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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 102

ADMIRAL DEWEY ADAMSON,

Appellant,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA

APPELLANT'S BRIEF ON APPEAL

Opinion Below

The opinion of the Supreme Court of California is reported in 27 Cal. (2d) 478, 165 P. (2d) 3.

Jurisdiction

Jurisdiction is sought under Title 28, Section 344 (a), U. S. Code; 8 Federal Code Annotated, page 44; Judicial Code, Section 237, as amended.

Title 28, Section 344 (a), U. S. C., is as follows:

> "(a) A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity

> of a treaty or statute of the United States, and the decision is against its validity; or where is drawn, in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court on appeal."

There was drawn in question in this case the constitutionality under the Fourteenth Amendment of the Constitution of the United States, of Article I, Section 13 of the Constitution of California, which provides as follows:

> "Art. I, § 13. *Permitting comment on evidence and failure of defendant to testify in criminal case.* In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf, and to appear and defend, in person and with counsel. No person shall be twice put in jeopardy for the same offense; nor be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; **but in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury.** The Legislature shall have power to provide for the taking, in the presence of the party accused and his counsel, of depositions of witnesses in criminal cases, other than cases of homicide when there is reason to believe that the witness, from inability or other cause, will not attend at the trial. (As amended November 6, 1934.)" (Black face type ours.)

The section of the California Constitution was challenged in the Superior Court of the State of California (R. 32), and again on appeal before the Supreme Court of the State

of California (R. 386 *et seq.*), and the claimed challenges were denied by the Supreme Court of the State of California on January 6, 1946. A Petition for rehearing was filed January 18, 1946, and denied by the Supreme Court of California on January 31, 1946.

A petition for appeal was filed in the Supreme Court of California on April 3, 1946, and again presented to Justice Wm. O. Douglas, who on April 15, 1946, allowed the appeal (R. 413).

Probable jurisdiction was noted by the Supreme Court June 10, 1946 and the petitioner was permitted to proceed in *forma pauperis* June 10, 1946.

Short Statement of Facts

The defendant, Admiral Dewey Adamson, a poor negro, was arrested on August 24, 1944 at Los Angeles, California (R. 308) and charged with the murder of Stella Blauvelt, a white woman 64 years of age.

Mrs. Blauvelt's body was found on the floor of her Los Angeles apartment at 744 South Catalina Street, Apartment 410, on July 24, 1944, about a month before Adamson's arrest. Her body showed that she had died at least on the afternoon of the preceding day (R. 46).

The defendant had, 24 years before, to-wit, February 3, 1920, been imprisoned in Missouri for the crime of burglary (R. 3) and also for robbery on June 30, 1927. Under California's procedure, the information must charge the prior convictions, (Section 1925 Penal Code) but if the defendant admits them before trial, then no reference can thereafter be made to it unless he denies it.

About two o'clock in the morning of August 24, 1944, the defendant was arrested and taken to the University Police Station at Los Angeles and booked there on suspicion of

murder. The officer who booked him related what happened as follows:

> "A. When the defendant was booked the desk sergeant asked, 'What is the charge?' and the booking—the man who booked him, Officer Towns, said 'Suspicion of murder.' The defendant says, 'Oh, not me.' They went ahead and booked the defendant and the defendant was searched; after the defendant was searched the slip—booking slips were torn out of the machine and one copy of the booking slip was handed to the defendant on the desk and he pushed it away and he says, 'Oh, no you aren't going to put no murder on me,' and he threw the booking slip on the floor."
>
> "Q. Now, directing your attention to the daytime—you said you saw him about 3 a.m., the daytime of that same day, did you have occasion to have the defendant in an automobile in the vicinity of the apartment house here located at 744 South Catalina?
>
> "A. Yes, we did.
>
> "Q. On what street were you in a car with the defendant?
>
> "A. At that time we put the defendant into a car from the Wilshire Station and we drove to several locations * * *."

The officers then drove him over to the vicinity of the apartment house, interrogating him all the while, and accusing him. After the ride, the officer said:

> "Then we went upstairs into the detective bureau, and at that time I asked the defendant if he was ready to tell us the whole story and he said, 'I haven't got anything to say',"
>
> "Q. Directing your attention to the People's Exhibit 35 for identification, Mr. Brennan, I will ask you to examine that and state when and where you first saw those stockings?
>
> "A. It was on Saturday evening which would be August 26th, I believe. Sergt. Wiseman found this stocking on top of the dresser in the room at 2460 South

St. Andrews. I saw him when he picked it up and he handed it to me to look at.

"Q. I am not very good on colors.

"A. It is a lighter color.

"Q. All right, the lighter color. Go ahead.

"A. These are the two I found in the dresser drawer, in the bottom dresser drawer, with some other things, some stockings and socks that were in there.

"Q. Now, with reference to the condition of these stockings, I notice each of the stockings has at the end which is away from what we might call the top a knot or knots tied in the end of each stocking. Was that the way they were found up there in the room of the defendant on the day of the 26th of August, 1944?

"A. Yes, that is exactly the way they were when we found them.

Mr. Roll: Now, I will now offer in evidence these stockings, if the court please, Exhibit No. 35.

The Court: 35?

Mr. Safier: I object to them as incompetent, irrelevant and immaterial, having no bearing on the issues in this case.

The Court: Marked 35 in evidence." (R. 314, 315)

No Evidence Had Been or Was Ever Adduced to Show That the Stockings Were Connected With the Dead Woman

No one saw the defendant or in fact any colored person at or in the neighborhood of the premises at any time involved in the case herein.

The sole alleged connecting link between the defendant and the offense were latent fingerprints which a police fingerprint man said he took on scotch tape from a door of the apartment where Mrs. Blauvelt resided, and said they corresponded with fingerprints of the defendant.

The evidence was entirely circumstantial. There was not one scintilla of evidence that the defendant murdered Mrs.

Blauvelt. There was no evidence that the defendant had been in the apartment. No one had seen him, and there was no evidence that anything taken from the apartment was actually in the possession of the defendant.

The murder was fixed as having occurred in broad daylight, by threads of some circumstantial evidence of someone having heard a thud and someone else having heard voices. No one ever saw a colored man in the apartment or in the apartment house, although the manager and her daughter were working around the building.

The defendant at the outset of the trial, in accordance with California procedure, admitted the prior convictions many years before of felony in Missouri alleged against him in the Information (R. 415). Thereafter, he did not take the witness stand, and the case rested upon the evidence furnished by the prosecution.

During the argument of the prosecutor to the jury, he commented several times on the failure of the defendant to take the witness stand (R. 367) and told the jury that it removed the presumption of innocence.

"Q. Have you heard from the lips of the defendant or a single witness called by the defendant where he was other than in that apartment? * * * So far as this defendant is concerned, as I said before, he does not have to take the stand. But it would take about twenty or fifty horses to keep someone off the stand if he was not *afraid*. He does not tell you. No." (R. 368)

* * * * * * *

"And here we started out in this case with the defendant, as counsel says, clothed with the presumption of innocence. But as this testimony moved forward piece by piece, bit by bit, article by article, this testimony stripped this defendant of that presumption of innocence, and finally,

at the conclusion of the People's case, when he did not take the stand or did not put any witnesses on the stand, he stood here with that presumption removed, based on the evidence in this case" (R. 369, 370).

* * * * * * *

"Well, there are a lot of things he could tell us. If he wasn't there, where was he? Where was he? . . . He could explain how his prints got on there." (R. 372)

In conclusion, he said:

"Now, counsel tries to lift from the defendant and place on himself the reason for the defendant not getting on the stand. He says, 'Put the blame on me.' That is what he told you. Well, I again repeat the statement I made this morning: that this defendant had the right to take the witness stand; it is a privilege afforded to him, and he did not do it. You can consider that with all the testimony in this case, and I ask you to consider it.

"In conclusion, I am going to make this one statement to you: Counsel asked you to find this defendant not guilty. But does the defendant get on the stand and say, under oath, 'I am not guilty'? Not one word from him, and not one word from a single witness. I leave the case in your hands" (R. 379).

Questions presented:

1. Whether Article 1, section 13, of the California Constitution, which provides that "in any criminal case, whether the defendant testifies or not, his failure to explain or deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel and may be considered by the court or the jury", and similar provisions found in section 1323 of the Penal Code of California, are in violation of the fourteenth amendment to the

Constitution of the United States, providing that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. Whether the exhibition before the jury of parts of women's stockings allegedly found in a room occupied by the defendant, a poor negro, and not shown to have been in any way connected with the deceased, so far inflamed the passions and prejudices of the jury on the trial of the negro for murder and burglary as to deny him due process of law and the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

3. Whether the defendant, a poor negro, was given a fair trial for murder and burglary guaranteed by the Fourteenth Amendment to the Constitution of the United States, where the only substantial evidence to connect him with the case were latent finger prints removed from a door in the apartment of the deceased and which were claimed to have been those of the defendant, and where in the trial of the case his claim of privilege against self-incrimination was used as a fact for the jury to consider to bring about his conviction and death penalty and his testimonial silence in the case was strenuously argued by the prosecutor as a fact for the jury to consider that the defendant had murdered the deceased.

Specification of the Assigned Errors

The Appellant specifies the following assigned errors upon which he intends to rely:

Specification of Error I

(Assignment of Error I)

The Supreme Court of the State of California in its opinion, decision, determination and judgment, erred in holding that the 1934 amendment to the California constitition, Article I, Section 13, permitting comment by the court or counsel on Defendant's personal failure to explain or deny any evidence or facts in a criminal case against him and the similar provision of the California penal code, Section 1323, inherently, and as construed and applied in this case, do not violate due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Specification of Error II

(Assignment of Error II)

The Supreme Court of the State of California in its opinion, decision, determination and judgment erred in holding that the 1934 Amendment to the California Constitution, Article I, Section 13, and California Penal Code, Section 1323, inherently, and as construed and applied in this case, are not unconstitutional in shifting the burden of proof to the Defendant and infringing the presumption of innocence and thereby denying due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

Specification of Error III

(Assignment of Error III)

The Supreme Court of the State of California in its opinion, decision, determination and judgment erred in holding that the 1934 Amendment to the California Constitution, Article I, Section 13 and California Penal Code, Section 1323, allowing comment by the court or counsel on Defendant's failure to explain or deny any evidence or facts in a a criminal case against him and allowing the jury to consider such failure inherently, and as construed and applied in this case, are not unconstitutional as violating the privileges or immunities clause of the Fourteenth Amendment to the Constitution of the United States.

Specification of Error IV

(Assignment of Error IV)

The Supreme Court of the State of California in its opinion, decision, determination and judgment erred in holding that where the Prosecutor repeatedly commented to the jury upon the Defendant's failure to take the stand, to the extent of telling the jury: "And here we started out in this case with a Defendant, as Counsel says, clothed with the presumption of innocence. But as this testimony moved forward piece by piece, bit by bit, article by article, this testimony stripped this defendant of that presumption of innocence, and finally, at the conclusion of the people's case, when he did not take the stand, or did not put any witnesses on the stand, he stood there with that presumption removed, based on the evidence in this case." That it was not a violation of due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Specification of Error V

(Assignment of Error V)

The Supreme Court of the State of California in its opinion, decision, determination and judgment, erred in holding that said Article I, Section 13 and said penal code Section 1323 do not violate the due process clause of the Fourteenth Amendment of the Federal Constitution in that they each authorized the jury to presume that the defendant who fails to personally explain or deny any evidence against him is guilty as charged, although there is no reasonable or logical connection between such presumption and the basic fact upon which it is based, to wit, failure to testify, and said opinion, decision, determination and judgment in so holding, itself violates the due process clause of the Fourteenth Amendment to the Federal Constitution.

Specification of Error VI

(Assignment of Error VI)

The Supreme Court of the State of California in its opinion, decision, determination and judgment, erred in holding that a law which permits and in effect encourages the jury to give additional or conclusive weight to any and all evidence introduced by the people against the defendant and to draw unrestricted inferences therefrom against the defendant and with respect to any such evidence which the defendant might reasonably be expected to explain or deny, where he fails to testify, even though he may have produced proof of convincing character, does not permit and encourage the jury to infer and presume the defendant's guilt from his mere failure to testify or to personally, under oath and during the trial, explain or deny any evidence against him, and by such error said opinion, decision, determination

and judgment itself violates and sustains a law which violates the defendant's rights to due process of law and to the protection of the privileges and immunities clause of the Fourteenth Amendment to the Constitution of the United States.

Specification of Error VII

(Assignment of Error VII)

The Supreme Court of the State of California in its opinion, decision, determination and judgment, erred in holding that Admiral Dewey Adamson was not denied due process of law as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States by the introduction in evidence of portions of women's stocking, which were admittedly not part of the deceased's stockings, and which served no other purpose than to influence or inflame the passions and prejudices of the jury, and to imply to this negro defendant a sex fetish and a low moral character.

ARGUMENT

Specification of Error I

The Supreme Court of the State of California in its opinion, decision, determination and judgment, erred in holding that the 1934 Amendment to the California Constitution, Article I, Section 13, permitting comment by the court or counsel on defendant's personal failure to explain or deny any evidence or facts in a criminal case against him and the similar provision of the California Penal Code, Section 1323, inherently, and as construed and applied in this case, do not violate due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

California's statute, inherently and as construed and applied in this case, amounts to *testimonial compulsion.* It virtually says that silence in court is tantamount to an admission of guilt and may be then commented on by the prosecution and the court and the fact of his silence may be considered by the jury. Such was the argument made in this case repeatedly, such is the argument made in all of these types of cases where the defendant fails to take the stand.

This is not in accordance with the American way of life. Rooted deeply in our Federal Constitution and most of the Constitutions of the States, is the fundamental guarantee against compulsion to testify against one's self. It was written into the Bill of Rights in the Federal Constitution, *Boyd* v. *U. S.,* 116 U. S. 616; *Counselman* v. *Hitchcock,* 35 L. Ed. 1110, 142 U. S. 547; *Brown* v. *Walker,* 40 L. Ed. 819, 161 U. S. 591; *Hale* v. *Henkel,* 50 L. Ed. 652, 201 U. S. 43, and in practically all the Constitutions of the States, including California, Article I, Sec. 13, and remained there from the beginning of constitutional Government in California until the 1934 Amendment. The statute now gives the right to the court and prosecution to argue guilt from the mere silence of the defendant and his claim of privilege becomes a weapon for the inference of guilt.

This court has said, in *Lisenba* v. *California,* 314 U. S. 219, 237, 86 L. Ed. 166, 180:

> "As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevent a fair trial."
>
> "The concept of due process would void a trial in which, by threats or promises in the presence of court and jury, a defendant was induced to testify against himself. The case stands no better if, by resort to the

> same means, the defendant is induced to confess and his confession is given in evidence. As we have said, 'due process of law * * * commands that no such practice * * * shall send any accused to his death.''

To induce a defendant to testify against himself, otherwise to hold that his failure to do so personally, spells guilt, is compulsion by statute to take the witness stand or else have comment of such an unfavorable nature made by the prosecution and court to the jury as to one's guilt from such silence and the claim of privilege as to preclude a fair trial.

California's statute goes farther than a confession. It says that *silence in the courtroom* is tantamount to a confession of guilt. It says the jury may consider that fact.

The case of *Boyd* v. *U. S.*, 116 U. S. 616, 29 L. Ed. 746, was a case where a Federal statute required the production of certain books and records upon notice by the government, and upon the failure of the production of such books and records, the allegations stated in the motion to produce shall be taken as confessed, unless his failure to produce the same shall be explained to the satisfaction of the court. This court held such a statute unconstitutional, saying that ''Any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, * * * is contrary to the principles of a free government. It is abhorrent * * * to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom.'' [1]

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[1] *Boyd* v. *United States,* 116 U. S. 621, 29 L. Ed. 748.

But, in regard to the Fourth Amendment, it is contended that, whatever might have been alleged against the constitutionality of the Acts of 1863 and 1867, that of 1874, under which the order in the present case was made, is free from constitutional objection, because it does not authorize the search and seizure of books and papers, but only requires the defendant

It is respectfully submitted that California's statute is equally despotic in character and that its presence and the results which flow from it give this conviction "the fatal taint" which is proscribed by the Fourteenth Amendment to the Constitution of the United States. Otherwise, it would mean that men can be forced to convict themselves by their own testimony, or else that the fact of their *failure to testify* results in conviction by construing the fact of silence as a confession of guilt.

Such state statute offends the procedural safeguards guaranteed by the Fourteenth Amendment to fair public trials by juries in a democracy, and permits the use of compulsion by statute or otherwise of self-incriminatory testimony or its inevitable consequences under this statute—guilt from the mere silence of the accused.

In *Johnson* v. *U. S.*, 318 U. S. 189, 195, 87 L. Ed. 704, 710; the court said:

> "But where the claim of privilege is asserted and unqualifiedly granted, the requirements of *fair trial* may preclude any comment. That certainly is true where the claim of privilege could not properly be denied. The rule which obtains when the accused fails to take the stand (Wilson v. United States, 149 U. S. 60, 37 L. Ed. 650, 13 S. Ct. 765) is then applicable. As stated by the Supreme Court of Pennsylvania, 'If the privilege claimed by the witness be allowed, the matter is at an end. The claim of privilege and its allowance is properly no part of the evidence submitted to the jury, and no inferences whatever can be legitimately drawn by them from the legal assertion by the witness of his constitutional right. The allowance of the privi-

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or claimant to produce them. That is so; but it declares that if he does not produce them, the allegations which it is affirmed they will prove shall be taken as confesseed. This is tantamount to compelling their production; for the prosecuting attorney will always be sure to state the evidence expected to be derived from them as strongly as the case will admit of.

> lege would be a mockery of justice, if either party is to be affected injuriously by it.' Phelin v. Kenderdine, 20 Pa. 354, 363; Wireman v. Com. 203 Ky. 62, 63, 261 S. W. 862. And see State v. Vroman, 45 S. D. 465, 473, 188 N. W. 746; Carne v. Litchfield, 2 Mich. 340; People v. McGungill, 41 Cal. 429. * * * An accused having the assurance of the court that his claim of privilege would be granted might well be entrapped if his assertion of the privilege could then be used against him. * * * If advised by the court that his claim of privilege though granted would be employed against him, he might well never claim it. If he receives assurance that it will be granted if claimed, or if it is claimed and granted outright, he has every right to expect that the ruling is made in good faith and that the rule against comment will be observed."

In California the constitution assures the accused that his claim of the privilege which it grants will not be used against him, but when he claims it, legalizes use of the fact that he claimed it by the prosecutor, the court and even the jury.

But in California, if an accused has suffered prior convictions anywhere of a previous crime, the prosecution is under a duty to allege this prior conviction in the indictment or information. If the accused admits the prior conviction when arraigned or before trial, then the statute provides that no reference may be made to this prior conviction before the jury (Section 1025, California Penal Code).[2] The

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[2] *1025. Previous conviction.*—When a defendant who is charged in the indictment or information with having suffered a previous conviction, pleads either guilty or not guilty of the offense for which he is indicted or informed against, he must be asked whether he has suffered such previous conviction. If he answers that he has, his answer must be entered by the clerk in the minutes of the court, and must, unless withdrawn by consent of the court, be conclusive of the fact of his having suffered such previous conviction in all subsequent proceedings. If he answers that he has not, his answer must be entered by the clerk in the minutes of the court, and the question whether or not he has suffered such previous conviction must

risk of taking the witness stand by one who has been accused in the indictment or information of prior felonies and thus to face possible prejudice growing out of it, has been the subject of comment by the California courts in their opinions.

In the case of *People* v. *Lanigan,* 22 Cal. (2) 569, the California Supreme Court held that an accused who had suffered a prior conviction of a felony was greatly prejudiced by the appointment of counsel who was representing a co-defendant who had not been previously convicted of a felony, because the delicate question would arise in the trial of the case as to whether, in view of one client's previous conviction of a felony, he should be put on the witness stand. The court then recognized the great prejudice which flows to an accused who has suffered prior conviction of felony and is subject to impeachment under California law on that ground alone.

In *Tot* v. *U. S.,* 319 U. S. 463 at 470, 87 L. Ed. 1519 at 1525, the court said:

> "* * * the defendant is under the handicap, if he takes the witness stand, of admitting prior conviction of violent crimes. His evidence as to acquisition of the firearm or ammunition is thus discredited in the eyes of the jury before it is given."

In California, the law specifically permits impeachment because of prior conviction of felony, and thus the accused who has suffered a prior conviction is put to his election either to disclose such prior convictions and thus be dis-

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be tried by the jury which tries the issue upon the plea of not guilty, or in case of a plea of guilty, by a jury impaneled for that purpose. The refusal of the defendant to answer is equivalent to a denial that he has suffered such previous conviction. In case the defendant pleads not guilty, and answers that he has suffered the previous conviction, the charge of the previous conviction must not be read to the jury, nor alluded to on the trial.

credited in the eyes of the jury, or decline to take the witness stand, in which case he is subject to unfair comment by the prosecutor and court and to *jury inferences* that result in almost certain conviction.

It is respectfully submitted that such holding is not due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Specification of Error II

The Supreme Court of the State of California in its opinion, decision, determination and judgment erred in holding that the 1934 amendment to the California Constitution, Article I, Section 13, and California Penal Code, Section 1323, inherently, and as construed and applied in this case, are not unconstitutional in shifting the burden of proof to the defendant and infringing the presumption of innocence and thereby denying due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

The effect of the statute is virtually to shift the burden of proof to the defendant and remove the presumption of innocence with which a defendant is constitutionally clothed in the United States of America.

The presumption of innocence has been held to be one of the strongest presumptions in our Constitutional safeguards. *Kirby* v. *U. S.*, 174 U. S. 47; 43 L. Ed. 890. It goes with a defendant throughout his trial and he may rely on it. Article I, Section 13 of the California Constitution, however, strips him of that presumption. The prosecution so argued in this case (R. 369, 370).

The law presumes, in the absence of proof to the contrary, that everyone obeys the law. The law prefers to speak and think well of people rather than evil, and that is why one is clothed with the presumption of innocence and the presumption that the law has been obeyed.

In the United States, the State has the burden of establishing all the essential elements of the crime with which the accused is charged and must prove his guilt beyond a reasonable doubt. The accused may stand on this presumption of innocence, withholding all proof. The presumption of innocence is a shield, not a weapon, but the constitutional provision in California strips him of this shield and turns it into a weapon.

The shield in the minds of the framers of our Government and the generally established principles safeguarding the rights of people in the United States was to protect them against the type of inquisition and torture which had been so prevalent on the Continent of Europe and which had so often accompanied the proceedings of the star chamber. They, too, had in their minds the excesses which had been committed under the Statutes of Philip and Mary when suspects were third-degreed by examining magistrates.

The privilege may not be violated because in a particular case its restraints are inconvenient or because the supposed malefactor may be a subject of public execration or because the disclosure of his wrong-doing will promote the public weal.

It is a barrier interposed between the individual and the power of the government, a barrier interposed by the sovereign people of the state; and neither legislators nor judges are free to overleap it.

Historic liberties and privileges are not to bend from day to day because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment.

In other words, inherently, and as construed and applied by the California courts, the failure of a defendant to take the witness stand would strip him of a presumption of innocence and result in an inference of guilt from a defendant's mere silence in the presence of court and jury.

This has been repeatedly held contrary to due process of law.

Morrison v. *California,* 291 U. S. 94, 96, 78 L. Ed. 672;
Tot v. *U. S.,* 319 U. S. 463, 87 L. Ed. 1519;
McFarland v. *American Sugar Co.,* 241 U. S. 86, 60 L. Ed. 904.

There certainly is no logical inference of guilt from the mere failure of an accused to take the witness stand. He may fail to take it because of prior convictions of felony. This is the most common reason. Or he may fail to take it because he knows no facts with relation to it, or he may fail to take it because he has difficulties as a witness and may easily be confused or put in a false light; he may have difficulty explaining what other persons might easily explain. Many considerations enter into his failure to do so, but to permit comment by the prosecution on the subject results in a false inference of guilt.

As said in *Tot* v. *U. S.,* 319 U. S. 463 at 469; 87 L. Ed. 1519 at 1525:

> "* * * it is not permissible thus to shift the burden by arbitrarily making one fact, which has no relevance to guilt of the offense, the occasion of casting on the defendant the obligation of exculpation."

Specification of Error III

The Supreme Court of the State of California in its opinion, decision, determination and judgment erred in holding that the 1934 Amendment to the California Constitution, Article I, Section 13, and California Penal Code, Section 1323, allowing comment by the court or counsel on defendant's failure to explain or deny any evidence or facts in a criminal case against him, and allowing the jury to consider such failure, inherently, and as construed

and applied in this case, are not unconstitutional as violating the privileges or immunities clause of the Fourteenth Amendment to the Constitution of the United States.

We can think of no greater privileges or immunities of a citizen of the United States guaranteed by the Fourteenth Amendment than that of not being compelled by statute to take the witness stand or have his failure to do so constitute testimonial admission of guilt.

The language of the Constitution, "and may be considered by the court or jury," places no restriction upon force or weight of the inference or presumption to be drawn from failure to testify. No standard is provided nor is any legislative purpose or plan revealed to guide Court or jury. Hence, from such failure the inference may be drawn or the presumption assumed that the silence of the accused establishes guilt, and a jury may do this independently of comments by prosecutor or Judge.

Such a statute strips the accused not only of the procedural safeguards found in the Bill of Rights, but strips him of a privilege and an immunity of a citizen, which is inherent in our American form of Government.

Specifications of Errors IV, V and VI

IV

The Supreme Court of the State of California in its opinion, decision, determination and judgment erred in holding that where the prosecutor repeatedly commented to the jury upon the defendant's failure to take the stand, to the extent of telling the jury: "And here we started out in this case with a defendant, as counsel says, clothed with the presumption of innocence. But as this testimony moved forward, piece by piece, bit by bit, article by article, this testimony stripped this defendant of that presumption of

innocence, and finally, at the conclusion of the People's case, when he did not take the stand, or did not put any witnesses on the stand, he stood there with that presumption removed, based on the evidence in this case.", that it was not a violation of due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

V

The Supreme Court of the State of California in its opinion, decision, determination and judgment, erred in holding: that said Article I, Section 13 and said Penal Code Section 1323, do not violate the due process clause of the Fourteenth Amendment of the Federal Constitution in that they each authorize the jury to presume that the defendant who fails to explain or deny any evidence against him is guilty as charged, although there is no reasonable or logical connection between such presumption and the basic fact upon which it is based, to wit, failure to testify, and said opinion, decision, determination and judgment in so holding, itself violates the due process clause of the Fourteenth Amendment to the Federal Constitution.

VI

The Supreme Court of the State of California in its opinion, decision, determination and judgment, erred in holding that a law which permits and in effect encourages the jury to give additional or conclusive weight to any and all evidence introduced by the people against the defendant and to draw unrestricted inferences therefrom against the defendant with respect to any such evidence which the defendant might reasonably be expected to explain or deny, where he fails to testify, even though he may have produced proof of convincing character, does not permit and encourage the jury to infer and presume the defendant's guilt

from his mere failure to testify or to personally, under oath and during the trial, explain or deny any evidence against him, and by such error said opinion, decision, determination and judgment itself violates and sustains a law which violates the defendant's rights to due process of law and to the protection of the privileges and immunities clause of the Fourteenth Amendment to the Constitution of the United States.

It is our position that the presumption of innocence is a fundamental presumption that inheres in all accused in the United States of America. It is in itself evidence. An accused may rely on it and unless it is overcome by evidence which overcomes the presumption, it cannot be stripped from him by statutory compulsion. This is what Article I, Section 13 of the California Constitution does. The statute inherently and as construed and applied by the State through its court and prosecutor violates due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Morrison v. *California,* 291 U. S. 94, 96, 78 L. Ed. 672;
McFarland v. *American Sugar Co.,* 241 U. S. 86; 60 L. Ed. 904;
Tot v. *U. S.,* 319 U. S. 463; 87 L. Ed. 1519.

What we have heretofore said regarding the violation of such procedure against due process applies equally to the protection of the Fourteenth Amendment regarding the privileges and immunities of citizens of the United States. Certainly one of the great privileges granted is the privilege not to be compelled to incriminate oneself or to take the witness stand to bring about one's conviction, or to have the law provide for the right of stating that testimonial silence is tantamount to guilt.

Boyd v. *U. S.,* 116 U. S. 616;
Twining v. *New Jersey,* 211 U. S. 78, 53 L. Ed. 97.

With respect to Specification V, appellant has contended and now urges that since the power granted to the jury to consider the defendant's failure to testify is without limitation and has no standard to guide and control the jury, a presumption of absolute character is authorized, and that there is no reasonable or logical connection between the basic fact, to-wit, failure to testify and the ultimate fact, guilt of the accused. Such a presumption is a violation of the guarantee of due process. (*Tot* v. *United States,* 319 U. S. 463, 87 L. Ed. 1519.)

That many reasons other than consciousness of guilt cause defendants to fail to testify is commonly known in the legal profession and in the Courts. The reason most often existing is avoidance of impeachment by being compelled to admit prior conviction of felony. Another common reason is, upon advice of counsel who decides that his client by reason of some characteristic, such as poor memory, being easily confused or ignorant, or in ill health, would be a poor witness, and under cross-examination, damage his case even though ever so innocent.

One or more of these reasons combined with counsel's belief that the People's proof is insufficient or that a convincing rebuttal can best be provided by other defense witnesses or that testimony which the accused might give might open the door to revelation of something to his discredit, although not criminal.

In *Brown,* 81 Cal. App. 226, the court took judicial knowledge that defendants often fail to testify for other reasons than being conscious of their guilt, and this statement was expressly approved by the State Supreme Court.

On the other hand in a majority of criminal trials the accused testifies, and undoubtedly a majority of those who do so are guilty; and it has never been suggested that the mere fact that a defendant exercises his constitutional

right to testify should add additional weight to the presumption of innocence.

From any viewpoint there is no rational relation between a defendant's testifying or failing to do so and his guilt or innocence, and this, it is believed and insisted, is a matter of common knowledge and experience among the members of the legal profession.

There are two other special factors in this novel constitutional provision: Regardless of the convincing character of proof produced by other defense witnesses, merely because he fails to testify and explain any and all evidence against him, the jury is empowered to infer guilt, and, equally capriciously, it is provided that this burden rests upon him even in respect to matters of which he is totally ignorant.

Specification of Error VII

The Supreme Court of the State of California in its opinion, decision, determination and judgment, erred in holding that Admiral Dewey Adamson was not denied due process of law as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States by the introduction in evidence of portions of women's stocking, which were admittedly not part of the deceased's stockings, and which served no other purpose than to influence or inflame the passions and prejudices of the jury, and to imply to this negro defendant a sex fetish and a low moral character.

During the trial of the case, Officer Brennan, who went to the place of residence of the defendant, a month after the alleged offense, found a part of a stocking on top of the dresser and two parts of stockings in the bottom dresser drawer. These stockings were admitted in evidence as Exhibit 35, although the prosecuting attorney conceded that they were not part of the stocking found beneath the body of Mrs. Blauvelt.

There was nothing to connect the defendant with the stockings thus introduced in evidence, but it furnished an alleged additional motive for the crime—a sexual one. Appellant is a negro. The mere suggestion of such a motive was calculated to excite the prejudices of the jurors and to inflame their minds against the accused, and, therefore, was highly prejudicial to the accused. Consequently, the admission of the stockings in evidence was not only irrelevant and incompetent (*People* v. *Smith,* 55 Cal. App. 320), but was for the purpose of inflaming the passions and prejudices of the jury to the deprivation of a fair trial for the accused.

This court has repeatedly held that incompetent evidence used to inflame the passions and prejudices of the jury offends due process of law.

Chambers v. *Florida,* 309 U. S. 227, 242; 84 L. Ed. 716, 724;
Snyder v. *Massachusetts,* 291 U. S. 97, 78 L. Ed. 674;
Moore v. *Dempsey,* 261 U. S. 86, 67 L. Ed. 543;
Hurtado v. *California,* 110 U. S. 516, 28 L. Ed. 232;
McKay v. *State,* 90 Neb. 63, 132 N. W. 741;
Flege v. *State,* 93 Neb. 610, 142 N. W. 276;
People v. *Madison,* 3 Cal. (2) 668.

Wherefore, the defendant prays that this Honorable Court declare Article I, Section 13, to the Constitution of California, as amended, unconstitutional, and that Section 1323 of the Penal Code of the State of California be declared unconstitutional, and that the judgments herein be reversed.

Respectfully submitted,

Morris Lavine,
Attorney for Appellant.

APPENDIX

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Art. I, Sec. 13. Permitting comment on evidence and failure of defendant to testify in criminal cases. In Criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf, and to appear and defend, in person and with counsel. No person shall be twice put in jeopardy for the same offense; nor be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; but in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commended upon by the court and by counsel, and may be considered by the court or the jury. The Legislature shall have power to provide for the taking, in the presence of the party accused and his counsel, of depositions of witnesses in criminal cases, other than cases of homicide when there is reason to believe that the witness, from inability or other cause, will not attend at the trial. (As amended November 6, 1934.)

1323 of the Penal Code of California Provides: *Defendant.* A defendant in a criminal action or proceeding cannot be compelled to be a witness against himself; but if he offers himself as a witness, he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief. The failure of the defendant to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by counsel.