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CRIMINAL LAW

SUFFICIENCY OF DEFINITION OF CRIME

The language used in a criminal statute must be sufficiently definite to enable a reader of ordinary intelligence to determine what conduct is proscribed.¹ There is not, nor can there be, a clearcut line between sufficient definition and unconstitutional vagueness in criminal statutes. The distinction can best be drawn, but then only in a rough sort of way, by an examination of the decisions in borderline cases. For example, the Supreme Court has declared that the phrases "to prospect,"² "mechanical devices,"³ "lewd or indecent act,"⁴ and "sexually indecent print"⁵ have sufficiently well-understood meanings, in the context of the statutes involved, to satisfy the requirements of criminal law definition. On the other hand, the phrases "immoral act,"⁶ "satisfactory explanation,"⁷ and "indecent print"⁸ have been deemed to be unconstitutionally vague as used in the statutes then be-

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1. LA. CONV. art. I, § 10; Shreveport v. Brewer, 225 La. 93, 72 So.2d 308 (1954); State v. Kraft, 214 La. 351, 37 So.2d 815 (1948).
2. State v. Evans, 214 La. 472, 38 So.2d 140 (1948), upholding the constitutionality of Act 212 of 1934, which made it unlawful to "prospect" by certain specified means or "any mechanical device" for oil and minerals on private or public lands without the consent of the appropriate party.
3. Ibid.
4. Shreveport v. Wilson, 145 La. 906, 83 So. 186 (1919), upholding a city ordinance which made it unlawful "to use or occupy any hotel, house, room or other building or place for the purpose of prostitution, assignation or other lewd or indecent act, in the city of Shreveport."
5. State v. Roth, 226 La. 1, 74 So.2d 322 (1954), holding that LA. R.S. 14:106(2) (1950), as amended, LA. Acts 1950, No. 314, § 1, p. 511, which defines obscenity as "possession with the intent to display . . . sexually indecent print" was constitutional.
6. State v. Truby, 211 La. 178, 29 So.2d 758 (1947), ruling on LA. R.S. 14:104 (1950), which reads: "Keeping a disorderly place is the intentional maintaining of a place to be used habitually for any illegal purpose or for any immoral sexual purpose."
7. Shreveport v. Brewer, 225 La. 93, 72 So.2d 308 (1954), holding that a city ordinance which provided penalties for those "who shall be on the streets of the city after midnight without a satisfactory explanation" was not sufficiently definite.
8. State v. Kraft, 214 La. 351, 37 So.2d 815 (1948), holding LA. R.S. 14:106(2) (1950), which defined obscenity, before the 1950 amendment, as "possession with the intent to display . . . any indecent print" to be insufficient.

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fore the court. Necessarily, the question is one of degree and common sense. In *State v. Murtes*, the Supreme Court considered the constitutionality of R.S. 48:422 which prohibited certain state officials from being "in any way interested" in any contract for the building of any highway or other specified state construction. Reasoning that the language could be interpreted to include an interest based on sentimental or ethical considerations alone, the court held that the quoted part of the statute was unconstitutionally vague. This holding re-emphasizes the Supreme Court's position that a very high degree of definiteness is required in criminal statutes. The reasoning in the *Murtes* case is analogous to the court's reasoning in *State v. Truby* that an article of the Criminal Code, defining keeping a disorderly place as maintaining a place for habitual use for any "immoral" purpose, was unconstitutionally vague and indefinite because "the language employed is of such vague and indefinite import that it might embrace many acts which could not possibly have any criminal character, and leaves the discrimination between these and others to arbitrary judicial discretion."

In *State v. Marsh*, the defendants argued that the simple escape statute under which they had been convicted was unconstitutional because of the indefiniteness of the following italicized phrases: "Simple escape is the intentional departure of a person, under circumstances wherein human life is not endangered, from lawful custody of any officer ... or from any place where he is lawfully detained by any officer." In affirming the conviction the court declared that the words used "taken according to their fair import, in their usual common or ordinary meaning, in connection with the context, and with reference to the purposes to be served" were not unconstitutionally vague.

THEFT — PARTNERSHIP PROPERTY

Article 67 of the Criminal Code defines theft as the taking of anything of value which belongs "to another." The case of *State v. Peterson* presented the novel question of whether commer-

10. 211 La. 178, 29 So.2d 758 (1947).
12. 96 So.2d 643 (La. 1957).
14. 96 So.2d 643, 646 (La. 1957).
15. 232 La. 931, 95 So.2d 608 (1957), 18 *LOUISIANA LAW REVIEW* 182 (1957).
16. In the case of *State v. Hogg*, 126 La. 1053, 53 So. 225 (1910), decided
cial partnership property is subject to theft by one of the part-
ners as property "of another." In the Peterson case, one of the
partners in a commercial partnership had allegedly withdrawn
money from the partnership bank account for the purpose of
converting the funds to his personal use. In the prosecution of
the partner for theft, the trial judge sustained a motion to quash
the bill of information on the ground that it did not charge the
crime of theft since the property taken was not the property "of
another" as to the defendant partner. The Supreme Court, two
Justices dissenting, affirmed the action of the trial judge. The
majority of the court reasoned that since each partner in a com-
mercial partnership can be held liable for the entire debt of the
partnership, there was such an identity of the partners and the
partnership that the requirement of Article 67 that the property
taken be that "of another" was not satisfied. The dissenting
Justices would have held commercial partnership property to be
the property "of another" as to the individual partners on the
theory that a partnership is a separate legal entity, distinct from
the individuals composing it. The dissenters' position would ap-
pear to have merit from a practical, as well as a technical, stand-
point. Partners in a commercial partnership need protection of
their property from misappropriation by one of the partners,
just as the individual needs protection as to his property which
may have been entrusted to another for use or management. It
is true, as pointed out in the majority opinion in the Peterson
case, that a partner may sue for an accounting and a dissolution
of the partnership when he believes that another partner is ap-
propriating partnership property to his own use. However, if
the defrauding partner has disposed of the property this may
prove to be an empty remedy. Furthermore, every person has a
civil right of action against a thief to recover the value of the
property taken from him, but this has never been deemed a suf-
cient reason not to impose criminal sanctions upon the thief.
From a purely legalistic standpoint, there is ample authority for
treating commercial partnership property as the property "of
another" within the contemplation of Article 67. Article 2 of the
Criminal Code, which defines terms used in the Code, provides
that "'another' refers to any other person or legal entity." It

before the adoption of the Criminal Code, the court stated in dicta that a partner
could not be guilty of embezzling the property of the partnership of which he is
a member.
17. LA. CIVIL CODE art. 2872 (1870).
18. In the Reporter's comment to this provision it is stated that "In view of
the method of use of [this] expression in the Code, it is extremely important that
is firmly established in the jurisprudence that a partnership "is an abstract ideal being with legal relations separate and distinct from those of its individual members"\(^19\) and that "partners are not the owners of the partnership property [but rather] the ideal being ... is the owner."\(^20\) By giving full effect to the entity concept of partnerships the Louisiana court could have imposed criminal liability upon a partner who misappropriates commercial partnership property.

The court in the \textit{Peterson} case seems to have based its decision on the fact that each partner in a commercial partnership can be held liable for the entire debt of the partnership. This implies that a different result might be reached in a case involving the misappropriation of property belonging to an ordinary partnership by one of the partners, since ordinary partners are liable only for their virile share of the debts of the partnership.\(^21\) Whether the partnership is commercial or ordinary, the practical and legal considerations are essentially the same, and it is highly doubtful that such a distinction will be made or could be justified.

**GUilty KNOWLEDGE AS A ELEMENT OF CRIME.**

The 1955 case of \textit{State v. Johnson}\(^22\) held (on rehearing) that "guilty knowledge is an essential ingredient of the crime of possession of narcotic drugs,"\(^23\) despite the fact that the statute denouncing the possession of narcotics as unlawful\(^24\) makes no mention of criminal intent or knowledge. Following the \textit{Johnson} decision, there was speculation as to whether the court meant that knowledge of the fact of possession would suffice, or whether the offender must have a guilty mind (mens rea) in the sense that he realizes that the substance is a narcotic.\(^25\) The court's language in the recent case of \textit{State v. Birdsell}\(^26\) indicates that the court requires something more than mere knowledge

\(^{19}\) Trappey v. Lumbermen's Mutual Casualty Co., 229 La. 632, 635, 86 So.2d 515, 516 (1956), holding that a partner may recover workmen's compensation from a partnership of which he is a member.


\(^{21}\) LA. CIVIL CODE art. 2872 (1870).

\(^{22}\) 228 La. 317, 82 So.2d 24 (1955), 17 LOUISIANA LAW REVIEW 229 (1956).

\(^{23}\) 228 La. 317, 334, 82 So.2d 24, 30 (1955).


\(^{26}\) 232 La. 725, 95 So.2d 290 (1957).
of the fact of possession. One subsection of the narcotics statute makes it unlawful to possess a hypodermic needle,27 with certain provisos and exceptions not pertinent here. Again, as in the provision dealing with possession of narcotic drugs, the statute makes no mention of criminal intent or knowledge of any particular facts. In a prosecution under that subsection, the Supreme Court in the Birdsell case reversed defendant's conviction and ordered a new trial on the ground that the exclusion by the trial judge of evidence that the defendant had never used the syringe and needle for narcotics erroneously deprived the defense of a substantial right. The court stated that "the defendant was entitled to prove that his intent was anything but that of violating the law . . . he was entitled to prove his good faith in possessing the prohibited articles."28 The Birdsell decision will be more fully analyzed in a student note in the next issue of the Review.

MEANING OF "INTOXICATING LIQUORS"

In State v. Viator,29 the Supreme Court held that beer and other malt beverages were not "intoxicating liquors" within the meaning of Criminal Code Article 91, which forbids the sale of intoxicating liquor to minors. The decision was based upon the thesis that the definitions of the terms "liquors" and "malt beverages" in the alcoholic beverages chapter of the Liquors — Alcoholic Beverages Title of the Revised Statutes30 rendered those terms mutually exclusive. The word "liquor" is therein defined as any "distilled or rectified alcoholic beverage," while the phrase "malt beverages" is defined as a beverage obtained "by alcoholic fermentation." The effect of the Viator ruling was to make the definitions found in the licensing provisions applicable throughout the Revised Statutes, despite the fact that the definition section expressly states that the terms were being defined "for the purposes of this Chapter."31 (The chapter is entitled "Collector of Revenue" and treats solely of dealers' permits and taxation.)

A similar problem was presented in State v. Guimbellot32 where the court was called upon to determine whether the sale

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31. Ibid.
32. 232 La. 1043, 95 So.2d 650 (1957).
of beer in a restaurant on Sunday constituted a violation of the Sunday Closing Law.\textsuperscript{33} Certain businesses, including restaurants, are specifically exempted from the Sunday Closing Law “unless intoxicating liquors are sold on the premises.”\textsuperscript{34} It was argued by the state that a restaurant in which beer is sold is not exempt from the closing law, because “intoxicating liquors are sold on the premises.” The majority of the court reasoned that in view of the holding in the \textit{Viator} case the restaurant, where only beer was sold, did not sell “intoxicating liquors” on the premises; and hence was not prevented from coming within the restaurant exemption to the Sunday Closing Law. Justices Hawthorne and Hamiter dissented on the ground that the licensing provision of the Alcoholic Beverages Title and the Sunday Closing Law were not in \textit{pari materia} and therefore should not be construed together. There is much to be said for the position taken in the dissenting opinions. However, the issue was settled in the \textit{Viator} decision, which categorically held that the definition of “intoxicating liquors” in the revenue and licensing chapter of Title 26 was applicable throughout the Revised Statutes.

**CRIMINAL PROCEDURE**

**CONTINUANCE — DUE DILIGENCE IN SECURING MATERIAL WITNESS**

The granting or refusing of a continuance rests “within the sound discretion of the trial judge,”\textsuperscript{35} and exceptional circumstances are required before the trial judge’s action will be held to constitute an abuse of discretion. A motion for a continuance to secure the presence of a key witness must “establish the exercise of due diligence”\textsuperscript{36} in attempting to obtain the witness. It was argued by the defense in \textit{State v. Blankenship}\textsuperscript{37} that the trial judge had abused his discretion in granting a continuance to the state for the purpose of securing the presence of a witness who had not been summoned by the district attorney, the theory being that the absence of a summons showed lack of due diligence. The Supreme Court rejected this argument, stating that “the issuing of a subpoena for the material witness [in this case] . . . would have been a vain and useless gesture, for his address at that time

\begin{table}[h]
\begin{tabular}{ll}
34. & \textit{Id.} at 51:192. \\
35. & \textit{Id.} at 15:320. \\
36. & \textit{Id.} at 15:322(3). \\
37. & 231 \textit{La.} 993, 83 So.2d 533 (1957).
\end{tabular}
\end{table}
was unknown to the district attorney.”

Apparently, the result would have been different if the district attorney had known the witness’ address, for the court has previously declared that a continuance should not be granted where no subpoena has been issued for the missing witness.

**Recusation of the District Attorney**

One of the grounds for the recusation of a district attorney is that he “shall have been employed or consulted as attorney for the accused before his election or appointment as district attorney.” In *State v. Brazile* the assistant district attorney had recused himself because of prior participation in the trial for the defense. The accused contended that the district attorney should also be recused because of the possibility that privileged information had been communicated to him by the assistant district attorney. The court held that there was no ground for recusation for “it is to be presumed that he [the assistant district attorney], as a member of the bar in good standing, has and will respect the defendant’s confidence.”

An earlier case, holding that an assistant district attorney must recuse himself when the district attorney does so, was distinguished on the ground that the reverse of the situation does not obtain — recusation of the subordinate would not require disqualification of the principal.

**Recusation of the Trial Judge**

Article 303 of the Code of Criminal Procedure provides that one of the grounds for the recusation of a trial judge is “his being related . . . to one of the attorneys or to the spouse of one of the attorneys within the second degree.”

In *State v. Miller* the trial judge recused himself on the ground that one of the

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38. 231 La. 993, 996, 99 So.2d 533, 535 (1957).
41. 231 La. 90, 90 So.2d 789 (1956).
42. Id at 94, 90 So.2d at 790.
43. State v. Buhler, 132 La. 1065, 62 So. 145 (1913). The Buhler decision was based on Act 74 of 1886, which specially authorized the appointment of attorneys to represent the state when the district attorney could not act. The rationale of the decision was that Act 74 did not contemplate that an assistant district attorney could act when the district attorney was recused. In this connection see La. R.S. 15:311 (1950), which supersedes La. Acts 1886, No. 74, p. 113, and provides in part that “in the event of the recusation, absence or disability of any district attorney, the district judge shall appoint a lawyer having the qualifications of a district attorney of said district to act in the place of said recused district attorney, during the time of his absence or disability.”
attorneys employed to assist the prosecution was a law partner of the recusing trial judge's son-in-law. The trial judge observed that while he knew that no prejudice to the defendant would result by his presiding it would be a dangerous practice "that could be fruitful of much evil and one calculated to lower the respect for and confidence in the Judiciary" to establish it as law that a judge should not be recused under the circumstances of the case at bar. The state's argument that recusation of the trial judge should be strictly interpreted as limited by the statute was rejected by the Supreme Court, which held that employment of a member of his son-in-law's law firm was tantamount to employment of the judge's son-in-law.

OBJECTIONS TO JURY VENIRE — ACTS OF DE FACTO JURY COMMISSIONERS

In 1923 the Louisiana Supreme Court, in State v. Smith, overruled the prior jurisprudence and held that the general rule that the acts of de facto officers cannot be challenged collaterally was applicable to de facto jury commissioners. This principle was the basis of the court's decision in State v. Kennedy. In that case it was argued that because a member of the jury commission had moved to another parish eight years prior to the selection of the jury venire, the venire was illegally constituted. The court rejected this contention, finding that the jury commissioner in question was in actual possession of the office, discharging his duties under color of right and was therefore a de facto member. As such his acts were not subject to collateral attack. Although the court in the Kennedy case does not cite Article 203 of the Code of Criminal Procedure, adopted after the Smith case, it would fully support the decision. That article provides that, in the absence of fraud or great wrong working irreparable injury to the defendant, irregularities in the composition of the jury commission shall not be sufficient cause to challenge the legality of the jury venire.

COMPOSITION OF THE GRAND JURY — NEGRO REPRESENTATION

The now established rule that the absence of Negroes from the grand jury does not of itself constitute systematic exclusion

45. 232 La. 541, 94 So.2d 661 (1957).
46. 153 La. 578, 96 So. 127 (1923). See also State v. Mitchell, 153 La. 586, 96 So. 130 (1923), a companion case.
47. 232 La. 755, 95 So.2d 301 (1957). See also the companion case of State v. Weston, 232 La. 766, 95 So.2d 303 (1957).
of Negroes was reaffirmed in *State v. Eubanks.* The case of *State v. Palmer* involved an ingenious, but unsuccessful, effort to urge racial discrimination in jury selection. In that case the defendant attempted to draw a distinction between "persons of color" and "Negroes," contending that the inclusion of "persons of color" did not invalidate the argument that Negroes had been systematically excluded from the grand jury. The court found that the proof was sufficient to establish that the individuals concerned were in fact members of the Negro race. The status of the questioned jurors as "Negroes" had been established by their birth certificates and by their testimony that they had always considered themselves to be Negroes, and that others had always so regarded them. In overruling the defense's contention, the judge aptly declared: "This novel effort to show discrimination is completely unrealistic. Appellant in effect is arguing that there exist two or more classes of Negroes, and that a Negro of any one of the so-called classes may allege that this class has been discriminated against in the matter of drawing juries if members of his particular class are excluded . . . even though members of other classes of Negroes have been included in the venire." After disposing of this hypertechnical argument, the court held that the evidence in the *Palmer* case did not show systematic exclusion, nor that there had been a systematic limitation of the number of Negroes whose names were included on the venire and jury lists so as to provide a mere token representation.

**GRAND JURY — PRESENCE OF UNAUTHORIZED PERSON**

Article 215 of the Code of Criminal Procedure provides that the sessions of the grand jury shall be secret, but that the district attorney shall have free access to the sessions. Also, it is provided that the district attorney may have the testimony recorded by a stenographer and the grand jury may employ an interpreter when needed. The stenographer and the interpreter must be sworn to keep the proceedings secret. In a recent application of these provisions, the Supreme Court held that the

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*49. 232 La. 289, 94 So.2d 262 (1957).*

*50. 232 La. 468, 94 So.2d 439 (1957).*

*51. Id. at 477, 94 So.2d at 443.*

*52. There were ten Negro names on the grand jury list of one hundred names, and two Negroes were selected and served on the grand jury.*

*53. State v. Howard, 230 La. 327, 88 So.2d 387 (1956).*
use by the district attorney of a recording device instead of a sworn stenographer to record the testimony was not a violation of the secrecy of the grand jury proceedings since the record "[did] not disclose that any unauthorized person appeared before the grand jury." 54 In State v. Revere 55 an investigator for the district attorney attended the session of the grand jury at which the defendant was indicted for the purpose of "monitoring" a "Soundscribing" machine which was recording the testimony of the witnesses. The defendant moved to quash the indictment on the ground that his rights had been violated in that the investigator was not one of the persons authorized by Article 215 to be present at grand jury sessions. The trial judge quashed the indictment on that ground. On appeal, the state argued alternatively that the investigator was present in the capacity of a stenographer as contemplated in Article 215; that the specific enumeration of persons did not imply that others were to be excluded; and that even if the investigator was an unauthorized person this, in the absence of a showing of prejudice, was not sufficient basis for vitiating the indictment. The Supreme Court rejected each of these arguments and upheld the quashing of the indictment. Chief Justice Fournet, after an extensive and learned review of the historical background of the grand jury, concluded that the requirement of secrecy of grand jury proceedings is for the protection of both the state and persons accused of crime. He points out that the assurance of secrecy promotes full disclosures by witnesses testifying, prevents the defendant from fabricating evidence to rebut the proposed testimony of witnesses at the trial, keeps the good names of persons not indicted from being besmirched, and otherwise generally fosters the proper functioning of the grand jury. Since the accused is not permitted to attend the sessions personally or through counsel, his right to have the grand jury duly impaneled and conducted according to law should be "rigorously protected." Therefore, although the investigator was sworn to secrecy and was performing a function similar to that of a stenographer recording the witnesses' testimony, the majority of the court felt that the practice offered too great a possibility for the exercise of undue influence to be condoned. The court aptly observed that "the problem of relaxing the secrecy of the grand jury proceedings is incapable of rule-of-thumb solutions ... [but] if the secrecy re-

54. Id. at 331, 88 So.2d at 388.
quirement is regarded lightly it may foster the very practices which the grand jury functions to avoid."

**LONG FORM INDICTMENT — TRACING THE LANGUAGE OF THE STATUTE**

If the long form indictment is used, it "must state every fact and circumstance necessary to constitute the offense, but it need do no more, and it is immaterial whether the language of the statute creating the offense, or words unequivocally conveying the meaning of the statute, be used." Generally, an indictment which follows the language of the statute satisfies the constitutional requirement that a defendant be apprised of the nature and cause of the accusation against him. Such an indictment, however, is not sufficient to charge a crime which is defined in general language covering a wide variety of criminal activity. Thus, the Supreme Court has held that an information charging that the defendants had "unlawfully possessed a mechanically and/or manually operated device . . . for the purpose of illegally taking commercial fish" was insufficient although it tracked the language of the statute. The court reasoned that since illegal fishing devices may take any of a great variety of forms it was necessary that the indictment state the specific facts on which the charge was based. To charge the crime by simply tracing the language of the statute in such a case did no more than state a conclusion of law and could not truly be said to inform the accused of the "nature and cause of the accusation." Similarly, a charge of gambling has been held inadequate when it followed the broad language of the multiple-offense gambling article without specifying which of the many forms of gambling had been committed. A different situation was presented in *State v. Green* where the indictment charged that the defendant "did with force and arms commit the crime of Simple Kidnapping as defined by R.S. 14:45 in that he intentionally and forcibly seized and carried [the prosecuting witness] from one place to another without the consent of the [prosecuting witness]." Defense counsel argued that the accused was entitled to be advised by the indictment of the place from which or to which the prosecuting witness was transported, the means of transportation, and the

56. 222 La. 184, 197, 94 So.2d 25, 30 (1957).
61. 231 La. 1068, 93 So.2d 657 (1957).
type of force used. The court held that the indictment, which followed the language of the simple kidnapping article, was sufficient since the statute itself adequately describes the acts constituting the offense. The ruling appears to be correct. The question is necessarily one of degree rather than rule of thumb. The information which the defense sought in the Green case was not such as was essential to inform the accused of the nature and cause of the accusation, nor facts and circumstances necessary to constitute the offense. Rather, it was the sort of information which the bill of particulars is designed to supply upon request.

**METHOD OF CHARGING ADULTS IN JUVENILE COURT**

Louisiana Revised Statutes 13:1573 provides that in the trial of adults coming within the jurisdiction of the juvenile court, the proceeding “may be: (1) by affidavit of a district attorney or any committing magistrate; or, with the approval of the district attorney, by affidavit of a probation officer, and when made by a district attorney, a committing magistrate, or probation officer may be on ‘information or belief,’ or (2) by bill of information.” In *State v. Cooper*, the Supreme Court held that the word “may” refers to the alternative procedural methods listed, and is not simply directory. Therefore, defendant’s conviction of criminal neglect of his minor child on an affidavit made and signed by his wife was invalid.

**JURORS — CHALLENGE FOR BIAS OR PREJUDICE**

The Louisiana Constitution guarantees a defendant the right to trial by an impartial jury. Accordingly, one of the special causes for challenging a proffered juror, specifically stated in the Code of Criminal Procedure, is that “he is not impartial, the cause of his bias being immaterial.” However, the prejudice which will render a prospective juror subject to challenge for cause must relate specifically to the defendant and the charge being brought against him. Thus, the Supreme Court has held that the fact that a prospective juror’s place of business had been burglarized four times does not automatically disqualify him on the ground that he is prejudiced against one accused of burglary. Also, in a case where a Negro was on trial for murder,

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63. 231 La. 187, 91 So.2d 5 (1956).
64. LA. CONST. art. I, § 9.
the court held that "the mere fact, if it be true, that the father of one of the jurors was killed by a Negro, and the further fact that the accused was a Negro, would not disqualify that juror from serving on the jury" trying the accused. In State v. Edwards, in which a Negro was charged with aggravated rape of a white woman, a prospective juror was asked whether he belonged to the Louisiana White Citizens' Council. He answered that he did not, but volunteered that he believed in "white supremacy." Defense counsel's challenge of the juror on the ground that he was prejudiced against the colored race was overruled by the trial judge. The Supreme Court affirmed this action, pointing out that the juror explained his statement saying that he was referring to "white supremacy" solely in the field of social relationships. Also, the juror further stated that the fact that the defendant in that case was a Negro accused of raping a white woman "would not interfere with his impartial consideration of the law and the evidence." As thus safeguarded the rights of the Negro defendant are adequately protected.

Voir Dire Examination as to Attitude on Capital Punishment

Article 352 of the Code of Criminal Procedure grants to the prosecution in a capital case the right to challenge for cause a juror who has conscientious scruples against the infliction of capital punishment. No corresponding right is granted by statute to the defense when a juror is conscientiously opposed to rendering a qualified verdict, carrying only life imprisonment, but the jurisprudence has recognized that it is only fair and just that the defense be accorded a right to challenge for this cause. In interrogating the proffered juror on this matter, counsel are not allowed to so phrase their questions that the juror is required to commit himself in advance as to how he will exercise his purely discretionary power to render either a capital or a qualified verdict. A dictum in a 1941 case had indicated that the court would consider it improper to ask a juror whether he "would" render a certain type of verdict, but that it would be proper to ask a juror if he "could" do so. However, in State v. Weston

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68. 232 La. 577, 94 So.2d 674 (1957).
70. In the second Henry decision, the court said that if the question had been phrased in the latter manner the objection "would have no merit." 197 La. 999, 1010, 198 So.2d 104, 108 (1941).
71. 232 La. 766, 95 So.2d 305 (1957).
the Supreme Court pointed out that either phraseology tends to commit the juror as to his verdict, in the case of conviction, before he hears the evidence; and that neither is "strictly correct." The court observed further that the pertinent inquiry is "not what the juror would or could do but whether he has such a prejudice against the type of crime charged that he is conscientiously opposed, in the event of a finding of guilt, to a verdict other than one with capital punishment."\(^7\) The court's summary of the voir dire examination of the prospective juror shows that he was confused as to what was meant by a "qualified verdict," and by the "considerable interchange by counsel in his questions to the juror as to what he 'would do' and 'could do.'"\(^7\) Even where the less drastic "could do" term is carefully employed, the Supreme Court appears to feel that a certain amount of commitment in advance and confusion is likely to result.

**Present Insanity — The Lunacy Commission**

Where insanity as a bar to present trial becomes an issue in the case, the procedure to be followed is set out in Article 267 of the Code of Criminal Procedure.\(^7\) This article directs the trial judge to fix a hearing to determine whether the defendant is insane or mentally defective to the extent that he "is unable to understand the proceedings against him or to assist in his defense." When such hearing is ordered the court "may appoint" a lunacy commission to examine the defendant and testify at the hearing. The extent to which the Supreme Court feels bound by the discretion of the trial judge in the matter of appointing a lunacy commission was well demonstrated in the case of *State v. Bailey*.\(^7\) In that case the defendant had been found presently insane by three doctors, one of them a psychiatrist, composing a sanity commission. The defendant was then sent to the hospital which reported that the defendant was suffering from severe mental illness and needed further treatment. The district attorney, being convinced that the defendant was merely feigning insanity, sent a copy of defendant's detailed confession to each of the members of the lunacy commission and had the trial judge call a hearing. At the hearing the commission, on the strength of an appraisal of the statements made in the confession, reversed its previous finding of present insanity. Defense

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\(^7\) 232 La. 766, 775, 95 So.2d 305, 308 (1957).
\(^7\) Ibid.
\(^7\) L. R.S. 15:267 (1950).
\(^7\) 96 So.2d 34 (La. 1957).
counsel moved for the appointment of a new commission, pointing out that two of the members had not re-examined the defendant since the first report was made. The trial judge overruled the motion and the Supreme Court upheld his ruling. While the facts urged by defense counsel might appear to call for a new lunacy commission, the Supreme Court's attitude toward the matter appears to be warranted. The question of defendant's present sanity is peculiarly a matter in which the trial judge's personal observation of the defendant and examination of the evidence would lend great weight to his determination.

Article 267 also governs the appointment of a lunacy commission to examine the defendant whose present sanity and ability to stand trial is in issue. It provides that the members of the commission are "to testify at the hearing." There is no stated requirement, as in Article 268, which provides for the appointment of a lunacy commission where the defense of insanity at the time of the crime is raised, that defense counsel must be afforded an opportunity to interrogate the physicians appointed to the commission. In State v. Smith, defense counsel had moved prior to trial for the appointment of a lunacy commission to determine the present mental condition of the defendant. The trial judge evidently believed that the defendant was sane. However, prior to ruling on the motion he ordered the defendant confined to the Louisiana State Hospital at Jackson for observation, naming two psychiatrists to examine him and to report on their findings. The report was to the effect that there was no evidence of insanity. Subsequently, defense counsel again moved for the appointment of a lunacy commission, on the assumption that the two appointed physicians did not constitute such a commission. Defense counsel also asked the court for permission to interrogate the two psychiatrists who were present in court. The trial court overruled the motion and counsel reserved a bill of exception. The Supreme Court held that, irrespective of the views entertained by the lower court and counsel, a lunacy commission had been, in effect, appointed; and that the refusal of the trial judge to allow counsel to interrogate the physicians was reversible error. The effect of this ruling is to make it mandatory that physicians appointed by the trial judge to examine the accused's present mental condition be present at the hearing and subject to interrogation by counsel. This is consistent in purpose with the specific provision in Article 269 of the Code of

76. 231 La. 139, 90 So.2d 866 (1956).
Criminal Procedure that the lunacy commission's report as to present sanity must be "accessible" to both prosecution and defense counsel.\textsuperscript{77}

**REMOVAL OF PERSONS FROM COURTROOM**

It is within the discretion of the trial judge to exclude persons from the courtroom while a witness is testifying if such a step is necessary for the witness to testify freely.\textsuperscript{78} In *State v. Poindexter*,\textsuperscript{79} defendant (an inmate of the Louisiana State Penitentiary) pleaded self-defense in the killing of another inmate. In presenting its case, the defendant wished to have another inmate of the prison testify and requested the court to remove from the courtroom three penitentiary personnel, one on duty and two spectators, because the witness could not speak freely in their presence. The trial judge promptly refused the request, without further inquiry, stating that "such an act by the court would be highly irregular and against custom." On motion for new trial, the defense attached an affidavit of the witness-inmate in which he stated that he had refused to testify because he was afraid to speak freely in the presence of the penitentiary personnel and that his testimony related to threats made by the deceased to the defendant. In reversing the conviction the Supreme Court stated that the trial judge seemed to have felt bound by what he termed "custom," and not to have realized that he had discretion to exclude the penitentiary personnel. It is quite likely, however, that even if the trial judge had clearly recognized his discretion in the matter the Supreme Court would have reversed on the ground that his action in refusing to remove the prison personnel had been an abuse of discretion, in view of the extreme importance of the intended testimony to the defendant's plea of self defense.

**REFERENCE BY DISTRICT ATTORNEY ON RETRIAL TO FORMER CONVICTION**

Some improper remarks of the district attorney constitute reversible error unless "cured" by the trial judge's prompt ad-


\textsuperscript{79} 231 La. 630, 92 So.2d 390 (1958).
monition to the jury that they are improper and are to be disregarded. Other improper remarks are so highly prejudicial that they are deemed to be "incurable," or reversible error per se. In State v. Clark the district attorney had referred, in his opening statement on retrial, to the defendant's conviction at the first trial. The trial judge overruled defense counsel's objection to the remark and refused to instruct the jury that the statement was improper and should be disregarded. In affirming the conviction the Supreme Court stated that "the defendant has failed to show us in what respect his rights have been violated or his cause prejudiced, and we can think of none." In essence, this decision holds that the district attorney's uncalled for reference to the former conviction is not sufficiently improper even to necessitate an admonition to disregard by the trial judge and is not to be treated as reversible error unless the defendant can show specifically in what manner he has been prejudiced by the remark. The court did concede, but without giving any real import to the concession, that it would be "better practice" for the trial judge in such cases to instruct the jury to disregard the remark of the district attorney. Reference to a former conviction would appear to involve a sufficient probability of prejudice to constitute a prima facie violation of the mandate of Article 515 of the Code of Criminal Procedure that a retrial is to be conducted "with as little prejudice to either party as if it had never been tried" and at least to call for a special admonition by the trial judge.

REMARKS OF THE TRIAL JUDGE

Article 384 of the Code of Criminal Procedure provides that "the judge shall not state or recapitulate the evidence, repeat the testimony of any witness, nor give any opinion as to what facts have been proved or refuted." Thus, any repetition of the testimony of a witness by the trial judge is error, even if it appears that the trial judge was merely explaining his ruling on the admissibility of evidence. Admitting that the remarks constitute a repetition of testimony in contravention of Article 384, a question still remains as to whether the error is sufficiently grave.
to entitle the defendant to a new trial. An examination of the cases discloses that the court will look to the facts and circumstances surrounding the erroneous repetition of testimony by the trial judge and decide whether the special state of facts warrants the granting of a new trial. In State v. Green, the trial judge overruled defendant's objection to certain testimony, remarking that "it seems to me like its (sic) definitely all part of res gestae, all together . . . he forced her in the car and forced her to drive off with him." Upon defendant's exception to these remarks the trial judge instructed the jury to disregard what he had said but refused to declare a mistrial. The Supreme Court set aside the conviction and remanded the case for a new trial, ruling that "if an inference can be drawn from the objectionable statement that it is an expression or implication of an opinion as to the guilt of the accused, the error cannot be cured by an instruction to the jurors that the remarks be disregarded." There is serious question as to the wisdom of a rule which, like Article 384, prohibits the trial judge from repeating or recapitulating the testimony and from expressing an opinion as to what has been established by the proof. Orfield has aptly stated that a rule which prohibits the trial judge from commenting upon the evidence "deprives the jury of the opinion of the only impartial expert present, and tends to debase trial by jury into a contest of skill between opposing counsel." The strong movement in the states since 1910 to return to the common law rule permitting the judge to comment upon the evidence indicates a general appreciation of this fact. Federal practice not only allows the trial judge to comment upon the evidence but also allows him to express his opinion on the merits of the case. In view of this development, it appears that a critical reappraisal of the Louisiana rule contained in Article 384 of the Code of Criminal Procedure is in order. Such a rule bespeaks a lack of confidence in the objectivity and competence of our trial judges.


85. Ibid. The Nicolosi opinion reviews the cases which have granted or denied a new trial depending upon the particular facts of each case.

86. 231 La. 1058, 93 So.2d 657 (1957).

87. Id. at 1064, 93 So.2d at 659.

88. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 457 (1947).

89. Id. at 458, and authorities cited.

The applicability of the doctrine of res judicata in criminal prosecutions is generally recognized throughout the United States. However, until the case of State v. Latil, there had apparently been no authoritative declaration of the Louisiana position on this question. In the Latil case, the defendant filed a "plea of prescription" to the bill of information charging him with unlawful possession of narcotics. Prescription was not negatived in the bill, and the bill showed on its face that it had been filed more than a year after the offense had allegedly occurred. The trial judge refused to allow the state to amend the bill to negative prescription and sustained the plea of prescription. The state took no exception to this ruling. Subsequently, another bill of information was filed which properly negatived prescription. The defendant then filed a motion to quash, based on the sustaining of the plea of prescription to the former bill. The trial judge upheld the motion and quashed the bill. The Supreme Court, on rehearing, affirmed the trial judge's action, holding that the sustaining of the plea of prescription was a ruling on the merits calling for the application of the doctrine of res judicata. This may be open to question. The only matter actually determined, when the original charge was quashed, was the fact that the information was prescribed on its face, since it was filed more than a year after the crime and did not negative prescription in any way. There had been no decision, on the

92. 231 La. 551, 92 So.2d 63 (1956).
93. In the case of Town of St. Martinville v. Dugas, 158 La. 262, 267, 103 So. 761, 763 (1925), it was said that "the doctrine of res judicata does not apply to criminal prosecutions." However, as the court in the Latil case observed, the statement was made without elaboration or citation of authority. Furthermore, the statement was clearly dictum for the accused in the Dugas case was being tried for a second and distinct offense rather than for the same offense.
94. Justice Hamiter, who authored the original opinion, argued in his dissent to the opinion on rehearing that under Article 288 of the Code of Criminal Procedure "defects in indictments can be urged before verdict only by demurrer or a motion to quash." (emphasis added), and therefore although the plea was styled a plea of prescription it was only a demurrer or a motion to quash. And, he continued, Article 15 provides that if an indictment is quashed, annulled, set aside, or nolle prossequi'd, then prescription begins to run against another bill.
95. The court could, however, have found support for its position in the case of State v. Shiro, 143 La. 842, 79 So. 426 (1918), in which the Supreme Court refused to deprive a defendant of the full benefit of his double jeopardy plea, despite the fact that the acquittal had resulted from trial errors in favor of the accused. Leche, J., concluded with this cryptic statement: "[A]ll judges are liable to err, and when they do so to the advantage of the accused our system of criminal procedure seldom offers the state an opportunity to have the error corrected." Id. at 843, 79 So. at 427.
merits, as to whether the offense was actually prescribed. However, the importance of the *Latil* decision lies in the fact that the Louisiana Supreme Court, in an extensive opinion which reviews the authorities on the subject, has adopted the almost universal rule that res judicata applies to criminal as well as to civil proceedings.

**JURISDICTION ON APPEAL — SUPREME COURT**

In misdemeanor cases the state cannot appeal from a trial judge's order quashing an information unless the judgment is based wholly on a ruling that the statute involved is unconstitutional and the record affirmatively discloses that basis. In *State v. Scallan* defendant was charged with a misdemeanor (using unsealed and false weighing or measuring device). The defense filed a motion to quash on the grounds that (1) the indictment did not set forth any crime known to the laws of this state and (2) the statute was unconstitutional. The trial court sustained the motion to quash without stating the basis for his ruling. The Supreme Court dismissed the appeal, following its prior ruling that "where the judgment appealed from may have been predicated, either upon the ground that the case presented was not within the law relied on, or upon the ground that such law is unconstitutional, it will not be assumed, for the purposes of the jurisdiction on appeal, that the latter was the ground adopted."

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96. 231 La. 471, 91 So.2d 761 (1956).