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ONE YEAR REVIEW OF EVIDENCE

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While the Supreme Court of Colorado decided the usual number of cases in 1961 involving the rules of Evidence, only five cases appear to be sufficiently significant to warrant comment as affecting the admissibility of evidence in this state.

The case of *Ruth v. Department of Highways*[1] adds one further principle to the existing law relating to the determination of the value of realty affected in condemnation proceedings. Ruth owned about 200 acres of mountain land and the condemnation action was brought to acquire a right of way 190 feet wide for the construction of a highway. This would take a total of about 2 acres of Ruth's land, located on flat ground at the bottom of a canyon. The remainder of his land, not taken, was a steep slope above the land taken, on which was an old mine tunnel, not presently being operated. Ruth contended that taking of the right of way would destroy the value of the remainder of his 200 acres by taking the only land on which waste could be dumped if mining operations should be resumed, using the tunnel to remove the debris from a mining location not owned by Ruth but situated about 1000 feet from the breast of the tunnel.

The sole question determined by the court was whether or not the trial court had properly excluded evidence relating to the value of the property not taken. This evidence, as shown by an offer of proof, would have shown that negotiations had been under way with a group of persons to finance the extension of the tunnel to the mining claim, but that when the condemnation action was started the negotiations were discontinued because the other parties felt that after the condemnation the property would be worthless. Ruth also offered to prove that the operation of the claim would be profitable and that the opening and use of the tunnel would be feasible.

The supreme court approved the action of the trial court in excluding this evidence. As to the negotiations to finance the extension, which apparently included a possible purchase of the entire property, the court pointed out that these negotiations never progressed to the point of sale or even to a firm offer to purchase. For that reason such evidence was not relevant to establish the value of the property. As to the evidence designed to establish the basis for a profitable operation of the mining claim, the court held that this was too remote and too speculative and that settlement sheets relating to the operation of the mine more than 20 years before to show the value of the ore removed from the mine in its earlier operations was properly excluded.

This decision is not inconsistent with the well established rule that the owner is entitled to have the jury consider the most advantageous use to which the land may be applied in the future, because that rule also excludes the allowance of speculative damages.

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1 359 P.2d 1033 (Colo. 1961).

The case of *Jones v. People*[2] raises an interesting question relative to the admissibility of a statement made by the defendant following his arrest. Jones was arrested and signed a written statement detailing the circumstances of a vicious assault which he had made upon one Powell with a hammer and a large pipe wrench, followed by the robbery of the hotel in which the assault occurred and where Powell worked. At the time Jones made this statement he was unaware of the fact that Powell had died as a result of the beating. Jones was charged with murder, tried and convicted, the jury fixing the penalty at death. At the trial the statement made by Jones was admitted into evidence, presumably over his objection. Counsel for Jones argued that the admission of this statement was error, because it was a confession of robbery (with which Jones was not charged), but that it was not a confession of murder, since Jones did not then know that Powell had died. He also argued that it could not even be an admission that Jones had *killed* Powell, but only that he had hit him—not that the blow had caused his death. From this it followed, argued defendant's counsel, that the state's case was wholly circumstantial—lacking a confession—and that the trial court erred in not giving a tendered instruction on circumstantial evidence.

The supreme court held that if the natural consequences of Jones' unlawful act would likely cause death, a statement that he did such act (beat Powell) from which the victim later died "would be a damning confession." Since the natural and probable consequences of Jones' assault on Powell were death and since Jones acknowledged doing these acts, his statement amounted to an ingredient of a felony-murder. The court then reaffirmed a rule announced in an earlier case that "A confession is an acknowledgment in express words, by the accused in a criminal case, of the truth of the guilty fact charged or of some essential part of it . . . ."[3] and went on to hold that Jones' signed statement was a confession, and, being supported by corroborating evidence relating to its contents, it was not merely circumstantial evidence.

The case also involved another important point of evidence having to do with the admission of some items of demonstrative evidence. Of particular interest was the use of Powell's blood-stained shirt. The court pointed out that the admission of such evidence without a showing of some use beyond merely displaying it to the jury might have been prejudicial, but that the shirt having been introduced because the blood on it indicated that the stains came from a person having the same type of blood as Powell's its admission was not improper and that Jones could not assign the ruling as error.

Hammil v. People[4] deals with the scope of allowable cross examination of an expert witness. A psychiatrist testified, as a witness for the state, concerning the mental condition of the defendant. His testimony was based entirely on his own observations of the defendant and his opinion was formed and stated with reference to his own observations alone. The trial court refused to permit the

2 360 P.2d 686 (Colo. 1961).
3 *Id.* at 690.
4 361 P.2d 117 (Colo. 1961).

defendant's counsel to cross examine the psychiatrist regarding his use of the report of a psychologist, who had conducted certain psychological tests on the defendant, since the trial court found that the psychiatrist had not used this report in forming his opinion. The cross examination was designed to bring out the contents of the psychologist's report to show that defendant had such a low grade mentality as to preclude his responsibility for his conduct. The supreme court affirmed the ruling of the trial court and pointed out that the psychologist's report had no tendency whatever to discredit either the psychiatrist's statement that he had relied solely on his own observations or to discredit his own opinion. On the contrary, to permit this cross examination would have served only to place its hearsay contents before the jury in such a way as to give them testimonial status. The court distinguishes this case from that of *Archina v. People*[5] in which the expert's opinion was based partly on hearsay, and cross examination in the matter was allowed.

A question of first impression in Colorado was presented in the case of *De Gesualdo v. People*.[6] The defendant was convicted of burglary and conspiracy to commit burglary. At the trial the defendant's co-conspirator was called as a witness by the prosecution. The co-conspirator's name had been endorsed as a witness in the case, but there were circumstances present which indicated that the district attorney could not have possibly entertained a good faith belief that the witness would testify if called. He either had a groundless hope that the witness would have a change of heart and would testify or he hoped to get before the jury the fact that the witness believed that his testimony would be incriminating. The witness refused to testify, claiming his privilege against self incrimination. In reversing the conviction the supreme court pointed out that the effect of such a device is clear and that the conduct of the district attorney constituted a studied attempt to bring to the attention of the jury the fact that the defendant's co-conspirator did not intend to testify for fear of the consequences to himself. The court held that this staged incident, absent the showing of good faith on the part of the district attorney in calling him and absent any instruction by the court to the jury to disregard this by-play, had a prejudicial effect on the rights of the defendant. The problem was not one of competency of an accomplice to testify (his competency was conceded), but, rather, whether he could be called for the purpose of extracting from him a claim of privilege against incrimination. Faced with a paucity of authority, the supreme court relied upon a number of Texas cases which had held that the sort of conduct practiced in this case was prejudicial and grounds for reversal, at least where no cautionary instruction was given. The court made the following interesting comment: "In holding that the conduct in question was reversible error, we take notice that in the public mind an odium surrounds the claim of constitutional privilege by a witness in refusing to testify on the ground that his testimony would tend to incriminate him. This is an aggravating factor."

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5 135 Colo. 8, 307 P.2d 1083 (1957).
6 364 P.2d 374 (Colo. 1961).

Once again the supreme court has been called upon to consider the effect of a presumption upon the burden of proof and it seems to have indicated that it continues to approve its now well established rule that the existence of a presumption in favor of the plaintiff shifts the burden of proof to the defendant on the particular issue as to which the presumption arose.[7] In *Bankers Warehouse Company v. Bennett*[8] the plaintiff, having stored some nut meats with the defendant, was entitled to rely upon the presumption of negligence on the part of the bailee (the defendant) which arises, as here, when the goods are damaged while in storage. After recognizing the existence of this presumption in favor of the plaintiff, bailor, the court then said: ". . . the burden of going forward with evidence to overcome this presumption rested on the defendant."[9] This expresses the rule which is well established in most jurisdictions and which recognizes that the burden of proof never shifts from the plaintiff, but that the presumption temporarily satisfies this burden, and thus places on the defendant the burden of producing evidence. It does not shift the burden of proof, often referred to as the risk of non-persuasion. If the court had stopped there it would have aligned itself with the general conception of the effect of presumptions. But the court did not stop there. It went on to say:

> *Here it was incumbent upon the defendant to show* that the nut meats were not contaminated by reason of its negligence. This it failed to do.
> The effect of the rule requiring the bailee to meet the presumption of negligence arising under such circumstances, is to place the burden upon the one best able to discharge it. . . .[10]

This rule clearly shifts the *burden of proof* (as distinguished from the burden of producing evidence) to the defendant. Had the court simply said that the presumption in favor of the plaintiff satisfied his burden of proof at that point, and thus placed upon the defendant the burden of producing evidence to overcome the presumption in favor of the plaintiff, there would have been no confusion, and if the defendant had failed to meet his burden of

7 *E.g.*, McGee v. Heim, 362 P.2d 193 (Colo. 1961).
8 365 P.2d 889 (Colo. 1961).
9 *Id.* at 891.
10 *Ibid.* (Emphasis supplied).

going forward the plaintiff would have been entitled to a favorable verdict. As it is now, the defendant, having the burden of proof, must satisfy the jury, by a fair preponderance of the evidence, that he was not negligent.[11] This relieves the plaintiff of his initial burden of proof to show that the defendant was negligent and works greatly to his advantage. The statute referred to in the case imposes upon the bailee no more than the duty to use reasonable care, and frees him from liability which could not have been avoided by the exercise of such care. Under the statute the plaintiff bailor must prove that the bailee did not use reasonable care; under the doctrine that the presumption shifts the burden of proof, the bailee must show that he used due care. This makes a substantial change in the substantive law under the statute.

The effect of a presumption upon the burden of proof has been stated by many well reasoned decisions, and the following quotations from some of the more representative opinions are enlightening.

In *Commercial Molasses Corp. v. New York Tank Barge Corp.*[12] the United States Supreme Court used this language, in a case involving a bailment:

> The burden of proof in a litigation, wherever the law has placed it, does not shift with the evidence, and in determining whether petitioner has sustained the burden the question often is, as in this case, what inferences of fact he may summon to his aid. In answering it in this, as in others where breach of duty is the issue, the law takes into account the relative opportunity of the parties to know the fact in issue and to account for the loss which it is alleged is due to the breach. Since the bailee in general is in a better position than the bailor to know the cause of the loss and to show that it was one not involving the bailee's liability, the law lays on him the duty to come forward with the information available to him. (Citing cases.) If the bailee fails, it leaves the trier of fact free to draw an inference unfavorable to him upon the bailor's establishing the unexplained failure to deliver the goods safely. (Citing cases.)
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> Whether we label this permissible inference with the equivocal term 'presumption' or consider merely that it is a rational inference from the facts proven, it does no more than require the bailee, if he would avoid the inference, to go forward with evidence sufficient to persuade that the non-existence of the fact, which would otherwise be inferred, is as probable as its existence. It does not cause the

11 See also Schierenbeck v. Minor, 367 P.2d 333 (Colo. 1961) where the court used this language: "A child born to a woman married at the time of its conception is by law presumed to be legitimate. [Citing cases.] Mary [the mother] was confronted with this presumption of legitimacy and its effect. To overcome it she had to prove that Sedillo [her husband] 'had no access to her during the time when, according to the course of nature, he could be the father of the child . . . . '" This, however, does not affect the burden of proof, since the plaintiff had to establish that the defendant was the father of the child born out of wedlock, and the presumption in favor of legitimacy operates in favor of the defendant, thus merely increasing the burden already resting on the plaintiff, requiring her to prove that the defendant is the father and that her husband is not. The defendant never had an obligation to do more than meet the evidence offered by the plaintiff. He had no burden of proof on any issue.

12 314 U.S. 104 (1941).

burden of proof to shift, and if the bailee does go forward with evidence enough to raise doubts as to the validity of the inference, which the trier of fact is unable to resolve, the bailor does not sustain the burden of persuasion which upon the whole evidence remains upon him, where it rested at the start.[13]

The New York Court of Appeals has used this language:[14]

> In the case at bar the plaintiff made out her cause of action prima facie by the aid of a legal presumption (referring to res ipsa loquitur), but when the proof was all in the burden of proof had not shifted, but was still upon the plaintiff. . . . If the defendant's proof operated to rebut the presumption upon which the plaintiff relied, or if it left the essential fact of negligence in doubt and uncertainty, the party who made that allegation should suffer, and not her adversary. The jury were bound to put the facts and cir-

13 *Id.* at 110-11.
14 Kay v. Metropolitan St. Ry., 163 N.Y. 447, 57 N.E. 751 (1900).

> cumstances proved by the defendant into the scale against the presumption upon which the plaintiff relied, and in determining the weight to be given to the former as against the latter, they were bound to apply the rule that the burden of proof was upon the plaintiff. If, on the whole, the scale did not preponderate in favor of the presumption and against defendant's proof, the plaintiff had not made out her case, since she had failed to meet and overcome the burden of proof.

Perhaps the clearest exposition of the rule as to the effect of a presumption upon the burden of proof to be found in any reported case is that of Judge Rodney in *Delaware Coach Co. v. Savage*.[15] He said:

> The burden of proof rests upon the party asserting the affirmative of an issue, such as, in this case, the negligence of the defendants. If an allegation, such as the negligence of the defendant, be alleged, the party asserting such fact must prove it by a preponderance of the evidence. The burden of proof of such fact continues throughout the case and this burden of proof never shifts. The burden of going forward with the evidence may shift from time to time during a trial after the establishing of a prima facie case or due to some other development in the case, but the burden of proof of the main fact remains with the party who alleged such main fact.
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> Upon the establishment of a prima facie case the burden of evidence or the burden of going forward with the evidence shifts to the defensive party. It then becomes incumbent upon such defensive party to meet the prima facie case which has been established. For this purpose the defensive party need not produce evidence which preponderates or outweighs or surpasses the evidence of his adversary, but it is sufficient if such evidence is co-equal, leaving the proof in equilibrium. If the defensive party, either by a preponderance of evidence or evidence sufficient to establish equilibrium, has met and answered the prima facie case, then the burden of going forward with the evidence returns to the original proponent charged with the burden of proof who must in turn, by a preponderance or greater weight of evidence, overcome the equilibrium thus established, or otherwise support his burden of proof by a preponderance of the evidence. *This is true whether the original prima facie case is founded upon affirmative evidence or established by the doctrine of res ipsa loquitur or other presumption or inference of law.*[16]

It would be of great benefit to the profession if the rule as to the effect of presumptions on the burden of proof could be clarified in Colorado. The rule as illustrated by the above cases seems to work well and is logical, and it also avoids some of the most puzzling aspects of a question which has become more confused than is warranted.

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15 81 F. Supp. 293 (D. Del. 1948).
16 *Id.* at 296. (Emphasis supplied).