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Part II: Procedural Law - Evidence

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PART II: PROCEDURAL LAW

EVIDENCE

by

Roy R. Ray*

DURING the year under review no decisions of great significance were rendered by Texas courts dealing with the rules of evidence. However, at the behest of the editors, I have selected for discussion several cases which may be of more than passing interest for those who desire to keep abreast of current developments.¹

I. HEARSAY

Business Records. A statutory exception to the hearsay rule is created by the Texas Business Records Act.² It makes a memorandum or record of an act, event, or condition competent evidence of the occurrence of the act or event or existence of the condition when the identity and mode of preparation of the memorandum or record are established as provided in the statute. One of the things which the party offering a record or memorandum must show is that "it was the regular course of that business for an employee or representative of such business with personal knowledge of such act, event, or condition to make such a memorandum or record or to transmit such information thereof to be included in such a memorandum or record."³ In a well-known decision the supreme court correctly interpreted this requirement to mean that "some employee or representative who either made or transmitted the information to another to record must have had personal knowledge of the act, event or condition in order for the record to be admissible."⁴ Several recent cases have turned on whether this personal knowledge requirement was satisfied.

In *Cooper Petroleum Co. v. La Gloria Corp.*⁵ the suit was based upon guaranties made by Cooper Petroleum and A. E. Hagan of accounts owing by International Marketing, Inc. to La Gloria. To prove the indebtedness, La Gloria offered in evidence a box of invoices purporting to cover sales to IMI and a demand letter from La Gloria to Cooper Petroleum with an attached list of invoices prepared by someone acting for La Gloria. The list contained the dates, numbers and amounts of the invoices and pur-

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¹ Discussions of developments in prior years are found in Ray, *Evidence, Annual Survey of Texas Law*, 23 Sw. L.J. 151 (1969); *id.*, 22 Sw. L.J. 167 (1968); *id.*, 21 Sw. L.J. 173 (1967).

² TEX. REV. CIV. STAT. ANN. art. 3737e (Supp. 1969) (enacted in 1951). For a discussion of the statute and its interpretation by the courts, see C. McCORMICK & R. RAY, *TEXAS LAW OF EVIDENCE* §§ 1251-62 (2d ed. 1956) [hereinafter cited as McCORMICK & RAY].

³ TEX. REV. CIV. STAT. ANN. art. 3737e, § 1(b) (Supp. 1969).

⁴ *Skilern & Sons, Inc. v. Rosen*, 359 S.W.2d 298 (Tex. 1962).

⁵ 423 S.W.2d 645 (Tex. Civ. App.—Houston 1967), *rev'd and remanded*, 436 S.W.2d 889 (Tex. 1969).

ported to show the amounts that should be charged to Cooper and Hagan respectively. Although the defendants objected to the invoices as hearsay and that a proper predicate had not been laid for their introduction as business records, they were admitted by the trial court. In upholding this ruling the court of civil appeals reasoned that since the list of invoices was admitted without objection any error in admitting the invoices themselves was harmless. The supreme court disagreed. While recognizing that a tabulated schedule or summary of voluminous records could in the discretion of the trial judge be used to expedite the trial and aid the trier,⁶ it properly observed that this rule assumed the admissibility of the records themselves. The list here tended to prove nothing more than the contents of the records it purported to summarize and if the invoices were improperly admitted the list itself was hearsay and of no probative value. The only testimony offered to establish the predicate for admission was that of the general sales manager. He testified that he could not say that the invoices were accurate. But he stated that they were kept in the regular course of La Gloria's business, and were prepared by employees in the office manager's group and were "based on delivery tickets," delivered or sent "from our rack to the Office Manager's Group." The supreme court held that this was not a sufficient foundation. It was clear that the person who prepared the invoices did not have personal knowledge of the information appearing thereon and there was no evidence indicating that it was the regular course of La Gloria's business for one or more employees who had personal knowledge of that information to transmit it for inclusion in the invoices. Under this state of the record the court said that neither the invoices nor the list were competent proof of the sales to IMI and in the absence of other evidence of the amount of the indebtedness, the judgment of the trial court must be reversed.

Another case where the personal knowledge element was lacking is *Coastal States Gas Producing Co. v. Locker*.⁷ This was a suit for injuries suffered in an automobile collision allegedly caused by the negligence of Coastal States' driver or the car manufacturer, Ford Motor Company, or both. The jury found that the cause of the accident was the failure of Coastal States' driver to maintain a proper lookout and to make proper application of his brakes. Coastal States sought to put the entire blame on Ford. It advanced the theory that the cause of the collision was a brake failure on the new car, caused by air in the brake fluid, even though the brakes had previously operated properly. After the collision the car had been taken to Jacobe-Pearson (the Ford dealer who sold the car) for a check of the brakes. At the trial Coastal States sought to introduce portions of certain business records of Jacobe-Pearson to sustain its theory. The first was a repair order written up by a service foreman to whom the car was first taken. It contained the notation "check brakes for going to floor and report. See Butler."⁸ The second item was a notation placed on

⁶ McCORMICK & RAY § 1566 n.43.

⁷ 436 S.W.2d at 891.

⁸ 436 S.W.2d 592 (Tex. Civ. App.—Houston 1968).

⁹ *Id.* at 595.

the service record by Jacobe-Pearson's service manager in the course of later making a warranty claim against the manufacturer, Ford. It stated "Air in brake system—abnormal time to remove air to get brake pedal."¹⁰ Both notations were excluded by the trial court, and the rulings upheld on appeal. As to the first notation, the court said this was not a record of any test done by a Jacobe-Pearson employee but was the complaint made by the Coastal employee who brought the car in for service. The court concluded: "This notation, therefore, while placed upon a business record, was not a notation by some person or employee having personal knowledge of the matter recorded."¹¹ Likewise, the court said the "second notation was not a recitation of fact based on personal knowledge of anyone testing the brakes but actually was conjecture on the part of the service manager."¹² That it was pure conjecture was shown by the testimony of the mechanic who bled the brakes, to the effect that there was no air in the brake fluid and that he never advised the service manager or any of his supervisors that there was air in the braking system. Furthermore, the service manager testified that he arrived at the conclusion from the notation on the time card indicating that an hour and a half had been used in removing the brake fluid from the vehicle. But he admitted that the time clock which made the entries upon which he had based his opinion was out of order and that the time entries were inaccurate.

In this same case Coastal States also contended that the trial judge erred in refusing to admit into evidence a statement contained in the history that plaintiff gave to her physician. The excluded part recited: "The patient [Helen Locker] states that this car hit her broadside due to faulty brakes."¹³ The court of civil appeals upheld the exclusion and stated: "It was her testimony, in fact, that she never saw the car that hit her move . . . [A]ccording to the position and testimony of Mrs. Locker, the only thing she could know of her own knowledge with reference to the accident was that she was struck in the right rear by the Coastal States vehicle. She would have no method of having personal knowledge as to whether or not the Coastal States vehicle had a brake failure."¹⁴ Incidentally the statement could not qualify as an admission by Mrs. Locker since she had pleaded brake failure and her testimony was not inconsistent with some type of brake failure on the part of the Coastal vehicle.

In *Switzer v. Johnson*,¹⁵ a wrongful death action arising out of a truck-pedestrian accident, the trial court permitted a police officer to read into evidence a report written by another police officer, now deceased, stating that the defendant (driver of the truck) had told him that he was looking to his right and did not see the pedestrian until he hit him. This was assigned as error. The court of civil appeals agreed that the statement was not admissible under the Business Records Act to establish the fact

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 596.

¹⁴ *Id.*

¹⁵ 432 S.W.2d 164 (Tex. Civ. App.—Houston 1968).

that the driver did not see the pedestrian because the officer who made the report did not have personal knowledge. However, it upheld the lower court's ruling by saying that the statement was admissible under the Act as an admission made by defendant inconsistent with his testimony. The court is correct as to the result. Since the defendant had testified that when he saw the pedestrian he was in the middle of the road and about ten feet west of the intersection, the statement in the deceased officer's report qualified as an admission. The court's reasoning, however, is confusing.¹⁶ It said that the statement was admissible under the Business Records Act because the officer had personal knowledge that it was made. In fact the admissibility of the statement in no way rests upon article 3737e. That Act provides for the admissibility of records to prove the truth of the facts stated. Where the statement is merely offered to show that defendant had previously made a statement contrary to his present position it qualifies as an admission—an independent ground of admissibility.

Hospital Records. The problem of admissibility of a medical diagnosis contained in hospital records again came before the supreme court in *Otis Elevator Co. v. Wood*.¹⁷ In a personal injury suit plaintiff contended that as a direct result of the accident she suffered a heart attack. To establish this causal connection her counsel offered into evidence a hospital consultation report written about plaintiff by an attending physician some year and nine months after the escalator accident. Counsel for Otis objected to the admission of the report on the basis that it did not record opinions and evaluations resting in reasonable medical certainty, a requirement established by the supreme court in *Loper v. Andrews*.¹⁸ The objections were overruled and the evidence admitted. On writ of error Otis argued that the report itself reflected a lack of reasonable medical certainty because the doctor stated that he did not know whether the heart damage was the result of a recent attack or whether it was due to an older attack and therefore unrelated to the condition for which plaintiff was hospitalized at the time the report was written. The court disagreed, distinguishing the *Loper* case on the ground that the dispute there was whether the condition diagnosed in the hospital report, a skull fracture, ever existed at all. In the present case the dispute was not whether there had been a heart attack but rather when it occurred. In answer to Otis' contention that the admission of the report denied it the right of cross-

¹⁶ *Id.* at 170:

Its authenticity was established under Article 3737e, V.A.T.S., the business records exception to the hearsay rule. We hold that the matter was properly admitted for the same reasons as those stated in *Skillern & Sons, Inc. v. Rosen*, 359 S.W.2d 298 (Tex. Sup. 1962). The statement was not admissible under Article 3737e, because Officer Maynard did not have the personal knowledge required by Sec. 1(b) of the Article (i.e., as to which way the driver was looking), but he had personal knowledge that the statement was made, and a record of it was made, so the record is admissible under statute to prove that an admission was made by a party; it is inconsistent with the testimony given by the party and is therefore an admission.

¹⁷ 436 S.W.2d 324 (Tex. 1968).

¹⁸ 404 S.W.2d 300, 305 (Tex. 1966). A critical comment by the present writer on the decision is found in Ray, *Evidence, Annual Survey of Texas Law*, 21 Sw. L.J. 173, 176-78 (1967).

examination of the physician whose opinion was placed before the jury, Justice Greenhill said:

[T]he only damaging aspect of the report as far as Otis was concerned was the doctor's diagnosis that Mrs. Wood had suffered a heart attack. Apparently this diagnosis was not disputed, because Otis concedes in its brief in this Court the *existence* of a heart condition. Since it is not disputed that the diagnosis recorded a condition that rested in reasonable medical certainty, the policy behind Article 3737e of admitting reliable business entries without a mandatory right of cross-examination is satisfied. The added fact that the doctor stated that it was uncertain as to *when* the attack occurred did nothing, standing alone, to help Mrs. Wood establish the element of causation. An entry in a hospital report should not be excluded, and Article 3737e held inapplicable, on the grounds that the opportunity to cross-examine has been denied, unless there is a need to disprove what the entry tends to establish. In the case before us, the doctor's uncertainty as to when the attack occurred does not tend to establish any fact that would be damaging to Otis' position. We hold that the report was admissible.¹⁹

Spontaneous Statements (Res Gestae). In *Fisk v. State*²⁰ the court of criminal appeals reaffirmed its position taken in *Hill v. State*²¹ that where statements satisfy the res gestae exception to the hearsay rule it is immaterial whether the defendant was under arrest at the time and/or given the warning required by articles 15.17²² and 38.22²³ of the new Code of Criminal Procedure. It called attention to section 1(b) of article 38.22 expressly excepting statements admissible under the res gestae principle from its requirements. The court said: "[T]he record clearly reflects that appellant at the time of the statements was still in a state of shock and under the stress of the nervous excitement of the shooting. He continued to talk despite the officer's attempt to silence him and to warn or admonish him. We feel that the statements attributed to him were properly admitted as res gestae declarations."²⁴

Declarations Against Penal Interest. Texas is one of the few states which admits declarations against penal interest.²⁵ The rule stated by the court of criminal appeals is that the extra-judicial declaration of a third person admitting his guilt of the crime for which the accused is on trial is admissible, when the state is relying solely upon circumstantial evidence and when there is also evidence indicating that the declarant was so situated that he might have committed the crime.²⁶ To come within the rule, the statement must contain an admission of guilt. In *Munoz v. State*,²⁷ a prosecution for breaking and entering, such an admission was lacking. Counsel for defendant offered himself as a witness to testify that a missing witness

¹⁹ 436 S.W.2d at 330-31.

²⁰ 432 S.W.2d 912 (Tex. Crim. App. 1968).

²¹ 420 S.W.2d 408 (Tex. Crim. App. 1967). For a discussion of *Hill*, see Ray, *Evidence, Annual Survey of Texas Law*, 23 Sw. L.J. 151, 155 (1969).

²² TEX. CODE CRIM. PROC. ANN. art. 15.17 (1966).

²³ *Id.* art. 38.22.

²⁴ 432 S.W.2d at 915.

²⁵ McCORMICK & RAY § 1005 n.32.

²⁶ *Id.* § 1006 n.60.

²⁷ 435 S.W.2d 500 (Tex. Crim. App. 1968).

(who had been subpoenaed and sworn in but who had left the courtroom after the trial began) told him that he was present at the time the automobile was broken into; that he himself did not do it, but that he knew who did it; and that David Munoz (the defendant) was not that person. Since the alleged statement contained no fact tending to subject the declarant to criminal liability it did not qualify even under the liberal Texas rule.

II. OPINION

Are medical experts' opinions as to what constitutes negligence admissible in a malpractice case? In *Snow v. Bond*²⁸ the supreme court recently said no. The plaintiff had charged that two doctors who operated on him for a ruptured disc negligently permitted an infection to delay his recovery. In support of a motion for summary judgment defendants offered their own depositions and affidavits and also an affidavit by Dr. Hooks, a disinterested orthopedic surgeon. Each defendant stated in his affidavit that he provided plaintiff with "that character of care which a reasonably prudent medical doctor similarly situated would have provided under the same or similar circumstances."²⁹ The affidavit of Dr. Hooks stated that he had read the defendants' depositions and examined the hospital records and that in his opinion the post-operative infection suffered by the plaintiff was not due to any malpractice or negligence on the part of either Dr. Eugenio or Dr. Snow and the type of care and treatment afforded to plaintiff by the defendants was in keeping with the kind and character of care and treatment which a reasonable and prudent medical doctor similarly situated would have provided under the same or similar circumstances. The supreme court ruled that the affidavits were not sufficient to support a summary judgment. It said that what constituted negligence or malpractice was a mixed question of law and fact,³⁰ and that a medical expert is not competent to express his opinion thereon. The court reasoned as follows:

The question of what a reasonable and prudent doctor would have done under the same or similar circumstances must also be determined by the trier of fact after being advised concerning the medical standards of practice and treatment in the particular case. An expert witness can and should give information about those standards without summarizing, qualifying or embellishing his evidence with expressions of opinion as to the conduct that might be expected of a hypothetical doctor similarly situated. . . . None of the conclusions mentioned in the preceding paragraph would be admissible on a conventional trial of the case, and the affidavits are not sufficient to support the summary judgment.³¹

While this author has no quarrel with the court's holding that the summary judgment should not have been granted on the basis of the affidavits,

²⁸ 438 S.W.2d 549 (Tex. 1969).

²⁹ *Id.* at 550.

³⁰ See *Houston & T.C. Ry. v. Roberts*, 100 Tex. 418, 108 S.W. 808 (1908); *McCORMICK & RAY* §§ 1423 n.78, 1395 n.19.

³¹ 438 S.W.2d at 550-51.

there is considerable doubt as to the soundness of the dicta to the effect that the opinions of the doctors would not be competent evidence. If it is agreed that the proper test as to the receipt of opinions is whether they can be of aid to the trier, then it seems that the opinions of the doctors here could be helpful to the jurors in making decisions in complicated issues such as those involved here.

Where a medical expert bases his opinion upon the plaintiff's subjective statements and past medical records the courts usually refuse to allow it in evidence.³² A court of civil appeals applied this rule in *Goodrich v. Tinker*³³ and reversed for the trial court's error in permitting plaintiff's doctor to testify as to his diagnosis and prognosis. The plaintiff agreed that if the doctor was only an examining or testifying doctor his opinions should not have been received. But he contended that Dr. Gonzalez was in fact a treating doctor and did in fact prescribe treatment for plaintiff. The appellate court said the admissibility of the opinion could not be resolved simply by deciding whether the doctor was a "treating doctor" or an "examining doctor." Rather the court must look to the foundation of the doctor's opinion, *i.e.*, the facts upon which it is based.³⁴ In this case Dr. Gonzalez found only one objective symptom—an audible popping sound when the neck was extended—which he thought caused no pain, and attributed to the natural processes of aging. The court concluded that the doctor's opinions were based upon the one objective finding, what the plaintiff told him, and the Army medical records covering plaintiff's twenty years of service, and held that these were not a sufficient foundation upon which to receive the opinions.

III. CIRCUMSTANTIAL EVIDENCE

In condemnation cases recent sales of comparable property near the land being condemned may be received as evidence of the value of the land in question provided they were the result of bargaining between a willing seller and a willing buyer.³⁵ Sales made to avoid condemnation are not admissible.³⁶ The supreme court has held that sales to a public body or corporation with authority by law to acquire the property by condemnation do not meet the willing seller-willing buyer requirement.³⁷ In *City of Austin v. Capital Livestock Auction Co.*³⁸ the court of civil appeals ruled that the mere fact that a sale was voluntary does not take it out of this rule. There the city sought to condemn land for use in widening a highway. It contended that the trial court erred in allowing evidence of the sale of other land to the Southwestern Bell Telephone Company, a condemning authority. In support of the trial court's ruling Capital Livestock argued that

³² McCORMICK & RAY §§ 1404 n.15, 1405 n.19.

³³ 437 S.W.2d 882 (Tex. Civ. App.—El Paso 1969).

³⁴ Dr. Gonzales saw Tinker only one time, which was some eighteen months after the accident. He did not treat Tinker, but did prescribe treatment which was not followed.

³⁵ McCORMICK & RAY § 1524 n.83.

³⁶ *Id.*

³⁷ Gomez Leon v. State, 426 S.W.2d 562 (Tex. 1968); Ray, *Evidence, Annual Survey of Texas Law*, 23 Sw. L.J. 151, 156 (1969).

³⁸ 434 S.W.2d 423 (Tex. Civ. App.—Austin 1968).

the purchase by the telephone company was an open transaction between a willing buyer and a willing seller; that even if the telephone company had the power to condemn, evidence of its purchase of the site for its dial exchange was admissible because not made under the threat of condemnation. It pointed out that the company shopped several different sites before purchasing the one in question. The court was not impressed. It held that even though independent testimony showed that the corporation acquired the property by voluntary sale and not under any express or implied threat of condemnation, if the purpose for which it was acquired was within its statutory powers of condemnation the price paid for it was inadmissible. Here the court was satisfied that the dial exchange was such a purpose, and ruled that the evidence should not have been allowed. However, in view of other evidence in the case the error was held not to require reversal.

Evidence of Liability Insurance. It is well settled in Texas as in most states that disclosure to the jury that defendant has liability insurance requires reversal.³⁹ In *Atchison, Topeka & Santa Fe Railway v. Acosta*,⁴⁰ a suit by a truck driver for injuries sustained in a collision with defendant's train, plaintiff's attorney, in the course of his argument to the jury, said "Mr. Stevens testified that he was out there the day of the accident. Of course he is an adjuster for the Railroad Company. They try to get right out there while the blood is still on the ground and people are laying down dying—to protect their insured or Company."⁴¹ At this point the defendant moved for a mistrial. The trial judge denied the motion and refused to instruct the jury "not to consider insurance in any way in this case."⁴² He said that such an instruction had already been given. He did tell the jury that they were to follow the court's charge rather than any statements made by attorneys. Plaintiff's attorney then continued his argument: "As I was saying we are familiar with the adjusters, their kits, pencils, their little note books, their typewriters, their cameras, and their job is to go out to the scene of accidents to investigate right then and there, to take statements and make pictures . . ."⁴³ The trial court again allowed the testimony to stand. The court of civil appeals held that a mistrial should have been granted, saying that while not every casual or inadvertent reference to insurance in the course of a trial will necessitate a mistrial,⁴⁴ the courts condemn the use of the "adjusters" in referring to a witness in the trial of a damage suit as a deliberate attempt to inject insurance into the case. Here evidence showed that Stevens was a claims agent employed by the railroad. By continuing to use the term after defendant's objection plaintiff's attorney sought to give the impression that defendant was protected by insurance.

³⁹ McCORMICK & RAY § 1539, where the present writer criticizes the rule.

⁴⁰ 435 S.W.2d 539 (Tex. Civ. App.—Houston 1968).

⁴¹ *Id.* at 549.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Trice Contract Carpets & Furniture Co. v. Gilson*, 329 S.W.2d 476 (Tex. Civ. App.—Houston 1959), *error ref. n.r.e.*; McCORMICK & RAY § 1539 n.87.

IV. REAL EVIDENCE

Posed Photographs. Texas courts have approved the use of posed photographs where a proper foundation is laid by testimony that the objects portrayed are the same or similar and faithfully represented as to their relative positions.⁴⁵ A recent case involving this question is *Briones v. Levine's Department Store, Inc.*,⁴⁶ where a customer sued for injuries suffered when she tripped and fell backward over a power lawnmower displayed for sale in an aisle of defendant's store. Plaintiff contended that the trial judge erred in admitting into evidence four photographs offered by defendant to show the interior of the store as it existed at the time of the accident. It contended that the pictures, made some four years after the accident, did not accurately reflect the scene at the time of the accident and were not sufficiently vouched for since the manager could only say that they were accurate to the best of his memory. The store manager, through whom the pictures were offered and who was at the scene of the accident immediately after plaintiff fell, testified that at the request of defendant's counsel, he had arranged a table and clothing rack in the store, and had placed a power lawnmower in the aisle or space between the table and the rack in the manner he remembered these objects to be at the time of the accident. The pictures were then taken by a professional photographer. The lawnmower used for the pictures was borrowed for the occasion but the manager said it was approximately the same size and type as that over which plaintiff tripped. During the trial a drawing of the floor plan was placed on a blackboard and with the pictures before him the manager explained the differences between the accident scene and the pictures. While there was a conflict in the evidence as to the location of the various objects with respect to each other, the court said since the witness through whom the pictures were offered testified that they correctly portrayed the scene to the best of his recollection, the trial judge did not abuse his discretion in receiving them, and that plaintiff's objection went to the weight of the evidence rather than to its admissibility.⁴⁷

V. BEST EVIDENCE

In *Morgan v. Arnold*,⁴⁸ an action by one partner against the other for damages resulting from alleged fraudulent representations in a financial statement which formed the basis of a dissolution agreement, the appellant attempted to raise for the first time on appeal a violation of the best evidence rule. He asserted that the partnership's final income tax returns, introduced for the purpose of determining the book value of the partnership on dissolution, were not the best evidence. Although the objection came too late to be effective, the appellate court ruled that the tax returns

⁴⁵ *Hinsley v. Continental Trailways Bus System*, 302 S.W.2d 668 (Tex. Civ. App.—Galveston 1957); *Dofner v. Branard*, 236 S.W.2d 544 (Tex. Civ. App.—San Antonio 1951), *error ref. n.r.e.*; *McCORMICK & RAY* § 1465.

⁴⁶ 435 S.W.2d 876 (Tex. Civ. App.—Austin 1969).

⁴⁷ The court quoted from and relied upon *McCORMICK & RAY* § 1465.

⁴⁸ 441 S.W.2d 897 (Tex. Civ. App.—Dallas 1969).

would have been admissible over the objection since testimony revealed that the tax returns contained information taken directly from books and records of the partnership and that such books and records were in the courtroom and available to the parties at all times. The court relied upon a line of cases holding that where excerpts are prepared by experts from books and records which are produced in court and available to the opposing party the best evidence rule does not apply to such extracts or summaries.⁴⁹

VI. WITNESSES

Competency of Child Witness. In *Williams v. State*,⁵⁰ a prosecution for sodomy, the state called the eight-year-old girl on whom the act was allegedly committed. After she had given her name and age the defense counsel asked to take her on voir dire and show that she did not understand the obligation of the oath. The request was denied and the state proceeded to interrogate the child, establishing that she was in the second grade, knew the difference between telling the truth and telling a lie, that she would get punished if she told a lie, and that she understood she was under oath and had to tell the truth. Thereupon the trial judge ruled that she was a competent witness and overruled defense counsel's repeated request to demonstrate that the child did not know the obligation of the oath. The court of criminal appeals held that the competency of the child as a witness was well established and there was nothing to show that the trial judge abused his discretion in refusing the request for further voir dire examination. This represents a sensible handling of the matter and accords with the view of the present writer expressed elsewhere as follows:

[T]his is a matter largely within the trial court's discretion and the Texas Courts have not been strict in enforcing the requirement that the nature of the oath be known or the formality of taking it be appreciated. In each individual case the test should be whether the judge is satisfied that the child feels some obligation imposed upon him to tell the truth. . . . Probably the most simple and effective test is whether the child understands that it is wrong to tell a lie and that for telling a falsehood he will be punished.⁵¹

Refreshing Recollection. It is a cardinal rule that any writing used to refresh the recollection of a witness must on demand be shown to the opponent for his inspection and use on cross-examination to guard against the danger of fraud and imposition.⁵² In *McGregor v. Gordon*⁵³ the plaintiff relied upon this rule, asserting that the trial court denied him his right of inspection. At the trial Paul Wise testified as a witness for the defendant and frequently referred to a file of notes and memoranda to refresh his memory. He had with him in the courtroom a brief case con-

⁴⁹ *Spradlin v. Rosebud Feed & Grain Co.*, 294 S.W.2d 301 (Tex. Civ. App.—Waco 1956); *Peters v. Brookshire*, 195 S.W.2d 181 (Tex. Civ. App.—Fort Worth 1946), *error ref. n.r.e.*; *McCORMICK & RAY* § 1566 n.43.

⁵⁰ 439 S.W.2d 846 (Tex. Crim. App. 1969).

⁵¹ *McCORMICK & RAY* § 294.

⁵² The court quoted from *McCORMICK & RAY* § 553. The cases are collected in *id.* n.43.

⁵³ 442 S.W.2d 751 (Tex. Civ. App.—Austin 1969).

taining his records pertaining to the property involved in the present suit. Plaintiff's counsel cross-examined Wise, inspected some of the documents used by Wise to refresh his recollection and introduced some of them into evidence. At the close of his cross-examination he asked to see the entire file Wise had with him. The court said "not at this time." Later a recess was called, during which plaintiff's counsel had a subpoena duces tecum issued summoning Wise to testify on behalf of plaintiff and commanding him to produce all the papers that he brought with him to the witness stand when he testified earlier. The trial judge went through Wise's entire file and segregated the material. He delivered part of it to plaintiff's counsel (presumably the part used by Wise to refresh his recollection) and placed the remainder in a sealed envelope. Wise then testified under cross-examination by plaintiff's counsel, who again asked to inspect Wise's entire file. His request was denied and he assigned error. The court of civil appeals upheld the trial judge's ruling, stating that the right of inspection is limited to the memoranda used by the witness to refresh recollection.⁵⁴ Plaintiff's counsel thus obtained all to which he was entitled and he had no right to rummage through the entire file to determine whether it contained any additional relevant information.

VII. PRESUMPTIONS

It is generally agreed that regardless of whether a presumption is rebutted, the basic fact which gives rise to the presumption continues to have throughout the case the probative value it would have had if no presumption had been recognized.⁵⁵ A classic illustration of this is found in *Employers' National Life Insurance Co. v. Willits*.⁵⁶ In a suit upon a life insurance policy the question before the court of civil appeals was whether a finding that a money order in payment of an overdue premium was received by the insurer before the insured's death on September 14, 1964, was supported by probative evidence. The money order was purchased on September 11, 1964. Deceased's son testified that it was placed in an envelope, sealed, stamped and addressed to the insurer and mailed at Amarillo, Texas on September 11th. A postal inspector testified that a letter properly mailed by ordinary mail in the downtown Amarillo Post Office on Friday afternoon, September 11, 1964, would in due course of mail be received sometime the next day (Saturday) in the post office box of addressee in Dallas. These facts were sufficient to create a presumption that the letter was received in due course. But the presumption is rebuttable by evidence tending to show that the money order was not received by September 14th. The insurance company's only witness, Doris Stewart, supervisor of the Accident, Sickness and Life Department, testified that after a call from the insurer's salesman about 3 p.m. on September 15th, inquiring about the remittance, she found the opened envelope with the money order enclosed in her tray on the cash receipts desk. She said

⁵⁴ The court quotes from MCCORMICK & RAY § 553; see *id.* n.42 for cases.

⁵⁵ Ray, *Presumptions and the Uniform Rules of Evidence*, 33 TEXAS L. REV. 588, 591 (1955).

⁵⁶ 436 S.W.2d 918 (Tex. Civ. App.—Amarillo 1968).

it did not reach there on September 14 and she had no personal knowledge as to the date it was placed in insurer's post office box. The company's strongest evidence indicating that the letter was not received by insurer on the 14th was the September 14th cancellation date on the envelope and testimony that a letter mailed on that date would not in due course reach Dallas before September 15th. The postal inspector testified that it was possible that people in the post office could have made a mistake as to the time and date of the postmark, and that such mistakes had occurred in the past. Under this state of the evidence and assuming that the insurer's evidence was sufficient to neutralize the presumption, the court held that there was probative evidence to support the jury's finding that the money order was received at the company's home office during the insured's lifetime. The court relied upon the leading case of *Southland Life Insurance Co. v. Greenwade*,⁵⁷ saying that it is not the presumption that the jury considers, but the facts and circumstances forming the basis of the presumption.

⁵⁷ 138 Tex. 450, 159 S.W.2d 854 (1942).