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# Evidence

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# PART II: PROCEDURAL LAW

## EVIDENCE

by

Frank W. Elliott\*

**D**URING the past year there were a number of cases of interest dealing with various aspects of the hearsay rule.

In *Sherrill v. Estate of Plumley*<sup>1</sup> the court of civil appeals considered five questions concerning the admissibility of hearsay evidence in a proceeding to determine the heirs of Mrs. Alpha Genevieve Meyer who died intestate in 1962 leaving no children or spouse. Her parents were divorced in 1900 and Mrs. Meyer and her father were never in contact again. Her mother, Mrs. Jennie C. Pettis, died in 1950. Thus, under the intestacy statute<sup>2</sup> Mrs. Meyer's estate should pass to her maternal grandparents or their descendants. The parties each claimed that their respective predecessors were the true grandparents of Mrs. Meyer. The appellants claimed under Robert and Mary Plumley, and the appellees claimed under Richard and Alice Plumley.

The first issue before the court concerned the admissibility of a 1915 newspaper obituary of Robert Plumley. The notice recited that Robert Plumley was survived by three named children, but Mrs. Pettis was not listed among the survivors. The item was offered by the appellees to show that Mrs. Pettis was not the daughter of Robert Plumley as claimed by the appellants.<sup>3</sup>

The court quickly dismissed the suggestion that the obituary was admissible under the Business Records Act.<sup>4</sup> Since the notice was unsigned and the author was unknown, the appellees could not show that the author had personal knowledge of the facts stated in the notice. Similarly, whether anyone with the newspaper would have had personal knowledge of facts contained in the obituary columns in the ordinary course of business was not established. Therefore, neither of the requirements of section 1(b) of the statute were met.<sup>5</sup>

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1. 514 S.W.2d 286 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ ref'd n.r.e.).

2. TEX. PROB. CODE ANN. § 34(a)4 (1956).

3. No consideration was given to the question of whether the out-of-court statements offered to show a negative implication are properly classified as hearsay. See Advisory Committee's Note to FED. R. EVID. 803(7), 56 F.R.D. 183, 311 (1973).

4. TEX. REV. CIV. STAT. ANN. art. 3737e (1974).

5. Article 3737e:

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

. . . (b) It was the regular course of that business for an employee or representative of that 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 . . . .

The second theory proposed as a basis for admission of the obituary was that it qualified under the ancient documents exception to the hearsay rule. Under this exception it must be established: (1) that the document is more than thirty years old;<sup>6</sup> (2) that it is free from suspicious appearances;<sup>7</sup> and (3) that the document came from a place of proper custody.<sup>8</sup> Additionally, both *McCormick and Ray*<sup>9</sup> and *McCormick*<sup>10</sup> indicate that the author of the document must have had personal knowledge of the facts stated. Again, the identity of the author proved to be a stumbling block.

With respect to the ancient documents exception the court briefly considered the earlier Fifth Circuit decision in *Dallas County v. Commercial Union Assurance Co.*<sup>11</sup> in which a 59-year-old newspaper article describing a fire that occurred during construction of a county courthouse was admitted into evidence. The court of civil appeals determined that *Dallas County* was inapposite because in that case the newspaper article "was admitted because the reporter had actual knowledge of the fire and . . . it was a matter of local concern. It's age gave it trustworthiness."<sup>12</sup> An examination of the opinion in *Dallas County* does not reveal that the reporter had personal knowledge of the fire. The article was unsigned and the fire occurred at two in the morning.<sup>13</sup> Perhaps the fact that the fire was a matter of great local concern is a sufficient basis for the different result, but it is certainly a much closer question once the similarities in the two cases are realized. Although the court in *Sherrill* held that admission of the obituary was error, it concluded that the error was not reversible because of the trial court's cautionary instruction.<sup>14</sup>

The court also rejected application of the so-called "pedigree exception" to the hearsay rule for the same reasons that the business records and ancient documents exceptions failed. The pedigree exception is predicated on the notion that intra-family discussions of matters of family history are likely to be free from purposeful deception and are reliable sources of information regarding subjects such as the age or ancestry of family members.<sup>15</sup> The appellees established three frequently mentioned requirements for admission: (1) the obituary was written before the controversy arose;<sup>16</sup> (2) no motive

6. See C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 323 (2d ed. 1972) [hereinafter cited as MCCORMICK]; C. MCCORMICK & R. RAY, TEXAS LAW OF EVIDENCE § 1376 (1956) [hereinafter cited as MCCORMICK & RAY].

7. MCCORMICK § 323.

8. *Id.*

9. MCCORMICK & RAY § 1376, at 207.

10. MCCORMICK § 323, at 747 n.39 and accompanying text.

11. 286 F.2d 388 (5th Cir. 1961).

12. 514 S.W.2d at 291.

13. 286 F.2d at 390.

14. ". . . I think in overruling the objection and admitting the paper it is only proper to let the jury know when they received this item nobody is necessarily vouching this information in the column is absolutely accurate. We can all take notice that newspapers could make a mistake like anyone else could. The information could or could not be accurate . . ." 514 S.W.2d at 291-92.

15. 5 J. WIGMORE, EVIDENCE § 1481 (3d ed. 1940).

16. MCCORMICK & RAY § 1345. The federal rule does not retain this requirement. See Advisory Committee's Note to FED. R. EVID. 804(b)(5), 56 F.R.D. 183, 327 (1973).

for misrepresentation by the author appears;<sup>17</sup> and (3) the author was unavailable.<sup>18</sup> But since the author was unknown, the appellees were unable to establish the most basic element of the exception, a showing that the author was a family member.<sup>19</sup>

The second questioned item of evidence was an "heirship deed" which contained the following recitals:<sup>20</sup> "Know all men by these presents: That we, W.H. Plumley, Jennie C. Pettis, A.M. Plumley, and Lizzie Plumley, being all the heirs of Richard Plumley, deceased . . ." The court held that the deed was admissible under the "pedigree exception" because the grantors, unlike the author of the obituary, were identified and were shown to be members of the family. The court did experience some difficulty in disposing of the appellants' contention that the recitals were "conclusions of law, not statements of fact."<sup>21</sup> This objection was no more than a disguised attack on the weight to be given the recitals in the deed. The important consideration under the "pedigree exception" is whether the declarant had knowledge, acquired through intra-family discussions, of the matters of family history contained in a declaration. Whether the declaration is of a conclusory nature or not does not affect the basis of the admission of the declaration but only inhibits its usefulness before the jury.<sup>22</sup>

The third and fourth items of evidence considered by the court were the original and amended petitions in the divorce proceedings of Jennie and Sam Pettis in 1900. These documents were offered for the limited purpose of showing that the Pettises' daughter, Alpha Genevieve, was eighteen years old in 1900. The appellants claimed the petitions lacked authentication and were hearsay. The thrust of the authentication arguments appears to have been that pleadings should be excluded from the rule permitting ancient documents to be authenticated by showing that they are more than thirty years old, free from suspicious circumstances, and have been kept in a place where old documents are normally found.<sup>23</sup> There is no conceivable basis for excluding pleadings from the operation of this rule, and the court properly dismissed the contention with a minimum of discussion.

The original divorce petition was signed by Mrs. Pettis and the court had no hesitation in holding it admissible under the "pedigree exception." The amended petition, however, was signed by an attorney. The court properly decided that the "pedigree exception" was inapplicable because there was not a showing that the attorney was a family member. There was an intimation that the ancient documents exception to the hearsay rule might provide a basis for admission of the amended petition.<sup>24</sup> Yet, there was no showing

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17. MCCORMICK & RAY § 1344.

18. *Id.* § 1342.

19. *See id.* § 1343, and FED. R. EVID. 804(b)(5), suggesting that the exception be extended to include some other close relations.

20. 514 S.W.2d at 292.

21. *Id.*

22. The restriction finds no support in the treatises, or in the Federal Rules. *See* FED. R. EVID. 804(b)(5); MCCORMICK & RAY § 1347; MCCORMICK § 322.

23. *See* MCCORMICK § 223 for discussion and MCCORMICK & RAY § 1372, at 201, for a broad list of documents authenticated under this rule in Texas.

24. 514 S.W.2d at 293 .

that the attorney had personal knowledge of the facts stated in the document. Additionally, since the amended petition added little to what had already been stated in the original petition, no special need was shown to support admission of the amended petition.<sup>25</sup> The court held that it was harmless error to admit the amended petition because the issue for which it was offered was very limited and because the relevant part of the document was no different from the original petition.<sup>26</sup>

The fifth hearsay problem arose from the exclusion from evidence of a handwritten statement which was delivered by Mrs. Meyer to a funeral director at the time of Mrs. Pettis' death in 1950. The statement, which was delivered for the purpose of preparing an obituary notice, contained a statement that Mrs. Pettis had been the daughter of Robert Plumley. The court's discussion of the issue is unclear and confusing. While the trial court sustained the appellees' objection, the court of civil appeals, in holding that the exclusion was harmless error, also analyzed the issue as if the hearsay problem predominated. But, the only significant question was whether the document had been properly authenticated.

If it is assumed that the document had been authenticated, the "pedigree exception" would meet the hearsay objection.<sup>27</sup> The preliminary inquiry, however, must be whether the statement was actually written by Mrs. Meyer. The appellant introduced a bank signature card signed by Mrs. Meyer in order to show that it was her handwriting on the questioned document. Since no question of the authenticity of the signature card was raised, sufficient evidence was produced to warrant admission of the statement to the jury for comparison of the two handwriting samples.<sup>28</sup> Although it was error to exclude the statement, the court held that the error was not harmful because the substance of the statement could as easily be read to support the appellees' position rather than the appellants'.<sup>29</sup>

Finally, the court considered a question of the admissibility of home movies depicting Mrs. Pettis and Mrs. Meyer in the company of the descendants of Richard Plumley "in a family setting."<sup>30</sup> No question of authentication was raised. The appellants complained that the movies were not relevant and were prejudicial. Although it must be conceded that the evidence is not strongly probative of the issue of whether Mrs. Pettis was Richard Plumley's child, its relevance is still readily apparent and accordingly it was admitted.

In two cases courts of civil appeals considered the admissibility of inter-office memoranda under the Business Records Act.<sup>31</sup> The defendant in *Bardwell v. Central Mutual Insurance Co.*<sup>32</sup> disputed whether the plaintiff had sustained an injury while on the job. In support of its position the defendant offered a memorandum prepared by the president of the employer.

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25. See MCCORMICK & RAY § 1376.

26. 514 S.W.2d at 293.

27. See notes 15-19 *supra* and accompanying text.

28. TEX. REV. CIV. STAT. ANN. art. 3737b (1974).

29. 514 S.W.2d at 294-95.

30. *Id.* at 293.

31. TEX. REV. CIV. STAT. ANN. art. 3737e (Supp. 1975).

32. 505 S.W.2d 349 (Tex. Civ App.—Houston [14th Dist.] 1974, writ ref'd n.r.e.).

The writing was addressed "TO WHOM IT MAY CONCERN" and appeared to have been made some time after the plaintiff had sustained her injury. It contained a description of the plaintiff's activities on the day in question, including statements that the plaintiff had been discharged after less than one day on the job and that when the plaintiff left the employer's premises she was jovial and had made no complaint of injury. The court held that admission of the memorandum was reversible error. No showing had been made that the author of the document had personal knowledge of the facts contained in the memorandum. Similarly, the defendant did not show that some employee with knowledge of the facts would convey that knowledge to the author in the regular course of business. Thus, the requirements of section 1(b) of the Act were not met. An even more basic reason for exclusion of the memorandum was the failure of the defendant to show that the document was produced in the ordinary course of business as required by section 1(a) of the Act. The author testified that such memoranda were always prepared when a suit was threatened, but he could recall only one prior occasion in the fifteen-year history of the company when a similar memorandum had been produced. Upon a similar rationale, first established in the classic case of *Palmer v. Hoffman*,<sup>33</sup> the court could have denied the admissibility of the memorandum because it was prepared with a view to litigation and thereby suffered the dual maladies of being prepared outside the ordinary course of business and for a self-serving purpose.

In *Moore v. Richardson Savings & Loan Ass'n*<sup>34</sup> the defendant in a usury action contended that the usurious terms of the contract were inserted because of a mistake. In support of this defense the defendant offered a memorandum written by the loan officer assigned to investigate the matter after the plaintiff had complained to the defendant. The memorandum included the observation that "the contracts as set up are in error."<sup>35</sup> The plaintiff did not question the authenticity of the document nor was there any dispute that the writing had been made in the regular course of the defendant's business. Rather, the plaintiff complained that the loan officer could not have had personal knowledge of the facts stated in the memorandum, since he had not been employed by the defendant at the time the contracts were executed.

The Dallas court of civil appeals held that the memorandum was properly admitted. The court reasoned that the loan officer was a qualified expert in the field of loan contracts and, therefore, the ordinary rule that the declarant must have had personal knowledge did not preclude the expert from giving his opinion regarding the contracts. The Texas Supreme Court in *Loper v. Andrews*<sup>36</sup> expressly authorized the admissibility of expert opinions in business records. Since the opposing party might not have an opportunity to cross-examine an expert as to an opinion contained in a business record, the court in *Loper* established the requirement that the opinion must be one

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33. 318 U.S. 109 (1943).

34. 499 S.W.2d 364 (Tex. Civ. App.—Dallas 1973, no writ).

35. *Id.* at 367.

36. 404 S.W.2d 300 (Tex. 1966).

that would be generally accepted in the relevant field of expertise.<sup>37</sup> This prophylactic was not necessary in *Moore* because the loan officer was present at the trial and was subjected to extensive examination by the plaintiff's counsel. Nonetheless, the court found in accordance with the *Loper* requirement that no one could dispute that the contracts were erroneously written.<sup>38</sup>

In three Texas cases the courts considered the admissibility of hospital records. Two medical reports were in issue in *Gonzales v. Gilliam*.<sup>39</sup> The first contained a final diagnosis that the plaintiff had suffered a "cervical disc." The report was made some eight months after an operation had been performed to correct the condition. Apparently the doctor did not elaborate on the basis of his diagnosis in the report and accordingly the defendant complained that the report was not "couched in terms of a reasonable degree of medical probability."<sup>40</sup> The court rejected the defendant's argument and held that the report was properly admitted. An additional concern of the court in *Loper* was that an opposing party might be prejudiced because of his inability to cross-examine an expert who had entered a diagnosis in a business record. As a means of mitigating this prejudice and to insure the reliability of the diagnosis the court required that the record contain demonstrable medical facts sustaining the diagnosis.<sup>41</sup> The court in *Gonzales* held that this requirement was met by a detailed report by the doctor who performed the operation. Thus, the absence from the diagnostic record of corroborating facts was not fatal if the trial record elsewhere contained the necessary recitation of the supporting facts.

The second report considered in the *Gonzales* case contained a doctor's discussion of the possibility that the plaintiff had suffered a nerve complication. The questioned section of the record included a discussion of symptoms which tended to disprove the existence of the nerve complication coupled with the doctor's opinion that he would "hate to make this diagnosis." The court, relying on the supreme court's opinion in *Otis Elevator Co. v. Wood*,<sup>42</sup> held that since the questioned section of the report did not tend to prove anything harmful to the defendant, its admission was not error.

Likewise, *Texas Steel Co. v. Recer*<sup>43</sup> concerned the admissibility of doctors' reports. One report contained statements that the plaintiff was injured nine days before the doctor had examined him, and that he was in pain at the time of the examination. The accident had occurred in the presence of at least two other persons and the doctor's report was not offered to prove any facts relating to that event. Thus, this case was not like the "lone worker" cases in which statements in the doctor's report are offered to show how the plaintiff suffered the injury.<sup>44</sup> The court of civil appeals properly perceived this distinction and held that there was no reason to exclude the report. An-

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37. *Id.* at 305.

38. 499 S.W.2d at 367.

39. 506 S.W.2d 650 (Tex. Civ. App.—Eastland 1974, no writ).

40. *Id.* at 651.

41. 404 S.W.2d at 305.

42. 436 S.W.2d 324 (Tex. 1968).

43. 508 S.W.2d 889 (Tex. Civ. App.—Fort Worth 1974, writ ref'd n.r.e.).

44. *See, e.g.,* Hartford Accident & Indem. Co. v. Hale, 400 S.W.2d 310 (Tex. 1966).

other report contained a statement that the plaintiff had been in pain since the time of the accident. The court found that such statements of past physical conditions which were related to a consulting physician were hearsay and were erroneously admitted into evidence. However, the court refused to reverse the trial court on this point because the admission of this report constituted harmless error.<sup>45</sup> Under the new Federal Rules of Evidence<sup>46</sup> it is likely that statements made by a patient to a consulting physician would be admissible as an exception to the hearsay rule. The federal rules take the broader viewpoint that statements made by the patient to assist the doctor either in diagnosis or treatment should be admissible, although hearsay, because the physical well-being of the out-of-court declarant depends on the truthfulness of these statements and upon this premise is based the assurance of reliability necessary for the exception of statements from the hearsay rule.<sup>47</sup>

The Fifth Circuit in *Reyes v. Wyeth Laboratories*<sup>48</sup> continued to forge a liberal policy regarding documents which do not fit nicely into conventional exceptions to the hearsay rule. Judge Wisdom eschewed reliance on either the Texas Business Records Act or the federal statute<sup>49</sup> in sustaining the admission of a listing of polio cases in Hidalgo County, Texas, during 1970 in a products liability action against a manufacturer of an oral polio vaccine. The plaintiff apparently could not find a sponsoring witness for the document and therefore relied on cross-examination to establish that the County Health Department regularly kept such records, that one of the defendants' witnesses from the Health Department was present at the time the report was made, and that some of the handwriting on the document was that of the director of the Public Health Unit for the county. Notations on the report linked the defendants to the vaccine from which the plaintiff contracted polio.

Using the rationale of *Dallas County v. Commercial Union Assurance Co.*,<sup>50</sup> the court reaffirmed that a federal trial judge is free to admit any evidence under Federal Rule of Civil Procedure 43(a) so long as the judge is satisfied that the evidence is necessary for a full presentation of the case and that there is sufficient indication of the trustworthiness of the evidence.<sup>51</sup> In *Reyes* the necessity for the questioned document was readily apparent. Regarding the trustworthiness of the report, the court said that it may be presumed that the experts in the Department of Health had a high degree of motivation to be conscientious in analyzing and recording the incidence of polio in the county. Additionally, the witness from the Department of Health testified that she was present when the report was being drafted. Given these indications of the general reliability of the document, the nota-

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45. See TEX. R. CIV. P. 434. For an interpretation of the harmless error concept with regard to the erroneous admission of evidence see *Purvis v. Johnson*, 430 S.W.2d 226, 231 (Tex. Civ. App.—San Antonio 1968, no writ).

46. FED. R. EVID. 803(4).

47. See generally MCCORMICK § 293, at 692.

48. 498 F.2d 1264 (5th Cir. 1974).

49. 28 U.S.C. § 1732(a) (1970).

50. 286 F.2d 388 (5th Cir. 1961).

51. 498 F.2d at 1287.



tions linking the defendants to the vaccine given the plaintiff were also entitled to the conclusion that they were sufficiently trustworthy to permit the evidence to go to the jury.

In *Seeley v. Eaton*<sup>52</sup> the court of civil appeals applied, somewhat reluctantly, the rule set out by the Texas Supreme Court in an earlier decision concerning the use in evidence of medical texts. "When a doctor testifies as an expert relative to injuries or diseases he may be asked to identify a given work as a standard authority on the subject involved; and if he so recognizes it, excerpts therefrom may be read not as original evidence but solely to discredit his testimony or to test its weight."<sup>53</sup> Dr. Eaton, a defendant in a medical malpractice case, was asked on cross-examination if he recognized certain texts as standard authority. He refused to recognize *any* texts as authorities, although he did admit that he used some of them to obtain his medical knowledge. The trial court refused to allow excerpts to be read for any purpose, and the court of civil appeals affirmed on the basis of *Bowles v. Vourdon*.<sup>54</sup>

Several reasons have been advanced as a justification for the rule applied in *Eaton*. Medical knowledge may develop rapidly, so the textual material may be out of date; the technical language employed in texts may be confusing to the trier of fact; the possibility of quoting out of context raises the specter of an unfair use; there is a difficulty in determining what texts are those which could be considered as established authority; the expertise is really a matter of skill rather than academic knowledge, and other experts will therefore likely be better sources of evidence; the author of the text was not under oath and is not subject to cross-examination.<sup>55</sup>

Wigmore takes the position that only the lack of cross-examination poses any real reason for excluding the evidence for substantive purposes, and that the need of the evidence and the general assurance of reliability is such that it should be admitted. Only two states provide for a broad exception to the hearsay rule for scientific texts.<sup>56</sup> However, the Federal Rules of Evidence provide for an exception for "published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art" established as "reliable authority" by the testimony or admission of the witness or by "other expert testimony or by judicial notice."<sup>57</sup>

The court in *Eaton* recognized that under the present rule, it was "hardly surprising . . . that Dr. Eaton would refuse to recognize as an authority a text that could be used to impeach his testimony."<sup>58</sup> It suggested, however, that it might have been permissible for the trial court to have allowed the cross-examination since the expert admitted that he had used the texts in his

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52. 506 S.W.2d 719 (Tex. Civ. App.—Houston [14th Dist.] 1974, writ ref'd n.r.e.).

53. *Bowles v. Bourdon*, 148 Tex. 1, 6, 219 S.W.2d 779, 783 (1943) (emphasis added).

54. 148 Tex. 1, 219 S.W.2d 779 (1943).

55. *Id.* See generally 6 J. WIGMORE, *supra* note 15, § 1690.

56. *City of Dothan v. Hardy*, 237 Ala. 603, 188 So. 264 (1939); *Lewandowski v. Preferred Risk Mut. Ins. Co.*, 33 Wis. 2d 69, 146 N.W.2d 505 (1966).

57. FED. R. EVID. 803(18).

58. 506 S.W.2d at 723.

studies. As the court stated, "the exclusion of properly qualified medical texts solely upon the opinion of the testifying physician as to their lack of authoritative value seems to be somewhat harsh."<sup>59</sup> In *McMillen Feeds, Inc. v. Harlow*<sup>60</sup> the admission into evidence of an issue of a magazine to prove the truth of facts stated in the magazine was approved. Similar action with respect to an established medical text seems only reasonable.

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59. *Id.*

60. 405 S.W.2d 123 (Tex. Civ. App.—Austin 1966, writ ref'd n.r.e.).