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## Recent Cases: Evidence — Privilege Against Self-Incrimination — Waiver and its Effect Upon Subsequent Proceedings

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### Evidence—Privilege Against Self-Incrimination—Waiver and Its Effect Upon Subsequent Proceedings

Witness testified before a federal grand jury regarding his participation in acts regarded by the grand jury as constituting a conspiracy to commit an offense against or to defraud the United States.<sup>1</sup> The grand jury returned an indictment naming the witness as a co-conspirator. At the trial of the other co-conspirators the government called the witness and asked him a series of questions similar to those answered by him at the grand jury investigation. He refused to answer these questions on the ground that his answers would tend to incriminate him. *Held*: the witness was privileged to refuse to answer these questions. His voluntary testimony at the grand jury investigation did not constitute a waiver of his privilege<sup>2</sup> against self incrimination.<sup>3</sup>

This seems to be a case of first impression in the federal courts. Earlier, federal cases have held, on the theory of waiver, that a witness who has already incriminated himself by his testimony before a grand jury cannot stop short of full disclosure to the grand jury of all the facts surrounding his crime, unless these facts tend to further incriminate him concerning other crimes.<sup>4</sup> The record of this testimony has been used as evidence in a later criminal prosecution.<sup>5</sup> However, in the instant case, the government, on the theory of waiver, sought to force the witness, himself, to divulge the evidence at the subsequent criminal prosecution.

Although it is settled that the Fifth Amendment privilege against self-incrimination is not applicable to state courts,<sup>6</sup> interpretations by state courts of similarly worded state constitutions may aid in analyzing the instant decision. These courts have held that the voluntary testimony of a witness before a grand jury<sup>7</sup> or other preliminary and separate proceeding<sup>8</sup> is not a waiver for the later trial, nor is testimony

<sup>1</sup> 62 Stat. 701 (1948), 18 U.S.C. § 371 (1950).

<sup>2</sup> U.S. Const. Amend. V.: "No person... shall be compelled in any criminal case to be a witness against himself..." For a history of the development of the privilege against self-incrimination see 8 Wigmore, Evidence § 2250 (3d ed. 1940); Note, 30 Neb. L. Rev. 643 (1951); Note, 18 Brooklyn L. Rev. 287 (1951); Inlay, The Paradoxical Self-Incrimination Rule, 6 Miami L. Q. 147 (1951).

<sup>3</sup> United States v. Malone, 111 F. Sup. 37 (N.D. Cal. 1953).

<sup>4</sup> Rogers v. United States, 340 U.S. 367 (1951) (Witness testified she was a Communist but refused to testify further; held, she must also name the person to whom she gave confidential records.); United States v. St. Pierre, 132 F.2d 837 (2d Cir. 1942).

<sup>5</sup> United States v. Thomas, 49 F. Supp. 547 (W.D. Ky. 1943).

<sup>6</sup> Adamson v. California, 332 U.S. 46 (1947); Palko v. Connecticut, 302 U.S. 319 (1937).

<sup>7</sup> Apodaca v. Viamontès, 53 N.M. 514, 212 P.2d 425 (1949); Duckworth v. Dist. Ct., 220 Iowa 1350, 264 N.W. 715 (1936).

<sup>8</sup> Ex parte Sales, 134 Cal. App. 54, 24 P.2d 916 (1933); Ex parte Berman, 105 Cal. App. 37, 287 Pac. 125 (1930); People v. Cassidy, 213 N.Y. 388, 107 N.E. 713 (1915); In re Mark, 146 Mich. 714, 110 N.W. 61 (1906).

in one criminal trial a waiver for a subsequent prosecution.<sup>9</sup> The cases reason that unless this view is adopted a witness in the second trial might be subjected to a more searching cross-examination and thus be required to give testimony that he did not anticipate when testifying at the previous investigation. This is especially true where the first proceeding is non-adversary, e.g., a grand jury investigation where the witness' counsel is normally not present.

In *United States v. Steffen*,<sup>10</sup> a recent federal case, it was held that voluntary testimony during one criminal trial does not constitute a waiver of the privilege by the witness in a later trial involving a different offense.<sup>11</sup> The court applied the reasoning above and, in addition, stated that the second admission would add to the weight of the evidence which the government might present at the criminal prosecution.

The court in the instant case recognized these arguments and pointed out that the reasoning is even more compelling where the witness first testifies at a private hearing, and is later called upon to state the same evidence at a public criminal prosecution. Public opinion resulting from the notoriety accompanying the criminal trial might force subsequent prosecution of the witness, where such would not be the case if his testimony were not publicized. Evidence discovered following the grand jury investigation, coupled with the testimony the witness is now asked to give, may make his testimony incriminating whereas it was harmless at the time of the earlier proceeding.

It is submitted that the instant case is a logical extension of the law set out by previous authorities, and together with the *Steffen* case should serve as a guide<sup>12</sup> in later litigation in this field.<sup>13</sup>

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<sup>9</sup> The rule applies in a retrial of the same case, *Emery v. State*, 101 Wis. 627, 78 N.W. 145 (1899), or an entirely new criminal action, *Burdy v. Conroy*, 182 Misc. 476, 48 N.Y.S.2d 871 (Sup. Ct. 1944); *State v. Sentner*, 230 Iowa 590, 298 N.W. 813 (1941).

<sup>10</sup> 103 F. Supp. 415 (N.D. Cal. 1951).

<sup>11</sup> Another federal case which seems to support, in spirit at least, the view adopted in the instant case is *McCarthy v. Arndstein*, 254 U.S. 71 (1920), reaff'd, 266 U.S. 34 (1924). Defendant was adjudged an involuntary bankrupt after he filed schedules of assets and liabilities under direction of bankruptcy court. Pursuant to a subpoena he then appeared before a special commissioner and during examination invoked his privilege with regard to certain of the commissioner's questions. Held: witness's previous testimony, i.e., filing of schedules of assets and liabilities, did not constitute a waiver since there had been no revelation of incriminating facts. The witness could still stop short whenever he could fairly claim that to answer would tend to incriminate him.

<sup>12</sup> A recent case in the Third Circuit, also concerning waiver of privilege by testifying at a grand jury investigation, has applied the reasoning of the instant case and reached the same decision. *In re Neff*, 206 F.2d 149 (3d Cir. 1953).

<sup>13</sup> The possibility of a case in the near future involving the effect of giving testimony at a legislative committee investigation upon an attempt in a sub-