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Hearsay and Non-Hearsay as Reflected in Louisiana Criminal Cases

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tion. Of course it is to be recognized there will always be situations where one of the parents may not be able to enjoy in fact the visitation rights he would have if he and the custodian parent lived in the same locality, but it would seem that the action taken by the trial judge in the *Sanford* case was more consistent with the actual interests involved in any custody problem when both parents are living. In such instances there are actually three interests, and not only one. There is, of course, the welfare of the child; but as long as this is not violated it would seem that the custody and visitation order should be so designed as to facilitate the maximum contact of both parents with the child. It is submitted that it is the recognition of these three interests that prompted the decision in the recent United States Supreme Court case of *May v. Anderson*,[12] under which a custody judgment is not entitled to full faith and credit when opposed by a parent who was not before the court which rendered it.[13]

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Hearsay and Non-Hearsay as Reflected in Louisiana Criminal Cases[1]

The Louisiana Code of Criminal Procedure provides that "Hearsay evidence is inadmissible except as otherwise provided in this Code." [2] No definition of hearsay evidence is given, nor is there a setting out of the exceptions. As a consequence, one who would understand the nature of hearsay evidence in Louisiana criminal jurisprudence must glean his rules and definitions from

12. 345 U.S. 528 (1953).

13. This paper does not go into the question of whether a custodian parent who is also natural tutor under Civil Code Articles 157 and 246 may remove his child and domicile beyond the limits of the state without seeking permission of the court which rendered the custody judgment. This matter was considered in the case of Wilmot v. Wilmot, 223 La. 221, 65 So.2d 321 (1953), and there it seems to have been assumed that such permission would be required. A good discussion of that case is contained in *The Work of the Louisiana Supreme Court for the 1952-1953 Term—Tutorship and Custody*, 14 LOUISIANA LAW REVIEW 127 (1953).

1. Civil cases are not discussed because the exclusionary rules of evidence as used in civil matters most often go to the weight rather than the admissibility of the evidence.

2. LA. R.S. § 15:434 (1950).

cases containing greatly varied factual situations and seemingly diverse reasons for excluding hearsay evidence from trials. The hearsay problem is an old one, common to most jurisdictions, and it has been analyzed and discussed by eminent text writers. It would be well to use this wealth of material in determining the precise nature of hearsay evidence,[3] and to emphasize the distinction between the hearsay and non-hearsay use of extra-judicial statements, before attempting to analyze the Louisiana cases discussing hearsay.

Professor Wigmore describes the two great classes of evidence as *testimonial* and *non-testimonial.*[4] A human utterance, or assertion, is a testimonial assertion only when made on the witness stand. A rational system, epitomized as the hearsay rule, provides for the exclusion of human assertions offered as though made on the witness stand, but which are in fact made extra-judicially. Whether or not a statement thus offered can in reality have the same effect as an assertion made on the stand, it is at the base of the hearsay rule.

The hearsay rule as conventionally stated excludes extra-judicial statements offered to prove the truth of the matter contained in the statement. Although the rule might appear contrary to the view that all relevant evidence should be admitted during a trial, its justification will appear from an examination of the considerations giving rise to it.

A trial is no more than an elaborate procedure for establishing facts and determining therefrom the status of the parties' legal rights. The adversaries have an interest in knowing that the evidence admitted to establish facts appears in its true character and is thus accorded only such weight as it merits. The best evidence principle, of which the hearsay rule is one highly refined branch,[5] is aimed at a similar interest, since under this theory the trier-of-fact should consider only the best evidence of the facts sought to be established. The protection of those interests is of great importance when a fact is sought to be established by a credible testimonial assertion because of the different and sometimes higher probative effect it has in establishing a given fact, as contrasted to non-testimonial evidence offered to

3. The author has relied heavily on the writings of Professors Wigmore and Morgan. Where material is taken directly from their works the specific citation is given.

4. WIGMORE, SCIENCE OF JUDICIAL PROOF 12 (3d ed. 1937).

5. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 497 *et seq.* (1898).

establish the same fact. If we could validly use the term *quantity* in speaking of evidence, we could say it takes a great deal more evidence to establish a fact inferentially from circumstantial evidence than to establish it by credible direct, or testimonial, evidence. The difference exists because the trier hearing an assertion is asked to rely upon the credibility of the asserter and to accept the existence of the fact asserted because the asserter vouches for it—because he says it is so and is a credible person, it is so. The assertion would seem to be a brief style of saying that the asserter knows the fact exists because he perceived it; he now manifests the perception in a testimonial declaration to the trier, who should accept the fact insofar as he favorably evaluates the credibility factors of the asserter. When the same fact is sought to be established with non-testimonial evidence, the trier should believe it exists only when an allowable series of inferences from the evidence, governed by man's experience with similar circumstances, has led him to that conclusion.

A person is capable of perceiving matters within himself, such as intentions, thoughts, or emotions, as well as external facts. Since a person's mind is not of the nature of a photographic plate, which can be examined by the trier to determine the exact impression, or perception, retained thereon, the person must manifest his perception by words or actions. Whether or not the manifestation is accurate, and whether or not the perception was a faithful recording of the fact, are important questions. The only way to answer them is to cross-examine the perceiver, evaluating his reliability of perception and his sincerity in stating his perception, thus determining what probative weight to accord his testimony that the asserted fact actually existed. If, therefore, an assertion is made by a person not before the trier for examination, it is impossible for the trier to test the factors on which he will base his belief that the fact exists. This is the objectionable characteristic of hearsay evidence, inherent in the assertive offering of an assertion made by a person not before the trier-of-fact for examination to prove the truth of the matter asserted.

While on the basic analysis, it is well to point out that an assertion can be made without words—non-verbally—which is another way of manifesting one's perception. If it is once determined that a non-verbal act was intended as an assertion, then the analysis of verbal hearsay is applicable.[6]

6. State v. Guidry, 213 La. 1047, 36 So.2d 32 (1948). In this case a sheriff was allowed to testify that a prosecuting witness had pointed out a given

The major reason for setting forth the characteristics of hearsay evidence in such detail is to avoid confusing the hearsay and the non-hearsay uses of the same extra-judicial statement, for those statements can be used non-assertively without violating any of the principles militating peculiarly against hearsay evidence. The statement is offered for a non-assertive use whenever it is offered as a fact perceived by the witness testifying, just as any other fact the witness might see or hear. The perception offered is that of the witness, who perceived the utterance of the words through his sense of hearing and manifests that perception to the trier. The credibility factors of the one asserting the fact (that the statement was made) are before the trier for examination. In short, the witness testifies of his own personal knowledge to the fact that the statement was made. On the other hand, were the extra-judicial statement received assertively, the fact asserted would be that related in the statement, perceived by a person not before the trier. The non-assertive use tends to establish only the fact perceived by the witness; the assertive use tends to establish the fact perceived by the absent declarant.

To determine whether a statement is offered assertively or non-assertively, it is necessary only to ascertain whether the perception to be relied upon is that of the testifying witness or of the absent declarant. Let us assume that on the trial of Sneaky for burglary, the state offers a witness to testify that "Joe said he saw Sneaky enter the house." If what Joe said is being offered to prove that Sneaky did enter the house, then the trier is being asked to rely on Joe's perception in the same manner as though he were presently testifying. This would be an assertive use, and would be objectionable as hearsay. On the other hand, in a slander action by Sneaky against Joe, if the same statement were offered to show that Joe had made a defamatory statement about Sneaky, then the witness should be asked to testify only that the statement was made. The trier would be asked to rely on the perception of the testifying witness, a clear non-assertive use.

There are only three basic situations in which an extra-

spot as the scene of an alleged rape. The Supreme Court held it was admitted only to establish venue, and not to prove the truth of the assertion that the rape had been committed at that place. This appears to be a case of non-verbal hearsay, and should have been excluded. The act of the absent witness in pointing out the location must have been intended to assert "this is the spot." The court stated it did not pertain to the guilt or innocence of the accused, nor did it prejudice him, thus forcing the statement to weigh properly in its "effect" test. See also State v. Brasseaux, 163 La. 686, 112 So. 650 (1927).

judicial statement can be used non-assertively, providing it is otherwise admissible: where the question is whether or not the words were spoken, as in a charge of slander;[7] where the state of mind of a listener is to be inferred from his having heard a given utterance, as when showing that the listener must be possessed of certain knowledge;[8] and where the state of mind of a speaker is to be inferred from his having made a given utterance.[9]

7. State v. Thomas, 159 La. 1076, 1078, 106 So. 570, 571 (1925). In this case a witness testified that the judge had instructed the sheriff and that the sheriff had instructed the deputy to notify the parties of time fixed for trial. The court spoke with extreme clarity in saying, "The objection was that the testimony was hearsay. It was not hearsay . . . because its purpose was not to prove the truth of anything that the judge told the sheriff . . . but to prove the fact that the instruction was given by the judge to the sheriff and by him to his deputy."

State v. Kay, 176 La. 294, 300, 145 So. 544, 545 (1933). In this case a witness was allowed to testify that he heard a woman say, "Oh Lord, Help me!" and a man say, "Hush, and come on," which was objected to as hearsay. The Supreme Court ruled that the witness was only testifying to an occurrence just as he would testify to a report of a gunshot or the fall of a body, or the flash of a pistol.

8. State v. Hamlet, 219 La. 278, 52 So.2d 852 (1951). In this case the tenant-manager of a farm sold the cattle thereon and was charged with theft. He argued that authority to sell was given to him by the agent-wife of the absent owner in a letter to a prior tenant. The state objected to the admission of the letter or its contents, and the trial court sustained the objection, calling the letter immaterial, irrelevant, and hearsay. The Supreme Court did not discuss the hearsay aspect, but held that the exclusion of the letter might have had a material effect on the outcome of the case. The exact contents of the letter are not known, but if there was language saying "I give authority to sell," then the fact that the statement was made would be relevant to show defendant's belief that he did have authority to sell and that he did not act with criminal intent. Such a use would illustrate the inference of a listener's state of mind from the fact that he heard (or read) a given statement.

State v. Sharpe, 170 La. 69, 127 So. 368 (1930). In this case witness was asked to give an explanation for testimony which conflicted with the story given at a prior trial. He said he had been threatened. The court allowed the answer, saying it was primary evidence of what brought about the conflicting testimony. This is using the fact that the threat was made to show its effect on the listener, who was the witness. The truth of the matter contained in the threat was not important.

9. State v. Monfre, 122 La. 251, 253, 47 So. 543, 544 (1908). In this case the witness Locayano was called on to testify that one Monfre had said, "Di Maggio, the bitch is telling everything," when a negro woman began telling a detective an apparently incriminating story. The Supreme Court allowed the testimony to be admitted. It said that the object of it was to bring out the part which Monfre himself then took in relation to the woman's statements, and not to make use of those statements as substantive evidence, and as being true. The court took an analytical approach, but closed its discussion by citing State v. Price, 121 La. 53, 46 So. 99 (1908), which admitted an extra-judicial statement as part of the admission of the accused. With the approach the court took in the instant case, it seems unnecessary to have relied on an exception to justify admission of the testimony.

State v. Morgan, 142 La. 755, 77 So. 588 (1917). In this case the evidence showed that deceased deputy sheriff suspected Morgan of illegally selling whiskey. Witness was allowed to testify that a short time before deceased was killed he had told the witness that he was going to get Morgan that night. The Supreme Court held that the mere fact that the deputy was look-

The first two uses are not controversial because they are so clearly disassociated from the credibility of the asserter. But the last category is the source of no little dispute among the text writers and in the courts. It is best illustrated by the non-assertive use of a statement to show the insanity of the declarant. The relevance of the reported statement lies in its use as a basis for the inference that since declarant so stated, so he believed, which requires the acceptance of the general premise that a person's words usually reflect his thoughts. The further inference is then made that one so believing is insane. The opponents of that mode of reasoning point out that to make the initial inference requires a reliance on the sincerity of the absent declarant, which is the essence of hearsay evidence.[10] The writer submits with deference that the basis for that view is the contention that an implied prefix to every utterance is the expression "I believe," so that every statement made by a person is in the form "(I believe) I saw X."[11] Adhering to the contention, an inference of belief from the fact that a statement was made would be a use of the statement for the truth of the matter contained therein. The view does not seem correct, for the factor of sincerity need be operative only when the trier is asked to accept the matter which the declarant asserts by manifesting his perception thereof, and sincerity enters only for determining whether the perception was accurately manifested. Since the declarant did not manifest his belief, his sincerity cannot be relied upon in establishing his belief.[12]

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ing for Morgan, intending to arrest him for bootlegging, was relevant as a circumstance pointing to Morgan's guilt. It stated the general rule that if the fact that a certain statement was uttered, which would otherwise be hearsay evidence, is relevant to the issue in a case, without regard to the truth of the statement, it is not hearsay evidence. It seems that an inference was allowed from statement to intent, from intent to probability of going after Morgan.

10. Morgan, *Hearsay and Non-Hearsay*, 48 HARV. L. REV. 1138, 1143 (1935).

11. Seligman, *An Exception to the Hearsay Rule*, 26 HARV. L. REV. 146, 150 (1912).

12. It is possible that this contention is compatible with Professor Wigmore's hearsay concept. The strength of the inference drawn from a testimonial assertion depends upon the trier's impression of the asserter's credibility, which is judged by the trier in the light of what has been the credibility of asserters in like circumstances. The same reasoning must be used to judge the credibility of an absent asserter. The only difference is that the judging of a present asserter can be based on a greater number of circumstances, such as physical reactions and personal appearance, which the trier can observe for himself. It follows that the disparity in observable credibility factors is the sole basis for treating present asserters differently from absent asserters, a difference in degree rather than in kind. Hence, there can be a reliance on the sincerity, or credibility, of an absent asserter, but by definition it cannot be in a sufficient degree to raise the statement to

The most famous case allowing an inference of intent from a statement of the declarant is *Mutual Life Ins. Co. v. Hillmon.*[13] The words of the absent declarant were: "I expect to go to Crooked Creek." The court allowed the inference first that the absent declarant had the intention of going, and second that since he intended to go, one would be justified in believing that he did go. The only hearsay problem concerns the inference of intent from the fact of the statement's having been made; for once his intent has been established, the probability of his having gone is an inference based upon the predictability of a person's carrying out his intentions.

Going a step further into the situation presented by the above mentioned statement, one finds it is not a strained construction to hold that "I expect to go" is the equivalent of, or even synonymous with "I intend to go." If the court considered it in that light, it seems that they allowed the statement to go to the truth of the matter stated and therefore allowed a hearsay use. Professor Wigmore classifies it as hearsay, since he expressly includes such a declaration of intention within an exception to the hearsay rule.[14] Yet, if our earlier reasoning is correct, it follows that the inference of such an intent could be made without relying on the credibility of the declarant, but upon the common knowledge that men's words usually reflect their thoughts, a premise established in the trier's mind by experience. The distinction perhaps is unduly fine, but it rests on the same foundation as the premise that a testimonal assertion of a fact has a different probative effect in establishing a fact than has the same statement used non-assertively.

An extra-judicial statement offered non-assertively is not automatically admissible, but must qualify under the criteria of relevancy, materiality, and risk of undue prejudice. Its relevancy and materiality must balance the prejudice which might flow from the inability of the ordinary person to calculate the fine difference in probative value which would distinguish the assertive and non-assertive uses of the same statement. It follows that there should exist a great need for the evidence before a court should admit such statements as that in the *Hillmon* case,[15]

the level of a testimonial assertion unless it is offered as such. Since the insanity statement is never offered as a testimonial assertion, it seems that some degree of sincerity could be relied on, but not to the extent that it would be objectionable as hearsay.

13. 145 U.S. 285 (1892).

14. 6 WIGMORE, EVIDENCE § 1715 (3d ed. 1940).

15. 145 U.S. 285 (1892).

since the inference allowed from its non-assertive use coincided with the truth of the matter asserted. The writer does not undertake to state the criteria for determining admissibility; the subject is mentioned only as a corollary to the point of major importance that a non-assertive use of a statement does not suffer *ab initio* the disability attaching to its assertive use.

The treatment of the hearsay rule by the Louisiana courts does not appear as a consistent pattern. The various hearsay problems have been encountered and dealt with, including non-verbal hearsay[16] and the non-assertive use of statements to show the state of mind of the speaker,[17] to show that the words were spoken,[18] and to show the knowledge or state of mind of a lis-

16. State v. Venson, 142 La. 245, 247, 76 So. 701, 702 (1917). In this case the testifying witness was allowed to state that another witness had pointed out to him a place, not specifying that it was the scene of the crime. It was offered on the issue of venue. The Supreme Court affirmed the admission of the testimony with the following reasoning: "No objection was made on the ground of relevancy, and if made would not have been well founded, since this testimony had some relevancy, in that it went to explain how the [testifying] witness came to be acquainted with this place. . . . The object in offering it was not to show that the crime had been committed at that place, and it had no tendency so to show."

The court placed emphasis on the fact that the testifying witness related that the other witness had only pointed out a place and had not pointed it out as the scene of the crime. It seems that this would be a non-verbal assertion, but from the analytical view, it was offered strictly to show that the testifying witness was acquainted with a given spot, so it was not an assertive use of the act. *But cf.* State v. Guidry, 213 La. 1047, 36 So.2d 32 (1948), discussed note 6 *supra*, where the statement was used assertively.

State v. Winstead, 204 La. 366, 15 So.2d 793 (1943). In this case a father testified to his observation of his son's preparations to leave home for the armed forces. The court held it not to be hearsay because the witness had direct knowledge of the preparations. This seems to be a case of the court's inferring intent from non-verbal conduct, which is clearly not hearsay in the absence of a showing that it was intended as an assertion.

17. State v. Dunn, 161 La. 532, 109 So. 56 (1926). In this trial for the death of a peace officer, the witness was asked to repeat what the deceased had said regarding where he was going and what he was going to do. The purpose was to establish that deceased was going to the home of defendants to serve a warrant on them, which would connect defendants with deceased at the time of the murder. The Supreme Court ruled it admissible to show the intention and the purpose of the deceased. It relied on State v. Morgan, 142 La. 755, 77 So. 588 (1917), discussed note 9 *supra*, which had also held statements of deceased admissible to show where he was going. The court may have considered this an exception to the hearsay rule since it indicated that the statements were ex parte declarations of a deceased as to his purpose and were admissible as original evidence. See also State v. Anthony, 166 La. 793, 117 So. 921 (1928); State v. Vial, 153 La. 883, 96 So. 796 (1923). The fact that it was the statement of a deceased appears to have been given great weight. Although the court said this was not hearsay, it was important only for the truth of the matter stated—that the deceased was going to the home of the defendants. It therefore seems that the court reached the same result as that in the Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285 (1892), by allowing it to show intent as the initial inference. Had the statement more directly concerned the guilt of the accused, a different result might have been reached.

18. See note 7 *supra*.

tener.[19] Such terms as *original* and *natural* evidence, and *ex parte* declarations have been used in the analysis and disposition of hearsay questions.[20] The use of the term *independent relevance*,[21] and the reasoning it illustrates, is more significant than any other, because its definition contemplates what Professor Wigmore would call the non-assertive use of a statement, which should indicate in this particular instance that the Louisiana courts are applying something like our earlier analysis. But *independent relevance* goes further, for it requires that the non-assertive use have an evidential value, thus combining in a single term the two steps logically necessary for the analytical approach engendered by reliance on the hearsay rule advocated by Professor Wigmore. The analytical approach consists of first deciding whether or not the statement is offered assertively, and, if it is not, then deciding whether the fact that it was made has sufficient relevancy to warrant its admission. The same reasoning must be exercised under either approach, but the former emphasizes the non-assertive use, while the latter turns first to the assertive use. The Louisiana court has stated a more elaborate rule based on independent relevance,[22] but the elements are the same. An understanding of this is important only to show that the basic analysis of hearsay is generally the same in

19. State v. Morgan, 211 La. 572, 30 So.2d 434 (1947). In this case the defendant had shot his mother-in-law at her home. State offered evidence that defendant had brought the shotgun with him to kill his wife, which he had earlier threatened to do. Defendant attempted to contradict this evidence by showing that several years earlier his mother-in-law had warned him of his father-in-law's violence and the shotgun had been brought along only for self-protection. The Supreme Court held that evidence of the warnings of the mother-in-law should have been admitted for the purpose of contradicting the evidence which the state had introduced to prove the purpose for which the defendant had taken his shotgun with him. It was not offered to prove the truth of what the mother-in-law had told him.

State v. Coll, 146 La. 597, 83 So. 844 (1919). In this case the question to the witness was whether or not he had received reports from the deceased employee concerning irregularities on the part of defendant, who was charged with killing the deceased. The court said the answer was not hearsay, because it was an independent fact which the witness had observed; it was not irrelevant since it was what led to the killing; it would have been hearsay had it been offered to prove the irregularities reported, but here it was offered to prove intent by showing the fact that the report had been made.

20. State v. Anthony, 166 La. 793, 117 So. 921 (1928).

21. See State v. Garon, 158 La. 1014, 105 So. 47 (1925), discussed note 25 *infra*.

22. State v. Cole, 145 La. 900, 902, 83 So. 184, 185 (1919). In this case Chief Justice O'Niell stated: "Of course, the rule excluding hearsay evidence does not apply when the mere fact that the statement was made (by the person not under oath) is itself a relevant and important fact. But, if the fact that the statement was made (by the person not under oath) would be of no importance except for the truth of the statement, it is not admissible."

Louisiana as that set out by the text writers, though the terms used by the court may be different.

With this background in mind, one can discern the pattern of treatment of the hearsay rule as one which varies in emphasis according to the facts of the particular case. This is altogether proper. If a statement is offered for a non-assertive use, but contains an assertion of a matter which is prejudicial to the accused, then the emphasis is naturally on weighing relevancy against risk of undue prejudice.[23] When the court determines that the statement does not have sufficient relevancy to outweigh the risk of undue prejudice, it often says that the statement is excluded as hearsay.[24] Though the language used appears to offend the analytical approach, the result is very sound. The assertive or non-assertive character of the extra-judicial statement is being judged by its probable effect on the trier, and not solely by the mode of offering. If the content of the statement be such that the truth of the matter stated is more likely to take effect upon the trier's mind than is the fact that it was made, with a resulting high risk of undue prejudice, then, regardless of how offered, it is treated as being used for the truth of the statement and objectionable as hearsay.[25]

23. State v. Lowery, 214 La. 465, 38 So.2d 77 (1948). In this trial for the illegal sale of intoxicating liquor, state witness was allowed to testify over defendant's objection that he had received complaints of defendant's selling intoxicating liquor, although he himself did not know of the sales. It seems that the testimony was offered to show the fact of complaint and not the fact of whiskey sales. The Supreme Court remanded the case for prejudicial error, which is consistent with the rule that when the truth of the statement is more relevant to a material issue than is the fact that it was made, with a resulting high risk of undue prejudice, the statement will be excluded as hearsay evidence.

See also State v. Elkins, 214 La. 501, 38 So.2d 150 (1948); State v. Kimble, 214 La. 58, 36 So.2d 637 (1948).

State v. Cole, 145 La. 900, 83 So. 184 (1919). In this case the witness for the state was allowed to relate to the jury all the details of the assault with intent to rape committed upon prosecutrix, as related to the witness by the prosecutrix. The Supreme Court disallowed it, saying that when the fact that the statement was made by a person (not under oath) would be of no importance except for the truth of the statement, it is not admissible.

24. *Ibid.*

25. State v. Brown, 161 La. 704, 706, 109 So. 394, 395 (1926). In this case a detective testified that a woman in the room had told him it was defendant's room. In deciding that the statement was hearsay evidence, the Supreme Court stated a relevance test as follows: "If the fact that the woman made the statement to the detective while he was searching the room had been, of itself and without regard for the truth of the statement, a material or important fact, the fact that she made the statement would have been admissible. But the woman's statement was not at all important or relevant to the question of guilt or innocence of the defendant, except in so far as the jury might have believed the statement to be true. It was therefore subject to the rule forbidding hearsay evidence."

State v. Garon, 158 La. 1014, 105 So. 47 (1925). In this case the state's

On the other hand, when there is little danger that the assertive content of the statement will be prejudicial, so that it takes only a slight degree of relevance to balance the risk of undue prejudice, the Louisiana court emphasizes that the proponent seeks to prove only the fact that the statement was made.[26] Similarly, where there is a high risk of undue prejudice, but the circumstances of the case lend great relevance to the fact that the statement was made, the courts have also emphasized that the statement is offered for a non-assertive use.[27] These

witness Miller testified that he had identified Chutz, one of the defendants. Apparently for corroborative purposes, the sheriff then testified that Miller had identified Chutz, but that Chutz had not been present at the time. Defense objected that Miller's identification in the presence of the sheriff was hearsay. The trial judge admitted it as the direct testimony of the sheriff to the fact that Miller had identified the accused. The Supreme Court called it hearsay since the mere existence of the fact of identification was not relevant, and its probable effect was to support Miller's testimony, thus being used more for the truth of the matter stated—that Miller had identified the accused—than for the fact that it was made.

State v. Butler, 114 La. 596, 597, 38 So. 466 (1905). In murder trial based on circumstantial evidence, state witness was asked "if he was in church on the night of the murder, and, if so, to state who else was there, and if he saw Archie Butler [defendant]." Witness replied, "Joe Carr and myself was standing in front of the church house, and we seen some one pass there, and it looked to be Archie Butler, and I asked him who it was, and he says, 'That's Archie,' and we called Archie by name." Defendant objected to it as hearsay. Trial court admitted the testimony apparently as being relevant. The Supreme Court ruled the admission of the testimony to be reversible error. It counted heavily the fact that the presence of defendant at the church was an important point and said that such testimony allowed not the knowledge of the testifying witness, but that of Joe Carr, the absent declarant, to reach the jury. The prosecution seems to have offered the statement in proof of defendant's presence at the church.

26. State v. Natalle, 172 La. 709, 135 So. 34 (1931). In this case defendant charged with receiving stolen goods argued that the goods were not stolen because the owner consented to the taking. The owner had assisted police in setting trap to catch thieves, after an informer told police of the plan. In attempting to establish that the owner had never consented to the taking, sheriff was asked whether the proposition to steal had been made to him or someone else. The Supreme Court relied on the trial judge's per curiam, which stated that the testimony was the only way to establish the fact of the agreement as to the entrapment. Apparently the reasoning was that if the proposition had been made to the owner by one who participated in the taking, there would have been a consent to the taking. By showing that the proposition was made to the sheriff it became apparent that the owner could not have consented. The exact proposition made to the sheriff does not appear in the opinion, but it seemed to have been offered solely for the fact that it was made. The per curiam negated the possibility of prejudice to the accused by pointing out that he also was seeking to get that testimony.

State v. Jackson, 223 La. 435, 65 So.2d 903 (1953). In this case a tag on a corpse bore the name "Frances Foster." The witness, a doctor, was asked whether the body bore the tag at the time of autopsy. It was objected to as hearsay. The court allowed the doctor to answer, saying that the purpose of the question was not to prove that the body was that of Frances Foster, but merely that the tag was on the body when it was examined.

27. See note 17 *supra*.

cases closely resemble the text writers' analytical approach.[28]

The result of using these two points of emphasis has been to create the impression that two separate tests have been used. They are in fact different branches of a single balancing process based on the probable effect of the extra-judicial statement upon the trier. Looking to the effect of the statement to distinguish hearsay from non-hearsay still requires a firm grasp of the distinction between the assertive and non-assertive uses of extra-judicial statements, and should produce just results on any given trial if the judge is aware of all factors entering into the proper use of the test. The rule best serves as one for determining whether a statement's effect would come chiefly from the truth of the matter contained therein, or from the mere fact that it was made. It is very useful when applied to statements admissible for either an assertive or non-assertive use; but it is misleading to label non-assertive evidence as hearsay becasue it is irrelevant and immaterial.[29] Valid evidence may thereby be excluded by one not exercising the delicate judgment necessary to make the "effect" test a proper one, because the full reasoning is not easily seen when a statement is offered non-assertively,

28. There are also cases which do not mention the relevance test, such as:

State v. Shelby, 215 La. 637, 639, 41 So.2d 458, 459 (1949). In this trial on a charge of simple burglary, a state witness was asked if he had been informed in his official capacity as marshal that stolen items were recovered, to which witness answered, "yes, sir." The Supreme Court allowed the statement, saying that it brought out only the fact that he had been advised of the recovery, which would not be hearsay. Had the statement made to the marshal been offered to prove the recovery of the tires, it would have been a hearsay use of the statement. As it was, it seems to have been a clear non-assertive use.

State v. Sutcliffe, 159 La. 305, 307, 105 So. 352, 353 (1925). In this case a prosecuting witness was asked by the state: "Who were the agents of defendant that came to you?" A second question was asked: "Did anybody offer you $100?" Defendant objected because the answers would be hearsay. The Supreme Court held that the "state did not attempt to prove what the four parties named stated to the prosecuting witness, but the mere fact that the parties had made an offer of compromise, and that in so doing they were acting at the instance of the defendant." The court drew this distinction without making any reference to relevance or risk of prejudice.

29. State v. Gunter, 208 La. 694, 23 So.2d 305 (1945). In this case defense counsel asked prosecuting witness if he had been told at an earlier time that his co-defendant had been arrested on other charges. The Supreme Court held that the answer would be hearsay, irrelevant, and immaterial because it would consist of unsworn statements made to the witness by certain third parties. Whether or not this was hearsay evidence depends on the purpose for which the question was asked, and the purpose does not appear in the opinion. If the defense were trying to show the witness' belief that such charges were made, which might discredit his other testimony, the fact that he was told of the arrest would be important completely apart from whether or not his co-defendant had actually been arrested. Since the desired answer did not apparently concern the material issues, it is difficult to see that it was objectionable as being prejudicial.

yet excluded as hearsay. What would objectively be an assertive use in one situation might be treated as a non-assertive use elsewhere, since a change in the factual situation would vary the effect of the offered statement. It is therefore possible that in cases decided with the "effect" test, the mode of offering, and not the "effect," will be seized as the basis of the decision.[30]

The most feasible plan for avoiding this possible confusion and for affording clarity to the Louisiana courts' treatment of the hearsay rule is to have legislation enacted which spells out a definition of hearsay evidence and lists specific exceptions to the exclusionary rule.

Two rules in the *Uniform Rules of Evidence*[31] set out a hearsay rule with attendant exceptions. Rule 63 provides that "Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible. . . ."[32] Thirty-one subsections set out in detail the exceptions to the rule. According to the comment following the above quoted section, the rule "follows Wigmore in defining hearsay as an extra-judicial statement which is offered to prove the truth of the matter stated."[33] The writer submits that it apparently differs with Wigmore's view that when an extra-judicial statement is offered assertively the original declarant is considered to be the asserter;[34] the following was quoted by Professor Wigmore in explanation of his view: "The individual testifying is merely the conduit or pipe through whose agency the impressions of someone else are conveyed to the Court. The real proof is the hearsay statement."[35] The use of the word *evidence* at the beginning of Rule 63 makes it appear that the offered assertion is that of the testifying witness who reports the hearsay statement. This may not be the intended meaning, but the definition of *evidence* found in the *Uniform Rules of Evidence* lends strength

30. State v. Harris, 166 La. 759, 117 So. 820 (1928). In this case the Supreme Court affirmed exclusion of questions whose answers called for statements giving the opinion of the police. Their reasons were that it was objectionable as being hearsay, as calling for an opinion of the police, as being of no probative value, and therefore irrelevant, and because it was not part of the *res gestae*. The purpose for which the question was offered was not discussed.

31. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM RULES OF EVIDENCE, Rules 62, 63 (1953).

32. *Id.* at 39.

33. *Id.* at Rule 63, comment.

34. 5 WIGMORE, EVIDENCE § 1361 (3d ed. 1940).

35. APPLETON, THE RULES OF EVIDENCE 174 (1860), as quoted in 5 WIGMORE, EVIDENCE § 1316 (3d ed. 1940).

to this interpretation, since evidence is defined as "the means from which inferences may be drawn. . . ."[36] If it is the assertion of the testifying witness which is being offered, then it seems that the reported statement would not be offered assertively; but the assertive offering is essential to the theory that the hearsay rule is violated only when the credibility of the absent asserter is relied on in establishing the fact. It is submitted that a simpler and more accurate rule, and one more in accord with Professor Wigmore's theory, would be: "An assertion made by a person not testifying at the hearing and offered as an assertion to prove the truth of the matter asserted, is hearsay evidence and inadmissible, except. . . ."

To clarify the Louisiana courts' criteria of admissibility for the non-assertive use of extra-judicial statements it would be well to set out, either as an explanatory comment following the above suggested rule or as a separate rule, the test apparently used by our Louisiana Supreme Court—if the content of the statement be such that the truth of the matter stated is more likely to take effect upon the trier's mind than is the fact that it was made, with a resulting high risk of undue prejudice, then the statement is inadmissible.

The compiling of a list of desirable exceptions to the exclusionary rule is beyond the scope of this comment. The exceptions listed as the subsections of Rule 63, *Uniform Rules of Evidence*, nearly exhaust the possible exceptions. A thorough investigation of them would determine which would be adaptable to our Louisiana policy.[37]

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36. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM RULES OF EVIDENCE, Rule 1 (1953).

37. The following exceptions are examples of those set forth in the *Uniform Rules of Evidence*, Rule 63:

"(5) *Dying Declarations.* A statement by a person unavailable as a witness because of his death if the judge finds that it was made voluntarily and in good faith and while the declarant was conscious of his impending death and believed that there was no hope of recovery;"

"(12) *Statements of Physical or Mental Condition of Declarant.* Unless the judge finds it was made in bad faith, a statement of the declarant's (a) then existing state of mind, emotion or physical sensation, including statements of intent, plan, motive, design, mental feeling, pain and bodily health, but not including memory or belief to prove the fact remembered or believed, when such a mental or physical condition is in issue or is relevant to prove or explain acts or conduct of the declarant, or (b) previous symptoms, pain or physical sensation, made to a physician consulted for