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**France**

Doris Jonas Freed\*

An appraisal of the rules of evidence in France necessitates an examination of the role played by these rules in both civil and criminal cases. Only by such a study can any conclusions be drawn as to whether substantial justice is achieved by the French method.

At the outset, it should be noted that in both French criminal and civil procedure, evidentiary and exclusionary rules as to hearsay and opinion evidence, so firmly embedded in the matrix of the Anglo-American sense of justice, have no place. Unlike the practice in the United States, the use of a jury is limited to the prosecution of certain serious felonies which are heard by the Cour d'Assises. Although originally, the function of the French jury resembled that in the Anglo-American system, i.e., the jury acting as the trier of the facts, with the court passing upon legal issues, this worked badly in France. Juries refused to disassociate themselves from the consequences of their findings, and often acquitted persons they believed guilty simply because they considered the legal penalty imposed for the particular offense too severe<sup>1</sup> In 1941, a reform was effected and the system of *echevinage*, used generally throughout Europe was adapted in France. Under this system the court and the jury<sup>2</sup> deliberate together and they both play a part in deciding facts and law. The court still rules on disputed questions of law which arise during the trial.

Serious felonies called "crimes", are tried before the Cour D'Assises sitting with a jury whereas offenses below this rank ("délits") are prosecuted by the Tribunal Correctionnel without a jury. Misdemeanors ("contraventions") also are not subject to jury trial.

The gathering of much of the evidence in cases of "crimes" and "délits", is done before the trial itself by an official called the "juge d'instruction",<sup>3</sup> although in penal cases, emphasis is on oral testimony at the trial. The "juge d'instruction's" investigation may be quite extensive. He questions the accused and the witnesses, and all the testimony is reduced to writing. This composes the dossier which the court has before it during the hearing.

The President of the Cour D'Assises and the Presiding Judge of the Tribunal Correctionnel play a controlling part in the trials before them.

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<sup>1</sup>Freed, *Aspects of French Penal Procedure*, 17 LA. L. REV. 730, 744-745 (1957).

<sup>2</sup>The number of jurors was fixed at 7 by the Ord. of April 20, 1945.

<sup>3</sup>Investigation by a "juge d'instruction" is mandatory only in cases involving serious felonies. In cases of lesser offenses ("délits"), the prosecutor has the right to investigate himself or turn the investigation over to a "juge d'instruction." A "juge" is never used to investigate misdemeanors.

Their activities differ sharply from those traditionally assigned to their American counterparts. In France, it is the President of the Cour d'Assises and the Presiding Judge of the Tribunal Correctionnel who control the trial from beginning to end. They make use of the attorneys as an aid in bringing out and arriving at the facts.

In the hearing before the Cour d'Assises, the president of the court begins the trial proper by an interrogation of the accused. This covers the "crime" itself, the surrounding circumstances, and all facts which may have a bearing on the character of the accused. This procedure is not specifically authorized by law, but is derived from the president's discretionary power<sup>4</sup> and his duty to clarify the case for the jury.

The president gives a brief resumé of the dossier, covering the life of the accused, his education, his work or professional activities, his family history and any previous criminal convictions. Then the president develops in detail the facts and issues of the case, exploring possible motives of the accused and giving his own ideas in a running commentary on the evidence. He often attempts to break down the story told by the accused and leaves little doubt in the jurors' minds as to his own opinions. Throughout, he relies on the dossier pointing out any conflicts between the statements in the dossier and those given at the trial. The president questions the witnesses as well as the accused; confronts the witnesses and the accused, and often, on his own motion, introduces documentary evidence. The activities of counsel are auxiliary and not all important as a trial in the United States.<sup>5</sup>

The president may order new documents to be introduced into evidence; he may permit the testimony of absent witnesses given before the "juge d'instruction" to be read into evidence, and may order papers introduced into evidence which the accused has never seen, such as a memorandum or even an anonymous letter.

In the trial of "délits" the role of the presiding judge is similar to that of the President of the Cour d'Assises. In prosecutions before the Tribunal Correctionnel and before the Cour d'Assises, the accused has the right to remain silent, but if he does so, this will generally prejudice the court against him. Also in both types of prosecutions, if it is felt that further investigation is necessary, the president or presiding judge issues an order to that end.<sup>6</sup>

The next step after the interrogation of the accused is the hearing of

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<sup>4</sup>Code d'Instruction Criminelle, Art. 267, 268.

<sup>5</sup>*Id.*, Art. 319, 327, 329, 330.

<sup>6</sup>Bouzat, "Traité Théorique et Pratique de Droit Pénal, § 1219 (1951 ed.); Code d'Instruction Criminelle, Art. 267.

witnesses. Here also, distinct differences are apparent between the American and French procedures. The witness is called and sworn<sup>7</sup> and then is allowed to discuss the case and tell what he knows in his own way without interruption. According to the strict wording of the French law, attorneys are not permitted to question witnesses directly, but only through the president of the court or presiding judge. In practice, however, they are permitted to do their questioning directly.

There is no cross examination of witnesses by attorneys such as is known in Anglo-American law. Furthermore, although the testimony of the witness must have some relevance, it is not confined by exclusionary rules such as are embedded in Anglo-American law. However, certain persons are incompetent to testify, such as the spouse of the accused, persons related to the accused within certain designated degrees, and persons having a pecuniary interest in the outcome of the case.<sup>8</sup> If such persons in fact do testify without objection by the prosecution, the hearing is not thereby nullified.<sup>9</sup>

After the witnesses are heard, the attorneys make their arguments, the accused or his lawyer always being entitled to the last word.<sup>10</sup>

In civil suits, the word "trial" is really not accurate, since the gathering of evidence and the formulation of the issues take place over a period of time. Although witnesses may be called upon to testify at the hearing which finally takes place in court, it is customary to take their testimony before trial outside of the court as an "enquête".<sup>11</sup> This is generally held in the chambers of an official designated for this purpose who may be the judge charged with hearing the case or some other judge. The testimony is then recorded in a report ("procès-verbal") drawn up by the court clerk and signed by the witnesses.<sup>12</sup> The "enquête" may be ordered by the court or may be requested by the parties at any time up to the time of the end of the trial.<sup>13</sup> Witnesses who live far from the court where the case is to be heard may be permitted to testify at a designated place where they live.<sup>14</sup>

Witnesses related by blood or marriage are disqualified from testifying as is a divorced spouse. Witnesses may be called upon to testify either once or a number of times and either alone or in the presence of the parties, according to the court's order.

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<sup>7</sup>Code d'Instruction Criminelle, Art. 316.

<sup>8</sup>*Id.*, Art. 322, 323.

<sup>9</sup>*Id.*

<sup>10</sup>*Id.*, Art. 335.

<sup>11</sup>This is a special proceeding. Code de Procédure Civile, Art. 252-280.

<sup>12</sup>*Id.*, Art. 252.

<sup>13</sup>*Id.*

<sup>14</sup>*Id.*, Art. 256.

The "procès-verbal" containing the minutes of the testimony taken before the trial is read by each witness who may make written additions to his evidence. The "procès-verbal" becomes part of the record and is submitted to the court at the trial.<sup>15</sup>

Where technical testimony is necessary, the court may call in experts.<sup>16</sup> The court in its discretion (as in criminal trials) may order a confrontation between a witness and the parties. The "juge" before whom the "enquête" is held may question the witnesses about all facts admissible by law, including those not mentioned in the decision ordering the "enquête", and the "juge" may summon anyone whose testimony he deems may be useful.<sup>17</sup>

A witness may not be interrupted by the parties or their attorneys during his testimony at the "enquête". Witnesses who refuse to take the oath as well as witnesses who refuse to testify without good reason are subject to a penalty and also to damages. The emphasis in civil proceedings is on testimony before the trial at the "enquête", and not as in criminal cases, on the testimony at the trial proper.

Today in France, the law does not require that specified weight must be given to certain types of evidence as was the case in French law up until the time of the Revolution. The law does determine, however, the admissibility of certain types of evidence,<sup>18</sup> and the circumstances under which evidence may be admitted.<sup>19</sup>

The French court possesses wide leeway in the evaluation of the evidence, and generally may receive direct and indirect proof and weigh such proof in its sole discretion.<sup>20</sup>

After the record is completed, the issues are formulated and the court considers the record and hears the oral arguments.<sup>21</sup> As in criminal trials, there is no direct or cross examination of the parties by the attorneys.

An evaluation of French rules of evidence in both civil and criminal procedure may only be made in the context of the trial itself and the part which such rules play therein. The French system is geared to give judicial officials far wider authority to obtain facts than the American system. In both systems of law, however, the goal of ascertaining the truth remains

<sup>15</sup>*Id.*, Art. 273.

<sup>162</sup> Planiol et Ripert § 2254; Code de Procédure Civil, Art. 302-323.

<sup>17</sup>Code de Procédure Civil, Art. 264.

<sup>18</sup>Such as written evidence, testimonial evidence and circumstantial evidence. 1 Ripert et Boulanger, "Traité de Droit Civil", § 748 (1956).

<sup>19</sup>*Id.*; For instance, evidence is admissible only if brought to the court's attention in a contentious proceeding.

<sup>20</sup>*Id.*, § 749.

<sup>21</sup>Code de Procédure Civil, Art. 82.