Criminal Law and Procedure

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Aggravated Battery—Dangerous Weapon

The felony of aggravated battery is distinguished from simple battery, a misdemeanor, by the requirement that it must be committed with "a dangerous weapon." "A dangerous weapon" is defined in the Criminal Code so as to include any "substance or instrumentality, which, in the manner used, is calculated or likely to produce death or great bodily harm." In applying this test, which is a codification of prior jurisprudence, the jury should consider "not only the character of such weapon, but by whom, upon whom, and in what manner it was used." Thus, in State v. Reynolds the supreme court held that a beer bottle, used in a manner likely to produce death or great bodily harm, constitutes a dangerous weapon authorizing a conviction of aggravated battery.

The problem presented in State v. Calvin was not so simple. In that case the trial judge had instructed the jury "that a person's bare fist could be classed and used as a dangerous weapon, that a person's teeth could be classed as a dangerous weapon." The exception to this instruction was presented too late for consideration upon appeal. The court's opinion, however, includes the following significant dictum statement:

"It is true that portions of the human anatomy may be dangerous and the bare hands of a merciless assailant may quite readily 'produce death or great bodily harm,' particularly if the victim be young or weak, but the fact remains that there must be proof of the use of some inanimate instrumentality before a defendant can be held guilty of assault 'with a dangerous weapon.'" (Italics supplied.)

This dictum holding was entirely appropriate in connection with the facts of the Calvin case, since the defendant's battery

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2. Id. at Art. 35.
3. Id. at Art. 2.
5. 209 La. 455, 24 So. (2d) 818 (1945).
7. 209 La. 257, 265, 24 So. (2d) 467, 469.
8. 209 La. 257, 266, 24 So. (2d) 467, 469.
THE WORK OF THE SUPREME COURT

consisted of striking the victim with the fist and biting the victim's arm. Neither means, under the circumstances, was reasonably calculated to cause great bodily harm. However, a general application of the requirement that “some inanimate instrumentality” must be employed could achieve some rather unfortunate practical results. A heavyweight boxer who struck an old man or a small child in the head with the full impact of his bare first would only be guilty of a simple battery. A defendant who gouged out his victim's eye with the finger, or tore off his victim's ear would likewise be guilty of a simple battery. Similarly, the offender who set a pack of vicious dogs upon another would not be using a dangerous weapon because the dogs could not be classed as “inanimate.”

The definition of “dangerous weapon” in Article 2 purported to cover any case where the instrumentality of injury was used in such a manner as to be calculated to cause serious bodily harm. The potential danger of the offenders' means of attack, rather than an artificial distinction between animate and inanimate objects, was contemplated as the line of demarcation between the aggravated and simple degrees of the offense. It is hoped that, when the more aggravated cases are presented, the dictum statement in the Calvin opinion will be restricted to factual situations similar to that out of which it arose.

Criminal Damage to Property—Killing Unregistered Dogs

Louisiana Act 239 of 1918 provided for the registration of dogs by the sheriffs of the respective parishes and for the issuance of tags by the Secretary of State to be delivered by the sheriff to the owner who paid the stipulated fee. This statute expressly stated that anyone might kill a vicious dog or an unregistered dog without any civil or criminal liability attaching. The 1918 registration statute had been universally disregarded and the Secretary of State's office had not been called upon to furnish any sheriff with tags for many years. Then, in State v. Moresi, it suddenly arose from dust-covered statute books to haunt the prosecution. In that case the defendant was charged with simple criminal damage to property, in that he had in-

9. If a specific intent to kill could be shown, the offender would, of course, be guilty of attempted murder pursuant to Articles 27 and 30 of the Criminal Code.
11. La. Act 239 of 1918, § 3 [Dart's Stats. (1939) § 361].
tentionally killed a valuable pointer belonging to another. The indictment was quashed for failure to allege that the dog was registered and tagged as required by Act 239 of 1918. The court's decision, though somewhat of a surprise to the average dog owner or lawyer, was entirely correct in view of the express language of the statute, for it is well settled that statutes do not become prescribed by non-use or obsolescence. In an effort to square the supreme court's holding with the sentiments of a dog-loving public, Justice Kennon declared:

"While the above section of the statute, which permits the killing of untagged dogs, may appear to be harsh on casual reading, particularly to those who love their dogs as companions at home, on the hunt, or as pets for their children, the fact remains that even the gentlest of these fine animals may become infected with rabies and become extremely dangerous."¹⁴

This reasoning falls somewhat short of its intended mark, in view of the fact that the 1918 statute does not require rabies inoculation as a condition of securing the license tag which is necessary to protect the dog, and is merely a revenue producing measure. It may be suggested that the public safety might better be served by a state wide rabies inoculation statute. Such a statute, proposed by the Criminal Law Section of the State Bar Association in 1946, did not even survive the committee hearing in the House in which it was introduced.

**Burglary in the Nighttime**

Louisiana has consistently preserved the common law distinction between burglary in the daytime and burglary in the nighttime, with the latter crime being a more serious offense. The difficulty of determining when the burglary is committed "at night" is nicely illustrated by the case of *State v. McDonald¹⁶* where the defendant had been convicted of breaking and entering in the nighttime with the intent to steal.¹⁶ The sole witness testified that the defendant had entered the burglarized apartment "at night," "between 6 and 7," and when it was "just getting dark." Official records showed that the sun set at shortly

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¹⁴ 209 La. 180, 184, 24 So. (2d) 370, 371.
¹⁶ The offense had been committed prior to the effective date of the 1942 Criminal Code; and prosecution was under Section 851 of the Revised Statutes, as amended by La. Act 71 of 1926.
after 8 p.m. on the day of the burglary. Upon this not-too-consistent testimony, the supreme court felt that it must uphold the jury's conclusion that the crime had been committed at night. Chief Justice O'Niell and Justice Higgins filed vigorous dissents, however, urging that the testimony clearly showed that the burglary had been committed in the daytime.

In an effort to achieve a more definite distinction between nighttime and daytime than the flexible Eighteenth Century criterion of "daylight enough to discern a man's countenance thereby," the Louisiana Criminal Code defined "nighttime" as the period "between sunset and sunrise." This formula provided a degree of certainty, since one can definitely ascertain, by use of the almanac, the exact time when the sun rises or sets on a given day. While this new statutory definition will achieve a measure of certainty in some instances, it would have been of little assistance in the McDonald case. There, the available eye witnesses could not testify as to the exact time of the burglary. This meant that the court and jury must necessarily revert to former principles and criteria in an effort to determine whether or not the degree of darkness was such as to indicate that the sun had set when the crime was committed.

Criminal Neglect of Family

A very realistic distinction between the necessary allegations for a valid indictment, and the defenses which may properly be raised, was made by the supreme court in State v. Clark. In that case it was held that an information for criminal neglect of family, which followed the language of the Criminal Code in charging the defendant with desertion and intentional non-support of his wife who was in destitute and necessitous circumstances, was sufficient and that it was not necessary to further allege that the desertion was "without just cause." Justice Fournet pointed out that the omission of this phrase, when the original non-support statute was supplanted by Articles 74 and 75 of the Criminal Code, indicated a legislative intent that the state was no longer required to allege and make an affirmative showing on the issue. This does not mean, however, that a defendant is to be held criminally responsible if he leaves his wife with just cause and without knowledge of her necessitous circum-

18. Under the 1942 Criminal Code, the offense is now covered by Article 60 (burglary in the nighttime); or Article 61 (burglary in the daytime).
19. 208 La. 1047, 24 So. (2d) 72 (1945).
20. La. Act 74 of 1933.
stances. Thus, the court held that a refusal of the trial judge to admit defendant’s evidence on these issues was reversible error. Speaking for a unanimous court, Justice Fournet declared,

“... it is elementary that there can be no desertion if, under our law, the defendant had the right to and was justified in leaving the matrimonial domicile, and that there can never be an intentional nonsupport of a wife or child if there is no legal duty or obligation on the part of the husband and father to support them. Furthermore, there can be no intentional nonsupport of a person to whom a duty or obligation to support is owed unless the party upon whom such duty or obligation rests has knowledge of the dire circumstances of that person.”

A query may be raised as to the practical effect of this decision. Does it mean that the burden of proof as to “just cause” is shifted to the defendant as in the case of other affirmative defenses such as reasonable mistake of fact, or does it simply mean that a specific allegation that the desertion and non-support was “without just cause” is not essential and that the issue is necessarily raised when desertion is charged?

Perjury by Counselling False Testimony—Confidential Communications

In State v. Johns an attorney was found guilty of perjury on the ground that he had procured and induced his client to falsely testify in a divorce suit. The defendant had contended that the indictment was invalid because it was founded upon a privileged communication between attorney and client. In rejecting this ingenious argument, the supreme court pointed out that the prohibition against an attorney's disclosing his communications with a client was intended as a protection and shield for the client, and does not protect a lawyer against prosecution for counselling and procuring his client to commit a crime. Even as to the client, the privileged nature of the communication does not extend to the formulation of plans for future criminal action.

21. 208 La. 1047, 1053, 24 So. (2d) 72, 73 (1945).
22. 209 La. 244, 24 So. (2d) 462 (1945).
23. The prosecution was under Art. 123 (perjury) of the Criminal Code, and the attorney's criminal liability as a principal, was expressly authorized by Art. 24 which provides that those who counsel or procure a crime are guilty as principals.
Prescription

An indictment for a prescribable offense, which shows on its face that more than a year has passed since the commission of the crime charged, is fatally defective unless it contains an allegation negativing prescription. This may be done by alleging that a previous indictment was found within the prescriptive period and a year has not elapsed since the date on which such indictment was set aside. In *State v. Jones* an information, filed in October 1936, charged burglary in July 1931. It asserted that an indictment for the crime had been filed in October 1931; but failed to disclose what had happened to the 1931 indictment. The supreme court held that this information did not clearly negative the running of prescription, since, for all the information disclosed, the 1931 charge could have been quashed, a nolle prosequi entered, or disposed of by trial, at a time prior to the year immediately preceding the filing of the new charge.

Justices Fournet and Hawthorne filed vigorous and well-reasoned dissenting opinions. Both dissenting opinions were based upon two grounds, either of which provides a sound justification for the position taken. Their first argument goes to the sufficiency of the language employed in the information to negative the running of the prescriptive period. Justice Hawthorne pointed out that, on the face of the information, the prescriptive period had not run. The October 1931 indictment had been filed within one year after the crime and was effective for six years from that date. While the burden of alleging and proving the filing of such an indictment is on the state, the burden of showing that the indictment has been quashed or a nolle prosequi entered rests on the defendant; and without a showing of more, it would appear that the running of the prescriptive period had been effectively negatived. The majority opinion, however, establishes the present Louisiana law on this subject and its warn-

27. 209 La. 394, 24 So. (2d) 627 (1945).
28. By Act 147 of 1942, the prescriptive period for the prosecution of a felony case, running from the filing of the indictment, has been reduced to three years. This statute did not apply to the case at bar, however.
ing should not be disregarded. Thus, where an intervening indictment is alleged as a means of interrupting prescription, the information must go one step further and specifically point out that such indictment had not been quashed or dismissed until within one year immediately preceding the present information.

The second argument of the dissenting justices, stressed in both Justice Fournet's and Justice Hawthorne's opinions, appears virtually unanswerable. In the case at bar, the defendant had been convicted, adjudged a fourth offender, and sentenced to a life term in the state penitentiary. No appeal was taken. Now, more than eight years later and while he was serving as an inmate of the state penitentiary, defense counsel filed a motion to quash the information, set aside the verdict and annul the sentence, on the ground that the crime was prescribed on the face of the indictment. In holding that the defendant's motion came too late, the dissenting judges rely on the express provisions in Articles 284 and 287 of the Code of Criminal Procedure to the effect that every objection to an indictment must be filed, tried and disposed of before trial on the merits; and upon the express stipulation in Article 542 that a motion for an appeal in a criminal case must be made "within 10 judicial days after the rendition of the judgment complained of...." A careful analysis of the jurisprudence and of the pertinent articles of the Code of Criminal Procedure clearly shows that the latest points at which a plea of prescription may be raised are on a motion for a new trial or by a motion in arrest of judgment, both of which motions must be filed and disposed of before sentence.

An interesting, but comparatively simple, problem concerning the interruption of the running of the one-year prescriptive period was raised in State v. Stanton. In that case the information sought to toll the running of the prescriptive period by an allegation that immediately following the offense the defendant had "absconded" from the state and was "a fugitive from justice." The defendant took issue by filing a plea of prescription prior to the trial. In upholding the trial judge's ruling that

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30. State v. Foley, 113 La. 206, 36 So. 940 (1904).
33. 209 La. 457, 24 So. (2d) 19 (1946).
34. The last paragraph in Article 8 of the Code of Criminal Procedure provides, "Nothing in this article shall apply or extend to an accused person who has absconded or who is a fugitive from justice.
35. The accused may insist that the judge decide the question of prescription in limine, State v. Hayes, 162 La. 917, 111 So. 327 (1927), or he may
the prescriptive period had not been interrupted by defendant's continued absence from the state, the supreme court emphasized a distinction between leaving the state for legitimate purposes and fleeing or hiding from the prosecuting authorities of the state of one's transgression. In the case at bar, the court found that the travels of the defendant and his wife in the states of California, Texas and Pennsylvania had been for the purpose of visiting his step-son, and in the course of a normal effort to secure a good job. No effort had been made by the defendant to change his name or to conceal his identity. Later, when he sought to enlist in the United States Navy, and the recruiting officer informed him of the charge against him, defendant contacted the appropriate Louisiana authorities. When it appeared that they did not intend to press the charges, the defendant went on to serve with the United States Navy for a period of approximately two years. Upon receiving his honorable discharge, the defendant registered with a Los Angeles draft board and again made no effort to conceal his identity or whereabouts. After reciting the above facts, the supreme court concluded that the defendant had not "absconded" or become a "fugitive from justice," and that the trial judge had properly held that the crime of forgery with which he was charged had been prescribed. In so doing, the court relied on the analogous case of *State v. Hayes* where it was held that mere flight from the wrath of private citizens did not interrupt prescription. Justice Rogers quotes from another earlier Louisiana decision when he succinctly states, "mere absence from the state is not sufficient. Such absence must be for the purpose of avoiding prosecution, and not for some legitimate purpose. In other words, to put the matter in common parlance, the accused must be 'hiding' from the criminal authorities of this state . . . ." Applying the above test to the facts of the Stanton case, it was obvious that the accused had not been a fugitive from justice and that there was no reason to toll the running of the prescriptive period.

In *State v. Lester* a 1945 information, charging a burglary committed in December of 1939, negatived the running of the prescriptive period by alleging that an indictment for the crime had been found in January of 1940. A nolle prosequi of this in-
dictment had been entered on the same day that the new information was filed. Defense counsel argued that the 1940 indictment, being fatally defective in stating that the burglary was of a "storehouse," rather than of a "store" as specified in the statute, did not interrupt prescription. In overruling this contention, the supreme court held that according to existing jurisprudence even a void indictment will, until it is set aside, or a nolle prosequi is entered, interrupt the running of the prescriptive period. It is interesting to note, by way of comparison, that an indictment filed in a parish without jurisdiction over the offense does not interrupt the running of the prescriptive period.

Short Form Indictments

One of the most important procedural reforms effected by the 1928 Code of Criminal Procedure was the provision in Article 235 for the use of short form indictments in lieu of the cumbersome and technical common law forms which had become Louisiana's heritage pursuant to Section 33 of the Crimes Act of 1805. Under the short form indictment, the accused was briefly but clearly apprised of the crime with which he was charged. If additional details were necessary in order that he might prepare a defense, these might be secured through a bill of particulars. The short forms provided by Article 235 did not entirely solve the problem, for there were many crimes for which a short form was not provided. In charging these crimes, the prosecuting authorities were still beset by the technical difficulties of the common law indictment forms. This problem was particularly acute in cases where the information was drawn under a criminal statute or an article of the Criminal Code which enumerated several ways of committing the offense. Thus, it was held insufficient to charge that the defendants "did unlawfully disturb the peace" without stating the particular manner in which the offense was committed. This rule was extended in State v. Varnado to an information for gambling, a crime defined in general terms rather than by an enumeration of the various ways

41. State v. Smith, 200 La. 10, 7 So. (2d) 368 (1942).
42. For discussions of the history, development and constitutionality of the short form indictment, see Comments (1944) 6 LOUISIANA LAW REVIEW 78 and (1945) 6 LOUISIANA LAW REVIEW 461.
44. State v. Morgan, 204 La. 499, 15 So. (2d) 866 (1943); Accord, under former criminal statute; State v. Verdin, 192 La. 275, 187 So. 666 (1939).
45. 208 La. 319, 23 So. (2d) 106 (1945).
in which the offense might be committed. In that case, the bill of information followed the generally accepted procedure authorized by Article 227 of the Code of Criminal Procedure and charged the offense by tracing the language of the gambling article of the Criminal Code. In holding the information insufficient, Justice Fournet declared that the general rule was inapplicable to a crime, like gambling, which might be committed in a number of ways. Not only did this decision create uncertainty as to the scope and applicability of Article 227, but it also raised a procedural barrier to an effectuation of the purpose of Article 90 of the Criminal Code. Article 90 had sought to eliminate the artificial distinctions between the various forms of gambling and to provide a broad general definition of the crime, with the phrase “as a business” distinguishing criminal from non-criminal types of gambling.

In an effort to cure this deficiency, the Louisiana legislature, in 1944, amended and extended the provisions of Article 235 so as to include all offenses set out in the Criminal Code, declaring that “in all cases of crimes included in the Criminal Code but not covered by the short forms hereinbefore set forth, it shall be sufficient to charge the defendant by using the name and article number of the offenses committed.” Pursuant to this provision, the bill of information in State v. Davis had charged that the defendant “did commit the crime of gambling as defined by Article 90 of the Louisiana Criminal Code.” A motion for a bill of particulars had been granted and the particulars furnished. The motion to quash the indictment was based upon the alleged unconstitutionality of the short form drawn pursuant to the 1944 amendment of Article 235. Defense counsel argued that gambling was a crime which might be committed in a number of ways and that the indictment did not inform the accused of the exact manner in which he was charged with transgressing the law. In overruling this argument, Mr. Justice Hamiter, speaking for the majority of the court, pointed out that the net effect of the gambling article is to take the offense of gambling as created by many pre-existing statutes and to place it under one comprehensive statute, making it an offense to conduct any form of gambling “as a business.” The fact that the crime may be committed in a

47. For complete discussion and criticism of the Varnado case, see Comment (1945) 6 LOUISIANA LAW REVIEW 461, 464.
49. 208 LA. 954, 23 SO. (2d) 801 (1945), noted in (1946) 6 LOUISIANA LAW REVIEW 716.
number of ways is not a sound basis for holding that the offense is not sufficiently specific to be charged in a short form indictment. The same thing might be equally argued as to such crimes as murder and rape, both of which may be committed in a number of different ways, but have been universally treated as properly chargeable by means of the short form indictment. In that regard, the even more recent case of State v. Chanet is significant.\(^\text{50}\) In this case the supreme court unanimously held that the crime of aggravated rape might be charged pursuant to the short form provided for in Article 235. Defense counsel's argument that aggravated rape might be committed in a number of ways did not particularly perturb the court, and Justice Ponder pointed out that the defendant could secure the full details as to the manner or means by which the crime was alleged to have been committed through a bill of particulars. Justice Ponder's opinion in the Chanet case leaves little doubt as to the sufficiency of the short form which was followed. Similarly, short form indictments were upheld for attempted murder in State v. Frazier\(^\text{51}\) and for simple battery in State v. Piggolotto.\(^\text{52}\)

In the Davis case, Justice Hamiter, speaking for the majority, exposed the opinion's reasoning to attack by the dissenting justices when he declared that if the original information were deficient, such deficiency was cured by the information furnished by the district attorney in his bill of particulars. As the late Justice Rogers declared in the case of State v. Bienvenu,\(^\text{53}\) "A bill of particulars can not change the offense charged or in any way aid an indictment or information fundamentally bad." A careful reading of Justice Hamiter's majority opinion, however, indicates a very definite holding that the short forms authorized by the 1944 amendment to Article 235 are, by themselves, adequate to charge a crime. The bill of particulars, which is not a part of the indictment, serves to help afford the accused the full measure of protection guaranteed by the Constitution. The net result of the short form indictment, whether it is pursuant to the original Article 235 as in the Chanet case, or in conformity with the amended Article 235 as in the Davis case, is to transfer the detailed allegations in the common law indictment forms to the bill of particulars, leaving for the indictment the single

\(^{50}\) 209 La. 410, 24 So. (2d) 670 (1946).

\(^{51}\) 209 La. 373, 24 So. (2d) 620 (1946).

\(^{52}\) 209 La. 644, 25 So. (2d) 292 (1946). The indictment was drawn in the exact language provided for in Article 235, and defendant's contention that it omitted the qualifying word "simple" was properly overruled.

\(^{53}\) 207 La. 859, 865, 22 So. (2d) 196, 198 (1945).
function of charging the crime. In either case, the accused must look to the appropriate article of the Criminal Code for the definition of the crime and he must look to the bill of particulars for a detailed account of the manner and type of transgression with which he is charged. It is sincerely hoped that the supreme court will, in its future decisions, follow the majority holding in the *Davis* case, in order that Louisiana's criminal procedure may realize the full beneficial effect of the short form indictment.

The case of *State v. Fazio* illustrates the technicalities and disadvantages of the long indictment form. In that case, the district attorney had attempted to charge burglary in the nighttime, alleging that "Defendants, 'between the hours of sunset and sunrise, did wilfully, feloniously and unlawfully enter the inhabited dwelling house of one Mrs. Elma Galarza, located at 1007 North Rampart Street, 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.'" This information was held insufficient in that it had failed to include any one of the alternative aggravating elements which distinguish the aggravated forms of burglary from simple burglary, that is, that the defendant was armed with a dangerous weapon or that he had committed a battery while in or leaving the building. A much simpler information, drafted in accordance with Article 235 and providing that "A.B. committed burglary in the nighttime of the dwelling of C.D." would have been entirely sufficient. If the short form were followed, the defendant might secure, through a bill of particulars, detailed information as to the nature and manner of the aggravating circumstances of the burglary.

Where the short form indictment is used, care must be exercised to make sure that the requisites of that form are fully complied with. In *State v. Reynolds* an information for aggravated battery, which failed to name the person upon whom the battery was committed, was held fatally defective.

54. 208 La. 296, 23 So. (2d) 99 (1945).
56. 208 La. 296, 298, 23 So.(2d) 97, 99 (1945).
57. 209 La. 455, 24 So. (2d) 818 (1945).
Defendant's Right to Compulsory Process for Obtaining Witnesses

It is expressly provided, both in the Louisiana Constitution and in the Code of Criminal Procedure, that the accused shall have the benefit of compulsory process for obtaining witnesses to testify in his favor. In State v. Bickham the defendant had been found guilty and sentenced on two affidavits of cruelty to animals. The convictions were set aside and the cases remanded for a new trial on the principal ground that the accused had been deprived of his right of compulsory process for securing the attendance of three material witnesses. The sheriff's return merely stated that, after diligent search and inquiry, he had received information from two individuals named in the return that the witness was not at home, and had then simply concluded that he was unable to find her. Not only did the sheriff's return fail to show the date upon which the subpoena was returned by his office and the date of the attempted service; but it also failed to show that, after being informed that the witness was not at home, any further efforts had been made to learn when she would return or where she could be found. In holding that, under the circumstances, the accused had been denied the right to compulsory service, the supreme court stressed the fact that this right "is not to be trifled with," and that the sheriff's return, where a witness could not be found, must affirmatively show the steps which had been taken and the inquiries which had been made to find the prisoner's witness. The court relied upon the case of State v. Boitreaux and reaffirmed the declaration therein that "it is not for them to pronounce that the witnesses can not be found, they must state every fact which, in their opinion, justifies their belief. This done, and the return presented, the judge then decides whether there has been, on the part of that officer, that diligent search without which the prisoner might be deprived of a constitutional privilege and his life and liberty arbitrarily imperiled." "

Continuance

A request or formal motion for a continuance, in order to give counsel additional time to prepare for the trial, or to secure the presence of a witness, is addressed to "the sound discretion of the

61. 208 La. 1026, 24 So. (2d) 65 (1945).
62. 31 La. Ann. 188 (1879).
63. 208 La. 1026, 1035, 24 So. (2d) 65, 68 (1945).
trial judge,” and only an “arbitrary or unreasonable abuse of such discretion may be reviewed . . . on appeal.” In State v. Green defense counsel, who had had a month to prepare for the trial of a simple burglary case, moved for a continuance. The motion simply stated that they had been engaged in the trial of “two cases in St. Helena Parish during the past week.” In holding that the trial court’s refusal to grant a continuance was a proper exercise of judicial discretion, the supreme court pointed out that there had been no showing of special or emergency circumstances and that the mere pendency of other trials in which counsel were engaged did not, per se, entitle the defendant to a continuance. In State v. McCart the trial judge was held to have properly exercised his discretion in overruling defendant’s motion for a continuance predicated upon the absence of a witness (his brother) in the armed services. The district attorney had admitted that the absent witness would testify to the facts outlined in the motion, that is, that the victim had threatened “to get even” with defendant. Article 325 of the Code of Criminal Procedure expressly provides that the other party, by admitting the alleged testimony of the absent witness, may demand an immediate trial. Also, the fact that three other witnesses testified to practically the same thing showed that the absent witness’s testimony was not essential to defendant’s case.

Jurors—Challenge for Cause

One of the special causes for which a juror may be challenged is “that he is not impartial, the cause of his bias being immaterial.” In State v. Frazier the defendant had participated in a robbery and had later attempted to murder his partner in crime. After defendant’s conviction of robbery, he was placed on trial for attempted murder. Defense counsel objected to his going to trial, contending that the members of the jury venire were “automatically and unintentionally” prejudiced by having been in and out of the court room and heard much of the evidence against the defendant in the robbery case. On voir dire examination, however, the prospective jurors had testified that they would decide the attempted murder case on the law and evidence presented and that the previous trial would not influ-

65. 210 La. 157, 26 So. (2d) 487 (1946).
66. 210 La. 278, 26 So. (2d) 745 (1946).
69. 209 La. 373, 24 So. (2d) 620 (1946).
ence their verdict. In upholding the trial judge's ruling that the veniremen were not automatically disqualified, Justice Fournet pointed out that Article 351 of the Code of Criminal Procedure expressly provides that a juror is not disqualified by an opinion as to guilt or innocence "which is not fixed, or has not been deliberately formed, or that would yield to evidence, or that could be changed." It is only where the prospective juror has a fixed opinion which would influence his verdict that he may be challenged for cause. Considerable discretion is vested in the trial judge, in such cases, in determining whether a previous knowledge or acquaintance with the case shall disqualify a juror, and whether the juror's positive testimony that he will decide the case entirely upon the evidence presented at the trial is sufficient to bring him within the proviso of Article 351.70

A similarly strict, but practical, interpretation of the right to challenge for cause because of relationship, friendship or enmity between a prospective juror and the defendant or the person injured was adopted by the supreme court in State v. Atwood,71 a murder case. In that case a prospective juror had testified on his voir dire that he was acquainted with both the deceased and the defendant and was also acquainted with some members of the deceased's family. However, he further testified that he was not prejudiced against the accused and that his various acquaintanceships would not influence his verdict in any way. Under these circumstances, the court held that there was no merit to defense counsel's challenge for cause.

**District Attorneys—Authority of Successor**

Upon the resignation of a district attorney it becomes the function of his successor in office, or an interim prosecutor representing the attorney general's office,72 to continue with and complete the prosecution of pending cases. In State v. Hardy,73 the district attorney resigned during a recess of the case and his successor was immediately appointed by the governor. Before the court reconvened for the purpose of resuming the trial, the newly selected district attorney appointed as his assistants the same attorneys who had been trying the case under the former

70. 209 La. 373, 377, 24 So. (2d) 620, 621, citing a number of Louisiana cases, including State v. Wren, 121 La. 55, 46 So. 99 (1908) where the court held that the presence of the jurors at a previous robbery trial did not necessarily disqualify them from serving in a later trial where another robbery was charged.

71. 27 So. (2d) 324 (La. 1946).


73. 209 La. 125, 24 So. (2d) 286 (1945).
district attorney. The oath of office was again administered to the assistant district attorneys. When the court reconvened, they proceeded with the trial, which resulted in a conviction and five-year prison sentence for the accused. In affirming the verdict and the procedure which had been followed, Chief Justice O'Niell stressed the fact that "No proceeding was had in the prosecution or trial of the case between the time at which the district attorney resigned and the time at which the assistant district attorney who had commenced the prosecution was reappointed and again took the constitutional oath of office." As a result, there was no time in the proceedings when it was necessary for the attorney-general to intervene, and the prosecution was handled throughout by duly appointed assistant district attorneys.

Improper Remarks by District Attorney

In State v. Bryant the district attorney, in his closing argument against a defense plea of justification, declared that if insults should justify a battery, one of the state's witnesses might well have been justified in making an attack on defense counsel. After conviction, and on appeal, the defendant argued that the above remarks constituted reversible error. The supreme court did not feel that there was anything particularly prejudicial about the illustration used by the district attorney; but further pointed out that, even if the remarks were improper, no sufficient basis had been laid for their consideration on appeal. Defense counsel had excepted to the remarks complained of, but had not requested that the jury be instructed to disregard them. Where the district attorney goes beyond proper bounds in his remarks to the jury, a prompt admonition by the court will ordinarily overcome any prejudicial effect of his remarks. The supreme court distinguished from the instant case those situations where the district attorney's remarks are so extreme in their nature that they cannot be cured by the trial judge's instruction to disregard them; that is, where the district attorney has commented on the failure of the accused to take the stand in his own behalf or has appealed to racial prejudice.

A very serious type of improper remark by the prosecution occurred in State v. Fletcher, a rape case. Defense counsel had

74. 209 La. 125, 127, 24 So. (2d) 286, 287.
75. 209 La. 918, 25 So. (2d) 814 (1946).
78. 27 So. (2d) 179 (La. 1946).
argued that a prosecution witness, the victim's fifteen year old brother, and not the accused, had been intimate with the eleven and a half year old victim. The district attorney, in his closing argument to the jury, declared that if they acquitted defendant, they would be saying "'the Grand Jury made a mistake, we are going to acquit this party and it will be the young man who should be brought before the next Grand Jury.'" The defendant promptly objected to this statement; but the report of the case did not show that defense counsel accompanied his objection by a special request that the jury be immediately instructed to disregard the improper statement. Later, in the general charge to the jury, the trial judge instructed them that "the indictment in this case is a mere accusation or charge but is not evidence of guilt and creates no prejudice against the defendant and the jury must not be influenced by it in considering the case."\footnote{Id. at 182.} In holding that the district attorney's improper remarks constituted reversible error, Justice Fournet stressed the fact that the jury had not been promptly instructed to disregard the same. In this case, the remarks by the district attorney were materially prejudicial, in seeking to use the grand jury indictment as evidence for the accused, and virtually telling the jury that they would be repudiating the grand jury if they should return a verdict of acquittal. Thus, even if the jury had been timely and clearly instructed to disregard the district attorney's statement, the court might still have held that the erroneous impression created in the minds of the jurors as to the nature and probative effect of the grand jury's indictment was not completely cured.

**Insanity**

The late Justice Rogers' opinion in the case of *State v. Gunter*\footnote{208 La. 694, 23 So. (2d) 305 (1945).} provides a review and discussion of two important questions pertaining to the defenses of insanity. The first question concerns the method of raising the defense of *insanity at the time of the crime*, which is a complete defense to criminal prosecution. Article 261 of the Code of Criminal Procedure provides that there are four pleas to an indictment: guilty, not-guilty, former jeopardy, and insanity. Following the obvious intendment of this article, the supreme court ruled that insanity at the time of the crime must be raised by a direct plea and that, in the absence
of such a special plea, evidence on the issue had properly been excluded from submission to the jury.

The importance of keeping the plea of insanity separate and distinct from the general plea of not guilty is further evidenced by the fact that Article 267 provides for the appointment of a special commission to examine defendant when his sanity becomes an issue. This special report, along with other evidence adduced at the trial, helps the jury in determining the question of insanity at the time of the crime. In cases where a defendant, who has filed a plea of "not guilty," desires to raise the issue of insanity at the time of the crime, his remedy is by a motion to withdraw the plea of not guilty and file a plea of insanity. If the change of plea is in good faith and not a dilatory tactic, it must be permitted by the trial judge. Even where the motion to withdraw the plea of not guilty and plead insanity looks like dilatory tactics, there is some question as to the propriety of the trial judge's refusing to allow the change of plea. In State v. Watts, the supreme court relied on a provision in Article 267 of the Code of Criminal Procedure that the insanity plea must be "filed, tried and disposed of prior to any trial of the plea of not guilty" and concluded that the plea of insanity was a matter of right and not of grace. While the statutory language relied upon in that opinion was omitted when Article 267 was amended in 1932, the court's actual holding will probably still be followed today.

The second question in the Gunter case involved the defense of present insanity. After the close of the testimony on both sides, defense counsel sought an examination and hearing on the question on insanity at the time of the trial. This defense would not go to the defendant's responsibility for the crime committed, but would merely preclude his being presently brought to trial. The issue when this plea is raised is the present ability of the defendant to understand the nature of the proceedings against him and to assist in his defense. The trial judge had refused to fix a sanity hearing or to appoint experts to examine the defendant in order to ascertain and testify as to his present sanity. In holding that such refusal constituted reversible error, the court

81. 171 La. 618, 131 So. 729 (1930) on rehearing.
83. It is interesting to note that in State v. Messer, 194 La. 238, 193 So. 633 (1940) the trial judge allowed the defendant to change his plea to present insanity, despite the fact that the change was held to be for dilatory purposes and the court refused to appoint a lunacy commission.
pointed out that the exception of present insanity can be raised at any time and without formal plea.\textsuperscript{84} While the trial judge is vested with a wide discretion in determining whether there are reasonable grounds to hold a hearing on the issue of present insanity, a clear abuse of that discretion is reversible error. Otherwise, the trial judge might arbitrarily deprive the accused of the benefits of the provision in Article 267 of the Code of Criminal Procedure which forbids his trial when he 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 a hearing is sought and the trial judge has "reasonable ground to believe" that such a mental condition exists, it becomes his duty to fix a time for a hearing and to appoint disinterested qualified experts to examine the defendant and to testify at the hearing. In the instant case, the evidence submitted by defense counsel showed that the defendant had been discharged from the Navy and awarded a thirty per cent disability compensation because of his nervous condition. Also, testimony of his family and friends showed that he was fractious, and evidenced many traits of mental instability. This showing, according to the supreme court, was sufficient to entitle the defendant to a hearing on the issue of present insanity; and the trial judge's observation of the accused during the trial was insufficient to justify a contrary conclusion that no substantial issue of present insanity was presented. The supreme court's holding that the trial judge had abused his discretion in refusing a hearing on the present insanity issue may be distinguished from the earlier case of \textit{State v. Ridgwaj}\textsuperscript{85} wherein the court upheld the trial judge who had refused to appoint experts to examine the defendant. In that case, the defendant's plea of insanity was only accompanied by affidavits of his mother and aunt, and the court did not feel that a reasonable basis for the defense had been sufficiently established by credible and unprejudiced testimony. The distinction, however, is a rather close factual one. Where the trial judge, after hearing and considering the testimony submitted, holds that no bona fide or substantial insanity question is presented, his conclusion should be given great weight and serious consideration by the supreme court. Trial convenience and expedi-

\textsuperscript{84} See Comment (1946) \textit{Louisiana Law Review} 693, 694 and cases cited therein.

\textsuperscript{85} 178 La. 606, 152 So. 306 (1933). Accord: \textit{State v. Allen}, 204 La. 513, 15 So. (2d) 870 (1943), where the witnesses called by defense counsel had disappointingly testified that the accused appeared perfectly sane to them.
ency fully justify the refusal to appoint a sanity commission and hold a hearing in cases where the claim of present insanity is insubstantial and apparently urged as a dilatory tactic.\textsuperscript{86}

Where, after a sanity hearing, the defendant is adjudged presently insane, he is committed to the state mental hospital. Later, if the proper officer of such institution is of the opinion that the defendant has become able to understand the proceedings and assist in his defense, he shall so report to the court. Upon receiving such a report the court shall fix a hearing, to be conducted in all respects like the original hearing, to determine if the defendant is presently capable of standing trial.\textsuperscript{87} In \textit{State v. Laborde}\textsuperscript{88} the trial judge had conducted a sanity hearing in 1942, after which the accused had been committed to the state hospital for the insane at Jackson, Louisiana. After a second hearing in 1943, defendant was again found to be presently insane and was returned to the mental hospital. In 1945, on motion of defense counsel, a third sanity hearing was held. The trial judge, after hearing the testimony of a number of experts in mental diseases, concluded that the accused was still insane and recommitted him to the state hospital. On appeal, the supreme court overruled defense counsel's contention that it was the mandatory duty of the trial judge to release the accused upon a recommendation of the superintendent of the state hospital that he had regained his sanity. The court declared that if this were true the hearing on this issue, which is provided for in Article 267 "would be wholly unnecessary."\textsuperscript{89} Briefly appraising the evidence adduced at the hearing, the court pointed out that the testimony of the superintendent of the state hospital and the doctor called by the family of accused had been very inconclusive on the issue. On the other hand, the parish coroner, who had served on the prior lunacy commissions and was an expert on mental diseases, testified positively that the accused was presently insane and that his mental condition remained unchanged.

\textit{Jury Verdict—Coercion by Trial Judge}

In the early days of the common law, jurors were deprived of "meat, or drink, or candle, or rest of any kind,"\textsuperscript{90} in order to

\textsuperscript{86} \textit{State v. Washington}, 207 La. 849, 22 So. (2d) 193 (1945).
\textsuperscript{88} 210 La. 291, 26 So. (2d) 749 (1946).
\textsuperscript{89} 26 So. (2d) 749, 751.
\textsuperscript{90} See, \textit{State v. Duval}, 135 La. 710, 723, 65 So. 904, 909 (1914), quoting from Judge Kent's opinion in \textit{People v. Olcott}, 2 Johns Cas. 301 (N.Y. 1801).
induce them to arrive at a speedy verdict. This early practice has been replaced by the modern doctrine that jurors should not be subjected to any physical or moral coercion. At the same time, it is well settled that, when the trial judge is informed by the jury that they cannot agree, he may use reasonable persuasion to induce them to arrive at a verdict. The scope of such persuasion is generally considered as within the sound discretion of the trial court and the exercise of that discretion is seldom subject to review. However, this discretion is not unlimited. In *State v. Rodman,* after the jury had reported a mistrial, the trial judge declared that he would not accept a mistrial and that the jury must renew their deliberations. The Louisiana Supreme Court held that the trial judge had exceeded his discretionary powers, in that the action of the court "had the effect of coercing" the jurors to agree upon a verdict, and was therefore reversible error. The instant decision is distinguishable on its facts from the earlier holding in *State v. Seals* where remarks by the trial judge that the jurors should agree, if possible, and thereby save expense to the parish, and that if the jury did not speedily agree on a verdict, court would be adjourned until the next morning, were held not to make out a case of coercion. It thus appears that the trial judge may send the jury back for further deliberation and may use every means of persuasion, including a threat to extend the case over to the next day; but that he cannot make an unqualified statement refusing to accept a mistrial and leading the jury to believe that they must arrive at a verdict.

Responsive Verdicts

In a criminal homicide case where murder or manslaughter is charged, it is well settled that the lesser and included crime of negligent homicide is a responsive verdict,* and Article 386 of the Code of Criminal Procedure expressly provides that the trial judge shall instruct the jury on the law applicable to each included homicide offense. In *State v. Malmay,* the defendant had been charged with manslaughter and found guilty of negligent homicide. Defense counsel filed a motion to set aside the verdict, alleging that the evidence unmistakably showed that the defendant had intentionally struck the deceased over the

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91. 208 La. 523, 23 So. (2d) 204 (1945).
92. 135 La. 602, 65 So. 756 (1914).
94. 209 La. 476, 24 So. (2d) 869 (1946).
head with a heavy instrument, and that the verdict of negligent homicide was entirely unresponsive to the evidence of an intentional attack which was adduced at the trial. The district judge refused to set aside the verdict and grant a new trial since there was "some evidence" upon which the jury might have reached its verdict of negligent homicide. On appeal, the supreme court held that the trial judge had not abused his judicial discretion, stressing the fact that the verdict rendered was not prejudicial to the accused. The decision is very similar, in this regard, to the Kansas case of State v. Yargus where the defendant had been charged with committing murder in the first degree by means of poison, and convicted of murder in the second degree. Defendant appealed, contending that murder by the admission of poison was necessarily first degree murder and could not constitute the lesser crime of second degree murder. In upholding the conviction, Justice Mason of the Kansas Supreme Court declared that the defendant had been benefited rather than injured by the verdict of second degree murder and could not be heard to complain that the evidence really justified only a conviction of the more serious degree of that crime.

The question of lesser and included homicide verdicts has presented a real problem to those charged with the administration of justice. Despite the most carefully worded instruction as to the proper scope and nature of the included crimes, the jury frequently will, as was probably done in the principal case, return a verdict of negligent homicide in a case where the killing was clearly intentional rather than as a result of criminal negligence. A similar problem is presented in connection with assault and battery, rape, burglary, and other graded offenses. In all such cases the trial judge is required to charge the jury on all of the included lesser offenses. Frequently, the jury, either because of confusion as to the properly applicable legal principles or because of some innate desire to mete out special mercy in their verdict, returns an inappropriate verdict of one of the

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95. If the negligent homicide verdict had been set aside, and a new trial granted, defense counsel would probably have relied upon the implied acquittal of manslaughter by the verdict of negligent homicide as a bar to any subsequent prosecution for manslaughter. State v. Harville, 171 La. 256, 130 So. 348 (1930).

96. Article 508 of the Code of Criminal Procedure provides "The motion for a new trial is based upon the supposition that injustice has been done the accused, and, unless such is shown to have been the case, the application shall be denied, no matter upon what allegations grounded."

97. 112 Kan. 450, 211 Pac. 121, 27 A. L. R. 1093 (1922).
lesser crimes upon which it has been charged.98 Realizing the importance of this problem, the Criminal Law Section of the Louisiana State Bar Association proposed statutes in 1944 and 1946 which sought to remedy the evil. The 1944 bill provided that the trial judge might limit his instruction concerning responsive verdicts to those lesser and included offenses which might possibly be properly found upon the evidence adduced. Thus, in a murder case where the evidence clearly pointed to an intentional killing, as the defendant alleged in the principal case, the court would only instruct as to the intentional homicides of murder and manslaughter; or in an aggravated battery case where there was no controversy as to the battery having been committed with a dangerous weapon, and the defendant was urging self defense, the court would not be required to confuse the jury with instructions concerning such inappropriate lesser crimes as simple battery, aggravated assault, and simple assault. The proposed statute was defeated, however, on the ground that it granted an arbitrary and unreviewable power to the trial judge. It was argued that since no record of the evidence was preserved in criminal cases, the trial judge's exclusion of certain verdicts would not be subject to an accurate check by the supreme court. A compromise 1946 bill sought to avoid this objection by providing merely that it should not be reversible error for the trial judge to fail to charge the jury as to the law relative to a lesser and included offense, unless such charge was requested in writing. This provision would have avoided the necessity of confusing the jury with inappropriate instructions, which neither the state nor the defendant particularly desired. At the same time it did not give the trial judge the so-called "arbitrary power" inherent in the earlier proposal. This second bill did not even survive the committee hearing in the House, being rejected upon an intangibly stated fear that it might result in depriving the accused of his constitutional rights because of some negligent omission of defense counsel. (It appears to the writer that the only "right" interfered with would have been a

98. In State v. Fletcher, 27 So. (2d) 179 (La. 1946), defendant was tried under an indictment for aggravated rape for having sexual intercourse with a girl under the age of 12 (Art. 42(3), La. Crim. Code) and was found guilty of simple rape, with a recommendation of mercy. The conviction was set aside on other grounds, but Justice Fournet significantly pointed out that—"If the defendant was guilty of anything he was guilty of aggravated rape and not of simple rape, and if the jury believed him guilty beyond a reasonable doubt it is more than probable they would not have returned a verdict of simple rape and at the same time have asked the mercy of the court in passing sentence on him." 27 So. (2d) 179, 183.
sort of vested defense right to have the jury confused as much as possible.)

At any rate, Louisiana can take solace from the fact that the problem of irrational homicide verdicts is not unique to this state, as is illustrated by the Kansas case of State v. Yargus. Also, there is some practical argument in favor of the trial expediency of such verdicts—the jurors returning a verdict of negligent homicide in the Malmay case might well have failed to agree on a verdict of manslaughter and a "hung jury," necessitating a retrial, would have resulted. Such considerations, however, are small justification for the consistent refusal of the Louisiana legislature to adopt a rule which would enable trial judges to eliminate the natural jury confusion which results from instructions as to totally inappropriate verdicts.

Responsive Verdicts—Attempt

Article 27 of the Louisiana Criminal Code expressly provides that "An attempt is a separate and lesser grade of the intended crime,"—and it would naturally follow from this that a verdict finding a defendant guilty of an attempt to commit a crime would be responsive to a charge of the completed offense. It was therefore somewhat surprising that the Louisiana Supreme Court should hold in State v. Love and State v. Bray that verdicts of attempted manslaughter and attempted murder were not responsive to indictments for murder. These particular holdings may be justified upon the ground, which was one of the points brought out in Justice Rogers' opinion in the Love case, that Article 386 of the Code of Criminal Procedure provides an exclusive enumeration of the verdicts responsive to a murder indictment when it states that "in all trials for murder the jury shall be instructed that they may find the accused guilty of manslaughter or negligent homicide." The difficulty arises when, in that same opinion, Justice Rogers generalizes that, "It is certain that murder and attempt to commit murder are not generic offenses and the lesser is not included in the greater. The two offenses are separate and distinctive." This broad declaration completely disregards the substantive law rule, restated in Article 27 of the Criminal Code, that an attempt is a generic lesser

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99. 210 La. 11, 26 So. (2d) 158 (1946).
100. 27 So. (2d) 337 (La. 1946).
101. The doctrine of expressio unius est exclusio alterius is frequently used in the construction of penal statutes. 2 Sutherland, Statutes and Statutory Construction (1943) 412 et seq., §4915.
102. 26 So. (2d) 156, 158 (La. 1946).
degree of the basic crime. Also, an earlier, but unrepealed, rule of criminal procedure specifically declared that an attempt was a responsive verdict.\(^1\)

In *State v. Ferrand*,\(^4\) decided shortly after the *Love* case, a verdict of attempted aggravated rape was held responsive to an indictment for aggravated rape. While no issue was made as to the responsiveness of the verdict affirmed, the court clearly recognized the general principle that an attempt verdict may be returned when the indictment charged the basic crime.\(^5\) It thus appears probable that, despite some of the general statements made in the *Love* case, the Louisiana Supreme Court intends to limit that holding to homicide cases. In other crimes an attempt verdict will be held responsive.\(^6\)

*Erroneous Verdicts*

It is clearly settled, both by judicial decision\(^7\) and by express provision of the Code of Criminal Procedure,\(^8\) that a verdict of negligent homicide is responsive to an indictment of manslaughter. In *State v. Gueringer*\(^9\) the defendant was indicted for manslaughter and the jury returned a verdict finding him guilty of “negligible homicide.” The defendant moved in arrest of judgment after the verdict was rendered and before sentence was pronounced, urging that the verdict was meaningless and that there was no crime such as the one for which the jury purported to find him guilty. Upon appeal the verdict and sentence were annulled and the case remanded. While the jury probably intended to find the defendant guilty of negligent homicide\(^1\) and the verdict rendered was probably a result of inadvertence, the court refused to overlook the mistake. The spelling used most nearly approximated the word “negligible” which was entirely different in meaning from “negligent.” To treat the verdict as a proper verdict of negligent homicide would not, ac-

\(^{103}\) La. Rev. Stat. of 1870, §1053, apparently this statute, which had been listed as superseded in Dart’s Criminal Statutes because of its non-use prior to the 1942 Criminal Code, was not called to the court’s attention.

\(^{104}\) 27 So. (2d) 174 (La. 1946).

\(^{105}\) “A separate but lesser grade of the offense of aggravated rape, and responsive to a charge for that crime, is an attempt to commit aggravated rape.” 27 So. (2d) 174, 178.

\(^{106}\) For a more complete critical analysis and discussion of the above cases, and the general problem of “The Attempt as a Responsive Verdict,” see Comment (1946) *Louisiana Law Review* —.


\(^{109}\) 209 La. 118, 24 So. (2d) 284 (1945).

according to the court, merely be a correction in spelling. Rather, it would be to strike an intended word from the verdict and substitute an entirely different word in its place. The verdict omitted an essential and characteristic ingredient of the offense and it was not merely a case of poor grammar or bad spelling. The court distinguished the earlier case of *State v. Ross* by pointing out (without explanation) that the polling of the jury in the instant case had not varied nor altered the situation for the better. It might also be added that the verdict in the *Ross* case of "guilty without capital punish" was not so inherently defective as the *Gueringer* verdict which used a completely distinct and different adjective "negligible" in place of "negligent" which went to the very essence of and characterized the crime.

**Appellate Jurisdiction of Supreme Court**

The supreme court's appellate jurisdiction is restricted, by express constitutional provision, to cases where "the penalty of death, or imprisonment at hard labor may be imposed; or where a fine exceeding Three Hundred Dollars, or imprisonment exceeding six months has been actually imposed." In *State v. Green* the amended information had charged the theft of two cases of eggs valued at nineteen dollars. Thus, the charge was for theft of "under twenty dollars," which is a misdemeanor punishable only by fine or up to six months imprisonment in the parish jail. The judge trying the case found the defendant guilty and sentenced him to imprisonment for three months. Inasmuch as the penalty actually imposed was imprisonment for a term of less than six months, the supreme court dismissed the appeal for want of jurisdiction.

**Appeal-Based upon Bill of Exceptions**

The bill of exceptions is grounded on objections made to rulings of the trial court and serves as the basis for an appeal for errors not patent on the face of the record. *State v. Phillips* applied the well settled rule that the appeal will not lie for alleged trial irregularities not patent on the face of the record.

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111. 32 La. Ann. 854 (1880) where the misspelled verdict was cured by being read correctly by the clerk and verified as correct by each juror as he was polled.  
113. 210 La. 190, 26 So. (2d) 693 (1945).  
116. Id. at Art. 502.  
117. 209 La. 194, 24 So. (2d) 374 (1945).
ord, unless a proper basis has been laid by the reservation of bills of exceptions to the rulings complained of.

The proper time and manner of reserving a bill of exceptions was also passed upon. In State v. Calvin the trial judge had refused to sign a bill of exception on the ground that it was too late, having been presented six days after sentence was imposed and the motion for suspensive appeal granted. On appeal, the supreme court upheld the district judge's refusal to sign the bill, and further held that the belated exception, although actually in the record, could not be considered upon appeal in view of the settled jurisprudence of the state. The conviction in the Calvin case was reversed, however, upon an error which was patent on the face of the record, that is, that the information for aggravated battery inappropriately included a count for disturbing the peace. The additional misdemeanor count was not triable by the jury trying the felony of aggravated battery. This resulted in a misjoinder of offenses and the improper admission of prejudicial evidence concerning an offense with which the accused was not properly charged.

In State v. Johns the reservation of bills of exception in open court, without formal presentation of the bills to the trial judge for his signature was held insufficient to authorize a review of the rulings complained of.

Appeal—Insufficiency of Evidence.

Louisiana has adopted the liberal minority view that the trial judge may set aside a verdict if he entertains a reasonable doubt as to the defendant's guilt. In such cases the issue is a factual one, and where the trial judge refuses to grant defendant's motion for a new trial based upon the insufficiency of the evidence, this ruling is not reviewable if there was any evidence to support the conviction. It is only where there is no evidence to support the verdict that the trial judge commits an error of law in not granting a new trial, and the supreme court's appellate jurisdiction in criminal cases is expressly limited by the Louisiana Constitution to "questions of law alone." In State v.

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118. 209 La. 257, 24 So. (2d) 467 (1945).
121. Id. at Art. 103.
122. 209 La. 244, 24 So. (2d) 462 (1945).
the supreme court held that it was without jurisdiction to inquire into the propriety of the trial court's refusal to set aside a negligent homicide verdict. Defendant, in his motion for a new trial and on appeal had urged that the evidence was insufficient to establish criminal negligence. In so holding, Justice Rogers very aptly pointed out that the defendant's appeal "is frankly an attempt on his part to have this court pass upon the findings of fact by the trial judge on the question of defendant's guilt or innocence," and stated that such findings are final if supported by any evidence.

In State v. Bateman, the court applied a similar constitutional provision which restricts the supreme court's jurisdiction on appeal from juvenile court criminal convictions to question of law alone. Defense counsel had argued that notes of testimony taken at the trial and placed in the transcript showed a "total lack of evidence to prove the crime." In holding that such a transcript does not form a part of the record and cannot be considered on appeal, Justice Ponder declared that the record "includes the caption in a criminal case, a statement of time and place of holding the court, the indictment or information with the indorsement, the arraignment, the plea of the accused, mention of the impaneling of the jury, verdict, and judgment of the court." Even assuming that the transcript was reviewable as a part of the record, which it was not, the court further concluded that "only a question of the sufficiency of the evidence would be presented and not a case where there is no evidence to prove the crime charged." The appeal in the Bateman case was from the juvenile court of Washington Parish. It is interesting to note, by way of comparison, that appeals from juvenile court decisions of Orleans Parish are now authorized on questions of both law and facts.

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127. 209 La. 950, 954, 25 So. (2d) 908, 909.
128. 209 La. 1036, 26 So. (2d) 130 (1946).
130. 209 La. 1036, 1040, 26 So. (2d) 130, 132.
131. Ibid.
132. See Article VII, Section 96, of the Louisiana Constitution of 1921, as amended pursuant to La. Act 322 of 1944. This extension of the supreme court's jurisdiction to questions of fact in Orleans Parish juvenile cases was criticized by the writer, Louisiana Legislation of 1944 (1944) 6 Louisiana Law Review. 9, 23.
Bail—Pending Appeal from Juvenile Court Judgment

Article I, Section 12, of the Louisiana Constitution expressly provides that bail shall be allowed pending appeal from felony convictions where the sentence imposed is less than five years' imprisonment. In State v. Smith, an adult defendant, convicted of the crime of indecent behavior with juveniles and sentenced to serve three months in the parish prison, had appealed from the conviction. The issue presented in defendant's petition for a writ of habeas corpus was whether the appellant had a right to suspensive appeal and to bail pending such appeal. The special 1944 juvenile court statute for the Parish of Orleans expressly provides that an appeal from the juvenile court's judgment shall not suspend judgment of such court. Relying upon this provision, the juvenile court judge had denied relator's motion for suspensive appeal, which denial had the practical effect of precluding bail pending the appeal. In ordering the juvenile judge to grant a suspensive appeal and to fix bail for the appellant, the supreme court held that the 1944 juvenile court statute must yield to the paramount authority of Article I, Section 12, of the Louisiana Constitution which grants a right of bail and is tantamount to a provision for a suspensive appeal.

A consideration of Article VII, Section 96, of the Louisiana Constitution was also necessitated by the fact that the judgment appealed from was a juvenile court judgment. Prior to 1944, Section 96 had expressly provided that appeals from judgments rendered by the juvenile court of the Parish of Orleans "shall not suspend the judgment of said court." As a corollary of this provision, the general right to bail pending appeal in ordinary criminal cases was inapplicable to appeals from juvenile court judgments. However, Section 96 of Article VII was amended in 1944 so as to provide that appeals from final judgments by the juvenile court "shall not discharge the child to whom said judgment relates from the custody of the juvenile court or of the person, institution, or agency to whose care such child may be committed by the juvenile court, unless the Supreme Court shall so order." As was pointed out by Justice Hawthorne, the amendment omits the previous general limitation to

133. As amended by La. Act 189 of 1936.
134. 209 La. 363, 24 So. (2d) 617 (1945).
136. La. Act 169 of 1944, § 27.
the effect that appeals shall not suspend any juvenile court judgments. The net result is that an exception is made only in the case of juveniles who have been committed to the care of some person, institution, or agency and that the adult who is convicted in a juvenile court of a crime relating to juveniles is entitled to the general right of bail provided in Section 12 of Article I of the Bill of Rights in the Louisiana Constitution.

VIII. CONFLICT OF LAWS

Joseph Dainow*

The number of cases which require a discussion of conflict of laws is relatively small; although there are only three cases in this section, each one is of particular interest.

Navarette v. Laughlin,1 involved a contest between the decedent's first wife and his second wife for the recoverable damages in a wrongful death action. Prior to his second marriage, the decedent had obtained a divorce in Mississippi, but the first wife now contends that it was not a valid decree and that she is therefore the lawful claimant in the present action. The validity of the Mississippi divorce depends upon whether the deceased had a bona fide domicile in Mississippi. With regard to this jurisdictional fact there was conflicting evidence. In support of a bona fide Mississippi domicile it was shown that the decedent had resided there for one and a half years. The evidence against this included declarations by the decedent in connection with a voting certificate and a chattel mortgage that his residence was in Louisiana. The court decided that there had been a bona fide domicile,2 and that the Mississippi divorce decree was therefore entitled to full faith and credit under the decision of the Supreme Court of the United States in Williams v. North Carolina.3

In conclusion, the court observed that the first wife had never thought of attacking her husband's divorce until after his death more than two years later.4

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1. 209 La. 417, 24 So. (2d) 672 (1946).
2. The court of appeal weighed the same evidence and concluded that there had not been a bona fide domicile in Mississippi [20 So. (2d) 313 (La. App. 1944)].
4. The extent to which the court may have been influenced by sheer policy considerations does not appear. The facts remain that the first wife had had nothing to do with the decedent for some years before his death.