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## CRIMINAL LAW CASE NOTES AND COMMENTS

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### THE CORPUS DELICTI—CONFESSION PROBLEM\*

Legal doctrines, while appropriate in one setting, may become a deterrent to justice when overextended. Unquestioning obedience to precedent is not necessarily a fulfillment of justice. An illustration of this undesirable result may be found in the cases involving the corpus delicti issue, particularly as regards the rule that the corpus delicti must be established independently of a confession before the confession will be admitted in evidence.

The general corpus delicti doctrine was first expounded by Sir Mathew Hale when he wrote, "I would never convict any person of murder or manslaughter unless the fact were proved to be done, or at least the body found dead."<sup>1</sup> The basis for his statement was the well-founded fear that people may be convicted of imaginary, non-existent crimes.<sup>2</sup> Since a criminal trial is, in a sense, an investigation carried on to determine if the accused perpetrated a particular criminal act, the necessity of establishing that the act is, in fact, done seems to be a logical prerequisite to the determination of who did it. The corpus delicti is, then, the foundation upon which the evidentiary structure showing who perpetrated the offense is built.<sup>3</sup>

The courts have developed three distinct views as to what constitutes the corpus delicti. The first view requires only proof of a particular loss or injury.<sup>4</sup> The second, and apparently the majority view, requires in addition to this, proof of a criminal act, agency, or cause bringing the loss or injury into being.<sup>5</sup> The third view demands a third element as well: proof that the accused himself committed the crime.<sup>6</sup> By including this third element as a

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1. 2 Hale P. C. 290.

2. History shows numerous convictions for crimes which were never committed. Hale cites the case of a man executed for the murder of a person who later returned from a forced sea voyage. 2 Hale P. C. 290. A man was convicted of the murder of his niece when she had disappeared under circumstances tending toward the proof that he had murdered her. Sir Edward Coke writes that the niece had merely run away and returned after her uncle had been executed. Inst. ch. 140, p. 232. Note also the execution of John Miles for the murder of William Ridley. Ridley was later found dead in a deep privy where he had fallen while intoxicated. 2 BEST, EVIDENCE, 444 (12th ed. 1922). A list of uncommitted "murders" can be found in 1 WHARTON, CRIMINAL LAW §357 (12th ed. 1932). Requiring proof of corpus delicti is a substantive rule of law to protect the accused from conviction of a crime not committed. See *People v. Mason*, 37 Cal. Cr. App.2d 407, 99 P.2d 567 (1940); *Barnes v. State*, 199 Miss. 86, 23 So.2d 405 (1945); *State v. Hawkins*, 165 S.W. 2d 644 (Mo. 1942).

3. *State v. Johnson*, 95 Utah 572, 83 P.2d 1010 (1938).

4. *State v. Potter*, 52 Vt. 33, (1879); 7 WIGMORE, EVIDENCE §2072 (3d ed. 1940).

5. *People v. Mohr*, 24 Cal. Cr. App.2d 580, 75 P.2d 616 (1938); *Lowe v. People*, 76 Colo. 603, 234 Pac. 169 (1925); *State v. Darrah*, 60 Idaho 479, 92 P.2d 143 (1939); *Warnell v. Commonwealth*, 246 S.W.2d 144 (Ky. 1952); *Ward v. State*, 222 P.2d 173 (Okla. 1950); *Commonwealth v. Coontz*, 238 Pa. 74, 135 Atl. 538 (1927); *State v. Pienick*, 46 Wash. 522, 90 Pac. 645 (1907).

6. *State v. Bennett*, 6 S.W.2d 881 (Mo. 1928); *Commonwealth v. Haley*, 359 Pa. 477, 59 A.2d 62 (1948).

part of the corpus delicti, the prosecution's entire case must be proven before the corpus delicti is considered established.<sup>7</sup>

If the policy behind the requirement of corpus delicti is stated as the protection of innocent people from conviction for criminal acts rather than the prevention of conviction for non-existent crimes, the third view requirement of proof of the identity of the perpetrator would be as important as the other elements.<sup>8</sup> However, since protection from convictions for non-existing crimes is the accepted policy objective, then the identity of the perpetrator is irrelevant.

The second view of what constitutes corpus delicti cannot be so criticized in light of the policy. It demands the proof of a crime and no more or less. The first view, however, can be criticized for requiring proof of less than an actual crime and thereby failing to provide adequate protection from unwarranted prosecution.

Just as there are varied ideas as to what elements constitute corpus delicti, there are different views as to the type of evidence required to establish these elements. The majority of courts say the corpus delicti need not be established beyond reasonable doubt.<sup>9</sup> Some courts describe the necessary proof in terms of prima facie proof,<sup>10</sup> while a few demand greater proof.<sup>11</sup> There is a distinct tendency to insist upon stronger proof when the evidence is circumstantial, and in such cases the courts use terms such as proof which is convincing,<sup>12</sup> of such a nature as to exclude all uncertainty,<sup>13</sup> strong and cogent,<sup>14</sup> unequivocal proof compatible with the nature of the case,<sup>15</sup> beyond reasonable doubt.<sup>16</sup> Yet others state that circumstantial evidence is itself sufficient.<sup>17</sup> If any principle can be deduced from the numerous cases, it is that the strictness of the evidence requirement varies with the particular facts of each case.

The formal ingredients of the corpus delicti and the degree of proof necessary for their establishment are empty concepts in and of themselves. Their substance can only be noted by discerning how the courts have utilized them to promote justice.

*Corpus Delicti in the Absence of a Confession by Accused:* The courts

7. 1 WHARTON CRIMINAL EVIDENCE §348 (12th ed. 1932); see note 4 *supra*. Compare *Haney v. United States*, 108 F.2d 835 (10th Cir. 1940) with *Pines v. United States*, 123 F.2d 825 (8th Cir. 1941). The Tenth Circuit follows the third view while the Eighth expounds the second view.

8. In some crimes, such as treason and conspiracy, which consist of intention and are of a psychological nature, it is impossible to prove the existence of the crime without disclosing the identity of the perpetrator in the process of the proof. This has been called *delicta facti transeuntis*. When traces of the crime are present without any knowledge of the author, it is known as *delicta facti permanentis*. See *Case of Captain Green and His Crew*, 14 How. St. Tr. 1199, 1230 (1705).

9. *People v. Borrelli*, 392 Ill. 481, 64 N.E.2d 719 (1946) *cert. denied*, 328 U.S. 845 (1945); *Phillips v. State*, 196 Miss. 194, 16 So.2d 630 (1944); also see *People v. Rafe*, 382 Ill. 588, 48 N.E.2d 367 (1943) (stating that the quantum of proof must vary with the circumstances of each case).

10. *People v. Hart*, 46 Cal. Cr. App.2d 230, 115 P.2d 546 (1941); *People v. Van Scoyoc*, 25 Cal. Cr. App.2d 416, 77 P.2d 485 (1938).

11. *Wrisper v. State*, 193 Ga. 157, 17 S.E.2d 714 (1942); *State v. Kindle*, 71 Mont. 58, 277 Pac. 65 (1924).

12. *United States v. Di Orto*, 150 F.2d 938 (3d Cir. 1945); *United States v. De Mormand*, 149 F.2d 622 (2d Cir. 1945) *cert. denied*, 326 U.S. 758; *United States v. Adleman*, 107 F.2d 497 (2d Cir. 1939); *Petrovick v. United States*, 205 U.S. 86 (1906).

13. *State v. Sullivan*, 34 Idaho 68, 199 Pac. 647 (1921).

14. *State v. Williams*, 52 N. C. 446 (1860).

15. *Lee v. State*, 96 Fla. 59, 117 So. 699 (1928).

16. *Timmerman v. Territory*, 3 Wash. Terr. 445, 17 Pac. 624 (1888).

17. *Cooley v. State*, 233 Ala. 407, 171 So. 725 (1937).

seldom talk of corpus delicti in cases where there is no confession. Here, the corpus delicti will be substantiated by other evidence, since the knowledge of the existence of a crime must have come from sources apart from the accused. However, the proof of the corpus delicti is still a necessary part of the prosecution's case.<sup>18</sup> In the non-confession case the only difference between holding that the accused should be acquitted because the corpus delicti has not been proved rather than directing acquittal for failure to establish guilt beyond reasonable doubt appears to be in the stigma attaching to the accused. In the one case he is freed because he cannot be proved guilty of a crime, and in the other he is in an even better social position because no crime was proved. This seems too sophisticated a distinction to have substance.

It is difficult to escape the conclusion that, in cases where there is no confession, it adds little to speak of lack of proof of the corpus delicti rather than to consider its proof as but one part of the whole case which has not been established beyond reasonable doubt. In all cases, the inadequacy of the evidence is ultimately in the hands of the jury. Whereas the judge frequently can direct for the defendant when he believes the corpus delicti has not been established,<sup>19</sup> if he cannot or chooses not to do so, the jury still must believe the accused is guilty beyond reasonable doubt. This must include belief that a crime has in fact been committed.<sup>20</sup>

*Corpus Delicti and Extra-Judicial Confessions:* In early times, confessions were considered the weakest form of evidence.<sup>21</sup> Modern courts, due to the fear of false confessions,<sup>22</sup> still do not trust them. This distrust is manifested by a rule of law whereby the confession is believed untrustworthy until the corpus delicti has been established by evidence other than the confession.<sup>23</sup>

Such a rule does, of course, foster the policy of the original corpus delicti requirement, for if the confession alone were believed there would be a possibility of convicting a person of a crime which was never committed. On the other hand an innocent confessor to an *actual crime* would be convicted without violating the policy.<sup>24</sup> However, the courts claim protection is given by requiring a confession to be corroborated or authenticated before it is admitted.<sup>25</sup>

18. "The corpus delicti, or the fact that a crime has been committed is an important element entering into the trial of *every person* charged with the commission of a crime." (emphasis added) See 1 WHARTON, CRIMINAL LAW §346 (12th ed. 1932).

19. In California it is the duty of the judge to advise the jury that the corpus delicti has not been established, but he can only advise and not instruct. *People v. Ward*, 145 Cal. 736, 79 Pac. 448 (1905). In Oklahoma the judge must direct or it is reversible error. *Huffman v. State*, 6 Okla. Cr. Rep. 476, 119 Pac. 644 (1911). This appears to be the majority view.

20. 7 WIGMORE §2073.

21. 4 BL. COMM. 357.

22. See GROSS, CRIMINAL PSYCHOLOGY §8 (2d ed. 1905); WIGMORE, SCIENCE OF JUDICIAL PROOF §§273-7 (3d ed. 1937); HEALY, PATHOLOGICAL LYING, ACCUSATION AND SWINDLING (1st ed. 1915).

23. *State v. Benham*, 58 Ariz. 129, 118 P.2d 91 (1941); *Barnes v. State*, 199 Miss. 86, 23 S.2d 405 (1945); *Jenkins v. State*, 41 Miss. 582 (1867); *People v. Fitzgerald*, 288 N.Y. 58, 41 N.E. 2d 457 (1942).

24. This would be the result unless evidence tending to show who is the perpetrator was considered a proper part of the proof of the corpus delicti. However, this would be reducing the confession to mere cumulative evidence covering what already had been proven by evidence independent of the confession.

25. The need for corroborating confessions was noted even in early Roman law. An uncorroborated confession was held to be a *semiplena probatio* and could not be used to convict the defendant. See *United States v. Dache*, 250 F. 566 (2d Cir. 1918); *Forte v. United States*, 302 U.S. 220 (1937) (The confession must be corroborated and such corroboration is insufficient if it tends to merely support the confession without embracing

If the requirement of corroboration is to guarantee truthfulness, it could be of various types: (a) matters tending to authenticate the confession, (b) matters tending to show the confession was sincere, (c) matters tending to substantiate the confession with respect to (1) participation of the defendant without reference to the fact of a crime or (2) the fact of a crime without reference to the participation of the defendant. This last situation (c-2) is the only one where there is corroboration which tends to establish the corpus delicti. However, the innocent confessor is not protected by it as much when he confesses to an actual crime as he would be by other types of corroboration where his participation may be shown by evidence outside the confession or where the truthfulness of the confession is shown by facts which go beyond only establishing a crime.<sup>26</sup>

The majority of courts hold, then, that the corpus delicti cannot be established by the confession of the accused, and as a corollary, that the confession will not be admitted without independent corroboration by proof of the corpus delicti. A confession may only establish the guilt of the accused.<sup>27</sup> Such is the result in the use of the confession during the trial if the corroboration rule is strictly applied.

It is unquestionable that the law should punish only for crimes actually committed.<sup>28</sup> It seems further without doubt that the acceptance of an uncorroborated extra-judicial confession as sufficient in itself to establish the corpus delicti may result in allowing legal suicide. Nevertheless, does the policy requiring an independent establishment of the corpus delicti necessarily dictate that a confession may, in effect, only be used to evidence the guilt of the accused. It seems anomalous that an uncorroborated confession is too unreliable to establish the fact that a crime has been committed, and yet is acceptable to establish the participation of the accused once the corpus delicti has been proved. Apparently the anomaly is thought removed by the assumption that if the confession is corroborated to the extent that the corpus delicti is established, sufficient trustworthiness appears in the confession to give it efficacy in itself to prove the accused as the perpetrator. But since the pathological liar and the suicide are as likely to confess to an actual crime as to an imaginary one, and are as deserving of protection in either case, the above assumption appears unsubstantiated.

Many courts, while outwardly approving the corpus delicti corroboration rule, have made inroads into it. Some courts allow the confession in as evidence before the corpus delicti has been established.<sup>29</sup> They assert that the

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substantial evidence of the corpus delicti beyond reasonable doubt without the confession). But see *Pearlman v. United States*, 10 F.2d 460 (9th Cir. 1926); UNDERHILL, *CRIMINAL EVIDENCE* §36 (4th ed. 1935).

26. Judge Learned Hand has expressed doubt in the wisdom of the rule, "That the rule has in fact any substantial necessity in justice, we are much disposed to doubt . . . But we should not feel at liberty to disregard a principle so commonly accepted, merely because it seems to us that such evils as it corrects could be much more flexibly treated by the judge at the trial. . ." *Dache v. United States*, 250 F. 566, 571 (ed Cir. 1918).

27. The other two elements under the majority view, a loss or injury and a criminal act, agency, or cause, and the confession would be equated to any other evidence which would indicate no more than the identity of the accused.

28. It may be argued that punishment for a crime serves two purposes—to punish the guilty and to be a warning to others. However, if the corpus delicti has not been legally established but the public still believes there has been a crime committed, this second purpose would be served even if no actual crime had ever been committed.

29. *Floyd v. State*, 82 Ala. 16, 2 So. 683 (1887); *State v. Alcorn*, 7 Idaho 599, 64 Pac. 1014 (1901).

30. *Holland v. State*, 39 Fla. 178, 22 So. 298 (1897).