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Roy R. Ray

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## THREE NEW RULES OF EVIDENCE

*Roy R. Ray\**

THE lawyers of Texas owe a debt of gratitude to the Fifty-second Legislature for its enactment of three statutes which will do much to simplify the rules relating to proof of business and official records and to provide a solution for what has been an almost insoluble problem in cases where two persons perished in a common disaster. These statutes are: The Business Records Act,<sup>1</sup> the Official Records Act,<sup>2</sup> and the Simultaneous Death Act.<sup>3</sup> The statutes were drafted by the Texas Committee for the Improvement of the Law of Evidence, a voluntary organization composed of Texas lawyers, judges, and teachers of Evidence. The members of this Committee,<sup>4</sup> which was organized in May, 1950, having no motive other than the improvement of our rules of evidence, were the sole sponsors of these statutes. They acknowledge the fine support received from the members of the House Judiciary Committee and the Senate Civil Jurisprudence Committee. Without their understanding and active assistance it would have been impossible to secure the passage of these acts during the last and extremely

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\*Professor of Law and Supervisor of Instruction, School of Law, Southern Methodist University; co-author, McCORMICK & RAY, *THE TEXAS LAW OF EVIDENCE* (1937); author of articles in various legal periodicals.

<sup>1</sup> This Act was drafted for the Committee by Roy R. Ray.

<sup>2</sup> This Act was drafted for the Committee by Dean Abner V. McCall and Professor Charles T. McCormick.

<sup>3</sup> This Act was drafted for the Committee by Professor Clarence Morris.

<sup>4</sup> The members of the Committee are: Professor Charles T. McCormick of the University of Texas, Chairman; Justice R. Norvell of the San Antonio Court of Civil Appeals; Dean Abner V. McCall of Baylor University; Virgil T. Seaberry, Attorney of Eastland; Gordon Simpson, Attorney of Dallas (former Justice of the Supreme Court of Texas); James M. Williamson, Attorney of Fort Worth (formerly District Judge at Laredo); Professor Clarence Morris of the University of Texas; Professor Warren P. McKenney of St. Mary's University; Ralph W. Yarborough, Attorney of Austin (former District Judge there); Professor Newell Blakely of the University of Houston; and Professor Roy R. Ray of Southern Methodist University.

busy days of the Session. Special thanks are due Senators Kyle Vick of Waco and George Nokes of Corsicana, and Representatives Morris Cobb of Amarillo and Jim Sewall of Blooming Grove, who introduced the bills and pushed them in their respective committees. All attorneys, and especially trial lawyers, should familiarize themselves with the provisions of these new rules. With this thought in mind, I have considered it worthwhile to set forth below the text of each statute with some pertinent comments as to its need, its source, and its objectives.

### THE BUSINESS RECORDS ACT

This Act, which carries the title "Business Records—Admission as Evidence," was Senate Bill No. 288, and was enacted as Chapter 321 of the Laws of 1951, 52nd Legislature. It becomes Article 3737e of *Vernon's Texas Revised Civil Statutes*. The text is as follows:

"Section 1. A memorandum or record of an act, event or condition shall, insofar as relevant, be competent evidence of the occurrence of the act or event or the existence of the condition if the judge finds that:

- (a) It was made in the regular course of business;
- (b) 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 memorandum or record or to transmit information thereof to be included in such memorandum or record;
- (c) It was made at or near the time of the act, event or condition or reasonably soon thereafter."

"Sec. 2. The identity and mode of preparation of the memorandum or record in accordance with the provisions of paragraph one (1) may be proved by the testimony of the entrant, custodian or other qualified witness even though he may not have personal knowledge as to the various items or contents of such memorandum or record. Such lack of personal knowledge may be shown to affect the weight and credibility of the memorandum or record but shall not affect its admissibility.

"Sec. 3. Evidence to the effect that the records of a business do not contain any memorandum or record of an alleged act, event or condi-

tion shall be competent to prove the non-occurrence of the act or event or the non-existence of the condition in that business if the judge finds that it was the regular course of that business to make such memoranda or records of all such acts, events or conditions at the time or within reasonable time thereafter and to preserve them.

"Sec. 4. 'Business' as used in this Act includes any and every kind of regular organized activity whether conducted for profit or not."

The chief problem in the proof of business records has been that of authentication. It is obvious that the entries do not prove themselves and should not be admitted in the absence of some preliminary showing as to what the books and entries are and under what circumstances they were kept. It is here that our courts, as well as most other state courts, have been unnecessarily strict and have failed to keep pace with modern business development. Our courts and most others (in the absence of statutory change) have continued the old common law requirement that the person who made the entry and the person upon whose information it was based be produced as witnesses or shown to be unavailable by reason of death or other cause. Today business entries are usually kept on loose-leaf sheets or cards and are typewritten rather than in longhand. They are made upon information furnished from many sources. It is frequently impossible to identify the person who made the entry or who reported the information upon which it was based. The maker of the final entry usually has no personal knowledge of the transaction recorded. And even if the persons who reported the information and who recorded it could be identified and produced, they would almost inevitably have no recollection about the particular transaction, and their testimony would invariably be merely a statement to the effect that they correctly reported and recorded the matter in question.

The rigid common law requirements served no useful purpose and actually tended to prevent or discourage proof of just claims. Under the new Act all that is required is proof by any qualified witness that the entry was made in the regular course of business

as a part of the record of some establishment, and near enough to the time of the act recorded to have been fresh in the memory of those participating in the transaction. All other matters, including lack of personal knowledge, non-production of entrants and reporters, may be shown only for the purpose of affecting the weight to be given to the entry. Furthermore, the Act provides for a circumstantial method of proving the non-occurrence of an Act or event or the non-existence of a condition, namely, by showing that the records of the business do not contain any memorandum or record of such act, event or condition.

The movement for improvement in this field, which began approximately twenty-five years ago with the model statute recommended by the Committee of the Commonwealth Fund, has finally reached Texas. Three states and the Federal Congress adopted that statute. In 1936 the National Conference of Commissioners on Uniform State Laws approved a Uniform Business Records as Evidence Act. This statute with modifications has been adopted in some sixteen states. Our Act has been based in part on these two model statutes and in part on Rule 514 of the American Law Institute's Model Code of Evidence. It is believed, however, that the provisions of the Texas Act are more definite and not quite as broad as those of the Uniform Act.

#### THE OFFICIAL RECORDS ACT

This Act, which carries the title "Records—Admission as Evidence," was Senate Bill No. 289 and was enacted as Chapter 471 of the Laws of 1951, 52nd Legislature. It becomes Article 3731a of *Vernon's Texas Revised Civil Statutes*. The text is as follows:

"Section 1. Any written statement, certificate, record, return or report made by an officer of this state or of any governmental subdivision thereof, or by his deputy or employee, in the performance of the functions of his office shall be, so far as relevant, admitted in the courts of this state as evidence of the matters stated therein, subject to the provisions in Section 3.

"Sec. 2. Any written statement, certificate, record, return or report made by an officer of the United States or of another state or nation, or of any governmental subdivision of any of the foregoing, or by his deputy or employee, in the performance of the functions of his office shall, so far as relevant, be admitted in the courts of this state as prima facie evidence of the matters stated therein, subject to the provisions in Section 3.

"Sec. 3. Such writing shall be admissible only if the party offering it has delivered a copy thereof, or so much of it as may relate to the controversy, to the adverse party a reasonable time before trial, unless in the opinion of the trial court the adverse party has not been unfairly surprised by the failure to deliver such copy.

"Sec. 4. Such writings may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy. Except in the case of a copy of an official writing from a public office of this state or a subdivision thereof, the attestation shall be accompanied with a certificate that the attesting officer has the legal custody of such writing. If the office in which the record is kept is within the United States or within a territory or insular possession subject to the dominion of the United States, the certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office. If the office in which the record is kept is in a foreign state or country, the certificate may be made by a secretary of embassy or legation, consul general, consul, vice-consul, or consular agent or by an officer of a United States military government, stationed in the foreign state or country in which the record is kept, and authenticated by the seal of his office.

"Sec. 5. A written statement signed by an officer having the custody of an official record, or by his deputy, that after diligent search no record or entry of a specified tenor is found to exist in the records of his office, accompanied by a certificate as above provided, is admissible as evidence that the records of his office contain no such record or entry.

"Sec. 6. This rule does not prevent the proof of official records or of entry or lack of entry therein by any method authorized by any applicable statute or by the rules of evidence at common law."

This statute introduces no new principles or theories concerning the admissibility of evidence. The courts and legislators have

long recognized that written statements, certificates, records, returns and reports of public officials made in the course of their official duties should be received as an exception to the hearsay rule. Two reasons have dictated this result: (1) if public officials were required to testify in person, much of their time would be taken from the performance of their duties; (2) there is not the same need for cross-examination because the official statements made by a disinterested public official, usually under a duty he has sworn to perform, are generally trustworthy. Furthermore, in the usual case the records are subject to public inspection and check, and there is little likelihood of error or falsification. Certified copies are permitted because the public business would be seriously handicapped if the original records were tied up in litigation.

The real need for the new statute is to afford a simple and uniform procedure for proving the content of public records. We now have in our state government approximately 200 agencies, departments and institutions administered by some 140 boards or individuals. Most of these officials have special statutes providing that their official records, reports, returns, and certificates or certified copies thereof are admissible in evidence as prima facie proof of the matters therein stated. These numerous acts are scattered throughout the civil statutes and have no semblance of uniformity. It is piecemeal legislation in the wildest form. The new statute provides a single, simple procedure for making proof of the contents of any statement, certificate, record, return or report made by any state official in the performance of his duties. The same procedure with an additional safeguard is applicable to proof of records of the Federal Government or of another state or nation. The adverse party is protected against surprise by the provision for notice.

The first three sections of the statute provide for the admission of the official records, *etc.*, as prima facie evidence of the facts stated therein, subject to the provision for notice. These sections

are based upon The Official Reports as Evidence Act drafted in 1936 by the Conference of Commissioners on Uniform State Laws, Rules 515, 516 and 519 of the American Law Institute's Model Code of Evidence, Sections 11 and 11b of the proposed Missouri Evidence Code, and the simplified rule for official statements set forth on page 745 of *The Texas Law of Evidence* (McCormick and Ray). Section 4 deals with the manner in which the proof shall be made, that is, authentication. This is done by an official publication or by a copy attested by the officer having legal custody of the record. In case of copies of official writings from public offices outside this state the attestation must be accompanied by a certificate that the attesting officer has legal custody.

Under existing statutes very few state officials can certify that the records of their office contain no specified record or entry. Section 5 of the Act makes it possible to prove such fact by a written statement signed by the officer having custody of the record, accompanied by a certificate that such officer is the legal custodian. Provision is made in Section 6 for the parties to resort to other methods authorized by statute or common law rule. So the new rule is not compulsory. Sections 4, 5 and 6 are taken from Rules 44(a), (b) and (c) of the Federal Rules of Civil Procedure, covering the subject of certified and authenticated copies. In 1938 the American Bar Association's Committee on Improvement of the Law of Evidence, by a vote of 49 to 0, recommended the adoption by each state of Federal Rule 44 for proof of records by certified copy.

#### THE SIMULTANEOUS DEATH ACT

This statute, which carries the title "Simultaneous Death—Disposition of Property," was Senate Bill No. 74, and was enacted as Chapter 196 of the Laws of 1951, 52nd Legislature. It becomes Article 2583a of *Vernon's Texas Revised Civil Statutes*. The text is as follows:

"Section 1. When the title to property or the devolution thereof depends upon priority of death and there is no direct evidence that persons have died otherwise than simultaneously, the property of each person shall be disposed of as if he had survived, except as provided otherwise in this Act.

"Sec. 2. When a husband and wife have died, leaving community property and there is no direct evidence that they have died otherwise than simultaneously, one-half of all community property shall be distributed as if the husband had survived and the other one-half thereof shall be distributed as if the wife had survived, except as provided in Section 5 hereof.

"Sec. 3. If property is so disposed of that the right of a beneficiary to succeed to any interest therein is conditional upon his surviving another person, and there is no direct evidence that the two have died otherwise than simultaneously, the beneficiary shall be deemed not to have survived. Provided, however, if any interest in property is given alternately to one of two or more beneficiaries, with the right of each to take being dependent upon his surviving the other or others, and all shall die, and there is no direct evidence that they have died otherwise than simultaneously, the property shall be divided into as many equal portions as there are beneficiaries and those portions shall be distributed respectively to those who would have taken in the event that each beneficiary had survived.

"Sec. 4. If any stocks, bonds, bank deposits, or other intangible property shall be so owned that one of two joint owners is entitled to the whole on the death of the other, and there is no direct evidence that the joint owners shall have died otherwise than simultaneously, these assets shall be distributed one-half as if one joint owner had survived and the other one-half as if the other joint owner had survived. If there are more than two joint owners and there is no direct evidence that all have died otherwise than simultaneously, these assets shall be divided into as many equal portions as there are joint owners and these portions shall be distributed respectively to those who would have taken in the event that each joint owner survived.

"Sec. 5. When the insured and the beneficiary in a policy of life or accident insurance have died and there is no direct evidence that they have died otherwise than simultaneously, the proceeds of the policy shall be distributed as if the insured had survived the beneficiary.

"Sec. 6. This Act shall not apply to the distribution of the property of a person who has died before it takes effect.

"Sec. 7. When provision has been made in the case of wills, living

trusts, deeds, or contracts of insurance, or any other situation, for distribution of property different from the provisions of this Act, this Act shall not apply."

At common law where two or more persons died in a common disaster such as a wreck or fire, and the disposition of property depended upon which of them survived, any person asserting a right depending on survivorship had the burden of proving that fact. The Texas courts have followed the common law in this respect. When, as in most cases, no evidence of survivorship was available, neither party could successfully prosecute a claim, and the rights of interested persons could be determined only by negotiation and settlement. For all practical purposes the courts were closed to claimants in such cases. Legislation was needed to solve this problem. The need is made more acute by the great increase in simultaneous deaths brought about by the tremendous growth in airplane travel and by higher automobile speeds. The civil law system had developed a series of arbitrary presumptions of survivorship based on circumstances such as age, sex, and physical condition which indicate a capacity to prolong life in a calamity. These presumptions, which have been enacted by statute in a number of states, have no statistical base and often operate to defeat intentions. Texas has had no such statutes.

In 1940, after more than five years of study, the National Conference of Commissioners on Uniform State Laws approved a Uniform Simultaneous Death Act and recommended it to the states for adoption. By 1951 it had been adopted with various modifications in some 37 states. Our Act is based on the Uniform Act,<sup>5</sup> but there are some significant changes which will be mentioned later.

Simultaneous death is seldom within the contemplation of persons who make provisions for the disposition of their property on

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<sup>5</sup> It is interesting to note that seven Acts, based in part at least on Acts drafted by the National Conference of Commissioners on Uniform State Laws, were passed by the Fifty-second Legislature of Texas in 1951. Until this year only eight Uniform Acts had been adopted in Texas.

death, and of course many persons make no wills. The Act represents an attempt to protect the probable intention of owners of property who have made no specific provisions for simultaneous death. A person seldom desires to make provision for some one else who dies at the same time he does. Furthermore, when two persons perish at the same time, it is not likely that either would wish the heir of the other to be preferred to his own heirs. So the theory of the Act is that as to the property of each such person, he is treated as having survived. In this way it is believed that his property is most likely to go to the natural objects of his bounty. These factors were given primary consideration in the drafting of Sections 1, 2, 4 and 5. Section 2 of our Act is not in the Uniform Act. It covers the subject of community property specifically and is taken from the Nevada statute which was enacted in 1949.

Section 3 of our Act represents a considerable departure from the Uniform Act. The latter provides that where two or more beneficiaries are to take successively by reason of survivorship, and they die simultaneously, the property shall be divided equally among the successive beneficiaries. This would seem to be justifiable only when the probable intent of the grantor cannot be carried out. Our Act provides for arbitrary division only in such cases. When succession is conditioned on survivorship, the intention of the property owner is likely to be defeated if that condition is ignored. So Section 3 provides in effect that an interest dependent on survivorship is destroyed by simultaneous death.

The Act is to apply only in cases where the property owners fail to provide for simultaneous deaths. Whenever a grantor or donor of property indicates an intention in conflict with the provision of the Act, his expressed intention will be carried out. This is specifically covered by Section 7 of the Act, which is taken from the Uniform Act.

There is another respect in which the first five sections of the Texas Act differ from the Uniform Act. Each of the sections applies only when there is no *direct evidence* that the persons have

died other than simultaneously. The Uniform Act uses the phrase "sufficient evidence," and this was the phrase used by the draftsman of the Texas Act. However, the Legislature saw fit to change it to "direct evidence." This may cause difficulty in interpretation, but I doubt that it will materially affect the application of the statute.

#### EVIDENCE REFORM THROUGH LEGISLATIVE ACTION

Lawyers as a group may wonder why the Committee on Improvement of the Law of Evidence took their suggestions to the Legislature rather than to the Supreme Court. This is a perfectly reasonable inquiry and deserving of a frank answer. With reference to the Simultaneous Death Act, the Committee felt that since it involved the disposition of property, it was within the jurisdiction of the Legislature, and this Act was submitted to that body. However, as to the other rules, the Committee was unanimously of the opinion that Rules of Evidence should be promulgated by the Supreme Court under its rule-making power. Since Evidence is really only a part of trial procedure, it was believed that there was no substantial doubt as to the Court's authority in the premises. Furthermore, it has become increasingly clear that if we are to have any real improvement in this field, it will have to come from rules promulgated by the Court or enacted by the Legislature. No substantial progress has resulted from piecemeal appellate rulings on evidence points.

When the Business Records Rule was drafted, it was submitted to the members of the Supreme Court's Advisory Committee on Civil Procedure and to the State Bar of Texas Committee on the Administration of Justice. No substantial objection was made to the proposed rule, and in fact most of the replies were outspokenly favorable and expressed hope that the Court would adopt it. Copies were then sent to the Supreme Court early in January with the statement that the rule would be proposed to the Court for adoption at its Spring meeting with the Advisory Committee on Rules

of Civil Procedure. Within two weeks and without giving the Evidence Committee a chance to be heard on the matter, the Court summarily turned thumbs down on this rule as well as any other Rules of Evidence. The two reasons assigned were that the Court doubted its authority and did not deem it wise to enter the Evidence field. While I do not propose to speak for the other members of the Committee, in my own judgment this action of the Court was an unfortunate abdication of judicial responsibility. I cannot help but feel that a strong position in favor of making Rules of Evidence would have added to the Court's stature, not only with the bar but with the lay public.

With this abrupt rejection by the Court the Committee had no other alternative than to seek improvement at the hands of the Legislature. I am glad to state that we found the Senators and Representatives ready and willing to listen to our proposals for reform. We were received with great courtesy and respect by the members of the Senate and House Committees, and many of them worked tirelessly to pilot our bills through both houses after approval in the Committees. This experience has convinced me that our legislators can be depended upon to enact rules for the improvement of the administration of justice once such rules are properly presented to them and they are convinced of their merit. Of course, difficulties are to be expected and congested calendars to be reckoned with, but the results are more than worth the effort. We have made a good start toward modernization of our rules of Evidence. To my mind the path for further improvement is through the legislative halls, and it is my hope that what has been accomplished so far is only a beginning.