Louisiana Law Review

Volume 17 | Number 2
The Work of the Louisiana Supreme Court for the 1955-1956 Term
February 1957

Criminal Law and Procedure

Dale E. Bennett

Criminal Law and Procedure

*Dale E. Bennett**

CRIMINAL LAW

Theft

Prior to the Criminal Code of 1942 a person who obtained property by false representations as to future facts was not criminally responsible for the misrepresentations.[1] Article 67[2] of the Criminal Code not only combined all the stealing offenses in one crime of theft, but it also broadened the coverage of that crime.[3] In the fraudulent pretense type of offense it covers the taking "by means of fraudulent conduct, practices or representations." In *State v. Dabbs*[4] defendant, a used car dealer, purchased three cars with a draft payable two days from date, knowing at the time that he did not have sufficient funds in the drawee bank to cover the draft. In defense to a theft charge, defendant contended that the drafts were mere promises to pay in the future, and hence the crime of theft was not made out. The Supreme Court had little trouble in holding that the giving of the drafts, even though it amounted to a representation of future facts, was a fraudulent conduct or practice as denounced by the theft article. Therefore, the defendant's conviction of theft was upheld. It was also held that a custom of used car dealers to make purchases with drafts which were not covered with sufficient funds at the time they were drawn would be no defense. It was said that custom cannot justify a violation of the Criminal Code.

Aggravated Battery

The Supreme court, in In re *Glassberg*,[5] reversed a juvenile court's determination that a thirteen year old boy was a delin-

---

*Professor of Law, Louisiana State University, with B. Lloyd Magruder as research assistant.

1. State v. Colly, 39 La. Ann. 841, 2 So. 496 (1887); State v. Antoine, 155 La. 120, 98 So. 861 (1924).

2. LA. R.S. 14:67 (1950).

3. Bennett, *The Louisiana Criminal Code*, 5 LOUISIANA LAW REVIEW 6, 37-38 (1942); L.S.A.-R.S. 14:67, Reporter's Comment, at 358 (1950).

4. 228 La. 960, 84 So.2d 601 (1955); noted in 16 LOUISIANA LAW REVIEW 807 (1956).

5. 230 La. 396, 88 So.2d 707 (1956).

quent in that he had committed aggravated battery by shooting a girl playmate in the face with a rifle. The court found, from an examination of the record, that the "pointing of the gun in the general direction of Miss Claire and the discharging of it with the resulting injury were wholly accidental acts." Thus, there was no general criminal intent which is a necessary element of the crime of aggravated battery.[6] While criminal negligence in handling a loaded gun might be the basis of a charge of negligent injuring,[7] it could not supply the general criminal intent which is an essential element of aggravated battery. In dismissing the proceedings, Justice Hamiter pointed out that the court could not be sure that the same action (placing the defendant on probation for three years) would have been taken if the boy had been adjudged a delinquent on the basis of having committed the much less serious offense of negligent injuring.

CRIMINAL PROCEDURE

Grand Jury — Secrecy of Session

Prior to the adoption of the Code of Criminal Procedure the Supreme Court in *State v. Louviere*[8] held that the presence of a stenographer at a grand jury session "was no more prejudicial to the accused than if the same testimony had been recorded on a phonograph or other mechanical device; and surely, *that* would not prejudice the accused or suffice to violate the finding of the grand jury."[9] Article 215 of the Code of Criminal Procedure maintained the secrecy of the sessions of the grand jury, but expressly allowed the district attorney and a sworn stenographer, who was to record the testimony, to be present during the sessions. In *State v. Howard*[10] the Supreme Court had occasion to test the correctness of the dictum in the *Louviere* case that the transcribing of testimony taken at a grand jury session did not violate the secrecy of the session. In holding that the secrecy of the grand jury sessions which Article 215 secures was not invaded by the recording of testimony, Justice Moise pointed out that there was no showing that any unauthorized person appeared before the grand jury or that anyone who had not taken the oath of secrecy transcribed the recorded testimony.

6. LA. R.S. 14:33 and 14:34 (1950).
7. LA. R.S. 14:39 (1950).
8. 165 La. 718, 115 So. 914 (1928) reversed on other grounds. *Accord*, State v. Louviere, 169 La. 109, 124 So. 188 (1929).
9. 165 La. 718, 720, 115 So. 914 (1928).
10. 230 La. 327, 88 So.2d 387 (1956).

Composition of the Grand Jury

The United States Supreme Court has consistently held that the systematic exclusion of Negroes from the venire and jury lists constitutes a denial of due process and equal protection of the laws to Negro defendants.[11] These decisions are based on the sound principle that impartial grand and petit juries, selected without discrimination against members of *his* race, are necessary to insure the defendant's right to a fair trial. It was not surprising, therefore, for the Louisiana Supreme Court in *State v. Lea*[12] to hold that a white man was not denied his constitutional rights by the systematic exclusion of Negroes from the grand jury which indicted him.

Short Form Indictments

By far the most significant decision rendered in the last term of the Supreme Court in the field of Criminal Procedure was that of *State v. Straughan.*[13] In a six to three decision the court declared that the part of the 1944 amendment[14] to Article 235 of the Code of Criminal Procedure, which provides that "it shall be sufficient to charge the defendant by using the name and article number of the offense committed" in cases of Criminal Code crimes not covered by the specific short forms,[15] was unconstitutional. In so doing, the court overruled *State v. Davis,*[16] which had held the provision constitutional. Chief Justice Fournet, in a majority opinion which showed much painstaking research, reasoned that[17] "all the essential facts necessary to describe the nature and cause of the offense must be incorporated in the initial criminal charge . . . because the constitution requires that all criminal prosecutions be by indictment or information"[18] and that the defendant "be informed of the nature and cause of the accusation against him."[19] Chief Justice Fournet did not feel

11. Cassell v. Texas, 339 U.S. 282 (1950); Pierre v. Louisiana, 306 U.S. 354 (1939); Norris v. Alabama, 294 U.S. 587 (1935); Strauder v. West Virginia, 100 U.S. 303 (1880).

12. 228 La. 724, 84 So.2d 169 (1955).

13. 229 La. 1036, 87 So.2d 523 (1956), 17 LOUISIANA LAW REVIEW 232 (1956). *Accord,* State v. McQueen, 230 La. 55, 87 So.2d 727 (1956).

14. La. Acts 1944, No. 223, p. 661, discussed by author, *Louisiana Legislation of 1944,* 6 LOUISIANA LAW REVIEW 16-18 (1944).

15. Article 235 provides specific short form indictments for a number of well understood crimes.

16. 208 La. 954, 23 So.2d 801 (1945), 6 LOUISIANA LAW REVIEW 716 (1946).

17. 229 La. 1036, 1072, 87 So.2d 523, 536 (1956).

18. LA. CONST. art. I, § 9.

19. LA. CONST. art. I, § 10.

that in crimes, such as gambling, which do not have a well-understood meaning, the defendant's right to a bill of particulars would satisfy the constitutional provisions. The full import of the *Straughan* decision will be carefully studied by district attorneys and judges. While only future Supreme Court decisions will completely settle the matter, the writer hazards a brief analysis of the situation. It is very probable that the Louisiana Supreme Court will continue to sustain the validity of specific short forms for crimes having a well-defined meaning and scope, such as murder,[20] theft,[21] aggravated rape,[22] and manslaughter.[23] The Chief Justice's opinion indicates a continued adherence to the view that these forms sufficiently inform the accused of the nature of the charge against him. However, the Supreme Court has definitely drawn the line upon charging multifarious and purely statutory crimes, such as gambling, by name and article number.

Long Form Indictments

The long form indictment, used for charging those crimes for which a special short form is not provided, "must state every fact and circumstance necessary to constitute the offense, but it need do no more, and it is immaterial whether the language of the statute creating the offense, or words unequivocally conveying the meaning of the statute, be used."[24] A number of 1955-56 decisions have construed the long form indictment provision so as to achieve the liberality intended — rejecting ultra-technical objections and simply determining whether the charge was sufficent to inform the accused fully of the nature of the charge against him. In *State v. Ware*[25] the defendant had been convicted under an indictment which alleged that he unlawfully sold intoxicating liquors for beverage purposes "in violation of an ordinance of the Claiborne Parish Police Jury." In a motion in arrest of judgment, defense counsel contended that the information should have specifically stated that Claiborne Parish was dry. The Supreme Court held that this contention was "untenable," stating that "a bill charging one with having committed an act in violation of a prohibitory law, is equal to saying that

20. State v. White, 172 La. 1045, 136 So. 47 (1931).
21. State v. Pete, 206 La. 1078, 20 So.2d 368 (1944).
22. State v. Chanet, 209 La. 410, 24 So.2d 670 (1946).
23. State v. Nichols, 216 La. 622, 44 So.2d 318 (1950).
24. LA. R.S. 15:227 (1950).
25. 228 La. 713, 84 So.2d 56 (1955).

the act committed is prohibited by a specific law as charged therein."[26] In *State v. Wagner*[27] it was objected that the information, charging a narcotic violation, was defective in alleging that the drug was administered to persons under the age of seventeen years, when the narcotic drug law made no reference to the age of the victim. The Supreme Court treated the allegation as surplusage, and affirmed the conviction on authority of Article 240 of the Code of Criminal Procedure. Actually, the allegation in the principal case was not adequately phrased. An allegation of the victim's age would appear essential if the enhanced penalties for sales to persons under the age of twenty-one were to be imposed.[28] In *State v. Peltier*[29] the Supreme Court held that an allegation of guilty knowledge was not essential to a valid information charging unlawful possession of narcotics. Defense counsel had urged the *Johnson*[30] and *Nicolosi*[31] decisions for the proposition that "guilty knowledge" was an essential ingredient of the crime which must be set forth in the information. In rejecting this contention, Justice Hamiter declared, "The cases cited by defense counsel plainly have reference only to the general criminal intent or guilty knowledge ordinarily required to be proved in obtaining convictions for most offenses. The question of a specific intent was not involved therein."[32] Since the crime involved requires only a general criminal intent, additional support for the holding comes from Article 234 of the Code of Criminal Procedure which states that "No indictment shall be held insufficient for want of the averment of . . . the word 'intentionally,' or . . . ." The word "intentionally" is generally employed to signify a general criminal intent.[33]

In *State v. LaNasa*[34] the Supreme Court adopted a much more technical approach. The accused was charged with violating a statute that requires death certificates to "be typewritten in

26. 228 La. 713, 722, 84 So.2d 56, 59 (1955).
27. 229 La. 223, 85 So.2d 272 (1956).
28. LA. R.S. 40:981 (1950), as amended, La. Acts 1954, No. 682, p. 1219.
29. 229 La. 745, 86 So.2d 693 (1956).
30. State v. Johnson, 228 La. 317, 82 So.2d 24 (1955), 17 LOUISIANA LAW REVIEW ... (1956).
31. State v. Nicolosi, 228 La. 65, 81 So.2d 771 (1955).
32. 229 La. 745, 756, 86 So.2d 693, 697 (1956). Justice Hamiter continued, "Inappropriate and not controlling here is *State v. Kelly*, 225 La. 495, 73 So.2d 437. The statute defining the crime involved therein specifically recited that the acts constituting the offense should be done 'knowingly.' No similar provision is contained in the statute under which this defendant was charged."
33. LA. R.S. 14:11 (1950).
34. 229 La. 842, 87 So.2d 1 (1956).

black type or written legibly in durable black ink."[35] The information simply stated that the accused had failed "to write with black ink on said certificate." In holding the information fatally defective, the Supreme Court stated, "the gravamen of the offense is not the failure to fill out a death certificate *in black ink*, as charged in the Bill of Information, but the failure to *legibly fill such a certificate in durable black ink.*"[36] Justice McCaleb, in an opinion which dissented on this point, spotted the weakness of the majority holding when he stated "it is clear to me that the charge that defendant did not use black ink at all in filling out the certificate avers a violation thereof. If the ink is not black, the law is breached even though it be durable. I have never understood that it is sacramental to charge an accused in the exact language of the statute. It is only necessary that the facts alleged disclose a violation of law."[37]

Filing the Information

In *State v. Brazzel*[38] the Supreme Court held that the information was "filed," as required by Article 5 of the Code of Criminal Procedure, when it was delivered to the clerk of court, although it had not been endorsed and marked "filed" by the clerk.

Bill of Particulars

In a number of decisions the Supreme Court again had occasion to repeat the well-settled rule that the validity of an indictment is determined solely by what is contained within its four corners, and the contents of a bill of particulars cannot serve to create or remedy a defect therein.[39]

In *State v. Butler*[40] an information charged that the accused on a certain day in Iberia Parish illegally sold and delivered a narcotic drug. The trial court refused the accused's motion for a bill of particulars requesting information as to whom the narcotics were sold and delivered, and as to where in the parish and at what time the crime took place. The trial court based its rul-

35. LA. R.S. 40:154 (1950).
36. 229 La. 842, 845, 87 So.2d 1, 2 (1956).
37. *Id.* at 848, 87 So.2d at 3, citing LA. R.S. 15:227 (1950).
38. 229 La. 1091, 87 So.2d 609 (1956).
39. State v. Dabbs, 228 La. 960, 84 So.2d 601 (1955); State v. McQueen, 230 La. 55, 87 So.2d 727 (1956); State v. Straughan, 229 La. 1036, 87 So.2d 523 (1956).
40. 229 La. 788, 86 So.2d 906 (1956).

ing on the ground that the information sought was in the nature of advance factual information as to the state's evidence which the accused was not entitled to demand. The Supreme Court, in reversing the conviction, acknowledged that it was within the sound discretion of the trial judge to grant or refuse a request for a bill of particulars but held that he had abused his discretion in this instance. The court was of the opinion that the information requested was essential to the accused's defense, especially if he desired to urge an alibi. *State v. Dugan*,[41] decided the same day as the *Butler* case, involved an identical factual situation and holding. This time the court stressed the idea that when one "is charged under the language of a statute that is so general in its terms that it does not sufficiently inform the accused of the nature and cause of the accusation" he is entitled to the same liberality from the trial judge in granting a bill of particulars as is one who is charged under a short form of indictment.

Article 222 of the Code of Criminal Procedure provides that where several distinct offenses are disjunctively enumerated in the same statute the offenses may be cumulated in the same count and charged conjunctively. The application of the principle of this article to situations where a bill of particulars is sought is neatly illustrated by the case of *State v. Mills*.[42] There, two defendants were charged with gambling, in that they conducted and directly assisted in the conducting of a lottery as a business. The gambling article of the Criminal Code[43] defines that offense as "the intentional conducting *or* directly assisting in the conducting as a business" of the activities described therein. The defendants, in a request for a bill of particulars, sought to require the state to specify whether each was charged "with conducting and operating a lottery, or only with assisting in the operation of a lottery." The state answered that each was charged with conducting *and* assisting in the conducting of a lottery. On the authority of Article 122 this answer was deemed sufficient.[44] The court also drew support for this holding from Article 24 of the Criminal Code, which abolishes the distinction between a principal and an accessory.

41. 229 La. 668, 86 So.2d 528 (1956).
42. 229 La. 758, 86 So.2d 895 (1956).
43. LA. R.S. 14:90 (1950).
44. *Accord*, State v. Prince, 216 La. 989, 45 So.2d 366 (1950), discussed in *The Work of the Louisiana Supreme Court for the 1949-1950 Term — Criminal Law and Procedure*, 11 LOUISIANA LAW REVIEW 239-40 (1951).

The *Mills* case also held that the defendant was not entitled to information before trial as to the type of lottery involved, because the word lottery "is neither vague nor indefinite." As to the other details sought by the defendant in a request for a bill of particulars the court applied the well-settled rule that "the state is not required to reveal in advance of the trial the facts on which it will rely in seeking a conviction."[45]

Scope of Lunacy Report

Article 268 of the Code of Criminal Procedure provides that the court may appoint a lunacy commission to examine into the defendant's mental condition at the time of the crime whenever his mental condition at that time "becomes an issue in the cause." In *State v. Chinn*[46] the defendant after pleading not guilty requested the court to appoint a lunacy commission to inquire into the defendant's present mental condition. The trial court's order appointing the lunacy commission directed the physicians to examine into the present mental condition of the defendant and also his mental condition at the time of the crime. After a hearing on the defendant's present mental condition, the court concluded that he was presently sane and should stand trial. Defendant then pleaded insanity at the time of the crime as a defense. The Supreme Court, on rehearing,[47] held that the order of the judge was a "nullity, insofar as it directed the experts to investigate appellant's mental condition at the time of the commission of the crime, for the reason that his sanity had not become an issue in the cause at that time."[48] However, the failure of the defendant to object to the irregularities of the order either at the sanity hearing or at the trial was held to amount to a waiver of his right to raise the issue on appeal. The *Chinn* case illustrates the desirability of a provision which would authorize the trial judge to order a complete diagnosis of the defendant's mental condition, including an opinion as to his present capacity to stand trial and also an opinion as to his mental condition at the time of the crime.[49] Such a combination report serves a very

45. State v. Mills, 229 La. 758, 768, 86 So.2d 895, 899 (1956).

46. 229 La. 984, 87 So.2d 315 (1955).

47. On the original hearing the court had mistaken the facts to be that the order of the judge in appointing the lunacy commission had limited the commission's inquiry to the defendant's present mental condition. When the true facts were called to the court's attention, it granted a rehearing.

48. 229 La. 984, 1012, 87 So.2d 315, 325 (1956).

49. The difficulty raised by the *Chinn* case is partially avoided under section 4.05(3) of the American Law Institute's Tentative Draft No. 4 of a Model Penal Code (1955).

practical purpose in cases where it appears that the insanity defense may ultimately be raised, even though the defense is not presently urged. It will be particularly helpful in cases where a defendant, who was found presently insane and committed to an institution, subsequently regains his mental powers and is brought to trial. A delayed separate examination at this later date may be seriously hampered by the fact that the evidence will be sketchy and unreliable.

Withdrawal of Plea of Guilty

Generally, it is within the sound discretion of the trial judge whether or not to allow the accused to withdraw his plea of guilty and to enter a plea of not guilty.[50] However, Article 266.1 gives the accused a right to withdraw his plea of guilty, even though sentence has been imposed, in cases where the plea was entered "within forty-eight hours after the arrest and incarceration or after placing the accused party under bond." In such cases the plea of guilty or the sentence shall be set aside upon motion by the accused, if made within thirty days after the entering of the plea or imposition of the sentence. In *State v. Monix*[51] the two defendants who were arrested in Oklahoma waived extradition and were returned to Louisiana. More than forty-eight hours after their arrest in Oklahoma, but less than forty-eight hours after their return to Louisiana, they entered a plea of guilty to four burglary charges and were sentenced immediately. Six days thereafter, the defendants moved to set aside the guilty plea and sentence, requesting that they be permitted to substitute a plea of not guilty. It was held that "arrest and incarceration" as used in Article 266.1 does not refer only to the arrest and incarceration in the parish where the plea is made. Since the plea of guilty was entered more than forty-eight hours after the initial arrest in Oklahoma, the general rule (rather than Article 266.1) applied. Not finding an abuse in the trial court's discretion in refusing to allow the defendants to withdraw their plea of guilty, the Supreme Court affirmed the conviction.

Change of Plea and Effect

State v. Joyner[52] presented the question of whether the minutes of the trial court, showing that the accused, who is pleading

50. LA. R.S. 15:266 (1950).

51. 229 La. 142, 85 So.2d 243 (1956). *Accord*, companion cases, State v. Russell, 229 La. 150, 85 So.2d 245 (1956); State v. Monix, 229 La. 150, 85 So.2d 246 (1956).

not guilty, had previously withdrawn a plea of guilty, may be admitted as evidence of a judicial confession. A minority of the jurisdiction take the view that the plea of guilty is a judicial confession of guilt and as such is entitled to greater weight than an extra-judicial confession.[53] Those jurisdictions, by this process of reasoning, conclude that evidence of the prior withdrawal of a plea of guilty is admissible as a judicial confession. However, as pointed out by one writer,[54] the plea of guilty is often only a tactical move and not in reality an admission of guilt. Louisiana is in line with the great weight of authority in holding that the plea of guilty, after its withdrawal, is not admissible to show a judicial confession of guilt. Under this view, the withdrawn plea of guilty is considered as completely annulled and is of no evidentiary effect.

Continuance

Article 320 of the Code of Criminal Procedure places the granting as refusal of a continuance in "the sound discretion of the trial judge." An abuse of this discretion will be found only in exceptional circumstances. No exceptional circumstance was found in *State v. Elias*,[55] where a continuance was sought when the case came to trial by the defense counsel, who also represented each defendant in six other cases which were set to be tried on the same day as the *Elias* case. The principal ground of the motion appeared to have been that defense counsel relied upon his realization that all cases could not be tried that day and upon a statement, alleged to have been made by the district attorney, that the *Elias* case would not be tried first. He therefore came to court prepared only for the first case.

Another case in which no abuse of discretion was found in the trial court's refusal to grant a continuance was *State v. Forsyth*.[56] There, a continuance was sought on the date of trial on the basis of a medical certificate submitted by the defendant's physician, which stated that the defendant had been under treatment for diabetes, that he reported to the physician two days before trial with certain complaints, that he had high blood pressure and that it was advisable to confine him to the hospital. The

52. 228 La. 927, 84 So.2d 462 (1955).
53. See Annot., 124 A.L.R. 1527 (1940).
54. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 302 (1947).
55. 229 La. 929, 87 So.2d 132 (1956).
56. 229 La. 690, 86 So.2d 536 (1956).

trial court was of the opinion that the defendant had entered the hospital for the specific purpose of avoiding trial, and took further note of the fact that at the trial the defendant consulted with his counsel from time to time and appeared to be completely oriented and alert. Justice McCaleb pointed out that since the defendant did not reenter the hospital until five days after the trial, hospitalization must not have been so essential as had been claimed.

Recusation of Trial Judge

Article 303 of the Code of Criminal Procedure provides that one of the causes of recusation of the trial judge is that he is related "to one of the attorneys or to the spouse of one of the attorneys within the second degree." In *State v. Lea*[57] it was held that the statute was not applicable to an attorney who was a public officer representing the state by virtue of his office. Therefore, a judge who was related within the second degree to an assistant district attorney who aided in the earlier stages of the proceedings was not required to recuse himself.

Voir Dire Examination

The purpose of a voir dire examination is not to see how much law the prospective juror knows or to explain the law to him. Rather, as is stated by Article 357, "the purpose of the examination of jurors is to ascertain the qualifications of the juror in the trial of the case in which he has been tendered, and the examination shall be limited to that purpose." This principle was applied in *State v. Dabbs*[58] to uphold the trial judge's action in refusing to allow the defense counsel to read from pertinent decisions of the Louisiana Supreme Court to prospective jurors on their voir dire examination. The trial judge's per curiam showed that defense counsel had been permitted to read from the decisions in question in his summation to the jury after the testimony was concluded.

It is a well-settled rule in the Louisiana jurisprudence that a prospective juror, on his voir dire, cannot be required to indicate in advance what his verdict would be under a described state of facts. In *State v. Peltier*[59] the defense counsel recited a factual

57. 228 La. 724, 84 So.2d 169 (1955).
58. 228 La. 960, 84 So.2d 601 (1955).
59. 229 La. 745, 86 So.2d 693 (1956).

situation to the prospective jurors and then asked: "Would you have any prejudice or bias against, or would there be anything that would keep you from returning a verdict of not guilty?" The trial court refused to allow the prospective juror to answer this question. The Supreme Court affirmed, holding that the question was clearly phrased so as to commit the prospective juror in advance as to what his verdict would be under the prescribed factual situation.

Opening Statement of the District Attorney

Article 333 requires that the state make an opening statement explaining the nature of the charge and the evidence by which it intends to establish that charge. In Louisiana this opening statement is regarded as limiting the proof of the state, thus making the state "show its hand" in advance of trial.[60] As is stated in *State v. Jones*[61] the underlying purpose of the requirement of an opening statement by the district attorney "is to force him to disclose state's evidence, not only to inform the court, the jury and the defendant of what facts the state intends to prove, but in fairness to permit the defendant to adequately present his defense and avoid being taken by surprise."[62] In that case the district attorney referred to a written statement made by the accused as an "admission." The defendant contended that the "admission" was in reality a confession and that, since there was no mention of a "confession" in the state's opening statement, it was inadmissible in evidence. In overruling this contention, both the trial judge and the Supreme Court held that the writing was really an "admission" as stated by the district attorney. The Supreme Court significantly stressed the fact that the district attorney had tracked the exact words of the "admission" in his opening statement. The court declared, "Certainly, under such a full disclosure it is inconceivable to us that the defendant was not fully apprised of the evidence which the state intended to prove."[63] Under this reasoning the court might well have reached the same result, whether the written statement of the defendant was technically an admission (as designated in the district attorney's opening statement) or a confession (as claimed by defense counsel). Where the opening statement is treated as a

60. See Note, 3 LOUISIANA LAW REVIEW 238 (1940).
61. 230 La. 356, 88 So.2d 655 (1956).
62. 88 So.2d 655, 658.
63. 88 So.2d 655, 658.

limitation on the state's proof at the trial, it is important that the courts adopt a liberal attitude regarding the details and completeness of the statement.

Improper Remarks of the District Attorney

Article 381 of the Code of Criminal Procedure states that counsel "must confine themselves to matters as to which evidence has been received; and counsel shall refrain from any appeal to prejudice." Some improper remarks are held "incurable" or reversible error per se. In other cases the prejudicial effect may be "cured" by a prompt admonition to the jury that they were improper and should be disregarded.[64] A case of curable improper argument was presented in *State v. Brossette*,[65] where the district attorney in his final argument stated that the victim had lost so much blood from the wound inflicted that he wrecked his car on the way to the hospital and died of the injuries thus received. Counsel for defense objected that the district attorney's argument went beyond the evidence adduced at the trial and was highly prejudicial, and asked the court to declare a mistrial. According to the trial judge's per curiam the fact of the fatal automobile wreck had been brought out at the trial, and so defense counsel's claim was partially unfounded. However, Justice Hawthorne posited the case on a broader principle, i.e., that arguments which go beyond the evidence of the case may be cured by a prompt admonition of the jury to disregard them. "Extreme cases," where the remark is incurable and the trial judge has no alternative but to order a mistrial, would include such highly prejudicial remarks as comments on the failure of the defendant to take the stand[66] and appeals to racial prejudice.[67]

Special Charge — When Necessary to Give

When the defense has presented a charge to the court for its ruling thereon, the judge must give the requested charge if it is "wholly correct and wholly pertinent . . . unless such charge require qualification, limitation or explanation."[68] In *State v. Dominquez*[69] the Supreme Court found certain requested charges

64. See Comment, *Improper Remarks of the District Attorney*, 10 LOUISIANA LAW REVIEW 486 (1950).
65. 229 La. 420, 86 So.2d 87 (1956).
66. State v. Robinson, 112 La. 939, 36 So. 811 (1904).
67. State v. Bessa, 115 La. 259, 38 So. 985 (1905).
68. LA. R.S. 15:390 (1950).
69. 230 La. 371, 88 So.2d 660 (1956).

were in need of qualification, limitation, and explanation, and were not wholly pertinent. It therefore held that the trial court properly refused to give them. On the other hand, in *State v. Leonard*[70] the Supreme Court held that the requested charge, which involved distinguishing between a confession and an admission, was "wholly correct and wholly pertinent." It was wholly correct because it was couched in the language of the statute defining admissions and confessions.[71] It was wholly pertinent because the statement made by the accused had been referred to as a confession in the presence of the jury and the defendant was contending that it was an admission of facts merely tending to establish guilt.

Instruction on Lesser Responsive Verdicts

It is well settled that attempted possession of narcotics is a lesser and included grade of the crime and unlawful possession of narcotics.[72] There is considerable confusion in the Louisiana jurisprudence, however, as to whether the general mandatory duty of the trial judge to instruct the jury upon the law applicable to lesser and included offenses[73] applies where the charge is unlawful possession of narcotics and there is no evidence in support of the lesser attempt verdict. In *State v. Espinosa*[74] the Supreme Court upheld the trial court's refusal to instruct the jury as to the lesser attempt crime. In that case the defendant had admitted the actual obtaining of the narcotic drugs. In the recent case of *State v. Marshfield*,[75] where no such admission appears to have been made, the court held that the trial judge had committed reversible error in refusing to instruct the jury concerning the lesser crime of attempted possession of narcotics. In his per curiam the trial judge had stated that the special charge on attempted possession "was refused for the reason that there was no evidence adduced as to any attempt to commit the crime."[76] While the *Marshfield* decision may be justified by the seemingly mandatory language of the responsive verdict article,[77]

70. 230 La. 414, 88 So.2d 804 (1956).
71. LA. R.S. 15:449 (1950).
72. State v. Broadnax, 216 La. 1003, 45 So.2d 604 (1950).
73. LA. R.S. 15:386 (1950).
74. 223 La. 520, 66 So.2d 323 (1953).
75. 229 La. 55, 85 So.2d 28 (1956).
76. *Id.* at 57, 85 So.2d at 29.
77. LA. R.S. 15:386 (1950): "Whenever the indictment sets out an offense including other offenses of less magnitude or grade the judge *shall charge* the jury the law applicable to all offenses of which the accused could be found guilty under the indictment." (Emphasis added.)

it is out of line with the rule followed in virtually every other jurisdiction.[78] It is entirely illogical, making for jury confusion and compromise verdicts, to instruct the jury concerning possible lesser verdicts which are entirely unsupported by the evidence adduced at the trial. The general rule, as to submission of lesser included offenses to the jury, is stated in Section 1.08(5) of the American Law Institute's Model Penal Code as follows: "The Court shall not charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense."[79] Instructions with respect to lesser included offenses where there is no basis for finding the defendant innocent of the crime charged and yet guilty of the lesser crime, as in the *Marshfield* case, only serves to confuse the jury and to invite an unwarranted compromise verdict.

Delay in Filing Motion for New Trial

Article 505 of the Code of Criminal Procedure stipulates that a motion for a new trial must be filed and disposed of before sentence. In *State v. Washington*[80] one of the two defendants, after being charged with murder, informed the court that he was unable to employ counsel. The court thereupon appointed a counsel to represent him. At the trial the other defendant was represented by counsel whom he had retained. After the defendants had been found guilty and sentenced to death, new defense counsel, other than the ones who had represented the defendants at the trial, moved for a new trial. They contended that certain acts, of both omission and commission, which occurred in the trial court, were so prejudicial to the defendants as to amount to a denial of due process. In support of this claim it was alleged that none of the usual defenses were urged and no bills of exceptions were reserved during the trial on the defendants' behalf. The Supreme Court upheld the trial court's refusal to grant a new trial and based its decision on Article 505. A lengthy quotation from *State* ex rel. *Sheffield v. Ellis*[81] was also relied on in support of the decision. That case was similar to the *Washington* case, although involving more aggravated facts. In the *Sheffield*

78. For a complete analysis of the problem, see Comment, 17 LOUISIANA LAW REVIEW 211 (1956).
79. Tentative Draft No. 5 (1956).
80. 230 La. 181, 88 So.2d 19 (1956).
81. La. Sup. Ct. Docket No. 41,689.

case the Louisiana Supreme Court in denying certiorari affirmed the trial court's action in denying a new trial, because the motion for the new trial had been filed after sentence was imposed. However, after the United States Supreme Court denied writs applied for on the defendant's behalf,[82] the defendant proceeded by habeas corpus in the federal district court[83] and Sheffield was released on the ground that he had been denied due process of law. The federal court pointed out that the Louisiana Supreme Court "could have granted the relief sought, by ordering a hearing on the due process questions in the lower court."[84] In view of the fact that a death sentence was imposed, it would appear that the Supreme Court in the *Washington* case could have, with consistency, relaxed the provisions of the Code as it has done in previous cases, even if the due process requirements had not been violated.[85]

Appeal — Method of Taking

In order for the Supreme Court to pass on irregularities that have occurred in the trial court, the defendant must reserve an exception to the trial court's rulings on his objection and annex to the exception the facts and circumstances upon which the ruling complained of was made. In *State v. Peltier*,[86] since the defendant had not included in his bill of exceptions the testimony showing the facts and circumstances leading to the introduction of certain evidence, the Supreme Court refused to pass on the merits of his exception to the trial court's ruling on the admissibility of the evidence complained of.

In a number of 1955-1956 cases, the Supreme Court refused to consider alleged trial irregularities on appeal because the motion for appeal had not been made within ten judicial days after the rendition of judgment[87] and because the bill of exceptions had not been perfected and signed by the trial judge before the motion of appeal was granted.[88] In *State v. Harrell*,[89] however,

82. Sheffield v. Louisiana, 348 U.S. 850 (1954).

83. United States *ex rel.* Sheffield v. Waller, 126 F. Supp. 537 (W.D. La. 1954).

84. *Id.* at 537, 543, n. 15, citing LA. CONST. art. VII, §§ 2, 10, relating to the Supreme Court's supervisory jurisdiction.

85. See State v. Richard, 203 La. 722, 14 So.2d 615 (1943) and State v. Harrell, 228 La. 434, 82 So.2d 701 (1955). Both of these cases are discussed page 420 *infra*.

86. 229 La. 745, 86 So.2d 693 (1956).

87. State v. Elias, 229 La. 1032, 87 So.2d 521 (1956).

88. State v. Perez, 228 La. 796, 84 So.2d 195 (1955), holding that the irreg-

the Supreme Court considered a bill of exceptions reserved by a defendant who had received a death sentence, although he failed to present the bill of exceptions for the trial court's signature before an appeal was taken. In *State v. Richard*,[90] in a somewhat analogous situation, the Supreme Court had previously refused to apply the appeal requirements of the Code of Criminal Procedure rigidly to one who had been sentenced to death. There the defendant's bills of exceptions were considered, although he had failed to make a motion for a new trial which Article 559 requires as a condition precedent to a new trial being granted on appeal.

There is one situation in which the reservation of a bill of exceptions is unnecessary to provide a basis for the Supreme Court's appellate review. This is when the trial court has overruled a motion in arrest of judgment based on an error patent on the face of the record. In such a case the alleged irregularity is already in the record, and a bill of exceptions would serve no practical purpose. *State v. Ware*[91] was such a case. Although no bills of exceptions had been timely perfected, the Supreme Court reviewed the trial court's overruling of the defendant's motion in arrest of judgment, which was based on an allegedly defective indictment. A defective indictment is "discoverable by the mere inspection of the pleadings without any inspection of the evidence."[92]

---

ularity was not cured by the trial judge's signing the bills subsequent to the appeal; State v. Ware, 228 La. 713, 84 So.2d 56 (1955). *Accord*, State v. Lovoi, 228 La. 638, 83 So.2d 656 (1955), where no bill of exceptions had been perfected.

89. 228 La. 434, 82 So.2d 701 (1955).

90. 203 La. 722, 14 So.2d 615 (1943), discussed by author in *The Work of the Louisiana Supreme Court for the 1942-1943 Term — Criminal Law and Procedure*, 5 LOUISIANA LAW REVIEW 574 (1944).

91. 228 La. 713, 84 So.2d 56 (1955).

92. LA. R.S. 15:503 (1950) defining errors patent on the face of the record.