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Evidence

George W. Pugh

The Supreme Court held that, under the circumstances, the garnishee could have protected itself in two ways: by depositing the money into the registry of the court, and provoking a concursus proceeding so as to implead all interested parties; or by proceeding as it did, in which case plaintiff would be required to bring these interested parties into the garnishment proceedings for the purpose of having their rights determined. The case, however, was remanded to the trial court, with instructions to permit plaintiff to cite all interested parties.

Evidence

*George W. Pugh**

As might well be expected, numerous points of evidence were presented to and decided by the Supreme Court during the past year. For obvious reasons only the most interesting and most significant will be discussed here.

RISK OF UNDUE PERSUASION—PHOTOGRAPHS OF DECEASED

In 1947 the Supreme Court stated in *State v. Morgan*[1] that on the retrial of that case, certain gruesome or ghastly pictures of the deceased victim should be excluded—"unless the State shows some necessary purpose for the introduction of the photographs in evidence."[2] The photographs in question had been presented for the alleged purpose of proving the corpus delicti, and the nature, scope and extent of the wounds received by deceased. Ample testimony had already been introduced as to these matters, and the Supreme Court understandably feared that the admission of the photographs might disturb the jury in its deliberations.

Sound judicial administration demands that the trial court exercise broad discretion in its control of a trial, but, of course, it must be ever alert to protect a litigant from a decision dictated by emotion rather than reason. Both legislative acts and appellate decisions should provide trial courts with criteria for the exercise of this discretion. The guiding rule of *State v.*

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1. 211 La. 572, 30 So. 2d 434 (1947), noted in 22 Tulane L. Rev. 327 (1947).
2. 211 La. 572, 579, 30 So. 2d 434, 436.

Morgan seemed to be that gruesome photographs of the deceased should be excluded if they are of little or no probative value and involve a substantial risk of undue persuasion. There is nothing unusual about such a rule. It is but the specific application of the balancing process that has played a great part in the formulation of many of our rules of evidence.

Two cases[3] decided during the past year seem to reduce greatly the force of this phase of *State v. Morgan.* In *State v. Solomon,*[4] the court found that two of the three photographs admitted in evidence were not in fact gruesome. The third photograph was "of the face and head of the dead man showing his gagged mouth and the gaping head wounds inflicted by appellant."[5] This, the court conceded, was "inelegant,"[6] but stated that "all murders, and especially those of the violent type are revolting to the senses."[7] The jurors, the court felt, had been fully prepared to see and hear unpleasant things by the opening statement of the district attorney, and were no more affected by seeing the photographs than by "hearing a recitation of the facts of appellant's shocking misdeed."[8] Thus the court apparently rejects the current notion that this type of demonstrative evidence generally carries great weight with jurors. In distinguishing the *Morgan* case, the court in the *Solomon* case discloses circumstances not discussed in the earlier opinion. In this latter case the court said that the circumstances in the *Morgan* case were so extreme that "the court was able to draw the conclusion that it was offered solely for the purpose of prejudicing the jury against the defendant."[9] In the *Solomon* case, the court found that "the photograph was clearly admissible for identification purposes and also in corroboration of the Coroner's procès verbal with reference to the description of the wounds and the cause of death,"[10] and concluded that "State v. Morgan is to be regarded as—indeed it is—a case of most unusual circumstances."[11]

3. State v. Solomon, 222 La. 269, 62 So. 2d 481 (1952) and State v. McMullan, 66 So. 2d 574 (La. 1953). For an earlier opinion discussing the application of the *Morgan* case, see State v. Dowdy, 217 La. 773, 47 So. 2d 496 (1950).

4. 222 La. 269, 62 So. 2d 481 (1952).

5. 222 La. 269, 277, 62 So. 2d 481, 483.

6. Ibid.

7. Ibid.

8. Ibid.

9. 222 La. 269, 278, 62 So. 2d 481, 484.

10. Ibid.

11. Ibid.

The effect of the *Morgan* opinion was further reduced by the decision in *State v. McMullan.*[12] Defendant was charged with the fatal shooting of a town official who had come to McMullan's home for the purpose of quieting the irate defendant. McMullan used the defense that the shooting was accidental. Over the objection of defense counsel, the trial court permitted the coroner to project upon a screen three color slides that he had taken of the deceased lying on the bloodstained floor. The Supreme Court sustained the decision of the trial judge, stating that one answer to defense counsel's objection was that the scene portrayed was not "so gruesome or revolting as to incite the emotions of the jury against the appellant."[13] The court restated what had been said in the *Solomon* case—that "all pictures of death by violence are inelegant and unpleasant"[14]—and then added that "this does not mean that they should be withheld from the jury's view *even though they are merely cumulative evidence.*"[15] (Italics supplied.) And it reiterated the *State v. Solomon* characterization of *State v. Morgan* as "a case of most unusual circumstances."[16]

These recent cases do not necessarily indicate an abandonment of *State v. Morgan.* That case remains available as a basis for relief in an exceptional case. But its applicability is apparently much less extensive than might be gathered from simply reading the opinion.

It seems to the writer that the balancing test implied by *State v. Morgan* is eminently sound. Certainly where a photograph is *important* evidence for the establishment of a disputed point, it should be admitted, even though it presents a gruesome spectacle, for here the probative value of the evidence would outweigh the risk of possible undue persuasion. But where the evidence is merely cumulative in nature, and is relevant only as to an *undisputed* fact (as for example corpus delicti in the *McMullan* case), then it would seem only fair to exclude the evidence because of the possible undue persuasive effect it might have upon the jury. The *McMullan* decision seems to represent an open invitation to coroners to take kodachrome pictures of all violent deaths. Such pictures would at least be

12. 66 So. 2d 574 (La. 1953). A Note on this case is planned for the next issue of this REVIEW.
13. Id. at 575.
14. Ibid.
15. Ibid.
16. See p. 221 supra.

cumulative evidence of corpus delicti. Apparently under the *McMullan* case, these pictures would normally be admitted, if properly authenticated, even where the fact of death is undisputed. That such a practice might become prevalent would seem indeed unfortunate.

WITNESSES—RIGHT OF DEFENDANT TO CALL CO-DEFENDANT AS WITNESS

Does a defendant who has obtained a severance have the right to call to the stand a person charged in the same bill of information with the same offense? In *State v. Gambino*,[17] the court answered in the affirmative,[18] and decided, too, that the failure to accord the defendant this right constituted reversible error. This in no way means that the party called to the stand will be denied his privilege against self incrimination, for the witness may assert his privilege and refuse to answer any question where the answer thereto might tend to incriminate him. Nevertheless defendant Gambino had the right to have the witness sworn.

WITNESSES—IMPEACHMENT

In *State v. Rocco*,[19] the Supreme Court in footnote restated the rule that "where impeaching evidence is received,[20] it becomes the duty of the judge to caution the jury that such evidence should not be considered as proof of defendant's guilt."[21] It indicated, however, that this rule is not applicable where the defendant is the witness being impeached. In the body of the opinion the court stated that the impeaching material involved in the instant case could have been introduced on the state's case in chief *"provided that it was mentioned in the opening statement."*[22] (Italics supplied.) Thus the apparent

17. 221 La. 1039, 61 So. 2d 732 (1952).

18. For other cases indicating same rule, see State v. Pace, 183 La. 838, 165 So. 6 (1935); State v. Gunter, 208 La. 694, 23 So. 2d 305 (1945).

19. 222 La. 177, 62 So. 2d 265 (1952).

20. It is somewhat difficult to understand upon what theory the material in question (a letter written by the defendant) was considered impeaching evidence. It does not appear to have been properly admitted as a prior inconsistent statement since defendant admitted his authorship of the letter. See Art. 493, La. Code of Crim. Proc. of 1928; La. R.S. 1950, 15:493.

21. 222 La. 177, 183, n. 3, 62 So. 2d 265, 267, n. 3 (1952). As authority for this rule the court cited State v. Reed, 49 La. Ann. 704, 21 So. 732 (1897) and State v. Paul, 203 La. 1033, 14 So. 2d 826 (1943).

22. 222 La. 177, 182, 62 So. 2d 265, 267 (1952).

implication is that the rule concerning the contents of the opening statement may be effectively circumvented where the evidence in question is relevant to the impeachment of a defendant who has taken the stand. As is recognized elsewhere in the opinion this is certainly not the rule with respect to confessions, and it may be questioned whether undue surprise may not result from a broad uncritical application of the rule implied in the footnote to the court's opinion.

Without much discussion, the court in *State v. Boudreaux*[23] adopted the majority rule[24] that a defendant who has been fully pardoned as to a prior conviction may nevertheless, if he takes the stand, be asked whether or not he has ever been convicted of a crime. In *State v. Taylor*,[25] the court had used very strong language indicating the great regenerative effect of a full pardon, and had held that under the circumstances of that case it was reversible error not to permit the defendant to introduce evidence that he had been given a full executive pardon. In the *Boudreaux* case, the court noted that here the defendant had not been prevented from showing that he had received a full pardon.

WITNESSES—PRIVILEGE

In *State v. McMullan*,[26] the defense counsel had informed the district attorney and the judge on the day of the trial that the wife of the defendant, an eyewitness of the shooting, desired to exercise her privilege not to testify against her husband. Nevertheless, the district attorney called the wife to the stand, and the Supreme Court held that the lower court committed no error in forcing the wife to assert her privilege in the presence of the jury. The problems that arise in connection with this phase of the husband-wife privilege are somewhat extensive in nature and will be discussed in some detail in a subsequent issue of this REVIEW.[27]

23. 221 La. 1078, 61 So. 2d 878 (1952).

24. For short general discussion as to state of the jurisprudence on this subject see Note, 25 Tulane L. Rev. 281 (1951).

25. 172 La. 20, 133 So. 349 (1931). For other Louisiana cases dealing with the general effect of a full pardon, see State v. Baptiste, 26 La. Ann. 134 (1874) and State v. Lee, 171 La. 744, 132 So. 219 (1931).

26. 66 So. 2d 574 (La. 1953). For discussion as to another interesting point raised in this case, see p. 222 supra.

27. See note 12 supra.

Opinion Testimony

A crucial point in *State v. Cooper*[28] was whether the deceased had been shot while sitting in his automobile, or while advancing upon the defendant with a weapon obtained from the car. Despite the requests of defense counsel, the jury was never clearly instructed to disregard the unsolicited opinion of the coroner that deceased had "fallen out of the door of his automobile."[29] The coroner had not been an eyewitness to the shooting and was not qualified to give an expert opinion as to this point. The Supreme Court found that the substantial rights of the defendant had been prejudiced, and properly set aside defendant's conviction and sentence.

In *State v. Robinson*,[30] the lower court, over the objection of defense counsel, had permitted a state trooper to give an estimate as to the speed at which defendant was driving at the time his truck collided with that of another. The trooper had not been an eyewitness of the accident, but had arrived at the scene about a half hour later. He testified that there had been no skid or road marks, and based his estimate upon "the force of the impact and the distance covered by both trucks after the blow."[31] He stated that he had been a state trooper for some twelve years and had had the schooling and experience that troopers usually have. The Supreme Court held on rehearing[32] that the lower court had committed reversible error in permitting the witness to give his opinion as to the speed of the truck, for it found that "the proper foundation, required by law as a condition precedent for the admission of the opinion, was not laid"[33] and that the district attorney had not tendered the witness as an expert.

Hearsay

In *State v. Jackson*,[34] the court properly distinguished between fact of utterance and utterance of fact, and held that no hearsay was involved where the coroner was permitted to

28. 66 So. 2d 336 (La. 1953).
29. 66 So. 2d 336, 337.
30. 66 So. 2d 515 (La. 1953).
31. 66 So. 2d 515, 516.
32. There was a vigorous dissent by Justice LeBlanc, who had written the majority opinion of the court in the original hearing.
33. 66 So. 2d 515, 519.
34. 223 La. 435, 65 So. 2d 903 (1953).

testify that the body on which he performed the autopsy bore upon it an identification tag bearing the name of the alleged deceased. The court said:

> "There might have been merit to the objection had the testimony sought to be brought out been offered for the purpose of identifying the body as that of Frances Foster merely because the tag which it bore had the name Foster written on it. As the doctor admits he did not know who had placed the tag on the body nor did he know who had written the name "Frances Foster" on the tag. But he certainly could testify that he saw such tag on the body without that being hearsay testimony.
>
> "When the testimony concerning the tag is considered in connection with several other facts and circumstances of the case, especially the one that it was known that Frances Foster had been shot in the head the night before, that it is the custom to attach an identifying tag to a corpse that is taken to the morgue and that the body on which Dr. McCormick performed his autopsy was the only one on which an autopsy had been performed that day, we believe that the testimony was relevant and was competent proof of the corpus delicti in this case."[35]

ADMISSIONS

In *State v. Roshto*,[36] the court followed its prior pronouncements in *State v. Aspara*[37] and *State v. Hayes*[38] and held that false exculpatory statements of an accused are admissible as admissions.

EVIDENCE AS TO THE DANGEROUS CHARACTER OF THE VICTIM IN A CRIMINAL CASE

State v. Terry[39] is an excellent example of a case decided under Article 482 of the Code of Criminal Procedure[40] prior to the 1952 amendment.[41] In order to introduce evidence of

35. 65 So. 2d 903, 905-906.
36. 222 La. 185, 62 So. 2d 268 (1952).
37. 113 La. 940, 37 So. 883 (1904).
38. 162 La. 310, 110 So. 486 (1926).
39. 221 La. 1109, 61 So. 2d 888 (1952).
40. La. R.S. 1950, 15:482. For discussion of problems presented under this article, see 2 LOUISIANA LAW REVIEW 377 (1940) and 10 Tulane L. Rev. 643 (1936).
41. La. Act 239 of 1952; La. R.S. Supp. 1952, 15:482.

the victim's bad character or of his prior threats against the accused, it was necessary first to prove to the trial court that the victim had made a hostile demonstration or overt act against accused. As is shown by the *Terry* case, the decision on the question of whether the condition precedent to admissibility was met was a matter resting largely within the discretion of the trial judge. Now, as a result of Act 239 of 1952,[42] the requirements of the condition precedent to admissibility have been substantially reduced.[43]

State v. Boudreaux[44] properly holds that evidence of a prior conviction is inadmissible to show the bad character of the victim, for "character, whether good or bad, depends upon the general reputation that a man has among his neighbors."[45] It is quite true that Article 495[46] permits the impeachment of a witness by a showing of prior convictions, but the impeachment of a witness is something totally different from the showing of the bad character of the victim. In one the question is credibility, in the other the question is whether or not the defendant reasonably apprehended himself to be in danger, or whether he or the victim was in fact the aggressor.

In *State v. McMillian*,[47] defendant was charged with murdering her husband. She pleaded self-defense and after introducing evidence showing that deceased was intoxicated at the time of the homicide, she attempted to show that when deceased had been drunk on past occasions he had "brutally mistreated"[48] her. The court conceded that evidence of prior relations between the parties was inadmissible to show dangerous character of the deceased, but held that

> "under the plea of self-defense such evidence was admissible and relevant to show the reasonableness of the defendant's fear of an impending attack or of suffering great

42. La. R.S. Supp. 1952, 15:482.

43. As amended, Article 482 of the Code of Criminal Procedure of 1928 reads as follows: "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." (Italics supplied.)

Prior to the 1952 amendment, the word *evidence* read *proof*.

44. 221 La. 1078, 61 So. 2d 878 (1952). For a discussion of another interesting point raised in this case, see notes 23 and 24 supra, and accompanying text.

45. Art. 479, La. Code of Crim. Proc. of 1928; La. R.S. 1950, 15:479.

46. La. Code of Crim. Proc. of 1928; La. R.S. Supp. 1952, 15:495.

47. 223 La. 96, 64 So. 2d 856 (1953).

48. 64 So. 2d 856.

bodily harm at the time of the homicide. It would have tended to negative intent and was thus relevant and admissible under Article 441 of the Code of Criminal Procedure, which provides: 'Relevant evidence is that tending * * to negative the commission of the offense and the intent.' "[49]

Criminal Law and Procedure

CRIMINAL LAW

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CRIMINAL NEGLECT OF FAMILY

Criminal Neglect of Family is defined in Article 74 of the Criminal Code[1] as "the desertion or *intentional non-support*" of a wife or "*minor child*" who is in necessitous circumstances. In *State v. Woods*[2] the court properly held that the term "minor child" meant any child under twenty-one years of age, and hence applied to a high school senior who had passed his seventeenth birthday. However, we may pause to question the court's further holding that "the earnings of the father are not an essential element of the crime of neglect of family," and that "the father's duty to support is absolute. His failure to do so constituted the offense."[3] Since Article 74 requires the "intentional" non-support, it would appear that a father who is financially unable to furnish such support should at least have an affirmative defense. A normal construction of the language employed in the statutory definition would only justify its application to the parent who is able to furnish support and wilfully refuses to do so. Possibly all the court means to hold is that the state establishes its case by showing that the child is in necessitous circumstances as a result of the parent's failure to furnish proper support, and that the affirmative defense of inability to furnish such support must be urged and proven by the defense, just as reasonable mistake of fact and other

49. Id. at 857.

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1. La. R.S. 1950, 14:74.
2. 66 So. 2d 315 (La. 1953).
3. Justice Moise, id. at 317.