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# Procedure: Criminal Procedure

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for her account. Although an undercurator had been appointed for the interdict and was still acting as such, at the instance of the plaintiff, the trial court appointed an attorney at law to represent the interdict. The attorneys so appointed filed exceptions of no right and no cause of action, of prescription, and also filed an answer denying the plaintiff's allegations and calling for strict proof thereof. After a trial, the trial court dismissed the action, holding that the undercurator was the proper representative of the interdict, and not an attorney appointed by the court. The intermediate appellate court affirmed. The case was governed by the rules of the Code of Practice; but the same result would have obtained under the new procedural Code.[99]

There is some language in the appellate court's opinion, however, that requires qualification. The trial judge's Reasons for Judgment, quoted in part with approval in the appellate opinion, states that " 'the articles of the Civil Code and Code of Practice . . . make it plain that the undercurator is the person who is to represent the interdict in suits wherein the interdict and curator have conflicting interests.' "

This is too broad a statement of the rule. Both before[100] and under the new procedural Code[101] an attorney at law must be appointed to represent an interdict in a partition proceeding, when he and his curator have conflicting interests.

## CRIMINAL PROCEDURE

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### *Racial Discrimination in Jury Selection*

In *State v. Clark*[1] a colored defendant, who had been convicted of aggravated rape by an all white jury, urged racial discrimination as a principal basis for his appeal. Systematic exclusion was not established by the facts that there were only three Negro names on the petit jury list of 30, and that only 15

99. See LA. CODE OF CIVIL PROCEDURE arts. 4202, 4553 (1960).
100. LA. CIVIL CODE art. 1368 (1870), repealed by La. Acts 1962, No. 70.
101. LA. CODE OF CIVIL PROCEDURE art. 4643 (1960), added by La. Acts 1962, No. 92, § 6.
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1. 242 La. 914, 140 So. 2d 1 (1962).

Negroes were included in the tales jury list of 100. It is inevitable that, by reason of economic conditions, illiteracy, and other factors, the number of Negro names on the various jury venires and lists will not fully conform with a mathematical ratio of colored to white persons in the area.[2]

The *Clark* case is of particular interest by reason of its holding that racial discrimination was not established by the fact that the district attorney had peremptorily challenged some of the Negro jurors. The Supreme Court of Louisiana stressed the fact that the district attorney had also exercised peremptory challenges on white jurors. However, it is quite significant that peremptory challenges are a matter of grace and may be exercised without cause assigned. Also, a colored defendant does not have a right to have a member of his race on the jury that tries him.[3] It is sufficient that there has not been a systematic exclusion, or token inclusion of members of his race on the jury venires from which the grand jury and petit jury were drawn.

## SUFFICIENCY OF LONG-FORM INDICTMENTS

Article 227 of the Code of Criminal Procedure, which sets forth the necessary contents of the so-called "long-form" indictment, states that "it is immaterial whether the language of the statute creating the offense, or words unequivocally conveying the meaning of the statute, be used." In conformity with this provision, *State v. Collins*[4] upheld a long-form aggravated rape indictment which charged that the defendant "assaulted and violently ravished" the victim "against her will and lawful consent." This charge, according to the court clearly informed the defendant that he was charged with aggravated rape under Clauses (1) and (2) of Article 42 of the Criminal Code. It would have been a safer practice, as was done in *State v. Clark*,[5] to use the authorized short form, "A.B. committed aggravated rape on C.D.," and then to add additional details providing a more particularized statement of the nature of the offense charged.[6]

2. See cases discussed in *The Work of the Louisiana Supreme Court for the 1945-1946 Term—Criminal Law and Procedure*, 6 LA. L. REV. 660-62 (1946). *Cf.* State v. Goree, 242 La. 886, 139 So. 2d 531 (1962) where systematic exclusion and racial discrimination were found.

3. State v. Anderson, 206 La. 986, 20 So. 2d 288 (1944).

4. 242 La. 704, 733, 138 So. 2d 546, 557 (1962).

5. 242 La. 914, 916, 140 So. 2d 1, 2 (1962).

6. LA. R.S. 15:235 (1950).

THEFT CHARGES — DUPLICITY

The last paragraph of the theft article[7] expressly authorizes the aggregating of separate takings to determine the grade of the offense. Where separate takings are aggregated, each taking must, pursuant to Article 225 of the Code of Criminal Procedure,[8] be stated in a separate count. In *State v. Norris*[9] five separate acts of obtaining gasoline and services by fraudulent use of an oil company credit card were charged in a single indictment, but without setting forth the acts in separate counts or numbered paragraphs. In upholding the trial court's refusal to quash the indictment for duplicity, the Supreme Court stressed the fact that each act of taking was separately stated and dated, and concluded: "True, such distinct acts were not numbered and described in separate paragraphs. However, L.R.S. 15:219, which defines 'counts' does not state that a count must be set forth in any particular manner. It merely provides: 'counts are charges of crime joined in the same indictment'. . . . Hence, since the instant indictment lists separately the distinct acts and the amount of each, a forceful argument might well be made that it contains five different counts in compliance with L.R.S. 15:225."[10] The majority opinion admitted that the indictment might consist of a single count, "inasmuch as the alleged distinct acts are not listed in separately numbered paragraphs";[11] and there is a strong indication that the majority opinion is based upon the harmless error concept, *i.e.*, that the defendant had not been injured by the cumulation of the charges in a single count.[12] In this regard the dissenting opinion appropriately points out that the lack of separate counts prevented the jury from considering each count separately, and prevented the defendant from separately pleading to each count. While duplicity may be waived if the objection is not timely urged,[13] the statutory right to require a separate statement of each of the cumulated takings should not be written off as insubstantial.

BILL OF PARTICULARS IN FELONY-MURDER

Article 222 of the 1928 Louisiana Code of Criminal Proce-

7. *Id.* 14:67.
8. *Id.* 15:225.
9. 242 La. 1070, 141 So. 2d 368 (1962).
10. *Id.* at 1075, 141 So. 2d at 370.
11. *Ibid.*
12. *Id.* at 1077, 141 So.2d at 371.
13. LA. R.S. 15:221 (1950).

dure provides for the conjunctive charging of a crime which may be committed in a number of different ways, all of which are listed in the criminal statute. When the different forms of a crime are charged conjunctively, proof of either form will support a conviction.[14] The authorization of conjunctive allegations has been applied to the bill of particulars as well as to the indictment.[15] Here also, as in framing the indictment, the district attorney may be unavoidably uncertain as to which form of the crime will be established at the trial.

In *State v. Rogers*,[16] a murder prosecution, the defense sought information by a bill of particulars as to whether the murder charge was being prosecuted as an intentional homicide under Clause (1) of the murder article,[17] or as felony-murder under Clause (2). Applying the conjunctive allegation rule, the Supreme Court held that it was sufficient for the state to answer that the defendant was charged under both Clause (1) *and* Clause (2). In short, "murder," according to the court, "can be committed under Subsection (1) or under Subsection (2) of the article or under both subsections at the same time, which is exactly what is alleged to have happened in the instant case."[18] In answer to a supplemental bill of particulars to determine which of six possible felonies listed in Clause (2) the defendant was committing when he killed the victim, the district attorney's answer that the defendant was committing armed robbery, simple robbery, *and* aggravated rape was held to provide defense counsel "ample information to prepare their defense."[19]

### TIME FOR FILING MOTION FOR BILL OF PARTICULARS

The bill of particulars, authorized by Articles 235 and 288 of the Code of Criminal Procedure, is an important device that implements the defendant's constitutional right to "be informed of the nature and cause of the accusation against him";[20] and

14. State v. Bryan, 175 La. 422, 143 So. 362 (1932) where the Supreme Court held that, although Article 222 provided that the offense must be charged conjunctively, it did not require proof of both. When a statute condemns an act under one or more alternative conditions, all of the alleged alternative conditions need not be proved.

15. State v. Prince, 216 La. 989, 45 So. 2d 366 (1950), where aggravated rape had been charged in a short form indictment. *Accord*, State v. Jackson, 227 La. 642, 80 So. 2d 105 (1955).

16. 241 La. 841, 132 So. 2d 819 (1961).

17. LA. R.S. 14:30 (1950).

18. 241 La. 841, 869, 132 So. 2d 819, 829 (1961).

19. *Ibid.*

20. LA. CONST. art. I, § 10.

to that end the rules governing the bill of particulars, especially where the short-form indictment is employed, have been liberally construed. Ordinarily, a motion for a bill of particulars is filed prior to arraignment,[21] but the court may allow the motion after the arraignment. In *State v. Barnes*[22] defendant had been charged with theft under a short-form indictment. After arraignment and five days prior to trial defense counsel filed a motion for a bill of particulars. In holding that it was reversible error for the trial judge to deny the motion "for the sole reason" that it was filed "too late," the Supreme Court stated: "Consequently whenever the short form indictment is used in a prosecution, the accused is entitled, *upon timely request,* to be furnished with a bill of particulars setting out such matters that are of the essence of the charge against him and not included in the indictment and any other facts that are necessary for him to properly and intelligently prepare his defense."[23] (Emphases added.)

Several questions remain partially unanswered as to the full implications of *Barnes*. Foremost is the query when the motion for a bill of particulars is not "timely," for the motion in *Barnes* had been filed after one continuance had been granted and just five days before the case was set for trial. An additional query arises whether the trial court's overruling of the motion for a bill of particulars was held to constitute reversible error because of the fact that a short-form indictment had been employed, or because of the summary manner in which the trial judge overruled the motion with the brief statement that it was filed "too late."

In any event, *Barnes* provides considerable clarification of the Supreme Court's thinking concerning the time for filing a motion for a bill of particulars. First, the bill of particulars is an important device for implementing the defendant's constitutional right to be apprised of the nature of the charge against him, and it is of particular importance when the short-form indictment is employed. Second, motions filed after the arraignment are not necessarily untimely and should ordinarily be considered by the trial judge. Third if the court refuses to consider a belated bill of particulars, as in *Barnes,* it must clearly and

21. LA. R.S. 15:235 (1950).
22. 242 La. 102, 134 So. 2d 890 (1961) 22 LA. L. REV 676 (1962).
23. *Id.* at 893, 134 So. 2d at 892.

fully state the circumstances showing that the bill amounted to a dilatory tactic, as distinguished from a bona fide effort to procure needed information.

## PLEA BARGAINS

So-called "plea bargains," entered into by mutual agreement of defense counsel, the district attorney, and the court, serve a very useful purpose. They help keep the criminal docket current by encouraging guilty defendants to plead guilty upon the assurance of a fair and reasonable sentence. The conclusive nature of sentences imposed pursuant to such agreements has been recognized by the Louisiana Supreme Court.[24] *State v. Hingle*[25] affirmed the enforceability of a plea bargain under which the defendant had pleaded guilty of attempted possession of marijuana cigarettes. In addition to a minimal sentence of two-and-one-half years, the district attorney had agreed, with apparent consent and approval of the court, not to invoke an increased sentence against the defendant as a multiple offender. The Justices of the Louisiana Supreme Court were in general agreement that such a plea bargain, entered into with knowledge and consent of the court, was binding upon the state and precluded the defendant from subsequently being charged as a fourth offender, found guilty, and sentenced as such. An important point of difference between Chief Justice Fournet's majority opinion and Justice Sander's concurring opinion related to the question whether the assent and apparent approval of the court was necessary to render the district attorney's agreement not to charge the defendant as a multiple offender enforceable.

The majority opinion's holding, that the district attorney had inherent authority to enter into binding plea bargains without the advice or consent of the court, was largely posited upon the general statement of the powers of the district attorney in Articles 17 and 18 of the Code of Criminal Procedure; and upon the district attorney's specific authority, under Article 329, to determine when a nolle prosequi shall be entered.[26] After stressing the broad authority vested in the district attorney by these articles of the Code, Chief Justice Fournet concluded:

24. State v. Mockosher, 205 La. 434, 17 So. 2d 575 (1944).
25. 242 La. 844, 139 So.2d 205 (1962).
26. LA. R.S. 15:17, 15:18, 15:329 (1950).

> "[W]hen, in a bargain made by a district attorney, an accused is promised immunity, the courts should give effect to such agreement, for it would not be consonant with the pledge of the state's public faith reposed in these officers by the legislative branch of our government to permit them to repudiate bargains made with persons accused of crimes who are acting in good faith, and, in reliance thereon, comply with their commitments by relinquishing valuable and fundamental rights."[27]

In a concurring opinion, Justice Sanders stressed the difference between the district attorney's authority under Article 329 to enter a nolle prosequi without consent of court, and the granting of complete immunity from prosecution as a multiple offender. The nolle prosequi, Justice Sanders pointed out, "does not bar a subsequent prosecution for the same offense. In legal effect it only discharges the particular indictment. There is a vast difference between entering a nolle prosequi and granting full immunity for crime. . . . This being true, it does not follow that the district attorney alone has general authority to grant immunity to an accused for a crime."[28]

It is very true that there is a basic distinction, as Justice Sanders points out, between the district attorney's plenary authority (under Article 329) to nolle prosequi a particular indictment, and the granting of immunity from future habitual offender charges. However, when the defendant pleads guilty he is bound by that plea, and he should be entitled to rely on performance of the district attorney's promise not to enforce the drastically enhanced penalties which are available under the habitual offender law. Strong support for the holding that the state is bound by the district attorney's agreement is found in the general statement of Article 17 of the Code of Criminal Procedure, relied upon in the majority opinion, that "the district attorney shall have entire charge and control of every criminal prosecution instituted or pending in any parish wherein he is district attorney, and shall determine whom, when, and how he shall prosecute." Additional support for the district attorney's authority in regard to the bringing of habitual offender charges is found in the 1954 amendment of the habitual offender law which states that the district attorney "*may*" file a habitual

27. 242 La. 844, 865, 139 So. 2d 205, 212 (1962).
28. *Id.* at 870, 139 So. 2d at 214.

offender charge.[29] The district attorney will seldom enter into a plea bargain without the knowledge and approval of the sentencing judge, as was the situation in *Hingle*. However, if he should, it would appear that justice and faith in our judicial procedures will best be served by holding that the state is bound by the district attorney's agreement as to a matter coming within his discretion to act.

COMPLETE TRANSCRIPTS FOR APPEAL BY INDIGENT DEFENDANTS

In *Griffin v. Illinois*[30] the United States Supreme Court held that the denial of a complete stenographic transcript to the indigent petitioners, for use in taking their appeal, constituted a violation of the "due process" and "equal protection" clauses of the fourteenth amendment. Application of the complete transcript requirement to Louisiana criminal appeals was squarely presented in *State v. Rideau*.[31] In *Rideau* the Louisiana Supreme Court upheld the trial judge's refusal to have all of the evidence adduced in the case, including the examination of prospective jurors, reported and transcribed. Justice Sanders put his finger on a controlling distinction between Illinois and Louisiana appellate procedures when he stated:

> "In that case (*Griffin v. Illinois*) it was conceded that the petitioners needed a full stenographic transcript in order to get adequate appellate review in the State of Illinois. A complete bill of exceptions consisted of all proceedings and evidence. . . . In this state the appellate jurisdiction of the Supreme Court in criminal cases extends to questions of law alone. It cannot review the facts. A stenographic transcript was made of all bills of exception. The record is adequate for appellate review of the questions of law. For these reasons the decision of *Griffin v. People of State of Illinois, supra,* is not controlling."[32]

In short, the requested complete transcript of the testimony was not necessary for appellate consideration of the defendant's bills of exception in *Rideau*.

A more difficult problem will be presented in cases where the defendant's motion for a new trial is based on the ground

29. LA. R.S. 15:529.1D (Supp. 1962).
30. 351 U.S. 12 (1955).
31. 242 La. 431, 137 So. 2d 283 (1962). *Accord*, State v. Daley, Case Nos. 46,158—36,160, Nov. 1962.
32. 242 La. 431, 452, 137 So. 2d 283, 291 (1962).

that "the verdict is contrary to the law and the evidence,"[33] and the defendant is urging that there is no evidence,[34] or "no evidence of any probative value"[35] of an essential element of the crime. In a recent federal case, *United States* ex rel. *Weston v. Sigler*,[36] where a writ of habeas corpus had been applied for, the circuit court of appeals held, that the failure to furnish a free transcript of all testimony to an indigent defendant who was appealing was a denial of "equal protection" of the law. The ultimate issue appears to be whether a complete transcript was, in the particular case, required for an adequate presentation of the defendant's appeal.[37] It may be necessary, in order to provide for the situation where a defendant is claiming that there is a complete lack of probative evidence of an essential element of the crime, to amend and liberalize the provision of Article 500 of the Code of Criminal Procedure,[38] "that any accused desiring to send up the testimony of all of the witnesses so taken, shall pay for the same." In such an amendment the general right to a free transcript should be limited to indigent defendants.[39]

## EVIDENCE

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### WITNESSES

#### *Testimonial "Judicial Confessions"*

Should a party-witness in a civil case be inexorably bound by his own disserving testimony? Relying upon Article 2291 of

33. LA. R.S. 15:509(1) (1950).

34. State v. Linkletter, 239 La. 1000, 120 So.2d 835 (1960), *Cf.* State v. Giangosso, 157 La. 360, 102 So. 429 (1924) where the facts certified by the trial judge showed that the defendant, convicted of receiving stolen things, really owned them.

35. State v. LaBorde, 234 La. 28, 99 So. 2d 11 (1958). *Accord*, Mayerhafer v. Department of Police, 235 La. 437, 104 So. 2d 163 (1958) using the phrase "no probative evidence."

36. (Oct. 1962) 5th Circuit Case No. 19402, rehearing pending.

37. State v. Bueche, 243 La. 160, 142 So. 2d 381 (1962) where the Louisiana Supreme Court upheld the trial judge's refusal of a complete transcript, stressing the fact that there was no allegation that an essential element of the crime was entirely unsupported by the proof.

38. LA. R.S. 15:500 (1950).

39. The 1960 statute (Act 12), which was suspended in 1960 and repealed in 1962 (Act 449), had provided for a free transcript for all defendants.

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