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1. GENERAL ASSEMBLY—WITNESS APPEARING BEFORE COMMITTEE OR SUBCOMMITTEE — COMPELLED TO ANSWER ALL QUESTIONS AND PRODUCE BOOKS, PAPERS AND OTHER DOCUMENTARY EVIDENCE DEMANDED.

2. TESTIMONY OF SUCH WITNESS CAN NOT BE USED AS EVIDENCE IN ANY CRIMINAL PROCEEDING AGAINST HIM—WITNESS CAN NOT BE PROSECUTED OR SUBJECTED TO ANY PENALTY OR FORFEITURE WHETHER TESTIMONY OR EVIDENCE WAS VOLUNTARILY OR INVOLUNTARILY GIVEN OR PRODUCED.

3. WITNESS MAY NOT WAIVE IMMUNITY GIVEN HIM UNDER SECTION 60 G. C. AND PLACE HIMSELF IN POSITION TO CLAIM PRIVILEGE GIVEN BY ARTICLE 1, SECTION 10, CONSTITUTION OF OHIO TO REFUSE TO GIVE SELF-INCRIMINATING TESTIMONY.

4. PERSONS WHO VOLUNTEER INFORMATION OR DOCUMENTARY EVIDENCE TO INVESTIGATORS OF COMMITTEE DO NOT ACQUIRE AMNESTY GRANTED BY SECTION 60 G. C.

SYLLABUS:

1. A witness appearing before a duly authorized and constituted committee or sub-committee of the General Assembly, or either house thereof, to testify, is compelled to answer all questions propounded to him and produce such books and papers and other documentary evidence which such committee demands.

2. After so testifying or producing evidence, the testimony of such witness can not be used as evidence in any criminal proceeding against him, nor can such witness be prosecuted or subjected to any penalty or forfeiture for or on account of the transaction concerning which he testified or produced evidence, whether such testimony or evidence was voluntarily or involuntarily given or produced.

3. A witness called before a legislative committee may not waive the immunity given him under Section 60 of the General Code, and thereby place himself in a position to claim the privilege given him by Section 10 of Article I of the Constitution of Ohio to refuse to give self-incriminating testimony.

4. Persons voluntarily furnishing information or documentary evidence to investigators of a legislative committee do not thereby acquire the amnesty granted by Section 60 of the General Code.

Columbus, Ohio, March 12, 1947

Hon. Thos. E. Bateman, Clerk of the Senate
Columbus, Ohio

Dear Sir:

This will acknowledge receipt of a copy of Senate Resolution No. 25, adopted by the Senate of the 97th General Assembly, which resolution reads as follows:

> "Relative to obtaining the opinion of the Attorney General upon matters pertaining to the investigation being made by the Liquor Investigating Committee of the Ohio Senate.

WHEREAS, a select committee to investigate the Department of Liquor Control of the State of Ohio was appointed pursuant to and by Senate Resolution Number 23, adopted January 29, 1947, with full power and authority to make any inquiry and investigation into any and all matters and things pertaining to the issuance of permits, purchase of liquor, employment of personnel, and any and all things that pertain to the liquor department, and with full authority to subpoena witnesses, books, papers and records of witnesses, including state employees in the Department of Liquor Control, to employ attorneys and investigators, to have full authority to administer oaths and to punish for contempt, and to take any and all of the steps necessary to determine the truth or falsity of the allegations, charges, rumors and reports as to the method of operation of the state Department of Liquor Control, as to the method of issuing permits therein, and as to an alleged system of collections and charges for influence in state purchases and the awarding of permits; and

WHEREAS, said select committee has employed investigators and has been and is now engaged in the investigation as aforesaid; and

WHEREAS, it is desirable to have the said investigators interview persons, and investigate documents, books, records and other instruments; and

WHEREAS, it is desirable to bring before the committee by subpoena witnesses for the purpose of giving testimony and of producing books, papers and records and to permit persons voluntarily to appear before the committee and give testimony and produce books, papers and records;

NOW, THEREFORE, BE IT RESOLVED, by the Ohio Senate that the Attorney General of Ohio be and he is hereby requested to furnish an opinion as to the following particulars:

1. May a person waive the immunity granted to him by Section 60 of the General Code, the Constitution, or other laws of the State of Ohio, and the Constitution and laws of the United States?

2. If a person can waive this immunity, in what form and at what time must such waiver be made?

3. May investigators employed by the committee seek information or documents from persons not under subpoena or oath without immunity being extended thereby:

4. If such waiver is made, may it be withdrawn by the witness before, during or after testimony and production of books, papers and records, and, if withdrawn, does it affect testimony

theretofore given, and is immunity extended by reason of such withdrawal?

5. Will the subpoenaing of a witness whose testimony is not taken before the committee and who does not produce documents or records extend any immunity to such witness?

6. Will the voluntary testimony of a witness or the voluntary production of books, papers and records by a witness before the committee, but without subpoena for appearance, and with the right to discontinue his testimony and production of books, papers and records at any time he sees fit, extend to such person any immunity?

7. Will statements by a person to an investigator for the committee or the answering by a person of questions put to him by an investigator for the committee, or the production of books, papers and records to an investigator of the committee, extend to such person immunity if he is not called before the committee to testify or to produce such books, papers or records? And will the communication of such statements and records, or their contents, to the committee by the investigator extend immunity to such person?

I, Thos. E. Bateman, hereby certify that the above is a true and correct copy of S. R. No. 25 adopted by the Ohio Senate, March 3, 1947.

Thos. E. Bateman

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Thos. E. Bateman
Clerk of the Ohio Senate"

The privilege of a witness to decline to give testimony which might have the effect of incriminating him is guaranteed in this state by Section 10 of Article I of the Constitution of Ohio, wherein it is provided:

" * * * No person shall be compelled, in a criminal case, to be a witness against himself; * * * ."

The above language finds its substantial counterpart in the fifth amendment to the Constitution of the United States, which provides:

"No person * * * shall be compelled in any criminal case to be a witness against himself, * * * ."

While said provisions, upon superficial examination, might seem to be limited in their application to a criminal prosecution in which the witness is a defendant, it has been uniformly held by the United States

Supreme Court and the courts of our various states that the privilege granted is one which may be invoked by any witness in any legal investigation, whether civil or criminal, judicial or quasi judicial. If such were not the case and if the privilege were limited to persons accused of the commission of crime, it would fail entirely in its fundamental purpose.

Therefore, it can be said that no witness can be required or compelled to answer a question if his answer, truthfully given, would tend to incriminate him or subject him to the danger of a criminal prosecution. Hardly any rule of evidence is better established than this.

However, if incriminating evidence called for by a question propounded to a witness can not be used against a witness in a criminal prosecution, the witness is compelled to answer. Such is the case where a statutory enactment forbids the use of such testimony in a subsequent criminal prosecution of the witness and completely relieves such witness from the risk of prosecution for or on account of any transaction concerning which he testifies.

In this regard, it should be pointed out that the courts are in complete accord that the immunity granted by a statute must be as broad as the constitutional protection for which it is sought to be substituted.

Thus, in the leading case of Counselman v. Hitchcock, 142 U. S. 547, 35 L. Ed. 1110, it was stated:

> "It is quite clear that legislation cannot abridge a constitutional privilege, and that it cannot replace or supply one, at least unless it is so broad as to have the same extent in scope and effect."

Likewise, in People v. Boyle, 312 Ill. 586, it was said:

> "In the consideration of such statutes the test is whether the immunity becomes a complete substitute for the constitutional privilege. Legislation cannot abridge this constitutional privilege, but the statute must be so broad as to have the same scope and effect."

And in Overman v. State, 194 Ind. 483, it was stated:

> "Any statute which undertakes to compel a witness to testify to any matter which might tend to show that he has committed a crime must grant to such person immunity which will fully guarantee his constitutional rights."

To the same effect is the declaration of People v. Buffalo Gravel Corp., 195 N. Y. S. 940:

> "To be effective the immunity given by the statute must be as broad as the privilege of which the witness is deprived."

A case of peculiar interest, because it relates to an investigation conducted by a legislative committee, is Doyle v. Hofstader, et al., 257 N. Y. 244, in which the opinion was delivered by Judge Cardozo. In said case it was held that the immunity provisions were insufficient because they did not grant absolute amnesty from prosecution except as to one particular crime, the statement of the court in this respect being:

> "The appellant is, therefore, privileged to refuse to answer questions that may tend to implicate him in a crime, unless by some act of amnesty or indemnity, or some valid resolution equivalent thereto, he has been relieved from the risk of prosecution for any felony or misdemeanor that his testimony may reveal. The immunity is not adequate if it does no more than assure him that the testimony coming from his lips will not be read in evidence against him upon a criminal prosecution. The clues thereby developed may still supply the links whereby a chain of guilt can be forged from the testimony of others. To force disclosure from unwilling lips, the immunity must be so broad that the risk of prosecution is ended altogether (People, ex rel. Lewisohn v. O'Brien, 176 N. Y. 253; Counselman v. Hitchcock, 142 U. S. 547; Heike v. United States, 227 U. S. 131, 142)."

The statutory provisions in Ohio which undertake to grant immunity to a person who testifies before a legislative committee are set out in Section 60 of the General Code, which reads:

> "The testimony of a witness examined before a committee or sub-committee shall not be used as evidence in a criminal proceeding against him. No person shall be prosecuted or subjected to a penalty or forfeiture for or on account of a transaction, matter or thing, concerning which he so testifies, or produces evidence, documentary or otherwise; but nothing herein shall exempt a witness from the penalties of perjury."

Provisions similar to those in the above section have, almost without exception, been held to afford adequate protection to a witness.

Thus, the Federal courts have held that a witness is adequately protected by and may be compelled to testify under a statute providing that

no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in the proceeding to which the statute applies, except that he shall not be exempt from prosecution or punishment from perjury in so testifying. Brown v. Walker, 161 U. S. 591, 40 L. Ed. 819; Interstate Commerce Commission v. Baird, 194 U. S. 25, 48 L. Ed. 860; Nelson v. United States, 201 U. S. 92, 50 L. Ed. 673.

So, likewise, it has been held in Minnesota and New York that a witness may be required to answer where he is protected by a statute prohibiting the use of his testimony against him in any criminal proceeding, and providing that he shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in the proceedings to which the statute applies. State v. Ruff, 176 Minn. 308; Dunham v. Ottinger, 243 N. Y. 423.

Similarly, in State, ex rel. Hadley v. Standard Oil Co., 218 No. 1 (affirmed in 224 U. S. 270), it was held that a witness could not avail himself of his constitutional privilege against self-incrimination, where the statute requiring his testimony provided that he should not be liable to prosecution or subject to an action of penalty or forfeiture on account of any transaction, matter, or thing concerning which he might testify or produce books or papers.

And in Mouser v. Public Utilities Commission, 124 O. S. 425, the court held that the state constitutional provision against compulsory self-incrimination was satisfied by a statute requiring testimony of a witness, but providing that he should not be prosecuted or subjected to a penalty or forfeiture for or on acount of any transaction, matter, or thing concerning which he might have testified.

From the above, it would appear that a statute which leaves the witness subject to prosecution after he answers an incriminating question does not have the effect of supplanting the privilege given by Section 10 of Article I of the Constitution; and that the immunity granted by the statute must be absolute against any future prosecution for the offense to which the questions asked the witness relate.

While it might appear that the above discussion is irrelevant to any of the specific questions presented, it is felt that a complete understanding of the cases dealing with the subject of your inquiry might be helpful in the investigation being conducted by your committee.

That part of your first question which deals with waiving the immunity granted a witness by Section 60 of the General Code, I confess, I am quite unable to understand. It is inconceivable to me how a person, clothed with complete immunity from prosecution, will, upon taking the witness stand, ask that in the event his testimony is self-incriminating he be sent to jail or the penitentary. It may be that such question contemplates a case where a witness called to testify attempts to waive the immunity given him by the statute thinking that in so doing he may claim the privilege given him by the Constitution and thereby refuse to respond to questions, the answers to which will tend to incriminate him. If such is the case, the answer is found in the foregoing cases, wherein it was held, in each instance, that when the immunity furnished by the statute is adequate and absolute, the witness is compelled to testify and answer all questions propounded. The obvious purpose of the statute, as stated in Heike v. United States, supra, is "to make evidence available and compulsory that otherwise could not be got".

At any rate, the clear language of the statute itself, which in mandatory terms, provides that the testimony of a witness given before a legislative committee "shall not be used as evidence in a criminal proceeding against him" and, he shall not "be prosecuted or subjected to a penalty or forfeiture", needs little or no interpretation. Here is a mandate addressed to every court and prosecuting attorney of the state which commands "a person testifying before your committee shall not be prosecuted or subjected to a penalty or forfeiture for or on account of a transaction concerning which he testifies".

With respect to that part of your first question which relates to the waiving of the privilege given to a witness by the Constitution, your attention is directed to the decisions of the courts of this state wherein it was held that since the privilege against self-incrimination is personal to the witness and may be asserted by him alone, he may waive the privilege if he desires to do so. See: Mimms v. The State, 16 O. S. 221; State v. Cox, 87 O. S. 313; Orum v. The State, 38 O. App. 171; Ammon v. Johnson, 3 O. C. C. 263.

Summarizing the above, a categorical answer to your first question would appear to be as follows: (1) The immunity granted by Section 60 of the General Code may not be waived by a witness who testifies before a legislative committee; (2) the protection given to a witness by Section 10 of Article I of the Constitution of Ohio may be waived by any witness entitled to invoke it.

This latter answer can, however, be of no interest to your committee since, as above pointed out, a witness testifying before your committee is given full immunity from prosecution and, therefore, denied the privilege given him by the Constitution and is compelled to answer all questions put to him.

In view of the answer to your first question, it becomes unnecessary to consider questions Nos. 2 and 4.

The third and seventh questions set out in your inquiry can be summarily disposed of. Since the statute deals only with the testimony of a witness examined *before a committee,* obviously the immunity granted thereby does not extend to a person who voluntarily makes statements or produces books and papers to an investigator for the committee.

Question No. 5 is likewise answered by the plain provisions of the statute. It will be noted that the protection of the statute is given only to those who *testify* before a committee. Therefore, a person who is subpoenaed, but not called upon to testify, is not brought within the terms of the statute and, consequently, is not entitled to the immunity granted thereunder.

There remains, then, your sixth question. Again I must refer you to the statute. No distinction is made therein between the person who voluntarily gives his testimony and the one who does so involuntarily. In connection therewith your attention is directed to the case of Nelson v. State, 41 O. App. 174, decided by the Court of Appeals of Crawford County in 1931. In said case the plaintiff in error, Edna Nelson, an election judge at a primary election, was convicted in the Court of Common Pleas of changing markings on ballots. Prior to her trial she had been called before the Board of Elections and testified as to what happened in the conduct of the election in her precinct. She also testified before the grand jury with reference to the same matter. At her trial in the lower court immunity

was claimed under provisions of the then Section 13340 of the General Code, which provided:

> "In a proceeding or prosecution brought under the laws relating to primary elections, if a person is called to testify, he shall be required to testify to all facts of which he has knowledge, and the fact that he has so testified shall forever be a bar to a prosecution brought against him for violating such laws as to such matters to which he may have testified."

The Court of Appeals set aside the conviction which had been obtained by the state in the lower court, and the defendant was discharged. The principal question involved in the error proceeding related to the question of whether or not the testimony given before the Board of Elections and the grand jury was voluntary on the part of the witness. In the course of the court's opinion, it was said:

> "It is asserted in behalf of the state that the testimony may have been voluntarily given, and, if such was the fact, defendants were not within the terms of the statute.
>
> It is quite enough to say in answer to that contention that the statute contains no word indicative of a purpose to discriminate between persons who testify voluntarily and those whose testimony is given involuntarily. The plain provision is that one who is called to testify in a proceeding or prosecution, and surely no one would claim that a grand jury investigation which resulted in an indictment was not within the words of the statute, shall give evidence of all facts of which he has knowledge, and that thereafter the fact that he has so testified shall forever be a bar to prosecution against him on a subject concerning which he so testified."

In light of the above, it would appear, and it is accordingly my opinion, that the immunity granted by Section 60 of the General Code extends to persons who voluntarily testify before a legislative committee, as well as those who do so involuntarily.

Before concluding, the provisions of Section 60, General Code, which state that "no person shall be * * * subjected to a penalty or forfeiture, etc." should not be left unobserved and dismissed without further comment. Clearly thereunder, if a person holding a permit issued by the Department of Liquor Control is called before your committee and gives testimony in connection with your present investigation, the permit held by him may not thereafter be suspended or revoked during the period for which the same

was issued for or on account of the transaction, matter or thing concerning which he so testified.

Indeed, it has been held that since the rule protecting a person from being compelled to furnish evidence which would incriminate him extends to cases where his answer would tend to expose him to a penalty and forfeiture, as well as a criminal prosecution, a statute, unless it gives complete immunity from penalties and forfeitures, is not effective to supplant the privilege conferred by the Constitution. See: Henry v. Bank of Salina, 1 N. Y. 83; People, ex rel. Akin v. Butler State Foundry and Iron Co., 201 Ill. 236; State, ex rel. Jones v. Mallinckrodt Chemical Works, 249 Mo. 702.

Summarizing the foregoing, you are advised that, in my opinion:

1. A witness appearing before a duly authorized and constituted committee or sub-committee of the General Assembly, or either house thereof, to testify, is compelled to answer all questions propounded to him and produce such books and papers and other documentary evidence which such committee demands.

2. After so testifying or producing evidence, the testimony of such witness can not be used as evidence in any criminal proceeding against him, nor can such witness be prosecuted or subjected to any penalty or forfeiture for or on account of the transaction concerning which he testified or produced evidence, whether such testimony or evidence was voluntarily or involuntarily given or produced.

3. A witness called before a legislative committee may not waive the immunity given him under Section 60 of the General Code, and thereby place himself in a position to claim the privilege given him by Section 10 of Article I of the Constitution of Ohio to refuse to give self-incriminating testimony.

4. Persons voluntarily furnishing information or documentary evidence to investigators of a legislative committee do not thereby acquire the amnesty granted by Section 60 of the General Code.

Respectfully,

HUGH S. JENKINS,
Attorney General.