Washington University Law Review

Volume 27 | Issue 1

January 1941

Evidence—Privilege Against Self-Incrimination—Refusal of Accused to Answer Questions After Arrest

Follow this and additional works at: https://openscholarship.wustl.edu/law_lawreview

Part of the Constitutional Law Commons, and the Criminal Procedure Commons

Recommended Citation

Evidence—Privilege Against Self-Incrimination—Refusal of Accused to Answer Questions After Arrest, 27 Wash. U. L. Q. 132 (1941).
Available at: https://openscholarship.wustl.edu/law_lawreview/vol27/iss1/20

This Comment on Recent Decisions is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Washington University Law Review by an authorized administrator of Washington University Open Scholarship. For more information, please contact digital@wumail.wustl.edu.

Wills case, it is to be noted that the St. Louis Court of Appeals in two recent cases,[10] again said, without qualification, that an inference might not be based upon an inference to prove a fact. Neither the *Wills* case nor the principal case was referred to in the opinions.

The court in the principal case, in holding that the plaintiff's evidence was sufficient to make a *prima facie* case, even though the jury might have to base an inference upon an inference in reaching the ultimate conclusion, recognizes the rule set out in the *Wills* case. It is hoped that in the future this attitude toward the prohibition of an inference upon an inference will prevail over the older idea. Regardless of the fact that the rule against inferences is probably not given any real effect in most cases, its mere repetition without explanation or basis is bad, and can lead to nothing but confusion and uncertainty in the law. The limitation prescribed in the *Wills* case will insure litigants against inferences based upon evidence which is too remote or speculative, without the necessity of resorting to the untenable "slogan" that an inference may not be based upon an inference. The decision in the *Wills* case and that of the principal case seem to be in line with other improvements in the application of the rules of evidence by the Missouri Supreme Court, such as the ruling on expert testimony in *Scanlon v. Kansas City*,[11] and the elimination of impeachment of witnesses by reputation for morality in *State v. Williams*.[12]

J. W. F.

EVIDENCE—PRIVILEGE AGAINST SELF-INCRIMINATION—REFUSAL OF ACCUSED TO ANSWER QUESTIONS AFTER ARREST—[Missouri].—Defendant was indicted for felonious assault but was not found and arrested for more than a year after the indictment was returned. After his arrest, defendant refused to answer questions until he consulted his attorney. At the trial, the chief of police, in response to questions put by the prosecutor, testified to certain questions which had been asked the defendant after his arrest and to the defendant's refusal to answer. Defendant was convicted, and on appeal the court held that while the testimony ought not to have been admitted, it was not incriminating, and the error was not reversible. On rehearing, *held:* reversed, and new trial granted. The introduction in evidence of defendant's statement that he would not talk until he consulted his lawyer was reversible error as an infringement of defendant's right against self-incrimination. *State v. Dowling*.[1]

---

may be broken down into a string of inferences, each drawn from former inferences. 1 Wigmore, *Evidence* (3rd ed. 1940) 434, §41. He says at page 436, "The judicial utterances that sanction the fallacious and impracticable limitation, originally put forward without authority, must be taken as valid only for the particular evidentiary facts therein ruled upon." For an analysis of the cases of all jurisdictions, see Note (1935) 95 A. L. R. 162.

10. Mendenhall v. Neyer (Mo. App. 1941) 149 S. W. (2d) 366; Pape v. Aetna Casualty & Surety Co. (Mo. App. 1941) 150 S. W. (2d) 569.

11. (1930) 325 Mo. 125, 28 S. W. (2d) 84.

12. (1935) 337 Mo. 884, 87 S. W. (2d) 175, 100 A. L. R. 1503.

1. (Mo. 1941) 154 S. W. (2d) 749. The first opinion was withdrawn by the court, but some of the reasoning of that case is given by the court in the instant case at page 754.

Washington University Open Scholarship

The decision in the instant case, though the facts are simple, raises an involved question of law. The hearsay rule ordinarily excludes evidence of assertions made outside of court, because there is no opportunity to test the grounds of the assertion and the credibility of the witness by cross-examination in court by the party against whom it is offered.[2] When a party's own assertions are offered against him, they are called admissions, and the hearsay rule does not exclude them, because the party cannot complain of lack of opportunity to cross-examine himself before his assertion is admitted.[3] Moreover, statements made in the presence and hearing of a party may be held to be adopted by him when not denied and are receivable in evidence as admissions, unless it can be shown that the party lacked the opportunity or motive to deny them.[4]

Apart from other considerations, statements adopted by the silence of accused while under arrest should be admissible in evidence as admissions. But the Constitution of the United States[5] prohibits compulsory self-incrimination, and the constitution of every state except Iowa and New Jersey gives similar protection in the state courts.[6] In addition to this constitutional protection, almost all the states have statutes which provide that the failure of accused to testify shall not be subject to comment.[7] The Missouri statute, like some others, contains both provisions.[8] The privileges against giving testimony and against comment on failure to testify are ordinarily extended to prohibit inferences from failure to testify at a prior trial or hearing.[9] The question in the instant case, however, is whether the Missouri statute which prohibits either inference or comment "if the accused shall not avail himself or herself of his or her right to testify" should be construed to prohibit the introduction of an accused's refusal to answer questions after arrest but before any formal arraignment. The Missouri court has regarded the accused's silence after arrest much like

2. 4 Wigmore, *Evidence* (3rd ed. 1940) 3, §1048.
3. Ibid.
4. 4 Wigmore, *Evidence* (3rd ed. 1940) 74, §1071.
5. U. S. Const. Amend. V.
6. 8 Wigmore, *Evidence* (3rd ed. 1940) 320, §2252. Reeder, Comment Upon Failure of Accused to Testify (1932) 31 Mich. L. Rev. 40. Article III, §2 of the Missouri Constitution reads in part: "No person shall be compelled to testify against himself in a criminal cause."
7. 8 Wigmore, *Evidence* (3rd ed. 1940) 412, §2272. Reeder, Comment Upon Failure of Accused to Testify (1932) 31 Mich. L. Rev. 40, 43.
8. R. S. Mo. (1939) §4082: "If the accused shall not avail himself or herself of his or her right to testify, or of the testimony of the wife or husband, on the trial in the case, it shall not be construed to affect the innocence or guilt of the accused, nor shall the same raise any presumption of guilt, nor be referred to by any attorney in the case, nor be considered by the court or jury before whom the trial takes place."
9. See Note (1930) 68 A. L. R. 1108, 1153, and cases there cited. 8 Wigmore, *Evidence* (3rd ed. 1940) 418, §2272.

Although Missouri holds otherwise, see State v. Greer (Mo. 1928) 12 S. W. (2d) 87, 90; State v. Pollnow (Mo. 1928) 14 S. W. (2d) 574, 575, the rule against self-incrimination is said to apply equally to the ordinary witness, in order to prevent an inference that the criminating fact exists from the witness's claim of privilege.

https://openscholarship.wustl.edu/law_lawreview/vol27/iss1/20

a formal claim of privilege, and has held that under such circumstances, the accused is under no duty to deny, and that his silence accordingly cannot be proved at the trial.[10] While a number of jurisdictions do not accept this rule,[11] and it has been criticized by an eminent authority,[12] so long as it is the rule in Missouri, it seems that no valid distinction can be drawn between the accused's mere silence and the fact situation in the principal case, namely accused's verbal assertion that he would not make any statements until he consulted his attorney.

The principal case was not complicated by any question of comment by the prosecutor on the defendant's failure to answer questions. Although, ordinarily, evidence of the accused's silence as giving rise to admissions and comment by the prosecutor on such evidence are separately stated by the writers, it is submitted that this demarcation is a difficult one to make on the facts of the cases. Obviously it would be error to admit comment on evidence which could be put before the jury only by means of a previous error. An early Missouri case held that it was not error for the prosecutor to remark that defendant did not deny his guilt, when accused while under arrest, as this related to a past transaction, and not to the "failure of defendant to testify."[13] The reasoning of this case seems to indicate that the court at that time would have permitted proof of defendant's silence after arrest, but later Missouri cases have taken a broader view of the statute and are clearly opposed to this early opinion.[14]

---

10. State v. Richardson (1906) 194 Mo. 326, 92 S. W. 649, 654; State v. Goldfeder (Mo. 1922) 242 S. W. 403, 404; State v. Higgins (1928) 321 Mo. 570, 12 S. W. (2d) 61, 63. See Notes (1932) 80 A. L. R. 1235, 1262, (1938) 115 A. L. R. 1510, 1517. Courts adopting this rule follow an early Massachusetts case, Commonwealth v. Kenney (1847) 12 Met. 235, 46 Am. Dec. 672. The courts not adopting this rule insist that the later Massachusetts cases misconstrued the *Kenney* case, pointing out that it was not upon the fact of arrest alone that the evidence was excluded. See Note (1932) 80 A. L. R. 1235, 1266.

However, where part of the conversation is incriminating and part is not, the entire conversation may be shown. State v. Capotelli (1926) 316 Mo. 256, 292 S. W. 42, 45; State v. Hardin (1929) 324 Mo. 28, 21 S. W. (2d) 758, 761; State v. Murphy (1939) 345 Mo. 358, 133 S. W. (2d) 398, 400.

11. A number of jurisdictions hold that the mere fact of arrest is not sufficient to render the testimony regarding silence of accused inadmissible, but that such fact deserves consideration in determining whether accused was afforded an opportunity to deny, and whether he was called upon to do so. Simmons v. State (1913) 7 Ala. App. 107, 61 So. 466, 467; Pierson v. Commonwealth (1929) 229 Ky. 584, 17 S. W. (2d) 697, 701. See Notes (1932) 80 A. L. R. 1255, 1259, (1938) 115 A. L. R. 1510, 1517; 4 Wigmore, *Evidence* (3rd ed. 1940) 80, §1072.

12. Wigmore states that the better rule is to allow some flexibility according to circumstances. 4 Wigmore, *Evidence* (3rd ed. 1940) 81, §1072.

13. State v. Schmidt (1897) 136 Mo. 644, 38 S. W. 719, 721. Note that in this case no objection was made at the time and no exceptions saved. See Note (1930) 68 A. L. R. 1108, 1155.

14. State v. Swisher (1905) 186 Mo. 1, 84 S. W. 911, 913, cited with approval in Williams v. State (Tex. Cr. App. 1925) 277 S. W. 389. State v. Mardino (Mo. 1924) 268 S. W. 48, 49; State v. Bowdry (Mo. 1940) 145 S. W. (2d) 127, 129, and cases there cited.

Washington University Open Scholarship

The court in the instant case, by reaching its decision only after reversing its first opinion on rehearing, illustrates its hesitancy in reversing a strong case for the state on an error in evidence, the actual effect of which on the outcome of the case may well be doubted.[15] There are a number of decisions in which courts have held that the comment of the prosecutor on the failure of defendant to testify or proof of defendant's silence while under arrest does not result in a miscarriage of justice warranting reversal when defendant's guilt is otherwise clearly established.[16] The American Law Institute and American Bar Association have adopted resolutions declaring that prosecutors should be permitted to comment upon the failure of accused to testify at the trial.[17] Although these resolutions deal with failure to talk at the trial, rather than while under arrest, as in the instant case, they indicate a tendency to relax the strict protection of the privilege against self-incrimination. It is significant to note that the number of states permitting an inference to be drawn from the failure of accused to testify at the trial is gradually being enlarged.[18]

A. M. E.

INSURANCE—RECOVERY BY BENEFICIARY WHO IS CONVICTED OF VOLUNTARY MANSLAUGHTER AFTER KILLING INSURED—[Federal].—The wife of the deceased insured, beneficiary of the policies in question, killed her husband and was convicted of manslaughter. The insurance company filed a bill of interpleader naming her among the defendants. From the record of the criminal case the court found that the killing had occurred under circumstances amounting to a clear case of common law voluntary manslaughter, there being no grades or degrees of the crime in Michigan.[1] *Held:* the wrongful and intentional killing of the insured by the beneficiary precludes

15. The court says in the instant case, at page 753: "We think the record shows that a strong case was made by the State." At page 754, the court says: "There is no contention that the State's counsel referred in argument to Dowling's refusal to discuss his whereabouts, or that they contended his silence was an admission of guilt. In other words, there was no aggravation of the error * * *."

16. State v. Howard (1890) 102 Mo. 142, 14 S. W. 937, 938; State v. Murray (1895) 126 Mo. 611, 29 S. W. 700, 702. See State v. Lee (Mo. 1920) 225 S. W. 928, 930, where the court said: "But, even if the statement aforesaid had not been withdrawn, and defendant's objection thereto had been overruled, it would not have constituted reversible error in this case. The evidence heretofore set out is clear and convincing as to defendant's guilt." Contra, State v. Hogan (Mo. 1923) 252 S. W. 387, 389.

17. For discussion of these proposals, see Reeder, Comment Upon Failure of Accused to Testify (1932) 31 Mich. L. Rev. 41; Bruce, The Right to Comment on the Failure of Defendant to Testify (1932) 31 Mich. L. Rev. 226.

18. 8 Wigmore, *Evidence* (3rd ed. 1940) 412, §2272. See Anderson, The Privilege Against Self-Incrimination (1940) 74 N. Y. L. Rev. 453, 458.

1. Mich. Stat. Anno. 28. 553, C. L., §16717. The statute simply penalizes manslaughter, leaving it to be defined by common law.

https://openscholarship.wustl.edu/law_lawreview/vol27/iss1/20