Louisiana Law Review

Volume 29 | Number 2
The Work of the Louisiana Appellate Courts for the 1967-1968 Term: A Symposium
February 1969

Procedure: Evidence

George W. Pugh

Georgia had recently instituted a new post-conviction remedy, decided to hold petitioner's application for habeas corpus in abeyance until the new Georgia remedy could be tried. The same "hold-in-abeyance" attitude toward new state post-conviction remedies can be found in a number of other cases in widely divergent geographical areas, including the courts of appeals in the third, ninth and tenth circuits.[54]

It is true that in some circuits the federal courts have taken a negative approach, announcing that *unless* the state demonstrates a "swift and imperative" remedy, federal courts will grant application for habeas corpus.[55] At present, the effectiveness of state "due process" remedies is, at the worst, an open question; and it would be premature to jettison the "due process" ground from Louisiana's expanded post-conviction remedy.

The guiding principle in this matter should, hopefully, be the one enunciated in *Fay v. Noia,* where Mr. Justice Brennan stated that, "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity for the state courts to correct a constitutional violation."[56]

EVIDENCE

*George W. Pugh**

BURDEN OF PROOF

"No Doubt at All"

What is the burden of proof required to change an entry on a birth certificate as to race? *State ex rel. Pritchard v. Louisiana State Board of Health*[1] was an action brought by a person designated as "colored" on her birth certificate to correct it to reflect that she is a member of the white race. The court considered "established" that relator had "lived as a white person"

54. In Hill v. Dutton, 277 F. Supp. 324 (N.D. Ga. 1967), the court agreed that "Georgia has equipped itself with flexible adequate tools to meet Georgia's responsibility in the vindication of federal constitutional rights in the trial of criminal cases. This is where it belongs. The role of the Federal Courts will be, as it should be, more and more reduced." *Id.* at 326. *See also* United States *ex rel.* Singer v. Myers, 384 F.2d 279 (3d Cir. 1967); United States *ex rel.* Walker v. Young, 388 F.2d 675 (9th Cir. 1967); Kennell v. Crouse, 384 F.2d 811 (10th Cir. 1967); Childress v. Beto, 273 F. Supp. 401 (S.D. Tex. 1967); Knox v. Maxwell, 277 F. Supp. 593 (N.D. Ohio 1967).

55. See, *e.g.*, United States *ex rel.* Harper v. Rundle, 278 F. Supp. 819 (E.D. Pa. 1968); United States *ex rel.* Shelton v. Rundle, 279 F. Supp. 1013 (E.D. Pa. 1967).

56. 372 U.S. 391, 419-20 (1963).

*Professor of Law, Louisiana State University.

1. 198 So.2d 490 (La. App. 4th Cir. 1967).

and had been "accepted as such by the community in which she [lived],"[2] as had been alleged in the petition. Nevertheless the court took the position, citing authorities, that in order for relator to win she must establish her right to be registered "white" by more than merely the preponderance of evidence, more even than the test required in criminal cases (beyond a reasonable doubt), but must establish it beyond any doubt at all. With deference, it is submitted that to accord these Public Health records such an august and sacrosanct position is unwarranted, and not in keeping with the legislation[3] and the jurisprudence taken in its entirety. To give such an administrative classification as to race, arrived at without notice and hearing, the status of practically a rule of law seems an undue obeisance to bureaucratic records—one which might well be in violation of the due process of law requirements of the fourteenth amendment.

The unusual test of the *Pritchard* case seems to find its genesis in *Green v. City of New Orleans*[4] which seems to have misapplied language contained in the *Sunseri*[5] and *Treadaway*[6] cases. Both *Sunseri* and *Treadaway* concern actions in which persons commonly accepted as members of the white race were designated as "colored" in the public records. In *Sunseri,* plaintiff, a white man, brought suit to annul his marriage on the ground that his wife was "a person of color, having a traceable amount of negro blood."[7] In evidence were certificates of the Recorder of Births and Marriages of the Parish of Orleans, one of which recited that the defendant was "colored." The court correctly stated that the recitals of the certificates are "presumably correct" but that since defendant insisted that they were not correct and that she could show the true facts, the court would remand the case "since her marriage should not be annulled on the ground that she is a member of the Negro race unless all the evidence adduced leaves no room for doubt that such is the case."[8] It is to be stressed that the *Sunseri* case *did not say* that the certificates' recitals are to be accepted as conclusive unless *defendant* proves beyond any doubt that they were in error—its thrust was quite to the contrary. The fact

2. *Id.* at 491.
3. LA. R.S. 40:159 (1950).
4. 88 So.2d 76 (La. App. Orl. Cir. 1956).
5. Sunseri v. Cassagne, 191 La. 209, 185 So. 1 (1938).
6. State *ex rel.* Treadaway v. Louisiana State Board of Health, 221 La. 1048, 61 So.2d 735 (1952).
7. 191 La. 209, 211, 185 So. 1, 2 (1938).
8. *Id.* at 223, 185 So. at 5.

that the record recited that the defendant was "colored" was insufficient to establish the plaintiff's case. The marriage was to be upheld and hence the wife to be considered "white" if there was any doubt as to the matter. The *Sunseri* case speaks of the public records as being "presumably correct" and the Supreme Court has properly cited[9] the *Sunseri* case as standing for the proposition that a prima facie case is made out by the certificate's recitals. The present statute[10] similarly states that certificates on file in the division of public health statistics are "prima facie evidence of the facts therein stated."

The Orleans Court of Appeal on rehearing in the *Treadaway* case,[11] in a mandamus proceeding by a person to change the public record classification from "colored" to "white," interpreted the *Sunseri* case as meaning that a person who has been commonly accepted as a member of the Caucasian race "should not be held to be of the colored race 'unless all the evidence adduced leaves no room for doubt that such is the case.' "[12] Again, the fact that the public health records classified a party as "colored" was not to be deemed conclusive. *Despite the records*, under the circumstances, for reclassification, there must be "no doubt at all."[13] Finding that there was "no room for doubt"[14] as to its accuracy, the court of appeal upheld the recital. The Louisiana Supreme Court affirmed, using a different formulation, however, as to the burden of proof[15]—one much more in favor of the public health record recital, but by no means according them the sacrosanct quality given them later in the court of appeal decisions.

The first case to take the position that a person attacking the classification of race contained in a birth or death certificate must prove his case by more even than beyond a reasonable doubt, *i.e.*, beyond any doubt, was *Green v. City of New*

9. Villa v. Lacoste, 213 La. 654, 35 So.2d 419 (1948).

10. LA. R.S. 40:159 (1950).

11. State *ex rel.* Treadaway v. Louisiana State Board of Health, 56 So.2d 249 (La. App. Orl. Cir. 1952), affirmed by the Supreme Court, with a different formulation, however, with respect to the burden of proof question, 221 La. 1048, 61 So.2d 735 (1952).

12. 56 So.2d 249 (La. App. Orl. Cir. 1952).

13. *Id.* at 250.

14. *Id.*

15. 221 La. 1048, 1060, 61 So.2d 735, 739 (1952): "Relator must show that he has a clear legal right to have the correction made. The legal certainty of the proof submitted must be such as to compel the Registrar of Vital Statistics to perform the ministerial duty of changing the recordation from "Colored" to "White." The proof of record falls far short of any such assumption. As the name indicates, the records kept by the Registrar are vital to the general public welfare. The registration of a birthright must be given as much sanctity in the law as the registration of a property right."

Orleans,[16] which, it is submitted, rested upon a misinterpretation of the *Sunseri* and *Treadaway* litigation. *Green* was a mandamus action by a Negro, seeking to adopt a child, to have the child's birth certificate designation changed from "white" to "colored." The "no doubt at all" language which had been used to protect a person generally accepted as "white" from designation as "colored" on a public health record certificate was for the first time applied to uphold birth certificate designation—a use quite the opposite from its origins. *Green* was followed in later cases.[17] In one of these, *State ex rel. Cousin v. Louisiana State Board of Health*,[18] the Supreme Court granted writs, perhaps to overturn the *Green* line of cases, but the appeal was dismissed as moot when the applicant died. The notion that granting of writs may suggest disinclination on the part of the Supreme Court to follow *Green* was perhaps reflected in a later court of appeal case.[19]

Although the instant case certainly finds support in the later jurisprudence of the Fourth Circuit Court of Appeal,[20] it is again submitted that these decisions rest upon a misinterpretation of prior cases. It is hoped that they will be overturned by the Louisiana Supreme Court and that recitals in the public health records will be given only the authority stipulated by statute—prima facie proof of the facts therein stated.

If we as citizens are to be classified by race on birth and death certificates, then at least classification should be fairly done, with fair and reasonable procedures available to eradicate error.[21] A person's race should clearly not be administratively determined with no practical redress in the courts. If the state

16. 88 So.2d 76 (La. App. Orl. Cir. 1956).

17. *See* State *ex rel.* Cousin v. Louisiana State Board of Health, 138 So.2d 829 (La. App. 4th Cir. 1962) and State *ex rel.* Lytell v. Louisiana State Board of Health, 153 So.2d 498 (La. App. 4th Cir. 1963).

18. 138 So.2d 829 (La. App. 4th Cir. 1962).

19. State *ex rel.* Lytell v. Louisiana State Board of Health, 153 So.2d 498, 503 (La. App. 4th Cir. 1963).

20. State *ex rel.* Cousin v. Louisiana State Board of Health, 138 So.2d 829 (La. App. 4th Cir. 1962). *See also* State *ex rel.* Francis v. Louisiana State Board of Health, 179 So.2d 681 (La. App. 4th Cir. 1965), cited by the court in its opinion.

21. Interestingly, a humane recent statute provides a relatively simple procedure for changing sex classification on birth certificates after anatomical change of sex by medical techniques. In such cases the statute provides that: "The court shall require such proof as it deems necessary to be convinced that the petitioner was properly diagnosed as a transsexual or pseudo hermaphrodite, that sex reassignment or corrective surgery has been properly performed upon the petitioner, and that as a result of such surgery and subsequent medical treatment the anatomical structure of the sex of the petitioner has been changed to a sex other than that which is stated on the original birth certificate of the petitioner. LA. R.S. 40:336. Added by Acts 1968, No. 611, § 1."

can take a man's life by proving its case beyond a reasonable doubt, then surely in order to prove that the state's records are in error, a citizen should not have to prove his case "beyond any doubt."

Stopping Charts

In 1967, in *Guidry v. Grain Dealers Mut. Ins. Co.*,[22] the Court of Appeal for the Third Circuit cited the *Bergeron*[23] case from the First Circuit as one of the few cases holding stopping charts to be "admissible as independant evidence."[24] The Third Circuit expressly disagreed with the *Bergeron* case and went further to state that unless the charts have been properly introduced in evidence "with proof that they are reasonably accurate and relevant to the facts of the particular case, they should be used by the court with great caution; i.e., they should be used only for broad general comparisons and not for precise calculations to determine speed or stopping distances."[25] Apparently the court felt that judicial notice would justify use for broad general comparisons, and in such cases there is no need for charts actually to be introduced in evidence. With this the writer agrees.

During the past term, the Court of Appeal for the First Circuit in *Picard v. Joffrion*[26] stated that it did not agree that its prior decision in *Bergeron* "represents the view" that stopping charts are admissible as independent evidence, and thereafter made an effort to "dispel such idea for all time."[27]

As recognized in *Picard,* where stopping charts are sought to be introduced as independant evidence, there is a hearsay problem, for the individual who prepared the charts is not present in court, under oath and subject to cross-examination. To overcome the hearsay difficulty, both *Picard* and *Guidry* agree that evidence must be introduced to show accuracy, apparently taking the position that in such event the charts become part of the sworn testimony of the expert witness on the stand, who himself testifies to their accuracy. There is language in the *Picard* case, however, which seems contrary to that of *Guidry,* for *Picard* states that *Guidry* holds stopping charts "should not be considered by the court where they are not in-

22. 193 So.2d 873 (La. App. 3d Cir. 1967).
23. Bergeron v. Hetherwick, 140 So.2d 440 (La. App. 1st Cir. 1962).
24. 193 So.2d 873, 876 (La. App. 3d Cir. 1967).
25. *Id.* at 877.
26. 202 So.2d 372 (La. App. 1st Cir. 1967).
27. *Id.* at 375.

troduced in evidence,"[28] whereas from the above quoted language of *Guidry*, it seems quite clear that *Guidry* would permit judicial notice of stopping charts for "broad general comparisons," although not "for precise calculations to determine speed or stopping distances." Later cases in the First and Third Circuits seem to this writer also to reflect this inconsistency.[29] The writer agrees with the approach taken in the Third Circuit.

JUDICIAL DISCRETION

Recesses and Continuances

The trial judge, of course, is in control of litigation in his court, and necessarily is vested with very broad discretion as to the means and method by which litigants may present their evidence. When and under what circumstances a litigant should be granted a recess or continuance is likewise a matter properly falling within the broad sound discretion of the trial judge. Rarely should the trial court's grant or denial be upset upon appeal. Seldom would such action by the trial court constitute denial of due process of law within the meaning of the fourteenth amendment, but in the opinion of this writer, it may be that *State v. Skinner*[30] presents such a case.

The unusual facts were these. Three defendants were jointly charged and tried before a twelve-man jury for narcotics violations, and sentences ranging from ten to fifty years (under the multiple offender statute)[31] were imposed. The state rested its case at 11:40 p.m. One of defense counsel, referring to the unquestioned fact that he was a sick man suffering from diabetes, and contending that he was "mortally tired," stated that he had about ten to twelve witnesses to put on the stand, and in effect asked for a recess or continuance until the next day. The trial court, reflecting considerable annoyance with defense counsel for past conduct and prior continuances, said that he would grant him a three-minute recess. Defense counsel then moved for a mistrial, which was denied, and a thirty-five-minute recess in fact ensued. From 12:25 a.m. until 2:45 a.m. defense counsel put on their case via seventeen witnesses (some of whom were character witnesses). Thereafter the court did recess until 9:30 a.m. the next day when closing arguments were

28. *Id.*

29. *See* Cole v. Maryland Cas. Co., 205 So.2d 863 (La. App. 3d Cir. 1968); Wheat v. Cutrer, 206 So.2d 573 (La.. App. 1st Cir. 1968).

30. 251 La. 300, 204 So.2d 370 (1967), *writs granted*, 88 S. Ct. 2031 (1968).

31. LA. R.S. 15:529.1 (1950) *as amended*, La. Acts 1958, No. 469, § 1.

held. Defendants contended and produced some evidence to show that two of the jurors were sleeping during the presentation of a portion of the evidence. The Supreme Court, however, agreed with the trial court's finding that this was not the case. The court held that the trial court's denial of defendants' motion for a continuance and of its later motions for mistrial and new trial was not reversible error—that defendants' substantive rights were neither violated nor prejudiced. With great deference, it is submitted that to insure fundamental fairness and to prevent setting an unfortunate precedent for the future a new trial should have been granted.

Celerity in trial court procedure is certainly "a consummation devoutly to be wish'd,"[32] but a too speedy trial may be too much of a good thing. There is suggestion in the record that the trial court may have become exasperated with defense counsel's prior continuances and conduct, and this is, of course, very understandable in the give and take of trial. The Supreme Court found that defense counsel remained "astute, thorough and vigorous" with no "lack of alertness or perception."[33] However, in this writer's opinion, the exceedingly long hours and marathon trial, especially in light of defense counsel's very serious illness, cast a cloud upon the proceedings.

RELEVANCY

Character

In *State v. Chapman*[34] the Supreme Court held that letters expressing the opinion of the writer as to the good character of a defendant in a criminal case are irrelevant and hence excludable by the trial court ex proprio motu. The writer certainly agrees with the trial court's and the Supreme Court's characterization of the letters as hearsay.[35] Further, under R.S. 15:479 and 483, it is quite clear that good character is to be shown only by general reputation and not by individual personal opinion of the defendant,[36] and this is an additional reason for saying that the letters are inadmissible. To say, however, that personal opinion is irrelevant—which is tantamount to saying that it has no

32. HAMLET, act III, sc. 1.
33. 251 La. 300, 348, 204 So.2d 370, 387 (1967).
34. 251 La. 1089, 208 So.2d 686 (1968).
35. *See The Work of the Louisiana Supreme Court for the 1958-1959 Term—Evidence*, 20 LA. L. REV. 335, 336 (1960).
36. *See The Work of the Louisiana Supreme Court for the 1955-1956 Term—Evidence*, 17 LA. L. REV. 421 (1957) and *The Work of the Louisiana Supreme Court for the 1958-1959 Term—Evidence*, 20 LA. L. REV. 335 (1960).

tendency in reason to establish a material proposition[37]—seems inaccurate. A personal opinion that the defendant is not the kind of person who would commit the crime might well tend to show that he is not the kind of person who would commit the crime—and hence tend to show that he did not in fact commit the crime. Professor Wigmore[38] and the *Uniform Rules of Evidence*[39] both take the position that personal opinion on the question of character is relevant, and both feel that it should come in.[40] A majority of American jurisdictions would agree with the Louisiana statutory provisions that personal opinion to show character is inadmissible, not because of irrelevancy, but because of other considerations.[41]

WITNESSES

Inference from Failure to Call

Professor McCormick has cautioned us against "spinning a web of rules"[42] around the inference or so-called presumption that may flow from failure of a party to call a witness under certain circumstances. He suggests, and this writer agrees, that rather than speak of "presumptions" in this area, it would be preferable to talk of "inferences."[43] Since in civil cases Louisiana appellate courts review both law and fact,[44] there are very few jury trials, and hence both trial and appellate courts are called upon to deal with factual matters with much more frequency than their common law counterparts. Hence it is not surprising that each year a number of appellate cases deal with the so-called "presumption from failure to call," and the past term was no exception.[45]

37. See UNIFORM RULES OF EVIDENCE R. 1(2) (1953).
38. *See* 7 WIGMORE, EVIDENCE §§ 1980-86 (3d ed. 1940).
39. UNIFORM RULES OF EVIDENCE R. 46 (1953).
40. See also the discussion in MCCORMICK, EVIDENCE §§ 153-54, 158 (1954).
41. See MCCORMICK, EVIDENCE §§ 153-54 (1954).
42. 1 C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 249 (1954).
43. *Id.*
44. LA. CONST. art. VII, §§ 10, 29.
45. See Ardoin v. Boutte, 209 So.2d 754 (La. App. 3d Cir. 1968); Hebert v. Farrington, 207 So.2d 789 (La. App. 4th Cir. 1968); Ruckstuhl & Fick, Inc. v. Parish of Jefferson, 207 So.2d 170 (La. App. 4th Cir. 1968); Fidelity & Cas. Co. of New York v. Employers Liab. Assur. Corp., 205 So.2d 623 (La. App. 1st Cir. 1967); Sun Ins. Office, Ltd. v. Batiste, 205 So.2d 71 (La. App. 4th Cir. 1968); Aguillard v. Home Ins. Co., 203 So.2d 745 (La. App. 3d Cir. 1968); Brooks v. Fondren, 199 So.2d 588 (La. App. 3d Cir. 1967); Delafosse v. Industrial Painters, Inc., 199 So.2d 559 (La. App. 3d Cir. 1967).

Whether in a particular trial a party's failure to call a witness is to be used against him is so much a part of the context in which it arises that it is extremely difficult to formulate hard and fast rules which will govern in future cases. It seems to this writer that often in this area, rather than regarding judicial pronouncements as "rules" it is preferable to construe them as discussions and analyses of particular situations—valuable as principles and guidelines for arriving at factual conclusions in future cases. Illustration of this during the past term is perhaps best found in *White v. Employers Liab. Assur. Corp.*,[46] wherein the court stated:

> "Counsel for defendants calls attention to the fact, and we think it is of significance, that no representative of the contractor was called to support the testimony of some of the witnesses for plaintiffs with regard to the road condition and warning lights. Counsel for defendants says in his brief that three employees of the contractor were summoned by counsel for plaintiffs and personal service was made of the subpoenas. The record contains these subpoenas showing such service. These witnesses were not called to testify. Ordinarily we would say that such witnesses were as available to defendants as to plaintiffs and would make no point on the absence of their testimony. However, we believe that if they were summoned by one attorney the other attorney had the right to expect them to be called by the attorney who had them summoned and if any presumption arises from the fact that such witnesses were not called, such presumption is chargeable against the attorney who summoned the witnesses. We think the situation here is sufficient to give rise to the presumption that the testimony of these three James' witnesses would not have been of assistance to plaintiffs' contention."[47]

It would be unfortunate, it seems to this writer, to interpret the foregoing as a "rule" that the non-calling of a summonsed witness is necessarily to result in an adverse inference. Whether such an inference is or is not to be drawn depends, it is submitted, upon the factual context of each case. Normally it would seem it should not be drawn.

Credibility

To what extent may a court in evaluating the testimony of a witness take into consideration the testimony given by him on

46. 210 So.2d 580 (La. App. 4th Cir. 1968).
47. *Id.* at 584.

a prior occasion and not made part of the record in the instant case? In *Olds v. Ashley*,[48] the Supreme Court said:

> ". . . [The trial court] undertook to impeach Dr. Tucker's testimony on the basis of evidence the doctor had given in other cases and not from any evidence, medical or otherwise, of a contradictory nature that had been adduced in the case at bar.
>
> "This, we find the judge was without right to do. . . ."[49]

With this the writer agrees.[50] The court goes on to say, citing a long line of cases:

> "For it is a familiar rule of law, approved time and time again by this Court, that evidence of witnesses which stands uncontradicted, as in this case, must be accepted as true."[51]

Taken completely literally, this statement seems to the writer to place the trial judge unnecessarily in a strait-jacket. If interpreted to mean, however, that the testimony of a witness must be accepted if there is nothing to cause the court to disbelieve it other than things outside the record, the statement seems thoroughly accurate: it is possible to conceive of situations where the testimony itself, though not "contradicted," may seem quite incredible, especially when the demeanor of the witness is taken into consideration. In such cases there ought to be no necessity for accepting it.

HEARSAY

Juvenile Proceedings

May hearsay evidence be received in a juvenile delinquency or juvenile neglect proceeding, despite the fact that it does not fit within any of the usually recognized exceptions to the rule? La. R.S. 13:1579.1 would appear to this reader to answer in the affirmative. The section provides:

> "In the hearing of all cases under this Part, involving petitions of juvenile delinquency or neglect, all facts connected therewith and all surrounding circumstances, including the environment and history of the child, together with any character of evidence, including hearsay evidence and opinion evidence which the court, in its discretion, may deem

48. 250 La. 935, 200 So.2d 1 (1967).
49. *Id.* at 943, 200 So.2d at 4.
50. See the discussion in 26 LA. L. REV. 618-620 (1966).
51. 250 La. 935, 943-44, 200 So.2d 1, 4 (1967).

proper, may be admissible, and the testimony of the probation officer assigned to the case shall be admissible."

In *In re State in Interest of Elliott*,[52] the Second Circuit Court of Appeal, in an action brought at the instance of the Department of Public Welfare to obtain custody of three minor children from their mother, held that the statute did not authorize the receipt of otherwise inadmissible hearsay and opinion evidence, or case workers' ex parte reports. In so holding, the court seems to this writer to be giving the statute a most strained construction. In this connection, the court stated:

> "In the interpretation of statutes, the word *'may'* means *'permissive.'* LSA-R.S. 1:3, C.C.P. Art. 5053. The word denotes discretion, in this instance, on the part of the trier of facts, that is, the court. A provision of a statute making admissible in evidence particular characters of supposed proof at the will, whim, or fancy of the court, which it may, at its discretion, in one case admit and in another exclude, establishes, in law, no rule of evidence which can be accorded any force or effect."[53]

The court went on to state that if the statute were to be otherwise interpreted, it would be abrogated by the now famous United States Supreme Court decision in *In re Gault*.[54] Although *Gault* will probably be interpreted by the United States Supreme Court to preclude use of otherwise inadmissible hearsay evidence in any *delinquency* proceeding which may result in the child's being committed to an institution in which his freedom would be curtailed, it is more questionable whether it will be extended to preclude such hearsay in child *neglect* cases such as the instant proceeding. It would not greatly surprise this writer, however, if it is so extended.

CONFESSIONS, ADMISSIONS, AND EVIDENCE OBTAINED IN VIOLATION OF CONSTITUTIONAL RIGHTS

Confessions Containing References to Other Crimes

To protect a defendant from the prejudice that would otherwise result, it is generally stated that unless there is an inde-

52. 206 So.2d 802 (La. App. 2d Cir. 1968).
53. *Id.* at 805.
54. 387 U.S. 1 (1967).

pendant relevance (as, for example, to show knowledge, intent, scheme, plan, *etc.*),[55] evidence of crimes other than that for which defendant is being tried, is inadmissible. The principle is an important one and of great significance for the protection of the rights of the accused. It partakes of our fundamental notion that a defendant's character as to probability is not at issue in a criminal case unless and until he chooses to place it at issue.

Where, in an otherwise admissible confession, the defendant has adverted to an unrelated crime which, apart therefrom would be inadmissible, is (1) the confession therefore to be excluded, (2) that portion of the confession referring to the unrelated crime to be excised, or (3) the confession in its entirety to come in?[56] The matter was again considered in *State v. Cardinale.*[57] The lower court had, over defendant's objection, permitted the entire statement to come in. The Louisiana Supreme Court affirmed, relying upon the *Maney,*[58] *Evans,*[59] and *Bailey*[60] cases and the provisions of R.S. 15:450.

Although the *Cardinale* case is supported by both the *Evans* and *Maney* decisions, those decisions rest upon *State v. Bailey* which, it is submitted, is a very shaky foundation. All four cases necessarily interpret R.S. 15:450, which provides:

> "450. *Use of confession, admission or declaration in entirety*
>
> "Every confession, admission or declaration sought to be used against any one must be used in its entirety, so that the person to be affected thereby may have the benefit of any exculpation or explanation that the whole statement may afford." (Emphasis added.)

From a reading of the article, it seems clear that the provisions of 15:450, like the past crime rule itself, were designed for the protection of the defendant. The fact that a past crime is referred to in an otherwise admissible confession should in no sense provide the state with a free pass to "get in" the unrelated

55. *See* LA. R.S. 15:446 (1950).

56. For general discussion of the problem, *see* MCCORMICK, EVIDENCE § 56 (1954).

57. 251 La. 827, 206 So.2d 510 (1968), *writs granted,* 89 S. Ct. 388 (1968).

58. State v. Maney, 242 La. 223, 135 So.2d 473 (1961).

59. State v. Evans, 249 La. 861, 192 So.2d 103 (1966).

60. State v. Bailey, 223 La. 40, 96 So.2d 34 (1957).

crime. In the foundation case of *State v. Bailey*, the *district attorney* himself offered to delete, with consent of defense counsel, that portion of the confessions which referred to the prior conviction. Upon refusal of defense counsel, the district attorney offered the confessions in evidence and at his request, the trial judge instructed the jury to *disregard* that portion of the confessions which dealt with the past conviction. In light of the foregoing, the court stated:

> "*Under the circumstances presented,* appellant is in no position to complain. Moreover, to sustain counsel's contention would ipso facto render every confession inadmissible when reference is made therein by the declarant to a prior conviction of an unrelated crime. This is not reasonable nor is it the law. See State v. Jones, 211 La. 387, 30 So.2d 127, 130."[61] (Emphasis added.)

It is submitted that rather than interpret R.S. 15:450 as *giving the state the right* to have the entire confession come in, it would be more in keeping with the spirit of the section to construe it to mean that the *defendant has the right* to force the state to introduce the confession in its entirety. Where, however, inadmissible portions of the confession can be excised without affecting the remainder, defendant should be privileged to force the excision. In the event excision is impossible, defendant should at least be entitled to jury instructions to disregard the otherwise inadmissible evidence.

Foundation Requirement for Admissions

From a negative implication it found in R.S. 15:454,[62] the Louisiana Supreme Court, as long ago as 1949, concluded that the free and voluntary foundation required for a confession is also applicable to admissions involving criminal intent or inculpatory facts.[63] It can be argued that the negative implication of the statute applies only to admissions involving criminal in-

61. *Id.* at 56, 96 So.2d at 40. Although the *Jones* case was actually decided on other grounds, it cites and quotes from authorities which in general seem to this writer to support the interpretation of 15:450 urged in the instant discussion.

62. LA. R.S. 15:454 (1950) provides: "The rule that a confession produced by threat or promise is inadmissible in evidence does not apply to admissions not involving the existence of a criminal intent."

63. State v. Robinson, 215 La. 974, 41 So.2d 848 (1949). See the discussion in 17 LA. L. REV. 421, 424 (1957).

tent, and not necessarily to all admissions of inculpatory facts. Making this argument forcefully, but recognizing that there are a number of decisions which have held that a free and voluntary foundation is necessary for any inculpatory statement, the Supreme Court in *State v. Andrus*[64] took the position that the foundation is not required for all inculpatory statements—only confessions and those involving criminal intent. The court pointed out that the new Code of Criminal Procedure, which went into effect January 1, 1967, contains provisions making certain rules applicable to both confessions and inculpatory statements "without drawing the [abovementioned] distinction."[65] The court stated that as a consequence "some confusion or conflict may possibly result,"[66] but stated that this is a matter which addresses itself to the legislature rather than to the courts. It may be in order, therefore, for the legislature either to amend 15:454 to include all inculpatory statements, or to change the articles of the Code of Criminal Procedure in this regard.

Search and Seizure—"Fruit of the Poisonous Tree"

Evidence illegally seized is inadmissible in state and federal court.[67] Presumably—again, in both state and federal court—evidence obtained in consequence of an unconstitutional seizure is likewise inadmissible,[68] provided that the relationship has not "become so attenuated as to dissipate the taint."[69] How close a relationship is required between the evidence and the seizure for the evidence to be inadmissible? Sometimes a fairly remote connection has been held to suffice.[70] Addressing itself to the problem, the United States Supreme Court in *Wong Sun v. United States* stated:

> "We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of

64. 250 La. 765, 199 So.2d 867 (1967).

65. *Id.* at 803, 199 So.2d at 880. The court cites as examples articles 703 and 768 of the Code of Criminal Procedure.

66. 250 La. 765, 803, 199 So.2d 867, 880 (1967).

67. Mapp v. Ohio, 367 U.S. 643 (1961).

68. Nardone v. United States, 308 U.S. 338 (1939).

69. *Id.* at 341. This quotation from *Nardone* was quoted approvingly in Wong Sun v. United States, 371 U.S. 471, 487-88 (1963).

70. *See* Smith v. United States, 344 F.2d 545 (D.C. Cir. 1965).

> the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' Maguire, Evidence of Guilt, 221 (1959)."[71]

State v. Jones[72] presented the problem to the Louisiana Supreme Court in a fascinating factual context. Defendant was arrested in a hotel room, and merchandise and personal property were seized. The trial court held that the arrest was illegal, and all evidence taken as a result of the illegal arrest was suppressed. An account of the arrest, however, had been published in the newspaper, and that was defendant's undoing, for in response to the newspaper account, several local merchants came forward in connection with bad checks given them by the defendant for the seized merchandise. Defendant was tried and convicted on these bad check charges. He unsuccessfully objected to the admissibility of the worthless checks as "fruit of the poisonous tree"—the illegal arrest.[73] The Supreme Court held that there was "no merit"[74] in this contention, stating:

> "The circumstance that the newspaper accounts of appellant's arrest alerted the merchants, who had accepted the worthless checks in payment for the seized merchandise, does not justify a conclusion that the evidence used in these prosecutions are the product of either the unlawful arrest or seizure. This being so, the illegality of the prior arrest and seizure is irrelevant."[75]

It may well be that the United States Supreme Court would agree. Certainly the instant case is an unusual one, and the question is really how far the "fruit of the poisonous tree" rule should be extended.

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71. 371 U.S. 471, 487-88 (1963).

72. 250 La. 1007, 201 So.2d 105 (1967).

73. An unconstitutional arrest apparently is itself a seizure within the meaning of the fourth amendment. *See* Henry v. United States, 361 U.S. 98, 100-01 (1959).

74. *Id.* at 1011, 201 So.2d at 106.

75. *Id.* at 1012-13, 201 So.2d at 107.

Search and Seizure—Consent

Under what circumstances is a person to be deemed to have "consented" to a search without a warrant, or to have waived his right to object to the admission of evidence obtained as a result of a unconstitutional search and seizure? Two cases during the past term dealt with the problem.[76]

Evidence Obtained as a Result of an Illegal Arrest by a Private Individual

Are the *Mapp*[77] and *Wong Sun*[78] rules to be interpreted to preclude admissibility of tangible or intangible evidence obtained as the result of an illegal arrest made by *private* individuals?[79] The matter was considered by the Louisiana Supreme Court in *State v. Kemp.*[80] Relying in part on the 1920 United States Supreme Court decision in *Burdeau v. McDowell,*[81] the Louisiana court answered in the negative. Whether in the future the United States Supreme Court will adhere to its position in *Burdeau* will be interesting to watch.

CONSOLIDATION AND SEVERANCE

Compulsory Process and the Privilege Against Self-Incrimination

In *State v. Kemp,*[82] two defendants were separately indicted for aggravated assault upon the same individual. The cases were consolidated, and at the trial there was evidence indicating that one of the defendants had fired upon the victim while the other waited in a getaway car. Each defendant had objected to the consolidation on the grounds that each desired to call the other as a witness. It was argued, inter alia, that the consolidation

76. State v. Andrus, 250 La. 765, 199 So.2d 867 (1967) (consent to search and seizure by a party then under arrest), and State v. Fox, 251 La. 464, 205 So.2d 42 (1967) (waiver of right to object). For an excellent discussion of waiver of constitutional rights in this area, see Comment, *Post-Conviction Remedies and Waiver of Constitutional Rights*, 26 LA. L. REV. 705 (1966). For another case during the past term dealing with waiver, or at least the loss of constitutional rights, see State v. Palmer, 251 La. 759, 206 So.2d 485 (1968).

77. Mapp v. Ohio, 367 U.S. 643 (1961).

78. Wong Sun v. United States, 371 U.S. 471 (1963).

79. For an analogous problem, see State v. Evans, 249 La. 861, 192 So.2d 103 (1966), discussed in 28 LA. L. REV. 435 (1968).

80. 251 La. 592, 205 So.2d 411 (1968).

81. 256 U.S. 465 (1920).

82. 251 La. 592, 205 So.2d 411 (1968).

thus deprived each of the defendants of the right to compulsory process of the other. The argument was rejected by the Supreme Court which reasoned that even if tried separately, the other party, when called as a witness, could have asserted his privilege against self-incrimination. This approach, however, does not seem wholly satisfying. If defendants had been tried separately, clearly each could have forced the other to take the stand and assert his privilege in open court, thereby acquiring whatever advantage might accrue.[83] On the other hand, traditionally, a *defendant* has the right not merely not to testify, but not to be called to the stand—at least, not by the state. It would have been interesting to see what would have happened in the instant case had the defendants actually attempted each to call the other to the stand. Would the refusal by the court in this context have constituted a denial of compulsory process? If each had been permitted to call the other, however, serious problems as to the violation of the privilege against self-incrimination would have been presented. Perhaps the solution is that the defendants should have been tried separately.

LIMITING INSTRUCTIONS

An out of court confession is normally admissible in court only against the defendant who made it.[84] Where two defendants are tried jointly for the same crime, and the prosecutor offers a confession by one of the defendants implicating not only himself but also the other defendant, are limiting instructions adequate to protect the non-confessing defendant? In *State v. Hopper*[85] defendants' confessions each implicated the other, and, before trial, each applied unsuccessfully for severance. The Louisiana Supreme Court affirmed the trial court's denial of severance, taking the position that the limiting instructions given the jury with respect to the confessions sufficed to protect defendants' rights. A later decision by the United States Supreme

83. Prior to the time a witness takes the stand, theoretically at least, one does not know whether the witness will assert the privilege against self-incrimination.

84. State v. West, 45 La. Ann. 928, 13 So. 173 (1893).

85. 251 La. 77, 203 So.2d 222 (1967).

Court[86] in this area reflects great skepticism as to the efficacy of such instructions to protect the accuseds' constitutional right of confrontation.[87] Whether *Hopper* will ultimately be upheld by the United States Supreme Court will be interesting to watch.[88]

86. Bruton v. United States, 391 U.S. 123 (1968).

87. See Pointer v. Texas, 380 U.S. 400 (1963), holding the sixth amendment right of confrontation applicable to the states through the fourteenth.

88. On June 17, 1968, the United States Supreme Court granted Hopper's application and remanded it to the Louisiana Supreme Court for further consideration in light of Bruton v. United States, 391 U.S. 123 (1968) and Roberts v. Russell, 88 S. Ct. 1921 (1968). As the Law Review goes to press the Louisiana Supreme Court, on reconsideration, two justices dissenting, reaffirmed the conviction, distinguishing the *Bruton* and *Roberts* cases.