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# Permissive Inference from the Nonproduction of Equally Available Witnesses

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# PERMISSIVE INFERENCE FROM THE NONPRODUCTION OF EQUALLY AVAILABLE WITNESSES

In *United States v. Dibrizzi*[1] the United States Court of Appeals for the Second Circuit held that when a witness is equally available to both parties, nonproduction of the witness allows the jury to draw an inference that the testimony would have been unfavorable to either party.[2] The defendant in *Dibrizzi* was convicted of embezzling union funds. When the prosecutor commented on the failure of defendant to call a key witness an objection was taken. The defendant contended that the uncalled witness was equally available to either party and thus his nonproduction should not be cause for an inference against the defendant. The court acknowledged that defendant's contentions had some support, but felt the better rule is that the failure to call an equally available witness is open to an inference against either party. There is a substantial split of authority concerning the permissibility of this inference in civil and criminal actions of which *Dibrizzi* is a recent illustration. This Comment will consider whether the inference should be allowed. It will also discuss the problems involved in defining equal availability, the reasoning behind the decisions which allow or deny the inference, the procedural effect of such an inference, and propose, in conclusion, a resolution of the split of authority.

## General Law of Inferences and Presumptions

A short review of the general law of inferences and presumptions will help put the precise issue in perspective. The rules of evidence determine what should and should not be heard by the jury. These rules recognize that principles of probability provide the groundwork for the submission of presumptions and inferences to the jury. When it is extremely probable that fact *B* will follow fact *A* then the jury is allowed to consider the presumption or inference that it does.[3] Support for allowing presumptions and

1. 393 F.2d 642 (2d Cir. 1968).

2. *Id.* at 646. The inference requested is usually phrased in terms of unfavorable testimony. Sometimes it is called a presumption and the exact wording often differs.

3. C. McCormick, Evidence 309 (1954). Presumptions are of two kinds: permissive and mandatory. These terms are descriptive of the effect that the presumption has on the jury. Mandatory presumptions

inferences to go to the jury is also found in considerations of convenience, fairness in allocating the burden of proof, and social and economic policy.[4] Wide latitude is allowed counsel when arguing these inferences to the jury.[5]

A relevant example of an inference is the negative inference based on nonproduction of evidence and witnesses. The inference goes back to 1722 and *Armory v. Delamirie*.[6] There the court would presume the worst against the nonproducer of important evidence. Lord Mansfield's statement that all the evidence is to be weighed according to the proof which it was in the power of one side to produce and the other to contradict,[7] has become a maxim. The assumption that a party does not produce evidence because he fears to do so leads to the presumption that witnesses not produced would give testimony harmful to the nonproducer. Thus the "missing witness rule" provides that if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, nonproduction of such witnesses creates the presumption that their testimony would be unfavorable.[8]

The key to the missing witness rule is in the phrase "peculiarly within his power." The inference is not drawn because of mere nonproduction, but is based on nonproduction when all the facts point to favorable testimony from the uncalled witness.[9]

Since all the facts point toward favorable testimony from the uncalled witness, the courts seek to infer some reason for nonproduction. The presumption is that the witness was not produced because, in fact, his testimony would have been unfavorable. There are, therefore, several exceptions to the missing witness rule. Where the witness is equally unavailable to the parties there can be no inference drawn from nor any comment made upon his nonproduction.[10] Similarly, in the case of corroborative testimony or that which is cumulative or unimportant, the missing witness rule is inapplicable.[11]

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compel the jury to find in accordance with the established probabilities (i.e., that a properly addressed and stamped letter shows receipt by the addressee). Permissive presumptions allow the jury to weigh the inference provided by the facts. It is the latter group which this Comment will discuss.

4. 2 J. WIGMORE, EVIDENCE § 288 (3d ed. 1964 Supp.).

5. Graves v. United States, 150 U.S. 118 (1893) (dissenting opinion); United States v. DeFillo, 257 F.2d 835 (2d Cir. 1958), *cert. denied*, 359 U.S. 915; United States v. Nunan, 236 F.2d 576 (2d Cir. 1956), *cert. denied*, 353 U.S. 912; *see* United States v. Cotter, 60 F.2d 689 (2d Cir. 1932), *cert. denied*, 287 U.S. 666.

6. 1 Strange 505 (1722).

7. Blatch v. Archer, Cowp. 66 (1774).

8. Graves v. United States, 150 U.S. 118 (1893); Pennewell v. United States, 353 F.2d 870 (D.C. Cir. 1965); Milton v. United States, 110 F.2d 556 (D.C. Cir. 1940); State v. Wallach, 389 S.W.2d 7 (Mo. 1965).

9. 2 J. WIGMORE, EVIDENCE § 288 (3d ed. 1964 Supp.).

10. United States v. Bergman, 354 F.2d 931 (2d Cir. 1966).

11. State v. Wallach, 389 S.W.2d 7 (Mo. 1965); State v. Clawans, 38

In *Dibrizzi*, the uncalled witnesses were equally available to both parties to the action. In many cases it is said that where the witness is equally available no inference may be drawn from his nonproduction.[12] The more logical view is that nonproduction is open to an inference against either party.[13] Before turning to a

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N.J. 162, 183 A.2d 77 (1962); *see* United States v. Johnson, 371 F.2d 800 (3d Cir. 1967); United States v. Llamas, 280 F.2d 392 (2d Cir. 1960); State v. Parker, 151 N.W.2d 505 (Iowa 1967); State v. Frazier, 221 A.2d 468 (R.I. 1966).

Some jurisdictions equate nonproduction with wilful suppression; the cases clearly are not synonymous and wilful suppression will not be considered. People v. Hrisoulas, 251 Cal. App. 2d 791, 60 Cal. Rptr. 80 (1967); People v. Lopez, 169 Cal. App. 2d 4, 336 P.2d 614 (1959); State v. Baker, 56 Wash. 2d 846, 355 P.2d 806 (1960).

*See generally Evidence: Positive and Negative Inferences From Spoilation or Suppression of Evidence or Witnesses*, 17 OKLA. L. REV. 74 (1964).

12. Jennings v. United States, 391 F.2d 512 (5th Cir. 1968); United States v. Chase, 372 F.2d 453 (4th Cir. 1967); Pennewell v. United States, 353 F.2d 870 (D.C. Cir. 1965); Arellanes v. United States, 302 F.2d 603 (9th Cir. 1962); Johnson v. United States, 291 F.2d 150 (8th Cir. 1961); Wagner v. United States, 264 F.2d 524 (9th Cir. 1959); Shurman v. United States, 233 F.2d 272 (5th Cir. 1956); Zammar v. United States, 217 F.2d 223 (8th Cir. 1954); Billeci v. United States, 184 F.2d 394 (D.C. Cir. 1950); Himmelfarb v. United States, 175 F.2d 924 (9th Cir. 1949); Rostello v. United States, 36 F.2d 899 (7th Cir. 1929); Orr v. State, 269 Ala. 696, 111 So. 2d 627 (1958); Kissic v. State, 266 Ala. 71, 94 So. 2d 202 (1957); Bates v. Morris, 101 Ala. 34, 13 So. 138 (1893); State v. Segar, 96 Conn. 428, 114 A. 389 (1921); Scovill v. Baldwin, 27 Conn. 316 (1858); Blackman v. State, 78 Ga. 592, 3 S.E. 418 (1887); People v. Munday, 280 Ill. 32, 117 N.E. 286 (1917); People v. Smith, 74 Ill. App. 2d 458, 221 N.E.2d 68 (1966); Barringer v. Arnold, 358 Mich. 594, 101 N.W.2d 365 (1960); *see* United States v. Marchisio, 344 F.2d 653 (2d Cir. 1965); State v. Plourde, 3 Conn. Cir. 465, 217 A.2d 423 (1965); People v. Williams, 87 Ill. App. 2d 338, 231 N.E.2d 646 (1967); People v. Williamson, 78 Ill. App. 2d 90, 223 N.E.2d 453 (1966); *cf.*, McClannahan v. United States, 230 F.2d 919 (5th Cir.), *cert. denied*, 352 U.S. 824 (1956); The Oregon, 133 F.2d 609 (9th Cir. 1904); Denton v. State, 246 Ind. 155, 203 N.E.2d 539 (1965). *See also* the multitude of citations in 2 J. WIGMORE, EVIDENCE § 288 (3d ed. 1964 Supp.).

13. United States v. Armone, 363 F.2d 385 (2d Cir. 1966); United States v. Cotter, 60 F.2d 689 (2d Cir. 1932), *cert. denied*, 287 U.S. 666; Burch v. Reading Co., 140 F. Supp. 136 (E.D. Pa. 1956), *aff'd*, 240 F.2d 574 (2d Cir. 1956); General Motors Acceptance Corporation v. Bearden, 114 Ga. App. 392, 151 S.E.2d 517 (1966); Denies v. First National Life Insurance Co., 44 So. 2d 570 (La. App. 1962); Baker v. Salvation Army, 91 N.H. 1, 12 A.2d 514 (1940); *see* Delaware and Hudson Co. v. Nahas, 14 F.2d 56 (3d Cir. 1926); Western and A. R. Co. v. Morrison, 102 Ga. 319, 29 S.E. 104 (1897); Goodloe v. State, 229 N.E.2d 626 (Ind. 1967); State v. Gardin, 251 Minn. 110, 86 N.W.2d 711 (1957); State v. Clawans, 38 N.J. 162, 183 A.2d 77 (1962); Commonwealth v. Black, 186 Pa. Super. 223, 142 A.2d 495 (1958); Commonwealth v. Trignaini, 185 Pa. Super. 332, 138 A.2d 215 (1958); Wooten v. State, 203 Tenn. 473, 314 S.W.2d 1 (1958); *cf.* United States v. Beekman, 155 F.2d 580 (2d Cir. 1946); People v. McElroy, 30 Ill. 2d 286, 196 N.E.2d 651 (1964); State v. Johnson, 151 La. 625, 92 So. 139 (1922). *See also* J. WIGMORE, EVIDENCE § 288 (3d ed. 1964 Supp.).

discussion of this split of authority, an inspection of who is an equally available witness is necessary.

## Equally Available Witness

A perusal of the cases does not yield a single workable standard by which "equal availability" of a witness may be judged. There are two theories diametrically opposed in concept and application. One considers equal availability in the narrow sense of mere physical presence.[14] The other looks to relationships and expectations of testimony in making the determination.[15] By the narrow definition of some jurisdictions all persons who are physically present at trial or accessible to service of process are equally available to either party. Thus, police officers, conspirators now in prison, and relatives of a party to the action may all be witnesses equally available to both parties, depending on their physical location.

For example, a leading case in Alabama held that where the husband of one of the parties was in court he was equally accessible to both parties.[16] A more recent federal case held defendant's partners in a criminal enterprise who were imprisoned for that crime were witnesses equally available to either party at defendant's trial.[17] Indicative of the same reasoning are cases which hold police officers to be equally available.[18]

On the other hand, many courts have shown a willingness to use a broader definition of equal availability which takes into account factors other than physical presence. This viewpoint is expressed in *McClannahan v. United States*,[19] where the uncalled witness was defendant's attorney and was therefore held not to be equally available. The court in dictum said that the question of equal availability is largely one of fact, with a wide variety of circumstances bearing on its ultimate determination. It is not decided merely from a witness' physical presence or accessibility to subpoena. On the contrary, it may depend on his relationship to one

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14. *See* Jennings v. United States, 391 F.2d 512 (5th Cir. 1968); United States v. Armone, 363 F.2d 385 (2d Cir. 1966); Arellanes v. United States, 302 F.2d 603 (9th Cir. 1962); Johnson v. United States, 291 F.2d 150 (8th Cir. 1961); Bates v. Morris, 101 Ala. 34, 13 So. 138 (1893); Bell v. State, 243 Ark. 839, 422 S.W.2d 668 (1968); State v. Johnson, 151 La. 625, 92 So. 139 (1922); State v. Gardin, 251 Minn. 110, 86 N.W.2d 711 (1957); State v. Wallach, 389 S.W.2d 7 (Mo. 1965); Wooten v. State, 203 Tenn. 473, 314 S.W.2d 1 (1958).

15. McClannahan v. United States, 230 F.2d 919 (5th Cir. 1956), *cert. denied*, 352 U.S. 824; Orr v. State, 40 Ala. App. 45, 111 So. 2d 627 (1958); Grady v. Collins Transportation Co., 341 Mass. 502, 170 N.E.2d 725 (1960). This is the view of equal availability held by Wigmore.

16. Bates v. Morris, 101 Ala. 34, 13 So. 138 (1893).

17. Johnson v. United States, 291 F.2d 150 (8th Cir. 1961).

18. *E.g.*, Bell v. State, 243 Ark. 839, 422 S.W.2d 668 (1968); State v. Wallach, 389 S.W.2d 7 (Mo. 1965); Wooten v. State, 203 Tenn. 473, 314 S.W.2d 1 (1958).

19. 230 F.2d 919 (5th Cir. 1956), *cert. denied*, 352 U.S. 824.

party and the nature of the testimony he might be expected to give. This definition results in fewer witnesses being equally available. This viewpoint considers certain realities of testimony and seems to weigh more carefully the probabilities on which all inferences are based. The definition which was first considered holding relatives, co-defendants, and police officers equally available seems unrealistic and places undue faith in the presumption of the honesty of a witness. Definitional problems, however, are not the major concern. The permissibility of an inference under any definition is the important problem which divides the courts.

### The Permissibility of an Inference;[20] The No Inference Position

It would appear that the reasons given for permitting an inference to be drawn when a witness is equally available are stronger than those given for not permitting an inference.

One reason cited to uphold the no inference position is that the "logical corollary" to the missing witness rule is that no presumption should arise when the witness is equally available.[21] On closer observation, however, it will be noted that this is not the logical corollary to the rule. Where a witness is equally available

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20. To properly analyze the problem it must be assumed that there is an equally available witness and a civil action. The vital differences between civil and criminal procedure raise a question regarding the propriety of permitting an inference from nonproduction of an equally available witness against defendants in criminal trials. Generally, whatever rule regarding the permissibility of an inference is chosen, it is followed in both the civil and criminal courts. This blanket application, however, ignores the fact that the rights of the criminal defendant differ greatly from those of the civil defendant. "It is at least doubtful, that as between a defendant in a criminal case, presumed to be innocent and required to call no witness, and the people, who have the burden of proof beyond a reasonable doubt, the rule of equal availability of witnesses to the commission of a crime has any sensible application." People v. Moore, 17 A.D.2d 57, 230 N.Y.S.2d 880, *cert. denied*, 371 U.S. 838 (1962).

This excerpt highlights the problems with the inference in a criminal trial. Should an inference be permissible against a party who is presumed to be innocent until proven guilty beyond a reasonable doubt? Should an inference be permissible against a party who has the option of silence, who needs present no case at all? These questions are rhetorical. Keeping in mind that it is the duty of the prosecutor to see that justice is done not to obtain every conviction possible, it is this writer's opinion that as a matter of law no inference should be permissible against the defendant in a criminal case.

Because some points to be later discussed are best illustrated by criminal cases, such citations will be found throughout this Comment.

21. Pennewell v. United States, 353 F.2d 870 (D.C. Cir. 1965) citing Milton v. United States, 110 F.2d 556 (D.C. Cir. 1940).

he is within the control of both parties. According to the missing witness rule this would lead to an inference against either party, not to no inference at all. The so-called corollary is defective logically because it tries to state a rule as the reason for that rule.

Another reason supporting the no inference rule, and perhaps the one which carries the most weight, is the contention that any inference would be mere speculation.[22] The jury is to try the case on the facts. They should not attempt to guess at what might be shown. In the case of nonproduction of a witness the jury has no right to guess as to what might be said.[23] But as described in *United States v. Cotter*,[24] when both sides fail to call a witness who knows something of the facts, their conduct is a circumstance which the jury should use. If both can call the witness and he is impartial his testimony will have little weight. If it appears he would naturally side with one party it is reasonable to expect that he is not being used for good reason. This is a fair argument for the opposition. An inference, strictly speaking, is proper against each side but of different weight. These considerations, however, cannot completely outweigh the argument that the jury will be guessing if it applies the inference. To the extent that the laws of probability do not operate to alleviate the absence of testimony this is a valid argument for the no interference position.

A third argument supporting the no inference position is that there is no duty to call every witness. If in view of some trial strategy, the interest of time, or fear of prejudicing the case or introducing error, one party fails to call an equally available witness, the jury should not be allowed to infer that the reason for nonproduction is the fear of adverse testimony. The argument was well put in *Morton v. United States*:[25] "It is necessary in the prosecution of a case that evidence and witnesses be sifted and selected with a view to economy of trial time and a better understanding of the case by the jury."[26] Under this view since there is no duty to call all the witnesses, failure to do so does not imply a design to suppress the truth.[27] But, while there is no duty to call all the witnesses, there is a duty to obtain all pertinent information. If counsel is keeping a close eye on trial time and is desirous of having the jury understand his presentation he should cut out redundant and repetitive witnesses. Clearly, the cumulative,

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22. Billeci v. United States, 184 F.2d 394 (D.C. Cir. 1950); Scovill v. Baldwin, 27 Conn. 316 (1858).
23. Bates v. Morris, 101 Ala. 34, 13 So. 138 (1893).
24. 60 F.2d 689 (2d Cir. 1932), *cert. denied*, 287 U.S. 666.
25. 147 F.2d 28, 31 (D.C. Cir. 1945).
26. *See also* Zammar v. United States, 217 F.2d 223 (8th Cir. 1954); Himmelfarb v. United States, 175 F.2d 924, 951 (9th Cir. 1949); Barringer v. Arnold, 358 Mich. 594, 101 N.W.2d 365 (1960); *cf.*, People v. McElroy, 30 Ill. 2d 286, 196 N.E.2d 651 (1964).
27. Bleecker v. Johnston, 69 N.Y. 309 (1877).

corroborative, irrelevant exception, which allows no inference when a nonproduced witness fits one of these categories,[28] is designed to provide counsel with the necessary latitude to plan his case uninfluenced by a negative inference. Where a witness' testimony does not fall under one of these exceptions there ought to be the risk that a negative inference will result from his nonproduction.

Another reason for not allowing an inference is the fear that the party will be prejudiced because the jury might associate nonproduction with wilful suppression.[29] This problem arises when at the close of both cases one counsel moves for the inference from nonproduction and the other is surprised and unable to provide the needed explanation. If the trial passes this critical stage without prejudice, instructions to the jury may be made excluding the consideration of fraud and wilful suppression. New Jersey case law[30] has developed an effective system to achieve this desired goal by having the motion made out of the hearing of the jury.[31] The problem of prejudicing a jury with intimations of fraud does not exist merely because an inference is allowed, and under the system which will be proposed below the problem does not exist.

Another fear of the proponents of the no inference rule is that an attorney may be able to cast an unfavorable light on an opponent's case by his own inactivity. Thus, where a witness is equally available, the party calling for the inference may himself be guilty of nonproduction; the concern is that in the eleventh hour of the trial, a negative inference will be asked for by a party who has slept on his equal ability to produce the witness.[32] The answer to this contention is twofold. First, the party asking the inference is perfectly willing to risk the inference against himself in order to argue that it would be more logically drawn against the opposition. Second, even though witnesses are called equally available, nevertheless, they are generally bound by logic, burden of proof, or natural relationship to one party's case.[33] A permissive inference

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28. See the discussion of exceptions to the missing witness rule on p. 388 *supra*, and cases cited in footnote 11.

29. *Cf.*, Barringer v. Arnold, 358 Mich. 594, 101 N.W.2d 365 (1960); Western and A. R. Co. v. Morrison, 102 Ga. 319, 29 S.E. 104, 107 (1897) (dissenting opinion).

30. State v. Clawans, 38 N.J. 162, 183 A.2d 77 (1962).

31. The precise procedure and the actual effect of the inference will be discussed in a later portion of this Comment.

32. Shurman v. United States, 233 F.2d 272 (5th Cir. 1956); *cf.*, United States v. Simons, 374 F.2d 993 (7th Cir. 1966), *cert. denied*, 386 U.S. 1025 (1967); United States v. Llamas, 280 F.2d 392 (2d Cir. 1960).

33. Western and A.R. Co. v. Morrison, 102 Ga. 319, 29 S.E. 104 (1897).

recognizes these facts; they should not be negated by an arbitrary declaration of no inference.

Perhaps the most easily refuted of the reasons given in the cause of no inference is expressed in *State v. Segar*.[34] The court felt that since the opponent wishes to argue that the testimony would be unfavorable if produced, the opponent should put the witness on the stand. The argument for an inference cuts both ways and therefore no inference should be allowed.[35] The response to this assertion is to allow an inference against either party. If the argument tells just as much against both parties, let the inference be argued to the jury hoping that someone will produce the witness. In that way, even if the witness is not called the jury knows the circumstances surrounding his nonproduction, has heard the arguments of counsel, and is able to assign some weight to the nonproduction. If facts may be reached by the threat of an adverse inference, then let it be drawn; if the inference is unjustified it may be avoided by explanation.[36]

One final reason stated by those who expound the no inference position is that reluctance of people to testify may be the true cause of nonproduction.[37] But if a negative inference encourages counsel to put reluctant but valuable witnesses on the stand then it would be an important tool for the legal profession. The rules of evidence are designed to place the facts before the jury, not to hide them. The time-honored theory of the trial as a strict adversary proceeding is no longer regarded as the most valid procedural method.[38] Primarily concerned with airing all possible evidence, the courts should employ every legal tool to do so. If counsel can be induced to produce important witnesses by the threat of a negative inference from nonproduction, then the inference should be allowed. Contrary to what some courts have held, allowing the inference will not instill our system with guesswork, but will provide for the efficient balancing of the probabilities by the jury when it makes a decision.

### The Inference Permitted Position

Although many of the courts allowing an inference provide no reasoning for their position,[39] the theory most heavily relied upon

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34. 96 Conn. 428, 114 A. 339 (1921).
35. Johnson v. United States, 291 F.2d 150 (8th Cir. 1961).
36. 2 J. Wigmore, Evidence § 280 (3d ed. 1964 Supp.).
37. 78 Ill. App. 2d 90, 223 N.E.2d 453 (1966).
38. The Field Code in New York pioneered this thinking which has culminated in the Federal Rules of Civil Procedure which provide wide discovery techniques and simplified pleading forms.
39. *E.g.*, United States v. Beekman, 155 F.2d 580, 584 (2d Cir. 1946). "It is sometimes said that no inference can be drawn against a party for failure to call a witness equally available to both parties. . . . We agree with Wigmore's criticism of that rule." State v. Gardin, 251 Minn. 110, 86 N.W.2d 711 (1957). "When a party fails to call an available witness pos-

is:

> Presumptively, all persons will tell the truth when sworn to do so, but we know from experience that it is frequently unwise to call as a witness one who is likely to be biased or prejudiced in favor of the opposite side. . . . Theoretically one party may be under as much obligation as the other to introduce a witness who was present at a transaction or occurrence in dispute and failure to do so may be said to cut as hard against one as the other, or that it should not cut against either when the witness is in court ready to be examined; but despite of all the reasoning and refining which may be had on the subject and notwithstanding intimations and expressions to the contrary by learned judges, the great fact remains a large number of witnesses are, for various reasons, more or less biased and it certainly is true that a party may with more safety introduce a friendly witness than one who is otherwise . . . because, as everybody knows, there is much in the manner in which a witness testifies, a great deal often depending upon his emphasis, upon the clearness or uncertainty of his recollection, upon his animus and upon one hundred other things which cannot well be described but can readily be imagined, all of which, . . . affect and qualify the force of what he says.[40]

More recently, it was said that the reasons for nonproduction of evidence are so many and so varied that there can be no positive rule of law refusing the inference.[41] It has also been said that since an equally available witness may be extremely favorable to one party and even hostile to the other, it is a fair inference that the party to whom the witness was favorable omitted to call him because the testimony would not support his contentions.[42] The only way certain factors can be considered is to allow the jury the benefit of counsel's argument and permit them to draw an inference; otherwise, a rule permitting no inference would reduce to arbitrary uniformity that which perhaps depends on the facts of each case.[43]

Another reason cited for allowing the inference is that counsel are given wide latitude in arguing their case before the jury.[44] The

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sessing peculiar knowledge of the facts of the case, a presumption arises that . . . his testimony would have been unfavorable to such party." Wooten v. State, 203 Tenn. 473, 314 S.W.2d 1, 4 (1958). "The rule is that it [nonproduction] may give rise to such a presumption or infernece."

40. Western and A. R. Co. v. Morrison, 102 Ga. 319, 29 S.E. 104 (1897).

41. Delaware & Hudson Co. v. Nahas, 14 F.2d 56 (3d Cir. 1926) (where the court felt that this was better left to the discretion of the trial court).

42. Stevens v. Moore, 139 S.W.2d 710 (Tenn. App. 1940).

43. 2 J. WIGMORE, EVIDENCE § 288 (3d ed. 1964 Supp.).

44. See cases cited note 5 *supra.*

dissenting opinion in *Graves v. United States*[45] after stating the wide latitude principle argues that although facts not proved cannot be discussed, illogical conclusions from facts proved may be insisted upon.[46] If such wide latitude is allowed that illogical arguments may be made to the jury, certainly it is no less improper to allow arguments concerning an inference based on probability and the applicability of the inference to leave to the jury. To allow no inference as a matter of law wherever there is no absolute certainty would reduce our trials to dry factual presentations and our trial counsel to mere investigatory machinery. Wide argument allows everything to be placed before the jury; if the witness is impartial it will have little effect.[47]

A third reason to allow the inference is found in the basic rules of evidence. Every fact which legally comes to the knowledge of the jury and which may influence their decisions is subject for comment.[48] When both sides fail to call a knowledgeable witness, their conduct, as with everything else they do, is a circumstance which the jury may use.[49] To deny counsel the right to comment vigorously to the jury on nonproduction denies his client a very substantial right.[50]

Another strong argument arises from the concept of the burden of proof. Where a witness has knowledge of facts pertinent to a certain issue and the party with the burden of proof on that issue fails to produce the witness, a negative inference is logical.[51] In *General Motors Acceptance Corp. v. Bearden*,[52] the inference was allowed where the burden of proving payment was on the defendant and the court felt that the testimony of the absent witnesses would tend to prove the claim had been paid. Thus it was incumbent upon defendant to produce such testimony or account for its absence. Although the witness was equally available, had the plaintiff thought the witness would tend to prove payment, his counsel's duty would have been to avoid the witness and argue the inference. As indicated earlier the inference is proper against both but of different weight. Clearly it should weigh heavily on the party with the burden of proof.

Allowing a permissive inference provides the law with a useful malleability. The inference fits any fact situation which provides a reason for the inference by its own unique qualities. In *Goodloe*

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45. 150 U.S. 118, 122 (1893).
46. United States v. Cotter, 60 F.2d 689 (2d Cir. 1932), *cert. denied*, 287 U.S. 666 (1932).
47. *Id.*
48. Graves v. United States, 150 U.S. 118 (1893).
49. United States v. Cotter, 60 F.2d 689 (2d Cir. 1932), *cert. denied*, 287 U.S. 666 (1932).
50. United States v. Jackson, 257 F.2d 41 (3d Cir. 1958).
51. *See* Denies v. First National Insurance Co., 144 So. 2d 570 (La. App. 1962).
52. 114 Ga. App. 392, 151 S.E.2d 517 (1966).

*v. State*,[53] the affidavit charging the defendant listed eight witnesses and only three were used. One was in court but uncalled and when the prosecutor was asked about his testimony he replied: "[t]hen you will have to make him your witness as I do not prefer to call him." The court allowed the inference to be drawn because the statement by the prosecutor had added to the probability that the witness would have been unfavorable to the state.

Another consideration supporting the permissible inference position is that the absolute rule of no inference ignores the fact that some witnesses are more logically part of one party's case.[54] Since that party has a higher duty to call the witness[55] it is important to allow the jury to assign some value to this nonproduction. A party should not be forced to present the opposition's case in order to obtain all the facts.

Therefore, in view of the general evidentiary policy of admitting anything that would help the jury and excluding only those things prohibited by strong policy considerations, it is submitted that the inference from nonproduction of a witnesss should be permissible.

### Procedural Effect of Allowing an Inference

It is clear that there is much to be gained by allowing the jury a permissive inference against either party in the case of nonproduction of equally available witnesses.[56] What then is the procedural effect of allowing an inference. The procedural problem posed by permitting the inference is that the jury may suspect fraud or infer bad faith from the nonproduction.[57] This is to be scrupulously avoided and *State v. Clawans*[58] provides the method for avoiding this problem. A conversation important to that case allegedly took place with a witness nearby. The witness, however, was not called to testify to the content of the conversation. Defendant requested a charge that from nonproduction of the witness the jury may infer that no such conversation took place. The court recognized that the requested charge was too broad; never-

53. 229 N.E.2d 626 (Ind. 1967).
54. *See* State v. Parker, 151 N.W.2d 505 (Iowa 1967) (dissenting opinion).
55. *See* State v. Johnson, 151 La. 625, 92 So. 139 (1922).
56. At this point the discussion in note 20 concerning the applicability of the inference to a criminal defendant is reemphasized.
57. See discussion on p. 343 *supra*.
58. State v. Clawans, 38 N.J. 162, 183 A.2d 77 (1962).

theless, it said that the failure of a party to produce elucidating testimony raises the natural inference that such party fears to produce because the testimony would have been unfavorable. Such inference is always open to destruction by explanation. The court, in holding that it is more logical to allow the inference also stated the cumulative, corroborative, and unimportant exception to the rule. Most important, however, was the court's recognition that the application of these principles is particularly perplexing when a litigant requests a charge concerning them. If presented at the close of the entire case the defaulting litigant is surprised and not prepared to offer the needed explanation. The better practice would be for the party requesting a charge to so advise the judge at the close of opposition's case out of the hearing of the jury. The judge may then determine if any reference in summation is warranted.[59] If it is warranted then the trier of fact takes over and must first decide that the witness would have information relevant to the issue being tried.[60] The inference must then be applied, but only with caution,[61] and only if there is a reason for such inference and a factual area in which it may logically operate. To be applied the supposition must rise above the level of mere possibility.[62]

When the inference is applied, it will not corroborate adverse testimony.[63] It will not supply a deficiency in the other party's case[64] nor will it be regarded as proof of any essential fact.[65] Rather it is persuasive evidence for the jury to consider in the light of the rest of the facts. It will not outweigh sworn evidence accepted as credible by the trier of fact,[66] but it will provide the jury with another yardstick to measure the evidence and decide the facts.

## Summary

In this Comment the split of authority concerning the permissibility of an adverse inference from the nonproduction of an equally available witness has been demonstrated. The reasons given by the courts which do not allow such an inference have been discussed and discredited, or in the case of procedural difficulties, obviated. The reasons cited by the courts in favor of allowing the inference were shown to be more persuasive because they consider both the realities of trial practice and the overriding aims of evidentiary policy.

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59. *Id.* at 167, 183 A.2d 82.
60. United States v. Johnson, 371 F.2d 800 (3d Cir. 1967).
61. *See* Wilson v. United States, 352 F.2d 889 (8th Cir. 1965); Grady v. Collins Transportation Co., 341 Mass. 502, 170 N.E.2d 725 (1960).
62. Jenkins v. Bierschenk, 333 F.2d 421 (8th Cir. 1964).
63. *See* Vogt v. S. M. Byrne Construction Co., 17 Wis. 2d 96, 117 N.W.2d 362 (1962).
64. Laffin v. Ryan, 4 A.D. 2d 21, 162 N.Y.S.2d 730 (1957).
65. *Id.*
66. Delafosse v. Industrial Painters, Inc., 199 So. 2d 559 (La. App. 1967).

Although there is some danger of procedural prejudice inherent in allowing the inference, the New Jersey courts have circumvented that danger by having the request for a charge regarding the inference made out of the hearing of the jury and in time to allow the other party to offer an explanation for nonproduction. The judge may then rule with respect to comment by the attorneys during summation and prepare a charge to the jury concerning the inference if any is warranted.

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