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# EVIDENCE-PROBATIVE VALUE OF INFERENCES FROM FAILURE TO CALL A WITNESS

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EVIDENCE—PROBATIVE VALUE OF INFERENCES FROM FAILURE TO CALL A WITNESS—Insured sued to recover sickness benefits under an insurance policy. The defense was that the insured was not in good health when the policy was issued. The only evidence introduced by the defendant insurance company was plaintiff's refusal to consent to taking the deposition of an examining hospital physician. Defendant's request for a directed verdict on the issue of good health was refused. After being instructed that from the refusal to permit taking of the deposition they might "presume that such evidence . . . would operate against plaintiff and be against his interest in this suit," the jury returned a verdict for plaintiff. *Held,* the instruction was not prejudicial to the defendant since he could not use the inference as a substitute for proof of a fact. *National Life & Accident Ins. Co. v. Eddings,* (Tenn. 1949) 221 S.W. (2d) 695.

Physician-patient communication is not privileged in Tennessee. It is well recognized that a party's failure to call an available witness who would be naturally capable of giving testimony superior to that actually relied upon may give rise to the inference that the testimony, if given, would be adverse to the party failing to call the witness. Defendant's objection to the instruction given in the principal case is a result of careless use of language in the cases. Despite the inappropriate use of the words "presumption" and "evidence" in this regard,[1]

[1] For example, "Where a party has an opportunity to explain . . . and fails to do so, it is *evidence* against him . . . the *presumption* arising from the withholding or suppression of evidence. . . ." Davis v. Etter & Curtis, (Tex. Civ. App. 1922) 243 S.W. 603 at 604.

it is clear that such an inference is not mandatory nor may the inference alone suffice to prove a fact or issue. It is persuasive and not probative. The court will rule against a party having the burden of proof if all that the party relies upon to sustain the burden is his adversary's failure to testify or to call a material witness.[2] Similarly, when a party has introduced enough evidence to go to the jury, it has been held error to permit comment upon the adversary's failure to call a witness when the adversary has introduced no evidence or testimony, but has rested upon completion of the other party's case.[3] Although the adversary takes a risk in so doing, there is no duty to speak until the burden of going forward with the evidence has shifted. On the other hand when an issue is met by the adversary, the jury is permitted to draw inferences from the failure of either party to call a material witness or to use the strongest evidence available. When this stage has been reached there is no point in instructing the jury as to the non-probative value of the inference. It would seem to result in less confusion if the court merely defines the inference and states that it is permissive rather than mandatory.[4] The court itself may weigh any inferences against the party having the burden of proof in deciding whether his case is sufficient to go to the jury, or in deciding whether the adversary now has the burden of going forward with the evidence.[5] However, the court in the principal case did not disclose the weight it gave to the inference in determining that the verdict was supported by the evidence. In some situations the court will not permit comment or give an instruction in regard to the failure to call a witness. Since the inference may be rebutted,[6] it is necessary that the court have power to control the matter so that the trial does not go off on a tangent when the inference clearly is not warranted under the circumstances. For example the court will not permit the inference to be drawn when the testimony withheld probably would be inferior or merely cumulative to that already given.[7] When a witness is equally available to the parties, e.g., when the uncalled witness is in the courtroom, it usually is held that no inference may be drawn.[8] However, a few jurisdictions

Italics added. The use of the word "presume" in the instruction given in the principal case is incorrect, but it was not prejudicial to the defendant. A presumption is a rule of law to be applied by the court and has no proper place in a charge to the jury unless the facts upon which the presumption is based are in dispute. 9 WIGMORE, EVIDENCE §§2490-2493 (1940).

[2] Stimpson v. Hunter, 234 Mass. 61, 125 N.E. 155 (1919); Login v. Waisman, 82 N.H. 500, 136 A. 134 (1927); 70 A.L.R. 1326 (1931).

[3] McFarland v. Commercial Boiler Works, Inc., 10 Wash. (2d) 81, 116 P. (2d) 288 (1941); Hubbard v. Cleveland, Columbus & Cincinnati Highway, Inc., 81 Ohio App. 445, 76 N.E. (2d) 721 (1947). *Contra*, Dommes v. Zuroski, 350 Pa. 206, 38 A. (2d) 73 (1944).

[4] But see Hammond v. Hammond, 134 Misc. 534, 236 N.Y.S. 100 (1929).

[5] Guthrie v. Gillespie, 319 Mo. 1137, 6 S.W. (2d) 886 (1928); United States v. Fields, (8th Cir. 1939) 102 F. (2d) 535.

[6] Mitchell v. Boston & Maine Railroad, 68 N.H. 96, 34 A. 674 (1894).

[7] Chambers v. Chambers, (Mo. App. 1934) 74 S.W. (2d) 104; 2 WIGMORE, EVIDENCE §§286-289 (1940).

[8] City of Birmingham v. Levens, 241 Ala. 47, 200 S. 888 (1941); Rosenstrom v. North Bend Stage Line, 154 Wash. 57, 280 P. 932 (1929). See also Deaver v. St. Louis Public Service Co., (Mo. App. 1947) 199 S.W. (2d) 83.

apply what appears to be a more reasonable rule and permit comment from both parties, with the jury deciding the relative strength of the inferences.[9] In the principal case, in view of the hospital rules against giving out information without the consent of the patient, it cannot be said that the physician was equally accessible to the parties. Under these circumstances the jury was properly permitted to draw the inference under either rule.

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[9] Baker v. Salvation Army, Inc., 91 N.H. 1, 12 A. (2d) 514 (1940); United States v. Cotter, (2d Cir. 1932) 60 F. (2d) 689, cert. den. 287 U.S. 666, 53 S.Ct. 291 (1932).