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# Prescription of Criminal Prosecutions in Louisiana

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## Prescription of Criminal Prosecutions in Louisiana

Articles 8 and 9 of the Louisiana Code of Criminal Procedure<sup>1</sup> provide two major prescriptive periods for criminal prosecutions: a one-year period within which a formal charge must be filed, and a three-year period after the filing of such a charge, within which the accused must be brought to trial. The object of this comment is to show the court's interpretation of the provisions establishing these two prescriptive periods.<sup>2</sup>

### *Prescription on Filing the Charge*

Article 8 provides in part that:

"No person shall be prosecuted, tried<sup>3</sup> or punished. . . unless the indictment, information, or affidavit for the same be found or filed within one year after the offense shall have been made known to the judge, district attorney or grand jury having jurisdiction. . . ."<sup>4</sup>

Both the prosecution for the seven major crimes enumerated in Article 8<sup>5</sup> and the prosecution and conviction for a lesser and included crime under an indictment charging one of the seven crimes are excepted from this one-year prescription, in effect making the crimes imprescriptible.<sup>6</sup> The one-year prescriptive period begins to run as to other crimes<sup>7</sup> when the authorities

1. LA. R.S. 15:8, 15:9 (1950). These limitations are strictly procedural. *State v. Bussa*, 176 La. 87, 145 So. 276 (1933); *State v. Rodosta*, 173 La. 623, 138 So. 124 (1931). See CLARK, HANDBOOK OF CRIMINAL PROCEDURE 149 *et seq.* (2d ed. 1918).

2. See other Louisiana statutes regarding prescription of criminal actions: LA. R.S. 15:81 (1950), time for release of prisoner arrested without warrant; LA. R.S. 15:168 (1950), discharge of persons arrested and detained pending extradition; LA. R.S. 15:529.1 (1950), habitual offender law; LA. R.S. 30:51 (1950), prescription of penalties for violation of Conservation Act.

3. The article protects accused against conviction and relieves him of being tried. *State v. Sullivan*, 159 La. 589, 105 So. 631 (1925).

4. LA. R.S. 15:8 (1950).

5. Murder, aggravated rape, aggravated kidnapping, aggravated arson, aggravated burglary, armed robbery, and treason. LA. R.S. 15:8 (1950).

6. LA. R.S. 15:8 (1950). For example, although an indictment for manslaughter has prescribed, a conviction for that crime will be sustained under an indictment for murder.

7. LA. R.S. 15:8 (1950). Fines and forfeitures must be charged within six months of their incurrance. See also LA. R.S. 30:51 (1950). Where the act is punishable by fine or imprisonment, prosecution is governed by the one-year prescription. *State v. Richard*, 123 La. 179, 48 So. 880 (1909). Where prison term is a consequence of failure to pay fine, the six-months period is applicable. *State v. Pujol*, 180 La. 82, 156 So. 182 (1934); *State v. Rhodes*, 150 La. 1064, 91 So. 512 (1922); *State v. Courlas*, 134 La. 364, 64 So. 141 (1913); *State v. Jumel*, 13 La. Ann. 399 (1858). For applicability of the statute in civil matters where a fine or forfeiture is imposed, see *McHugh v. Placid Oil Co.*, 206 La. 511, 19 So.2d 221 (1944).

acquire actual knowledge of who committed the offense<sup>8</sup> or when they acquire knowledge sufficient to put them on inquiry.<sup>9</sup> If an indictment is found more than a year after the alleged date of the offense, the state must show in the indictment that the offense has not prescribed.<sup>10</sup> This may be done by alleging that the one-year prescription began to run only when the offense was made known to a competent authority within the preceding year, or by showing that prescription was interrupted either by a prior, timely charge, or by the accused's flight from justice.

Where an indictment shows that the offense was committed more than a year prior to charging the accused, the allegations sufficient to negative prescription may vary. For example, the court has held sufficient the allegation that the offense had "just" come to the knowledge of the appropriate officer.<sup>11</sup> Similarly, the court has considered adequate the allegation that the offense was not known to the proper authorities "until June" of the year in which the information was filed.<sup>12</sup> In another case, a divided court held that the words "*yet more than one year has not elapsed*" meant "*within one year*."<sup>13</sup> The date the offense became known should be alleged where available, and the court has suggested that the indictment should contain the averment that it is filed within one year after the offense was made known.<sup>14</sup>

To negative prescription by alleging that a prior indictment had been filed, the state must show the timeliness of the first indictment with a full statement of the offense previously

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8. *State v. Hanks*, 38 La. Ann. 468 (1886).

9. *State v. Stanton*, 209 La. 457, 24 So.2d 819 (1946); *State v. Young*, 194 La. 1061, 195 So. 539 (1940). "If the officer charged with the duty of instituting the prosecution is permitted to negative prescription by merely stating he did not have actual knowledge of the commission of the offense, such a holding would, in a large measure and for all practical reasons, nullify the effect of this law." *State v. Oliver*, 196 La. 659, 670, 199 So. 793, 797 (1941).

Information given to the assistant district attorneys is sufficient to put the district attorney on inquiry. *State v. Brocato*, 205 La. 1019, 18 So.2d 602 (1944). Knowledge by the sheriff and his deputies is not sufficient to start running of prescription. *State v. Stanton*, 209 La. 457, 24 So.2d 819 (1946).

10. *State v. Jones*, 209 La. 394, 24 So.2d 627 (1945); *State v. Gehlbach*, 205 La. 340, 17 So.2d 349 (1943); *State v. Oliver*, 193 La. 1084, 192 So. 725 (1939). See also cases cited in *State v. Bischoff*, 146 La. 748, 84 So. 41 (1919). It is not necessary to show crime charged occurred on a precise day, if proof shows crime was committed on any day within a year previous to finding bill of indictment which the jury is trying. *State v. Clark*, 8 Rob. 533 (La. 1844).

11. *State v. Hinton*, 49 La. Ann. 1354, 22 So. 617 (1897).

12. *State v. Bussa*, 176 La. 87, 145 So. 276 (1933).

13. *State v. Gehlbach*, 205 La. 340, 347, 17 So.2d 349, 351 (1943).

14. *State v. Doucet*, 205 La. 648, 17 So.2d 907 (1944); *State v. Gehlbach*, 205 La. 340, 17 So.2d 349 (1943).

charged, and must also allege what disposition was made of the previous indictment.<sup>15</sup> This information assures the court that prescription beginning to run on the date of knowledge was interrupted by the first charge, and that the one-year period did not subsequently elapse. It has been argued<sup>16</sup> that the prior indictment might be presumed to be pending, unless the contrary were shown by the defense; but the court required in two cases<sup>17</sup> that there be further averments by the state showing that prescription had not run after the alleged interruption. Even an invalid indictment is effective to interrupt prescription if it is filed in a parish of proper venue.<sup>18</sup> Prescription begins to run anew from the date upon which the initial indictment is officially set aside or annulled.<sup>19</sup> To negative prescription with the allegation that the accused was a "fugitive from justice" it must be shown during trial that the defendant was seeking to avoid prosecution for the crime charged.<sup>20</sup>

There are no Louisiana cases discussing the prescription for continuing crimes. The rule followed in other jurisdictions is that if any part of the crime has not prescribed, the entire crime is held not to have prescribed.<sup>21</sup>

To bring the issue of prescription before the court the defendant ordinarily uses a special plea of prescription. If the indictment shows on its face that the crime has prescribed, the defense may either demur or urge prescription in a motion to quash.<sup>22</sup> Prescription, because it involves no facts pertinent to

15. State v. Jones, 209 La. 394, 24 So.2d 627 (1945).

16. *Ibid.*

17. State v. Dooley, 223 La. 980, 67 So.2d 558 (1953), 15 LOUISIANA LAW REVIEW 216 (1954); State v. Jones, 209 La. 394, 24 So.2d 627 (1945).

18. State v. Smith, 200 La. 10, 7 So.2d 368 (1942), discussed in *The Work of the Louisiana Supreme Court for the 1941-1942 Term—Criminal Procedure*, 5 LOUISIANA LAW REVIEW 241, 243 (1943). Indictment defective by reason of irregularity in empaneling grand jury is sufficient to interrupt prescription. State v. Hoffman, 120 La. 949, 45 So. 951 (1908) *semble*.

19. LA. R.S. 15:8 (1950).

20. State v. Berryhill, 188 La. 549, 177 So. 663 (1937). Flight from private wrath of victim without concealing self from prosecuting officers is not flight from justice. State v. Hayes, 161 La. 963, 109 So. 778 (1926). Where the officers have power and authority to seize accused whose whereabouts are known, prescription is not interrupted. State v. Stanton, 209 La. 457, 24 So.2d 819 (1946).

21. United States v. Graham, 102 F.2d 436 (2d Cir. 1939) *semble, cert. denied*, 307 U.S. 643 (1939); Pioneer Packing Co. v. United States, 99 F.2d 547 (9th Cir. 1938); Hurst v. State, 44 Ga. App. 289, 161 S.E. 278 (1931); State v. Sloan, 55 Iowa 217, 7 N.W. 516 (1880); Commonwealth v. Ross, 248 Mass. 15, 142 N.E. 791 (1924).

22. Demurrer: State v. Bryan, 19 La. Ann. 435 (1867). Differentiating the use of motion to quash and the plea of prescription: State v. Conega, 121 La. 522, 46 So. 614 (1908).

guilt or innocence,<sup>23</sup> may be pleaded and tried *in limine* before the judge.<sup>24</sup> If the judge sustains the plea, the state has the right of appeal;<sup>25</sup> if the judge overrules the plea, the issue may not thereafter be raised before the jury,<sup>26</sup> but a bill of exceptions may be reserved for the purpose of seeking a new trial or taking an appeal based on the court's ruling. The right to trial of the plea *in limine* may be waived, and, under a general plea of not guilty, the issue of prescription can be presented to the jury.<sup>27</sup> The defendant can raise the issue of prescription during the trial by insisting on proof that the crime occurred within one year prior to the indictment. After urging prescription before the jury, however, the defendant no longer has the right to have the judge pass upon it.<sup>28</sup> If the jury finds the defendant guilty, the issue will not be reviewed on appeal because the appellate court considers itself without power to review a jury finding on the plea.<sup>29</sup> During the latter stages of the trial, defendant may urge prescription for the first time in a motion for new trial,<sup>30</sup> or, where the crime is shown to be prescribed on the face of the indictment, by a motion in arrest of judgment or by an assignment of error.<sup>31</sup>

The burden of proof is on the state to prove that prescription was interrupted.<sup>32</sup> The defendant, on the other hand, bears the burden of proving that the proper officials had such knowledge of the offense as would support the plea of prescription, thus relieving the state of the burden of proving a universal negative.<sup>33</sup>

23. *State v. Gendusa*, 193 La. 59, 190 So. 322 (1939); *State v. Bussa*, 176 La. 87, 145 So. 276 (1932); *State v. Hayes*, 161 La. 963, 109 So. 778 (1926).

24. *State v. Gendusa*, 193 La. 59, 190 So. 332 (1939); *State v. Brown*, 185 La. 1023, 171 So. 433 (1936); *State v. Posey*, 157 La. 55, 101 So. 869 (1924).

25. *State v. Pierre*, 49 La. Ann. 1159, 22 So. 373 (1897).

26. *State v. Gendusa*, 193 La. 59, 190 So. 332 (1939). But see *State v. Beale*, 163 La. 1093, 1096, 113 So. 546, 547 (1927); *State v. Hayes*, 162 La. 917, 922, 111 So. 327, 329 (1927).

27. *State v. Strong*, 39 La. Ann. 1081, 3 So. 266 (1887); *State v. Cason*, 28 La. Ann. 40 (1876).

28. *State v. Brown*, 185 La. 1023, 171 So. 433 (1936); *State v. Posey*, 157 La. 55, 101 So. 869 (1924).

29. *State v. Beale*, 163 La. 1093, 113 So. 546 (1927). The alleged insufficiency of evidence adduced before the jury to prove interruption is not assignable as error. *State v. Guillot*, 200 La. 935, 9 So.2d 235 (1942); *State v. Drummond*, 132 La. 749, 61 So. 778 (1913).

30. *State v. Block*, 179 La. 426, 154 So. 46 (1934). See *State v. Oliver*, 193 La. 1084, 192 So. 725 (1939) *semble*; *State v. Bischoff*, 146 La. 748, 84 So. 41 (1919).

31. See *State v. Guillot*, 200 La. 935, 9 So.2d 235 (1942) *semble*; *State v. Forrest*, 23 La. Ann. 433 (1871) *semble*.

32. *State v. Anderson*, 51 La. Ann. 1181, 25 So. 990 (1899). See Comment, 6 LOUISIANA LAW REVIEW 274 (1945).

33. *State v. Keife*, 165 La. 47, 115 So. 363 (1928); *State v. Fuller*, 164 La. 718, 114 So. 606 (1927); *State v. Hayes*, 162 La. 917, 111 So. 327 (1927); *State*

*Prescription on Bringing to Trial*

The second major prescriptive period for the prosecution of a criminal act is a three-year limitation on bringing felons to trial after they have been charged.<sup>34</sup> The defendant's right to this limitation and the procedure for enforcing it are provided for in Articles 8 and 9<sup>35</sup> as follows:

" . . . it shall be the duty of the district attorney to enter a nolle prosequi if the accused has not been tried, and if [he] fail or neglect to do so, the court may on motion of the defendant . . . cause such nolle prosequi to be entered. . . ."<sup>36</sup>

"Whenever it shall have been established . . . that the prescriptive periods as herein provided have elapsed . . . and that the district attorney has not entered his nolle prosequi, the court shall order the dismissal of said prosecution. . . ."<sup>37</sup>

When the district attorney or the court enters a nolle prosequi after prescription has run on the charge, the defendant is completely relieved of criminal responsibility for the offense charged.<sup>38</sup>

The three-year prescription can be interrupted by the defendant's voluntary absence from the state without written consent of the court where the charge against him is pending, or, by his flight from justice.<sup>39</sup> Absence by reason of incarceration in a federal prison is not "voluntary" within the contemplation of the statute and does not interrupt prescription.<sup>40</sup> But pre-

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v. Posey, 157 La. 55, 101 So. 869 (1924); State v. Barfield, 36 La. Ann. 89 (1884); State v. Barrow, 31 La. Ann. 691 (1879).

34. Prior to Act 147 of 1942, the period was six years. For a discussion of the 1942 act, see State v. Shushan, 206 La. 415, 19 So.2d 185 (1944). A two-year prescription is applicable to all other charges. LA. R.S. 15:8 (1950). Neither period is applicable to delay in bringing a "new trial" after one is granted on motion of the defendant. State v. Pitre, 171 La. 751, 132 So. 221 (1931).

35. LA. R.S. 15:8, 15:9 (1950).

36. LA. R.S. 15:8 (1950).

37. LA. R.S. 15:9 (1950).

38. ". . . the court shall order the dismissal of said prosecution, and the same shall not thereafter be revived. . . ." LA. R.S. 15:9 (1950). The state has right of appeal where defendant obtains nolle prosequi. State v. Shushan, 204 La. 672, 16 So.2d 227 (1943). Dismissal of charge on defendant's motion operates "the same as if entered by the district attorney." LA. R.S. 15:8 (1950).

39. LA. R.S. 15:8 (1950). Since the amendment of Article 9 in 1950, La. Acts 1950, No. 487, p. 883, if a defendant is released on bond, written consent of the judge is unnecessary and the defendant can absent himself from the state without interrupting prescription, provided he make a timely appearance for his trial.

40. State v. Shushan, 206 La. 415, 19 So.2d 185 (1944).

scription is interrupted if the defendant delays the trial by employing dilatory pleas. Whether such pleas caused an improper delay presents an issue of fact and in at least one instance a defendant was discharged when his trial was delayed by the court's failure to timely act on defendant's properly urged plea.<sup>41</sup>

Although Articles 8 and 9 do not provide for a suspension of the three-year prescription, the court has held that since a person adjudged insane is involuntarily beyond the process of law prescription will be suspended, but not interrupted, until he be adjudged sane.<sup>42</sup>

Article 9 expressly provides that the burden of proving the accrual of the three-year prescription shall rest upon the person alleging it. Thus if the defendant moves to set the charge aside, he must prove that he was amenable to prosecution at all times during the prescriptive period.<sup>43</sup>

A nolle prosequi entered before the three-year prescription on bringing to trial has run will, under the provisions of Article 8, merely start anew the one-year prescription on bringing the charge.<sup>44</sup> There seems to be nothing to prevent the state from circumventing the three-year prescription by (1) filing a timely charge, (2) permitting it to run for almost three years, (3) entering a nolle prosequi, (4) bringing a new charge within a year negating prescription, and (5) repeating the process *ad infinitum*. But dictum in a recent case indicates that, in keeping with the purpose of Articles 8 and 9, the accused must be brought to trial within three years from the date of filing the first charge, regardless of how many subsequent charges might be made and dismissed.<sup>45</sup>

The courts have not discussed the question of whether an indictment brought for one of the seven enumerated crimes is subject to the three-year prescription because of an accused's constitutional right to a speedy trial.<sup>46</sup> The seven crimes excepted

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41. Denial of request for bill of particulars, *State v. Bradford*, 217 La. 32, 45 So.2d 897 (1950).

42. *State v. Theard*, 212 La. 1022, 34 So.2d 248 (1948). Presumably the same reasoning would apply to the involuntary nature of incarceration in the federal penitentiary if there were no procedure established for obtaining release of federal prisoners to stand trial in state courts. *State v. Shushan*, 206 La. 415, 19 So.2d 185 (1944) describes procedure for obtaining release of prisoners to custody of state officials for prosecution.

43. LA. R.S. 15:9 (1950).

44. LA. R.S. 15:8 (1950).

45. *State v. Murray*, 222 La. 950, 956, 64 So.2d 230, 232 (1953).

46. LA. CONST. Art. I, § 9. See also U.S. CONST. AMEND. VI.

from the one-year prescription on bringing the charge are not similarly excepted from the three-year prescription on bringing to trial;<sup>47</sup> yet, the court might well hold that a prosecution for one of the seven crimes cannot prescribe in any fashion.

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47. LA. R.S. 15:8 (1950).