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Evidence

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EVIDENCE

NON-PRODUCTION OF WITNESS

Louisiana. A rather impractical Louisiana rule of evidence was further limited in *Lacaze v. Morway.*[1] The case involved an automobile collision about which the accounts of the respective parties differed widely. The plaintiff testified that he was driving at less than 30 m.p.h. when the defendant impulsively dashed out of a driveway into his path, the latter being drunk. The defendant insisted that he was driving across an intersection when the plaintiff came roaring down the street at 50 m.p.h, and that he had drunk nothing all evening except one beer an hour before.

At the trial it became apparent that there was only one disinterested witness to the accident, a passenger in the plaintiff's automobile who was not produced or even identified. The defendant invoked the Louisiana doctrine that the unexplained failure of a litigant to produce a material witness is presumptive evidence that the witness would have given unfavorable testimony.[2] A verdict for the defendant was returned on this presumption.

The court of appeals reversed the decision with something akin to a judicial blush; it had turned out that the missing witness was a married woman "who for obvious reasons did not want to get involved." It is hoped that this case has ridiculed the unrealistic presumption into the limbo of other discarded artificial evidence.

ADMISSIBILITY OF OFFICIAL CORRESPONDENCE

Oklahoma. In *Noble v. City of Bethany*[3] the trial court excluded from evidence two letters which were offered by the plaintiff under the Oklahoma Official Records Act.[4] The suit arose out of

[1] 57 So. 2d 791 (La. App. 1952).
[2] Reid v. Missouri Pacific Railway, 3 La. App. 608 (1925).
[3] ____Okla.____, 241 P. 2d 401 (1952).
[4] 12 OKLA. STAT. ANN. (Perm. ed.) § 486.

the pollution of plaintiff's lake by the new Bethany sewage treatment plant. Some time previously, the Chief Chemist of the State Department of Health had corresponded with the Chief Engineer of the Bureau of Sanitary Engineering, who in turn had written the Mayor of Bethany, stating that the sewage disposal facilities of the City were inadequate and likely to cause pollution and subsequent litigation.

The majority of the supreme court decided that the letters were properly excluded. It was pointed out that the statute applied only to "papers authorized or required by law to be filed or recorded in any public office." The letters were held analogous to a policeman's report based on hearsay[5] and to the Insurance Commissioner's certificate as to the contents of a policy,[6] both of which documents had previously been held inadmissible under the statute.

While it must be conceded that the court applied a correct literal interpretation of the statute, the dissenting opinion of Justice Gibson would seem to offer a more realistic view.[7] He pointed out that the Board of Health was required by law to investigate and dispose of water pollution problems[8] and that the letters in this case, although couched in polite language,[9] still amounted to an order that the pollution cease. Reports of water analysis made by the Department of Health under this statute were unquestionably admissible in evidence.[10] If the orders of the Board are kept out of court because of issuance as informal letters, private liti-

[5] Hadley v. Ross, 195 Okla. 89, 154 P. 2d 939 (1944).

[6] Kansas City Life Ins. Co. v. Meador, 186 Okla. 397, 98 P. 2d 20 (1939).

[7] 241 P. 2d at 405.

[8] "... [T]he State Board of Health shall have the authority to make an order requiring such pollution to cease within a reasonable time, or requiring such manner of treatment or of disposition of the sewage or other polluting material as may in its judgment be necessary to prevent the further pollution of such stream, or both." 63 OKLA. STAT. ANN. (Perm. ed.) § 614.

[9] "Before this project is officially submitted to this office for approval as required by law, I think it is only right that the city officials be informed of the position the Health Department will have to take...." 241 P. 2d at 403.

[10] Town of Sentinel v. Riley, 171 Okla. 533, 43 P. 2d 742 (1935).

gants are deprived of the use of facts discovered in public investigation by public officials.

MEDICAL CASE HISTORY RECORDS — ADMISSIONS IN ACCIDENT CLAIMS

Texas. The first Texas decision involving the scope of Section 2 of the new Official Records Act[11] is *Smith v. Riviere.*[12] The action was brought on behalf of an insane person to set aside his deed executed some three years prior to the lunacy proceedings, while he was in the naval service.

The first two hearings in the civil appeals court were directed to the question of the admissibility of the jury's finding in the prior lunacy proceedings that Riviere had been insane for three years. The court held that admission of the verdict was subject to objection, only the decretal part of the judgment being admissible in this action.

On the second rehearing, error was assigned to the admission of three Navy medical reports on Riviere's condition, including a case history of his mental illness from childhood. The reports were introduced as certified copies under federal[13] and state[14] statutes. The court here held that regardless of the sweeping language of the statutes, they were not intended to permit the introduction of evidence which would be otherwise objectionable:

> Neither statute expresses or implies an intent to abrogate the well-settled principle of the common law of the inadmissibility of hearsay evidence based on further hearsay evidence. . . .[15]

The result in this case is unquestionably the more sound con-

[11] TEX. REV. CIV. STAT. (Vernon, 1952 Supp.) art. 3731a.

[12] 248 S. W. 2d 526 (Tex. Civ. App. 1952).

[13] 28 U.S.C. 1946 ed. § 1733(a): "Books or records of account or minutes of proceedings of any department or agency of the United States shall be admissible to prove the act, transaction or occurrence as a memorandum of which the same were made or kept."

[14] Cited note 11 *supra.* The applicable part of § 2 admits into evidence "[a]ny written statement, certificate, record, return or report made by an officer of the United States . . . or of any governmental subdivision of the foregoing. . . ."

[15] 248 S. W. 2d at 530.

struction of the statute. A report from the files of the Federal Government has an authentic ring to it, and a jury would be likely to overlook its character as secondary hearsay (if such be the case). It is doubtful whether the legislature intended the statute to be other than a procedural simplification for proving the content of public records.[16]

A question of the admissibility of a claim made to the Industrial Accident Board according to law[17] was raised in *Texas General Indemnity Co. v. Scott.*[18] Plaintiff was injured while at work and filed a notice and claim stating that she had suffered permanent injury and damage to her left foot and general nervous system. In this suit, however, she asked damages for a permanent neck injury as well; the defendant insurance company unsuccessfully sought to introduce the claim as an admission. The court of civil appeals conceded that a party's silence, under circumstances where it would be natural and usual for him to speak, may be proved against him as an admission;[19] but it held that claims before the Industrial Accident Board were admissible solely for jurisdictional purposes[20] and that in any event the exclusion would be harmless error.

The supreme court, in reversing this holding, established the rule that notice of injury and claim for compensation filed with the Board was not privileged matter, but may be offered in evidence as an admission. The court pointed out, of course, that, like admissions received in evidence in other types of cases, such statements or omissions are but evidence and as such are subject to explanations or contradiction.[21]

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[16] See Ray, *Three New Rules of Evidence*, 5 Southw. L. J. 381, 386 (1951).

[17] TEX. REV. CIV. STAT. (Vernon, 1948) art. 8307, § 4a.

[18] ____Tex.____, 253 S. W. 2d 651 (1952), *rev'g* 246 S. W. 2d 228 (Tex. Civ. App. 1952).

[19] MCCORMICK AND RAY, TEXAS LAW OF EVIDENCE (1937) § 387.

[20] Uselton v. Southern Underwriters, 131 S. W. 2d 1040 (Tex. Civ. App. 1939) *er. dism. judg. cor.*

[21] *Cf.* MCCORMICK AND RAY, *supra* note 19, § 495.