# DEFENDANT AS A WITNESS IN A CRIMINAL PROCEEDING

At common law an interested party in a court proceeding was not a competent witness in his own behalf. The basis for disqualifying parties was a notion that the temptation to falsify was too great for the average witness to resist. Any party, therefore, who had any interest whatsoever in the case could not testify. A riper wisdom and experience, however, brought to light the fact that it was better not to close the mouths of interested parties in court proceedings, and statutes were subsequently passed in practically all the English-speaking jurisdictions that would allow an interested party to be a competent witness, and consequently a defendant in a criminal case could testify and be a witness at his own trial.[1]

In reviewing the laws of the several jurisdictions of the English speaking countries, the states of the United States, and the practice in United States Federal Courts, one can readily ascertain that the defendant can testify and be a competent witness in a criminal proceeding in all the jurisdictions with the exception of Georgia.[2] The question of whether or not defendant is a competent witness is amply set forth in the United States Code which is worded similarly to statutes in jurisdictions that

1. ENGLISH CRIMINAL EVIDENCE ACT, 1898, St. 61 and 62, Vict. c. 36; CANADA DRAFT EVIDENCE ACT, 1938, § 3; 62 STAT. 833 (1948), 18 U.S.C. 3481 (Supp. 1951); ALA. CODE, 1940, Tit. 15, § 305; ARIZ. CODE ANN., 1939, § 44-2704; ARK. STAT. ANN., 1947, § 43-2018; CAL. PENAL CODE, 1949, § 593.02; MISS. CODE ANN., 1942, § 1692; MO. REVISED STAT., 1929, § 7868; REVISED CODE OF DEL., 1915, § 4690; FLA. STAT. ANN., 1949, § 90.05; IDAHO CODE, 1949, § 19-3003; SMITH-HURD ILL. ANN. STAT., 1937, c. 38, § 734; IND. BURNS STAT., 1933, § 9-1603; IOWA CODE, 1946, § 622.3; KAN. GEN. STAT., 1949, § 62-1420; KY. REVISED STAT., 1948, § 455.090; LA. CODE OF CRIM. PROC., 1932, § 461; ME. REVISED STAT., 1930, § 115; MD. ANN. CODE, 1924, Art. 5, § 1; ANN. LAWS OF MASS., 1933, c. 233, § 20; MICH. COMPILED LAWS, 1948, § 617.63; MINN. STAT., 1949, § 593.02; MISS CODE ANN., 1942, § 1692; MO. REVISED STAT., 1929, § 3689; MONT. REVISED CODE, 1935, § 12177; REVISED STAT. OF NEBR., 1943, § 29-2011; NEV. LAWS, 1929, § 10959; N. H. PUBLIC LAWS, 1926, § 2:97-10; N. M. STAT. ANN., 1929, § 45-504; MCKINNEY'S CONSOLIDATED LAWS OF N. Y. ANN., 1945, § 393; N. J. REVISED STAT., 1939, § 2:97-1; GEN. STAT. OF N. C., 1943, § 8-54; N. D. COMPILED LAWS, 1913, § 10837; PAGE'S OHIO GEN. CODE ANN., 1945, § 13444-2; OKLA. STAT., 1941, § 22-701; ORE. CODE, 1930, § 13-929; PA. PURDEN'S STAT., 1930, St. 1887, § 1, Tit. 19, § 681; R. I. GEN. LAWS, 1938, c. 538, § 11; S. C. CODE, 1932, § 1011; S. D. CODE, 1939, § 34.3633; TENN. CODE, 1932, § 9782; TEX. CODE OF CRIM. PROC., 1936, Art. 710; UTAH CONST., 1895, Art. 1, § 12; VT. PUBLIC LAWS, 1934, § 2383; VA. CODE, 1950, § 19-238; WASH. CONST., 1889, Art. 1, § 22; W. VA. CODE, 1949, § 5731; WIS. STAT., 1947, § 325.13; WYO. COMPILED LAWS, 1945, § 10-1201.
2. An act was proposed at the 1952 session of the Georgia General Assembly that would have allowed a defendant to become a competent witness, but in spite of the backing of the Georgia Bar Association the proposed act failed to be reported out of committee.

allow a criminal defendant to testify under oath: 62 STAT. 833(1948) 18 U.S.C. 3481(Supp. 1951). "In trials of all persons charged with the commission of offenses against the United States . . . the person charged shall, at his own request, be a competent witness." The jurisdictional rules that will allow a defendant to be a competent witness are uniform in the holding that the defendant must volunteer to become a witness and that compulsion or coercion cannot be used in any degree, and the defendant must be informed that he can remain silent and no inference shall be drawn from his failure to testify.[3]

In all criminal trials in Georgia the prisoner shall have the right to make to the court and jury such statement in the case as he may deem proper in his defense. It shall not be under oath, and shall have such force only as the jury may think proper to give it. The jury may believe the defendant's statement in preference to the sworn testimony in the case, and the defendant shall not be compelled to answer any questions on cross-examination should he decline to answer.[4] The defendant may, however, consent to be cross-examined, but this cross-examination cannot be under oath because the law does not allow a defendant to be placed under oath even with his consent and neither the state nor the defendant can waive this law prohibiting the defendant from being sworn.[5] Comment by counsel may, however, be made upon defendant's unsworn statements made to the jury.

The review of the laws of the various jurisdictions has conclusively shown that the accused in a criminal proceeding can be a competent witness in his own behalf; the different codes however, have different rules in regard to the degree of cross-examination. As to precisely what position the defendant is in once he elects to take the stand and the counsel for the prosecution begin their cross-examination is one of the larger if not the largest aspects of defendant's taking the stand. This aspect has been treated differently by the several jurisdictions, but generally its mode of treatment will fall into one of the following categories:[6] (1) The voluntary taking of the stand is a waiver as to all facts whatsoever, including those which merely affect credibility. (2) The waiver extends to all matters relevant to the issue, meaning thereby to exclude collateral matter, *i.e.*, facts merely affecting credibility. (3) The accused may be cross-examined only as to subjects already dealt with in his direct examination. (4) The waiver extends to no other criminal acts

3. State v. Chisnell, 36 W.Va. 659, 15 S.E. 412 (1892).
4. GA. CODE, 1933, § 27-405.
5. Roberts v. State, 189 Ga. 36, 5 S.E.2d 340 (1939).
6. WIGMORE, EVIDENCE, § 2276 (3d ed. 1940).

than the one precisely charged. The defendant therefore, must suffer the consequences if he exercises his option and decides to take the stand and become a competent witness.

The voluntary taking the stand and its resultant waiver can be supported on the ground that the privilege protects the accused against any form of compulsory disclosure as a witness; consequently, its waiver abandons any right to refuse to answer questions as a witness. The second rule is based upon the fact that defendant was not obligated to testify and if he does testify he exonerates himself and denies the commission of the offense charged and therefore he is subject to cross-examination as the necessary result of his assuming the position of a witness, and consequently, if he discloses part he must disclose the whole in relation to the subject matter about which he has answered in part.[7] The third rule, which holds that the waiver allows the prosecution to ask questions pertaining to the issues about which questions were asked upon direct examination only, is practically the same as the second rule, and the literal effect of the third rule is to limit the doctrine of waiver to the subject of the direct examination, but the subject of direct examination, properly construed, is the whole fact of guilt or innocence, and hence the topic of cross-examination could readily range over all relevant facts except those facts that merely affect credibility. The fourth rule, that the waiver extends to no other criminal act, is presumably grounded in the reasoning that an accused who takes the stand may fairly be asked to tell all he knows that is revelant, and since the prosecution can in any event, by other witnesses prove the former offenses, it is difficult to see why the same act cannot be proved by defendant's own testimony, without unfair prejudice.[8]

The rules vary somewhat as to the mode of treating the defendant's character once he is called as a witness. In England the accused who is called as a witness cannot be asked any question tending to show that he has committed, or been convicted of, or been charged with any offense other than that with which he is then charged, unless, *inter alia,* such offense is admissible to show he is guilty of the offense charged, or evidence has been given or questions asked tending to establish his own good character.[9] One would gather from the English

7. State v. Wentworth, 65 Me. 234 (1875).
8. State v. Bartness, 33 Ore. 110, 54 Pac. 167 (1898).
9. The English rule is apparently based on the common law doctrine that everyone is innocent until proven guilty, and from this beneficent principle comes the rule that the general bad character of one charged with a particular crime may not be shown unless the accused himself

view that the defendant has the option as to whether or not his character will be put in evidence. If the defendant decides to put his good character forward then he has left himself open for the probing questions of the prosecution as to his bad character.

The Canada Evidence Act of 1893,[10] provides that a witness may be asked whether he has been convicted of any offense, and if he does not admit that he has been convicted, the conviction may be proved against him. It has accordingly been held that this subjects the accused to the same liability with regard to cross-examination as to previous convictions even though he has not given evidence of good character.[11] No valid justification has been given for the rule, and it has not escaped notice that such evidence may have the effect of prejudicing the position of accused with the jury.[12]

The prevailing rule in the United States is that the prosecution may not initially attack the defendant's character in a criminal proceeding. However, after a defendant has attempted to show his good character in his own aid, the prosecution may in rebuttal offer evidence of the defendant's bad character.[13] The reason for this rule is that if the accused having a bad character, misleads the court, the false impression should be removed by the prosecution going into the issue of defendant's character. The rule therefore that prevails in the United States is the same as the English rule and both the English and United States rules are based on the common law approach to a defendant's character.[14]

The question of comment upon defendant's failure to testify has been treated differently in different jurisdictions. In England the judge is allowed to comment upon the failure of the defendant to testify but Crown counsel cannot.[15] The Canadian Code prohibits any comment by either judge or counsel.[16] The rule that prevails in the United States jurisdictions is that defendant's failure to submit himself as a witness shall not create any presumption against him nor be the subject of comment by counsel nor judge, and any comment whatsoever is

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chooses to put his character in issue; and it is urged that this settled rule will be violated by allowing the prosecution to show that a defendant on trial is wanting in truthfulness, as that must necessarily, to some extent at least, involve the matter of general character.

10. 56 VICT., c. 31.
11. Rex. v. D'Aoust (1902), 3 D.L.R. 563, 5 Can. Cr. Cas. 407.
12. 12 CAN. B. REV. 519 (1934).
13. Romes v. Commonwealth, 164 Ky. 334, 175 S.W. 669 (1915).
14. See Note 7, *supra*.
15. ENGLISH CRIMINAL EVIDENCE ACT, 1898, *supra*, Note 1.
16. 13 CAN. B. REV. 336 (1935).

forbidden in the presence of the jury with regard to the refusal of defendant to take the stand and become a competent witness.[17] If the silence of the defendant is permitted to raise adverse inferences against him, and therefore the subsequent comment by a prosecuting counsel, the privilege extended by the option of taking the stand or remaining silent would become a coercive influence to take the witness stand, with all the temptation to perjury arising from his vital interest in the case, accentuated by a searching cross-examination.[18] In Georgia however, comment may be made upon the unsworn statement of the defendant, which could be construed as being contrary to the prevalent rule that will not allow comment to be made upon an accused's failure to testify because the defendant's statement is not testimony in Georgia criminal proceedings.[19]

There has been much criticism leveled at the fact that defendant is not treated as other witnesses with regard to self-incriminating evidence when he once volunteers to take the stand. The view seems to be that the privilege of not taking the stand allowed the accused to enjoy the right of not having a single question asked him and for this reason no relevant fact could be inquired about that would tend to incriminate him,[20] and, consequently, on this very hypothesis his voluntary offer of testimony upon any fact is a waiver at to all other relevant facts. It follows, therefore, that he has signified his waiver to the privilege against self-incrimination. The prohibition in the United States Constitution is against compelling an accused person to become a witness against himself,[21] but if he consents to become a witness in a criminal action in which he is a defendant, voluntarily and without any compulsion, and he gives evidence which bears against himself, the giving of evidence results from the defendant's voluntary act of becoming a witness, and not from compulsion. The accused's own act is the pri-

17. Garrett v. State, 25 Ariz. 508, 219 Pac. 593 (1923). There is, however, a rule much in evidence that will allow comment to be made upon defendant's failure to become a witness. PAGE'S OHIO GEN. CODE ANN., 1945, § 13444-3. Goodman v. Sapp, 102 N.C. 477, 9 S.E. 483 (1889). See also, Adamson v. California, 67 S.Ct. 1672, 322 U.S. 46 (1947), where the United States Supreme Court held that a California law was constitutional which would allow comment to be made upon defendant's failure to take the stand as a witness.
18. Turner v. State, 238 Ala. 352, 191 So. 396 (1939).
19. See Note 5, *supra*.
20. 8 WIGMORE, EVIDENCE, § 2260 (3d ed. 1940).
21. The Fifth Amendment to the Constitution of the United States provides that no person shall be compelled to furnish evidence against himself. The ruling, however, of the United States Supreme Court in Adamson v. California, Note 17, *supra*, is to the effect that a state law compelling a person to be a witness against himself in a state criminal proceeding violates no United States constitutional guarantee.

mary cause and if it was voluntary, he has no reason to complain.[22]

There are certain drawbacks to legislation that allows a defendant to testify in a criminal proceeding, and this discussion would not be complete without mentioning a few of the more important drawbacks to precedure rules that would allow a defendant in a criminal case to be a competent witness. One of the more important aspects is that such legislation would place the defendant under a moral duress, compelling him to become a witness, under the penalty, if he declines, of the most damaging suspicions on the part of the jury, as well as the public.[23] The jury is likely to infer from the defendant's silence that he must be guilty or he would have taken the stand and sworn to his innocence, regardless of what instructions the judge might have given them with regard to the inference of any guilt from defendant's silence. If on the other hand defendant does take the stand the jury will say that if he is guilty of the crime of which he is accused he will not hesitate to add perjury to it, and on top of all this the average defendant in a criminal case is unaccustomed to public speaking, and by no means in the habit of arranging his ideas in logical sequence, or expressing them in apt terms, and the strain of cross-examination by men skilled in the art of cross-examination and well learned in the law could very easily cause the defendant to make omissions that could be construed as a confession of guilt.[24]

## CONCLUSION

The rule that will not allow a defendant to be a competent witness in a criminal proceeding was a very practical rule in its day, but in modern times when the courts are confronted with the professional criminal it would seem to be imperative that the prosecution have every means possible under our democratic form of government to cope with these breakers of the law. The enforcement of the criminal law is not a game for which rewards are offered for skillful manuevers. The criminal is, in most cases, anything but a sportsman, and he will use every trick or device to cover up his act and escape the consequences. Therefore the prosecution must be armed to overcome such shrewdness and expose the criminals whenever possible, consequently the prosecutor's hands should not be tied by legislation that is not necessary where the defendant can be adequately protected without it.[25]

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22. Connors v. People, 50 N.Y. 240 (1872).
23. 22 CENT. L.J. 314 (1886).
24. State v. Maynard, 19 Nev. 284, 9 Pac. 514 (1886).
25. 14 CAN. B. REV. 424 (1936).