Legislation Affecting Criminal Law and Procedure

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CRIMINAL LAW

Criminal Mischief

"The felling, topping, or pruning of trees or shrubs within the right of way of a state highway, without the prior written approval of the director of the department of highways" is added to the list of acts that constitute criminal mischief by Act 232.1

Theft of Livestock

Act 154 amends the penalty provisions of the livestock theft article2 to provide for imprisonment "at hard labor for not less than one nor more than ten years." Prior to this act the sentencing judge had very little discretion in imposing a sentence, the penalty being imprisonment with or without hard labor "for not less than three years nor more than five years." The severity of the high minimum sentence of the original livestock theft statute has been pointed out in a previous issue of this Review.3 There, it was suggested that it was possible to circumvent the harsh penalty by prosecuting under the general theft article.4 Also, probation was available at the discretion of the sentencing judge.5 It is also significant that the penalty clause now provides for imprisonment "at hard labor," whereas the original statute provided for imprisonment "with or without hard labor." This change was evidently made for the purpose of avoiding mistrials caused by "hung juries." Under the present constitutional6 and

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4. This suggestion was approved in State v. Hamlet, 219 La. 278, 52 So.2d 852 (1951).
6. LA. Const. art. VII, § 41.
statutory provisions, the verdict of the five-man jury which tries the relative felony (with or without hard labor) cases must be unanimous, while the verdict of the twelve-man jury which tries the serious felony (necessarily hard labor) cases only requires concurrence of nine jurors. The ultimate remedy, of course, is not to alter penalty clauses of individual crimes. It is to amend the Constitution so as to eliminate the anomalous requirement of a unanimous verdict in relative felony cases. An appropriate verdict requirement, consistent with that of the twelve-man juries, would be a four out of five verdict. The Louisiana State Law Institute Project of a Constitution for Louisiana provides for an eight-man jury, with six jurors concurring in the verdict, for this class of cases.

Issuing Worthless Checks — Penalties

The 1954 Legislature amended the penalty provisions of the worthless check article to provide for imprisonment “with or without hard labor” when the amount of the check was less than $100.00, and for imprisonment “without hard labor” when the amount of the check was $100.00 or more. It was certainly incongruous that a charge of issuing a worthless check of less than $100.00 would be a relative felony requiring a jury trial unless waived, whereas, the greater offense of issuing a worthless check of an amount exceeding $100.00 would be a misdemeanor triable only by the judge. This anomalous result has been explained as an inadvertent error occasioned by a committee amendment deleting the words “with or” from the wrong penalty provision.

The worthless check article was re-amended by Act 156 of 1956, so as to correct the error in the penalty clause and to accomplish the original legislative purpose of bringing the penalty clause of the worthless check article into substantial conformity with the penalty clause of the general theft article. Issuing worthless checks is now effectively graded according to the amount of the check given, with classifications of “one hundred

8. Art. VI, § 32.
10. LA. Const. art. VII, § 41.
dollars or more," "between twenty and one hundred dollars," and "twenty dollars or less."

**Indecent Behavior with Juveniles**

The penalty for indecent behavior with juveniles was doubled in the 1956 session by Act 450, with the maximum penalty being raised to one thousand dollars fine, or two years imprisonment, or both.

**Illegal Carrying of Weapons**

Act 345 enlarges the definition of illegal carrying of weapons to include the intentional concealment on one's person of any instrumentality "intended for use" as a dangerous weapon. Previous to this act, only instrumentalities, "customarily used" as dangerous weapons, were within the prohibition against carrying concealed weapons. The extended definition would now cover the offender who carries an ice pick, a straight razor, or a large knife, not customarily used as a dangerous weapon, under circumstances clearly indicating an intent to use it as such. Act 345 specifically exempts sheriffs, deputy sheriffs, city police, constables, town marshals, and "persons vested with police power, when in the actual discharge of official duties" from the prohibitions of the illegal carrying of weapons crime.

**Drunken Driving Statute**

Criminal Code article 98, prior to Act 122, made the operation of a vehicle while "under the influence of intoxicating liquor or narcotic drugs" a criminal act. That article is amended by Act 122 for the obvious purpose of overruling any limitations which the recent Louisiana Supreme Court decision in *State v. Viator* may have placed upon it. The *Viator* case held that beer and other fermented beverages were not "intoxicating liquor" within the meaning of Criminal Code article 91, which forbids the sale of intoxicating liquor to minors. The legislative defini-

15. In State v. Davis, 214 La. 885, 39 So.2d 164 (1950) it was held that a "large knife" was not customarily used as a dangerous weapon. This case is discussed by the writer in *The Work of the Louisiana Supreme Court for the 1948-1949 Term — Criminal Law*, 10 *Louisiana Law Review* 198, 205 (1950).
tion of the phrase "intoxicating liquor" as found in the Liquors —Alcoholic Beverages Title of the 1950 Revised Statutes\textsuperscript{17} was the basis of the decision. The word "liquor" is therein defined as "any distilled or rectified alcoholic beverage." A number of arguments may be advanced against the use of this definition to limit the meaning of the words "intoxicating liquor," where that phrase is used in other titles of the Revised Statutes. In the first place, the definitions in Title 26 were specifically declared to be "for the purposes of this chapter."\textsuperscript{18} Secondly, the provisions of that title, dealing with the licensing and regulation of traffic in alcoholic beverages, are not in pari materia with such unrelated materials as the Criminal Code provisions of Title 14. Thirdly, the obvious meaning of the phrase "intoxicating liquor," where it is used in other titles of the Revised Statutes, such as the criminal law title, is beverages from which the drinker can become intoxicated. While it may be argued, as stated above, that the definition of "intoxicating liquor" in the alcoholic beverages title was intended for that title only, the Viator case has settled the issue. It clearly and unequivocally held the alcoholic beverages title definition applicable throughout the Revised Statutes. As was pointed out in Justice Hawthorne's dissenting opinion, this would lead to the absurd result that no matter how much beer a person drank, immediately prior to operating a vehicle, he could not be prosecuted under the drunken driving statute.\textsuperscript{19} The 1956 Legislature has corrected this situation by using the broader term "alcoholic beverages" in place of "intoxicating liquor." Article 98 now makes it a criminal act to operate a vehicle while under the "influence of alcoholic beverages or narcotic drugs." This should provide full protection, for the court in the Viator case said, "From these sections it is clear that the words 'alcoholic beverages' include beer as well as intoxicating or spirituous liquors."\textsuperscript{20}

**Dual Office Holding**

Act 291 amends article 137 of the Criminal Code so as to exclude "law clerks and stenographers employed by judges of a court of record" from the crime of dual office holding.

\begin{footnotes}
\item[18] LA. R.S. 26:2 (1950).
\item[19] 229 La. 882, 899, 87 So.2d 115, 122 (1956).
\item[20] Id. at 891, 87 So.2d at 119 (1956).
\end{footnotes}
Miscellaneous New Crimes

Act 1982\(^1\) prohibits dumping of trash on land adjacent to a road, on roadside parks, or on the right-of-way without the consent of the owners or the Director of Highways. The operation of a vehicle in such a manner or condition that its contents can blow or fall out is also prohibited by this act. A penalty of $25.00 to $100.00 or imprisonment for not more than thirty days or both will be imposed for violations. This act represents a laudable effort to enhance the beauty of our highways.

Narcotic Law—Penalties

In 1951 the basic penalty for violations of the narcotic law was raised from “not less than twenty months nor more than five years” to “not less than ten nor more than fifteen years.”\(^2\) The penalty for the sale of narcotics to minors was imprisonment for “not less than twenty nor more than thirty years.” In 1954 an amendment to the penalty section brought about a reduction of the minimum penalties to two years of imprisonment in the usual cases and to ten years of imprisonment in cases of sales to minors, without a change in the maximum penalty.\(^3\)

The 1956 Legislature produced another substantial revision of the penalty provisions of the narcotic laws. In Act 84 a penalty which varies not only according to the age of the vendee of the narcotics but also according to the age of the vendor was formulated. When the vendor is over twenty-one and the vendee is less than twenty-one, the penalty is “not less than thirty years nor more than ninety-nine years.” When both the vendee and vendor are over twenty-one, the penalty is “not less than ten years nor more than fifty years.” However, if the vendor is less than twenty-one, the penalty is “not less than five years nor more than fifteen years,” regardless of the vendee’s age. In each of these situations, Act 84 deprives the offender of the “benefit of parole, probation or suspension of sentence.”

The severe and Draconian penalties can scarcely be attacked on the constitutional ground of imposing “cruel and unusual” punishment,\(^4\) but the wisdom of providing such drastic minimum

\(^{24}\) LA. CONST. art. I, § 12. In State v. Thomas, 224 La. 431, 69 So.2d 738 (1954) it was held that LA. R.S. 40:981 as it then stood did not impose a cruel
penalties is open to serious question. There is no doubt that the increased mandatory penalties, without the possibility of release under probation or on parole, may tend to deter those who deal in narcotics for personal gain. At the same time it poses a real dilemma as to the lesser offender — the "pusher" who is an addict himself and is forced to engage in the illicit traffic in order to secure his own supply. Often this offender may be rehabilitated by a short period of probation, including the conditions that he must voluntarily take "the cure" and keep strictly away from his associations of the past. Such individualization and rehabilitation is completely impossible under the new law. Where the offender is a user, rather than a commercial dealer in narcotics, the harsh 1956 penalties present equally undesirable alternatives. Possibly the jury will be moved by the plight of the accused who is faced with a mandatory penalty of ten years, or even of thirty years, in the state penitentiary, and may acquit him completely. If the jury convicts the defendant, the trial judge has no alternative but to sentence him to a long prison term that is completely out of proportion to the nature of his criminal conduct. Louisiana's handling of the narcotics violations penalty problem brings to mind the statement of one writer that, "On the whole, the problem of imprisonment and in general of punishing those who violate the law is one of the most disheartening ones that face modern civilization. It represents the breakdown of human intelligence as well as good will."


**Criminal Procedure**

*Coroner — Certificate of Death*

After an inquest is held, the coroner is required to submit to the district court the *procès verbal* of the inquest, which is competent evidence only of the death and its cause. Act 425 provides for the situation where there is no inquest. In such a situation the coroner may certify the fact and the cause for a death and this certificate will be admissible and relevant only to the same extent as the *procès verbal*. and unreasonable punishment. The reasoning of this case would also apply to the even harsher penalties of the 1956 statute.
Municipal Violations — Amount of Bail Bond

Article 77.1 had expressly limited the maximum amount of a bail bond for charges of violation of city ordinances to $100.00. Two 1956 statutes purported to raise the maximum in specified situations. Act 101 amended article 77.1 so as to increase the amount of the release bond to $350.00 in cities having a population of 100,000 to 300,000, when the charge is driving while under the influence of alcohol. Act 285, also amending the existing article 77.1, raised the maximum of bail bonds where violation of a municipal ordinance is charged to $500.00 in situations where “a city court vested with criminal jurisdiction exists.” The effect of these two acts, each amending article 77.1 in a different way and taking no cognizance of the other, depends upon the rule of construction which is to prevail. One view would stress the fact that Act 285 is the later expression of the legislative will. Since it amends and re-enacts article 77.1 without including the special proviso added to article 77.1 by Act 101, it has in effect repealed Act 101.28 Another view, which would more nearly effectuate the overall legislative intent, would be that the two statutes are to be construed in pari materia. Such construction would give effect to the bail provisions of Act 101 in the special case of drunken driving in cities having a population of 100,000 to 300,000. Otherwise, effect would be given to the general provision of Act 285 for increasing the maximum bail to $500.00 in situations where the city court is vested with criminal jurisdiction.

Appearance Bond — Release of Surety

Two 1956 statutes were designed to provide a procedure for relief of the surety if he produces the accused, even after a formal forfeiture of the appearance bond. Prior to Act 261,29 in order for a surety on an appearance bond to assure himself of relief from responsibility, he was required to surrender the accused in open court or within the four walls of the prison before forfeiture of the bond. Act 261 allows the surety to obtain a discharge by surrendering the accused within the four walls of the prison at any time, or in open court before forfeiture of the bond.

Act 260 seeks further relief for the surety. Under the prior law, if a person failed to appear at the fixed time, a judgment decreeing forfeiture of the bond and against the principal and surety was entered and recorded. If the judgment was not paid at the expiration of the time allowed for appealing, the district attorney caused a writ of *fieri facias* to issue. Act 260 purports to change the last step in this procedure. Now, the district attorney must wait until the expiration of the time allowed for appealing and "the time allowed by law for the surety to return the fugitive to the jurisdiction of the court." This clause is by no means clear. If the language of Act 261 is given a broad interpretation, this clause would mean that *fieri facias* would never issue against the surety, since under Act 261 he could return the fugitive at any time. However, a practical interpretation of Act 261 would be to read it in the light of the last provision of Act 260, which extends, from thirty days to sixty days after judgment of forfeiture, the time in which a judgment of forfeiture may be set aside by the conviction or acquittal of the accused.

Compulsory Process — Resident and Nonresident Witness

Act 301 amends article 152 of the Code of Criminal Procedure so as to authorize specifically the clerk of court, as well as the judge, to sign subpoenas for the attendance of witnesses.

The per diem of witnesses subpoenaed upon final trial received a substantial raise in the 1956 session. Resident witnesses will receive a per diem of three dollars a day instead of one dollar, and witnesses who are nonresidents of the parish in which the prosecution is pending will receive five dollars a day instead of the old amount of two dollars a day.

Double Jeopardy — Arbitrary Dismissal of Jury

Jeopardy attaches when the indictment is read to the completed jury. Thereafter, an arbitrary dismissal of the jury will operate to acquit the accused. An example of the application of this rule is when a juror or the trial judge becomes ill during

the trial and a mistrial is declared. In such cases, since the discharge of the jury is from necessity and is not arbitrary, it does not operate to acquit the accused.\textsuperscript{35} Seemingly, from an abundance of caution, the 1956 Legislature enacted Act 541 to authorize expressly the discharge of a jury when any juror, defendant, counsel, or judge becomes ill or dies before rendition of the verdict.\textsuperscript{36} If the judge is the victim of illness or death, it is the duty of the clerk of court to enter a mistrial.

\textit{Habitual Offender Law}

In \textit{State v. Williams}\textsuperscript{37} the Louisiana Supreme Court recently held that the defendant's status under the habitual offender statutes was based solely upon the number of convictions prior to the present felony. An interval of freedom between each prior conviction was unnecessary in order for each conviction to be counted and a defendant who committed a felony after serving three consecutive sentences, all imposed on the same day, was a fourth offender. In so holding, the Supreme Court rejected the theory that the increased penalties are imposed because of the defendant's "successive failure to rehabilitate himself."

Act 312\textsuperscript{38} is a legislative repudiation of the test of the \textit{Williams} case. In order for one to be considered a second offender, the second offense must have been committed after the first conviction. To be a third offender, the third offense must have been committed after the conviction which caused him to be a second offender, and a fourth offender is one who commits a felony after the conviction which caused him to be a third offender. Act 312 is consistent with and spells out the existing jurisprudence that the offender need not have been declared a second or third offender in order to be subsequently declared a third or fourth offender.

The habitual offender law is inapplicable when there has been a lapse of five years between the expiration of the maximum sentence of the prior conviction and the time of commission of the last felony. Act 312 adds the specific proviso that the running of this five-year period will be suspended during the

\textsuperscript{35} State v. Varnado, 124 La. 711, 50 So. 661 (1909); State v. Roberson, 225 La. 74, 72 So.2d 265 (1954).
\textsuperscript{36} Amending LA. R.S. 15:397 (1950).
\textsuperscript{37} 226 La. 862, 77 So.2d 515 (1955).
\textsuperscript{38} Repealing LA. R.S. 15:529.1 (1950), and adding LA. R.S. 15:529.11 (Supp. 1966).
time of servitude in a “penal institution.” The proviso can hardly have applicability to one serving sentence for a subsequently committed felony. The commission of another felony completely interrupts the running of the five-year prescriptive period and a new period commences after the expiration of the maximum sentence imposed. It would appear, therefore, that the proviso is applicable only to one who is serving sentence in a parish or city jail after conviction of a misdemeanor. In this latter situation, the five-year period is not interrupted, but the five-year period is suspended and time served in jail is not to be counted.

Unsupervised Suspended Sentence of Misdemeanors—Exceptions

Article 536 of the Code of Criminal Procedure permits the sentencing judge to suspend the sentence of anyone convicted of a misdemeanor. The suspended sentence is unsupervised and the only condition imposed is that “the offender shall not be convicted of any other crime during the time of such suspended sentence.” The misdemeanor of criminal neglect of family is excepted from this article so as to allow probation in those cases where supervised conditions are thought to be needed.\(^{39}\) Act 390 adds article 536A, which makes another exception. When the misdemeanant is between the ages of seventeen and twenty-two and the sentence imposed is from ninety days to one year, the judge is authorized to suspend the sentence and place the offender on probation under the supervision of the Department of Welfare “for such period and upon such terms as the court may deem best.” While this act provides a very sound procedure for the handling of youthful offenders, it is probably invalid for want of an enacting clause.\(^ {40} \)

Death Penalty — Place of Execution

Prior to Act 143, executions of persons sentenced to death took place in the parish where the crime was committed. Act 143 provides that all executions shall take place at the Louisiana State Penitentiary at Angola.\(^{41}\) Act 18\(^{42}\) of the Extraordinary Session makes minor adjustments in other provisions of the Code of Criminal Procedure so as to implement fully this change.

Reorganization of Parole Board

Formerly the Board of Parole consisted of the Attorney General and the Commissioner of the Department of Public Welfare, as ex officio members, and three members appointed by the Governor. Under Act 66, there are no longer any ex officio members of the Board. The Board of Parole now consists of five members appointed by the chief executive for a term to run concurrently with his.

In 1952 the position of the parole officer was abolished and the functions of his office were placed in the Department of Welfare. Act 66 reinstates the independent position of the parole officer as executive head of the parole system, with the duties of investigating and supervising parolees and preparing and maintaining individual records. The parole officer is to be appointed by the Governor to serve under the direction of the Board of Parole. Other necessary employees are to be appointed by the Board.

Attorney Fees of Counsel Representing Convicts

Act 80 provides for the payment of "reasonable" attorney fees to an attorney appointed by the district court for the Parish of West Feliciana to represent any inmate of Angola charged with a crime committed in that parish. This act will help to mitigate the heavy burden placed on the few attorneys in the vicinity of Angola by virtue of their being frequently called upon to represent convicts who commit crimes while confined in the penitentiary and who are usually in an impecunious position.

Penitentiary — Payments of Wages to Convicts

Act 554 authorizes and inaugurates a procedure for the payment of compensation to the inmates at the Louisiana State Penitentiary "according to their skill and industry." The inmates are each put into one of three classes — Grades A, B, or C. Those in Grade A will receive five cents per hour, those in Grade B

47. 5% of the inmate population will be in Grade A, 10% in Grade B, and 85% in Grade C. The word "per cent" is omitted from the statute but it is the result of an obvious clerical error and should give no trouble. LA. R.S. 1:5 (1950).
will receive three and one-half cents per hour, and two cents per hour will be paid to those in Grade C. The amounts so earned are to be credited 50% to the inmate's savings account and 50% to his "personal account" which is available for fully regulated expenditures in his behalf.

Orleans Parish — Jury Commissioners

Act 12 of the Regular Session and Act 11 of the Extraordinary Session represent special enactments making detailed changes in the compensation, number, and procedure for appointment of jury commissioners and process servers for the Parish of Orleans. Perhaps the most significant changes are the increase in the number of jury commissioners from four commissioners to five and the provision that all shall serve at the Governor's pleasure. A recounting of the numerous other changes in Louisiana Revised Statutes 15:191 and 15:198 would require a lengthy statement which can better be gathered from the laws themselves.