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Criminal Procedure - Opening Statement - Admissibility of Evidence Not Mentioned in Opening Statement

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such an extension is a mere "pecuniary advantage" and is not included within the wording "or other valuable thing whatsoever." It follows that if all doubt is to be eliminated, the statutes should include "any tangible or intangible thing of value whether the same be money, property, rights in action, labor, services, or any other pecuniary advantage."

R. B. L.

CRIMINAL PROCEDURE—OPENING STATEMENT—ADMISSIBILITY OF EVIDENCE NOT MENTIONED IN OPENING STATEMENT—Certain portions of the district attorney's opening statement in a criminal trial were objected to by defendant as untrue and hence prejudicial to the defendant on the ground that the opening statement is regarded as evidence. *Held,* it is the mandatory duty of the district attorney in all cases triable by jury to make an opening statement explaining the nature of the charge against the accused and the evidence by which he expects to establish the same. The statement has no binding force and is designed only "to enable the jury to understand and appreciate the testimony as it falls from the lips of the witnesses."[1] *State v. Sharbino,* 194 La. 709, 194 So. 756 (1940).

The spare remarks in the Louisiana criminal jurisprudence throw very little light on the functions and operation of the opening statement. The present case is employed in this note only as a point of departure for a very brief discussion of a few current problems raised by the opening statement in Louisiana criminal trials. Prior to the adoption of the Code of Criminal Procedure in 1928, there seems to have been no requirement of an opening statement, nor can any cases dealing with such a problem be found. Article 333 of the Louisiana Code of Criminal Procedure states that in criminal cases tried before a jury, "the trial shall proceed in the following order. . . ." Among the steps listed is the opening statement by the district attorney "explaining the nature of the charge and the evidence by which he expects to establish the same."[2] Many states have held similar statutes merely directory when the question of omission of the statement has arisen,[3]

1. Quoted in State v. Sharbino, 194 La. 709, 716, 194 So. 756, 758 (1940) from People v. Van Zile, 73 Hun 534, 539, 26 N.Y. Supp. 390, 393 (1893).

2. Art. 333, La. Code of Crim. Proc. of 1928.

3. People v. Weber, 149 Cal. 325, 86 Pac. 671 (1906); Hendrickson v. Commonwealth, 23 Ky. 1191, 64 S.W. 954 (1901); People v. Koharski, 177 Mich.

and this is true even where the statute states that the district attorney "must" open the case and state the evidence.[4] But the Louisiana Supreme Court has uniformly held that it is the mandatory duty of the prosecution to make an opening statement,[5] and that its omission is ground for reversal.[6] However, the defendant may waive the benefit of the opening statement by failing to make timely objection to its omission.[7]

Contrary to the holdings of the few cases in point in other jurisdictions,[8] it has been held in Louisiana that evidence not mentioned in the opening statement is inadmissible.[9] The statement itself, however, may be amended and supplemented.[10] Furthermore, objections to the trial judge's admission of evidence on the above ground must be specific,[11] or must show prejudice to defendant. The court has pointed out that "a conviction will not be set aside for error therein unless defendant's rights were plainly violated."[12] This is a departure from the usual rule adopted in Louisiana, that the erroneous inclusion or exclusion of evi-

194, 142 N.W. 1097 (1913); Roper v. State, 49 Okla. Cr. 21, 292 Pac. 875 (1930); Bell v. State, 80 Tex. Cr. R. 475, 190 S.W. 732 (1916); Johnson v. Commonwealth, 111 Va. 877, 69 S.E. 1104 (1911).

The Texas rule seems to be that the statute is directory unless defendant requests an opening statement and shows that its omission is prejudicial to him. Cannon v. State, 84 Tex. Cr. R. 479, 208 S.W. 660 (1919); Wray v. State, 89 Tex. Cr. R. 632, 232 S.W. 808 (1921).

4. United States v. Sprague, 8 Utah 378, 31 Pac. 1049 (1893). Contra: Andrews v. State, 99 Fla. 1350, 129 So. 771 (1930); State v. Loeb, 190 S.W. 299 (Mo. 1916); People v. Romano, 279 N.Y. 392, 18 N.E. (2d) 634 (1939).

5. State v. Ricks, 170 La. 507, 128 So. 293 (1930); State v. Nahoum, 172 La. 83, 133 So. 370 (1931); State v. Ducre, 173 La. 438, 137 So. 745 (1931); State v. Silsby, 176 La. 727, 146 So. 684 (1933); State v. Newport, 179 La. 459, 151 So. 770 (1933); State v. Bishop, 179 La. 378, 154 So. 30 (1934); State v. Capaci, 179 La. 462, 154 So. 419 (1934); State v. Daleo, 179 La. 516, 154 So. 437 (1934); State v. Cannon, 184 La. 514, 166 So. 485 (1936); State v. Tullos, 190 La. 184, 182 So. 321 (1938); State v. Smith, 193 La. 665, 192 So. 92 (1939).

6. State v. Ducre, 173 La. 438, 137 So. 745 (1931).

7. State v. Shearer, 174 La. 142, 140 So. 4 (1932); State v. Brown, 180 La. 299, 156 So. 359 (1934).

8. People v. Ellsworth, 92 Cal. 594, 28 Pac. 604 (1891); People v. Rial, 139 Cal. App. 713, 139 Pac. 661 (1914).

9. State v. Silsby, 176 La. 727, 146 So. 684 (1933); State v. Elmore, 177 La. 877, 149 So. 507 (1933); State v. Garrity, 178 La. 541, 152 So. 77 (1934); State v. Ward, 187 La. 585, 175 So. 69 (1937). In all these cases a confession, unmentioned in the opening statement, was later introduced. Admission of this was uniformly held grounds for reversal. However, in State v. Dallao, 187 La. 392, 175 So. 4 (1937), it was held that testimony introduced by the prosecution at variance with its opening statement did not necessitate reversal where the trial judge promptly sustained an objection thereto and instructed the jury to disregard that portion of the testimony objected to.

10. State v. Peyton, 194 La. 681, 194 So. 715 (1940).

11. State v. McKee, 170 La. 630, 128 So. 658 (1930); State v. Tullos, 190 La. 184, 182 So. 321 (1938).

12. State v. Nahoum, 172 La. 83, 95, 133 So. 370, 374 (1931); State v. Tullos, 190 La. 184, 188, 182 So. 321, 322 (1938).

dence is presumed to be prejudicial to defendant and hence affords ground for a new trial.[13]

The opening statement is generally regarded as existing for the benefit of the jury; its purpose is to place them in a better position to understand and apply the evidence as it is produced during the course of the trial.[14] Louisiana courts, however, interpret the requirement as one designed primarily to serve the defendant by forcing the prosecuting attorney to "show his hand."[15] Evidence to be introduced must be indicated in the opening statement so that the accused may properly defend himself against prejudiced or perjured sources of testimony.[16]

It is clear that the district attorney must make an opening statement in which he must indicate all evidence he intends to use. But how complete or comprehensive must the statement be? Is only a general outline sufficient? Or must the defense be furnished with a detailed analysis of the proposed conduct of the case from which path the prosecution may not deviate? The cases give no definitive answer.[17] It has been said that the district attorney must indicate not only *what* he expects to prove, but also *how* and by what evidence he expects to prove it; that he must state the "nature of the evidence . . . whether oral or written or direct, or circumstantial, or confessed."[18] However, in a later decision the court held that the statement need mention only the "general nature" of the evidence.[19]

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13. Hebert, The Problems of Reversible Error in Louisiana (1932) 6 Tulane L. Rev. 169, 184-191.

14. Coats v. State, 101 Ark. 51, 141 S.W. 197 (1911); McDonald v. People, 126 Ill. 150, 18 N.E. 817 (1888); People v. Arnold, 248 Ill. 169, 93 N.E. 786 (1910); Lickliter v. Commonwealth, 249 Ky. 95, 60 S.W. (2d) 355 (1933); People v. Van Zile, 73 Hun 534, 26 N.Y. Supp. 390 (1893). II Bishop, New Criminal Procedure (2 ed. 1913) 791, § 969; Clark, Handbook on Criminal Procedure (2 ed. 1918) 532, § 168; 16 C.J. 889, § 2226. See dicta supporting this view in State v. Ricks, 170 La. 507, 512, 128 So. 293, 294 (1930) cited in State v. Sharbino, 194 La. 709, 716, 194 So. 756, 758 (1940). Also lending support is the fact that the statement is required only in jury trials. State v. Florane, 179 La. 453, 154 So. 417 (1934).

15. State v. Ducre, 173 La. 438, 445, 137 So. 745, 747 (1931); State v. Shearer, 174 La. 142, 140 So. 4 (1932). The latter case states that the rule is necessary in order that defendant may better meet the issue and make his defense.

16. On rehearing, State v. Ducre, 173 La. 438, 447, 137 So. 745, 747 (1931).

17. The jurisprudence seems fairly settled only in the confession cases. In case a confession is to be used, that fact must be mentioned specifically. See note 9, supra. But no details beyond the fact that the prosecution intends to use a confession need, apparently, be given. See note 18, infra.

18. State v. Silsby, 176 La. 727, 146 So. 684 (1933).

19. A declaration of intention to introduce a confession was held sufficient without further details as to the nature of the confession, whether oral or written. State v. Bishop, 179 La. 378, 154 So. 30 (1934).

Several safeguards against surprise are available to the defendant in a criminal trial. The elaborate requirements to which the indictment must conform guarantee a full understanding of the prosecution's charge in advance of trial. Also, a bill of particulars is available in appropriate cases,[20] and a continuance may be allowed in the event of surprise.[21] Should the defendant be afforded further and more detailed information by being allowed to insist that the prosecution expose its evidence in the opening statement? The rule that evidence not referred to at the opening of trial is inadmissable affords another technicality of the criminal law by means of which astute defense lawyers may thwart an unwary prosecutor and incidentally defeat justice. It adds another complicating factor to the already over-elaborate and highly technical body of exclusionary rules of evidence. If such a rule is to obtain, it should apply only to testimony whose import the jury is unable to understand because it was omitted from the opening statement. Confusion of the jury, not surprise to the defendant, should be the test.[22]

A. B. R.

LABOR LAW—ANTI-TRUST ACTS—RESTRAINT OF COMPETITION—The defendant union seized and occupied the petitioner's shop, inflicted heavy material damage, and on three occasions refused to allow the shipment of finished goods to purchasers in other states. The petitioner brought this action to recover treble damages under the Sherman Act[1] as amended by the Clayton Act.[2] *Held*, although the effect of the sit-down strike was to restrict substantially the interstate transportation of the petitioner's product, there could be no recovery as there was no "restraint upon com-

20. Arts. 235, 288, La. Code of Crim. Proc. of 1928. It has been held that the bill of particulars should be granted where the short form of indictment is used. State v. White, 172 La. 1045, 136 So. 47 (1931). But it would seem that, in any case, the granting of a request for a bill of particulars lies within the discretion of the trial judge, and is not a matter of right. State v. Ezell, 189 La. 151, 179 So. 64 (1938).

21. Arts. 320-326, La. Code of Crim. Proc. of 1928.

22. If the criterion of admissibiity of evidence not mentioned in the opening statement be the ability of the jury to understand and apply such evidence, every Louisiana case in which evidence has been excluded under the present interpretation would have reached a contrary result. In each case a confession was the evidence not alluded to (supra, note 9). It seems certain that a jury can understand and apply a confession whenever introduced, and whether or not it is preceded by mention in the opening statement.

1. 26 Stat. 209 (1891), 15 U.S.C.A. § 1 (1927).

2. 38 Stat. 730 (1915), 15 U.S.C.A. § 15 (1927).