True
The judgments of both the trial and intermediate appellate courts were set aside. After an examination of the case, the Supreme Court held that plaintiff was not purely a stakeholder, as there was a strong possibility that plaintiff was obligated to all of the defendants impleaded.

State v. Bayles, an expropriation case, presented only factual issues. Since no manifest error was found in the value of the land placed by the jury of freeholders before whom the case was tried, the judgment appealed from was affirmed.

CRIMINAL PROCEDURE

Dale E. Bennett*

VENUE—CRIMINAL NEGLECT OF FAMILY

The venue rule that prosecutions for criminal neglect of family could be brought only in the parish where the father resided stemmed from the provision in Article 39 of the Civil Code that the domicile of the mother and children is that of the father. This limitation operated unfortunately in cases where the husband had deserted the family, or the wife and children had been forced to live with the wife’s family as a result of the husband’s nonsupport. The parish where the neglected wife and children resided was interested, but without jurisdiction to prosecute the husband. The law enforcement officials of the husband’s domicile had jurisdiction over the offense, but there was frequently a lack of interest on their part. In 1950, a special venue provision was enacted which provided, in essence, that the prosecution for nonsupport might be brought (1) in the parish in which the person owing the support resided, (2) in the parish in which the last matrimonial domicile was established, or (3) in the parish in which the dependent established a justifiable and bona fide separate residence.1

In State v. Maxie2 this broader venue provision was invoked to support a prosecution for criminal neglect of family in a parish where the widowed defendant’s children had been living and cared for by their maternal grandmother. Defense counsel argued that the offense was committed and the proper place for prosecu-

80. 220 La. 506, 56 So. 2d 852 (1952).
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2. 221 La. 518, 59 So. 2d 706 (1952).
tion was in the parish of the father's domicile. In rejecting this argument the Supreme Court pointed out that the decisions relied upon were handed down prior to the 1950 venue provision. "This later legislation," declared Justice Ponder, "was evidently enacted because our jurisprudence was not in accord with the majority rule in the United States, and for the interest and welfare of neglected wives and minor children. The majority rule recognizes the right to prosecute the father where the wife or child becomes dependent, regardless of his nonresidence, for that is the place where the duty to support should be discharged." Under the new provision the offense of criminal neglect of family is treated as a continuing offense, with the duty of support being owed in any of the three parishes listed. To that extent "Article 39 of the Civil Code must bow to this later legislation."4

**INTERRUPTION OF THREE YEAR PRESCRIPTION**

In *State v. Bradford*5 the state had sought to toll the running of the three year prescription period on a felony indictment by urging that the defendant had delayed the trial by his motion for a bill of particulars. On the first appeal the Supreme Court remanded the case to the district court to ascertain whether the state or the defense was responsible for the trial court's delay in ruling on the motion.6 The trial judge found that the delay in ruling on the bill of particulars had been occasioned by the suggestion of the district attorney that the charge in question would never be tried because the state had a better case against the defendant in another division of the court. Defense counsel had always been ready and available to argue the motion. Under these circumstances, the delay was chargeable to the prosecution rather than to the defense. The procedure followed placed an appropriate emphasis on the fault element. Not every delay which follows the filing of a motion by defense counsel will interrupt the three year prescriptive period. Prescription would be interrupted through "dilatory pleas"7 in a case where the state sought to start actual prosecution of the case shortly before the end of the three year period and the defendant prevented the case coming to trial by a series of colorable preliminary motions.

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3. 59 So. 2d 706, 708.
4. 59 So. 2d 706, 707.
5. 220 La. 176, 56 So. 2d 145 (1951).
The bail bond is given for the purpose of assuring the state that the accused will appear in court to answer the charges against him. Where the accused absconds and bail is forfeited, our courts have not looked with favor upon hyper-technical defenses raised by sureties. For example, it is well settled that the surety cannot escape liability because the bond failed to set forth correctly and fully the crime charged. In State v. Svoboda the bondsman for appearance of the accused at an extradition hearing sought to defend against a forfeiture by alleging that the requisition of the Illinois Governor had not been accompanied by a sworn copy of the charge against the accused. Such a deficiency would clearly have been a defense to the accused. The court held that the surety had no right to test the sufficiency of the extradition papers by raising defenses that would have been available to the defendant at the extradition hearing. It is the surety's obligation that the accused will appear at the hearing to answer the charges against him. It is not the surety's concern that those charges be well founded or insufficient.

A number of technical defenses were appropriately overruled in holding a surety on a bail bond in State v. Myers. An irregularity in the bondsman's affidavit as to his property subject to seizure could not be urged by the surety. The provision was one for the benefit of the state, and the bondsman was "estopped" to rely on his irregular affidavit to escape the obligation of the bond he signed. The court also rejected the surety's argument that he was entitled to notice of the arraignment of the accused. The bond is conditioned upon the appearance of the accused to answer the charges against him, and there is no requirement in the law governing forfeiture proceedings that the surety be notified either of the arraignment or of the trial.

INDICTMENTS

Where the long form indictment is employed, great care must be exercised to spell out all elements of the crime. The rule that it is sufficient to charge a crime by stating the elements of

the crime as found in the statute has been held inapplicable to the charge of a crime like gambling, which is defined in general terms but may be committed in a number of different ways. In *State v. Richardson* the information met this requirement of particularity by specifically alleging that the gambling was committed by the operation of "a mechanical device known as a slot machine." The indictment also included allegations as to the time and place of the offense. However, the important consideration in sustaining the sufficiency of the charge was the fact that the type of gambling operation (a slot machine) was specified. It should be noted that the safest procedure where a multiple crime such as gambling is charged is to follow the short form indictment authorized by Article 235 of the Code of Criminal Procedure. In following this procedure, it would have been sufficient to charge that the defendant "did commit the crime of gambling as defined by Article 90 of the Criminal Code." If the defendant needed additional information as to the type of gambling with which he was charged, the same could be secured through a bill of particulars. Frequently, where the short form is followed, the indictment also includes a particularized statement of the offense charged. Such additional allegations, without affecting the validity of the short form, are specifically authorized by the 1944 amendment to Article 235 and may be employed to avoid the delay incidental to a bill of particulars.

A number of allegations which were considered essential to the validity of prolix common law indictments have been designated as immaterial under modern codes of criminal procedure. Article 234 of the Louisiana Code of Criminal Procedure, which sets out a number of these "immaterial averments," specifically states that no indictment shall be set aside "for omitting to state the time at which an offense was committed where time is not of the essence of the offense, nor for stating the time imperfectly." In keeping with this liberal view as to allegations of the date or time of the crime, the Louisiana Supreme Court, in *State v. Martinez*, upheld a burglary indictment which had charged that the crime was committed "between December 19, 1950, and December 20, 1950." The trial judge had pointed out in his per

17. 220 La. 899, 57 So. 2d 888 (1952).
curiam that the time of the crime could not be pin-pointed to a single date, since the drug store burglarized was closed on the night of December 19 and reopened in the daytime on December 20, during which period of time the alleged burglary was committed. The appellant's further claim, that the uncertainty as to the exact date of the alleged crime might result in his being placed in jeopardy a second time for the same burglary, was rejected by the court, which correctly held that the accused could not be again prosecuted for burglarizing that particular drug store on either of the dates set out in the indictment. In view of Article 234 the indictment in the Martinez case would have been sufficient even if the date had been entirely omitted. In such a situation, if the date was material to a defendant relying on an alibi, or in order to protect against the likelihood of a second trial for the same offense, the defendant's remedy would be to secure the necessary data through a bill of particulars.

JURY LISTS—DISCRIMINATION

The Louisiana Supreme Court, in a series of carefully written opinions rendered during the past ten years, has provided a rather clear pattern as to those jury commission procedures which will meet the “equal protection” requirement of the Federal Constitution. In the 1950 case of Cassell v. Texas, the United States Supreme Court indicated a further tightening of the judicial reins on this matter, and enunciated certain general principles which necessitated a re-examination of state jury commission procedures. The most perplexing problem was raised by Mr. Justice Reed's statement that “an accused is entitled to have charges against him considered by a jury in the selection of which there has been neither inclusion nor exclusion because of race.” Mr. Justice Frankfurter's concurring opinion similarly declared “It is not a question of presence on a grand jury nor absence from it. The basis of selection cannot consciously take color into account.”

A practical application of this rule was presented in State v. Green. After the Cassell decision the jury commission of Con-
cordia Parish adopted a new method of jury selection wherein a special effort was made to consider eligible Negroes in the preparation of the general jury venire and the various jury lists. Defense council in the *Green* case urged that the jury commission had consciously taken color into account, and had sought to determine what would be proper Negro representation when they placed ten or twelve Negro names on the general venire list of three hundred and included three Negro names in the grand jury list of twenty names from which the grand jury indicting Green had been drawn. In overruling this contention, the Louisiana Supreme Court concluded that a planned limitation upon the number of Negro names had not been established. The Court distinguished the *Cassell* case, where the jury commissioners had consistently placed only one Negro name on each of twenty-one successive grand jury lists.

Several guiding principles stand out in Justice McCaleb's concise analysis of this point. It is inevitable that the jury commissioners will be conscious of the color line, and they should not be charged with fault in making a forthright effort to provide adequate Negro representation. While it is not necessary to afford a full mathematical proportion of Negro veniremen, the purposeful inclusion of a token number of Negroes on the various jury lists would constitute a violation of the "equal protection" requirements as interpreted in the *Cassell* case. The small proportion of Negro names on the general venire list of three hundred came very close to such a token representation. However, the facts of the case indicated that the jury commissioners had honestly and conscientiously attempted to secure a fair Negro representation. The low percentage of names actually found on the various lists had resulted from the fact that a large percentage of the otherwise available Negroes were ineligible by reason of illiteracy. It is inevitable that such special factors as illiteracy and the inability of Negro wage earners to leave their jobs for jury service will result in a rather small mathematical proportion of Negro veniremen—and this despite a conscientious effort to secure a fair representation of qualified Negroes.

Another point in the *Cassell* case which was indirectly raised in *State v. Green* was Justice Reed's statement that racial discrim-

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25. The parish population consisted of 5,871 whites and 8,515 Negroes.
26. See *State v. Dorsey*, 207 La. 928, 22 So. 2d 273 (1945), where the mathematical percentage was low despite the fact that the jury commissioners had obtained special lists of Negro names from colored insurance companies and fraternal organizations.
ination may be established entirely by the exclusion of Negro names from the jury lists for a single case, and does not depend upon systematic exclusion continuing over a long period and practices by a succession of jury commissioners. Applying the converse of this principle, the trial judge in State v. Green had refused evidence that discrimination had been practiced in the parish for the past several years. While agreeing that the practices of past years are "generally of high relevance" in establishing systematic racial exclusion, the Louisiana Supreme Court agreed with the trial judge's holding that past practices in the parish were irrelevant in view of the special circumstances of the Green case. There the commissioners had adopted a new method of jury selection for the express purpose of avoiding discriminatory practices of the past. It is only where there is a continuing method of jury selection that evidence of past practices are "of high relevance" in determining the issue of systematic exclusion.

JURORS—CHALLENGE FOR BIAS OR PREJUDICE

The defendant's right to trial by an impartial jury is a very sacred one which receives specific recognition by Louisiana Constitution and statutes. At the same time it has been construed in a very practical manner. Widespread newspaper publicity concerning important criminal cases has rendered it almost impossible to select a jury from those who have no preconceived notion of the case. Thus it is expressly provided in Article 351 of the Code of Criminal Procedure that "An opinion as to guilt or innocence of the accused, which is not fixed, or has not been deliberately formed, or that would yield to the evidence, or that could be changed, does not disqualify the juror." In State v. Stroud the Supreme Court followed its previous holding that members of the jury panel are not automatically disqualified by having been in the courtroom and heard much of the evidence in the case against a co-defendant who had been separately tried. The juror in question had testified on voir dire examination that while he had formed an opinion from the evidence heard, that opinion was not fixed and he would readily yield to the evidence adduced at the trial. Under those circumstances the Supreme Court upheld

29. 220 La. 806, 57 So. 2d 691 (1952).
the trial judge's refusal to discharge the juror. Considerable discretion is vested in the trial judge who has had the benefit of hearing the juror's voir dire examination. His determination of whether the prospective juror's previous knowledge of the case has created a fixed opinion that would influence his verdict is usually sustained by the Supreme Court.

In *State v. Oliphant*, however, the Supreme Court set aside a murder conviction because the trial judge overruled defense counsel's challenge for cause of two prospective jurors who had revealed a fixed opinion of the defendant's guilt upon voir dire examinations. Although the jurors stated that the opinion which they had formed by reading and hearing about the case was not fixed and that they could come into the trial with an open mind, further interrogation by defense counsel indicated that the jurors would actually enter the case with an initial belief of guilt and that they would require evidence of innocence to change that opinion. When questioned by the court, the jurors stated that they understood and would adhere to the general rule that the state has the burden of proving guilt beyond a reasonable doubt. Possibly the jurors actually entertained a present opinion of guilt which was such as to destroy their ability to decide the case impartially. Possibly they were merely confused by the astute questioning of defense counsel. This risk, however, was not one to which the accused should be required to submit. There was no assurance when the jumbled and somewhat contradictory answers of the prospective jurors were analyzed that their decisions would be solely controlled by the evidence adduced at the trial. After reviewing a transcript of the voir dire examinations, the Supreme Court held that the trial judge committed a reversible error in not sustaining the challenge for cause of these two prejudiced (or confused) jurors. The defendant's rights to an impartial jury and to a presumption of innocence are clearly violated when he is placed on trial before jurors who admit that their already formed opinions of guilt will continue until changed by evidence submitted by the defense.

The prejudice which will render a juror subject to challenge

31. The fact that the prospective juror had heard the reading of a guilty verdict against the previously tried co-defendant would normally result in an inference of the defendant's guilt. However, in the case at bar, each defendant was seeking to establish his innocence by shifting responsibility to the other. Under those circumstances the hearing of the jury verdict in the companion case would tend to create an inference of the defendant's innocence rather than one of his guilt.

32. 220 La. 489, 56 So. 2d 846 (1952).
for cause must relate specifically to the defendant or to the charge being brought against him. In State v. Martinez the defendants, charged with burglary, sought to challenge a prospective juror on the ground that his place of business had been burglarized four times. On voir dire examination the juror had stated that his prior unfortunate experiences would not prejudice him against these particular defendants. On appeal the Supreme Court held that the trial judge had properly overruled the challenge of this juror for cause. In the absence of evidence of specific prejudice against the defendants, it was not enough to show that the juror had reason to be antagonistic to burglars in general. In so ruling Justice Ponder stated "There is nothing in the testimony of the juror nor evidence to show that the juror is prejudiced against the defendants. We cannot assume that he is biased against the defendants merely because his place of business has been burglarized." The only previous Louisiana decision in point is State v. Allen. In that case a Negro defendant was charged with the murder of a white man, and the Supreme Court held that "[t]he mere fact, if it be true, that the father of one of the jurors was killed by a Negro, and the further fact that the accused was a Negro would not disqualify that juror from serving on the jury." The Allen decision is not on all fours, since the objection to the juror was first discovered after conviction and was raised in a motion for a new trial. Also there was no allegation or proof that the prior killing of the juror's father was a felonious homicide. However, the opinion does give definite support to the idea that a juror is not automatically disqualified on the ground of prejudice because he has reason to be antagonistic to criminals whose offenses are similar to that charged against the particular defendant.

**FORMER JEOPARDY**

Where a crime continues through two or more parishes the offender may be prosecuted in either parish, but there can be only one prosecution for the offense. In State v. Sawyer, the defendant's offense of drunken driving had taken place in two parishes. Defendant Sawyer, a resident of Oak Grove in West Carroll Parish, had driven over to Lake Providence, in adjoining

33. 220 La. 899, 57 So. 2d 888 (1952).
34. 220 La. 899, 909, 57 So. 2d 888, 891.
35. 203 La. 1016, 1024, 14 So. 2d 821, 823 (1943).
37. 220 La. 932, 57 So. 2d 899 (1952).
East Carroll Parish, where he engaged in some heavy drinking. While driving his Buick car at an excessive rate of speed on the return trip to Oak Grove, he ran into two cars parked on the highway. As a consequence he was arrested on a warrant issued by a Justice of the Peace of West Carroll Parish where the accident occurred, and charged with operating a vehicle while intoxicated. Upon his release, after making bond, the still inebriated defendant proceeded in a Ford pick-up truck toward Lake Providence where he was to join friends for a fishing trip. Based on the above stated activities, two charges were filed against Sawyer in West Carroll Parish. A bill of information was filed charging him with driving his Buick automobile while intoxicated. The grand jury indicted him for operating the Ford truck while in like condition.

Sawyer must have believed that the authorities in his home parish (West Carroll) would deal severely with him on the drunken driving charge. Prior to the filing of the information and indictment in West Carroll Parish, but subsequent to his original arrest in that parish, he procured the filing of a drunken driving charge against himself in East Carroll Parish. When brought to trial in the apparently more favorable atmosphere of the latter parish, Sawyer pleaded guilty and was sentenced to pay a fine of $125. Later, when the two charges of drunken driving came up for trial in West Carroll Parish, he filed pleas of former jeopardy, relying on the rule that there can be only one trial for a continuing crime. However, the artificially created former jeopardy pleas fell short of their intended effect and were overruled by the trial judge. Thereupon the defendant was convicted on both charges of drunken driving and sentenced to sixty days in the parish jail for each offense.

The Louisiana Supreme Court reviewed the case on a writ of certiorari, but refused to set aside the dual convictions. Two interesting former jeopardy principles were involved in the decision. First, the prior trial in East Carroll Parish could not be urged as a bar to the West Carroll prosecutions, since the East Carroll court had been without jurisdiction to try the defendant. The prior arrest in West Carroll Parish had given the court in that parish exclusive plenary control of the case. It is a well settled principle of criminal procedure that to constitute former

jeopardy the court in which the first trial took place must have had jurisdiction.\(^9\)

Secondly, the Supreme Court upheld the convictions on two separate charges of drunken driving despite the fact that they had both been committed in connection with a single drinking spree. The charge of drunken driving in connection with the operation of the Buick car had ended, according to the court, with the accident which occurred just outside of Oak Grove. That was one crime. The driving of the Ford truck, although the same drunken condition may have continued throughout, began an hour or two after the wreck of the Buick car. It was characterized as "an entirely different project, wholly disconnected from the other offense." It is interesting to conjecture as to whether the time interval or the fact that different cars were driven played the greater part in the court's conclusion that two separate offenses of drunken driving had been committed. Probably the time element was most significant. If, immediately after wrecking his Buick car, the defendant had continued on his inebriated way in the Ford truck, it might very logically have been insisted that the whole affair constituted but one crime and that a dual prosecution would constitute double jeopardy.

**INSANITY DEFENSE—HEARING AND LUNACY COMMISSION**

In *State v. Bentley*\(^{40}\) defense counsel was relying on the dual insanity defenses—insanity at the time of the crime as a complete defense, and present insanity as a bar to present trial. The motion for a lunacy commission was supported only by general conclusions as to the effects of an early head injury to the accused. Based upon the insufficiency of these recitals, and the trial judge's interrogation of the accused in his private chambers, the judge ruled that the appointment of a lunacy commission was unnecessary. In upholding the trial judge's refusal to appoint a lunacy commission, the Supreme Court stressed the fact that the appointment of a lunacy commission to examine the mental condition of the accused is clearly discretionary with the trial judge, "and his ruling in this respect is never disturbed on appeal except where it has been manifestly abused."\(^{41}\) If evidence submitted in support of the motion had raised a substantial doubt as to the defen-

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dant's present ability to understand the nature of the proceedings against him or to assist in his defense, the court's refusal to appoint a lunacy commission and hold a hearing would have constituted an abuse of judicial discretion and grounds for reversal. 42

IMPROPER REMARKS BY DISTRICT ATTORNEY

Several 1951-1952 cases required a rather complete judicial re-examination of the scope of permissible comment by the prosecution. In State v. Hoover 43 the Supreme Court reaffirmed the "settled jurisprudence" that "any comment of the district attorney, the result of which would be to direct attention of the jury to the failure of the defendant to testify, is so inherently prejudicial an error that it cannot be cured by the trial court's instructions to the jury to disregard what they have heard." 44 In so holding, Justice Moise reviewed the jurisprudence and authorities which have recognized this rule as a logical inference implementing the defendant's constitutional right against self-incrimination. 45 Justice Hawthorne filed a vigorous dissent, based partially upon the contention that the draftsman of the 1928 Code of Criminal Procedure had "deliberately omitted" any provision forbidding district attorney and court to discuss and comment on the defendant's failure to testify. The intent to permit such testimony was specifically evidenced by the commissioners' notes. 46 This phase of Justice Hawthorne's dissenting opinion is, however, completely and logically refuted by a careful analysis of the legislative history of this problem in Chief Justice Fournet's scholarly opinion in State v. Bentley. 47 The Chief Justice points out that the redactors of the Code of Criminal Procedure had sought to carry out their avowed intention by special provisions in Articles 384 and 385 which would have expressly recognized the right to comment on the failure of the accused to testify. However, the Legislature rejected this recommendation and deleted the provisions inserted to accomplish that purpose. Thus the legislative intent to reject the redactors' proposal and to adhere to the existing rule forbidding such comment was clear.

One may raise a query as to whether the Louisiana Supreme

42. State v. Gunter, 208 La. 694, 23 So. 2d 305 (1945).
43. 219 La. 872, 54 So. 2d 130 (1951).
44. 219 La. 872, 875, 54 So. 2d 130, 131.
45. See Comment, 10 LOUISIANA LAW REVIEW 486 (1950).
46. 219 La. 872, 887, 54 So. 2d 130, 135 (1951).
47. 219 La. 893, 54 So. 2d 137 (1951).
Court would uphold a statute which, as unsuccessfully proposed by the 1928 commissioners, would expressly authorize comment to the jury upon the defendant's failure to take the stand. There is language in Chief Justice Fournet's opinion in the Bentley case indicating a belief that such a provision might be unconstitutional. Justice Moise, writing the majority opinion in the Hoover case, announces the rule prohibiting comment as "settled jurisprudence which stems from the Constitution." However, those statements must be construed in the light of the issues actually presented, that is, an effort to find the proper rule in the absence of an express statutory provision. It is very doubtful that a majority of the Supreme Court would declare such an express statutory authorization unconstitutional. At least we can be sure that Justice Hawthorne would spearhead the defense of such a statute.48

Since it is clearly settled that comment on the failure of the accused to take the stand constitutes reversible error, let us next view these cases to see what will constitute such comment. In State v. Bentley the district attorney's remark that "that evidence is uncontradicted and uncontroverted"49 was held proper—being only a general statement of the prosecution's appreciation of the evidence adduced at the trial. In State v. Martinez50 the district attorney, in his opening statement in a burglary case, declared "Where was Louis Bommarito that night? Nobody knows but Louis Bommarito and the police officers." In holding that this did not constitute a direct or indirect comment on the defendant's failure to testify, the Supreme Court stressed the fact that the defendant could establish his whereabouts by other means than his own testimony. The purpose of the question, reasoned the Supreme Court, was to emphasize generally the weakness of the defendant's explanation of his whereabouts at the time of the crime.

In State v. Hoover,51 however, the court held that prejudicial error was committed when the district attorney remarked that the manner in which the defendant observed and discussed with

48. Justice Hawthorne pointed out that today the accused is permitted to testify. Then he significantly stated, "as a rule only professional criminals with records avail themselves of the privilege of staying off the witness stand." Dissenting opinion in State v. Hoover, 219 La. 872, 887, 54 So. 2d 130, 135 (1951).
49. 219 La. 893, 897, 54 So. 2d 137, 138.
50. 220 La. 896, 913, 57 So. 2d 888, 893 (1952).
51. 219 La. 872, 54 So. 2d 130 (1951).
counsel certain photographs of the scene of the crime, showed that he was familiar with the actual scene of the crime. That remark, according to Justice Moise, put the defendant on the spot and fixed him as having been at the scene of the crime. It forced him to take the stand to dispel the inference created. Justice Hawthorne, again dissenting, based his decision partly on a factual conclusion that the declaration did not amount even to an indirect comment on the defendant's failure to take the witness stand. Justice Hamiter also agreed that the remarks made no reference, either directly or indirectly, to the defendant's failure to testify. It is submitted that it is difficult to distinguish the comment in the Hoover case from that which was held proper in State v. Martinez.

Thus we come to a second, sometimes overlapping, issue which was discussed in this group of cases. In State v. Hoover Justices McCaleb and Hamiter disagreed with Justice Moise's conclusion that the district attorney's statement amounted to a comment on the failure of accused to testify. However, they concurred in the finding that reversible error had been committed, positing their conclusion on the requirement of Article 318 of the Code of Criminal Procedure that counsel "must confine themselves to matters as to which evidence has been received." They held that the district attorney's comment on the defendant's demeanor when the photographs were exhibited constituted a comment on evidence not adduced at the trial. The defendant's presence in the court was not as a witness. Thus the statement was either a prohibited statement of personal opinion or a violation of the defendant's privilege against self-incrimination, or both.

Another question concerning opinion statements was presented in State v. Cascio\(^5\) where defendant appealed from a conviction of receiving stolen things. In his closing argument an attorney associated with the prosecution had stated that he had worked with the state from the beginning and "was convinced that the accused was involved in the matter." It was evident that the statement was based upon evidence \textit{aliunde} the trial, but the conviction was affirmed on the basis of a technical distinction. "For the accused to be involved in the matter," declared Justice Hawthorne, "does not necessarily mean that he is guilty of the crime charged. One could, for instance, receive stolen property

\(^5\) 219 La. 819, 54 So. 2d 95 (1951).
in good faith and without knowing or having reason to know that it was stolen, and under such circumstances he would be 'involved in the matter' although not guilty of the crime denounced by the Statute.' On rehearing, Justice McCaleb re-examined the case and concluded that the statement did import an opinion of guilt. Looking to a normal construction of counsel's words and considering the circumstances of their utterance, they would convey an impression to the jury that counsel was convinced of defendant's guilt. Such a statement of guilt, when not based upon evidence adduced at the trial, would fall squarely within the prohibition of Article 381. This conclusion as to the nature of the statement was also concurred in by Justice Hamiter, who dissented for other reasons. On this point it seems that the test applied by Justice McCaleb is a correct one. The statement must be judged by its natural effect upon the jury. Would they construe it as expressing a conviction that the accused was criminally involved?

Another somewhat novel question was involved in the Cascio case. While Justices Hawthorne and McCaleb differed as to whether the statement by prosecution counsel expressed a belief in the guilt of the accused, they agreed that the defendant was not in a position to object since defense counsel had brought on the statement by accusing the associate counsel of being in the case for mercenary motives. According to their view the statement was a "reasonable explanation" of the associate counsel's presence in the case—that is, that he was associated in the case because of belief of guilt, rather than to enhance the possibilities of a civil recovery of the value of the stolen property from the accused. Dissenting Justice Hawthorne felt that a reasonable explanation of the associate counsel's presence on the case did not require an expression of his opinion of the defendant's guilt. Actually a very close case was presented on this issue. It would appear that the challenging of the associate prosecutor's motives should not give him a free reign to disregard the fundamental requirements and safeguards of Article 381.

**Responsive Verdicts**

Article 405 of the Code of Criminal Procedure provides, "The verdict must be responsive to the indictment, that is to say no one can be found guilty of an offense not charged in the indictment or not necessarily included in the offense included. . . ."

53. 219 La. 819, 822, 54 So. 2d 95, 96.
The 1948 Responsive Verdict Statute,\textsuperscript{54} which spells out the appropriate responsive verdicts, embraces many of the important general crimes found in the Criminal Code. In all other cases, the lesser and "necessarily included" offenses are determined by well-settled tests evolved by the jurisprudence.\textsuperscript{55} In addition to the requirement that the offenses must be of the same general class, all essential elements of the lesser and included crime must be included in the definition of the offense charged.\textsuperscript{56} This test was logically applied in \textit{State v. Robinson}\textsuperscript{57} where the accused had been charged with unlawful possession of narcotics.\textsuperscript{58} The court held that "guilty of the attempted possession of a narcotics drug" was an appropriate responsive verdict, since an attempt is specifically defined in Article 27 of the Criminal Code as a "lesser grade of the intended crime."\textsuperscript{59} However, "guilty of being an addict" was treated as a separate and distinct offense, and hence not appropriate as a responsive verdict to the charge of unlawful possession of narcotics. Although both offenses are made criminal by the same general narcotics statutes,\textsuperscript{60} "being a drug addict" did not meet the test of a lesser and included offense. The basis of the Supreme Court's decision is nicely epitomized in Chief Justice Fournet's concluding statement: "Clearly the offense of possessing narcotics, as defined in the act under which the defendant was charged, . . . [is] neither included in, nor does it in fact have, any of the elements of the crime of being an addict."\textsuperscript{61}

\textbf{SENTENCING—TWENTY-FOUR HOUR DELAY}

Article 521 of the Code of Criminal Procedure requires that "at least 24 hours shall elapse between conviction and sentence, unless the accused waive the delay and ask for the imposition of sentence at once." While this waiver of delay need not follow the exact language of Article 521,\textsuperscript{62} it must be expressly declared. In \textit{State v. Woods}\textsuperscript{63} the mere failure to object to the immediate imposition of sentence did not have the effect of waiving the

\textsuperscript{54} La. R.S. 1950, 15:386.
\textsuperscript{55} Comment, 5 \textit{Louisiana Law Review} 603 (1944).
\textsuperscript{56} State v. Roberts, 213 La. 559, 35 So. 2d 216 (1948).
\textsuperscript{57} 58 So. 2d 408, 414 (La. 1952).
\textsuperscript{58} La. R.S. 1950, 40:961 et seq.
\textsuperscript{59} La. R.S. 1950, 14:27, applied in \textit{State v. Brown}, 214 La. 18, 36 So. 2d 624 (1948), where attempted murder was held responsive to a murder charge.
\textsuperscript{60} La. R.S. 1950, 40:961 et seq.
\textsuperscript{61} 220 La. 162, 55 So. 2d 902 (1951).
\textsuperscript{62} State v. Martin, 199 La. 39, 5 So. 2d 377 (1941), finding a sufficient waiver where the defendant stated that she was "ready for immediate sentence."

\textsuperscript{63} 220 La. 162, 55 So. 2d 902 (1951).
twenty-four hour delay. Resulting prejudice was shown from the fact that defendant's motion for a new trial, a motion which must be filed between verdict and sentence, was summarily overruled as coming too late. The Supreme Court's theory, in setting aside the sentence and remanding the case to the trial court for a consideration of the defendant's motion for a new trial, was that the sentence imposed without a twenty-four hour delay or waiver "was premature and therefore void." Compare, however, the situation in State v. George, decided at the prior term of court. There the trial judge, after imposing sentence without the prescribed delay, had granted defense counsel additional time and had fully considered a motion in arrest of judgment which was overruled on its merits. While an error had been committed by the hasty sentence, it was not a ground for reversal since no probable miscarriage of justice or prejudice to substantial rights of the accused had resulted.

**Suspension of Misdemeanor Sentences**

In State v. Johnson a defendant who had been convicted of false registration was given the following sentence: "I sentence you, Jesse Johnson, to serve six months in the Parish Jail, subject to work, and suspend all of the same except three months thereof, upon good behavior." In arguing that a suspension of the whole sentence had resulted, defense counsel relied on Cox v. Brown, where the Supreme Court had construed Article 536 of the Code of Criminal Procedure as authorizing only an entire suspension of sentence. In that case, the court had held that suspension of forty days of a ninety day sentence operated to suspend the entire sentence, with the attempted limitation to forty days being ineffective. This windfall of a complete suspension of sentence had never been contemplated by the sentencing judge.

The Supreme Court, however, refused to carry the principle of the Cox v. Brown decision beyond the facts of that case. While restating its previous ruling that Article 536 does not authorize a partial suspension of sentence, the court refused to treat the judge's action as an entirely suspended sentence. It held that

64. La. R.S. 1950, 15:505.
67. 220 La. 64, 55 So. 2d 782 (1951).
68. 211 La. 235, 29 So. 2d 778 (1947).
the proper remedy, where the judge had sought to impose a partial suspension of sentence, was to remand the case to the district court for imposition of a legal sentence. Cox v. Brown was distinguished on the highly technical ground that the original sentence imposed had been a legal one and the only question presented in that case was the effect of a subsequent order purporting to suspend a portion of the sentence remaining to be served.

Whether the opinion in the Johnson case distinguishes or partially overrules Cox v. Brown, the result is certainly a preferable one. If the Supreme Court is wedded to the idea that Article 536 precludes a partial suspension of sentence, it is much better to remand the case for resentencing than to permit defense counsel to take advantage of the trial judge’s error and secure an entire suspension of sentence, a result which was never intended by the trial judge. In view of the Johnson decision, it is probable that where future sentences erroneously provide for partial suspension, defendants will serve out those sentences according to their terms—feeling that half a loaf is better than none.69

The basic purpose of the suspended sentence is to enable a trial judge to adjust the sentence to the exigencies of the case at hand. Frequently, it is advisable to release a prisoner for a short time due to his critical illness or because of an emergency situation in his family. This can best be done by a partially suspended sentence. It would appear that Article 536 could logically be construed as authorizing a partial suspension of sentence, since the power to suspend the entire sentence should include the power to suspend a portion thereof. This provision is one operating to the advantage of the accused, and so there is no reason to apply a rule of strict construction. However, in view of Cox v. Brown and State v. Johnson, an amendment of Article 536 will probably be necessary to achieve this end.

HABITUAL OFFENDERS—DRUNKEN DRIVING

The misdemeanor of operating a vehicle while intoxicated does not come within the general habitual offender law,70 which applies only to multiple felony convictions. However, Article 98 of the Criminal Code,71 defining that offense, specifically provides a more severe penalty for the second conviction. In State v.

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69. After the Johnson case was remanded for resentencing, the trial judge imposed an unsuspended six months sentence.
70. La. R.S. 1950, 15:529.1.
71. La. R.S. 1950, 14:98.
Duncan the defendant had been convicted in the city court of operating a vehicle while intoxicated in violation of Article 98. He had been sentenced as a second offender on the basis of a prior conviction of drunken driving in violation of a Baton Rouge city ordinance. In remanding the case for resentencing of the defendant as a first offender, the Supreme Court held that violation of a city ordinance prescribing a similar offense could not be counted in fixing a second offender status. Reading Article 98 in its entirety, the court appropriately concluded that only prior convictions under that article are to serve as a basis for the enhanced penalties provided. As a make-weight argument, Chief Justice Fournet pointed out that "a statute authorizing a more severe punishment to be inflicted upon one convicted of a second or subsequent offense is highly penal, and should be strictly construed and not extended in its application to cases which do not by the strictest construction come under its provisions." In this regard, the general habitual offender statute is of a much broader application. It expressly applies to any prior felony convictions, whether they be for Louisiana, federal, or foreign crimes. Also the prior felony convictions need not be for the same crime as that for which the offender stands currently convicted. For example, in the recent case of State v. George the defendant was sentenced as a sixth offender on the basis of five previous felony convictions distributed among the states of Louisiana, Tennessee and Ohio, and ranging from automobile theft to burglary.

NEWLY DISCOVERED EVIDENCE

Where a motion for a new trial is based on newly discovered evidence, the requirements of Article 511 of the Code of Criminal Procedure must be fully complied with. Among these prerequisites is a showing "that said evidence is not merely cumulative; that it does not merely corroborate or impeach the credibility or testimony of any witness examined at the trial ...." In State v. Washington the principal ground for overruling the defendant's motion had been that the testimony of the two newly discovered witnesses merely tended to corroborate the defendant's own

72. 219 La. 1030, 55 So. 2d 234 (1951).
73. 219 La., 1030, 1033, 55 So. 2d 234, 235.
75. 218 La., 18, 48 So. 2d 265 (1950), discussed in The Work of the Supreme Court for the 1950-1951 Term, 12 LOUISIANA LAW REVIEW 179 (1952).
76. 220 La. 963, 58 So. 2d 195 (1952).
explanation of his presence at the scene of the crime at the time of his arrest. Whether the language quoted from Article 511 should be construed to mean that new evidence is "cumulative" if it merely corroborates the defendant's own unsupported testimony is highly doubtful. Actually the trial judge's refusal to grant a new trial could be, and was, amply supported by the further finding that the new evidence related to a minor matter and was not "so material that it ought to produce a different result from the verdict reached"—another requirement of Article 511. In reviewing this decision it is well to remember that new trials on the ground of newly discovered evidence are not favored. Also, the trial judge has a wide discretion in such cases and his refusal to sustain a motion will not be reversed unless that discretion has been "arbitrarily abused."

Supervisory Jurisdiction of Supreme Court

The Louisiana Supreme Court has consistently and very properly taken the view that its supervisory jurisdiction, granted by Sections 2 and 10 of Article VII of the Louisiana Constitution, is a plenary power which prevails over any special statutory limitations on appellate review. For example, in State v. Doucet the Supreme Court granted supervisory writs for immediate review of an order refusing to recuse the trial judge, despite the express provision of Article 312 of the Code of Criminal Procedure that no such ruling should be reviewable before sentence, either under the Supreme Court's appellate or supervisory powers. This principle was recently applied in State v. Bowie. The Supreme Court issued supervisory writs and reviewed the ruling of the Orleans Parish Criminal District Court, which had improperly sustained a motion in arrest of judgment and had set aside a conviction for violation of the penal provisions of the 1944 Chattel Mortgage Act. Since no sentence had been imposed and no question of constitutionality was raised, there was no special basis upon which the Supreme Court would have appellate review of the order setting aside this misdemeanor conviction.

78. State v. Saba, 203 La. 881, 14 So. 2d 751 (1943), containing a fine summation of what must be shown in order to secure a new trial on this ground.
79. 199 La. 276, 5 So. 2d 894 (1942).
80. 221 La. 41, 56 So. 2d 415 (1952).
82. Section 10 of Article VII of the Louisiana Constitution limits the appellate jurisdiction of the Louisiana Supreme Court to cases involving a question of the "legality or constitutionality" of the penalty imposed or "where a fine exceeding $300 and imprisonment exceeding six months have been actually imposed."
Thus the review of the district court’s ruling was under the Supreme Court’s general supervisory jurisdiction. The writs granted in the Bowie case do not set any precedent for the Supreme Court’s acting as a general court of last resort for minor criminal matters. Here was a case where there were special and compelling reasons for an exercise of the exceptional supervisory jurisdiction. An opportunity was presented to clarify the law relating to the effect of the general saving clause which had been enacted to do away with so-called “legislative pardons.”\(^8\) The district court’s erroneous ruling had thwarted justice, resulting in the complete discharge of a properly convicted defendant. If writs for supervisory review had not been issued the state would have been completely remediless.

A less compelling situation was presented in State v. Bradford\(^4\) where the Supreme Court granted writs to review the decision of a trial judge who had improperly overruled a plea of prescription. Justice Hawthorne dissented from the procedure followed on the ground that the defendant should have been relegated to his normal remedy of appeal after trial and conviction. “The reason for the rule and policy of the [supreme] court in refusing to pass upon a case of this nature in the past,” declared Justice Hawthorne, “has been that the granting of such a writ necessitated the trial of criminal cases piecemeal, and a criminal prosecution would in effect be endless if a defendant could stop the proceedings against him at every stage of the trial at which a ruling is made against him,—on a plea of prescription, plea of unconstitutionality of a statute, motion to quash, etc. I see no reason for making an exception to the rule in this case.”\(^5\) Probably the majority of the court were of the opinion that the novelty of the issue presented, plus the special circumstance that the original record of the case failed to show who was at fault in delaying the prosecution, justified the exceptional relief granted. The Bradford decision may unduly encourage defense counsel to seek writs for immediate review of adverse preliminary rulings. However, the Supreme Court was exercising a completely discretionary power, and hence this one holding does not establish any general precedent for such relief.

84. 219 La. 1090, 55 So. 2d 255 (1951).
85. 219 La. 1090, 1094, 55 So. 2d 255, 256.