THE PRELIMINARY INVESTIGATION OF CRIME IN FRANCE

PART II *

EDWIN R. KEEDY

V. INVESTIGATION BY THE JUGE D'INSTRUCTION

1. Scope of the Investigation

The investigation by the *juge d'instruction*, which is largely judicial in character, is known as the *instruction préparatoire*.³⁸⁶ The *juge* may investigate in the three following cases only: (1) when directed by the *procureur*,³⁸⁷ (2) when a person injured by either a *crime* or *délit* complains to the *juge* and constitutes himself *partie civile*,³⁸⁸ (3) when the offense is considered a *flagrant délit*,³⁸⁹ in which case the *juge* may on his own initiative conduct an investigation.³⁹⁰ The first of these methods is the one ordinarily employed.³⁹¹ When directed by the *procureur* to conduct the investigation, the *juge* may refuse to act in certain situations, for example, where the proceedings are barred by law, or a necessary preliminary step such as a complaint has not been taken or the *juge* is of the opinion that the facts as presented to him by the *procureur* do not constitute an offense.³⁹² The *juge* has the same right of refusal where the *partie civile* requests him to act.³⁹³

When the *juge* is authorized to proceed by the *procureur*, the inquiry is not limited to the person or persons specified. It is the duty of the *juge* to investigate the whole affair.³⁹⁴ It sometimes happens that the *juge* is required by the *procureur* to investigate the commission of an offense when at the time the matter is referred to him there is no indication of the identity of the offender. In such case it is the duty of the *juge* to discover the offender.³⁹⁵ If in the course of his investigation

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386. Also called the *instruction préalable*.

387. C. I. C. art. 47. The order of the *procureur* directing the *juge d'instruction* to conduct the investigation must be in writing and is called a *réquisitoire*.

388. C. I. C. art. 63.

389. C. I. C. art. 59. The concept of *flagrant délit* is discussed *supra* p. 391.

390. 3 GARRAUD, *op. cit. supra* note 1, at 22.

391. MORIZOT-THIBAUT, *op. cit. supra* note 20, at 104; COMPTE GÉNÉRAL PENDANT L'ANNÉE 1932 (1934) 89. The third method will be discussed in the next installment of this article.

392. 3 GARRAUD, *op. cit. supra* note 1, at 28.

393. *Ibid.*

394. "If the investigation was directed simply against the suspect, it would not accomplish its purpose, for it would not lead to a complete manifestation of the truth, and it would permit the *ministère public* arbitrarily to limit the operation of justice." MORIZOT-THIBAUT, *op. cit. supra* note 20, at 108.

395. 3 GARRAUD, *op. cit. supra* note 1, at 23.

the *juge* discovers evidence indicating the commission of any other offense than that mentioned in the *réquisitoire* of the *procureur*, whether by the suspect or any other person, before he may proceed with the investigation of the new offense he must obtain a second *réquisitoire* from the *procureur*. Thus, if the *juge* is directed to investigate a theft, he cannot without a new *réquisitoire* proceed against the receiver of the stolen goods.³⁹⁶

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

2. Transport, Perquisition and Saisie

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

396. GOYET, *op. cit. supra* note 65, at 283n; 3 LE POITTEVIN, *op. cit. supra* note 74, at 240.

397. C. I. C. art. 62. The wording is "*transport sur les lieux*". This proceeding is also described in the following terms: (1) "*descente sur les lieux*", 2 MASSABIAU, *op. cit. supra* note 120, at 230; CUMENGE, L'INSTRUCTION PRÉPARATOIRE (1891) 93; (2) "*descente de justice*", 2 MASSABIAU, *op. cit. supra* note 120, at 231; (3) "*transport de justice*", GOYET, *op. cit. supra* note 65, at 291; (4) "*transport judiciaire*", 2 GARRAUD, *op. cit. supra* note 1, at 202; (5) "*visite des lieux*", VIDAL, *op. cit. supra* note 276, at 855.

398. C. I. C. art. 62. The presence of the *greffier* is necessary to validate the actions of the *juge d'instruction*. 2 GARRAUD, *op. cit. supra* note 1, at 203; HERMELIN, DES GARANTIES À ACCORDER À L'INCUPLÉ DANS L'INSTRUCTION PRÉPARATOIRE (Thesis Paris, 1897) 131; BRACK, PERQUISITIONS (Thesis Paris, 1910) 125. If the regular *greffier* is unable to accompany the *juge*, he may appoint any French citizen, at least twenty-five years old, to act as *greffier* for the particular occasion. Decision of the *Cour de Cassation*, Sept. 5, 1852, cited in 1 GARRAUD, *op. cit. supra* note 1, at 577n.

399. C. I. C. art. 88, as amended by Law of Feb. 7, 1933, JOURNAL OFFICIEL (Feb. 9, 1933) 1354.

400. C. I. C. art. 62 provides that the *juge* shall always be accompanied by the *procureur*, but this requirement was not regarded as obligatory. 1 GARRAUD, *op. cit. supra* note 1, at 576. The new *projet* (1938) for a *Code d'Instruction Criminelle* states that the *procureur* has the right to accompany the *juge*. Art. 67. "Except in a case of a *flagrant délit*, fire or calls for help from inside, no judicial or police officer may enter the buildings or grounds of a university for the purpose of determining if a crime has been committed or for executing a *mandat d'amener* against members of the faculty or students unless authorized in writing by the *procureur général*, or one of his assistants, or by the *procureur*. When the *juge d'instruction* makes a *perquisition* in a secondary school he must always be accompanied by the *procureur*." 4 LE POITTEVIN, *op. cit. supra* note 74, at 1003.

practice the *juge* visits the scene only if the offense is serious and a personal inspection of the place is considered necessary.⁴⁰¹ Upon his arrival at the scene the first duty of the *juge* is to determine if a crime has been in fact committed.⁴⁰² If so, he questions any persons who were present when the crime occurred or who have information regarding it.⁴⁰³ He also takes possession of any weapons or other objects tending to establish commission of the crime.⁴⁰⁴

In the course of his investigation the *juge* may conduct a search (*perquisition*)⁴⁰⁵ of the dwelling of a suspect or a building occupied by another person if, in the latter case, it is likely to contain articles relating to the alleged offense.⁴⁰⁶ The object of the *perquisition* may be either the search for and arrest of a suspect or the search for and seizure of papers or other evidence.⁴⁰⁷ It is provided by the Constitution of the Year VIII (1800) that officers may not enter buildings at night.⁴⁰⁸ There is an exception to this rule in the case of public places such as hotels, cafés and stores, which may be entered at any time, and the same exception applies to bawdy and gaming houses.⁴⁰⁹ It has also been stated that a private building may be entered at night with the consent of the occupant.⁴¹⁰ If a building is entered during the day, the search may be continued into the night, which has been arbitrarily defined as between the hours of six in the evening to six in the morning from October 1st to March 31st and between nine and four from April 1st

401. See the *Circulaires* of the Minister of Justice, Nov. 20, 1829 and August 16, 1842, renewed Feb. 23, 1887, cited in 1 LE POITTEVIN, C. I. C. ANNOTÉ, art. 62, n. 6.

402. GOYET, *op. cit. supra* note 65, at 291.

403. 1 GARRAUD, *op. cit. supra* note 1, at 578; GOYET, *op. cit. supra* note 65, at 291; 2 MASSABIAU, *op. cit. supra* note 120, at 239.

"The *juge* ought to reconstruct in his mind the scene of the crime and to investigate the circumstances of its commission, the exact hour, the cause of death, and the instruments employed by the assassin; in a word, all the facts tending to put him on the trail of the offender." CUMENGE, *op. cit. supra* note 398, at 107.

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

405. The term *perquisition*, although properly denoting only a search (SOUFFLIER, *op. cit. supra* note 97, at 767, and LE POITTEVIN, *op. cit. supra* note 74, *supplément* at 377) is often used broadly to embrace both the entry into a building (*visite domiciliaire*) and the search made therein. 3 GARRAUD, *op. cit. supra* note 1, at 214, and MORIZOT-THIBAUT, *op. cit. supra* note 20, at 447.

406. C. I. C. arts. 87 and 88. This right was reaffirmed by the Law of Feb. 7, 1933, JOURNAL OFFICIEL (Feb. 9, 1933) 1354, art. 6, amending art. 87 of the C. I. C. "Of all the investigation proceedings the *perquisition* is perhaps the harshest. Nothing violates more the inviolability of the person and of the home than the right to enter the dwelling of a citizen, to examine his papers, and to seize anything that may be found in his home, for seizure is the natural and almost necessary consequence of the *perquisition*." HERMELIN, *op. cit. supra* note 398, at 131.

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

407. 3 GARRAUD, *op. cit. supra* note 1, at 218.

408. Art. 76. This article provides for an exception to the prohibition in case of fire, flood or a request made by a person in the building.

409. 4 LE POITTEVIN, *op. cit. supra* note 74, at 1002.

410. 3 GARRAUD, *op. cit. supra* note 1, at 215.

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

In practice a distinction must be made between the two situations (1) where the *transport* is to one place, such as a public street, and the *perquisition* is at another place, as the dwelling of the suspect, and (2) where the *transport* is to the same place as the *perquisition*, for example where the scene of the crime is in the dwelling of the suspect. If the *transport* is to a public place, the suspect need not be present,⁴¹³ although if in custody he is generally taken along.⁴¹⁴ On the other hand, in the case where the offense has occurred in a building, the *transport* being to the place where the *perquisition* will be held, the rules applicable to the latter will apply. Thus, the building may be either that of the suspect or of a third person, and in either case under the law governing *perquisitions*, the suspect, if arrested, has a right to be present. If, whether under arrest or not, he cannot or does not attend, the *perquisition* is to be conducted in the presence of a representative named by him, except that where neither he nor his representative is present, the *juge* is to name two witnesses who will attend.⁴¹⁵

The *perquisition* is a judicial proceeding and should be employed only where there are strong indications of the suspect's guilt.⁴¹⁶ A *procès-verbal* of all that occurs during the proceedings should be made by the *greffier* under the direction of the *juge*.⁴¹⁷ Notwithstanding the judicial character of the *perquisition*, the suspect is not permitted to have counsel present,⁴¹⁸ unless he is subjected to an interrogation by the *juge*.⁴¹⁹ In no case may the *partie civile* be present.⁴²⁰ It has been suggested that the law be changed so as to permit the presence of the suspect's counsel.⁴²¹

411. CODE DE PROCÉD. CIVILE, art. 1037.

412. C. P. art. 184. They are also subject to a civil action for damages (*prise à partie*).

413. MORIZOT-THIBAUT, *op. cit. supra* note 20, at 451.

414. 3 GARRAUD, *op. cit. supra* note 1, at 204.

415. Law of Feb. 7, 1933, JOURNAL OFFICIEL (Feb. 9, 1933) 1354, art. 6, amending C. I. C. art. 87. If the *perquisition* occurs in the dwelling of a person other than the suspect, such person must be invited to attend and if for any reason he does not do so, two members of his family must be invited in his stead. If none of these persons appears, the *juge* is to appoint two witnesses to be present at the proceedings. Law of Feb. 7, 1933, JOURNAL OFFICIEL (Feb. 9, 1933) 1354, art. 6, amending C. I. C. art. 87.

416. 3 GARRAUD, *op. cit. supra* note 1, at 207.

417. 1 GARRAUD, *op. cit. supra* note 1, at 580. The *procès-verbal* prepared by the *greffier* is a written record of all that occurs before the *juge d'instruction* at every part of his investigation, including an account (not stenographic) of all testimony, with remarks by the *juge* as to the attitude of suspect, witnesses, etc.

418. 3 LE POITTEVIN, *op. cit. supra* note 74, at 245.

419. This will be discussed later. See *infra* p. 705.

420. 1 GARRAUD, *op. cit. supra* note 1, at 577.

421. 1 GARRAUD, *op. cit. supra* note 1, at 578.

During the search of buildings it is the duty of the *juge* to seize any papers or articles "useful in establishing the truth",⁴²² whether they indicate the guilt or innocence of the suspect. The *Code* does not specify the various types of articles to be seized,⁴²³ this being left to the discretion of the *juge*.⁴²⁴ However, the confidential relationship of lawyer and client prevents the seizure of correspondence between a suspect and his counsel,⁴²⁵ although other documents in a lawyer's office may be taken.⁴²⁶ During the search of a building the *juge* may break open a desk or other article of furniture, containing papers or articles which he wishes to examine.⁴²⁷

The *juge* may seize letters in the post, not only those sent by or addressed to the suspect, but also those where the senders and addressees are other persons.⁴²⁸ The Law of February 7, 1933,⁴²⁹ amending Article 89 of the *Code*, expressly limited the right of seizure to letters sent by or addressed to the suspect, but this limitation was omitted in the revision of Article 89 by the Law of March 25, 1935.⁴³⁰ The limitation was considered unworkable in practice, as a suspect could arrange to have incriminating correspondence addressed to a third person.⁴³¹

If the suspect is present when papers or articles are seized, they should be shown to him, in order to see if he recognizes them, and also to have them initialed by him.⁴³² He should be given an opportunity to explain why and when they came into his possession.⁴³³ A *procès-verbal* of all seizures must be prepared.⁴³⁴ All articles seized are sealed by the

422. Law of Feb. 7, 1933, JOURNAL OFFICIEL (Feb. 9, 1933) 1354, art. 6, amending C. I. C. art. 88.

423. The articles to be seized have been classified as follows:

"1. Articles adapted for committing the crime—arms of any kind as daggers, fire-arms, stillets, etc. All instruments which may be used for breaking and entering as crow-bars, files, false keys, etc. Incendiary materials, as torches, petroleum, etc. Articles and instruments employed by counterfeiters: crucibles, alloys, metals, etc.

"2. Articles used in the commission of the crime: daggers red with blood, firearms recently discharged; crow-bars and files found on the scene of the offense; incendiary materials not consumed or the residue of such materials.

"3. Results of the crime: intestines of a poisoned victim, portions of a dead body. or stolen articles.

"4. Articles which may serve in establishing the truth. We will enter in this last group all the articles which are not included in the three preceding groups, and which the *juge* nevertheless considers useful in discovering the truth." CUMENGE, *op. cit. supra* note 397, at 128.

424. 3 GARRAUD, *op. cit. supra* note 1, at 219.

425. 4 LE POITTEVIN, *op. cit. supra* note 74, at 1004.

426. 3 GARRAUD, *op. cit. supra* note 1, at 223.

427. BRACK, *op. cit. supra* note 398, at 50.

428. 3 GARRAUD, *op. cit. supra* note 1, at 224.

429. JOURNAL OFFICIEL (Feb. 9, 1933) 1354.

430. JOURNAL OFFICIEL (March 26, 1935) 3426.

431. MAGNOL, COMMENTAIRE DE LA LOI DU 25 MARS 1935 (1935) 14.

432. C. I. C. arts. 89 and 39. This provision is omitted from the Law of Feb. 7, 1933, but it is stated that the same practice should continue. DALLOZ, RECUEIL PÉRIODIQUE, 1933 IV. 74.

433. CUMENGE, *op. cit. supra* note 397, at 139.

434. GOYET, *op. cit. supra* note 65, at 292.

juge or enclosed in a container which he seals.⁴³⁵ The seals should be broken and the articles taken from the container only in the presence of the suspect or his counsel or a third person authorized in writing by the suspect.⁴³⁶ According to Garraud, the safeguards provided by law for the protection of the rights of a suspect, whose papers are seized, are not always observed. He says that the *juge* will sometimes seize all the papers which he finds and will examine them in his office in the absence of the suspect or his counsel, and that there have been instances where confidential documents and those having no connection with the case have been seized.⁴³⁷

The practice of some *juges d'instruction* of permitting the *procureur* to have access to papers and articles seized has been severely criticized.⁴³⁸ It has also been stated that in some instances confidential documents having no connection with the investigation have been given by the *juge* to the press for publication.⁴³⁹ To remedy these abuses the Law of February 7, 1933, provides that the *juge* alone shall examine letters and telegrams.⁴⁴⁰ It is further provided that the communication of the contents of any seized document, without the authorization of the suspect or the other party to the correspondence, to a person not authorized by law to receive it and any use made of this communication shall constitute a criminal offense punishable by a fine of 5000 francs and imprisonment for a period ranging from two months to two years.⁴⁴¹

A failure on the part of a *juge* to observe all the legal requirements in conducting a *saisie* will not prevent the admission in evidence of the seized articles at the trial, but may affect their probative value.⁴⁴²

3. Mandats

A *mandat* is an order issued by a *juge d'instruction* directing the appearance, arrest or detention of a suspect.⁴⁴³ The *juge* may issue four *mandats*—two of these, the *mandat de comparution* and the *mandat d'amener*, serve to bring the suspect before the *juge* to be interrogated with regard to an alleged offense, and the other two, the *mandat de*

435. C. I. C., arts. 89, as amended by the Law of Mar. 25, 1935, art. 4, JOURNAL OFFICIEL, Mar. 26, 1935, 3426, and 38, as amended by the Law of Feb. 7, 1933, JOURNAL OFFICIEL, Feb. 9, 1933, 1354.

436. C. I. C. art. 89, as amended by Law of Mar. 25, 1935, JOURNAL OFFICIEL (Mar. 26, 1935) 3426.

437. 3 GARRAUD, *op. cit. supra* note 1, at 226 and 227. "For purposes of expedition, the *juge* takes away all the articles." MORIZOT-THIBAUT, *op. cit. supra* note 20, at 454.

438. 3 GARRAUD, *op. cit. supra* note 1, at 227; MORIZOT-THIBAUT, *op. cit. supra* note 20, at 454.

439. 3 GARRAUD, *op. cit. supra* note 1, at 227; DALLOZ, RECUEIL PÉRIODIQUE, 1933 IV. 75.

440. Art. 6, amending C. I. C. art. 89, JOURNAL OFFICIEL (Feb. 9, 1933) 1356, re-enacted in the Law of Mar. 25, 1935, JOURNAL OFFICIEL (Mar. 26, 1935) 3427.

441. Law of Feb. 7, 1933, art. 6, amending C. I. C. arts. 88 and 38, JOURNAL OFFICIEL (Feb. 9, 1933) 1355.

442. 3 GARRAUD, *op. cit. supra* note 1, at 225; 2 ROUX, *op. cit. supra* note 43, at 313.

443. CUCHE, *op. cit. supra* note 217, at 338.

dépôt and the *mandat d'arrêt*⁴⁴⁴ are orders of commitment. The *mandats* may be employed only where the offense involved is a *crime* or *délit*.⁴⁴⁵

All *mandats* must be signed and sealed by the *juge* who issues them, and the suspect must be named or otherwise described as clearly as possible.⁴⁴⁶ A *mandat* is void if (1) it is issued by an incompetent official, (2) is not signed or (3) does not clearly indicate the person against whom it is directed.⁴⁴⁷ *Mandats* are served either by a bailiff (*huissier*) or a police officer, who must show the *mandat* to the suspect and leave a copy with him.⁴⁴⁸ In an urgent case the *mandats* may be served by telegraph.⁴⁴⁹ All *mandats* may be served anywhere in the country.⁴⁵⁰

The *mandat de comparution*, which corresponds to a summons,⁴⁵¹ is simply an order to the person specified to appear before the *juge* issuing the *mandat* at a designated time and place for the purpose of being questioned regarding an alleged offense.⁴⁵² The *mandat d'amener*, which is in effect a warrant of arrest,⁴⁵³ is an order addressed to all bailiffs and police officers to bring the person indicated before the *juge* for questioning.⁴⁵⁴ In practice, the *mandat de comparution* is served by a bailiff and the *mandat d'amener* by a police officer.⁴⁵⁵ Although there is no requirement that the *mandats de comparution* and *d'amener* contain a statement of the offense charged, this is generally inserted,⁴⁵⁶ since a suspect so advised may be able to exculpate himself immediately.⁴⁵⁷ The *mandat de comparution* being simply an order directing the suspect to appear, he is not taken into custody, but in the case of a *mandat d'amener* there is an arrest,⁴⁵⁸ and force may be employed in its execution.⁴⁵⁹ If, after being served with a *mandat de comparution*, the person fails to appear, a *mandat d'amener* will be issued.⁴⁶⁰

444. For the history of *mandats de dépôt* and *d'arrêt* see *id.* at 341.

445. *Id.* at 338.

446. C. I. C. arts. 95 and 96.

447. 3 LE POITTEVIN, *op. cit. supra* note 74, at 487.

448. C. I. C. art. 97.

449. Law of May 20, 1903, § 121, 1903 BULLETIN DES LOIS (XII sér.) pt. 2, 65.

450. C. I. C. art. 98.

451. HERMELIN, *op. cit. supra* note 398, at 165. Forms for all the *mandats* are contained in SIGNOREL, MANUEL-FORMULAIRE DES JUGES D'INSTRUCTION (1923) 21, 23, 25 and 26.

452. 3 GARRAUD, *op. cit. supra* note 1, at 93.

453. HERMELIN, *op. cit. supra* note 398, at 165.

454. 3 GARRAUD, *op. cit. supra* note 1, at 93.

455. GOYET, *op. cit. supra* note 65, at 307.

456. 3 GARRAUD, *op. cit. supra* note 1, at 105 and 107. The lack of any statutory requirement that the *mandat d'amener* contain a statement of the offense for which it is issued and a citation of the law creating this offense has been severely criticized. MORIZOT-THIBAUT, *op. cit. supra* note 20, at 206.

457. 3 GARRAUD, *op. cit. supra* note 1, at 109.

458. 3 GARRAUD, *op. cit. supra* note 1, at 107; DEGOIS, *op. cit. supra* note 144, at 559.

459. C. I. C. art. 99.

460. C. I. C. art. 91.

The *juge*, in the exercise of his discretion, may issue either a *mandat de comparution* or a *mandat d'amener*, no matter how serious the offense.⁴⁶¹ It is a remarkable feature of French procedure that a person suspected of one of the greatest offenses, such as murder, may be simply summoned to appear instead of being taken into custody. Of course the *juge* will adopt this course only if he does not fear the escape of the suspect or the destruction of evidence.⁴⁶² In practice the *mandat d'amener* is employed (1) when the offense is a *crime*, (2) when it is a *délit* involving a punishment of imprisonment and the suspect does not have an established residence, (3) when it is a *délit* of so serious a character that there is danger the suspect, although having such a residence, may flee.⁴⁶³ The *mandat de comparution* is employed where the punishment is merely a fine or even where the offense is a *délit* involving imprisonment if the suspect is domiciled in France.⁴⁶⁴ It has been decided that the *juge* may decline to employ either *mandat* and may direct the suspect to appear by an ordinary letter.⁴⁶⁵

If the arrest by a *mandat d'amener* occurs within the *arrondissement* and not more than 100 kilometers from the town or city where the *juge* is located, the person arrested must be brought before him immediately. If, however, the arrest occurs outside the area mentioned above, the person arrested must be taken before the *procureur* of the place where he was arrested, who questions him regarding his identity, receives any statements he cares to make and asks him if he consents to being transferred to the place where the *juge* who issued the *mandat* is located. If he objects to being transferred, the *juge* must be notified of the fact and be furnished with a report of all that occurred at the hearing before the *procureur*. The *juge* then decides whether the person arrested shall be brought before him.⁴⁶⁶ If the *juge* is satisfied from the report either that the person arrested is not the one indicated in the *mandat*, or that, although he is the person sought, his explanations before the *procureur* established his innocence, the *juge* will order that he be set at liberty.⁴⁶⁷

If the person named in a *mandat d'amener* cannot be found, the officer having the *mandat* must exhibit it to the mayor or *commissaire* of police of the *commune* in which the person resides, and the return must be signed by the official to whom the *mandat* is exhibited.⁴⁶⁸ In

461. GOYET, *op. cit. supra* note 65, at 307.

462. HERMELIN, *op. cit. supra* note 398, at 164.

463. GOYET, *op. cit. supra* note 65, at 307; 3 LE POITTEVIN, *op. cit. supra* note 74, at 490.

464. 3 LE POITTEVIN, *op. cit. supra* note 74, at 489.

465. 1 LE POITTEVIN, C. I. C. ANNOTÉ, art. 91, n. 23.

466. Law of Dec. 8, 1897, arts. 4, 5 and 6, 1897 BULLETIN DES LOIS (XII sér.) pt. 2, 1777.

467. DEGOIS, *op. cit. supra* note 144, at 560.

468. C. I. C. art. 105. The purpose of this formality is to show that every effort has been made to execute the *mandat*. 3 GARRAUD, *op. cit. supra* note 1, at 114.

serving a *mandat d'amener* the police may enter the dwelling of the suspect,⁴⁶⁹ but may not do so at night.⁴⁷⁰ The dwelling of another person may be entered for the purpose of arresting the suspect only in case of a *perquisition* conducted by the *juge d'instruction*.⁴⁷¹

The *mandat de dépôt* is an order by which the *juge* directs that a suspect, who has already appeared before him on a *mandat de comparution* or a *mandat d'amener*, be placed in detention.⁴⁷² The *mandat d'arrêt* is also an order for the commitment of the suspect to a place of detention.⁴⁷³ It is ordinarily employed when the suspect has fled,⁴⁷⁴ in which case it is an order both for arrest and commitment. The *mandat de dépôt* and the *mandat d'arrêt* may be issued only for offenses involving imprisonment or a more severe penalty.⁴⁷⁵ Both *mandats* are always served by police officers, who may employ force in so doing.⁴⁷⁶

The *juge* must obtain the opinion of the *procureur* before issuing a *mandat d'arrêt*,⁴⁷⁷ but is not bound to follow this opinion.⁴⁷⁸ If the *procureur* recommends that the *mandat* be issued and the *juge* refuses, the former may appeal to the *chambre d'accusation*.⁴⁷⁹ Unlike the other *mandats*, the *mandat d'arrêt* must contain a statement of the offense for which it was issued and a citation of the law creating the offense.⁴⁸⁰ Ordinarily the offense is indicated in the *mandat d'arrêt* simply by its name, such as "*meurtre*", neither the date nor the place of the offense nor the name of the victim being stated.⁴⁸¹ The *mandat d'arrêt* is more

469. 3 LE POITTEVIN, *op. cit. supra* note 74, at 491.

470. CONSTITUTION, YEAR VIII, art. 76.

471. 3 LE POITTEVIN, *op. cit. supra* note 74, at 491.

472. Decree of May 20, 1903, art. 121, 1903 BULLETIN DES LOIS (XII sér.) pt. 2, 65; 3 GARRAUD, *op. cit. supra* note 1, at 133. In the case of a *flagrant délit* the *mandat de dépôt* may be issued by the *procureur*. Law of May 20, 1863, 1863 BULLETIN DES LOIS (XI sér.) pt. 1, 966.

473. Decree of May 20, 1903, art. 121, 1903 BULLETIN DES LOIS (XII sér.) pt. 2, 65. The *mandat d'arrêt* may never be issued by the *procureur*. 3 GARRAUD, *op. cit. supra* note 1, at 136.

474. GOYET, *op. cit. supra* note 65, at 310.

475. C. I. C. art. 94.

476. GOYET, *op. cit. supra* note 65, at 309.

477. Decree of May 20, 1903, art. 121, 1903 BULLETIN DES LOIS (XII sér.) pt. 2, 65.

478. GOYET, *op. cit. supra* note 65, at 310.

479. 3 GARRAUD, *op. cit. supra* note 1, at 135; 3 LE POITTEVIN, *op. cit. supra* note 74, at 498. The full title is *chambre des mises en accusation*. See *supra* p. 397. The new *projet* (1938) for the *Code d'Instruction Criminelle* uses both titles. Arts. 153 and 154.

480. C. I. C. art. 96.

481. 3 GARRAUD, *op. cit. supra* note 1, at 135; MORIZOT-THIBAUT, *op. cit. supra* note 20, at 210.

"The greatest precision in the wording of the *mandat* is desirable, since it is employed in the case of a suspect who has not been interrogated and who, because he does not know of what he is accused, finds himself unable to present evidence and refute the charges." 3 GARRAUD, *op. cit. supra* note 1, at 135.

The Minister of Justice, referring to *mandats d'arrêt*, called attention in a *circulaire* of Dec. 6, 1926, to the fact that unjustifiable arrests resulted from similarity of names or the incomplete description of the person to be arrested. He accordingly recommended that the *mandat* contain precise information regarding identity and a minute description of the person sought. 3 LE POITTEVIN, *op. cit. supra* note 74, at 486.

expensive than a *mandat de dépôt*, since the officers who serve the former are entitled to a special fee.⁴⁸²

When either a *mandat de dépôt* or *d'arrêt* is served, the suspect should be at once taken to the place of detention mentioned in the *mandat*.⁴⁸³ In the case where an arrest occurs under a *mandat d'arrêt* outside the *arrondissement* of the *juge* who issued the *mandat* or at a distance of more than 100 kilometers from the place where he is located, there is no legal requirement as in the case of the *mandat d'amener* that the person arrested be brought to have his identity established before the *procureur* of the place where the arrest occurs, but in practice this is done so as to prevent any mistake in the identification. If the *procureur* is in doubt, he will telegraph the *juge* who issued the *mandat* and, after hearing from him, will either discharge the suspect or order him taken before the *juge*.⁴⁸⁴

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

4. *Détention Préventive* and *Liberté Provisoire*

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

482. 3 GARRAUD, *op. cit. supra* note 1, at 136; GOYET, *op. cit. supra* note 65, at 310.

483. C. I. C. art. 110.

484. GOYET, *op. cit. supra* note 65, at 311.

485. This subject will be discussed later. See *infra* p. 705.

486. DEGOIS, *op. cit. supra* note 144, at 575.

487. 3 GARRAUD, *op. cit. supra* note 1, at 128; GOYET, *op. cit. supra* note 65, at 297.

488. 2 FAUSTIN HÉLIE, *op. cit. supra* note 2, at 422; MORIZOT-THIBAUT, *op. cit. supra* note 20, at 221.

489. C. I. C. art. 603, as amended by Law of Sept. 3, 1926.

490. C. I. C. art. 604.

491. GARRAUD ET LABORDE-LACOSTE, *PRÉCIS ÉLÉMENTAIRE DE DROIT PÉNAL* (1930) 330; VERNET, *op. cit. supra* note 9, at 60.

492. CUCHE, *op. cit. supra* note 217, at 343.

The *Code*, as amended in 1865, provided for the release (*liberté provisoire*) of a suspect from *détention préventive* in a number of situations and under varying conditions. The *juge d'instruction* upon the request of the suspect could, in the exercise of an uncontrolled discretion irrespective of the gravity of the offense, release him from custody after securing the advice of the *procureur*, which the *juge* was at liberty to disregard.⁴⁹³ The release was made without bail (*cautionnement*) upon the undertaking of the suspect to appear for any proceeding, when required, and for the execution of any judgment that might be imposed.⁴⁹⁴

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

The conditions of the bail undertaking were that the suspect (1) would appear for all proceedings and (2) would pay the costs of the prosecution, the costs advanced by the *partie civile* and any fines that might be imposed.⁴⁹⁷ It was provided that bail might consist either of cash, furnished by the suspect or another person, or the undertaking of another person, having sufficient assets, either to produce the suspect when required or to forfeit a specified sum of money.⁴⁹⁸ Real estate has never been accepted as security.⁴⁹⁹ The amount of the bail is entirely within the discretion of the *juge*.⁵⁰⁰ The factors to be considered by him in fixing the amount of bail are said to be the gravity of the alleged offense, the pecuniary resources⁵⁰¹ and the moral character of the suspect.⁵⁰² If the application of the suspect to be released on bail was refused, he could not appeal to any other official, and he had no redress except a civil action for damages against the *juge* if fraud or connivance could be proved, which damages the government

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

494. *Ibid.*

495. *Ibid.*

496. C. I. C. art. 114, as amended by the Law of July 14, 1865. When a release is granted, bail is seldom required. During the year 1934, 4265 suspects, out of 68,513 placed in detention, were released on *liberté provisoire*, bail being required in the case of only 202. COMPTE GÉNÉRAL PENDANT L'ANNÉE 1934 (1936) 146.

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

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

499. 3 LE POITTEVIN, *op. cit. supra* note 74, at 447.

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

501. 3 GARRAUD, *op. cit. supra* note 1, at 165; 3 LE POITTEVIN, *op. cit. supra* note 74, at 448.

502. 3 LE POITTEVIN, *op. cit. supra* note 74, at 448.

would pay if the *juge* was unable to do so.⁵⁰³ The *Code Pénal* also provides a penalty if the action of the *juge* is arbitrary,⁵⁰⁴ but it has been stated that this provision has never been enforced.⁵⁰⁵

As the provisions of the *Code* were administered by the *juges d'instruction*, it frequently resulted that suspects were kept in detention for unnecessarily long periods,⁵⁰⁶ there being no time limit to the effect of a *mandat de dépôt* or *mandat d'arrêt*. At intervals for half a century there were demands that the *Code* be amended so as to correct the abuses of discretion by the *juge*. One of the suggested reforms was a proceeding similar to the Anglo-American writ of habeas corpus.⁵⁰⁷

To meet the demands for amending the *Code* a *projet* was presented in the Senate by the Prime Minister, M. Georges Clemenceau, which, after discussion at various times in both houses of Parliament,⁵⁰⁸ was enacted in modified form in 1933. The most important and radical provision of the new law was that no person could be placed or kept in detention after his first appearance before the *juge*, if he had a known domicile and had never been convicted of a *crime* or sentenced, without suspension, to more than three months for a *délit*.⁵⁰⁹ All suspects already in detention for an alleged *délit* who were not released under the foregoing provision were, subject to certain exceptions,⁵¹⁰ entitled to release without bail within five days following the first appearance.⁵¹¹ A suspect who came within one of the exceptions could be detained for a further period of not more than fifteen days by an *ordonnance* of the *juge* setting forth the reasons for the extended detention.⁵¹² A suspect could be kept in further detention only after a hearing and order by a body of judges, called the "*chambre du conseil*",⁵¹³ selected from the

503. C. I. C. art. 112; CODE DE PROCÉD. CIVILE, art. 505. This right of action involved so many difficulties that it was of little practical value to the suspect. LESTELLE, *op. cit. supra* note 24, at 26.

504. C. I. C. art. 114.

505. 3 GARRAUD, *op. cit. supra* note 1, at 190, n. 7; MORIZOT-THIBAUT, *op. cit. supra* note 20, at 296.

506. LAILLER ET VONOVEN, LES ERREURS JUDICIAIRES (1897) 138; 3 GARRAUD, *op. cit. supra* note 1, at 149; DENYS, *op. cit. supra* note 25, at 28; LESTELLE, *op. cit. supra* note 24, at 30.

507. MORIZOT-THIBAUT, *op. cit. supra* note 20, at 236; 3 GARRAUD, *op. cit. supra* note 1, at 116, 148.

508. The *projet* had been passed by the Senate in 1909 and by the *Chambre des Députés* in 1919.

509. C. I. C. art. 113, as amended by the Law of Feb. 7, 1933, JOURNAL OFFICIEL (Feb. 9, 1933) 1354.

510. 1. If the suspect does not have a known domicile in France;

2. If he has been previously sentenced, with suspension, to more than three months' imprisonment for a non-political *délit*;

3. If there is reason to fear that the suspect may try to escape from justice;

4. If he is a danger to the public safety;

5. If his remaining at liberty is likely to interfere with the ascertainment of the truth. *Ibid.*

511. *Ibid.*

512. C. I. C. art. 114, as amended by the Law of Feb. 7, 1933.

513. C. I. C. art. 117, as amended by the Law of Feb. 7, 1933.

Tribunal de Première Instance. Both the suspect and the *procureur* were entitled to present arguments at the hearing and either one might appeal from an order of the *chambre*. The maximum period of further detention which the *chambre* could order at any one time was one month, but after following the required procedure it could make further orders indefinitely.⁵¹⁴ The Law of February 7, 1933, also amended the provision of the *Code*⁵¹⁵ regarding bail by providing that bank notes and bonds issued by or guaranteed by the national government, in addition to cash, might be furnished by either the suspect or another person.⁵¹⁶

As soon as the Law of February 7, 1933, went into effect, difficulties of administration developed and the beneficial results that were desired from the Law were not obtained. In the case of a suspect who, if he complied with certain conditions,⁵¹⁷ was entitled to immediate release after his first appearance before the *juge*, it was found that several days were consumed by the *juge* in discovering whether the qualifying conditions existed.⁵¹⁸ The situation was further complicated by the number of appeals and hearings that frequently occurred⁵¹⁹ and by the consequent time and expense required in procuring the attendance of necessary parties at the hearings.⁵²⁰ The appeal to the *chambre du conseil* was of little practical value, since the judges were unacquainted with the details of the investigation and in most cases simply affirmed whatever action the *juge d'instruction* had taken.⁵²¹ From the point of view of the prosecution and the *juge* the results of the Law were unsatisfactory, as many suspects who, in the opinion of both should have been longer detained because of danger of flight or of concealing evidence, had to be released.⁵²²

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

514. C. I. C. art. 114, as amended by the Law of Feb. 7, 1933.

515. Art. 120, as amended by the Law of July 14, 1865.

516. Art. 120, as amended by the Law of Feb. 7, 1933.

517. 1. If he had a known domicile, and

2. If he had never been convicted of a *crime* or sentenced, without suspension, to more than three months for a *délit*. C. I. C. art. 113, as amended by the Law of Feb. 7, 1933.

518. As a consequence, the *juges* were obliged to release suspects immediately without being able to ascertain the qualifying facts, and to rely largely on the suspect's own statements, which might be found upon investigation to be false. DANIEL, *LA LIBERTÉ PROVISOIRE ET LA LOI DU 7 FÉVRIER 1933* (1934) 10; MAGNOL, *op. cit. supra* note 431, at 6; LESTELLE, *op. cit. supra* note 24, at 125.

519. DANIEL, *op. cit. supra* note 518, at 70; MAGNOL, *op. cit. supra* note 431, at 7; LESTELLE, *op. cit. supra* note 24, at 101. Unanimity of opinion for repeal was to a considerable degree the result of delays and obstructions which occurred in application of the law in the various investigations resulting from the Stavisky scandal of 1933-1934. MAGNOL, *op. cit. supra* note 431, at 7.

520. LESTELLE, *op. cit. supra* note 24, at 100.

521. *Ibid.*

522. DANIEL, *op. cit. supra* note 518, at 83; MAGNOL, *op. cit. supra* note 431, at 6.

embodied in the Law of February 7, 1933, and restoring to a considerable extent the earlier law. This *projet*, after much discussion, was enacted as the Law of March 25, 1935. Of the provisions dealing with *détention préventive* the most important was the repeal of the requirement, contained in the Law of February 7, 1933, for the immediate release of a suspect charged with an offense carrying less than two years' imprisonment, who had a known domicile and had never been convicted of a *crime* or a *délit* with a sentence of more than three months' imprisonment. Such a suspect is now entitled to release after five days. A suspect not so entitled to release must be released within fifteen days, subject to certain broad exceptions.⁵²³ An advantage was given the suspect, however, in that further detention may not result from the mere inaction of the *juge*, as under the Law of February 7, 1933, but requires an *ordonnance* of the *juge* in which the reasons for his action are set forth, the period of further detention being limited to one month.⁵²⁴ The *juge* may later detain the suspect for an additional month, but only after a hearing, which the suspect and his counsel may attend, and an *ordonnance* by the *juge* which is subject to appeal.⁵²⁵ Further detention may take place only after a hearing and order by the *chambre d'accusation*.⁵²⁶ This body was given the power of review previously vested in the *chambre du conseil*, which was abolished. It will be seen that some of the hearings and appeals, previously available to the suspect at the early stages of his detention, were eliminated by the Law of March 25, 1935, thus reducing the amount of delay which had been the subject of much criticism.

5. *Interrogatoire*

a. In general

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

523. 1. If the suspect does not have a known domicile in France;

2. If he has been previously sentenced, with suspension, to more than three months' imprisonment for a non-political *délit*;

3. If there is reason to fear that the suspect may try to escape from justice;

4. If he is a danger to the public safety;

5. If his remaining at liberty is likely to interfere with the ascertainment of the truth. C. I. C. art. 113, as amended by the Law of Mar. 25, 1935. It has been pointed out that the last three reasons are stated in such general terms that they can readily be found to exist in any case. DALLOZ, *RECUEIL PÉRIODIQUE*, 1933 IV. 68; DANIEL, *op. cit. supra* note 518, at 23.

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

525. C. I. C. art. 114, as amended by the Law of Mar. 25, 1935. The *juge* could thus keep the suspect in detention a maximum of two and one-half months. Statistics used in the debates showed this to be the average period that suspects were detained. DALLOZ, *RECUEIL PÉRIODIQUE*, 1936 IV. 23.

526. The *chambre* may give the *juge* a stated time to complete his investigation, or may take over and complete the investigation itself. C. I. C. art. 116, as amended by the Law of Mar. 25, 1935.

directed that the suspect be interrogated and the *Ordonnance* of 1670 devoted an entire chapter to this subject.⁵²⁷ The *Code d'Instruction Criminelle* provides for an *interrogatoire* by the *juge*,⁵²⁸ but does not specify the form or methods of the interrogation.⁵²⁹ The *interrogatoire* is regarded as a necessary feature of the investigation by the *juge* unless the suspect is in flight.⁵³⁰

The theoretical purpose of the *interrogatoire* is the ascertainment of the truth.⁵³¹ Faustin Hélie states the following: "It is necessary to consider it [the *interrogatoire*] as being at the same time a means of defense and a means of investigation; its object is to hear the explanations of the suspect for the purpose of verifying them, to record his denials or his admissions, to search for the truth of the facts in his convincing or contradictory statements."⁵³² The *Cour de Cassation* has announced that "the *interrogatoire* is not only a method of the official investigation but is also a method of defense".⁵³³

The *interrogatoire* is conducted in secret, generally in the *cabinet* of the *juge* located in the *Palais de Justice*,⁵³⁴ but the *juge* may, if he considers it desirable, question the suspect in the jail where he is detained.⁵³⁵ The number of *interrogatoires* is left entirely to the discretion of the *juge*.⁵³⁶ The *greffier* of the *juge* must be present throughout every interrogation,⁵³⁷ and it is his duty to set forth in the *procès-verbal* all that occurs during the proceeding.⁵³⁸ The suspect is not under oath during the *interrogatoire*.⁵³⁹ The *Ordonnance* of 1670 required that the suspect be sworn, but this "odious practice" was abolished by the Decree of October 9, 1789.⁵⁴⁰ The general rule is that suspects must be separately examined by the *juge*,⁵⁴¹ but if a suspect denies the charges or becomes entangled in his explanations it is customary to confront him with other suspects or witnesses who have made contradictory statements.⁵⁴²

527. 2 FAUSTIN HÉLIE, *op. cit. supra* note 2, at 402, 403.

528. C. I. C. art. 93.

529. CUMENGE, *op. cit. supra* note 397, at 195.

530. MIMIN, L'INTERROGATOIRE PAR LE JUGE D'INSTRUCTION (1926) 13, 17.

531. CUMENGE, *op. cit. supra* note 397, at 214.

532. 2 FAUSTIN HÉLIE, *op. cit. supra* note 2, at 403.

533. Cited by CUMENGE, *op. cit. supra* note 397, at 194. "The *interrogatoires* ought to lead either to convincing explanations, which when verified establish innocence, or to incriminatory admissions regarding the offense or the circumstances connected with it or to a scheme of fictitious defense from which guilt may be inferred." MIMIN, *op. cit. supra* note 530, at 45.

534. 2 GARRAUD, *op. cit. supra* note 1, at 219.

535. MIMIN, *op. cit. supra* note 530, at 88.

536. 2 GARRAUD, *op. cit. supra* note 1, at 221; MIMIN, *op. cit. supra* note 530, at 33.

537. MIMIN, *op. cit. supra* note 530, at 82.

538. *Ibid.*

539. *Id.* at 86.

540. 2 GARRAUD, *op. cit. supra* note 1, at 221.

541. CUMENGE, *op. cit. supra* note 397, at 202; 3 LE POITTEVIN, *op. cit. supra* note 74, at 297.

542. HERMELIN, *op. cit. supra* note 398, at 174; MIMIN, *op. cit. supra* 530, at 64.

Under the *Code* the *interrogatoire* was in all respects an inquisitorial procedure.⁵⁴³ The suspect was not informed of the charge against him, he was frequently not permitted to communicate with any one, and was denied the right to have counsel present during the *interrogatoire*, which, as already stated, was secret. In such a situation abuses naturally developed.⁵⁴⁴ The *juge* too frequently enacted the role of prosecutor, and the *interrogatoire* was used primarily as a method of securing a confession.⁵⁴⁵ The *interrogatoire* was in effect a duel⁵⁴⁶ between the frequently frightened and intimidated suspect⁵⁴⁷ and the skilled *juge*,⁵⁴⁸ who, under the approved practice, might employ lies and deceptions in order to trap the suspect.⁵⁴⁹ There was some difference of opinion among the writers as to whether hypnotism might properly be employed.⁵⁵⁰

The need for reforming the procedure of the *interrogatoire*, so as to protect the suspect from deceptive and coercive methods of the *juge d'instruction*, was recognized for a long time. In 1882 the Senate adopted the *projet* of a commission, appointed by the Minister of Justice, which provided among other things that the *juge* should conduct a controversial proceeding in which the *ministère public* and counsel for both the suspect and the *partie civile* were authorized to participate.⁵⁵¹ The *projet* was rejected by the Chamber of Deputies in 1882, 1884, and 1889. It was again submitted in 1894, but no vote was taken at that time.⁵⁵² In 1895 a less radical proposal than the original *projet* was submitted to the Senate by M. Constans. The chief feature of the new proposal was a provision that the suspect should be entitled to the presence of counsel during the *interrogatoire*.

In the debate in the Senate forceful statements were made regarding the many evils of the old system,⁵⁵³ but the *Cour de Cassation*, when

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

544. HERMELIN, *op. cit. supra* note 398, at 157.

545. 2 GARRAUD, *op. cit. supra* note 1, at 226; MORIZOT-THIBAUT, *op. cit. supra* note 20, at 419. "The *juge* considers the accusation not as a hypothesis to be verified, but as a theorem to be demonstrated." LAILLER ET VONOVEN, *op. cit. supra* note 506, at 121, 122. "A confession, direct or indirect, complete or partial, spontaneous or surprised, obtained formerly by torture, is the end which the secret investigation aimed at and still continually aims at." BONNIER-ORTOLAN, *PUBLICITÉ DE L'INSTRUCTION PRÉPARATOIRE* (1872) 38.

546. See BRÉGEAULT ET ALBANET, *LA RÉFORME DE L'INSTRUCTION PRÉALABLE* (1898) 24.

547. MORIZOT-THIBAUT, *op. cit. supra* note 20, at 411.

548. MUNIER-JOLAIN, *L'INSTRUCTION CRIMINELLE, INQUISITORIALE ET SECRÈTE* (1880) 31.

549. CUMENGE, *op. cit. supra* note 397, at 214; MORIZOT-THIBAUT, *op. cit. supra* note 20, at 402.

550. MIMIN, *op. cit. supra* note 530, at 75; 2 ROUX, *op. cit. supra* note 43, at 320, n. 7.

551. DALLOZ, *RECUEIL PÉRIODIQUE*, 1897 IV. 114.

552. *Ibid.*

553. DALLOZ, *RECUEIL PÉRIODIQUE*, 1897 IV. 113 *et seq.*

consulted regarding the proposal, expressed the opinion that presence of counsel at the *interrogatoire* was not desirable.⁵⁵⁴ However, so strong was the force of public opinion that the Constans proposal became law on December 8, 1897.⁵⁵⁵

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

As already pointed out, the chief innovation accomplished by the Law of December 8, 1897, was the granting of the right to the suspect to have counsel present during the *interrogatoire*. Other features of the procedure, as will appear, were also modified. The Law provides for at least two appearances of the suspect before the *juge d'instruction*. At the first appearance⁵⁵⁶ the *juge* establishes his identity, informs him of the charge against him and receives any statements which he desires to make, after warning him that he is under no compulsion to make any.⁵⁵⁷ If the suspect exercises his right to make a statement and succeeds in convincing the *juge* that the charge against him is unfounded, he will be discharged without being interrogated. If, however, the *juge* is of the opinion that the suspect should be examined, he must advise him of his right to employ counsel to assist him in further proceedings before the *juge*.⁵⁵⁸ In case the suspect does not avail himself of this privilege, the *juge* must have counsel appointed for him, if he so requests.⁵⁵⁹ Counsel so appointed is obliged to serve unless excused for adequate reasons.⁵⁶⁰ It should be noted that the presence of counsel is not a requisite to the legality of the *interrogatoire*. The accused is simply given the right to have counsel, who must be notified before each *interrogatoire*, but if counsel fails to appear, the *juge* may proceed.⁵⁶¹

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

554. Cited by HERMELIN, *op. cit. supra* note 398, at 173, and quoted by OLIER, *LA RÉFORME DE L'INSTRUCTION PRÉPARATOIRE* (1898) 97 *et seq.*

555. 1897 BULLETIN DES LOIS, pt. 2, 1777.

556. The Law of December 8, 1897, provides that if the suspect appears in answer to a *mandat de comparution* he must be brought before the *juge d'instruction* immediately, but if he is taken into custody under a *mandat d'amener* he must have his first appearance before the *juge* within twenty-four hours. If this latter requirement is not complied with the officer having the suspect in custody must at once notify the *procureur*, who is required to direct the immediate interrogation of the suspect by the *juge d'instruction* or by a *juge* of the *Tribunal de Première Instance*. In default of such interrogation the *procureur* must straightway set the suspect at liberty. C. I. C. art 93, as amended by the Law of Dec. 8, 1897. His failure to do so may subject him to civil and criminal actions for false imprisonment. *Ibid.*

557. Law of Dec. 8, 1897, art. 3, 1897 BULLETIN DES LOIS, pt. 2, 1777.

558. *Ibid.*

559. This appointment will be made by the head (*bâtonnier*) of the local organization of *avocats* if such exists, otherwise by the president of the *Tribunal de Première Instance*. Law of Dec. 8, 1897, art. 3.

560. 3 GARRAUD, *op. cit. supra* note 1, at 41; 3 LE POITTEVIN, *op. cit. supra* note 74, at 243.

561. MIMIN, *op. cit. supra* note 530, at 139.

defense.⁵⁶² Accordingly, the general rule is that the *juge* may not question the suspect at the first appearance. Exceptions to this rule are (1) if there is an emergency due to the fact that a witness is in danger of death or that some evidence is about to disappear or that the *juge* has gone to the scene of the crime in case of a *flagrant délit*,⁵⁶³ or (2) if the suspect states that he does not desire counsel.⁵⁶⁴

The Law provides that counsel must be notified by a letter sent at least twenty-four hours before the *interrogatoire*.⁵⁶⁵ Under a strict construction of this provision it is possible that counsel may receive the letter of notification just before or even after the time set for the *interrogatoire*. Accordingly, in practice, the letter is sent forty-eight hours in advance.⁵⁶⁶ Counsel must also be given the opportunity the day preceding each *interrogatoire* to consult the record of the proceedings that have already occurred.⁵⁶⁷ He is thus in a position to advise his client before the *interrogatoire*. If the suspect is in custody, he is given the right to communicate freely with his counsel.⁵⁶⁸ The Law also provides that during the *interrogatoire* counsel may speak only when given permission by the *juge*.⁵⁶⁹

The question as to what rights are in fact accorded to the counsel of the suspect at the *interrogatoire* by the provisions of the Law that the suspect may be questioned only in the presence of his counsel and that the latter may speak only when permitted by the *juge* has been much discussed. It is clearly recognized that counsel may listen to the proceedings and take notes of them,⁵⁷⁰ but he may not advise his client how to answer the questions put to him.⁵⁷¹ With the permission of the *juge* he may make observations regarding the questions of the *juge* and the answers given to them, and he may put further questions to his client.⁵⁷² He may also ask for such clarification of the proceedings as he believes will be beneficial to the interests of his client.⁵⁷³ He

562. HERMELIN, *op. cit. supra* note 398, at 69.

563. Law of Dec. 8, 1897, art. 7, 1897 BULLETIN DES LOIS, pt. 2, 1777.

564. *Id.* art. 9. MIMIN, *op. cit. supra* note 530, at 159. The refusal by the suspect at the first appearance to have counsel does not prevent him from later claiming this privilege. CUCHE, *op. cit. supra* note 217, at 348.

565. Law of Dec. 8, 1897, art. 9, 1897 BULLETIN DES LOIS, pt. 2, 1777.

566. MIMIN, *op. cit. supra* note 530, at 142.

567. Law of Dec. 8, 1897, art. 10, 1897 BULLETIN DES LOIS, pt. 2, 1777.

568. *Id.* art. 10. When a suspect is in *détention préventive*, the *juge* has the power to forbid him to communicate orally or in writing with any person inside or outside the place of detention (3 GARRAUD, *op. cit. supra* note 1, at 143), except his counsel as provided by the Law of Dec. 8, 1897, art. 8, 1897 BULLETIN DES LOIS, pt. 2, 1777.

569. *Id.* art. 9.

570. 3 LE POITTEVIN, *op. cit. supra* note 74, at 296.

571. When the *projet* for the Law of Dec. 8, 1897, was discussed in the Senate, M. Dauphin stated the following: "It is recognized that when a question is put by the *juge d'instruction* counsel shall not have the right to say, 'Permit me to speak to my client so that I may tell him the answer.'" Cited by 1 LE POITTEVIN, C. I. C. ANNOTÉ, Law of Dec. 8, 1897, art. 9, n. 79, p. 367.

572. 3 LE POITTEVIN, *op. cit. supra* note 74, at 296.

573. HERMELIN, *op. cit. supra* note 398, at 171.

may advise his client regarding his rights and may oppose any illegal measures by the *juge*.⁵⁷⁴ His role is to keep a check on the conduct of the *juge*.⁵⁷⁵ While he may speak only with the permission of the *juge*, if this is refused, a note of the fact must be made in the *procès-verbal*,⁵⁷⁶ which may be considered by the court, in case the suspect is later brought to trial. Under the Law counsel may not interrupt the proceedings, but in practice this may occur.⁵⁷⁷ A *circulaire* issued by the Minister of Justice relative to the rights of counsel under the Law of December 8, 1897, states that "he does not have the right, by an intervention unceasingly renewed, to deprive the answers of his client, other suspects or the confronting witnesses of the spontaneity which is the best guarantee of their sincerity". The *circulaire* contained the further statement: "It is not impossible that the application of paragraph 3 of article 9 may give rise, in practice, to some conflicts which may be regrettable. They may be easily avoided if defendant's counsel and the *juge* are thoroughly imbued with the idea that they are collaborating in a common work and that their united efforts ought to be directed towards the speedy and clarifying manifestation of the truth."⁵⁷⁸

If counsel, notwithstanding the admonitions of the *juge*, should persist in interrupting or should whisper to his client the answer to an embarrassing question, it is stated that the *juge* should send a special report to the *procureur* with a view to disciplinary action.⁵⁷⁹ It has also been suggested that the *juge* may eject a recalcitrant counsel.⁵⁸⁰ The extent of counsel's participation in the examination conducted by the *juge d'instruction* will necessarily depend to a considerable extent upon the respective personalities and temperaments of the two individuals. Where the *juge* is skilful and aggressive and counsel is inexperienced and timid, the latter will play a much less important role than where the situation is reversed.

As already stated, the *juge*, upon the first appearance of the suspect, informs him that he may refuse to make any statements. It is generally recognized that this warning relates only to declarations made at this first appearance and has no application to the answering of questions put by the *juge* to the suspect at any subsequent appearance.⁵⁸¹ It became well settled before the enactment of the Law of December 8, 1897, that

574. GARRAUD ET LABORDE-LACOSTE, *op. cit. supra* note 491, at 835.

575. MORIZOT-THIBAUT, *op. cit. supra* note 20, at 376.

576. Law of Dec. 8, 1897, art. 9, 1897 BULLETIN DES LOIS, pt. 2, 1777.

577. MORIZOT-THIBAUT, *op. cit. supra* note 20, at 418.

578. Cited by BRÉGEAULT ET ALBANEL, *op. cit. supra* note 546, at 73.

579. MIMIN, *op. cit. supra* note 530, at 145.

580. *Ibid.*

581. MIMIN, *op. cit. supra* note 530, at 125; GOYET, *op. cit. supra* note 65, at 287. It has, however, been suggested that the warning applies to subsequent questioning of the suspect. BRÉGEAULT ET ALBANEL, *op. cit. supra* note 546, at 65.

if the suspect refuses to answer, the *juge* is provided with no means of compulsion,⁵⁸² although he may make appropriate "observations" to the suspect, and may postpone further questioning to another day.⁵⁸³ If the suspect persists in his refusal to answer questions, mention of this fact must be made in the *procès-verbal*,⁵⁸⁴ and if the suspect is brought to trial, the court may draw an unfavorable inference from the fact of such refusal.⁵⁸⁵ The refusal to answer questions, even if persisted in, will not delay or obstruct the other proceedings of the investigation, such as the hearing of witnesses.⁵⁸⁶

The *procureur* must be informed by the *juge d'instruction* of all that occurs at the various stages of the investigation by the *juge d'instruction*,⁵⁸⁷ but the almost universal opinion is that he may not legally be present during the interrogation of the suspect.⁵⁸⁸ Before the Law of December 8, 1897, there was some doubt regarding the right of the *procureur* in this respect, and, as already pointed out, the early *projets* for amending the *Code* provided for the presence of both the *procureur* and the *partie civile*, but this provision was not enacted. Garraud states that in practice the *procureur* "by an unjustified indulgence" is permitted to be present at the interrogation of a suspect.⁵⁸⁹ The author of the leading work on the *interrogatoire* by the *juge d'instruction* forcefully affirms that this statement is erroneous,⁵⁹⁰ and his view is supported by several other writers.⁵⁹¹ Following the *interrogatoire*, however, the complete record of the proceeding must be sent to the *procureur*.⁵⁹²

582. 2 FAUSTIN HÉLIE, *op. cit. supra* note 2, at 406; MORIZOT-THIBAUT, *op. cit. supra* note 20, at 410; MIMIN, *op. cit. supra* note 530, at 34.

583. 2 FAUSTIN HÉLIE, *op. cit. supra* note 2, at 406; 2 DUVERGER, MANUEL DES JUGES D'INSTRUCTION (1865) 266.

584. 2 DUVERGER, *op. cit. supra* note 583, at 266; CUMENGE, *op. cit. supra* note 397, at 204; MIMIN, *op. cit. supra* note 530, at 20.

585. "Without doubt in the actual state of our judicial practice, the refusal of the suspect to answer the questions of the *juge d'instruction* may create an unfavorable impression against him in the trial courts. . . ." Observation of the *Cour de Cassation* on the *projet* for the Law of Dec. 8, 1897, cited by OLIER, *op. cit. supra* note 554, at 104.

586. 2 FAUSTIN HÉLIE, *op. cit. supra* note 2, at 406; 2 DUVERGER, *op. cit. supra* note 583, at 267; MIMIN, *op. cit. supra* note 530, at 20.

587. C. I. C. art. 61.

588. BRÉGEAULT ET ALBANEL, *op. cit. supra* note 546, at 76; MASSON, *op. cit. supra* note 225, at 194; MIMIN, *op. cit. supra* note 530, at 111; 2 GARRAUD, *op. cit. supra* note 1, at 219; VIDAL, *op. cit. supra* note 272, at 929; GOYET, *op. cit. supra* note 65, at 312; 3 LE PORTEVIN, *op. cit. supra* note 74, at 245.

589. 2 GARRAUD, *op. cit. supra* note 1, at 219. To the same effect is VIDAL, *op. cit. supra* note 272, at 929. During the discussion in the Senate, on May 24, 1897, of the *projet* for the Law of Dec. 8, 1897, Senator Constans said: "As to the *procureur de la République*, we have not opened the door for him for the simple reason that it is already entirely open." Quoted in 1 LE PORTEVIN, C. I. C. ANNOTÉ, Law of Dec. 8, 1897, art. 9, n. 54, p. 364. In reply to this statement, M. Darlan, the Minister of Justice, said that he did not know of any instance where there was such a violation of the law. Cited in OLIER, *op. cit. supra* note 554, at 24.

590. MIMIN, *op. cit. supra* note 530, at 113.

591. OLIER, *op. cit. supra* note 554, at 24; BRÉGEAULT ET ALBANEL, *op. cit. supra* note 546, at 75.

592. C. I. C. art. 127, as amended by the Law of July 17, 1856.

Criticisms have at various times been expressed regarding the provision of the Law of December 8, 1897, giving the suspect the right to have counsel present during the *interrogatoire*. Thus it has been said that unnecessary delay results,⁵⁹³ particularly in cases where the charge is not serious or complicated,⁵⁹⁴ thereby lengthening the period that a defendant may be kept in *détention préventive*.⁵⁹⁵ It has also been said that the right to have counsel obstructs the ascertainment of the truth⁵⁹⁶ and increases the expenses of the investigation because of the number of notices that must be sent to counsel.⁵⁹⁷ The most general criticism is that a great advantage is given to wealthy suspects capable of employing experienced counsel who will give proper attention to their clients' interests.⁵⁹⁸ It has been stated that where suspects are unable to employ counsel, the lawyers who are appointed not infrequently fail to appear.⁵⁹⁹ The present writer is of the opinion, formed from the study of other authorities⁶⁰⁰ and from inquiries made in France, that these adverse criticisms are exaggerations.

An important provision of the Law of December 8, 1897, prohibits the *juge d'instruction*, who is also a *juge* of the *Tribunal de Première Instance*,⁶⁰¹ from participating in the trial of any case which he had previously investigated.⁶⁰²

6. Hearing of Witnesses

An important and usual feature of the investigation made by the *juge d'instruction* is the examination of witnesses. This, however, is not an obligatory proceeding and the *juge* may, if he sees fit, close his investigation without hearing any witnesses.⁶⁰³ Likewise, it is entirely discretionary with the *juge* to determine what witnesses he will examine, although requests for the calling of particular witnesses may be made by the *procureur*, the suspect and the *partie civile*.⁶⁰⁴ It seems to

593. 3 GARRAUD, *op. cit. supra* note 1, at 12.

594. BRÉGEAULT ET ALBANEL, *op. cit. supra* note 546, at 82.

595. BRÉGEAULT ET ALBANEL, *op. cit. supra* note 546, at 82; 3 GARRAUD, *op. cit. supra* note 1, at 12.

596. LEPAULLE, *op. cit. supra* note 324, at 65. The right of counsel to consult the record of the case the day before the *interrogatoire* has been criticized on the ground that it tends to frustrate the work of the *juge*. MIMIN, *op. cit. supra* note 530, at 146.

597. BRÉGEAULT ET ALBANEL, *op. cit. supra* note 546, at 83.

598. MASSON, *op. cit. supra* note 225, at 159; MORIZOT-THIBAUT, *op. cit. supra* note 20, at 385; 3 GARRAUD, *op. cit. supra* note 1, at 13.

599. MORIZOT-THIBAUT, *op. cit. supra* note 20, at 385.

600. See MIMIN, *op. cit. supra* note 530, at 5; DONNEDIEU DE VABRES, *op. cit. supra* note 296, at 115.

601. See *supra* p. 410.

602. Art. 1.

603. SIREY, RECUEIL GÉNÉRAL DES LOIS ET DES ARRÊTS, 1922 I, 188; 2 ROUX, *op. cit. supra* note 43, at 318.

604. HERMELIN, *op. cit. supra* note 398, at 149. The *juge d'instruction* ought to hear any witness on the demand of the *procureur*, the *partie civile* or the suspect unless there is a strong reason for not doing so. 2 MASSABIAU, *op. cit. supra* note 120, at 234. If, after the *procureur* has demanded that a witness be heard, the *juge* persists in his

be the general opinion that, except in case of a *flagrant délit*, a person who volunteers to testify as a witness may not be heard, for the reason that his testimony is likely to be biased.⁶⁰⁵ Witnesses may be called to testify not only regarding the facts of the alleged offense, but also the character of the suspect,⁶⁰⁶ this being an important consideration in the investigation.

The *Code* authorizes the *juge* to direct the *procureur* to issue an official order, to be served by a *huissier*, for the appearance of witnesses,⁶⁰⁷ but in practice, in order to avoid expense, the *juge* simply sends a letter of notification, either by post or by a police official.⁶⁰⁸ If a witness after a formal notification fails to appear, the *juge* may compel his appearance and may fine him not exceeding one hundred francs.⁶⁰⁹ However, if the witness can later satisfactorily explain his failure to appear, the fine may be remitted upon the recommendation of the *procureur*.⁶¹⁰ Upon the presentation of a physician's certificate that the witness is unable to appear the *juge* will go to his residence for the purpose of conducting the examination if he resides within a certain district;⁶¹¹ otherwise the *juge* will appoint another official to examine the witness.⁶¹² If a witness is in prison, the *juge* may examine him there⁶¹³ or have him brought to the *cabinet* of the *juge*.⁶¹⁴

Witnesses are sworn "to speak all the truth, nothing but the truth",⁶¹⁵ but false testimony before the *juge d'instruction* is not punishable, as is the case when a witness testifies falsely before a trial court.⁶¹⁶ Infants under fifteen years may not be sworn but may make unsworn statements⁶¹⁷ to the *juge*.⁶¹⁸ The same rule applies to persons who have been convicted of certain grades of offenses or have incurred other specified penalties.⁶¹⁹ A witness, who after appearing refuses to

refusal, he must make an *ordonnance*, from which the *procureur* may appeal to the *chambre d'accusation*. 4 LE POITTEVIN, *op. cit. supra* note 74, at 802.

605. 2 GARRAUD, *op. cit. supra* note 1, at 25.

606. 2 MASSABIAU, *op. cit. supra* note 120, at 234; 2 ROUX, *op. cit. supra* note 143, at 316.

607. Arts. 71 and 72.

608. GOYET, *op. cit. supra* note 65, at 290; 4 LE POITTEVIN, *op. cit. supra* note 74, at 791.

609. C. I. C. art. 80.

610. C. I. C. art. 81.

611. Within the *canton* of the *juge de paix* of the domicile of the *juge d'instruction*. C. I. C. art. 83.

612. If the witness resides outside the *canton*, the *juge* will appoint the *juge de paix* of the witness' *canton* to examine him, and, if outside the *arrondissement* of the *juge*, he will request the *juge* of the *arrondissement* in which the witness resides to act. C. I. C. arts 83 and 84.

613. CUMENGE, *op. cit. supra* note 397, at 165.

614. 4 LE POITTEVIN, *op. cit. supra* note 74, at 797.

615. C. I. C. art. 75.

616. CUMENGE, *op. cit. supra* note 397, at 178; 2 GARRAUD, *op. cit. supra* note 1, at 16 and 17; 2 MASSABIAU, *op. cit. supra* note 120, at 238; GOYET, *op. cit. supra* note 65, at 291.

617. These have less probative value than sworn testimony.

618. C. I. C. art. 79.

619. 2 MASSABIAU, *op. cit. supra* note 120, at 238; 4 LE POITTEVIN, *op. cit. supra* note 74, at 801.

testify, is subject to the same fine that might be imposed in case he had failed to appear.⁶²⁰ An exception to this rule exists in the case of certain groups of persons, such as lawyers and physicians, who cannot be compelled to reveal professional secrets.⁶²¹ There is some diversity of opinion as to whether a witness may justify his failure to testify on the ground that it would incriminate him, there being no constitutional or statutory provision against self-incrimination. While some writers contend that this justification should be allowed,⁶²² the decisions of the courts forbid it.⁶²³ Relationship by blood or marriage to the suspect or to the *partie civile* does not disqualify a person as a witness, but it may affect the weight of the testimony, and for this reason mention of the fact must be made in the *procès-verbal*.⁶²⁴

The *juge*, attended by the *greffier*, must examine the witnesses separately and outside the presence of the suspect.⁶²⁵ The requirement of separate examination is subject to the qualification that where there are variations or contradictions in the testimony of witnesses, they may be confronted and examined in each other's presence for the purpose of reconciling any differences.⁶²⁶ While the *Code* provides that the suspect is not to be present at the examination of witnesses,⁶²⁷ it is established that he may be compelled to appear for the purpose of being confronted with any witnesses.⁶²⁸ Counsel for the suspect may not be present except when the suspect is being confronted,⁶²⁹ nor may the *partie civile*.⁶³⁰ However, if the *partie civile* is being examined as a witness, he is entitled under a law enacted in 1921 to the presence of counsel during the examination who must be accorded the same priv-

620. DEGOIS, *op. cit. supra* note 144, at 567; 4 LE POITTEVIN, *op. cit. supra* note 74, at 793. If a person, who has publicly charged that a *crime* or *délit* has been committed and declared publicly that he knows the offenders or their accomplices, refuses to answer questions put to him by the *juge d'instruction* regarding his charge, he is guilty of a *délit* and may be punished by an imprisonment of six days to a year or a fine of 100 francs to 2,000 francs or both. C. I. C. art. 80, as amended by the Law of July 1, 1919.

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

622. DALLOZ, RECUEIL PÉRIODIQUE, 1863 I. 323n.; 2 ROUX, *op. cit. supra* note 43, at 317.

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

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

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

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

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

628. 2 GARRAUD, *op. cit. supra* note 1, at 112.

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

630. 2 DUVERGER, *op. cit. supra* note 583, at 188; CUMENGE, *op. cit. supra* note 397, at 179; OLIER, *op. cit. supra* note 554, at 30.

ileges as are granted to the counsel of the suspect during the *interrogatoire*.⁶³¹ It is stated positively that the *procureur* has no right to be present,⁶³² but the authorities differ as to whether this rule is observed in practice.⁶³³

The *Code* provides that the *juge* shall "hear" witnesses,⁶³⁴ and it is generally stated by writers on the subject that the examination of a witness is not by question and answer, but that he makes a spontaneous and uninterrupted statement after which the *juge* may put questions for the purpose of correction or clarification.⁶³⁵ It may be doubted whether this procedure always operates in practice. In the case of a witness testifying before a trial court the *Code* directs that he must testify without interruption,⁶³⁶ but it was observed by the present writer that when the President of the court happened to be aggressive and impatient, the witness did not progress far with his spontaneous testimony before he was subjected to the questioning of the President. The testimony of the witnesses must be oral and they may not present a written deposition, nor may they consult notes except in a complicated case involving figures or dates.⁶³⁷ The *juge* may recall and re-examine a witness as often as he considers proper for ascertaining the truth.⁶³⁸

When the testimony of the witness is completed the *juge* dictates a recital of it in the form of a deposition to the *greffier*. This constitutes the *procès-verbal*. It is read to the witness, who may have any error corrected.⁶³⁹ Upon his approval of the deposition, it is signed by the *juge*, the *greffier* and himself.⁶⁴⁰ This *procès-verbal* serves in part

631. Law of March 21, 1921, JOURNAL OFFICIEL (March 24, 1921) 3646, amending articles 3 and 10 of the Law of Dec. 8, 1897, 1897 BULLETIN DES LOIS, pt. 2, 1777. One of the reasons for the new Law has been stated as follows: "It too frequently happened that at the examination, when the suspect demanded the presence of counsel, the *partie civile*, the victim of the offense, was less protected than the suspect and might endanger his case by stupid answers to questions suggested by the lawyer of the suspect." CUCHE, *op. cit. supra* note 217, at 349.

632. 2 FAUSTIN HÉLIE, *op. cit. supra* note 2, at 373; CUMENGE, *op. cit. supra* note 397, at 180; 2 DUVERGER, *op. cit. supra* note 583, at 188; GOYET, *op. cit. supra* note 65, at 312. Article 80 of the C. I. C. provides that a witness who fails to appear for examination may, upon the recommendation of the *procureur*, be fined and compelled to appear upon the order of the *juge*. It has been argued that this section inferentially authorizes the presence of the *procureur* at the examination. CUMENGE, *op. cit. supra* note 397, at 180. The question whether the *procureur* may be present is discussed in LABORDE, *op. cit. supra* note 132, at 655.

633. That he is present, 2 GARRAUD, *op. cit. supra* note 1, at 220; VIDAL, *op. cit. supra* note 272, at 929. That he is not present, 2 MASSABIAU, *op. cit. supra* note 120, at 239.

634. C. I. C. art. 73.

635. CUMENGE, *op. cit. supra* note 397, at 187; MORIZOT-THIBAUT, *op. cit. supra* note 20, at 427; GOYET, *op. cit. supra* note 65, at 290; 4 LE POITTEVIN, *op. cit. supra* note 74, at 792.

636. C. I. C. art. 319.

637. CUMENGE, *op. cit. supra* note 397, at 184; CUCHE, *op. cit. supra* note 217, at 328.

638. 2 DUVERGER, *op. cit. supra* note 583, at 207; CUMENGE, *op. cit. supra* note 397, at 188.

639. DEGOIS, *op. cit. supra* note 144, at 568.

640. C. I. C. art. 76. This article provides that the *juge* and the *greffier* must sign each page of the deposition, and provides further that if the witness refuses to sign his deposition, mention of this fact must be made in the *procès-verbal*.

as a basis for the action of the *juge d'instruction* in disposing of the case and of the *chambre d'accusation* in deciding whether the case shall be brought to trial.⁶⁴¹ It is also useful to the suspect's counsel, who is furnished with a copy. If he considers that the examination of a witness has not been complete, he may demand that the witness be questioned further.⁶⁴² The preparation of the *procès-verbal* is an important and difficult proceeding, as the *juge* ought to reproduce as exactly as possible the testimony of the witness.⁶⁴³ In practice, however, he is not likely to accomplish this result. The personality of the *juge* frequently characterizes the recital of the witness' testimony, and it has been said, "all the witnesses speak the same language—that of the *juge*".⁶⁴⁴ In addition to the declarations of the witnesses, the *juge* may make note in the *procès-verbal* of their attitude and manner.⁶⁴⁵ A stenographic⁶⁴⁶ or phonographic record of the witness' testimony has been suggested as an improvement on the written deposition.⁶⁴⁷

While a failure on the part of the *juge* and the *greffier* to observe all the rules, prescribed in the *Code* for the examination of witnesses and the preparation of the *procès-verbal*, does not result in a nullification of the proceedings, it may affect the probative value of the witness' depositions and the *greffier* may be subject to a fine and the *juge* to a civil action by a person injured by the non-observance of any *Code* requirement.⁶⁴⁸

7. Experts

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

641. C. I. C. art. 222.

642. CUMENGE, *op. cit. supra* note 397, at 183.

643. MORIZOT-THIBAUT, *op. cit. supra* note 20, at 427.

644. ". . . the magistrate ought to analyze faithfully the depositions of the witnesses. His *procès-verbal* will then be an exact reproduction, a photograph, so to speak. This direction is difficult to observe, if one may judge by the common practice. . . . almost always in the *procès-verbaux* the witnesses speak the same language—that of the *juge*, the translator of their depositions." 2 GARRAUD, *op. cit. supra* note 1, at 113. To the same effect is MORIZOT-THIBAUT, *op. cit. supra* note 20, at 427. "To insist on reproducing the depositions in a style too correct and concise may prevent the magistrate from reproducing exactly what he has heard, may make him reject certain expressions which appear trivial, but which in reality give an exact idea of the examination, of the intelligence of the witness, and of the degree of credibility which ought to be accorded his deposition." CUMENGE, *op. cit. supra* note 397, at 191.

645. MIMIN, *op. cit. supra* note 530, at 101.

646. The written deposition is criticized and a stenographic report of the testimony recommended by LOCARD, *op. cit. supra* note 275, at 55. Opposition to a stenographic report of the witness' testimony has been expressed. MORIZOT-THIBAUT, *op. cit. supra* note 20, at 428. The question whether the testimony of the witness should be taken down stenographically is discussed in 2 GARRAUD, *op. cit. supra* note 1, at 114.

647. CUMENGE, *op. cit. supra* note 397, at 191.

648. C. I. C. art. 77.

study the matter involved and give an opinion regarding it.⁶⁴⁹ For example, it may be necessary to appoint a surgeon to perform an autopsy, a chemist to analyze the contents of a deceased person's stomach, a skilled accountant to examine books of account, an electrician to evaluate certain experiments, a psychiatrist to determine the mental condition of a suspect. The appointment of an expert is altogether discretionary with the *juge* so far as the suspect and the *partie civile* are concerned, and it is not necessary that they be informed of the appointment.⁶⁵⁰ The *procureur*, however, must be notified in all cases,⁶⁵¹ and he may of his own initiative demand that an expert be appointed and may appeal from an order of the *juge* refusing compliance.⁶⁵² The *juge* is in most cases allowed a wide choice in the selection of an expert. Each year the *Cour d'Appel* in every *ressort* prepares an official list of experts in various lines, notably medicine⁶⁵³ and chemistry, but it is only in the case of a medical expert, where the offense that is being investigated is not considered *flagrant*, that the *juge* is required to confine his choice to the prepared list.⁶⁵⁴

There is no provision in the *Code* fixing the number of experts who may be selected, but the Minister of Justice has recommended that only in an exceptional case, such as a particularly delicate autopsy, should as many as two be appointed.⁶⁵⁵ If there is a disagreement between the two, a third should be added. In most medico-legal cases it is the practice to appoint two or three experts.⁶⁵⁶ The amount of the fees to be paid experts in certain lines is fixed by law, but in the case of those who are not so included it is determined by the *juge*.⁶⁵⁷

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

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

650. I GARRAUD, *op. cit. supra* note 1, at 612. Because of abuses in the appointment of accountants the *juges d'instruction* are directed by the Minister of Justice to use the services of such experts only when they are "absolutely indispensable". *Circulaire* of June 16, 1926, cited in 2 LE POITTEVIN, *op. cit. supra* note 74, at 497.

651. C. I. C. art. 61, as amended by the Law of July 17, 1856.

652. HERMELIN, *op. cit. supra* note 398, at 138.

653. In order to be listed as an expert, a member of the medical profession must have practiced for five years or have received a diploma in "medical jurisprudence and psychiatry" from one of certain universities designated by law. 2 LE POITTEVIN, *op. cit. supra* note 74, at 507. It is provided by law that a medical expert must be a French citizen. Law of Nov. 30, 1892, art. 14, 1893 BULLETIN DES LOIS (XII sér.) pt. 1, 836.

654. GOYER, *op. cit. supra* note 65, at 293.

655. 2 LE POITTEVIN, *op. cit. supra* note 74, at 497, citing various *circulaires*.

656. I GARRAUD, *op. cit. supra* note 1, at 611.

657. 2 LE POITTEVIN, *op. cit. supra* note 74, at 502; Decree of Oct. 5, 1920, JOURNAL OFFICIEL (Oct. 7, 1920) 15018.

be answered.⁶⁵⁸ Members of the medical profession are required to accept appointments as experts.⁶⁵⁹ Other persons are under no legal obligation to serve except where there is an emergency or a *flagrant délit*, in both of which cases refusal to serve is punishable by a fine.⁶⁶⁰

The position of an expert appointed by the *juge d'instruction* is not that of a witness.⁶⁶¹ This is exemplified by the oath taken by the experts who swear "to make their report and to give their opinion on their honor and conscience" ⁶⁶² while the witness swears "to speak the truth and nothing but the truth".⁶⁶³ If the expert is called at the trial, he then becomes a witness and takes the regular oath of a witness.⁶⁶⁴ The expert may be neither challenged nor impeached.⁶⁶⁵ He exercises a quasi-judicial function in assisting the *juge* in ascertaining the truth and arriving at a decision based upon it.⁶⁶⁶

An expert may not delegate any of his functions, but it may become necessary for him to secure the opinion of another expert; for example, a surgeon called to give an opinion on the result of a wound may require the report of an x-ray specialist.⁶⁶⁷ While the expert cannot be held responsible for any mistakes of fact in his findings or errors of judgment in his opinions, he is liable to anyone who is injured by fraud or deceit on his part.⁶⁶⁸

The expert makes his investigation free from any supervision or control by the suspect or the *partie civile*, who do not have the right to appoint experts to participate in the investigation, except in a few exceptional cases, notably prosecutions for fraud in the sale of goods, and for adulteration of food and farm products.⁶⁶⁹ In such cases it is provided that the *procureur* shall appoint, from the lists prepared by the courts, two chemical experts, one selected by the *juge d'instruction* and the other by the suspect. The experts may make their analyses together or separately as they please. If the findings or conclusions of the experts differ, they may select a third expert, whose opinion will be decisive. In

658. I GARRAUD, *op. cit. supra* note 1, at 608.

659. Law of Nov. 30, 1892, art. 23, 1893 BULLETIN DES LOIS (XII sér.) pt. 1, 836, 838.

660. C. P. art. 475.

661. CUMENGE, *op. cit. supra* note 397, at 143.

662. C. I. C. art. 44.

663. C. I. C. art. 75.

664. I GARRAUD, *op. cit. supra* note 1, at 621.

665. *Id.* at 595.

666. *Id.* at 592. The Minister of Justice in 1930 called to the attention of the *juges d'instruction* the fact that the rôle of the expert consists only in making findings and drawing conclusions under the control and direction of the *juge*, who cannot without neglect of duty leave to the expert the conduct of the investigation. *Circulaire* of Apr. 3, 1930, cited by LE POITTEVIN, *op. cit. supra* note 74, *supplément* at 176.

667. 2 LE POITTEVIN, *op. cit. supra* note 74, at 501.

668. I GARRAUD, *op. cit. supra* note 1, at 597.

669. Law of Aug. 1, 1905, art. 12, 1905 BULLETIN DES LOIS (XII sér.) pt. 2, 811, 815.

case the two experts cannot agree on a third, the choice will be made by the President of the *Tribunal de Première Instance*.⁶⁷⁰

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

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

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

670. Decree of July 31, 1906, arts. 17-20, 1906 BULLETIN DES LOIS (XII sér.) pt. 2, 2270, 2274.

671. DEHESDIN, DE L'EXPERTISE EN MATIÈRE CRIMINELLE (Thesis Paris, 1901) 100; MESLIER, DES EXPERTISES EN MATIÈRE CRIMINELLE (Thesis Paris, 1901) 158; TCHERNOFF ET SCHONFELD, EXPERTISES JUDICIAIRES EN MATIÈRE PÉNALE (1932) 192.

672. 3 GARRAUD, *op. cit. supra* note 1, at 84n.

673. 2 DUVERGER, *op. cit. supra* note 583, at 503; MESLIER, *op. cit. supra* note 671, at 159; 2 MASSABIAU, *op. cit. supra* note 120, at 125.

674. DEHESDIN, *op. cit. supra* note 671, at 100; TCHERNOFF ET SCHONFELD, *op. cit. supra* note 671, at 192.

675. 2 MASSABIAU, *op. cit. supra* note 120, at 125, n. 1.

676. LABORDE, *op. cit. supra* note 132, at 650.

677. DEHESDIN, *op. cit. supra* note 671, at 102.

678. TCHERNOFF ET SCHONFELD, *op. cit. supra* note 671, at 54.

679. MORIZOT-THIBAUT, *op. cit. supra* note 20, at 459. During the spring of 1932, when the present writer was in Paris, an engineer, named Dunikowski, was in custody on a charge of obtaining money on the false pretense that he could extract gold in paying quantities from sea water. The *juge d'instruction* who was in charge of the investigation appointed several experts to study and report upon Dunikowski's claims. At various intervals over a period of several months Dunikowski demonstrated his process to the experts. The *juge d'instruction* was sometimes present during the demonstrations and questioned Dunikowski, who was accordingly permitted to have counsel present, as provided by the Law of Dec. 8, 1897.

680. TCHERNOFF ET SCHONFELD, *op. cit. supra* note 671, at 56.

681. 2 LE POITTEVIN, *op. cit. supra* note 74, at 501.

ing upon the circumstances of the case. If there are several experts, they join in a report.⁶⁸² The report should be expressed in ordinary language and technical terms should be avoided as far as possible, particularly in setting forth the conclusions.⁶⁸³ The *juge* is not compelled by law to adopt the conclusions of the report, but in practice, generally through necessity, he does so. He should, however, seek to make a personal evaluation.⁶⁸⁴

A copy of the expert's report is furnished the suspect, and he may at his own expense employ another expert, whose function is limited to a discussion, from a scientific point of view, of the opinion of the *juge's* expert, based upon the findings of fact set forth in his report.⁶⁸⁵ He is not given an opportunity to check the operations on which the report is based, but must accept these as conclusive. Any opinion he may express on the report is not under oath and has little evidentiary value.⁶⁸⁶

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

In practice the appointment of experts by the *juge d'instruction* has not always produced satisfactory results, and many criticisms have been directed at the system by modern writers. Thus it is stated that incompetent experts are not infrequently appointed,⁶⁸⁷ and that this condition is due in part to the difficulty of securing properly qualified experts because of the small fees allowed.⁶⁸⁸ The fees received by medical experts are notably inadequate.⁶⁸⁹ The practice of appointing a single expert is also criticized, it being pointed out that the risk of error is lessened when several are chosen.⁶⁹⁰ The most common criticism, however, is directed at the lack of any supervision by the suspect of

682. I GARRAUD, *op. cit. supra* note 1, at 627.

683. I GARRAUD, *op. cit. supra* note 1, at 629.

684. I GARRAUD, *op. cit. supra* note 1, at 632. "The expert is not an arbiter, for arbitration involves a judgment." TCHERNOFF ET SCHONFELD, *op. cit. supra* note 671, at 14.

685. I GARRAUD, *op. cit. supra* note 1, at 613.

686. *Ibid.*

687. I GARRAUD, *op. cit. supra* note 1, at 599; MORIZOT-THIBAUT, *op. cit. supra* note 20, at 459; LAGNEAU, *DE L'EXPERTISE À BASE SCIENTIFIQUE COMME MOYEN DE PREUVE EN MATIÈRE CRIMINELLE* (Thesis Paris, 1934) 163.

688. CUMENGE, *op. cit. supra* note 397, at 147.

689. TCHERNOFF ET SCHONFELD, *op. cit. supra* note 671, at 162.

690. LAGNEAU, *op. cit. supra* note 687, at 157.

the operations of the experts,⁶⁹¹ who are too much inclined to favor the prosecution.⁶⁹²

Various recommendations for improving both the system and practice of appointing experts have been advanced. It has been proposed that the suspect should be given the right to appoint an expert, who would attend and supervise the operations of the experts chosen by the *juge*.⁶⁹³ Garraud would permit the *procureur*, the suspect and the *partie civile* to be present or to be represented at the investigations conducted by the expert appointed by the *juge* and would have his findings and conclusions submitted for review by a body of *superarbitres* composed of a selected group of specialists in the various fields.⁶⁹⁴ It has also been recommended that the fees of the experts be increased,⁶⁹⁵ and that experts who refuse to serve shall be subject to the same penalties as witnesses who fail to appear.⁶⁹⁶

A proposal which has been forcefully presented would give to the suspect the right to choose an expert who would occupy a position corresponding to that of the expert appointed by the *juge*, in which case the two experts would join in conducting the various operations, would discuss their findings and conclusions, and, in case of disagreement, would have joined with them a third expert.⁶⁹⁷ This is known as the *expertise contradictoire*.⁶⁹⁸ There is a difference of opinion among the proponents of the system of *expertise contradictoire* as to the method of selecting a third expert if the two originally selected disagree. The following methods have been suggested: (1) The two experts who are in disagreement will select a third. (2) The third expert will be selected by the *juge* who ordered the expert investigation. (3) The third expert will be designated by the governing body of the appropriate association

691. MORIZOT-THIBAUT, *op. cit. supra* note 20, at 459.

692. I GARRAUD, *op. cit. supra* note 1, at 613; MESLIER, *op. cit. supra* note 671, at 296-298.

693. CUMENGE, *op. cit. supra* note 397, at 149. "For safeguarding the interests of the suspect, it will be sufficient that the operations of the appointed experts be under the surveillance of a representative chosen by him or for him. The experts appointed by the *juge d'instruction* will do the work and form the conclusions, but alongside them, and taking the same oath as they, will be placed an expert chosen by the suspect from the annual list, whose function will consist in supervising his associates, in requiring of them the operations which he believes useful for establishing the truth, and who will record his comments at the bottom of the *procès-verbal* or after the report." HERMELIN, *op. cit. supra* note 398, at 139.

694. I GARRAUD, *op. cit. supra* note 1, at 615.

695. MORIZOT-THIBAUT, *op. cit. supra* note 20, at 466.

696. MASSON, *op. cit. supra* note 225, at 255.

697. GENESTEIX, L'EXPERTISE CRIMINELLE (Thesis Paris, 1900) 106; LAGNEAU, *op. cit. supra* note 687, at 160.

698. MORIZOT-THIBAUT, *op. cit. supra* note 20, at 463. "There are those who oppose the *expertise contradictoire*. Their principal argument is that the *expertise* gets its value chiefly from the qualifications of the expert chosen, the opinion of one good expert having more value than that of two bad ones." LAGNEAU, *op. cit. supra* note 687, at 160.

of professional experts.⁶⁹⁹ As a variant of the *expertise contradictoire* it has been suggested that both the suspect and the *partie civile* be permitted to select experts.⁷⁰⁰

8. Reconstitution

A method of investigation frequently employed is the reconstruction (*reconstitution*) of the crime at the place where it occurred.⁷⁰¹ Sometimes the crime is enacted by witnesses assisted by police officers in the presence of the suspect and sometimes the suspect is induced to play the principal part in the drama. The purposes of the *reconstitution* are to place the witnesses in the actual setting of the crime for the enlightenment of the *juge*, to call forth admissions or a confession from the suspect,⁷⁰² and sometimes to verify a confession already made.⁷⁰³ A man who was suspected of having participated in the robbing of a bank was conducted to the scene of the crime where he was placed before the bank armed with a carbine and wearing a cloak for the purpose of reconstructing the crime according to the testimony of the witnesses.⁷⁰⁴

A proceeding somewhat similar to the *reconstitution* is the confrontation of a suspected murderer with the corpse of his victim.⁷⁰⁵ *Juges d'instruction* have been instructed by the Minister of Justice to employ this method of investigation only when absolutely necessary to discover the truth.⁷⁰⁶

9. Secrecy of the Investigation.

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

699. LAGNEAU, *op. cit. supra* note 687, at 163.

700. MASSON, *op. cit. supra* note 225, at 255.

701. 3 GARRAUD, *op. cit. supra* note 1, at 197; CUCHE, *op. cit. supra* note 217, at 333.

702. 3 GARRAUD, *op. cit. supra* note 1, at 197. "Frequently when the case is important the complainant and witnesses are taken for purposes of clarification to the scene of the crime. It is an excellent method. Many uncertain indications are made definite; many recollections are awakened by the association of ideas; particularly many improbabilities of the recital and physical impossibilities become apparent. If the suspect is taken along, his facial expression will be of the greatest interest." LOCARD, *op. cit. supra* note 254, at 112.

703. GRIERSON, *LA POLICE JUDICIAIRE FRANÇAISE* (1935) 24, 27.

704. *Id.* at 44.

705. This practice originated in the ordeal. 3 GARRAUD, *op. cit. supra* note 1, at 197. "This sight may inspire a guilty person with overwhelming remorse and draw from him a confession which he will let escape in the first vivid emotions, before he has had time to appreciate his danger and to free himself from the agitation produced by the consciousness of his crime or to fortify himself with the hope of escaping conviction and obtaining exemption from punishment." 2 DUVERGER, *op. cit. supra* note 583, at 79.

706. *Circulaire*, Mar. 6, 1901, cited in 3 GARRAUD, *op. cit. supra* note 1, at 197. "The purpose of this method of investigation, in the field of legal proof, was either to furnish, by the confusion, the emotion or the pallor of the accused person in the presence of the corpse of his victim, information of which the *juge d'instruction* might take advantage or to provoke a confession from the suspect. To-day it is recognized that this ordeal, the results of which are quite different according to the temperament and sensibility of the criminal, has more disadvantages than advantages." *Ibid.*

struction that so far as the public is concerned it should be secret.⁷⁰⁷ One exception to this rule is found in the right of the *juge* to make such disclosures as he considers proper to facilitate his investigation, for example to enable him to determine the identity of a person who has been killed.⁷⁰⁸ Another exception occurs in the case of the *reconstitution* of an offense which occurred in a public place. In such a case the public attends in large numbers and the newspapers contain graphic accounts, sometimes with photographs, of the proceeding. While the public is rigorously excluded from the *cabinet* of the *juge d'instruction*, the rule of secrecy is altogether ineffective in preventing the press from publishing reports of the proceedings conducted by the *juge*. Newspaper reporters obtain, through attendants and petty officials at the *Palais de Justice*, the names of witnesses and suspects whom they then interview regarding their testimony before the *juge*.⁷⁰⁹ They also obtain information regarding the proceedings from police officials,⁷¹⁰ experts,⁷¹¹ lawyers,⁷¹² and even the *juges d'instruction* themselves.⁷¹³ Not only do the newspapers print reports of the proceedings in the *cabinet* of the *juge d'instruction*, but they also conduct independent investigations during which the scene of the crime is visited and witnesses and suspects interviewed.⁷¹⁴ There has been much criticism of the existing situation of theoretical secrecy and actual semi-publicity, and the following proposals for change have been made: (1) to punish those who publish reports of any proceedings during the preliminary investigation,⁷¹⁵ and (2) to open all the proceedings to the public.⁷¹⁶

10. *Délégation*

a. In general

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

707. 2 FAUSTIN HÉLIE, *op. cit. supra* note 2, at 352; 1 DUVERGER, *op. cit. supra* note 583, at 453; 3 GARRAUD, *op. cit. supra* note 1, at 16; GOYET, *op. cit. supra* note 65, at 285. The requirement of secrecy in case of the *interrogatoire* has survived from the express provisions of the *Ordonnances* of 1539 and 1670. MIMIN, *op. cit. supra* note 530, at 108.

708. 3 GARRAUD, *op. cit. supra* note 1, at 200; 2 MASSABIAU, *op. cit. supra* note 120, at 257.

709. OLIER, *op. cit. supra* note 554, at 301; MORIZOT-THIBAUT, *op. cit. supra* note 20, at 357; 3 GARRAUD, *op. cit. supra* note 1, at 16.

710. OLIER, *op. cit. supra* note 554, at 311; SIFNÉOS, *op. cit. supra* note 63, at 242.

711. TCHERNOFF ET SCHONFELD, *op. cit. supra* note 671, at 53.

712. BRÉGEAULT ET ALBANEL, *op. cit. supra* note 546, at 75.

713. *Id.* at 75; MASSON, *op. cit. supra* note 225, at 48. Some *juges* issue *communiqués* to the press. Henry, *La Réforme du Statut du Juge d'Instruction*, DALLOZ, RECUEIL HEBDOMADAIRE DE JURISPRUDENCE (1935) *Chronique*, 73, 76.

714. 3 GARRAUD, *op. cit. supra* note 1, at 16; VIDAL, *op. cit. supra* note 272, at 925.

715. OLIER, *op. cit. supra* note 554, at 31.

716. 1 HERMELIN, *op. cit. supra* note 398, at 52; 3 GARRAUD, *op. cit. supra* note 1, at 17.

mentators. The *Code* provides that where a witness, who has been certified by a physician as unable to appear in answer to a subpoena issued by a *juge d'instruction*, resides outside the *canton* in which the *juge* sits, he may delegate the hearing of this witness to a *juge de paix* of the *canton* in which the witness resides, and where the witness resides in another *arrondissement*, the *juge* must authorize a *juge d'instruction* of the latter *arrondissement* to conduct the hearing of the witness.⁷¹⁷ The *Code* further provided, until amended in 1933, that the *juge* must delegate the conduct of a *perquisition* in another *arrondissement* to a *juge d'instruction* of the latter place.⁷¹⁸ The delegation must be made by a formal order, known as a *commission rogatoire*. This should specify the name, title and address of the delegated official and should set forth precisely the functions to be performed by him.⁷¹⁹ For example, where the *commission rogatoire* is issued for the hearing of a witness it should contain a recital of the facts regarding which he is to testify⁷²⁰ and also the questions which should be put to him.⁷²¹

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

When an official is conducting an *interrogatoire* under a *commission rogatoire* he should observe the requirements of the Law of December 8, 1897, regarding the presence and rights of counsel.⁷²⁶ For this reason it became customary to delegate *interrogatoires* only to *juges d'instruction* and *juges de paix*, since it is considered beneath the dignity of lawyers to appear before inferior officials of the *police judiciaire*, such as *commissaires de police*.⁷²⁷ This objection does not apply to the dele-

717. Arts. 83 and 84.

718. Art. 90.

719. 2 MASSABIAU, *op. cit. supra* note 120, at 249; 1 LE POITTEVIN, *op. cit. supra* note 74, at 876.

720. CUMENGE, *op. cit. supra* note 397, at 221.

721. CUCHE, *op. cit. supra* note 217, at 351.

722. 3 GARRAUD, *op. cit. supra* note 1, at 289; BASTIDE, DÉLÉGATION EN DROIT PÉNAL FRANÇAIS (1914) 48; GOYET, *op. cit. supra* note 65, at 294; 1 LE POITTEVIN, *op. cit. supra* note 74, at 876.

723. 1 LE POITTEVIN, *op. cit. supra* note 74, at 875.

724. 3 GARRAUD, *op. cit. supra* note 1, at 288; BASTIDE, *op. cit. supra* note 722, at 47; GOYET, *op. cit. supra* note 65, at 296; 1 LE POITTEVIN, *op. cit. supra* note 74, at 877.

725. 3 GARRAUD, *op. cit. supra* note 1, at 288; LABORDE, *op. cit. supra* note 132, at 701; BASTIDE, *op. cit. supra* note 722, at 158.

726. 3 GARRAUD, *op. cit. supra* note 1, at 82; BASTIDE, *op. cit. supra* note 722, at 187; GOYET, *op. cit. supra* note 65, at 297.

727. PASCAL, *op. cit. supra* note 216, at 56; MIMIN, *op. cit. supra* note 530, at 81.

gation of the authority to hear the suspect at his first appearance before the *juge*, since there is no right to counsel at this proceeding.⁷²⁸

The general rule is that the issuing of a *mandat* may not be delegated,⁷²⁹ although it is recognized that where a *commission rogatoire* has been directed to a *juge d'instruction* to conduct an *interrogatoire*, he may as a necessary incident, for the purpose of securing the presence of the suspect, issue a *mandat de comparution*.⁷³⁰ Sometimes the *juge* will send with his *commission rogatoire* for an *interrogatoire* a *mandat d'amener* with a direction that it be executed if necessary, but this is considered an improper practice.⁷³¹ If, during the course of the *interrogatoire*, the delegated *juge* deems it advisable that the suspect be committed to custody, some authorities state that this *juge* may issue a *mandat de dépôt*.⁷³² On the other hand, it has been stated that in such case the delegating *juge* should be notified, and that he should issue the *mandat*.⁷³³

Contrary to the requirement that the *commission rogatoire* should contain a precise statement of the function to be performed, the practice developed of sending to *commissaires de police* general delegations under which they might conduct *perquisitions*, examine witnesses and even interrogate suspects.⁷³⁴ While it is recognized that by reason of the excessive amount of work to be done the *juges d'instruction* are unable to perform personally all their functions as contemplated by the *Code*,⁷³⁵ yet the frequency and extent of the delegations has been the subject of severe criticism.⁷³⁶

728. PASCAL, *op. cit. supra* note 216, at 55.

729. 2 FAUSTIN HÉLIE, *op. cit. supra* note 2, at 428; 2 ROUX, *op. cit. supra* note 43, at 343.

730. 3 GARRAUD, *op. cit. supra* note 1, at 96; BASTIDE, *op. cit. supra* note 722, at 76; GOYET, *op. cit. supra* note 65, at 294; MIMIN, *op. cit. supra* note 530, at 80. Some writers state that the issuing of a *mandat de comparution* may be delegated. 2 MASSABIAU, *op. cit. supra* note 120, at 249; DEGOIS, *op. cit. supra* note 144, at 571. There is also authority for the proposition that if the suspect fails to appear upon this *mandat*, the *juge* may then issue a *mandat d'amener*. 3 GARRAUD, *op. cit. supra* note 1, at 96; GOYET, *op. cit. supra* note 65, at 295; MIMIN, *op. cit. supra* note 530, at 80; 1 LE POITTEVIN, *op. cit. supra* note 74, at 873. In such a situation the delegating *juge*, after being notified by telegraph, may issue the *mandat*. BASTIDE, *op. cit. supra* note 722, at 73. It has, however, been categorically stated that the issuance of a *mandat d'amener* may not be delegated. 2 MASSABIAU, *op. cit. supra* note 120, at 249; LABORDE, *op. cit. supra* note 132, at 701; VIDAL, *op. cit. supra* note 272, at 923; BASTIDE, *op. cit. supra* note 722, at 75.

731. BASTIDE, *op. cit. supra* note 722, at 66.

732. 3 GARRAUD, *op. cit. supra* note 1, at 96; 1 LE POITTEVIN, *op. cit. supra* note 74, at 874.

733. AGULHON, MANUEL PRATIQUE DU JUGE D'INSTRUCTION (1924) 97.

734. *Id.* at 158; SIFNÉOS, *op. cit. supra* note 63, at 182.

735. MORIZOT-THIBAUT, *op. cit. supra* note 20, at 533; CUCHE, *op. cit. supra* note 217, at 351; MAGNOL, *op. cit. supra* note 431, at 15.

736. LABORDE, *op. cit. supra* note 132, at 701; SIFNÉOS, *op. cit. supra* note 63, at 181 *et seq.*; MORIZOT-THIBAUT, *op. cit. supra* note 20, at 527; 2 ROUX, *op. cit. supra* note 43, at 342.

b. *Délégation*—After 1933

A law enacted in 1933 specifically prohibited the delegation of an *interrogatoire* and provided that only another *juge d'instruction*, a *juge de paix* or another *juge* of the court of which the *juge d'instruction* is a member may be delegated to perform the other functions of the *juge*, with the exception of a *saisie*, which other officers of the *police judiciaire* may be authorized to make.⁷³⁷ The following year the provision of the Law of February 7, 1933, prohibiting the delegation of the *interrogatoire*, was repealed⁷³⁸ because of the expense of bringing suspects from a distance, the difficulty of interrogating several suspects at one time and the impossibility under the law of interrogating a suspect who resides outside the *arrondissement* and who is too ill to travel. The necessity of remedying this situation was regarded as so pressing that an emergency was declared and the law was passed the day following its introduction.⁷³⁹ In 1935 the power of the *juge* to delegate was re-extended to include all the proceedings of his investigation, and he was authorized to commission any officers of the *police judiciaire* to act for him, except in case of an *interrogatoire* where he may designate only the three *juges* named in the Law of February 8, 1933.⁷⁴⁰ The effect of the Law of March 25, 1935 is to codify the practice existing before 1933 in all respects except that the *juge* may not delegate an *interrogatoire* to any officers of the *police judiciaire*, who are designated as assistants of the *procureur*, other than a *juge de paix*. The chief practical effect of this exception is to prohibit the *juge* from authorizing a *commissaire de police* to conduct an *interrogatoire*.

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

When the *juge d'instruction* has completed his investigation, he must send a report of the proceedings with his conclusions thereon to the *procureur*⁷⁴¹ in the form of an *ordonnance*.⁷⁴² Within three days the *procureur* must make recommendations to the *juge* regarding the action to be taken,⁷⁴³ but the *juge* is not bound to follow such recommendations.⁷⁴⁴ If the *juge* concludes from all the evidence that no

737. C. I. C. art. 90, as amended by the Law of Feb. 7, 1933, art. 6.

738. Law of July 9, 1934, JOURNAL OFFICIEL (July 11, 1934) 6994.

739. DALLOZ, RECUEIL PÉRIODIQUE, 1934 IV. 419.

740. C. I. C. art. 90, as amended by the Law of March 25, 1935, art. 4. The power of making *perquisitions* when authorized by a *juge d'instruction* was thereby restored to the other officers of the *police judiciaire* so as to permit a number of *perquisitions* to be conducted in different places at the same time and for the further reason that these officials are much better qualified by aptitude and experience for this service than the *juges de paix*. SIREY, RECUEIL GÉNÉRAL, 1935 V. 1481.

741. C. I. C. art. 127, as amended by the Law of July 17, 1856.

742. *Ordonnance de soit communiqué*. 3 LE POITTEVIN, *op. cit. supra* note 74, at 928.

743. C. I. C. art. 127, as amended by the Law of July 17, 1856.

744. 3 LE POITTEVIN, *op. cit. supra* note 74, at 247.

offense was committed or that there is not sufficient ground for holding the suspect, he will issue an *ordonnance de non-lieu à poursuivre*,⁷⁴⁵ and if the suspect has been arrested, the *juge* will order that he will be immediately set at liberty.⁷⁴⁶ The order of the *juge* discharging the suspect, after the period for an appeal has expired, becomes definitive so that no new prosecution upon the same facts may be instituted by any party.⁷⁴⁷

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

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

[To be concluded.⁷⁵⁵]

745. Generally referred to simply as *ordonnance de non-lieu*. Forms of the *ordonnances* are given in 3 LE POITTEVIN, *op. cit. supra* note 74, at 938 *et seq.*

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

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

748. GOYET, *op. cit. supra* note 65, at 315. Also termed *ordonnance de renvoi*. 3 LE POITTEVIN, *op. cit. supra* note 74, at 939.

749. GOYET, *op. cit. supra* note 65, at 315.

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

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

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

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

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

755. The final installment of this article will appear in the June number of the REVIEW.