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Evidence

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PART II: PROCEDURAL LAW

EVIDENCE

by

David J. Beck*

DURING the past year numerous cases involving "no evidence" and "sufficiency of the evidence" issues were handed down by the appellate courts of Texas, as well as other decisions dealing with well established legal principles. The cases of greatest importance fall into several categories: (1) expert witnesses, (2) impeachment, (3) hearsay, (4) business records, (5) voluminous records, (6) judicial admissions, (7) parol evidence rule, (8) the dead man's statute, (9) presumptions and inferences, (10) judicial notice, and (11) attorneys' conduct at trial. This Article has been arranged into these substantive categories.

I. EXPERT WITNESSES

Competency. The competency of an expert witness is generally a matter to be determined within the sound discretion of the trial court¹ but two cases during the survey period indicated that there are limitations on that discretion. In *Simpson v. Glenn*² the basic liability issue was whether the defendant-physician had properly and adequately maintained the appropriate water and electrolyte balance in plaintiff's deceased wife during post-surgical care following a hysterectomy operation. During the trial plaintiff attempted to read into evidence the deposition testimony of Dr. Edward B. Grothaus, a prospective expert witness, relating to water and electrolyte balance. The trial court sustained defendant's objection to the proffered deposition, and plaintiff perfected his bill of exceptions.

Through plaintiff's bill of exceptions the record disclosed that the defendant-physician was a specialist in obstetrics and gynecology practicing in Amarillo, Texas. Dr. Grothaus, on the other hand, was a general surgeon who had practiced in California and Arizona. Defendant objected to the admissibility of the testimony because a proper predicate had not been laid. According to defendant, the plaintiff had not demonstrated that Dr. Grothaus was familiar either with standards of care of specialists in the field of obstetrics and gynecology or with the local standards which prevailed where the surgery and treatment occurred. Plaintiff's position was that the subject of the excluded testimony concerned all post-surgical care of patients who underwent serious operations and was not, therefore, a matter limited to obstetrics and gynecology.

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1. See, e.g., *Louis v. Parchman*, 493 S.W.2d 310 (Tex. Civ. App.—Fort Worth 1973, writ ref'd n.r.e.); *Texas & N.O.R.R. v. Pettit*, 290 S.W.2d 730 (Tex. Civ. App.—Beaumont 1956, writ ref'd n.r.e.). See generally 2 C. McCORMICK & R. RAY, TEXAS LAW OF EVIDENCE § 1401 (2d ed. 1956) [hereinafter cited as McCORMICK & RAY]. See also McCoid, *Opinion Evidence and Expert Witnesses*, 2 U.C.L.A. L. REV. 356, 362-63 (1955).

2. 537 S.W.2d 114 (Tex. Civ. App.—Amarillo 1976, writ ref'd n.r.e.).

In reversing the trial court the court of civil appeals first recognized the rule that, where a particular subject is common to and equally developed in all fields of practice, and the prospective medical expert witness has practical knowledge of what is usually and customarily done by a practitioner, the witness is competent to testify.³ The court then held that the facts concerning Dr. Grothaus' qualifications, experience, and history of practice were sufficient to qualify him as a competent witness to post-operative procedures. Since he was qualified and his testimony was contrary to that of other witnesses, it was reversible error to exclude such testimony in toto. The appellate court qualified its holding, however, by saying that the trial court could determine the admissibility of specific portions of his testimony within its sound discretion.

The second limitation placed on the discretion of the trial judge involved a case in which the court held it error to admit the testimony of a non-medical expert as to an employee's disability for performing any type of manual labor. In *Texaco, Inc. v. Romine*⁴ a discharged employee sued under his employer's total disability plan. At trial defendant complained of the omission of the testimony of an expert witness with a Ph.D. in management statistics who had testified about plaintiff's alleged total occupational disability at the time of his discharge. After testifying to his experience in labor management, evaluation of disability claims, service in the Civil Service Commission, and consulting work for a number of firms in the area of personnel, the expert witness gave his first opinion that, depending on the occupation, a percentage medical disability could constitute total occupational disability. The expert was then asked to express a second opinion on Romine's ability to do heavy manual work, and he responded by saying that the plaintiff was totally occupationally disabled from performing any such work. Although the court held that the non-medical expert's first opinion was within his professional field of expertise and was proper, his second opinion was held to constitute error because it permitted a non-medical expert to render a medical opinion. The court noted that the witness "though an expert in his own field, when it came to expressing a medical opinion . . . was no more qualified than the lowest lay witness on the totem pole."⁵ The court then stated that while a lay witness may testify as to a person's physical condition which he has observed, this expert's opinion as to this plaintiff's occupational disability was not based on matters he had observed but on information furnished him prior to trial.⁶

A medical expert, however, at times may be allowed to testify about certain character traits of a party he has examined. For example, in *Simon v. Watson*⁷ defendant complained of the admissibility of the testimony of a psychiatrist, who stated his opinion that the plaintiff was "honest." After discussing in

3. See, e.g., *Porter v. Puryear*, 153 Tex. 82, 262 S.W.2d 933 (1953), *rev'd on other grounds*, 264 S.W.2d 689 (Tex. 1954). For a recent discussion of the scope of an expert's testimony see Byrd & Stults, *Knowledge for Sale—The Dilemma of the Expert Witness*, 12 TRIAL 59 (1976).

4. 536 S.W.2d 253 (Tex. Civ. App.—El Paso 1976, writ ref'd n.r.e.).

5. *Id.* at 257.

6. The court reversed and rendered the decision of the trial court because the evidence did not support the jury submission of arbitrariness or bad faith of the employer, a finding which was necessary for plaintiff's recovery. *Id.* at 256.

7. 539 S.W.2d 951 (Tex. Civ. App.—Waco 1976, no writ).

detail the expert's testimony, the court concluded that there was no error in permitting a qualified psychiatrist to give his expert opinion on plaintiff's honesty during a professional examination.⁸

Proof Necessary to Raise Issue of Fact. Questions continue to arise relating to the quantum of expert proof necessary to raise a fact issue when the issue involves a medical diagnosis. To establish liability Texas courts require that the evidence demonstrate at least a reasonable probability that plaintiff's problems were caused by defendant's conduct.⁹ Although the proof necessary to establish a causal relation is easily stated, it is often difficult to determine whether a sufficient showing has been made to raise an issue of fact. The trier of fact is usually authorized to decide the issue of causation when: (1) general experience and common sense will enable a layman fairly to determine the causal relationship; (2) scientific principles, usually proved by expert testimony, establish a traceable chain of causation; or (3) a probable causal relationship is established by expert testimony.¹⁰

To determine whether a fact issue of causation is raised the trier of fact may follow more than one of these three approaches. For instance, in *Insurance Co. of North America v. Kneten*¹¹ evidence of the type described in both the first and third categories was considered. The court concluded that the jury could have decided the issue of causation either from expert testimony concerning a possible causal relationship or on the basis of general experience and common sense. In addition, the *Kneten* court ruled that "reasonable

8. This holding must be viewed in the context of the facts of the case. This case concerned an attempt by plaintiff to avoid the binding effect of a letter agreement and certain transfers of car titles in favor of the defendant on the theory that the plaintiff's assent to these agreements was secured by undue influence, fraud, and duress at the times the plaintiff signed these instruments.

The plaintiff sought to establish this theory of undue influence by the testimony of the psychiatrist, Dr. Holbrook, but the psychiatrist's testimony was challenged in so far as it involved the plaintiff's honesty in that this invaded the province of the jury. The court, however, properly drew the distinction between testimony concerning the patient's honest belief in the facts that she related to the doctor, and upon which he relied in concluding that her will had been overpowered by the defendant, and testimony as to whether the plaintiff was telling the truth at the trial:

In summary, Dr. Holbrook's testimony supports the jury's findings of undue influence, fraud, and duress at the times she signed the letter agreement and transfers of car titles. The doctor also testified that in his opinion she was truthful and honest with him in his evaluation of her and told him the truth 'as she understood it' during the examinations, and that he was concerned with whether she was honest with him in these examinations rather than whether she told the truth in this lawsuit.

Appellant's chief complaint about Dr. Holbrook's testimony is the part where-in he testified that in his opinion the plaintiff was being honest with him, for the stated reason that this invaded the province of the jury. We see no error in the admissibility of Dr. Holbrook's testimony, since as a qualified expert in psychiatric matters he had the right to give his expert opinion on plaintiff's honesty concerning the examinations. See *Carr v. Radkey*, (Tex. 1965) 393 S.W.2d 806.

539 S.W.2d at 959.

Thus, the court stated that in making the statement concerning the plaintiff's honesty, the psychiatrist spoke only to the patient's mental state for purposes of his diagnosis, citing the *Carr* case, and did not in the least degree speak to the plaintiff's truth and veracity at the time of trial which seemed clearly to be a question of fact, the resolution of which was clearly within the province of the jury. *Id.* Although the court did not mention whether the defendant requested a limiting instruction to this effect, the defendant would seem to be entitled to such an instruction.

9. See, e.g., *Insurance Co. of N. America v. Myers*, 411 S.W.2d 710 (Tex. 1966).

10. *Lenger v. Physician's Gen. Hosp., Inc.*, 455 S.W.2d 703 (Tex. 1970). See also Note, *Evidence—Medical Causation Requires a "Reasonable Probability" Standard of Proof Before Negligence Case May Reach a Texas Jury*, 3 TEX. TECH L. REV. 175 (1971).

11. 440 S.W.2d 52 (Tex. 1969).

medical probability" only relates to the quantum of evidence necessary to support an ultimate finding of fact and is not the standard by which a medical expert must testify.¹² Accordingly, *Kneten* agrees with the statement that "the context of a witness's testimony may demonstrate that when he said 'could have' he was using the phrase in the sense of 'probably did.'" ¹³

One case during the survey period, *Webb v. Jorns*,¹⁴ discussed the problem of admitting expert testimony based solely on opinions and medical possibilities and relied on the holdings in *Kneten* and *Lenger v. Physicians General Hospital, Inc.*¹⁵ In *Lenger* it was held to constitute error to refuse to allow an expert medical witness to testify concerning the possible causes of a physical malady of a patient who lived, whereas *Webb* extended this reasoning by holding that this same rule should be applied to one who died. The *Webb* court noted that expert testimony concerning possible causes of the condition in question will often assist the trier of fact in evaluating other evidence. The court reasoned that if the witness is permitted to state his opinion only in terms of medical probability, there would be no opportunity to decide the case on the substance rather than on the form of his testimony, and that the expert's testimony on the possible causes of the malady should be admitted into evidence. The court then followed the *Kneten* rule and concluded that "reasonable medical probability" relates only to a showing that must be made to support an ultimate issue of fact and not the standard by which the expert must testify.¹⁶

Types of Expert Opinion Held Admissible. The Texas Supreme Court in *Spindor v. Lo-Vaca Gathering Co.*¹⁷ maintained the policy in favor of admitting expert opinion evidence whenever that evidence assists the trier of fact to evaluate other evidence.¹⁸ In *Spindor* the expert witness for the condemnees, Mr. Turner, testified to the amount of lake damage that he had observed to be caused by the condemnation and to the estimated cost of restoring the lake to its prior condition. The trial court rendered judgment for the owners of the condemned land for damages to the remainder, but the court of civil appeals reversed the trial court's judgment solely on the admission of Turner's expert testimony to damages caused by the pipeline construction.¹⁹

The Texas Supreme Court disagreed, however, with the court of civil appeals. It first recognized that the factors to be considered in ascertaining damages in a condemnation action are those which would reasonably be given consideration in negotiations between a willing seller and willing buyer, and then reversed the decision of the court of civil appeals. According to the Texas Supreme Court an expert's estimate of the cost to restore property to

12. *Id.* at 54. See also *Otis Elevator Co. v. Wood*, 436 S.W.2d 324 (Tex. 1968), noted in 2 MCCORMICK & RAY, *supra* note 1, § 1262 n.89 (2d ed. Supp. 1975).

13. *Otis Elevator Co. v. Wood*, 436 S.W.2d 324, 332 (Tex. 1968).

14. 530 S.W.2d 847 (Tex. Civ. App.—Fort Worth 1975, writ ref'd n.r.e.).

15. 455 S.W.2d 703 (Tex. 1970).

16. 530 S.W.2d at 855.

17. 529 S.W.2d 63 (Tex. 1975).

18. 2 MCCORMICK & RAY, *supra* note 1, § 1400; see, e.g., *City of Kennedale v. City of Arlington*, 532 S.W.2d 668 (Tex. Civ. App.—Fort Worth 1976, writ ref'd n.r.e.) (expert demographer's opinion as to population held admissible). See also Ladd, *Expert and Other Opinion Testimony*, 40 MINN. L. REV. 437, 443 (1956).

19. 529 S.W.2d at 66.

its condition prior to condemnation is admissible to prove the probable diminution in fair market value of the remainder immediately after the taking, regardless of whether any actual damage occurs. In reinstating the judgment of the trial court the supreme court reasoned that it made little sense to say that an expert could testify as to restoration costs of a hypothetical filling of the lake with dirt but that it was reversible error if the expert testified to the estimated restoration costs after the lake had actually been filled with dirt.²⁰

II. IMPEACHMENT

Prior Inconsistent Statements. When a witness's prior statements and present testimony are contradictory courts have long recognized that a party may use such inconsistent statements for impeachment purposes.²¹ Thus, in personal injury suits the plaintiff is usually subject to cross-examination regarding previous injuries, claims, and actions to show that the injuries arose from prior or subsequent incidents,²² and the defendant may introduce evidence of prior claims when such evidence is inconsistent with plaintiff's present contentions.²³

The recent workmen's compensation case of *Commercial Standard & Marine Co. v. Murphy*²⁴ illustrates the interrelationship between these principles. There, defendant insurance company contended on appeal that the trial court erred in excluding certain evidence of prior inconsistent statements made by plaintiff. Defendant contended, among other things, that plaintiff's incapacity was caused solely by a pre-existing compensable injury or congenital defect in his back, and alternatively, that a prior compensable injury contributed to any incapacity suffered by plaintiff. In order either to impeach plaintiff's testimony with prior inconsistent statements or to force an admission defendant attempted to introduce, out of the jury's presence, plaintiff's petition, deposition testimony, and answers to written interrogatories in another lawsuit arising out of a prior injury.²⁵

Though the pleadings in both suits were virtually identical, the trial court excluded all such evidence. But after defendant made his bill of exceptions, plaintiff admitted before the jury that he made the prior inconsistent statements. Noting that the trial court initially erred in not admitting the evidence, the court of civil appeals held that the error was not reversible because plaintiff subsequently "admitted the particulars which Commercial, the defendant, sought to impeach by introduction of prior inconsistent statements."²⁶ The court reasoned that before a party has a right to introduce a

20. *Id.* at 65. Similarly, in *City of Beaumont v. Kinard*, 533 S.W.2d 481, 483-84 (Tex. Civ. App.—Beaumont 1976, writ ref'd n.r.e.), the court held that the trial court did not err in allowing a witness to testify to the cost of renovation work necessary to restore the remainder of a piece of condemned property to its highest and best use.

21. 1 MCCORMICK & RAY, *supra* note 1, § 687.

22. *See, e.g.,* *Robertson v. Southwestern Bell Tel. Co.*, 403 S.W.2d 459 (Tex. Civ. App.—Tyler 1966, no writ).

23. *St. Paul Fire & Marine Ins. Co. v. Murphree*, 163 Tex. 534, 357 S.W.2d 744 (1962); *Bonham v. Baldeschwiler*, 533 S.W.2d 144 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.).

24. 537 S.W.2d 497 (Tex. Civ. App.—Houston [14th Dist.] 1976, no writ).

25. *Id.* at 498.

26. *Id.* at 499.

prior inconsistent statement a party must establish that an inconsistency exists between the witness's testimony at trial and his prior statement. Therefore, where the witness admits his prior inconsistent statement, there is no longer any testimony to impeach by the introduction of prior inconsistent statements.²⁷

In *Thomas v. International Insurance Co.*,²⁸ another workmen's compensation case, plaintiff sought to impeach the insurer's changed answers to an interrogatory and a request for admission by showing its prior answers. The situation arose because defendant moved the court during the trial to permit it to file amended answers. Defendant's attorney stated that he did not learn the true facts until the night before he made the request. In order to verify to the court that the changed answers were the correct answers, he indicated that he would call a certain witness. Although that witness never appeared to testify, the trial court permitted defendant to change the answers and ordered plaintiff's counsel not to mention or intimate to the jury that the answers had been changed.²⁹

By bill of exception plaintiff established that the signatory of the amended answers changed the answers upon the request of defendant's counsel "because counsel told him the answers should be changed, based upon 'the file information.'" ³⁰ Defendant argued that he had a right under rule 168 of the Texas Rules of Civil Procedure³¹ to make such a change. In reversing the trial court the court of civil appeals held:

[A]ssuming without deciding that the trial court's permission to change the answers was a proper exercise of judicial discretion, it was error for the trial court to forbid the plaintiff from offering evidence to explain to the jury the reasons behind the changed answers. The plaintiff should have been permitted to impeach the defendant's changed answers by a showing of the former answers, as well as the purported basis for changing the answers, just as impeachment would be proper for any other prior inconsistent statement.³²

Abandoned pleadings may also contain statements capable of being used for impeachment purposes if they are inconsistent with a party's trial position or if they constitute an admission against interest. For example, in *Texaco, Inc. v. Pursley*³³ plaintiff brought suit to recover damages for injuries sustained when a filter unit fell on his leg in a warehouse. Pursley went to trial on

27. For problems confronted when an attorney attempts to impeach his own witnesses see Graham, *Examination of a Party's Own Witness Under the Federal Rules of Evidence: A Promise Unfulfilled*, 54 TEXAS L. REV. 917 (1976).

28. 527 S.W.2d 813 (Tex. Civ. App.—Waco 1975, writ ref'd n.r.e.).

29. *Id.* at 819. The change in the answer to the interrogatory and request for admission was that defendant did *not* request an examination of plaintiff by a certain physician. Defendant's initial response had been "yes."

30. *Id.*

31. TEX. R. CIV. P. 168 provides:

A party whose answers to interrogatories were complete when made is under no duty to supplement his answers to include information thereafter acquired, except as follows: (1) a party is under a duty seasonably to amend his answer if he obtains information upon the basis of which (a) he knows that the answer was incorrect when made, or (b) he knows that the answer though correct when made is no longer true and the circumstances are such that a failure to amend the answer is in substance a knowing concealment

32. 527 S.W.2d at 820.

33. 527 S.W.2d 236 (Tex. Civ. App.—Eastland 1975, writ ref'd n.r.e.).

his first amended petition and alleged only that Texaco and Davis, an independent contractor, were guilty of negligence that proximately caused his injuries. Texaco offered into evidence the abandoned original petition of Pursley wherein he alleged specific acts of negligence against Texaco and three other defendants on the theory that it was inconsistent with Pursley's position at the time of trial. The trial court refused to admit the abandoned pleading and Texaco appealed following judgment for plaintiff.

On appeal Texaco relied on *Long v. Knox*,³⁴ which holds that an admission against interest in an abandoned pleading may be used in evidence against the pleader, to support its contention that the trial court erred in refusing to permit it to introduce Pursley's abandoned original petition. The court disagreed, however, because Texaco's bill of exception only revealed that Pursley had settled with two of the defendants not named as parties in his amended petition. Therefore, in affirming the trial court's refusal to admit into evidence the fact of their present omission, the court of civil appeals held that since Pursley did not testify to anything inconsistent with his original petition, and that because Pursley's original petition was not inconsistent with his trial pleadings, the abandoned pleading contained no admission against interest.³⁵ The court also held that evidence that two of the defendants had been dismissed from the lawsuit on plaintiff's motion because he had settled with them and had entered into a covenant not to sue was properly excluded.³⁶

Use of Books, Journals, and Articles. The extent to which an expert may be cross-examined and impeached with the use of treatises and other texts was discussed in two decisions by Texas courts during the past year. In *Simms v. Southwest Texas Methodist Hospital*³⁷ plaintiff complained that it was error to exclude medical journals published subsequent to the time she underwent her operation for removal of a cyst. She argued that the medical journals were admissible for impeachment purposes and to establish producing cause. The court first cited the well-established rule that an expert witness may properly be cross-examined for impeachment purposes by reading to him excerpts from treatises, books, and scientific journals and asking him whether he agrees or disagrees with such a statement contained in the writings. According to the leading case of *Bowles v. Bourden*,³⁸ however, this use of treatises,

34. 155 Tex. 581, 291 S.W.2d 292 (1956); see 11 Sw. L.J. 96 (1957).

35. 527 S.W.2d at 240.

36. *Id.*

37. 535 S.W.2d 192 (Tex. Civ. App.—San Antonio 1976, writ ref'd n.r.e.).

38. 148 Tex. 1, 219 S.W.2d 779 (1949). See generally 1 MCCORMICK & RAY, *supra* note 1, § 790 n.56. The supreme court in *Bowles* made the classic statement of the rule as follows:

When a doctor testifies as an expert relative to injuries or diseases he may be asked to identify a given work as a standard authority on the subject involved; and if he so recognizes it, excerpts therefrom may be read not as original evidence but solely to discredit his testimony or to test its weight. . . . The reasons for this 'usual rule, are because of the unsettled condition of the sciences themselves; because the language employed is technical, and hence not within the understanding of men of common experience; because of the difficulty of determining what books are or are not of good and established authority; because such books are written without the sanction of an oath, and the authors are not liable to cross-examination; and lastly, because such books are but hearsay evidence of matters about which a living witness could be called to testify.' 32 C.J.S., Evidence, § 718, p. 627.

148 Tex. at 5, 219 S.W.2d at 783.

books, and journals is limited to publications which the witness recognizes as authoritative and has relied upon in the practice of his profession. Furthermore, there is the added requirement that the medical expert must have testified to the contrary of what is written in the book before this use of treatises, books, and journals is permitted. The plaintiff in *Simms* did not meet these requirements.³⁹

The *Simms* court also determined that the reading of such an excerpt was inadmissible as original evidence to establish the existence of the fact affirmed in the publication because the statements violated the hearsay rule. Moreover, *Simms* held that even if the evidence were admissible solely for impeachment purposes, the trial court's exclusionary ruling was proper since plaintiffs also sought to introduce the testimony to establish producing cause, an impermissible purpose.⁴⁰

The plaintiff in the other case, *Webb v. Jorns*,⁴¹ argued that it was permissible to use medical texts during cross-examination if the witness merely recognized the text as authoritative in the field although he had not relied upon it. The court, however, rejected this argument and rebuked the plaintiffs for citing as authority for their position "what the text authors seem to feel the rule should be rather than what it is generally acknowledged to be."⁴² Rather, the true rule, according to *Webb*, is still the *Bowles* rule. Therefore, unless a medical expert concedes that a particular author or book is an "authority," the court should prohibit cross-examination of those experts through the reading of excerpts from those alleged authorities. Notably, this kind of impeachment evidence, in itself, never attains the stature of original evidence nor can it support a judgment or issue.⁴³

Offenses Involving Moral Turpitude. Since the leading decision of *Compton v. Jay*⁴⁴ evidence of prior misdemeanor and felony offenses is not admissible in civil cases unless the earlier convictions were for crimes involving moral turpitude. One decision during the past year tested the applicability of this standard to drug-related offenses. After the trial court in *Minter v. Joplin*⁴⁵ entered judgment on a jury verdict in favor of the defendant-father in an action seeking to hold him liable for negligent entrustment of an automobile to his defendant-son, plaintiff asserted on appeal that the trial court committed reversible error in excluding evidence of the son's use of marijuana and in excluding evidence of narcotic paraphernalia found in the car. Plaintiff's first contention was that the excluded testimony was relevant to the question of the father's negligence in entrusting the car to his son. The trial court, however, determined that such evidence was not relevant to the issues concerning whether the father owned the car or whether he gave the son

39. 535 S.W.2d at 199.

40. *Id.*

41. 530 S.W.2d 847 (Tex. Civ. App.—Fort Worth 1975, writ ref'd n.r.e.).

42. *Id.* at 857.

43. *Bowles v. Bourdon*, 148 Tex. 1, 219 S.W.2d 779 (1949).

44. 389 S.W.2d 639 (Tex. 1965); see Note, *Proof of Conviction to Impeach Credibility of Witness in Civil Trial Is Admissible Only if Crime Is One of Moral Turpitude*, 3 HOUS. L. REV. 247 (1965); Note, *Admission of Evidence*, 43 TEXAS L. REV. 1106 (1965).

45. 535 S.W.2d 737 (Tex. Civ. App.—Amarillo 1976, no writ).

permission to drive it. Any evidence concerning marijuana might have related to the issues inquiring if the son was a reckless and incompetent driver and if the father should have known this fact, but since the jury did not reach those issues any error was held to be harmless.⁴⁶

The *Joplin* plaintiff also contended that the evidence of a pending criminal charge against the defendant-son for possession of narcotic paraphernalia should have been admitted on the question of the son's credibility as a witness.⁴⁷ The court concluded that the possession of narcotic paraphernalia is not an offense involving moral turpitude, applied the rule set forth in *Compton v. Jay*,⁴⁸ and stated that "it was not disposed to relax the accepted rule so as to admit evidence which might have a highly prejudicial effect, although it would have little or no logical bearing on the issue of credibility."⁴⁹

III. HEARSAY

In *Zurich Insurance Co. v. Wieggers*,⁵⁰ a venue case, the hearsay rule was held to be inapplicable because the utterance in question fell within the operative fact exception. The question arose when plaintiff sued Reliance Insurance Company, the liability insurer of a station wagon owner, to determine whether the owner's policy covered the accident in question. Alternatively, plaintiff sought to recover from Zurich Insurance Company, his own insurer, under an uninsured motorist endorsement to his policy. The trial court overruled Zurich's plea of privilege and Zurich appealed.

In order to establish venue against Zurich, the plaintiff, Wieggers, had to prove that Lopez was driving an "uninsured automobile" at the time of the collision. Since an "uninsured automobile" was defined in the policy to include an automobile for which there was a policy but for which the company had denied coverage, the issue of whether Reliance had denied coverage under its liability policy was a material issue at the venue hearing. Zurich argued that the only evidence in the record which showed that Reliance denied coverage was the statement by plaintiff's attorney that the attorney for Reliance had denied that coverage existed because the driver allegedly lacked permission to operate the car at the time of the collision. Zurich argued that this testimony by plaintiff's attorney was, therefore, inadmissible as hearsay because it was an extra-judicial statement offered for the purpose of showing the truth of the fact asserted—that Reliance denied coverage. The court of civil appeals rejected Zurich's contention and stated: "The testimony was properly received because the utterance of the words had legal significance without regard to its truth or falsity."⁵¹ The court apparently failed to grasp the real significance of defendant's objection to the statement by plaintiff's attorney. Granted, certain out-of-court statements, when they constitute a

46. *Id.* at 739.

47. See 1 MCCORMICK & RAY, *supra* note 1, § 660.

48. See note 44 *supra* and accompanying text. A witness may also be impeached when he is only charged with an offense involving moral turpitude provided that he admits his guilt. See *Compton v. Jay*, 389 S.W.2d 639, 641 (Tex. 1965).

49. 535 S.W.2d at 739.

50. 527 S.W.2d 511 (Tex. Civ. App.—Austin 1975, no writ).

51. *Id.* at 516. See generally 6 WIGMORE ON EVIDENCE § 1770 (3d ed. 1940).

necessary part of a cause of action,⁵² form an exception to the general hearsay exclusion and are admissible without regard to their truth or falsity. In such instances the words are not introduced for the truth of the matter asserted, but rather to show the mere utterance of the words themselves because their utterance constitutes the fact to be proved.⁵³ Here it was not the mere statement by Reliance's attorney that was critical to plaintiff's cause of action. Rather, it was the truth or falsity of that statement, and for this reason the holding in *Wieggers* is questionable. If the plaintiff failed to prove that Reliance denied coverage by competent evidence, then plaintiff failed to prove an essential element of his cause of action. An out-of-court statement by Reliance's attorney not introduced for the truth of the statement falls short of satisfying plaintiff's burden of proof on the question of the truth of the denial of that element.⁵⁴

IV. BUSINESS RECORDS—EXCEPTION TO THE HEARSAY RULE

Statutory Requisites. Several cases during the survey period discussed the predicate necessary to satisfy the "business records" exception to the hearsay rule.⁵⁵ The cases generally broadened the scope of the exception. For

52. Professors McCormick and Ray explain the operative fact exception to the hearsay rule as follows:

The utterance or writing of the words is itself the fact to be proved, and if evidence of such utterance or writing be given by one who testifies to it as a matter of personal knowledge, it is obviously not hearsay.

. . . . The very question involved in the suit is: were those words *used*? To answer this question the evidence is offered, and the question, Were they true? does not arise.

1 MCCORMICK & RAY, *supra* note 1, § 795, at 585, 587.

53. *Id.* § 795.

54. Professor Wigmore states:

Where the utterance of specific words is itself a part of the details of the issue under the substantive law and the pleadings, their utterance may be proved without violation of the Hearsay rule, *because they are not offered to evidence the truth of the matter that may be asserted therein.*

6 WIGMORE, *supra* note 51, § 1770.

55. TEX. REV. CIV. STAT. ANN. art. 3737e (Vernon Supp. 1976-77). The statutory exception to the hearsay rule provides:

Competence of record as evidence

Section 1. A memorandum or record of an act, event or condition shall, insofar as relevant, be competent evidence of the occurrence of the act or event or the existence of the condition if the judge finds that:

- (a) It was made in the regular course of business;
- (b) It was the regular course of that business for an employee or representative of such business with personal knowledge of such act, event or condition to make such memorandum or record or to transmit information thereof to be included in such memorandum or record;
- (c) It was made at or near the time of the act, event or condition or reasonably soon thereafter.

Proof of identity and mode of preparation; lack of personal knowledge

Sec. 2. The identity and mode of preparation of the memorandum or record in accordance with the provisions of paragraph one (1) may be proved by the testimony of the entrant, custodian or other qualified witness even though he may not have personal knowledge as to the various items or contents of such memorandum or record. Such lack of personal knowledge may be shown to affect the weight and credibility of the memorandum or record but shall not affect its admissibility.

Sec. 4. 'Business' as used in this Act includes any and every kind of regular organized activity whether conducted for profit or not.

example, delivery tickets signed by defendant's employees within one to two days after delivery of the material were held to be timely prepared so as to satisfy the "reasonably soon thereafter" provision contained in article 3737e, section 1(c).⁵⁶

*Kaufman Northwest, Inc. v. Bi-Stone Fuel Co.*⁵⁷ also construed article 3737e broadly. In *Kaufman* defendant contended in a condemnation proceeding that the trial court erred in admitting evidence of an aerial photograph of the defendant's tract of land with notations denoting the types of soils existing on the tract. Plaintiffs offered the exhibit prepared by the U.S. Department of Agriculture, Soil Conservation Service as a business record under article 3737e. Defendant's sole objection was that a proper predicate was not laid for its submission as a business record. The court of civil appeals held that, since the statute defined a "business" to include "any and every kind of regular organized activity whether conducted for profit or not," the Soil Conservation Service was a business within the meaning of section 4 of article 3737e. The evidence indicated that the Soil Conservation Service keeps and maintains aerial maps of the entire county and that such records were within the custody and control of the witness who testified that soil notations were regularly made and kept by the Service and regularly used by employees in developing conservation plans, and that such records were kept in the regular course of the business of the Service. The witness also testified that the map was made soon after the time the soil scientist investigated and soil-tested defendant's land. The court concluded that this evidence was sufficient to establish a proper predicate and held that, in any event, the exhibit was admissible under article 3737a⁵⁸ which permits a written instrument permitted or required to be kept by law by an officer or clerk of the United States to be admissible.⁵⁹

Another case increased the burden necessary to overturn the trial judge's ruling on a "business record." In *Rio Grande Oil Co. v. State*⁶⁰ an action was brought to restrain defendants from selling unregistered securities in the form of fractional interests in oil and gas leases. Defendants appealed from an order granting a temporary injunction and appointing a temporary receiver for their assets. In support of their contention that the trial court abused its discretion in issuing the temporary injunction, defendants asserted that the trial court erred in admitting into evidence copies of the minutes of a board of

56. *Miller v. Patterson*, 537 S.W.2d 360 (Tex. Civ. App.—Fort Worth 1976, no writ). See generally Comment, *The Admissibility of Computer Printouts Under the Business Record Exception in Texas*, 12 So. TEX. L.J. 291 (1971); Note, *Article 3737e—What Is a Business?*, 26 BAYLOR L. REV. 700 (1974).

57. 529 S.W.2d 281 (Tex. Civ. App.—Tyler 1975, writ ref'd n.r.e.).

58. TEX. REV. CIV. STAT. ANN. art. 3737a (Vernon Supp. 1976-77).

59. In *Airline Commerce Bank v. Commercial Credit Corp.*, 531 S.W.2d 171 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.), another case decided within the past year, it was held that, since certificates of tax assessment are federal records, in order for copies to be properly admitted under article 3737a, they would have to be attested to by the legal custodian and accompanied by a certificate required in the statute. Because these requisites were not satisfied, the tax assessments were held to be inadmissible. The error in admitting the records was not held to be reversible error, however, because the notices of tax liens were sufficient evidence to support the trial court's finding that the United States had a valid tax lien and assessments in the amounts reflected in the record.

60. 539 S.W.2d 917 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ).

directors' meeting and of the first meeting of shareholders of Rio Grande Oil Company. Defendants' objection was that the instruments constituted hearsay because they were not authenticated business records. The supervising examiner of the State Securities Board testified that he had served an administrative subpoena on Rio Grande Oil Company calling for its books, records, and corporate minutes and that the two documents objected to had been obtained in response to the subpoena. The trial court admitted the exhibits for the limited purpose of showing that in response to a subpoena these instruments were given by the persons named. On appeal the state contended that the documents were admissible as an admission against interest since the exhibits were inconsistent with defendants' general denial. The court of civil appeals held not only that the identification of the documents was sufficient authentication but that "the error, if any, in admitting them for the limited purpose stated has not been shown to be harmful."⁶¹

Medical Diagnoses. Problems involving medical opinions and diagnoses contained in medical records continue to plague our courts. Justice Pope, in his concurring opinion in the landmark decision of *Loper v. Andrews*,⁶² highlighted the difficulties presented in determining whether a diagnosis or opinion is conjectural⁶³ and prompted one commentator to suggest that perhaps the best approach to solving these problems would be to require the opposing party to prove that the diagnosis was controverted before it could be excluded.⁶⁴ One court of civil appeals moved toward this position in *Thomas v. International Insurance Co.*,⁶⁵ one of the most recent cases to apply the *Loper* standard to medical records.

The plaintiff in *Thomas* brought suit to recover workmen's compensation benefits for an injury allegedly sustained while working on an assembly line in a slaughterhouse. On the basis of the jury's findings, the trial court entered judgment for plaintiff in the amount of \$240.25, and he appealed.⁶⁶ Plaintiff complained that the trial court erred in admitting into evidence hospital

61. *Id.* at 923.

62. 404 S.W.2d 300 (Tex. 1966).

63. Justice Pope stated:

The majority, in holding that opinion testimony should be excluded, has announced a new exclusionary rule with respect to medical opinions. The Court treats expert medical opinion as speculation or conjecture in spite of medical evidence to the contrary. The majority says that because there was a dispute between the doctors who examined the injured boy, the diagnostic entries 'necessarily rest largely in expert opinion, speculation or conjecture.'

When a doctor gives his expert opinion about medical causes, lawyers and judges, who are not medical experts, are bold indeed to say that the evidence is mere conjecture or speculation. . . .

. . . The Court in this case, and apparently for the future, has committed itself as an overseeing expert to pass upon medical conditions, diseases, treatments, prognoses, and to announce to both the medical and legal professions, which medical opinions are sound and which are conjectural. I would leave this to the doctors.

Id. at 307 (Pope, J., concurring).

64. Elliott, *Evidence, Annual Survey of Texas Law*, 27 Sw. L.J. 158 (1973).

65. 527 S.W.2d 813 (Tex. Civ. App.—Waco 1975, writ ref'd n.r.e.).

66. The court of civil appeals held that the jury's findings to the effect that plaintiff sustained no total and no partial incapacity following injury to his back was so against the great weight and preponderance of the evidence as to be manifestly unjust. *Id.* at 815. Since the case was going to be retried, the court addressed itself to certain assignments of error complained of by plaintiff.

records containing certain medical opinions and conclusions. Plaintiff also objected that the opinions and conclusions contained in the records were contradictory and controversial on their face and were not based upon reasonable medical probability. The court sustained this point of error and held that many of the entries contained in the hospital records "were manifestly not based upon reasonable medical probability,"⁶⁷ citing examples of the contradictory nature of the records.⁶⁸ The court relied on *Loper* to hold that diagnostic entries in hospital records are not competent evidence of the condition they describe where the condition is genuinely disputed and necessarily rests on an expert opinion based largely on speculation or conjecture.⁶⁹

Another recent case which applied the *Loper* standard is *Reed v. Aetna Casualty & Surety Co.*⁷⁰ in which a plaintiff sued to recover workmen's compensation benefits for an injury allegedly sustained when she fell while attempting to open a door and an umbrella at the same time. After judgment was entered for defendant, plaintiff contended on appeal that the trial court erred in admitting the medical records of the doctor under the Business Records Act.⁷¹ Specifically, plaintiff objected to the doctor's notations and opinions reflected in the records because they allegedly constituted hearsay, were expressions of opinion, and denied her the opportunity of cross-examination. The court of civil appeals, upon noting the absence of any substantial dispute among the diagnoses of the various doctors who testified in the case, held that the medical records were properly admissible because "the diagnosis records a condition resting in reasonable medical certainty."⁷²

The difficulty in applying the *Loper* standard is aptly illustrated by Justice Dies' dissent in *Reed*. He believed that the doctor's diagnosis of "myositis," "cervical arthritis," and "bursitis" were not conditions resting in reasonable certainty. In addition, Justice Dies argued that for policy reasons the *Loper* decision should be strictly interpreted to protect a litigant's right to cross-examination at trial. Therefore, he would have remanded the case for a new trial in order to develop more fully the expert testimony in question.⁷³

V. VOLUMINOUS RECORDS

In litigation involving voluminous records, the introduction of summaries of those documents is common despite the hearsay exclusion and the best evidence rule, two seemingly valid objections. The hearsay objection to the introduction of the underlying records is overcome by laying a proper predicate under article 3737e,⁷⁴ and the best evidence rule, while theoretically precluding the introduction of secondary evidence of such records, is relaxed

67. *Id* at 817.

68. In one instance a physician reached a diagnosis of "early stage of congestive heart failure," while another summary concluded that there were "no signs of congestive heart failure." Another example was an opinion that plaintiff had brucellosis, whereas another opinion entry recited that he did not have brucellosis.

69. See generally 2 MCCORMICK & RAY, *supra* note 1, § 1262.

70. 535 S.W.2d 377 (Tex. Civ. App.—Beaumont 1976, writ ref'd n.r.e.).

71. See note 55 *supra*.

72. The court in *Reed* relied for its holding on *Otis Elevator Co. v. Wood*, 436 S.W.2d 324 (Tex. 1968), and *Loper v. Andrews*, 404 S.W.2d 300 (Tex. 1966).

73. 535 S.W.2d at 380.

74. See note 55 *supra*; *Jackson v. Fontaine's Clinics, Inc.*, 499 S.W.2d 87, 90 (Tex. 1973).

in this instance to permit summaries of voluminous records as long as the underlying records themselves are admissible.⁷⁵ Yet the problems raised by the introduction of a summary of voluminous records and the application of the best evidence rule again reached the Texas Supreme Court in *Black Lake Pipeline Co. v. Union Construction Co.*,⁷⁶ in which the court reaffirmed the rule that before such secondary evidence is admissible the introducing party must show that the underlying records were (1) voluminous, (2) accessible to the opposing party, and (3) admissible.⁷⁷ Since in *Black Lake* the plaintiff never identified, described, or showed the underlying records to be admissible, it was error to admit them in summary form. As the summary was the only proof of damages presented by plaintiff, the evidence could not support the decision of the lower court and plaintiff's judgment was reversed.⁷⁸

VI. JUDICIAL ADMISSIONS

A "judicial admission" has long been defined in Texas as a deliberate, clear, and unequivocal formal act done in the course of a judicial proceeding which amounts to a waiver of proof by the opposing party and binds the declarant to an essential contrary fact embraced in his theory of recovery or defense.⁷⁹ Several cases discussed the differences between judicial admissions and mere admissions against interest.

In *Esteve Cotton Co. v. Hancock*⁸⁰ the assignee of a buyer of a cotton purchase contract sued the seller to recover the extra cost of the cotton purchased elsewhere because of the seller's failure to deliver the cotton called for by the contract. Plaintiff alleged that the defendant's testimony concerning his impression, understanding, and assumptions, together with his act of delivering thirty-two bales of cotton under contract, constituted a judicial admission conclusive on the defendant's theory. The court rejected this assertion and held that such conduct by the defendant amounted to no more than an extra-judicial admission⁸¹ which was not conclusive against him. The court's rationale was that nowhere in the record did the defendant unequivocally admit that he believed the contract covered all of his cotton or that he believed he had an obligation to deliver additional cotton of like quality for the same contract price. Therefore, defendant's informal statements about his delivery of cotton to plaintiff, made incidentally in the course of judicial proceedings and which were inconsistent with his position at trial, merely formed a part of the evidence, and their weight and probative force were matters for the trier of fact.⁸²

75. 2 MCCORMICK & RAY, *supra* note 1, § 1566. The question of whether the opposing party has had an adequate opportunity to examine the underlying records is a matter left to the discretion of the court.

76. 538 S.W.2d 80 (Tex. 1976).

77. *Id.* at 93.

78. *Id.* at 94.

79. *See, e.g.*, Griffin v. Superior Ins. Co., 161 Tex. 195, 338 S.W.2d 415 (1960). *See generally* 2 MCCORMICK & RAY, *supra* note 1, § 1127. The formal acts include facts admitted in pleadings, stipulations, or testimony.

80. 539 S.W.2d 145 (Tex. Civ. App.—Amarillo 1976, no writ).

81. An "extra-judicial admission" is one which, although admitted into evidence, is not conclusive. 2 MCCORMICK & RAY, *supra* note 1, § 1127. Testimonial declarations of a party normally will not be given the effect of a "judicial admission" if they merely contradict other portions of his testimony. Stafford v. Wilkinson, 157 Tex. 483, 304 S.W.2d 364 (1957).

82. 539 S.W.2d at 157.

In *Worley Hospital, Inc. v. Caldwell*,⁸³ a medical malpractice suit, the jury returned a verdict for the plaintiff against the hospital but not against the surgeon-defendant. The court of civil appeals affirmed the judgment against the hospital and reversed and rendered that portion of the judgment denying recovery against the doctor on the theory that the nurses were agents of both the doctor and the hospital. Yet, in deciding an evidentiary question the court held that the trial judge properly excluded the doctor's statement to the nurse, "Mrs. Holland, we are in trouble," after he had informed her that a sponge had been left in plaintiff's abdomen. Such a statement is inadmissible as a conclusion of liability under the rules set forth in *Isaacs v. Plains Transport Co.*⁸⁴ Therefore, if a statement represents pure conclusions and opinions and is not offered for purposes of impeachment, then that statement is inadmissible even if made immediately after the incident in question.

VII. PAROL EVIDENCE RULE

Several Texas cases during the past year followed the well-established rule that in the absence of fraud, accident, or mutual mistake parol evidence is not admissible,⁸⁵ especially where a written agreement recites that it contains the entire agreement between the parties.⁸⁶ Nevertheless, the rule has several notable exceptions: parol evidence has been held to be admissible to establish the intent of the parties where the terms of a contract were ambiguous,⁸⁷ and

83. 529 S.W.2d 639 (Tex. Civ. App.—Amarillo 1975, writ granted). [Editor's Note: Since this Article was written the Texas Supreme Court reversed the Amarillo court of civil appeals. The supreme court affirmed the trial court's verdict that the plaintiff recover from the hospital. *Sparger v. Worley Hosp., Inc.*, 20 Tex. Sup. Ct. J. 143 (Jan. 12, 1977).]

84. 367 S.W.2d 152 (Tex. 1963). In *Isaacs*, where it was held that the testimony of the driver of defendant's truck that he was "at fault" and that he could have avoided the accident if he had been three feet farther back, was not admissible, it is important to note that the Texas Supreme Court's rationale was that the statements of the witness were merely his conclusion and his opinion and "were not offered for impeachment." *Id.* at 153 (emphasis added). Similarly, in *Lincoln Liberty Life Ins. Co. v. Goodman*, 535 S.W.2d 7, 11 (Tex. Civ. App.—Amarillo 1976, writ ref'd n.r.e.), which involved an insurance policy exclusion coverage question, it was held that the trial court properly excluded a letter by the insurance company claims manager, construing the legal effect of the language of a clause, on the ground that "[c]onclusions of law are not admissible as admissions by a party."

85. For an exhaustive discussion of the parol evidence rule see 9 WIGMORE, *supra* note 51, §§ 2400-2597. It is interesting to note that Professor Wigmore does not view the parol evidence rule as a rule of evidence at all, but rather a principle which declares certain kinds of fact ineffective in the substantive law and therefore inadmissible regardless of its reliability or probative value:

(1) First and foremost, *the rule is in no sense a rule of Evidence*, but a rule of Substantive Law. It does not exclude certain data because they are for one or another reason untrustworthy or undesirable means of evidencing some fact to be proved. It does not concern a probative mental process,—the process of believing one fact on the faith of another. What the rule does is to declare that certain kinds of fact are legally ineffective in the substantive law; and this of course (like any other ruling of substantive law) results in forbidding the fact to be proved at all

.....

Let us dismiss, then, once and for all, any notion that the Parol Evidence rule, in any of its aspects, is concerned with any precautions or limitations based on probative value, or indeed with any regulation of evidence in the legitimate sense of that word. This must be the first step to a clear understanding of the working of the rule.

Id. § 2400, at 3-4.

86. *Austin Shoe Stores v. Elizabeth Co.*, 538 S.W.2d 677 (Tex. Civ. App.—Waco 1976, no writ).

87. *Esteve Cotton Co. v. Hancock*, 539 S.W.2d 145 (Tex. Civ. App.—Amarillo 1976, no writ).

to establish the conditional delivery of a written instrument when the condition was a condition precedent to the formation of a contract.⁸⁸ Moreover, where the written instrument was a unilateral memorandum neither endorsed nor delivered, oral testimony concerning an oral agreement to pay interest in the amount borrower deposited as collateral was held to be admissible.⁸⁹

While words, not the punctuation, are the controlling guide in construing a contract, punctuation may be resorted to in order to solve an ambiguity and to give the contract a certain or definite legal meaning or interpretation and exclude conflicting parol evidence. For instance, in *Mattison, Inc. v. W.F. Larson, Inc.*⁹⁰ plaintiff brought suit alleging that defendant defaulted on its contract to pay minimum royalties for an exclusive license to manufacture and sell litter collection machines. The trial judge, sitting without the aid of a jury, rendered a take-nothing judgment against plaintiff. On appeal plaintiff contended that the contract between the parties was unambiguous, that parol evidence was inadmissible, and that defendant was liable for minimum royalties. In reversing and rendering a decision in plaintiff's favor, the court followed the general rule that a contract is not ambiguous if it can be given a certain or definite legal meaning or interpretation.⁹¹ The court concluded that the first quoted paragraph, which provided for a three-year agreement with an option in defendant to renew for one-year periods thereafter, standing alone was unambiguous. The court then questioned whether the last quoted paragraph could reasonably be read not to conflict with the first paragraph and create an ambiguity. To answer this question the *Mattison* court relied on *Anderson & Kerr Drilling Co. v. Bruhlmeier*,⁹² and inserted two commas in the second paragraph. The court then stated that the parol evidence offered was inadmissible to create an ambiguity since the last paragraph did not conflict with the first paragraph once the two commas were inserted.⁹³

VIII. DEAD MAN'S STATUTE

Two decisions within the past year involved problems related to the application and waiver of Texas' dead man's statute.⁹⁴ In *Graham v. Darnell*⁹⁵ proponents of competing wills both asserted on appeal that William H. Pruett was erroneously permitted to testify concerning transactions with his deceased father. The trial court held that First Baptist Church, one of the proponents, waived the dead man's statute by obtaining Mr. Pruett's tes-

88. *Losson v. Whitson*, 535 S.W.2d 406 (Tex. Civ. App.—Amarillo 1976, no writ).

89. *Hurley v. National Bank of Commerce*, 529 S.W.2d 788 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.).

90. 529 S.W.2d 271 (Tex. Civ. App.—Amarillo 1975, writ ref'd n.r.e.).

91. *See, e.g., Lewis v. East Tex. Fin. Co.*, 136 Tex. 149, 146 S.W.2d 977 (1941).

92. 134 Tex. 574, 136 S.W.2d 800 (1940).

93. 529 S.W.2d at 273.

94. TEX. REV. CIV. STAT. ANN. art. 3716 (Vernon 1926) states:

In actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them as such, neither party shall be allowed to testify against the others as to any transaction with, or statement by, the testator, intestate or ward, unless called to testify thereto by the opposite party; and the provisions of this article shall extend to and include all actions by or against the heirs or legal representatives of a decedent arising out of any transaction with such decedent.

95. 538 S.W.2d 690 (Tex. Civ. App.—Fort Worth 1976, no writ).

timony upon the same transaction when the Pruett deposition was taken prior to trial. Billy Graham, the proponent of the second will, did not obtain any testimony from this witness during that deposition even though his attorney was present.⁹⁶ At the trial Graham entered his objection to Pruett's testimony on the basis of article 3716, but his objection was overruled and the evidence was admitted. The witness was later recalled to the stand by First Baptist Church and was interrogated concerning a certain transaction which had occurred later in the life of the decedent. Graham did not object to this evidence. The appellate court held that it was error for the trial court to consider the witness's evidence as it applied to Graham. Graham had not waived his statutory objection to the witness's testimony since he did not question the witness at his deposition. Furthermore, the failure to object to the witness's later testimony about the second transaction did not constitute a waiver of the witness's testimony concerning the first transaction.

In the second case, *Hart v. Rogers*,⁹⁷ plaintiffs brought suit in trespass to try title. Both plaintiffs and defendants claimed title under the will of Bessie Holt, but judgment was rendered for plaintiffs. On appeal defendants contended that the trial court erred in excluding the testimony of two witnesses that it was common knowledge that Bessie Holt had deeded some or all of her property to her grandson, Don Leander Hart. Plaintiffs, the great-grandchildren of Bessie Holt, contended that when Hart died without children, the property vested in them. In an effort to rebut that contention defendants asserted that in evidencing ownership of the property, general reputation in the neighborhood should be admissible.⁹⁸ The court disagreed and held that while general reputation evidence of ownership was admissible for the limited purpose of showing the notoriety of a person's claim, it was not admissible to show actual ownership. The court reasoned that since the testimony of defendants' two witnesses was offered generally and not limited to showing the notoriety of Hart's claim to the property, the court did not err in excluding the testimony. Significantly, the court also held that the trial court did not err in excluding the testimony of Hart's mother that she was present and saw Bessie Holt hand the deed to Hart. The court decided that article 3716 prohibited an incompetent witness from testifying not only to statements but also to conversations and transactions which occurred between the deceased and a third party. Therefore, the term "transaction" was construed broadly to include a unilateral event where the decedent is the sole participant and the witness merely observes the conduct of or what occurred to deceased.⁹⁹

The waiver issue also arose in *Heil Co. v. Grant*,¹⁰⁰ a wrongful death action

96. *Id.* at 696. The attorney for the First Baptist Church stipulated that questions asked the witness by any other party might be considered as having been asked by him. Importantly, Graham's attorney did not make the same stipulation.

97. 527 S.W.2d 230 (Tex. Civ. App.—Eastland 1975, writ ref'd n.r.e.).

98. Defendants relied on 2 MCCORMICK & RAY, *supra* note 1, § 1322, at 174, as authority for their contention. The appellate court noted that "several of the cases cited by McCormick & Ray support the proposition that general reputation evidence of ownership is admissible to show notoriety of claim, but the cases do not support the proposition that reputation evidence is admissible to show actual ownership of property." 527 S.W.2d at 235.

99. 527 S.W.2d at 236.

100. 534 S.W.2d 916 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.).

brought by the widow and children of the decedent who was killed while assisting his brother in making repairs on a dump truck. Immediately before the accident the decedent's brother had told him that if he hit a certain cable the bed of the truck would come down, but this testimony was excluded on the basis of the dead man's statute. Defendant preserved its error by bill of exception and contended on appeal that the dead man's statute was inapplicable to this testimony because plaintiffs sought recovery only in their own right under the Wrongful Death Act and not as heirs or legal representatives of the decedent. Plaintiffs, however, urged the applicability of the dead man's statute because: (1) in seeking exemplary damages they acted as the heirs and representatives of the decedent since the decedent's children obtained their capacity to invoke the dead man's statute by suing for exemplary damages under the Texas Constitution and that decedent's widow obtained that same capacity under the survival statute; (2) in seeking recovery for decedent's conscious pain and suffering, a cause of action under the survival statute, they invoked the dead man's statute; (3) even though they did not plead a cause of action based on the survival statute, defendant waived this pleading defect by failing to object to the introduction of testimony raising this issue; and (4) even if they did not advance a cause of action as the heirs and legal representatives of decedent, the statute was applicable because the judgment barred their future ability to sue defendant as the heirs and representatives of decedent. Nevertheless, the court of civil appeals rejected all of plaintiff's contentions and held it was reversible error to exclude the testimony of decedent's brother on the basis of the dead man's statute. The court's rationale was that the dead man's statute does apply to actions brought under the survival statute but is inapplicable to actions brought under the Wrongful Death Act. Therefore, the testimony of the decedent's brother should not have been excluded.¹⁰¹

IX. PRESUMPTIONS AND INFERENCES

Presumption of Reasonable Care. Presumptions are usually not considered as evidence but as procedural rules to be administered by the court.¹⁰² Inferences, however, are different from presumptions because an inference is a deduction that the trier of fact may make according to his own judgment. The trier of fact is compelled to draw an inference only "where a contrary conclusion would be supported by no evidence or would be against the great weight of the evidence."¹⁰³ These distinctions were discussed in *Republic National Life Insurance Co. v. Heyward*¹⁰⁴ where suit was instituted for accidental death benefits under a group life policy. The evidence demonstrated that the insured died from multiple gunshot wounds and from multiple lacerations on his head and back made by a sharp object. The medical examiner testified that, in his opinion, someone shot the insured intentional-

101. *Id.* at 926.

102. *See, e.g.*, 1 McCORMICK & RAY, *supra* note 1, § 56.

103. Lents, *Presumptions in Texas: A Study in Irrational Jury Control*, 52 TEXAS L. REV. 1329, 1333 (1974).

104. 536 S.W.2d 549 (Tex. 1976).

ly. Nevertheless, the trial court granted the defendant's motion for an instructed verdict and entered a take-nothing judgment against plaintiff. The court of civil appeals reversed and remanded.

Defendant argued before the Texas Supreme Court that plaintiff failed to raise a question of fact whether the insured's death was by "accidental means" because plaintiff produced no evidence that the insured had not provoked his assailant. Evidence of death by violent and external means normally raises a presumption that the insured did not commit suicide,¹⁰⁵ but this presumption itself neither constitutes evidence nor shifts the burden of proof; it merely raises an issue of fact of whether the insured's death was self-inflicted.¹⁰⁶ As a result the supreme court in *Heyward* held that since defendant offered no evidence that the insured had provoked his assailant or that he was the aggressor in the incident which resulted in his death, plaintiff's evidence raised an issue of fact whether the insured's death was accidental. The court decided that unless some evidence to the contrary was produced, "we think it is reasonable to presume that insured did not act in such a way that he should have reasonably known his actions would probably result in his death."¹⁰⁷ Thus, a plaintiff must prove that the death was accidental, but he is aided by two presumptions: first, that death by violent and external means is not self-inflicted, and second, that the deceased was innocent of any alleged felonious conduct at the time of his death.¹⁰⁸

Presumption upon Failure to Produce Evidence. When a party fails to produce evidence within his control, a presumption is raised that, if produced, the evidence would operate against him.¹⁰⁹ In addition, such a failure to produce evidence not only strengthens the probative force of the testimony offered on the issue by the other side but its mere absence is clothed with some probative force.¹¹⁰ Nevertheless, this kind of a presumption is not evidence. Rather it is a rule of procedure which vanishes when rebutted.¹¹¹

The recent venue case of *H.E. Butt Grocery Co. v. Bruner*¹¹² reaffirmed this treatment of unproduced evidence. Plaintiff had brought suit to recover damages for injuries sustained when she slipped upon an onion stalk and fell. The trial court overruled defendant's plea of privilege. In affirming the trial court's decision, the court of civil appeals held that the intentional destruction of the onion stalk by defendant created the presumption that its introduction into evidence would have been unfavorable to defendant or, more specifically, "that it would have shown that it was sufficiently 'stepped on and mashed' as to lead to the conclusion that it had lain on the floor for a sufficient period of time that the defendant should have, by the exercise of reasonable diligence, discovered and removed it."¹¹³ The court then reasoned that, since

105. *Combined Am. Ins. Co. v. Blanton*, 163 Tex. 225, 353 S.W.2d 847 (1962).

106. *Prudential Ins. Co. of America v. Krayner*, 366 S.W.2d 779 (Tex. 1963).

107. 536 S.W.2d at 559.

108. *Id.*

109. *See, e.g., Fain v. Beaver*, 478 S.W.2d 816 (Tex. Civ. App.—Waco 1972, writ ref'd n.r.e.); *King Constr. Co. v. Flores*, 359 S.W.2d 919 (Tex. Civ. App.—Houston 1962, writ ref'd n.r.e.). *See generally* 1 MCCORMICK & RAY, *supra* note 1, § 100 n.67.

110. *State v. Gray*, 141 Tex. 604, 175 S.W.2d 224 (1943).

111. *Empire Gas & Fuel Co. v. Muegge*, 135 Tex. 520, 143 S.W.2d 763 (1940).

112. 530 S.W.2d 340 (Tex. Civ. App.—Waco 1975, no writ).

113. *Id.* at 344.

this presumption was not rebutted by defendant, the trial court was authorized to take such presumption into consideration, "not only as strengthening the testimony offered by plaintiff, but also he was authorized to consider that such presumption in and of itself had probative value."¹¹⁴

Inferences. In *Porter v. Hajovsky*,¹¹⁵ an auto collision case, the jury found both plaintiff and defendant guilty of negligence which proximately caused the accident and entered a take-nothing judgment in defendant's favor. Plaintiff attacked the jury finding of improper lookout, contending that such a finding was against the great weight and preponderance of the evidence. The court of civil appeals agreed with plaintiff because contributory negligence is not established by evidence which is equally consistent with the exercise of care by plaintiff "or where the inference of care is just as reasonable as the inference of the absence thereof."¹¹⁶ Therefore, the jury's finding of plaintiff's negligence as to his lookout was held to be against the great weight and preponderance of the evidence. Since the jury only awarded \$5,000 damages and the defendant was entitled to a credit in excess thereof, the judgment was affirmed.

X. JUDICIAL NOTICE

Texas courts continue to take increasingly more judicial notice of factual information.¹¹⁷ For example, in *Jackman v. Jackman*,¹¹⁸ a suit to increase the amount of child support payments, the court took judicial notice "that we have been beset by a spiraling inflation since the original decree was entered [in 1966], although the extent of such inflation may not be the proper subject of judicial notice."¹¹⁹ Two other Texas courts took notice of a prior judgment concerning the capacity of the decedent in a will contest¹²⁰ and of a weather report for a particular day in a negligence action.¹²¹

In *Stewart v. Mathes*,¹²² a suit to enforce a contractual settlement agreement, the trial court rendered judgment upholding the validity of the agreement. The agreement to settle a claim against the estate for the sum of \$22,500 consisted of communications between the attorneys of the respective parties. Before the actual payment was made, however, Stewart informed her attorneys that she did not desire to go through with the settlement. Mathes, administratrix of the estate, thereafter filed a motion for summary judgment

114. *Id.* The dissent in *Bruner* rested on the belief that plaintiff's own testimony could not "spawn the inference asserted by the majority that the stalk had been stepped on by others in the store before the plaintiff did so." *Id.* at 346. Moreover, the dissent continued, even assuming such a presumption, the presumption itself could not supply the proof necessary to establish any length of time that the onion stalk had been on the floor, upon which the judgment turned. *Id.* at 348.

115. 537 S.W.2d 501 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.).

116. *Id.* at 502. See also *Williams v. Hill*, 496 S.W.2d 748, 751 (Tex. Civ. App.—Tyler 1973, writ ref'd n.r.e.).

117. See generally 1 MCCORMICK & RAY, *supra* note 1, §§ 187-211; Davis, *Judicial Notice*, 55 COLUM. L. REV. 945 (1955).

118. 533 S.W.2d 361 (Tex. Civ. App.—San Antonio 1975, no writ).

119. *Id.* at 364.

120. *Thomas v. Price*, 534 S.W.2d 730 (Tex. Civ. App.—Waco 1976, no writ).

121. *J. Weingarten, Inc. v. Tripplett*, 530 S.W.2d 653, 656 (Tex. Civ. App.—Beaumont 1975, writ ref'd n.r.e.).

122. 528 S.W.2d 116 (Tex. Civ. App.—Beaumont 1975, no writ).

upon the compromise agreement, but the motion was denied by the trial court. After hearing evidence upon the issue of the compromise agreement, the trial court rendered judgment upholding the validity of the agreement. Stewart never asserted that her attorney did not have the authority to enter into the agreement. In discussing whether a party to a settlement agreement may withdraw his consent prior to the time judgment is rendered on that agreement, the court took judicial notice "of the fact that many settlement agreements are entered into by the parties during the progress of contested trials."¹²³ The court then held that a party should not be permitted to enter into such an agreement to avoid an unexpected development during the trial and then repudiate the agreement before the written judgment can be prepared for entry. The court distinguished *Burnaman v. Heaton*,¹²⁴ which held that a valid consent judgment cannot be rendered by a court when consent of one of the parties thereto is lacking at the moment the court undertakes to make the agreement the judgment of the court, by holding that *Burnaman* held only the consent judgment and not the settlement agreement invalid. The court then stated that since Mathes did not request entry of a consent judgment but only sought to enforce the settlement agreement through a hearing in which the court heard evidence, the settlement agreement should be enforced.

XI. ATTORNEY CONDUCT AT TRIAL

*Liberty Mutual Insurance Co. v. Rodriguez*¹²⁵ recognized the general prohibition against the inclusion of gestures and voice inflections into the reading of depositions to the trier of fact but held that the attorney misconduct occurring in *Rodriguez* did not amount to reversible error. The appellate court first noted that defendant objected twice to the misconduct and both of his objections were promptly sustained by the trial court. The appellate court then held that such attorney misconduct, when it occurred, could be and was cured by an appropriate instruction.¹²⁶

The propriety of the jury argument also remains a sensitive issue. In *Hartford Accident & Indemnity Co. v. Thurmond*¹²⁷ plaintiff sued to recover workmen's compensation benefits. The trial court entered judgment for plaintiff and the insurer appealed. One of Hartford's contentions on appeal was that the trial court erred in overruling its motion for mistrial based upon the final jury argument of plaintiff's counsel "that Hartford had appealed from the award of the Industrial Accident Board." The court of civil appeals reviewed the evidence and noted that defendant's counsel cross-examined one of plaintiff's witnesses, an attorney who had once represented the plaintiff. That witness testified that he had referred the case to another law firm following a hearing before the Industrial Accident Board from which Hartford had appealed, but Hartford's counsel failed to object to this answer and failed to move that it be stricken from the record or that the jury be instructed to disregard it. While citing the well-settled rule in Texas that the

123. *Id.* at 119.

124. 150 Tex. 333, 240 S.W.2d 288 (1951).

125. 537 S.W.2d 522 (Tex. Civ. App.—San Antonio 1976, no writ).

126. *Id.* at 525.

127. 527 S.W.2d 180 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.).

admission of the award of the Industrial Accident Board into the record is error,¹²⁸ the court noted that such evidence was before the jury without objection. As a result, although not approving the argument by plaintiff's counsel, the error was held not to be reversible under the facts and circumstances in this particular case.¹²⁹

Hartford also objected to numerous other portions of the final argument¹³⁰ of plaintiff's counsel, contending that since such arguments were so highly prejudicial and inflammatory, they constituted reversible error. The court discussed the distinction between "curable" and "incurable" jury arguments and recited the rule that a jury argument is "curable" when the harmful effect of the argument can be eliminated by a trial judge's instruction to the jury to disregard what they have heard. Conversely, an "incurable" argument is one that is so inflammatory that its harmfulness cannot be eliminated by an objection or instruction to the jury to disregard it.¹³¹ If the argument is incurable, the failure to object does not result in a waiver, but if an argument is of a "curable nature," an objection to it must be promptly made and an instruction requested or the error is waived. Hartford argued that if it had objected to all the remarks of plaintiff's attorneys, such continuous objections would have compounded the error so much that no instructions from the court could have corrected the cumulative effect of such error. Nevertheless, the court held that "Hartford should have objected the first and every time thereafter that the offensive argument was made. He took no steps to secure appropriate instructions from the trial court. He should have requested that the jury be instructed to disregard the same."¹³² The court then held that, in the light of the entire record, reversible error was not presented.

128. *See, e.g.*, *Federal Underwriters Exch. v. Bickham*, 138 Tex. 128, 157 S.W.2d 356 (1941).

129. The court stated in its opinion on motion for rehearing that "the arguments by plaintiff's attorney are not to be condoned." 527 S.W.2d at 194.

130. The arguments of plaintiff's counsel were to the effect that defense counsel's law firm was one of the largest in the world; that Hartford was one of the largest insurance companies in the world; that defense counsel's firm would do what it was told by Hartford; that Hartford sent someone to defeat plaintiff out of his "little" benefits; that defense counsel's father was a district judge; that defense counsel had been sent to permit Hartford to avoid their contract; that they assume defense counsel had been instructed to talk out of both sides of his mouth to carry Hartford's message; and that Hartford is a corporation which "is cold, has no soul, heart, morals nor compassion." *Id.* at 192.

131. *See, e.g.*, *Otis Elevator Co. v. Wood*, 436 S.W.2d 324 (Tex. 1968).

132. 527 S.W.2d at 193.