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quired to reduce an idea to a form in which it can be used and the fact that only in such shape can its value be appreciated.⁴¹

The degree of novelty promises to play an increasingly important part in the cases, although it may seldom be discussed. When a decision is based on this factor, the use of the description "concrete" as the basis for the distinction is misleading. In this connection the "concrete" idea distinction may be merely a legal device by which the court reserves to itself the determination of a question of fact. Thus an extremely ingenious idea will probably be regarded by the court as "concrete" while another not so brilliant will be regarded as abstract although the latter may have been reduced to a more definite form.

CONCLUSION

All ideas should serve as consideration for express contracts. In addition original ideas will be protected on the basis of quasi contract whenever the courts feel that the circumstances justify undertaking the difficulties of administration involved. Whether protection will be extended will depend largely upon the degree of novelty, the definiteness of the form and the amount of effort expended in reducing the idea to a detailed form. Due to the relative ease of administering them, slogans and slogan-like advertisements have been the first type of ideas to which the courts have accorded protection. The term "concrete" has been used to designate those ideas whose administration the courts deem feasible.

RUSSELL B. LONG

JOINDER OF CRIMINAL OFFENSES IN LOUISIANA

The problem of joinder of criminal offenses in Louisiana has struggled through an interesting cycle. Prior to the adoption of the Code of Criminal Procedure, the general rule in Louisiana, like that of the common law jurisdictions,¹ was that two or more

41. In *Keller v. American Chain Co.*, 255 N.Y. 94, 174 N.E. 74 (1930), an idea for reducing freight rates by changing the classification of certain goods was held to be sufficient consideration to support a contract, due to the effort required to work out the new schedule. Judgment was for the defendant, however, because of a pre-existing duty on the part of the plaintiff's employer.

1. *Johnson v. State*, 29 Ala. 62, 65 Am. Dec. 383 (1856); *Lascelles v. State*, 90 Ga. 347, 35 Am. St. Rep. 216 (1892); *State v. Houx*, 109 Mo. 654, 32 Am. Dec. 686 (1891); *Porath v. State*, 90 Wis. 527, 48 Am. St. Rep. 954 (1895). See Bell

offenses could be joined in one indictment if they were part of the same unlawful transaction and had the same method of trial and appeal.²

In the leading case of *State v. Hataway*,³ a defendant was charged with burglary and grand larceny in separate counts of the same indictment, and was convicted of petty larceny by a jury of twelve. In reversing the conviction Chief Justice O'Niell said:

"But the rule that two or more crimes, if committed in one transaction, may be charged in one indictment, is subject to the qualification that the two or more crimes so charged 'are subject to the same mode of trial and nature of punishment.'"⁴

"It cannot be that a district attorney or a grand jury, in the prosecution of a person for larceny, can, by cumulating the case with a prosecution for another crime, deprive the accused party of his constitutional right to be tried either by a jury of five or by the judge alone, at his option, and deprive him also of the guarantee of a unanimous verdict in his case."⁵

The rule of the *Hataway* case was also applied where offenses did not have the same appellate jurisdiction. In *State v. Nejin*,⁶ defendant was prosecuted in the city court for violating both a state statute and a municipal ordinance at one time by keeping a

v. State, 48 Ala. 684, 694, 17 Am. Rep. 40, 48 (1874); Notes (1853) 48 Am. Dec. 238, 247, (1893) 49 Am. St. Rep. 771.

2. *State v. Crosby*, 4 La. Ann. 434 (1849); *State v. McLane*, 4 La. Ann. 435 (1849); *State v. Laqué*, 37 La. Ann. 853 (1885); *State v. Thornton*, 142 La. 798, 77 So. 634 (1913). See *State v. Moultrie*, 33 La. Ann. 1146, 1148 (1881).

As a practical matter, before 1880 all criminal offenses in Louisiana were tried by a jury of twelve, so whenever two or more crimes were committed in one unlawful transaction they could always be included in separate counts of the same indictment. See *State v. Malloy*, 30 La. Ann. 61 (1878); *State v. Depass*, 31 La. Ann. 487 (1879).

3. 153 La. 751, 96 So. 556 (1923).

4. *State v. Hataway*, 153 La. 751, 755, 96 So. 556, 557 (1923). Where a lesser species of burglary is punishable by imprisonment with or without hard labor, and triable by a jury of five, there is, of course, no objection to a joinder with larceny. See *State v. Natcisse*, 133 La. 584, 63 So. 182 (1913), prosecuted under La. Act 27 of 1890.

It is necessary to distinguish the cases where larceny and burglary are charged in one count. It has always been the rule in this state, as in common law jurisdictions, that such an indictment charges burglary in a particular manner. *State v. Ford*, 30 La. Ann. 311 (1878); *State v. Johnson*, 34 La. Ann. 48 (1882); *State v. King*, 37 La. Ann. 662 (1885); *State v. Nicholls*, 37 La. Ann. 779 (1885); *State v. Carriere*, 127 La. 1029, 54 So. 339 (1911); *State v. Fuselier*, 134 La. 632, 64 So. 493 (1914). In such case, the accused can be convicted only for burglary. See *State v. Hataway*, 153 La. 751, 755, 96 So. 556, 557 (1923).

5. *State v. Hataway*, 153 La. at 759, 96 So. at 558.

6. 139 La. 912, 72 So. 452 (1916).

"blind tiger" and was convicted on both charges. The violation of the municipal ordinance was appealable to the district court, but the violation of the state statute was appealable to the supreme court. In annulling the conviction, Chief Justice Monroe declared that the prosecution for the two offenses charged was not subject to one or the same method of procedure, and "it is, obviously, a legal impossibility . . . [to] try them as one case, with a single arraignment, plea, and conviction, and a single judgment imposing two sentences."⁷

Article 218 of the Code of Criminal Procedure⁸ was apparently intended to embody a more liberal rule of joinder than that adopted in the *Hataway* case, for it did not mention the requirement of a similar mode of trial. The apparent promise of liberality was, however, denied by the jurisprudence arising under the article.

State v. Roberts,⁹ the first case involving Article 218, presented no difficulty. Defendant was charged in separate indictments with the murder of Mrs. A and her young son, both of whom were admittedly killed in the same transaction. He was convicted for the murder of the mother, and on being called to trial for the murder of the son filed a motion to quash, contending that under Article 218 only one indictment could lie. The court upheld the defendant's contention.

In each of two later cases, *State v. Hill*¹⁰ and *State v. O'Banion*,¹¹ the two crimes charged in the same information were not triable by the same type of jury. The court recognized the general rule of Article 218 that two or more crimes, committed in the same unlawful transaction, must be charged in one indictment, but concluded that

"it does not follow, as contended by the state, that defendant may be tried, at the same time, for burglary and larceny before a jury of twelve members, and convicted of larceny."¹²

The doctrine of the *Roberts* case, the court reasoned, was applicable only where the two or more crimes are triable before the same type of tribunal.

7. 139 La. at 915, 72 So. at 453.

8. La. Act 2 of 1928.

9. 170 La. 727, 129 So. 144 (1930).

10. 171 La. 277, 130 So. 865 (1930).

11. 171 La. 323, 131 So. 34 (1930).

12. *State v. Hill*, 171 La. 277, 279, 130 So. 865 (1930).

The well known *Jacques* case¹³ involved a single indictment under Article 218 embodying separate counts for murder and robbery. In a motion to quash, it was acknowledged that both crimes were part of one transaction, but it was contended that Article 218 violated Section 41 of Article VII of the Louisiana constitution.¹⁴ The court recognized that Article 218 would be constitutional as applied where the two or more crimes were of the same magnitude; but held that the article must be considered as a whole, since the legislature clearly intended that it should operate in its entirety or not at all. The court concluded that the article was completely unconstitutional because it violated the constitutional requirement that in a capital crime (murder), the verdict of the jury must be unanimous, while in the case of a felony punishable necessarily at hard labor (robbery), only nine of the twelve need concur.

Closely following the *Jacques* decision came the case of *State v. White*.¹⁵ Here defendant was charged in separate counts of one indictment with the murders of A and B in the same transaction. In dismissing an appeal based upon the unconstitutionality of Article 218, the court asserted that the *Jacques* case went too far in holding the article wholly unconstitutional, for

"It is clear, therefore, that no constitutional objection can be urged against the inclusion in one indictment in separate counts of two murders, or other crimes of the same nature, when such crimes result from one continuous unlawful transaction, and are triable and punishable alike."¹⁶

Thus Article 218 was unconstitutional only insofar as it purported to authorize the joinder of two or more offenses which did not have the same method of trial and appeal.¹⁷ It will be noted that Article 218 thus interpreted was a substantial codification of the old *Hataway* case rule.

13. *State v. Jacques*, 171 La. 994, 132 So. 657 (1931).

14. Article VII, Section 41, reads in part as follows:

"All cases in which the punishment may not be at hard labor shall, until otherwise provided by law, be tried by the judge without a jury. Cases, in which the punishment may be at hard labor, shall be tried by a jury of five, all of whom must concur to render a verdict; cases, in which the punishment is necessarily at hard labor, by a jury of twelve, nine of whom must concur to render a verdict; cases in which the punishment may be capital, by a jury of twelve, all of whom must concur to render a verdict."

15. 172 La. 1045, 136 So. 47 (1931).

16. 172 La. at 1051, 136 So. at 48.

17. In a dissenting opinion in the *White* case, Chief Justice O'Niell traces the origin of Article 218, and points out that the rule was applied only to cases where one act or transaction constituted two or more crimes.

In 1932, by Act 153, the legislature repealed Article 218 in its entirety. This raised new problems as to whether or not the deletion of Article 218 operated to preclude joinders which were permissible prior to the adoption of the Code of Criminal Procedure. Article 217 of the Code reads, "Except as otherwise provided under this title, no indictment shall charge more than one crime. . . ." With Article 218 repealed, Article 225 is the only exception to Article 217.

Yet in the two cases which have arisen since the repeal of Article 218 the Louisiana Supreme Court has very definitely indicated, though by way of dictum, that the joinder rule codified in Article 218 is far from dead. Article 218 is gone, but the rule of *State v. Hataway* has been resurrected in its stead. In *State v. Turner*¹⁸ defendant was charged in two counts of one indictment with separate shootings with intent to murder. The conviction was reversed because the jury panel was improperly drawn. But in discussing the plea of misjoinder the court stated,

"Even had the complaint been properly pleaded we do not think that the indictment is amenable to the charge of duplicity. The repeal of article 218 of the Code of Criminal Procedure (Act No. 153 of 1932), relating to charging two or more offenses in distinct counts does not have the effect of repealing the rule at common law as to charging such offenses."¹⁹

The other recent case was *State v. Mansfield*.²⁰ Defendant was charged in two counts of an indictment with wilfully shooting A and B, and was acquitted on one count and found guilty on the other. The conviction was affirmed on appeal. Although the misjoinder does not appear to have been brought to the court's attention, the affirming of the conviction was at least a passive recognition of the procedure followed.

It would be interesting to know what considerations led to the repeal of Article 218 and what prompted the supreme court to reaffirm the basic idea upon which this article rested. Probably it was repealed because the legislature, aware of the conflicting jurisprudence interpreting it, sought to terminate this legal turmoil. But in so doing they evidently overlooked Article 217²¹

18. 178 La. 927, 152 So. 567 (1934).

19. 178 La. at 939, 152 So. at 571.

20. 178 La. 393, 151 So. 631 (1933).

21. Art. 217, La. Code of Crim. Proc. of 1928: "Except as otherwise provided under this title, no indictment shall charge more than one crime, but the same crime may be charged in different ways in several counts."

which appears to prohibit in express language the charging of more than one crime in an indictment in any case except the limited joinder permitted by Article 225. But the continued use of the older rule in cases involving offenses triable and punishable alike was probably dictated by considerations of the practicability, efficiency, and flexibility of the practice of joinder which permitted only one indictment to lie where two or more crimes result from a single act, or from one continuous unlawful transaction.

Recent months have witnessed a revived interest in criminal law and procedure with the result that a new proposed criminal code is now in preparation. Now is a propitious time to so amend the Code of Criminal Procedure as to sanction the rule of the *Hataway* case. This can be done by a re-enactment of Article 218 in such form as will obviate all objections based on the state constitution. The writer suggests a form which he believes will accomplish this purpose:

Article 218. When two or more crimes which are subject to the same mode of trial and nature of punishment result from a single act or from one continuous unlawful transaction, only one indictment will lie; but each of the distinct crimes may be separately charged in distinct counts in the same indictment.

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