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1. GENERAL ASSEMBLY—REFUSALS, THREE NAMED WITNESSES TO ANSWER QUESTIONS—TRANSCRIPT, TESTIMONY BEFORE ANTI-SUBVERSIVE INVESTIGATING COMMITTEE—REASONABLE GROUND FOR CITATION OF WITNESSES FOR CONTEMPT OF GENERAL ASSEMBLY.

2. NO STATUTORY PROCEDURE FOR GENERAL ASSEMBLY, ACTING ALONE, TO CARRY OUT CONSTITUTIONAL POWER TO PUNISH WITNESSES.

3. PROSECUTION OF WITNESSES FOR VIOLATION OF SECTION 12845 G. C. CAN BE COMMENCED BY PROPER OFFICERS OF GENERAL ASSEMBLY IN MANNER PROVIDED BY LAW.

SYLLABUS:

1. The refusals of three named witnesses to answer questions propounded to them as shown by the transcript of testimony taken before the Anti-Subversive Investigating Committee constitute reasonable ground for the citation of said witnesses for contempt of the General Assembly.

2. There is no statutory procedure by which the General Assembly, acting alone, can carry out its constitutional power to punish said witnesses.

3. Prosecution of said witnesses for a violation of Section 12845, General Code, can be commenced by the proper officers of the General Assembly in the manner provided by law.

Columbus, Ohio, May 18, 1951

TO THE 99TH GENERAL ASSEMBLY:

Senate Joint Resolution No. 18 of the 99th General Assembly provides as follows:

> "WHEREAS House Joint Resolution Number 21, a copy of which is transmitted herewith, was duly and regularly adopted by the House of Representatives on February 22, 1951, and by the Senate on March 5, 1951; and
>
> "WHEREAS said committee was appointed pursuant to said resolution and in accordance with the terms thereof; and
>
> "WHEREAS, on May 3, 1951, Mildred Hamilton and Pauline Taylor, both of Youngstown, Ohio, were duly summoned

to appear and testify as witnesses before said committee by subpoena issued by said committee and duly served upon said witnesses according to law, copies of which subpoenas are herewith transmitted; and

"WHEREAS the said Mildred Hamilton and Pauline Taylor appeared before said committee, the committee being then in regular session, with a legal quorum of its members present, on said day, and were duly sworn according to law; and

"WHEREAS during the course of the examination of said witnesses by counsel for the committee and by members of the committee, said witnesses refused to answer certain questions pertinent to the matter under inquiry, as will appear from the transcript of the testimony of said witnesses, a copy of which is transmitted herewith, and

"WHEREAS on the fourth day of May, 1951 Philip Frankfeld and Andrew Remes, both of Cleveland, Ohio, were duly summoned to appear and testify as witnesses before said committee by subpoena issued by said committee and duly served upon said witnesses according to law, copies of which subpoenas are herewith transmitted; and

"WHEREAS the said Philip Frankfeld and Andrew Remes appeared before said committee, the committee being then in regular session, with a legal quorum of its members present, on said day, and were duly sworn according to law; and

"WHEREAS during the course of the examination of said witnesses by counsel for the committee and by members of the committee, said witnesses refused to answer certain questions pertinent to the matter under inquiry, as will appear from the transcript of the testimony of said witnesses, a copy of which is transmitted herewith; and

"WHEREAS the committee is considering the matter of the citation of said witnesses to answer for contempt of this committee and of the General Assembly of Ohio; now, therefore,

"BE IT RESOLVED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO that the Attorney General of the State of Ohio be requested to submit to said General Assembly his opinion and advice on the following matters:

"1. Do the refusals of the witnesses above named, or any of them, to answer questions propounded to them, as shown by the transcript of the testimony submitted herewith, constitute reasonable ground for the citation of said witnesses to answer for contempt of the committee or of the General Assembly?

"2. If said witnesses may be cited for contempt of this committee or of the General Assembly, what is the procedure for citing, trying and punishing said witnesses, or any of them?

"3. If tried by the General Assembly, what punishment may be imposed by said General Assembly, if said witnesses, or any of them, are found to be guilty of contempt?

"4. May such witnesses, or any of them, be cited to appear before a court for trial and punishment for such contempt, if it exists; and, if so, before what court, and what procedure should be followed by the General Assembly or the committee?"

The answer to the first question presented, as to whether reasonable grounds exist for the citation of any or all of the named witnesses for contempt, requires a preliminary discussion of certain general principles.

House Joint Resolution No. 21 of the 99th General Assembly, referred to in your request, provides in part as follows:

"* * * This assembly recognizes * * * that not only communism but all doctrines which subscribe to the same insidious scheme * * * constitute a clear, present and deadly danger to the peace, security and industrial potential of this state * * *.

"* * * now, therefore be it

"Resolved by the General Assembly of Ohio, That a joint committee of the House of Representatives and the Senate, to be known as the joint anti-subversive investigating committee, is hereby created, * * *.

"Said committee is hereby authorized and directed to investigate, study and analyze all facts relating to the activities of persons, groups and organizations whose membership includes persons who are members of organizations who have as their objectives or may be suspected of having as their objectives the overthrow and reform of our constitutional governments by fraud, force, violence, or other unlawful means; and all persons, groups, and organizations, known to be or suspected of being dominated by or giving allegiance to a foreign power, whose activities adversely affect or may adversely affect the national defense, the functioning of any agency of the state government or the industrial potential of this state.

"Said committee may make such partial reports to the House of Representatives and the Senate from time to time as it deems advisable.

"On or before May 10, 1951, said committee shall render a final report to the House of Representatives and the Senate of the

results of its investigations and studies, *together with its recommendations for the revision of existing laws or the enactment of new laws relating to the subject of this resolution,* and for the creation of a commission to continue the investigation of the subject of this resolution." (Emphasis added.)

It can be seen that the General Assembly recognized a danger to constitutional government, which danger might be mitigated by legislation; it appointed a committee to investigate persons and activities which might contribute to this danger; and it charged the committee wtih recommending legislation based upon the results of its inquiry. This is clearly a proper exercise of the legislative power conferred upon the General Assembly by Article II, Section 1 of the Constitution of Ohio.

The general principle that legislative bodies have the power to summon witnesses, to compel testimony and to punish for contempt in cases involving obstruction of legislative proceedings is too well established to need discussion here. For the purposes of this opinion reference is simply made to the following text and the authorities collected there:

49 American Jurisprudence 256, et seq., Section 39, et seq., States, Territories and Dependencies.

12 American Jurisprudence 428, Section 59, Contempt.

It is also clear that properly constituted legislative committees have the same powers. 49 American Jurisprudence 259, Section 42, States, Territories and Dependencies, provides in part as follows:

"* * * A duly authorized legislative committee, like the legislative body from which it derives its powers, may summon persons not members of the legislature to attend as witnesses any meetings which it has power to hold * * * enforce obedience to its process, compel obedience to a summons, and punish as for contempt those summoned who fail or refuse to obey the call."

From the above discussion, I have no difficulty in arriving at the conclusion that the basic right of the committee in question to summon these witnesses and to punish them for contempt is established. It can be assumed, for the purposes of this opinion, that the committee was properly established so far as legislative procedure is concerned and that the sessions in question were regular and lawful sessions of the committee.

The right of legislative inquiry is not an unlimited one. Not only must a legislative committee be operating within a proper field, but the

information which it seeks must be pertinent to the subject under investigation. Since I have held that the committee was inquiring into a proper subject, the next issue is the pertinency of the questions asked which the witnesses refused to answer. This requires a reference to the testimony of each of the named witnesses.

The testimony of Mrs. Mildred Hamilton begins on page 142 of the Record. This witness refused to give her husband's name (R. 143;) to give her last place of employment (R. 144;) to give her maiden name (R. 146;) to state whether she was or had been a member of the Communist Party (R. 147;) and to answer certain factual questions which indicated that she had a connection with the party (R. 148-149.)

The testimony of Philip Frankfeld begins on page 151 of the Record. This witness refused to identify a letter written to the committee over his name (R. 152;) to answer numerous factual questions concerning his connection with and activities in behalf of the Communist Party (R. 154-156, 161, 163, 164, 166-172, 174;) to say whether he was a member of the Communist Party (R. 155) or a communist (R. 191;) to state whether he knew certain named individuals associated with communism (R. 156, 164, 167, 168, 170, 172, 183-184;) to state whether he knew what the Lenin Institute is or whether he ever attended (R. 157-159;) to say whether he had been arrested, fined and imprisoned in two named cities for inciting to riot and being a communist (R. 160, 161;) to say whether he was acquainted with certain publications and had written articles for them (R. 160-162, 184;) to say whether he had appeared before certain investigating committees (R. 165, 168, 180;) to say whether he had made or signed certain statements (R. 172, 173, 174, 178;) refused to identify his signature (R. 176;) and refused to answer two questions as to his knowledge of the principles of the Communist Party (R. 188, 190.)

The testimony of Andrew Remes begins at page 196 of the Record. This witness refused to state his employment (R. 197) or the name under which he was born (R. 197-198;) to say whether he was connected with the Communist Party in certain named capacities (R. 199-203, 204-205;) to say whether he was familiar with certain publications (R. 199, 203) or had made or signed certain statements (R. 205, 207, 208;) to say whether he spoke at a certain rally with Earl Browder (R. 203;) to say whether he knew the witness, Frankfeld (R. 212-213;) or to say whether he knew anything about the Soviet Union (R. 212) or whether there was any con-

nection between the Soviet Union and the Communist Party in the United States (R. 213.)

From my examination of the Record which I have summarized above, I have no difficulty in arriving at the conclusion that the questions propounded to the named witnesses, and which they refused to answer, were relevant to the legislative inquiry. The purpose of the committee was to gather facts as to certain persons and organizations known or suspected of having certain objectives. Those facts could be gathered only by observation or by questioning people who had knowledge of those persons and organizations; and the questions asked were obviously designed to disclose the facts if the witnesses had knowledge thereof.

It is true that many of the questions involved in the Record were personal ones, the answers to which, standing alone, might not provide a basis for suggested legislation. However, it is elementary that certain preliminary and background information must be elicited from a witness before he can give relevant testimony concerning broader issues; and that such testimony must be developed in a logical sequence. These witnesses refused even to let the sequence begin. By refusing to answer the preliminary questions, they cannot escape responsibility for failure to disclose helpful and relevant information which could reasonably have been expected to be developed.

There remains but one other matter germane to the first question presented. Even a cursory examination of the Record discloses frequent references by all of the witnesses to their constitutional privilege against self-incrimination. It is not necessary here to discuss subtle questions of whether or not the witnesses properly exercised the privilege in their refusals, or whether the matter which would have been disclosed might have incriminated them. For our purposes the answer to the problem of possible self-incrimination is found in Section 60, General Code. That section provides as follows:

> "Except as to a person who, in writing, requests permission to appear before such committee or sub-committee or who, in writing waives the rights, privileges and immunities granted by this section, the testimony of a witness examined before a committee or sub-committee shall not be used as evidence in a criminal proceeding against him, nor shall a person 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 pro-

duces evidence, documentary or otherwise; but nothing herein shall exempt a witness from the penalties of perjury."

This section has never been passed upon by the courts, but it was the subject of a well considered opinion by one of my predecessors, Opinion No. 1793, Opinions of the Attorney General for 1933, page 1666. That opinion traced the development of the present statute from its more limited predecessor, and came to the conclusion that the present statute is coterminous with the privilege granted by Article I, Section 10 of the Constitution. With that conclusion I agree and, in my opinion, Section 60, General Code, provides a complete immunity from State prosecution and precludes a refusal to answer on the ground of the constitutional privilege against self-incrimination.

When immunity against State prosecution is established, there are no Federal questions involved. It has been settled, since the case of Twining v. New Jersey, 211 U. S., 78, that the Fifth Amendment to the Constitution of the United States applies only in Federal trials, and that the Fourteenth Amendment does not make the provisions of the Fifth Amendment a privilege and immunity of citizens of the United States to be protected by the Federal courts against any alleged violation by a state. It has been settled, since the case of Jack v. Kansas, 199 U. S., 372, that the possibility of future prosecution in a Federal court does not justify a refusal to testify in a State proceeding when the State statute gives complete immunity.

The witness Frankfeld indicated that he was familiar with the provisions of Section 60, General Code (R. 188.) They were explained to Mrs. Hamilton before the committee (R. 149.) The witness Remes indicated that he was present at the session in which the statute was explained to Mrs. Hamilton (R. 210,) and even if he had no knowledge of the statute, I can find nothing in his testimony to indicate that he would purge himself if the statute were brought to his attention.

In view of the above, therefore, and in answer to your first question, it is my opinion that the refusal of the witnesses Mildred Hamilton, Philip Frankfeld and Andrew Remes to answer questions propounded to them as shown by the transcript of testimony taken before the Anti-Subversive Investigating Committee constitutes reasonable ground for the citation of said witnesses for contempt of the General Assembly.

I have examined the transcript of the testimony of the witness Pauline Taylor, which begins on page 69 of the Record. I cannot find reasonable ground for citing this witness for contempt. The witness obviously was unwilling and appears to have been very evasive. It is possible that she was not telling the truth. If so, she is not immune from the penalties of perjury, but she cannot, for that reason, be punished for contempt.

The answers to the second, third and fourth questions which have been presented may be considered together. Those questions deal with the procedure for punishing the contempts discussed above. This procedure is set out in Sections 57, 58 and 59, General Code. Those sections have not been referred to previously for the reason that it has been held by the Supreme Court of Ohio, in the case of State, ex rel. Realty Co. v. Guilbert, 75 Ohio St., 1, that they do not confer authority on the General Assembly, but merely prescribe the procedure for committees lawfully constituted.

Section 57, General Code, provides that the chairman of a committee may subpoena witnesses and require the production of books and papers.

Section 58, General Code, describes the subpoena, to whom it is directed and how it is served.

Section 59, General Code, provides as follows:

> "Whoever wilfully fails to appear in obedience to such subpoena, or appears and refuses to answer a question pertinent to the matter of inquiry, or declines to produce a paper or record in his possession or control, shall be liable to the penalties for contempt of the authority of the general assembly, if the committee be a joint committee or of the proper house of the general assembly, if the committee be appointed by one house, and shall be dealt with by the general assembly, or such house, according to parliamentary rules and usages in cases of contempt. The chairman of the committee, before which such person fails to appear or refuses to answer or produce a paper or record on its order, shall report the facts to the proper house, and on like order issue a warrant for the arrest and conveyance of the witness before that house to answer for the contempt. The sergeant-at-arms or sheriff, to whom such warrant is directed, shall forthwith execute it. Proceedings against a witness, or his punishment by the general assembly, or either house thereof, for contempt, shall not prevent or affect his indictment and punishment for the same offense in a court of competent jurisdiction."

It can be seen that this statute contemplates two possible methods of

punishment for refusal to answer—one at the hands of the General Assembly and one at the hands of the courts. I shall first consider the procedure for punishment by the General Assembly.

It is obvious from reading the statute that the procedure contemplated is far from clear. The statute simply provides that the recalcitrant witness shall be dealt with by the General Assembly "according to parliamentary rules and usages in cases of contempt." It further provides that the chairman of the committee shall, on its order, issue a warrant for the arrest of the witness and his conveyance before the General Assembly and that the officer to whom the warrant is issued shall forthwith execute it.

When it comes to putting the solid flesh of an exact procedure upon this rather sketchy framework, the law is far from clear. No Ohio case has held that the General Assembly has an inherent power to punish for contempts committed in its immediate presence, or in the presence of one of its committees, and the weight of authority in other jurisdictions is obscure. The courts are reluctant to permit imprisonment or other punishment except under an exact statutory procedure. And, even if it were to be held that the General Assembly, or either of its houses, could provide by its rules for a procedure in contempt cases to supplement the statute, no such rules have been adopted.

The interpretation of Section 59, General Code, has been before the Supreme Court in only one case, Ex parte Dalton, 44 Ohio St., 142. In that case Dalton, by the authority of a resolution of the House, was committed by a warrant to the custody of the sergeant-at-arms for contempt, to be committed to the Franklin County jail for thirty days, or until the end of the then current term of the General Assembly. While in the custody of the sergeant-at-arms, Dalton procured a writ of habeas corpus, and, upon hearing, his detention was held to be lawful. This judgment was affirmed by the Supreme Court.

Speaking of the provisions of present Section 59 and the procedure for carrying it into effect, the court said at page 154:

> "Rules have been adopted by the house to effectuate the provisions of this section."

The Court did not elaborate on this statement, however, but proceeded to find the statutory justification for Dalton's commitment in certain other statutes which have since been repealed.

Because of this state of the statutes and the almost total lack of judicial authorities, I would not presume to outline a procedure whereby the General Assembly could carry out its unquestionable constitutional power to punish these witnesses. Anything which I might suggest in that connection would consist more of legislating than advising, and so exceeds my powers. I can only suggest that the General Assembly examine the statutes set out above to ascertain whether they should be clarified.

When we come to a discussion of the punishment which can be imposed by the courts, we are on more solid ground. Section 12845, General Code, provides as follows:

> "Whoever, having been subpoenaed or ordered to appear before either branch of the general assembly, or before a standing or select committee of the general assembly, or either branch thereof, fails so to do, or, having appeared, refuses to answer a question pertinent to the matter under inquiry, or to produce, upon reasonable notice, books, papers or documents in his possession or under his control pertinent thereto, shall be fined not less than one hundred dollars nor more than five thousand dollars."

By the definition set out in Section 12372, General Code, this offense is a misdemeanor and a prosecution for its commission may be instituted in the manner provided by law. Various magistrates have jurisdiction in such cases, or prosecution could properly be commenced in the Court of Common Pleas of Franklin County.

As to the procedure to be followed by the General Assembly or the committee, there are several alternatives. The presiding officr of either house or the chairman of the committee could properly present the matter to the Prosecuting Attorney of Franklin County, and he could either present it to the grand jury with a view to obtaining an indictment, or he could commence prosecution by the filing of an information. Or any of the above named officers of the General Assembly could commence prosecution directly by affidavit in the form prescribed by Section 13432-18, General Code. A warrant could then be issued upon this affidavit and the arrest of the accused and further proceedings would follow. The choice among these alternatives rests in the discretion of the General Assembly.

Respectfully,

C. WILLIAM O'NEILL
Attorney General