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Corpus Delicti Proof Requirements in Nebraska *Aliunde* Defendant's Confession

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CORPUS DELICTI PROOF REQUIREMENTS IN NEBRASKA ALIUNDE DEFENDANT'S CONFESSION

I. INTRODUCTION

Proof of crime may be divided into three parts: (1) a specific kind of injury or loss, the burned dwelling house in arson, for example, or the body in homicide; (2) the criminal agency of another as the means; and (3) the identity of the defendant as the perpetrator.[1] Only the first two elements however constitute the corpus delicti,[2] and it is only the corpus delicti which need be established by "some evidence" in addition to defendant's extra-judicial confession or admission. No jurisdiction requires proof in addition to defendant's extra-judicial confession or admission that defendant was the perpetrator.[3]

The central problem in the corpus delicti area is to determine the quantum of evidence in addition to the confession or admission which is needed in order to sustain a conviction. The basic purpose here is to review the Nebraska cases on the question, to compare them with decisions elsewhere, and to predict the probable course of future decisions in Nebraska.

First, however, an historical word. The English cases originally held that a conviction could be had merely upon the extra-judicial confession or admission of the defendant. English judicial attitudes changed however, at least in homicide cases, after a number of incidents where the alleged victims of homicides turned up after the execution of their supposed slayers,[4] a situation which caused Lord Matthew Hale to write that he "would never convict any person of murder or manslaughter, unless the fact were proved to be done, or at least the body found dead."[5]

[1] 7 Wigmore, Evidence (3rd ed. 1940), § 2072.

[2] Gallegos v. State, 152 Neb. 831, 43 N.W.2d 1 (1950). For a collection of State cases on the elements required see 103 U. of Pa. Law Review 649, footnote 63.

[3] 23 C.J.S. 180, § 916.

[4] For listings of English and American cases involving conviction upon a false confession see: 3 Wigmore, Evidence (3rd ed. 1940), § 867, note 1. 7 Wigmore, Evidence (3rd ed. 1940), § 2081, note 4.

[5] 2 Hale, Pleas of the Crown 290 (1847).

While the English courts never went to the extreme of holding that the deceased's body must necessarily be produced in order to warrant a homicide conviction, a rule was finally established that "a person accused of homicide ought not to be convicted merely on his own confession, without proof of the finding of the dead body *or* evidence 'aliunde' that the party alleged to have been murdered is in fact dead."[6] Proof of evidence *aliunde* the confession of criminal agency was also required. But to this day the English courts have never required proof *aliunde* the confession or admission in other than homicide and bigamy cases, and the requirement in bigamy cases simply rests on the best evidence rule, i.e., the records of defendant's marriages are better evidence of them than defendant's extra-judicial statement that they took place.[7]

III. AMERICAN LAW IN GENERAL

However, the English rules were long in developing and the unsettled nature of the English law left American courts free to fashion their own doctrines.[8] It was early agreed that "some evidence" of the corpus delicti was needed in addition to defendant's extra-judicial confession or admission and that the requirement of such other proof was not limited to homicide and bigamy prosecutions but extended to all criminal cases.[9] The principal dispute, as suggested above, has been over the quantum and nature of the other evidence required to establish the corpus delicti. Only three states[10] have ever insisted that the corpus delicti be proved beyond a reasonable doubt *without reference to*

[6] Ireland 8 R.C.L. 50, 58.

[7] 7 Wigmore, Evidence (3rd ed. 1940), § 2084.

[8] For a collection of early American cases illustrating how the courts searched for a rule see: 1 Roscoe, Crim. Evid. (8th ed. 1888), p. 66, note 1 (8th ed. 1888).

[9] Cooley, Constitutional Limitations, p. 315: "A confession alone ought not to be sufficient evidence of the corpus delicti. There should be other proof that a crime has been committed, and the confession should only be allowed for the purpose of connecting the defendant with the offense."

Greenleaf, Evidence, § 217: ". . . this opinion certainly best accords with the humanity of the criminal code and with the great degree of caution applied in receiving and weighing the evidence of confessions in other cases."

[10] Commonwealth v. Bishop, 285 Pa. 49, 131 Atl. 657 (1926); State v. Lalujer, 4 Minn. 368 (1860); Dunn v. State, 34 Tex.Cr. 257, 30 S.W. 227 (1895).

the confession or admission and only Pennsylvania appears to cling to such a rule today.[11] The other states all allow the confession to come in as cumulative proof of the corpus delicti.[12]

Putting the anomolous Pennsylvania rule to one side, there appears to be two views concerning the nature of the proof required in addition to defendant's extra-judicial confession or admission. One group of courts insists that such other evidence be

[11] Commonwealth v. Lettrick, 346 Pa. 497, 502, 31 A.2d 155, 157 (1943). "In practice, the rule requires that the jury may not consider such confession as evidence of the defendant's guilt of the crime charged, unless the Commonwealth shall have produced evidence sufficient to convince the jury beyond a reasonable doubt that the crime charged was committed by someone."

[12] Alabama: Whitehead v. State, 16 Ala.App. 427, 78 So. 467 (1918; Daniels v. State, 12 Ala.App. 119, 121, 68 So. 499, 499 (1915), "any evidence at all, even the slightest tendency."

Arizona: State v. Romo, 66 Ariz. 174, 185 P.2d 757 (1947), must have "reasonable proof" of the corpus delicti aliunde.

California: People v. Kay, 34 Cal.App.2d 691, 94 P.2d 361 (1939).

Connecticut: State v. Guastamachio, 137 Conn. 179, 182, 75 A.2d 429, 430 (1950), evidence of a "substantial character."

Deleware: State v. Kehm, 103 A.2d 781 (Del. Super. 1954).

Florida: Parrish v. State, 90 Fla. 25, 105 So. 130 (1925).

Georgia: McVeigh v. State, 205 Ga. 326, 53 S.E.2d 462 (1949).

Indiana: Dennis v. State, 230 Ind. 210, 216, 102 N.E.2d 650, 653 (1952), "clear proof".

Idaho: State v. Keller, 8 Id. 699, 70 Pac. 1051 (1902).

Kansas: State v. Cardwell, 90 Kan. 606, 135 P. 597 (1913).

Maine: State v. Carlton, 148 Me. 237, 92 A.2d 327 (1952), evidence giving rise to a reasonable inference of the existence of the corpus delicti.

Maryland: Weller v. State, 150 Md. 278, 132 Atl. 624 (1926).

Michigan: People v. Coapman, 326 Mich. 321, 40 N.W.2d 167 (1949).

Missouri: State v. McGuire, 327 Mo. 1176, 39 S.W.2d 472 (1950).

Montana: State v. Ratkovich, 111 Mont. 9, 105 P.2d 597 (1940), "some" independent evidence which together with the confession will establish the corpus delicti beyond a reasonable doubt.

Nebraska: Sullivan v. State, 58 Neb. 796, 79 N.W. 721 (1899).

Nevada: In re Kelly, 28 Nev. 491, 83 Pac. 223 (1905).

New Mexico: State v. Lindemuth, 56 N.M. 257, 243 P.2d 325 (1952).

North Carolina: State v. Cope, 81 S.E.2d 773 (N.C. 1954).

Ohio: State v. Maranda, 94 Ohio St. 364, 114 N.E. 1038 (1916).

Oklahoma: Riddinger v. State, 267 P.2d 175 (Okla. Crim. App. 1953).

Rhode Island: State v. Jacobs, 21 R.I. 259 (1899).

South Carolina: State v. Blocker, 205 S.C. 303, 31 S.E.2d 908 (1944).

Tennessee: Taylor v. State, 191 Tenn. 670, 235 S.W.2d 818 (1950).

Vermont: State v. Blay, 77 Vt. 56, 58 Atl. 794 (1904).

entirely independent of the confession or admission, that the confession or admission may not be lifted by its own bootstraps in order to give criminal color to otherwise non-inculpatory circumstances.[13] Under this view, a conviction may not be had no matter how persuasively the confession or admission may be corroborated unless the proof *aliunde* of itself tends independently to establish the corpus delicti. Probably a majority of the courts on the other hand only require that the proof *aliunde* be such as to corroborate the confession or admission.[14] If, for ex-

Virginia: Campbell v. Commonwealth, 194 Va. 824, 74 S.E.2d 468 (1953).
Washington: State v. Lutes, 38 Wash.2d 475, 230 P.2d 786 (1951).
West Virginia: State v. Blackwell, 102 W.Va. 421, 135 S.E. 393 (1926).
Wyoming: Curran v. State, 12 Wyo. 553, 562, 76 Pac. 577, 578 (1904), "such extrinsic corroborating circumstances as well, in connection with the confession, show the prisoner's guilt beyond a reasonable doubt."
Federal: Gullotta v. U. S., 113 F.2d 683, 685-86 (8th Cir. 1940), "a substantial showing which together with the defendant's confession or admission establishes the crime beyond a reasonable doubt."

[13] Federal: Tingle v. U. S., 38 F.2d 573 (8th Cir. 1930).
Alabama: Johnson v. State, 59 Ala. 37 (1877), extrajudicial confession, not corroborated by independent evidence of corpus delicti—insufficient.
Dist. of Columbia: Forte v. U. S., 68 D.C.App. 111, 94 F.2d 236 (1938), independent evidence must deal with the whole of the corpus delicti.
Georgia: Bines v. State, 118 Ga. 320, 45 S.E. 376 (1903), arson—evidence other than confession must show burning to have been felonious.
Minnesota: State v. Wylie, 151 Minn. 375, 186 N.W. 707 (1922).
Virginia: Hamilton v. Commonwealth, 163 Va. 1089, 177 S.E. 847 (1935).

[14] Federal: (leading case) U. S. v. Williams, 1 Cliff. 5 (1858).
Colorado: Bunch v. People, 87 Colo. 84, 285 Pac. 766 (1930).
Illinois: Bergen v. People, 17 Ill. 426 (1856), Skinner, J., required "some proof that a crime had been committed, or of circumstances corroborating and fortifying the confession; . . . proof of any number of these facts and circumstances consistent with the truth of the confession, or which the confession had led to the discovery of, and which would not probably have existed had not the crime been committed, necessarily corroborated it; . . . the corroborating fact or facts in proof need not necessarily, independent of the confession, tend to prove the 'corpus delicti'."
New York: People v. Deacons, 109 N.Y. 374, 377, 16 N.E. 676 (1888), "The measuring of the Code is that there must be some other evidence of the corpus delicti besides the confession."
Texas: Harris v. State, 64 Tex.Cr. 594, 144 S.W. 232 (1912), confession may be used to aid the proof of the corpus delicti.

ample, defendant confesses that he shot X in the front-room of a particular wilderness cabin and then buried X's body in a shallow grave the location of which he describes and a bloodstain is found in the cabin front-room and a decomposed body in the grave, this would probably be enough proof *aliunde* to warrant a conviction under the latter view. It would not however be enough in a jurisdiction requiring some independent proof of the corpus delicti. A decomposed body in a shallow grave and a bloodstain on a cabin floor are in themselves non-inculpatory and do nothing more than corroborate defendant's confession.

Although most courts have said that proof of the corpus delicti *aliunde* the confession should precede the introduction of the confession, this "rule" has been principally honored in the breach and it has almost uniformly been held that a reversal of the order of proof, provided the requisite proof *aliunde is* introduced at some stage, does not constitute reversible error.[15]

The corpus deliciti may be proved by direct evidence or if none is available by circumstantial evidence. Where however the corpus delicti is proved by circumstantial evidence it must be so conclusive as to exclude every reasonable hypothesis, other than that a crime has been committed, and the evidence fails to establish the corpus delicti sufficiently if it suggests a theory which is as consistent with the absence of a crime as with its existence.[16]

III. THE LAW IN NEBRASKA

Nebraska cases have historically observed two fundamentally different rubrics in discussing the nature and quantum of proof necessary in order to establish the corpus delicti aliunde defendant's extra-judicial confession or admission. The first, announced in the early cases and recognized only in the breach, is that defendant's confession or admission is not to be considered except for the purpose of proving defendant's identity as the perpetrator of the crime. Under this view, the confession or admission could not come in as cumulative proof of the corpus delicti and, though the Court never squarely so stated, it would follow under this view that the corpus delicti had to be proved by evidence *aliunde* beyond a reasonable doubt. This view, as we have seen, is today followed only in Pennsylvania. The leading Ne-

[15] People v. McWilliams, 117 Cal.App. 732, 4 P.2d 601 (1931); Parker v. State, 228 Ind. 1, 88 N.E.2d 556 (1949); Commonwealth v. Lettrick, 346 Pa. 497, 31 A.2d 155 (1943).

[16] 23 C.J.S. § 916(c)

braska case announcing the doctrine is *Dodge v. People*:[17] "There should be other proof that a crime has actually been committed, and the confession should only be allowed for the purpose of connecting the defendant with the offense." *Chezen v. State*[18] and *Wilshusen v. State*[19] announce the same doctrine, but it is significant that in all of these cases defendant went to jail. While the doctrine in question has never squarely been repudiated, and though the cases professing it are still frequently cited by the Court, it is very clear from the modern decisions that it has long fallen into disuse.

Modern Nebraska law on the question dates from *Sullivan v. State*,[20] a homicide case decided in 1899. Defendant quarreled with some Negroes, obtained a revolver in a saloon and ran out declaring that he intended to kill a "black nigger." A man was seen walking in an alley, there was a flash and report of a pistol, and the man fell to the sidewalk and was found dead. Just after the shot, defendant ran back into the saloon, threw the pistol on the floor, and exclaimed, "My God! I have killed Tom Kirkland, my best friend." He then ran outside to the dying man and again declared he had shot or killed his best friend and that he would be hanged. No other person was seen on the street in the vicinity when the shot was fired. There was no direct evidence presented of any wound on the body of the deceased, and the above circumstances, together with the subsequent confession of the defendant that he shot Kirkland under the impression that he was a Negro constituted all of the evidence tending to show that death was the result of a gunshot wound. The court stated that although a voluntary extra-judicial confession is insufficient standing alone to prove the corpus delicti, it is nevertheless competent proof of the corpus delicti, and may, with only *slight corroborative evidence*, establish the corpus delicti as well as defendant's guilty participation.

The slight corroborative evidence found by the Court consisted solely in defendant's above-stated admissions at the time of the alleged shooting which were held to be "part of the res gestae."[21] Though the Court indicated no recognition of having

[17] 4 Neb. 220, 231 (1875).

[18] 56 Neb. 496, 76 N.W. 1056 (1898).

[19] 149 Neb. 594, 31 N.W.2d 544 (1948).

[20] 58 Neb. 796, 79 N.W. 721 (1899).

[21] Res gestae—events speaking for themselves, through the instinctive words and acts of participants, not the words and acts of participants

made a shift in approach, the pendulum was thus swung from a rule requiring independent proof *aliunde* the confession beyond a reasonable doubt to one allowing the corpus delicti to be proved by lifting the confession by its own bootstraps with only "slight corroborative proof." And the Court's formulation of its rule, "only slight corroborative proof," is perhaps the least stringent in the sense of requiring least proof aliunde of any court in the United States. That the Court meant what it said is underscored by the fact that defendant's confession in the *Sullivan* case was not only lifted by its own bootstraps, but the "slight evidence" *aliunde* consisted solely in defendant's own admissions. The defendant's confession in the other words was held to be sufficiently corroborated aliunde solely by defendant's admissions.[22]

The most recent Nebraska cases adhere to *Sullivan's* "only slight corroborative proof" rubric. In *Gallegos v. State*,[23] for example, defendant was convicted of manslaughter of a woman with whom he and his two daughters had been living. Nearly a year after the alleged crime the defendant was arrested in El Paso, Texas on another charge, and in the course of questioning by police officers defendant confessed that he had killed the deceased woman in a heated argument by striking her on the head with a piece of stove wood, that he had wrapped her in a blanket, placed a handkerchief in her mouth and buried her the next day in a north-south grave just east of the house in which the crime was committeed. A police officers went to the house and discovered the grave as described by the defendant, and found a dark brown stain on the kitchen floor where defendant stated

when narrating the events. What is done or said by participants, under the immediate spur of a transaction, becomes thus part of the transaction, because it is then the transaction that thus speaks. A declaration to be part of the res gestae need not necessarily be coincident in point of time with the main fact proved. It is enough that the two are so clearly connected that the declaration can, in the ordinary course of affairs, be said to be a spontaneous explanation of the real cause. Statements which were part of the res gestate were held to be competent evidence also in the case of Egbert v. State, 113 Neb. 790, 205 N.W. 252 (1925). "Circumstances capable of an innocent construction may be interpreted in the light of the defendant's confession (statements which were part of the res gestate here), and the fact under investigation be thus given a criminal aspect."

22 Admission and confession are distinguishable, the difference being that the latter is an acknowledgment of guilt, while the former is but acknowledgment of some fact or circumstance in itself insufficient to constitute an acknowledgment of guilt, and tending only toward the proof of the ultimate fact of guilt. 22 C.J.S. § 816(a), p. 1422.

23 152 Neb. 831, 43 N.W.2d 1 (1950).

deceased had fallen. Upon these facts defendant's conviction of manslaughter was sustained.

Whether the Court's "slight corroborative" proof requirement would have been held satisfied had defendant's confession *followed* the discovery of the body and the blood stain, and newspaper accounts of such discovery were published, was of course left unanswered by the Court. The danger of convicting an innocent man in such a case would naturally be notably enhanced. It is noteworthy however as bearing on the answer that the Court has seldom looked to the policy considerations underlying the proof aliunde requirement but has applied its "slight corroborative proof" rule almost mechanically.

Two more recent cases likewise bear mention. The first, *Hoffman v. State*,[24] a motor vehicle homicide case, doubtless requires less proof *aliunde* the confession of any Nebraska case and goes considerably beyond most of the authorities elsewhere. Defendant and deceased were on a drinking spree and their car was involved in a collision; defendant was found in the front seat partially behind the steering wheel, and the body of deceased was hanging out of the partially open right-hand door. The automobile in which they were riding belonged to the defendant, but defendant contended that he was asleep in the rear seat at the time of the accident. The state introduced evidence however that defendant told the sheriff two hours after the accident that he was driving. While reiterating the rule that defendant's extra-judicial[25] confession or admission is not alone sufficient proof of the corpus delicti, the court found the necessary "slight corroborative proof" in the following circumstances: (1) the position of defendant in the car after the accident; (2) the position of the only other passenger in the car; (3) the nature and location of the injuries received by deceased; (4) the blood and light, or blond, hair on the doorpose of the car in front of where deceased was found; (5) the fact that deceased had light or blond hair and that the hair of defendant was dark. The proof *aliunde* is indeed slight. Most if not all of the circumstances relied on are almost equally consistent with the hypothesis that defendant was not driving.

[24] 160 Neb. 375, 70 N.W.2d 314 (1955).

[25] Authorities are unanimous in holding that only an extra-judicial confession requires corroboration. A confession in open court is sufficient standing alone to convict. Skaggs v. State, 88 Ark. 62, 113 S.W. 346 (1908).

The final case of interest is *Cotner v. Solomon*,[26] a habeas corpus action based on the theory that there was no evidence to justify a magistrate's finding that there was sufficient cause to hold petitioner on a charge of indecently fondling a minor. The evidence relied upon to hold petitioner consisted of defendant's extra-judicial confession to the charge and the testimony of a five year old girl that defendant had tickled her somewhere but she would not say where.

The Court's holding that there was sufficient cause to hold petitioner would not be of interest here except for the way in which the Court approached the question. The authorities are uniform that an extra-judicial confession is sufficient to warrant bindover for trial.[27] However, the Court did not refer to this well-established rule but instead dealt with the question as though defendant had been convicted, stated the "slight corroborative proof" rule and found it to be satisfied by the little girl's seemingly non-inculpatory testimony that defendant tickled her she knew not where.

If *Cotner* is taken on the basis that the Court proceeded on, which, of course, it need not be, it appears that Nebraska currently requires almost no evidence *aliunde* defendant's confession to warrant a conviction.

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[26] 163 Neb. 619, 80 N.W.2d 587 (1957).

[27] E.g., Latimer v. State, 55 Neb. 609, 76 N.W. 207 (1898); State ex rel. Germain v. Ross, 39 N.D. 630, 170 N.W. 121 (1918).