The Louisiana Criminal Code: A Comparison with Prior Louisiana Criminal Law

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Enactment of the new "Louisiana Criminal Code" marks an important transition in the criminal law of the state—a transition from a hybrid system of partially "written" and partially "unwritten" law to a complete system of written law which is in keeping with Louisiana's foremost position in the field of codification. A brief restatement of the objects which guided the Louisiana State Law Institute and its Reporters is significant and necessary for a complete understanding of the Code. The fundamental principles of present Louisiana criminal law were to be codified wherever such principles were sound and practicable, thus preserving the invaluable heritage of past jurisprudence and experience. Changes were not to be made, merely for the sake of change; and untried, largely theoretical, penal innovations were to be avoided. However, the Institute was charged with the preparation of a "Code" in the full civilian sense of the word, and not with a mere compilation of existing statutes. Thus wherever obsolete fictions and obtuse distinctions existed in the present law, such fictions and distinctions were to be eliminated. Where past jurisprudence indicated gaps or hiatuses in existing criminal statutes, the articles of the new Code were to be drafted so as to plug up those gaps and hiatuses. Where a change was clearly necessary and practical, a century of habitual error should not preclude its adoption. Such must be the modus operandi if the new Code was to be worthy to serve as a pattern for other jurisdictions interested in the codification and improvement of their criminal law. A number of important changes were made, but in each case the change was preceded by a full consideration of the policies and practical issues involved. An equal number of changes, tentatively proposed by the Reporters, were rejected by the advisory group and Council of the Institute as being unneces-

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sary, or on the ground that the innovation suggested was of more theoretical than practical merit. Thus the Code presented to, and adopted by, the Louisiana legislature represents a sound compromise of the sometimes over-theoretical attitude of the law professor with the sometimes over-conservative attitude of the practitioner.

The new Criminal Code should be of special help to the young lawyer who has not yet had time to master the intricacies of our present system, with its numerous over-lapping and sometimes conflicting statutes superimposed upon a basic system of common law crimes. General principles of culpability, justification and excuse are specifically covered by codal articles, where formerly Louisiana jurists and lawyers were relegated entirely to the unwritten precedents of the English common law. Many of the meaningless fictions and purposeless distinctions, which have arisen by historical accident and persisted to plague the common law of crimes, have been eliminated; and each crime is fully defined, with all of its essential elements spelled out in the clearest and simplest language possible. Lengthy enumerations, such as those found in the present burglary, embezzlement, forgery and arson statutes, have been eliminated and inclusive general terms used in their stead. The drafting of each article was preceded by a thorough consideration of pertinent decisions and commentaries. This was done in order to be sure that the language used would be broad enough to cover all intended situations, and yet would not be too inclusive or indefinite. The advantage of careful generalization over lengthy enumeration is not solely stylistic. It provides a much more adequate coverage of the prohibited antisocial activity, and precludes the frequently urged defense that the act or actor involved does not exactly fit within any of the specified enumerations.  

An important change, effected throughout the Code, is the elimination of minimum penalties, except for a few very serious

2. In State v. Fontenot, 112 La. 628, 36 So. 630 (1904), the court held that the burning of a "merry-go-round outfit" was not within an arson statute (La. Rev. St. of 1870, § 847 [Dart's Crim. St. (1940) § 782]) which enumerated "goods, wares and merchandise" and a long list of other objects as to possible objects of the offense. It made no difference that the act was "of equal atrocity or of kindred character with those which are enumerated." See also the recent case of State v. Mason, 197 La. 965, 2 So. (2d) 895 (1941), discussed in The Work of the Louisiana Supreme Court for the 1940-1941 Term (1942) (Louisiana Law Review 273, where the defendant argued that the forgery of a "completion certificate" in connection with an F.H.A. loan was not criminal, since such certificate was not one of the instruments enumerated in the forgery statute. It was only by a very liberal interpretation of that statute that the defense was overruled.
offenses. This is in accord with a uniform trend in penal legisla-
tion to vest a larger discretion in the sentencing judge; and is in
recognition of the idea that the criminal himself (his age, phy-
sical and mental characteristics, social and economic background,
and chance of rehabilitation), as well as the specific crime com-
mitt ed, should be carefully considered in the imposition of sen-
tence. The definitions of and distinctions between substantive
crimes are, at best, general legislative categorizations of criminal
responsibility.3

**Title I. General Provisions**

Too much stress cannot be placed upon the importance of the
provisions in Title I. These are, in general, applicable to all
crimes set out in subsequent articles of the Code. Descriptions of
offenses, which might otherwise appear incomplete or too inclu-
sive, are supplemented and qualified by the general provisions in
this Title. Hence a careful study of Title I is essential to an un-
derstanding application and interpretation of the new Criminal
Code.

**Preliminary Provisions**

Certain frequently used terms, the exact meanings and scope
of which are important, have been defined in Article 2. This
eliminates the necessity of much cumbersome language in subse-
quent articles describing the various offenses. While most of
these definitions will be discussed in connection with the offenses
to which they relate, a few are of such a general nature as to call
for immediate comment. The distinction between felonies and
misdemeanors, based upon the possibility of imprisonment at
hard labor, is merely a restatement of the commonly accepted one
in this state and is consistent with the Louisiana Code of Criminal
Procedure.4 The definitions of “person” and “whoever” have been
inserted to make the status of a corporate offender abundantly
clear. It is intended that corporations may be convicted of crimes
and subjected to fines, wherever the penalty clause of the crime
in question provides for that form of punishment. A penalty of
death or imprisonment is, of necessity, only applicable to natural
persons. The obsolete general concept of Article 443 of the Civil
Code, that a corporation cannot be guilty of a crime, is repudiated.

3. See Wilson, Making the Punishment Fit the Crime (1942) 5 Louisiana
Law Review, 53.
satisfactory term “hard labor” in penalty clauses was necessitated by Art.
VII, § 41 of the Louisiana Constitution of 1921. (The requirement or possibil-
ity of a sentence at “hard labor” determines whether a crime is triable before
a judge, a five man jury or a twelve man jury).
Article 3 is purely interpretative and epitomizes the "spirit" of the Code. It adds nothing which should not naturally follow, even in its absence; and yet a conscientious understanding and application of that article will do much to insure a sound interpretation of the Code. The method of analogical projection, often permitted as to civil statutes, shall not be available in determining the scope of various crimes denounced. However, it is very important that the provisions of the Code shall be given "a genuine construction, according to the fair import of their words, taken in their usual sense, in connection with the context, and with reference to the purpose of the provision." A natural and logical interpretation of the various terms employed in defining the crimes is the necessary and hoped for construction.

It is inevitable that there will be some overlapping of the various Code articles, and also of the Code articles and individual statutes left unrepealed or enacted at the same legislative session. Article 4 indicates a clear legislative intent that where this occurs there shall be no repeal by implication, and that the "special" provision shall not be applicable to the exclusion of the "general." Instead, prosecution may be had under "either." A few examples will serve to illustrate the application of this article. While the present lobbying statute has been expressly retained, certain conduct coming under that statute might also be punishable as Public Bribery (Article 118) or Public Intimidation (Article 122). A number of civil statutes contain penal clauses punishing false statements made under oath. This conduct will also be punishable as False Swearing (Article 125). The 1942 legislature enacted a comprehensive statute on prostitution and kindred offenses. These offenses are also fully covered by a number of articles of the new Criminal Code. In the above and other similar situations prosecution may be under either, but not under both, provisions. Where the two offenses are really the same the offender will be amply protected from dual prosecution by the existing law forbidding double jeopardy.

5. Article 7 emphasizes the traditional principle that Louisiana criminal law is purely statutory, and that no act is criminal unless defined as such in the Code or other statutes of the state. State v. Robinson, 143 La. 543, 75 So. 933 (1918).
Article 5 restates the present law which permits a prosecution for lesser and included offenses. Thus the district attorney may receive a plea of guilty for a lesser and included offense where he feels, as a practical matter, that a conviction of the greater offense actually committed would be highly improbable. Then too, it should never be a defense for an offender to assert that an aggravating element was present, making him guilty of a more serious crime.12

The second sentence of the article specifically recognizes the established rule as to responsive verdicts. It provides that when an indictment includes an accusation of a lesser crime, a verdict convicting the offender of the less serious crime will be responsive.13 Thus an indictment for aggravated battery would include the lesser offenses of simple battery and aggravated assault, or simple assault. An indictment for murder would include the lesser crimes of manslaughter and negligent homicide. Aggravated arson would include simple arson, and armed robbery would include simple robbery. A similar result would not follow in the case of aggravated kidnapping. An accusation of that offense would not include simple kidnapping, for the latter offense may well require certain elements which are not included in aggravated kidnapping.14

Articles 7 through 12 set out traditional and well-settled principles as to the elements of crimes, with special emphasis placed upon a statement of the "intent" element. Article 8 defines "criminal conduct" as requiring an act or failure to act which produces "criminal consequences."15 In some cases a specific knowledge or specific criminal intent is required; in others a general criminal intent or even criminal negligence will suffice. In a few crimes the mere act or failure to act is punished.16 Article 10 is a condifica-

12. For example, it should not be a defense to a person charged with manslaughter or with attempted murder to prove that he was guilty of the more serious crime of murder.
13. Accord: State v. Barber, 167 La. 635, 644, 120 So. 33, 37 (1929). The reason for such a rule is that it is impossible, in such case, to accuse a person of the more serious crime without accusing him of the less serious included offense, and proof of the first would necessarily involve proof of the latter. See State v. Evans, 40 La. Ann. 216, 3 So. 838 (1888); State v. Flattmann, 172 La. 620, 626, 135 So. 3, 5 (1931).
14. Compare the aggravated kidnapping and simple kidnapping articles. La. Crim. Code, Arts. 442, 45(3). Subdivisions (2) and (3) of the simple kidnapping article require elements which are not included in the offense of aggravated kidnapping.
15. Article 9 defines "criminal consequences" and indicates that the phrase is merely a shorthand method of referring to the various sets of consequences described in detail in subsequent articles of the Code.
tion of generally accepted rules. A "specific" criminal intent exists where the criminal consequence was "actively desired." A "general" criminal intent will be found in all cases where there is a specific intent, and also where it appears that the offender "must have adverted" to the particular consequences. For example, the roomer who sets fire to a trunk in his quarters, in order to defraud an insurance company, might well be convicted of the serious offense of aggravated arson.\(^{17}\) Aggravated arson only requires a general criminal intent, which is supplied by the fact that the offender "must have adverted" to the fact that the burning of the dwelling was "reasonably certain to result" from the fire started.\(^{18}\)

Many crimes only require a general criminal intent. It is important to note the provision in the last sentence of Article 11, that when the terms "intent" or "intentional" are used without qualification in the definition of an offense they refer only to "general criminal intent" as defined in the preceding article.

The definition of "Criminal Negligence" in Article 12, as requiring "a gross deviation below the standard of care expected to be maintained by a reasonably careful man under like circumstances" is in accord with the usual conception of the term. It calls for substantially more than the ordinary lack of care which may be the basis of tort liability, and furnishes a more explicit statement of that lack of care which has been variously characterized in criminal statutes as "gross negligence" and "recklessness."

Culpability

The common law presumptions\(^{19}\) of the incapacity of an infant to commit a crime have not been recognized in Louisiana. The test has been whether the child was of sufficient maturity to know that the act was wrong and to be aware of his legal responsibility for its commission.\(^{20}\) Article 13 rejects both of these uncertain approaches to the problem in favor of establishing complete immunity up to the age of ten years. This is believed to be a more reasonable and realistic view.\(^{21}\) The applicability of this provision is more limited than it would at first appear. The

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19. At common law there was a conclusive presumption of incapacity where the offender was under the age of seven years, and there was a rebuttable presumption between the ages of seven and fourteen. Clark and Marshall, Law of Crimes (4 ed. 1940) 115-120, §§ 76-81.
offender who is under the age of seventeen is not presently subject to criminal prosecution, except as to capital crimes and assault with intent to commit rape. His transgression is treated as an "act of delinquency" which subjects him to the jurisdictions of the juvenile courts. This jurisdiction is expressly recognized in Article 13. It is only when the juvenile commits a murder or other capital crime that the problem of criminal responsibility attaches. In such cases it is believed that greater justice and consistency of decision will result from a fixed age line, than by resorting to the common law presumptions or attempting to apply the adult "right and wrong" test to infants. A child, under the age of ten years is not of sufficient maturity to realize the criminal nature of his act. While he is exempted from the harsh punishment necessarily imposed for criminal liability, his offense may still be treated as an act of delinquency subjecting him to the jurisdiction of the juvenile court.

It is universally agreed that a man is not criminally responsible if he was so insane at the time he committed the act that he was incapable of entertaining a criminal intent; but there is considerable judicial disagreement as to when such incapacity exists. Article 14 restates the familiar "right and wrong" test. This test, which apparently originated in the famous "M'Naghten's Case," presently prevails in Louisiana and a majority of American jurisdictions as the sole test of responsibility. Thus, if because of a mental disease or defect the accused was without the capacity to distinguish between right and wrong as to the particular act at the time it was committed, he is not subject to criminal liability. Some states have broadened the scope and availability of the insanity defense by excusing the defendant who may have known that the act was morally and legally wrong, but was "irresistibly impelled" to its commission by reason of a mental disease or defect. Such liberalizing tests are theoretically sound, but as a practical matter they open the door to a further abuse of the already overworked insanity defense. Any

23. I Car. & K. 130, 10 Clark & F. 200 (1843).
25. Clark and Marshall, op. cit. supra note 19, at 123, ¶ 84.
27. Clark and Marshall, op. cit. supra note 19, at 128, 129, questions the practical efficacy of the so-called "insane irresistible impulse" test, and declares: "The objections made to this view are that it is doubtful whether such a situation can exist in fact, that if it does it is difficult of proof, that it is subject to abuses in the use of expert witnesses who testify both for the prosecution and the defense in terms unintelligible to juries, and that its
test of insanity where the jury is called upon to evaluate the conflicting testimony of expert witnesses who testify in terms far above their meagre horizon of medical and psychopathic knowledge is bound to be somewhat unsatisfactory. However, it was generally agreed by the experienced judges who acted as advisors in the preparation of the Code that the present "right and wrong" test came as close to stating an understandable formula for the jury as any which could be devised.

Article 15 is a codification of the well-settled rule that voluntary drunkenness or use of drugs does not exempt a man from criminal responsibility, except where the intoxicated or drugged condition has precluded the presence of a specific intent or a special knowledge which is an essential element of the crime charged.28

The Code maintains the traditional distinction between mistake of fact and mistake of law. Article 16 provides that, unless otherwise provided in the definition of a crime, a reasonable ignorance or mistake of fact may preclude the presence of some mental element and thus constitute a defense. For example, the misappropriation or use of another's horse, under the reasonable belief that it belonged to the offender, would not amount to theft or the unauthorized use of movables, respectively. Ignorance and mistake of law are not a defense; but Article 17 recognizes well-settled exceptions, where the offender reasonably relied (1) upon an apparently valid act of the legislature, or (2) upon a holding of a competent court of last resort.29 Other more doubtful exceptions, which have occasionally been applied, were considered but were rejected upon advice of the Council.30

sanction by the courts has popularized insanity as a defense and weakened the force of the criminal court as a restraint of wrongdoers... The defect is in its application in practice due to the difficulty of the average jury in weighing subsidized testimony of so-called alienists as to a past psychopathic condition."

In State v. Lyons, 113 La. 959, 37 So. 890 (1904) the Louisiana court held that the doctrine of moral insanity (which consists of irresistible impulse co-existent with mental sanity) had no support in either psychology or law.


29. The authorities are collected in Hall and Seligman, Mistake of Law and Mens Rea (1941) 8 U. of Chi. L. Rev. 641.

30. The article originally presented by the draftsmen included a third exception as follows:

"(3) Where the offender was in doubt about the legality of his conduct, and after communication with the public officer, reasonably relied on the apparently honest advice or action of any public officer authorized to give such advice or take such action, indicating that the proposed conduct of the offender would be lawful." This exception was not supported by any Louisi-
The importance of Articles 18 through 22, which enunciate the rules of justification, cannot be over-emphasized. Subsequent articles defining the various crimes, which usually make no mention of this defense, must be read and construed in the light of the justification provisions in Title I.

Article 18 collects a number of situations where it is generally recognized that an act, which would otherwise be a crime, is justifiable and does not subject the actor to criminal liability. More specifically, it covers compulsion, physical impossibility, and public, domestic and other lawful authority.

The most important, or at least the most litigated, instances of justification, defense of person and property, are treated in more detail. Article 19 states the generally accepted rule that one may use reasonable and apparently necessary force in defense of his person or his property. The facts of each case will determine what is "reasonable" force. Apparent, rather than actual, necessity is the test.

In order to justify a homicide as being in self-defense the person attacked must have actually and reasonably believed: first, that he was in "imminent danger of losing his life or receiving great bodily harm"; and second, that the killing was "necessary to save himself from that danger." These general requirements in Article 20(1) are merely a codification of existing Louisiana jurisprudence. It is anticipated that the Louisiana courts will continue to hold that a person's belief that he is in danger of losing his life or receiving serious personal injury is not "reasonable" unless it is founded upon an actual physical attack or hostile demonstration by the deceased.

The question of the necessity of retreating in order to justify
a killing as self-defense gave the Reporters considerable concern. American writers are in considerable doubt as to the proper rule or prevailing doctrine. Louisiana has generally recognized a duty to retreat, but with many not too clear qualifications. Article 20(1) expresses no specific retreat formula. It simply requires that the defendant must have had a reasonable belief that the killing was necessary. The possibility of retreat, as is also the possibility of prevention by force or violence less than killing, is merely one of the factors that should be considered in determining the ultimate question of the apparent necessity of the homicide. If specific rules as to retreat were given, there might be a tendency to judge the reasonableness of a person's belief in the necessity of killing by that test alone.

A homicide is also justifiable for the purpose of preventing "a violent or forcible" felony. This provision in Article 20(2) is a substantial codification of the present law, but is slightly more limited in requiring that the felony prevented must be one "involving danger to life or of great bodily harm." Most forcible and violent felonies endanger human life; but where the circumstances are such that human life is not endangered (as in the burglary of an empty dwelling), the law should not recognize a right to kill to prevent the crime. Once again an objective standard is adopted and the defendant must reasonably believe that a forcible felony is about to be committed, and that killing is the only safe method of prevention.

Article 21 restates another well-settled rule. The aggressor or person who brings on a difficulty has no right of self-defense, except where he bona fidey withdraws from the conflict "in such a manner that his adversary knows or should know that he desires to withdraw and discontinue the conflict."

The right to use force or to kill in defense of others may be exercised in protecting a stranger, as well as a servant or member of the family. This justification is subject to the same require-

35. Clark and Marshall, op. cit. supra note 19, at 351, § 280; Beale, Retreat from a Murderous Assault (1902) 16 Harv. L. Rev. 567.
37. "Rationally the failure to retreat is a circumstance to be considered with all the others in order to determine whether the defendant went farther than he was justified in doing; not a categorical proof of guilt." Justice Holmes, in Brown v. United States, 256 U.S. 335, 343, 41 S.Ct. 501, 502, 65 L.Ed. 961, 963 (1921).
ment of apparent necessity as the right of self-defense. Louisiana has recognized the right to intervene in defense of another, but has held that the intervenor stands in the shoes of the person protected and has only his actual rights of defense. Thus if the person protected instigated the conflict the intervenor acts without justification, regardless of how reasonable he may have been in assuming that he was protecting an innocent party. Article 22 adopts the more liberal and common sense rule that the intervenor’s acts are justifiable if he does what it is “reasonably apparent” that the party attacked might have done in his own behalf. This view is also consistent with the objective test adopted in the other articles on defense and the article on mistake of fact.

In certain instances, as in preventing the killing of another person, the defense of another would also amount to the prevention of a felony. Under Article 22 one is not permitted to kill in defense of an apparent aggressor. The general provision in Article 20 (2) that one may kill to prevent a felony contains no such limitation. In such a situation, it is intended and logically follows that the specific article on defense of others should control, rather than the general article on prevention of felonies.

Parties

The new Code follows the present legislative policy of recognizing only two classes of parties to crimes, i.e., principals and accessories after the fact. The Louisiana legislature early recognized the procedural difficulties inherent in a distinction between the doer (principal at common law) and the procurer or aider (accessory before the fact), and that these difficulties were not

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41. This is generally considered as the better view. State v. Menilla, 177 Iowa 253, 168 N.W. 645 (1916); American Law Institute, Restatement of the Law of Torts (1934) § 76; May, Law of Crimes (4 ed. 1938) 74, § 62; 26 Am. Jur. (Homicide) § 160.
43. “At the common law both those who personally committed a felony and those who were present and aided, assisted or encouraged the commission of the felony, were principals to the felony. Those who aided, assisted or encouraged the commission of the felony, but were not present at its actual commission, were accessories before the fact. . . .

“Two procedural results flowed from the distinction:

“(1) The indictment had to state whether defendant was indicted as principal or accessory; and a defendant indicted as one could not be convicted as the other. . . .

“(2) An accessory before the fact could not be convicted unless the principal had been convicted before the accessory’s trial or was convicted at a joint trial with the accessory.” Hall and Glueck, Cases on Criminal Law (1940) 468 (note on accessories). Thus if the principal was dead or a fugitive from justice the accessory could not be tried.
compensated for by any sound reason for the distinction. Thus, in common with the legislatures of virtually every state, it sought to simplify its criminal procedure by abolishing this common law distinction. The first statute which merely prescribed identical punishment for principals and accessories before the fact, failed to accomplish this purpose; and it was still held that a person indicted as a principal could not be convicted as an accessory before the fact. Article 238 of the Louisiana Code of Criminal Procedure of 1928 expressly provided that accessories before the fact might be indicted as principals and charged directly with the commission of the crime; but in State v. Rodosta the Louisiana Supreme Court declared Article 238 unconstitutional on the ground that it made a change in the substantive law, and thus transcended the authority of the constitutional mandate providing for the drafting of a "Code of Criminal Procedure." The legislature immediately re-enacted the rule as a substantive criminal statute which was even more explicit and forceful in declaring that all persons concerned with the commission of a crime were principals. This statute was the basis of the broad definition of "principals" in Article 24.

With this definition it is clear that anyone who procures, or assists in, the commission of a crime may be indicted and tried as a principal. While such an offender may be tried before the doer (common law principal) or even although the doer is dead or out of the jurisdiction, the state must still prove the fact of the guilt of the alleged doer, for one cannot procure or assist in a crime which has never been committed. It is thus anticipated that Louisiana courts will continue to hold that the broad definition of the term "principal" does not authorize the conviction of an alleged procurer (common law accessory before the fact) where the alleged doer (common law principal) has actually been tried and acquitted.

44. "If there ever was forceful reason for drawing a distinction between such procurer and doer, such reason has ceased to exist. Certainly, where one procures another to do a criminal act, such act is in effect the act of the procurer as well as that of the doer." Scharman v. State, 115 Neb. 109, 112, 211 N.W. 613, 614 (1926).
47. 173 La. 623, 138 So. 124 (1931).
A person, incompetent by reason of sex, condition or class, to commit a particular crime as a principle in the limited common law sense, may well be found guilty under the new Article 24. For example, a woman, unable to personally commit the crime of carnal knowledge of a juvenile, might assist a male offender by persuading a young girl to submit. A husband might aid in the crime of rape committed by another upon his wife. Such aiders and abettors would clearly be "principals," and liable as such for the crimes committed.50

The accessory after the fact comes into the picture after a felony has been committed. His criminal act is aiding, harboring or concealing the offender. Existing Louisiana statutes were inadequate for codification purposes. The general accessory after the fact statute,51 following the usual form of the Crimes Act of 1805, merely prescribed punishment, but did not define the offense. A statute punishing the harboring of criminals52 defined the offense, but has been limited by judicial interpretation to the harboring of burglars.53 Article 25 corresponds to the common law and usual statutory definition of accessories after the fact, except in one particular. While the common law rule required actual knowledge that the person aided had committed a felony, the new law makes it sufficient that the accessory knew or had "reasonable ground to believe" that the one assisted had committed a felony. Proof of actual knowledge is sometimes very difficult, and the really innocent accomplice after the fact will be protected by the concluding requirement that the assistance must be rendered "with the intent that he may avoid or escape from arrest, trial, conviction or punishment."

Generally speaking, virtually any sort of aid given to a fugitive felon, as furnishing a car, food, shelter or money to help him evade the lawful authorities, will make the person assisting an accessory after the fact. Certain activities authorized by law, as the efforts of an attorney in behalf of the accused would constitute justifiable conduct.54

Paragraph two expressly provides that trial of the principal shall not be a prerequisite to trial of an accessory after the fact. The fact that the principal offender has not been tried, or is for

50. Clark and Marshall, supra note 19, at 226, § 185; Note (1941) 131 A.L.R. 1522.
51. La. Rev. Stats. of 1870, § 973 [Dart's Crim. Stats. (1932) § 748].
52. La. Act 135 of 1938 § 1 [Dart's Crim. Stats. (Supp. 1941) § 749].
53. State v. Wells, 195 La. 754, 197 So. 419 (1940) (statute held inapplicable to one who concealed a robber).
some reason (such as death or present insanity) not amenable to justice, should not prevent trial of one who harbored him or otherwise assisted him in dodging justice. While this provision will greatly facilitate the trial of accessories after the fact, it is still necessary to prove the guilt of the principal beyond a reasonable doubt. The liability of the accessory is directly dependent upon the guilt of the person aided.55

Inchoate Offenses

The general conspiracy and attempt articles provide a very useful device for law enforcement. They enable the state to prevent crime by dealing with the criminal at an early stage before the intended offense is actually completed. Also, where proof of the consummated crime is difficult, the state may choose to prosecute for the lesser inchoate offense with a greater probability of securing a conviction.

Article 26 is based upon a 1940 general conspiracy statute.56 While there was some ambiguity in the existing statute,57 the new Code provision makes it abundantly clear that a conspiracy to commit any crime is included. Specific intent is an essential element of a conspiracy, for the offense “is heavily mental in composition.”58 However, a specific knowledge of the criminality of the act planned should not be required. It should be sufficient that the conspirators specifically intended to bring about a result in fact criminal. If the article is interpreted according to the “fair import” of its language, and not in light of the common law decisions,59 the courts will apply the general rule that mistake of law is no defense and will not permit conspirators to set up lack of knowledge of criminality as a defense.

At common law only an unlawful combination or agreement was necessary for a conspiracy, and subsequent change of heart did not affect the participant’s liability.60 The conspiracy article adopts an additional requirement, found in the 1940 Louisiana statute and in a majority of other recent conspiracy statutes, that one of the conspirators must do an act in furtherance of the

56. La. Act 16 of 1940, § 1 [Dart’s Crim. Stats. (Supp. 1941) § 839.2].
57. See Bugea, Lazarus, and Pegues, Louisiana Legislation of 1940 (1940)
3 LOUISIANA LAW REVIEW 98, 157.
60. Clark and Marshall, op. cit. supra note 19, at 168, 169, §§ 126, 127.
object of the conspiracy. This additional element serves to guarantee the genuineness of the criminal agreement, and to preclude a prosecution of those who bona fide withdraw before the offense is out of the talking stage.

Conspiracy is a separate and completely distinct offense, and is not merely a lesser degree of the completed basic crime. It involves the additional element of combination or agreement of purpose. Thus paragraph two expressly recognizes the present common law rule\(^{61}\) that where the conspirators have committed the crime planned they may be tried for either the conspiracy, the completed offense, or both. Prosecutions, for both the conspiracy and the completed crime, will be rare; but there may be numerous cases where a district attorney will choose to prosecute for the lesser offense when a prosecution for the completed felony would be unlikely to succeed.

The general attempt article is an important innovation in Louisiana law. Existing statutes provided only a random coverage of the offense. Attempts to commit murder, manslaughter, rape and robbery were punishable under separate aggravated assault statutes. Occasionally a criminal statute expressly included the person who attempted to commit the offense. In the absence of such a provision, the offender who merely attempted to commit a crime went unpunished by justice. The general attempt provision in Article 27 embraces an attempt to commit any crime, whether a felony or a misdemeanor.\(^{62}\)

In accordance with the purpose of the Code to fully define the various offenses, the essential elements of an attempt are fully set out. There must be a "specific intent" to commit the basic crime, and an "overt act" directed toward that end. The requisite specific intent need not be proved by direct evidence and may be inferred from the circumstances. For example, an intent to kill may be inferred from the use of a deadly weapon.\(^{63}\) Since the subjective mental element is all-important in this offense, it is expressly stated that an apparent, rather than an actual, ability to commit the crime is sufficient.\(^{64}\) An attempted homicide may

\(^{61}\) Note (1931) 17 Corn. L. Rev. 136, collecting and discussing common law decisions.
\(^{62}\) This is in accord with the general common law concept of attempt. Clark and Marshall, op. cit. supra note 19, at 153, § 113.
\(^{63}\) For a good practical discussion of the intent element, see Skilton, The Mental Element in a Criminal Attempt (1937) 3 U. of Pitt. L. Rev. 181. Also see Hitchler, Criminal Attempts (1939) 43 Dick. L. Rev. 211.
\(^{64}\) The Canadian attempt statute served as a pattern. Canadian Crim. Code (Snow, 1939) § 72.
fail because the gun is defective or the poison is not sufficiently deadly; an attempted rape may fail because the perpetrator is impotent; or an attempted theft may fail because the cash drawer looted or the pocket picked is empty. Where such conditions are unknown to the offender they will not prevent his being guilty of an attempt.

The attempt article adopts the generally accepted view that “mere preparation” is not sufficient, and that there must be some act “tending directly toward the accomplishing” of the criminal purpose. The distinction between preparation and a sufficient overt act is one of nearness and degree which defies a more concise and detailed definition. However, it is expressly provided that one who arms himself with a dangerous weapon and lies in wait, or seeks for the intended victim, but is apprehended before the victim appears, should be guilty of an attempt. But for this special provision, such activity would probably be held insufficient for criminal liability.

An attempt is clearly a lesser degree of the completed basic offense. It requires no additional element such as the combination or agreement necessary for a conspiracy. Where the contemplated offense is begun, but not completed, the offender may be prosecuted for an attempt. The common law rule, that “failure” is an essential element of an attempt, has been rejected; and paragraph three expressly provides that an attempt does not merge, in the completed offense. Thus, where an offender is indicted for an attempt, evidence showing that the offense was actually committed will not necessitate an acquittal. Of course, as in all

65. One writer provides the formula that the offender's act must be "something approximately connected with—fairly close to—the final consequence intended but not fulfilled." Skilton, The Requisite Act in Criminal Attempt (1937) 3 U. of Pitt. L. Rev. 308. Another helpfully states "all that can be definitely gathered from the authorities is that . . . the first step . . . is not necessarily sufficient and the final step is not necessarily required." Hitchler, supra note 63, at 217.
66. In People v. Rizzo, 246 N.Y. 334, 158 N.E. 888 (1927), the defendant and his fellow gangsters toured the city seeking a paymaster they sought to rob, but were apprehended before they located their victim. The court complimented the New York police upon their alertness in preventing a dangerous crime, but released the offender on the ground that since he had not found the paymaster at the time of his arrest he was not near enough to the accomplishment of the crime to be guilty of an attempt.

The special provision in paragraph 2 of Article 27 is in accord with former Louisiana statutes punishing lying in wait to commit certain serious crimes (La. Act 26 of 1892, § 1 [Dart's Crim. Stats. (1932) § 1092]); and has been declared to be within the proper scope of attempts by Clark and Marshall, op. cit. supra note 19, at 157, § 116.
67. See Hitchler, supra note 63, at 221, 222.
cases of different degrees of the same generic offense, a conviction or acquittal of a lesser degree (attempt) will preclude a subsequent trial for the greater (completed crime).

The penalty clauses in both the conspiracy and attempt articles provide that the penalty shall vary in proportion to the penalty prescribed for the basic offense contemplated. In capital crimes the maximum penalty for the inchoate offense is twenty years at hard labor. In other cases the penalty is fixed at one-half of that set for the basic offense. A real practical problem was presented in regard to the crimes of theft and receiving stolen things, since those offenses are graded according to the value of the property misappropriated or received. For example, is the offender who attempts to loot a cash drawer of whatever it may contain guilty of attempted theft of property amounting to over $100, over $20, or under $20? An accurate determination of the amount the offender intended to steal may be almost impossible, and yet it must control the grade of the offense, and whether the habitual offender statute will apply. If all inchoate thefts were to be punished according to the penalty for the most serious grade of the offense, it would be unduly harsh on the offender who attempts or conspires to commit a petty theft. If the penalty for the lowest grade of theft were used as the base, it would be inadequate for the more serious conspiracies and attempts. Thus a special provision has been inserted in the penalty clauses of Articles 26 and 27. It provides a maximum penalty sufficiently large to take care of the more serious cases; and at the same time enables the court to impose a relatively light penalty in cases where only petty theft is plotted or attempted.

**Title II. Offenses Against the Person**

**Homicide**

Criminal homicide is divided into three offenses: murder, manslaughter, and negligent homicide. Article 39 restates the familiar common law "year and a day" rule, which has always been recognized in this state. The important crimes of murder

69. La. Act 45 of 1942 (habitual offender statute) is limited to felony cases, and only theft of property amounting to over $100.00 is a felony.

70. Since the penalty clauses do not carry a possibility of hard labor, the offense is not a felony and the offender will not be subject to the more drastic provisions of the habitual offender statute.

71. State v. Kennedy, 8 Rob. 590 (La. 1845); State v. Moore, 196 La. 617, 199 So. 661 (1940). The article, as originally presented, expressly abolished the "year and a day rule." It was felt that with modern developments in medical science the
and manslaughter had never been defined by the Louisiana legislature. The Crimes Act of 1805 simply provided penalties and directed the courts to look to the common law of England for definitions. Therefore it was necessary to start at scratch, aided only by past jurisprudence and the statutory definitions of other states, in drafting the murder and manslaughter articles.

Article 30 does not provide the numerous refinements and degrees of murder which were found in some statutes examined. The stereograpbed distinctions sometimes drawn between first, second, third, and even fourth and fifth degree murder, have served to perplex courts and juries without any corresponding advantage in the administration of justice. Certain criminal homicides which would have been within the common law definition of murder, but where the killing was not of a sufficiently atrocious character to merit life imprisonment or capital punishment, have been shifted to the lesser offense of manslaughter with its appropriately flexible penalty of not more than twenty-one years at hard labor.

The traditional common law requirement of “malice aforethought, express or implied” was not included in the murder article, since that expression means nothing apart from the decisions which interpret it. As a matter of fact neither “malice” nor “aforethought,” according to the generally accepted meanings of those terms, was necessary for murder at common law. Rather than use this vague and purely fictional phrase, relying upon past decisions for its interpretation, the draftsmen specifically enumerated those situations where the homicide was to constitute mur-

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72. States subdividing the crime of murder usually make “deliberation and premeditation” the distinguishing characteristic of first degree murder. Mr. Justice Cardozo voiced a typical criticism when he declared, “The present distinction is so obscure that no jury hearing it for the first time can fairly be expected to assimilate and understand it. I am not at all sure that I understand it myself after trying to apply it for many years and after diligent study of what has been written in the books.” Cardozo, Law, Literature and Other Essays (1931) 100, 101.

73. Clark and Marshall declare, in speaking of malice aforethought, “It must be construed according to the decided cases, which have given it a meaning different from that which might be supposed.” Clark and Marshall, op. cit. supra note 19, at 288, § 237a. Perkins adds “It does not, for example, indicate either ‘malice’ or ‘aforethought’ in what might be called the face value of these words.” Perkins, a Re-Examination of Malice Aforethought (1934) 43 Yale L. J. 937.
der. These enumerations coincide very closely with prior juris-
prudence where the courts have attempted to apply the nebulous
requirement of "malice aforethought."

Subdivision (1) covers those homicides where the offender
had "a specific intent to kill or to inflict great bodily harm." In
such cases the courts always found "express malice" under the old
common law definition. Even in the absence of such a specific
intent, the common law courts held that the homicide was murder
where the conduct causing the death was imminently dangerous
to others and evinced a wilful and wanton disregard of human
life. An additional subdivision in the murder article which
would have included such cases was deleted by the legislature.
As a result the offender who kills while wantonly shooting at a
train or through the window of a house, but without a specific
intent to kill or seriously injure, will be prosecuted for the lesser
crime of negligent homicide.

Subdivision (2) is a modified codification of the felony-mur-
der doctrine. Existing Louisiana jurisprudence had recognized
and applied the common law rule that an unintentional homicide
committed in the perpetration of a felony was murder. The
application of this rule to cases where a homicide is accidentally
committed in the perpetration of some of the less dangerous fel-
onies has been severely criticized. With these practical consid-
erations in mind, the murder article restricted the felony-murder
document to the more serious and dangerous felonies, e.g., aggra-
vated arson, burglary in the nighttime, burglary in the daytime,
aggravated kidnapping, aggravated rape, armed robbery and sim-
ple robbery. A homicide accidentally committed in the perpetra-
tion of other felonies will constitute manslaughter under Article
31 (2) (a).

The possibility of grading the offense of manslaughter was
considered but rejected in favor of continuing the present policy
of the law. The wide variations of the offense are not susceptible
of a stereotyped legislative classification, but are best taken care
of by a flexible penalty clause which gives the judge an oppor-

74. People v. Jernatowski, 238 N.Y. 188, 144 N.E. 497 (1924) (shooting into
house); State v. Capps, 134 N.C. 622, 46 S.E. 730 (1904) (shooting into room
of house); Banks v. State, 85 Tex. Cr. App. 165, 211 S.W. 217 (1919) (shooting
into train); Davis v. State, 106 Tex. Cr. App. 300, 292 S.W. 220 (1927) (shooting
into automobile); State v. Saunders, 108 W. Va. 148, 150 S.E. 519 (1929)
(shooting into crowd).

75. State v. McCollum, 135 La. 432, 65 So. 600 (1914); State v. Werner, 144
La. 350, 80 So. 596 (1919).

76. Corcoran, Felony Murder in New York (1937) 6 Fordham L. Rev. 43;
Clark and Marshall, op. cit. supra note 19, at 300, § 245a.
tunity to consider all the circumstances of the crime and sentence accordingly.

Subdivision (1) of Article 30 is identical with the offense which is usually labelled "voluntary manslaughter," and covers intentional killings which are reduced from murder to manslaughter by reason of the fact that they are committed "in sudden passion or heat of blood" caused by a reasonable provocation. Great provocation resulting in impulsive and uncontrolled action does not excuse the offense; but in recognition of the frailties of human nature, the crime is reduced from murder to manslaughter. In view of the many and varying circumstances which may result in an impulsive killing, a detailed enumeration of adequate "provocations" was not practicable. Mere insulting words, a moderate blow, or adultery with a daughter or sister, standing alone, have not usually been considered as a sufficient provocation; and yet a combination of such factors may well be sufficient to reduce the homicide to manslaughter. After considerable discussion, it was decided that "reasonable provocation" should be left as a jury question. Thus the jury will consider all the circumstances of each individual case and determine whether the killing was "caused by provocation sufficient to deprive the average person of his self control and cool reflection." If a man unreasonably permits his impulse and passion to obscure his judgment he will be fully responsible for the consequences of his act. Even where there has been an adequate provocation the homicide will not be reduced to manslaughter if the offender's blood had actually cooled (subjective test), or if the blood of the average man would have cooled (objective test). Here again the question of a reasonable time for cooling will be a jury question which will be largely affected by the circumstances and seriousness of the provocation.

Subdivision (2) is similar to, but not quite as broad as, the offense which is often labelled "involuntary manslaughter." It covers unintentional homicides where the criminal liability is predicated upon the nature of the activity the offender was engaged in at the time. An accidental killing in the perpetration of any felony, other than those dangerous and forcible felonies enumerated in the murder article, is manslaughter. Thus man-

77. In State v. Grugin, 147 Mo. 39, 47 S.W. 1058 (1898) it was held to be a jury question whether insulting words plus adultery, committed by a son-in-law with defendant's daughter, constituted adequate provocation to reduce the killing to manslaughter.
slaughter comprehends certain killings which might be classed as murder under the conventional unrestricted application of the felony-murder doctrine. In regard to accidental homicides resulting from the commission or attempted commission of misdemeanors, Article 31 does not adopt the artificial, but generally recognized, distinction between crimes *malum in se* and *malum prohibitum*. The attempted definitions and practical applications of this distinction have been far from uniform and definitely unsatisfactory.\(^7\) Subdivision (2) (a) only includes killings which occur in connection with misdemeanors "directly affecting the person," such as assault, battery and false imprisonment. A similar New York provision was properly held inapplicable to a homicide by drunken and reckless driving. The court declared that the statute was limited to misdemeanors "affecting some particular person... as distinguished from a misdemeanor affecting society in general."\(^8\)

Homicide, where liability is predicated upon safety law violations, such as failure to obey traffic and firearm regulations, are shifted to the lesser offense of negligent homicide. In prosecutions for this offense, violation of safety regulations will be strong, but not conclusive, evidence of criminal negligence. Also it will be necessary to show that such negligence was a proximate cause of the death.

The broad statement is often made that any killing by one who is resisting a lawful arrest is murder.\(^9\) Under the new Code, a resisting offender, who intended to kill or inflict great bodily harm, would come within Subdivision (1) of the murder article if the officer was killed. However, where an unarmed misdemeanant was resisting arrest in a mild manner which did not indicate any malice or intent to seriously injure (such as pushing the officer or a relatively slight blow), he would only be guilty of manslaughter, under Article 30 (2) (b), if death accidentally resulted.\(^10\)

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\(^7\) For a good discussion of the various decisions in point, see Note (1930) 30 Col. L. Rev. 74. Compare Dixon v. State, 104 Miss. 410, 61 So. 423 (1913) with Keller v. State, 155 Tenn. 633, 299 S.W. 803 (1927).

\(^8\) People v. Grieco, 266 N.Y. 48, 193 N.E. 634 (1934).

\(^9\) Miller, Criminal Law (1934) 270, § 88(E).

\(^10\) The well reasoned case of State v. Weisengoff, 85 W.Ca. 271, 101 S.E. 450 (1919), presents a nice illustration of the limitation intended. An officer standing on the running board of defendant's moving car and endeavoring to make an arrest was killed when the car ran into a bridge. The court instructed the jury that if the defendant intentionally ran against the bridge the crime was murder; but that if his purpose was to cross over the bridge into the next state in order to get out of the officer's jurisdiction, and the collision was a mischance or accident, the crime was only manslaughter. Accord: Dickey, Culpable Homicides in Resisting Arrest (1933) 18 Corn. L. Rev. 373, 376.
The lesser offense of manslaughter is much more appropriate for such cases.

A homicide resulting from criminal negligence was manslaughter at common law. The reluctance of juries to convict of manslaughter in such cases has indicated the need for a special crime which would carry less stigma and provide a lesser penalty. Thus thirty-four states have enacted negligent homicide statutes. The old Louisiana "involuntary homicide" statute, enacted in 1930, was limited to deaths caused by the negligent operation of "vehicles." Other negligent killings, if punishable, were manslaughter. Article 32 is broader and covers all negligent homicides. For example, deaths caused by the grossly negligent handling of firearms or explosives, by the grossly negligent construction of a bridge, or by the gross negligence of a doctor, would now constitute negligent homicide rather than manslaughter. The term "criminal negligence," as already pointed out, has been defined in Article 12 so as to require more than the ordinary negligence sufficient for civil liability, and to be virtually synonymous with the usual conception of the term "gross negligence."

According to the better rule and clear weight of authority, the mere violation of a speed regulation does not, without more, amount to criminal negligence. Article 32 continues the policy already declared in the former "involuntary homicide" statute, and expressly provides that the "violation of a statute or ordinance shall be considered only as presumptive evidence of such negligence." This clause forestalls any possibility of the torts doctrine that violation of a safety statute is negligence per se, being carried over into the criminal law.

Assault and Battery

The conglomeration of existing assault and battery statutes was of little help to the Reporters, except to indicate the evils of numerous overlapping statutes. It was obvious that, with the

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84. La. Act 64 of 1930 [Dart's Crim. Stats. (1932) §§ 1047-1052].
87. The article, as originally presented by the Institute, declared that "driving while under the influence of intoxicating liquor or narcotic drugs shall constitute criminal negligence." This exception was deleted in legislative committee.
88. The Louisiana court, prior to the enactment of the involuntary homicide statute, had declared that the violation of a safety statute was criminal negligence. State v. Wilbanks, 188 La. 861, 123 So. 600 (1929).
inclusion of a general attempt article, the various special statutes punishing assault and battery with the specific intent to murder, kill, rape or rob, were no longer necessary. These offenses contain all the elements of, and are really nothing more than, attempts to commit murder, manslaughter, rape and robbery, respectively. Applying Article 27, they will be appropriately punished, for the penalty for an attempt is fixed in proportion to the severity of the crime attempted.\textsuperscript{89}

After elimination of those assaults and batteries which will constitute attempts, the offenses were graded according to the means employed. Thus the use of a dangerous weapon distinguished an \textit{aggravated} from a \textit{simple} assault or battery. The use of a dangerous weapon had been used as an aggravor in a number of existing Louisiana statutes, and by the better statutes examined from other jurisdictions. The definition of a “dangerous weapon,” stated in Article 2, is a codification of Louisiana jurisprudence and an abundance of well-reasoned decisions are available for its interpretation. The term has been broadly defined, with gases and liquids specifically included, thus avoiding the necessity of special articles on scalding, acid throwing and kindred crimes. The test is not whether the instrument is inherently dangerous, but whether it is dangerous “in the manner used.”\textsuperscript{90} Thus an iron rod\textsuperscript{91} or a large piece of timber,\textsuperscript{92} when used in a way likely to produce serious injury, may constitute a “dangerous weapon.”

The definition of a battery, in Article 33, reaffirms the general view that the administration of poison or any other injurious substance is a battery.\textsuperscript{93} Of course, the offender who administers or attempts to administer a deadly poison will probably be prosecuted for the more serious offense of attempted murder.

Article 36 defines an assault to include either an “attempt” to

\textsuperscript{89} Attempts were generally punished as misdemeanors at common law. This punishment was inadequate for such major offenses as attempted murder, manslaughter, robbery and rape. Thus special statutes were enacted making it a serious offense to assault or attack another with the intent to commit these specific crimes. Note (1916) 14 Mich. L. Rev. 399, 401.

\textsuperscript{90} The Louisiana Supreme Court distinctly enunciated this test in State v. Washington, 104 La. 443, 445, 29 So. 55, 56 (1900), when it declared, “Whether the weapon used by defendant was dangerous within the meaning of the statute was a question for the jury to determine upon considering not only the character of such weapon, but by whom, upon whom, and in what manner it was used.”

\textsuperscript{91} State v. Lowry, 33 La. Ann. 1224 (1881).

\textsuperscript{92} State v. Alfred, 44 La. Ann. 582, 10 So. 887 (1892).

\textsuperscript{93} Accord: Commonwealth v. Stratton, 114 Mass. 303, 19 Am. Rep. 350 (1873) (putting “love powder” in figs); State v. Monroe, 121 N.C. 677, 28 S.E. 547 (1897) (putting croton oil in candy).
commit a battery or the "placing of another in reasonable apprehension of receiving a battery." It is generally agreed that any attempt to commit a battery is an assault; and following the general rule as to attempts the actual ability to accomplish the intended purpose should be immaterial. For example, D commits an aggravated assault if he attempts to shoot V with a gun, which unknown to D, is unloaded. The second alternative in the definition covers cases where no battery is actually intended, but the offender intentionally places another in the fear of a battery. Thus in the above hypothetical case D would be guilty if he knew the gun was unloaded but intentionally placed V in a reasonable fear of being shot. The commentators and cases are sharply divided upon the advisability of imposing criminal liability in such cases. The view adopted in the Code is predicated upon the fact that such actions, despite the offender's secret intention, will induce breaches of the peace. 

While injuring by grossly negligent conduct has generally been held to constitute a battery, it is fundamentally a less serious offense than a battery committed by an intentional attacker. The reckless motorist who runs down a pedestrian is hardly in the same criminal class as the culprit who intentionally shoots or stabs another. In order to draw a distinction between these two inherently different offenses, a "battery" has been defined so as to require an intentional use of force or violence and "negligent injuring" has been made a separate and lesser crime. Article 39 (Negligent Injuring) follows the pattern of the negligent homicide article, in that violation of a statute or ordinance is only presumptive evidence of negligence. Again all cases of injuring by criminally negligent conduct are covered, thus including the reckless handling of explosives, firearms or poisons.

Rape

The Crimes Act of 1805 had denounced rape as a crime punishable by death; and then, as in the case of murder and manslaughter, had merely directed the courts to look to the common

94. See discussion of "Attempts," page 20, supra.
law for its definition. The new Code has divided the offense of rape into "aggravated rape" and "simple rape," to the end that the death penalty shall only apply to the more serious and aggravated cases. Three articles are included. Article 41 provides a general definition of the offense. Article 42 specifies those situations where the offender will have committed the capital crime of "aggravated rape." Article 43 embraces the less heinous cases which are to constitute "simple rape," with an appropriately flexible penalty of from one to twenty years.

Every case coming within the aggravated rape article would clearly have constituted rape under the common law definition of that capital offense. Subdivision (1) covers the case of forcible rape, where the female resists and her resistance is overcome by the offender. In such cases it is essential that the victim must have put up a genuine and bona fide resistance. Various expressions have been used in statutes and by courts in describing such resistance. Some of them are: "all resistance in her power," "positive resistance," "reasonable resistance," and "the utmost resistance." Regardless of the phrase adopted it is obvious that the jury will require conclusive proof that the resistance is genuine. After considerable debate, the Council of the Institute decided that a requirement of resistance "to the utmost" was the statement most nearly in accord with the somewhat uncertain existing Louisiana jurisprudence. However, resistance to the utmost is not essential under Subdivision (2), which covers situations where such resistance has been prevented by threats and a reasonable fear of "great and immediate bodily harm." Subdivision (3) is a codification of the general rule, consistently followed in Louisiana, that a girl under the age of twelve is incapable of consenting to carnal knowledge, and that intercourse with a child of such tender years is rape regardless of voluntary acquiescence. In order to provide the fullest possible protection to young girls, it is expressly stated that lack of knowledge of non-age shall not be a defense. The fact of the girl's age, and not the offender's knowledge or reasonable belief, will fix criminal responsibility.

A number of the less serious situations, where the crime would have been rape at common law, have been shifted to the lesser offense of simple rape. In such cases a jury will seldom convict the offender of a crime carrying the extreme penalty of

99. 1 Wharton, op. cit, supra note 38, at 995, § 734.
100. State v. Mehojovich, 118 La. 1013, 43 So. 660 (1907); State v. Folden, 135 La. 791, 66 So. 223 (1914); Ala. Code Ann. (Michie, 1928) § 5410.
death or life imprisonment. Also the less drastic, yet still severe,
penalty of from one to twenty years at hard labor is more appro-
priate to the offense committed. Subdivision (1) of the simple
rape article contemplates the carnal knowledge of a woman who
is in a drugged or intoxicated state which prevents her under-
standing the nature of the act, or renders resistance impossible.
This includes any case where the offender administered the intox-
icant or narcotic, or where he knew or should have known of the
woman's abnormal condition. Thus, a young man who gets a girl
drunk and drowns her normal resistance in spirituous liquors
would be guilty of simple rape. If the intoxicants merely made
the girl more carefree, no crime would have been committed;
but if they robbed her of the capacity to understand the nature
of the act, the offender would be guilty of simple rape. Under the
old Louisiana law our hypothetical young man could only be tried
for common law rape, a crime carrying the stiff penalty of death
or life imprisonment. It is not surprising that, despite the fre-
cquent occurrence of the above situation, prosecutions were very
infrequent and no Louisiana convictions have come to the writ-
er's attention. With the classification of such an offense as simple
rape, carrying a milder and more flexible penalty, there will be
a greater likelihood of the prosecution and conviction of truly
guilty parties.

Subdivision (2) specifically includes the case where the fe-
male's consent has been induced by a fraudulent impersonation
of her husband or by a pretended marriage with the offender.
Such an act was not rape, by the weight of common law author-
ity, on the theory that the woman understood the nature of the
act. However, the man who obtains a woman's consent by such
intrinsic fraud should not, if his guilt is proved beyond any rea-
sonable doubt, go free of criminal liability. Simple rape is an
appropriate offense to cover such cases.

Subdivision (3) is in accord with a 1936 Louisiana statute
which made carnal knowledge of an insane or feeble-minded
woman a lesser crime. Here again the test is whether the woman
was of sufficient mentality to understand the nature of the act.

101. Clark and Marshall, op. cit. supra note 19, at 366, § 296. Courts have
held that the act was not rape where the woman understood the nature of the
act, but was induced to consent by a fraudulent impersonation of her
husband [State v. Brooks, 76 N.C. 1 (1877); Reg. v. Saunders, 8 Car. & P.
266, 173 Eng. Rep. 488 (1838)], or by a sham marriage [Draughn v. State, 12
Okla. Cr. 479, 158 Pac. 890 (1916)].


103. La. Act 43 of 1936, § 1 [Dart's Crim. Stats. (Supp. 1940) § 1158.1].
The offender is liable only if he “knew or should have known” of the female’s incapacity.104 If the woman is of age and appears to be of sound mind and intellect, there does not appear to be any strong reason to hold that the man acts at his peril as to her mental capacity.

**Kidnapping**

The old Louisiana kidnapping statute carried the death penalty, and yet it apparently covered any case where one person forcibly carried or secreted another without authority of law.105 It is conceivable that this statute might have been held applicable to an ordinary case of false imprisonment or to the abducting of a star athlete just before a big game. The new kidnapping articles emphasize the kidnapper’s intent. Aggravated kidnapping (Article 44) carries the usual death penalty, but is limited to kidnapping for ransom (with intent to extort). Other criminal seizures and imprisonments will be punishable either as simple kidnapping (Article 45) or as false imprisonment (Article 46). The aggravated kidnapping article embraces all cases where a kidnapper obtains control over another person for the purpose of extortion, whether by enticing and persuasion or by forcible seizure. The penalty clause was copied from the federal “Lindberg Law,”106 and specifically provides that if the victim is “liberated unharmed before sentence is imposed” the offender shall be sentenced to life imprisonment rather than capital punishment. This provision was inserted in the hope that it may tend to influence kidnappers to safeguard the lives and health of their victims.

Article 45 defines “simple kidnapping” and embraces those cases where there is no intent to extort. Subdivision (1) covers any case where a person is forcibly seized and carried to another place against his will. The distance traversed is immaterial107 but a mere enticement is not sufficient under this clause of Article 45. The next two subdivisions deal with those needing greater protection, and are extended to include “enticing or decoying away.”

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107. The clause added in the 1938 statute (La. Act 412 of 1938, § 1 [Dart’s Crim. Stats. (Supp. 1941) § 1301.1]) “from one part of a Parish of this State to another part of the same Parish” was clearly surplusage in light of the decision in State v. Backarow, 38 La. Ann. 316 (1896). The kidnapping articles in the new Code simply state “from one place to another,” and contemplate any taking out of the state, or from one place to another within the state, parish, or city.
Subdivision (2) covers the taking or enticing away of a child under the age of fourteen years. Subdivision (3) covers the abduction of inmates from orphan, insane, feeble-minded or similar institutions, and supplants a 1932 statute carrying a somewhat similar penalty.  

Article 46 provides the usual definition of false imprisonment, and complements Subdivision (3) of the aggravated kidnapping article. The presence or absence of an intent to extort distinguishes the two crimes.

**Defamation**

Oral defamation (slander) was not an indictable offense at common law, but the malicious publication of a defamatory writing or picture (libel) was a misdemeanor. However, an oral defamation, as in the case of a speech before a large gathering, may be more injurious than the libel written in a letter to a third person. Every state has enacted both libel and slander statutes, but the latter show much variation in scope. While the existing Louisiana statutes had been confusing and inadequate, the two offenses were equally inclusive. Adhering to the idea that oral and written defamation are equally anti-social, the new Code has combined libel and slander in a single crime entitled "defamation." This will have the additional advantage of eliminating the controversial question as to whether defamation over the radio is libel or slander.

"Defamation" is defined by Article 47 so as to include "any manner" of publication or expression, whether written, printed, pictorial or oral. It is also expressly required that the defamatory statement be communicated to some person other than the party defamed. The enumeration of situations where the malicious publication or expression will be criminal covers three general classifications: Subdivision (1) embraces the generally recognized case where the defamatory statement tends to expose a living person to "hatred, contempt or ridicule." Subdivision (2) includes defamation of the memory of a deceased person. This would not

111. In some jurisdictions a criminal libel is committed even though the defamatory writing is communicated only to the libeled person. May, Criminal Law (4 ed. 1940) 157, § 118. The requirement of Article 47 that the defamatory matter be communicated to a third person is in accord with the present Louisiana law as to publication in civil suits, Tuyes v. Chambers, 144 La. 723, 81 So. 265 (1919); and with the probable rule as to criminal cases. See State v. Roy, 158 La. 352, 104 So. 112 (1925).
have been criminal at common law, but is expressly included in
the better modern statutes. Subdivision (3) supersedes and
takes the place of numerous special statutes enacted to protect
the credit and good will of banks, insurance companies and other
similar businesses: It covers malicious publications or expressions
which tend to injure the business or occupation of any person or
firm.

Article 48 settles the somewhat clouded issue as to the effect
of truth in a criminal prosecution for a non-privileged defamatory
communication. Where the publication or expression is false it is
presumed to be malicious and the accused must overcome this
presumption by showing a justifiable motive. However, where
the statement is true the state has the burden of proving actual
malice. This is a change from the general criminal law rule that,
except in privileged communications, malice is always presumed
from the fact of publication. The early common law maxim,
"the greater the truth the greater the libel," had been taken over
by our American decisions as a part of the common law of
CRIMES; but it was so incompatible with the public policy in favor
of free dissemination of the truth that it has been altered by
statute in many states and has never been applied in civil ac-
tions. Under the new Code, the truth of a defamatory statement
will be material in determining criminal, as well as civil, liability.

Certain situations have been rather uniformly recognized as
creating a "qualified privilege." In such cases no presumption of
malice arises from the mere publication or utterance of the de-
famatory matter; and actual malice must be proved regardless
of the truth or falsity of the communication. Article 49 is a sub-
stantial codification of the law of "qualified privilege," as gleaned
from the jurisprudence of Louisiana and other American states.
It enumerates those situations where the relationship of the
parties, or the nature of the publication, is such as to raise a pre-
sumption that the statement was made to serve a legitimate pur-
pose and not because of a malicious motive. Subdivision (1)
covers the case of a "fair and true report" of judicial, legislative
or other public proceeding. Subdivision (2) contemplates com-
ments upon persons who submit themselves to the public, or upon

113. State v. Lambert, 188 La. 968, 178 So. 508 (1938). Clark and Marshall,
op. cit. supra note 19, at 578, § 430b.
(1924) (newspaper account of report made to city council).
things submitted by their authors or owners to the public, provided such comments are made "in the reasonable belief" that they are true.\textsuperscript{118} Subdivision (3) embraces cases where the relationship between the person making the communication and the person to whom the communication is made is such as to afford a reasonable presumption of a proper motive.\textsuperscript{117} The fourth subdivision recognizes the qualified privilege of an attorney or party in a judicial proceeding.\textsuperscript{118}

In certain cases an entire freedom of expression is socially desirable. Article 50 declares an absolute privilege in such situations, and prohibits any prosecution for defamation, regardless of the truth or falsity of the communication of the author's motive. Subdivision (1) simply restates the well-settled privilege accorded to legislators and judges.\textsuperscript{119} Subdivision (2) adopts a rule, generally recognized in civil defamation cases,\textsuperscript{120} that a witness to a judicial proceeding has an absolute privilege as to testimony which is reasonably believed to be pertinent and material.\textsuperscript{121}

\textbf{Bird's Eye View of Titles III Through VII}\textsuperscript{122}

\textit{Offenses Against Property}

Common law \textit{arson} was limited to the burning of a dwelling house of another. Special statutes, in Louisiana and elsewhere, extended the crime to include the burning of other structures and of movables. Additional statutes covering destruction by explosives added to the mass of statutory material. The arson articles in the new Code embrace damaging by both explosives

\textsuperscript{117} State \textit{v.} Lambert, 188 La. 966, 178 So. 508 (1938) (letter by father to custodian of minor child, criticizing the custodian's sister).
\textsuperscript{118} Lescase \textit{v.} Joseph Schwartz Co., 116 La. 293, 40 So. 708 (1906); Dunn \textit{v.} Southern Ins. Co., 116 La. 431, 40 So. 786 (1906).
\textsuperscript{119} Legislators are granted a constitutional immunity, La. Const. of 1921, Art. III, § 13. The absolute judicial privilege is a codification of a well settled common law rule. Newell, Slander and Libel (3 ed. 1914) 517, § 520.
\textsuperscript{120} Oakes \textit{v.} Walther, 179 La. 365, 154 So. 26 (1934).
\textsuperscript{121} This rule is advocated by Harper, Law of Torts (1933) 530, § 248.
\textsuperscript{122} The writer only purports to hit the high spots and stress some of the more fundamental features of the articles in Titles III-VII. It is contemplated that a companion paper, containing a more comprehensive and detailed discussion of the articles in Title III, will appear in the fourth issue of this volume. The article in Titles IV-VII are of less general importance and interest. Thus, a briefer discussion of the nature of those articles and of the changes effected should suffice.
and burning. The common law requirement of a "dwelling house" has been rejected, and the essence of aggravated arson\textsuperscript{122} is a foreseeable danger to human life. The burning during business hours of a picture show or a store would clearly constitute aggravated arson. Where human life is not endangered the offense is simple arson.\textsuperscript{124} This crime is truly an offense against property and the penalty is graded according to whether the damage done amounts to five hundred dollars or more.

The offense of arson with intent to defraud\textsuperscript{125} is broader than the former Louisiana statute,\textsuperscript{126} and specifically embraces the burning of "any property," whether movable or immovable.

The criminal damage to property articles follow the same general outline as that adopted for arson, with danger to human life and damage to property serving as a basis for distinguishing the aggravated\textsuperscript{127} and simple\textsuperscript{128} grades of the offense.

Turning next to the important burglary crimes, three concise and simply stated articles supplant a number of involved and sometimes overlapping statutes. These former statutes had adopted the common law requirement of a breaking and entering, but the "breaking" actually meant very little. Louisiana and common law courts have declared the offense to be burglary where the offender pushed open an unlatched screen door, raised a window that was already partly open, entered Santa Claus fashion through an open chimney, or broke out after entering without even a technical breaking. The new burglary articles only require an "unauthorized entering," to the end that courts will no longer find it necessary to tax their legal ingenuity for a fictional breaking. It is essential to the offense that the burglar must have entered "with the intent to commit a felony or any theft therein." This is a little broader than the common law requisite of an "intent to commit a felony," but is in line with the trend in modern burglary statutes.

The aggravated degrees of the offense—burglary in the nighttime\textsuperscript{129} and burglary in the daytime\textsuperscript{130}—are also somewhat broader.

\begin{itemize}
\item \textsuperscript{122} La. Crim. Code, Art. 51.
\item \textsuperscript{124} La. Crim. Code, Art. 52.
\item \textsuperscript{125} La. Crim. Code, Art. 53.
\item \textsuperscript{126} La. Act 211 of 1928, § 4 [Dart's Crim. Stats. (1932) § 753]. This statute was limited to the burning of goods and merchandise with intent to defraud. Criminal liability for a similar burning of one's own dwelling was not at all certain.
\item \textsuperscript{127} La. Crim. Code, Art. 55.
\item \textsuperscript{128} La. Crim. Code, Art. 56.
\item \textsuperscript{129} La. Crim. Code, Art. 60.
\item \textsuperscript{130} La. Crim. Code, Art. 61.
\end{itemize}
than the common law offense. They contemplate the unauthorized entry into "any structure, watercraft or movable where a person is present," as well as the traditional "inhabited dwelling." In addition to the requirement as to the nature of the place entered, it is also essential that the burglar either be armed with a dangerous weapon or commit a battery in the course of his crime.

If the offender commits an unauthorized entry with the intent to commit a felony or theft, but where the above aggravating circumstances as to the nature of the structure and as to the means employed are not both present, he is only guilty of simple burglary which carries a considerably lesser penalty. This crime is analogous to the burglary of sundry buildings statutes which are found in almost every state.

The most significant change effected throughout the entire Code is found in the theft article which combines all stealing crimes in one. The technical distinctions between larceny, embezzlement and obtaining property by false pretenses are without any substantial basis. It is well known that the separate crime of embezzlement arose out of the inadequacies of the crime of larceny. Larceny was formerly a capital offense and as such was strictly limited in scope. With a lessening of the penalty for larceny, the old restrictions remained. Thus early courts indulged in such familiar fictions as the doctrine of "breaking the bulk" to catch the bailee who turned thief; or as the doctrine of "constructive possession" to catch the servant who stole his master's goods. When these devices failed the legislatures stepped in and created the separate, but very similar, crime of embezzlement. The distinction between "larceny by trick" and obtaining property by false pretenses, depending upon whether the owner intended to part with "possession" or "property" in the goods, is also largely a product of historical accident. Then, too, when none of the above crimes seemed to fit, ingenious district attorneys might insert a count for violation of the "confidence game" statute. The above sketchy summary gives only a partial picture of the confusion as to the stealing crimes. Distinctions had been heaped upon distinctions, and then any number of special statutory classifications superimposed; and only partial relief had been secured by liberal procedural rules as to responsible verdicts. Under the new Article 67, all cases where one person takes or

misappropriates another's property will be *theft* regardless of the relationship of the parties (whether the offender is bailee, servant or agent), or of the means employed (whether by stealth or by false pretenses).

It is essential to the crime of theft that the offender must have specifically intended to *permanently* deprive the owner of whatever may have been the subject of the offense. Where a person takes another's automobile or bicycle, without the owner's consent but intending to return the same, he is not guilty of theft. In such a case he has committed the lesser offense of *unauthorized use of movables.*

*Robby* is a theft committed “by use of force or intimidation.” The property must be taken from the person of another or from his immediate control. The distinction between armed robbery and simple robbery depends upon whether or not the offender is armed with a dangerous weapon. In the latter instance there is not the same inherent danger to human life, and the penalty clause permits a light sentence in appropriate cases.

The crime of *receiving stolen things* is largely based upon a 1938 Louisiana statute. The fines provided for the receiver of goods valued at less than one hundred dollars have been raised considerably. The article, as originally presented by the reporters, carried a maximum sentence of fifteen years, regardless of the amount received. It was felt that the “fence” for stolen things was a very substantial cause of juvenile and negro petty thievery. Also where a conviction was secured it was usually very difficult to prove the receipt of any very substantial amount of property, for it is rather generally conceded that for one detection, there are about a hundred receipts of stolen property which avoid the law. However, the idea that the receiver should not be punished more severely than the thief was well rooted; and the reporters were instructed to draft a penalty clause, substantially like the existing statute, which graded the offense according to the amount received. In view of the difficulty of proving actual knowledge that the goods received were stolen, the article has adopted the completely objective test and it is sufficient that the offender “had good reason to believe” that the goods had been

the subject of theft or robbery. This is a departure from the subjective actual knowledge requirement of the old law.

*False accounting*\(^{139}\) is a new and definitely needed offense, in view of the large number of situations where the civil law requires an accounting but provides no punishment for the rendering of a false account. The *forgery*\(^ {140}\) and *extortion*\(^ {141}\) articles are simply and directly stated, in striking contrast to the former Louisiana laws on those subjects. The article on *issuing worthless checks*\(^ {142}\) is a substantial restatement of the old "bad check statute."\(^ {143}\) The Reporters originally proposed a definition of the offense which would have included the giving of a worthless check in payment of an antecedent debt.\(^ {144}\) However, upon a suggestion of the Advisers, they returned to the usual requirement (as found in the existing Louisiana statute), that the offender must receive something of value for the check.

**Offenses Affecting the Family**

The *criminal neglect of family* articles\(^ {145}\) were copied largely from a 1932 Louisiana statute,\(^ {146}\) which was a substantial enactment of the Uniform Desertion and Nonsupport Act.\(^ {147}\) In addition to, or in lieu of, the usual sentence of a flat fine or imprisonment, the court may issue an order directing the payment of weekly alimony to the neglected wife or minor child.\(^ {148}\) These provisions, necessarily lengthy and detailed, provide a device whereby the wife is enabled to secure periodic payments for support without a decree of divorce or judicial separation.\(^ {149}\)

The former *bigamy* statute only covered cases where the bigamous marriage was contracted in Louisiana.\(^ {150}\) The new bigamy

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143. La. Act 209 of 1914, §§ 1, 2 [Dart's Stats. (1939) §§ 676, 677].
146. La. Act 77 of 1932 [Dart's Crim. Stats. (1932) § 927].
147. 10 U.L.A. 1 (perm. ed. 1922).
148. In Louisiana a wife cannot bring a civil suit against her husband for support unless she makes her claim for alimony as an incident to a suit for separation from bed and board or for divorce. Art. 105, La. Code of Practice of 1870; Mary Heyob v. Husband, 18 La. Ann. 41 (1866); Moore v. Moore, 18 La. Ann. 613 (1866).
149. La. Rev. Stats. of 1870, § 800 [Dart's Crim. Stats. (1932) § 1128].
The offense of incest is graded according to the degree of relationship. The marriage or cohabitation of cousins, although such marriages are prohibited by the Civil Code, is not a crime. This is in accord with the Louisiana Supreme Court's interpretation of the former incest statute.

The miscegenation article is based upon a 1910 concubinage
statute, and punishes black and white marriages or habitual cohabitation. Another statute, prohibiting concubinage between Indians and negroes, had been of little social utility, and its subject matter was not included.

**Offenses Affecting Sexual Immorality**

*Carnal knowledge of a juvenile* is the act of sexual intercourse with a girl under seventeen years of age, either with or without her consent. Where the girl is under the age of twelve years, the more serious crime of aggravated rape is committed. In order to afford the fullest possible protection to young girls, it is expressly provided that a mistake as to the female's age shall not be a defense. While a reasonable mistake of fact is generally a defense, here is one situation where, even without special statutory authority, the courts have held that the offender acts at his peril. Other acts of sexual misconduct, committed upon the person or in the presence of a juvenile of either sex, will be punishable as *indecent behavior with juveniles*. This offense is a misdemeanor; and again it is specifically stipulated that lack of knowledge of the child's age shall not be a defense.

*Prostitution,* and the related offenses of soliciting for prostitutes, pandering, letting premises for prostitution, and enticing minors into prostitution are covered by a series of succinctly stated articles, which provide a complete coverage of these offenses. Another statute, covering these same crimes in the old-style method of detailed enumeration, was enacted at the same session of the legislature. While it is regrettable that the same offenses should be twice covered, the dual enactments should not cause any difficulty, since Article 4 expressly authorizes prosecution under either the appropriate Code article or the special statute.

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161. The “age of consent” line has been reduced from eighteen to seventeen years. This is in accord with the age limit which controls the jurisdiction of juvenile courts.
165. La. Crim. Code, Arts. 82-86.
166. La. Act 241 of 1942.
167. The enactment of a separate statute is largely explained by the fact that the legislators, and their constituents, were much impressed with the urgent necessity of laws adequate for the stamping out of prostitution around the various army camps in Louisiana.
The abortion and distribution of abortifacients articles\textsuperscript{168} substantially restate existing Louisiana statutes, with some modification in the interests of clarity and formal consistency. A number of changes, which would have liberalized and modernized the offense of abortion, were considered by the Reporters and the Institute, but were rejected by reason of their highly controversial nature.

The key words in the otherwise all-inclusive gambling article\textsuperscript{169} are the phrase “as a business.” Any form of gambling conducted as a business is criminal.\textsuperscript{170} The article supplants numerous special statutes and will include lotteries, card and dice games in gambling houses, slot machines and other similar devices whereby the proprietor makes a profit from the risks taken by others. On the other hand, a friendly poker game or a group “shooting craps” would not be committing any crime. Such activities have seldom been prosecuted, and no logical end is served by laws which are universally violated with impunity.

The sale of liquor and dangerous weapons to persons under the age of twenty-one will constitute the crime of unlawful sales to minors.\textsuperscript{171} The seemingly high age limit of twenty-one years is in accord with existing Louisiana statutes,\textsuperscript{172} and was recommended by the Council of the Institute. Again, as in other offenses affecting juveniles and minors, lack of knowledge of non-age is not a defense. In this regard the article goes further, and should be more effective, than former statutes.

Contributing to the delinquency of juveniles\textsuperscript{173} and cruelty to juveniles\textsuperscript{174} complete the list of adult offenses particularly affecting those of tender years; and are a substantial re-enactment of existing statutes.

\textsuperscript{168} La. Crim. Code, Arts. 87, 88.
\textsuperscript{169} La. Crim. Code, Art. 90.
\textsuperscript{170} Pari-Mutuel Wagering on horse races is authorized by a special statute (La. Act 276 of 1940), which is expressly saved in Section 3 of the Criminal Code.

One may raise a query as to the validity of such authorization, in view of the express declaration in La. Const. of 1921, Art. XIX, § 8, that “Gambling is a vice and the Legislature shall pass laws to suppress it.”

\textsuperscript{171} La. Crim. Code, Art. 91.
\textsuperscript{172} La. Act 46 of 1890 [Dart’s Crim. Stats. (1932) §§ 1276-1277] (selling weapons to minors prohibited); La. Act 93 of 1906 [Dart’s Crim. Stats. (1932) §§ 1369-1372] (selling liquor, etc., to minors).
\textsuperscript{174} La. Crim. Code, Art. 93.
Offenses Affecting the Public Generally

The traditional crime of illegal discharge of firearms in public places has been enlarged so as to include "the throwing, placing or other use of any article, liquid, or substance." In either case criminal liability is limited to situations where it is foreseeable that death or great bodily harm may result. The new and broader crime is labeled illegal use of weapons or dangerous instrumentalities. The related offense of illegal carrying of weapons is committed by the concealment of a dangerous weapon on one's person, or by mere possession of such a weapon by an alien enemy.

Obstruction of highways of commerce is graded, as were arson and criminal damage to property, according to the foreseeability of danger to human life. The serious felony of aggravated obstruction of a highway of commerce is committed where the obstruction endangers human life, as in the case of a dangerous obstruction on a railroad track or on an airport runway. In simple obstruction of a highway of commerce, it is sufficient that the offender's act has rendered the movement of traffic more difficult. This lesser grade of the offense is only a misdemeanor.

The most important driving offense is that of operating a vehicle while intoxicated. This crime is not limited to automobiles, but also includes airplanes, boats and all other means of conveyance. A more severe penalty, with a minimum sentence of one hundred dollars and thirty days imprisonment, is provided for the second or subsequent conviction. The lesser offense of reckless operation of a vehicle follows the same general pattern, but with appropriately lesser penalties. This group of crimes is completed with a hit and run driving article requiring the driver of any vehicle involved in an accident to stop, give his

175. La. Crim. Code, Art. 94.
180. By increasing the possible maximum penalty, the necessity for a special article on intoxicated driving which caused injury to person or property was eliminated. Cf. La. Act 320 of 1938 [Dart's Stats. (1939) §§ 5293.1-5293.7] (intoxicated driving which caused personal injury or property damage). Under Article 98 the maximum penalty for both the first and the multiple offender is sufficiently large to permit the sentencing judge to take damage done by the offender into consideration as an aggravator.
181. La. Crim. Code, Art. 99. This article is substantially in accord with the present Louisiana statute (La. Act 286 of 1938), and with the Uniform Act Regulating Traffic on Highways, § 19, 11 U.L.A. 20 (1938).
identity and render reasonable aid. This new article is much clearer than the former "hit and run" statute.\textsuperscript{183}

Special protection to the public sensibility is provided by articles punishing the \textit{desecration of graves}\textsuperscript{184} and \textit{cruelty to animals}.\textsuperscript{185} This latter offense is stated in terms sufficiently broad to embrace all kinds of intentional or criminally negligent mistreatment of animals.

\textit{Disturbing the peace}\textsuperscript{186} is a misdemeanor which includes the doing of any of a number of enumerated offensive acts "in such a manner as would foreseeably disturb or alarm the public." The public interest in the prevention of disorderly, illegal and immoral conduct is further protected by articles making it criminal to keep or to let a disorderly place.\textsuperscript{187} The broad definition of a \textit{disorderly place};\textsuperscript{188} as "a place to be used habitually for any illegal or immoral purpose," eliminates the necessity of the verbose enumeration found in most statutes.

The \textit{obscenity} article\textsuperscript{189} embraces a wide range of immoral and obnoxious practices. Subdivisions (1) and (2) cover the traditional obscenity situations—indecent public exposure of one's person, and the sale or display of any indecent material. Two additional subdivisions were added to cover a type of very reprehensible conduct which had given the police department in New Orleans and other larger cities considerable trouble. There was no present law which punished the sexual pervert who frequents parks and other public places, and solicits abnormal sexual practices. Such conduct would not amount to \textit{crime against nature};\textsuperscript{190} but will come within Subdivision (4) of the obscenity article.

\textit{Resisting an officer} is a misdemeanor which includes all forms of resistance of an officer who is making a lawful arrest or seizure of property, or is serving any lawful process. It is essential that the offender know, or at least have knowledge of facts giving him reason to know, that such officer is acting in his official capacity. The more serious offense of \textit{escape} is divided into \textit{aggravated}

\begin{itemize}
  \item \textit{La. Act 286 of 1938, § 3, Rule 18} [Dart's Stats. (1939) § 5223].
  \item \textit{La. Crim. Code, Art. 101}.
  \item \textit{La. Crim. Code, Art. 102}.
  \item \textit{La. Crim. Code, Art. 103}.
  \item \textit{La. Crim. Code, Art. 104} (keeping a disorderly place), and Art. 105 (letting a disorderly place).
  \item \textit{La. Crim. Code, Art. 104}.
  \item \textit{La. Crim. Code, Art. 106}. Mere solicitation has generally been held insufficient to constitute an attempt.
  \item \textit{La. Crim. Code, Art. 108}.
\end{itemize}
escape\textsuperscript{191} and simple escape,\textsuperscript{192} with danger to human life serving as the distinguishing factor. The additional prison term, which may be imposed for escape or attempted escape, is not to run concurrently with the offender's existing sentence. Assisting escape\textsuperscript{193} is committed by any public officer who intentionally permits the escape of a prisoner in his custody, or by anyone who actively assists in an escape or attempted escape.

**Offenses Affecting Organized Government**

The treason\textsuperscript{194} and flag desecration\textsuperscript{195} articles are simply a restatement, in a somewhat more concise form, of the existing Louisiana statutes. A misprision of treason article\textsuperscript{196} has been added to provide punishment for the individual who knows of treasonous activities and fails to notify the proper authorities. Criminal anarchy\textsuperscript{197} is the advocating, teaching, or belonging to a society known to advocate any doctrine which contemplates crime, violence or terrorism as a means of effecting governmental change. Such activities may fall short of treason, but they are nevertheless very dangerous in times like these. A 1918 statute\textsuperscript{198} punishing abusive and disloyal language when the United States is at war was expressly retained. A special sabotage statute and a number of other emergency criminal laws were also enacted by the 1942 legislature.\textsuperscript{199} These statutes, being special war-time legislation, are not included in the Code.

Existing bribery statutes were numerous and confusing.\textsuperscript{200} The new Code correlates and combines all these various special statutes in one general article on public bribery,\textsuperscript{201} which embraces the bribery of public officers or employees,\textsuperscript{202} election officials, jurors, and witnesses. Upon a suggestion of the Advisers,

\begin{itemize}
\item \textsuperscript{191} La. Crim. Code, Art. 109.
\item \textsuperscript{192} La. Crim. Code, Art. 110.
\item \textsuperscript{193} La. Crim. Code, Art. 111.
\item \textsuperscript{194} La. Crim. Code, Art. 113.
\item \textsuperscript{195} La. Crim. Code, Arts. 116, 117.
\item \textsuperscript{196} La. Crim. Code, Art. 114.
\item \textsuperscript{197} La. Crim. Code, Art. 115.
\item \textsuperscript{198} La. Act 138 of 1918, §§ 1, 2 [Dart's Crim. Stats. (1932) §§ 1188, 1189].
\item \textsuperscript{199} La. Acts 24-26 of 1942 (sabotage); and La. Act 242 of 1942 (disloyal teachings and utterances).
\item \textsuperscript{200} A general bribery statute was passed in 1878 (La. Act 59 of 1878 [Dart's Crim. Stats. (1932) §§ 788-795]), and then a similar statute was enacted in 1890 (La. Act 78 of 1890 [Dart's Stats. (1893) §§ 796-798]). The Louisiana courts have held that the 1890 statute only effected a partial repeal of the prior statute. State v. Desforges, 46 La. Ann. 75, 18 So. 912 (1896).
\item \textsuperscript{201} La. Crim. Code, Art. 118.
\item \textsuperscript{202} The terms "public officer" and "public employee" are defined in Article 2 of the Code. In applying to "public employees," the new article enlarges the scope of the offense.
\end{itemize}
bribery of voters\textsuperscript{203} was made a separate and lesser offense. Bribery is defined to include the giving or receiving, and also the promising or soliciting, of a bribe. The intent element of the offense is simply stated. It is enough that the bribe was given or offered "with the intent to influence his [the recipient's] conduct in relation to his position, employment, or duty." The action induced need not be corrupt or illegal. The buying or selling of appointments to office, or extra payments to induce a public officer or employee to do what he is already legally bound to do, would clearly constitute public bribery.\textsuperscript{204}

Public intimidation\textsuperscript{205} includes the same parties and requires the same intention as public bribery. The principal distinction between the two offenses is the method employed to accomplish that purpose. The phrase "violence, force, or threats" is broad enough to include threats of injury to character as well as threats of physical violence.

The public bribery and public intimidation articles are supplemented by two special articles which cover a related type of improper conduct particularly affecting jurors. Any attempt to influence jurors in respect to their verdict, except in the regular course of the trial, will constitute jury tampering;\textsuperscript{206} while any juror who intentionally permits such undue influencing or pledges his verdict will be guilty of jury misconduct.\textsuperscript{207}

Existing perjury and false swearing statutes were very inadequate and did not provide a complete definition of those offenses. While the former perjury statute was limited to false swearing in judicial proceedings,\textsuperscript{208} the new perjury article\textsuperscript{209} has extended the offense so as to include false oaths in any proceeding before a board or official authorized to take testimony. Such administrative hearings are often fully as important, and perjury therein fully as anti-social, as in judicial proceedings. The crime is fully defined and it is specifically required that the statement must be material, and that the offender must have knowledge of its falsity. A more severe maximum penalty is provided for the commission of perjury at a felony trial. The lesser offense of

\begin{itemize}
\item 203. La. Crim. Code, Art. 119.
\item 205. La. Crim. Code, Art. 122. It is even broader than the public bribery article and includes intimidation of voters.
\item 206. La. Crim. Code, Art. 129.
\item 207. La. Crim. Code, Art. 130.
\item 208. La. Act 18 of 1888 [Dart's Crim. Stats. (1932) § 1093].
\item 209. La. Crim. Code, Art. 123.
\end{itemize}
false swearing\textsuperscript{210} is committed by the making of a false extra-judicial oath, provided that such oath is "required by law."\textsuperscript{211} Often conflicting statements are made under oath, as before the grand jury and upon the actual criminal trial. Such changing of testimony by a key witness (for reasons which are usually impossible of proof) may often wreck the most carefully and honestly prepared case. One of the statements is bound to be false, and yet it is very difficult for the prosecution to specifically prove which statement is false. Special articles\textsuperscript{212} have been inserted, patterned after a similar 1932 Louisiana statute of more limited scope,\textsuperscript{213} which establish prima facie liability for perjury or false swearing by the fact of inconsistent statements. In cases of honest forgetting it will be an affirmative defense (burden of proof on the accused) that "at the time he made them, the accused honestly believed both statements to be true."

A number of miscellaneous offenses in Title VII deserve passing mention. Compounding a felony\textsuperscript{214} is committed when any person agrees, upon a consideration, not to prosecute or reveal the commission of a crime. Injuring public records\textsuperscript{215} covers the destruction, mutilation or alteration of public records. To be the subject of this offense the document must have been filed or deposited "by authority of law." This crime is supplemented by that of filing false public records\textsuperscript{216} which is committed by the original filing of a false or forged document for record. A general malfeasance in office article\textsuperscript{217} is substantially copied from the existing Louisiana statute,\textsuperscript{218} but is broader in that it includes malfeasance of public employees as well as of public officers.

The concluding articles of the Code set out the "political" offenses and are designed to deter and prevent various undesirable or corrupt practices by state officials and employees. The crimes of public salary deduction\textsuperscript{219} and public salary extortion\textsuperscript{220} prohibit the so-called "deducts" and "contributions" which provide funds to grease the political machine at the expense of the small employees. Dual office holding\textsuperscript{221} is an offense which can

\textsuperscript{211} Accord: State v. Parrish, 129 La. 547, 56 So. 503 (1911).
\textsuperscript{212} La. Crim. Code, Arts. 124, 126.
\textsuperscript{213} La. Act 210 of 1932, § 2 [Dart's Crim. Stats. (Supp. 1941) § 1096].
\textsuperscript{216} La. Crim. Code, Art. 133.
\textsuperscript{218} La. Act 254 of 1912, § 1 [Dart's Crim. Stats. (1932) § 801].
\textsuperscript{221} La. Crim. Code, Art. 137.
never be defined to the satisfaction of everyone, as was indicated by the number of special dual office holding bills proposed and hotly debated in the 1942 legislature. Rather than launch perilously into this uncharted sea, the new article is a substantial re-enactment of a 1940 statute which had been drafted and recommended by the Louisiana State Law Institute after a careful consideration of all of the conflicting issues involved.\footnote{222}{See Special Report of the Louisiana State Law Institute to the Legislature of Louisiana Recommending Certain Criminal Statutes (May, 1940) 8, 9. The statute (La. Act 259 of 1940 [Dart’s Stats. (Supp. 1941) §§ 7789.2-7789.5]) is discussed in Bugea, Lazarus, and Pegues, Louisiana Legislation of 1940 (1940) 3 LOUISIANA LAW REVIEW 88, 149.} The public payroll fraud article\footnote{223}{La. Crim. Code, Art. 138.} is simply a rewriting of the 1940 “deadhead” statute,\footnote{224}{La. Act 63 of 1940 [Dart’s Stats. (Supp. 1941) §§ 7773.1-7773.7].} in a form consistent with the other articles of the Code. Similarly, political payroll padding is based upon a 1940 statute\footnote{225}{La. Crim. Code, Art. 139.} making it criminal to increase public payrolls and expenditures during the six months immediately preceding any gubernatorial election date. The clause providing for an exception in case of public emergency has been slightly altered so as to make it clear that the increased payroll or expenditure must be “necessitated by” such emergency. The old public contract fraud statute\footnote{226}{La. Act 9 of 1940 [Dart’s Stats. (Supp. 1941) §§ 2788.6-2788.9].} was so worded as to apparently make the mere fact that a public officer had an interest in a public contract sufficient for criminal liability. However, the Louisiana Supreme Court had recently held that this statute was only applicable where the officer voted for or did some other affirmative act in order to secure the awarding of a public contract to himself or the firm in which he was interested. The new article expressly codifies that limitation, and makes an affirmative act or influencing the graven men of the offense. While the mere existence of an interest will not be per se criminal, it will constitute “presumptive evidence” of the use of official influence.

**CONCLUSION**

The new “Louisiana Criminal Code,” with its direct and simple language, will be a real help to the younger lawyer. The experienced practitioner, who has a natural reluctance toward a new system of criminal law, will be agreeably surprised to find

\begin{footnotes}
\item[222] See Special Report of the Louisiana State Law Institute to the Legislature of Louisiana Recommending Certain Criminal Statutes (May, 1940) 8, 9. The statute (La. Act 259 of 1940 [Dart’s Stats. (Supp. 1941) §§ 7789.2-7789.5]) is discussed in Bugea, Lazarus, and Pegues, Louisiana Legislation of 1940 (1940) 3 LOUISIANA LAW REVIEW 88, 149.
\item[224] La. Act 63 of 1940 [Dart’s Stats. (Supp. 1941) §§ 7773.1-7773.7].
\item[225] La. Crim. Code, Art. 139.
\item[226] La. Act 9 of 1940 [Dart’s Stats. (Supp. 1941) §§ 2788.6-2788.9].
\item[227] La. Act 128 of 1906 [Dart’s Crim. Stats. (1932) §§ 805, 806].
\end{footnotes}
that many of his old landmarks and beacons still remain. However, a considerable amount of redefinition and rearrangement has been necessary in order to eliminate the overlapping and confusion of the old patch-upon-patch system of criminal law. Also a number of the obtuse fictions and purposeless distinctions of the common law of crimes have been eliminated. The Reporters' Comments, published with the Code,\(^228\) explain the articles and should greatly facilitate an adjustment to the new law. These comments point out the nature of and reason for changes made, and also indicate the intended scope and meaning of the language employed. A comprehensive index, including both the old and new terminology, should be of real assistance to those using the Code.\(^229\) The repealing\(^230\) and saving\(^231\) clauses have been carefully worked out, and enumerate the statutes affected in chronological order. This simplifies the task of the lawyer who seeks to ascertain whether a particular statute is repealed or preserved.

A discussion of the Criminal Code would be incomplete without brief mention of a companion statute,\(^232\) also prepared by the Louisiana State Law Institute, which serves to correlate the new substantive criminal law and the 1928 Code of Criminal Procedure. Numerous changes in the various crimes and criminal terminology necessitated a careful re-examination and amendment of the procedural rules, to the end that the language employed might be consistent. Article 8 of the Code of Criminal Procedure has been amended so that the enumeration of crimes excepted from the one year prescription period includes the most serious offenses under the new Criminal Code.\(^233\) The short forms of in-

\(^{228}\) Publication of these comments was pursuant to Senate Concurrent Resolution 12 of 1942.

\(^{229}\) This index was carefully prepared by Mr. Albert S. Lutz, who had worked as a research assistant and contributed largely to the preparation of the Criminal Code.


\(^{231}\) La. Act 43 of 1942, § 3.

\(^{232}\) La. Act 147 of 1940 [Dart's Stats. (Supp. 1941) § 8737].

\(^{233}\) The old offenses have all been included, with the exception of counterfeiting, which is solely a federal offense, and is not punishable under the Louisiana Criminal Code. Rape, arson, and robbery have been graded, so only the most serious grade is included. The crimes added to the list of exceptions are aggravated kidnapping, burglary in the nighttime, burglary in the daytime, and treason.

Act 323 of 1940 [Dart's Stats. (Supp. 1941) § 8577], enacted in the same session, amended Article 8 of the Code of Criminal Procedure by reducing the time within which a district attorney must nolle prosequi or prosecute, after indictment or information for a felony, from six to three years. A similar provision was also inserted in the procedure bill accompanying the Criminal Code. Construing these two amendments to Article 8 together, the special amendatory statute with the old enumeration of exceptions will apply
dictment have been re-drafted to conform with the changed names and nature of certain offenses. Article 13 has been amended so as to provide a liberal venue rule, applicable in all criminal prosecutions. Less significant modifications of other procedural articles serve to dovetail them with the new substantive law of crimes.

The Louisiana Criminal Code represents the combined work and thought of judges, district attorneys, criminal law practitioners and law teachers. The important nature of the Louisiana State Law Institute's accomplishment can best be understood when one reviews previous futile efforts at codification in this state and considers similar unsuccessful efforts in other jurisdictions. Some penal theorists will urge that the changes made were not sweeping enough. Old school practitioners may decry the new legislation as too radical. The existence of such objections is a rather convincing testimonial to the fact that the new Code has effected a fair and practical compromise of these two divergent interests. Such a compromise was essential if the Code was to become a reality. Some of the Reporters' pet theories fell in the process, but only after careful consideration, and usually in the interest of producing a code which would stand a substantial chance of actual enactment. In a number of instances the articles were considerably improved by the Council's deliberations and suggestions. The rape articles, much debated from both legal and

235. Article 13 of the Code of Criminal Procedure was simply a restatement of the venue provision in the Louisiana Constitution (Art. I, § 9) that the trial for a crime must take place in the parish where the offense was committed. As long as an offense was completed within a single parish, this rule presented little difficulty. However, an offense is often begun in one parish, partly executed in another, and completed in a third. In such cases, the district attorney (and ultimately the court) had a very difficult time in selecting the parish where the crime was committed. The recent cases of State v. Hart, 195 La. 184, 196 So. 62 (1940); State v. Smith, 194 La. 1015, 195 So. 523 (1940); and numerous other complex and difficult venue situations presented during the 1939-1940 term of the Louisiana Supreme Court, served to focus attention upon the problem. In a number of recent criminal statutes, the legislature had inserted special liberal venue provisions. Rather than to insert special venue provisions in the various articles of the Code where the problem may be troublesome, Article 13 was rewritten so as to specifically authorize trial in the parish where any element of an offense was committed, although the crime may have been continued or completed elsewhere. An examination of the decisions in other states with constitutional provisions identical to Art. I, § 9, of the Louisiana Constitution, reveals the fact that statutes similar to the amended Article 13 have been uniformly upheld. For a full collection and analysis of these decisions, see Comment by Litton (1942) 4 LOUISIANA LAW REVIEW 321.
social viewpoints, present a good illustration of such improvement. Undoubtedly, there are many points in which the new Criminal Code, either because of practical considerations or lack of perspective, does not achieve perfection. Yet, the significant fact remains that by the enactment of this Code the Louisiana legislature has taken a very substantial step forward in the field of criminal law.

The future value of the new Criminal Code, and the efficacy of the improvements made, now depends very largely upon a sympathetic and understanding interpretation by the Louisiana courts. In this regard the legislative mandate of Article 3 becomes especially significant: “In order to promote justice and to effect the objects of the law, all of its provisions shall be given a genuine construction according to the fair import of their words, taken in their usual sense, in connection with the context, and with reference to the purpose of the provision.” It is important that our courts shall not permit the fine spun disquisitions and fictions of the common law to creep back in, as has been the case in a number of states where legislatures sought to modernize and improve the criminal law.

236. Summary of other Amendments to Louisiana Code of Criminal Procedure:

Art. 35 (detention of witnesses—proces verbal of inquest). “Negligent homicide” has been added. The coroner’s power to detain or order the detention of witnesses thus covers all homicides.

Art. 36 (arrest of accused by coroner). Again the new offense of “negligent homicide” has been added to the enumeration.

Art. 42 (search warrants for stolen property). A slight re-wording was necessitated by the fact that the crimes presently designated as larceny, embezzlement and obtaining by false pretenses have been combined in the crime of “Theft.”

Art. 43 (situations where search warrants may be issued). In subdivision (3) the word “gaming” has been changed to “gambling” which is the term used in the new Criminal Code. Subdivision (1) has been deleted in view of the fact that counterfeiting is not a state offense under the new Criminal Code.

Art. 48 (seized property—custody—return to owner). This article has been slightly altered so as to adapt it to the “Theft” article.

Art. 225 (several acts of theft—determination of grade of offense). This article has been rewritten in a form which will be consistent with and supplement the provision in the “Theft” article for aggregating the amounts misappropriated or taken to determine the grade of the offense.

Art. 230 (naming of injured person). The only change was a substitution of “battery” for “wounding” in the enumeration of illustrative offenses.

Art. 234 (immaterial averments and omissions). The only change is to delete “feloniously” and insert “intentionally,” which is the word used in the Criminal Code to mean general criminal intent. See Article 10 of the Criminal Code.

Art. 236 (description of written instrument in indictment). This article was redrafted in order to correlate it with the Criminal Code offenses. The phrase “written instrument” has been substituted for the broader and possibly ambiguous word “instrument.” Also the last clause which states that the value of the instrument need not be described has been deleted. In case
of "Theft" it is essential that a value be placed upon the property misappropriated in order to determine the grade of the offense.

Art. 238 (aiders and abettors—indictment as principals) Repealed. This article had been superseded by Louisiana Act 120 of 1932. Both of these are expressly set out in the repealing clause of the Criminal Code, since the subject matter is covered by Article 24 of the new Criminal Code (principals).

Art. 245 (indictment for theft). This article has been redrafted so that it will be applicable to the crime of "Theft," which combines those offenses which were originally designated separately as larceny, embezzlement and obtaining by false pretenses.

Art. 246 (theft—charges in indictment). The changes made serve to accomplish the end sought by the original article and to adapt it to the new offenses set out in the Criminal Code.

Art. 247 (indictment for defamation). This article is rephrased slightly so as to apply to the crime of "defamation," which combines the former separate offenses of libel and slander.

Art. 248 (indictment for murder, manslaughter, or negligent homicide). The similar offense of negligent homicide has been included. Also the last sentence merely re-affirms a right to use the short forms prescribed in Article 235, rather than to repeat those forms of indictment.

Art. 250 (indictment for perjury or false swearing). The words "subornation of perjury" have been eliminated since the Criminal Code contains no such offense.

Arts. 362-363 (influencing and shadowing of jurors) Repealed. Articles 118, 122, and 129 of the new Criminal Code cover attempts to influence jurors. These matters were clearly substantive criminal law, rather than criminal procedure.

Art. 386 (judges' charge to jury on responsive verdicts). "Negligent homicide" has been added to the list of verdicts of lesser offenses which are responsive to a murder indictment. This is in accord with the purpose of Article 29 of the Criminal Code which specifically designates murder, manslaughter, and negligent homicide as different degrees of homicide.

Art. 407 (larceny, embezzlement, obtaining by false pretenses—responsive verdicts) Repealed. This article is rendered obsolete by combination of the formerly separate offenses of larceny, embezzlement, obtaining by false pretenses and swindling in the crime of "Theft."

Art. 431 (embezzlement by public officer). The word "embezzlement" has been changed to "Theft," in conformity with Article 67 of the Criminal Code.

Art. 443 (defamation—admissibility of truth in evidence). The new term "defamation" is substituted for the word "libel." Under the new Criminal Code, the truth of non-privileged defamatory statements is very material. If the publication or expression is true, actual malice must be proved in order to convict the offender.

Art. 468 (bribery—incriminating testimony). The article has been amended so as to enumerate the various kinds of bribery set out in the new Criminal Code.

La. Act 57 of 1940 (charging the crimes of stealing, embezzlement, obtaining by false pretenses, and swindling, and grading of said offenses) Repealed. In view of the "Theft" article of the Criminal Code and the amendment and re-enactment of Article 225 of the Code of Criminal Procedure, this statute is no longer necessary.