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# Criminal Law and Procedure

Dale E. Bennett

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# The Work of the Louisiana Supreme Court for the 1943-1944 Term

## I. CRIMINAL LAW AND PROCEDURE

DALE E. BENNETT\*

### A. CRIMINAL LAW

Louisiana's enactment of the Criminal Code of 1942<sup>1</sup> places this state well in the fore in the field of substantive criminal law. It is now possible to ascertain the law without poring over and comparing a cumbersome mass of overlapping and not too clear statutory enactments; and lawyers in the civil law State of Louisiana are no longer required to resort to the common law of England for a definition of such important crimes as murder, manslaughter, and rape. At the time of its enactment, however, the new and modernized Criminal Code was viewed with misgivings by some members of the Bar. It meant additional work for the veteran criminal lawyer and for the judge. The experienced practitioner who had mastered the intricacies and obtuse distinctions of the old common law statutory system lost the advantage which went with his special training. He must study the new Code along with the novice fresh out of law school. District attorneys and judges, whose files included memoranda and the charges on all of the more important crimes, must now rework those charges and adjust them to the changed nature of the offenses. Even the most careful draftsmanship could not preclude some nice questions of construction which must ultimately be decided by the Louisiana Supreme Court. The general attitude of the Bench and Bar, however, was to welcome unselfishly the improvement of Louisiana's substantive criminal law, and to buckle down to the immediate problem of a correct and understanding interpretation of the various provisions of the new Code. It is significant to note that only seven cases directly involving an application of articles of the Criminal Code were presented to the

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\* Acting Dean of the Law School and Associate Professor of Law, Louisiana State University.

1. La. Act 43 of 1942.

Louisiana Supreme Court during the 1943-44 term, and these were easily disposed of. No questions arose concerning the assault and battery articles—an area of the law which had given Louisiana courts considerable difficulty in the past.<sup>2</sup>

### *Criminal Code Declared Constitutional*

The recent Louisiana Supreme Court decision in *State v. Pete*<sup>3</sup> unanimously upheld the constitutionality of the Criminal Code of 1942. This decision is of special importance in that it shows judicial approval and understanding of improved modern methods of legislative draftsmanship. Counsel for the appellant had argued that the new Criminal Code was unconstitutional on the grounds that it embraced more than one object and that the title was not sufficiently indicative of its subject matter. Similar objections have been raised as to other efforts at improved legislation such as the Uniform Business Corporations Act of 1928 and the Uniform Narcotics Act of 1934. As it had in those previous instances, the Louisiana Supreme Court refused to adopt a restrictive interpretation of the constitutional requirement that "Every law enacted by the Legislature shall embrace but one object, and shall have a title indicative of such object."<sup>4</sup> The court pointed out that the object of Act 43 of 1942 was a single one, the adoption of a code of substantive criminal law for the State of Louisiana, and necessarily comprehended the definition of various crimes and fixing the penalties for violation thereof. In its definitive handling of the point concerning the adequacy of the concise title adopted for the Criminal Code, i.e., "To adopt a Criminal Code for the State of Louisiana; defining certain crimes, and fixing penalties for the violation thereof . . .," the supreme court completely laid at rest the erroneous, but somewhat prevalent, legislative theory that the title to Louisiana statutes must contain a detailed enumeration or synopsis of all items included in the statute.<sup>5</sup>

### *Homicide—Responsive Verdicts*

Criminal homicide, as set out in the new Criminal Code, is of three grades: murder, manslaughter, and negligent homicide.<sup>6</sup> The

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2. For example, see *Work of the Louisiana Supreme Court for the 1937-1938 Term (1939)* 1 LOUISIANA LAW REVIEW 314, 372-374.

3. 206 La. 1078, 20 So. (2) 368 (1944) discussed (1944) 6 LOUISIANA LAW REVIEW 72, 77.

4. La. Const. of 1921, Art. III, § 16.

5. See *Constitutional Limitations Upon Statute Titles in Louisiana (1944)* 6 LOUISIANA LAW REVIEW 72.

6. Art. 29, La. Crim. Code of 1942.

offense is graded according to the circumstances of the case and the intent of the killer. For example, an intentional killing is murder.<sup>7</sup> Where the offender commits an intentional homicide in the heat of sudden passion, induced by a sufficient provocation, the crime is reduced to manslaughter.<sup>8</sup> Where the homicide is unintentional but is a result of criminal negligence the offender is chargeable with negligent homicide.<sup>9</sup> In the case of *State v. Stanford*,<sup>10</sup> Mr. Justice Higgins, speaking for a unanimous court, held that a verdict of "guilty of negligent homicide" was responsive to a charge of manslaughter. He pointed out that murder, manslaughter and negligent homicide were generic offenses and that it was the legislative intent that negligent homicide should be included in murder and manslaughter as a lesser offense. The court overruled defense counsel's argument that the accused had not been fully informed as to the nature of the accusation against him,<sup>11</sup> pointing out that the defendant knew, by virtue of the amended Article 386 of the Louisiana Code of Criminal Procedure<sup>12</sup> and Article 5<sup>13</sup> of the Criminal Code, that when he was charged with the crime of manslaughter the jury was authorized to return a verdict of the lesser crime of negligent homicide.<sup>14</sup>

Consistent with its reasoning in the *Stanford* case, the supreme court held, in *State v. Harper*<sup>15</sup> that a verdict of "attempted manslaughter" was responsive to an indictment for "attempt to murder." The defendant had urged that there was no such crime as "attempted manslaughter" since a specific intent was an essential element in any "attempt."<sup>16</sup> The court correctly pointed out

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7. Art. 30, La. Crim. Code of 1942.

8. Art. 31 (1), La. Crim. Code of 1942.

9. Art. 32, La. Crim. Code of 1942.

10. 204 La. 439, 15 So. (2d) 817 (1943). Accord: *State v. Iseringhausen*, 204 La. 593, 606, 16 So. (2d) 65, 69 (1943).

11. La. Const. of 1921, Art. I § 10, provides in part that "In all criminal prosecutions, the accused shall be informed of the nature and cause of the accusation against him; . . ."

12. "Whenever the indictment sets out an offense including other offenses of less magnitude or grade, the judge shall charge the jury the law applicable to all offenses of which the accused could be found guilty under the indictment, and in all trials for murder the jury shall be instructed that they may find the accused guilty of manslaughter or negligent homicide."

13. "An offender who commits an offense which includes all the elements of other lesser offenses, may be prosecuted for and convicted of either the greater offense or one of the lesser and included offenses. In such case, where the offender is prosecuted for the greater offense, he may be convicted of any one of the lesser and included offenses."

14. Accord: *State v. Iseringhausen*, 204 La. 593, 607, 16 So. (2d) 64, 69 (1943).

15. 205 La. 228, 17 So. (2d) 260 (1944), noted in (1944) 18 Tulane L. Rev. 639, 640.

16. Art. 27, La. Crim. Code of 1942, defines attempt so as to require "a specific intent" to commit a crime.

that voluntary manslaughter was an intentional wrong and that the defendant could, therefore, be found guilty of an attempt to commit that crime. The court's reasoning in referring to Clark and Marshall on Crimes, wherein manslaughter is distinguished from murder by the presence or absence of "malice aforethought," is somewhat misleading. The definition of murder in the Criminal Code<sup>17</sup> does not include the traditional common law requirement of "malice aforethought, or implied." The redactors' comment points out that, "This expression means nothing in itself apart from the decisions which interpret it. As a matter of fact, neither 'malice' nor 'aforethought,' according to the generally accepted meanings of those terms, is necessary for the crime of murder."<sup>18</sup> The actual decision in the *Harper* case, however, can be fully justified by careful examination of the manslaughter article.<sup>19</sup> Subdivision (1) of that article corresponds to the common law offense of voluntary manslaughter. It contemplates an intentional killing which would be murder but for the fact that the offense is committed in the sudden heat of passion immediately caused by provocation sufficient to deprive the average person of his self control. Since manslaughter, as well as murder, may be intentional, an offender may be guilty of attempt to commit either of those crimes. It is significant to note, however, that an offender could not be found guilty of "attempted negligent homicide." Negligent homicide is by the very definition of the offense an unintentional killing where liability is based upon criminal negligence.<sup>20</sup>

Murder embraces all the elements of, and includes, the lesser criminal homicide of manslaughter. Thus, it is no defense for an offender charged with manslaughter to urge that he is really guilty of the more serious crime of murder. In *State v. Walker*,<sup>21</sup> a manslaughter prosecution, it was held entirely proper for the district attorney to state that if the jury reached the conclusion that the defendant had committed murder they should find him guilty of manslaughter as charged.

### *Attempted Aggravated Rape*

The Crimes Act of 1805, and the subsequent Louisiana statutes which supplemented it, failed to include any general provision for

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17. Art. 30, La. Crim. Code of 1942.

18. La. Crim. Code of 1942, p. 31.

19. Art. 31, La. Crim. Code of 1942.

20. Art. 32, La. Crim. Code of 1942.

21. 204 La. 523, 538, 15 So. (2d) 874, 878 (1943).

the punishment of attempts to commit the various crimes. This important phase of the substantive criminal law was partially covered by the enactment of a number of special statutes which prescribed punishment for aggravated assaults with a specific intent to commit certain serious crimes against the person. For example, attempted murder, rape or robbery was punished as "assault with intent to murder, rape or rob."<sup>22</sup> At the same time, attempts to commit a number of serious crimes were entirely omitted and an offender who fell short of the successful completion of his purported offense went scot free. The Criminal Code of 1942, rather than depend upon hit-or-miss legislative enactments, provided a complete coverage of attempts in Article 27, which declares that "Any person who, having a specific intent to commit a crime, does or omits an act for the purpose of and tending directly toward the accomplishing of his object is guilty of an attempt to commit the offense intended . . .," and sets the maximum punishment for an attempt at twenty years imprisonment in the case of capital offenses and at one-half of the punishment for the completed offense in other cases. In *State v. Burris*<sup>23</sup> the defendant was tried, convicted, and sentenced to six years imprisonment in the state penitentiary for the crime of attempted aggravated rape. Defense counsel sought to confuse the issue by reference to the now repealed statute punishing an assault with intent to rape, and argued that after the repeal of this special statute the conduct prescribed therein was no longer criminal. The Louisiana Supreme Court summarily dismissed this contention and simply applied the pertinent articles of the Criminal Code.<sup>24</sup> Article 27 clearly defines criminal attempts so as to include an attempt to commit the crime of aggravated rape.

#### *Confidence Game—Theft*

In *State ex rel. Kavanaugh v. Mitchiner*<sup>24a</sup> the petitioner, who had been convicted, sentenced and confined in the Louisiana State Penitentiary for violation of the confidence game statute<sup>25</sup> brought a writ of habeas corpus claiming that the offense of "confidence game" was not sufficiently defined and that his conviction and imprisonment was therefore a denial of due process of law. If the

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22. La. Rev. Stats. of 1870, § 792, as amended by La. Act 59 of 1896, and La. Act 9 of 1912, § 1 [Dart's Crim. Stats. (1932) § 766].

23. 204 La. 608, 16 So. (2d) 124 (1943).

24. Art. 27, *Attempts*; Art. 41, *Rape*; and Art. 42, *Aggravated Rape*.

24a. 204 La. 415, 15 So. (2d) 809 (1943).

25. La. Act 43 of 1912 [Dart's Crim. Stats. (1932) § 946].

offense had been committed after the effective date of the 1942 Criminal Code, the defendant would have been guilty of theft as defined in Article 67 of that Code. Theft includes any case where a person secures another's property "by means of fraudulent conduct, practices or representations," and thus covers those offenses which had formerly been separately designated as larceny, embezzlement, obtaining by false pretenses and the confidence game. The court's decision in the *Mitchiner* case is significant, however, because it indicates a complete realization of the fact that the definitions of crimes cannot be expected to specify each of the various detailed ways that those crimes may be committed. The confidence game had been defined by the Louisiana statute as obtaining money or property "by means or by use of any false or bogus checks, or by any other means, instrument or device, commonly called the confidence game. . . ." (Italics supplied.) It was argued that this did not sufficiently inform the defendant of the charge made against him. In upholding the constitutionality of the confidence game statute the court pointed out that the crimes of murder and burglary, for example, might also be committed in any number of ways, and concluded that the confidence game statute should not be held unconstitutional "simply because it does not ad infinitum attempt to list every conceivable means through which the offense might be perpetrated."<sup>26</sup>

An analogous problem was similarly solved in *State v. Pete*<sup>27</sup> wherein the appellant had contended that Article 67 of the Criminal Code, which defines the crime of *Theft*, was unconstitutional because it covered the criminal activity which had been previously separately designated as larceny, obtaining by false pretenses, embezzlement and the confidence game. Mr. Justice Fournet's handling of this point is significant. He states that in Article 67 "the Legislature sought to denounce under the single heading of 'theft' all of the crimes that it considered constituted the culpable taking of anything of value belonging to another, whether such taking was without the consent of the owner, commonly known as larceny, or the taking with his consent as is the case in confidence games, embezzlement, and false pretenses. This is in accordance with the modern trend, followed in numerous states, of simplifying the law by discarding ancient and outmoded forms and re-defining offenses to prevent confusion and injustices." Any

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26. 204 La. 426, 15 So. (2d) 809, 812.

27. 206 La. 1078, 20 So. (2d) 368 (1944), discussed in Comment (1944) 6 LOUISIANA LAW REVIEW 72, 77.

other approach to the problem would have virtually prevented any major improvements in the criminal law.

### *Conspiracy to Break Prison*

Section 867 of the Revised Statutes of 1870 covered two crimes, i. e., breaking or conspiring to break prison and malicious prosecution. The definitions of these crimes were separated by a semi-colon, and the penalty was stated at the end of the section and immediately after the definition of malicious prosecution. In *State v. Coverdale*<sup>28</sup> the petitioner had been convicted of a conspiracy to break prison and sentenced accordingly. He applied for a writ of habeas corpus, arguing that the sentence had been illegally imposed since Section 867 provided no penalty for the crime of breaking prison.<sup>29</sup> In denying the petitioner's application the Louisiana Supreme Court agreed that the statute would have been clearer if the conjunctive "or" had appeared in place of the semi-colon in Section 867. The court, however, adopted the very practical and generally accepted view that "Punctuation . . . cannot control its [a statute's] construction against the manifest intent of the legislature, and the court will punctuate or disregard punctuation . . . to ascertain and give effect to the real intent. . .";<sup>30</sup> and concluded that the legislative intent to levy the same penalty against both crimes was clear. The fact that the part of the statute denouncing malicious prosecution had been superseded by a 1902 statute covering that offense<sup>31</sup> was immaterial, since the subsequent statute had no relation to the crime of conspiracy to break prison nor to the penalty clause in its application to that offense.

Section 867 of the Revised Statutes of 1870 was expressly included in the repealing clause of the Louisiana Criminal Code and prison breaking is now covered by Articles 109 and 110 of that Code. The distinction between Aggravated Escape (Article 109) and Simple Escape (Article 110) is dependent upon whether or not human life is endangered by the escape. A conspiracy to commit Aggravated or Simple Escape would be punishable under Article 26 which defines a Criminal Conspiracy so as to be appli-

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28. 204 La. 448, 15 So. (2d) 849 (1943).

29. It is well settled that a criminal statute is ineffective unless it fixes the penalty for the offense. *State v. Bischoff*, 146 La. 748, 84 So. 41 (1920).

30. 204 La. 448, 450, 15 So. (2d) 849 (1943).

31. La. Act 107 of 1902, § 3 [Dart's Crim. Stats. (1932) § 1294].



cable to all of the various crimes set out in the Criminal Code and sets the penalty at one-half of that provided for commission of the crime planned.

#### *Gambling—Slot Machines*

Article 90 of the Criminal Code defines gambling as "the intentional conducting, or directly assisting in the conducting, as a business, of any game, contest, lottery, or contrivance whereby a person risks the loss of anything of value in order to realize a profit." (Italics supplied.) This act superseded a number of Louisiana statutes which had proscribed various specific forms of gambling, and those statutes were accordingly repealed.<sup>32</sup> The important change effected by Article 90, in addition to the fact that gambling is defined generally rather than by means of specific detailed instances, was the limitation that only the person who conducted or assisted in conducting the gambling "as a business" was to be punished. No attempt was made to include the patrons of gambling establishments nor the participants in a friendly gambling game. Previous statutes had not been enforced against that class of individuals and it was deemed appropriate that the crime of gambling should only include those who maintain and operate gambling devices or establishments "as a business."<sup>33</sup>

One of the specific gambling statutes repealed was Act 107 of 1908 which made it a misdemeanor to play or operate a slot machine or other mechanical gambling device or to permit such a device to remain or to be operated on the premises.<sup>34</sup> In *State v. Schimpf*<sup>35</sup> the defendant had been prosecuted under Article 90 for possession of one hundred and two mechanical gambling devices consisting of slot machines and pin-ball machines. In reversing a conviction, the supreme court held that the business of gambling as defined in Article 90 did not contemplate nor include the mere possession of gambling paraphernalia.

At the time Schimpf was tried for the crime of gambling, the sheriff had seized the automatic pay-off machines which were found in his warehouse and planned to confiscate the same under authority of Act 231 of 1928.<sup>36</sup> In the companion case of *Schimpf*

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32. La. Act 43 of 1942, § 2.

33. "The phrase 'as a business' shall be construed to mean or include cases where gambling may take place only from time to time and yet be profitable to the operator although not his main line of business." Reporters' comment, Louisiana Criminal Code (1942) 96.

34. Dart's Crim. Stats. (1932) § § 1007, 1008.

35. 203 La. 835, 14 So. (2d) 876 (1943).

36. Dart's Crim. Stats. (1943) § 1009.

*v. Thomas*<sup>37</sup> an action was brought to enjoin the sheriff from destroying these machines. A number of interesting points were decided by the Louisiana Supreme Court in that case. First, it was held that the 1928 statute providing for the confiscation and destruction of slot machines had not been repealed, either expressly or impliedly, by the Criminal Code. It was, therefore, full authority for the seizure and confiscation. Second, the court properly construed the language of this statute as requiring the law enforcement officers to confiscate all slot machines coming to their attention, whether the machines were being operated or not.<sup>38</sup> A third point dealt with the scope of the term "slot machine." *Schimpf* had argued that pin-ball machines did not come within the definition and that it should be limited to that type of gambling devices which are commonly referred to as "one-armed bandits." The majority of the supreme court, however, adopted a broader definition. In considering this point on the rehearing, Mr. Justice Hamiter relied upon the dictionary definition that "A slot machine is a machine the operation of which is started by dropping a coin into a slot." He then pointed out that all of the automatic machines seized came within the statute since they automatically paid off in money if the player was fortunate enough to hit or make the right combination.<sup>39</sup>

#### *Prohibition—Scope of Local Option Ordinances*

Local option ordinances have given rise to a number of nice problems of interpretation. In *State v. Bernard*<sup>40</sup> a defendant was apprehended in dry territory with whiskey, which had been purchased in another parish for friends, in his possession. The court held that this did not constitute a violation of the prohibition ordinance of the latter parish which made it an offense to "engage in the business of handling intoxicating liquor." Chief Justice O'Niell, who wrote the opinion, stressed the normal meaning of the language employed in the ordinance and concluded that the offense was clearly limited to buying, selling, dealing or trading in intoxicant liquors as a business. This view was further sub-

37. 204 La. 541, 15 So. (2d) 880 (1943).

38. Chief Justice O'Niell, dissenting, took the view that the statute should be interpreted so as to limit the duty of confiscation to slot machines which were found "in operation." 204 La. 541, 554, 15 So. (2d) 880, 884.

On rehearing Mr. Justice Hamiter pointed out that the majority opinion was strengthened by the fact that the title of the statute spoke of machines which might come to the officers' attention and made no reference whatsoever to those found in operation. 204 La. 541, 558, 559, 15 So. (2d) 880, 886.

39. 204 La. 541, 559, 15 So. (2d) 880, 886.

40. 204 La. 844, 16 So. (2d) 454 (1943).

stantiated by the local option statute<sup>41</sup> which repeatedly used such phrases as "traffic in" and "business." Every pertinent provision of that act, concluded the court, indicated a legislative purpose to authorize local governmental units to prohibit the sale of or traffic in intoxicating liquors, but not to authorize a prohibition against the possession of such commodities. The case of *State v. Bonner*,<sup>42</sup> where the supreme court had held that "selling" was equivalent to "engaging in the business of selling," was distinguished from the instant case where the defendant merely possessed and transferred liquors not for sale. Had the defendant been acting as agent for the seller in delivering liquor in dry territory an entirely different situation would have been presented.

A similar result was reached in *State v. Richards*<sup>43</sup> where an indictment for violation of a local option ordinance was held to be insufficient because of a failure to charge that the accused was "engaged in the traffic or the business" of the manufacture, handling or sale of intoxicating liquor. In that case the undisputed facts recited in the judge's per curiam showed that the defendant, an auto mechanic, had purchased wine in another parish and brought the same to his home in dry territory for private consumption.

## B. CRIMINAL PROCEDURE

### *Prescription*

Time tends to gradually becloud the facts and circumstances of a criminal case and to wear away the proofs of innocence. Thus, Article 8 of the Code of Criminal Procedure provides that offenses, except certain enumerated and very serious felonies, shall not be tried unless a charge is brought "within one year after the offense shall have been made known to the judge, district attorney or grand jury having jurisdiction. . . ." In *State v. Brocato*<sup>44</sup> it was held that information given to three assistant district attorneys concerning the embezzlement of state funds was sufficient to put the district attorney on notice and to commence the running of the prescriptive period. In arriving at this decision, the Louisiana

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41. La. Act 17 of 1935 (1 E.S.) [Dart's Crim. Stats. (1943) § 1362.41].

42. 193 La. 387, 190 So. 621 (1939).

43. 205 La. 410, 17 So. (2d) 567 (1944). Mr. Justice Higgins cited and relied upon the *Bernard* decision. Accord: *State v. Nomey*, 204 La. 667, 16 So. (2d) 226 (1943) holding that mere proof of possession of intoxicating liquors is insufficient to sustain a conviction under either a local prohibition ordinance or the state statute regulating the sale of alcoholic beverages. La. Act 15 of 1934, as last amended by La. Act 202 of 1940 [Dart's Crim. Stats. (1943) § 1362.13].

44. 205 La. 1019, 18 So. (2d) 602 (1944).

Supreme Court relied upon the leading case of *State v. Oliver*<sup>45</sup> which held that notice of facts concerning the commission of an offense was sufficient to put the district attorney on inquiry and was the equivalent of actual knowledge of the information which such inquiry would have revealed.

It is well settled by Louisiana jurisprudence that an indictment charging a crime committed more than a year before the date of the indictment is an absolute nullity if it does not contain an allegation negating prescription.<sup>46</sup> In *State v. Gehlbach*<sup>47</sup> the bill of information charged acts of embezzlement committed several years before and stated that "more than one year has not elapsed since the commission of the aforesaid offenses was made known to the Judge, District Attorney, or Grand Jury having jurisdiction thereof."<sup>48</sup> Defense counsel relied upon the language of Section 986 of the Revised Statutes of 1870 and argued that the information was insufficient in that it had failed to negative knowledge on the part of the attorney general, who is "a public officer having power to direct a public prosecution." In a previous case, *State v. Bussa*,<sup>49</sup> the Louisiana Supreme Court had held that Section 986 of the Revised Statutes is superseded by Article 8 of the 1928 Code of Criminal Procedure which does not include the attorney general in its enumeration of those public officials whose knowledge of the crime will commence the running of the prescriptive period. Also, Articles 17 and 156 of the Code of Criminal Procedure place the charge and control of criminal prosecutions solely in the hands of the district attorney. A 1934 statute,<sup>50</sup> which had amended Articles 17 and 156 so as to give an attorney general full power to institute and prosecute criminal proceedings, was declared unconstitutional in *Kemp v. Stanley*.<sup>51</sup> Thus, the supreme court was not required to pass upon defendant's contention that that statute had effected an implied amendment to Article 8 so as to add the attorney general to the list of those public officials whose knowledge of the crime will commence the running of the prescriptive period.

The court, in the *Gehlbach* case, also overruled a very technical objection to the language used by the state in negating the running of prescription. The best form in such cases is to

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45. 196 La. 659, 664, 665, 199 So. 793, 795 (1941).

46. *Ibid.*

47. 205 La. 340, 17 So. (2d) 349 (1943).

48. 205 La. 340, 342, 17 So. (2d) 349, 350.

49. 176 La. 87, 104, 145 So. 276, 281 (1932).

50. La. Act 24 of 1934 (1 E.S.) [Dart's Stats. (1943) Arts. 17, 156].

51. 204 La. 110, 15 So. (2d) 1 (1943).

follow the exact language of Article 8 and state that the offense had not been made known to the judge, district attorney or grand jury having jurisdiction "within one year" from the filing of the information. Defense counsel, and also Mr. Justice Higgins who filed a very carefully written dissenting opinion, took the view that the precise words "within the year" were sacramental and that it was not sufficient to allege that "more than one year has not elapsed since the commission of the aforesaid offenses was made known to the judge, district attorney or. . . ." The majority of the supreme court justices adopted what appears to the writer as a more practical, and also a correct approach to the problem. They held that the phrases "within one year" and "no longer than one year has elapsed" were synonymous and equivalent in import. In each instance, it is alleged that the information is filed within the first year, and that the second year has not yet begun.<sup>52</sup>

In addition to the one year prescriptive period which limits the time within which the charge may be brought, Article 8 also provides a limitation as to the time during which the indictment or information may be permitted to lie dormant. This article, as originally drafted, provided that the district attorney must either prosecute the case or enter a nolle prosequi within six years after an indictment for a felony is returned. A 1942 amendment<sup>53</sup> reduced this period to three years. This achieves a sound result. The filing of dilatory pleas or continuances obtained by the accused do not count in the three years' period, and there is no good reason why the district attorney should keep an indictment or information suspended over the head of the accused for a longer period than three years. In *State ex rel. Kavanaugh v. Mitchiner*<sup>54</sup> the court held that the shortened prescriptive period was inapplicable to trials held before the effective date of that amendment. In that case the accused had been tried, found guilty and sentenced twenty-nine days before the effective date of the amendment to Article 8 of the Code of Criminal Procedure.

#### *Juvenile Court Jurisdiction—Offenses Against Juveniles*

The juvenile courts have jurisdiction over juveniles who are charged as "Neglected or Delinquent Children." They also have limited jurisdiction over adults who are prosecuted for contribu-

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52. This ruling was followed with approval in *State v. Doucet*, 205 La. 648, 17 So. (2d) 907 (1944), but with Justices Higgins, Fournet and Ponder again dissenting.

53. La. Act 323 of 1942 [Dart's Crim. Stats. (1943) Art. 8, n.]

54. 204 La. 415, 15 So. (2d) 809 (1943).

ting to juvenile neglect or delinquency, or for any misdemeanor affecting the physical or mental well-being of children.<sup>55</sup> In *State v. Alford*<sup>56</sup> a prosecution for indecent behavior with juveniles was held to come within the jurisdiction of the juvenile court on the ground that "the offense constituted contributing to the delinquency of the juvenile." The juvenile court's jurisdiction might also have been sustained on the ground that the article of the Criminal Code<sup>57</sup> which had been violated was a law enacted for the protection of the moral well-being of children.

#### *Jurors—Improper Names on the General Venire List*

Jurors who served on the petit jury at an original trial are, on a retrial of the case, subject to challenge for cause.<sup>58</sup> However, the supreme court held in *State v. Gros*<sup>59</sup> that the mere appearance of the name of one such juror on the general venire list was not sufficient ground for setting aside the entire venire. The court relied on Article 203 of the Code of Criminal Procedure which expressly provides that the venire cannot, in the absence of fraud or irreparable injury, be set aside because some of the jurors listed are disqualified or because of an irregularity in the manner of selection.

In *State v. Iseringhausen*,<sup>60</sup> Article 203 was again applied when the court overruled defendant's motion to quash and set aside the general venire and the petit jury list on the ground that nine of the three hundred names listed on the general venire were not names of registered voters of the parish. In this case there was serious doubt as to whether any substantial error had been committed in the selection of the general venire. Mr. Justice Ponder, speaking for the supreme court, stated that the veniremen might be residents of the parish, and thus qualified for jury service,<sup>61</sup> even though they were not registered voters. He also pointed out that the registrar of voters had merely reported that his list did not include any names with the exact spelling of those in question, and concluded that if the names on the venire list were misspelled, that defect was not of great consequence. Absolute accuracy of spelling is not required so long as the identity of the individual venireman is sufficiently revealed.

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55. La. Const. of 1921, Art. VII, § 52.

56. 206 La. 100, 18 So. (2d) 666 (1944).

57. Art. 81, La. Crim. Code of 1942.

58. Art. 351(3), La. Code of Crim. Proc. of 1928.

59. 204 La. 705, 16 So. (2d) 238 (1943).

60. 204 La. 593, 16 So. (2d) 65 (1943).

61. Art. 172, La. Code of Crim. Proc. of 1928.

*Jury—Exclusion of Negroes as Denial of "Equal Protection"*

Prior to the famous case of *Pierre v. State of Louisiana*,<sup>62</sup> the Louisiana Supreme Court had taken the view that the exclusion of negroes from the general jury venire list did not constitute an unconstitutional discrimination against defendants of the colored race. Louisiana courts had reasoned that the exclusion of negroes was a logical result of the fact that the jury commissioners were white men. Thus it was natural that they would select veniremen from members of the white race who they would be acquainted with and would feel were best qualified for service.<sup>63</sup>

In the *Pierre* case, a negro had been indicted, tried and found guilty of murdering a white man. Despite the fact that over one-third of the parish population consisted of negroes, the general venire list from which the jury had been selected contained no negro names. Evidence submitted by the defense counsel, who had filed a motion to quash the venire, showed that no negroes had served on any local jury during the period from 1896 to 1936. In 1936 the jury venire list of 300 had contained three negroes' names—one was dead, one was misspelled, and one served. Based upon this showing, the United States Supreme Court reversed the Louisiana Supreme Court's decision and held that the jury commissioners had systematically and deliberately excluded negroes from the juries, thus denying Pierre, a negro defendant, equal protection of the law.

Later, Pierre was re-tried and convicted of murder.<sup>64</sup> Again the defense counsel moved to quash the indictment on the ground that the jury commissioners had discriminated in excluding negroes from the general venire list. It was urged that while more than forty-nine per cent of the parish population was colored, the venire list of three hundred names only included fifty-two negroes. The Louisiana Supreme Court ruled that the United States Supreme Court had not laid down a requirement that the jury list must contain a proportionate percentage of negroes; but had only established the rule that a systematic exclusion of negroes from the jury list consisted of denial of equal protection where the accused was colored. Roughly speaking, the percentage of negroes should be in proportion to the "qualified" negroes, and many negroes do not meet the literacy and character qualifica-

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62. 306 U.S. 354, 50 S.Ct. 536, 83 L.Ed. 757 (1939). See Note (1939) 1 LOUISIANA LAW REVIEW 841 re subsequent hearing of the case.

63. *State v. Turner*, 133 La. 555, 63 So. 169 (1913).

64. *State v. Pierre*, 198 La. 619, 3 So. (2d) 895 (1941).

tions for jury service. The United States Supreme Court was apparently satisfied with this interpretation of its decision, for a writ of certiorari was denied.<sup>65</sup>

While a systematic exclusion of negroes from the jury lists because of color will be a proper basis for a motion before the trial to quash the jury venire, the grand jury panel or the indictment, the Louisiana Supreme Court has held that such matters cannot be raised for the first time on a motion for a new trial.<sup>66</sup> Objections to the mode of selection or to the composition of the grand or petit jury are waived unless raised before trial.

In the recent case of *State v. Anderson*,<sup>67</sup> a negro had been indicted for the murder of a white man. Motions were properly filed to quash the indictment and to set aside the petit jury panel on the ground that negroes had been systematically excluded in selecting the general venire list of three hundred names with which the grand jury was selected and from which the petit jury was drawn to serve on the case. Evidence established the fact that while between ten and twenty per cent of the population of the parish consisted of negroes, never in the thirty-one years of the parish's history had a negro served on a grand or petit jury, and in the instant case only one negro name had been originally placed on the general venire list of three hundred names. Relying upon these facts, the Louisiana Supreme Court held that a prima facie case of racial discrimination and denial of equal protection had been made out, and that the motions to quash the indictment and set aside the petit jury panel should have been sustained. Although acknowledging the fact that a considerable proportion of the negro population were unqualified for jury service, the court stressed the fact that the parish provided eight negro schools which were attended by 876 colored pupils and concluded that some of the colored populace should be sufficiently educated and otherwise qualified for jury service.

It may be safely predicted that after the *Pierre* case and its application in *State v. Anderson* Louisiana trial judges will be careful to see that a reasonable proportion of negro names are included in the general venire list. This does not mean that the names must be in proportion to negro population, but merely means that they must be in proportion to the qualified negro population. Actually a considerable number of the negroes in

65. 314 U.S. 676, 62 S.Ct. 186, 86 L.Ed. 541 (1941).

66. *State v. White*, 193 La. 775, 192 So. 345 (1939).

67. 205 La. 710, 18 So. (2d) 33 (1944).



every parish will be disqualified along lines of literacy or moral character, and due process will not be interpreted to require inclusion according to strict mathematical percentages.

### *Separation of Jury*

It is important to the administration of criminal justice that the jurors who are to try a case shall be kept entirely free from any outside influence. To that end Article 394 of the Code of Criminal Procedure stipulates that "From the moment of the acceptance of any juror . . . the jurors shall be kept together under the charge of an officer. . . ." In the case of *State v. Towns*,<sup>68</sup> a murder trial, four jurors had been accepted by both the state and the defense. Four prospective jurors, who had not yet been examined, were sitting in the jury box with the accepted jurors. Over the objection of defense counsel, the four accepted jurors were permitted to leave the jury room for a few minutes in a body and in the custody of the sheriff. During their absence the court remained at ease. After conviction the defendant appealed, urging that there had been a separation of jurors in violation of Article 394. The supreme court, in affirming the verdict and sentence, pointed out that this provision applied only to the accepted jurors who will actually try the case, and not to prospective jurors who may or may not serve at the trial. Mr. Justice Ponder emphasized the difference between accepted and prospective jurors by referring to the case of *State v. Craighead*<sup>69</sup> where it was held reversible error for accepted jurors to be placed in custody of the sheriff over night with a number of prospective jurors who had not yet been accepted and sworn. Article 394, by the very nature of things, applies only to accepted jurors. It is the purpose of the law to keep those jurors who are actually to try the case together and away from any possible outside influence.

### *Jury—Number of Jurors*

In *State v. Stanford*<sup>70</sup> the court applied a well-settled rule that the number of jurors to try a case is determined by the gravity of the crime charged and not by the verdict rendered. In that case, the defendant had been indicted for manslaughter, and it was held appropriate for the twelve man jury which heard the

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68. 205 La. 530, 17 So. (2d) 814 (1944).

69. 114 La. 84, 38 So. 28 (1905).

70. 204 La. 439, 15 So. (2d) 817 (1943), followed without discussion in *State v. Iseringhausen*, 204 La. 593, 608, 16 So. (2d) 65, 69 (1943).

case to return a verdict of negligent homicide, despite the fact that an original trial for this lesser offense which is only a quasi-felony, would have been held before a bob-tail jury of five.

*Indictments—Essential Allegations and Short Forms*

Much of the difficulty inherent in the prolix and cumbersome common law indictment forms has been eliminated by the short forms of indictment which are authorized by Article 235 of the Louisiana Code of Criminal Procedure.<sup>71</sup> The crime of manslaughter is sufficiently charged by alleging that "A.B. unlawfully killed C.D." In *State v. Iseringhausen*<sup>72</sup> the information charged that the defendant "did unlawfully, wilfully and feloniously kill and slay one Theresa Iseringhausen." In upholding the sufficiency of this information, the supreme court pointed out that it met all requirements of the short form as well as the form recognized prior to the Code of Criminal Procedure.<sup>73</sup> The added words "wilfully and feloniously" were treated as surplusage and did not vitiate the bill of information.<sup>74</sup>

Article 103 of the Criminal Code enumerates a number of different ways in which a person may be guilty of the offense of disturbing the peace, and replaces several former statutes which were expressly repealed by the Code. In *State v. Morgan*<sup>75</sup> a bill of information charging that the defendant "did unlawfully disturb the peace" at a particular place, without stating the specific manner in which the offense was committed, was held insufficient and subject to a motion to quash. The supreme court pointed out that a defendant in such a situation is not required to validate the defective information by requesting that the omitted allegations be furnished in a bill of particulars. The *Morgan* case follows the previous holding in *State v. Verdin*<sup>76</sup> where, under a similar disturbance of the peace statute,<sup>77</sup> it was held that an indictment was insufficient when it failed to specifically charge the commission of one or more of the separate and distinct acts enumerated in the statute.

71. See Comment (1944) 6 LOUISIANA LAW REVIEW 78.

72. 204 La. 593, 605, 16 So. (2d) 65, 68 (1943).

73. "Prior to the adoption of the Code of Criminal Procedure in the crime of manslaughter, it was sufficient to allege in the indictment or bill of information 'that the accused did feloniously kill and slay the deceased.'" 204 La. 593, 605, 16 So. (2d) 65, 69.

74. Art. 240, La. Code of Crim. Proc. of 1928.

75. 204 La. 499, 15 So. (2d) 866 (1943).

76. 192 La. 275, 187 So. 66 (1939).

77. La. Act 31 of 1886, as amended by La. Act. 227 of 1934 [Dart's Crim. Stats. (1932) § 843].

A similar difficulty was encountered in *State v. Hebert*<sup>78</sup> where six bills of information had been filed against the defendant charging that he "did unlawfully and feloniously commit indecent behavior, as defined by Article 81 of the Louisiana Criminal Code." The supreme court, which expressly applied the same ruling as in the *Morgan* case, held that the bills of information were fatally defective and should have been quashed because they failed to disclose the particular manner in which the offense had been committed. The court pointed out that under Article 81 indecent behavior may be committed in more than one way, i. e., by the commission of lewd or lascivious acts either *on the person* or *in the presence* of a child under the age of seventeen; and, further declared that "in either case, he [the defendant] is entitled to specific information as to the kind and character of the acts he is alleged to have committed."

A 1944 amendment<sup>79</sup> to Article 235 of the Code of Criminal Procedure is significant in regard to the problem raised by these decisions. It enlarges the scope of the short form indictment by providing that, in addition to the short forms already specifically set out, any crime included in the Criminal Code may be charged "using the name and article number of the offense committed." If the informations in the *Morgan* and *Hebert* cases had been filed after the effective date of this 1944 amendment, it would have been fully sufficient to charge that the defendant committed the offense of disturbing the peace, or of indecent behavior with juveniles, as proscribed by Article 103 or Article 81 of the Criminal Code, as the case might be. Then if the defense counsel required further information concerning the specific manner and details of the offense charged, he could secure the same through a bill of particulars. It is well settled by jurisprudence, in Louisiana and elsewhere, that the short form of indictment which states the crime charged, leaving the details to be secured through a bill of particulars, is in compliance with the accused's constitutional right to be informed of the nature of the charge made against him.<sup>80</sup>

Article 93 of the Criminal Code, which defines the offense of cruelty to juveniles, specifically includes the requirement, taken from the previous statute punishing those who contributed to the

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78. 205 La. 110, 111, 17 So. (2d) 3, 4 (1944), noted in (1944) 19 Tulane L. Rev. 144.

79. La. Act 223 of 1944, discussed in Daggett and Bennett, Louisiana Legislation of 1944 (1944) 6 LOUISIANA LAW REVIEW 1, 17.

80. For a discussion of the short form indictment—its history, development and constitutionality, see Comment (1944) 6 LOUISIANA LAW REVIEW 78.

delinquency of children,<sup>81</sup> that the offender must be "over the age of 17." This proviso is really in the nature of surplusage<sup>82</sup> since no person under the age of 17 is subject to criminal prosecution, except for capital crimes.<sup>83</sup> It is somewhat surprising, therefore, that the supreme court should have held in *State v. Toney*<sup>84</sup> that a failure to charge that the accused is "over 17" was fatal to an accusation for cruelty to juveniles. Such a requirement is, by the very nature of things, impliedly included in every charge of a non-capital crime. The problem arising in the *Toney* case<sup>85</sup> will be avoided in the future by use of the short form authorized by the 1944 amendment to Article 235 of the Code of Criminal Procedure.

Where a bill of information is quashed because of a failure to charge the offense with a sufficient degree of certainty, the proper procedure for the State is to apply for the court's permission to amend the information so as to fully meet the requirements of the law.<sup>86</sup>

#### *Bill of Particulars—Limitations on Use*

In *State v. Iseringhausen*,<sup>87</sup> the defendant was charged with manslaughter, having killed his daughter with a shotgun. The facts of the case were such that the jury might find that the killing was unintentional and the result of criminal negligence only, in which case the defendant would be guilty of the lesser crime of negligent homicide.<sup>88</sup> Defense counsel's motion for a bill of particulars, wherein the state would be required to specify whether the killing was intentional or was a result of gross (criminal) negligence, was properly overruled. The supreme court stressed the fact that the granting or refusing of a bill of particulars is within the sound discretion of the trial judge; and astutely pointed out that the defense counsel, by its requested bill of particulars, "was endeavoring to place the State in the position of abandon—either one or the other of the responsive verdicts [manslaughter or negligent homicide] that might be rendered under the charge."<sup>89</sup>

81. La. Act 169 of 1918 [Dart's Crim. Stats. (1932) § 930].

82. The clause was retained in Article 93 out of abundant caution in order to be sure that the new provision would not be construed as attempting to depart from the previous statute in that regard.

83. La. Const. of 1921, Art VII, § 52.

84. 205 La. 451, 17 So. (2d) 624 (1944).

85. *Ibid.*

86. *State v. Morgan*, 204 La. 499, 15 So. (2d) 866 (1943), applying Art. 253, La. Code of Crim. Proc. of 1928.

87. 204 La. 593, 16 So. (2d) 65 (1943).

88. Art. 32, La. Crim. Code of 1942.

89. 204 La. 593, 606, 16 So. (2d) 65, 69 (1943).

In *State v. Alford*,<sup>90</sup> the affidavit, which charged a defendant with the offense of indecent behavior with juveniles, alleged that the crime was committed "on or about the 23rd day of September 1943." In a motion for a bill of particulars, defense counsel asked that the prosecuting attorney be required to state the exact date and time when the alleged misconduct occurred. In upholding the trial court's refusal to order the prosecution to set out the hour at which the crime was committed, Chief Justice O'Niell, speaking for a unanimous court, declared that the indictment, information or affidavit, on which the prosecution is founded, need not state the time of day or night when the alleged offense was committed "unless the time, or the question of day or night, is essential, as in the case of burglary in the nighttime." The allegation that the crime was committed "on or about the 23rd day of September, 1943" was deemed sufficiently definite, the court taking the view that the words "or about" were surplusage and that the date specified should be treated as the real or exact date.

#### *Motion to Elect—Thefts Cumulated in One Indictment*

In *State v. Savoy*<sup>91</sup> a tax assessor had been indicted for the embezzlement of public funds, and the various embezzlements cumulated in one count as authorized by Article 225 of the Code of Criminal Procedure.<sup>92</sup> At a previous hearing of the case the supreme court held that the several misappropriations constituted a single offense and were properly charged in a single count.<sup>93</sup> Subsequently, a bill of particulars was filed and in answer thereto the various items or amounts misappropriated were separately listed. Defense counsel then filed a motion to compel the state to try the defendant separately for the embezzlement of each of the items—one at a time—as listed in the bill of particulars. In holding that the prosecution could not be compelled to try the defendant separately for each of the items making up the aggregate amount embezzled during his tenure of office, Chief Justice O'Niell pointed out that such a procedure would virtually emasculate the provision in Article 225 of the Code of Criminal Proce-

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90. 206 La. 100, 18 So. (2d) 666 (1944).

91. 205 La. 650, 17 So. (2d) 908 (1944).

92. This article was re-enacted by La. Act 57 of 1940 as substantive law in order to remedy a holding of unconstitutionality in *State v. Rodosta*, 173 La. 623, 138 So. 124 (1931). See Note (1940) 3 LOUISIANA LAW REVIEW 159.

93. 204 La. 99, 14 So. (2d) 924 (1943). The principles of law involved are set out in *State v. Doucet*, 202 La. 1071, 13 So. (2d) 353 (1943), discussed in *The Work of the Louisiana Supreme Court for the 1942-1943 Term* (1944) 5 LOUISIANA LAW REVIEW 512, 566.

ture which authorizes the lumping of several misappropriations in one count, with the total amount misappropriated determining the grade of the offense. Chief Justice O'Niell further pointed out that the several misappropriations of all went to make up "one offense," and that the correctness of this interpretation was verified by the last paragraph of the *Theft* article of the 1942 Louisiana Criminal Code which provides that "When there has been misappropriation or taking by a number of distinct acts of the offender, the aggregate of the amount of the misappropriations or takings shall determine the grade of the offense."<sup>94</sup>

#### *Former Jeopardy*

Article I, Section 9 of the Louisiana Constitution, and also Article 274 of the Louisiana Code of Criminal Procedure, declare the obviously just principle that no person shall be twice put in jeopardy for the same offense. This rule is, however, subject to certain limitations. It is expressly inapplicable where the second trial comes as a result of the defendant's application for a new trial or motion in arrest of judgment. In this situation the second trial is an advantage, rather than a detriment to the defendant and he is in no position to complain. In *State v. Gros*,<sup>95</sup> defendant, tried and convicted of shooting with intent to murder, had been granted a new trial upon the ground that the twelve man jury rendering the verdict was improperly constituted.<sup>96</sup> At the second trial, defense counsel filed a plea of former jeopardy. In sustaining the trial court's overruling of this plea, the supreme court stressed the fact that the new trial had been granted by the defendant's own motion and was, therefore, within the exact meaning and intentment of the exception to the double jeopardy provision. Mr. Justice Fournet, speaking for the court, also stressed the fact that the jury of twelve which sat at the first trial "was not legally constituted." Article 279 of the Code of Criminal Procedure, which

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94. A companion procedural statute, La. Act 147 of 1942, which was enacted to synchronize the Code of Criminal Procedure with the new substantive criminal law, amended Article 225 of the Code of Criminal Procedure so as to provide in part "that whenever anyone, by virtue of his office, employment or of any fiduciary relationship which he may occupy towards another, shall be entrusted with any money or other thing of value, and shall misappropriate the same, he may be charged in one count with the theft of the aggregate amount misappropriated by him during the entire time of his holding such office, employment or relationship."

95. 204 La. 705, 16 So. (2d) 238 (1943).

96. The crime charged with not "necessarily punishable at hard labor" and was therefore triable by a bob-tail jury of five. La. Const. of 1921, Art. VII, § 41.

codifies the law as to what shall amount to former jeopardy, states an express requirement "that the court in which the former trial took place had jurisdiction, and was legally constituted. . . ."

### *Viewing Scene of the Crime*

In *State v. West*<sup>97</sup> the defendant was on trial for the theft of three hogs. Evidence introduced indicated that at about the time prosecuting witness' hogs were lost the defendant and his assistants had killed and dressed three hogs in a certain wooded section. The hair removed from the hogs was buried at the scene of the butchering. There was a conflict in the testimony on the material issue as to whether the color of the prosecuting witness' hogs and that of the hogs killed by defendant was the same. The trial court refused defense counsel's request that the jurors visit the place where the hogs had been butchered to examine and determine the color of the buried hair. Upon appeal from a conviction the supreme court held that the question of whether the jurors should be taken to view the scene of the crime is one "which addresses itself largely to the discretion of the court," and that no abuse of that discretion was shown. The color of the hair of the hogs killed could have been adequately established by the testimony of witnesses or by identifying the hair and bringing it into court for inspection. Thus the trial judge might very wisely have refused to order the requested visitation.

### *District Attorney's Argument to Jury—Permissible Scope*

In *State v. Tucker*,<sup>98</sup> where a defendant was on trial for the possession of marijuana cigarettes, the district attorney stated during the course of his argument to the jury that "The evidence shows that this man is not an ordinary salesman. I say that this man is a big operator. . . ." These remarks did not constitute reversible error since abundant and convincing evidence had been submitted in support of the statement. In affirming the conviction, Mr. Justice Fournet briefly, but clearly, summarized prior Louisiana jurisprudence as to the permissible scope of the district attorney's argument to the jury. The prosecuting officer must base his conclusions and deductions upon evidence adduced.<sup>99</sup> He is, however, permitted to argue the case with a rea-

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97. 204 La. 475, 15 So. (2d) 858 (1943).

98. 204 La. 463, 15 So. (2d), 854 (1943).

99. Citing *State v. Conners*, 142 La. 208, 76 So. 611 (1917).

sonable degree of freedom,<sup>100</sup> and a jury verdict will not be set aside on the ground of intemperate and improper remarks by the district attorney unless there is a clear showing that such remarks influenced the jury and contributed to the verdict found.<sup>101</sup>

### *Judge's Charge to the Jury*

Article 384 of the Code of Criminal Procedure provides that the trial judge shall instruct the jury on the law, but not on the facts of the case. The jurors, in criminal cases, are the sole judges of the weight and credibility of the evidence presented. While the trial judge is prohibited from summarizing the evidence so as to indicate what facts have been proved or disproved, our Louisiana courts have recognized that a complete statement of the law frequently involves some reference to the evidence presented.<sup>102</sup> In *State v. Burris*,<sup>103</sup> a prosecution for attempted rape, the trial judge charged the jury that they might take into consideration all facts and circumstances surrounding the case "including any testimony which may have been offered tending to show the extent and purpose of assaulting the party, and any attempt to remove her garments and the nature of the garments removed."<sup>104</sup> Counsel for the defense argued that the judge's charge constituted prejudicial comment on the evidence, in that it directed their attention to the torn underwear that was introduced in evidence by the state. In overruling this contention, the supreme court pointed out that the judge's charge had not assumed or indicated that any fact was proved or disproved, nor had the judge intimated any opinion thereon. The trial judge had called the jurors' particular attention to the fact that they were sole judges of the weight and credibility of the evidence presented.

### *Motion for a New Trial*

The defendant's motion for a new trial must be founded upon objections raised, with exceptions properly taken, at the time the prejudicial conduct occurred. In *State v. Gros*<sup>105</sup> the indictment which the jury took with them for use during their deliberations, contained an endorsement showing that a verdict of guilty had

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100. Citing *State v. Johnson*, 119 La. 130, 43 So. 981, 982 (1907).

101. Citing *State v. Johnson and Butler*, 48 La. Ann. 87, 19 So. 213, 214 (1896), and a number of other Louisiana decisions.

102. *State v. Richey*, 198 La. 88, 3 So. (2d) 285 (1941).

103. 204 La. 608, 16 So. (2d) 124 (1943).

104. 204 La. 608, 615, 16 So. (2d) 124, 126.

105. 204 La. 705, 16 So. (2d) 238 (1943).



been rendered upon the first trial of the case. This was improper and might have been reversible error if defense counsel had promptly objected when the indictment was first placed in the hands of the jury.<sup>106</sup> The objection came too late, however, when it was raised for the first time in a motion for a new trial. Mr. Justice Fournet reiterated a former supreme court holding that "The guarantee under our constitution, Article 1, § 9, of a fair and impartial trial does not contemplate that an accused can take advantage of technical errors committed during the course of his trial while he sat idly by without some showing that the errors were prejudicial to his cause."<sup>107</sup> A continued and consistent emphasis upon this very sound principle will do much to prevent the use of our sometimes overly technical rules of criminal procedure as a means of thwarting justice.

The right of the accused to a new trial for newly discovered evidence is governed by Article 511 of the Code of Criminal Procedure, which requires that the proposed evidence must be newly discovered and that it must also affirmatively appear that it could not have been discovered before or during trial by the exercise of reasonable diligence.<sup>108</sup> In *State v. Sterling*<sup>109</sup> the defendants, who had been convicted of armed robbery, filed a motion for a new trial based upon the claim that a statement by one of the two victims, which contradicted the testimony given by the other victim as prosecuting witness, had not come to the attention of the defense until after verdict. The trial judge took the view, which was supported by the facts of the case, that the appellants were incorrect in their claim of lack of knowledge of the statement relied upon as newly discovered evidence and that it would have been possible for them to have procured and used the statement prior to the completion of the trial. Since the motion for a new trial on the ground of newly discovered evidence was not supported by the facts, the trial judge's refusal to grant that motion was upheld by the supreme court.

*State v. West*<sup>110</sup> applied the well settled rule that it is not error to deny a motion for a new trial on the ground of newly discovered evidence, where such evidence would tend to merely contradict or impeach the testimony of the state's witnesses. This

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106. *State v. Schaff*, 154 La. 802, 98 So. 251 (1923).

107. 204 La. 705, 712, 16 So. (2d) 238, 241 (1943), quoting from *State v. Hoover*, 203 La. 181, 191-192, 13 So. (2d) 784, 787 (1943).

108. *State v. Saba*, 203 La. 881, 14 So. (2d) 751 (1943), noted in (1943) 5 LOUISIANA LAW REVIEW 474.

109. 205 La. 879, 18 So. (2d) 327 (1944).

110. 204 La. 475, 15 So. (2d) 853 (1943).

rule is based upon the express stipulation in Article 511 that the newly discovered evidence must do more than merely to impeach the credibility of witnesses examined at the trial.

In a number of recent cases the supreme court applied the well established rule that a conviction may not be set aside for insufficiency of evidence.<sup>111</sup> The jury's finding on all questions of fact relating to the guilt or innocence of a defendant is final. It is only where there is no evidence tending to prove a necessary element of the crime that the verdict will be set aside.<sup>112</sup>

### *Determinate Sentences*

The 1926 indeterminate sentence law<sup>113</sup> which became Article 529 of the Code of Criminal Procedure provided that, except as to certain enumerated offenses, the sentence imposed should include both a minimum and a maximum term. After serving the minimum term of his sentence a prisoner was eligible for parole. Much confusion resulted from the complicated nature of the indeterminate sentence provision and from the fact that the excepted offenses were not completely and precisely stated. As a result many persons were committed to the penitentiary under flat sentences for crimes which required indeterminate sentences. In order to eliminate these problems, and to provide a more consistent sentencing procedure, Article 529 of the Code of Criminal Procedure was amended in 1942 so as to require that all sentences be determinate and for a fixed period.<sup>114</sup> At the same session of the legislature a new parole statute was enacted which makes it possible for any prisoner to apply for parole after he has served one-third of the sentence imposed.<sup>115</sup>

The applicability of the new sentencing provision which calls for a determinate sentence in all cases is dependent upon the time when the offense was committed for "the law in effect at the time of the commission of the offense is determinative of the penalty

111. *State v. Tucker*, 204 La. 463, 15 So. (2d) 854 (1943). See *The Work of the Louisiana Supreme Court for the 1942-1943 Term* (1944) 5 LOUISIANA LAW REVIEW 512, 573.

112. *State v. Nomey*, 204 La. 667, 16 So. (2d) 226 (1943), holding that in order to sustain a conviction for a prohibition law violation there must be some evidence tending to show that the defendant was keeping the intoxicants for sale. Mere proof of possession is insufficient.

113. La. Act 222 of 1926. See Wilson, *Making the Punishment Fit the Criminal* (1942) 5 LOUISIANA LAW REVIEW 53, 63.

114. La. Act 46 of 1942 [Dart's Stats. (Supp. 1943) § 529].

115. La. Act 44 of 1942 [Dart's Stats. (Supp. 1943) § 725.1], discussed by Wilson, *Making the Punishment Fit the Criminal* (1942) 5 LOUISIANA LAW REVIEW 66-73.

which the convicted accused must suffer."<sup>116</sup> Thus, where an offense was committed before the effective date of the amendment to Article 529, even though the trial was held and sentence was imposed at a later time, the old indeterminate sentence provision controls, and a flat or determinate sentence for a fixed term will be set aside and vacated.<sup>117</sup>

### *Habitual Offenders*

The Habitual Criminal Act was amended in 1942<sup>118</sup> so as to make the statute more usable and to ameliorate the somewhat Draconic sentences which were mandatory under the 1928 law. The principal issue presented in *State v. Dreaux*<sup>119</sup> was the applicability of the reduced penalties to a second offense committed five days before the effective date of the new statute and tried subsequent thereto. Defense counsel argued that the status of the offender, who was tried and arraigned as a second offender after the effective date of the new statute, was established at some uncertain later date. It was not at all clear whether this later date was to be the date when the defendant was found guilty of the second offense, the date when he pleaded guilty as a second offender, or the date when he was sentenced as such. The pivotal question was—when does the defendant become a second offender? The supreme court held that the date of commission of the new felony which carried a heavier penalty because of past transgressions, fixed the accused's status as a second offender. Thus the more severe provisions of the 1928 law were applicable.

### *Amendment of Sentence—Effect of "Plea Bargaining"*

Article 526 of the Code of Criminal Procedure empowers a sentencing judge to amend the sentence imposed "up to the beginning of the execution of the sentence." In *State v. Mockosher*,<sup>120</sup> a negligent homicide case, the defendant originally pleaded not guilty. After a conference with the district attorney

116. *State v. Gros*, 205 La. 935, 18 So. (2d) 507 (1944).

117. *Ibid.* Cf. *State v. Dreaux*, 205 La. 387, 17 So. (2d) 559 (1944) where an indeterminate sentence of from fourteen to twenty-eight years at hard labor for a robbery committed before the effective date of the amendment to Article 529 was annulled and set aside. The court pointed out that the robbery was one of those crimes which was specifically excepted in Article 529 from the indeterminate sentence.

118. La. Act 45 of 1942 [Dart's Stats. (Supp. 1943) § 709.1], discussed by Wilson, *Making the Punishment Fit the Criminal* (1942) 5 LOUISIANA LAW REVIEW 53, 60.

119. 205 La. 387, 17 So. (2d) 559 (1944).

120. 205 La. 434, 17 So. (2d) 575 (1944).

and trial judge he withdrew a plea of not guilty and entered a plea of guilty. Pursuant to an understanding arrived at between defense counsel, the prosecution and the trial judge, the defendant was sentenced to the state penitentiary for a period of ten months. Subsequently, additional facts were brought to the district attorney's attention by the widow of the deceased, whereupon he filed a motion that the sentence be increased. In conformity with this motion the sentence was increased to three years. In setting aside the new sentence the supreme court held that Article 526 was inapplicable to a case like the one at bar where a plea of guilty had been accepted with the understanding that a limited sentence was to be imposed. In such a case, reasoned the court, the defendant had surrendered "substantial rights" in order to achieve a position of security insofar as the term of the sentence was concerned. The court cited and relied upon its analogous decision in *State v. Boutte*,<sup>121</sup> where it had held that a defendant, whose plea of guilty of a lesser charge had been accepted by the district attorney and the trial judge, could not reinstate his original plea of not guilty. In that case the supreme court had pointed out that the accused, by pleading guilty of the lesser and included offense, had been thereby placed in a position of security as to the more grievous charge; and declared that a withdrawal of said plea would not be sustained in the absence of a clear showing that the defendant stood willing to take chances of a trial on the higher charge. The Louisiana Supreme Court thus imposes a judicial limitation upon the otherwise sweeping language of Article 526, and refuses to recognize the right of a trial judge to increase a sentence in cases where the accused has entered a plea of guilty in reliance upon an understanding as to the sentence to be imposed. Apparently, although this point has not been directly decided, this lack of power to change the sentence is applicable even though the court were to permit the defendant to withdraw his plea of guilty and stand trial. The benefits secured by reasonable "plea bargaining" are thus given complete judicial protection.

#### *Appellate Jurisdiction of Supreme Court in Criminal Cases*

Article VII, Section 10 of the Louisiana Constitution limits the appellate jurisdiction of the supreme court in criminal cases to "questions of law alone." Thus in *State v. Sterling*<sup>122</sup> an armed

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121. 119 La. 134, 43 So. 983 (1907).

122. 205 La. 879, 887, 18 So. (2d) 327, 329 (1944).

robbery case, the Louisiana Supreme Court re-affirmed and applied the rule that it was without jurisdiction to review questions of fact touching the guilt or innocence of the accused, "as to which the jurors are the sole judges." Compare, however, the case of *State v. Bernard*<sup>123</sup> where the facts were agreed upon and the only question presented was whether the mere possession and transportation of intoxicants constituted a violation of the local prohibition ordinance. This question was held to be properly reviewable by the supreme court.

The supreme court's appellate jurisdiction is further limited by the aforementioned constitutional provision to cases where "the penalty of death, or imprisonment at hard labor may be imposed; or where a fine exceeding Three Hundred Dollars or imprisonment exceeding six months has been actually imposed." In *State v. Lejeune*<sup>124</sup> the defendant, who was charged with criminal neglect of family<sup>125</sup> excepted to the territorial jurisdiction of the trial court. When the trial court overruled this plea, a suspensive appeal was taken to the supreme court. That court dismissed the appeal for want of jurisdiction. Mr. Justice Rogers, speaking for the court, pointed out that the crime charged did not carry a possible penalty of either death or imprisonment at hard labor; and further stated that, as the case had not yet been tried on its merits, no fine or sentence giving the supreme court jurisdiction had actually been imposed.

*State v. Rome*<sup>126</sup> held that an order by a judge of the juvenile court for Orleans Parish, directing the payment of alimony for support of a minor child, was appealable to the criminal district court. Mr. Justice Fournet stressed the fact that Article 75 of the Criminal Code<sup>127</sup> expressly authorizes an alimony decree, in lieu of a judgment of fine or imprisonment, in cases where a defendant has been found guilty of criminal neglect of family.<sup>128</sup> Such an order was authorized in order to empower the court to force a husband, within his ability to pay, to provide for the needs of his wife or children in necessitous circumstances. An order directing a defendant to pay more than he is financially able to pay, reasoned the court, is in direct violation of the purpose of this article.

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123. 204 La. 844, 846, 16 So. (2d) 454, 455 (1943).

124. 205 La. 708, 18 So. (2d) 33 (1944).

125. Art. 74, La. Crim. Code of 1942.

126. 205 La. 1071, 18 So. (2d) 625 (1944).

127. Article 75 was copied substantially from the former Louisiana statute, Act 77, § 1, of 1932 [Dart's Crim. Stats. (1932) § 927]. Alimony decrees under this statute had been held to be appealable judgments. *State v. Walter*, 170 La. 677, 129 So. 127 (1930).

128. Art. 74, La. Crim. Code of 1942.

Since the court is given full power to enforce such an order, it should, if arbitrarily fixed, be appealable. It is important to note that an appeal, such as the one which was ordered in *State v. Rome*, would be taken direct to the Louisiana Supreme Court after a 1944 amendment to Article VII, Section 96, of the Louisiana Constitution.<sup>129</sup>

#### *Appeal—Basis and Scope*

Article 502 of the Code of Criminal Procedure stipulates that errors not patent on the face of the record are not available after verdict unless a timely objection shall have been made at the trial and a bill of exceptions taken. *State v. Toney*<sup>130</sup> applied the well settled and logical corollary of that rule to the effect that a "court is charged with noticing ex proprio motu such nullities or defects as may be apparent on the face of the record." In that case a verdict and sentence for cruelty to juveniles<sup>131</sup> was annulled and set aside on the grounds that the accusation had failed to state all essential elements of the crime charged, and that the defendants had been sentenced within less than twenty-four hours following their conviction.<sup>132</sup> While no objection had been made during the trial of the case, these defects were both apparent on the face of the record and were, therefore, properly urged, for the first time, on appeal.

The right of appeal in felony cases is expressly limited to court rulings or judgments which have "finally disposed" of the case.<sup>133</sup> The question presented in *State v. Shushan*<sup>134</sup> was whether the state has a right to appeal from a judgment of the district court ordering that a nolle prosequi be entered and the accused parties discharged because the accusations had been pending for longer than three years.<sup>135</sup> The state had urged that the prescriptive period had been interrupted by the defendant's absence from the state while incarcerated in a federal prison in Texas. Without passing upon the validity of this claim, the supreme court went directly to the issue at bar, i. e., did the state have a right to

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129. Proposed by La. Act 322 of 1944.

130. 205 La. 451, 17 So. (2d) 624 (1944).

131. Art. 93, La. Crim. Code of 1942.

132. Art. 521, La. Code of Crim. Proc. of 1928 provides "In all criminal cases at least twenty-four hours shall elapse between conviction and sentence, unless the accused waive the delay and ask for imposition of sentence at once; . . ."

133. Art. 540, La. Code of Crim. Proc. of 1928.

134. 204 La. 672, 16 So. (2d) 227 (1943).

135. The three year prescriptive period for prosecutions is set out in Articles 8 and 9 of the Louisiana Code of Criminal Procedure.

appeal from the nolle prosequi order? The right of the state to appeal from a judgment maintaining a plea of prescription was well settled by a long line of Louisiana cases. Defense counsel sought to distinguish these decisions from the *Shushan* case where, instead of filing a plea of prescription as is done when the one year prescriptive period elapses without the bringing of a formal accusation, the defendant had moved to have the court order a nolle prosequi entered because there had been a three year delay between the formal accusation and the actual trial. Chief Justice O'Niell, who rendered a very scholarly majority opinion, promptly rejected this attempted distinction. He pointed out that both the one year period preceding the indictment and the three year period preceding the trial had been consistently treated as *prescriptive* periods. The judgment rendered in each instance was a final judgment putting an end to the prosecution and was, therefore appealable by the state.

Mr. Justice Fournet's brief dissenting opinion relied upon the provision in Article 8 of the Code of Criminal Procedure that where the district attorney fails to enter a nolle prosequi after three years have elapsed without prosecution, "the court may on motion of defendant or his attorney cause such nolle prosequi to be entered *the same as if entered by the district attorney.*" (Italics supplied.) Mr. Justice Fournet applied this clause literally and reasoned that the district attorney should have no more right to appeal where the judge caused a nolle prosequi to be entered than where it was entered by the district attorney himself. Chief Justice O'Niell's majority opinion takes the practical approach that the judge is actually causing the nolle prosequi to be entered "against the protest," rather than on behalf of the district attorney. The court in such cases is clearly acting in its judicial capacity and not as an agent of the prosecution. It follows, therefore, that the state's right of appeal is unimpaired.

Mr. Justice Higgins concurred in the court's holding that the state should be accorded the right to present a nolle prosequi order of the district judge to the supreme court for review, but maintained that the appropriate remedy was through the more expeditious procedure of the remedial writs of certiorari and prohibition, under the supervisory jurisdiction of the supreme court. In directing the district court to grant the state an appeal the majority opinion stated, however, that "As a general rule this court will not exercise its supervisory jurisdiction in a case where

the party complaining has an adequate remedy by appeal."<sup>136</sup> The state had a material interest in demanding an appeal, rather than the speedier remedy afforded by the supervisory writs. On appeal, an appellant has the privilege of oral argument which is not permitted in cases coming before the supreme court under its supervisory jurisdiction.

#### *Insanity at Time of Execution*

Article 267 of the Louisiana Code of Criminal Procedure expressly provides that if a defendant is found, by reason of insanity or other mental deficiency, to be unable to understand the nature of the proceedings against him or to assist in his defense, he shall be committed to a proper institution and shall remain in that institution until he regains his sanity and is capable of assisting in the defense of his case. Where the issue of present insanity is raised, the court is authorized to hold a hearing and appoint disinterested experts who will testify along with other witnesses on the question of sanity. The issue is then decided by the court. It has been held that the appointment of a lunacy commission to determine the mental condition of the prisoner and the holding of a hearing on the sanity issue is a matter which addresses itself to the sound discretion of the trial judge. His refusal to appoint experts to examine the defendant is not reversible error where the defense has merely made an assertion of insanity which is not supported by trustworthy and substantial evidence providing a reasonable ground for believing that the defendant is mentally unbalanced.<sup>137</sup>

The Code of Criminal Procedure does not provide for the case where a defendant, who has been convicted of a capital crime, becomes insane pending his execution. The Louisiana Supreme Court has, however, relied upon a 1918 statute<sup>138</sup> which recognized this type of insanity; and has declared that such supervening insanity will suspend the execution of sentence.<sup>139</sup> This rule was reaffirmed in *State v. Allen*<sup>140</sup> but the supreme court

136. 204 La. 672, 683, 16 So. (2d) 227, 231 (1943).

137. *State v. Ridgway*, 178 La. 606, 152 So. 306 (1934).

138. La. Act 261 of 1918 [Dart's Stats. (1939) § 3879].

139. See *State v. Cannon*, 185 La. 395, 402, 169 So. 446, 448 (1936). There is also authority at common law for the view that, even after sentence is passed, a plea of insanity will suspend the execution of the sentence. See 1 Hale, *Pleas of the Crown* (1736) 35. The precise test of such insanity has not been worked out by the courts, but it would appear to be the same as that for insanity at the time of the trial.

140. 204 La. 513, 15 So. (2d) 870 (1943).



held that the trial judge's refusal to appoint experts to examine the defendant, who alleged present insanity as a stay to the execution, was a proper exercise of judicial discretion. The court held that the procedure set out in Article 267 of the Code of Criminal Procedure was applicable to and governed all pleas of insanity in criminal cases. It stressed the provision that the court's obligation to appoint disinterested experts to inquire into the sanity of the accused is limited to cases where it "has reasonable ground to believe" that the defendant is insane or mentally deficient. In the case at bar, each of the witnesses, upon whom defense counsel had relied in urging present insanity, had stated when questioned by the trial judge that he felt the prisoner was perfectly sane.

## II. TORTS

WEX S. MALONE\*

### *Tort Liability Between Spouses*

The problem of tort liability between husband and wife has given rise to confusion and differences of opinion everywhere. In common law jurisdictions the problem is stated simply as one of responsibility: can the husband (or wife) be made liable to the other spouse, or, does their marital relationship preclude tort actions between themselves?<sup>1</sup> The Louisiana court apparently has assumed that this question is to be answered in favor of liability, but it has given the problem a different and difficult twist by positing the issue in terms of community property. Both spouses share in the benefits of the community, and successful damage actions in favor of either of them usually accrue to the community.<sup>2</sup> For this reason it has been urged that a recovery by one spouse against the insurer of the other for damages occasioned by the latter's negligence will result in allowing the tortious spouse, who participates in the community, to benefit by

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\* Associate Professor of Law, Louisiana State University Law School.

1. Prosser, *Handbook of the Law of Torts* (1941) § 99.

2. Apparently damages for personal injury to the wife resulting in loss of earnings enter the community if she was living with her husband at the time of the injury, while other damages for personal injury are her separate property. See *Klantz v. Charles Dennery, Inc.*, 17 So.(2d) 506 (La. App. 1944), noted in (1944) 19 *Tulane L. Rev.* 141.