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## Criminal Law and Procedure

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# Criminal Law and Procedure

Dale E. Bennett\*

## *Criminal Trespass*

Three 1960 statutes provided for a re-definition or expansion of the crime of *criminal trespass*. Act 458 is a comprehensive elaboration of the criminal trespass article of the Criminal Code,<sup>1</sup> providing a dual definition of criminal trespass. Under subsection D, now applicable only in nine specified parishes,<sup>2</sup> the original Criminal Code definition and penalty is retained. Elsewhere in the state the new and more complicated trespass law<sup>3</sup> is to apply. The principal difference between the new general definition of subsection A and the nine-parish former definition of subsection D is the addition of clause (2) (a) under which trespass may be committed upon a posted but not enclosed plot of ground, provided it exceeds one acre and is not situated in an open range. Under the comparable provision of original Article 93 and subsection D of the new law, the land trespassed upon must be "enclosed and posted." (Emphasis added.) The old requirement of "enclosed and posted" still applies where the plot is less than an acre or is an open range area.

Subsection C provides a graduated penalty clause, making a distinction as to first, second, and third offenders. It applies only to the new general criminal trespass crime of subsection A, and the original penalty clause is retained in subsection D for the nine specified parishes. The flexibility of the original penalty clause was much more in keeping with modern theories of judicial discretion and individualization in sentencing than is the arbitrary penalty pattern of subsection C.

Elaborate definitions in subsection B of the basic terms "posted" and "enclosed" should serve to clarify application of the law. They will provide a more definite guide for the landowner who desires to bar hunters and other trespassers from his property.

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1. LA. R.S. 14:63 (Supp. 1960).

2. Allen, Beauregard, Grant, LaSalle, Livingston, St. Helena, Vernon, Winn, and Sabine parishes.

3. Subsection A defines the crime of trespass; while subsection C provides a graduated penalty clause for first, second, and third offenders.

Act 388<sup>4</sup> makes it a rather serious misdemeanor for anyone other than the owner, lessee, or their duly authorized representative to place posted signs on property. Act 385<sup>5</sup> provides penalties for the unauthorized destruction, defacing, or removal of "posted" or boundary signs. Both of these statutes implement the general effectiveness of posting property for criminal trespass purposes.

#### *Miscellaneous Criminal Statutes*

Act 544 amends the flag desecration article of the Criminal Code<sup>6</sup> so as to expand the definition of "flag" to include the Confederate flag, as well as the flags of the United States and the State of Louisiana.

Act 550 enlarges the crime of *illegal use of weapons*<sup>7</sup> by adding "the discharging or firing of a rifle of a caliber of 22 or larger across navigable streams in this state" to the list of prohibited activities.

Act 505 makes two changes in a 1954 statute<sup>8</sup> which punished *encouraging or contributing to child delinquency*. In subsection B of that statute the phrase "drinking beverages of low alcoholic content or beverages of high alcoholic content" was substituted for "drinking intoxicating liquor." This change was apparently aimed at avoiding the limitation of *State v. Viator*,<sup>9</sup> where the phrase "intoxicating or spirituous liquors" (emphasis added) in the Criminal Code crime of unlawful sales to minors<sup>10</sup> was construed as embracing only whiskey and other distilled beverages, as distinguished from beer and other fermented beverages of low alcoholic content. A second change was the elimination of "going into a place where intoxicating liquors or narcotics are kept, drunk, used, sold or given away" from the definition of "delinquency" in subsection B. This phrase was unduly broad in view of the fact that package liquor is kept and sold in many drug stores and groceries, which are hardly to be characterized as dens of iniquity. However, the deletion of the entire phrase may be questioned, since places where intoxicants are

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4. LA. R.S. 14:63.1 (Supp. 1960).

5. LA. R.S. 14:63.2 (Supp. 1960).

6. LA. R.S. 14:116 (Supp. 1960).

7. LA. R.S. 14:94 (Supp. 1960).

8. LA. R.S. 14:92.1 (Supp. 1960).

9. 229 La. 882, 87 So.2d 115 (1956).

10. LA. R.S. 14:91 (Supp. 1960).

used or consumed should be in the out-of-bounds area for children.

Act 488, aimed at strengthening the Uniform Narcotic Drug Law in Louisiana,<sup>11</sup> has amended the definition of "narcotic drugs"<sup>12</sup> by adding methadone, alphaprodine, levorphanol, ansteridine, levomethorphan, and phenamicine, and by providing definitions of those new terms.<sup>13</sup>

### *Morality Laws — Obscenity*

Three 1960 statutes, drafted and sponsored by the Legislature's Joint Sex Crime Study Committee, will serve to strengthen Louisiana's anti-obscenity laws. Act 199 amends the *obscenity* article<sup>14</sup> of the Criminal Code which had recently been declared unconstitutional, on the ground of vagueness and indefiniteness, in *State v. Christine*.<sup>15</sup> Amended Article 106 goes into great detail in particularizing the prescribed criminal conduct — all of which is specifically directed toward "arousing sexual desires" or toward primarily appealing to "the prurient interest of the average person." The specification and enumeration employed in Act 199 would not ordinarily be considered good drafting, since the use of broad all-embracing terms provides more complete coverage and avoids inadvertent loopholes. However, in the field of morality crimes where standards of conduct vary so greatly between individuals or groups of individuals, and in view of the strict construction of the obscenity article in the *Christine* case, the detailed elaboration is justified as a means of seeking to provide an attack-proof obscenity law. It is significant to note that obscenity is defined as the "intentional" exposure, production, display, etc. Thus, under the general provision of Article 11 of the Criminal Code a general criminal intent is required, and under Article 16 reasonable ignorance or mistake of fact which precludes a guilty mind will be a defense.

Act 200 implements obscenity law enforcement by creating the new crime of *letting premises for obscenity*.<sup>16</sup> This statute is drafted in conformity with the analogous Criminal Code offense of letting premises for prostitution,<sup>17</sup> and makes the letting of

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11. LA. R.S. 40:961-984 (Supp. 1960).

12. LA. R.S. 40:961(19) (Supp. 1960).

13. *Id.*, clauses (10) through (15).

14. LA. R.S. 14:106 (Supp. 1960).

15. 239 La. 259, 118 So.2d 403 (1960), noted page 264 *infra*.

16. LA. R.S. 14:85.1 (Supp. 1960).

17. LA. R.S. 14:85 (1950).

premises for purposes of obscenity a misdemeanor with a maximum possible penalty of a fine of \$500.00 or six months imprisonment, or both.

Act 201 amends the padlocking law<sup>18</sup> so as to declare the carrying on of obscenity to be a nuisance, and subject to injunction and abatement.<sup>19</sup>

### *Time Limitations*

Act 25, providing a completely new system of time limitations on criminal prosecutions, is probably the most significant 1960 statute in the field of criminal law and procedure. This statute, drafted by the Louisiana State Law Institute as a part of its work on a revision of the Louisiana Code of Criminal Procedure, was put in statute form, for pre-code enactment to meet an urgent need for immediate relief in this confused area of the law. It replaces the much-amended and litigated Articles 8 and 9 of the 1928 Code of Criminal Procedure, which are repealed except as to prosecutions already instituted and prescriptions already accrued at the effective date of the new law.<sup>20</sup> As under the 1928 Code, the new law provides for two major time limitations. Sub-part A<sup>21</sup> provides for limitations upon the institution of prosecutions; while sub-part B<sup>22</sup> provides time limitations upon commencement of the trial after the prosecution is instituted.

A significant feature of the new limitations upon the institution of prosecutions is the abolition of the so-called "made known" test. Under Article 8 of the 1928 Code the prosecution must be instituted, as to most crimes, within one year after the commission of the offense "shall have been made known" to the appropriate judge, district attorney, or grand jury. This language had been construed to mean that the period ran from the time the offense should have been known by the court or prosecuting authorities; and this formula injected great uncertainty into the law.<sup>23</sup> New Section 7.2, in accordance with the prepon-

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18. LA. R.S. 13:4711 (Supp. 1960).

19. LA. R.S. 13:4711 through 4717 (Supp. 1960).

20. LA. Acts 1960, No. 25, § 2.

21. LA. R.S. 15:7.1-7.7 (Supp. 1960).

22. LA. R.S. 15:7.8-7.12 (Supp. 1960).

23. *State v. Oliver*, 196 La. 659, 199 So. 793 (1941) wherein there was a factual divergence between the majority and dissenting opinions as to whether the district attorney should have known of the defendant's embezzlement of the parish funds entrusted to him.

derant weight of authority, the American Law Institute's Model Penal Code,<sup>24</sup> and the federal prescription statute,<sup>25</sup> states a time limitation, for the institution of prosecution by indictment or information, which runs from the commission of the offense — a time that can be clearly and easily determined. The new time limitation is necessarily longer than the former one-year period which did not begin to run until the prosecution had actual or constructive notice of the defendant's crime. The limitation of Section 7.2, similar to the American Law Institute and federal limitations upon which it is based, is graduated from a two-year period for misdemeanors to a six-year period for major felonies.<sup>26</sup>

There are certain types of felonies where the offender is in a position to conceal his crime, as where a public officer or other fiduciary misappropriates money and continues in office or public bribery is committed. Section 7.3, based upon Section 1.07 (3a-3b) of the American Law Institute's Model Penal Code, provides that in these specified situations the time limitations will not run "until the relationship or status involved has ceased to exist."

In accordance with the general policy that the book is never closed on such heinous crimes as murder or aggravated rape, Section 7.1 provides that there is no time limitation on the institution of prosecution for capital crimes.<sup>27</sup> Article 8 of the 1928 Code had also included aggravated burglary, aggravated arson, and armed robbery in the list of non-prescribable offenses. Section 7.4 continues the sound rule of Article 8 of the 1928 Code of Criminal Procedure that the exemption of non-prescribable crimes also applies to lesser and included offenses which may be responsive verdicts. Thus, if the non-prescriptible offense of murder is charged, a verdict of manslaughter would be appropriate even though the time limitation had run upon the institution of a prosecution for an independent charge of manslaughter.

The fundamental principle that time should not run in favor of a defendant who has absconded or fled in order to avoid detection or prosecution is stated in Section 7.5, which treats such

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24. ALI MODEL PENAL CODE, Tentative Draft No. 5, Sec. 1.07 (1956).

25. 18 U.S.C. §§ 3281, 3282, 3288 and 3289.

26. LA. R.S. 15:7.3 (Supp. 1960). Accord: ALI MODEL PENAL CODE, TENTATIVE DRAFT No. 5, § 1.07 (3a-3b).

27. LA. R.S. 15:7.1 (Supp. 1960). Accord: ALI MODEL PENAL CODE, TENTATIVE DRAFT No. 5, page 17.

conduct as an interruption of the time limitation. A similar provision has been part of every Louisiana statute since 1805,<sup>28</sup> and is found in the American Law Institute Model Penal Code.<sup>29</sup>

Where a prosecution has been instituted and the indictment subsequently nolle prosequed, or the charge dismissed by the court by reason of some defect or deficiency, Section 7.6 permits the state to bring a new charge within the original time limitation, or within six months after the dismissal, whichever is longer. This provision is more explicit than a comparable provision in Article 8 of the 1928 Code, and also contains an express proviso that the nolle prosequi must not have been "entered for the purpose of avoiding the time limitation for the commencement of trial in Section 7.8."

Section 7.7 provides specific rules as to the time and manner in which time limitations are to be pleaded, a matter which was very inadequately covered in the 1928 Code of Criminal Procedure. It retains the concept that the plea may be raised at any time,<sup>30</sup> but changes the existing law when it states that the plea may be raised "only once, and shall be tried by the court alone."<sup>31</sup>

The fundamental right of the accused to a speedy trial is implemented by the limitations upon trial set out in sub-part B.<sup>32</sup> Section 7.8 continues the rule, which had previously been confusingly handled in part of Articles 8 and 9 of the 1928 Code, that the trial must be commenced with reasonable expedition, i.e., capital cases within three years from the institution of the prosecution by indictment, other felony cases within two years, and misdemeanor cases within one year. The confusion resulting from the involved wording and overlapping provision of Articles 8 and 9 as to the three-year time limitation had forcibly pointed up the need for a clearly drafted series of articles providing for the period, not periods, within which the accused must be brought to trial.<sup>33</sup>

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28. Crimes Act of 1805, § 37; Revised Statutes 1870, § 986; LA. R.S. 15:8 (Supp. 1960).

29. ALI MODEL PENAL CODE, TENTATIVE DRAFT No. 5, § 1.07(6a).

30. *State v. Guillot*, 200 La. 935, 9 So.2d 235 (1942) where plea was filed before trial; *State v. Oliver*, 193 La. 1084, 192 So. 725 (1939) where the time limitation was raised after trial and conviction.

31. See *State v. Sullivan*, 159 La. 589, 105 So. 631 (1925).

32. LA. R.S. 15:7.8-7.12 (Supp. 1960).

33. In *State v. Bradley*, 227 La. 421, 79 So.2d 561 (1955), the Louisiana Supreme Court held, and not without logical support from the involved wording of Articles 8 and 9, that there were *two* three-year prescriptive periods — (1) a three-year period created by Article 8, which started to run with the filing of the

A distinction between those causes which will *interrupt* and those which will merely *suspend* the running of the time limitation for the commencement of trial is clearly drawn in Sections 7.9 and 7.10, respectively. Those causes which preclude any proceedings in the case, such as the fact that the accused is a fugitive from justice or cannot be brought to trial because of present insanity, will interrupt the time limitations which "shall commence to run anew from the date the cause of interruption no longer exists."<sup>34</sup> The time limitation is *suspended*, rather than interrupted, during delays occasioned by the court's ruling on preliminary pleas.<sup>35</sup> In this situation the time before the filing of the plea is counted and may be tacked to time accruing after the court's ruling to determine if the time limitation has run. In order always to allow the state a reasonable time after the ruling on the plea to reset the case for trial, Section 7.10 expressly provides "but in no case shall the state have less than one year after the ruling to commence the trial."

Section 7.12 is a new provision, which has been appropriately characterized in the Reporter's Comment as "an administrative necessity." It states that where a new trial is granted or a mistrial declared the state shall always have at least one year to commence the trial irrespective of the fact that the regular period for commencement of trial may have expired.

#### *Commitment in Case of Acquittal by Reason of Insanity*

The 1928 Code of Criminal Procedure did not provide for further disposition of a case where a defendant was acquitted on the ground of insanity at the time of the crime.<sup>36</sup> Under general provisions of the Mental Health Law<sup>37</sup> the court was empowered to, and usually did, order the defendant committed. However,

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indictment, and (2) another three-year period, created by Article 9, which ran from the last prosecutive step, which was the arraignment in the *Bradley* case. Carrying the concept of two three-year prescriptive periods even further; Justice Hawthorne's opinion in the *Bradley* case suggested that the trial judge might have discretion as to whether the charge should be *nolle prosequi* at the end of the prescriptive period set out in Article 8, but that there was no discretion as to the three-year period provided in Article 9. *State v. Truett*, 230 La. 955, 89 So.2d 754 (1956), followed the *Bradley* decision, but a number of additional difficulties were raised in the course of the *Truett* rehearings and dissenting opinions.

34. LA. R.S. 15:7.9 (Supp. 1960).

35. LA. R.S. 15:7.10 (Supp. 1960).

36. Under LA. R.S. 15:412.1 (Supp. 1960) (origination in R.S., 1870, § 995) when the jury acquits "on account of insanity they shall, in giving their verdict of not guilty, state that it was for this cause."

37. LA. R.S. 28:59 (1950).

this provision was permissive, not mandatory; and it also necessitated regular commitment procedures. Act 509 of 1960, in accordance with the practice in England and ten American jurisdictions, provides for automatic commitment to a state mental institution of a person who is charged with a capital crime and acquitted on the ground of insanity.

In explaining a similar provision in Section 4.08(1) of the American Law Institute's Model Penal Code, the Reporter states, "Automatic commitment not only provides the public with maximum immediate protection, but may also work to the advantage of mentally diseased or defective defendants by making the defense of irresponsibility more acceptable to the public and to the jury."<sup>38</sup>

While the new Louisiana provision for automatic commitment is a definite step in the right direction, it would have been even better if Act 509 had more fully spelled out the procedures to be followed if the defendant subsequently regains his sanity. The American Law Institute commitment rule is followed by comprehensive provisions as to a subsequent determination of the defendant's fitness to return to society,<sup>39</sup> and provisions for safeguarding society, by a system of probation, against dangers from a possible reoccurrence of the mental instability.<sup>40</sup> The procedures of Louisiana's general mental health law will scarcely suffice in these regards. Also, the limitation of Act 509 to acquittals in capital cases is unwise; for the habitual offender who is acquitted of a non-capital, but dangerous, felony also presents a very real present danger to society.

### *Suspended Sentence and Probation*

Act 360, a statute prepared by the "Forgotten Man Committee," revises suspended sentence and probation procedures, incorporating many features of the American Law Institute's Model Penal Code<sup>41</sup> and of the Standard Probation and Parole Act prepared by the National Probation and Parole Association. The new law continues Louisiana's present policy of providing separately for suspension of sentence and probation in felony<sup>42</sup> and in misdemeanor<sup>43</sup> cases; but it provides for situations which were

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38. ALI MODEL PENAL CODE, TENTATIVE DRAFT No. 4, at 199 (1955).

39. *Ibid.*

40. *Id.* § 4.08(2), (3) and (5).

41. *Id.* § 4.08(3) and (4).

42. LA. 15:530 — 535 (Supp. 1960).

43. LA. R.S. 15:536 — 538 (Supp. 1960).

not covered, or very inadequately treated, in the existing law. Section 530 gives the sentencing judge a free hand to adapt the type of sentence to the case at bar. He may suspend the imposition of sentence or impose sentence immediately and suspend its execution, and in either case he may place the defendant on probation under supervision. Following the prevailing view, the court is authorized to impose conditions on the suspension of sentence or admission to probation. *Clause B*, patterned after Section 301.1(2) of the American Law Institute's Model Penal Code, provides a list of conditions which the court may impose. These specified permissive conditions, based upon the composite experience of the draftsmen and advisors for the American Law Institute Code, and tempered by a careful analysis by the Louisiana drafting committee, will serve as a valuable guide for the sentencing judge. In addition to nine specified conditions, any of which may be imposed, the sentencing judge is assured of complete freedom to adapt the conditions to the needs of the case by a residual clause granting broad authority to impose "any other specific conditions reasonably related to rehabilitation."<sup>44</sup> Additional flexibility is afforded by the court's authority, under Section 533, to modify or add to the conditions originally imposed.

Section 530 continues the prior limitation that the period of the suspended sentence or probation shall not exceed five years. Writing concerning a similar limitation in Section 301.2 of the American Law Institute's Model Penal Code, the Reporter states, "We think that 5 years in the case of felonies . . . should suffice to serve the ends of a conditional suspension or probation, without overburdening the limited facilities for supervision that must be employed. Since these periods may prove unnecessary in some cases, we provide that the defendant may be discharged sooner by the court."<sup>45</sup> Louisiana's amended suspended sentence and probation law similarly provides, in Section 533, that the court may order the defendant's discharge "at any time after the expiration of one year of probation or suspended sentence," thus providing an added incentive to the defendant to achieve a prompt rehabilitation.

Section 535 provides that upon completion of the period of suspended sentence or probation "the defendant shall have satis-

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44. LA. R.S. 15:530 B(10) (Supp. 1960).

45. ALI MODEL PENAL CODE, TENTATIVE DRAFT No. 4, at 147, Comment to § 301.3 (1955).

fied his sentence." Thus no formal discharge, such as was required under the prior law,<sup>46</sup> is necessary.

Section 531 continues the provision authorizing the trial court to order a pre-sentence investigation of the defendant's background, physical and mental health, and all pertinent information concerning the circumstances of the offense. The authority to order a pre-sentence investigation, which had formerly been limited to felonies, and criminal neglect of family cases,<sup>47</sup> is now extended to include all misdemeanors. Where no pre-sentence investigation is ordered, an added paragraph of Section 531 requires a prompt post-sentence investigation with the report sent to the officer in charge of the correctional institution to which the defendant has been committed. This means that there will be a complete investigation and report concerning every convicted felon.<sup>48</sup> Where the report is made after sentence is imposed it will serve a very valuable purpose as a guide to prison administrators and in connection with subsequent parole and pardon hearings.

Where a defendant violates, or is suspected of violating, the terms of his suspended sentence or probation, there must be authority for bringing him in for a prompt hearing. Thus Section 534A authorizes the court to issue a warrant of arrest for this purpose. Subsection B empowers the probation officer to make an arrest, or to authorize a peace officer to make an arrest, where he "has reasonable cause to believe that a probationer has violated or is about to violate a condition of his probation or that an emergency exists, so that awaiting an order of the court would create an undue risk." The arrested probationer's rights are further protected by the provisions in subsection C for a prompt hearing. At this hearing the court is given much wider latitude as to possible action than under the prior probation law where revocation of the probation and reincarceration was the only stated sanction for a breach.<sup>49</sup> Under the new law the sanction for violation of the conditions of probation or a suspended sentence may consist of a reprimand and warning, intensified super-

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46. LA. R.S. 15:534 (1950).

47. LA. R.S. 15:531 (1950), as amended by La. Act 43 of 1954.

48. The post-sentence investigation is to be made where "the court waives the investigation as a prerequisite to sentence," thus showing that the requirement is only intended to apply to felony cases. In dealing with pre-sentence investigations for felonies, the first paragraph provides for the investigation "unless the court waives same." Thus paragraphs one and two are logically construed *in pari materia*.

49. LA. R.S. 15:533 (1950).

vision, the imposition of additional conditions, or revocation of the probation or suspended sentence. Where the probation or suspended sentence is revoked, Section 535 continues an express provision of the 1942 probation law<sup>50</sup> that the sentence shall be served "without credit for time served on probation or under suspended sentence."

Sections 536 through 538 provide for suspension of sentence and probation in misdemeanor cases. Where the offense is criminal neglect of family<sup>51</sup> or in other misdemeanors when a sentence "in excess of ninety days" is imposed,<sup>52</sup> the defendant may be placed on probation under supervision of the division of probation and parole supervision subject to much the same terms and conditions as in felony cases. A principal difference between felony and misdemeanor cases, which is a continuation of existing law, is the fact that in misdemeanor cases the sentence may be suspended or probation ordered after the defendant "has . . . begun to serve the sentence imposed."<sup>53</sup> This provides a desirable flexibility of sentencing of those convicted of minor crimes where a pre-sentence investigation is seldom held, and where release from incarceration should be freely granted to meet emergency situations. The use of suspended sentence and probation in criminal neglect of family cases is specially provided for in Section 536.1. This separate and rather detailed treatment is well justified, since suspended sentence and probation is particularly significant in these cases. It accomplishes the desirable social result of making sure that the defendant supports his family, a family which would probably be thrown on the already crowded relief rolls if he were incarcerated. Outside of the aforementioned changes, the suspension of misdemeanor sentences follows the prior pattern of the 1942 statute very closely.

#### *Detention and Arrest of Shoplifters*

A 1958 statute<sup>54</sup> provided special authorization for the detention and possible arrest of shoplifters — a situation which had been inadequately dealt with in the arrest articles of the 1928 Louisiana Code of Criminal Procedure. While the statute granted authority to "a peace officer, or a merchant or a merchant's

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50. LA. R.S. 15:534 (1950).

51. LA. R.S. 15:536.1 (Supp. 1960).

52. LA. R.S. 15:536 (1950).

53. *Ibid.* Contra: LA. R.S. 15:530 (1950) prohibits suspension of sentence or the granting of probation after the prisoner has begun to serve his sentence.

54. LA. R.S. 15:84.5 and 84.6, enacted by Act No. 301 of 1958.

especially authorized employee,"<sup>55</sup> the clause exempting the person detaining a suspected shoplifter from civil and criminal liability for false arrest only granted immunity to a "peace officer."<sup>56</sup> Act 326 of 1960 amends the immunity clause so that it now embraces all who are authorized to arrest or detain suspected shoplifters for questioning. Actually the special immunity clause serves no useful purpose, in either its original or amended form. If the detention is authorized, as meeting the conditions of the statute, immunity from both criminal and civil liability will naturally follow. If the detention is unreasonable, or otherwise outside the authorization of the statute, there would be no immunity, with or without the special section.

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55. LA. R.S. 15:84.5A (1950).

56. LA. R.S. 15:84.6 (Supp. 1960).