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Evidence

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CHARACTER TESTIMONY

When a character witness called by the defendant testifies that he has never heard defendant's reputation discussed, is the witness thereby disqualified from going further and testifying as to whether defendant's reputation is good or bad? In *State v. Howard*,[1] a case decided during the past term, the Supreme Court upheld the action of the lower court in restricting the testimony of two character witnesses called by the defendant. In setting forth the problem the court stated:

> "These witnesses were not permitted *to express their personal opinion as to the reputation of the accused.* Both testified that they had never heard his general reputation discussed." (Emphasis added.)[2]

It is of course true that under the applicable statutory authority[3] a character witness should not be permitted to express his individual opinion as to whether he *personally* feels that defendant is a good or bad man. A somewhat different problem, however, is presented relative to a character witness's opinion as to defendant's *reputation.*

It would appear to the writer that generally a character witness necessarily expresses his individual appraisal of the reputation of the person in question. Article 479 of the Code of Criminal Procedure[4] states that "character" depends upon a man's *general reputation* and not upon what particular persons think of him. Instead of a character witness testifying as to circumstances indicating what individual persons think of the accused, he thus must testify as to his appraisal of the composite reputation borne by the defendant in the community.

It is generally sound policy to permit the witness to testify as to his appraisal of reputation, and also to prevent him from

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1. 230 La. 327, 88 So.2d 387 (1956).
2. 88 So.2d 387, 391 (La. 1956).
3. LA. R.S. 15:479 (1950). For Professor Wigmore's argument that the contrary is the better position, see 7 WIGMORE, EVIDENCE §§ 1980-86 (2d ed. 1940).
4. LA. R.S. 15:479 (1950).

reciting specific circumstances indicating what particular other persons might think of the defendant. It would be quite difficult for a witness to detail and describe fully all of the instances in which he has heard the reputation discussed. And even if he were able to recall and relate them, there would be a tendency for the trial to become bogged down in minutiae. And, furthermore, it would be extremely difficult for a jury to appraise and evaluate the "raw material," especially so if unaided by the opinions of persons actually familiar with the reputation.

This is the type of situation in which opinion testimony is particularly valuable.[5] And when the character witness states that the defendant's reputation is good or bad, the writer feels that he is making a value judgment, necessarily expressing his individual opinion as to the quality of the reputation in question. Since the character witness is usually far more able to form an opinion in this connection than the jury could possibly be, the jury should normally not be deprived of the benefit that could be derived from receiving it. It does not necessarily follow, however, that a character witness who has never heard the defendant's reputation discussed should be permitted to express himself as to whether the defendant's reputation is good or bad.

Professor Wigmore has stated that "the absence of utterance unfavorable to a person is a sufficient basis for predicating that the general opinion of him is favorable."[6] In this connection, the Louisiana Supreme Court stated in *State v. Emory*:

> "Bill No. 4 was reserved to the refusal of the judge to give the following special charge to the jury, viz.:
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> " 'The best evidence of good reputation is where the witness testifies that he has never heard it discussed, questioned, or talked about. The more unsullied and exalted the character is, the less likely is it ever to be called into question.'
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> "The charge requested is a literal quotation from Wharton's work on Criminal Evidence (10th Ed.) vol. 1, par. 57, and the doctrine has the approval of all text-writers on the subject, and of the courts generally. Wigmore on Evidence, vol. 2, p. 1961, § 1614; 22 C. J. 484. If the judge in this instance was unwilling to go so far as to put such evidence of good character or reputation in the superlative degree, he

5. See 7 WIGMORE, EVIDENCE §§ 1923-24 (3d ed. 1940).
6. 5 *id.* § 1614.

should have at least instructed the jury that the testimony of the witnesses who had testified to the good character or general reputation of the defendant, and who had been, by long-continued association with him and his friends and acquaintances, in a position where they would very likely have heard his character or reputation discussed if it had not been good, was worthy of consideration, notwithstanding the witnesses admitted that they had never heard the man's character or reputation discussed. If such evidence was not worthy of consideration, men and women in the most exalted position or station in society would be deprived of all means of proving, if an occasion should demand proof of, their general reputation for morality or virtue."[7]

The question presented by the instant case, however, is not so much whether absence of discussed reputation will ground an inference of good reputation,[8] but rather whether the witness shall be permitted to express himself concerning the quality of defendant's reputation.

The character witness who has never heard the defendant's reputation discussed can easily so state to the jury. It can thus be argued that here the jury is in a position to evaluate the fact of non-discussion, without the need of an opinion by the witness. However, it can be forcefully argued that the character witness should be permitted to testify as to whether the defendant's reputation is good or bad. The witness is familiar with the special circumstances of the particular case, and his testimony may be much more significant than the favorable inference that flows from the abstract circumstance of non-discussion. In his dissenting opinion in *State v. Warren*,[9] Justice (later Chief Justice) O'Niell stated:

"A man's general reputation in the community in which he lives is known from his habits and associations, the respect in which he is held, and the social and commercial circles in which he may or may not be received, as well as by the talk

7. 151 La. 152, 153, 91 So. 659, 660 (1922).
8. In this connection, the court stated: "We do not think that the defendant was prejudiced by the ruling of the trial judge, especially since the jury had the advantage of considering the testimony of the two character witnesses to the effect that they had never heard the reputation of the defendant discussed. Consequently, the trial court was correct in restricting the testimony of these character witnesses." 88 So.2d 387, 391 (La. 1956).
9. 138 La. 361, 70 So. 326 (1915).

> or gossip of the neighbors about him. Mr. Beard did not say that his personal opinion which he proposed to express to the jury was his opinion of the character of the defendants, but was his personal opinion of their general reputation. That opinion was based upon facts sufficient to sustain it. A witness' knowledge of another man's general reputation is nothing more than an opinion after all; and, when a witness testifies to facts upon which he may well have formed an opinion of the general reputation of a defendant, he ought to be permitted to express that opinion."[10]

The Louisiana jurisprudence on the point has not been free from ambiguity. The court has held[11] that under certain circumstances the jury should be instructed as to the favorable inference that can be drawn from non-discussion. Prior to 1935, it several times held[12] that the character witness should not be permitted to draw the inference himself. In 1935, however, in *State v. Pace*,[13] the court took the position that the lower court erred in refusing to permit defendant's character witness to give his opinion as to general character, where such opinion had been based upon absence of adverse criticism. The court, however, held that under the circumstances, the ruling was harmless error. The court in the *Pace* case did not specifically overrule the prior jurisprudence. To the contrary, it indicated it was following the prior cases.

In the instant case, the court did not mention the *Pace* case.[14] The only case cited was the earlier case of *State v. Ciaccio*,[15] which had stated a rule contrary to that of *State v. Pace*.

ADMISSIONS AND CONFESSIONS

Article 454 of the Code of Criminal Procedure[16] provides that:

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10. 70 So. 326, 328 (La. 1915).
11. State v. Emory, 51 La. 152, 91 So. 659 (1922). See also State v. Leming, 217 La. 257, 46 So.2d 262 (1950); State v. Todd, 173 La. 23, 136 So. 76 (1931).
12. State v. Harrison, 168 La. 1115, 123 So. 800 (1929); State v. Leslie, 167 La. 967, 120 So. 614 (1929); State v. Ciaccio, 163 La. 563, 112 So. 486 (1927); State v. Warren, 138 La. 361, 70 So. 326 (1915).
13. 183 La. 838, 165 So. 6 (1935).
14. *Ibid.*
15. 163 La. 563, 112 So. 486 (1927). This case has been characterized by Professor Wigmore as "a quiddity." 5 WIGMORE, EVIDENCE § 1614, n. 1 (3d ed. 1940).
16. LA. R.S. 15:454 (1950).

> "The rule that a confession produced by threat or promise is inadmissible in evidence does not apply to admissions not involving the existence of a criminal intent."

In 1949, in *State v. Robinson*,[17] the court had stated that from the converse of the latter part of this article it is clear "that admissions involving the existence of a criminal intent or inculpatory facts are governed by the rules applicable to confessions."[18] Following this approach, the court in *State v. Clark*[19] found it unnecessary to determine whether certain statements allegedly made by defendants constituted confessions or admissions of inculpatory facts. It held that the failure to require the state to lay a proper foundation constituted reversible error.

In *State v. Joyner*[20] the court followed what would appear to be the majority view,[21] and held inadmissible a withdrawn plea of guilty. In this connection the court stated:

> "Where the plea of guilty is withdrawn, the defendant stands for trial upon a plea of not guilty, and is entitled to all the safeguards and presumptions of innocence which the humanity of the law extends to an individual whose life or liberty is at stake."[22]

PRIVILEGE

During the past term, the Supreme Court had occasion to consider a series of lottery cases.[23] Perhaps the most significant of these from the standpoint of evidence was the case of *State v. Mills*.[24] Relying in part upon decisions of the United States Su-

17. 215 La. 974, 41 So.2d 848 (1949).

18. *Id.* at 983, 41 So.2d at 851.

19. 228 La. 899, 84 So.2d 452 (1955). In this connection, see also State v. Johnson, 229 La. 476, 486, 86 So.2d 108, 111 (1956), wherein the court held that the statement there involved "amounted to an independent confession," but went on to say: "To say the least they constituted a separate admission of inculpatory facts which, under our jurisprudence, must be treated as a confession with respect to the requirement of laying a proper foundation for the introduction thereof." For further discussion of the *Johnson* case, see note 47 *infra* and accompanying text.

20. 228 La. 927, 84 So.2d 462 (1955).

21. 2 WHARTON, CRIMINAL EVIDENCE § 345 (12th ed. 1955); Annot., 124 A.L.R. 1527 (1940). *Cf.* 4 WIGMORE, EVIDENCE § 1067 (3d ed. 1940).

22. 228 La. 927, 930, 84 So.2d 462, 463 (1955).

23. See State v. Baum, 230 La. 247, 88 So.2d 209 (1956); State v. Mills, 230 La. 251, 88 So.2d 210 (1956); State v. Forsyth, 229 La. 1088, 87 So.2d 608 (1956); State v. Callia, 229 La. 796, 86 So.2d 909 (1956); State v. Crovetto, 229 La. 793, 86 So.2d 907 (1956); State v. Mills, 229 La. 758, 86 So.2d 895 (1956); State v. Forsyth, 229 La. 690, 86 So.2d 536 (1956); State v. Reinhardt, 229 La. 673, 86 So.2d 530 (1956).

preme Court,[25] the Louisiana Supreme Court found that no error had been committed in admitting in evidence "tax returns and applications for registry made to the federal government pursuant to the Federal Wagering Tax Law."[26] In addition the court found no error in the admission of "quarterly reports made to the Louisiana Department of Labor, Division of Employment Security, pursuant to the provisions of the Louisiana Unemployment Compensation Law."[27] Whether the latter were properly admitted seems to the writer to be somewhat questionable. As the court pointed out, the Louisiana Unemployment Compensation Law provides in part that:

> "'* * * Information thus obtained, or obtained from any individual pursuant to the administration of this Chapter except to the extent necessary for the proper administration thereof, *shall be held confidential and shall not be published or be open to public inspection (other than to public employees in the performance of their public duties) in any manner revealing the individual's or employing unit's identity* * * *.'" (Emphasis added.)[28]

In the court's view, the district attorney in his use of the exhibits in the instant case was a "public employee" engaged in the performance of his "public duties" within the meaning of the statute. It would seem to the writer, however, that this interpretation is not in harmony with the nature and purpose of the statute in question. Although privileges are in derogation of the court's need for all relevant evidence, and although the terms of this statute are not as clear or explicit as other statutes creating privileges,[29] it seems to the writer that the use of the reports in cases such as the one under discussion was not within the intendment of the statute.

IMPEACHMENT — BIAS, INTEREST, OR CORRUPTION

Is defense counsel on cross examination of a state's witness limited to questions relative to the witness's *direct* bias or inter-

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24. 229 La. 758, 86 So.2d 895 (1956).
25. Lewis v. United States, 348 U.S. 419 (1955); Irvine v. California, 347 U.S. 128 (1954); United States v. Kahriger, 345 U.S. 22 (1953).
26. 229 La. 758, 771, 86 So.2d 895, 899 (1956); 26 U.S.C.A. § 4401 *et seq.* (1955).
27. 229 La. 758, 770, 86 So.2d 895, 899 (1956).
28. *Id.* at 777, 86 So.2d at 902, quoting from LA. R.S. 23:1660 (1950).
29. LA. R.S. 23:1471-1713 (1950).

est against the accused? Or may defense counsel ask questions relative to a possible *direct* bias against persons closely identifiable with the accused (as, for example, his father or employer) from which it might be inferred that the witness is biased against the accused? In *State v. Howard*[30] the court, relying in part upon *State v. Cullens*,[31] strongly indicated that such questions should be limited to facts indicating *direct* bias against the accused. It should be noted, however, that here the relationship between the defendant and the purported object of the witness's hostility was fairly remote, for he was merely a member of the Board of Managers of defendant's employer.

In the opinion of the writer, the provisions of Article 492 of the Code of Criminal Procedure do not require such a restrictive interpretation as that indicated in the *Howard* case. As a policy matter, it would seem unfortunate to adopt such an inflexible rule relative to the very valuable right of cross examination. Whether the circumstances are such that bias against the accused might reasonably be inferred should probably be the test.

In *State v. Elias*,[32] a case decided during the same term, the court apparently took a much more liberal view towards defendant's right of cross examination in this regard. It found reversible error in the lower court's refusal to permit defense counsel to ask several pertinent questions, the answers to which might have tended to show a very strong hostility between the witness and defendant's father. The court characterized as "untenable" the state's contention that the questions were "too remote in relationship."

BEST EVIDENCE

Noting that certain plans and specifications were, or should have been, in the possession of the defendant, and that plaintiff had unsuccessfully employed every available means afforded by judicial process in order to force defendant to produce them, the court, in *Breaux v. Laird*,[33] held that secondary evidence became admissible and that, under the circumstances, "defendant cannot be heard to complain of the character of such evidence, the quality and weight of which rests with the trial judge."[34]

30. 230 La. 327, 88 So.2d 387 (1956).
31. 168 La. 976, 123 So. 645 (1929).
32. 229 La. 929, 87 So.2d 132 (1956).
33. 230 La. 221, 88 So.2d 33 (1956).
34. 88 So.2d 33, 40 (La. 1956).

STIPULATIONS OF COUNSEL

In *Fenerty v. Culotta*[35] plaintiff had sought recovery for personal injuries, property damage, and expenses arising out of an intersectional collision between two automobiles. The court of appeal allowed recovery on several of plaintiff's claims for damages,[36] but finding no evidence in the record as to the amount plaintiff had paid to have his vehicle towed from the scene of the accident, or as to the amount it would have cost him to repair his vehicle, the court denied recovery for both of these items. In his application to the Supreme Court for writ of certiorari plaintiff's counsel stated that, after the court of appeal had denied rehearing in the case, he had gone to the organ of the court to inquire why plaintiff was not entitled to the additional award, and had called the attention of the judge to a stipulation of counsel relative to these items. Council further stated that the organ of the court had authorized counsel to quote him as saying that the stipulations had been overlooked by the court, and that in the opinion of the judge, plaintiff was entitled to the additional award. The judge was further quoted as saying that in view of the fact that the court of appeal had denied rehearing, and no longer had jurisdiction of the case, he would advise counsel for plaintiff to apply to the Supreme Court for writ of certiorari to correct the error. In reversing the decision of the court of appeal, the Supreme Court[37] took cognizance of these undisputed allegations by plaintiff's counsel, and noted in passing that the oversight had obviously been attributable to the stipulation's position in the record.

HARMLESS ERROR

Since appeals in Louisiana civil cases extend to both the law and the facts,[38] and since the overwhelming majority of Louisiana civil cases are tried without juries, it would seem incongruous in this area for our courts to apply rigidly the technical common law rules of evidence, rules which were developed in the context of common law jury trials. The frequently heard ruling of the trial judge, "let the objection go to the effect rather than the admissibility," is of course a means by which technical exclusionary rules are circumvented. And because of the broad

35. 80 So.2d 537 (La. App. 1955); 228 La. 649, 83 So.2d 888 (1955).
36. 80 So.2d 537 (La. App. 1955).
37. 228 La. 649, 83 So.2d 888 (1955).
38. LA. CONST. art. VII, §§ 10, 29.

scope of appellate review, evidence erroneously considered by the trial judge can be ignored on appeal, and the appropriate judgment rendered without the advent of a costly new trial. This does not mean, however, that the Louisiana evidentiary system in civil cases is ideal, for the rules themselves are ill suited for a system in which juries are so seldom employed.[39] It is to be hoped that when a new code of evidence for Louisiana is prepared[40] it will take into account the special needs of the Louisiana civil system.

Thoman v. Grevemberg[41] reflects the court's liberal attitude towards the evidentiary procedures followed in civil cases. Plaintiff brought a declaratory action to have certain coin amusement machines declared free from seizure and destruction, contending that they were not "slot machines" or gambling devices reprobated by law. The defendant proposed to have an expert witness demonstrate the operation of one or more of the machines. Plaintiff objected on the ground that prior to the demonstration, he should have the opportunity to cross examine the witness as to whether the condition of the machines had been altered between seizure and trial. The objection was overruled, the trial judge "expressing the belief that plaintiff's rights would be amply protected by cross-examination of the witness when he was tendered and reserving unto him whatever merits his objection would warrant."[42] Despite a lengthy cross examination, plaintiff failed to urge further objection, and the Supreme Court found that the record disclosed that plaintiff had "previously acceded to the court's ruling."[43] Noting that this was a civil case, the Supreme Court held that "the mere deferment of the cross-examination of the witness by plaintiff, bearing upon the tampering, if any, with the machines during the period of their custody, cannot be held to be prejudicial to plaintiff's rights."[44]

Since juries are much more frequently employed in criminal than civil cases, and since appeal to the Supreme Court in criminal cases is limited to questions of law,[45] the importance in this

39. For a discussion of the sources of the Louisiana law of evidence in civil cases, see Comment, *Were the Louisiana Rules of Civil Evidence Affected by the Adoption of the Louisiana Code of Criminal Procedure?*, 14 LOUISIANA LAW REVIEW 568 (1954).
40. See La. Acts 1956, No. 87.
41. 229 La. 529, 86 So.2d 181 (1956).
42. *Id.* at 533, 86 So.2d at 182.
43. *Id.* at 534, 86 So.2d at 182.
44. *Id.* at 534, 86 So.2d at 182-83.
45. LA. CONST. art. VII, § 10.

area of the exclusionary rules of evidence is greatly increased. In *State v. Johnson*[46] the court held that the trial judge had erred in refusing to instruct the jury to disregard gratuitous testimony relative to an oral confession[47] allegedly made by defendant, which had not been mentioned in the state's opening statement and as to which proper foundation had not been laid. The court found that the confession referred to by the witness was independent from one previously admitted in evidence. In reaching this conclusion, it noted differences in content, and the fact that the two statements had been made "at widely separated times and places and under entirely different circumstances."[48] In a supplemental brief, the state contended that since a proper confession had already been heard by the jury, the gratuitous statement " 'did not add much, if anything, to the state's case, particularly since the prosecution did not pursue the point at all.' "[49] And further the state contended: " 'We think that the other evidence in the case was so strong that this chance remark by officer Polito could not have had any substantive bearing on the final result.' "[50] The court rejected this contention. Noting that it is for the jury to determine the effect to be given a confession, the court stated that the jury might not have given any weight to the confession previously admitted. The three witnesses to it had not been in complete agreement and the defendant maintained that it had never been made. In the opinion of the writer, the court was correct in holding the error to be grounds for reversal.

In *State v. Chinn*,[51] a capital case, the Supreme Court found that the trial judge had been in error in refusing to comply with the provisions of Article 268 of the Code of Criminal Procedure,[52] which provides that when insanity at the time of the alleged commission of the crime is an issue in the case, and the judge has appointed disinterested physicians to examine the defendant, the "physicians appointed by the court shall be summoned to testify at the trial and shall be examined by the court and may be examined by counsel for the state and the defendant."

46. 229 La. 476, 86 So.2d 108 (1956).
47. See note 19 *supra* for further discussion of this case.
48. 229 La. 476, 486, 86 So.2d 108, 111 (1956).
49. *Id.* at 487, 86 So.2d at 111-12.
50. *Id.* at 487, 86 So.2d at 112.
51. 229 La. 984, 87 So.2d 315 (1956).
52. LA. R.S. 15:268 (1950).

Relying on the provisions of Article 557 of the Code of Criminal Procedure,[53] the court held that, despite the error, the judgment of conviction should not be set aside. Noting that the physicians' report supported appellant's defense, the court stated that if the jury had not had the benefit of the doctors' testimony, it would have been necessary to order a new trial. But since defendant had himself called the physicians, the court said that it was unable "to perceive that [defendant] suffered injury or that his substantial rights were prejudiced."[54] And taking cognizance of the fact that the jury was aware that the physicians were appointed by the court and made their examination under its orders, the Supreme Court found that no prejudice resulted from the fact that the physicians were presented as defense witnesses rather than court witnesses. The Supreme Court found further that it did not matter that the local coroner, one of the physicians appointed by the trial judge, on the stand had somewhat repudiated the written report of the appointed physicians (which the coroner had signed), for the court said that defense counsel were apprised of the coroner's views at the time they put him on the stand, and that the coroner would have given the same testimony, whether called by the court or by the defense. The Supreme Court also found that the right of cross examination had not been impaired. It reasoned that the coroner had in fact been rigorously cross examined "as a hostile witness, even though the defense had not been taken by surprise,"[55] and that there was no reason for defense counsel to cross examine the other physicians appointed by the court, for they had testified in favor of defendant.

Because of the difficulties inherent in appraising the factors that might or might not have weighed upon the minds of the jurors in their deliberations, the writer is not convinced that the refusal of the trial judge to comply with the provisions of Article 268 was not "prejudicial to the substantial rights of the accused."[56] Even though the jury was aware that the physicians

53. *Id.* 15:557, which provides as follows: "No judgment shall be set aside, or a new trial granted by any appellate court of this state, in any criminal case, on the grounds of misdirection of the jury or the improper admission or rejection of evidence, or as to error of any matter of pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the entire record, it appears that the error complained of has probably resulted in a miscarriage of justice, is prejudicial to the substantial rights of the accused, or constitutes a substantial violation of a constitutional or statutory right."

54. 229 La. 984, 1016, 87 So.2d 315, 326 (1955).

55. *Ibid.*

56. See note 53 *supra.*

had been appointed by the court and had made their examination pursuant to court order, is it clear that the jury decision was unaffected by the fact that the original examination of the witnesses was not conducted by the trial judge as prescribed by law? How much attention do jurors pay to things such as this? In the opinion of the writer it is extremely difficult to be completely certain one way or the other. The statute prescribes the trial procedure that should have been followed in the instant case. Despite the objections of defense counsel, the prescribed procedure was not followed. Whether the substantial rights of the accused were thereby prejudiced is an extremely difficult problem.