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EVIDENCE

by

Roy R. Ray*

A VAST number of cases reaching the Texas appellate courts involve some alleged error in the admission or exclusion of evidence. Many opinions of the courts merely reiterate well-established rules. A reference to every such ruling would consume undue space and serve no useful purpose. Accordingly the writer has selected for discussion only those cases which appear to be novel or of some significance.

I. WITNESSES

Competency—Dead Man's Statute. The most important case involving article 3716 of the Texas Civil Statutes was *Roberts v. Roberts*.¹ This was a proceeding to set aside an order probating a holographic will on the ground that it was revoked by a later holographic will under the terms of which all the testator's children would share equally in the estate. The alleged later will was not produced and allegedly was last seen in the possession of the testator's son. A court of civil appeals held the statute inapplicable to testimony of three of the testator's children to the effect that an alleged lost will had been seen by them, was in the testator's handwriting, and devised his estate to his six children. It said that the making of the will, while a "transaction" was not a transaction of the testator with the devisees or legatees. The court relied upon *Martin v. McAdams*,² which involved a holographic will produced in court, and reasoned that the rule stated in that case was equally applicable to wills that could not be produced.

In another civil appeals case a witness' testimony that the deceased "placed the will on the bed to show him what was going on" was held to involve a "transaction" with the deceased and therefore, inadmissible under the Dead Man's Statute.³ The court quoted from the opinion in a 1958 case⁴ in which testimony as to the receipt of a letter from decedent was excluded.

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¹ 405 S.W.2d 211 (Tex. Civ. App. 1966). For further discussion see Galvin, *Wills and Trusts*, this Survey at footnote 21.

² 87 Tex. 225, 27 S.W. 255 (1894). See McCORMICK & RAY, *TEXAS EVIDENCE* § 329 (2d ed. 1956).

³ *Stewart v. Long*, 394 S.W.2d 25 (Tex. Civ. App. 1965) *error ref. n.r.e.*

⁴ *Munden v. Chambless*, 315 S.W.2d 355 (Tex. Civ. App. 1958) *error ref. n.r.e.*

Impeachment. It is a well established Texas rule that a character witness who has attested to the good reputation of an accused may be asked on cross-examination whether he has heard of certain acts of misconduct of the accused which are inconsistent with that reputation.⁵ In *Pace v. State*⁶ the court of criminal appeals held that this was never intended to apply to traffic offenses and that it was reversible error for the trial court to allow the state to ask the reputation witnesses if they had heard that the defendant had been charged with speeding in several counties and running a red light in another county. Prior acts of misconduct may, however, be admissible for purposes other than impeachment. This is illustrated by *Clark v. State*⁷ where the defendant was charged with selling marijuana. Evidence that he had sold heroin on other occasions was held properly admitted on the issues of notice, system, intent, and identity.⁸

Whether a defendant who gives testimony which would have been inadmissible over proper objection may be contradicted on the point by other witnesses was raised in a civil appeals case.⁹ In an intersection accident case the defendant had testified that he always drove through a particular intersection slowly. A witness for the plaintiff testified that in the past the defendant had gone through the intersection too fast. The admission of this evidence was held error requiring reversal apparently on the theory that the defendant could not be impeached on testimony which was not admissible.

II. OPINION

The problem of what questions may properly be asked of a lay or expert witness in a contest regarding the capacity of a testator or grantor has troubled Texas courts for many years.¹⁰ This resulted chiefly from a failure to distinguish testimony relating solely to legal capacity, a question involving legal definition, from testimony concerning mental condition.¹¹ In *Carr v. Radkey*¹² the supreme court sought to clarify the law in this field. This was a will contest with the holographic instrument being attacked by testatrix's relatives on the ground that she lacked testamentary capacity at the

⁵ McCORMICK & RAY, *op. cit. supra* note 2, at § 1492. An extensive discussion of the rule is found in *Stewart v. State*, 148 Tex. Crim. 480, 188 S.W.2d 167 (1945). See also *Vance v. State*, 365 S.W.2d 182 (Tex. Crim. App. 1963).

⁶ 398 S.W.2d 123 (Tex. Crim. App. 1965) (defendant was charged with driving while intoxicated).

⁷ 398 S.W.2d 763 (Tex. Crim. App. 1966).

⁸ For a discussion of this theory of admissibility see McCORMICK & RAY, *op. cit. supra* note 2, at § 1521.

⁹ *Hudson v. Hightower*, 394 S.W.2d 46 (Tex. Civ. App. 1965) *error ref. n.r.e.*

¹⁰ Marshall, *Opinion Testimony on Testamentary Capacity*, 25 TEXAS B.J. 385 (1962); Stout, *Some Problems in the Trial of a Will Contest*, 7 BAYLOR L. REV. 121 (1955).

¹¹ McCORMICK & RAY, *op. cit. supra* note 2, at § 1421 n.45.

¹² 393 S.W.2d 806 (Tex. 1965), 20 Sw. L.J. 662 (1966). See also Galvin, *Wills and Trusts*, this Survey at footnote 41.

time of execution. A jury found against capacity and the trial court denied probate. The court of civil appeals affirmed. The primary error assigned in the supreme court was the refusal of the trial judge to allow a qualified psychiatrist, who had never known or examined the testatrix, to testify, in answer to a hypothetical question, that in his opinion, at the time testatrix wrote the will, she had sufficient ability to understand the business in which she was engaged, the effect of her acts in making the will, realized what she was doing, knew her people and relatives and knew the property she owned. The supreme court reversed and remanded holding the exclusion of this testimony harmful error. Justice Greenhill, in an excellent opinion, reviewed most of the leading cases in the area.¹³ *Pickering v. Harris*,¹⁴ which had caused most of the confusion, was specifically overruled as being incorrectly decided and out of line with *Scalf v. Collin County*¹⁵ and the better opinions of the courts of civil appeals in which the supreme court had denied writ of error. The guidelines set by the court are: a witness may not be asked whether a testator had the mental capacity to make and publish a will because this involves a legal definition and a legal test. A witness may be asked, assuming he knows, or is a properly qualified expert, whether the testator knew or had the capacity to know the objects of his bounty, the nature of the transaction in which he was engaged, the nature and extent of his estate, and similar questions.¹⁶ It is a matter of regret that the court did not seize the opportunity of adopting an even more liberal standard of admission, namely that any questions and answers should be allowed if they would be helpful to the jury. This has been advocated by some writers on basis that any difference of definition could be brought out by proper cross-examination.¹⁷ The court adverted to this in a footnote but said the court's position had been stated in the early case of *Brown v. Mitchell* and recently followed in *Lindley v. Lindley*.

Two other cases involving expert testimony are worthy of note. In a civil appeals case a police officer sought to give his opinion that at the time the brakes were applied a truck was moving at least forty-five miles per hour.¹⁸ Although he had considerable police training in investigating automobile collisions, the court held that he had no knowledge qualifying him to estimate the speed of an auto from the amount of damage sustained by it nor any experience qualifying him to express opinion as to the speed of a

¹³ *Lindley v. Lindley*, 384 S.W.2d 676 (Tex. 1964); *Brown v. Mitchell*, 88 Tex. 350, 31 S.W. 621 (1895); *Scalf v. Collin County*, 80 Tex. 514, 16 S.W. 314 (1891); *Pickering v. Harris*, 23 S.W.2d 316 (Tex. Comm'n App. 1930).

¹⁴ 23 S.W.2d 316 (Tex. Comm'n App. 1930).

¹⁵ 80 Tex. 514, 16 S.W. 314 (1891).

¹⁶ In a paragraph prior to stating the specific guidelines the court also indicated its approval of opinion testimony concerning "mental condition and mental ability" of a testator.

¹⁷ McCORMICK, EVIDENCE § 12, at 28 (1954); Slough, *Testamentary Capacity: Evidentiary Aspects*, 36 TEXAS L. REV. 1, 14, 15 (1957).

¹⁸ *Terhay v. Pat Canion Excavating Co.*, 396 S.W.2d 482 (Tex. Civ. App. 1965) error ref. n.r.e.

truck based on skid marks left on the steep, wet, muddy, and slick pavement. The exclusion of the opinion testimony was, therefore, held proper.

Another civil appeals decision illustrates a limitation on the use of evidence of sales of comparable properties where an expert is testifying as to value.¹⁹ When he has learned from other sources of the sale prices of the other properties which he considers comparable, he may testify as to such sale prices but only for the limited purpose of showing part of the basis of his opinion as to the value of the property in question.

III. HEARSAY

Nature of Hearsay. The question of whether particular testimony is to be classed as hearsay, and excluded if no exception is available, has been a troublesome one for judges as well as lawyers. Unless an out-of-court statement is offered as evidence of the truth of the facts stated, the hearsay rule does not apply. In *Cabrera v. State*,²⁰ a prosecution for unlawful possession of heroin, the court of criminal appeals appears to have overlooked this point. During his testimony an officer was asked what attracted his attention to the vehicle which the defendant was driving. An objection at the trial that the question called for hearsay was overruled. The officer then answered that he had received information from a reliable and credible person that defendant would be in his car, a 1960 brown Pontiac, license number TC-3660, and on his way to deliver heroin in the vicinity of Quitman and North Main. The court of criminal appeals reversed saying the testimony was hearsay and prejudicial. It is believed that the court fell into error. The testimony was offered for the obvious purpose of explaining the officer's reason for closely observing the defendant rather than to establish the truth of the informant's statement. In a civil appeals decision a statement in a hospital record "this patient is reported to have had a very mild myocardial infarction in 1953" was correctly held to be hearsay when offered to show that he did have such a history.²¹

Hospital Records. The law in Texas has been unsettled regarding the admissibility of diagnostic findings in hospital records under article 3737e, the Business Records Act, which creates a statutory exception to the hearsay rule.²² The statute provides that a record of a condition shall be competent evidence of the existence of the condition when the judge finds that certain specified requirements are met. In 1959 a court of civil appeals construed article 3737e to authorize the admission of an entry in a hospital record containing a physician's diagnosis of leukemia, the court's opinion

¹⁹ *Natural Gas Pipeline Co. of America v. Fowler*, 396 S.W.2d 917 (Tex. Civ. App. 1965).

²⁰ 395 S.W.2d 34 (Tex. Crim. App. 1965).

²¹ *Smith v. Selz*, 395 S.W.2d 692 (Tex. Civ. App. 1965) *error ref. n.r.e.* See text accompanying note 27 *infra* for a discussion of this case in relation to the hospital records exception.

²² *McCORMICK & RAY, op. cit. supra* note 2, at § 1262 n.87 (pocket part) and cases cited.

apparently assuming that a diagnosis of leukemia was not one about which physicians ordinarily differ.²³ The per curiam denial of writ of error by the supreme court was interpreted by many civil appeals courts as holding that hospital records containing disputable diagnostic entries were admissible under article 3737e.²⁴ In the recent case of *Loper v. Andrews*,²⁵ the supreme court sought to clarify the law on this point and to clear up any misunderstanding of its position. The controlling question in a suit for injuries suffered by a minor child was whether he had received a skull fracture. Dr. S, the treating physician, testified that in his opinion the boy had sustained such a fracture. Offered in evidence were hospital records signed by Dr. S which included an entry, "I have referred him to Dr. H for examination and he finds a papilledema of the left optic disc of about two diopters. This, he believes, is definitely the result of a fracture at the base of the skull." Also in the hospital records, a third doctor had reached a conclusion different from Drs. S and H. Over objection the trial judge admitted the part of the record containing Dr. H's opinion. The supreme court held that this type of diagnostic entry was not admissible under 3737e because there were no demonstrable medical facts substantiating the opinion and other medical testimony disagreed with the diagnosis. It declined to reverse, however, on the basis that the entry was not harmful to the defendant since it was not reasonably probable that the entry persuaded the jury to its verdict when it was offset by the report of the third doctor and the matter was developed in great detail by Dr. S in his testimony which was subject to cross-examination.

In reaching its decision the court divided medical diagnosis into three classes: (1) Those concerning medical conditions apparent to all, for example, a severed limb or open wound), (2) those concerning medical conditions requiring expert interpretation but nevertheless well recognized and reasonably certain, and as to which medical minds do not differ (for example, a leukemia diagnosis), and (3) those concerning medical conditions whose meaning and resulting medical opinion rest primarily on expert conjecture and speculation. The court said that the first two classes are admissible in evidence, but the third type of diagnosis does not come within the purview of article 3737e. It ruled that the diagnosis in the *Loper* case was of this type, that Dr. H's opinion was expert conjecture. The ruling was based both upon the words (referring to Dr. H's opinion) "he believes" and upon the dispute between the doctors. This view was disapproved by

²³ *Travis Life Ins. Co. v. Rodriguez*, 326 S.W.2d 256 (Tex. Civ. App), *error ref. n.r.e.*, *per curiam*, 160 Tex. 182, 328 S.W.2d 434 (1959).

²⁴ See *Loper v. Andrews*, 404 S.W.2d 300, 304 (Tex. 1966). A representative opinion expressing this view was *Missouri Pac. Ry. v. Watson*, 346 S.W.2d 640 (Tex. Civ. App. 1961) *error ref. n.r.e.*, an excellent opinion by Justice Pope.

²⁵ 404 S.W.2d 300 (Tex. 1966).

Justice Pope in a separate opinion although he agreed that there was no error requiring reversal. He took the majority to task for treating expert medical opinion as speculation or conjecture. He said that the mere fact that there is a dispute between doctors as to their diagnosis does not mean that diagnostic entries "rest largely in expert opinion, speculation or conjecture." Furthermore, judges should not set themselves up as super medical experts to sit in judgment on the opinions of medical experts to determine which medical opinions are sound and which are conjecture. As he has previously indicated elsewhere,²⁶ this writer believes Justice Pope's view to be the correct one. I would leave these matters to the doctors. By its strict ruling the supreme court has deprived future juries of the advantage of expert medical opinions which would be helpful in reaching decisions on complicated issues.

In a civil appeals case²⁷ a notation in a hospital record read, "there is a question about the patient having a mild coronary thrombosis in 1956, however, this is questionable." This was held not to qualify under article 3737e because it could not be considered as an act, event, or condition contemplated by the statute.

Admissions. A statement by or an act of a party inconsistent with his present position may be receivable in evidence against him as an admission. In *Hartford Acc. & Indem. Co. v. Hale*,²⁸ a suit to recover benefits under the Texas Workmen's Compensation Insurance Law for death of the plaintiff's husband, the plaintiff contended that the payment by Hartford of a weekly insurance benefit constituted an admission that the deceased sustained an accidental injury in the course of his employment. This position was upheld by the court of civil appeals. The supreme court reversed and rendered holding that such payment was not an admission by the insurer of the alleged facts and had no probative value as such. The court relied upon the earlier supreme court ruling in *Southern Underwriters v. Schoolcraft*,²⁹ the rationale of which was that courts should encourage prompt payment of weekly benefits to an injured employee. Cases holding that payment of weekly benefits by an insurer had probative force as an admission that the insurance policy was in force at the time of the injury were distinguished.

A civil appeals decision presents an interesting instance where silence was treated as an admission.³⁰ The suit was by parents and child against two doctors for medical malpractice in alleged failure to diagnose the child's

²⁶ McCORMICK & RAY, *op cit. supra* note 2, at § 1262 and nn.87-88. For approval of this view, see Note, 38 TEXAS L. REV. 645 (1960).

²⁷ *Smith v. Selz*, 395 S.W.2d 692, 696 (Tex. Civ. App. 1965) *error ref. n.r.e.*

²⁸ 400 S.W.2d 310 (Tex. 1966). For further discussion see Akin, *Workmen's Compensation*, this Survey at footnote 33.

²⁹ 138 Tex. 323, 158 S.W.2d 991 (Tex. Comm'n App. 1942).

³⁰ *Leverman v. Cartall*, 393 S.W.2d 931 (Tex. Civ. App. 1965) *error ref. n.r.e.*

head injury. On the issue of whether a fall by the child was a significant part of the child's medical history during the time the parents allegedly told the defendants of the fall, the court said the parents' conversation with another doctor in which they made no mention of the fall causing head injury was receivable as an admission.

A court of civil appeals ruled that in the absence of express authority statements of public officials are not competent evidence against a governmental agency.³¹ In this respect it was said that the law imposes a stricter rule on officials or directors of governmental corporations in regard to their ability to bind the corporation than would be applied to officials of private corporations.

Res Gestae—Spontaneous Statements. In *Hartford Acc. & Indem. Co. v. Hale*³² the supreme court reiterated the rule it had announced in *Truck Ins. Exch. v. Michling*,³³ that before a statement can be admissible as *res gestae* there must be independent proof, other than the statement itself, of the existence of a startling event prompting the statement. In the *Hale* case there was no such independent proof. At most there was some evidence from which it might have been inferred that there was such an event. The court said that was not enough; there must be concrete evidence to support a finding that it did occur. This seems to go further than the *Michling* case. Referring to cases relied upon by the plaintiff to show that such independent proof was not essential the court said that all such cases antedated the 1963 *Michling* holding and had been examined and distinguished in that case.

Former Testimony. It is well settled that testimony of a witness given at a former trial of the same case on substantially the same issues where there was opportunity for cross-examination may be introduced in evidence at a later trial provided the witness is unable to testify. To establish such unavailability the party offering the former testimony must show one of the following: that the witness is dead, insane, physically unable to testify, absent from the jurisdiction of the court, cannot be located or has been kept away from the trial by the adverse party.³⁴ In *Houston Fire & Cas. Ins. Co. v. Brittain*³⁵ the supreme court ruled that these were exclusive grounds and that the trial judge had no discretion to admit testimony of a doctor given at the first trial when plaintiff had not subpoenaed the doctor, a resident of an adjacent county, and did not seek a postponement when the

³¹ Dallas County Water Control & Improvement Dist. No. 7 v. Ingram, 395 S.W.2d 834 (Tex. Civ. App. 1965) *error ref. n.r.e.*

³² 400 S.W.2d 310 (Tex. 1966).

³³ 364 S.W.2d 172 (Tex. 1963).

³⁴ Lone Star Gas Co. v. State, 137 Tex. 279, 153 S.W.2d 681 (1941).

³⁵ 402 S.W.2d 509 (Tex. 1966). For further discussion see Akin, *Workmen's Compensation*, this Survey at footnote 35.

doctor unexpectedly did not show up at the trial. The court said that there was no showing of unavailability.

Confessions. Several cases in the Texas Court of Criminal Appeals³⁶ limited the effect of *Escobedo v. Illinois*³⁷ in Texas concerning admission of confessions into evidence. However, the United States Supreme Court's decision in *Miranda v. Arizona*³⁸ makes their current effect questionable. Perhaps the court has been basing admissibility more upon truthfulness of the statement rather than upon a consideration of the civil rights of the accused. If so, it seems to be out of step with the trend of Supreme Court decisions.³⁹

Commercial Lists. The courts of some states recognize an exception to the hearsay rule for commercial lists in general use among a class of persons interested in the matter contained in the publication.⁴⁰ Such an exception, proposed by the Uniform Rules of Evidence,⁴¹ was specifically recognized and applied by a court of civil appeals decision.⁴² The action was for damages to turkeys allegedly caused by feed furnished under contract by defendants. Charts contained in the magazine *Turkey World*, which were extensively used in the turkey growing business and relied upon as one of the bases upon which the industry conducts its business, were held properly admitted over a hearsay objection. The court held that this was evidence from which the jury could reasonably conclude what the plaintiff's turkeys should have weighed at particular times of their growth. This appears to be the first explicit recognition of the exception by a Texas court as applied to lists or charts, although a 1961 civil appeals decision approved the admission of published sheets reflecting stock market transactions.⁴³

³⁶ *Zapata v. State*, 406 S.W.2d 473 (Tex. Crim. App. 1966); *Ex Parte Bertsch*, 395 S.W.2d 620 (Tex. Crim. App. 1965); *Corry v. State*, 390 S.W.2d 763 (Tex. Crim. App. 1965); *Marion v. State*, 387 S.W.2d 56 (Tex. Crim. App. 1965).

³⁷ 378 U.S. 478 (1964).

³⁸ *Miranda v. Arizona*, 383 U.S. 903 (1966), Comment, *Custodial Interrogation as a Tool of Law Enforcement: Miranda v. Arizona and the Texas Code of Criminal Procedure*, in this issue. For further discussion see Baernstein, *Criminal Law and Procedure*, this Survey at footnote 33.

³⁹ For further discussion, see *Criminal Law and Procedure*, in this Survey.

⁴⁰ WIGMORE, EVIDENCE § 1706 and cases collected in n.1 (3d ed. 1940). For a rationale of the exception, see *Mohr v. Schultz*, 86 Idaho 531, 388 P.2d 1002 (1964).

⁴¹ UNIFORM RULE OF EVIDENCE 63(30): "Evidence of matters of interest to persons engaged in an occupation contained in a list, register, periodical or other published compilation to prove the truth of any relevant matter so stated if the judge finds that the compilation is published for use by persons engaged in that occupation and is generally used and relied upon by them." New Jersey and Kansas have adopted the exception by statute or court rule.

⁴² *McMillen Feeds, Inc. v. Harlow*, 405 S.W.2d 123 (Tex. Civ. App. 1966) *error ref. n.r.e.* In an early civil appeals decision the American Berkshire Association's registered pedigree of a hog was admitted to show value. *Pacific Express Co. v. Lothrop*, 20 Tex. Civ. App. 339, 49 S.W. 898 (1899). Compare the court of criminal appeals ruling excluding a register of Texas bank numbers recognized by the banks of Texas as correct, when offered to identify the transit number of a bank on a check. *Leahy v. State*, 11 Tex. Crim. 570, 13 S.W.2d 874 (1928) (murder, defense alibi, the date being fixed by the passing of a check).

⁴³ *City Nat'l Bank v. Kiel*, 348 S.W.2d 260 (Tex. Civ. App. 1961) *error ref. n.r.e.*

IV. BEST EVIDENCE

*Hancock v. State*⁴⁴ illustrates an unusual excuse for non-production of the original documents. The charge against the defendant was felony theft, involving fifty-nine computer programs. The programs were not set out in the indictment but were sufficiently described for identification. Upon appeal from conviction the appellant contended that the trial judge had erred in allowing the state to prove the contents of the documents as charged in the indictment by oral testimony over his objection that the documents themselves were the best evidence. The programs were available during the trial and were offered to appellant and his attorney and were available to the jury. The court of criminal appeals held that for security reasons (protection of the contents of the programs—allegedly worth millions of dollars) it was proper for the trial court to excuse the formal introduction of the documents and permit oral testimony as to their contents.

V. PAROL EVIDENCE

Where oral statements are relied upon to prove fraud as the basis of recovery or defense, the parol evidence rule does not prevent their use. This principle was followed in a civil appeals decision in which the defendant's agent represented to the plaintiffs that if they would grant the defendant an easement for towers and lines the defendant would pay them \$1,000 and after the construction was completed would pay additional damages.⁴⁵ The jury found that the representations were made by the agent, were false when made, were believed by the plaintiffs, and caused them to execute the easement, and that the plaintiffs did not know until after the towers were erected that the defendant did not intend to pay the additional money. These findings were disregarded by the trial judge who entered judgment for the defendant apparently on the theory that there was no evidence to support them since the parol evidence rule prevented the use of oral statements. The court of civil appeals reversed and rendered judgment for the plaintiffs, holding that the parol evidence rule had no application to the facts of the case. It was said that the pleadings contained the basic elements of an action for fraud, as distinguished from warranty, and the oral presentations were admissible to prove the fraud. The court relied upon *Dallas Farm Mach. Co. v. Reaves*⁴⁶ in which the supreme court used the following language: "Fraud is always a matter of false representations; and how is it that extrinsic representations are as warranties to be ignored, but

⁴⁴ 402 S.W.2d 906 (Tex. Crim. App. 1966).

⁴⁵ *Beggs v. Texas Elec. Serv. Co.*, 396 S.W.2d 461 (Tex. Civ. App. 1965) *error ref. n.r.e.*

⁴⁶ 158 Tex. 1, 307 S.W.2d 233 (1957).

as fraud to be admitted? The explanation seems to be that the vital element in fraud is the party's state of mind, which neither can be nor is intended to be embodied in the written document and hence the rule does not forbid considering it wherever it is the vital element of the claim.⁴⁷

⁴⁷ The court also relied upon and quoted from MCCORMICK & RAY, *op. cit. supra* note 2, at § 1644 as follows: "It is only when the oral expressions are relied upon as warranties, that is, as parts of the contract as being obligations intentionally assumed, that the Parol Evidence Rule applies. If they are relied on as misrepresentations and the theory of recovery or defense is fraud, then the Parol Evidence Rule is clearly without application."