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Evidence

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PART II. PROCEDURAL LAW

EVIDENCE

by

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and

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DURING this survey period the appellate courts of Texas handed down numerous decisions involving various rules of evidence. The cases of greatest significance lie in the following substantive areas: (1) Expert Opinion Evidence; (2) The Hearsay Rule and Its Exceptions; (3) Dead Man's Statute; (4) No Probative Evidence; (5) Best Evidence Rule; (6) Impeachment; and (7) Parol Evidence.

I. EXPERT OPINION EVIDENCE

Competency. Texas courts have long followed the rule articulated in *Bowles v. Bourdon*¹ that requires a medical doctor testifying as an expert witness in a medical malpractice case to be of the same school of medical practice as the defendant-doctor.² If the subject of inquiry is common to and equally developed in all fields of practice, however, any physician familiar with and trained in the area may testify as to the requisite standard of care.³ In *Sears v. Cooper*⁴ the court of civil appeals liberally construed the "common to and equally developed" criterion and allowed a pathologist to testify as an expert medical witness against a general practitioner. The jury found the defendant-doctor negligent. The doctor appealed, claiming no evidence or, alternatively, insufficient evidence to support the jury's findings. The plaintiff's primary expert witness at trial, a California pathologist, testified that the plaintiff suffered from an electrolyte imbalance that was aggravated by a diuretic prescribed by the defendant, and that this aggravation resulted in brain damage. Relying on the rule set forth in *Bowles*, the appellant attacked much of the pathologist's testimony

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1. 148 Tex. 1, 219 S.W.2d 779 (1949).

2. *Id.* at 5, 219 S.W.2d at 782. The *Bowles* court made clear that the defendant-doctor's school or method of practice must be of good standing and one that has established rules and principles to guide its members. *Id.*

3. *Porter v. Puryear*, 153 Tex. 82, 262 S.W.2d 933 (1953), *rev'd after second rehearing*, 264 S.W.2d 689 (Tex. 1954).

4. 574 S.W.2d 612 (Tex. Civ. App.—Houston [14th Dist.] 1978, writ *ref'd n.r.e.*).

on the ground that the standard of care applicable to specialists differs from that of general practitioners and that, as a result, the pathologist's testimony could not support the jury's findings. The appellate court rejected this contention. The court determined that the plaintiff's expert had established, through his testimony, that the standards relating to the prescribing of a diuretic are uniform throughout the four states in which he had practiced, including Texas.⁵ The court concluded that the evidence showing uniformity was sufficient to bring the pathologist's testimony within the rule established in *Porter v. Puryear*.⁶ Accordingly, the Court affirmed the trial court's ruling.

The competency of a medical expert to testify regarding the applicable standard of care was also presented in *Guidry v. Phillips*.⁷ In *Guidry* the plaintiff sued the defendant-doctor, alleging malpractice, negligence, fraud, and breach of warranty in the performance of unnecessary surgery to cure the plaintiff's asthma. The trial court entered judgment for the defendant, and the plaintiff appealed. One of the plaintiff's points of error on appeal was the trial court's exclusion of that portion of the plaintiff's expert's testimony regarding the standard of care applicable at the time of the operation. The court excluded the expert's testimony on the ground that the plaintiff had failed to establish the expert's competency to testify as to the appropriate standard of care on the date of the operation. Reversing and remanding the case, the court of civil appeals inferred the medical expert's familiarity with the standard of care that existed on the date of the operation, noting that during the period in question the plaintiff's expert was a licensed physician pursuing intensive studies in the area of pulmonary disease.⁸

During the survey period Texas courts also considered the competency of witnesses to testify as experts in specialties other than medicine. Whether a witness is qualified to testify as an expert is a matter within the discretion of the trial court, and a determination that a witness is competent will be reversed on appeal only upon a clear abuse of discretion.⁹ For example, in *In re B _____ S _____ L _____ & R _____ A _____*

5. 574 S.W.2d at 615. In holding that the pathologist's testimony was sufficient to establish the same standard of care concerning the prescription of diuretics, the court of civil appeals observed that the defendant had not challenged the qualifications of the expert witness on this ground at trial. *Id.* Consequently, whether a specialist is competent to establish the requisite standard of care for a general practitioner could be decided differently if objection to the specialist's qualifications is properly made.

6. 153 Tex. 82, 262 S.W.2d 933 (1953), *rev'd on other grounds*, 264 S.W.2d 689 (Tex. 1954); see text accompanying note 2 *supra*.

7. 580 S.W.2d 883 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ *ref'd n.r.e.*).

8. The evidence indicated that the witness graduated from the University of Colorado Medical School in 1958 with an M.D. degree, spent the next year in an internship training program, and then had one year of medical specialty residency at the University of Michigan. He subsequently had two additional years of medical specialty training at the University of Colorado, ending in 1962. In 1963, he had training in the sub-specialty of pulmonary disease, which made him Board qualified in the area of pulmonary diseases. *Id.* at 885.

9. *E.g.*, *Wilson v. Scott*, 412 S.W.2d 299 (Tex. 1967); 2 C. McCORMICK & R. RAY, TEXAS LAW OF EVIDENCE § 1401 (2d ed. 1956).

L _____, an action seeking modification of the custodial provisions of a prior divorce decree,¹⁰ the ex-wife offered the testimony of a purported expert recommending that her managing conservatorship not be disturbed. The witness, an adoption case worker, had a bachelor's degree in elementary education, a master's degree in "Family Relations and Early Childhood Development," and a history of employment as a first grade teacher and subsequently as a special education teacher. The trial court excluded the testimony on the ground that the witness was not qualified as an expert to express a recommendation that the ex-wife should maintain custody over the minor children. The ex-wife appealed her removal as managing conservator, claiming, as one point of error, that the trial court erred in excluding the caseworker's testimony. In affirming the trial court's exclusion of the witness's testimony, the court of civil appeals concluded that experience as a first grade teacher or participation in special education programs does not qualify an individual "to evaluate environments, attributes and personalities of parents and children and other circumstances which must be considered in determining what may be for the best interest of children in custody disputes."¹¹ Because no other evidence was presented demonstrating that the witness had gained a measure of expertise in any special area,¹² the appellate court held that the trial court did not abuse its discretion in concluding that the witness did not qualify as an expert.

Similarly, *Clark v. Cotten*¹³ considered whether the trial court had properly excluded the testimony of a state trooper who the plaintiff presented as an accident reconstruction expert. The state trooper had been employed with the Department of Public Safety for eight-and-a-half years, had received seventeen weeks of training, and had investigated 350 accidents. When the officer investigated the accident in question, he saw "eraser marks" on the highway, which indicated to him that the defendant's westbound vehicle had either skidded or hydroplaned after hitting a puddle of water, causing it to run into the eastbound lane and strike plaintiff's automobile. The state trooper testified that he had been taught that a car could "hydroplane" at fifty-six miles per hour when running through water. Notwithstanding the officer's training and experience, the court of civil appeals held that the officer was not qualified to render an *opinion* regarding the ultimate cause of the accident.

A police officer's prior experience and training, however, can qualify him to be an expert in some areas. In *Wood v. State*,¹⁴ involving an appeal of a conviction for aggravated promotion of prostitution, the appellant argued that the trial court committed reversible error in allowing a police officer to testify as an expert regarding the contents of 2,000 three-by-five

10. 579 S.W.2d 527 (Tex. Civ. App.—San Antonio 1979, writ ref'd n.r.e.).

11. *Id.* at 530.

12. The record revealed neither the name of the institution from which the witness's master's degree was obtained, the content of the program that led to the master's degree, nor the length of her employment as a placement worker.

13. 573 S.W.2d 886 (Tex. Civ. App.—Beaumont 1978, writ ref'd n.r.e.).

14. 573 S.W.2d 207 (Tex. Crim. App. 1978).

index cards and several stenographic pads seized during the execution of a search warrant. The officer testified at trial that he had previously investigated thirty to forty aggravated promotion of prostitution cases. He also testified that client lists similar to those seized from appellant had been confiscated by him on at least ten prior occasions, and that, in his experience, the majority of the lists seized maintained the same symbols. The court of criminal appeals concluded that the trial court acted within its discretion in allowing the officer to testify as an expert with regard to client lists generally used in prostitution enterprises.¹⁵

Underlying Data. An expert is generally required to state the underlying facts or other data upon which his opinion is based. In *Roth v. Law*¹⁶ a mother brought suit against a truck driver and his employer for injuries that she and her daughter had sustained when their vehicle collided with the defendant's truck. The defendants argued on appeal that the trial court erred in allowing an ophthalmologist to testify concerning the daughter's retinal detachment, because two of his opinions were based solely on other physicians' opinions found in the hospital's records and the records of a Dr. McPherson, who had previously examined the child's retina. The evidence indicated that the ophthalmologist had made his only examination of the child's eye slightly over a month before the case went to trial. He performed a routine examination, but due to an advanced cataract clouding the child's eye, he was unable personally to examine the damaged retina. Relying on retinal drawings prepared by Dr. McPherson, the witness testified that a subsequent accident did not cause the child's retinal detachment, and further that the accident in issue probably did cause the detachment. The court of civil appeals concluded that the witness's testimony was not based on the opinions of other physicians. The appellate court found no indication in the record that the expert relied on the opinions of other physicians, emphasizing that the retinal drawings were objective findings rather than opinion.¹⁷ The court thus held that the expert was entitled to base his testimony regarding the subsequent accident totally upon the drawings.¹⁸

*Moore v. Grantham*¹⁹ addressed the perennial inquiry regarding the extent to which an expert's opinion may be based on hearsay. *Moore* involved an action for damages resulting from personal injuries sustained when the defendant's automobile struck the rear of the plaintiff's vehicle. The trial court entered judgment for the plaintiff on the jury's verdict. On appeal, the defendant's primary concern was the jury's award of \$39,600 for the plaintiff's loss of future earning capacity. Prior to the accident, plaintiff had been trained and had worked as an interior designer. She

15. *Id.* at 211.

16. 579 S.W.2d 949 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.).

17. *Id.* at 953. Retinal drawings are hand sketched reproductions reflecting what the doctor views when looking into the patient's dilated eye.

18. *Id.*

19. 580 S.W.2d 142 (Tex. Civ. App.—Tyler 1979, writ granted).

testified that she had attempted to return to interior design work after the accident, but her injuries had precluded her doing so. Plaintiff also called as a witness the director of the Rehabilitation Counselor Education Program and a professor of vocational rehabilitation counseling at the University of Texas. The witness testified that, in his opinion, the plaintiff's loss of future earning capacity was \$39,200, which sum represented the differential between the plaintiff's future career expectancy as an interior decorator and her current employment as assistant manager of a retail store.²⁰

The defendant did not complain that the witness was unqualified to testify as a vocational rehabilitation expert. Rather, the defendant argued that the witness's testimony was based wholly on hearsay. Recognizing that all expert testimony is significantly based upon hearsay, the court of civil appeals rejected the defendant's assertion.²¹ The court stated that the "recent trend" is to recognize that objections of this nature go to the weight rather than the admissibility of the evidence.²² Following recent decisions of the Texas Supreme Court,²³ *Moore* held that once an expert is qualified, the issue of admissibility becomes whether the basis of the expert's opinion and the sources of information relied upon are of the type reasonably and customarily relied upon by experts in that particular field.²⁴ The Texas Supreme Court has granted writ on this case.²⁵

Reasonable Probability. A medical expert's testimony must establish causation in terms of reasonable medical probability in order to support a jury's finding of liability.²⁶ The trier of fact is allowed to determine causation when it can do so from either general experience and common sense, when scientific principle proven by expert testimony has established causation, or when probable causation is established by expert testimony.²⁷ In *Stodghill v. Texas Employers Insurance Association*²⁸ a workers' compensation case, the widow and children of a deceased employee had been

20. The witness reviewed the correspondence and deposition of plaintiff's orthopedist who testified at trial, and correspondence from plaintiff's former employers and clients. The witness also interviewed a University of Texas home economics professor specializing in interior design, and researched Manpower and Department of Labor surveys and statistics. He testified that his training and expertise enabled him to take such statistical data and to reach an opinion as to the vocational limitations imposed upon a person by medical disability and the person's resulting capabilities in the labor market. *Id.* at 147.

21. *Id.* at 148.

22. *Id.*

23. *Slaughter v. Abilene State School*, 561 S.W.2d 789, 791 (Tex. 1977); *Lewis v. Southmore Savings Ass'n*, 480 S.W.2d 180, 186-87 (Tex. 1972).

24. 580 S.W.2d at 148. The court cautioned that an expert may not rely on "just any" hearsay. *Id.* The court found, however, that the expert based his testimony on sources that were customarily relied upon by other experts in his field and upheld the trial court's admission of the expert's testimony. *Id.*

25. 23 Tex. Sup. Ct. J. 38 (Oct. 27, 1979). After the end of the survey period, the Texas Supreme Court reversed, holding that an expert opinion based solely on hearsay is inadmissible. 23 Tex. Sup. Ct. J. 227 (Mar. 1, 1980).

26. *E.g.*, *Insurance Co. of N. America v. Myers*, 411 S.W.2d 710, 714 (Tex. 1966).

27. *E.g.*, *Lenger v. Physician's Gen. Hosp., Inc.*, 455 S.W.2d 703 (Tex. 1970).

28. 582 S.W.2d 102 (Tex. 1979).

awarded death benefits under the Texas Worker's Compensation Act.²⁹ The decedent had suffered injuries from a fall while he was actively engaged in his employment. Immediately following the fall, the decedent's blood pressure rose above normal levels. The evidence also indicated, however, that the decedent had a history of high blood pressure. While recuperating at his home the decedent suffered a heart attack and died shortly thereafter. Plaintiffs produced an expert witness who testified that the probable cause of the decedent's heart attack was increased tension brought about by the physical injuries and mental stress resulting from the fall. The defendant produced an expert who testified that the decedent's heart attack was not caused by the injuries suffered in the employment accident.

The court of civil appeals concluded that the cause of the decedent's heart attack was determinable only from the testimony of medical experts and, because plaintiffs' proof failed to rise to the level of reasonable medical probability, judgment was rendered for the defendant.³⁰ The supreme court, however, concluded otherwise. The court stated that a medical expert need not use the words "reasonable medical probability" to support a finding of causation. The testimony is sufficient if the circumstances demonstrate that the substance of the expert's testimony rises to that level.³¹ The court then held that plaintiffs' expert's testimony, even though strongly rebutted, constituted "some direct evidence of probative force of the causal connection between the injury and the death."³²

The supreme court in *Stodghill* distinguished *Insurance Co. of North America v. Myers*³³ and *Parker v. Employers' Mutual Liability Insurance Co.*³⁴ on the ground that the evidence presented in support of causation in those cases amounted to no more than establishing a "possibility" of a causal connection.³⁵ Also distinguished were *Commercial Standard Fire & Marine Co. v. Thornton*,³⁶ in which the causal connection could only be inferred by the jury from their general experience and common sense, and *Baird v. Texas Employers' Insurance Association*,³⁷ in which circumstantial evidence was needed to establish that an on-the-job accidental injury was the cause of a fatal heart attack.

In *Hoppe v. Hughes*³⁸ the court of civil appeals was presented with the issue of whether causation was established as a medical probability or as a mere possibility. The survivors of a head-on automobile collision brought

29. TEX. REV. CIV. STAT. ANN. arts. 8306-8309f (Vernon 1967 & Supp. 1980).

30. *Texas Employers' Ins. Ass'n v. Stodghill*, 570 S.W.2d 398 (Tex. Civ. App.—El Paso 1978).

31. *Id.* at 105 (citing *Lucas v. Hartford Accident & Indem. Co.*, 552 S.W.2d 796, 797 (Tex. 1977)).

32. 582 S.W.2d at 105.

33. 411 S.W.2d 710 (Tex. 1966).

34. 440 S.W.2d 43 (Tex. 1969).

35. 582 S.W.2d at 105.

36. 540 S.W.2d 521 (Tex. Civ. App.—Texarkana 1976, writ ref'd n.r.e.).

37. 495 S.W.2d 207 (Tex. 1973).

38. 577 S.W.2d 773 (Tex. Civ. App.—Amarillo 1979, writ ref'd n.r.e.).

suit against the estate of the driver of one of the vehicles involved in the accident. The jury failed to find that the deceased driver was negligent, even though his automobile crossed the center line and the collision occurred in the plaintiffs' lane of traffic. The basis of the excuse presented for the decedent's statutory violation was that he had suffered a heart attack immediately prior to the collision. In reversing the decision of the trial court, the court of civil appeals reviewed the evidence to ascertain whether the medical testimony satisfied the reasonable probability standard. When the defendant's medical expert was asked whether the decedent had suffered some type of cardiovascular accident prior to the automobile collision, which caused him to lose control of his car, he replied that it was possible that the decedent suffered from a cardiovascular attack immediately prior to the collision, but he admitted that his reply was pure supposition.³⁹ The court of civil appeals concluded that the medical testimony did not rise to the level of reasonable probability; therefore, the jury's failure to find that the decedent was negligent in traveling on the wrong side of the roadway was against the great weight and preponderance of the evidence.⁴⁰

A fire inspector's opinion, articulated in terms of "possibilities," was held to be admissible in *Ralph v. Mr. Paul's Shoes, Inc.*⁴¹ The plaintiff brought suit for fire damage alleging specific acts of negligence. The defendant appealed from an adverse judgment, complaining that the testimony of the fire inspector offered by the plaintiff at trial did not support the jury's verdict. The inspector testified that he had had five years of experience in investigation and that in his opinion the fire's origin was in the trash can of the defendant's storeroom. The evidence showed that, shortly before the fire began, the defendant's waitresses had been smoking in the bar's storeroom and then emptied their ashtrays into the storeroom's trash can. He also testified that he observed the physical evidence of the fire and that there was an absence of any other reasonable origin of the fire.⁴² The defendant claimed that there was no probative evidence to support the trial court's judgment in that the opinions of the fire inspector, the only witness to testify on causation, were qualified by the term "possibly," and were therefore merely conjectural. Although the appellate court found in the record only one unqualified statement of causation made by the witness, the court analyzed the substance of the witness's testimony and held that he had used the word "possibly" in the sense of "probably."⁴³ The court therefore concluded that the inspector's testimony was

39. *Id.* at 776-77. The doctor also testified that, although the decedent was susceptible to heart attack, he could have had a stroke, could have suffered from transient amnesia, could have had a convulsion, gone to sleep, or reached for a cigarette and dropped a match, thereby causing him to lose control of his vehicle.

40. *Id.* at 778.

41. 572 S.W.2d 812 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.).

42. His investigation also consisted of interviewing several people at the scene, including the firemen called to the scene, the manager of defendant's bar, and two of the bar's waitresses.

43. 572 S.W.2d at 814.

probative evidence concerning causation of the fire.⁴⁴

In *Crocker v. State*⁴⁵ the court of criminal appeals, in affirming the defendant's conviction for castration of his son, applied the civil causation standard of reasonable medical probability.⁴⁶ On motion for rehearing, however, the court expressly held that the civil standard of reasonable medical probability has no place in criminal trials and disavowed all language in its original opinion that utilized the civil standard for establishing causation in a criminal trial.⁴⁷ In a concurring opinion Justice Douglas implied that evidence establishing causation to a reasonable medical probability was sufficient to meet the prosecution's burden of proving causation beyond a reasonable doubt.⁴⁸ The majority's emphatic disavowal of its original opinion, however, makes it apparent that Justice Douglas's position is not likely to prevail in future cases.

Nature of Opinion That Is Admissible. Texas courts have long recognized that although damages for loss of future earning capacity are uncertain, they are recoverable if "proved with that degree of certainty of which the case is susceptible."⁴⁹ The proof of loss of future earning capacity is especially difficult when the plaintiff is a child who has not only never earned wages, but also has not yet demonstrated any abilities or aptitudes.⁵⁰ For example, in *Roth v. Law*⁵¹ the court of civil appeals allowed the plaintiff's expert to testify regarding the child's loss of future earning capacity. The expert stated that the type of jobs that would be available when the child would enter the work force could be so different from those jobs presently available that it would be extremely difficult to estimate her loss of work capacity. He further stated that the child's capacity to work and gain promotion could be reduced by twenty-five to fifty percent. Even though the expert acknowledged that his testimony was only a "guesstimate," the court of civil appeals held that the trial court did not err in admitting such testimony, reasoning that the "guesstimate" label the expert gave his opinion went to the weight of the opinion, rather than to its admissibility.⁵²

The manner in which a question is formed to elicit opinion testimony often results in the introduction of incompetent evidence. For example, in *Cottle v. Knapper*,⁵³ a will contest, the plaintiff brought suit for cancellation of a deed from Flora Miller conveying certain property to the Cottles. The stated consideration for the deed was love and affection. The plaintiff

44. *Id.*

45. 573 S.W.2d 190 (Tex. Crim. App. 1978).

46. *Id.* at 203.

47. *Id.* at 207.

48. *Id.* (Douglas, J., concurring).

49. *McIver v. Gloria*, 140 Tex. 566, 568, 169 S.W.2d 710, 712 (1943).

50. *E.g.*, *English v. Hegi*, 337 S.W.2d 860, 863 (Tex. Civ. App.—Amarillo 1960, no writ). When a child is claiming lost future earnings and the claim is not susceptible to a high degree of proof, the jury must base its award for lost future earnings, if any, on its "common knowledge and sense of justice." *Id.*

51. 579 S.W.2d 949 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.).

52. *Id.* at 959.

53. 571 S.W.2d 59 (Tex. Civ. App.—Tyler 1978, no writ).

contended that the property was deeded because of undue influence and mental incapacity on the part of Flora Miller. The trial court set the deed aside, and the judgment expressly recited that Flora Miller did not have the sufficient mental capacity to understand the nature and effect of her act. On cross-examination, the plaintiff, who was acting pro se,⁵⁴ was asked whether the decedent "did not have the mental capacity to make a deed." The plaintiff replied that the decedent "did not."⁵⁵

The court of civil appeals held that the plaintiff's testimony was not admissible to support the trial court's finding that Flora Miller lacked the requisite mental capacity when she signed the deed. The appellate court concluded that the question asked the plaintiff was improper and the elicited testimony was therefore inadmissible. The court reasoned that the decedent's mental capacity to execute the deed involved a legal definition and a legal test, and thus the answer to the question asked could not be considered in determining the sufficiency of the evidence.⁵⁶ Because the trial court's judgment recited a specific reason for the rendition of judgment,⁵⁷ the appellate court reversed and remanded, concluding that the evidence was not of sufficient strength to support the judgment.⁵⁸

II. THE HEARSAY RULE AND ITS EXCEPTIONS

Official Writings and Ancient Documents. Official written statements have long been admissible in Texas under an exception to the hearsay rule on the ground that documents or statements made pursuant to an official duty are inherently trustworthy.⁵⁹ Similarly, an "ancient document" at least thirty years old, unsuspecting in appearance, and produced from a place of custody natural for such a writing can also be admissible as an exception to the hearsay rule.⁶⁰ The Texas Supreme Court recently reaffirmed the vitality of these two exceptions in *Zobel v. Slim*,⁶¹ a trespass to try title suit. The plaintiffs introduced into evidence an 1894 judgment entered in a lawsuit between the heirs of George Childress, from whom the plaintiffs claimed title, and persons claiming title under an administrator's deed. The 1894 judgment recited that the suit had been prosecuted in the name of the heirs of George Childress, and recited the names of the plaintiffs

54. Although the court was aware that the plaintiff was representing herself in the litigation, *id.* at 61, the court made short shrift of the fact that the controversial evidence was received without objection and that it was elicited on cross-examination by counsel for the Cottles. *Id.* at 62.

55. *Id.* at 62.

56. A witness with the requisite knowledge or expertise may only be asked whether a grantor knows or had capacity to know the object of his or her bounty, the nature of the transaction in which he or she was engaged, the nature and extent of his or her estate, and similar related questions. *Carr v. Radkey*, 393 S.W.2d 806 (Tex. 1965).

57. 571 S.W.2d at 63.

58. *Id.* at 64.

59. 2 C. McCORMICK & R. RAY, *supra* note 9, § 1272. For a general discussion of the official written statements exception to the hearsay rule, see *id.* § 1271-1293.

60. *Id.*, *supra* note 9, § 1372. See generally Wickes, *Ancient Documents and Hearsay*, 8 TEXAS L. REV. 451 (1930).

61. 576 S.W.2d 362 (Tex. 1978).

who were awarded title to the property in question. The defendants presented no evidence to the contrary, but merely claimed that the recitations in the judgment were conclusory, self-serving, made after descent had been cast, and therefore inadmissible hearsay. The trial court granted plaintiffs' motion for an instructed verdict, entering judgment that plaintiffs recover title and possession to five acres of land.

The court of civil appeals agreed with the defendants' contentions and held that the judgment failed to show as a matter of law the identity of the heirs of George W. Childress.⁶² The supreme court reversed and held that recitals in an ancient document are admissible as evidence of the facts recited therein under the well-recognized "ancient documents" exception to the hearsay rule.⁶³ The supreme court distinguished the instant case from the cases relied on by the defendants⁶⁴ on the ground that those cases did not involve the recitals of heirship in a judgment entered in a lawsuit in which the court determined heirship to grant relief. The court reasoned that "[a]s a practical matter, there is usually no other way to prove the heirship of a person who died in 1836 than by the recitations in ancient documents. The 1894 judgment is particularly reliable because it had to determine heirship in a contested proceeding."⁶⁵ In an interesting fusion of the official writings rule with the ancient documents rule, the court held that "in the absence of rebutting evidence, recitations of heirship in an ancient judgment entered in a lawsuit that had to determine heirship in order to grant relief establish heirship as a matter of law."⁶⁶

Res Gestae. In *Southwestern Bell Telephone Co. v. Griffith*⁶⁷ the plaintiff brought a products liability suit against the installer of a mobil telephone unit for injuries sustained when the telephone unit came loose from its mounting and allegedly caused a vehicular accident. The defendant appealed from an adverse judgment and argued *inter alia* that the trial court erred in excluding the *res gestae* statement of an unidentified motorist. The evidence indicated that the unidentified witness approached the investigating police officer at least forty-five minutes after the officer arrived on the scene. The witness did not observe the accident but merely observed the plaintiff driving his vehicle prior to the accident.

Although a *res gestae* statement in the form of an opinion or conclusion is generally inadmissible,⁶⁸ some case law indicates a trend away from this

62. *Slim v. Zobel*, 552 S.W.2d 899, 901 (Tex. Civ. App.—Eastland 1977).

63. 576 S.W.2d at 365.

64. *Byers v. Wallace*, 87 Tex. 503, 28 S.W. 1056 (1894); *Walker v. Barrow*, 464 S.W.2d 480 (Tex. Civ. App.—Houston [1st Dist.] 1971, writ ref'd n.r.e.); *Slatery v. Adams*, 279 S.W.2d 445 (Tex. Civ. App.—Beaumont 1954), *aff'd*, 156 Tex. 433, 295 S.W.2d 859 (1956); *Smith v. Lynn*, 152 S.W.2d 838 (Tex. Civ. App.—San Antonio 1941, no writ).

65. 576 S.W.2d at 365.

66. *Id.*

67. 575 S.W.2d 92 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.).

68. *See, e.g., Isaacs v. Plains Transp. Co.*, 367 S.W.2d 152, 153 (Tex. 1963) (per curiam) (defendant's employee's statements that collision was his fault "were pure conclusions and opinions" and therefore inadmissible under *res gestae* rule); *Worley Hospital, Inc. v. Caldwell*, 529 S.W.2d 639 (Tex. Civ. App.—Amarillo 1975), *rev'd on other grounds*, 547 S.W.2d

rule.⁶⁹ Factual evidence, however, is generally admissible in the event the requisites of the *res gestae* rule are satisfied.⁷⁰ Whether a declaration is spontaneous and arises out of the transaction itself is to be determined by the circumstances of each particular case and must necessarily be left largely to the discretion of the trial court.⁷¹ There must be independent proof of the transaction out of which a spontaneous declaration arises.⁷² A spontaneous declaration may either immediately precede or follow the transaction,⁷³ and is not necessarily inadmissible because it is in response to a nonleading question⁷⁴ or is self-serving in nature.⁷⁵

In *Griffith* the court of civil appeals held that the unidentified motorist's

582 (Tex. 1977) (doctor's statement to nurse that "we are in trouble" inadmissible as conclusion of liability); *Galveston Transit Co. v. Morgan*, 408 S.W.2d 728 (Tex. Civ. App.—Houston 1966, no writ) (statement by nonparty to defendant carrier that "it's not your fault" was inadmissible as a conjectural and speculative opinion by a lay witness); *Knapik v. Edison Brothers*, 313 S.W.2d 335 (Tex. Civ. App.—Waco 1958, writ ref'd) (statement by defendant's employee using the phrase "and you know it" held inadmissible as an opinion and conclusion); *Morgan v. Maunders*, 37 S.W.2d 791 (Tex. Civ. App.—Fort Worth 1930, writ dism'd) (statement by witness that defendant was driving "awfully fast" was inadmissible since it was a conclusion and indefinite).

69. *E.g.*, *Gonzalez v. Layton*, 429 S.W.2d 215 (Tex. Civ. App.—Corpus Christi 1968, no writ). Although the court held that the witness's statement as to "fault" was properly excluded because it failed to meet the requirements of the *res gestae* rule, the court stated: "It seems clear that the modern text writers and courts are leaning toward the admission of . . . opinion statements where they are spontaneous, a part of the *res gestae*, and couched in language setting forth a shorthand rendition of facts, or are used for an impeachment purpose." *Id.* at 219.

70. *Strickland v. Pioneer Bus Co.*, 427 S.W.2d 347 (Tex. Civ. App.—Houston [1st Dist.] 1968, writ ref'd n.r.e.) (written statement signed by defendant's driver fifteen to twenty minutes after accident admissible); *Caton v. Kelley*, 424 S.W.2d 698 (Tex. Civ. App.—Houston [1st Dist.] 1968, writ ref'd n.r.e.) (statement by defendant's waitress a few minutes after plaintiff fell, that the floor in restaurant was slippery and that she had slipped on it twice before that day admissible); *Payne v. Hartford Fire Ins. Co.*, 409 S.W.2d 591 (Tex. Civ. App.—Beaumont 1966, writ ref'd n.r.e.) (wife's statement to brother-in-law held admissible because declarant had just seen disaster, knew her husband was in serious condition, and had just finished riding to hospital with him).

71. *E.g.*, *Galveston Transit Co. v. Morgan*, 408 S.W.2d 728 (Tex. Civ. App.—Houston 1966, no writ) (spontaneous declaration of personal liability held admissible as part of *res gestae*; however, exclusion of statement "I'm to blame" not an abuse of discretion because declarant not a party and statement merely cumulative of other evidence); *Lusinger v. Philpott*, 392 S.W.2d 217 (Tex. Civ. App.—Austin 1965, writ ref'd n.r.e.) (statement by bystander that defendant "was going too fast" held admissible as part of *res gestae*); *1 C. McCORMICK & R. RAY*, *supra* note 9, § 917, at 696.

72. *E.g.*, *Hartford Accident & Indem. Co. v. Hale*, 400 S.W.2d 310, 311 (Tex. 1966) (statements by injured employee as to cause of his injury inadmissible because no proof of accident itself and statements could not be used to prove accident); *Truck Ins. Exch. v. Michling*, 364 S.W.2d 172, 174 (Tex. 1963) (statement of widow inadmissible to prove accident because no other independent proof offered).

73. *Houston Oxygen Co. v. Davis*, 139 Tex. 1, 7-8, 161 S.W.2d 474, 477 (1942) (spontaneous pretransaction declaration admissible); *Coleman v. Donaho*, 559 S.W.2d 860, 863 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ dism'd) (writ dismissed without reference to merits of appeal) (spontaneous post-transaction declaration admissible).

74. *Davis Transp. Co. v. Bolstad*, 295 S.W.2d 941 (Tex. Civ. App.—Galveston 1956, no writ) (plaintiff regained consciousness for few moments and was asked what caused accident; answer admissible).

75. *Gilmer v. Griffin*, 265 S.W.2d 252 (Tex. Civ. App.—San Antonio 1954, writ ref'd n.r.e.) (declaration by defendant's wife that accident was not husband's fault, made at time of accident, admissible).

statements were not admissible and that the trial judge did not abuse his discretion in refusing to admit them.⁷⁶ The court reasoned that the statements of the witness were not shown to have been in spontaneous reaction to an exciting event. The court distinguished the two decisions relied upon by the defendant⁷⁷ on the ground that they both involved statements made by declarants to the testifying witness at the time of the exciting event. The purported *res gestae* statements in *Griffith* were made almost an hour after the accident and therefore lacked the requisite spontaneity "to save them from the suspicion of being either manufactured or unreliable evidence."⁷⁸

Judicial Admissions. Before a statement can be considered a judicial admission, it must meet certain requirements. The statement must be made during the course of a judicial proceeding; it must be contrary to an essential fact or defense asserted by the person testifying; it must be deliberate, clear, and unequivocal; giving conclusive effect to the statement must be consistent with public policy; and the statement in question must not also destroy the opposing party's theory of recovery.⁷⁹ *William B. Roberts, Inc. v. McDrilling Co.*⁸⁰ addressed the issue of whether equivocal testimony may constitute a judicial admission. In *Roberts* the plaintiff brought suit against a corporate property owner and the corporation's president, attempting to recover damages for a breach of a written contract or, in the alternative, fraud, relating to the drilling of two wells. The trial court entered judgment for the plaintiff and the defendants appealed. One defendant, Roberts, complained on appeal that the trial court erred in rendering judgment against him individually because there was no evidence to justify invoking the alter ego doctrine. Evidence elicited at trial showed that the stock of the corporation was wholly owned by Roberts, his wife, and his daughter. All of the corporation's earnings were reported as earnings of the shareholders. Roberts personally made all the decisions of the corporation and stated at trial that he considered himself to be personally responsible for the dealings of the corporation and personally liable for the obligations he had contracted for and on behalf of the corporation. Plaintiff argued that this evidence constituted a judicial admission by Roberts that the corporation was Roberts' alter ego.

The court of civil appeals, in ruling that Roberts' testimony was not a judicial admission,⁸¹ relied on another statement in Roberts' testimony: "I feel like the corporation stands on its own."⁸² The court reasoned that,

76. 575 S.W.2d at 103.

77. *Houston Oxygen Co. v. Davis*, 139 Tex. 1, 161 S.W.2d 474 (1942); *Claybrook v. Acreman*, 373 S.W.2d 287 (Tex. Civ. App.—Beaumont 1963, writ ref'd n.r.e.).

78. 575 S.W.2d at 103.

79. *United States Fidelity & Guar. Co. v. Carr*, 242 S.W.2d 224, 229 (Tex. Civ. App.—San Antonio 1951, writ ref'd). The public policy from which the rule is deduced is that it would be unjust to allow a party to recover after he has unequivocally given testimony contrary to his present position. *Id.* at 229.

80. 579 S.W.2d 335 (Tex. Civ. App.—Corpus Christi 1979, no writ).

81. *Id.* at 345.

82. *Id.* at 344.

although Roberts later testified that he considered himself personally liable for the corporation's contracts, the effect of his entire testimony amounted to an equivocation and hence did not meet the requirements of a judicial admission.⁸³

Hearsay as Corroboration. Agency cannot ordinarily be established by a declaration of the alleged agent alone.⁸⁴ When other prima facie evidence of agency or employment exists, however, declarations of an alleged agent are admissible as corroboration.⁸⁵ The court of civil appeals applied this principle in *Texas Pipe Bending Co. v. Gibbs*.⁸⁶ In *Gibbs* the appellate court affirmed the trial court's admission into evidence of a witness's testimony regarding a declaration of agency that had been made to him by defendant's otherwise unidentified employee. Relying on the common law presumption that a person found performing the work of another is presumed to be in the employment of the person whose work is being performed,⁸⁷ the court of civil appeals reasoned that although the identity of the person operating the truck in question was unknown, and he could not be produced as a witness, there was no evidence, either direct or circumstantial, to contradict the plaintiff's testimony that the accident occurred on the defendant's premises. As there was no evidence to show that the operator of the truck was not the defendant's employee, the court of civil appeals liberally interpreted the employer presumption by allowing the declaration of agency to be admitted into evidence not by the alleged agent himself, but through the testimony of a third party.⁸⁸

III. DEAD MAN'S STATUTE

Waiver. It is well established that initiating an inquiry through a deposition of an adverse party regarding transactions with a deceased can waive the application of the dead man's statute.⁸⁹ Whether the dead man's statute can be similarly waived by propounding interrogatories is, however, unclear.⁹⁰ During this survey period the Houston (1st District) court of

83. *Id.* at 345.

84. *E.g.*, *Palmer v. Radcliff Fin. Corp.*, 344 S.W.2d 896 (Tex. Civ. App.—Houston 1961, writ *dism'd* w.o.j.).

85. *E.g.*, *McAfee v. Travis Gas Corp.*, 137 Tex. 314, 323, 153 S.W.2d 442, 448 (1941).

86. 580 S.W.2d 41 (Tex. Civ. App.—Houston [1st Dist.]), *writ ref'd n.r.e. per curiam*, 584 S.W.2d 702 (Tex. 1979).

87. *E.g.*, *Ochoa v. Winerich Motor Sales Co.*, 127 Tex. 542, 548, 94 S.W.2d 416, 418 (1936).

88. 580 S.W.2d at 44.

89. *E.g.*, *Chandler v. Welborn*, 156 Tex. 312, 322-23, 294 S.W.2d 801, 809 (1956); *Pinchback v. Pinchback*, 352 S.W.2d 151 (Tex. Civ. App.—Waco 1961, writ *ref'd* n.r.e.). Texas courts have held that the dead man's statute is waived even though the deposition has not been offered into evidence. *Allen v. Pollard*, 109 Tex. 536, 212 S.W. 468 (1920). The text of the Texas dead man's statute appears at note 94 *infra*.

90. The Texas Supreme Court, in a *per curiam* opinion refusing an application for writ of error in *Fleming v. Baylor Univ. Medical Center*, 554 S.W.2d 263 (Tex. Civ. App.—Waco), *writ ref'd n.r.e. per curiam*, 561 S.W.2d 797 (Tex. 1977), wrote that its ruling of no reversible error should not be construed as approval of the portion of the court of civil appeal's opinion that pertained to waiver of the dead man's statute by interrogatories that

civil appeals held that addressing interrogatories that inquire of an opposing party regarding transactions with the deceased constitutes a waiver of the dead man's statute.⁹¹ In *Muhm v. Davis*⁹² the plaintiff brought suit to set aside two deeds. Both parties moved for summary judgment. The trial court granted the defendants' motion that was supported by an affidavit that included testimony regarding transactions with the deceased grantor. On appeal the plaintiff argued that the trial court improperly considered the affidavit because, among other things, it included the testimony regarding the transactions with the deceased. The court of civil appeals, in affirming the trial court, ruled that the plaintiff had initiated the inquiry by propounding interrogatories to the defendant regarding the transactions with the deceased, and that therefore the plaintiff waived the dead man's statute, at least insofar as that particular transaction was concerned.⁹³

A common misconception arising from the dead man's statute⁹⁴ is that the statute prohibits the introduction of written statements of the decedent. This misconception surfaced in *Wilson v. Wilson*,⁹⁵ a will contest. The court of civil appeals reversed the judgment of the probate court because the probate court admitted certain inadmissible evidence that was considered to be highly prejudicial.⁹⁶ In its opinion, however, the appellate court addressed a counterpoint presented by the appellee. The appellee argued that the probate court erred in refusing to admit into evidence a contest to an application filed by the appellant to have the decedent declared mentally incompetent. The trial court refused to admit the document on the basis that it was barred by the dead man's statute, or alternatively, that the document was a statement by the decedent and not admissible for the purpose of proving undue influence. The appellate court disagreed and concluded that article 3716 does not prevent parties from relying upon written instruments executed by the decedent as a basis of either recovery or defense. The court reasoned that the statute only prevents the parties them-

inquired about transactions with the deceased. Nevertheless, if initiating an inquiry concerning transactions with the deceased waives the statute, no logical reason exists for making a distinction among the various methods of making such an inquiry. An inquiry into transactions can just as readily be made by written interrogatories or requests for admissions as by questioning on oral deposition.

91. *Muhm v. Davis*, 580 S.W.2d 98 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ ref'd n.r.e.).

92. *Id.*

93. *Id.* at 101.

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

95. 581 S.W.2d 729 (Tex. Civ. App.—Dallas), *rev'd per curiam on other grounds*, 587 S.W.2d 674 (Tex. 1979).

96. The supreme court reversed the court of civil appeals because the evidence that the appellate court held inadmissible was found to be relevant and therefore admissible under the controlling statute. *Wilson v. Wilson*, 587 S.W.2d 674 (Tex. 1979).

selves from testifying concerning transactions with the decedent,⁹⁷ thus, the written document did not fall within the prohibitions of the dead man's statute.⁹⁸

IV. NO PROBATIVE EVIDENCE

Many cases address the issue of whether there is any evidence in the record to support the determinations made by the trier of fact.⁹⁹ In *Cross v. City of Dallas*,¹⁰⁰ for example, the plaintiff was injured when she fell into a water meter hole built and maintained by the city of Dallas. The jury rendered a verdict favorable to the plaintiff. The trial court, however, granted the city's motion for judgment notwithstanding the verdict, and the plaintiff appealed. The evidence indicated that the water meter had been read by an employee of the city approximately eighteen days before the accident. The water meter lids normally were locked and city personnel used a special key to unlock the lids when reading the meters. The lid could be removed without a key but, according to the evidence, only by actions that would leave scratches or marks on the locking mechanism. The city examined the lid after the accident and found no evidence of any damage. The water meter serviced a warehouse, and a representative of that warehouse testified that no plumbing or building maintenance had been performed on the warehouse for at least two months before the accident, and that he did not open the lid nor observe any of his employees doing so. On the basis of this evidence, the court of civil appeals held that the jury could have reasonably inferred that the city negligently failed to lock the water meter lid and that this failure caused the plaintiff's damages.¹⁰¹ The court thereupon reversed the judgment of the trial court and rendered judgment for plaintiff.¹⁰²

In *Guffey v. Borden, Inc.*¹⁰³ a truck driver delivering a load of warm liquid wax slipped on the wax and sustained injuries. The jury found the defendant one hundred per cent negligent. The evidence indicated that a small leak of wax was coming from the hose coupling that the plaintiff was using to transfer the wax from his truck to the defendant's tanks. The defendant's employee applied pressure to the coupling and the latch disengaged resulting in a wax spill. Upon observing this situation, the plaintiff turned off the safety valve on the truck to prevent more wax from being discharged. He stepped into some wax on that occasion but did not fall. After shutting off the safety valve, the plaintiff walked to the place where the uncoupled hose was lying in a pool of wax and reached down to pick it up. He slipped and fell on that occasion and sustained injuries. The jury

97. 581 S.W.2d at 731.

98. *Id.*

99. For an excellent discussion of this general area of the law, see Calvert, "No Evidence" and "Insufficient Evidence" Points of Error, 38 TEXAS L. REV. 361 (1960).

100. 581 S.W.2d 514 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.).

101. *Id.* at 516.

102. *Id.*

103. 595 F.2d 1111 (5th Cir. 1979).

rendered a verdict in favor of the plaintiff, and the defendant appealed, claiming there was no evidence or insufficient evidence to support the verdict.

The Fifth Circuit Court of Appeals was primarily concerned about the finding of one hundred percent negligence against the defendant. The court observed that the plaintiff had failed to act as an ordinary, prudent man when, aware of the wax spill and its slippery propensities, he deliberately walked into the pool of wax to retrieve the disjoined hose. Since the plaintiff was at least partially negligent, the court of appeals held that the jury's finding of one hundred percent negligence against the defendant was not supported by the evidence. The judgment of the trial court was thereupon reversed and the cause remanded for a new trial.¹⁰⁴

*Southwestern Bell Telephone Co. v. Davis*¹⁰⁵ presented the issue of whether there was any probative evidence to support the jury's findings that the defendant was grossly negligent in entrusting a vehicle to its employee and that the plaintiff was entitled to an award of exemplary damages. The evidence reflected that the defendant hired the driver without inquiring or checking into his driving record, that the employee had his driver's license suspended for two years prior to his employment because he was a habitual violator of the traffic laws, and that, during his employment with the defendant, he was convicted of four traffic violations that involved two accidents. The evidence also demonstrated that the employee had a valid driver's license when he was employed by Southwestern Bell, and that Southwestern Bell did not have any actual knowledge of his driving record.

The court of civil appeals held that, although the evidence would amply sustain a finding of ordinary negligence for the entrustment of the vehicle to the employee, the evidence would not sustain a finding of gross negligence.¹⁰⁶ The court concluded that the record failed to show that the defendant was "consciously indifferent" to the rights or welfare of the plaintiff.¹⁰⁷ The appellate court therefore reformed the judgment, ordered a remittitur, and affirmed the judgment as modified.

In *Transport Insurance Co. v. Campbell*¹⁰⁸ the defendant appealed from an adverse judgment entered in a workers' compensation case. The defendant contended that there was no evidence that a blow to the back of the plaintiff's head sustained in the course of his employment was the producing cause of a stroke that resulted in his total incapacity. While the plaintiff, a truck driver, was removing a mudflap attached to his tractor, he slipped, fell backwards, and hit the back of his head against the trailer dolly. Suffering no immediate adverse affects, the plaintiff reported the

104. The court of appeals also held that only a jury can determine the relative percentages of negligence attributable to the plaintiff and the defendant under these circumstances. *Id.* at 1114.

105. 582 S.W.2d 191 (Tex. Civ. App.—Waco 1979, no writ).

106. *Id.* at 195.

107. *Id.* at 195-96.

108. 582 S.W.2d 173 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ ref'd n.r.e.).

incident to his employer and continued working. He then drove approximately fifty miles and, although he was having no physical difficulty, decided to take a rest. The next morning he had a slight headache which had persisted since he bumped his head. He was not certain, however, if he had the headache while he drove the fifty miles from his terminal. After taking a shower and shaving, he took two aspirins for his headache, then cleaned his truck and fueled up. While eating breakfast, he noted he was losing control of his hand. Thereafter, while paying his bill his leg gave way and he fell to the floor. He was then taken to the hospital and it was determined that he had suffered a stroke causing paralysis to his left side.

The question presented in *Campbell* was whether the time interval between the incident and the manifestation of the plaintiff's physical problem was such that it was reasonable to believe that his disability was job related. The treating physician testified that the plaintiff had developed a clot in the brain or had a clot elsewhere which had traveled to the brain and paralyzed the left side of the body. He considered it probable that the blood clot was caused by high blood pressure, but recognized the slight possibility that the bump on the head could have caused the stroke. Another doctor testified that in reasonable medical probability the cause of the plaintiff's condition was the hardening of the arteries in the blood vessels to the plaintiff's head and that the blow to the plaintiff's head had nothing to do with the stroke. A third doctor testified that the plaintiff's condition was probably due to clotting in the cerebral blood vessels. He stated that of all the possible causes of the stroke the least likely was the blow to the plaintiff's head and the most likely was hypertension. The witness did admit, however, that there was a remote possibility that the blow to the head did contribute to the stroke.

After recognizing that there is "no precise rule to measure probative force" of evidence and to determine "if questions of fact are raised by the evidence,"¹⁰⁹ the court concluded that there was no medical testimony sufficient to support the finding of the jury that there was a causal relationship between the blow to the plaintiff's head and his stroke.¹¹⁰ The court determined that it was not enough that the plaintiff raise a mere surmise or suspicion of the existence of causation, but the circumstances relied upon must be of such a character as to be reasonably satisfactory and convincing.¹¹¹ The court thereupon reversed and rendered judgment for the appellant. Subsequently, however, on motion for rehearing, the court concluded that its original opinion was in error and affirmed the decision of the trial court. The court stated that it had erroneously failed to apply the rule of *Garza v. Alviar*.¹¹² *Garza* dictates that, when determining whether any evidence exists in the record to support a jury's finding, only the evidence and inferences tending to support the jury finding may be

109. *Id.* at 176 (quoting *Baird v. Texas Employers' Ins. Ass'n*, 495 S.W.2d 207, 211 (Tex. 1973)).

110. 582 S.W.2d at 177.

111. *Id.*

112. 395 S.W.2d 821 (Tex. 1965).

considered and all evidence and inferences to the contrary must be disregarded.¹¹³ The court then concluded that because "the medical testimony to the effect that hypertension was the probable cause of the [stroke] must be disregarded,"¹¹⁴ the evidence presented supported the conclusion that the job-related incident precipitated the plaintiff's stroke.

In *Dodd v. Texas Farm Products Co.*¹¹⁵ the Texas Supreme Court again addressed the question of whether any evidence existed in the record to support a jury finding. The plaintiff testified regarding the events preceding an injury he received when a retaining wall collapsed on him. The retaining wall acted as a support to hold in place sulphate that was used in the defendant's business. Immediately prior to the collapse of the wall the defendant had set off an explosion to loosen the sulphate. Following the explosion, the defendant's foreman instructed the plaintiff to remove the loosened pieces of sulphate near the retaining wall. Although the plaintiff thought the wall was weakened by the explosion and informed his foreman of his thoughts, he was again instructed by the foreman to remove the sulphate. The plaintiff complied with his foreman's instructions and then suffered injuries when the wall collapsed. While the jury found the company negligent in failing to inspect the wall after the explosion, and found such negligence to be the proximate cause of the plaintiff's injuries, the trial court entered judgment notwithstanding the verdict in favor of the defendant. The court of civil appeals affirmed,¹¹⁶ holding that there was no evidence to support the jury's finding of the defendant's negligence. The supreme court reversed and rendered. In finding "some evidence," the Texas Supreme Court stated that it looked to the totality of the circumstances, including "the events, the time involved, the instruments involved, and the surrounding circumstances" and that taken together, these factors presented some evidence of a failure to properly inspect.¹¹⁷

Business Records. In *O'Shea v. International Business Machines Corp.*¹¹⁸ IBM filed suit alleging that the defendant failed to pay for equipment that he had purchased pursuant to a written sale agreement. Judgment was entered in IBM's favor, and the defendant appealed. Although the court of civil appeals determined that the judgment in favor of IBM was based on reversible error, the court addressed IBM's cross-points that complained of the trial court's admission into evidence of certain computerized business records to prove the amount of attorneys' fees that the defendant incurred in support of his counterclaim. The appellate court observed that the record was silent as to whether the computer equipment relied upon by the defendant's law firm was recognized as standard equipment for use in client billings, whether the records were prepared by persons who under-

113. *Id.* at 823.

114. 582 S.W.2d at 178.

115. 576 S.W.2d 812 (Tex. 1979).

116. *Dodd v. Texas Farm Prods.*, 567 S.W.2d 919 (Tex. Civ. App.—Tyler 1978).

117. 576 S.W.2d at 815.

118. 578 S.W.2d 844 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ ref'd n.r.e.).

stood the operation of the equipment and who also regularly operated such equipment, and whether daily processing of information was fed into the computer in a manner that would enable the information to be retained in the computer's permanent records storage bank.¹¹⁹ The court held that, because this proof is required under the business records exception in article 3737e,¹²⁰ the trial court erred in admitting the computerized business records.¹²¹

In *Steves Sash & Door Co. v. WBH International*,¹²² a suit on a sworn account in which the defendant filed a plea of privilege, the plaintiff failed to lay the required statutory predicate for the admissibility of the ledger sheets and invoices.¹²³ The court of civil appeals concluded that "absent the required showing, the exhibits were clearly hearsay and lacking in probative force."¹²⁴ Because the plaintiff failed to prove a prima facie case, the court held that the trial court properly sustained the defendant's plea of privilege.¹²⁵

In *Porter v. State*¹²⁶ the defendant was convicted of capital murder. At the punishment phase of his trial, the trial court admitted certain letters, reports, and documents from a federal parole officer's file pertaining to the defendant's supervision and progress while on federal parole. The documents contained unfavorable references to the defendant's psychiatric condition, his serious narcotic addiction, and the fact that his rehabilitative rating was very poor. The defendant objected to the admission of these

119. *Id.* at 848. The court commented that the proper predicate for the introduction of computerized business records is set forth in *Railroad Comm'n v. Southern Pac. Co.*, 468 S.W.2d 125 (Tex. Civ. App.—Austin 1971, writ ref'd n.r.e.).

120. TEX. REV. CIV. STAT. ANN. art. 3737e (Vernon Supp. 1980).

121. 578 S.W.2d at 848.

122. 575 S.W.2d 355 (Tex. Civ. App.—San Antonio 1978, no writ).

123. Article 3737e requires that an employee or representative who has personal knowledge of the transaction either make the record or transmit the information to another who makes the record in order to be admissible under the business records exception to the hearsay rule. TEX. REV. CIV. STAT. ANN. art. 3737e, § 1(b) (Vernon Supp. 1980). See *Skillern & Sons v. Rosen*, 359 S.W.2d 298, 305 (Tex. 1962). The plaintiff in *WBH International* failed to lay a proper predicate for admission of the account ledger because he failed to offer proof of the personal knowledge requirement of article 3737e. 575 S.W.2d at 357. Similarly, the requirements of article 3737e are not satisfied when there is no proof that the record was made at or near the time of the act, event, or condition to be proved. *Carr Well Service, Inc. v. Liberty Mut. Ins. Co.*, 587 S.W.2d 62 (Tex. Civ. App.—El Paso 1979, no writ).

124. 575 S.W.2d at 357. The court also indicated that the account, ledger sheets, and invoices failed to show in "reasonable certainty" the nature of each item, the date, and the charge therefor. The court reasoned that there was no evidence in the record that explained the symbols and abbreviations used in the ledger sheets and the invoices. The exhibits were therefore insufficient to establish "that the systematic record required by rule 185 has been kept so as to constitute prima facie evidence of the debt." *Id.*

125. *Id.* The court made its determination even though the defendant failed to object when the ledger sheets and invoices were offered into evidence. *Id.* The court's determination that defendant's failure to object was irrelevant is correct in that the ledger sheets and invoices were at all times hearsay because the plaintiff failed to lay a proper predicate. The Texas courts have long held that hearsay is without probative force, whether objected to or not. *E.g.*, *Texas Pipe Bending Co. v. Gibbs*, 580 S.W.2d 41, 44 (Tex. Civ. App.—Houston [1st Dist.]), writ ref'd n.r.e. per curiam, 584 S.W.2d 702 (Tex. 1979); *Perkins v. Springstun*, 557 S.W.2d 343, 345 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.).

126. 578 S.W.2d 742 (Tex. Crim. App. 1979).

records, claiming that the records violated his constitutional rights of confrontation and cross-examination.

The court of criminal appeals recognized that, although guaranteed by the United States Constitution, the rights of confrontation and cross-examination "are not absolute."¹²⁷ The court cited several statutes in which documentary evidence was considered to be admissible notwithstanding that it denied the party against whom the evidence was introduced the right to cross-examine or confront the witness who made the document.¹²⁸ The court recognized, however, that the documents submitted into evidence under these statutes must be of "such trustworthiness as to guarantee the same protection provided by the constitutional rights of confrontation and cross-examination."¹²⁹ The court in *Porter* noted that the documents introduced in the trial court "contained hearsay upon hearsay," and that "[t]he sources of these opinions are in most cases unnamed, and in no case are the authors or the unnamed sources shown to be competent to make the statements attributed to them."¹³⁰ The court then reasoned that simply because the documents were collected in a file in a government office does not mean that they "have the indicia of reliability sufficient to insure the integrity of the fact finding process commensurate with the constitutional rights of confrontation and cross-examinations."¹³¹ The court concluded that, although the documents may have been relevant, their admission denied the defendant his rights of confrontation and cross-examination.¹³²

V. BEST EVIDENCE RULE

The best evidence rule provides that when the contents of a writing are sought to be proved, and the writing pertains to a noncollateral issue, the original writing must be produced, or its nonproduction accounted for.¹³³ The rule applies only if the contents of the writing are sought to be proved.¹³⁴ The rule does not apply if the writing relates only to a collateral issue.¹³⁵ The rule also does not apply to "duplicate originals"¹³⁶ but

127. *Id.* at 745.

128. The court cited TEX. REV. CIV. STAT. ANN. arts. 3731, 3737e (Vernon Supp. 1980).

129. 578 S.W.2d at 746.

130. *Id.*

131. *Id.* The state argued that the trial court has wide discretion in admitting or excluding evidence at the punishment phase of a capital murder trial. The court rejected this contention, stating that this discretion extends only to the question of the relevance of the facts sought to be proved. *Id.* at 748.

132. *Id.*

133. *See, e.g.,* Fechtel v. Gatewood, 470 S.W.2d 293 (Tex. Civ. App.—Tyler 1971, writ ref'd n.r.e.); 2 C. MCCORMICK & R. RAY, *supra* note 9, §§ 1561-1563.

134. *See, e.g.,* Southern Pac. Transp. Co. v. Peralez, 546 S.W.2d 88 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.) (best evidence of provisions and regulations of Texas and U.S. Department of Transportation as to standards and conditions at railroad crossings are regulations themselves); Middagh v. Tiller-Smith Co., 518 S.W.2d 589 (Tex. Civ. App.—El Paso 1975, no writ) (company's vice president's testimony concerning reduction in sales inadmissible because sales records best evidence).

135. *See, e.g.,* Bains v. Parker, 143 Tex. 57, 182 S.W.2d 397 (1944) (parol evidence of ownership of land admissible without production of deed or title because ownership not in

does apply to and precludes the use of carbon copies and photographic or photostatic copies.¹³⁷

In *Prudential Insurance Co. of America v. Black*¹³⁸ the plaintiff appealed from an adverse judgment in its suit seeking recovery of unpaid rents on a lease agreement. Plaintiff sought to prove its ownership of the leased premises through the testimony of a former member of a partnership that had sold the leased premises to the plaintiff. The trial court excluded the witness's testimony on the ground that the document of title was the best evidence to establish plaintiff's ownership of the property. The appellate court concluded that the question of ownership of the leased premises was only collaterally related to the main issue of whether the defendant breached the lease agreement. Thus the best evidence rule was incorrectly applied by the trial court, and the court reversed and remanded the matter.¹³⁹

VI. IMPEACHMENT

Proof that a witness has been convicted of a criminal offense is admissible for impeachment purposes only if the offense is one involving moral turpitude¹⁴⁰ and not too remote.¹⁴¹ The remoteness of a prior criminal conviction, as it affects admissibility for impeachment purposes, is usually

dispute); *Fannin Bank v. Johnson*, 432 S.W.2d 138 (Tex. Civ. App.—Houston [1st Dist.] 1968, writ dismissed) (oral testimony as to ownership of land admissible without production of deed because title of land only collaterally involved). See also 2 C. McCORMICK & R. RAY, *supra* note 9, § 1567.

136. See, e.g., *Brown v. Leasing Assoc., Inc.*, 453 S.W.2d 863 (Tex. Civ. App.—Houston [1st Dist.] 1970, writ refused n.r.e.) (signed duplicate copy of assignment on cause of action admissible); *Cross v. Everybodys*, 357 S.W.2d 156 (Tex. Civ. App.—Fort Worth 1962, writ refused n.r.e.) (photostatic copy of partnership termination agreement made and signed at same time as typewritten copy admissible as duplicate original).

137. See, e.g., *Empire Gas & Fuel Co. v. Muegge*, 135 Tex. 520, 143 S.W.2d 763 (1940) (photostatic copies of out-of-state auto registration certificate, without authentication, inadmissible); *Pitcock v. B & W Inc.*, 476 S.W.2d 83 (Tex. Civ. App.—Houston [1st Dist.] 1971, writ refused n.r.e.) (photostatic copy of photograph inadmissible); *Hill v. Moore*, 278 S.W.2d 472 (Tex. Civ. App.—Amarillo 1954, no writ) (carbon copy of auto registration certificate inadmissible without accounting for nonproduction of original); *Great Am. Indem. Co. v. Dabney*, 128 S.W.2d 496 (Tex. Civ. App.—Amarillo 1939, writ dismissed judgment corrected) (unauthenticated carbon copy of autopsy report inadmissible). But cf. *In re Bates*, 555 S.W.2d 420 (Tex. 1977) (article 3731c allowed admission of photostatic copies of \$100 bills that had been returned to bank).

138. 572 S.W.2d 379 (Tex. Civ. App.—Houston [14th Dist.] 1978, no writ).

139. *Id.* at 380-81.

140. *Landry v. Travelers Ins. Co.*, 458 S.W.2d 694 (Tex. 1970) (theft and forgery of postal money orders are crimes involving moral turpitude); *Compton v. Jay*, 389 S.W.2d 639 (Tex. 1965) (driving while intoxicated not a crime involving moral turpitude); *British Am. Ins. Co. v. Coffman*, 574 S.W.2d 873 (Tex. Civ. App.—Texarkana 1978, no writ) (conviction for possession of heroine is crime of moral turpitude); *Ka-Hugh Enterprises, Inc. v. Fort Worth Pipe & Supply Co.*, 524 S.W.2d 418 (Tex. Civ. App.—Fort Worth 1975, writ refused n.r.e.) (conviction for income tax evasion was crime involving moral turpitude and could be used to impeach credibility of witness).

141. E.g., *Landry v. Travelers Ins. Co.*, 458 S.W.2d 649, 650-51 (Tex. 1970); 1 C. McCORMICK & R. RAY, *supra* note 9, § 660. See also Elliott, *Evidence, Annual Survey of Texas Law*, 25 Sw. L.J. 135, 135-38 (1971).

a matter within the discretion of the trial court.¹⁴²

In *American Motorists Insurance Co. v. Evans*,¹⁴³ for example, a workers' compensation case, the defendant attempted to impeach the plaintiff by establishing that he had been convicted of a misdemeanor. In one of his answers to interrogatories, which were introduced into evidence, the plaintiff stated that he had never been charged with a criminal offense other than a traffic violation. The specific offense with which the defendant sought to impeach the plaintiff was that, for the purpose of obtaining unemployment benefits, the plaintiff knowingly made a false statement that he had not worked to receive wages for the period in which he was seeking employment compensation. The trial court denied the defendant the opportunity to impeach the plaintiff on the basis of that offense. The appellate court held that the making of a false affidavit for the purpose of securing money benefits to which a person is not entitled is an offense involving moral turpitude.¹⁴⁴ As the conviction was not too remote, the appellate court concluded that it had a bearing upon plaintiff's present credibility.¹⁴⁵ The court therefore reversed the decision of the trial court and remanded the matter for trial.

In *Watkins v. State*¹⁴⁶ the defendant appealed from a conviction of two counts of felony theft. On appeal, he contended that the trial court erred in admitting evidence of his convictions in 1971 and 1976 in the federal courts because he had received a full presidential pardon for such offenses. There was no allegation that his presidential pardon was received because of subsequent proof of his innocence.¹⁴⁷ The defendant's contention was that his guilt was eradicated when he received his full, unconditional pardon. Relying on the United States Supreme Court's decision in *Carlesi v. New York*,¹⁴⁸ the court of criminal appeals rejected the defendant's contention. *Carlesi* held that, notwithstanding a full presidential pardon, a prior federal conviction can be used as an enhancement count in a state prosecution.¹⁴⁹ The court then concluded that although a pardon forgives

142. *Landry v. Travelers Ins. Co.*, 458 S.W.2d 649, 650-51 (Tex. 1970); see *British Am. Ins. Co. v. Coffman*, 574 S.W.2d 873 (Tex. Civ. App.—Texarkana 1978, no writ) (exclusion of conviction four months prior to trial abuse of discretion); *Hartford Accident & Indem. Co. v. Williams*, 516 S.W.2d 425 (Tex. Civ. App.—Amarillo 1974, writ ref'd n.r.e.) (exclusion of conviction five years and six months prior to trial not abuse of discretion); *Calloway v. Texas Employers Ins. Ass'n*, 491 S.W.2d 765 (Tex. Civ. App.—Beaumont 1973, writ ref'd n.r.e.) (conviction twelve years before trial too remote and admission reversible error); *Millers Mut. Fire Ins. Co. v. Pollard*, 474 S.W.2d 638 (Tex. Civ. App.—Houston [14th Dist.] 1971, no writ) (exclusion of conviction nine and one-half years before trial not abuse of discretion).

143. 577 S.W.2d 514 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.).

144. *Id.* at 515.

145. *Id.* at 515-16. Only fifteen months elapsed between the conviction and the alleged injury, and less than three years between the conviction and the civil trial.

146. 572 S.W.2d 339 (Tex. Crim. App. 1978).

147. The defendant's pardon was apparently based on his work as an undercover investigator for the Federal Bureau of Narcotics and Dangerous Drugs, 572 S.W.2d at 341 n.2.

148. 233 U.S. 51 (1914).

149. *Id.* at 59.

the penalty, it does not affect the conviction.¹⁵⁰ Accordingly, the court overruled the defendant's claim and affirmed his conviction.

Rule 404 of the Federal Rules of Evidence¹⁵¹ generally excludes evidence of a person's character for the purpose of proving that he acted in the same manner at the time of the occurrence in dispute.¹⁵² This general rule of exclusion is based upon the assumption that such evidence is of slight probative value and very prejudicial. In *Reyes v. Missouri Pacific Railroad*¹⁵³ the court of civil appeals addressed the admissibility of such character evidence. The plaintiff brought suit for injuries sustained when he was run over by defendant's train as he lay on the tracks at night. The plaintiff explained his presence on the railroad tracks by claiming that, while walking along the tracks, he was knocked unconscious by an unknown assailant. The trial court admitted into evidence four prior misdemeanor convictions of the plaintiff for public intoxication. The purpose of the evidence was to show that the plaintiff was intoxicated on the night that he was run over by the train. Judgment was entered for the defendant, and the plaintiff appealed. The court of civil appeals concluded that the prior convictions were inadmissible character evidence under rule 404, because the evidence of the plaintiff's prior conviction was admitted for the sole purpose of showing that he had a character trait of drinking to excess and that he acted in conformity with his character on the night of the accident by becoming intoxicated.

The defendant further sought to justify the admission of such evidence by alleging that the prior convictions constituted relevant habit evidence.¹⁵⁴ Rule 406 of the Federal Rules of Evidence¹⁵⁵ allows the intro-

150. 572 S.W.2d at 341-42.

151. FED. R. EVID. 404.

152. Rule 404 provides:

(a) Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of witness. Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

153. 589 F.2d 791 (5th Cir. 1979).

154. For discussions on habit evidence, see C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 195 (2d ed. 1972); 1 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 92 (3d ed. 1940). Habit evidence, unlike character evidence, is considered to be of highly probative value because "the uniformity of one's response to habit is far greater than the consistency with which one's conduct conforms to character or disposition. C. McCORMICK, *supra*, § 195, at 463.

duction of evidence of the habit of a person for the purpose of proving that the person acted in conformity with his habit on the particular occasion.¹⁵⁶ Recognizing that no precise formula exists for determining if the offered evidence is inadmissible character evidence or admissible habit evidence, the court chose not to prescribe the precise quantum of proof necessary to transform a general disposition for excessive drinking into a "habit" of intemperance."¹⁵⁷ The court then found that the four prior convictions for public intoxication spanning a three-and-one-half-year period were of insufficient regularity to rise to the level of habit evidence.¹⁵⁸ The evidence was therefore held to be inadmissible, and the case was reversed and remanded for a new trial.¹⁵⁹

The general rule in Texas is that a party is bound by the testimony of his own witness.¹⁶⁰ A party may, however, impeach his own witness when the witness's testimony is injurious to the party putting him on the stand and the testimony is a surprise to that party.¹⁶¹ The rule against impeaching one's own witness does not prevent a party from proving facts at variance with or in contradiction of those facts testified to by the witness.¹⁶²

In *Burleson v. Finley*,¹⁶³ a trespass to try title and assault case, the plaintiffs appealed from an adverse judgment claiming that, *inter alia*, the trial court erred in allowing the defendants to impeach their own witness. The defendants called Clinton P. Rippey, a surveyor who had surveyed the land in question, as their witness. On direct examination, the defendants' coun-

155. FED. R. EVID. 406.

156. Rule 406 provides:

(a) Admissibility. Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

157. 589 F.2d at 795.

158. *Id.*

159. Similarly, in *Burleson v. Finney*, 581 S.W.2d 304 (Tex. Civ. App.—Austin 1979, writ ref'd n.r.e.), a trespass to try title and an assault case, it was held that proof of prior assaults committed by defendant was not admissible to show that the defendant committed the assault in question. *Id.* at 307-08. In *Burleson*, however, the court also concluded that, if exemplary damages are sought, evidence of prior assaults is admissible on the issue of exemplary damages. *Id.*

160. *E.g.*, *Pickett v. Dallas Trust & Sav. Bank*, 24 S.W.2d 354 (Tex. Comm'n App. 1930, holding approved); *Anderson v. Anderson*, 535 S.W.2d 943 (Tex. Civ. App.—Waco 1976, no writ).

161. *See, e.g.*, *Phlegm v. Pacific Employers Ins. Co.*, 453 S.W.2d 320 (Tex. Civ. App.—Houston [14th Dist.] 1970, no writ); *City of San Antonio v. Poulos*, 403 S.W.2d 168 (Tex. Civ. App.—San Antonio 1966), *aff'd*, 422 S.W.2d 140 (Tex. 1967).

162. *See, e.g.*, *Englebrecht v. W.D. Brannan & Sons*, 501 S.W.2d 707, 711-12 (Tex. Civ. App.—Amarillo 1973, no writ) (where witness testified that it was not the custom in community to charge if farmer dissatisfied with result of aerial spraying, evidence could not be introduced to attack credibility of witness, but testimony would be admissible to contradict witness's testimony as to custom in community); *Hawkins v. Maxwell*, 318 S.W.2d 492 (Tex. Civ. App.—Dallas 1958, no writ) (plaintiff allowed to give testimony contradicting his attorney's testimony); *Shinn v. Dillon*, 306 S.W.2d 940 (Tex. Civ. App.—Fort Worth 1957, no writ) (plaintiff permitted to give testimony contradicting his witness's testimony concerning automobile accident).

163. 581 S.W.2d 304 (Tex. Civ. App.—Austin 1979, writ ref'd n.r.e.).

sel inquired whether one of the plaintiffs had told the witness that the property line was the center of a certain creek. The witness replied that he could not answer the question either "yes" or "no." The witness then testified that "it was understood between he and I [*sic*] that we were supposed to survey up the center line of Brushy Creek, and not to go to the fence on the other side."¹⁶⁴ The trial court, over the plaintiffs' objection, permitted the witness to read a previously signed affidavit in which the witness stated that one of the plaintiffs had told him that the property line ran to the center of the channel of the creek. The defendants contended that the admission of the affidavit was proper because they were entitled to impeach their own witness because he had qualified or contradicted his statement made earlier in his affidavit.

The *Burleson* court recognized that when a party is surprised by his witness's testimony, he is entitled to impeach the witness by showing that the witness made prior statements that contradict his testimony given at trial. The court stated, however, that the "testimony sought to be discredited must be such as disproves, in some degree, the case of the party by whom the witness is called."¹⁶⁵ The court of civil appeals concluded that the evidence failed to show that the defendant was either surprised by his witness's testimony or that the testimony disproved, in any degree, the defendants' case. The court reasoned that the only "surprise" shown by the witness's testimony was "counsel's statement that he was surprised,"¹⁶⁶ and that, although the testimony did not meet the defendants' expectations, it did not disprove any part of the defendants' case. The appellate court affirmed the trial court, however, because the plaintiffs failed to specify a particular rule of evidence that was violated by the admission of the affidavit. As a result, the plaintiffs waived any error that existed.¹⁶⁷

VII. PAROL EVIDENCE

The parol evidence rule provides that, in the absence of fraud, accident, or mistake, parol or extrinsic evidence is not admissible to contradict or vary the terms of a written instrument.¹⁶⁸ In *Benson v. Jones*¹⁶⁹ the plaintiffs brought suit on a written farm lease to recover rent, interest, damages to land covered by the lease, and attorney's fees. The lease agreement provided that the plaintiffs would lease to the defendants a specified number

164. *Id.* at 309.

165. 581 S.W.2d at 310.

166. *Id.*

167. *Id.*

168. See cases decided during the survey period: *Transamerican Leasing Co. v. Three Bears, Inc.*, 586 S.W.2d 472 (Tex. 1979) (extrinsic evidence inadmissible to establish oral option to purchase equipment where lease recited it was "sole agreement"); *Caviness Packing Co. v. Corbett*, 587 S.W.2d 543 (Tex. Civ. App.—Amarillo 1979, writ ref'd n.r.e.) (extrinsic evidence admissible to establish that ambiguous sales contract provision pertaining to weight of cattle meant "at time of delivery"); *Hinckley v. Eggers*, 587 S.W.2d 448 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.) (extrinsic evidence admissible to establish that investors were liable as principals on deed of trust note even though not identified in note). See, e.g., *Jackson v. Hernandez*, 155 Tex. 249, 260, 285 S.W.2d 184, 190 (1955).

169. 578 S.W.2d 480 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.).

of tillable acres, with rent to be based on the "net" number of tillable acres. The defendants offered extrinsic evidence to explain what the parties intended by the use of the term "net" tillable acres. After judgment was rendered that the plaintiffs take nothing, the plaintiffs appealed from the portion of the judgment concerning their action to recover past due rentals and interest, plus attorney's fees. The plaintiffs contended that the trial court improperly permitted the defendants to introduce the parol testimony because it varied the terms of the unambiguous written lease agreement. The defendants asserted that the testimony was admissible because the parties clearly intended the phrase rental "based on net tillable acres" to mean rental determined by the number of tillable acres actually delivered to the defendants.

The court of civil appeals recognized that evidence adduced in violation of the extrinsic evidence rule is incompetent and has no probative force even though admitted without objection.¹⁷⁰ It also acknowledged, however, that even in the case of an unambiguous instrument, a trial court may properly admit parol evidence of the facts and circumstances surrounding or pertaining to the making of the agreement for the purpose of ascertaining the true intention of the parties.¹⁷¹ The court therefore concluded that the parol evidence was admissible to show the facts and circumstances surrounding the execution of the lease in order to ascertain the true intent of the parties in their use of the term "net" tillable acres as it appeared in the written agreement.¹⁷²

In *Alba Tool & Supply Co. v. Industrial Contractors, Inc.*¹⁷³ the Texas Supreme Court considered the admissibility of parol evidence to explain written contract terms alleged to be ambiguous. Industrial contractors entered into a written contract with Alba for the sale of products to be manufactured by Industrial Contractors. The contract granted Alba the "exclusive right to offer for sale," within the areas defined by the contract, the products of Industrial Contractors.¹⁷⁴ Another paragraph of the same contract stated that "Alba shall be the exclusive agent of [Industrial Contractors] to sell such account[s]."¹⁷⁵ Before the contract expired, Industrial Contractors cancelled the contract and Alba sued, seeking a five percent commission on sales. On the basis of the parol evidence rule, the trial court excluded testimony offered by Industrial Contractors' president to explain the allegedly ambiguous sales areas as defined in the written agreement.¹⁷⁶ The trial court rendered judgment in favor of the plaintiff, but

170. *Id.* at 484.

171. *Id.*

172. *Id.* at 485.

173. 585 S.W.2d 662 (Tex. 1979).

174. Paragraph 2 of the contract specifically provided: "2. Alba shall have the (exclusive) ~~(non-exclusive)~~ and ~~(transferable)~~ ~~(non-transferable)~~ right to offer for sale within the Area of Representation defined below products of the Manufacturer . . ." *Id.* at 663 n.1. The deleted words were lined through and initialed by the parties to the contract. *Id.*

175. *Id.*

176. The area of representation was set out in paragraph 4: "4. AREA OF REPRESENTATION: M.W. Kellogg, Litwin, Fluor Corp.—Houston & L.A., Tellepsen, Hydrocarbon

the court of civil appeals held the contract to be ambiguous and remanded for admission of the parol evidence.¹⁷⁷ Reversing the court of civil appeals and affirming the trial court's judgment, the supreme court found the contract to be clear and unambiguous.¹⁷⁸ The court concluded that the area of representation paragraph was not susceptible to more than one meaning and that the use of the terms "exclusive right to offer for sale" and "exclusive agent" in the same contract did not create an ambiguity.¹⁷⁹ Finding no ambiguity in the contract, the court followed clearly established law that it is not error to exclude parol evidence offered to explain a contract that is unambiguous on its face.¹⁸⁰

Const., S.I.P., Inc., Shell Oil and Chem., T.D.A. Edwards Engr., Dow Badische, American Lurgi, Lurgi Group, Procon, Weatherby Engr., Celanese Corp. Engr.—Houston Division."

177. Industrial Contractors argued, and the court of civil appeals agreed, that paragraph 4 was susceptible to three different interpretations. *Industrial Contractors, Inc. v. Alba Tool & Supply Co.*, 572 S.W.2d 366, 368 (Tex. Civ. App.—Houston [14th Dist.] 1978). The appellate court also held that the terms "exclusive right to offer for sale" and "exclusive agency" created an additional ambiguity. *Id.*

178. 585 S.W.2d at 665.

179. *Id.* at 664.

180. *See Anderson & Kerr Drilling Co. v. Bruhlmeier*, 134 Tex. 574, 136 S.W.2d 800 (1940).

