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Nevertheless, the first years of operations have indicated areas which should be restudied and most probably revised. It has been the writer's duty to review intensively the Louisiana procedural decisions of the last three years for evaluation in this faculty symposium. In this, the third and final performance of this pleasant task, an effort has been made to suggest these few major problem areas and possible cures, as follows:

1. The need for revision of criteria for compulsory joinder of necessary and dispensable parties;¹²⁶

2. The need for Code amendment to prevent the proper-party articles from being misused to deny substantive justice;¹²⁷

3. The possible need for rationalization of the incidental actions and for revision of the requirement for leave of court to prevent substantive injustice based upon this procedural technicality;¹²⁸

4. Consideration of allowing separate trials and adjudications of severable issues, and of interlocutory appeals with leave, under limited conditions;¹²⁹

5. In line with 4, consideration of instituting a rationalized general policy of allowing separate threshold trial of defenses which might conclude the litigation, in place of the present scheme of specialized exceptions with function delineated by chiefly historical considerations.¹³⁰

CRIMINAL PROCEDURE

*Dale E. Bennett**

SEARCH WARRANTS—REQUISITE RECITALS OF SUPPORTING AFFIDAVIT

Mapp v. Ohio,¹ holding that illegally seized evidence is inadmissible in state as well as federal courts, necessitated a careful review of state search warrant procedures. It is important that search warrants be validly issued, to the end that the property seized will be admissible in evidence in subsequent criminal proceedings. Thus, article 162 of the Code of Criminal Procedure

126. See text accompanying notes 15-27 *supra*.

127. See text accompanying notes 32-33 *supra*.

128. See text accompanying notes 61-62 and 67-69 *supra*.

129. See text accompanying notes 70-81 *supra*.

130. See text accompanying notes 82-89 *supra*.

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1. 367 U.S. 643 (1961).

states that "A search warrant may issue only upon probable cause established to the satisfaction of the judge, by the affidavit of a credible person, *reciting facts establishing the cause* for issuance of the warrant." (Emphasis added.) In *State v. Wells*² this provision was applied in holding a search warrant to have been illegally issued "because the affidavit upon which it was based recites nothing more than that the officer seeking the warrant . . . has reasonable cause to suspect" that weapons might be found in the premises to be searched. Justice Hamiter's opinion underscored the purpose and effect of article 162, when he stated that it "now leaves no doubt but that a search warrant can legally issue in this state only when an *affidavit* has been submitted to the judge *and such affidavit recites facts* which satisfy him, the judge, *not the affiant*, that probable cause exists for its issuance."³ Justice Hamiter then points out that it is the clear purpose of article 162 that the judge is to determine if the search warrant is to be issued upon the basis of facts stated in the affidavit. He is not simply to rubber-stamp the investigating officer's determination that there is probable cause. The importance of the statement of facts, to serve as a basis for issuance of the search warrant, cannot be overemphasized by those who instruct peace officers in the preparation of affidavits for search warrants.

PRELIMINARY EXAMINATIONS—EFFECT OF INDICTMENT
BY GRAND JURY

One of the purposes of the preliminary examination is to determine whether there is "probable cause" to charge the accused with the offense for which he is held. The scope of the preliminary examination after the defendant has been indicted is stated in article 296 of the Code of Criminal Procedure. After a grand jury has considered the case and returned an indictment, the issue of probable cause to charge the accused has been authoritatively determined; and the grand jury's finding establishes a sufficient *prima facie* case of guilt to justify holding the defendant. Thus a preliminary examination after an indictment is expressly "limited to the perpetuation of testimony and the fixing of bail."⁴ The paramount significance of the grand jury's investigation and finding is logically and clearly illustrated by the procedures approved in *State v. Hudson*.⁵ In *Hudson* the de-

2. 253 La. 925, 929, 221 So.2d 50, 52 (1969).

3. *Id.* at 931, 221 So.2d at 52.

4. LA. CODE CRIM. P. art. 296, last paragraph.

5. 253 La. 992, 221 So.2d 484 (1969).

defendants had been arrested on a murder charge and a preliminary examination had been ordered for June 2, 1967. Upon being informed that the murder charge was pending before the grand jury, the judge continued the preliminary examination until June 8. However, the grand jury returned a murder indictment on June 7 and a preliminary examination to consider possible bail was not held until June 30. In approving the procedures followed, the supreme court held that the five-day delay, to await the grand jury's disposition of the charge, "did not breach the mandate of article 292 of the Code of Criminal Procedure directing that the judge 'immediately' order a preliminary examination in felony cases." In his opinion, Justice Summers pointed out that both procedures are "designed primarily to ascertain whether there is probable cause to charge the defendant with the offense,"⁶ and it is implicit in *Hudson* that the important issue of probable cause to hold the defendant for trial had been settled by the grand jury's indictment. Recognizing practical considerations, the court stated: "Nor do we feel that the law requires the district attorney to present the same case in different forums at the same time"; and concluded that "the language of article 292 of the Code of Criminal Procedure requiring that the judge 'immediately' order a preliminary examination in felony cases is not to be so rigidly applied that it brings about the abolition of the judge's right to grant a continuance in these cases."⁷ The *Hudson* opinion provides a fine supplement to, and workable application of, the basic rule enunciated in article 296 of the Code of Criminal Procedure.

Article 292 of the Code of Criminal Procedure has been applied, in two recent cases,⁸ to support the court's refusal to order a preliminary examination after the defendant has been indicted by a grand jury. In *State v. Singleton*, in upholding the trial court's denial of a motion for a new trial, Justice McCaleb stated, "In the first place there is no constitutional right to a preliminary hearing,⁹ and the law is well settled in this state and under the federal system that since the purpose of a preliminary hearing is to determine probable cause, no such hearing is required where

6. *Id.* at 1009, 221 So.2d at 490.

7. 253 La. 992, 1010, 221 So.2d 484, 490 (1969).

8. *State v. Manuel*, 253 La. 195, 217 So.2d 369 (1969); *State v. Singleton*, 253 La. 18, 215 So.2d 838 (1968).

9. *Accord*, *Sciortino v. Zampano*, 385 F.2d 132 (2d cir. 1967).

the defendant has been indicted by a Grand Jury because the fact of indictment evidences probable cause."¹⁰

INDICTMENTS—CHARGING PRIOR CONVICTIONS

Article 483 of the Code of Criminal Procedure articulates the procedure, in conformity with prior jurisprudential rules, for charging prior convictions to establish multiple offender liability. Where the offense, such as driving while intoxicated, is graded according to whether the violator is a first, second, or subsequent offender, it is necessary to allege the prior convictions in the indictment. Such an allegation is essential if the defendant is to be convicted as a second or subsequent offender.¹¹ The first paragraph of article 483 states the method of charging such prior convictions, that is, "the name or nature of the offense and the fact, date, and court of the conviction" must be alleged. This procedure must be followed. In *State v. Bass*¹² an affidavit for driving while intoxicated contained the notation "Second Offense," which was held insufficient to charge a prior conviction. Thus, the sentence as a second offender was illegal and the case was remanded for a proper sentence as a first offender.

CHOICE OF CHARGE WHERE TWO POSSIBLE CRIMES

It is inevitable that there will be some overlap of the broadly stated basic offenses of the Criminal Code and special criminal statutes, or even special offenses in the Code itself. In such situations, article 4 of the Code¹³ provides that "prosecution may proceed under *either* provision, in the discretion of the district attorney" (emphasis added), thus expressly negating the possible rule that the special provision would be applicable to the exclusion of the general crime. It should be noted that article 4 permits a choice of prosecutions, but does not authorize dual prosecutions. This provision was understandably and logically applied in *State v. Orr*¹⁴ where the defendant was prosecuted for stealing a bull calf. This offense could have been charged as cattle theft under a special statute which makes the offense a felony, regardless of the value of the animal stolen, and prescribes the severe penalty of from one to ten years in the State Penitentiary.¹⁵

10. 253 La. 18, 24, 215 So.2d 838, 839 (1968).

11. *State v. Compagno*, 125 La. 669, 671, 51 So. 681, 682 (1910).

12. 254 La. 83, 222 So.2d 865 (1969).

13. La. R.S. 14:4 (1950).

14. 253 La. 752, 219 So.2d 775 (1969).

15. La. R.S. 14:67.1 (Supp. 1969).

Rather than invoke the draconic penalty of the cattle theft law, the district attorney chose to charge the defendant with the misdemeanor of petty theft (of a bull calf valued at eighteen dollars) under the general theft article of the Criminal Code. In upholding the district attorney's authority to prosecute for the lesser offense, the Louisiana Supreme Court applied article 4 of the Criminal Code. The district attorney's choice to prosecute for the misdemeanor of petty theft resulted in the defendant's being tried for a crime that was more in keeping with the nature of his transgressions, for the cattle theft law should be limited to aggravated cases. It would also have precluded the necessity for a jury trial, except for the unfortunate circumstance that the penalty for attempted theft (fixed before the *Duncan* rule was envisioned) exceeded the "petty offense" standard.¹⁶

SEVERANCE—ON GROUND DEFENDANT WISHES TO CALL
CO-DEFENDANT AS A WITNESS

Article 704 of the Code of Criminal Procedure authorizes the court to grant a severance on motion of the defendant when it "is satisfied that justice requires a severance." Thus, if the co-defendants have antagonistic defenses, or will submit directly contradictory evidence, a severance should be granted.¹⁷ A more difficult problem arises in cases like *State v. Vale*¹⁸ where the jointly indicted defendant moves for a severance in order that he may call his co-defendant as a witness, which would be impossible if they were tried together.¹⁹ In *Vale* the defendant argued, on appeal, that the refusal of a severance had deprived him of the right to call his co-defendant (brother) as a witness. The brother had taken full blame for the narcotics and paraphernalia concealed in the house in which they resided. In sustaining the trial court's ruling, the supreme court pointed out that "the statement alluded to his brother reached the jury through the testimony of the officers. . . ." ²⁰ Chief Justice Fournet pointed out that "severance on joint trials is not a matter of right . . . merely because one co-defendant may desire or be willing to testify for the other co-defendants."²¹

The key to the *Vale* decision was brought into clear focus

16. See text accompanying note 46 *infra*.

17. See LA. CODE CRIM. P. art. 704, comments (a) and (c), and cases cited.

18. 252 La. 1056, 215 So.2d 811 (1968).

19. See LA. R.S. 15:461(3) (1950).

20. *State v. Vale*, 252 La. 1056, 1075, 215 So.2d 811, 817-818 (1968).

21. *Id.*

when Chief Justice Fournet distinguished the case of *United States v. Echeles*,²² which had been relied upon by defendant, as follows: "In the *Echeles* case the court found that Echeles' cause was prejudiced in denying him a severance from his co-defendant, a former client, because of his inability to call him to testify to obtain evidence of prior statements holding Echeles blameless, whereas in the instant case, it cannot be said James was prejudiced for his co-defendant's prior statements claiming full responsibility and ownership of the narcotics and paraphernalia forming the basis of this suit was introduced into evidence, reaching the jury through the testimony of the officers."²³

CONTINUANCES

The continuance articles of the 1966 Code of Criminal Procedure²⁴ provided a more complete coverage of this important device than the corresponding provisions of the 1928 Code, drawing upon the Louisiana Code of Civil Procedure and the American Law Institute's Code of Criminal Procedure for additional rules. These provisions were logically applied in a number of recent cases. In *State v. Devenow*²⁵ the supreme court upheld the trial judge's overruling of defense counsel's motion for a continuance which was not in writing and did not specify the grounds upon which it was based, as required by article 707 of the Code.²⁶ In addition to the formal insufficiency of the motion, the court pointed out that there was no real need for a continuance. The trial judge's per curiam stated, "Defense counsel had been employed for thirty days and the trial was then set for six days away, which is adequate to prepare for trial."²⁷ It was stressed that the trial "was not a complicated one" and "no special circumstances were shown."²⁸ In this regard it is significant to note that article 712 stresses the discretionary nature of the court's ruling upon a motion for a continuance. In *State v. Bland*²⁹ the supreme court again upheld the trial judge's refusal of a continuance where the grounds alleged were not significant. The ground that the defendant, who was represented by court-

22. 352 F.2d 892 (7th Cir. 1965).

23. *State v. Vale*, 252 La. 1056, 1078, 215 So.2d 811, 818 (1968).

24. LA. CODE CRIM. P. arts. 707-715.

25. 253 La. 796, 220 So.2d 78 (1969).

26. *Cf.* LA. CODE CIV. P. arts 961, 1603 with respect to oral continuance in civil cases.

27. *State v. Devenow*, 253 La. 796, 806, 220 So.2d 78, 82 (1969).

28. *Id.*

29. 253 La. 185, 217 So.2d 195 (1969).

appointed counsel, needed time to arrange for private counsel did not impress the court since the defendant had already had sufficient time to procure counsel. The motion made the day before the case was set for trial impressed the court as a dilatory tactic. It was also a bit late to decide suddenly that additional time was needed to subpoena two out-of-state witnesses (from Houston, Texas). Also, defense counsel had failed to follow the requirements of article 709 as to the facts which must be stated in a motion for a continuance to secure the presence of absent witnesses. Article 489 provides for a continuance where the defendant "has been prejudiced in his defense on the merits" by a defect in the indictment, or variance with the evidence, which has been cured by amendment of the indictment or bill of particulars. Thus, if the defendant were relying on an alibi for a certain date or time of day, and that date or time were changed by amendment, the defense would be entitled to a reasonable time to prepare to meet this unexpected change in the charge.³⁰ In *State v. Lewis*³¹ the court properly refused a continuance, holding that the defendant had not been prejudiced or surprised by amendment of the indictment to properly connect the disjunctively stated elements of the crime by the word "and," rather than "or," so as to conform with the proper statutory method of charging such crimes.³² There had been no showing that the defendant was misled as to the nature of the charge by the correction of the defectively stated indictment. It is prejudice, not mere change in the form of the charge, which is necessary in order to establish the right to a continuance.

CAPACITY TO STAND TRIAL—INDUCED BY TRANQUILIZER

The test of capacity to proceed with the trial, stated in article 641 of the Code of Criminal Procedure, conforms with the prior law³³ and is a test that has been almost universally adopted. The issue is whether "as a result of mental disease or defect, a defendant *presently* lacks the capacity to understand the proceedings against him or to assist in his defense." (Emphasis added.) This test is simply stated and generally provides a very understandable measure for the determination of capacity to stand trial. A difficult question has been presented, however, by the

30. *State v. Singleton*, 169 La. 191, 124 So. 824 (1929).

31. 253 La. 230, 217 So.2d 381 (1968).

32. LA. CODE CRIM. P. art 480.

33. Former LA. R.S. 15:267 (1950).

tranquilized defendant,³⁴ that is, the defendant whose mental capability is maintained through the use of prescribed medication. Does this defendant meet the test of article 641? Two recent Louisiana Supreme Court decisions have answered this question in the affirmative. In *State v. Plaisance*,³⁵ and more recently in *State v. Hampton*,³⁶ the court upheld the competency of a defendant who, as a result of the administration of a tranquilizing drug, was able to understand the nature of the proceedings against him and to assist in his defense. In *Hampton*, Justice Sanders stated, "[t]he test of present insanity under the above article [art. 641] is whether the defendant *presently* lacks the capacity to understand the proceedings or to assist in his defense."³⁷ (Emphasis by court.) After pointing out that the unrefuted testimony of the sanity commission was to the effect that the defendant was capable of understanding the proceedings and assisting in her defense, Justice Sanders concluded, "The psychotic symptoms are in remission. That this condition resulted from the use of prescribed tranquilizing medication is of no legal consequence. Under the codal test the court looks to the condition only. It does not look beyond existing competency and erase improvement produced by medical science."³⁸ The question of competency of a tranquilized defendant has not been passed upon in most jurisdictions. However, an Ohio court recently held that a defendant was competent to stand trial where tranquilizing drugs administered under proper medical direction would permit him to communicate with counsel in an apparently reasonable and rational manner as to the preparation and conduct of his defense.³⁹

The result reached in *Hampton* is a logical application of the test of present capacity to stand trial which is stated in article 641 of the Code of Criminal Procedure. It also achieves a sound and desirable result, for it enables the state to try the defendant whenever he is actually capable of effectively assisting in his defense. For the innocent defendant it means an opportunity to establish his innocence, rather than to spend the remainder of his life as a "forgotten man" in the criminally insane ward of a mental hospital. Where the defendant is guilty, it means that

34. See Note, 29 LA. L. REV. 265 (1968).

35. 252 La. 212, 210 So.2d 323 (1968).

36. 253 La. 399, 218 So.2d 311 (1969).

37. *Id.* at 403, 218 So.2d at 312.

38. *Id.* at 401, 218 So.2d at 311.

39. *State v. Rand*, 247 N.E.2d 343 (Ohio Ct. Common Pleas 1969).

the state can bring him to trial while key witnesses are still available and their memories are reasonably fresh and dependable.

JURY TRIAL—UNANIMOUS JURY VERDICT NOT IMPLICIT IN
DUNCAN V. STATE OF LOUISIANA

The United States Supreme Court in *Duncan v. Louisiana*⁴⁰ held that a charge of simple battery, with a maximum possible prison sentence of two years, must be tried by a jury. In holding that the sixth amendment guaranty of a jury trial was applicable to state criminal proceedings via the "due process" clause of the fourteenth amendment, the Supreme Court characterized the right to trial by jury as an integral part of due process for a defendant charged with a "serious crime." While the *Duncan* opinion refused to define a "serious crime," where a jury is required, there is much in the opinion which indicates that the Court approves the line drawn in the federal court system, where "petty offenses" are defined as those punishable by no more than six months in prison and a \$500 fine.⁴¹ In 1968 the Louisiana legislature amended article 779 of the Code of Criminal Procedure to conform with the apparent federal standard, providing for trial misdemeanors by a five-man jury where the maximum possible prison sentence exceeded six months, or a fine in excess of \$500 might be imposed. Another 1968 statute reduced the maximum penalty for nineteen Criminal Code misdemeanors to six months, so that those offenses would meet the petty offense standard and would be triable without a jury.⁴²

A related question was raised, but not answered, in *Duncan*. Does compliance with "due process" require states to provide a common law and federal type of jury with twelve members who must reach a unanimous verdict? A petition for a rehearing which raised this vital issue was denied in *Duncan*.⁴³ Two recent Louisiana Supreme Court decisions have rejected the defendant's attempt to read into *Duncan* the common law understanding of a unanimous jury verdict. While a great majority of the states have adopted the common law jury, it is significant that several states have procedures which are not in accord with the common law standards.⁴⁴ Also, even in England, where the common law

40. 391 U.S. 145 (1968), discussed in Comment, 29 LA. L. REV. 118 (1968).

41. *Duncan v. Louisiana*, 391 U.S. 145, 161 (1968).

42. La. Acts 1968, No. 647.

43. *Duncan v. Louisiana*, 392 U.S. 947 (1968).

44. See Comment, 29 LA. L. REV. 118, 128 n.55 (1968).

jury developed, the trial may be by a jury of less than twelve and a unanimous verdict is no longer required.⁴⁵

The fact that the United States Supreme Court might not impose the federal concept of a unanimous twelve-man jury on the states was indicated by its reply to Louisiana's objection to the application of the sixth amendment standard of a twelve-man jury and a unanimous verdict to the states. In relation to this objection Mr. Justice White stated, "It seems very unlikely to us that our decision today will require widespread changes in state criminal processes. First, our decisions interpreting the sixth amendment are always subject to reconsideration, a fact amply demonstrated by the instant decision."⁴⁶ This statement in *Duncan* was emphasized by Chief Justice Fournet in *State v. Dunn*⁴⁷ when the Louisiana Supreme Court rejected the contention that the *Duncan* decision called for a unanimous verdict in all twelve-man jury cases. In *State v. White*⁴⁸ the Louisiana Supreme Court similarly upheld Louisiana's constitutional provision for a nine-out-of-twelve verdict in major felony trials,⁴⁹ and Justice Hamlin stated, "We must await a clear exposition of this point by the Federal Supreme Court before we can decide whether a unanimous verdict is a requirement of the Sixth Amendment of the Federal Constitution which is obligatory on the States."⁵⁰ This is a matter upon which the Louisiana Supreme Court is certainly justified in adopting a policy of watchful waiting, for there is serious doubt as to whether the Supreme Court will or should hold that the particular type of jury used in the federal courts and at common law is so sacramental that it is essential to "due process" of law. It is one thing to hold that a jury trial is required for the trial of serious crimes, but quite another to say that only a particular type of jury will satisfy standards of fundamental fairness.

OTHER RECENT DUNCAN RULINGS

*State v. Watson*⁵¹ held that the *Duncan* requirement should only be given prospective effect, and could not be urged to invalidate a conviction of aggravated assault which failed to meet

45. Eng. Criminal Justice Act of 1967, ch. 80, § 13.1.

46. *Duncan v. Louisiana*, 391 U.S. 145, 158 (1968).

47. 223 So.2d 856 (La. 1969).

48. 223 So.2d 843 (La. 1969).

49. See LA. CONST. art. VII, § 41.

50. 223 So.2d 843, 846 (La. 1969).

51. 252 La. 649, 212 So.2d 415 (1968).

Duncan standards.⁵² The correctness of the Louisiana Supreme Court's holding was borne out by a subsequent United States Supreme Court decision which held that the *Duncan* rule should only be applied prospectively.⁵³

One of the 1968 misdemeanor penalty reductions to meet the *Duncan* petty offense standard was for petty theft (amount less than twenty dollars) committed by a first offender.⁵⁴ This amendment had failed to take into account the fact that the penalty for attempted theft, regardless of the amount the defendant was attempting to steal, could be as much as imprisonment for one year.⁵⁵ In *State v. Orr*⁵⁶ the Louisiana Supreme Court held that petty theft of a bull calf valued at eighteen dollars must be tried by a jury, since attempted theft was a responsive verdict and that offense carried a possible penalty of imprisonment for one year. The *Orr* decision is eminently sound in view of the present state of the statute law. However, it is highly desirable to eliminate the incongruity of having a higher penalty for attempted petty theft or receiving stolen things than for the completed crimes. It is also important to relieve the overcrowded jury dockets of the necessity of jury trials for petty theft and receiving, which are offenses of a minor nature. Both of these objectives can be accomplished by reducing the maximum penalty for attempted theft and receiving to six months imprisonment, and it is hoped that such legislation will be enacted in 1970.

MOTION FOR NEW TRIAL—NEWLY DISCOVERED EVIDENCE

Two 1968-69 decisions continued the Louisiana Supreme Court's well-established policy that "applications for new trials when based on the ground of newly discovered evidence should be received with extreme caution. . . ."⁵⁷ The test ". . . is not simply whether another jury might bring in a different verdict—

52. Conviction, without a jury, of aggravated assault which carried a maximum penalty of imprisonment for two years.

53. *De Stenano v. Woods*, 392 U.S. 631 (1968), cited in footnote to *State v. Watson*, 252 La. 649, 651, 212 So.2d 415, 416 (1968).

54. LA. R.S. 14:67 (Supp. 1969).

55. The attempt article of the Criminal Code, LA. R.S. 14:27 (1950), generally fixes the penalty at one-half of the penalty for the crime attempted. An exception was made for attempted theft and attempted receiving stolen things. Those attempts, unlike the basic crimes attempted, are not graded according to value of the stolen goods, since it is not always possible to prove how much the defendant was attempting to steal or receive. Thus, a flat maximum penalty of one year's imprisonment was set for attempted theft or receiving.

56. 253 La. 752, 219 So.2d 775 (1969).

57. *State v. Jackson*, 253 La. 205, 214, 217 So.2d 372, 375 (1969).

that is a speculative matter—it is whether the new evidence is 'so material that it *ought to produce a different result* than the verdict reached. . .'"⁵⁸ (Emphasis added.) In general, the Louisiana Supreme Court has shown a commendable reluctance to interfere with the trial court's ruling on this question, for the importance of the new evidence can best be determined by the court which had firsthand knowledge of the evidence adduced at the trial.

APPEALS—POST-CONVICTION RULINGS

Article 912 of the Code of Criminal Procedure lists a number of final judgments or rulings which are appealable, but expressly states that this enumeration is not exclusive. Further clarification of the scope of the right of appeal was provided in two 1969 Louisiana Supreme Court decisions which held that the right of appeal was inapplicable to post-conviction rulings. In *State v. Augustine*⁵⁹ the supreme court held that it lacked jurisdiction to entertain an appeal from a post-conviction ruling that the defendant was presently sane and subject to execution of the sentence of capital punishment. Justice Hamiter, writing for a unanimous court, pointed out that the remedy when a review of the trial judge's post-conviction ruling on present sanity of the convicted defendant is sought, is by supervisory writs. In *State v. Bruno*⁶⁰ the supreme court refused to entertain an appeal from the trial court's revocation of a suspended sentence, holding that such ruling can only be reviewed under its supervisory jurisdiction. The supreme court's holdings in *Augustine* and *Bruno* are supported by practical considerations, by prior jurisprudence (cited by Justice Hamiter in *Augustine*) and by the fact that none of the enumerated judgments or rulings appealable in article 912 are post-conviction rulings.

APPEALS—EFFECT OF ESCAPE PENDING APPEAL

Former La. R.S. 15:548 provided that if the appellant was a fugitive from justice on the return day or the day fixed for the appeal, the appeal would be dismissed. This provision was purposely omitted from the Code of Criminal Procedure, and the Reporter's Comment stated that the omission was "because it is

58. *Id.* at 215, 217 So.2d at 375. *Accord*, *State v. Williams*, 252 La. 1023, 215 So.2d 799 (1968).

59. 254 La. 32, 222 So.2d 502 (1969).

60. 253 La. 669, 219 So.2d 490 (1969).

unfair to the defendant," to impose this extreme penalty upon the escapee.⁶¹ In *State v. Lampkin*⁶² the intended deletion of the draconic forfeiture provision was given effect, and the Code Comment was followed in holding that the escape of a convicted burglar did not have the pre-Code effect of automatic forfeiture of his appeal. Dissenting Justice Barham disagreed with the majority of the court and with the Code Reporter as to the effect of the deletion of former La. R.S. 15:548. Justice Barham pointed out that the dismissal procedure enunciated in section 548 of the 1928 Code "had been the law by judicial pronouncement" since 1884, and was merely carried forward in that Code. However, regardless of the source of La. R.S. 15:548, its repeal and deletion from the 1966 Code of Criminal Procedure, along with the Reporter's Comment, would appear to justify the majority of the supreme court in recognizing the legislative demise of that rule. The situation might have been different if the rule had remained a rule of the jurisprudence, but it had been codified in 1928 and then repealed in 1966.

EVIDENCE

*George W. Pugh**

RELEVANCY

Other Crimes

In *State v. Crook*,¹ an aggravated rape case, the supreme court upheld the trial court's permitting the prosecution to show that five days before the alleged rape for which he was being tried, defendant had raped another young woman under similar circumstances in another section of the city. The court said that it is admissible "for corroboration and to show the intent and licentious disposition of defendant."² Justice Barham wrote an eloquent dissenting opinion, analyzing pertinent legislation and prior statutory provisions. He forcefully contends that in the past the Louisiana Supreme Court at times has given too broad an interpretation to the so-called knowledge-intent-plan exception

61. LA. CODE CRIM. P. art. 919, Comment (c) further explains: "For example, if a man has appealed from a death sentence and he escapes, under the provisions of former R.S. 15:548 the effect is to make the escape a capital offense, since he loses his right of appeal. . . ."

62. 253 La. 337, 218 So.2d 239 (1969).

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1. 253 La. 961, 221 So.2d 473 (1969).

2. *Id.* at 973, 221 So.2d at 477.