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James Daniel Cornette
University of Kentucky

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CORROBORATION OF ACCOMPLICE TESTIMONY
IN CRIMINAL CASES

It has been stated that the "stool pigeon"¹ is the most effective of present day police weapons. The "stool pigeon" is an informer. He is frequently an accomplice of others, who having had the misfortune to be apprehended, now seeks to turn state's evidence against his co-partners in crime. Many criminal cases involve the use by the state of testimony of such accomplices, and the result has usually been satisfactory from the standpoint of convictions obtained. When a crime has been committed, there is a natural tendency on the part of everyone to believe that all are guilty who have a convincing web of implication wound about them. There can be no doubt that when one who has been convicted of crime or has confessed to its commission takes the witness stand and testifies that others were his partners in the nefarious deed, there is a convincing stigma of guilt cast upon the accused party or parties. At first blush, everyone is prone to accept as truth the revelations of an accomplice chiefly because of a popular belief that one who confesses or is convicted and subsequently "tells the whole story" is forever telling the truth in order to clear his conscience. Indeed, accomplice testimony is coming to be a more frequent basis of convictions as time goes on. There have been several strong indications of approval of allowing convictions to stand on such testimony alone in recent years.² However, in Kentucky as in many other jurisdictions when one is charged with commission of a crime by an alleged accomplice the courts are confronted by a code provision which provides:

"A conviction can not be had upon the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the commission of the offence; and the corroboration is not sufficient if it merely shows that the offense was committed, and the circumstances thereof."³

This type of statute is not a codification of the common law. In the English common law institution of the jury trial, there was no

¹ COLLIER S, June 25, 1949, p. 29.

For an observation on the popular opinion concerning the problem, see note 30, MICH. L. REV. 1292 (1932). See also note 35 CORN. L. Q. 663 (1950). The New York Commission on the Administration of Justice urged repeal of New York's requirement of corroboration. "The Committee was strongly of the opinion that this section in the present Code is a refuge of organized crime and protects the principals in racketeering cases. The Committee carefully considered the possibility that the deletion of this provision might encourage frame-ups and related abuses, but was strongly of the opinion that such would not be the case." *New York Commission on the Administration of Justice, Third Supplemental Report*, p. 16 (Leg. Dec. 1937, No. 77).

³ KY. CODE CRIM. PROC. sec. 241 (Carroll, 1948).

requirement that there be corroboration of the testimony of an accomplice in criminal cases. In early times such testimony when admitted was perfectly capable of sustaining a conviction.⁴ Of course, other objections such as competence and credibility as a matter of law remained, but the case is rare when accomplice testimony can be voided completely under these doctrines.⁵ Courts began to recognize in the latter stages of the common law certain dangers inherent in the unquestioned acceptance of testimony of one who was turning state's evidence against his alleged recent partner in crime. The fact that the apprehended felon was frequently able to purchase leniency by implication of others was recognized.⁶ It also became obvious that extrinsic motives such as revenge often prompted known criminals to manufacture persuasive stories of guilt against others. "Experience taught the courts to be chary of an accomplice's testimony, as there are so many reasons which may lead one to shift to or share the crime with another."⁷

Frequent distrust of such testimony induced the courts to adopt a rule of practice whereby the judge would admonish the jury to be wary of the testimony of an accomplice.⁸ This practice, however, never evolved into a rule of law and the judge was powerless to direct a verdict of acquittal in a case where there was no corroboration of the accusations of the accomplice.⁹

About one half of the states have now abandoned the common law rule.¹⁰ The normal replacement of the old practice of admonition by the common law judges is a statute requiring corroboration of the testimony of the accomplice. These statutes are a manifestation of the belief that revenge and hope of leniency by accusing others frequently lead to false testimony. The normal safeguards of the statutes are similar to Kentucky's in that the accomplice's testimony is not sufficient "unless corroborated by other evidence tending to con-

⁴ "An accomplice alone is a competent witness; and that, if the jury, weighing the probability of the testimony, think him worthy of belief, a conviction supported by such testimony alone is perfectly legal." *R. V. Atwood and Robbins*, 1 Leach Cr. L. 464 (4th ed.), 168 Eng. Rep. 334 (1788). *State v. Hardin*, 19 N. C. (2 Dev. & B.) 407 (1837).

⁵ 7 WIGMORE, EVIDENCE, sec. 2056, 312 (3d ed. 1940).

⁶ "It is a practice which deserves all the reverence of law, that judges have uniformly told juries that they ought not to pay any respect to the testimony of an accomplice, unless the accomplice is corroborated in some material circumstance.

The danger is, that when a man is fixed, and knows that his own guilt is detected, he purchases impunity, by falsely accusing others." *Regina v. Farler*, 8 C. & P. 106, 108, 173 Eng. Rep. 418, 419 (1937); 1 Hale P. C. 305.

⁷ *People v. Crum*, 272 N. Y. 348, 353, 6 N.E. 2d 51, 53 (1936).

⁸ *Regina v. Stubbs*, 1 Dears. 555, 169 Eng. Rep. 843 (1855).

⁹ See note, 24 N. Y. U. L. Q. REV. 623 (1949).

¹⁰ 7 WIGMORE, *op. cit. supra* note 5 at 312.

nect the defendant with the commission of the offense¹¹ Such statutes place a duty upon the court to determine if there is *any* corroborating evidence, and if there is not, a directed verdict of acquittal must be forthcoming.¹²

Even though shielded by this statute, persons standing accused by "accomplices" do not often receive the protection which was the purpose behind the enactment of the corroboration requirements. The natural tendency to condemn anyone convincingly implicated in an atrocious crime has been an unrelenting pressure upon the courts to do violence to the requirements and purpose of the statutes.¹³ There are many cases where court, jury, press and public are convinced of the truth of the charges merely because the accomplice tells a convincing story. It is in this type of case, where the testimony is persuasive on its face, that the requirements of other facts tending to connect the defendant with the commission of the offense is apt to be circumvented. Skirting of the mandates of the codes is usually accomplished by a loose decision as to whether or not there is other evidence before the court amounting to corroboration. Frequently, courts have found evidence to be sufficiently corroborative which in reality was not even material or relevant to the charge at all.¹⁴ Sup-

¹¹ KENTUCKY CODE CRIM. PROC. sec. 241 (Carroll, 1948); *supra* note 10 at 312.

¹² The Kentucky Code provides: "In all cases where, by law, two witnesses, or one witness with corroborating circumstances, are requisite, to warrant a conviction, if the requisition be not fulfilled, the court shall instruct the jury to render a verdict of acquittal, by which instruction they are bound." Note 3 *supra* sec. 242.

¹³ See note 2 *supra*. Many notorious criminals have been convicted on the basis of accomplice testimony when all other types of proof would have failed. "Lucky" Luciano, *People v. Luciano*, 277 N. Y. 348, 14 N.E. 2d 433 (1938). "The exigencies of public policy remove the result of this particular decision beyond criticism. Nevertheless, the case is the foundation of a novel and fearfully successful theory for determining what constitutes sufficient corroboration of an accomplice's testimony." Note 35 CORN. L. Q. 663, 667 (1950). "Murder, Inc." *People v. Nitzberg*, 287 N. Y. 183, 38 N.E. 2d 490 (1941), noted 16 ST. JOHN'S L. REV. 253 (1942).

¹⁴ *People v. King*, 40 Cal. App. 137, 104 P. 2d 521 (1940); accomplice testified that defendant stole a billfold. After the theft defendant denied knowing the victim. It was proved that this denial was false, *held*, this was corroboration of the accomplice's testimony. *Kilgore v. State*, 67 Ga. App. 391, 20 S.E. 2d 187 (1942); the defendant was accused of incest with his twenty year old daughter. There was evidence that the defendant had illicit relations with his sister-in-law and that he had made advances to a neighboring woman, *held*, this was corroboration of the testimony of the prosecuting witness. *State v. Mundell*, 66 Idaho 297, 158 P. 2d 818 (1945); defendant was charged with burglary of a garage. In addition to accomplice testimony implicating him, it was proved that he had been at the garage on that day (defendant explained he had gone there to borrow a jack) and that the accomplices had spent the night with the defendant, *held*, corroboration. *Price v. Som.*, 296 Ky. 144, 176 S.W. 2d 271 (1943); defendant was accused of chicken stealing on the basis of accomplice testimony. It was proved that the defendant had been seen with the two accomplices on the night of the theft at a place not near the scene of the crime, *held*, corroboration. *People v. Dixon*, 231 N. Y. 111, 131 N.E. 752 (1921); defendant was convicted of murder on the testimony of another who testified that defendant had paid him to do the job. It

pose the accomplice tells the harrowing tale of a murder and states in the course of his testimony, "I had my shoes shined that morning at a shoe shine stand on Broadway" Subsequently the prosecution introduces the shoe shine boy as a witness who testifies, "Yes, I shined the shoes of Mr. Accomplice that morning." Granted the truth of this insignificant fact, it in no manner connects the defendant with the commission of the offense. "Yet such proof is poisonous because the jury naturally gleans the impression that it shows the truthfulness of the entire tale of the accomplice and thus established his complete credibility"¹⁵ As a matter of fact, the additional evidence offered for confirmation in this instance merely shows that the accomplice is truthful about a fact which is not in any manner connected with the commission of the crime and the details thereof.¹⁶ Situations such as this continue to occur, although the rule has long been recognized that evidence which merely established the credibility of the testifying accomplice is of no effect in satisfying the requirement of corroboration. The difficulty in application of this principle is caused by a fallacious belief that if the accomplice is telling the truth about one thing he is telling the truth about all things.¹⁷ Any such belief is entirely erroneous because when an "accomplice" falsely accuses another, the accomplice can always relate some immaterial fact which can be established by subsequent witnesses. When such irrelevant matter is confirmed, it can in no manner reasonably be said that it is indicative of a complete truthful revelation on the part of the accuser.¹⁸

Some highly publicized criminal trials have been based on accomplice testimony¹⁹ Effect was recently given to the Kentucky Code provision regarding such testimony in the case of *Daggitt v Common-*

was proved that on the night of the murder that defendant was seen to hand the other \$5 on a crowded street, *held*, corroboration. *Hathcoat v. State*, 71 Okla. Cr. 5, 107 P 2d 825 (1940); defendant was charged with chicken stealing on the basis of testimony of two accomplices. It was proved that the defendant was seen in the company of the two accomplices on the day of the theft at a place not adjacent to the scene of the theft, *held*, corroboration. *Wormser, Corroboration of Accomplices in Criminal Cases*, 11 *FORD L. REV.* 193 (1942); see also, *People v. Becker*, 215 N. Y. 126, 109 N.E. 127 (1915), *People v. Katz*, 209 N. Y. 311, 103 N.E. 305 (1913).

¹⁵ *Wormser, Corroboration of Accomplices in Criminal Cases*, 11 *FORD. L. REV.* 193, 198 (1942).

¹⁶ See *People v. Maione*, 284 N. Y. 423, 31 N.E. 2d 759 (1940).

¹⁷ *People v. Kress*, 284 N.Y. 452, 459, 31 N.E. 2d 898, 901 (1940); *Com. v. Bosworth*, 39 Mass. 397 (1839).

¹⁸ *People v. Nitzberg*, 287 N. Y. 183, 189, 38 N.E. 2d 490, 493 (1941); "But if an accomplice-witness could be supported at large by independent evidence that he told the truth in matters of that sort, then every accomplice (not incompetent for want of understanding) could always rake into his story materials for such confirmation of it."

¹⁹ See note 13 *supra*.

wealth.²⁰ In that case the Court of Appeals reversed a conviction arising out of one of the most notorious murder trials in the history of the state. Edward Kilgore, a convicted double murderer, months after his conviction implicated his former friend Daggit in the crime. Daggit was indicted and charged with being an accessory before the fact to murder. At his trial, Kilgore was the principal witness for the prosecution. He testified to the details of the murder asserting that Daggit was his accomplice in the heinous deed. In its attempt to corroborate the testimony of Kilgore, the prosecution brought in several facts. An attempt was made to establish an inference that the crime in all probability was committed by more than one man. On appeal the Kentucky Court of Appeals correctly held that even if the evidence had been such as to show that the crime was committed by a hundred men, there is nothing in this evidence to even point a finger of suspicion at Daggit.²¹ There was evidence to the effect that a revolver was stolen from a house where Daggit had resided some four months after Daggit had moved from that particular home and six months prior to the commission of the crime. It was also established that Daggit and Kilgore were close companions and were seen on many occasions together. The court said that none of this evidence tended to connect the defendant with the commission of the crime.²² In addition it was established that Daggit had made the statement, "I love that boy If anything happens to him, I cannot bear it. If he is in prison, I want to be in prison too." The position of the court was unassailable when it said, "Although other inferences reasonably could be drawn from this statement, it is not susceptible of the inference that Daggit was connected with the murder."²³

The *Daggit* case is, therefore, an outstanding one in that with penetrating wisdom the court eliminates proof offered as corroborative which in reality was of no value whatsoever, but merely established some independent facts in no manner connected with the act involved. The only effect the evidence of the prosecution was capable of producing was one indicating a likelihood that Kilgore was telling the truth. This is nothing more than a round about method of establishing the credibility of Kilgore, and as has been pointed out, evidence going to the credibility of the testifying accomplice is not enough.²⁴ The requirement of independent proof of the defendant's participation in the very acts charged was clearly not fulfilled in this case, and the

²⁰ 314 Ky. 721, 237 S.W. 2d 49 (1951).

²¹ *Id.* at 725, S.W. at 51.

²² *Id.* at 726, S.W. at 51.

²³ *Id.* at 727, S.W. at 52.

²⁴ See note, 35 CORN. L. Q. 663 (1950).

decision that a verdict of acquittal should have been directed by the trial court is undoubtedly a correct one.²⁵

The court in the Daggit case did more than merely remedy the situation resulting from the trial court's common error of accepting evidence as corroborative which in reality only established independent irrelevant facts. The court made frequent reference to the fact that Kilgore's testimony was a bit fantastic:

"The entire testimony of Kilgore indicates that he is a person lacking in mental stability, even though he may know right from wrong. On this account, the evidence, which it is contended corroborates his testimony, must be viewed with a great deal of scrutiny."²⁶

It is believed that this reasoning of the court may come to be the foundation of a rule which affords more protection to one accused of crime by an accomplice than is presently followed in most jurisdictions. The court apparently recognized that although the sanity of Kilgore was not sufficiently impaired to be the basis of a blanket exclusion of testimony under the rule of incompetency,²⁷ it was sufficiently in doubt to cause the court to take some other action in the nature of protection for the accused. The action taken on the basis of the obvious mental instability of Kilgore was that "the evidence, which it is contended corroborates his testimony, must be viewed with a great deal of scrutiny"²⁸ In effect, there must not only be independent material corroborating evidence, but the testimony concerning this evidence will be subjected to a particularly careful examination where the witness is suspected of insanity or instability. It is true that the credibility of an accomplice witness is a matter for the decision of the jury.²⁹ However, after the decision in the Daggit case the defendant is apparently not left to the mercy of the jury even though the testimony of the accomplice is admissible and even though there are other facts proved which appear to be corroborative. This is because of the nature of the testimony itself, that is to say, if it is such as to raise suspicion, the corroborative evidence will be viewed with greater care than in the ordinary case where the testimony of the accomplice is not questionable *per se*.

The Daggit case may possibly be criticized by pointing out that once the testimony of the accomplice has been admitted as evidence, the court should take no action on the corroboration requirement based on its own belief of the credibility of principal testimony, credibility

²⁵ See *Williams v. Com.*, 257 Ky. 175, 77 S.W. 2d 609 (1934).

²⁶ Note 20, *supra* at 725, S.W. at 51.

²⁷ 3 JONES, EVIDENCE, 1299 sec. 723 (4th ed. 1938).

²⁸ Note 26, *supra*.

²⁹ 3 JONES, *op. cit.* *supra* note 27 at 1687 sec. 901a.

being traditionally the province of the jury. It is believed, however, that the Kentucky court is merely admitting a truth which in reality is necessarily practiced by all courts, probably without their realization of it. Deciding the question whether evidence is truly corroborative or not is often an intricate task. Any court is bound to be influenced by its own observation that the testimony of the accomplice himself which is sought to be corroborated is stigmatized with suspicion, and in a case where courts are skeptical, they are likely to be more demanding in their requirements of corroboration.

The Daggitt case goes far in its protection of one who is accused of crime by a person who claims to be his accomplice. It is believed, however, that the reasons which led the courts and legislatures to adopt the requirements of corroboration are still valid. The case may very well become a leading one for corroboration at a time when the requirement is being neglected in many jurisdictions.

JAMES DANIEL CORNETTE

IRRIGATION IN KENTUCKY AS AFFECTED BY THE LAW OF RIPARIAN RIGHTS

The beneficial use of irrigation¹ is not confined to the arid and semi-arid western states. It has been very effective in the humid areas of the eastern and southeastern states. Irrigation was very effective in Kentucky this year, although it was used on a small acreage.

With the price of Kentucky farm land surpassing previous peaks, farm commodities nearing record prices and farm labor being rapidly absorbed by Kentucky's expanding industries and Federal sponsored projects, the Kentucky farmer is being induced and forced into purchasing more farm machinery and fertilizers, and using modern, economical farming methods. After obtaining a high level of soil fertility with such practices, he is confronted with the ageless problems of insufficient moisture for maximum and efficient crop production. In Kentucky, there were thirteen years in a twenty-year period studied in

¹ "The Latin word 'irrigare' from which the term 'irrigation' is derived means, primarily to convey water to or upon anything and, more generally, to wet or moisten. In our language, the ordinary and popular conception of the term is that it denotes the application of water to land for the production of crops. The mere method of obtaining the water with which to irrigate has nothing to do with the process of irrigation or with the meaning of the word; the term embraces all artificial watering of lands, whether by channels, by flooding, or merely by sprinkling." 30 AM. JUR. 598 (1940).