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Evidence

EVIDENCE

DURING 1947 the appellate courts of Texas rendered no really significant decisions relating to the law of evidence. A few, however, are worthy of some discussion.

INSTRUCTION TO JURY ON COMMON KNOWLEDGE

The Supreme Court of Texas settled one point on the law respecting instruction to the jury on matters of common knowledge. In the case of *Gillette Motor Transport Co. v. Whitfield*,[1] the trial judge instructed the jury indirectly that they could consider matters of common knowledge in arriving at their verdict. The Supreme Court held that proof of the giving of such an instruction is not alone sufficient to present reversible error in the absence of a showing that the jury discussed any matters not within the rule of common knowledge. This opinion marks a departure from the principles set out in *Phoenix Refining Co. v. Tips*[2] and *Petroleum Co. v. Stolley*.[3] In the *Tips* case, which involved a similar instruction, the Commission of Appeals, in an opinion adopted by the Supreme Court, held that such an instruction was reversible error as being on the weight of the evidence, argumentative, and calculated to mislead the jury, because they were not presumed to know what in law constituted "common and general knowledge." The trial judge in the *Stolley* case refused to instruct the jury that they might consider matters of common knowledge, which was assigned as error. The Court of Civil Appeals held that it would have been reversible error for the court to charge affirmatively one way or the other, pointing out that it is of itself a matter of common knowledge that jurors, in the process ofdetermining facts, do resort to such matters regardless of instructions from the judge.

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[1] ___ Tex. ....., 200 S. W. (2d) 624 (1947).

[2] 125 Tex. 69, 81 S. W. (2d) 60 (1935).

[3] 137 S. W. (2d) 27 (Tex. Civ. App. 1939), *writ of error dism'd., judgment correct.*

The view expresesd in the *Whitfield* case is a more sensible and practical one than that of the previous cases. The court points out that jurors have a right to take into consideration matters of common knowledge in arriving at their verdict, and that in most jurisdictions it is permissible for the court to give an instruction to that effect. The charge contained a correct statement of the law, said the court, and it will be presumed that the jury understood and followed the instruction, and if so, that they considered only matters proper for their consideration, and that the complaining party was not injured. The court felt, however, that it is better practice not to instruct the jury to consider such matters.

Distinction Between Admissions and Declarations Against Interest

The appellate courts of Texas sometimes confuse "admissions" with "declarations against interest."[4] *Downs v. McCampbell*,[5] however, correctly distinguishes the two. That case involved the admissibility of a sworn statement made by the plaintiff shortly after the accident which gave rise to the dispute. The statement absolved the defendant from any acts of negligence and was materially different from the testimony given by the plaintiff at the trial. The court held that the statement was properly received in evidence as an admission, pointing out that admissions must come from a party in interest, his agent or predecessor, while declarations against interest may come from anyone.

Plaintiff had sought to introduce evidence that he had told others, shortly after the accident, substantially the same facts as related by him at the trial. The court said that this evidence was properly excluded, in that a party cannot rebut the evidence of his own admission by different declarations made at other times, an admission being original and substantive and not impeachment evidence. Such prior consistent statements, it was pointed out, are

[4] McCormick and Ray, Texas Law of Evidence, 628 (1st ed. 1937).
[5] 203 S. W. (2d) 302 (Tex. Civ. App. 1947).

admissible where a witness (not a party) has been impeached, or where there is a charge of recent fabrication of testimony by a party who had kept silent when he should have spoken, in which case evidence that he did speak at other times consistently with his trial testimony is admitted in rebuttal of the testimony of his failure to speak.

Contractual Consideration Bars Parol Evidence

An interesting application of the parol evidence rule is found in the case of *Navarro Oil Co. v. Cross*.[6] An oil lease from Cross to the oil company contained an extensive recitation of the consideration for the lease, including the cash bonus, oil payment, royalties, and the agreements of the lessee. The trial court had allowed parol evidence to be introduced, which proved that there was an oral agreement that the cash bonus recited in the lease was to be "net to Cross." The Supreme Court held that such evidence was inadmissible, overruling the contention that the provision in the lease was a mere recital, not contractual in nature, and subject to being varied by parol, so that the "real consideration" could be shown. The difficulty with this contention was that the lease contained explicit and detailed agreements as to the consideration, which went much further than a mere recital of payment. Such minute detailing of the consideration, it was said, must be held to exclude the existence of any other, and the rule applies that a contractual consideration in a conveyance may not be varied by parol.

Admissibility of Photographic Evidence

Two Civil Appeals decisions rendered in 1947 indicate that the Texas courts have taken a common-sense view of the admissibility of X-ray photographs and are in line with the majority of courts in this country. In *Texas & N. O. Ry. v. Barham*,[7] X-ray

[6] .....Tex. ....., 200 S. W. (2d) 616 (1947).

[7] 204 S. W. (2d) 205 (Tex. Civ. App. 1947).

pictures were admitted in evidence when it was shown that the witness, a doctor, had taken the patient into the X-ray room, instructed the technician how to take the pictures, watched the process and examined the pictures as soon as they were developed. The fact that the doctor did not take the pictures was not present when they were developed affects the weight to be given the evidence but not its admissibility. This decision bears out the statement by Scott[8] that, while certain requirements are theoretically necessary to authenticate such evidence, few decisions have indicated that a complete verification is compulsory.

In *Pan American Life Insurance Co. v. American Industrial Investment Co.*,[9] X-ray pictures were admitted in evidence as a means of establishing the identity of a burned corpse, one of the pictures having been taken during the lifetime of the deceased and the other after his death. The X-ray specialist, in testifying with regard to the first picture, changed his testimony, first declaring that his technician had made the picture and later claiming that he had made it himself. The court held that both pictures were admissible for comparison, and that the fact that the witness testified directly opposite on a material issue went to the weight rather than to the admissibility of the evidence.

The opinion in *Richardson v. M-K-T R. Co. of Texas*[10] is valuable because it contains a good summary of the law regulating the use of motion pictures as evidence. This was an action for damages resulting from injuries sustained by plaintiff while operating a shaper machine in defendant's planing mill. Defendant introduced in evidence a motion picture, taken nine months after plaintiff was injured, showing the machine in operation. The court, in overruling several grounds of inadmissibility urged by plaintiff, held that the picture was properly received as secondary and demonstrative evidence and stated the following rules as governing the use of motion pictures as evidence:

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[8] SCOTT, PHOTOGRAPHIC EVIDENCE, 730 (1st ed. 1942).
[9] 207 S. W. (2d) 173 (Tex. Civ. App. 1947).
[10] 205 S. W. (2d) 819 (Tex. Civ. App. 1947), *writ of error dism'd.*

(1) Generally, the same rules apply to motion pictures as apply to still pictures,[11] and motion pictures are admissible as secondary evidence of objects which cannot be produced in court.

(2) Before a motion picture may be introduced in evidence, it must be shown by extrinsic evidence to be a true and faithful representation of the place or object it purports to represent as it existed at the time pertinent to the issue. It need not be precisely the same, but it is sufficient if the situation is substantially unchanged. The fact that it is incorrect in some particular goes to the weight rather than to the admissibility of the picture.[12]

(3) It is not necessary that the opposing party be present when the picture is taken.[13]

(4) The objection that a motion picture is hearsay is met if it is subject to cross-examination through the witness who verifies and uses it.[14]

(5) It is not necessary that the picture be proved up by the photographer who took it, nor is it necessary that the verifying witness be present when the picture is taken.[15]

(6) The admissibility of motion picture evidence rests largely in the discretion of the trial judge, and his decision will not be disturbed by the appellate courts unless his decision is arbitrary and constitutes an abuse of discretion.

Burden of Proof in Criminal Cases

A difficult problem relating to burden of proof in criminal cases was before the Court of Criminal Appeals in *Chancelor v. State*.[16] In his charge to the jury in a prosecution for bigamy, the trial judge told the jury that, if they believed beyond a reasonable doubt that the defendant had entered into the second marriage while the first wife was still living, the burden was on the defendant to prove by a preponderance of the evidence that at that time the former wife was absent from the state, had abandoned him, or that they had been divorced. The trial court was attempt-

[11] 32 C. J. S. § 709 (1938).

[12] Bilbrey v. Gentle, 107 S. W. (2d) 597 (Tex. Civ. App. 1937), *writ of error dism'd.*

[13] 32 C. J. S. § 715 (1938).

[14] 3 Wigmore, Evidence 178 (3rd ed. 1940).

[15] Wise v. City of Abilene, 141 S. W. (2d) 400 (Tex. Civ. App. 1940), *writ of error*

[16] ..... Tex. Crim. Rep. ....., 205 S. W. (2d) 581 (1947).

[16] Tex. Crim. Rep., 205 S. W. (2d) 581 (1947).

ing to apply the provisions of a statute[17] relative to defensive matters to the crime of bigamy. Such a charge, it was held, unduly shifted the burden of proof. The defendant must establish the defensive matters set out in the statute, but not by a preponderance of the evidence. They are established when the jury believes or entertains a reasonable doubt as to their existence. Here the defendant offered no evidence on any of the defensive issues set out in the statute, and under these circumstances it was held to be reversible error to give such a charge.

Photographic Duplication of Public Records

The Texas Legislature in 1947 passed an act[18] providing for the duplication of all public records by photostatic reproduction and the destruction of many of the original records, in order to preserve these records and reduce storage space. This act provides that the photographic duplicates shall be deemed original records for all purposes and that such records, or certified copies thereof, may be used for the purposes of evidence.

Jury's Province with Respect to Undisputed Testimony

In *Texas & N. O. R. Co. v. Burden*,[19] in a five-to-four decision, the Supreme Court rendered a rather startling opinion dealing with the jury's duty where the testimony of a witness is undisputed. This was a damage suit against the railroad to recover for the death of plaintiff's husband, caused by his being struck by one of defendant's trains. One of defendant's witnesses testified that, shortly before the accident, plaintiff's husband remarked that the train was coming and that he was leaving. Two other witnesses, who were present at the time, did not testify on that point. The jury decided the issue in favor of plaintiff. In support of this finding, plaintiff contended that the jury was not required to believe the witness who testified on the issue, on the theory that

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[17] Tex. Pen. Code (1925) art. 491.

[18] Tex. Ann. Rev. Civ. Stat. (Vernon, 1925) art, 6574b.

[19] ___ Tex. ___, 203 S. W. (2d) 522 (1947).

the jury had the right to believe or disbelieve all or any part of the testimony of the witness. The majority opinion, in reversing the case, conceded that it is the province of the jury to decide the issues which are raised by the conflicting evidence, but pointed out that, where there is evidence by a disinterested witness on the issue and no evidence to the contrary, and the plaintiff had an opportunity to question the other witnesses but did not, then the jury cannot disregard the undisputed evidence and decide the issue in accordance with their own wishes. The basis of the dissent was that this was a question of passing on the sufficiency of the evidence, which could be passed on by the Court of Civil Appeals but not by the Supreme Court. The dissenters believed that there was enough other evidence to create a doubt in the minds of the jurors as to whether plaintiff's husband was guilty of contributory negligence. The case is significant in that it appears at first glance to be contrary to the rule that the credibility of witnesses is for the jury.

W. B. W.