NY CLS CPLR § 4501

Current through 2025 released Chapters 1-207

New York

Consolidated Laws Service **>**

Civil Practice Law And Rules (Arts. 1 — 100) **>**

Article 45 Evidence (§§ 4501 — 4551)

§ 4501. Self-incrimination

A competent witness shall not be excused from answering a relevant question, on the ground only that the answer may tend to establish that he owes a debt or is otherwise subject to a civil suit. This section does not require a witness to give an answer which will tend to accuse himself of a crime or to expose him to a penalty or forfeiture, nor does it vary any other rule respecting the examination of a witness.

History

Add, L 1962, ch 308; amd, L 1963, ch 532, § 21, eff Sept 1, 1963.

Annotations

Notes

Prior Law:

Earlier statutes: CPA § 355; CCP § 837; 2 RS 405, § 71.

Advisory Committee Notes:

This section is the same as CPA § 355 except that the title has been changed from “Personal privilege of witness” and the final phrase which dealt with traffic infractions has been eliminated.

The former title seemed to include other personal privileges, such as that of the client or patient, which were covered by other sections.

The final phrase of former § 355 was added in 1934. It read, “nor shall any witness be required to disclose a conviction for a traffic infraction, as defined by the vehicle and traffic law, nor shall conviction therefor affect the credibility of such witness in any action or proceeding.” Insofar as this phrase made conviction of a traffic infraction inadmissible on the issue of credibility, it was unnecessary since subd 29 of § 2 of the Vehicle and Traffic Law provides, in part, that “a traffic infraction is not a crime, and the penalty or punishment imposed therefor shall not . . . affect or impair the credibility as a witness, or otherwise, of any person convicted thereof.” That portion which stated that the witness need not disclose the infraction made little sense. If the infraction is relevant for any purpose other than on the issue of credibility it is admissible for that other purpose (cf. Hart v Mealey, 287 NY 39, 42–43, 38 NE2d 121, 123 (1941)) and it could be proved by an official record. Where it is more convenient to prove it by the witness himself no good reason for requiring the official record is apparent. It should be noted that the rule in criminal cases will remain the same as it was since the stricken phrase also appears as § 2444 of the Penal Law. Since § 2444 referred to both civil and criminal proceedings, that section has been amended to read “a witness in a criminal cause or proceeding shall not be required to disclose”; it formerly read “such witness shall not be required to disclose.”

Notes to Decisions

I.Under CPLR

1.Generally

2.Proper forum to assert privilege

3.Criteria for asserting privilege

4.Miranda rule

5.Party to suit as adversary’s witness

6.Particular proceedings

II.Under Former Civil Practice Laws

7.Generally

8.Who may assert privilege

9.Incrimination

10.—Vehicle and traffic violation under CPA § 355

11.—Effect of statute of limitations

12.Exposure to contempt proceeding

13.Subjection to civil suit

14.Subjection to penalty or forfeiture

I. Under CPLR

1. Generally

Exemption from disclosing evidence based on claim of privilege is almost exclusively controlled by statute. Hopson v Pinckney, 77 Misc. 2d 391, 353 N.Y.S.2d 664, 1974 N.Y. Misc. LEXIS 1146 (N.Y. Sup. Ct. 1974).

Privilege against self-incrimination protects not only answers which alone could support a criminal conviction, but all responses which could feed the chain of evidence needed to prosecute. Slater v Slater, 78 Misc. 2d 13, 355 N.Y.S.2d 943, 1974 N.Y. Misc. LEXIS 1316 (N.Y. Sup. Ct. 1974).

2. Proper forum to assert privilege

Privilege may be claimed in civil cases. The privilege can be asserted in any forum, and is not confined to the forum in which the witness is or may be subject to criminal penalties. Haftel v Appleton, 42 Misc. 2d 292, 247 N.Y.S.2d 967, 1964 N.Y. Misc. LEXIS 2055 (N.Y. Sup. Ct.), app. dismissed, 21 A.D.2d 651, 249 N.Y.S.2d 437, 1964 N.Y. App. Div. LEXIS 3808 (N.Y. App. Div. 1st Dep't 1964).

The privilege against self-incrimination may be claimed in civil cases. People ex rel. Catherwood v Purvis, 48 Misc. 2d 848, 265 N.Y.S.2d 865, 1965 N.Y. Misc. LEXIS 1237 (N.Y. Sup. Ct. 1965).

The right of any witness in a civil case, whether or not a party, to invoke the privilege against self-incrimination was carried over from § 355 of the Civil Practice Act into CPLR 4501 and the scope of the coverage has been extended to any witness in a civil or criminal case, administrative proceeding or legislative hearing. Gullo v Courtright, 62 Misc. 2d 721, 309 N.Y.S.2d 735, 1970 N.Y. Misc. LEXIS 1815 (N.Y. County Ct. 1970).

3. Criteria for asserting privilege

Availability of a privilege depends not on contents of privileged communication but rather on character of communication, relationship between parties to it, and circumstances under which it was made. People v Carmona, 82 N.Y.2d 603, 606 N.Y.S.2d 879, 627 N.E.2d 959, 1993 N.Y. LEXIS 4354 (N.Y. 1993).

Defendant in medical malpractice action is not excused from answering question on basis that answer may subject him to discipline since possible sanction arising from disciplinary investigation does not constitute “penalty or forfeiture”. Busshart v Park, 112 A.D.2d 787, 492 N.Y.S.2d 284, 1985 N.Y. App. Div. LEXIS 56030 (N.Y. App. Div. 4th Dep't 1985).

Corporation, in civil matter, had no standing to assert former officer and director’s privilege against self-incrimination since privilege is personal right which cannot be invoked by

corporation. EDP Medical Computer Sys. v Sears, Roebuck & Co., 193 A.D.2d 645, 597 N.Y.S.2d 461, 1993 N.Y. App. Div. LEXIS 4747 (N.Y. App. Div. 2d Dep't 1993).

It is sufficient to make the privilege applicable that the testimony may provide the clue or links by which the guilt of the witness may be established. Haftel v Appleton, 42 Misc. 2d 292, 247 N.Y.S.2d 967, 1964 N.Y. Misc. LEXIS 2055 (N.Y. Sup. Ct.), app. dismissed, 21 A.D.2d 651, 249 N.Y.S.2d 437, 1964 N.Y. App. Div. LEXIS 3808 (N.Y. App. Div. 1st Dep't 1964).

One who claims privilege against self-incrimination may invoke privilege when he has reasonable cause to fear the danger of incrimination; mere imaginary possibility of prosecution is insufficient to stave off the direction to respond. Slater v Slater, 78 Misc. 2d 13, 355 N.Y.S.2d 943, 1974 N.Y. Misc. LEXIS 1316 (N.Y. Sup. Ct. 1974).

4. Miranda rule

The rule enunciated in Miranda does not forbid the use in the civil action of admissions made, where civil action is tried following trial of criminal action and finding of not guilty. Dixson v State, 30 A.D.2d 626, 290 N.Y.S.2d 682, 1968 N.Y. App. Div. LEXIS 3881 (N.Y. App. Div. 3d Dep't 1968).

5. Party to suit as adversary’s witness

A party in a civil suit may be called as a witness by his adversary and questioned as to matters relevant to the issues. McDermott v Manhattan Eye, Ear & Throat Hospital, 15 N.Y.2d 20, 255 N.Y.S.2d 65, 203 N.E.2d 469, 1964 N.Y. LEXIS 817 (N.Y. 1964).

Plaintiff in a malpractice action can call the defendant doctor to the stand and question him both as to his factual knowledge of the case; that, as to his examination, diagnosis, treatment, and the like, and if he be so qualified, as an expert to establish the generally accepted medical practice in the community. McDermott v Manhattan Eye, Ear & Throat Hospital, 15 N.Y.2d 20, 255 N.Y.S.2d 65, 203 N.E.2d 469, 1964 N.Y. LEXIS 817 (N.Y. 1964).

6. Particular proceedings

A membership corporation could not resist Attorney General's subpoena under General Business Law § 343 by invoking the privilege against self-incrimination on its own behalf, nor with respect to its corporate records, on behalf of its officers. Long Island Moving & Storage Asso. v Lefkowitz, 24 A.D.2d 452, 260 N.Y.S.2d 192, 1965 N.Y. App. Div. LEXIS 4020 (N.Y. App. Div. 2d Dep't 1965), app. denied, 17 N.Y.2d 419, 1966 N.Y. LEXIS 1740 (N.Y. 1966).

Since the United States Supreme Court in Murphy v Waterfront Com. of New York Harbor (1964) 378 US 52, 12 L Ed 2d 678, 84 S Ct 1594, held that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him, and further held that the federal government is prohibited from making any such use of compelled testimony and its fruits, the appellant would have no grounds upon which to refuse to answer the questions before the grand jury which granted him immunity. People v Fornaro, 28 A.D.2d 908, 282 N.Y.S.2d 13, 1967 N.Y. App. Div. LEXIS 3547 (N.Y. App. Div. 2d Dep't 1967).

A subpoena directing a psychiatrist to appear before the Superintendent of Insurance in connection with an investigation into the filing of suspicious claims by fifteen named individuals under a group health policy for reimbursement of expenses for professional services allegedly rendered by the psychiatrist, and to produce the individuals' medical records and certain other specified office records should have been quashed as to all materials sought except for the dates and times of treatments contained in the records, even though the psychiatrist could not invoke the privilege against self-incrimination as to the medical records that were required by statute to be maintained or as to the contents of voluntarily maintained business records, in that there was no compulsion in relation to the contents of the records, where the psychiatrist was nevertheless entitled to assert his Fifth Amendment privilege as to the records, in that the act of producing his billing and receipt records and appointment books or diaries had communicative

aspects that could be incriminatory. The psychiatrist's claim of privilege with respect to his own testimony was premature, however, since the privilege may not be asserted or claimed in advance of questions actually propounded. Henry v Lewis, 102 A.D.2d 430, 478 N.Y.S.2d 263, 1984 N.Y. App. Div. LEXIS 18804 (N.Y. App. Div. 1st Dep't 1984).

On motion to compel defendant to answer questions in examination before trial in action for damages for wrongful deaths of homicide victims, defendant, who was found guilty of conspiracy but acquitted of actual murders of victims, could not be compelled to answer questions while his CLS CPL Art 440 motion was pending, since answers could be incriminating in subsequent trial for conspiracy. Brahm v Hatch, 169 A.D.2d 263, 572 N.Y.S.2d 395, 1991 N.Y. App. Div. LEXIS 9466 (N.Y. App. Div. 3d Dep't 1991).

On motion to compel defendant to answer questions in examination before trial in action for damages for wrongful deaths of homicide victims, defendant, who was found guilty of conspiracy but acquitted of actual murders of victims, could not invoke privilege against self incrimination as basis for nondisclosure where exposure to prosecution was barred by statute of limitations or double jeopardy. Brahm v Hatch, 169 A.D.2d 263, 572 N.Y.S.2d 395, 1991 N.Y. App. Div. LEXIS 9466 (N.Y. App. Div. 3d Dep't 1991).

Witness subpoenaed by Waterfront Commission in investigation of "waterfront practices and conditions generally within the port of New York," could not invoke blanket privilege against self-incrimination before questions were asked. In view of constitutional protection against double jeopardy, Appellate Division would not consider subpoenaed witness's Fifth Amendment claim of self-incrimination, so long as investigation by Waterfront Commission, before which witness refused to testify, was limited to particular theft for which he had already been convicted. In re Waterfront Comm'n, 245 A.D.2d 63, 665 N.Y.S.2d 82, 1997 N.Y. App. Div. LEXIS 12890 (N.Y. App. Div. 1st Dep't 1997).

Despite defendant's assertion of Fifth Amendment privilege, possibility that he would be prejudiced in 2 other pending civil actions if he were called on to testify in present action was not proper ground to stay present action for legal fees. Schulte Roth & Zabel L.L.P. v Chammah,

251 A.D.2d 132, 672 N.Y.S.2d 736, 1998 N.Y. App. Div. LEXIS 6945 (N.Y. App. Div. 1st Dep't 1998).

Civil defendants were not entitled to stay of their depositions until completion of related criminal case, despite their claim of irreparable harm if depositions went forward because jury in present action could draw negative inference from their assertion of privilege against self-incrimination, where fact that witness may invoke privilege against self-incrimination is not basis for precluding civil discovery, and defendants' reliance of factually distinguishable Britt v International Bus Servs., 255 AD2d 143, was misplaced. Walden Marine, Inc. v Walden, 266 A.D.2d 933, 698 N.Y.S.2d 185, 1999 N.Y. App. Div. LEXIS 11769 (N.Y. App. Div. 4th Dep't 1999).

Father was not entitled to visitation with parties' 7-year-old daughter, even if court applied improper burden of proof, where (1) father was sentenced to 7 ½ to 15 years in prison for attempted murder of daughter's mother, (2) although shooting of mother did not place daughter in immediate physical danger, father knew that daughter was at home when he shot mother, and he left mother lying on floor seriously wounded for daughter to find her, and (3) adverse inference could be drawn from his invocation of Fifth Amendment at hearing. Moses v Rachal S., 273 A.D.2d 928, 708 N.Y.S.2d 795, 2000 N.Y. App. Div. LEXIS 6977 (N.Y. App. Div. 4th Dep't 2000).

Medical malpractice plaintiff was properly required to respond at her deposition to inquiries as to her prior drug use where there was medical link between such use and osteomyelitis condition for which she sought to recover damages, and thus defendants' inquiries were relevant to issue of whether plaintiff's condition was attributable to defendants' malpractice. Green v City of New York, 281 A.D.2d 193, 721 N.Y.S.2d 353, 2001 N.Y. App. Div. LEXIS 2193 (N.Y. App. Div. 1st Dep't 2001).

Where in a separation action the defendant counterclaimed for a judgment declaring his wife's prior divorce from a former husband invalid, the plaintiff wife could, on grounds of possible self-incrimination, properly decline to answer written interrogatories designed to establish the defendant's contention; however, she could not, on the same grounds, decline to answer

interrogatories intended to bolster the defendant's claim to exclusive title to the household furniture for, at worst, any answer of hers would only establish that she owed a debt or was subject to civil suit. Rolnick v Rolnick, 46 Misc. 2d 1012, 261 N.Y.S.2d 414, 1965 N.Y. Misc. LEXIS 1906 (N.Y. Sup. Ct. 1965).

Husband's assertion of privilege against self-incrimination at examination before trial of matrimonial action inquiring into his federal income tax return did not preclude any further inquiry; examination would be permitted to continue with appropriate safeguards and husband would be compelled to answer to the extent that appropriate rulings could be had as they related to furnishing a factual predicate for invoking the privilege. Slater v Slater, 78 Misc. 2d 13, 355 N.Y.S.2d 943, 1974 N.Y. Misc. LEXIS 1316 (N.Y. Sup. Ct. 1974).

In a proceeding regarding defendant, pursuant to Mental Hygiene Law § 10.01 et seq., to determine whether he had a mental abnormality after being convicted of attempted rape of a child, the trial court determined that certain presentence and parole records regarding defendant's 1980 and 1992 convictions were properly relied upon by an expert with regard to his opinion as to defendant's condition, but documents relied upon to establish the facts of a 1961 conviction, for example, that defendant suffered from pedophilia, were not, since those records were made some six years or thirty years after the events surrounding the 1961 convictions Matter of State of New York v J.A., 868 N.Y.S.2d 841, 21 Misc. 3d 806, 240 N.Y.L.J. 76, 2008 N.Y. Misc. LEXIS 5791 (N.Y. Sup. Ct. 2008).

New York State's Sex Offender Management and Treatment Act, N.Y. Mental Hyg. Law art. 10, affords a respondent in an art. 10 proceeding the right to refuse to be called as a witness for the State, and this right overrides the general provisions of N.Y. C.P.L.R. art. 45, including N.Y. C.P.L.R. 4501, which provides that a person shall not be excused from being a witness because the person has an interest in the outcome of a case or is a party. State of New York v Suggs, 920 N.Y.S.2d 644, 31 Misc. 3d 1009, 2011 N.Y. Misc. LEXIS 1714 (N.Y. Sup. Ct. 2011).

II. Under Former Civil Practice Laws

7. Generally

CPA § 248 (§ 3020 herein) and § 355 construed together in not requiring defendant to verify his answer to complaint. King v Terwilliger, 259 A.D. 437, 19 N.Y.S.2d 657, 1940 N.Y. App. Div. LEXIS 6167 (N.Y. App. Div. 1940).

Matters that are privilege include everything which would tend to subject the witness to a fine or imprisonment, a forfeiture or confiscation of land or a penalty and the privilege applies in civil as well as criminal cases. Levine v Bornstein, 13 Misc. 2d 161, 174 N.Y.S.2d 574, 1958 N.Y. Misc. LEXIS 3529 (N.Y. Sup. Ct. 1958), aff'd, 7 A.D.2d 995, 183 N.Y.S.2d 868, 1959 N.Y. App. Div. LEXIS 9810 (N.Y. App. Div. 2d Dep't 1959), limited, Barbato v Tuosto, 38 Misc. 2d 823, 238 N.Y.S.2d 1000, 1963 N.Y. Misc. LEXIS 2168 (N.Y. Sup. Ct. 1963).

The privilege extends to books and papers. Byass v Sullivan, 21 How. Pr. 50, 1860 N.Y. Misc. LEXIS 190 (N.Y. Sup. Ct. July 1, 1860).

Privilege does not extend to trade secrets. Burnett v Phalon, 19 How. Pr. 530, 1860 N.Y. Misc. LEXIS 264 (N.Y. Sup. Ct. Oct. 1, 1860); Byass v Sullivan, 21 How. Pr. 50, 1860 N.Y. Misc. LEXIS 190 (N.Y. Sup. Ct. July 1, 1860).

8. Who may assert privilege

The privilege is personal to the witness. Southard v Rexford; Taylor v Wood, 1833 N.Y. LEXIS 175 (N.Y. July 8, 1833); Cloyes v Thayer & Morse, 1842 N.Y. LEXIS 267 (N.Y. Sup. Ct. Oct. 1, 1842).

9. Incrimination

The privilege extends to a bank officer who has on his own account illegally discounted a note. Henry v Bank of Salina, 1 N.Y. 83, 1 N.Y. (N.Y.S.) 83, How. A. Cas. 173, 1847 N.Y. LEXIS 7 (N.Y. 1847).

A witness in judicial or other proceedings against himself or others cannot be compelled to disclose facts or circumstances which can be used against him as admissions tending to prove his guilt or connection with any criminal offense, or the sources from or means by which evidence of its commission or his connection with it may be obtained. Nothing short of absolute immunity from prosecution can take the place of such privilege. People ex rel. Taylor v Forbes, 143 N.Y. 219, 38 N.E. 303, 143 N.Y. (N.Y.S.) 219, 1894 N.Y. LEXIS 939 (N.Y. 1894).

In an action by an administrator to recover property of the testator claimed to have been fraudulently obtained by the defendant and concealed, the latter cannot be compelled to answer questions as to whom the testator transferred the property if he asserts that the answer will tend to accuse him of a crime; an order of the court requiring the defendant to answer such questions is, under the circumstances, within the express condemnation of this section and violates the organic law insuring immunity to citizens from self-accusation. (U. S. Const., 5th amendment; N. Y. Const., arts. 1, 6.) Answers to such questions cannot be compelled by virtue of § 2443 of the Penal Law, providing that “no person shall be excused from testifying in any civil action showing that a thing in action has been bought, sold or received contrary to law upon the ground that his testimony might convict him of crime.” Said section, which is derived from the Revised Statutes, refers only to particular crimes, e. g., to buying demands in suit, dueling, etc., and has no general application. Chappell v Chappell, 116 A.D. 573, 101 N.Y.S. 846, 19 N.Y. Ann. Cas. 343, 1906 N.Y. App. Div. LEXIS 2726 (N.Y. App. Div. 1906).

Where defendant in an action by his wife to recover her expenditures for necessaries while they were living apart set up as a defense that prior to the first date of such expenditures the wife committed acts of adultery in France, that she had been convicted of the crime of adultery in such country on proof of such facts, and that the defendant had been granted a divorce by the courts of that country on the ground of adultery, neither CPA § 248 (§ 3020 herein) nor § 255, entitled her to be excused from making a verified reply to such defenses in the answer. Gould v Gould, 201 A.D. 674, 194 N.Y.S. 742, 1922 N.Y. App. Div. LEXIS 6387 (N.Y. App. Div. 1922).

A witness may not be asked on cross-examination if he has ever been indicted or arrested. Tryon v Willbank, 234 A.D. 335, 255 N.Y.S. 27, 1932 N.Y. App. Div. LEXIS 10429 (N.Y. App. Div. 1932).

Loss of position, by policeman who refused to testify in administrative proceeding, was no excuse for failure or refusal to testify. Application of Delehanty, 280 A.D. 542, 115 N.Y.S.2d 614, 1952 N.Y. App. Div. LEXIS 3515 (N.Y. App. Div.), aff'd, 304 N.Y. 725, 108 N.E.2d 46, 304 N.Y. (N.Y.S.) 725, 1952 N.Y. LEXIS 925 (N.Y. 1952), aff'd, 304 N.Y. 727, 108 N.E.2d 46, 304 N.Y. (N.Y.S.) 727, 1952 N.Y. LEXIS 926 (N.Y. 1952).

In action to declare plaintiff to be defendant’s lawful wife and to declare invalid divorce obtained by him, his refusal to answer question whether he had ever obtained divorce and where, did not violate CPA § 355. Wiener v Wiener, 283 A.D. 950, 130 N.Y.S.2d 212, 1954 N.Y. App. Div. LEXIS 5899 (N.Y. App. Div. 1954).

In absence of statute such as CPA §§ 349–354 (§§ 4502, 4503(a), (b), 4504(a)–(c), 4505, 4513 herein), witness who refuses to divulge sources of criminal information about others before grand jury and asserts that identity of his informers was confidentially acquired while he was engaged by his employer, voluntary private agency, in aiding in enforcement of criminal laws, has no privilege other than constitutional one of self-incrimination. People v Keating, 286 A.D. 150, 141 N.Y.S.2d 562, 1955 N.Y. App. Div. LEXIS 3998 (N.Y. App. Div. 1955).

A witness is privileged to refrain from divulging not only all the facts and circumstances which might subject him to successful prosecution for a crime, but to refrain from furnishing a single link in a chain of facts capable of being used to his detriment or peril. American Blue Stone Co. v Cohn Cut Stone Co., 161 N.Y.S. 667, 97 Misc. 428, 1916 N.Y. Misc. LEXIS 1112 (N.Y. Sup. Ct. 1916), aff'd, 177 A.D. 952, 164 N.Y.S. 1085, 1917 N.Y. App. Div. LEXIS 5859 (N.Y. App. Div. 1917).

On examination before trial, in action for death of pedestrian struck by automobile, defendant may claim privilege against self-incrimination. Owen v Fisher, 66 N.Y.S.2d 856, 189 Misc. 69, 1947 N.Y. Misc. LEXIS 1959 (N.Y. Sup. Ct. 1947).

If a Florida divorce is void for lack of domicile, a husband's subsequent marriage and cohabitation constitute the crimes of bigamy and adultery and upon an examination before trial in an action for a judgment declaring the Florida divorce decree void and annulling the husband's second marriage, the husband may properly refuse to say whether he had obtained a divorce against the plaintiff in Florida and how long he had lived in Florida and New York. Schwartz v Schwartz, 4 Misc. 2d 790, 164 N.Y.S.2d 943, 1956 N.Y. Misc. LEXIS 1422 (N.Y. Sup. Ct. 1956).

10. —Vehicle and traffic violation under CPA § 355

Evidence that a plaintiff in an action for negligence growing out of the operation of an automobile, has been previously convicted for traffic infraction, should not be received to affect his credibility when a witness in an action or proceeding, and he may not be required to disclose a conviction therefor. De Stasio v Janssen Dairy Corp., 279 N.Y. 501, 18 N.E.2d 833, 279 N.Y. (N.Y.S.) 501, 1939 N.Y. LEXIS 884 (N.Y. 1939).

Conviction of automobile operator in traffic court of failure to yield right of way to pedestrian at intersection held insufficient to show reckless driving despite failure to object to its incompetency. Hart v Mealey, 287 N.Y. 39, 38 N.E.2d 121, 287 N.Y. (N.Y.S.) 39, 1941 N.Y. LEXIS 1388 (N.Y. 1941).

Defendant's prior plea of guilty to a traffic offense is admissible as evidence of his carelessness in a civil suit for damages, and the statutory provisions (Vehicle & Traffic L § 2, subd 29 and CPA § 355) forbidding use of conviction of traffic infraction to affect credibility will not be extended to forbid its use as evidence in chief. Defendant's contention that he did not mean what he said when he pleaded guilty to traffic offense goes to the weight, and not to the

admissibility of his plea as evidence of carelessness. Ando v Woodberry, 8 N.Y.2d 165, 203 N.Y.S.2d 74, 168 N.E.2d 520, 1960 N.Y. LEXIS 1060 (N.Y. 1960).

In an action to recover damages for the death of plaintiff's intestate, who was killed in an automobile collision, it was prejudicial error to refuse to permit an inquiry on the cross-examination of the defendant as to whether he had been convicted of the crime of driving an automobile while intoxicated. This was not a conviction for a traffic infraction, referred to in CPA § 355. Geiger v Weiss, 245 A.D. 817, 281 N.Y.S. 154, 1935 N.Y. App. Div. LEXIS 11074 (N.Y. App. Div. 1935).

Conviction of dangerous driving in violation of New York City Police Traffic Regulations was conviction of traffic infraction, and was inadmissible in civil action to discredit witness. Walther v News Syndicate Co., 276 A.D. 169, 93 N.Y.S.2d 537, 1949 N.Y. App. Div. LEXIS 3137 (N.Y. App. Div. 1949).

11. —Effect of statute of limitations

One may be compelled to testify to facts tending to show the commission of an offense where prosecution is barred by limitations. Meyer v Mayo, 173 A.D. 199, 159 N.Y.S. 405, 1916 N.Y. App. Div. LEXIS 6590 (N.Y. App. Div. 1916).

Defendant's privilege against incriminating himself is not destroyed by operation in his favor of statute of limitations. Meyer v Mayo, 166 N.Y.S. 284 (N.Y. Sup. Ct.), aff'd, 179 A.D. 886, 165 N.Y.S. 1099, 1917 N.Y. App. Div. LEXIS 6985 (N.Y. App. Div. 1917).

Witness was entitled to invoke constitutional privilege against self-incrimination in refusing to answer questions as to alleged Communist association, even though six year's statute had run, where answers could lead to evidence of witness' present activities, and afford grounds for prosecution under the Smith Act. Application of Newark Morning Ledger Co., 215 N.Y.S.2d 929 (N.Y. Sup. Ct. 1961).

Where it appears that the offense is barred by statute of limitations the court is barred to pronounce against his claim to exceptions. CLOSE & AIKIN v OLNEY, 1845 N.Y. LEXIS 69 (N.Y. Sup. Ct. July 1, 1845); Wolfe v Goulard, 15 Abb. Pr. 336, 1863 N.Y. Misc. LEXIS 175 (N.Y. Sup. Ct. 1863).

12. Exposure to contempt proceeding

The president and general manager of a bankrupt corporation was not entitled to plead privilege under this section, when questioned as to certain corporate transactions, on the ground that his answers might hold him for contempt of court, liability to punishment for contempt not being a penalty within the meaning of CPA § 355. Cohen v I. Goodman & Son, Inc., 205 A.D. 312, 199 N.Y.S. 497, 1923 N.Y. App. Div. LEXIS 5012 (N.Y. App. Div.), app. dismissed, 236 N.Y. 642, 142 N.E. 317, 236 N.Y. (N.Y.S.) 642, 1923 N.Y. LEXIS 1092 (N.Y. 1923).

13. Subjection to civil suit

The fact that a witness by giving his testimony may thereby lay himself open to a civil suit will not privilege him from testifying. Taylor v Jennings, 30 Super Ct (7 Robt) 581.

14. Subjection to penalty or forfeiture

An action against a director of a manufacturing corporation to charge him with a corporate debt by reason of failure to file an annual report is an action to recover a penalty and the defendant is not obliged to testify and is privileged. Gadsden v Woodward, 103 N.Y. 242, 103 N.Y. 638, 8 N.E. 653, 103 N.Y. (N.Y.S.) 242, 1886 N.Y. LEXIS 1053 (N.Y. 1886).

The liability of trustees of social clubs incorporated under chap 368 of 1865, for debts contracted while they were trustees is not in the nature of a penalty. When the complaint in an action to enforce such a liability is verified, the answer must be verified. Rogers v Decker, 131 N.Y. 490, 30 N.E. 571, 131 N.Y. (N.Y.S.) 490, 1892 N.Y. LEXIS 1045 (N.Y. 1892).

Even though the complaint in an action against directors by one who became a stockholder because of false reports issued by said directors is verified, the answer need not be verified. Thompson v McLaughlin, 138 A.D. 711, 123 N.Y.S. 762, 1910 N.Y. App. Div. LEXIS 1619 (N.Y. App. Div. 1910).

The fine or imprisonment that might be imposed for a violation of an injunction has no reference to the "penalty" mentioned in CPA § 355. Russie Cement Co. v F. W. Woolworth & Co., 125 N.Y.S. 82, 68 Misc. 454, 1910 N.Y. Misc. LEXIS 445 (N.Y. Sup. Ct. 1910).

In proceeding to determine right of testator's widow to take intestate share against will, she may be called to witness-stand and asked if she signed separation agreement waiving all rights in testator's estate. In re Howland's Will, 125 N.Y.S.2d 234, 1953 N.Y. Misc. LEXIS 2305 (N.Y. Sur. Ct. 1953), rev'd, 284 A.D. 306, 132 N.Y.S.2d 451, 1954 N.Y. App. Div. LEXIS 3391 (N.Y. App. Div. 1954).

One cannot be compelled to testify where he would be exposed to a penalty or forfeiture. Anable v Anable, 24 How Pr 92; see Livingston v Tompkins.

The provision to the effect that the rule compelling parties to answer relevant questions "does not require a witness to give an answer which will tend to . . . to expose himself to a penalty or forfeiture," cannot be invoked to justify the contestant of a will in refusing to furnish testimony which would establish the fact or validity of the disputed document. Estate of Hoyt, 1887 N.Y. Misc. LEXIS 9 (N.Y. Sur. Ct. May 1, 1887).

An action against a trustee of a corporation under chap 510 of 1875, to recover debts due from company on ground of failure to file annual report, is not an action for such a penalty as will excuse defendant from answering questions which would tend to expose him to a verdict. Geisenheimer v Dodge, 1 How. Pr. (n.s.) 264.

Research References & Practice Aids

Cross References:

Immunity of witness, extent and limitations, CLS CPL § 50.20.

Rules of evidence; in general, CLS CPL § 60.10.

Grand jury; witnesses, compulsion of evidence and immunity, CLS CPL § 190.40.

Nomination of guardian, CLS Men Hyg § 81.17.

Immunity for action of military courts or boards, CLS Mil § 131.9.

Damaging military or naval equipment, supplies or stores, CLS Mil § 238-a.

Federal Aspects:

Taking of testimony in trials in United States District Courts, USCS Court Rules, Federal Rules of Civil Procedure, Rule 43.

General rule for privileges in United States courts, USCS Court Rules, Federal Rules of Evidence, Rule 501.

Jurisprudences:

2 NY Jur 2d Administrative Law § 134.

33 NY Jur 2d Criminal Law § 2032.

44 NY Jur 2d Disclosure § 87.

51 NY Jur 2d Eminent Domain § 405.

57 NY Jur 2d Evidence and Witnesses § 3.

58 NY Jur 2d Evidence and Witnesses § 456.

58A NY Jur 2d Evidence and Witnesses §§ 842., 843.

84 NY Jur 2d Pleading § 126.

81 Am Jur 2d, Witnesses §§ 80., 83.– 85.

2 Am Jur Proof of Facts 467., Best and Secondary Evidence.

3 Am Jur Proof of Facts 405., Conviction of Crime.

17 Am Jur Proof of Facts 1., Tape Recordings as Evidence.

6 Am Jur Trials 263., Direct Examination of Defendant.

Law Reviews:

Admissibility in civil actions of constitutionally protected evidence: some brief observations. 34 Alb. L. Rev. 512.

Privilege against self-incrimination “federalized.” 31 Brook. L. Rev. 1.

Books and records and the privilege against self-incrimination. 33 Brook. L. Rev. 70.

Preventing unfair use of the privilege against self-incrimination in private civil litigation: a critical analysis. 39 Brook. L. Rev. 121.

Required information and the privilege against self-incrimination. 65 Colum. L. Rev. 681.

Immunity statutes and the Constitution. 68 Colum. L. Rev. 959.

Evidence symposium. 52 Cornell L.Q. 177.

Constitutionality of administrative or statutory sanctions upon the exercise of the privilege against self-incrimination. 36 Fordham L. Rev. 593.

Toward a New York evidence code: some notes on the privileges. 19 N.Y.L. Sch. L. Rev. 791.

Immunity and the privilege against self-incrimination—too little and too much. 39 NYS B J 219.

Treatises

Matthew Bender’s New York Civil Practice:

Weinstein, Korn & Miller, New York Civil Practice: CPLR Ch. 4501, Self-incrimination.

1 Carrieri, Lansner, New York Civil Practice: Family Court Proceedings § 3.06.

2 Lansner, Reichler, New York Civil Practice: Matrimonial Actions §§ 35.04, 35A.05.

Matthew Bender’s New York CPLR Manual:

CPLR Manual § 20.02. Scope of disclosure.

CPLR Manual § 36.05. Provisional remedies.

Matthew Bender’s New York Practice Guides:

1 New York Practice Guide: Domestic Relations § 12.06; 3 New York Practice Guide: Domestic Relations § 37.06.

LexisNexis Practice Guide New York e-Discovery and Evidence § 9.05. Objecting Based on Privilege.

Matthew Bender’s New York AnswerGuides:

Lexis Nexis AnswerGuide New York Civil Disclosure § 8.15. Asserting Privilege Against Self-Incrimination.

LexisNexis AnswerGuide New York Civil Litigation § 10.03. Ensuring Witness Is Competent to Testify.

Matthew Bender’s New York Evidence:

1 Bender's New York Evidence § 101.09. Privileges.

4 Bender's New York Evidence § 161.01. Overview of Fifth Amendment Privilege.

4 Bender's New York Evidence § 161.04. Danger of Incrimination.

Annotations:

Right of one against whom testimony is offered to invoke privilege of communication between others. 2 ALR2d 645.

Sufficiency of witness' claim of privilege against self-incrimination. 51 ALR2d 1178.

Dismissing action or striking testimony where party to civil action asserts privilege against self-incrimination as to pertinent question. 4 ALR3d 545.

Plea of guilty or conviction as resulting in loss of privilege against self-incrimination as to crime in question. 9 ALR3d 990.

Privilege against self-incrimination as ground for refusal to produce noncorporate documents in possession of person asserting privilege but owned by another. 37 ALR3d 1373.

Witness' refusal to testify on ground of self-incrimination as justifying reception of evidence of prior statements or admissions. 43 ALR3d 1413.

Admissibility, in action against notary public, of evidence as to usual business practice of notary public of identifying person seeking certificate of acknowledgment. 59 ALR3d 1327.

Modern status of rules as to use of motion in limine or similar preliminary motion to secure exclusion of prejudicial evidence or reference to prejudicial matters. 63 ALR3d 311.

What constitutes a "false statement" within exception to federal use immunity statute (18 USCS § 6002). 28 ALR Fed 938.

Right of witness in federal court to claim privilege against self-incrimination after giving sworn evidence on same matter in other proceedings. 42 ALR Fed 793.

Propriety of court's failure or refusal to strike direct testimony of government witness who refuses, on grounds of self-incrimination, to answer questions on cross-examination. 55 ALR Fed 742.

Loss of privilege against self incrimination by individual as result of his action or inaction occurring when he was not accused—Supreme Court cases. 47 L Ed 2d 922.

Matthew Bender's New York Checklists:

Checklist for Protecting Privileged Communications LexisNexis AnswerGuide New York Civil Litigation § 10.02.

Texts:

NY Pattern Jury Instructions 3d, PJI 1:76.

1 New York Trial Guide (Matthew Bender) § 7.23; 3 New York Trial Guide (Matthew Bender) §§ 51.01, 51.30.

Hierarchy Notes:

NY CLS CPLR, Art. 45

End of Document