Louisiana Law Review

Volume 31 | Number 2
The Work of the Louisiana Appellate Courts for the 1969-1970 Term: A Symposium
February 1971

Public Law: Criminal Law

Dale E. Bennett

ance Co.,[23] nevertheless, the Supreme Court of Louisiana reversed the decision of the Court of Appeal for the Second Circuit[24] which had rejected the application of the *lex loci delicti* rule to allow a Louisiana domiciliary recovery against another Louisiana domiciliary for injuries suffered while a guest in the former's automobile and driving in Arkansas on their way from Louisiana to Iowa. The supreme court's majority opinion, to which Justice Sanders dissented, gives sufficient references to the changing thought on the subject; but its stated reasons for continuing to apply the rule of *lex loci delicti*, in spite of their length and argumentative tone, appear to the writer to evidence less concern with a reasonable delineation of legislative jurisdiction—or applying the law applicable to the regulation of the rights and obligations of the parties—than they do with mere judicial convenience.[25] There can be no doubt that a conflicts rule having the force of custom on a national scale should not be discarded lightly; but once any custom has been shown to be unreasonable it becomes necessary to reject it in favor of a more reasonable regulation. The position taken by the *Restatement of Conflict of Laws (Second), Proposed Official Draft* is that conflict of laws rules based on decisions are subject to re-evaluation and change,[26] and in the particular matter of guest passenger liability the Restatement Draft, as noted by the supreme court, leans toward the rejection of the application of the *lex loci delicti*.[27] The supreme court should reconsider the *Johnson* decision at its first opportunity.

CRIMINAL LAW

*Dale E. Bennett**

Aggravated Arson—Danger to Firemen

Foreseeable danger to human life is an essential and distinguishing element of aggravated arson.[1] Thus, within the Louisiana Criminal Code definition, the burning during business

23. 256 La. 289, 236 So.2d 216 (1970).

24. 218 So.2d 375 (La. App. 2d Cir. 1969).

25. The supreme court rebuked the court of appeal for failing to follow its previous decisions on the matter. *See* the author's and Assistant Professor Tête's discussion of this facet of the decision at p. 185 *supra*.

26. RESTATEMENT OF CONFLICT OF LAWS (SECOND), PROPOSED OFFICIAL DRAFT § 5 (1969).

27. *Id.* § 145, comment(e), under "The place where the relationship between the parties . . . is centered," and Illustration 1 thereunder.

* Professor of Law, Louisiana State University.

1. LA. R.S. 14:51 (Supp. 1970).

hours of a motion picture theatre or a store would clearly constitute aggravated arson. Where human life is not directly endangered the offense is simple arson, which is essentially a crime against the property of another and is graded according to the amount of damage done.[2] In *State v. Bonfanti*[3] the defendant was accused of setting fire to an unoccupied building under the circumstances where no other buildings were endangered. In seeking to sustain a charge of aggravated arson, the state argued that it was foreseeable that city firemen would come to put out the fire and that their lives would be endangered.[4] The intended scope and application of the aggravated arson article was summarized by Justice Hamiter's statement that "the legislature did not intend to so enlarge the scope of preexisting legislation as to include anticipation of injury to firemen or to others who might come to the site of the fire after its commencement. Rather, we think that it was intended to include the burning or blowing up of property when the actor foresees or anticipates the then presence of persons at the site, or in such close proximity thereto, that their lives might be endangered by the act."[5]

To have stretched the aggravated arson crime to cover any case where firemen may foreseeably come to the scene of the arson to put out the fire, would have virtually meant that every arson committed in an area where there was fire protection would become aggravated arson, and would have so limited simple arson as to render that offense largely ineffective. This practical consideration was advanced by Justice Hamiter as a "very compelling reason" for rejecting such a broad application of aggravated arson. It is one thing to provide severe punishments where there is foreseeable danger to persons in or near the structure burned or dynamited. It would have been quite another thing to extend aggravated arson to all city arsons because of the foreseeable fact that firemen will be called to fight the fire. Fortunately, the supreme court has kept the scope of the offense within its proper limits.

Receiving Stolen Things

The offense of receiving stolen things[6] covers "the intentional

2. LA. R.S. 14:52 (1950).
3. 254 La. 877, 227 So.2d 916 (1969) (indictment for aggravated arson quashed).
4. *Id.* at 880, 227 So.2d at 917.
5. *Id.* at 882, 227 So.2d at 918.
6. LA. R.S. 14:69 (1950).

procuring, receiving, or *concealing*" of stolen property. (Emphasis supplied.) In *State v. Crum*[7] the defendants had taken an automobile stolen in Mississippi into the populous city of New Orleans, where the car was used in the perpetration of a robbery. Since the stolen car had been obtained in Mississippi, the Louisiana conviction of receiving stolen things could only be upheld if there had been a "concealing" of the car in New Orleans. In affirming the conviction, the Supreme Court of Louisiana distinguished its former decision in *State v. Ellerbe*,[8] where it had held that the mere possession in one parish of pigs stolen in another parish did not constitute "concealing" within the meaning of the article. In *Ellerbe* the court had found that the facts were insufficient to show "that appellant hid the pigs from public view or that he otherwise *did anything to hinder the owner in his search and investigation of their whereabouts.*" (Emphasis supplied.)[9]

"A determination of whether stolen property is concealed depends," according to Justice Barham's opinion in *Crum*, "upon the facts of the particular case as they affect the ability of the owner to search for and find it," and includes conduct "which may prevent or hinder its discovery by the owner." Applying this formula to the case at bar, Justice Barham concluded that "[t]he commingling of a stolen automobile with other vehicles on the public thoroughfares of a city foreign to and removed from the owner is an effective hinderance to the owner's discovery of it."[10] The fact that the car had been removed to a populous city some distance from the owner's residence was of apparent significance. Although the line between *Ellerbe* and *Crum* may be difficult to pinpoint in some future cases, such difficulty does not detract from the basic soundness of Justice Barham's decision. In this regard it is well to remember Chief Justice Fournet's admonition in *State v. Smith*[11] where, in upholding the public bribery article of the Criminal Code,[12] he stated that " 'if the general class of offenses to which the statute is directed is plainly within its terms, the statute will not be struck down as vague, even though marginal cases could be put where doubts might arise.' "[13] The same reasoning is applicable to su-

7. 255 La. 60, 229 So.2d 700 (1969).
8. 217 La. 639, 47 So.2d 30 (1950).
9. *Id.* at 643, 47 So.2d at 31.
10. 255 La. 60, 62, 229 So.2d 700, 701 (1969).
11. 252 La. 636, 212 So.2d 410 (1968).
12. LA. R.S. 14:118 (1950).
13. 252 La. 636, 646, 212 So.2d 410, 414 (1968).

preme court decisions like *Crum*, which further establish the appropriate meaning and scope of a phrase or word (such as "concealed") in a statute.

EXPROPRIATION

*Melvin G. Dakin**

Authority to Expropriate

The recent litigation before the First Circuit in *Louisiana Power & Light Co. v. City of Houma*[1] will probably stand for some time as an example of unparalleled brashness on the part of a private utility in its relations with a municipally owned utility. Tiring of its role as supplier of standby capacity to the municipality as the latter took on additional customers outside of its municipal limits, the private utility sought to expropriate the municipal property outside such limits. There is of course unquestioned statutory power to expropriate private property for the public use of developing and transmitting electricity for power and other uses. The general expropriation statute does not, however, speak to the question of power to expropriate property already devoted to a public use.[2] While the statute conferring expropriation power on the highway department was explicit in vesting power to expropriate public as well as private property,[3] in the statute at hand there is no such explicitness; it is consequently necessary to explore whether the Louisiana courts have developed a doctrine of expropriation power vested by necessary implication. The First Circuit turned to common law authorities for guidance and concluded that there could be no such implied authority save that arising from a necessity so absolute that without it the grant itself would be defeated or rendered meaningless; if applicable, however, the doctrine would apply whether or not the new use be the same or different from the present use.[4] The court's research also indicated that the rule that power to expropriate property already in public use must be express or implied by necessity was subject to an exception termed a "greater public interest" rule, providing that

---

* Professor of Law, Louisiana State University.

1. 229 So.2d 202 (La. App. 1st Cir. 1969), *cert. denied*, Dec. 11, 1969, *rehearing denied*, Dec. 22, 1969.

2. LA. R.S. 19:2(9) (1950).

3. LA. R.S. 48:303 (1950).

4. 229 So.2d 202, 207-08 (La. App. 1st Cir. 1969).