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Criminal Law and Procedure

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CRIMINAL LAW

AGGRAVATED ARSON

Act 117 amends the aggravated arson article of the Criminal Code[1] so as to cover more clearly all situations where the arson endangers human life, whether it is by burning or explosion. Foreseeable danger to human life is the gist of arson in its aggravated form. A situation pointing up the need for clarifying the definition of aggravated arson was presented by the intentional burning of an unoccupied building which was located within a few feet of an occupied residence. Here, there was clear danger to human life, for the fire could easily spread to the occupied residence. Similarly, arson by explosion in an unoccupied building in a crowded downtown area could endanger the lives of persons in adjoining buildings. However, difficulty might have been encountered with the phrase *"wherein* it is foreseeable that human life might be endangered." (Emphasis added.) By substituting the word "whereby" for "wherein," the new aggravated arson definition clearly shows that danger to human life is the aggravating element of the crime and that the danger may be to occupants of adjoining buildings as well as to people in the building burned or dynamited. Under the new definition it will clearly be aggravated arson to intentionally burn or dynamite a warehouse in a crowded district of a city.

CRIMINAL TRESPASS

The desire of many local communities for a definition of criminal trespass which will meet the peculiar needs and conditions of its agrarian economy has resulted in numerous amendments of the criminal trespass article of the Criminal Code,[2] and a series of special criminal trespass provisions. Act 497 of 1964 again amends the general criminal trespass article, with special

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1. LA. R.S. 14:51 (Supp. 1964).
2. *Id.* 14:63.

provisions for Assumption Parish. Act 435 provides a special criminal trespass offense for Bossier Parish.[3] The need for different criminal trespass rules in certain areas is acknowledged, but the problem is being badly confused by a series of parish-by-parish amendments or special trespass laws. A true solution will require a careful joint consideration of trespass problems by interested parties from various sections of the state, and then a study of what other states are doing.

ABORTION

The crime of abortion, as defined in article 87 of the Criminal Code[4] had required that the drug be administered or the instrument used upon "a pregnant female" for the purpose of procuring a miscarriage. If the defendant intended to procure a miscarriage, but the female was not actually pregnant (or the state failed to prove the female's pregnancy beyond a reasonable doubt), the crime of abortion was not established; *but* the defendant could be convicted of an attempted abortion. Under the general attempt article of the Criminal Code[5] an attempt is committed when the defendant has a specific intent to commit a crime and does an act tending directly toward the accomplishing of his object. The definition paragraph of this article concludes, "it shall be immaterial whether under the circumstances, he would have actually accomplished his purpose."

Under amended article 87, the would-be abortionist is guilty even though it turns out that the female was not actually pregnant. The *specific intent* to cause a miscarriage is the gist of the offense. The extended definition of abortion may have been dictated by a desire to impose criminal liability for the basic crime upon one who attempts the offense. (This is not unusual: public bribery, for example, is defined to include "giving or offering to give" a bribe.[6]) If it is posited upon a fear that an attempt to commit an abortion upon a non-pregnant female is unprovided for, the fear does not seem well founded in view of the broad language of the general attempt article of the Criminal Code. That situation would be analogous to attempted theft by the picking of an empty pocket or reaching into an empty cash drawer. It is significant that the definition of abor-

3. *Id.* 14:63.6.
4. *Id.* 14:87.
5. *Id.* 14:27.
6. *Id.* 14:118.

tion in the American Law Institute's Model Penal Code[7] follows the same pattern as the original article 87 of the Louisiana Criminal Code in requiring that the defendant shall "terminate the pregnancy" of the woman.

SPECIAL FRAUD CRIMES

A number of special fraud crimes, reminiscent of the pre-criminal code days when there was a special theft law to cover each of the various forms and types of stealing, provided for credit card theft,[8] wrongfully removing a building or structure from mortgaged immovable property,[9] and renting a motor vehicle for fraudulent pretenses.[10]

The credit card theft law adds nothing but elaboration to the general theft article of the Criminal Code[11] and the recently amended definition of "anything of value" which now includes any "service available for hire."[12] Unauthorized use of a credit card, or use of a revoked, forged, or expired credit card or number, as well as the various other devices spelled out by act 192, would constitute obtaining "by means of fraudulent conduct, practices or representations" under the theft article, and the obtaining of "credit or the privilege of making a deferred payment" will always be incidental to the obtaining of goods or services. The credit card theft law may serve a useful purpose in states without a general theft law, and the magnitude of the evil may justify special treatment in Louisiana. However, the legislature should carefully evaluate such special laws, lest we re-embark on the old merry-go-round of a separate crime for each kind of thievery.

The crime of removal of a building, structure, or some attached part, from mortgaged immovable property covers a specialized type of fraud which might not be clearly covered by the general theft article. The requirement of intent to defraud is most important here, for removals which are not intended to defeat or materially diminish the mortgagee's security should not be criminal.

The fraudulent renting or retention of motor vehicles act

7. ALI MODEL PENAL CODE § 230.3(1) (Proposed Official Draft, 1962).
8. La. Acts 1964, No. 192, LA. R.S. 14:218 (Supp. 1964).
9. La. Acts 1964, No. 496, LA. R.S. 14:219 (Supp. 1964).
10. La. Acts 1964, No. 442, LA. R.S. 14:220 (Supp. 1964).
11. *Id.* 14:67.
12. Amended by La. Acts 1964, No. 68.

covers criminal conduct that was already adequately provided for. The fraudulent renting or otherwise obtaining of a motor vehicle would constitute unauthorized use of movables under article 68 of the Criminal Code,[13] which embraces obtaining "by means of fraudulent conduct, practices or representations." The wrongful refusal to return the property, whether it constituted a misappropriation or a taking, would constitute theft if it was with an intent to deprive permanently; otherwise, it would constitute unauthorized use. The special defense to civil actions arising out of the arrest or detention of violators of this law may create some nice problems. It would appear indirectly to extend the officer's right of arrest without a warrant to misdemeanors not committed in the officer's presence. A further query — would it permit arrests by private persons?[14]

CRIMINAL PROCEDURE

DISPOSITION OF SEIZED PROPERTY

Act 5,[1] providing for the disposition of property seized in connection with criminal proceedings, supplies a serious deficiency in the present law. It covers all types of property seized, either under a search warrant or incidental to an arrest, except as otherwise specifically provided by law. Without any comprehensive statute on the subject, clerks of court, as custodians of seized property, have been without statutory guidance as to the proper method of disposing of seized property after it was no longer needed as evidence. As a result, much seized property accumulated in storerooms; and many owners of non-contraband property were required to go through a long, arduous procedure to obtain possession of their property. The new statute provides a procedure for expeditious disposal of contraband property and for the prompt and safe return of harmless property to its rightful owner.

BAIL PROCEDURES

Act 220 increases from sixty days to six months the period

13. LA. R.S. 14:68 (1950).
14. Generally, private persons have no authority to arrest for misdemeanors. see *id.* 15:61.
1. LA. R.S. 15:48.1 (Supp. 1964).

within which a judgment of forfeiture of an appearance bond may be set aside upon the surrender or appearance of the defendant for trial, or upon proof that the defendant's non-appearance was due to physical disability, detention in jail, or service in the armed forces of the United States.[2] While it is appropriate, under the specified circumstances, to relieve from the hardship of a judgment of forfeiture of an appearance bond, the extension of the period to six months after rendition of the judgment is very generous.[3] In extending the discharge period the new statute should have required the defendant and his surety to pay the costs and expenses of the defendant's failure to appear, such as the costs incurred in the forfeiture proceedings, and the costs of returning the defendant for trial, which will sometimes require extradition.[4] The surety is given liberal relief from the judgment of forfeiture, and it is reasonable that he should reimburse the parish for all costs and expenses resulting from the defendant's breach of the bail undertaking as a minimal liability resulting from the default. A special problem will be presented by the discharge of forfeitures of cash bonds, especially small bonds of one hundred dollars or less which may be furnished by misdemeanants. The return of these bonds, after a six-month period, may give rise to some practical difficulties.

GRAND AND PETIT JURIES

In *Collins v. Walker*[5] the jury commission had attempted to include an ample number of Negroes on the grand jury which indicted a Negro defendant, and had purposely included six (of twenty) Negro names on the grand jury list from which the grand jury was drawn. The United States Court of Appeals for the Fifth Circuit held that the purposeful placing of six Negro names on the grand jury list was a violation of the "equal protection" formula announced in *Cassel v. Texas*,[6] that "the basis of selection cannot consciously take color into account." The *Collins* decision posed a serious practical problem for judges and jury commissions. How can the commission assure adequate

2. Amending LA. R.S. 15:108B, 15:109 and 15:110 (1950).

3. A commentary to § 106 of the American Law Institute Code of Criminal Procedure shows a wide variety of periods for remission of bail bond forfeitures as follows: Iowa (60 days), New Jersey (4 years), New York (1 year), Oklahoma (the term of court), and Washington (60 days). The 1963 Illinois Code of Criminal Procedure, § 110-8(g) provides a thirty-day period.

4. See ALI CODE OF CRIMINAL PROCEDURE § 107 (1930).

5. 329 F.2d 100 (5th Cir. 1964), aff'd on rehearing, with dissent, 335 F.2d 417.

6. 339 U.S. 282 (1950).

representation of the colored race without some conscious effort to do so? Act 161 seeks to help with this jury selection enigma by changing the method of selection of the grand jury list.[7] The prior law, in order to secure an able group of prospective grand jurors representing all portions of the parish, had provided that the grand jury list of twenty names should be *selected* from the general jury venire. The new law provides that the names should be drawn "indiscriminately and by lot" from the general venire list. It further stipulates, out of an abundance of caution, that the names so drawn are to be written or typewritten on slips of paper, "with no designation as to race or color." Both the old and the new law provide that name slips shall be placed in an envelope, from which the grand jury will ultimately be drawn.[8]

The 1964 amendment, by providing for drawing, rather than selection, of the twenty names for the grand jury list, will probably forestall further problems involving conscious inclusion or exclusion of Negroes from grand jury lists.[9] Unfortunately a heavy price is paid, for the jury commisssion is now deprived of an opportunity to *select* capable jurors from all parts of the parish for the important grand jury list. However, it is much easier to criticize a present solution than to propose a better one, and much careful thought has been given to this problem.

The procedure for supplementing the Orleans Parish general jury venire of "not less than seven hundred and fifty persons" was amended by act 515.[10] With a weather eye directed toward the *Cassel* and *Collins* holdings, the new law requires that this list be supplemented quarterly "from a list to be furnished by the Registrar of Voters, . . . which list shall contain the names of persons added to or deleted from the voter registration rolls . . . during the preceding quarter."

INSANITY PROCEDURES

Act 472 amends the insanity procedures of the Code of Criminal Procedure by adding a number of provisions aimed at avoiding improper commitment or continued commitment to mental institutions of persons charged with offenses.[11]

7. LA. R.S. 15:180 (Supp. 1964).

8. LA. R.S. 15:184 (1950) provides for the selection of the foreman and the drawing of the grand jury.

9. In an addendum to a very thorough and logical dissent to the opinion on a second rehearing in *Collins*, Judge Dawkins calls attention to Act 161 of 1964 and suggests that it "clearly cures" the problem raised by the *Collins* decision.

10. Amending LA. R.S. 15:194 (1950).

11. It adds a new LA. R.S. 15:271 (Supp. 1964).

Paragraph A provides that no person charged with an offense shall be committed to a mental institution for observation or detention on the ground of insanity or mental defect unless he was represented by counsel at the hearing or trial where his mental condition was determined. This provision is phrased in a somewhat confused manner, but it will probably get the job done. It goes further than the general Code of Criminal Procedure rule providing for the assignment of counsel in felony cases,[12] and provides that a person charged with a misdemeanor must have counsel when his sanity or mental capacity is in issue. This is particularly important in protecting petty offenders from unnecessary commitments to mental institutions. Such persons are, by the very nature of their condition, unable to determine the need for counsel.[13]

Paragraph B seeks to help the "forgotten man" of the mental hospital, by requiring that the patients in the security ward of the mental hospital shall be examined at least once a year by the medical staff to determine whether the patient is capable of standing trial, or should be transferred to another ward for a different type of treatment. Of course, the medical staff's determination that a committed defendant is capable of standing trial will merely constitute a recommendation, and the ultimate determination of the defendant's mental capacity to proceed will be determined by the court in a contradictory hearing held pursuant to article 267 of the Code of Criminal Procedure.[14] This hearing will be conducted like the original sanity hearing. Prior to that hearing the court may order an examination by a sanity commission, or it may rely upon the report of the superintendent or staff psychiatrist of the mental institution. If the court determines that the defendant has the mental capacity to proceed, the criminal proceedings should be promptly resumed. Paragraph C of new article 271 provides that all releases from the mental institution, whether of a temporary or permanent nature, must be by order of court.

It is not clear as to how far this provision will supersede the clearly stated and practical discharge provisions of the Mental Health Law.[15]

12. LA. R.S. 15:143 (1950).
13. *Accord*, LOUISIANA STATE LAW INSTITUTE, CODE OF CRIMINAL PROCEDURE REVISION tit. XXI — *Insanity Proceedings* art. 3 (Exposé des motifs no. 19, March 8, 1963).
14. LA. R.S. 15:267 (1950).
15. *Id.* 28:96-97.