Louisiana Law Review

Volume 38 | Number 3
Spring 1978

Defendant-Witnesses, Confessions, and a Limited Scope of Cross-Examination

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balancing is the only way to implement the protection for the free exercise of religion afforded by the first amendment.

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DEFENDANT-WITNESSES, CONFESSIONS, AND A LIMITED SCOPE OF CROSS-EXAMINATION

Appellant was indicted for first degree murder and, prior to trial, moved to suppress a statement made to police.[1] An evidentiary hearing on this motion was held at which appellant testified and was cross-examined on whether the statement was voluntary. The trial judge denied the motion, finding the confession to have been voluntary, and the prosecution introduced evidence at trial to show that the confession was freely given.[2] Appellant's motion to testify for the limited purpose of rebutting the prosecution's evidence concerning the confession's voluntariness was denied, and defendant appealed to the Louisiana Supreme Court on that question alone. In a prospective decision,[3] the court *held* that in order to enable a jury to determine the weight to be given a confession, an accused must be allowed to testify on the voluntariness and validity of the confession, and may be cross-examined only on the issues of voluntariness and credibility, including prior convictions. *State v. Lovett*, 345 So. 2d 1139 (La. 1977).

Louisiana criminal procedure entitles a defendant in a criminal prosecution to a hearing outside the presence of the jury on the question of the admissibility of his confession.[4] This determination of admissibil-

1. It was appellant's contention that the statement given to the police was involuntary because the police took at least one other unrecorded statement from him prior to giving the *Miranda* warnings. Furthermore, appellant alleged that he was promised leniency if he would cooperate by confessing and was threatened with physical harm. 345 So. 2d at 1144.

2. LA. CODE CRIM. P. art. 703(B) requires the state to show at trial the circumstances surrounding the making of a written confession or inculpatory statement where a ruling on a motion to suppress is adverse to the defendant. This showing is to enable the jury to determine the weight to be given the statement.

3. The court reached its decision on January 24, 1977, and applied it prospectively, thus affirming appellant's conviction. On rehearing, however, appellant's conviction was reversed. This reversal was in response to the complaint that the prospective nature of the decision constituted dicta, which, said the court, was error in law. 345 So. 2d at 1144.

4. In *Brown v. Mississippi*, 297 U.S. 278 (1936), the United States Supreme Court held that the fourteenth amendment to the federal constitution prohibits the use of an involuntary confession to convict a defendant in a state criminal proceeding. The minimum stan-

ity may be made at a pre-trial hearing on a motion to suppress evidence,[5] if such a motion is filed, and must be made as a predicate to the introduction of the confession as evidence at the trial on the merits.[6] A defendant may challenge the admissibility of his confession at trial notwithstanding his failure to file a motion to suppress prior to trial.[7] The prosecution has the burden of proving affirmatively and beyond a reasonable doubt that the accused's confession meets the statutory requirements[8] for admissibility.[9] At this judge-hearing, the defendant is not obliged to testify in order to prove the involuntariness of his confession,[10] but if he does testify, the prosecution's cross-examination is limited to that narrow issue, and such testimony cannot be used against him at the subsequent trial before the jury.[11] The judge determines the voluntariness, and thus the admissibility, of the confession at this evidentiary

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dard of admissibility held constitutionally binding in state courts was that the extraction of defendant's confession not offend the fourteenth amendment standards of fundamental fairness. 297 U.S. at 286. However, since *Miranda v. Arizona*, 384 U.S. 436 (1966), a defendant's in-custody statements may be inadmissible at trial despite their factually voluntary character if fifth amendment rights against self-incrimination have been abridged. The Court imposed procedural safeguards upon law enforcement agencies to ensure the protection of these rights. As a result, in order for a competent waiver of these rights to occur, an accused must be warned prior to custodial interrogation that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. *Id.* at 444. *See also* Jackson v. Denno, 378 U.S. 368 (1964). These constitutional requirements are contained in LA. R.S. 15:451 (1950), which provides: "Before what purposes [purports] to be a confession can be introduced in evidence, it must be affirmatively shown that it was free and voluntary, and not made under the influence of fear, duress, intimidation, menaces, threats, inducements, or promises." *See also* LA. CODE CRIM. P. arts. 703(B), 794, which provide defendants with statutory protection similar but not identical to the federal jurisprudential safeguards for the right against self-incrimination.

5. LA. CODE CRIM. P. art. 703(B).

6. LA. R.S. 15:451 (1950). See note 4, *supra*, for the text of this section. *See also* LA. CODE CRIM. P. art. 794 which permits, and at the request of the prosecution or defendant requires, the court to remove the jury from the courtroom when the court hears matters to be decided by the court alone.

7. LA. CODE CRIM. P. art. 703(B).

8. LA. R.S. 15:451 (1950). See note 4, *supra*, for the text of this section.

9. State v. Simmons, 328 So. 2d 149 (La. 1976); State v. Sims, 310 So. 2d 587 (La. 1975); State v. Anderson, 254 La. 1107, 229 So. 2d 329 (1969).

10. State v. Bray, 292 So. 2d 697 (La. 1974).

11. State v. Sears, 298 So. 2d 814 (La. 1974). *See also* Simmons v. United States, 390 U.S. 377, 389-94 (1968), articulating reasons for this procedure. The Court wished to relieve a defendant from the dilemma of either testifying at such a hearing to assert his constitutional rights and having his testimony admitted against him at trial as an admission or testimony by a party, or risking a conviction based on evidence to which he desired to object.

hearing.[12]

Although a ruling that a confession is admissible in a hearing on a motion to suppress evidence is binding at the trial on the merits,[13] a defendant may introduce evidence during the trial concerning the circumstances surrounding the making of the confession for the purpose of enabling the jury to assess the weight to be given to it.[14] Moreover, the prosecution is required by statute to prove before the jury that the confession was free and voluntary,[15] as a predicate to its introduction.

The permissible scope of cross-examination at trial before the jury has traditionally been quite different from that at the prior judge-hearing. When a defendant testifies at trial, he waives his fifth amendment privilege against self-incrimination.[16] However, prior to the Louisiana Code of Criminal Procedure of 1928, when an accused testified he could only be cross-examined on those matters covered on direct examination.[17] Since that time, the Louisiana Supreme Court has consistently followed the superseding statutory authority[18] to permit cross-examination on the entire case.[19] Thus, prior to *Lovett*, the defendant could not, at the conclusion of the prosecution's predicate, testify for the limited purpose of rebutting the evidence of the voluntariness of his confes-

12. The trial judge's decision that the confession was voluntary is a finding of fact that will not be reversed on appeal unless it is without support in the evidence. State v. Demourelle, 332 So. 2d 752 (La. 1976); State v. Whatley, 320 So. 2d 123 (La. 1975); State v. Sims, 310 So. 2d 587 (La. 1975); State v. Cripps, 259 La. 403, 250 So. 2d 382 (1971). In a habeas corpus proceeding, however, a federal district court has the power to hold an evidentiary hearing and determine the facts notwithstanding a state court's findings. Faye v. Noia, 372 U.S. 391 (1963).

13. LA. CODE CRIM. P. art. 703(B).

14. *Id. See, e.g.*, State v. Demourelle, 332 So. 2d 752 (La. 1976).

15. LA. R.S. 15:451 (1950). See note 4, *supra*, for the text of this section. *See also* LA. CODE CRIM. P. art. 703(B), which provides in part: "When a ruling on a motion to suppress is adverse to the defendant, the State shall be required prior to presenting the written confession or written inculpatory statement to the jury, to introduce evidence concerning the circumstances surrounding the making of the written confession or written inculpatory statement for the purpose of enabling the jury to determine the weight to be given it."

16. U.S. CONST. amend. V: "No person . . . shall be *compelled* in any criminal case to be a witness against himself . . . ." (Emphasis added).

17. La. Acts 1886, No. 29, § 2, provided: "[I]f the person accused avails himself of this privilege [of testifying], he shall be subject to all the rules that apply to other witnesses, and may be cross-examined as to all matters concerning which he gives his testimony . . . ."

18. LA. R.S. 15:280 (Supp. 1966), 15:462 (1950). See note 24, *infra*, for the text of these sections.

19. *See, e.g.*, State v. Sears, 298 So. 2d 814 (La. 1974); State v. Cripps, 259 La. 403, 250 So. 2d 382 (1971).

sion.[20] In the 1975 case of *State v. Whatley*,[21] however, the Supreme Court hinted at its dissatisfaction with the prior jurisprudence by choosing a narrow procedural ground—the absence of an objection to the procedure employed— to avoid deciding whether a defendant must be given an opportunity before his confession is introduced to present evidence against voluntariness, or whether he must wait until the presentation of his own case to present such evidence. *Lovett*, by allowing the defendant himself to testify before the jury contemporaneously with the prosecution's predicate, departs from the jurisprudence.

To reach its decision in the instant case, the court had to "reinterpret" the relevant state statutes[22] in light of the constitutional rights of an accused. The court first recognized that the legislative policy expressed in Louisiana Code of Criminal Procedure article 703(B) is to allow the jury to determine the weight to be given a confession, notwithstanding its admissibility. This is accomplished by requiring the prosecution to prove affirmatively that the confession was free and voluntary as a predicate to its introduction as evidence. The defendant's traditional dilemma, wherein he often cannot refute this evidence without completely sacrificing his self-incrimination rights, was an important factor in the court's reasoning.

The court was at pains to reconcile the interpretation offered by the defendant[23] with the language in Louisiana Revised Statutes title 15, sections 280 and 462,[24] because both sections explicitly provide that a de-

20. *See, e.g.*, State v. Sears, 298 So. 2d 814 (La. 1974); State v. Cripps, 259 La. 403, 250 So. 2d 382 (1971); State v. Goins, 232 La. 238, 94 So. 2d 244 (1957).

21. 320 So. 2d 123 (La. 1975).

22. LA. R.S. 15:280 (Supp. 1966), 15:451 (1950), 15:462 (1950); LA. CODE CRIM. P. arts. 703(B), 794. See note 24, *infra*, for the text of LA. R.S. 15:280, 462.

23. "The defendant strenuously urges that, unless he is permitted to take the stand to refute the state's evidence of voluntariness, there is no practical way by which his contention of involuntariness may properly be considered by the jury in its determination of the weight to be given the confession. Thus, he contends, the legislative policy of letting the jury determine the weight to be given an allegedly involuntary confession, and an accused's right against self-incrimination, cannot both be effectuated unless an accused is permitted to take the stand (preferably contemporaneously with the state's predicate) to dispute the state's evidence of voluntariness, without at the same time subjecting himself to cross-examination except as to the issue of the confession and as to his credibility." 345 So. 2d at 1141.

24. LA. R.S. 15:280 (Supp. 1966) reads: "When a witness has been intentionally sworn and has testified to any single fact in his examination in chief, *he may be cross-examined upon the whole case.*" (Emphasis added). Likewise, LA. R.S.15:462 (1950) says: "When a person accused, or a husband or wife becomes a witness, such witness *shall be subject to all the rules that apply to other witnesses*, and *may be cross-examined upon the whole case.*" (Emphasis added.)

fendant can be cross-examined on the whole case once he voluntarily testifies on direct examination.[25] In its new interpretation of these statutes, the court concluded that a defendant does not waive his right against self-incrimination, and is therefore not subject to cross-examination upon the whole case, unless he takes the stand *as part of his defense on the merits.*[26] This implies that a rebuttal by a defendant-witness concerning the voluntariness of the confession at the conclusion of the prosecution's predicate is not a defense on the merits, but is merely a compliance with the legislative policy of allowing the jury to determine the weight to be given the confession.

The court found support for this determination in the history and rules concerning the prior law regulating the scope of cross-examination of a defendant[27] and the evidentiary hearing at trial or on a motion to suppress. The principles applicable to this hearing, said the court, "result in a judicial balancing of the necessity for a statutory predicate of admissibility in order to effectuate constitutional rights, against the equal necessity not to infringe upon an accused's constitutional right against self-incrimination."[28] Even though the court conceded that evidence concerning a confession is admitted at trial for a different purpose,[29] it nonetheless applied the principles controlling the evidentiary hearing to the trial and found that the same rules should apply to both. Therefore, as in the case of the evidentiary hearing, an accused who testifies at the conclusion of the prosecution's predicate can only be cross-examined on the issue raised therein, the voluntariness of the confession. The *Lovett* court preferred this statutory construction, and overruled contrary jurispru-

25. See note 24, *supra.*

26. The court cites *State v. Rhodes*, 337 So. 2d 207 (La. 1976) and *State v. Pellerin*, 286 So. 2d 639 (La. 1973), among other cases, as authority for this proposition. 345 So. 2d at 1141-42. In *Rhodes*, the court noted: "Whatever the merit of the claim that a defendant testifying *on his own behalf* may not be cross-examined on totally irrelevant matters if an answer requires him to incriminate himself, a defendant who chooses to waive his fifth amendment privilege by testifying may certainly be required to answer possibly incriminating questions pertinent to the case under consideration, *if relevant.* He may be cross-examined on the whole case." 337 So. 2d at 209. (Emphasis added). The court in *Pellerin* stated, "However, here where the defendant has taken the stand before the jury at the trial *on the question of guilt or innocence*, he is subject to all the rules that apply to other witnesses, including comment upon his testimony and the reasonable and fair conclusions to be drawn therefrom." 286 So. 2d at 643. (Emphasis added).

27. 345 So. 2d at 1141; see note 17, *supra.*

28. *Id.* at 1142.

29. *Id.*

dence,[30] because the exercise of a statutory right to have the jury hear evidence which may lessen the weight given to the confession[31] should not be conditioned upon the waiver of the constitutional right against self-incrimination.[32]

On first impression, *Lovett* appears to have broad implications for future cases and the trial process itself. However, the decision's scope is not so broad as it appears. First, it should be noted that *Lovett* does not hold that *all* evidence concerning the involuntariness of a defendant's confession must be presented contemporaneously with the prosecution's predicate. Only the accused himself must be allowed to testify at this point to avoid prejudicing his right against self-incrimination,[33] although the court indicated in dictum that it preferred the broader procedure so that the issue is segregated for presentation to the jury.[34] Furthermore, the court was unwilling to declare that the prior judicial interpretation violated defendants' constitutional rights, and therefore decisions contrary to *Lovett*[35] were not overruled retrospectively. Moreover, the formulation of judge-made rules to protect the fifth amendment privilege against self-incrimination in another phase of the trial process is not so radical in light of the institution of such rules in the pre-trial setting of custodial arrests in *Miranda v. Arizona*.[36] The judiciary has historically emphasized the fifth amendment right against self-incrimination with the rationale that government should bear the burden of convicting an accused through its own labor, rather than causing the defendant to incriminate himself.[37] Therefore, when defense counsel argued that there was no practical way to exercise the statutory right to put evidence before the jury on the voluntariness of the confession without sacrificing fifth amendment rights,[38] it is not surprising that the court accepted this argument and extended the privilege against self-incrimination for a limited purpose within the trial.

Despite the apparent conflict between *Lovett* and the language of sections 280 and 462,[39] support for the decision can be found in these

30. State v. Sears, 298 So. 2d 814 (La. 1974); State v. Cripps, 259 La. 403, 250 So. 2d 382 (1971); State v. Goins, 232 La. 238, 94 So. 2d 244 (1957).

31. LA. CODE CRIM. P. art. 703(B).

32. 345 So. 2d at 1142.

33. *Id.* at 1143.

34. *Id.*

35. *See* cases cited in note 30, *supra.*

36. 384 U.S. 436 (1966).

37. *See* Chambers v. Florida, 309 U.S. 227, 235-38 (1940).

38. 345 So. 2d at 1141.

39. See the text of these sections in note 24, *supra.*

statutes and the jurisprudence interpreting them. According to section 280, the scope of cross-examination is unlimited only when a witness testifies on "any single fact in his examination in chief."[40] Thus, one could arguably exclude the *Lovett* rebuttal from the scope of this statute since it is not a part of the defense in chief, but is made contemporaneously with the prosecution's predicate, and goes only to the weight of the confession.[41] Furthermore, section 462 provides that a defendant-witness is subject to the rules applying to all other witnesses, and there is support in the jurisprudence for an argument that a non-defendant witness who testifies on one issue does not necessarily waive his right against self-incrimination on unrelated matters.[42] In limiting the waiver of the right against self-incrimination to those matters covered on direct, *Lovett* is therefore partially consistent with language in the jurisprudence interpreting the relevant statutes.

This rationale, however, involves an assumption that the voluntariness issue is unrelated to other relevant issues within the case. The evidentiary hearing determines the confession's admissibility and, therefore, by definition, its voluntariness.[43] However, when a defendant testifies at trial and attempts to discredit a confession offered by the prosecution, the issue is no longer admissibility. At this point, testimony goes to the determination of guilt or innocence of the accused, although in the guise of the jury's determining the weight to be given the confession. Thus, the court's distinction between the weight to be given the confession and the ultimate issue of guilt or innocence of the accused may not be justified, since once a confession is admissible, its weight has a direct relationship to the jury's ultimate verdict. A denial of the evidence presented by the prosecution to show the statement's voluntary nature amounts to a denial of the truth of that confession. Therefore, the *Lovett* rebuttal, for all practical purposes, becomes a defense on the merits and the weight issue merges with the ultimate issue of guilt or innocence. As a matter of statu-

40. LA. R.S. 15:280 (Supp. 1966).

41. 345 So. 2d at 1141.

42. *Id.* at 1142, *citing* State v. Bolen, 338 So. 2d 97 (La. 1976), wherein a prosecution witness was not compelled to answer defense counsel's questions on whether marijuana had been smoked in a car in which witness and decedent-victim had been riding immediately prior to the accident for which defendant was tried, because compelling the witness to answer this question would be a violation of his right against self-incrimination.

43. *See* State v. Gilmore, 332 So. 2d 256, 259 (La. 1976) ("Admissibility of a confession is to be determined by the trial judge, while the weight to be given to the confession is a question for the jury. The conclusions of the trial judge on the voluntariness of the confession to determine its admissibility, therefore, [are rulings on] a question of fact which this court will not overturn unless . . . not supported by the evidence.").

tory construction, this realization places the rationales supporting the decision on a precarious assumption.

Although the court used statutory construction as the basis for its holding,[44] *Lovett* is clearly a policy oriented decision. For instance, the court balanced the "necessity for a statutory predicate of admissibility in order to effectuate constitutional rights, against the equal necessity not to infringe upon an accused's constitutional right against self-incrimination" to find that the limitation upon cross-examination at the evidentiary hearing should also apply at the conclusion of the prosecution's predicate,[45] though the court declined to hold that this limitation is mandated by constitutional law.[46] However, it should be noted that the evidentiary hearing was established to avoid merging the legal question of admissibility with the factual determination of guilt or innocence of the accused. Since the only relevant inquiry at this hearing is the voluntariness of the confession, cross-examination is necessarily limited to that narrow issue. Limiting the scope of cross-examination at trial is irrational unless the issues of guilt or innocence and the weight to be given the confession can be separated.

Lovett may, however, be justified as a matter of constitutional law. At least one authority[47] has stated that *Malloy v. Hogan*,[48] which made the right against self-incrimination applicable to the states,[49] also may oblige the states to follow the narrow rule of cross-examination rather than Louisiana's wide-open rule. The narrow rule, employed by federal courts, limits cross-examination to matters covered on direct. In a sense, *Lovett* appears to be a tacit adoption of the narrow rule in cases where a confession will be introduced because it allows a defendant to take the stand on the limited issue of voluntariness. From the defendant's perspective, this interpretation would be preferable to an extension of his right against self-incrimination because it would avoid the prejudicial effect of the defendant's having to invoke his privilege in response to a potentially incriminating question by prohibiting the question itself.[50]

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44. 345 So. 2d at 1142-43.

45. *Id.* at 1142.

46. *Id.* at 1143.

47. *The Work of the Louisiana Appellate Courts for the 1970-1971 Term— Evidence*, 32 LA. L. REV. 346 (1972).

48. 378 U.S. 1 (1963).

49. *Id.* at 10-11: "[O]n applying the [fifth amendment] privilege, the same standards determine whether or not an accused's silence is justified, be it in State or Federal Court."

50. The privilege against self-incrimination excludes the response to judicial inquiry, regardless of probative value. *See, e.g.*, Wood v. United States, 75 App. D.C. 274, 128 F.2d 265 (1942). Before a judge can determine whether an answer will incriminate a witness, the

The procedure used to implement the *Lovett* protection has not yet developed, and the decision leaves several unanswered questions. Although the judge's determination of admissibility at the evidentiary hearing previously was binding at the trial, the language employed by the court in its holding raises the issue of whether the jury is now entitled to decide the legal question of admissibility. Under the *Lovett* rule, an accused is permitted to take the stand for "the limited purpose of testifying as to the voluntariness *and validity* of the confession sought to be introduced."[51] However, the meaning of the term "validity" is unclear. If the court used "validity" merely to restate "voluntariness" then the jury's duty, to determine the credibility of the confession, is unchanged. However, if the court used that term in a strict, legal sense, then the jury may have the duty to determine admissibility. In such a case, the defendant should be entitled to an instruction charging the jury to disregard the confession if it finds that it was given involuntarily. Although a similar charge in a trial held *without* a prior evidentiary hearing was found insufficient to protect a defendant's constitutional right to have an involuntary confession entirely disregarded,[52] the added protection of an independent determination of the coercion issue at the evidentiary hearing will render such an instruction beneficial to the defendant by giving him another chance to prove the confession was coerced, and therefore invalid.

The ultimate effects of the *Lovett* decision remain to be seen. It could signal a trend which may result in allowing a defendant, before his confession is introduced as evidence, to present *all* his evidence against its voluntariness, the issue the court was unwilling to decide in *Whatley*. If not, *Lovett* may not be a significant decision. Since the court declined to hold that constitutional rights were abridged by the procedure employed before the instant decision,[53] *Lovett* could be legislatively overruled. Furthermore, the protected rebuttal may not be available to a significant number of defendants, for only those defendants who plead not guilty despite their confessions will be affected. The prosecution may impeach the defendant who chooses to testify on the voluntariness issue,

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question must first be asked. Sweeney v. Cregan, 89 Colo. 94, 299 P. 1058 (1931). A limitation upon the scope of cross-examination, however, does not involve a privilege concerning a response, but excludes the inquiry itself by denying a party the right to cross-examine, thereby eliminating the prejudicial effect of having a jury hear a defendant invoke his privilege after being asked a potentially incriminating question. *See, e.g.*, Houghton v. Jones, 68 U.S. 702 (1863).

51. 345 So. 2d at 1142-43 (emphasis added).

52. Jackson v. Denno, 378 U.S. 368 (1964).

53. 345 So. 2d at 1143.

even by using prior convictions.[54] Moreover, the psychological advantage of a defendant's testimony, now protected by a limited scope of cross-examination, arises only with a defendant who is a good witness. Thus the primary factors that contribute to the general reluctance for a defendant to testify at trial remain, and the limitation upon the scope of cross-examination applies only for a limited purpose, the denial of the voluntariness of an already incriminating confession. In short, despite the extended protection afforded defendants, prosecutors should not be unduly constrained by the *Lovett* decision.

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DELVING INTO THE DETAILS OF PRIOR CONVICTIONS: THE NEW LOUISIANA RULE

Four recent Louisiana cases have held that a cross-examiner may properly go into details of prior convictions being used for impeachment. In the parent case, *State v. Jackson*,[1] the defendant was charged with armed robbery. When the principal defense witness took the stand to testify, he was cross-examined over objection on a prior conviction. While asking questions about his conviction for armed robbery, the prosecutor inquired into a rape which occurred during the course of the prior robbery. The court overruled previous Louisiana jurisprudence[2] and held that cross-examination concerning the rape was proper to show the details of the crime underlying the conviction as tending to establish the "true nature" of the conviction. Following *Jackson*, a unanimous court in *State v. Elam*[3] found that the trial court had not committed reversible error by permitting the prosecution to examine a defendant-witness on the details of his prior convictions. These decisions were reaffirmed by a sharply divided court in *State v. Williams*[4] and in a later *State v. Jackson*.[5]

One common method of impeaching a witness is by prior convic-

54. *Id.*

1. 307 So. 2d 604 (La. 1975) [referred to hereafter in text as "Jackson I"].
2. *Id.* at 606.
3. 312 So. 2d 318 (La. 1975).
4. 339 So. 2d 728 (La. 1976).
5. 339 So. 2d 730 (La. 1976).