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Procedure: Evidence

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that "the verdict is contrary to the law and the evidence,"[33] and the defendant is urging that there is no evidence,[34] or "no evidence of any probative value"[35] of an essential element of the crime. In a recent federal case, *United States* ex rel. *Weston v. Sigler*,[36] where a writ of habeas corpus had been applied for, the circuit court of appeals held, that the failure to furnish a free transcript of all testimony to an indigent defendant who was appealing was a denial of "equal protection" of the law. The ultimate issue appears to be whether a complete transcript was, in the particular case, required for an adequate presentation of the defendant's appeal.[37] It may be necessary, in order to provide for the situation where a defendant is claiming that there is a complete lack of probative evidence of an essential element of the crime, to amend and liberalize the provision of Article 500 of the Code of Criminal Procedure,[38] "that any accused desiring to send up the testimony of all of the witnesses so taken, shall pay for the same." In such an amendment the general right to a free transcript should be limited to indigent defendants.[39]

EVIDENCE

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WITNESSES

Testimonial "Judicial Confessions"

Should a party-witness in a civil case be inexorably bound by his own disserving testimony? Relying upon Article 2291 of

33. LA. R.S. 15:509(1) (1950).

34. State v. Linkletter, 239 La. 1000, 120 So.2d 835 (1960), *Cf.* State v. Giangosso, 157 La. 360, 102 So. 429 (1924) where the facts certified by the trial judge showed that the defendant, convicted of receiving stolen things, really owned them.

35. State v. LaBorde, 234 La. 28, 99 So. 2d 11 (1958). *Accord*, Mayerhafer v. Department of Police, 235 La. 437, 104 So. 2d 163 (1958) using the phrase "no probative evidence."

36. (Oct. 1962) 5th Circuit Case No. 19402, rehearing pending.

37. State v. Bueche, 243 La. 160, 142 So. 2d 381 (1962) where the Louisiana Supreme Court upheld the trial judge's refusal of a complete transcript, stressing the fact that there was no allegation that an essential element of the crime was entirely unsupported by the proof.

38. LA. R.S. 15:500 (1950).

39. The 1960 statute (Act 12), which was suspended in 1960 and repealed in 1962 (Act 449), had provided for a free transcript for all defendants.

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the Civil Code[1] and a prior decision of the Orleans Court of Appeal,[2] the First Circuit, in *Franklin v. Zurich Insurance Co.*,[3] held that if the disserving testimony of a party-witness is completely consistent and unequivocal on a crucial factual issue, then it is a "judicial confession," compelling a judgment adverse to the party-witness, despite the existence in the record of contradictory testimony by other witnesses.

It appears that at common law, it is improper to classify disserving testimony by a party as a judicial admission or judicial confession.[4] The proper effect to be given to a party's disserving testimony, however, has been the subject of conflicting decisions. Professor McCormick takes the firm position that a mechanical rule of law requiring that a party be inexorably bound by his own testimony should not be adopted.[5] Certainly, in weighing the evidence or determining whether a motion for a directed verdict should be granted, a party's testimony adverse to his own cause will receive great weight. A party may be scrupulously honest while giving disserving testimony — but may be in error. If a court is persuaded from all of the evidence that the party was mistaken, should it nonetheless be forced to render a judgment against him? If a party-witness is lying when he gives disserving testimony, is the loss of his lawsuit the price that he should be forced to pay, or a perjury prosecution the more appropriate remedy? A rule requiring the acceptance of a party-litigant's disserving testimony can present real problems when both plaintiff and defendant testify adversely to their respective interests on a crucial factual question.[6] It seems to this writer that in the absence of controlling authority, the better view is to treat disserving testimony of the party-litigant along with all the other evidence in the record, weighing it in light of all of the circumstances.

At the time Article 2291 (defining and setting forth the effects of a judicial confession) was originally placed in the Civil Code,[7] a party-litigant, because of the interest disqualifica-

1. LA. CIVIL CODE art. 2291 (1870).
2. Thompson v. Haubtman, 137 So. 362 (La. App. Orl. Cir. 1931).
3. 136 So.2d 735 (La. App. 1st Cir. 1962).
4. See MCCORMICK, EVIDENCE §§ 239, 243 (1954); 9 WIGMORE, EVIDENCE §§ 2588, 2594a (3d ed. 1940).
5. MCCORMICK, EVIDENCE § 243 (1954). See also 9 WIGMORE, EVIDENCE, § 2594a (3d ed. 1940).
6. See MCCORMICK, EVIDENCE § 243 (1954); Sutherland v. Davis, 286 Ky. 743, 151 S.W.2d 1021 (1941).
7. As Article 257 of the Civil Code of 1808, and as Article 2270 of the Civil Code of 1825.

tion, was generally incompetent to testify as a witness.[8] The application of the article in present-day law to a party-witness' disserving testimony, therefore, may appear somewhat anachronistic.[9] It seems that in several instances where the courts have had real doubt as to the verity of the disserving testimony, the article has not been applied.[10] In the instant case, the court stressed that the party-witness' testimony was completely consistent and unequivocal, and apparently would limit the application of Article 2291 to such cases. Earlier cases[11] indicate like limitation of the article, but the article itself does not so stipulate. It seems unfortunate for Louisiana to have a rule of law requiring automatic acceptance of a party's disserving testimony, even when it is completely consistent and unequivocal — an undesirable departure from the normal practice of weighing all the evidence in light of the totality of circumstances.

EXAMINATION OF WITNESSES

Sequestration of Witnesses

Whether, in a criminal case, a motion to sequester witnesses should be granted, and whether, if such an order is granted, certain witnesses should be excluded from its coverage, is a matter within the sound discretion of the trial judge.[12] The

8. Article 2260 of the Civil Code of 1825 (substantially the same as Article 248 of the Civil Code of 1808) provided:

"The competent witness of any covenant or fact, whatever it may be, in civil matters, is that who is above the age of fourteen years complete, of a sound mind, free or unfranchised, and not one of those whom the law deem infamous.

"*He must besides be not interested, neither directly nor indirectly, in the cause.*

"The husband cannot be a witness either for or against his wife, nor the wife for or against her husband; neither can ascendants with respect to their descendants, nor descendants with respect to their ascendants." (Emphasis added.)

See Brander v. Ferriday, Bennett & Co., 16 La. 296 (1840); Baudoin v. Nicolas, 12 Rob. 594 (La. 1846); Beer v. Word, 13 La. Ann. 467 (1858).

9. It has been the subject of conflicting jurisprudence in another context. In connection with the applicability of the article to allegations made by a party in pleadings in prior suits, see Farley v. Frost-Johnson Lumber Co., 133 La. 497, 63 So. 122 (1913) and numerous cases therein discussed; Sanderson v. Frost, 198 La. 295, 3 So.2d 626 (1941); *The Work of the Louisiana Supreme Court for the 1957-1958 Term—Evidence*, 19 LA. L. REV. 431, 433 (1959).

10. See Stroud v. Standard Accident Insurance Co., 90 So.2d 477 (La. App. 2d Cir. 1956); Bowers v. Hardware Mutual Casualty Co., 119 So.2d 671 (La. App. 2d Cir. 1960); Richard v. Canning, 158 So. 598 (La. App. Orl. Cir. 1935).

11. Stroud v. Standard Accident Insurance Co., 90 So.2d 477 (La. App. 2d Cir. 1956); Bowers v. Hardware Mutual Casualty Co., 119 So.2d 671 (La. App. 2d Cir. 1960).

12. LA. R.S. 15:371 (1950); State v. Barton, 207 La. 820, 22 So.2d 183

Supreme Court has stated that when an order of sequestration excludes from its coverage certain designated witnesses, the trial court will be reversed only if this exercise of discretion has been "arbitrary and unreasonable and the accused has been thereby prejudiced in obtaining a fair and impartial trial."[13] If a bill of exception has been taken to a ruling excluding certain persons from an order of sequestration, is it necessary for defense counsel, in order to protect his rights on appeal, to take an additional bill of exception when the witness in question is called to the stand to testify? Citing earlier cases, the court in *State v. Ricks*[14] indicates that the failure to take the additional bill "precludes consideration of the claim of defendant that their [the witnesses'] testimony was prejudicial to him."[15] Although this position is clearly supported by the earlier *Ferguson* case, it seems to this writer to be unwise and unduly technical. If, from the judge's per curiam on the first bill, or from other bills, it is possible for defense counsel to show that the discretionary refusal to sequester was "arbitrary or unreasonable" and that the defendant was thereby prejudiced, this should suffice. He has already registered his dissent from the judge's ruling, and should not be forced further to incur the disfavor of the witness. Thus, it is submitted, failure to renew the objection at the time the witness is called should not necessarily result in a forfeiture of his rights.

Prejudicial Effects of Unanswered Question

Prior to 1952, Article 495 of the Code of Criminal Procedure provided that a witness (including a defendant who took the stand) could be compelled to answer on cross-examination whether or not he had ever been indicted or arrested, and, if so, how many times.[16] If the witness answered in the negative, however, his cross-examiner was not allowed to prove the affirmative by extrinsic evidence.[17] In 1952, the article was amended 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."[18] (Emphasis added.) When,

(1945) and the cases therein collected; State v. Ferguson, 240 La. 593, 124 So.2d 558 (1960).

13. State v. Ferguson, 240 La. 593, 618, 124 So.2d 558, 567 (1960).
14. 242 La. 823, 138 So.2d 589 (1962).
15. *Id.* at 831, 138 So.2d at 592.
16. LA. R.S. 15:495 (1950).
17. See State v. Vastine, 172 La. 137, 133 So. 389 (1931).
18. LA. R.S. 15:495 (1950), as amended by La. Acts 1952, No. 180, § 1. A

despite the prohibitory language of the 1952 amendment, a defendant is questioned on cross-examination concerning prior arrests, are his rights violated by the mere asking of the question — whether or not objection to the question is sustained and no answer to it ever received? Phrased differently, does the statutory provision give a witness not only a right not to answer the question but also a right not to have the question asked?

In *State v. Maney*[19] the district judge had sustained defense counsel's objection to a question relative to previous arrests, and instructed the jury to disregard it. The Supreme Court found that the question violated the express language of the article as amended, but held that defendant's rights had been adequately protected, and that the district judge had not erred in refusing to grant defendant's motion for mistrial. In this connection, the court stated:

> "The question itself furnishes no objectionable information, it is the answer to that question which could furnish the prohibited information. For an accused to be permitted to stand mute before such a question with the Court's sanction gives no cause for a jury to conclude that he has or has not been arrested before, or to draw any other inference therefrom harmful to defendant."[20]

There appears to be a strong implication in the opinion that in no instance would the mere asking of the question afford a right to a mistrial. It seems to the writer, however, that this position is not in keeping with the purpose of the 1952 amendment, or the actualities of jury trial. Yet, when defense counsel is confronted with such a question, his interposition of an objection may itself strongly suggest to the jury that if the defendant were permitted to answer the question, the answer would be in the affirmative. The jury will presumably reason that otherwise the witness would have been permitted to answer. Thus the question and the objection thereto may be as communicative to the jury as the answer itself would have been. Unless a defendant is protected from the *asking* of such a question, he may suffer incurable prejudice, as well recognized by Professor Wig-

full discussion of admissibility, in Louisiana criminal trials, of evidence as to prior arrests is contained in Comment, *Admissibility of Evidence of Prior Arrests in Louisiana Criminal Trials*, 19 LA. L. REV. 684 (1959).

19. 242 La. 223, 135 So.2d 473 (1961).

20. *Id.* at 233, 135 So.2d at 476.

more,[21] a recent Note in the *Louisiana Law Review*,[22] and a recent federal case.[23] The phraseology itself of Article 495 seems clearly to set the face of the law against the wafting of innuendo[24] by the mere asking of the arrest question.

Motion To Strike

The court in *State v. Rogers*,[25] speaking of a motion to strike and quoting from *State v. Saia*,[26] stated that "insofar as we have been able to ascertain, the Louisiana Code of Criminal Procedure does not provide for any such motion in the trial of a criminal case."[27] In both the *Rogers* and *Saia* cases, the motions to strike appear to have been inappropriate and without merit.[28] For the court to use language, however, indicating that in no instance is a motion to strike available in Louisiana seems unsound. Although it is true that there is no express authority in the Code of Criminal Procedure for the motion, it is also true that there is no express prohibition or abolition of this common law device. The motion is at times useful and convenient,[29] often serving functionally the same purpose as the frequently employed motion for the court to instruct the jury to disregard certain testimony.[30] In *State v. Norris*,[31] decided during the same term as the *Rogers* case, the Supreme Court noted that "the [trial] judge, at the instance of defense counsel and as requested to do, sustained an objection to the witness' testimony, *ordered all of it stricken*, and directed the jury to disregard it."[32] (Emphasis added.) The Supreme Court expressly stated that the ruling had been correct.

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21. 6 WIGMORE, EVIDENCE § 1808 (3d ed. 1940).
22. Note, 19 LA. L. REV. 881 (1959).
23. United States v. C.L. Guild Construction Co., 193 F. Supp. 268 (D. R.I 1961).
24. See Justice Jackson's opinion in Michelson v. United States, 335 U.S. 469 (1948).
25. 241 La. 841, 132 So.2d 819 (1961).
26. 212 La. 868, 877, 33 So.2d 665, 668 (1948).
27. 241 La. 841, 898, 132 So.2d 819, 839 (1961).
28. See MCCORMICK, EVIDENCE § 52 (1954); 1 WIGMORE, EVIDENCE § 18 (3d ed. 1940).
29. *Ibid.*
30. See, for example, State v. Norris, 242 La. 1070, 141 So.2d 368 (1962); State v. Johnson, 229 La. 476, 86 So.2d 108 (1956); State v. Cooper, 223 La. 560, 66 So.2d 336 (1953); State v. Foster, 164 La. 813, 114 So. 696 (1927); State v. Armstrong, 118 La. 480, 43 So. 57 (1907); Roquest v. Boutin, 14 La. Ann. 44 (1859); MCCORMICK, EVIDENCE § 52 (1954); 1 WIGMORE, EVIDENCE § 18 (3d ed. 1940).
31. 242 La. 1070, 141 So.2d 368 (1962).
32. *Id.* at 1080-81, 141 So.2d at 372.

Article 0.2 of the Code of Criminal Procedure provides that "in matters of criminal procedure where there is no express law the common law rules of procedure shall prevail."[33] It is submitted that under the authority of this article, the motion to strike should still be available.

HEARSAY

Statements in the Presence of the Accused

In *State v. Ricks*[34] the Supreme Court, upholding the trial court's overruling of a hearsay objection, stated: "The testimony was not hearsay for, as pointed out by the judge, the entire identification incident took place in the presence of the accused."[35] With deference, it is submitted that the mere fact that an out-of-court statement was made in the presence of an accused should not *necessarily* cause it to be classified as non-hearsay, or admissible as an admission. At times, because of its independent relevance, the fact that a statement was made in the presence of an accused outside of court may be admissible as fact of utterance rather than utterance of fact, as, for example, to show that the accused was possessed of certain information.[36] If an accused remains silent or does not deny a statement made in his presence, and circumstances are such that an ordinary person would deny the validity of the statement if he believed it to be untrue, then the silence of the accused may qualify as an admission,[37] and this may well have been the situation actually presented in the instant case. Although it is sometimes assumed that an out-of-court statement made in the presence of the accused is always automatically admissible, it is submitted that the better reasoned view is to the contrary.[38] Let us consider, for example, (1) an accusatory statement made in the presence of a person (later the defendant) which he at the time expressly denied, or (2) a non-accusatory, non-incriminating statement to a third party made in the presence of a person (later the defendant) which he clearly had no interest either to affirm or deny. In such cases the presence of the defendant cer-

33. LA. R.S. 15:0.2 (1950).
34. 242 La. 823, 138 So.2d 589 (1962).
35. *Id.* at 831, 138 So.2d at 592.
36. Comment, *Hearsay and Non-Hearsay as Reflected in Louisiana Criminal Cases*, 14 LA. L. REV. 611 (1954).
37. MCCORMICK, EVIDENCE § 247 (1954); 4 WIGMORE, EVIDENCE §§ 1069-1072 (3d ed. 1940).
38. MCCORMICK, EVIDENCE § 247 (1954).

tainly should afford no magical balm transmuting the out-of-court assertion to admissible non-hearsay. Although, in the instant case, the evidence may well have been admissible as an admission, it seems unwise for Louisiana to take the position that no statement made in the presence of a defendant is subject to a hearsay objection.

Confessions

Rules for the protection of a defendant against jury consideration of an inadmissible confession are fundamental to our law. Article 451 of the Code of Criminal Procedure[39] expressly provides that before a confession may be introduced in evidence, it must be *affirmatively* shown to have been freely and voluntarily made. The decisions make it clear that the same rule applies to admissions involving criminal intent or inculpatory fact.[40] Speaking of this preliminary showing, the Supreme Court has stated[41] that unquestionably the correct practice is to require that the jury be withdrawn, for if, after the jury has heard the state's evidence in this connection, the defendant's statement is held inadmissible, a mistrial must be granted.[42]

What of indubitable knowledge coming to a juror prior to trial that a defendant has confessed? Can a juror, however conscientious, completely disregard such firsthand knowledge? Do our present rules afford defendant adequate protection?

In *State v. Rideau*,[43] a murder case, the defendant, prior to indictment, had been "interviewed" by the sheriff, and had "admitted his part in the crime."[44] The entire interview had been filmed with sound track, and telecast locally three times. Although other admissions and confessions were admitted in evidence, there is no indication in the Supreme Court's opinion that the televised interview was offered or received. As might be expected, however, the effect of the public showing presented problems at the trial.

Relying in part upon the "sensational" news coverage, de-

39. LA. R.S. 15:451 (1950).
40. See *The Work of the Louisiana Supreme Court for the 1955-1956 Term—Evidence*, 17 LA. L. REV. 421, 424-25 (1957).
41. State v. Green, 221 La. 713, 730, 60 So.2d 208, 213 (1952).
42. As to the incurable effect of a remark by a district attorney relative to an inadmissible statement made by the defendant, see State v. Coleman, 140 La. 417, 73 So. 252 (1916).
43. 242 La. 431, 137 So.2d 283 (1962).
44. *Id.* at 447, 137 So.2d at 289.

fendant moved for a change of venue. The Supreme Court, citing traditional rules vesting wide discretion in the trial judge, found no error in the denial of the motion.

One of the prospective jurors, when examined on *voir dire*, had stated, in the presence of eleven jurors, that he had a fixed opinion and could not try the case solely on the evidence adduced at the trial, since he had seen the defendant confessing on television in the presence of the sheriff. The district court granted a challenge for cause and instructed the jury to disregard the remark, but denied defendant's motion for mistrial. Since the prosecution had not been responsible for the remark, the Supreme Court, relying upon prior jurisprudence, upheld the ruling.[45]

Three of the jurors who tried the defendant had testified on *voir dire* that they had seen the television "interview." Defendant's challenges for cause of these jurors had been denied by the trial court, since they had testified "that they could lay aside any opinion, give the defendant the presumption of innocence as provided by law, base their decision solely upon the evidence, and apply the law as given by the court."[46] Applying the usual test, the Supreme Court also upheld this ruling.

It seems to this writer that it would be practically impossible for even the most conscientious juror completely to disregard defendant's filmed confession. The problems inherent in a pretrial telecast of a defendant's confession were certainly not foreseen when the various traditional rules applied in the above holdings were formulated. If a defendant is to be protected from consideration of such confessions in our new electronic age, then it seems that some means must be designed either to prohibit telecasts such as that in the instant case, or to provide more effective rules for the implementation of fundamental principles.

45. A like incident occurred during the selection of an alternate juror, this time in the presence of all twelve jurors. Similar rulings were made in the district court and Supreme Court.

46. 242 La. 431, 462, 137 So.2d 283, 295 (1962).