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THE PERMISSIBILITY OF COMMENT ON THE DEFENDANT'S FAILURE TO TESTIFY IN HIS OWN BEHALF IN CRIMINAL PROCEEDINGS

When the question as to whether or not a prosecuting attorney should be permitted to comment on the failure of the accused in a criminal action to testify in his own behalf first arose in the state of Washington, the Supreme Court rested its decision[1] denying the right to make such comment on a statute.[2] The abrogation[3] of this statute by the Supreme Court under its rule-making power,[4] leaves this question of vital importance in criminal practice open and undecided in this State.

The statute referred to formerly provided in substance that the accused in a criminal case could offer himself as a witness in his own behalf, thereby subjecting himself to the usual rules of law relating to cross-examination, and further provided

> "that nothing in this code shall be construed to compel such accused person to offer himself or herself as a witness in such case *And provided further, that it shall be the duty of the court to instruct the jury that no inference of guilt shall arise against the accused if the accused shall fail or refuse to testify as a witness in his or her own behalf* "[5] (Italics ours)

The Supreme Court in its decision in the case of *State v. Smokalem*,[6] merely said in relation to the question, that the statute[7] im-

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[1] *State v. Smokalem*, 37 Wash. 91, 79 Pac. 603 (1905).
[2] Rem. Comp. Stat. (Wash., 1922), Sec. 2148.
[3] Rule IX, sec. 1, 140 Wash. XXXV..
[4] Laws 1925, Ch. 118, Sec. 1, providing in substance that the Supreme Court shall have power to make rules for the simplification of pleading, practice, and procedure of the courts of the state and all laws in conflict with such rules shall be nullified.
[5] See Note 2, *supra*. The italicized portion was abrogated by the recent rule cited in Note 3.
[6] See Note 1, *supra*.
[7] Referring to Rem. Comp. Stat. (Wash., 1922), Sec. 2148.

posing a duty on the court to instruct that no inference arose against the defendant by reason of his failure to testify, prohibited by implication the prosecuting attorney as an officer of the court from commenting on such failure.

Now, with the italicised proviso of the quoted section gone, there arises the question whether or not, in the absence of any statute affecting the matter, comment by the prosecutor on the defendant's silence in a criminal trial violates the defendant's constitutional privilege[8] against compulsory self-incrimination.

Historical Background of the Privilege Against Self-Incrimination

Before considering the scope of the constitutional privilege from compulsory self-incrimination, a short investigation of the common law privilege is both interesting and necessary for a proper understanding of the question. Since the growth of the common law privilege took place over a period of over 400 years, only a slight resume can be given in this discussion.

It may suffice to say that the privilege grew up as a reaction against the oath "*jusjurandem de veritate dicenda*" or inquisitional oath introduced into England by ecclesiastical courts in the late 1300's to replace trial by ordeal and compurgation.[9] The misuse of this oath by these courts and by the common law courts which also undertook the punishment of Protestants under the Stuarts aroused great public indignation,[10] for the use of the oath degenerated into a mere inquisitional process used to probe into the individual's private thoughts to find something chargeable.

During the Reign of Charles I, his courts found the use of this oath very efficacious in destroying his political enemies by treason charges and in obtaining his "forced loans."[12] Not only was the oath used, but it was augmented by bullying and extreme tor ture[13] in even such modern times as to be transferred for certain uses to the colonies.[14] Such persecution brought on the revolution

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[8] Wash. Const. Art. 1, Sec. 9.

[9] 1 Poll. & Mait., Hist. of Eng. Law (1905) 425.

[10] 2 Cobbet, Parl. Hist., 722.

[12] 3 Car. I, C. 1, s. 1-3, 10 (1627)

[13] 1 Stephens, Hist. of Crim. Law, 325 and *Felton's Case*, 3 How St. Tr. 371 (P C., 1628).

[14] Mass. Body of Liberties 1641 (Whitmore's Ed.) s. 45, "No man shall be forced by torture to confess any crime against himself nor any other unless it be in some capital case where he is first fully convicted by clear and sufficient evidence to be guilty After which, if the cause be of that nature, that it is apparent there be other conspirators or confederates with him, then he may be tortured, yet not such tortures as be barbarous and unhumane."

of 1648, ending in the beheading of Charles I, the establishment of the Commonwealth and the destruction of everything the Stuarts had used in their oppression.

The courts of the Commonwealth now decided that compulsory self-incrimination was not permissible in criminal trials.[15] Next the courts of the Protectorate recognized the privilege in civil cases.[16] Though the Stuarts were again restored, their evil practices were gone forever, the liberties gained were extended, and the privilege against self-incrimination was now recognized to include all witnesses.[17]

The growth of the privilege was not, then, accidental,[18] but rather it was the reaction to centuries of tyranny, persecution and torture, recognized as an essential element of fair criminal procedure, springing from the Anglo-Saxon repugnance to oppression and expressing that people's ideal of fairness, equity, and justice.

The privilege was so well entrenched in the common law by 1689 that it did not appear in the Bill of Rights of that year,[19] but a hundred years later suddenly appears in the American Constitution.[20] Since it did not appear in the earlier constitutions it may be supposed that the idea of the necessity of writing it into the Constitution came from clamour raised by the French Constitutional Assembly,[21] against compulsory self-incrimination just before our Bill of Rights was added to the Constitution. It is probable that our delegates to France after the Revolution, seeing the danger of oppression by the use of compulsory self-incrimination and remembering the violation of individual rights under the British Writs of Assistance, had the privilege written into our so-called Bill of Rights as protection against the then fearsome central government. Moreover, the privilege has been so highly regarded that

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[15] *Lilburn's Trial*, 4 How. St. Tr. 1269 (1649).

[16] *The Protector v. Lord Tumley*, Hard. 22 (1655).

[17] *Scrogg's Trial*, 5 How. St. Tr. 1034 (1660) "You are not bound to answer me, but if you will not, we must prove it." *Reading's Trial*, 7 How. St. Tr. 259 (1679).

[18] 1 STEPHEN'S HIST. CRIM. LAW, 342.

[19] *Ibid.* 325.

[20] U. S. CONST. Amend. V The history of the privilege is quite fully discussed in *Twining v. New Jersey*, 211 U. S. 78, 29 Sup. Ct. 14, 53 L. Ed. 97, in which it was assumed for the purpose of argument only, but not decided that comment by a judge on the failure of the accused to testify violated the privilege.

[21] 4 WIGMORE, EVIDENCE (2nd ed., 1923) 817, n. 112.

it has been expressly written into the constitution of every state in the Union save those of Iowa[22] and New Jersey

THE SCOPE AND POLICY OF THE PRIVILEGE

An investigation into the scope and policies of the privilege will be necessary to determine whether comment on its exercise violates its purposes.

From the view-point of the individual, the privilege exists to protect his private life, freedom, and independence to protect him from inquisitional grilling relative to every act that might, to an officious investigator, seem indicative of some unlawful intent. It exists also to protect him from investigations of the police third degree type which easily lead to barbarous practices.

Society and the state itself are also interested in the promulgation of the privilege, for without it the prosecuting system may come to rely on evidence obtained by examining the defendant,[23] the tendency progressively being, first, to seek an incriminating answer, next, to demand it, and ultimately, to force it by bullying, which readily leads to the use of physical force and torture such as reputedly sometimes used in "third degrees"

With this back-ground, it may be said generally that the function of the privilege, generally stated, is to guarantee to the individual that he will not be forced, by positive present act or word to furnish, produce, or make evidence to be used against himself.[24]

THE COMPETENCY ACTS

At common law until very recent times the accused could not testify at his own trial,[25] being disqualified because of interest, though of course, his confession could be received, and prior to the establishment of the privilege he could be examined to obtain a confession. This disqualification was universal until 1864 when Maine passed the first competency act,[26] followed since then by

[22] Iowa guarantees the privilege by statute: Iowa Code 1924, Sec. 13891, and has also held that it is included in the "due process" clause of the Constitution. *State v. Height*, 117 Ia. 650, 91 N. W 935 (1902). However, such opinion is unsound in the face of the opposite holding of the U. S. Supreme Court in *Twining v. New Jersey*, Note 20, *supra*.

[23] "Any system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer morally thereby" 1 WIGMORE ,*op. cit. supra*, Note 21, 472, Sec. 225.

[24] Use of footprints, articles found on the accused, and voluntary statements are not necessarily exceptions to this statement since they come under the head of real evidence. *State v. Nordstrom*, 7 Wash. 506, 35 Pac. 382 (1893) *State v. Barela*, 23 N. M. 395, 168 Pac. 545, L. R. A. 1918B, 844 (1917) and note; 28 L. R. A. 699.

[25] He could since early times make an unsworn statement to the jury 5 Minn. L. Rev 390, 553.

[26] Me., Stat. 1864, c. 280, "—the person so charged shall at his own requests, but not otherwise, be deemed a competent witness."

all the states of the Union save Georgia. Thus, the right of the accused to testify dates back less than 75 years and exists only by virtue of statutory or constitutional provision. This fact coupled with the one that almost all such statutes while qualifying the defendant to testify, provide against comment,[27] explains the dearth of decisions on the point in question.

These competency acts were not passed with any intent of limiting the extent of the privilege but only for the purpose of adding a further privilege of testifying if the defendant desired. As stated by the Virginia Supreme Court

> "The sole purpose of this enactment, it is obvious, was to give the accused, who alone could know the true state of the case and the explanation of its many exculpatory circumstances, the opportunity to testify or not as his interests might dictate."[28]

In order to avoid any possibility of the competency acts limiting the privilege, every state in the Union, with the exception of Georgia, New Jersey, South Carolina and Washington, to which Ohio now may be added,[29] provides in the statute granting competency that the failure of the accused to testify shall not create any inference or presumption against him. This latter clause, though varying slightly in phraseology in some states, is generally construed to prevent comment by either court or prosecutor.[30] Of this group of states only New Jersey[31] has come to allow comment on the failure to exercise the right to testify, and it has no constitutional guarantee against self-incrimination.

The constitution of Washington guarantees the privilege against compulsory self-incrimination in the following words

> "No person shall be compelled in any criminal case to give evidence against himself or be twice put in jeopardy for the same offense."[32]

A statute of the state grants to the accused the right to testify as any other witness, subjects him to cross-examination, and further provides that

> "Nothing in this code shall be construed to compel such

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[27] See Note 30, *infra.*

[28] *Price v. Commonwealth*, 77 Va. 393 (1883)

[29] Ohio amended constitution in 1912 to allow comment. OHIO CONST. Art. I, Sec. 10.

[30] 4 WIGMORE, *op. cit. supra* Note 21, Sec. 2272, p. 900, footnote 4, *Wilson v. U. S.*, 149 U. S. 60, 13 Sup. Ct. 765, 37 L. Ed. 650 (1893) *State v. Garrington*, 11 S. D. 178, 76 N. W 326 (1898) *Commonwealth v. Scott*, 123 Mass. 239, 25 Am. Rep. 87 (1877).

[31] See Note 59, *infra.*

[32] WASH. CONST., Art. 1, Sec. 9.

accused person to offer himself or herself as a witness in such case.[33]

That remaining silent, even though allowed to testify, is not inconsistent with innocence has been often said. The Supreme Court of the United States does so in the following language

> "It is not every one who can safely venture on the witness stand though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offences charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. It is not every one, however honest, who would, therefore, willingly be placed on the witness stand. The statute, in tenderness to the weakness of those who from the causes mentioned might refuse to ask to be a witness, particularly when they may have been in some degree compromised by their association with others, declares that the failure of the defendant in a criminal action to request to be a witness shall not create any presumption against him."[34]

Again it has been said

> "It may be quite natural to infer that an accused remains silent because he cannot truthfully deny the charges, but there are other possible and not improbable explanations. An innocent man might consider it wiser to remain silent rather than to be compelled to disclose suspicious circumstances which would probably outweigh his denial, or, though innocent of the offense in question, he might be compelled to disclose a more serious crime."[35]

EFFECT OF COMMENT ON THE SILENCE OF THE ACCUSED

If comment is allowed on the silence of the accused he is placed in a true dilemma, for if he exercises his privilege not to testify the prosecutor draws an inference of guilt from this fact, whereas, if, to avoid this, he testifies, he thereby waives his privilege in this state[36] and in most other jurisdictions. True, he has a choice, but the choosing between two horns of a dilemma cannot be the exercise of true option,[37] nor does it seem that the exercise of a constitutional right should prove such a trap or place one in such a predicament.

The result which would flow from holding comment permissible has been thus expressed

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[33] See Note 2, *supra.*

[34] *Wilson v. U. S.*, Note 30, supra.

[35] HINTON, CASES ON EVIDENCE. (1919) p. 239, footnote.

[36] Cf. *State v. O'Hara*, 17 Wash. 526, 50 Pac. 477 (1897) *State v. Peoples*, 71 Wash. 451, 458, 129 Pac. 108 (1912) *State v. Crowder* 119 Wash. 450, 205 Pac. 850 (1922) *State v. Ulsemer* 24 Wash. 657, 64 Pac. 800 (1901).

[37] WIGMORE, *op. cit. supra* Note 21, 894, Sec. 2272.

> "This (competency) law, while intended to confer a benefit on the accused, places him in a peculiar position. If he does make the request, and takes the stand, his testimony will be the subject of those tests on cross-examination that may prove embarrassing, and detract largely from its weight as evidence. If, on the other hand, his failure to take the stand on his own behalf can ever be called to the attention of the jury, the provision intended for his benefit would prove a trap and a snare."[38]

The effect of waiver of the privilege by taking the stand in this state reveals the real danger to the accused when placed in this predicament. He may be cross examined as any other witness,[39] he may be charged with admitting all the evidence adduced against him that he fails to deny by his own testimony[40] and his credibility may be attacked in any manner even to the extent of introducing prior convictions of any crime.[41] The state may also show that his reputation for truth is bad[42] and may request an instruction that the interest of the accused discredits the weight of his testimony [43]

If comment is permitted, it does not seem probable that the accused could safely choose the other horn of the dilemma and remain silent in the face of the prosecutor's right to comment, for the prosecutor having the last statement to the jury could easily leave the impression with that body that silence on the part of the defendant is itself conclusive of his guilt.

If comment is permissible, the ultimate result is inescapable, —the accused must take the stand, and, thereby waiving his privilege entirely, subject himself to all the dangers and pitfalls of cross-examination set out heretofore. As so aptly stated by the California Supreme Court

> "Now if, at the trial, when for all purposes of the trial, the burden is on the people to prove the offense charged by affirmative evidence, and the defendant is entitled to rest on his plea of not guilty, an inference of guilt can be legally drawn from his declining to go upon the stand as a witness, and again deny the charge against him in the form of testimony, he would practically if not theoretically, by his act in declining to exercise his privilege, furnish evidence of his guilt that might turn the scale and con-

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[38] *State v. Garrington*, Note 30, *supra.*
[39] *State v. Crowder* Note 36, *supra.*
[40] *State v. McCormick*, 127 Wash. 288, 220 Pac. 808 (1923).
[41] Rem. Comp. Stat. (Wash. 1922), Sec. 2290, and *State v. Turner*, 115 Wash. 170, 196 Pac. 638 (1921).
[42] *State v. Friedlander* 141 Wash. 1, 250 Pac. 453 (1926)
[43] *State v. McCann*, 16 Wash. 249, 47 Pac. 443 (1896).

> vict him. In this mode he would indirectly and practically be deprived of the option which the law gives him.''[44]

If it is conceded then, and there seems no escape from so doing, that allowing comment forces the accused to testify, the constitutional privilege against compulsory self-incrimination is clearly violated, for the privilege of the accused includes freedom from testifying at all, since nothing but questions relative to or leading to his guilt could be asked him. This fact is acknowledged by universal practice and procedure.[45]

True it is that the accused is not compelled to testify by process of law, which distinction is mistakenly drawn in England;[46] but he is nevertheless compelled with the full force and effect of that word, whether he takes the stand in response to summons by the state or by force of an incriminating inference which such a state of the law would permit the state to draw by virtue of his not testifying.

No distinction is made in the application of the rule holding forced confessions inadmissible no matter what kind of force is used to extort them. When it is remembered that the same policies and reasons, the protection of the individual and the morals of the prosecuting system are the basis of both rules, it is difficult to see why such a distinction should be made in one case and not in the other, especially when the privilege against self-incrimination is a constitutional right and the other only a rule of evidence.

To allow comment by the prosecutor, is to violate the policies of the privilege, no matter which means of escape the accused chooses from the position in which he is placed thereby If he testifies, waiving his privilege, the prosecution may soon come to depend on the incriminating statements or confessions resulting from the cross-examination, or the discrediting facts revealed in the attack on credibility, while, if the accused chooses to remain silent the prosecution will rely strongly on the inference of guilt which it will deduce from this circumstance.

The Analogy of the Rule Governing Other Privileges

Since the other evidentiary privileges such as that between physician and patient, attorney and client and husband and wife are similar in nature to the privilege in question, the almost universal holding, that the exercise of such privilege is not the proper

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[44] *People v. Tyler* 36 Cal. 522 (1869).

[45] 5 Wigmore, *op. cit. supra* Note 21, Sec. 3134.

[46] *Kopps v. Regina* (1894). App. Cases 650; *Queen v. Rhodes* [1899] 1 Q. B. 77, 68 L. J. 83, 79 L. T. 360, 62 J. P 774, 47 W R. 121.

subject of comment,[47] should be of some considerable weight in the decision of the principal problem.

The holding of the Supreme Court of Washington is interesting on the question of comment on the exercise of the privilege between physician and patient

> "If the plaintiff had the legal right to have this testimony excluded, she could exercise that right without making it the subject of comment for the jury "[48]

It is interesting also to note that the reason given for denying comment in each case, is, that to allow comment is to destroy the privilege.[49] Certainly the same reasoning applies in the case of the privilege in question and certainly, also, a constitutional privilege is entitled to at least as much consideration as a mere common law or statutory privilege.

THE DECISIONS ON THE QUESTION

As has been stated,[50] due to statutory provisions against comment on the accused's failure to testify, but few states have had the opportunity to pass on the question, in the absence of statute.

The California case[51] is the leading case. It was decided in 1869 just after the California competency act went into effect. That act enabled the defendant to testify if he chose, but it did not contain the usual clause that his failure to testify should not create any presumption against him. Thus the California act of 1866 is in substance exactly the same as the present Washington statute now that the new rule has stripped off the quoted words italicised at the beginning of this article. There being no express provision against comment or inference, there arose in California then, as there arises here now, squarely the question whether, in the absence of any statute forbidding it directly or inferentially, comment by the prosecutor on the defendant's failure to take the stand violated the constitutional provision against self-incrimination—a provision identical with the one in this state.[52] The California case denied the prosecutor the right to comment in these words

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[47] Comment on the exercise of privilege between physician and patient not permissible. *Lane v. Spokane Falls & Northern R. R. Co.*, 21 Wash. 119, 57 Pac. 367, 46 L. R. A. 152 (1900). Same as to privilege between attorney and client. *Wentworth v. Lloy*, 10 H. L. Cas. 589 (1864) *Travelers Ins. Co. v. Pomerantz*, 214 Misc. 250, 207 N. Y. S. 81. Same as to privilege between husband and wife. *Zumwalt v. State*, 16 Ariz. 82, 141 Pac. 710 (1914) *Mash v. People*, 220 Ill. 86, 77 N. E. 92 (1906). *State v. Taylor*, 57 W Va. 228, 50 S. E. 247 (1905).

[48] *Lane v. Spokane Falls & N. R. R. Co., supra* Note 40.

[49] Note 40, *supra.*

[50] See main text relating to Notes 27 and 30, *supra.*

[51] See Note 44, *supra,* California has since also covered the point by code. Cal. Penal Code, Sec. 1323.

[52] CALIF. CONST. Art. I, Sec. 13.

> "—In this mode [if comment were allowed] he would indirectly and practically be deprived of the option which the law gives him, and of the benefit of the provision of the law and the Constitution, which say, in substance, that he shall not be compelled to criminate himself" "to permit such an inference would be to violate the principles and the spirit of the Constitution and the statute, and defeat, rather than promote the object designed to be accomplished by the innovation [allowing accused to testify] in question."
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> "We are of opinion, therefore, that the Court erred in permitting the District Attorney to pursue the line of argument to which objection and exception were taken, and intimating its approbation of the ground taken, and especially after what had transpired, in refusing the instruction asked on behalf of defendant for the purpose of correcting any erroneous view that might have been impressed on the minds of the jury We think such instruction proper in all cases where the defendant desires it."[53]

Virginia, South Carolina, and Georgia also denied comment with the same course of reasoning.[54]

To these decisions may be added the language of the Supreme Judicial Court of Massachusetts in a decision denying the prosecutor the right to comment, as follows

> "The statutes clearly recognize their (accused persons) constitutional privilege by providing that their failure to testify shall not create any presumption against them."[55]

This Massachusetts case, while predicated on a statute expressly preventing any presumption of guilt arising from the failure to testify, appears to regard this cautionary clause as merely declaratory of the necessary consequence of the constitutional privilege, to-wit, that no inference or comment could be made. In other words, the presumption clause adds nothing, but is merely included to make it clear and express that the legislature did not by the competency statute infringe in any way upon the constitutional privilege. If this is true, the prohibition against comment would seem to flow directly from the constitution and not from the purely declaratory statute.

In a minority of common law jurisdictions, comment has been al-

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[53] *People v. Tyler* Note 44, *supra.*

[54] *Price v. Com.*, 77 Va. 393 (1883) *State v. Howard*, 35 S. C. 197, 14 S. E. 48 (1892) *Bird v. State*, 50 Ga. 585 (1874) *Coleman v. State*, 15 Ga. App. 398, 83 S. E. 154 (1914).

[55] *Commonwealth v. Scott*, 123 Mass. 239, 25 Am. Rep. 87 (1877). See also *Berg v. Pentilla*, 217 N. W 935 (Minn. 1928) Note 12 Minn. L. Rev. 555.

lowed—Maine, New Jersey, and England—though it is only in Maine that the question arose as to the effect of comment in the face of a constitutional privilege against self-incrimination, and it has since changed its holding by statute.[56] The rule in Maine[57] is based on a supposed analogy to the rule of admission by silence and conduct. The Maine rule seems erroneous for the reason that the accused must be under a duty to deny accusations before his silence can imply an acquiescence in them,[58] and if the privilege has any effect at all it would be to remove that duty

The New Jersey decisions are based on the same line of reasoning[59] as those from Maine and therefore fall into the same error. New Jersey has, however, refused to go so far as to allow an instruction authorizing the jury to draw an "irresistible" inference of guilt from the defendant's silence.[60]

When the question arose in England under the limited competency act of 1885 making the defendant in certain criminal charges "competent but not compellable" to give evidence[61] the trial judge's comment on the defendant's silence was sustained[62] on the basis that "competent but not compellable" must have the same meaning in this case as in the statute affording the defendant in a civil case the right to testify, and that there the words not compellable had been construed to mean not compellable by process of law;[63] so that since comment did not compel the defendant by process of law, it was permissible.

The question cannot be so summarily disposed of. The different situation of the defendant in a criminal case and a civil case is alone enough to render the analogy between the civil competency and criminal competency statutes inaccurate. The closer and more accurate analogy would be to the rule on the admissibility of confessions wherein any force, legal, physical, mental, or moral renders the confession inadmissible.

The full criminal competency act passed in England in 1898 specifically provides that the prosecutor can make no comment,[64] but the right of the judge to comment has been maintained on

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[56] Me. Rev. Stat. 1916, c. 136, Sec. 19.
[57] *State v. Bartlett*, 55 Me. 200 (1867).
[58] JONES, EVIDENCE, Sec. 1044.
[59] *Parker v. State*, 65 N. J. L. 308, 39 Atl. 651 (1898)
[60] *State v. Wines*, 65 N. J. L. 36, 46 Atl. 702 (1900).
[61] 14 & 15 Vict. c. 99.
[62] *Kopps v. Regina*, *supra* Note 39.
[63] *Bartlett v. Lewis*, 12 C. B. N. S. 249 (1862).
[64] 61 & 62 Vict. c. 36, Sec. 1b.

his general power to sum up the evidence and on the inaccurate reasoning of Knopps case.[65]

The three jurisdictions whose decisions have been discussed above are the only jurisdictions save one[66] that have been found allowing any comment on the defendant's silence at the trial, while he was protected by the privilege against self-incrimination.[67] It must be recognized that in each case the comment is by the trial judge by virtue of his duty to sum up the evidence to the jury in those jurisdictions, a thing specifically forbidden by the constitution of the state of Washington.[68]

The reasoning of the cases from those jurisdictions is at least questionable and appears to be wholly incompatible with the existence of the privilege at least as constitutionally guaranteed in this state.

Other Phases of the Privilege.

Though statutes have generally prevented the question of comment on the claim of the privilege by the accused from arising, the courts have had an opportunity to pass on the question as to whether or not the defendant can be put in a position by request for incriminating documents as to have to claim the privilege openly and thus give rise to inferences of guilt or at least of the incriminating character of the documents withheld. The rule of the Federal courts[69] and most other courts[70] seems to be that the defendant shall not, by the exercise of his constitutional right to be forced to give evidence against himself, be placed in such a position.

The Supreme Court of Washington has held that the state cannot, by demanding in open court that the accused produce documents alleged to be incriminating, force the accused to claim the privilege and thus give rise to adverse inference in the eyes of the jury

> "The reasoning to sustain this principle lies in this that the state is not put to the necessity, neither will it be permitted to put an inference of guilt which necessarily

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[65] *Regina v. Rhodes, supra* Note 39, *Kirkham's Case*, 2 Cr. App. R. 253 (1909) *Hampton's Case*, 2 Cr. App. R. 274 (1909).

[66] Ohio. It is significant that it was deemed necessary to amend the constitution to allow comment. See Note 29, *supra.*

[67] A possible exception to this statement may be found in *State v. Garret*, 44 N. C. 358 (1853), where the prosecutor was allowed to draw an inference of the truth of a question which a witness refused to answer on the ground that it was incriminating.

[68] Wash. Const. Art. IV Sec. 16.

[69] *McKnight v. U. S.*, 155 Fed. 972 (1902) *Hibbard v. U. S.*, 172 Fed. 66, 18 Ann. Cas. 1040 (1909).

[70] *Gillespie v. State*, 5 Okla. Cr. 546, 115 Pac. 620, 35 L. R. A. (N. S.) 1171 (1911).

> flows from an imputation that the accused person has suppressed or is withholding evidence, when the constitution provides that no person shall be compelled to give evidence against himself The demand is futile except to put the defendant in a false light before the jury and compel him to defend himself against inferences arising from a collateral circumstance and to the stress of extricating himself from a position in which the constitution says he shall not be placed The fact that a witness may be compelled to answer to the jury for something that could not be introduced directly, is in itself enough to sustain the protective clauses of the constitution.''[71]

This is a clear holding that not only may the state not draw an inference from the claim of the privilege but further it may not put the defendant in such a position that he must openly claim the privilege. If the reasoning is sound in this case the same holding should be made as to the defendant not testifying orally

While it is true that some courts[72] have held that in *civil* cases where a party to the action asserts his privilege against self-incrimination, a logical inference may be drawn from his silence in so far as such silence bears on the civil issues involved in that case, even the adoption of this view does not directly defeat the real purpose of the privilege, which is merely to protect a witness from being required to disclose information which may lead to his criminal prosecution or conviction. In a civil case his criminal guilt is not in issue, whereas in a criminal proceeding it is the very issue in the case. Hence the effect of comment is totally different in the two cases. Even in civil cases there is a strong authority[73] against comment on the exercise of the privilege, on the ground that it is an indirect curtailment of the privilege, and tends to nullify it.

On the question as to the implied acquiescence in accusations or admission of them by silence, it is held that no such acquiescence or admission is implied unless the accusations are made in such a manner that the accused is under a duty to deny them.[74] Almost all jurisdictions hold that when the defendant is in custody of the law he is under no duty to answer accusations because of the privilege against compulsory self-incrimination.[75]

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[71] *State v. Jackson*, 83 Wash. 514, 195 Pac. 470 (1915).

[72] *Morris v. McClellan*, 154 Ala. 639, 45 So. 641, 16 Ann. Cas. 305 (1908) *Morgan v. Kendall*, 124 Ind. 454, 24 N. E. 149, 9 L. R. A. 445.

[73] *Carne v. Litchfield*, 2 Mich. 340 (1852) *Berg v. Pentilla*, Note 55, *supra*, where many authorities are collected.

[74] See Note 58, *supra*.

[75] *Hauger v. U. S.*, 173 Fed. 54 (1909) *Vaughan v. State*, 7 Okla. Cr. 685,

The same reasoning, it seems logical, would prevent any inference arising from silence during trial, for if the privilege protects the accused during the preliminary proceedings of arrest and arraignment it should do the same at the trial.

CONCLUSIONS

In summary, it would seem that to allow the prosecutor to make an adverse comment on the accused's failure to testify is an infraction of his constitutional privilege against compulsory self-incrimination, first, because it practically forces the accused to take the stand and testify as a witness, which is the very thing the constitution says he cannot be forced to do, and second, because permitting such comment on the exercise of a privilege nullifies that privilege and places a privilege guaranteed by the constitution in a position in which the courts have not allowed even ordinary evidentiary privileges to be placed.

If it be claimed that the inference of guilt from the failure of the accused to testify is a natural and logical one, the answer would seem to be that there are also other permissible inferences consistent with innocence, and that, in any event, the constitution forbids the inference to be drawn. Since he is under no duty to speak, the silence of the accused according to well settled principles should not be used against him.

Of the few states that have had the opportunity to pass on the permissibility of such comment, a clear majority have held against it, and the Supreme Court of Washington has flatly held that no inference should arise from the exercise of the constitutional right against self-incrimination when it is exercised by withholding incriminating documents, and has also held that analogous privileges are not subject to comment.

So far as the effect of the new court rule in this state is concerned, which abolishes what was theretofore a mandatory require-

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127 Pac. 264 (1911) *State v. Hillstrom*, 46 Utah 341, 150 Pac. 935 (1915) *State v. Epstein*, 25 R. I. 131, 55 Atl. 204 (1903; "It is clearly the right and privilege of a party in such circumstances to remain silent, and the fact that he does so ought not to be used against him." *Parrot v. State*, 125 Tenn. 1, 139 S. W 1056, 35 L. R. A. (N. S.) 1073 (1911) *Bell v. State*, 93 Ga. 557, 19 S. E. 244 (1894) *State v. Mullins*, 101 Mo. 514, 14 S. W 625 (1890) *State v. Hale*, 156 Mo. 162, 56 S. W 881 (1900) *Comstock v. State*, 14 Neb. 205, 15 N. W 355 (1883) *Maloney v. State*, 91 Ark. 585, 121 S. W 728 (1909) *Com. v. Zorambo*, 205 Pa. 109, 54 Atl. 716 (1903) *Broyles v. State*, 47 Ind. 251 (1874).

ment of the trial judge to instruct that no inference of guilt should arise from the failure to testify, it would seem that the only effect of the new rule is to remove the mandate. If the California[76] view is adopted, which, unaffected by any statute, is based on a constitutional provision like ours and which we may have obtained from California as there construed,[77] it is plain that the constitutional privilege against self-incrimination in and of itself prevents the prosecutor from commenting on the silence of the accused and, moreover, entitles the accused to an instruction on the point if he requests it. In other words, it is in the state of Washington since the adoption of the new court rule no longer the mandatory duty of the court to give the instruction whether requested or not,[78] but it must probably still be given if requested by the accused. While the Supreme Court of Washington has not under all circumstances reversed judgments where comments have been made by the prosecutor on the silence of the accused,[79] it seems a fair supposition that the court will not permit the constitutional guaranty against self-incrimination to be broken down by permitting a prosecutor to drive the accused to the stand through the possession of the power of comment, notwithstanding the fact that the prosecutor is as yet denied direct legal process to compel the accused to testify

There seems no other possible conclusion but that such comment by the prosecutor cannot be allowed without practically nullifying a right firmly entrenched in the common law since the seventeenth century and redeclared and guaranteed by virtually all the American constitutions,—a right which in its fundamental fairness to

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[76] See Note 44, *supra*, and main text at Note 53, *supra*.

[77] 12 C. J. 717.

[78] *State v. Gustavson*, 87 Wash. 613, 152 Pac. 335 (1915).

[79] *State v. Raub*, 103 Wash. 214, 173 Pac. 1094 (1918), discussed in *Spokane v. Roberts*, 132 Wash. 568, 232 Pac. 316 (1925). See also *State v. Fitzenberger*, 140 Wash. 308, 248 Pac. 799 (1926), where the court held that a statement by the prosecutor to the jury that the testimony of the state was not denied, when no one could have denied it except the accused who did not take the stand, was not an unlawful comment on the silence of the accused—a statement which it would seem in a most pointed and artful way, without expressly doing so, called the attention of the jury to the fact that the accused had not taken the stand.

The doctrine espoused in *State v. Raub*, *supra*, that an unlawful comment by the prosecutor can be cured by an appropriate instruction seems objectionable if the violation of a constitutional right is involved, as it appears to be. As a matter of fact, the third from the last paragraph in *Spokane v. Roberts*, *supra*, says that the comment of the prosecutor was "prejudicial error." If so, it would seem to be an error not curable by an instruction, and the court appears to say so. At any rate the language referred to in the *Spokane v. Roberts*, *supra*, seems to cast some doubt on whether *State v. Raub* would be adhered to.

the accused causes the American system of the administration of justice to stand out above other systems in other parts of the world, whatever may be the defects in our criminal procedure in other matters.

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