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Criminal Law—Conviction on Accomplice Testimony—Sufficiency of Corroborating Evidence

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a mess of things" during an operation on the plaintiff. The admissions were the sole expert testimony presented by either plaintiff. Judgments of non-suit were reversed in both cases, the California court stating that the admissions were ambiguous, and that it was for the jury to decide whether they were admissions of negligence.

It is important to note that each of the above admissions contained the element of fault, even though they could also be interpreted as innocent statements. Thus, where the plaintiff is attempting to prove his case solely by defendant's admissions, the courts continually state that the admission to be sufficient must be one of negligence or lack of skill and not an admission of a mere mistake in judgment or *untoward result of treatment.*[15]

In contrast, the ruling in the instant case might be interpreted as saying that an admission of an untoward result of treatment coupled with expert testimony which establishes only that intentionally to obtain such result is not acceptable medical practice amounts to an admission of negligence.

While upon the strongest view of the evidence, taken out of context, the Montana Supreme Court may be justified in reversing a nonsuit in the instant case, it would seem that its statements relating to the establishment of malpractice through the admissions of the defendant should be applied only with caution.

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CRIMINAL LAW—CONVICTION ON ACCOMPLICE TESTIMONY—SUFFICIENCY OF CORROBORATING EVIDENCE — Defendant was convicted of first degree burglary on the testimony of an accomplice and other evidence. The accomplice testified that while drinking in a bar he was approached by defendant and invited to participate in a burglary; that as he remained outside the victim's apartment, defendant forced the latch with a blue banded strip of celluloid and entered; that after taking money and traveler's checks they retired to a bar. Independent evidence established that the two were together before and after the burglary; that defendant had in his possession a celluloid strip with a blue band; that the defendant was arrested wearing some of the clothing purchased by the accomplice with the stolen money while on a shopping spree with defendant. On appeal to the Supreme Court of Montana, *held,* affirmed. The testimony of the accomplice was sufficiently corroborated. *State v. Harmon,* 340 P.2d 128 (Mont. 1959) (Justices Bottomly and Adair dissenting).[1]

Under early Montana law the testimony of an accomplice was sufficient in itself to sustain a conviction.[2] When the statutes were codified by the territorial legislature in 1871 the requirement of corroboration was added.[3]

[15]Lashley v. Koerber, 26 Cal. 2d 83, 156 P.2d 441, 444 (1945). See generally 70 C.J.S. *Physicians and Surgeons* § 62 (1951).

[1]The dissenting opinion considers at length other less important evidence presented in the instant case.

[2]Laws of the Territory of Montana, 1864, Criminal Practice Act § 12, at 178.

[3]Laws of the Territory of Montana, 1871-1872, Criminal Practice Act § 316, at 238. The law provided that "a conviction cannot be had on the testimony of an accomplice, unless he be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense or the circumstances thereof."

The statute, still essentially the same, acquired its present form in 1895. It provides:[4]

> Conviction on testimony of accomplice. Conviction cannot be had on the testimony of an accomplice, unless he is corroborated by other evidence, which in itself, and without the aid of the testimony of the accomplice tends to connect the defendant with the commission of the offense, and the corroboration is not sufficient, if it merely shows the commission of the offense, or the circumstances thereof.

The statute has been the subject of considerable litigation.[5] Although the cases tend to turn on their particular facts, some principles are established. The Montana Supreme Court in *State v. Geddes*[6] recognized that in addition to the statutory requirement that corroborating evidence should tend to connect the defendant with the crime charged, it must also corroborate the accomplice's testimony as to material matters. In *State v. Bolton*[7] the court indicated that the evidence must be from an independent source, and may be either direct or circumstantial. It is not necessary, however, that the accomplice be corroborated upon every fact to which he testifies. The *Bolton* case also recognized that the corroborating evidence must connect the defendant with the crime without the aid of the accomplice's testimony.

The statutory phrase "tends to connect" is considered in *State v. Keckonen*.[8] There the court stated:

> [I]f the conclusion to be reached from the alleged corroborative evidence is equally consonant with a reasonable explanation pointing toward innocent conduct on the part of the defendant, then such evidence does not tend to connect him with the commission of the offense, and 'any inference drawn from such testimony, however shrewd, is still in the realm of speculation."[9]

Further, in this connection, the Montana court in *State v. Jones*[10] held that it is not sufficient corroboration if the evidence merely raises a suspicion or probability that the defendant is linked with the crime charged.

These cases thus establish the following standards for determining the sufficiency of corroborating evidence. (1) The evidence must corroborate the accomplice's testimony as to some material matters. (2) It may be either direct or circumstantial evidence. (3) It must be evidence from an independent source. (4) The evidence must itself tend to connect the defendant with the commission of the crime, without the aid of the accomplice's testimony (5) Before it can be said to tend to connect the defendant with the crime it must raise more than a strong suspicion, but it need not be sufficient to establish a prima facie case of guilt.

[4] REVISED CODES OF MONTANA, 1947, § 94-7220.
[5] Whether the corroborating evidence tends to connect the defendant with the commission of the offense is a question of law to be determined by the court. State v. Cobb, 76 Mont. 89, 245 Pac. 265 (1926).
[6] 22 Mont. 68, 55 Pac. 919 (1899).
[7] 65 Mont. 74, 212 Pac. 504 (1922).
[8] 107 Mont. 253, 84 P.2d 341 (1938).
[9] *Id.* at 261, 84 P.2d at 344.
[10] 95 Mont. 317, 26 P.2d 341 (1933).

The court in the instant case, although ostensibly adhering to the statute and the cases decided thereunder, seems to have adopted a more liberal view of the law, for the corroborating evidence here must be explained in the light of the accomplice's testimony before it tends to connect the defendant with the crime charged. Without the aid of such testimony the most that can be said is that a strong suspicion is raised.

The evidence showing defendant's possession of a celluloid strip becomes significant only when it is revealed by the accomplice's testimony that such was the method used to force the latch on the door. Since the accomplice's testimony is the only evidence establishing the time of the offense, the fact that the defendant and accomplice were seen together before and after the burglary means little. Likewise, the defendant's association with the accomplice on the shopping spree may raise a suspicion, but mere suspicion is not sufficient corroboration.[11]

The policy behind the rule requiring corroboration of an accomplice's testimony is that he may expect favorable treatment for procuring the conviction of others.[12] Although an actual promise of immunity is not present in most cases, this hope or expectation may always exist. Even so, the feasibility of a fixed rule requiring corroboration may be questioned. At common law the rule was only a caution given by the judge to the jury.[13] Proponents of the common law practice argue that an unvarying rule should not be applied to such an elusive subject as credibility of witnesses. Furthermore the likelihood of perjury depends in large measure upon the seriousness of the crime to which the accomplice must himself confess, and is almost minimal in petty crimes. Dean Wigmore argues that the modern rule only adds to the detailed refinements of present instructions, and increases the confusion of the jury, as well as providing defense counsel with a built-in formula for obtaining new trials.[14]

For the reasons stated above, it is submitted that the statutory requirement of corroboration might well be abrogated. However the desirability of such a position is a question for the legislature. The court in the instant case in failing to view the corroborating evidence without the aid of the accomplice's testimony seems to have circumvented what appears to be the clear intent of the present statute.

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[11]California under a statute somewhat similar to Montana's has ruled that the corroborative evidence required by the statute must be considered without the aid of the testimony which it is to corroborate. The evidence is not sufficient if it requires the interpretation and direction of such testimony to give it value. See People v. Sawaya, 46 Cal. App. 2d 466, 115 P.2d 1001 (1941). People v. Garrison, 80 Cal. App. 2d 458, 181 P.2d 738 (1947). People v. Reingold, 87 Cal App. 2d 382, 197 P.2d 175 (1948).

[12]7 WIGMORE, EVIDENCE § 2057 (3d ed. 1940).

[13]*Id.* at § 2056.

[14]*Id.* at § 2057.