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Cross-Examination of a Defendant as to Failure to Testify on Former Trial

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However that may be, one finds a disposition in other recent cases of the Supreme Court of the State to depart from this rule of presumption in the strict literal application thereof, for those cases[9] seem to say that there must be something more than mere travel by the public. What that something more is, however, does not appear. It is not necessary to show acts of recognition or proprietorship by the public authorities.[10] But it does seem that there is something more in each of the cases than the mere fact of user by the public for the required period, such as the fact that the roadway in dispute was a continuation of other roads acknowledged to be public ways[11] or that the way had been laid out on a plat as a road (for private purposes it is true) and was in fact used by the public,[12] or that cinder walks had been laid on either side of the road and gates placed where it crossed a railroad.[13] So that can it not be said that in addition to travel by the public for the required length of time, the surrounding circumstances must indicate a road of a type intended to be permanent?[14] Thus, a way through wild timberland was not such a road as justified any such presumption from user for the prescribed time, even though houses had been erected along it.[15] Thereby the two presumptions would harmonize, for, if the way remained such as did not assume any of the appearances of a public highway familiar in the general locality, then the period of its use by the public would not make it such, but if its appearance was that of other ways in the locality which *were* public highways, then it were time the owner of the vacant land over which it ran, awoke and rubbed his eyes, and if he permitted such condition for the statutory period, it were meet that he *should be* penalized by such a rule as the second presumption.

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WITNESSES—CROSS-EXAMINATION OF A DEFENDANT AS TO FAILURE TO TESTIFY ON FORMER TRIAL—[United States] In a recent prosecution for a violation of the National Prohibition Act a government witness testified to admissions by the defendant who did not testify on his own behalf in that trial. On a second trial of the same case the defendant voluntarily took the stand and denied the alleged admissions. Over objection, he was then cross-examined by the judge as to his failure to testify on the first trial and his reasons for such failure. The defendant answered that he did not

9. *Palmer* v. *City of Chicago* 248 Ill. 211; *City of Springfield* v. *Springfield Ry. Co.* 295 Ill. 238; and see *Boss* v. *Ill. Cent. R. R. Co.* 210 Ill. App. 673.

10. *Phillips* v. *Leininger* 280 Ill. 140.

11. *Weihe* v. *Pein* 281 Ill. 138, 141.

12. *Norworth* v. *Sheets* 269 Ill. 573.

13. *Boss* v. *Illinois Central Rd. Co.* 210 Ill. App. 668.

14. *Law* v. *Neola Elevator Co.* 281 Ill. 150 (where the road was a cul de sac leading up to a man's place of business only, but used by the public in resorting to the place for business, and had become so well traveled as to have all the appearance of a public highway).

15. *Town of Grand Prairie* v. *Schneider* 211 Ill. App. 107.

think that the prosecution had made a case against him, and that he acted on advice of counsel.

The second trial resulted in a conviction and the defendant sued on a writ of error. On this state of facts the Circuit Court of Appeals certified the following question: "Was it error to require the defendant, Raffel, offering himself as a witness upon the second trial, to disclose that he had not testified as a witness in his own behalf upon the first trial?"

The Supreme Court, in an opinion by Mr. Justice Stone, answered the question in the negative.[1] While this decision may settle the question for the Federal Courts, there is a sharp conflict among the states where the problem has arisen, with the apparent weight of authority, numerically at least, against the admission of such evidence.[2]

On the first trial the Fifth Amendment to the Constitution protected the defendant from being made a witness against himself, and the statute[3] protected him, so far as possible, from adverse inference or comment because of his failure to become a witness on his own behalf. The statute seems unnecessary because of the general rule that one is not to be prejudiced by the exercise of a legal privilege, but at least it emphasizes the legislative policy on the subject. There are occasional suggestions that the protection is limited to the particular stage of the case in which the privilege is exercised, but no plausible reason has ever been given for such a restriction. If the defendant had remained silent on the second trial, practically all of the courts agree, and the opinion concedes, that the fact of the defendant's failure to testify on the first trial would not have been admissible against him.[4] It would be absurd to hold that the defendant was protected from adverse inference and comment on his silence at the last trial, but not on his silence at the first trial, which was equally privileged and protected at that time.

His failure to testify on the first trial might be logically relevant on the theory of an implied admission, as in the ordinary case where a person fails to deny a criminal accusation,[5] or what amounts to the same thing, fails to deny incriminating facts in his testimony.

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1. *Raffel* v. *United States* (1926) 46 Sup. Ct. Rep. 566.

2. Supporting the cross-examination, see *Taylor* v. *Commonwealth* (1896) 17 Ky. Law 1214; *Commonwealth* v. *Smith* (1895) 163 Mass. 411; *People* v. *Prevost* (1922) 219 Mich. 233; *Sanders* v. *State* (1907) 52 Tex. Cr. 156.

Contra: *Maloney* v. *State* (1909) 91 Ark. 485; *State* v. *Bailey* (1880) 54 Ia. 414; *Parrott* v. *Commonwealth* (1898) 20 Ky. Law 761; *Buckley* v. *State* (1899) 77 Miss. 540; *Smith* v. *State* (1907) 90 Miss. 111; *Parrott* v. *State* (1911) 125 Tenn. 1; *Smithson* v. *State* (1912) 127 Tenn. 357; *Wilson* v. *State* (1908) 54 Tex. Cr. 505.

3. U. S. Comp. Stat. sec. 1465.

4. *Maloney* v. *State* (1909) 91 Ark. 485, and cases cited in opinion.

5. *Sparf* v. *United States* (1895) 156 U. S. 51.

As a matter of experience there is a certain probability that an innocent man will deny a false accusation. But in spite of the logical relevancy of the evidence, the fact of a failure to testify is rejected because it would render the Constitutional privilege worthless,[6] and because the statute as a matter of policy has prohibited the use of such an inference or presumption.

When the defendant voluntarily took the stand on the second trial, he waived the protection of the Fifth Amendment. He could not become a witness for himself without becoming equally a witness against himself. He was bound to tell the whole story. He could not limit his testimony to what was favorable. If he failed to deny incriminating matters which he might have denied, such failure would have been the proper subject of comment and inference.[7] He would be subject to all legitimate and proper cross-examination. But his waiver of the protection of the Fifth Amendment would not subject him to cross-examination as to facts excluded by some other rule. For example, he could not be cross-examined as to privileged communications with his counsel, or as to an involuntary confession.

Since both the Constitution and the statute prohibit the use of the defendant's silence at a former stage of the case as an implied admission of guilt, it would be no more competent to prove the inadmissible fact *for that purpose* by the cross-examination of the defendant than to prove it by other means. In other words, his waiver of the protection of the Fifth Amendment subjected him to cross-examination on all admissible facts, but that could not make his former exercise of privilege an admissible fact to prove him guilty. Is there any other theory which would make such fact the proper subject of cross-examination?

The leading case[8] sanctioning such cross-examination admits it on the ground that it tends to discredit the defendant's testimony. The theory of the *Smith* case—and it is the only one of the cases relied on which has worked out a theory—is shown by the following extract:

"But it may be assumed that the provision of the Constitution needs no statute to reinforce it in this particular, and that the refusal to testify before the grand jury could create no presumption against the defendant, whether the above statute applies or not. This means, no presumption upon which a legal judgment or consequence could rest. Magistrates and courts in their official action must give no weight to it. *One who avails himself of his constitutional privilege, and refuses to accuse or furnish evidence against himself, shall be subject to no injurious consequence under the law by reason of his having done so.*"

"The defendant in such a case now says that he is innocent. He formerly did not say that he was innocent, but that he would not answer lest he might criminate himself. This fact, though open to explanation, has some tendency to throw doubt on the truth of his present testi-

6. *People* v. *Tyler* (1869) 36 Calif. 522.

7. *Caminetti* v. *United States* (1917) 242 U. S. 470.

8. *Commonwealth* v. *Smith* (1895) 163 Mass. 411.

mony, and thus has some bearing upon one material question, namely, the truthfulness of the witness."

In short, the court held that while the constitutional privilege of silence at a prior stage of the case could not be used positively as an implied admission of guilt, neither the constitution nor the statute prohibited its purely negative use to discredit, and therefore such former claim of privilege became the proper subject of cross-examination. This is the view apparently adopted in the principal case, for the opinion states:

"It is elementary that a witness, who upon direct examination denies making statements relevant to the issue, may be cross-examined with respect to conduct on his part inconsistent with this denial. The value of such testimony, as is always the case with cross-examination, must depend upon the nature of the answers elicited and their weight is for the jury. But we cannot say that such questions are improper cross-examination, although the trial judge might appropriately instruct the jury that the failure of the defendant to take the stand on his own behalf is not in itself to be taken as an admission of the truth of the testimony which he did not deny."

The logical relevancy of a former claim of privilege to discredit later testimony may be conceded because there may be more or less inconsistency between the two.

And there may be some inconsistency between a mere failure to testify at a former stage of the case and the defendant's later testimony at the trial.

But when it is remembered that the failure to place the defendant on the stand is normally the act of his counsel who may be moved to that course by various reasons not understood by the defendant himself, the real evidential value of the fact is exceedingly small, though its prejudicial effect is apt to be very great, in spite of the suggested charge that such silence in itself is not to be taken as an admission of the truth of the testimony which the defendant did not take the stand to deny. If the fact of silence in itself can not fairly be treated as an admission, will the answer normally to be expected that defendant acted on advice of counsel supply the necessary basis for the discrediting inference?

But conceding the logical relevancy of the fact of former silence alone, or in connection with possible answers based on it, the propriety of such cross-examination by no means follows. Logical relevancy is not the sole test of admissibility. The same fact, if relevant at all, is equally relevant as affirmative proof of guilt, but, as already seen, is excluded for that purpose by constitutional and statutory policy. In fact the principal effect of the various rules of evidence is to shut out facts having logical relevancy, but of too little value as compared with their probable misleading or prejudicial effect. For example, hearsay may be quite relevant, but is normally excluded. The bad character of a defendant in a criminal case may be quite as relevant to prove guilt, as his good character to prove innocence, but the bad character is universally rejected.

Returning to the problem in hand, it may be easy enough as a matter of theory to distinguish between the prohibited use of the defendant's former silence as an implied admission to prove guilt and the negative use of the same fact for the sole purpose of discrediting his testimony, but is it possible to make it work in practice?

In the case of a mere witness it is undoubtedly permissible to cross-examine as to any inconsistency between his present testimony and his former statements or conduct. His former silence may discredit his present testimony, and it is assumed that a jury can be made to understand that reasons for doubting or refusing to credit his testimony are not to be taken as proof of a contrary state of fact, just as prior contradictory statements may be used to discredit without violating the hearsay rule. In such a case the prior statement is not received to prove the truth of the facts therein asserted, but merely to detract from the credit of the later statement. But where the defendant is the witness such a refinement seems impracticable, if not impossible. In the ordinary case where a defendant has made express or implied admissions and later testifies, such admissions may be used both to prove his guilt and to disprove his testimony, and hence no difficulty arises. The jury are entitled to make all logical uses of the evidence.

In the actual case the silence of the defendant at the first trial must be taken as an implied admission of the truth of the adverse testimony, otherwise there would be no inconsistency with his present testimony and no discredit.

But the federal statute which certainly applied when he failed to testify clearly prohibits its use to sustain the charge. It is doubtful whether a trained judge could actually make a purely negative use of such an implied admission. If he thought the inconsistency sufficient to refuse credit to the testimony, it is unlikely that he could avoid being influenced by it in his final conclusion.

Certainly it is inconceivable that the average untrained jury could successfully perform such a feat of mental gymnastics.

If it is practically impossible to limit the effect of the evidence, then it would seem that the policy of the statute ought to exclude it altogether. It is to be regretted that this phase of the problem does not seem to have been considered by the court.

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WORKMEN'S COMPENSATION—DISABILITY—LOSS OF MEMBER OF BODY—[Illinois] The case of *Superior Coal Co.* v. *Industrial Com.*[1] is welcomed as furnishing the answer to the query which was the burden of a recent comment in these pages[2] relative to the effect upon right to compensation as for total permanent disability, of the loss, say of an eye or a hand, where the claimant was already minus the other eye or hand at the time of the injury for which compen-

1. (1926) 321 Ill. 533.
2. ILLINOIS LAW REVIEW XX 93, 94.