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ONE YEAR REVIEW OF EVIDENCE

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CRIMINAL CASES

There were in 1959 no startling decisions by our Supreme Court affecting rules of evidence in criminal cases. There were, however, several cases which deal with points of interest to the profession.

Evidence of Refusal to Take Test

Probably of most interest were two cases decided the same day, dealing with evidence relating to the refusal of a defendant to submit to tests.

The court held that it was error for the trial court to permit a witness to testify that the defendant had refused to take the so-called paraffin test, in *Brooke v. People.*[1] The test is designed to disclose whether or not the subject of the test has fired a gun within recent hours. The court said that the testimony in the trial court, and certain authorities, indicate that the test is not entirely reliable. For this reason the court concludes that the results of the test would not have been admissible, and therefore testimony of refusal to submit to the test was incompetent.

In *Mills v. People*[2] the defendant refused to take a lie detector test. The Supreme Court held that it was error on the part of the trial court to allow testimony to the effect that the defendant had so refused. It is not entirely clear whether the court predicated its conclusion on a constitutional basis or on possible unreliability of the test, though it would appear that the latter controlled.

Similar Transactions

In *Bledsoe v. People*[3] the court rather summarily disposed of the question of admitting evidence of other similar transactions, but affirmed the admission of such evidence on the authority of *McBride v. People*[4] and *Munsell v. People.*[5] A reference to these cases throws little light on the matter of admitting evidence of other transactions.

In *Stull v. People*[6] we find an extensive opinion on this problem with the following four rules delineated as guide posts:

1. The District Attorney should state the purpose for which evidence of similar acts or transactions is offered.

2. Upon request of the party adversely affected by admission of evidence of other acts or transactions, the trial court should *at the time of its reception* direct the jury as to the only purpose for which it may be considered. The court goes on to intimate that such instructions should be given without request, but does not say that failure to do so would be reversible error.

1 339 P.2d 993 (Colo. 1959).
2 339 P.2d 998 (Colo. 1959).
3 138 Colo. 490, 335 P.2d 284 (1959).
4 126 Colo. 277, 248 P.2d 725 (1952).
5 122 Colo. 420, 222 P.2d 615 (1950).
6 344 P.2d 455 (Colo. 1959).

3. In its general instructions the trial court should instruct on the limited purpose of such evidence.

4. Use of terms "other crimes," "other offenses," "similar offenses," and the like should be carefully avoided.

Possession of Equipment Suitable for Commission of Act Charged

The case of *Baca v. People*[7] goes far in approving the admission of evidence concerning the alleged possession of a gun in connection with burglary. Defendant was found in a burglarized drug store, hiding behind a counter. A gun found on a shelf near the dedefendant's hiding place was admitted in evidence. There was some evidence that the proprietor had left no gun there and that none was there when the store was closed. The court admitted some doubts as to the propriety of admitting the gun as an exhibit because it was not conclusively shown to have been in the possession of the defendant, but nevertheless affirmed the action of the trial court. The court held that acquisition or possession of instruments, tools, or other means of doing the act may be shown as signifying the probable design to use the same in performance of the act charged.

In *Dechant v. People*[8] it was contended that a knife should not have been admitted in a trial on a charge of assault because there was inconsistency in the testimony of the identifying officer. He allegedly had previously testified differently in a hearing before a justice of the peace. The Supreme Court quite properly held that this was a matter of credibility and not of admissibility.

Admissibility of Confession

A confession, if voluntarily made, does not become inadmissible in evidence because of the failure of the officers to inform the defendant that his confession might be used against him. *Castro v. People.*[9] Here the court said that the basic question is, was the confession voluntary? This is a question primarily for the trial court and on review its ruling will not be disturbed in the absence of clear abuse.

Cross-Examination of Character Witnesses

In *People v. Futamata*[10] the defendant was charged with rape. The District Attorney attemped to cross-examine character witnesses as to whether they had *heard* that defendant had phoned women other than prosecutrix and used improper language. Objections were sustained by the trial court and the ruling was affirmed on writ of error. The cross examination had been objected to as hearsay. The Supreme Court felt that although this type of cross examination is proper, strict supervision by the trial court is necessary, and in this case was sustained.

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7 336 P.2d 712 (Colo. 1959).
8 345 P.2d 723 (Colo. 1959).
9 346 P.2d 1020 (Colo. 1959).
10 343 P.2d 1058 (Colo. 1959).

Motions and Objections in Trial of Defendants Jointly

A warning as to trial procedure is found in *Thompson v. People.*[11] An officer testified that one defendant had stated to him that "he had just been released three days previously." Counsel representing all defendants moved generally for mistrial. The motion was denied by the trial court. The Supreme Court said the evidence was admissible as against the one defendant only, but there was no error in overruling a motion made on behalf of all defendants.

Use of Deposition

In *Trujillo v. People*[12] the trial court admitted the deposition of a witness who testified on the taking of the deposition that he would be out of the city at trial time. There was no proof of non-availability at the trial. This, said the court, was error, but in view of other testimony, not prejudicial.

CIVIL CASES

In the field of civil law, appellate rulings on evidence were not revolutionary, but some cases are of interest and some may deserve re-examination.

Experiments

There were two decisions on this question that make one wonder where the line may be drawn.

In *Kling v. City and County of Denver*[13] the plaintiff claimed that damages sustained in an automobile accident were the result of the unsafe and dangerous condition of a city street. A patrolman was permitted to testify that three or four days after the accident he drove his car over the same street at a comparable speed and experienced "some difficulty in handling the car at the higher speed involved." It was contended that the admission of this testimony was error because of, among other things, the use of a different car, a different time involved, and operation by a more experienced driver. The court held that these variances go to weight and not admissibility of the evidence, and admission was a matter in the discretion of the trial court.

11 336 P.2d 93 (Colo. 1959).
12 338 P.2d 102 (Colo. 1959).
13 138 Colo. 567, 335 P.2d 876 (1959).

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Publix Cab Co. v. Colorado Nat'l Bank[14] opens the door still further. There a police officer testified that he first observed the condition of the pavement at the place of the automobile accident, then went to a place with "similar" conditions and made a test to determine the speed necessary to make the skid marks observed at the scene of the accident. At the trial, he gave precise testimony as to the speed of the car in question immediately preceding the accident.

The appellate court said such evidence is admissible if made under conditions substantially similar to those which obtained on the occurrence of the event. Here again the court said admission was a matter of discretion with the trial court, and its exercise would not be disturbed in the absence of abuse.

Hearsay

In *Michael v. John Hancock Mut. Ins. Co.*[15] the trial court admitted a report of an army officer in Alaska who had served as investigating officer in attempting to determine the cause of death of a fellow officer. The report contained conclusions and findings of the investigating officer, together with affidavits considered at the army hearing into the cause of death. The Supreme Court said the admission of the entire report was clearly error, both under the common law as to hearsay and under the federal statute.[16] Here again, as in *Trujillo v. People,*[17] the court ruled that in view of other evidence the admission of the report was not reversible error.

In *American Medical and Dental Ass'n v. Brown*[18] plaintiff in error had been sued for services rendered by a doctor. She claimed payment and delivery of a receipt, but could not produce the receipt. After an adverse judgment, a receipt was found, and the instant case was brought to recover the previous payment. The plaintiff (former defendant) could not identify the doctor's signature on the receipt and did not see him sign. The reviewing court held that her positive testimony that she had paid the doctor his claim in full and that he had handed her a receipt was sufficient to justify admission of the document.

In *Askins v. Easterling*[19] the surviving husband claimed that his deceased wife had wrongfully put title to certain property in joint tenancy with her son. The property allegedly had been purchased by the wife under an agreement to take jointly with the husband. The trial court permitted testimony (a) of third persons as to declarations of decedent to the effect that the property had been purchased as a home for her husband and herself; (b) of a real estate broker who handled the purchase of the property, to the effect the husband had signed a purchase money note, which note was not in evidence; and (c) conversations between the husband and the wife at the time of the purchase.

The Supreme Court held there was no error. As to (a), statements of a former owner which were made at the time he held the property, and which were in derogation of his interest, are admissi-

14 338 P.2d 702 (Colo. 1959).
15 138 Colo. 450, 334 P.2d 1090 (1959).
16 28 U.S.C. § 1733 (1958).
17 338 P.2d 102 (Colo. 1959).
18 344 P.2d 189 (Colo. 1959).
19 347 P.2d 126 (Colo. 1959).

ble against a successor in interest; as to (b), the testimony was not prejudicial, since it was merely cumulative. As to (c), the testimony was admitted by the trial court as a declaration against the pecuniary interest of the decedent. The Supreme Court held that it might be treated as a verbal act introduced for the purpose of evidencing, not the truth of the content of the statement, but rather showing that a declaration was in fact made. However, it is obvious, from a reading of the cited sections of Wigmore,[20] that the court intended to justify its admission as an "utterance forming a part of the issue," rather than a "verbal act." It was competent to establish the contract relied on by the husband, which gave rise to a constructive trust.

Opinion Evidence

Our Supreme Court reversed the trial court in the case of *Johnson v. Board of County Comm'rs*[21] because the trial court had rejected the testimony of an expert witness. The witness qualified as an expert in design and construction engineering. The plaintiff, Board of County Commissioners, had sued a truck company for damage to a county bridge. It was proposed that the engineer testify as to the value of the bridge, based upon an examination of records of the county concerning its history and various repairs, including a record of materials used over the years. There was no indication that he had examined the bridge itself.

A minister was held competent to testify as to the value of meals in *Young v. Burke*.[22] He *qualified* by stating that he had observed preparation of some of the meals and had noted the quality and quantity of the food. The court seems to say that a non-expert may testify as to common, ordinary things within the knowledge of the average layman, citing Wigmore on Evidence: "The general tendency of courts, however, is toward a broad principle that *no special training or occupation is necessary to enable one to estimate values*."[23]

An expert witness may testify as to an ultimate conclusion which the jury is required to determine.[24] An officer was allowed to testify that in his opinion the accident in question was caused by

20 6 Wigmore, Evidence § 1770 (3d ed. 1940).
21 336 P.2d 300 (Colo. 1959).
22 338 P.2d 284 (Colo. 1959).
23 3 Wigmore, Evidence § 712 (3d ed. 1940).
24 Bridges v. Lintz, 346 P.2d 571 (Colo. 1959).

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excessive speed. This the court held did not improperly invade the province of the jury, but that the true test of admissibility is first, whether the subject is sufficiently complex as to be susceptible of opinion evidence, and second, whether the witness is properly qualified to give an opinion.

Unacknowledged Deed

It is error to reject an offer of an unacknowledged deed which is accompanied by an offer to prove by a witness that there was due execution and delivery of the instrument by the grantor named therein. *Friend v. Stancato.*[25]

Mental Capacity of Witness

Every person of unsound mind is not incompetent to testify as a witness.[26] It was held that the mere fact that an individual has been adjudicated a mental incompetent does not disqualify him as a witness. A witness is not debarred on the ground of mental incapacity unless proof of disqualification is clear and conclusive. The fact of mental adjudication has a bearing as to the weight, rather than the admissibility, of the testimony.

Res Ipsa Loquitur

The *res ipsa loquitur* front was comparatively quiet in 1959, after its extensive treatment last year in *Weiss v. Axler.*[27] The court in *Weber v. Gamble Bldg. Co.*[28] held that the doctrine did not apply to a fall sustained by plaintiff when ground gave way over a septic tank. The evidence indicated that the tank had been installed by defendant, but that the property had been in the possession and control of the plaintiff for five months after installation of the tank.

Miscellaneous

The so-called "Lord Mansfield" rule does not prevail in Colorado. In *Vasquez v. Esquibel,*[29] the court held that both the mother of an alleged illegitimate child and the mother's husband could testify as to non-access of the husband at the probable time of conception.

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25 342 P.2d 643 (Colo. 1959).
26 Howard v. Hester, 338 P.2d 106 (Colo. 1959).
27 137 Colo. 544, 328 P.2d 88 (1958).
28 345 P.2d 727 (Colo. 1959).
29 346 P.2d 293 (Colo. 1959).

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