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Procedure: Evidence

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EVIDENCE

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EXPERT WITNESSES

The fact that a medical specialist is brought from another state to testify in Louisiana and is not licensed to practice medicine in Louisiana would not prevent him from qualifying as an expert witness if he had the specialized training, knowledge, and competency required of such a witness. Similarly, *Carvell v. Winn*[1] held that a doctor of chiropractic was qualified to testify as an expert witness in the field of chiropractic and physiology, even though the practice of chiropractic as such is not authorized in Louisiana unless the practitioner has the same qualifications and passes the same examinations required of "medical" doctors. Competence to testify as an expert is based on specialized training, knowledge, and experience and is not determined by the licensing laws of the forum. However, the court of appeal held it was within the trial court's discretion to limit the area of the testimony of the doctor of chiropractic; there was no abuse of discretion in excluding his testimony on a causal connection between injuries and subsequent physical ailments.

PRIVILEGE AGAINST SELF INCRIMINATION

May a member of a corporation called upon to show cause why he should not be removed from office and expelled from membership in the corporation refuse to answer questions on the ground that his answers might tend to incriminate him? Due notice of the hearing was given to the member and the hearing was in accordance with the bylaws of the corporation. In reasoning similar to that employed in a New York case,[2] the court of appeal held that the witness, as an officer, stood in a fiduciary relation to the corporation. As such, he could not refuse to answer questions concerning his official conduct while

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1. 154 So. 2d 788 (La. App. 3d Cir. 1963).

2. *In re* Cohen, 195 N.Y.S.2d 990 (1959), *aff'd*, Cohen v. Hurley, 366 U.S. 117 (1960), noted 20 LA. L. REV. 743. Cohen, an attorney, in a proceeding investigating unethical practices, refused to answer questions concerning certain of his activities. He was disbarred for violation of his duty of candor and frankness to the court.

occupying that fiduciary position without subjecting himself to the civil remedies of the corporation.[3]

The majority American view limits an "accused's" privilege against self-incrimination to criminal proceedings, not allowing it to be invoked in an investigation into the circumstances and authorship of an alleged crime.[4] Louisiana's privilege is a little broader. It may be invoked in a "proceeding that may subject . . . [a person] to criminal prosecution."[5] However, since the instant proceeding subjected the member to civil sanctions only, the Louisiana constitutional guaranty was inapplicable. Of course, a private corporation could adopt articles or bylaws to accord an "accused" a civil privilege against being compelled to give testimony which would incriminate him under the rules of the corporation or the laws of the jurisdiction.

RELEVANCY

Color Slides

Fifteen color slides were projected before the jury in *State v. Morris*[6] showing the torso of a homicide victim before and during an autopsy. Blood and gore were increasingly displayed from pictures one through fifteen until a body cavity was shown, with the coroner holding up various organs while a pump evacuated blood. The state possessed a confession from Morris that he had shot the decedent, and the sole issue was whether the killing was intentional or committed in the heat of passion. Prior to the introduction of the color slides, the coroner had testified that death resulted from gunshot wounds, which he had identified, and the court received in evidence a black and white picture of the wound. The only relevancy the state could assert for introduction of the color slides was the contention that the jury could determine from the condition of the organs, held by the coroner, whether the decedent died from a gunshot wound or natural causes.

The color slides were irrelevant since they did not tend to be probative of the proposition at which they were directed, the cause of death. A lay jury was incapable of determining wheth-

3. Heuer v. Crescent River Port Pilots' Ass'n, 158 So. 2d 221 (La. App. 4th Cir. 1963).
4. McCORMICK, EVIDENCE § 122 (1954).
5. LA. CONST. art. I, § 11.
6. 245 La. 475, 157 So. 2d 728 (1963).

er the organs were diseased. Even if the pictures had been probative of the cause of death, they would have been excluded on the theory that the cause of death was not at issue. The killing was an admitted fact. Relevant evidence — an appellation certainly not applicable to the fifteen color slides presented in *State v. Morris* — is admissible if its probative value is not outweighed by the dangers of undue prejudice, abstraction and waste of time. After arguing relevancy, the state contended that if the pictures were irrelevant, the defendant was not prejudiced. However, the Supreme Court, after viewing the slides, held the pictures were inherently prejudicial because they were "in such form as to be highly shocking and emotionally disturbing to the mind of the average individual."[7]

CHARACTER EVIDENCE

Other Crimes

Generally, evidence of other crimes of the accused is excluded and the prosecutor is required to prove the case other than by showing the accused is a "bad man." The relevancy of such evidence is outweighed by the danger of undue prejudice to the accused. An exception is made where the evidence of other crimes has independent relevance. For example, if the prior crimes show the existence of a larger scheme, the evidence is admitted. In *State v. Morris*[8] evidence was received of a prior homicide occurring in a bar-room fight similar to the circumstances resulting in the accused's present prosecution for murder. The Supreme Court, while reversing the conviction on other grounds, held that the evidence[9] was properly received to show intent to kill or inflict great bodily harm even though the prior crime occurred seven years earlier.

The decision presents difficulty in two respects. First, the court did not explore the similarity between the two crimes other than to note they both involved homicides which occurred in bar-rooms. Similarity of the crimes is an essential requirement.[10] The prior crime to be admissible need not have been

7. *Id.* at 485, 157 So. 2d at 732.
8. 245 La. 475, 157 So. 2d 728 (1963).
9. The court said the evidence of the prior conviction was not hearsay. A police officer present at the first conviction testified he heard the accused plead guilty. It is submitted this was an extrajudicial declaration falling within the definition of hearsay, but possibly admissible under an exception to the rule.
10. State v. Rives, 193 La. 186, 190 So. 374 (1939); WIGMORE, EVIDENCE § 363 (1940).

committed immediately before the act charged. Wigmore is of the opinion that a correct application of the principle would receive evidence which constitutes "real probative indication of the defendant's intent."[11] In applying this rule, the Louisiana Supreme Court has held evidence of cattle theft from a dairy two months before the act charged, cattle theft from a different dairy, did not offer probative indication of the defendant's intent in committing the second crime.[12] Even assuming similarity of crimes, a time removal of seven years would not seem to be probative of intent in commission of the later crime.[13]

Prejudicial Effects of Mention of Other Crimes

In *State v. Maney*[14] an exception was sustained to the question of a district attorney relative to prior arrests of the accused. The Supreme Court held that the judge's instructions to the jury to disregard the question adequately protected the defendant's rights. Another illustration of the application of Article 495 of the Code of Criminal Procedure, which provides the mandate that no witness can be asked on cross-examination whether he has been indicted or arrested, occurred in the past court term in *State v. Carite*.[15] The district attorney in closing argument said:

> "Because the defendant has not been convicted before does not mean it's the first time he was arrested or prosecuted for narcotics."

A defense objection was sustained and the trial judge instructed the jury to disregard the remark. *Maney* was cited in support of the contention that the judge's instruction effectively cured the admitted error. The Supreme Court said *Maney* was "different," unanimously holding that if article 495 were ever to have substance it must be applied in the instant case to cure the prejudice through a reversal and that the instruction to the jury was not sufficient. However, it is difficult to reconcile this

11. WIGMORE, EVIDENCE § 363 (1940).

12. State v. Rives, 193 La. 186, 190 So. 374 (1939).

13. Evidence of prior crimes was received without difficulty in State v. Richard, 245 La. 465, 158 So. 2d 828 (1963). There the accused was charged with possession of narcotics. Evidence of possession of *barbiturates*, a lesser crime committed at the same time as the act charged, was admitted to show the possession of narcotics was not unintentional, inadvertent, or without guilty knowledge.

14. 242 La. 223, 135 So. 2d 473 (1961); commented on in *The Work of the Louisiana Appellate Courts for the 1961-1962 Term — Evidence*, 23 LA. L. REV. 406, 410 (1963).

15. 244 La. 928, 155 So. 2d 21 (1963).

decision with *Maney* where it was held that an instruction could cure the prejudice flowing from a question asserting prior arrests. It is submitted that the rationale employed by the court in *Carite* should be applied to the *Maney* situation. If an inference of a crime is present in the state's remarks in closing argument, is it not also present in the insinuating question to the accused which forces the defense counsel to his feet to assert an objection? The prejudice takes the same form in each case, the accused's credibility is destroyed in the minds of the jury by innuendo.

HEARSAY EVIDENCE

Admissions — Declarations Against Interest

In a direct action against an insurer of a trucking concern for damages resulting from a sideswiping collision, a traffic officer investigating the truck-car collision was allowed to testify that the truck driver had said after the accident that he was changing from the right to the left lane of a four-lane highway in order to make a left turn a few streets ahead.[16] The truck driver was present at the trial and testified. The court of appeal held that the traffic officer was presenting hearsay testimony admissible under the exception to the hearsay rule for the declarations against interest.

It is generally regarded as a fundamental requirement for the admission of declarations against interest that the declarant be unavailable at the time of the trial.[17] While not discussed by the court, modern commentators have urged the deletion of the requirement of unavailability of witnesses to receive declarations against interest under this exception of the hearsay rule.[18] The same reasoning which receives admissions of parties and spontaneous declarations without regard to availability of the declarant, namely the theory that the testimony of extrajudicial declarations is just as credible as the declarant's present testimony would be, is applicable.

Another possible ground for admission of the extrajudicial declaration would be the exception to the hearsay rule for ad-

16. Leblanc v. Phoenix Assur. Co., 158 So. 2d 256 (La. App. 4th Cir. 1963).
17. Day v. Armour Fertilizer Works, 8 La. App. 720 (Orl. Cir. 1928); Rousseau v. Texas & Pacific Ry., 4 La. App. 691 (Orl. Cir. 1926); McCORMICK, EVIDENCE § 253 (1954).
18. UNIFORM RULE OF EVIDENCE 63(10).

missions of parties. Admissions of *agents and employees* of parties are generally excluded. The trend is to admissibility, however, and both the Model Code of Evidence[19] and the Uniform Rules of Evidence[20] would receive the declaration of the truck driver as an admission of a party. These rules admit "against a party, a statement which would be admissible if made by the declarant at the hearing if (a) the statement concerned a matter within the scope of an agency or employment of the declarant for the party and was made before the termination of such relationship. . . ."[21]

19. ALI MODEL CODE OF EVIDENCE Rule 508, comment on Rule 508(a) (1942).
20. UNIFORM RULE OF EVIDENCE 63(9).
21. *Ibid.* See also Comment, 47 COLUM. L. REV. 1227 (1947).