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Evidence

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EVIDENCE*

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I. CONTINUED APPLICATION OF THE TEST OF PROBATIVE FORCE

It appears that the supreme court has continued in recent decisions to apply the test of probative force to determine the admissibility of evidence. As previously stated,[1] this test requires that evidence, to be admissible, must be of sufficient force so that if believed it logically tends to prove or disprove a fact or issue necessary to a decision of the particular case. The term "probative force" occasionally appears, but in most cases this term is not used by the court to explain its decision. Rather, the court continues to refer to historical formalized rules and exceptions. Yet, an understanding of apparently conflicting results reached in different decisions can only be obtained by applying the probative force test.

II. THE USE OF THE PROBATIVE FORCE TEST TO DETERMINE WHAT CONSTITUTES SUBSTANTIAL EVIDENCE

A conflict in the testimony of different witnesses offered by the same party does not necessarily destroy the probative force of all of such testimony. In *Young v. Kansas City Southern Ry.*[2] plaintiff appealed on the ground that the judgment and verdict of $5,000.00 was inadequate. Defendant called two doctors as expert witnesses, each of whom testified to the nature and extent of plaintiff's injuries. Plaintiff argued that the testimony of one of defendant's expert witnesses required a much higher verdict and conceded that the testimony of the other doctor, standing alone, constituted substantial evidence supporting the $5,000.00 verdict. In view of the conflicting testimony, plaintiff contended that the substantiality and probative force of the testimony of both doctors was destroyed. In

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*This article contains a discussion of elected Missouri court decisions reported in volumes 371 through 381 of South Western Reporter, Second Series.

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1. Thomson, *Evidence*, 28 Mo. L. REV. 539 (1963).
2. 374 S.W.2d 150 (Mo. 1964).

this case plaintiff directly referred to the term "probative force." The court in applying formalized rules of evidence stated that a party is not bound by the testimony of one of his witnesses insofar as such testimony is contradicted by that party's other evidence. Such testimony may be accepted or rejected by the jury in whole or in part. In effect, the court held that the substantiality and probative force of one of defendant's witnesses was not destroyed by the conflicting testimony of the other witness. In this case the jury merely performed its function of deciding that the testimony of one of defendant's witnesses had greater probative force than that of the other witness.

In the *Young* case, the court was not applying the test of probative force to determine the admissibility of evidence. That question was not discussed since the admissibility of the evidence was not in issue. Plaintiff had also presented evidence of an expert medical witness which would have supported a much higher verdict. It appears that what the plaintiff was really contending was that the testimony of both of defendant's witnesses was of sufficient force to be admissible but when a conflict occurred in the testimony of defendant's two witnesses, the substantiality and probative force of the testimony of both witnesses was destroyed and should have been removed from jury consideration in arriving at a verdict. Therefore, the jury would have been required to consider only the testimony of plaintiff's expert medical witness in determining the extent of the injuries to plaintiff and arriving at a verdict. The court did not agree and decided that the testimony of both of defendant's witnesses was substantial and of sufficient probative force to be admissible and the jury could select what testimony it preferred to believe.

The court applied the same formal rule in the case of *Hinds v. Kircher*[3] where the evidence presented by plaintiff was contradictory to that presented by defendant. In this case plaintiff's evidence established a collision between plaintiff's automobile and an automobile driven by defendant; but defendant produced evidence that no collision occurred. Here a verdict for either party would have been supported by substantial evidence and the jury in holding for the defendant merely determined that the probative force of defendant's evidence was greater than that of plaintiff's. The same formalized rule of evidence was applied by the court to conflicting evidence between parties as that applied in the *Young* case[4] to conflicting evidence of a party's own witnesses.

3. 379 S.W.2d 607 (Mo. 1964).
4. Young v. Kansas City Southern Ry., *supra* note 2.

The opinion in *Coffman v. St. Louis-San Francisco Ry.*[5] is an exceedingly clear explanation that reasonable inferences from specific evidence have substantial probative force. There, a jury verdict in the amount of $270,000.00 for a quadraplegic plaintiff was reduced to a judgment of $220,000.00. It is a constantly reoccurring problem to measure in a monetary amount the future value of plaintiff's injury, medical expenses, loss of earnings, and life expectancy. In considering such cases, the *Coffman* opinion is required reading. The court made a detailed review of the evidence and illustrated the reasonable inferences that can be drawn from various portions of the evidence. Here the principal was restated that an essential element of the plaintiff's case or of a defense may be supplied by inference from a fact or testimony as to a specific subject. So long as the jury's verdict is based upon a reasonable presumption founded upon the evidence, then the evidence taken as a whole has sufficient probative value to support the jury verdict. Of course, reasonable inferences from other definitive evidence or circumstantial evidence may be used and has sufficient probative force to establish facts which have already occurred and such presumptions and circumstantial evidence are not limited to proving facts in the future.

III. The Probative Force of Evidence May Be Against the Party Introducing It

Williams v. Cavender[6] illustrates the point that evidence may be admissible under the probative force test but that the force of the evidence itself may be against the party offering it. There plaintiff brought an action for the death of her husband, as a result of the head-on collision of two automobiles. There were no witnesses to the collision. The only evidence as to how the collision occurred was supplied by the investigating highway patrol officer who was called as a witness by plaintiff. The court decided that the physical facts found by the highway patrol officer did not establish that the deceased driver of the defendant's automobile was or was not negligent. Then the court went on to hold that the physical facts did establish that plaintiff's deceased husband was guilty of negligence either directly causing or directly contributing to the cause of the collision as a matter of law. Thus, plaintiff was barred from recovery and the judgment in plaintiff's favor was reversed because of the probative force of

5. 378 S.W.2d 583 (Mo. 1964).
6. 378 S.W.2d 537 (Mo. 1964).

the evidence introduced by plaintiff. This illustrates that evidence presented by one party which is admissible under the "probative force rule" may prove an ultimate issue as a matter of law in favor of another party to the litigation.

IV. The Probative Force of Judicial Notice

Judicial notice is an example of the working of the probative force test. The function of the doctrine of judicial notice is to excuse a party having the burden of establishing a fact from the necessity of formal proof of the fact by objective evidence.[7] The facts or state of facts of which the court will take judicial notice are constantly changing. What is common knowledge today may not have been known even ten years ago. The constant change in what is included in the area "common knowledge" or "encyclopedic knowledge" or "established scientific fact" forces a recognition that certain areas of judicial notice have changed or are changing.

There is no way of being certain that the court will take judicial notice of a matter unless the supreme court has by prior decisions under the same or similar circumstances taken judicial notice of the same subject matter. Therefore, the careful lawyer will be certain that the court will take judicial notice of an essential fact or element of his client's case before relying upon the probative force of judicial notice to establish that fact. Judicial notice once taken has absolute probative force and in reality is not a matter of evidence. Rather, it is the elimination of the necessity of evidence.

In *Huttig v. City of Richmond Heights*[8] the court took judicial notice of the changes which have taken place since 1941 in the Richmond Heights area of St. Louis County. In *Martin v. Sloan*[9] the court took judicial notice that there was no town or community between two geographic points.

An excellent illustration of the absolute probative force arising from the court's judicial notice of a particular state of facts is found in *Mt. Olivet Baptist Church v. George.*[10] There plaintiffs contended that the defendant, George, was required to drive as close as practical to the right curb of a street while turning onto another street in accordance with the

7. McCormick, Evidence 687 (1954).
8. 372 S.W.2d 833 (Mo. 1963).
9. 377 S.W.2d 252 (Mo. 1964).
10. 378 S.W.2d 549 (Mo. 1964).

appropriate Kansas statute. Plaintiffs further contended that the physical facts and circumstances in evidence constituted a substantial showing that defendant had violated this statutory duty so that defendant was negligent as a matter of law. The court held that plaintiff did not make a submissible case for the jury, pointing out that it was common knowledge and a physical fact that a vehicle 45 feet long could not hug or be immediately adjacent to the curb along the vehicle's full length while the vehicle was making a right-hand turn. The court stated that no 45-foot vehicle could do this and remain in the roadway.

In *Ward v. City Nat'l Bank & Trust Co.*[11] the court took judicial notice of continued and gradual reduction of the value of the dollar and the forces of inflation. The court stated that while the verdict was a liberal award, it would not order remittitur because of the inflationary forces of which it took judicial notice.

V. Probative Force of Photographic Evidence

In *Jones v. Smith*[12] photographs were admitted in evidence showing the location of an accident. The photographs were taken on a clear, sunny day, but it was obvious that the collision had actually occurred during a heavy rain. The court held that it had long been the rule that photographs of a location or of objects are admissible in evidence even though taken long after the event and when changes have occurred. Here the jury was made fully aware of the difference in conditions between the time of the collision and the time of the taking of the photographs. Therefore, no abuse of discretion was made by the trial court in admitting the photographs as they were of sufficient probative force to show sight, distances and physical facts at the scene of the collision.

The court reached a similar result in the case of *Boydston v. Burton*[13] where photographs showing the view that each motorist involved in an accident had of the other motorist were admitted even though taken some two years after the accident. If the photographs are of sufficient probative force that they tend to prove or disprove a fact or issue necessary to a decision of the case, they are admissible. This is true regardless of whether or not the photographs were taken after the conditions had

11. 379 S.W.2d 614 (Mo. 1964).
12. 372 S.W.2d 71 (Mo. 1963).
13. 379 S.W.2d 536 (Mo. 1964).

changed. However, the court will require other evidence to establish the changed conditions so that the danger of misleading the jury is minimized.

In the *Boydston* case the court also admitted color transparencies showing a peg which had been driven into plaintiff's leg for the purpose of attaching traction as well as the traction device. These transparencies were objected to on the grounds that they were inflammatory and prejudicial and that there was no showing that they accurately portrayed the matters they showed. The court distinguished two prior cases, *Faught v. Washam*[14] and *Kickham v. Carter*[15] and held that the subject matter portrayed was not of such inflammatory or prejudicial nature as would justify the view that the court abused its discretion in admitting them. In distinguishing the *Faught* case the court in *Boydston* said:

> Inherent in the quality of the photographs there under scrutiny was that of a distinct want of natural color renditioning both as to parts affected and background as well, and this was so pronounced or distorted as to make their probable inflammatory and prejudicial effect outweigh their probative value.[16]

In effect it appears that what the court is really saying with respect to color photographs, is that where there is a distinct want of natural color renditioning, the photographs so inaccurately portray the subject matter that they have little or no probative force.

VI. Expert and Opinion Evidence

In *Keith v. Jos. G. Schmersahl Co.*[17] plaintiff brought an action for injuries sustained in a fall on the steps of defendant's display home. There was a plastic cover on the steps of the stairway upon which plaintiff fell. A similar plastic cover was offered in evidence and there was testimony to establish that the plastic cover offered was identical or similar to the one upon which the plaintiff fell. An engineer made certain tests with the particular strip of plastic offered in evidence and plaintiff contended that the court erred in permitting the engineer to testify to the result of this experiment because it created a false impression in that the jury was led to believe that the plastic upon which plaintiff had fallen was not slick or slippery. A simple test was performed by the engineer, consisting of pulling

14. 329 S.W.2d 588 (Mo. 1959).
15. 314 S.W.2d 902 (Mo. 1958).
16. Boydston v. Burton, *supra* note 13, at 542.
17. 371 S.W.2d 334 (Mo. 1963).

a weighted block with a scale attached across eight types of material employed as floor covering. The court said:

> The simple test performed by the engineer, pulling a weighted block with a scale attached across eight types of material employed as floor covering, was not particularly impressive from a scientific standpoint (Annotation 76 A.L.R.2d 354, 374), but from mere observation the jury was as capable of drawing the proper inference as was the expert (James v. Kansas City Gas Co., 325 Mo. 1054, 1070, 30 S.W.2d 118, 124), and in all the circumstances it may not be said that the trial court manifestly abused its discretion in permitting the witness to testify as to the results of his experiments.[18]

What the court appears to be saying is that testimony of the expert witness as to the result of the experiment had little probative value, but since the jury could draw its own conclusions from mere observation, the trial court had not manifestly abused its discretion in permitting the engineer to testify and no reversible error occurred.

In *Jones v. Smith*[19] plaintiff objected to the admission of testimony of defendant's expert witness, as to what would happen when vehicles collided head-on at various speeds and angles, what he would expect to find in the road after a collision, and which wheel of a Chevrolet would carry the weight upon an assumed impact, for the reason that such testimony was an improper subject for expert testimony. The court cited the rule that the admission of expert testimony in a given situation rests in the first instance on the sound discretion of the trial court and its decision in those respects will not be set aside in the absence of a showing of an abuse of discretion. The court held that in the instant case the trial court had carefully limited the witness's testimony, particularly as to matters of opinion relating to question of common knowledge and also on the strongly contested issue of the angle at which the vehicles collided. Therefore, there was no abuse of discretion on the part of the trial court.

In *Harris v. Goggins*[20] an action by the administrator of decedent's estate was instituted for personal injuries sustained by the decedent. A doctor who had never examined the decedent was permitted to testify as an expert for plaintiff. He had merely examined the records of Bonne Terre Hospital and of Barnes Hospital, which related to the decedent. These

18. *Id.* at 336.
19. *Supra* note 12.
20. 374 S.W.2d 6 (Mo. En Banc 1963).

records were admitted in their entirety. The expert was asked to state various opinions based upon those records and an objection was made that this was improper because based on hearsay. Other hypothetical questions were based on these records and objections were made that the questions were based upon facts not in evidence. The court ruled that this was proper testimony by an expert since the hospital records were in evidence and the expert's opinion based on these records was admissible. The doctor's testimony had sufficient probative force where his opinions were based on hospital records already in evidence.

An example of where certain doctor's notes taken in consultation with plaintiff were inadmissible is the case of *Johnson v. Sandweg*.[21] The records revealed that plaintiff had been married three times and that two of the marriages terminated in divorce. The court held that to admit that portion of the notes revealing the previous marriages and divorces of plaintiff was reversible error. The evidence of plaintiff's prior marriages did not tend to prove or disprove a fact or issue necessary to a decision of the case. Thus, in applying the test of probative force this evidence was inadmissible.

Another kind of expert evidence was acknowledged by the court as having probative force in *Ward v. City Nat'l Bank & Trust Co.*[22] where the American Standard Safety Code for elevators was used as evidence in the examination of witnesses. Witnesses testified that many concerns follow that code and there was evidence that the new code was published while the elevator was under construction and was adopted by the City of Kansas City before the elevator was turned over to the owner. The court said that the standards are promulgated by experts in that line of business and ruled that in using the code there was no error committed and this was evidence which the jury could consider on the question of negligence. The court thereby decided that the code had sufficient probative force to permit its use in the questioning of witnesses. The fact that witnesses in the instant case had testified that many concerns follow the code and that Kansas City had adopted it established its probative value.

An interesting case discussing the use of expert testimony is *Phillips v. Shaw*[23] where testimony by expert witnesses, an engineer and a physician, was refused. In this case plaintiff was trying to prove that something had been thrown by defendant's lawn mower causing an injury to plaintiff's leg. Offers of proof were made that the engineer would have testified that

21. 378 S.W.2d 454 (Mo. 1964).
22. *Supra* note 11.
23. 381 S.W.2d 768 (Mo. 1964).

in his opinion something thrown by defendant's lawn mower could have caused plaintiff's injury and that if a part of the lawn mower had broken off, it would have been propelled a distance of thirty feet. He would have further testified that at the time of his inspection of the lawn mower he found numerous nicks on the lawn mower blade. The inspection of the mower was made more than two years after the injury occurred. The court held that the first two questions that the engineer would have testified to were questions for the jury and that the expert's testimony would not have aided the jury in the determination of the ultimate issue of negligence. The court further held that the last item was too remote from the time of the accident. It appears that what the court was really saying is that the matters that the expert was attempting to testify to did not tend to prove or disprove a fact or issue necessary to a decision and, therefore, were of no help to the jury in reaching its decision. The same application was made to the testimony sought to be elicited from plaintiff's physician as to whether the operation of the lawn mower caused the injury to plaintiff's leg.

VII. Relevancy of Evidence with Respect to The Test of Probative Force

Switzer v. Switzer[24] was a will contest case in which Hadley Switzer and his wife were accused of exerting undue influence upon the testator, George L. Switzer. Various parties involved in the contest, including Hadley Switzer, farmed portions of testator's farms on a fifty-fifty basis with testator. During the cross-examination of Hadley Switzer, the contestants developed the fact that he had purchased fertilizer worth about 2,000 dollars in 1960, and, over objections that the evidence was irrelevant, it was shown that subsequent to testator's death, he had charged against testator's estate 5,900 dollars for fertilizer and seed, including purchases in 1961 and 1962. This evidence was admitted on the theory that contestants were attacking the witness's credibility. Hadley Switzer testified that he had the approval of testator's administrator for these purchases. The court held:

> Evidence in any suit should be relevant; and evidence that throws no light on the controversy should be excluded as it tends to confuse the issues and operate to prejudice a party before the jury.

24. 373 S.W.2d 930 (Mo. 1964).

> To invalidate a will, undue influence must be directly connected with the execution of the will, must operate at that time, and must destroy the free agency of testator in the execution of the will. Baker v. Spears, supra, 210 S.W.2d 13, 18(5). Hadley Switzer's purchase of seed or fertilizer after testator's death in August, 1960, and charging the same against testator's estate is a collateral matter involving the rights of testator's estate against him or the vendors against him or said estate. It does not tend to establish Hadley's exercise of undue influence over testator at the time of the execution of the will of July 31, 1959.[25]

In the instant case the court held that the evidence was inadmissible because it did not tend to prove or disprove a fact or issue necessary to a determination of the case. Note that the court actually mentioned in this case that evidence which throws no light on the controversy should be excluded as it tends to confuse the issues. Therefore, such evidence has no probative force.

In *Charles F. Curry and Co. v. Hedrick*[26] an action for damages was instituted by plaintiff against defendant arising out of the sale of an airplane to plaintiff. The airplane was officially "grounded" as unairworthy by the Federal Aviation Agency about seven months after purchase. It was later returned to defendant by plaintiff for correction of the discrepancies which took a considerable length of time, and defendant refused to return the plane to plaintiff without first receiving among other things a release for any liability with respect to loss of use of the plane for the time it was being repaired. Plaintiff was informed by defendant that defendant would let the airplane sit unless the plaintiff, among other things, released defendant from liability in writing. Count One of plaintiff's petition, for the loss of use of the airplane, was based upon alleged breaches of certain expressed warranties and Count Three was in trover for alleged conversion. Plaintiff sought exemplary damages as well as actual damages under its conversion count. Plaintiff claimed error in the exclusion of evidence that the defendant let the airplane sit outside for fifteen months without running its engines with resulting damages to the aircraft. Defendant argued that if it converted the airplane on December 28, its treatment of it thereafter was its business and not plaintiff's. The court held that it was error not to admit this evidence since evidence of other acts of the defendant than those alleged for which damages were sought, both preceding as well as

25. *Id.* at 939.
26. 378 S.W.2d 522 (Mo. 1964).

following the particular acts, was admissible under an issue of exemplary damages if so connected with the particular acts as tending to show defendant's disposition, intention or motive in the commission of the particular acts for which damages were claimed. Here was an example of evidence having probative force where it did not tend to prove or disprove a fact bearing on a principal issue, but only had value in relation to the issue of exemplary damages.

Another example of evidence which was properly admitted when normally it would have been excluded is found in the case of *State v. Salmark Home Builders, Inc.*[27] This was a condemnation action in which defendant's witness made statements on cross-examination which were contradictory to statements made in a prior trial. In the transcript of the prior trial there was evidence of amounts paid by a condemnor or received by condemnee for other property included in the same condemnation proceedings as in the instant case. Defendant's contention was that the trial court erred in permitting the testimony from the prior trial to be read when it contained statements of amounts paid even though the property was included in the same condemnation proceedings. The court announced that there was no doubt but that the law does not permit a showing of how much was paid or received for land involved in the same condemnation project. However, the court went on to say that this rule had no application when the information as to the price paid or received was disclosed upon proper cross-examination of a witness. The court said:

> Under the circumstances, we are of the opinion that the disclosure in question was a proper fact for the jury to consider, along with Mr. Ong's explanations, in weighing the witness's testimony as to value and damages, and thus that the trial court did not err in permitting the cross-examination in question.[28]

While the evidence admitted would normally have been inadmissible, in view of the conflicting testimony of the witness, the evidence became admissible to help the jury in determining the probative value of the testimony. Therefore, the testimony given by the same witness in the prior trial as to amounts paid for other property included in the same condemnation proceedings was not admitted for the purpose of establishing the value of the property in the instant proceeding, but it was of sufficient probative force to be admissable since it tended to prove or disprove and help the jury in determining the value of the testimony elicited in the instant case.

27. 375 S.W.2d 92 (Mo. 1964).
28. *Id.* at 97.

VIII. Probative Force and Presumptions

In *Tilton v. Woods*[29] a suit in equity was brought for a judicial declaration that a contract whereby the plaintiff agreed to devise a farm to defendants if they would farm it during their lifetime had been terminated and canceled by a subsequent release and quit-claim deed. Defendants filed a counterclaim. The court held that the contract was canceled, abrogated and rescinded by the release and quit-claim deed. Plaintiff did not testify and defendants sought the benefit of a presumption that plaintiff's testimony would have been unfavorable to plaintiff because of her failure to testify. Defendants attacked the validity of the release on the grounds that it was paid by misrepresentation, fraud and duress and that it was not supported by a valuable consideration. The court held that the burden of proof on the issue of mistake was upon the defendants and that they did not sustain that burden. Therefore, no unfavorable presumption would arise because of plaintiff's failure to testify since defendants had not made a prima facie case. The court cited the rule that no duty rests upon the party charged to speak until the other party has introduced evidence which, unexplained, makes a case against him. This was an example of a party not sufficiently sustaining the burden of proof to give rise to a presumption and therefore not benefiting from the probative force that such presumption would carry.

In *Terminal Warehouses v. Reiners*,[30] plaintiff, Terminal Warehouses, brought an action against Reiners for the damage to its truck arising out of an automobile collision. Reiners counterclaimed against Terminal Warehouses and the driver of its truck. The only evidence as to the agency relationship between the driver of the truck and Terminal Warehouses, was that Terminal Warehouses owned the truck involved in the accident and that the truck was being driven by a Walter W. Bollman. There was no evidence to establish that Bollman was the regular employee of Terminal Warehouses. The court acknowledged that the general rule is that upon proof that a certain employer owned a certain vehicle which was being driven at the time in question by one of its regular employees, a presumption arises that such employee was driving the vehicle in the service of his employer. The court further stated that upon substantial proof to the contrary, the presumption disappears but the facts giving rise to the presumption remain. However, in the instant case where the only proof was that

29. 371 S.W.2d 291 (Mo. 1963).
30. 371 S.W.2d 311 (Mo. 1963).

the truck involved in the accident was owned by Terminal Warehouses and that the driver of the truck was Bollman, but there was no proof that Bollman was a regular employee of Terminal Warehouses, the court decided that a presumption arose that Bollman was Terminal's agent but upon substantial evidence to the contrary the presumption was destroyed and the facts remaining did not support a reasonable inference of agency between Bollman and Terminal. Therefore, no submissible case was made on the issue of agency. This case is required reading for any lawyer trying to establish an agency relationship.

St. Louis Union Trust Co. v. Krueger[31] is a case which should be of interest to every lawyer who engages in probate work. Here, the court held that when a testator devises a fractional part of his estate to a named beneficiary, that share should represent the fractional share of the estate available for distribution after payment of all debts, claims, administration expenses, taxes, including federal estate taxes, and other lawful charges. This was a case of first instance on this precise point in Missouri. The court said:

> It must be presumed that the testatrix, as an adult person mentally capable of managing her affairs and making her will, knew that the various charges imposed by law against the property of her estate would have to be paid by her executors before the legatees designated in her will could be paid the various amounts from her distributable estate.[32]

In the instant case the presumption appears to be a rule of substantive law which arises without the requirement of any evidence on the matter. However, this presumption can also be rebutted.

IX. Documentary Evidence and the Best Evidence Rule

In *Bakelite Co. v. Miller*[33] plaintiff sought, among other things, to recover a sum of money as the alleged balance due on an open account for merchandise sold and delivered by plaintiff to the J. H. Miller Manufacturing Company, the payment of which had been guaranteed in writing by the individual defendants. There was a jury verdict for the defendants on that issue. Recognizing the general rule that the jury could believe or disbelieve the plaintiff's uncontradicted or uncontroverted evidence and if it did not believe the evidence, it could find for the defendants, plaintiff

31. 377 S.W.2d 303 (Mo. En Banc 1964).
32. *Id.* at 304.
33. 372 S.W.2d 867 (Mo. 1963).

sought to bring itself within an exception to this general rule contending that its evidence was uncontradicted and since its proof was largely documentary the general rule as to "conclusive documentary evidence" should be applied. The court said that the general rule as to "conclusive documentary evidence" applies to an instrument or record having legal efficacy to which the one sought to be bound is in some way a party, or the truth of which he vouches for, either expressly or in legal effect, or is estopped to deny. It was held that the only "documents" which plaintiff referred to were its own books and records which were not offered in evidence, and even if they had been offered, those books and certain letters written by plaintiff to defendants were not "documentary" within the meaning of the exception to the general rule that the jury may believe or disbelieve plaintiff's evidence. The records which plaintiff attempted to rely on did not have sufficient probative force to warrant the application of the conclusive documentary evidence rule and the jury was free to determine the value of such evidence.

X. Admissions Against Interest

Hill v. Seaboard Fire & Marine Ins. Co.[34] involved a suit on an uninsured motorist clause of an automobile insurance policy issued by defendant to plaintiff. There was evidence of statements made by a claims adjuster for defendant that the other vehicle with which plaintiff's vehicle came in contact was uninsured. Defendant's objection was that the statement was made by one not authorized by the defendant corporation and that the testimony was hearsay. The court held that the adjuster's declarations, in the nature of admissions against the interest of the defendant and made within the scope of his employment and in direct connection with his investigation of plaintiff's claim and as a part of the transaction itself was evidence in the case and could be considered as such. It appears that the court held that these admissions as long as they were made within the scope of the adjuster's employment were of sufficient probative force to be considered.

XI. Probative Force of Evidence Obtained Wrongfully

In *Diener v. Mid-American Coaches, Inc.*[35] a bus belonging to defendant collided with an automobile. Plaintiff was a passenger on defendant's bus. A pathologist testified as to the alcoholic content of the blood of

34. 374 S.W.2d 606 (K.C. Mo. App. 1963).
35. 378 S.W.2d 509 (Mo. 1964).

deceased driver of the automobile with which the bus collided. Plaintiff contended that this evidence was incompetent because obtained by the unlawful and criminal desecration of a dead body amounting to an unconstitutional search and seizure, and the use of the data obtained was against public policy. The court held that evidence which is otherwise admissible will not be excluded because it has been obtained fraudulently, wrongfully or illegally. In so holding, the Court said that this constitutional right is personal in nature and plaintiff had no standing to complain or urge the constitutional question since it was not plaintiff's blood that was drawn and there was no showing of a relationship between plaintiff and the driver of the automobile involved in the collision. The court went on to hold that the evidence of intoxication was admissible on the issue of the cause of the collision. Actually, plaintiff was relying on a constitutional right to keep this evidence out of the case and the question of the probative force of such evidence was not in question.

XII. Extrinsic or Parol Evidence

Wolf v. Miravalle[36] is authority for the proposition that where an uncertainty in the description of land conveyed does not appear upon the face of the deed but evidence discloses that the description applies equally to two or more parcels, a latent ambiguity is said to exist and extrinsic or parol evidence is admissible to show which tract or parcel of land was intended. Before parol evidence has sufficient probative force to be admissible, inquiry must be made to determine if a latent ambiguity exists. Once the ambiguity is shown, parol evidence becomes of sufficient probative value to clarify the ambiguity.

Another example of parol evidence having sufficient probative value to be admissible is found in *Smith v. Tracy*.[37] Here the court held that evidence of oral agreements and conversations prior to the execution of a written contract for the purchase of real estate was properly admitted where a purchaser had counterclaimed for the vendors' fraud in inducing the purchase. The court said that the plaintiff appeared to recognize the exception to the parol evidence rule in situations involving fraud but that plaintiff contended the parol evidence should not be admitted until a showing of fraud had been made. The court said that it is almost always necessary to admit parol evidence in order to prove the fraud and there-

36. 372 S.W.2d 28 (Mo. 1963).
37. 372 S.W.2d 925 (Mo. 1963).

fore the necessity of showing fraud before the parol evidence would become admissible would for all practical purposes destroy the exception to the parol evidence rule which exists when fraud is alleged. Therefore, contrary to the *Wolf* case,[38] where a latent ambiguity existed, and a showing of the ambiguity was necessary before parol evidence was admissible, no showing of fraud was necessary in the principal case before parol evidence was admissible on that issue. In applying the holding of the *Wolf* case and the holding of the *Smith* case, it appears that the rule that parol evidence cannot be admitted to vary the terms of a written contract is premised on the theory that such evidence normally would have little or no probative force and therefore should not be admitted as other methods of proof could be used in most cases. But, in the case of fraud where the fraud can seldom be proven except by the use of parol evidence, the parol evidence has sufficient probative force that it should at least be considered by the jury.

In *Price v. Ridler*[39] the plaintiff, purchaser, brought an action for specific performance of a contract for the sale of real estate. Defendant attempted to admit evidence that plaintiff was advised during negotiations for the sale that the sale would not be carried out if defendant could secure a better price for the property before the end of the year. This evidence was objected to and the court sustained this objection for the reason that it was inadmissible under the parol evidence rule. In this case defendant had contended that the contract between plaintiff and defendant was oppressive, unfavorable, unequitable, an unreasonable and unconscionable bargain, one sided, biting, over reaching; that it worked an unreasonable and disproportionate hardship upon defendant and placed him at the mercy of plaintiff. This case can be distinguished from the *Smith* case[40] since in this case there was no pleading of fraud by the defendant. Therefore, there would be no reason to admit parol evidence and it would not be of sufficient probative force since the unfavorable or unconscionable bargain could be shown by other evidence such as the unreasonableness of the contract on its face.

XIII. Conclusion

In determining the admissibility of evidence, the test of probative force is the magic touchstone which dispels confusion, resolves conflicts, and causes doubt to disappear. It is a reliable guide through the morass

38. Wolf v. Miravalle, *supra* note 36.
39. 373 S.W.2d 59 (Mo. 1963).
40. Smith v. Tracy, *supra* note 37.

created by formalized historical rules. The probative force test is basic. It is nothing new.

It is referred to by every major author in the field of evidence. More often than not, it is assumed to be so basic that it requires no extensive discussion. Instead, he who seeks a fundamental knowledge of what constitutes admissible evidence is plunged into hearsay, admissions or declarations against interest, business records and other exceptions to the hearsay rule, judicial notice, relevancy, conditional relevancy, irrelevancy, and similar technical rules, the discussion of which fills volumes. The fundamental tenet of what evidence is all about is smothered. The foliage on the branches hides the tree.

Should certain evidence be excluded as irrelevant or admitted as relevant? Should it be excluded as hearsay or admitted under one of the myriad exceptions to the hearsay rule? Apply the test. If it tends to prove or disprove an issue necessary to a decision of the case before the court, it is relevant. If it has sufficient probative force to logically tend to prove or disprove that issue, it is admissible and there will be an applicable exception to the hearsay rule, or it was not hearsay in the first place.

Unfortunately, the formalized rules of evidence cannot yet be discarded or ignored. While the admission or exclusion of evidence has been and still is based on the probative force test, the stated reasons for admissions and exclusions have been and still are assigned the old formalized historical name tags. The practicing lawyer must know them and know them well. He must be able to recite and apply them instantly, if not automatically.

In recent decisions, usually a formalized historical rule of evidence is given by the supreme court as the reason for its decision. Yet, the court is clearly cognizant of and following the probative force test. This test not only resolves any apparent conflict in the recent decisions, it also allows a reasonably certain prediction of what the court will do on evidentiary matters in the future.