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Procedure: Evidence

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EVIDENCE

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RELEVANCY

Admissibility—Risk of Improper Use in Jury and Non-Jury Trials

Whether certain logically relevant evidence should be held admissible is often a question of balancing the probative value of the evidence against the risk of undue prejudice.[1] In a bench trial, as distinguished from a jury trial, there is generally much less danger that the evidence will be improperly used,[2] and therefore evidence is frequently properly admissible at a bench trial which should be held inadmissible in a jury trial.

State v. Launey[3] supports this approach. Discussing whether certain disputed evidence was admissible, Justice Summers, speaking for a majority of the court, stated: "In a bench trial the judge is especially qualified to confine consideration of such evidence to the limited purpose for which it may properly be admitted."[4]

Character of Victim—Prior Acts and Threats

Under what circumstances may the defendant in a criminal case show that the victim had a dangerous character and previously had threatened or

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1. *See* FED. R. EVID. 403; UNIFORM RULE OF EVID. 45 (1953); State v. Moore, 278 So. 2d 781 (La. 1973), discussed in *The Work of the Louisiana Appellate Courts for the 1972-1973 Term—Evidence*, 34 LA. L. REV. 443, 446 (1974), reprinted in G. PUGH, LOUISIANA EVIDENCE LAW 11 (Supp. 1976) [hereinafter cited as PUGH]; C. MCCORMICK, EVIDENCE § 185 at 434 (Cleary ed. 1972) [hereinafter cited as MCCORMICK]. *But see* LA. R.S. 15:442 (1950) (which taken literally would indicate a contrary position).

2. For authorities discussing the problem see J. MAGUIRE, J. WEINSTEIN, J. CHADBOURNE AND J. MANSFIELD, CASES AND MATERIALS ON EVIDENCE 1114-127 (6th ed. 1973); MCCORMICK § 60 at 137; 1 J. WEINSTEIN, EVIDENCE §§ 102(01) at 102-5, 201(07) at 201-43 (1975) [hereinafter cited as WEINSTEIN]; Davis, *An Approach to Rules of Evidence for Nonjury Cases*, 50 A.B.A.J. 723 (1964); Davis, *Hearsay in Nonjury Cases*, 83 HARV. L. REV. 1362 (1970); Levin & Cohen, *The Exclusionary Rules in Nonjury Criminal Cases*, 119 U. PA. L. REV. 905 (1971); Maguire & Epstein, *Rules of Evidence in Preliminary Controversies as to Admissibility*, 36 YALE L.J. 1101 (1927); Note, 79 HARV. L. REV. 407 (1965); Note, 29 IND. L.J. 446 (1954); Note, 24 ROCKY MTN. L. REV. 480 (1952).

3. 335 So. 2d 435 (1976).

4. *Id.* at 437.

committed criminal acts against defendant or others? Essentially the problem is one of undue prejudice—protecting the prosecution against jurors improperly permitting a defendant to go free because the person he victimized may have been an unsavory individual.

State v. Lee[5] is an exceptionally important case in the area.[6] A sharply divided court in *Lee*, both on original hearing and on rehearing, takes a broad view as to the admissibility of such evidence. Its full implications for the future, however, are not altogether clear.

LA. R.S. 15:482 provides:

> In the absence of evidence of hostile demonstration or of overt act on the part of the person slain or injured, evidence of his dangerous character or of his threats against accused is not admissible.

Prior to 1952[7] the provision in question required "proof" rather than mere "evidence" of hostile demonstration or of overt act.[8] Despite the legislative change, a number of cases continued to apply the earlier, stricter test.[9] The majority in *State v. Lee* holds that if there is "appreciable evidence"[10] of hostile demonstration or overt act, under 15:482 the evidentiary door is opened and the fact that the trial judge finds the unlocking evidence to be incredible is of no moment.

The controversial *Lee* case goes further, however, opening the door quite wide to the admissibility of evidence *re* the character and prior conduct of a victim. Justice Tate, speaking for a divided court on original hearing, explains that when self-defense is pleaded, evidence as to the character and prior conduct of the defendant may be relevant on either of two issues: (1) state of mind of the defendant as to his reasonable apprehension, or (2) ascertaining whether the defendant or the victim was the aggressor. Where the only pertinent issue is who was the aggressor, prior

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5. 331 So. 2d 455 (La. 1976).

6. For a discussion of earlier Louisiana jurisprudence see *The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Evidence*, 36 LA. L. REV. 651, 653 (1976); *The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Evidence*, 35 LA. L. REV. 525, 529 (1975), reprinted in PUGH at 7 (Supp. 1976); *The Work of the Louisiana Supreme Court for the 1952-1953 Term—Evidence*, 14 LA. L. REV. 220, 226 (1953), reprinted in PUGH at 28; *Note*, 10 TUL. L. REV. 642 (1936).

7. LA. R.S. 15:482 (Supp. 1952).

8. As to what constitutes an overt act see *State v. Burkhalter*, 319 So. 2d 392 (La. 1975), and *State v. Houston*, 316 So. 2d 724 (La. 1975).

9. See the discussion in *The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Evidence*, 36 LA L. REV. 651, 653 (1976); *The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Evidence*, 35 LA. L. REV. 525, 529 (1975), reprinted in PUGH at 7 (Supp. 1976).

10. 331 So. 2d at 459.

knowledge by the defendant as to the evidence in question may be irrelevant. On the other hand, where the evidence is directed toward showing the state of mind of the defendant as to what he reasonably apprehended, his prior knowledge as to the information involved may be all-important.

As these writers see it, *State v. Lee* does not fully answer the question as to when and under what circumstances a defendant may introduce evidence of prior threats and/or acts by the victim against the defendant or others. Despite the fact that the questions put by defense counsel in the *Lee* case were broad, general and wide-ranging, the majority found that error was committed in the trial court's sustaining the prosecution's objections. The court does not, however, set definite limits to the area of appropriate inquiry, as forcefully pointed out in Chief Justice Sanders' dissent. The majority held that where the issue is state of mind of the defendant as to what he reasonably apprehended and the predicate set out by LA. R.S. 15:482 has been laid, violent acts by the victim, even against third parties, shown to have been known to the defendant, are admissible to show the defendant's state of mind. The majority of the court takes the position that, although recognizing that such specific acts might not be admissible to show character, under appropriate circumstances they are admissible, apart from the character question, to show state of mind of the defendant. In this respect the court relies upon *State v. McMillan*[11] which had concerned prior incidents between the victim and the defendant. The whole area is to be explored in greater depth in a casenote in a later issue of this Review.

Gruesome Photographs—Stipulation to Avoid Admission

Should a defendant, by a clear stipulation as to the verity of facts sought to be proved by a gruesome photograph, be permitted to prevent the prosecution's admission of such evidence? For example, should defendant, by conceding the identity of the victim, or the nature and extent of the wounds, etc. be able to prevent the admission of gory photographs of the victim? This approach was tried by defense counsel in *State v. Gilmore*.[12] Reversing on other grounds, a majority of the court, speaking through Justice Dennis, took great pains to analyze the problem exhaustively, concluding that whether defendant should be permitted to avoid the admission of photographs in this manner is a matter addressing itself to the

11. 223 La. 96, 64 So. 2d 856 (1953), discussed in *The Work of the Louisiana Supreme Court for the 1952-1953 Term—Evidence*, 14 LA. L. REV. 220, 226 (1953), reprinted in PUGH at 28.

12. 332 So. 2d 789 (La. 1976).

discretion of the trial court. In a splendid discussion he carefully outlined the factors that should weigh with the trial court in the exercise of its discretion. The supreme court seems to look with favor upon the propriety of the trial court's accepting such an unequivocal stipulation, as a substitute for the contested photographs. Presumably the trial court's discretion would be subject to appellate review by the supreme court in light of the factors outlined.

Gruesome Photographs—The Risky Balancing Test

The admissibility of allegedly gruesome photographs confronted and divided the court in *State v. Smith*.[13] The test to be applied as to the admissibility of such photographs appears to be generally accepted and settled, *i.e.*, for the photograph to be admissible it must be relevant and its probative value must outweigh its probable inflammatory effect.[14] The difficulty comes in the application of the test. On original hearing in *State v. Smith*, a majority of the court held that the test was unsatisfied and that the admission of the photograph in question was reversible error. On rehearing, a divided court reversed itself, holding that the trial court had not abused its discretion in letting in the contested photograph, a color photograph of the upper portion of the victim's body in the morgue. The justices differed as to whether or not the photograph was in fact gruesome or grisly and as to its probative value and relevancy. Although the prosecution prevailed on rehearing, there is an indication that a majority of the court is perhaps more concerned than previously about the admissibility of allegedly gruesome photographs.[15] In the opinion on rehearing, affirming the trial court's admission of the evidence, Justice Calogero indicated that a "prosecutor would do well to avoid flirtation with reversible error."[16]

REFERENCE TO A DEFENDANT'S OTHER CRIMINAL CONDUCT

Improper Prosecutorial Question Regarding Prior Criminal Conduct

In *State v. Meshell*[17] the majority of the court held that under certain

13. 327 So. 2d 355 (La. 1976).

14. *See* State v. Gilmore, 332 So. 2d 789 (La. 1976); State v. Chase, 329 So. 2d 434 (La. 1976); State v. Nix, 327 So. 2d 301 (La. 1975); and State v. Beach, 320 So. 2d 142 (La. 1975). See also the discussion in *The Work of the Louisiana Appellate Courts for the 1970-1971 Term—Evidence*, 32 LA. L. REV. 344, 351 (1972), reprinted in PUGH at 72.

15. See the discussion in *The Work of the Louisiana Supreme Court for the 1952-1953 Term—Evidence*, 14 LA. L. REV. 220 (1953), reprinted in PUGH at 73; and Note, 14 LA. L. REV. 421 (1954), reprinted in PUGH at 66.

16. 327 So. 2d at 362.

17. 332 So. 2d 767 (La. 1976). *See also* State v. Green, 315 So. 2d 763 (La. 1975).

circumstances the prosecutor's asking of a suggestive question *re* other criminal conduct constitutes a comment by the prosecutor as to such conduct and thus necessitates a reversal.[18] In a strongly worded opinion which relied in part on *State v. Frazier*[19] and the ABA Standards[20] the court held that a "mistrial is mandatorily required by statute because of the prosecutor's comments by way of question to inadmissible evidence of offenses other than that for which the defendant is on trial."[21] In rejecting the state's contention that under the circumstances presented no reversible error was committed, the court held that under the pertinent statute such improper prosecutorial conduct automatically entitles the defendant to a mistrial and a trial court's failure to grant same is reversible error. The writers agree. The innuendos wafted[23] by the questions were highly prejudicial and it is believed that the questions were properly classified as prosecutorial comment. Earlier judicial pronouncements indicating a contrary view, it is respectfully submitted, should now be regarded as non-authoritative.[24]

Improper Prosecutorial Question Regarding Juvenile Offense

Is an improper prosecutorial question relative to a defendant's prior inadmissible juvenile offense to be deemed a prosecutorial comment on a defendant's inadmissible other "crime" in contravention of Code of Criminal Procedure article 770, thus necessitating a mistrial? It is submitted that generally it should, that reference to an act committed by a juvenile which would have been criminal if committed by an adult is usually just as prejudicial in the eyes of the jury as a reference to a similar act committed by an adult. The provision in LA. R.S. 13:1580, that a person adjudged a juvenile delinquent shall not be considered a "criminal," is to *protect* the juvenile from the ill effects of such a determination.

Nevertheless, *State v. Roberts*[25] holds that an improper prosecutorial

18. *See* LA. CODE CRIM. P. art. 770.

19. 165 La. 758, 116 So. 176 (1928).

20. ABA STANDARDS RELATING TO THE PROSECUTION FUNCTION Standard 5.6(b) (1971).

21. 332 So. 2d at 769.

22. LA. CODE CRIM. P. art. 770.

23. For a splendid analysis of a related problem in a different context by Justice Jackson, see *Michelson v. United States*, 335 U.S. 469 (1948).

24. See the discussion in *The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Evidence*, 36 LA. L. REV. 651, 656 (1976), and the cases and discussions therein cited. Also to be contrasted with the court's holding in *State v. Meshell* is its disposition of an analogous problem in the earlier case of *State v. Ross*, 320 So. 2d 177 (La. 1975), discussed in the text at notes 27-30, *infra*.

25. 331 So. 2d 11 (La. 1976).

question relative to defendant-witness's juvenile delinquency record is not a reference to a prior crime within the meaning of Code of Criminal Procedure article 770 and hence does not necessarily require a mistrial and that a judicial admonition to disregard may suffice to protect defendant's rights. This interpretation seems to these writers strained, and the holding, it is submitted, should be limited to the context in which it arose. In *Roberts*, had the juvenile act involved been committed by the defendant as an adult, the conviction for such act would have been admissible against him for the purpose of impeaching his credibility as a witness.[26]

Prosecutorial Responsibility for a Police Witness's Answer Regarding Defendant's Prior Arrests

In *State v. Ross*[27] the prosecuting attorney had asked the police witness called by him to read the defendant's statement "in full." In compliance, the witness commenced reading, in question and answer form, the statement made by the defendant. One of the questions earlier put to the defendant by the officer and thus read by him to the jury was, "How many times have you been arrested?"[28] The trial court sustained the defendant's objection and admonished the jury to disregard same, but denied defendant's motion for a mistrial. The majority of the court, over forceful dissents by Justices Calogero and Barham, held that this was not a reference *by the district attorney* to other crimes and hence Code of Criminal Procedure article 770 was not violated. Noting that the prosecuting attorney himself possessed a copy of the statement, Justice Calogero in dissent maintained that when the prosecuting attorney asked the police officer called by him to read such statement what was read was in fact a comment by the district attorney within the meaning of article 770. Justice Barham in his dissenting opinion argues forcefully that any surplusage in a defendant's statement read by a state's witness on request of the prosecutor should be treated as a comment by the prosecuting attorney.

It is submitted that if the prosecution is not to be held responsible for what police officers, in response to its own questions, read into evidence, the door is open to much abuse.[29] Further, it is believed that the *Ross* case does not harmonize well with the realistic attitude reflected in the later case of *State v. Meshell*.[30]

26. See also the discussion of *State v. Meshell*, 332 So. 2d 767 (La. 1976), discussed in the text at notes 17-24, *supra*.

27. 320 So. 2d 177 (La. 1975).

28. *Id.* at 179.

29. See also in this connection *The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Evidence*, 36 LA. L. REV. 651, 657 (1976).

30. 332 So. 2d 767 (La. 1976). See text at notes 17-24, *supra*.

SCIENTIFIC EVIDENCE

Chemical Tests on Suspected Drunken Drivers

A number of cases decided during the past term concerned the admissibility of the results of chemical tests to prove intoxication in prosecutions for driving while intoxicated. Taken as a whole, they underline the necessity of strict adherence to statutory standards.

LA. R.S. 32:663 sets forth two criteria for such chemical analyses: (1) that they be performed by methods prescribed by the state department of health, and (2) that they be performed by a person issued a permit to do so by that department.

The foundation case of *State v. Junell*[31] held that the statute's certification requirement is mandatory, not directory.[32] *State v. Jones*[33] held that in light of the best evidence rule of LA. R.S. 15:436 and the non-permanent character of the certification, defendant is entitled to force the prosecution to produce the certificate itself. Merely adducing testimony by the person administering the test that he possessed a certificate is an inadequate showing.[34] Further emphasizing the sanctity of the certification requirements, the court in *State v. Bruins*[35] held that the fact that the results of such a test were included in hospital records does not dispense with the necessity of establishing certification compliance.

Addressing itself to the other requirement of LA. R.S. 32:663, the court in *State v. Jones*[36] held that

> the State may not avail itself of the presumptions available under La. R.S. 32:662 until the 'state department of health', that is the Louisiana Health and Human Resources Administration, establishes and promulgates carefully detailed methods, procedures and techniques covering, but not limited to repair, maintenance, inspection, cleaning, chemical accuracy, certification, proof of adherence to which would reasonably assure that the right articulated in *Junell, supra*, would be recognized and implemented in the courts of law of this State.[37]

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31. 308 So. 2d 780 (La. 1975).

32. For a discussion of *State v. Junell* see *The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Evidence*, 36 LA. L. REV. 651, 655 (1976).

33. 316 So. 2d 100 (La. 1975).

34. *See also* State v. Batiste, 327 So. 2d 420 (La. 1976); City of Monroe v. Robinson, 316 So. 2d 119 (La. 1975); and State v. McGuffey, 316 So. 2d 107 (La. 1975).

35. 315 So. 2d 293 (La. 1975). See also the discussion in the text at notes 187-88, *infra*.

36. 316 So. 2d at 100.

37. *Id.* at 105.

Initial efforts at compliance by the Louisiana Health and Human Resources Administration were held inadequate.[38] Since then detailed implementing regulations have been published.[39]

EXAMINATION AND CROSS-EXAMINATION OF WITNESSES

Pre-Trial Preparation—Right to Continuance to Prepare for Trial

In *State v. Winston*[40] a divided court, speaking through Justice Calogero, held that defendant was entitled to a new trial because of the trial court's denial of a motion for continuance. Ten days before trial, defense counsel had been appointed to represent defendant in a heroin distribution case, but because of defendant's efforts to employ counsel of his choice, appointed counsel had only three days notice, including Saturday and Sunday, to prepare for trial relative to a crime allegedly committed some eight months previously. Under the circumstances the writers agree that the trial judge had abused his discretion in denying defendant's motion for a continuance.

Pre-Trial Preparation—Right to Interview Witnesses in Advance of Trial

From judicial pronouncements incidental to the court's granting writs in *State v. Lovett*[41] and *State v. Baudean*[42] it appears that the Louisiana Supreme Court, in appropriate cases, will accord a defendant the right, under trial court supervision, to some pretrial interviews. Both opinions are laconic in character, but the action taken appears very important. In the opinion of these writers the cases reflect a very salutary development.[43]

Calling a Witness Under Cross-Examination in Criminal Cases

Following earlier cases,[44] *State v. Rogers*[45] and *State v. Clark*[46] hold that there is no authority in Louisiana for a defendant in a criminal case to call a witness under cross-examination.[47] It is submitted, however, that

38. *See* State v. Ginn, 328 So. 2d 672 (La. 1976); State v. Karol, 316 So. 2d 106 (La. 1975); and State v. Jones, 316 So. 2d 100 (La. 1975).

39. See 2 LOUISIANA REGISTER no. 11 at 390 (Nov. 20, 1976).

40. 327 So. 2d 380 (La. 1976).

41. 329 So. 2d 753 (La. 1976).

42. 332 So. 2d 460 (La. 1976).

43. *See also* Gregory v. United States, 369 F. 2d 185 (D.C. Cir. 1966).

44. State v. Brent, 248 La. 1072, 184 So. 2d 14 (1966), *cert. denied*, 385 U.S. 992 (1966); and State v. Bush, 297 So. 2d 415 (La. 1974).

45. 324 So. 2d 403 (La. 1975).

46. 325 So. 2d 802 (La. 1976).

47. As to the obligation, however, of the state to call a pertinent police witness on a motion to suppress, see *State v. Peters*, 315 So. 2d 678 (La. 1975).

some witnesses are so presumptively pro-prosecution or anti-defendant that perhaps a defendant should be permitted to do so. Louisiana law stipulates that if a party can show that a witness called by him is "hostile" or "unwilling" then leading questions are to be permitted.[48] What showing should be required to meet this test? May the required antipathy or reticence be established by inference or relationship? It can be argued that in a realistic sense most police officers called by a defendant as defense witnesses will be "hostile" or "unwilling" within the spirit of LA. R.S. 15:277, and in appropriate circumstances defendant should be permitted to ask them leading questions just as the state is often permitted to put leading questions to a sibling or other person closely identified with the defendant.[49] For example, in *State v. Willis*[50] the supreme court held that a showing by the prosecution that a state witness (the victim of an alleged aggravated battery committed by the defendant) had had an illicit relationship with the defendant was sufficient, without more, to establish "hostility" for this purpose.[51]

The Federal Rules go far towards permitting leading questions by a party calling a witness identified with the opposition. Without making a distinction between civil and criminal cases, the Federal Rules provide that leading questions may be put to "a hostile witness, an adverse party, or *a witness identified with an adverse party*."[52] Further, under the Federal Rules there is no prohibition against a party's impeaching a witness called by him.[53] In Louisiana civil cases the legislation permits a party to both

48. LA. R.S. 15:277 (Supp. 1967) (formerly R.S. 15:373).

49. See the discussion in *The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Evidence*, 35 LA. L. REV. 525, 544 (1975), reprinted in PUGH at 16 (Supp. 1976); *The Work of the Louisiana Appellate Courts for the 1972-1973 Term—Evidence*, 34 LA. L. REV. 443, 449 (1974), reprinted in PUGH at 27 (Supp. 1976).

50. 241 La. 796, 131 So. 2d 792 (1961), discussed in *The Work of the Louisiana Supreme Court for the 1960-1961 Term—Evidence*, 22 LA. L. REV. 397 (1962), reprinted in PUGH at 135.

51. Perhaps a higher standard should be required to show "hostility" sufficient to authorize a party to impeach a witness called by it. For a discussion of the standard to be applied in the impeachment context see Justice Tate's concurring opinion in *State v. Rossi*, 273 So. 2d 265 (La. 1973), discussed in *The Work of the Louisiana Appellate Courts for the 1972-1973 Term—Evidence*, 34 LA.L. REV. 443, 454 (1974), reprinted in PUGH at 38 (Supp. 1976).

52. FED. R. EVID. 611(c) (Emphasis added). For a case permitting leading questions to be put by the defense to a government agent see *United States v. Bryant*, 461 F. 2d 912 (6th Cir. 1972), which cited the then proposed Federal Rule of Evidence 611(c). *See also* 3 WEINSTEIN § 611(05) at 611-59.

53. FED. R. EVID. 607.

cross-examine and impeach an opposing party called by him and his "representatives."[54]

ATTACKING CREDIBILITY OF WITNESSES

"Surprise" as Basis for Impeaching Own Witness

Under Louisiana law a witness's prior inconsistent statement offered for the purpose of impeachment is to be given neutralizing effect only; the out-of-court statement is not to be given substantive weight.[55] In keeping with this approach LA. R.S. 15:488 provides that for a person calling a witness to establish "surprise" within the meaning of the article, and in consequence thereof to be able to impeach him by showing a prior inconsistent statement, the party calling him must show not only that the witness failed to testify as expected, but that he testified on "some material matter against the party introducing him and in favor of the other side." Thus if a person, in advance of trial, gives a written statement to the prosecutor stating that he was present at the scene of the alleged murder and saw the defendant stab the decedent, but when called to the stand testifies that he was not at the scene of the crime, the prior out-of-court statement is inadmissible. The prosecution's chances of success, it may be assumed, are unquestionably greatly decreased by the failure of the witness to testify as expected, but since the witness *on the stand* has *testified* to nothing hurtful to the state's case, the out-of-court statement is inadmissible, because in theory *neutralization* is unnecessary. The out-of-court statement is hearsay, is inadmissible to establish the truth of its contents, and since it is not needed to neutralize, under 15:488 it is inadmissible. This approach by Louisiana is in keeping with traditional evidentiary theory.[56]

The rule, it seems to these writers, was violated in *State v. Governor*.[57] Two persons in advance of trial had apparently given very helpful statements to the prosecution placing the defendants in a car going towards the scene of the robbery. At the trial they testified instead that they saw a car

54. LA. CODE CIV. P. art 1634. "Representative" is defined in article 1634 as "an officer, agent or employee having supervision or knowledge of the matter in controversy, in whole or in part, whether or not he is in the employ of or connected with the party at the time his testimony is taken."

55. See the discussion in *State v. Williams*, 331 So. 2d 467 (La. 1976), discussed in text at note 209, *infra*; *The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Evidence*, 36 LA. L. REV. 661, 665 (1976); and *The Work of the Louisiana Appellate Courts for the 1971-1972 Term—Evidence*, 33 LA. L. REV. 306, 311 (1973), reprinted in PUGH at 104.

56. MCCORMICK §§ 34 at 67, 251 at 601.

57. 331 So. 2d 443 (La. 1976).

similar to that of one of the defendants but that they were unable to give further detailed information concerning it or its occupants. It seems to these writers that the witnesses had not given testimony favorable to the defendant within the meaning of 15:488. They had merely failed to give testimony expected by the state to be favorable to the prosecution. A majority of the court held, however, that the requirements of 15:488 were met and that the out-of-court statement was admissible.

Capacity to Perceive

May a witness who has testified that he saw or heard a particular thing be cross-examined as to his capacity to perceive such thing? Absent the witness's admission of the claimed incapacity, may extrinsic evidence (for example, a physician's testimony) be introduced to show that the witness lacked the physical or mental capacity to perceive that which he purports to have seen, etc.? Similarly, may a party by cross-examination or extrinsic evidence bring out that a witness was so under the influence of alcohol or drugs at the time he allegedly perceived that his capacity to observe was thereby impaired? Although Title 15 does not enumerate lack of capacity or impaired capacity as a method available in Louisiana to attack a witness's credibility, it is a method well-recognized elsewhere in the country[58] and presumably should be available in Louisiana. *State v. Luckett*[59] accepts the availability of such a method of attacking credibility in Louisiana, and the writers completely agree.

The propriety of the application of the rule under the particular facts of *Luckett*, however, appears open to serious question. The defendant on cross-examination was questioned as to whether at the time of the alleged robbery he had marijuana in the back of his car or had been smoking same that night. The defendant answered in the negative but by implication indicated that he had smoked same on prior occasions. There was no showing that the state had evidence that the defendant possessed marijuana on the night involved or had been smoking it at that time. Nor does it appear that the state contended that the defendant-witness's ability to perceive the events testified to had been impaired by the use of such substance. In fact, this justification for the admission of the testimony does not appear to have been urged upon the court on original hearing. The majority of the court on original hearing ruled that the question was an improper reference to another

58. *See* MCCORMICK § 45 at 94; 3 WEINSTEIN § 607(04) at 607-33; 3A J. WIGMORE, EVIDENCE §§ 933, 934, 989-95 at 761, 762, 921-35 (Chadbourn rev. 1970) [hereinafter cited as 3A WIGMORE.

59. 327 So. 2d 365 (La. 1976).

crime and the writers agree. It is submitted that for the state to be permitted to ask such inflammatory questions of a witness, especially of the defendant himself, it should be required to demonstrate bona fide basis for belief as to the witness's use of such drugs on the occasion in question and that same impaired his ability to perceive.[60] Otherwise the lack of capacity method for attacking credibility may prove to be an unwholesome vehicle for the prosecution's suggesting to the jury otherwise inadmissible and highly prejudicial matter.

Bias, Interest, Corruption

A number of cases decided during the past year concerned attempts to attack the credibility of a witness by showing bias, interest or corruption, a well recognized method of attacking a witness's testimony.[61] As shown by *Davis v. Alaska*,[62] defendant's right to examine a state's witness as to such matter in a criminal case is of constitutional dimension, partaking of his right of confrontation.

It seems to these writers that much of the difficulty encountered in this area concerns the problems of remoteness, probative value, and risk of undue prejudice—how weighty and significant must be the matter inquired about for the examiner to have a right to develop it by cross-examination and extrinsic evidence? It is true that some Louisiana cases have said that to show bias the matter must be "personal" or "direct,"[63] but it is believed that the real problem here, as is so often the case elsewhere in the law of evidence, is a balancing one, juxtaposing the probative value of the anticipated evidence against the time, expense and risk involved in developing it.[64] Generally a defendant in a criminal case has such a significant

60. For analogous safeguards in other areas, see *Michelson v. United States*, 335 U.S. 469 (1948); *State v. Prieur*, 277 So. 2d 126 (La. 1973); *State v. Billstron*, 276 Minn. 174, 149 N.W.2d 281 (1967); *State v. Spreigl*, 272 Minn. 488, 139 N.W.2d 167 (1965); and *Miller v. State*, 418 P.2d 220 (Okla. 1966).

61. *See* LA. R.S. 15:492 (1950).

62. 415 U.S. 308 (1974), discussed in *The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Evidence*, 35 LA. L. REV. 525, 538 (1975), reprinted in PUGH at 33 (Supp. 1976).

63. See the cases collected in *State v. Lewis*, 328 So. 2d 75 (La. 1976); *State v. Senegal*, 316 So. 2d 124 (La. 1975); and see the discussion in *The Work of the Louisiana Supreme Court for the 1955-1956 Term—Evidence*, 17 LA. L. REV. 421, 426 (1957), reprinted in PUGH at 110.

64. See the discussion in text at notes 13-16, *supra*. *See* State v. Moore, 278 So. 2d 781 (La. 1973), discussed in *The Work of the Louisiana Appellate Courts for the 1972-1973 Term—Evidence*, 34 LA. L. REV. 443, 446, reprinted in PUGH at 14 (Supp. 1976). *See also* FED. R. EVID. 403 and UNIFORM R. EVID. 45 (1953).

interest in showing the bias, interest, or corruption of a state's witness that he should be given wide latitude. On the other hand, because of the risk of unduly prejudicing the rights of the defendant, at times it may be proper to restrict the state somewhat in its efforts to attack the credibility of a defendant's witness.

It seems to these writers that to show bias, interest or corruption, it will often be necessary to go into a collateral matter, and that this circumstance should not preclude cross-questioning for the purpose of showing same, nor the introduction of extrinsic evidence to establish it.[65] Often bias, interest or corruption that might cause a witness to lie or color his testimony arises from "collateral" or side issues. For example, the state's star witness may have a grudge against the defendant because the defendant had an affair with the witness's wife—a matter wholly collateral to the merits of the criminal case. It is believed that the provision in LA. R.S. 15:494 relative to the impropriety of impeaching as to "collateral facts or irrelevant matter" is to be read as limiting impeachment under the preceding section *re* a showing of prior inconsistent statement[66]—not as a limitation on showing bias, interest or corruption via collateral matter. There is language in *State v. Lewis*[67] and *State v. Johnson*,[68] however, which would indicate a contrary result. The real question, it is submitted, is the strength of motive to falsify, not whether the motive arises from some collateral matter.

The writers would urge that normally all matter relevant to show bias, interest or corruption is admissible—both on cross-examination and by extrinsic evidence. The broad sweep of this method of attacking credibility is well recognized by the majority of the court, speaking through Justice Tate in *State v. Senegal*:[69] "The decisions of our own jurisprudence . . . have generally permitted full scope of cross-examination in the interests of exposing, for jury evaluation, any bias or interest of the witness, which might influence his perceptions or color his testimony."[70] As recognized by

65. *See* MCCORMICK § 40 at 81.

66. LA. R.S. 14:493 (1950).

67. 328 So. 2d 75 (La. 1976).

68. 322 So. 2d 119 (La. 1975). It is difficult to tell what the supreme court would have held in the *Johnson* case had the intended purpose been made clear as to defense counsel's question of a white victim of an alleged interracial rape, ". . . you don't have any prejudice against black people do you?" The trial judge had said he did not see the relevancy of the question, and defense counsel apparently did not clarify the intended relevance at the trial court level. Defendant urged on appeal that "[i]f he had been permitted to establish this fact (prejudice against Negroes), . . . the inference would be clear that the victim's bias and prejudice would never permit her to admit that she had consented to sexual intercourse with a Negro." *Id.* at 121.

69. 316 So. 2d 124 (La. 1975).

70. *Id.* at 126. See also the language of the court in *State v. Lewis*, 328 So. 2d 75

the courts, however, there are limits to such inquiry. Unfortunately, neither the language used in etching out the limits, nor the location of the line, has always been satisfying. Intriguing cases decided during the past year are illustrative.

The court, we believe, was clearly correct when, speaking through Justice Marcus in *State v. Guidry*,[71] it held that defendant's conviction had to be reversed because of the trial court's denial of defendant's efforts to show that a state's star witness, a paid undercover informant, had, five months subsequent to the alleged offense, attempted to kill the defendant via a shotgun blast. The fact that it was subsequent to the offense, or perhaps would open a collateral issue, did not cause it to be inadmissible—the incident definitely tended to show ill will towards the defendant.

On the other hand, it is submitted that the court erred in *State v. Romano*[72] in refusing to permit defendant to show that a state's witness, a confidential informant, had pending criminal charges against him. As indicated by Justice Tate in dissent, this seems contrary to the thrust of *Davis v. Alaska*,[73] for the answer may well have indicated that the prosecution had "leverage" on the state's witness and hence the witness may have had a strong motive to attempt to please the prosecution.[74] It is believed that LA. R.S. 15:495, which generally prohibits attacking credibility by showing prior arrests, is not controlling here, for properly construed, it addresses itself to a generalized showing that a witness is not worthy of belief because he has a "record" and does not preclude showing a prior arrest where, as here, it has independent particularized relevancy.[75]

(La. 1976), where, however, the court found that the matter inquired into by the state was too remote. See the discussion of *Lewis* in the text at notes 78-80, *infra*.

71. 319 So. 2d 415 (La. 1975).

72. 320 So. 2d 167 (1975).

73. 415 U.S. 308 (1974).

74. It seems also contrary to the court's 1959 decision in *State v. Lewis*, 236 La. 473, 108 So. 2d 93 (1959), discussed in *The Work of the Louisiana Supreme Court for the 1958-1959 Term—Evidence*, 20 LA. L. REV. 335. 340 (1960), reprinted in PUGH at 133.

75. See the discussion in *The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Evidence*, 35 LA. L. REV. 525, 538 (1975), reprinted in PUGH at 33 (Supp. 1976); and *The Work of the Louisiana Supreme Court for the 1955-1956 Term—Evidence*, 17 LA. L. REV. 421, 426 (1957), reprinted in PUGH at 110; and in Comment, *Admissibility of Evidence of Prior Arrests in Louisiana Criminal Trials*, 19 LA L. REV. 684 (1959), reprinted in PUGH at 53. Where the inquiry is as to prior criminal conduct having no particularized relevance to show bias, interest or corruption of the witness, but merely claimed relevance to the witness's general credibility, see the discussion of the second *Prieur* case, 277 So. 2d 134 (La. 1973) in *State v. Romano*, 320 So. 2d 167 (La. 1975), discussed in the text at note 72, *supra*; and in *The*

The breadth of the attack permitted when it is the defendant who launches the attack, is reflected in *State v. Senegal*.[76] The trial court upheld the prosecution's efforts to block inquiry concerning why an undercover state police narcotics officer had entered upon such a career three and a half years before, when the stated purpose of the inquiry "was to ascertain whether the witness was motivated by grudge or prejudice."[77] A majority of the court, speaking through Justice Tate, found reversible error.

To be contrasted with the holding in *Senegal* is *State v. Lewis*.[78] The majority of the court in *Lewis* held that it was error, albeit non-reversible error, for the trial court to permit the prosecution to question a defense witness as to whether the witness's brother had been arrested for an unrelated offense. The court found that such possible basis for bias was "too remote and involving too collateral an issue for it to be available as impeachment."[79] The result in *Lewis*, it is believed, is sound. The bias against the prosecution that might have been provoked by such an arrest of the witness's brother, however, may have been quite real. Had it been the *defendant* who was trying to show an equivalent bias or prejudice on the part of the state's witness against the defendant, under *Davis v. Alaska* defendant should perhaps have been permitted to inquire into it. In light of societal interest in favor of protecting the rights of the accused, the scales are often weighted in defendant's favor and this is perhaps but another area in which such differentiation operates. Whether the claimed bias is "personal" or "direct," it is submitted, should not be the determinative test.[80] As above indicated, the essential inquiry is balancing the probative value of evidence against the risk of harm.

Reputation Testimony

State v. Muse[81] is an important case concerning the proper method to impeach a witness by reputation testimony. A majority of the court, speaking through Justice Summers, found reversible error in the trial court's

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Work of the Louisiana Appellate Courts for the 1972-1973 Term—Evidence, 34 LA. L. REV. 443, 453 (1974), reprinted in PUGH at 36 (Supp. 1976); Comment, *Other Crimes Evidence in Louisiana—To Attack The Credibility of the Defendant on Cross-Examination*, 33 LA. L. REV. 630 (1973), reprinted in PUGH at 111.

76. 316 So. 2d 124 (La. 1975).

77. *Id.* at 125.

78. 328 So. 2d 75 (La. 1976).

79. *Id.* at 80. However, two members of the court, Justices Dixon and Dennis, felt that the cross-examination was proper.

80. See the discussion in *The Work of the Louisiana Supreme Court for the 1955-1956 Term—Evidence*, 17 LA. L. REV. 421, 426 (1957), reprinted in PUGH at 110.

81. 319 So. 2d 920 (La. 1975).

sustaining of the state's objection to defendant's question relative to whether a state's witness knew another state's witness's "general reputation in the community." The court found that sustaining the state's objection in this regard was an improper curtailment of defendant's right of cross-examination and violated his right of confrontation. Both the majority opinion, and the dissenting opinion by Chief Justice Sanders, give important discussions of the proper method of impeaching a witness by reputation testimony.

As pointed out by Chief Justice Sanders in dissent, the question put to the witness in *Muse* was not as articulate or precise as it might have been. Under LA. R.S. 15:490 two types of reputation testimony are admissible to impeach a witness: (1) his reputation as to general moral character, and/or (2) his reputation for truth. This reputation, says *Muse*, is the reputation of the witness to be impeached "in the place where he resides."[82] The majority opinion also takes pains to spell out that in Louisiana, as is often the case elsewhere,[83] a person attacking a witness's credibility via reputation testimony, after eliciting the required reputation testimony on the issue of credibility, may go further and ask the impeaching witness whether, from his knowledge of the reputation, he would believe him under oath.

Arguably Louisiana law in this area should be realistically reevaluated in light of modern conditions.[84] In the meantime it is very helpful to have the prevailing rules clarified.

Prior Convictions—Use of Uncounseled Convictions

In *State v. Bernard*[85] a unanimous court, speaking through Justice Summers, reversed a conviction because of the failure of the trial court to permit defense counsel to attempt to show that convictions sought to be used by the prosecution to impeach the defendant had been obtained in denial of his federal constitutional rights. The decision is in accord with the United States Supreme Court opinion in *Loper v. Beto*.[86]

82. *Id.* at 922.

83. *See* United States v. Walker, 313 F. 2d 236 (6th Cir.), *cert. denied*, 374 U.S. 807 (1963); and the discussion in 3A WIGMORE § 923 at 728.

84. *See* MCCORMICK § 44 at 90.

85. 326 So. 2d 332 (La. 1976).

86. 405 U.S. 473 (1972). See in this connection the discussion of *State v. Kelly*, 271 So. 2d 870 (La. 1973), in *The Work of the Louisiana Appellate Courts for the 1972-1973 Term—Evidence*, 34 LA. L. REV. 443, 452 (1974), reprinted in PUGH at 35 (Supp. 1976).

Prior Convictions—Juvenile Delinquency Adjudication

In keeping with LA. R.S. 13:1580, the court in *State v. Roberts*[87] takes the position that a witness may not properly be impeached by inquiries relative to adjudications of juvenile delinquency or guilty pleas to charges of same. This aspect of the opinion appears eminently sound.[88]

Cross-Examination as to Prior Criminal Acts, Absent Conviction

May a witness, for the purpose of impeachment, be cross-examined as to an unrelated prior criminal act when the witness was never convicted of said crime? The second *Prieur* case[89] held that he could not.[90] In both *State v. Romano*[91] and in the opinion on original hearing in *State v. Luckett*[92] the court indicates continued adherence to this doctrine.[93] The facts of *Romano* are especially strong in this connection because they involved an alleged criminal act bearing directly upon general veracity—whether an important state's witness had falsified his federal income tax return. In this connection Chief Justice Sanders stated that "evidence of Dodd's malfeasance in preparing his income tax returns was not competent evidence for impeaching his credibility in this prosecution."[94]

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87. 331 So. 2d 11 (La. 1976).

88. As to prosecutorial reference to an act of juvenile delinquency which, if committed by an adult, would have been a crime, see the discussion of *State v. Roberts* in the text at notes 25 & 26, *supra*.

89. 277 So. 2d 134 (La. 1973), discussed in *The Work of the Louisiana Appellate Courts for the 1972-1973 Term—Evidence*, 34 LA. L. REV. 443, 453 (1974), reprinted in PUGH at 36 (Supp. 1976). See also the extensive discussion in the excellent student comment, *Other Crimes Evidence in Louisiana—To Attack the Credibility of the Defendant on Cross-Examination*, 33 LA. L. REV. 630 (1973), reprinted in PUGH at 111.

90. Federal Rule of Evidence 608(b) permits inquiry in such matters within the discretion of the court "if probative of truthfulness or untruthfulness," but precludes extrinsic evidence as to same.

91. 320 So. 2d 167 (La. 1975).

92. 327 So. 2d 365 (La. 1976). On rehearing the court reversed itself finding that the prosecutorial inquiry was proper to show lack of capacity. For a discussion of this aspect of the case, see the text at note 58-60, *supra*.

93. See also in this connection *State v. James*, 305 So. 2d 514 (La. 1974), and *State v. Mason*, 305 So. 2d 523 (La. 1974).

94. 320 So. 2d at 169. If the prior criminal act is found to have a particularized relevance to show bias, interest or corruption of the witness, then it is submitted that the broader rules governing impeachment by a showing of bias, interest or corruption discussed above (see the text at notes 61-80, *supra*) should control. See also Justice Tate's dissenting opinion in *State v. Romano*, 320 So. 2d 167, 170 (La. 1975).

Experiments to Test Credibility

In *State v. Mays*[95] the court, speaking through Justice Tate, took what these writers believe to be a very enlightened position relative to in-court experiments. It held that the trial court committed error, albeit non-reversible error, in denying defendant's request to have the prosecution witness, an undercover agent, demonstrate (if he could) how, as his testimony claimed, he had feigned puffing on a marijuana cigarette. Although the court declared that whether or not in-court experiments should be permitted is largely a matter within the discretion of the trial court, it found that here the refusal to permit the experiment was an abuse of discretion. It outlined some of the factors pertinent to such determination, *i.e.*, (1) "the possible disruption of orderly and expeditious proceedings" and (2) "lack of similarity between the courtroom conditions and the actual conditions sought to be re-tested."[96]

In the later case of *State v. Hampton*[97] the court, applying the above standards, found that the trial court had not abused its discretion in denying defendant the right to insist that a witness (prosecutrix in a rape case) "yell to the top of [her] voice"[98] as she claimed to have done at the scene.

In light of *State v. Mays*, the authority of prior cases affirming trial courts' refusal to permit in-court experiments to test a witness's identification of the defendant as the culprit seems dubious.[99]

Right to Production at Trial of a Witness's Prior Memorandum

Under what circumstances may a cross-examiner have access to a witness's prior memorandum for use in cross-examination and impeachment? The problem is of great significance and has been frequently before the Louisiana Supreme Court in recent years.[100] In an exceptionally able and perceptive concurring opinion in *State v. Babin* on original hearing,[101]

95. 315 So. 2d 766 (La. 1975).

96. *Id.* at 768.

97. 326 So. 2d 364 (La. 1976).

98. *Id.* at 366.

99. *See* State v. Morris, 259 La. 1001, 254 So. 2d 444 (1971), *cert. denied*, 406 U.S. 959 (1972), discussed in *The Work of the Louisiana Appellate Courts for the 1971-1972 Term—Evidence*, 33 LA. L. REV. 306, 312 (1973). See also the concurring opinion by Justice Tate and dissenting opinions by Justices Dixon and Calogero in *State v. Hinkie*, 321 So. 2d 317 (La. 1975) (regarding defendant's right to force a non-suggestive in-court identification procedure).

100. See the discussions in *The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Evidence*, 35 LA. L. REV. 525, 534 (1975), reprinted in PUGH at 243, 244 (Supp. 1976).

101. 319 So. 2d 367, 372 (La. 1975). The case was ultimately decided on a different issue.

Justice Tate[102] indicates great dissatisfaction with Louisiana's current position as to defendant's right to inspect a state witness's prior memorandum for purposes of cross-examination and possible impeachment. These writers agree with the concurring opinion statement that present rights in Louisiana in this regard are far too restrictive.[103] The procedures suggested by Justice Tate seem well thought out and practical, and it is hoped that in an appropriate case they will be adopted by the court.

The concurring opinion in *Babin* is also very valuable in its careful analysis in differentiation of analogous related problems—pretrial discovery, required prosecutorial disclosure, etc.[104]

PRIVILEGE

Attorney-Client Privilege

In civil cases Louisiana's attorney-client privilege[105] is similar to that in most states.[106] Generally, it applies only to confidences between the client and the attorney, and under usual circumstances there is no attorney-client privilege as to the identity of the client represented by the attorney.[107] In contrast to those in other states and to Louisiana's privilege in civil cases, Louisiana's statutory attorney-client privilege for criminal cases expressly applies to "any communication made to him as such legal adviser 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."[108] Does this mean that in Louisiana criminal cases even the name and identity of the client is subject to privilege? Without discussing the broader ambit of the privilege provided in the Louisiana criminal statute, and relying on the weight of authority elsewhere, a majority of the supreme

102. Justice Barham joined in the concurring opinion. From language in *State v. Foret*, 315 So. 2d 278 (La. 1975), it appears that Justice Calogero also agrees with the opinions expressed by Justice Tate in his concurring opinion in *Babin*.

103. See the discussion of State v. Weston, 232 La. 766, 95 So. 2d 305 (1957), in *The Work of the Louisiana Supreme Court for the 1956-1957 Term—Evidence*, 18 LA. L. REV. 139, 143 (1957), reprinted in PUGH at 689; and in *Note*, 18 LA. L. REV. 350 (1958), reprinted in PUGH at 686.

104. See also the concurring opinion in *State v. Johnson*, 323 So. 2d 132 (La. 1975); and *State v. Foret*, 315 So. 2d 278 (La. 1975).

105. LA. CIV. CODE art. 2283.

106. *See* MCCORMICK § 89 at 182.

107. *See* Shaughnessey v. Fogg, 15 La. Ann. 330 (1860); Comment, *Purpose and Extent of the Attorney-Client Privilege in Louisiana*, 18 LA. L. REV. 162 (1957), reprinted in PUGH at 155; MCCORMICK § 90 at 185.

108. LA. R.S. 15:475 (1950).

court in *State v. Hayes*[109] held that an attorney may be forced, in a proceeding to declare the defendant a recidivist,[110] to identify the defendant as the person he had defended in a prior criminal proceeding. The court said:

> the privilege protected any communication made to the attorney during his representation or information obtained as a result of it, . . . [it] did not under the present facts extend to the fact that he had represented him, a matter of public record.[111]

Husband-Wife Privilege—Confidential Conversations

LA. R.S. 15:461 provides that private conversations between husband and wife shall be privileged. *State v. Dupuy*[112] is a helpful case re-establishing the private nature of the husband-wife conversation. It follows *State v. Pizzolotto*[113] in saying that where there is no evidence to the contrary, communications between spouses are presumed to be confidential. However, when a party seeking to introduce a husband-wife conversation makes a prima facie showing that the conversation was not in private, *Dupuy* makes clear that the burden of going forward with the evidence shifts to the party claiming the privilege to show that the conversation was in fact private.[114]

Husband-Wife Privilege—Concubines

State v. Kaufman[115] makes it clear that, as long suspected, there is no confidential concubinage communication privilege. The fact that had the witness and defendant lived in another state, the witness might have qualified as a common-law wife, did not give rise to a husband-wife privilege—either general or confidential—under Louisiana law.

Physician-Patient Privilege—Ambit of Privilege

When a person entering jail is given an in-custody physical examination by a state physician for the limited purpose of making objective

109. 324 So. 2d 421 (La. 1976).

110. LA. R.S. 15:529.1 (Supp. 1958).

111. 324 So. 2d at 423. For further discussion of the problem see *State v. Jones*, 284 So. 2d 570 (La. 1973), discussed in *The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Evidence*, 35 LA. L. REV. 525, 541 (1975), reprinted in PUGH at 44 (Supp. 1976).

112. 319 So. 2d 194 (La. 1975).

113. 209 La. 644, 25 So. 2d 292 (1946).

114. In *Dupuy* the defendant who claimed the privilege failed to introduce evidence to show that the conversation was in fact private.

115. 331 So. 2d 16 (La. 1976).

findings, the results of such examination, says the court in *State v. Berry*,[116] are not subject to the doctor-patient privilege set out in LA. R.S. 15:476. In so holding, the court emphasized that the witness had not been consulted by the defendant as a physician. The doctor had made a routine physical examination conducted as an agent for the state independent of the wishes of the defendant.

Physician-Patient Privilege—Waiver

Although not a part of the traditional common law,[117] a physician-patient privilege has been recognized by approximately three-fourths of the states,[118] including Louisiana.[119] This privilege has been strenuously attacked by scholars,[120] and except as to psychotherapists,[121] was rejected by the Supreme Court in its promulgated but unadopted version of the Federal Rules of Evidence. Like other privileges, it stands athwart judicial ascertainment of truth. In *State v. Berry*[122] an important case in the privilege area, Justice Tate held that by pleading not guilty by reason of insanity and tendering this issue at trial, defendant has waived his physician-patient privilege as to pertinent physician-patient data. Defendant, said the court, should not be permitted to ask the court to find him not guilty by reason of insanity and at the same time prevent effective judicial inquiry into the facts of such alleged insanity. The language of the statute creating the privilege, however, is very broad, stating that without "express consent," no doctor shall

> 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 . . . .[123]

A question that naturally occurs is whether the consent found by *Berry*

116. 324 So. 2d 822 (La. 1975).
117. MCCORMICK § 98 at 212.
118. *Id.*
119. LA. R.S. 15:476 (1950) (criminal) and LA. R.S. 13:3734 (Supp. 1968) (civil).
120. MCCORMICK § 105 at 223-28; 8 J. WIGMORE, EVIDENCE § 2380a at 828-32 (McNaughton ed. 1961).
121. See Rule 504 in the version of the Federal Rules of Evidence promulgated by the United States Supreme Court, 56 F.R.D. 183, 240 (1972). Congress, however, when it enacted the Federal Rules of Evidence, adopted a truncated approach to privileges and avoided the problem.
122. 324 So. 2d 822 (La. 1975).
123. LA. R.S. 15:476 (1950).

from the insanity plea extends to testimony by a private psychiatrist consulted by a defendant for treatment. In light of *Berry*, defense counsel contemplating an insanity defense should proceed with much caution, and the client should be well advised as to the possible implications of such a plea.

Clergyman-Penitent Privilege

State v. Berry is one of the rare cases in the country discussing the clergyman-penitent privilege. In light of the facts therein presented, the court found that the privilege did not lie, for although made to a minister by the defendant, "the communication was not made within the requisite nature of a confidential disclosure for religious purposes of a penitent to a clergyman seeking religious consolation."[124]

Accountant Privilege—Availability in Criminal and/or Civil Proceedings

LA. R.S. 37:85 would appear to authorize a broad accountant testimonial privilege. It states:

> No . . . public accountant . . . shall be required to, or voluntarily disclose or divulge, the contents of any communication made to him by any person employing him to examine, audit, or report on any books, records, or accounts, or divulge any information derived from such books, records, or accounts in rendering professional services except by express permission of the person employing him . . . .

The next succeeding section[125] contains broad emasculating language stating that "[n]othing in R.S. 37:83 through 37:85 shall modify, change, or affect the criminal laws of this state . . . any rules or laws of evidence of this state, or any proceedings held in any court." R.S. 37:83 and 37:84 discuss the procedure to be followed by the Louisiana State Board of Accountants relative to the discipline, etc. of its members. It may have been that 37:86 in fact was intended to apply only to Sections 83 and 84, and that a clerical error was committed. As written, however, the language of 37:86 seems thoroughly enigmatic. If it is applied literally, there is no accountant testimonial privilege in any court proceeding, civil or criminal. But giving 37:86 this interpretation would generally negate the significance of 37:85.

Applying 37:86 literally, the court in *State v. McKinnon*[126] held that an accountant privilege is not available in a *criminal proceeding*. The

124. 324 So. 2d 822, 829 (La. 1975).
125. LA. R.S. 37:86 (1950).
126. 317 So. 2d 184 (La. 1975).

logical extension of its reasoning would negate the availability of an accountant privilege in a civil suit as well.

A forceful argument can well be made against having an accountant privilege.[127] In any event, if there is to be a meaningful privilege here, a new statutory enactment seems to be called for.

Accountant Privilege—Waiver

In *State v. McKinnon*[128] the court as an alternative basis for its conclusion, held that the accountant privilege asserted by the defendant had been waived. Although the defendant apparently owned one-third of the stock of the corporation and presumably was a director thereof, the accountant had been employed by the corporation; the president, two of the three directors,[129] and the accountant himself had expressly waived the privilege. This aspect of the case appears eminently sound and since the accountant privilege appears to be that of the person employing the accountant, rather than the accountant himself, waiver by the accountant appears to have been unnecessary. Waiver by the person employing him, it is submitted, would have sufficed.

Police Records Privilege

In his very able concurring opinion in *State v. Babin*[130] Justice Tate argues most persuasively that except as to records identifying police informers, LA. R.S. 44:3's exemption of police records from the operation of the public records act does not thereby make such records privileged; it merely takes them out of the broad category of public records to which, under the law, members of the public are entitled to immediate access.[131] It does not, argues Justice Tate, cause them to be privileged from production in a judicial proceeding. Under this approach, police records are like records of a business or private person, *i.e.*, although not available for public inspection generally, they are in appropriate cases subject to forced production in a judicial proceeding.

In a later plurality opinion in *State v. Chase*,[132] authored by Justice

127. *See* MCCORMICK § 77 at 156.

128. 317 So. 2d 184 (La. 1975).

129. One of whom was the above mentioned president.

130. 319 So. 2d 367, 375 (La. 1975).

131. See the discussion of a purported police records privilege in *The Work of The Louisiana Appellate Courts for the 1964-1965 Term— Evidence*, 26 LA. L. REV. 606, 613 (1966), reprinted in PUGH at 191. *See also* Flanagan v. Henderson, 496 F.2d 1274 (5th Cir. 1974).

132. 327 So. 2d 391 (La. 1976).

Summers, a contrary position was taken by three members of the court. Three justices, however, expressed a view similar to that taken by Justice Tate in his concurring opinion in *Babin*. The seventh member of the court, Justice Dennis, found it "unnecessary to discuss La. R.S.44:3"[133] because in his opinion it was not applicable to the case.

The writers agree with the position advanced by Justice Tate in his concurring opinion in *Babin*. The contrary view throws in jeopardy the right of the defendant to have a copy of his own written confession, a view wisely adopted by the supreme court in 1945 in a forward-looking decision in *State v. Dorsey*,[134] and followed ever since.

Justice Tate's approach is buttressed by the court's action in *State v. Berry*.[135] On a very analogous problem *re* the hospital records exemption from the public records act, a unanimous court in *Berry*, speaking through Justice Tate, stated in footnote that "the purpose of the Public Records Act is to provide for immediate public inspection of public records, . . . not to create a privilege exempting them from production for court purposes. Cf. State v. Babin, La., 319 So. 2d 367, 375 (1975)."[136]

Comment Upon or Inference From Claim of Privilege

Is a party entitled to force a non-party witness to assert a privilege in open court, to comment thereon, and to have the trier of fact draw an inference therefrom? In line with the direction recently indicated by *State v. Haynes*[137] a unanimous court in *State v. Berry*,[138] heavily relying on the ABA Standards, held that a defendant in a criminal case had no right to call a witness and force that witness to assert his privilege against self-incrimination in open court.[139] The court used broad language which by its

133. *Id.* at 394.

134. 207 La. 928, 22 So. 2d 273 (1945). See the discussion in *The Work of the Louisiana Appellate Courts for the 1964-1965 Term— Evidence*, 26 LA. L. REV. 606, 613 (1966), reprinted in PUGH at 191.

135. 324 So. 2d 822 (La. 1975).

136. *Id.* at 827.

137. 291 So. 2d 771 (La. 1974), discussed in *The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Evidence*, 35 LA. L. REV. 525, 542 (1975), reprinted in PUGH at 47 (Supp. 1976).

138. 324 So. 2d 822 (La. 1975).

139. *Compare*, however, the opinion of the court in *State v. McMullan*, 223 La. 629, 66 So. 2d 574 (1953), discussed in Note, 14 LA. L. REV. 427 (1954), reprinted in PUGH at 173; *with State v. Jacobs*, 281 So. 2d 713 (La. 1973), discussed in *The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Evidence*, 35 LA L. REV. 525, 542 (1975), reprinted in PUGH at 47 (Supp. 1976). As to the propriety of the drawing of an inference in a civil case from a *party litigant's* claim of his privilege against self-incrimination, see *Baxter v. Palmigiano*, 425 U.S. 308 (1976).

terms would apply to all privileges, not simply to forcing a third person to assert his privilege against self incrimination:

> It is improper conduct for either the prosecution or the defense knowingly to call a witness who will claim a privilege, for the purpose of impressing upon the jury the fact of the claim of privilege. American Bar Association Standards of Criminal Justice, Relating to the Prosecution Function, Standard 5.7(c), and Relating to the Defense Function, Standard 7 -6(c) (1971).
>
> As the commentaries to these standards indicate, claims of privilege are preferably determined outside the presence of the jury, since undue weight may be given by a jury to the claim of privilege and due to the impossibility of cross-examination as to its assertion. (The commentaries also note the impropriety of either counsel arguing any inference from the failure of another to call a witness, if the failure to do so is known to be based on the witness's claim of privilege.) For similar reasons, the courts have uniformly rejected a defendant's claim of error based upon the denial of his request that a witness assert his claim of privilege before the jury. See *United States v. Lacouture*, 495 F.2d 1237 (CA5, 1974), and decisions therein cited. See also *Namet v. United States*, 373 U.S. 179, 83 S.Ct. 1151, 10 L. Ed. 2d 278 (1963).[140]

The view espoused is similar to that contained in the version of the Federal Rules of Evidence promulgated by the United States Supreme Court.[141] The *Berry* decision appears to be contrary to the Louisiana Supreme Court's 1952 unanimous decision in *State v. Gambino*.[142] The *Gambino* case, however, was not discussed by the court in *Berry*.

State v. Duhon,[143] decided subsequent to *Berry*, reemphasizes the Louisiana Supreme Court's continued adherence to the principles announced in *Berry*. A majority of the court held that despite the absence of a pertinent, specific contemporaneous objection by defense counsel,[144] if the prosecution knows that a severed co-defendant will assert the privilege

140. 324 So. 2d at 830.

141. See Rule 513 in the version of the Federal Rules of Evidence promulgated by the United States Supreme Court, 56 F.R.D. 183, 260 (1972). Congress, however, when it enacted the Federal Rules of Evidence adopted a truncated approach to the whole field of privileges and took no position on this problem.

142. 221 La. 1039, 61 So. 2d 732 (1952), discussed in *The Work of the Louisiana Supreme Court for the 1952-1953 Term—Evidence*, 14 LA. L. REV. 220, 223 (1953), reprinted in PUGH at 342.

143. 332 So. 2d 245 (La. 1976).

144. See the discussion in text at notes 219-30, *infra*.

against self-incrimination and nonetheless calls the severed co-defendant to the stand, defendant is entitled to a new trial. In a forthright, praiseworthy *per curiam*, Judge Earl E. Veron, the trial judge, had reflected great sensitivity to the prejudice suffered by the defendant as a result of the prosecutorial action, and indicated that upon subsequent reflection he felt that because of it he should have declared a mistrial.

HEARSAY

Admissibility of Hearsay Evidence at Preliminary Examination

From judicial pronouncements incident to writ denials,[145] it appears that the Louisiana Supreme Court is now taking the position that hearsay evidence is admissible in the preliminary examination provided for by Louisiana statutory[146] and constitutional[147] provisions. With deference and for reasons elaborated upon by others earlier in the pages of this Review,[148] the writers urge that a contrary view should be taken.

It is submitted that the preliminary hearing mandated by the fourth and fourteenth amendments to the federal constitution, as interpreted by the United States Supreme Court in *Gerstein v. Pugh*,[149] should be sharply differentiated from that required by Louisiana law. The federal constitutionally required hearing, as these writers understand it, is in the nature of the first appearance hearing held in other states and formerly required under Louisiana law.[150] The hearing mandated by the federal constitution is to be held immediately after a person is arrested without a warrant, whether for a felony or misdemeanor, before extended incarceration. At such a hearing the defendant is entitled only to minimal safeguards. In contrast, the Louisiana statutes make clear that the proceeding therein contemplated is an adversary proceeding at which defendant has the right to be present, to be represented by counsel, to call witnesses, and to cross-examine those called by the state.[151] Further, in contradistinction to the federally mandated hearing, Louisiana statutes make no provision for a preliminary examina-

145. State v. Font, 324 So. 2d 821 (La. 1975); and State v. Perkins, 316 So. 2d 385 (La. 1975).

146. LA. CODE CRIM. P. arts. 293-95.

147. LA. CONST. art. I, § 14.

148. *See The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Louisiana Constitutional Law*, 36 LA. L. REV. 533, 544 (1976); and Note, 36 LA. L. REV. 1050 (1976).

149. 420 U.S. 103 (1975).

150. LA. CODE CRIM. P. arts 79-82 (1928), *repealed by* La. Acts 1966, No. 310. *See* Note, 36 LA. L. REV. 1050, 1055 (1976).

151. *See* LA. CODE CRIM. P. arts. 293-95 and accompanying comments.

tion in misdemeanor cases. Thus, it is submitted that a defendant arrested without a warrant for a felony in Louisiana, before extended incarceration, should have the right to two hearings—(1) the summary *Gerstein v. Pugh* hearing immediately after arrest (wherein admittedly his procedural safeguards are minimal), and (2) the later more extensive Louisiana preliminary examination spelled out by Louisiana statute and since 1974, protected by state constitutional provisions.[152]

It is quite appropriate to utilize hearsay at a first appearance-*Gerstein v. Pugh* hearing. On the other hand, in light of the Louisiana statutory provision's redactors' comments,[153] and the pertinent Louisiana constitutional language and history,[154] it is submitted that absent a hearsay exception, hearsay evidence should be held inadmissible at Louisiana's more elaborate preliminary examination.

Admissions—Statements by Co-conspirators

Under certain circumstances, as an aspect of the admissibility of admissions, statements and actions of a defendant's co-conspirator in furtherance of the common effort are admissible against a defendant. The traditional theory is that such a co-conspirator's statement is impliedly authorized by his confederate and is therefore admissible as an admission by an implied agent. The potential for abuse, however, is enormous and the problems encountered myriad—much too broad to be adequately covered in a survey such as this.[155] It is anticipated that the matter will be explored in a student comment published later in this Review. Louisiana's statutory provision[156] is similar to that in many other states. To protect the defendant, it stipulates that for a co-conspirator's statement to be admissible against the defendant "a prima facie case of conspiracy must have been established."

152. *See The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Louisiana Constitutional Law*, 36 LA. L. REV. 533, 544 (1976).

153. See especially comment to LA. CODE CRIM. P. art. 294.

154. DOCUMENTS OF THE LOUISIANA CONSTITUTIONAL CONVENTION RELATIVE TO THE ADMINISTRATION OF CRIMINAL JUSTICE 715-18, 1153 (1976).

155. For a discussion of the problem see UNIFORM RULE OF EVID. 63 (1953); MODEL CODE OF EVIDENCE rule 508 (1942); MCCORMICK § 267 at 639; 4 J. WIGMORE, EVIDENCE § 1079-80a at 180-201 (Chadbourn ed. 1972); Comment, *Co-Conspirators*, 2 So. U.L. REV. 128 (1975).

156. LA. R.S. 15:455 (1950) provides: "Each coconspirator is deemed to assent to or to commend whatever is said or done in furtherance of the common enterprise, and it is therefore of no moment that such act was done or such declaration was made out of the presence of the conspirator sought to be bound thereby, or whether the conspirator doing such act or making such declaration be or be not on trial with his co-defendant. But to have this effect, a prima facie case of conspiracy must have been established."

Three cases[157] of great importance in the area divided the court during the past year, and it is difficult indeed to predict what the court will do in the future with the issues therein presented. Much will depend on the views of Justice James L. Dennis, the newly elected member of the court.

Declarations Against Interest

Traditionally, to qualify under the declaration against interest exception to the hearsay rule,[158] a statement must have been made by a person now unavailable, with respect to a matter as to which he had firsthand knowledge, and so much against his *pecuniary* and *proprietary* interest that a reasonable person under the circumstances would not have made the statement unless he believed it to be true.[159] Thus, the exception is a narrow one and a majority of jurisdictions do not include within it declarations against "mere" *penal* interest. This position, however, has been much criticized[160] and the subject of a lacerating attack by Justice Holmes in his famous dissent in *Donnelly v. United States*.[160] In keeping with the provisions of earlier reform codes,[162] the recently adopted Federal Rules of Evidence expand the declaration against interest exception, *inter alia*, to include those against *penal* interest.[163]

In his dissenting opinion in *State v. Morrow*,[164] Justice Summers

157. State v. Kaufman, 331 So. 2d 16 (La. 1976); State v. Carter, 326 So. 2d 848 (La. 1975); and State v. Brown, 326 So. 2d 839 (La. 1975).

158. The declaration against interest exception is sharply to be distinguished from admissions, statements made by a party litigant or one in privity with him, etc., offered by his opponent. The strictures applied to admissibility of declarations against interest are generally totally inapplicable to admissions. For a discussion of the two exceptions and the reasons underlying the distinction between them, see MCCORMICK § 276 at 670.

159. *See* Davis v. Lloyd, 1 C. & K. 276 (1844); MCCORMICK §§ 278-80 at 673-79; 5 J. WIGMORE, EVIDENCE §§ 1455 at 323, 1469 at 346 (Chadbourn ed. 1970) [hereinafter cited as 5 WIGMORE].

160. *See* MCCORMICK § 278 at 673; 5 WIGMORE §§ 1476-77 at 349-62.

161. 228 U.S. 243, 277 (1913).

162. *See* UNIFORM RULE OF EVID. 63(10) (1953); MODEL CODE OF EVIDENCE rule 509 (1942).

163. Federal Rule of Evidence 804(b)(3) sets forth the declaration against interest exception as "[a] statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement."

164. 255 So. 2d 78 (1971), discussed in *The Work of the Louisiana Appellate Courts for the 1971-1972 Term—Evidence*, 33 LA. L. REV. 306, 318 (1973), reprinted in PUGH at 445.

urged expansion of the declaration against interest exception to include declarations against penal interest, but the majority of the court in that case found it unnecessary to reach the issue.[165]

The very significant case of *State v. Gilmore*[166] deals directly with the problem. Relying upon Dean Wigmore's treatise, the views expressed by Justice Summers in dissent in *Morrow*, and Justice Holmes' dissent in *Donnelly*, Justice Dennis, speaking for a majority of the court, held that *under the circumstances presented*, an unavailable declarant's confession to a homicide should be deemed admissible under an exception to the hearsay rule. The exact ambit of the *Gilmore* holding is not clear. The circumstances presented were particularly appealing from the standpoint of admissibility—the out-of-court declaration appeared very trustworthy and unsuspicious, there were circumstances to corroborate the truthfulness of the absent declarant's confession, and the third party's confession was offered by the defendant. In light of *Chambers v. Mississippi*,[167] defendant may have had a constitutional right to have the out-of-court declaration held admissible. It may, therefore, be premature to assert that Louisiana has without reservations accepted the declaration against penal interest as an exception to the hearsay rule. It is not clear, for example, whether the court will hold such a statement admissible when offered by the state, and there are constitutional confrontation problems inherent in such an extension.[168] The contours of the exception, the protective safeguards that may be established, and the extent to which (as in the Federal Rules of Evidence) the court may further liberalize the declaration against interest exception all remain as yet undetermined.

Prior Reported Testimony—Unavailability

Is testimony given by a state's witness at a prior trial admissible if the

165. The majority concluded that under the circumstances there presented the "unavailability requirement" had not been met.

166. 332 So. 2d 789 (La. 1976).

167. 410 U.S. 284 (1973). See discussion in *The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Evidence*, 35 LA L. REV. 525, 544 (1975), reprinted in PUGH at 26 (Supp. 1976). See also discussion in *Federal Rulss of Evidence, Hearsay Evidence and the Federal Rules: Article VIII—II. Exceptions to the Hearsay Rule: Expanding the Limits of Admissibility*, 36 LA. L. REV. 159, 181 (1975).

168. *See* Bruton v. United States, 391 U.S. 123 (1968); Douglas v. Alabama, 380 U.S. 415 (1965); S. REP. NO. 1277, 93d Cong., 2d Sess. 21 (1974); Advisory Committee Note to Federal Rules 804(b)(3), 56 F.R.D. 183, 327 (1972), and Comment, *Federal Rules of Evidence, Hearsay Evidence and the Federal Rules: Article VIII-II. Exceptions to the Hearsay Rule: Expanding the Limits of Admissibility*, 36 LA. L. REV. 159, 181 (1975).

witness is produced by the state but persists in refusal to testify, and at the request of the state is held in contempt of court and sentenced for same? Appropriately, in *State v. Ghoram*[169] the court held that under these circumstances the prior testimony was admissible, that the witness could properly be deemed "unavailable." It is significant that in accordance with a requirement indicated by Professor McCormick's treatise[170] in a passage quoted and relied upon by the court, all available judicial pressures had been brought to bear upon the witness to force him to testify.

In a strongly worded plurality opinion[171] in *State v. Jones*,[172] Justice Tate reemphasized the requirements of the federal confrontation clause enumerated by the United States Supreme Court in *Barber v. Page*[173] and followed by the Louisiana Supreme Court in *State v. Sam*[174] and succeeding cases.[175] Justice Tate stressed that testimony given by a witness at a prior hearing is inadmissible on behalf of the state "unless the state proves the witness is truly not available for the trial despite good-faith and diligent efforts to locate him timely before the trial and to produce him at the trial."[176] The plurality opinion took the position that such a showing had not been made relative to prior testimony given by the deputy coroner, but found that under the extremely narrow circumstances there presented the admission of the prior testimony on an uncontroverted matter was non-reversible error. The importance of the prosecution's good-faith attempt to produce live witnesses can hardly be over-emphasized.

Res Gestae

When is an out-of-court statement admissible as part of the res gestae? The problem is a difficult one and continues to perplex the courts. The Louisiana statutory statement[177] seemingly affords a narrow scope to

169. 328 So. 2d 91 (La. 1976).

170. MCCORMICK § 253 at 608, 612.

171. Justice Dixon dissented without written reasons from affirmance of the conviction. In light of his opinions in *State v. Michelli*, 301 So. 2d 577 (La. 1974), and *State v. Soukup*, 275 So. 2d 179 (La. 1973), it is perhaps not unreasonable to presume that he agreed with the plurality opinion in its finding that the trial court committed error in receiving the prior testimony but would have held the trial court action reversible error.

172. 325 So. 2d 235 (La. 1975).

173. 390 U.S. 719 (1968).

174. 283 So. 2d 81 (La. 1973).

175. State v. Moore, 305 So. 2d 532 (La. 1974); State v. Kaufman, 304 So. 2d 300 (La. 1974).

176. 325 So. 2d at 238.

177. LA. R.S. 15:447-48 (1950).

statements admissible as part of the res gestae, but at times it has been given broad interpretation.[178] Part of the confusion, it is believed, results from blending statements admissible as part of the res gestae with those admissible as excited utterances.[179] These two avenues of admissibility, it is submitted, should be sharply distinguished and separately analyzed.[180]

Although continuing somewhat to merge res gestae and excited utterances, a majority of the court in *State v. Williams*[181] adopts a more literal, narrow interpretation of Louisiana's res gestae statutory provisions. In the opinion of the writers, there is great danger in letting too much evidence in under the amorphous res gestae shibboleth, and a return to the narrow scope of the Louisiana statutory definition is desirable.

Ancient Documents

Osborn v. Johnston[182] is one of the rare cases interpreting Louisiana's broadly phrased statutes regarding the admissibility and authenticity of recorded "ancient documents."[183] Emphasizing that Louisiana's statutory provisions, contrary to those in other states, were designed as part of a system for land recordation, the Louisiana Supreme Court rejected the court of appeal's holding that the showing of a material alteration of an ancient recorded document necessarily dissipates the presumption of execution and genuineness provided by the statute. The court held instead that

> [t]he combination of age and recordation not only authenticates the old document, making it admissible in evidence, but also, by the terms of the act, establishes 'a prima facie presumption of the execution and of the genuineness of such instrument'.[184]

Although, of course, the presumption thus created is rebuttable, the court found that the circumstances presented in the instant case were insufficient to rebut the presumption.

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178. *See, e.g.*, State v. Shaffer, 260 La. 605, 257 So. 2d 121 (1971); State v. Reese, 250 La. 151, 194 So. 2d 729 (1967).

179. See also in this connection the recent cases of *State v. Comeaux*, 319 So. 2d 897 (La. 1975), and *State v. Sneed*, 328 So. 2d 126 (La. 1976).

180. *See The Work of the Louisiana Appellate Courts for the 1971-1972 Term—Evidence*, 33 LA. L. REV. 306, 316 (1973), reprinted in PUGH at 514; Comment, *Excited Utterances and Present Sense Impressions As Exceptions to the Hearsay Rule in Louisiana*, 29 LA. L. REV. 661 (1969), reprinted in PUGH at 494.

181. 331 So. 2d 467 (La. 1976).

182. 322 So. 2d 112 (La. 1975). Although one of the co-authors of this discussion, James McClelland, is an associate with one of the law firms that handled this case, he did not participate in the preparation or presentation of the case.

183. LA. R. S. 13:3728-31 (1950).

184. 322 So. 2d at 116.

Hospital Records

State v. Junell[185] and succeeding cases recognized that the legislature had established strict mandatory standards for the admissibility of the results of PEI (Photo-Electric Intoximeter) tests to show drunkenness in prosecutions for driving while intoxicated. In light of the provisions of LA. R.S. 13:3714 regarding the admissibility of hospital records,[186] does the inclusion of the results of a PEI test in a hospital record provide a means for avoiding the rigorous requirements of the *Junell* line of cases? With much force and reason, *State v. Bruins*[187] answers in the negative. The court in *Bruins* held that notwithstanding the provisions of the Hospital Records Act, the results of PEI tests are to be given no evidentiary value unless the state affirmatively shows "that the blood sample was taken and analyzed by persons who have the requisite qualifications and certification set forth in LA. R.S. 32:663 and LA. R.S. 32:664."[188]

Admissibility of Police Reports

As recognized by the Louisiana Supreme Court in two cases[189] decided during the past term, the mere fact that an out-of-court statement is contained in a police report does not mean that it necessarily escapes the hearsay rule. To do so, it must qualify under some recognized exception.[190]

Statements in Complaints to Police

May a police officer witness, over a hearsay objection, testify to complaints and statements made to him? Here, as so often is true elsewhere in the law of evidence, the major problem usually encountered is one of relevancy.

If the question arises on a motion to suppress, as opposed to the trial, the testimony will often be admissible despite the hearsay objection because

185. 308 So. 2d 780 (La. 1975), discussed in *The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Evidence*, 36 LA. L. REV. 651, 655 (1976). See the discussion in the text at notes 31-39, *supra*.

186. See the discussion in *The Work of the Louisiana Appellate Courts for the 1969-1970 Term—Evidence*, 31 LA. L. REV. 381, 388 (1971), reprinted in PUGH at 409.

187. 315 So. 2d 293 (La. 1975). See also discussion in text at note 35, *supra*.

188. *Id.* at 295.

189. State v. Bizette, 334 So. 2d 392 (La. 1976); and State v. Nix, 327 So. 2d 301 (La. 1975).

190. *See The Work of the Louisiana Appellate Courts for the 1966-1967 Term—Evidence*, 28 LA. L. REV. 429, 433 (1968), reprinted in PUGH at 492; *The Work of the Louisiana Supreme Court for the 1958-1959 Term—Evidence*, 20 LA. L. REV. 335, 347 (1960), reprinted in PUGH at 493.

the relevancy is to show probable cause—whether the police officer at the time he acted in arresting the defendant (or made a search without a warrant) had probable cause to do so and hence whether evidence obtained as the result of such arrest (or search) was constitutionally obtained. At such a motion to suppress hearing, therefore, the major question is often the state of mind of the officer as to what he had reason to believe, not the truth of the out-of-court complaint or statement. Such use of the statement in the motion to supress hearing is a non-hearsay use.[191]

At the criminal trial itself, however, rarely is the state of mind of the officer at issue. The validity *vel non* of the arrest or the reasonableness of the police officer's conduct is normally of no moment to the trier of fact in determining whether the evidence adduced as to the guilt of the defendant adds up to proof beyond a reasonable doubt. Thus, at the trial, as distinguished from the motion to suppress hearing, it is usually improper to permit the police officer, over a hearsay objection, to testify as to the contents of complaints and statements made to him by a third person, for the relevance of such statements is normally the truth thereof rather than the fact that they were made. Such use in the trial context, therefore, is generally a hearsay use, and usually there is no hearsay exception within which the out-of-court complaint or statement can fit.[192] Under certain circumstances the admission of such statements would violate the defendant's right of confrontation.[193]

Justice Tate, speaking for a majority of the court in *State v. Thompson*,[194] provided an exceptionally lucid analysis of the problem. All members of the court agreed that testimony by a police officer as to what an unnamed informer had told him prior to his arrest of the defendant was

191. See the discussion in *The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Evidence*, 36 LA. L. REV. 651, 673 (1976); *The Work of the Louisiana Appellate Courts for the 1972-1973 Term—Evidence*, 34 LA. L. REV. 443, 455 (1974), reprinted in PUGH at 201 (Supp. 1976).

192. In some cases, however, the out-of-court statement will fit into an exception to the hearsay rule, as, for example, unsuspicious complaints made by a rape victim shortly after the alleged rape, or the newly created extension of such exception for unsuspicious statements made by the alleged victim of child abuse shortly after such alleged abuse. *See the Work of the Louisiana Appellate Courts for the 1974-1975 Term—Evidence*, 36 LA. L. REV. 651, 674 (1976). See also the discussion in the text at notes 177-81, *supra*; and the discussion in the text at notes 202-04, *infra*.

193. *See* Favre v. Henderson, 464 F. 2d 359 (5th Cir.), *cert. denied*, 409 U.S. 942 (1972). *See* State v. Favre, 255 La. 690, 232 So. 2d 479 (1970), discussed in *The Work of the Louisiana Appellate Courts for the 1969-1970 Term—Evidence*, 31 LA. L. REV. 381, 385 (1971), reprinted in PUGH at 429. *See also* Favre v. Henderson, 444 F.2d 127 (5th Cir. 1971); Favre v. Henderson, 318 F.Supp. 1384 (E.D. La. 1970).

194. 331 So. 2d 848 (La. 1976).

hearsay.[195] The majority opinion states that although the fact of the complaint and what the officer did as a result thereof is non-hearsay, the content of the statement is inadmissible hearsay. Although it is true that the fact of the complaint and the action taken as a result thereof is not hearsay, they are often irrelevant to the facts in issue, and to the extent such testimony implies the contents of an out-of-court utterance, its admission, it is submitted, may well run afoul of both the hearsay and confrontation rules.[196]

It must be conceded, however, that several recent cases have permitted the contents of out-of-court statements received, heard, or communicated by police to come into evidence over a hearsay objection. For example, in *State v. Calloway*[197] the witness was permitted to testify that he received a "report on the radio that the two suspects were believed to be in a black Cadillac,"[198] for the court found that the testimony was admissible "to explain the sequence of events leading to the arrest of the defendants from the viewpoint of the arresting officers."[199] The opinion does not state why, at the trial on the merits, the officers' viewpoint was relevant to the guilt or innocence of defendant. Similarly, in *State v. Singleton*[200] the court held that a police officer could testify, over a hearsay objection, to a description he broadcast over the radio—a description he had received from a man across the street as to a vehicle that man said he saw drive away from the scene of the crime—because the testimony by the officer as to what he himself did was a fact within his knowledge.[201] With deference it is submitted that what the officer testified to was a description of the car given by another person where the relevance of the statement appears to have been that such a car drove away from the scene of the crime, the truth of which statement was as to a critical fact not within the knowledge of the testifying witness. In both *Calloway* and *Singleton* the truth of the statement, rather than the fact of the statement, appears to have been the relevant circumstance. In the opinion of the writers such cases as *Calloway* and *Singleton*

195. Three of the justices felt, however, that under the circumstances admission of the testimony was harmless error.

196. See the discussion of *State v. McLeod*, 271 So. 2d 45 (La. 1973), in *The Work of the Louisiana Appellate Courts for the 1972-1973 Term—Evidence*, 34 LA. L. REV. 443, 445 (1974), reprinted in PUGH at 201 (Supp. 1976).

197. 324 So. 2d 801 (La. 1975).

198. *Id.* at 809.

199. *Id.*

200. 321 So. 2d 509 (La. 1975).

201. The court held alternatively that the testimony, if hearsay, under the circumstances was harmless error.

are inconsistent with the approach taken in the later *Thompson* decision. *Thompson*, it is believed, represents the correct view.

Complaint by Child Abuse Victim

In *State v. Comeaux*[202] a majority of the court, speaking through Chief Justice Sanders, held admissible, over a hearsay objection, statements by a five-year-old, bleeding, hysterical child, given about thirty minutes after the attack, as to the cause of her physical condition. The court held same admissible either as part of the res gestae or under an extension of the exception regarding the admissibility of the first complaint of an allegedly sexually assaulted young child. Although it seems questionable to these writers whether such a statement could properly fit under the res gestae exception,[203] the writers agree with expanding the complaint of the sexually assaulted victim to include such unsuspicious, trustworthy statements of the physically abused young child as here presented. There is obvious danger, however, in giving too wide a berth to such an exception, and constitutional problems are presented.[204] It should, it is submitted, be narrowly restricted.

Prior Statement by Witness

Does the fact that a person testifies as a witness cause out-of-court statements by him to be admissible under some exception to the hearsay rule or as non-hearsay? Phrased differently, does the fact that an out-of-court declarant is *now* on the stand, under oath and subject to cross-examination, cause the out-of-court declaration made by him to be admissible as non-hearsay or under some hearsay exception? The traditional view is that such out-of-court statements are hearsay and do not necessarily fit under an exception to the hearsay rule.[205] Although the position has been criticized,[206] it is generally adhered to in the Federal Rules of Evidence.[207]

202. 319 So. 2d 897 (La. 1975).

203. See also discussion in the text at notes 177-81, *supra*.

204. See discussion in the text at notes 191-201, *supra*.

205. *See* State v. Ray, 249 So. 2d 540 (1971), discussed in *The Work of the Louisiana Appellate Courts for the 1971-1972 Term—Evidence*, 33 LA. L. REV. 306, 311 (1973), reprinted in PUGH at 104; and *The Work of the Louisiana Appellate Courts for the 1974-1975 Term— Evidence*, 36 LA. L. REV. 651, 665 (1976).

206. *See* UNIFORM RULE OF EVID. 63(1) (1953); MODEL CODE OF EVIDENCE rule 503(b) & comment (1942); MCCORMICK § 251 at 601; 3A WIGMORE § 1018 at 995.

207. *See* FED. R. EVID. 801, 802. There are, however, exceptions under the Federal Rules of Evidence. Prior inconsistent statements under certain narrow circumstances are admissible for substantive weight (FED R. EVID. 801(d)(1)(A)), as are certain prior consistent statements (FED. R. EVID. 801(d)(1)(b)), and by a post-adoption Congressional amendment, prior identifications by a witness (FED. R. EVID. 801(d)(1)(C)) are also deemed non-hearsay. *See also* Blakely, *Substantive Use*

Justice Tate in a very well-reasoned opinion in *State v. Williams*[208] makes it clear that Louisiana continues to adhere to the traditional view. Neither of the two dissents in the *Williams* case voiced disagreement with this view of the hearsay rule. It appears, therefore, to be firmly established, and in the writers' opinion, desirably so.

Self-serving Statements

As was well recognized by Judge Culpepper speaking for the Third Circuit Court of Appeal in *Lambert v. Heirs of Adam*,[209] the fact that an out-of-court statement was or was not "self-serving" does not necessarily determine whether the statement is inadmissible hearsay or is admissible under some exception to the hearsay rule. It is true that to qualify as a declaration against interest[210] the statement in question must be disserving, but this is not a necessary qualification for all exceptions to the hearsay rule. Often, as recognized by the court, the fact that a statement was "self-serving" properly goes to the weight to be given to the statement, not to its admissibility.

Necessity-Trustworthiness as Basis for New Exceptions—Safety Codes

After extensive consideration of the problem, the court in *Burley v. Louisiana Power and Light Co.*,[211] speaking through Justice Summers, held that the National Electric Safety Code, outgrowth of a project sponsored by the National Bureau of Standards and agreed to by a number of responsible organizations, may, over a hearsay objection, be given probative weight in determining negligence. The court recognized that the Code had not been adopted by any law or ordinance, but stressed the trustworthy character of the Safety Code, its wide acceptance and reliability, and the need for considering such evidence. The court recognized that the persons preparing the Code were not in court under oath subject to cross-examination, but stressed that the twin elements of necessity and trustworthiness which underlie most exceptions to the hearsay rule[212] were present and said that Louisiana courts of appeal have for some time received such evidence. In so holding, the court acknowledged that it was taking a minority view. The

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of Prior Inconsistent Statements Under the Federal Rules of Evidence, 64 KENT. L.J. 3 (1975).

208. 331 So. 2d 467 (La. 1976).

209. 325 So. 2d 331 (La. App. 3d Cir. 1975), *cert. denied*, 329 So. 2d 458 (La. 1976).

210. See discussion in the text at notes 158-68, *supra*.

211. 319 So. 2d 334 (La. 1975).

212. See discussion in *The Work of the Louisiana Appellate Courts for the 1968-1969 Term—Evidence*, 30 LA. L. REV. 321, 322 (1970), reprinted in PUGH at 526.

evidence seems to these writers appropriate for consideration in a civil case, especially a non-jury case.[213] Perhaps, however, provision should be made for advance notice to the opponent of the intention to utilize such evidence, as required by the Federal Rules of Evidence for omnibus hearsay exceptions.[214]

Weight to be Given Hearsay Testimony Admitted Without Objection

Where inadmissible hearsay is admitted without objection, may it be given probative weight by the trier of fact? The traditional view is that such evidence may be given the probative value to which it is found by reason to be entitled.[215] Professor McCormick's treatise tells us that this view is almost universally accepted.[216] In *Coleman v. Victor*[217] the Louisiana Supreme Court, in reversing the court of appeal for taking the contrary position, held that "uncontradicted hearsay testimony" may be given probative value.[218] The traditional view, as noted above, would go even further, and it is to be anticipated that the Louisiana Supreme Court would do so in an appropriate case.

PRESERVING RIGHTS FOR APPEAL

Necessity for Contemporaneous Objection re Admissibility of Evidence

In a number of criminal cases decided during the past year the court held that defendant had lost his right to remedy on appeal because of his counsel's failure to comply with the provisions of Code of Criminal Procedure article 841 *et seq.* regarding the necessity for contemporaneous objection, etc. to the prosecution's attempt to get evidence before the trier of fact. Although in 1974 Louisiana repealed its anachronistic bills of exception procedure,[219] the legislation stipulates

> It is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires

213. See material cited in note 2, *supra*.
214. FED. R. EVID. 803(24) and 804(b)(5).
215. MCCORMICK § 54 at 125.
216. *Id.* at 126.
217. 326 So. 2d 344 (La. 1976).
218. The court's decision was also based on the finding that by soliciting the evidence himself, the complaining party had waived his objection.
219. *See* Joseph, *The Assignment of Error: A New Procedure for Appellate Review*, 1 SO. U. L. REV. 36 (1975); *The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Evidence*, 36 LA. L. REV. 651, 677 (1976).

> the court to take, or of his objections to the action of the court, and the grounds therefor.[220]

The purpose and reason underlying the contemporaneous objection rules is helpfully discussed in *State v. Marcell*.[221] *State v. Sosa*[222] and *State v. Powell*[223] reemphasize that definitely to protect oneself a specific objection should be made.

Thus Louisiana follows the traditional rule that an overruled general objection to the admissibility of evidence tendered by an opponent is ordinarily insufficient to protect one's rights on appeal;[224] the grounds for the objection should be given.[225] Traditionally however, there have been exceptions to the general rule.[226] The language used by the court in *Sosa* and *Powell*, however, does not appear to admit of the traditional exceptions, nor does the language in Code of Criminal Procedure article 841 expressly recognize them. It is to be hoped, however, that to prevent injustice and undue technicality, exceptions will be recognized in appropriate cases.

Several cases decided during the past term reflect a liberal attitude towards the statute. In *State v. Jones*[227] the court indicated that the statute is to be given a common sense non-technical interpretation, and in *State v. Griffin*[228] the court, in an opinion authored by Justice Summers, displayed a willingness to consider an imperfectly articulated objection. Further, in

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220. LA. CODE CRIM. P. art 841. Where federal constitutional rights are involved however, federal standards as to waiver are generally applicable. *See* Comment, *Post-conviction Remedies and Waiver of Constitutional Rights*, 26 LA. L. REV. 705 (1966), reprinted in PUGH at 567.

221. 320 So. 2d 195 (La. 1975). *See also* State v. Spain, 329 So. 2d 178 (La. 1976). For the discussion of the contemporaneous objection rule see *The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Evidence*, 36 LA. L. REV. 651, 677 (1976).

222. 328 So. 2d 889 (La. 1976).

223. 325 So. 2d 791 (La. 1976).

224. *See* LA. CODE CRIM. P. art. 841.

225. As to the necessity of stating the grounds for the admissibility of evidence, where the opponent is the one making the objection, see *State v. Moorcraft*, 319 So. 2d 386 (La. 1975). Compare this case with the recent case of *State v. Charles*, 326 So. 2d 335 (La. 1976).

226. See the discussion in MCCORMICK § 52 at 113; and 1 WEINSTEIN 103(01) at 103-5. Under the provisions of Federal Rule of Evidence 103(a)(1) a specific objection is not required if the specific ground was "apparent from the context." In addition, Federal Rule of Evidence 103(d) provides that "plain error" "affecting substantial rights" may be noted on appeal despite the absence of objection. See the discussion of "plain error" in *The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Evidence*, 36 LA. L. REV. 651, 677 (1976).

227. 332 So. 2d 267 (La. 1976).

228. 329 So. 2d 693 (La. 1976).

State v. Duhon,[229] over forceful dissent, the court was willing to notice what it found to be prosecutorial misconduct in having defendant's severed co-defendant assert his privilege against self-incrimination in open court despite the absence of a pertinent, specific contemporaneous objection.[230]

229. 332 So. 2d 245 (La. 1976).
230. See discussion in the text at notes 185-88, *supra*.