THE PRELIMINARY INVESTIGATION OF CRIME IN FRANCE

PART II *

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V. INVESTIGATION BY THE JUGE D'INSTRUCTION

I. Scope of the Investigation

The investigation by the juge d'instruction, which is largely judicial in character, is known as the instruction préparatoire. The juge may investigate in the three following cases only: (1) when directed by the procureur, (2) when a person injured by either a crime or délit complains to the juge and constitutes himself partie civile, (3) when the offense is considered a flagrant délit, in which case the juge may on his own initiative conduct an investigation. The first of these methods is the one ordinarily employed. When directed by the procureur to conduct the investigation, the juge may refuse to act in certain situations, for example, where the proceedings are barred by law, or a necessary preliminary step such as a complaint has not been taken or the juge is of the opinion that the facts as presented to him by the procureur do not constitute an offense. The juge has the same right of refusal where the partie civile requests him to act.

When the juge is authorized to proceed by the procureur, the inquiry is not limited to the person or persons specified. It is the duty of the juge to investigate the whole affair. It sometimes happens that the juge is required by the procureur to investigate the commission of an offense when at the time the matter is referred to him there is no indication of the identity of the offender. In such case it is the duty of the juge to discover the offender. If in the course of his investigation

* The first installment of this article, containing footnotes 1 to 385, appeared in the February issue of the Review.
386. Also called the instruction préalable.
387. C. I. C. art. 47. The order of the procureur directing the juge d'instruction to conduct the investigation must be in writing and is called a requisitioire.
388. C. I. C. art. 63.
389. C. I. C. art. 59. The concept of flagrant délit is discussed supra p. 391.
390. 3 GARBAUD, op. cit. supra note 1, at 22.
391. MORIOT-THIBAULT, op. cit. supra note 20, at 104; COMPTÉ GÉNÉRAL PENDANT L'ANNÉE 1932 (1934) 89. The third method will be discussed in the next installment of this article.
392. 3 GARBAUD, op. cit. supra note 1, at 28.
393. Ibid.
394. "If the investigation was directed simply against the suspect, it would not accomplish its purpose, for it would not lead to a complete manifestation of the truth, and it would permit the ministère public arbitrarily to limit the operation of justice." MORIOT-THIBAULT, op. cit. supra note 20, at 108.
395. 3 GARBAUD, op. cit. supra note 1, at 23.
the juge discovers evidence indicating the commission of any other offense than that mentioned in the réquisitoire of the procureur, whether by the suspect or any other person, before he may proceed with the investigation of the new offense he must obtain a second réquisitoire from the procureur. Thus, if the juge is directed to investigate a theft, he cannot without a new réquisitoire proceed against the receiver of the stolen goods.396

The juge d'instruction in making his investigation is authorized by law to perform many and varied functions. Thus, he may (1) visit the scene of the crime (transport) and make searches (perquisitions) and seizures (saisies), (2) issue orders (mandats) to bring the suspect before him and then to detain him, (3) keep the defendant detained (détention préventive) or grant him a conditional release (liberté provisoire), (4) interrogate the suspect (interrogatoire), (5) summon and hear witnesses, (6) reconstruct the crime (reconstitution), (7) appoint experts to conduct special investigations (expertises), (8) delegate certain of his functions to other officials (délégation). At the conclusion of his investigation the juge d'instruction makes further disposition of the case by means of one of various ordonnances.

2. Transport, Perquisition and Saisie

The visit of the juge d'instruction to the scene of an alleged crime is called a transport.397 When making a transport the juge must be accompanied by his greffier.398 He should also give notice in advance to the procureur,399 whose presence, however, is not required.400

396. GOYET, op. cit. supra note 65, at 2931; 3 LE PONTET, op. cit. supra note 74, at 240.
397. C. I. C. art. 62. The wording is "transport sur les lieux". This proceeding is also described in the following terms: (1) "descente sur les lieux", 2 MASSABIAU, op. cit. supra note 120, at 230; CUMENGE, L'INSTRUCTION PRÉPARATOIRE (1891) 93; (2) "descente de justice", 2 MASSABIAU, op. cit. supra note 120, at 231; (3) "transport de justice", GOYET, op. cit. supra note 65, at 291; (4) "transport judiciaire", 2 GARraud, op. cit. supra note 1, at 202; (5) "visite des lieux", Vidal, op. cit. supra note 276, at 835.
398. C. I. C. art. 62. The presence of the greffier is necessary to validate the actions of the juge d'instruction. 2 GARraud, op. cit. supra note 1, at 203; HERMELIN, DES GARANTIES À ACCORDER À L'INCUPLÉ DANS L'INSTRUCTION PRÉPARATOIRE (Thesis Paris, 1897) 131; BRACK, PERQUISITIONS (Thesis Paris, 1910) 125. If the regular greffier is unable to accompany the juge, he may appoint any French citizen, at least twenty-five years old, to act as greffier for the particular occasion. Decision of the Cour de Cassation, Sept. 5, 1852, cited in 1 GARraud, op. cit. supra note 1, at 577n.
399. C. I. C. art. 88, as amended by Law of Feb. 7, 1933, JOURNAL OFFICIEL (Feb. 9, 1933) 1534.
400. C. I. C. art. 62 provides that the juge shall always be accompanied by the procureur, but this requirement was not regarded as obligatory. 1 GARraud, op. cit. supra note 1, at 576. The new projet (1938) for a Code d'Instruction Criminelle states that the procureur has the right to accompany the juge. Art. 67. "Except in a case of a flagrant délit, fire or calls for help from inside, no judicial or police officer may enter the buildings or grounds of a university for the purpose of determining if a crime has been committed or for executing a mandat d'amener against members of the faculty or students unless authorized in writing by the procureur général, or one of his assistants, or by the procureur. When the juge d'instruction makes a perquisition in a secondary school he must always be accompanied by the procureur." 4 LE PONTET, op. cit. supra note 74, at 1003.
practice the juge visits the scene only if the offense is serious and a personal inspection of the place is considered necessary. Upon his arrival at the scene the first duty of the juge is to determine if a crime has been in fact committed. If so, he questions any persons who were present when the crime occurred or who have information regarding it. He also takes possession of any weapons or other objects tending to establish commission of the crime.

In the course of his investigation the juge may conduct a search (perquisition) of the dwelling of a suspect or a building occupied by another person if, in the latter case, it is likely to contain articles relating to the alleged offense. The object of the perquisition may be either the search for and arrest of a suspect or the search for and seizure of papers or other evidence. It is provided by the Constitution of the Year VIII (1800) that officers may not enter buildings at night. There is an exception to this rule in the case of public places such as hotels, cafés and stores, which may be entered at any time, and the same exception applies to bawdy and gaming houses. It has also been stated that a private building may be entered at night with the consent of the occupant.

If a building is entered during the day, the search may be continued into the night, which has been arbitrarily defined as between the hours of six in the evening to six in the morning from October 1st to March 31st and between nine and four from April 1st to September 30th. Art. 401. See the Circulaires of the Minister of Justice, Nov. 20, 1829 and August 16, 1842, renewed Feb. 23, 1887, cited in op. cit. supra note 65, at 291; 2 M. GARBAUD, op. cit. supra note 65, at 291; 3 M. GARBAUD, op. cit. supra note 65, at 299.

"The juge ought to reconstruct in his mind the scene of the crime and to investigate the circumstances of its commission, the exact hour, the cause of death, and the instruments employed by the assassin; in a word, all the facts tending to put him on the trail of the offender." GUERGENE, op. cit. supra note 65, at 297.

This right was conferred by a combination of articles 35 and 89 of the C. I. C. and was expressly granted by the Law of Feb. 7, 1933, JOURNAL OFFICIEL (Feb. 9, 1933) 1354, art. 6, amending C. I. C. art. 88.

The term perquisition, although properly denoting only a search (Soufflerie, op. cit. supra note 97, at 767, and LE POITTEVIN, op. cit. supra note 74, supplément at 337) is often used broadly to embrace both the entry into a building (visite domiciliaire) and the search made therein. GARBAUD, op. cit. supra note 1, at 214, and MONCHON-THIBAULT, op. cit. supra note 20, at 447.

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This right was reaffirmed by the Law of Feb. 7, 1933, JOURNAL OFFICIEL (Feb. 9, 1933) 1354, art. 6, amending art. 87 of the C. I. C. "Of all the investigation proceedings the perquisition is perhaps the harshest. Nothing violates more the inviolability of the person and of the home than the right to enter the dwelling of a citizen, to examine his papers, and to seize anything that may be found in his home, for seizure is the natural and almost necessary consequence of the perquisition." HERMELIN, op. cit. supra note 65, at 131.

The new projet (1938) for the Code d'Instruction Criminelle provides that the juge by issuing an ordonnance, setting forth his reasons, may order a perquisition at any hour. Art. 68.

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to September 30th. 411 Heavy penalties are provided for officials who enter dwellings contrary to law. 412

In practice a distinction must be made between the two situations (1) where the transport is to one place, such as a public street, and the perquisition is at another place, as the dwelling of the suspect, and (2) where the transport is to the same place as the perquisition, for example where the scene of the crime is in the dwelling of the suspect. If the transport is to a public place, the suspect need not be present, although if in custody he is generally taken along. 413 On the other hand, in the case where the offense has occurred in a building, the transport being to the place where the perquisition will be held, the rules applicable to the latter will apply. Thus, the building may be either that of the suspect or of a third person, and in either case under the law governing perquisitions, the suspect, if arrested, has a right to be present. If, whether under arrest or not, he cannot or does not attend, the perquisition is to be conducted in the presence of a representative named by him, except that where neither he nor his representative is present, the juge is to name two witnesses who will attend. 414

The perquisition is a judicial proceeding and should be employed only where there are strong indications of the suspect's guilt. 415 A procès-verbal of all that occurs during the proceedings should be made by the greffier under the direction of the juge. 416 Notwithstanding the judicial character of the perquisition, the suspect is not permitted to have counsel present, unless he is subjected to an interrogation by the juge. 417 In no case may the partie civile be present. 418 It has been suggested that the law be changed so as to permit the presence of the suspect's counsel. 419

411. CODE DE PROCE D. CIVILE, art. 1037.
412. C. P. art. 184. They are also subject to a civil action for damages (prise à partie).
413. MORI ZOT-THIBAULT, op. cit. supra note 20, at 451.
414. 3 GARraud, op. cit. supra note 1, at 204.
415. Law of Feb. 7, 1933, JOURNAL OFFICIEL (Feb. 9, 1933) 1354, art. 6, amending C. I. C. art. 87. If the perquisition occurs in the dwelling of a person other than the suspect, such person must be invited to attend and if for any reason he does not do so, two members of his family must be invited in his stead. If none of these persons appears, the juge is to appoint two witnesses to be present at the proceedings. Law of Feb. 7, 1933, JOURNAL OFFICIEL (Feb. 9, 1933) 1354, art. 6, amending C. I. C. art. 87.
416. 3 GARraud, op. cit. supra note 1, at 207.
417. 1 GARraud, op. cit. supra note 1, at 580. The procès-verbal prepared by the greffier is a written record of all that occurs before the juge d'instruction at every part of his investigation, including an account (not stenographic) of all testimony, with remarks by the juge as to the attitude of suspect, witnesses, etc.
418. 3 LE POTTETVIN, op. cit. supra note 74, at 245.
419. This will be discussed later. See infra p. 705.
420. 1 GARraud, op. cit. supra note 1, at 577.
421. 1 GARraud, op. cit. supra note 1, at 578.
During the search of buildings it is the duty of the juge to seize any papers or articles "useful in establishing the truth", whether they indicate the guilt or innocence of the suspect. The Code does not specify the various types of articles to be seized, this being left to the discretion of the juge. However, the confidential relationship of lawyer and client prevents the seizure of correspondence between a suspect and his counsel, although other documents in a lawyer's office may be taken. During the search of a building the juge may break open a desk or other article of furniture, containing papers or articles which he wishes to examine.

The juge may seize letters in the post, not only those sent by or addressed to the suspect, but also those where the senders and addressees are other persons. The Law of February 7, 1933, amending Article 89 of the Code, expressly limited the right of seizure to letters sent by or addressed to the suspect, but this limitation was omitted in the revision of Article 89 by the Law of March 25, 1935. The limitation was considered unworkable in practice, as a suspect could arrange to have incriminating correspondence addressed to a third person.

If the suspect is present when papers or articles are seized, they should be shown to him, in order to see if he recognizes them, and also to have them initialed by him. He should be given an opportunity to explain why and when they came into his possession. A procès-verbal of all seizures must be prepared. All articles seized are sealed by the

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422. Law of Feb. 7, 1933, JOURNAL OFFICIEL (Feb. 9, 1933) 1354, art. 6, amending C. I. C. art. 88.
423. The articles to be seized have been classified as follows:
   1. Articles adapted for committing the crime—arms of any kind as daggers, firearms, stiletos, etc. All instruments which may be used for breaking and entering as crow-bars, files, false keys, etc. Incendiary materials, as torches, petroleum, etc. Articles and instruments employed by counterfeiters: crucibles, alloys, metals, etc.
   2. Articles used in the commission of the crime: daggers red with blood, firearms recently discharged; crow-bars and files found on the scene of the offense; incendiary materials not consumed or the residue of such materials.
   3. Results of the crime: intestines of a poisoned victim, portions of a dead body, or stolen articles.
   4. Articles which may serve in establishing the truth. We will enter in this last group all the articles which are not included in the three preceding groups, and which the juge nevertheless considers useful in discovering the truth.” CUMENGE, op. cit. supra note 397, at 128.
424. 3 GARRAUB, op. cit. supra note 1, at 219.
425. 4 LE POTTESVIN, op. cit. supra note 74, at 1004.
426. 3 GARRAUB, op. cit. supra note 1, at 223.
427. BRACK, op. cit. supra note 398, at 59.
428. 3 GARRAUB, op. cit. supra note 1, at 224.
429. JOURNAL OFFICIEL (Feb. 9, 1933) 1354.
430. JOURNAL OFFICIEL (March 26, 1935) 3426.
432. C. I. C. arts. 89 and 39. This provision is omitted from the Law of Feb. 7, 1933, but it is stated that the same practice should continue. DALLOZ, RECUVEIL PÉRIODIQUE, 1933 IV. 74.
433. CUMENGE, op. cit. supra note 397, at 139.
434. GOYET, op. cit. supra note 65, at 292.
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The seals should be broken and the articles taken from the container only in the presence of the suspect or his counsel or a third person authorized in writing by the suspect. According to Garraud, the safeguards provided by law for the protection of the rights of a suspect, whose papers are seized, are not always observed. He says that the juge will sometimes seize all the papers which he finds and will examine them in his office in the absence of the suspect or his counsel, and that there have been instances where confidential documents and those having no connection with the case have been seized.

The practice of some juges d'instruction of permitting the procureur to have access to papers and articles seized has been severely criticized. It has also been stated that in some instances confidential documents having no connection with the investigation have been given by the juge to the press for publication. To remedy these abuses the Law of February 7, 1933, provides that the juge alone shall examine letters and telegrams. It is further provided that the communication of the contents of any seized document, without the authorization of the suspect or the other party to the correspondence, to a person not authorized by law to receive it and any use made of this communication shall constitute a criminal offense punishable by a fine of 5000 francs and imprisonment for a period ranging from two months to two years.

A failure on the part of a juge to observe all the legal requirements in conducting a saisie will not prevent the admission in evidence of the seized articles at the trial, but may affect their probative value.

3. Mandats

A mandat is an order issued by a juge d'instruction directing the appearance, arrest or detention of a suspect. The juge may issue four mandats—two of these, the mandat de comparution and the mandat d'amener, serve to bring the suspect before the juge to be interrogated with regard to an alleged offense, and the other two, the mandat de...
dépôt and the mandat d'arrêt are orders of commitment. The mandats may be employed only where the offense involved is a crime or délit.

All mandats must be signed and sealed by the juge who issues them, and the suspect must be named or otherwise described as clearly as possible. A mandat is void if (1) it is issued by an incompetent official, (2) is not signed or (3) does not clearly indicate the person against whom it is directed. Mandats are served either by a bailiff (huissier) or a police officer, who must show the mandat to the suspect and leave a copy with him. In an urgent case the mandats may be served by telegraph. All mandats may be served anywhere in the country.

The mandat de comparution, which corresponds to a summons, is simply an order to the person specified to appear before the juge issuing the mandat at a designated time and place for the purpose of being questioned regarding an alleged offense. The mandat d'amener, which is in effect a warrant of arrest, is an order addressed to all bailiffs and police officers to bring the person indicated before the juge for questioning. In practice, the mandat de comparution is served by a bailiff and the mandat d'amener by a police officer. Although there is no requirement that the mandats de comparution and d'amener contain a statement of the offense charged, this is generally inserted, since a suspect so advised may be able to exculpate himself immediately. The mandat de comparution being simply an order directing the suspect to appear, he is not taken into custody, but in the case of a mandat d'amener there is an arrest, and force may be employed in its execution. If, after being served with a mandat de comparution, the person fails to appear, a mandat d'amener will be issued.

444. For the history of mandats de dépôt and d'arrêt see id. at 341.
445. Id. at 338.
446. C. I. C. arts. 95 and 96.
447. 3 Le Poitevin, op. cit. supra note 74, at 487.
448. C. I. C. art. 97.
450. C. I. C. art. 98.
452. 3 Garraud, op. cit. supra note 1, at 93.
454. 3 Garraud, op. cit. supra note 1, at 93.
456. 3 Garraud, op. cit. supra note 1, at 105 and 107. The lack of any statutory requirement that the mandat d'amener contain a statement of the offense for which it is issued and a citation of the law creating this offense has been severely criticized. Morsot-Thibault, op. cit. supra note 20, at 206.
457. 3 Garraud, op. cit. supra note 1, at 109.
458. 3 Garraud, op. cit. supra note 1, at 107; Debois, op. cit. supra note 144, at 559.
460. C. I. C. art. 91.
The juge, in the exercise of his discretion, may issue either a mandat de comparution or a mandat d'amener, no matter how serious the offense. It is a remarkable feature of French procedure that a person suspected of one of the greatest offenses, such as murder, may be simply summoned to appear instead of being taken into custody. Of course the juge will adopt this course only if he does not fear the escape of the suspect or the destruction of evidence. In practice the mandat d'amener is employed (1) when the offense is a crime, (2) when it is a délit involving a punishment of imprisonment and the suspect does not have an established residence, (3) when it is a délit of so serious a character that there is danger the suspect, although having such a residence, may flee. The mandat de comparution is employed where the punishment is merely a fine or even where the offense is a délit involving imprisonment if the suspect is domiciled in France. It has been decided that the juge may decline to employ either mandat and may direct the suspect to appear by an ordinary letter.

If the arrest by a mandat d'amener occurs within the arrondissement and not more than 100 kilometers from the town or city where the juge is located, the person arrested must be brought before him immediately. If, however, the arrest occurs outside the area mentioned above, the person arrested must be taken before the procureur of the place where he was arrested, who questions him regarding his identity, receives any statements he cares to make and asks him if he consents to being transferred to the place where the juge who issued the mandat is located. If he objects to being transferred, the juge must be notified of the fact and be furnished with a report of all that occurred at the hearing before the procureur. The juge then decides whether the person arrested shall be brought before him. If the juge is satisfied from the report either that the person arrested is not the one indicated in the mandat, or that, although he is the person sought, his explanations before the procureur established his innocence, the juge will order that he be set at liberty.

If the person named in a mandat d'amener cannot be found, the officer having the mandat must exhibit it to the mayor or commissaire of police of the commune in which the person resides, and the return must be signed by the official to whom the mandat is exhibited. In

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464. 3 Le Pottevin, op. cit. supra note 74, at 489.
465. 1 Le Pottevin, C. I. C. Annoté, art. 91, n. 23.
466. Law of Dec. 8, 1897, arts. 4, 5 and 6, 1897 Bulletin des Lois (XII sér.) pt. 2, 1777.
467. Debois, op. cit. supra note 144, at 560.
468. C. I. C. art. 105. The purpose of this formality is to show that every effort has been made to execute the mandat. 3 Garraud, op. cit. supra note 1, at 114.
serving a mandat d’amener the police may enter the dwelling of the suspect, but may not do so at night. The dwelling of another person may be entered for the purpose of arresting the suspect only in case of a perquisition conducted by the juge d’instruction.

The mandat de dépôt is an order by which the juge directs that a suspect, who has already appeared before him on a mandat de comparution or a mandat d’amener, be placed in detention. The mandat d’arrêt is also an order for the commitment of the suspect to a place of detention. It is ordinarily employed when the suspect has fled, in which case it is an order both for arrest and commitment. The mandat de dépôt and the mandat d’arrêt may be issued only for offenses involving imprisonment or a more severe penalty. Both mandats are always served by police officers, who may employ force in so doing.

The juge must obtain the opinion of the procureur before issuing a mandat d’arrêt, but is not bound to follow this opinion. If the procureur recommends that the mandat be issued and the juge refuses, the former may appeal to the chambre d’accusation. Unlike the other mandats, the mandat d’arrêt must contain a statement of the offense for which it was issued and a citation of the law creating the offense. Ordinarily the offense is indicated in the mandat d’arrêt simply by its name, such as “meurtre,” neither the date nor the place of the offense nor the name of the victim being stated. The mandat d’arrêt is more

469. 3 Le Poitevin, op. cit. supra note 74, at 491.
470. Constitution, Year VIII, art. 76.
471. 3 Le Poitevin, op. cit. supra note 74, at 491.
473. Decree of May 20, 1903, art. 121, 1903 Bulletin des Lois (XII sér.) pt. 2, 65. The mandat d’arrêt may never be issued by the procureur. 3 Garraud, op. cit. supra note 1, at 136.
474. Goyet, op. cit. supra note 65, at 310.
475. C. I. C. art. 94.
476. Goyet, op. cit. supra note 65, at 309.
478. Goyet, op. cit. supra note 65, at 310.
479. 3 Garraud, op. cit. supra note 1, at 135; 3 Le Poitevin, op. cit. supra note 74, at 498. The full title is chambre des mises en accusation. See supra p. 397. The new projet (1938) for the Code d’Instruction Criminelle uses both titles. Arts. 153 and 154.
480. C. I. C. art. 96.
481. 3 Garraud, op. cit. supra note 1, at 135; Morizot-Thibault, op. cit. supra note 20, at 210.
482. The greatest precision in the wording of the mandat is desirable, since it is employed in the case of a suspect who has not been interrogated and who, because he does not know of what he is accused, finds himself unable to present evidence and refute the charges.” 3 Garraud, op. cit. supra note 1, at 135.
483. The Minister of Justice, referring to mandats d’arrêt, called attention in a circulaire of Dec. 6, 1926, to the fact that unjustifiable arrests resulted from similarity of names or the incomplete description of the person to be arrested. He accordingly recommended that the mandat contain precise information regarding identity and a minute description of the person sought. 3 Le Poitevin, op. cit. supra note 74, at 486.
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When either a mandat de dépôt or d'arrêt is served, the suspect should be at once taken to the place of detention mentioned in the mandat.\textsuperscript{483} In the case where an arrest occurs under a mandat d'arrêt outside the arrondissement of the juge who issued the mandat or at a distance of more than 100 kilometers from the place where he is located, there is no legal requirement as in the case of the mandat d'amener that the person arrested be brought to have his identity established before the procureur of the place where the arrest occurs, but in practice this is done so as to prevent any mistake in the identification. If the procureur is in doubt, he will telegraph the juge who issued the mandat and, after hearing from him, will either discharge the suspect or order him taken before the juge.\textsuperscript{484}

When a suspect has been committed under a mandat d'arrêt, it is not necessary that he be granted a hearing within twenty-four hours, as is the case when an arrest occurs under a mandat d'amener, the provisions of the Law of December 8, 1897, regulating the interrogation of suspects,\textsuperscript{485} applying only to the latter mandat.\textsuperscript{486}

4. Détention Préventive and Liberté Provisoire

As already stated, the mandats d'arrêt and de dépôt direct that the suspect shall be placed in détention préventive. The purposes of this detention are to insure the availability of the suspect during the course of the investigation by the juge d'instruction and to prevent the destruction of evidence and the subornation of witnesses.\textsuperscript{487} Another purpose, sometimes mentioned, is to prevent the commission of other offenses by the suspect.\textsuperscript{488} The Code requires that special places of confinement be provided for suspects in détention préventive\textsuperscript{489} entirely separate from the prisons where persons convicted of crime are confined;\textsuperscript{490} but, due to the lack of separate buildings and facilities, suspects are for the most part kept in the prison of the département, although in separate quarters,\textsuperscript{491} and are granted certain privileges denied to the convicts.\textsuperscript{492}

\begin{footnotes}
\textsuperscript{482}Garraud, \textit{op. cit. supra} note 1, at 136; Goyet, \textit{op. cit. supra} note 65, at 310.
\textsuperscript{483}C. I. C. art. 110.
\textsuperscript{484}Goyet, \textit{op. cit. supra} note 65, at 311.
\textsuperscript{485}This subject will be discussed later. See infra p. 705.
\textsuperscript{486}Degois, \textit{op. cit. supra} note 144, at 575.
\textsuperscript{487}Garraud, \textit{op. cit. supra} note 1, at 128; Goyet, \textit{op. cit. supra} note 65, at 297.
\textsuperscript{488}Faustin Hélie, \textit{op. cit. supra} note 2, at 422; Morizot-Thibault, \textit{op. cit. supra} note 20, at 221.
\textsuperscript{489}C. I. C. art. 603, as amended by Law of Sept. 3, 1926.
\textsuperscript{490}C. I. C. art. 604.
\textsuperscript{491}Garraud et Laborde-Lacoste, \textit{Précis Élémentaire de Droit Pénal} (1930) 330; Vernet, \textit{op. cit. supra} note 9, at 60.
\textsuperscript{492}Cuche, \textit{op. cit. supra} note 217, at 343.
\end{footnotes}
The Code, as amended in 1865, provided for the release (liberté provisoire) of a suspect from détention préventive in a number of situations and under varying conditions. The juge d'instruction upon the request of the suspect could, in the exercise of an uncontrolled discretion irrespective of the gravity of the offense, release him from custody after securing the advice of the procureur, which the juge was at liberty to disregard.\textsuperscript{493} The release was made without bail (cautionnement) upon the undertaking of the suspect to appear for any proceeding, when required, and for the execution of any judgment that might be imposed.\textsuperscript{494}

The Code further provided that a suspect, after being detained for five days following the first appearance of the interrogatoire, was entitled to release without bail if he had a known domicile and if the maximum penalty for the offense was less than two years,\textsuperscript{495} which excluded all crimes and serious délits. All suspects not entitled to release under the foregoing provision could, with or without application, be released on bail in the discretion of the juge.\textsuperscript{496}

The conditions of the bail undertaking were that the suspect (1) would appear for all proceedings and (2) would pay the costs of the prosecution, the costs advanced by the partie civile and any fines that might be imposed.\textsuperscript{497} It was provided that bail might consist either of cash, furnished by the suspect or another person, or the undertaking of another person, having sufficient assets, either to produce the suspect when required or to forfeit a specified sum of money.\textsuperscript{498} Real estate has never been accepted as security.\textsuperscript{499} The amount of the bail is entirely within the discretion of the juge.\textsuperscript{500} The factors to be considered by him in fixing the amount of bail are said to be the gravity of the alleged offense, the pecuniary resources\textsuperscript{501} and the moral character of the suspect.\textsuperscript{502} If the application of the suspect to be released on bail was refused, he could not appeal to any other official, and he had no redress except a civil action for damages against the juge if fraud or connivance could be proved, which damages the government

\textsuperscript{493} C. I. C. art. 113, as amended by the Law of July 14, 1865.

\textsuperscript{494} Ibid.

\textsuperscript{495} Ibid.

\textsuperscript{496} C. I. C. art. 114, as amended by the Law of July 14, 1865. When a release is granted, bail is seldom required. During the year 1934, 4265 suspects, out of 68,513 placed in detention, were released on liberté provisoire, bail being required in the case of only 202. Compte Général Pendant l'Année 1934 (1936) 146.

\textsuperscript{497} C. I. C. art. 114, as amended by the Law of July 14, 1865.

\textsuperscript{498} C. I. C. art. 120, as amended by the Law of July 14, 1865.

\textsuperscript{499} 3 Le Poittevin, op. cit. supra note 74, at 447.

\textsuperscript{500} C. I. C. art. 120, as amended by the Law of July 14, 1865.

\textsuperscript{501} 3 Garraud, op. cit. supra note 1, at 165; 3 Le Poittevin, op. cit. supra note 74, at 448.

\textsuperscript{502} 3 Le Poittevin, op. cit. supra note 74, at 448.
would pay if the juge was unable to do so. The Code Pénal also provides a penalty if the action of the juge is arbitrary, but it has been stated that this provision has never been enforced.

As the provisions of the Code were administered by the juges d'Instruction, it frequently resulted that suspects were kept in detention for unnecessarily long periods, there being no time limit to the effect of a mandat de dépôt or mandat d'arrêt. At intervals for half a century there were demands that the Code be amended so as to correct the abuses of discretion by the juge. One of the suggested reforms was a proceeding similar to the Anglo-American writ of habeas corpus.

To meet the demands for amending the Code a projet was presented in the Senate by the Prime Minister, M. Georges Clemenceau, which, after discussion at various times in both houses of Parliament, was enacted in modified form in 1933. The most important and radical provision of the new law was that no person could be placed or kept in detention after his first appearance before the juge, if he had a known domicile and had never been convicted of a crime or sentenced, without suspension, to more than three months for a délit. All suspects already in detention for an alleged délit who were not released under the foregoing provision were, subject to certain exceptions, entitled to release without bail within five days following the first appearance. A suspect who came within one of the exceptions could be detained for a further period of not more than fifteen days by an ordonnance of the juge setting forth the reasons for the extended detention. A suspect could be kept in further detention only after a hearing and order by a body of judges, called the "chambre du conseil", selected from the

503. C. I. C. art. 112; Code de Procéd. Crim., art. 505. This right of action involved so many difficulties that it was of little practical value to the suspect. Lestelle, op. cit. supra note 24, at 26.
504. C. I. C. art. 114.
505. 3 Garraud, op. cit. supra note 1, at 190, n. 7; Morizot-Thibault, op. cit. supra note 20, at 296.
508. The projet had been passed by the Senate in 1909 and by the Chambre des Députés in 1919. 509. C. I. C. art. 113, as amended by the Law of Feb. 7, 1933, Journal Officiel (Feb. 9, 1933) 1354.
510. 1. If the suspect does not have a known domicile in France;
2. If he has been previously sentenced, with suspension, to more than three months' imprisonment for a non-political délit;
3. If there is reason to fear that the suspect may try to escape from justice;
4. If he is a danger to the public safety;
5. If his remaining at liberty is likely to interfere with the ascertainment of the truth. Ibid.
511. Ibid.
Tribunal de Première Instance. Both the suspect and the procureur were entitled to present arguments at the hearing and either one might appeal from an order of the chambre. The maximum period of further detention which the chambre could order at any one time was one month, but after following the required procedure it could make further orders indefinitely.514 The Law of February 7, 1933, also amended the provision of the Code 515 regarding bail by providing that bank notes and bonds issued by or guaranteed by the national government, in addition to cash, might be furnished by either the suspect or another person.518

As soon as the Law of February 7, 1933, went into effect, difficulties of administration developed and the beneficial results that were desired from the Law were not obtained. In the case of a suspect who, if he complied with certain conditions,517 was entitled to immediate release after his first appearance before the juge, it was found that several days were consumed by the juge in discovering whether the qualifying conditions existed.518 The situation was further complicated by the number of appeals and hearings that frequently occurred 519 and by the consequent time and expense required in procuring the attendance of necessary parties at the hearings.520 The appeal to the chambre du conseil was of little practical value, since the judges were unacquainted with the details of the investigation and in most cases simply affirmed whatever action the juge d'instruction had taken.521 From the point of view of the prosecution and the juge the results of the Law were unsatisfactory, as many suspects who, in the opinion of both should have been longer detained because of danger of flight or of concealing evidence, had to be released.522

On May 15, 1934, the Minister of Justice and the Minister of the Interior presented to the Senate a projet modifying many of the reforms

515. Art. 120, as amended by the Law of July 14, 1865.
516. Art. 120, as amended by the Law of Feb. 7, 1933.
517. 1. If he had a known domicile, and
2. If he had never been convicted of a crime or sentenced, without suspension, to more than three months for a délit. C. I. C. art. 113, as amended by the Law of Feb. 7, 1933.
518. As a consequence, the juges were obliged to release suspects immediately without being able to ascertain the qualifying facts, and to rely largely on the suspect's own statements, which might be found upon investigation to be false. DANIEL, LA LIBERTÉ PRÉVISOIRE ET LA LOI DU 7 FÉVRIER 1933 (1934) 10; MAGNOL, op. cit. supra note 431, at 6; LESTELLE, op. cit. supra note 24, at 125.
519. DANIEL, op. cit. supra note 518, at 70; MAGNOL, op. cit. supra note 431, at 7; LESTELLE, op. cit. supra note 24, at 101. Unanimity of opinion for repeal was to a considerable degree the result of delays and obstructions which occurred in application of the law in the various investigations resulting from the Stavisky scandal of 1933-1934. MAGNOL, op. cit. supra note 431, at 7.
520. LESTELLE, op. cit. supra note 24, at 100.
521. Ibid.
522. DANIEL, op. cit. supra note 518, at 83; MAGNOL, op. cit. supra note 431, at 6.
embodied in the Law of February 7, 1933, and restoring to a considerable extent the earlier law. This projet, after much discussion, was enacted as the Law of March 25, 1935. Of the provisions dealing with détention préventive the most important was the repeal of the requirement, contained in the Law of February 7, 1933, for the immediate release of a suspect charged with an offense carrying less than two years' imprisonment, who had a known domicile and had never been convicted of a crime or a délit with a sentence of more than three months' imprisonment. Such a suspect is now entitled to release after five days. A suspect not so entitled to release must be released within fifteen days, subject to certain broad exceptions.\textsuperscript{523} An advantage was given the suspect, however, in that further detention may not result from the mere inaction of the juge, as under the Law of February 7, 1933, but requires an ordonnance of the juge in which the reasons for his action are set forth, the period of further detention being limited to one month.\textsuperscript{524} The juge may later detain the suspect for an additional month, but only after a hearing, which the suspect and his counsel may attend, and an ordonnance by the juge which is subject to appeal.\textsuperscript{525} Further detention may take place only after a hearing and order by the chambre d'accusation.\textsuperscript{526} This body was given the power of review previously vested in the chambre du conseil, which was abolished. It will be seen that some of the hearings and appeals, previously available to the suspect at the early stages of his detention, were eliminated by the Law of March 25, 1935, thus reducing the amount of delay which had been the subject of much criticism.

5. Interrogatoire

a. In general

The most characteristic and probably the most ancient feature of the investigation conducted by the juge d'instruction is the interrogation (interrogatoire) of the suspect. The Ordonnances of 1536 and 1539

\textsuperscript{523} 1. If the suspect does not have a known domicile in France;
2. If he has been previously sentenced, with suspension, to more than three months' imprisonment for a non-political délit;
3. If there is reason to fear that the suspect may try to escape from justice;
4. If he is a danger to the public safety;
5. If his remaining at liberty is likely to interfere with the ascertainment of the truth. C.I.C. art. 113, as amended by the Law of Mar. 25, 1935. It has been pointed out that the last three reasons are stated in such general terms that they can readily be found to exist in any case. D\textsc{alloz}, Recueil P\textsc{ériodique}, 1933 IV. 68; D\textsc{aniel}, op. cit. supra note 518, at 23.

\textsuperscript{524} C.I.C. art. 113, as amended by the Law of Mar. 25, 1935.

\textsuperscript{525} C.I.C. art. 114, as amended by the Law of Mar. 25, 1935. The juge could thus keep the suspect in detention a maximum of two and one-half months. Statistics used in the debates showed this to be the average period that suspects were detained. D\textsc{alloz}, Recueil P\textsc{ériodique}, 1936 IV. 23.

\textsuperscript{526} The chambre may give the juge a stated time to complete his investigation, or may take over and complete the investigation itself. C.I.C. art. 116, as amended by the Law of Mar. 25, 1935.
directed that the suspect be interrogated and the *Ordonnance* of 1670 devoted an entire chapter to this subject. The *Code d'Instruction Criminelle* provides for an *interrogatoire* by the *juge*, but does not specify the form or methods of the interrogation. The *interrogatoire* is regarded as a necessary feature of the investigation by the *juge* unless the suspect is in flight.

The theoretical purpose of the *interrogatoire* is the ascertainment of the truth. Faustin Hélie states the following: "It is necessary to consider it [the *interrogatoire*] as being at the same time a means of defense and a means of investigation; its object is to hear the explanations of the suspect for the purpose of verifying them, to record his denials or his admissions, to search for the truth of the facts in his convincing or contradictory statements." The *Cour de Cassation* has announced that "the *interrogatoire* is not only a method of the official investigation but is also a method of defense".

The *interrogatoire* is conducted in secret, generally in the cabinet of the *juge* located in the *Palais de Justice*, but the *juge* may, if he considers it desirable, question the suspect in the jail where he is detained. The number of *interrogatoires* is left entirely to the discretion of the *juge*. The *greffier* of the *juge* must be present throughout every interrogation and it is his duty to set forth in the *procès-verbal* all that occurs during the proceeding. The suspect is not under oath during the *interrogatoire*. The *Ordonnance* of 1670 required that the suspect be sworn, but this "odious practice" was abolished by the Decree of October 9, 1789. The general rule is that suspects must be separately examined by the *juge*, but if a suspect denies the charges or becomes entangled in his explanations it is customary to confront him with other suspects or witnesses who have made contradictory statements.

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527. 2 FAUSTIN HÉLIE, *op. cit. supra* note 2, at 402, 403.
528. C. I. C. art. 93.
529. CUMENGE, *op. cit. supra* note 397, at 195.
530. MIMIN, _L'INTERROGAIRE PAR LE JUGE D'INSTRUCTION_ (1926) 13, 17.
531. CUMENGE, *op. cit. supra* note 397, at 214.
532. 2 FAUSTIN HÉLIE, *op. cit. supra* note 2, at 403.
533. Cited by CUMENGE, *op. cit. supra* note 397, at 194. "The *interrogatoires* ought to lead either to convincing explanations, which when verified establish innocence, or to incriminatory admissions regarding the offense or the circumstances connected with it or to a scheme of fictitious defense from which guilt may be inferred." MIMIN, *op. cit. supra* note 530, at 45.
534. 2 GARRAUD, *op. cit. supra* note 1, at 219.
535. MIMIN, *op. cit. supra* note 530, at 88.
536. 2 GARRAUD, *op. cit. supra* note 1, at 221; MIMIN, *op. cit. supra* note 530, at 33.
537. MIMIN, *op. cit. supra* note 530, at 82.
538. Ibid.
539. Id. at 86.
540. 2 GARRAUD, *op. cit. supra* note 1, at 221.
542. HERMELIN, *op. cit. supra* note 398, at 174; MIMIN, *op. cit. supra* 530, at 64.
Under the *Code* the *interrogatoire* was in all respects an inquisitorial procedure. The suspect was not informed of the charge against him, he was frequently not permitted to communicate with any one, and was denied the right to have counsel present during the *interrogatoire*, which, as already stated, was secret. In such a situation abuses naturally developed. The *juge* too frequently enacted the role of prosecutor, and the *interrogatoire* was used primarily as a method of securing a confession. The *interrogatoire* was in effect a duel between the frequently frightened and intimidated suspect and the skilled *juge*, who, under the approved practice, might employ lies and deceptions in order to trap the suspect. There was some difference of opinion among the writers as to whether hypnotism might properly be employed.

The need for reforming the procedure of the *interrogatoire*, so as to protect the suspect from deceptive and coercive methods of the *juge d'instruction*, was recognized for a long time. In 1882 the Senate adopted the *projet* of a commission, appointed by the Minister of Justice, which provided among other things that the *juge* should conduct a controversial proceeding in which the ministre public and counsel for both the suspect and the *partie civile* were authorized to participate. The *projet* was rejected by the Chamber of Deputies in 1882, 1884, and 1889. It was again submitted in 1894, but no vote was taken at that time. In 1895 a less radical proposal than the original *projet* was submitted to the Senate by M. Constans. The chief feature of the new proposal was a provision that the suspect should be entitled to the presence of counsel during the *interrogatoire*.

In the debate in the Senate forceful statements were made regarding the many evils of the old system, but the *Cour de Cassation*, when

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543. The *juge* in his *interrogatoire* makes use of the suspect's *casier judiciaire*, which contains a record of all previous convictions. *Minin*, *op. cit. supra* note 530, at 46.


545. *Garraud*, *op. cit. supra* note 1, at 225; *Morizot-Thibault*, *op. cit. supra* note 20, at 419. "The *juge* considers the accusation not as a hypothesis to be verified, but as a theorem to be demonstrated." *Laillet et Vonoven*, *op. cit. supra* note 506, at 121, 122. "A confession, direct or indirect, complete or partial, spontaneous or surprised, obtained formerly by torture, is the end which the secret investigation aimed at and still continually aims at." *Bonnier-Ortolan*, *Publicité de l’Instruction Préparatoire* (1872) 38.


549. *Cumenge*, *op. cit supra* note 397, at 214; *Morizot-Thibault*, *op. cit. supra* note 20, at 402.


553. *Dalloz, Recueil Périodique*, 1897 IV. 113 et seq.
consulted regarding the proposal, expressed the opinion that presence of
counsel at the *interrogatoire* was not desirable. However, so strong
was the force of public opinion that the Constans proposal became law
on December 8, 1897.

b. *Interrogatoire*—Law of December 8, 1897

As already pointed out, the chief innovation accomplished by the
Law of December 8, 1897, was the granting of the right to the suspect
to have counsel present during the *interrogatoire*. Other features of
the procedure, as will appear, were also modified. The Law provides
for at least two appearances of the suspect before the *juge d'instruction*.
At the first appearance the *juge* establishes his identity, informs him
of the charge against him and receives any statements which he desires
to make, after warning him that he is under no compulsion to make
any. If the suspect exercises his right to make a statement and suc-
ceds in convincing the *juge* that the charge against him is unfounded,
he will be discharged without being interrogated. If, however, the *juge*
is of the opinion that the suspect should be examined, he must advise
him of his right to employ counsel to assist him in further proceedings
before the *juge*. In case the suspect does not avail himself of this
privilege, the *juge* must have counsel appointed for him, if he so re-
quests. Counsel so appointed is obliged to serve unless excused for
adequate reasons. It should be noted that the presence of counsel is
not a requisite to the legality of the *interrogatoire*. The accused is
simply given the right to have counsel, who must be notified before each
interrogatoire, but if counsel fails to appear, the *juge* may proceed.

The first appearance is regarded as a preliminary proceeding, whose
chief purpose is to give the suspect an opportunity to explain away the
charge and to advise him of the rights which are accorded him for his

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556. The Law of December 8, 1897, provides that if the suspect appears in answer
to a *mandat de comparution* he must be brought before the *juge d'instruction* immedi-
ately, but if he is taken into custody under a *mandat d'amener* he must have his first
appearance before the *juge* within twenty-four hours. If this latter requirement is not
complied with the officer having the suspect in custody must at once notify the *procu-
reur*, who is required to direct the immediate interrogation of the suspect by the *juge
d'instruction* or by a *juge* of the *Tribunal de Premiere Instance*. In default of such
interrogation the *procureur* must straightway set the suspect at liberty. C. I. C. art 93,
as amended by the Law of Dec. 8, 1897. His failure to do so may subject him to civil
559. This appointment will be made by the head (*bâtonnier*) of the local organiza-
tion of *avocats* if such exists, otherwise by the president of the *Tribunal de Premiere
Instance*. Law of Dec. 8, 1897, art. 3.
560. 3 Garraud, *op. cit. supra* note 1, at 41; 3 Le Poitevin, *op. cit. supra* note 74,
at 243.
561. Mimin, *op. cit. supra* note 530, at 139.
Accordingly, the general rule is that the juge may not question the suspect at the first appearance. Exceptions to this rule are (1) if there is an emergency due to the fact that a witness is in danger of death or that some evidence is about to disappear or that the juge has gone to the scene of the crime in case of a flagrant délit, or (2) if the suspect states that he does not desire counsel.

The Law provides that counsel must be notified by a letter sent at least twenty-four hours before the interrogatoire. Under a strict construction of this provision it is possible that counsel may receive the letter of notification just before or even after the time set for the interrogatoire. Accordingly, in practice, the letter is sent forty-eight hours in advance. Counsel must also be given the opportunity the day preceding each interrogatoire to consult the record of the proceedings that have already occurred. He is thus in a position to advise his client before the interrogatoire. If the suspect is in custody, he is given the right to communicate freely with his counsel. The Law also provides that during the interrogatoire counsel may speak only when given permission by the juge.

The question as to what rights are in fact accorded to the counsel of the suspect at the interrogatoire by the provisions of the Law that the suspect may be questioned only in the presence of his counsel and that the latter may speak only when permitted by the juge has been much discussed. It is clearly recognized that counsel may listen to the proceedings and take notes of them, but he may not advise his client how to answer the questions put to him. With the permission of the juge he may make observations regarding the questions of the juge and the answers given to them, and he may put further questions to his client. He may also ask for such clarification of the proceedings as he believes will be beneficial to the interests of his client.
may advise his client regarding his rights and may oppose any illegal measures by the juge. His role is to keep a check on the conduct of the juge. While he may speak only with the permission of the juge, if this is refused, a note of the fact must be made in the procès-verbal, which may be considered by the court, in case the suspect is later brought to trial. Under the Law counsel may not interrupt the proceedings, but in practice this may occur. A circulaire issued by the Minister of Justice relative to the rights of counsel under the Law of December 8, 1897, states that “he does not have the right, by an intervention unceasingly renewed, to deprive the answers of his client, other suspects or the confronting witnesses of the spontaneity which is the best guarantee of their sincerity”. The circulaire contained the further statement: “It is not impossible that the application of paragraph 3 of article 9 may give rise, in practice, to some conflicts which may be regrettable. They may be easily avoided if defendant’s counsel and the juge are thoroughly imbued with the idea that they are collaborating in a common work and that their united efforts ought to be directed towards the speedy and clarifying manifestation of the truth.”

If counsel, notwithstanding the admonitions of the juge, should persist in interrupting or should whisper to his client the answer to an embarrassing question, it is stated that the juge should send a special report to the procureur with a view to disciplinary action. It has also been suggested that the juge may eject a recalcitrant counsel. The extent of counsel’s participation in the examination conducted by the juge d’instruction will necessarily depend to a considerable extent upon the respective personalities and temperaments of the two individuals. Where the juge is skilful and aggressive and counsel is inexperienced and timid, the latter will play a much less important role than where the situation is reversed.

As already stated, the juge, upon the first appearance of the suspect, informs him that he may refuse to make any statements. It is generally recognized that this warning relates only to declarations made at this first appearance and has no application to the answering of questions put by the juge to the suspect at any subsequent appearance. It became well settled before the enactment of the Law of December 8, 1897, that

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575. Morizot-Thibault, op. cit. supra note 20, at 376.
577. Morizot-Thibault, op. cit. supra note 20, at 418.
578. Cited by Brégeault et Albanel, op. cit. supra note 546, at 73.
579. Mimin, op. cit. supra note 530, at 145.
580. Ibid.
581. Mimin, op. cit. supra note 530, at 125; Goyet, op. cit. supra note 65, at 287.

It has, however, been suggested that the warning applies to subsequent questioning of the suspect. Brégeault et Albanel, op. cit. supra note 546, at 65.
if the suspect refuses to answer, the *juge* is provided with no means of compulsion, although he may make appropriate "observations" to the suspect, and may postpone further questioning to another day. If the suspect persists in his refusal to answer questions, mention of this fact must be made in the *procès-verbal*, and if the suspect is brought to trial, the court may draw an unfavorable inference from the fact of such refusal. The refusal to answer questions, even if persisted in, will not delay or obstruct the other proceedings of the investigation, such as the hearing of witnesses.

The *procureur* must be informed by the *juge d'instruction* of all that occurs at the various stages of the investigation by the *juge d'instruction*, but the almost universal opinion is that he may not legally be present during the interrogation of the suspect. Before the Law of December 8, 1897, there was some doubt regarding the right of the *procureur* in this respect, and, as already pointed out, the early *projets* for amending the *Code* provided for the presence of both the *procureur* and the *partie civile*, but this provision was not enacted. Garraud states that in practice the *procureur* "by an unjustified indulgence" is permitted to be present at the interrogation of a suspect. The author of the leading work on the *interrogatoire* forcefully affirms that this statement is erroneous, and his view is supported by several other writers. Following the *interroga-toire*, however, the complete record of the proceeding must be sent to the *procureur*.  

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582. 2 Faustin Hélie, *op. cit.* supra note 2, at 406; Morizot-Thibault, *op. cit.* supra note 20, at 410; Mmim, *op. cit.* supra note 530, at 34.  
583. 2 Faustin Hélie, *op. cit.* supra note 2, at 406; 2 Duverger, Manuel des Juges d'Instruction (1865) 266.  
584. 2 Duverger, *op. cit.* supra note 583, at 266; CuMenge, *op. cit.* supra note 397, at 204; Mmim, *op. cit.* supra note 530, at 20.  
585. "Without doubt in the actual state of our judicial practice, the refusal of the suspect to answer the questions of the *juge d'instruction* may create an unfavorable impression against him in the trial courts. ..." Observation of the Cour de Cassation on the *projet* for the Law of Dec. 8, 1897, cited by Olier, *op. cit.* supra note 554, at 104.  
587. C. I. C. art. 61.  
589. 2 Garraud, *op. cit.* supra note 1, at 219. To the same effect is Vidal, *op. cit.* supra note 272, at 920n. During the discussion in the Senate, on May 24, 1897, of the *projet* for the Law of Dec. 8, 1897, Senator Constans said: "As to the *procureur de la République*, we have not opened the door for him for the simple reason that it is already entirely open." Quoted in 1 Le Poittevin, C. I. C. Annuaire, Law of Dec. 8, 1897, art. 9, n. 54, p. 364. In reply to this statement, M. Darlan, the Minister of Justice, said that he did not know of any instance where there was such a violation of the law. Cited in Olier, *op. cit.* supra note 554, at 24.  
592. C. I. C. art. 127, as amended by the Law of July 17, 1856.
Criticisms have at various times been expressed regarding the provision of the Law of December 8, 1897, giving the suspect the right to have counsel present during the *interrogatoire*. Thus it has been said that unnecessary delay results, particularly in cases where the charge is not serious or complicated, thereby lengthening the period that a defendant may be kept in *détention préventive*. It has also been said that the right to have counsel obstructs the ascertainment of the truth and increases the expenses of the investigation because of the number of notices that must be sent to counsel. The most general criticism is that a great advantage is given to wealthy suspects capable of employing experienced counsel who will give proper attention to their clients' interests. It has been stated that where suspects are unable to employ counsel, the lawyers who are appointed not infrequently fail to appear. The present writer is of the opinion, formed from the study of other authorities and from inquiries made in France, that these adverse criticisms are exaggerations.

An important provision of the Law of December 8, 1897, prohibits the *juge d'instruction*, who is also a *juge* of the *Tribunal de Premiere Instance*, from participating in the trial of any case which he had previously investigated.

6. Hearing of Witnesses

An important and usual feature of the investigation made by the *juge d'instruction* is the examination of witnesses. This, however, is not an obligatory proceeding and the *juge* may, if he sees fit, close his investigation without hearing any witnesses. Likewise, it is entirely discretionary with the *juge* to determine what witnesses he will examine, although requests for the calling of particular witnesses may be made by the *procureur*, the suspect and the *partie civile*. It seems to
be the general opinion that, except in case of a flagrant délit, a person who volunteers to testify as a witness may not be heard, for the reason that his testimony is likely to be biased. Witnesses may be called to testify not only regarding the facts of the alleged offense, but also the character of the suspect, this being an important consideration in the investigation.

The Code authorizes the juge to direct the procureur to issue an official order, to be served by a huissier, for the appearance of witnesses, but in practice, in order to avoid expense, the juge simply sends a letter of notification, either by post or by a police official. If a witness after a formal notification fails to appear, the juge may compel his appearance and may fine him not exceeding one hundred francs. However, if the witness can later satisfactorily explain his failure to appear, the fine may be remitted upon the recommendation of the procureur. Upon the presentation of a physician's certificate that the witness is unable to appear the juge will go to his residence for the purpose of conducting the examination if he resides within a certain district; otherwise the juge will appoint another official to examine the witness. If a witness is in prison, the juge may examine him there or have him brought to the cabinet of the juge.

Witnesses are sworn "to speak all the truth, nothing but the truth", but false testimony before the juge d'instruction is not punishable, as is the case when a witness testifies falsely before a trial court. Infants under fifteen years may not be sworn but may make unsworn statements to the juge. The same rule applies to persons who have been convicted of certain grades of offenses or have incurred other specified penalties. A witness, who after appearing refuses to refusal, he must make an ordonnance, from which the procureur may appeal to the chambre d'accusation. 4 Le Poittevin, op. cit. supra note 74, at 802.

605. 2 Garraud, op. cit. supra note 1, at 25.
606. 2 Massabau, op. cit. supra note 120, at 234; 2 Roux, op. cit. supra note 143, at 316.
607. Arts. 71 and 72.
608. Goyet, op. cit. supra note 65, at 290; 4 Le Poittevin, op. cit. supra note 74, at 791.
609. C. I. C. art. 80.
610. C. I. C. art. 81.
611. Within the canton of the juge de paix of the domicile of the juge d'instruction.
612. If the witness resides outside the canton, the juge will appoint the juge de paix of the witness' canton to examine him, and, if outside the arrondissement of the juge, he will request the juge of the arrondissement in which the witness resides to act. C. I. C. arts 83 and 84.
613. Cumenge, op. cit. supra note 397, at 165.
614. 4 Le Poittevin, op. cit. supra note 74, at 797.
615. C. I. C. art. 75.
616. Cumenge, op. cit. supra note 397, at 178; 2 Garraud, op. cit. supra note 1, at 16 and 17; 2 Massabau, op. cit. note 120, at 238; Goyet, op. cit. supra note 65, at 291.
617. These have less probative value than sworn testimony.
618. C. I. C. art. 79.
619. 2 Massabau, op. cit. supra note 120, at 238; 4 Le Poittevin, op. cit. supra note 74, at 801.
testify, is subject to the same fine that might be imposed in case he had failed to appear. An exception to this rule exists in the case of certain groups of persons, such as lawyers and physicians, who cannot be compelled to reveal professional secrets. There is some diversity of opinion as to whether a witness may justify his failure to testify on the ground that it would incriminate him, there being no constitutional or statutory provision against self-incrimination. While some writers contend that this justification should be allowed, the decisions of the courts forbid it. Relationship by blood or marriage to the suspect or to the partie civile does not disqualify a person as a witness, but it may affect the weight of the testimony, and for this reason mention of the fact must be made in the procès-verbal.

The juge, attended by the greffier, must examine the witnesses separately and outside the presence of the suspect. The requirement of separate examination is subject to the qualification that where there are variations or contradictions in the testimony of witnesses, they may be confronted and examined in each other's presence for the purpose of reconciling any differences. While the Code provides that the suspect is not to be present at the examination of witnesses, it is established that he may be compelled to appear for the purpose of being confronted with any witnesses. Counsel for the suspect may not be present except when the suspect is being confronted, nor may the partie civile. However, if the partie civile is being examined as a witness, he is entitled under a law enacted in 1921 to the presence of counsel during the examination who must be accorded the same priv-

620. DEGOS, op. cit. supra note 144, at 557; 4 LE POTTEVIN, op. cit. supra note 74, at 793. If a person, who has publicly charged that a crime or délit has been committed and declared publicly that he knows the offenders or their accomplices, refuses to answer questions put to him by the juge d'instruction regarding his charge, he is guilty of a délit and may be punished by an imprisonment of six days to a year or a fine of 100 francs to 2,000 francs or both. C. I. C. art. 80, as amended by the Law of July 1, 1919.

621. 2 GARRAUD, op. cit. supra note 1, at 53 et seq.; 4 LE POTTEVIN, op. cit. supra note 74, at 634 et seq.


623. The reports of these decisions are collected in 1 LE POTTEVIN, C. I. C. ANNOTÉ, art. 80, n. 26.

624. C. I. C. art. 75.

625. C. I. C. art. 73. The juge may employ proper measures to prevent witnesses from communicating with each other. 2 FAUSTIN HÉLIE, op. cit. supra note 2, at 372; 2 DUVERGER, op. cit. supra note 583, at 185.

626. 2 DUVERGER, op. cit. supra note 583, at 208; 2 MASSABIAU, op. cit. supra note 120, at 238; 4 LE POTTEVIN, op. cit. supra note 74, at 792. The confronting of witnesses has, however, been criticized on two grounds: (1) that it violates the express provision of Art. 73 (2 FAUSTIN HÉLIE, op. cit. supra note 2, at 378), and (2) that the suspect ought to be given the advantage of contradictions by witnesses. CUMENGE, op. cit. supra note 397, at 189.

627. C. I. C. art. 73.

628. 2 GARBAUD, op. cit. supra note 1, at 112.

629. HERMELIN, op. cit. supra note 398, at 145; VIDAL, op. cit. supra note 272, at 929; OLIER, op. cit. supra note 554, at 80.

630. 2 DUVERGER, op. cit. supra note 583, at 188; CUMENGE, op. cit. supra note 397, at 179; OLIER, op. cit. supra note 554, at 30.
ileges as are granted to the counsel of the suspect during the *interrogatoire*. It is stated positively that the *procureur* has no right to be present, but the authorities differ as to whether this rule is observed in practice.

The *Code* provides that the *juge* shall "hear" witnesses, and it is generally stated by writers on the subject that the examination of a witness is not by question and answer, but that he makes a spontaneous and uninterrupted statement after which the *juge* may put questions for the purpose of correction or clarification. It may be doubted whether this procedure always operates in practice. In the case of a witness testifying before a trial court the *Code* directs that he must testify without interruption, but it was observed by the present writer that when the President of the court happened to be aggressive and impatient, the witness did not progress far with his spontaneous testimony when the President of the court happened to be aggressive and impatient, the witness did not progress far with his spontaneous testimony before he was subjected to the questioning of the President. The testimony of the witnesses must be oral and they may not present a written deposition, nor may they consult notes except in a complicated case involving figures or dates. The *juge* may recall and re-examine a witness as often as he considers proper for ascertaining the truth.

When the testimony of the witness is completed the *juge* dictates a recital of it in the form of a deposition to the *greffier*. This constitutes the *procès-verbal*. It is read to the witness, who may have any error corrected. Upon his approval of the deposition, it is signed by the *juge*, the *greffier* and himself. This *procès-verbal* serves in part

631. Law of March 21, 1921, *Journal Officiel* (March 24, 1921) 3646, amending articles 3 and 10 of the Law of Dec. 8, 1897, 1897 *Bulletin des Lois*, pt. 2, 1777. One of the reasons for the new Law has been stated as follows: "It too frequently happened that at the examination, when the suspect demanded the presence of counsel, the *partie civile*, the victim of the offense, was less protected than the suspect and might endanger his case by stupid answers to questions suggested by the lawyer of the suspect." 632. 2 Faustin Hélie, *op. cit. supra* note 2, at 373; Cumenge, *op. cit. supra* note 397, at 180; 2 Duverger, *op. cit. supra* note 583, at 188; Guyer, *op. cit. supra* note 65, at 312. Article 80 of the C.I.C. provides that a witness who fails to appear for examination may, upon the recommendation of the *procureur*, be fined and compelled to appear upon the order of the *juge*. It has been argued that this section inferentially authorizes the presence of the *procureur* at the examination. Cumenge, *op. cit. supra* note 397, at 180. The question whether the *procureur* may be present is discussed in Laborde, *op. cit. supra* note 132, at 655.

633. That he is present, 2 Garraud, *op. cit. supra* note 1, at 220; Vidal, *op. cit. supra* note 272, at 299. That he is not present, 2 Massabiau, *op. cit. supra* note 120, at 239.

634. C. I. C. art. 73.
636. C. I. C. art. 319.
638. 2 Duverger, *op. cit. supra* note 583, at 207; Cumenge, *op. cit. supra* note 397, at 188.
640. C. I. C. art. 76. This article provides that the *juge* and the *greffier* must sign each page of the deposition, and provides further that if the witness refuses to sign his deposition, mention of this fact must be made in the *procès-verbal*. 
as a basis for the action of the *juge d'instruction* in disposing of the case and of the *chambre d'accusation* in deciding whether the case shall be brought to trial.\(^{641}\) It is also useful to the suspect's counsel, who is furnished with a copy. If he considers that the examination of a witness has not been complete, he may demand that the witness be questioned further.\(^{642}\) The preparation of the *procès-verbal* is an important and difficult proceeding, as the *juge* ought to reproduce as exactly as possible the testimony of the witness.\(^{643}\) In practice, however, he is not likely to accomplish this result. The personality of the *juge* frequently characterizes the recital of the witness' testimony, and it has been said, "all the witnesses speak the same language—that of the *juge*.\(^{644}\) In addition to the declarations of the witnesses, the *juge* may make note in the *procès-verbal* of their attitude and manner.\(^{645}\) A stenographic or phonographic record of the witness' testimony has been suggested as an improvement on the written deposition.\(^{646}\)

While a failure on the part of the *juge* and the *greffier* to observe all the rules, prescribed in the *Code* for the examination of witnesses and the preparation of the *procès-verbal*, does not result in a nullification of the proceedings, it may affect the probative value of the witness' depositions and the *greffier* may be subject to a fine and the *juge* to a civil action by a person injured by the non-observance of any *Code* requirement.\(^{647}\)

### 7. Experts

In the course of investigations by the *juge d'instruction* there frequently arise special problems for the solution of which scientific or technical knowledge and skill are required. As the *juge* is seldom qualified in these respects, he may appoint an expert in the particular field to

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641. C. I. C. art. 222.
642. CUMENGE, *op. cit. supra* note 397, at 183.
644. "... the magistrate ought to analyze faithfully the depositions of the witnesses. His *procès-verbal* will then be an exact reproduction, a photograph, so to speak. This direction is difficult to observe, if one may judge by the common practice. ... almost always in the *procès-verbaux* the witnesses speak the same language—that of the *juge*, the translator of their depositions." 2 GARBAUD, *op. cit. supra* note 1, at 113. To the same effect is MORIZOT-THIBAULT, *op. cit. supra* note 20, at 427. "To insist on reproducing the depositions in a style too correct and concise may prevent the magistrate from reproducing exactly what he has heard, may make him reject certain expressions which appear trivial, but which in reality give an exact idea of the examination, of the intelligence of the witness, and of the degree of credibility which ought to be accorded his deposition." CUMENGE, *op. cit. supra* note 397, at 191.
645. MEMIN, *op. cit. supra* note 530, at 101.
646. The written deposition is criticized and a stenographic report of the testimony recommended by LOCARD, *op. cit. supra* note 275, at 55. Opposition to a stenographic report of the witness' testimony has been expressed. MORIZOT-THIBAULT, *op. cit. supra* note 20, at 428. The question whether the testimony of the witness should be taken down stenographically is discussed in 2 GARBAUD, *op. cit. supra* note 1, at 114.
647. CUMENGE, *op. cit. supra* note 397, at 191.
648. C. I. C. art. 77.
study the matter involved and give an opinion regarding it. For example, it may be necessary to appoint a surgeon to perform an autopsy, a chemist to analyze the contents of a deceased person's stomach, a skilled accountant to examine books of account, an electrician to evaluate certain experiments, a psychiatrist to determine the mental condition of a suspect. The appointment of an expert is altogether discretionary with the juge so far as the suspect and the partie civile are concerned, and it is not necessary that they be informed of the appointment. The procureur, however, must be notified in all cases, and he may of his own initiative demand that an expert be appointed and may appeal from an order of the juge refusing compliance. The juge is in most cases allowed a wide choice in the selection of an expert. Each year the Cour d'Appel in every ressort prepares an official list of experts in various lines, notably medicine and chemistry, but it is only in the case of a medical expert, where the offense that is being investigated is not considered flagrant, that the juge is required to confine his choice to the prepared list.

There is no provision in the Code fixing the number of experts who may be selected, but the Minister of Justice has recommended that only in an exceptional case, such as a particularly delicate autopsy, should as many as two be appointed. If there is a disagreement between the two, a third should be added. In most medico-legal cases it is the practice to appoint two or three experts. The amount of the fees to be paid experts in certain lines is fixed by law, but in the case of those who are not so included it is determined by the juge.

The expert is appointed by an official order, which should set forth precisely the matter to be investigated and the particular questions to

649. The juge d'instruction is not specifically authorized by the Code to appoint experts except in case of a flagrant délit, but such appointment is recognized as an ordinary method of the investigation. 2 Le Poirottevin, op. cit. supra note 74, at 495. The procureur is, however, empowered to appoint experts when investigating a flagrant délit by the express provisions of articles 43 and 44. Experts may be appointed by the chambre d'accusation and also by the trial courts. 2 Le Poirottevin, op. cit. supra note 74, at 495.

650. 1 Garraud, op. cit. supra note 1, at 612. Because of abuses in the appointment of accountants the juges d'instruction are directed by the Minister of Justice to use the services of such experts only when they are "absolutely indispensable". Circulaire of June 16, 1926, cited in 2 Le Poirottevin, op. cit. supra note 74, at 497. 651. C. I. C. art. 65, as amended by the Law of July 17, 1856. 652. Hermelin, op. cit. supra note 398, at 138. 653. In order to be listed as an expert, a member of the medical profession must have practiced for five years or have received a diploma in "medical jurisprudence and psychiatry" from one of certain universities designated by law. 2 Le Poirottevin, op. cit. supra note 74, at 507. It is provided by law that a medical expert must be a French citizen. Law of Nov. 30, 1892, art. 14, 1893 Bulletin des Lois (XII sér.) pt. 1, 836. 654. Goyet, op. cit. supra note 65, at 293. 655. 2 Le Poirottevin, op. cit. supra note 74, at 497, citing various circulaires. 656. 1 Garraud, op. cit. supra note 1, at 611. 657. 2 Le Poirottevin, op. cit. supra note 74, at 502; Decree of Oct. 5, 1920, Journal Officiel (Oct. 7, 1920) 15018.
be answered. Members of the medical profession are required to accept appointments as experts. Other persons are under no legal obligation to serve except where there is an emergency or a flagrant délit, in both of which cases refusal to serve is punishable by a fine.

The position of an expert appointed by the juge d'instruction is not that of a witness. This is exemplified by the oath taken by the experts who swear "to make their report and to give their opinion on their honor and conscience" while the witness swears "to speak the truth and nothing but the truth". If the expert is called at the trial, he then becomes a witness and takes the regular oath of a witness. The expert may be neither challenged nor impeached. He exercises a quasi-judicial function in assisting the juge in ascertaining the truth and arriving at a decision based upon it.

An expert may not delegate any of his functions, but it may become necessary for him to secure the opinion of another expert; for example, a surgeon called to give an opinion on the result of a wound may require the report of an x-ray specialist. While the expert cannot be held responsible for any mistakes of fact in his findings or errors of judgment in his opinions, he is liable to anyone who is injured by fraud or deceit on his part.

The expert makes his investigation free from any supervision or control by the suspect or the partie civile, who do not have the right to appoint experts to participate in the investigation, except in a few exceptional cases, notably prosecutions for fraud in the sale of goods, and for adulteration of food and farm products. In such cases it is provided that the procureur shall appoint, from the lists prepared by the courts, two chemical experts, one selected by the juge d'instruction and the other by the suspect. The experts may make their analyses together or separately as they please. If the findings or conclusions of the experts differ, they may select a third expert, whose opinion will be decisive. In

658. I Garraud, op. cit. supra note 1, at 608.
660. C. P. art. 475.
661. C. C. art. 75.
662. I Garraud, op. cit. supra note 1, at 621.
663. Id. at 592. The Minister of Justice in 1930 called to the attention of the juges d'instruction the fact that the rôle of the expert consists only in making findings and drawing conclusions under the control and direction of the juge, who cannot without neglect of duty leave to the expert the conduct of the investigation. Circulaire of Apr. 3, 1930, cited by L. Pottevin, op. cit. supra note 74, supplément at 176.
664. 2 L. Pottevin, op. cit. supra note 74, at 501.
665. I Garraud, op. cit. supra note 1, at 597.
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case the two experts cannot agree on a third, the choice will be made by the President of the Tribunal de Première Instance.670

Except during the performance of an autopsy in a case of flagrant délit, the juge d'instruction is not required to be present at the examination or investigation conducted by the expert,671 but may be present if he desires.672 Some writers contend that the juge should be present during all investigations of the experts in order to direct and supervise their activities.673 In practice, however, the juge is ordinarily not present.674 The procureur may attend the investigations of the expert, but it is considered desirable that he do so only when the juge is present.675 Neither the suspect nor a partie civile has the right to be present when the expert is making his investigations, and they are not ordinarily notified of the expert's appointment.676 The suspect, however, may be present, upon the order of the juge, for example, "in order to ask of him explanations which tend to the discovery of the truth".677

No provision of the Code grants to the suspect the right to be represented by counsel at the operations of the expert. It has been stated, however, that a practice has developed of permitting counsel to be present.678 If the suspect is present and is interrogated by the juge, then the presence of counsel is guaranteed by the Law of December 8, 1897. The counsel, however, has no control over the operations of the expert.679 It is settled that the suspect has no right to have an expert of his own selection present when the experts appointed by the juge are conducting their investigation.680

At the conclusion of his investigations the expert must present to the juge a report setting forth the character of his operations, his findings and his conclusions.681 This report may be oral or written, depend-

672. 3 GARAUD, op. cit. supra note 1, at 84n.
673. 2 DUVERGER, op. cit. supra note 583, at 503; MESLIER, op. cit. supra note 671, at 159; 2 Massabiau, op. cit. supra note 120, at 125.
674. DEHESDIN, op. cit. supra note 671, at 100; TCHERNOFF ET SCHONFELD, op. cit. supra note 671, at 192.
675. 2 Massabiau, op. cit. supra note 120, at 125, n. 1.
676. LABORDE, op. cit. supra note 132, at 650.
677. DEHESDIN, op. cit. supra note 671, at 102.
678. TCHERNOFF ET SCHONFELD, op. cit. supra note 671, at 54.
679. MORIZOT-THIBAULT, op. cit. supra note 20, at 450. During the spring of 1932, when the present writer was in Paris, an engineer, named Dunikowski, was in custody on a charge of obtaining money on the false pretense that he could extract gold in paying quantities from sea water. The juge d'instruction who was in charge of the investigation appointed several experts to study and report upon Dunikowski's claims. At various intervals over a period of several months Dunikowski demonstrated his process to the experts. The juge d'instruction was sometimes present during the demonstrations and questioned Dunikowski, who was accordingly permitted to have counsel present, as provided by the Law of Dec. 8, 1897.
680. TCHERNOFF ET SCHONFELD, op. cit. supra note 671, at 56.
681. 2 LE POTTEVIN, op. cit. supra note 74, at 501.
ing upon the circumstances of the case. If there are several experts, they join in a report. The report should be expressed in ordinary language and technical terms should be avoided as far as possible, particularly in setting forth the conclusions. The is not compelled by law to adopt the conclusions of the report, but in practice, generally through necessity, he does so. He should, however, seek to make a personal evaluation.

A copy of the expert’s report is furnished the suspect, and he may at his own expense employ another expert, whose function is limited to a discussion, from a scientific point of view, of the opinion of the expert, based upon the findings of fact set forth in his report. He is not given an opportunity to check the operations on which the report is based, but must accept these as conclusive. Any opinion he may express on the report is not under oath and has little evidentiary value.

The power granted to the to appoint experts has definitely advantageous results. It permits a non-partisan investigation of difficult scientific and technical problems during the preliminary examination and frequently enables the to dispose finally of the entire criminal proceeding. Thus, if in a case of an alleged forgery the expert reports that the writing was genuine or in a case of suspected poisoning that no poison was found, the may close his investigation and free the suspect. Or if a person accused of murder is found to be irresponsible by reason of mental disease, the may at once have him committed to an institution.

In practice the appointment of experts by the has not always produced satisfactory results, and many criticisms have been directed at the system by modern writers. Thus it is stated that incompetent experts are not infrequently appointed, and that this condition is due in part to the difficulty of securing properly qualified experts because of the small fees allowed. The fees received by medical experts are notably inadequate. The practice of appointing a single expert is also criticized, it being pointed out that the risk of error is lessened when several are chosen. The most common criticism, however, is directed at the lack of any supervision by the suspect of

682. GARBAUD, op. cit. supra note 1, at 627.
683. GARBAUD, op. cit. supra note 1, at 629.
684. GARBAUD, op. cit. supra note 1, at 632. "The expert is not an arbiter, for arbitration involves a judgment." TCHERNOFF ET SCHONFELD, op. cit. supra note 671, at 14.
685. GARBAUD, op. cit. supra note 1, at 613.
686. Ibid.
688. CUMENGE, op. cit. supra note 397, at 147.
689. TCHERNOFF ET SCHONFELD, op. cit. supra note 671, at 162.
690. LAGNEAU, op. cit. supra note 687, at 157.
the operations of the experts, who are too much inclined to favor the prosecution.

Various recommendations for improving both the system and practice of appointing experts have been advanced. It has been proposed that the suspect should be given the right to appoint an expert, who would attend and supervise the operations of the experts chosen by the juge. Garraud would permit the procureur, the suspect and the partie civile to be present or to be represented at the investigations conducted by the expert appointed by the juge and would have his findings and conclusions submitted for review by a body of superarbitres composed of a selected group of specialists in the various fields. It has also been recommended that the fees of the experts be increased, and that experts who refuse to serve shall be subject to the same penalties as witnesses who fail to appear.

A proposal which has been forcefully presented would give to the suspect the right to choose an expert who would occupy a position corresponding to that of the expert appointed by the juge, in which case the two experts would join in conducting the various operations, would discuss their findings and conclusions, and, in case of disagreement, would have joined with them a third expert. This is known as the expertise contradictoire. There is a difference of opinion among the proponents of the system of expertise contradictoire as to the method of selecting a third expert if the two originally selected disagree. The following methods have been suggested: (1) The two experts who are in disagreement will select a third. (2) The third expert will be selected by the juge who ordered the expert investigation. (3) The third expert will be designated by the governing body of the appropriate association.

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691. MORIOT-THIBAULT, op. cit. supra note 20, at 459.
692. GARRAUD, op. cit. supra note 1, at 613; MESLIER, op. cit. supra note 671, at 296-298.
693. CUMENGE, op. cit. supra note 397, at 149. "For safeguarding the interests of the suspect, it will be sufficient that the operations of the appointed experts be under the surveillance of a representative chosen by him or for him. The experts appointed by the juge d'instruction will do the work and form the conclusions, but alongside them, and taking the same oath as they, will be placed an expert chosen by the suspect from the annual list, whose function will consist in supervising his associates, in requiring of them the operations which he believes useful for establishing the truth, and who will record his comments at the bottom of the procès-verbal or after the report." HERMELIN, op. cit. supra note 398, at 139.
694. GARRAUD, op. cit. supra note 1, at 615.
695. MORIOT-THIBAULT, op. cit. supra note 20, at 466.
696. MASSON, op. cit. supra note 225, at 255.
697. GENESTEIX, L'EXPERTISE CRIMINELLE (Thesis Paris, 1900) 106; LAGNEAU, op. cit. supra note 687, at 160.
698. MORIOT-THIBAULT, op. cit. supra note 20, at 463. "There are those who oppose the expertise contradictoire. Their principal argument is that the expertise gets its value chiefly from the qualifications of the expert chosen, the opinion of one good expert having more value than that of two bad ones." LAGNEAU, op. cit. supra note 687, at 160.
of professional experts. As a variant of the expertise contradictoire it has been suggested that both the suspect and the partie civile be permitted to select experts.

8. Reconstitution

A method of investigation frequently employed is the reconstruction (reconstitution) of the crime at the place where it occurred. Sometimes the crime is enacted by witnesses assisted by police officers in the presence of the suspect and sometimes the suspect is induced to play the principal part in the drama. The purposes of the reconstitution are to place the witnesses in the actual setting of the crime for the enlightenment of the juge, to call forth admissions or a confession from the suspect, and sometimes to verify a confession already made. A man who was suspected of having participated in the robbing of a bank was conducted to the scene of the crime where he was placed before the bank armed with a carbine and wearing a cloak for the purpose of reconstructing the crime according to the testimony of the witnesses.

A proceeding somewhat similar to the reconstitution is the confrontation of a suspected murderer with the corpse of his victim. Judges d'instruction have been instructed by the Minister of Justice to employ this method of investigation only when absolutely necessary to discover the truth.


Although there is no express provision in the Code, it is a fundamental rule governing the investigation conducted by the juge d'in-

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701. 3 Garaud, op. cit. supra note 1, at 197; Cuche, op. cit. supra note 217, at 333.
702. 3 Garaud, op. cit. supra note 1, at 197. "Frequently when the case is important the complainant and witnesses are taken for purposes of clarification to the scene of the crime. It is an excellent method. Many uncertain indications are made definite; many recollections are awakened by the association of ideas; particularly many improbabilities of the recital and physical impossibilities become apparent. If the suspect is taken along, his facial expression will be of the greatest interest." Locard, op. cit. supra note 254, at 112.
704. Id. at 44.
705. This practice originated in the ordeal. 3 Garaud, op. cit. supra note 1, at 197. "This sight may inspire a guilty person with overwhelming remorse and draw from him a confession which he will let escape in the first vivid emotions, before he has had time to appreciate his danger and to free himself from the agitation produced by the consciousness of his crime or to fortify himself with the hope of escaping conviction and obtaining exemption from punishment." 2 Duverger, op. cit. supra note 583, at 79.
706. Circulaire, Mar. 6, 1901, cited in 3 Garaud, op. cit. supra note 1, at 197. "The purpose of this method of investigation, in the field of legal proof, was either to furnish, by the confusion, the emotion or the pallor of the accused person in the presence of the corpse of his victim, information of which the juge d'instruction might take advantage or to provoke a confession from the suspect. To-day it is recognized that this ordeal, the results of which are quite different according to the temperament and sensibility of the criminal, has more disadvantages than advantages." Ibid.
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struction that so far as the public is concerned it should be secret.\textsuperscript{707} One exception to this rule is found in the right of the \textit{juge} to make such disclosures as he considers proper to facilitate his investigation, for example to enable him to determine the identity of a person who has been killed.\textsuperscript{708} Another exception occurs in the case of the \textit{reconstitution} of an offense which occurred in a public place. In such a case the public attends in large numbers and the newspapers contain graphic accounts, sometimes with photographs, of the proceeding. While the public is rigorously excluded from the \textit{cabinet} of the \textit{juge d'instruction}, the rule of secrecy is altogether ineffective in preventing the press from publishing reports of the proceedings conducted by the \textit{juge}. Newspaper reporters obtain, through attendants and petty officials at the \textit{Palais de Justice}, the names of witnesses and suspects whom they then interview regarding their testimony before the \textit{juge}.\textsuperscript{709} They also obtain information regarding the proceedings from police officials,\textsuperscript{710} experts,\textsuperscript{711} lawyers,\textsuperscript{712} and even the \textit{juges d'instruction} themselves.\textsuperscript{713} Not only do the newspapers print reports of the proceedings in the \textit{cabinet} of the \textit{juge d'instruction}, but they also conduct independent investigations during which the scene of the crime is visited and witnesses and suspects interviewed.\textsuperscript{714} There has been much criticism of the existing situation of theoretical secrecy and actual semi-publicity, and the following proposals for change have been made: (1) to punish those who publish reports of any proceedings during the preliminary investigation,\textsuperscript{715} and (2) to open all the proceedings to the public.\textsuperscript{716}

I0. \textit{Délégation}

a. In general

The right of a \textit{juge d'instruction} to delegate his functions to another official and the extent to which this right may be exercised have been the subject of much legislation and even more discussion by com-

\textsuperscript{707} 2 \textit{Faustin Hélie}, \textit{op. cit. supra} note 2, at 352; 1 \textit{Duverger}, \textit{op. cit. supra} note 583, at 453; 3 \textit{Garraud}, \textit{op. cit. supra} note 1, at 10; \textit{Goyet}, \textit{op. cit. supra} note 65, at 285. The requirement of secrecy in case of the \textit{interrogatoire} has survived from the express provisions of the \textit{Ordonnances} of 1539 and 1670. \textit{Mimin}, \textit{op. cit. supra} note 530, at 108.

\textsuperscript{708} 3 \textit{Garraud}, \textit{op. cit. supra} note 1, at 200; 2 \textit{Massabiau}, \textit{op. cit. supra} note 120, at 257.

\textsuperscript{709} \textit{Olier}, \textit{op. cit. supra} note 554, at 30n.; \textit{Morizot-Thibault}, \textit{op. cit. supra} note 20, at 357; 3 \textit{Garraud}, \textit{op. cit. supra} note 1, at 16.

\textsuperscript{710} \textit{Olier}, \textit{op. cit. supra} note 554, at 31n.; \textit{Sifnost}, \textit{op. cit. supra} note 63, at 242.

\textsuperscript{711} \textit{Thernoff et Schonfeld}, \textit{op. cit. supra} note 671, at 53.

\textsuperscript{712} \textit{Brégeaut et Albanel}, \textit{op. cit. supra} note 546, at 75.


\textsuperscript{714} 3 \textit{Garraud}, \textit{op. cit. supra} note 1, at 16; \textit{Vidal}, \textit{op. cit. supra} note 272, at 925.

\textsuperscript{715} \textit{Olier}, \textit{op. cit. supra} note 554, at 31.

\textsuperscript{716} 1 \textit{Hermelin}, \textit{op. cit. supra} note 398, at 52; 3 \textit{Garraud}, \textit{op. cit. supra} note 1, at 17.
mentators. The Code provides that where a witness, who has been certified by a physician as unable to appear in answer to a subpoena issued by a juge d'instruction, resides outside the canton in which the juge sits, he may delegate the hearing of this witness to a juge de paix of the canton in which the witness resides, and where the witness resides in another arrondissement, the juge must authorize a juge d'instruction of the latter arrondissement to conduct the hearing of the witness.\footnote{717} The Code further provided, until amended in 1933, that the juge must delegate the conduct of a perquisition in another arrondissement to a juge d'instruction of the latter place.\footnote{718} The delegation must be made by a formal order, known as a commission rogatoire. This should specify the name, title and address of the delegated official and should set forth precisely the functions to be performed by him.\footnote{719} For example, where the commission rogatoire is issued for the hearing of a witness it should contain a recital of the facts regarding which he is to testify \footnote{720} and also the questions which should be put to him.\footnote{721}

Notwithstanding the very limited right of delegation conferred by the Code, the practice developed whereby the juge d'instruction might delegate all of his functions which pertain to securing evidence,\footnote{722} including the appointment of experts,\footnote{723} not only to another juge d'instruction, but also to any officer of the police judiciaire subordinate to the procureur.\footnote{724} In the large cities certain police officials, known as commissaires aux délégations judiciaires, have been designated for the special purpose of conducting investigations delegated to them by juges d'instruction.\footnote{725}

When an official is conducting an interrogatoire under a commission rogatoire he should observe the requirements of the Law of December 8, 1897, regarding the presence and rights of counsel.\footnote{726} For this reason it became customary to delegate interrogatoires only to juges d'instruction and juges de paix, since it is considered beneath the dignity of lawyers to appear before inferior officials of the police judiciaire, such as commissaires de police.\footnote{727} This objection does not apply to the dele-
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gation of the authority to hear the suspect at his first appearance before the juge, since there is no right to counsel at this proceeding.\textsuperscript{728}

The general rule is that the issuing of a mandat may not be delegated,\textsuperscript{729} although it is recognized that where a commission rogatoire has been directed to a juge d'instruction to conduct an interrogatoire, he may as a necessary incident, for the purpose of securing the presence of the suspect, issue a mandat de comparution.\textsuperscript{730} Sometimes the juge will send with his commission rogatoire for an interrogatoire a mandat d'amener with a direction that it be executed if necessary, but this is considered an improper practice.\textsuperscript{731} If, during the course of the interrogatoire, the delegated juge deems it advisable that the suspect be committed to custody, some authorities state that this juge may issue a mandat.\textsuperscript{732} Contrary to the requirement that the commission rogatoire should contain a precise statement of the function to be performed, the practice developed of sending to commissaires de police general delegations under which they might conduct perquisitions, examine witnesses and even interrogate suspects.\textsuperscript{734} While it is recognized that by reason of the excessive amount of work to be done the juges d'instruction are unable to perform personally all their functions as contemplated by the Code,\textsuperscript{735} yet the frequency and extent of the delegations has been the subject of severe criticism.\textsuperscript{736}

\textsuperscript{728} PASCAL, op. cit. supra note 216, at 55.

\textsuperscript{729} 2 Faustin Hélie, op. cit. supra note 2, at 428; 2 ROUX, op. cit. supra note 43, at 343.

\textsuperscript{730} 3 Garraud, op. cit. supra note 1, at 96; Bastide, op. cit. supra note 722, at 76; Goyet, op. cit. supra note 65, at 203; Mimin, op. cit. supra note 530, at 80. Some writers state that the issuing of a mandat de comparution may be delegated. 2 Massabieau, op. cit. supra note 120, at 249; Decoix, op. cit. supra note 144, at 571. There is also authority for the proposition that if the suspect fails to appear upon this mandat, the juge may then issue a mandat d'amener. 3 Garraud, op. cit. supra note 1, at 96; Goyet, op. cit. supra note 65, at 295; Mimin, op. cit. supra note 530, at 80; i Le Pottévin, op. cit. supra note 74, at 873. In such a situation the delegating juge, after being notified by telegraph, may issue the mandat. Bastide, op. cit. supra note 722, at 73. It has, however, been categorically stated that the issuance of a mandat d'amener may not be delegated. 2 Massabieau, op. cit. supra note 120, at 249; Laborde, op. cit. supra note 132, at 701; Vidal, op. cit. supra note 272, at 923; Bastide, op. cit. supra note 722, at 75.

\textsuperscript{731} Bastide, op. cit. supra note 722, at 66.

\textsuperscript{732} 3 Garraud, op. cit. supra note 1, at 96; i Le Pottévin, op. cit. supra note 74, at 874.

\textsuperscript{733} Agulhon, Manuel Pratique du Juge d'Instruction (1924) 97.

\textsuperscript{734} Id. at 158; Sifnéos, op. cit. supra note 63, at 182.

\textsuperscript{735} Morizot-Thibault, op. cit. supra note 20, at 533; Cuche, op. cit. supra note 217, at 351; Magnol, op. cit. supra note 431, at 15.

\textsuperscript{736} Laborde, op. cit. supra note 132, at 701; Sifnéos, op. cit. supra note 63, at 181 et seq.; Morizot-Thibault, op. cit. supra note 20, at 527; 2 Roux, op. cit. supra note 43, at 342.
b. Délégation—After 1933

A law enacted in 1933 specifically prohibited the delegation of an interrogatoire and provided that only another juge d'instruction, a juge de paix or another juge of the court of which the juge d'instruction is a member may be delegated to perform the other functions of the juge, with the exception of a saisie, which other officers of the police judiciaire may be authorized to make. The following year the provision of the Law of February 7, 1933, prohibiting the delegation of the interrogatoire, was repealed because of the expense of bringing suspects from a distance, the difficulty of interrogating several suspects at one time and the impossibility under the law of interrogating a suspect who resides outside the arrondissement and who is too ill to travel. The necessity of remedying this situation was regarded as so pressing that an emergency was declared and the law was passed the day following its introduction. In 1935 the power of the juge to delegate was re-extended to include all the proceedings of his investigation, and he was authorized to commission any officers of the police judiciaire to act for him, except in case of an interrogatoire where he may designate only the three juges named in the Law of February 8, 1933. The effect of the Law of March 25, 1935 is to codify the practice existing before 1933 in all respects except that the juge may not delegate an interrogatoire to any officers of the police judiciaire, who are designated as assistants of the procureur, other than a juge de paix. The chief practical effect of this exception is to prohibit the juge from authorizing a commissaire de police to conduct an interrogatoire.

II. Disposition of the Case by the Juge d'Instruction

When the juge d'instruction has completed his investigation, he must send a report of the proceedings with his conclusions thereon to the procureur in the form of an ordonnance. Within three days the procureur must make recommendations to the juge regarding the action to be taken, but the juge is not bound to follow such recommendations. If the juge concludes from all the evidence that no

737. C. I. C. art. 90, as amended by the Law of Feb. 7, 1933, art. 6.
738. Law of July 9, 1934, JOURNAL OFFICIEL (July 11, 1934) 6994.
739. DALLOZ, RECUEIL PÉRIODIQUE, 1934 IV. 419.
740. C. I. C. art. 90, as amended by the Law of March 25, 1935, art. 4. The power of making perquisitions when authorized by a juge d'instruction was thereby restored to the other officers of the police judiciaire so as to permit a number of perquisitions to be conducted in different places at the same time and for the further reason that these officials are much better qualified by aptitude and experience for this service than the juges de paix. SIREY, RECUEIL GÉNÉRAL, 1935 V. 1481.
741. C. I. C. art. 127, as amended by the Law of July 17, 1856.
742. Ordonnance de soit communiqué. 3 LE POITTEVIN, op. cit. supra note 74, at 928.
743. C. I. C. art. 127, as amended by the Law of July 17, 1856.
744. 3 LE POITTEVIN, op. cit. supra note 74, at 247.
offense was committed or that there is not sufficient ground for holding the suspect, he will issue an ordonnance de non-lieu à poursuivre,\textsuperscript{745} and if the suspect has been arrested, the juge will order that he will be immediately set at liberty.\textsuperscript{746} The order of the juge discharging the suspect, after the period for an appeal has expired, becomes definitive so that no new prosecution upon the same facts may be instituted by any party.\textsuperscript{747}

In case the juge concludes that an offense has been committed and that there is sufficient evidence to justify further proceedings against the suspect, he will issue an ordonnance de mise en prévention.\textsuperscript{748} In making this ordonnance, the juge may limit his finding to a lesser offense than he was authorized to investigate,\textsuperscript{749} for example, where the original charge was theft with aggravating circumstances the ordonnance may be for simple theft. If the juge is of the opinion that the offense is a contravention, he will send the case for trial to the Tribunal de Simple Police,\textsuperscript{750} and, if a délit, to the Tribunal Correctionel.\textsuperscript{751} Where the juge decides that the offense is a crime, he will direct the procureur to forward the report of the investigation and a description of all real evidence in the case to the procureur général of the Cour d'Appel for the consideration of the chambre d'accusation,\textsuperscript{752} which will decide whether or not the suspect shall be brought to trial before the Cour d'Assises.

The procureur may make objection to any ordonnance of the juge by appealing to the chambre d'accusation and the partie civile may likewise appeal against an ordonnance discharging the suspect or against any other ordonnance unfavorable to his civil claim.\textsuperscript{753} If the partie civile loses on his appeal, the chambre is required of its own motion to order him to pay money damages to the suspect.\textsuperscript{754}

\[\text{To be concluded.}\textsuperscript{755}\]

\textsuperscript{745} Generally referred to simply as ordonnance de non-lieu. Forms of the ordonnances are given in 3 Le Poitevin, op. cit. supra note 74, at 938 \textit{et seq}.

\textsuperscript{746} C. I. C. art. 128, as amended by the Law of July 17, 1856.

\textsuperscript{747} 3 Garraud, op. cit. supra note 1, at 323. The new projet (1938) for a Code d'Instruction Criminelle provides that another prosecution may be instituted, if new evidence is discovered. Arts. 150 and 151.

\textsuperscript{748} Goyet, op. cit. supra note 65, at 315. Also termed ordonnance de renvoi. 3 Le Poitevin, op. cit. supra note 74, at 939.

\textsuperscript{749} Goyet, op. cit. supra note 65, at 315.

\textsuperscript{750} C. I. C. art. 129, as amended by the Law of July 17, 1856, and art. 138, as amended by the Law of Jan. 27, 1873.

\textsuperscript{751} C. I. C. art. 130, as amended by the Law of July 17, 1856.

\textsuperscript{752} C. I. C. art. 133, as amended by the Law of July 17, 1856, and art. 221.

\textsuperscript{753} C. I. C. art. 135, as amended by the Law of Mar. 25, 1935.

\textsuperscript{754} C. I. C. art. 136, as amended by the Law of Feb. 7, 1933.

\textsuperscript{755} The final installment of this article will appear in the June number of the REVIEW.