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EVIDENCE

by

*David J. Beck**

DURING this survey period the appellate courts of Texas handed down numerous decisions involving various rules of evidence. The cases of greatest importance fall into these substantive areas: (1) Expert Opinion Evidence; (2) Hearsay Rule and Exceptions; (3) Uncontradicted Testimony of Interested Witnesses; (4) Dead Man's Statute; (5) Cross-Examination; (6) Judicial Notice; (7) Privileges; (8) Res Ipsa Loquitur; (9) Unavailability of Witnesses; and (10) Parol Evidence Rule.

I. EXPERT OPINION EVIDENCE

Opinions of Nontreating Physicians. Texas courts have long followed the rule that when a doctor examines a patient solely for the purpose of making a report and testifying, he cannot base his expert opinion concerning the patient's condition solely on the medical history as related by the patient and purely subjective symptoms. To be admissible, the doctor's testimony ordinarily must be based on a physical examination and a study of objective symptoms and X-rays.[1] In *Slaughter v. Abilene State School*[2] the Texas Supreme Court questioned the applicability of this rule. Slaughter made a claim under the Texas Tort Claims Act[3] after he was injured when a co-employee backed a tractor over him. The trial court entered judgment on the jury verdict for the plaintiff. The court of civil appeals, however, reversed the decision of the trial court,[4] and, following the general rule, held that the medical opinion of Slaughter's doctor was inadmissible because the doctor examined Slaughter solely for the purpose of testifying and based his expert opinion in part upon both the history given by Slaughter and Slaughter's subjective symptoms.

The Texas Supreme Court changed this well-established rule and held that the testimony of the nontreating doctor was admissible because it was also based on a physical examination and a review of X-rays. The court concluded that the general rule that does not allow a nontreating physician

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1. *E.g.*, Goodrich v. Tinker, 437 S.W.2d 882, 885-86 (Tex. Civ. App.—El Paso 1969, writ ref'd n.r.e.); Pacific Employers Ins. Co. v. Gibson, 419 S.W.2d 239, 241-42 (Tex. Civ. App.—Dallas 1967, no writ); Texas Employers' Ins. Ass'n v. Wallace, 70 S.W.2d 832, 833 (Tex. Civ. App.—Eastland 1934, no writ).
2. 561 S.W.2d 789 (Tex. 1977).
3. TEX. REV. CIV. STAT. ANN. art. 6252—19 (Vernon 1970).
4. 546 S.W.2d 106 (Tex. Civ. App.—Eastland 1977).

to base his opinion in part on the history of the case as related by the patient, "places an unfair limitation upon a reasonable practice of those preparing their case for trial, namely that of securing qualified physicians and surgeons to make an examination for the purpose of later aiding the court and jury to better understand the claimant's physical condition."[5] The court reasoned that since the doctor had testified that the patient's subjective complaints were consistent with the doctor's objective findings, the case fell within the general rule allowing the use of testimony that is predicated upon both personal knowledge and hearsay.[6] The court agreed with the commentators[7] who had concluded that the better reasoned authorities admitted testimony based in part upon reports of others if the expert customarily relied upon such reports in the practice of his profession. The court expressly disapproved those decisions holding to the contrary.

Reasonable Medical Probability. The testimony of a medical expert witness must ordinarily rise to the level of reasonable medical probability before it will support a damage award.[8] Thus, to recover in a personal injury action, a plaintiff usually must establish that his medical condition was in *reasonable medical probability* caused by the occurrence in dispute. Courts normally will look to the substance of the medical testimony to determine whether this standard has been satisfied, and the standard relates only to the quantum of evidence necessary to support an ultimate issue of fact; it is not the standard by which a medical expert must testify.[9] In *Texas Employers' Insurance Association v. Stodghill*,[10] a workers' compensation case, the issue presented was whether there was sufficient evidence to support the jury's finding that an on-the-job injury was a producing cause of the plaintiff's husband's death. The hospital listed the cause of death as a myocardial infarction. To determine whether the plaintiff had satisfied her burden of establishing that her husband's death was within reasonable medical probability caused by his on-the-job injury, the court examined the medical testimony of the two expert witnesses who testified at the trial.

The plaintiff introduced the testimony of a doctor who had never seen or treated the decedent and had only reviewed the decedent's medical records. He testified that the decedent had been suffering from essential hypertension, and that the injuries that he had received on the job "could aggravate the progress, and trigger final complication to the hyperten-

5. 561 S.W.2d at 790-91.
6. *See, e.g.*, Combined Ins. Co. v. Kennedy, 495 S.W.2d 306 (Tex. Civ. App.—Eastland, 1973, writ ref'd n.r.e.).
7. C. MCCORMICK, EVIDENCE § 15 (2d ed. 1972); 2 C. MCCORMICK & R. RAY, TEXAS LAW OF EVIDENCE § 1404 (2d ed. 1956); 3 J. WIGMORE, EVIDENCE § 668 (J. Chadbourn rev. 1970).
8. *E.g.*, Insurance Co. of N. America v. Myers, 411 S.W.2d 710 (Tex. 1966); Beck, *Evidence, Annual Survey of Texas Law*, 31 Sw. L.J. 323, 325-26 (1977).
9. Beck, *supra* note 8, at 325-26.
10. 570 S.W.2d 398 (Tex. Civ. App.—El Paso 1978, writ granted).

sion."[11] When asked in a hypothetical question whether the decedent's injury "hastened his death," the witness responded that "any kind of accident which produced a bodily injury, will trigger any complication in hypertension, and basis—and the cause of death . . . but the main thing here, the man was injured, and that injury could produce probably some kind of shortening of the life span."[12] The *treating* doctor, however, was "strongly of the opinion that the injury did not cause the [decedent's] heart attack."[13] There was also evidence that the decedent showed general physical improvement during the month immediately following the injury.

The El Paso court of civil appeals concluded that the cause of the decedent's heart attack was determinable only from the testimony of medical experts and therefore must be founded on reasonable probability. Neither doctor, however, stated as his medical opinion that the heart attack was, in fact or in reasonable medical probability, caused by the prior on-the-job injury. Because the plaintiff's proof failed to rise to the level of reasonable medical probability, the court reversed and rendered judgment that the plaintiff take nothing.[14]

Underlying Facts or Data. When testifying in state courts, an expert is normally required to state the underlying facts or other data upon which his opinion is based. A different rule, however, exists in federal courts, due to rule 705 of the Federal Rules of Evidence.[15]

The plaintiff in *Bryan v. John Bean Division of FMC Corp.*[16] argued successfully in the trial court that the written reports of two metallurgists were admissible even though they did not testify at trial either in person or by deposition. Their reports were admitted on the grounds that they constituted "underlying facts or data" for the opinion of a third expert who testified for one of the defendants. The defendant's expert had not examined the product in question, a clevis,[17] he therefore based his opinion in part on data established by the two metallurgists. On cross-examination of defendant's expert witness,[18] plaintiff's counsel made maximum use of the *opinions* expressed in the reports of the two metallurgists. One of the defendants objected on the ground that although the facts recited in the reports were admissible, the *opinions* of the two metallurgists, who were not

11. *Id.* at 399.
12. *Id.* at 400.
13. *Id.*
14. Justice Osborn wrote a concurring opinion in which he stated that although he concurred in the reversal, he favored a remand instead of a rendition. *Id.* at 401.
15. FED. R. EVID. 705 provides: "The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination."
16. 566 F.2d 541 (5th Cir. 1978).
17. A "clevis" is a cast-iron tool used in bending an automobile axle for wheel alignment. In *John Bean* the clevis was designed and distributed by the defendant as part of a wheel alignment kit. *Id.* at 543.
18. The defendant's expert testified that the clevis, as manufactured, was sufficiently strong to sustain the stress it would have encountered in normal use.

before the court, were not. The trial court overruled the objection, stating that the opinions were admissible because they constituted "supporting data" for the opinion of the defendant's expert.

The Fifth Circuit Court of Appeals held that the trial court committed reversible error in admitting the opinions either as evidence of the underlying basis of the testifying expert's opinion or as impeachment evidence. The court observed that, as with all exceptions to the hearsay rule, the admissibility of the sources underlying a testifying expert's opinion depends upon the two critical factors of necessity and trustworthiness. The court then concluded that both elements were lacking under the circumstances presented. The court reasoned that since plaintiff's counsel presented the opinions of the two metallurgists to the jury without first qualifying them as experts, the jury had no way of determining whether the opinions were credible or worthy of belief.[19]

Competency. Numerous instances were presented during the past year in which trial courts were called upon to determine whether a witness was competent to give expert or other opinion evidence. In *Landreth v. Reed*,[20] for example, the plaintiffs brought a damage suit as a result of the death of their fourteen-month-old child, who drowned in a swimming pool at the defendants' day nursery. The plaintiffs' expert witness, a clinical psychologist, testified that the plaintiffs' other child had suffered physical injury as a result of the shock and emotional trauma caused by witnessing the efforts to revive her sister immediately after she was removed from the pool.[21] Defendants objected on the grounds that the witness was not a medical doctor and therefore should not be permitted to testify as to the child's physical symptoms or disability, but should be limited to testimony concerning the child's mental condition.

The Texarkana court of civil appeals held that the trial court was correct in admitting the testimony of the clinical psychologist. The court's rationale was that the witness was a trained expert in behavioral psychology and was therefore competent to testify as to the child's mental condition and stability. The court then concluded that "it is difficult, if not impossible, to distinguish between strictly mental and strictly physical ailments, because they each may manifest themselves by symptoms relating to the other."[22]

19. The court indicated that the plaintiff could have introduced the opinions of the two metallurgists simply by calling them as witnesses for the purpose of impeaching the testimony of defendant's expert. In the event they deviated from their reports, they could be impeached by the prior inconsistent statements made in their reports. *See generally* Graham, *Examination of a Party's Own Witness Under the Federal Rules of Evidence: A Promise Unfulfilled*, 54 TEXAS L. REV. 917 (1976).

20. 570 S.W.2d 486 (Tex. Civ. App.—Texarkana 1978, no writ).

21. The psychologist testified that in addition to and as a result of the emotional trauma, the child experienced "hyperactivity, distractability, loss of weight, extreme nervousness and difficulty in sleeping." *Id.* at 488. She also testified that in a child her age, the physical symptoms were a common result of the type of mental and emotional shock that she had experienced. *Id.* at 489.

22. *Id.*

In *Harrison v. Humphries*,[23] a venue case in which the third party defendant's plea of privilege was overruled, the third party defendant contended that the evidence introduced as to the cause of the fire in question was incompetent and therefore constituted no evidence. To prove the necessary venue facts, the plaintiff introduced the testimony of an expert in order to establish the cause of the fire.[24] The plaintiff's expert witness had received several years of schooling in heating and air conditioning, had completed 160 hours of a certified building course, and had contracted heating work for several years. Also as chief heating inspector for the City of Amarillo, the expert had experience in inspecting prefabricated and manufactured fireplaces in residences.

After reviewing authorities that established that a trial judge's determination of an expert's qualifications will not be overturned in the absence of a clear abuse of discretion,[25] the Amarillo court of civil appeals concluded that the trial judge did not abuse his discretion in admitting and considering the testimony of the fire expert. Since the trial court determined that the fire expert possessed knowledge or skill not possessed by ordinary persons, the admission of his opinion was held to be within the trial court's discretion.

In *Texas Electric Service Co. v. Ragle*,[26] a condemnation case, the testimony of a chemistry professor was not rendered incompetent merely because he testified only about a "possibility" of a nuclear accident rather than the "probability" of such an accident. The professor was an authority on nuclear waste disposal. The issue on appeal involved the extent of the diminution in the market value of the appellee's land after the appellant acquired an easement across the land for a railroad to be used to transport nuclear waste. The appellant contended that since the expert's testimony was only based upon the "possibility" of a nuclear accident rather than in terms of "probability," the judgment in favor of the landowners was based on incompetent testimony as to the extent of the diminution in market value of their land.[27] After reviewing the evidence, the court of civil appeals held that the expert's testimony was competent even though he did

23. 567 S.W.2d 884 (Tex. Civ. App.—Amarillo 1978, no writ).

24. To maintain venue in the county of suit, plaintiff relied on TEX. REV. CIV. STAT. ANN. art. 1995(9a) (Vernon Supp. 1978-79). Thus, the plaintiff was required to prove that the defendant committed an act or omission of negligence in the county of suit and that such negligence was a proximate cause of his damages.

25. *E.g.*, Wilson v. Scott, 412 S.W.2d 299 (Tex. 1967); 2 C. MCCORMICK & R. RAY, *supra* note 7, §§ 1400-1401.

26. 559 S.W.2d 454 (Tex. Civ. App.—Fort Worth 1977, writ ref'd n.r.e.).

27. The test of whether an expert's testimony expresses a reasonable probability, as opposed to conjecture, is not based upon the semantics of the expert, but rather is determined by looking to the substance of his testimony. *E.g.*, Ralph v. Mr. Paul's Shoes, Inc., 572 S.W.2d 812 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.). The chemistry professor in *Ragle* testified that there was a hazard and "real danger" to the occupants in the territory adjacent to the railroad. He also testified that there was actual danger that nuclear contaminants would be released through the actions of terrorists and that "it's easy to see that there is a *possibility* there that something could go wrong." 559 S.W.2d at 456 (emphasis added). He admitted on recross-examination that all of his testimony was based on "possibilities" that he described as "very real." *Id.*

not testify in terms of "probabilities." The court noted that the professor testified that "the danger is based on fact, rather than fancy, delusion or imagination."[28]

The competency of the testimony of a handwriting analysis expert was called into question in *Warren v. Hartnett*.[29] In that case the plaintiffs moved to set aside the probate of the decedent's holographic will. At the close of the plaintiffs' evidence, the trial court directed a verdict for the defendants, who were the proponents of the will. On appeal the plaintiffs argued that the trial court should have considered a handwriting expert's testimony that due to alcoholism, the decedent did not have sufficient mental ability to understand her business, the nature and extent of her property, or the natural objects of her bounty. The expert based his opinion on a comparison of the handwriting of the decedent's holographic will with two postcards written earlier by the decedent. The court of civil appeals, however, refused to give this testimony any probative effect. The court's rationale was that the evaluation of abnormal mental conditions is peculiarly within the field of medical science and that it was "aware of no recognized field of scientific inquiry which permits divination of mental capacity by persons whose expertise is limited to handwriting analysis."[30]

In a slip-and-fall case, *Kimbell, Inc. v. Roberson*,[31] a lay witness was held incompetent to testify as to how long a foreign substance had been on the defendant's floor. To maintain venue, the plaintiff attempted to establish negligence on the part of the defendant by testifying that the foreign substance had been on the defendant's floor anywhere from thirty to forty minutes. The plaintiff admitted, however, that he had only been in the defendant's store for ten or fifteen minutes and that he did not see the foreign substance on the floor until *after* he had fallen. The court of civil appeals held that the plaintiff's testimony was merely an unsupported opinion or bare conclusion, did not constitute evidence of probative force, and therefore would not support a finding of negligence even though it had been elicited on cross-examination and thus was admitted without objection.

II. HEARSAY RULE AND EXCEPTIONS

Reputation Evidence. Certain types of reputation evidence are admissible as exceptions to the hearsay rule. For example, reputation evidence of old land boundaries, family pedigree, and a person's moral character is generally admissible.[32] In *Missouri Pacific Railroad v. Cooper*[33] the Texas

28. *Id.* at 457.
29. 561 S.W.2d 860 (Tex. Civ. App.—Dallas 1977, writ ref'd n.r.e.).
30. *Id.* at 863. The court noted that nonphysicians may qualify as medical experts by virtue of "special experience." *Id.* Although the witness testified that she had "lots of experience" with alcoholics and had seen their handwriting, the court said that "mere association with alcoholics and examination of their handwriting is not sufficient 'special experience' to qualify a person as an expert in the fields of alcohol-related disorders and the effects of those disorders on a person's handwriting." *Id.*
31. 570 S.W.2d 587 (Tex. Civ. App.—Tyler 1978, no writ).
32. *See generally* 2 C. McCormick & R. Ray , *supra* note 7, §§ 1321-1329.
33. 563 S.W.2d 233 (Tex. 1978).

Supreme Court was confronted with the issue of whether reputation evidence was admissible to prove that a railroad crossing was extra hazardous. Over the defendant's objection, the plaintiff produced two witnesses who testified that the railroad crossing in question had a reputation for being dangerous. Although the supreme court recognized that under certain circumstances reputation testimony is admissible, the court stated that it "found no instances in which reputation has been used to prove a controlling issue in a tort case such as the extra hazardous nature of a railroad crossing."[34] The court thus concluded that the evidence was inadmissible hearsay.

Admissions Against Interest. Any statement made by or on behalf of a party that is inconsistent with his present position is generally admissible against the party as an admission against his interest.[35] In *Southwestern Bell Telephone Co. v. Ashley*[36] the plaintiffs alleged that the defendants entered into a conspiracy to wiretap and eavesdrop upon the plaintiffs, thus invading their right of privacy. On appeal Bell argued that the trial court erred in admitting certain hearsay statements and claimed that the judgment for the plaintiffs should be reversed because there was no other evidence to support the jury's finding that Bell had engaged in wiretapping or eavesdropping. The hearsay statements in question were introduced by the plaintiff, who testified that T.O. Gravitt, a Bell official, told him on several occasions that the company was wiretapping the plaintiff. The plaintiff also testified that he was told that he had incurred the enmity of the company's security organization. He testified to additional statements made to him by other people representing Bell in managerial capacities, who allegedly told him that they had been confronted by Bell officials with evidence of their long-distance telephone conversations with him. The trial court admitted this hearsay evidence under the "declarations against interest" or "admissions against interest" exceptions to the hearsay rule.[37]

In the leading case of *Le Sage v. Pryor*[38] it was held that the declarations of an agent or employee are admissible against the principal or employer as an exception to the hearsay rule only if the declarations are made within the course of the agent or employee's employment and bear a close relationship to the performance of the agent or employee's duties. If such declarations are purely voluntary or made merely in casual conversation, however, they are generally inadmissible.[39] The court of civil appeals in *Ashley* followed *Le Sage v. Pryor* and held that the plaintiff's testimony relating to conversations he had with Gravitt concerning wiretapping and

34. *Id.* at 238.

35. Texas Gen. Indem. Co. v. Scott, 152 Tex. 1, 7, 253 S.W.2d 651, 655 (1952); *see* 2 C. McCORMICK & R. RAY, *supra* note 7, § 1141.

36. 563 S.W.2d 637 (Tex. Civ. App.—Eastland 1978, writ ref'd n.r.e.).

37. The trial court also admitted such evidence not for the truth of the matters asserted but only to establish that such conversations actually took place. *Id.* at 641.

38. 137 Tex. 455, 154 S.W.2d 446 (1941).

39. *Id.* at 461, 154 S.W.2d at 450.

eavesdropping by Bell did not constitute an admission against Bell's interest. The court reasoned that since Gravitt was not exercising authority conferred upon him by Bell when he made the statements and his declarations did not relate to Bell's pending business, such declarations were not made officially, but were merely declarations concerning past events. The court thereupon reversed and rendered judgment in favor of Bell.

In *E-Tex Dairy Queen, Inc. v. Adair*[40] an employee obtained a judgment against his employer for wrongful discharge, and the employer appealed. The employer argued that the plaintiff judicially admitted in his deposition and in court that he sued the wrong entity. The defendant urged that the company that actually discharged the plaintiff was E-Tex Dairy Queen Company, which was not a party to the suit.[41]

A judicial admission, unlike an admission against interest, which is primarily evidentiary in nature, is a *formal* waiver of proof that relieves the opposing party from proving the admitted fact and bars the party who made the admission from disputing it.[42] Such a judicial admission, however, must be clear, deliberate, and unequivocal.[43] The evidence in *Adair* showed that the plaintiff knew only that there had been a change in the ownership and managment of the defendant, but that "as far as the company being the same, nothing's changed, the address is the same."[44] The court of civil appeals affirmed the decision of the trial court, holding that the plaintiff's statements were not so clear, deliberate, and unequivocal as to constitute a judicial admission that the plaintiff knew that an entity other than the defendant fired him.

Business Records Exceptions. The question of which party has the burden of separating the inadmissible portions of a proffered exhibit from the admissible portions was presented in *Hurtado v. Texas Employers' Insurance Association.*[45] In *Hurtado* the plaintiff sued to recover workers' compensation benefits, alleging that he was totally and permanently incapacitated in a fall that primarily injured his back. Texas Employers' Insurance Association argued that the plaintiff's incapacity was due solely to prior and subsequent injuries and conditions. Because the jury answered "no" to the issue inquiring whether the plaintiff's injury was a producing cause of any total incapacity, the trial court entered a take nothing judgment against the plaintiff.

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40. 566 S.W.2d 37 (Tex. Civ. App.—Beaumont 1978, no writ).
41. Because of a change in ownership, E-Tex Dairy Queen *Co.*, a partnership, was the employer on the date of discharge, rather than E-Tex Dairy Queen, *Inc.*, a corporation. *Id.* at 39.
42. Gevinson v. Manhattan Constr. Co., 449 S.W.2d 458, 466 (Tex. 1969); Esteve Cotton Co. v. Hancock, 539 S.W.2d 145, 157 (Tex. Civ. App.—Amarillo 1976, writ ref'd n.r.e.). Judicial admissions include facts admitted in pleadings, stipulations, or testimony. *See* Gevinson v. Manhattan Constr. Co., 449 S.W.2d at 466. *See generally* 2 C. McCormick & R. Ray., *supra* note 7, § 1127.
43. Gevinson v. Manhattan Constr. Co., 449 S.W.2d 458, 466 (Tex. 1969); Griffin v. Superior Ins. Co., 161 Tex. 195, 202, 338 S.W.2d 415, 419 (1960).
44. 566 S.W.2d at 39 n.2.
45. 574 S.W.2d 536 (Tex. 1978).

During the trial the defendant offered into evidence four exhibits that represented the plaintiff's complete medical records from two hospitals and two doctors. The exhibits reflected the plaintiff's long history of health problems with diabetes, rheumatoid arthritis, and a prior back injury. The plaintiff's attorney objected to the introduction of these exhibits, arguing that under article 3737e[46] the exhibits were "admissible only . . . to show matters upon which the minds of reasonable men cannot differ."[47] This argument appears to be based upon the leading case of *Loper v. Andrews*,[48] in which the Texas Supreme Court held that expert medical opinions are admissible under article 3737e only if the diagnosis is founded on a reasonable medical certainty. The plaintiff's attorney in *Hurtado* objected to the medical records, listing various excerpts from the records as examples of inadmissible evidence.[49] The trial court overruled the plaintiff's objections and admitted all of the records into evidence.

The court of civil appeals held that the trial court had discretion to decide which party was responsible for specifically pointing out to the trial court the objectionable parts of business records sought to be introduced, and inferentially held that the trial court did not abuse its discretion.[50] The chief justice, however, dissented, stating that since the plaintiff had called the inadmissible nature of the medical records to the trial court's attention and had mentioned specific portions of the records that he con-

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46. TEX. REV. CIV. STAT. ANN. art. 3737e (Vernon Supp. 1978-79), a statutory exception to the hearsay rule, provides in part:

> 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.

47. 574 S.W.2d at 537.

48. 404 S.W.2d 300 (Tex. 1966). Some of the problems surrounding the admissibility of medical opinions and diagnoses contained in medical records were discussed in Beck, *Evidence, Annual Survey of Texas Law*, 31 Sw. L.J. 323, 334-35 (1977).

49. The defense attorney replied to the listing of these examples by saying that if there was anything objectionable in the records, the objectionable portions could be excluded. 574 S.W.2d at 537.

50. 563 S.W.2d 360, 362 (Tex. Civ. App.—San Antonio 1978).

sidered to be inadmissible, the trial court erred in ruling that *all* of the records were admissible.

The supreme court agreed with the dissenting justice and noted that the plaintiff's attorney made clear to the trial court that his objections to the medical records were in part directed to the hearsay, opinions, and conclusions they contained. Plaintiff's attorney also pointed out to the trial court a number of examples supporting his objections. The supreme court concluded that the plaintiff's attorney "was not required to examine each of the 280 pages in the voluminous exhibits and segregate the inadmissible items from the admissible items."[51] After *Hurtado*, it appears that when voluminous records are introduced, one can probably preserve error simply by objecting to the admissibility of the records and reciting portions of the records that support these objections. Nevertheless, the more cautious approach would be to ask the trial court for sufficient time to review the records thoroughly to permit the leveling of objections to all of the objectionable portions; otherwise, the trial court might exclude only those portions of the records objected to and admit other damaging documents.

During the last survey period the Dallas court of civil appeals decided *United States Fire Insurance Co. v. Stricklin*.[52] In that case the court of civil appeals, following the *Black Lake* test,[53] held that for a summary of records to be admissible, the underlying records must be admissible. This past year the supreme court wrote a per curiam opinion refusing writ in *Stricklin* with the notation "no reversible error."[54] The supreme court, however, expressly disapproved the intermediate court's holding that the plaintiff's summary was inadmissible under article 3737e.[55]

In *Johnson v. Brown*,[56] a suit to establish a constructive trust on certain property, the court held that a ledger sheet offered by the defendant did not fulfill the requirements of article 3737e and thus was not admissible under the business records exception to the hearsay rule. The ledger sheet had been kept for many years by the defendant's father. There was no evidence as to the date that the information in the ledger was written, although the defendant did state that he first saw the ledger sheet about

51. 574 S.W.2d at 539. When evidence, only a part of which is admissible, is offered as a whole, the sustaining of an objection to such testimony has been held not to constitute error. The theory supporting such authority is that the objecting party does not have the duty to separate the admissible evidence from the inadmissible. Powell v. Powell, 554 S.W.2d 850, 855 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.); Texas Gen. Indem. Co. v. Ellis, 421 S.W.2d 467, 473 (Tex. Civ. App.—Tyler 1967, no writ).

52. 556 S.W.2d 575 (Tex. Civ. App.—Dallas 1977), *writ ref'd n.r.e. per curiam*, 565 S.W.2d 43 (Tex. 1978). *See* Beck, *Evidence, Annual Survey of Texas Law*, 31 Sw. L.J. 323, 371-72 (1977).

53. The Texas Supreme Court held in Black Lake Pipe Line Co. v. Union Constr. Co., 538 S.W.2d 80 (Tex. 1976), that in order to introduce a summary of voluminous records, the introducing party must show that the underlying records are (1) voluminous, (2) accessible to the opposing party, and (3) admissible.

54. 565 S.W.2d 43 (Tex. 1978).

55. The supreme court expressly disavowed the court of civil appeal's assertion that the record in the case did not establish the underlying records' qualifications under art. 3737e. *Id.* at 43.

56. 560 S.W.2d 763 (Tex. Civ. App.—Eastland 1977, writ ref'd n.r.e.).

1970. After the trial court admitted the ledger into evidence, the jury placed great significance upon the ledger sheet in answering the special issues. On appeal the court focused on the requirement of article 3737e that the document be made at or near the time of the act, event, or condition.[57] Since the defendant wholly failed to satisfy this requirement, the trial court erred in ruling that the ledger was admissible.

In *Roylex, Inc. v. Avco Community Developers, Inc.*[58] both parties appealed from a judgment entered in a breach of contract suit brought by a subcontractor against a general contractor. The trial court found for the plaintiff subcontractor and awarded damages. On appeal the defendant alleged that the invoices introduced by Roylex were erroneously admitted into evidence since the proper predicate for their admission under article 3737e was not laid. The court recognized the general rule that before business records may be admitted into evidence it must be shown that the person who either made the record or transmitted the information to another to record had personal knowledge of the act, event, or condition recorded.[59] The court then observed that the plaintiff's bookkeeper testified that she prepared the invoices in question based on information given to her by the field supervisor, or someone else present at the project. She stated that the field supervisor was at the project site at all times and that because of his presence he had personal knowledge of the acts or events recorded in each of the invoices. Notwithstanding the defendant's contention that presence on a job site does not necessarily provide a person with personal knowledge of all that occurs there, the court concluded that a trial judge may draw such an inference from the evidence and that the trial court's finding would not be disturbed on appeal simply because a different inference might have been drawn. The plaintiff's witness's testimony was held to be sufficient to support the trial court's implied finding of fact that the requisite personal knowledge existed.[60]

III. UNCONTRADICTED TESTIMONY OF INTERESTED WITNESSES

The frequently contested issue of whether a directed verdict may be based on the uncontradicted testimony of an interested witness was considered in several cases during the survey period. In *Collora v. Navarro*[61] the plaintiff sought partition of a farm, alleging that she owned an undivided one-half interest by virtue of her common law marriage to Joe Collora. Mr. Collora originally purchased the land in his name only and later attempted to transfer it to Camille Corporation, predecessor in title to the

57. TEX. REV. CIV. STAT. ANN. art. 3737e, § 1(c) (Vernon Supp. 1978-79).

58. 559 S.W.2d 833 (Tex. Civ. App.—Houston [14th Dist.] 1977, no writ).

59. Skillern & Sons v. Rosen, 359 S.W.2d 298 (Tex. 1962); TEX. REV. CIV. STAT. ANN. art. 3737e, § 1(b) (Vernon Supp. 1978-79).

60. On appeal the defendant further alleged that the plaintiff failed to establish that the invoices were made at or near the time of the act. The court held, however, that since this objection was not made at the time the invoices were admitted into evidence, the objection was considered waived. 559 S.W.2d at 837.

61. 574 S.W.2d 65 (Tex. 1978).

defendant, Navarro. The only direct evidence offered to prove the existence of a present agreement to be husband and wife, which is one of the elements necessary to establish a common law marriage, was the plaintiff's testimony that she and Joe Collora had "agreed to a marriage."[62] The other two elements of common law marriage were conclusively proven by evidence other than the plaintiff's testimony. The defendant did not cross-examine the plaintiff regarding the marriage agreement, nor did he call her as an adverse witness. There was no other direct evidence produced at the trial that proved or disproved her testimony. Even under these circumstances, the court of civil appeals held that the plaintiff's testimony, standing alone, could do no more than raise a fact issue and could not support a directed verdict.[63]

The supreme court disagreed with the conclusion reached by the court of civil appeals. Although the supreme court agreed with the general proposition that testimony by a party or a witness who has an interest in the outcome of a suit cannot form the basis of an instructed verdict because the jury needs to determine the credibility of the witness, the court held that this rule is "not without exception."[64] The court then determined that the plaintiff's uncontradicted testimony conclusively established the fact in dispute. The court applied one of the rule's exceptions, which dictates that an instructed verdict may be based upon the testimony of an interested witness when the testimony pertains to matters reasonably capable of exact statement, is clear, direct, and positive, is internally devoid of inconsistencies and contradictions, and is uncontradicted either by the testimony of other witnesses or by circumstances.[65]

Three factors led the supreme court to disagree with the court of civil appeals and apply an exception to the general rule in *Collora*. First, the general rule governing the finality to be given to the testimony of an interested witness is a flexible one, and its application must turn on the facts of each case. Secondly, the court of civil appeals erroneously stated that the defendant had no way to disprove or contradict the plaintiff's testimony as to the marital agreement.[66] Thirdly, the plaintiff's proof of cohabitation and holding out to the public was corroborative evidence of her direct testimony. Curiously, however, the court cautioned that the presence of these three factors will not always justify the application of that exception.[67]

The opposite result was reached in *Masco International, Inc. v.*

62. *Id.* at 68.

63. 566 S.W.2d 304 (Tex. Civ. App.—Corpus Christi 1978).

64. 574 S.W.2d at 69.

65. *Id.* (citing 3 R. McDONALD, TEXAS CIVIL PRACTICE § 11.28.6 (rev. ed. 1970)). The supreme court thought this exception to be "most appropriate when the opposing party has the means and opportunity of disproving the testimony or testing the credibility of the witness, but fails to avail himself of it." 574 S.W.2d at 69.

66. The supreme court agreed with the dissenting opinion in the court of civil appeals, which noted that the defendant could have cross-examined the plaintiff and tested her credibility.

67. The court carefully articulated that each case must turn on its own facts even though all three factors are present. 574 S.W.2d at 70.

Stokley,[68] in which a party asserted that his testimony conclusively established a fact issue. In *Stokley* a seller of corporate stock brought suit on a promissory note executed by the buyer as part of the purchase price. In a series of special issues the jury determined that the plaintiff made certain representations to the defendant, that the representations were false, and that they were made to induce the purchase of the stock. The jury also found, however, that the representations were *not* relied upon by the defendant. On appeal the defendant argued that the evidence conclusively established that he relied upon the representations of the plaintiff. The court of civil appeals rejected the defendant's assertion, citing the leading case of *Gevinson v. Manhattan Construction Co.*[69] for the general rule that evidence given by an interested witness, even though uncontradicted, merely presents an issue to be determined by the trier of fact. The court held that although Stokley had testified that he relied upon the defendant's representations, such testimony was not binding on the trier of fact because Stokely was an interested witness.[70]

In *Westchester Fire Insurance Co. v. Wendeborn*[71] the issue was whether the decedent was intoxicated at the time of his on-the-job injury, and the defendant sought reversal based on the uncontradicted testimony of an expert witness. The jury was instructed that an injury received while "the employee is in the state of intoxication" is not an injury received in the course of employment.[72] At trial the defendant introduced the testimony of a pathologist who had performed an autopsy on the deceased. He testified that the results of a blood-alcohol clinical analysis test performed on the deceased showed that his blood-alcohol content was 0.165 percent at the time of death. He further testified that the American Medical Association had determined that every individual with a concentration greater than 0.15 percent would " 'have lost to a measurable extent some of that clearness of intellect and control of himself that he would normally' possess."[73] The doctor then stated that, in his opinion, the deceased was intoxicated at the time of his injury. On appeal the defendant contended that such evidence conclusively established that the decendent was intoxicated at the time of his fatal injury or, alternatively, that the jury's finding that he was not intoxicated was against the great weight and preponderance of the evidence.

68. 567 S.W.2d 598 (Tex. Civ. App.—Eastland 1978, writ ref'd n.r.e.).

69. 449 S.W.2d 458, 467 (Tex. 1969).

70. In Willingham v. Farmers New World Life Ins. Co., 562 S.W.2d 526 (Tex. Civ. App.—El Paso 1978, no writ), the appellant urged that a medical witness authorized to examine applicants for life insurance was an interested witness, and his testimony therefore could do no more than raise a fact issue to be considered by the jury. The court of appeals held, however, that since the witness's testimony was clear, direct, positive, and unimpeached by anything in the record, his testimony conclusively established the fact in dispute. *Id.* at 529.

71. 559 S.W.2d 108 (Tex. Civ. App.—Eastland 1977, writ ref'd n.r.e.).

72. *Id.* at 109. Such an instruction is in accordance with the applicable provision of the Texas Workers' Compensation Act. TEX. REV. CIV. STAT. ANN. art. 8306, § 1(3) & art. 8309, § 1 (Vernon 1967).

73. 559 S.W.2d at 109.

The Eastland court of civil appeals held that the testimony of the pathologist did not conclusively establish that the decedent was intoxicated at the time he was injured and that the jury's finding was not against the great weight and preponderance of the evidence. The court found no authority for the assertion that the results of a blood-alcohol test established a state of intoxication as a matter of law. The court further reasoned that although under certain circumstances a high blood-alcohol content does create a presumption of intoxication,[74] that presumption is rebuttable.

IV. DEAD MAN'S STATUTE

Transaction with the Deceased. Texas courts are continually faced with the question of what constitutes a "transaction" within the meaning of article 3716,[75] commonly referred to as the dead man's statute, and that question emerged once again during this survey period. In *Adams v. Barry*[76] the respondent sought to set aside the earlier probate of the decedent's 1968 will and to admit to probate an alleged lost will of the decedent, which was claimed to have been signed in 1972 and in which respondent was allegedly named as the sole beneficiary. The only evidence to support the validity of the lost will was the testimony of the respondent herself. She testified that she accompanied the decedent to a lawyer's office where they executed their respective wills in the presence of two witnesses.[77] The respondent's testimony was excluded by the trial court and an instructed verdict was rendered in favor of the probated will. The court of civil appeals, however, reversed and remanded, holding that the respondent's testimony was based on matters within her own knowledge, was not based on any transaction with the decedent, and, therefore, should not have been excluded under article 3716.[78]

The Texas Supreme Court reversed the judgment of the court of civil appeals and affirmed the holding of the trial court. The dead man's statute is a statutory exception to the general rule that parties to a lawsuit are competent to testify.[79] Its purpose is to exclude testimony of a living party pertaining to a transaction with or statement by a decedent, whose death

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74. *See* Bolieu v. Firemen's & Policemen's Civil Serv. Comm'n, 330 S.W.2d 234, 236-37 (Tex. Civ. App.—San Antonio 1959, writ ref'd n.r.e.); TEX. REV. CIV. STAT. ANN. art. 6701*l*-5, § 3(a) (Vernon 1977).

75. TEX. REV. CIV. STAT. ANN. art. 3716 (Vernon 1926) (emphasis added) provides:

> 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.

76. 560 S.W.2d 935 (Tex. 1978).

77. Both of these witnesses testified at the trial and denied witnessing the execution of a will by the decedent. *Id.* at 937-38.

78. 551 S.W.2d 792 (Tex. Civ. App.—Waco 1977).

79. 560 S.W.2d at 937 (citing Roberts v. Yarboro, 41 Tex. 449 (1874)).

prevents rebuttal.[80] The rule does not, however, prohibit a party from testifying from personal knowledge arising otherwise than from a transaction with or statement by the decedent.[81] The supreme court in *Barry* held that whatever personal knowledge the respondent possessed concerning the allegedly lost will of the decedent was inseparably connected with their joint trip to the lawyer's office. Since the term "transaction" merely requires a mutuality or concert of action, the supreme court held that their trip was a transaction and article 3716 therefore barred the admission of the respondent's testimony.

Waiver. Since the dead man's statute serves to exclude otherwise competent testimony of a party merely because it pertains to a transaction with or statement by the decedent, the courts have strictly construed the statute.[82] In addition, there are numerous decisions in which parties have been able to circumvent the restrictive effect of the statute by showing that the objecting party waived its applicability.[83] One of the most common grounds for asserting waiver of the statute is that during a deposition the objecting party questioned the proposed witness about the "transaction" with the decedent. Although such questioning in depositions has long been considered a waiver of the statute,[84] questions in interrogatory form have rarely raised the waiver issue.

The issue of wavier in an interrogatory form was presented during the survey period. In *Denbo v. Butler*[85] the court of civil appeals stated that the dead man's statute could be waived through the use of interrogatories that contain questions concerning transactions with the decedent, but in *Fleming v. Baylor University Medical Center*[86] the Texas Supreme Court cast serious doubt upon this statement.

In *Fleming* a patient who was burned when oxygen that was supplied to his room ignited brought suit against the hospital. The patient died prior to trial, and his widow was substituted as plaintiff. The trial court granted the hospital's motion for an instructed verdict, but the court of civil appeals reversed and remanded, holding that the evidence raised issues of negligence on the part of the hospital. The court of civil appeals noted, however, that "another problem" existed in the case.[87] During the trial certain testimony offered was excluded on the basis of the dead man's stat-

80. *See* Walker, *The Dead Man's Statute* , 27 TEX. B.J. 315 (1964).
81. *E.g.*, Roberts v. Roberts, 405 S.W.2d 211 (Tex. Civ. App.—Waco), *writ ref'd n.r.e. per curiam*, 407 S.W.2d 772 (Tex. 1966).
82. *See* Ragsdale v. Ragsdale, 142 Tex. 476, 179 S.W.2d 291 (1944).
83. *E.g.*, Green v. Hale, 433 F.2d 324 (5th Cir. 1970); Mueller v. Banks, 273 S.W.2d 88 (Tex. Civ. App.—San Antonio 1954, writ ref'd n.r.e.); Smith v. Smith, 257 S.W.2d 335 (Tex. Civ. App.—Waco 1953, writ ref'd n.r.e.); Merriman v. Lary, 205 S.W.2d 100 (Tex. Civ. App.—Waco 1947, writ ref'd n.r.e.).
84. Green v. Hale, 433 F.2d 324, 331 (5th Cir. 1970); Merriman v. Lary, 205 S.W.2d 100, 103 (Tex. Civ. App.—Waco 1947, writ ref'd n.r.e.).
85. 523 S.W.2d 458, 460 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ).
86. 554 S.W.2d 263 (Tex. Civ. App.—Waco), *writ ref'd n.r.e. per curiam*, 561 S.W.2d 797 (Tex. 1977).
87. *Id.* at 266.

ute. The evidence offered consisted of testimony by the plaintiff relating to Mr. Fleming's physical and mental condition immediately prior to his admission into the hospital, between the time of his admission and the time of the fire, and after he was burned. Such evidence was primarily designed to show that Mr. Fleming was in a confused state during the five days preceding the fire. The defendant contended that article 3716 precludes the admission of testimony arising out of a transaction between a party and a decedent unless the party is called to testify thereto by the opposing party. The court of civil appeals concluded that since the defendant propounded written interrogatories to Mrs. Fleming that were directly related to Mr. Fleming's mental and physical condition during his five-day stay in the hospital, the defendant had waived the dead man's statute. Although the supreme court, in a per curiam opinion, refused the defendant's application for writ of error with the notation "no reversible error," in its opinion the court expressly held that its ruling "should not be understood as approving the portion of the opinion pertaining to waiver" of the dead man's statute.[88] The supreme court apparently disapproved of the lower court's application of the waiver doctrine in a case in which the defendant merely made inquiries in the form of interrogatories.

V. CROSS-EXAMINATION

Prosecutors frequently resort to the use of "have you heard" questions on cross-examination of a defendant's character witnesses. In *McIlveen v. State*[89] the defendant complained of a series of "have you heard" questions,[90] alleging that the questions were not propounded in good faith. The court of criminal appeals held that a witness attesting to the good reputation of an accused may be asked on cross-examination whether he has heard of acts of the accused that are inconsistent with that good reputation.[91] The rationale for this rule is that the state should be permitted to test the witness's knowledge of the defendant's reputation. The prosecutor, however, may only ask such questions in good faith, and he must believe that the inquiry has some basis in fact. The court of criminal appeals in *McIlveen* held that since the defendant proved no bad faith by the prosector in asking the questions, no error was shown.[92]

The use of "have you heard" questions was also upheld in *Williams v.*

88. 561 S.W.2d 797, 797 (Tex. 1977).

89. 559 S.W.2d 815 (Tex. Crim. App. 1977).

90. Among the complained of questions were the following: "Have you heard that Lincoln McIlveen drew a pistol on Tim Robinson in Teague?" "Have you heard that in 1967 Lincoln McIlveen rented . . . his building next door to his barber shop knowing it would be used for illegal gambling purposes?" *Id.* at 821.

91. FED. R. EVID. 405(a) also allows counsel to inquire on cross-examination whether a witness attesting to the character of a criminal defendant has heard of particular instances of misconduct by the defendant.

92. The court in *McIlveen* considered it significant that the defendant made no objection on the ground of bad faith to any of the propounded questions during the trial. Also, the defendant failed to develop any evidence of bad faith on the part of the prosecution at the hearing on his motion for new trial. 559 S.W.2d at 821.

State,[93] in which the defendant was convicted of murder. The defendant contended on appeal that the trial court erred in allowing the state to cross-examine his father during the punishment phase of his trial with "have you heard" questions[94] because the scope of the direct examination had not included questions about the defendant's reputation. The defendant's father had testified, however, that the defendant had never been convicted of a felony offense, and he asked the jury to grant the defendant probation. He also testified that the defendant had never given him or his wife any trouble.

The court of criminal appeals held that the trial court did not err in permitting the witness to be cross-examined in such a manner. The court relied on *Childs v. State*,[95] in which the court held that similar testimony elicited on direct examination was "geared to persuade the jury to grant probation by showing them [the defendant's] good character and law abiding habits."[96] The *Childs* court held that the defendant cannot have a witness testify about his good character and then claim that he has not placed his reputation in issue merely because the witness was not asked whether the defendant "enjoyed a good reputation in the community,"[97] and in *Williams* the court reaffirmed that holding.

The improper phrasing of a "have you heard" question constituted reversible error in *Sisson v. State*,[98] in which the defendant was convicted of delivering cocaine. The court of criminal appeals noted that although it is permissible for "have you heard" questions to contain details of the rumored event alluded to, a question that injects an assertion of fact is clearly improper.[99] In *Sisson* the court held that the prosecution's question[100] was prohibited because it contained the phrase "did in fact" and therefore had the undeniable effect of asserting the matter as fact.

In *Texas Employers' Insurance Association v. Garza*,[101] a workers' compensation case, the defendant's attorney went beyond the prescribed limits of cross-examination. The insurer appealed from a judgment for the plaintiff, asserting that the trial judge's remarks to its counsel were comments on the weight of the evidence that were calculated to and probably did cause the rendition of an improper verdict. During the defense attorney's cross-examination of the plaintiff's doctor, the trial judge stated that the questioning was not material and merely constituted harassment of the witness. The defense counsel responded that he intended to harass the

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93. 566 S.W.2d 919 (Tex. Crim. App. 1978).

94. The witness was asked the following question: "Q. Let me ask you, sir, whether or not you have heard that on June the 14th, 1967, your son was arrested for the offense of assault with intent to murder?" *Id.* at 925.

95. 491 S.W.2d 907 (Tex. Crim. App. 1973).

96. *Id.* at 908.

97. *Id.* at 909.

98. 561 S.W.2d 197 (Tex. Crim. App. 1978).

99. *See, e.g.*, Moffett v. State, 555 S.W.2d 437 (Tex. Crim. App. 1977).

100. The question asked was: "Have you heard that on August the 7th, 1976, this Defendant with Randy Walter, Kay Miller and Donna Rana *did in fact*, smoke marihuana together, have you heard that?" *Id.* at 199 (emphasis added by the court).

101. 557 S.W.2d 843 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.).

witness as much as possible on cross-examination. The judge replied that counsel would not be permitted to harass a witness in his court; if counsel continued, he would end up in jail.[102] The defense attorney persisted in questioning the doctor about the number of patients he had examined for the plaintiff's attorney. The trial judge held that the line of questioning was not relevant and stated that the plaintiff's counsel was a member of the bar in good standing. The judge subsequently admonished the defense counsel to conduct himself in a "decent lawyer-like way."[103]

A trial judge generally has broad discretion in determining the manner in which a trial is to be conducted in his court, including the extent to which cross-examination will be allowed.[104] After holding that the trial judge did not abuse his discretion, the court of appeals stated that the defense counsel's remarks were contemptuous of both the trial judge and the witness because it is always improper to threaten or browbeat a witness.[105]

In *Logan v. Barge*[106] a widow brought suit against the son, daughter, and daughter-in-law of her deceased husband, alleging a conspiracy to defraud her of community property rights in her husband's estate. During the trial one of the plaintiff's witnesses testified that his son had purchased land from the decedent, thereby incurring a debt that was not fully discharged at the time of the decedent's death. The witness stated that the balance of the debt was to be forgiven upon the death of the decedent. The defendants denied that the debt was to be forgiven and sought to expose the witness's bias against them because of a dispute between the witness's son and the defendants. The plaintiff's objections to this line of cross-examination, however, were sustained by the trial court. The witness was the plaintiff's most important witness and gave the only testimony as to several aspects of her case. Based on jury findings, the trial court entered judgment for the plaintiff.

It is well settled in Texas that a party may cross-examine an adverse witness to develop any fact that tends to show that a witness might have reason to be biased.[107] Thus, the exact nature of a business relationship between a witness and a party is generally a matter to be considered by the trier of fact.[108] The court of civil appeals in *Logan v. Barge* held that the trial court erred in refusing to permit further cross-examination of the wit-

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102. *Id.* at 845.

103. *Id.*

104. *E.g.*, Best Inv. Co. v. Hernandez, 479 S.W.2d 759 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.); Sands v. Cooke, 368 S.W.2d 111 (Tex. Civ. App.—San Antonio 1963, no writ).

105. The court of civil appeals also stated that since the bill of exceptions prepared by the defense attorney to preserve the omitted evidence contained both admissible and inadmissible evidence, the defendant could not validly complain of the trial court's refusal to admit *all* of such testimony. 557 S.W.2d at 847.

106. 568 S.W.2d 863 (Tex. Civ. App.—Beaumont 1978, writ ref'd n.r.e.).

107. *See, e.g.*, Walker v. Mo. Pac. R.R., 425 S.W.2d 462, 464 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref'd n.r.e.); Aguilera v. Reynolds Well Serv., Inc., 234 S.W.2d 282, 283-84 (Tex. Civ. App.—San Antonio 1950, writ ref'd).

108. Aguilera v. Reynolds Well Serv., Inc., 234 S.W.2d 282, 283 (Tex. Civ. App.—San Antonio 1950, writ ref'd).

ness concerning the dispute between his son and the defendants. The court reasoned that wide latitude must be given in the cross-examination of damaging factual witnesses to show their possible bias and prejudice. The court concluded, however, that in this case such error was not reversible.

VI. JUDICIAL NOTICE

The list of matters of which Texas courts are willing to take judicial notice continues to lengthen. In *Black v. Kidder, Peabody & Co.*,[109] a usury case, the plaintiff argued on appeal that the trial court erred in its conclusion that the disputed interest charges were not usurious under New York law. The plaintiff also argued that the defendant failed to file a timely motion asking the court to take judicial notice of New York law in accordance with the provisions of rule 184a of the Texas Rules of Civil Procedure.[110] The court of civil appeals held that no reversible error was present even though no formal motion was filed by the defendant. The conclusions of law filed by the trial court expressly showed that it judicially noted the laws of New York and that it was sufficiently satisfied as to the meaning and application of such laws.[111]

In *Scott v. Abilene Independent School District*[112] a United States district court took judicial notice of the fact that an adjacent school district was not inconvenient for a person living in Abilene, stating that the "two towns were only about twelve miles apart and were connected by a good divided highway."[113] Courts do, however, refuse to take judicial notice of some facts. In *Stoner v. Thompson*[114] an issue arose concerning whether a matter was properly set for trial under the local rules of Harris County, Texas. The court of civil appeals held that since there was no evidence in the record as to the contents of the local rules and it had no actual knowledge of their contents, it would be improper as well as impossible to take judi-

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109. 559 S.W.2d 669 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ).

110. TEX. R. CIV. P. 184a states:

> The judge upon the motion of either party shall take judicial notice of the common law, public statutes, and court decisions of every other state, territory, or jurisdiction of the United States. Any party requesting that judicial notice be taken of such matter shall furnish the judge sufficient information to enable him properly to comply with the request, and shall give each adverse party such notice, if any, as the judge may deem necessary, to enable the adverse party fairly to prepare to meet the request. The rulings of the judge on such matters shall be subject to review.

111. 559 S.W.2d at 670. Similarly, in A & S Distrib. Co. v. Providence Pile Fabric Corp., 563 S.W.2d 281 (Tex. Civ. App.—Dallas 1977, writ ref'd n.r.e.), in which a judgment creditor brought suit on a New York judgment against the judgment debtor, the defendant contended that the law of New York had not been properly pleaded and proved and that the court therefore had to presume that New York law was the same as Texas law. Although no motion under rule 184a of the Texas Rules of Civil Procedure was filed, the court stated that a memorandum of authorities that cited the pertinent New York law was filed in support of the plaintiff's motion for summary judgment and that it was sufficient as a rule 184a motion requesting the court to take judicial notice of New York law.

112. 438 F. Supp. 594 (N.D. Tex. 1977).

113. *Id.* at 596 n.2.

114. 570 S.W.2d 511 (Tex. Civ. App.—Waco 1978), *aff'd*, 22 Tex. Sup. Ct. J. 258 (Mar. 14, 1979).

cial notice of such rules.[115]

VII. PRIVILEGES

Privilege Against Self-Incrimination. The fifth amendment privilege against self-incrimination is generally considered to be a privilege that is personal to the witness.[116] A defendant, therefore, may not invoke a witness's privilege for the defendant's own benefit.[117] The situation presented in *United States v. Colyer*[118] was unique because the trial court, and not the witness, invoked the privilege. The defendant was convicted of unlawfully transporting a fraudulently obtained credit card in interstate and foreign commerce. The owner of the credit card testified that he met the defendant at a bar and invited him to his apartment for drinks. He also testified that he fell asleep and found his wallet missing when he awoke. On cross-examination the defendant's attorney asked the credit card owner if he was a homosexual. The prosecutor objected on the ground that the witness was entitled to invoke his fifth amendment rights against self-incrimination and thus could not be required to answer the question.[119] Although there apparently was no unwillingness on the part of the witness to answer the question, the trial court agreed and sustained the objection.

The defendant contended on appeal that the trial court abused its discretion by invoking the privilege on behalf of the witness and thus restricting the cross-examination of the witness. The defendant further argued that the witness waived his right to invoke the privilege by testifying that the bar at which he met the defendant was frequented by homosexuals. The Fifth Circuit Court of Appeals commended the trial court's solicitude for the witness's rights, especially since he was not represented by counsel, but stated that the "better practice would have been to ask the witness either whether he desired to claim the privilege or whether he wanted to consult with his attorney."[120] The court found no authority to indicate that the trial court was entitled to assume that the witness would claim the privilege simply because it was available. The court nevertheless determined that the trial court's error was harmless.

115. *Id.* at 515. The court also stated that attaching a copy of the local rules to the appellate brief did not constitute proof of the rules. Other courts, however, in their discretion, have taken judicial notice of local rules of procedure. *See, e.g.*, Woodard v. Hopperstad Builders, Inc., 554 S.W.2d 726 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.).

116. *See, e.g.*, United States v. Mayes, 512 F.2d 637 (6th Cir. 1974), *cert. denied*, 422 U.S. 1008 (1975). *See also* C. MCCORMICK, *supra* note 7, § 120.

117. United States v. Mayes, 512 F.2d 637, 649-50 (6th Cir. 1974), *cert. denied*, 422 U.S. 1008 (1975). In *Mayes*, however, defendant's counsel successfully asserted a witness's right to remain silent by arguing that he was representing both the witness and the defendant.

118. 571 F.2d 941 (5th Cir. 1978).

119. Since TEX. PENAL CODE ANN. § 21.06(a) (Vernon 1974) precludes persons of the same sex from engaging in deviate sexual intercourse, the witness's answer to the question could have been incriminating. It is extremely doubtful, however, that the witness's homosexuality had anything to do with his credibility. *See* 571 F.2d at 946 n.7.

120. 571 F.2d at 946. The Government admitted that the procedure followed by the trial court was not in accordance with the guidelines established by the Fifth Circuit Court of Appeals for resolving the fifth amendment claims of witnesses. *Id.* at 944.

Privileges Created by Statute. The question whether article 342—210 of the Texas Banking Code[121] creates an absolute privilege for information relating to the financial condition of state banks was presented for the first time during the past year.[122] In *Stewart v. McCain*[123] a subpoena duces tecum was served on the relator, commanding him to produce at a deposition all documents and records concerning an examination of a certain bank. The relator's motions to quash or modify the subpoena duces tecum and to grant a protective order were denied, and the relator thereafter filed a petition for writ of mandamus to compel the trial judge to vacate his order. The Texas Supreme Court concluded that the legislature intended to establish an absolute privilege against the disclosure of such confidential information. Accordingly, the court held that article 342—210 prevented discovery of the confidential section of the report.[124]

Similarly, in *Valley International Properties, Inc. v. Los Campeones, Inc.*[125] the defendant alleged on appeal that the trial court erred in refusing to permit its counsel to review certain court exhibits and in refusing to admit some of them into evidence. Pursuant to a subpoena duces tecum, a witness was ordered to deliver to the court a savings and loan association's correspondence file relevant to the plaintiff. The court reviewed the seven documents produced and admitted one of them into evidence. The remainder of the documents were considered to be privileged information, and defendant's counsel was not permitted to review them.[126] The defend-

121. TEX. REV. CIV. STAT. ANN. art. 342—210 (Vernon 1973) provides:

> [A]ll information obtained by the Banking Department relative to the financial condition of state banks, whether obtained through examination or otherwise, except published statements, and all files and records of said Department relative thereto shall be confidential, and shall not be disclosed by the Commissioner or any officer or employee of said Department. Further provided that no such information shall be divulged to any member of the Finance Commission, nor shall any member of the Finance Commission be given access to such files and records of the Banking Department; provided, however, that the Commissioner may disclose to the Finance Commission, or either section thereof, or to the State Banking Board information, files and records pertinent to any hearing or matter pending before such Commission or either section thereof or such Board. Further provided that upon request, the Commissioner may disclose to a Federal Reserve Bank any information relative to its members, and shall permit it access to any files and records or reports relating to its members. Further provided that the Commissioner may, in his discretion, if he deems it necessary or proper to the enforcement of the laws of this State or the United States, and to the best interest of the public, divulge such information to any other department of the State or National Government, or any agency or instrumentality thereof.

122. Although there had been no court decision that construed the effect of this privilege, the attorney general had previously rendered an opinion determining that information held by the Banking Department should remain confidential. TEX. ATT'Y GEN. ORD-147 (1976).

123. 575 S.W.2d 509 (Tex. 1978).

124. The supreme court recognized that a government in some instances needs information concerning the affairs of its citizens to enable the government to perform its functions properly, and that statutes therefore are required to preserve the confidentiality of the information. *Id.* at 137; *see* Note, *Discovery of Government Documents and the Official Information Privilege*, 76 COLUM. L. REV. 142 (1976).

125. 568 S.W.2d 680 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.).

126. The privilege claimed was predicated on TEX. REV. CIV. STAT. ANN. art. 852a, § 3.07 (Vernon 1964) (emphasis added), which provides:

ant contended that the statute by its very language applied only to "books and records" and did not bar discovery of correspondence of an informal nature. The court rejected the defendant's argument and applied a common sense approach to the problem. Observing that the statute permits every member of a savings and loan association to inspect books and records relevant to his transactions with the association,[127] the court concluded that the legislature did not intend to omit correspondence from the phrase "books and records" and thereby prevent members from inspecting their own correspondence.

VIII. RES IPSA LOQUITUR

In *Kimbell, Inc. v. Moreno*,[128] a venue case, the defendant appealed from an order denying its plea of privilege. The defendant contended that the plaintiff could not maintain venue in the county of suit because the plaintiff had failed to prove the necessary elements of a negligence cause of action. To support venue the plaintiff relied, *inter alia*, on the doctrine of res ipsa loquitur to establish the defendant's negligence.[129] The plaintiff argued that proof of the existence of a foreign substance on the floor of the defendant's store was sufficient to warrant an inference that the storekeeper was negligent.

The doctrine of res ipsa loquitur permits the trier of fact to base an inference of negligence upon circumstantial evidence when it appears that the character of the accident is such that it ordinarily would not occur in

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Otherwise, the right of inspection and examination of the books and records shall be limited to the Commissioner or his duly authorized representatives as provided in this Act, to persons duly authorized to act for the association and to any Federal instrumentality or agency authorized to inspect or examine the books and records of an association whose savings accounts are insured by the Federal Savings and Loan Insurance Corporation. *The books and records pertaining to the accounts and loans of members shall be kept confidential by the Commissioner, his examiners and representatives*, except where disclosure thereof shall be compelled by a court of competent jurisdiction, and no member or other person shall have access to the books and records or shall be furnished or shall possess a partial or complete list of the members except upon express action and authority of the board of directors. The books, records and files of an association shall not be admissible as evidence in any proceeding concerning the validity of any tax assessment or the collection of delinquent taxes, penalties and interest except where (i) the owner of an account is a proper party to the proceeding in which event the books, files and records pertaining to the account of such party shall be admissible or (ii) the association itself is a proper party to the proceeding in which event any book, file or record material to the proceeding shall be admissible.

127. Section 3.07 also provides: "Every member shall have the right to inspect such books and records of an association as pertain to his loan, Permanent Reserve Fund Stock or savings account." *Id.*

128. 563 S.W.2d 350 (Tex. Civ. App.—Amarillo 1978, no writ).

129. Because this was a slip and fall case, in order to prove negligence the plaintiff in *Kimbell* was required to establish that the defendant put the substance on the floor, or that the defendant knew that the foreign substance was on the floor and negligently failed to remove it, or that the foreign substance had been on the floor a sufficient length of time that it should have been discovered and removed by the defendant. *See, e.g.* , Franklin v. Safeway Stores, Inc., 504 S.W.2d 514 (Tex. Civ. App.—Dallas 1973, writ ref'd n.r.e.).

the absence of negligence and the evidence shows that the instrumentality causing the injury was under the management and control of the defendant.[130] The doctrine neither compels an inference of negligence nor does it raise a presumption of negligence.[131] Thus, even if a party establishes the facts necessary to invoke the doctrine, he nevertheless must secure a finding of negligence.[132] Because the plaintiff in *Kimbell, Inc. v. Moreno* failed to secure a finding of negligence,[133] he would have been unable to prevail on his claim even if he had established the factors necessary to invoke the res ipsa loquitur doctrine. As a result the defendant's plea of privilege was sustained.

The res ipsa loquitur doctrine was also relied upon by the plaintiff in *Goodpasture, Inc. v. Hosch*,[134] another venue case. The sole issue presented on appeal was whether the trial court's finding of negligence based on the doctrine of res ipsa loquitur was supported by the evidence. Only two witnesses testified at the venue hearing. The plaintiff testified that he was working approximately 300 to 400 feet away from a grain storage elevator when it exploded. He testified that he knew where the explosion had occurred but he did not know the reason for the explosion. A special agent of the United States Treasury Department, who was also employed by the defendant at the time of the venue hearing, testified that he was in charge of the team assigned to investigate the explosion to try to determine its cause. He further testified that the investigative effort was inconclusive as to the cause of the explosion. He admitted, however, that under the right conditions a spark could touch off grain dust within a grain elevator and cause it to explode.[135]

The Houston court of civil appeals determined that the trial court was justified in concluding that the defendant failed to exercise reasonable care in the management and control of its grain storage elevator and that its negligence was the proximate cause of the explosion. The court reasoned that although the doctrine of res ipsa loquitur is inapplicable when it cannot be reasonably inferred from the evidence that the accident resulted from the defendant's negligence, the plaintiff is not required to negate every other possible cause of the occurrence. The court indicated that since the plaintiff made out "a *prima facie* case of negligence under the rules of *res ipsa loquitur*, it was incumbent on Goodpasture to introduce evidence to explain, rebut or otherwise overcome the inference that the

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130. Mobil Chem. Co. v. Bell, 517 S.W.2d 245, 251 (Tex. 1975); Owen v. Brown, 447 S.W.2d 883, 886 (Tex. 1969).

131. *E.g.*, Mobil Chem. Co. v. Bell, 517 S.W.2d 245, 251-52 (Tex. 1975).

132. *Id.* The court in *Bell* noted that only under extraordinary circumstances would the doctrine of res ipsa loquitur compel a conclusion of negligence as a matter of law. *Id.* at 252.

133. The plaintiff actually had secured a finding that the substance had been on the floor for such a period of time that the defendant should have discovered it, but even he conceded that the finding was without evidentiary support. 563 S.W.2d at 352-53.

134. 568 S.W.2d 662 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ dism'd).

135. The court of civil appeals determined that the evidence conclusively established the defendant's management and control of the grain storage elevator at the time of the explosion. 568 S.W.2d at 665-66.

injury complained of was due to its negligence."[136]

IX. UNAVAILABILITY OF WITNESSES

The death of a witness is universally recognized as grounds for admitting into evidence former testimony given by him at a prior trial.[137] The majority of jurisdictions also held that in the case of a witness who is outside the jurisdiction of the court, the necessary predicate to the introduction of his prior testimony is shown by proof of his permanent absence from the jurisdiction and due diligence in attempting to secure his presence.[138] Until this year, the question of the predicate necessary to introduce the prior testimony of an unavailable witness who is inside the court's jurisdiction but temporarily unavailable because of illness was relatively unsettled in Texas.[139] In *A.F. Conner & Sons v. Tri-County Water Supply Corp.* [140] this issue was squarely presented and decided.

The proponent of the testimony of a witness who testified at a prior trial but is unable to appear at a subsequent trial because of temporary illness usually has at least two alternatives: (1) moving for a continuance until the witness recovers from his illness; or (2) offering the prior testimony of the witness as an exception to the hearsay rule. The ruling in each instance is usually within the discretion of the trial court.[141] In *Conner* one of the witnesses at the first trial, a Mr. Garner, was in a hospital for surgery and was unable to testify at the second trial. The plaintiff's counsel submitted a written motion to the trial court requesting that the court reporter transcribe Garner's testimony from the first trial. In its motion the plaintiff alleged that Garner would be unable to appear as a witness, that he was physically unable to have his deposition taken, and that his testimony was essential to the plaintiff's case. The trial judge granted the motion and issued the order. On the day of trial the defendants objected to the introduction of Garner's prior testimony and moved for a continuance until a deposition could be taken, or until such time as Garner could appear at trial. The defendant's motion was overruled,[142] and Garner's prior testimony was thereafter introduced into evidence. The defendants objected to the introduction of the testimony on the ground that they had no opportunity to cross-examine Garner on the facts occurring between the first and

136. *Id.* at 666.

137. 5 J. WIGMORE, EVIDENCE § 1403 (J. Chadbourn rev. 1974).

138. *Id.* at 205-09 & n.5; Comment, *The Unavailability Requirement for Exceptions to the Hearsay Rule*, 41 MO. L. REV. 404 (1976).

139. The supreme court did, however, previously refuse writ of error with the notation "no reversible error" in Harris v. Reeves, 421 S.W.2d 689 (Tex. Civ. App.—Waco 1967, writ ref'd n.r.e.). The petitioner in *Harris*, however, did not allege in his application for writ of error that the court of civil appeals erred in holding that the evidence of an absent witness given at a former trial was properly admitted. The *Harris* case is discussed in A.F. Conner & Sons v. Tri-County Water Supply Corp., 561 S.W.2d 466, 471 (Tex. 1978).

140. 561 S.W.2d 466 (Tex. 1978).

141. *Id.* at 471.

142. The trial court indicated that when the prior testimony was offered with a proper predicate, it would consider a recess for the purpose of obtaining Garner's deposition. *Id.* at 468.

second trial and that his testimony at this trial would differ from his prior testimony. The plaintiff, however, submitted Garner's sworn affidavit that his testimony would not change. The trial court ruled that the prior testimony could be read to the jury because the plaintiff had established a proper predicate for its introduction into evidence. The court of civil appeals found no error in the admission of the prior testimony.[143]

The Texas Supreme Court reversed the holding of the court of appeals, stating that the proponent of a witness's prior testimony has the burden of showing both the degree and duration of the witness's illness and that he has exercised due diligence in seeking to obtain the witness's testimony. The court added an additional factor for consideration: "Absent a question of diligence, the problem becomes one of fairness to the respective parties . . . ."[144] The court concluded that the trial court erred in admitting the prior testimony in the face of evidence of changed circumstances between the first and second trial and a dispute between counsel as to whether Garner's testimony would be less favorable to the plaintiff than his prior testimony. Furthermore, the court considered it significant that Garner was "the only witness whose testimony was based on repeated and actual inspections of the pipeline during construction and as such his prior testimony undoubtedly carried significant weight with the jury."[145]

X. Parol Evidence Rule

The parol evidence rule states that in the absence of fraud, accident, or mistake, parol or extrinsic evidence is inadmissible to contradict or vary the terms of a written instrument.[146] In *Chaplin v. Milne*[147] the parol evidence rule was invoked to prohibit evidence of a contemporaneous oral agreement that a promissory note would be renegotiated on its due date. Relying on section 2-202 of the Uniform Commercial Code,[148] which expressly excludes evidence of contemporaneous oral agreements, the court held that the extrinsic evidence was inadmissible to vary the terms of the note.[149]

Parol evidence was admitted, however, in *Hogg v. Jaeckle*,[150] in which five lessees brought suit to recover a security deposit paid to the owner of a rented house. The written lease provided that $400 was paid as a security deposit, but the plaintiffs orally testified that each of them made a $100

143. 541 S.W.2d 856 (Tex. Civ. App.—Eastland 1976).
144. 561 S.W.2d at 472.
145. *Id.*
146. *See, e.g.*, Jackson v. Hernandez, 155 Tex. 249, 285 S.W.2d 184 (1955).
147. 555 S.W.2d 161 (Tex. Civ. App.—El Paso 1977, no writ).
148. Tex. Bus. & Com. Code Ann. § 2.202 (Tex. UCC) (Vernon 1968), provides that "such terms as are included [in the written agreement] may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement."
149. A similar result was reached in Huddleston v. Fergeson, 564 S.W.2d 448 (Tex. Civ. App.—Amarillo 1978, no writ). It was held that error occurred in not excluding the purchaser's testimony that contemporaneous with the execution of a contract the vendor had promised immediate possession or return of the escrow deposit.
150. 561 S.W.2d 568 (Tex. Civ. App.—Tyler 1978, no writ).

security deposit, for a total of $500. The defendant contended that the trial court erred in finding that the total security deposit was $500 because such a finding was at variance with the terms of the written lease. The court held that the parol evidence rule did not prevent a written instrument from being *subsequently* modified or changed by oral agreement of the parties.[151]

In *Ferguson v. Yorfino*[152] the plaintiff brought suit on a written contract to build a home, alleging that he had overpaid the general contractor. The contractor filed a counterclaim, asserting that the owner had failed to pay him certain amounts that were due. The contractor also testified that he signed the first contract after the plaintiff told him that it was only for the purpose of obtaining a loan on the residence. The contractor also testified that he told the plaintiff that he could not complete the job for the amount stated in the first contract and that he wanted an open-end contract. According to the contractor's testimony, the owner prepared a second agreement that voided the first contract. The plaintiff testified, however, that the second contract was made under duress when the contractor threatened to walk off the job if the plaintiff did not sign another agreement. On appeal from a jury finding in favor of the contractor, the plaintiff claimed that the trial court erred in allowing testimony that contradicted the terms of the first agreement. The plaintiff argued that since there was no pleading or evidence that the first contract was induced by fraud, accident, or mistake, any evidence introduced to vary the terms of that contract would violate the parol evidence rule.

The court of civil appeals rejected the plaintiff's argument, holding that parol evidence is admissible to show that a written contract does not actually evidence any agreement between the parties. Since the testimony of the contractor attacked the validity of the first contract and tended to show that the contract was nonexistent, the parol evidence rule was not applicable, and it was not necessary for the defendant to plead or prove fraud, accident, or mistake.[153]

The supreme court in *Town North National Bank v. Broaddus*[154] was confronted with the issue of whether the parol evidence rule prohibits the

151. *Id.* at 570; *see* 2 C. McCORMICK & R. RAY, *supra* note 7, § 1671.

152. 570 S.W.2d 422 (Tex. Civ. App.—San Antonio 1978, writ ref'd n.r.e.).

153. A similar result was reached in Our Fair Lady Health Resort v. Miller, 564 S.W.2d 410 (Tex. Civ. App.—Austin 1978, no writ). It was held that extrinsic evidence was admissible to establish either that the parties did not intend for the contract to take effect immediately or that a contract did not even exist. The defendant, who was sued for the unpaid balance due on an installment contract executed by her, successfully contended that the plaintiff's agent represented to her at the time she signed the contract that the contract would not be effective until the lapse of a three-day period, during which time she could cancel the contract.

In Brannon v. Gulf States Energy Corp., 562 S.W.2d 219 (Tex. 1977), a letter and check relating to "lease rentals" were held to be of a contractual nature. Extrinsic parol evidence, therefore, was held not to be admissible to establish that the "lease rental" was actually a bonus consideration for an unexecuted lease rather than rental due under a prior executed lease.

154. 569 S.W.2d 489 (Tex. 1978).

admission of extrinsic evidence that the maker of a promissory note was induced to sign the note by the payee's representations that the maker would not be liable for repayment. The trial court granted the payee's motion for summary judgment notwithstanding the defendants' affidavits, which raised fact questions concerning the means used to induce them to sign the promissory note. The court of civil appeals reversed and remanded the case for determination of the question of fraud raised by the affidavits, stating that evidence introduced to show fraud in the inducement is always admissible as an exception to the parol evidence rule.[155] The supreme court, however, held that the allegations of fact, even if true, did not constitute fraud in the inducement. The court distinguished the cases relied upon by the court of civil appeals,[156] stating that in each case "some sort of trick, artifice, or device was employed by the payee in addition to his representation to the maker that he would not be liable."[157] Applying that distinction to the present case, the court found no evidence that such trickery, artifice, or device was employed by the payee. The affidavits offered by the defendants indicated only that the bank made representations that they would not be liable on the note. The supreme court affirmed the trial court's decision that the facts stated in defendants' affidavit were inadmissible under the parol evidence rule and that summary judgment therefore was proper.

155. 558 S.W.2d 909 (Tex. Civ. App.—Tyler 1977).

156. Berry v. Abilene Savings Ass'n, 513 S.W.2d 872 (Tex. Civ. App.—Eastland 1974, writ ref'd n.r.e.); Viracola v. Dallas Int'l Bank, 508 S.W.2d 472 (Tex. Civ. App.—Waco 1974, writ ref'd n.r.e.).

157. 569 S.W.2d at 493.