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Evidence

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tive severance of the fruit by the contract of sale, the subject matter would be considered personal property. As title passed at the time of the contract to the buyer and possession remained in the seller, a bailment was created. It was a bailment for mutual benefit and the seller-bailee was under a duty to exercise ordinary care in protecting the fruit. This duty was breached and she should have been held liable.

Robt. A. (Dean) Carlton, Jr.

EVIDENCE

EXCEPTIONS TO THE HEARSAY RULE—PEDIGREE

*Arkansas. Daniel v. Johnson*¹ was a proceeding brought under *Arkansas Statutes, 1947 Annotated*, Section 62-1301, for the determination of heirship. The decedent was born shortly after the Civil War and was the son of two former slaves. Testimony was given by descendants and relatives of the intestate, and also by a Mrs. Britt, the 96-year-old daughter of a former slave owner. Mrs. Britt had lived her entire life in the same community with the families involved and was well acquainted with the community reputation as to their relationships, and her memory was clear even in the small details concerning the slaves with whom she played in her childhood. The testimony given was hearsay concerning the family relationships and marital relations of certain persons. The court held that under Arkansas decisions this evidence was properly admitted as an exception to the hearsay rule in order to establish pedigree.

The declarations of persons now deceased or wholly unavailable, who were related to the family by blood or marriage, are generally admitted on the ground that such persons were in position to know the truth and were free of any temptation to state an untruth. Such declarations must have been made prior to the beginning of the controversy in respect to which the proof is

¹ _____ Ark. _____, 226 S. W. 2d 571 (1950).

offered. While the pedigree exception to the hearsay rule is well established, the heavy weight of authority confines the exception to declarations made by legal relatives and excludes those made by non-relatives no matter how closely they may have been associated with the family.²

In unequivocally condemning the narrow rule of the majority, Wigmore points out that the only reasoned defense that has been given for it is that the court would have to inquire in each instance as to the degree of intimacy that existed between the declarant and the family. This defense is considered to be wholly insufficient, since no court has the right to place its own convenience ahead of its duty to investigate, so far as may be necessary, the sources of a witness' qualifications.³

Often old servants, family physicians, or very intimate friends are as well informed as members of the family and sometimes more so. It is not contended that the statement of any friend should always be received, but it is believed that an arbitrary limitation which excludes the statements of one whose intimacy leaves no doubt as to his opportunity to learn the facts is unwise.⁴

QUALIFICATION OF EXPERT WITNESS

*Louisiana. State v. Carter*⁵ was a manslaughter case. Defendant's witness, a physician, was questioned by counsel for defendant as to whether or not a certain physical condition of the deceased could have been caused by heart trouble. The trial court sustained the State's objection to this question on the ground that the witness had qualified only as a general practitioner and not as a heart specialist. *Held*, refusal to allow the witness to answer the question was an abuse of discretion by the trial court. The supreme court said that even though specialists were available, a general practitioner could testify as to the nature and effect of diseases, the test being whether or not the witness was familiar with such laws of the medical profession as bear upon the issue.

² JONES, EVIDENCE (3rd ed. 1924) § 312.

³ 5 WIGMORE, TREATISE ON EVIDENCE (3rd ed. 1940) § 1487.

⁴ MCCORMICK AND RAY, TEXAS LAW OF EVIDENCE (1937) § 600.

⁵ 217 La. 547, 46 So. 2d 897 (1950).

A physician may give opinions as to matters connected with his profession or with medical science, although in his own practice he may not have had experience as to such matters and although his knowledge in respect thereto is derived only from study.⁶ The liberal doctrine, favored by Wigmore, is that the law does not require the best possible kind of a witness but only persons of such qualifications as the community daily and reasonably relies upon in seeking medical advice. Thus, a general practitioner may testify on all matters as to which a regular medical training necessarily involves some general knowledge.⁷

EXPERT TESTIMONY—INSTRUCTIONS

Oklahoma. In *Mid-Continent Pipe Line Co. v. Price*⁸ decedent died from a lung condition allegedly caused by inhaling acrid fumes and smoke from hot coal tar enamel while he was employed by defendant as a pipeline laborer. Physicians were introduced as expert witnesses by both sides and gave conflicting testimony as to whether or not the fumes could have caused the fatal lung condition. The trial court instructed the jury that they were not bound by the testimony of any witness, expert or otherwise, and that they were to determine the ultimate weight to be given to the testimony of such witnesses. Defendant contended that this charge advised the jury that they could ignore the opinions of expert witnesses. *Held*, the charge did not convey such meaning as claimed by defendant, and it stated no rule of law violative of defendant's rights. The court said that the jury cannot be instructed wholly to disregard the testimony of expert witnesses, but that it is not error to instruct the jury that they may disregard such evidence if they should deem it unreasonable or not entitled to belief because of other and conflicting evidence from witnesses claiming positive knowledge.

It is not uncommon for the testimony of experts to conflict, and when such testimony consists of opinion against opinion, it is not only proper, but necessary, that the jury know that they are free

⁶ JONES, *op. cit. supra* note 2, § 368.

⁷ 2 WIGMORE, *op. cit. supra* note 3, § 569.

⁸Okla....., 225 P. 2d 176 (1950).

to disregard such expert testimony as they deem unreasonable. It is obvious that if they are to reach any decision at all, the jury must necessarily choose to rely upon some expert testimony and to disregard the conflicting testimony given by other experts. The jury may not, of course, be instructed to disregard certain expert testimony, but it is not error to instruct them that they may disregard such evidence as they deem unreasonable.⁹

SCIENTIFIC TESTING DEVICES

*Texas. McKay v. State*¹⁰ was a driving-while-intoxicated case. On the trial the State first introduced in evidence the results of a breath test made with defendant's consent at the time of his arrest, and then introduced, as an expert witness, a research biochemist who testified that from the results of the breath test he would say defendant was intoxicated. This witness testified that the testing instrument was accurate but admitted that there was disagreement among scientists as to its accuracy. Defendant contended that such disagreement would preclude the introduction in evidence of the results of such a test. *Held*, defendant's objection went to the weight of the evidence and not to its admissibility.

Use of scientific instruments always involves to some extent a dependence upon the statements of other persons. It is not feasible for the scientist to test every instrument personally, and, furthermore, he finds that from a practical standpoint the standard methods are sufficiently dependable to be trusted.¹¹ What is needed in order to justify testimony based on scientific instruments is preliminary professional testimony as to the trustworthiness of the process or instrument in general, and as to the correctness of the particular instrument.¹² To refuse to recognize generally accepted scientific conclusions would be contrary to the modern tendency, which is to receive whatever light can be thrown upon the issue by competent persons and then leave their credit to the jury.¹³

⁹ JONES, *op. cit.* § 392.

¹⁰ _____ Tex. Crim Rep. _____, 235 S. W. 2d 173 (1950).

¹¹ 2 WIGMORE, *op. cit.* § 665a.

¹² 3 WIGMORE, *op. cit.* § 795.

¹³ 2 WIGMORE, *op. cit.* § 662.

There are few scientific theories on which scientists are in complete accord, and the fact that they disagree as to the merits of a particular test for intoxication should not be sufficient reason to exclude entirely the results of such a test from the consideration of the jury. The fact that the test is not highly regarded by some members of the scientific profession is a circumstance that should affect the weight to be given by the jury to such a test, but is not such a circumstance as to render the test inadmissible as evidence.

In another driving-while-intoxicated case, *House v. State*,¹⁴ the State introduced in evidence the results of a chemist's analysis of a specimen of urine voluntarily given by defendant at the time of his arrest. The chemist testified without objection as to the percentage of alcohol contained in the specimen. The State's next witness, a physician who was not a chemist, then testified that from reading and study and from certain documents relative to such matters, he was of the opinion that the percentage of alcohol shown by the chemical analysis was evidence that the giver of the specimen was intoxicated. Defendant objected to the physician's testimony as hearsay and a conclusion of the witness. *Held*, defendant's objection went to the weight rather than to the admissibility of the testimony.

The person offered as an expert witness must possess special knowledge as to the very matter on which he proposes to give an opinion, but this knowledge may have been obtained entirely from study of technical works.¹⁵ The fact that his information as to the particular matter is based in whole or in part upon hearsay statements of his fellow practitioners or of medical books should make no difference.¹⁶ A doctor must necessarily gain a great deal of his information from sources other than personal experience. It is the special knowledge acquired, not the manner of acquiring it, that makes him an expert witness. The source of his knowledge may properly affect the weight of his testimony but not its admissibility.

It is felt that the holdings in the *McKay* and *House* cases will

¹⁴Tex. Crim. Rep., 233 S. W. 2d 862 (1950).

¹⁵ McCORMICK AND RAY, *op. cit. supra* note 4, § 633, p. 798, n. 73.

¹⁶ *Id.* § 643, p. 818, n. 91.

tend to broaden the scope of evidence which may be introduced by allowing the results of scientific tests to be offered in testimony and permitting experts to interpret them, while reserving to the jury the right to pass on the weight to be given both to the tests themselves and to the interpretation placed upon the results by the experts.

SELF-INCRIMINATION

*Texas. Thomas v. State*¹⁷ was a driving-while-intoxicated case. On the trial a policeman testified that he could tell that defendant was intoxicated by the way he acted, adding, "Yes, I had him to walk." Defendant objected that forcing him to walk violated his constitutional rights in that it compelled him to produce evidence against himself. *Held*, the conviction should be affirmed. The court remarked that the record was silent as to when and where the policeman had defendant walk, as to what the result of the walking was, and as to whether or not such walking was the basis for the officer's conclusion that defendant was drunk. The court added that unless arrested in his cell, a man would ordinarily have to do some walking and that there is no reason why an officer who observed such walking should not be permitted to testify as to the results.

Most of the cases dealing with self-incrimination have involved requiring the defendant to perform a physical act before the jury. For example, the accused may be required to stand up for identification, or to give a specimen of his handwriting.¹⁸ Inspection of bodily features does not violate the privilege, because the accused is not made a witness. He may be required to exercise muscular action, as to roll up his sleeve or to take off his shoe, because it is testimonial compulsion, not compulsion alone, that is the essential idea of the privilege. Unless some attempt is made to secure from defendant a communication, written or oral, which is to be relied upon as his conscious recitation of fact, the demand made upon him is not a testimonial one.¹⁹ In recent times the privi-

¹⁷Tex. Crim. Rep....., 227 S. W. 2d 810 (1950).

¹⁸ McCORMICK AND RAY, *op. cit.* § 203.

¹⁹ 8 WICMORE, *op. cit.* § 2265.

lege against self-incrimination has been subjected to numerous abuses. So long as constitutional and statutory sanction is given to the privilege, it cannot be abandoned, but since the only substantial reasons for it have long since ceased to exist, it is well for our courts to confine it within the narrowest possible limits.²⁰

CHARACTER WITNESSES

Texas. The defendant in *Baker v. State*,²¹ having pleaded for a suspended sentence in a prosecution for rape, introduced several character witnesses. Upon cross-examination, the prosecutor questioned defendant's witnesses as to their personal knowledge of certain prior occasions upon which (according to the prosecutor) defendant had been arrested for drunkenness. Over defendant's objections the witnesses were required to answer. *Held*, the judgment should be reversed and remanded for the reason that the cross-examination was directed not at showing defendant's reputation but at showing defendant's character, *i.e.*, showing the witnesses' personal knowledge of defendant's conduct. Since only the reputation of defendant was in issue, and not his character, the cross-examination was not admissible.

This holding follows the well-established rule in Texas that character witnesses may give evidence only as to the general reputation of the accused. By filing application for a suspended sentence defendant puts in issue his reputation, thus enabling the State to show his bad reputation as a part of its case. "Reputation," as used in Article 778 of the *Texas Code of Criminal Procedure* (Vernon, 1948), is held to mean reputation as a peaceable, law-abiding citizen, and the State is not permitted to inquire into specific conduct or specific character traits.²²

Since Article 778 says nothing about character, the defendant who seeks a suspended sentence does not put his character in issue. As made admirably clear in *McNaulty v. State*,²³ there is no necessary correlation between one's reputation and one's character—

²⁰ McCORMICK AND RAY, *op. cit.* § 193.

²¹ Tex. Crim. Rep., 230 S. W. 2d 219 (1950).

²² McCORMICK AND RAY, *op. cit.* § 681, p. 877.

²³ 138 Tex. Crim. Rep. 317, 321, 135 S. W. 2d 987, 989 (1940).

character being that which one actually is and does, and reputation being that which others think and say about him. To admit testimony of a witness' personal knowledge of specific acts of defendant's misconduct would be to admit evidence as to a matter not in issue, *i.e.*, defendant's character. According to the *McNaulty* case, cited with complete approval by the court in the *Baker* case, the exact rule is that a witness may tell what he has *heard* about defendant's reputation but may not tell what he *knows* about the facts which may have gone to make up such reputation.

While no one would seriously dispute that evidence of defendant's specific acts of misconduct would frequently be of great value to the jury in suspended sentence cases, nevertheless the dangers of undue prejudice, unfair surprise, and confusion of minor issues with the main issue tip the scales heavily in favor of ruling out all such testimony. The sound reasons of policy behind the absolute exclusion of testimony regarding specific conduct where reputation is the issue are well set forth in *Wigmore*²⁴ and in *McCormick and Ray*.²⁵

EXPERT TESTIMONY TO PROVE NEGLIGENCE

Texas. In *Kelly v. McKay*²⁶ plaintiff sought an injunction and sued to recover for extensive damages to his home allegedly caused by use of explosives in defendant's nearby caliche pit. Plaintiff's witness, after qualifying as an expert, was permitted over defendant's objection to testify that he had examined the rock formation on which plaintiff's house rested as well as the topography of the land between the caliche pit and plaintiff's premises; that in his opinion 100 to 150 pounds of explosives would be necessary to cause rock tremors at the distance of plaintiff's house from the caliche pit; that he had never found so much explosive necessary to quarry gravel or caliche under reasonable conditions; and that in his opinion there would be no need to use a blast of 150 pounds of explosive in excavating a gravel pit. The trial court instructed a verdict for defendant and rendered judgment denying plaintiff

²⁴ 3 WIGMORE, *op. cit.* § 988, pp. 619, 624.

²⁵ MCCORMICK AND RAY, *op. cit.* § 672, p. 862.

²⁶Tex....., 233 S. W. 2d 121 (1950).