Volume 6
Issue 3 *Survey of Southwestern Law for 1951*

Article 4

1952

Evidence

Dean V. Grossnickle

Calvin J. Henson Jr.

rights. The logic in this reasoning is manifest. While there is a split of authority on the question of stockholders having equitable title to corporate assets,[39] a recognized exception to the general rule that the corporation, not its stockholders, must sue to rectify injuries against the corporation, has application here. Where corporation directors have permitted a breach of trust by fraud, *ultra vires* act, or negligence and the corporation is unable or unwilling to institute suit in the courts of the state, a stockholder can sue in its stead. Hildebrand[40] states the rule thus:

> ... [E]ven where the corporation has been denied the right to use our courts as a penalty for its failure to pay the franchise tax required by the laws of this state, the property of the corporation is not subject to appropriation by third parties. In such cases, the suit must be brought, not for the benefit of the corporation, but by the individual stockholders, suing in their own right, even though the property was acquired while the corporation was authorized to do business. A court of equity, in such cases, possesses full power and authority to take whatever action is necessary and proper to protect the interests of the stockholders in the corporate property and the creditors of the corporation.

A. G. Weaver.

EVIDENCE

Recordings of Telephone Conversation

Texas. In *Schwartz v. State*[1] recordings of a telephone conversation between one Jarrett and defendant, the alleged accomplice, were held admissible to corroborate testimony of Jarrett and Bennett, another party to the crime. The records were made at the sheriff's office for the purpose of obtaining evidence against de-

[39] See cases cited in Pratt-Hewitt Oil Corp. v. Hewitt, 122 Texas 38, 52 S. W. 2d 64 (1932).

[40] 3 Hildebrand, Private Corporations (1942) § 767, p. 192.

[1] .....Tex. Crim. Rep....., 246 S. W. 2d 174 (1951).

fendant, permission having been secured from Jarrett, who was then a prisoner and who cooperated with officers in making out the State's case. The defendant, a pawnbroker, was accused of being an accomplice to the robbery which Jarrett and Bennett committed.

The court expressly held that the provisions of the Federal Communications Act of 1934[2] did not bar the evidence. No findings were made as to whether the evidence had been obtained in violation of such Act, but the court ruled that the question involved was the applicability of a federal procedural statute to a trial in a state court. Its decision was based upon specific provisions of the Texas Code of Criminal Procedure,[3] as previously interpreted.[4]

The Supreme Court of the United States has granted certiorari[5] based upon the contention that the lower court erred in denying the supremacy of the Federal Communications Act, and violated Article VI, Paragraph 2, of the Federal Constitution.[6] The petitioner asserts that a right under a statute of the United States has been denied.

The Supreme Court of the United States has taken the position that it is within the power of a state to prescribe the evidence which will be received in its own courts.[7] While it has long been the rule in the federal courts that evidence obtained by an illegal search

---

[2] 47 U.S.C. 1946 ed. § 605.

[3] "No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case." TEX. CODE CRIM. PROC. (Vernon, 1948) art. 727 (a).

Prior to 1929, the statute had read, "No evidence obtained by an officer or other person in violation of any provision of the constitution or laws of the State of Texas, or of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case."

[4] Montalbano v. State, 116 Tex. Crim. Rep. 242, 34 S. W. 2d 1100 (1930).

[5] ..... U. S. ..... (1952).

[6] "This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding."

[7] Adams v. New York, 192 U. S. 585, 599 (1904); Fong Yue Ting v. U. S., 149 U. S. 698 (1893).

and seizure cannot be received,[8] the right of the states to reject this doctrine was upheld by the Supreme Court in *Wolf v. Colorado.*[9] While evidence obtained by wire-tapping by federal officials is not admissible in federal courts[10] (including intrastate messages[11]), several state courts have held that such evidence obtained by state officials is admissible.[12] In *People v. Kelley*[13] the California District Court of Appeals said, "Section 605 was intended for the activities of officials and courts of the Federal Government and for no others. In matters involving solely procedure state courts are not affected by acts of Congress." In a recent federal district court case evidence obtained under an illegal search warrant by state officials, not acting solely for the purpose of aiding enforcement of federal law, was held admissible in a prosecution by the United States.[14] Indication was thus made that evidence obtained by persons other than federal officials in violation of federal statutes is admissible in federal courts. This decision rests upon *Byars v. United States,*[15] wherein the Supreme Court stated, "We do not question the right of the federal government to avail itself of evidence improperly seized by state officers operating entirely upon their own account."

The Supreme Court has also stated that the protection afforded by Section 605 of the Federal Communications Act of 1934[16] is extended to the means of communication and not the secrecy of the conversation[17] and that evidence obtained by wire-tapping does not constitute an unreasonable search and seizure under the Fourth Amendment of the Federal Constitution.[18] The second and fourth

[8] Weeks v. United States, 232 U. S. 383 (1914).
[9] 338 U. S. 25 (1949).
[10] Nardone v. United States, 302 U. S. 379, 384 (1937).
[11] Weiss v. United States, 308 U. S. 321 (1939).
[12] People v. Channell, 236 P. 2d 654 (Cal. App. 1951); Hubin v. State, 180 Md. 279, 23 A. 2d 706 (1942); State v. Steadman, 216 S. C. 579, 59 S. E. 2d 168 (1950).
[13] 122 P. 2d 655, 658 (1942), *aff'd,* 22 Cal. 2d 169, 137 P. 2d 1 (1943).
[14] United States v. Scott, 102 F. Supp. 747, 752 (S. D. Tex. 1950).
[15] 273 U. S. 28, 33 (1927).
[16] 47 U. S. C. 1946 ed. § 605.
[17] Goldman v. United States, 316 U. S. 129, 133 (1942).
[18] Olmstead v. United States, 277 U. S. 438, 464 (1928).

clauses of Section 605 of the Federal Communications Act of 1934[19] have been interpreted as constituting rules of evidence in the purest sense.[20] It is believed that the decision in the *Schwartz* case is well supported by reason and authority.

Blood Tests to Show Intoxication

Texas. The recent case of *Brown v. State*[21] graphically portrays the fatal defect of not providing an intact chain of possession from the person drawing the blood sample to the analyst, thereby rendering the results of a test of defendant's blood inadmissible. Brown was convicted of driving a motor vehicle on a public highway while intoxicated. On appeal to the Texas Court of Criminal Appeals, that court reversed on the ground that there was no legal proof that a blood specimen taken by a nurse at a hospital following defendant's arrest was the same specimen forwarded by a physician to the State Public Safety Department for analysis.

Briefly this is what happened. The specimen was drawn by a nurse in the presence of a police officer, who testified that it was placed in a tube by the nurse and left at the hospital. Unfortunately for the State's case, the nurse did not testify. A physician testified that the specimen was called to his attention by a laboratory technician after it had been labeled with defendant's name and sealed with paraffin, and that he mailed it to the Department of Public Safety for analysis. A chemist for the Department testified as to receipt of the labeled specimen and the results of his analysis. Everything was regular except for one missing link—what happened to the

[19] "... [A]nd no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; ... and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto...."

[20] Sablowsky v. United States, 101 F. 2d 183, 189 (3d Cir. 1938).

[21] .....Tex. Crim. Rep....., 240 S. W. 2d 310 (1951).

blood specimen after the nurse placed it in the tube and before the physician saw and mailed it?

If the procedure suggested by Lowell W. Bradford, Director of the Laboratory of Criminalistics, District Attorney's Office, Santa Clara County, California, in a recently published article[22] had been followed, it would seem that the conviction in the *Brown* case would not have been reversed. He suggests the use of an envelope upon which is kept a permanent record of all of the data pertinent to a particular case. The person drawing the blood sample initials the vial label, and the officer places the vial in an envelope and seals it with scotch tape and fills out the data on the face of the envelope. All persons handling the envelope from then on sign it, and the chain of possession is kept intact.

Prior Sexual Relations With The Same Person

Texas. In *Johns v. State*[23] the defendant was convicted of rape of his stepdaughter, a girl under the age of 18 years. The principal complaint raised on appeal was that the trial court erred in admitting evidence that defendant had had sexual relations with the girl on occasions prior to the occasion charged. In the course of the opinion the court observed that its own decisions on the point had not been entirely uniform and had caused some confusion in trials for the offense involved.[24]

The court held that evidence of prior acts was admissible to show "the associations between the parties and their evident regard each for the other as evidencing the probability of the charged act and the unnaturalness of the accused's attitude toward the victim of his lust. . . ."[25] The court said, "Any cases holding to the contrary will be overruled without setting forth the same herein."[26]

---

[22] *Handling and Preserving Blood Alcohol Test Samples*, 41 J. Crim. L. & Criminology 107 (1950).

[23] .....Tex. Crim. Rep....., 236 S. W. 2d 820 (1951).

[24] 236 S. W. 2d at 823.

[25] *Ibid.*

[26] *Ibid.*

The rule in most jurisdictions is that, in prosecutions for rape of a female under the age of consent, evidence of prior acts committed by the defendant with the prosecuting witness is admissible in corroboration of the offense charged.[27] The courts have been inclined to admit evidence of other sexual acts with the same party because such other acts tend to show an emotional propensity to commit the offense charged. This is an exception to the general rule that it is not competent to prove that the defendant committed other crimes of a similar nature for the purpose of showing that he would be likely to commit the crime charged; ordinarily such proof would not shed any light upon the specific crime with which the defendant was charged.[28]

It must be remembered that the object of a criminal trial is to reach a just verdict, and so evidence of prior acts will not be admitted where it plainly will not aid in proving the accused guilty of the offense charged.[29] For example, most courts would hold inadmissible evidence of the commission of similar acts with other females.[30]

It appears that the decision in the *Johns* case is sound. The court did not say that evidence of prior acts is admissible under all circumstances, but only that in this case the prior acts showed an emotional propensity to commit the crime charged.

Dean V. Grossnickle.
Calvin J. Henson, Jr.

---

[27] See authorities collected in 22 C. J. S., *Criminal Law*, p. 1165.

[28] See authorities collected in 20 AM. JUR., *Evidence*, §§ 309, 310.

[29] See Note, 167 A. L. R. 565, 570 (1947).

[30] *Id.* at 588.