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DePaul Law Review

Volume 6
Issue 1 *Fall-Winter 1956*

Article 5

Commenting Upon Failure of Accused to Testify

DePaul College of Law

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Recommended Citation

DePaul College of Law, *Commenting Upon Failure of Accused to Testify*, 6 DePaul L. Rev. 83 (1956)
Available at: https://via.library.depaul.edu/law-review/vol6/iss1/5

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in relation to the rights of the landlord. No doubt many of the decisions in the future in this regard will be "the unconscious result of instinctive preferences and inarticulate convictions . . . traceable to views of public policy in the last analysis."[105]

Yet is is possible to draw certain tentative conclusions. The courts have early and consistently held that the circle of the tenant's rights is great in circumference. They have not hesitated in giving him something like unbridled dominion over the exterior of the walls. Where an entire building has been leased, they have held that the lessee also takes by the lease necessary contiguous land. It is then but a short step to hold that the lessee of a floor, or of a room, has not only possession of the exterior of the walls, but also possession and the right to use adjacent airspace essential to the enjoyment of the lease.

But admittedly, the law here, as elsewhere, is unsettled, indeed undecided. Additional decisions will be needed to more fully clarify the rights of both landlords and tenants as technological advances continue to create new difficulties for lawyers and laymen alike. There is, then, reassurance in the words of Cardozo:

> There are topics where the law is still uninformed and void. Some hint or premonition of coming shapes and moulds, it betrays amid the flux, yet it is so amorphous, so indeterminate, that formulation, if attempted would be the prophecy of what is to be rather than the statement of what is. . . . [W]ith all our centuries of common law development, with all our multitudinous decisions, there are so many questions, elementary in the sense of being primary and basic, that remain unsettled even now. . . . What is certain is that the gaps in the system will be filled, and filled with ever-growing consciousness of the process by a balancing of social interests, an estimate of social values, a reading of the social mind.[106]

[105] Ibid. [106] Paradoxes of Legal Science, 76 (1928).

COMMENTING UPON FAILURE OF ACCUSED TO TESTIFY

At common law, the defendant was incompetent to testify in a criminal proceeding.[1] As a result of such incompetency, comment by the prosecution concerning the failure of the accused to testify was of no importance. Historically, therefore, the problem of whether the prosecution can effectively comment upon the failure of the accused to take the witness stand was created by the enactment of the statutes which relieved the accused of his incapacity to testify.[2]

Some of these statutes contained express clauses that no presumption

[1] 2 Wigmore, Evidence § 579 (3d ed., 1940).

[2] State v. Ferguson, 222 Iowa 1148, 283 N.W. 917 (1939). For a list of the statutory enactments, see Reeder, Comment Upon Failure of Accused to Testify, 31 Mich. L. Rev. 40, 41, 42 (1932).

shall arise from the failure of the accused to testify, whereas others provided that his silence shall not be subject to comment.[3] If all the statutes contained words of similar import, comment by prosecution would have been conclusively prohibited. But some states, whether by design or inadvertence, failed to provide against any comment by the prosecution and, as a result of such omissions, seven states now allow comment.[4]

There is a strong possibility that more jurisdictions will adopt laws allowing the prosecution to comment upon the failure of the accused to testify. In view of this possibility, an examination of the doctrine as well as its impact on the furtherance of justice is in order.

I. WHAT IS COMMENT?

The test laid down by the federal courts on what is or is not comment is "whether the language used is manifestly intended to be, or is of such character that the jury would naturally and necessarily take it to be comment on accused's failure to testify."[5] In applying the rule the courts have said that a general comment such as, "certain evidence was uncontradicted" is not objectionable, but that a strong, emphatic, and specific remark directed toward the defendant's failure to testify is objectionable and reversible error. Generally, the state courts seem to be in harmony with the federal courts as to what constitutes comment. Pennsylvania has said, "the statute does not prohibit a mere reference to the fact that a defendant has not taken the witness stand; the prohibition is against adverse comments on the part of the court or prosecutor."[6] The majority of the courts which do not allow comment appear to use the following criterion: Under statutes expressly prohibiting comment on the failure of the accused to testify, and under those providing that his failure to become a witness in his own behalf shall create no presumption against him, and under other statutes of similar import, it is generally held that it is improper and prejudicial for the prosecuting attorney, in the course of the

[3] Evidence—Comment on a Defendant's Failure to Testify in a Criminal Proceeding, 28 N.Y.U.L.R. 1049 (1953).

[4] Iowa and New Jersey, by judicial approbation, absent a constitutional privilege against self-incrimination: State v. Stennett, 220 Ia. 388, 260 N.W. 732 (1935); Parker v. State, 61 N.J.L. 308, 39 Atl. 651 (1898). California and Ohio by constitutional amendment: Cal. Const. Art. 1, § 13; Cal. Pen. Code § 1093(6), 1127, 1323, 1439; Ohio Const. Art. 1, § 10, amended Sept. 3, 1912; Ohio Gen. Code Ann. § 13444(3). Vermont and New Mexico by statute in spite of a constitutional privilege against self-incrimination: Vt. Pub. Laws § 2383 (1933), amended by Vt. Laws 1935, No. 52; N.M. 1953 Comp. § 41-12-19. Connecticut, by judicial decision in the face of a constitutional privilege: Conn. Gen. Stat. § 6480 (1930) interpreted in State v. Ford, 109 Conn. 490, 146 Atl. 828 (1929).

[5] Morrison v. United States, 6 F. 2d 809, 810 (1925).

[6] Commonwealth v. Schuster, 158 Pa. Super. 164, 167, 44 A. 2d 303, 306 (1945). Accord: Commonwealth v. Kloiber, 378 Pa. 412, 106 A. 2d 820 (1954).

trial, to comment on or to make any reference to the fact that the accused did not testify as a witness in his own behalf.[7] Oklahoma, which follows the above rule, has said:

> It is immaterial what words are used in such circumstances, if they are clearly calculated to direct the attention of the jury to the fact that a defendant has not testified in his own behalf, that he might have done so, and that by such failure some inference might be indulged against him.[8]

A Mississippi court simply said, "the attention of the jury is not to be called to the fact that defendant did not testify."[9]

II. WHEN THE INFERENCE MAY BE DRAWN

Having generally determined the definitive meaning of "comment" in the jurisdictions which do not recognize such a mode of procedure, it follows that it should be ascertained when such comment is allowed in the jurisdictions that do recognize such procedure. Even though comment is allowed in the latter jurisdictions, there are certain specific restrictions as to its propriety.

In determining at what stage in the proceedings the inference of defendant's failure to testify may be properly drawn, a Connecticut court declared:

> The question immediately arises as to how much evidence the state must produce before the trier is permitted to apply the inference. Obviously the state must first produce some evidence of guilt. The state must produce a case where the evidence, apart from the inference, would be sufficient to go to a jury. . . . If the state has supported its burden of proof, then the jury, may throw its inference arising from the failure of the accused to testify in his own defense into the scale to determine the ultimate question of guilt or innocence.[10]

A 1953 New Jersey decision held that if the evidence is only prejudicial to the defendant and perhaps not inculpative in some degree of guilt, then silence on his part does not justify a comment by the state.[11] Consequently, it must necessarily be concluded that in order for the inference to be drawn: 1) the state must prove a prima facie case and 2) there must be facts in evidence concerning the acts of the defendant which facts can be denied by defendant and if not denied will be inculpative in some degree of guilt.

California, another state which allows comment, takes a somewhat

[7] 84 A.L.R. 784.

[8] Perkins v. Territory, 17 Okla. 82, 87 Pac. 297 (1906). Accord: Presnell v. State, 71 Okla. 158, 109 P. 2d 836 (1941).

[9] Gurley v. State, 101 Miss. 190, 57 So. 565 (1911). Accord: Lambert v. State, 199 Miss. 790, 25 So. 2d 477 (1946).

[10] State v. McDonough, 129 Conn. 483, 484, 29 A. 2d 582, 583 (1942).

[11] State v. Christy, 26 N.J. Super. 459, 98 A. 2d 118 (1953).

broader viewpoint on when such inference is permissible. In *People v. Greenberg*[12] the California Court of Appeals said that it is the failure of the defendant to explain or deny evidence of facts against him, when it appears that he could do so, if innocent, not his mere failure to take the witness stand, which may be commented upon and taken into consideration.

III. LEGAL EFFECT

In jurisdictions that recognize the defendant's failure to testify as being adverse to his case, the weight given to that evidence seems to vary depending upon the state. Connecticut, for example, has repeatedly held that from the fact that the accused has either neglected or refused to testify, the jury may draw any inference as to his guilt which is reasonable under the circumstances.[13] The state of California appears to go further in emphasizing the failure of the accused to testify. In the famous case of *People v. Adamson*[14] the California court noted, "if it appears that the defendant could reasonably be expected to explain or deny evidence presented against him, the jury may consider his failure to do so as *tending* to indicate the truth of such evidence, and, as indicating that among the inferences that may reasonably be drawn therefrom, those unfavorable to the defendant are the more probable." Ohio looks upon such failure to testify as tilting the scale of evidence against the accused. As was mentioned in *State v. Cott*,[15] "the failure of the defendant to testify was therefore effective in supplying any deficiency in degree of the evidence and with the evidence tended to prove the guilt of the defendant beyond a reasonable doubt." The legal effect of failing to testify is apparently given the strongest emphasis in New Jersey. In *State v. Marinella*, the New Jersey court observed:

> His [defendant's] failure to be a witness in his own behalf is no presumption of guilt, and does not erase the presumption of innocence, but if facts are testified to which concern the acts of that particular defendant which he could by his own oath deny, *his failure to testify in his own behalf raises a strong presumption that he could not truthfully deny those facts.*[16]

Thus, whereas California, under the same circumstances, would hold that defendant's failure to testify would *tend* to indicate the truth of certain evidence, New Jersey holds that a *strong presumption* of the validity of such evidence (evidence which he could deny) is raised. It may be con-

[12] 73 Cal. App. 2d 675, 167 P. 2d 214 (1946).
[13] State v. Hayes, 127 Conn. 543, 18 A. 2d 895 (1941).
[14] 27 Cal. 2d 478, 165 P. 2d 3, 10 (1946).
[15] 58 Ohio App. 439, 16 N.E. 2d 788 (1937).
[16] 24 N.J. Super. 49, 93 A. 2d 620, 621 (1952) (italics added).

cluded, therefore, that the probative legal effect of the defendant's failure to testify varies in degree depending upon the jurisdiction.

In jurisdictions where comment is not allowed, the misconduct of a prosecuting attorney in commenting on the defendant's failure to testify does not result in a miscarriage of justice warranting a reversal, when the evidence of the defendant's guilt is otherwise clearly established.[17] However, where the defendant is not clearly guilty, there is a split of authority on whether such comment constitutes reversible error. The majority of these jurisdictions hold that comments of the prosecuting attorney on the failure of the defendant to testify in a criminal case, though highly improper, may under some circumstances work no injury, where the trial judge promptly intervenes, excluding the comments and admonishing the jury to disregard them. In other words, comments of that kind stand on very much the same footing as other improper arguments, and whether they call for a reversal or not depends on whether, after a full consideration of all the circumstances, including the action of the trial judge at the time they were made, the appellate court is of the opinion that no prejudice resulted.[18] However, a minority of the courts hold that remarks by prosecuting officers, as to the failure of the accused to testify, made in violation of statute, are so prejudicial that they cannot be cured by instruction to the jury, however forcibly given.[19]

IV. ARGUMENTS IN SUPPORT OF COMMENT

1. *An inference from the refusal to testify is inevitable; therefore why try futilely to avoid it?*

This line of argument was best expressed in *State v. Cleaves*, wherein the court observed:

> But the defendant having the opportunity to contradict or explain the inculpative facts proved against him may decline to avail himself of the opportunity thus afforded by the law. His declining to avail himself of the privilege of testifying is an existent and obvious fact. It is a fact patent in the case. The jury cannot avoid perceiving it. Why should they not regard it as a fact of more or less weight in determining the guilt or innocence of the accused? All the analogies of the law are in favor of their regarding this as an evidentiary fact. . . .
>
> When the prisoner is on trial, and the evidence offered by the government tends to establish his guilt, and he declines to contradict or explain the inculpatory facts which have been proved against him, is not that a fact ominous of criminality? . . . The silence of the accused,—the omission to explain or contradict, when the evidence tends to establish guilt is a fact,—the probative effect of which may vary according to the varying conditions of the different trials in

[17] E.g., People v. Curran, 207 Ill. App. 264 (1917) aff'd 286 Ill. 302, 121 N.E. 637 (1918).

[18] E.g., Commonwealth v. Festo, 251 Mass. 275, 146 N.E. 700 (1925).

[19] Angelo v. People, 96 Ill. 209, 36 Am. Rep. 132 (1880).

which it may occur,—which the jury must perceive, and which perceiving they can no more disregard than one can the light of the sun when shining with full blaze on the open eye.[20]

2. *An innocent defendant cannot have any reason for refusing to testify.*

The Attorney General of Ohio in a speech subsequent to the passing of Ohio's constitutional amendment[21] which allowed comment had this to say to the argument that an innocent defendant would not wish to be subjected to cross-examination:

Of course it is a well known fact that certain matters that probably could not be brought out in the trial, in any other way, are possible of disclosure by reason of the defendant taking the stand.

But why should that not be true? Why should courts exist, and why should there be criminal prosecution? Is it for the purpose of protecting criminals? Is it for the purpose of handicapping the state in its efforts to bring about a full disclosure of all the facts attendant upon a crime committed, or alleged to have been committed by the accused. . . . There are many provisions throughout the country that make it very difficult for prosecuting attorneys to conduct cases for the best interests of the state.[22]

As an illustration of the contrast between an innocent and a guilty defendant's desire to take the witness stand, it has been said that:

The defendant, in criminal cases, is either innocent or guilty. If innocent, he has every inducement to state the facts, which would exonerate him. The truth would be his protection. There can be no reason why he should withhold it, and every reason for its utterance.

Being guilty, if a witness, a statement of the truth would lead to his conviction, and justice would ensue. Being guilty, and denying his guilt as a witness, an additional crime would be committed, and the peril of a conviction for a new offense incurred.[23]

3. *There is no actual compulsion to testify; for the accused has an option, and the exercise of this option, by choosing silence, is therefore a voluntary act of his own.*

The statement that there is no actual compulsion to testify is the target which receives the majority of the attacks by the opponents of comment. Nevertheless, the advocates of comment steadfastly deny that the constitutional privilege against self-incrimination is vitiated. In *State v. Ford*, where the defendant objected to comment by the prosecuting attorney on the grounds that his privilege against self-incrimination had been violated, Justice Banks proclaimed:

The constitutional privilege goes no further historically or logically than to prevent the employment of legal process to compel an accused to incriminate

[20] 59 Me. 298, 300, 8 Am. Rep. 424 (1871). [21] Ohio Const. Art. 1, § 10.

[22] Journal of American Institute of Criminal Law and Criminology, Vol. 13, p. 294.

[23] State v. Cleaves, 59 Me. 298, 301, 8 Am. Rep. 425 (1871).

himself by what he may say upon the witness stand. He cannot be compelled to testify against his will. The privilege of refraining from testifying, if he so elect, does not protect him from any unfavorable inference which may be drawn by his triers from his exercise of the privilege. . . . There is no actual compulsion upon the accused to testify, and, when he elects not to do so, he is obviously not being compelled to give evidence against himself.[24]

In further support of the concept that comment does not abridge the privilege against self-incrimination Andrew A. Bruce wrote:

Never, at any time, could the defendant be compelled to testify against himself, and we believe that it was only against *direct* compulsion that the constitutional provision was aimed. He is not asked to testify against himself, but in favor of himself. All that was in the minds of the framers of the constitutional provisions was the desire to prevent injustice and direct compulsion.[25]

4. *In the jurisdictions where comment is permitted, it has achieved most satisfactory results.*

The American Bar Association Committee in 1938 made a study of the jurisdictions where comment was permitted and the results of that study were that 93.65 per cent of the judges regarded comment as an important and proper aid in the administration of justice, while only 2.65 per cent considered it definitely unfair to the accused (the others listing it as relatively unimportant). Over 85 per cent said that it seldom if ever causes the prosecuting attorney to be less diligent in his search for evidence of guilt.[26]

V. ARGUMENTS AGAINST COMMENT

1. *Comment is unjust when it results in the situation where the defendant must choose between being subjected to a cross-examination of past offenses and remaining tacit.*

The advocates of comment claim that an innocent defendant cannot have any reason for refusing to testify, in spite of the fact that in many states if the accused takes the stand he may be subjected to a cross-examination which is not limited to the offense for which he is then on trial.[27] It is not without logic that a defendant, whether because of previous misconduct or his own personality, may deem it advantageous to refrain from testifying.[28] Yet, if the prosecution can comment on his reti-

[24] 109 Conn. 490, 146 Atl. 828, 830 (1929).

[25] Bruce, The Right to Comment on the Failure of the Defendant To Testify, 31 Mich. L. Rev. 226, 233 (1932).

[26] 8 Wigmore, Evidence § 2272a (3d ed., 1940).

[27] For a list of those states, see Reeder, Comment upon Failure of Accused To Testify, 31 Mich. L. Rev. 40, 56 at note 78 (1932).

[28] Authority cited note 22 supra. At p. 293 it was said, "Now, on the question of the defendant taking the stand, one of the strongest arguments that is urged against the right of the prosecutor to comment rises out of this fact: that many people, innocent or guilty,

cence, the defendant is placed in not only an awkward but, moreover, a somewhat unfair position.[29] Assuming such a defendant is actually innocent but remains tacit on these grounds, the effect of the prosecutor's comment is, nevertheless, accepted as evidence adverse to the defendant's cause. The counter argument that prior acts are not evidence against the present indictment and that personality quirks can actually work to the defendant's advantage if he were to testify does not seem to outweigh the greater justice that would ensue if defendant were to exercise his constitutional privilege of not testifying. Consequently, on the one hand, there is the ideal of searching for the truth by indirectly coercing the accused to take the witness stand out of fear of damaging comment by prosecution, and on the other hand, there is the ideal of protecting the accused from any possible cross-examination of prior offenses. There are reasons to seek out the truth. There are also reasons to protect the accused in the obtainment of the truth. The ultimate question that must be resolved is, does allowing comment so benefit the State as to overcome any injury to the defendant caused by comment so that substantial justice is achieved?

2. *Right of comment would cause prosecutors to become less diligent.*

A general practice of allowing comment might tend to bring about the very evils which the privilege (against self-incrimination) is intended to prevent, namely, the reliance by the prosecution, for the means of proof, upon the confessions in court of the accused himself or upon the inferences of guilt which could be drawn from his silence. As a result, there is a consequent slack and imperfect investigation of other sources of proof.[30]

Speaking on the possible evils involved if the prosecution would be allowed to comment, Hugo Pam of the Superior Court of Cook County said:

> The point I wanted to make is this: the reason I think such an amendment to the constitution is dangerous is because of the over-zealous prosecutor. If all the prosecutors were intellectually honest and weighed questions judicially, I don't think there would be any danger from them. But we know that prosecutors are not all thus, and we know that many prosecutors would take advantage of such a law, and with very little evidence of guilt would spend an hour commenting on the fact that the defendant didn't testify, make a great speech about it and build up a beautiful argument, which would very likely mislead the jury. In other words, it seems to me, it is wholly immaterial. The jury knows he didn't testify; the jury makes the argument itself; somebody on the jury is going to do the arguing when they get into the jury room; and the state can point out that the evidence has not been disputed. . . . Possibly it hasn't caused any great harm, but the opportunities to cause harm are great; it seems

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when called to the witness stand are timid, and do not present the best side of their character."

[29] Comment on Defendant's Failure To Take the Stand, 57 Yale L.J. 145 (1947).

[30] Authority cited note 26 supra.

to me they outweigh all the advantages we might get from such a law or such an amendment.[31]

3. *The effect of comment is in violation of the privilege against self-incrimination.*

The United States Supreme Court has declared that comment does not violate due process, but has not passed on the specific question whether comment violates the self-incrimination provision, although in *Adamson v. California* the Supreme Court has indicated that the self-incrimination provision would not be affected.[32]

Since 1936, there have been three important decisions pertaining to the constitutionality of comment in the face of a provision against self-incrimination.

In 1936, the South Dakota Supreme Court declared unconstitutional a statute allowing comment because of a constitutional privilege against self-incrimination.[33] Two years later a similar decision was handed down in Massachusetts, where the court said:

> The protection of the Constitution is that no subject shall be . . . compelled to furnish evidence against himself. That shield is positive and unequivocal. It is subject to no condition. . . . The proposed bill is not positive and unequivocal. . . . That which was before certain, clear, and indubitable has become contingent, clouded, and ambiguous. Positive rights secured to individuals by the Constitution cannot be thus circumscribed and rendered doubtful.[34]

The third important decision was handed down in 1951 by a Louisiana court wherein it was held:

> After a careful and exhaustive study of all the arguments pro and con by eminent legal scholars and logicians, we are convinced that the better rule pre-

[31] Authority cited note 22 supra at page 297.

[32] Adamson v. California, 332 U.S. 46 (1946), which reaffirmed the Twining v. New Jersey case, 211 U.S. 78 (1908), and the Palko v. Connecticut case, 302 U.S. 319 (1937). In answering the question whether comment violates due process, the court said at page 50, "Assuming comment violates the provisions against self-incrimination, there is still no violation of the due process clause, because the fifth amendment is not made effective against state action by the fourteenth amendment."

The court noted that however sound may be the legislative conclusion that an accused should not be compelled in any criminal case to be a witness against himself, and it saw no reason why comment should not be made upon his silence. On the same point, Justice Murphy in his dissent, at page 124, remarked: "It is my belief that this guarantee against self-incrimination has been violated in this case. . . . Much can be said pro and con as to the desirability of allowing comment on the failure of the accused to testify. But policy arguments are to no avail in the face of a clear constitutional command. This guarantee of freedom from self-incrimination is grounded on a deep respect for those who might prefer to remain silent before their accusers. . . . We are obliged to give effect to the principle of freedom from self-incrimination. That principle is as applicable where the compelled testimony is in the form of silence as where it is composed of oral statements."

[33] State v. Wolfe, 64 S.D. 178, 266 N.W. 116 (1936).

[34] In re Opinion of the Justices, 300 Mass. 620, 15 N.E. 2d 662 (1938).

vails in this state, which is in accord with the majority view; that it is not only sound, but that if such comment were to be permitted, it would, in effect, amount to an infringement of the constitutional right of the accused to abstain from taking the witness stand or to give testimony in the trial of his own cause. . . .

We are fortified in this view by the fact that in those states where comment obtains, experience has shown the defendant is, in fact, pressed to testify. . . .

Allowing comment would indeed make the constitutional privilege against self-incrimination an idle gesture, for everyone accused of crime would be faced with the dilemma of being forced to either take the stand in his own defense or have an inference of guilt attach merely because he does not do so.[35]

CONCLUSION

It would appear that all the arguments favoring the right of comment may be distilled into one major proposition, viz., a greater amount of truth will be obtained in criminal proceedings. This will occur because the possible effect of comment will cause more defendants to testify, and therefore direct evidence will be obtained for the court.

While it is true that the obtaining of direct evidence would aid in producing a just result, the fact remains that such a desirable end tends to reduce the effectiveness of the constitutional privilege against self-incrimination since the accused will usually testify out of fear of the prosecution's right to comment on his failure to testify.

Therefore, although the choice is technically a voluntary one on behalf of the accused, in a real sense he is being forced to testify, which is the exact right which the self-incrimination amendments are designed to protect. The all-important question, then, is whether the increased obtainment of direct evidence is a great enough benefit to pay for the cost of reducing a constitutional right.

[35] State v. Bentley, 219 La. 893, 54 So. 2d 137, 141, 142 (1951).

DEFENDANT'S RIGHT TO POLL THE JURY IN CRIMINAL CASES

Polling the jury—the practice whereby the jurors are asked individually the findings they have reached, thus creating individual responsibility and eliminating any uncertainty as to the verdict announced by the foreman[1]—is designed to afford the members of the jury an opportunity for free expression before the court, unhampered by the fears or the errors which may have attended their private deliberations.[2] A survey of the extent to which this right exists, if at all, comprises the subject matter of this comment.

Little did Sir Matthew Hale realize, in writing his *History of the Pleas of the Crown,* the extent of the divergence subsequent judicial interpreta-

[1] State v. Cleveland, 6 N.J. 316, 78 A. 2d 560 (1951).

[2] 8 Wigmore on Evidence § 2355 (1940).