University of Pennsylvania Law Review

And American Law Register

FOUNDED 1852

Copyright 1940, by the University of Pennsylvania

VOLUME 88

FEBRUARY, 1940

No. 4

THE PRELIMINARY INVESTIGATION OF CRIME IN FRANCE

EDWIN R. KEEDY †

I. INTRODUCTION

This article covers the proceedings in a criminal investigation to the point where the jurisdiction of a trial court attaches. For a better understanding of these proceedings certain matters of more general application are first presented. They are as follows: 1. *Code d'Instruction Criminelle*. 2. Classification of offenses. 3. The concept of *flagrant délit*. 4. Organization and jurisdiction of the criminal courts. 5. The personnel of the courts and the prosecuting department. 6. *Ministère public*.

1. *Code d'Instruction Criminelle*

The methods of the preliminary investigation of crime, as well as the procedure of the criminal courts, are prescribed and regulated by the *Code d'Instruction Criminelle*.¹ This *Code* had its genesis in a Consular Decree of 7 *Germinal* IX (March 28, 1801),² signed "Bonaparte, First Consul", which appointed a commission to draft a "criminal code". The commissioners prepared a draft entitled *Code Criminel, Correctionnel et de Police*, consisting of 1169 articles. This proposed *Code* was in two parts, the first relating to substantive law, and the

† The writer spent ten months in France making a personal study of the administration of the criminal law. In the preparation of this article he had the valuable assistance of Chauncey M. Depuy, Jr., a former Gowen Memorial Fellow of the University of Pennsylvania and now a member of the Franklin County (Pa.) Bar.

1. A more appropriate title would have been *Code de Procédure Pénale*. 1 GARRAUD, *TRAITÉ D'INSTRUCTION CRIMINELLE ET DE PROCÉDURE PÉNALE* (1907) 89 n.

2. For the history of French criminal procedure preceding the *Code d'Instruction Criminelle* see 1 FAUSTIN HÉLIE, *TRAITÉ DE L'INSTRUCTION CRIMINELLE* (1853) 48 *et seq.*; 1 GARRAUD, *op. cit. supra* note 1, at 28 *et seq.*; ESMEIN, *A HISTORY OF CONTINENTAL CRIMINAL PROCEDURE* (Simpson's trans. 1913) 39 *et seq.*; Ploscowe, *Development of Inquisitorial and Accusatorial Elements in French Procedure* (1932) 23 J. CRIM. L. AND CRIMINOL. 372.

second to procedure. The judges of the various courts were consulted regarding the draft of the *Code*,³ but there was no official discussion of it until 1804. On May 18 of that year Napoleon proclaimed himself Emperor and, four days later at a session of the *Conseil d'État*,⁴ he directed its section on legislation to present within fifteen days the fundamental questions involved in drafting the *Code*.⁵ The section presented fourteen questions, six of which related to substantive law and eight to procedure, six of the latter being concerned with the jury system.⁶ The draft was discussed at twenty-five meetings of the *Conseil*, the last one being held on 29 *Frimaire* XIII (Dec. 20, 1804).⁷ Napoleon personally presided at thirteen of these sessions. All the chapters of the draft were considered, and many of the articles were approved.⁸ Much of the discussion during the meetings related to the question of retaining the jury of accusation and the trial jury. As great differences of opinion developed, the sessions were discontinued without this question being settled.⁹

There appears to have been no further discussion of the proposed criminal code until January 23, 1808. At the session of the *Conseil*

3. I GARRAUD, *op. cit. supra* note 1, at 87.

4. Under the Consulate the *Conseil d'État* was an administrative body, one of whose functions was the drafting of laws. BERTHÉLEMY, *TRAITÉ ÉLÉMENTAIRE DE DROIT ADMINISTRATIF* (12th ed. 1930) 152.

5. 24 LOCÉ, *LA LÉGISLATION CIVILE, COMMERCIALE ET CRIMINELLE DE LA FRANCE* (1831) 8.

6. *Id.* at 11. The eight questions relating to procedure were as follows:

1. Shall the institution of the jury be preserved?
2. Shall there be an accusing jury and a trial jury?
3. How many jurors shall be selected? From what class of society shall the jurors be selected? Who shall select them?
4. How shall the right of challenge be exercised?
5. Shall the proceedings of the trial be entirely oral or partly oral and partly written?

6. Shall several questions be presented to the trial jury or shall only one be presented, viz., Is he guilty?

7. Shall the verdict of the jury be unanimous or by a particular number of votes?

8. Ought judges be permitted to hold assizes in one or several departmental criminal courts?

7. *Id.* at 562.

8. I LOCÉ, *op. cit. supra* note 5, at 224.

9. Although no reason for discontinuing the discussions can be assigned with certainty, and none was given at the time, the great difficulty experienced by the *Conseil* in deciding the question whether there should be separate courts and judges for civil and criminal cases, and the related question of whether the trial jury should be preserved, appears to have been the reason for bringing the work to a standstill for four years. I GARRAUD, *op. cit. supra* note 1, at 89n; VERNET, *LES ARRESTATIONS—LES PERQUISITIONS* (Thesis Paris, 1924) 19. Napoleon has been represented as an unyielding opponent of the trial jury, and it has been asserted that the cessation of discussions resulted solely from his refusal to agree to preservation of the trial jury. ESMEIN, *op. cit. supra* note 2, at 487, 495, 497; CRUPPI, *LA COUR D'ASSISES* (1898) 9. This view has not been adopted, however, by other writers, who point to his statements in a number of instances in favor of retaining the trial jury if ample safeguards for its proper functioning could be worked out. I GARRAUD, *op. cit. supra* note 1, at 88n; Sabatier, *Napoléon et les Codes Criminels* (1910) 34 *REVUE PÉNITENTIAIRE ET DE DROIT PÉNAL* 905, 916 and 917. In one instance Napoleon is quoted as saying that "opinion upon the institution of the jury appears to be too doubtful for that institution to be abolished without exciting regrets". 24 LOCÉ, *op. cit. supra* note 5, at 518.

d'État on this date, Napoleon ordered that a report be given him by the section on legislation concerning the status of work on the *projet* for the *Code d'Instruction Criminelle*, and to formulate the fundamental questions whose solution would provide the bases of this *Code*.¹⁰ Thus, for the first time, that portion of the original draft, which dealt with procedure, was separated from that relating to the substantive law.¹¹ Although the members of the commission which prepared the original draft had participated in the first series of deliberations of the *Conseil d'État*, they were not called when the meetings were resumed.¹²

The discussion was renewed at the session of the *Conseil d'État* on January 30, 1808. The fourteen questions originally presented on June 5, 1804, and decided in most instances in the former sessions after prolonged discussions, were propounded anew.¹³ Furthermore, the proceedings were carried on as if no part of the draft had been finally approved, whereas, in fact, as has been pointed out, the *Conseil* had almost completed that part of the *Code* forming the present *Code d'Instruction Criminelle*.¹⁴ In fact, everyone seemed to have retained but a very vague idea of what had gone on four years earlier.¹⁵

The second series of deliberations, beginning January 30, 1808, and covering thirty-seven sessions, in twelve of which Napoleon took part in the discussion, ended with the completion of the draft of the *Code d'Instruction Criminelle*.¹⁶ As portions of the draft were completed, they were promulgated as law by Imperial Decrees, the last of these being that of December 26, 1808.¹⁷ The Imperial Decree of February 2, 1809,¹⁸ after reciting that a modification of the judicial organization was necessary before the new *Code* could become effective, postponed its operation until January 1, 1810. The Decree of December 17, 1809, provided for further postponement until January 1, 1811.¹⁹

The *Code d'Instruction Criminelle* embodies in entirety neither the inquisitorial nor the accusatorial system of criminal procedure, but that which the French writers have termed a *système mixte*²⁰ resulting from the compromises made by the commission and the *Conseil d'État* between the adherents of the pre-Revolutionary inquisitorial ideas expressed in the *Ordonnance Criminelle* of 1670²¹ and the adherents of the system

10. 24 LOCRÉ, *op. cit. supra* note 5, at 577.

11. 1 LOCRÉ, *op. cit. supra* note 5, at 225; 1 GARRAUD, *op. cit. supra* note 1, at 89.

12. 1 LOCRÉ, *op. cit. supra* note 5, at 225.

13. *Id.* at 224, 226.

14. *Id.* at 226.

15. *Id.* at 225.

16. *Id.* at 228; 1 GARRAUD, *op. cit. supra* note 1, at 89.

17. 1808 BULLETIN DES LOIS (IV sér.) pt. 2, No. 214, bis, 141.

18. 1809 BULLETIN DES LOIS (IV sér.) pt. 1, 21.

19. 1809 BULLETIN DES LOIS (IV sér.) pt. 2, 285.

20. 1 FAUSTIN HÉLIE, *op. cit. supra* note 2, at 177; MORIZOT-THIBAUT, DE L'INSTRUCTION PRÉPARATOIRE (1906) 344-347; 1 GARRAUD, *op. cit. supra* note 1, at 21 and 90.

21. 18 RECUEIL GÉNÉRAL DES ANCIENNES LOIS FRANÇAISES (1829) 371.

inaugurated in the several statutes of the Constituent Assembly,²² which had been very largely borrowed from the English law. In the proceedings prior to trial, the system of the *Ordonnance* of 1670 was to a large extent preserved, with the secret investigation by the *juge d'instruction* and with counsel forbidden the suspect. At the trial the accusatorial system prevailed, with public proceedings, oral evidence and the defendant having a right to counsel.

Of the five codes enacted under Napoleon, the two relating to criminal law were the last completed. Only the *Code Civil* was given the name *Code Napoléon*, and it has been said the Emperor refused this title to the *Code d'Instruction Criminelle*, because he realized it was not a perfected work and that shortcomings would not be long in appearing.²³

The *Code d'Instruction Criminelle* with such amendments as have been made regulates French criminal procedure today. There are, however, certain points of procedure which the *Code* covers either briefly or not at all. These gaps have been filled by usage and the decisions of the courts.²⁴ Of the 129 articles in the *Code* relating to the preliminary investigation, 42 have been amended. Of the 508 articles which relate to trial and appeal, 128 have been amended.

Much criticism has at various times been directed at the *Code*, sometimes with a view to specific modification, sometimes demanding a general revision.²⁵ In 1880 the Minister of Justice submitted to the Senate the draft of a bill designed to reform and liberalize that part of the *Code* relating to the preliminary investigation. Chiefly because of strong conservative opposition, the bill never became law.²⁶ In 1897, as will be seen later on, certain portions of the draft, relating primarily to granting the suspect the right to have counsel when being interrogated, were enacted.²⁷ Efforts further to protect the rights of citizens

22. Law of Oct. 8 and 9, 1789, 1 LOIS ET ACTES (1789) 11; Law of Sept. 16 and 29, 1791, 4 LOIS ET ACTES (1791) 244; Law of Sept. 26 and Oct. 6, 1791, 4 LOIS ET ACTES (1791) 390; Law of July 19 and 22, 1791, 3 LOIS ET ACTES (1791) 406. The topic is treated at length in Ploscowe, *supra* note 2, at 372. See also Ploscowe, *The Development of Present-Day Criminal Procedures in Europe and America* (1935) 48 HARV. L. REV. 433, 462.

23. Thonissen, quoted in 1 GARRAUD, *op. cit. supra* note 1, at 91. The body of law in the field of criminal procedure had not been brought by previous legislation and doctrinal development to the same stage of organization and clarity at the time of codification as had the civil law, so that there was less likelihood of constructing at that time a code of maximum perfection. MORIZOT-THIBAUT, *op. cit. supra* note 20, at xviii.

24. LESTELLE, LES LOIS DES 7 FÉVRIER 1933 ET 25 MARS 1935 SUR LES GARANTIES DE LA LIBERTÉ INDIVIDUELLE (1936) 27 and 28.

25. 1 FAUSTIN HÉLIE, *op. cit. supra* note 2, at 178; COULON, DE L'INCONVÉNIENT DEVANT LA JUSTICE FRANÇAISE DE FAIRE ÉCLATER SON INNOCENCE (1904) 19; MORIZOT-THIBAUT, *op. cit. supra* note 20, at 347 and 392-399; 1 GARRAUD, *op. cit. supra* note 1, at 90 and 94-99; DENYS, LES GARANTIES DE LA LIBERTÉ INDIVIDUELLE (1933) 8-10; LESTELLE, *op. cit. supra* note 24, at 29-34.

26. MORIZOT-THIBAUT, *op. cit. supra* note 20, at xxii and xxiii.

27. Law of Dec. 8, 1897, 1897 BULLETIN DES LOIS (XII sér.) pt. 2, 1777.

and suspects, begun in 1907,²⁸ finally culminated in 1933 in numerous amendments made by the "law for safeguarding individual liberties",²⁹ which was, however, to a considerable extent repealed in 1935.³⁰

By a Decree of December 23, 1930,³¹ the government appointed a commission "to prepare a revision of the criminal legislation". Work was begun first on a new *Code Pénal*,³² and the *projet* for a new *Code d'Instruction Criminelle* was published in 1939.³³

2. Classification of Offenses

The character of the preliminary proceedings and the functions of the particular officials who conduct them are determined to a considerable extent by the grade of the offense involved.³⁴ This is based entirely on the character and extent of the punishment in each case, as provided by the *Code Pénal*.

There are three grades of offenses, viz. *crime*, *délit*³⁵ and *contravention*. In order to constitute a non-political *crime* the punishment provided in the *Code Pénal* must be one of the following: (1) death,³⁶ (2) imprisonment with hard labor (*les travaux forcés*) either for life or for a prescribed period,³⁷ or (3) imprisonment with labor for five to ten years (*régclusion*).³⁸ For a political *crime*, the following punishments are provided: (1) deportation for life to a designated place of confinement outside continental France,³⁹ (2) detention in a fortress within continental France for five to twenty years,⁴⁰ (3) banishment from the country for five to ten years,⁴¹ (4) *dégradation civique* which

28. *Projet* introduced in the Senate by M. Clemenceau, then Premier, and M. Guyot-Dessaigne, Minister of Justice. JOURNAL OFFICIEL, SÉNAT, DOC. PARL. (Jan. 18, 1907) *annexe* no. 10, p. 2.

29. Law of Feb. 7, 1933, JOURNAL OFFICIEL (Feb. 9, 1933) 1354.

30. Law of Mar. 25, 1935, JOURNAL OFFICIEL (Mar. 26, 1935) 3426. The successive modifications of the *Code* are discussed in ESMEIN, *op. cit. supra* note 2, at 528 *et seq.*

31. JOURNAL OFFICIEL (Dec. 24, 1930) 14011.

32. The text is given in *Avant-Projet de Code Pénal Français* (1932) 9 REVUE INTERNATIONALE DE DROIT PÉNAL 281.

33. Cuche, *Revue Juridique* (1939) 16 DALLOZ, RECUEIL HEBDOMADAIRE 5.

34. I GARRAUD, *op. cit. supra* note 1, at 27.

35. The term "*délit*" is also employed in a broad sense to describe any offense without regard to its grade. CAPITANT, VOCABULAIRE JURIDIQUE (1930-1936) 183.

36. CODE PÉNAL (hereinafter cited as C. P.) arts. 1 and 7, the latter as amended by the Law of Apr. 28, 1832.

37. C. P. arts. 1 and 7, the latter as amended by the Law of Apr. 28, 1832.

This penalty was until 1938 executed in some colony, more recently in Guiana. A Decree of June 17, 1938, provided that convicts sentenced to the "*travaux forcés*" are to be confined in special prisons in France, designated as "*maisons de force*". If offenders who are confined in the *maisons de force*, either during or after their release from confinement, commit certain specified offenses, they are then sent to Guiana. JOURNAL OFFICIEL (June 29, 1938) 7497. This Decree is discussed by Cuche, *Chronique Pénale et Pénitentiaire* (1939) 79 REVUE CRITIQUE DE LÉGISLATION ET DE JURISPRUDENCE 13.

38. C. P. arts. 1, 7, as amended by the Law of Apr. 28, 1832, and 21.

39. C. P. arts. 1, 7, and 17, the latter two as amended by the Law of Apr. 28, 1832. GARCON, CODE PÉNAL, ANNOTÉ 49.

40. C. P. arts. 1, 7, and 20, the latter two as amended by the Law of Apr. 28, 1832.

41. C. P. arts. 1, 8, as amended by the Law of Apr. 28, 1832, and 32.

is the permanent deprivation of certain political, civil and personal rights, including the right to hold office, to vote, to be a guardian, to bear arms and to be a teacher.⁴² *Dégradation civique* is also imposed as an auxiliary penalty accompanying every other punishment for *crime*.⁴³ Other auxiliary penalties attaching to certain of the prescribed punishments are (1) deprivation of the right to deal with or dispose of one's property (*interdiction légale*),⁴⁴ and (2) prohibition to enter certain specified localities after the expiration of the sentence (*interdiction de séjour*).⁴⁵

The punishments prescribed for *délits* are: (1) imprisonment with labor for not less than six days nor for more than five years,⁴⁶ (2) deprivation for a time of certain political, civil and personal rights,⁴⁷ and (3) a fine of more than fifteen francs.⁴⁸

The punishments for *contraventions* are the following: (1) imprisonment for not more than five days,⁴⁹ (2) a fine not to exceed fifteen francs,⁵⁰ and (3) confiscation of articles employed in committing the offense or produced by it.⁵¹

While *crimes* correspond to felonies in Anglo-American law in the sense that they are the serious offenses, there is no exact parallel when individual offenses are considered. For example, ordinary offenses concerning property, such as theft and obtaining property by false pretenses, are *délits*. If there are aggravating circumstances, a theft may be a *crime*. Thus a theft committed (1) with force,⁵² or (2) on a railroad train,⁵³ or (3) by two or more persons at night,⁵⁴ or (4) by a domestic servant⁵⁵ constitutes a *crime*. An offense corresponding to involuntary manslaughter is a *délit*; ⁵⁶ all other homicides are *crimes*.⁵⁷

For over a century there has been a succession of amendments to the *Code Pénal* reducing the penalties for offenses originally *crimes*, as a result of which they were made *délits*.⁵⁸ Thus in 1832, certain thefts

42. C. P. arts. 1, 8, and 34, the latter two as amended by the Law of Apr. 28, 1832.

43. I ROUX, COURS DE DROIT CRIMINEL (1927) 421.

44. C. P. arts. 29 and 30, both as amended by the Law of Apr. 28, 1832, and art. 31.

45. I ROUX, *op. cit. supra* note 43, at 455.

46. C. P. arts. 1, 9, and 40.

47. C. P. arts. 1, 9, and 42.

48. C. P. arts. 1 and 9.

49. C. P. arts. 1, 464, and 465.

50. C. P. arts. 1, 464, and 466.

51. C. P. arts. 1, 464, and 470.

52. C. P. art. 382, as amended by the Law of May 13, 1863.

53. C. P. art. 383, as amended by the Law of Oct. 27, 1922.

54. C. P. art. 385, as amended by the Law of May 13, 1863.

55. C. P. art. 386, as amended by the Law of Apr. 28, 1832.

56. C. P. art. 319.

57. C. P. arts. 295-316.

58. One of the reasons for this change has been the fact that juries, who sit only in the trial of *crimes*, as will be discussed later, have shown a reluctance to convict for certain types of offenses.

of farm implements and products were reduced to *délits*.⁵⁹ In 1863, a number of miscellaneous *crimes* were so reduced.⁶⁰ Abortion and bigamy, which had been *crimes*, were made *délits*, the former in 1923 and the latter in 1933.⁶¹

3. The Concept of *Flagrant Délit*

An important question during the investigation stage is whether an offense constitutes a *flagrant délit*,⁶² since the character of the preliminary procedure and the functions of certain officials are changed if the offense is *flagrant*. The term "*flagrant délit*" has a much wider application than "*flagrante delicto*" in Anglo-American law. The *Code* provides: "An offense (a) which is being presently committed or (b) which has just been committed, is a *flagrant délit*."⁶³ The *Code* also treats as *flagrants délits* offenses (a) where the suspect is denounced by public clamor,⁶⁴ and (b) where the suspect is found shortly after the offense (*temps voisin du délit*) in the possession of effects, weapons or papers which raise the presumption that he was either a principal or an accomplice.⁶⁵

The situations in the second group are capable of broad interpretation. Thus two leading authorities have warned against confusing "public clamor", which connotes an immediate reaction, with "public rumor" and "public notoriety".⁶⁶ The last situation is patently indefinite. When the draft of the *Code* was being prepared it was proposed first that a limitation of twenty-four hours be prescribed. Later this was extended to forty-eight hours. Both these proposals, however, were rejected and the indefinite time "*voisin du délit*" was substituted.⁶⁷

In addition to the situations mentioned, the *Code* provides that the procedure for *flagrants délits* shall be used, wherever a *crime* or *délit*,

59. C. P. art. 388, as amended by the Law of Apr. 28, 1832.

60. Law of May 13, 1863, 1863 BULLETIN DES LOIS (XI sér.) pt. I, 949.

61. C. P. art. 317, as amended by the Law of Mar. 27, 1923, and C. P. art. 340, as amended by the Law of Feb. 17, 1933. In the case of bigamy the punishment of imprisonment at hard labor for five years to life was reduced to imprisonment for six months to three years, and a fine of 50 to 5000 francs.

62. The term *délit* in this connection is used in a broad sense to include every offense defined by the *Code Pénal* either as *crime* or *délit*.

63. C. I. C. art. 41. The finding of a dead body still warm establishes the fact that, if a homicide is suspected, it is *flagrant*. 3 GARRAUD, *op. cit. supra* note 1, at 234. There is some authority for the proposition that the finding of any corpse indicates that a suspected homicide is *flagrant*. SIFNÉOS, L'ORGANISATION DE L'INSTRUCTION (Thesis Paris, 1930) 87.

64. An example of this situation is where there are cries of "Stop, thief!". 3 GARRAUD, *op. cit. supra* note 1, at 234.

65. C. I. C. art. 41. It is recognized that in describing these two situations as *flagrant*, the meaning of the word has been stretched, but the draftsmen of the *Code* for practical reasons desired to prescribe procedure of the same kind as that where the offense was actually in process of commission. GOYET, LE MINISTÈRE PUBLIC (1926) 244.

66. 2 FAUSTIN HÉLIE, *op. cit. supra* note 2, at 177, § 1902; 3 GARRAUD, *op. cit. supra* note 1, at 235.

67. 25 LOCRIÉ, *op. cit. supra* note 5, at 163-165; 3 GARRAUD, *op. cit. supra* note 1, at 235.

whether or not *flagrant*, appears to have been committed inside a dwelling house, and the head of the household requests the investigation.⁶⁸

4. Organization and Jurisdiction of the Criminal Courts

For purposes of national administration⁶⁹ France (including the island of Corsica) is geographically divided into 89 *départements* and one *territoire*,⁷⁰ and for local administration into 38,015 *communes*.⁷¹ The chief administrative officer of a *département* is the *préfet*,⁷² and of the *commune*, the *maire*.⁷³

The *départements* and the *territoire* are grouped into 27 judicial districts (*ressorts*)⁷⁴ and on the other hand are divided into 356 judicial areas, called *arrondissements*.⁷⁵ These *arrondissements* are divided for judicial and certain administrative purposes into 3,028 *cantons*.⁷⁶ Ordinarily *communes* are grouped into *cantons*, but there are some instances

68. C. I. C. art. 46.

69. BERTHÉLEMY, *op. cit. supra* note 4, at 111 and 160.

70. Before the war of 1870 there were 89 *départements*. By the treaty following the war, the *département* of *Bas Rhin* and most of the territory comprising the *département* of *Haut Rhin* constituted the greater portion of the territory ceded to Germany. Convention of Feb. 26, 1871, art. 1, 1871 BULLETIN DES LOIS (XII sér.) pt. 1, vol. 2, 111; DALLOZ, RECUEIL PÉRIODIQUE ET CRITIQUE DE JURISPRUDENCE, DE LÉGISLATION ET DE DOCTRINE, 1871 IV, 24 (hereinafter cited as DALLOZ, RECUEIL PÉRIODIQUE); Treaty of May 10, 1871, art. 1, 1871 BULLETIN DES LOIS (XII sér.) pt. 1, vol. 2, 117; DALLOZ, RECUEIL PÉRIODIQUE, 1871 IV, 26; Law of Sept. 7, 1871, 1871 BULLETIN DES LOIS (XII sér.) pt. 1, vol. 3, 126; DALLOZ, RECUEIL PÉRIODIQUE, 1871 IV, 151. The part of *Haut Rhin* which remained to France consisted of an area of only 235 square miles, in which was the city of Belfort. This area, since called the *territoire* of Belfort, was not added to any of the adjoining *départements*, but for administrative purposes was treated as a separate *département*. 4 DALLOZ, RÉPERTOIRE PRATIQUE DE LÉGISLATION, DE DOCTRINE ET DE JURISPRUDENCE (1912) 222, § 3 (hereinafter cited as DALLOZ, RÉPERTOIRE PRATIQUE); 52 ANNUAIRE STATISTIQUE DE LA FRANCE, 1936 (1937) 3; Decree of Oct. 19, 1911, 1911 BULLETIN DES LOIS (XII sér.) pt. 1, 2132. When the ceded territory was returned to France after the World War, the *territoire* of Belfort was not reunited with *Haut Rhin*, but still continues to be regarded administratively as an independent *département*. 1 DALLOZ, RÉPERTOIRE PRATIQUE (Supplément, 1927) 495, § 3 (2). For judicial purposes Belfort is not regarded as a *département*. COMPTE GÉNÉRAL DE L'ADMINISTRATION DE LA JUSTICE CRIMINELLE PENDANT L'ANNÉE 1932 (1934) 3.

71. BERTHÉLEMY, *op. cit. supra* note 4, at 214; 1 ANNUAIRE DIDOT-BOTTIN (1939), *Départements*, 8.

72. Decree of Nov. 5, 1926, art. 1, 1926 BULLETIN DES LOIS (*Nouv. sér.* vol. 19) pt. 1, 5045. The chief official of the *territoire* of Belfort is called administrator. HAU-RIOU, PRÉCIS DE DROIT ADMINISTRATIF ET DE DROIT PUBLIC (11th ed. 1927) 131n.

73. *Id.* at 188.

74. 3 LE POITTEVIN, DICTIONNAIRE-FORMULAIRE DES PARQUETS ET DE LA POLICE JUDICIAIRE (1928) 961.

75. See Decrees of Mar. 28, 1934, arts. 4 and 8, JOURNAL OFFICIEL (Apr. 5, 1934) 3509, and of May 15, 1934, art. 1, JOURNAL OFFICIEL (May 17, 1934) 4866. Formerly the judicial *arrondissement* coincided with the administrative *arrondissement*, the chief official of the latter being a *sous-préfet*. BERTHÉLEMY, *op. cit. supra* note 4, at 174. *Sous-préfectures* to the number of 106 were abolished by an economy Decree of 1926 and the *cantons* composing them allocated among the neighboring *arrondissements* not affected. The Decree describes the latter as "administrative *arrondissements*", indicating that what is under this Decree regarded as an *arrondissement* administratively does not always coincide with the "judicial *arrondissement*" referred to in the Decree of 1934. Decrees of Sept. 10, 1926, art. 1, 1926 BULLETIN DES LOIS (XII sér.) pt. 1, 4426, and Mar. 28, 1934, arts. 4 and 8, JOURNAL OFFICIEL (Apr. 5, 1934) 3509.

76. 4 DALLOZ, RÉPERTOIRE PRATIQUE 273, §§ 1028 and 1029; 1 ANNUAIRE DIDOT-BOTTIN (1936) *Départements*, 8.

where a large *commune* is divided into several *cantons*,⁷⁷ and in some cities, notably Paris and Lyon, into municipal *arrondissements* which correspond to wards and are to be distinguished from the judicial and administrative *arrondissements*. In each *ressort*, judicial *arrondissement* and *canton* there is a permanent court.

The lowest trial court is the cantonal court,⁷⁸ which has jurisdiction in both civil and criminal cases. The judge of this court is the *juge de paix*,⁷⁹ who, differing from the judges of the higher courts, sits alone.⁸⁰ For the trial of civil cases the court is called the *Tribunal de Paix*,⁸¹ and for criminal, the *Tribunal de Simple Police*,⁸² which has jurisdiction over *contraventions* only.⁸³ There is a *Tribunal de Simple Police* in every *canton*,⁸⁴ except where several *cantons* are included in one *commune*, in which situation there will be but one *tribunal*.⁸⁵

In each judicial *arrondissement* there is a court known as the *Tribunal de Première Instance*,⁸⁶ with original and appellate jurisdiction in both civil and criminal cases,⁸⁷ original jurisdiction in criminal cases being ordinarily limited to *délits*,⁸⁸ and appellate jurisdiction to the

77. 4 DALLOZ, RÉPERTOIRE PRATIQUE 273, § 1026.

78. The cantonal court in civil matters exercises only special jurisdiction, but in criminal cases it is a court of general jurisdiction. 3 LE POITTEVIN, *op. cit. supra* note 74, at 959.

79. Law of July 12, 1905, art. 18, 1905 BULLETIN DES LOIS (XII sér.) pt. 2, 841, 846.

80. 3 GARRAUD, *op. cit. supra* note 1, at 571.

81. 4 DALLOZ, RÉPERTOIRE PRATIQUE 71, § 677; 3 LE POITTEVIN, *op. cit. supra* note 74, at 328. The term, *justice de paix*, is also used to describe the court. 4 GARRAUD, *op. cit. supra* note 1, at 673.

82. 4 GARRAUD, *op. cit. supra* note 1, at 673. In Paris, however, the *juges de paix* of the respective *cantons* (which are coterminous with the 20 municipal *arrondissements*, Law of June 16, 1859, art. 2, 1859 BULLETIN DES LOIS (XI sér.) pt. 2, 749) have civil jurisdiction only, and special *juges de paix* having exclusive criminal jurisdiction compose there the *Tribunal de Police*. Law of July 12, 1905, art. 18, 1905 BULLETIN DES LOIS (XII sér.) pt. 2, 846.

83. C. I. C. art. 138, as amended by the Law of Jan. 27, 1873. This *Tribunal* has jurisdiction also in the case of a few *délits*, including those committed in its presence. C. I. C. arts. 504 and 505, 4 GARRAUD, *op. cit. supra* note 1, at 684. Also, certain *contraventions*, as will be seen, are in the jurisdiction of the *Tribunaux Correctionnels*, and even of the *Cour d'Assises*.

84. 4 GARRAUD, *op. cit. supra* note 1, at 673.

85. C. I. C. art. 142, 4 GARRAUD, *op. cit. supra* note 1, at 675.

Several legislative measures dating from 1919 have, for reasons of economy, provided for reduction of the number of *juges de paix*, with the result that in some instances one *juge* sits in the civil and criminal *tribunaux* of several adjoining *cantons*. 3 LE POITTEVIN, *op. cit. supra* note 74, at 325, and *Supplément* at 225. For the same reasons, provision has recently been made that in certain less important *cantons*, containing the principal town of judicial *arrondissements*, the functions of *juge de paix* shall be fulfilled by a designated judge of the *Tribunal de Première Instance* there. Decree of Mar. 28, 1934, art. 8, JOURNAL OFFICIEL (Apr. 5, 1934) 3509.

86. LE POITTEVIN, *op. cit. supra* note 74 (*Supplément*, 1933) 141.

87. 1 LE POITTEVIN, *op. cit. supra* note 74, at 1074.

88. C. I. C. art. 179, as amended by the Law of Dec. 31, 1906. Some *tribunaux* in the less populated *arrondissements* do not have jurisdiction to try *délits* in the following situations where trial for purposes of expedition must take place in designated neighboring *tribunaux*: (1) where at the time for trial one or more of the suspects is in detention, (2) in case of *flagrant délit*, or (3) where an offense against the dignity of the court or of its officers has been committed in a civil trial. CODE DE PROCÉDURE CIVILE, art. 91; Decree of Mar. 28, 1934, art. 3, JOURNAL OFFICIEL (Apr. 5, 1934) 3509.

more serious *contraventions*.⁸⁹ For the trial of civil cases the court is designated the *Tribunal Civil*,⁹⁰ and for criminal cases the *Tribunal Correctionnel*.⁹¹ In the more populous *arrondissements* the court is divided into *chambres*, each hearing either civil (*chambre civile*) or criminal (*chambre criminelle*) cases.⁹² An odd number of judges, not less than three, must sit in each case,⁹³ it being a fundamental principle of the French judicial system that at least three judges must sit in order to constitute a court.⁹⁴ There is an old maxim "*juge unique, juge inique*". The one exception to the principle is the *tribunal* of the *juge de paix*, who sits alone.

There are 356 *Tribunaux de Première Instance*, not counting the *Tribunal* of the Seine sitting in Paris.⁹⁵ The *Tribunal* of the Seine, which has jurisdiction over the 20 municipal *arrondissements* of Paris, and the portion of the *département* of the Seine outside the city, has 19 *chambres* with 116 judges.⁹⁶

Some *contraventions*, for example, certain ones against the forest, mining, or tax laws, are tried in the *Tribunal de Première Instance*. C. I. C. art. 192, as amended by the Law of Nov. 26, 1936; 4 GARRAUD, *op. cit. supra* note 1, at 569.

For the trial of offenses committed by minors, aged 17 years or younger, the regular criminal courts do not in general have jurisdiction. Special sessions of the *Tribunal de Simple Police*, or of the *Tribunal de Première Instance*, are devoted to such offenses, in the latter case being then known as the *Tribunal Civil Statuant en Chambre du Conseil* for minors aged under 13, and *Tribunal pour Enfants et Adolescents* for minors over 13 and under 18 years. Law of July 22, 1912, arts. 1 and 18, 1912 BULLETIN DES LOIS (*nouv. sér.*) pt. 1, 2097.

89. C. I. C. arts. 172 and 174, both as amended by the Law of Dec. 31, 1906.

90. 4 DALLOZ, RÉPERTOIRE PRATIQUE, 55, § 215.

91. C. I. C. art. 179, as amended by the Law of Dec. 31, 1906. When the *Code* was drafted it was determined after considerable discussion that the same courts should have jurisdiction in both civil and criminal cases. 3 LE POITTEVIN, *op. cit. supra* note 74, at 960. Where a court is divided into *chambres*, a number of the judges are, by a system of rotation, transferred annually from one *chambre* to another. 4 GARRAUD, *op. cit. supra* note 1, at 553.

92. 4 GARRAUD, *op. cit. supra* note 1, at 553.

93. C. I. C. art. 180; Law of Aug. 30, 1883, art. 4, 1883 BULLETIN DES LOIS (XII *sér.*) pt. 2, 213.

94. 3 GARRAUD, *op. cit. supra* note 1, at 458n; 1 GLASSON AND TISSIER, TRAITÉ DE PROCÉDURE CIVILE (1925) 88.

95. Decree of May 15, 1934, art. 1, JOURNAL OFFICIEL (May 17, 1934) 4866.

96. Decree of June 25, 1934, art. 2 and schedule thereto, JOURNAL OFFICIEL (June 26, 1934) 6315.

In the least populous of the *arrondissements* recent legislation has, for the purposes of economy, provided that there shall be but one resident judge. It is accordingly necessary, for each sitting of the *Tribunal*, to add judges from the *Tribunal* of a specifically designated neighboring *arrondissement*. For example, judges from the *Tribunal* at Amiens in the *département* of the Somme assist the single resident judge at Doullens. In the other *arrondissements* the judges composing each *Tribunal* vary from three to twenty-seven. Decree of Mar. 28, 1934, art. 1 and schedule thereto, JOURNAL OFFICIEL (Apr. 5, 1934) 3509. For salary purposes, the *Tribunaux de Première Instance*, excepting the *Tribunal* of the Seine, are divided into three classes, as follows: (1) *tribunaux* situated either in cities of at least 80,000 or in *arrondissements* of at least 250,000 population are of the first class, (2) those in towns of at least 20,000 or in *arrondissements* of at least 120,000 population of the second class, and (3) the remaining ones, including those having but a single judge, of the third class. Law of July 16, 1930, art. 3, 1930 BULLETIN DES LOIS (*nouv. sér.* vol. 22) pt. 1, 1769, as amended by the Decree of Mar. 28, 1934, art. 7, JOURNAL OFFICIEL (Apr. 5, 1934) 3509, and by the Decree of May 15, 1934, art. 1, JOURNAL OFFICIEL (May 17, 1934) 4866; Decree of May 22, 1930, art. 1, 1930 BULLETIN DES LOIS (*nouv. sér.* vol. 22) pt. 1, 1195.

There is no permanent departmental court, either civil or criminal, but for the trial of *crimes* a court known as the *Cour*⁹⁷ *d'Assises*⁹⁸ is set up in each *département* every three months and oftener if necessary.⁹⁹ This court consists of a president and two associate judges known as *assesseurs*,¹⁰⁰ who sit with a jury of twelve laymen,¹⁰¹ this being the only court in France, civil or criminal, which has a jury.¹⁰² The president must be a *conseiller*¹⁰³ of the *Cour d'Appel*, which will be hereafter described, while the *assesseurs* may be either *conseillers* of the *Cour d'Appel* or judges of the *Tribunal de Première Instance*, sitting in the city where the *Cour d'Assises* is held.¹⁰⁴

In each *ressort* there is a *Cour d'Appel*,¹⁰⁵ which, in 22 out of the

97. The term *cour* is applied to the higher courts, whether trial or appellate, and *tribunal* to the lower courts. SOUFFLIER, *VOCABULAIRE DE DROIT* (2d ed. 1926) 298; CAPITANT, *op. cit. supra* note 35, at 163. Judgments handed down by the *cours* are generally termed *arrêts* and those of the *tribunaux*, *jugements*. 3 GARRAUD, *op. cit. supra* note 1, at 561.

98. C. I. C. art. 231, as amended by the Law of July 17, 1856. Certain *délits* of the press are tried in *Cour d'Assises* (Law of July 29, 1881, art. 45, 1881 BULLETIN DES LOIS (XII sér.) pt. 2, 1933), as well as *délits* connected with *crimes* being tried before the *Cour*. C. I. C. art. 226.

99. C. I. C. arts. 251 and 259. *Crimes* committed in the *territoire* of Belfort are tried in the *Cour d'Assises* of the adjoining *département* of *Haute-Saône*. Law of Apr. 17, 1871, art. 4, 1871 BULLETIN DES LOIS (XII sér.) pt. 1, 103; COMPTE GÉNÉRAL, PENDANT L'ANNÉE 1932 (1934) 3.

100. C. I. C. art. 252, as amended by the Law of Feb. 25, 1901, art. 38.

101. If a trial appears likely to be of long duration, the *Cour d'Assises* may order additional jurors to be drawn, who will attend the proceedings and take the place of any of the original jurors who may later become incapacitated. C. I. C. art. 394, as amended by the Laws of April 28, 1832, and of August 14, 1926.

102. 1 GARRAUD, *op. cit. supra* note 1, at 23; 4 GARRAUD, *op. cit. supra* note 1, at 28.

103. In the *Cour d'Appel* and *Cour de Cassation* each judge other than the president or vice-president is termed a *conseiller*. CAPITANT, *op. cit. supra* note 35, at 149.

104. C. I. C. art. 252, as amended by the Law of Feb. 25, 1901, art. 38.

105. The *Cours d'Appel* bear the names of the cities in which the *Cours* sit. The 27 *Cours d'Appel*, with the number of *départements* included in the *ressort* of each *Cour*, are as follows: Agen (3), Aix (4), Amiens (3), Angers (3), Bastia (1), Besançon (3), Bordeaux (3), Bourges (3), Caen (3), Chambéry (2), Colmar (3), Dijon (3), Douai (2), Grenoble (3), Limoges (3), Lyon (3), Montpellier (4), Nancy (4), Nîmes (4), Orléans (3), Paris (7), Pau (3), Poitiers (4), Rennes (5), Riom (4), Rouen (2), Toulouse (4). The names of the 7 *départements* in the *ressort* of the *Cour d'Appel* of Paris are Aube, Eure-et-Loire, Marne, Seine, Seine-et-Marne, Seine-et-Oise, and Yonne. See COMPTE GÉNÉRAL, PENDANT L'ANNÉE 1932 (1934) 8 and 9. The city of Paris lies wholly within the *département* of the Seine and is divided into 20 municipal *arrondissements*, having a total population of 2,891,020 in 1931. That part of the *département* of the Seine lying outside Paris contains two *arrondissements* and has a population of 2,042,835. 52 ANNUAIRE STATISTIQUE DE LA FRANCE, 1936 (1937) 3 and 4. Within the city, each municipal *arrondissement* has a *maire* (Law of June 16, 1859, arts. 2 and 3, 1859 BULLETIN DES LOIS (IX sér.) pt. 2, 747), appointed by the government. There is no *maire* of the entire city, but the executive power is divided between two officers appointed by the government, called respectively the *préfet* of the Seine, whose powers are exclusive of police, and the *préfet* of police in Paris, who controls the police not only of Paris but of the entire *département* of the Seine, and in addition several adjoining *communes* of the *département* of Seine-et-Oise. Decree of Oct. 10, 1859, 1859 BULLETIN DES LOIS (IX sér.) pt. 2, 721; BERTHÉLEMY, *op. cit. supra* note 4, at 260, 262 and 266.

The organization of the city of Lyon is also of a special kind. The city is divided into seven municipal *arrondissements* and the control of the police, including that in towns surrounding the city is exercised by the *préfet* of the *département* of the Rhône so far as preservation of the public peace is concerned, and by the respective *maires* in other respects. BERTHÉLEMY, *op. cit. supra* note 4, at 269.

27 *ressorts*, contains two or more sections (*chambres*).¹⁰⁶ The judicial personnel of a *Cour d'Appel* consists of a first president, a president of each *chambre*, and *conseillers* proportionate to the number of *chambres*.¹⁰⁷ The jurisdiction of the *Cour d'Appel*, which includes both civil and criminal cases, is altogether appellate,¹⁰⁸ except where a civil action (*prise à partie*) is brought by a litigant against a court or judge for damage caused him by grave official misconduct,¹⁰⁹ or where a judge or any of certain other high officials is being prosecuted for a *délit*.¹¹⁰ The appellate jurisdiction of the *Cour d'Appel* in criminal matters is limited to appeals from the *Tribunal Correctionnel*.¹¹¹ An appeal may be taken by the defendant, the *partie civile*,¹¹² the *procureur*, or *procureur général* who will be described later.¹¹³

An appeal from a judgment of the trial court may be either on a point of law or on the merits.¹¹⁴ In the former case the *Cour* limits its review to the point of law involved and either affirms or reverses the judgment of the trial court.¹¹⁵ When a reversal occurs, the *Cour* does not, except where there was originally a lack of jurisdiction in the trial court, order a new trial in a trial court,¹¹⁶ but makes an investigation on the merits and may, if it sees fit, conduct what amounts to a new trial.¹¹⁷ This action is taken to avoid the delay and expense of sending

106. Law of April 28, 1919, art. 1 and schedule attached, 1919 BULLETIN DES LOIS (*nouv. sér.* vol. 11) pt. 1, 1263, as amended by Decree of June 25, 1934, art. 1 and schedule attached, JOURNAL OFFICIEL (June 26, 1934) 6315.

107. Where there is but one *chambre*, the *conseillers* vary in number from 4 to 5, and where two *chambres* from 5 to 6. Where three *chambres* there are 8 *conseillers*, and where four *chambres* they vary from 10 to 12, and where five *chambres* from 12 to 14. The *Cour d'Appel* of Paris with 14 *chambres* has 14 vice-presidents and 63 *conseillers*. Decree of June 25, 1934, art. 1, JOURNAL OFFICIEL (June 25 and 26, 1934) 6315; Decree of Dec. 31, 1936, art. 1, JOURNAL OFFICIEL (Jan. 4 and 5, 1937) 234; Decree of Nov. 12, 1938, art. 3, JOURNAL OFFICIEL (Nov. 14 and 15, 1938) 12969.

108. 3 DALLOZ, RÉPERTOIRE PRATIQUE (1912) 315, § 2; 4 *id.* at 70, § 641; 1 LE POITTEVIN, *op. cit. supra* note 74, at 1070. In *Cours* having more than one *chambre*, one of the *chambres*, termed the *chambre des appels correctionnels*, is devoted exclusively to appeals from the *Tribunaux Correctionnels* in the *ressort*. Law of Apr. 20, 1810, art. 40, 1810 BULLETIN DES LOIS (IV *sér.*) pt. 1, No. 282, 300; 4 GARRAUD, *op. cit. supra* note 1, at 562.

109. CODE DE PROCÉDURE CIVILE, art. 509.

110. C. I. C. arts. 479 and 483; Law of Apr. 20, 1810, art. 10, 1810 BULLETIN DES LOIS (IV *sér.*) pt. 1, No. 282, 294.

111. C. I. C. art. 201, as amended by the Law of June 13, 1856; 1 LE POITTEVIN, *op. cit. supra* note 74, at 1070.

112. The person injured by a *crime* or *délit* may, as *partie civile*, bring a civil action for damages against the offender, which will be tried along with the criminal prosecution. This practice will be discussed more fully later. When the *partie civile* appeals, only the judgment in the civil action is considered. C. I. C. art. 202, as amended by the Law of June 13, 1856; 1 LE POITTEVIN, *op. cit. supra* note 74, at 317.

113. C. I. C. art. 202, as amended by the Law of June 13, 1856.

114. 5 GARRAUD, *op. cit. supra* note 1, at 196 and 250.

115. 5 GARRAUD, *op. cit. supra* note 1, at 197.

116. C. I. C. art. 214, as amended by the Law of June 13, 1856; 1 LE POITTEVIN, *op. cit. supra* note 74, at 330. In the event the offense is a *contravention*, however, the *Cour* may retain jurisdiction if the *partie civile* and *ministère public* consent. C. I. C. art. 213, as amended by the Law of June 13, 1856.

117. C. I. C. art. 215, as amended by the Law of June 13, 1856; 1 LE POITTEVIN, *op. cit. supra* note 74, at 330; GOYET, *op. cit. supra* note 65, at 372.

the case back to the trial court.¹¹⁸ When the *Cour* reviews a case on the merits, it considers both the law and the facts¹¹⁹ and may, if it sees proper, examine any witnesses who testified at the trial and also new witnesses.¹²⁰ In such case the *Cour* renders final judgment.

Under the French "collegiate" system, it is necessary for the validity of a decision that the *Cour d'Appel* be composed of a president and not less than two *conseillers*. In certain important cases four *conseillers* are required.¹²¹

In each *Cour d'Appel*, three judges are assigned to a *chambre* known as the *chambre des mises en accusation* (chamber of accusations),¹²² which decides after the preliminary investigation by the *juge d'instruction* whether the defendant shall be brought to trial, and if so, in what court.¹²³ This *chambre* also hears appeals from decisions of the *juges d'instruction* of the *ressort*.¹²⁴

The highest court is the *Cour de Cassation*, which has appellate jurisdiction¹²⁵ in both civil and criminal cases for the entire country and the colonies.¹²⁶ The criminal cases include *crimes*, *délits*, and *contraventions*.¹²⁷ The court, which sits in Paris, is divided into four *chambres*, one of which hears petitions for review in civil cases (*chambre des requêtes*) only, while two exercise jurisdiction in civil and criminal cases respectively.¹²⁸ A fourth, created in 1938 and called the *chambre sociale*, hears cases involving a group of related subjects including the relation of master and servant and that of landlord and tenant. The judicial personnel of the court consists of a first president, a president for each *chambre* and 55 associate judges (*conseillers*).¹²⁹

118. 5 GARRAUD, *op. cit. supra* note 1, at 246.

119. *Id.* at 191.

120. 2 MASSABIAU, MANUEL DU MINISTÈRE PUBLIC (5th ed. 1903) 381; 5 GARRAUD, *op. cit. supra* note 1, at 234; 1 LE POITTEVIN, *op. cit. supra* note 74, at 310n.

121. Law of Aug. 30, 1883, art. 1, 1883 BULLETIN DES LOIS (XII sér.) pt. 2, 213, as amended by the Law of Apr. 28, 1919, art. 2, 1919 BULLETIN DES LOIS (nouv. sér. vol. 11) pt. 1, 1263, amended in turn by the Decree of June 25, 1934, art. 1, JOURNAL OFFICIEL (June 26, 1934) 6315.

122. C. I. C. art. 218, as amended by the Law of July 17, 1856; Law of Aug. 30, 1883, art. 1, 1883 BULLETIN DES LOIS (XII sér.) pt. 2, 213, as amended by the Law of Apr. 28, 1919, art. 2, 1919 BULLETIN DES LOIS (nouv. sér. vol. 11) pt. 1, 1263.

123. C. I. C. art. 221, art. 230, as amended by the Law of July 17, 1856, and art. 231, as amended by the Law of July 17, 1856.

124. C. I. C. art. 135, as amended by the Law of July 17, 1856; 1 LE POITTEVIN, *op. cit. supra* note 74, at 720.

125. The *Cour* exercises original jurisdiction where an action of *prise à partie* is brought against a *Cour d'Assises*, *Cour d'Appel*, or any of their *chambres*. FAYE, LA COUR DE CASSATION (1903) 488.

126. 3 LE POITTEVIN, *op. cit. supra* note 74, at 961; 4 DALLOZ, RÉPERTOIRE PRATIQUE, 86, § 1086.

127. C. I. C. art. 407.

128. FAYE, *op. cit. supra* note 125, at 20.

129. *Id.* at 17; Decree of June 17, 1938, JOURNAL OFFICIEL (June 29, 1938) 7495, as amended by Decree of Nov. 12, 1938, JOURNAL OFFICIEL (Nov. 14 and 15, 1938) 12969.

At every session of a *chambre* at least 11 judges, including the president, must sit.¹³⁰

The method of securing the review of a criminal case in the *Cour de Cassation* is known as *pourvoi*, of which there are three kinds, (1) *pourvoi en cassation*, (2) *pourvoi* "in the interest of the law",¹³¹ and (3) *pourvoi en revision*.¹³² By far the most common of these is the *pourvoi en cassation*. This may be brought by either the defendant, the *partie civile*, or an officer of the prosecuting department (*ministère public*) attached to the court which rendered the judgment which is the subject of review.¹³³ It is worthy of note that a judgment of acquittal, except when rendered in the *Cour d'Assises*, may be reviewed and a new trial ordered at the instance of the prosecuting department.

Five classes of cases may be taken to the *Cour de Cassation* from the criminal courts of general jurisdiction for review by the *pourvoi en cassation*.¹³⁴ In three cases the *pourvoi* is taken directly from a trial court. The most important and the most frequent of these is the *pourvoi* from a judgment in the *Cour d'Assises*, there being no other method of review from this court.¹³⁵ The other two embrace certain exceptional cases where a judgment, non-appealable on the merits, has been rendered in the *Tribunal Correctionnel* or *Tribunal de Simple Police*.¹³⁶ There are two situations where a case is taken on *pourvoi* from an appellate court to the *Cour de Cassation*. These are (1) where the *Cour d'Appel* has decided an appeal from a judgment of the *Tribunal Correctionnel*,¹³⁷ and (2) where the *Tribunal Correctionnel* has decided an appeal from the *Tribunal de Simple Police*.¹³⁸

On a *pourvoi en cassation* the *Cour* does not review the case on its merits. It considers simply errors of law, both substantive and procedural, the latter including questions of jurisdiction.¹³⁹ The scope of the review is somewhat similar to that of a common law court on the hearing of a writ of error. Subject to a few exceptions, for example when the *Cour* decides that the facts proved constitute no offense, in

130. FAYE, *op. cit. supra* note 125, at 22.

131. *Pourvoi* "dans l'intérêt de la loi". C. I. C. art. 442.

132. The term "*demande en revision*" is used interchangeably. LABORDE, *PRÉCIS DE DROIT PÉNAL FRANÇAIS* (3d ed. 1911) 880. See C. I. C. arts. 443 and 444, both as amended by the Law of June 8, 1895.

133. C. I. C. arts. 177, 216, as amended by the Law of June 13, 1856, 297, 298, 408, 413; 5 GARRAUD, *op. cit. supra* note 1, at 309.

134. The right of *pourvoi* lies also against judgments of courts having special criminal jurisdiction, such as the admiralty courts and the military courts, but no *pourvoi* lies from judgments of the Senate sitting as high court of justice. 5 GARRAUD, *op. cit. supra* note 1, at 289.

135. C. I. C. art. 262.

136. C. I. C. arts. 177 and 407; 5 GARRAUD, *op. cit. supra* note 1, at 299 and 300.

137. 1 LE POITTEVIN, *op. cit. supra* note 74, at 681.

138. C. I. C. art. 177; 5 GARRAUD, *op. cit. supra* note 1, at 300.

139. 5 GARRAUD, *op. cit. supra* note 1, at 317.

which case the judgment is simply reversed,¹⁴⁰ the practice of the *Cour*, when it finds that substantial error was committed by the court whose judgment is reviewed, is to remand the case¹⁴¹ to a specifically designated court of the same grade as the one which rendered the judgment.¹⁴² For example, excluding certain exceptions one of which is the finding of an error of jurisdiction,¹⁴³ if the *pourvoi* is from a *Cour d'Appel*, the case will be sent to the *Cour d'Appel* of another *ressort*,¹⁴⁴ and if the *pourvoi* is from a *Cour d'Assises*, the case will be sent for a new trial in the *Cour d'Assises* of another *département*, none of whose members sat on the court at the previous trial.¹⁴⁵ It is a notable feature of French criminal procedure that a new trial cannot be held in the court which originally tried the case. It is thought that the court hearing the cause anew should be one that is able to reach its conclusion in full independence and without predisposition of any kind. Hence, it is forbidden for any judge who participated in the earlier judgment to sit in the court at the new hearing.¹⁴⁶

The *pourvoi* "in the interest of the law" is brought by the *procureur général* attached to the *Cour de Cassation*, either on his own motion¹⁴⁷ or upon formal order of the Minister of Justice.¹⁴⁸ The *pourvoi* by the *procureur général* on his own motion may be brought on any grounds justifying a *pourvoi en cassation* provided no such *pourvoi* has been made by any of the parties to the cause.¹⁴⁹ The *pourvoi* initiated by the *procureur général* is solely for the purpose of correcting and making uniform the principles of law enunciated in the cases. The judgment of the *Cour* on this *pourvoi*, unlike that in case of a *pourvoi en cassation*, does not affect in any respect the status of any of the parties.¹⁵⁰ Thus in case of an acquittal, the judgment on a *pourvoi* "in the interest of the law" has no effect except to secure a correct pronouncement of the law. Similarly, where the *Cour* decides that a con-

140. C. I. C. art. 429; 1 LE POITTEVIN, *op. cit. supra* note 74, at 700.

141. 5 GARRAUD, *op. cit. supra* note 1, at 317.

142. C. I. C. art. 427, 428 and 429; 5 GARRAUD, *op. cit. supra* note 1, at 492.

143. C. I. C. art. 429.

144. The *Cour d'Appel*, to which the case is sent, proceeds to a new hearing on the law or facts with the same scope as that of the first *Cour d'Appel* prior to rendering the judgment invalidated. Witnesses may be called and any other appropriate trial measures taken. 3 FAUSTIN HÉLIE, *op. cit. supra* note 2, at 787, § 5397; DEGOIS, DROIT CRIMINEL (1922) 744.

145. 5 GARRAUD, *op. cit. supra* note 1, at 493; 2 DALLOZ, RÉPERTOIRE PRATIQUE, 255, § 752.

146. 5 GARRAUD, *op. cit. supra* note 1, at 493.

147. C. I. C. art. 442.

148. C. I. C. art. 441; 1 LE POITTEVIN, *op. cit. supra* note 74, at 702. In the latter case this *pourvoi* is sometimes termed "*demande en annulation*", LABORDE, *op. cit. supra* note 132, at 877; or "*pourvoi en annulation*", 5 GARRAUD, *op. cit. supra* note 1, at 526.

149. C. I. C. art. 442. The *pourvoi* by order of the Minister of Justice may attack not only final judgments such as are susceptible of *pourvoi en cassation*, but also any judicial decision or order at any stage of the proceedings. C. I. C. art. 441.

150. 5 GARRAUD, *op. cit. supra* note 1, at 523.

viction was improper, if the defendant is still serving his sentence, he continues to do so unless there is a pardon. It seems, however, that in the case of a *pourvoi* initiated by the Minister of Justice, the effect is not exclusively doctrinal, i.e. "in the interest of the law". In fact, this *pourvoi* is sometimes said to be "in the interest of the law and of the person convicted".¹⁵¹ It is clear that the rights of the defendant may not be adversely affected, nor those of the *partie civile* either adversely or favorably affected,¹⁵² but it appears settled today that a decision against the validity of a conviction takes effect to the benefit of the person convicted.¹⁵³ The *Cour* has, however, decided that the Minister of Justice may by express terms restrict the effect of the *pourvoi* to the clarifying of legal principles.¹⁵⁴

A *pourvoi en revision*¹⁵⁵ lies only in a case where a defendant has been convicted of a *crime* or a *délit*.¹⁵⁶ This *pourvoi* may be employed solely by the Minister of Justice, who may act *ex officio* or upon the request of the defendant or someone acting in his behalf.¹⁵⁷ The *Code* specifies four situations in which this *pourvoi* may be used: (1) when the supposed victim of a homicide is shown to have been alive after the conviction of the defendant, (2) when another person who acted independently of the defendant is subsequently convicted of the same offense of which the defendant was found guilty, (3) when a person who

151. DEGOIS, *op. cit. supra* note 144, at 768.

152. 5 GARRAUD, *op. cit. supra* note 1, at 541; GOYET, *op. cit. supra* note 65, at 390.

153. 5 GARRAUD, *op. cit. supra* note 1, at 542, citing cases; 1 LE POITTEVIN, *op. cit. supra* note 74, at 702; GOYET, *op. cit. supra* note 65, at 390.

154. 5 GARRAUD, *op. cit. supra* note 1, at 545; 1 LE POITTEVIN, *op. cit. supra* note 74, at 702. In the case of any *pourvoi* "in the interest of the law", if the *Cour* finds an error as to jurisdiction was made below, the case is sent to the proper court for rehearing. 1 LE POITTEVIN, *op. cit. supra* note 74, at 702.

The number of *pourvois en cassation* filed with the *Cour* during the year 1932 was 5651, of which 91 were by the *ministère public* and the remainder by the other parties. There were filed during the same period only 2 *pourvois* "in the interest of the law". COMPTE GÉNÉRAL PENDANT L'ANNÉE 1932 (1934) 114.

155. *Revision* is to be distinguished from the legal proceeding known as *réhabilitation* (C. I. C. art. 619, as amended by the Law of Mar. 10, 1898, *et seq.*), which has the effect after full execution of the sentence, of restoring entirely his civil rights to the person convicted, because of his good behavior for a period of years after completion of the sentence. *Réhabilitation* is in no respect retroactive, and has no reference to the correctness of the conviction. 5 GARRAUD, *op. cit. supra* note 1, at 553 and 651.

156. C. I. C. art. 443, as amended by the Law of June 8, 1895. The right of *pourvoi en revision* extends to judgments of special courts, including military courts. 5 GARRAUD, *op. cit. supra* note 1, at 569. In the case of Dreyfus, who was convicted on Dec. 22, 1894, by a court martial (at Paris), there was a *revision* on the application of Mme. Dreyfus. The *Cour de Cassation* ordered a new trial by court martial at Rennes, in which Dreyfus was again convicted. Later, due to popular demand, he was pardoned. Several years afterwards, as a result of new evidence which was discovered, he sought *revision* a second time, pardon being no obstacle to *revision*. 5 GARRAUD, *op. cit. supra* note 1, at 567n. The *Cour de Cassation* annulled the original sentence and under art. 445 completely rehabilitated Dreyfus. See Cass. Ch. Réun. June 3, 1899 (DALLOZ, RECUEIL PÉRIODIQUE, 1900 I, 181) and Cass.-réun. July 12, 1906 (SIREY, RECUEIL GÉNÉRAL DES LOIS ET DES ARRÊTS, 1907 I, 49).

157. For example, if the defendant is deceased, the spouse, children, relatives or legal representative may make the application for the purpose of clearing his name and securing damages from the state. C. I. C. art. 444, as amended by the Law of June 8, 1895.

testified against the defendant at the trial is convicted of perjury in so testifying, (4) when there is newly discovered evidence tending to establish the innocence of the convicted defendant.¹⁵⁸

In the case of a *pourvoi en revision* the *Cour* does not concern itself with errors of law, but considers simply evidence of guilt for the sole purpose of determining whether an innocent person has been convicted.¹⁵⁹ In addition to considering the record of the trial, the *Cour* may examine witnesses and may also order that investigations be made for the purpose of securing additional evidence.¹⁶⁰ Ordinarily, if the *Cour* decides to reverse the judgment of conviction, it will order a new trial in another court of the same grade as the one in which the original trial was held. In certain situations, for example where the defendant is dead or insane, or where prosecution is barred by lapse of time, the court will reverse the conviction without a remand.¹⁶¹

In addition to the functions of review just described, the *Cour de Cassation* has jurisdiction to receive applications from the defendant, the *partie civile* or the prosecuting department for change of court because of alleged bias of judges or other sufficient reason;¹⁶² or from the *ministère public* alone, through intermediation of the Minister of Justice, because of danger of disturbance at the trial.¹⁶³

Besides the courts of general jurisdiction already described, a court of special criminal jurisdiction must be noted. This is the Senate, specially constituted by decree of the government as the High Court (*Haute Cour de Justice*) for the purpose of trying (1) the President of the Republic for high treason, (2) Ministers for *crimes* committed in the exercise of their functions, and (3) any person where an offense against the safety of the state is charged.¹⁶⁴ The Senate

158. C. I. C. art. 443, as amended by the Law of June 8, 1895.

159. 5 GARRAUD, *op. cit. supra* note 1, at 550.

160. C. I. C. art. 445, as amended by the Law of June 8, 1895; 5 GARRAUD, *op. cit. supra* note 1, at 623.

161. C. I. C. art. 445, as amended by the Laws of June 8, 1895 and of July 19, 1917. During 1932, the applications for *revision* numbered 13, but the records indicate a decision in only four cases. The judgment attacked was annulled in two cases and found valid in one. In the fourth the application was denied on the ground of lack of jurisdiction. COMPTE GÉNÉRAL PENDANT L'ANNÉE 1932 (1934) 114.

162. C. I. C. arts. 542-544.

163. 4 LE POITTEVIN, *op. cit. supra* note 74, at 774n. An important special function of the *Cour de Cassation* is that of sitting, all *chambres* united, for the purpose of disciplining judges of any court, including the *Cour de Cassation* itself. The *Cour* is then known as the *Conseil Supérieur de la Magistrature*. Proceedings are initiated by the Minister of Justice and prosecuted before the *Conseil* by the *procureur général* attached to the *Cour de Cassation*. They may result either from official misconduct or personal activities inconsistent with judicial office, including those of a political nature. If the charges are sustained, the sanction of the *Conseil* may be either simple censure, censure with reprimand including cessation of salary for one month, suspension carrying deprivation of salary for its duration, or removal. Law of Aug. 30, 1883, arts. 13, 14 and 16, 1883 BULLETIN DES LOIS (XII sér.) pt. 2, 217.

164. Constitutional Law of July 16, 1875, art. 12. 1875 BULLETIN DES LOIS (XII sér.) pt. 2, 1; 2 GARRAUD, *op. cit. supra* note 1, at 367. The ordinary courts continue to exercise alternate jurisdiction in cases (2) and (3).

was so constituted for the trial of Joseph Caillaux (Minister of the Interior during the World War) and others in 1918-1920.¹⁶⁵

5. Personnel of the Courts and Prosecuting Department ¹⁶⁶

The general term used to describe the members of the judicial profession is *magistrature*, and each member is known as a *magistrat*.¹⁶⁷ At the head of the judicial system is the Minister of Justice, known also as *Garde des Sceaux*,¹⁶⁸ and it is upon his recommendation that the *magistrats* are appointed by the President of the Republic.¹⁶⁹ In practice this means that the appointments are made by the Minister.¹⁷⁰

A characteristic feature of the French system is the fact that members of the prosecuting department are *magistrats*,¹⁷¹ the reason for this being that the position of the prosecutor is regarded as non-partisan and judicial. The *magistrats* who act as prosecutors are, by reason of the fact that they stand when addressing the court, described as the standing magistracy (*magistrature debout*) in contrast to those acting as judges, who constitute the sitting magistracy (*magistrature assise*).¹⁷² Members of the two groups wear the same costume and are inducted into office by similar ceremonies.¹⁷³ The position of the prosecuting official as a member of the *magistrature* is further indi-

165. 4 GARRAUD, *op. cit. supra* note 1, at 135n. The organization of the French courts is treated in Walton, *The Organization of Justice in France* (1903) 19 L. Q. REV. 263; Perroud, *The Organization of the Courts and the Judicial Bench in France* (1929) 11 J. COMP. LEG. & INT. L. (3d ser.) 1; Tyndale, *The Organization and Administration of Justice in France, with an Outline of French Procedure with Respect to the Production of Evidence* (1935) 13 CAN. B. REV. 567; Déak and Rheinstein, *The Machinery of Law Administration in France and Germany* (1936) 84 U. OF PA. L. REV. 846.

166. This subject is discussed at length in ENSOR, COURTS AND JUDGES IN FRANCE, GERMANY AND ENGLAND (1933); Garner, *The French Judiciary* (1917) 26 YALE L. J. 349; Perroud, *supra* note 165; Ploscowe, *The Career of Judges and Prosecutors in Continental Countries* (1934) 44 YALE L. J. 268.

167. CAPITANT, *op. cit. supra* note 35, at 320. The *juge de paix*, however, is not included in the *magistrature*. BARTHÉLEMY, LE GOUVERNEMENT DE LA FRANCE (1919) 179. Prior to 1905, no special training was required for this office (1 GLASSON AND TISSIER, *op. cit. supra* note 94, at 102), but today the conditions for admission approach those for admission to the *magistrature*. 3 LE POITTEVIN, *op. cit. supra* note 74, at 329 and 331. Not belonging to the *magistrature*, the *juge de paix* may not be promoted to any post therein.

168. 1 GLASSON AND TISSIER, *op. cit. supra* note 94, at 177; Law of Aug. 30, 1883, art. 17, 1883 BULLETIN DES LOIS (XII sér.) pt. 2, 218.

169. 3 LE POITTEVIN, *op. cit. supra* note 74, at 981.

170. Detailed regulations for admission to the *magistrature* are now provided by law. Decree of July 21, 1927, 1927 BULLETIN DES LOIS (nouveau sér. vol. 19) pt. 1, 2401; 3 LE POITTEVIN, *op. cit. supra* note 74, at 962 et seq.

171. 1 GLASSON AND TISSIER, *op. cit. supra* note 94, at 265; 3 LE POITTEVIN, *op. cit. supra* note 74, at 666. The prosecuting official before the *Tribunal de Simple Police* is the *commissaire de police*, who, while sometimes referred to as *magistrat* (1 LE POITTEVIN, C. I. C. ANNOTÉ (1911-1915) art. 144, §§ 47 and 52), is in fact not a member of the *magistrature*.

172. 1 GARRAUD, *op. cit. supra* note 1, at 173n; 1 GLASSON AND TISSIER, *op. cit. supra* note 94, at 266.

173. 1 GARRAUD, *op. cit. supra* note 1, at 173; 3 LE POITTEVIN, *op. cit. supra* note 74, at 673.

cated by the fact that during the trial of a case he occupies a seat on the bench near the judges.

All appointments are of indefinite duration, but a Decree promulgated by Louis Napoleon in 1852, and still in force, requires the retirement at the age of 70 of the judges of all the courts except the *Cour de Cassation*, whose members must retire at 75.¹⁷⁴ One purpose of this Decree was, according to a leading authority, that of removing from the bench the remaining judges appointed during the Revolution and substituting others who would be less independent.¹⁷⁵ Members of the standing magistracy must, if attached to the lower courts, retire at the age of 70, and, if attached to the *Cour de Cassation*, at the age of 75.¹⁷⁶

The judicial system is a hierarchy, and all the *magistrats* are grouped in graded classes with a system of promotion from one class to the next higher one. Standing and sitting *magistrats* are grouped in the same classes and transfers are not infrequently made from one branch of the profession to the other.¹⁷⁷ Until the year 1906 the promotion of *magistrats* was entirely in the discretion of the Minister of Justice, and there was much criticism of the system.¹⁷⁸ Since then provision has been made, by a series of decrees, for a system of promotion whereby the Minister must be guided to a considerable extent

174. Decree of Mar. 1, 1852, art. 1, 1852 BULLETIN DES LOIS (X sér.) pt. 1, 443, with letter of recommendation by the Minister of Justice to Napoleon; 3 LE POITTEVIN, *op. cit. supra* note 74, at 1012. The Decree is criticized in FAVRE, DE LA RÉFORME JUDICIAIRE (1877) 22 and 56 *et seq.*; PICOT, LA RÉFORME JUDICIAIRE (1881) 127; MALEPEYRE, LA MAGISTRATURE (1900) 145.

175. BARROT, DE L'ORGANISATION JUDICIAIRE EN FRANCE (1871) 76.

176. Decree of Dec. 21, 1928, 1928 BULLETIN DES LOIS (*novv. sér.* vol. 20) pt. 1, 2909; LE POITTEVIN, *op. cit. supra* note 74, *Supplément* at 268. By the Law of May 31, 1933, art. 122 (JOURNAL OFFICIEL (June 1, 1933) 5712), however, the age limit was extended to 75 years in the case of the first president and the *procureur-général* of the *Cour d'Appel* of Paris, and of the president and *procureur* of the *Tribunal* of the Seine.

Prior to the retirement age, sitting *magistrats* may not be removed by the executive power, nor may they be transferred or demoted. 1 MASSABIAU, *op. cit. supra* note 120, at 45; 1 GLASSON AND TISSIER, *op. cit. supra* note 94, at 124. They may, however, be removed or otherwise disciplined for conduct unbefitting their office by a judicial body, the *Conseil Supérieur de la Magistrature*, composed of all the judges of the *Cour de Cassation*. They may not be impeached by the legislative body as in this country.

Standing *magistrats* may be removed, demoted or transferred by the Minister of Justice. 1 MASSABIAU, *op. cit. supra* note 120, at 48; 1 GLASSON AND TISSIER, *op. cit. supra* note 94, at 268. A recent measure requires, however, that the Minister, before exercising this power to discipline, shall convoke a commission of certain high *magistrats* who shall give him an advisory ruling, which he may follow or not as he chooses. Decree of June 5, 1934, JOURNAL OFFICIEL (June 6, 1934) 5580.

177. GOYET, *op. cit. supra* note 65, at 14. An example is the career of M. Pierre Bouchardon, born in 1870, admitted to the bar (Paris) in 1892; named substitute *juge* at Aubusson, in 1895, a judge of the *Tribunal de Première Instance* at Baume-les-Dames, then at Guéret in 1900, assistant *procureur* at Cambrai in 1903, *procureur* at Yvetot in 1905, assistant *procureur* at Rouen in 1906, chief of the bureau of *Affaires Criminelles* at the Ministry of Justice in 1908, *juge d'instruction* in the *Tribunal* of the Seine (Paris) in 1912, *conseiller* of the *Cour d'Appel* of Paris in 1918, and *conseiller* of the *Cour de Cassation* in 1929. DICTIONNAIRE NATIONAL DES CONTEMPORAINS (1936) 98.

178. See FAVRE, *op. cit. supra* note 174, at 14; PICOT, *op. cit. supra* note 174, at 319 *et seq.*; MALEPEYRE, *op. cit. supra* note 174, at 4.

by considerations of merit, based on the recommendations of a group of high ranking *magistrats*.¹⁷⁹

6. *Ministère Public*

The members of the *magistrature* who represent in the courts the interests of the government are known as the *ministère public*.¹⁸⁰ They function in both civil and criminal cases. The term is applied both to the ensemble of these officials and also to the group attached to a particular court. A member of the *ministère public* is an essential constituent of every criminal court,¹⁸¹ and no judgment is valid which does not expressly recite that he was present at every stage of the proceedings and either expressed his views or was given an opportunity to do so.¹⁸²

The *ministère public* is said to possess three attributes, (1) unity, (2) indivisibility, and (3) independence.¹⁸³ By "unity" is meant the fact that just as all the *magistrats* are parts of a hierarchical system, so the members of the *ministère public* in turn constitute a hierarchy,¹⁸⁴ of which the head is likewise the Minister of Justice, who directs and supervises the work of all the prosecuting officials.¹⁸⁵ For example, he may direct that a prosecution shall be brought or shall not be brought, but after a court has taken jurisdiction of a prosecution, the case is beyond the reach of the Minister.¹⁸⁶ For the enforcing of his orders he may employ disciplinary measures including dismissal.¹⁸⁷ There is, however, one interesting particular in which a subordinate is said to be free from the control of the Minister. Although compelled to begin a prosecution or to file papers as commanded, each member of the *ministère public* at the trial may orally express his own opinion even though it contradicts what he has written at the order of the Minister. This idea is expressed in the old maxim, "*la plume est servie, mais la parole est libre*".¹⁸⁸

179. Decree of August 18, 1906, art. 16, 1906 BULLETIN DES LOIS (XII sér.) pt. 2, 2396; Decree of February 13, 1908, art. 23, 1908 BULLETIN DES LOIS (XII sér.) pt. 1, 684; Decree of July 21, 1927, 1927 BULLETIN DES LOIS (nouv. sér. vol. 19) pt. 1, 2401.

The promotion of *magistrats* is discussed in 3 LE POITTEVIN, *op. cit. supra* note 74, at 970 *et seq.*; PERROUD, *supra* note 165, at 14; ENSOR, *op. cit. supra* note 166, at 118 *et seq.*; Ploscowe, *supra* note 166, at 276 *et seq.*

180. I GARRAUD, *op. cit. supra* note 1, at 172; GOYET, *op. cit. supra* note 65, at 7.

181. Likewise at every sitting of a civil court of general jurisdiction a member of the *ministère public* must attend and be given an opportunity to present his views on each case. 3 LE POITTEVIN, *op. cit. supra* note 74, at 675.

182. I GARRAUD, *op. cit. supra* note 1, at 175; GOYET, *op. cit. supra* note 65, at 9;

3 LE POITTEVIN, *op. cit. supra* note 74, at 342 and 675.

183. 3 LE POITTEVIN, *op. cit. supra* note 74, at 659.

184. See C. I. C. arts. 27 and 274.

185. I GARRAUD, *op. cit. supra* note 1, at 174; 3 LE POITTEVIN, *op. cit. supra* note 74, at 660.

186. 3 LE POITTEVIN, *op. cit. supra* note 74, at 662-664.

187. I GARRAUD, *op. cit. supra* note 1, at 174; GOYET, *op. cit. supra* note 65, at 11; 3 LE POITTEVIN, *op. cit. supra* note 74, at 678.

188. GOYET, *op. cit. supra* note 65, at 12; 3 LE POITTEVIN, *op. cit. supra* note 74, at 665.

"Indivisibility" means that each member of the *ministère public* attached to a given court acts as the representative of, and exercises the powers possessed by, the group regarded as a unit.¹⁸⁹ It follows from this that a prosecution started by one prosecutor may be continued by another;¹⁹⁰ also that several may participate in the same trial.¹⁹¹ In such case, when one is speaking, his associates also stand. This is to indicate that they are being represented in what is said.¹⁹²

By "independence" is meant that the members of the *ministère public* are not subject to control or direction by the court.¹⁹³ They may not be refused the right to speak at a trial nor may they be required to cease speaking.¹⁹⁴ They may not be censured nor reprimanded by the court for any official conduct.¹⁹⁵ All that the court can do, if it considers any action improper, is to report the fact to one of the higher officers of the *ministère public*.¹⁹⁶

The members of the *ministère public* attached to any particular court are known collectively as the *parquet*.¹⁹⁷ The chief of the *parquet* attached to each *Cour d'Appel* is the *procureur général*, and proceedings in the *Cour d'Appel* and *Cour d'Assises* are conducted in his name,¹⁹⁸ although he need not appear in person.¹⁹⁹ The *procureur général* has a number of assistants, known as *avocats généraux* and *substituts*.²⁰⁰ The prosecutor in the *Cour d'Assises* of the *département* wherein there is located a *Cour d'Appel* is ordinarily an *avocat général* appearing as the representative of the *procureur général*. In the other *Cours d'Assises* of the *ressort*, this function is performed generally by the

189. I GARRAUD, *op. cit. supra* note 1, at 185; 3 LE POITTEVIN, *op. cit. supra* note 74, at 660.

190. I GARRAUD, *op. cit. supra* note 1, at 186; 3 LE POITTEVIN, *op. cit. supra* note 74, at 661.

191. GOYET, *op. cit. supra* note 65, at 10.

192. I GARRAUD, *op. cit. supra* note 1, at 186n; 3 LE POITTEVIN, *op. cit. supra* note 74, at 660.

193. I GARRAUD, *op. cit. supra* note 1, at 320; GOYET, *op. cit. supra* note 65, at 12; 3 LE POITTEVIN, *op. cit. supra* note 74, at 661.

194. GOYET, *op. cit. supra* note 65, at 12; 3 LE POITTEVIN, *op. cit. supra* note 74, at 661.

195. I MASSABIAU, *op. cit. supra* note 120, at 50; I GARRAUD, *op. cit. supra* note 1, at 320; 3 LE POITTEVIN, *op. cit. supra* note 74, at 661.

196. I MASSABIAU, *op. cit. supra* note 120, at 50; I GARRAUD, *op. cit. supra* note 1, at 321 and 322; 3 LE POITTEVIN, *op. cit. supra* note 74, at 678.

197. 3 LE POITTEVIN, *op. cit. supra* note 74, at 659. This name is derived from the fact that seats occupied by the members were formerly placed below the platform on which the judges sit. I GARRAUD, *op. cit. supra* note 1, at 179; GOYET, *op. cit. supra* note 65, at 8.

198. The title of a criminal case is "*Ministère Public contre X*". DALLOZ, RECUEIL PÉRIODIQUE, 1933 II, 12.

199. I GARRAUD, *op. cit. supra* note 1, at 180; GOYET, *op. cit. supra* note 65, at 9.

200. GOYET, *op. cit. supra* note 65, at 9; 3 LE POITTEVIN, *op. cit. supra* note 74, at 684.

procureur attached to the *tribunal* in the city where the *Cour* sits.²⁰¹ The *substituts* perform the office work of the *parquet*.²⁰²

In addition to his position in the *parquet* of the *Cour d'Appel*, the *procureur général* is the head of the *ministère public* for the entire *ressort* and exercises supervision and control over all the officers of the *parquets* below him²⁰³ and may take disciplinary measures against them to the extent of recommending their removal by the Minister of Justice.²⁰⁴

The *parquet* at a *Tribunal de Première Instance* at most *tribunaux* consists of the *procureur de la République* and one or more *substituts*.²⁰⁵ The *procureur* prosecutes in the *Tribunal Correctionnel* in his own right by virtue of article 22 of the *Code*.²⁰⁶ He also acts as prosecutor in the *Cour d'Assises* when it is not held at the seat of the *Cour d'Appel*. In such event he acts as the subordinate of the *procureur général*.²⁰⁷ In addition to his duties as official prosecutor, the *procureur*, as will be presented more fully later, has extensive duties in the preliminary investigation of offenses. He also has many administrative duties.²⁰⁸

At the *Tribunal de Simple Police*, the function of the *ministère public* is performed by one or more *commissaires de police* of the city where the *tribunal* is located, assigned for one year to this duty by the *procureur général* of the *ressort*.²⁰⁹

The *ministère public* of the *Cour de Cassation* is entirely independent of the *ministère public* in the other courts. It consists of a *procureur général*, a number of *avocats généraux* and a secretary general.²¹⁰

201. C. I. C. art. 253, as amended by the Law of Feb. 25, 1901; L. CAULLET, *DES FONCTIONS DU PROCUREUR DE LA RÉPUBLIQUE ET DE SES AUXILIAIRES* (1909) 2; I LE POITTEVIN, *op. cit. supra* note 74, at 1049.

202. I GARRAUD, *op. cit. supra* note 1, at 182.

203. Decree of July 6, 1810, art. 42, 1810 BULLETIN DES LOIS (IV sér.) pt. 2, 14; Law of Apr. 20, 1810, arts. 45 and 60, 1810 BULLETIN DES LOIS (IV sér.) pt. 1, 301 and 304; 3 LE POITTEVIN, *op. cit. supra* note 74, at 685.

204. Further, as will be later set forth, all the officers of the *police judiciaire* of the *ressort* are under the control of the *procureur général*.

205. I GARRAUD, *op. cit. supra* note 1, at 182; GOYET, *op. cit. supra* note 65, at 9. Following the judicial reforms of recent years, reducing the number of judges in the *tribunaux* of the least populous judicial *arrondissements* to one, there is no longer a *parquet* at the *tribunaux* of this group. Decree of Mar. 28, 1934, art. 1 and schedule A attached, JOURNAL OFFICIEL (Apr. 5, 1934) 3509. Prosecutions in these *tribunaux* are conducted by the *parquets* of the *tribunaux* of neighboring *arrondissements*. Law of Aug. 21, 1929, arts. 4 and 6, 1929 BULLETIN DES LOIS (nouv. sér. vol. 21) pt. 1, 2177; Law of July 16, 1930, 1930 BULLETIN DES LOIS (nouv. sér. vol. 22) pt. 1, 1769.

206. I GARRAUD, *op. cit. supra* note 1, at 183; GOYET, *op. cit. supra* note 65, at 9.

207. I GARRAUD, *op. cit. supra* note 1, at 183; GOYET, *op. cit. supra* note 65, at 10.

208. 3 LE POITTEVIN, *op. cit. supra* note 74, at 695.

209. GOYET, *op. cit. supra* note 65, at 8.

210. I GARRAUD, *op. cit. supra* note 1, at 184; GOYET, *op. cit. supra* note 65, at 10; 3 LE POITTEVIN, *op. cit. supra* note 74, at 682. The *ministère public* is discussed in ENSOR, *op. cit. supra* note 166, at 121; Walton, *supra* note 165; Tyndale, *supra* note 165; Déak and Rheinstein, *supra* note 164.

II. PERSONNEL AND FUNCTIONS OF THE POLICE JUDICIAIRE

The investigation of offenses, preliminary to trial, is performed by a group of officials constituting what is termed the *police judiciaire*. "Police" in France has a much broader meaning than "police" in this country and includes some officials who would not be so characterized here. Furthermore the functions of most members of the *police judiciaire* are in no respect judicial, but are entirely for the purpose of preparing the case for the prosecution.²¹¹

"Police" includes two distinct functions, which are described as *administrative* and *judiciaire*. The *Code* of 3 Brumaire IV (Oct. 26, 1795) provided the following: "The purpose of the *police administrative* is to maintain continually the public order in all places under the general government. It is principally concerned with the prevention of offenses. The laws concerning it are part of the Code of Civil Administration. The *police judiciaire* searches out the offenses, the commission of which the *police administrative* has not been able to prevent; it collects the evidence and delivers the perpetrators to the tribunals authorized by law to punish them."²¹² The provision regarding the *police judiciaire* has been reproduced in article 8 of the present *Code*.²¹³ The work of the *police judiciaire* is said to commence at the point where the work of the *police administrative* ends.²¹⁴

While the *Code* enumerates the general functions of the *police judiciaire* it has not presented any procedure to govern its operation.²¹⁵ It does, however, specifically designate the officers who are to constitute the *police judiciaire*, listing them without regard to their relative importance in the following order: (1) rural and forest guards, (2) *commissaires de police*,²¹⁶ (3) *inspecteurs* of the *police mobile* and of the special police, with at least five years' service, who are designated for this work by the Minister of the Interior and the Minister of Justice, (4) mayors and their deputies, (5) *procureurs de la République* and

211. The term "*police judiciaire*" has been variously translated as follows: (a) "*judicial police*" in I STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND (1883) 525, and ESMEIN, *op. cit. supra* note 2, at 43; and (b) "police judiciary" in Coudert, *French Criminal Procedure* (1910) 19 YALE L. J. 326, 332. On page 331 the translation "*judicial police*" appears.

212. IV BULLETIN DES LOIS (II sér.) No. 204, arts. 19 and 20, p. 4.

213. Article 8 reads as follows: "The *police judiciaire* searches out *crimes*, *délits*, and *contraventions*; it collects the evidence and delivers the perpetrators to the tribunals authorized by law to punish them."

214. 2 GARRAUD, *op. cit. supra* note 1, at 531. The *police administrative* is subject to the direction of the Minister of the Interior; the *police judiciaire* to that of the Minister of Justice. GOYET, *op. cit. supra* note 65, at 191; VOHL, LA POLICE FRANÇAISE (4th ed. 1931) 32.

215. 1 GARRAUD, *op. cit. supra* note 1, at 25.

216. *Commissaires généraux de police* are still listed in articles 9 and 48 of the *Code*, although this office was abolished by the Decree of March 28, 1815, 1815 BULLETIN DES LOIS (VI sér.) pt. 2, 68; PASCAL, LE RÔLE JUDICIAIRE DU COMMISSAIRE DE POLICE (Thesis Lyon, 1922) 17.

their assistants, (6) justices of the peace (*juges de paix*), (7) officers of the *gendarmerie*, and (8) *juges d'instruction*.²¹⁷

The most important official of the *police judiciaire* is the *procureur*,²¹⁸ who is directed by the *Code* to inquire into all offenses cognizable by the *Cours d'Assises* and the *Tribunaux Correctionnels*.²¹⁹ His functions are performed within the *arrondissement* where he is located. The *procureur* in his capacity as *magistrat* is also the official prosecutor before the *juge d'instruction*, when sitting as an examining magistrate, and the *Tribunal Correctionnel*.²²⁰ In the case of a *flagrant délit*, the *procureur* may go beyond his sphere as a member of the *police judiciaire* and may conduct an investigation partly judicial in character,²²¹ such as is normally made by a *juge d'instruction*. The *procureur* is the head of the *police judiciaire* in his *arrondissement*,²²² and the *Code* provides that he shall have as assistants the *commissaires de police*, the *inspecteurs* of the *police mobile* and of the special police, the *juges de paix*, and the officers of the *gendarmerie*.²²³

The *juge d'instruction*, in addition to being a member of the *police judiciaire*, performs judicial duties in the conducting of the preliminary examination (*instruction préparatoire*).²²⁴ Like the *procureur* he functions within an *arrondissement*. According to the *Code*, as originally promulgated, the attributes of the *juge d'instruction* were much more than those of an officer of the *police judiciaire* than those of a judge.²²⁵ While he collected the evidence, the decision as to whether the suspected person should be brought to trial and, if so, be-

217. C. I. C. art. 9, as amended by the Law of July 5, 1929. The following members of the *police judiciaire* are also members of the *police administrative*: the rural and forest guards, the *commissaires de police*, the mayors and their deputies (4 LE POITTEVIN, *op. cit. supra* note 74, at 149, 150), and the officers of the *gendarmerie*. CAPITANT, *op. cit. supra* note 35, at 267.

The police officers who regulate the traffic and patrol the streets in French cities are designated *agents de police*. CAPITANT, *op. cit. supra* note 35, at 43. They are also frequently called *sergents de ville* or *gardiens de la paix* and sometimes mistakenly by foreigners, *gendarmes*. They are not members of the *police judiciaire*, since not specified in article 4 of the *Code*, although they prepare reports for the *commissaires de police* regarding any offenses which come to their attention. CUCHE, *PRÉCIS DE DROIT CRIMINEL* (1927) 252; P. CAULLET, *COURS DE POLICE* (1934) 107. The *agents de police* are sometimes described as adjuncts to the *police judiciaire*. 2 GARRAUD, *op. cit. supra* note 1, at 603.

218. The *procureur* and the *juge d'instruction* are described as the superior officers of the *police judiciaire*. 2 GARRAUD, *op. cit. supra* note 1, at 536; GOYET, *op. cit. supra* note 65, at 193.

219. C. I. C. art. 22. The *Code* confers no authority on the *procureur* to take any action with regard to *contraventions*, but in practice he frequently orders investigations and prosecutions in such cases. L. CAULLET, *op. cit. supra* note 201, at 20.

220. 2 GARRAUD, *op. cit. supra* note 1, at 539; GOYET, *op. cit. supra* note 65, at 193.

221. C. I. C. arts. 32-36, 37, as amended by the Law of Feb. 7, 1933, and 40.

222. 2 MASSABIAU, *op. cit. supra* note 120, at 74; GOYET, *op. cit. supra* note 65, at 193.

223. C. I. C. arts. 48-54.

224. 2 GARRAUD, *op. cit. supra* note 1, at 547; GOYET, *op. cit. supra* note 65, at 194.

225. MASSON, *LA SÉPARATION DE LA POURSUITE ET DE L'INSTRUCTION* (Thesis Paris, 1898) 37.

fore what court, was decided by a council of three or more judges (*chambre du conseil*), one of whom was the *juge d'instruction*.²²⁶ By a law enacted in 1856 the *chambre du conseil* was abolished and all of its powers were conferred on the *juge d'instruction*,²²⁷ whose position thereby became more that of a judge and correspondingly less that of a police officer. His judicial status was further recognized by a law enacted in 1897²²⁸ providing that a suspect whom he is interrogating may have counsel. There still remains, however, considerable difference of opinion among writers regarding the line of division between the duties performed by the *juge* in his judicial capacity and as a member of the *police judiciaire*.²²⁹ Thus the view is expressed that when conducting the preliminary examination, he is acting entirely as a judge.²³⁰ On the contrary, it is said that in such case he is an officer of the *police judiciaire*²³¹ and that he acts judicially only when issuing official orders (*ordonnances*). The former is the more general view. The *Code* provides, however, that with regard to his functions as a member of the *police judiciaire*, the *juge d'instruction* is subject to the surveillance of the *procureur général*.²³² This, according to an early contention, meant that in the performance of all his duties the *juge* was subject to the orders of the *procureur général*,²³³ but today it is recognized that the latter's right of supervision is limited to general directions to promote efficiency,²³⁴ with the accompanying right to admonish for negligent conduct²³⁵ and, if this is repeated, to cite the *juge d'instruction* before the *Cour d'Appel* which may enjoin him from continuing such conduct.²³⁶ The *procureur général* as a disciplinary measure may withdraw a case from a *juge d'instruction*²³⁷ and may even have his appointment as *juge d'instruction* revoked.²³⁸ In addition to his duties as an examining magistrate and as an officer of the

226. C. I. C. old arts. 127, 128, 129, 130, 133.

227. C. I. C. arts. 114, 127, 128, 129, 130 and 133, as enacted by the Law of July 17, 1856.

228. Law of December 8, 1897, 1897 BULLETIN DES LOIS (XII sér.) pt. 2, 1777.

229. Cuche, *Les Réformes Législatives à l'Étude* (1934) 54 REV. CRIT. DE LÉGIS. ET DE JURIS. 404.

230. L. CAULLET, *op. cit. supra* note 201, at 229; CUCHE, *op. cit. supra* note 217, at 248.

231. DEGOIS, *op. cit. supra* note 143, at 437.

232. C. I. C. arts. 57 and 279. The *juges d'instruction* make regular reports to the *procureurs généraux* regarding the cases before them. 2 GARRAUD, *op. cit. supra* note 1, at 554; 3 LE POITTEVIN, *op. cit. supra* note 74, at 234.

233. See MORIZOT-THIBAUT, *op. cit. supra* note 20, at 123; 2 GARRAUD, *op. cit. supra* note 1, at 553 n.

234. 2 MASSABIAU, *op. cit. supra* note 120, at 143; 2 GARRAUD, *op. cit. supra* note 1, at 641; GOYET, *op. cit. supra* note 65, at 277.

235. C. I. C. art. 280.

236. C. I. C. art. 281; GOYET, *op. cit. supra* note 65, at 202-203.

237. 2 MASSABIAU, *op. cit. supra* note 120, at 143.

238. 2 MASSABIAU, *op. cit. supra* note 120, at 143; GOYET, *op. cit. supra* note 65, at 203.

police judiciaire, the *juge d'instruction* is a member of the *Tribunal de Première Instance*.²³⁹

The *commissaire de police*, who is the most important police assistant of the *procureur*, is a superior officer, attached to various police units, which may be either the municipal police, the *police mobile* or the special police.²⁴⁰ There is a *commissaire* of the municipal police in every city having a population of at least 5000; and in a city with a population of more than 10,000, there is a *commissaire* for each 10,000 inhabitants.²⁴¹ As members of the *police administrative*, the *commissaires* are under the direction of the mayors and the *préfets*, but are subject to the order of the *procureur* when acting as officers of the *police judiciaire*.²⁴² The *commissaire* is authorized in his own right to investigate all *contraventions*, including the receiving of complaints regarding them²⁴³ and, as an official of the *ministère public*, to prosecute them before the *Tribunal de Simple Police*.²⁴⁴ In the investigation of *délits* and *crimes* the *commissaire*,²⁴⁵ as already pointed out, acts as an assistant of the *procureur*. He may also be delegated to perform some of the duties of the *juge d'instruction*.²⁴⁶

The mayor is the chief executive official of a *commune*,²⁴⁷ as well as one of the assistants of the *procureur* in the *police judiciaire*. In the latter capacity his power is limited to the *commune*.²⁴⁸

The *gendarmerie* is a unit of the army,²⁴⁹ which is customarily employed in performing services in other branches of the government, viz. Interior, Justice, Navy and Colonies.²⁵⁰ Its services are rendered primarily in the rural districts and along the highways.²⁵¹ The officers of the *gendarmerie* perform the duties of members of the *police judiciaire*, in the capacity of assistants of the *procureur*.²⁵²

239. 2 GARRAUD, *op. cit. supra* note 1, at 540. As a member of the *Tribunal de Première Instance* the *juge d'instruction* is irremovable. *Id.* at 542.

240. GOYET, *op. cit. supra* note 65, at 196; 1 LE POITTEVIN, *op. cit. supra* note 74, at 858.

241. Where there are more than one *commissaire* the work is coordinated by a *commissaire central*. 2 GARRAUD, *op. cit. supra* note 1, at 583n; 1 LE POITTEVIN, *op. cit. supra* note 74, at 859.

242. 2 GARRAUD, *op. cit. supra* note 1, at 585; 1 LE POITTEVIN, *op. cit. supra* note 74, at 858.

243. C. I. C. art. 11.

244. C. I. C. art. 144, as amended by the Law of December 31, 1906.

245. The *commissaire de police* is made an officer of the *police judiciaire* by C. I. C. art. 9.

246. This delegation will be discussed in detail when the functions of the *juge d'instruction* are presented.

247. BERTHÉLEMY, *op. cit. supra* note 4, at 246 *et seq.*

248. 4 LE POITTEVIN, *op. cit. supra* note 74, at 153. The mayor has become increasingly less active as an officer of the *police judiciaire*. 2 GARRAUD, *op. cit. supra* note 1, at 587n.

249. Decree of May 20, 1903, art. 2, 1903 BULLETIN DES LOIS (XII sér.) pt. 2, 33.

250. *Id.* at art. 4.

251. *Id.* at art. 1; GUYON, ORGANISATION DE LA POLICE EN FRANCE (Thesis Paris, 1923) 170.

252. C. I. C. art. 9, as amended by the Law of July 5, 1929.

The *police mobile* was organized in 1907 solely for the work of the *police judiciaire*.²⁵³ It is composed of 15 brigades corresponding to that number of districts into which the country has been divided for this purpose. Each brigade is commanded by a *commissaire divisionnaire de police mobile* and contains a number of *commissaires de police mobile* and *inspecteurs* in addition to a chauffeur.²⁵⁴ In 1929 it was provided that an *inspecteur* of the *police mobile*, who had served five years as such, might be named an officer of the *police judiciaire* by order of the Ministers of Justice and of the Interior.²⁵⁵ The officers of the *police mobile*, which must be distinguished from the *garde mobile*,²⁵⁶ are not members of the *police administrative*.

The special police, whose *commissaires* and *inspecteurs* of five years' service, when so designated, are officers of the *police judiciaire*,²⁵⁷ have the function of surveillance at the frontiers, railroads, etc.,²⁵⁸ including investigation of offenses, such as anarchistic attempts against the safety of the state, as a result of which the name "*police politique*" is sometimes applied to them.

The *juge de paix* who, as already seen, is the judge of the *Tribunal de Simple Police*, is also one of the assistants of the *procureur* in the *police judiciaire*.²⁵⁹

The rural guards and the forest guards as officers of the *police judiciaire* investigate *délits* and *contraventions* committed within the areas under their surveillance.²⁶⁰

The *Code* provides that, as already seen in the case of the *juge d'instruction*, all the officers of the *police judiciaire* shall, in their functions as such, be under the supervision of the *procureur général* of the *ressort*²⁶¹ who, for failure to perform their duties, may cite them for censure before the *Cour d'Appel*.²⁶² Such a proceeding rarely occurs,

253. Decree of Dec. 30, 1907, art. 1, 1908 BULLETIN DES LOIS (XII sér.) pt. 2, 640; 4 LE POITTEVIN, *op. cit. supra* note 74, at 156.

254. VOHL, *op. cit. supra* note 214, at 43; ULMANN, LE QUATRIÈME POUVOIR-POLICE (1935) 27. A high tribute is paid to the efficiency of the *police mobile* in LOCARD, LA POLICE (1919) 12.

255. C. I. C. art. 9, as amended by the Law of July 5, 1929.

256. The *garde mobile*, more correctly called the *garde républicaine mobile*, is, like the select *garde républicaine* of Paris, a branch of the *gendarmerie* and is entrusted with the maintenance of order throughout the entire country. P. CAULLET, *op. cit. supra* note 217, at 142; VOHL, *op. cit. supra* note 214, at 89. During the riots in Paris in the early summer of 1936 the writer saw the *garde mobile* with trench helmets and rifles maintaining order on the Avenue Champs Élysées. Later they were employed in suppressing political disorder in Alsace-Lorraine.

257. C. I. C. art. 9, as amended by the Law of July 5, 1929.

258. VOHL, *op. cit. supra* note 214, at 33.

259. In practice the *juge de paix* performs little work of the *police judiciaire*. 2 GARRAUD, *op. cit. supra* note 1, at 591.

260. C. I. C. art. 16. The rural and forest guards alone among the officers of the *police judiciaire* enumerated in art. 9 of the *Code* do not serve as assistants to the *procureur*. C. I. C. art. 48 and art. 50, as amended by the Law of July 5, 1929.

261. C. I. C. art. 279; 2 GARRAUD, *op. cit. supra* note 1, at 638 *et seq.*

262. C. I. C. arts. 280-282.

however, since the *procureur général* prefers the more simple and efficacious measure of transfer or dismissal of officers whose services are unsatisfactory because of incompetence or other reason.²⁶³

III. INITIATION OF INVESTIGATION

I. Through the *Procureur*

The usual methods of initiating the investigation of an alleged offense are the following: (1) the complaint (*plainte*) of the injured person; (2) an accusation (*dénonciation*) of another person who saw the offense committed or learned of it afterwards,²⁶⁴ and (3) the written report (*procès verbal*) of an officer of the *police judiciaire* who in the performance of his duties learned of the offense.²⁶⁵ The *plainte* and the *dénonciation* may be made either (1) to the *procureur* of the *arrondissement* where the offense was committed or where the suspect resides or is found,²⁶⁶ or (2) to an assistant of the *procureur* in the *police judiciaire*,²⁶⁷ in which case they must then be transmitted to the *procureur*.²⁶⁸ The *plainte* may also be made to the *juge d'instruction*,²⁶⁹ who must then transmit it to the *procureur*.²⁷⁰ The *procès verbaux* of the officers must be sent directly to the *procureur*.²⁷¹ It is also possible for the *procureur*, without having received any *plainte*, *dénonciation* or *procès verbal*, to initiate proceedings on his own motion where he has acquired personal knowledge of a supposed offense²⁷² or has learned of it by public rumor.²⁷³

Both the *plainte* and the *dénonciation* may be written or oral. In the latter case the official to whom either a *plainte* or *dénonciation* is presented must reduce it to writing.²⁷⁴ Not infrequently the *dénoncia-*

263. 4 LE POITTEVIN, *op. cit. supra* note 74, at 154n.

264. Any public official or government employee (*fonctionnaire*) who in the performance of his duties learns of a *crime* or *délit* must immediately report it to the *procureur* of the *arrondissement* in which the alleged offense was committed or in which the suspect is found. C. I. C. art. 29. Any citizen who sees a *crime* or a *délit* committed is under a duty to report it to the *procureur*, as provided in article 29. C. I. C. art. 30. The wording of the section is "*toute personne*", but the authorities construe this to mean "any citizen". 2 FAUSTIN HÉLIE, *op. cit. supra* note 2, at 284, § 2232; 2 LE POITTEVIN, *op. cit. supra* note 74, at 35. Although articles 29 and 30 by their terms impose an obligation to make a *dénonciation* in the cases specified, the law provides no penalty for a violation. 2 GARRAUD, *op. cit. supra* note 1, at 618; 2 LE POITTEVIN, *op. cit. supra* note 74, at 35. Any person, whether a citizen or a foreigner, who learns of the commission of a *crime* or *délit* may make a *dénonciation*. 2 LE POITTEVIN, *op. cit. supra* note 74, at 35.

265. C. I. C. art. 29; 2 GARRAUD, *op. cit. supra* note 1, at 580 and 622.

266. C. I. C. arts. 23, 29 and 64.

267. C. I. C. arts. 48, 50, as amended by the Law of July 5, 1929, and 64.

268. C. I. C. arts. 54 and 64.

269. C. I. C. art. 63. In receiving the *plainte* the *juge* is acting as a member of the *police judiciaire*. GOYET, *op. cit. supra* note 65, at 194.

270. 3 LE POITTEVIN, *op. cit. supra* note 74, at 236.

271. C. I. C. art. 29.

272. VIDAL, *COURS DE DROIT CRIMINEL* (1916) 916.

273. 2 MASSABIAU, *op. cit. supra* note 120, at 101.

274. C. I. C. arts. 31 and 65. 2 LE POITTEVIN, *op. cit. supra* note 74, at 36.

tion consists of an anonymous letter.²⁷⁵ In practice the most usual method of bringing alleged offenses to the official attention of the *procureur* is by the *procès verbaux* of the *commissaires de police* and the officers of the *gendarmerie*.²⁷⁶

There are certain offenses which may be prosecuted only if a *plainte* is made by the person injured, for example, defamation, adultery, and rape where followed by marriage, in which cases a prosecution would necessarily involve undesirable publicity for the complainant.²⁷⁷ A *plainte* is also required for (1) various kinds of trespass committed on private land, such as prohibited hunting and fishing, which do not concern the public,²⁷⁸ and (2) fraud in the furnishing of military supplies, since inopportune action by the civil authorities might interfere with the supplying of needed materials.²⁷⁹

Any person, including a government employee (*fonctionnaire*), who knowingly makes in writing a false *plainte* or *dénonciation* is guilty of a *délit*.²⁸⁰ In addition any private person, who by a false *plainte* or *dénonciation* made either knowingly or without reasonable cause injures another, is subject to a civil action for damages.²⁸¹ A *fonctionnaire* who has made such an accusation is, however, exempted from this action, but may be subject to the more restricted one of *prise à partie*.²⁸²

The *Code* provides that the *procureur* shall promptly notify the *procureur général* of his *ressort* of each offense coming to his knowledge and shall carry out the latter's orders with regard to any investigation by the *police judiciaire*.²⁸³ In practice this requirement is not observed because of the difficulties involved.²⁸⁴ It has, however, been insisted that, in cases which involve political issues or are likely to arouse public opinion, the *procureur* should consult the *procureur général* and receive his instructions as well as those of the Minister of

275. L. CAULLET, *op. cit. supra* note 201, at 180; LOCARD, *L'ENQUÊTE CRIMINELLE* (1920) 7; DEGOIS, *op. cit. supra* note 144, at 437.

276. 2 MASSABIAU, *op. cit. supra* note 120, at 108.

277. "If the prosecution will sever sacred bonds, as in case of adultery, disgrace the victim of the assault, as in case of rape, besmirch the reputation of persons, as in case of defamation, it should depend upon the instigation of the persons injured." 1 FAUSTIN HÉLIE, *op. cit. supra* note 2, at 417, § 996.

278. GOYET, *op. cit. supra* note 65, at 221; 1 LE POITTEVIN, *op. cit. supra* note 74, at 144.

279. 2 MASSABIAU, *op. cit. supra* note 120, at 106. Also, where a *délit* is committed abroad by a French citizen it may be prosecuted in France only upon *plainte* of the person injured or of the government of the state where committed. C. I. C. art. 5, as amended by the Law of Feb. 26, 1910.

280. This is punishable by imprisonment not exceeding one year, and a fine not exceeding 3000 francs. C. P. art. 373.

281. 2 GARRAUD, *op. cit. supra* note 1, at 619; L. CAULLET, *op. cit. supra* note 201, at 177.

282. L. CAULLET, *op. cit. supra* note 201, at 178.

283. C. I. C. art. 27.

284. GOYET, *op. cit. supra* note 65, at 242.

Justice. *Circulaires*²⁸⁵ to that effect have been issued.²⁸⁶ On the other hand, it has been asserted that the Minister of Justice should not be consulted in such cases, as such action tends to lessen the responsibility of the *procureur*.²⁸⁷

2. By the *Partie Civile* through the *Juge d'Instruction*.

The party injured by an offense, whether *crime* or *délit*, instead of making a *plainte* to the *procureur* or one of his assistants in the *police judiciaire*, may file a *plainte* with the *juge d'instruction*,²⁸⁸ to which is appended a claim to recover pecuniary damages from the perpetrator of the offense. By such procedure the party injured constitutes himself the *partie civile*.²⁸⁹ The interest of the *partie civile* may be direct, as where he is the victim of an assault or a robbery, or indirect, as where a father loses the services of a son who is killed.²⁹⁰ The *partie civile* by filing his *plainte* with the *juge d'instruction* sets in motion both a criminal prosecution²⁹¹ and a civil action for damages.²⁹² It is an interesting characteristic of French procedure that criminal and civil actions may be instituted and tried together.

A corporation, whether or not for profit, may, under the same conditions as an individual, institute criminal and civil proceedings as *partie civile*.²⁹³ Where an offense is committed against the property of a non-profit corporation, such as the embezzlement of university funds, the right of the corporation to become *partie civile* is the same as that of a corporation for profit. However, where the non-profit corporation, such as a medical society, is not complaining of injury to its property, but to its professional interests, as in a prosecution against a person for practicing medicine without a license, the difficulty of demonstrating

285. *Circulaires* are instructions in writing, which prescribe or recommend a general course of action by a group of subordinate officials. They do not have the force of law. CAPITANT, *op. cit. supra* note 35, at 114.

286. See L. CAULLET, *op. cit. supra* note 201, at 128.

287. I GARRAUD, *op. cit. supra* note 1, at 333.

288. The *plainte* may be made to the *juge d'instruction* of the place of the offense or the residence of the suspect or the place where he is found. C. I. C. art. 63.

289. C. I. C. art. 63. The injured party may state his intention of becoming *partie civile* in a *plainte* made to the *procureur* (2 GARRAUD, *op. cit. supra* note 1, at 621; 4 LE POITTEVIN, *op. cit. supra* note 74, at 12), but his status as *partie civile* is established only when this *plainte* is then transmitted to the *juge d'instruction*. C. I. C. art. 63.

290. I GARRAUD, *op. cit. supra* note 1, at 257; PONS, *DE L'ACTION DIRECTE DE LA PARTIE LÉSÉE DEVANT LE JUGE D'INSTRUCTION ET DE SES ABUS* (1927) 36.

291. I GARRAUD, *op. cit. supra* note 1, at 342; GOYET, *op. cit. supra* note 65, at 216; LE GRIEL, *TRAITÉ PRATIQUE DE L'EXERCICE DE L'ACTION CIVILE ET DE L'INTERVENTION DES TIERS DEVANT LES JURIDICTIONS RÉPRESSIVES* (1933) 135. If a prosecution has been barred because of previous conviction or acquittal, prescription, death, or other reason, the complainant may not institute proceedings as *partie civile*, although his right of action in the civil courts may be unimpaired. I LE POITTEVIN, *op. cit. supra* note 74, at 152; LE GRIEL, *op. cit. supra* note 291, at 67.

292. Any person suffering a tortious injury is given the right to bring a civil action for damages by art. 1382 of the *Code Civil*. DEGOIS, *op. cit. supra* note 143, at 442.

293. I GARRAUD, *op. cit. supra* note 1, at 258; 4 LE POITTEVIN, *op. cit. supra* note 74, at 9.

a pecuniary damage to the complainant is presented and it has been decided that the corporation may not become a *partie civile*.²⁹⁴ Consequently, in the case of specific classes of associations whose value to society is recognized, statutes have granted the right to instigate prosecution as *parties civiles* without requiring the showing of pecuniary damage. Thus in 1920 it was enacted that "*syndicats* (such as professional or business associations and labor unions) may, before any court, exercise all the rights reserved to the *partie civile*, so far as relates to acts causing a direct or indirect injury to the collective interests of the profession, trade or business, which they represent".²⁹⁵ Under this law, for example, associations of wine growers may cause prosecutions to suppress fraudulent practices, such as watering of wine, to be instituted.²⁹⁶ Likewise, associations of wineshop proprietors and temperance societies may proceed against persons illegally operating such shops.²⁹⁷ Strong efforts have been made to secure the right for certain other associations formed to promote the public good in specific directions, such as societies for moral improvement, to become *parties civiles* against violators of laws which they especially desire observed.²⁹⁸ The courts, however, have been hesitant in allowing these actions.²⁹⁹

The only formality necessary for the injured party to constitute himself *partie civile* at the start of the proceedings is a simple statement to that effect in the *plainte*.³⁰⁰ He must, however, at the same time deposit with the clerk (*greffier*) of the *juge d'instruction* a sum sufficient, in the opinion of the *juge*, to cover all probable costs of the prosecution, and may later be required to make an additional deposit if the original amount proves insufficient to cover the costs.³⁰¹ One of the

294. LE GRIEL, *op. cit. supra* note 291, at 35.

295. Law of Mar. 21, 1884, art. 5, 1884 BULLETIN DES LOIS (XII, sér.) pt. 1, 618, as amended by the Law of Mar. 12, 1920, art. 1, 1920 BULLETIN DES LOIS (nouv. sér. vol. 12) pt. 1, 1084.

296. DONNEDIEU DE VABRES, LA JUSTICE PÉNALE D'AUJOURD'HUI (1929) 110.

297. Law of Nov. 9, 1915, art. 14, 1915 BULLETIN DES LOIS (nouv. sér. vol. 7) pt. 1, 2029.

298. MORIZOT-THIBAUT, *op. cit. supra* note 20, at 141 *et seq.*; DONNEDIEU DE VABRES, *op. cit. supra* note 296, at 110.

299. In 1913 the Tribunal of Bordeaux declined to receive on action by the "*Comité Bordelais de Vigilance Contre le Licence des Rues*" as *partie civile* which charged the proprietor of an alleged "*Musée Physiologique*" with giving obscene exhibitions, the Tribunal stating the following reason: "It is somewhat difficult to conceive that a moral entity, which is only an abstraction, has a modesty susceptible of suffering from exhibitions or spectacles which it is unable to perceive." DONNEDIEU DE VABRES, *op. cit. supra* note 296, at 111. The decision was affirmed by the *Cour d'Appel* and by the *Cour de Cassation*. Cass. Oct. 18, 1913 (SIREY, RECUEIL GÉNÉRAL, 1920 I, 321), cited by DONNEDIEU DE VABRES, *supra*. For a discussion of abuses of the action by associations see PONS, *op. cit. supra* note 290, at 139 *et seq.*

300. C. I. C. art. 66. Any *partie civile* who resides outside the *arrondissement* where the proceeding was started must designate an address within the *arrondissement* for receiving any necessary notification during the course of the proceedings. C. I. C. art. 68.

301. Decree of Oct. 5, 1920, art. 151, 1920 BULLETIN DES LOIS (nouv. sér. vol. 12) pt. 1, 4736. An indigent *partie civile* may receive legal aid and need not make any deposit for costs. Law of July 10, 1901, art. 1, 1901 BULLETIN DES LOIS (XII sér.) pt.

reasons for requiring the *partie civile* to make a deposit to cover the costs is to discourage the making of doubtful claims.³⁰² If a conviction results, the amount of the deposit made by the *partie civile* is returned to him.³⁰³

A *partie civile* may withdraw his claim for damages at any time before judgment,³⁰⁴ but this does not stop the criminal prosecution which was set in motion when he constituted himself *partie civile*,³⁰⁵ except in the case of certain offenses where the injury involved is chiefly of a personal nature such as adultery and defamation.³⁰⁶ If the withdrawal occurs within twenty-four hours, the *partie civile* is not liable for any costs of the prosecution incurred thereafter.³⁰⁷

The *juge d'instruction*, upon receiving a *plainte* from the *partie civile*, must refer it to the *procureur* for the latter's opinion,³⁰⁸ but, whatever the latter's recommendation, the *juge* is obliged, following a decision of the *Cour de Cassation* in 1906,³⁰⁹ to proceed with his formal investigation and thereafter to make an order either charging or exculpating³¹⁰ the person alleged by the *plainte* to be the perpetrator. If there is a *plainte* against a person unknown, he must also make an investigation and order.³¹¹

In the years following 1906 a marked increase in the number of *plaintes* as *partie civile* filed with the *juges d'instruction* occurred,³¹²

2, 3, and Decree of Oct. 5, 1920, art. 151, 1920 BULLETIN DES LOIS (nouv. sér. vol. 12) pt. 1, 4736.

302. MORIZOT-THIBAUT, *op. cit. supra* note 20, at 55; SAVIDAN, DE LA MISE EN MOUVEMENT DE L'ACTION PUBLIQUE PAR LES PARTICULIERS ET DE SES ABUS (1934) 34.

303. Decree of Oct. 5, 1920, arts. 154 and 155, 1920 BULLETIN DES LOIS (nouv. sér. vol. 12) pt. 1, 4736; 6 GARRAUD, *op. cit. supra* note 1, at 152; 4 LE POITTEVIN, *op. cit. supra* note 74, at 16; LE GRIEL, *op. cit. supra* note 291, at 96.

304. 1 GARRAUD, *op. cit. supra* note 1, at 442; LE GRIEL, *op. cit. supra* note 291, at 72. His withdrawal may be the result of a settlement with the defendant. 1 GARRAUD, *op. cit. supra* note 1, at 253.

305. C. I. C. art. 4; LE GRIEL, *op. cit. supra* note 291, at 72.

306. LE GRIEL, *op. cit. supra* note 291, at 74. When withdrawal by the *partie civile* occurs before a *délit* has come to trial, the *procureur* often ceases the prosecution, although given no right to do so in such case. *Ibid.*

307. C. I. C. art. 66.

308. C. I. C. art. 70, as amended by the Law of July 2, 1931.

309. Cass. Dec. 8, 1906, DALLOZ, RECUEIL PÉRIODIQUE, 1907 I, 207. Up to that date legal opinion had been sharply divided, as to whether under the terms of the *Code* the *procureur* in this case could exercise his power of barring a prosecution because he deemed it unfounded or for any other reason. 1 GARRAUD, *op. cit. supra* note 1, at 342, with authorities and cases there cited; MORIZOT-THIBAUT, *op. cit. supra* note 74, at 60; PONS, *op. cit. supra* note 290, at 49 *et seq.*

310. If, at the end of his investigation, the *juge d'instruction* renders an order discharging the person named in the *plainte* as perpetrator, the *partie civile* may appeal to the *chambre des mises en accusation* (*supra* p. 397) for reversal of the order. C. I. C. art. 135; 3 LE POITTEVIN, *op. cit. supra* note 74, at 943. He appeals at his peril, however, since if he loses the appeal, the *chambre* must award pecuniary damages for malicious prosecution to the person wrongfully suspected. C. I. C. art. 136, as amended by the Law of Feb. 7, 1933; 3 LE POITTEVIN, *op. cit. supra* note 74, at 947; LE GRIEL, *op. cit. supra* note 291, at 160.

311. 3 LE POITTEVIN, *op. cit. supra* note 74, at 236; LE GRIEL, *op. cit. supra* note 291, at 135.

312. SAVIDAN, *op. cit. supra* note 302, at 68; PONS, *op. cit. supra* note 290, at 114-116. Statistics available from the *tribunal* of the Seine (Paris) alone showed an in-

resulting in considerable measure from the decision referred to, aided by the Law of 1921³¹³ granting to the *partie civile* the right to examine the record to date before the *juge d'instruction* might question him, and the right to have counsel at the hearing before the *juge*.³¹⁴ In approximately 75 per cent of the cases, the investigation by the *juge* resulted in a decision that no offense had been committed by the person named in the *plainte*.³¹⁵ With this increase in number of unwarranted *plaintes*, other abuses became markedly evident. Thus the machinery of the criminal law in some cases was set in motion solely for the purpose of obtaining evidence to support civil claims.³¹⁶ More serious than this was the practice of becoming *partie civile* for the purpose of revenge or blackmail, the *partie civile* agreeing to withdraw his claim if paid a demanded sum.³¹⁷

If the criminal prosecution instituted by the *partie civile* is not successfully maintained, and it appears that he made the *plainte* without reasonable cause, or knowing it to be false, he, like any other complainant in a similar situation, may be held liable in damages to the defendant by an action of *dénonciation calomnieuse*,³¹⁸ and may be subjected to a criminal prosecution if a malicious intention to injure can be made out.³¹⁹ These legal remedies, however, did not greatly lessen the number of unwarranted and improper actions instituted by complainants as *parties civiles*. The innocent defendant refrained from his civil action

crease from an average of 647 *plaintes* as *partie civile* filed yearly from 1909 to 1913, to an average of 2183 annually from 1918 to 1928. JOURNAL OFFICIEL, CHAMBRE, DOC. PARL. (July 2, 1929) *annexe* no. 1931, p. 999.

313. Law of Mar. 22, 1921, 1921 BULLETIN DES LOIS (*nouv. sér.* vol. 13) pt. 1, 1084.

314. PONS, *op. cit. supra* note 290, at 48.

315. JOURNAL OFFICIEL, CHAMBRE, DOC. PARL. (July 2, 1929) *annexe* no. 1931, p. 999; PONS, *op. cit. supra* note 290, at 115. In the majority of cases the injury complained of existed, but was merely a civil, not a criminal, wrong. "The subtleties of the Code Pénal escape the ordinary citizen." *Id.* at 116.

316. *Id.* at 117.

317. *Projet* for the Law of July 2, 1931, amending art. 70 of the C. I. C., in JOURNAL OFFICIEL, CHAMBRE, DOC. PARL. (Feb. 8, 1929) *annexe* no. 1239, p. 186. "Plaintes are sometimes the work of unbalanced persons, or of ignorant ones whose imagination has quickly transformed a mere indelicacy into a criminal offense. More often, they are the acts of evasive debtors who seek to gain time by turning to their advantage a favorable interpretation of the maxim, 'the criminal proceeding suspends the civil,' or the act of the litigants who wish to profit from the facilities furnished by the criminal investigation for discovering evidence with a view to a civil proceeding, or even more obviously of expert blackmailers who later agree to withdraw upon payment of a sum demanded. The risks run by the complainant are not great. The victim will generally refrain from claiming damages from him, either because he is insolvent, or because the procedure is discouraging, by its length and the costs involved, and may often end only in a small pecuniary judgment, since it is generally the reparation of but a moral injury." Frejaville, *La Réaction Contre Les Abus des Constitutions de Partie Civile* (1931) DALLOZ, RECUEIL HEBDOMADAIRE, *Chronique* 61. See also SAVIDAN, *op. cit. supra* note 302, at 71 and 133; PONS, *op. cit. supra* note 290, at 117-122.

318. C. I. C. art. 70, as amended by the Law of July 2, 1931; arts. 136, 191, 358, 359; I GARRAUD, *op. cit. supra* note 1, at 433; PONS, *op. cit. supra* note 290, at 122; LE GRIEL, *op. cit. supra* note 291, at 125.

319. C. P. art. 373.

against the *partie civile* because he wished no additional publicity of the unfounded charges, and feared in addition to find the latter insolvent. He seldom instituted a criminal prosecution because of the difficulty of proving malice.³²⁰ To cope more effectively with the abuses, the *Code d'Instruction Criminelle* was amended in 1931³²¹ to provide (1) that where a *plainte* by a *partie civile* is filed with a *juge d'instruction*, the *procureur*, upon its being referred to him, may, if he finds no serious suspicion pointing to the person named, order the *juge* to conduct a general investigation of the offense in question without reference to any particular person, thus saving the reputation of the person named in the *plainte*; (2) a simpler, speedier and less public method for a person unjustly proceeded against by a *partie civile* to recover pecuniary damages from the latter, by enabling him, in case of discharge by the *juge*, to present his claim immediately before the *Tribunal Correctionnel* in closed session; (3) that the court may, in case it finds for the person unjustly suspected, order its judgment published in one or more newspapers at the cost of the *partie civile*. The Law of 1931 in addition prohibited under criminal penalty the publication, during the course of the investigation by the *juge d'instruction*, of any information regarding prosecutions instituted by *parties civiles*.³²² The reason for this enactment was to discourage blackmail.³²³ Notwithstanding the penalties provided by the Law of 1931, a writer in 1934 speaks of the abuses as still prevailing.³²⁴

It is to be noted further that even in cases where the *juge d'instruction* has commenced an investigation at the sole instance of the *procureur*, a person injured by the offense may file with the *juge* a claim for damages, thereby becoming *partie civile* for the remainder of the proceedings in the case.³²⁵ No deposit need be made for costs in this situation,³²⁶ although, if the judgment is for the defendant, all costs will be charged to the *partie civile*.³²⁷

The following results of joining the civil and criminal proceedings may be noted. Where a person has suffered pecuniary loss from the commission of a criminal offense, proof of the offense will generally

320. PONS, *op. cit. supra* note 290, at 122-128.

321. C. I. C. art. 70, as amended by the Law of July 2, 1931.

322. Law of July 2, 1931, art. 2, JOURNAL OFFICIEL (July 7, 1931) 7338.

323. This article "is aimed at the blackmail which is accomplished by means of the publicity, mainly in newspapers, whenever a person is the object of judicial investigation after filing of a *plainte* by the *partie civile* before the *juge d'instruction*". Report of the *Commission de la Législation Civile et Criminelle* of the *Chambre des Députés* on the *projet* for the law, in JOURNAL OFFICIEL, CHAMBRE, DOC. PARL. (July 2, 1929) *annexe* no. 1931, p. 1002.

324. LÉPAULLE, LA JUSTICE (1934) 65.

325. C. I. C. arts. 66 and 67; 1 GARRAUD, *op. cit. supra* note 1, at 299 and 426; 4 LE POITTEVIN, *op. cit. supra* note 74, at 14.

326. 2 LE POITTEVIN, *op. cit. supra* note 74, at 861.

327. LE GRIEL, *op. cit. supra* note 291, at 95 and 99.

establish the right to recover damages.³²⁸ When both issues are settled in the same proceeding, costs are reduced, and the possibility of variations in the testimony of witnesses, which may occur when there are two actions, is avoided.³²⁹ Furthermore, where both actions are joined, the efforts of the public prosecutor and counsel for the *partie civile* are united, and thus both a conviction and an award of damages are more likely to result. One who has caused injury to another will frequently make reparation in order to avoid a criminal prosecution at the instance of a *partie civile*.³³⁰

IV. INVESTIGATION BY THE PROCUREUR

1. Powers of the *Procureur*

After the *procureur* has received information of an alleged offense by any of the methods already described,³³¹ he may take action in one of the following ways:

1. If he is of the opinion that the facts brought to his attention do not constitute an offense or he considers it inadvisable to proceed with a prosecution for the reason that the offense is trivial or for any other reason, he may make an order closing the investigation. This is known as *classement sans suite* and will be discussed in detail later.

2. If the offense is a *crime*, not *flagrant*, the *Code* requires that the *procureur* shall direct the *juge d'instruction* to proceed to an investigation³³² to determine whether the case should be referred to the chamber of accusations, which may order a trial in the *Cour d'Assises*.³³³

3. If the offense is a *flagrant crime* the *procureur* is authorized by the *Code* to proceed to a judicial investigation such as is normally conducted by the *juge d'instruction*.³³⁴ The powers of the *procureur* in this situation will be discussed after the functions of the *juge d'instruction* have been presented.

4. If the offense is a *délit*, the *Code* also expressly states that the *procureur* must order an investigation by the *juge d'instruction*³³⁵ but at the same time provides in another section that he may bring the case immediately to trial (*citation directe*) in the *Tribunal Correctionnel*,³³⁶ except where the *délit* may be punished by imprisonment and the suspect is between 13 and 18 years of age, in which situation the case must be

328. I GARRAUD, *op. cit. supra* note 1, at 378.

329. LE GRIEL, *op. cit. supra* note 291, at 11.

330. I GARRAUD, *op. cit. supra* note 1, at 234.

331. Personal knowledge, *plainte*, *dénonciation*, or *procès-verbal*.

332. C. I. C. art. 47.

333. GOYET, *op. cit. supra* note 65, at 279.

334. C. I. C. arts. 32-40. See 3 GARRAUD, *op. cit. supra* note 1, at 246.

335. C. I. C. art. 47.

336. C. I. C. art. 182.

referred to the *juge d'instruction*.³³⁷ If a *délit* is in fact *flagrant* the *procureur* is required to proceed by *citation directe*.³³⁸ In the case of other *délits* he generally adopts this procedure (a) if the *délit* is punishable merely by a fine;³³⁹ (b) if the case is not considered very important;³⁴⁰ (c) if it is definitely established that a *délit* has been committed;³⁴¹ (d) if the perpetrator of the *délit* is ascertained;³⁴² and (e) if there appears to be no danger that the perpetrator will escape.³⁴³ In practice today, *délits* are much more frequently brought to trial in the *Tribunal Correctionnel* than referred to the *juge d'instruction*.³⁴⁴ In some instances where it appears to the *procureur* that a *crime* has been committed which, under the *Code*, must be referred to the *juge d'instruction* for investigation with a view to trial in the *Cour d'Assises*, he will reduce the charge to a *délit* and bring it to trial in the *Tribunal Correctionnel*. This practice, which is known as *correctionalisation*, will be discussed later.

5. If the offense is a *contravention*, the *procureur* refers it to the member of the *ministère public* attached to the *Tribunal de Simple Police*.³⁴⁵

As the *procureur* has in practice a wide discretion in determining what procedure to adopt when the suspected commission of a *crime* or *délit* is brought to his attention, he frequently directs his assistants in the *police judiciaire* to conduct an investigation, known as the *enquête officieuse*, in order to determine what action to take. There is some difference of opinion among the writers as to whether the *enquête officieuse* is authorized by the *Code*. Some contend that it comes within the general provision of article 22, which states that the *procureur* is charged with the "*recherche*" of all offenses of the grade of *crime* or *délit*.³⁴⁶ Others take the view that the *enquête* is not authorized by the *Code*, but that its practical advantages justify its use.³⁴⁷ Quite irrespective of the question whether the *enquête officieuse* is legal or extra-legal, the *procureurs* have with increasing frequency adopted the practice until today it is the ordinary procedure. As the *enquête officieuse*

337. Law of July 2, 1912, arts. 2 and 15.

338. Law of May 20, 1863, 1863 BULLETIN DES LOIS (XI sér.) pt. 1, 966.

339. GOYET, *op. cit. supra* note 65, at 257.

340. 2 LE POITTEVIN, *op. cit. supra* note 74, at 244.

341. 2 MASSABIAU, *op. cit. supra* note 120, at 111; 2 LE POITTEVIN, *op. cit. supra* note 74, at 244.

342. 2 MASSABIAU, *op. cit. supra* note 120, at 111.

343. 2 LE POITTEVIN, *op. cit. supra* note 74, at 244.

344. L. CAULLET, *op. cit. supra* note 201, at 402. The official statistics for 1932 show 169,231 *délits* prosecuted by *citation directe* in the *Tribunal Correctionnel*, while only 69,727 *crimes* and *délits* (no separate figures for *délits* are published) were referred to the *juge d'instruction*. COMPTE GÉNÉRALE, PENDANT L'ANNÉE 1932 (1934) p. 98.

345. GOYET, *op. cit. supra* note 65, at 258.

346. *Id.* at 243; VERNET, *op. cit. supra* note 9, at 29.

347. CUCHE, *op. cit. supra* note 217, at 262; 2 LE POITTEVIN, *op. cit. supra* note 74, at 242.

resembles to a considerable degree the investigation which the *Code* authorizes the *juge d'instruction* to conduct, it will be discussed in detail after the powers and duties of this official have been presented.

2. Classement Sans Suite

After being informed, whether by *plainte*, *dénonciation*, or *procès-verbal*, of the alleged commission of an offense, the *procureur* has the right to decide that he will not initiate a prosecution, without regard to the degree or character of the offense.³⁴⁸ This right is sometimes referred to as the "*système d'opportunité*", according to which the *procureur* decides whether in his opinion prosecution in the particular case is "opportune" or "inopportune", in contradistinction to a "*système de légalité*" which would require him to prosecute.³⁴⁹ The right to refuse to prosecute is not granted to the *procureur* by the *Code*, which, on the contrary, seems inferentially to negative its existence.³⁵⁰ However, for over a century, apparently without dissent, the right has been recognized by officials and commentators.³⁵¹ When the *procureur* decides not to prosecute, he makes a notation to this effect in the *registre d'ordre*, in which is recorded the history of each case, and a *classement sans suite* is said to have taken place.³⁵²

Ordinarily the *procureur* exercises the right not to prosecute only in the following cases: (1) where the facts do not constitute an offense, (2) where the offense is of slight public interest, such as defamation of a *private* citizen or prohibited hunting on *private* land, (3) where the offense is not regarded as serious, (4) where perpetrators of the offense cannot be discovered, and (5) where the prosecution would create a public scandal.³⁵³ The *procureur* may decide not to prosecute even when a *plainte* has been filed in a case where the making of a *plainte* is a pre-requisite to any prosecution.³⁵⁴

348. I GARRAUD, *op. cit. supra* note 1, at 338; L. CAULLET, *op. cit. supra* note 201, at 180; 3 LE POITTEVIN, *op. cit. supra* note 74, at 693.

349. I GARRAUD, *op. cit. supra* note 1, at 191; CUCHE, *op. cit. supra* note 217, at 260. "His determination is absolute and depends only upon his conscience." MORIZOT-THIBAUT, *op. cit. supra* note 20, at 51.

350. C. I. C. art. 47.

351. I FAUSTIN HÉLIE, *op. cit. supra* note 2, at 249; I GARRAUD, *op. cit. supra* note 1, at 337; L. CAULLET, *op. cit. supra* note 201, at 170.

352. I LE POITTEVIN, *op. cit. supra* note 74, at 847.

353. See MORIZOT-THIBAUT, *op. cit. supra* note 20, at 51; L. CAULLET, *op. cit. supra* note 20, at 181; GOYET, *op. cit. supra* note 65, at 242; I LE POITTEVIN, *op. cit. supra* note 74, at 847. In 1903 the *procureur* decided not to prosecute in 60 per cent. of the cases presented to him. From 1903 to 1923 there was a small but gradual reduction. DONNEDIEU DE VABRES, *op. cit. supra* note 206, at 101. The official statistics for the year 1932 show that of the 635,261 alleged offenses brought to the attention of the *Ministère Public*, it was decided that there should be no prosecution in 338,616. In 97,680 instances no *crime* or *délit* was, in the opinion of the *procureur*, indicated by the facts. Inability to discover the offender explained 118,752 of the cases. In 28,882 instances the offense was not considered important, and in 73,813 cases sufficient evidence to secure a conviction could not be secured. COMPTE GÉNÉRALE, PENDANT L'ANNÉE 1932 (1934) 98 and 99.

354. I GARRAUD, *op. cit. supra* note 1, at 354.

While this arbitrary power in the *procureur* may lead to serious abuses,³⁵⁵ it is considered desirable that he should possess it in order to preclude inadvisable prosecutions, particularly in cases where the chief interest to be served is the personal animus of the complainant.³⁵⁶ The *procureur*, however, is not bound by his decision not to prosecute, and he is free at any time to proceed with the prosecution.³⁵⁷ If he declines to prosecute in a case where a *plainte* was made, the complainant may present a petition to the *procureur général* or to the Minister of Justice, either of whom may require the *procureur* to proceed with the prosecution.³⁵⁸ Where the injury to the complainant is of such a nature that he may become *partie civile*, he may set the criminal proceeding in motion, notwithstanding the action of the *procureur*, by constituting himself *partie civile* before the *juge d'instruction*³⁵⁹ or before the *Tribunal Correctionnel* by *citation directe*.³⁶⁰ The complainant also may bring a civil action for damages against the *procureur* if his refusal to prosecute may be characterized as grossly improper.³⁶¹ If the failure of the *procureur* to act is due to negligence or connivance he may be disciplined by the officials above him.³⁶²

3. Correctionnalisation

When the investigation by the *procureur* of an alleged offense indicates that it is a *crime*, which the *Code* directs him to refer to the *juge d'instruction*³⁶³ for further investigation with a view to its trial in the *Cour d'Assises*,³⁶⁴ it is not uncommon practice for the *procureur* to reduce the charge to a *délit*, thereby enabling him to send the case for trial before the *Tribunal Correctionnel* without a jury. This practice is known as the "correctionnalisation" of a *crime*³⁶⁵ and may be readily employed where the *crime* in question consists of a *délit* with the addition of an aggravating circumstance. Thus, while ordinary theft is a *délit*,³⁶⁶ theft by a domestic servant or at night in a dwelling

355. MORIZOT-THIBAUT, *op. cit. supra* note 20, at 52.

356. *Circulaire* of March 8, 1817, quoted in 1 FAUSTIN HÉLIE, *op. cit. supra* note 2, at 300, § 793. Also *Circulaires* of November 20, 1829, and August 16, 1842, cited in 3 LE POITTEVIN, *op. cit. supra* note 74, at 694.

357. 2 MASSABIAU, *op. cit. supra* note 120, at 111; GOYET, *op. cit. supra* note 65, at 242; 1 LE POITTEVIN, *op. cit. supra* note 74, at 847.

358. GOYET, *op. cit. supra* note 65, at 217; 3 LE POITTEVIN, *op. cit. supra* note 74, at 694.

359. C. I. C. art. 63.

360. C. I. C. arts. 64 and 182. Criticism has been directed at the fact that many *plaintes* receive no attention from the *parquets* because of serious shortages of personnel, which makes it necessary for the injured party, if he desires a prosecution, to constitute himself *partie civile* and deposit a considerable sum to cover the costs. LEPAULLE, *op. cit. supra* note 324, at 68.

361. L. CAULLET, *op. cit. supra* note 201, at 180.

362. 2 MASSABIAU, *op. cit. supra* note 120, at 8.

363. C. I. C. art. 47.

364. C. I. C. art. 231.

365. 2 GARRAUD, *op. cit. supra* note 1, at 321; GOYET, *op. cit. supra* note 65, at 247.

366. C. P. art. 401.

house is a *crime*.³⁶⁷ Assault is a *délit*,³⁶⁸ but an assault producing an incapacity to work is a *crime*.³⁶⁹ Another type of *correctionnalisation* is exemplified by the reduction of a charge of infanticide to failure to report the birth or abandonment of the infant.³⁷⁰

There is no express or even inferential justification in the *Code* for *correctionnalisation*, which was first employed about the middle of the nineteenth century, and the practice has been described both as "irregular" ³⁷¹ and "illegal".³⁷² In the past it has been both recommended and forbidden by Ministers of Justice in their *circulaires*.³⁷³ Today it is well established and frequently employed.³⁷⁴

The reasons usually assigned for *correctionnalisation* are: (1) the *procureur* considers the penalty for the *crime* too severe;³⁷⁵ (2) the fear that because of the severe penalties for *crimes* a jury may acquit;³⁷⁶ (3) a trial in the *Tribunal Correctionnel* is more expeditious and much less expensive than in the *Cour d'Assises*;³⁷⁷ (4) the procedure is simpler.³⁷⁸ So far as the second reason is concerned, it should be noted that in fact *correctionnalisation* is most common in the case of offenses against property, where jurors are always ready to convict.³⁷⁹ Although it is regarded as unfortunate that *correctionnalisation* involves a disregard of the provisions of the *Code*,³⁸⁰ the authorities generally believe that the practical considerations, already enumerated, outweigh this objection.³⁸¹

Where the facts clearly show that the offense is a *crime*, the *Tribunal Correctionnel* to which the case has been sent by the *procureur*

367. C. P. art. 386.

368. C. P. art. 311.

369. C. P. art. 312.

370. VERDUN, DES PRATIQUES JUDICIAIRES DE CORRECTIONNALISATION (Thesis Aix-Marseille, 1922) 29.

371. GOYET, *op. cit. supra* note 65, at 247.

372. VIDAL, *op. cit. supra* note 272, at 94; SOULAS, LE RECRUTEMENT DU JURY (Thesis Montpellier, 1933) 14; Perreau, *À Propos d'Une Pratique Judiciaire Illégale* (1930) 50 REV. CRIT. DE LÉGIS. ET DE JURIS. 441.

373. 2 MASSABIAU, *op. cit. supra* note 120, at 272, citing *circulaires*.

374. 2 GARRAUD, *op. cit. supra* note 1, at 321; CUCHE, *op. cit. supra* note 217, at 312. The number of offenses tried in the *Cour d'Assises* has gradually diminished from an average annual figure of 5,350 for the years from 1826 to 1850, to an average of 2,654 annually from 1891 to 1900, and 1,248 for the year 1932; whereas on the contrary, the average annual number of cases tried in the *Tribunaux Correctionnels* for the same periods has risen from 143,014 (1826 to 1850) and 190,603 (1891-1900) to 211,322 in 1932. VERDUN, *op. cit. supra* note 370, at 33; COMPTE GÉNÉRALE, PENDANT L'ANNÉE 1932 (1934) 63.

375. 2 GARRAUD, *op. cit. supra* note 1, at 321; 2 MASSABIAU, *op. cit. supra* note 120, at 273.

376. "The *Tribunal Correctionnel* may impose only a moderate penalty, but the imposition of such penalty is certain." CUCHE, *op. cit. supra* note 229, at 312.

377. VERDUN, *op. cit. supra* note 370, at 34.

378. 2 GARRAUD, *op. cit. supra* note 1, at 321; VIDAL, *op. cit. supra* note 272, at 94.

379. 4 GARRAUD, *op. cit. supra* note 1, at 462.

380. VERDUN, *op. cit. supra* note 370, at 69.

381. 2 MASSABIAU, *op. cit. supra* note 120, at 272; MORIZOT-THIBAUT, *op. cit. supra* note 74, at 526; TOULEMON, LA QUESTION DU JURY (1930) 84; VERDUN, *op. cit. supra* note 370, at 83. To the contrary is Perreau, *supra* note 371.

should, under the *Code*,³⁸² declare that it does not have jurisdiction and send the case to the *juge d'instruction*, but, convinced of the desirability of the practice of *correctionnalisation*, generally does not do so.³⁸³ The defendant also may object to the jurisdiction of the *Tribunal*,³⁸⁴ but usually accepts it because of the briefer period of detention before trial, the shorter trial and the lesser penalty.³⁸⁵

[To be continued.³⁸⁶]

382. C. I. C. art. 193.

383. VIDAL, *op. cit. supra* note 272, at 95; VERDUN, *op. cit. supra* note 370, at 35.

384. 2 GARRAUD, *op. cit. supra* note 1, at 323; VERDUN, *op. cit. supra* note 370, at 39; GOYET, *op. cit. supra* note 65, at 247.

385. 2 MASSABIAU, *op. cit. supra* note 120, at 273; VIDAL, *op. cit. supra* note 272, at 95.

386. The second installment of this article will appear in either the March or April number of the REVIEW.