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EVIDENCE AND CRIMINAL LAW

By WILLIAM E. DOYLE *of the Denver Bar*

EVIDENCE

There have been few decisions dealing with evidence questions during the past year; in fact, there are only four decisions which treat the question of admissibility. There are, of course, problems which are within the limits of the field of evidence which are considered in substantive law fields. For example: There are some criminal law cases which are discussed under that heading which actually deal with the problem of proof or sufficiency. Three of the cases involve hearsay exceptions and the fourth deals with the opinion evidence rule.

Opinion evidence: It is not conclusive so that it establishes the matter in controversy as a matter of law if uncontradicted. *Rosenthal v. Citizens Bank of Cortez.*[1]

This was an action to recover $2,500.00 which plaintiff alleged that he had deposited in the defendant bank. The bank denied the deposit and the evidence at the trial consisted of documents such as deposit slips and pass books, together with the testimony of the interested parties as to the alleged deposit. Plaintiff called a handwriting expert who testified that the notation in the plaintiff's pass book was in the handwriting of the bank teller. There was no expert testimony to the contrary, and consequently plaintiff argued that there was no issue of fact as to this. It was held that the testimony of such an expert is not conclusive even though not contradicted, and that the jury verdict in favor of the defendant bank must stand.

It was also held that a bank deposit slip is not conclusive against the bank as to the fact of deposit—that it is mere evidence that a deposit was made. It is like a receipt and may be explained by extrinsic evidence.

The Supreme Court does not always follow the rule of the *Rosenthal* case, supra. One controversial decision, a Workmen's Compensation case, has held that uncontradicted opinion evidence creates a question of law and not a question of fact; *Arvas v. McNeil Coal Corporation,*[2] held uncontradicted medical opinion evidence to be conclusive. It is submitted that the principal case adopts the proper rule.

Hearsay evidence: In order to establish a case of trespass to land, the plaintiff must establish by competent evidence that there was a trespass on his land and hearsay testimony as to boundaries cannot be used to establish this and is insufficient as a matter of law. *Yakes v. Williams.*[3]

Here verdicts were returned against the defendants for trespassing on the land of the plaintiffs and cutting timber. It appeared

[1] 1953-54 C.B.A. Adv. Sh. No. 8.
[2] 119 Colo. 289, 203 P. 2d 906.
[3] 1953-54 C.B.A. Adv. Sh., No. 14.

that plaintiffs did not have positive evidence as to the boundaries of their tract—that the boundaries to which they testified were established on the basis of hearsay. *Held* that it was error to direct a verdict for the plaintiffs. Judgment reversed with directions to dismiss the complaint.

Certainly a plaintiff cannot recover in trespass to land unless he proves that the defendant actually entered upon his, the plaintiff's land, and unquestionably this must be established by competent evidence. This case should also be examined, however, as a tort decision because it includes some *dicta* which suggests that an unintentional trespass may not be actionable. This is contrary to the orthodox view, although there are some authorities who recommend that the action of trespass to real estate should lie only where the defendant has knowingly or negligently trespassed upon the plaintiff's land.

Res gestae: It was error to admit the testimony of a police officer in a murder prosecution that he had received a complaint from the victim three days prior to the homicide and he had observed bruises on her person. *Brown v. People.*[4]

The issue in this case was whether the homicide was accidental or intentional, there being no question about the defendant's having fired the gun five times. He claimed that he had fired the first bullet accidentally and that his mind had then become a blank. For the purpose of proving motive, the prosecution called a police officer who three days before the alleged murder had received a complaint from the victim, at which time the defendant was identified as her assailant. This action of the court was held to be prejudicial error.

> . . . Any testimony from the police officer detailing what was told to him by deceased would be hearsay evidence. The character of the evidence is not changed from forbidden hearsay to competent evidence by the technique of permitting the offcer to draw his conclusions from all that was said by deceased, and give the result thus obtained in one sentence to the effect that, 'She made the complaint against Mrion Brown, Jr.'

As a matter of fact, if the evidence was to satisfy the requirements of the *res gestae* exception, it would have been much better to have detailed the conversations so as to establish that the event, that is the beating, was in fact speaking. The conclusion of the police officer could hardly be considered to be within the *res gestae* exception.

It was also held to be error to allow the district attorney under the guise of discrediting the defendant as a witness to cross-examine him with respect to a gun incident which occurred in the year

[4] 1953-54 C.B.A. Adv. Sh. No. 17.

1950 with a view to establishing that he had in the past used the gun for some purpose other than to shoot at tin cans and bottles.

The errors were regarded as particularly prejudicial since the death penalty had been imposed by the jury. No one can argue that it is not desirable policy to scrutinize judgments imposing the death penalty with great care.

Judgment based upon hearsay evidence: As it appears here where an essential allegation of claim is established by hearsay evidence, the Court must direct a verdict, notwithstanding that the evidence was received without objection. It was error to deny the motion to strike. *Wheelock Brothers, Inc., a Corporation v. Lindner Packing Co.*[5]

This was an action by a meat packer for damages arising from the defendant's failure to properly refrigerate meats which were shipped to the army quartermaster at Fort Worth, Texas. At the trial it appeared that a portion of the shipment was rejected by the quartermaster and was returned, and sold to the Colorado State Penitentiary at Canon City. Plaintiff recovered in the trial court the amount which was lost on the transaction—the meat was sold to the penitentiary at less than the market price. The only evidence as to the reason for the rejection was that of plaintiff's manager who testified that he was notified by a third person that a part of the shipment was rejected bcause the truck was not properly refrigerated. He further stated that he was informed that the rejected meat was soft. It was held that this evidence was not competent and should not have been considered by the trial judge in passing on the motion for a directed verdict. The Court considered the argument that in a carrier case there is a presumption of negligence where the goods were delivered in good order to the carrier and were in bad condition when delivery was made. It was held that the burden was on the plaintiff to either show that the goods were in bad condition when they arrived at destination or to prove that the carrier was negligent.

Undoubtedly the Court concluded that if negligence was presumed one would be presuming that the goods were damaged from the fact that they were rejected and one would then be presuming negligence from this latter conclusion. It is fundamental that a presumption cannot be based upon a presumption.

CRIMINAL LAW

The only area where there was a great deal of activity was that of extradition of a fugitive under the Uniform Extradition Act. This act was passed in 1951 and it makes very radical changes in the extradition procedure in that it allows interstate rendition of fugitives where the defendant was not within the demanding state at the time of the commission of the offense, if he did an act in another state which resulted in the violation of the laws in the

[5] 1953-54 C.B.A. Adv. Sh. No. 18.

demanding state. Undoubtedly it is because of the radical departure from the orthodox practice of allowing extradition pursuant to the constitution and laws of the United States only where the defendant had actually fled from the demanding state, that caused our court to construe the new statute very strictly.

There are four decisions which deal with this subject and they will be very briefly outlined. The first of these is *McKnight v. Forsyth, Chief of Police.*[6] This involved the right of the demanding state to extradite a defendant for non-support where he was not in the state at the time of the alleged commission of the crime.

The demand here was not made pursuant to the Uniform Extradition Act which allows extradition where the defendant is charged with the commission of an act in this state which intentionally results in a crime in the state whose executive authority is making the demand. The Court rightly held that where an attempt is made to extradite the defendant on the theory that he has fled from justice, it will fail notwithstanding the provisions of the special statute.[7]

Extradition: Habeas corpus is proper remedy where the papers do not show that respondent is a fugitive from justice. *Teeter v. People.*[8]

In order to extradite under the uniform extradition law it is necessary to comply strictly with its provisions. Where extradition was sought pursuant to Section 3 of the act, i. e. that part having to do with fugitives, it is ineffectual and void where it clearly appeared from the evidence that the accused had not been in the demanding state at the time.

Extradition: Where extradition is sought under Section 6 of the Uniform Extradition Act allowing an accused to be extradited notwithstanding that he was not in the demanding state on the date of the alleged commission of the crime there must be a strict compliance with the statute. *Stobie v. Barger.*[9]

Where extradition is sought under Section 6 of the Uniform Extradition Act under which extradition can be had where an act is committed in one state which intentionally results in the crime in another state, the act must be complied with strictly and even where the papers from the demanding state are in order, the accused is entitled to his liberty on a writ of habeas corpus where the warrant of the Governor of Colorado recites that extradition is granted under the Constitution and laws of the United States. The governor's warrant was held to be void.

Extradition: Glover v. Foster.[10]

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[6] 1953-54 C.B.A. Adv. Sh. No. 8.
[7] Wigchert v. Lockhart, 114 Colo. 485, 166 P. 2d 988.
[8] 1953-54 C.B.A. Adv. Sh. No. 10.
[9] 1953-54 C.B.A. Adv. Sh. No. 11.
[10] 1953-54 C.B.A. Adv. Sh. No. 16.

Under the Uniform Extradition Act a hearing before the governor is formal only unless the accused waives extradition, but if he files a petition for writ of habeas corpus, he is entitled to a hearing before the district court and at the time every question is tested. In this case the demand was made upon the basis that the defendant had fled from justice and, consequently, it was competent for him to introduce evidence in court that he was not a fugitive.

Assault with intent to commit rape: Sufficiency of the evidence where resistance on the part of the victim is not affirmatively shown. *Crump v. People.*[11]

The evidence was to the effect that the defendant attacked the victim on the street late at night; that he knocked her down, and was engaged in carrying out his evil purpose when he was thwarted by the lights of an automobile. The Court held that the crime is complete if the defendant commits an assault and his acts are such as to indicate his intention to overcome resistance by force—that express evidence of resistance is not essential. The Court also held that there was no misconduct on the part of the district attorney in commenting on the fact that the defendant's attorney would not allow the arresting officer to testify—presumably because he was not endorsed.

Compounding a felony: Manion v. Stephens.[12]

Here plaintiff in a civil action for conversion had filed a criminal action against the defendant charging the larceny of a quantity of turkeys. Following the arrest of the defendant the parties met in the office of the sheriff and defendant agreed in writing to pay the plaintiff an amount equal to the value of the turkeys which were allegedly converted. Subsequently defendant refused to comply with this undertaking and plaintiff brought an action in conversion. At the trial plaintiff offered and the court received in evidence the signed statement of the defendant in which he agreed to make restitution. Defendant contended on review that this was an illegal agreement in that it amounted to compounding a felony, and that it was therefore error to receive it. It was held, however, that it was not inadmissible on this ground, for in order to constitute this offense there must be a promise not to prosecute with intent to stifle the prosecution of a public offense. It was pointed out that in the instant case there was no promise not to prosecute; that the evidence did not establish that there had been a larceny. The conversion which the jury found was innocent and not intentional and this is sufficient in a civil action.

Circumstantial evidence: Sufficiency to sustain a conviction. *Gonzales v. People.*[13]

The evidence upon which defendant was convicted of possession of narcotics was that marijuana cigarettes were found in the

[11] 1953-54 C.B.A. Adv. Sh. No. 8.
[12] 1953-54 C.B.A. Adv. Sh. No. 1.
[13] 1953-54 C.B.A. Adv. Sh. No. 6.

hotel room which he shared with a woman who was referred to in the opinion as his wife. Few of her belongings were found in the room, and although they were registered there as husband and wife, the relationship had been apparently of short duration. Even though she testified that the drug was her property—that she had purchased the cigarettes for her own use, the Court held that the evidence sufficiently established his possession—that it was not necessary to exclude every possible theory except that of guilt; that it is sufficient to exclude every "reasonable" theory except that of guilt.

Verdict: A general finding of guilt is sufficient in a larceny case even though there is no finding as to value. *Archer v. People.*[14]

The defendant was charged with the theft of one meat cattle of the value of $100.00. The evidence was uncontradicted as to the question of value.

> In a criminal prosecution where the information sets out the value of the property unlawfully obtained or stolen, a general verdict of 'guilty as charged in the information herein' is sufficient to support a sentence for grand larceny where the information alleges that the property stolen was of the value of $100.00 and there is uncontroverted evidence that its value exceeded the amount stated in the information.

Homicide: Jack Kukuljan v. People.[15]

Instruction on involuntary manslaughter is not necessary where as in the instant case, there is not the least scintilla of evidence that the homicide was accidental. Here defendant shot the deceased as he was going down the street in the latter's car. Defendant's wife was in the car, and defendant had discovered her in intimate embrace an hour before, and had then proceeded to obtain his 30:06 rifle. The first shot hit the front tire and the second shot went through the back of the car and the back of deceased's head.

> It needs no citation of authorities to demonstrate that when defendant fired at the automobile with its occupants he was committing an unlawful act. Death resulted 'in the commission of an unlawful act which in its consequences naturally tends to destroy the life of a human being' and, under the statute, where death thus results, "the offense shall be deemed and adjudged to be murder."

Pleading: People v. Conner Holmes.[16]

Burglary with and without force as duplicity when they are charged in the same information: *Held* that these are not distinct

[14] 1953-54 C.B.A. Adv. Sh. No. 11.
[15] 1953-54 C.B.A. Adv. Sh. No. 10.
[16] 1953-54 C.B.A. Adv. Sh. No. 10.

offenses but two different ways of charging a single offense. There is a single transaction and there can be but a single conviction.

Proof of Corpus Delicti: Use of confession for the purpose of establishing the corpus delicti where it is corroborated by other facts and circumstances. *Martinez v. People.*[17]

The charge was that of burglary and conspiracy to commit burglary. The substantive charge was dismissed by the trial court and a conviction was had on the conspiracy. The evidence adduced at the trial disclosed that the defendants were discovered at the scene engaged in prying bricks out of a wall behind a liquor store. One of the defendants was arrested at the scene, and the other got away. He was arrested the next morning after hiding in a creek all night. He had cut his hand in the process, and his clothes were wet. He confessed to having been present and explained the cut hand and wet clothes. Under the authority of *Williams v. People,*[18] it was held that the evidence was sufficient to support the verdict; that the confession was admissible and that together with the surrounding circumstances established the crime.

Comment on Martinez case. The corpus delicti involves proof that a crime has been committed—that there has been a criminal agency. The agency of the accused is a distinct problem. When the police officers saw one of the defendants prying bricks out of a wall, and the other defendant acting as a lookout he was in a position to testify to facts which provided an ample foundation for the introduction of a confession. Even without the confession, it would seem that the inference that there was a conspiracy afoot to burglarize the liquor store was clear.

Proof: Sufficiency of foundation for introduction of deposition of an absent witness. *Haynes v. People.*[19]

The prosecution was for murder and the defendant was convicted of murder in the second degree. At the trial the deposition of a witness who had since departed was offered and received. The extent of the showing to justify its admission was the testimony of the sheriff that he had been handed a subpoena directed to the witness in question; that he had inquired throughout the country, at the places where he had worked and where he roomed, and was unable to locate him. The Court held that it was error to admit this deposition under these circumstances; that the prosecution had not established the use of due diligence to secure the personal attendance of the witness. The cases involving the taking of depositions in order to allow witnesses to leave the state, which cases sanction the use of depositions, were distinguished.

While depositions are allowable in criminal cases, the circumstances permitting their use must be extra-

[17] 1953-54 C.B.A. Adv. Sh. No. 9.
[18] 114 Colo. 207, 158 P. 2d 447.
[19] 1953-54 C.B.A. Adv. Sh. No. 8.

> ordinary. The necessity must be clearly established, and the duty of showing that necessity is the burden upon the prosecution.

Sentence: Propriety of a penitentiary sentence where a boy under the age of 21 has served a reformatory sentence and is subsequently prosecuted for an offense which occurred prior to the first conviction. *Rivera v. People.*[20]

The Court held that a sentence of twenty-five (25) years in the penitentiary was not valid, and that habeas corpus was the proper remedy to question the validity of this sentence. The reason given by the Court was that at the time of the commission of the offense the defendant had not been convicted of a felony and no subsequent conviction could change this condition. It was said:

> The law applicable at the time of the commission of the offense under all the facts and circumstances thereof must govern and control any prosecution based thereon . . .

Comment: A proper decision. The analogy is the second offense statute or the habitual criminal statute. In this type of case the courts take the same view. The purpose of increasing sentences following repeated violations is to discourage the repeater or recidivist.

Appeal and error: Failure to specify points in the motion for new trial. *Cook v. People.*[21]

It was noted that none of the points presented for review were included in the motion of the defendant for a new trial. In affirming the judgment it was said:

> A careful examination of the entire record convinces us that the verdict finding defendant guilty was amply supported by competent evidence. . . . The purpose of a motion for new trial is to accord the trial judge an opportunity to consider, and correct if necessary, any erroneous rulings made by him, and to acquaint him with the specific objections to those rulings.

Procedure following an insanity plea: Martin v. People.[22]

Action in prohibition to prevent the trial of the defendant upon his not guilty plea where he had simultaneously with the entry of the plea of not guilty also entered a plea of not guilty by reason of insanity. The rule was made absolute, the Court holding that the statute although providing for the trial of

[20] 1953-54 C.B.A. Adv. Sh. No. 7.
[21] 1953-54 C.B.A. Adv. Sh. No. 8.
[22] 1953-54 C.B.A. Adv. Sh. No. 8.

the not guilty plea first did not contemplate trial forthwith and prior to commitment for examination and report. It was said:

> We are of the opinion that the trial court erred in refusing to commit accused for observation and examination as to his mental condition, and we hold that such commitment, under the facts presented, is mandatory and must be had before a trial on any issue can be conducted.

Comment: One interesting feature is the observation of the Court that it has doubts about the validity of the provision which allowed a trial on the merits before that on insanity and without a determination of the insanity issue. On this subject the Court said:

> . . . While we have considerable doubt as to whether an accused person can be compelled by statute to first stand trial upon the issues framed by a plea of not guilty and compel withholding of determination of his mental responsibility until after a verdict has been rendered on the not guilty plea, we are not here called upon to determine. The constitutionality of Section 509, supra, is not raised in this cause and is not here determined.

It is noteworthy that in the case of *Bauman v. The People* [23] (which is not within the scope of this review but belongs to the 1955 review) the problem was again before the Court, and while the dissenting justices, Holland and Bradfield, held that the law was unconstitutional, the majority of the court reversed the judgment of the District Court on the ground that there had been error in the admission of evidence and suggested that on a re-trial the defendant be permitted to enter the additional plea of not guilty, and that he be not held to have admitted his guilt but enter a plea of not guilty by reason of insanity.

> *Sufficiency of evidence:* Testimony of accessory uncorroborated is not necessarily sufficient. The trial judge is justified in directing a verdict where the witness has been discredited. *People v. Phillip Urso.*[24]

The charge was aggravated robbery. One Davidson and Pratt robbed Elderman, and were quickly apprehended. Davidson implicated Urso and later after he was out on bond went to the office of an attorney and signed an affidavit exonerating Urso.

> When we have before us the finding of a competent trial judge who had the opportunity to observe the witness, his demeanor, and consider the possible or likely quality of his testimony on account of his past criminal record, and the fact that he was a participant in the crime, and consider all of the evidence in the entire case and ar-

[23] 1954-55 C.B.A. Adv. Sh. No. 1.
[24] 1953-54 C.B.A. Adv. Sh. No. 12.

> rive at an honest conclusion that the testimony of the only evidence that would implicate defendant was unworthy of belief, then he certainly had the right to say, and it was his duty to say, that it was unbelievable and, in law, was not competent to support a verdict of guilt, then we must uphold the end of such courageous action by affirming his judgment.

The case is noteworthy because it modifies the rule which has obtained in criminal case that the jury is the judge of the credit to be given to a witness and of the weight to be given to his testimony. Heretofore, the rule has been that the testimony of an accomplice must be received with great caution if uncorroborated by other evidence, but that it can result in conviction if it establishes guilt beyond a reasonable doubt even though it is not corroborated.

ADMINISTRATIVE LAW, MUNICIPAL LAW, ZONING

By J. GLENN DONALDSON *of the Denver Bar*

ADMINISTRATIVE LAW

(1) *Colo. Contractors Ass'n., Inc. v. Public Utilities Comm.*, 128 Colo. 333, 262 P. 2d 266.

Action for declaratory judgment that the Commercial Carrier Act and the ton-mile tax imposed thereby are inapplicable to heavy construction contractors, who use their own large trucks for transportation of materials.

The Supreme Court held that they were so exempt—not because included in the exemption clause of the Act, which they were not, but simply because they were not within the intended scope of the Act.

The legislation under examination, The Commercial Carrier Act of 1935, since amended, is the last of the legislative classifications of carriers by motor vehicles. It was previously held in *Commission v. Manley*,[1] that the '35 Act is regulatory in character, not primarily for the raising of revenue, and goes no further than to regulate and license the use of the highways when used to transport freight in furtherance of any commercial enterprise. In short, Justice Clark pointed out here that the Commercial Carrier Act of 1935 under examination, applies to transportation of property sold or to be sold: that a heavy contractor, when purchasing needed materials and supplies, buys not for resale, but to incorporate them in the completion of a new integrated structure wherein they are useless for any other purposes: the procurement and haulage of required materials is but incidental to the over-all task of producing the finished product contemplated under the contract.

[1] 99 Colo. 153, 60 P. 2d 913.