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One Year Review of Evidence

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ONE YEAR REVIEW OF EVIDENCE

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Below are briefed the 1957 Colorado decisions touching on evidence. They are topically presented for convenient reference. The topics are organizational and should not be considered conclusive.

ADMISSIONS

Ankcorn v. Boulder County Welfare Dep't[1] was an action by the county welfare department to recover, from the personal representative of a deceased old age pensioner, pension payments which the department alleged the decedent was not entitled to because she owned certain bonds. The defendant during the life time of the old age pensioner had filed a suit as her conservatrix and in that suit alleged in the complaint that the old age pensioner owned the bonds. The court held that the defendant's personal representative was bound by the facts she had alleged in the complaint which she filed as conservatrix.

Miller v. Hepner[2] was an action by Miller against A. J. Hepner, his wife Lillian and a corporation on an agreement between the Hepners and the plaintiff whereby A. J. Hepner was to pay certain amounts to the plaintiff and to Lillian Hepner. When A. J. Hepner died, Lillian, as executrix of his estate, was substituted for him as a defendant. The trial court refused to admit the plaintiff's testimony as to conversations between himself, A. J. and Lillian, holding that exception (6) of the Dead Man's Statute[2a] would not apply because Lillian as well as plaintiff had an interest in the enforcement of the agreement. The supreme court held, however, that Lillian's interest was adverse to plaintiff's. She was almost the sole beneficiary of A. J.'s estate and if plaintiff recovered against the estate the loss to the estate was, in substance, Lillian Hepner's loss.

In *Foster v. Feder,*[3] a suit to recover compensation for services rendered, the court held that the plaintiff's original complaint, which he later amended materially, was admissible in evidence against him as an admission against interest.

HEARSAY (INDUSTRIAL COMMISSION)

In *Williams v. New Amsterdam Casualty Co.,*[4] a Workmen's Compensation case, the validity of claimant-plaintiff's marriage to a deceased employee was the issue. A statement written by one person and signed by another person, neither of whom testified, reciting facts showing the marriage was not valid, was admitted in evidence. The supreme court said the statement was "purest hearsay," not made competent by the statute which provides that the Commission and its referees "shall not be bound by the usual common law or statutory rules of evidence. . . ."[5] The court expressly disapproved its statements in several cases which indicated that an award of the Industrial Commission could not be reversed because of the introduction of hearsay evidence.

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1 307 P.2d 1110 (Colo. 1957).
2 314 P.2d 604 (Colo. 1957).
2a Colo. Rev. Stat. Ann. § 153-1-2 (6) (1953).
3 316 P.2d 576 (Colo. 1957).
4 10 Colo. Bar Ass'n Adv. Sh. 95 (1957).
5 Colo. Rev. Stat. Ann. § 80-1-22 (1953).

HEARSAY EXCEPTION

The last reported case of the year touching on evidence is the case of *Alexander Film Co. v. Industrial Comm'n.*[6] The issue was whether or not a deceased employee was in the course of his employment at the time of the accident that caused his death. The deceased had told a fellow employee shortly before the accident that he was returning to his motel for the purpose of performing certain tasks for his employer. When crossing the street to the motel he was struck by a motor vehicle and was killed. The court held that the statement of the deceased just prior to the accident was a statement of design or plan which was within an exception of the hearsay rule and was admissible in evidence. The court pointed out that where such a statement is attended by the elements of a present existing state of mind and is made in the usual course of things under circumstances excluding an ulterior purpose, the admission into evidence of the statement is proper.

JUDICIAL NOTICE

In *Union Pacific R.R. v. Cogburn,*[7] the court stated that: "It is common knowledge, of which we take notice, that the point of intersection of a railroad and a highway is a point of danger."[8]

In the case of *Mosko v. Dunbar,*[9] the supreme court, in affirming the lower court's determination of the constitutionality of a statute barring sale of motor vehicles on Sundays, judicial notice was taken that it was common knowledge that the automobile business had expanded, grown, and developed since a prior decision of the court in 1938.

OPINION

Davis v. Bonebrake[10] was a suit against a physician for alleged malpractice in leaving a surgical sponge in the plaintiff's body. A nurse testified that he was present when an operation was performed on the plaintiff in which a substance was removed from her body which in his opinion was surgical gauze. The supreme court held this testimony was admissible whether the witness was professionally qualified or not. The expression of an opinion or an impression is admissible unless the opinion is based on conjecture or hearsay. In the same case the court held that evidence of two conversations between the plaintiff and the nurse was admissible, not to prove the malpractice but to show when plaintiff was first informed of the fact on which she based her case, the plaintiff having alleged that the defendant had fraudulently concealed the facts so that the statute of limitations had not run.

In the case of *City of Boulder v. Burns,*[11] a case wherein the plaintiff sought damages as a result of stumbling over a water box owned by the defendant, it was held that the decision of the trial judge on the qualifications of a witness called to give opinion evidence is conclusive unless clearly shown to be erroneous in matter of law.

PAROL EVIDENCE

In *Payne v. Cummings,*[12] the court reiterated the general rule that recission of a written contract by mutual consent of the parties to the contract may be established by parol evidence.

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6 Decided December 23, 1957.
7 315 P.2d 209 (Colo. 1957).
8 Id. at 212.
9 309 P.2d 581 (Colo. 1957).
10 313 P.2d 982 (Colo. 1957).
11 312 P.2d 712 (Colo. 1957).
12 315 P.2d 818 (Colo. 1957).

PRESUMPTIONS

In the case of *People v. Scott*,[13] in which a quo warranto proceeding was involved, the court held that there is a strong presumption, particularly applicable to executive actions by the governor of the state, that every public officer does his duty and that executive action may be questioned or controlled by the courts only when such action is ministerial, and requires the exercise of neither judgment nor discretion.

In the case of *Industrial Comm'n v. London & Lancashire Indemnity Co.*,[14] it was held in a Workmen's Compensation case that it was not necessary to overcome the presumption against suicide by conclusive evidence and further held that the burden of proof remained upon the claimant to establish that the injury or death was not intentionally self-inflicted. Where evidence was offered by the employer from which the conclusion of suicide could be reached, the inference against self-destruction was insufficient basis for an award in favor of the claimant.

Comment was made in *Williams v. New Amsterdam Casualty Co.*,[15] that proof of a marriage ceremony and cohabitation until the death of one raises a presumption of the validity of the marriage which the party attacking it must overcome by competent evidence.

PRIMA FACIE EVIDENCE

Industrial Comm'n v. Havens,[16] involved a claim of coronary occlusion and death caused by an accident in the course of employment. No medical testimony was taken. The death certificate stating "coronary occlusion" as the cause of death was admitted in evidence. The supreme court held that the coronary occlusion was prima facie proved by the admission in evidence of the death certificate; that causal connection between the employee's over-exertion and death need not be proved by expert medical testimony; that the claimant was not required to prove by direct and conclusive evidence the cause of death as arising out of employment and that the claimant had made a prima facie case by showing circumstances establishing a reasonable connection between the over-exertion and the death, which was not refuted.

RECORDS

Mumm v. Adam,[17] was a suit to recover on a note and a check. The defendant filed a counter-claim alleging that the plaintiff, his former

[13] 134 Colo. 525, 307 P.2d 191 (1957).
[14] 311 P.2d 705 (Colo. 1957).
[15] 10 Colo. Bar Ass'n Adv. Sh. 95 (1957).
[16] 314 P.2d 698 (Colo. 1957).
[17] 134 Colo. 493, 307 P.2d 797 (1957).

partner, had failed to account for profits in the partnership. The books and records of the partnership were put in evidence. The defendant offered in evidence the income tax returns of the partnership for three years. The plaintiff objected to their admission because they "might be used for the confusion of the jury,"[18] because they did not prove anything the defendant was obliged to prove, and because the original books and records were the best evidence. The court held, however, that the income tax returns were admissible because they summarized the entries in the books, because they would aid the jury in determining the difference between the total of sales shown in the books and the total of sales revealed by sales sheets, and because of the inference that could be drawn from the evidence that the parties recognized them as periodic accountings between themselves.

In the case of *Buchholz v. Union Pacific R.R.*,[19] it was held unnecessary for the railroad, in proving a cross-claim for damages resulting from an auto-train collision, to produce original entries of each transaction concerned in damage to the railroad, the court stating that it was probably impossible to have each of the entries identified by the person who originally made them. It was further held that the sworn testimony of a proper supervisor to the effect that certain facts were shown by the corporate records over which he had supervision was competent evidence. Referring to Rule 43 (f) of the Colorado Rules of Civil Procedure, the court held that where the original records are complicated, burdensome, or voluminous, summaries of such original records, prepared by competent persons, may be offered in evidence as the only practicable way of receiving such proof.

It will be observed that in this review no comment is made relative to criminal cases. A review of criminal cases is being reported elsewhere in this issue. In the interest of space and to avoid duplication, such cases are not here covered.

STATUTES

The legislature in House Bill No. 133[20] provided that in a paternity suit upon motion of the reputed father, the court shall order the mother and child to submit to one or more blood grouping tests to determine whether or not the reputed father can be excluded as being the father of a child or children and the results of such tests may be received in evidence, but only in such cases where exclusion is established.

In House Bill No. 258[21] the General Assembly amended §152-5-31 of the 1953 Revised Statutes relative to the taking of a deposition of a witness to a will. This amendment specifically provides that a photostatic or photographic copy of the will be attached to the Commission and the original will shall be retained by the court.

House Bill No. 275[22] amended the Uniform Photographic Records Act enacted in 1955 to provide that the records of the trust department of a bank or trust company are not such records as are excepted under the phrase in the original act as being "held in a custodial or fiduciary capacity" and that such trust records could be reproduced and the destroying of the original records would not effect the admissibility of the reproduction into evidence.

[18] Id. at 500, 307 P.2d at 801.
[19] 311 P.2d 717 (Colo. 1957).
[20] Colo. Laws 1st Reg. Sess. 1957, c. 139.
[21] Colo. Laws 1st Reg. Sess. 1957, c. 297.
[22] Colo. Laws 1st Reg. Sess. 1957, c. 140.