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THE 1966 CODE OF CRIMINAL PROCEDURE

*Dale E. Bennett**

At a time when all members of the bar are faced with the responsibility of defending indigent defendants, it is particularly important that the rules governing the trial of criminal cases be stated as fully and clearly as possible. At the same time the code procedures must be sufficiently flexible to permit trial judges to adapt them to the special circumstances and necessities of particular cases. A definite attempt has been made to provide a statement in the new Code of many rules which are presently ascertainable only by a careful search of key Supreme Court decisions and miscellaneous statutes. The filling of such code gaps and hiatuses, so that the basic procedures are stated in a single volume, should be of substantial assistance to the lawyer who is called upon to defend only an occasional criminal case. Another general objective of the new Code has been to adapt Louisiana's procedures to those federal requirements which apply to the states via the fourteenth amendment. There has also been a consideration of recently developed rules of other states which are aimed at providing more practical and fairer trial procedures. At the same time it was important to retain Louisiana's present basic procedures, and no innovation was adopted without a careful check of its practicality, and also of its fairness to the defendant and to the state. One constant aim was the elimination of rigid technical requirements which served no other purpose than to trip an inexperienced defense lawyer or to harass a busy district attorney. It is with these considerations in mind that this writer will seek to explain the new procedures, and modifications of existing procedures, in the 1966 Code of Criminal Procedure. In general, no mention will be made of those code articles in which existing rules are continued with only minor clarification and reorganization.

TITLE I. PRELIMINARY PROVISIONS AND GENERAL POWERS OF COURTS

The new Code seeks to provide a full statement of basic procedural rules, and yet there are bound to be points upon which the Code is silent. In these instances article 3 authorizes the

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court to "proceed in a manner consistent with the spirit of the provisions of this Code and other applicable statutory and constitutional provisions."¹ This discretionary authority of the trial judge should prove more workable than the old rule which directed the judge to resort to common law procedures to supply deficiencies in the statute law.²

Article 15 expresses an important applicability rule. It states the general rule that the code provisions govern procedures in district courts. They also govern procedures in city, parish, juvenile, and family courts "except insofar as a particular provision is incompatible with the general nature and organization of, or special procedures established or authorized by law for, those courts." This stated exception is quite important. Some procedures of the Code are "incompatible with" the informal procedures of city courts. Also, many important procedures of those courts are rather completely set out by special provisions found in Title 13 of the Revised Statutes. For example, special informal procedures are authorized for traffic violations bureaus of city courts.³

Time-wise, an important applicability rule is stated in section 4 of the statute enacting the Code. The effective date of the Code of Criminal Procedure was delayed until January 1, 1967. Under clause (1) of this section the Code governs procedures in all prosecutions instituted on or after the effective date. Under clause (2) prosecutions pending on that date will also be governed by the new Code. However, no procedural delay which has commenced to run will be shortened, and the validity and legal effect of prior official acts or failures to act will be unaffected.

Chapter 3 continues a general statement of the inherent power and authority of the courts.⁴ Article 18 implements the courts' authority to adopt local rules covering matters that, either because of their detailed nature or because of necessary local variations, are not stated in the law.⁵ Specific contempt provisions conform in general with corresponding contempt pro-

1. *Accord*, UNIFORM RULES OF CRIMINAL PROC. 61; FED. R. CRIM. P. 57(b),

2. LA. R.S. 15:0.2 (1950).

3. *Id.* 13:1900; 13:2485.27; 13:2487.27 and 13:2561.8.

4. LA. CODE OF CRIMINAL PROCEDURE arts. 16 and 17 (1966), restating concepts found in former LA. R.S. 15:10 and 15:11 (1950).

5. Following LA. CODE OF CRIMINAL PROCEDURE arts. 16 and 17 (1966).

visions in the Code of Civil Procedure.⁶ The division of contempts into two classes, direct and constructive, follows a rather general pattern. Following the Code of Civil Procedure contempt procedures will make for uniformity of interpretation and application. It is interesting to note that the penalty when an attorney is judged in direct contempt of court may not exceed a fine of one hundred dollars or imprisonment for more than twenty-four hours for the first offense.⁷ This limitation is intended to prevent the imposition of heavy penalties during the heat of trial when heated legal argumentation may cause tempers to flare.

The Peace Bonds chapter⁸ provides a more complete procedure and guide for the ordering of peace bonds than was found in the skimpy provisions of former R.S. 15:27. A survey conducted by the Law Institute among district and city judges showed opinion to be evenly divided as to the value and utility of the peace bond. These opinions ranged from characterizing the peace bond as "a device that merely fanned the flames of potential trouble" to statements that the peace bond was a very important means of holding down family or neighborhood strife and disorder. The peace bond procedures have been revised so that they may be more effectively used by judges who favor the peace bond. It should be noted that the issuance of a peace bond is discretionary, even where the court "determines that there is just cause to fear that the defendant is about to commit the threatened offense."⁹

TITLE II. DISTRICT ATTORNEY AND ATTORNEY GENERAL

This title continues the sound basic rule that the district attorney is in complete control of prosecutions in his district, with full authority to determine "whom, when, and how he shall prosecute."¹⁰ Article 66 provides the district attorney with a right to subpoena witnesses to appear before him for questioning concerning any offense under investigation. This will provide a valuable aid in cases where prospective witnesses ignore the "D. A. Notice," which is a printed form ordering the attendance of the witness at the district attorney's office, but which

6. *Id.* arts. 221-227.

7. LA. CODE OF CRIMINAL PROCEDURE art. 25 (1966), taken from LA. R.S. 13:4611 (1950).

8. *Id.* arts. 26-33.

9. *Id.* art. 29.

10. *Id.* art. 61, following former LA. R.S. 15:17 (1950).

is not enforceable by contempt. This subpoena power will enable the district attorney to interview key witnesses and procure important documents without resorting to grand jury proceedings.

TITLE III. THE CORONER AND OTHER OFFICERS

The coroner in Louisiana, unlike the coroner in a number of states, must be a licensed physician,¹¹ and the coroner's authority and duties are fully and clearly spelled out in the Revised Statutes.¹² The only substantial change in the provisions relating to the coroner is the abolition, in article 101 of the Code, of the coroner's jury and inquest. The antiquated coroner's inquest, by which a jury of five laymen made a determination of the cause of death, served no useful purpose, and its abolition was supported by recommendations of national studies and by the unanimous opinion of a number of Louisiana coroners who were consulted. The coroner himself, being a licensed physician, is best qualified to conduct investigations into the cause of death. Under the Code, as under the former law, the coroner has the authority to summon witnesses and to perform autopsies or cause them to be performed.¹³ His findings are admissible in evidence as to the cause of death.¹⁴

TITLE IV. SEARCH WARRANTS

Mapp v. Ohio,¹⁵ holding that illegally seized evidence is inadmissible in state as well as federal courts, necessitated a careful review of state search warrant procedures. It is important that search warrant procedures be clearly stated, to the end that law enforcement people and courts can be assured that search warrants are validly issued and that the property subject to seizure will not be unnecessarily limited.¹⁶ Article 161 follows the Federal Rules¹⁷ in broadening the authority which may be granted by a search warrant. Clause (2), which is aptly

11. LA. CONST. art. VII, § 71.

12. LA. R.S. 33:1557.1-33:1568; 33:1625 (1950), as amended by La. Acts 1966, No. 312.

13. LA. CODE OF CRIMINAL PROCEDURE arts. 102-104 (1966).

14. *Id.* art. 105.

15. 367 U.S. 643 (1961).

16. In a preliminary statement to Title IV, LA. CODE OF CRIMINAL PROCEDURE (1966), the Reporter concludes, "This Title [on search warrants] is designed to provide law enforcement officers and courts the necessary guide-lines in this important field. Although an effort has been made to comply with previous pronouncements of the United States Supreme Court, which are at best somewhat uncertain, no attempt has been made to foresee or to anticipate future decisions by the court."

17. FED. R. CRIM. P. 41.

characterized by the Reporter as "in part a crime prevention measure," applies to the seizure of things used or intended for use in committing any "offense." The prior article was limited to instrumentalities for the commission of felonies. Clause (3) authorizes a warrant to search for "anything" that "may constitute evidence tending to prove the commission of an offense."¹⁸ The source provisions¹⁹ were unduly restrictive in that they only authorized issuance of warrants for specified purposes and in enumerated instances.

Article 165 provides a much needed guide as to what a peace officer can do when he gains access to the premises by virtue of a search warrant. It specifically grants authority to do certain things beyond searching for the described property. The officer may make photographs, lift fingerprints, and seize things which may constitute evidence although these things are not specifically described in the warrant. This specific statutory authority provides a reasonable and much needed aid to law enforcement.²⁰

TITLE V. ARREST

The procedures for issuance of a warrant of arrest have been revised so as to fully conform with Louisiana and federal constitutional requirements. Article 202(2) provides, in conformity with the ALI Code, the Federal Rules, and many state procedures,²¹ that the warrant shall be issued upon a finding of "probable cause" to believe that the offense alleged in the affidavit was committed by the accused. The former rule, which only required the affidavit of a "credible person" was of doubtful constitutionality,²² and this might well have been urged as a means of challenging the admissibility of evidence seized incidental to an arrest. The requirement of "probable cause" has been easily satisfied in connection with the issuance of federal warrants or summons to appear. In *Jaben v. United States*²³

18. See Comment, 27 LA. L. REV. 53 (1966).

19. LA. R.S. 15:42, 15:43 (1950).

20. *Accord*, DEL. CODE ANN. tit. 11, § 2309 (1953). Extensive authority of federal peace officers executing search warrants was recognized in *Harris v. United States*, 331 U.S. 145 (1947).

21. ALI CODE OF CRIM. PROC. § 2 (1931); FED. R. CRIM. P. 4(a), with many state statutes cited in the Commentary. The most recent enactment is ILL. CODE CRIM. PROC. § 107-9 (1964).

22. LA. CONST. art. I, § 7, prohibits seizure of persons except upon a warrant issued upon "probable cause."

23. 381 U.S. 214 (1965).

the court stated, "It simply requires that enough information be presented to the Commissioner to enable him to make the judgment that the charges are not capricious and are sufficiently supported to justify bringing into play the further steps of the criminal process." This information might be included in the affidavit of the peace officer or other complainant, or might be obtained by supplemental oral statements.

Article 203 eliminates "John Doe" warrants, which are of doubtful validity in view of the constitutional requirement that the person to be seized must be particularly described.²⁴ The requirement of clause (3) that an unknown person must be so described that "he can be identified with reasonable certainty," states a practical rule that should satisfy both Louisiana and federal constitutional requirements. It is important to be sure that warrants of arrest are validly issued; otherwise property seized incidental to the arrest is illegally seized and inadmissible in evidence.

Articles 208 through 211 provide for the issuance of a summons, in lieu of an arrest warrant, where the person charged with a petty offense is well-established in the community and can be depended upon to appear for trial in response to the summons. The summons offers the advantage of avoiding the hardship and inconvenience involved in arrest and detention, which may include the added financial burden of furnishing bail. There is no good reason why an accused should be unnecessarily subjected to arrest and possible incarceration, prior to his trial and conviction of a misdemeanor. Then too, the summons saves time of peace officers and helps relieve the over-crowded condition of many jails. Extensive use of the summons is recommended by Model Codes and recently enacted rules.²⁵ Article 209 applies to the magistrate and authorizes him, in a misdemeanor case, to issue a summons instead of a warrant of arrest. Article 211 authorizes a peace officer, acting without a warrant in a misdemeanor case, to give a written summons instead of making an arrest. In both instances the issuance of the summons is discretionary. Also, the person issuing the summons must have "reasonable ground to believe that the person will appear upon a summons." A warrant of arrest may be issued if the defend-

24. LA. CONST. art. I, § 7.

25. ALI CODE OF CRIM. PROC. §§ 12-17 (1931); FED. R. CRIM. P. 4(b)(2); UNIFORM ARREST ACT § 9.

ant fails to appear in answer to the summons, or if the magistrate or the peace officer subsequently becomes fearful of non-appearance.

Arrests by an officer without a warrant are provided for in article 213, and one change is worthy of special notice. Clause (3), which was amended by the Senate committee upon a strong recommendation of law enforcement people and others, authorizes peace officers to arrest for misdemeanors committed out of the officer's presence, on reasonable belief that the person to be arrested committed an offense. The term "offense," which is substituted for "felony," is broadly defined in the Code to embrace both felonies and misdemeanors.²⁶ This enlarged authority to arrest for misdemeanors on probable cause should materially aid peace officers in situations where there is need for a prompt arrest of a misdemeanant, but where the offense was not committed in the officer's presence and delay to procure a warrant would frustrate effective law enforcement.

Article 220 continues the rule that a person must submit peaceably to a lawful arrest.²⁷ It also combines existing authorizations for the use of force in making the arrest and detention, and in overcoming any resistance or threatened resistance.²⁸ It follows the Uniform Arrest Act formula in providing that the force employed must be "reasonable."²⁹ This objective reasonableness test applies both as to the necessity for and the nature of the force employed. Reasonableness, rather than actual necessity, is a proper test to impose upon peace officers. It provides necessary and proper protection for the conscientious officer, and yet precludes the use of clearly inappropriate force.

The Code of Criminal Procedure Project originally sought to provide a statutory statement as to when deadly force might be employed by an arresting officer. The formula proposed was considered unsatisfactory by Louisiana law enforcement officials, and the Senate committee deleted the "deadly force" articles.³⁰ This means that the use of deadly force will continue to depend upon the circumstances of the arrest and will be governed by general principles expressed in the jurisprudence, as it

26. LA. CODE OF CRIMINAL PROCEDURE art. 933(1) (1966). *Accord*, ILL. CODE OF CRIM. PROC. §107-2(c) (1964).

27. LA. R.S. 15:64 (1950).

28. *Id.* 15:58, 15:64.

29. UNIFORM ARREST ACT § 4.

30. Projet arts. 221-223 (1966).

is in most other states. This jurisprudence is somewhat nebulous, but it would appear that deadly force will be considered reasonable force when it appears reasonably necessary to make an arrest for a felony, but not when used for the sole purpose of apprehending a misdemeanor or traffic violator.³¹ The authority to make a lawful arrest includes the overcoming of any resistance or threatened resistance. In this situation, whether the arrest is for a felony or a misdemeanor, the arresting officer is authorized to press forward to make the arrest; and in so doing he has full rights of self-defense. This includes the right to use deadly force to protect himself or any other person assisting him from death or great bodily harm.³²

Article 228 requires a peace officer to promptly book an arrested person at the nearest jail or police station. This is the stage in the proceedings where the accused is fully informed of his rights, which include the rights to communicate with and procure counsel and to request a preliminary examination.³³ The requirement of "prompt" booking is somewhat more flexible than the former requirement of "immediate" booking,³⁴ and is better adapted to exceptional cases, such as an arrest during a riot or in a place where immediate booking is not possible. In addition to requiring that the officer in charge of the place of booking shall fully inform the arrested person of his basic rights, Article 229 requires him to notify the district attorney, within forty-eight hours, of all persons booked for violations of state statutes. This provision will make sure that the district attorney has an opportunity to make a prompt investigation of the case. It will also facilitate the early release of those not wanted for prosecution.

TITLE VI. EXTRADITION

Since interstate extradition of persons charged with crime in one state and found in another involves the cooperation of two states, the state extraditing and the state of asylum, it is particularly important to have uniform state procedures. The Uniform Criminal Extradition Act, which served as the basis of Title VI, has been adopted by forty-six states, including Louisiana's neighboring states of Alabama, Arkansas, and Texas. In

31. *State v. Turner*, 190 La. 198, 182 So. 325 (1938).

32. LA. R.S. 14:20, 14:22 (1950).

33. LA. CODE OF CRIMINAL PROCEDURE art. 229 (1966).

34. Former LA. R.S. 15:77 (1950).

following the Uniform Act the procedures and required papers will generally conform with those of other states from whom or by whom extradition is sought. Also, some important procedures, not available under the 1928 Code, have been added. However, the Uniform Act has not been adopted lock, stock and barrel, and certain superior features of Louisiana's existing procedures are retained. For example, Article 262 continues the rule that extradition is discretionary with the Louisiana governor. Thus the governor may deny extradition of a criminal who has effected complete self-rehabilitation and has established himself as a worthwhile member of the community. Louisiana governors have not abused this discretion, and the constitutionality of discretionary extradition was upheld by the United States Supreme Court in *Kentucky v. Dennison*.³⁵

Article 262 has eliminated the technical and sometimes troublesome requirement that the person demanded must be a "fugitive from justice." It simply requires that the person extradited must be "wanted in that state to be tried for a crime." It would embrace a criminal who left the demanding state under compulsion, as where he had been extradited to Louisiana for trial before his crime in the demanding state was discovered. It would also cover the offender who was not present in the demanding state when the crime was committed, as where a shot was fired across a state line or the offender performed his part of a crime from outside the state. In these situations the usual "fugitive from justice" formula would not be met.

The extradition of offenders who have been convicted and then have escaped from confinement or jumped parole or probation presents a special problem. In such cases the usual copy of the indictment or other formal charge would be of little practical value. Thus clause (2) of article 263 provides a specific statement of the necessary extradition papers, *i.e.*, a copy of the judgment or sentence, together with an official statement that the person sought has escaped from custody or jumped his parole, as the case may be. This is an area in which inadequacy of the former extradition law resulted in much uncertainty.

35. 65 U.S. (24 How.) 66 (1860), holding that the federal government has no constitutional authority to compel a state to exercise the duty imposed by art. IV, § 2, cl. 2 of the United States Constitution. The Court recognized the existence of a duty, but stated that its enforcement depended on the fidelity of state governors.

Frequently unnecessary papers were furnished and essential papers were omitted.

Existing provisions for the extradition hearing, and for commitment to await formal extradition papers are clarified and continued without major change.³⁶ Extradition hearings, and temporary commitment proceedings, are conducted by a "judge," specially defined in article 261, for extradition purposes, as a "judge of a district court with criminal jurisdiction." This is more workable than the former provision³⁷ which authorized any "committing magistrate," thus even including a justice of the peace, to act. It is appropriate, in view of the fact that persons extradited will ordinarily be charged with major felonies, to have extradition proceedings conducted by district judges who have exclusive trial jurisdiction in Louisiana felony cases. While juvenile and family court judges do not have general extradition jurisdiction, they will retain the special jurisdiction conferred on them by the Reciprocal Enforcement of Support Law.³⁸

One of the most important provisions of the extradition title is the adoption of Uniform Act procedures for re-extradition agreements. Sometimes the criminal wanted by the demanding state is already convicted or awaiting trial for a crime in the state of asylum. In this situation extradition will be appropriate if the crime in the demanding state is a more serious one, but the state relinquishing the defendant will want assurance that if he is acquitted in the demanding state he will be returned without formal extradition proceedings. This is accomplished, under article 272, by requiring that the governor of the demanding state enter into a re-extradition agreement. In order that such extraditions will not interfere with local law enforcement, the district attorney must agree to the surrender of a demanded criminal where a local prosecution is pending; and, the court of the conviction must agree to the surrender of a convicted person who has not satisfied his sentence. The consent should ordinarily be given if the crime charged in the demanding state is more serious than the local offense and a re-extradition agreement is entered into.

36. LA. CODE OF CRIMINAL PROCEDURE art. 267 (1966), Rights of accused; extradition hearing; art. 268, Issues at extradition hearing; art. 269, Arrest prior to demand for extradition; art. 270, Commitment to await extradition.

37. Former LA. R.S. 15:163 (1950).

38. *Id.* 13:1641-13:1673. See *State v. Smith*, 207 La. 735, 21 So.2d 890 (1945), holding that a subsequently enacted general statute does not supersede existing special laws, unless the intent to do so is clearly stated.

Conversely, article 278 authorizes the Louisiana governor to enter into re-extradition agreements as a means of procuring the return of a criminal wanted for trial in this state, but who is imprisoned or held for trial in another state. In this situation the Louisiana governor is authorized to agree that if the demanded criminal is extradited he will be returned to the other state on demand of that state's governor without formal extradition proceedings and at the expense of Louisiana. The authority to enter into re-extradition agreements will, in such cases, greatly facilitate the prompt procurement of persons charged with major Louisiana crimes and held upon lesser charges in other states.

TITLE VII. PRELIMINARY EXAMINATION

Preliminary examination procedures conform with practices followed in most Louisiana courts. It is not practical, without a special committing magistrate available, to require the arresting officer to take the arrested person immediately before a judge for a preliminary examination. In line with procedures generally followed, the arrested person must be promptly conducted to the police station or jail and booked.³⁹ At this time he must be informed by the officer in charge of his rights, which include his right to a preliminary examination.⁴⁰ If a preliminary examination is requested, either for the purpose of fixing bail or determining whether there is probable cause to hold the defendant, the officer in charge should deliver him, as promptly as possible, for a preliminary examination. Implementation of the defendant's right to a prompt preliminary examination is a matter which can best be worked out at the local level, rather than by imposition of a statutory pattern. The conditions in a large metropolitan area, for example, will pose different problems and call for different solutions than those in a rural community. The problem is an important one which deserves careful attention and requires full cooperation of courts and law enforcement officials.

The Code rules as to those magistrates having authority to conduct preliminary examinations, and the scope and procedures for such examinations, generally conform with existing constitutional and statutory provisions.⁴¹ One of the purposes of the

39. Art. 228.

40. Art. 229.

41. Arts. 291-295.

preliminary examination is to determine whether there is "probable cause" to charge the accused with the offense for which he is held. The prior law⁴² appeared to set out a requirement that the guilt of the accused must be established at the preliminary hearing. The article 296 test of "probable cause" clearly states the issue at the preliminary hearing to be whether a prima facie case, sufficient to hold the accused for trial, has been established.

The limited scope of the preliminary examination after the defendant has been indicted is clearly stated by article 296. After a grand jury has considered the case and returned an indictment there is no further necessity to determine whether there is "probable cause" to charge the accused with the offense. The grand jury finding establishes a sufficient prima facie case of guilt to justify holding the defendant.⁴³ Thus, a preliminary examination held after indictment is limited to the perpetuation of testimony and the fixing of bail. However, an information filed by the district attorney is not given the same official finality as to probable cause, and the court may release the accused from custody if it determines that the state does not have a solid prima facie case against him. Such release of a person against whom an information is pending will be an infrequent occurrence, and will merely operate to discharge the accused from present custody. The district attorney may still, if he feels that strongly, bring the defendant to trial.⁴⁴

The provision of article 294 requiring the presence of the defendant during the examination of witnesses at the preliminary examination and giving him the right to cross-examine them, is an implementation of the defendant's constitutional right to be confronted by the witnesses against him.⁴⁵ Under article 295 the testimony of witnesses at the preliminary examination is admissible upon the trial if the witness is, for various stated reasons, unavailable to testify. If it is probable that the state may need to use such testimony, the court should make sure that the accused is afforded the aid of counsel, if counsel is desired, to cross-examine witnesses at the preliminary hearing. The United States Supreme Court has held, applying

42. Former L.A. R.S. 15:155 (1950).

43. *Accord*, State v. Merrick, 10 La. Ann. 424 (1855).

44. *Cf.* Art. 386 expressly authorizes the district attorney to file an information after discharge of the defendant at a preliminary examination.

45. LA. CONST. art. I, § 9. See State v. Chambers, 44 La. Ann. 603, 10 So. 886 (1892).

a combination of the sixth-amendment right of confrontation and the "due process" right to counsel, that the right of confrontation includes the right to cross-examine witnesses, and that the right of cross-examination is not fully satisfied unless the defendant has the assistance of counsel.⁴⁶

The provision, in the first paragraph of article 295, that the transcript of the defendant's testimony at the preliminary examination may be used against him at the trial of the case is well supported by the authorities cited in the comment to that article; and this preliminary examination testimony of the defendant may be used even though he does not choose to take the stand and testify at the trial. The constitutional privilege against self-incrimination must be claimed at the preliminary examination when the testimony is given.⁴⁷

TITLE VIII. BAIL

The trend in modern thinking is to make bail procedures as flexible as possible, thus avoiding unnecessary hardship and bail-bond costs to the accused, who may ultimately be found innocent of the crime charged. The bail procedures have, insofar as is compatible with providing reasonable assurance that the accused will be in court when the case is called for trial, sought to ameliorate the oppressive operation of present bail rules.⁴⁸ The rules governing the accused's right to bail are fixed in the Louisiana Constitution,⁴⁹ and the bail provisions have been drafted in conformity with these constitutional guidelines. Similarly, a statement of those magistrates having authority to fix bail follows the existing constitutional pattern.⁵⁰ Generally, the bail procedures of the 1928 Code have been clarified and continued. However, two important changes should serve to help relieve arrested persons from unnecessary pre-trial detention. Articles 319 and 320 authorize district courts, as well as city courts,⁵¹ to fix bail schedules setting bail in advance for misdemeanors within their respective trial jurisdictions. The bail schedule serves a very useful purpose in situations where a person is arrested late at night or on a weekend when no judge is avail-

46. *Pointer v. Texas*, 380 U.S. 400 (1965).

47. 58 AM. JUR., *Witnesses*, § 100 (1948).

48. See Preliminary Statement to Title VIII.

49. LA. CONST. art. I, § 12.

50. Art. 315; cf. LA. CONST. art. VII, §§ 35, 48, 51-53, 83.

51. Former LA. R.S. 15:86.2 (1950).

able to fix bail. Also, the establishment of a bail schedule will no logical reason why the bail schedule should only be available generally result in a saving of much judicial time. There was where charges were pending in city courts. Where both the district court and a city court have jurisdiction to try misdemeanors under state statutes or parish ordinances, the applicable bail schedule will be that of the court in which the case is to be tried. In such situations, the city court bail schedule will probably be lower since it will be geared to the lower costs in city courts. While the bail schedule will usually be employed, the defendant may demand a special bail order,⁵² and the trial court may increase or reduce the bail at any time.⁵³ In felony cases, article 316 continues the general rule that "bail must be specifically fixed in each case." If bail in a felony case is given pursuant to a general bail order, the bail is ineffective and the defendant may be rearrested. However, if the defendant jumps bail the invalidity of the bail order will not be a defense to an action to forfeit and enforce the bail.⁵⁴

Article 336 authorizes the judge to order the defendant's release "on his personal bail undertaking." In this situation it will not be necessary for the defendant to purchase a bail bond, to post cash or other security, or to show that he has property in the amount of the bond. Where the defendant has strong roots in the community, either because of his family or his employment, it is quite unlikely that he will breach his personal bail obligation; and it may work a great financial hardship upon the poor but responsible defendant to raise money to pay for a bail bond or to furnish cash as security. It is hoped that courts will make wide use, in appropriate cases, of their authority to release defendants on their personal bail undertaking — to the end that unnecessary financial hardship may not be imposed on possibly innocent persons, and our jails and prisons will not be further overcrowded by the unnecessary incarceration of defendants awaiting trial. Release of a defendant on his own bail undertaking is in the discretion of the court, and the courts can be expected to draw the proper line between those defendants who can reasonably be expected to appear for trial and non-residents

52. Art. 320.

53. Art. 321.

54. Former LA. R.S. 15:92 (1950) gave the surety a windfall in this situation, by stating the minority rule that a bail bond taken under a general bail order was "of no effect."

or irresponsible individuals who will ordinarily need to post a bail bond or deposit other security in order to insure appearance.

Some special bail procedures have been retained in the Code of Criminal Procedure Ancillaries chapter of Title 15 of the Revised Statutes. These include special procedures and bail limitations where a person is arrested upon a city ordinance violation charge,⁵⁵ and the frequently amended and detailed statutory procedures for bail forfeiture.⁵⁶

TITLE IX. HABEAS CORPUS

The Code does not specify the courts having authority to issue writs of habeas corpus, since this authority is granted by constitutional provisions.⁵⁷ The procedures for habeas corpus in civil matters are set out in the Code of Civil Procedure, and the procedures applicable to writs requested from the Supreme Court will be governed by the rules of that court. In the interest of uniformity, the habeas corpus procedures of Title IX follow the general form and style of the Code of Civil Procedure.

Article 352 had continued the existing rule that all habeas corpus proceedings should be instituted in the parish in which the petitioner was in custody. This article was amended in the legislature to provide that where a person is held pursuant to a court order, the habeas corpus proceedings shall be instituted in the parish from which the person in custody was sentenced or committed. This change was made to facilitate the procurement of witnesses who will be more readily available at the place of the trial or commitment proceedings. Use of frivolous habeas corpus petitions as a device to secure a free trip home from Angola will be minimized by the provision of article 354, which authorizes the court to refuse to grant clearly unfounded writs.

Article 362, which states the grounds for discharge when a person is held in custody by virtue of a court order, includes four new and important grounds. One of these, the sixth-listed ground, is the basic defense of double jeopardy, which formerly was only available when urged by a special plea before trial.⁵⁸ The seventh ground, that the time limitation for the institution

55. LA. R.S. 15:81 (1966), formerly LA. R.S. 15:77.1 (1950). Similarly, LA. R.S. 15:574.15 is a special provision which was not repealed.

56. LA. R.S. 15:84-15:89 (1966), formerly LA. R.S. 15:99, 15:107-15:109, 15:111, 15:112.

57. LA. CONST. art. VII, § 2.

58. *State v. Klock*, 45 La. Ann. 316, 12 So. 307 (1893).

of prosecution has run, implements the rule that this defense can be pleaded at any time.⁵⁹ However, neither double jeopardy nor time limitations can be urged by habeas corpus if they have been previously raised. These defenses may be raised before trial by a motion to quash, or after conviction and before sentence by a motion in arrest of judgment. If thus raised and the motion is overruled, the defendant's further remedy is by way of appeal.

The eighth ground complements the Code's extradition procedures by providing for discharge by habeas corpus when an arrested fugitive from justice has been denied his right to an extradition hearing.⁶⁰

The ninth and last ground, that the petitioner, "was convicted without due process of law," is quite important. It meets a problem which all states are facing — the provision of an adequate post-conviction remedy in state courts for "due process" cases. The federal decisions make it clear that the federal habeas corpus power is "as broad as the due process concept itself,"⁶¹ and is available in any case where the state courts do not provide a remedy. Clause (9) provides a simple post-conviction remedy which, if understandingly applied, should reduce the flood of federal habeas corpus petitions and enable Louisiana to determine claims of denial of "due process" in its state courts. "Due process," as applicable to state procedures, is an expanding federal concept. Thus, it was impossible to provide a detailed enumeration of the situations coming within the scope of ground (9). Guidance as to the line of distinction between denial of due process situations, and trial irregularities which must be promptly objected to and then urged by appeal, can be found in the federal "due process" decisions.⁶² However, the fact that the concept is sometimes shifting and vague does not preclude the desirability of seeking to provide "due process" relief through state, as distinguished from the federal, courts.

TITLE X. INSTITUTING CRIMINAL PROSECUTIONS

The methods of instituting criminal prosecutions conform with controlling constitutional provisions.⁶³ Offenses which "may

59. Art. 577.

60. Arts. 267, 268.

61. Comment (i) to article 362, with federal cases cited to illustrate the great variety and extent of "due process" situations.

62. See note 61 *supra*.

63. LA. CONST. art. I, § 9.

be punished by death" can only be charged by a grand jury indictment. Other prosecutions in district courts may be instituted either by indictment or by an information filed by the district attorney.⁶⁴ The definitions and procedures for filing the information conform with existing law. Article 386 makes it clear that the discharge of a defendant after a preliminary examination, or the refusal of a grand jury to indict the defendant, do not preclude the state from prosecuting the defendant. The defendant's discharge at the preliminary examination operates to effect his release from present custody, but does not preclude his rearrest and trial when a prosecution is subsequently instituted by indictment or information.

Similarly, the second paragraph of the article states the limited effect of a grand jury's refusal or failure to indict. A "no true bill" merely means that the evidence submitted did not establish a sufficient *prima facie* case to bring the defendant to trial. The charge may be resubmitted to the same or another grand jury, although it would be a safer practice to submit a new bill.⁶⁵ Also, the district attorney is free to disregard the grand jury's refusal to indict and may institute the prosecution by filing an information.⁶⁶ This is in conformity with the co-extensive authority of the district attorney and the grand jury, in non-capital cases, to determine the propriety of instituting a criminal prosecution.

TITLE XI. QUALIFICATIONS AND SELECTION OF GRAND AND PETIT JURORS

This title, insofar as is practicable, establishes uniform provisions for the qualifications and selection of jurors. The result is the elimination of separate chapters for Orleans and for other parishes. Consistency between criminal and civil provisions has been accomplished by a separate statute revising the provisions governing the qualifications and selection of jurors for civil cases.⁶⁷ It would not serve a useful purpose to list the changes in the general qualifications of jurors, exemptions for jury service, and jury commission procedures. The changes are not radi-

64. Art. 382.

65. 42 C.J.S., *Indictments and Informations* § 25 (1944).

66. *Accord*, *State v. Ross*, 14 La. Ann. 364 (1859); *State v. Vincent*, 36 La. Ann. 770 (1884).

67. La. Acts 1966, No. 313, amending and re-enacting sections 3041 through 3046, 3051, 3055 and 3101 of Title 13 of the Louisiana Revised Statutes of 1950.

cal; the new procedures have sought only to eliminate unnecessary detail and provide a clearer guide for jury selection procedures. A study of the code articles and explanatory comments should precede the appointment and instruction of jury commissions. Article 419 continues the sound rule⁶⁸ that jury venires cannot be set aside "unless fraud has been practiced or some great wrong committed that would work irreparable injury to the defendant." This provision has served well in preventing technical attacks upon jury venires for irregular, but good faith, jury commission procedures.⁶⁹ It cannot be expected that jury commissioners, who are seldom lawyers, will always follow the strict letter of the procedures provided.

TITLE XII. THE GRAND JURY

Grand jury procedures, which frequently come under attack by means of motions to quash the indictments returned, are more fully stated. Article 433 provides a slightly broader rule as to persons who may be present during grand jury sessions. It adds assistant district attorneys, and thus clearly permits their presence either alone or with the district attorney. Inclusion of "a person sworn to record" the proceedings and testimony conforms with a 1965 amendment to Federal Rule 6(d) and fills a gap recognized by the Louisiana Supreme Court when it held that the term "stenographer" did not include the operator of a modern electrical recording device.⁷⁰ This broadening of the list of persons permitted to be present during grand jury sessions is important, since an indictment is subject to being quashed without a showing of prejudice, if an unauthorized person is intentionally present at a meeting of the grand jury.⁷¹

Article 434 provides a much needed articulation of the extent of the obligation of secrecy as to information procured and testimony heard at grand jury proceedings. The obligation of secrecy, which is imposed on the grand jury and "all other persons present at a grand jury meeting," clearly covers witnesses who appear before the grand jury. However, this does not preclude a witness who appeared before the grand jury from discussing his knowledge of the facts of a case with defense coun-

68. Former LA. R.S. 15:203 (1950).

69. See Comment (a) to article 419 for examples of the application of this provision.

70. *State v. Revere*, 232 La. 184, 199, 94 So.2d 25, 31 (1957).

71. *Ibid.*; accord, *United States v. Borys*, 169 F. Supp. 366 (Alaska 1959).

sel and others. Furthermore, the article expressly permits the witness to discuss his testimony before the grand jury with those having a legitimate interest in that testimony, *i.e.*, defense counsel or the district attorney. Thus, while general disclosure of grand jury information is forbidden, the obligation of secrecy does not curtail a defense attorney's discovery of facts concerning the case.

Two important exceptions to the rule of secrecy are stated. The first permits the revelation, after indictment, of statutory irregularities in the proceedings to defense counsel, the district attorney and the court. This would allow, for example, disclosure of the fact that the indictment was not returned by the required vote or that a meeting was held without a quorum. The rationale of this exception, which is a broadened codification of present jurisprudence,⁷² is that persons under investigation have a basic right to have the grand jury proceed as specified by law. A second exception, in conformity with provisions found in the Evidence chapter of Title 15 of the Revised Statutes, authorizes disclosure of a witness' testimony before the grand jury to show that he committed perjury.⁷³

Article 442 provides a much needed clarification of the rule governing evidence to be received by the grand jury. The first paragraph retains the rule that the defendant has no right to have his evidence heard by the grand jury, but the grand jury may receive it.⁷⁴ In recognition of the fact that the district attorney is the legal advisor to the grand jury with the duty of presenting evidence of crimes, the grand jury is specifically directed to hear all evidence presented by the district attorney.⁷⁵

The 1928 Code of Criminal Procedure categorically stated that the grand jury "*can* receive no other than legal evidence." (Emphasis added.)⁷⁶ Fortunately, this provision was construed by the Louisiana Supreme Court as no more than a direction to the grand jury that it should limit its investigations to a consideration of legal evidence. It could not be employed as

72. *State v. Revere*, 232 La. 184, 94 So.2d 25 (1957); *State v. Kifer*, 186 La. 674, 173 So. 169 (1937).

73. LA. R.S. 15:471 (1950) permits disclosure of grand jury testimony to show perjury. Under R.S. 14:124 inconsistent statements made before the grand jury and at the subsequent trial raise a presumption of perjury.

74. Former LA. R.S. 15:214 (1950), rephrased in conformity with similar rule stated in ALI CODE OF CRIM. PROC. § 139 (1930).

75. *Accord*, ILL. CODE OF CRIM. PROC. § 112-4(a) (1963).

76. Former LA. R.S. 15:213 (1950).

a basis for challenging the indictment.⁷⁷ To permit a review of the evidence considered by the grand jury would destroy the traditional veil of secrecy which surrounds the proceedings and testimony presented to the grand jury. Article 442 codifies the Louisiana jurisprudential rule by employing the term "should" in the directive to the grand jury to receive only legal evidence. It also expressly states that no indictment or conviction may be set aside on the ground that the indictment was based, in whole or in part, on illegal evidence.⁷⁸ The statement that only legal evidence should be received will, however, serve to guide the district attorney and the grand jury in a proper performance of their duties.

TITLE XIII. INDICTMENT AND INFORMATION

This title seeks to provide a simple and complete guide to the formulation of indictments — eliminating, insofar as possible, the "game of chess" aspect of indictment forms.⁷⁹ In this regard, article 464, which provides the formula for the so-called "long form indictment," is particularly significant. This article governs the nature and contents of all indictments, except where the specific forms authorized by article 465 are employed. Article 227 of the 1928 Code of Criminal Procedure was a source of considerable difficulty. Its requirement that "the indictment must state *every fact and circumstance* necessary to constitute the offense . . ." (emphasis added) was occasionally interpreted so as to virtually require a spelling out of the details of the crime.⁸⁰ Article 464 of the new Code provides a simpler form of indictment, wherein only "the *essential facts* constituting the offense charged" (emphasis added) need be set forth. It contemplates that the details of the commission of the alleged crime are not part of the indictment, but are to be procured through the bill of particulars. The bill of particulars implements the defendant's constitutional right to "be informed of the nature and cause of the accusation against him,"⁸¹ but is not subject to those technical rules of construction which have sometimes

77. *State v. Simpson*, 216 La. 212, 43 So. 2d 585 (1949).

78. ALI CODE OF CRIM. PROC. § 138 (1930).

79. The strict construction of indictments in early English law was decried as a blemish and inconvenience in the law which enabled more offenders to escape by the over easy ear given to exceptions in indictments than by their own innocence. HALE, HISTORY OF PLEAS TO THE CROWN (1st Am. Ed. 1847).

80. See *State v. Kelly*, 225 La. 495, 73 So. 2d 437 (1954).

81. LA. CONST. art. I, § 10.

made the long-form indictment a technical trap for the prosecution.

Article 464 follows Federal Rule 7(c) in requiring citation of the statute alleged to have been violated. This added requirement for indictments under article 464 is desirable because the ever-increasing number and complexity of crimes has resulted in a frequent overlap of criminal statutes under which the prosecution may be instituted.⁸² While the citation requirement is for the benefit of the defendant, it is not intended as a ground for invalidating an otherwise sufficient indictment and prosecution.⁸³ Thus, it is expressly stated that an error or omission of citation will not be grounds for reversal if it did not "mislead the defendant to his prejudice."

Article 465, "Specific Indictment Forms," retained the short-form indictment and extended its availability to a number of other important and well-understood crimes. The specific forms added were carefully studied by the Law Institute in light of the Louisiana jurisprudence, and especially Chief Justice Fournet's thorough and scholarly analysis of the problem in *State v. Straughan*.⁸⁴ It is significant that short forms have been upheld for crimes that may be committed in a number of ways, provided they have a well-understood meaning and scope.⁸⁵ The added specific forms meet this test, being for such crimes as abortion, prostitution, unauthorized use of movables, negligent injuring, arson, and kidnapping.⁸⁶ Conversely, it was not found possible to formulate special forms for such multifarious statutory offenses as narcotics violations and gambling.

The chapter on "Special Allegations"⁸⁷ provides a clearer and more complete formula for the stating of many matters which are essential to indictment forms. Some provisions are modifications of existing rules and others have been copied from the very complete American Law Institute Code of Criminal Procedure. In general, the law remains unchanged, but with rules that are easier to find and to follow. For example, article

82. "To know the statute may be as important as to know the facts intended to be proved." ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 258 (1947).

83. See Advisory Committee note to FED. R. CRIM. P. 7(c).

84. 229 La. 1036, 87 So.2d 523 (1956); see Comments (a) and (b) to art. 465.

85. See cases cited in Comment (a), note 84 *supra*.

86. Title XIII, chapter 2, arts. 466-483.

87. See Comment (b), cited note 84 *supra*.

483 articulates an important distinction as to allegation of prior convictions. Where an offense, such as petty theft or driving while intoxicated, is graded according to whether the violator is a first, second, or subsequent offender, it is necessary to allege the prior convictions in the indictment. Such an allegation is essential if the defendant is to be convicted as a second or subsequent offender.⁸⁸ The first paragraph of article 483, following a provision of the 1928 Code,⁸⁹ states the method of charging such prior convictions. Conversely, prior felony convictions, which may be the basis of enhanced penalties as a multiple offender, may not be charged in the indictment. To state the defendant's past felony convictions in the indictment for the current felony would, according to the Louisiana Supreme Court, unduly prejudice the jury.⁹⁰ In keeping with this sound holding, the second paragraph states that the indictment shall not allege a prior conviction unless it "is necessary to fully charge the offense." Thus, the multiple offender charge must be brought by a separate information after conviction.

Article 484 clarifies the rules governing the bill of particulars — an important device by which the defendant procures necessary detailed information as to the manner in which the offense is alleged to have been committed.⁹¹ It was impossible to draw set lines as to what particulars the defendant may demand. Each case rides off on its own peculiar facts and the matter is one which is not susceptible to precise predetermination. Under this article Louisiana trial judges will continue to be guided by certain general principles which emerge from Louisiana's very sound jurisprudence.⁹² An important feature of article 484 is the fact that it provides a clear statement of the time for filing a motion for a bill of particulars. The 1928 Code provided no clear guidelines and the *Barnes* case simply stated that the motion must be "timely filed."⁹³ Under article 484 the motion may be filed of right within ten days after arraignment,

88. "We are of opinion that it is essential; that the first conviction must be alleged. It enters into and makes part of the last offense. It is an aggravation which gives rise to an increase of the punishment." *State v. Compagno*, 125 La. 669, 671, 51 So. 681, 682 (1910).

89. Former LA. R.S. 15:242 (1950).

90. *State v. Jones*, 209 La. 394, 399, 24 So. 2d 627, 629 (1945).

91. The bill of particulars implements the defendant's constitutional right to be informed of the nature and cause of the accusation against him. LA. CONST. art. I, § 10.

92. For an analysis of the Louisiana jurisprudence see Comments, 12 LA. L. REV. 457 (1952), and 24 LA. L. REV. 912 (1964).

93. *State v. Barnes*, 242 La. 102, 134 So. 2d 890 (1961).

or before trial if the trial is held earlier. The court may, in its discretion, permit the motion to be filed until the commencement of trial. In exercising this discretion the court may refuse to permit the filing of a belated motion if the delay looks like a dilatory tactic, but should rule liberally if there is an excuse for the delay, especially if defense counsel is inexperienced in criminal procedures.

Article 487, which states the rules authorizing amendment of defective indictments, differentiates between the curing of formal defects⁹⁴ and defects of substance. An indictment may be amended, by court order at any time, to cure formal defects, imperfections or omissions. The court may order amendment to cure a defect of substance, such as leaving out an essential element of the crime charged,⁹⁵ before the trial begins. After the trial has begun, a defect of substance cannot be cured by amendment and a mistrial must be ordered. It is sacramental that the entire trial must be held upon an indictment which is not substantially defective.⁹⁶ Article 488 authorizes the court to order the amendment of an indictment or a bill of particulars to conform with the evidence which the state proposes to submit. When a variance develops between the state's allegations in the indictment or bill of particulars and the testimony at the trial, arbitrary exclusion of the testimony could lead to unfortunate results.⁹⁷ While the prior law only provided for amendment of the indictment or information,⁹⁸ the same practical considerations call for liberality in the amendment of the bill of particulars.⁹⁹ Article 489 protects the defendant from surprise changes by providing that if an amendment prejudices the defendant he is entitled to a reasonable continuance. This right to a continuance conforms with the prior law,¹⁰⁰ and the

94. The first paragraph follows the broad statement of the ALI CODE OF CRIM. PROC. § 184(1) (1930), instead of enumerating the myriad forms that formal defects may take, as was done in former LA. R.S. 15:364 (1950).

95. *State v. McDonald*, 178 La. 612, 152 So. 308 (1934), where a burglary indictment failed to allege that "a building" had been burglarized.

96. *State v. Williams*, 173 La. 1, 136 So. 68 (1931).

97. In *State v. Schiro*, 143 La. 841, 79 So. 426 (1918), evidence of the alleged maiming was excluded because it did not correspond with the date charged in the information. As a result, proof of the crime was impossible and the defendant was acquitted. Later he was charged with the same maiming, but with the correct date. A plea of double jeopardy was sustained, on the ground that the defendant had been tried for that maiming—and the defendant went scot free.

98. Former LA. R.S. 15:253 (1950).

99. *Accord*, by jurisprudence, *State v. Boyd*, 162 La. 531, 110 So. 744 (1926).

100. Former LA. R.S. 15:253 (1950).

logical lines followed in the Louisiana jurisprudence will still prevail.¹⁰¹

Changes made in the procedures after indictment have been directed toward the elimination of unnecessary legal requirements. Article 497 follows the general arrest procedures¹⁰² in authorizing the judge to issue a summons, in lieu of the more drastic warrant of arrest, to procure the defendant's presence in court to answer the charge against him. The old requirement that the defendant in major felony cases be furnished with a copy of the indictment and of the jury list¹⁰³ placed an unnecessary burden on courts and sheriffs' offices without any corresponding benefit to the defendant. Thus it has not been continued in the new code. The defense attorney can easily procure a copy of the jury list and article 498 provides that all defendants shall be furnished a copy of the indictment upon request.

TITLE XIV. RIGHT TO COUNSEL

This title codifies and implements those constitutional "due process" standards clearly established by the federal decisions, but it does not attempt to anticipate possible expansions of those standards. Trial courts should be constantly alert to meet expanding "due process" requirements, and as the pattern becomes more clearly settled it may be necessary to adopt statutes or amend this title so as to further implement the defendant's right to counsel.

The need for counsel is particularly urgent in capital cases, and there is strong support for the proposition that "due process" requires that every defendant charged with a capital crime shall be assisted by counsel.¹⁰⁴ Some Louisiana judges, without any statutory mandate, follow the laudable practice of appointing counsel for indigent defendants as promptly as possible after arrest in capital cases. Article 512 recognizes the importance of mandatory assignment of counsel, and imposes a general duty

101. Compare *State v. Singleton*, 169 La. 191, 124 So. 824 (1929), where the defendant was prepared to prove an alibi on the date originally stated; with *State v. Thomas*, 214 La. 374, 37 So.2d 841 (1948), where the amendment specified the particular building burglarized, and this change was not shown to have misled or prejudiced the defendant.

102. Arts. 208-210.

103. Former LA. R.S. 15:332.1 (1950).

104. *Williams v. Kaiser*, 323 U.S. 471 (1945); *Powell v. Ala.*, 287 U.S. 45 (1932).

on the court to assign counsel before the defendant pleads to the indictment. Such assignment is automatic in capital cases, and does not depend upon indigency or require a request by the defendant. Mandatory appointment of counsel may occasion some problems where the defendant is antagonistic to law or lawyers and prefers to conduct his own defense. In this situation the role of appointed counsel can best be determined by court order in the individual case and the antagonistic defendant will usually come to appreciate the help that is provided.

Article 513 continues the Louisiana policy of limiting the statutory right to state-provided counsel to felony cases, which include the so-called "relative felonies" punishable with or without hard labor.¹⁰⁵ This article does not purport to answer the question, left unanswered in *Gideon v. Wainwright*¹⁰⁶ and only partially answered by more recent federal cases,¹⁰⁷ concerning the necessity for court-appointed counsel in serious misdemeanor cases. About all one can presently state with assurance is that the indigent defendant's "due process" right to counsel is not limited to felony cases and has not been extended to lesser misdemeanor charges. The time for assignment of court-appointed counsel is clearly stated, *i.e.*, before the defendant pleads at the arraignment.¹⁰⁸

Any waiver of the indigent defendant's right to counsel must be intelligently made. Thus, article 513 provides that the court must inform the unrepresented defendant of his right to counsel,¹⁰⁹ and article 514 requires a minute entry showing either that the defendant was represented by counsel or that he was informed of his right to counsel. In this regard, the United States Supreme Court has meaningfully stated, in *Carnley v.*

105. Art. 933(3) defines "felony" as "an offense that may be punished by death or by imprisonment at hard labor."

106. 372 U.S. 335 (1963).

107. For discussion of recent Fifth Circuit Court of Appeals decisions enforcing the right to counsel in misdemeanor cases, see Comment, *Some Aspects of the Right to Counsel*, 26 LA. L. REV. 666, 677-78 (1966); Comment (a) to Code art. 513.

108. "The better view is that one needs the advice of counsel on the crucial question of how to plead. Some judges have taken the position that how one pleads doesn't matter much because counsel are always free to change a plea later. However, once a plea of guilty has been entered, a very damaging admission has been made, and counsel may be understandably reluctant to try to undo the harm later by changing the plea. State courts are practically unanimous in agreement that the right to counsel accrues at the arraignment." FELLMAN, *THE DEFENDANT'S RIGHTS* 123 (1958).

109. *Accord*, FED. R. CRIM. P. 44; N.J. RULES 1:12-9(a); ALI CODE OF CRIM. PROC. § 203 (1930).

Cochran,¹¹⁰ that "the record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not a waiver." Similarly, and in conformity with a 1964 statute, the court must always appoint counsel for a defendant whose mental capacity to proceed is in issue. Such a person may not be qualified to determine his need for counsel or capable of procuring counsel.¹¹¹

The indigent defendant's right to counsel to prosecute his appeal was recognized as having full "equal protection" status in *Douglas v. California*.¹¹² Unfortunately, the *Douglas* decision provided no guidance as to what procedure might be adopted to screen out frivolous and obviously unfounded appeals, where the appointment of an attorney would be an unnecessary burden on the bar and a "useless gesture."¹¹³ In view of this practical difficulty, the code followed existing Louisiana procedures; no statutory duty is imposed, but the appointed attorney who represented the defendant at the trial usually continues to represent him on appeal, often at considerable personal expense and sacrifice. Such appellate representation, in meritorious cases, has come to be recognized as part of the obligation of the lawyer who represented the defendant at the trial.¹¹⁴

Similarly, the code has not attempted to anticipate the ultimate effects of *Miranda v. Arizona*,¹¹⁵ where the United States Supreme Court held that the defendant must be offered the benefit of counsel when questioned by police, as an implementation of his constitutional privilege against self-incrimination. This is a problem that was not susceptible of statutory formulation when the code was adopted, and it may be a matter which can best be solved at a local level.

TITLE XV. MOTION TO QUASH

Article 531 adopts a procedure, recommended by the Ameri-

110. 369 U.S. 506, 516 (1962); *accord*, *State v. Youchunas*, 187 La. 281, 174 So. 356 (1937).

111. Art. 643; *accord*, former LA. R.S. 15:271 (1950).

112. 372 U.S. 353, 357 (1963), where Justice Douglas stated that when the appeal of an indigent defendant is decided without the benefit of counsel, "an unconstitutional line has been drawn between rich and poor."

113. *Id.* at 359. Justice Clark, in a well-reasoned and vigorous dissent, cited imposing statistics showing that 96% of appeals in forma pauperis in federal courts were frivolous.

114. *State v. Graves*, 246 La. 460, 467, 165 So.2d 285, 288 (1964).

115. 384 U.S. 436 (1966), noted, 27 LA. L. Rev. 87 (1966).

can Law Institute,¹¹⁶ whereby the all-inclusive motion to quash is substituted for numerous separate devices which have been employed to raise preliminary defenses. The grounds, covering all forms of defects in the proceedings, are fully stated in articles 532 through 534. There had been some uncertainty as to the proper device for urging some of those defenses under the multi-labeled pleas of the 1928 code. For example, matters raised by demurrer could also be urged by a motion to quash. However, the converse was not true, and it was fatal to the defendant's objection when he mistakenly filed a demurrer for an objection which did not appear on the face of the indictment.¹¹⁷

The grounds for the motion to quash cover a wide variety of defenses, some of which were inadequately articulated in the old code or found only in the jurisprudence. These grounds should be studied. Preliminary motions which do not constitute "pleas or defenses" are governed by other titles of the code. Examples of such motions are motions for a bill of particulars, for change of venue, for a continuance, or for recusation of the trial judge. The defense of mental incapacity to proceed, which may be raised before or during the trial, is expressly excepted from the general coverage of article 531, and is to be handled in conformity with special procedures fully set forth in Title XXI, *Insanity Proceedings*.

The time for filing motions to quash was confusingly stated in three overlapping articles of the 1928 code,¹¹⁸ and resort to the jurisprudence was frequently necessary to ascertain the rule to be followed.¹¹⁹ Under article 535 the time for filing a motion to quash is dependent upon the ground upon which the motion is based, and these grounds are fully spelled out. Paragraph A embraces those grounds which are so fundamental that they are not waived by failure to file a motion to quash, and may be urged for the first time after conviction. Examples of these grounds are the unconstitutionality of the statute under which the prosecution was brought, double jeopardy, time limitation upon the institution of prosecution, and lack of jurisdiction. In

116. ALI CODE OF CRIM. PROC. §§ 209, 210 (1930).

117. *State v. Aenspacker*, 130 La. 717, 58 So. 520 (1912).

118. Former LA. R.S. 15:202, 15:265, 15:284 (1950).

119. See the Supreme Court's construction of R.S. 15:202 in *State v. Smothers*, 168 La. 1099, 123 So. 781 (1929), and *State v. Wilson*, 204 La. 24, 14 So. 2d 873 (1943).

these instances it is best to get the issue settled before trial, if possible. Thus a liberal rule is stated and the motion to quash may be filed of right at any time before the commencement of the trial. Trial procedure is expedited by the trial judge's specific authority to defer the hearing on the motion to quash until the end of the trial.

Paragraph B includes important grounds, but grounds which cannot generally be urged after conviction. It covers expiration of the time limitation upon the commencement of trial, a rule implementing the defendant's constitutional right to a speedy trial. It also embraces alleged irregularities in the selection of jury venires. A motion to quash on these grounds may be filed as of right at least three judicial days before commencement of the trial; it may be filed with permission of the court during the three-day period immediately preceding the trial. Again, the hearing may be deferred in the interest of trial expediency.

The non-enumerated "other grounds" embraced by paragraph C are formal defects which are waived if not promptly urged. They include, among other things, such defects as misjoinder or duplicity, failure to properly file or authenticate the indictment, and improper venue. These may be filed, as of right "within ten days after arraignment, or before commencement of the trial, whichever is earlier." The court may permit the motion between the expiration of the ten-day period and the beginning of the trial. This discretion will enable the trial judge to help an inexperienced defense counsel who has an excuse for his belated motion.

Article 538, which is based largely on Federal Rule 12(5), specifies the effect of sustaining a motion to quash. If the ground is invalidity of the statute upon which the charge is based, double jeopardy, time limitations, or the court's lack of jurisdiction, the defendant will be discharged as to the present charge when the motion is sustained. When the motion to quash is based upon defective grand jury proceedings, a defectively framed indictment, or other defects which merely vitiate the particular charge, the court is authorized to order the defendant continued in custody or on bail pending the filing of a new or corrected indictment.

TITLE XVI. ARRAIGNMENT AND PLEAS

This title generally conforms with prior code provisions and

the Louisiana jurisprudence. It should be noted that article 552, listing the pleas at the arraignment, includes two changes. The plea of double jeopardy is no longer listed as a plea to the merits, but is one of the grounds for the motion to quash.¹²⁰ There was no sound reason for treating double jeopardy as a plea to the merits, when other fundamental bars to trial that are determined by the court, such as time limitations and lack of jurisdiction, are raised by the motion to quash. The dual plea of "not guilty and not guilty by reason of insanity" conforms more clearly with present procedures whereby the insanity defense, when pleaded, is tried concurrently with those defenses which are generally available upon a simple "not guilty" plea.¹²¹

The method of pleading is fully set forth in article 553, which continues the requirement that a defendant charged with a felony must plead in person.¹²² In misdemeanor cases, liberal and practical pleading rules are stated. In these cases the defendant may always plead "not guilty" through counsel. Whether a "guilty" plea shall be received in the absence of the defendant is a matter left to the discretion of the judge, who may have reason to require the defendant's presence in court when the plea is received and the sentence imposed. It is normal for a corporate defendant to plead through counsel in all cases, and this is specifically authorized.¹²³

Existing safeguards and limitations upon the receiving of "guilty" pleas are continued in articles 557 through 560. Article 556 adds a further precautionary requirement that where a defendant is not represented by counsel in a felony case, the court shall not accept a guilty plea "without first determining that the plea is made voluntarily with understanding of the nature of the charge."¹²⁴ The article emphasizes and reiterates the court's duty in protecting the unrepresented defendant against

120. Art. 532(6).

121. These procedures, which were formerly only determined by a careful study of the jurisprudence, are fully stated in chapter 2 of Title XXI, Insanity Proceedings. See art. 651, Comment (b) (1966).

122. Former LA. R.S. 15:257 (1950).

123. *Accord*, ALI CODE OF CRIMINAL PROC. § 223 (1930). See also, the provision in LA. CODE OF CRIMINAL PROCEDURE art. 554 (1966) to the effect that where a corporate defendant fails to appear a plea of "not guilty" shall be entered.

124. The general requirement is based upon FED. R. CRIM. P. 11 and follows ALI CODE OF CRIM. PROC. § 224 (1930) in limiting its application to cases where the defendant is not represented by counsel.

coerced or misunderstood guilty pleas, but is stated in broad, non-technical language so that it will not serve as a device for beclouding the validity of sentences imposed after pleas of guilty.¹²⁵

The trial court's discretion as to whether a plea of guilty may be withdrawn¹²⁶ has been continued in article 559, but with the added requirement that the withdrawal of the plea must be made "before sentence."¹²⁷ Existing jurisprudence, to the effect that an improper refusal to permit the withdrawal of the guilty plea is reversible error¹²⁸ will still be fully effective. A special right to relief, where the defendant has been rushed into a plea of guilty within forty-eight hours after his arrest, is continued in the second paragraph of article 559.¹²⁹ The sound rule that a withdrawn guilty plea shall not be admissible at the trial,¹³⁰ is broadly stated so as to clearly apply to any plea of guilty that is subsequently withdrawn or set aside.

TITLE XVII. TIME LIMITATIONS

This title embraces, without change, the completely new system of time limitations on criminal prosecutions which was enacted in 1960.¹³¹ The 1960 time limitations law had been drafted by the Louisiana State Law Institute as part of the Code of Criminal Procedure revision, but was enacted prior to the completion of the Code, in order to meet an urgent need for relief in this confused area of the law.

TITLE XVIII. DOUBLE JEOPARDY

Article 592 eliminates an unnecessary distinction between jury and judge trial cases and provides that in both situations jeopardy begins when the first witness is sworn at the trial on the merits.

Under the 1928 code provisions, double jeopardy could only be urged by a special plea, which was urged, tried, and disposed

125. See Comment (c) to art. 556.

126. Former LA. R.S. 15:266 (1950).

127. This added requirement follows ALI CODE OF CRIM. PROC. § 230 (1930) and is well supported by the cases and statutes cited in the commentary to § 230.

128. See Comment (a) to art. 559 for citation of Louisiana cases.

129. Based upon former LA. R.S. 15:266.1 (1950).

130. The basis of this rule is set out in Comment (d) to art. 559.

131. La. Acts 1960, No. 25, enacting former LA. R.S. 15:7.1-15:7.13 (Supp. 1960).

of before the trial.¹³² Article 594, in recognition of the fundamental nature of this defense,¹³³ provides that double jeopardy "may be raised at any time, but only once." Thus it may be urged before trial by a motion to quash,¹³⁴ with a bill of exceptions reserved if the motion is overruled. If not previously urged, it may be raised after conviction by a motion in arrest of judgment¹³⁵ or by a writ of habeas corpus.¹³⁶ In all situations, as under the former law,¹³⁷ the defense is tried by the court alone.

Article 596, which covers the identity of offenses concept, includes the "identical with or different grades of the same offense" formula of article 279 of the 1928 code. However, it makes it abundantly clear that double jeopardy is not limited by responsive verdict restrictions.

Clause (2) of the article precludes multiple prosecutions for continuous offenses. For example, possession of stolen goods or narcotics may continue over a considerable period of time or in several parishes. Yet, there has only been one crime and only one criminal prosecution is proper.

Article 598 codifies the *Harville*¹³⁸ rule that conviction of a lesser included offense constitutes an implied acquittal of the greater offense charged; and on a new trial the defendant can be tried only for the offense for which he was convicted. The second sentence carries the *Harville* rule a logical step further and provides that when a jury returns a verdict of "guilty without capital punishment," a subsequent new trial cannot result in a death sentence.

TITLE XIX. JURISDICTION AND VENUE

Liberal jurisdiction and venue provisions, and an implementing constitutional amendment, were adopted upon the recommendation of the Louisiana State Law Institute in 1962.¹³⁹ These provisions, and other existing jurisdiction and venue rules,

132. Former LA. R.S. 15:281 (1950).

133. LA. CONST. art. I, § 9.

134. Art. 532(6).

135. Art. 859(6).

136. Art. 362(6).

137. Former LA. R.S. 15:282 (1950).

138. *State v. Harville*, 171 La. 256, 130 So. 348 (1930), where the defendant was tried for murder and convicted of manslaughter. Upon a new trial the defendant was only subject to trial for manslaughter.

139. Amendments of LA. CONST. art. 1, § 9, and LA. R.S. 15:13 (1950).

are continued without change in articles 611 through 614. A special provision, which deals with venue in non-support cases, was placed in the Code of Criminal Procedure Ancillaries chapter of Title 15 of the Revised Statutes.¹⁴⁰ The method of raising improper venue is clarified by article 615, but is stated in conformity with existing constitutional rules. In general, improper venue may be raised before trial by a motion to quash, and then is triable by the judge alone. The right of the defendant to again raise the issue at the trial on the merits before the jury¹⁴¹ is also preserved.

TITLE XX. CHANGE OF VENUE

The change of venue rules and procedures are in general conformity with the 1928 code provisions. Article 623, however, affords a much needed liberalization, by providing that when a change of venue is granted the case shall be transferred "to another parish." The former limitation of transfer to a court of an adjoining parish or district proved completely unworkable in cases like *State v. Rideau*,¹⁴² where prejudice existed in the entire area covered by the telecast of the defendant's confession, and transfer of the case to a more distant section of the state was ordered by the Louisiana Supreme Court to assure the defendant a fair trial.¹⁴³ Also, the former limitation to a single change of venue¹⁴⁴ has been deleted. Such an arbitrary limitation was so out of keeping with the defendant's right to a fair trial that it could, in an extreme situation, have constituted a denial of "due process."

TITLE XXI. INSANITY PROCEEDINGS

The procedures for administering the defenses of insanity at the time of the crime (a defense on the merits) and present insanity (a bar to present trial) were confusingly and inadequately stated in the cumbersome and much amended provisions of articles 267 through 269 of the 1928 Code of Criminal Procedure. Many important rules were only ascertainable by an extensive study of the Louisiana jurisprudence. Title XXI

140. LA. R.S. 15:191 (Supp. 1966), formerly LA. R.S. 15:16.1 (1950).

141. See cases cited in Comment (a) (2) under art. 615.

142. 373 U.S. 723 (1963).

143. *State v. Rideau*, 246 La. 451, 165 So.2d 282 (1964).

144. Former LA. R.S. 15:294 (1950), providing that a second change of venue could not be had "under any pretense whatsoever."

builds upon existing statutory procedures by codifying a number of sound rules which have been established by decisions of the Louisiana Supreme Court. It further implements those procedures by the addition of supplementary provisions suggested in part by the American Law Institute's Model Penal Code.¹⁴⁵

The two insanity defenses are separately treated. Chapter 1 provides procedures for raising and determining the defense of mental incapacity to proceed, which may be urged at any time,¹⁴⁶ but is usually urged and disposed of prior to the actual trial of the case. The test of article 641 conforms with the prior law¹⁴⁷ and is a test that has been almost universally adopted. The issue is whether "as a result of mental disease or defect, a defendant presently lacks the capacity to understand the proceedings against him or to assist in his defense." The procedures for raising this defense are largely unchanged. Under article 642, mental incapacity to proceed may be raised at any time, even during trial; and it may be urged by the defense, the district attorney, or the court. The ordering of a mental examination as to a defendant's capacity to proceed rests in the sound discretion of the court. Thus article 643 continues the rule that the court must have "reasonable ground to doubt the defendant's mental capacity to proceed."

Article 644 provides a more flexible procedure as to the composition of a sanity commission appointed to examine and report upon the defendant's present mental condition. Under the former law the commission was composed of two members, with the coroner a mandatory member. This latter requirement, which was unique to Louisiana, was difficult to justify in view of the fact that coroners usually have very little training in psychiatry. Under the new code, determination of the composition of the sanity commission rests entirely with the court, which is authorized to appoint a commission of from one to three "physicians" with at least three years' practical experience. It is quite probable that the judge will appoint psychiatrists where they are available; but there is nothing to prevent appointment of the coroner or some general practitioner, where the judge has special confidence in the advice of these men or psychiatrists

145. ALI MODEL PENAL CODE §§ 4.02-4.09 (1962).

146. Art. 642.

147. Former LA. R.S. 15:267 (1950).

are not readily available. The determination of mental capacity to proceed follows existing procedures.¹⁴⁸

Article 648, in conformity with the usual disposition of such cases, provides that a mentally incapacitated defendant shall be committed to a state mental institution for as long as such incapacity continues. This may result in great hardship where a defendant charged with a non-violent offense is committed for a long period pending a finding of present capacity to proceed. In such a situation probation is authorized upon a finding that the defendant is not being helped by continued custody in the mental institution and that he may be released without danger. Probation can only be granted upon recommendation of the superintendent of the mental institution, and the court should impose conditions designed to make sure that the defendant will not create a problem in the community to which he is returned.

Article 649 provides more complete procedures for subsequent determination of whether a committed defendant has regained capacity to stand trial. The subsequent hearing as to present capacity will usually be instigated by a report by the superintendent of the mental institution to which the defendant was committed, but present capacity may also be urged by the district attorney or the defense. In all instances the trial judge decides the issue of present capacity, and flexible procedures are desirable. In making his determination the judge may depend upon the report and recommendation of the superintendent of the mental institution, since this is certainly a source of first-hand, complete information. Examinations and reports by the staff of the mental institution may be ordered when the district attorney or the defense applies to have the proceedings resumed. On the other hand, there will be many cases where appointment of an independent sanity commission will be advisable — taking into consideration such factors as the availability of staff psychiatrists to make complete examinations and to testify at the sanity hearing, and the particular court's experience as to the relative thoroughness and value of institutional versus independent examinations and reports. It should be noted that the re-determination of present capacity must be at a contradictory hearing, where both the defense and the district attorney are given a full opportunity to present evidence and cross-examine any witnesses called.

148. Arts. 645-646.

Chapter 2 provides procedures for determination of the basic defense on the merits of insanity at the time of the offense.¹⁴⁹ These procedures were inadequately stated in the 1928 Code of Criminal Procedure, and subsequent amendatory statutes have resulted in obfuscation rather than clarification. A true picture can only be had by a careful study of key Louisiana Supreme Court decisions, and the attorney who is not familiar with such landmark decisions as *Gunter*, *Dowdy* and *Watts* is almost as confused as the defendant he represents. Article 651 codifies the current practice and procedure, as established by the *Gunter*¹⁵⁰ and *Dowdy*¹⁵¹ decisions. Under a simple plea of "not guilty" insanity is not in issue, and evidence of insanity or mental defect at the time of the crime is inadmissible. Under a combined plea of "not guilty and not guilty by reason of insanity" all defenses going to the defendant's guilt or innocence, including the special defense of insanity at the time of the crime, are tried concurrently by the jury. The reason for requiring a special plea of insanity, as distinguished from the old common-law procedure of permitting the insanity defense under a general "not guilty" plea, is that it provides advance notice to the court and the district attorney that insanity will be urged at the trial.¹⁵² This enables the court to appoint a sanity commission in advance of the trial.

An important related question concerns the time within which a defendant may change from a simple "not guilty" plea where insanity is not in issue, to a dual plea which raises insanity along with other defenses on the merits. The much amended provisions of the 1928 code provided no real guidelines, and the matter was apparently controlled by *State v. Watts*,¹⁵³ where the Louisiana Supreme Court held that the trial judge erred in refusing to entertain the defendant's plea of insanity, even though it was filed just before the case was called for trial,

149. This defense is a matter of substantive criminal law which is stated in art. 14 of the 1942 Louisiana Criminal Code. "If the circumstances indicate that because of a mental disease or mental defect the offender was incapable of distinguishing between *right and wrong* with reference to the conduct in question, the offender shall be exempt from criminal responsibility." (Emphasis added.)

150. *State v. Gunter*, 208 La. 694, 23 So. 2d 305 (1945).

151. *State v. Dowdy*, 217 La. 773, 47 So. 2d 496 (1950); see Comment (b) to art. 651.

152. *Accord*, ALI MODEL PENAL CODE § 4.03 (1962): "(2) Evidence of mental disease or defect excluding responsibility is not admissible unless the defendant, at the time of entering his plea of not guilty or within ten days thereafter or at such later time as the Court may for good cause permit, files a written notice of his purpose to rely on such defense."

153. 171 La. 618, 131 So. 729 (1930).

would result in delaying the trial until the next term of court, and was probably filed late as a dilatory tactic. The rule of the *Watts* case had little support in practicality or in the law of Louisiana or other states. Article 561 provides a definite rule which follows the procedure adopted in most modern insanity statutes and is consistent with the analogous notice provision of the ALI Model Penal Code.¹⁵⁴ The ten-day period after arraignment to change to an insanity plea, as of right, provides a brief additional period for counsel to assess the advisability of urging a defense of insanity. Added protection against inadvertent loss of a good insanity defense is contained in the provision which authorizes the court, for good cause shown, to permit a change of plea at any time before the commencement of trial. Delays resulting from inexperience of defense counsel and other hardship cases will come within this provision. Otherwise, failure to urge the insanity defense within ten days after the arraignment, as in *Watts*, will justify the court's refusal to permit the belated change of plea.

When insanity is pleaded as a defense, a verdict of "not guilty by reason of insanity" is responsive,¹⁵⁵ and the court shall charge the jury that if it acquits the defendant on that ground it must so specify in its verdict.¹⁵⁶ Article 654 fully states, for the first time, the procedures after an acquittal on the ground of insanity. In capital cases, as under the existing law, the acquitted defendant is automatically committed to a proper mental institution. In non-capital felony cases provision is made for a prompt determination, by a contradictory hearing as part of the criminal proceedings, of the question of whether the defendant should be committed or may safely be discharged completely or released on probation. Under the former code, no provision was made for this situation and the only protection against a still dangerous defendant was a civil commitment procedure, brought by the district attorney under the mental health laws.¹⁵⁷

The test for continued custody of a defendant who has been committed after an acquittal on the ground of insanity is dangerousness of the defendant. This test conforms with the 1960 Louisiana statute for commitment of capital defendants.¹⁵⁸ In

154. ALI MODEL PENAL CODE § 4.03(2) (1962).

155. Art. 816.

156. Art. 805.

157. LA. R.S. 28:59 (1950).

158. *Id.* 15:270 (Supp. 1960).

support of a similar ALI Model Penal Code provision, the Comment states that "it seems preferable to make dangerousness the criterion for continued custody, rather than to provide that the committed person may be discharged or released when restored to sanity as defined by the mental hygiene laws. Although his mental disease may have greatly improved, such a person may still be dangerous because of factors in his personality and background other than mental disease. Also, such a standard provides a possible means for the control of the occasional defendant who may be quite dangerous but who successfully feigned mental disease to gain an acquittal."¹⁵⁹

The acquitted forcible felon, especially the insane killer or rapist, will seldom regain mental normality to such an extent as to render his release safe to society. However, procedures for making such a determination are provided,¹⁶⁰ following the general pattern of the complete and carefully formulated ALI Model Penal Code procedures,¹⁶¹ and place the responsibility for deciding whether the defendant may be safely released upon the trial judge. In making this determination he may, as in the determination of mental capacity to proceed, rely upon a report from the superintendent of the mental institution or appoint an independent sanity commission. The release procedures are very flexible, authorizing the court to act upon the basis of reports filed or to hold a full contradictory hearing. If a hearing is held, the burden of proof is on the committed person to prove that his discharge or release on probation would be "without danger to others or to himself."¹⁶²

A 1966 amendment to the mental health laws¹⁶³ authorizes the superintendent of a mental institution, on a certificate from two physicians that no harm will result from his discharge, to order the release of a committed person. This statute will not apply to commitments incidental to criminal proceedings, where release from the mental institution must always be by court order. Section 6 of the statute enacting the Code of Criminal Procedure¹⁶⁴ repudiates any possible artificial rule of construction to the contrary and states that the new code procedures

159. ALI MODEL PENAL CODE, tentative draft no. 4, § 4.08, Comment 2 (1955).

160. Arts. 654-657.

161. ALI MODEL PENAL CODE § 4.08 (1962).

162. Art. 657.

163. LA. R.S. 28:96.1 (Supp. 1966).

164. La. Acts 1966, No. 310.

shall prevail over any conflicting statutory provision enacted at the 1966 regular legislative session "regardless of which act is adopted later or signed later by the Governor." The legislative intention that special Code of Criminal Procedure provisions were not to be superseded by the mental health law amendment was further shown by the fact that that amendatory statute purported to expressly continue the applicability of the then effective Code of Criminal Procedure rules governing insanity proceedings.¹⁶⁵

TITLE XXII. RECUSATION OF JUDGES AND DISTRICT ATTORNEYS

The procedures for recusation of judges, in the interest of promoting uniformity, follow the 1960 Code of Civil Procedure, with such adaptations as are necessary to adjust to the special differences in criminal cases. The most important ground for recusation, as stated in article 671, is ground (1). It continues the rule that interest in the cause is a ground for recusation, and adds the much needed provision that bias or prejudice shall also be a ground for recusation. This expansion is in line with the basic purpose of recusation procedures, *i.e.*, to protect the defendant's right to a fair and impartial trial.¹⁶⁶ The other grounds are stated in substantial conformity with existing law.

The provisions for recusation of the district attorney largely follow existing procedures, codifying some rules which were formerly found only in the jurisprudence. For example, the first ground for recusation, stated in article 680, is "personal interest in the cause which is in *conflict with fair and impartial administration of justice.*" (Emphasis added.) This conforms with the jurisprudence, and is much clearer than the former ground which was stated as "personal interest *adverse to that of the prosecution.*" (Emphasis added.) A district attorney who is overzealous in the prosecution because he was engaged to sue the defendant in a civil action is fully as undesirable as one whose personal interests are adverse to the prosecution.¹⁶⁷

165. LA. R.S. 28:96.1 B (Supp. 1966), which continues the effectiveness of art. 267 of the 1928 Code of Criminal Procedure.

166. *Accord*, ALI CODE OF CRIM. PROC. § 250 (1930). ALI Commentary lists the U. S. Judicial Code and nineteen states as having statutes making prejudice a ground for recusation of the judge.

167. Canon 5 of the ABA CANONS OF PROFESSIONAL ETHICS states: "The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done."

TITLE XXIII. DISMISSAL OF PROSECUTION

The provisions of this title continue, under a more usual and descriptive name but without major change, the nolle prosequi authority of the district attorney. Article 691 continues the discretionary power of the district attorney to dismiss prosecutions on his own motion, without obtaining consent of the court.¹⁶⁸ An added requirement that the dismissal be entered on the minutes of the court follows the ALI Code of Criminal Procedure,¹⁶⁹ and provides a public record of the district attorney's exercise of his dismissal authority.

The district attorney's authority to dismiss an indictment, when a trial de novo has been ordered in the district court after appeal from a city court conviction, is stated in article 692(2). This provision is new, but is a logical implementation of the district attorney's authority to determine which cases he will prosecute. The same considerations which support the district attorney's authority to dismiss grand jury indictments which are not supported by sufficient proof, justify his authority to dismiss unfounded city court convictions which would not stand upon a retrial in the district court.

There are certain limitations as to the scope of the trial de novo on the appeal of a city court conviction to the district court. The sentence imposed by the city court cannot be increased,¹⁷⁰ and only evidence presented in the city court may be presented at the district court trial.¹⁷¹ In view of these limitations, article 693(2) logically provides that if the district attorney dismisses the charge appealed, he may not institute the prosecution again with a new charge. Thus the dismissal of the appeal operates, in practical effect, as an acquittal.

TITLE XXIV. PROCEDURES PRIOR TO TRIAL

The motion to suppress evidence provides a practical device for testing, in advance of trial, the validity of evidence and of written confessions. Paragraph A provides for the suppression of evidence procured by "an unconstitutional search or seizure." By this general statement the provision is tailored to fit future determinations of the Louisiana and United States Supreme

168. *Accord*, former LA. R.S. 15:329 (1950).

169. ALI CODE OF CRIM. PROC. § 295 (1930).

170. *State v. Debose*, 235 La. 875, 106 So.2d 294 (1958).

171. LA. CONST. art. VII, § 36, as amended in 1958.

Courts as to what is constitutional. The Comment states that "the term 'unconstitutional,' rather than the term 'illegal' is employed on the theory that a search or seizure can be 'illegal' if some minor aspect of search or seizure, or of the search warrant or arrest involved, was technically contrary to law even if not violative of Fourteenth Amendment 'due process' concepts as expressed by the *Mapp* case. Use of the more limited term 'unconstitutional,' also conforms with the Louisiana Supreme Court's interpretation of the *Mapp* requirements in *State v. James* (citation omitted)."¹⁷² Paragraph A, being similar to Federal Rule 41(c), limits the time for filing the motion to suppress, but relaxes the time requirement where defense counsel did not have an opportunity to file it earlier or was unaware of the ground. Also, the court is given general discretionary authority to entertain a belated motion to suppress.

Paragraph B goes further than the federal rule and authorizes a motion to suppress a written confession in advance of trial. This provision does not embrace oral confessions, which will be governed by existing rules of the jurisprudence. Although the motion to suppress a written confession must be filed at least three judicial days before trial, the failure to file a timely motion to suppress will not prevent objection to the admissibility of the confession at the trial on the merits.

Article 702 states that cases "shall" be set for trial on motion of the state, thus preserving the district attorney's general authority to control the docket.¹⁷³ The further provision that cases "may" (discretionary) be set for trial on motion of the defendant conforms with the jurisprudential rule that the state's right to control the docket cannot affect the defendant's right to a speedy trial.¹⁷⁴ After the case is set for arraignment or for trial, the court is in control as to postponements, and the continuance provisions of the Code¹⁷⁵ apply. Continuance procedures substantially conform with the former law, with the granting of a continuance being "within the sound discretion of the trial judge."¹⁷⁶ Article 713 adds the sound rule that a continuance must be granted when requested by both the state and the de-

172. Comment (b) to Art. 703.

173. See Comment (a) to Art. 702.

174. *State v. Frith*, 194 La. 508, 194 So. 1 (1940).

175. Arts. 707-715.

176. Art. 712.

defendant. This "negates the idea that when both parties agree to a continuance the court may nevertheless refuse it."¹⁷⁷

TITLE XXV. COMPULSORY PROCESS

The provisions of this title, which implement the defendant's constitutional right to compulsory process,¹⁷⁸ continue and elaborate upon existing statutory procedures. There was no legislation authorizing use of the subpoena duces tecum in criminal matters. Article 732 fills this gap without including the broad discovery procedures of the Federal Rules of Criminal Procedure. Some changes, based on considerations of expediency and fairness, have been made in the rules governing the number of witnesses who may be summoned at the expense of the parish. The Comments accompanying these articles¹⁷⁹ fully explain the nature of, and reasons for, these changes. The Uniform Act provisions for obtaining witnesses from outside the state¹⁸⁰ are incorporated in the new Code without change, thus avoiding possible conflict with this uniform legislation as adopted in other states.

TITLE XXVI. TRIAL PROCEDURE

Article 765, which states the normal order of trial, is not limited to jury trials. Orderly and predictable proceedings are desirable in all trials.¹⁸¹ This article continues the existing requirement of an opening statement by the district attorney. Article 769 codifies a well-settled rule, developed in the jurisprudence, that the district attorney is bound by his opening statement. It provides "evidence not fairly within the scope of the opening statement . . . shall not be admitted in evidence." This rule is modified, in the interest of avoiding a technical bar to the full presentation of the facts of the case, to authorize the court to admit evidence inadvertently and in good faith omitted from the opening statement. The admission of such evidence is in the discretion of the trial judge and is dependent upon a finding that the defendant will not be taken by surprise or prejudiced in his defense.

177. See Comment (a) to Art. 713.

178. LA. CONST. art. I, § 9. It was unnecessary to retain former La. R.S. 15:144 and 15:145, which merely restated the constitutional guaranty.

179. Arts. 738-740.

180. Arts. 741-745.

181. Cf. former La. R.S. 15:333 was apparently limited to jury trials; while the comparable article of the Code of Civil Procedure, Article 1632, applies both to jury trials and to judge tried cases.

Articles 767 and 768 present an entirely new approach to the problem of reference to confessions in the opening statement. The defendant cannot properly prepare to meet the issue unless he is apprised of the state's intention to use the confession. The making of a sufficient, but not overly detailed, reference to the confession has raised some close opening-statement problems. From the defendant's standpoint, substantial damage has been done when the jury has been told that the defendant made a confession which later proved inadmissible. The new procedure solves both of these problems. Article 767 prohibits any reference to a confession or inculpatory statement in the district attorney's opening statement. Article 768 requires the state to advise the defense of its intention to introduce the confession in writing prior to the opening statement, thus satisfying the notice requirement even more fully than reference in the opening statement would do. Failure to give such notice, even though there may have been a prior ruling on a motion to suppress, will render the confession inadmissible in evidence.¹⁸²

A troublesome problem has existed as to prejudicial remarks made before the jury. Great uncertainty has prevailed as to when the effect of such remarks can be cured by a prompt admonition to disregard the remark or comment and when the remark or comment is so damaging that it is incurable and a mistrial must be declared. Article 770, which follows existing lines of the jurisprudence, covers remarks by the court, the district attorney, or any other court official, which are so highly prejudicial that they cannot be cured by an admonition. In these situations the defendant is entitled to a mistrial, unless he prefers that the court admonish the jury and the trial proceed. Under ground (1), appeals to racial prejudice, there must be a showing that the remark was immaterial, irrelevant, and of such a serious nature that it "might create prejudice against the defendant." It thus becomes a matter of degree, as is borne out by existing jurisprudence, as to whether the intemperate remark is a ground for a mistrial. Ground (2), proscribing reference to other crimes of the defendant, expressly excludes reference to crimes as to which evidence is admissible.¹⁸³ Grounds (3) and (4) involve very sensitive areas, where any official reference is irreparably damaging. Reference to the defendant's failure to

182. See Art. 703, Comment (f).

183. See Comment (c) to Art. 770.

take the stand, for example, is in derogation of his constitutional privilege against self-incrimination.

Article 771 covers irrelevant prejudicial remarks where an admonition will generally be sufficient. This would include lesser prejudicial remarks by a district attorney, being those not listed in article 770. It would embrace any remarks by a spectator or witness, including remarks of the character included in article 770. Remarks by these persons do not have the same weight as official utterances by the court or district attorney. Also, these people cannot be fully controlled and there is not the same official responsibility for their utterances. In these situations, while an admonition is the normal remedy, the trial judge is authorized to grant a mistrial if the situation is so bad that an admonition will not assure the defendant of a fair trial.

Article 775 is of particular importance in connection with double jeopardy, since double jeopardy cannot exist if a mistrial was properly ordered in the first trial. Existing guidelines as to the ordering of mistrial were somewhat inadequate, consisting of a hybrid admixture of statutory and jurisprudential rules. Article 775 draws these rules together with an enumeration of those situations in which a mistrial may be ordered and the jury dismissed. These grounds conform with present standards and are carefully stated.

The directed verdict is extended to jury trials by article 778, which follows the federal motion for acquittal.¹⁸⁴ The motion may be made either after the close of the state's evidence or after all evidence is in. It is an extension of the existing rule that the judge should grant a new trial when "the verdict is contrary to the law and the evidence."¹⁸⁵ It goes further, however, since the granting of a new trial lacks the finality of an acquittal. The test for directing a verdict is the same as that enunciated in the federal motion for acquittal, *i.e.*, "if the evidence is insufficient to sustain a conviction." This test is about as definite as is possible in this area, and Louisiana courts will be able to look to federal decisions for some guidance.¹⁸⁶ In general, federal courts appear reluctant to order an acquittal unless the

184. FED. R. CRIM. P. 29; *accord*, ALI CODE OF CRIM. PROC. § 321 (1930).

185. Art. 851(1), following former La. R.S. 15:509.

186. For examples of the somewhat divergent views of the federal decisions in point, see *Curley v. United States*, 160 F.2d 229, 232-33 (D.C. Cir. 1947) and *Knapp v. United States*, 311 F. 2d. 71, 73 (5th Cir. 1962).

prosecution has completely failed to make out a case against the defendant.¹⁸⁸ The discretionary nature of the Louisiana directed verdict provision for jury trials is clearly shown by the use of the phrase "*may* direct a verdict of not guilty" (emphasis added) in the jury trial provision of article 778. Since the Louisiana Supreme Court's appellate jurisdiction in criminal cases is restricted to "questions of law alone,"¹⁸⁹ there will probably be a very limited review of the trial judge's ruling upon a motion for a directed verdict. In this regard Supreme Court decisions concerning the trial judge's refusal to grant a new trial on the ground that the verdict is contrary to the law and the evidence will be of high relevancy.¹⁹⁰ Following present federal and Louisiana guidelines, directed verdicts will be limited to cases where the failure of proof is clear. In those situations it will serve a very useful and proper purpose.

Article 800 adopts practical requirements for review of the trial judge's refusal to sustain a challenge of a juror for cause. In order to establish probable prejudice by an erroneous ruling it is only necessary that the defendant exhaust his peremptory challenges in completing the jury. The provision thus legislatively overrules the additional requirement of *State v. Breedlove*¹⁹¹ that the defendant must unsuccessfully challenge an additional juror after his peremptory challenges are exhausted — thereby affirmatively showing that he is "forced to accept an obnoxious juror."¹⁹² It may be logically assumed that a defendant, who exhausted all his peremptory challenges, had a need for the peremptory challenge he used to exclude the juror he unsuccessfully challenged for cause; and it was unfair to require

188. See ORFIELD, *CRIMINAL PROCEDURE FROM ARREST TO APPEAL* 435 (1947).

189. LA. CONST. art. VII, § 10.

190. The judge's refusal to grant a new trial has only been held reversible error where the court found no evidence or "no probative evidence" in support of an essential element of the crime. In *State v. Giangosso*, 157 La. 360, 102 So. 429 (1924), the facts certified by the trial judge showed that the defendant, convicted of receiving stolen things, really owned them. In *State v. Linkletter*, 239 La. 1000, 1018, 120 So. 2d 835, 841 (1960) the Supreme Court adopted a rather liberal attitude as to its appellate jurisdiction in holding that scanty and very tenuous circumstantial evidence constituted "a total lack of evidence to prove the guilt." Similarly, in *State v. LaBorde*, 234 La. 28, 99 So. 2d 11 (1958), the Supreme Court reversed on the ground that there was "no probative evidence" of an essential element of the crime of carnal knowledge of a juvenile, i.e., of the requirement that the victim was an unmarried female. While not susceptible of a rule of thumb, the Louisiana Supreme Court decisions have established a fairly understandable pattern as to when a refusal to grant a new trial or to direct a verdict would constitute reversible error.

191. 199 La. 965, 7 So. 2d 221 (1942).

192. See former LA. R.S. 15:353 (1950).

the defendant to run the risk of prejudicing a juror he is forced to keep by challenging that juror after his peremptory challenges are exhausted.

The verdicts chapter generally follows existing rules, but a few changes are worthy of particular note. Article 810 provides that the jury verdict shall be written on the back of the list of responsive verdicts which is given to the jury,¹⁹³ rather than on the back of the indictment. Article 816 follows present law, but clarifies the procedure by expressly stating that, where the defendant has pleaded insanity, a verdict of "not guilty by reason of insanity" is an added responsive verdict. Thus it must be included in the written list of responsive verdicts.

TITLE XXVII. PRESENCE OF DEFENDANT

The important requirement in felony trials of the defendant's presence at every important stage of the proceedings was formerly based in part upon the jurisprudence, and partly stated in specific provisions of the 1928 Code of Criminal Procedure. Article 831 gathers into one provision a statement of the various steps of the trial during which the defendant's presence is required — thus providing a clear and more complete statement of this phase of the law. In general, it conforms with the former law and covers those situations where the defendant's presence is of particular significance, either because of the importance of the determinations being made or because the defense will be aided by first-hand information from the defendant. The fourth requirement that the defendant must be present "at all times . . . when the court is determining and ruling on the admissibility of evidence," embraces an important stage of the proceedings which might not have been considered as a "stage of the trial" under the jurisprudential formula. However, it is important that the defendant, who best knows the facts and circumstances, should be present during argument of counsel as to the admissibility of a confession or other key evidence.

Article 834, which is in line with existing jurisprudence, states those stages in the criminal proceedings during which the defendant's presence is not necessary. These stages mainly involve preliminary motions and post-conviction motions. Presence of the defendant at pronouncement of sentence is separately

193. Art. 809.

treated in article 835, since the defendant's absence at sentencing does not invalidate the trial, but merely requires resentencing in the defendant's presence. In misdemeanor cases the sentencing rule is liberalized so as to expressly authorize the court to excuse the defendant from being present when sentence is pronounced. The former code provision required that all sentences be pronounced in the defendant's presence,¹⁹⁴ a requirement that was frequently ignored when a fine was imposed for a petty offense.

Article 832 provides rules governing waiver of the defendant's right to be present by his temporary, voluntary absence. The waiver is limited to non-capital cases, thus codifying the Louisiana and general rule that the defendant's presence at important stages of the proceedings in a trial for a capital offense is sacramental and cannot be waived. The general waiver rule for non-capital cases conforms with a fairly well-settled rule of the jurisprudence. Questions can arise, of course, as to when absence is "voluntary" or when it is "temporary," these being considerations that defy more precise definition.¹⁹⁵ It should be noted that the waiver rule for non-capital felonies only applies when counsel is present at the time of defendant's absence.

TITLE XXVIII. BILL OF EXCEPTIONS

This title conforms with the bill of exceptions provisions of the 1928 Code of Criminal Procedure. It was not considered feasible to eliminate the bill of exceptions, which is a device for preserving a complete record of the proceedings or ruling objected to, until Louisiana has a state-wide procedure for recordation and transcription of the entire proceedings in all felony trials. Legislative efforts to achieve this uniformity were unsuccessful in 1960, 1962, and 1964, so the bill of exceptions was retained in substantially its present form. A few provisions have been added in the interest of completeness and trial convenience. Paragraph A of article 844 states the well-settled rule that only formal bills of exceptions, perfected and signed timely by the trial judge, will be considered on appeal. An exception is recognized in capital cases, where the appellate court, "to promote the ends of justice, *may* consider bills that have not been

194. Former LA. R.S. 15:523 (1950).

195. See art. 832, comment (b).

timely signed." (Emphasis added.) This codifies the Louisiana jurisprudence.¹⁹⁶

Paragraph B adds legislative sanction to a practical procedure, where it had been generally felt that special Supreme Court permission was required. This provision allows evidence already included in one bill of exceptions to be incorporated by reference in other bills, thus avoiding unnecessary duplication of long transcriptions of evidence that is of relevance to several bills of exceptions. Thus such application is provided for.

Article 845 provides an important liberalization of the rule as to the procedure for signing bills of exceptions. Under the 1928 code provisions, as interpreted by the jurisprudence, the defendant lost any bills that were not signed prior to the issuance of the order of appeal, and it was not possible for the trial judge to extend the time for presenting bills of exception when he granted the order of appeal.¹⁹⁷ Sometimes, where many bills with much testimony to be transcribed were to be presented, it was almost impossible to get them ready in the short time¹⁹⁸ allowed for taking an appeal; and this difficulty was even greater when defense counsel was inexperienced in criminal trial procedures. Articles 845 and 915A of the new Code afford relief in this situation by providing that where bills of exceptions are not perfected prior to the order of appeal the court shall set a later date for their submission and signing. The limit upon the additional time for submission of formal bills is the return day for the appeal.¹⁹⁹

TITLE XXIX. MOTIONS FOR NEW TRIAL AND IN ARREST OF JUDGMENT

Both the motion for a new trial and the motion in arrest of judgment must be filed before sentence.²⁰⁰ In felony cases the

196. *State v. Harrell*, 228 La. 434, 82 So.2d 701 (1955). In capital cases the Louisiana Supreme Court has been solicitous in not allowing a technicality to deprive a defendant of review of trial procedures.

197. *State v. Dartez*, 222 La. 9, 12, 62 So.2d 83, 84 (1952) construing former R.S. 15:545 to require that "After an appeal has been granted the trial court is immediately divested of jurisdiction and any bills filed thereafter and presented to the judge for his signature and per curiam come too late and cannot be considered an appeal."

198. Art. 914 increases the time for filing the motion for an appeal from ten to fifteen days, but the time will still be insufficient for perfecting bills of exceptions in some complicated cases.

199. Under Art. 919, appeals to the Supreme Court are returnable within not less than fifteen days and not more than sixty days from the day the order of appeal is entered.

200. Art. 853 (motion for new trial); art. 861 (motion in arrest of judgment).

mandatory delay (unless waived) between conviction and sentence has been raised from twenty-four hours to three days.²⁰¹ The longer mandatory delay is to assure the defendant sufficient time to prepare his motions, especially in cases where an inexperienced attorney is urging numerous objections to the trial procedures. This provision conforms with the period prescribed in a comparable provision of the American Law Institute's Code of Criminal Procedure.²⁰² Flexibility is provided by the fact that the three-day delay period may be expressly waived,²⁰³ and "the court, on motion of the defendant and for good cause shown, may postpone the imposition of sentence for a specified period in order to give the defendant additional time to prepare and file a motion for a new trial." In misdemeanor cases, where complicated motions for new trial and in arrest of judgment are not usually filed, no mandatory period for delay in sentencing is provided. In those exceptional cases where, in order to prepare post-conviction motions or for some other good reason, a delay in sentencing is needed, a motion to that effect should be considered by the trial judge.

The Chapter 1 provisions, which govern motions for new trial, make no substantial changes in the law. The grounds for a new trial, and the procedures for asserting them, follow the 1928 code provisions very closely. The most significant improvements, but no drastic changes, have been made in connection with ground (3), newly discovered evidence.²⁰⁴ The test for a new trial on this ground is more realistically and clearly stated, in conformity with a corresponding provision of the American Law Institute's Code of Criminal Procedure.²⁰⁵ It now simply requires that the newly discovered evidence would probably have changed the verdict or judgment if it had been introduced. The former requirement of a showing, under article 511 of the 1928 Code, "that said evidence is not merely cumulative; that it does not merely corroborate or impeach the credibility or testimony of any witness examined at the trial" has been a source of uncertainty,²⁰⁶ and is omitted.

201. Art. 873.

202. ALI CODE OF CRIM. PROC. § 378 (1930).

203. Art. 873.

204. Art. 851, Grounds for new trial.

205. ALI CODE OF CRIM. PROC. § 364 (1930).

206. It is clear from the jurisprudence that this rule was not without its exceptions; and the fact that important newly discovered evidence was cumulative would not, standing alone, prevent its being urged as a ground for a new trial. See, *State v. Wynne*, 153 La. 414, 417, 96 So. 15, 16 (1923); *State v. Day*, 148 La. 815, 817, 88 So. 76, 77 (1921).

The second paragraph of Article 853, following a provision of the American Law Institute's Code,²⁰⁷ gives the defendant a period of one year in which to file a motion for a new trial on the ground of newly discovered evidence.²⁰⁸ The extended time allowed for filing on this ground is desirable because new evidence seldom comes to the defendant's attention within the normal period for filing the motion for a new trial. While special liberality is called for, the one year cut-off date recommended by the American Law Institute is desirable. The Reporters and their advisors considered, but rejected, the possibility of added time for filing a motion for a new trial on the ground of a newly discovered error or defect in the proceedings. It was concluded that such defects, unless they were so grievous as to assume "due process" significance and to be a ground for habeas corpus,²⁰⁹ should be urged within the liberalized normal period for filing a motion for a new trial.

The requirement of article 507 of the 1928 Code that the proof must correspond with the allegations of the motion for a new trial is omitted. A new trial should be granted any time the defendant shows a valid ground therefor, even though by oversight or inexperience defense counsel failed to state the ground in his motion.²¹⁰ Liberal provisions for supplementing the motion for a new trial by including additional grounds are stated in article 856 of the new Code. The state can be fully protected by the court's granting of additional time to prepare to meet a surprise ground that is asserted by the defense.

The specific statement in article 859, of the grounds for a motion in arrest of judgment, should be an important aid to the inexperienced defense lawyer and to the new judge. The nebulous formula of the 1928 Code of "a substantial defect, patent upon the face of the record,"²¹¹ was a source of considerable uncertainty, and its meaning was obtainable only by a careful study of the jurisprudence. Here, there were some surprise holdings for the inexperienced attorney, since the so-called "record" does

207. ALI CODE OF CRIM. PROC. § 362 (1930). The Commentary of the ALI source provision lists seven states that have statutes providing an extended period for filing the motion for a new trial on the basis of newly discovered evidence.

208. Art. 851 (4).

209. Art. 362. It is a ground for discharge of a defendant by habeas corpus if "he was convicted without due process of law."

210. The comprehensive new trial provisions of the ALI CODE OF CRIM. PROC. §§ 361-368 (1930), do not limit the court's authority to the grounds stated in the motion.

211. Former LA. R.S. 15:517 (1950).

not embrace all matters that are transcribed in the minutes of the court.²¹² Uncertainty as to the proper use of the motion in arrest was further illustrated by the many times it was unsuccessfully urged when the appropriate remedy was the reservation of a bill of exceptions and a subsequent motion for a new trial.²¹³ The first five grounds stated in article 859 conform with the jurisprudence under the general "face of the record" formula. Grounds (6) and (7), double jeopardy and time limitation upon the institution of prosecution, have been added. While they would not have met the former test, they are basic defenses which should not be lost by delay in their assertion. Double jeopardy is a fundamental defense which is stated in both the United States and Louisiana Constitutions.²¹⁴ The time limitation upon the institution of prosecution, which is distinguishable from the time limitation upon the commencement of trial, may be urged at any time;²¹⁵ and a motion in arrest is the proper device for urging it, since the defendant is not seeking a new trial. Although the defenses of grounds (6) and (7) may be urged at any stage in the proceedings, they may be urged only once. Therefore, they may not be urged by a motion in arrest if previously urged. If such defenses are unsuccessfully urged by a motion to quash, or during trial, the defendant's remedy is to reserve a bill of exceptions to the adverse ruling and proceed to appellate review by that route.

No generalized rule is possible as to the effect of sustaining a motion in arrest of judgment. Under article 862, which conforms with existing jurisprudence, disposition of the defendant, when a motion in arrest is sustained, varies with the ground for the motion. Where the conviction is set aside because of defective procedures in the present trial,²¹⁶ such as a defective indictment or the wrong type of tribunal, the defendant is subject to another trial upon a valid indictment or before the appropriate type of tribunal. Some grounds for a motion in arrest are fundamental defenses that will serve as a complete bar to any further trial. These are invalidity of the statute the defend-

212. *State v. Daleo*, 179 La. 516, 154 So. 437 (1934), holding that the judge's written charge could not be the basis of a motion in arrest; *State v. Knight*, 227 La. 739, 80 So. 2d 391 (1955), holding that the written list of verdicts given the jury was not a matter of record.

213. See art. 859, comment (a), third paragraph.

214. U. S. CONST. amend. V; LA. CONST. art. I, § 9.

215. Art. 577.

216. See Art. 859, grounds (1), (3), (4), and (5).

ant was charged to have violated, double jeopardy and that the prosecution was not timely instituted. When a judgment is arrested on one of these grounds²¹⁷ the defendant will be completely discharged.

TITLE XXX. SENTENCE

Generally, this title does not make drastic changes in sentencing procedures. Most of the new provisions either codify present practices or supply deficiencies in the law. It should be noted, as pointed out in the last paragraph of Comment (b) of Article 871, which states the procedures for pronouncing and recording sentence, that "the requirements of this article, as well as other rules stated in this code, do not preclude or interfere with the adoption of special informal procedures for receiving pleas of guilty before traffic violations bureaus."²¹⁸

The requirement of article 874 that sentence shall be imposed "without unreasonable delay" is taken from Federal Rule 32(a).²¹⁹ An attempt to be specific as to the time within which sentence must be imposed would have presented difficulty in view of the wide variety of circumstances which enter into the sentencing process. Valuable guides as to the "unreasonable delay" formula are available in federal jurisprudence. In one case the trial court lost jurisdiction to pass sentence by indefinite postponement for a period of approximately three years (five terms).²²⁰ Except in very extreme cases, however, the federal courts have displayed a marked tendency to find consent to the delay by the defendant's failure to move for sentence, or to find that the delay was justified.²²¹ The provision for discretionary supervisory writs, rather than a right of appeal, should serve to avoid clogging the Supreme Court docket with frivolous appeals on claims of unreasonable delay in sentencing.

Article 880 is based on a recent federal sentencing statute²²² which authorizes the sentencing judge to allow credit for time spent in actual custody pending trial and sentence. There was no authority, under the 1928 code, to give a convicted defendant credit for time spent in jail awaiting trial and sentencing

217. See Art. 862, last paragraph, and comment (e).

218. Art. 15, see comments (c) and (d).

219. *Accord*, ILL. CODE OF CRIM. PROC. § 118-1 (1964).

220. *Mintie v. Biddle*, 15 F.2d 931 (8th Cir. 1926).

221. See Art. 874, comment (b).

222. 18 U.S.C. § 3568 (1960).

and some confusion had resulted. Judges would frequently take pre-sentence detention into consideration and impose a lighter sentence, but they could not legally impose a regular sentence and give credit for prior custody.²²³ Article 880 permits a realistic and direct approach in which the judge imposes an appropriate sentence and expressly gives the defendant credit for his pre-sentence incarceration. Similarly, article 913 provides that where the defendant is held in jail pending his appeal the court "may" amend the sentence to "grant credit for all or a part of the time served pending the appeal."

Article 883 continues the sentencing judge's general authority to determine whether multiple sentences are to be served concurrently or consecutively. The judge's intent in this regard is frequently unexpressed, or may be expressed in a very confusing way.²²⁴ If the court does not expressly direct whether the sentences are to be served concurrently or consecutively, this article provides the rule of construction. If the sentences are for related offenses such as a burglary and an incidental robbery, the sentences will run concurrently.²²⁵ Conversely, if the convictions are for offenses which did not arise out of the same criminal transaction or scheme, it is less likely that concurrent sentences were intended, and the article provides that such sentences, in the absence of a stipulation to the contrary, are to be served consecutively.

Article 884, in conformity with a procedure widely employed by other states, and former miscellaneous Louisiana provisions,²²⁶ directs the court to impose an alternate prison sentence, as a means of enforcing a sentence of a fine or costs. It follows former R.S. 15:529.3 in limiting the maximum prison term to one year, and providing that the default sentence of imprisonment shall be specified in the original sentence. It would be impractical to require that the defendant be brought back into court, after his default, for imposition of the prison sentence.

Article 890 provides a clearer and more complete statement of the method of serving jail sentences. There was no need for rules in the Code with respect to sentences of imprisonment in

223. *Salisbury v. Raines*, 365 P.2d 568 (Okla. App. 1961).

224. "One of the knottiest questions of criminal procedure is how to tell when sentences are concurrent and when they are consecutive." ORFIELD, *CRIMINAL PROCEDURE FROM ARREST TO APPEAL* 575 (1947).

225. *Accord*, ALI CODE OF CRIM. PROC. § 402 (1930).

226. See Comments to Art. 884, summarizing the former statutory provisions.

the state penitentiary, since this is fully provided for in general statutes governing prisons, which are retained unchanged in Title 15 of the Revised Statutes.²²⁷

Louisiana's suspended sentence and probation laws were revised in 1960, by the Parolee Rehabilitation Committee, in the light of recent developments in this important field. The 1960 statute,²²⁸ which had been carefully considered by a strong panel of judges and prison administrators, served as the basis for the "Suspended Sentence and Probation" chapter of Title XXX. A few changes, made in the interest of more effective administration of suspended sentence and probation, will be briefly noted.

Article 894, providing for suspension of sentence in misdemeanor cases, expressly authorizes the court to suspend the execution of "the whole or any part of the sentence imposed." Flexibility is desirable to enable the sentencing judge to adjust the sentence to the exigencies of the case at hand. For example, it frequently may be advisable to release a defendant for a short time when he is needed at home by reason of his wife's illness or some other emergency. The authority to suspend sentence had been construed as requiring the suspension of the entire sentence or full remainder, and as not permitting suspension of part of a sentence of imprisonment.²²⁹ Regardless of the term of the sentence imposed, which may be for a short period of twenty or thirty days, the suspension of sentence "during good behavior" is generally fixed at one year. Since the defendant is relieved of actual incarceration, it is reasonable to hold him to "good behavior," which is defined to mean non-criminal behavior, for a substantial period of time. The court may, if it so desires, specify a shorter period than one year for the suspended sentence.

Commission of another felony while a defendant is on probation for a felony, or of any offense when a defendant is under a suspended misdemeanor sentence, is such a serious matter that it will ordinarily result in revocation of the probation or suspended sentence. Article 901 clears up uncertainty in the jurisprudence, resulting from incompleteness of the statute law, as to subsequent criminal convictions as a ground for revocation

227. See Art. 890, comment (a).

228. L.A. Acts 1960, No. 360.

229. *State v. Johnson*, 220 La. 64, 55 So. 2d 782 (1951); *Cox v. Brown*, 211 La. 235, 29 So. 2d 776 (1947).

of probation in felony cases. Under existing jurisprudence, applying former R.S. 15:538 (a misdemeanor provision) to felony probations,²³⁰ it would have been possible to revoke a felony probation and subject the defendant to a long prison term for the sole reason that he committed some petty misdemeanor. There will be cases where abstinence from commission of certain types of misdemeanors will be stated conditions of the probation, but application of the general "good behavior" misdemeanor formula to felony probations could result in some harsh results.

TITLE XXXI. APPEAL

Article 912 continues the existing general concept that "only a final judgment or ruling is appealable," but then goes further and provides a list of the rulings or judgments which are appealable by the state or by the defendant. The list was prepared in conformity with existing Louisiana jurisprudence and sought to include all possible situations. However, appealable judgments and rulings "include, but are not limited to," those which are listed. In the event that a judgment which should be appealable is not included among those listed, "the court has the discretion and the power to allow an appeal if the basic test of finality is satisfied."²³¹ Judgments appealable by the state, for example, would include the sustaining of any motion that finally kills the prosecution. In general, the defendant's appeal is limited to appeal from a judgment which imposes sentence.²³² The defendant's normal remedy as to adverse preliminary rulings is to preserve his right of appeal by reserving a bill of exceptions and then proceeding with the trial. In exceptional situations, such as when an order declaring the defendant presently incapable of standing trial and committing him to a mental institution has been issued, the order is final as to the issue involved and the defendant is given a right to appeal. Article 912 purports to authorize an appeal, by the state and by the defendant, from an extradition ruling. This authorization will probably be ineffective in view of *Extradition Proceedings v. Palmer*²³³ and the Reporters plan to have this authorization re-

230. State ex rel. Waggoner v. Cozart, 222 La. 1039, 64 So. 2d 424 (1953); State v. Lucas, 225 La. 27, 71 So. 2d 870 (1954).

231. See Art. 912, comment (a).

232. This is in conformity with the Louisiana jurisprudence. See Art. 912, comment (c).

233. 240 La. 784, 125 So. 2d 164 (1960).

considered and probably deleted. In the meantime it would be advisable to either continue the former remedy of applying for writs, or to simultaneously take an appeal and apply for writs.

Article 913 makes a change as to the effect of appeals by the state. Under former R.S. 15:539 all appeals were suspensive. This apparently required that when the state appealed from a judgment calling for the defendant's discharge, the defendant, except in those cases where bail was possible, had to remain in jail. New article 913A continues the general pattern of suspensive appeals, but makes an exception "when the ruling or judgment [appealed from] requires the release of the defendant." Thus, an appeal from a ruling arresting judgment on a ground requiring the defendant's release, such as unconstitutionality of the statute he was prosecuted under, double jeopardy, or time limitation on the institution of prosecution,²³⁴ would not be suspensive and the defendant would be released pending appeal.²³⁵

Bail pending appeal from felony convictions is very limited.²³⁶ Thus article 913B appropriately authorizes the trial court, when a defendant has been held in jail pending his unsuccessful appeal, "to grant credit for all or a part of the time served pending the appeal."

Article 914 increases the time for filing a motion for an appeal from ten to fifteen days. This is in recognition of the fact that the former ten-day period was inadequate.

Article 920, defining the scope of appellate review, provides rules which eliminate unnecessary technical requirements. Paragraph (1) continues and clearly states the rule that formal bills of exceptions can be reviewed even if they have not been made a ground for a motion for a new trial.²³⁷ Paragraph (2) eliminates the cumbersome assignment of error procedure, and generally authorizes the Supreme Court to consider any errors "discoverable by a mere inspection of the pleadings and proceedings and without inspection of the evidence." This formula was taken from former R.S. 15:503, which defined an error "patent on the face of the record." The main advantage of the new pro-

234. Art. 859(2), (6), (7), and art. 862, last paragraph.

235. See Art. 913, comment (a).

236. Art. 314, Bail after conviction.

237. The requirement of a motion for a new trial was in former LA. R.S. 15:559 (1950), which was repealed by LA. Acts 1964, No. 516.

cedure is to eliminate the time limit for filing an assignment of errors. The Comment to this provision states that the time limit "was unfair, because if an error is patent on the face of the record, the appellate court should be able to consider it at any time . . . and if the opposing party is surprised by the raising of the new issue, it is a simple matter to grant a continuance."²³⁸

Article 921 retains the important "harmless error" provision of the 1928 Code of Criminal Procedure.²³⁹ This provision was continued with all its sacramental language intact, for it has been given a well-understood and meaningful application by the Louisiana Supreme Court. The aim of this provision, which was originally proposed by a committee of the American Bar Association, was to limit reversals to cases where the error complained of probably had a substantial effect upon the outcome of the trial. As was very aptly pointed out in *State v. Saia*,²⁴⁰ appeals are not granted merely to test the correctness of the trial judge's ruling, but only to rectify probable injury caused thereby.

CONCLUSION

It has been the purpose of this article to point up the most important changes effected in the various titles of the new Code of Criminal Procedure. It is hoped that interested members of the Bar, and this means almost everyone since *Gideon v. Wainwright*, will use these explanations as a starting point for a detailed study of the procedures with which they are most concerned. When they do, I feel confident that the inexperienced defense counsel will find the new code easier to work with than the former hodge-podge of statutory rules, judicial decisions and local ad hoc procedures. It is also hoped that the new code will provide workable tools for our courts, district attorneys, and experienced defense lawyers. An attempt has been made to provide sound rules, stripped of technical requirements which might unnecessarily shackle the defense, the state, or the court.

238. See Art. 920, comment (d).

239. L.A. R.S. 15:557 (1950).

240. 212 La. 868, 33 So.2d 665 (1947). See Art. 921, comment (c).