction to the court in the performance of its duty." Ex Parte Hudgings, 249 U.S. 378 (1918); United States v. Appel, 211 F. 495 (S.D.N.Y. 1913).
19. *Supra* note 2 at 405, 910.

governmental action and in no way protects a person from private reprisals and community censure, there is at least a sympathy for giving a witness some means of evading indefinite imprisonment. In opposition to this view, it may be enough to say that "[s]ociety is also entitled to full protection of the law."[20]

MARKET VALUE DEFINED IN GRAND LARCENY PROSECUTIONS

Section 1305 of the New York Penal law provides: "In every other case not regulated by statute, the market value of the thing stolen is deemed its value."

A unanimous Court in *People v. Irrizari*,[21] has authoritatively determined the meaning of market value as used in the above penal provision, for the first time. In determining whether grand larceny has been committed, market value is not the replacement cost to the owner, but rather the price in the market the thief would have had to purchase the goods had he not stolen them.[22]

In the instant case the larceny consisted of the theft of a total of nine garments from three different department stores. Defendant, in seeking a reversal of his conviction, contended that wholesale rather than retail price should be determinative of market value.

In rejecting this contention the Court realized that the retail price of goods ordinarily reflects the retailers amortization of his merchandising expenses into the total cost of the goods, and, therefore, retail price is a truer reflection of market value in a consumer economy.[23]

The Court is apparently making a clear pronouncement of law in an area where the need for clarification has been felt. This is evidenced by the fact that the Court is affirmatively answering a question it may not have had to answer. The defendant was convicted upon three counts of second degree grand larceny, which crime necessitates the theft of goods of a value of over one-hundred and under five-hundred dollars to ground a conviction.[24] Each of the three counts covered thefts from a single store. However, even had the defendant been successful in claiming wholesale price as market value the value of the goods under that standard would still have been in excess of one-hundred dollars on each count,[25] and the Court would have nevertheless sustained the conviction, since the defendant, in any case, would not have been

20. *Supra* note 6 at 803.

21. 5 N.Y.2d 142, 182 N.Y.S.2d 361 (1959).

22. The Court indicates, that such value is determined at the time and place where the theft occurred, and that it is open for the defendant to show that such retail price, is in fact, much higher than that of similar goods in the same locale.

23. The legislative intent regarding New York Penal Law Section 1305 is gleaned by the Court from a consideration of New York Penal Law Sections 1303, 1305. Under Section 1303, value of a stolen evidence of debt is the amount due upon it at the time of the theft, while Section 1304 states the value of a stolen passenger ticket to be the price at which it is sold.

24. N.Y. PEN. LAW § 1296.

25. The difference in value on each count at wholesale and retail prices respectively, was, first, $114-$190, second, $252-$440, third, $114.90-$199.85.