Louisiana Criminal Procedure - A Critical Appraisal

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Under the Crimes Act of 1805, the rules of evidence, forms of indictment and method of procedure for Louisiana’s criminal trials were governed by the highly technical rules of the common law of England. This wholesale adoption of the English common law for a predominantly French territory met with disfavor, and it was not surprising that the Louisiana Constitution of 1812 contained a specific prohibition “that the Legislature shall never adopt any system or code of laws by a general reference to the said system or code.” However, the damage had already been done in the field of criminal procedure, and the Louisiana lawyer was forced to resort to the confusing precedents and obtuse distinctions of the English common law. Attempts to improve the situation by subsequent legislation resulted in a patchwork system of basic common law with statutory variations superimposed thereon.

In 1928, after previous efforts at codification had proved unavailing, the Louisiana Legislature finally adopted a Code of Criminal Procedure. In preparing the new code, the commissioners had drawn heavily upon the then recently adopted codes of California and Michigan. They also relied upon the 1910 projet of the Marr Commission, and sought to integrate the best rules found in the hodge-podge of existing Louisiana statutes and case law. Unfortunately the new code did not completely cover the field. In the preface to his annotated edition of the code, St. Clair Adams, chairman of the Code Commission, significantly states, “As a Code of Criminal Procedure, it does not embody

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2. La. Const. of 1812, Art. IV, § 11. This provision has been continued substantially in every subsequent constitution. See La. Const. of 1921, Art. III, § 18.
3. Previous projets for Codes of Criminal Procedure had been prepared by Livingston in 1825, by the Thompson Commission in 1898, and by the Marr Commission in 1910. All of these had failed of adoption, due largely to constitutional obstacles to the enactment as single codes.
all of the rules of pleading, practice and procedure that are applicable to the trial of criminal cases. Many of these rules are not embraced in the Code and will be found in the Revised Statutes, in the Acts of the Legislature, in the common law, and in the jurisprudence of the state."

Subsequent piece-meal, though well meaning, amendments have confused rather than clarified the procedural pattern which was intended by the 1928 draftsman. Some improvement was effected by the 1950 Revised Statutes when the reporter integrated a considerable number of miscellaneous statutory provisions with the Code of Criminal Procedure in Chapter I of Title 15. However, that work did not include policy changes and there are a number of areas where the present rules are either inadequate, illogical or obscure.  

In our appraisal of Louisiana's rules of criminal procedure we must be cognizant of the dual and conflicting objectives which they serve. They must carefully safeguard the rights of the accused by affording him a full opportunity to establish his innocence. At the same time they should not be so hyper-technical as to provide loopholes through which the guilty may escape or delay justice. To these ends the rules of criminal procedure must simply and concisely spell out the basic elements of a fair trial, but without imposing awkward requirements which may be manipulated by astute defense counsel to delay and ultimately thwart justice. To the extent that a rule of criminal procedure meets those needs it should be cherished and preserved. To the extent that it does not, it should be carefully and thoughtfully re-examined.

**Prescription**

The first problem concerns the one year prescription set out in Article 8, which applies to all crimes except an enumerated list of serious and aggravated offenses. This period of limitation is bottomed on the idea that criminal charges must be filed with reasonable promptness after the offense is known to the law enforcement authorities, and that a person should not be suddenly charged with an offense at a time more than a year after

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4. It should be noted that La. R.S. 1950, 15:0.2, declares that "In matters of criminal procedure where there is no express law the common law rules of procedure shall prevail." This was merely a restatement of the principle found in Sections 976 and 2072 of the Revised Statutes of 1870, a provision which was clearly effective at the time the 1950 Revision was enacted.
its commission. Ample safeguards against misuse of this statute of limitations are found in the provisions that the period runs from the time the crime is known to the proper authorities, and that prescription is interrupted by the filing of a prior charge or by the fact that the accused has fled from justice. The writer is somewhat at a loss as to the justification for a stated exception which permits the conviction of an otherwise prescribed crime where a non-prescribable offense is charged. For example, the crime of manslaughter may have been prescribed, and yet the accused could be convicted of manslaughter under a murder indictment. It is submitted that this deprives the accused of the protection from delayed prosecutions, which was contemplated by the one year prescriptive period. Also, there is a possibility that a district attorney who had delayed the prescribable charge beyond the one year period might be able to persuade the grand jury to open the door again through an indictment for a greater and non-prescribable crime. The fact that the probability of such misuse of the indictment is slight and would be almost negligible under proper instructions to the grand jury does not justify the insertion of this illogical proviso. The note of the commissioners provides no explanation other than the general notation that its source was a 1926 Louisiana statute.

**Venue**

Prior to 1942 the Louisiana courts had experienced consistent difficulty in determining proper venue in cases where the various elements of a crime were scattered over several parishes. In view of the courts’ adherence to the view that they must ascertain the parish where the crime was committed, it was not surprising to find that these numerous venue cases were replete in fictions and artificial technicalities. Frequently the pattern of decision was somewhat difficult to ascertain. In 1942, the general venue article of the Code of Criminal Procedure was amended so as to provide for trial “in any parish where a substantial element of the crime has been committed.” This provision solved the venue riddle in those cases where the component elements of a transi-

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5. Article 8 provides that the one year prescription “shall not apply to prosecution and conviction for a lesser offense under an indictment or information for murder, aggravated rape, aggravated kidnapping, aggravated arson, aggravated burglary, armed robbery, or treason...”


tory crime were spread over a number of parishes. In a few instances, however, there may still be uncertainty as to the physical location of the offense. Thus Article 15 provides that the trial may be held in either parish where a crime is committed on the boundary line or within one hundred feet of the boundary line of two parishes. Another situation which may still cause difficulty is illustrated by the Illinois case of *Watt v. People*\(^9\) where a homicide was committed on a train, but with uncertainty as to which of two counties was the place of the attack and immediate death of the victim. The Illinois court relied on special venue provisions which authorized the trial in either county. Without such special statutory assistance, Louisiana might treat the offense as a continuing crime and subject to prosecution in any parish through which the train was traveling. From a practical standpoint such a result would be justifiable, since the crime was committed on the moving train and had no special connection with either of the parishes. From a strictly logical standpoint, such a holding would appear highly artificial. Undoubtedly the better solution is by legislation—that is, adoption of the special venue provision found in the Model Code of Criminal Procedure. This clause, already adopted by twenty states, declares that "When an offense is committed in this state, on a railroad train or car prosecuting its trip, the jurisdiction is in any county through which the train or car passes in the course of its trip, or in the county where the trip terminates."\(^11\) Such a provision, rephrased in accordance with Louisiana terminology and enlarged to embrace crimes on vessels\(^12\) and aircraft could serve a very useful purpose in plugging up a possible technical loophole in our venue laws.

The Model Code includes a special provision whereby the offense is triable in either county when stolen goods stolen in one county are carried into another.\(^13\) Variations of this provision are found in most state codes of criminal procedure. A similar result has been achieved in Louisiana by court decision, on the theory that the original theft continues as the goods are carried from one parish into another.\(^14\) While this "continuous

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\(^10\) 126 Ill. 9, 18 N.E. 340 (1888).
\(^12\) Id. at § 246 similarly covers crimes committed on boats and other vessels.
\(^13\) Id. at § 248.
asportation” doctrine is strongly artificial in nature, it achieves a very good practical result in permitting the thief to be tried wherever he is apprehended with the stolen property. Possibly an express statutory recognition of the rule would be more in line with the treatment of other venue problems. Also the rule might be enlarged to cover the receiver who carries the property into another parish.15

**Extradition**

Interstate extradition of those charged with a crime, who have fled from justice and are found in another state, is provided for by federal constitutional16 and statutory17 authority. Implementing state legislation has been uniformly adopted. The Louisiana provisions, in common with those of many other states, repeat the troublesome federal requirement that the person to be extradited must be “a fugitive from justice.”18 This operates as a bar to extradition in cases where the offender was not physically in the state seeking extradition at the time of his crime, and thus did not flee from justice in that state after committing the offense. For example, in the much cited North Carolina case of *State v. Hall*19 a defendant, while in North Carolina, shot across the state line and killed his victim in Tennessee. The crime was committed in Tennessee where the fatal shot took effect,20 but the North Carolina court refused extradition on the theory that the defendant had not committed a crime in Tennessee and then “fled from justice after his crime.” The Uniform Criminal Extradition Act, which has been adopted by thirty-one states, solves the problem by authorizing extradition by the state of asylum in any case where the person is charged with a crime in the demanding state.21 The constitutionality of such enactments, which do not include the federal requirement that the person extradited be a “fugitive from justice,” has been sus-

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15. Such an extension would overrule *State v. Ellerbe*, 217 La. 639, 47 So. 2d 30 (1950), which refused to allow prosecution of the receiver in the parish where he subsequently carried the goods.
tained on the ground that the broader state procedure is supplemental to, and not in conflict with, the federal legislation.\textsuperscript{22} Louisiana might well consider adoption of the more effective procedures of the Uniform Extradition Act which also include a very practical provision expressly authorizing the re-extradition of a local offender who has been extradited to another state to stand trial there.\textsuperscript{23} Uniformity is particularly desirable on a matter such as extradition where full interstate cooperation is essential.

**Jury Lists**

A problem which has been pointed up by attempted 1952 legislation deals with the inadequacy of jury venires. The general venire list of three hundred frequently proves inadequate for a jury term with several twelve-man jury cases booked for trial. The grand jury list of twenty names, due to the arduous nature of the duties assumed and numerous excuses from service, is also frequently insufficient. The petit jury list of thirty names is always inadequate for a jury week where the trial of a major offense with multiple offenders is set. While supplemental petit jury lists are authorized, there is no requirement of publication and service of these lists of jurors on the defendant. Act 158 of 1952 sought to alleviate these difficulties by giving the court a discretionary power to order the jury commission to prepare larger general venires and jury lists. It amended Article 179 of the Code of Criminal Procedure so as to authorize general venire lists of from three hundred to six hundred names as the judge might direct. Article 180 was amended so as to raise appreciably the number of names on the grand jury list to not less than fifty names nor more than seventy-five. As amended, Article 181 provides for a weekly petit jury list of from thirty to one hundred names in the discretion of the judge. This statute was enacted without opposition, but the amendments to Articles 179 and 180 were accidentally superseded by Act 303 of the same session, which amended Articles 179 and 180 for the purpose of specifically authorizing "typewritten" lists. This subsequent act, which failed to include the important changes brought about by the earlier amendment, was held to have superseded Act 158 insofar as it empowered the judge to provide larger general

\textsuperscript{22} Ex parte Morgan, 78 F. Supp. 756 (S.D. Calif. 1948).
\textsuperscript{23} Uniform Crim. Extradition Act, § 5.
venire and grand jury lists. Fortunately, the authorization of larger petit jury lists, which is probably the most significant of the changes effected by Act 158, was not impliedly repealed by Act 303. However, the problem of frequently inadequate general venires and grand jury lists is still with us. A legislative remedy such as that proposed in 1952 may well be the answer.

Another source of considerable difficulty and dissatisfaction has been the requirement of Article 202 that objections to the general venire or jury lists must be urged "before the expiration of the third judicial day of the term for which said jury shall have been drawn, or before entering trial of the case if it be begun sooner; otherwise, all such objections shall be considered as waived and shall not afterwards be urged or heard." This article is apparently aimed at securing prompt objections to jury venires and jury lists, but it presents a cure which is distinctly worse than the situation which it purports to remedy. Insofar as it relates to objections to the grand jury panel there is apparent conflict with other articles which permit the filing of objections to the indictment at any time prior to the commencement of the trial. As applied to the time for objecting to petit jury venires, it states a rule which also frequently proves unworkable. Undoubtedly the principal source of difficulty has arisen out of the attempt to set out a single rule that would govern the time for filing objections to the general venire and petit jury lists, and that would also govern the time for objecting to the composition of the grand jury as a ground for quashing indictments. In this regard it will be noted that challenges to the petit jury panel from which the trial jury is to be drawn, and challenges to the grand jury panel as a ground for quashing the indictment, are separately and distinctly treated in the Model Code of Criminal Procedure.

THE GRAND JURY

The true scope of the grand jury's investigation of crimes can only be ascertained by the combined reading of two separate

25. La. R.S. 1950, 15:202. For a complete discussion of this provision see Comment, 18 Tulane L. Rev. 462 (1944).
26. Articles 253, 284 and 287, discussed infra at p. 19 et seq.
27. A. L. I., Model Code of Crim. Proc. §§ 207 and 210 (2) (a) (1930), dealing with challenges of the grand jury panel after indictment, and Sections 267-274 dealing with challenges to the petit jury panel.
arately enacted statutory provisions. Article 209 of the Code of Criminal Procedure states that the grand jury shall investigate offenses called to its attention by the court or the district attorney. An old 1870 provision, which was integrated into the 1950 Revised Statutes as Article 209.1, further states that it is the duty of the individual grand jurors to call attention to crimes of which they have personal knowledge or information. A clearer and much simpler pattern of the grand jury's accusatory authority would be provided if Louisiana should adopt a simple statement that "the grand jury shall inquire into every offense triable within the parish and for which a charge has not already been filed." It should make no difference how the crime came to the grand jury's attention. Legislative efforts are frequently made in the various states to give grand juries general inquisitorial powers. However, it appears that the redactors of the 1928 Code followed a sound policy in refusing to establish the grand jury as a censor of public morals, and generally limiting its duties to the filing of specific criminal charges.

**JOINDER OF OFFENSES**

One of the most serious deficiencies in our present criminal procedures relates to the matter of joinder of offenses. Article 217 reads: "Except as otherwise provided under this title, no indictment shall charge more than one crime ...." The principal exception was found in Article 218 which had codified the common law and general rule. It directed the joinder of charges "when two or more crimes result from a single act, or from one continuous unlawful transaction ...." This meant, for example, that where an armed intruder robbed the inhabitants of the dwelling burglarized, the charges would be brought in a single indictment—count one for aggravated burglary, and count two for armed robbery. The related charges thus joined would be determined by a single jury at a single trial, thus saving time and eliminating much useless duplication of testimony. In State v. Jacques, Article 218 was held unconstitutional insofar as it

31. 171 La. 994, 132 So. 657 (1931) where joinder of murder (unanimous 12 man verdict) and robbery (9 out of 12 verdict) was held to violate the defendant's constitutional right to different types of jury verdicts for the two offenses joined.
directed the joinder of offenses triable by different types of juries. As an aftermath of the Jacques decision, Article 218 was repealed in 1932. This repeal was also motivated by an exaggerated fear that the test of “one continuous unlawful transaction” was too uncertain—an argument that is largely answered by the fact that the federal courts have not experienced great difficulty in their interpretation and application of a similar joinder rule. The re-enactment of Article 218 would promote both trial convenience and substantial justice, but certain factors should be kept in mind. First, the joinder provision should be expressly limited to crimes with the same mode of trial and appeal, thus eliminating the type of unconstitutional joinder which was set aside in the Jacques case. Second, the provision should follow the federal and common law pattern, making joinder permissive rather than mandatory.

CHALLENGING THE INDICTMENT

The method of challenging the validity of an indictment or information, that is, by demurrer or motion to quash, is clearly spelled out in the Code of Criminal Procedure. However, the time for filing such preliminary pleas is confusingly stated in the various codal provisions. Article 284 states that such objections must be taken “before the arraignment.” Article 287 declares that the demurrer and motion to quash “must be filed, tried and disposed of before trial on the merits.” Even more latitude is apparently contemplated by the declaration in Article 253 that objections to the indictment must “be made prior to the commencement of the trial or at such time thereafter as the court in its discretion permit.” In cases where the indictment is defective by reason of the illegal composition of the grand jury list, added confusion is injected by Article 202. Ignoring the possible complications of Article 202, certain fairly definite conclusions emerge from a careful analysis of the above provisions. The

33. Suggested Article 218. “When two or more crimes which are subject to the same mode of trial and appeal are based on the same act or transaction, or on several acts or transactions connected together or constituting parts of a common scheme or plan, they may be charged in the same indictment with a separate count for each offense charged.”

35. Discussed supra pp. 16-17.
defendant's unqualified right to file a demurrer or motion to quash the indictment is controlled by Article 284 which directs the filing of such motions before pleading to the merits at the arraignment. After the accused has entered a plea to the merits he may, in the discretion of the trial judge, withdraw that plea to plead otherwise. In such cases Article 287 will generally control and the substituted motion to quash must be tried and disposed of before the trial on the merits. While Article 253 authorizes the judge to permit the filing of a motion to quash after the trial is under way, such discretionary permission will seldom be granted since the resulting mistrials are not favored.

To the veteran criminal lawyer or trial judge, the above pattern is fairly well set. However, the inexperienced lawyer or judge is faced with a rather perplexing situation—as evidenced by the fact that cases involving this matter are presented at almost every term of the Supreme Court. A great deal of confusion could be avoided by a very simple statement as to the latest point at which objections to the indictment may be filed as of right, and the latest point at which they may be permitted within the sound discretion of the trial judge. Possibly a rephrasing and combination of Articles 284 and 287 would effect such clarification. At any rate Article 202 should be eased out of the picture in this regard.

Article 253 is a cumbersomely phrased provision which is primarily concerned with the amendment of indictments and procedures incidental thereto. It also includes the misleading statement “... nor shall any conviction be set aside or reversed on account of any defect in form or substance of the indictment, unless the objection to such indictment, specifically stating the defect claimed, be made prior to the commencement of the trial, or at such time thereafter as the court in its discretion permit.”

36. Id. at Arts. 265 and 266. Where the defendant has a valid basis for his motion to quash and the shift in plea was not a dilatory tactic, the refusal to permit a change of pleas is reversible error. State v. Verdin, 192 La. 275, 187 So. 666 (1939).

37. Sometimes the indictment may be so defective that it would not support a verdict as in State v. McDonald, 178 La. 612, 152 So. 308 (1934) where the indictment omitted an element of the crime. In such a case the trial judge would do well to allow the motion to quash, so that a new trial may be instituted on a valid indictment. Here, however, experienced defense counsel will seldom seek to quash the indictment—preferring to go to trial with the assurance that any verdict rendered on the fatally defective indictment will be subject to a motion in arrest of judgment as in the McDonald case.

(Italics supplied.) In *State v. McDonald* the court sustained a motion in arrest of judgment where the conviction was upon a defective indictment which omitted an essential element of the crime charged. No objection to the indictment had been raised either prior to or during the trial. In so holding the court stressed the fact that the motion in arrest, which lies for any “substantial defect patent upon the face of the record,” would be rendered negatory if prior objection must be raised. It is significant that the above quoted language of Article 253 was not even mentioned, and it would appear that the italicized words “or substance” have been read out by judicial construction. Since Louisiana seems wedded to the rule of the *McDonald* decision that no valid conviction and sentence can be based on a substantially defective indictment, it would avoid possible future confusion if the judicial demise of the phrase “or substance” were to be given appropriate legislative recognition. In support of the rule enunciated in the *McDonald* decision, it should be noted that the American Law Institute’s Model Code of Criminal Procedure expressly states, as one of the grounds for a motion in arrest of judgment—“(a) that the indictment or information does not charge an offense.”

The utility of the demurrer, as a method of challenging the validity of an indictment, is open to question. The demurrer is limited to “defects apparent upon the face of the indictment” and does not embrace those defects which must be established by outside evidence. Since “defects apparent upon the face of the indictment” may also be raised by the broader motion to quash the indictment, the separate demurrer serves no useful purpose. However, it frequently provides a trap for some unwary defense attorney who may fail to recognize the technical limitations of the demurrer and use it to raise an objection requiring a consideration of evidence alien to the record, which objection should have been raised by the more comprehensive motion to quash. There is much merit in the procedure set out in the Model Code of Criminal Procedure wherein all prelimi-
nary objections to the indictment are raised by a motion to quash, and the obsolete demurrer is omitted.

THE DEFENSE OF INSANITY

The question of how to handle the insanity defense has always been a source of difficulty. Prior to the 1928 code, Louisiana had followed the common law procedure whereby the defense of insanity at the time of the crime, along with all other defenses on the merits, could be raised under a general plea of "not guilty." This commingling of the insanity issue with other basic guilt issues would frequently result in serious jury confusion. Under the heading of insanity proof, it was not uncommon to introduce evidence of hardships in the defendant's life—evidence which would otherwise be inadmissible. While this evidence might fall short of establishing the purported insanity defense, it might so cloud a sympathetic jury's perception of the basic issues of criminal liability as to result in a compromise verdict of a lesser degree of the crime, or in a "hung jury." On the other side of the ledger, joint consideration of the pleas might prejudice the defendant by forcing him to urge simultaneously the mutually inconsistent claims that he did not commit the crime; but that if he did, he was not mentally responsible.

The Code of Criminal Procedure sought to avoid these difficulties by establishing "insanity at the time of the crime" as a separate defense to the merits which must be set up by a special plea. It further directed that such defense "shall be filed, tried and disposed of prior to any trial of the plea of not guilty, and no evidence of insanity shall be admissible upon the trial of the plea of not guilty." In explaining this change the code commissioners stated, "It is thought that the provisions on this subject will result in determining the issue of insanity vel non before the trial on the merits, thereby minimizing the abuses which often arise from the use of the plea of insanity."

The new procedure contemplated separate trials and virtually required the impaneling of two juries. The first jury would determine the insanity plea, that is, whether the defendant was criminally responsible for his action. If they found him sane, a second jury would be impaneled to determine whether he had

committed the crime charged. This created a serious practical problem in the smaller country parishes where jury venires were barely adequate to provide one twelve man jury for sensational murder or rape cases. In an effort to eliminate the necessity of dual juries, a 1932 statute\textsuperscript{49} deleted the provision requiring that the insanity plea be tried and disposed of prior to trial of the plea of "not guilty." However, no change was made in the article listing insanity as a special plea,\textsuperscript{50} and the amendatory statute provided no substitute for the procedure eliminated—it did not specify when the plea of insanity was to be raised or how it was to be handled. During the past twenty years the procedure has become rather well set by judicial decision, but the results are somewhat anomalous: If the defendant simply pleads "not guilty," evidence of insanity at the time of the crime is inadmissible;\textsuperscript{51} but if he pleads "not guilty by reason of insanity," the door is wide open and all defenses may be urged simultaneously. Evidence is then admissible to show that the defendant did not commit the act; that he was justified as by self-defense, and that he is not responsible by reason of insanity. Even where the defendant wants it, he has no right to a separate trial on his insanity plea.\textsuperscript{52}

If it is desirable to keep the trial of the insanity plea separate from the general "not guilty" plea, a practical solution may be found in the California procedure.\textsuperscript{53} California reverses the order of trial and provides that where insanity is pleaded the jury shall first determine if the defendant committed the crime charged. Then, if the defendant is found to have committed the crime, the jury passes upon the separate defense of insanity. In this way a single jury can decide both issues, and its judgment in deciding the initial question of guilt or innocence is not colored by the insanity defense or evidence introduced thereunder.

If it is desirable to revert to the more expeditious common

\textsuperscript{51} State v. Eisenhardt, 185 La. 308, 169 So. 417 (1938); State v. Gunter, 208 La. 694, 24 So. 2d 303 (1945).
\textsuperscript{52} State v. Dowdy, 217 La. 773, 47 So. 2d 496 (1950), discussed 11 Louisiana Law Review 246 (1951).
\textsuperscript{53} 11 Cal. Pen. Code § 1016 (Deering, 1937). This procedure does not violate the "due process" provisions of the Fourteenth Amendment. Troche v. California, 206 Cal. 35, 273 Pac. 767 (1928); appeal to United States Supreme Court dismissed 280 U.S. 524 (1929).
law procedure of trying the insanity plea along with other defenses relating to guilt or innocence, then insanity should be struck out as a separate plea under Article 261. In such case it might be well to require specifically advance notice of the defendant's intention to rely on insanity as a defense. This could easily be accomplished by requiring the filing of such notice at the arraignment, or at such later time prior to the beginning of the trial as the judge in his discretion may permit.

Closely related to the above problem is the question of how the question of sanity is to be investigated. Rather than to leave the matter to be determined by a "battle of experts," where both sides call high-powered psychiatrists as witnesses, a 1932 amendment to the Code of Criminal Procedure54 provided for an examination and report by qualified mental experts appointed by the court. The requirement of "qualified experts in mental diseases" proved difficult to comply with in view of the then scarcity of properly trained personnel. A 1944 amendment substituted a lunacy commission composed of "disinterested physicians" whose sole qualification was that they must have practiced medicine for three years. The mandatory inclusion of the coroner, who usually has no special training in the field of psychiatry and mental diseases, did not serve to strengthen the commission. The result has been that the lunacy commission's report has been entitled to little weight, and the battle of paid experts (psychiatrists employed by the defense and the state) rages unabated.

In seeking to recapture lost ground in the matter of sanity hearings, the Massachusetts procedure offers a very sound solution.55 In that state the law provides for a state sanity commission composed of trained psychiatrists. It is the duty of this commission to examine in advance of trial all persons indicted for a capital crime and others who appear likely to urge any form of insanity plea as a defense. Such pre-trial examinations by a specially qualified board results in sanity reports which are promptly available and are entitled to serious consideration as unbiased expert testimony. Considering the importance of a sound and fair hearing on the question of defendant's mental condition, it would appear that the cost of providing such a commission

would be money well spent. If the members were employed on a fulltime basis, their extra time could be utilized in helping the overworked staffs of our state mental institutions.

It has frequently and logically been suggested that where a person is acquitted by reason of insanity at the time of the offense he should be committed forthwith to an institution for the criminally insane. Present procedures apparently entitle the defendant to an immediate separate hearing on the question of his present insanity. The constitutionality of a statutory provision for automatic commitment has not been passed on by the United States Supreme Court. While state tribunals are in conflict on this point, a majority of the holdings support the view that such a procedure is not a denial of due process of law.56

THE NOLLE PROSEQUI

Article 329 codified the existing Louisiana jurisprudence and general common law rule when it stated that power to nolle prosequi an indictment should be "subject to the sound discretion and control of the district attorney, and in order to exercise that power he shall not have to obtain the consent or permission of the court."56 Such a rule puts tremendous power in the hands of the district attorney, who may thus nullify the findings of the grand jury. Actually this danger is largely conjectural, since the force of public opinion and the district attorney's sense of public responsibility will generally preclude such a summary disposition of grand jury indictments. A fear that the prosecutor's discretion may be abused led to the proposal in the American Law Institute's Code of Criminal Procedure that a prosecution shall not be dismissed except by court order and for good cause entered of record by a written statement.58 Similarly, the Federal Rules of Criminal Procedure require "leave of court" for the dismissal of an indictment by the United States Attorney.59 There are a number of rather convincing arguments for not limiting the district attorney's full discretionary power to nolle prosequi indictments.60 Foremost of these are the facts that the district attorney frequently operates with a staff which is

60. See Note, 50 Yale L.J. 107, 110 (1940), and Orfleld, Criminal Procedure 342 (1947).
inadequate for the proper prosecution of all charges which may be brought by an overactive grand jury, and that the district attorney has the best opportunity to investigate and sift such charges. Possibly the Minnesota Crime Commission suggestion represents a proper compromise of the conflicting interests when it recommended that whenever an indictment or information is nolle prossequied a written record should be made of the reasons therefor.61 There is, however, the possibility that the district attorney will make purely perfunctory statements, such as "insufficient evidence" or "witness missing."

Recusation of Trial Judge

Article 303, which states the causes for recusation of the trial judge, was rewritten when it was incorporated into the 1950 Revised Statutes. While the revision simplified, clarified and slightly broadened the grounds stated, it did not purport to supply a major deficiency in the article. The first and most litigated ground, "his being interested in the cause," only covers the situation where the judge has a personal interest or advantage to be served through the defendant's conviction. It does not apply to the case where the trial judge has evidenced a definite hostility for some other reason.62 Full protection of the defendant's right to an impartial tribunal should appear to require the recusation of any hostile judge, regardless of whether he has any pecuniary or personal axe to grind. In that regard, the Model Code and Federal Rules both state this ground of recusation to cover any case of "interest or prejudice."

Jury Verdicts

The provisions as to jury verdicts, which are found in both the Louisiana Constitution64 and the Code of Criminal Procedure,65 appear somewhat illogical. In capital cases a unanimous verdict of a twelve man jury is required. In other serious felony cases a nine-out-of-twelve verdict is sufficient. However, in quasi (relative) felony cases, tried by a five man jury, the

63. A.L.I., Model Code of Crim. Proc., § 250 (1930). See Comment to Section 250 for other statutes recognizing "personal bias or prejudice" as a ground for recusal.
64. La. Const. of 1921, Art. I, § 9, and Art. VII, §§ 41, 42.
requirement of unanimity is again imposed. It would appear that if a nine-out-of-twelve verdict would suffice for conviction of a serious felony that a similar proportionate verdict should be adequate in these lesser crimes. With that thought in mind the Louisiana State Law Institute, in its projet for a new Constitution, provided that the quasi-felony should be tried by an eight man jury with six concurring in any verdict rendered.66 This suggestion met some disapproval in the small parishes due to the inconvenience and cost of securing eight man juries for these lesser crimes. Possibly a more practical solution would be to keep the present five man bobtail jury and provide that a four-out-of-five verdict would be sufficient. Such a change would eliminate many of the presently large number of mistrials. At the same time it can scarcely be urged that the defendant's constitutional rights to a fair trial demand a unanimous verdict where he is charged with one of the lesser offenses. In this regard, it is significant that in Orfield's recent treatise on Criminal Procedure, abolition of the requirement of unanimity, and reduction of the size of the jury, are listed among the chief jury reforms which have been proposed and adopted in some jurisdictions.67 The American Law Institute's Model Code provides that in non-capital felony cases "a verdict concurred in by five-sixths of the jurors . . . may be rendered."68

A related question is raised by the well settled rule that even the lesser responsive verdicts must be unanimous if a capital offense is charged. For example, if the charge is murder then a verdict of manslaughter, which would normally be returned by nine-out-of-twelve jurors, must also be unanimous. Since the purpose of the unanimity requirement is to make sure that a man shall not be convicted of a crime carrying capital punishment except by a unanimous verdict, it would appear appropriate to authorize included verdicts of lesser crimes or a verdict of "not guilty" by a nine-out-of-twelve vote. Again the matter is being considered from the standpoint of avoiding an unnecessary number of "hung juries" with resulting mistrials. The recommendations concerning jury verdicts are matters

which would require constitutional amendments as well as changes in the appropriate sections of the Code of Criminal Procedure.

**Jury Selection**

The purpose of the voir dire examination of prospective jurors is to secure fair and qualified persons for that important function. One sometimes wonders whether this end is really achieved by Louisiana's common law system of long and confusing voir dire examinations, which often resolve themselves into a battle of wits between defense counsel and the district attorney. 69 The federal system, 70 wherein the trial judge plays the leading role in jury selection, provides a much more expeditious method, and yet, federal juries compare very favorably with our state juries as to fairness and integrity. The Model Code of Criminal Procedure also provides for examination of prospective jurors by the trial judge, and for such supplemental examination by either party as the court in its discretion may permit. 71 However, a majority of our states still adhere to the old common law system. This question as to the best method of jury selection is a debatable one which should be the subject of thorough study and discussion. 72

Any consideration of the process of jury selection would be incomplete without a brief discussion of Article 353 which purports to state the prerequisites for reversal where the challenge of a juror for cause has been improperly overruled. In that article the draftsmen of the 1928 Code sought to restate existing Louisiana jurisprudence. However, the language employed is cumbersome and ambiguous, and the situation has not been improved by the somewhat unfortunate holding of *State v. Breedlove.* 73 In that case the Supreme Court held that the de-

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69. The recent case of *State v. Oliphant*, 220 La. 489, 56 So. 2d 846 (1952) discussed 13 Louisiana Law Review 333 (1953), presents our common law system of voir dire examination at its worst. The line of questions astutely propounded to the prospective jurors appeared calculated to confuse them, rather than truly to ascertain whether they had formed a fixed opinion of guilt.


72. From a mass of authoritative writing in point, the following are suggested: Report to the Judicial Conference of Senior Circuit Judges of the Commission on Selection of Jurors (1942); Blume, Jury Selection Analyzed, 42 Mich. L. Rev. 831 (1944); Grant, Methods of Jury Selection, 24 Am. Pol. Sci. Rev. 117 (1930); Otis, Selecting Federal Court Jurors, 29 A.B.A. J. 19 (1943).

73. 199 La. 965, 7 So. 2d 221 (1942), discussed in 5 Louisiana Law Review 253 (1948).
fendant could not claim reversible error unless he had done two things. First, he must have exhausted his peremptory challenges in the completion of the jury—a requirement expressly spelled out in the first clause of Article 353. Second, he must have challenged an additional juror whom he was forced to keep, after his peremptory challenges were exhausted. This must be done, according to the court, in order to show that the error was “prejudicial to substantial rights of the accused” and to meet the specific requirement of the last clause of Article 353 by showing that “the defendant by such ruling is forced to accept an obnoxious juror.” There was much common sense in the late Chief Justice O’Niell’s dissent. He stated that a sufficient presumption of injury is established by the fact that defense counsel has exhausted his peremptory challenges in impaneling the jury, without imposing the additional requirement that he must challenge and thus prejudice a subsequent juror whom he is ultimately forced to keep. The Breedlove decision, although rendered by a divided court (4 to 3), appears justified by the language of Article 353. The remedy is a legislative one, and clarification of the language and effect of this article is much to be desired.

THE OPENING STATEMENT

The district attorney’s opening statement “explaining the nature of the charge and the evidence by which he expects to establish the same” is mandatory in Louisiana, and its omission is ground for reversal if timely objection is made. The purpose and scope of this opening statement has been a much litigated question. A few Louisiana cases have followed the generally accepted rule that the statement has no binding force and is made “to enable the jury to understand and appreciate the testimony as it falls from the lips of the witnesses.” There is a tendency in the Louisiana jurisprudence, however, to treat the opening statement as a device to protect the defendant from surprise by forcing the state to “show its hand” in advance of trial.

75. Id. at Art. 333.
77. State v. Sharbino, 194 La. 709, 194 So. 756 (1940) noted in 3 Louisiana Law Review 238 (1940); Orfield, Criminal Procedure 356 (1947) states that the function of the opening statement is “to assist the jury in arriving at the truth.”
this theory evidence not mentioned in the opening statement is inadmissible, and a troublesome problem is posed as to how detailed the opening statement must be. These difficulties are without corresponding benefits for there is no real need for requiring such a preview of the state's case. The defendant is amply protected from prejudicial surprise by his right to a bill of particulars and to a continuance in appropriate cases. In view of the unsettled state of our jurisprudence, a specific legislative statement may be the only way to place the district attorney's opening statement in its proper focus—as an aid to the jury, rather than a technical limitation on the proof to be adduced at the trial.

**DIRECTED VERDICTS**

A device giving the judge added control over the trial is the federal motion for judgment of acquittal and the provision for a directed verdict of acquittal in the Model Code. In cases where the *prosecution's evidence* has failed to establish a prima facie case of guilt, the directed verdict of acquittal saves the defendant from further harassment and expense. Furthermore, it is to the interest of the state to prevent additional prolongment of a clearly futile trial. The advantages of the judgment or directed verdict of acquittal after the evidence of both sides is concluded are much less substantial. In such cases there is no great benefit to be secured by the trial judge's taking over the jury's function and ordering an acquittal. Ample protection from a prosecution-happy jury is provided by the motion for a new trial on the ground that the verdict is contrary to the law and the evidence.

The Louisiana Code of Criminal Procedure does not provide any form of directed verdict of acquittal. Thus, even an obviously unfounded prosecution must drag on to the bitter end, unless the district attorney chooses to nolle prosequi the charge. A 1950 statute provides partial relief, in cases tried before

82. Art. 509 (1), La. Code of Crim. Proc. of 1928; La. R.S. 1950, 15:509(1). In State v. Daspit, 167 La. 53, 118 So. 690 (1928), the Louisiana Supreme Court held that it was the "duty" of a trial judge to determine the sufficiency of the evidence to support the jury's verdict of guilty.
the judge alone, by a motion for acquittal after the state's evidence is completed. No form of directed verdict is available, however, in cases tried before a jury. It is true that motions for a directed verdict at the conclusion of the state's evidence are seldom well founded, for it is not the usual practice for a district attorney to bring a case to trial with evidence insufficient to establish a prima facie case. Yet, the device should be available for those situations where it is needed to protect the accused from unnecessary prolongation of unfounded charges.

SUSPENSION OF SENTENCE

The 1942 amendment of the articles governing suspension of sentence in misdemeanor cases made little improvement in the law. A provision which would have permitted the imposition of conditions by the court was deleted by the House Committee, and the offender is still released “during his good behavior” which simply means “until he is convicted of another crime.” While it might not be financially practical to set up a sufficiently extensive probation system to provide supervision for misdemeanants with suspended sentences, the imposition of reasonably enforceable conditions would be far preferable to a completely unregulated release. The specific authority to suspend sentence after the prisoner has begun to serve enables the trial judge to grant necessary relief in cases where the prisoner becomes critically ill during his incarceration or is desperately needed in a family emergency. However, the full beneficial effect of this provision is somewhat diminished by the Supreme Court’s ruling that the suspension must be for the entire remainder of the term to be served. There are temporary emergency situations where a partial suspension of sentence may serve a very useful purpose and the law should be clarified so as to permit such relief.

MOTION FOR A NEW TRIAL

The motion for a new trial “must be filed and disposed of

84. Missouri Crime Survey 175 (1926); “... out of the total number of 4,969 felony cases in the circuit courts, during the period of the survey, only 18 were dismissed owing to the failure of the state to make out a prima facie case.”
before sentence. A minimum time of twenty-four hours must elapse between verdict and sentence, and it is the usual practice to sentence the defendant within a few days after conviction. This period is adequate for the preparation and filing of the motion for a new trial, except in those cases where the motion is based on newly discovered evidence. Frequently the evidence, despite reasonable diligence of defense counsel, is not discovered until after sentence. In such cases it appears to be the generally accepted practice to disregard the mandatory language of the code, by permitting the motion to be filed at such later time as the new and material evidence is discovered. Rather than to relegate this important matter to the judicial recognition of an implied exception to a flatly stated rule, the Federal Rules provide a special two-year period for the filing of a motion for a new trial on this ground.

The remedy, when a motion for a new trial is granted on the ground that the verdict is contrary to the law and the evidence, is to set aside the verdict with a resulting trial de novo of the case. Sometimes the achievement of practical justice is not that simple. The trial judge may be convinced that the defendant is not guilty of the crime of which he was convicted, but is still clearly guilty of a lesser and included offense. For example, a defendant may have been convicted of murder in a case where the killing was in the heat of passion caused by adequate provocation. In such a case the appropriate relief

89. Id. at Art. 521.
90. Under Article 531 the judge may postpone the imposition of sentence "for a period not exceeding sixty days" to secure information relating to the advisability of placing the offender on probation.
91. The motion must affirmatively show "that notwithstanding the exercise of reasonable diligence, the evidence was not known before or during the trial, but has been discovered since." Id. at Art. 511. See also Article 512 and State v. Saba, 203 La. 881, 14 So. 2d 751 (1943) applying this requirement.
92. Fed. Rules of Crim. Proc., Rule 33. The prior federal rule (by jurisprudence) had required that such motion be made within the term of court.
94. Id. at Art. 515. Louisiana has adopted the probable minority view that a defendant who secures a new trial, after having been convicted of a lesser degree of the crime charged, does not give up the benefit of the implied acquittal of the greater offense. State v. Harville, 171 La. 256, 130 So. 348 (1930). However, Section 368 of the Institute’s Model Code expressly provides that on re-trial “the defendant may be convicted of any offense charged in the indictment or information, irrespective of the verdict or finding on the former trial.” Many jurisdictions uphold the validity of such convictions, see Note, 23 Tulane L. Rev. 575 (1949).
should be a reduction of the judgment to manslaughter, rather than a complete reversal—yet no such practical solution is available to the reviewing court. In this regard a 1927 California statute furnishes a very logical solution. It provides that if the evidence shows the defendant to be not guilty of the degree of the crime of which he was convicted, but guilty of a lesser degree of the crime, the trial court may modify the judgment accordingly without granting or ordering a new trial. Such a procedure achieves complete justice and also eliminates the burden of unnecessary re-trials.

EXCEPTIONAL REMEDIES FOR IMPROPER CONVICTIONS

Where the impropriety or irregularity of a conviction is not realized until the defendant is already serving his sentence, the normal remedies of the motion for a new trial or in arrest are unavailable. Such motions must be filed between verdict and sentence. Where there was a lack of jurisdiction ratione materiae extraordinary relief may be secured through a writ of habeas corpus filed with the district court. Such relief was granted in *State ex rel. Duhon v. General Manager, Louisiana State Penitentiary*, where the defendant had been convicted of a non-existent crime. Similarly a writ of habeas corpus would be appropriate where a juvenile was convicted and sentenced for the crime of burglary, since the criminal district court has no jurisdiction to try a juvenile for non-capital crimes. A possible hiatus in our procedure lies, however, in the case where there was clearly jurisdiction ratione materiae, but where the conviction or guilty plea had resulted from gross irregularities or a serious mistake as to the law. Such a situation could occur in a case where the jurisprudence at the time of the conviction indicated liability, but a subsequent Supreme Court decision in another case recognized a defense which might have been raised had it not been assumed invalid. Again, a miscarriage of justice might occur by reason of irregular procedures at the trial—as where a defendant charged with murder pleaded guilty in order to go to the state penitentiary and escape threatened mob violence. In this type of case the Indiana Supreme Court affirmed the granting of relief through the little used common law writ

of error *coram nobis*. Probably this form of relief would be available in Louisiana, since the common law rules of procedure prevail in matters where the statutory law is silent. Again, it may be that the applicant for relief may be relegated to some less certain type of relief such as appealing to the discretionary supervisory jurisdiction of the Supreme Court. Here is an important right of the defendant which should be clearly spelled out and a definite procedure provided rather than to leave the remedy for such mistaken convictions to conjecture and somewhat dependent upon super-astuteness of defense counsel. Several legislative solutions suggest themselves. An expanded and modernized version of the writ of error *coram nobis* might be added to the review procedures in the Code of Criminal Procedure. The arbitrary time limitations on the motions for a new trial and in arrest of judgment might be removed. The legislature might point the way (although it could not direct effectively) to such relief through the Supreme Court's supervisory jurisdiction. At any rate, here is a matter which should not be handled "by main force and awkwardness" in our state courts, possibly resulting in situations calling for collateral intervention through the federal writ of habeas corpus.

In this article the writer has briefly raised some of the more serious deficiencies and incongruities found in the 1928 Code of Criminal Procedure in its present much-amended form. Some of the basic procedures followed have been compared with their differing counterparts in the Federal Rules and in the Model Code of Criminal Procedure. Suggested amendments are sometimes offered—not with the idea that the suggestion presents the solution of the problem, but rather to indicate one of the ways in which the procedure might be improved. A number of lesser problems have been omitted, and the important chapter on rules of evidence is completely untouched. Suffice it to point out that the provisions of this chapter have been a prolific source of Supreme Court jurisprudence, and that many of the rules stated therein should be carefully appraised as to their practicality, fairness and clarity. Each change, whether enacted piece-meal, or through a complete revision of the code, will re-

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89. La. R.S. 1950, 15:0.2, source Section 33 of the Crimes Act of 1805.
100. La. R.S. 1950, 15:422-497.
quire a certain amount of re-adjustment to the new procedure, as was the case after the adoption of the code in 1928. Such is the price of all progress in the law. Experienced practitioners must stand ready to give up their vested advantage in a knowledge of the confusing complexities of the present system, in order that the entire bar may benefit from new and simplified procedures. Suggested changes must be appraised in the light of dual, and somewhat conflicting considerations—fairness to the accused and trial expediency. Procedures should not be altered for the sake of change alone or without sound reason. Yet, where a rule is clearly out-moded, a century of habitual error should not establish a vested right for its continuance. Unfortunately the wheels of progress move rather slowly in this sometimes neglected, yet very important, area of adjective law.