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tations that the desirable and uniform coloring contained in petitioners' products was the result of superior methods of roasting, painstaking process of selection, and sorting, when in reality the coloration was produced artificially by iron oxide. Unanimous approval of the order was given by the court.

Another disparagement situation is raised in *International Parts Corporation v. Federal Trade Commission.*[78] A manufacturer of mufflers was ordered to desist from stating that competing mufflers with stop-welded seams were inferior to its own product or that the use of such competing devices results in danger of carbon monoxide poisoning. This order was set aside by the court on the ground that there was no evidence to support the Commission's finding of untruthfulness. The testimony of the only witness produced was contrary to the finding of the Commission.

HORACE G. PEPPER

NECESSITY FOR A BILL OF EXCEPTIONS TO THE OVERRULING OF A MOTION FOR A NEW TRIAL

In criminal practice there is a generally accepted rule that a bill of exceptions must be taken to every adverse ruling of the trial judge, a rule which has been carried to the extent of requiring a bill of exceptions to the overruling of a motion for a new trial. It is the purpose of this article to point out that such an extension carries the rule further than is warranted by the relevant articles of the Louisiana Code of Criminal Procedure. It is the further purpose of this article to indicate a possible solution to what now constitutes a rather perplexing dilemma.

For a proper understanding of the problem, a brief study of the history of bills of exception is in order. "Bills of exception in criminal cases in this state are not of statutory origin. As they were unknown at common law, which did not allow an appeal in criminal cases, they were not adopted into our system by the act of 1805, which adopted the body of common-law procedure in criminal cases. . . . They are the growth of jurisprudence, and prior to the adoption of Act No. 113 of 1896, p. 162, were wholly dependent upon jurisprudence . . . ."[1] Reference to the earlier

78. 133 F.(2d) 883 (C.C.A. 7th, 1943).
1. State v. Stockett, 115 La. 743, 744, 39 So. 1000 (1905).

case of *State v. Nelson*[2] discloses the difficulties which had plagued the courts in the early stages of the development of the jurisprudence and sheds light on the later "growing pains" of its evolution. The provision in the Louisiana constitution limiting the supreme court's appellate jurisdiction in criminal cases to questions of law alone had given the court considerable difficulty when the issue before it was a blended one of law and fact. The court, in the *Nelson* case, resolved that difficulty by holding that the constitutional inhibition extended only to those questions of fact relating to the guilt or innocence of the accused which were to be decided by the jury and not to those incidental questions of fact which were to be decided by the judge as a basis for his rulings of law. Hence, if the trial judge signed a bill of exceptions, thereby in effect certifying those facts upon which his ruling was based, the supreme court could review his ruling as a matter of law. A bill of exceptions was therefore necessary in all such cases, and in the absence of one the supreme court would be without power to review the ruling of the trial judge, denying a motion for a new trial. The motion for new trial in the *Nelson* case was based on alleged misconduct of the jury during its deliberation.[3]

In the same month as the *Nelson* case, *State v. Given*[4] was decided. It affirmed the *Nelson* case, holding that evidence introduced to show the alleged misconduct of the jury would not be examined by the supreme court since it had not been embodied in a bill of exceptions. No distinction was made in either case between the necessity for a bill of exceptions to the purely incidental rulings which serve as a basis for a motion for a new trial before the *trial court* will entertain the motion and the necessity for a bill of exceptions to the overruling of the motion for a new trial before an appeal is taken. To put it differently, no distinction was made between the necessity for a bill of excep-

2. 32 La. Ann. 842 (1880).

3. It is not clear whether defendant's counsel became aware of this alleged misconduct before or after verdict. Apparently it was after the verdict. Had his discovery been *before* verdict, it is submitted that the case might be justified on the basis of the present Art. 502, La. Code of Crim. Proc. of 1928, i.e., that counsel should have asked for a mistrial, then should have taken a bill of exceptions to the judge's ruling, his failure to do so acting as a waiver. If, as apparently was the case here, the information came to counsel's attention *after* verdict, obviously he could have made no objection to the trial judge before verdict. Thus, his only remedy was to present the evidence to the court in the form of a motion for a new trial, which was done, a procedure now authorized by Arts. 509 (4) and 514, La. Code of Crim. Proc. of 1928.

4. 32 La. Ann. 782 (1880).

tions to an adverse *incidental ruling* and the necessity for one to an adverse *final judgment.* Be that as it may, however, these two cases served as a foundation for a long line of decisions requiring bill of exceptions to the overruling of a motion for a new trial.[5]

In 1928 a Code of Criminal Procedure was adopted, the purpose of which was to clarify and make more orderly the pleadings and practices in criminal cases. In the main, it codified the existing jurisprudence, attempting wherever necessary to reconcile and harmonize the conflicting rules to the end that an efficient and logical procedure would be provided. *Bills of Exception, Motions for New Trials,* and *Appeals* were made the subject of separate and distinct chapters. Though separate, the chapters are related and are in a logical sequence, as even a cursory examination will reveal. Thus, Article 498, Chapter XXIV, states that the bill of exceptions is grounded on objections made to the rulings of the trial court on some *purely incidental* question arising during the progress of the cause. In the following chapter, Chapter XXV, Article 507 requires that every motion for a new trial specify the grounds upon which the relief is sought. Article 509, of that same chapter, sets forth those grounds, one of which being that the bills of exception reserved during the trial show error to the prejudice of the accused. Thus, the trial judge is given an opportunity to reconsider and to correct any erroneous rulings he might have made during the heat of the trial, which, it is submitted, is the primary function of a bill of exceptions.[6] If, on the trial of the motion, the judge, having the bill of exceptions before him (which presents the objection, the ruling and the reasons for the ruling)[7] again considers the objection and persists in maintaining his original position, he will deny the motion for a new trial and any further bills of exceptions to that ruling will be merely repetitious of what has already been presented. The next logical step is to appeal to the supreme court for a determination as to whether or not the trial judge was correct. Article 540, Chapter XXVIII, gives to both the state and the accused the right to *appeal* from any final prejudicial judg-

5. See infra note 11.

6. "'An exception is an objection formally taken to *a decision of the court* on a matter of law. . . . The office of an exception is to challenge the correctness of *the rulings or decisions of the court* promptly when made, to the end that such rulings or decisions may be corrected by the court itself, if deemed erroneous, and to lay the foundation for review, if necessary, by the appropriate, appellate tribunal; . . .'" State v. Poole, 156 La. 434, 440, 441, 100 So. 613, 615 (1924).

7. Art. 499, La. Code of Crim. Proc. of 1928.

ment and, under Article 541 of that same chapter, an order refusing a motion for a new trial is a final judgment.

Reading the various articles together, then, and considering the sequence of the chapters, the logical inference seems to be that the redactors intended that where defendant objects to the ruling of the trial judge *on some incidental question*, he must reserve a bill of exceptions. Reservation of the bill would have a multiple function: it would again call the judge's attention to the ruling complained of and give him an opportunity to correct it; it would lay the groundwork for a motion for a new trial in a case of conviction; and, finally, it would present the issues in such a form as to enable the appellate court to pass on them in case a motion for a new trial, based thereon, was denied by the lower court. If the motion for a new trial is denied, since such a ruling is a *final judgment* (rather than an incidental ruling) defendant is entitled to an *appeal*.[8] This seems to be the view taken by the court in *State v. Soileau*,[9] as the following statements indicate:

> "While Code Cr. Proc. Art. 559, requires as a condition precedent for an appeal that a motion for a new trial should have been made and overruled in the trial court, there is no requirement for the reservation of a bill of exception to the overruling of the motion. Whatever may be the proper procedure in the case of new matter set out in the motion for a new trial, no bill of exception to the overruling of the motion is required in order to bring up for review on appeal the al-

8. Take a hypothetical case, for instance. D objects to the admission of certain evidence and the trial judge overrules the objection. D reserves a bill and has it properly signed by the trial judge. After conviction, D files a motion for a new trial based on the bill of exception and (since every motion for a new trial must specify the grounds upon which the relief is sought—Art. 507) incorporates therein the bill of exceptions previously reserved. The judge is, in reality, given two "bites at the cherry," the first during the heat of the trial when the objection is originally urged and, second, when it is again urged as a ground for a new trial. So far as the trial judge is concerned, the bill of exception has fulfilled its function. Since, in effect, it certifies the facts upon which the ruling was based (by virtue of the judge's signature or per curiam), it is submitted that it also has fulfilled its function of presenting the issues in such a form as to be reviewed on appeal. Finally, since the refusal of a motion for a new trial is a final judgment according to Article 541, the next logical step in the procedure is an appeal. (Of course, in this hypothetical case, if no bill of exception whatever had been reserved, it would be another matter entirely, but we are here dealing only with the necessity for a bill of exceptions to the overruling of the motion for a new trial.)

As to the emphasis herein laid on the distinction between incidental rulings and final judgments, note the reasoning of Chief Justice O'Niell (dissenting) in State v. LeBleu, 203 La. 337, 14 So. (2d) 17 (1943).

9. 173 La. 531, 538, 138 So. 92, 94 (1931).

leged irregularities in the proceedings, reiterated in the motion, which were objected to at the time of their occurrence and to the adverse ruling on which objections bills of exception were reserved."

The precise issue by-passed by the court in the *Soileau* case was presented to it in the case of *State v. Houck*[10] in 1942. The supreme court there cited *State v. Soileau* and extended its ruling to cover the case of new matter (information which came to defendant's attorney after the trial) which formed the basis of a motion for a new trial. The *Houck* case is the latest expression of the Louisiana Supreme Court and should, therefore, carry considerable weight. Unfortunately, however, though citing the *Soileau* case, the court made no mention of the long line of decisions holding to the contrary.[11]

For the reasons previously given, it is submitted that the *Soileau* case and the *Houck* case are logically sound and are in harmony with the theory of bills of exceptions and in consonance with the articles of the Code of Criminal Procedure. Yet, however desirable these decisions may be, the fact remains that they are directly in the teeth of an imposing array of contrary cases. It becomes necessary therefore to dispose of these. An examination of them reveals several important considerations: many of these cases were decided before the adoption of the Code of Criminal Procedure;[12] of those decided since its adoption, three cite no authority whatsoever, but which were probably grounded on the old conception;[13] and, finally, the remaining case was

10. 199 La. 478, 6 So. (2d) 553 (1942).

11. State v. Nelson, 32 La. Ann. 842 (1880); State v. Givens, 32 La. Ann. 782 (1880); State v. Williams, 35 La. Ann. 742 (1883); State v. Jackson, 35 La. Ann. 769 (1883); State v. Belden, 35 La. Ann. 823 (1883); State v. Comstock, 36 La. Ann. 308 (1884); State v. Vincent, 36 La. Ann. 770 (1884); State v. Redwine, 37 La. Ann. 780 (1885); State v. Deas, 38 La. Ann. 581 (1886); State v. Wire, 38 La. Ann. 684 (1886); State v. Darrow, 39 La. Ann. 677 (1887); State v. Brooks, 39 La. Ann. 817 (1887); State v. Waggoner, 39 La. Ann. 919, 3 So. 119 (1887); State v. Pete, 39 La. Ann. 1095, 3 So. 284 (1887); State v. McTier, 45 La. Ann. 440, 12 So. 516 (1893); State v. Rodrigues, 45 La. Ann. 1040, 13 So. 802 (1893); State v. Napoleon, 104 La. 164, 28 So. 972 (1900); State v. Pullen, 130 La. 249, 57 So. 906 (1912); State v. Munlin, 133 La. 60, 62 So. 351 (1913); State v. Haynes, 133 La. 671, 63 So. 261 (1913); State v. Matassa, 138 La. 1079, 71 So. 190 (1916); State v. Smith, 149 La. 700, 90 So. 28 (1921); State v. Sandiford, 149 La. 933, 90 So. 261 (1921); State v. Smith, 159 La. 768, 106 So. 298 (1925); State v. Louviere, 169 La. 109, 124 So. 188 (1929); State v. Wiggins, 188 La. 64, 175 So. 751 (1937); State v. Odom, 192 La. 257, 187 So. 659 (1939); State v. Carlson, 192 La. 501, 188 So. 155 (1939); State v. Rivers, 193 La. 927, 192 So. 533 (1939).

12. See first twenty-four cases cited supra note 11.

13. State v. Wiggins, 188 La. 64, 175 So. 751 (1937); State v. Odom, 192 La. 257, 187 So. 659 (1939); State v. Rivers, 193 La. 927, 192 So. 533 (1939).

grounded on cases which do not deal with the *necessity* for a bill of exceptions to the overruling of a motion for a new trial.[14]

Assuming then that the *Soileau* case and the *Houck* case are correct, the attorney is nevertheless left in a rather perplexing predicament. Because the great numerical weight of authority is opposed to the *Soileau* case, he is met with the practical consideration that he must take no chances on uncertain authorities and should therefore, out of caution, reserve a bill of exceptions to the overruling of his motion for a new trial. On the other hand, reservation of the bill entails a certain amount of labor which is perhaps unnecessary and which, if continued over a long period of time, might become so accepted a practice that eventually the courts would refuse to recognize a departure therefrom.[15]

The only logical and practical solution to the problem, there-

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14. In State v. Carlson, 192 La. 501, 188 So. 155 (1939), defendant's counsel reserved a bill to the overruling of his motion for a new trial. but did not prepare a formal bill of exceptions and have it signed by the trial judge. Citing State v. Barrett, 137 La. 535, 68 So. 945 (1915) and State v. Snowden, 174 La. 156, 140 So. 9 (1932), the court refused to consider the action of the trial judge, saying: "Bills of exception must be prepared and presented to the trial court for its signature and per curiam before an appeal is taken." Undoubtedly those cases may be correctly cited for that point, but neither deals with the necessity for a bill of exceptions to an order refusing a motion for a new trial. In State v. Barrett, supra, four bills of exceptions were signed by the trial judge after an appeal was taken. Since bills of exception (where required) must be signed before an appeal is taken (State v. Butler, 137 La. 525, 68 So. 859 [1915]), the supreme court refused to consider them. In State v. Snowden, State v. Barrett was affirmed on the same point. So, in the *Carlson* case, if the basis for defendant's motion for a new trial had been an objection to an incidental ruling of the trial court, to which an exception is required, the citations are not only relevant but decisive since, apparently, no bill of exceptions was signed at any time. On the other hand, if, as seems to be the case, defendant's motion for a new trial was not based on an incidental ruling or error, the citations beg the question rather than answer it. The same might be said for State v. Simmons, 118 La. 22, 42 So. 582 (1906) and State v. Festervand, 189 La. 226, 179 So. 297 (1938), neither of which dealt with a motion for a new trial or the necessity for a bill of exceptions to the overruling of it.

15. In defense of the practice, it might be argued that the rule is too well established to justify a departure at this late date. On the other hand, the great number of cases thrown out of court for failure to reserve the bill might well militate against such a conclusion. The supreme court itself has recognized the harshness of the rule, in numerous cases of a more serious nature, by considering the merits of defendant's motion for a new trial even in the absence of a bill. (See for instance, State v. Hagan, 45 La. Ann. 839 [1893]; State v. Reed, 49 La. Ann. 704, 21 So. 732 [1897]; State v. Michel, 111 La. 434, 35 So. 629 [1904]). And considering bills of exceptions reserved during the trial (as distinguished from bills of exception taken to the overruling of the motion for a new trial), the logical effect of which, if sustained, would be the granting of a new trial. See infra note 18.

Perhaps the primary justification for the requirement, however, lies in the difficulty of getting the evidence, introduced on the hearing of the motion, before the reviewing court. This problem and its possible solution will be discussed at a later point.

fore, would seem to be in the amendment of the Code of Criminal Procedure so as to codify the rule of the *Soileau* and *Houck* cases. Such a result might be accomplished by amending Article 498 so that it would read substantially as follows:

> *498.* Scope of Bill of Exceptions.—The bill of exceptions is grounded on the objection made to the ruling of the court on some purely incidental question arising during the progress of the cause; and involves the correctness of the conclusions drawn by the court from the facts recited in the bill. *A bill of exceptions is not necessary however when the ruling complained of is a final judgment, according to the provisions or Article 541.*"[16]

Such an amendment would more clearly define the scope of the bill of exceptions and should restrict its use to adverse rulings on *"purely incidental questions."* An amendment to that effect, however, would not in and of itself solve all the difficulties connected with this issue. There still remains the problem of getting the evidence, introduced in the motion for a new trial, before the appellate court in such a form as will enable that court to pass on it. Where the new trial is asked for on the ground that the verdict is contrary to the law and evidence, there is no problem. The supreme court has consistently refused to review the action of the trial judge in such case since any evidence to be considered on such motions relates directly to the guilt or innocence of the accused.[17] Where the motion for a new trial is based upon bills of exceptions reserved during the trial, the court should find little difficulty in justifying its review, for such is the function of a bill of exceptions.[18] On the other hand, where the motion for a new trial is based on facts requiring independent evidence, the difficulty is somewhat greater; yet, it is submitted, the difficulty is not insurmountable. Such facts do not relate to the guilt or innocence of the accused. They are not facts which are to be determined by the jury, the jury having in fact been discharged; and the supreme court has repeatedly maintained its power to review evidence of that nature.[19] Even in *State v. Nelson* the

16. The proposed amendment is in italics.

17. State v. Ricks, 170 La. 507, 128 So. 293 (1930); State v. McKee, 170 La. 630, 128 So. 658 (1930); and innumerable others.

18. See supra note 6. See also State v. Dyer, 154 La. 379, 97 So. 563 (1923); State v. Robichaux, 165 La. 497, 115 So. 728 (1938); State v. Chretien, 184 La. 739, 167 So. 426 (1936).

19. State v. Hayes, 162 La. 917, 111 So. 327 (1927); State v. Richardson, 175 La. 823, 144 So. 587 (1932); State v. Bridges, 175 La. 872, 144 So. 602 (1932).

leading case for the proposition that a bill of exceptions is necessary to the overruling of the motion for a new trial, it was said, "The court has, therefore, authority to consider the facts *established* on a motion for a new trial, when they are such as were not submitted to and passed upon by the jury, but were considered and decided by the *judge*."[20] The court might therefore very well take the suggestion made by Chief Justice Merrick in his dissenting opinion in *State v. Brunetto*[21] where he stated, ". . . the motion for a new trial is a part of the record and speaks for itself. . . ." Thus, where the motion is based on evidence obtained after verdict, Articles 511 and 512 require that an affidavit accompany the motion, setting forth in detail the nature of evidence upon which the motion is based. If the motion is grounded on errors discovered after verdict, Article 514 requires that the alleged errors must be specifically and affirmatively shown. In either of these cases, if, on the hearing of the motion, evidence should be introduced and recorded, there should be little reason why the supreme court could not review the ruling of the trial judge as to said motion, as it does for instance in matters of prescription, overt acts, et cetera.[22]

In this connection, however, it might also be necessary to amend Article 507 in order to give the right to the accused to have the testimony, introduced on the hearing of the motion, recorded in a note of evidence, and the right to append such note of evidence to his motion for a new trial when the question goes up on appeal in order that the supreme court might have the whole proceeding before it. To the argument that such an amendment would be in violation of the constitutional limitation of the court's powers of review, it might be said that the facts do not relate to the guilt or innocence of the accused and that an abuse of the trial court's discretion in granting or refusing to grant a new trial constitutes error, as a matter of law.[23]

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20. 32 La. Ann. 845 (1880). The court adds, however, that such evidence must be brought up in the proper form, which, according to that decision, is in a bill of exceptions. Accord: State v. Seiley, 41 La. Ann. 143, 6 So. 571 (1889); State v. Michel, 111 La. 434, 35 So. 629 (1904); State v. Napoleon, 104 La. 164, 28 So. 972 (1900).

21. 13 La. Ann 45, 47 (1858).

22. See supra note 19. But see State v. LeBleu, 203 La. 337, 14 So. (2d) 17 (1943).

23. State v. Nelson, 32 La. Ann. 842, 845 (1880); State v. Bradley, 166 La. 1010, 118 So. 116 (1928).