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Evidence

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pointed out that the federal circuit court of appeals in *Jackson v. Western Union Telegraph Co.*,[22] decided in 1921, had stated that Article 1359 prevented the *acquisition* of land by a dissolved corporation for the purpose of winding up its affairs, paying debts, or distributing assets among its stockholders. The federal case is distinguishable on its facts, since no option to purchase was involved. Granting that the legislative purpose of Article 1359 was to limit corporate ownership of lands, the statute should not restrict trustees of a dissolved corporation from acquiring real estate for the benefit of its former stockholders.

Richard E. Batson, Jr.

EVIDENCE

Learned Treatises (Texas)

Bowles v. Bourdon[1] was a suit for damages for malpractice. Judgment was rendered for defendant doctor on an instructed verdict, plaintiff having failed to show that defendant's negligence, if any, was the proximate cause of the injury. Plaintiff had read excerpts from certain medical works in his cross-examination of defendant, and on appeal urged them as evidence of proximate cause on the theory that defendant's responses were admissions. *Held:* when a doctor testifies as an expert on injuries or diseases, he may be asked to identify a given work as a standard authority on the subject involved; if he so recognizes it, excerpts therefrom may be read not as original evidence, but solely for the purpose of discrediting his testimony or testing its weight. The answers of the witness to questions based on the treatise were not admissions because the context showed that such answers were qualified by other testimony of the witness.

Alabama is cited by the court as the only jurisdiction which

[22] 269 Fed. 598 (C.C.A. 5th, 1921).

[1] ——Tex.——, 219 S. W. 2d. 779 (1949).

permits the use of medical treatises to establish the proof of their own statements. The court cites 32 C.J.S., Evidence, sec. 718, p. 267, as stating the reasons for the general rule to be the unsettled condition of the sciences and the absence of opportunity to cross-examine. When the rapid advances in scientific knowledge in recent years and the stability of much of that knowledge are considered, it is surprising to hear repeated the argument that medical science is still so unsettled that treaties are almost immediately out-dated and are less reliable than the testimony of so-called expert witnesses present in the courtroom. An expert witness must, of necessity, be basing the greater part of his information and knowledge on just such treatises; to contend otherwise would be to close one's eyes to the truth. It is not felt that any opportunity must be afforded for cross-examination of such an expert witness on the sources of his knowledge. There is much to be said in favor of the Alabama rule. An exception could be made to the hearsay rule in order to permit the introduction of standard and authoritative scientific treatises to establish the truth of matters contained therein.

In stating the general rule concerning the inadmissibility of such works as proof of their own statements, the court follows the great weight of authority;[2] however, in permitting the use of such evidence for impeachment purposes, it falls in line with the minority.[3] It would seem, if such evidence is objectionable where it is sought to be used to establish the truth of matters asserted, it should be equally objectionable when it is offered to discredit a witness. Where excerpts from medical treatises are introduced to lessen the weight of a witness' testimony, it is obvious that these same excerpts must be given some independent weight toward proving the truth of matters asserted; otherwise they could not be considered for even such a limited purpose. In following the minority in this regard it is felt that the court has taken a more realistic

[2] 6 WIGMORE, TREATISE ON EVIDENCE (3rd ed.) § 1693 (1940).

[3] 6 WIGMORE, *op. cit.* § 1700.

approach to the problem than it has in its position that such evidence is inadmissible because hearsay.

The case indicates that even though hearsay, such evidence may be received if it satisfies the requirements of an admission. Apparently, at the present time, it is only under this exception that such evidence may be introduced as independent authority for the facts stated.

EXPERT TESTIMONY, INTERPRETING X-RAYS (TEXAS)

Defendant, in *Hall v. State*,[4] on trial for assault with intent to murder, objected to testimony of a doctor, witness for the state, offered in response to a question as to what X-rays he had taken of the injured party showed. The grounds of the objection were that the X-rays themselves were the best evidence, that no predicate had been laid for the introduction of secondary evidence, and that the evidence offered was hearsay. The doctor was permitted to describe the injuries without producing the X-rays themselves. *Held:* The witness was entitled to state the condition of the injured party's head and face when he treated him and what he found as a result of his examination, which the X-rays may or may not have confirmed. Since there was nothing in the bill showing the jurors or any other persons connected with the trial were able to read such pictures, their introduction would have served no useful purpose.

Defendant's objection to the question posed seems sound. The information sought to be elicited was that revealed by the X-rays, and the "best evidence" rule was applicable. The trial court admitted the evidence with the comment that the witness might state the condition of the injured party,[5] and this was upheld on the theory that the doctor might testify relying both on his examination and the pictures. While unquestionably the assistance of an expert witness should be required to interpret and explain such evidence, to require a showing that some one other than the doctor

[4] ——Tex. Crim. Rep. ——, 219 S. W. 2d. 475 (1949).

[5] The instruction to the jury is not too clear.

was capable of reading such pictures in order to insist on their production is to lay down a rule that has not been advanced before. With this requirement as a prerequisite, it is doubtful, in the absence of other expert witnesses, that an adverse party could ever maintain his right to have such original evidence produced. A defendant, in a criminal case, is not always able to obtain expert witnesses, and it is seldom that judges and jurors are skilled in the interpretation of X-rays.

CONFRONTATION (NEW MEXICO, ARKANSAS)

In *State v. Martin et al.*[6] the trial court experienced difficulty which might have been avoided by the simple expedient of referring to a dictionary. Three defendants were jointly tried and convicted for involuntary manslaughter. At the conclusion of the State's case in chief defendant Martin rested and moved for a directed verdict. The motion was overruled. Thereafter, the other defendants took the stand and gave testimony damaging to Martin, who was refused permission to cross-examine unless he first withdrew his motion. *Held:* The right of confrontation given a defendant by Article 2, Section 14, New Mexico Constitution,[7] had been denied; judgment was reversed as to defendant Martin. No justification exists for so conditioning defendant's right to cross-examine an adverse witness. Citing Webster's New International Dictionary the court defined "to rest" as "to bring to an end voluntarily the introduction of evidence, the right to introduce fresh evidence, except in rebuttal, being thereupon lost."

The holding is clearly correct: the opportunity for cross-examination is recognized as the essential purpose of confrontation[8], and to deny defendant this right unless he first withdraws a legitimate motion is too arbitrary an exercise of judicial discretion to pass unchecked. Since the burden of going forward with the evi-

[6] 53 N. M. 413, 209 P. 2d. 525 (1949).

[7] "In all criminal prosecutions the accused shall have the right . . . to be confronted with the witnesses against him."

[8] 5 WIGMORE, *op. cit.* § 1395.

dence lay on the State, defendant could properly rest if he felt the prosecution had failed to establish its case. The benefits to the general course of justice in forcing the defendant to withdraw the motion before he could cross-examine are slight; the injustice to the defendant in the court's position was great. The case itself is not important, but it does arouse one's curiosity as to the cause of this impasse. It appears that both the trial court and defendant's counsel might have been more intent on maintaining and vindicating their respective positions than they were in displaying the judicial impartiality and respectful restraint that should be controlling in such proceedings.

An Arkansas case, *Barnes et al. v. State*,[9] involved the utilization of a written confession for impeachment purposes, and the right of confrontation. The confession, purportedly made by defendant's accomplice, was not received in evidence, but the trial court permitted its use in cross-examination of defendant; parts were read to defendant, and he was questioned as to the truth or falsity thereof. This testimony, over objection, went to the jury for the limited purpose of testing the credibility of the witness. *Held*, this was a denial to defendant of his constitutional right of confrontation. Such evidence was hearsay and improperly admitted because no opportunity was offered for cross-examination.

The two grounds given for exclusion of this evidence appear sound. The right of cross-examination, as indicated in the New Mexico case above, is essential to the right of confrontation. Limiting the purpose for which such evidence is admitted does not alter its nature as hearsay nor eliminate the probability of improper use by the jury. Though professedly used solely for impeachment, such a use carries with it a tacit acceptance of the confession as proving the truth of the matters contained therein; otherwise, it would have no value even for impeachment purposes. Any extra-judicial utterance which is submitted as evidence of the truth of the facts asserted is hearsay. This ingenious method of getting inadmissible

[9] ——Ark.——, 223 S. W. 2d. 503 (1949).

evidence before the jury, superficially for a limited purpose, was recognized and disposed of by the court as it should have been.

RES GESTAE (ARKANSAS)

The term "res gestae" seems to have been loosely used in *Thacker v. Hicks*,[10] a case of forcible entry and detainer. Here the rule is stated that extra-judicial declarations of a person in possession of land showing that he held in his own right and not as the agent of another are admissible, as exceptions to the hearsay rule, on the principle of res gestae to show that the declarant had the hostile intent necessary to support a claim of adverse possession.

Indiscriminate use of this phrase has been effectively criticized elsewhere,[11] but it may not be inapposite to mention again the desirability of accurate thinking on the hearsay rule. The obvious criticism to be levelled at the holding in the instant case is that such declarations are not hearsay at all; they are not offered as evidence of the truth of the facts asserted, but only to indicate the nature of the possession. For the court to admit evidence as an exception to the hearsay rule, such evidence must first be hearsay. The declarations are not used to establish either the title of the declarant or the fact of possession, but are circumstantial evidence of the hostility of declarant's possession. Since the courts appear to be committed to a continual use of the phrase "res gestae," it would be preferable if they would confine its application to those cases where extra-judicial declarations are so spontaneous as to eliminate any reasonable doubts of their reliability.[12]

CONFESSIONS (TEXAS)

Housewright v. State[13] contains a statement by the court which, if taken as stating the complete rule, would be a highly desirable reversal of the previous Texas position on acts as confessions. It

[10] ——Ark.——, 224 S. W. 2d. 1 (1949).

[11] 6 WIGMORE, *op. cit.* § 1767.

[12] McCORMICK AND RAY, TEXAS LAW OF EVIDENCE (1937) § 382; 6 WIGMORE, *op. cit.* § 1745.

[13] ——Tex. Crim. Rep.——, 225 S. W. 2d. 417 (1949).

was held that motion pictures of one being booked on a charge of driving while intoxicated were admissible, although consent was not given and no warning was tendered in compliance with the statute.[14] The court distinguishes between acts performed and a confession made; the former, it is said, are admissible, the latter are not, unless coming strictly within the letter of the statute. The pictures are but a clearer delineation of what witnesses at the scene saw and could have described from memory.

The instant case falls in line with an earlier Texas case, cited by the court, where it was held that placing an accused's foot within a footprint was not forcing him to give testimony against himself;[15] however, that case was qualified later in *Kennison v. State*[16] to the effect that such a holding was an exception to the general rule holding conduct of the accused a confession. The instant case, if taken literally, would eliminate any necessity for finding such an exception. Texas stands alone in this interpretation of a confession,[17] although several exceptions have been made to the rule as stated.[18] A complete and unequivocal abandonment of this strange Texas holding could be effected and still be within the statute, there being nothing therein calling for the inclusion of acts within the definition of a confession. The instant case seems correct in its result, although, judging from previous cases, the language is too broad. It would perhaps be over-optimistic to hope that the case will not be so distinguished by later decisions as to render it completely ineffectual as a precedent for a more orthodox interpretation of a confession. It is true, of course, that Article 727 makes provision for the admissibility of unwarned confessions made while under arrest where the statements of facts and circumstances are found to be true and conduce to establish the guilt of the accused. On this basis alone the instant case can be limited. The

[14] Tex. Code Crim. Pro. (1925) art. 727.

[15] Walker v. State, 7 Tex. Crim. App. 245, 32 Am. Rep. 595 (1879).

[16] 97 Tex. Crim. Rep. 154, 260 S. W. 174 (1924).

[17] 3 WIGMORE, *op. cit.* § 821, note 1.

[18] MCCORMICK AND RAY, TEXAS LAW OF EVIDENCE (1937) § 527.

fact remains that the unqualified statement by the court is to be preferred over the present Texas rule.

SELF-INCRIMINATION (TEXAS)

A case involving still another aspect of Article 727, Texas Code of Criminal Procedure, was *Trollinger v. State.*[19] Defendant, after shooting three persons, drove to the county jail, arriving there some thirty or forty-five minutes after the event, and gave himself up to the jailer. At the trial the jailer testified, over objection, that in answer to questioning by him, defendant had made certain damaging statements. Defendant contended that the statements were inadmissible because he was under arrest at the time, no warning had been given, and the statements were oral. *Held,* reaffirming the Texas rule, it is not necessary that there be a formal arrest to make compliance with Article 727 mandatory; the test is whether the accused reasonably believed himself to be in custody. The time between the shooting and the statements was too great to make them admissible as part of the res gestae, or as spontaneous declarations.

While the case presents no new statements of law concerning the admissibility of confessions made while under arrest or in custody,[20] it is a reaffirmance of the strict interpretation of Article 727. The Texas rule requiring a formal warning to an accused in custody is unique, all other American jurisdictions requiring only that such confessions be voluntary,[21] apparently feeling that no harm will ensue in the absence of such warning. The Texas rule has been under attack for many years,[22] and no logical argument can be advanced in its support. Its benefits to an innocent accused appear non-existent, whereas it obviously serves well the guilty. If the requirement of a warning under such circumstances were

[19] ——Tex. Crim. Rep.——, 219 S. W. 2d. 1019 (1949).

[20] MCCORMICK AND RAY, TEXAS LAW OF EVIDENCE (1937) § 538.

[21] MCCORMICK AND RAY, *op. cit.* § 537.
A Louisiana case recently decided, State v. Byrd, 38 So. 2d. 395 (La. 1949), represents the majority in holding it is not necessary to warn an accused in custody.

[22] Comment, 4 Tex. L. Rev. 499 (1926).