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III. Procedure

CRIMINAL PROCEDURE

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VOIR DIRE EXAMINATION OF JURORS

Article 352 of the Code of Criminal Procedure recognizes a ground for challenge for cause by the prosecution "That the juror tendered in a capital case has conscientious scruples against the infliction of capital punishment." [1] As a corollary of that rule, a juror who will impose only the death penalty is subject to challenge for cause by the defense. In brief, jurors must be free of any conscientious scruples which would prevent either a capital or a qualified verdict. In the *Henry* cases[2] the proper method of eliciting such information is clearly stated. The questions must be phrased "*could* you" and not "*would* you" render a capital verdict, or a qualified verdict, as the case may be. This form of questioning does not commit the juror in advance as to how he will exercise a strictly discretionary power, which "is analogous to the commuting power of the governor." In *State v. Sanford*[3] the proposed question of defense counsel concluded—"In the event that you are convinced beyond a reasonable doubt of the guilt of this accused, is a verdict carrying with it the death penalty the only verdict that you could return, or could you bring in a verdict of guilty without capital punishment?" When the trial judge sustained the state's objection to this question, defense counsel took a bill of exception without making any effort to rephrase the question.

The question propounded had followed the approved "could you" form, but the trial judge felt confusion resulted by reason of uncertainty as to what was meant by "guilt of the accused." While the supreme court may not have entirely subscribed to the trial judge's belief that the propounded question was unduly confusing, it felt that the defense counsel should have made some effort to rephrase the question along simpler lines. In affirming the conviction, the supreme court stressed the trial judge's per curiam observation that his ruling was leveled at the form in which the question was propounded rather than to its

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1. La. R.S. (1950) 15:352(2).
2. 196 La. 217, 198 So. 910 (1940); and 197 La. 999, 3 So. 2d 104 (1941).
3. 218 La. 38, 48 So. 2d 272 (1950).

substance, and that the right to interrogate the prospective jurors concerning their attitude toward the qualified verdict had never been denied. The *Sanford* decision serves notice on defense attorneys that they must make an effort to satisfy the trial judge's requirements of simplicity and clarity, rather than to stand upon the technical legality of specific questions asked.

In *State v. Wideman*[4] several bills of exceptions were leveled at rulings of the trial judge upon the voir dire examination of jurors. The most significant were incidental to the examination of a prospective juror who was a brother of the deputy sheriff listed as a witness for the state. First, the supreme court held that the trial judge had properly overruled a question of whether this juror would believe his brother's testimony, rather than the testimony of defendants and their witnesses. This ruling came within the well-settled principle that it is the purpose of the voir dire examination to ascertain the qualifications of the juror for the trial of the case, and not to determine his attitude toward a particular witness who is expected to testify. In so holding, the supreme court pointed out that the relationship contemplated by Article 351 was specifically limited to that existing between the juror and the *accused* or the *person injured.* While relationship with a state's witness might, under certain circumstances, result in such partiality or prejudice as to prevent a fair trial, no such showing had been made. "The right to permit challenge of a juror for cause on any ground other than those set out in Article 351," declared Chief Justice Fournet, "is within the sound discretion of the trial judge, which will not be disturbed unless it is shown he abused that discretion. . . ." [5]

SEPARATION OF JURORS

From the moment of acceptance until the rendition of their verdict, jurors in a capital case "shall be kept together under the charge of an officer in such a way as to be secluded from all outside communication." [6] The sacramental character of this requirement is forcefully illustrated by *State v. Walters*,[7] a protracted trial for kidnapping, where improper separation was found by the distribution of the jurors in three adjoining but clearly separated suites of hotel rooms. It did not preclude reversal that the

4. 218 La. 860, 51 So. 2d 96 (1951).
5. 218 La. 860, 866, 51 So. 2d 96, 98 (1950).
6. Art. 394, La. Crim. Code of 1942; La. R.S. (1950) 15:394.
7. 135 La. 1070, 66 So. 364 (1914).

entrances to all rooms were in the sight and hearing of a deputy sheriff who slept in the hall in front of the rooms, and that the evidence of the case revealed no possibility of outside communication with the jurors. Subsequent cases have shown a somewhat more liberal tendency, upholding the verdict where jurors were taken to a picture show by the deputies in charge,[8] and where the jurors were temporarily separated, but with both groups under immediate supervision.[9]

In non-capital cases, the trial judge is expressly authorized to permit separation of the jurors at any time prior to his charge to the jury.[10] Where the temporary separation of the jury is not judicially authorized, error is committed; but the situation is governed by the general rule that a trial irregularity is not ground for reversal unless substantial prejudice is shown to have resulted.[11] In *State v. Fuller*[12] the jury of a non-capital case had been taken to a crowded restaurant where it became necessary to seat two jurors at a separate table with third persons. This separation of the jurors had not been authorized. However, testimony on a motion for a new trial revealed positively that there was no misconduct on the part of the two jurors, who made no reference to the case in conversing with their table companions. In overruling defense counsel's motion for a new trial, the supreme court stressed the fact that the defense had failed to establish its claim of prejudice and injury.

It should be noted that proof of actual prejudice is usually almost impossible, for the juror who is tampered with will seldom admit of the transgression. The requirement of jury isolation is to avoid any possibility of such an occurrence. The *Fuller* case is probably correct in holding that prejudice must specifically be shown in a judicially unauthorized separation of the jury prior to the charge in a non-capital case. However, an unsupervised separation in a capital case, or after charge in a non-capital case, presents a much more serious situation. Here, the intent of the statutory requirement is so clear and the danger so evident, that prejudice will probably be presumed from the act of violation.

8. State v. Clary, 136 La. 589, 67 So. 376 (1915); State v. Ledet, 211 La. 769, 30 So. 2d 830 (1947), discussed in 8 LOUISIANA LAW REVIEW 298 (1948).

9. State v. Dowdy, 217 La. 773, 47 So. 2d 496 (1950), where part of the selected jurors remained in the jury box, and part were taken to an adjoining room and there kept in the custody of the sheriff.

10. Art. 394, La. Crim. Code of 1942.

11. Art. 557, La. Code of Crim. Proc. of 1928; La. R.S. (1950) 15:557.

12. 218 La. 872, 51 So. 2d 305 (1951), noted in 25 Tulane L. Rev. 511 (1951).

PRESENCE OF ACCUSED DURING TRIAL

It is a well-settled rule in felony cases that the accused must be present at every stage of the trial from arraignment to sentence, and the burden is on the state to see that the minutes of the court show such presence.[13] Where the defendant has been actually present, but such presence is not shown in the court minutes, the case may be remanded to permit the state to prove that the accused was present and to have the court minutes amended accordingly.[14] In *State v. Benoit*[15] the defendant, who had been convicted of negligent homicide, argued that the court minutes failed to show his presence at every important stage of the trial.

The supreme court pointed out that since the minutes specifically showed that the accused was present at the beginning of the trial and the trial was a continuous transaction without interruption, that would constitute a sufficient general showing of defendant's presence during the entire trial. It is so well settled that citation of authorities would be superfluous, that in a short continuous trial if the court minutes show the defendant's presence when the trial began, his presence will be presumed to have continued until the termination of the trial. It would be most inconvenient, as a practical matter, to require the making of a minute entry showing the defendant's presence at each separate stage of the trial. A further difficulty would lie in ascertaining what would constitute a separate stage.

The appellant had been prompt in urging the further specific objection that he was not present at the time the jury examined the homicide car. In passing upon the trial judge's refusal to grant a new trial on this ground, the supreme court recognized the fact that the jury's visit to the car constituted a taking of evidence, even though no witnesses testified at the scene.[16] However, the court concluded that no reversible error had been committed. Justice Ponder stressed the facts that the defense counsel had requested that the jury view the car, that the defendant's absence was voluntary, and that the visit to the car was a rather unimportant part of the proceedings since no witnesses testified at the scene. This holding was in conformity with the trend of Louisiana decisions to recognize a waiver of the right of the accused to be present where (1) his absence was voluntary and

13. State v. Thomas, 128 La. 813, 55 So. 415 (1911).
14. State v. Pope, 214 La. 1026, 39 So. 2d 719 (1949).
15. 53 So. 2d 404 (La. 1951).
16. State v. O'Day, 188 La. 169, 175 So. 838 (1937).

(2) no real prejudice is shown to have resulted. It is suggested that if the trial had been for a capital crime the defendant's absence, even under the mitigating circumstances of the *Benoit* case, might well have constituted reversible error. In capital cases it is generally held that the accused must be present during all phases of the trial and cannot waive this right.[17]

HABITUAL OFFENDER PROCEEDINGS

The Louisiana Habitual Offender Law[18] provides penalties progressively more severe for cases in which a defendant convicted of a felony is found to have been previously convicted of other felonies. The charge that the defendant is a prior offender may be brought "at any time, either after conviction or sentence," and is frequently brought after the offender is already serving his sentence.[19] In such cases, if the offender is found to have previous felony convictions on his record, the court resentences him as a multiple offender, with credit given for time already served under the original lighter sentence.

In *State v. George*[20] the offender had been convicted of theft of $1460 and sentenced to one year in the parish prison. Shortly after he completed his sentence and was released from the jail, the district attorney filed an information charging five previous felonies distributed among the states of Louisiana, Tennessee, and Ohio, and ranging from automobile theft to burglary. After determining the truth of these charges, the trial judge sentenced the offender to the state penitentiary for life. Defense counsel's unsuccessful motion to quash the information charging the offender as a habitual offender had been largely predicated upon the contention that after the offender served his original sentence and was discharged from jail the case was closed, and he could no longer be charged with enhanced penalties as a multiple offender. On appeal, the supreme court properly approached the problem as one of statutory interpretation. Does our habitual criminal statute require that the charge be brought prior to execution of the original sentence? No constitutional issue of double jeopardy was involved.[21] If the legislature decides to impose

17. State v. Thomas, 128 La. 813, 55 So. 415 (1911), where the defendant's failure to except at the time did not deprive him of the right to urge the defect on appeal.
18. La. R.S. (1950) 15:529.1.
19. State v. Guidry, 169 La. 215, 124 So. 832 (1929).
20. 218 La. 18, 48 So. 2d 265 (1950).
21. See State v. Guidry, 169 La. 215, 124 So. 832 (1929).

increased penalties upon offenders with a prior criminal record, it may determine the time at which such proceedings must be instituted. Controlling statutory language was found in the provision that the charge may be brought "at any time, either after conviction or sentence" and that the offender shall thereupon be brought before the court "whether confined in prison or otherwise." The supreme court concluded that the legislature intended to authorize the bringing of the charge even after the offender has served the sentence imposed upon him as a first offender. The proceeding, in such a case, is one to correct a sentence which was insufficient in the light of facts (prior convictions) discovered after it was imposed. New York, interpreting a similar provision, had clearly upheld the legislature's power to authorize such a procedure.[22]

SENTENCING—TWENTY-FOUR HOUR DELAY

Article 521 of the Code of Criminal Procedure[23] requires that "at least twenty-four hours shall elapse between conviction and sentence, unless the accused waive the delay and ask for the imposition of sentence at once." This mandatory delay provides a brief period during which the defense may prepare and file motions for a new trial and in arrest of judgment—motions which must be filed after conviction and before sentence.[24] In *State v. George*,[25] the trial judge, after determining that the defendant was an habitual offender[26] immediately sentenced him to life imprisonment. Defense counsel's request for a twenty-four hour delay in which to file additional pleadings was overruled. In holding that no reversible error had been committed, the supreme court followed the mandate of Article 557 of the Code of Criminal Procedure[27] that no judgment shall be set aside unless it appears that the error complained of "has probably resulted in a miscarriage of justice" or "is prejudicial to the substantial rights of the accused." It was significant that, after imposing sentence, the trial judge had granted defense counsel additional time to file further pleadings, and had heard defendant's motion in arrest of judgment which was fully considered

22. People v. Gowasky, 244 N.Y. 451, 459, 155 N.E. 737 (1927), cited 218 La. 18, 32, 48 So. 2d 265, 270 (1950).
23. La. R.S. (1950) 15:521.
24. La. R.S. (1950) 15:505 and 519.
25. 218 La. 18, 48 So. 2d 265 (1950).
26. La. R.S. (1950) 15:529.1.
27. La. R.S. (1950) 15:557.

and overruled on its merits. Thus, "after an examination of the entire record," as contemplated by Article 557, it did not appear that the defendant's rights had been substantially affected by the hasty imposition of sentence.

In view of its clear-cut disposition of the above issue, the supreme court did not find it necessary to pass upon the state's further query as to whether the twenty-four hour delay requirement is applicable to a person sentenced after being adjudged an habitual criminal. It would seem that the purpose of the rule applies equally to such a situation, and that a normal construction of the phrase "between conviction and sentence" would include the habitual offender proceedings which are instigated by information and are expressly referred to as a "trial." [28]

Bills of Exceptions

Exceptions must be taken to trial judge's rulings objected to, if such irregularities are to serve as the basis of an appeal. The exception must specify the ground of objection to the trial judge's ruling[29] and must be incorporated in a formal bill of exceptions prepared by defense counsel and signed by the trial judge.[30] In *State v. Honeycutt*[31] the defendant had, for a second time, been found guilty of aggravated rape. Defense counsel had excepted and purported to reserve a bill of exceptions to the trial judge's overruling a motion to quash the indictment because of alleged racial discrimination by the jury commissioners and also to the judge's admission of certain testimony. A motion for a new trial, based upon the exceptions, had been overruled by the trial judge and defense counsel appealed. In holding that a proper basis for an appeal had not been established, the supreme court stressed the fact that the bill of exceptions had never been perfected by being presented to the trial judge for his signature and per curiam.[32] Similarly, in *State v. Roy*,[33] the supreme court refused to consider appellant's unsigned bills of exceptions. The

28. La. R.S. (1950) 15:529.1. As to the nature of the habitual offender proceedings as a regular criminal trial, see State v. Nejin, 140 La. 793, 74 So. 103 (1917).

29. State v. Ricks, 170 La. 507, 128 So. 293 (1930).

30. Art. 499, La. Code of Crim. Proc. of 1928; La. R.S. (1950) 15:499.

31. 218 La. 362, 49 So. 2d 610 (1950).

32. Bills of exceptions must be presented to and signed by the trial judge before appeal is taken. Arts. 542, 545, La. Code of Crim. Proc. of 1928; La. R.S. (1950) 15:542, 545. "Unsigned bills copied in the transcript are in legal contemplation no bills at all." State v. Chretian, 184 La. 739, 167 So. 426 (1936). Accord: State v. McDonald, 218 La. 198, 48 So. 2d 797 (1950).

33. 217 La. 1074, 47 So. 2d 915 (1950).

exceptions had been presented to the trial judge after the order of appeal was granted, and he had appropriately refused to sign them, since his jurisdiction over the case had terminated with the granting of the appeal.

In the *Honeycutt* case a further reason that the issues raised by defendant's exceptions could not be reviewed upon appeal was the fact that the testimony adduced at the hearing of the motion to quash had not been annexed to and made a part of the bill of exceptions. Even though such testimony was found in the clerk's transcript of the trial, it did not become a part of the official record reviewable by the supreme court, except by being annexed to and made a part of a bill of exceptions duly reserved.

NEW TRIAL AFTER CONVICTION OF LESSER OFFENSE

In *State v. Crittenden* the defendant was originally indicted for manslaughter and found guilty of the then included lesser crime of negligent homicide. This verdict had the dual effect of finding the accused "not guilty of manslaughter" and "guilty of negligent homicide." When the conviction was set aside and the case remanded, the new trial was limited to the negligent homicide charge of which he had been convicted.[34] Upon a second trial the defendant was again convicted of negligent homicide and again appealed. The case has already been noted in this REVIEW,[35] but the two principal procedural issues raised in connection with the second appeal[36] will be briefly restated.

The first question related to the propriety of giving the jury the original indictment, which was endorsed with the first jury's "negligent homicide" finding. Appellant claimed that the jurors, who carry the indictment with them to the jury room, would be prejudiced by the knowledge that a prior jury had found the defendant guilty of the crime now charged. The contention was briefly, but distinctly, overruled. General approval of this procedure is predicated upon the assumption that such incidental knowledge of the former conviction is of no serious consequence, so long as the jury is properly instructed as to the true legal situation, that is, that they are to determine the issue of guilt entirely de novo.

Second, the court held that the original indictment and

34. State v. Harville, 171 La. 256, 130 So. 348 (1930).
35. 11 LOUISIANA LAW REVIEW 464 (1951).
36. 218 La. 333, 49 So. 2d 418 (1950).

arraignment for manslaughter could serve, at the second trial, as a proper charge and arraignment for the lesser generic offense of negligent homicide. Thus, it was not necessary to re-indict or to re-arraign the defendant for that charge. In so holding the court looked to the time when the indictment was found, the verdict returned, and the new trial granted—all of which were prior to the effective date of the 1948 responsive verdict statute[37] which eliminated negligent homicide as a responsive verdict to murder and manslaughter charges. If the charge, verdict, and granting of the new trial had been subsequent to the effective date of the 1948 statute, the filing of a new charge and a second arraignment would have been required and it is entirely possible that a second charge would have been subject to a former jeopardy plea.[38]

APPEAL—MUNICIPAL COURT JUDGMENTS

The Louisiana Supreme Court's appellate jurisdiction over municipal court judgments is limited to those cases where a fine exceeding three hundred dollars or imprisonment exceeding six months was actually imposed, or where the constitutionality or legality of a statute or penalty is attacked.[39] In other cases, the only appeal from a municipal court judgment is to the district court.[40] In *City of Shreveport v. Moore*[41] the defendant had been convicted in the Shreveport City Court of reckless driving while intoxicated, and sentenced to a fine of one hundred dollars and thirty days in jail. An appeal, questioning the legality of the penalty imposed, was taken to the district court. After a trial de novo, the conviction was affirmed, and defense counsel sought to appeal to the supreme court. The case met the supreme court's general jurisdictional requirements, since the legality of the penalty was challenged. However, the defendant had already raised that issue in his appeal to the district court, and a further appeal was refused. Where such a constitutional question is involved, the defendant may appeal directly to the supreme court *or* may raise the issue on appeal to the district court, but he cannot raise it twice.

Justice LeBlanc suggests two limitations on the court's

37. La. Act 191 of 1948; La. R.S. (1950) 15:386.

38. This important double jeopardy aspect of the situation is discussed in Note, 11 LOUISIANA LAW REVIEW 464, 467 (1951).

39. La. Const. of 1921, Art. VII, § 10.

40. Id. at Art. VII, § 36.

41. 53 So. 2d 783 (La. 1951), consolidated for argument and appeal with City of Shreveport v. O'Daniel, 53 So. 2d 786 (La. 1951).

ruling, which will eliminate the possibility of its operating oppressively in deserving cases. First, while the defendant has no right of further appeal upon the legality of the penalty, the supreme court might in a sufficiently meritorious case, grant review under its plenary supervisory jurisdiction. Second, if the trial de novo in the appeal to the district court had been limited to the question of defendant's guilt or innocence, the issue of constitutionality of the penalty could have been presented in a direct appeal to the supreme court. That would be a case of concurrent appellate jurisdiction, upon separate and distinct questions.

CIVIL PROCEDURE

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ORIGINAL JURISDICTION

Seven cases decided during the past term involved serious questions concerning the jurisdiction ratione materiae of the trial court. In two of these,[1] a closely-divided court held the gambling abatement statute[2] invalid because of an unconstitutional grant of territorial jurisdiction. Both cases presented appeals from judgments of the district court sustaining exceptions of no right and no cause of action to proceedings brought to enjoin defendants from continued operation of their gambling houses. These exceptions were leveled at the unconstitutionality of the basic statute in permitting institution of abatement suits in any district court of the state, regardless of the location of the nuisance sought to be enjoined, in violation of Sections 31 and 81 of Article VII of the Constitution, and of the due process clause of the Constitutions[3] of the state and of the United States. The chief justice, speaking for the majority of the court, accepted the argument of the defendants in pronouncing the invalidity of the basic statute. Two of the dissenting judges, Justices Hamiter and Hawthorne, adhered to their original positions[4] that the

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1. Tanner v. Beverly Country Club; Ellzey v. Original Club Forest, 217 La. 1043, 47 So. 2d 905 (1950), noted in 25 Tulane L. Rev. 399 (1951).

2. La. Act 192 of 1920, as amended by La. Acts 49 of 1938 and 120 of 1940, La. R.S. (1950) 13:4721 through 13:4727.

3. La. Const. of 1921, Art. I, § 2; U.S. Const. Amend. XIV.

4. These cases were considered by the supreme court about eighteen months before, when judgments of the trial court sustaining exceptions to the jurisdiction were reversed. See Tanner v. Beverly Country Club; Ellzey v. Original Club Forest, 214 La. 791, 38 So. 2d 783 (1948), discussed in The Work of the Louisiana Supreme Court for the 1948-1949 Term, 10 LOUISIANA LAW REVIEW 120, 237 (1950).