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Evidence

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PART II: PROCEDURAL LAW

EVIDENCE

by

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THE most significant decision handed down during the past year which affects the law of evidence is not based on Texas law, yet it will have an impact on two aspects of the Texas practice. Texas cases decided last year concerning the vicarious admissions exception to the hearsay rule, as well as the problem of the existence and sufficiency of the evidence on appeal are also of importance.

I. CHAMBERS V. MISSISSIPPI

In *Chambers v. Mississippi*[1] the United States Supreme Court decided two points which will directly affect the Texas law of evidence. Chambers was convicted of the murder of a policeman during a commotion brought about by the attempted arrest of another person. Chambers, himself wounded by the dying officer, was taken to a hospital by friends, where he was placed under guard and charged with the murder. Some time later, Gable McDonald, one of the friends who took Chambers to the hospital, gave a sworn confession to Chambers' attorneys that he, McDonald, had shot the officer. He stated that he had used his own pistol, which he had discarded shortly after the shooting, and also that he had told another friend that he shot the officer. The confession was turned over to the police and McDonald was placed in jail. One month later, at a preliminary hearing, McDonald repudiated the confession, whereupon a local justice of the peace accepted the repudiation and released him from custody.

When Chambers went to trial he endeavored to develop two lines of defense. First, he attempted to show that he did not shoot the police officer. Only one witness testified that he actually saw Chambers fire the shots, but no weapon was recovered from the scene, and there was no proof that Chambers had ever owned a .22 caliber pistol as was allegedly used by the murderer. Furthermore, one eyewitness testified that he was looking at Chambers and was sure that he did not fire the shots. Secondly, Chambers attempted to show that McDonald had fired the fatal shots. In support of this defense one witness testified that he had seen McDonald shoot the officer, and a second witness testified that he saw McDonald immediately

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1. 410 U.S. 284 (1973).

after the shooting with a pistol in his hand. In addition, Chambers attempted to prove that McDonald had admitted the murder on four occasions: once when he gave the sworn statement, and three other times prior to that occasion in private conversations with friends.

Before the trial Chambers requested that the court order McDonald to appear, and sought a ruling that if the state chose not to call McDonald, he be allowed to call him as an adverse witness. The trial court did require McDonald to appear, but reserved ruling on the adverse witness motion. Because the state did not call McDonald as a witness, Chambers put him on the stand, introduced his prior confession, and had it read to the jury. The state, upon cross-examination, developed the fact that the confession had been repudiated, and also elicited testimony from McDonald giving his present story. Chambers then renewed his motion to examine McDonald as an adverse witness, but the motion was denied. The trial court stated: "He may be hostile, but he is not adverse in the sense of the word, so your request will be overruled."[2] Chambers then sought to introduce the testimony of the three witnesses to whom McDonald had admitted the shooting, but hearsay objections to the testimony were sustained.

As the Supreme Court stated:

> In sum, then, this was Chambers' predicament. As a consequence of the combination of Mississippi's 'party witness' or 'voucher' rule and its hearsay rule, he was unable either to cross-examine McDonald or to present witnesses in his own behalf who would have discredited McDonald's repudiation and demonstrated his complicity.[3]

The Court first considered the "voucher" rule, which provides that a party who calls a witness "vouches for his credibility," and may not impeach him. As applied in the trial court, Chambers was not only precluded from cross-examining McDonald, but was also restricted in the scope of his direct examination. Noting that the rule has been rejected altogether by the proposed Federal Rules of Evidence, the Court stated:

> Whatever validity the 'voucher' rule may have once enjoyed, and apart from whatever usefulness it retains today in the civil trial process, it bears little present relationship to the realities of the criminal process. It might have been logical for the early common law to require a party to vouch for the credibility of witnesses he brought before the jury to affirm his veracity. Having selected them especially for that purpose, the party might reasonably be expected to stand firmly behind their testimony. But in modern criminal trials defendants are rarely able to select their witnesses: they must take them where they find them.[4]

The Court did not rely exclusively upon this error for reversal, but also considered the hearsay question. Mississippi law recognizes the exception

2. *Id.* at 291. The Mississippi Supreme Court upheld this ruling, finding that "McDonald's testimony was not adverse to appellant" because "[n]owhere did he point the finger at Chambers." Chambers v. Mississippi, 252 So. 2d 217, 220 (Miss. 1971).

3. 410 U.S. at 294.

4. *Id.* at 296. *See also* Proposed Federal Rules of Evidence, rule 607, 56 F.R.D. 183, 266 (1973).

to the hearsay rule for declarations against interest, but restricts that exception to declarations against pecuniary interest.[5] Recognizing that this is the rule in most states, and is the present rule in federal practice, but that the proposed Federal Rules of Evidence[6] and a few states have rejected it, the Court held that under the particular circumstances of the case before it, the testimony should have been admitted.[7] The Court then detailed four factors which led to admissibility. First, each of the confessions was made spontaneously to a close acquaintance shortly after the murder. Second, each one was corroborated by some other evidence in the case. Third, each confession was in a real sense self-incriminatory and unquestionably against interest. Finally, McDonald was present in the courtroom and under oath so that he could have been cross-examined by the state and his demeanor and responses weighed by the jury. In short, the testimony "bore persuasive assurances of trustworthiness and thus was well within the basic rationale of the exception for declarations against interest."[8] The Court concluded that "the exclusion of this critical evidence, coupled with the State's refusal to permit Chambers to cross-examine McDonald, denied him a trial in accord with traditional and fundamental standards of due process."[9]

Although the Court went on to say that in "reaching this judgment we establish no new principles of constitutional law,"[10] the decision surely does establish a new principle for the law of evidence. Much more important than what the Court did say in accepting the theory of declarations against penal interest is what it did not say regarding another facet of the exception. One of the standard requirements for the application of the declaration against interest exception is that the declarant be unavailable.[11] However, nothing was said about this requirement, and in fact both the Mississippi[12] and the federal[13] precedents were distinguished on the ground that in both cases the declarant was unavailable. Moreover, the Court found the final factor establishing admissibility to be the presence of McDonald, and his availability for cross-examination.[14]

5. H. MCELROY, MISSISSIPPI EVIDENCE § 46 (1955); Forrest County Cooperative Ass'n v. McCaffrey, 176 So. 2d 287 (Miss. 1965).

6. Proposed Federal Rules of Evidence, rule 804(b)(4), 56 F.R.D. 183, 321 (1973).

7. The Court limited its holding by stating that "we need not decide in this case whether, under other circumstances, it might serve some valid state purpose by excluding untrustworthy testimony." 410 U.S. at 300.

8. *Id.* at 302.

9. *Id.*

10. *Id.*

11. *See* C. MCCORMICK, EVIDENCE § 280 (2d ed. 1972) [hereinafter cited as MCCORMICK].

12. Brown v. State, 99 Miss. 719, 55 So. 961 (1911).

13. Donnelly v. United States, 228 U.S. 243 (1913).

14. In a footnote the Court stated:

> McDonald's presence also deprives the State's argument for retention of the penal-interest rule of much of its force. In claiming that '[t]o change the rule would work a travesty of justice,' the State posited the following hypothetical: 'If the rule were changed, A could be charged with the crime; B could tell C and D that he committed the crime; *B could go into hiding* and at A's trial C and D would testify as to B's admission of guilt; A could be acquitted and B would return to stand trial;

The decision in *Chambers* and that in *California v. Green*[15] indicate that the availability of the declarant for cross-examination at the trial is by far the most important factor to be considered both in the application of exceptions to the hearsay rule and in satisfaction of the right of confrontation. This result is fortified by the proposed Federal Rules of Evidence,[16] though diluted to some extent by congressional action.[17] The classical requirement of some special need for hearsay testimony is replaced by a satisfaction of the purposes of the hearsay rule itself, namely the declarant's presence under oath, subject to cross-examination, and the weighing of his demeanor and responses by the trier of fact.

Whatever the possible impact on the hearsay rule in general, it is clear that the decision will require a change in Texas practice, both with respect to the impeachment by the accused of a witness called by him,[18] and the use of declarations against penal interest,[19] whether the declarant is available or not.

II. VICARIOUS ADMISSIONS

In *Big Mack Trucking Co. v. Dickerson*[20] the Supreme Court of Texas reversed a decision which was applauded in last year's *Survey*.[21] Three holdings of the court in *Big Mack* are important. While two of these strictly concern the law of evidence, the third is intertwined with the substantive law of torts. The first evidentiary holding denied the admissibility of a statement made by an employee to his employer concerning the cause of

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> B could then provide several witnesses to testify as to his whereabouts at the time of the crime. The testimony of those witnesses along with A's statement that he really committed the crime would result in B's acquittal. A would be barred from further prosecution because of the protection against double jeopardy. No one could be convicted of perjury as A did not testify at his first trial, B did not lie under oath, and C and D were truthful in their testimony.' . . . Obviously, 'B's' absence at trial is critical to the success of the justice-subverting ploy.

410 U.S. at 301-02 n.21.

15. 399 U.S. 149 (1970).

16. Proposed Federal Rules of Evidence, rule 801(d)(1), 56 F.R.D. 183, 293 (1973). A statement is not hearsay if:

> (1) *Prior statement by witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving him . . . .

Id. But cf. Vanston v. Connecticut Gen. Life Ins. Co., 482 F.2d 337 (5th Cir. 1973).

17. The House committee considering the rules added the following proviso to the proposal: "Provided, That a prior inconsistent statement under clause (A) shall not be admissible as proof of the facts stated unless it was given under oath and subject to the penalty of perjury at a trial or hearing or in a deposition or before a grand jury." HOUSE COMM. ON CRIMINAL JUSTICE, 93D CONG., 1ST SESS., FEDERAL RULES OF EVIDENCE, H.R. 5463 (Comm. Print 1973), reprinted in 1973 U.S. CODE CONG. & ADMIN. NEWS 2077, 2104.

18. *See* 1 C. MCCORMICK & R. RAY, TEXAS LAW OF EVIDENCE §§ 631-41 (1966) [hereinafter cited as MCCORMICK & RAY]. *See also* Vanston v. Connecticut Gen. Life Ins. Co., 482 F.2d 337 (5th Cir. 1973).

19. *See* Cameron v. State, 153 Tex. Crim. 374, 217 S.W.2d 23 (1949); MCCORMICK § 278; MCCORMICK & RAY §§ 1003, 1006.

20. 497 S.W.2d 283 (Tex. 1973).

21. Elliott, *Evidence, Annual Survey of Texas Law*, 27 SW. L.J. 158, 162 (1973).

an accident. As noted last year,[22] the cases are divided on the issue, and although it appears that the arguments favoring admissibility are persuasive, the holding to the contrary comes as no surprise, only as a disappointment.[23]

The second evidentiary holding denied the admissibility against an employer of an admission by his employee to a third party concerning the cause of an accident. This result follows the weight of authority in the United States that a truck driver is hired to drive, not to talk.[24] The court stated: "In terms of strictly consensual authority, we believe the well-advised employer would generally not authorize the driver to speak in these circumstances."[25] This is certainly true, but a well-advised employer would generally not authorize the driver to operate his vehicle in a negligent manner, and the courts still impose liability on the employer if the driver, acting within the general scope of his employment, negligently injures another. It is suggested that the trend is toward admissibility in these circumstances if the statement by the employee *concerns* a matter within the scope of his employment.[26] Again, the holding is not surprising, only disappointing.

The third point is another matter. Assuming the correctness of the other two positions, statements by an employee to an employer or third parties concerning the accident would not be admissible in a suit against the employer alone unless the employee was unavailable as a witness.[27] In the event, however, the employee were joined as a defendant, his statements would be admissible against him as admissions of a party opponent.[28] Assuming that the driver was acting within the scope of his employment, the only issues to be submitted are those concerning the negligence of the driver, proximate cause, and the extent of injuries. The employer is liable because of the doctrine of *respondeat superior*, not because of his own negligence. The court stated:

> The suggestion is that with respect to proof of the servant's liability, which we deem an essential element of plaintiff's *case against the master*, the master loses the protection of the hearsay rule. Any reason which suggests that the master should lose the protection of that rule would also militate against the master's right to offer contrary evidence, to cross-examine plaintiff's witnesses, to object to evidence on grounds other than hearsay, or, indeed, even to plead the general denial which requires the plaintiffs to prove the servant's liability in the first place.[29]

This position is simply not persuasive. If the courts are willing to hold

22. *Id.* at 162.
23. *See* McCORMICK § 267, at 642-43.
24. *See id.* at 641.
25. 497 S.W.2d at 288.
26. *See* McCORMICK § 267, at 641; UNIFORM RULE OF EVIDENCE 63(9)(a); Proposed Federal Rules of Evidence, rule 801(d)(2), 56 F.R.D. 183, 293 (1973). For variations in the vicarious admissions rule, see Bolin Oil Co. v. Staples, 496 S.W.2d 167 (Tex. Civ. App.—Fort Worth 1973), *error ref. n.r.e.*; Commercial Standard Ins. Co. v. Barron, 495 S.W.2d 276 (Tex. Civ. App.—Tyler 1973); Missouri Pac. R.R. v. Cross, 487 S.W.2d 206 (Tex. Civ. App.—Texarkana 1972), *error granted.*
27. *See* McCORMICK §§ 276-80; McCORMICK & RAY §§ 1001-11. This is the traditional application of the declaration against interest exception to the hearsay rule. *But cf.* the decision in *Chambers* discussed above.
28. *See* McCORMICK § 262; McCORMICK & RAY § 1121.
29. 497 S.W.2d at 287.

a principal liable for the negligent acts of his agent, it must be because public policy demands that third persons be protected. Responsibility is imposed upon the principal despite the fact that he would never have authorized the negligent act of his agent. Because the principal has chosen to act through the agent, the acts of the agent are imputed to the principal.

Of course the principal should be afforded all the protection the hearsay rule would offer to the agent, but only this protection. If the evidence would be inadmissible against the agent, then it would be inadmissible against the principal. Once it has been established that the agent was acting within the scope of his authority when he committed the allegedly negligent act, the rights and duties of the agent and his principal would coexist on the issue of negligence. While the agent's admissions would be admissible against the principal, the principal would be entitled to all the agent's rights to cross-examine witnesses, to object to evidence on other grounds, and to offer evidence and enter pleas. Dead straw men do little to strengthen arguments.

All the parties to the case, and all the courts which have considered the case, agree that the evidence is admissible to prove the negligence of the driver. The findings by the jury that the actions of the driver were negligent and a proximate cause of the injuries are therefore supported by evidence, and the doctrine of *respondeat superior* should then operate to authorize a judgment against the principal. "To hold otherwise would be to make a mockery of the law, because it would mean that the agent had been found guilty of actionable negligence, upon competent evidence, while acting within the scope of his employment, yet his principal had escaped."[30] The doctrine of *respondeat superior* has, therefore, been rendered inoperative in this instance. To paraphrase the closing comments in last year's discussion,[31] it is suggested that a re-examination of the Texas position on the matter is even longer overdue.

III. "No Evidence" Revisited

Three courts of civil appeals have been faced with points of error attacking negative responses by the jury to certain special issues. The problem has been discussed at length in other forums,[32] but the recurrent difficulty it creates requires that the basic principles involved be reviewed briefly before examining the recent decisions.

When a complaint on appeal concerns (1) whether or not an issue should have been submitted to the jury at all because there was no fact question, or (2) whether or not a particular answer by the jury to a properly submitted issue was supported by the evidence, the correct wording of the

30. Grayson v. Williams, 256 F.2d 61, 68 (10th Cir. 1958), quoted and followed in Madron v. Thomson, 245 Ore. 513, 419 P.2d 611 (1966).

31. Elliott, *supra* note 21, at 164.

32. *See In re* King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); 4 R. McDonald, Texas Civil Practice § 18.14 (Elliott rev. 1971); Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 Texas L. Rev. 361 (1960); Garwood, *The Question of Insufficient Evidence on Appeal*, 30 Texas L. Rev. 803 (1952).

complaint depends upon which party had the burden of producing evidence or the burden of persuasion on the issue.

Assume first that an issue is submitted and answered in the affirmative. If the complaint by the party who did not have the burden of producing evidence is that the issue should not have been submitted at all because no fact issue was raised, it should state there was no evidence to raise the issue.[33] If, however, the complaint by the party who did not have the burden of persuasion[34] is that although there was evidence to justify submission of the issue, there was not enough to justify an affirmative answer, the complaint should be that there was insufficient evidence to support the answer of the jury.[35]

On the other hand, assume that an issue is submitted and answered in the negative. If the complaint by the party who had the burdens of producing evidence and persuasion is that the issue should not have been submitted at all because no fact issue was raised, it should be that the proposition was established as a matter of law. If the complaint by the party who had the burden of persuasion is that although there was a factual dispute to justify submission of the issue, on the evidence the negative answer was wrong, the complaint should be that the answer by the jury was against the great weight and preponderance of the evidence. It must be emphasized that the first complaint in each situation is that the issue should not have been submitted at all because there was no fact question involved. The second complaint in each situation is that the jury answer to a properly submitted issue is wrong. Of course, the complaints may be made separately or in the alternative.

The specific problem in each of the three cases was a complaint by the party with the burdens of producing evidence and persuasion concerning negative answers by the jury. In *United National Life Insurance Co. v. Jackson*[36] the points of error contended that there was no evidence to support the jury's negative findings. Under the above analysis, these points were incorrectly stated, since the prevailing party did not have the burden of producing evidence. However, the court sustained them using the proper terminology that "the answers of the jury . . . are contrary to the undisputed evidence as a matter of law."[37] Again, in *Deviney v. McLendon*[38] the points of error contended that there was no evidence to support the jury's negative findings. The court overruled the points, holding that there were fact questions raised on the issues, and that they were properly submitted. It recognized, however, that "[t]he negative answers of the jury to the several negligence issues amounted to nothing more than a failure or refusal by the jury to find from a preponderance of the evidence that the defendant

33. McCORMICK & RAY §§ 43-46.
34. The two burdens are usually on the same party, but not necessarily so. *See* Calvert, *supra* note 32, at 365.
35. *Id.* at 362.
36. 488 S.W.2d 834 (Tex. Civ. App.—Tyler 1972).
37. *Id.* at 836.
38. 496 S.W.2d 161 (Tex. Civ. App.—Beaumont 1973), *error ref. n.r.e.*

was negligent—meaning simply that the plaintiff had failed to discharge her burden of proving such facts."[39] In a footnote the court added:

> We do not necessarily subscribe to the views of one Court of Civil Appeals when it held: 'In situations such as this where a jury returns a negative answer to an issue upon which the proponent has the burden of proof, the jury's negative answer need not be supported by affirmative evidence.' . . . We simply hold that the evidence presented a question of fact for determination by the jury and that the plaintiff failed to carry her burden of persuasion.[40]

The third case, *Prunty v. Post Oak Bank*[41] squarely considered the principles set out above. First, the court held that "no-evidence" points of error concerning negative findings are improper and do not invoke the authority to review. "A jury's failure to find affirmatively on a special issue merely means the party proponent failed to meet his burden of proving the fact and evidence is not required to support the negative answer."[42] Second, it considered the appellant's properly phrased complaint that the issue should not have been submitted because the proposition was established as a matter of law, and found that negligence was not established as a matter of law.[43] Finally, it considered another properly phrased complaint that the negative answers were contrary to the great weight and preponderance of the evidence, and held that while a jury could properly have found negligence, it could not say that a failure to so find was in disregard of the overwhelming preponderance of the evidence.[44]

Although the whole problem might seem like an exercise in semantics, the cautious attorney should be very careful in phrasing his points of error so that the appellate court will know exactly what the complaint on appeal is. Failure to state the grounds of complaint properly may well lead to a failure of review.

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39. *Id.* at 164.
40. *Id.* at 165 n.1, quoting Smith v. Safeway Stores, Inc., 433 S.W.2d 217, 218-19 (Tex. Civ. App.—Tyler 1968), *error ref. n.r.e.*
41. 493 S.W.2d 645 (Tex. Civ. App.—Houston [14th Dist.] 1973), *error ref. n.r.e.*
42. *Id.* at 646.
43. *Id.* at 647.
44. *Id.*