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Prescription of Criminal Prosecutions

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PRESCRIPTION OF CRIMINAL PROSECUTIONS

So important is the right of an accused to a speedy trial that it is expressly guaranteed to him by Article I, Section 9, of the Louisiana Constitution. Article 8 of the Code of Criminal Procedure further protects that right by providing maximum periods within which prosecutions must be brought.[1] Our courts have stressed the statement in Article 8 that "No person shall be prosecuted, tried or punished for any offense" on which the specified prescriptive period has run. Thus, an accused may insist that the judge decide the question in limine[2] or he may have it referred to the jury. Once the issue goes to the jury, however, it is too late for the defendant to demand that the judge pass on it; he is deemed to have waived the right of having it decided

1. Art. 8, La. Code of Crim. Proc. of 1928: "No person shall be prosecuted, tried or punished for any offense, murder, aggravated rape, aggravated kidnapping, aggravated arson, burglary in the nighttime, burglary in the daytime, armed robbery, and treason excepted, 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; but this prescription shall not apply to prosecution and conviction for a lesser offense under an indictment or information for murder, aggravated rape, aggravated kidnapping, aggravated arson, burglary in the nighttime, burglary in the daytime, armed robbery, or treason. Nor shall any person be prosecuted for any fine or forfeiture unless the prosecution for the same shall be instituted within six months of the time of incurring such fine or forfeiture.

"Provided, that in all criminal prosecutions an indictment found, or an information filed, or an affidavit filed where prosecution may be by affidavit, before the above prescription has accrued, shall have the effect of interrupting such prescription; and if any such indictment, information or affidavit be quashed, annulled or set aside, or a nolle prosequi be entered, prescription of one year and six months, respectively, as above provided, shall begin to run against another indictment, information or affidavit based on the same facts, only from the time that said original indictment, information or affidavit was quashed, set aside, annulled or nolle prosequied.

"In felony cases when three years elapse from the date of finding an indictment, or filing an information, and in all other cases when two years elapse from the date of finding an indictment, or filing an information or affidavit, it shall be the duty of the district attorney to enter a nolle prosequi if the accused has not been tried, and if the district attorney fail or neglect to do so, the court may on motion of the defendant or his attorney cause such nolle prosequi to be entered the same as if entered by the district attorney.

"Nothing in this article shall apply or extend to an accused person who has absconded, or who is a fugitive from justice or who has escaped trial through dilatory pleas, or continuances obtained by him or in his behalf. [As amended, Acts 1935 (2nd E. S.), No. 21, §1; 1942; No. 147, §1.]"

2. State v. Hayes, 162 La. 917 111 So. 327 (1927); State v. Gendusa, 193 La. 59, 190 So. 332 (1939).

by the court.[3] The plea of prescription may also be raised by a motion for a new trial[4] or by a motion in arrest of judgment.[5]

The first paragraph of Article 8 sets out two classes of prescription which arise before indictment: (1) the prescription of one year, which deals with offenses punishable by imprisonment; and (2) that of six months, which deals with offenses punishable only by fine or forfeiture. The great majority of the cases have dealt with the one year prescriptive period. The cases are legion to the effect that an indictment, which shows on its face that more than a year has passed since the commission of the offense, is fatally defective unless it also contains an allegation negativing prescription.[6] Article 8 provides specific authority for negativing prescription by an allegation in the indictment that (1) the offense had not been made known to a competent officer until within a year of the indictment, (2) a previous indictment had been found within the prescriptive period and a year had not elapsed since the date on which it was set aside, or (3) the accused had been a fugitive from justice until within a year of the indictment. The court, in *State v. Theard*,[7] provided a possible additional way of negativing prescription, i.e., by an allegation in the indictment that defendant had not been amenable to prosecution because of his having been adjudged insane.

Perhaps the most troublesome problem arising in cases where the state must negative prescription has been that of burden of proof. Where the allegation is that the offense was not made known to the proper authorities until within a year of the indictment, the court early took the view that the burden should be on the defendant to prove that there was, in fact, such knowledge more than a year previous to the indictment.[8] The theory underlying this was that the defendant could more easily prove the affirmative fact of knowledge than could the state prove the "universal negative" that none of the competent officials had such

3. State v. Posey, 157 La. 550, 101 So. 869 (1924); State v. Brown, 185 La. 1023, 171 So. 433 (1936).

4. State v. Hinton, 49 La. Ann. 1354, 22 So. 617 (1897); State v. Foley, 113 La. 206, 36 So. 940 (1904).

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

6. State v. Foster, 7 La. Ann. 256 (1852); State v. Freeman, 17 La. Ann. 69 (1865); State v. Oliver, 193 La. 1084, 192 So. 725 (1939); State v. Gehlbach, 205 La. 340, 17 So.(2d) 349 (1943).

7. 203 La. 1026, 14 So.(2d) 824 (1943). This case dealt with the three year class of prescription. The reasoning however seems equally applicable to the one year class.

8. State v. Barrow, 31 La. Ann. 691 (1879; State v. Barfield, 36 La. Ann. 89 (1884); State v. Robinson, 37 La. Ann. 676 (1885).

knowledge until within a year of the indictment. In other words the burden should "rest on the party who can most conveniently and most certainly make the proof."[9] Later, in *State v. Bischoff*,[10] the court specifically repudiated the earlier line of cases, reasoning that a party making an allegation must prove it and is not to be relieved of that responsibility merely because the allegation happens to be in a negative form, when the information supporting it is entirely within his knowledge and control. In the leading case of *State v. Posey*,[11] the court again reversed itself, specifically overruling the *Bischoff* case and reinstating the earlier line of cases holding the burden to be on defendant to prove knowledge. This decision has been followed consistently, and apparently the matter is now well settled. It is not necessary, however, that defendant prove *actual* knowledge on the part of some competent officer; it is sufficient that he prove them to have possessed information which should have put them on inquiry.[12] Then, they are chargeable with knowledge of the facts which such an inquiry would have revealed had it been made. On the other hand, where the officials knew of the offense but had ample reason to believe that someone other than defendant had committed it and, in fact, prosecuted that other party, this knowledge would not start prescription running as to the accused.[13] Likewise, when the information possessed by the officials indicates that the crime was committed in some other jurisdiction, prescription will not begin to run until they obtain information which should put them on notice that the offense might have been committed within their jurisdiction.[14] The language of the allegation negativing prescription should be carefully chosen. It was recently held in *State v. Gehlbach*,[15] a four to three decision, that an indictment alleging that "more than one year has not elapsed" since the commission of the offense was made known to the proper authorities, sufficiently tracked the article. It was forcibly argued in a carefully written, but perhaps overly techni-

9. State v. Barrow, 31 La. Ann. 691, 694 (1879).

10. 146 La. 748, 84 So. 41 (1919), followed by State v. Richard, 149 La. 574, 89 So. 697 (1921).

11. 157 La. 550, 101 So. 869 (1924).

12. State v. Hayes, 161 La. 963, 109 So. 778 (1927); State v. Perkins, 181 La. 997, 160 So. 789 (1935); State v. Oliver, 193 La. 1084, 192 So. 725 (1939).

13. State v. Hanks, 38 La. Ann. 468 (1886); State v. Touchet, 46 La. Ann. 827, 15 So. 390 (1894); State v. Wren, 48 La. Ann. 803, 19 So. 745 (1896).

14. State v. Young, 194 La. 1061, 195 So. 539 (1940).

15. 205 La. 340, 17 So.(2d) 349 (1943). The *Gehlbach* case also held that it was not necessary for the indictment to negative knowledge on the part of the attorney general, citing and affirming State v. Bussa, 176 La. 87, 145 So. 276 (1933).

cal, dissenting opinion that the allegation should have been more precise, to the effect that "not one year had elapsed" from the time of knowledge.

Where the indictment alleges an interruption of prescription by a previous indictment, the burden of proof is on the state.[16] The jurisprudence on this point is clear and without conflict, with a possible cloud case by the opinion in *State v. Brown*,[17] which will be dealt with at greater length in another connection. Before the previous indictment will have the effect of interrupting prescription, however, it must have been found in the proper jurisdiction.[18]

Where, to negative prescription, the indictment alleges that the accused has been a fugitive from justice, the burden of proof again is on the state.[19] Here, the "universal negative" theory favors the defendant. It would be more difficult for defendant to prove that he was at no time during the prescriptive period a fugitive from justice than it would be for the state to prove the affirmative fact that he had been sought but not found. This rule is apparently well settled, despite a suggestion to the contrary by the opinion in *State v. Brown*,[20] wherein the court applied the last clause[21] of Article 9 to the one year class of prescription.

Because of the importance of this question, a brief analysis of *State v. Brown* seems in order. The crime having been com-

16. State v. Hoffman, 120 La. 949, 45 So. 951 (1908); State v. Gendusa, 193 La. 59, 190 So. 332 (1939).

17. 185 La. 1023, 171 So. 433 (1936).

18. State v. Smith, 200 La. 10, 7 So. (2d) 368 (1942). In the Smith case the prosecution relied on State v. Young, 194 La. 1061, 195 So. 539 (1940). That case, however, did not deal with the question of interruption by a previous indictment but with whether a competent official had sufficient knowledge of an offense to start prescription running. The only information that the official had was such as to indicate that the offense had been committed in an adjoining jurisdiction. Having found this to be true, the supreme court held that such knowledge was not sufficient to start prescription running. In the *Smith* case, on the other hand, the prosecuting authorities knew all of the facts of the case but, making an error of law, decided that Orleans Parish was the proper jurisdiction. The supreme court held that their knowledge was sufficient to start prescription running and that the indictment in Orleans Parish (set aside for lack of jurisdiction) did not have the effect of interrupting it. (The opinion in the *Smith* case was grounded on the earlier case of State v. Cooley, 176 La. 448, 146 So. 19 (1933), wherein it was held that, once the proper officials acquire the information, prescription begins to run regardless of their private reasons for nonaction.)

19. State v. Anderson, 51 La. Ann. 1181, 25 So. 990 (1889); State v. Gibson, 108 La. 464, 32 So. 332 (1902); State v. Berryhill, 188 La. 549, 177 So. 663 (1937).

20. 185 La. 1023, 171 So. 433 (1936).

21. "Provided, further, that the burden of proving the accruing of the prescription herein established shall in all cases rest upon the person alleging the same."

mitted some four years previous to the indictment, the indictment alleged that defendant had been a fugitive from justice. The question before the supreme court was not one of burden of proof, but was whether the trial judge had erred in refusing to permit defense counsel to withdraw the question of prescription from the jury, after the state had rested its case, in order that he, the trial judge, might pass on it. The supreme court approved the refusal of the trial judge, saying, "While we think the ruling of the trial judge on this particular point was correct, yet we find it necessary to set aside the conviction and sentence on another ground [on a question of admissibility of evidence]." Then, perhaps as suggestion to counsel, it added that defendant could still urge his plea of prescription upon assuming the burden of proving the accrual of it, citing Article 9 as authority.

Both the language and the spirit of Article 9 seem clearly to apply only to the prescriptive period which runs *after* indictment. Its function seems to be to provide a procedure for setting aside an indictment which has become prescribed according to the provisions of Paragraph 3 of Article 8, and it seems to have no application to prescription arising *before* indictment. It is submitted that the application of Article 9 to the one year class of prescription in *State v. Brown* was by way of dictum and, as will be shown hereafter, has since been tacitly overruled or, rather, ignored. In the later case of *State v. Gendusa*[22] dealing with interruption by a previous indictment, the court said,

> "It was incumbent on the part of *the State* to prove beyond a reasonable doubt that the crime charged in the indictment was not prescribed. . . ." (Italics supplied.)

In *State v. Berryhill*[23] the court approved the trial judges' charge to the jury that "*The State* carries the burden of proving that the accused 'fled from justice,' as defined to you." (Italics supplied.) Had the supreme court seen fit to follow the suggestion made in the *Brown* case, the above language would not only have been

22. 193 La. 59, 72, 190 So. 332, 336 (1939).

23. 188 La. 549, 555, 177 So. 663, 665 (1937). In this case the court said that the state had to prove defendant's flight only by a preponderance of the evidence. No mention was made of the *Gendusa* case and the degree of proof required by it. True, the two cases deal with interruption by different allegations, yet the principle seems to be the same, and there seems to be no reason for requiring a higher degree of proof in one than in the other. Because the facts do not relate to the *guilt or innocence* of the accused, it is submitted that the later expression of the court is the better view. The nature of the proof, however, probably makes the question one of academic rather than practical importance.

unnecessary but would have been erroneous since, if Article 9 is applicable to the one year class of prescription, by its express language the burden would have rested on the *defendant.* Hence, it seems safe to conclude that, as to this particular point, the supreme court has not seen fit to follow the dictum of the *Brown* case and that the state bears the burden of proving its allegation that the defendant had been a fugitive from justice.

In order to toll the running of the one year prescriptive period the state must prove more than the naked fact that defendant had been a fugitive; it must prove that he was a fugitive from the authorities of this state. The fact that he had been a fugitive from some other state, although he lived openly in Louisiana all the while, will not interrupt prescription.[24] The state must likewise prove that the accused had been a fugitive from representatives of the law; mere flight from the wrath of private citizens will not interrupt prescription.[25]

The prescription of six months is applicable only where the penalty for the offense is fine or forfeiture.[26] If imprisonment may be inflicted, the one year prescriptive period applies.[27] However, where the offense is punishable by fine only and the defendant is sentenced to pay the fine on pain of imprisonment if he fails, this does not take the case out of the six months prescriptive class.[28] The imprisonment here is merely the consequence of failing to obey a court order and not a direct consequence of the offense. This class of prescription runs from the commission of the offense to the date of the indictment, and it cannot be negatived by lack of knowledge on the part of the authorities.[29] Dictum in the *Edwards* case[30] indicates, however, that it might be negatived by an allegation that the accused had been a fugitive from justice—a view which is manifestly sound considering the all-inclusive language of the fourth paragraph of Article 8. Similarly, the filing of a previous indictment would probably interrupt the six months prescription.

Paragraph 3 of Article 8 provides for that type of prescription which runs from the time an indictment is found. A defendant must be tried within three years after indictment in felony

24. See State v. Berryhill, 188 La. 549, 177 So. 663 (1937).
25. State v. Hayes, 162 La. 917, 111 So. 327 (1927).
26. State v. Jumel, 13 La. Ann. 399 (1858); State v. Markham, 15 La. Ann. 498 (1860); State v. Courlas, 134 La. 364, 64 So. 141 (1913).
27. Ibid.
28. State v. King, 29 La. Ann. 704 (1877).
29. State ex rel. Teague v. Edwards, 107 La. 49, 31 So. 381 (1902).
30. Ibid.

cases (within two years for lesser offenses), and it is expressly stated that the district attorney is under a duty to nolle prosequi the indictment after the lapse of such time. If the district attorney fails or neglects to dismiss the prosecution, defendant is given the right to apply to the judge by motion, and the judge is empowered to enter the nolle prosequi on behalf of the state. Article 9 sets forth the requirements and the procedure by which the defendant may obtain a judicial nolle prosequi. Mere passage of time will not, in and of itself, operate to annul the indictment. It stands as a charge against the accused until it is formally dismissed.[31] By the express terms of Article 9, the burden is on the defendant to prove the accrual of the prescription and that he has complied with the requirements set forth therein.

In *State v. Theard,*[32] it was held that this class of prescription was suspended when the defendant was adjudged insane shortly after indictment and was, therefore, not amenable to prosecution. It has also been held that the requirement of Article 9 that defendant obtain permission from the court before leaving its jurisdiction refers to *voluntary* absence. Hence, when the defendant was sent, in custody of the federal authorities, to a federal penitentiary outside this state, it was not necessary for him to obtain permission from the court before leaving. His failure to do so did not, therefore, suspend prescription while he was absent.[33] An analogy might possibly be drawn to the case where a man under indictment is drafted into the armed forces.

Another question arising under this type of prescription is whether it applies to *all* crimes, including those excepted from the one year prescription of paragraph 1 in Article 8. The forerunner of this provision, Act 67 of 1926, specifically stated that the prescription (under that act the periods were six and two years, rather than three and two years) applied to indictments of *all* offenses, "capital or otherwise." Article 8 is not worded so strongly. The quaere then is whether the legislature, in tempering the language of the statute, intended that the three year prescriptive period should be subject to the exceptions which limit the scope of the one year class, or whether an indictment for murder[34] will prescribe in three years if no action is taken

31. State v. Gunter, 188 La. 314, 177 So. 60 (1937).
32. 203 La. 1026, 14 So. (2d) 824 (1943).
33. State v. Shushan, 206 La. 415, 19 So.(2d) 185 (1944).
34. Or any of the other offenses excepted from the one year class of prescription.

thereon. The importance of this question lies in the substantial advantages of having one's name freed from accusation[35] and in the provision of Article 9 that any prosecution which is so prescribed may be dismissed and may not thereafter be revived.

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DEFAMATION—CONDITIONAL PRIVILEGE IN LOUISIANA

I†

The Louisiana law of defamation springs from Article 2315 of the Louisiana Civil Code, which provides:

> "Every act whatever of man which causes an injury to another, shall oblige him by whose fault it happened to repair it. . . ."[1]

Despite the obvious leeway which this article gives the court, the Louisiana courts have developed a law of defamation closely resembling that of common law jurisdictions.

In Louisiana, when the defendant has defamed the social, business, or moral interests or character of another, he is liable to the injured party without further proof of damage or bad faith.[2] If, however, he can show that the occasion was one in which the value to society that the communication be made was great enough to justify the damage caused, the law allows a privilege to the publisher, relieving him entirely from civil liability.

These privileges are of two types—absolute and conditional. An absolute privilege exists in certain situations where the public interest in unhampered freedom of speech is so strong that the courts feel that no liability should be imposed under any circumstances. This privilege is limited to judges, legislators, and certain executives acting in their respective official capacities. In other situations the courts grant only limited protection to the

35. For one of these advantages, see State v. Gunter, 188 La. 314, 177 So. 60 (1937).

†This is the first of two installments on this subject. Included are the privileges to defame for self protection, for common interest, for the protection of a third party, and for the protection of the recipient. The privilege of fair comment, the privilege to defame for the protection of the public, together with the topic of abuse of the conditional privilege to defame will be dealt with in the concluding installment of this comment which will be published in the forthcoming issue of the *Louisiana Law Review*.

1. Art. 2315, La. Civil Code of 1870.

2. Miller v. Holstein, 16 La. 389 (1839); Sotorno v. Fourichon, 40 La. Ann. 423, 4 So. 71 (1888); Fellman v. Dreyfous, 47 La. Ann. 907, 17 So. 422 (1895).