

# Louisiana Law Review

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Volume 6 | Number 3  
December 1945

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### Repository Citation

Cecil C. Cutrer, *Indictment Forms - A Technical Loophole for the Accused*, 6 La. L. Rev. (1945)  
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol6/iss3/10>

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INDICTMENT FORMS—A TECHNICAL LOOPHOLE  
FOR THE ACCUSED

The indictment was originally an informal accusation by the grand jury, taken down by the clerk of court from the lips of the foreman and recorded on the court rolls. In the time of Edward I, the grand jury was required by statute to make its presentments in writing, and the indictment soon acquired a set, formal structure.<sup>1</sup> Some of the early English indictments were so involved and formalistic that they were beyond the sphere of comprehension of laymen and were also confusing to those trained in the law.<sup>2</sup> In addition to their unnecessary prolixity, the common law forms of indictment became very stilted and the slightest deviation was held to constitute a fatal error. These numerous reversals may be explained by the fact that Blackstone lamented the existence in his time of one hundred and sixty capital offenses.<sup>3</sup> In the face of each over-severity of punishment one might well expect to find the judges searching for technicalities to save offenders from penalties which were outrageously excessive in their particular cases.<sup>4</sup> Unfortunately the precedents thus established applied to all cases and the law governing indictments became a maze of technicalities. The seriousness of the problem was evident as far back as the 17th century.<sup>5</sup> Sir Mathew Hale made the statement,

"In favour of life, great strictnesses have been in all times required in points of indictments and the truth is, that it is

1. I Stephen, *History of the Criminal Law of England* (1883) 273, 274.

2. An example of an early English indictment is the following: The Jurors for our Lady the Queen present that H. S. formerly of S. in the County of E., Tailor, and W. C. of S. in the County of E., aforesaid, Weaver on the first day of March in the fourth year of the reign of our Lady Elizabeth, of England, France and Ireland, Queen Defender of the Faith, at C. in the Parish of S. aforesaid in the County of E. aforesaid, with force and armes in and upon one T. B. in the Peace of God and of our Lady the Queen then and there did make an assault and the said H. W. with a certain salcastrun in English called a Welsh Hook of the value of twelve pence which he the said T. B. on the right arm near the right hand then and there feloniously struck, giving then and there to the said T. B. a mortal wound the depth of two inches and the length of five inches of which certain mortal wound the said T. then and there instantly died. And so the said H. W. and W. C. at S. aforesaid in the County of E. aforesaid in manner and form aforesaid, the said T. B. feloniously and of their malice aforesaid thought did kill and murder against the peace of our Lady, now Queen, her Crown and dignity. See *Riddell, The Sacco-Vanzetti Case from a Canadian Point* (1927) 13 A.B.A.J. 685.

3. 4 Blackstone, *Commentaries on the Laws of England*, 18.

4. See *Kavanaugh, Improvement of Administration of Criminal Justice by Exercise of Judicial Power* (1925) 11 A.B.A.J. 217; *Perkins, Absurdities in Criminal Procedure* (1926) 11 Iowa L. Rev. 297, 329-331.

5. 2 Hale, *Pleas to the Crown* (1680) 193.

grown to be a blemish and inconvenience in the law, and the administration thereof; more offenders escape by the over easy ear given to exceptions in indictments than by their own innocence, and many times gross murders, burglaries, robberies and other heinous and crying offenses, escape by these unseemingly niceties to the reproach of the law, to the shame of the government, and to the encouragement of villainy, and to the dishonor of God."

The Louisiana Criminal Code, in accord with modern criminal law legislation of other states, only provides the death penalty for four offenses—murder, aggravated kidnapping, aggravated rape, and treason.<sup>6</sup> The penalties for other offenses are graduated according to the seriousness of the conduct proscribed. Thus, it is no longer necessary to provide a technical device for reversing convictions of those who are obviously guilty. At the same time the importance of a fair trial and of safeguarding the innocent from wrongful conviction still remains. Following the lead of the American Law Institute which prepared a model Code of Criminal Procedure,<sup>7</sup> the legislatures of various states have attempted to correct the evil through the innovation of statutory short form indictments.<sup>8</sup> These statutes prescribe short and relatively simple forms of indictments from which have been eliminated the technicalities and artificialities that characterize early indictment forms.

In Louisiana, the indictment problem and its solution has followed the usual pattern of judicial and legislative development. Earlier Louisiana jurisprudence recognized the ultimate need for the simplified indictment, and the burden of drawing up a valid and sufficient indictment was greatly relieved by a consistent judicial holding that an indictment was sufficient if drawn in the language of the statute or language equivalent thereto.<sup>9</sup> If the charge was too general (though drawn in the terms of the statute) to place defendant on his guard, he might request a bill of particulars.<sup>10</sup>

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6. Arts. 30, 42, 44, 113, La. Crim. Code of 1942.

7. The American Law Institute compiled a tentative Code of Criminal Procedure in 1927. See *Drafting of a Code of Criminal Procedure* (1929) 15 A.B.A.J. 7.

8. Perkins, *Short Indictments and Informations* (1929) 15 A.B.A.J. 292.

9. *State v. Washington*, 48 La. Ann. 1361, 20 So. 911 (1896); *State v. Hopkins*, 115 La. 786, 40 So. 166 (1906); *State v. Menard*, 150 La. 324, 90 So. 665 (1922); *State v. Bullock*, 151 La. 593, 92 So. 127 (1922); *State v. McClellan*, 155 La. 37, 98 So. 748 (1924); *State v. Leonard*, 162 La. 357, 110 So. 557 (1926).

10. *New Orleans v. Chappuis*, 105 La. 179, 29 So. 721 (1901); *State v. Maloney*, 115 La. 498, 39 So. 539 (1905); *State v. Goodson*, 116 La. 388, 40 So. 771 (1906); *State v. Clark*, 124 La. 965, 50 So. 811 (1909).

Another step along the path of simplifying indictments and informations was taken when the 1928 Louisiana Legislature adopted a Code of Criminal Procedure. Article 235 of that code specifically authorized the use of the short form indictment for certain enumerated crimes.<sup>11</sup> It is only natural that defense lawyers, in their desperate struggle to prolong litigations and to set aside verdicts, have consistently attacked the constitutionality of short form indictments. The courts, however, have consistently held that the constitutional rights of the defendant<sup>12</sup> are fully protected by this procedure.<sup>13</sup> When a code of substantive criminal law was adopted in 1942, the basic crimes were regrouped and a new terminology was employed. In synchronizing the new Criminal Code and the Code of Criminal Procedure, the article setting out the short forms of indictments was correspondingly amended.<sup>14</sup>

In the recent case *State v. Fazzio*,<sup>15</sup> the district attorney attempted to charge burglary in the night time<sup>16</sup> in a bill of information, which alleged that "Defendants, between the hours of sunset and sunrise, did wilfully, feloniously enter the inhabited dwelling house of one Mrs. Elma Galarza, located at 1007 N. Rampart St. with the felonious intent to commit a theft therein, contrary to the form of the statute of the State of Louisiana in such case made and provided against the peace and dignity of the same." The Louisiana Supreme Court held the information insufficient, in that it failed to specify that defendant was "armed with a dangerous weapon when he entered the place, or that he armed himself with a dangerous weapon after entering the place, or that he committed battery upon some person while in the place or in entering or leaving the place."<sup>17</sup> The decision fully illustrates the advantage of using the simplified forms of indictment. The *Fazzio* information could have been drafted in accordance with Article 235 of the Code of Criminal Procedure and

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11. Art. 216, La. Code of Crim. Proc. of 1928: "The rules of pleading contained in this Code shall apply as much to affidavits charging crimes and to informations as to indictments, and whenever the word 'indictment' is used, unless it be the clear intent to restrict that word to the finding by a grand jury, it shall be taken to include affidavit and information."

12. La. Const. of 1921, Art. I, § 10: "In all criminal prosecutions the accused shall be informed of the nature and cause of the accusation against him . . . ."

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

14. See Symposium, The Work of the Louisiana Supreme Court for the 1942-1943 Term (1944) 5 LOUISIANA LAW REVIEW 512.

15. 23 So. (2d) 99 (La. 1945).

16. Art. 60, La. Crim. Code of 1942.

17. 23 So. (2d) 100 (La. 1945).

simply charged that, "Anthony Fazio committed burglary in the night time of the dwelling of Mrs. Elma Galarza." The technicality which set aside the verdict would have been eliminated, the information would have been shorter and simpler, and yet the constitutional rights of the defendant to be informed of the crime charged would have been fully protected. If the defendant were in need of any further information, he could secure the same through a bill of particulars.<sup>18</sup>

Although Article 235 cleared away many of the obstacles along the tortuous road of indictment procedures, the problem was not completely solved for the short forms were only available for a limited number of crimes. Thus, in the case of *State v. Morgan*,<sup>19</sup> the bill of information charged that defendants "did unlawfully disturb the peace" at a certain place, without stating the manner in which the offense was committed. The bill of information was held insufficient because it failed to charge specifically the commission of one or more of the separate and distinct acts enumerated in the article of the Criminal Code which defined the offense of disturbing the peace.<sup>20</sup> Mr. Justice Fournet, writing for the court, pointed out that where, as in the instant case, the statute enumerates several ways in which the offense may be committed, the indictment must state which one of the alternative criminal acts has been committed. Otherwise, the indictment is not couched in the words of the statute. Similar rulings are to be found in other cases,<sup>21</sup> where the statute under which the indictment was drawn specified several ways of committing the offense.

The even more recent decision in *State v. Varnado*<sup>22</sup> appears to have extended the doctrine laid down in previous cases. The bill of information charged the crime of gambling in that "the defendants did intentionally conduct and directly assist in the conducting as a business, of a game, contest, and contrivance whereby a person risked money and things of value in order to realize a profit, contrary to the form of the statute." The court quashed the bill of information on the ground that it did not give the accused sufficient information to enable them to prepare

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

19. 204 La. 499, 15 So. (2d) 866 (1943).

20. Art. 103, La. Code of Crim. Proc. of 1928. The *Morgan* case was decided on the authority of *State v. Verdin*, 192 La. 275, 187 So. 666 (1939).

21. *State v. Hebert*, 205 La. 110, 17 So. (2d) 3 (1944). See Symposium, *The Work of the Louisiana Supreme Court for the 1942-1943 Term* (1944) 5 LOUISIANA LAW REVIEW 565.

22. 23 So. (2d) 106 (La. 1945).

their defense, and was not sufficiently definite to serve as a bar to future prosecutions.<sup>23</sup> While acknowledging the modern and universally accepted rule that it is sufficient to charge an offense in the language of the statute or by words equivalent thereto, a rule which is reiterated in Article 227 of the Louisiana Code of Criminal Procedure, Mr. Justice Fournet cited and relied upon *American Jurisprudence* for the proposition that "the general rule is without application where the statutory words do not in themselves fully, directly, and expressly, without uncertainty or ambiguity, set forth all the elements and ingredients necessary to constitute the offense intended to be punished. . . . An information charging an offense in the words of a statute which defines an offense generally is insufficient where it alleges the offense in the language of the statute, but does not state the specific acts on which the charge is based, and is not sufficiently definite to be of any value as a bar to further prosecution."<sup>24</sup>

The Gambling Article<sup>25</sup> of the Louisiana Criminal Code supercedes a number of Louisiana statutes which had proscribed various specific forms of gambling, and those acts were accordingly repealed.<sup>26</sup> The net effect of this new act, then, has been to take the offense of gambling out of the various categories created by the pre-existing statutes and place it under one comprehensive statute which makes it an offense to conduct gambling "as a business." The essential elements of the offense are that the defendant must conduct some "game, contest, lottery, or contrivance whereby a person risks a loss of anything of value in order to realize a profit," and that it must be conducted "as a business." This last element is all-important in distinguishing criminal from non-criminal gambling activity. True enough, there are an infinite number of ways to conduct gambling *as a business*, but it does not follow that gambling should be classified as a "general" offense, as that term is used by Mr. Justice Fournet. Such crimes as murder, manslaughter, theft, or aggravated rape, all of which may be committed in a number of different ways, are not treated as requiring a detailed specification of the way the crime was committed. There appears to be no sound reason why the offense of gambling should not be similarly treated.

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23. Art. 90, La. Crim. Code of 1942; La. Const. of 1921, Art. I, §§ 9, 10.

24. *State v. Varnado*, 23 So. (2d) 106, 124 (La. 1945), quoting from 27 Am. Jur. 660, 662, §§ 101, 103.

25. Art. 90, La. Crim. Code of 1942.

26. La. Act 43 of 1942, § 2.

Mr. Justice Fournet's reasoning that the indictment was not sufficiently definite to serve as a bar to further prosecutions for the same offense, loses sight of the normal way in which the plea of "former jeopardy" operates. If the defendant were prosecuted under an indictment or information which generally charged the offense in the language of the statute, this would include any and all acts of conducting gambling "as a business" at that particular time, and would therefore serve as a bar to any further prosecution for such criminal acts. Instead of prejudicing the defendant this type of indictment would increase the scope of his plea of former jeopardy.

In the *Varnado* case, as in other similar situations, the defendant was fully apprised of the nature of the crime charged. If he needed further particulars or data he might secure the same through a motion for a bill of particulars which would set forth the precise type of criminal gambling with which he is charged.<sup>27</sup> The crime of gambling was fully defined by Article 90 of the Criminal Code, and a charge in the language of the statute was fully and specifically authorized by Article 227 of the Code of Criminal Procedure.

The majority opinion concluded with the statement "We agree that the statute itself is not vague in its definition of gambling. We know of no inhibition to the Legislature's authority to pass such a general statute so long as the offense sought to be denounced is clearly defined so that the one accused thereunder cannot complain if the particular acts with which he is charged fall within this definition." Chief Justice O'Niell, in his dissenting opinion,<sup>28</sup> stated that he could not reconcile this concluding statement with the actual holding in the case. He pointed out that the bill of information complied with the requirements of Article 227 of the Code of Criminal Procedure, since it was drawn in the language of the statute creating the offense. He also indicated that under the authorities the right of a defendant to move for a bill of particulars is not confined to indictments

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27. Arts. 252, 253, 288, La. Code of Crim. Proc. of 1928.

28. Chief Justice O'Niell, in his dissenting opinion, pointed out that in the decisions on this subject, since the adoption of the Code of Criminal Procedure, the court has recognized, consistently, that the right of an accused to demand a bill of particulars if he really wants one was not abolished by Article 288, in cases not listed in Article 235. The decisions recognized that the substitution of the word "data" for the word "particulars" or for the term "bill of particulars," was merely an instance of calling a rose by another name. Thus, the defendants were at liberty to specify and request whatever additional information they wanted before pleading to the bill of information. 23 So. (2d) 129, 130 (La. 1945).

drawn under Article 235, and that where the trial judge abuses his discretion in refusing the request, such a refusal would constitute reversible error.<sup>29</sup> The defendants, therefore, were not denied their constitutional right to be informed of the nature and cause of the accusation against them.

The rules governing the forms of indictments, when the *Morgan*, *Fazzio* and *Varnado* indictments were filed, may be summarized as follows: If the offense is one of those included in Article 235, the short form is available, and the indictment will be sufficient if this form is followed. Other offenses may be charged pursuant to Article 227 by following the language of the statute or words that unequivocally convey its meaning. Where the statute sets out several distinct ways to commit the offense then the indictment must state which of these acts was committed. If the defendant desires further information, he may make a motion for a bill of particulars. The sufficiency of indictments charged in the words of the statute was further narrowed by the ruling in the *Varnado* case in which the court held that if the statute is a "general one," the indictment must specify the manner in which the offense was committed. The unfortunate uncertainty of that decision lies in the fact that the criterion of a "general" statute is far from definite. Also, the application of such a requirement would defeat the very purpose of the broad definition in the 1942 Criminal Code—namely, to eliminate the necessity for making fine distinction between the various forms of a general type of criminal conduct.

Upon a recommendation of the Criminal Law Section of the Louisiana State Bar Association,<sup>30</sup> the 1944 legislature again amended Article 235 and extended the scope of the short form indictment to cover all offenses set out in the Criminal Code.<sup>31</sup> This statute provides that, in addition to the short forms already specifically set out in Article 235 of the Code of Criminal Procedure, any crime included in the 1942 Criminal Code may be charged by "using the name and article number of the offense committed." Any additional words would be treated as mere surplusage and would not vitiate the bill of information.<sup>32</sup> The amended Article 235 will undoubtedly help materially in solving

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29. *State v. Mines*, 137 La. 489, 68 So. 837, 839 (1915).

30. See Bennett, *Louisiana Legislation of 1944* (1944) 6 *LOUISIANA LAW REVIEW* 1, 16-18.

31. La. Act 223 of 1944.

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

the indictment problems which are illustrated by the *Morgan* and *Varnado* cases, and should enable Louisiana courts to give full effect to the Criminal Code's elimination of the technical common law distinctions which have been Louisiana's heritage since the Crimes Act of 1805.<sup>33</sup>

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33. Crimes Act of 1805 (Laws of the Territory of Orleans of 1805).