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Evidence - Wyoming's New Missing Witness Rule - Seyle v. State

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EVIDENCE—Wyoming's New Missing Witness Rule. Seyle v. State, 584 P.2d 1081 (Wyo. 1978).

In early January, 1977, two-year-old Christopher Phillips died from a severe, blunt blow to the back of his head.[1] The boy's stepfather, Irving E. Seyle, claimed that on the morning of his death Christopher had urinated in his pants and, for this, he spanked him and put him on the toilet. After a short time the child wet his pants again; Seyle punished him a second time, making him stand in a doorway, facing a doorjamb. According to Seyle, the child soon began shaking and convulsing, then he fell backwards, hitting his head on the floor.[2] The boy was rushed to the hospital and given emergency treatment, but he died within the hour. Seyle was eventually charged with first degree murder.

At trial, the attending physician testified that he had noticed multiple bruises on the deceased's forehead and neck, and behind each ear. He also indicated that the effect of the child's head injury might be compared to hitting one's head against a solid wall at a speed of thirty-five to forty miles per hour.[3] Another witness testified that Seyle had told her he would "beat the child to death if he wouldn't be potty trained."[4] The accused's wife did not testify for her husband, but the accused stated at trial that his wife had been in the bathroom, and evidently very near the child, at the time of his alleged fall.[5] Seyle was ultimately found guilty of manslaughter, and was sentenced to not less than seven years in the Wyoming State Penitentiary.[6]

On appeal, the defendant urged that the prosecuting attorney had committed plain and reversible error by commenting on the failure of the defendant's wife to testify in her husband's behalf.[7] Objection to the comment was raised

1. Seyle v. State, 584 P.2d 1081 (Wyo. 1978).
2. *Id.* at 1083. Seyle related this series of events to an ambulance driver, an attending physician, a military police officer and to the jury.
3. *Id.* at 1084.
4. Brief for Appellee at 4.
5. Seyle v. State, *supra* note 1, at 1084.
6. Brief for Appellant at 2.
7. State v. Seyle, *supra* note 1, at 1085 n. 1. The relevant portion of the prosecutor's argument is as follows:

> She's never told us the story of what happened. I speculate she didn't want to get on this witness stand, when I started cross-examining her as to why she would stand idly by and permit these things to be done to this child. It puts a mother in a pretty difficult position, because there is no explanation—it's not normal. So, are we dealing with a normal mother? I submit to you, we are not.

for the first time on appeal.[8] The Wyoming Supreme Court affirmed,[9] concluding that, in view of his claim of innocence, Seyle's testimony suggested this his wife might naturally be expected to testify for him. Thus, the failure of the accused to produce his wife as a witness was proper subject for prosecutorial comment.[10] Argument of the inference was permitted notwithstanding the fact that Seyle's wife, was, according to law, available to both parties.[11]

The right to comment on the failure of one's adversary to call a material witness is well-established. When, however, as in *Seyle v. State,* this right encounters a confusing body of law regarding spousal immunities, re-evaluation of each area of law is perhaps necessary. Both are, in fact, in something of a state of flux; both, as some critics assert, are not without certain shortcomings.

THE "MISSING WITNESS RULE"

Historical Background

Courts have, for years, permitted comment on the failure of a party to call a witness who would "naturally have been produced by an honest and therefore fearless claimant."[12] The propriety of drawing adverse inferences from such "conduct evidence" has, in fact, been a recognized principal of law since 1722, when the famous case of the Chimney

8. The defendant advanced two other arguments on appeal, both of which had been brought to the court's attention either before or during trial. First, the defendant asserted that the probative value of certain photographs of the child's body, admitted into evidence at trial, was outweighed by their prejudicial effect. The photographs were understandibly rather gruesome, and the coloration of the bruises shown in some of them was acknowledged by expert testimony to have been different from the color observed on the day of the child's death. Citing State v. Tafoya, 101 Ariz. 424, 454 P.2d 569 (1969) the court held that the photographs could be admitted at the trial court's discretion, even if changes in the object photographed had occurred between the time of the incident and the taking of the photos. The court, however, indicated that such changes must be sufficiently explained to the jury.

Secondly, the defendant argued that the evidence failed to prove that he struck the fatal blow, or did so in a sudden heat of passion or as a result of culpable negligence. On this issue the court held that the observations of expert witnesses regarding the head injury were inconsistent with the defendant's assertion that the child had collapsed, and that the jury could have reasonably inferred that the defendant struck the fatal blow with the requisite criminal intent.

9. Since the objection was not brought to the attention of the court below, the appellate court invoked the "plain error doctrine." The doctrine states that unless the trial court committed plain error in their deliberations, the decision of the court will not be reversed when material objections are raised for the first time on appeal. *See* WYO. R. CRIM. P. 49(b). *See also* Hampton v. State, 558 P.2d 504 (Wyo. 1977).
10. Seyle v. State, *supra* note 1, at 1083.
11. *Id.* at 1086.
12. 2 WIGMORE, EVIDENCE § 285 (3rd ed. 1940) [hereinafter cited as WIGMORE].

Sweeper's Jewel was decided.[13] In that case, a sweep found a jewel and left it with an appraiser; the appraiser refused to return it. The English court ruled that if the jewel were not produced, the highest possible value would be inferred.[14] Today, as then, the party's conduct is construed to indicate that he is fearful of unveiling something or someone unfavorable to his cause.[15] If, after all, the non-producing party knows of facts favorable to his claim, one might naturally expect him to produce them.[16] The modern "missing witness rule" permits a party to argue the fact of his adversary's failure to produce an apparently key witness to the jury.[17]

As a general proposition, the non-testifying witness must have been "peculiarly available" to the party against whom the inference is directed.[18] The requirement has two levels of meaning. A handful of jurisdictions have permitted comment only if the witness is inaccessible to the party arguing the inference.[19] Implicit in this interpretation is the notion that the inference is permitted only because the commenting party cannot call the missing witness. The Wyoming Supreme Court adopted this approach in *State v. Spears*,[20] a 1956 murder case. There the inference was permitted because the defendant's wife, an alleged witness to the incident, was not called upon to testify for her husband. The witness was, according to Wyoming law, privileged against testifying for the prosecution.[21]

The greater number of jurisdictions, however, give the concept of peculiar availability more liberal treatment. These courts look to relationships and expectations of testi-

13. Armory v. Delamire, 1 Strange 505 (1722).
14. 2 WIGMORE § 285.
15. *Id.*
16. Attorney-General v. Pelletier, 240 Mass. 264, 316, 134 N.E. 407, 423 (1922), quoted in 2 WIGMORE § 289, at 172.
17. Graves v. United States, 150 U.S. 118 (1893).
18. *See* note, *Permissive Inference from the Nonproduction of Equally Available Witnesses*, 73 DICK. L. REV. 337, 338 (1968-1969).
19. State v. Wallach, 389 S.W.2d 7 (Mo. 1965).
20. 76 Wyo. 82, 300 P.2d 551 (1956).
21. The applicable statute at the time of the decision was WYO. STAT. § 3-2605 (1945). The current statute, essentially unchanged, is WYO. STAT. § 1-12-104 (1977).

    Strictly speaking, the defendant's wife was not totally inaccessible to the prosecution. The prosecutor could have called the defendant's wife to the stand, but the defense could then invoke its privilege against inter-spousal testimony. The language of these statutes, it is true, makes no reference to privilege; both statutes speak in mandatory terms. However, subsequent cases indicate that a spouse is merely privileged against testifying, and not wholly incompetent. *See* Chamberlain v. State, 348 P.2d 280 (Wyo. 1960). Also, companion statutes to both of these provisions, WYO. STAT. § 3-2602 (1945) and WYO. STAT. § 1-12-107 (1977), refer to privilege in their titles.

mony in making their determination.[22] If, assuming the non-producing party's claims in the controversy were true, the witness would naturally be expected to testify for him, comment on the failure to produce the witness is deemed proper.[23] The witness may, moreover, be accessible to both parties—and yet retain his status as a "peculiarly available" witness.[24]

It is, conversely, sometimes stated that if the witness is "equally available" to both parties, no inference springs from the failure of a party to call him.[25] Some courts apply the rule literally; these courts assume that since either party can subpoena the witness, the inference is simply unnecessary.[26] Others indicate that the requirement admits of certain exceptions—in situtations, again, in which the missing witness would naturally be expected to testify for the non-producing party.[27] The court in the instant case carved out precisely this exception.[28] Thus, *Seyle* marks an abandonment of the *Spears* rule and a turn to a broader mode of analysis.

McCormick's observations on equal availability are stated in somewhat different terms. He explains that if the failure of either party to call a particular witness gives rise to an inference against both parties in equal proportions, the inference should not be permitted.[29] If the inference will "cut both ways," neither inference has any ultimate persuasive value. The inference is therefore improper.[30] But McCormick cites the proposition without endorsing it and instead, he takes it

22. Note, *supra* note 18, at 340.
23. MCCORMICK, EVIDENCE § 272 (McNaughton Rev. 1972) [hereinafter cited as MCCORMICK].
24. State v. Collins, 350 Mo. 291, 165 S.W.2d 647 (1942).
25. MCCORMICK § 272.
26. The assumption is ill-founded. A prosecutor may decide for various reasons not to use evidence which could conceivably advance the State's case. The fact that the prosecution does not call a particular witness does not make the defendant's failure to produce the witness any less telling. Since the possibility exists that the witness may, in fact, hurt the prosecution's case, it is highly unlikely that the prosecutor would take the initiative of calling the witness. And by the time the prosecution is certain the defense will not call the witness—that being at the close of the defendant's case in rejoinder—the opportunity for the prosecution to call the witness will have passed. *See* United States v. Cotter, 60 F.2d 689 (2d Cir. 1932) (L. Hand, J.).
27. U. S. v. Beekman, 155 F.2d 580 (2d Cir. 1946) (Frank, J.).
Sometimes the exceptions to the rule are not actually cast in the form of exceptions. Courts often conclude that despite the accessibility of the witness to both parties, the evidence suggests that the witness cannot be *considered* equally available. *See* State v. Collins, *supra* note 24.
28. Seyle v. State, *supra* note 1, at 1086.
29. MCCORMICK § 272.
30. Hickman v. Pace, 82 N.J. Super 483, 198 A.2d 123 (1964).

one step further. He suggests that the failure of both parties to produce an equally available witness should be open to an inference against both parties; either party should be permitted to argue the inference against the adversary.[31] *Seyle,* to be sure, does not reach this far, but the point is well taken. The decision as to whether a witness is equally available in McCormick's sense is, as one might suppose, nearly always debatable. Hence, the determination, especially if the question is quite close, can be easily and safely left to the jury.[32] This position received its most articulate support in *United States v. Cotter,*[33] a mail fraud case in which Judge Learned Hand observed that "an inference is, strictly speaking, always proper against each side, but of different weight."[34] Furthermore, both inferences would be admissible as evidence under McCormick's basic test for relevancy.[35] That an inference equally disfavors both parties, or seems to, need not render it devoid of persuasive value.

Use of the missing witness rule is forbidden in other situations as well. Comment is prohibited if the testimony would have been either irrelevant[36] or culmulative,[37] or if the missing witness is outside the court's jurisdiction—equally *un*available to both parties.[38] Nor is the inference permitted if the witness is incompetent to testify in behalf of the party against whom the inference is sought.[39] "Disqualifications" such as the latter, however, have all but disappeared, especially spousal disqualifications.[40] Coke's assertion that a wife cannot be a witness "for or against her husband, *quia sunt duae animae in carnae una,*"[41] has proven entirely too broad, if not rather silly. In England, the Evidence Amendment Act

31. MCCORMICK § 272.
32. MCCORMICK § 272. A growing number of jurisdictions are adopting this method of analysis. *See* Note, *supra* note 18, at 339 n.13.
33. United States v. Cotter, 60 F.2d 689 (2d Cir. 1932).
34. *Id.* at 692.
35. MCCORMICK at § 184.
36. Note, *supra* note 18, at 338.
37. State v. Heiser, 183 Neb. 665, 163 N.W.2d 582 (1968).
38. *Id.* at 585.
39. 2 WIGMORE § 286. *See also* Graves v. United States, *supra* note 17.
40. Note the distinction between disqualification and privilege: disqualification is the absolute bar against testifying *for* another. Privilege, on the other hand, is the right not to be compelled to testify *against* another, and is waived if not asserted. *See* Note, *Spouse's Testimony in Criminal Cases,* 19 WYO. L. J. 35 (1964-1965).
41. COKE, A COMMENTARIE ON LITTLETON (1928), cited in 2 WIGMORE § 2227. Coke is here asserting that a spouse is incompetent to testify because husband and wife are actually one person—despite separate bodies. Wigmore, of course disagreeing with this observation, states that Code "mouthed a few words of medieval scholasticism, and suggested a consideration doubtful in its morality and narrow in its view of human nature." 2 WIGMORE § 2228.

of 1853 abolished the disqualification of the spouse of the defendant.[42] The U.S. Supreme Court, overruling prior decisions, held in 1933 that a wife is competent to testify for her husband when he is a defendant in any criminal case.[43] Wyoming permits husband and wife to be witnesses for each other in both civil and criminal action "as though the relationship did not exist."[44] The provision was enacted in 1899.[45]

Note finally, that such inferences cannot be used to establish the elements of proof which constitute the prima facie case.[46] Nor is the missing witness rule applicable to the defendant who produces no evidence at all.[47] Prosecutorial comment on the exercise of a constitutional or statutory privilege not to testify against another is never permitted,[48] and comment upon the failure of an accused to take the stand in his own defense violates the privilege against self-incrimination by "making its assertion costly."[49]

The Seyle Reformulation

In *Seyle v. State,* the court modified Wyoming's missing witness rule to permit prosecutorial comment "if the failure to call a witness more naturally leads to an inference against the defendant."[50] After this decision, parties to a criminal proceeding need no longer confine their comments to cases in which the witness is only available to the party charged with non-production. The missing witness rule, having now shed the limitations of *Spears,*[51] is clearly more versatile.

42. St. 16 & 17 Vict. c. 83 (1853).
43. Funk v. United States, 290 U.S. 371, 377 (1933).
44. WYO. STAT. § 1-142 (1957); WYO. STAT. § 1-12-104 (1977).
45. REV. STAT. 1899, § 3681.
46. People v. Ashley, 42 Cal.2d 246, 267 P.2d 271 (1954), *cert. denied,* 348 U.S. 900 (1954).
47. Robins Dry Dock & Repair Co. v. Navigazione Libera Triestina, 32 F.2d 209 (2d Cir. 1929), *cert. denied,* 280 U.S. 574 (1929).
48. MCCORMICK § 76. Wigmore nevertheless speculates that the propriety of the comment may depend upon who asserts the privilege. If it is independent of the party's control, he agrees that the witness' claim of privilege should render any comment improper. But if the privilege lies within the control of the party himself, Wigmore suggests that the comment may be justified. He does, however, concede that the privilege may be undermined—perhaps even destroyed—by indirection. *See* 2 WIGMORE § 286.
49. Griffin v. California, 380 U.S. 609 (1965). The federal courts have, since 1878, forbidden comment on the failure of the defendant to take the stand in his own behalf. *See* 20 Stat. 30 (1878), now 18 U.S.C. § 3481 (1971). *Griffin,* however, made the so-called "no comment rule" a constitutional imperative.
50. Seyle v. State, *supra* note 1, at 1086.
51. *See, supra* notes 19 & 20.

At first blush, this modification may seem insignificant, at least with regard to *Seyle*. Under the old rule, a prosecutor could comment on the defendant's failure to call his wife to the stand, if appropriate, in a broad majority of cases, but he is permitted to argue the inference under the new rule as well. If, however, the facts in *Seyle* are analyzed with an eye to the current law of marital privilege, the decision becomes something more than a tempest in a teapot. Reversal on this issue would have, in fact, dealt this evolving body of law a stinging blow.

TESTIMONIAL PRIVILEGES[52] AND CHILD ABUSE

Historical Development of the Privilege

Coke's musings on spousal testimony have little contemporary relevance. As mentioned previously, the spouse of the accused will rarely, if ever, be disqualified from testifying *for* the defense. And although Coke's reference to spousal testimony was framed in absolute terms, it is now generally held that the spouse of an accused is competent, but cannot be compelled, to take the stand *against* the accused.[53] Some jurisdictions permit the privilege to be asserted by either spouse.[54] The majority of jurisdictions including Wyoming,[55] however, permit the privilege to be asserted by the accused alone.[56] A few jurisdictions do not recognize the privilege at all.[57]

In certain situations, the privilege is simply unavailable. The spouse of the accused may, in most jurisdictions, testify

52. Privileged communications between married couples present other issues and are beyond the scope of this discussion.
53. MCCORMICK § 66.
54. West Virginia, for example, permits either spouse to exercise the privilege. *See* W. VA. CODE § 57-3-3 (1966). Rule 505(b) of the Federal Rules of Evidence also allows either spouse to claim the privilege, but the rule has not been enacted. There seems to be some question as to whether a husband or wife may testify against his or her accused spouse under the Federal Rules of Evidence in their present form. *See* MCCORMICK § 66 n. 53 (1978 Pocket Part).
55. WRE 501 indicates that the law of privilege shall be "governed by the principles of the common law as they may be interpreted by the courts of the State of Wyoming in light of reason and experience." The Wyoming cases that have dealt with the matter of spousal privileges indicate that the right to assert the privilege belongs to the accused. *See* Chamberlain v. State, 348 P.2d 280 (Wyo. 1960) and Pike v. State, 495 P.2d 1188 (Wyo. 1972).
56. *See* FED. R. EVID. 505 (Advisory Committee's Note).
57. In New York, the privilege applies only to confidential communications. N. Y. EVIDENCE LAW § 4502(b) (1963).

for the prosecution in proceedings for crimes committed by one spouse against the other, objections by the defense notwithstanding.[58] Section 1-12-104 of the Wyoming Statutes adopts this position.[59] And the Wyoming Supreme Court has ruled, in *Chamberlain v. State,* that the language of the statute permits such testimony if the victim of the alleged crime is the couple's minor child.[60] Such crimes offend both the child and the child's parent—the spouse of the accused; the spouse may therefore testify for the prosecution. But the actual interest is in the plight of the abused child.

The modern tendency is to question most marital privileges. McCormick refers to them as an "archiac survival of a mystical religious doctrine."[61] Today's marital relationship, compared to that of Coke's era, has been rationalized, depolarized and dechivalrized; complete legal and political equality arguably calls the survival of spousal privileges against adverse testimony into question. Justice Stewart, addressing the issue in *Hawkins v. United States,*[62] asserted that "(a)ny rule that impedes the discovery of justice impedes as well the doing of justice."[63] The draftsmen of the *Model Code of Evidence* managed, in their deliberations, to limit the scope of nearly every existing privilege, but the final draft restated the law of privilege with no essential modifications.[65] Nor did the draftsmen of the *Uniform Rules of Evidence,* after a similar attempt, succeed in having any noteworthy effect on the traditional privilege laws.[66] The passage of Section 1-12-104 seems, in retrospect, to have been a rather fortunate event.[67]

Disposition of the Issue in Seyle

In *Seyle v. State,* the defendant argued that comment by the prosecutor on the *exercise* of a marital privilege constituted reversible error.[68] That a prosecutor may not comment

58. McCORMICK § 66.
59. WYO. STAT. § 1-12-104 (1977).
60. Chamberlain v. State, *supra* note 56, at 284.
61. McCORMICK § 66.
62. 358 U.S. 74 (1958).
63. *Id.* at 81.
64. AMERICAN LAW INSTITUTE PROCEEDINGS 187 (1941-1942).
65. MODEL CODE OF EVIDENCE, *Forward,* 17 (1942).
66. UNIFORM RULES OF EVIDENCE 501-512.
67. WYO. STAT. § 1-12-104 (1977).
68. Brief for Appellant at 12.

on the exercise of a privilege does, indeed, go practically without question.[69] But in *Seyle,* the prosecution never attempted to put the defendant's wife on the stand; thus the opportunity for the defendant to *exercise* his acknowledged privilege never arose.[70] If, as the court pointed out, no privilege had been asserted, it could hardly have been violated.[71]

But the defendant's point was not entirely without merit. In cases in which the privilege continues to apply, the defense must either call the defendant's spouse to the stand, or suffer the adverse inference.[72] Thus, the failure of a witness to testify on behalf of his or her spouse is tantamount to testifying against the spouse. The marital privilege is effectively destroyed, although the opportunity to exercise it never arose.[73] This point was argued in *State v. Brown,* which was cited by the defendant in his brief.[74]

The argument is, in any event, misplaced. *Seyle is a child abuse case; Chamberlain* made it abundantly clear that the privilege is abrogated in such situations.[75] Besides, *Brown* itself has dubious precedential value. In *Brown,* the Utah court observed that "(t)he cases are in hopeless confusion on whether, under what circumstances and statues, such comment on the failure to testify is prejudicial error."[76] The Utah bench, apparently nonplussed by the entire issue, seems to have simply thrown up its hands; failing to cite any precedent for its holdings. At any rate, the impropriety of prosecutorial comment, absent the exercise of a privilege, is said to be confined to instances in which the accused fails to take the stand in his own defense.[77] This is in addition to the circumstances in which such comments are deemed improper, discussed earlier.

69. McCORMICK § 76.
70. Seyle v. State, *supra* note 1, at 1084.
71. *Id.* at p. 1086. *See also* Brief for Appellee at 11.
72. Comment, *Drawing an Inference from the Failure to Produce a Knowledgeable Witness: Evidentiary and Constitutional Considerations,* 61 CAL. L. REV. 1422, 1435 (1973).
73. State v. Brown, 14 Utah 2d 324, 383 P.2d 930 (1963). McCormick argues that the privilege is *not* effectively destroyed. He notes that the privilege has its most practical benefit when it can impede a vital element of proof from getting to the jury. An inference, however, cannot supply a lack of proof. *See* McCORMICK § 76.
74. Brief for Appellant at 13.
75. Chamberlain v. State, *supra* note 56.
76. State v. Brown, *supra* note 73, at 932.
77. Griffin v. California, *supra* note 49.

At this point the two issues in the case, privilege and the missing witness rule, finally intersect. Since, in *Seyle v. State,* the accused was unable to rely on any privileges against spousal testimony, his wife was "equally available" to both the defense and the prosecution. In that situation, the *Spears* rule would have prohibited any adverse comment.[78] *Seyle,* however, removed this limitation.[79] Because the accused's wife, according to the defendant's testimony, was present at the incident, his failure to call her, coupled with his claim of innocence, formed the basis for a legitimate inference. No more is required to call the rule into play.

Viewed from the perspective of the law of privilege, the decision follows as a logical necessity. That is, had the court *not* reversed *Spears,* the prosecution's chances of bringing the inference to the jury would have arguably been *better* under a system of jurisprudence which in no circumstances permitted a wife to testify against her husband over his protestations. At least then she would have been peculiarly available in the *Spears* very rigid sense.[80] And since the right of a wife to testify against her husband for a "crime committed by one against the other" existed at least as early as 1631,[81] the prosecution, if forced to comply with the *Spears* formulation of peculiar availability, would probably fare better on the issue if the case had been docketed a full three-hundred and fifty—or more—years ago. Inconsistencies such as these blatantly signal a need for change. In this era of general disenchantment with marital privileges[82] but growing legal concern for the problems of abused youngsters,[83] the constraints imposed by the *Spears* missing witness rule seem, at best, ironic.

QUESTIONING THE PROPRIETY OF THE INFERENCE

Courts have, nevertheless, advised that the rule be ap-

78. State v. Spears, *supra* note 20.
79. Seyle v. State, *supra* note 1, at 1086.
80. *See, supra* note 19.
81. The first documented trace of this right to testify is in the case of Lord Audley's Trial, 3 How. St. Tr. 401, 402 (1631). There the English court resolved that the wife might be a witness against her husband for rape upon her, instigated by him, because she was the party wronged.
82. MCCORMICK, § 66, § 86.
83. *See, Symposium: Juvenile Justice,* 57 B. L. REV. 617 (1977), and also *A Symposium: The Medical, Legislature and Legal Aspects of Child Abuse and Neglect,* 23 VILL. L. REV. 445 (1978) for an overview of the contemporary legal response to the problems of child abuse.

plied with caution.[84] A party's failure to produce a witness is by its very nature ambiguous.[85] The non-producing party may, for example, fear that the witness, if called, would be impeached because of his criminal record, that the person's appearance or demeanor would adversely affect the jury, or that the potential witness is just too unreliable to call.[86] Perhaps an explanation to the jury of the witness' absence from the stand, even if the jury were previously instructed to disregard the adverse comment, would be ineffective. McCormick's remedy for fallacious argument, "the answering argument and the jury's good sense,"[87] is hardly fail-safe. Furthermore, the possibility that the inference may be drawn invites waste of time in calling unnecessary witnesses,[88] although evidence offered to explain the failure of the witness to testify would probably save all parties needless problems ahead.[89]

Such shortcomings, if dealt with at all, are generally dealt with in one of two ways. First, the court may simply disallow the inference by its customary and individualized set of rules. Prohibition of an inference is always within the court's discretion.[90] Secondly, use of the inference may be forbidden by statute. In Missouri, for example, the failure of a criminal defendant to avail himself of the testimony of his spouse may "(n)ot be referred to by any attorney in the case, nor be considered by the court or jury before whom the trial takes place."[91] New Jersey's approach to the issue, however,

84. MCCORMICK § 272. *See also* Jenkins v. Bierschenk, 333 F.2d 421, 425 (8th Cir. 1964). In a lawsuit arising out of an automobile mishap, the defendant did not call as a witness his own son, who had been in a previous accident with the defendant's car. The father-son relationship would arguably have permitted the adverse inference, but the court ruled that argument of the inference was impermissible. The court quoted Shoenberg v. Commissioner, 302 F.2d 416, 420 (8th Cir. 1962):

> We adhere to our comment that any rule creating a presumption (sic) of this kind is to be applied with caution and we agree with the trial court that 'there must be a reason for such a supposition, and a factual area within which it may legally operate. The supposition must rise above the level of a mere possibility. . . .'

85. *Id.*
86. Comment, *supra* note 72, at 1426.
87. MCCORMICK § 272.
88. *Id.* In Ballard v. Lumbermen's Mutual Cas. Co., 33 Wis.2d 601, 148 N.W.2d 65, 73 (1967) the court observed that "[a] party to a lawsuit does not have the burden, at his peril, of calling every possible witness to a fact, lest his failure to do so will result in an inference against him."
89. The comment is evidently permitted even if the party charged with non-production offers an explanation as to the witness' whereabouts. In People v. Saltz, 131 C.A.2d 459, 280 P.2d 900 (1955), the prosecution was permitted to argue that the alibi offered by the defense, considering all the evidence, was simply a myth.
90. MCCORMICK § 272.
91. *See* W. VA. CODE § 57-3-3 (1966) and also MO. REV. STAT. § 546.270 (1949).

is a bit more novel. In *State v. Clawans,*[92] a case in which an attorney was accused of inducing a witness to commit perjury,[93] the court suggested that the party seeking to obtain a charge on an adverse inference first advise the trial judge and opposing counsel of his intent to do so, at the close of his opponent's case. The non-producing party would then have the opportunity to either call the designated witness or give some explanation of the failure to call. The trial court's determination of the propriety of the inference would depend upon the circumstances thus disclosed.[94]

The foregoing suggestion was cast in the form of dictum, but it nevertheless deserves consideration. There has, in the fairly recent past, been a shift away from the notion that criminal proceedings are "adversary" in nature. The current trend, for example, has been both to de-emphasize and discourage the surprise element in litigation. McCormick's statement that "the availability of modern discovery procedures serves to diminish both the justification and the need for the (adverse) inference" may have been something of an overstatement,[95] but the fact remains that discovery is now available to parties to a criminal action.[96] This contemporary attitude is, in any event, embodied as well in the Federal Rules of Evidence; Rules 803 (24) and 804(b)(5) indicated that any uses of hearsay not included in the many exceptions contained in the Rules must be preceded by timely notice to the adverse party. Thus, the *Clawans* suggestion that notice be given is not without precedent. But more importantly, it is in keeping with the spirit of modern criminal litigation, despite the fact that this spirit seems at times to be confined largely to the realm of the ideal.

A *Clawans*-type approach would, however, be more useful in some circumstances than in others. The party considering the use of the inference will probably have made inquiry into the possibility of the missing witness' genuine unavailability, since comment on the failure of a particular witness to testify who is beyond the reach of the court's subpoena power is commonly held to be reversible error. If the

92. 38 N.J. 162, 183 A.2d 77 (1962).
93. *Id.* at 78.
94. *Id.* at 82.
95. MCCORMICK § 272.
96. MCCORMICK § 3

witness is found to be truly unavailable, the need for notice, and of course the opportunity for comment, will simply have been obviated. It seems, rather, that notice would perform its most useful service when the missing witness' testimony would have been either irrelevant or cumulative, or if, for some other reason, the comment would have plainly been out of order. Notice in these situations could significantly reduce the number of appeals based on the missing witness issue.

There are, to be sure, those who would balk at the suggestion put forth in *Clawans*. The possibility always exists that the non-producing party, either deliberately or by way of oversight, will have withheld valuable evidence by not producing a key witness. Opposition to the *Clawans* approach is thus understandable, especially in situations of the latter type; notice in those instances would bestow upon the withholding party the luxury of an eleventh-hour warning—and, in effect, reward carelessness or ignorance. And as to the situation in which an unreliable witness is kept from the stand, the argument that the non-producing party must "live with its choice" not to call a particular witness surely has merit.

The party who wishes to argue the inference would, in other words, be placed in the position of having to force his opponent's hand. Once notice is given, the party seeking to invoke the inference will either have done his opponent the favor of policing the opponent's case, or he will have scored a "victory." Such a victory will manifest itself in one of two ways: the party seeking the adverse comment will either be permitted to make it (hardly a victory at all if courts have traditionally permitted argument of the inference), or he will have the opportunity to cross-examine the withheld witness. Notice, regardless of the result, introduces into the litigation an added element of risk. That is, the party seeking to comment may simply lose the opportunity to do so. Conversely, if the commenting party is victorious, the right to cross-examine an unreliable or unpredictable witness may result in a mere Phyrric victory. Some will naturally find these risks distressing.

On the other hand, the language of the preceding paragraph admits too much of the pugilist—deliberately so.

To reiterate, the ideal of modern criminal procedure is truth, not combativeness. That being the case, notice would probably be more beneficial than burdensome. It would serve, first of all, to spread more evidence, both favorable and unfavorable, before the trier of fact. Secondly, it would very possibly prevent unnecessary appeals. The *Clawans* approach is undeniably solicitous of the withholding party, but at this point in legal history the interests of justice seem to demand the use of this and similar protective measures.

The *Clawans* court did not, however, discuss pre-comment notice in anything resembling categorical terms. Even to this day, notice in such situations appears not to be a requirement in New Jersey. But if it were, it is reasonable to suspect that some sort of penalty would attach to the failure to provide notice. This "remedy" issue presents its own set of problems. To limit the possibility of a new trial to cases in whch the missing witness is genuinely unavailable is actually a rather meaningless approach: in those situations counsel would probably have committed reversible error regardless of the notice requirement. As mentioned previously, this particular issue would present itself on appeal only on the rarest of occasions, since counsel would hopefully have inquired into the whereabouts of the missing witness at some earlier point.

A second alternative is automatic reversal and remand for any failure to give notice—reversal *per se*. This seems inordinately generous. It also places an invaluable trump card in the hand of the appellant, especially if the absence of his witness from the stand was a careless oversight. On the other hand, to leave the question of whether the error is reversible entirely to the discretion of the court leaves almost as much to the desired. Appellate courts would probably reverse only in situations in which they would have reversed in the pre-notice era—in situations in which the testimony of the witness would have been irrelevant, cumulative, etc. That being the case, the notice requirement would be essentially without meaning. In fact, it is reasonable to suspect that prosecutors would intentionally ignore a notice requirement if the risk that a verdict in their favor would not be overturned on appeal appeared to be worth tak-

ing. Hence, the net effect of the notice requirement would probably *not* be to increase the number of new trials in cases involving missing witnesses and comments thereon. It may, however, reduce the number of appeals dealing with the issue. More than anything else, the effectiveness of a notice requirement would have to depend upon the willingness of the courts to consider it seriously and enforce it consistently.

One recent critic's remarks on the missing witness rule are especially worthy of note. In *Wynn v. United States*[97] a federal circuit court suggested that in order to raise a similar inference against a criminal defendant, the record should show the extent of the non-producing party's knowledge of the witness' whereabouts at the time of the trial, whether the witness was within the jurisdiction, and whether the State had the opportunity to call the absent witness either before or during the trial.[98] This position is very reminiscent of the traditional notion that comment be prohibited if the witness is "equally available" to both parties in the literal sense. Such a rule would significantly limit the number of criminal cases in which the adverse comment might be invoked. Commenting on the suggestion, one critic observed that "(i)n light of the presumption of innocence, this restriction on the application of the rule and the resulting pressure on the government to rely on its own efforts to produce affirmative evidence seems proper."[99]

The court's recommendation is well-meaning, but both the recommendation and the critic's observations are problematical. If the goal, as previously noted, is to ferret out all pertinent facts. This would undeniably aid in clearing up the ambiguity. However, the critic's reliance on the notion of any "presumption of innocence" in making her point is actually misplaced. No inherent probability exists that a criminal defendant is innocent; the term is best labeled a misnomer. There is perhaps an "assumption of innocence," in the sense that in the absence of facts to the contrary, it should be assumed that a person's conduct on a given occasion is lawful.[100] The inclusion of the phrase in the legal

97. 397 F.2d 621 (D.C. Cir. 1967).
98. *Id.* at 625 & n. 23.
99. Comment, *supra* note 72, at 1428 n. 27.
100. MCCORMICK § 342.

jargon is, thus, better described as an amplification of the prosecutor's overall burden of persuasion.[101]

Given these observations, the use of the adverse inference can very conceivably be justified. A prosecutor's burden is, of course, weighty, but not quite as weighty as the critic has suggested. It is true that the prosecution must prove beyond a reasonable doubt the facts of its case.[102] But it is also true that the inference which rises from the failure to produce is persuasive rather than probative; that is, it merely adds weight to the invoking party's claim.[103] These observations are not to suggest that because the inference has a minor part to play in the legal process it should not be a matter of anything but the most minimal concern. They are merely to point out that the failure to call a witness who might naturally be expected to take the stand—one within the jurisdiction and able to testify—must be of some persuasive value, albeit at times slight. Sometimes the failure to call a witness has little significance; at other times the failure is imbued with troublesome implications. The latter may be the case regardless of the fact that the party seeking the inference has not chosen to call the witness to the stand. And since such conspicuous absences are correctly considered to have evidentiary significance, it thus seems logical that the burden of dispelling the legitimate suspicion should lie with the party charged with non-production. In fact, the notice rule discussed earlier would at the same time it safeguards any misuse of the adverse comment guarantee that the interests of fact ascertainment, our current concern, are served. The witness would either be produced or the withholding party would suffer the adverse inference, but the burden of production would not be placed on the party whose only desire is to argue a concededly legitimate inference.

It must, at the risk of belaboring the point, be admitted that this allocation of the burden to exonerate appears to place the criminal defendant on the offense. The party arguing the inference, as the critic suggests, has actually produced nothing. Conversely, the non-producing party must, it

101. *Id.*
102. People v. Ashley, *supra* note 46, at 285.
103. *Id.*

seems, vindicate himself of the unfavorable innuendo—possibly a difficult task if the opportunity to call the vindicating witness has already come and gone. At least with regard to this issue, a criminal defendant may seem to have been deemed "guilty until proven innocent."

However, comment on the failure to produce a witness is not a comment on "nothing." The inference, recall, is drawn from "conduct evidence," not from an utter lack of evidence. Thus, evidence presented at any stage of the proceeding to fend off the inference is actually made in defense.

CONCLUSION

The decison in *Seyle v. State* was both a logical and, from the standpoint of jurisprudence, an historical necessity. Since the missing witness need no longer be available solely to the non-producing party, valid inferences, once silenced by the rule in *State v. Spears,* may now find a place in the closing argument. And the particular facts of this case, the death of a battered infant, highlight the need for such a change.

Juries deliberate on facts; all that is neither irrelevant or prejudicial, as Judge Learned Hand has indicated, is that which the jury should use.[104] The decision in *Seyle v. State* is in keeping with this fundamental rule.

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104. United States v. Cotter, *supra* note 26, at 692.