

# Criminal Law: Sufficiency of Uncorroborated Testimony of Accomplice on Preliminary Hearing

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conditional sales contract at the time he attaches or levies on conditionally sold property is not within the protection of the statute declaring an unfiled conditional sales contract void as to creditors of the buyer and subsequent purchasers and mortgagees in good faith." *Holt Motor Co. v. R. C. A. Photophone, Inc.*, 196 Minn. 527, 265 N.W. 313 (1936).

In Illinois, where the statute uses the term "third persons," an unrecorded contract of a conditional sale has been held valid against judgment creditors in the absence of conduct that would estop the seller. In a case where the conditional vendor authorizes his vendee to sell the goods which are the subject of the contract, the vendor relinquishes his contract lien against the goods and this conduct is sufficient to estop the vendor in his claim for the goods against subsequent purchasers and creditors. *Kilgore v. State Bank of Colusa*, 372 Ill. 578, 25 N.E. (2d) 39 (1939).

In the District of Columbia, the courts have held that an unrecorded conditional sales contract is valid as against a conditional buyer's judgment creditor who levies on goods conditionally sold, since the judgment creditor did not acquire any title to the property of the judgment debtor. Such a creditor is therefore not within the classification of "third persons acquiring title to said property from said purchaser" within the meaning of the recording statute. The reasoning of this rule seems to be that in cases where title remains in the seller until the purchase price is paid, the conditional vendee does not have title and any judgment creditor, therefore, could get no greater title than the vendee has at the time the attachment or levy is made. *C. I. T. Corp. v. Carl*, 66 App. D.C. 232, 85 F. (2d) 809 (1936).

The Wisconsin rule with respect to this problem is two fold. First of all, if the creditors were not in fact misled by the failure to file the instrument, the conditional vendor is not estopped and may claim the property as against the creditors. If the creditor, before extending credit, did not in fact depend on the property in the possession of the conditional vendee as being unincumbered, he is not within the protection of the statute. Secondly, it would seem that the creditor may not be such within the meaning of the statute unless prior to the filing of the contract he shall have acquired a specific interest in the property which is the subject of the contract. *John Deere Plow Co. of Moline v. Edgar Farmer Store Co.*, 154 Wis. 490, 143 N.W. 194 (1913); *E. L. Essley Machinery Co. v. First Trust Co.*, 160 Wis. 300, 151 N.W. 814 (1915).

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**Criminal Law—Sufficiency of Uncorroborated Testimony of Accomplice on Preliminary Hearing.**—After a preliminary examination, Eleanor Jeffrey and Robert Jeffrey were held to answer a charge of arson. From orders quashing writs of habeas corpus and remanding them to custody Eleanor Jeffrey and Robert Jeffrey appealed. The relators, who are mother and son, and one Weaver, were charged with setting fire to the mother's chicken hatchery. The incendiary origin of the fire and the fact that the relators were parties to causing the fires were established solely by the testimony of Weaver, who was an admitted accomplice. Relators contended that they were illegally held in custody upon the ground that the uncorroborated testimony of an accomplice was insufficient to justify a magistrate in committing a prisoner to answer for a felony. The Minnesota Statutes provided that the prisoner should be held by the magistrate whenever at the close of an examination it appeared that an offense has been committed, and that there was probable cause to believe the

prisoner guilty. Another statute provided that a conviction could not be had upon the uncorroborated testimony of an accomplice. *Held*: The uncorroborated testimony of an accomplice is sufficient to sustain a finding of probable cause for holding a prisoner to answer for a felony. The statute requiring corroboration of an accomplice to convict does not apply to showing probable cause upon a preliminary examination. *State v. Jeffrey et al.*, 300 N.W. 7 (Minn. 1941).

The common-law rule is that a conviction can be had upon the uncorroborated testimony of an accomplice. Trial judges are under the duty of giving a cautionary instruction concerning the weight of the testimony of accomplices, but the weight and credibility of their testimony is for the jury. 7 WIGMORE, EVIDENCE (3d ed.) §§ 2056, 2057; UNDERHILL'S CRIMINAL EVIDENCE (3d ed.) § 129; 5 JONES, COMMENTARIES ON EVIDENCE (2d ed.) § 2218.

However, in most states it is well settled, today, either by statute or by the practice, that a conviction cannot be had solely on the uncorroborated testimony of an accomplice. *People v. Sawaya*, 115 P.(2d) 1001 (Cal. 1941); *Marcum v. Commonwealth*, 285 Ky. 750, 149 S.W. (2d) 506 (1941); *Mims v. State*, 146 S.W.(2d) 754 (Texas 1941); *Smith v. State*, 5 S.E.(2d) 762 (Ga. 1940); *Dunn v. State*, 237 Ala. 474, 187 So. 643 (1939); *Rogers v. State*, 114 S.W. (2d) 883 (Tex. 1938); *Stephens v. State*, 192 S.E. 78 (Ga. 1937); *Canada v. Commonwealth*, 262 Ky. 177, 89 S.W. (2d) 880 (1936); *Myers v. State*, 26 Ala. App. 385, 160 So. 902 (1935); *People v. Berger*, 254 N.Y.S. 166, 142 Misc. 178 (1932); *State v. Keithley*, 83 Mont. 177, 271 Pac. 449 (1928); *State v. Burzette*, 208 Iowa 818, 222 N.W. 394 (1928); *Wolf v. State*, 143 Md. 489, 122 Atl. 641 (1923); *Weems v. State*, *vs Okla. Cr.* 198, 182 Pac. 264 (1919); *State v. McCarthy*, 36 Mont. 226, 92 Pac. 521 (1907).

There are also a considerable number of cases holding that a defendant can be convicted on the uncorroborated testimony of an accomplice. *People v. Martin*, 376 Ill. 569, 34 N.E. (2d) 845 (1941); *U. S. v. Glasser*, 116 F. (2d) 690 (C.C.A. 7th 1941); *Lifer v. State*, 189 Miss. 754, 199 So. 107 (1941); *Watkins v. Commonwealth*, 6 S.E. (2d) 670 (Va. 1940); *State v. Cots*, 126 Conn. 48, 9 Atl. (2d) 138 (1940); *People v. Ross*, 116 P. (2d) 81 (Cal. 1941); *Arnold v. U. S.*, 94 F. (2d) 499 (C.C.A. 10th, 1938); *People v. Cohen*, 363 Ill. 303, 2 N.E. (2d) 66 (1936); *State v. Gore*, 207 N.C. 618, 178 S.E. 209 (1935); *State v. Stogsdill*, 324 Mo. 105, 23 S.W. (2d) 22 (1930); *Collingsworth v. State*, 93 Fla. 1110, 113 So. 561 (1927); *Schechtel v. People*, 99 P (2d) 968 (Col. 1939). However, those states permitting convictions on the uncorroborated testimony of an accomplice invariably qualify such assertion by such statements as: "provided the trier believes the crime proved beyond a reasonable doubt by such evidence," *State v. Cots, supra*; "though such testimony should be received and acted upon with great caution," *Watkins v. Commonwealth, supra*; "when corroborative facts are shown, independently and without aid of the testimony of the accomplice, tending substantially to connect the defendant with the commission of the offense," *People v. Ross, supra*; "but, to support the conviction, the testimony must be clear and convincing, must be received with great caution, and must show guilt beyond a reasonable doubt," *Schechtel v. People, supra*. None of the cases flatly asserts that a defendant may be convicted on the uncorroborated testimony of an accomplice unsupported by other facts and circumstances.

The rule of the principal case that the uncorroborated testimony of an accomplice is sufficient to establish probable cause for the magistrate's action in holding the accused to answer for trial has been followed in several jurisdictions.

In a California case involving arson, where the defendant sought a writ of habeas corpus on the ground that the evidence produced was insufficient to

establish probable cause because it was furnished by an accomplice, the court held that while a defendant cannot be convicted upon the uncorroborated testimony of an accomplice, the testimony of an accomplice is admissible and is proper to be considered and is sufficient to make it appear that there is a probability that a defendant has been guilty of the offense charged against him. *In re Application of Schwitalla*, 36 Cal. App. 511, 172 Pac. 617 (1918).

A petition for a writ of habeas corpus for discharge from confinement on a charge of seduction was dismissed, the court holding that the law requiring corroboration is a mere rule of evidence relating to the trial and conviction of such offenders, and in no manner pertains to the formal complaint which initiates the prosecution. *In re Dempsey*, 65 N.Y.S. 717 (1900).

A New York court held that a defendant charged with a felony of which, by statute, a conviction cannot be had without testimony corroborating that of the plaintiff, is not entitled to release on habeas corpus, notwithstanding there was no such corroboration on his preliminary examination before the magistrate by whom committed; lack of corroboration being material on the trial only. *People ex rel. Baron v. Warden of City Prison of City of N. Y.*, 106 N.Y.S. 139, 56 Misc. 108 (1907).

In another New York case in which a writ of habeas corpus was quashed, the wife of a murder victim was held as an accomplice with the accused. The accused contended that since the Criminal Code of Procedure provided that a conviction cannot be had upon the uncorroborated testimony of an accomplice, all the evidence given by such accomplice must be corroborated before the same can have any force or effect, and that there had been no corroboration of the evidence of his accomplice. The court on appeal held that a committing magistrate need not exact the same degree of proof as is necessary to secure conviction, but must hold the accused if there is proof that a crime has been committed and reasonable grounds to believe accused is guilty, and that uncorroborated testimony of an accomplice, though insufficient to sustain a conviction for murder, is sufficient to justify the magistrate in holding the accused for trial. *People ex rel. Giallarenzi v. Munro*, 268 N.Y.S. 404, 150 Misc. 41 (1934).

An opposite result has been reached by the courts of two states. In an application for a writ of habeas corpus where the only evidence of the guilt of the accused was the uncorroborated testimony of an accomplice, a Nevada court held that the general rule of the statute providing that a conviction of crime cannot be had on the uncorroborated testimony of an accomplice, is to be applied where the sole witness against the defendant on his preliminary examination is an accomplice, and a commitment on his uncorroborated testimony is not based on reasonable or probable cause. *Ex parte Oxley*, 38 Nev. 379, 149 Pac. 992 (1915).

In an Alabama case all the testimony adduced at the preliminary examination was provided by an accomplice of the accused. On a habeas corpus proceeding the accused was discharged and the state appealed. The discharge was affirmed, the court saying that since under the Alabama code a defendant cannot be convicted of a felony on the uncorroborated evidence of an accomplice, such evidence is insufficient to establish probable cause of the commission of a felony on a preliminary examination of the defendant, so as to authorize his commitment to await the action of the grand jury. *State v. Smith*, 13 Ala. 111, 53 So. 42 (1903).

It would seem that in those states permitting a conviction on the uncorroborated testimony of an accomplice that the problem of the sufficiency of the uncorroborated testimony of an accomplice to sustain a finding of probable

cause for holding a defendant to answer for a felony would not arise, because if one may be convicted on the uncorroborated testimony of an accomplice it necessarily follows that the uncorroborated testimony of such accomplice is sufficient to establish probable cause for holding a prisoner to answer a criminal charge.

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**Damages—What Must Be Shown to Justify an Award of Punitive Damages in Assault and Battery Actions.**—The plaintiff was standing on the sidewalk in front of a store next to the defendant's tavern, engaged in conversation with one Kostiw, the owner of a dog then in the custody of the plaintiff and held by a leash attached to her wrist. The plaintiff claimed that the defendant, who was standing nearby, without provocation, seized the dog's tail, and lifting the animal up whirled it in the air and dropped it; that Kostiw then remonstrated with the defendant and was struck down, and that when the plaintiff protested, the defendant struck her, knocked her down, struck her twice again and then seizing the leash dragged her across the walk. Plaintiff sued for assault, and the jury found that the defendant's acts were wilful, wanton, and malicious. Judgment was entered on a \$2,250 verdict. The defendant contends on appeal that the evidence showed that the incident was an unpremeditated "flare-up" affair, and that no punitive damages should have been allowed.

On appeal, *held*, judgment affirmed. There was no provocation for the assault and battery, and in view of the jury finding that the assault was wilful, wanton, and malicious, the award of punitive damages was proper. An assault need not be premeditated to warrant assessment of punitive damages. *Karpluk v. Danisewicz*, 38 N.E. (2d) 823 (Ill. 1942).

Generally the courts have held that the acts of a defendant for which the plaintiff is awarded punitive or exemplary damages must be characterized by being wanton, wilful, reckless, or malicious. *Pendleton v. Norfolk and W. Ry. Co.*, 82 W.Va. 270, 95 S.E. 941 (1918); *Friedman v. Jordan*, 166 Va. 65, 184 S.E. 186 (1936); *Baltimore Transit Co. v. Faulkner*, 20 Atl. (2d) 485 (Md. 1941); WILLIS, *PRINCIPLES OF THE LAW OF DAMAGES* (1909) p. 28; *Shupack v. Gordon*, 79 Conn. 298, 64 Atl. 740 (1906); *Corn v. Sheppard*, 179 Minn. 490, 229 N.W. 869 (1930); *May v. Baron*, 329 Penn. 65, 196 Atl. 866 (1938).

Along with the principle case a typical fact situation for awarding punitive damages is illustrated in *May v. Baron*, *supra*, where the defendant demanded payment from the plaintiff for a bill. When the plaintiff refused to pay, the defendant immediately struck him in the face, knocked him over in the chair in which he was sitting, and then while he lay unconscious on the floor in a pool of blood, kicked him several times in the abdomen. The plaintiff suffered serious injuries as a result of which he was unable to work more than two or three days a week. Combined damages of \$4,000 were awarded in the lower court, and in reviewing this decision on appeal the appellate court stated that, "In view of the circumstances, the injuries sustained, the pain and suffering endured, the loss of earning power, and the malicious and wilful character of the assault there can be no question that the court below did not abuse its discretion in refusing to grant a new trial."

Wisconsin courts, in their instructions to juries on punitive damages, have dwelled on the actual malice or ill will displayed in the acts of the defendant. *Nichols v. Brabaron*, 94 W. 549, 69 N.W. 342 (1896), is typical. Here a man and a woman related by marriage came to blows. "He struck her so she kicked