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Comments

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Comments

LIABILITY IN MISSOURI FOR THE PHYSICAL CONSEQUENCES RESULTING FROM EMOTIONAL DISTURBANCE—The problem of to what extent an individual may recover for injuries received through mental shock or emotional disturbance, caused by the wrongful act of another, is of comparatively recent origin in the field of tort law.1 Because of the wide diversity of situations in which the problem may arise and the failure of the courts always satisfactorily to distinguish them, the principles to be deduced from the adjudged cases are sometimes confusing, and their application to fact situations often difficult.

For this reason, it may be well briefly to classify the situations in which emotional disturbance is an important factor, before any attempt is made to analyze the cases in Missouri. A. An individual may intentionally act toward another in such a way as to place him in fear of bodily harm or of an offensive touching. This specialized form of emotional disturbance is denominated assault for which recovery is universally permitted.2 B. An individual may act, intentionally or negligently, in such a way as to cause emotional disturbance in another which influences him to react toward his physical surroundings in such a manner as to sustain physical injury. Recovery is generally allowed in such a case.3 C. An individual may act, intentionally or negligently, in such a way as to cause emotional disturbance in another which influences him to react toward his physical surroundings in such a manner as to cause physical injury to a third person. Again, the courts usually permit the third person to recover.4 D. An individual may act in such a way as to cause emotional disturbance in another which results in physical injury solely from the emotional disturbance itself. Here the injury is a result of a shock to the mental or nervous system with its attendant reactions on the body.

3. Tuttle v. Atl. City R. R., 66 N. J. L. 327, 49 Atl. 450 (1901); RESTATEMENT, TORTS (1934) §443: “An intervening act of a human being or animal which is a normal response to the stimulus of a situation created by the actor’s negligent conduct, is not a superseding cause of harm to another which the actor’s conduct is a substantial factor in bringing about.”
4. Note (1925) 35 A. L. R. 1447; RESTATEMENT, TORTS (1934) §444: “An act done by another in normal response to fear or emotional disturbance to which the actor’s negligent conduct is a substantial factor in subjecting the other is not a superseding cause of harm done by the other’s act to himself or a third person.”

(67)
It is in the last situation that the greatest confusion and difference of opinion arises. If there is no resulting physical injury, no recovery is allowed for the emotional disturbance alone. 1. If physical injury results from the same act that caused the emotional disturbance, or if any other tort is proved, the jury may consider the emotional disturbance in determining the amount of damages. 2. If physical injury results from the emotional disturbance, but there was also some slight impact, or injury from without, most courts hold that a recovery may be had for all the injuries caused by the emotional disturbance. 3. If physical injury results from the emotional disturbance, but there was no physical impact, or injury from without, the cases are sharply divided. 4. If the emotional disturbance was intentionally caused, and resulted in physical injury, although there was no physical impact or injury from without, recovery is permitted. 5. If the emotional disturbance was caused by acts toward a third person, and resulted in physical injury, recovery is usually denied, although there are some exceptions when the act was intentional, and some risk of injury to the plaintiff could have been foreseen, or even when the act was negligent, where some special relationship existed between the third person and the plaintiff, i.e., parent and child.

It is the third type of case which has given the greatest difficulty, as indicated by the division in the authorities. All of the Missouri cases involving the problem of liability for physical injury resulting solely from the emotional disturbance itself start with the case of Trigg v. St. L., K. C. & N. Ry. Here, a train was started while the plaintiff was attempting to alight at her station, with her children and baggage, as a consequence of which she was carried to the next station. Although

13. 74 Mo. 147 (1881).
provision was made by the employees of the railroad for lodging and transportation to her home, she voluntarily returned on a handcar the same evening. There was no showing of physical injury from any source, so that the only possible injury was plaintiff’s suffering from mental anxiety, suspense, and inconvenience. The trial court instructed the jury that they might consider the delay, anxiety, and suspense of mind, physical hardship, effect upon her health and the danger to which she was exposed in estimating the damages. The supreme court held the verdict for $1,000 excessive and said: “The general rule is that ‘pain of mind, when connected with bodily injury, is the subject of damages; but it must be so connected in order to be included in the estimate, unless the injury is accompanied by circumstances of malice, insult or inhumanity.’” It is very difficult to determine whether this was an action for tort or for breach of contract, although such causes are usually based upon breach of contract, where no physical injury is shown. Nevertheless, the rule announced has been the basis for a long line of authority in this state in cases sounding in tort.14 This seems unfortunate, in light of the much narrower rule of damages applied to breach of contract, than for injuries from tortious acts.15 This point should not be over-emphasized, however, since the Supreme Court has consistently followed the rule that there can be no recovery for injuries resulting from emotional disturbance when there was no external physical injury or impact.16

In McCardle v. Peck Dry Goods Co.,17 an elevator in which the plaintiff was riding fell, causing shock to the plaintiff, which resulted in physical injury. The trial court instructed the jury “that the plaintiff cannot recover for any fright, terror, alarm, anxiety, or distress of mind caused by or resulting from the descent of defendant’s elevator, if these were unaccompanied by some physical injury. You are further instructed that if you believe, from the evidence, that plaintiff’s present condition is the result of a fright or scare only, then plaintiff cannot recover in this case.” The Supreme Court found no error in the instruction and quoted the rule announced in the Trigg case. The court further said: “If the defendant is not responsible for the mental shock and suffering of plaintiff, in the absence of accompanying physical injury, it is not responsible for physical injury caused by such mental shock and suffering.” The court apparently considered the rule of the Trigg case to be that there could be no recovery for mental shock and pain, alone resulting


17. 271 Mo. 111, 195 S. W. 1034 (1917).
from the defendant’s negligence, and added the conclusion that consequently there could be no recovery for physical injuries resulting from such mental shock and pain.

In *Perkins v. Wilcox* 18 which was an action to recover for the death of the plaintiff’s husband, the defendant, with an officer, went to the plaintiff’s home to serve a writ. An argument between the officer and the decedent’s father resulted in the shooting of the latter by the officer. It was alleged that the decedent, who was then recuperating from an illness, was so greatly disturbed that he drove away and because of exposure suffered a relapse resulting in his death. It was shown that the plaintiff and the decedent were preparing to drive away when the defendant and the officer arrived. The Supreme Court said that, even if the defendant himself had shot the father of the deceased, there could have been no recovery, citing the *Trigg* case, because there would have been no causal connection between the wrongful act and the death. But, if it be conceded that the injury was not the proximate result of the wrongful act there can never be any recovery. And, as has been pointed out, recovery is everywhere denied for the emotional disturbance itself.

In *Porter v. St. J. Ry., Lt., Heat & Power Co.* 19 the plaintiff sued for injuries alleged to have been caused by a collision of the defendant’s cars, in one of which she was a passenger. Although she was thrown against the side of the car, no immediate physical injury was shown. The trial court instructed the jury that “even if you should find and believe from the evidence that plaintiff was made nervous solely by reason of the collision described in evidence, or that some previous nervous condition had been aggravated by reason thereof, yet, if you further find and believe from the evidence that she sustained no physical injury of any kind, then under the law it is your duty to find your verdict in favor of the defendant.” The supreme court, in sustaining the instruction, adopted the opinions of the *Perkins* and *McCardle* cases and reaffirmed the rule of the *Trigg* case.

In *Chaukley v. Wabash Ry. Co.*, 20 which was an action to recover for the death of the plaintiff’s husband and two children, and for injuries to herself, sustained when their automobile was struck by the defendant’s train, evidence was introduced to show mental shock and derangement. The instruction authorized recovery for mental suffering only in so far as caused directly by the physical injuries. A judgment entered upon a verdict for the plaintiff was reversed by the Supreme Court upon several grounds. The Court held that the evidence should have been excluded and that the instruction did not remove its injurious effects. Therein the court said: “The rule is that mental distress, suffering, may not be recovered for unless directly caused by a physical injury. The plaintiff could not recover for impairment which the evidence showed to be in her physical and mental condition, unless that particular impairment could be traced directly to the physical shock or

18. 294 Mo. 700, 242 S. W. 974 (1922).
19. 311 Mo. 66, 277 S. W. 913 (1925).
20. 317 Mo. 782, 297 S. W. 20 (1927).
physical wounds or bruises inflicted upon her.” And further: “It was not fright in anticipation of an injury, which was put before the jury; it was mental distress caused by a realization of the injury which had already occurred.”

These cases indicate that the Missouri Supreme Court is aligned with those authorities which deny recovery for the physical consequences of emotional disturbance, caused by the negligent act of another, unless some physical impact or injury from without also resulted from the negligent act. But the rule is not clearly established, due to the somewhat ambiguous language employed. To say that there can never be recovery for mental shock and pain, unaccompanied by physical injury is to state the rule too broadly and does not explain much. Does it mean that some physical injury must be alleged and proved? In the Trigg case, where the rule was first announced, there was no showing of any physical injury as a consequence of the emotional disturbance. It is well established that there can be no recovery in Missouri or elsewhere under such circumstances. Does it mean that, if physical injury is alleged and proved, emotional disturbance is to be considered in the estimate of damages? Such a proposition is nowhere doubted, although, in the Chawkley case, it was held erroneous to admit evidence thereof unless a proper basis of causal relation had been laid. Does the language mean that the physical injuries must be shown to have resulted as a proximate result of the wrongful act, through the emotional disturbance? Such an interpretation seems to have been made by the Court in the Perkins case, but this is a universal requirement in all negligence cases. Finally, the language may mean that the physical consequences of emotional disturbance, created by another's negligent act, may not be the basis of an action unless some physical impact may be shown to have resulted as a co-incident of the negligent act. Such appears to be the position taken by the court in the Porter and McCordale cases. But what degree of impact or injury from without is necessary? It has been generally held in those jurisdictions following this impact rule that the impact need be only very slight. The illustration of dust in the eyes is familiar. But the plaintiff in the McCordale case was thrown against the side or bottom of the elevator, and the plaintiff in the Porter case was thrown against the side of the street car. The Missouri court evidently requires a more substantial impact.

The reasons generally given for denying recovery in these cases are: (1) since there can be no recovery for the emotional disturbance itself there can be no recovery for its consequences, (2) to permit recovery would be contrary to public policy, in that it would result in an increase in so-called personal injury actions in which the injury is easily feigned and the damages are conjectural.

and (3) the injury is too remote. In answer to the first objection it may be said that the law does not give redress unless such an interest as is recognized by the law has been interfered with. An undisturbed mental or emotional state has never been considered such an interest, but any substantial physical injury has always been so considered. The last objection cannot be given serious consideration because legal causation is an element of every negligence action. The second appears to be the real danger sought to be avoided; the reason behind the impact requirement. It is said that the reality of the cause is thereby guaranteed. But “dust in the eyes” seems to be a rather slim thread upon which to hang such reality. Is medical testimony not competent to establish the genuineness and extent of injury in these cases? Its efficacy is recognized where a tort is otherwise proved and the matter becomes an element of damages. A remedy to an injured plaintiff should not be denied merely because of the difficulty of proof.

It is submitted, therefore, that the present status of this question in Missouri is far from satisfactory. In a recent case in which recovery was sought for the physical consequences of emotional disturbance, caused by the alleged negligent shooting of the plaintiff’s husband, who was standing near her at the time, and who fell against her after being shot, the court cited the decisions of the Supreme Court above reviewed and said: “... there is nothing whatsoever in her testimony to show that she fell down or that she received a bruise, a scratch, a bump, or any other kind of physical wound or injury by her husband pushing her, which would afford a basis for an inference to account for the condition of her health as described by herself and Dr. Barnes at the time of the trial.” But the purpose of showing the injury from without, under the rule requiring impact, is not to serve as a basis to account for the physical injury alleged to have resulted, but to establish the reality of the cause; the injury results from the emotional disturbance, not from the impact.

The extremes into which the courts are led by application of the rule are strikingly demonstrated by two companion cases in this state. A brother and sister, ages four and nine years, were carried past their station. As they were returning to the station, where their mother was waiting for them, they both fell down several times along the muddy and slippery route. The girl suffered minor scratches and bruises but her brother did not receive any outward injury, and both were greatly frightened by their situation. As a result the boy later became very ill, but the girl did not suffer such severe consequences. The court permitted the

girl to recover because of the fact that she had received some injury from without, while upon the same basis the boy was denied recovery for his resulting illness. Could it be very urgently contended that the reality of the girl's cause was any more firmly established than that of the boy? It seems apparent that a rule which permits of such refinements is not in accord with accepted concepts of justice.

In conclusion, it is suggested that the way is not entirely closed to a rejection of the necessity of impact or some physical injury from without before damages resulting from the emotional disturbance may be recovered in such cases. If the negligent act of the defendant, which is the legal cause of physical injury to the plaintiff, is established, the fact that emotional disturbance is one of the links in the chain of causation should not vary the result. Medical science recognizes that shock to the nervous system is as much a physical injury itself as is a broken bone, and can assist in determining the authenticity of the claim and the extent of the injury. It would seem desirable for the court to re-examine the problem of physical injury resulting from nervous and emotional disturbance rather than to continue the reiteration of a broad principle laid down almost fifty years ago in a case in which the problem was not directly presented.

WARNER G. MAUPIN

LIABILITY OF MANUFACTURER TO CONSUMER FOR PERSONAL INJURIES RESULTING FROM UNWHOLESOME FOOD AND BEVERAGES.—A recent Missouri case brings to attention the liability of a manufacturer of food products to a consumer for personal injuries through an expansion of the principle of recovery based on an implied warranty of fitness for human consumption. In the Missouri case the


33. Alabama Fuel & Iron Co. v. Baladoni, 15 Ala. App. 316, 73 So. 205 (1916); Purcell v. St. Paul City Ry., 48 Minn. 134, 50 N. W. 1034 (1892); RESTATEMENT, TORTS (1934) §436: "If the actor's conduct is negligent as violating a duty of care designed to protect another from a fright or other emotional disturbance which the actor should recognize as involving an unreasonable risk of bodily harm, the fact that the harm results solely through the internal operation of the fright or other emotional disturbance does not protect the actor from liability.

"If the actor's conduct is negligent as creating an unreasonable risk of causing bodily harm to another otherwise than by subjecting him to fright, shock or other similar and immediate emotional disturbance, the fact that such harm results solely from the internal operation of fright or other emotional disturbance does not protect the actor from liability."


1. Madouros v. Kansas City Coca-Cola Bottling Co., 90 S. W. (2d) 445 (Mo. App. 1936). This case is the first of its kind to come before the Missouri courts. The Appellate Court, therefore, had the opportunity of reviewing all of the existing authorities and deciding the question for the first time. This allowed the court to decide a difficult question involving considerations of social policy without being bound by precedent.
manufacturer-bottler sold a bottled drink known by its trade name as coca-cola to a retailer, who in turn sold the bottle to a customer. The customer drank from the bottle and became very ill from a deleterious substance (decomposed mouse) contained therein. The Missouri Appellate Court allowed the customer to recover from the manufacturer-bottler on the stated basis of an implied warranty of fitness for human consumption. Yet, clearly there could have been no actual privity of contract, as such privity is commonly understood,2 between the manufacturer and the consumer. The case as pleaded on the warranty basis presented for a definite stand, the Missouri court believed, the question of whether by a broadened concept of warranty the court was going to hold the manufacturer as an insurer, or whether the court, by denying that the term includes cases where no actual privity is found, would force the customer to have resort to the remedy of tort based only on negligence.3

This question has been met by the courts in various ways, many of which have served only to confuse the main issue and leave in doubt the actual basis for their decisions.4 The basis of tort liability based on negligence is allowed by all courts, for every manufacturer of foodstuffs is under the common law duty to a purchaser to use reasonable care to make and sell only wholesome foodstuffs.5 But the standard of care imposed by different courts has come to vary from that of a duty to use due care6 to that approaching liability without fault.7 This tort duty goes back to the old case of Winterbottom v. Wright,8 which was accepted as authority for the general rule that the manufacturer, contractor, or vendor of a chattel owed a duty of due care only to the person or persons with whom he contracted. Exceptions were soon made. The duty of due care for the safety and protection of the ultimate consumer where the article manufactured was inherently dangerous to human life even if correctly made was imposed.9 This duty expanded

2. For a general discussion of privity, its historical background, see Notes (1924) 9 CORN. L. Q. 487; (1933) 18 CORN. L. Q. 445.
3. There is no Missouri case that holds specifically that the manufacturer is in a tort action liable without fault in a case of this kind.
4. The cases are collected in (1922) 17 A. L. R. 672; (1925) 39 A. L. R. 922; (1929) 63 A. L. R. 340.
5. 2 COOLEY, TORTS (3d ed.1906) 1488: “a person who deals with an eminently dangerous article owes a public duty to all to whom it may come to exercise care in proportion to the peril involved.” Unwholesome food is listed as of this class. “In view of the evidentiary value of the mere fact of the defect as negligence, even where only ordinary care is required this avenue of escape (for one who is not negligent) has often proven a blind alley, so that it is possible to consider the negligence remedy also a species of liability without fault.” (1933) 33 COL. L. REV. 868, 874.
into one to use due care for the protection of the ultimate consumer with respect to all articles designed to affect, preserve, or destroy human life.\textsuperscript{10}

As the law has developed in this field the courts have come to differ in the duty of care the manufacturer of foodstuffs must exercise as to the ultimate consumer of them. Most courts no longer require mere due care,\textsuperscript{11} but now require the highest degree of care.\textsuperscript{12} Some courts place the burden of showing lack of highest degree of care on the injured consumer,\textsuperscript{13} while others have expanded the duty to include the shifting of all\textsuperscript{14} or part\textsuperscript{15} of this burden onto the manufacturer. This application of a duty varying according to the jurisdiction has been effected in main through various methods of applying the doctrine of \textit{res ipsa loquitur} to this fact situation. In general, it can be said that courts follow one of four methods. First, those courts that refuse to allow an inference of negligence to be raised from a mere showing that injury happened to a consumer from the deleterious character of the food prepared and put-up by the manufacturer,\textsuperscript{16} the courts saying in effect that such a showing is not evidence of negligence and that unless evidence of negligence is given for the jury to consider a verdict will be directed. Second, those courts that on the showing of such facts hold that it is enough evidence to take the case to the jury and do not allow a directed verdict even if the manufacturer offers no rebutting evidence of due care.\textsuperscript{17} Third, those courts that direct a verdict if the manufacturer offers no rebuttal, but if there is a rebuttal hold that the presumption disappears.\textsuperscript{18} And lastly, there are those courts that hold that under such circumstances the case goes to the jury and the manufacturer must show not only the exercise of the highest degree of care, but also must explain and show what caused the injury complained of, if it was not caused by his negligence.\textsuperscript{19}

\textsuperscript{10} Birmingham Chero-Cola Bottling Co. v. Clark, 205 Ala. 678, 89 So. 64 (1921).

\textsuperscript{11} Boyd v. Coco-Cola Bottling Works, 132 Tenn. 23, 177 S. W. 80 (1914).

\textsuperscript{12} Davis v. Van Camp Packing Co., 189 Iowa 775, 176 N. W. 382 (1920); Coca-Cola Bottling Co. v. Rowland, 66 S. W. (2d) 272 (Tenn. 1932).

\textsuperscript{13} Swenson v. Purity Baking Co., 183 Minn. 289, 236 N. W. 310 (1931); Broom v. Monroe Coca-Cola Bottling Co., 200 N. C. 55, 156 S. E. 152 (1930).

\textsuperscript{14} Coca-Cola Bottling Co. of Shelbyville v. Creech, 245 Ky. 414, 53 S. W. (2d) 745 (1932).

\textsuperscript{15} Catani v. Swift, 251 Pa. 52, 95 Atl. 931 (1915).

\textsuperscript{16} Swenson v. Purity Baking Co., 183 Minn. 289, 236 N. W. 310 (1931); Broom v. Monroe Coca-Cola Bottling Co., 200 N. C. 55, 156 S. E. 152 (1930).

\textsuperscript{17} Rozumailski v. Philadelphia Coca-Cola Bottling Co., 296 Pa. 114, 145 Atl. 700 (1929).

\textsuperscript{18} Sweeney v. Erving, 228 U. S. 233 (1913); Catani v. Swift, 251 Pa. 52, 95 Atl. 931 (1915).

\textsuperscript{19} Coca-Cola Bottling Co. of Shelbyville v. Creech, 245 Ky. 414, 53 S. W. (2d) 745 (1932), holding in effect that a mere showing that plaintiff had drunk coca-cola from a bottle in which a partly decomposed mouse was found, and thereby became violently ill, is sufficient to support a judgment for the consumer even though the manufacturer's evidence disclosed a practice of the use of the most scrupulous care in the bottling of its product.
The criticism to which all of these holdings are subject is that, where the duty imposed on the manufacturer is less than that of an insurer, and some degree of negligence must be found, there is great difficulty in proving the negligence of the manufacturer, since, from the very nature of the thing, what actually took place is almost impossible to ascertain, and proof of negligence is forced to revolve around and come from evidence of the usual methods the manufacturer uses in running his factory, instead of evidence as to what actually happened in this particular event. Since the manufacturer has complete control, neither the middleman nor the consumer is in any position to know of the defect or of its cause.

To this factor of difficulty of obtaining proper evidence is added the factor that under our present day factory system of mass production there is a growing spirit of commerce that actuates many courts to impose the duty of insurer on the manufacturer, those courts feeling that the duty is one that the manufacturer can stand, and that it is one that he should stand as an incident to his business. Also undoubtedly there is in the court's mind the feeling that the imposition of such a duty on the manufacturer is a prerequisite to the existence of the duty of insurer.

20. In Nickols v. Continental Baking Co., 34 F. (2d) 141 (C. C. A. 3d, 1929), after evidence of the general methods used in the manufacturing and wrapping of bread wherein a customer found a cockroach the court directed the jury to find for the manufacturer, the judge saying that to hold the manufacturer guilty of negligence would be "to base a verdict on speculation instead of the solid basis of proven negligence." Yet many courts will not only allow a presumption of negligence from such a finding of a harmful substance, but will require the manufacturer to prove he was not negligent by specifically showing how it did happen, if not by his negligence, Coca-Cola Bottling Co. of Shelbyville v. Creech, 245 Ky. 414, 53 S. W. (2d) 745 (1932). A note in (1925) 32 U. of Mo. Bull. L. Ser. 56, points out that, "when the duty is less than that of an insurer, there is difficulty in proving negligence of the seller, where he testifies as to his care in the selection, preparation and service of the food." For a description of new economic conditions, see Baxter v. Ford Motor Co., 12 P. (2d) 409 (Wash. 1932). For a discussion of the fact that the manufacturer is the only one who can prevent the injury and indicative of the feeling that the manufacturer ought to pay, see (1931) 29 Mich. L. Rev. 793.


22. In Smith v. Carlos, 215 Mo. App. 488, 247 S. W. 468 (1923), a suit between a restaurant keeper and an injured customer, the court said: "The importance of pure food to the public, and the inability of a guest to see or examine his food prior to its preparation and cooking, of necessity requires that one who holds himself out as a public furnisher of food . . . be held as an insurer against injury occasioned by a failure to furnish wholesome and pure food to eat." [Italics the writer's]. This same reasoning applies with equal force to a manufacturer, retailer, consumer situation. And in the instant case the court said, "The obligation of the manufacturer should not be based alone on privity of contract. It should rest . . . upon the demands of social justice." For a discussion of the possible contention that the privity requirement might be satisfied in these modern days by radio and billboards by conceiving a direct contractual relationship between the manufacturer and consumer by means of such advertising, see (1935) 23 Calif. L. Rev. 621, at 625, which pins the point by declaring that "this view seems artificial since neither party intends to contract with the other." See also note (1932) 7 Wash. L. Rev. 351.
duty makes for the exercise of a higher degree of care on the part of the manufacturer. These courts allow recovery on what they prefer to call an implied warranty of fitness for human consumption, and they have various approaches by which they get around the fact that there is no actual privity of contract between the manufacturer and the consumer where there is an intervening middleman. In main, they follow one of two approaches: (1) that the implied warranty of fitness for human consumption runs with the articles sold; and (2) that the manufacturer’s warranty to the retailer inures to the benefit of the consumer.

Although these courts admit the absence of actual privity of contract between the parties to the suit, and though they differ in their methods of rationalizing away the common law requirement of privity usually thought necessary to an action based on contract, yet they do unite in the belief that under these circumstances recovery by the consumer from the manufacturer should be allowed. The more recent of this type of case that allows a recovery regardless of actual privity do so on the grounds of “social justice.” Those that refuse to allow a recovery on the implied warranty of fitness for human consumption have done so by applying the strict test of privity of contract to the problem. This they do from a reluctance to stretch the common law remedy of implied warranty beyond its strict meaning. They are also undoubtedly influenced by a belief that the consumer has a proper remedy in tort based on negligence. It is submitted that, just as the tort recovery has developed from the doctrine of due care only to the person or persons to whom the article was sold, as expressed in Winterbottom v. Wright, to the doctrine of the highest degree of care with the burden shifted by the use of res ipsa loquitur on to the manufacturer to show not only the exercise of the highest degree of care, but also to show how the injury happened, such doctrine being

23. See Perkins, Unwholesome Food as a Source of Liability (1920) 5 Iowa L. Bull. 86, 110.
27. Coca-Cola Bottling Co. v. Crook, 222 Ala. 369, 132 So. 898 (1931); Coca-Cola Bottling Co. v. Bennett, 184 Ark. 329, 42 S. W. (2d) 213 (1931); Coca-Cola Bottling Co. of Shelbyville v. Creech, 245 Ky. 414, 53 S. W. (2d) 745 (1932); Coca-Cola Bottling of Greenwood v. Simpson, 158 Miss. 390, 130 So. 479 (1930).
premised on policy and the difficulty of producing evidence, so also should that duty be expanded into one of absolute liability, which is but the ultimate and logical result toward which the courts have always been reaching and at which they are just now arriving. This same result is being reached by means of the enactment of pure food statutes which ordinarily prohibit and punish as a misdemeanor the manufacture, sale, or offering for sale of any article of food, if it is in itself injurious, or if it contains any ingredients injurious to health.33 The courts hold that any person who violates such a statute is liable to persons injured whether or not they knew of the unwholesomeness. Negligence is implied from the violation of the duty imposed by the statute.34 These statutes are conceived of as a motivating force for greater care in the selection and preparation of the food by the manufacturer.35

Although some courts have approached the ultimate end which is liability without fault through the means of an implied warranty, and though some of the courts have been lost on the wayside by the obstacle of the old common law privity requirement, combined with, perhaps, the belief that the better policy is not to make the manufacturer an insurer, yet the real question underlying it all (which has been so confused) is, have the courts today arrived at the belief that the manufacturer of foodstuffs should be held as an insurer? And if the courts have, the means of approach used is incidental to the actual allowance of a recovery. We have long ceased to take seriously the label attached to the remedy and to look behind the procedural device to see the real nature of the wrong. Here is a civil wrong for which damages should be given irrespective of the absence or presence of a contract, and this the court recognizes in the instant case when it says: "If privity of contract is required, then, under the situation and circumstance of modern merchandise in such matters, privity of contract exists in the consciousness and understanding of all right-thinking persons."

ELMO HUNTER

PROPOSED LIMITATIONS UPON THE PRIVILEGE AGAINST SELF-INCrimINATION—Until 1877 in Missouri the defendant in a criminal case was not allowed to testify. In 1877 a statute was passed permitting the defendant to testify if he so desired, and further providing that no presumption of guilt should arise from his failure to testify and that no comment on his failure to testify might be made by the prosecuting attorney or by the court.1 Since that time there has been much dispute over the question of how far to extend the doctrine which protects a person from being compelled to incriminate himself. In view of the existing comprehen-

33. MINN. REV. LAWS (1905) §§ 1771, 1775.
sive literature concerning the history of this privilege, a lengthy discourse upon its history would be futile. Suffice it to say that the main purpose of the privilege is to protect against testimonial compulsion. Professor Wigmore tells us that the main objection to compulsory self-disclosure is the tendency of the prosecution to rely too heavily upon such disclosure. When this happens, it is often true that unless the prosecution can get an admission from the defendant, its case will collapse. Too much emphasis is placed upon this phase of the trial and not enough stress is put upon a vigilant search for independent evidence. The right to cross examine without limitation results in attempts to trap the defendant with catch questions. The cross-examination proceeds with the utmost severity accompanied by a liberal use of invective and sarcasm in an attempt to impute guilt to the defendant. Truth becomes secondary in the struggle between the ingenuity of the prosecutor and the subterfuge to which an untrained layman must resort in order not to be put in an unfavorable light by the cross-examination.

Granting then, that the main objective of the privilege is to shield persons from abusive cross-examinations, how far does the privilege extend? It is the unanimous rule in the United States and state courts that the privilege does not protect one against civil or pecuniary liability but solely against criminal liability and forfeitures. Whom is the privilege meant to shield? The wording of the various constitutions clearly protects the defendant in criminal cases. It is gen-

3. John Lilburn's Case, 13 How. St. Tr. 1315 (1637), was highly instrumental in establishing the privilege in the common law. John Lilburn was on trial for printing or importing heretical books. He refused to answer questions as to other charges. For so refusing he was condemned to be whipped and pilloried on the ground that if such a privilege were allowed, many offenses might go undiscovered and unpunished. The House of Lords ordered the sentence vacated because it was against the liberty of the defendant and against the law of the land. Lilburn was granted three thousand pounds in reparation.
4a. Wigmore, op. cit. supra note 2.
5. There are only two states whose constitutions do not guarantee to their citizens the privilege against self-incrimination. Neither New Jersey nor Iowa provide for this protection to the accused in their respective constitutions. Art. I, § 10, of the Iowa Constitution deals with the rights of persons accused and does not mention that the accused shall not be compelled to testify against himself. Art. I, § 8, of the New Jersey Constitution likewise deals with the rights of accused persons and makes no mention of freedom from self-incrimination. State v. Zdanelewicz, 69 N. J. L. 619, 55 Atl. 743 (1903), said, "By the fifth amendment to the Constitution of the United States it is, among other things, provided that no person shall be compelled, in any criminal case, to be a witness against himself. Many of the states have included a similar prohibition in their constitutions. There is no such prohibition in the constitution of the State of New Jersey."
6. Counselman v. Hitchcock, 142 U. S. 547 (1892); Bull v. Loveland, 10 Pick. 9 (Mass. 1830).
7. See the Fifth Amendment to the United States Constitution which provides, "... nor shall be compelled, in any criminal case, to be witness against himself ..." Mo. Constr. Art. II, § 23, says, "... no person shall be compelled to testify against himself in a criminal cause ..." The Missouri provision is typical of the provisions of virtually all the states.
eraly held to be immaterial whether or not the prosecution is then and there “against himself” (to use the words of most constitutional provisions), and there fore the privilege protects any witness in any proceeding where testimony is given.8

Encroachments upon this privilege have been zealously prevented by the courts. To sustain it courts even forbid comment on the failure of the ac-
cused to testify.9 In only four states may comment be made upon such failure. In New Jersey and in Iowa no Constitutional provisions bar comment and the courts permit such comment.10 Ohio and California amended their constitutions

8. The case of Counselman v. Hitchcock, 142 U. S. 547, 562 (1892), is a leading case upon this point. The Supreme Court of the United States there said, “It is impossible that the meaning of the constitutional provision can only be, that a person shall not be compelled to be a witness against himself in a criminal prosecution against himself. It would doubtless cover such cases; but it is not limited to them. The object was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show he himself had committed a crime. The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard.” Even before the Counselman case the states, including Missouri, had placed the same interpretation on their similar constitutional provisions. Ex parte Senior, 37 Fla. 1, 19 So. 652 (1896); Higdon v. Heard, 14 Ga. 255 (1853); Wilkins v. Malone, 14 Ind. 135 (1860); State v. Marshall, 36 Mo. 400 (1865); State v. Albert and Talbott, 73 Mo. 347, 359 (1881) (quoting Greenleaf, “When the answer will have a tendency to expose the witness to a penal liability, or to any kind of punishment or to a criminal charge, the witness is not bound to answer”); People v. Kelly, 24 N. Y. 74 (1861); Commonwealth v. Cameron, 229 Pa. 592, 79 Atl. 169 (1911); Cullen v. Commonwealth, 24 Grat. 624 (Va. 1873).

Witneses in grand jury proceedings may exercise the privilege against self-incrimination. The case of State v. Naughton, 221 Mo. 398, 120 S. W. 53 (1909), held, “The investigation of a crime before a grand jury falls within the term ‘criminal cause.’” United States v. Edgerton, 80 Fed. 374 (D. Mont. 1897); State v. Froiseth, 16 Minn. 260 (1870); State v. Faulkner, 175 Mo. 546, 75 S. W. 116 (1903); Ex parte Gauss, 223 Mo. 277, 122 S. W. 741 (1909); Ex parte Eichel, 223 Mo. 258, 122 S. W. 743 (1909). The privilege has been held to exist in a juvenile court proceeding. In this connection Ex parte Tahbel, 46 Cal. App. 755, 189 Pac. 804 (1920), held, “It is sufficient if there is a law creating the offense under which the witness may be prosecuted. If there is such a law, and if the witness may be indicted or otherwise prosecuted for a public offense arising out of the acts to which the examination relates, he cannot be compelled to answer in any collateral proceeding, civil or criminal . . . .” Even in ecclesiastical courts it was held that a party is not bound to answer, when his answer would criminate himself, or when it would tend to degrade him. Swift v. Swift, 4 Hagg. Eccl. R. 139 (1832).

9. Wilson v. U. S., 149 U. S. 60 (1893); Davis v. State, 197 Ind. 448, 151 N. E. 329 (1926); Commonwealth v. Scott, 123 Mass. 239 (1877); State v. Martin, 74 Mo. 547 (1881); State v. Weaver, 165 Mo. 1, 65 S. W. 308 (1901); Ruloff v. People, 45 N. Y. 213 (1871); Commonwealth v. Green, 233 Pa. 291, 82 Atl. 250 (1912).

to permit comment upon the silence of the accused.\textsuperscript{11} Not only is it held that in all but four states no comment may be made upon the failure of the defendant to testify, but it is further held by many courts in regard to a witness who is not the defendant that the inference that the criminating fact exists may not be drawn because of the witness's claim of privilege.\textsuperscript{12}

Because the courts have so carefully preserved the privilege against self-incrimination, much criticism has been directed at its very existence and many suggestions have been made which would tend to limit it. One of the less drastic suggestions proposes that the court and counsel be permitted to comment upon and the jury be permitted to draw an inference from the claim of privilege by a witness. The results reached by the cases refusing to allow such comment and inference illustrate the necessity for adopting such a suggestion. In the case of \textit{State v. Weber},\textsuperscript{13} the defendant was convicted of rape after he sought to show by the testimony of the justice of the peace who presided over the preliminary hearing that another witness (out of the jurisdiction at the time of the trial) had claimed privilege in response to a question as to whether or not the witness had had intercourse with the prosecutrix prior to the alleged rape. The justice of the peace was not allowed to testify and the Supreme Court upheld the conviction with the words, "It has now become well settled by the great weight of authority that no inference of the existence of the incriminating fact is permitted to be drawn from the witness's claim of privilege and that therefore the witness's claim of privilege is not a proper matter of evidence for the jury's consideration." This seems to be a very unjust result. As a matter of pure logic it cannot be denied that the very claim of the privilege denotes a strong probability that the witness is guilty. There are only two situations where a witness may claim the privilege: where he is actually

\textsuperscript{11} \textit{Ohio Const.} Art. I, § 10, deals with the privilege against self-incrimination. On September 3, 1912 the people passed an amendment allowing comment upon the failure of accused to testify. For a case in which the prosecuting attorney took advantage of his new power under the amendment, see \textit{Patterson v. State}, 122 Ohio 96, 171 N. E. 26 (1930). Art. I, § 13, of the California Constitution likewise provides for the privilege against self-incrimination. On November 6, 1934 it was amended as follows, "... but in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury." \textit{People v. Owens}, 54 P. (2d) 728 (Cal. 1936), upheld comment upon the defendant's failure to testify in accordance with this amendment. (It is interesting to note that the amendment also provided that the court might comment upon the evidence and upon the credibility of any witness; and it was further provided that testimony which might become unavailable before trial might be secured by depositions.)


\textsuperscript{13} 272 Mo. 475, 199 S. W. 147 (1917).
guilty; or where he is innocent but to answer the question put might tend to incriminate him. As a general rule it may be said that innocent witnesses will answer the questions put in order that they may clear themselves of all suspicion. In only those very few cases where the innocent witness cannot completely clear himself of the implications put by the question, will he claim the privilege. As a common sense proposition, it is clear that the overwhelming majority of those claiming the privilege are guilty. The Weber case presents a strong example. To the question, “Did you have intercourse with the prosecutrix?,” there are two possible answers. If the answer is “no,” the answer is not crimating and there is no need for the privilege. If the answer is “yes,” the answer is crimating and the privilege may be claimed. If the witness in the Weber case had not engaged in intercourse with the prosecutrix and he claimed the privilege, he was committing perjury. Because the witness claimed privilege, we realize that he was probably guilty and therefore the defendant should not have been convicted. Yet the jury was not permitted to consider this, nor is it allowed to consider the claim of privilege by witnesses in other cases.¹⁴ A practical solution for the difficulties presented by these cases would be to allow the court and counsel to comment upon and the jury to draw reasonable inferences from the claim of privilege by a witness other than the defendant. What would be the results of the adoption of the suggested solution? Would the witness be deprived of any of the rights sought to be guaranteed him by the privilege? It is submitted that his rights would in no way be infringed upon. The drawing of the inference could not possibly harm him, since he is not on trial, and the fact that he claimed the privilege at a former trial is not admissible and no inference is deducible therefrom at a subsequent trial¹⁵ (unless, of course, he later waives the privilege).

The limitations which have been proposed are not, however, confined to the drawing of an inference from the claim of privilege by a witness who is not a party to the case. A much more far-reaching and much more debatable proposal

¹⁴. Beach v. United States, 46 Fed. 754 (N. D. Cal. 1890); Harrison v. Powers, 76 Ga. 218 (1886); People v. Maunausau, 60 Mich. 15, 26 N. W. 797 (1886); Waer v. Waer, 90 Atl. 1039 (N. J. Ch. 1914); Powers v. State, 75 Neb. 226, 106 N. W. 332 (1905); Phelin v. Kenderdine, 20 Pa. 354 (1853); State v. Nelson, 91 Vt. 168, 99 Atl. 881 (1917). In Waer v. Waer, supra, the plaintiff charged his wife with adultery with one Johnston. His evidence was entirely circumstantial. He was unable to prove that his wife and Johnston had had opportunities to indulge their passions. But in giving his deposition before a commissioner, Johnston, when asked whether he had ever committed adultery with defendant, refused to answer on the ground that it might incriminate him. The appellate court said, “An inference that the crinating fact embodied in the question exists is not to be drawn because of this claim of privilege.” Can there be any doubt but that the correspondent would have denied the question if it had not been true? If, then, the correspondent could not truthfully have denied the question, the plaintiff was entitled to the relief which the court denied him.

¹⁵. People v. Mayen, 188 Cal. 237, 205 Pac. 435 (1922); Loewenherz v. Merchants’ and Mechanics’ Bank, 144 Ga. 556, 87 S. E. 778 (1915); State v. Bailey, 54 Iowa 414, 6 N. W. 589 (1880); Boyd v. State, 84 Miss. 414, 36 So. 525 (1904); Parrott v. State, 125 Tenn. 1, 139 S. W. 1056 (1911).
is that the court and counsel may comment upon and the jury may draw reasonable inferences from the failure of the defendant in a criminal case to take the stand. Those who are against the drawing of such an inference contend that defendant's privilege is of little value if the fact that he has claimed the protection it affords may be made the basis of an argument to prove his guilt.\textsuperscript{16} The answer to this is obvious in that the purpose and the value of the privilege are to protect the defendant from compulsory self-disclosure. The privilege is not meant to hinder the jury from arriving at the truth. An innocent defendant has every incentive to produce the facts which will exonerate him. Is there any reason why he should withhold the truth? Is there not every reason why he should disclose the actual facts and thereby remove the impending threat to his freedom or to his very existence? However, as is his right, he may decline to testify. His refusal to take the stand is not something intangible; it is not something that the jury is likely to overlook. His refusal is an obvious fact which the jury cannot avoid perceiving.\textsuperscript{17} Why should it not be regarded as a fact worthy of consideration in determining his guilt or innocence? It is said that to allow an inference to be drawn from his refusal indirectly does what the privilege expressly forbids: that is, it compels him to take the stand or to suffer the same consequences by his refusal to do so as he would suffer were he to take the stand. But to whom may this so-called discomfiture be attributed? To the law or to the defendant? The defendant's discomfiture (if he is guilty and for that reason placed in such an embarrassing position) is the result of his own previous misconduct. An innocent defendant will take advantage of the right to testify. A guilty defendant may or may not testify. If he chooses not to testify, why should he be heard to complain of the election he makes? His failure to deny the charges made against him is due to his own choice. He has no right to complain if his own wrongdoing has so

\textsuperscript{16} Ruloff v. People, 45 N. Y. 213, 222 (1871), held, "If ... the fact that he is not sworn can be used against him, and suspicion be made to assume the form and have the force of evidence, and circumstances, however slightly tending to prove guilt, be made conclusive evidence of the fact, then the individual is morally coerced, although not actually compelled to be a witness against himself. The constitution, which protects a party accused of crime from being a witness against himself, will be practically abrogated." The court here seemingly overlooked the fact that the constitutional guaranty is that no person shall be compelled to give evidence against himself; not that he shall not be morally coerced. All the mechanics of a criminal trial are a form of moral coercion tending to force the defendant to testify. The moral coercion of the defendant which may impel him to take the stand is the consciousness that the jury will observe that he has not done so, and by application of their own human experience and observation, treat it as an evidence of guilt. See Judge Bakewell's dissent in State v. Wolfe, 266 N. W. 116 (S. D. 1936). For a well rounded presentment of the view against the allowing of comment upon the failure of the defendant to testify, see Reeder, Comment Upon Failure of Accused to Testify (1932) 31 Mich. L. Rev. 40.

\textsuperscript{17} This point is well covered by Bruce, The Right to Comment on the Failure of the Defendant to Testify (1932) 31 Mich. L. Rev. 226.
situated him that he prefers the inferences which may be drawn from his refusal to testify, to those which would necessarily result from his revealing the truth.\textsuperscript{18}

It is significant that both the American Law Institute\textsuperscript{19} and the American Bar Association\textsuperscript{20} favor the drawing of an inference from defendant's failure to testify. As already pointed out, four states now follow this view. It must be remembered that the enactment of a proposal permitting comment by the court and counsel and permitting the drawing of inferences by the jury from defendant's failure to testify will not lessen the proof required of the prosecution. Before the defendant can be called upon to produce his defense, the state must have proved every essential element of the crime charged.\textsuperscript{21} However, when the state has shown by its evidence certain facts or a chain of circumstances which unexplained are such as to tend strongly to show guilt on the part of the defendant and when, in such cases, the defendant does not take the stand to refute the evidence produced, it should be proper for the court and jury to take into consideration the fact that the one person who could explain has not done so. The law is clear that the extra-judicial conduct of the defendant, who remains silent when he hears himself accused of crime under circumstances permitting him an opportunity to reply and under circumstances where a person similarly situated would ordinarily deny the accusa-

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\item \textbf{18.} The court in State v. Cleaves, 59 Me. 298 (1871), indulges in very strong language in favoring comment upon the defendant's failure to take the stand. At this time the Maine courts had adopted the view that the constitutional provision against self-incrimination and the statutory right of the defendant to testify did not bar consideration of defendant's failure to testify by the jury. State v. Bartlett, 55 Me. 200 (1867); State v. Lawrence, 57 Me. 574 (1870). Soon after the Cleaves case a statute was passed providing that defendant's failure to testify should not be considered as evidence of his guilt. The reasons for the passage of the statute were given by the court in State v. Banks, 78 Me. 490, 7 Atl. 269 (1886). In this case the court said, "This practice [of permitting comment upon defendant's failure to testify] continued for 15 years; and while it operated favorably for innocent persons, it resulted disastrously to the guilty, who would not add perjury to the crime charged." A more fitting tribute to the idea of permitting comment upon the defendant's failure to testify has never been expressed. Does this idea not strive to operate "favorably for innocent persons?" Is not the main objective of the idea the hope that its enactment will result "disastrously to the guilty who would not add perjury to the crime charged?" As for those who perjure themselves, the answer is easy. They are not only punished for the crime charged (if convicted) but they subject themselves to an additional charge of perjury. Whether knowingly or otherwise the Maine court has gone on record as acknowledging the success of the proposal of allowing comment on the failure of the accused to testify in reaching the objectives for which it strives.
\item \textbf{19.} 9 Proc. Am. L. Inst. 218 (1931).
\item \textbf{20.} 56 Rep. of Am. Bar Ass'n. 137 (1931).
\item \textbf{21.} Sylvester v. State, 187 N. E. 669 (Ind. 1933). For a description of the procedure of the cases in Ohio since the adoption of the amendment allowing the jury to draw inferences from the silence of the defendant, see Dunmore, \textit{Comment on Failure of Accused to Testify} (1917) 26 Yale L. J. 464.
\end{itemize}
tion, may be introduced in evidence as an admission. An honest and innocent person would never be more likely to deny charges made against him than when he is on trial for his life or his liberty. It is true that the defendant may not interrupt the court proceedings to deny his guilt, but he may, at a later stage in the trial, take the stand and deny his guilt. Judge Bruce says, “All that is involved in a rule which permits comment on the failure of the defendant to take the stand and to testify is the recognition of an admission by silence, an admission which is so apparent that, whether comment is made on the fact or not, the average juror will not disregard it.”

Next we are confronted by the question of what action must be taken to bring about these necessary and desired limitations upon the privilege. The Supreme Court of the United States has decided that the due process clause of the fourteenth amendment does not prohibit the instruction of a state court that an unfavorable inference might be drawn from the silence of the accused. Article II, § 23, of the Missouri Constitution prohibits a person from being compelled to incriminate himself. Forty-two other states have similar provisions and, like Missouri, at present they do not allow comment upon the defendant’s failure to testify. Whether these constitutional provisions in the absence of statutes prohibit comment upon the failure of the defendant to testify has generally not been directly passed upon. The reason for this situation is that at the time the defendant was given the status of a competent witness, most states simultaneously passed statutes declaring that no presumption of guilt should arise from the failure of the defendant to testify.*

22. People v. Nitti, 312 Ill. 73, 143 N. E. 448 (1924); Commonwealth v. Kenney, 12 Metc. 235 (Mass. 1847); Ball v. City of Independence, 41 Mo. App. 469 (1890); Atkinson v. Am. School of Osteopathy, 199 Mo. App. 251, 202 S. W. 452 (1918). These cases hold that where a damaging declaration is made in one’s hearing and he makes no reply under circumstances under which reasonable men would reply, his silence may be held to be a tacit admission of the truth of the declaration.

23. Bruce, supra note 17, at 233.


25. As previously pointed out four states allow comment upon the failure of the accused to testify. In the remaining state, Georgia, the defendant in a criminal case is not a competent witness in any event.

26. Mo. Rev. Stat. (1929) § 3693, presents an example of such a statute, the statute providing that there shall not be a presumption of guilt or comment by the court or counsel upon the failure of accused to testify.

27. There is some doubt as to whether Missouri still follows State v. Weber, 272 Mo. 475, 199 S. W. 147 (1917). The case of State v. Pollnow, 14 S. W. (2d) 574 (Mo. 1928), seems to overrule the Weber case. The court expressly held that the claim of privilege of a witness might be commented upon by the prosecuting attorney and considered by the jury. However, the court did not mention the Weber case. Moreover, it cited no authority for the proposition other than its assertion that neither the constitution nor the statutes barred such comment. It seems peculiar that the case is not reported in the official Missouri reports. If the court had really
presents itself is whether a constitutional amendment will be necessary to bring about the desired reforms or will a statute be sufficient. The Missouri cases do not cast much light upon the problem. Some of them have referred to comment by the prosecuting attorney as violating the constitutional rights of the defendant. Others have based the entire decision upon the statute. The same confusion may be found in the cases of the other jurisdictions which do not allow comment upon the defendant’s claim of privilege. The confusion which is found among the decisions of those states not now permitting comment upon the defendant’s refusal to testify is not present in those jurisdictions which now permit such comment or which have unsuccessfully sanctioned such comment. There are only three available examples but they all point in the same direction. Both Ohio and California deemed it necessary to pass constitutional amendments to bring about the desired reforms. South Dakota thought a statute was sufficient to bring about the intended their decision to overrule the Weber case and the cases which preceded it, then the case would probably have been officially reported. For earlier cases which are in line with the Weber case, see Masterson v. St. Louis Transit Co., 204 Mo. 507, 98 S. W. 504 (1907); Garrett v. St. Louis Transit Co., 219 Mo. 65, 118 S. W. 68 (1909). The writer has been able to find no cases since the Pollnow case which would tend to show whether the Weber case or the Pollnow case represents the rule in Missouri.

28. State v. Weber, 272 Mo. 475, 199 S. W. 147 (1917) cited note 13, supra, relied on the case of Phelin v. Kenderdine, 20 Pa. 354 (1853). The Phelin case (Pennsylvania’s constitutional provision and relevant statute being almost identical to Missouri’s) described defendant’s right as a constitutional right. The Pollnow case, likewise, calls the right not to have the prosecutor comment upon defendant’s claim of privilege a constitutional right.

29. State v. Moxley, 102 Mo. 374, 14 S. W. 969 (1890); State v. Weaver, 165 Mo. 1, 65 S. W. 308 (1901); State v. Guinn, 174 Mo. 680, 74 S. W. 614 (1903); State v. Snyder, 182 Mo. 462, 82 S. W. 12 (1904); State v. Drummins, 274 Mo. 632, 204 S. W. 271 (1918); State v. Watson, 1 S. W. (2d) 837 (Mo. 1927); State v. Brownfield, 15 Mo. App. 593 (1884); State v. Flick, 198 S. W. 1134 (Mo. App. 1917).

30. The following cases hold that it is a violation of the defendant’s constitutional rights to permit comment upon his refusal to testify: People v. Tyler, 36 Cal. 522 (1869); Commonwealth v. Harlow, 110 Mass. 411 (1872); People v. Wessel, 256 Mich. 72, 239 N. W. 259 (1931); Shelton v. State, 49 Okla. Cr. App. 430, 295 Pac. 240 (1931); State v. Cameron, 40 Vt. 555 (1868). The case of State v. Indiana Mfrs. of Dairy Products, 198 Ind. 288, 153 N. E. 499 (1926), went so far as to hold that the constitution prevented an inference being drawn from the claim of privilege by a witness other than the defendant. The following cases rely solely upon the various statutes to be found in the respective states rather than upon the constitution: People v. Calvert, 251 Pac. 244 (Cal. App. 1926); Davis v. State, 197 Ind. 448, 151 N. E. 329 (1926); State v. McLeod, 198 N. C. 649, 152 S. E. 895 (1930); Commonwealth v. Wilhelm, 90 Pa. Super. 473 (1926); State v. Howard, 35 S. C. 197, 14 S. E. 481 (1891); Staples v. State, 89 Tenn. 231, 14 S. W. 603 (1890); Price v. Commonwealth, 77 Va. 393 (1883).

31. See discussion, note 11, supra.
desired reforms. The case of State v. Wolfe declared this statute unconstitutional by a three to two division of the South Dakota Supreme Court. From the confusion as outlined above, it is clear that the question of whether a statute will be sufficient or whether a constitutional amendment is necessary to bring about the needed limitations upon the privilege against self-incrimination is one for the courts of the individual states.

Whether it is determined that constitutional amendment will be necessary or that a statute will be sufficient, it is submitted that the need for permitting comment by court and counsel and for the drawing of reasonable inferences by the jury from the defendant's failure to testify has been established. The clearest summing-up of the problem may be found in the statement which is attributed to Chief Justice Hughes that, "It is clear that reversals because a prosecuting attorney has directed the attention of the jury to a circumstance which no intelligent person could help taking into consideration of his own accord should have no place in any well ordered system of criminal procedure." 

MORTON M. LEIBOWITZ

TRIALS—CHARGES ON PRESUMPTIONS—In a recent Missouri case, the court took occasion to criticize the giving of an instruction that the law "imports" or "presumes" something, saying that such an instruction is likely to be confusing to the jury. The court said that what the jury should be told is what facts they must believe to be true to reach a verdict. Quoting from an earlier Missouri case the

32. S. D. Laws, 1927, c. 93, p. 116. The statute gave the prosecuting attorney the right to comment upon the defendant's failure to testify.
33. 266 N. W. 116 (S. D. 1936). The majority opinion was based upon the contention that the defendant was morally coerced into testifying if the prosecuting attorney could comment upon his failure to testify. They held that the Constitution prohibited such comment and that a mere statute could not change the situation. Both dissenters wrote opinions. Judge Rudolph relied largely upon the Maine case of State v. Cleaves, 59 Me. 298 (1871), cited note 18, supra. Judge Bakewell said, "To assume that the jury will not notice that this central figure in the trial has failed to testify, but will remain in blissful ignorance of the fact until reminded of it by the prosecutor, is an assumption fully as unsound as that of the Legislature in providing by statute that 'His (the defendant's) failure to make such request (to testify) shall not create any presumption against him,' which is an amazing example of legislative confidence in its power to control human reactions. Neither legislative command nor judicial doctrine will close the eyes of jurors to the failure of defendant to deny from the witness chair the inculpatory facts adduced from the state's witnesses; nor can the jury fail to draw an inference therefrom unfavorable to defendant. This, the defendant well knows, and, doubting the omnipotence of the Legislature to direct the natural conclusions of men with a statute creating a negation of presumption, he is morally coerced to take the witness chair. The comment of the prosecutor does not create a situation which did not already exist and was not already evidence to every juror."

1. Lampe v. Franklin American Trust Co., 96 S. W. (2d) 710, 720 (Mo. 1936). Several interesting problems arose in the case and were discussed by the court, but it is impossible to comment here on all the important features of the case.
court stated that references to presumptions in instructions are "sometimes useless, sometimes prejudicial, and always illogical." Despite some few cases indicating the contrary,\(^2\) this appears to represent the attitude of Missouri courts on the subject, the majority of the decisions being to the effect that it is reversible error to instruct as to a presumption when any evidence has been introduced to rebut the presumption.\(^3\)

Instructions on presumptions are frequently given in two types of cases: 1. Where no evidence has been introduced to rebut the presumption. Here the instruction takes the form of a directed verdict for the party in whose favor the presumption operates, on the point covered by the presumption. This is of necessity true if the presumption is a true legal presumption, as it is mandatory in effect in the absence of rebutting evidence. Legal presumptions differ in this regard from inferences, sometimes called "presumptions of fact."\(^4\) 2. Where evidence is offered to rebut the presumption. This is the point of disagreement between the courts of the various states, some holding that the presumption goes to the jury to be considered by them in reaching a verdict and to be weighed as evidence against other evidence introduced,\(^5\) while others say that a presumption disappears in the face of evidence and is not to be used by the jury as evidence.\(^6\) It also appears that some courts instruct on the presumption, though they do not say that it is to be used as evidence and probably would not admit that it is.\(^7\) The majority of the courts adhere to the view that a presumption is not evidence, though some few so authorize its use. The rule against its use as evidence is not only the prevailing view, but, as careful study will reveal, it is the most desirable one. The holdings of the courts following this practice are based on the idea that the only functions of a presumption are in determining the burden of going forward with the evidence and as forming the basis for a directed verdict.\(^8\) They state that if any evidence has been introduced in the case to rebut the presumption, then its purpose has been served and it disappears entirely, having no further efficacy.

In getting to the core of the objection to the use of presumptions as evidence, it seems that one of the undesirable features of such practice is that an instruction that a presumption exists is likely to be misleading. The word "presumption" is in itself ambiguous and when stated in an instruction is subject to many different

\(^2\) Cornelius v. Cornelius, 233 Mo. 1, 135 S. W. 65 (1911); (1936) 1 Mo. L. Rev. 359, n. 10.
\(^3\) McCune v. Daniels, 251 S. W. 458 (Mo. App. 1923).
\(^4\) Rose v. Mo. District Tel. Co., 328 Mo. 1009, 1027, 43 S. W. (2d) 562, 569 (1931): "... a presumption is a mandatory deduction which the law expressly directs to be made, while an inference is a permissible deduction which the reason of the trier of fact makes without an express instruction of law to that effect." 5 Wigmore, Evidence (2d ed. 1923) § 2491.
\(^5\) (1936) 1 Mo. L. Rev. 359, n. 4.
\(^6\) Ibid, n. 5.
\(^7\) Pooler v. Smith, 73 S. C. 102, 52 S. E. 967 (1905).
\(^8\) 5 Wigmore, Evidence (2d ed. 1923) § 2487. In addition, some presumptions based on strong principles of public policy seem to shift the risk of non-persuasion in cases in which they operate. This matter will be discussed presently.
interpretations by a jury. As the instruction comes from the court, the jury is apt to feel that the presumption is commanding in nature and that it is mandatory on them to follow it, without due consideration of the other evidence. Even though the court should state that the presumption may be rebutted, still the jury may think that such rebutting evidence must be stronger than is, in reality, required by the court. On the other hand, the jury might feel that, since the law indulges in the presumption, there must be something in the nature of magic behind it that should have a great deal of influence on their decision. Or they might feel that it is merely an inference which they may draw if they so choose, or may totally disregard. It is difficult to tell just how a jury will interpret the word, and it may be most confusing to the minds of the individual jurors. There is danger of the same confusion being created regardless of whether the party in whose favor the presumption operates offers evidence in support of the presumption, or whether he relies solely on the factual basis behind the presumption. Thus such an instruction seems to be undesirable and is to be avoided if possible, and this objection to the instruction should be a potent argument against the use of presumptions as evidence.

This criticism is likewise a convincing argument against an instruction on a presumption in a case where the court does not state that it is to be weighed as evidence. In many of these cases it is difficult to determine whether the presumption is intended to be used as evidence, as the court merely states that the presumption exists and that it may be rebutted. However, any instruction on a presumption would appear to amount, in effect, to a use of the presumption as evidence. At least, it comes dangerously near to an authorization to the jury to use it as evidence, though this may not be the actual intention of the court. But, assuming that the presumption is really not used as evidence, if these courts insist on giving some benefit to the party for whom it operates, still the instruction should not be in the words "the law presumes" or "there is a presumption." The same objections apply in either case, and the position here taken is that the instruction should never be given, whether the presumption is to be used as evidence or not.

Professor McCormick has suggested that there are cases where instructions as to presumptions would be useful, and advocates as a solution that it should be left to the discretion of the trial court, although he certainly does not think that they are, or should be, used as evidence. In support of his contention he gives as an illustration a case involving a statute making possession of liquor prima facie evidence that such liquor is kept for the purpose of being sold, bartered, etc. As to this case the contention is that if the state proves only the bare facts of possession,

9. Pooler v. Smith, 73 S. C. 102, 105, 108, 52 S. E. 967 (1905). The court instructed the jury that the question of legitimacy of a child "is simply a question of fact; but the law in this state is, for the peace and repose of families, and for the good of society, that a child, the issue of a man and woman lawfully married to each other, are presumed to be legitimate children. And that presumption prevails. . . . It may, however, be rebutted, where you bring positive proof to show that the child could not be the lawful child of a man and his wife."

then the jury should be instructed as to the terms of the statute. A suggested answer to this is that a feasible interpretation of the statute would be that such showing of possession only enables the state to take the case to the jury without further showing of guilt. If this view were taken, then the court should not instruct that possession raises the presumption or that it is prima facie evidence of unlawful handling for gain. The presumption would disappear upon the submission of the case to the jury, it having now fulfilled its only purpose. On the other hand, if the statute is to be construed as authorizing such instruction, still it would be desirable that the courts establish the practice of giving the instruction in some other manner. It would seem better to allow counsel to argue the logic behind the presumption to the jury, if the presumption is based on logic or probability, and have no instruction on the presumption at all. The jury should know that the court authorizes a finding of guilt, by the mere submission of the case to them. If it is deemed desirable to impress this upon them, the court might state that the evidence would support a verdict either way.11

Another illustration given by Professor McCormick is that of the presumption of legitimacy of a child born to a woman during wedlock. These cases may also be handled in a different manner. In many jurisdictions the presumption operates here to place the risk of non-persuasion on the party questioning legitimacy.12 Here it should be sufficient to give an instruction on the preponderance of the evidence and not mention the presumption at all. This would apply in any case where the risk of non-persuasion is on the party against whom the presumption operates. This situation apparently exists in many cases,13 though Wigmore declares that a presumption never shifts the burden.14 It is certainly true that in Missouri the maker of a note has the burden of showing the absence of consideration, the presumption being that the note was given for valuable consideration.15 However, courts differ in their opinion as to the effect of a presumption in such case.16 But even though it is held that the risk is not shifted, still it is not necessary that the jury be informed of the presumption by the court. It would seem sufficient if counsel argued the reasoning behind the presumption to the jury, that is, that notes are in fact seldom given unless in exchange for valuable consideration. Thus the danger of misinterpretation would be avoided and sufficient emphasis would be given the presumption.

It has been suggested that if the presumption is based on considerations of logic, experience or probability, then there need be no instruction informing the jury of the presumption, as the logic of the presumption would be apparent to

11. For a discussion of statutory presumptions, both criminal and civil, and the peculiar features of such criminal statutes, see Keeton, Statutory Presumptions—Their Constitutionality and Legal Effect (1931) 10 Tex. L. Rev. 34.
14. 5 Wigmore, Evidence (2d ed. 1923) § 2487.
the jury. Other presumptions are based on some legal or social policy other than that of ascertaining the facts. McCormick proposes that the jury be informed of the presumption in these cases. It is true that the jury probably would not recognize the policy giving rise to the presumption if it were not called to their attention, but if the presumption is not strong enough to change the burden of proof, its use should be confined to making out a case for the jury and as the basis for a directed verdict.

The above discussion presupposes that a jury will give heed to instructions on presumptions and allow the presumption to influence their decision. Realists may doubt that a jury pays much attention to the instructions of the court as to presumptions, or, for that matter, any other instructions. If this be true it is an additional reason for omitting the instruction, to subserve the ends of justice in simplification of its administration.

In Missouri it is not proper to inform the jury of the existence of a presumption if any evidence is introduced to rebut it. Clearly it is not used as evidence. The Lampe case reflects the attitude of the courts and echoes Judge Lamm's humorous but thoughtful remark: "Presumptions may be looked on as the bats of the law, flitting in the twilight but disappearing in the sunshine of actual facts."

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18. Ibid.
19. (1936) 1 Mo. L. Rev. 359.