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Criminal Law and Procedure

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tax collector and the heirs or legatees of the deceased, when the court determines that a larger tax is due than that admitted to be due. In all probability, the trial court had this authority already,[22] but the amended section provides needed authority to permit the inheritance tax collector to pay his experts the fees awarded by the court as soon as they are paid to him by the heirs of legatees.[23]

On the recommendation of the Law Institute, two articles of the Civil Code were expressly repealed in 1962.[24] The repeal of Article 398 of the Civil Code, which should have been effected at the time the new procedural Code was adopted,[25] was somewhat tardily accomplished. The reasons for the repeal of Article 1369 of the Civil Code have been given above.[26]

CRIMINAL LAW AND PROCEDURE

*Dale E. Bennett**

CRIMINAL LAW

Services Included in "Anything of Value"

Act 68 broadens the definition of "anything of value" in Article 2 of the Criminal Code[1] specifically to include services, by adding the phrase "and including transportation, telephone or telegraph service, or any other service available for hire," to the first sentence of that definition. The added language removes any doubt as to the propriety of prosecuting variously executed telephone service frauds as theft. It would also embrace the obtaining of filling station services by means of fraudulently used credit cards. The "credit card" fraud situation and other fraudulent devices used to obtain services clearly come within the gen-

22. Under LA. R.S. 13:3666 (1950), *as amended*, La. Acts 1960, No. 114, § 1.

23. LA. R.S. 47:2423 (Supp. 1962), added by La. Acts 1962, No. 114, § 2.

24. LA. CIVIL CODE arts. 398, 1369 (1870) were expressly repealed by La. Acts 1962, No. 70.

25. *Id.* art. 398, required the curator of an interdict to advertise the judgment of interdiction three times within a month of its rendition. This requirement did not mesh with the new schedule of judicial advertisements adopted by LA. R.S. 43:203 (1950), *as amended*, La. Acts 1960, No. 34, § 2, and La. Acts 1961, No. 26, § 1, and it was both unnecessary to, and in conflict with, the new rules adopted by LA. CODE OF CIVIL PROCEDURE art. 4552 (1960).

26. See text accompanying notes 13, 14, *supra*.

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1. LA. R.S. 14:2(2) (Supp. 1962).

eral *theft*[2] crime, since they constitute taking "by means of fraudulent conduct practices or representations"; and the 1962 amendment of the definition of Article 2 removes all doubt[3] as to whether the services obtained constituted "anything of value" under the Criminal Code.

Armed Robbery Penalty Increased

Armed robbery is a serious crime and the maximum penalty of thirty years is quite appropriate; but there may be some question as to the wisdom of the harsh provisions of Act 475,[4] which impose a minimum sentence of five years and completely deny probation. Thus, a convicted defendant, even though he is a first offender who has been led into the crime by others, must be sentenced to Angola for at least five years. A further provision of Act 475[5] denies any parole consideration until the first offender has served one-third of his sentence.

Narcotics Penalties

The punishment pendulum swung the other way when Act 80 relaxed, in first-offender "possession" cases, the severe penalty clause of the narcotics law.[6] Drastic penalties serve a useful purpose as a deterrent to this highly commercialized and reprehensible crime; but the general denial of probation or parole to those found guilty of "possession" was, in the case of youthful or first offenders, unduly harsh. Too often, such offenders are themselves victims of this vicious racket and are more deserving of help than punishment. Help will be possible, in proper cases, under Act 80. Clause (4) of the narcotics penalty clause is amended to permit probation and parole if the defendant convicted of possession is a first narcotics offender. A clause (5) is added, which specially provides that the youthful (under twenty-one) offender shall be subject to a lessened penalty of "imprisonment, with or without hard labor, for not more than

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

3. "Anything of value" is defined as having the "broadest possible construction, including any conceivable thing of the slightest value, movable or immovable, corporeal or incorporeal." This language was probably broad enough, without amendment, to cover telephone or filling station services. See State v. Norris, 242 La. 1070, 141 So. 2d 368 (1962), in which the obtaining of services by fraudulent use of a credit card was treated as theft. However, the *Norris* case did not squarely raise the issue and some district attorneys had been hesitant to file theft charges based upon the fraudulent obtaining of services.

4. Amending LA. R.S. 14:64 (1950).

5. Adding a Clause G to LA. R.S. 15:574.3 (1950).

6. LA. R.S. 40:98.1 (Supp. 1962).

ten years"; and this type of offense does not carry the general narcotics case prohibition of probation or parole. These amendments will give the sentencing judge a much-needed authority so to frame his sentences as to promote rehabilitation of first and youthful offenders.

Simple Kidnapping Extended

The offense of simple kidnapping is extended by Act 344 to cover the parent who, after a Louisiana court has awarded custody of his or her child to another, takes or entices the child out of the state in an effort to defeat the custody order.[7] This added simple kidnapping clause is limited to removing the child "from the state," and requires proof of a specific "intent to defeat the jurisdiction" of the court awarding the child's custody to another person.

Theft of Dogs

The 1950 "cattle theft" law[8] served no useful purpose, since stealing of domesticated animals is fully and adequately covered by the general theft article of the 1942 Criminal Code.[9] There is also little need for the special "theft of dogs" crime created by Act 290. In *State v. Chambers*[10] the Louisiana Supreme Court held that a dog was the subject of larceny; and the reasons assigned in *Chambers* would be equally applicable to a prosecution for theft under Article 67 of the 1942 Criminal Code.

Aggravated Crime Against Nature

The maximum five-year penalty for crime against nature[11] provided an entirely adequate penalty for the case where two sexually perverted adults voluntarily committed crime against nature. In this situation the maximum sentence was seldom im-

7. *Id.* 14:45(4).

8. LA. R.S. 14:67.1 (1950).

9. LA. R.S. 14:67.2 (Supp. 1962). The penalty clause of new Article 67.2B is confusingly stated, providing a heavier fine but lesser prison sentence for second and subsequent offenses.

10. 194 La. 1042, 195 So. 532 (1940), discussed in *The Work of the Louisiana Supreme Court for the 1939-1940 Term — Criminal Law and Procedure*, 3 LA. L. REV. 379, 389 (1941). *Cf.* State v. Moresi, 209 La. 180, 24 So. 2d 370 (1945), holding that the killing of an unregistered dog was authorized by La. Acts 1918, No. 239. This decision would not preclude a theft prosecution for the stealing of an unregistered dog, for even contraband articles may be the subject of theft. State v. Donovan, 108 Wash. 276, 183 Pac. 127 (1919). PERKINS, CRIMINAL LAW 861 (1957).

11. LA. R.S. 14:89 (1950).

posed for the offense is more a violation of the public sense of decency than a major crime.[12] On the other hand, where force is employed in having unnatural sex relations with an unwilling partner, or the other party to the relations is a juvenile, the five-year maximum term may be insufficient. It is to meet the latter situations that Act 60 defined and provided a possible maximum penalty of fifteen years for "aggravated crime against nature." This maximum penalty was decided upon after a study of the statutes of twenty-five states, most of which provided for maximum penalties ranging from ten years to life imprisonment. The special circumstances which characterize *aggravated* crime against nature look to force employed, age of the victim, disparity in ages of the offender and the victim, and mental incapacity of the victim.

Clauses (1) and (2) follow the pattern of the aggravated rape article of the Criminal Code,[13] in placing emphasis upon the use of force or aggression in effecting the act.[14]

Clauses (3) and (4) generally conform with the simple rape article of the Criminal Code,[15] covering the situation where the other party is of unsound mind or rendered incapable of a valid consent by stupor produced by drugs. It should be noted that drunkenness is not included in Clause (4).

Cases in which the aggravating circumstance is the immature age of the other party bring Clause (5) into operation only if the other person (victim) is under the age of seventeen years *and* the offender is at least three years older than the victim. Clause (5) is aimed at the situation in which an adult leads a juvenile into abnormal sexual behavior that is likely to precipitate a fixed pattern of sexual maladjustment.[16]

Hit-and-Run Hunting

The sound and humane principle of the hit-and-run driving

12. See A.L.I. Model Penal Code § 207.5(4) (Tent. Draft No. 4, 1955), which treats consensual sodomy between two adults as a misdemeanor.

13. LA. R.S. 14:42 (1950).

14. This factor is also emphasized in A.L.I. Model Penal Code § 207.5(1)(a) (Tent. Draft No. 4, 1955); N.Y. Penal Law § 690 (McKinney 1950).

15. LA. R.S. 14:43(1), (3) (1950).

16. "Gross Imposition" by deviate sexual conduct is defined in the Model Penal Code to include the situation where "the victim is less than 18 years old, and the actor is at least 5 years older than the victim, but it shall be a defense under this paragraph if the actor proves that the victim had previously engaged promiscuously in deviate sexual intercourse." Model Penal Code § 207.5(2)(d) (Tent. Draft No. 4, 1955).

law[17] is applied to hunting accidents by Act 446, which imposes a maximum fine of $500 upon a hunter who, after knowingly injuring another, "either abandons such person or fails to render to such person all necessary aid possible under the circumstances." The writer's only criticism of the law is its failure to follow the hit and run driver law pattern completely by authorizing a prison sentence for such a callous disregard of human decency.

CRIMINAL PROCEDURE

Venue

Act 76 is drafted in conformity with Articles 1 and 2 of the tentative Jurisdiction and Venue Title of the Louisiana State Law Institute's projet (now in preparation) for a revision of the Code of Criminal Procedure. It amends Article 13 of the 1928 Code of Criminal Procedure[18] to facilitate the determination of venue for the prosecution of crimes, parts of which have occurred in several parishes, or where the exact place of the crime is difficult to determine with certainty.

Article 13 had been amended in 1942, to provide that a multi-parish offense might be tried "in any parish where a *substantial* element of the crime has been committed." (Emphasis added.) While the 1942 amendment had materially helped with the venue problem, there was often considerable difficulty in determining whether certain acts of the defendant constituted a "substantial element" of the offense.[19] The new "act or element" formula is more flexible; but it is still qualified by the requirement that the act in the parish of the trial must be an act "constituting" the offense.

Paragraph B is based on Sections 239, 245, and 246 of the American Law Institute's Code of Criminal Procedure (1931). It provides a workable venue rule for crimes committed on public

17. LA. R.S. 14:100 (1950).

18. *Id.* 15:13.

19. See State v. Pollard, 215 La. 655, 41 So. 2d 465 (1949), discussed in *The Work of the Louisiana Supreme Court for the 1948-1949 Term — Criminal Law and Procedure*, 10 LA. L. REV. 198, 207 (1950). In *Pollard* a contractor was prosecuted in the parish where the work was done and false records were prepared for fraudulently obtaining money for purported road work. In reversing the conviction on the ground of improper venue, the supreme court stressed the fact that no substantial element of the crime occurred in the parish where the prosecution was brought. That parish, which had a very vital interest in the prosecution, would probably be proper venue under the broadened "act or element" formula of amended Article 13A.

conveyances, such as trains, airplanes, and boats, under circumstances where the exact locus of the offense cannot be determined with any degree of certainty. In this situation the venue may be laid in any parish through which the vehicle passed and in which "the crime *could* have been committed." (Emphasis added.)

One distinction should be noted between the scope of Paragraph A and that of Paragraph B. Paragraph A applies to interstate jurisdiction, as well as venue between parishes. It covers cases where some of the acts or elements of the crime may have occurred in another state. Paragraph B governs only venue between parishes, where the offense is committed on a "vehicle while in transit *in this state* and the exact place of the offense *in this state* cannot be established." (Emphasis added.)

Constitutionality of the liberal venue provisions of amended Article 13 is assured by an amendment of Section 9 of Article I of the Louisiana Constitution.[20]

Bail Law Revised

Act 411 will be of special interest to surety companies and other bail bondsmen. It adds to Article 86 of the Code of Criminal Procedure[21] a provision for a three-year cut-off date on the obligation of the bail bondsmen in felony cases and a two-year limitation on the bail undertaking in misdemeanor cases. These time limitations are qualified by the proviso that the defendant must have furnished other bail or have been formally surrendered in open court or the parish jail at the expiration of the stated cut-off period.

Act 411 excludes surety companies from certain bail bond limitations which are of significance where personal sureties are given. Article 89,[22] which authorizes the court to reject a surety who is already acting as surety on another bond pending in the court, is limited to personal sureties by an express proviso excepting surety companies. The declaration of financial responsibility, required by Article 103,[23] is likewise limited to personal sureties; and the court is required to accept any bail bond fur-

20. Amend. No. 8. The amendment may not have been necessary in order to validate Paragraph A. See State v. Coon, 242 La. 1019, 141 So. 2d 350 (1962).
21. LA. R.S. 15:86 (1950).
22. *Id.* 15:89.
23. *Id.* 15:103.

nished by a duly authorized surety company. Article 107,[24] providing for forfeiture and collection of bonds for appearances before city or juvenile courts or for preliminary examinations, is modified to eliminate the recordation requirement when the bondsman is a surety company.

In 1958[25] the nonforfeiture situations set forth in Article 109 were amended to embrace cases where the defendant was prevented from appearing because he was detained in jail or a penitentiary in another jurisdiction, or because he was in the Armed Services. Article 109 is further amended by Act 411 to provide for setting aside a judgment of forfeiture within sixty days on proof that the defendant's non-appearance resulted from the types of detention recognized in that article.

Article 110[26] is amended to authorize the discharge of a judgment of forfeiture if the defendant is surrendered, in prison or in open court, within sixty days after the rendition of the judgment. Discharge of the judgment of forfeiture upon subsequent surrender of the defendant is a justifiable relaxation of the liability imposed on the surety, but the surety should bear the costs incurred in the forfeiture proceedings. This is not specified in the amendment, but such assessment of costs should be within the court's general authority in setting aside the judgment.

PUBLIC LAW

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STATE REGULATION OF BUSINESS — THE NEW "MILK AUDIT" LAW

The last legislative session took another long step towards complete regulation of the fluid milk and ice cream and ice cream substitutes industry. The Orderly Milk Marketing Act, which was enacted in 1958 to provide minimum prices to producers and to proscribe sales below cost and other "disruptive sales practices,"[1] was amended in 1962 to provide for the fixing of minimum and maximum prices at which "milk, milk products and

24. *Id.* 15:107.
25. *Id.* 15:109 (1950), *as amended*, La. Acts 1958, No. 191.
26. LA. R.S. 15:110 (Supp. 1962).
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1. LA. R.S. 40:940.1-940.15 (Supp. 1958).