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EVIDENCE

by

Roy R. Ray*

DURING the period under review no landmark rulings on evidence were handed down by the Texas appellate courts. A few decisions of more than ordinary interest have been selected for comment here.

I. HEARSAY

Former Testimony. Perhaps the most significant decision of the year came from the Dallas court of civil appeals.¹ In a case of first impression in Texas the court ruled that testimony given by a witness in a prior criminal trial was admissible in a subsequent civil case where the party against whom it was offered had full opportunity to cross-examine the witness (now dead) in the prior case on the same issue.²

The plaintiff was the owner of a restaurant which was destroyed by fire. He was tried and acquitted on a charge of arson. At that trial a witness testified to the effect that the plaintiff told him of his intention to set fire to the restaurant in order to collect the insurance on the building and contents, showed the witness how he planned to set the fire and offered the witness money to set it. The civil suit was against insurance companies for the fire loss. Their defense was that plaintiff burned the property or caused it to be done. Plaintiff (Bryant) argued that the testimony was not admissible since the issues in the two trials were different, *i.e.*, the issue in the criminal trial was Bryant's guilt while that in the civil case concerned property rights. The court ruled that the real issue in both actions was whether Bryant had set the fire or had procured the burning of the building and that he had adequate opportunity to cross-examine the witness on this issue.

The older statement of the former testimony exception to the hearsay rule requires that the parties and issues in the two trials be the same and that the witness be unavailable at the present trial. A minority of courts which adhere strictly to the requirement of identity of parties would exclude the evidence in the present case. The majority of courts which have considered the question adopt the more liberal view followed by the Dallas court, *i.e.*, the test is whether the party against whom the evidence is now offered was a party in the criminal trial and had full opportunity to cross-examine the witness at that time.³

Business Records. One of the requirements for admission under the Bus-

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¹ Bryant v. Trinity Universal Ins. Co., 411 S.W.2d 945 (Tex. Civ. App. 1967).

² The court quoted C. McCORMICK & R. RAY, TEXAS LAW OF EVIDENCE § 941 (2d ed. 1956) as stating the correct rule.

³ A review of the decisions in other states is found in 46 A.L.R. 463 (1927) and 70 A.L.R.2d 1179 (1960).

iness Records Act⁴ is a showing that some employee or representative of the business who made the entry or transmitted information to another to be recorded had personal knowledge of the act, event or condition. A court of civil appeals applied this requirement to uphold the exclusion of entries on the bottom half of a bank account card.⁵ The card was offered to prove that the defendants were engaged in a joint venture. The top part of the card showed "Postscript Homes" as the name of the account followed by signatures of the defendants. On the bottom half, the word "construction" appeared as the type of business, followed by the words "new joint venture." In the lower right-hand corner under the heading "Teller" were the initials "N.Y." A bank officer testified that the card was made in the regular course of the bank's business, that filling in of the longhand writing was done at or about the time the account was opened, and that it was customary for the teller or whoever filled out that part of the card to put his initials at the bottom of the card. But the officer stated that he had no knowledge of who the person was or whether that person had personal knowledge of the information contained in the entry. In upholding the trial court reliance was placed upon the supreme court's ruling in *Skillern & Sons, Inc. v. Rosen*⁶ to the effect that there must be a showing that the person who made the entry or who transmitted the information for the entry had personal knowledge of the matter.

Admissions. Where a defendant in a criminal case pleads guilty to negligent acts charged against him, his plea is admissible in a civil suit to recover damages resulting from such alleged negligent acts.⁷ In a recent civil appeals case⁸ plaintiff claimed the trial court erred in excluding testimony of a clerk of corporation court to the effect that a plea of guilty had been entered to the charge of negligent collision. The evidence indicated that defendant's wife paid a \$25 fine, and that no plea of guilty was made by defendant or his counsel. The appellate court said that prior to 1965, and at the time the accident occurred, payment of a fine did not constitute a plea of guilty in open court as though a plea of *nolo contendere* had been entered by defendant as it now does;⁹ and that the trial court did not err in excluding testimony concerning payment by the wife of the fine.

Confessions. In *Hearn v. State*¹⁰ the Texas Court of Criminal Appeals held that the failure of an arresting officer to take one, charged with driving while intoxicated, immediately before a magistrate did not render inadmissible evidence pertaining to a blood test for alcohol to which the accused consented; and that the question of whether consent was voluntary

⁴ TEX. REV. CIV. STAT. ANN. art. 3737e (1965).

⁵ North Tex. Lumber Co. v. Kaspar, 415 S.W.2d 470 (Tex. Civ. App. 1967).

⁶ 359 S.W.2d 298, 305 (Tex. 1962).

⁷ Canales v. Bank of California, 316 S.W.2d 314 (Tex. Civ. App. 1958) *error ref.*

⁸ Barrios v. Davis, 415 S.W.2d 714 (Tex. Civ. App. 1967).

⁹ See TEX. CODE CRIM. PROC. ANN. art. 27.14 (1965).

¹⁰ 411 S.W.2d 543 (Tex. Crim. App. 1967).

was properly left to the jury. The court said the Confession Statute¹¹ has no application to the obtaining of consent for taking blood specimens for analysis; and that the principles announced by the United States Supreme Court in *Escobedo v. Illinois*¹² and *Massiah v. United States*¹³ relating to confessions and incriminating statements made by an accused are not controlling as to the giving of blood specimens. The court also mentioned that it had previously held in *Weeks v. State*¹⁴ that a consent to search was not a confession and not governed by the rules announced by the Supreme Court of the United States in *Miranda v. Arizona*.¹⁵

One of the grounds relied upon by the court of criminal appeals for reversal of the conviction in the celebrated *Ruby*¹⁶ case was the erroneous admission into evidence of the alleged statement by Ruby some minutes after his arrest and while in a jail cell being interrogated by police officers. The alleged statement was to the effect that Ruby had seen Oswald in a police lineup two nights before and that when he saw the sarcastic sneer on Oswald's face he had decided that if he ever got the chance he would kill him. Prior to answering questions preceding the alleged statement Ruby had asked if any of his answers would be made available to magazines or publications. When assured that he was being questioned only for police purposes he replied that he would "be glad to answer questions." The court held that the statement constituted an oral confession of premeditation made while in police custody and its admission was in violation of the Confession Statute. The court further ruled that it did not qualify as a spontaneous utterance in view of the deliberate caution with which accused spoke.

II. WITNESSES

Competency—Husband and Wife. In *Ex parte Moreland*¹⁷ the Texas Court of Criminal Appeals ruled that a wife who did not voluntarily testify or swear to a complaint against her husband, who was charged with statutory rape on her daughter, could not be compelled to testify against him. The question arose in a habeas corpus proceeding to discharge her from confinement under an order adjudging her in contempt for refusing to answer a question propounded to her as a witness before the grand jury. The court based its ruling upon article 38.11 of the new Code of Criminal Procedure, adopted in 1965.¹⁸ Prior to that time article 714 of the Code of Criminal Procedure, 1925, had provided that the husband and wife should "in no case testify against each other *except in a criminal prosecution for an offense committed by one against the other.*"¹⁹ This provision

¹¹ TEX. CODE CRIM. PROC. ANN. art. 38.22 (1965).

¹² 378 U.S. 478 (1964).

¹³ 377 U.S. 201 (1964).

¹⁴ 417 S.W.2d 716 (Tex. Crim. App. 1967). The court in *Hearn* was citing the original unpublished opinions in *Weeks*.

¹⁵ 384 U.S. 436 (1966).

¹⁶ *Rubenstein v. State*, 407 S.W.2d 793 (Tex. Crim. App. 1966).

¹⁷ 415 S.W.2d 428 (Tex. Crim. App. 1967).

¹⁸ TEX. CODE CRIM. PROC. ANN. art. 38.11 (1965).

¹⁹ Former art. 714, Tex. Code Crim. Proc. (1925) (emphasis added).

had been construed by the Texas Court of Criminal Appeals to mean that the state could call the wife and compel her to testify where he was charged with an offense against her.²⁰ Furthermore, article 605 of the Penal Code provides that in prosecutions relating to wife and child desertion "both husband and wife shall be competent and compellable witnesses to testify against each other as to any relevant matter"²¹ In contrast with these statutes article 38.11 of the new Code says, "However, a wife or husband *may voluntarily* testify against each other in any case for an offense involving any grade of assault or violence committed by one against the other or against the child of either under 16 years of age or in any case where either is charged with an offense . . . pertaining to wife or child desertion or failure or refusal to support his or her minor children."²² The Court emphasized the use of the words "may voluntarily testify against the other." It said the legislature had the authority to change the rule relating to whether a competent witness could be compelled to testify and had done so. It agreed that if a wife did voluntarily become a witness against her husband or swear to a complaint against him then she could be compelled to testify as any other witness. But in this case the petitioner did not voluntarily testify or swear to such a complaint and the contempt order was, therefore, erroneous.

Dead Man's Statute. Article 3716 of the Revised Civil Statutes, 1925, was held to require the exclusion of testimony by a widow concerning statements made by her deceased husband, previously a member of a partnership, expressing dissatisfaction with the business relationship with surviving partner and a desire to rewrite the partnership agreement.²³ The widow of the deceased partner had sued the surviving partner seeking a declaration that the partnership agreement terminated at the end of the initial ten-year period. The surviving partner had filed a cross-action against the widow in her individual capacity and as executor of the deceased partner for cancellation of a deed executed by the deceased partner to the widow of a one-fourth interest in the partnership assets and for an accounting. Since the cross-action was against the widow in her representative capacity as well as individually and since she answered in both capacities, the statute undoubtedly applied to the action and the widow was certainly an interested party. Her disqualification necessarily followed.

In *Roberts v. Roberts*²⁴ the Texas Supreme Court refused writ of error, thereby approving the court of civil appeals ruling²⁵ to the effect that the Dead Man's Statute did not prevent the heirs of a decedent from testifying that after his death they saw and read a holographic will (produced in court), and that it was in the handwriting of the deceased, nor did it prohibit testimony by them as to the contents of the instrument.

²⁰ *Bramlette v. State*, 21 Tex. Crim. App. 611, 2 S.W. 765 (1886).

²¹ TEX. PEN. CODE ANN. art. 605 (1967).

²² TEX. CODE CRIM. PROC. ANN. art. 38.11 (1965) (emphasis added).

²³ *Southworth v. Clark*, 411 S.W.2d 62 (Tex. Civ. App. 1967).

²⁴ 407 S.W.2d 772 (Tex. 1966), discussed in 21 Sw. L.J. 173 (1967).

²⁵ 405 S.W.2d 211 (Tex. Civ. App. 1966). The civil appeals opinion was previously discussed in Ray, *Evidence, Annual Survey of Texas Law*, 21 Sw. L.J. 173 (1967).

III. JUDICIAL NOTICE

A salutary application of the doctrine of judicial notice to geographical facts was made by the Texas Supreme Court in *Barber v. Intercoast Jobbers & Brokers*.²⁶ Plaintiff filed suit in Ector County against defendant for death of his wife in a collision between defendant's truck and the car his wife was driving. He produced evidence showing that the accident occurred at the intersection of 81st Street and Highway 385 four miles north of downtown Odessa. The trial court overruled defendant's plea of privilege but the court of civil appeals reversed the trial court's action and ordered the cause transferred to Dawson County, holding that there was no proof that the accident occurred in Ector County and that the trial court could not judicially know that a point about four miles north of Odessa was in Ector County. The supreme court reversed the court of civil appeals and affirmed the judgment of the trial court. It stated that the fact was one which was certain and indisputable and capable of "verifiable certainty."²⁷ It pointed to numerous supreme court and civil appeals precedents noticing such facts as: that Amarillo is not situated wholly within Potter County; that an entire city is located in a particular county; that the western boundary of Nueces County is several miles west of Robstown; that a collision point located one-eighth of a mile south of the city limits of Rockdale was in Milam County; that an accident point two miles east of Katy was in Harris County; that a point six miles from McKinney was in Collin County. The Court said these decisions reflect the present status of judicial knowledge concerning geographical facts about the location of places in counties. It distinguished *Miller v. Burke*,²⁸ relied upon by the court of civil appeals, pointing out that plaintiff there failed to prove the location of the accident with reference either to a county or any other place. He had merely alleged that the accident occurred in Harris County but offered no evidence concerning the place where it occurred.

In *Schechter v. Folsom*²⁹ the Dallas court of civil appeals held that a court may not take judicial notice of the reasonableness of an attorney's fee. A landlord had brought an action against his tenant for rent alleged to be due plus attorney's fees under the written terms of a lease contract. In a case tried by the judge, plaintiff received judgment for \$540 for rentals and \$350 for attorney's fees. At the trial no evidence was offered to show that the \$350 was a reasonable fee. The court severed the part of the judgment for attorney's fees and reversed as to it, relying upon *Great American Reserve Insurance Co. v. Britton*,³⁰ where the supreme court, in a case involving article 3.62 of the Texas Insurance Code, held

²⁶ 417 S.W.2d 154 (1967), noted in 21 Sw. L.J. 707 (1967). For further discussion, see VanDercreek, *Texas Civil Procedure*, this *Survey*, at footnote 66.

²⁷ The court relied upon C. McCORMICK & R. RAY, *TEXAS LAW OF EVIDENCE* § 211 (2d ed. 1956).

²⁸ 401 S.W.2d 852 (Tex. Civ. App. 1966).

²⁹ 417 S.W.2d 180 (Tex. Civ. App. 1967).

³⁰ 406 S.W.2d 901, 907 (Tex. 1966).

that a court did not have the authority to adjudicate the reasonableness of an attorney's fee on the basis of the judicial notice.

IV. LEGISLATION

Privilege for Communications Made to Clergymen. The common law recognized no privilege protecting from disclosure confidential communications made to clergymen, ministers or priests in their professional capacity.³¹ Over the years, however, some three-fourths of the states in the United States have enacted statutes sanctioning such a privilege. Prior to 1967, Texas had no such statute and the privilege had never received judicial approval from the appellate courts. This was changed by the Sixtieth Legislature in 1967 by the enactment of the following statute which became effective on August 28, 1967:

No ordained minister, priest, rabbi or duly accredited Christian Science practitioner of an established church or religious organization shall be required to testify in any action, suit or proceeding, concerning any information which may have been confidentially communicated to him in his professional capacity under such circumstances that to disclose the information would violate a sacred or moral trust, when the *giving of such testimony is objected to by the communicant*; provided, however, that the presiding judge in any trial may compel such disclosure if in his opinion the same is necessary to a proper administration of justice.³²

It should be noted that the wording of the statute differs substantially from that of rule 29 of the Uniform Rules of Evidence which was taken from rule 219 of the Model Code of Evidence. That rule provides that the penitent may refuse to disclose or prevent the clergyman from disclosing a penitential communication; that the claim of privilege may be made by the penitent or by the clergyman on behalf of an absent penitent. The Texas statute merely says that the priest or clergyman shall not disclose if the communicant objects. However, since the penitent is really the proprietor of the privilege it is reasonable to assume that where the communicant is the witness he would be allowed to assert the privilege and refuse to disclose the communication.

The Texas statute is more restrictive than those in most states since the judge is given authority to compel disclosure if in his discretion disclosure is necessary to the proper administration of justice. This limitation has been recommended by many commentators since the absolute privilege when granted often does prevent the triers from receiving information essential to a rational and just decision.

It is interesting to note that Jeremy Bentham, the great reformer and in general an opponent of all privileges because they suppress relevant and vital evidence, sought to justify the penitent-priest privilege. Wigmore also advanced arguments in support of it.

While the legislature has now officially created the privilege it is doubt-

³¹ C. McCORMICK & R. RAY, TEXAS LAW OF EVIDENCE § 492 (2d ed. 1956).

³² TEX. REV. CIV. STAT. ANN. art. 3715a (Supp. 1967) (emphasis added).

ful that the outcome of any trial is likely to be influenced by the statute. It is believed that a de facto privilege has existed in the absence of statute. I know of several instances where the minister stood his ground and refused to obey the judge's admonition to answer, without suffering any penalty. No case has been found where a priest or clergyman was compelled to disclose communications made in the confessional. It is difficult to imagine an elected judge committing a clergyman for contempt in refusing to obey an instruction to disclose a confession made to him.