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Recent Decision

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solidation of the mortgage notes, or any of them. The relation of the parties is not changed. No new right in the mortgaged property is given, and no new lien is created."

By way of conclusion we think it important to emphasize two points. The first is to determine whether either by statute or construction the mortgage is considered to be conveyance of an interest in land. Once this fact is determined in the affirmative, it follows that the Statute of Frauds must be complied with and that the mortgage agreement be in writing. Secondly, it is necessary to observe and understand the distinction between and the provisions of the Statute of Frauds and the Parol Evidence Rule respectively.

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RECENT DECISION

EVIDENCE — WAIVING PRIVILEGE AGAINST SELF INCRIMINATION.— Among important recent decisions of the Supreme Court, *Johnson v. United States* [1] merits attention. It redefines the constitutional privilege of an accused in a criminal proceeding not to testify to incriminating facts. And in view of present war hysteria and general disregard for law and order it comes at an opportune moment.

Under the federal constitution (Amendments, art. 5), and many state constitutions, "no person shall be . . . compelled in any criminal case to be a witness against himself. . . ." This privilege belongs to every individual but to gain its protection it must be positively claimed by the witness for the court will not claim the privilege for him.[2] A voluntary offer of testimony waives the privilege as to all relevant facts concerning such direct testimony,[3] and the opposing counsel may cross-examine to reveal and explain away such relevant facts.[4] Yet if the accused refuses to testify on the grounds of this privilege and remains silent, he has not waived it and it will protect him.[5]

Significantly, during the last war the decision of *Caminetti v. United States* [6] was handed down which the *Johnson* case directly bears upon.

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1 87 L. Ed. 497 (1942).

2 United States v. Ginsburg, 96 F. (2d) 882 (1938); Johnson v. United States, 87 L. Ed. 497 (1942).

3 Wigmore on Evidence, Vol. 8 (3d Ed.) § 2276 (2); Fitzpatrick v. United States, 178 N. S. 304, 20 S. Ct. 944, 44 L. Ed. 1078 (1900).

4 Cravens v. United States, 62 F. (2d) 261 (1933).

5 Raffel v. United States, 271 N. W. 494, 46 S. Ct. 566, 70 L. Ed. 1054 (1926).

6 242 U. S. 479, 35 S. Ct. 192, 61 L. Ed. 442 (1917).

The *Caminetti* case holds essentially: an accused who takes the stand "may not stop short in his testimony by omitting and failing to explain incriminating circumstances and events already in evidence, in which he participated and concerning which he is fully informed, without subjecting his silence to the inferences to be naturally drawn from it." And, another principle of long standing influenced by the *Johnson* case is that when the accused takes the stand without claiming his constitutional privilege, it is too late for him to halt at the point which best suits his own convenience.[7] The facts of the case prompting this declaration of principle well illustrate the point. The defendant had offered himself as a witness and testified in his own behalf. On cross-examination the state's attorney asked a question whether he had not sold spiritous liquors within one year previous to his indictment. The witness declined under the Bill of Rights, Art. 15, which prohibits compelling any person to furnish evidence against himself. The state insisted that the jury should consider the declining to answer as a pertinent matter of evidence. Defendant's counsel objected. Overruled; and the court directed the jury that they had a right to consider such declination as bearing upon the question of guilt or innocence of the prisoner. "The respondent by electing to testify in his own favor, waived his constitutional privilege. If he refuses to testify at all, the statute protects him from adverse comment or inference; but, if he avails himself of the statute, he waives the constitutional protection in his favor, and subjects himself to the peril of being examined as to any and every matter pertinent to the issue." [8] In other words, an accused who voluntarily testifies is subject to the same tests and rules as other witnesses, although some courts refuse to phrase the rule in this manner.[9]

The principle enunciated in *Johnson v. United States* [10] can be shown best only by a brief review of the facts. Petitioner was convicted of wilfully attempting to defeat and evade his federal income taxes for the years 1936 and 1937. He was a political leader in Atlantic City, New Jersey. The government's theory was that he had received large amounts of money from persons conducting the numbers racket for protection against police interference and he had not reported these sums in his tax returns for the years indicated. The theory of the defense was that the petitioner failed to list in his tax return all the in-

7 State v. Ober, 52 N. H. 459, 13 Am. Rep. 88 (1872).

8 State v. Ober, 52 N. H. 459, 13 Am. Rep. 88 (1872).

9 Clarke v. State, 78 Ala. 474, 56 Am. Rep. 45 (1885); Quintana v. State, 29 Tex. App. 401, 25 A. S. R. 730, 16 S. W. 258 (1891); Drew v. State, 124 Ind. 9, 23 N. E. 1098 (1890); Heldt v. State, 20 Neb. 492, 30 N. W. 626 (1886); Thomas v. State, 103 Ind. 419, 2 N. E. 808 (1885); Boyle v. State, 105 Ind. 469, 5 N. E. 203 (1886); State v. Schopmeyer, 207 Ind. 538, 194 N. E. 144 (1935); U. S. v. Buckner, 108 F. (2d) 929 (1940); Diggs v. U. S. 37 S. Ct. 192, 242 U. S. 470, 61 L. Ed. 442 (1917); Reagan v. U. S. 157 U. S. 301, 15 S. Ct. 610, 39 L. Ed 709 (1895).

10 87 L. Ed. 496 (1942).

come he had received because he had the sincere but mistaken belief that he was bound to report only the net balance remaining after deducting amounts expended for political purposes. A government witness testified that he had turned over $1200 weekly to the petitioner during the years 1935 through November of 1937. The petitioner then took the stand in his own defense and admitted receiving these weekly amounts except for the two months of November and December in 1937. On cross examination he denied receiving money for these two months. He was then asked, "Did you receive any money from numbers in 1938?" Defense counsel objected that this question was not relevant to the issue and would tend to prove a different offense than the one for which the petitioner was being tried. The defense's objection was overruled. Petitioner, after giving an affirmative answer, was asked: "Who gave it to you?" Defense counsel objected and the jury was withdrawn while the attorneys argued. The government asked also that the petitioner be excused from the court room. The request was acceded to without objection. Upon returning to the court room petitioner's counsel advised him of his constitutional privilege that if he believed the answer to the question would incriminate him he would not have to answer the question. The petitioner thereupon claimed the privilege. The Court ruled, "You may decline to answer." In the course of the trial, the prosecutor addressed the jury and made capital of the petitioner's refusal to testify, drawing inferences of guilt from petitioner's refusal to testify and continued silence. Petitioner's counsel objected to such statements but his objection was overruled; exception was taken. The next morning counsel for the petitioner said: "We withdraw whatever was said last night," and he failed to have the court instruct the jury to disregard petitioner's refusal to testify. Basis of the objection of counsel for petitioner was that the prosecutor's reference to the claim of privilege actually amounted to an admission of income tax violation in 1938. This he claimed thwarted the privilege and actually incriminated the petitioner. The court approved of the grounds for the objection and added: "He is not being charged with any 1938 tax." But then the prosecutor argued that the purpose for which the questions were permitted was a matter of the petitioner's good faith and his credibility, as were the answers he had already given on similar questions. The court advised: "I think I probably should indicate to the jury that that is the full extent of it." Petitioner's counsel made no objection thereto, nor later did the counsel assert error in the motion for a new trial that the proscutor's comment and the court's charge were improper.

The reasoning of the Supreme Court is significant. "The cross-examination did not run afoul of the rule which prohibits inquiry into a col-

lateral crime unconnected with the offense charged. . . . The amount and source of the 1938 income accordingly were relevant to show the continuous nature of the transactions in question. . . . Though the issue might have been more aptly phrased by the court in terms other than credibility, the meaning of the ruling in its context is plain. Thus we may assume that it would not have been error for the court to deny petitioner's claim of privilege. In such a case his failure to explain the source of his numbers income in 1938 could properly be the subject of comment and inference. . . . But where the claim of privilege is asserted and unqualifiedly granted, the requirements of a fair trial may preclude any comment. That certainly is true where the claim of privilege could not properly be denied." The dilemma in which the petitioner found himself is well stated by the Supreme Court. "The ruling of the court gave the petitioner the choice between testifying and refusing to testify as to his 1938 income. 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. His real choice might then be quite different from his apparent one. In this case it would lie between protection against an indictment for 1938 and the use of his claim of privilege as evidence that he did in fact receive the income during the last two months of 1937. Elementary fairness requires that an accused should not be misled on that score. If advised by the court that his claim of privilege though granted would be employed against him, he well might 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."

Although the petitioner was entitled to judgment on principle, his case and his rights were prejudiced by the failure of his counsel to make objection and note exceptions to the conduct of the prosecutor and the instructions of the court. Justice Douglas, stating the majority opinion, said that this amounted to a waiver of the petitioner's rights. The Supreme Court refused to find for the petitioner for the reason that the grounds for appeal had not appeared in the motion for a new trial or in the assignments of error. "The point now is a mere afterthought." This shows graphically how basic legal procedure is, and though constitutional rights are at stake proper procedure is fundamental if any justice is to be administered.

From the Court's statements it is apparent that this decision does not overthrow established principles. In fact it establishes another principle, namely, that an accused may take the stand to testify in his own behalf and if the court unqualifiedly grants him his claim of constitutional privilege the prosecutor is estopped from making reference thereto or

from drawing inferences therefrom. And the jury is likewise so restricted. It is clear that this rule is different from the rule enunciated in the case of *State v. Ober* previously referred to. In that case, it may be recalled, the court refused the accused his claim of privilege. In the *Johnson* case, however, the court did unqualifiedly grant the claim of privilege. In *State v. Ober* the prosecutor was permitted to make comment and draw inferences from the refusal to testify, and the jury had the right to draw inferences therefrom. The Supreme Court said in the *Johnson* case that after the granting of the privilege comment and inference by the prosecutor and jury is prohibited, otherwise the privilege is undermined and rendered ineffective.

The principles enunciated in the *Johnson* case square with common sense and decent, just, constitutional government.

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