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located enterprises are never nuisances *per se*[32] and the commencement of their operations cannot be prevented for fear that they will become nuisances.[33] On the other hand, if the occupant of neighboring land fails to protest the establishment of an enterprise, this failure to protest may be used against him in subsequent litigation.

Conclusion

None of the foregoing factors can be described as ordinarily conclusive. The weight of each in the balancing process in any given nuisance case varies with the presence or absence of the others. In no other area of the law do the implications of the decisions seem more difficult to trace.

Billy H. Hines

Separation of the Jury in Criminal Trials

The common law system of criminal procedure, which was adopted in the Territory of Orleans by the Crimes Act of 1805,[1] requires that there be no separation of the jury during a criminal trial.[2] This rule was adopted by the Louisiana Supreme Court for the first time in 1844 in the case of *State v. Hornsby*,[3] and, with little change, is now included in Article 394 of the Louisiana Code of Criminal Procedure of 1928:

> "From the moment of the acceptance of any juror until the rendition of verdict or the entry of a mistrial, as the case may be, the jurors shall be kept together under the charge of an officer in such a way as to be secluded from all outside communication; provided that in cases not capital the judge may, in his discretion, permit the jurors to separate at any time before the actual delivery of his charge."

The object of this comment is to present an analysis of the

32. Canone v. Pailet, 160 La. 159, 106 So. 730 (1926); New Orleans v. Lenfant, 126 La. 455, 52 So. 575 (1910); *cf.* Frederick v. Brown Funeral Homes, Inc., 222 La. 57, 62 So.2d 100 (1952); Graver v. Lepine, 161 La. 97, 108 So. 138 (1926); Hill v. Battalion Washington Artillery of City of New Orleans, 143 La. 533, 78 So. 844 (1918).

33. Frederick v. Brown Funeral Homes, Inc., 222 La. 57, 62 So.2d 100 (1952); Bell v. A. Riggs & Bro., 38 La. Ann. 555 (1886).

1. La. Acts 1805, c. 50, § 33, p. 440.

2. 1 CHITTY, CRIMINAL LAW 632 *et seq.* (1819).

3. 8 Rob. 554 (La. 1844).

Louisiana jurisprudence in an effort to determine what jury separations constitute sufficient ground for setting aside a conviction.

Non-Capital Cases

The Louisiana Supreme Court has continually applied the following rule from *State v. Hornsby*: "In cases not capital, courts may, in their discretion, permit the jury to disperse until they have received the charge of the court."[4] There have been ten appeals from convictions in non-capital cases wherein a reversal of the conviction was urged on grounds of a jury separation before the judge had given his charge to the jury.[5] The fact situations involved ranged from one juror's making a visit to the men's room unaccompanied by an officer, to complete dispersal of the jury overnight. All ten convictions were affirmed. The most recent of these cases, *State v. Williams*,[6] involved an extreme situation in which twenty-eight hours elapsed between the close of the argument and the delivery of the charge. During that time one of the jurors was sworn in for the trial of a second case. The court, citing Article 394 of the Code of Criminal Procedure, affirmed the conviction, observing that the defendant had failed to show how he suffered a disadvantage from this unusual sequence of events.

In three non-capital cases the appeals were based on a separation of the jury after the trial judge had given his charge to the jury. The Supreme Court set aside the conviction in *State v. Populus*[7] because the jurors were allowed to return to their homes overnight. In the other two cases the convictions were affirmed, the court finding that the accused could not have been prejudiced by the incidents which took place. In *State v. Sims*[8] the jurors were leaving the courtroom for the jury room when one of them "diverged for the purpose of getting his hat" about fifteen feet from the jury box; he then rejoined the other jurors. In *State v. Smith*[9] the jurors were retiring for deliberations when

4. *Id.* at 559.

5. State v. Williams, 192 La. 713, 189 So. 112 (1939); State v. Wells, 168 La. 925, 123 So. 621 (1929); State v. Robichaux, 165 La. 497, 115 So. 728 (1928); State v. Spurling, 115 La. 789, 40 So. 167 (1906); State v. Baudoin, 115 La. 773, 40 So. 42 (1905); State v. Antoine, 52 La. Ann. 488, 26 So. 1011 (1900); State v. Magee, 48 La. Ann. 901, 19 So. 933 (1896); State v. Pierre, 38 La. Ann. 91 (1886); State v. Dubois, 24 La. Ann. 309 (1872); State v. Crosby, 4 La. Ann. 434 (1849).

6. 192 La. 713, 189 So. 112 (1939).

7. 12 La. Ann. 710 (1857).

8. 117 La. 1036, 42 So. 494 (1906).

9. 156 La. 818, 101 So. 209 (1924).

some of them stopped in the courtroom to get a drink of water while the remainder of the group left the courtroom in the custody of a deputy. The courtroom door then slammed shut but was immediately opened. In both the latter cases all jurors were constantly in the presence of either the court or a sworn deputy, and the separations were brief.

An analysis of the cases indicates that a separation of the jury before the charge has been delivered is not sufficient grounds for setting aside a conviction. Convictions will be reversed for separations occurring after the charge to the jury only upon a clear showing that one or more jurors passed from the surveillance of the court or its sworn deputies, thereby raising the possibility of outside influence upon the jurors.

Capital Cases

Separation of the jury has been urged in appeals from capital convictions much more often than appeals from non-capital convictions. The cases have presented widely varied fact situations, one of the most unusual of which was as follows: The jury began their deliberations late on a Saturday night. The trial judge waited for the verdict until one-thirty on Sunday morning, then adjourned his court until Monday. At six o'clock Sunday morning the jurors emerged from the jury room, handed the clerk of court a sealed verdict, then separated and went to their homes. On Monday morning the court convened, the jury was polled, and then the sealed verdict was opened. The Supreme Court set aside the conviction on grounds of a separation of the jury during the course of the trial, taking the position that "the trial is not closed until the delivery and reading of the verdict in open court and the discharge of the jury."[10]

In *State v. Warren*[11] and *State v. Moss*[12] the convictions were set aside because of the jurors' visits to the rest room. In those cases it was found that although the jurors being conducted to the rest room were in the custody of a sworn deputy, those left behind in the court house were completely unsupervised and therefore exposed to outside influence. The Supreme Court has consistently held that one or more jurors may separate from the group to visit the rest room as long as all twelve jurors are kept under the supervision of the court or sworn deputies. This

10. State v. Hornsby, 32 La. Ann. 1268, 1269 (1880).
11. 43 La. Ann. 828, 9 So. 559 (1891).
12. 47 La. Ann. 1514, 18 So. 507 (1895).

rule is apparently applicable to separations occurring either before[13] or after[14] the charge to the jury.

In *State v. Foster*[15] the conviction was reversed because of the manner in which the jurors had been housed overnight during the course of the trial. Ten white and two colored jurors had been selected and were given quarters in a deputy's home near the court house. The white jurors occupied one room, the colored jurors the kitchen, and the deputy slept in a third room. No officer slept with either jury group and the doors of the house remained unlocked. In *State v. Walters*[16] the conviction was set aside because of an erroneous charge to the jury, and the court discussed in detail the manner in which the jury had been housed. The twelve jurors were assigned to three unconnected hotel suites opening into a common hallway. The suite doors were locked and the only deputy in charge slept outside in the hallway. The court criticized the use of separate rooms and pointed out that all the jurors were "out of the presence, sight, and hearing of the deputy sheriff."[17] In *State v. Spears*,[18] decided the same year as the *Walters* case, the jurors retired to two hotel rooms opening into and separated by a common hallway. The doors were locked and one deputy sheriff slept in each room. The Supreme Court affirmed the conviction, pointing out that the jurors had been continuously under the supervision of a deputy sheriff.

In *State v. Carriere*[19] and *State v. Fuller*[20] the alleged jury separations occurred in public restaurants. In the first case the jurors dined at three tables on one side of the restaurant. Other patrons were seated on the other side of the room. The Court affirmed the conviction, finding that the jury had not been separated, since they had been kept apart from other persons and

13. State v. Sharbino, 194 La. 709, 194 So. 756 (1940); State v. Washington, 169 La. 595, 125 So. 629 (1930); State v. Reed, 149 La. 175, 88 So. 783 (1921); State v. Gunn, 147 La. 373, 85 So. 44 (1920); State v. Bullock, 136 La. 167, 66 So. 767 (1914); State v. Callian, 109 La. 346, 33 So. 363 (1903); State v. Veillon, 105 La. 411, 29 So. 883 (1901); State v. Scanlan, 52 La. Ann. 2058, 28 So. 211 (1900); State v. Bellow, 42 La. Ann. 586, 7 So. 782 (1890); State v. Nockum, 41 La. Ann. 689, 6 So. 729 (1889); State v. Forney, 24 La. Ann. 191 (1872).

14. State v. Johnson, 30 La. Ann. 921 (1878); State v. Turner, 25 La. Ann. 573 (1873).

15. 45 La. Ann. 1176, 14 So. 180 (1893).

16. 135 La. 1070, 66 So. 364 (1914).

17. 135 La. 1070, 1105, 66 So. 364, 376 (1914).

18. 134 La. 483, 64 So. 385 (1914).

19. 141 La. 136, 74 So. 792 (1917).

20. 218 La. 872, 51 So.2d 305 (1951).

had had no communication with them. In the second case three deputies conducted the jury to a crowded cafe where ten jurors sat at one table with no outsiders, and two jurors sat in a booth with outsiders. One of the outsiders was a grand juror who had indicted the defendant, and during the course of the meal one of the two trial jurors conversed with the grand juror. On a motion for a new trial the parties involved testified that they did not know each other's status and that their conversation had had no reference to the trial. The conviction was affirmed.

In three instances the reversal of a conviction has been urged on the ground that the jury was allowed to attend public entertainment. In *State v. Oteri*[21] the jury sat on reserved benches ten feet from other spectators, in the custody of a deputy who was a prosecution witness. The court affirmed the conviction, ruling that a prosecution witness can also serve as a bailiff, and that the evidence indicated no jury separation or communication with outside persons. In *State v. Clary*[22] the jury attended two picture shows with the permission of the judge and in the custody of bailiffs. The jurors were seated in the audience with the rows of seats in front of and behind them occupied by outsiders. The Supreme Court affirmed the conviction, finding no evidence of communication between the jurors and outsiders. The court further pointed out that defense counsel, knowing of the visits to the movies, should not have delayed his objections until after the verdict was returned. But in the similar case of *State v. Ledet*[23] defense counsel was not guilty of laches, since he first learned after the murder conviction that the jury had attended a motion picture during the course of the trial. The jurors had been in the custody of a deputy and had been together at all times. The rows of movie seats immediately in front of and behind the jurors had been occupied by outsiders. The state's evidence indicated that there had been no attempt by outsiders to communicate with the jury, and the defendant offered no evidence to the contrary. The Supreme Court affirmed this conviction also, stating that "the rule requiring the isolation of a jury against improper influences does not appear to preclude the allowance of recreation and exercise to the jury . . . ."[24]

21. 128 La. 939, 55 So. 582 (1911).
22. 136 La. 589, 67 So. 376 (1915).
23. 211 La. 769, 30 So.2d 830 (1947).
24. 211 La. 769, 780, 30 So.2d 830, 833 (1947).

One consistent point can be noted in all the Louisiana jury separation cases[25]—convictions are set aside only in instances where one or more jurors have passed out of surveillance of the court or its sworn deputies, thereby possibly exposing them to influence from outsiders. Though there be a physical separation of the jury, even for a period of several hours, a conviction will nonetheless be upheld if all jurors were constantly supervised by a deputy who can testify that they have had no outside contacts sufficient to prejudice their verdict. In view of this, the selection of mixed juries should cause no apprehension among Louisiana district attorneys, even though it be necessary for such juries to separate for sleeping and other purposes during the course of the trial. It is submitted that our Supreme Court would sustain a conviction made by such a separated jury if the requirement of constant supervision by deputies had been observed.

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Recovery for Mental Suffering in Louisiana

The weight of authority at early common law[1] considered mental suffering, not accompanied by any other element of actual damage, insufficient grounds for a recovery of damages.[2] The statement in the famous case of *Lynch v. Knight*,[3] that "[m]ental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone," was the generally accepted rule. In the absence of competent medical knowledge in the field, mental pain was regarded merely as a state of mind or feelings, hidden in the inner

25. The cases discussed present the most frequently urged types of jury separations. The situations not presented add little to the pattern.

1. The growth of the law regarding mental suffering at common law may be traced through the following articles: Bohlen, *Right to Recover for Injury Resulting from Negligence Without Impact*, 50 U. OF PA. L. REV. 141 (1902); Goodrich, *Emotional Disturbance as Legal Damage*, 20 MICH. L. REV. 497 (1922); Green, *"Fright" Cases*, 27 ILL. L. REV. 761 (1933); Hallen, *Damages for Physical Injuries Resulting from Fright or Shock*, 19 VA. L. REV. 253 (1933); Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936); Throckmorton, *Damages for Fright*, 34 HARV. L. REV. 260 (1921), 57 AM. L. REV. 828 (1923); Wade, *Tort Liability for Abusive and Insulting Language*, 4 VAND. L. REV. 63 (1950); Comment, *Fright or Nervous Shock as a Basis for the Recovery of Damages*, 12 TULANE L. REV. 272 (1938).

2. Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896).

3. 9 H.L. Cas. 577, 598 (1861).