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Evidence

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WITNESSES

Unresponsive Answers

Generally speaking, the failure to invoke a rule of evidence results in a waiver.[1] As Professor McCormick puts it,[2] counsel may not "gamble upon the possibility of a favorable answer" to an objectionable question, but must interpose an objection as soon as the ground therefor becomes apparent. Normally, the ground for objection will be apparent in the question, but of course this is not always the case. The answer, for example, may be unresponsive, and its inadmissible nature not previously disclosed.

In *State v. Donaldson*,[3] defense counsel had objected to a statement by a state's witness in response to a question by the district attorney, and urged that the statement was so prejudicial that a mistrial should be ordered. Although the trial court sustained the objection and admonished the jury to disregard the statement, it found that the remark was gratuitous and unresponsive, and denied the motion for mistrial. In affirming the action of the trial court, the Supreme Court stated: "We find no error in this ruling. The law is well settled and has been often stated by this Court to the effect that the trial for a criminal offense cannot be defeated or nullified by the act of a witness in volunteering an objectionable remark for which the prosecution is not responsible."[4]

HEARSAY

The line of demarcation between hearsay and non-hearsay is sometimes shadowy and obscure.[5] An extra-judicial statement

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1. 1 WIGMORE, EVIDENCE 321, § 18 (1940).

2. MCCORMICK, EVIDENCE 115, § 52 (1954). See also Ladd, *Common Mistakes in the Technique of Trial*, 22 IOWA L. REV. 609, 622-26 (1937).

3. 238 La. 265, 115 So.2d 345 (1959).

4. *Id.* at 268-69, 115 So.2d at 346.

5. For able discussions of the matter, see McCormick, *The Borderland of Hearsay*, 39 YALE L.J. 489 (1930) and Comment, *Hearsay and Non-Hearsay as Reflected in Louisiana Criminal Cases*, 14 LOUISIANA LAW REVIEW 611 (1954).

may sometimes be offered not to prove the truth of the out-of-court assertion, but merely the fact that such an assertion was made. If the fact that the out-of-court utterance was made has an independent relevance and the risk that the trier of fact will ascribe undue weight to the evidence is comparatively slight, then the statement is frequently admissible as non-hearsay. When, in a given case, the trier of fact is a judge rather than a jury, the risk of misuse of an out-of-court statement offered as non-hearsay (the risk that the statement will be given more than its logical weight) is of course reduced. This may explain why out-of-court statements which would be held inadmissible in a case tried by a common law jury are sometimes held admissible in a case tried to a judge alone.

A principle that fits hand-in-glove with the hearsay rule is the requirement that a witness have first-hand knowledge of the fact of which he speaks — not mere hearsay knowledge. If the fact to which he is testifying is an out-of-court statement which has independent relevance, and the witness himself actually heard the out-of-court statement uttered, then of course the requirement of first-hand knowledge is met.

In *Southwest Natural Production Co. v. Anderson*,[6] the Supreme Court in reviewing the decision of the district court in a civil case tried to a judge sitting without a jury reflected a willingness to consider statements which might well be considered inadmissible in a case tried to a common law jury.[7]

Confessions

In *State v. Brauner*,[8] the Supreme Court reversed a narcotics conviction because it found that there was at least "considerable and reasonable doubt . . . that defendant's confessions were free and voluntary."[9] Article 451 of the Code of Criminal Procedure[10] prohibits the introduction of a confession unless it is affirmatively shown that the same was free and voluntary, and "not made under the influence of fear, duress, intimidation, menaces, threats, inducements or promises." In the instant case, the court reaffirmed the position taken in *State v. Ellis*[11] that if there

6. 239 La. 490, 118 So.2d 897 (1960).
7. See also Wells v. Twin City Fire Ins. Co., 239 La. 662, 119 So.2d 501 (1960).
8. 239 La. 651, 119 So.2d 497 (1960).
9. *Id.* at 660, 119 So.2d at 500.
10. LA. R.S. 15:451 (1950).
11. 207 La. 812, 22 So.2d 181 (1945).

is any reasonable doubt that a proper confession was freely and voluntarily made, it must be excluded. A police officer had testified that he had told the defendant that if he surrendered the narcotics and would cooperate with the officers in apprehending the supplier, they would so inform the district attorney, and that possibly, in the discretion of the district attorney, defendant might be given a suspended sentence. This statement, the court found, might well have prompted the defendant to confess, and the fact that defendant never fulfilled a condition of the officer's proposal "could not possibly serve to render voluntary confessions that were otherwise involuntary."[12] Following the *Gebbia*[13] and *Simpson*[14] cases, the court also stated that facts which have been discovered as a result of confessions found to have been improperly obtained are nonetheless admissible. Thus, the state may employ the fruits of a confession, even though it may not introduce the confession itself.

Documentary Evidence

In *Southern Scrap Material Co. v. Commercial Scrap Material Corp.*,[15] the defendant contended that certain letters written to it by the plaintiff were self-serving declarations and should not be considered. The Supreme Court noted that no objection had been urged to the production of the documents. Since the letters were apparently relevant, the court's remarks concerning the failure of the defendant to interpose an objection to admissibility would seemingly have sufficed to dispose of defendant's contentions.[16] However, the court went further and stated: "Furthermore, the truth of the statements made in these communications was established by witnesses who had knowledge of the facts. Where the truth of statements made in a written communication is established by witnesses having knowledge of the facts, the communication is not objectionable as being hearsay or a self-serving declaration."[17] The validity of the quoted statements seems open to serious question. If the facts contained in a document, to which a proper hearsay objection has been made and overruled, are indeed *established* by witnesses who had actual knowledge of the facts, then the trial court's

12. 239 La. 651, 660, 119 So.2d 497, 500 (1960).
13. 121 La. 1083, 47 So. 32 (1908).
14. 157 La. 614, 102 So. 810 (1925).
15. 239 La. 958, 120 So.2d 491 (1960).
16. See notes 1 and 2 *supra*.
17. 239 La. 958, 964-65, 120 So.2d 491, 494 (1960).

erroneous ruling would normally be harmless error. But the hearsay character of a proffered document is not altered by the fact that statements contained in it have been established by proper evidence.[18]

18. The cases cited by the court, Lado v. First Nat. Life Ins. Co., 182 La. 726, 162 So. 579 (1935) and Succession of Bell, 194 La. 274, 193 So. 645 (1940), would seem properly to stand merely for the well-recognized proposition that the failure of a party to interpose an objection to the admissibility of evidence generally results in a waiver of the objection. See notes 1 and 2 *supra*.