Louisiana Law Review

Volume 19 | Number 2
The Work of the Louisiana Supreme Court for the 1957-1958 Term
February 1959

Evidence

George W. Pugh

Evidence

*George W. Pugh**

HEARSAY

Business Records

Despite the fact that the rest of the country has witnessed considerable agitation and legislation militating in favor of the admissibility of business records,[1] the Louisiana Civil Code continues to carry the thoroughly outmoded provision that: "The books of merchants can not be given in evidence in their favor."[2] That such a rule is undesirable today would appear obvious; yet there has been no legislative repeal of this unfortunate statutory injunction. Judicial exceptions have mitigated the harshness of its mandate,[3] but in a legal system such as ours, where Article 1 of our Civil Code declares that "law is a solemn expression of legislative will," it would seem clear that legislative change is desirable.

In a suit on an open account, *National Supply Company v. Baillio*,[4] defendant, a guarantor for a corporation of which he was president and principal stockholder, was sued for debts allegedly incurred by the corporation in favor of plaintiff company. To prove the debt, plaintiff quite naturally sought to introduce its books. In light of the circumstances of the case, the

*Associate Professor of Law, Louisiana State University; Faculty Editor, Louisiana Law Review.

1. JONES, LAW OF EVIDENCE §§ 609-20 (4th ed. 1958); MCCORMICK, LAW OF EVIDENCE 596-613 (1954); MAGUIRE, EVIDENCE, COMMON SENSE AND COMMON LAW 155-61 (1947); MORGAN ET AL., THE LAW OF EVIDENCE, SOME PROPOSALS FOR ITS REFORM, c. v (1927); WIGMORE, EVIDENCE §§ 1518-1561 (3d ed. 1940); SELECTED WRITINGS ON THE LAW OF EVIDENCE AND TRIAL 892-934 (Fryer, ed., 1957); Morgan, *The Law of Evidence 1941-1945*, 59 HARV. L. REV. 561-68 (1946); ALI, MODEL CODE OF EVIDENCE Rule 514 (1942); NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM RULES OF EVIDENCE, Rule 63(13)(14).

2. LA. CIVIL CODE art. 2248 (1870). In this connection, see also *id.* arts 2249, 2250.

3. See, e.g., Crosby v. Little River Sand and Gravel Development, 212 La. 1, 31 So.2d 226 (1947); Shea v. Sewerage and Water Board of New Orleans, 124 La. 299, 50 So. 166 (1909); Kolman v. His Creditors, 39 La. Ann. 1089, 3 So. 382 (1887); Flower v. Downs, 6 La. Ann. 538 (1851); Martinstein v. His Creditors, 8 Rob. 6 (La. 1844); Oliver v. Andrus, 17 So.2d 748 (La. App. 1944); Royal Products, Inc. v. Johnson, 191 So. 329 (La. App. 1939).

4. 234 La. 257, 99 So.2d 103 (1958).

provisions of Article 2277,[5] and some prior jurisprudence, the Supreme Court affirmed the action of the trial court in overruling the objection to the admissibility of the records. Neither in the appellate briefs of counsel nor in the decision of the court was any mention made of Article 2248. In the opinion of this writer our system of evidence should permit the introduction of business records under the circumstances presented in the instant case, but it seems clear that this is an area where legislative clarification is needed.

Reported Testimony

Section 12 of Article XIII of the Articles of Incorporation of the Louisiana State Bar Association, which governs in disbarment proceedings,[6] provides in part:

> "Section 12. Member convicted of felony. Whenever any member of the bar shall be convicted of a felony and such conviction shall be final, the Committee [on Professional Ethics and Grievances] may present to the Supreme Court a certified or exemplified copy of the judgment of such conviction, and thereupon the court may, without further evidence, if in its opinion the case warrants such action, enter an order striking the name of the person so convicted from the roll of attorneys and cancelling his license to practice law in the State of Louisiana."

In *Louisiana State Bar Association v. Cawthorn*[7] defendant had been convicted of a felony in federal court, and the Louisiana Supreme Court had stated that the Commissioner appointed by the Supreme Court to take testimony in the disbarment case "could, if he so deemed necessary, examine the record of the criminal case in which defendant was convicted, not for the purpose of construing the testimony of any of the witnesses but merely for the purpose of comparing the testimony in the record with that of the witnesses who may testify before him

5. "All agreements relative to movable property, and all contracts for the payment of money, where the value does not exceed five hundred dollars, which are not reduced to writing, may be proved by any other competent evidence; such contracts or agreements, above five hundred dollars in value, must be proved at least by one credible witness, and other corroborating circumstances."

6. Rule XVII of the Revised Rules of the Supreme Court of Louisiana (Adopted October 4, 1951, to be effective January 1, 1952) provides that: "All matters touching upon the discipline and disbarment of members of the bar shall be governed by Article XIII of the Articles of Incorporation of the Louisiana State Bar Association adopted as the rules of this Court on March 12th, 1941."

7. 223 La. 884, 67 So.2d 165 (1953).

and of properly weighing and giving effect to their testimony as he hears it."[8]

In a disbarment case decided during the past term, *Louisiana State Bar Association v. Sackett*,[9] defendant had been convicted of a misdemeanor relative to the corrupt influencing of the complainant in a pending case. Over the objection of the defendant, the record in the criminal case was admitted in evidence before the Commissioner appointed by the court to take testimony. The Supreme Court held that no error had been committed by the Commissioner in this regard, stating: "it was not admitted as a Prima Facie case as Respondent was not convicted of a felony. It was not admitted as a proof of guilt of his misconduct. The record in the Criminal District Court was admitted by authority of the case of Louisiana State Bar Association v. Cawthorn, 223 La. 884, 67 So.2d 165. Furthermore, the Supreme Court has a right to examine any record in any Court of State under its supervisory jurisdiction, and this is particularly true where an officer of the Court is involved. The Court and Commissioner have the right to compare the testimony in the record with the testimony of the witnesses in the disbarment proceeding."[10]

Admissions and Confessions

Is a litigant bound by allegations made by him in pleadings in prior suits? Article 2291 of the Louisiana Civil Code provides that a "judicial confession," which is defined as "the declaration which the party, or his special attorney in fact, makes in a judicial proceeding," "amounts to full proof against him who has made it" and "can not be revoked, unless it be proved to have been made through an error in fact," and "can not be revoked on a pretense of an error in law." It was stated in *Sanderson v. Frost*[11] that in the early decisions there was much controversy about the meaning of the article, but that since the decision in *Farley v. Frost-Johnson Lumber Co.*,[12] there has been no difficulty relative to its interpretation. In a case decided during

8. *Id.* at 896, 67 So.2d at 169.
9. 234 La. 762, 101 So.2d 661 (1958).
10. *Id.* at 770-771, 101 So.2d at 663-64. For a discussion of the reported testimony problem present in a prior ruling by the court in the *Sackett*, case, see *The Work of the Louisiana Supreme Court for the 1956-1957 Term — Evidence*, 18 LOUISIANA LAW REVIEW 139, 146-47 (1958).
11. 198 La. 295, 307, 3 So.2d 626, 630 (1941).
12. 133 La. 497, 542-43, 63 So. 122, 137 (1913).

the past term,[13] it was contended by the plaintiff that the defendant was bound by statements made by her in prior judicial proceedings. Relying on a number of prior cases, including the *Sanderson* decision, the court rejected this contention, stating: "An earlier judicial admission does not in a subsequent proceeding bind the person making same, nor does it estop him from denying the correctness thereof, unless the other party claiming the benefit of a judicial estoppel resulting therefrom has been deceived by such judicial confession and has relied or acted thereon to his prejudice."[14] Although the allegations in prior cases do not *bind* the party, they are of course admissible as admissions against him.[15] He may attempt, however, to explain them away, as was successfully done in the instant case.

In *State v. Faciane*[16] it was contended that the lower court committed error in permitting the introduction over objection of certain statements made by co-defendants after the termination of the conspiracy and out of the presence of the objecting defendants. It was argued that the statements in question were self-serving in nature from the standpoint of the defendants who made them (against whom they were ostensibly offered as admissions), that the statements were intended by the makers to be exculpatory as to themselves and inculpatory as to the others. The Supreme Court found that there was no error in the introduction of the statements, and that although some portions of the statements were exculpatory in nature, others contained inculpatory facts and were therefore admissible against the makers as admissions as substantive evidence of guilt. The court pointed out that the lower court had promptly and properly instructed the jury that the statements should be disregarded as to the others. Although the writer does not differ with the court in its application of the pertinent evidentiary rules, nevertheless it may be appropriate to state that problems such as the instant ones point up the difficulties inherent in trying multiple defendants. It is well recognized that frequently instructions such as those given in the instant case are not fully heeded by the jury. And yet, in cases such as this one, the failure of the jury to comply with the court's instructions might result in great injustice.

13. Succession of Turner, 235 La. 206, 103 So.2d 91 (1958).
14. 103 So.2d at 93.
15. See Farley v. Frost-Johnson Lumber Co., 133 La. 497, 541-42, 63 So. 122, 137 (1913).
16. 233 La. 1028, 99 So.2d 333 (1958).

Both *State v. Domino*[17] and *State v. Smith*[18] concerned in part the free and voluntary requirement as to the admissibility of confessions or admissions involving the existence of criminal intent or inculpatory facts.[19] Both cases emphasized the reliance that will be given by the appellate court to the views of the trial judge.

Res Gestae

In *State v. Domino*[20] defendant had been charged with operating "a race horse betting book at a place other than within the track or other enclosure where said horse races took place,"[21] in violation of R.S. 14:90. On appeal from his conviction, he contended that error had been committed in admitting over timely objection testimony by a police officer relative to certain telephone calls received by him at the scene of the arrest.

The court followed its earlier decision in *State v. DiVincenti*[22] and held that, although hearsay, the testimony was admissible, for it referred to matter constituting "part of the res gestae."[23]

BURDEN OF PRODUCING EVIDENCE AND BURDEN OF PERSUASION

New Orleans v. Levy[24] was an injunction action brought by the city to compel the removal of a "permanent plastic covering or roof" which allegedly violated certain ordinances. Defendants contended that they were being discriminated against and brought in evidence indicating that there were a great many other non-conforming conditions as to which no injunctions had been sought. To this the city replied that the defendants had failed to show that these other conditions had occurred subsequent to the enactment of the ordinances. In this connection the court stated: "It appears that the defendants made out a prima facie case of discrimination when they proved conclusively the

17. 234 La. 950, 102 So.2d 227 (1958).
18. 234 La. 19, 99 So.2d 8 (1958).
19. See LA. CODE OF CRIM. PROC. art. 454 (1928). For a discussion of the free and voluntary requirement as applied to the admissibility of admissions involving the existence of criminal intent or inculpatory facts, see *The Work of the Louisiana Supreme Court for the 1955-1956 Term — Evidence*, 17 LOUISIANA LAW REVIEW 421, 424-25 (1957).
20. 234 La. 950, 102 So.2d 227 (1958).
21. *Id.* at 954, 102 So.2d at 229.
22. 232 La. 13, 93 So.2d 676 (1957).
23. State v. Domino, 234 La. 950, 959, 102 So.2d 227, 230 (1958). For criticism of the reasoning of the court in this regard, see the discussion by the writer of the earlier *DiVincenti* case in 18 LOUISIANA LAW REVIEW 139, 144 *et seq.* (1957).
24. 233 La. 844, 98 So.2d 210 (1957).

existence of many unrestrained violations. Thereupon, the burden of going forward with the evidence, to explain its apparently discriminatory conduct, shifted to the city."[25]

In *Cooper v. Succession of Cooper*[26] the court reaffirmed the position taken by it in *Moss v. Robinson*[27] relative to the burden of persuasion and the burden of producing evidence on the issue of consideration for a negotiable instrument.[28]

FACT FINDING

Will particular circumstances support a reasonable inference as to the existence of certain other facts, or will they compel a different conclusion? The problem can present itself in varying contexts, and its resolution is often difficult indeed. In *Dowling v. Orleans Parish Democratic Committee and O'Hara*[29] the court faced the problem in an election dispute. Plaintiff, a candidate for the Democratic nomination to the office of district attorney, contested the action of the Democratic Committee in certifying his opponent as party nominee. The action of the Democratic Committee had been predicated upon the conclusion that the plaintiff's opponent had won the nomination by a majority of nine votes, but the Supreme Court was unanimous in its conclusion that seventeen of the votes cast and counted were illegal. In view of this finding, should a new election be ordered? All members of the court apparently agreed that if it could be ascertained for whom the illegal votes had been cast, then there would be no need to order another election. The number of illegal votes would simply be deducted from the numerical total of the candi-

25. *Id.* at 852, 98 So.2d at 213.

26. 234 La. 832, 101 So.2d 686 (1958).

27. 216 La. 295, 43 So.2d 613 (1949).

28. In this connection the court stated: "With reference to the proof to be made in a case of this nature the law is fully set forth in Moss v. Robinson, 216 La. 295, 43 So.2d 613, 617. Therein we said: 'The jurisprudence of this state * * * appears to support the view that when a plaintiff introduces in evidence the negotiable instrument sued on (legally presumed to have been given for value received) he is not required in the first instance to produce any further proof of consideration, notwithstanding that the defendant has specifically pleaded a want thereof. The defendant, thereupon, has the burden of going forward with the evidence and rebutting the prima facie case (in favor of plaintiff) thus made out. (Here numerous authorities are cited). But if the defendant offers evidence which overcomes the prima facie case, that is, casts doubt upon the reality of the consideration, the ultimate burden of proving consideration, by evidence that preponderates, is on the plaintiff. (Here numerous authorities are cited)'."

For an able comment, with copious citation of authority, discussing the problem in Louisiana and elsewhere, see *The Defenses of Want and Failure of Consideration in Negotiable Instruments*, 17 LOUISIANA LAW REVIEW 466, 477-483 (1957).

29. 235 La. 62, 102 So.2d 755 (1958).

date for whom the illegal votes had been cast, and the winner thus determined. The Justices seemingly all agreed that circumstantial evidence could be considered in determining for whom the illegal votes had been cast. All of them apparently were also of the opinion that in order to arrive at a decision based upon circumstantial evidence as to who received the illegal votes the circumstantial evidence would have to be so strong that it excluded every other reasonable hypothesis. An area of vigorous disagreement among the Justices concerned the question of whether the circumstantial evidence in this case compelled the conclusion that the seventeen votes had been cast for the party who had been declared the winner of the primary by the Democratic Committee, or whether there was some other reasonable hypothesis. On this issue the court split four to three, the majority taking the position that the evidence compelled the conclusion that the illegal votes had been cast for plaintiff's opponent and that no other reasonable inference was possible. Since the majority opinion concluded that the plaintiff had received a majority of the *legal* votes cast, he was declared the party nominee.

How can a court resolve the differences of opinion as to the proper valuation to be placed upon property? As demonstrated by the case of *Domino v. Domino*,[30] which involved an allegation of lesion beyond moiety, the problem can be very difficult at times, and can defy *scientific* determination. The writer knows of so nice, neat rule of thumb which will cut the Gordian knot. No Shibboleth seems to suffice; a common sense determination (such as that made in the instant case) often appears to be the only answer.

30. 233 La. 1014, 99 So.2d 328 (1958).