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One Year Review of Evidence Decisions of the Colorado Supreme Court

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ONE YEAR REVIEW OF EVIDENCE DECISIONS OF THE COLORADO SUPREME COURT

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Presented herewith is the annual review of evidence decisions. It will be noted that there are numerous decisions in this field, and due to this and the consequent length, comments have been eliminated. It is hoped that these brief abstracts will prove helpful.

IMMATERIAL AND PREJUDICIAL TESTIMONY

Huggins vs. Campbell[1]

Paternity action. Defendant's counsel cross-examined the mother on her relations with other men prior to the date of conception, claiming that petitioner herself had opened the door in direct examination.

The Court said the matter of petitioner's relationships with other men was immaterial since the relationships were prior to the period of gestation. It was further held that the witness could not be discredited on matters immaterial to the issue on trial. To continually question petitioner about such issues was held to constitute prejudicial error.

INSUFFICIENCY OF EVIDENCE

Hice vs. Pullum[2]

Plaintiff sued Defendant for water damage done to Plaintiff's apartment, claiming Defendant's son was responsible. Water from an upstairs bathroom was left running and damaged Plaintiff's downstairs apartment. The only evidence indicating that the little boy was guilty was that in the past he had been seen playing in the bathroom. Other persons had access to the bathroom. The County Court gave judgment for Plaintiff direct. In reversing this judgment, the Court said there was not a word of testimony connecting the incident to the little boy or any member of Defendant's family. Defendant's motion for directed verdict should have been granted. There was not a scintilla of evidence connecting the tort of the child, if the child committed a tort, to the parent.

Alley vs. Troutdale Hotel[3]

The attorney for Defendant, in his opening statement, stated that the evidence would show that Plaintiff was subject to epileptic seizures which could have caused the injury which Plaintiff was suing on. The only evidence introduced was a statement by Plaintiff's wife that a doctor had seven years before told Plaintiff he had had such a seizure and testimony by a doctor who examined Plaintiff after the accident that the injury *could have* been caused by such a seizure, based to some extent on what Plaintiff's wife had told the doctor concerning what the other doctor had told

[1] C.B.A. Ad. Sh. Vol. I, Pg. 3, 1955.
[2] C.B.A. Ad. Sh. Vol. II, Pg. 74, 1955.
[3] C.B.A. Ad. Sh. Vol. VII, Pg. 211, 1955.

Plaintiff's wife seven years earlier, together with the doctor's observations plus the history given by the family at the time.

Court said the testimony on the epileptic seizure should have been stricken because it was hearsay. A judgment based on a finding of fact based on conjecture and possibility only, cannot be sustained, and the case is reversed.

Dawkins vs. Chavez[4]

Action in wrongful death in which the issue was the sufficiency of the evidence to establish the identity of the Defendant as the driver of the lethal automobile. A witness at the scene identified the car and a waitress at a near-by drive-in testified that Defendant had ordered beer there 15 minutes before the impact. This witness testified that she had identified Defendant in a police line-up as the identical man. It was held not to be error to receive this testimony. The identification is an unsworn, out of Court act and the fact that the witness is cross-examined at the trial does not detract from its hearsay character. Nevertheless, it is received, and properly so, because it is trustworthy.

RES GESTAE

Boney vs. People[5]

Charged with murder, assault to rape, and forcible rape, Defendant pleaded not guilty. The victim died about 24 hours after the attack due to allergic reaction to novocaine while an attempt was made to repair some damage to her vagina and the murder charge was disposed of on a directed verdict. The Court admitted some statements made by the victim to a doctor who examined her the day after the attack, and also admitted some statements made by the victim to a deputy sheriff the following day concerning the place the attack took place. The statements to the sheriff were the only evidence introduced on venue.

The Court said that the testimony of the doctor and that of the deputy sheriff was hearsay and was not a part of the *res gestae*. It was not spontaneous nor was it voluntary since it was given in reply to questions. Without this testimony, the State's case was insufficient. This was a mere narration of the events and hence was inadmissable.

PAROLE EVIDENCE

Rocky Mountain Fuel vs. Providence[6]

Plaintiff sued Defendant for loss of a building and contents, covered by fire insurance. The original policy set forth a list of buildings and their contents, one of which was the "Casero Building," which was insured for $10,000.00 with contents. There were 14 other buildings. The building was destroyed by fire and Plaintiff claimed a loss of $72,000.00. The increase was occasioned by moving equipment from other buildings to the one destroyed. The policy had been endorsed as follows: "The occupancy of all buildings

[4] C.B.A. Ad. Sh. Vol. VII, Pg. 423, No. 12, 1955.
[5] C.B.A. Ad. Sh. Vol. III, Pg. 84, 1955.
[6] C.B.A. Ad. Sh. Vol. III, Pg. 90, 1955.

shown on the form is amended to read 'Machinery Warehouse' with the exception of Item 8." The "Casero Building" was not Item 8. Plaintiff offered to show that the equipment would be insured wherever it was located. Defendant claimed this was a violation of the parol evidence rule since the policy was clear, and the trial court upheld Defendant's contention.

Court said the endorsement was ambiguous and parol evidence could be used to explain the endorsement. If the original policy had not been changed, there would be no need to attach the endorsement. Thus, the trial court erred in not admitting testimony on what the endorsement meant.

McGuire vs. Luckenbach[7]

Here the parties entered a contract providing that the Defendant would operate certain mining properties and that profits and losses would be shared equally. In an action by the Plaintiff to recover one-half (½) of the profits, the jury decided that the Defendant was not legally bound notwithstanding the contract since it appeared that Defendant had no actual interest in the operation--that his father-in-law was the real party in interest. In upholding the refusal to exclude oral evidence as to the true relationship and in holding that the parol evidence rule was not applicable, the Court invoked the exception to the parol evidence rule which allows a party to prove that the written contract was a sham and that the true agreement was oral.

BEST EVIDENCE

Miles vs. People[8]

Defendant was charged and convicted of aggravated robbery and conspiracy to commit aggravated robbery. The bill of exceptions to the Supreme Court failed to contain two exhibits which were confessions and which could not be found, and which appeared to be lost. The District Attorney produced carbon copies of the confession, signed by Defendant and each page initialed by Defendant.

[7] C.B.A. Ad. Sh. No. 17323.
[8] C.B.A. Ad. Sh. Vol. V, Pg. 163, 1955.

Court said that when the originals are lost, carbon copies of exhibits which are identical, can be used by the Supreme Court on its review. If there is any question about the identical nature of the exhibits, the question will be referred to a master.

RELEVANCY - CIRCUMSTANTIAL EVIDENCE

Bilorsky vs. Bilorsky[9]

Divorce action by husband against wife and separate maintenance by wife against husband. Wife offered to show that husband had written a compromising letter to some other woman, by introducing the letter. Husband admitted writing the letter, but the Court refused to admit the letter in evidence. Divorce granted husband.

On review, the Supreme Court determined that it was error to exclude the letter because it showed that the husband was associating with other women, and also showed that the husband did not leave home solely because of the wife—that he had another motive.

ADMISSIONS - EXCULPATORY STATEMENT INDEPENDENTLY PREJUDICIAL

MacRae vs. People[10]

Defendant charged and convicted of aggravated robbery after pleading not guilty. Defendant objected to testimony at the trial, given by police officers who questioned him about large amounts of money he had. His answer to the questions was that he had saved it while in Canon City Penitentiary. Defendant did not take the stand, but the statements made while talking to the police officers were admitted.

The Court said the statement was an admission against interest made voluntarily and the entire statement could be admitted, including the reference to Defendant's past conviction.

STATEMENTS OF COUNSEL

Veto LaRocco and Lucy LaRocco vs. Joe Eliseo et al[11]

The action was one for alleged negligence in connection with an automobile collision. The trial court had dismissed the action at the end of Plaintiff's case where there was a failure by Plaintiff to prove how the accident happened. A was passing B and while

[9] C.B.A. Ad. Sh. Vol. VIII, Pg. 254, 1955.
[10] C.B.A. Ad. Sh. Vol. IX, Pg. 280, 1955.
[11] C.B.A. Ad. Sh. Vol. IV, Pg. 130, 1955.

doing so, side-swiped B and hit C head-on. The opening statements of counsel for A and B, while not admitting negligence, did bring out that the collision occurred in this manner. The Supreme Court per Holland, held that the admissions of counsel in the opening statements were binding on their respective clients and consequently, the trial judge erred in dismissing the complaint for lack of evidence.

Res Ipsa Loquitur:

It was further concluded that the case was a proper one for the application of the doctrine of res ispa loquitur. *Comment*: This part of the decision is very interesting because in the normal *res ipsa* situation there is a single Defendant and there is no question, but that he had control of the instrumentality which caused the injury, and the issue concerns *how* it happened. However, where one of several Defendants perpetrated the wrong, it would seem proper to require each to make his explanations and to not penalize Plaintiff because he is unable to isolate the wrongdoer.

BLOOD ALCOHOL

McRae vs. People[12]

Holding that a blood alochol test was inconclusive where all of the evidence indicated that the Defendant had consumed a small quantity of 3.2% beer. Furthermore, the instruction that a person is intoxicated where his capacity to drive is impaired in the slight-

[12] C.B.A. Ad. Sh. Vol. X, Pg. 354, 1955.

est degree, was disapproved in a case such as that at bar pertaining to 3.2% beer. 4-3 Decision.

The above opinion was published May 9, 1955; however, it was superseded by a new opinion published July 25, 1955, in which the Court reached a contrary conclusion holding that the evidence was sufficient and that the instructions were proper.

SURVIVOR STATUTE

Ofstad vs. Sarconi[13]

Where the testimony of the proponent of a will and that of the attorney who drafted the will is in conflict as a result of the attorney testifying that the proponent had told him what to put in the will and a denial of this fact by the proponent, it was error for the Court to exclude the testimony of the proponent—the dead man statute being no bar to the admission of such testimony since an exception to that statute is present when an adverse party calls the witness and thus waives the bar.

WITNESSES—CROSS EXAMINATION

Ripple vs. Brack[14]

In a civil damage action it was error to allow counsel for Plaintiff to cross-examine the patrol officer concerning the plea entered by the Defendant in a criminal case tried before a justice of the peace. Such questions are immaterial in a civil action and are, of course, highly prejudicial.—*W. D.*

[13] C.B.A. Ad. Sh. Vol. VII, Pg. 375, No. 11, 1955.
[14] C.B.A. Ad. Sh. Vol. VII, Pg. 466, No. 12, 1955.