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## APPEAL AND ERROR - EFFECT OF RULE THAT APPELLATE COURT CAN TAKE NOTICE OF THE FAILURE OF THE DEFENDANT TO TESTIFY

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## RECENT DECISIONS

APPEAL AND ERROR — EFFECT OF RULE THAT APPELLATE COURT CAN TAKE NOTICE OF THE FAILURE OF THE DEFENDANT TO TESTIFY — In affirming a conviction on an indictment for conspiracy to cheat and defraud, the Illinois Appellate Court, an intermediate court of appeals, decided that the evidence was sufficient to justify the jury in concluding that the representations made by the defendants were false. The defendants brought error to review the judgment of the Appellate Court, one ground being that in considering the sufficiency of the evidence, the Appellate Court took notice of the fact that the defendants failed to take the stand and explain the representations. *Held*, it was not error for the Appellate Court on review to consider the fact that the defendants failed to testify in the trial court. *People v. Carmen*, 367 Ill. 326, 11 N. E. (2d) 397 (1937).

Forty-two states have adopted statutory rules dealing with the situation that arises when the defendant in a criminal trial fails to testify.<sup>1</sup> In twenty-four of these states the statute provides that no presumption of guilt shall arise, nor shall any comment be made upon the failure of the accused to testify.<sup>2</sup> Some statutes provide only that no comment shall be made,<sup>3</sup> and some include only the provision that no presumption of guilt shall arise.<sup>4</sup> So far as the statutes prohibit comment, they have been strictly applied; and if any comment is made by counsel, the court should charge that the comment should be disregarded.<sup>5</sup> Comment may be ground for a new trial.<sup>6</sup> Where a presumption of guilt is prohibited, the statute is also strictly interpreted, and the defendant may obtain an instruction that his failure to testify does not create any inference of guilt.<sup>7</sup>

<sup>1</sup> Reeder, "Comment Upon Failure of Accused to Testify," 31 MICH. L. REV. 40 (1932); Shealy, "Comment on Failure of Accused to Testify," 12 WIS. L. REV. 361 (1937).

<sup>2</sup> Reeder, "Comment Upon Failure of Accused to Testify," 31 MICH. L. REV. 40 at 43, note 25 (1932). Georgia, Iowa, New Jersey, Ohio, and Nevada do not have statutes prohibiting comment or a presumption of guilt. In California, Colorado, Massachusetts, New York, South Carolina and Tennessee, there have been cases which have prohibited any inference on constitutional grounds. In South Dakota a statute giving the prosecutor the right to comment on the defendant's failure to testify was held unconstitutional on the ground that it compelled the defendant to give evidence against himself. *State v. Wolfe*, 64 S. D. 178, 266 N. W. 116 (1936).

<sup>3</sup> Conn. Gen. Stat. (1930), § 6480; Fla. Comp. Laws (1927), § 8385; 4 Ind. Ann. Stat. (Burns, 1933), § 9-1603.

<sup>4</sup> Reeder, "Comment Upon Failure of Accused to Testify," 31 MICH. L. REV. 40 at 43, note 23 (1932).

<sup>5</sup> *Clinton v. State*, 56 Fla. 57, 47 So. 389 (1908); *People v. Hess*, 85 Mich. 128, 48 N. W. 181 (1891); *Herndon v. State*, 50 Tex. Crim. Rep. 552, 99 S. W. 558 (1907); UNDERHILL, CRIMINAL EVIDENCE, 4th ed., 216 (1935).

<sup>6</sup> *State v. Holmes*, 65 Minn. 230, 68 N. W. 11 (1896); *State v. Brownfield*, 15 Mo. App. 593 (1884); *Sanders v. State*, 73 Miss. 444, 18 So. 541 (1895).

<sup>7</sup> *Staples v. State*, 89 Tenn. 231, 14 S. W. 603 (1890); *Hays v. State*, 159 Tenn. 388, 19 S. W. (2d) 313 (1928); *State v. Cameron*, 40 Vt. 555 (1868); I WHARTON, CRIMINAL EVIDENCE, 11th ed., 132 (1935).

The rule prohibiting comment has been strictly applied in Illinois where the statute prohibits both a presumption of guilt and comment.<sup>8</sup> There it is held that the court should make no comment on the defendant's failure to testify unless the defendant requests an instruction on the omission;<sup>9</sup> that the prosecutor cannot comment on the defendant's failure to take the stand;<sup>10</sup> and if he does so, such comment is ground for a new trial, even where counsel was admonished by the court and instructions were given the jury to disregard the comment.<sup>11</sup> In the case of *Farrell v. People*<sup>12</sup> the Illinois court stated that the jury should not consider the defendant's failure to testify, and that no inferences should be made. In spite of this decision that the jury should not consider the defendant's failure to testify, it would seem that the instant case holds that the jury is to be allowed to make inferences. If the Appellate Court, in deciding that the evidence was sufficient to justify a verdict by the jury for conviction, took notice of the failure of the accused to testify, then by necessary implication the jury must have been able to consider that circumstance. Under the statute, the instant case would not affect the rule that no comment can be made, but it does decide that the jury can make an inference of guilt, and thus no instruction should be given that the defendant's failure to testify must be disregarded. It is submitted that the instant case is in line with the growing feeling among the members of the bar that inferences should be permitted and comment allowed.<sup>13</sup>

<sup>8</sup> Ill. Rev. Stat. (1937), c. 38, § 734.

<sup>9</sup> *Farrell v. People*, 133 Ill. 244, 24 N. E. 423 (1890).

<sup>10</sup> *Watt v. People*, 126 Ill. 9, 18 N. E. 340 (1888).

<sup>11</sup> *Angelo v. People*, 96 Ill. 209 (1880); *Quinn v. People*, 123 Ill. 333, 15 N. E. 46 (1888). But where the jury could not have reasonably found any other verdict than guilty, the counsel's comment will not justify reversal. *People v. Shader*, 326 Ill. 145, 157 N. E. 225 (1927). And if there is slight doubt of guilt, the conviction will be reversed. *People v. Curran*, 207 Ill. App. 264 (1917). Note also that if a comment is made at a trial without jury, it will not be cause for reversal, as the Appellate Court will not presume that the trial court was influenced by the counsel's reference to the defendant's failure to testify. *People v. Corey*, 349 Ill. 122, 181 N. E. 603 (1932).

<sup>12</sup> *Farrell v. People*, 133 Ill. 244, 24 N. E. 423 (1890). In *People v. Shader*, 326 Ill. 145, 157 N. E. 225 (1927), it was held proper for the judge to instruct that the neglect or failure of the defendant to testify should not create any presumption against him.

<sup>13</sup> 9 PROC. AM. L. INST. 202-218 (1931); 59 A. B. A. REP. 131-141 (1934); Bruce, "The Right to Comment on the Failure of the Defendant to Testify," 31 MICH. L. REV. 226 (1932).