Louisiana Law Review

Volume 32 | Number 2
The Work of the Louisiana Appellate Courts for the 1970-1971 Term: A Symposium
February 1972

Procedure: Evidence

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> proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal."[39]

In *State v. Rutledge*,[40] the record was barren of any reason for increasing the original one-year sentence to two and a half years. Thus, the Louisiana Supreme Court remanded the case for re-sentencing in conformity with the *Pearce* decision. If there had been a justification for the increased sentence, it was too late to supply that factual data after the appeal was taken.

Under the *Pearce* and *Rutledge* decisions, the sentencing judge who increases the sentence after a re-conviction must point to some substantial additional considerations which were not available at the time of the original sentence, and this factual basis must be made a matter of record when the new sentence is imposed.

EVIDENCE

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WITNESSES

Examination of Witnesses—Responsiveness

An attorney questioning a witness, whether on direct or cross-examination, may insist that the answer given by the witness be responsive to the question, *i.e.*, that the witness answer the question asked and *only* the question asked. In *State v. Rouse*,[1] involving theft by the use of a credit card, the prosecuting witness (the person to whom the credit card had been issued) was asked on cross-examination whether the bank (who apparently had issued the credit card) had ever confirmed to him that they had received his notification of the loss of the credit card. To this question the witness replied:

> "Well on November the 7th Mr. Ross Johnston called me and advised me that a receipt had shown up or they had gotten a call from a place in Baton Rouge that my card had been used in the name of Joe B. Smith for a lodging in a

39. 395 U.S. 711, 726 (1969).
40. 250 So.2d 734 (La. 1971).
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1. 256 La. 275, 236 So.2d 211 (1970).

> motel and that a T.V. set had been stolen from that motel and they were checking to see if Mr. Johnston knows a Joe B. Smith."[2]

Over a dissenting opinion by Justice Barham, the supreme court affirmed the trial court's refusal to instruct the jury to disregard the witness's answer as unresponsive. The supreme court held that the question was responsive; that it confirmed the loss; that absent special circumstances under which a witness is instructed by the court to the contrary, he may properly explain his answer; and that the response in question fell under the category of an explanation of an answer.

The writer agrees with the dissenting Justice in finding the answer unresponsive, for the answer does not state whether the bank confirmed to the witness that they had received his message about the loss. Instead, it relates a statement by the bank representative concerning an inquiry by a third person suggesting that an individual using the credit card issued to the prosecuting witness might have stolen a television set. Not only does it appear unresponsive, but also highly prejudicial, for it wafts an innuendo that defendant, in addition to unauthorized use of a credit card, might also have filched a television set.

Scope of Cross-Examination

It is said that prior to 1928, when Louisiana's first Code of Criminal Procedure was adopted, the law regulating the scope of cross-examination was "chaotic."[3] Articles 376 and 462 of that Code,[4] however, made it clear that Louisiana had adopted the so-called "broad rule" of cross-examination for criminal cases[5]—that a witness who "has been intentionally sworn and has testified to any single fact in his examination in chief . . . may be cross-examined upon the whole case."[6] Under article 462 of the Code of Criminal Procedure,[7] a defendant who takes the stand is "subject to all the rules that apply to other witnesses" and hence, it seems quite clear that it was intended that the "broad rule" of cross-examination is to apply to a defendant

2. *Id.* at 279, 236 So.2d at 212.
3. Comment, 10 TUL. L. REV. 294, 297 (1936).
4. Now LA. R.S. 15:280 and 462 (1950), respectively.
5. For a discussion of the problem in Louisiana civil cases, *see* Comment, 10 TUL. L. REV. 294 (1936).
6. LA. CODE CRIM. P. art. 376, now LA. R.S. 15:280 (1950).
7. Now LA. R.S. 15:462 (1950).

who takes the stand and becomes a witness at the trial on the question of guilt or innocence.[8] It has been properly held, however, that a defendant has the right to take the stand out of the presence of the jury for the restricted purpose of testifying as to the involuntariness of his alleged confession,[9] and the same approach should probably be taken to permit a defendant to testify on a motion to suppress evidence allegedly obtained by illegal means.[10]

It is interesting, perhaps, to note that the federal courts follow the "narrow rule" of cross-examination, and hence a defendant in federal court who takes the stand, in effect, waives his privilege against self-incrimination only as to matters connected with the subjects covered on direct examination.[11] An argument can be made that because of *Malloy v. Hogan*[12] 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.[13] It is hoped, however, that any such argument would be rejected, for the "broad rule" seems much the sounder approach.

There have been very few Louisiana cases since 1928 discussing cross-examination of a defendant who takes the stand to testify in his own behalf at trial before the jury. The legislative action in that year to institute the "broad rule" of cross-examination was somewhat confused and undermined during the past term by language in *State v. Richardson*,[14] wherein the court, by way of dictum, quoted with approval a 1913 opinion[15] which set forth a "narrow rule" of cross-examination in such cases. However, the court in *Richardson* after citing and quoting from the applicable statutory authority, upheld the instant cross-examination of defendant, and presumably will continue to apply the "broad rule" of cross-examination in future cases.

8. *See* State v. Sanderson, 169 La. 55, 124 So. 143 (1929).
9. State v. Thomas, 208 La. 548, 23 So.2d 212 (1945).
10. *See* Simmons v. United States, 390 U.S. 377 (1968). *But cf.* State v. Coleman, 254 La. 264, 223 So.2d 402 (1969), in which it is unclear to this writer whether defendant's offer to testify on the voluntariness question only was made with respect to testimony outside or in the presence of the jury.
11. *See* WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 416 (1969).
12. 378 U.S. 1 (1964).
13. In this connection *see* Tucker v. United States, 5 F.2d 818 (8th Cir. 1925).
14. 258 La. 62, 245 So.2d 357 (1971).
15. State v. Bellard, 132 La. 491, 61 So. 537 (1913).

IMPEACHMENT

Testimony Given Before a Grand Jury

If a witness tells a different story at a criminal trial than that told by him before the grand jury, may the state use the grand jury testimony to impeach him? Relying on provisions of the Louisiana Code of Criminal Procedure establishing the secrecy of grand jury proceedings,[16] Justice Summers, speaking for the majority of the court in *State v. Terrebonne*,[17] held that it could not. The two dissenting justices argued that under R.S. 15:493 a witness may be impeached by *any* prior contradictory statement.[18] The writer agrees with the majority, believing that R.S. 15:493 should not be read as broadly as contended by the the dissent, but rather should be interpreted as stating that whenever impeachment by prior contradictory statement is to be made, a prescribed foundation is to be laid. A forceful argument may be made in favor of a legislative relaxation of the statutory rules relative to secrecy of the grand jury proceedings which would permit a defendant, under appropriate circumstances, to have access to them. In the absence of such access by the defense, however, it would seem unduly one-sided to permit the state to use grand jury testimony to impeach when,

16. *See especially* article 434:
"Members of the grand jury, all other persons present at a grand jury meeting, and all persons having confidential access to information concerning grand jury proceedings, shall keep secret the testimony of witnesses and all other matters occurring at, or directly connected with, a meeting of the grand jury. However, after the indictment, such persons may reveal statutory irregularities in grand jury proceedings to defense counsel, the district attorney, or the court, and may testify concerning them. Such persons may disclose testimony given before the grand jury, at any time when permitted by the court, to show that a witness committed perjury in his testimony before the grand jury. A witness may discuss his testimony given before the grand jury with counsel for a person under investigation or indicted, with the district attorney, or with the court.

"Any person who violates the provisions of this article shall be in constructive contempt of court."

17. 256 La. 385, 236 So.2d 773 (1970).

18. LA. R.S. 15:493 (1950):
"Whenever the credibility of a witness is to be impeached by proof of any statement made by him contradictory to his testimony, he must first be asked whether he has made such statement, and his attention must be called to the time, place and circumstances, and to the persons to whom the alleged statement was made, in order that the witness may have an opportunity of explaining that which is prima facie contradictory. If the witness does not distinctly admit making such statement, evidence that he did make it is admissible."

because of the secrecy rule, defendant is not permitted a similar opportunity.

Prior Inconsistent Statements

In *State v. Williams*[19] and *State v. Ray*,[20] the court reiterated the traditional principle that the prior inconsistent statement of a non-party witness may be used to tear down or neutralize testimony given by the witness on the stand, but not as substantive proof of the truth of the contents of the out-of-court utterance. A line of cases had held that where the out-of-court utterance by a non-party witness implicated the defendant, the trial court was required, of its own motion, to give a contemporaneous instruction as to the limited use of the evidence.[21] In *State v. Ray*, the majority of the court, in an opinion authored by Justice Sanders, reconsidered and rejected the latter rule, taking the position that although defendants in the instant case could avail themselves of the rule, the case providing for it would be overruled prospectively. In cases hereafter tried, a defendant is to have the burden of requesting such limiting instructions. The writer fully agrees with this position taken by the court in the *Ray* case; a trial court should not be burdened with the obligation of giving such instruction *ex proprio motu*. In light of the prior jurisprudence, however, the writer shares the court's feeling that the defendants in the instant case should not be deprived of the overly generous protection afforded by the ill-advised rule; prospective overruling in such a context seems very appropriate.

EXPERT WITNESSES

Chiropractors and Unlicensed Physicians

R.S. 37:1284 provides that an unlicensed physician shall not "be allowed to testify as a medical or surgical expert in any court." Does the statute prohibit the reception of depositions containing expert testimony from out-of-state physicians? The Fourth Circuit Court of Appeal in *Hebert v. Travelers Indemnity Co.*[22] properly held that it does not—that the purpose of the

19. 258 La. 251, 246 So.2d 4 (1971).
20. 259 La. 105, 249 So.2d 540 (1971).
21. *See* State v. Barbar, 250 La. 509, 197 So.2d 69 (1967) *and* State v. Reed, 49 La. 704, 21 So. 732 (1897).
22. 239 So.2d 367 (La. App. 4th Cir. 1970).

statute was rather to prevent unlicensed physicians practicing in Louisiana from testifying as experts in the courts of this state.

Louisiana does not license chiropractors as such, and for chiropractors to be licensed they must obtain a medical license in accordance with the provisions of the Louisiana Medical Practice Act.[23] In Louisiana the practice of chiropractic is the practice of medicine and is regulated as such.[24] May an unlicensed chiropractor testify as an expert in a Louisiana court? Following a prior decision to the same effect by the Third Circuit Court of Appeal,[25] the First Circuit, in *Ducote v. Allstate Insurance Co.*,[26] permitted a chiropractor to testify as an expert. In neither case, however, was the above-mentioned statute cited or discussed. In light of the statute and pertinent jurisprudence,[27] it seems to this writer that unlicensed chiropractors should be held incapable of testifying as experts in Louisiana courts.

RELEVANCY

Other Crimes

In accordance with the presumption of innocence[28] and the principle that a defendant's character is not at issue in a criminal case unless he places it at issue, there is a well-recognized rule that past acts of misconduct allegedly committed by the defendant are inadmissible on the state's case-in-chief unless they have an independent relevancy, as, for example, to show knowledge, intent, plan, *etc.*[29] These rules are fundamental to Anglo-American criminal procedure, protecting the defendant from the prejudice that would otherwise arise in the jury's mind from

23. LA. R.S. 37:1261 (1950). *See* Louisiana State Bd. of Medical Examiners v. Fife, 162 La. 681, 111 So. 58 (1927). The Louisiana practice in this regard has been recently upheld as constitutional by the United States Supreme Court: England v. Louisiana State Bd. of Medical Examiners, 246 F. Supp. 993 (E.D. La. 1965), *aff'd*, 384 U.S. 885 (1966).

24. *See* Louisiana State Bd. of Medical Examiners v. Fife, 162 La. 681, 111 So. 58 (1927); Louisiana State Bd. of Medical Examiners v. Cronk, 157 La. 321, 102 So. 415 (1924).

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

26. 242 So.2d 103 (La. App. 1st Cir. 1970), *cert. denied*, 257 La. 618, 243 So.2d 532 (1971).

27. England v. Louisiana State Bd. of Medical Examiners, 246 F. Supp. 993 (E.D. La. 1965), *aff'd*, 384 U.S. 885 (1966); Louisiana State Bd. of Medical Examiners v. Fife, 162 La. 681, 111 So. 58 (1927); Louisiana State Bd. of Medical Examiners v. Cronk, 157 La. 321, 102 So. 415 (1924).

28. LA. CODE CRIM. P. art. 804.

29. *See* LA. R.S. 15:445 and 446 (1950).

knowledge that he is a man with a sordid past.[30] Both *State v. Montegut*[31] and *State v. Spencer*[32] afford splendid examples of instances in which past criminal acts by a defendant are properly admissible as being independently relevant to show plan, scheme, system, *etc.*[33] In both cases the state was permitted to show that at a time very near the occasions in question (a few days before in one case and a few days after in another), defendant had perpetrated an armed robbery on the same person at the same place. Even in such cases, however, it may well be that fairness demands, as Justice Barham suggests,[34] that the state put the defendant on notice of its intent to introduce such evidence.[35]

State v. Bolden,[36] on the other hand, seems to this writer to provide an example of the kind of evidence the rules were designed to exclude. The state, in an aggravated rape case, was permitted to call a witness to testify that two years prior to the instant alleged offense defendant had purportedly attempted aggravated rape upon her. Over vigorous and cogent dissents by Justices Barham and Tate, the supreme court affirmed. Both dissenting justices questioned the constitutionality of the use of such evidence. There apparently was no connection between the two alleged rapes. The real pertinence of the evidence appears to have been to show the disposition of the defendant to commit this type of crime, *i.e.*, character. The failure to give defendant advance notice of such crime seems to involve a very serious question of notice and hearing.[37]

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30. For prior discussion *see The Work of the Louisiana Appellate Courts for the 1968-1969 Term—Evidence*, 30 LA. REV. 321 (1969).

31. 257 La. 670, 243 So.2d 793 (1971).

32. 257 La. 672, 243 So.2d 793 (1971).

33. *See* State v. Hurst, 257 La. 595, 243 So.2d 269 (1971) (prior robberies of other victims in same general area with similar methods of operation within three week period held admissible to show intent); State v. Montegut, 257 La. 665, 243 So.2d 791 (1971) (evidence of robbery of another victim in close proximity of time under very similar circumstances held admissible to show system and intent); State v. Pesson, 256 La. 201, 235 So.2d 568 (1970) (prior acts of abortion allegedly committed by defendant held admissible as tending to show intent).

34. 257 La. 672, 679 n.1, 243 So.2d 793, 796 n.1 (1971).

35. *See* the discussion in State v. Billstrom, 276 Minn. 174, 149 N.W.2d 281 (1967) and State v. Spreigl, 272 Minn. 488, 139 N.W.2d 167 (1965).

36. 257 La. 60, 241 So.2d 490 (1970).

37. *See* dissent in State v. Spencer, 257 La. 672, 679 n.1, 243 So.2d 793, 796 n.1 (1971). *See* note 35 *supra* and accompanying text.

Gruesome Photographs

In *State v. Washington*,[38] Justice Sanders, speaking for the court, sets forth a good, workable statement as to the admissibility of gruesome photographs in criminal cases, recognizing that whether or not they are admissible depends on the balancing of the probative value of the evidence against the risk of undue prejudice.[39]

CONFRONTATION AND COMPULSORY PROCESS

In *State v. Holmes*,[40] a very disturbing murder case, instead of calling the attending physician or coroner to establish cause of death (a much controverted issue), the prosecution offered in evidence an "autopsy report" prepared by the coroner. Code of Criminal Procedure article 105 provides that "A coroner's report and a procès verbal of an autopsy shall be competent evidence of death and the cause thereof, but not of any other fact." There seems to be considerable doubt as to whether the document in question met the statutory requirements. The majority of the Louisiana Supreme Court, however, upheld the trial court's reception of the proffered evidence to establish cause of death, as well as the trial court's denial of defendant's motion for a continuance until the coroner himself could be examined by defendant as a defense witness relative to cause of death.

It seems to this writer that dissenting Justices Barham and Tate argue most persuasively that defendant was denied his constitutional rights of confrontation[41] and compulsory process.[42] Where the coroner is dead or otherwise unavailable, it may be reasonable to permit the introduction of his official statement as to cause of death. If the coroner is available, the statute should at least afford defendant the right to call him under cross-examination, as is provided in the Louisiana statute regulating admissibility of hospital records.[43] The use of the coroner's report under the facts of the instant case, coupled with the court's

38. 256 La. 233, 236 So.2d 23 (1970).

39. For discussion of prior cases on the subject, *see The Work of the Louisiana Supreme Court for the 1960-1961 Term—Evidence*, 22 LA. L. REV. 397, 399 (1962) and discussions cited therein.

40. 258 La. 221, 245 So.2d 707 (1971).

41. *See* Pointer v. Texas, 380 U.S. 400 (1965) *and* State v. Tims, 9 Ohio St.2d 136, 224 N.E.2d 348 (1967).

42. Washington v. Texas, 388 U.S. 14 (1967).

43. LA. R.S. 13:3714 (1950), *discussed in The Work of the Louisiana Appellate Courts for the 1969-1970 Term—Evidence*, 31 LA. L. REV. 381, 388 (1971). Contrast also the rules regulating admissibility at the trial on the

denial of defendant's motion for a brief continuance, seem to this writer to have denied the defendant due process of law. This was a murder case; the state had previously subpoenaed the coroner; defense counsel arguably was not unreasonable in relying upon such subpoena to secure the presence of the coroner; defense counsel immediately moved to subpoena the coroner and requested a continuance when he discovered that the coroner was not to testify on behalf of the state; it presumably would have involved but a short delay to secure the presence of this important public official (who, it appears, was within the state attending a convention).

HEARSAY

The rights of confrontation[44] and compulsory process,[45] and the hearsay rule, are all interrelated. Violation of the hearsay rule may involve a denial of federal constitutional rights and hence afford an aggrieved criminal defendant access to federal court.[46] Several very important cases concerning applicability of the hearsay rule were decided by the Louisiana Supreme Court during the past term.

What is or is not hearsay is a perennial problem.[47] In *State v. Maiden*,[48] an opinion authored by Justice Sanders, the court very properly held that, when the issue at the trial is identity, for a witness to testify to another witness's out-of-court identification of one of the defendants at a line-up is hearsay.[49] Despite language in another decision[50] that the testimony as to a person's out-of-court conduct is not hearsay, it seems to this

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merits of testimony of persons appointed to a sanity commission relative to the mental state of the defendant at the time of the commission of the alleged crime, and the intended inadmissibility of the report itself. LA. CODE CRIM. P. art. 653 *and* official revision comments. *But see* in this connection LA. R.S. 15:425 (1950).

44. *See* discussion of State v. Holmes, 258 La. 221, 245 So.2d 707 (1971) *supra*.

45. *See* Comment, *Hearsay, The Confrontation Guarantee and Related Problems*, 30 LA. L. REV. 651 (1970).

46. *See* State v. Favre, 255 La. 690, 232 So.2d 479 (1970), *discussed in The Work of the Louisiana Appellate Court for the 1969-1970 Term*, 31 LA. L. REV. 386 (1971), and on writ of habeas corpus in federal court, Favre v. Henderson, 318 F. Supp. 1384 (E.D. La. 1970), 444 F.2d 127 (5th Cir. 1971).

47. *See* Comment, *Hearsay and Non-Hearsay as Reflected in Louisiana Criminal Cases*, 14 LA. L. REV. 611 (1954).

48. 258 La. 417, 246 So.2d 810 (1971).

49. The court held, however, that under these circumstances its admission was harmless error.

50. State v. Roach, 256 La. 408, 236 So.2d 782 (1970).

writer that whether out-of-court conduct is or is not hearsay depends on whether the conduct was assertive in character, and if so, whether it is offered in court to prove the truth of the out-of-court assertion.[51] Often the relevance of out-of-court statements or conduct is to show the fact of the statement or conduct rather than to show the truth of an out-of-court assertion. A statement used for such a purpose is not hearsay, as was well-illustrated by two decisions rendered during the past term.[52] The fact of a complaint offered on a motion to suppress to show that there was probable cause for the arrest is a non-hearsay use of an out-of-court assertion, as recognized by the supreme court in *State v. McQueen*.[53] Similarly, the fact of a woman's offer to an "undercover" police plainclothesman to prostitute herself, coupled with acceptance by her of three twenty-dollar bills, was admissible non-hearsay in a prosecution of defendant for receiving support and maintenance from the earnings of a prostitute. Justice Sanders, speaking for the court, stated:

> "The evidentiary question is whether the words of solicitation were spoken. Without the words, the transfer of money to the barmaid is at best ambiguous. Under these circumstances, her conversation with the officer is usable, not to prove the truth of the content, but that the utterance occurred. The utterance gives color to the non-verbal conduct. The officer, of course, is able to testify as to her statement from his own perception. Such evidence is non-hearsay. Because of its relevance, it is admissible in the present case. State v. Kay, 176 La. 294, 145 So. 544; State v. Thomas, supra; McCormick on Evidence, § 228, pp. 463, 464 (1954); 6 Wigmore on Evidence (3d ed.), § 1772, pp. 190-192."[54]

By far the most interesting case on the subject decided during the past term was *State v. Raymond*,[55] a murder prosecution in which the defendant had been convicted of manslaughter.

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51. *See* Faulknor, *The "Hear-Say" Rule as a "See-Do" Rule*, 33 ROCKY MT. L. REV. 133 (1961); Comment, *Hearsay and Non-Hearsay as Reflected in Louisiana Criminal Cases*, 14 LA. L. REV. 611 (1954); UNIFORM RULES OF EVIDENCE, RULE 62(1).

52. *State v. Gonzales*, 258 La. 103, 245 So.2d 372 (1971) *and* State v. McQueen, 257 La. 684, 243 So.2d 798 (1971).

53. 257 La. 684, 243 So.2d 798 (1971). This case is to be contrasted with State v. Favre, 255 La. 690, 232 So.2d 479 (1970), and on writ of habeas corpus in federal court, Favre v. Henderson, 318 F.Supp. 1384 (E.D. La. 1970). 444 F.2d 127 (5th Cir. 1971).

54. State v. Gonzales, 258 La. 103, 107, 245 So.2d 372, 373 (1971).

55. 258 La. 1, 245 So.2d 335 (1971).

There was testimony that a couple of hours before the victim (a young male) was seen getting into a car and riding off with defendant, the defendant drove up to the place where the victim was and inquired about the victim's whereabouts. Over objection, the trial court permitted the witness to state that as defendant approached, the victim said "that punk" would want to have unnatural sexual relations with him that night, and then hid behind a tree. The majority of the supreme court sustained the action of the trial court, holding (1) that the proffered evidence was not hearsay, but rather was circumstantial evidence used to show the state of mind of the victim reflecting his fear or "emotional reaction to the presence of the defendant," and (2) that if, *arguendo*, it was hearsay, then it was admissible either under the declaration of mental state or res gestae exceptions.[56]

In the opinion of the writer the evidence should have been excluded, and its admission raises serious federal constitutional questions relative to possible violation of defendant's right of confrontation. Although the court forcefully argued that the evidence should be treated as non-hearsay, as circumstantial evidence of the victim's state of mind,[57] the difficulty, it is submitted, is that the *victim's* state of mind was not a fact in issue.[58] Most statements manifest a declarant's state of mind, but whether or not an out-of-court utterance is admissible to show that state of mind normally depends upon the relationship between the declarant's state of mind and the event in question. Where the issue is whether a declarant did or did not do a particular act, an antecedent statement by the declarant expressing an intent to do the act is often admissible to show that he thereafter fulfilled the expressed intention.[59] Where, however, the real relevance of the statement is backward-looking in character, it is submitted that the evidence should be excluded, as was well

56. Justice Tate in his concurring opinion stated that although he had "reservations as to the rationale of the majority opinion," he would hold the evidence "admissible as tending to show immediately antecedent circumstances explanatory of the killing and tending to connect the accused with it." 258 La. 1, 22, 245 So.2d 335, 342 (1971). In the opinion of the writer, the argument advanced in the text against the admissibility of the proffered evidence applies likewise to this suggested alternative avenue of admissibility.

57. *See* Comment, *Hearsay and Non-Hearsay as Reflected in Louisiana Criminal Cases*, 14 LA. L. REV. 611 (1954).

58. *See* Wright v. Tatham, 5 Cl. & Fin. 670, 7 Eng. Rep. 550 (H.L. 1888).

59. *See* Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285 (1892).

recognized by Mr. Justice Cardozo in *Shepard v. United States.*[60] If the proffered evidence had been a statement by the victim *to the defendant* that he planned to discontinue sexual relations with him, then the statement would surely have been admissible as tending to show *defendant's* state of mind, giving him a motive for the crime. Instead, however, this was a statement made by the victim to a *third party* adverting to *prior* unnatural (and highly prejudicial) sexual acts, which presumably would have significant impact on the mind of the jury.[61] The thrust of the statement is that the victim did not want to be with the defendant and thus, this statement is to be contrasted with cases of a declaration of future intent offered to show that the intent was in fact carried out.[62]

As Justice Barham points out in his dissenting opinion, since the statement is disconnected in time and place with the homicide, it does not appear to meet the test of R.S. 15:447 and 448 for admissibility as part of the res gestae. This was an unsworn accusation against defendant from a person now deceased, of antecedent unnatural sexual acts; defendant had no opportunity to cross-examine the victim. In the opinion of the writer, whether or not the statement is classified as hearsay, it should have been excluded for the same reasons that give rise to the hearsay exclusionary rule.

Admissions—Civil Cases

To show contributory negligence, defendant insurance company in *Farris v. Baker*[63] offered a statement taken and written by its insurance adjuster, signed by plaintiff. At the trial the plaintiff denied having made the statement, but did not deny signing the document attributed to her. The Second Circuit Court of Appeal upheld the trial court's exclusion of the proffered evidence, pointing out that the plaintiff had only a fourth grade education, and that the insurance adjuster had neither been called to testify in the case nor had his deposition been taken. It seems to this writer, however, that the document, since it was

60. 290 U.S. 96 (1933).

61. *See* concurring opinion of Justice Tate, 258 La. 1, 20, 245 So.2d 335, 342 (1971) *and* dissenting opinion of Justice Barham, 258 La. 1, 22, 245 So. 2d 335, 343 (1971).

62. *See* Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285 (1892). *Cf.* People v. Alcalde, 24 Cal.2d 177, 148 P.2d 627 (1944).

63. 240 So.2d 410 (La. App. 2d Cir. 1970).

apparently signed by the plaintiff and offered by the defendant, should have been admissible against the plaintiff as an admission, and that the factors relied upon for exclusion should have gone to the weight to be given the statement rather than its admissibility.

Admissions—Criminal Cases

Article 768 of the Code of Criminal Procedure provides that if the state intends to introduce a confession or inculpatory statement, it shall give written notice to the defendant before the trial, and if it fails to do so the confession or inculpatory statement is inadmissible in evidence. In *State v. Lacoste*,[64] by inadvertence and in good faith, the prosecution had failed to give the defendant the required notice until after a number of witnesses had testified. A divided supreme court held that the trial judge had not abused his discretion, and, alternatively, that if the trial judge had committed error, it was not a "substantial violation of a constitutional or statutory right" within the meaning of article 921 of the Code of Criminal Procedure. In a very persuasive dissent Justice Sanders pointed out that article 768 uses mandatory language. He argued therefore that the matter is not one of discretion, and further, that the statutory right involved is a substantial right and hence, that defendant should have been granted a new trial.

Res Gestae

In *State v. Richard*,[65] a prosecution for possession of marijuana, the supreme court upheld the trial court's overruling of defendant's objection to witnesses' testimony that in searching the defendant pursuant to his arrest, they had found some pills in his shirt pocket and a plastic vial containing capsules. So far as the record discloses, there was no evidence that the pills or capsules contained narcotics. The supreme court, however, agreed with the trial court that the evidence was admissible as part of the res gestae. With deference, it is submitted that the mere fact that something is found pursuant to an arrest should not cause it to be admissible as part of the res gestae, if it is otherwise irrelevant. For example, if a defendant in a murder case had a lewd and lascivious picture in his wallet at

64. 256 La. 697, 237 So.2d 871 (1970).
65. 256 La. 551, 237 So.2d 374 (1970).

the time of his arrest, this should not cause the picture to be admissible. The fact that the defendant possessed it at the time of his arrest does not necessarily make it relevant, and its introduction might well prejudice the jury. If possession of the pills and capsules were illegal, then defendant should perhaps have been prosecuted for illegal possession of same in another proceeding, but again there was no showing that the pills and capsules in question were contraband or relevant. Under the circumstances of the instant case, the admission of the evidence may not have been prejudicial, but it appears unfortunate to this writer for the court to have held that the pills were admissible as part of the res gestae.

SEARCH AND SEIZURE

What may be seized and searched incidental to a lawful arrest? In *State v. Mejia*,[66] the supreme court took what seems to this writer an unduly broad approach. Pursuant to a search incidental to the legal arrest of defendant for murder in St. Charles Parish, police authorities discovered two claim checks to luggage deposited at a bus station in New Orleans, which police officers had good reason to believe contained the murder weapon, a .22-caliber pistol. Without obtaining a search warrant, police officials retrieved the luggage, and, searching same, found the weapon.

The Louisiana Supreme Court held that the pistol had been legally seized incidental to a lawful arrest, reasoning that defendant had been in constructive possession of the suitcases at the time of his arrest and that, by obtaining lawful possession of the claim checks, the police became entitled to the possession of the suitcases and hence, had the right to search them. With deference, the writer disagrees. The purpose of the search warrant requirement of the fourth amendment is to protect the privacy of individuals by insisting upon independent evaluation of evidence by an impartial magistrate. The rule permitting search of the person and the area under his immediate control incidental to a lawful arrest is in the nature of an exception to the search warrant requirement—a concession to practical necessity intended to prevent an arrested person from arming himself, or concealing or destroying evidence.[67] In the instant case

66. 257 La. 310, 242 So.2d 525 (1970).

67. *See* Chimel v. California, 393 U.S. 958 (1968) *and* State v. Roach, 256 La. 408, 236 So.2d 782 (1970).

it appears that there was ample time for police authorities to secure a search warrant, and thus obtain independent determination of probable cause by an impartial magistrate.

State v. Roach[68] concerned the admissibility of narcotics and narcotics paraphernalia found in the kitchen of defendant, allegedly incidental to the arrest of a third party in the kitchen. Finding that the arrest of the third person was but a pretext for entering and searching the home of the defendant, a divided court held that, under the circumstances, the search was unreasonable.[69]

In *State v. Lawson*[70] the supreme court upheld the trial court's suppression of evidence, finding that there was insufficient evidence to support the police officer's contention that defendant had been arrested for failure to yield to an emergency vehicle, and that the arrest for this infraction was a pretext to search for evidence. The supreme court concluded, therefore, that evidence obtained as a result of the arrest must be suppressed.

Bill of Exceptions

State v. Barnes[71] affords an excellent example of the need for overhaul of Louisiana's archaic bill of exceptions procedure. For traditional reasons eloquently and persuasively denounced by dissenting Justices Tate, Dixon, and Barham, the court refused to consider the merits of objections raised by defendant-appellant, on the grounds that several of his bills of exceptions had not been properly perfected. Although the present system is perhaps appropriate to a bygone era, Louisiana now needs a much more efficient, non-technical method of preserving one's rights on appeal in criminal cases. Where federal constitutional rights are involved Louisiana's present anachronistic rule may well be unconstitutional as violative of federal rules relative to knowing intentional waiver of federal constitutional rights, as suggested by Justice Tate.[72]

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68. 256 La. 408, 236 So.2d 782 (1970).

69. In so holding the court relied heavily on Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931) *and* United States v. Lefkowitz, 285 U.S. 452 (1932).

70. 256 La. 471, 236 So.2d 804 (1970).

71. 257 La. 1017, 245 So.2d 159 (1971) *cert denied*, 92 S. Ct. 289 (1971).

72. *See* Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294 (1967); Henry v. Mississippi, 379 U.S. 443 (1965); Fay v. Noia, 372 U.S. 391 (1963).