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Evidence

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RELEVANCY

Character

Reputation testimony offered to show that the character of a witness is such that he is not the type of person who is to be believed under oath[1] is to be sharply distinguished from reputation testimony offered to show that the character of the defendant is such that he is not the type of person who would commit the crime charged.[2] In the former instance it is clear from Article 490 of the Code of Criminal Procedure that the inquiry may be as to (1) the witness' general reputation for truth, or (2) the witness' general moral character. In the latter instance, however, it is clear from Article 480[3] that where the issue is guilt or innocence of the defendant, the reputation testimony must be restricted to the moral qualities pertinent to the crime for which the defendant is being charged. In *State v. Kelly*,[4] the court, in a case involving an alleged crime against nature, cited Article 480 and affirmed the action of the trial court in restricting testimony of defendant's character witness "to show character only as to such moral qualities as have pertinence to the crime with which these defendants are charged,"[5] and in instructing the jury "to disregard all previous testimony as to defendant's character except as to those answers relating to moral qualities pertinent to the crime charged."[6] The ruling is clearly sound.

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1. See LA. R.S. 15:490 *et seq.* (1950).
2. See *id.* 15:479-483.
3. See also State v. Thornhill, 188 La. 762, 788, 178 So. 343, 352 (1938), wherein it is stated: "As article 480 of the Code of Criminal Procedure is a statutory requirement, restricting proof of character to such moral qualities as have pertinence to the crime charged, a defendant is bound by such restriction, and, in a murder case, must ask the witness if he knows the general reputation of the accused as being a quiet, peaceable, and law-abiding citizen in the community in which he lives.

"To hold otherwise would make the statute a dead letter, and permit proof of the general reputation of the defendant as good, without any pertinent restriction whatever, thereby enabling a defendant to evade the statute, and still get before the jury proof of his good character."
4. 237 La. 991, 112 So.2d 687 (1959).
5. *Id.* at 996, 112 So.2d at 688-89.
6. *Id.* at 996-97, 112 So.2d at 689.

The provisions of Article 480 also provided ample authority for the court's action in *State v. Knox*[7] in upholding the ruling of the trial judge excluding a letter offered by defendant, who was being tried for armed robbery. The letter had been purportedly written by an employer, was addressed: "To whom it may concern," and stated that "defendant's work was satisfactory."[8] The fact that defendant had or had not performed his work satisfactorily for an employer certainly was not evidence restricted to showing the moral qualities pertinent to the crime of armed robbery. The proffered evidence also fell far short of meeting the test of admissibility on other grounds. According to Article 479, character depends upon the "general reputation that a man has among his neighbors, not upon what particular persons think of him." The tendered evidence did not meet this test. In addition, the person who purportedly wrote the letter was not present in court and subject to cross-examination, nor was the letter made under oath. The hearsay rule thus would clearly have been violated by its admission. In addition, there was no testimony identifying the signature on the letter, or its authenticity.

Flight of the Accused

In *State v. McCrory*,[9] the lower court, over the objection of the defendant, permitted the state to show the court order fixing the appearance bond of the defendant, the bond itself, the fact that defendant had gone to Chicago after the execution of the bond, and that the surety had had him taken into custody there and returned to Louisiana; and in addition, that defendant had not appeared in answer to a notice for arraignment, and that a bench warrant had been issued for his arrest. In its brief in the Supreme Court, the state contended that the evidence was admissible to counteract statements made by defense counsel in which he allegedly stated or intimated that the state had been "guilty of dilatory tactics and that it had arrested appellant and brought him to trial because he was an ex-convict."[10] To this the Supreme Court replied that in view of the fact that there was nothing in the bill of exception or record to show that defense counsel had engaged in the claimed tactics, and since there was no per curiam by the trial judge, defendant's "claim of error is

7. 236 La. 461, 107 So.2d 719 (1959).
8. *Id.* at 467, 107 So.2d at 721.
9. 237 La. 747, 112 So.2d 432 (1959).
10. *Id.* at 755, 112 So.2d at 434.

to be determined by the statements and facts contained in the bills of exceptions and not by the prosecution's assertions of purported facts dehors the record."[11]

The Supreme Court stated that the evidence in question was "irrelevant and could serve only to prejudice appellant before the jury,"[12] that the evidence "had no bearing whatsoever on his guilt or innocence, or his intent."[13] Reversal of the conviction was postulated upon the action of the trial court in admitting this and other testimony.

With deference, it is submitted that the evidence in question was in fact relevant, and admissible as admission tending to show consciousness of guilt on the part of defendant. The admissibility of this evidence would seem to be supported by both the commentators and the jurisprudence. Professor Wigmore states: "It is to-day universally conceded that the fact of an accused's flight, escape from custody, resistance to arrest, concealment, assumption of a false name, and related conduct, are admissible as evidence of consciousness of guilt, and thus of guilt itself."[14] In this connection, he cites numerous cases from all over the country, a number of which admit evidence in situations analogous to that presented in *State v. McCrory*. Prior Louisiana cases[15] likewise would seem to indicate that the evidence adduced was relevant as tending to show consciousness of guilt on the part of the defendant, and that the admissibility of the evidence could have been justified on this ground. The recent case of *State v. Neal*,[16] decided in 1957, seems particularly in point. The defendant in that case, who was charged with the crime of attempted murder, took a bill of exceptions to a remark by the district attorney in his opening statement "that he would show that the accused was apprehended in California, where she had fled while out on bond pending trial."[17] Defense counsel objected on the ground that the remark was prejudicial and "amounted to evidence of another crime." To this the Supreme Court re-

11. *Id.* at 755, 112 So.2d at 435.
12. *Id.* at 754, 112 So.2d at 434.
13. *Ibid.*
14. 2 WIGMORE, EVIDENCE 111, § 276 (1940).
15. State v. Neal, 231 La. 1048, 93 So.2d 554 (1957); State v. Pullen, 130 La. 253, 57 So. 907 (1912); State v. Nash, 115 La. 719, 39 So. 854 (1905); State v. Austin, 104 La. 410, 29 So. 23 (1900); State v. Middleton, 104 La. 233, 28 So. 914 (1900); State v. Harris, 48 La. Ann. 1189, 20 So. 729 (1896); State v. Wingfield, 34 La. Ann. 1200 (1882); State v. Dufour, 31 La. Ann. 804 (1879); State v. Beatty, 30 La. Ann. 1266 (1878).
16. 231 La. 1048, 93 So.2d 554 (1957).
17. *Id.* at 1051, 93 So.2d at 555.

plied: "There is no merit in this bill. Evidence to show that the accused fled the jurisdiction after the commission of the crime is admissible to show consciousness of guilt, and it is immaterial whether the flight occurs before formal charges are filed, before arrest, after arrest and admission to bail, or after arrest and escape from jail or from the custody of an officer. See *State v. Wingfield,* 34 La. Ann. 1200; Wharton's Criminal Evidence, vol. 1, p. 414, sec. 205 (12th Ed. 1955); Marr's Criminal Jurisprudence of Louisiana, vol. II, pp. 866-867 (2d Ed. 1923). Jumping bail is a crime denounced by Article 110.1 of the Criminal Code, and evidence of that offense is, as counsel state, evidence of another crime. Nevertheless, under the authorities cited above, evidence of appellant's flight from the jurisdiction after being charged with attempted murder and admitted to bail on that charge is admissible on her trial on that charge."[18]

In the opinion of this writer, the statement in *State v. McCrory* that the evidence in question was irrelevant is erroneous, and not in accord with prior jurisprudence in Louisiana or that in other jurisdictions. It should be noted, however, that the possibility of justifying the admissibility of the evidence on the ground that it was relevant to show consciousness of guilt on the part of the defendant seems not to have been urged upon the court. There is no indication that the court considered this possibility. Neither *State v. Neal* nor its antecedents were discussed or cited, and it is to be anticipated that they, rather than the *McCrory* case, will be followed in the future in this regard. It should also be noted, perhaps, that the holding of the court that the admitted evidence was irrelevant and prejudicial was merely one of the grounds upon which the reversal of conviction was postulated.[19]

Matter Beyond the Scope of the Pleading

Citing and quoting from its earlier decision in the *Gunter* case,[20] the Supreme Court in *State v. Burr*[21] held that in the absence of a special plea of insanity by defendant, evidence that he had three years previously been committed to a mental institution for examination was inadmissible. Defense counsel had argued that the evidence should have been admitted to assist the jury in determining whether or not the defendant had the neces-

18. *Ibid.*
19. *Id.* at 1051-52, 93 So.2d at 555.
20. 208 La. 694, 23 So.2d 305 (1945).
21. 237 La. 1065, 112 So.2d 713 (1959).

sary guilty knowledge or criminal intent to commit the crime charged. The court, relying upon the *Gunter* case, rejected this contention.

Gruesome Photographs

In *State v. Miller*[22] defendant was tried for the crime of aggravated rape and one of the grounds he urged on appeal was the action of the trial court of permitting the district attorney to show on a "movie" screen certain colored slides of bruises on the prosecuting witness allegedly inflicted by defendant. The evidence appears to have been very relevant on the issue of the resistance offered by the alleged victim.[23] In view of the relevancy of the photographs and their relatively high probative value, and the finding by the court that they were not "gruesome, morbid, or of any other character as would prejudice the jury,"[24] and the testimony by the Chief Criminologist for the Louisiana State Police Crime Laboratory that the color film, as contrasted with black and white film, provided a reasonable duplication of the bruises and did not exaggerate them, it appears that the ruling of the court was sound. The value of the evidence clearly seems to have outweighed whatever risk of undue prejudice might have been present.[25]

The case of *State v. Stahl*[26] also concerned the admissibility of photographs alleged by the defendant to be gruesome. Defendant was being tried for the murder of one of two convicts who had been killed in the same manner and at the same time while they lay in adjacent beds in the penitentiary. Over the objection of the defendant, two photographs taken at the scene of the homicide were admitted in evidence, one showing the body of the person for whose murder the defendant was being tried, and the other showing both bodies. The trial judge had conceded that the photographs were in fact gruesome, and the Supreme Court concurred. Neverthless, relying upon *State v. Ross*,[27]

22. 237 La. 266, 111 So.2d 108 (1959).
23. LA. R.S. 14:42 (1950).
24. 237 La. 266, 269, 111 So.2d 108, 109 (1959).
25. For further discussion of the admissibility of photographs allegedly gruesome, see *The Work of the Louisiana Supreme Court for the 1956-1957 Term — Evidence*, 18 LOUISIANA LAW REVIEW 139 (1957); *The Work of the Louisiana Supreme Court for the 1952-1953 Term —Evidence*, 14 LOUISIANA LAW REVIEW 220 (1953); Note, 14 LOUISIANA LAW REVIEW 421 (1954).
26. 236 La. 362, 107 So.2d 670 (1959).
27. 217 La. 837, 47 So.2d 559 (1950), discussed in *The Work of the Louisiana*

State v. Solomon,[28] and upon the information furnished by the trial judge's per curiam, the court held that no error had been committed in receiving the photographs in evidence.

In his per curiam, the trial judge had stated "that the two killings were actually one act or a continuing act, and that the evidence of the killing of one of the dead men necessarily included the killing of the other . . . [and] that these photographs were important to clarify to the jury the identity of the man for whose murder the accused was being tried, the position of the bodies bearing on whether there had been a struggle at the time of the killings, the probability that the two men were asleep when they were killed, and the location of their bunks with reference to the bed of the principal state's witness; [and] that all of these matters were issues in the case."[29] In the light of these findings, it would appear that although the circumstances favoring admissibility are not as strong as those in *State v. Miller*,[30] the Supreme Court was probably correct in affirming the action of the trial judge in admitting the photographs.

WITNESSES

Impeachment — Prior Arrests and Convictions

Prior to the amendment of Article 495 of the Code of Criminal Procedure in 1952, the article provided in part that "a witness, whether he be the defendant or not, may be compelled to answer on cross-examination whether or not he has ever been indicted or arrested and how many times." It was clear, however, from other provisions of the same article that if the witnes who was being questioned on cross-examination as to his arrests or indictments, answered in the negative, the party putting the question could not introduce evidence to disprove his answer in the instant proceeding. Apparently, it was felt that the fact of prior arrests had sufficient relevancy to the witness' credibility to justify opening the matter on cross-examination, but was too remote to warrant further investigation in the particular proceeding. Of course, this rule would not

Supreme Court for the 1949-1950 Term — Evidence, 11 LOUISIANA LAW REVIEW 222, 231 (1951).

28. 222 La. 269, 62 So.2d 481 (1953), discussed in *The Work of the Louisiana Supreme Court for the 1952-1953 Term — Evidence*, 14 LOUISIANA LAW REVIEW 220 (1953).

29. 236 La. 362, 376, 107 So.2d 670, 675 (1959).

30. 237 La. 266, 111 So.2d 108 (1959), discussed page 339 *supra*.

have prevented a showing of the prior arrest or indictment in a subsequent prosecution of a recalcitrant witness for perjury. Although the fact of a witness' prior indictment or arrest does have some logical relevancy as to the issue of his credibility, there is great danger that the trier of fact would ascribe undue weight to the *accusation of guilt* and might too easily jump to the unwarranted conclusion that the witness was in fact guilty of the crime for which he was arrested or indicted, and then conclude that such a person is unworthy of belief. It was because of this feeling, it would appear, that Article 495 in 1952 was amended in part to provide that "no witness, whether he be defendant or not, can be asked on cross-examination whether or not he has ever been indicted or arrested, and can only be questioned as to conviction, and as provided herein."[31]

Does the 1952 amendment prohibit a witness' being questioned, under all circumstances, concerning his arrests and indictments? *State v. Lewis*[32] makes it clear that the answer to this question is in the negative. In this case, the fact of the witness' prior arrest had an independent relevance as tending to show bias, interest, or corruption. The witness, an alleged accomplice of defendant, had been called by the state. Defendant on cross-examination sought to bring out that the witness had been indicted along with defendant and others for a crime which was a part of the transaction involved in the instant proceeding, but "had not been brought to trial for more than a year and would not be tried, or at least promised leniency, because of his assistance to the state in testifying at the trials of the others involved in the crime."[33] The court held that reversible error was committed in refusing to allow the defendant to develop this line of questioning.

In holding that the 1952 amendment to Article 495 was inapplicable, the court, in the opinion of this writer, reached what is clearly the proper conclusion.[34] Here, the fact of the witness' arrest was not offered as tending to show that the witness was a "bad man" and therefore unworthy of belief (which is prohibited by the 1952 amendment to Article 495), but for a completely different reason — as tending to show bias, interest, or corruption. This method of impeachment is clearly recognized

31. LA. R.S. 15:495 (1950), as amended, La. Acts 1952, No. 180, § 1.
32. 236 La. 473, 108 So.2d 93 (1959).
33. *Id.* at 476, 108 So.2d at 95.
34. For a fuller development of this subject, see Comment, 19 LOUISIANA LAW REVIEW 684 (1959).

by Article 492, and it is submitted that the 1952 amendment to Article 495 was not intended to limit the scope of Article 492.

The 1952 amendment to Article 495 did not alter the law with regard to impeachment because of prior convictions. The fact of a witness' prior conviction may still be brought to the attention of the jury for the purpose of impeaching the witness' credibility. Article 495, however, makes it clear that before any other evidence can be offered to show a prior conviction, the witness himself must have been cross-examined as to such conviction, and that the other evidence of conviction is admissible only if the witness had himself "failed distinctly to admit the same." This rule promotes efficiency of trial procedure. If the witness himself will admit the prior conviction, then the simplest and least time-consuming way to present this information to the jury is to develop it from the witness himself. The basis of the rule, however, probably goes much deeper than mere economy of time. The damaging effect of a showing of prior conviction is probably greatly lessened if the witness himself is given the opportunity to "come clean." Undue prejudice might result from permitting opposing counsel to use the more dramatic method of showing the prior conviction by other means. The latter device may waft an implication to the jury that the witness was "covering up" his prior record, an implication which may be unwarranted. In *State v. Scott*,[35] the court, following the clear language of Article 495, affirmed the action of the trial judge in refusing to permit defense counsel to cross-examine a state's witness concerning his personal knowledge of another state's witness' having "served time in the State Penitentiary for cattle theft,"[36] for the proper foundation had not been laid. The supposed ex-convict had not been given the opportunity on cross-examination to affirm or deny the purported fact.

Impeaching of own Witness

Article 487 of the Code of Criminal Procedure provides that no one can impeach his own witness unless taken by surprise by the testimony of the witness, or unless the witness show hostility toward him, and that even in such cases impeachment must be limited to prior contradictory statements. Article 488 then states that "surprise" as used in the prior article "does not arise out

35. 237 La. 71, 110 So.2d 530 (1959).
36. *Id.* at 90, 110 So.2d at 537.

of the mere failure of the witness to testify as expected, but out of his testifying *upon some material matter against the party introducing him and in favor of the other side.*" (Emphasis added.) Article 493 further provides that in order to impeach a witness on the ground of prior contradictory statements, he must be first asked whether he made the statement and the time, place, and circumstances under which it was made. The reasons for the requirement of this foundation are similar to those, discussed above, which require the laying of a foundation before impeachment of a witness by introducing evidence of prior conviction.

The application of these rules in *State v. Knox*[37] is somewhat questionable. Previous to the trial in the lower court, a state's witness (an inmate in the state penitentiary) had apparently informed the district attorney in the presence of five witnesses "that the defendant was in effect the prime mover in the robbery."[38] At the trial, when questioned by the district attorney, the witness "changed his testimony and stated that he was not sure that he knew the defendant."[39] The district attorney then placed him on guard and asked whether he had not made certain contrary statements, pointing out the time, place, and names of persons present. Defense counsel took exception to the trial judge's permitting the district attorney to plead surprise and objected "that the district attorney had not laid the proper foundation for the impeachment of the witness."[40] The Supreme Court, citing Articles 487, 488, and 493 without discussion, affirmed the action of the trial judge rejecting the contentions of defendant.

It does not appear from the reported opinion that the state's witness was "hostile" or that he did any more than state that "he was not sure that he knew the defendant." It would seem that the state was not "surprised" within the meaning of Articles 487 and 488, for apparently the witness did not testify "upon some material matter against the party introducing him and in favor of the other side." Therefore, it would appear that the district attorney was without authority to impeach his own witness. The reason for the narrow definition of "surprise" given in Article 488, which causes considerable stricture upon

37. 236 La. 461, 107 So.2d 719 (1959).
38. *Id.* at 465, 107 So.2d at 721.
39. *Ibid.*
40. *Ibid.*

the possibility of impeaching one's own witness by the showing of prior contradictory statements, is clear. The prior contradictory statement of a witness offered for the purpose of impeachment may not be used as substantive evidence and may be used solely for the purpose of neutralizing the testimony given by the witness on the stand. If one's own witness has testified to no material matter against the party calling him and in favor of his opponent, then it would appear that the showing of a prior inconsistent statement is being made only for its substantive effect. For the trier of fact to give such a statement substantive effect is forbidden. The prior statement was made outside of court, was not made under oath, and was not subject to cross-examination. To admit it for substantive weight would, in the opinion of this writer, contravene the hearsay rule.

Since it would appear that the district attorney was without authority to impeach his own witness under the circumstances of this case, it would likewise appear that he was without authority to lay a foundation for such impeachment.

Comment on Defendant's Failure To Take the Stand

In *State v. Stahl*,[41] defendant contended on appeal that when the district attorney had asked the sheriff whether the defendant had been given a lie detector test, the remark constituted a comment on the failure of the defendant to take the stand, and that his motion for a mistrial should have been granted. When the question was asked and an objection made, the district attorney had stated that "he would withdraw the question if any objection was made."[42] The Supreme Court stated that the objection was sustained by the trial court and that so far as the record shows, the question was never answered. In the opinion of the writer, the Supreme Court was correct in rejecting the contention of defense counsel that the remark by the district attorney was a comment on defendant's failure to take the stand. Problems with respect to the harmful effects that may result from merely asking a question, even though it is never answered, are discussed in a casenote on the *Stahl* case appearing elsewhere in this *Review*.[43]

41. 236 La. 362, 107 So.2d 670 (1959).
42. *Id.* at 369, 107 So.2d at 672.
43. Note, 19 LOUISIANA LAW REVIEW 881 (1959).

Rehabilitation

Article 485 of the Code of Criminal Procedure provides in part that "Whenever a witness has been impeached or contradicted, or his character or credibility been assailed, corroborative testimony is admissible." In *State v. Stahl*,[44] defendant, an inmate at the state penitentiary, had been tried and convicted of the murder of a fellow inmate. On appeal, he contended that the trial judge had erred in (1) permitting the state to bring out on redirect examination of the main state's witness, who was also a convict, that after the trial, the witness would have to be "locked apart from the other prisoners as his life would be in danger";[45] and (2) permitting similar information to be elicited from the penitentiary warden. The action of the trial judge was affirmed by the Supreme Court, which quoted Article 485 and the per curiam of the trial judge, which had stated that the witness had been assailed on cross-examination, that it had been brought out that the witness had been convicted five times, that it was suggested in very possible manner that the witness had been promised something to testify, and that every possible insinuation relative to the witness' character and credibility had been made.

HEARSAY

In *Sallier v. Boudreaux*,[46] an issue in the case concerned whether certain property had been acquired by defendant's ancestor in title Nathaniel Vincent at the succession sale of property belonging to Nathaniel's father, Simeon Vincent. The original succession proceedings had been burned in 1910 by the fire which destroyed the Calcasieu Parish courthouse. In support of defendant's contention that Nathaniel Vincent had purchased the property at the succession sale of his father, a witness was called who testified that when he was about twenty years old, he had attended the public sale of property belonging to the estate of Simeon Vincent, that the witness' father "also was present and assisted Nathaniel Vincent in conducting the sale, and that his father told him on that day that Nathaniel Vincent 'got' the property here at issue in that sale."[47] Plaintiffs objected to the witness' stating what his father had told him, but the trial

44. 236 La. 362, 107 So.2d 670 (1959).
45. *Id.* at 379, 107 So.2d at 676.
46. 237 La. 909, 112 So.2d 657 (1959).
47. *Id.* at 919, 112 So.2d at 660.

judge, citing the case of *Vidrine v. Deshotels*,[48] held that the testimony was admissible. Adopting the written opinion of the trial judge, the decision of the lower court was affirmed. With deference, it is submitted that the trial judge erred in holding that the evidence was proper and admissible. Citing with approval the case of *Landry v. Laplos*,[49] the court in the *Vidrine* case stated that under certain circumstances the adjudication of succession property could be proved by parol evidence, but this is quite different from holding that it may be proved by hearsay. In the *Vidrine* case there were three eye witnesses who testified at the trial that the property had been purchased at the public sale by the party in question, and in addition there was testimony by a fourth witness that although he was not at the sale, "he met several persons coming from the house after the sale and that he knew there was a sale."[50] The *Vidrine* and *Sallier* cases, therefore, are quite different. None of the witnesses in the *Vidrine* case were testifying as to what *someone else said* as to who had purchased property at a succession sale. There may be some question as to the testimony of the fourth witness in the *Vidrine* case that there had been a sale, for there is no showing that he knew of his own knowledge that a sale had taken place, but it should be noted that there is no indication in the *Vidrine* decision that his testimony was objected to as hearsay. Apparently in the *Sallier* case, the witness did not know of his own knowledge that Nathaniel Vincent had been the adjudicatee at the succession sale, although he did have first hand knowledge that a sale had taken place. To permit him to testify to what his father told him as to who "got" the property is to go much further than simply holding that under certain circumstances an adjudication at a succession sale can be shown by parol evidence; it is admitting hearsay evidence to show an adjudication to a particular person. The father of the witness was not under oath or subject to cross-examination at the time he made the statement, and it is suggested that his out-of-court statement to his son should not have been admitted in evidence.

Hospital Records

Louisiana R.S. 13:3714[51] provides that a certified copy of a chart or record of a Louisiana charity hospital or a veterans

48. 181 La. 50, 158 So. 618 (1935).
49. 113 La. 697, 37 So. 606 (1904).
50. 181 La. 50, 54-55, 158 So. 618, 619 (1935).
51. LA. R.S. 13:3714 (1950), as amended, LA. Acts 1952, No. 519, § 1.

hospital located in this state is admissible in evidence as prima facie proof of its contents, "provided that the party against whom the said record is sought to be used shall have the right to summon and examine those making the original of said record as witnesses under cross-examination." Citing this provision, the Supreme Court in *State v. Kelly*[52] affirmed the action of the trial court in admitting a record of the Charity Hospital of New Orleans which stated that the defendant had been treated for a bullet wound.

Declarations by Co-Conspirators

Under the provisions of Article 455 of the Code of Criminal Procedure, a co-conspirator is deemed to assent to statements made or actions done in furtherance of the common enterprise, provided a prima facie case of conspiracy has been established. In *State v. Melerine*,[53] the Supreme Court, citing this article and prior jurisprudence, affirmed the action of the trial court in permitting a playing of tape recordings of declarations made by one who had been charged with malfeasance in office along with defendants, but as to whom a severance had been granted.

Police Report

In *State v. Kelly*[54] the Supreme Court affirmed the action of the trial court in overruling defendant's objection to the introduction of the original vehicle theft report of the New Orleans Police Department offered by the state to corroborate the testimony of its accomplice-witness that the witness had stolen an automobile on the day of the robbery and shooting. It was urged, inter alia, on appeal, that the record was hearsay. The trial court had instructed the jury that the purpose of the evidence was " 'merely and only to prove whether or not the police had such an entry in their records or not, not to prove the theft of the automobile.' "[55] The Supreme Court stated that "the objection was to the weight and sufficiency of the evidence, rather than to its admissibility,"[56] and that "under such conditions, it was properly admitted in evidence."[57] It does not appear altogether clear to the writer whether the Supreme Court treated

52. 237 La. 956, 112 So.2d 674 (1959).
53. 236 La. 930, 109 So.2d 471 (1959).
54. 237 La. 956, 112 So.2d 674 (1959).
55. *Id.* at 966, 112 So.2d at 677.
56. *Ibid.*
57. *Ibid.*

the report as coming in under an exception (public document) to the hearsay rule, or as non-hearsay — fact of utterance rather than utterance of fact. It would appear, however, that what the state was really interested in was establishing the truth of the report, that the vehicle had in fact been stolen, and that the trier of fact would accept the evidence as such, ascribing to it testimonial value. It is submitted that the evidence was hearsay,[58] that the police report did not fall properly within any exception to the hearsay rule, and that it should have been excluded.[59]

BEST EVIDENCE

In *State v. McCrory*[60] the court held that a failure to comply with the provisions of Article 436 of the Code of Criminal Procedure relative to the production of the best evidence (here a case of whiskey which was the object of the alleged burglary), where the same was concededly in the possession of the district attorney, was prejudicial to the substantial rights of the accused.

The Supreme Court also made it clear during the last term[61] that where it is permissible to show the contents of an out-of-court conversation, it may be shown either by a tape recording thereof, or by a witness who was present, and that there is no violation of the best evidence rule, regardless which of these methods is used.

Proof of Lost Document

In *Sallier v. Boudreaux*,[62] The Supreme Court adopted with approval the opinion of the trial judge which had cited the provisions of R.S. 44:325[63] and prior jurisprudence,[64] and held that

58. Comment, *Hearsay and Non-Hearsay as Reflected in Louisiana Criminal Cases*, 14 LOUISIANA LAW REVIEW 611 (1954).

59. See LA. R.S. 15:485 (1950) (admissibility of corroborative testimony; testimony of accomplice); State v. Hataway, 144 La. 138, 80 So. 227 (1918); State v. Callahan, 47 La. Ann. 444, 17 So. 50 (1895); 1 WHARTON, CRIMINAL EVIDENCE § 431 (11th ed. 1935); Comment, *Rehabilitation of Witnesses in Louisiana*, 12 TUL. L. REV. 286, 295 (1938).

60. 237 La. 747, 112 So.2d 432 (1959).

61. State v. Melerine, 236 La. 881, 109 So.2d 454 (1959); State v. Melerine, 236 La. 930, 109 So.2d 471 (1959).

62. 237 La. 909, 112 So.2d 657 (1959).

63. "The provisions of this Sub-part shall not prevent the establishment of any judgment or any other instrument of writing, by parol evidence, where the original record has been destroyed by the burning of the courthouse or any other place of deposit of public records, or destroyed in any other way in the parish."

64. Childers v. Hudson, 223 La. 181, 65 So.2d 131 (1953); Grotevant v. Dorrestein, 152 La. 734, 94 So. 372 (1922). To these two cases, the Supreme Court added a third: Lyons v. Goodman, 78 So.2d 424 (La. App. 1955).

parol evidence is admissible to establish the existence and contents of records which have been destroyed by the burning of a courthouse, without the necessity of advertising loss of the documents.[65]

JUDICIAL NOTICE

Article 422 of the Code of Criminal Procedure provides in part that "judicial cognizance is taken of . . . the political, social and racial conditions prevailing in this state." In the two *Melerine* cases,[66] on a motion to recuse the district attorney, it was urged by the defendant that the Supreme Court should take judicial notice of the political conditions existing in the parish in question, that the parish was "a political hot-bed,"[67] and "that the district attorney herein had lost control of the Police Jury"[68] from which it was argued that the district attorney had a political advantage in connection with the trial of the president and vice-president of the police jury for malfeasance in office. The request was properly denied, for the provisions of Article 422 should not be construed as authorizing judicial cognizance of such alleged specific conditions.

65. See LA. CIVIL CODE art. 2280 (1870); LA. R.S. 44:321 (1950).
66. 236 La. 881, 109 So.2d 454 (1959) and 236 La. 930, 109 So.2d 471 (1959).
67. 236 La. 881, 898, 109 So.2d 454, 460 (1959); 236 La. 930, 946, 109 So.2d 471, 477 (1959).
68. See note 67 *supra*.