The Trial Court's Duty To Instruct On Responsive Verdicts

Daniel J. Shea
Conclusion

The effect given to conformance with the obligation to pay in public sales under the Louisiana jurisprudence is, perhaps, unique. The French, with the same basic system of sales, have apparently reached a different result. The common law, at least at the present, seems to be more in accord with the French solution than the Louisiana solution. However, there would appear to be no innate injustice or violation of public policy in a consistent and carefully worked out system that would not permit of a transfer of ownership before all the obligations of the purchaser have been met. However, the Louisiana jurisprudence does not provide this consistent system. Perhaps the most undesirable feature of the jurisprudence is not its own inconsistency, but the logical difficulty involved in interpreting the Civil Code to mean that the purchaser in no respect becomes owner at adjudication unless he has paid the purchase price, despite the provisions of articles 2456, 2608, and others which seem clearly to make the purchaser the owner at the time of adjudication, at least as between the parties.

Harry R. Sachse

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If it be conceded that on a criminal trial, the judge, in instructing the jury as to what verdicts it may find, is limited to verdicts of the crime charged in the indictment and of such lesser

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69. See note 15 supra.
70. 2 Williston, Sales 201-02 (1948), and authority cited therein. "Not only is the contract complete when the hammer falls, but the property in the goods passes then, unless some term of the bargain makes it impossible that it should do so. It is of course possible that such conditions may be imposed by the terms of the sale as to make immediate transfer of the property in the goods impossible. The condition that the sale is for cash is, however, not such a condition as will prevent immediate transfer of the property, since this condition may be satisfied by construing it as meaning that possession shall not be delivered until payment. Such a condition is indeed implied in every sale by auction, as well as in other sales, unless there is agreement for credit.

"Though the contract is complete and the property has passed to the buyer, if the transaction is within the Statute of Frauds it is unenforceable until a memorandum has been signed by the auctioneer or his clerk who are the agents of both parties for this purpose. Until then either party still may prevent the bargain from becoming enforceable by withdrawing from it, and the owner of the property may revoke the auctioneer's authority prior to that time."
crimes as may be responsive to the indictment, the question then arises as to whether the judge is required to instruct on all responsive verdicts or whether he may limit the number of verdicts on which he instructs according to the evidence developed at the trial. An investigation of the cases from many American jurisdictions indicates that Louisiana’s position in this matter is directly opposite to that of the overwhelming majority of her sister jurisdictions. An inquiry into the question of the correctness and the desirability of the Louisiana rule is the subject of this Comment.

The General Rule

The general rule in American jurisdictions is that there is no duty on the part of the trial judge to instruct on lesser and included offenses in the absence of evidence tending to prove such offenses. Of these jurisdictions, most hold that in the absence

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1. La. R.S. 15:405 (1950): “The verdict must be responsive to the indictment...”
of evidence of the lesser offense, instructions thereon need not be given. Others go further and hold such instructions to be error.\(^3\) It has been held that there should be no instructions on a lesser offense unless the evidence clearly shows that defendant might be guilty of such offense;\(^4\) but more often courts hold that if any evidence adduced tends to support a finding of the lesser crime, no matter how weak such evidence may be, an instruction on the lesser crime should be given.\(^5\)

**Rationale**

At the outset, it should be understood that when a court states that "there was no evidence adduced tending to prove the lesser offense" it may be speaking of one or the other of two possible situations. One such situation is where the lesser crime involves elements not found in the crime charged. For example, the crimes of murder and manslaughter may both, depending upon the particular statute, involve an intentional homicide.\(^6\) Manslaughter may be defined as an intentional homicide where there are certain mitigating circumstances,\(^7\) whereas murder is defined

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This position is adopted by ALI, MODEL PENAL CODE § 1.08(5) (Tent. Draft No. 5, 1956), which states: "The Court shall not charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense." Id. at 30. See also id., comment to § 1.08(5), at 42.

3. People v. Sanchez, 30 Cal.2d 560, 184 P.2d 673 (1948); People v. Moore, 386 Ill. 455, 14 N.E.2d 494 (1938); State v. Linville, 148 Kan. 142, 79 P.2d 869 (1938). In one case, the court specified that if the instruction on the lesser offense was given at the request of the prosecution, it would be reversible error if there was no evidence of the lesser offense and defendant was convicted of the lesser offense. People v. Brown, 415 Ill. 23, 112 N.E.2d 122 (1953).


5. People v. Mussenden, 308 N.Y. 558, 127 N.E.2d 551 (1955); People v. Cummins, 274 N.Y. 336, 8 N.E.2d 882 (1937); Commonwealth v. Walker, 178 Pa. Super. 522, 116 A.2d 320 (1955); State v. Gardner, 219 S.C. 97, 64 S.E.2d 130 (1951). But cf. State v. Gallagher, 4 Wash.2d 437, 103 P.2d 1100 (1940), wherein the court stated that a defendant could not be convicted of a lesser offense unless the evidence sustains such a conviction; and DeVroy v. State, 239 Wis. 466, 1 N.W.2d 875 (1942), which states that there must be some reasonable basis in the evidence, in the judgment of the trial court, to justify an instruction on an offense lesser than that charged.


7. LA. R.S. 14:31 (1950) states, in effect, that manslaughter is a killing where there is a specific intent to kill but done in the heat of passion, or a killing where
as an unmitigated intentional homicide. Plainly, though man- 
slaughter may be considered responsive to a charge of murder, 
the crime of manslaughter involves elements, the mitigating cir-
cumstances, not found in the crime of murder. Equally as plain 
is the fact that the evidence adduced at the trial may tend to 
prove the crime of murder without there being any evidence 
tending to prove the mitigating circumstances essential to a find-
ing of manslaughter. In such a case the court is clearly correct 
in saying that “there was no evidence adduced tending to prove 
the lesser offense.” However, in the second situation to which 
this statement is applied, its use appears to be largely inaccurate. 
This situation involves a “lesser and included” offense, that is, 
a case in which the greater offense involves all the elements of 
the lesser offense plus certain additional elements. A good ex-
ample is the crime of aggravated assault and simple assault. Aggravated assault involves all of the elements of simple assault, 
plus the element of aggravation. In this situation, if the court 
limits its instructions to the crime of aggravated assault on the 
ground that there is no evidence tending to prove the lesser crime 
of simple assault, its statement must be held incorrect. If there is 
no evidence of simple assault, then it must follow that there is 
no evidence of aggravated assault, for the greater crime neces-
sarily involves the lesser. What, then, does the court mean? The 
court means that the evidential pattern of the case is such that 
“the defendant is guilty either of the crime charged or is guilty 
of nothing at all.” The situation thus described is best demon-
strated by example, again using the assault crimes. On trial 
under a charge of aggravated assault the defendant admits hav-
ing fired a gun at the victim, thereby “intentional[ly] placing 
... another in reasonable apprehension of receiving a battery” by 
means of “a dangerous weapon.” Thus, the aggravating ele-
ment is admitted and there is no evidence of defendant’s having 
assaulted the victim in any manner other than by the firing of

10. See, for use of same or similar language, in sustaining a refusal to instruct on a “lesser and included” offense: Clark v. State, 169 Ark. 717, 276 S.W. 849 (1925); State v. Montiech, 53 Idaho 30, 20 P.2d 1033 (1933); Duckworth v. State, 209 Miss. 322, 46 So.2d 787 (1950); State v. Bunk, 4 N.J. 461, 73 A.2d 249 (1950).
11. LA. R.S. 14:36 (1950) defining the crime of “assault.”
the gun. The sole defense made by the accused is justification or mistake. Clearly the "defendant is guilty either of the crime charged or of nothing at all" for the only fact to be found by the jury is the *mens rea, vel non*, of the defendant. If the jury rejects the defense of the accused then, of necessity, it has found that he is, in fact, guilty of the aggravated offense. If it be conceivable that the jury might reject the defendant's admission of the use of a dangerous weapon, then it is without grounds on which to find a verdict of simple assault, for the use of the dangerous weapon, the act of aggravation, was the only act of assault of which there was either allegation or evidence. Therefore, although technically speaking, there is evidence of a simple assault by reason of the fact that every aggravated assault is considered to include a simple assault, the evidence does not support a finding of the lesser offense. Under such circumstances most courts feel justified in refusing to submit the lesser offense to the jury, which submission could result only in confusion of the jury and the opportunity for the return of an illogical compromise verdict.

It can be argued that the court ought not have discretion to refuse to instruct on the lesser offense, since technically there must be evidence of the lesser offense if there is evidence of the greater. However, this view appears to be based upon the notion that the jury, if given the opportunity, might violate its obligations as a jury. If the evidence satisfies the jury that the crime charged is proved beyond a reasonable doubt, it ought to find the accused guilty as charged. It ought to find the converse if not so satisfied. A finding of the lesser verdict in this situation of necessity involves a finding of the greater, and a finding that the greater has not been proved beyond a reasonable doubt necessarily involves a finding that the lesser offense is equally not proven.

13. In the case of State v. Muskus, 158 Ohio St. 276, 109 N.E.2d 15 (1952), the court stated that although a statute permitted conviction of a lesser and included crime, and although the crime there involved was lesser than and included in the crime charged, the technical inclusion of the lesser in the greater does not alone justify instruction as to the lesser crime. Whether or not an instruction should be given on the lesser crime depends upon whether there is evidence to support the lesser verdict. If not, it is not error to refuse to instruct on the lesser offense.

14. In People v. Mussenden, 308 N.Y. 558, 127 N.E.2d 551 (1955), the court stated that if, under any view of the evidence, the defendant may be properly found guilty of the lesser offense, the court must instruct on the lesser offense, no matter how weak the evidence supporting such instructions may be. But, since under this rule the jury can ignore the facts and render a compromise verdict, the court has evolved the rule that submission of the lesser crime is justified only when there is some basis in the evidence for finding the defendant guilty of the lesser
It seems error to think that the defendant has been deprived of some right by the court’s refusal to charge on the lesser offense. Since, under the evidence, he “is guilty either of the crime charged or of nothing at all,” it cannot be said that he has a right to the opportunity for the lesser verdict, which verdict would be a compromise and irrational. A Delaware court has appropriately stated that “a defendant has no constitutional or statutory right to a compromise verdict, nor should such verdicts be encouraged.”

Nor is the court’s action subject to the criticism that it constitutes a comment on the evidence.

The court has not usurped a jury function or found an element of “guilt or innocence.” Rather, it has refused to allow the jury to find an element of guilt which, in the opinion of the court, the jury cannot rationally find. Such a refusal can no more be considered a comment upon the evidence than can the court’s granting a new trial on the ground that a verdict is “contrary to the law and the evidence.”

The Louisiana Rule Before 1928

In Louisiana, prior to the adoption of the 1928 Code of Criminal Procedure, there existed two rules on the matter in question. Section 785 of the Revised Statutes of 1870 provided: “There shall be no crime known under the name of murder in the second degree; but on trials for murder the jury may find the prisoner

crime and innocent of the greater. But, the court cannot allow the jury to find a lesser offense when such finding necessarily involves a finding of the greater.

Also, in People v. Sutic, 41 Cal.2d 483, 261 P.2d 241 (1953), it was said that “jury instructions must be responsive to the issues and are determined by the evidence.” The court said that there the defense was non-commission only, and therefore, no issue or evidence raised the question of manslaughter and no evidence would have supported such a verdict.

16. Cf. Hamilton v. State, 95 Okla. Crim. 262, 244 P.2d 328 (1952), wherein the court stated that the judge should instruct on the degree of homicide the evidence tends to prove and that it should be determined as a matter of law whether there is any evidence which would tend to reduce the offense to manslaughter.

Note that, depending upon the particular statute, manslaughter may or may not be a “lesser and included” offense of the crime of murder. In Louisiana, it is not. LA. R.S. 14:29-31 (1950).

17. For a general discussion of the question of the trial court’s commenting on the evidence, see Comment, 16 LOUISIANA LAW REVIEW 780 (1956).
18. LA. R.S. 15:509(1) (1950). See State v. Daspit, 167 La. 53, 118 So. 690 (1928). Additionally, the fact that apparently all American jurisdictions (except Louisiana) and Louisiana until 1928 (as shall appear later) have approved of the practice of limiting instructions on lesser verdicts to those supported by the evidence, would strongly indicate that such action is not considered to be comment on the evidence.

The Supreme Court consistently held that this section made it the mandatory duty of the trial judge, on an indictment for murder, to charge the jury that it might find the defendant guilty of manslaughter, notwithstanding the fact that there was no evidence adduced at the trial which would warrant a finding of manslaughter. The trial judge was required to charge as to the lesser offense whether or not such a charge had been requested by defendant, and failure or refusal so to charge was reversible error. In one case the Supreme Court allowed what might be termed the sole relaxation of this rule. There, under a murder indictment, the trial judge properly instructed on the law of manslaughter, but added that if the jury should find the killing was deliberate and without provocation, “a verdict of manslaughter would not be responsive to the evidence.” On rehearing, the Supreme Court approved the lower court’s action, but cautioned that if the lower court had instructed that a verdict of manslaughter would not be responsive to the “indictment,” its instruction would have been erroneous. The Supreme Court explained its decision by saying that although section 785 gave the jury the “power” to return a verdict of manslaughter even though it found the killing to have been deliberate, it did “not mean that jurors” could do so “without violating their oath,” and to instruct the jury to that effect was proper.

From the language of section 785 it may be seen that the effect given that provision is open to certain criticism. On its face, the statute purports to do little more than to abolish the crime of second degree murder, replacing it with the crime of

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20. LA. REV. STAT. § 785 (1870).
25. 149 La. 42, 88 So. 546 (1921).
26. Ibid. But cf. State v. Brown, 41 La. Ann. 410, 6 So. 670 (1889), wherein the Supreme Court held to be reversible error the lower court’s having followed its instruction on manslaughter with a statement to the effect that it did not think that the law of manslaughter could have any application to the case.
manslaughter. The language referring to the verdict of manslaughter is entirely permissive and it appears somewhat strained to extract therefrom a mandatory duty to instruct on manslaughter. Statutes quite similar to section 785 have been construed by courts of other jurisdictions and no such mandatory duty has been found. Thus, it would appear that the Louisiana mandatory duty rule emanates from a rather questionable interpretation of an early statute which referred to a single crime. As shall appear later in this Comment, this isolated rule, with the aid of the Legislature and the courts, has come to occupy the entire field of instructions to juries on lesser offenses.

Prior to 1928, in all cases other than a prosecution under an indictment for murder, the rule that the judge must, on his own motion, instruct on lesser and included offenses, did not apply. In such cases the judge was required to instruct on lesser and included offenses only when such instructions were specially and timely requested by the defendant, and then only when such instructions were supported by the evidence. Where there was no evidence tending to prove the lesser offense, an instruction as to that offense was “not only unnecessary, but improper.”

27. Such statutes provide, in effect, that, on an indictment for an offense which includes lesser offenses, the jury may find the defendant guilty of one of the lesser offenses. Courts have held that such statutes do not make an instruction on the lesser offenses mandatory, in absence of evidence of the lesser offenses. Bantum v. State, 7 Ter. 418, 85 A.2d 741 (Del. 1952); State v. Carey, 36 Del. 521, 175 Atl. 577 (1935); State v. Elsen, 68 Idaho 50, 187 P.2d 976 (1947); State v. Tennyson, 212 Minn. 158, 2 N.W.2d 833 (1942); State v. Lamm, 222 N.C. 402, 61 S.E.2d 188 (1950); State v. Muschus, 158 Ohio St. 726, 109 N.E.2d 15 (1952); Brandon v. Webb, 23 Wash.2d 155, 160 P.2d 529 (1945) (application for habeas corpus). These statutes appear to have been recognized as referring specifically to responsiveness only and therefore were not mandatory on the issue of the duty to instruct.

28. State v. Ramkissoonsinghjiki, 163 La. 750, 112 So. 708 (1927); State v. Braxton, 167 La. 733, 103 So. 24 (1923); State v. Kemp, 120 La. 378, 45 So. 253 (1907); State v. O'Connor, 119 La. 464, 44 So. 265 (1907); State v. Johnson, 116 La. 30, 40 So. 521 (1906); State v. Fruge, 106 La. 694, 31 So. 909 (1900). In State v. Thomas, 50 La. Ann. 148, 23 So. 250 (1897), the court outlined the pre-Code of Criminal Procedure rule by saying that the rule that the judge must, as a matter of law, instruct on lesser offenses under a murder indictment was sui generis and did not apply to cases under an indictment for any other crime.


an instruction on the lesser offense, the defendant waived his right to such instruction by failure to make a timely request therefor, the Supreme Court restricting its review of the failure to charge under such circumstances to "cases of gross and unambiguous error."  33

The Louisiana Rule After 1928

The adoption, in 1928, of the Code of Criminal Procedure has, under the interpretations of the Supreme Court, wrought a substantial change in the duty of trial court judges in respect to instructions on lesser and included offenses. The specific provision in point was article 386 34 which, as originally enacted, read:

"Whenever an indictment sets out an offense including other offenses of a lesser magnitude or grade, the judge shall charge the jury the law applicable to all offenses of which the accused could be found guilty under the indictment and in all trials for murder the jury shall be instructed that they may find the accused guilty of manslaughter." (Emphasis added.) (In 1942 this provision was amended by adding the words "or negligent homicide" after the word "manslaughter.") 35

In the 1943 case of State v. Stanford 36 the Supreme Court held that article 386 as amended was an expression of the Legislature's intent that "in all trials for murder it is the mandatory duty of the judge to instruct the jury that it might find the accused guilty of either manslaughter or negligent homicide." 37 Thus, the court was of the opinion that no change had been made in the pre-1928 rule, as to the homicide crimes. But note that the new statute, rather than re-enacting the permissive language of the former section 785, used more mandatory language, in

32. State v. Ramkissoonsinghjiki, 163 La. 750, 112 So. 708 (1927); State v. Braxton, 157 La. 733, 103 So. 24 (1923); State v. O'Connor, 119 La. 464, 44 So. 265 (1907); State v. Marquez, 45 La. Ann. 41, 12 So. 128 (1893). The court explained this rule by saying that defendant is not allowed to take his chances on the charge as given and then, after an unfavorable verdict, object to the charge. State v. Wright, 104 La. 44, 45, 28 So. 909, 910 (1900).
33. State v. Marquez, 45 La. Ann. 41, 43, 12 So. 128 (1893); State v. Curtis, 34 La. Ann. 1213, 1214 (1882). However, the court cautioned that when the evidence permits a verdict other than guilty or not guilty, the trial judge should instruct carefully on all possible verdicts. State v. Wright, 104 La. 44, 46, 28 So. 909, 910 (1900).
34. LA. R.S. 15:386 (1950).
35. La. Acts 1942, No. 147, § 1, p. 500.
36. 204 La. 439, 15 So.2d 817 (1943).
37. 204 La. 446, 15 So.2d 819 (1943).
conformity with the court's interpretations of the older statute. As to cases other than those involving an indictment for murder article 386 was not as specific. It merely stated that "the judge shall charge the jury the law applicable to all offenses of which the accused could be found guilty under the indictment." Of which offenses could the accused be found guilty? It could be argued: only those of which evidence has been adduced at the trial. The words "under the indictment" are explainable as words of limitation, i.e., not only is evidence of the offense required, but also such offense must be an offense lesser than and included in the offense charged in the indictment. Such a construction, that in the case of a murder indictment it was mandatory that the judge instruct on manslaughter and negligent homicide, and that in all other cases it was permissible and proper for the judge to limit his instructions on lesser offenses to those of which evidence had been adduced at the trial, would have been a recognition that the Legislature had intended to codify the well established jurisprudential rule existing prior to the adoption of the Code of Criminal Procedure. Otherwise, why would the statute have made a distinction by providing for the case of a murder indictment specially and for all other cases generally, the same distinction made by the pre-1928 jurisprudence? A reasonable answer in view of the statute's language and history would appear to be that the Legislature had not intended to make a change in the law as it existed prior to 1928.

However, the court may have indicated its feeling on this matter in the 1948 case of State v. Brown in which, though confronted with a case of a murder indictment, the court made a blanket statement to the effect that articles 386 (as amended in 1942) and 406 made it the mandatory duty of the judge to charge the jury with the law applicable to all of the offenses of which the accused could be found guilty under the indictment. Significantly, the refused charge had not been as to the law of manslaughter or negligent homicide, concerning which the statute was specific, but had been as to the law of attempt, of which

38. 214 La. 18, 36 So.2d 624 (1948).
39. La. R.S. 15:406 (1950): "When the crime charged includes another of lesser grade, a verdict of guilty of the lesser crime is responsive to the indictment, and it is of no moment that the greater offense is a felony and the lesser is a misdemeanor." Note that the statute deals exclusively with the question of responsiveness and that in saying that an offense is responsive does not import a duty to instruct on the lesser offense regardless of the evidence.
40. 214 La. 18, 24, 36 So.2d 624, 627 (1948).
no mention was made in the statute. The court must have con-
strued the general language of article 386, i.e., “the judge shall charge the jury with the law applicable to all offenses of which the accused could be found guilty under the indictment” as meaning that it was the “mandatory duty” of the judge to charge the jury on the lesser and included crime of attempted murder. Of necessity, such a holding would preclude any discretion on the part of the trial judge to limit his instructions on lesser and in-
cluded offenses to those supported by the evidence.

In 1948, article 386 was again amended to read in part:

“Whenever the indictment sets out an offense including other offenses of lesser magnitude or grade the judge shall charge the jury the law applicable to all offenses of which the accused could be found guilty under the indictment. The only responsive verdicts which may be rendered, and upon which the judge shall charge the jury, where the indictment charges the following offenses are:” (There follows an enumeration of 40 crimes and a specification of the responsive verdicts allowed to each of the 40 crimes enumerated.) (Em-
phasis added.)

It should be noticed that the 1948 amendment eliminated the specific mention of manslaughter as a mandatory charge on an indictment for murder, but the language that “the judge shall charge the jury the law applicable to all offenses of which the accused could be found guilty under the indictment” remained intact. Insofar as that language is concerned the statute remains susceptible of an interpretation to the effect that “the accused could be found guilty” only of offenses of which there is evi-
dence. However, the second sentence, added by the 1948 amend-
ment, is considerably more mandatory in tone and would appear to preclude any other construction, unless the court should hold “shall” to be used as permissive rather than mandatory. That the court is not inclined to do so was indicated in the 1950 case of State v. Broussard, where, in discussing the question of the responsiveness of a verdict of simple rape to an indictment for aggravated rape, the court stated that it was specifically declared so to be by article 386, “under which the judge was required, on a charge of attempted aggravated rape, to instruct the jury that it had the right to find appellant guilty of an attempt to commit

42. 217 La. 90, 46 So.2d 48 (1950).
simple rape." The Stanford case was cited in support and the court described the judge's duty to instruct on the lesser offense as "mandatory."

**Recent Cases**

Thus, from the language of the present article 386 and the cases above discussed, it would appear that the rule, which began with a doubtful interpretation of section 785 of the Revised Statutes of 1870 as to a single crime, has, by successive stages of enactment and decision, enveloped the entire subject of the duty to instruct on lesser crimes. However, it may yet be argued that the mandatory duty rule is not the law of Louisiana. Such an argument would be based upon four propositions: (1) that the present language of article 386 does not preclude absolutely an interpretation to the effect that "the judge shall charge the jury the law applicable to all offenses of which the accused could be found guilty under the indictment" and the evidence; (2) that there is yet no case which has directly decided that the mandatory duty rule is the law of Louisiana; (3) that recent cases have shown that the question may still be open; and (4) that of the two rules, the mandatory duty rule is the less desirable.

As to the first proposition, the possible interpretations of article 386 have already been discussed. As for the jurisprudence discussed thus far, none of the cases appear to have squarely held the mandatory duty rule to be the law. The cases of *State v. Stanford* and *State v. Love,* holding that article 386, as it stood before the 1948 amendment, made it the mandatory duty of the judge under a murder indictment to instruct on manslaughter and negligent homicide, were grounded upon specific language of the statute which has since been deleted. In the case of *State v. Brown,* the issue presented was whether or not the verdicts of attempted murder and attempted manslaughter were responsive to the charge of murder, and the statement to the effect that instructions as to these offenses were mandatory was

43. *Id.* at 102, 46 So.2d at 52.
44. *Ibid.,* 46 So.2d at 53.
45. 204 La. 439, 15 So.2d 817 (1943).
46. 210 La. 11, 26 So.2d 156 (1946). See also *State v. Ferrand,* 210 La. 394, 27 So.2d 174 (1946), where the court stated that article 386 obliges the trial court, on a trial for aggravated rape, to instruct on the offense of attempted aggravated rape. But there the statement was made in assigning reasons for its holding on a question of the admission of evidence of prior criminal acts of the accused. The court was not presented with the question of the trial judge's duty to instruct.
47. 214 La. 18, 36 So.2d 624 (1948).
dictum. *State v. Broussard*\(^48\) was identical. The issue was responsiveness and the statement as to the court's duty to instruct was dictum.

Concerning proposition number three, two recent cases indicate that the state of the law is not presently certain. In the case of *State v. Espinosa*,\(^49\) decided in 1953, the defendant was charged with having "unlawfully obtained a narcotic drug," and the defendant had reserved an exception to the lower court's refusal to instruct the jury that it could bring in an attempt verdict. The Supreme Court, after determining that a verdict of attempt was responsive to a charge of "obtaining," said, "be that as it may, 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." "The judge's ruling in refusing this charge (of attempt) was correct."\(^50\) That is, granting that such a verdict would be responsive, there was no duty to instruct on the lesser offense in the absence of evidence tending to reduce the crime to an attempt. Thus, the court would appear to have rejected the mandatory duty rule. However, it may be significant that the court did not mention article 386 in the opinion. The most recent case on the question, *State v. Marshfield*,\(^51\) was decided in 1956, and presented a situation almost identical to that found in *State v. Espinosa*, but with opposite results. There, the defendant, on trial under a charge of "possession of narcotics," made a timely request for a special charge on the law of attempt. The trial judge refused to give the requested charge, stating in his per curiam that the refusal was "for the reason that there was no evidence adduced as to any attempt to commit the crime,"\(^52\) citing the *Espinosa* case in support of his ruling. The Supreme Court held the lower court's ruling to be error, but in doing so, it appeared to concern itself solely with the question of whether the crime of attempted possession was responsive to the crime charged. It made no men-

\(^{48}\) 217 La. 90, 46 So.2d 48 (1950).
\(^{49}\) 223 La. 520, 66 So.2d 323 (1953).
\(^{50}\) Id. at 526, 66 So.2d at 325.
\(^{51}\) 229 La. 55, 85 So.2d 28 (1958).
\(^{52}\) See trial court's per curiam, 229 La. 56, 85 So.2d 28, 29 (1958). Notice here that the lesser crime in question, attempt, is a "lesser and included crime" and therefore falls into that class of cases discussed earlier in the comment as "situation two." Therefore, the lower court's statement is not technically correct, for if there was evidence of the greater crime there must also have been evidence of the lesser crime. What the lower court appears to have meant was that under the evidence the defendant was guilty of the crime charged or of nothing at all. Hence, a charge on the lesser offense would have been of no purpose.
tion of the evidence issue raised by the lower court's per curiam. The higher court merely cited article 386 without comment. The lower court's citation of the Espinosa case, which appears clearly to support the ruling below, was disposed of by saying that the Supreme Court had explained the Espinosa decision in the case of State v. Nicolosi, which decision had not been handed down as of the time of the trial of the Mansfield case. However, an examination of the opinion in the Nicolosi case shows that there the sole question presented and discussed was whether or not a verdict of attempt was responsive to a charge of "possession." The court correctly held that the ruling in the Espinosa case did not overrule the prior decisions to the effect that attempt was responsive to a charge of possession and that the holding in the Espinosa case was "clearly inapposite." It seems clear that the issue presented in the Espinosa and Marshfield cases was neither presented nor passed upon in the Nicolosi case. It is difficult to understand how the Nicolosi case "explained" the Espinosa case for purposes of the Marshfield decision. State v. Espinosa and State v. Marshfield appear to have reached opposite conclusions upon the same question.

In view of the almost universal rejection of the "mandatory duty" rule in other jurisdictions, it is suggested that the rule

53. Id. at 60, 85 So.2d at 30. It seems possible that the court failed to distinguish between the issues of responsiveness to the indictment and responsiveness to the evidence. That such issues are distinct is well demonstrated by the cases cited in note 2 supra, all of which dealt with the issue of whether instructions must be given on an offense, admittedly responsive to the indictment, which may or may not be responsive to the evidence. As shown above, the pre-1928 Louisiana cases also recognized the distinction. The confusion of the two issues in Louisiana began with the 1928 Code of Criminal Procedure and this obscurcation may be at the heart of the present difficulties.

54. 228 La. 65, 81 So.2d 771 (1955).

55. Id. at 78, 81 So.2d at 775. The court stated that the "principal basis" for the holding in the Espinosa case was that the defendant had confessed to the crime charged, implying that since the evidence established commission, the lower court correctly refused to instruct on attempt to commit. Further, the court clearly recognized that the issue in the Nicolosi case was responsiveness, and therefore the Espinosa case, which dealt with the duty to instruct, "was clearly inapposite." 56. Perhaps the strongest criticism which can be made of the Espinosa case would be based upon article 557 of the Code of Criminal Procedure, i.e., the "harmless error rule," which provides in substance that error shall not be ground for reversal unless the error results in substantial prejudice to the defendant. In the instant case, there having been a conviction of the substantive crime of "possession," it is difficult to see how the defendant was prejudiced by a refusal of the trial judge to instruct the jury that it could find defendant guilty of attempt. Presumably, he was guilty of "possession" for the jury found him so. The remand of the case should result only in finding him guilty once again, but this time, with the right given to the jury to find him guilty of a crime which would be illogical in view of the evidence.

57. See cases cited note 2 supra.
which apparently obtains in Louisiana should be reconsidered. It is also suggested that, if it be found that the present language of article 386 can be construed to be permissive, and that the jurisprudence presents but one case, the Espinosa case, in which the issue was both presented and passed upon, and that in that case the mandatory duty rule was rejected, the court might make this reconsideration without legislative intervention. However, if necessary, legislative correction could be made simply by amending article 386 to read: "The judge shall charge the jury the law applicable to all offenses of which the accused could be found guilty under the indictment and the evidence. The only responsive verdicts which may be rendered, and upon which the judge may charge the jury, . . . are: . . . ."

The "mandatory duty" rule may stem from an idea expressed on several occasions by the Supreme Court that if a defendant is convicted of a crime lesser than that charged he has no complaint on that account because the result was to his advantage. However, it does not follow that being convicted of a crime of which there was no proof on the one hand, or under an illogical verdict on the other, is to the advantage of the defendant in every case. Juries should be required to return verdicts of which they find proof beyond a reasonable doubt. The "mandatory duty" rule encourages compromise verdicts. It would appear that the better rule would be to allow the trial judge to limit his instructions on lesser and included offenses to those a verdict of which would be reasonably supported by the evidence.

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58. State v. Malmay, 209 La. 476, 24 So.2d 869 (1946). Other courts have held that an instruction on a lesser offense in the absence of evidence of such lesser offense, though error, is not prejudicial, for such error is to the defendant's advantage. Smith v. State, 222 Ark. 650, 262 S.W.2d 272 (1953); People v. Andrus, 331 Mich. 535, 50 N.W.2d 310 (1951); People v. Miller, 96 Mich. 119, 55 N.W. 675 (1893); Hamilton v. State, 95 Okla. Crim. 262, 244 P.2d 328 (1952). But see Duckworth v. State, 209 Miss. 322, 46 So.2d 787 (1950), where the court admonishes that to instruct on the lesser offense under these circumstances is to invite the compromise verdict; and State v. Carey, 36 Del. 521, 178 Atl. 877 (1935), wherein the court states that "a defendant has no . . . right to a compromise verdict." See also State v. Scott, 72 Idaho 202, 239 P.2d 258 (1951), where the court held that the failure to instruct on a lesser offense is favorable to the defendant, for it is not presumed that the jury will convict of the higher offense because it was not allowed to convict of the lesser offense. It is presumed that there will not be a conviction of the higher offense without proof thereof beyond a reasonable doubt.