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The question of when a planter or farm manager is totally and permanently disabled within the meaning of an insurance policy was presented to the court in *Pearson v. Prudential Insurance Company of America*.⁸ It was found that the insured had had an attack of coronary thrombosis which had left him in such a condition that it was not safe for him to carry on his former physically strenuous activities. It also appeared, however, that insured was the owner of about 850 acres of land for the operation of which he employed managers, assisted by his wife and brother. The court followed the *Boughton* case⁹ in holding that if the disability is such that the insured is rendered unable to perform the substantial and material acts of his business or occupation in the usual and customary way, it is total and permanent.

In *Stovall v. Empire States Insurance Company*¹⁰ the court found no reason for holding a fire policy void on the ground that the insured had withheld material facts where all the facts were either known to the agent or subject to discovery on inquiry prior to the loss. It also held that the plaintiff had not lost his insurable interest in the property by forming a corporation to which he had never transferred it.

VI. CRIMINAL LAW AND PROCEDURE

*Dale E. Bennett**

A. CRIMINAL LAW

Definition of Crimes—Certainty Required

General language, as distinguished from detailed specification and enumeration, may be used in defining crimes—provided the words employed are of definite well-understood application. For example, "reasonable care" to avoid injuring others traveling upon the streets was held by the Maryland court to constitute a "flexible but reasonably certain" standard of conduct.¹ In the

8. 214 La. 220, 36 So.(2d) 763 (1948).

9. *Boughton v. Mutual Life Ins. Co. of New York*, 183 La. 908, 165 So. 140 (1936).

10. 215 La. 100, 39 So.(2d) 837 (1949).

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1. *State v. Magaha*, 182 Md. 122, 129-130, 32 Atl. (2d) 477, 480-481 (1943). In this case Judge Delaplaine epitomized the policy underlining his and many other similar decisions when he declared "It is desirable, of course, that penal statutes and ordinances should be expressed in language as specific as the subject matter will permit, but it is obviously impossible to define some types of crime by a detailed description of all possible cases that may arise. The prohibited act may be characterized by a general term without definition, if the term has a settled common-law meaning and a commonly understood

recent case of *State v. Evans*² the Louisiana Supreme Court held that a statute making it a misdemeanor to *prospect* for oil, gas and other minerals by means of *mechanical devices* on private lands without the consent of the owner³ had sufficiently defined the offense in words having a well-defined and commonly accepted meaning. "The ordinary man," declared Justice Ponder, "has no difficulty in understanding what prospecting for oil with mechanical devices means, especially when these phrases are used in connection with the oil industry. It is not necessary to state any and every mechanical device which might be used in the discovery of minerals in the statute. . . ."⁴

in connection with the oil industry. It is not necessary to state any and every mechanical device which might be used in the discovery of minerals in the statute. . . ."⁴

Applying the same common sense formula, the Louisiana Supreme Court had previously upheld the constitutionality⁵ of the broad but well-understood language employed by the Louisiana Criminal Code in defining such important crimes as Theft⁶ and Gambling.⁷ Similarly, the court had upheld the definition of Indecent Behaviour with Juveniles, in Article 81 of the Criminal Code, as the commission of "lewd or lascivious act upon the person or in the presence of any child, under the age of seventeen, with the intention of arousing or gratifying the sexual desires of either person." The terms "lewd or lascivious" were found to have a sufficiently well-understood meaning, and the definition

meaning which does not leave a person of ordinary intelligence in doubt as to its purport, even though there may be in the term an element of degree as to which estimates of reasonable men might differ."

2. 214 La. 472, 38 So. (2d) 140 (1948).

3. La. Act 212 of 1934.

4. 214 La. 472, 479, 38 So. (2d) 140, 143.

5. La. Const. of 1921, Art. I, § 10, provides that: "In all criminal prosecutions the accused shall be informed of the nature and cause of the accusation against him." The Fourteenth Amendment to the U. S. Constitution (Due Process Clause) has also been interpreted so as to require reasonable certainty in the definition of crimes.

6. Article 67 defined *Theft* so as to eliminate many of the obtuse distinctions and troublesome enumerations which had characterized Louisiana's numerous prior statutory laws on the subject. This article was held constitutional in *State v. Pete*, 206 La. 1073, 20 So. (2d) 368 (1944).

7. *Gambling* had previously been denounced in a series of cumbrously worded statutes, dealing separately with the various forms of gambling. Article 90 of the Criminal Code simply defined gambling as "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." This article was upheld in *State v. Varnado*, 208 La. 319, 23 So. (2d) 106 (1944). Justice Fournet definitely recognized the impossibility of specifying every variation of the conduct prescribed as criminal and sanctioned the use of broad language, provided the line between criminal and non-criminal conduct is sufficiently drawn to be clearly ascertainable.

was further characterized by the requirement of a specific intention to arouse or gratify sexual desires.⁸

The phrase "immoral purpose," however, was held to be susceptible of so many variations of meaning and interpretation that it rendered the definitions of Keeping a Disorderly House⁹ and of Contributing to the Delinquency of a Juvenile¹⁰ too vague and indefinite. To one person or judge, it might denote only sexual immorality. To another it might embrace such things as playing baseball on Sunday, or unfair trade practices. Thus, the phrase "immoral purposes" failed to apprise sufficiently those subject to the articles involved as to what conduct would be considered criminal, or to establish a reasonably definite standard for the adjudicative process.

In 1948, Article 104 was amended to re-define Keeping a Disorderly House as the keeping of a place "to be used habitually for any illegal or *sexually* immoral purposes."¹¹ Similarly, Clause (7) of Article 92 was changed to define Contributing to the Delinquency of a Juvenile so as to require the enticing, aiding, or permitting of "any *sexually* immoral act."¹² As thus amended, these articles of the Criminal Code should now provide a sufficient definition of the prescribed criminal conduct. The supreme court's recent decision in *State v. Stewart*¹³ affords no indication as to the judicial fate of these amended articles. In that case, defendants had been found guilty of aiding a sixteen year old girl to perform acts of sexual intercourse. This would clearly be a "sexually immoral act." In reversing the conviction and sentence, however, the supreme court pointed out that the prosecution and trial had been based upon the *original* form of Article 92 (7), which had been held unconstitutional.¹⁴

Probably the most difficult case yet presented, and one coming close to the line between sufficient definition and unconstitutional vagueness, involved the constitutionality of Clause (2) of Article 106 of the Criminal Code which defined Obscenity to include the possession with intent to display of "any indecent print,

8. *State v. Saibold*, 213 La. 415, 34 So. (2d) 909 (1948); *State v. LeBlanc*, 213 La. 404, 34 So. (2d) 905 (1948).

9. *State v. Truby*, 211 La. 178, 29 So. (2d) 758 (1947), declaring Art. 104, La. Crim. Code of 1942 partially unconstitutional.

10. *State v. Vallery*, 212 La. 1095, 34 So. (2d) 329 (1948), declaring clause (7) of Art. 92, La. Crim. Code of 1942 unconstitutional.

11. La. Act 389 of 1948.

12. La. Act 388 of 1948.

13. 214 La. 365, 37 So. (2d) 820 (1948).

14. Citing and following *State v. Vallery*, 212 La. 1095, 34 So.(2d) 329 (1948).

picture, written composition, model or instrument." In *State v. Kraft*¹⁵ the defendant was prosecuted "for having in his possession with intent to display, an indecent print and movie film." It was claimed that the word "indecent," like the word "immoral," was so vague that it failed to apprise sufficiently the defendant of the line between criminal and non-criminal conduct. The supreme court might have treated the phrase "indecent print" as similar to the words "lewd dancing" which had been held sufficiently definite in a pre-Criminal Code decision.¹⁶ Also, the United States Supreme Court had recently stated that the words obscene, lewd, lascivious, filthy, indecent, and disgusting were of permissible certainty and well-understood by long use in the criminal law.¹⁷ In the *Kraft* case, however, the Louisiana Supreme Court chose to construe the phrase "indecent print" as similar in nature to the broad phrase "immoral act" which it had previously held insufficient for a criminal law definition. Possibly if the definition in Article 106 had included additional characterizing language such as that recently approved by the United States Supreme Court, it would have been upheld by the Louisiana court.

It is suggested that the offender in the *Kraft* case, and in other cases which might have come within the purview of Article 106 (2), had a reasonably clear understanding of what the legislature contemplated when it prohibited the possession with intent to display "an indecent print." Additional language could not add a great deal to that definition which, by the very nature of things, contemplates a type of conduct which may assume a multitude of different forms.¹⁸ The offender who seeks to skate

15. 214 La. 351, 37 So. (2d) 815 (1948), noted in (1949) 9 LOUISIANA LAW REVIEW 414.

16. *State v. Rose*, 147 La. 243, 84 So. 643 (1920) holding that a 1912 act defining a Disorderly House as one where "lewd dancing" was permitted sufficiently met the test of certainty.

17. See *Winters v. New York*, 333 U. S. 507, 68 S.Ct. 665, 92 L.Ed. 840, (1948).

Accord: 33 Am. Jur. 20, §9. "While the statutes relating to obscenity do not generally undertake to define obscene or indecent pictures or publications, nevertheless the words usually employed in the statutes are themselves descriptive being words of common use and readily understood by persons of ordinary intelligence."

18. While not exactly in point, the court's statement in *City of Shreveport v. Fanny Roos*, 35 La. Ann. 1010 (1883), indicates an early appreciation of the frequent impossibility of complete specification and enumeration in defining morality crimes. A Shreveport ordinance provided that a fine should be imposed upon anyone who conducted a house of ill fame "in an indecent manner." In upholding the constitutionality of this ordinance against defense counsel's claims of vagueness and uncertainty, Justice Manning declared, "It could scarcely be expected that an ordinance affecting houses of this kind should specify the particular act of indecency which will render its inmates

on the outer edges of law and propriety can hardly express surprise that the exhibition in question is held to be indecent. In a borderline case, the general maxim that criminal statutes are strictly construed in favor of the accused should protect from surprise or oppression.

*Attempted Aggravated Criminal Damage to Property by
Lying in Wait with a Dangerous Weapon*

Mere preparation to commit a crime is not sufficient to constitute an attempt. The general jurisprudence indicated that lying in wait or searching for the intended victim was a mere act of preparation, not coming close enough to the crime itself to constitute a criminal attempt. However, there were substantial practical reasons for extending the attempt concept so as to include the offender who arms himself with a dangerous weapon and waits or searches for the victim. The danger of the activity and the unequivocal nature of the action already taken fully justified this result. With these considerations in mind, it was specifically provided in Paragraph 2 of the general Attempt article of the Criminal Code¹⁹ that "lying in wait with a dangerous weapon with the intent to commit a crime or searching for the intended victim with a dangerous weapon with the intent to commit a crime shall be sufficient to constitute an attempt to commit the offense intended."

The case of *State v. Murff*²⁰ presented a unique and difficult problem as to the applicability and scope of the above quoted provision. Justice Hawthorne's opinion in that case should do much to establish a practical and workable interpretation of the rule. The defendants appealed from a conviction of Attempted Aggravated Criminal Damage to Property, alleging that the facts of the case did not show a lying in wait "with a dangerous weapon." Pursuant to a plan to damage a bus operated by the Southern Bus Lines, Incorporated, their former employer, the defendants had procured a number of mowing machine blades, specially

obnoxious to the law's denunciation. These acts may be so various in kind and so differing in degree, and withal so numerous, as to defy specification. The experience of the city fathers in that domain is doubtless so limited that in drafting an ordinance which should comprehend all the indecent convolutions of lascivious cyprians they would be forced to put fancy on the wing, and imagine postures they never beheld. This would be dangerous occupation. Neither the law, nor the right of the accused parties to be informed of the nature of the accusation against them, imposed such particularization upon the corporation authorities." (35 La. Ann. 1010, 1011.)

19. Art. 27, La. Crim. Code of 1942. See Reporters' Comment on lying in wait with a dangerous weapon.

20. 215 La. 40, 39 So.(2d) 817 (1949).

sharpened to a point and welded to a flat piece of metal to hold them upright on the pavement. Intending to place these blades upon the highway in such a way that they would cut the tires of the bus and cause the bus to be wrecked, the defendants went to a prearranged place where they waited for the bus to arrive. Before the bus arrived and before the mowing machine blades had been set upon the highway, an alarmed neighboring farmer began shooting and the defendants fled from the scene of their intended crime. There was little doubt but that if the defendants had carried out their criminal purpose they would have committed the crime of Aggravated Criminal Damage to Property, because of the foreseeability of danger to the lives of the driver and passengers on the bus. If the blades had been set upon the highway, but the bus driver had stopped in time to avoid a disaster, the defendants would clearly have been guilty of Attempted Aggravated Criminal Damage to Property. The principal issue in the case arose out of the fact that the defendants' criminal activity had not proceeded beyond the point where they were lying in wait for the bus with the instrumentalities for wrecking it in their possession. The theory of the conviction had been that this constituted "lying in wait with a dangerous weapon." Admittedly the mowing machine blades were not dangerous weapons per se. Yet in the manner of their intended use they were "calculated or likely to produce death or great bodily harm."²¹ Justice Hamiter, who prepared a very careful dissenting opinion, took the view that since the mowing machine blades had not been fully assembled and placed upon the highway they were never used as dangerous weapons. *Actual use* of the instrumentalities in such a way as to endanger human life, stated Justice Hamiter, was necessary before they could be characterized as "dangerous weapons."

Justice Hawthorne, in writing the majority opinion, stressed the fact that in an Attempt to commit a crime, and especially where the lying in wait provision is involved, only *intended use* can ordinarily be established. He, therefore, concluded that, at least for the purposes of this provision of the Attempt article, an instrumentality "may be a dangerous weapon if the one lying in wait intends to use it in a manner calculated or likely to produce death or great bodily harm."²² This question of the manner and

21. Art. 2, La. Crim. Code of 1942: " 'Dangerous weapon' includes any gas, liquid or other substance or instrumentality, which, in the manner used, is calculated or likely to produce death or great bodily harm."

22. 39 So.(2d) 817, 824.

nature of the intended use of the instrumentality is a question of fact for the determination of the jury in view of all the circumstances of the case. It is submitted that the court's decision in the *Murff* case is the only one which could give real practical effect, except where inherently dangerous weapons such as a gun are employed, to the lying in wait provision of the Attempt article. It is also consistent with the definition of a dangerous weapon which contemplates that a very broad meaning shall be given to that term so that no instrumentality will be rejected as a dangerous weapon merely because of its substance or form.

The proper test to be applied in determining what shall constitute a dangerous weapon in cases like the *Murff* case should be the *intended use* of the instrumentality. However, this rule will probably not be carried beyond the facts of that case where the mowing machine blades had been assembled in such a way that they could be used as a dangerous instrumentality, and it was only the placing of the instrumentality upon the highway which remained to be done. If it could be said that the offenders waited with materials which were to be assembled as a wrecking device, then there might be strong justification for the position that they did not as yet constitute a "dangerous weapon" within the meaning of the lying in wait provision. As the writer views the facts of the principal case this construction would be a little far-fetched and technical.

It is interesting to note that, even though dissenting Justice Hamiter was not willing to treat the offenders' act as an Attempt to commit Aggravated Criminal Damage to Property, he suggested by way of dictum that the offenders might well have been prosecuted for conspiracy to commit that crime. The companion inchoate crime of Criminal Conspiracy²³ requires a combination of two or more persons, which was easily satisfied in the principal case; and any act, even though clearly in the preparation zone, is sufficient to satisfy the overt act requirement of that offense.

Illegal Carrying of Weapons—Concealment of Large Knife

The crime of Illegal Carrying of Concealed Weapons, as set out in Article 95 (1) of the Criminal Code, purported, without the usual specification of the various types of weapons included, to cover the same type of criminal activity which had been prohibited by the then existing statutes.²⁴ This was done by making the

23. See Art. 26, La. Crim. Code of 1942, Criminal Conspiracy.

24. La. Rev. Stats. of 1870, §932 [Dart's Crim. Stats. (1939) § 1274]; La. Act 112 of 1898; La. Acts 61 and 107 of 1902; La. Act 43 of 1906.

offenses applicable to the intentional concealment on one's person "of any firearm or other instrumentality *customarily used* as a dangerous weapon." As thus phrased it would cover those instrumentalities which are dangerous weapons per se, such as a pistol, bowie knife, blackjack and possibly a straight razor. In *State v. Davis*²⁵ the court held that "a large knife" had many proper uses, and could not be held to constitute "an instrumentality customarily used as a dangerous weapon" within the meaning of Article 95 (2).

The widespread carrying of large knives, ice picks, and so forth by many members of the rougher element of society, with such implements intended as a handy means of either offense or defense, has created a problem for law enforcement officers. It would hardly be appropriate to define broadly the carrying of concealed weapons to include any instrumentality which *could be used* as a dangerous weapon. If this were done many legitimate hunters and craftsmen might suddenly find themselves outside the pale of the law. At the same time, there is much which might be said in favor of amending and extending Clause (1) of Article 95 to embrace the intentional concealment upon one's person of "any firearm or other instrumentality customarily used or *intended for use* as a dangerous weapon." (Additional phrase indicated by italics.) While the state would have the burden of proving the intended use beyond any reasonable doubt, the extended scope of the statute would make it applicable in those extreme and aggravated cases where the dangerous nature of the activity was clear. This is, of course, a matter of policy for the legislature to decide, rather than a matter addressed to the discretion of the courts or of the writer.

B. CRIMINAL PROCEDURE

Extradition

Both Federal²⁶ and Louisiana²⁷ law provides for the arrest and extradition of a fugitive from justice in another state. It is essential to such extradition proceedings that the person arrested must have been charged with a crime in the other state, and the extradition papers must be accompanied by a properly certified copy of the indictment.²⁸ In *In re Commisso*²⁹ the relator had

25. 214 La. 885, 39 So.(2d) 164 (1949).

26. U.S. Const. Art. IV, § 2; U.S. Rev. Stat. § 5278.

27. Arts. 160-167, La. Code of Crim. Proc. of 1928.

28. Id. at Art. 160.

29. 214 La. 1055, 39 So.(2d) 729 (1949).

been arrested upon a requisition by the Governor of Tennessee, which requisition had been held insufficient because the copy of the indictment accompanying the requisition papers had not been certified as authentic by the governor. The court instructed the Tennessee agents to secure a correction of the requisition papers and set a rehearing of the case. Thereupon the district attorney nol prossed the original extradition affidavit and filed a new affidavit, pursuant to Article 168 of the Code of Criminal Procedure,³⁰ to detain the relator until proper extradition papers could be furnished by the Tennessee authorities. The relator invoked the supervisory jurisdiction of the court claiming that he had already been held, under the original affidavit, for a period of thirty days, and that Article 168 could not be employed as a means of imprisoning him for a period exceeding that time. In upholding this contention and ordering the discharge of the relator, the supreme court made it clear that, regardless of the filing of successive affidavits, the accused cannot be held awaiting proper formal extradition papers for a period longer than thirty days.

Venue—Theft by Obtaining Money by False Pretenses

Proper venue for the prosecution of stealing crimes has given the courts considerable trouble, for present day business and banking conditions are such that the various elements of a theft are frequently distributed over two or more different parishes. This is particularly true in Theft by obtaining money by false pretenses. Certain generalizations may safely be made from the Louisiana jurisprudence. The place where the pretense was uttered has been treated as relatively immaterial where the court has been seeking to find *the single parish* where the offense had been committed. The gist of the offense was the obtaining of the property or money. The venue situation might be very complicated where the money was obtained by checks received in one parish, cashed or deposited in a second parish, and honored by the drawee bank in a third parish. In such a case the problem of ascertaining where the money *was obtained* was a difficult one, as evidenced by a number of very perplexing 1940 venue decisions.³¹

In an effort to solve this troublesome legal riddle, Article 13

30. This article provides an ancillary procedure whereby, on oath of a credible person that the defendant is believed to be a fugitive from justice the accused may be held for *thirty days* to await regular extradition proceedings.

31. For a discussion of these decisions, see *The Work of the Louisiana Supreme Court for the 1939-1940 Term* (1941) 3 LOUISIANA LAW REVIEW 379.

of the Code of Criminal Procedure was amended in 1942³² to provide that "where the several acts constituting a crime shall have been committed in more than one parish, the offender may be tried in any parish where a substantial element of the crime has been committed." While this liberal provision should definitely minimize the venue problem in Louisiana, it does not mean that the prosecution may be brought in every parish having some connection with the crime. It is necessary that a "substantial element" of the crime may be found in the parish. This requirement was applied in *State v. Pollard*³³ where the defendant was prosecuted in Caldwell Parish for Theft in obtaining money from the state by fraudulent representations as to road work purported to have been done in that parish. The project engineer's office was in Caldwell Parish and the falsified records which were submitted as a basis for the payment received were prepared in that parish. In reversing the judgment because of improper venue, the supreme court stressed the facts that the check received was issued and signed in the City of Baton Rouge and was drawn on a Baton Rouge bank. The check was delivered to the offices of the defendant in Bossier Parish and was deposited by the defendant in a Bossier Parish bank. According to the facts, as recited in the court's opinion, the fraudulent estimate of work done, while prepared in Caldwell Parish, was submitted to the department of highways in East Baton Rouge Parish. Thus, not even the fraudulent representation was completed in Caldwell Parish. While Caldwell Parish was interested in the offense because its roads had suffered as a result thereof, no complete substantial element of the crime was located in that parish. Thus even the liberal provisions of the amended Article 13 were not satisfied.

It is interesting to speculate as to venue possibilities in a situation such as the *Pollard* case. Had the fraudulent estimate been submitted to a representative of the highway department in Caldwell Parish the false representation would have been completed there and a different venue situation might well have resulted. Although the court refuses to go beyond the actual decision of that case, they might well have found a proper basis for venue if the prosecution had been brought in East Baton Rouge Parish where the false estimate was filed, the checks were issued, and finally honored by the drawee bank. Possibly venue might also be had in Bossier Parish where the check was received by the contractor

32. La. Act 147 of 1942.

33. 41 So. (2d) 465 (La. 1949).

and deposited to his account. Certainly substantial elements of criminal liability are found in each of those parishes.

Juvenile Court—Jurisdiction of Murder by Fifteen Year Old

1948 amendments to Sections 52³⁴ and 96³⁵ of Article VII of the Louisiana Constitution have extended the juvenile court's exclusive jurisdiction to include *all* crimes committed by children under the age of fifteen. Prior to these amendments juvenile offenders had been subject to criminal prosecution for capital crimes and Attempted Aggravated Rape. In *State v. Anderson*³⁶ the extended juvenile court jurisdiction was applied in favor of a defendant under fifteen years of age who had been charged in 1947 with a murder committed in that year. In 1949 the accused was permitted to withdraw his plea of not guilty and to challenge the jurisdiction of the court to try him as a criminal. In conformity with the 1948 amendment giving the juvenile court exclusive jurisdiction of criminal acts of children under fifteen, the trial judge sustained the defendant's plea and ordered his discharge. On appeal, the state did not question the applicability of the 1948 amendment as a limitation on the court's criminal jurisdiction over previously committed offenses. It was urged, however, that the trial judge should have transferred the case to the juvenile court, rather than to order the defendant's discharge. Act 169 of 1944 makes it the mandatory duty of the trial judge to transfer cases where the juvenile court is vested with exclusive jurisdiction. While this statute stated an exception in "charges of capital crimes or charges of attempted aggravated rape" (then triable as crimes), that exception was necessarily nullified by the constitutional amendment which now gives the juvenile court exclusive jurisdiction in all cases. In essence, the purpose of the statute was to avoid the delay which would result from the subsequent filing of a separate charge of juvenile delinquency, by providing for a mandatory and immediate transfer of the case to the juvenile court in those instances where the criminal district court is without jurisdiction.

Jury Venires—Exclusion of Class as Discrimination

The prohibition against discrimination, set out in the Fourteenth Amendment to the Federal Constitution, has been consistently applied in cases where there has been a systematic exclu-

34. Adopted pursuant to La. Act 539 of 1948.

35. Adopted pursuant to La. Act. 513 of 1948.

36. 41 So. (2d) 809 (La. 1949).

sion of negroes from jury service.³⁷ While other charges of class discrimination have been frequently urged, they have seldom been upheld.³⁸ In such cases adequate proof of actual and systematic discrimination is ordinarily lacking. In *State v. Poe*³⁹ a motion to quash the venire on the grounds that no members of defendant's class (World War II veterans) were on the jury list, and that no members of the jury panel had been drawn from defendant's ward, had been overruled. The supreme court affirmed the trial court's ruling, merely citing Article 202 of the Code of Criminal Procedure without discussion. The court had similarly approved, in a 1947 decision, the trial judge's refusal to set aside the petit jury venire on the ground that white manual laborers had been systematically excluded by the jury commission.⁴⁰

Long Form Indictments—Necessary Averments

The long form indictment must be used for charging those special crimes which are not included in the Criminal Code. Such indictments must state every fact and circumstance necessary to constitute the offense.⁴¹ In *State v. Quinn*⁴² the accused had been convicted of the illegal possession for sale of intoxicating liquors.⁴³ The bill of information upon which defendant had been tried had alleged defendant's possession of intoxicating liquors for purposes of sale, but had failed to allege further that such possession for sale was in a dry parish where the sale of intoxicating liquor had been outlawed by a local option election. In accord with a well-settled principle of Louisiana jurisprudence,⁴⁴ that where the indictment is substantially defective in failing to state every essential element of the crime the nullity may be complained of after conviction by a motion in arrest of judgment, the conviction and sentence were set aside.

Similarly, in *State v. Davis*⁴⁵ an information for Illegal Carrying of Weapons⁴⁶ which charged the defendant with the intentional concealment on or about his person of a "dangerous wea-

37. See Comment (1948) 8 LOUISIANA LAW REVIEW 548.

38. Id. at 552.

39. 214 La. 606, 38 So.(2d) 359 (1948).

40. *State v. Krieger*, 212 La. 527, 33 So.(2d) 58 (1947).

41. Art. 227, La. Code of Crim. Proc. of 1928.

42. 214 La. 368, 37 So.(2d) 821 (1948).

43. La. Act 15 of 1934, § 13, as amended by La. Act 17 of 1935 (1 E.S.).

44. *State v. Pridgen*, 187 La. 569, 572, 175 So. 63, 64 (1937), where the indictment failed to charge that the sale was "for beverage purposes"; *State v. Waits*, 210 La. 769, 772, 28 So.(2d) 265 (1946), where the information failed to charge that the sale was "in or about any tavern, house of public entertainment, or a shop for retailing liquors."

45. 214 La. 885, 39 So.(2d) 164 (1949).

46. Art. 95(1), La. Crim. Code of 1942.

pon—to wit, a large knife,” was held insufficient to sustain a conviction. There was no allegation that the large knife in question was a bowie knife, dirk, or other special type of knife which could be said to be “customarily used as a dangerous weapon.” As a result, the information failed to state facts establishing this necessary element of the crime charged. The information could not be sustained under the short form authorized by the 1942 amendment to Article 235 of the Code of Criminal Procedure,⁴⁷ for it is sacramental to the short form method of charging a Criminal Code crime that the name of the crime and also the number of the article of the Criminal Code denouncing that particular offense must be stated. These requirements had not been met in the *Davis* case.

In *State v. Willson*⁴⁸ the murder indictment, apparently drafted in conformity with some old common law indictment in the district attorney’s file, charged that the defendant “did feloniously, willfully, unlawfully and with malice aforethought did kill and murder _____.” Defense counsel had moved to quash the indictment on the ground that it was not drawn in conformity with the short form provided in Article 235,⁴⁹ nor did it state the crime of Murder as now defined in Article 30 of the Criminal Code.⁵⁰ In affirming a conviction of Manslaughter and upholding the trial judge’s ruling that the indictment was sufficient, the supreme court pointed out that the forms outlined in Article 235 are permissive, not exclusive. Without any detailed discussion of the point, Justice McCaleb continued that “the indictment contains all the essential ingredients of the crime of murder.” Justice McCaleb’s conclusion was probably based upon the idea that one could not kill and murder willfully and with malice aforethought without having the “specific intent to kill or to inflict great bodily harm” which is necessary for Murder as defined in Article 30(1) of the Criminal Code. However, it would be much safer to frame indictments either in conformity with the short forms provided by Article 235 or according to the present definition of the crime as stated in the Criminal Code. While the use of obsolete common law terminology may be excused as surplusage or as having substantially the same meaning as the present day elements of criminal liability,

47. La. Act 147 of 1942.

48. 41 So.(2d) 69 (La. 1949).

49. The short form for murder reads “AB murdered CD.”

50. Article 30(1) defines murder as the killing of a human being “(1) when the offender has a specific intent to kill or to inflict great bodily harm. . . .”

which was apparently the supreme court's approach in the *Willson* case, it results in a confusion of thinking which might well vitiate the indictment.

Short Form Indictments

Where the short form indictment prescribed by Article 235 of the Code of Criminal Procedure is used, great care must be exercised to make sure that the requisites of that form have been fully complied with. In *State v. Johnson*,⁵¹ an indictment, charging that defendant "attempted unlawfully to kill" the person named, was held sufficient to sustain a conviction for Attempted Manslaughter. It was argued in a motion in arrest of judgment that the indictment was not in strict compliance with Article 235, in that it should have alleged that appellant "attempted to unlawfully kill" the named victim. It will be noted that there had been a slight technical departure from the short form for Attempt provided in Article 235, in that the word "to" was placed after the word "unlawfully," rather than after the word "attempted." In upholding the trial judge's overruling of the motion in arrest of judgment, the supreme court agreed that the technical departure did not in any way becloud the nature of the indictment and that the accused was fully advised of the nature and cause of the charge against him. The supreme court further pointed out that even if there was a defect it was merely a formal defect which must be raised by demurrer or motion to quash in advance of trial.⁵²

In *State v. Wright*⁵³ the short form for Simple Burglary was strictly adhered to and the court reiterated its holding on numerous prior occasions that indictments and informations drawn in conformity with the short forms are sufficient to inform the accused of the nature of the charge against him and to support a plea of former jeopardy.⁵⁴

Indictments—Name of Victim

The name of the person injured is an essential element of the indictment in crimes against the person.⁵⁵ The name of the

51. 214 La. 535, 38 So.(2d) 162 (1948).

52. Citing Art. 253, La. Code of Crim. Proc. of 1928.

53. 41 So.(2d) 76 (La. 1949).

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

55. Art. 230, La. Code of Crim. Proc. of 1928; the name of the victim is required even when the short form is used—see short forms for murder, aggravated battery, aggravated rape, etc., Art. 235, La. Code of Crim Proc. of 1928.

owner, however, has not been considered an essential ingredient in charges of crimes against property, such as Theft.⁵⁶ Following this line of distinction, the court held in *State v. Wilde*⁵⁷ that an indictment for Forgery need not name the party defrauded, and that the defendant is not entitled to that information through a bill of particulars unless he shows it to be necessary to a proper defense of the case.⁵⁸ In actual practice such a bill of particulars is usually granted,⁵⁹ and the necessity for such information is fairly easy to establish.

Bill of Particulars—When Granted

When the crime is charged by a short form indictment, the provision for a bill of particulars⁶⁰ should be liberally construed; and it is reversible error to deny the accused any particulars which would help him to understand fully the nature of the charge.⁶¹ Where the long form indictment is used the trial court has a wider discretion as to the granting or refusal of the bill of particulars.⁶² In *State v. Poe*,⁶³ the accused had been charged with Attempted Simple Kidnapping by a long form indictment which specified that the offender had attempted forcibly to seize and carry the victim away. A motion for a bill of particulars requesting detailed information as to how the crime was alleged to have been committed was refused. In holding that the ruling was a proper exercise of the trial judge's discretion, the supreme court declared that the bill "was plainly an attempt to obtain knowledge of the evidence upon which the State relied to prove its case."⁶⁴

Bill of Particulars—A Restriction Upon the Charge

It is well settled that "a bill of particulars cannot change the offense charged or in any way aid an indictment or informa-

56. *State v. Miller*, 170 La. 51, 127 So. 361 (1930). See also the short form for Theft set out in Art. 235, La. Code of Crim. Proc. of 1928.

57. 214 La. 453, 38 So.(2d) 72 (1948).

58. The per curiam showed that defense counsel had reserved no bill of exceptions to the refusal of his request for a bill of particulars. 214 La. 453, 460, 38 So.(2d) 72, 75.

59. See *State v. Miller*, 214 La. 472, 38 So. (2d) 140 (1948), Cf. the recent Mississippi case of *Wilson v. State*, 37 So.(2d) 19 (Miss. 1948), where the name of the victim in a forgery prosecution was considered so material that a variance in the charge and the proof was ground for reversal.

60. Art. 235, La. Code of Crim. Proc. of 1928.

61. *State v. Brooks*, 173 La. 9, 136 So. 71 (1931).

62. Art. 288, La. Code of Crim. Proc. of 1928. See *State v. Sheffield*, 201 La. 1055, 10 So.(2d) 894 (1942) and *State v. Alford*, 206 La. 100, 18 So.(2d) 666 (1944), where bills of particulars were properly refused.

63. 214 La. 606, 38 So.(2d) 359 (1948).

64. 214 La. 606, 626, 38 So.(2d) 359, 365.

tion fundamentally bad.”⁶⁵ However, the supreme court has recently indicated in *State v. Mesino*⁶⁶ that the converse does not follow and that the bill of particulars may so limit the charge in an otherwise valid indictment as to render it subject to a motion to quash. In that case the short form indictment adequately charged the crime of Negligent Homicide, and the bill of particulars was in proper order. In remanding the case for trial on the indictment, which had been improperly quashed by the trial judge, the supreme court very appropriately pointed out that the bill of particulars furnished would operate “to limit the scope of proof on the trial by restricting the introduction of evidence to the proof of those facts set out in the bill of particulars.”⁶⁷ Justice Moise, speaking for the court, then continued that “the court in considering the motion to quash the indictment must construe those facts as set out in the bill of particulars to be true and determine whether or not, as proved, they constitute the crime charged.” Recognizing that this statement might be subject to some criticism in view of the supreme court’s previous holdings that the bill of particulars is not to be treated as a part of the indictment, Justice Moise continued, “It is of no moment whether we say that a bill of particulars is an amendment or an amplification of the indictment or a restriction of proof to be offered by the State. It is easier to find fault with a remedy proposed than to propose a remedy that is faultless.”⁶⁸

The practical common sense of Justice Moise’s dictum conclusion is easily recognizable, for it would appear a futile procedure to continue a trial under a charge which had been so limited by the bill of particulars as to render a valid conviction impossible. At the same time, it is neither wise nor logical to treat the bill of particulars as a part of the indictment. Let us suppose that the defendant did not file a motion to quash and went to trial under a charge wherein proof had been restricted by an incorrect bill of particulars. He would probably secure an acquittal by excluding evidence inconsistent with the bill of particulars. Could he then plead former jeopardy as a bar to a subsequent prosecution for that crime?⁶⁹ A plea of former jeopardy could only be sustained if the court held the indictment

65. *State v. Bienvenu*, 207 La. 859, 865, 22 So.(2d) 196, 198 (1945).

66. 214 La. 744, 38 So.(2d) 622 (1949).

67. 214 La. 744, 748, 38 So.(2d) 622, 623, citing numerous general authorities.

68. *Ibid.*

69. See *State v. Shiro*, 143 La. 842, 79 So. 426 (1918), where such a plea was sustained, despite the fact that proof of the crime was actually impossible at the first trial, due to rulings excluding evidence.

valid.⁷⁰ To do this would necessitate reverting to the traditional concept of the nature of the bill of particulars, that is, that it is not a part of the indictment but is merely a supplemental means of protecting the right of the accused to be informed as to the nature of the charge brought against him. In such a case the court would be faced with the technical decision which Justice Moise so neatly sidestepped in the *Mesino* case dictum, and would probably conclude that the bill of particulars is only "a restriction of proof to be offered by the state."⁷¹

Recusation of the Trial Judge

Article 303 of the Code of Criminal Procedure specifies the causes for recusation of the trial judge. The first, and most litigated, of these is "his being interested in the cause." In *State v. Doucet*⁷² the supreme court had ordered the recusal of a trial judge who had been the leader of a rival political faction interested in securing defendant's conviction and preventing his re-election to the office of sheriff. Compare, however, the case of *State v. Hutton*,⁷³ where the trial judge's statement, in sentencing defendant's nineteen year old younger brother and accomplice in the burglary, that the defendant should receive a heavier sentence if convicted, did not constitute such an "interest" as would require the judge to recuse himself. It appeared significant that the judge was not acquainted with defendant and had no personal interest in the outcome of the trial.

In the recent case of *State v. LaBorde*⁷⁴ defense counsel moved to recuse the trial judge who, while previously serving as district attorney, had prosecuted defendant on several occasions for other crimes. The motion for recusation alleged that when the defense stated that a jury trial was not desirable because the accused was too well known to the jurors, the trial judge remarked "the accused would have a better chance before a jury than before this court." In upholding the refusal of the trial judge to recuse himself or to submit the motion to another judge for determination,⁷⁵ the supreme court reaffirmed its previous hold-

70. Under Art. 279, La. Code of Crim. Proc. of 1928, it is necessary, in order to constitute former jeopardy, "that the former acquittal or conviction was rendered on a sufficient indictment."

71. 214 La. 744, 748, 38 So.(2d) 622, 623 (1949).

72. 199 La. 276, 5 So.(2d) 894 (1942). Accord: *State v. Manouvrier*, 199 La. 300, 5 So.(2d) 901 (1942); *State v. Hayes*, 199 La. 549, 6 So.(2d) 657 (1942).

73. 198 La. 174, 3 So.(2d) 549 (1941).

74. 214 La. 644, 38 So.(2d) 371 (1948).

75. Art. 309, La. Code of Crim. Proc. of 1928, requires the trial judge to refer the application for a recusation to another judge for determination, unless the facts stated, if proved, would not constitute a legal ground for re-

ing in *State v. Phillips* that mere bias or prejudice on the part of the judge is not one of the specified grounds of recusation, and that "interest in the cause" means that it must be "to the judge's personal advantage,"⁷⁶ to decide the case or to influence the decision for or against the accused. The supreme court's statement, as it had been in the *Phillips* case, was in the nature of dictum in view of its express holding that the facts alleged in the motion for recusation did not show that the trial judge was biased or prejudiced, or unable to conduct a fair and impartial trial. Giving the trial judge the benefit of a very large doubt, the supreme court construed his statement as meaning that he would be guided by the law and the evidence and could not be swayed by sympathy and those other extraneous considerations which so often influence a jury.⁷⁷

While the *LaBorde* decision probably represents a correct limitation of the phrase "his being interested in the cause," it would appear that "substantial bias or prejudice against the accused" should be a ground for recusation of the trial judge. The trial judge plays such an important part in the trial procedure and is given such a wide discretion in sentencing that the accused should be able to demand his impartiality. If this additional cause for recusation were added by a legislative amendment of Article 303, it should not be interpreted to mean that the judge in the *Hutton* case would be disqualified by reason of his stricter attitude toward adult offenders, or that a judge would be disqualified merely because he had previously prosecuted an accused for other crimes while serving as district attorney. Under the theory of the *LaBorde* decision, the judge's utterance in that case would not serve to disqualify him, but that case is pretty close to the line and might be decided differently if "substantial bias or prejudice against the accused" were a specific ground of recusation.

Insanity as a Defense—Appointment of Lunacy Commission

In *State v. Cook*⁷⁸ the defendant applied for the appointment

cusation. See cases cited in the *LaBorde* opinion, 214 La. 644, 655, 38 So.(2d) 371, 375.

76. 159 La. 903, 906, 106 So. 375, 376 (1925).

77. Justice McCaleb states that "This [remark] does not indicate that the court, in trying the case, would not be guided by the evidence adduced or that appellant would be convicted if the proof did not show his guilt beyond a reasonable doubt. On the contrary, it strikes us that the judge was merely expressing a fact, well known to members of the Bar, that a jury oftentimes is motivated in its deliberations by considerations of sympathy or other extraneous matters, whereas, the judge, as a trained trier of facts, will invariably be guided by the law and the evidence." 214 La. 644, 658, 38 So.(2d) 371, 376.

of a lunacy commission to defense council the mental condition of the accused both at the time of the trial and at the time of the commission of the offense. In support of the motion it was claimed that there was hereditary insanity in the family of the accused, but there was no specific allegation of facts indicating actual insanity in his case. The coroner reported, after examining and observing the accused, that there was no indication of insanity. The trial judge refused to appoint a lunacy commission and overruled the defense counsel's motion of present insanity. In upholding the trial judge's ruling, the supreme court reaffirmed its previous decision in *State v. Bessar*⁷⁹ that the defendant's right to a hearing on the plea of present insanity is not an unqualified one, and is only provided for in cases where the trial judge has reasonable ground to believe that the defendant is mentally incapable of understanding the proceedings and assisting in his defense.

Since no special plea of insanity at the time of the crime was filed, the trial judge was justified in assuming that defense attorneys had abandoned this phase of the insanity defense which would have raised a jury question relating to guilt or innocence. In the district judge's per curiam, which was set out in the supreme court opinion as a means of presenting the facts of the case, the trial judge states that if the defense of insanity at the time of the commission of the crime had been urged at the trial, and a request for a lunacy commission made, "the court most assuredly would have appointed a commission in compliance with Article 267. . . ." This gratuitous statement by the trial judge is a little more favorable to the rights of the accused than are the actual provisions of Article 267 of the Code of Criminal Procedure, which states that the court "may appoint" a lunacy commission where insanity at the time of the crime becomes an issue in the case. Usually the lunacy commission will be appointed; but where the plea of insanity is entirely unsupported by evidence, as it apparently was in the principal case, the court might well refuse to appoint a lunacy commission. Such a refusal was upheld in *State v. Messer*⁸⁰ where the trial judge refused to appoint a lunacy commission because he was convinced that the defendant was sane and that defense counsel had filed the insanity plea as a dilatory tactic. The Louisiana Supreme Court held that this

79. 213 La. 299, 34 So.(2d) 785 (1948), discussed by writer in *The Work of the Louisiana Supreme Court for the 1947-1948 Term (1949)* 9 LOUISIANA LAW REVIEW 263.

80. 194 La. 238, 193 So. 633 (1940).

refusal was, under the circumstances of that case, a proper exercise of judicial discretion.

Motion for Severance

The granting or refusal of defense counsel's motion for a severance, where parties are jointly indicted for a crime, is addressed to the sound discretion of the trial judge. His ruling will not be reversed on appeal, except in case of manifest error and clear injury to the accused. In *State v. Cook*,⁸¹ a joint trial for a murder, the motion for a severance alleged that the defenses of the two defendants were antagonistic, with each defendant claiming in his confession that the crime was entirely committed by the other. If this situation had actually existed, a clear case for a severance would have been made out, and the trial judge's refusal to grant the motion would have been reversible error. However, the state's case was not based on the antagonistic confessions. In a subsequent oral confession, one of the defendants admitted firing the fatal shot. The state relied upon this confession and claimed that both defendants were present, and were mutually aiding and abetting each other in the attack upon the deceased—thus rendering both parties guilty as principals, regardless of who fired the gun. In affirming the murder conviction, the supreme court pointed out that upon the contradictory hearing of the motion for a severance "there was no evidence before the court showing that the defenses were antagonistic." The court also stressed the fact that no conflict or antagonism appeared during the trial of the case. Actually, this latter point was in the nature of make-weight support of the first, since the question of antagonistic defenses is determined by the facts available as of the time the motion for severance is made and the hearing held.

Continuance

The granting or refusing of a motion for a continuance is addressed to "the sound discretion of the trial judge," and only an "arbitrary or unreasonable abuse of such discretion may be reviewed—on appeal."⁸² In *State v. Comery*,⁸³ a continuance was sought during the middle of the trial in order to secure the attendance of two physicians as witnesses. The court recessed briefly and, after a fruitless effort was made to reach the witnesses over the telephone, refused to order a continuance. The trial court's

81. 215 La. 163, 39 So.(2d) 898 (1949).

82. Art. 320, La. Code of Crim. Proc. of 1928.

83. 214 La. 245, 36 So.(2d) 781 (1948).

refusal was affirmed on the ground that the defense counsel had not exercised due diligence in securing the witness before the trial commenced.⁸⁴ In *State v. Poe*⁸⁵ the defendant had been arraigned five days after his arrest, and had been brought to trial a month later. There was no specific showing of injury, and the defense failed to sustain its contention that the trial judge was guilty of "rushing the case to trial precipitately." In two other cases where lesser periods had intervened, but where there was no showing that the refusal of a continuance had deprived the defendant of the presence of any specific witnesses⁸⁶ or had otherwise prejudiced his defense,⁸⁷ the trial judge's ruling was upheld as a proper exercise of discretion.

The trial judge is granted broad powers, under Article 253 of the Code of Criminal Procedure, to amend the indictment before or during the trial in respect to any defect or to cure a variance between the indictment and the proof. Where such an amendment is made the defendant is entitled to a continuance if he has been misled or prejudiced by the defect or variance. Such prejudice has been consistently found to exist in cases where the date of the alleged crime was changed and the defendant had been relying upon an alibi defense. In such instances the defendant is entitled to a continuance in order that he may prepare to account for his presence on the date now charged, and the refusal to grant a continuance has been held to constitute reversible error.⁸⁸ Compare, however, the recent case of *State v. Thomas*⁸⁹ where the information, which charged Simple Burglary of the Dillard University Hospital building at a certain address, had been amended to allege specifically that the building burglarized was the hospital nurses' home located behind the main hospital building on the same plot of ground. In holding that defense counsel's motion for a continuance had been properly overruled, the supreme court pointed out that the amendment in question "merely sets forth with more particularity the building burglarized"⁹⁰ and that the record was devoid of any evidence that the

84. Art. 322, La. Code of Crim. Proc. of 1928, requires that every motion for a continuance based upon the absence of witnesses must show that counsel exercised due diligence in securing the attendance of the witnesses.

85. 214 La. 606, 38 So.(2d) 359 (1948).

86. *State v. Thomas*, 214 La. 499, 38 So(2d) 49 (1948).

87. *State v. LeBorde*, 214 La. 644, 38 So.(2d) 371 (1948).

88. *State v. Barnhart*, 143 La. 596, 78 So. 975 (1918); *State v. Singleton*, 169 La. 191, 124 So. 824 (1929).

89. 214 La. 374, 37 So.(2d) 841 (1948).

90. The amendment, specifying the particular building which was burglarized, was necessary in order to cure a substantial defect in the information. See *State v. McDonald*, 178 La. 612, 152 So. 308 (1934), holding that a burglary

defendant had been misled or prejudiced in his defense by the particularized description of the building.

Presence of Accused During Trial

Louisiana jurisprudence is in accord with the general common law rule that one on trial for a felony must be personally present in court during every important stage of the trial from arraignment to sentence. Further, the minutes of the court must affirmatively show his presence.⁹¹ In *State v. Augusta*⁹² the supreme court had announced a possible departure from this rule, by declaring that the defendant cannot raise the fact of his absence by motion for a new trial without seasonable objection and exception duly taken, or taking some affirmative steps to see that his absence is expressly recited in the minutes of the court. In the 1949 case of *State v. Pope*⁹³ the court, without any mention of the *Augusta* decision, clearly and definitely reverted to the previously well-settled rule that the court minutes must affirmatively disclose the presence of the accused, and it is not enough that the minutes give the general impression that the defendant was present. While reaffirming the rule placing the burden of proof on the state to make sure that the minutes show the presence of the accused or facts from which his presence may be directly inferred,⁹⁴ the supreme court refused to treat the deficiency in the minutes as reversible error per se. Instead, they remanded the case to the district court for the purpose of giving the state an opportunity to prove, contradictorily with the defendant, that the accused was present, and have the minutes corrected accordingly.

indictment was fatally defective when it merely alleged the breaking and entering of "The American Hat Company" which was not necessarily a building or structure. The information in the instant case was somewhat more explicit, in charging the burglary of "the building and structure" of the Dillard University, but might well be considered inadequate since it failed to specify which building had been invaded.

91. *State v. Coston*, 113 La. 717, 37 So. 619 (1904); *State v. Thomas*, 128 La. 813, 55 So. 415 (1911); *State v. Layton*, 180 La. 1029, 158 So. 375 (1934).

92. 199 La. 896, 7 So.(2d) 177 (1942), noted in (1942) 4 LOUISIANA LAW REVIEW 618.

93. 214 La. 1026, 39 So.(2d) 719 (1949). The minutes respecting the arraignment recited: "This day the accused was arraigned, and through his attorney, waived the reading of the indictment, and pled not guilty, the case was then assigned for trial Tuesday, June 8, 1948. The defendant was then served with a copy of the Jury Venire and the counsel for the defendant was given until Friday morning to file any motion."

94. In case of a short trial, it has been held that where the record shows that the accused was present at the beginning of the trial, a presumption arises that he was present during the remainder. *State v. Collins*, 33 La. Ann. 152 (1881); *State v. Price*, 37 La. Ann. 215 (1885); *State v. Clement*, 42 La. Ann. 583 (1890); *State v. Starr*, 52 La. Ann. 610, 26 So. 998 (1899).

Opening Statement of District Attorney

Article 333 of the Code of Criminal Procedure requires an opening statement by the district attorney "explaining the nature of the charge and the evidence by which he expects to establish the same." In *State v. Poe*⁹⁵ the trial judge had ruled that the district attorney's exposition in his opening statement of the difference between aggravated and simple kidnapping, was appropriate as "an explanation of the nature of the charge." Reaffirming the general principle that the scope and extent of the opening statement is within the control of the trial judge, the supreme court held that the allowance of the district attorney's explanation of the law applicable to the case was a proper exercise of the judge's discretion.

Comments on Failure to Testify or Produce Witnesses

The district attorney has a right to argue logical inferences from the evidence submitted or from evidence suppressed by the defense.⁹⁶ Comment, in rebuttal of defense contentions, upon the failure of the accused to produce logical third party witnesses was held permissible in two recent cases. In *State v. McNeal*,⁹⁷ a defendant, charged with horse stealing had testified that his neighbors knew of his ownership of a horse similar to the one he was charged with stealing. It was proper, therefore, for the district attorney to state in his closing argument to the jury that it was "quite significant" that none of the neighbors had been called to testify to such ownership. Similarly, in *State v. Poe*,⁹⁸ where defense counsel had urged the good character of the defendants, it was appropriate for the district attorney to tell the jury, "If these parties are such fine characters as Mr. Parker would lead you to believe, why then didn't he put somebody on the stand to prove their character?"

A different situation is presented where the district attorney comments upon the defendant's failure to take the stand. The inference drawn may be a logical one, but it has the effect of indirectly forcing the defendant to take the stand and run the risk of self-incrimination. In this case, the remarks are deemed so basically prejudicial that they entitle the defendant to a mistrial and cannot be cured by the judge's admonition to the jury to disregard them.⁹⁹

95. 214 La. 606, 628, 38 So.(2d) 359, 366 (1948).

96. Art. 382, La. Code of Crim. Proc. of 1928.

97. 214 La. 664, 38 So.(2d) 378 (1948).

98. 214 La. 606, 638, 38 So.(2d) 359, 369 (1948).

99. *State v. Marceau*, 50 La. Ann. 1137, 24 So. 611 (1898); *State v. Robinson*,

Responsive Verdicts

The practical importance of the 1948 responsive verdict statute,¹⁰⁰ wherein the proper responsive verdicts for the most important crimes are specifically stated, is illustrated by two 1948 decisions. In *State v. Poe*¹⁰¹ the supreme court held, on rehearing, that a verdict of Simple Assault was not responsive to a charge of Attempted Simple Kidnapping. After the first hearing of the case, the court had held that Attempted Simple Kidnapping by forcible seizing and carrying the victim¹⁰² necessarily included at least a Simple Assault. It was reasoned that an assault is committed whenever an attempt is made to use force or violence upon the person of another.¹⁰³ On rehearing, the majority of the court agreed as to the test to be applied, that is, "whether the definition of the greater offense necessarily includes all the elements of the lesser," but differed as to its application. The majority opinion cited one example, and another might be suggested by the case of the defendant who commits an attempt by lying in wait while armed with a dangerous weapon, where a simple assault is not "necessarily included" in the attempted kidnapping. An added justification for the holding, which was not mentioned in the *Poe* case or in the leading recent case of *State v. Roberts*,¹⁰⁴ is the fact that the two crimes were not generic. Attempted Simple Kidnapping is a species of the kidnapping and false imprisonment genus, while Simple Assault belongs to the assault and battery class of crimes.¹⁰⁵ Under the 1948 responsive verdict statute, which strictly adhered to the generic offense requirement, simple assault is not a responsive verdict to any kidnapping or attempted kidnapping charge.

In *State v. Murphy*¹⁰⁶ the information had charged Aggravat-

112 La. 939, 36 So. 811 (1904). See Note (1948) 8 LOUISIANA LAW REVIEW 423. For a complete discussion of this question see Comment, *infra* p.—.

100. La. Act 181 of 1948, amending Art. 336, La. Code of Crim. Proc. of 1928.

101. 214 La. 606, 38 So.(2d) 359 (1948).

102. Arts. 27, 45(1), La. Crim. Code of 1942.

103. *Id.* at Arts. 33, 36.

104. 213 La. 559, 35 So.(2d) 216 (1948), discussed by writer (1949) 9 LOUISIANA LAW REVIEW 267.

105. This requirement is directly supported by the supreme court's earlier holding in *State v. Guillory*, 42 La. Ann. 581, 7 So. 690 (1890), where a verdict of Assault with Intent to Murder was held not responsive to a murder indictment because the two crimes were not of the same generic class. For a complete analysis of the generic and included offense requirements of responsive verdicts in Louisiana, see Comment (1944) 5 LOUISIANA LAW REVIEW 603.

106. 214 La. 600, 38 So.(2d) 254 (1948), noted in (1949) 9 LOUISIANA LAW REVIEW 576.

ed Arson, and a verdict of guilty of "Simple Arson in the sum of \$150" was held not responsive. While the two offenses were generic, all elements of Simple Arson are not necessarily included in a charge of Aggravated Arson. In his opinion Chief Justice O'Niell pointed out that the gravamen of aggravated arson is foreseeable danger to human life; whereas the gravamen of the offense of simple arson is the damaging of the property of another without his consent. An offender may commit Aggravated Arson by burning his own property in such a way as to endanger human life, while it is an essential element of the crime of Simple Arson that the property belong to "another." Under the 1948 responsive verdict statute, Simple Arson is listed as a responsive verdict to a charge of Aggravated Arson. In most instances the new statute has reduced the number of responsive verdicts. However, because of possible close questions as to the "foreseeable danger to human life," it was deemed expedient to provide that a charge of Aggravated Arson should also embrace the lesser generic offense of Simple Arson. In this regard Chief Justice O'Niell raises a very significant question when he declares, by way of dictum:

"Whether it is necessary also, in a prosecution for aggravated arson, under the provisions of Act No. 161 of 1948, in order to make a verdict of guilty of simple arson responsive, that the indictment shall state also that the property damaged by the explosive substance, or set on fire, was the property of another person, other than the party accused, and that the damaging or setting fire to the property was done without the consent of the owner, is a matter which we need not decide in this case."¹⁰⁷

The necessity of these additional allegations is indicated by the analogous decision in *State v. Pace*¹⁰⁸ where the defendant was charged with robbery and convicted of larceny. Although larceny was a lesser and generic offense, it was held that a larceny verdict was not responsive unless the indictment had alleged the value of the property stolen. This allegation, while immaterial to the aggravated crime of robbery, was essential to a charge of the graded lesser offense of larceny.

Suspended Misdemeanor Sentences

The trial judge is authorized to suspend sentence in misde-

107. 214 La. 600, 605, 38 So.(2d) 254, 256.

108. 174 La. 295, 140 So. 482 (1932).

meanor cases. Such suspension, unlike probation in felony cases, is without supervision and conditioned only on "good behavior," which is specifically defined to mean that the offender "shall not be convicted of any other crime."¹⁰⁹ In *State v. Gordon*¹¹⁰ the court interpreted the phrase "any other crime" to include conviction of a federal offense. Stressing the policy of the probation law, that is, to aid the rehabilitation of the penitent prisoner who abstains from further crime, the court held that the condition of the suspended sentence would be broken by any conviction "whether local, federal or foreign."

The court in the *Gordon* case also settled a point of importance concerning the meaning of the declaration in Article 538 of the Code of Criminal Procedure that upon conviction of another crime the judge shall pronounce sentence upon the original judgment, "and shall *cumulate* the punishment of any subsequent conviction or convictions. . . ." This plainly means, according to Justice McCaleb, that the first sentence shall be served in addition to the punishment given for the second offense and that "the sentences shall not, under any circumstances, run concurrently."¹¹¹

In *Cox v. Brown*¹¹² the supreme court had held that suspension of forty days of a ninety-day sentence operated as a suspension of the *entire* sentence with the attempted limitation to forty days being ineffective. Compare, however, the recent case of *State v. LaBorde*¹¹³ where the defendant was sentenced to a fine of \$200 and one year's imprisonment, the maximum penalty for attempted Theft, but with the proviso that if he paid the fine nine months of the jail sentence would be suspended. In discussing other issues raised by the appeal, the supreme court assumed the validity of the partial suspension of sentence. Apparently the cases may be distinguished by looking to which part of the sentence was suspended. In the *Cox* case the first part of the sentence was suspended, and the state's effort later to require actual service of the balance of the term was unavailing. In the *LaBorde* case, however, the first three months of the sentence were to be served, and then the *entire remainder* of the sentence

109. Art. 536, La. Code of Crim. Proc. of 1928, as amended and re-enacted by La. Act 48 of 1942.

110. 214 La. 822, 38 So.(2d) 794 (1949).

111. 214 La. 822, 830, 38 So.(2d)794, 796.

112. 211 La. 235, 29 So.(2d) 776 (1947), discussed *The Work of the Louisiana Supreme Court for the 1946-1947 Term* (1948) 8 LOUISIANA LAW REVIEW 301.

113. 214 La. 644, 38 So.(2d) 371 (1949).

was to be suspended. This method of partial suspension was tacitly approved.

Motion for New Trial

Where the trial judge overrules a motion for a new trial based upon an alleged insufficiency of the evidence, or upon newly discovered evidence, the probability that the trial judge's decision will be reversed by the supreme court is very slight. Thus, in *State v. McNeal*¹¹⁴ the supreme court applied the well-settled rule that the trial judge's refusal to grant a new trial on the ground that "the verdict is contrary to the law and the evidence" presents nothing for review. Upon such a motion the trial judge may set aside a verdict if he feels that the jury was wrong and entertains a reasonable doubt as to the defendant's guilt. However, the judge's ruling involves a question of fact and the supreme court's appellate jurisdiction in criminal cases is limited to questions of law.¹¹⁵ An exception has been recognized in those cases where there was a complete lack of evidence to prove an essential element of the crime charged.¹¹⁶ In this situation the trial judge commits an error of law in refusing a new trial, which error is reviewable by the supreme court on appeal. In *State v. Laborde*¹¹⁷ the appellant sought to bring his appeal within this exception, but the supreme court refused to consider the claim, since the evidence presented to the trial judge had not been transcribed or made a part of the record. It would appear very difficult to bring a case within this exception unless the facts were stipulated, fully summarized in a per curiam of the trial judge, or sufficiently set out in a formal bill of exception to show specifically the alleged complete absence of proof.

In the *McNeal* case the supreme court also upheld the trial judge's refusal to grant a new trial on the ground of *newly discovered evidence*. Here again the court followed a well-settled line of jurisprudence, but the reasoning is somewhat different. New trials on the grounds of newly discovered evidence are not looked upon with judicial favor, since such evidence is frequently of a rather untrustworthy character. The supreme court has consistently held that the trial judge, who has had a first-hand

114. 214 La. 664, 38 So.(2d) 378 (1948). Accord: *State v. Vallery*, 214 La. 495, 38 So.(2d) 148 (1948).

115. Art. 516, La. Code of Crim. Proc. of 1928; La. Const. of 1921, Art. VII, § 10.

116. *State v. Wooderson*, 213 La. 40, 34 So.(2d) 369 (1948); *State v. Giangosso*, 157 La. 360, 102 So. 429 (1924).

117. 214 La. 644, 38 So. (2d) 371 (1948).

opportunity to evaluate the credibility and probative effect of the new evidence, is vested with a wide discretion in this matter and his decision will not be reversed unless it is manifestly erroneous.¹¹⁸

Appeal—Insufficient Charge to Jury

The trial judge's charge to the jury, even though it has been included in the transcript of the case, is not considered a part of "the record." Thus, in *State v. Davis*,¹¹⁹ where no objection had been made or bill of exceptions reserved to the trial judge's failure to instruct the jury upon the law relative to certain responsive verdicts,¹²⁰ there was no basis for a motion in arrest of judgment and subsequent appeal. Technically, the alleged error was not a part of the record, and hence could not be taken advantage of by a motion in arrest which goes only to those errors which are "patent upon the face of the record,"¹²¹ nor could it serve as the basis of an appeal.¹²² The defense effort to perfect the basis of an appeal by securing an order that a certified copy of the judge's charge be filed with the supreme court was unavailing. The trial judge's order was probably a nullity for he had lost jurisdiction in the case from the moment the appeal was lodged.¹²³ Even the original inclusion of the judge's charge in the transcript of the case would not entitle the defendant to a review unless he had objected and made the court's ruling a matter of record by duly preserving a bill of exception thereto. The practical reason for requiring a timely and specific objection to the judge's charge was succinctly reiterated by the court when it declared that "it is not considered proper that the defendant should be permitted to sit idly by while the judge is making an erroneous charge to the

118. *State v. Saba*, 203 La. 881, 14 So.(2d) 751 (1943). For a complete discussion of the *Saba* case and other cases in point, see Note (1948) 5 LOUISIANA LAW REVIEW 474. Cf. *State v. Gardner*, 198 La. 861, 5 So.(2d) 132 (1941), where the newly discovered evidence was on a point upon which the evidence adduced at the trial had been very unsatisfactory.

119. 214 La. 831, 39 So.(2d) 76 (1949).

120. The trial was for Murder and the trial judge had failed to instruct the jury concerning Attempted Murder, Attempted Manslaughter and Attempted Negligent Homicide. Since the case was tried before the effective date of the new responsive verdict statute, instructions should have been given concerning Attempted Murder and Attempted Manslaughter. *State v. Brown*, 214 La. 18, 36 So.(2d) 624 (1948), discussed in *The Work of the Louisiana Supreme Court for the 1947-1948 Term* (1949) 9 LOUISIANA LAW REVIEW 268; but there was no basis for charging Attempted Negligent Homicide, since one cannot attempt (requiring specific intent) to commit a crime where liability is predicated solely on negligence.

121. Art. 517, La. Code of Crim. Proc. of 1928.

122. *Id.* at Arts. 391, 560.

123. *Id.* at Art. 545.

jury, take his chances upon the verdict, and, if against him, then by assignment of error or motion in arrest take advantage of it."¹²⁴

Appeal from Municipal Court Judgments

The Louisiana Supreme Court's appellate jurisdiction over municipal court judgments is specifically limited to those cases where a fine exceeding \$300, or imprisonment exceeding six months is actually imposed, or where the constitutionality or legality of the penalty is attacked.¹²⁵ In *State v. LaBorde*¹²⁶ the defendant, convicted of petty theft, had been sentenced to pay a fine of \$200 and to serve one year in jail with nine months of the jail sentence being suspended upon the payment of the fine. In assuming appellate jurisdiction to review the sentence the supreme court held that a sentence of one year had actually been imposed. The suspension of nine months of that sentence upon payment of the fine would result in a conditional release of the defendant from imprisonment. If, however, the offender was convicted of another crime during the period of such suspension he would be subject to arrest and must serve the full time of his sentence in jail.¹²⁷ Justice McCaleb's majority opinion is consistent with the real nature and purpose of the suspended sentence. A sentence of imprisonment was actually imposed, but suspended on condition that the offender should abstain from further violations of the criminal law. The *LaBorde* case is different from the situation where imprisonment is imposed in default of the payment of a fine. In that instance payment of the fine completely relieves the offender from imprisonment and it has been consistently held that the imprisonment sentence is not, therefore, actually imposed within the meaning of the constitution.¹²⁸

VII. LOCAL GOVERNMENT LAW

*Albert H. Cotton**

ORGANIZATION AND BOUNDARIES

Perhaps the most important case decided by the Louisiana Supreme Court during the year in the field of local government

124. 214 La. 831, 853, 39 So.(2d) 76, 83, quoting from *State v. Stracner*, 190 La. 457, 182 So. 571, 576.

125. La. Const. of 1921, Art. VII, § 10.

126. 214 La. 644, 38 So.(2d) 371 (1948).

127. Art. 536, La. Code of Crim. Proc. of 1928.

128. *State v. Desimone*, 143 La. 505, 78 So. 751 (1918); *State v. Roy*, 152 La. 933, 94 So. 703 (1922).

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