COMMENTS

CONSTITUTIONAL LAW—PRIVILEGE AGAINST SELF-INCRIMINATION—REQUIREMENT OF WARNING TO WITNESS TESTIFYING BEFORE GRAND JURY

United States v. Scully, 225 F.2d 113 (2d Cir. 1955)

When subpoenaed to testify before a grand jury which was investigating alleged fraud, defendant was not advised of the privilege against self-incrimination under the fifth amendment. He was indicted and subsequently convicted of conspiracy to defraud the United States. Defendant moved to quash the indictment on the ground that the failure to warn constituted a denial of the privilege against self-incrimination. The Court of Appeals for the Second Circuit affirmed the order of the trial court denying the motion to quash, holding that the mere possibility that an ordinary witness may subsequently be indicted by a grand jury does not require that he be advised of his right to invoke the privilege when testifying before that grand jury.[1]

An accused[2] who is called as a witness before a grand jury or other preliminary investigating body to give testimony in regard to matters as to which he has already been charged, has a privilege to refuse to take the stand.[3] The ordinary witness, however, is afforded merely the right to refuse to answer specific questions,[4] the answer to which might tend to indicate that he is guilty of a crime,[5] and he can constitutionally be compelled to take the stand.[6] While an accused is entitled to a warning of his right to refuse to take the stand,[7] it has

1. United States v. Scully, 225 F.2d 113 (2d Cir.), *cert. denied*, 350 U.S. 897 (1955).

2. An accused is one against whom a formal charge has been openly made by indictment, information, or complaint before a magistrate. Virginia v. Paul, 148 U.S. 107, 119-21 (1893). In the principal case defendant did not come within this definition.

3. 8 WIGMORE, EVIDENCE § 2268(2) & n.6 (3d ed. 1940); MCCORMICK, EVIDENCE § 122 (1954); see UNIFORM RULES OF EVIDENCE rule 23(1).

4. MCCORMICK, EVIDENCE § 122 (1954).

5. *Id.* at § 128 (1954).

6. United States v. Mattes, 79 F.2d 127 (3d Cir. 1935); United States v. Pleva, 66 F.2d 529 (2d Cir. 1933); O'Connell v. United States, 40 F.2d 201 (2d Cir. 1930).

7. United States v. Lawn, 115 F. Supp. 674, 677-78 (S.D.N.Y. 1953). The distinction between the rights of an accused and the rights of a mere witness was made in the earlier cases of United States v. Wetmore, 218 Fed. 277 (W.D. Pa. 1914) and United States v. Kimball, 117 Fed. 156 (S.D.N.Y. 1902). It was reasoned that the fifth amendment guaranteed an ordinary witness the right to refuse to answer specific questions, the answers to which would tend to incriminate him, after he was sworn as a witness at a trial, but that the scope of the constitutional privilege did not extend to accused parties in criminal trials, since they were incompetent as witnesses at common law. The passage of statutes permitting an accused to testify if, and only if, he chose to do so (see, *e.g.*, 18 U.S.C. § 3481 (1952)) did not automatically remove his incompetency, but merely gave him the power to

generally been stated, as in the principal case, that where an ordinary witness is called to testify, no warning of his privilege to refuse to answer specific questions is required.[8]

While the question in the principal case is presented in terms of whether there existed a duty to warn defendant of his privilege to refuse to answer, it would appear that such an issue involves merely a specific element of a broader problem, *i.e.*, whether, by reason of the fact that a witness is compelled to take the stand without having been warned, he has been compelled to testify against himself in violation of the privilege.

This postulate is supported by the fact that among the cases generally cited in support of the rule that it is unnecessary to warn ordinary witnesses, can be found cases which are phrased in terms of compulsion, rather than of warning.[9] In *Powers v. United States*[10] and in *Wilson v. United States*,[11] the Supreme Court was concerned with whether certain confessions were admissible in evidence. In both cases it was determined that it was not essential to show that the confessing party had been warned that his statements could be used against him, so long as it appeared that the confessions were freely and voluntarily made, and that there were no outward manifestations of compulsion.[12]

If a witness can prove that he was ignorant of the privilege against self-incrimination, and that he would have invoked it had he had

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remove this incompetency by offering himself as a witness. It was said that since an accused could not be compelled to take the stand in a criminal trial, he could not be compelled to appear before any other body unless the statutory immunity was waived. The more recent cases have stated that an accused waives his privilege to refuse to take the stand only after having been informed of his privilege and then having chosen to take the stand. Thus, the scope of the requirement that a warning be given of the existence of the privilege has been extended from operation in a formal criminal trial so as to include other proceedings, such as those of a grand jury. United States v. Lawn, *supra*; United States v. Benjamin, 120 F.2d 521 (2d Cir. 1941); United States v. Miller, 80 F. Supp. 979 (E.D. Pa. 1948). Unlike the earlier cases recognizing that the privilege of an accused to refuse to take the stand had to come from the statute removing his incompetency, and not from the Constitution, the later cases have confused the two privileges. *But see* McCORMICK, EVIDENCE § 122 (1954) (legislative privilege assimilated to constitutional privilege).

8. United States v. Block, 88 F.2d 618 (2d Cir. 1937); Pulford v. United States, 155 F.2d 944 (6th Cir. 1946) (dictum); United States v. Hirsch, 74 F.2d 215 (2d Cir. 1934) (dictum); Thompson v. United States, 10 F.2d 781 (7th Cir. 1926) (dictum). See also 8 WIGMORE, EVIDENCE § 2269 (3d ed. 1940).

9. Powers v. United States, 223 U.S. 303 (1912); Wilson v. United States, 162 U.S. 613 (1896); Knoell v. United States, 239 Fed. 16 (3d Cir. 1917) (Since defendants appearing as witnesses were represented by counsel and did not claim the privilege, there was no compulsion.); United States v. Wetmore, 218 Fed. 227 (W.D. Pa. 1914); United States v. Kimball, 117 Fed. 156 (S.D.N.Y. 1902) (Since defendants did not show any signs of unwillingness and were represented by counsel, there was no compulsion.). In none of the above cases was there stated a rule that no warning was needed.

10. 223 U.S. 303 (1912).

11. 162 U.S. 613 (1896).

12. 223 U.S. at 313-14; 162 U.S. at 623-24.

knowledge, it has been held that a warning is necessary in order that any possibility of compulsion may be obviated. Thus, in *Bell v. United States*,[13] defendant, when testifying as an ordinary witness at a prior trial, was not advised that he could refuse to give self-incriminating testimony. Since it appeared that he was unaware of the privilege against self-incrimination, the court felt that there was a strong likelihood of compulsion. The court considered compulsion not only as a matter of actual physical coercion, but also as a state of mind, the existence of which might not be indicated by outward manifestations. The *Bell* case, however, does not require a warning in all cases, but merely establishes that is it necessary to warn a witness where there might otherwise be compulsion. Hence, *Bell* is not inconsistent with those cases which have declined to reverse convictions because of a failure to warn inasmuch as the latter involve situations where each appeal was based upon allegations asserting merely the failure to warn—not upon allegations or offer of proof that the witness was actually ignorant of his rights under the privilege, or that he would have refused to testify had he known of his rights.[14]

In some of the cases holding that a warning is unnecessary, the accused persons who appeared as witnesses before grand juries had consulted counsel, were acting under the advice of counsel, or were themselves lawyers.[15] While it thus was apparent that none of these witnesses were ignorant of the privilege against self-incrimination, the privilege was not invoked by any of them. The feeling is expressed in the opinions that the witnesses had testified before the grand juries in attempting to create favorable impressions, and having failed to do so, were, as an afterthought, seeking to quash the indictments by alleging violations of the privilege because they had not been warned.[16] These cases clearly would not qualify under the rule in the *Bell* case,

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13. 81 Fed. 830 (W.D. Tenn. 1897).

14. See, *e.g.*, Powers v. United States and Wilson v. United States, *supra* note 9. *Cf.* United States v. Kimball, *supra* note 7, where it was stated that it is not a violation of the privilege against self-incrimination to compel a witness to take the stand unless there are outward manifestations of an unwillingness to answer specific questions. It was further stated that the question of what procedure should be employed where the witness is ignorant of the privilege was not before the court.

15. Thompson v. United States, 10 F.2d 781 (7th Cir. 1926); United States v. Haas, 126 F. Supp. 817 (S.D.N.Y. 1954); United States v. Klein, 124 F. Supp. 476 (S.D.N.Y. 1954).

16. *Ibid.* That a similar attitude of the courts exists where the incriminating testimony was given at a prior criminal trial, is indicated by Block v. United States, 88 F.2d 618 (2d Cir. 1937). In that case defendant, while testifying as an ordinary witness at a prior trial, had given self-incriminating testimony in portions of his answers which were beyond the scope of the questions. The court held that a warning was not essential since the test of whether a witness has been denied the privilege against self-incrimination is whether the testimony was freely given, all things considered.

but rather would seem to fall within the purview of the *Powers* and *Wilson* cases, no warning being required.

In the principal case it did not appear that defendant was ignorant of his rights or that he would have testified differently had he been warned of the privilege.[17] He had not been denied opportunity to consult counsel, and had asserted his complete innocence of any wrongdoing.[18] Therefore, defendant in the principal case failed to meet the test of *Bell,* but rather fell within that line of cases generally cited for the rule that no warning is necessary.[19]

Despite the implications of the *Powers* and *Wilson* cases,[20] there is much to be said for a general warning requirement whereby *all* witnesses, before taking the stand, would be advised of the constitutional privilege to refuse to answer incriminating questions.[21] Such a rule would insure that all witnesses had knowledge of the privilege, and that constitutional rights would not be lost by reason of ignorance.[22] Not even a general warning requirement, however, would fully effectuate the policy of the amendment because the lay witness would often fail to recognize the incriminating quality of a certain fact in a circumstantial chain.[23] Although convictions would be reversed even when the witness had actual knowledge of the privilege in those instances where no warning was given, such a rule would seem to be preferable to a rule which would possibly deny the benefit of the constitutional privilege because of the failure to bear the presently required burden of proof.[24] It seems unfair to require a person to prove that he is ignorant of a constitutional privilege to which he is admitted initially to be entitled, and to further require him to offer speculative proof of the nature of what his actions would have been had he not been ignorant.

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17. 225 F.2d at 114.
18. *Id.* at 114 n.1.
19. See notes 8 & 9 *supra.*
20. In the principal case Judge Frank's concurring opinion describes the *Powers* and *Wilson* cases as "virtual rulings" that it is unnecessary to warn any witness other than an accused. *Id.* at 119.
21. The concurring opinion of Judge Frank in the principal case proposes that any witness should be warned of the privilege by a federal prosecutor if a question calls for an incriminating answer. *Id.* at 120.
22. It has been stated that the privilege against self-incrimination does not extend to one who is ignorant of his rights—the privilege must be claimed. United States v. Johnson, 76 F. Supp. 538 (M.D. Pa. 1947) (dictum); United States v. Bryant, 245 Fed. 682 (N.D. Tex. 1917) (dictum). *But see* discussion of *Bell v. United States* in text supported by note 13 *supra.*
23. McCormick, Evidence § 130 (1954).
24. See text supported by note 14 *supra.*