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EVIDENCE

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IMPEACHMENT — PRIOR INCONSISTENT STATEMENTS

In *State v. Jackson*,[1] an armed robbery case, the defense used two letters to impeach the authors, the victims of the robbery who were offered as state's witnesses. On cross-examination each of the witnesses distinctly admitted making the prior inconsistent statements contained in the letters. The defense then sought to introduce the letters into evidence, but the objection of the state to the admission of the letters was sustained by the trial judge. In sustaining the ruling of the trial court, the Supreme Court held that "the letters offered in evidence were inadmissible because it is only when the witness does not distinctly admit the making of the statement contradictory to his testimony that evidence of such a statement is admissible."[2]

The applicable statute provides: "If the witness does not distinctly admit making such [contradictory] statement, evidence that he did make it is admissible."[3] In the instant case the court adhered to its prior holdings which have the effect of drawing a negative inference from the quoted portion of the statute. As early as 1896, long prior to the adoption of the present statute, the Supreme Court established this rule,[4] but at no time has the rationale been examined.

The theory underlying impeachment by prior inconsistent statement is that the trier of fact may doubt the veracity of the witness when presented with the fact that the witness has made conflicting statements concerning the same matter. Under this view, the witness is impeached at the time that he is shown to have made the conflicting statements, and this undoubtedly occurs when the witness clearly admits making the prior inconsistent statement. Only when the witness denies making the prior statement or makes an ambiguous response such as "I don't know" or "I don't remember"[5] is it necessary to complete the impeachment by proof that the witness in fact made the

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1. 248 La. 919, 183 So. 2d 305 (1966).
2. *Id.* at 922, 183 So. 2d at 306.
3. LA. R.S. 15:493 (1950), *as amended*, La. Acts 1952, No. 180, § 1.
4. State v. Goodbier, 48 La. Ann. 770, 19 So. 755 (1896).
5. State v. Johnson, 47 La. Ann. 1225, 17 So. 789 (1895).

prior inconsistent statement. The essential question, then, is whether the prior inconsistent statement was made, and not which statement is true.

When the impeachment has been completed by the admission of the witness, most courts appear to share the Louisiana view that no further evidence of the prior statement is admissible.[6] Wigmore has sharply criticized this view, taking the position that it is unfair to the impeaching party to restrict him to this "unemphatic mode" of impeachment.[7] In the usual criminal case, one of the most valuable weapons available to the defense is the ability to impeach the state's witnesses by prior inconsistent statements. Where the witness admits making a prior inconsistent statement and thereby can foreclose further inquiry and introduction into evidence of the prior statement, there is serious question as to whether the impeachment will have much meaning for the jury when determining the credibility to be assigned to the particular witness. It should be remembered that impeachment is not merely a legal formality, but is a means of enabling the trier of fact to properly evaluate the evidence presented at the trial.

IMPEACHMENT — PRIOR CONVICTIONS

The law is clear that a witness in a Louisiana criminal case may be impeached by a showing that he has been convicted of a crime.[8] The rule applies equally to a defendant who chooses to testify in his own behalf. In *State v. Perkins*,[9] the defendant, charged with negligent homicide, testified and was then asked the following question on cross-examination: "This is not the first stop sign you have ever run, is it Mrs. Perkins?" The defense objected on the ground that evidence of other traffic violations was inadmissible, but the court overruled the objection, stating: "The objection will be overruled if it has reference to a

6. See McCORMICK, EVIDENCE § 37 (1954).

7. 3 WIGMORE, EVIDENCE § 1037 (3d ed. 1940).

8. LA. R.S. 15:495 (Supp. 1952), provides: "Evidence of conviction of crime, but not of arrest, indictment or prosecution, is admissible for the purpose of impeaching the credibility of the witness, but before evidence of such former conviction can be adduced from any other source than the witness whose credibility is to be impeached, he must have been questioned on cross-examination as to such conviction, and have failed distinctly to admit the same; and 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."

9. 248 La. 293, 178 So. 2d 255 (1965).

prior offense when she was an adult." Later in the course of its cross-examination of the defendant, the prosecution, after a caution by the trial judge to interrogate as to convictions only, asked the defendant if she had been convicted in the City Court for reckless driving, knowing that a new trial had been granted in that case.

On appeal, the Supreme Court took pains to point out that the statute means what it says. This type of impeachment rests only upon prior convictions. A witness may be questioned only about convictions. He cannot be asked about specific misconduct or the details of prior offenses, nor may he be queried about an arrest or an indictment. The court reiterated its statement in *State v. Carite*[10] that the statute "sought to clothe the defendant with a mantle of protection against any evidence of prior arrests or charges for the reason that such information is prejudicial. It tends to destroy the defendant's credibility in the minds of the jurors."[11] In the instant case, the court found that the "mantle of protection was pulled aside."

Having found a substantial violation of the statutory rights of the defendant, the Supreme Court reversed the conviction and sentence and remanded the case for a new trial. In so doing, the court refused to find that the error had been cured as in *State v. Maney*,[12] because, although the trial judge had sustained an objection to the reckless driving question, he gave no immediate instruction to the jury to disregard the information it had received through the question. Rather, the court adopted the *Carite*[13] rationale that a reversal is required in order to give effect to the prohibition of the statute. As a result, prosecutors are placed on notice that a violation of the mandate of the statute, uncorrected by a prompt instruction to disregard the offending question, may well result in a reversal and a new trial.[14]

10. 244 La. 928, 155 So. 2d 21 (1963).

11. State v. Perkins, 248 La. 293, 303, 178 So. 2d 255, 259 (1965).

12. 242 La. 223, 135 So. 2d 473 (1961); commented on in *The Work of the Louisiana Appellate Courts for the 1961-1962 Term — Evidence*, 23 LA. L. REV. 406, 410 (1963).

13. State v. Carite, 244 La. 928, 155 So. 2d 21 (1963). See the discussion of this case in *The Work of the Louisiana Appellate Courts for the 1963-1964 Term — Evidence*, 25 LA. L. REV. 461, 464 (1965). The error in *State v. Carite* was the reference to a previous arrest of the accused made by the prosecutor in his closing argument.

14. Hawthorne, J., with whom McCaleb, J., joined, dissented on the basis that the questioning by the State was proper, the objectionable matter having been injected by defense counsel. The incident occurred in the following manner: "Q. Were you on or about October 21, 1964, convicted in City Court for reckless

In *State v. Brent*,[15] an aggravated rape case, defendant, a Negro, was asked the following question on cross-examination: "Was that disorderly conviction as a result of your insulting a white girl?" The trial judge in overruling the objection stated: "[T]he District Attorney can go into prior convictions. Not prior arrests, or prior anything else, just prior convictions." Noting that neither the answer to the question nor the surrounding testimony was made a part of the Bill of Exception, the Supreme Court held that so far as the bill disclosed, the trial judge properly restricted the impeachment to prior convictions. In so holding, the court stated the rule that "the prosecution may not, however, interrogate defendant concerning details of prior offenses."[16] The question here certainly sought details of the prior disorderly conviction, and the most prejudicial details imaginable. It would seem that the question in this case was at least as assertive as that presented in the *Perkins* case,[17] that is, the question itself called to the attention of the jury the highly prejudicial details of the prior conviction. Moreover, the objection to the question was overruled and hence no question of instructing the jury to disregard could be presented. It seems to the writer that this case clearly called for the application of the *Perkins* rationale and the proper course would have been to reverse the conviction and remand for a new trial.

The impeachment of a witness by showing his conviction of crime is established in criminal cases by statute.[18] No such statute governs in civil cases, and the question is thus presented as to whether this method of impeachment is applicable in civil cases. The Court of Appeal (First Circuit) has now answered this question in the affirmative. In *Middleton v. Consolidated Underwriters*,[19] a personal injury case tried before a jury, the plaintiff was asked on cross-examination whether or not he had ever been convicted of a crime, and he answered in the affirmative. Counsel then asked the plaintiff to describe the nature of the crime. Plaintiff's objection to this question was overruled,

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driving? (Defense Counsel): Your Honor, I object to that. The District Attorney well knows it is an improper question. There has been no conviction. The Court granted a new trial in that case, and the District Attorney knows that. THE COURT: The objection is maintained. (sic.)"

15. 248 La. 1072, 184 So. 2d 14 (1966).

16. *Id.* at 1087, 184 So. 2d at 19.

17. State v. Perkins, 248 La. 293, 178 So. 2d 255 (1965).

18. La. R.S. 15:495 (1950), *as amended*, La. Acts 1952, No. 180, § 1.

19. 185 So.2d 307 (La. App. 1st Cir. 1966).

he was instructed to answer and did so, describing a felony involving dishonesty committed some twenty years before.

In upholding the ruling of the trial court, the court of appeal stated:

> "In every case involving testimonial evidence, the trier of fact, in this case, the jury, is faced with the question of whether to believe the testimony of any given witness, or differently phrased, is faced with the task of assessing the credibility of the witness. One of the material factors bearing on the issue of credibility is the character of the witness for truthfulness, and one of the main functions of the cross-examination is to afford an opportunity to elicit answers which will impeach the truthfulness or credibility of the opponent's witnesses. We therefore believe that prior convictions of a crime and the nature of the crime may be inquired into for impeachment purposes on cross-examination."[20]

There is no valid reason why impeachment by conviction for a previous crime should not be applied to civil cases as well as criminal. The credibility of a witness is just as crucial a consideration in either type of case, and the trier of fact is certainly entitled to receive any information that might shed light on the weight to be attached to particular testimony.

The court of appeal did not content itself with the above statement of general availability of this method of impeachment in civil cases, however. In considering the propriety of the question asking plaintiff to describe the nature of the crime for which he was convicted, the court said this: "In substance, we feel that cross-examination of a witness which seeks to elicit from that witness facts *as to the commission of and details of* any crime committed by that witness is proper cross-examination in that it is as relevant a consideration to be used in evaluating the credibility of a witness as are many other factors."[21]

This would appear to broaden the usual scope of this type of impeachment considerably and to establish a scope at variance with that applied by the Supreme Court in criminal cases.[22] It

20. *Id.* at 309.

21. *Id.* at 310 (emphasis added).

22. "The prosecution may not, however, interrogate defendant concerning details of prior offenses." State v. Brent, 248 La. 1072, 184 So. 2d 14, 19 (1966); see State v. Perkins, 248 La. 293, 178 So. 2d 255 (1965); State v. Danna, 170 La. 755, 129 So. 154, 155 (1930).

seems of doubtful value to allow cross-examination concerning the commission of and details of a crime where a conviction has resulted. The late Professor McCormick saw the problem as follows:

> "How far may the cross-examiner go in his inquiries about convictions? He may ask about the name of the crime committed, as murder or embezzlement, and the punishment awarded. It will certainly add to the pungency of the impeachment where the crime was an aggravated one if he may ask about the circumstances, such as in a conviction of murder whether the victim was a baby, the niece of the witness. And it is argued that since proof by record is allowable, and the record would show many of these circumstances, the cross-examination should at least be permitted to touch all the facts that the record would. On the whole, however, the more reasonable practice, minimizing prejudice and distraction from the issues, is the one generally prevailing that beyond the name of the crime, the time and place of conviction, and the punishment, further details such as the name of the victim and the aggravating circumstances may not be inquired into."[23]

It is submitted that an adherence to the McCormick view would be a more proper and reasonable result. It is also the belief of this writer that at least in civil cases impeachment by prior conviction should be limited to convictions within a reasonable degree of proximity to the time of the trial. To expose a witness or party in a civil case to cross-examination concerning a criminal conviction "some twenty years before" may well be to defeat the ends of justice. The choice between testifying and thus disclosing the skeleton in the closet and not testifying and thus risking the defeat of a just claim is indeed a distasteful one. Justice may indeed be blind, but it need not be both blind and insensitive.

PHOTOGRAPHS—FOUNDATION FOR ADMISSIBILITY

In *Launey v. Traders & Gen. Ins. Co.*,[24] the Court of Appeal for the Third Circuit reviewed the authorities concerning the

23. MCCORMICK, EVIDENCE § 43, at 92 (1954).

24. 169 So. 2d 757 (La. App. 3d Cir. 1964); commented on in *The Work of the Louisiana Appellate Courts for the 1964-1965 Term — Evidence*, 26 LA. L. REV. 606, 618 (1966).

admissibility of photographs and the nature and extent of the preliminary foundation to be required. In the course of the opinion the court said:

> "The present photographs, being identified as accurate representations of young Launey's appearance at the time taken, are therefore admissible for the purpose of demonstrating the nature of his initial facial injuries. If the defendant felt that there were distortions despite the authenticating evidence, it was open to the defendant to produce testimony to such effect from other witnesses or from the photographer himself, presumably being entitled to call the latter under cross-examination if the pictures had been made at the order of the plaintiff or his attorney, LSA-C.C.P. Art. 1634."[25]

In the last term, the Court of Appeal for the First Circuit had occasion to consider the matter of the foundation necessary for the admission of photographs. In *United States Fid. & Guar. Co. v. Duet*,[26] the defendants sought to introduce two photographs depicting the area around an intersection which was the scene of an automobile collision out of which this case arose. The foundation for the introduction of these photographs was limited to a series of questions presented to one of the defendants as to whether or not the photographs correctly depicted the scene. The objection that "the usual proper foundation had not been laid for the introduction" was sustained.

The court in answer to appellants' reliance on the *Launey* case as justification for admitting the photographs stated:

> "We do not believe that this case can stand as authority for the introduction of these photographs in the instant case. Nothing in the record indicates when these photographs were taken, and this, despite Miss Duet's identification of them, makes them completely valueless and completely irrelevant to this suit. These photographs may have been taken three years prior to the accident, they may have been taken the day after the accident, or they may have been taken two years after the accident. In the absence of any testimony other than that of Miss Duet, we must hold that the identification and authentication of these photographs adduced by

25. *Id.* at 760.
26. 177 So. 2d 362 (La. App. 1st Cir. 1965).

> counsel at the time of the trial falls far short of the normal requirements set out by the rules of evidence."[27]

Thus, without citation of authority or any attempt to state the "normal requirements set out by the rules of evidence," the court has created some uncertainty as to the application of the *Launey*[28] case and the requirements of the foundation necessary to the introduction of photographs. It would seem that the court ignored the basic distinction between the requirements for admissibility of evidence and the factors which may affect the weight to be given to a particular piece of evidence by the trier of fact. In modern times the admissibility of photographs has rested upon the fact that some witness testifies that the photograph accurately portrays a particular scene. The accuracy of the photo therefore rests upon the testimony under oath of the authenticating witness, and this witness, is, of course, subject to cross-examination and any other evidence may be presented to diminish the weight to be given the photograph. Professor McCormick pointed this out in the following passage:

> "As with demonstrative evidence generally, the prime condition on admissibility is that the photograph be identified by a witness as a portrayal of certain facts relevant to the issue, and verified by such a witness on personal knowledge as a correct representation of these facts. The witness who thus lays the foundation need not be the photographer nor need the witness know anything of the time or conditions of the taking. It is the facts represented, the scene or the object, that he must know about, and when this knowledge is shown, he can say whether the photograph correctly portrays these facts."[29]

It is submitted that this is the proper test for the authentication of photographs, and that this test was met in the instant case. If the time of taking of these photographs was important in this case, "The opposing litigant has the right, of course, to bring out the differences in conditions and circumstances between the time of the accident and the taking of the picture, both by cross-examination of the witness presenting the photographs and by other competent evidence."[30]

27. *Id.* at 306.
28. Launey v. Traders & Gen. Ins. Co., 169 So. 2d 757 (La. App. 3d Cir. 1964).
29. McCormick, Evidence § 181, at 387 (1954).
30. Fuqua v. Martin, 40 So. 2d 404, 407 (La. App. 2d Cir. 1949).

DISCOVERY — CRIMINAL CASES

In *State v. Dickson*,[31] a narcotics case, defendant again attempted to establish a right of discovery in criminal cases. In this case defendant filed a prayer for oyer seeking any evidence in typewritten form, on tape recordings, in moving pictures or otherwise recorded by electronic devices. The state had in its possession a moving picture apparently showing the accused in the act of committing the crime charged. In refusing to allow such discovery the Supreme Court restated its prior holdings in *State v. Dorsey*[32] and *State v. Pailet*:[33] "All evidence relating to a pending criminal trial which is in the possession of the district attorney or the police is privileged; and it is not subject to pre-trial inspection by the accused, an exception to this rule being written confessions of the accused."[34] Since the new Code of Criminal Procedure fails to provide for discovery in criminal cases, it can be expected that the Supreme Court will maintain its present attitude barring such discovery.

CROSS-EXAMINATION OF ADVERSARY

The courts of appeal have considered two aspects of the right of a party to call an adverse party as a witness under cross-examination. In *Brown v. Brown*[35] the court held that a civil enforcement proceeding under the Reciprocal Enforcement of Support Law[36] is subject to the rules of civil procedure governing ordinary civil actions. In this case the wife had obtained a support order in Oregon and sought enforcement in Louisiana. Despite the fact that the defendant-husband had no opportunity to cross-examine the plaintiff-wife in Oregon, the court determined that the wife could establish her case by calling the husband as a witness under cross-examination. This decision has the effect of providing a nonresident plaintiff with a much more effective method of proof than would otherwise be available in non-support cases.

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31. 248 La. 500, 180 So. 2d 403 (1965).
32. 207 La. 928, 22 So. 2d 273 (1945).
33. 246 La. 483, 165 So. 2d 294 (1964).
34. 248 La. 500, 504, 180 So. 2d 403, 404 (1965). The Supreme Court has also held that a bill of particulars may not be used to obtain a pre-trial revelation of the evidence to be used by the State or to determine whether the State is prepared to prove certain elements of the crime charged. State v. Bourg, 248 La. 844, 182 So. 2d 510 (1966).
35. 185 So. 2d 286 (La. App. 1st Cir. 1966).
36. LA. R.S. 13:1661-1673 (1950).

The Court of Appeal for the Fourth Circuit has reviewed the question of the use of the testimony of one defendant under cross-examination against another defendant. In *Rancatore v. Evans*,[37] the court held that plaintiff may not use the testimony of an insured given under cross-examination against the insurer, and further that the adverse testimony of one defendant cannot be used by that defendant against a co-defendant.

In *State v. Brent*[38] the defense met with failure in an attempt to create a doctrine whereby a witness in a criminal case could be called under cross-examination. The Supreme Court, pointing out that there exists no authority for the proposition urged by the defendant, held that when the defendant calls a witness, not yet called by the state, that witness becomes a defense witness and may not be cross-examined. In addition, the defense by calling a witness vouches for the credibility of the witness and may not impeach the witness except to the limited extent provided by statute.[39] If, under the circumstances of a particular case, it would be unfair to require the defendant to call a particular witness possessing important knowledge of relevant facts, the proper solution would be for the judge to call the person as a court witness and to make the witness available for examination as under cross-examination.[40]

DISCOVERY-WORK PRODUCT PRIVILEGE

The Code of Civil Procedure[41] prohibits the production or inspection of any writing reflecting the mental impressions, conclusions, opinions or theories of either an attorney or an expert, but does the prohibition extend to the use of interrogatories to obtain that information? The Court of Appeal for the Fourth Circuit in *Barnett v. Barnett Enterprises, Inc.*,[42] refused to give the statute an unduly narrow interpretation and held:

> "While the Article 1452 in terms refers only to *writings* we are of the opinion that what the Legislature must have intended to forbid was the revelation of any of the conclusions of experts and not merely the physical viewing or copying

37. 182 So. 2d 102 (La. App. 4th Cir. 1966).
38. 248 La. 1072, 184 So. 2d 14 (1966).
39. LA. R.S. 15:487 (1950).
40. See 9 WIGMORE, EVIDENCE § 2484 (1940); MCCORMICK, EVIDENCE § 8 (1954).
41. LA. CODE OF CIVIL PROCEDURE art. 1452 (1960).
42. 182 So. 2d 728 (La. App. 4th Cir. 1966).

> of their writings. We cannot hold that the Legislature intended on the one hand to forbid the production or inspection of any part of the writing that reflects the conclusions or opinions of an expert and on the other hand to permit such conclusions or opinions to be obtained by oral depositions or by answers to interrogatories. To so hold would lead to the absurdity of shielding the physical writing from view while permitting the revelation of its contents, and would result from a practical standpoint in the complete nullification of the prohibition contained in Article 1452."[43]

The court then specifically held that article 1452 protects a party against being compelled to disclose in any manner the conclusions and opinions of experts or attorneys which are obtained or prepared in anticipation of litigation or preparation for trial.

DEPOSITIONS — USE AT TRIAL

For many years trial attorneys have been concerned with the best method of presentation of a deposition to a jury where the deposition may be admitted into evidence.[44] The usual method of reading the deposition, whether by counsel or by the court reporter, leaves much to be desired. The credibility factors which attach to and become an important part of oral testimony are for the most part lost in a dull reading of a document, often of considerable length. In *Luquette v. Bouillion*,[45] counsel for the plaintiffs, at considerable cost, I would suspect, showed a considerable degree of ingenuity by having a sound movie film made at the time a deposition was taken. The deposition was taken in full conformity with the provisions of the Code of Civil Procedure,[46] and the deposition was preserved in writing and transcribed under oath. At trial, the movie film was offered, but the trial judge refused to permit the jury to view the deposition in this form and the deposition was read to the jury by the court reporter. The court of appeal found it unnecessary to express any views as to plaintiffs' right to show the film on the basis that no prejudice had been demonstrated. Citing the wide discretion of the trial court in determining whether to allow the presenta-

43. *Id.* at 730-31.
44. The use of depositions at trial is governed by LA. CODE OF CIVIL PROCEDURE art. 1428 (1960).
45. 184 So. 2d 766 (La. App. 3d Cir. 1966).
46. LA. CODE OF CIVIL PROCEDURE arts. 1453, 1455, 1456 (1960).

tion of evidence through properly authenticated motion pictures,[47] the court found no abuse of discretion by the trial judge.

Although the cost factor involved will prevent any extensive use of this technique for recording depositions, a sound film of the proceedings, properly authenticated, should certainly be admissible if the deposition is otherwise admissible at trial. This is the best possible type of substitute for oral testimony in open court, and to exclude such a film seems to this writer to constitute a clear abuse of the discretion of the trial judge. A party has the right to present his case in the best possible manner consistent with the rules of evidence, and this includes the right to bring before the trier of facts all of the credibility factors which play such an important part in any fact determination. To place an unreasonably broad degree of discretion over the production of evidence in the trial judge makes the task of adequate preparation for trial even more difficult and, as here, tends to inhibit the resourceful and intelligent use of new and meritorious techniques.

47. Carvell v. Winn, 154 So. 2d 788 (La. App. 3d Cir. 1963).