

The Privilege Against Self-Incrimination as Affecting Public Officers and Attorneys

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The duties of the trial judge involve great responsibilities.³⁷ He must constantly be alert to the introduction of evidence into the record which may be indiscreet as to the rights of any one of several defendants, and result in possible confusing and intermingling of issues in the minds of the jury.³⁸ Deliberate care must be exercised where there is a confession or admission that may possibly incriminate a co-defendant, when the rest of the evidence appears to be of a weak and highly speculative character. In recent years there have been numerous reversals of convictions actually based on that type of flimsy and unreliable evidence which, independent of a confession or uncorroborated testimony of an accomplice, was totally insufficient for the state to rest its case on.³⁹

BERNARD STRASSBURG.

THE PRIVILEGE AGAINST SELF-INCRIMINATION AS AFFECTING
PUBLIC OFFICERS AND ATTORNEYS

In General

“ * * * No person shall be subject to be twice put in jeopardy for the same offense: nor shall he be compelled in any criminal case to be a witness against himself, providing that any public officer who upon being called before a grand jury to testify concerning the conduct of his office or the performance of his official duties, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury, shall be removed from office by the appropriate au-

³⁷ *Capital Traction Co. v. Hof*, 174 U. S. 1, 19 Sup. Ct. 580 (1898); 12 REPORTS OF THE AMERICAN BAR ASSOCIATION 275.

³⁸ *People v. Hooghkert*, 96 N. Y. 149 (1884); *People v. Dixon*, 231 N. Y. 111, 131 N. E. 752 (1921); *People v. Reddy*, 261 N. Y. 479, 483, 185 N. E. 705, 706 (1933) (“Here there is a typical case of conflict between the public need of bringing to justice one against whom suspicion of guilt exists, and the undivided right of the suspect to be safeguarded within the law against the effect of tainted evidence”).

³⁹ *People v. Rutigliano*, 261 N. Y. 103, 184 N. E. 689 (1933); *People v. Dolce*, 261 N. Y. 108, 184 N. E. 690 (1933) (The trial court held that a confession in the presence of his co-defendant who did not protest at the time was admissible against the latter. The Court of Appeals reversed on the ground that silence while under arrest was no admission of guilt); *People v. Reddy*, 261 N. Y. 479, 185 N. E. 705 (1933) (The court held it to constitute error on the part of the trial court to allow the case to go before a jury where all the evidence against the defendant was that he broke parole right after the crime. This was interpreted as flight. On the strength of that evidence and the uncorroborated testimony of an accomplice a jury found him guilty); *People v. Pignataro*, 263 N. Y. 229, 188 N. E. 720 (1934).

thority or shall forfeit his office at the suit of the attorney-general." ¹ The foregoing is the amendment to the New York Constitution proposed by the Constitutional Convention of 1938 and approved by vote of the people. The question to be considered is whether or not attorneys at law may continue to exercise their constitutional privilege against self-incrimination with impunity or should they be subjected to the same conditional tenure of office.

The quotation, *supra*, from the New York Constitution and Amendment V of the Federal Constitution, are both declaratory of the common law maxim, "Nobody is bound to accuse himself"; ² adopted by the English courts in the seventeenth century. ³ The Supreme Court, in *Brown v. Walker*, ⁴ said: "The maxim *nemo tenetur scipsum accusare* had its origin in a protest against the inquisitional and manifestly unjust methods of interrogating accused persons which has long obtained * * * and (until) the erection of additional barriers for the protection of the people against the exercise of arbitrary power, was not uncommon even in England. * * * But, however adopted, it has become firmly imbedded in English as well as in American jurisprudence. * * * the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence became clothed in this country with the impregnability of a constitutional enactment." The privilege has been characterized by Justice Cardozo as a barrier between the individual, from whom the testimony is sought, and the power of government which seeks the evidence, interposed by a sovereign people, and through which neither the legislature nor the courts may penetrate. ⁵ Although long regarded as a safeguard of civil liberties, as other fundamental guaranties for the protection of personal rights, and a basic principle of American constitutional law, it is not one of those natural, inalienable, nor fundamental rights of national citizenship as is protected by the Due

¹ N. Y. CONST. art. I, § 6; N. Y. CODE CRIM. PROC. § 10.

² N. Y. S. CONST. CONV. COMM. 920 (1938); Rapacez, *Limiting the Plea of Self-Incrimination and Recent Enlargement of the New York Immunity Statutes* (1932) 20 GEO. L. J. 329.

Amendment V of the United States Constitution reads, " * * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, * * *"

³ 8 R. C. L. (1915) 77, § 32.

⁴ 161 U. S. 591, 596, 16 Sup. Ct. 644, 646 (1895); *In re Lemon*, 15 Cal. App. (2d) 82, 59 P. (2d) 213 (1936); 4 WIGMORE, EVIDENCE (3d ed. 1940) § 2250; 3 JONES, EVIDENCE (4th ed. 1938) 1639, § 884; 2 SELECTED ESSAYS ON CONSTITUTIONAL LAW (1938) 1398; Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause* (1930) 29 MICH. L. REV. 1 and 191.

The privilege is included in the constitutions of all the states except New Jersey and Iowa, where it has been held to be a part of the common law. *Twining v. New Jersey*, 211 U. S. 78, 29 Sup. Ct. 214 (1908); *State v. Height*, 117 Iowa 650, 91 N. W. 935 (1902); *State v. Zdanowicz*, 69 N. J. L. 619, 55 Atl. 743 (1903).

⁵ *Doyle v. Hofstader*, 257 N. Y. 244, 177 N. E. 489 (1931).

Process and Privileges and Immunities Clauses of the Fourteenth Amendment.⁶ Rather it exists separate and apart from due process.

The purpose of the privilege is to guarantee freedom from being compelled, by legal process, to disclose self-incriminating matter.⁷ Accordingly, the ordinary witness may maintain silence and the accused need not take the witness stand to testify when there is apprehension of forcing any disclosure.⁸ The courts have treated it with great judicial care as a valuable and substantial right,⁹ liberally construing it in the light of its common law background.¹⁰

Protection may be invoked in any kind of proceeding,¹¹ civil or criminal,¹² in which testimony is received; litigious, *ex parte*, or otherwise; under executive, legislative or judicial powers of government; preliminary, collateral, independent; pending or not pending at the time of asserting the privilege.¹³ It extends to parties, accused, and

⁶ *In re Grae*, 282 N. Y. 428, 26 N. E. (2d) 963 (1940); *In re Ellis*, 258 App. Div. 573, 17 N. Y. S. (2d) 800 (2d Dept. 1940) (dissenting opinion), *rev'd*, 282 N. Y. 435, 26 N. E. (2d) 967 (1940); 3 JONES, *op. cit. supra* note 4, at 1639.

⁷ *Counselman v. Hitchcock*, 142 U. S. 547, 12 Sup. Ct. 195 (1891); *People v. Forbes*, 143 N. Y. 219, 38 N. E. 303 (1894); *People v. Gardner*, 144 N. Y. 119, 38 N. E. 1003 (1894); *People v. O'Brien*, 176 N. Y. 253, 261, 68 N. E. 353, 355 (1903) ("The meaning of the Constitutional provision is not merely that a person shall not be compelled to be a witness against himself in a criminal prosecution against himself, but its object is to insure that a person shall not be compelled when acting as a witness in any investigation, to give testimony which may tend to show that he himself has committed a crime").

⁸ *In re Doyle*, 42 F. (2d) 686 (S. D. N. Y. 1930), *rev'd*, 47 F. (2d) 1086 (C. C. A. 2d, 1931); *In re Lemon*, 15 Cal. App. (2d) 82, 59 P. (2d) 213 (1936).

⁹ *Counselman v. Hitchcock*, 142 U. S. 547, 12 Sup. Ct. 195 (1891); *McKnight v. United States*, 115 Fed. 972 (C. C. A. 6th, 1902).

¹⁰ *Boyd v. United States*, 116 U. S. 616, 6 Sup. Ct. 524 (1885); *United States v. Price*, 163 Fed. 904 (C. C. S. D. N. Y. 1908); *People v. Newmark*, 312 Ill. 625, 144 N. E. 338 (1924); *People v. Danziger*, 238 Mich. 39, 213 N. W. 448 (1927); *People v. Forbes*, 143 N. Y. 219, 38 N. E. 303 (1894); *People v. Coyle*, 172 Misc. 593, 15 N. Y. S. (2d) 441 (1939); *People v. Nation Wide News Service*, 172 Misc. 857, 16 N. Y. S. (2d) 232 (1939).

¹¹ *McCarthy v. Arndstein*, 266 U. S. 34, 45 Sup. Ct. 16 (1924) (Bankruptcy proceedings); *Taylor v. Commonwealth*, 274 Ky. 51, 118 S. W. (2d) 140 (1938) (Grand jury investigation); *People v. Culkin*, 248 N. Y. 465, 162 N. E. 487 (1928) (Preliminary inquisition by court into attorney's conduct); *Matter of Doyle*, 257 N. Y. 244, 177 N. E. 489 (1931) (Investigation by joint legislative committee); *In re Grae*, 282 N. Y. 428, 26 N. E. (2d) 963 (1940) (Disciplinary proceedings against attorney); 8 WIGMORE, EVIDENCE (3d ed. 1940) § 2252. It applies in all courts, investigations by a grand jury, legislature or a body with legislative functions, or before non-judicial officers or bodies. *Emery's Case*, 107 Mass. 172 (1871); *State v. Rixon*, 180 Minn. 573, 231 N. W. 217, 68 A. L. R. 50 (1930).

¹² *McCarthy v. Arndstein*, 266 U. S. 34, 45 Sup. Ct. 16 (1924); *In re Rouss*, 221 N. Y. 81, 86, 116 N. E. 782, 784 (1917) ("We do not suggest that the witness is protected by the Constitution only when testifying in the criminal courts. The law is settled to the contrary. But to bring him within the protection of the Constitution the disclosures asked of him must expose him to punishment for crime").

¹³ *Chappell v. Chappell*, 116 App. Div. 573, 101 N. Y. Supp. 846 (4th Dept. 1906); *People v. Rosenheimer*, 209 N. Y. 115, 102 N. E. 530 (1913); 8 WIGMORE, *loc. cit. supra* note 11.

witnesses not accused,¹⁴ and only applies to crimes which may be prosecuted in the jurisdiction wherein one is examined. The danger of a criminal action in a foreign jurisdiction is deemed unsubstantial and remote.¹⁵

The immunity granted by the Constitution is not impaired by compelling the witness to be sworn and take the witness stand. It is his duty to answer all questions until he is subject to self-disclosure.¹⁶ The court and witness both determine what effect should be given the testimony. A noted authority¹⁷ writes that it is in the court's discretion, depending on the circumstances of the case and the nature of the evidence. The reasonable ground of danger to the witness must be appreciable, not fanciful or imaginary and not a possibility outside ordinary legal processes. It may not be invoked to shield others, and if, in the court's opinion, his privilege is not interfered with, he must testify. However, if there is an apprehension of danger, and as only the witness is capable of knowing the nature of his answer, he is given latitude to determine its effect, which may in itself, or as a link in the chain of events, bring about his criminal prosecution.¹⁸ The privilege is personal to the witness, "a protection to the innocent though a shelter to the guilty."¹⁹ As a consequence it may be waived by voluntarily answering a self-incriminating question²⁰ or by the accused taking the stand in his own behalf,²¹ thus placing himself in the position of an ordinary witness.²² To prevent his testimony from being used against him in a criminal prosecution

¹⁴ *In re Lemon*, 15 Cal. App. (2d) 82, 59 P. (2d) 213 (1936); *Christal v. Police Com'r of San Francisco*, 33 Cal. App. (2d) 564, 92 P. (2d) 416 (1939); Comment (1940) 49 YALE L. J. 1059.

¹⁵ 59 A. L. R. (1929) 895; 82 A. L. R. (1932) 1380.

¹⁶ *O'Connell v. United States*, 40 F. (2d) 201 (C. C. A. 2d, 1930); *In re Rouss*, 221 N. Y. 81, 116 N. E. 782 (1917); 8 WIGMORE, *op. cit. supra* note 12, 388, § 2268 ("The privilege is merely an option of refusal, not a prohibition of inquiry").

¹⁷ 4 JONES, *op. cit. supra* note 4, § 887.

¹⁸ 1 *Burr's Trial* 244, Fed. Cas. 14,692e (1807); *Hale v. Henkel*, 20 U. S. 43, 26 Sup. Ct. 370 (1905); *United States v. Herron*, 28 F. (2d) 122 (D. C. N. D. Cal. S. D. 1928); *People v. Forbes*, 143 N. Y. 219, 38 N. E. 303 (1894); *People v. O'Brien*, 176 N. Y. 253, 68 N. E. 353 (1903); *People v. Kramer*, 257 App. Div. 598, 14 N. Y. S. (2d) 161 (1939); 48 A. L. R. (1927) 991.

¹⁹ *Twining v. United States*, 211 U. S. 78, 91, 29 Sup. Ct. 14, 16 (1908); *United States v. Murdock*, 284 U. S. 141, 52 Sup. Ct. 63, 82 A. L. R. 1376 (1931); *People v. Priori*, 164 N. Y. 459, 58 N. E. 668 (1900); *People v. Hudson Valley Construction Co.*, 165 App. Div. 626, 151 N. Y. Supp. 314 (3d Dept. 1915).

²⁰ *United States v. Com'r of Investigation*, 273 U. S. 103, 47 Sup. Ct. 302 (1926); *People v. Molineux*, 168 N. Y. 264, 61 N. E. 286 (1901); *People v. Rosenheimer*, 209 N. Y. 115, 102 N. E. 530 (1913); 8 WIGMORE, *op. cit. supra* note 12, § 2276.

²¹ *Morris v. Commonwealth*, 231 Ky. 838, 22 S. W. (2d) 295 (1929).

²² *People v. Tice*, 131 N. Y. 651, 30 N. E. 494 (1892); O'TOOLE, CASES AND MATERIALS ON THE LAW OF EVIDENCE (2d ed. 1937) 932.

in which he is the defendant, it is essential that the witness claim his immunity before testifying.²³

Public Officers

A police officer is a state or public officer. The municipality appoints him as a matter of convenience, under state-granted authority. His duties are more than local. They are public in nature and include the governmental function of preserving peace and order for the public at large.²⁴ As his civil responsibility he must prevent and aid in the detection of crime and protect the citizens at large. The security of the community and the efficiency of the government's executive system depend on the extent to which he performs his duties and is faithful to his trust.²⁵ It is the duty of all citizens, government officials, and especially police officers, to aid in the administration of justice and to disclose information which might tend to bring about the apprehension and punishment of the guilty. When summoned, it is incumbent on them to attend and be sworn by the grand jury or any other investigatory body. They must testify freely of facts within their knowledge, although subjecting themselves to self-incrimination. A refusal to answer for such cause is a breach of duty, and is "conduct unbecoming an officer", subjecting him to dismissal.²⁶ For its maintenance and efficiency, and to enforce discipline, rules and regulations are necessary for governmental departments. It is within the legislative power to regulate against acts incompatible with a proper discharge of the public officer's duty, demoralizing public service, to promote the general objects of government. Public officers, and especially those in superior positions, to carry out this ideal and to gain the respect, confidence and obedience of their inferiors, must conduct themselves so that no trace of wrongdoing, nor charges reflecting on their honesty and integrity, should

²³ *United v. Murdock*, 284 U. S. 141, 52 Sup. Ct. 63, 82 A. L. R. 1376 (1931); *People v. Molineux*, 168 N. Y. 264, 61 N. E. 286 (1901); *People v. Rosenheimer*, 209 N. Y. 115, 102 N. E. 530 (1913).

²⁴ *Canteline v. McClellan*, 282 N. Y. 166, 25 N. E. (2d) 972 (1940); 36 L. R. A. (N. S. 1912) 881; 84 A. L. R. (1933) 309; (1940) 28 CALIF. L. REV. 94.

²⁵ *Christal v. Police Com'r of San Francisco*, 33 Cal. App. (2d) 564, 92 P. (2d) 416 (1939); *Souder v. City of Phila.*, 305 Pa. 1, 156 Atl. 245, *aff'd*, 314 Pa. 21, 170 Atl. 260 (1934).

²⁶ *In re Lemon*, 15 Cal. App. (2d) 82, 59 P. (2d) 213 (1936); *Christal v. Police Com'r of San Francisco*, 33 Cal. App. (2d) 564, 92 P. (2d) 416 (1939); *De Guire v. Police Com'r of San Francisco*, 33 Cal. App. (2d) 576, 92 P. (2d) 423 (1939); see *Garvin v. Chambers*, 195 Cal. 212, 224, 232 Pac. 696, 701 (1925). In the *Christal* case, silence under such circumstances was held to be "conduct unbecoming an officer" within a police department rule authorizing dismissal for such cause. Another department rule required members to testify without reservation in any investigation before a grand jury or court. This was said to express no new rule, but was a restatement of his recognized duty, and not a deprivation of his constitutional rights.

attach to them. It is their duty to be above suspicion, and to refute and explain accusations made against them.²⁷

A state, except for clear arbitrary discrimination, may deal with its public officers without restriction. Public office is not considered private property involving a constitutional right to continue till its term expires, but is a personal privilege, revocable by the sovereignty in good faith and for just cause. The incumbent, though having a property right to some extent, has no vested absolute right to retain office. Therefore, as the legislature has the power to create, exclude or remove, it may attach conditions to the tenure of office.²⁸ One contemplating holding public office must anticipate any legislative change concerning the terms of tenure, as the office is intended for the public good, and not for his benefit.²⁹ It seems only reasonable that a public servant desiring to continue in office should be willing to forego some constitutional rights and privileges, to the extent that they may be inconsistent with the performance of his duties.³⁰ By becoming a member of any organization, one is necessarily subjected

²⁷ *United States v. Curtis*, 12 Fed. 824 (1882); *O'Regan v. City of Chicago*, 37 Chi. Leg. News 150 (Dec. 24, 1904) cited in *Osborn v. Thorp*, 298 Ill. App. 199, 18 N. E. (2d) 719, 722 (1939) ("A police force is peculiar, *sui generis*, *** in its formation and in its relation to the city government. It is practically an organized force resembling in many respects a military force, organized under the laws of the United States ***. It is not an ordinary branch of the executive government ***. It is a department which requires that the members of it shall surrender their individual opinion and power to act, and submit to that of the controlling head just as much as the common soldier ***. And there is the same necessity of discipline, of regulation existing in the police department ***. Strict discipline must be enforced ***. This man goes into office as a patrolman. At the time *** there is found *** in existence a set of rules and regulations promulgated by that department existing for years before he became a member, which prescribes the manner in which he shall act, and his superior officer shall act towards him to a very large extent. It lays down the discipline to which he is to become subject by reason of his enlistment, or rather, his taking his oath of office as a policeman. It enters into his conduct by which he becomes a policeman, that he will obey the rules and regulations of his superior officer; that he will conform to the discipline prescribed—it is a part of his contract *** [he holds] office either temporarily or during good behavior, or for a specified term, and *** under an implied contract that he will submit to certain rules and regulations in regard to that employment"); *People v. Scannell*, 74 App. Div. 406, 77 N. Y. Supp. 704 (1882), *aff'd*, 173 N. Y. 606, 66 N. E. 1114 (1903); *Kleinberg v. Valentine*, 256 App. Div. 638, 11 N. Y. S. (2d) 56 (1st Dept. 1939); *Souder v. City of Phila.*, 305 Pa. 1, 156 Atl. 245, *aff'd*, 314 Pa. 21, 170 Atl. 260 (1934).

²⁸ *Packard v. Banton*, 264 U. S. 140, 44 Sup. Ct. 257 (1924); *Field v. Giegenbach*, 73 F. (2d) 945 (App. D. C. 1934); *People v. Mischler*, 132 Misc. 13, 228 N. Y. Supp. 524 (1934); *Malone v. Hayden*, 329 Pa. 213, 97 Atl. 344 (1938); 2 SELECTED ESSAYS ON CONSTITUTIONAL LAW (1938) 1471.

²⁹ *Yeiser v. Dysart*, 267 U. S. 540, 45 Sup. Ct. 399 (1925); *State v. Sullivan*, 98 Mont. 425, 40 P. (2d) 995 (1935); *People v. Mischler*, 132 Misc. 13, 228 N. Y. Supp. 675 (1928).

³⁰ *Christal v. Police Com'r of San Francisco*, 33 Cal. App. (2d) 564, 92 P. (2d) 416 (1939); *McCauliffe v. Mayor, etc., of New Bedford*, 155 Mass. 216, 29 N. E. 517 (1892); *People v. Scannell*, 74 App. Div. 406, 77 N. Y. Supp. 707, *aff'd*, 173 N. Y. 606, 66 N. E. 1114 (1903); 2 SELECTED ESSAYS ON CONSTITUTIONAL LAW (1930) 1471.

to its rules and regulations, and what may be his rights as an individual may often be denied him as a public officer. Accordingly, if a member of a governmental department, for example, the police department, wishes to exercise his constitutional rights as a citizen, he may do so but must resign so as not to violate his duty as an officer.³¹

"The primary purpose of a removal statute is the protection of public interests. Those interests are not imperiled by acts of a trifling or unimportant character. The peril arises when the incumbent's administration of the office is marked by such grave misconduct or such flagrant incompetency as demonstrates his unfitness for the position. * * * Corrupt, incapable and unworthy officials should not be tolerated in the public service."³² To justify the removal, the cause assigned must substantially and directly relate to the efficient and faithful administration of his office, affecting the public right and interests, and not as a mere whim or subterfuge. It must be shown that he lacks the necessary qualifications or has not properly discharged his duties, demonstrating his unfitness to continue as a public official.³³ The purpose of the New York Constitutional Amendment, *supra*, is to give the public officer an "option of refusal",³⁴ by permitting him to claim his privilege as a citizen. But he is not compelled to disclose any self-incriminating matter before a grand jury, thus violating his privilege. Its object is to deprive him of his office if he seeks its immunity and breaches his official duty, by not revealing all his knowledge of crime. This is termed "conduct unbecoming an officer", even in the absence of a statute or department rule to that effect. Public confidence would be shattered by permitting public servants to retain their offices although charged with betraying the public trust, in not offering themselves as witnesses and giving a reasonable explanation for their conduct. It would reflect upon the department involved and the object of the amendment would be defeated thereby.³⁵ Courts, as a general rule, will make a reasonable

³¹ *United States v. Curtis*, 12 Fed. 824 (1882); *People v. Bd. of Fire Com'r*, 77 N. Y. 153 (1879); *People v. Bd. of Police Com'r*, 93 N. Y. 97 (1883).

³² *Sausbier v. Wheeler*, 252 App. Div. 267, 299 N. Y. Supp. 466, 470, *rev'd*, 276 N. Y. 246, 11 N. Y. (2d) 897 (1937); *Canteline v. McClellan*, 258 App. Div. 314, 16 N. Y. S. (2d) 792, *aff'd*, 282 N. Y. 166, 25 N. E. (2d) 972 (1940).

³³ *People v. Purdy*, 221 N. Y. 396, 117 N. E. 609 (1917); *Sausbier v. Wheeler*, 252 App. Div. 267, 299 N. Y. Supp. 466, *rev'd on other grounds*, 276 N. Y. 246, 11 N. E. (2d) 897 (1937); 19 R. C. L. (1917) 934.

³⁴ *In re Phillips*, 143 App. Div. 522, 128 N. Y. Supp. 428 (1st Dept. 1911); *Shine v. Fitzgerald*, 14 N. Y. S. (2d) 169 (Sup. Ct. 1939).

³⁵ *Christal v. Police Com'r of San Francisco*, 33 Cal. App. (2d) 564, 92 P. (2d) 416 (1939); *De Guire v. Police Com'r of San Francisco*, 33 Cal. App. (2d) 576, 92 P. (2d) 423 (1939); *Canteline v. McClellan*, 258 App. Div. 314, 16 N. Y. S. (2d) 792, 795, *aff'd*, 282 N. Y. 166, 25 N. E. (2d) 972 (1940) ("One of the delegates [to the Constitutional Convention of 1938] said: 'May I say that this proposal came before the Committee on Governor and Other State Officers for consideration. The Committee * * * came to the conclusion that no public officer who sought to hide behind the cloak of self-incrimination was worthy of holding public office, and that an enactment of this kind in the Constitution was absolutely necessary to give our government the kind of public

interpretation from the ordinary sense of the language of the statute or constitutional provision.³⁶ However, "The law relating to removal from office is drastic and highly penal, and must be given a strict interpretation."³⁷ Accordingly, the Amendment only applies to a public officer refusing to answer relevant questions before a grand jury or sign a waiver of immunity³⁸ concerning his conduct in office or performance of his duties.³⁹ The narrow scope and limited application thus seems to negative a generally changed policy, as a reading of the Constitutional Convention Committee's report would indicate. The present provision is a partial adoption of one of its suggestions to change the pre-existing law: "It has been suggested that if the privilege is retained it be made unavailable to public officers and *others holding positions of public trust*. The proposal takes two forms: one, to specify in the Constitution those who would be denied the privilege; two, to adopt an enabling clause empowering the Legislature to make the specification."⁴⁰ (Italics mine.)

Attorneys at Law

A disbarment proceeding is *sui generis*,⁴¹ possessing certain characteristics of both civil and criminal actions. It is not a criminal proceeding in which the accused may decline to testify, although he may invoke his constitutional privilege against self-incriminating questions. However, he may not thus shield himself by claiming that he will be subject to disbarment as a result of violating his official duties.⁴² Although partaking of such nature, it is not strictly a pro-

officials that we have a right to expect, the public official whose every act in public office should be open to scrutiny, and who shall not refuse to answer by reason of the fact that his answer might be self-incriminatory"); *Souder v. City of Phila.*, 305 Pa. 1, 156 Atl. 245, *aff'd*, 314 Pa. 21, 170 Atl. 260 (1934); (1940) 28 CALIF. L. REV. 94.

³⁶ 1 BL. COMM. *87 ("There are three points to be considered in the construction of all remedial statutes; the old law, the mischief, and the remedy * * *"); *People v. Fancher*, 50 N. Y. 288 (1872); *American Historical Soc. v. Glenn*, 248 N. Y. 445, 162 N. E. 481 (1928); *Ass'n for Protection of Adirondacks v. MacDonald*, 253 N. Y. 234, 170 N. E. 902 (1930); *Canteline v. McClellan*, 258 App. Div. 314, 16 N. Y. S. (2d) 792, *aff'd*, 282 N. Y. 166, 25 N. E. (2d) 972 (1940).

³⁷ *Sausbier v. Wheeler*, 252 App. Div. 267, 269, 299 N. Y. Supp. 466, 470, *rev'd on other grounds*, 276 N. Y. 246, 11 N. E. (2d) 897 (1937).

³⁸ N. Y. PENAL LAW § 2446.

³⁹ *In re Ellis*, 258 App. Div. 573, 17 N. Y. S. (2d) 800 (2d Dept. 1940) (dissenting opinion), *rev'd*, 282 N. Y. 435, 26 N. E. (2d) 967 (1940).

⁴⁰ 9 N. Y. S. CONST. CONV. COMM. 920, 940 (1938).

⁴¹ *McIntosh v. State Bar of Cal.*, 211 Cal. 261, 294 Pac. 1067 (1930); *In re Gardner*, 119 S. W. (2d) 50 (Mo. 1938).

⁴² *In re Vaughan*, 189 Cal. 491, 209 Pac. 353, 24 A. L. R. 858 (1922); *Johnson v. State Bar of Cal.*, 52 P. (2d) 928 (Cal. 1935); *Matter of Rouss*, 221 N. Y. 81, 116 N. E. 782 (1917); 70 C. J. (1935) 735, § 888.

ceeding to punish,⁴³ and as it is not a "penalty or forfeiture"⁴⁴ within the meaning of the New York Penal Law, his testimony may be used against him to disbar. Unlike the ordinary criminal action, wherein no presumption may be raised from a witness' failure to testify, the attorney in a disbarment proceeding, who refuses to answer charges against himself when the material matters are peculiarly within his knowledge, is subject to a legal presumption of their truth.⁴⁵

The primary purpose and issue in a disbarment proceeding is to determine the attorney's fitness to retain his privileged status as an officer of the court.⁴⁶ To enter the legal profession, one must demonstrate by examination that he possesses special qualifications: a fair private and professional character, and sufficient legal knowledge to conduct a law suit. These are essential as a condition precedent, and must also be retained subsequent to admission to the bar.⁴⁷ The order of admission is a certificate that in the court's judgment its agent possesses the necessary prerequisites of a trustworthy moral character who will act fairly and honestly. It is a continuous, though rebuttable presumption.⁴⁸ The attorney's license represents not a constitutional right, but is a mere privilege or franchise, granted by the state, burdened with conditions of good behavior and professional integrity.⁴⁹ The court's duty is to maintain and protect itself, the legal profession and the public in its administration of justice against professional misconduct. Failure to do so will impair the trust and confidence of the public.⁵⁰ The acts proving the attorney's unfitness needn't be sufficient to cause criminal or civil liability.⁵¹ But the

⁴³ *Ex parte* Wall, 107 U. S. 265, 2 Sup. Ct. 569 (1883); *People v. Culklin*, 248 N. Y. 465, 162 N. E. 487, 60 A. L. R. 851 (1928); *In re Donegan*, 282 N. Y. 285, 26 N. E. (2d) 260 (1940).

⁴⁴ N. Y. PENAL LAW § 584; *Matter of Rouss*, 221 N. Y. 81, 116 N. E. 782 (1917) (explaining *In re Kaffenburgh*, 188 N. Y. 49, 80 N. E. 570 (1907)); *Matter of Solovie*, 276 N. Y. 647, 12 N. E. (2d) 807 (1938).

⁴⁵ N. Y. CODE CRIM. PROC. § 393; *In re Fenn*, 128 S. W. (2d) 657 (Mo. 1939); *In re Randel*, 158 N. Y. 216, 52 N. E. 1106 (1899); *Matter of Spenser*, 143 App. Div. 229, 128 N. Y. Supp. 168, *aff'd*, 203 N. Y. 613, 96 N. E. 1131 (1911); *In re Ropiecki*, 246 App. Div. 80, 282 N. Y. Supp. 947 (4th Dept. 1935).

⁴⁶ *Ex parte* Robinson, 19 Wall. 505 (U. S. 1873); *McIntosh v. State Bar of Cal.*, 211 Cal. 261, 294 Pac. 1067 (1930).

⁴⁷ *Ex parte* Wall, 107 U. S. 265, 2 Sup. Ct. 569 (1883); *In re Greer*, 81 P. (2d) 96 (Ariz. 1938); *State v. Marconnit*, 134 Neb. 898, 280 N. W. 216 (1938); *Matter of Rouss*, 221 N. Y. 81, 116 N. E. 782 (1917); *In re Clay*, 256 App. Div. 528, 11 N. Y. S. (2d) 96 (1939).

⁴⁸ *Ex parte* Robinson, 19 Wall. 505 (U. S. 1873); *Roark v. State Bar of Cal.*, 55 P. (2d) 839 (Cal. 1936).

⁴⁹ *Ex parte* Garland, 4 Wall. 333 (1866); *In re Bailey*, 30 Ariz. 407, 248 Pac. 29 (1926); *In re Durant*, 80 Conn. 40, 67 Atl. 497 (1907); *Matter of Rouss*, 221 N. Y. 81, 116 N. E. 782 (1917); *In re Bond*, 168 Okla. 161, 31 P. (2d) 921 (1934).

⁵⁰ *Ex parte* Wall, 107 U. S. 265, 2 Sup. Ct. 569 (1883); *People v. Sherwin*, 364 Ill. 350, 4 N. E. (2d) 477 (1936); *In re Keenan*, 287 Mass. 577, 192 N. E. 65 (1934).

⁵¹ *In re Needham*, 364 Ill. 65, 4 N. E. (2d) 19 (1936); *In re Mix*, 249 App. Div. 422, 292 N. Y. Supp. 502, *rev'd*, 274 N. Y. 183, 8 N. E. (2d) 328

power should only be exercised where necessary, and not arbitrarily, especially if a less severe punishment is practicable, as a reprimand, fine or temporary suspension. It must be borne in mind that his status is a source of honor, emolument and livelihood. Of course, notice and an opportunity to defend are necessary.⁵²

"The supreme court shall have power and control over attorneys * * *, and the appellatè division * * * is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice as such who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice * * *." ⁵³ The power is inherent, plenary, summary, continuous, existing independent of statute,⁵⁴ and is a corollary to the court's jurisdiction to admit the attorney to the bar.⁵⁵ It may initiate investigations on its own order concerning general unprofessional practices, although not directed against a particular defendant or class, based on specific charges.⁵⁶ The court, in its investigation, may also compel the attorney to testify concerning his conduct, subject to his claim of privilege if any unlawful practices are unearthed. It is his duty to exhibit an attitude of candor and fairness, as in the case of the public officer. Only thus can the court promulgate rules to prevent a recurrence of unprofessional practices, and gather information to base future charges against its officers.⁵⁷ As pointed out, an attorney is an officer of the court, an instrument or agency to advance the ends of justice. However, he is not a public officer in the ordinary sense of the word. He does not exercise sovereign power, nor is he in the public employ with an official status. But he takes an oath of office and assumes definite obligations concerning the administration of justice, aiding the court to uphold the honor of the legal profession and root out corruption and fraud. He may therefore be termed a *quasi*-public officer, a recognized instrumentality in government.⁵⁸

(1937), conforming to, 251 App. Div. 125, 296 N. Y. Supp. 405 (4th Dept. 1937).

⁵² *Ex parte* Burr, 9 Wheat. 529 (U. S. 1824); *Bradley v. Fisher*, 13 Wall. 335 (U. S. 1872); *In re* Conrad, 105 S. W. (2d) 1 (Mo. 1937).

⁵³ N. Y. JUDICIARY LAW § 88 (2); *Matter of* Levy, 229 App. Div. 62, 241 N. Y. Supp. 369, *appeal dismissed*, 255 N. Y. 223, 174 N. E. 461 (1931).

⁵⁴ *In re* Boone, 83 Fed. 944 (C. C. N. D. Cal. 1897); *Gould v. State*, 99 Fla. 662, 127 So. 309, 69 A. L. R. 699 (1930); *In re* Needham, 364 Ill. 65, 4 N. E. (2d) 19 (1936).

⁵⁵ *Bradley v. Fisher*, 13 Wall. 335 (U. S. 1872); *Ex parte* Robinson, 19 Wall. 505 (U. S. 1873).

⁵⁶ *People v. Karlin*, 248 N. Y. 465, 162 N. E. 487, 60 A. L. R. 851 (1928); *Matter of* Bar Ass'n of N. Y. C., 222 App. Div. 580, 227 N. Y. Supp. 1 (1st Dept. 1928); *In re* Bklyn. Bar Ass'n, 223 App. Div. 249, 227 N. Y. Supp. 666 (2d Dept. 1928).

⁵⁷ *People v. Karlin*, 248 N. Y. 465, 162 N. E. 487, 60 A. L. R. 851 (1928); *Matter of* Bar Ass'n of N. Y. C., 222 App. Div. 580, 227 N. Y. Supp. 1 (1st Dept. 1928); *Rubin v. State*, 194 Wis. 207, 216 N. W. 513 (1927).

⁵⁸ *In re* Bailey, 30 Ariz. 407, 248 Pac. 29 (1926); *Matter of* Levy, 229 App.

Under the existing law, an attorney who refuses to sign a waiver of immunity before a grand jury, or who refuses to answer a self-incriminating question, may not be subject to discipline nor held in contempt of court.⁵⁹ To compel either would deprive him of his constitutional right. The attorney is thus on the level with the ordinary layman, instead of being held to a higher duty, justification being found in the fundamental law. It was held that exercising such a right is not a breach of duty to the court, and being a legal act, is therefore moral and not in defiance of the court.⁶⁰ Immunity is granted to him if he acts in good faith, not contumaciously or as a sham or pretext to evade answering non-incriminating questions. However, refusing to sign a waiver, although willing to testify, is not bad faith causing discipline.⁶¹

Conclusion

It thus appears that the privilege against self-incrimination has long been surrounded by a constitutional halo, and anyone falling within its protection may call upon it to shield himself. However, it is recognized that there should at least be limitations, as evidenced by the report of the Constitutional Convention Committee,⁶² in which five possible changes are suggested: (1) Remove it from the Constitution, (2) Abolish it, (3) Retain it, but extend the use of amnesty statutes, (4) Retain it, but permit to the opposing attorney and court the right to comment on the witnesses' failure to testify,⁶³ and (5) Retain it, but limit its application.⁶⁴

An analysis has shown that the public officer and the attorney, a quasi-public officer, are, in many respects, in a similar position. The attorney, as an officer of the court, must maintain the trust and confidence reposed in him, and should therefore be bound to a greater duty to aid the court in its administration of justice. It is therefore submitted that the Constitutional Convention's fifth suggestion be ex-

Div. 62, 241 N. Y. Supp. 369, *appeal dismissed*, 255 N. Y. 223, 174 N. E. 461 (1931); *Matter of Dawson v. Knox*, 231 App. Div. 490, 246 N. Y. Supp. 73 (3d Dept. 1931), *aff'd*, 267 N. Y. 565, 196 N. E. 582 (1935).

⁵⁹ *In re Schneidkraut*, 231 App. Div. 109, 246 N. Y. Supp. 505 (2d Dept. 1930); *In re Solovie*, 276 N. Y. 647, 12 N. E. (2d) 807 (1939); *In re Ellis*, 258 App. Div. 573, 17 N. Y. S. (2d) 800 (2d Dept. 1940) (dissenting opinion), *rev'd*, 282 N. Y. 435, 26 N. E. (2d) 967 (1940); (1940) 9 FORDHAM L. REV. 284.

⁶⁰ *In re Ellis*, 258 App. Div. 573, 17 N. Y. S. (2d) 800 (2d Dept. 1940) (dissenting opinion), *rev'd*, 282 N. Y. 435, 26 N. E. (2d) 967 (1940); *In re Grae*, 258 App. Div. 576, 17 N. Y. S. (2d) 822 (2d Dept. 1940) (dissenting opinion), *rev'd*, 282 N. Y. 428, 26 N. E. (2d) 963 (1940).

⁶¹ *Matter of Levy*, 229 App. Div. 62, 241 N. Y. Supp. 369, *appeal dismissed*, 255 N. Y. 223, 174 N. E. 461 (1931); *In re Grae*, 282 N. Y. 428, 26 N. E. (2d) 963, 127 A. L. R. 1276 (1940); Note (1940) 25 CORN. L. Q. 420.

⁶² 9 N. Y. CONST. CONV. COMM. (1938) 920.

⁶³ FINAL REPORT OF THE COMMISSION ON THE ADMINISTRATION OF JUSTICE IN N. Y. STATE (1939) 13; Note (1935) 10 ST. JOHN'S L. REV. 66.

⁶⁴ N. Y. CONST. art. I, § 6.

tended to include both the public officer and attorney-at-law, requiring them to sign a waiver of immunity, or forfeit their official position.

BERNARD ROTHMAN.

THE WRONGFUL DEATH ACT AS AFFECTED BY THE SURVIVAL
STATUTE

Unlike the situation at the common law,¹ one does not take to the grave with him an action against the wrongdoer when dying as a result of personal injuries. The personal representative may, in his own name, commence an action for damages suffered by the deceased.² Closely akin to such right of action is that possessed by the same representative to sue for damages, suffered by certain designated beneficiaries by reason of the death, in a case where an action could have been maintained by the deceased had he survived.³ In such case the damages recovered are distributable to the beneficiaries, separate and apart from the decedent's estate.⁴ These substantive rights, not recognized by common law, exist today only by virtue of legislative fiat.⁵ The two causes of action may be consolidated and prosecuted in one; but, so related are the rights that it is often difficult to decide where one ends and the other begins, or to distinguish the incidents of one from those of the other.

"And in action merely personal, arising *ex delicto*, for wrongs actually done or committed by the defendant, as trespass, battery, and slander, the rule is that *actio personalis moritur cum persona*, and it never shall be revived either by or against the executors or other representatives. For neither the executors of the plaintiff have received, nor those of the defendant have committed, in their own personal capacity any manner of wrong or injury."⁶ This rule, that no civil action would lie for death resulting from injury, was first based on the doctrine that the civil injury was merged in the felony, which was more grave as an offense to the crown.⁷ Such reasoning failed where there was no felony. In later decisions the conclusion was reached that the law could not permit the evaluation of damages resulting from the loss of human life.⁸ Probably the reason for the existence of

¹ *Stuber v. McEntee*, 142 N. Y. 200, 36 N. E. 878 (1894); *Roche v. St. John's Riverside Hospital*, 96 Misc. 289, 160 N. Y. Supp. 401 (1916) (at common law no right of action for causing death existed).

² N. Y. DEC. EST. LAW §§ 119, 120.

³ *Id.* § 130.

⁴ See note 20, *infra*.

⁵ *De Bevoise v. N. Y., Lake Erie & W. R. R.*, 98 N. Y. 377 (1885); *Stuber v. McEntee*, 142 N. Y. 200, 36 N. E. 878 (1894).

⁶ 3 BL. COMM. *302.

⁷ *Connors v. Burlington, etc. Ry.*, 171 Iowa 490, 32 N. W. 465 (1887).

⁸ *Philby v. Northern Pac. R. R.*, 46 Wash. 173, 89 Pac. 468 (1907).