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# Evidence, Failure of a Party to Testify, Implied Admission, Privilege

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arbitration could under the statutes be carried through and enforced even if the other party were absent. It is very questionable, however, if it is desirable to permit a party to obtain a judgment without service on the other party in such cases. The possibility of the misuse of such a statute to place an unwarranted burden upon an adversary may well outweigh the hardship in some cases upon a party wishing to go on with the arbitration. Indeed a provision that judgment could be obtained against a non-resident party without service at any time would present a serious constitutional question. It might be urged that this was consented to in advance by the arbitration contract. But this would not be true when the question in issue is the making of the contract.

On the whole, the amendment seems to be a desirable addition to arbitration statutes modelled on the lines of the New York statute. Without it there is the possibility that a recalcitrant party would be able to delay the arbitration or annoy his opponent by merely refusing to go on, thus compelling the institution of court proceedings. It is true that an order might be obtained by a summary method. Yet some time is necessarily consumed, especially when a jury trial is demanded. The fact that a party willing to proceed is required to take the initiative is burdensome. Furthermore, the sometimes difficult question whether a party has merely failed to appear or whether he has actually withdrawn from the arbitration is avoided.[17]

Although the amendment may be good in its general purpose, the drafters of similar amendments in other jurisdictions may profit by the opinion of the Court of Appeals in this case. It should be expressly provided that a party continuing with the arbitration under protest should be permitted subsequently to attack the authority of the tribunal. It should be made clear that the objecting party may apply for a determination of the validity of the contract of arbitration, the power of the arbitrators, etc., pending the arbitration proceedings. Some thought should be given to the question whether it would be advisable to give a court discretionary power on the application of an objecting party to stay the arbitration proceedings pending a judicial determination of jurisdiction and similar matters.

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EVIDENCE—FAILURE OF A PARTY TO TESTIFY—IMPLIED ADMISSION—PRIVILEGE.—[Connecticut] A case[1] recently decided by the Supreme Court of Errors of Connecticut suggests several interesting problems. The action was brought by the administrator of a woman who had been struck and killed by an automobile driven by the defendant. There were no eyewitnesses to the accident, which occurred while the deceased was crossing the street at the regular

17. The question whether this makes any difference is suggested supra, note 3.

1. *Kotler* v. *Lalley*, (Conn. 1930) 151 Atl. 433.

crossing. The defendant had admitted the fact that his car struck the deceased; but he did not testify at the trial. At the close of the very scant evidence for the plaintiff, the trial court directed a nonsuit, and the appeal presented the question whether the case should have been submitted to the jury—i. e., whether there was evidence warranting a finding of negligence on the part of the defendant and freedom from contributory negligence on the part of the deceased.

In discussing the first of these problems the court observed:

"A review of the evidence leads us to the conclusion that the jury might reasonably and logically have found the defendant negligent. We think the trial court failed to accord the force which the law gives to the conduct of the defendant and the inferences and presumptions legally created thereby."

Then, after discussing the fact that the defendant did not stop after the accident, which had been treated in *State* v. *Ford*[2] as an implied admission, the court proceeded:

"In that case [State v. Ford] as in this, the defendant failed to take the stand to explain the occurrence, and we said, (page 497 of 109 Conn., 146 A. 828), and now affirm, that: 'The privilege of refraining from testifying, if he so elects, does not protect him from any unfavorable inferences which may be drawn by his triers from his exercise of the privilege'."

The court was obviously speaking of the privilege against self-incrimination, since the common law[3] privilege of a party to a civil action not to testify for the adverse party had been abolished by statute[4] in Connecticut.

While the point has not often arisen, the ruling seems sound enough, that the privilege against self-incrimination does not protect a party to a *civil* action from what otherwise would be proper adverse inferences from his exercise of the privilege. That privilege is designed to protect him from forced disclosure of matter that might be used to his prejudice in a criminal prosecution, and not to protect him from civil[5] liability.

Whether the same rule should be applied to a defendant exercising his privilege when he is prosecuted on a criminal charge, as the same court had ruled in the case[6] referred to in its opinion, is a much more doubtful problem. If the matter is viewed on a purely technical basis, the allowance of adverse inference from an exercise of the privilege does not technically force the defendant to testify, or be a witness against himself. He has perfect freedom to choose between the two evils.

2. (1929). 109 Conn. 490.

3. *Rex* v. *Inhabitants of Woburn* (1808) 10 East 395; *Benoist* v. *Darby* (1848) 12 Mo. 196.

4. Gen. Stat. Conn. Rev. 1918. Sec. 5741.

5. *Morris* v. *McClellan* (1908), 154 Ala. 639.

6. *State* v. *Ford* (1929), 109 Conn. 490.

But such a rule does make the privilege of silence practically worthless in all cases where his testimony would not be more damaging than a presumption or inference of guilt from silence. In the case of other privileges, such as that for communications between attorney and client, it is generally held that the policy on which the privilege is based precludes[7] adverse inference from its exercise. This view was thus expounded by Lord Chelmsford in the Wentworth case:

"The exclusion of such evidence is for the general interest of the community, and therefore to say that when a party refuses to permit professional confidences to be broken, everything must be taken most strongly against him, what is it but to deny him the protection which, for public purposes, the law affords him, and take away a privilege which can thus only be asserted to his prejudice."

The same view has been taken of the defendant's privilege against self-incrimination by courts that thought that the Constitution laid down a broad policy of protection which should not be stripped of its value by legalistic reasoning.[8] On the other hand, the courts of Maine and New Jersey seem to have taken the view that the privilege should be restricted[9] to the narrowest limits possible.

In many states the statutes seem to foreclose all question in the criminal cases by prohibiting comment or presumption from the defendant's failure to testify.[10] The Connecticut statute prohibited comment, but the court in the *Ford* case held that this did not prohibit adverse inferences. It is certainly an innovation to be told that a jury may properly consider matters which can not be discussed by counsel.

The English courts have held that a statute, prohibiting comment by *the prosecution* on the failure of a defendant to testify, did not preclude comment by the judge.[11] According to this reasoning it might be urged that a statute, like that of Illinois, declaring that the failure of the defendant to testify should not create any *presumption* against him, would not make it improper for the jury to draw inferences of fact from such silence, since there are differences between a presumption and an inference.

In fact in one case[12] the Supreme court apparently adopted that

7. *Wentworth* v. *Lloyd* (1864), 10 H. L. Cas. 589; *Pennsylvania R. R. Co.* v. *Durkee* (1906), 147 Fed. 99.

8. *People* v. *Tyler* (1869), 36 Cal. 522; *State* v. *Pavelich* (1928), 150 Wash. 411.

9. *State* v. *Bartlett* (1867), 55 Me. 200; *Parker* v. *State* (1898), 61 N. J. L. 308.

10. The Illinois statute is a good example. Ch. 38 sec. 734. Smith-Hurd's Ill. Rev. Stats., 1925: "Provided, however, that defendant in any criminal case or proceeding shall only at his own request be deemed a competent witness, and his neglect to testify shall not create any presumption against him, nor shall the court permit any reference or comment to be made to or upon the subject.

11. *Queen* v. *Rhodes* [1899] 1 Q. B. 77.

12. *Raffel* v. *United States* (1926), 271 U. S. 494.

view. The federal statute[13] provides that the failure of the defendant to testify shall not create a presumption against him, but the court held that a defendant who testifies on a second trial of his case might, for the purpose of affecting his credibility, be cross-examined by the judge as to his failure to testify on the first trial. This indicates that in the opinion of the court the jury were at liberty to draw unfavorable inferences as to the truth of his testimony from privileged and seemingly protected silence on the former trial.

These variant rulings mean that courts treat the constitutional privileges against self-incrimination and the supplementary legislation on that subject liberally or strictly according to their own views of sound policy.

But there is another problem quite independent of any question of privilege, and that is, whether the failure of a party to take the stand on his own behalf should be the subject of adverse inference in the absence of special circumstances.

There are a great many cases, which need not be cited, laying down broadly, subject to a few limitations, that the failure of a party to take the stand on his own behalf is the proper subject of adverse inference. The only limitations suggested are that a prima facie case must have been made against him, and the matter must be apparently within his knowledge. One court, at least, has rejected this rule on the ground of policy.[14] In the *Ward* case the court quotes with approval the following passage from the opinion of Justice Bleckley in *Thompson* v. *Davitte:*

"We think, on the contrary, that it is becoming, and to be commended, in a party not to testify, if he can avoid it without positive injury to the cause of truth and justice. As long as he is unheard, there should be no presumption that his silence is counseled by prudence rather than modesty. While his case should not gain by his forbearance to testify, neither should it lose by it. Public policy forbids that a suitor should feel constrained to mount the witness stand for no purpose but to let the jury know that he has something to say in his favor, or to show that he can face the terrors of cross-examination without breaking down. The encouragement of anything like competition in swearing would be sure to breed perjury. Let those testify in their own behalf who voluntarily present themselves; but let no uncharitable imaginations light upon those who stay away, merely because they might swear if they would."

According to the writer's observation of many trials, there is no less danger of perjury today from competition in swearing then there was when Justice Bleckley wrote.

The theory in support of the prevailing rule is that of an admission implied from silence. At best constructive or implied admissions are troublesome and unsatisfactory. The failure to deny or explain an adverse statement may, of course, be due to the fact

13. 28 U. S. C. A. sec. 632.

14. *Thompson* v. *Davitte* (1877), 59 Ga. 472, approved in *Ward* v. *Morris* (1922), 153 Ga. 421, at 425.

that the party can not truthfully deny or explain, and is unwilling to lie. If that is really the case, there is a true admission. But silence may be due to various other causes, and, in that event, is not an admission at all. In that case, if treated as an admission, it is given a probative force which it ought not to have. The inherent difficulty is that generally there is no way of determining the true reason for the silence, and we do not know enough about human behavior under various conditions to apply a theory of probability.

For example, on arrest for some charge, the prisoner fails to deny or offer an explanation. This may be due to the fact that he has none to offer, or to the fact that he does not think it would do any good, or to the fact that he wishes legal advice before making any statement. Since there is no way of determining the true explanation, silence there is not usually admitted as an implied admission.[15]

A person receives a letter from a stranger making some demand on him or asserting some claim against him, and fails to answer it. Such failure may be due to the fact that he can not truthfully dispute the charge, or to the fact that he does not feel called on to notice it. Again since there is no way of determining the true explanation of the silence, the failure to answer such a letter is not received as an implied admission.[16]

On the other hand, A has a regular charge account with B, and fails to make any objection to the monthly statement sent to him. Under these conditions his failure to object is received as an implied admission.[17]

We doubtless know enough about behavior under these conditions to say that most persons do object to erroneous bills, so that we have fair ground for concluding that the failure to object has real significance. A party takes the stand and testifies in his own behalf, but fails to deny or explain some adverse testimony about which he clearly has personal knowledge. In such a case his silence is the subject of comment and inference.[18]

Here again general experience is probably sufficient to enable us to conclude that the party could not truthfully deny or explain. If the instances noted indicate the true basis of implied admissions from silence, then to justify the evidential use of a party's failure to take the stand on his own behalf general observation and experience must indicate that in a majority of instances, absent unusual circumstances, the failure is due to his inability to deny or explain.

If we have no such basis in experience and observation, then there is no rational ground for treating the silence as an implied admission. It will not do to say, "I would take the stand to deny or explain if I could," and therefore this man's failure to deny or explain means his inability to do so. That is a hypothetical case, not an actual one.

15. *Comm.* v. *Kenney* (1847) 12 Metc. (Mass.) 235.
16. *Leach* v. *Pierson* (1927) 275 U. S. 120.
17. *Wiggins* v. *Burkham* (1869) 10 Wall. (U. S.) 129.
18. *Caminetti* v. *United States* (1917) 242 U. S. 470.

Inability to deny may be the true explanation in some cases, but every lawyer knows that it is rarely the unwillingness of the client to testify that keeps him off the stand. The attorney decides, as a rule, whether his client is to take the stand, and the reasons which influence the attorney are many. He knows that juries are apt to discount the testimony of an interested party, and he may wish to prevent the opposing attorney from harping on the interest of the party as detracting from his credibility, and thus distract attention from disinterested testimony. The client may have an unfortunate personality or manner which may make a bad impression and do more harm than any possible benefit from his testimony.

A cross-examination to discredit is full of possibilities for prejudice, though it may have little bearing on real credibility. Such considerations frequently lead the attorney to keep his client off the stand, and the judges of the appellate courts know it, if they have not forgotten their experience as trial lawyers. One is led to suspect, however, that the unconscious position of the judges has been something like this: *"I* would take the stand to deny adverse testimony if it wasn't true." Therefore if this defendant does not take the stand it must be because he can not deny.

To the writer this assumption seems unwarranted, and results in a rule that may work undue hardship, without compensating advantages.

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TRUSTS—VALIDITY OF PRIVATE TRUSTS—CERTAINTY.—[Illinois] In *Spaulding* v. *Lackey*[1] the will provided that trustees, named, should use the residue of rents and income in keeping up the family cemetery for a period of twenty years from the testator's death, or, if the wife survived him, for twenty years from her death, at which time the trustees were to convert all the properties of the estate into cash and expend the moneys in building a roadway, the route of which was specifically described, but the selection and choice of the material of which it was to be constructed, were left to the trustees.

The bill was brought by those nominated as trustees for their appointment as such and for directions. The chancellor denied the prayer of the bill and this action the Supreme Court affirmed, holding that the attempted trust was void. Using the court's own language, the reason for the decision was:

"The entire fund to be derived from the conversion of the estate into money as directed . . . , can be applied by the trustees in the construction of the proposed road over private property and for a purely private purpose, and in that event nothing will be left for the improvement of those portions of the public highway which constitute the remainders of the route specified by the testator. If the trustees possess

1. (1930) 340 Ill. 572.