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Procedure: Evidence

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unfair to the defendant," to impose this extreme penalty upon the escapee.[61] In *State v. Lampkin*[62] the intended deletion of the draconic forfeiture provision was given effect, and the Code Comment was followed in holding that the escape of a convicted burglar did not have the pre-Code effect of automatic forfeiture of his appeal. Dissenting Justice Barham disagreed with the majority of the court and with the Code Reporter as to the effect of the deletion of former La. R.S. 15:548. Justice Barham pointed out that the dismissal procedure enunciated in section 548 of the 1928 Code "had been the law by judicial pronouncement" since 1884, and was merely carried forward in that Code. However, regardless of the source of La. R.S. 15:548, its repeal and deletion from the 1966 Code of Criminal Procedure, along with the Reporter's Comment, would appear to justify the majority of the supreme court in recognizing the legislative demise of that rule. The situation might have been different if the rule had remained a rule of the jurisprudence, but it had been codified in 1928 and then repealed in 1966.

EVIDENCE

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RELEVANCY

Other Crimes

In *State v. Crook*,[1] an aggravated rape case, the supreme court upheld the trial court's permitting the prosecution to show that five days before the alleged rape for which he was being tried, defendant had raped another young woman under similar circumstances in another section of the city. The court said that it is admissible "for corroboration and to show the intent and licentious disposition of defendant."[2] Justice Barham wrote an eloquent dissenting opinion, analyzing pertinent legislation and prior statutory provisions. He forcefully contends that in the past the Louisiana Supreme Court at times has given too broad an interpretation to the so-called knowledge-intent-plan exception

61. LA. CODE CRIM. P. art. 919, Comment (c) further explains: "For example, if a man has appealed from a death sentence and he escapes, under the provisions of former R.S. 15:548 the effect is to make the escape a capital offense, since he loses his right of appeal. . . ."

62. 253 La. 337, 218 So.2d 289 (1969).

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1. 253 La. 961, 221 So.2d 473 (1969).

2. *Id.* at 973, 221 So.2d at 477.

to the general rule that prior criminal acts of a defendant are inadmissible to show guilt on a particular occasion.[3] With this the writer agrees, and feels that the admission of the questioned testimony in this case may raise serious federal constitutional questions.[4]

In the instant case, the evidence was offered by the state in its case in chief. Defendant had not put his character at issue, and therefore it was not open to the state to attack. Under traditional notions, therefore, it seems clear to this writer that the prior act was not admissible to show "the licentious disposition" of the defendant. Concluding his very persuasive dissent, Justice Barham stated:

> "We have already overextended the exception to the general rule. Some of our jurisprudence has disregarded the explicit, unambiguous language of R.S. 15:444, 15:445, and 15:446. That language excepts evidence of other offenses from the general rule of evidence only when '*knowledge* or *intent* forms an essential part of the inquiry.' I submit that this is the law, the correct law, the rational law. The majority holding will stretch the already overextended jurisprudential exception."[5]

HEARSAY

A vigorous application of the intricacies of the hearsay rule is at times awkward indeed. Confronted by a very difficult practical problem (proof of the amount of a wholesale grocery salesman's defalcation in a complicated far-flung operation with a number of customers), the Court of Appeal for the Second Circuit, in *Salley Grocer Co. v. Hartford Accident & Idem. Co.*,[6] on original hearing found the proffered testimony to be inadmissible hearsay. The evidence in question was (1) the testimony of plaintiff's assistant manager who had made an investigation and survey of the numerous outstanding customer accounts and the vendor's records with respect to same, and (2) a recapitulation prepared by him showing the shortages in the various accounts.

3. *See* LA. R.S. 15:445, 446 (1950).

4. *See* Cardinale v. Louisiana, 394 U.S. 437 (1969), where the United States Supreme Court dismissed a writ of certiorari in a case raising a similar problem on the grounds that the federal constitutional question which was the basis for the granting of the writ had not been raised or passed upon by the Louisiana Supreme Court.

5. State v. Crook, 253 La. 961, 981, 221 So.2d 473, 480 (1969).

6. 223 So.2d 5 (La. App. 2d Cir. 1969).

On rehearing, the court reversed itself, taking a very relaxed view of the hearsay rule. Finding the proffered evidence to be reliable and the circumstances necessitous, the court held it admissible in this case to establish a prima facie case as to the amount of the loss. Significantly, the Louisiana Supreme Court denied writs. The case appears to have real importance; for, unable to fit the evidence into an appropriate pigeonhole exception to the hearsay rule, but finding that it was nonetheless "reliable," and that the necessity therefor was evident, the court was willing to admit it.[7] Of course, there is much less danger in admitting hearsay when, as in the instant case, it is a civil case tried to a judge alone.

An interesting case to be considered in connection with the *Salley Grocer Co.* case is *Murray v. Murray*,[8] a custody case. Relying on prior jurisprudence, the court held that a report prepared by the State Department of Public Welfare containing the results of their investigation and their recommendations was inadmissible. In giving its reasons for the holding, the court stated that "much therein was predicated on hearsay and the parties furnishing the information were not available for cross-examination."[9] It would seem to this writer that whether or not the persons furnishing the information to the investigator had been available for cross-examination, the report itself was nonetheless hearsay and technically inadmissible. It appears that reports prepared by professional people from the Department of Public Welfare are often regarded as very helpful in custody cases and it may well be that a hearsay exception should be established to permit the reception of such reports with appropriate safeguards. Language from a prior case, *LeBlanc v. LeBlanc*,[10] quoted in the *Murray* case with apparent approval, indicated that such reports should be admissible if the opponent is first given an opportunity to see the report, to confront the *investigator* preparing it, and cross-examine him. The implication from the language of *LeBlanc* seems to be that it would not have been necessary to call the person giving the information to the inves-

7. In so holding, the court relied on the discussion in 29 AM. JUR. 2d *Evidence* §§ 496, 458 (1967). *See also* in this connection Dallas County v. Commercial Union Assur. Co., 286 F.2d 388 (5th Cir. 1961). The approach taken seems consonant with that suggested in PRELIMINARY DRAFT OF PROPOSED RULES OF EVIDENCE FOR THE UNITED STATES DISTRICT COURTS AND MAGISTRATES R. 8-02.—8-04. (March 1969).

8. 220 So.2d 790 (La. App. 1st Cir. 1969), *cert. denied*, 223 So.2d 411 (La. 1969).

9. Murray v. Murray, 220 So.2d 790, 793 (La. App. 1st Cir. 1969).

10. 194 So.2d 122 (La. App. 3d Cir. 1967).

tigator. The safeguards suggested by *Murray* may be too onerous for they may make it very difficult to get the kind of information needed for a reliable report. The questions are (1) whether a hearsay exception should be established for such reports in custody cases and (2) if so, what should be the requirements for the exception.[11]

Res Gestae—Excited Utterances

Determining whether or not an out-of-court statement offered in court is hearsay depends upon the relevancy of the statement. Is it the truth of the statement that is pertinent or the mere fact that it was said? If it is the mere fact that it was said—as in a slander case or an offer to purchase—then a non-hearsay use of the statement is involved.[12]

In *State v. Hudson*,[13] the court was confronted with the admissibility of a statement made to a police officer by the victim of a shooting (who died the next day), given immediately after the shooting while the declarant-victim held one of the culprits at bay at gunpoint. Although La. R.S. 15:447 states that statements of the participants "narrating the events" are not part of the res gestae,[14] the court, relying especially on La. R.S. 15:448[15] held that the statement was admissible under the res gestae exception to prove the truth of its contents. Rather than using the res gestae exception, it seems to this writer that it would have been preferable to find the statement admissible under the excited utterance exception.[16] The court went on to find that the declaration in question was also admissible to show the fact that

11. The *Murray* case is to be contrasted with *In re* State in Interest of Elliott, 206 So.2d 802 (La. App. 2d Cir. 1968), dealing with the admissibility of "otherwise inadmissible hearsay and opinion evidence" under LA. R.S. 13:1579.1 (1950) in neglect and delinquency cases. *See also* the discussion in *The Work of the Louisiana Appellate Courts for the 1967-1968 Term—Evidence*, 29 LA. L. REV. 310, 319 (1969).

12. *See* Comment, 14 LA. L. REV. 611 (1954).

13. 253 La. 992, 221 So.2d 484 (1969).

14. LA. R.S. 15:447 (1950) in its entirety provides: "Res gestae are events speaking for themselves under the immediate pressure of the occurrence, through the instructive, impulsive and spontaneous words and acts of the participants, and not the words of the participants when narrating the events. What forms any part of the res gestae is always admissible in evidence."

15. LA. R.S. 15:448 (1950): "To constitute res gestae the circumstances and declarations must be necessary incidents of the criminal act, or immediate concomitants of it, or form in conjunction with it one continuous transaction."

16. *See* the excellent recent Comment, *Excited Utterances and Present Sense Impressions as Exceptions to the Hearsay Rule in Louisiana*, 29 LA. L. REV. 661 (1969).

it was made. With deference, it is submitted that under the circumstances of the case it was the truth of the out-of-court statement that was relevant rather than the mere fact that it was said.

Business Records

The need for a properly drawn business record exception to the hearsay rule is quite clear, and there have been extensive developments in this area elsewhere in the country.[17] Article 2248 of the Louisiana Civil Code constitutes an inappropriate and anachronistic provision:

> "The books of merchants can not be given in evidence in their favor; they are good evidence against them, but if used as evidence, the whole must be taken together."

To avoid hardship, Louisiana courts have developed rather vague exceptions[18] to the "rule" of article 2248, and it is fair to state that the article is not always given full effect. *Talley v. Duplantis*,[19] decided during the past term, reflects the continued willingness of the courts to strain hard to avoid the harsh and impractical results of the archaic rule. It seems clear, however, that a repeal of article 2248 and appropriate legislation is much needed.

Admissions—Statement by Minor in Tort Action Against Parent

In a suit against a parent for damages occasioned by the torts of his minor child, are out-of-court statements by the child admitting the alleged act admissible against the parent as "admissions"? In *McCrossen v. Stoyka*,[20] the Fourth Circuit Court of Appeal, relying on prior Louisiana Supreme Court decisions, answered in the negative. The Louisiana cases relied on certainly support the position taken in *McCrossen v. Stoyka*, but it is submitted that such out-of-court statements are generally reliable and their admissibility desirable.[21] The proposed Uniform Rules of Evidence, in a salutary provision, would appear to make

17. *See* PRELIMINARY DRAFT OF PROPOSED RULES OF EVIDENCE FOR THE UNITED STATES DISTRICT COURTS AND MAGISTRATES R. 8-03.(b)(6), (7) and comments 185-190 (1969) and authorities cited therein; Comment, 21 LA. L. REV. 449 (1961); *The Work of the Louisiana Supreme Court for the 1957-1958 Term—Evidence*, 19 LA. L. REV. 431 (1959).

18. *See* Comment, 21 LA. L. REV. 449 (1961).

19. 213 So.2d 82 (La. App. 1st Cir. 1968).

20. 218 So.2d 669 (La. App. 4th Cir. 1969).

21. If such statements do not qualify as admissions, they may, under appropriate circumstances, be admissible as declarations against interest.

such statements admissible as vicarious admissions,[22] and the Model Code of Evidence[23] likewise seems to favor admissibility in such cases. It is to be hoped that the supreme court would reconsider the problem.

Admissions—Binding Effect of Pleadings

A party litigant is not inexorably bound by testimony given by him as a witness on the stand.[24] Also, a party is not inexorably bound by factual allegations contained in pleadings in a different proceeding.[25]

There is language in *Merriell v. Collins*,[26] a court of appeal case, indicating that a party litigant is not even bound by factual allegations in an unamended pleading in the instant proceeding, provided plaintiff testifies that he did not make such representations to his attorney and that his attorney, only, signed the petition. This position appears contrary to the provisions of Civil Code article 2291, as elucidated in *Sanderson v. Frost*[27] and *Jackson v. Gulf Ins. Co.*[28] It is submitted that until a pleading is amended, the factual allegations contained in the pleading should bind the party litigant. Otherwise, his opponent might be surprised and unduly prejudiced. If a litigant successfully contends that a factual allegation contained in his pleading is erroneous or made through error or without authority, then it appears that the remedy is to be found in the new Code of Civil Procedure's very liberal rules relative to amendment of pleadings.[29]

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22. UNIFORM RULES OF EVIDENCE rule 63(9)(c) (1964) provides:
"RULE 63, *Hearsay Evidence Excluded—Exceptions.* Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except:
". . .
"(9) *Vicarious Admissions.* As against a party, a statement which would be admissible if made by the declarant at the hearing if . . . (c) one of the issues between the party and the proponent of the evidence of the statement is a legal liability of the declarant, and the statement tends to establish that liability."

23. MODEL CODE OF EVIDENCE rule 508(c) (1942). *See also* C. MCCORMICK, EVIDENCE § 244 (1954).

24. Jackson v. Gulf Ins. Co., 250 La. 819, 199 So.2d 886 (1967); *see* discussion in *The Work of the Louisiana Appellate Courts for the 1966-1967 Term—Evidence*, 28 LA. L. REV. 429, 438 (1968); *The Work of the Louisiana Appellate Courts for the 1961-1962 Term—Evidence*, 23 LA. L. REV. 406 (1963).

25. Sanderson v. Frost, 198 La. 295, 3 So.2d 626 (1941).

26. 218 So.2d 632 (La. App. 4th Cir. 1969).

27. 198 La. 295, 3 So.2d 626 (1941).

28. 250 La. 819, 199 So.2d 886 (1967).

29. LA. CODE CIV. P. arts. 1151-1156.

WITNESSES

Impeachment

In 1967, in *State v. Barbar*,[30] the supreme court held that if the state offers evidence of a prior statement of its own witness for purposes of impeaching the witness, and the out-of-court statement is pertinent to the guilt or innocence of the defendant, it is the duty of the court on its own motion, and contemporaneously, to instruct the jury of the limited use to which the statement may properly be put—that is, to negative the testimony given by the witness on the stand, not for substantive proof of the guilt of the defendant.[31] As apparently recognized in *Barbar*, the same reasoning applies whether the witness to be impeached is defendant's witness or the state's own witness. Relying on *Barbar*, in a decision by Justice Hamiter, the court very properly applied the same rationale to an analogous situation.[32]

Scope of Redirect Examination

La. R.S. 15:280 provides that a witness who has testified to *any* fact in chief may be cross-examined on the entire case—thus adopting the so-called "broad rule" of cross-examination. The next section (La. R.S. 15:281) stipulates that redirect is to be limited to the subject matter covered on cross-examination. The section goes on to state, however, that the application of the rule is within the discretion of the trial court, provided that if the rule is relaxed, opportunity must be given the cross-examiner to recross on any matter brought out on redirect.

Where there has been redirect examination of a witness, is it contemplated that recross is to be limited to the matter covered on redirect? The above-noted statute did not cover the point, but the implication seems clear—otherwise, the symmetry would be destroyed. The suggested pattern comports with that followed elsewhere in the country.[33]

It seems to this writer that the legislature intended that the same rules would govern on recross-examination of a defendant who takes the stand. In *State v. Giles*,[34] however, the supreme

30. 250 La. 509, 197 So.2d 69 (1967).

31. *See* discussion in *The Work of the Louisiana Appellate Courts for the 1966-1967 Term—Evidence*, 28 LA. L. REV. 429, 430 (1968).

32. State v. Whitfield, 253 La. 679, 219 So.2d 493 (1969).

33. *See* C. MCCORMICK, EVIDENCE § 32 (1954); 2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 416 (1969).

34. 253 La. 533, 218 So.2d 585 (1969).

court held the contrary, relying on La. R.S. 15:462, which provides that when a defendant (or his spouse) becomes a witness, he is subject to all the rules applying to other witnesses, and "may be cross-examined upon the whole case." With deference, it is submitted that the fact that the statute provides that a defendant who takes the stand may be cross-examined on the whole case should not be interpreted to mean that the state is entitled to recross-examine as to the entire case. It is the opinion of the writer, however, that rules relative to the scope of examination and cross-examination should be general guidelines only and that the trial judge in his discretion should be able to depart therefrom in appropriate cases.

It is interesting, perhaps, to note that since the federal courts follow the "narrow rule" of cross-examination and in that court the waiver of privilege against self-incrimination is effective only to the extent of the matter covered on direct and issues going to defendant's credibility,[35] an argument can be made that because of *Malloy v. Hogan*[36] and its application of the fifth amendment privilege against self-incrimination to the states through the fourteenth amendment, the states may now be obliged to apply the "narrow rule" of cross-examination when a defendant takes the stand.[37] It is hoped, however, that any such argument would be rejected, for the "broad rule" seems much the sounder approach.

DISCOVERY

Louisiana was the first state in the country to hold that a defendant has the right to a pre-trial inspection of his written confession.[38] For reasons that seem to this writer subject to criticism,[39] the Louisiana Supreme Court has refused to expand this right of pre-trial inspection. Just this past term, the court upheld the trial court's refusal to permit defendant a pre-trial

35. *See* 2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 407 (1969).

36. 378 U.S. 1 (1964).

37. In this connection *see* Tucker v. United States, 5 F.2d 818 (8th Cir. 1925).

38. *See* State v. Dorsey, 207 La. 928, 22 So.2d 273 (1945); *See also* discussion in *The Work of the Louisiana Appellate Courts for the 1964-1965 Term—Evidence*, 26 LA. L. REV. 606, 613 (1966); *The Work of the Louisiana Supreme Court for the 1956-1957 Term—Evidence*, 18 LA. L. REV. 139, 143 (1958).

39. *See The Work of the Louisiana Appellate Courts for the 1964-1965 Term—Evidence*, 26 LA. L. REV. 606, 613 (1966); *The Work of the Louisiana Supreme Court for the 1956-1957 Term—Evidence*, 18 LA. L. REV. 139, 143 (1958).

inspection and analysis of gleanings from his clothing alleged to contain marijuana, stating the same was privileged.[40]

Is video tape of a defendant's confession a "written" confession within the meaning of *State v. Dorsey*?[41] In *State v. Hall*,[42] the court, in a well-reasoned opinion, held in the affirmative, indicating that it would hold likewise as to a wire or tape recording.

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

Confessions—Voluntariness and Waiver

It is quite clear that a person in police custody has a federal constitutional right not to answer questions put to him by the police. Under *Miranda v. Arizona*,[43] he is to be advised, *inter alia*, of this right. Although he can waive it, presumably the waiver would be ineffectual unless it were knowingly and intelligently made.[44] It would seem that such a waiver is very similar to the traditional "voluntariness" requirement for the admissibility of a confession. What if a person in police custody, prior thereto, on his own and without official inducement, had become drugged or intoxicated, and such condition clearly "loosened his tongue"?[45] The Louisiana Supreme Court in *State v. Manuel*[46] (a murder case) took what seems to this writer to be too broad a position in favor of admissibility, stating

> "To render a confession inadmissible, drug or alcohol intoxication must be of such a degree as to negate the defendant's comprehension and render him unconscious of what he is saying. If a defendant understands the statements directed to him and knows what he is saying, the confession is admissible."[47]

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40. State v. Clack, 254 La. 61, 222 So.2d 857 (1969). *See also* State v. Crook, 253 La. 961, 221 So.2d 473 (1969). For discussion as to the privilege question, *see The Work of the Louisiana Appellate Courts for the 1964-1965 Term—Evidence*, 26 LA. L. REV. 606, 613 (1966).

41. 207 La. 928, 22 So.2d 273 (1945).

42. 253 La. 425, 218 So.2d 320 (1969).

43. 384 U.S. 436 (1966).

44. Johnson v. Zerbst, 304 U.S. 458 (1938); *see* Comment, 26 LA. L. REV. 705 (1966).

45. For discussion of the problem, *see In re* Cameron, 68 Cal. 2d 487, 439 P. 2633, 67 Cal. Rptr. 529 (1968); State v. Warner, 237 A.2d 150 (Me. 1967); B. GEORGE, CONSTITUTIONAL LIMITATIONS ON EVIDENCE IN CRIMINAL CASES 299 (1969).

46. 253 La. 195, 217 So.2d 369 (1969).

47. *Id.* at 203, 217 So.2d at 371.

A federal constitutional question is, of course, at issue and ultimately the impact of antecedent "voluntary" intoxication on an in-custody confession is for the United States Supreme Court to determine.

Confessions of Co-Defendants—Limiting Instructions

As recognized in *State v. Hopper*,[48] where two defendants are tried jointly and each has issued a confession implicating not only himself but his co-defendant as well, limiting instructions by the court that the confession of each is to be used against that confessor only are inadequate to protect federal constitutional confrontation rights. Under the circumstances of *Hopper*, however, the majority held that the error involved was "harmless error."[49]

Confessions—Burden of Proof

In *State v. Skiffer*,[50] the supreme court held that the burden of proof is upon the state to establish beyond a reasonable doubt that the legal requirements for voluntariness of admissions and confessions have been complied with.[51] The court included within this rule proof that the demands of *Miranda*[52] have been met. Defendant had been arrested, given what the court found to be an incomplete *Miranda* caution, and some time thereafter made to police officers the admission in question. The court held that the state had failed to prove that it was not made during a period of "custodial interrogation" within the meaning of *Miranda*.[53] Apparently, the court would not in this context draw any distinction between the requirements for admissibility of inculpatory or exculpatory admissions made to police, or admissions involving criminal intent or inculpatory fact—a distinction drawn in a different setting in *State v. Andrus*.[54]

48. 253 La. 439, 218 So.2d 551 (1969).

49. For a discussion of harmless error in this context, *see* text accompanying note 74 *infra* and the recent United States Supreme Court decision in Harrington v. California, 395 U.S. 250 (1969).

50. 253 La. 405, 218 So.2d 313 (1969).

51. *Cf.* the discussion on the burden of proof issue in State v. Collins, 253 La. 149, 217 So.2d 182 (1968).

52. Miranda v. Arizona, 384 U.S. 436 (1966).

53. For another case during the past term holding that the state had failed to sustain its burden of proof as to the voluntariness of the inculpatory statement, *see* State v. Collins, 253 La. 149, 217 So.2d 182 (1968).

54. 250 La. 765, 199 So.2d 867 (1967); *see* discussion in *The Work of the Louisiana Appellate Courts for the 1967-1968 Term—Evidence*, 29 LA. L. REV. 310, 322 (1969).

Privilege Against Self-Incrimination—
Refusal to Take Blood Test

Schmerber v. California[55] held that the privilege against self-incrimination did not preclude the admissibility of blood taken from the veins of a suspect by the police over his protest. In so holding, the Court found that the privilege extended to "evidence of a testimonial or communicative nature"[56] not to "compulsion which makes a suspect or accused the source of 'real or physical evidence.' "[57]

In a negligent homicide case, is the *refusal* of a defendant to submit to a blood test admissible on behalf of the state? This was the problem faced in *State v. Dugas*,[58] and answered in the affirmative. Quoting and relying upon the above language from *Schmerber*, the Louisiana Supreme Court stated that "since such bodily evidence violates no privilege against self-incrimination, neither does testimony of a refusal to give bodily evidence violate that privilege."[59] With deference, the writer disagrees. Admissibility seems to be based on the notion that the statement of refusal is an admission—that the fact that the suspect refused tends to show that he *believed* himself to be guilty, or at least that he feared that the test would so indicate. It is relevant, for the incidence of intoxicated people is probably higher among those who refuse to submit to the test than among those submitting. His refusal is not "real or physical evidence"; it is an assertion that he did not want to submit to a blood test, and this assertion (or testimonial utterance) is used as the basis for inferences as to what he thought. From what the suspect thought, thus inferred, one infers a physical fact. Admittedly, the line is a thin one, but the writer believes the United States Supreme Court in *Schmerber* went about as far as it intends to go in the direction of admissibility.[60] Although, under appropriate circumstances, the state can forcibly extract blood from a suspect, it should not be able to use his mental attitude—his disinclination to submit to the test—as a basis for an inference tending to show he was intoxicated. A subsequently enacted statute[61] provides for the admissibility of refusal to submit to a blood test and it will be in-

55. 384 U.S. 757 (1966).
56. *Id.* at 761.
57. *Id.* at 764.
58. 252 La. 345, 211 So.2d 285 (1968).
59. *Id.* at 355, 211 So.2d at 289.
60. *See* Schmerber v. California, 384 U.S. 757, 765 n.9 (1966).
61. LA. R.S. 32:666 (Supp. 1968).

teresting to see what the United States Supreme Court does with the problem in future cases. It denied writs in the *Dugas* case.

Search and Seizure

In a dissenting opinion in *State v. Lampkin*,[62] Justice Barham made a very strong argument that the court erred in rejecting defendant's contention that the evidence complained of had been obtained pursuant to an illegal search warrant. He argued most persuasively that the affidavit in question did not contain sufficient facts and information to show probable cause for the issuance of the warrant, and that the affidavit and the warrant failed "to clearly and particularly designate the premises to be searched."[63]

Subsequently, in *State v. Wells*,[64] in a persuasive opinion by Justice Hamiter, the court reversed the conviction therein, holding that the evidence in question had been obtained as a result of an illegal search and seizure. The search warrant used to justify the search was held invalid because the underlying affidavit failed to recite sufficient facts to uphold the issuance of the warrant. Justice Barham concurred, noting that he did so for the additional reasons set forth in *State v. Lampkin*, and contending that the search warrant in *Lampkin* was almost identical to the one in *Wells*. It seems to this writer that the position taken by Justice Hamiter and the majority in *Wells*, and by Justice Barham in his dissenting opinion in *Lampkin* and his concurring opinion in *Wells* represents the proper view.

What is the proper scope of a search incident to a lawful arrest? In *State v. Vale*,[65] police had had a house under surveillance and had a warrant for the arrest of defendant, an occupant of the house. Police officers watched defendant come out of the house, go to an automobile parked in front of it, return to the house, and thereafter deliver to the person in the car something believed by the police officers to be narcotics. Police advanced upon the defendant; he started walking quickly towards the house, and as he reached the front steps thereof, the officers told him he was under arrest. After giving the defendant a caution as to his constitutional rights, they told him they were going to search the house, which they proceeded to do. The Louisiana

62. 253 La. 337, 218 So.2d 289 (1969).
63. *Id.* at 359, 218 So.2d at 297.
64. 253 La. 925, 221 So.2d 50 (1969).
65. 252 La. 1056, 215 So.2d 811 (1968).

Supreme Court upheld the trial court's admission of narcotics found in the house pursuant to such search, holding that the search of the house was incidental to a lawful arrest. With deference, the writer doubts whether such a search would have been upheld even under the broad view taken by the *Harris*[66] and *Rabinowitz*[67] cases. In *Chimel v. California*,[68] a case decided subsequent to the Louisiana Supreme Court's decision in *State v. Vale*, the United States Supreme Court rejected the *Harris-Rabinowitz* approach to the problem, in effect overruling these cases. The *Chimel* holding would seem to make it clear that a search such as that in *Vale* would not be authorized as incidental to a lawful arrest. In *Chimel*, the Court stated:

> "Application of sound Fourth Amendment principles to the facts of this case produces a clear result. The search here went far beyond the petitioner's person and the area from within which he might have obtained either a weapon or something that could have been used as evidence against him. There was no constitutional justification, in the absence of a search warrant, for extending the search beyond that area. The scope of search was, therefore, 'unreasonable' under the Fourth and Fourteenth Amendments, and the petitioner's conviction cannot stand."[69]

Right to Counsel—Identification

State v. Singleton[70] involves several interesting points relative to in-court eye witness identification of the defendants as the perpetrators of the crimes. Shortly after the report of the alleged crimes (rape and attempted rape), defendants had been picked up and taken to the sheriff's office. The two girls involved and their escorts were also taken to the sheriff's office, where they viewed the handcuffed suspects and identified them as the culprits. Although there had been no "line-up," the Louisiana Supreme Court, relying on *United States v. Wade*,[71] held that the

66. Harris v. United States, 331 U.S. 145 (1947).
67. United States v. Rabinowitz, 339 U.S. 56 (1950).
68. 395 U.S. 752, 89 S.Ct. 2034 (1969).
69. *Id.* at ——, 89 S.Ct. at 2043.
70. 253 La. 18, 215 So.2d 838 (1968).
71. 388 U.S. 218 (1967). The court did not discuss the questionable efficacy of the congressional attempt to repeal the rule of United States v. Wade insofar as it deals with the admissibility of eye witness testimony in federal courts (Omnibus Crime Control and Safe Streets Act § 701(a), 18 U.S.C. § 3502 (1968)), nor the possible impact of such legislation on the admissibility of eye witness testimony in state courts.

fact that defendants were unrepresented by counsel at the identification procedure and had not effectively waived their right to same, constituted a violation of their right to counsel at a critical stage of the proceedings. The court found, however, that the prosecution had "established by convincing proof" that the in-court identification was "based on observations of the accused independent of and disassociated" from the "tainted" pre-trial identification.[72] It was concluded, therefore, that the in-court identification did not violate the rule of *Wade*.

The court next considered whether the fact that the out-of-court identification was made while the suspects were handcuffed, without the protection afforded by a line-up, was itself a violation of due process of law. The Louisiana Supreme Court apparently recognized, as has the United States Supreme Court,[73] the obvious dangers in not employing the line-up identification process, but held that under the circumstances of the instant case the procedure employed (aside from the right to counsel issue discussed above) did not involve a violation of constitutional rights.

Harmless Error—Confrontation

State v. Hopper[74] was a case involving the admissibility of the confessions of two defendants, each confession implicating both defendants.[75] Initially decided by the Louisiana Supreme Court[76] before the United States Supreme Court decision in *Bruton v. United States*,[77] the case was remanded to the Louisiana Supreme Court for further consideration in light of *Bruton* and *Roberts v. Russell*.[78] On remand, a divided court again affirmed the convictions, finding that although defendants' federal constitutional confrontation rights had been violated, under the circumstances of this case the violations were "harmless error." In so deciding, the majority applied the test outlined in Louisiana Code of Criminal Procedure article 921, whereas Chief Justice

72. State v. Singleton, 253 La. 18, 30, 215 So.2d 838, 842 (1968).
73. *See* Stovall v. Denno, 388 U.S. 293 (1967).
74. 253 La. 439, 218 So.2d 551 (1969) (United States Supreme Court appeal pending).
75. For further discussion of the *Hopper* case, *see* text accompanying note 48 *supra*.
76. State v. Hopper, 251 La. 77, 203 So.2d 222 (1967); *see* discussion in *The Work of the Louisiana Appellate Courts for the 1967-1968 Term—Evidence*, 29 LA. L. REV. 310, 326 (1969).
77. 391 U.S. 123 (1968).
78. 392 U.S. 293 (1968).

Fournet and Justice Barham argued in strong dissenting opinions that the federal rule embodied in *Chapman v. California*[79] controlled and dictated a contrary result. It seems to this writer that where federal constitutional rights are involved, the federal test as to harmless error controls.[80]

In another case involving the confrontation problem,[81] the supreme court very properly held that under the circumstances presented, the admission at the trial of testimony given by a witness at the preliminary hearing violated defendant's Louisiana constitutional rights to confrontation. The court, without discussion, found that the violation constituted prejudicial, reversible error, and the writer agrees. It appears that the same result would have been reached under federal confrontation guarantees.[82]

79. 386 U.S. 18 (1967).

80. For further development of the federal test in the *Bruton* area, *see* Harrington v. California, 395 U.S. 250 (1969). It is to be noted that an appeal to the United States Supreme Court in the *Hopper* case is pending.

81. State v. Augustine, 252 La. 983, 215 So.2d 634 (1968).

82. *See* Barber v. Page, 390 U.S. 719 (1968); Pointer v. Texas, 380 U.S. 400 (1965).