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Evidence

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EXAMINATION OF WITNESSES

Expert Witnesses

Before a physician called by the state is permitted to give expert testimony as to the mental condition of an accused, is the defense entitled to cross examine the witness, not only as to his general qualifications, but also as to the extent of his examination and observation of the accused? In *State v. Augustine*[1] the Supreme Court answered in the negative. Article 466 of the Code of Criminal Procedure provides that before a witness can give evidence as an expert, his "competency" to testify as an expert must have been established to the satisfaction of the court. The test of competency of an expert, states the article, is "his knowledge of the subject about which he is called upon to express an opinion." In the *Augustine* case the last quoted phrase is apparently interpreted as referring to the witness' familiarity with the *general field of knowledge* involved, not his knowledge of the particular facts at issue in the particular proceedings.

IMPEACHMENT

Surprise and Hostility

May a party impeach his own witness even though not taken by "surprise" by his testimony? Article 487 of the Code of Criminal Procedure provides that "no one can impeach his own witness, unless he have been taken by surprise by the testimony of such witness, or unless the witness show hostility toward him, and, even then, the impeachment must be limited to evidence of prior contradictory statements." Prior to the adoption of the Code of Criminal Procedure,[2] the court, relying on *Wharton's Criminal Evidence*,[3] took the position that hostility alone would

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1. 241 La. 761, 131 So.2d 56 (1961).
2. State v. Bodoin, 153 La. 641, 96 So. 501 (1923).
3. 1 WHARTON, CRIMINAL EVIDENCE § 484a (10th ed.).

not suffice to permit a party to impeach his own witness — that to do this the hostility must come unexpectedly. After the adoption of the Code of Criminal Procedure, in the light of Article 487, the court, in *State v. Williams*[4] took the contrary position. In the recent case of *State v. Willis*[5] the court followed the interpretation placed upon the article in the *Williams* case (that either hostility *or* surprise would suffice).

The position taken in the *Willis* case is certainly grounded upon a reasonable interpretation of Article 487. Whether the law *should* be otherwise is, of course, another question. Where the prior contradictory statement is admissible *solely* for the purpose of impeaching the testimony given by the witness on the stand, the *Willis* case holds that the trial judge must instruct the jury that it is not to treat the testimony as substantive evidence of defendant's guilt. If a party knows in advance that a person will give testimony unfavorable to his position, and he nevertheless calls him as a witness with the intention of impeaching him by a prior contradictory statement, then it seems reasonable to presume that he is doing so with the hope that the jury will ascribe substantive weight to the prior contradictory statement. As a practical matter, this writer shares the view of many that, despite judicial instruction to the contrary, juries will in fact ascribe substantive as well as neutralizing effect to such impeaching testimony. If the policy of the law is *really* against such conduct by the jury, then would it not be better to amend Article 487 to provide that hostility alone would not be sufficient to permit a party to impeach his own witness — that surprise is a *sine qua non*?[6]

When a party wishes to show that a witness he has called is hostile, in order that the witness may be impeached by a prior contradictory statement, how can this be done? The *Willis* case states: "[I]t is not necessary to prove a belligerent or biased attitude in giving testimony in order to show that a witness is hostile. It suffices to show that a witness' interest is on the side of the accused to such an extent that he or she is unlikely to give a true account of the transaction."[7] The fact that the witness in question had been having an illicit relationship with the defendant was deemed an ample showing.

4. 185 La. 849, 171 So. 52 (1936).
5. 241 La. 796, 131 So.2d 792 (1961).
6. See very interesting discussion of this general problem by Judge Hutcheson in Young v. United States, 97 F.2d 200, 117 A.L.R. 316 (5th Cir. 1938).
7. 131 So.2d 792, 795 (La. 1961).

RELEVANCY

Offers to Purchase

In expropriation proceedings, triable to the court without a jury,[8] should the defendant be permitted to introduce into evidence bona fide offers received by him to purchase the subject property? Relying upon *Louisiana Ry. & Nav. Co. v. Morere*[9] and "the fact that such evidence is inherently unreliable, being highly susceptible to fabrication," the court in *State v. McDuffie*[10] held that even if found to be bona fide, offers to purchase are "inadmissible as evidence of market value in expropriation cases." The position of the court is in accord with the weight of authority.[11] Nevertheless, it seems to this writer that evidence such as that offered in the *McDuffie* case should be admissible in Louisiana expropriation cases. Such cases are tried by a judge sitting without a jury.[12] When weighed and evaluated by a trained legal mind, the risk that undue weight will be ascribed to it or that imposition might result is substantially lessened. The fact that the defendant received but rejected a bona fide offer certainly seems to indicate that the fair market value was at least as high as the amount offered. The fact that such evidence is subject to fabrication seems to this writer to be no more true than with much admissible evidence. In the context of Louisiana expropriation cases, the value to be gained by receiving such evidence seems to outweigh the dangers.

Gruesome Photographs

In *State v. Eubanks*[13] the court once again rejected argument that a trial court had committed reversible error in overruling defense counsel's objections to the admissibility of allegedly "gruesome" photographs of the deceased. Two photographs were involved in the *Eubanks* case, one taken at the scene of the crime and the other at the morgue. Defense counsel unsuccess-

8. LA. R.S. 19:4, 48:454 (1950). See Comment, *Expropriation — A Survey of Louisiana Law*, 18 LOUISIANA LAW REVIEW 509, 523 *et seq.* (1958).
9. 116 La. 997, 41 So. 236 (1906).
10. 240 La. 378, 123 So.2d 93 (1960).
11. See Comment, *Expropriation — A Survey of Louisiana Law*, 18 LOUISIANA LAW REVIEW 509, 543 *et seq.* (1958); MCCORMICK, EVIDENCE § 166 (1954); 4 NICHOLS, EMINENT DOMAIN § 12.3113(3) (4th ed. 1962); Annot., 7 A.L.R.2d 781 *et seq.* (1949).
12. See note 8 *supra*.
13. 240 La. 552, 124 So.2d 543 (1960).

fully relied upon *State v. Morgan*.[14] After an extensive review of other authorities and repeating a quotation from *State v. Solomon*[15] that "State v. Morgan is to be regarded as — indeed it is — a case of most unusual circumstances," the Supreme Court in *Eubanks* stated: "In the light of the jurisprudence which we have discussed at length, we shall not comment on the Morgan case."[16] The court now seems to adhere strongly to the position that the fact that photographs are gruesome and tend to prejudice the jury does not cause them to be inadmissible, if they are relevant to a material fact. Regretfully, it must be recognized that the authoritative value of the approach taken in *State v. Morgan* now appears to be all but eliminated.[17]

COMPETENCY

Attorney as Witness

A novel and interesting point was raised and decided in *State v. Newton*,[18] an aggravated rape case. On the hearing of a motion for new trial, one of the two defense counsel stated that his co-counsel (who was also his law partner) desired to give testimony for the purpose of impeaching one of the state's witnesses at the hearing. Directing the attention of the court to the provisions of Article 19 of the Canons of Professional Ethics that:

> "When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, he shall leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer shall avoid testifying in court in behalf of his client."

and stating that neither his co-counsel nor their client wished co-counsel to withdraw from the case, he requested the court to order co-counsel to testify so that "we would be protected against any charge that might be brought as a result of our

14. 211 La. 572, 30 So.2d 434 (1947), discussed in Note on State v. McMullan, 223 La. 629, 66 So.2d 574 (1953), in 14 LOUISIANA LAW REVIEW 421 (1954); *The Work of the Louisiana Supreme Court for the 1952-1953 Term — Evidence*, 14 LOUISIANA LAW REVIEW 220 (1953); *The Work of the Louisiana Supreme Court for the 1956-1957 Term — Evidence*, 18 LOUISIANA LAW REVIEW 139 (1957). See also *The Work of the Louisiana Supreme Court for the 1958-1959 Term*, 20 LOUISIANA LAW REVIEW 335, 339 (1960).

15. 222 La. 269, 62 So.2d 481 (1953).

16. 240 La. 552, 561, 562, 124 So.2d 543, 547 (1960).

17. See also the authorities cited in note 14 *supra*.

18. 241 La. 261, 128 So.2d 651 (1961).

testifying."[19] Although the trial judge made it very clear that he would allow defense counsel to testify, he refused to "order" him to do so. In light of this ruling, co-counsel did not testify, but took a bill of exceptions. In his per curiam, the trial judge expressed the view that whether to testify or not was a question for co-counsel to decide, and that the court "could not compel him to testify." On appeal, the Supreme Court upheld the action of the trial court.

Whether co-counsel's testifying would or would not have been a breach of professional ethics does not detract from the fact that he was a competent witness, and whatever improprieties might have been involved in his testifying and continuing as co-counsel did not affect the admissibility of his testimony.[20] In this respect, the trial court was clearly correct. Of course, the trial court was asked not merely to allow co-counsel to testify, but to order him to do so. If co-counsel and his partner had both withdrawn from the case and new counsel had come in to represent the defendant, then on request of the new counsel it would certainly appear that the former attorney could have been subpoenaed and ordered to testify. Even absent this, however, it would nevertheles appear that a defendant or his attorney would be entitled to a subpoena and an order by the court to have the witness (even a defense counsel) so subpoenaed testify. The question of whether the defense counsel so subpoenaed should withdraw from the case or remain would appear to involve ethical considerations not pertinent to the right of the defendant to have a witness subpoenaed and ordered to testify. Whether or not the proceedings outlined above should be considered as tantamount to a request for a subpoena and an order to a witness so subpoenaed to testify seems to this writer to be the essential inquiry. The Supreme Court, it is felt, was reasonable in not so construing them.

PRIVILEGE

Privilege Against Self-Incrimination

Section 11 of Article I of the Louisiana Constitution of 1921 stipulates that, except as otherwise provided in the Constitution, "no person shall be compelled to give evidence against himself

19. 128 So.2d at 652.

20. See State v. Woodville, 161 La. 125, 108 So. 309 (1926); Succession of Grant, 14 La. Ann. 795 (1859); Annot., 118 A.L.R. 954 (1939).

in a criminal case or in any proceeding that may subject him to criminal prosecution." Section 13 of Article XIX provides that "any person" may be compelled to testify in any proceeding against "anyone" who may be charged with having committed bribery, but that, except for perjury committed in giving such testimony, it shall not thereafter be used against the witness in any judicial proceeding. In *State v. Smalling*[21] the Supreme Court held that if a person is compelled to give testimony of a self-incriminatory nature before a grand jury investigating bribery, a bill of information filed against him, which is based in whole or in part upon such testimony, must be quashed, whether or not he was the party being investigated at the grand jury proceeding. In so holding, the court rejected the contention of the state that the protective immunity of Section 13, Article XIX, does not afford protection to a person who is summoned to testify in a proceeding wherein such person is the party being investigated for bribery, but only to a person who is appearing as a witness against someone else.

HEARSAY

Spontaneous Declarations

In *State v. Hills*[22] the Supreme Court was called upon to rule as to the admissibility of an oral statement made by the prosecutrix in a rape case shortly after the alleged occurrence, including data given at that time as to the description of the assailant. Over objection, the landlord of the prosecutrix was permitted to testify that shortly after midnight, the prosecutrix, battered, bruised, disheveled, and hysterical, had banged upon his door, and, after calming down, related that she had just been raped, describing the perpetrator of the offense. At this stage of the trial, the prosecutrix herself had not yet testified. Nevertheless, the Supreme Court, noting that "there is a tendency of the courts to extend rather than narrow the scope of the introduction of evidence as res gestae,"[23] held that the evidence was properly admissible. Apparently, the majority of American jurisdictions would hold such evidence inadmissible as hearsay,[24] but it would

21. 240 La. 887, 125 So.2d 399 (1960).
22. 241 La. 345, 129 So.2d 12 (1961).
23. 129 So.2d at 21.
24. See WIGMORE, EVIDENCE §§ 1134-1140, 1760-1761 (3d ed. 1940).

seem that no less an authority than Professor Wigmore would favor admissibility under the circumstances.[25]

Since here the condition of the accused, as described by the witness, afforded ample evidence that the alleged rape had in fact recently taken place and in view of the startling nature of the occurrence, there seems to be much merit to the position that her statement to the landlord should be admissible under the spontaneous utterance exception to the hearsay rule.

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25. *Ibid.*