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Law.[42] In this area, however, where the likelihood of frequent occurrence is present, it would appear that a more definite statement of the Commissioner's power to revoke under Section 71 would be beneficial to the public.

EXCEPTION TO RULE MAKING EVIDENCE OF WITNESS'S INVOCATION OF RIGHT AGAINST SELF-INCRIMINATION INADMISSIBLE

The credibility of a witness may be impeached by proof of prior statements under oath inconsistent with his testimony.[43] Can evidence that the witness has previously invoked his privilege against self-incrimination be used to impeach his subsequent non-incriminating testimony on the same matters?[44]

In *People v. Ashby*,[45] the prosecution was permitted during cross-examination of a key defense witness to show that in his appearance before the Grand Jury, testifying as to the same matters to which he testified freely and without incriminating himself at the trial, he had invoked the privilege fifty or sixty times.[46] The Appellate Division,[47] holding this to be a reversible error of law,[48] ordered a new trial. The Court of Appeals, while affirming the principle that a citizen's assertion of his constitutional right to refuse to incriminate himself cannot subsequently be used to his discredit,[49] held that under the special circumstances of this case the evidence was properly admitted. The defense had attempted to show that the witness in question had always been ready to testify fully and completely but that the prosecutor, to thwart a full investigation, had refrained from calling this key witness. The Court held that in thus raising the issue of the witness's alleged willingness to testify, the defense had opened the door to full inquiry into the witness's prior refusal to testify in reliance on his privilege against self-incrimination.

The only New York authority on this point is *People v. Luckman*,[50] a memorandum decision stating that it was reversible error to permit the prosecution, in cross-examining the witness, to show that she had asserted her privilege against self-incrimination in testifying before the Grand Jury. The distinction between this and the present case is both fine and clear. While such evidence might bear improperly on the credibility of the witness, it is admissible when directed to the question of the willingness with which he testified when the issue has been raised by opposing counsel.

The question has been considered more fully by the federal courts. In *Halperin v. United States*,[51] the Supreme Court recognized that there is nothing inconsistent with innocence in an assertion of the constitutional privilege

42. See dissenting opinion, supra note 38.
43. N.Y. Civ. Prac. Act § 343-a.
44. U.S. Const. Amend. V; N.Y. Const. Art. I, § 6.
45. 8 N.Y.2d 238, 203 N.Y.S.2d 854 (1960).
46. 17 Misc. 2d 413, 184 N.Y.S.2d 284 (Sup. Ct. 1959).
47. 9 A.D.2d 464, 195 N.Y.S.2d 301 (3d Dep't 1959).
48. Citing Halperin v. United States, 353 U.S. 391 (1957).
49. Ibid.
50. 254 App. Div. 694, 3 N.Y.S.2d 864 (2d Dep't 1938).
51. Supra note 48.

against incriminating one's self, especially when the privilege is asserted during the course of testimony before a Grand Jury. There the Court said "Innocent men are more likely to plead the privilege in secret proceedings, where they testify without advice of counsel and without opportunity for cross-examination, than in open court proceedings, where cross-examination and judicially supervised procedure provides safeguards for the establishing of the whole, as against the possibility of merely partial, truth."[52] The Supreme Court, however, did not absolutely bar the admission of evidence that the witness had previously asserted the privilege. Rather, it said that in each case the court should determine from the particular circumstances whether the impact of the possible impermissible inference of the defendant's guilt which the jury could draw from the evidence so far outweighed its probative value going to the issue of credibility of the witness that it should be excluded.

This holding was almost immediately applied by the United States Court of Appeals, Second Circuit,[53] to the effect that testimony consistent with innocence may not be impeached by evidence of the witness's prior assertion of the privilege. If the testimony bears a contrary interpretation, such evidence is admissible only in so far as its probative value is not outweighed by the possible impermissible inferences of the defendant's guilt which could be drawn from it.

In a concurring opinion in the *Halperin*[54] case, four members of the Court advocated absolutely barring such evidence saying that they could ". . . think of no special circumstances that would justify use of a constitutional privilege to discredit or convict a person who asserts it. The value of constitutional privileges is largely destroyed if persons can be discredited for relying on them."[55]

The New York law on this question is not yet as finely drawn as the federal law. Inasmuch as the present decision turns on the holding that the defense itself opened the door to this line of cross-examination, the basic question, whether New York law will develop in accord with the view that the evidence is absolutely barred or, following *Halperin,* admit the evidence if the circumstances of the particular case warrant it, remains unresolved. While the present decision may seem to imply that the courts will adopt the latter position, this is largely nullified by the fact that the Court appears to interpret *Halperin* as holding ". . . that a citizen's assertion of his constitutional right to refuse to incriminate himself cannot afterwards be the basis of an attack on his credibility."[56]

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52. Id. at 422-3.
53. United States v. Tomaiolo, 249 F.2d 683 (2d Cir. 1957), evidence excluded; United States v. Sing Kee, 250 F.2d 236 (2d Cir. 1957), evidence admitted.
54. Supra note 48.
55. Id. at 425.
56. Supra note 45 at 241, 203 N.Y.S.2d 857 (1960).