Kentucky Law Journal

Volume 24 | Issue 3 Article 9

1936

# Criminal Law--Evidence--Admissibility of Evidence of Trailing by Bloodhounds

George T. Skinner
*University of Kentucky*

The Maine courts hold a gratuitous bailee to reasonable or ordinary care.[25] In the case of *Maddock* v. *Riggs*,[26] it was held that:

> "The so-called distinction between a slight, ordinary and gross negligence, over which the courts have quibbled for a hundred years can furnish no assistance with respect to the gratuitous bailment involved."

In this case and in the case of *Kubli* v. *First Natl. Bank*,[27] affirmed in later appeal,[28] it was pointed out that the three degrees of care and of negligence were no longer recognized in that state.

The Kentucky court apparently recognizes two degrees of negligence, gross and ordinary negligence.[29] Ordinary negligence is defined as the failure to exercise that care which ordinary prudent persons would exercise in like or similar circumstances.[30]

In concluding, keeping in mind the observations made above, it appears apt and suitable to a practical end, to dispense with the use of the two degrees of negligence, gross and ordinary, recognized by the Kentucky courts. Ordinary negligence includes and is concurrent with gross negligence. The term gross negligence is actually surplusage.

Many courts do not use the term "gross negligence" in fixing the liability of a gratuitous bailee, obviously realizing the futility of its application. The broad rule or doctrine, that a person is bound to exercise that degree of care which a reasonable prudent man would use under similar circumstances, would suffice.

JOHN A. EVANS.

## CRIMINAL LAW—EVIDENCE—ADMISSIBILITY OF EVIDENCE OF TRAILING BY BLOODHOUNDS

In 1932, late one afternoon, a person was going home from work, and, as he passed a cabin on the road, he was felled by a charge of shotgun pellets. Twenty-four hours after the killing a bloodhound followed a trail from the cabin to that of another person some two miles away. This latter person was made the defendant in a prosecution for murder, and was convicted in the county court upon circumstantial evidence, which was mainly that furnished by the bloodhound. Upon appeal to the Court of Appeals the lower court was reversed for error in the admission of incompetent evidence. The quali-

[25] 124 Me. 75, 126 Atl. 180 (1924); Whiting v. Whiting, 111 Me. 13, 87 Atl. 381 (1913).

[26] *Supra*, Note 8.

[27] *Supra*, Note 9.

[28] 199 Ia. 194, 200 N. W. 434 (1924).

[29] Louisville & N. R. Co. v. Brown, 186 Ky. 435, 217 S. W. 686 (1919).

[30] *Supra*, Note 29; Golubic v. Rasnick, 239 Ky. 355, 39 S. W. (2d) 513 (1931); Jackson's Admrs. v. Cose, 239 Ky. 754, 40 S. W. (2d) 343 (1931).

fications of the dog had not been shown, under the rule[1] of the Kentucky cases.

The defendant was tried again for the same offense, and in 1933 there was a second appeal of the case, and a ground of alleged error was the admission of incompetent evidence. The owner of the dog had testified that he possessed a certificate of pedigree of the dog's mother but not of its father; that he owned both the father and the mother of the dog and had purchased them as full-blooded pedigreed dogs; that at the time he purchased the father, the owner represented to him that the dog was a pedigreed full-blooded strain of bloodhound; that he had reared and trained the dog. He testified as to his own knowledge of the pedigree, the method used in training the dog, the length of time it had been trained, and its aptness, accuracy, experience, qualifications, and dependability. Under this showing the Court of Appeals affirmed the action taken in the court below and held that the testimony satisfied the rule governing the admission of bloodhound evidence.[2]

Fiction contains accounts of the mysterious feats of animals, but nowhere is there such an uncanny ability shown as in the case of trailing by dogs. For centuries the dog has afforded much sport to the hunter in running down game, pointing birds, and retrieving. But other animals have not been the only quarry of dogs. The uncanny nose of the dog has been put to use in tracking man as well.

Although all dogs are generally thought of as being able to trail, they seem to vary as to their ability. Perhaps it is a matter of intelligence or keenness of scent. However, it is known that some trail by sight and others by scent. For example, the greyhound and the deerhound are sight trailing dogs, while on the other hand the true hound such as the bloodhound, foxhound and staghound are scent trailing. It has been said that "The bloodhound has the keenest scent of all dogs."[3] The bloodhound, or blooded hound, is an animal which readily learns to trail human beings. During the slave days, bloodhounds as well as Cuban bloodhounds were used for tracking down escaped slaves. Stories of incidents as portrayed in Uncle Tom's

[1] "In Kentucky it is settled that testimony as to trailing by bloodhounds of one charged with crime, may be permitted to go to the jury for what it is worth, as one of the circumstances which may tend to connect the defendant with the crime only after it has been shown by some one having personal knowledge of the facts (a) that the dog in question is of pure blood and of a stock characterized by acuteness of scent and power of discrimination; (b) it itself possessed of these qualities and has been trained or tested in the tracking of human beings; and (c) that the dog so trained and tested was laid on the trail, whether visible or not, at the point where the circumstances tend clearly to show that the guilty party had been, or upon a track which such circumstances indicated had been made by him." Blair v. Commonwealth, 171 Ky. 319, 188 S. W. 390 (1916).

[2] Bullock v. Commonwealth, 241 Ky. 789, 45 S. W. (2d) 449 (1932); 249 Ky. 1, 60 S. W. (2d) 108 (1933).

[3] *Encyclopedia Britannica*, 14th Edition, Vol. 7, p. 497.

Cabin are well known. There seems to be "common knowledge that dogs may be trained to follow the tracks of a human being with considerable certainty and accuracy."[4]

"O'er all, the bloodhound boasts superior skill,
To scent, to view, to turn and boldly kill—
His fellows' vain alarm rejects with scorn,
True to the master's voice and learned horn;—
His nostrils oft, if ancient fame sings true,
Traced the sly felon thro' the tainted dew,
Once snuff'd, he follows with unaltered aim,
Nor odours lure him from the chosed game;
Deep-mouthed, he thunders and inflamed he views,
Springs on relentless, and to death pursues."[5]

Just how does the bloodhound follow the human trail? A scientific statement of the process would be that "It is a 'theory' that microscopic particles of effluvia emanate constantly from the body of every living human being, and that these particles possess an odor characteristic of the particular individual. It is supposed that the highly developed olfactory nerves of a bloodhound enable him to detect the peculiar odor of these particles, and thus to follow the 'trail' of any particular person."[6]

There have been numerous cases in which the question of bloodhound evidence has arisen, and most of them have been in the South. The earliest reported case presenting the question of whether evidence of trailing by bloodhounds is admissible is *Hodge* v. *State*,[7] decided in 1893, in which the evidence was held admissible. Since that date there have grown majority and minority views. Most courts in which the question has been presented take the position that upon a proper foundation being laid by proof that the dogs were qualified to trail human beings and that the circumstances surrounding the trailing were such as to make it probable that the person trailed was the guilty party, such evidence is admissible. The following jurisdictions favor the view that the trailing of a person by dogs is admissible as evidence: Alabama, Arkansas, Florida, Georgia, Kansas, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Texas, and West Virginia.[8] Thus the

[4] Hodge v. State, 98 Ala. 10, 13 So. 385, 39 Am. St. Rep. 17 (1893).
[5] McWhorter, *Boodhound as a Witness* (1920) 54 Am. L. R. 109.
[6] State v. Grba, 196 Iowa 241, 194 N. W. 250 (1923).
[7] 98 Ala. 10, 13 So. 385, 39 Am. St. Rep. 17.
[8] Loper v. State, 205 Ala. 216, 87 So. 92 (1920); Holub v. State, 116 Ark. 227, 172 S. W. 878 (1915); Davis v. State, 46 Fla. 137, 35 So. 76 (1903); Troup v. State, 26 Ga. App. 623, 107 N. E. 75 (1921); State v. Adams, 85 Kans. 435, 116 Pac. 608 (1911); Bullock v. Com., 249 Ky. 1, 60 S. W. (2d) 108 (1933); State v. Davis, 154 La. 295, 97 So. 449 (1923); Harris v. State, 143 Miss. 102, 108 So. 446 (1926); State v. Freyer, 330 Mo. 62, 42 S. W. (2d) 894 (1932); State v. McLeod, 198 N. Car. 649, 152 S. E. 895 (1930); State v. Dickerson, 77 Ohio St. 34, 82 N. E. 969 (1907); Commonwealth v. Hoffman, 52 Pa. Super. 272 (1913); State v. Brown, 103 S. Car. 437, 88 S. E. 21 (1916); Copley v. State,

Southern states are almost unanimous in their approval of the bloodhound evidence.

Jurisdictions holding the minority view that bloodhound evidence is not admissible are Illinois, Indiana, and Iowa.[9]

The reason for allowing the admission of bloodhound evidence is largely a matter of common knowledge and experience that a bloodhound with proper qualifications can trail a human being. In opposition to its admission several arguments have been made.

In the first place, it is said that, due to the many variable factors involved, the evidence is too uncertain and unreliable to warrant its admission in the trial of a criminal case.[10] But, for that matter, the case against a criminal is usually circumstantial, and the jury must weigh the circumstantial facts. Would it not be well to allow the jury to determine the weight to be given this evidence?

Then it is stated that the jury would be likely to give the evidence more weight than it is entitled to receive.[11] It may be admitted that people regard the actions of animals with superstitious awe, but on the other hand can it not also be said that their regard for the testimony of humans is influenced largely by the human element? The superstitious regard for the animal should be no more a bar to the evidence than the emotional regard for a human witness.

Also, it is said that the life and liberty of a free citizen ought not to be put in jeopardy on the testimony of dogs. Such a contention was upheld in the leading minority case.[12] We ask why not? as the reason is begging the question, and add that the testimony involved is not only that of the dog, but of the person working him, since that is necessary in admitting the evidence.

Another reason given for its rejection is that the defendant cannot cross-examine the dogs.[12A] The answer usually made to this objection is that the witness is not the bloodhound, but the person testifying as to the bloodhound's acts.[13]

Another objection is that the defendant is deprived of his constitutional right to confront the witnesses against him. But the witness

153 Tenn. 189, 281 S. W. 460 (1926); Parker v. State, 46 Tex. Crim. Rep. 461, 80 S. W. 1008 (1904); State v. McKinney, 88 W. Va. 400, 106 S. E. 894 (1921).

[9] People v. Pfanschmidt, 262 Illinois 411, 104 N. E. 804 (1914); Ruse v. State, 186 Ind. 237, 115 N. E. 778 (1917); State v. Grba, 196 Iowa 241, 194 N. W. 250 (1923); Brott v. State, 70 Nebr. 395, 97 N. W. 597 (1903).

[10] Ruse v. State, 186 Ind. 237, 115 N. E. 778 (1917).

[11] "It is well known that the exercise of a mysterious power not possessed by human beings begets in the minds of many people a superstitious awe, like that inspired by the bleeding of a corpse at the touch of the supposed murderer, and that they see in such an exhibition a direct interposition of divine providence in aid of human justice." Pedigo v. Com., 103 Ky. 41, 44 S. W. 143 (1898).

[12] State v. Grba, 196 Iowa 241, 194 N. W. 250 (1923).

[12A] *Ibid.*

is not the bloodhound, but the person testifying as to what the bloodhound did.[13]

Often the courts will reject the evidence on the ground of its weakness. Even if we assume that such evidence is not of much weight, should it be rejected on that account alone? "Instinct is not unerring, neither is reason. The mere weakness of evidence does not make it incompetent."[14] An example of where a court refused to allow bloodhound evidence on the ground of its weakness is the Pfanschmidt case.[14A] It may be said that just because the testimony was weak in the particular case because of the lack of precautionary measures and favorable circumstances, a court should not say that bloodhound evidence is never admissible.[15]

No court holds that such evidence is admissible without the proper precautions. And even then, when it is admitted, the courts concede that such evidence is to be accepted with caution, and is not under any circumstances to be regarded as conclusive of guilt. It is generally held that this class of evidence is not sufficient of itself to support a conviction.[16]

The evidence has been compared to expert testimony, which is one of the weakest kinds of testimony.[17]

There are four leading cases which hold to the minority view. *State* v. *Grba*[18] was a murder case in which the defendant was charged with having dynamited the deceased as he was emerging from a garage. Bloodhounds followed a trail to certain excavations and a steamshovel where defendant's clothes were found. The dogs were taken to the jail where they picked out the defendant.

*Brott* v. *State*[19] was an indictment for burglary. The trail had been walked across by persons at least a hundred times. The court said that bloodhound evidence was "unsafe evidence, and both reason and instinct condemn it." That "the sleuthhound of fiction is a marvelous dog, but we find nothing quite like him in real life." But if the case were properly put to the jury so that they could consider the fact that the trail had been "muddied" time and again, would there be injustice? Shouldn't it be allowed for what it is worth?

*People* v. *Pfanschmidt*[20] was a case where a family was burned to death in their home. More than thirty hours after the crime dogs were put on the trail of a horse and followed a circuitous route to the stables of the place where the defendant was staying, and lay down beside a certain horse—the horse that drew the defendant's buggy. The

[13] State v. Davis, 154 La. 295, 97 So. 449 (1923).
[14] Dissent of State v. Grba, 196 Iowa 241, 194 N. W. 250 (1923).
[14A] 262 Ill. 411, 104 N. E. 804 (1914).
[15] Note, 63 Pa. L. R. 42–44.
[16] Myers v. Com., 194 Ky. 523, 240 S. W. 71 (1922); State v. Freyer, 330 Mo. 62, 48 S. W. (2d) 894 (1932).
[17] Myers v. Com., 194 Ky. 523, 240 S. W. 71 (1922).
[18] 196 Iowa 241, 194 N. W. 250 (1926).
[19] 70 Nebr. 395, 97 N. W. 597 (1903).
[20] 262 Ill. 411, 104 N. E. 804 (1914).

court held that the bloodhound evidence was inadmissible to show trailing of a horse, and said that it could not be used to show the trailing of a human.

In *Ruse* v. *State*[21] the court held that evidence of trailing by bloodhounds was inadmissible, saying that since the use of bloodhounds is uncertain and may readily lead to the conviction of the innocent, and since such evidence is not of great probative value, then reason and instinct condemn its reception in a criminal case as proof of guilt.

It is submitted that in each of the above minority cases the courts were confusing weight with admissibility of evidence, and that the unsuitable conditions for traling should discount the weight of the evidence but not bar it entirely.

In Kentucky there have been twelve reported cases in which the Court of Appeals has decided upon the admission of evidence of trailing of bloodhounds. The first case was the *Pedigo*[22] case in 1898, which laid down the rules which thereafter have been followed by the Kentucky courts. Also, this case has furnished the basis of many decisions in other jurisdictions, as it is often cited as a basic case upon the problem. It involved the burning of a stock barn. At noon on the day following the burning bloodhounds were put on the trail. The evidence of their trailing was not admitted in this case, but the court said that it is admissible when certain rules are complied with. A person who has personal knowledge of the facts must testify that the dog was of pure blood, and of stock characterized by acuteness of scent and power of discrimination, and that the dog possessed these qualities, and that it had been trained and tested to track human beings.

The case of *Allen* v. *Commonwealth*[23] was a murder case in which there was no showing that the dogs used in trailing measured up to the requirements enumerated in the Pedigo case.

*Dunham* v. *Commonwealth*[24] was a case of assault with intent to kill. The owner of the dogs used in trailing testified that they were of good breeding, the sire of one being a pure bloodhound, and the grandsire an English bloodhound trained in tracking men; that they were carefully trained in tracking men, and the older one had aided in the capture of 63 criminals, being assisted in several of those cases by the younger dog; that the dogs reached the situs of the crime on the same night it was committed; that their heads were held up until they were put to the trail, which they followed. The rules for admission were satisfied.

*Sprouse* v. *Commonwealth*[25] was a murder case in which proper qualifications and working of the dogs were not sufficiently shown to render the evidence competent under the rules of the earlier cases.

---

[21] 186 Ind. 237, 115 N. E. 778 (1917).
[22] 103 Ky. 41, 44 S. W. 143.
[23] — Ky. —, 82 S. W. 589 (1904).
[24] 119 Ky. 508, 84 S. W. 538 (1905).
[25] 132 Ky. 269, 116 S. W. 344 (1909).

*Blair* v. *Commonwealth*[26] was an indictment for housebreaking. The bloodhound evidence offered was held inadmissible, as the reliability of the dogs was not shown.

In *Myers* v. *Commonwealth*[27] involving arson in the burning of a barn, the bloodhound evidence was admitted. The court did caution as to its use, saying that its effect should be restricted, comparing it to expert testimony.

*Springs* v. *Commonwealth*[28] was a barn burning case. As no objection was made in the court below to the admission of the bloodhound evidence, the court presumed it to be competent.

The case of *Hays* v. *Commonwealth*[29] also had to do with the burning of a barn. The bloodhound evidence was not admissible as there was not a sufficient showing of pedigree and qualifications.

In *Stidham* v. *Commonwealth*[30] the bloodhound evidence was admitted, as there was a showing that the hounds were pure bred and had been found accurate in the tracking of human beings.

*Alsept* v. *Commonwealth*[31] was an arson case, in which the bloodhound evidence was admissible under the rule.

In 1932 and 1933 came the *Bullock*[32] case discussed in the beginning. This case is in line with all of the Kentucky authorities.

This is the latest reported Kentucky case directly upon the problem, except the recent case of *Kelly* v. *Commonwealth*[33] which was decided in 1935. It was a murder case in which bloodhound evidence was admitted, no question being made as to whether such evidence is admissible in Kentucky. Included in the dictum was a statement that testimony that "something like two hundred confessions from their trailing was inadmissible to show the skill of the dogs, or for any other purpose."

In summary, we shall say that the evidence of trailing by bloodhounds, by the great weight of authority, is admissible under proper showing of the qualifications and performance. All of the Southern states except Virginia certify its competence. Kentucky, starting with the *Pedigo* case in 1893, has maintained that such evidence is admissible. Despite the objections that the bloodhound is not an unfailing Nemesis, as a matter of practice the evidence is admissible for what it is worth.

GEORGE T. SKINNER.

---

[26] 171 Ky. 319, 188 S. W. 390 (1916).
[27] 194 Ky. 523, 240 S. W. 71 (1922).
[28] 198 Ky. 258, 248 S. W. 535 (1923).
[29] 211 Ky. 716, 277 S. W. 1004 (1925).
[30] 221 Ky. 49, 297 S. W. 929 (1927).
[31] 240 Ky. 395, 42 S. W. (2d) 517 (1931).
[32] 241 Ky. 789, 45 S. W. (2d) 449 (1932); 249 Ky. 1, 60 S. W. (2d) 108 (1933).
[33] 259 Ky. 770, 83 S. W. (2d) 489.