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THE BLOODHOUND AS A WITNESS

By JOHN C. McWHORTER¹

HUMAN faculties of observation, memory, the ability accurately to describe what the mind perceives and the memory retains, are so imperfect that scientists, after careful experiments, have found that the average man in giving the details of what he sees and hears is in error in more than fifty *per cent.* of his statements. Inattention, lack of concentration, treacherous memory, bias, prejudice, animosity, friendship, or personal interest—any or all of these combined in a witness may render his testimony in a given case entirely unreliable, if courts and jurors could only know it. The most honest and conscientious man often does not know where his memory ceases and his imagination begins.

Add to this the dishonesty of many men, the loose and careless habits of thought and speech of others, the misunderstandings of others, and mental limitations of others, the timidity, fear or embarrassment of still others, and one can readily see how unreliable, at best, human testimony is when based upon what witnesses have heard and seen and try to relate as remembered.

It would seem, in the face of these well-known facts, that courts cannot be too careful in guarding the rights of litigants against

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these weaknesses and imperfections, especially where life or liberty is involved, and to keep out of trials, as far as reasonably possible, any character of testimony which may strongly tend to mislead juries, confuse the mind, arouse feelings of superstitious awe, or in any way warp the judgment. It would seem that every canon of justice would require this. And yet, every dramatic play before a jury, every passionate appeal of counsel, represents an effort to substitute in the jury box emotion for reason, impulse and passion for sedate judgment, and to convert a jury of reasoning men into an irrational mob.

The trial of Leo Frank for murder, in Georgia, is an exaggerated illustration of this point and of administration of mob law in courts. The writer read the printed, and doubtless, edited copy of the prosecuting attorney's closing speech in that case. It was not an argument; it was only an inflammatory screech. And yet that screech made him governor of a great state! And so it goes.

But one of the enigmas, if one may so term it, of modern practice in American courts—it seems to appear in no other—is the subjecting of life and liberty of human beings to the insidious danger and the caprice of that thing known as “Bloodhound Testimony.” The admission in evidence of the statements of witnesses of what a bloodhound is supposed to have done in the way of tracking an accused party is a modern doctrine peculiar to American courts. Because of the superstitious awe in which such an animal is held by the average man, partly because of a lack of information as to its habits, traits and imperfections, and partly because of the mysterious and supernatural powers of smell and discrimination and the superior sagacity such animal is supposed to possess, such evidence, unless most carefully guarded, is insidiously dangerous and calculated to produce frightful miscarriages of justice. The very name of the animal, “bloodhound,” carries with it a sense of terror and superstitious awe and admiration. The word “blood” in the breed's name is ordinarily supposed to indicate the bloodthirsty and vicious traits of the dog, such as cause him, when laid to an unfoiled trail of a human being, to hold to that particular trail, like an avenging Nemesis, with an unerring tenacity, until the victim is run to earth and torn to pieces, no matter how many fresher trails of other human beings the dog may cross in the quest. The dog is supposed to have the mysterious power of distinguishing, with infallible accuracy, the

particular smell of the particular individual traced from all the other millions of smells the earth, with its teeming myriads of other human beings and animals, produces.

The "bloodhound doctrine," as generally followed by the American courts, is expressed with reasonable accuracy by the Supreme Court of Kentucky, in the leading case of *Pedigo v. Commonwealth*,² as follows:

"Evidence as to trailing with a bloodhound of one accused of crime is admissible to connect him therewith only when it is shown by some one having personal knowledge of the fact that the dog is of pure blood and of a stock characterized by acuteness of scent and power of discrimination; that he is possessed of these qualities, and has been trained or tested in their exercise in the tracking of human beings; that such dog was laid on the trail, whether visible or not, concerning which testimony has been admitted, at a point where the circumstances tend clearly to show that the guilty party had been, or upon a track which such circumstances indicate to have been made by him."

Some states, however, notably Nebraska in *Brott v. State*,³ have declined to adopt it at all, and Elliott on Evidence says: "There is no certainty in such evidence. It is really the dog that is the witness, and the evidence would seem to be hearsay in this view."⁴

A few years ago, the writer was engaged in the defense of a man charged with a most cruel and heartless murder, and in which the state's chief testimony was the work of a bloodhound. This caused the writer to investigate the whole question in all of its phases with all the care and thoroughness of which he was capable. He procured and consulted every authority on the subject he could find. From London, the writer procured the only book published on the breeding, training and use of bloodhounds; and one of the best publishing houses in America found for him an interesting magazine article on some branches of the subject, published in 1895. The writer found from this course of study, to his amazement, not only that the popular notions concerning the characteristics and efficiency of these dogs were highly fallacious, but that the courts in laying down and following the "bloodhound law" seemed to have entertained the same false notions and to have been influenced by the same fallacies.

¹103 Ky. 41, 44 S. W. 143, 82 Am. St. Rep. 566 (1898).

²70 Neb. 395, 97 N. W. 593, 63 L. R. A. 789 (1903).

⁴2 ELLIOTT, EVIDENCE, 1253.

It may be of some interest to the profession to discuss briefly a few of the facts this investigation disclosed, although most of these matters may be perfectly familiar to most of the members of the profession.

The first reported case is *Hodge v. State*,⁵ decided in 1892 by the Supreme Court of Alabama, an old slave-holding state. Strange to say, the doctrine was announced at this late period. The Court, in this case, begins its opinion with this significant statement: "It is common knowledge that dogs may be trained to follow the tracks of a human being with considerable certainty and accuracy." The Court then, under the peculiar facts of that case, *without citing a single authority or offering a single reason*, announced the doctrine, based on this "common knowledge," that the evidence of the tracking by the hound should go to the jury as a circumstance tending to connect the defendant with the crime. The Court never stopped for a moment, so far as the record shows, to investigate the source of this "common knowledge," to determine whether it was dependably accurate in matters involving human life and liberty.

Then followed soon after *Simpson v. State*,⁶ wherein the same Court, again without offering any reason therefor, cited *Hoge v. State*⁷ as a precedent, and reiterated the doctrine.

Then came *Pedigo v. Commonwealth*,⁸ above cited, in which the Court cites the two Alabama cases as authority, and adding some further restrictions, affirms the "dog doctrine." The Court, however, is very guarded in this case, and calls attention to the extreme danger of such testimony, in that it tends to excite a superstitious awe in juries, and that the very name of the animal has a direct tendency to enhance the impressiveness of its performance. Justice Guffey, in this case, wrote a strong dissenting opinion, calling attention to the fact that no opportunity is afforded to cross-examine the witness, which in reality is the dog.

This was followed by *State v. Moore*,⁹ in which the Supreme Court of North Carolina, citing the foregoing cases, and specifically citing and applying this same "common knowledge and experience," follows the Alabama cases. *Parker v. State*,¹⁰ citing the Kentucky and Alabama cases and reiterating the "common

⁵98 Ala. 10, 13 So. 385, 39 Am. St. Rep. 17 (1892).

⁶111 Ala. 6, 20 So. 572 (1896).

⁷*Supra*, note 5.

⁸*Supra*, note 2.

⁹129 N. C. 494, 39 S. E. 626 55 L. R. A. 86 (1901).

¹⁰46 Tex. Cr. R. 461, 80 S. W. 1008, 108 Am. St. Rep. 1021 (1904).

knowledge" basis adopted the doctrine without any discussion evincing careful study and investigation of the question.

Then came *Davis v. State*,¹¹ citing these other cases as authority, *all cases from old slave-holding states*, the significance of which will later appear.

Then came *Brott v. State*,¹² above cited, in which a western state, Nebraska, emphatically refused to adopt the "bloodhound doctrine." The opinion of Judge Sullivan in this case is so full of common sense, and so closely follows the actual truth respecting the work of bloodhounds, that it is apparent to one well informed upon this subject that he had investigated and studied the subject with a care and thoroughness that does not appear in any of the other opinions cited. This opinion is commended to the thoughtful reader. In that case, the Attorney General argued this same "common knowledge" as the sufficient basis for the doctrine, and the Court refused to adopt or approve it.

After these cases comes a line of approving decisions from various courts, but all with admonitions of great caution because of the attendant danger of such testimony.

Now, whence came this "common knowledge" on which this "bloodhound doctrine" is predicated and from which it started?

In the first place it should be borne in mind that no breed of domesticated dogs is by instinct or disposition inclined to track a human being, as they do animals. They do this only per force of training. It is not scientifically known that the blooded hound, or "bloodhound," possesses any powers of scent or smell superior to the common hound, or the setter for that matter. The only real reason for the employment of this particular breed of dogs for tracking human beings is its slow, plodding and patient disposition. It is more persistent than most other dogs, enjoys any kind of a chase, and is, therefore, more easily and dependably trained for this purpose. It is not so employed because of any superior sagacity, or power of discrimination, or natural disposition to trail a human being, but because of its patient, plodding traits. By reason of these qualities, it yields more readily to the influence of a skillful trainer.

The bloodhound, according to Count Le Couteulx De Cautelue, (without doubt the greatest authority on the subject), dates from early ages, was used by the Romans, and was early prized for

¹¹46 Fla. 137, 35 So. 76.

¹²*Supra*, note 3.

“unharbouring the wild boar.” It was imported into England in the early centuries for two purposes:

First, because of its docile, affectionate nature, to be used as a great pet and house dog.

Second, to be used in the chase.

But on account of its slow and plodding nature, it was found useless for the chase, and it was crossed with the fox terrier, producing a strain of hounds called fox hounds, now our common hounds. To distinguish the breeds, the latter was called the “hound” and the other the “blooded hound,” or, as later abbreviated, the “bloodhound.” That is all the word “blood” in the name signifies, simply that it is a blooded or thoroughbred hound. It has nothing to do with the traits, characteristics or disposition of the dog. The common notion that he is a savage beast, that he has a fondness for trailing human beings, and will tear to pieces the man he trails unless prevented, is false in every particular. He can hardly be induced to hurt any one. He is kind, very affectionate, a lover of children, and tries to be friendly with any one. When overtaking a man he is trailing, he only wants to make friends with him, and never offers any harm. He has no natural disposition to track a human being, and will do so only after the most careful training, and is as unreliable as a fox hound about taking a fresher trail unless trained from the time he is three or four months old by an experienced trainer who is careful always to hold the dog to the trail started, and never at any time to let the dog get the idea that he can fail. He is nervous, easily excited and confused, and is moody. Edin Brough, in his book on this subject, quoting Lord Wolverton says: “Yet for all their fire and metal in chase, the bloodhounds are sad cowards under pressure from a crowd. A whip cracked hurriedly, and horses galloping in their track, even at a judicious rate, will make the best of them shy and sulky for half a day.” He further says that the real value of this dog as a trailer of criminals is the moral deterrent effect his presence has upon criminals because of the “common knowledge” of the traits and powers the dog is supposed to possess.

During the slavery days of America, the slave-holders of the South conceived the idea of employing dogs in tracking slaves who attempted to escape. There were then no bloodhounds in America, and none were imported. But the common fox hound was trained to trail the slaves, and for the purpose of keeping the

slaves awed and intimidated, the reports were generally circulated that these dogs were bloodhounds, with great accent on the word "blood," and that they were infallible, and when put on the trail of a negro would never abandon it until the fugitive was run down and torn to shreds, and that there was no escape from such ferocious dogs. This naturally appealed to the imaginative slave and he helped to give credence and circulation to these reports.

But by and by the slave began to learn that these hounds were harmless, and that all the reports concerning their viciousness were false, and the "bloodhound" began to lose his terror. To offset this trouble, the common hound was then crossed with the Great Dane, or the Cuban Mastiff, both savage and vicious breeds of dogs, and a new strain produced called the "Cuban Bloodhound," and later and more appropriately called the "Nigger Hound." These dogs were vicious, and the former reports of the viciousness of the so-called "bloodhounds" were renewed and fully credited, not only by the negroes but by the whites of both North and South as well. The vivid stories about these dogs in "Uncle Tom's Cabin" had their counterparts in every slave-holding section of the country. These dogs could, with ease, track barefooted negroes through the swamps and low damp grounds of the South, and it was utterly immaterial whether the dog left an older trail for a fresher trail of another negro. Just so the dog "treed a nigger," the moral effect was the same. The slaves were kept intimidated, and these dogs were doing their work effectively, regardless of their accuracy.

Thus this "common knowledge" of the work of the "bloodhounds" grew. These reports were exaggerated, and, without scruple, falsified and the sagacity, discriminating powers and deadly precision of these dogs magnified for the very purpose of keeping the slave terrified. In this there was eminent success. The following poem expresses this "common knowledge:"

"O'er all, the bloodhound boasts superior skill,
 To scent, to view, to turn, and boldly kill—
 His fellows' vain alarms 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 chosen game;

Deep-mouthed, he thunders, and inflamed he views,
Springs on relentless, and to death pursues."

But who would have dreamed at that time that these false and highly-colored reports would become the basis for the promulgation of a doctrine by the courts of America that would put in deadly peril the lives and sacred liberties of American citizens?

It will be observed that these dogs, from whose work this "common knowledge" largely arose, or at least took its coloring, were not bloodhounds at all. They were, at best, only quarter bloods; and all these reports of the vicious character and deadly precision of the so-called "bloodhounds" had their foundation in fact only to the extent that the blood of the Cuban Mastiff or the Great Dane had been infused into the strain. Such reports were not true of the English bloodhound, and never were.

If these facts had been thoroughly understood, the writer does not believe this insidiously dangerous "bloodhound doctrine" would ever have been adopted by any of the American courts, and that when once fully understood, it will either be repudiated *in toto*, or so emasculated by precautionary restrictions as to render it harmless.

The grave dangers attending such testimony are powerfully illustrated by an incident in the case above referred to in which the writer was employed, if he may be pardoned for again advertising to it.

Public feeling ran high against the defendant. The hound, laid to the trail twenty-two hours after the murder, had gone to the home of the defendant, accompanied by a large crowd. The people believed in the hound, and the fact that in the chase the hound crossed repeatedly the fresher trail of the defendant, in one instance only six hours old, without paying any regard to it, and that the defendant himself was along with the hound and the crowd while the trailing was progressing without the dog paying the slightest attention to him, seemed not to have raised the least doubt with the people of the hound's infallibility. The "hound had no motive to lie," and he could not be cross-examined. The people, or, apparently, the most of them, believed in the "common knowledge" of the dog's relentless tenacity and fierce and vicious disposition. Fitting this idea, evidence was introduced by the state to the effect that the next day, the dog, with harness and leash attached, on being brought into the presence of the

defendant and others, with a deep growl and upturned bristles, reared upon the defendant, and only the timely intervention of the dog's master saved the defendant from being pulled down.

The writer knew from the habits and disposition of this breed of dogs that this statement as made simply could not be true. It was unnatural and impossible. No bloodhound would do such a thing under any ordinary conditions. And upon further investigation, it was developed that when the dog, in his kind, friendly and characteristic way, came near the defendant he patted the dog on the head, making some friendly remark, and the dog, true to his nature, in sheer delight, reared upon the defendant, just as he would have done to any other person present showing the hound this attention. It signified absolutely nothing, so far as the recognition or guilt of the defendant was concerned,—absolutely nothing. But here was this false notion about the bloodhound in the minds of the people, and here came this testimony to fit the notion—all evolved unconsciously, probably from the excited imaginations of some really good and honest people.

The facts of that case, involving the work of the dog, would alone furnish materials for an interesting article.

The writer does not deny that bloodhounds have performed some wonderful feats, and that in many instances their work has shown exceptional merit. But these cases depend largely upon the skill with which the dogs were trained and worked and the conditions under which they worked, the individuality of the particular dog, and the skill and integrity of the master of the dog. Such instances are not numerous, and when the real truth about bloodhounds as trailers of human beings is fully known, the "common knowledge" will be that as a witness the bloodhound is generally thoroughly undependable.

To the lawyer who may have occasion to meet this character of testimony, let it be suggested that, among numerous others, he keep well in mind the following points:

The animal must be pure blooded.

He must have been carefully trained to track human beings only, nothing else.

He must have been tested by the tracking of other human beings and found reliable.

He must have been put on the track at a time and under circumstances which tend to show it was the track of the defendant.

The dog must have been given the scent beyond question from

some article of wearing apparel belonging to the accused, or given such scent from his track with a clear and unfoiled trail of several yards before him.

He must not have been confused by a crowd, or urged on from time to time; he must have been given his liberty.

Ascertain the history, traits and individual characteristics of the dog in question.

There must be no excitement, no rushing of crowds or horses, no hurrying, no strange noises.

The dog's physical condition at the time, his feeding, the distances and conditions under which he was brought, and the mood in which he started, are all very important. Bloodhounds are very moody.

Bloodhounds do not successfully hunt together; hence, the importance of knowing the individuality of the particular dog.

The dog must never have been teased or played with by children or other unskilled persons, in tracking human beings.

Observe carefully whether the dog was hesitating, or manifested uncertainty in trailing, or was "bothered" at times.

The manner in which the defendant was shod, the condition of the weather and of the ground over which the trailing occurs, and the age of the track, are all important.

At no time should any one be permitted to come near the dog when he is hunting, especially in unfavorable weather.

It is important that the dog should have become accustomed to strange sights and noises at an early age.

The dog must be self-reliant, and it is very material to know just to what extent he was guided by his master in the pursuit. He generally works in harness with a long leash, and is easily influenced or guided by it.

A well-trained bloodhound soon learns to cast himself when at fault, and should never be assisted or interfered with so long as he is trying on his own account. If he throws up at slight difficulties and looks to the man hunting him for help, he is most certainly unreliable.

It is not necessary that the hound follow directly upon the trail. Edin Brough says that on a good scenting day, with a fresh trail, it is not unusual for the hound to run hard fifty yards or more to leeward of the line taken.

It should be remembered that the more people there are along with the dog, the more numerous and complex the smells, the

greater are the "discriminating powers" of the dog taxed, and the more likely he is to become confused.

If the trail has been frequently crossed by other persons, the work of the dog is most likely to be utterly worthless.

The man working the dog should be of the most rigid and sterling integrity. So much depends upon his actions and statements. If he is some man who wants to make a name for his dog, watch him! It is as important to know him and his antecedent life as to know the dog.

It should also be borne in mind that shortly before the eighties when the bloodhounds were imported to America, the stock had been so inbred to preserve its purity, that the dog's constitution became undermined and it became so subject to distemper that it appeared that the whole stock was liable to perish, and that to preserve it from extinction and to renew its constitutional vigor, the bloodhound was outcrossed, and the blood of other strains infused into it. Although the dog since has been carefully bred, and registered dogs may be obtained, it is doubtful whether a genuine pure bloodhound now exists.

In short, let it be remembered that bloodhounds, like human beings, have their moods, are subject to "nerves," are affected in their efficiency by their physical condition and the manner in which they are cared for just before being set to a scent, and by the distance they have had to travel. Their surroundings, the strangeness of the country and people present, the noises or excitement of the occasion, the presence or distant baying of other dogs, the number of crosses upon the trail, the eagerness with which the master urges him on, the age of the scent, the weather and ground conditions, the training and personal characteristics of the dog,—these and a thousand other things vitally affect the accuracy of the dog's work.