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Comments

Were the Louisiana Rules of Civil Evidence Affected by the Adoption of the Louisiana Code of Criminal Procedure?

History of Louisiana Evidence Rules

From the delivery of Louisiana to the United States in 1803, until 1805, the complete body of the Spanish law of evidence was theoretically in force. In 1805, the Crimes Act¹ and the Practice Act² came into effect. The Crimes Act incorporated as a system

1. La. Acts 1804, c. 50, p. 416; approved May 4, 1805.

2. La. Acts 1804, c. 26, p. 210; approved April 10, 1805.

the common law rules of evidence for prosecutions involving the crimes enumerated in that act.³ The Practice Act, enacted a month prior to the Crimes Act, provided rules for the swearing and competency of witnesses,⁴ but made no provision for other rules of evidence.⁵ The Civil Code of 1808 provided rules for the proof of obligations⁶ and clarified the rules as to the competency of witnesses;⁷ still there were no provisions for such matters as the exclusion of hearsay, cross-examination, and the various privileges.

In 1811, the court was considering common law evidence authorities in a civil case⁸ without any discussion as to the appro-

3. La. Acts 1804, c. 50, § 33, p. 440: "*And be it further enacted*, That all the crimes, offences and misdemeanors herein before named, shall be taken, intended and construed, according to and in conformity with the common law of England; and that the forms of indictment, (divested however of unnecessary prolixity) the method of trial; the rules of evidence, and all other proceedings whatsoever in the prosecution of the said crimes, offences and misdemeanors, changing what ought to be changed, shall be except as is by this act otherwise provided for, according to the said common law."

4. La. Acts 1804, c. 26, § 19, p. 250: "*And be it further enacted*, That the examination of all witnesses shall be taken in open court, or before such persons as the court may, in each cause authorize to take the same, and that all witnesses shall previous to giving testimony, be sworn to declare the truth, the whole truth and nothing but the truth, relative to the matter in dispute between the parties. . . ."

La. Acts 1804, c. 26, § 9, p. 222: ". . . and no free white witness of the age of discretion shall be disqualified from testifying on the ground of being incompetent, unless such witness shall, at the time of producing him, be interested or infamous: all other exceptions shall go to the credit, and not to the competence of the witness: *Provided however*, That the wife and husband shall not give testimony for or against each other."

5. The legislature must have intended for the courts to apply some rules of evidence other than those mentioned in the Practice Act: ". . . and if such witness, *without any legal objection*, shall refuse to answer or testify in the cause, it shall be lawful for said court to fine the said witness. . . ." (Italics supplied.) La. Acts 1804, c. 26, § 19, p. 250, 256. The Practice Act does not mention any privilege of the witness not to testify.

6. LA. CIVIL CODE of 1808, 3.3.215-64, pp. 304-17, "*Of The Proof Of Obligations And Of That Of Payment*."

7. LA. CIVIL CODE of 1808, 3.3.248-9, p. 312:

"Art. 248. The competent witness of any covenant or fact whatever it may be in civil matters, is that who is above the age of fourteen years complete, of a sound mind, free or enfranchised, and not one of those whom the law deems infamous.

"He must besides be not interested neither directly or indirectly in the cause.

"The husband cannot be a witness either for or against his wife, nor the wife for or against her husband, neither can ascendants with respect to their descendants, or the descendants with respect to their ascendants."

"Art. 249. The circumstance of the witness being a relation in the collateral line as far as the fourth degree inclusively of one of the parties interested in the cause, or engaged in the actual service or salary of one of the said parties, or a free coloured person, is not a sufficient cause to consider the witness as incompetent, but may according to circumstances diminish the extent of his credibility."

8. Durnford v. Clark, 1 Mart.(O.S.) 202 (La. 1811).

priateness of the common law in this field. In 1819, in *Planters' Bank v. George*,⁹ the Louisiana Supreme Court held that the Spanish law had been repealed by common consent and that the common law rules of evidence should be followed in civil cases.¹⁰ In 1825, the legislature adopted a Code of Practice and a Civil Code, but no provision was made in these codes for general rules of evidence because it was then contemplated that a code of evidence would soon be adopted. The codes adopted restated the rules of the Practice Act, and the Civil Code of 1808. The only important addition to these rules was the adoption of the attorney-client privilege.¹¹

Livingston, discussing the need for his proposed code of evidence,¹² lists the rules of evidence then in force as: common law evidence for criminal cases involving crimes listed in the Crimes Act; Spanish rules of evidence for crimes under Spanish criminal law still in force;¹³ the rules of evidence of the Civil Code for civil cases. Although he stated no opinion as to the proper rules of civil evidence for situations not covered by the Civil Code, he expressed no disagreement with the *Planters' Bank* decision. Livingston's code of evidence, modeled on the common law, was to have been applicable to all types of actions; but his code was not adopted and the courts continued to apply common law evidence rules in all proceedings until the adoption of the Code of Criminal Procedure in 1928.

Common law rules of evidence are in general the same for civil and criminal actions;¹⁴ and our Supreme Court, in a case

9. 6 Mart.(O.S.) 670 (La. 1819).

10. *Id.* at 673-4: "Upon a question of this kind, the ancient laws of the country can afford no assistance. Laws which required torture to be inflicted on witnesses, suspected of participation in a crime, to compel them to reveal their own guilt and infamy, would not be very tender in protecting a witness, when his interest alone was at stake. Such laws, being at open war with the principles of a free government, must be considered as abrogated, in common with all dispositions repugnant to the liberality of our institutions.—Hence, as much from a tacit conviction that the former laws of evidence are sometimes adverse to the privileges of freemen, as from the introduction of trial by jury with all its concomitants and consequences, it has grown into practice to resort, upon questions of evidence, to the principles recognized in a country where liberty directs the administration of justice."

11. Art. 2262, LA. CIVIL CODE of 1825, now Art. 2283, LA. CIVIL CODE of 1870.

12. LIVINGSTON, A SYSTEM OF PENAL LAW FOR THE STATE OF LOUISIANA 253 *et seq.* (1833).

13. Livingston maintained that the Crimes Act repealed only the Spanish criminal law which was inconsistent with the provisions of that act. *Id.* at 59, 157, n. a.

14. 1 BEST, THE PRINCIPLES OF THE LAW OF EVIDENCE § 94 (Morgan's ed. 1875), cited by the dissent in *State v. Batson*, 108 La. 479, 491-2, 32 So. 478, 483 (1902), quoted in note 24 *infra*; 1 WHARTON, EVIDENCE IN CRIMINAL CASES § 1 (11th ed. 1935); 1 WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 4(2) (3d ed. 1940).

decided in 1927, shortly before the adoption of the Code of Criminal Procedure, held that this was true in Louisiana.¹⁵ Marr, writing on criminal procedure in 1923,¹⁶ and Cross, writing on civil practice in 1912,¹⁷ both cited civil and criminal cases indiscriminately in their discussion of evidence. Mr. St. Clair Adams, one of the redactors of the Code of Criminal Procedure, listed civil cases as the basis of many of the rules of evidence contained in the code.¹⁸ It seems certain, then, that prior to 1928, Louisiana civil and criminal evidence rules were the same.

Effect of the Adoption of the Code of Criminal Procedure

In attempting to determine the effect, if any, of the adoption of the Code of Criminal Procedure on civil evidence rules, the pertinent articles of the code will be discussed under the following categories:¹⁹

- (1) Articles which are different from prior statutes on civil evidence.²⁰

15. *State v. Wilson*, 163 La. 29, 111 So. 484 (1927).

16. MARR, *THE CRIMINAL JURISPRUDENCE OF LOUISIANA* §§ 562-651 (1923).

17. CROSS, *PRACTICE IN THE COURTS OF LOUISIANA* §§ 126-223 (1912).

18. ADAMS, *ANNOTATED CODE OF CRIMINAL PROCEDURE OF THE STATE OF LOUISIANA* tit. xxxii, c. 7-8; tit. xxxiii (1929).

19. There is no discussion of the status of prior civil evidence rules, statutory or common law, concerning topics not touched upon in the Code of Criminal Procedure. As Mr. Adams points out in the preface to his code (*id.* at iii), the redactors of the Code of Criminal Procedure did not even purport to replace all of the prior *criminal* procedure rules. See also LA. R.S. § 15:0.2 (1950). It is inconceivable, therefore, that the code affected prior civil evidence rules not covered in the code.

20. The following articles of the Code of Criminal Procedure contain provisions different to some extent from the civil evidence statutes listed with them.

Art. 366, LA. CODE OF CRIM. PROC. (1928): "Before any witness shall be permitted to testify he shall be sworn to truthfully answer such questions as may be propounded to him."

Art. 479, LA. CODE OF PRACTICE of 1870: "If the religious opinions of a witness are opposed to his taking an oath, his affirmation of the truth of his testimony shall suffice."

Art. 370, LA. CODE OF CRIM. PROC. (1928): "It is within the sound discretion of the trial judge to permit or to refuse to permit the prosecution or the defense to bring additional testimony after the evidence has been closed, provided that no additional evidence shall be heard after the argument has begun or the charge been given."

Art. 484, LA. CODE OF PRACTICE of 1870: "After all incidental questions shall have been decided, and both parties have produced their respective evidence, the argument commences; no witness then can be heard, nor proof introduced except with the consent of all the parties." *Cf.* *Succession of Robinson*, 186 La. 389, 396, 172 So. 429, 431 (1936); *Succession of Lefort*, 139 La. 51, 67, 71 So. 215, 220 (1916).

Art. 424, LA. CODE OF CRIM. PROC. (1928): "The published statutes and digests of the other states and territories shall be prima facie evidence of the statute laws of the state or territory from which they purport to emanate, without being filed in evidence."

- (2) Articles which are different from prior jurisprudence.²¹
- (3) Articles which restate pre-1928 statutes or jurisprudence, civil or criminal.²²

La. Acts 1922, No. 66, p. 128, LA. R.S. § 13:3717 (1950): "Printed books or pamphlets purporting on their face to be the session or other statutes of any of the United States, or the territories thereof, or of any foreign jurisdictions, and to have been printed and published by the authority of any such state, territory, or foreign jurisdiction, or proved to be commonly recognized in its courts, shall be received in the courts of this state as prima facie evidence of such statutes."

Art. 456, LA. CODE OF CRIM. PROC. (1928): "Every authentic act, unless shown to be a forgery, makes full proof of its own execution, nor can the recitals of such act be contradicted by any party thereto; but no instrument under private signature is admissible in evidence, without proof of its genuineness."

Art. 2244, LA. CIVIL CODE of 1870: "The person against whom an act under private signature is produced, is obliged formally to avow or disavow his signature.

"The heirs or assigns may simply declare that they know not the handwriting or the signature of the person they represent."

Art. 475, LA. CODE OF CRIM. PROC. (1928): "No legal adviser is permitted, whether during or after the termination of his employment as such, unless with his client's express consent, to disclose any communication made to him as such legal advisor by or on behalf of his client, or any advice given by him to his client, or any information that he may have gotten by reason of his being such legal adviser."

Art. 2283, LA. CIVIL CODE of 1870: "No attorney or counselor at law shall give evidence of any thing that has been confided to him by his client, without the consent of such client; but his being employed as a counsellor or attorney, does not disqualify him from being a witness in the cause in which he is employed."

21. The following articles of the Code of Criminal Procedure seem to be somewhat different from the prior jurisprudence.

Art. 376, LA. CODE OF CRIM. PROC. (1928): "When a witness has been intentionally sworn and has testified to any single fact in his examination in chief, he may be cross-examined upon the whole case."

There is some confusion as to the rule in civil cases, see Comment, 10 TULANE L. REV. 294, 299 (1936).

Art. 484, LA. CODE OF CRIM. PROC. (1928): "Before a witness has been sworn he can be neither corroborated nor impeached, nor is testimony to establish the credibility of a witness admissible until that credibility has been attacked."

See *Pilié v. Kenner*, 2 Rob. 95 (La. 1842), holding that if the testimony of a witness is inherently improbable, the testimony may be corroborated even though the credibility of the witness has not been attacked.

22. This group includes all of the evidence rules of the Code of Criminal Procedure which could be applicable to civil cases which are not listed in notes 20 and 21 *supra*, or note 23 *infra*. Two articles of the code, however, are based on statutes applicable to civil cases and these statutes have now been repealed.

Art. 427, LA. CODE OF CRIM. PROC. (1928): "Whenever any commercial paper shall have been protested, either in or out of this state, for nonpayment, the act of protest, or a certified copy thereof, shall be prima facie evidence of the facts recited in said act."

LA. REV. STAT. § 326 (1870): "All notaries, or persons acting as such, are authorized, in their protests of bills of exchange, promissory notes or orders for the payment of money, to make mention of the demand made upon the drawer, acceptor or person on whom such order or bill of exchange is drawn or given, and of the manner and circumstances of such demand, and by certificate added to such

protest to state the manner in which any notices of protest were served or forwarded; and whenever they shall have so done, a *certified copy of such protest and certificate shall be evidence of all the matters therein stated.*" (Italics supplied.) (This provision was not incorporated in the revision of 1950.)

Art. 461, LA. CODE OF CRIM. PROC. (1928): "The competent witness in any criminal proceeding, in court or before a person having authority to receive evidence, shall be a person of proper understanding, but;

"(1) Private conversations between husband and wife shall be privileged.

"(2) Neither husband nor wife shall be compelled to be a witness on any trial upon an indictment, complaint or other criminal proceeding, against the other.

"(3) In the trial of all indictments, complaints and other proceedings against persons charged with the commission of crimes or offenses, a person so charged shall, at his own request, but not otherwise, be deemed a competent witness."

This provision is a restatement of La. Acts 1916, No. 157, p. 379. The original act, however, provided: ". . . That the competent witness in any proceeding, *civil or criminal*, . . ." (Italics supplied.) When La. Acts 1916, No. 157, p. 379, was incorporated into Title 13 of the Revised Statutes of 1950 [La. R.S. § 13:3665 (1950)] subdivisions (1), (2) and (3) were omitted.

Art. 495, LA. CODE OF CRIM. PROC. (1928), as amended, La. Acts 1952, No. 180, p. 426: "Evidence of conviction of crime, but not of arrest, indictment or prosecution, is admissible for the purpose of impeaching the credibility of the witness, but before evidence of such former conviction can be adduced from any other source than the witness whose credibility is to be impeached, he must have been questioned on cross-examination as to such conviction, and have failed distinctly to admit the same; and no witness, whether he be defendant or not, can be asked on cross-examination whether or not he has ever been indicted or arrested, and can only be questioned as to conviction, and as provided herein."

Prior to the 1952 amendment the article provided:

"Evidence of conviction of crime, but not of arrest, indictment or prosecution, is admissible for the purpose of impeaching the credibility of the witness. But before evidence of such former conviction can be adduced from any other source than the witness whose credibility is to be impeached, he must have been questioned on cross-examination as to such conviction, and have failed distinctly to admit the same; provided, always, that a witness, whether he be the defendant or not, may be compelled to answer on cross-examination whether or not he has ever been indicted or arrested and how many times." The first part of this article as originally enacted was taken verbatim—as were most of the evidence articles of the code—from Marr's proposed code of criminal procedure of 1910 (Art. 530). The proviso was added by the redactors of the 1928 code.

There seem to be no appellate cases discussing the right to question a witness in civil suits as to prior arrests, indictments, or prosecutions. See, however, *Prevost v. Simeon*, 4 La. 472, 475 (1832), in which the court said that although it was error to allow a witness to be asked if he had not committed larceny, since the appellant had previously introduced testimony bolstering the credibility of the witness, both had committed error and the case would not be reversed.

It seems certain, however, that prior to the adoption of the Code of Criminal Procedure a witness in a criminal case could be asked if he had ever been arrested, indicted, or prosecuted. *State v. Dundas*, 168 La. 95, 107, 121 So. 586, 591 (1929) (tried before the Code of Criminal Procedure went into effect). See also *State v. Hughes*, 141 La. 578, 75 So. 416 (1917), allowing a witness to be asked if he has not been accused of a crime. Since prior to the Code of Criminal Procedure the rules were the same in civil and criminal cases, such questions should have been permitted in civil cases before 1928.

If it is held that the Code of Criminal Procedure provisions which departed from the jurisprudence followed prior to its enactment are binding in civil cases, it would seem that the 1952 amendment must also be followed

- (4) Articles which contain innovations to Louisiana evidence rules.²³

(1) *Articles which are different from prior statutes on civil evidence.* Only by finding that the legislature intended the codified rules of criminal evidence to supersede all prior conflicting evidence law could the court hold that prior civil evidence statutes were repealed. The case of *State v. Batson*,^{23a} decided in 1902, presented a somewhat similar problem. The defendant sought to introduce evidence admissible under a Civil Code provision, but inadmissible at common law. The majority of the court did not even discuss the possibility of the Civil Code's provisions being applicable to criminal cases.²⁴ Justice Breaux, however, in

in civil cases; for, if it was intended that the evidence articles of the code apply to civil cases, it must have been intended that amendments to these articles should also apply.

Conversely, if it is held that the Code of Criminal Procedure, when enacted in 1928, did not supersede prior jurisprudence, there is no basis for holding that a subsequent amendment to the code has this effect, and hence it should still be permissible in civil suits to question a witness as to prior arrests, indictments, and prosecutions.

23. The following articles of the Code of Criminal Procedure seem to belong in this group.

Art. 423, LA. CODE OF CRIM. PROC. (1928): "The list of the registered physicians and surgeons in this state published by the state board of health and duly certified by the secretary of said board shall be received by the courts of the state as proof that the physicians and surgeons therein named are duly registered as required by law, provided that this method of proof shall not be considered exclusive."

Art. 426, LA. CODE OF CRIM. PROC. (1928): "A copy of the articles of any vessels, authenticated by the affidavit of the captain, shall be prima facie evidence that any seaman whose name appears subscribed thereto has actually signed articles."

Art. 476, LA. CODE OF CRIM. PROC. (1928): "No physician is permitted, whether during or after the termination of his employment as such, unless with his patient's express consent, to disclose any communication made to him as such physician by or on behalf of his patient, or the result of any investigation made into the patient's physical or mental condition, or any opinion based upon such investigation, or any information that he may have gotten by reason of his being such physician; provided, that the provisions of this article shall not apply to any physician, who, under the appointment of the court, and not by a selection of the patient, has made investigation into the patient's physical or mental condition; provided, further, that any physician may be cross-examined upon the correctness of any certificate issued by him."

The courts have never directly held whether there was or was not a doctor-patient privilege in civil suits. See note 31 *infra*.

Art. 477, LA. CODE OF CRIM. PROC. (1928): "No clergyman is permitted, without the consent of the person making the communication, to disclose any communication made to him in confidence by one seeking his spiritual advice or consolation, or any information that he may have gotten by reason of such communication."

23a. 108 La. 479, 32 So. 478 (1902).

24. The court said: "The Statute law to which the learned author refers is, however, that contained in article 2245 of the Civil Code and article 325 of the Code of Practice, which relate to civil proceedings, whereas by section 976, of the Revised Statutes, hereinbefore quoted, it is provided that 'the

an emphatic dissent said that since at common law the rules of evidence were the same in civil and criminal cases, a statutory modification of the civil rule also modified the criminal rule.²⁵ The rule which the court held binding was of common law rather than statutory origin; but the court said that since the common law rules of evidence were adopted by statute for criminal cases, it had no more power to modify these rules than it had to modify a statute.²⁶

Although the question settled in the *Batson* case was very similar to the problem under discussion, there are distinguishing

method of trial, the rules of evidence, and all other proceedings whatsoever in the prosecution of crimes shall be according to the common law, unless otherwise provided.' And no other provisions concerning the prosecution of the crime of murder have been made." 108 La. 479, 491-2, 32 So. 478, 483 (1902).

For a discussion of the way the courts of other jurisdictions have treated a criminal law statutory presumption which was sought to be applied in a civil case, see Note, 43 A.L.R. 959 (1926).

25. 108 La. 479, 492, 32 So. 478, 483 (1902): "In this connection it may be stated that generally the rules of evidence are the same in criminal cases as in civil cases. There are exceptions, as stated by Best in his book on Evidence (page 89). The text in Best does not exclude proof by handwriting. . . . If the mode of proof is generally the same in civil and criminal proceedings, and the exception does not include proof by comparison by [sic] handwriting, the proof by comparison of handwriting under required condition, in my view, is admissible. Beyond question, the rule is recognized in civil proceedings in this state, and the evidence would have been admissible in a civil case under the Codes. It is not convincing that the rule in question does not apply to civil and criminal cases, and that, admissible in one, it is not in the other."

26. After quoting La. Rev. Stat. § 976 (1870), the court said: "This is merely a re-enactment of section 33 of the act of 1805, [see note 3 *supra*] but, dealing with it as of the date of the adoption of the Revised Statutes, there has since then been no other provision made with respect to 'the rules of evidence' which are to be applied in the prosecution of the crime of murder; and it therefore follows that we have only to ascertain what the common-law rule applicable to the question at issue is, in order to determine whether that question has been correctly decided." 108 La. 479, 490, 32 So. 478, 483 (1902).

The court has expressed a similar opinion on other occasions. In *State v. Denis*, 19 La. Ann. 119, 120 (1867), the court said:

"It is unquestionably true, that when the common law rules of evidence, in criminal proceedings, were adopted by the Legislature of this State; no rule was better understood nor more firmly established than the one now under consideration. It had always been deemed a wise and salutary one, and had been uniformly adhered to.

"The discretion, which in the cases referred to, is claimed for Courts to relax, to change, or to utterly disregard rules of criminal evidence, which the Legislature has decreed it obligatory on them to observe, would be effectually to make the law a dead letter; cases might certainly occur, and this, perhaps, is one of them, wherein a relaxation of the rule might serve to advance the course of justice; but this is no reason why the general rules of evidence should not be observed, and until the law of evidence in criminal proceedings, now extant, is partially or wholly changed, our Courts are not justified in exercising their discretion in regarding or disregarding rules of evidence, which our Legislature has adopted as a system."

This statement was quoted with approval in *State v. Swaze*, 30 La. Ann. 1323, 1327 (1878).

features. In the *Batson* case the evidence statute which the court refused to apply was in the Civil Code, and the Civil Code does not contain a complete set of evidence rules. The Code of Criminal Procedure, however, contains a fairly complete body of rules of evidence, most of which could be applied to civil and criminal proceedings. The court could find that the legislature intended that this system of rules supersede all prior conflicting evidence statutes.

Any discussion of what the legislature intended is likely to be unrealistic. Then, as now, no one seemed greatly concerned with civil evidence, and it is likely that the question of the applicability of the code to civil suits was not present in the mind of the legislators. Most of the facts, however, tend to show that only rules of criminal evidence were being adopted. Although two of the articles of the code seem to be more applicable to civil than to criminal proceedings,²⁷ all of the rules are in a code of criminal procedure and the words *plaintiff* and *defendant* are never used; instead, the contestants are referred to exclusively as *state* and *accused*. Further, it is not certain that the legislature had the constitutional power to alter rules of civil practice in this code. The constitutional amendment²⁸ which dispensed with the usual formalities of reading and promulgating the code only authorized a code of criminal procedure.²⁹

(2) *Articles which are different from prior jurisprudence.* Even if the court finds there was no legislative intent that the Code of Criminal Procedure supersede conflicting civil evidence statutes, it might find that the evidence rules of the code replaced prior conflicting jurisprudence. The *Batson* case held that a civil evidence statute did not affect the rule for criminal cases, but the reasoning of the court would not make the converse of this necessarily true. The common law of evidence was brought into criminal proceedings by a legislative act. In the *Batson* case the court said that as a result of this act, only the legislature could change a common law rule of evidence for criminal cases. The

27. See Louisiana Code of Criminal Procedure Articles 426, quoted note 23 *supra*, and 427, quoted note 22 *supra*.

28. La. Acts 1926, No. 262, p. 457.

29. It could be argued that the Code of Criminal Procedure was re-enacted in the revision of 1950 without such a restriction, and by the same token those statutes regulating civil evidence which were re-enacted in the Revised Statutes can no longer be considered as statutes enacted prior to the Code of Criminal Procedure.

court found no such legislative change in the adoption of the Civil Code.³⁰

In civil cases, however, the common law was adopted by the court itself, and what the court adopts, the court should have power to change. At the time the court adopted the common law there seem to have been a great many civil jury trials, and there was no other system of evidence in existence suitable for that type of proceeding. Now, however, in the Code of Criminal Procedure the legislature has provided a fairly complete system of evidence rules. Though these rules were formulated for jury trials, and most Louisiana civil suits are tried without a jury, they are as satisfactory for non-jury trials as are the common law rules. The court could hold that since these rules are a reflection of legislative opinion as to proper evidence rules, they will be followed in preference to the common law. It could hold with equal reason, however, that the legislature knew that the courts were following the common law evidence rules in civil cases; and if they had intended to make any change, they would have said so.

(3) *Articles which restate pre-1928 statutes or jurisprudence, civil or criminal.* The disposition made of the rules in groups (1) and (2) should determine the court's attitude toward the rules which fall into this classification. If the court finds that the Code of Criminal Procedure did not repeal prior conflicting evidence statutes, there would be no reason for it to hold that prior evidence statutes which are restated in the code are affected in any way. If the court finds, however, that the code repeals prior conflicting civil evidence statutes it would seem to follow that it also repealed, or made ineffective, prior statutes which it merely restated. If this is true, a subsequent legislative repeal of the earlier statute accomplishes nothing, and the rule as stated in the code is still applicable to civil proceedings. This would seem especially true of a legislative repeal which resulted from the general revision of 1950, since a repeal resulting from the revision of the statutes does not create a strong presumption of legislative intent to remove a particular provision from civil proceedings.

As for articles which merely restate the prior jurisprudence, if the courts hold that they are bound to follow provisions of the code which altered the rules contained in the prior jurisprudence, they can hardly consider themselves not bound by rules of the

30. See note 24 *supra*.

code which restated the prior jurisprudence. If, on the other hand, the court should find that it is not bound by the provisions which departed from the holdings in prior cases, there is no reason for a finding that the code, by restating prior decisions, made those decisions more binding.

Even if the Supreme Court finds that the provisions of the Code of Criminal Procedure are not binding in civil suits, the trial judge might use the code articles of this group, not as an enactment of the law, but as a convenient restatement of the earlier law which is reflected in these articles.

(4) *Articles which contain innovations to Louisiana evidence rules.* The most important provisions of this group are the doctor-patient and priest-penitent privileges. There are no provisions for these in our present civil evidence statutes. There is some inconclusive jurisprudence as to the doctor-patient privilege,³¹ but none whatsoever concerning communications between

31. In *State v. Lyons*, 113 La. 959, 964, 37 So. 890, 892 (1904), the court, after finding that the physician to whose testimony objection was made had visited the accused as a friend, and not as his physician, said: "The objection was therefore inapplicable to the facts, and was properly overruled. Whether it would have made any difference, under our law, if Dr. Richard had been the attending physician, need not be considered."

The Louisiana Constitution of 1921, Art. VI, § 12, provides:

"The Legislature shall provide for . . . protecting confidential communications made to practitioners of medicine and dentistry and druggists by their patients and clients while under professional treatment and for the purpose of such treatment. . . ."

Prior to the enactment of the Code of Criminal Procedure in 1928, the legislature had made no such provision. In *State v. Genna*, 163 La. 701, 112 So. 655 (1927), the defendant claimed that communications made to the parish coroner who had visited him in his cell in an effort to determine whether he was then insane were privileged communications between doctor and patient. The court said that the constitutional provision was not self-operative, and that there was no doctor-patient privilege in Louisiana. The court indicated, however, that even if there were a doctor-patient privilege the testimony in this case would not fall within such a privilege.

Both the *Genna* and *Lyons* cases were criminal prosecutions, but they were decided prior to the enactment of the Code of Criminal Procedure. Since Louisiana civil and criminal evidence rules were then the same, the decisions of those cases should still be applicable to civil cases unless the civil evidence rule was changed by the adoption of the code.

Two Louisiana court of appeal decisions concerning the doctor-patient privilege have been rendered since the adoption of the Code of Criminal Procedure, but the possible applicability of Article 476 was not discussed. In *Shepard v. Whitney Nat. Bk.*, 177 So. 825, 826 (La. App. 1938), it was objected that hospital records were privileged as communications between doctor and patient. The court said: "We are referred to no authority which sustains the contention . . . that such records are privileged communications between doctor and patient." In *Morgan v. American Bitumuls Co.*, 39 So.2d 139, 144 (La. App. 1949), the lower court had sustained an objection on the ground that the question asked concerned a privileged communication between doctor and patient. The appellate court said: "There is no basis for sustaining of this objection in a compensation case."

priest and penitent. If the court adopts the rules of evidence of the Code of Criminal Procedure as a system for civil cases, these privileges would of course be included. If the court holds that the rules of the code are not applicable as a system of evidence for civil proceedings, there would seem to be no expression of legislative intent that these communications be privileged in civil proceedings.

*Should the Rules of Evidence Be the Same in
Civil and Criminal Cases?*

Even if it is found that the Code of Criminal Procedure had no effect on civil evidence rules, most of the important rules of evidence remain the same for both types of trials, since in most instances the Code of Criminal Procedure merely restated the prior evidence rules. As mentioned above,³² civil and criminal evidence rules are the same at common law; and when both types of cases are tried by the same type of tribunal, there seems to be no reason for a different basic approach.

It is generally agreed, however, that the common law of evidence is a rational system only for trial by jury. As Thayer points out,³³ all irrelevant facts must be excluded as a logical necessity, regardless of the wisdom of the trier of fact, but in developing a practical legal system it is not necessary that we take as a premise that all logically relevant evidence must be admitted.³⁴ Some relevant evidence may be deemed privileged

In *Rhodes v. Metropolitan Life Ins. Co.*, 172 F.2d 183, 184 (5th Cir. 1949), Art. 476, LA. CODE OF CRIM. PROC. (1928) was urged. The court said: "It is not the function of courts, nor, indeed, is it in any way within the province of the judiciary, where local law is administered under two codes, a criminal and a civil, to transpose the provisions of the one to the other or to interchange the statutory principles they enunciate in the absence of express authority. We are inclined, therefore, to the view that the privilege in question is restricted to criminal proceedings. However, should it transpire that we are mistaken in this view, it is clearly beyond doubt that the privilege may not be exercised by the plaintiff in this case. He failed to establish himself in the stead of the person in whose favor the right existed, if it be found to be applicable to a civil action."

32. See note 15 *supra*.

33. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 264 (1898).

34. So much relevant evidence has been excluded that, in Professor Thayer's words, "What has taken place, in fact, is the shutting out by the judges of one and another thing from time to time; and so, gradually, the recognition of this exclusion under a rule. These rules of exclusion have had their exceptions; and so the law has come into the shape of a set of primary rules of exclusion; and then a set of exceptions to these rules." *Id.* at 265.

As a result of this development: "Rules, principles, and methods of legal reasoning have taken on the color and used the phraseology of this subject, and thus disguised, have figured as rules of Evidence, to the perplexity and

to protect other social interests, which society considers so important that to protect these interests society will allow its interest in the correct finding of facts to be thwarted.³⁵ The probative value of some relevant evidence is so slight in relation to the time required for its introduction that it may be excluded. The law may deem some matters of such social importance that it may require that interests in these matters be proved only by certain types of evidence.³⁶ Evidence excluded for these reasons would be excluded whether the trier were a judge alone, or a lay jury. On the other hand, much logically relevant evidence—such as hearsay and non-expert opinion—is excluded only because of the fear that a lay jury would give undue weight to this type of evidence.

In France, where the weighing of facts is done by a judge, there is no system of exclusionary rules.³⁷ Admiralty courts³⁸ and administrative tribunals in this country have never been considered bound by the common law rules.³⁹ Since most Louisiana civil cases are tried without a jury⁴⁰ it would seem that the strict rules of admissibility should not be applied in these proceedings.

As a practical matter, it is impossible to accomplish completely the purpose of rules of exclusion when admissibility is determined by the same person who must later weigh the evidence. When the judge rules on admissibility, even if he does not hear or see the proffered evidence, he must learn of its nature to determine whether it should be let in. Since he knows the content of the evidence, the most he can do is to strive to abstain

confusion of those who sought for a strong grasp of the subject. A bastard sort of technicality has thus sprung up, and a crop of fanciful reasons for anomalies destitute of reason, which baffle and disgust a healthy mind." *Id.* at 273.

35. Such as communications between husband and wife, doctor and patient, priest and penitent, lawyer and client.

36. Such as matters covered by the Statute of Frauds.

37. BODINGTON, *AN OUTLINE OF THE FRENCH LAW OF EVIDENCE* 2 (1904): "Under the head of Relevancy, we shall search the Codes in vain for a provision excluding 'hearsay' or 'opinion' or evidence as to character. . . . The documents put in are such as counsel consider will help his client's case."

38. 1 WIGMORE, *A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW* § 4d (3d ed. 1940).

39. Section 7(c) of the Administrative Procedure Act [60 STAT. 237 (1946), 5 U.S.C. § 1006(c) (1946)] provides that, "Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. . . ."

40. It has been estimated that ninety-nine percent of all personal injury, death, and workmen's compensation claim cases are tried without a jury. Brumfield, *Louisiana Practice—Trial de Novo on Appeal*, NACCA 1951 San Francisco Convention Proceedings 560, 561 (1952).

from attributing probative weight to it if he holds it inadmissible.⁴¹ His mental process is directed toward applying the rules of admissibility, and not toward analysis and proof; but if we can assume that the trier is sufficiently analytical in his thinking to be capable of completely excluding evidence which, though inadmissible, is logically relevant and which he may consciously or subconsciously feel should carry some weight, then the reason for the exclusion—the trier's imputed lack of discernment—no longer exists. It would seem then that a judge sitting alone should be allowed to assign some probative weight to relevant evidence which is presently excluded solely because lay juries are not deemed capable of properly evaluating it. When such evidence is admitted, however, the weighing process becomes more difficult.

There is currently a great dispute in the courts as to the extent to which an agency finding can be based on hearsay,⁴² or non-expert opinion evidence.⁴³ If the trier's weighing of hearsay is recognized, can a decision be based entirely on hearsay, or can the trier reject direct assertion and accept hearsay?⁴⁴ Liberalizing the rules of evidence creates many new problems; but it would seem that when the trier is permitted to evaluate the maximum amount of relevant evidence consistent with his ability to evaluate properly, the decision rendered is more likely to be based on the true facts.

Conclusion

The Code of Criminal Procedure has been in effect for twenty-six years and the Supreme Court has had no occasion to

41. 1 GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 81(e) (16th ed. 1899): "In trials of fact, without the aid of a jury, the question of the admissibility of evidence, strictly speaking, can seldom be raised; since, whatever be the ground of objection, the evidence objected to must, of necessity, be read or heard by the Judge, in order to determine its character and value. In such cases, the only question, in effect, is upon the sufficiency and weight of the evidence."

42. DAVIS, ADMINISTRATIVE LAW §§ 144, 145 (1950).

43. *Id.* at § 146.

44. The Louisiana Supreme Court considered the general problem in *Rountree v. Brilliant Steamboat Co.*, 8 La. Ann. 289 (1853). Discussing the trial court's allowing an essential point of the case to be established by hearsay admitted without objection the court said: "Two witnesses . . . were permitted, without objection, to testify that they 'understood' afterwards he died from the scalding and other wounds. We do not think the appellant here can call upon us to disregard this testimony entirely, because it is hearsay. . . . We do not say if a judgment came before us resting wholly on hearsay evidence received below without objection, we should feel bound to affirm it. It is unnecessary to push the inquiry to that extent. Here is a case where hearsay evidence is accompanied by direct and unexceptionable testimony, strongly indicating the probability of its truth." *Id.* at 290. The judgment of the lower court was allowed to stand.

rule on the effect of the evidence provisions of this code in civil suits. Points of civil evidence are seldom presented to the appellate courts. From this it would seem that even though the proper source of civil evidence rules is none too clear, the rules which are presently applied by the trial courts do not seem to be a source of great concern.

Roy M. Lilly, Jr.

Citation of Appeal in Louisiana

Appeals are favored in Louisiana procedure and will not ordinarily be dismissed on mere technicalities. Support for this principle may be found in statute¹ and in judicial decision.² Yet, in at least one phase of the appellate procedure—that involving citation of appeal—numerous technical and arbitrary rules can be found which are entirely unnecessary to a workable and just system.

The Code of Practice of 1825 originally provided for the taking of appeal only by petition and citation.³ In 1843, Articles 573 and 574 of that code were amended so as to allow appeals to be taken by motion in open court at the same term at which judgment was rendered and without the necessity of citation of appeal.⁴ In *Prudhomme v. Edens*,⁵ decided soon after the 1843 amendment, the trial judge granted an appeal upon motion made in the term following that in which judgment had been rendered. Recognizing that this procedure was not in accordance with the provisions of the code articles, the Supreme Court, nevertheless,

1. Art. 898, LA. CODE OF PRACTICE of 1870; LA. R.S. § 13:4433 (1950).

2. Succession of Tullier, 216 La. 821, 44 So.2d 880 (1950); *Picard v. Mutual Life Ins. Co. of N.Y.*, 212 La. 234, 31 So.2d 783 (1947); *McCann v. Todd*, 201 La. 953, 10 So.2d 769 (1942); *Gulf States Finance Corp. v. Colbert*, 61 So.2d 626 (La. App. 1952); *Johnson v. Wyble*, 55 So.2d 711 (La. App. 1951).

3. Art. 573, LA. CODE OF PRACTICE of 1825: "Whoever intends to appeal, must present a petition to that effect to the court. . ."

Art. 581, LA. CODE OF PRACTICE of 1825: "When an appeal has been taken, . . . the clerk shall deliver a copy of the petition of appeal to the sheriff, to be served on the appellee, together with a citation. . ."

4. La. Acts 1843, No. 64, p. 40: "*Be it enacted* . . . , That Articles five hundred and seventy three and five hundred and seventy four of the Code of Practice be so amended that the party intending to appeal may do so either by petition or by motion in open Court at the same term at which judgment was rendered . . . and when an appeal has been granted on motion in open Court, no citation of appeal or other notice to appellee shall be necessary."

5. 6 Rob. 64 (La. 1843).