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## Part II: Procedural Law - Evidence

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# PART II: PROCEDURAL LAW

## EVIDENCE

by

Roy R. Ray\*

A SUBSTANTIAL proportion of the cases reaching the Texas appellate courts involved some alleged error in the admission or exclusion of evidence. Most of the rulings are routine applications of well settled principles and warrant no notice in an annual review. As has been my practice in past years,<sup>1</sup> I have selected for comment a few cases which may be of more than ordinary interest to the profession.

### I. HEARSAY

*In General.* Written statements of experts whether in learned treatises or other form are hearsay when offered as evidence of their truth.<sup>2</sup> Only two states recognize an exception to the hearsay rule providing for the admission of such statements.<sup>3</sup> Moreover, Texas courts as well as those of most states hold that on cross-examination of a medical expert counsel may not read excerpts from a medical book which the witness does not recognize as authoritative.<sup>4</sup> A recent civil appeals decision has enforced this rule where the statements were in a letter. In *Purvis v. Johnson*,<sup>5</sup> a personal injury action, Dr. R testified concerning his examination of the plaintiff, the treatment he administered, and the severity and permanence of her injuries. On cross-examination the trial judge permitted defendant's counsel, over repeated objections, to read excerpts from a purported letter from the "Orthopedic Surgery Section" to the Tissue Audit Committee of the Brackenridge Hospital in Austin attacking the professional and diagnostic ability of Dr. R. The doctor did not recall having received a copy of the letter and did not recognize the signature. He did not agree that the letter was authoritative. The court of civil appeals reversed, saying "The effect of allowing those excerpts to be read was to place before the jury the unauthenticated, unsworn, out of court, heresay [*sic*] statements as to Dr. [R's] professional ability and integrity with no opportunity for plaintiff's coun-

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<sup>1</sup> Ray, *Evidence, Annual Survey of Texas Law*, 21 Sw. L.J. 173 (1967); Ray, *Evidence, Annual Survey of Texas Law*, 22 Sw. L.J. 167 (1968).

<sup>2</sup> C. McCORMICK & R. RAY, TEXAS LAW OF EVIDENCE § 790 nn.55, 56 (2d ed. 1956) [hereinafter cited as McCORMICK & RAY].

<sup>3</sup> Alabama by judicial decision: *City of Dothan v. Hardy*, 237 Ala. 603, 188 So. 264 (1939); Kansas by statute: KAN. CIV. PRO. STAT. ANN. § 60-460 (Vernon 1964). Such an exception is proposed by UNIFORM RULES OF EVIDENCE 63(31).

<sup>4</sup> *Bowles v. Bourdon*, 148 Tex. 1, 219 S.W.2d 779 (1949); *Gravis v. Physicians & Surgeons Hosp. of Alice*, 415 S.W.2d 674 (Tex. Civ. App. 1967); *Texas Employers Ins. Ass'n v. Nixon*, 328 S.W.2d 809 (Tex. Civ. App. 1959); Comment, *Evidence—Admissibility of the Contents of Medical Treatises*, 12 So. CAL. L. REV. 424 (1939); Annot., 65 A.L.R. 1102 (1930).

<sup>5</sup> 430 S.W.2d 226 (Tex. Civ. App. 1968).

sel to cross-examine the person or persons purportedly making such statements as to their qualifications, whether such statements were made from their own first-hand knowledge, possible bias or prejudice . . . ."<sup>6</sup>

*Business Records.* In the seventeen years since its enactment, the Business Records Act<sup>7</sup> has played an increasingly important role in making possible the use of business records as evidence without the unreasonable strictures of the common law rules. For the most part the Act has been interpreted by the Texas courts in a manner furthering its purpose.<sup>8</sup> In *University Savings & Loan Ass'n v. Security Lumber Co.*<sup>9</sup> the supreme court has enhanced the usefulness of the statute with two logical and common sense rulings. First, it specifically held that it is not necessary to plead that particular business records meet the requirements of the Act as a predicate to their admission in evidence. Second, it said that the Act does not limit the admissibility of business records to suits between the original parties to a business transaction. The action was by the Security Lumber Company against Weighard Construction Company, certain of its officers and its mortgagee, University Savings and Loan Association, to recover a money judgment and assert liens upon materials furnished. As proof of the indebtedness Security offered in evidence a large number of invoices and delivery tickets. Each invoice contained a list of the materials ordered, the date of the order, prices of various materials included in the order, and the total charge for all materials. Security's president testified: that the invoices were made in the regular course of business; that in the regular course of Security's business an employee took the orders for materials and wrote them down on cardboard loading tickets, which were sent to other employees who loaded the material on trucks for delivery; that the loading tickets were then returned to the office where other employees made the invoices from them; that another employee checked the materials on the trucks against the invoices to be sure orders were properly filled and gave the truck driver two copies of the invoices, one to be turned over to the purchaser upon delivery and the other to be signed by someone at the construction project and returned to the office as a delivery ticket; and that prices were then entered on the invoices and a copy sent to the construction company. The supreme court held that the president's testimony supported a finding that the invoices met the requirement of article 3737e and were therefore admissible as competent evidence that the construction company had offered to buy the listed materials and Security had accepted the offer. In answer to the argument that there were no entries in the invoices to show that the materials were actually delivered, the court said that Security's possession of the delivery tickets supplied such evidence. To defendant's argument that the invoices were not admissible because plain-

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<sup>6</sup> *Id.* at 229.

<sup>7</sup> TEX. REV. CIV. STAT. ANN. art. 3737e (1968), enacted in 1951. For a discussion of the statute and its interpretation by the courts, see McCORMICK & RAY §§ 1251-62.

<sup>8</sup> The statute was drafted by the present writer and its genesis and purpose are explained in Ray, *Business Records—A Proposed Rule of Admissibility*, 5 Sw. L.J. 33 (1951).

<sup>9</sup> 423 S.W.2d 287 (Tex. 1967).

tiff had failed to plead that they were made in the regular course of business, the court answered that the statute contained no such requirement. In so ruling it expressly disapproved a statement by the Texarkana court of civil appeals in *Love v. Travelers Insurance Co.*<sup>10</sup> University contended that the records should not be admissible against a litigant who was not a party to the business transaction. This was rejected by Chief Justice Calvert on the ground that the statute does not limit the admissibility of such records to suits between the original parties to the business transaction.

*Declarations as to Mental State.* Declarations of a mental state may be admitted as an exception to the hearsay rule where mental state is in issue or the declaration is offered to prove a future act. However, there is much confusion concerning the application of the hearsay rule in this area. This is illustrated by a recent civil appeals case<sup>11</sup> involving an action by a doctor's widow and children for his wrongful death in an accidental shooting. The trial judge excluded testimony of the deceased's treating psychiatrist as to the following statements made to him by the deceased: That deceased had found out that his wife had been unfaithful and his reaction to that discovery; that he had accused his wife of infidelity; that he was having affairs with other women; and that he contemplated divorce. Also excluded was testimony by defendant that deceased had told him that his wife was unfaithful and did not love him, and that he had found her in a compromising situation with another doctor.

The court of civil appeals held that the exclusion was reversible error. It said that the statements of deceased were relevant and vital on the issue of damages suffered by the widow and children as a result of the doctor's death. The court felt that the excluded statements were reasonably calculated to cause the jury to conclude, contrary to what it evidently believed, that if deceased had lived he soon would have divorced his wife and stopped supporting her or contributing to her support; thus the excluded statements tended to show facts from which the jury probably would have concluded that the plaintiff's losses were much less than those found by the verdict. Unfortunately the opinion of the court leaves in doubt the approved basis of admissibility. At one point the court says that the statements made to the psychiatrist for the purpose of treatment, evincing deceased's attitude and feelings toward his wife and his intention to terminate his support were admissible as an exception to the hearsay rule<sup>12</sup> (referring to the exception for statements as to past pain and symptoms). In the next paragraph the court cites authority dealing with the state of mind exception to the hearsay rule.<sup>13</sup> At still another point it appears to approve the

<sup>10</sup> 395 S.W.2d 682 (Tex. Civ. App. 1965), *error ref. n.r.e.* The court's words were: "When the records are offered in evidence *it must be under pleading and proof* that they were made in the regular course of business at or near the time the act or event [or] condition is recorded or reasonably soon thereafter." *Id.* at 685 (emphasis added). The supreme court said: "The statement is an obviously incorrect statement of the law. We expressly disapprove the holding that there must be *pleading* that business records meet the requirements of Article 3737e as a predicate for their admission in evidence." 423 S.W.2d at 291.

<sup>11</sup> *Allen v. Riedel*, 425 S.W.2d 665 (Tex. Civ. App. 1968).

<sup>12</sup> *Id.* at 671, quoting from *McCORMICK & RAY* § 842.

<sup>13</sup> *McCORMICK & RAY* §§ 861, 862.

verbal act theory.<sup>14</sup> It is believed that the correct basis of admissibility here is circumstantial evidence. Mental state was not in issue and the statements were not used to evidence a future act. Instead they showed declarant's feelings toward his wife from which an inference could be drawn that it was unlikely he would have continued to support her had he lived. To such statements the hearsay rule is inapplicable and no bar to admission.<sup>15</sup>

Where the issue is whether a will has been made or a will has been revoked, declarations of the testator as to his past acts in that respect made after the alleged date of the making or revocation are admissible in Texas under a special exception to the hearsay rule.<sup>16</sup> But a recent case held that this rule is limited to will cases and has no application to statements of other declarants, whether deceased or not, as to their past conduct.<sup>17</sup> Thus in a trespass to try title suit involving rights of testator's widow in a ranch, testator's statements to his wife that he used proceeds from the sale of his separate property to make the initial payment on a ranch acquired after marriage were held to be inadmissible. The court pointed out that all the cases relied upon by defendants involved statements concerning the decedent's plans or intentions, whereas the statements here related to decedent's past conduct and that there was no rule making such statements admissible.

*Spontaneous Statements (Res Gestae)*. Does the failure to warn an accused as to his right to counsel and the right to remain silent prevent the use as evidence of a spontaneous statement made while under arrest? The court of criminal appeals says no. Prior to the adoption of the new Texas Code of Criminal Procedure in 1965 it had been the rule that spontaneous statements were admissible without regard to the requirements of the confession statute.<sup>18</sup> This was reaffirmed in the *Ruby* case.<sup>19</sup> In 1967 the new Code was amended<sup>20</sup> to require a warning substantially similar to that prescribed by the United States Supreme Court in *Miranda v. Arizona*.<sup>21</sup> Article 38.22 sets forth the warning to be given by arresting officers, and article 15.17 contains the warning to be administered by a magistrate before whom an arrested person is taken. Article 38.22 expressly excepts from its require-

<sup>14</sup> The court quotes from *Loetsch v. New York City Omnibus Corp.*, 291 N.Y. 308, 52 N.E.2d 448 (1943), in part as follows: "[T]he fact that such a declaration was made by the decedent, whether true or false, is compelling evidence of [his] feelings toward, and relations to [his wife]. As such it is not excluded under the hearsay rule but is admissible as a verbal act." 425 S.W.2d at 671.

<sup>15</sup> McCORMICK & RAY § 798, cases in n.36.

<sup>16</sup> *Compton v. Dannenbauer*, 120 Tex. 14, 35 S.W.2d 682 (1931), Annot., 79 A.L.R. 1448 (1931); McCORMICK & RAY § 895.

<sup>17</sup> *West v. Austin Nat'l Bank*, 427 S.W.2d 906 (Tex. Civ. App. 1968).

<sup>18</sup> The leading case is *Powers v. State*, 5 S.W. 153 (Tex. Civ. App. 1887). See also *Heath v. State*, 375 S.W.2d 909 (Tex. Civ. App. 1964). A long list of cases is found in McCORMICK & RAY § 926 n.75.

<sup>19</sup> *Rubenstein v. State*, 407 S.W.2d 793 (Tex. Crim. App. 1966) (however, the court said the statement did not qualify as a spontaneous utterance in view of the deliberate caution with which the accused spoke).

<sup>20</sup> The pertinent provisions are TEX. CODE CRIM. PROC. ANN. arts. 15.17, 38.22 (1968). For a discussion of these see McCORMICK & RAY § 1213 (Supp. 1968).

<sup>21</sup> 384 U.S. 436 (1966).

ments statements which are admissible under the *res gestae* principle.<sup>22</sup> In *Hill v. State*,<sup>23</sup> a prosecution for burglary, an officer testified that immediately after he arrested defendant he asked him how many people were in the building, and defendant answered "just one." Error was assigned in the admission of the statement on the ground that no warning had been given. The court of criminal appeals said that the circumstances showed that defendant was nervous and excited at the time and the statement qualified as part of the *res gestae*. It then said that the warning required by article 15.17 is not applicable to *res gestae* statements,<sup>24</sup> and that it did not interpret *Miranda v. Arizona* as excluding *res gestae* statements such as that involved here.

## II. OPINION

There is considerable contrariety in the Texas decisions as to the applicability of the opinion rule to statements admissible under some exceptions to the hearsay rule.<sup>25</sup> The problem seems to arise most often where the statement qualifies as an admission or a spontaneous utterance. A classic illustration is *Gonzales v. Layton*,<sup>26</sup> an action for injuries received in an automobile collision. At the trial a witness for the plaintiff offered to testify that defendant came to his house after the accident to make a phone call and stated "I didn't see the blinker light. I guess it was my fault." Plaintiff contended that the statement was admissible as an admission and a shorthand rendition of what took place, and also for impeachment purposes since defendant had denied earlier that he had made any such statement to the witness. The trial judge offered to admit the part of the statement about the blinker light but refused to receive the part "I guess it was my fault." The court of civil appeals reviewed the state of authority concerning the admissibility of spontaneous statements which contain expressions regarded as opinions,<sup>27</sup> and concluded that modern day writers and courts were leaning toward the admission of such opinion statements

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<sup>22</sup> TEX. CODE CRIM. PROC. ANN. art. 38.22, § 1(f) (1968).

<sup>23</sup> 420 S.W.2d 408 (Tex. Crim. App. 1967).

<sup>24</sup> In this respect the court reaffirmed the position taken in *Ramos v. State*, 419 S.W.2d 359 (Tex. Crim. App. 1967).

<sup>25</sup> Admittedly a majority of the cases have applied the rule. *Isaacs v. Plains Transp. Co.*, 367 S.W.2d 152 (Tex. 1963); *Red Arrow Freight Lines v. Gravis*, 84 S.W.2d 540 (Tex. Civ. App. 1935) (*res gestae*); *Tinker v. Yellow Cab Co.*, 74 S.W.2d 521 (Tex. Civ. App. 1934) (declaration against interest); *Negociacion Agricola y Ganadera de San Enrique v. Love*, 220 S.W. 224 (Tex. Civ. App. 1920) (admission). In *Isaacs v. Plains Transp. Co.*, *supra*, the statement was made by the driver of a truck immediately after the collision that he was at fault was held inadmissible as mere opinion, although it apparently qualified both as a spontaneous statement and as an admission. I regard this case as unsound and have so stated in *McCORMICK & RAY* § 1126 (Supp. 1968).

Cases holding the opinion rule inapplicable include *Woods v. Townsend*, 144 Tex. 594, 192 S.W.2d 884 (1946); *Galveston Transit Co. v. Morgan*, 408 S.W.2d 728 (Tex. Civ. App. 1966) (spontaneous statement); *Taylor v. Owen*, 290 S.W.2d 771 (Tex. Civ. App. 1956) (defendant's statement that plaintiff was not at fault); *Plains Transport, Inc. v. Isaacs*, 361 S.W.2d 919 (Tex. Civ. App. 1962) (this case was, however, reversed by the supreme court in *Isaacs v. Plains Transp. Co.*, 367 S.W.2d 152 (Tex. 1963)).

<sup>26</sup> 429 S.W.2d 215 (Tex. Civ. App. 1968).

<sup>27</sup> The court quotes from 18 Sw. L.J. 313, 315 (1964) and states that the comment contains an excellent commentary on the cases and rules in Texas concerning the applicability of the opinion rule to spontaneous statements.

where they are spontaneous, a part of the *res gestae*, and couched in language setting forth a shorthand rendition of the facts. However, the court seemed to feel that the statement did not qualify as a spontaneous utterance since there was nothing to indicate the lapse of time between the collision and the statement and the blinking light a block away had little, if anything, to do with the accident. At any rate the majority opinion avoided a decision on the applicability of the opinion rule by holding that there was no reversible error. Chief Justice Green concurred that there was no reversible error since the jury had found defendant guilty of three counts of negligence all of which were a proximate cause of plaintiff's injuries. He also agreed that the alleged statement was not a spontaneous utterance. But he felt that it was a factual statement made by defendant about the collision inconsistent with his present position, and that its exclusion was error. In my judgment this position is the correct one. The statement qualified as an admission, and as I have stated elsewhere,<sup>28</sup> a party's admissions should not be limited by the opinion rule. That rule was designed to regulate the examination of witnesses on the stand so as to receive from them as far as practicable concrete descriptions rather than opinions. Obviously this policy can have no application to the question of admitting statements made out of court by the present defendant indicating fault. Such statements may be of great probative value whether or not they happen to be what would be called in the courthouse "facts." Surely a party should not be allowed to prevent the use of his own admissions when he is, as here, fully aware of the facts upon which they were based. It is gratifying to note that the court of criminal appeals has been far more liberal in construing declarations, wherever possible, to be shorthand statements of facts rather than mere opinions.<sup>29</sup>

### III. CIRCUMSTANTIAL EVIDENCE

*Sales of Similar Property.* It is a well settled principle that in condemnation cases where the issue is the value of the land being taken recent sales of comparable property near the land in question may be received as circumstantial evidence of the value of the land in question. An important limitation on such evidence, however, is that the sales must have been the result of bargaining between a willing seller and a willing buyer. Sales of a forced character such as those made to avoid condemnation are not admissible.<sup>30</sup> In applying this limitation the supreme court held in *Gomez Leon v. State*<sup>31</sup> that sales to a corporation or governmental agency having the power of eminent domain do not meet the willing seller-willing buyer concept. There the state sought to condemn a piece of land for highway purposes. The state's expert witness was permitted over objection to testify, as a basis for his appraised value, to prices paid for property in the area by the University of Texas at El Paso. The court ruled that this was error requiring

<sup>28</sup> McCORMICK & RAY § 1406.

<sup>29</sup> *Autry v. State*, 143 Tex. Crim. 252, 157 S.W.2d 924 (1941); *Powell v. State*, 113 Tex. Crim. 314, 21 S.W.2d 728 (1929). Both of these involved dying declarations.

<sup>30</sup> McCORMICK & RAY § 1524 n.83.

<sup>31</sup> 426 S.W.2d 562 (Tex. 1968).

reversal. Chief Justice Calvert said such sales "are made under a direct or an implied threat of condemnation and, theoretically at least, are not free and voluntary. . . . There is even less reason for permitting an expert witness to consider such sales in arriving at an opinion as to the value of property being taken through condemnation and to testify as to the prices paid."<sup>32</sup>

#### IV. ANCIENT DOCUMENTS

Any instrument which is at least thirty years old, comes from a proper custody, and is free from suspicion in appearance is admissible in evidence without direct proof of execution.<sup>33</sup> In *Cowan v. Mason*,<sup>34</sup> a trespass to try title suit, plaintiffs offered in evidence certified copies of deeds meeting the above criteria. Defendants objected on the ground that they had filed affidavits of forgery and the plaintiffs had offered no proof of execution. Defendants produced no evidence to show forgery. The trial judge excluded the deeds. In reversing, the court of civil appeals said that the filing of an affidavit of forgery was no evidence of forgery and that its only effect was to require the one offering the ancient instrument to prove its execution as at common law, and that the introduction of an instrument which was more than thirty years old, came from proper custody, and was unsuspecting in appearance was prima facie proof of its genuineness.

#### V. WITNESSES

*Qualification of Medical Expert.* In *Watson v. Ward*,<sup>35</sup> a suit for personal injuries, the plaintiff's only medical witness was a chiropractor. He testified over defendant's objection to the extent of plaintiff's injuries. Defendant contended that the chiropractor was not qualified to testify as to the permanence of plaintiff's injury and that opinions as to future disability had to be based on reasonable medical probability. The court of civil appeals held that the doctor's evidence was properly allowed. He had diagnosed the injury as that commonly known as a whiplash involving only the muscles, blood vessels, nerves, and vertebrae in and around the neck. The court said that while the doctor was not qualified to operate on the human body or to prescribe medication, the only treatments he gave were manipulation of the vertebrae and affected parts with his hands and application of heat treatments; thus his opinions here were within the scope of the practice of chiropractors.<sup>36</sup>

*Impeachment and Rehabilitation.* Prior statements consistent with a witness' testimony on the stand may not be offered to support the witness unless and until he has been impeached. The court of criminal appeals applied

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<sup>32</sup> *Id.* at 565.

<sup>33</sup> *Emory v. Bailey*, 111 Tex. 337, 234 S.W. 660 (1921).

<sup>34</sup> 428 S.W.2d 96 (Tex. Civ. App. 1968).

<sup>35</sup> 423 S.W.2d 457 (Tex. Civ. App. 1968).

<sup>36</sup> The court relied upon *Maryland Cas. Co. v. Hill*, 91 S.W.2d 391 (Tex. Civ. App. 1936).



this rule in *Acker v. State*.<sup>37</sup> Defendant was charged with murdering his wife's former husband. On direct examination she had testified that defendant had threatened her and the former husband. On cross-examination she admitted that she had been reconciled with her husband after various threats, but insisted that she lived in constant fear of him. Over defendant's objection the state was permitted to put in evidence portions of her divorce petition, filed after the shooting, in which she alleged that defendant had a wild temper and had threatened her with serious harm. The appellate court held this to be error on the ground that the cross-examination did not amount to impeachment. An even greater error had been committed by the trial judge in allowing the wife to testify at all since the divorce decree was not final. A writ of error was pending and the wife remained an incompetent witness against defendant.

#### VI. FOREIGN LAW

*Proof Required.* Where the law of another country controls in a given case that law must be proved as fact.<sup>38</sup> In the absence of pleading and proof of such law the trial court will apply the local law. This problem arose in a recent Texas case.<sup>39</sup> Suit was filed in the district court in Bexar County for personal injuries sustained by plaintiff in the Republic of Mexico while a passenger in defendant's bus. Defendant filed a plea to the jurisdiction alleging that the applicable substantive law of the place of injury (State of Tamaulipas) was so dissimilar to Texas law that Texas courts would not adjudicate the rights of the parties. Attached to the plea were translations of certain articles of the Mexican Civil Code. The court sustained the plea and dismissed plaintiff's suit. On appeal the case was reversed on the ground that no proper proof had been made of the foreign substantive law alleged to be applicable. Consequently, there was no evidence to support the finding of dissimilarity between the Mexican and Texas law. This being so, the court was officially ignorant of the foreign law. Defendant's counsel had attempted to prove the foreign law by the testimony of a lawyer-witness together with the translations. He should have produced a printed volume of the Mexican Code which showed on its face that it purported to be printed under the authority of the Mexican government.<sup>40</sup>

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<sup>37</sup> 421 S.W.2d 398 (Tex. Crim. App. 1967).

<sup>38</sup> MCCORMICK & RAY § 99.

<sup>39</sup> *Garza v. Greyhound Lines*, 418 S.W.2d 595 (Tex. Civ. App. 1967).

<sup>40</sup> *Hunter v. West*, 293 S.W.2d 686 (Tex. Civ. App. 1956).