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## Criminal Law and Procedure: Criminal Procedure

Dale E. Bennett

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it be to place the surety on guard that if in taking the required oath he has sworn falsely he is subject to prosecution under the criminal laws of this state."<sup>15</sup> (Italics supplied.) This statement is in agreement with the writer's belief that such provisions should be disregarded, at least in statutes enacted before the Criminal Code of 1942, and that the offense should be governed by the appropriate articles of that code.<sup>16</sup> If this were done, the offender's false non-judicial oath in the *Conforto* case should have been prosecuted as False Swearing rather than as Perjury. However, in *State v. Smith*<sup>17</sup> with Chief Justice O'Niell writing the court's opinion, it was held that such special penal provisions were not impliedly repealed by the inconsistent general definitions of offenses in the criminal code. Apparently this view was tacitly reaffirmed by the majority of the court when it upheld the perjury conviction of the falsifying surety.

## CRIMINAL PROCEDURE

*Dale E. Bennett\**

### PRELIMINARY EXAMINATIONS

After an indictment has been found or an information filed, the granting of a preliminary examination is "wholly within the discretion of the district court, and not subject to review by any other court."<sup>18</sup> In such cases the grand jury's deliberations, or the district attorney's investigations, insure good faith and probable cause. Of course the preliminary examination may be granted for the purpose of fixing bail, taking depositions of witnesses who may be unavailable at the time of the trial, or bonding key witnesses to appear. In *State v. Gaspard*<sup>2</sup> a defendant had been charged with theft of rice valued at \$4,234.91, and sought a preliminary examination, claiming that the charge was unfounded and made to extort money from him. In upholding the refusal to grant a preliminary hearing, the Supreme Court

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15. 222 La. 427, 436, 62 So. 2d 630, 634.

16. Arts. 123-128, La. R.S. 1950, 14:123-128. For a complete discussion of this point see *The Work of the Louisiana Supreme Court for the 1944-1945 Term*, 6 LOUISIANA LAW REVIEW 647 (1946).

17. 207 La. 735, 21 So. 2d 890 (1945).

\* Professor of Law, Louisiana State University.

1. Art. 154, La. Code of Crim. Proc. of 1928; La. R.S. 1950, 15:154.

2. 222 La. 222, 62 So. 2d 281 (1952).

stressed the trial judge's per curiam statement: "I was convinced that there was at least a reasonably sound basis in law and fact for the charge, that the charge was not maliciously filed, that the filing of such charge did not arise out of a 'vicious conspiracy to deprive respondent of his civil rights' or to 'extort money from him,' . . . that no useful purpose could be served by such a hearing."<sup>3</sup> Actually there was little reason to probe the sufficiency of the charge, for it is generally conceded that the existence of probable cause for trying the accused has been officially determined prior to the filing of the information. After the charge is filed that matter should not be subject to collateral inquiry.

#### PRESCRIPTION

The one year prescriptive period, which serves as a bar to prosecution for all but a few aggravated felonies, may be interrupted by the filing of an information or finding of an indictment.<sup>4</sup> In *State v. Murray*<sup>5</sup> the first information charged theft of \$63.89. After that charge was nolle prosequied, a substituted information was immediately filed charging theft of \$47.94, and with a slight variation in the date of the alleged crime. Defense counsel claimed that the first indictment had not interrupted prescription as to the theft charged in the substituted information, relying principally upon the variation in the amount of the thefts charged. In overruling the defendant's claim of prescription, the Supreme Court looked to the substance of the two informations and refused to require technically identical charges. Justice McCaleb stated, "We think it is clear that the second bill of information is founded on the *identical act* charged in the first. There was but one theft, i.e. that of the money collected by appellee for his employer from the four customers."<sup>6</sup> (Italics supplied.)

Of equal significance was the court's dictum statement concerning the three year prescriptive period, which requires the nolle prosequing of a charge if the accused is not brought to trial within three years.<sup>7</sup> Defense counsel had suggested that a district attorney might keep a charge hanging over the de-

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3. 222 La. 222, 227, 62 So. 2d 281, 282.

4. Art. 8, La. Code of Crim. Proc. of 1928; La. R.S. 1950, 15:8.

5. 222 La. 950, 64 So. 2d 230 (1953).

6. 222 La. 950, 955, 64 So. 2d 230, 232.

7. Arts. 8, 9, La. Code of Crim. Proc. of 1928; La. R.S. 1950, 15:8, 9.

defendant indefinitely by the simple expedient of filing a new information each year. Justice McCaleb was not impressed with this argument, pointing out that there had been no cases of such abuse. He further stated that such a practice would be rendered impossible by the three year prescriptive period, which he construed to require that the accused be brought to trial "within three years from the date of the *original charge*." This is apparently the first judicial statement in regard to this question, but its logic and practicality commend it for direct reaffirmation if such an abuse of the district attorney's powers should occur.

#### VENUE

Improper venue may be raised by either a motion to quash or by a plea to the jurisdiction of the trial court (using jurisdiction in a broad sense to cover venue between parishes). In *State v. Gaspard*<sup>8</sup> the court upheld the venue of Jefferson Davis Parish for the crime of theft, committed by obtaining a consignment of rice by false pretenses. The false representation was made in that parish, which was also the place where the rice was obtained when it was loaded on the truck of an independent carrier hired by the accused. It made no difference that final delivery by the truck was made at defendant's place of business in Vermilion Parish. According to the trial judge's per curiam, "all elements of the offense charged, including the delivery or obtaining of the property . . . occurred or were committed in the Parish of Jefferson Davis."<sup>9</sup> It is of interest to note that if the trucker had been an employee of the victim, and hence delivery to the owner had been at his place of business in Vermilion Parish, the offense could have been tried in either parish. The making of the false pretense and the obtaining of the goods would both be *substantial elements* of the crime, and thus a basis for trial venue under the liberal provisions of Article 13 of the Code of Criminal Procedure, as amended in 1942.<sup>10</sup>

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8. 222 La. 222, 62 So. 2d 281 (1952).

9. 222 La. 222, 228, 62 So. 2d 281, 283.

10. La. Act 147 of 1942, La. R.S. 1950, 15:13. Cf. *State v. Pollard*, 215 La. 655, 41 So. 2d 465 (1949), discussed in 10 LOUISIANA LAW REVIEW 207 (1950) neither the false representation nor the obtaining of the money occurred in Caldwell Parish.

## INDICTMENTS

*State v. Laurence*<sup>11</sup> applied the rather obvious principle that the validity and nature of a charge is determined from "the body of the indictment" and that an otherwise proper indictment is not invalidated by an incorrect endorsement on its back by the deputy clerk.

In *State v. Scott*<sup>12</sup> defense counsel had raised the technical objection that since the short form indictment for murder was couched in language pertaining to a charge against a single defendant, it could not be employed in charging a murder by two defendants. This objection was briefly and definitely overruled. Clearly no such restriction was intended by the illustrative language employed.

In *State v. Roshto*<sup>13</sup> the Supreme Court upheld a short form indictment for cattle theft, which had been drawn in conformity with Article 235.<sup>14</sup> In his opinion, Justice LeBlanc relied heavily on the court's landmark decision in *State v. Pete*<sup>15</sup> wherein the validity of the short form for the general crime of theft was unanimously sustained.

## BILL OF PARTICULARS

The bill of particulars supplements the short form indictment by providing full information as to the details of the charge, and the trial judge must be liberal in the granting of a motion for a bill of particulars where the short form is employed. In *State v. Holmes*<sup>16</sup> the defendant had been charged, in a short form indictment, with simple burglary of a specified service station. The Supreme Court held that he was entitled to a bill of particulars informing him as to whether the alleged intent of the accused had been to commit a theft or a forcible felony in the building entered, and if forcible felony, the nature of such intended felony. In holding that the accused was entitled to these particulars the court pointed out that such a specification would have been essential to its validity if a long form indictment had been employed.

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11. 221 La. 861, 60 So. 2d 464 (1952).

12. 66 So. 2d 802 (La. 1953).

13. 222 La. 185, 62 So. 2d 268 (1952).

14. Art. 235, La. Code of Crim. Proc. of 1928; La. R.S. 1950, 15:235. See Comment, 6 Louisiana Law Review 78 (1944).

15. 206 La. 1078, 20 So. 2d 368 (1944).

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

The bill of particulars is not a part of the indictment.<sup>17</sup> Thus, the Supreme Court held, in *State v. Hudson*,<sup>18</sup> that it is unnecessary to amend the indictment so as to include the information furnished in a bill of particulars.

Certain limitations upon the extent and the nature of information which may be procured through a bill of particulars have become fairly well established by the jurisprudence.<sup>19</sup> Thus in *State v. Matassa*<sup>20</sup> the Supreme Court upheld the trial judge's overruling of defense counsel's motion wherein he was seeking information as to the particular type of heroin which the defendant had allegedly dealt in. It had not been shown how such detailed information was material to the defense. Furthermore, the state cannot be expected to furnish information which it does not have, and experts had testified as to the difficulty of ascertaining the specific sources and types of heroin. A more difficult issue was presented by the refusal to grant requested particulars as to whether defendants had committed the crimes individually and directly, or were liable as accessories before the fact. In holding that this evidence was properly refused, Justice Hamiter declared, "The request related to evidence to be used in proof of the offenses charged, and the state was not required to furnish it before trial."<sup>21</sup> Such a ruling might appear a bit abrupt but for the fact that the distinction between principals and accessories after the fact has been abolished in Louisiana.<sup>22</sup> Even then, the question presented was a close one.

#### LUNACY PROCEEDINGS

Substantial clarification of the proper procedures for handling the report of a lunacy commission has resulted from two 1952 decisions. In *State v. Winfield*<sup>23</sup> there had been some delay in submission of the written report of the lunacy commission. To expedite matters the trial judge telephoned one of the members who informed him that the written report was to the effect that the defendant was presently sane and able to assist in his defense. Thereupon the trial judge held the lunacy hearing and adjudged the defendant presently sane. The holding of the hear-

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

18. 222 La. 14, 62 So. 2d 85 (1952).

19. Comment, 12 Louisiana Law Review 457 (1952).

20. 222 La. 363, 62 So. 2d 609 (1952).

21. 222 La. 363, 370, 62 So. 2d 609, 611.

22. Art. 24, La. Crim. Code of 1942; La. R.S. 1950, 14:24.

23. 222 La. 157, 62 So. 2d 258 (1952).

ing in advance of the actual filing of a written lunacy report was held to be reversible error. At first blush this would seem like an unduly technical application of the requirement that a written copy of the lunacy commission's report must be furnished to the trial judge.<sup>24</sup> However, the underlying basis of the decision clearly appears in Justice Moise's statement that "The mandatory provisions of the statute—that the written report of the commission shall be presented to the trial judge and shall be accessible to the district attorney and to the attorney for the accused—were not followed." These requirements were "for the benefit of both the prosecution and the defense—because it is provided that at such hearing of the lunacy commission—both the prosecution and the defense are granted the right to offer other evidence and summon witnesses."<sup>25</sup> It thus appears that the unavailability of the report to the accused, rather than its mere oral form, was the basis of the reversal.

In *State v. Solomon*<sup>26</sup> the Supreme Court upheld a sanity hearing where only the coroner had testified, pointing out that it is not essential that members of the lunacy commission testify at the hearing—unless their findings are questioned or defense counsel requests that they be present. There was no finding of any such request in the instant case.

Justice McCaleb's opinion in *State v. Swails*<sup>27</sup> provides an excellent review of the criterion for determining the issue of present insanity as a bar to trial for a crime. The test set out in Article 267 of the Code of Criminal Procedure is addressed entirely to the *present* mental condition of the accused. Is he now of sufficient mental capacity "to understand the proceedings and to assist in his defense"? If he is, a past condition of mental derangement, or the probability that he may become mentally incompetent at some future date, should not constitute a bar to his presently standing trial for the crime charged. Ordinarily amnesia or a memory lapse for the period of a year preceding the crime would prevent the accused from being capable of properly assisting in his defense. However, this was not true in the *Swails* case where the defendant was not seeking to deny or justify the killing. There he was defending solely upon the ground of insanity at the time of the crime, and the

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24. Art. 269, La. Code of Crim. Proc. of 1928; La. R.S. 1950, 15:269.

25. 222 La. 157, 161, 62 So. 2d 253, 259 (1952).

26. 222 La. 269, 62 So. 2d 481 (1952).

27. 66 So. 2d 796 (La. 1953).

alleged amnesia would aid, rather than hamper, the presentation of such a defense.

#### DOUBLE JEOPARDY

*State v. Ysasi*<sup>28</sup> lays at rest a confusing problem as to the effect of attacks upon two or more persons arising out of a common criminal transaction. In *State v. Morrison*<sup>29</sup> the Supreme Court had indicated that two killings arising out of a single robbery should be treated as a single criminal act and charged as one murder, even though one victim was killed with an axe and the other was shot to death. While that holding could be explained on the ground that the objection to the combined charge came too late when urged for the first time during trial, there was language in the opinion which indicated a distorted construction of the term "act" so as to make it virtually synonymous with a criminal transaction. The question was squarely presented in the *Ysasi* case where the defendant had committed batteries upon two different persons, at the same time and arising out of the same disturbance. These batteries had been committed within a few seconds of each other, like the homicides in the *Morrison* case, and were provable by the same witnesses. After studying the entire jurisprudence and not any individual case standing alone, the court concluded that *two distinct and separate offenses* had been committed, and that two convictions did not violate the constitutional prohibition against double jeopardy.<sup>30</sup> The double jeopardy provision would clearly apply if the defendant were tried twice for a battery on the same person. It would probably also apply if two victims had been injured or killed by a single act.<sup>31</sup> However, it does not apply in a situation like the *Ysasi* case where there were two criminal acts and therefore two crimes.

#### VOIR DIRE EXAMINATION OF JURORS

Two 1952 decisions serve to re-emphasize the general principle that the Supreme Court will not reverse the trial judge's rulings in connection with the voir dire examination of prospective jurors "Except in plain cases of abuse of discretion."<sup>32</sup>

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28. 222 La. 402, 64 So. 2d 213 (1953), noted *infra* p. 273.

29. 184 La. 39, 165 So. 323 (1935).

30. La. Const of 1921, Art. I, § 9.

31. *State v. Batson*, 108 La. 479, 32 So. 478 (1902).

32. Justice Hamiter, in *State v. Matassa*, 222 La. 363, 372, 62 So. 2d 609, 612 (1952).



In *State v. Matassa*<sup>33</sup> the trial judge had refused to permit defense counsel, upon voir dire examination of prospective jurors, to refer to the severe penalty possible for narcotics convictions. Such reference was made, according to the trial judge's per curiam, for the purpose of causing the jurors to hesitate to find the accused guilty. In holding that the reference was properly disallowed, Justice Hamiter pointed out that the verdict is to be rendered solely on the basis of evidence adduced at the trial, and the voir dire examination cannot be utilized as a means for influencing the jury in advance of trial. In *State v. Morris*<sup>34</sup> the Supreme Court upheld the trial judge's refusal to permit voir dire examination regarding the juror's willingness to recognize entrapment as a defense. The situation came within the prohibition of hypothetical questions or questions of law which call for prejudgment of any suppositional statement of facts. The tendency of such questioning is to commit the juror in advance of trial as to his holding on such state of facts. As a make-weight factor, the questions were further objectionable as failing to draw correctly the distinction between entrapment and inducement. Judge Fournet epitomized the basis of these holdings in quoting the express provision of Article 357 that "The purpose of the examination of jurors is to ascertain the qualifications of the juror in the trial of the case in which he has been tendered, and the examination shall be limited to that purpose."

#### OPENING STATEMENT BY THE DISTRICT ATTORNEY

Louisiana jurisprudence has tended toward the minority view that the district attorney's opening statement is for the purpose of making the state "show its hand" by outlining its proof in advance of trial.<sup>35</sup> Although there is some doubt as to how complete and detailed this statement must be, there is a decided tendency toward liberality. This attitude is exemplified in *State v. Solomon*<sup>36</sup> where the defense had objected to the testimony of two witnesses, identifying the body of the victim, on the ground that they had not been mentioned in the opening statement. It was found sufficient that the district attorney had stated that the body of the deceased "was identified by his

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33. *Ibid.*

34. 222 La. 480, 62 So. 2d 649 (1952).

35. See Note, 3 Louisiana Law Review 238 (1940).

36. 222 La. 269, 62 So. 2d 481 (1952).

brother Frank Street *and others.*" (Italics supplied.) If the opening statement is to serve as a limitation on the state's proof, then such a liberal attitude is almost essential. Better yet, the Louisiana courts might follow the view that the statement does not limit the state's proof, but rather is designed only "to enable the jury to understand and appreciate the testimony as it falls from the lips of the witnesses."<sup>37</sup>

#### EXAMINATION OF WITNESSES

The trial judge's role in the interrogation of witnesses is illustrated by the case of *State v. Coffil*<sup>38</sup> where defense counsel had objected to the trial judge's interrogation of unintelligent witnesses, claiming that it amounted to comment on the evidence. In holding the questioning proper, Justice Ponder stated, "It would appear that the trial judge was endeavoring to clarify the testimony so that it would be intelligible and he had the right to interrogate the witnesses sufficiently to know and understand what they said and what they meant, and to shape his questions so as to clarify their testimony."<sup>39</sup> Evidencing a similar understanding of the problems of the conscientious trial judge, the Supreme Court also upheld the refusal to permit apparently irrelevant testimony. "The trial judge," declared Justice Ponder, "is vested with sound discretion to stop the prolonged, unnecessary and irrelevant examination of witnesses."<sup>40</sup>

#### JUDGE'S CHARGE TO THE JURY

The scope and nature of the judge's charge to the jury was considered in two 1952 decisions. Special defenses or special rules relied upon by defense counsel are to be covered by special charges, presented to the judge at the close of the evidence.<sup>41</sup> Such charges must be given if they are "wholly correct and wholly pertinent,"<sup>42</sup> but the charge is not authorized when based on a special defense unsupported by any evidence. Thus, in *State v. Morris*<sup>43</sup> the Supreme Court upheld the trial judge's refusal of a special entrapment charge where "there was no

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37. *State v. Sharbino*, 194 La. 709, 716, 194 So. 756, 758 (1940).

38. 222 La. 487, 62 So. 2d 651 (1952).

39. 222 La. 487, 490, 62 So. 2d 651, 652.

40. *Ibid.*

41. Art. 390, La. Code of Crim. Proc. of 1928; La. R.S. 1950, 15:390.

42. *Ibid.*

43. 222 La. 480, 484, 62 So. 2d 649, 650 (1952).

evidence introduced . . . in the trial which would warrant such a charge.' For a similar reason a special charge on "defense of habitation" was properly rejected in *State v. Rone*.<sup>44</sup> The trial judge's per curiam stated that there was no evidence that the homicide was in defense of habitation, and the Supreme Court was bound by the trial judge's findings of fact. Review was further precluded by the fact that this requested charge was not in writing, thus preventing any appellate determination of its correctness or applicability.<sup>45</sup> In the *Rone* case other special charges concerning self-defense and defense of others were refused because they were sufficiently, and less confusingly, covered in the general charge. This was approved on appeal. Similarly, in *State v. Gray*<sup>46</sup> a series of lengthy special charges had been refused on the ground that their substance was covered in the general charge in simple and less confusing language. After reviewing the general charge, the Supreme Court agreed that the requested special charges would have served no useful purpose.

The general charge covers only the law relative to the general elements of criminal liability. In *State v. Morris*<sup>47</sup> the Supreme Court held that the law relative to the jury recommendation for a suspended sentence need not be included in the general charge, being a matter upon which a special charge must be requested. This point is mentioned merely to indicate the distinction between the general charge and matters requiring special charges, for a 1952 amendment of the probation law has eliminated the requirement of a jury recommendation, thus placing probation entirely in the discretion of the trial judge.<sup>48</sup>

#### VERDICTS

A responsive verdict of a lesser degree of the crime charged must specify the grade of such offense if it is graded.<sup>49</sup> In *State v. Hudson*<sup>50</sup> a defendant charged with theft was found "guilty of attempted theft." Defense counsel's motion in arrest was based, in part, on the claim that the verdict was insufficient

44. 222 La. 99, 62 So. 2d 114 (1952).

45. Article 390 provides that requested special charges shall be submitted in writing.

46. 221 La. 868, 60 So. 2d 466 (1952).

47. 222 La. 480, 62 So. 2d 649 (1952).

48. La. Act 367 of 1952, amending Art. 530, § 1, La. Code of Crim. Proc. of 1928. See Louisiana Legislation, 13 Louisiana Law Review 65 (1953).

49. *State v. Chambers*, 194 La. 1042, 195 So. 532 (1940).

50. 222 La. 13, 62 So. 2d 85 (1952).

because it did not specify the value of the property the defendant had attempted to steal. In upholding the verdict, the court assigned the reason that it had fully complied with the form set out in the 1948 responsive verdict statute.<sup>51</sup> An additional reason for the holding lies in the fact that attempted theft, unlike the basic crime of theft, is not graded according to the value of the property involved.<sup>52</sup>

It is the duty of the trial judge to instruct the jury upon the law applicable to the lesser and responsive verdicts which may be found under the indictment.<sup>53</sup>

In *State v. Espinosa*<sup>54</sup> the Supreme Court affirmed a conviction of obtaining a narcotic drug by a forged prescription. It was held that the trial judge had not committed reversible error in refusing to instruct the jury that it could bring in an attempt verdict. The court agreed that an attempt to obtain narcotics was a lesser and included degree of the offense charged, both by prior jurisprudence<sup>55</sup> and by a specific 1952 amendment of the Narcotics Act,<sup>56</sup> but justified the refusal of the instruction concerning attempt as a responsive verdict by the brief statement that "the defendant was charged with obtaining a narcotic, and his confession which was admitted in evidence states that he *did obtain* the drug through forgery."<sup>57</sup> (Italics supplied.) The full implications of this decision are somewhat difficult to grasp. Probably it means that the trial judge may omit legally responsive lesser verdicts where, as in the principal case, the evidence is such that it could not possibly provide any logical support for such a verdict. In such cases it could hardly be claimed that the omission has "probably resulted in a miscarriage of justice, is prejudicial to the substantial rights of the accused, or constitutes a substantial violation of a constitutional or statutory right."<sup>58</sup> Looking to the facts of the *Espinosa* case, it would appear that no useful purpose, except possibly jury

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51. Art. 386, La. Code of Crim. Proc. of 1928, as amended by La. Act 161 of 1948.

52. Art. 27, La. Crim. Code of 1942; La. R.S. 1950, 14:27. Note the special provisions regarding theft in the penalty clause. This variation is based on the practical consideration that frequently it will be impossible to determine "how much" a defendant "intended to steal."

53. Art. 386, La. Code of Crim. Proc. of 1928; La. R.S. 1950, 15:386.

54. 66 So. 2d 323 (La. 1953).

55. *State v. Broadnax*, 216 La. 1003, 45 So. 2d 604 (1950).

56. La. R.S. 1950, 40:981, as amended by La. Act 429 of 1952, § 1.

57. *Justice Moise*, 66 So. 2d 323, 325 (La. 1953).

58. Art. 557, La. Code of Crim. Proc. of 1928; La. R.S. 1950, 15:557.

confusion, would have been served by the requested attempt instruction. At the same time, the rule apparently applied in this case should be limited to the clearest cases, for it is the duty of the jury, rather than the trial judge, to decide whether the evidence will support lesser and included responsive verdicts.

#### MOTION FOR NEW TRIAL TO SERVE "THE ENDS OF JUSTICE"

*State v. Weber*<sup>59</sup> held that there was no basis for review by the Supreme Court when a motion for a new trial to serve "the ends of justice"<sup>60</sup> was denied. In such case the issue is one of fact and hence not reviewable. Also, this ground gives the trial judge an apparently limitless and completely discretionary power to grant a new trial without assigning specific reasons therefor.

A new use of this omnibus clause in Article 509 was suggested by *State v. Truax*<sup>61</sup> where the motion for a new trial came too late, having been filed the day after sentence and fourteen days after the verdict. The trial judge's refusal of the motion was clearly justified by the express provision of Article 505 that the motion for a new trial "must be filed and disposed of before sentence." However, Justice LeBlanc made the novel dictum suggestion that a tardy motion for a new trial could have been granted under the broad provision of Article 509 (5), which authorizes the granting of a new trial "Whenever, though as a matter of legal right the accused may not be entitled to one, yet the judge is of the opinion that the ends of justice would be served by the granting of a new trial." The granting of a motion on this ground, declared Justice LeBlanc, "is a matter which addresses itself primarily to the discretion of the trial court and this court will not interfere unless an arbitrary abuse of that discretion appears."<sup>62</sup> Justice McCaleb, in his concurring opinion, disagreed with the suggestion that the trial judge might grant a tardy motion under ground (5) of Article 509. He points out that Article 509 merely sets forth the grounds for a new trial if "timely sought," and is limited by the general requirements set out in Article 505. This appears to be a logical and natural construction of the interrelation of these two

59. 221 La. 1093, 61 So. 2d 883 (1952).

60. Art. 509(5), La. Code of Crim. Proc. of 1928; La. R.S. 1950, 15:509(5).

61. 222 La. 463, 62 So. 2d 643 (1952).

62. 222 La. 463, 467, 62 So. 2d 643, 644 (1952).

articles. If motions for a new trial are to be authorized after sentence, it must be on the circumstances of the special case,<sup>63</sup>

#### APPEAL—METHOD OF TAKING

A number of cases applied the general rule that the Supreme Court will only review a conviction on appeal where there are bills of exceptions duly taken, filed and perfected, or where there is an error patent on the face of the record.<sup>64</sup> In *State v. Dartez*<sup>65</sup> the Supreme Court approved the trial judge's refusal to sign bills of exceptions which were tendered for the first time after the order for an appeal had been signed. Chief Justice Fournet restated the rule "that after an appeal has been granted the trial judge is *immediately divested of jurisdiction* and any bills filed thereafter and presented to the trial judge for his signature and per curiam come too late and cannot be considered on appeal."<sup>66</sup> (Italics supplied.) It was urged that the trial judge, in view of defense counsel's multiple commitments demanding immediate attention, had granted a "reasonable time" to prepare and submit the bills of exceptions, that the short delay was clearly reasonable, and that the effect of the trial judge's ruling was to deprive the accused of any opportunity to pursue his appeal. The Supreme Court dismissed this claim with the terse remark that "The trial judge is without right or authority to extend the time within which the appeal may be taken." This holding may be justified under a strict application of the provision in Article 545 that the trial judge loses jurisdiction over the cause after the appeal is granted. However, it apparently runs contra to prior Louisiana jurisprudence and procedures.

In *State v. Young*<sup>67</sup> the Supreme Court had considered bills of exceptions which had been signed four days after the appeal was granted. There, as in the *Dartez* case, the delayed presentation was pursuant to an agreement whereby the trial judge and not by a strained construction of Article 509 (5).

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63. As in *State v. George*, 218 La. 18, 48 So. 2d 265 (1950), where the sentence had been imposed without the 24 hour delay or any waiver thereof.

64. *State v. Lorello*, 222 La. 268, 62 So. 2d 402 (1952), narcotics violator sentenced to life imprisonment as a multiple offender; *State v. Coffl*, 222 La. 487, 62 So. 2d 651 (1952); *State v. Weber*, 221 La. 1093, 61 So. 2d 883 (1952) holding that the bills of exceptions must be predicated upon actual adverse rulings of the court.

65. 222 La. 9, 62 So. 2d 83 (1952).

66. 222 La. 9, 12, 62 So. 2d 83, 84 (1952).

67. 153 La. 605, 96 So. 275 (1922).

allowed ten days for filing of the bills. In view of the practical importance of the issue, it might be well to re-examine the court's reasoning in the *Young* case. In rejecting the district attorney's argument that bills of exceptions must always be presented and signed before appeal, Judge Dawkins stated,

"It is unquestionably true that the granting of the appeal divests the trial court of jurisdiction, in so far as the performance of any act requiring the exercise of judicial discretion or judgment is concerned; but as to ministerial duties, which are necessary to have the record show what took place, we think it has the power, within reasonable bounds before granting such an appeal, to reserve the right to do whatever is necessary to accomplish that result. The signing of a bill of exceptions is so much a ministerial duty that, when timely applied for, mandamus will lie to compel its performance. . . . Where time is requested before appeal, the judge is called upon to exercise a sound discretion, and may refuse or grant it within reasonable limits, not to exceed the completion and filing of the transcript within the return day, provided he acts before losing jurisdiction. When this has been done, nothing remains but to execute the order or duty which he has imposed upon himself while the case was still in his hands."<sup>68</sup>

Justice Dawkins' reasoning is not unanswerable, but the result is one which commends itself as a very practical solution of the dilemma of the defense attorney who is faced with a crowded agenda and actually deserves a little additional time to perfect his bills of exception. While the writer has not had the opportunity to research completely the Louisiana jurisprudence on this point, it appears that the granting of additional time to perfect bills of exceptions has not been uncommon. For example, in *State v. Allen*<sup>69</sup> the trial judge granted additional time for the presentation and filing of bills of exception. Since the bills were not presented until two days after the date fixed, they were held to come too late. However, the clear inference was that they would have been effectively perfected if signed and filed in the time stipulated.

As the law now stands, in light of the *Dartez* case, the attorney must follow the indirect procedure of having the trial

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68. 153 La. 605, 614, 96 So. 275, 278.

69. 167 La. 798, 120 So. 372 (1929).

judge agree not to sign the order of appeal until such future time as will enable him to have perfected his bills. Surer yet, he has ten days in which to move for an appeal and so should delay his motion until the bills of exception are in order.<sup>70</sup> Article 542 provides that the motion for appeal shall be made "within ten judicial days after the rendition of the judgment complained of"; and further provides for an extension of that time where the trial judge fails to act upon the bills of exception tendered for his signature.

The *Dartez* case also serves to point up the further requirement of Article 542 that the order for appeal must be made "in open court." The court did not pass on that issue, but it may be assumed that the telephone motion would scarcely satisfy the express requirements of the law.

*State v. Weaver*<sup>71</sup> applied the simply stated rule that bills of exception, which were neither argued orally nor briefed on appeal, are presumed to have been abandoned. This policy should be consistently followed, for an "off the cuff" opinion on unbriefed issues frequently beclouds, rather than clarifies the law.<sup>72</sup>

#### APPEAL—SUFFICIENCY OF THE EVIDENCE

In *State v. Matassa*<sup>73</sup> the Supreme Court again affirmed its previous rulings that the trial judge's overruling of a motion for a new trial does not present a question for review by that court if there was any evidence (no matter how little) to support the conviction.<sup>74</sup> In that case the defendant had sought a complete transcript of the testimony in order to establish his claim

70. Art. 542, La. Code of Crim. Proc. of 1928; La. R.S. 1950, 15:542.

71. 222 La. 148, 62 So. 2d 255 (1952). Accord: *State v. Morgan*, 66 So. 2d 852 (La. 1953) where the bill of exceptions had not been perfected, and no appearance was made on appeal.

72. An example of the danger of such holdings is *State v. Mitchel*, 210 La. 1078, 29 So. 2d 162 (1946) where the Supreme Court considered a double jeopardy problem despite the apparent abandonment of the appeal by defense counsel. In holding that the defendant, who struck a 16-year old youth could be prosecuted twice for the act, which happened to fit under two separate articles of the Criminal Code, the Supreme Court partially opened the door for a rule which would violate the basic purpose of the prohibition against double jeopardy. See *The Work of the Supreme Court for the 1947-1948 Term*, 8 Louisiana Law Review 290 (1948).

73. 222 La. 363, 62 So. 2d 609, 614 (1952). Accord: *State v. Coffil*, 222 La. 487, 62 So. 2d 651 (1952).

74. For a discussion of other recent cases in point see, *Work of Supreme Court*, 8 Louisiana Law Review 302 (1948), and 9 Louisiana Law Review 275 (1949).



“that no evidence of guilt whatever as to him was introduced.” The refusal to order such transcription was held not to constitute reversible error. From this it appears that the opportunity for review is limited to those exceptional cases where the facts are stipulated and a pure question of law is involved,<sup>75</sup> or where the judge’s per curiam statement shows the complete lack of proof of some essential element of the crime.<sup>76</sup>

#### REPRIEVE VIOLATIONS

In *Waggoner v. Cozart*<sup>77</sup> the court held that where a convicted offender had been reprieved by the Governor and had committed another felony while enjoying his temporary freedom, he must *consecutively* serve both his original sentence and the sentence for the second offense, and that the judge had no authority to order the concurrent serving of both sentences. The court further held that the period of time while the offender was out of the penitentiary on reprieve could not be considered as time served on his first sentence. Justice Moise thus reaffirmed the generally accepted proposition that a sentence of imprisonment can only be satisfied “by the actual suffering of the imprisonment imposed.”<sup>78</sup> The same rules would apply, under express provisions of the Code of Criminal Procedure<sup>79</sup> to a probationer who committed another crime. One basic difference is to be noted. A reprieve is always treated as a mere suspension of sentence, with the result that the full sentence must be served at the termination of the period of freedom. However, where a probationer completes the entire period of his probation without violation of the terms thereof, he is entitled to a complete release.

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75. *State v. Bernard*, 204 La. 844, 16 So. 2d 454 (1943).

76. *State v. Ginagosso*, 157 La. 360, 102 So. 429 (1924).

77. 222 La. 1039, 64 So. 2d 424 (1953).

78. 222 La. 1039, 1047, 64 So. 2d 424, 426 (1953), quoting from 8 R.C.L. 259.

79. Arts. 534, 538, La. Code of Crim. Proc. of 1928; La. R.S. 1950, 15:534 and 538.