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Criminal Procedure - Right to Bill of Particulars After Arraignment

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In the writer's opinion the prospective effect of the instant case should be limited strictly.[18] Since the majority relied upon an oral admission before it, a strict reading of the case does *not* authorize the district judge to issue an order of seizure and sale upon evidence such as here presented to him; but the opinion indicates that where the order is issued it will be sustained if the mortgagor judicially admits the mortgagee's rights.

Robert B. Butler III

CRIMINAL PROCEDURE — RIGHT TO BILL OF PARTICULARS AFTER ARRAIGNMENT

Defendant was indicted for theft under a short form indictment.[1] After the arraignment, at which his counsel was present, the defendant filed several motions, among them a motion for a bill of particulars. The trial judge refused this motion for the sole reason that it came too late, having been filed after the arraignment and five days prior to the trial.[2] The case proceeded to trial and the defendant was convicted as charged. On appeal to the Louisiana Supreme Court, *held*, reversed. Refusal to grant a motion for a bill of particulars by one indicted under a short form indictment was an abuse of discretion where the only reason given for the refusal was that the motion was filed after the arraignment and five days before trial. *State v. Barnes*, 242 La. 102, 134 So. 2d 890 (1961).

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on the question of authentic evidence to show ownership of a note for the purposes of executory process than was the Code of Practice. The comments indicate the drafters' intention was that prior jurisprudence be followed where available. LA. CODE OF CIVIL PROCEDURE art. 2635 (1960) and comments thereunder.

1. LA. R.S. 15:235 (1950) provides for the use of the short form indictments in the particular cases specified in the article.

2. State v. Barnes, 242 La. 102, 134 So. 2d 890, 891 (1961). It appears from the district attorney's petition for rehearing that the motions of the defendant, including the motion for a bill of particulars, were filed for the purpose of delaying the trial again after one continuance had been granted. The petition for rehearing contains the following language: "Barnes was arraigned January 6, 1961, entered a plea of not guilty and his case set for trial for February 9, 1961, and on February 9, 1961, was continued to February 20, 1961, and on Thursday, February 16, 1961, filed the Motion for Bill of Particulars; Motion for Continuance; A Demurrer; a Motion To Quash, knowing full well the case was set on Monday, February 20. The motions were taken up and overruled on Friday before trial on Monday."

The defendant, in his motion for a bill of particulars, requested the following information: (1) whether the alleged theft was committed with the consent of the owner of the stolen property, or by means of fraudulent practices; (2) if it was with the consent of the owner, the manner of the misappropriation; and (3) the name of the servant or employee of the owner involved in the transaction.

Article 1, Section 10, of the Louisiana Constitution provides that "In all criminal prosecutions, the accused shall be informed of the nature and cause of the accusation against him." When a long form indictment is used, the indictment itself is usually sufficient to give the accused the necessary information to protect his constitutional rights.[3] However, when the provision for the use of short form indictments was introduced into Louisiana criminal procedure by Article 235 of the 1928 Louisiana Code of Criminal Procedure,[4] the revisors were apparently aware that the short forms themselves might not be sufficient to inform the accused of the nature and cause of the accusation against him.[5] For this reason, the original Article 235 contained a proviso to the effect that the judge could order the district attorney to furnish particulars of the offense to the defendant if they were requested *prior to the arraignment.*[6]

Though the bill of particulars is designed to give the accused information necessary for his defense, it cannot be used to force the state to choose between alternate methods of charging the same offense,[7] or to force the state to disclose its evidence.[8]

Under Article 235[9] of the Louisiana Code of Criminal Procedure, the defendant has a *right* to file a motion for a bill of particulars prior to the arraignment, and the trial judge has discretion to grant or refuse the motion. The Supreme Court has stated many times that the ruling of the trial judge on a bill of particulars will be upheld unless there is a clear abuse of dis-

3. LA. R.S. 15:227 (1950): "The indictment must state every fact and circumstance necessary to constitute the offense, but it need do no more, and it is immaterial whether the language of the statute creating the offense, or words unequivocally conveying the meaning of the statute, be used."

4. *Id.* 15:235.

5. In State v. Brooks, 173 La. 9, 15, 136 So. 71, 73 (1931) the court noted that the short form indictment for embezzlement provided in Article 235 of the Code of Criminal Procedure was "A.B. embezzled (describe property embezzled and state value of property)." The court said: "It is clear that this form of indictment does not state either the ownership of the property embezzled nor the fiduciary relation of the party charged to the owner." Other short forms provided by Article 235 are, *e.g.*: Murder: "A.B. murdered C.D." Aggravated rape: "A.B. committed aggravated rape upon C.D." Manslaughter: "A.B. unlawfully killed C.D."

6. The portion of Article 235 pertinent here reads as follows: "Provided further that the district attorney, if requested by the accused prior to arraignment, may be required by the judge to furnish a bill of particulars setting up more specifically the nature of the offense charged."

7. State v. Williams, 230 La. 1059, 89 So. 2d 898 (1956); State v. Poe, 214 La. 606, 38 So. 2d 359 (1948).

8. State v. Amiss, 230 La. 1003, 89 So. 2d 877 (1956); State v. Iseringhausen, 204 La. 593, 16 So. 2d 65 (1943).

9. LA. R.S. 15:235 (1950).

cretion.[10] Although there is no direct statutory authorization for granting a bill of particulars requested *after* the arraignment, the jurisprudence has established that a judge has discretion to do so.[11] After the trial has started, the judge cannot entertain a motion for a bill of particulars.[12]

The Louisiana Supreme Court has often stressed the importance of the bill of particulars as a device for protecting the constitutional rights of the accused.[13] The court has lent particular emphasis to its position on this matter in the case of short form indictments by reversing every case in which a defendant who had requested a bill of particulars was forced to go to trial under a short form indictment without the requested particulars.[14] The strongest case in this category prior to the instant case, however, involved a bill of particulars that was requested prior to the ar-

10. State v. Copling, 135 So. 2d 271 (La. 1961); State v. Williams, 230 La. 1059, 89 So. 2d 898 (1956); State v. Amiss, 230 La. 1003, 89 So. 2d 877 (1956); State v. Butler, 229 La. 788, 86 So. 2d 906 (1956); State v. Mills, 229 La. 758, 86 So. 2d 895 (1956); State v. Poe, 214 La. 606, 38 So. 2d 359 (1948); State v. Chanet, 209 La. 410, 24 So. 2d 670 (1946); State v. Iseringhausen, 204 La. 593, 16 So. 2d 65 (1943); State v. Ezell, 189 La. 151, 179 So. 64 (1938).

11. State v. Barnes, 242 La. 102, 134 So. 2d 890 (1961); State v. Brooks, 173 La. 9, 136 So. 71 (1931).

12. LA. R.S. 15:288 (1950): "Defects in indictments can be urged before verdict only by demurrer or a motion to quash, and the accused is not entitled to any bill of particulars as to the subject-matter charged in the indictment, but the trial judge may, in his discretion, require the district attorney to file in the case such data as, in the opinion of the judge, may be sufficient."

13. State v. Nichols, 216 La. 622, 44 So. 2d 318 (1950); State v. Chanet, 209 La. 410, 24 So. 2d 670 (1946); State v. Ward, 208 La. 56, 22 So. 2d 740 (1945); State v. Pete, 206 La. 1078, 20 So. 2d 368 (1944); State v. Brooks, 173 La. 9, 136 So. 71 (1931); State v. Miller, 170 La. 51, 127 So. 361 (1930).

14. State v. Barnes, 242 La. 102, 134 So. 2d 890 (1961); State v. Holmes, 223 La. 397, 65 So. 2d 890 (1953); State v. Brooks, 173 La. 9, 136 So. 71 (1931). It appears that the defendant must make a request for information before the court will consider the matter of whether he has been sufficiently informed. In State v. Coleman, 236 La. 629, 634, 108 So. 2d 534, 536 (1959), the defendant was convicted of negligent homicide under a short form indictment. The defendant did not move for a bill of particulars, but moved to quash the indictment on the ground that it did not sufficiently inform him of the nature and cause of the accusation against him. The court upheld the indictment and said: "If appellant desired additional information as to the details of the charge for preparation of his defense, he was entitled as a matter of right to be furnished with a bill of particulars." In *State v. Brooks, supra*, the defendant moved to quash the indictment on the day of the trial, or to have it amended so as to show a fiduciary relationship between him and the owner of the property he allegedly embezzled. The trial judge refused the motion because he felt that it came too late and was filed for purposes of delay. The Supreme Court reversed this ruling, and apparently assumed that the defendant could have moved for a bill of particulars here, as it said: "[D]efendant was unquestionably entitled to the amendments sought, as a bill of particulars, if nothing more, since this information was necessary to enable defendant to defend himself intelligently."

Though the defendant here did not move for a bill of particulars as such, the language of the court concerning the bill of particulars is too strong to be discounted as dictum.

raignment,[15] and it appears well-settled in such cases that the defendant has a right to the particulars necessary to inform him of the nature and cause of the accusation against him.[16]

The instant case seems to be the first case in which the issue of the trial court's discretion to refuse a bill of particulars requested after arraignment was squarely posed. The court found statutory authorization for ordering a bill of particulars requested after the arraignment by relying on Article 265,[17] which allows the trial court to consent at any time to withdrawal of a plea of not guilty in order to set up some other plea, demur, or move to quash the indictment. The court reasoned that Article 265[18] could be construed to allow the trial judge discretion to order a bill of particulars requested *after arraignment.*[19] An examination of Article 265[20] casts some doubt on the validity of this construction because the article specifies only a change of plea, a demurrer, and a motion to quash, and it is apparently not concerned with the bill of particulars. However, the court seemed to feel that protection of the defendant's constitutional rights required that his request for a bill of particulars after arraignment should be granted, and that Article 265[21] provided the only appropriate statutory vehicle.

In evaluating the trial judge's exercise of his discretion to grant a motion for a bill of particulars requested after arraignment, the court concluded that refusal merely because the request came "too late" was arbitrary, even though the defendant had received a continuance, and was apparently seeking further to postpone the date of the trial.[22] The court noted that although

15. State v. Holmes, 223 La. 397, 65 So. 2d 890 (1953).

16. State v. Coleman, 236 La. 629, 108 So. 2d 534 (1959); State v. Picou, 236 La. 421, 107 So. 2d 691 (1958); State v. Holmes, 223 La. 397, 65 So. 2d 890 (1953); State v. Leming, 217 La. 257, 46 So. 2d 262 (1950); State v. Masino, 214 La. 744, 38 So. 2d 622 (1949); State v. Bessar, 213 La. 299, 34 So. 2d 785 (1948).

17. LA. R.S. 15:265 (1950).

18. *Ibid.*

19. State v. Barnes, 242 La. 102, 134 So. 2d 890, 893 (1961). The court said: "The provisions of L.R.S. 15:235 must be read in connection with L.R.S. 15:265 which specifically declares that 'the defendant may at any time, with the consent of the court, withdraw his plea of not guilty and then set up some other plea or demur . . . ,' and while the accused is not entitled to a bill of particulars as a matter of right under these articles, his rights thereunder must be consonant with the rights guaranteed to him under the Constitution that 'in all criminal prosecutions, the accused shall be informed of the nature and cause of the accusation against him.'"

20. LA. R.S. 15:265 (1950).

21. *Ibid.*

22. The fact of the continuance having been previously granted does not appear from the opinion of the Supreme Court, and it apparently was not included in the

a defendant has no absolute right to a bill of particulars, he does have a right to be informed of the nature and cause of the accusation against him.

It is possible to construe the instant case to mean that the Supreme Court will reverse any case in which the defendant is forced to go to trial under a short form indictment without the benefit of a bill of particulars if requested by the defendant.[23] However, the court did not commit itself to this extreme position.[24] Obviously, the court was faced with a difficult problem — to secure to the defendant his constitutional rights without permitting him to assert them solely for dilatory purposes. Perhaps a proposal of the Louisiana State Law Institute in its tentative Code of Criminal Procedure revision project may provide a solution to this problem. Article 24 of Title XIII, Indictment and Information,[25] provides in part:

> "A motion for a bill of particulars may be filed of right before trial or within ten days after arraignment, whichever is earlier. After expiration of the ten day period, the court may permit the filing of such a motion until the commencement of trial."

This article gives the defendant a *right* to request a bill of particulars for a reasonable time after the arraignment. It also provides that the judge shall have discretion to grant a request for a bill of particulars until the commencement of the trial, thus codifying part of the rule of the instant case. By providing a reasonable time during which the defendant has a right to request a bill of particulars, it may be that the court will be more disposed to honor the ruling of a trial judge who refuses a motion filed after the ten-day period has elapsed, especially if it appears that the motion is being used as a dilatory tactic. How-

opinion of the trial judge. However, in its application for rehearing, the state contended that the defendant had used delaying tactics in the trial court. See note 2 *supra*.

23. See the language of the court quoted in note 19 *supra*.

24. The court restricted its holding to the instant case by saying: "Clearly, *under the facts of this case*, the judge should have instructed counsel for the State to give the defendant the information showing every fact and circumstance necessary to constitute the offense with which he was charged in order that he might properly and intelligently prepare his defense, and, in our opinion, by refusing defendant's motion the trial judge committed reversible error." (Emphasis added.) State v. Barnes, 242 La. 102, 134 So. 2d 890, 893 (1961).

Though this is emphatic language, it is possible that the court felt that the district attorney could have furnished the requested particulars before the trial, and could have thus protected the defendant without causing further delay.

25. Expose des Motifs No. 12 (March 16, 1962).

ever, a trial judge should not deny a motion for a bill of particulars unless he has strong reasons for doing so and articulates them clearly.

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DONATIONS — REVOCATION FOR NON-FULFILLMENT OF CONDITION

By a single authentic act, one Manson sold certain property to the City of New Orleans and purportedly donated two additional lots "to be used for public school purposes."[1] The city operated a school on the two lots for over twenty years, after which the building at times remained vacant and at times was rented, the rental proceeds being applied to the general operating expenses of the School Board.[2] The building was demolished a number of years prior to institution of the present suit. Upon learning that the School Board had advertised the lots for sale, defendants, who had been placed in possession of Manson's succession, demanded revocation on the ground of non-fulfillment of the donation's condition. The School Board then filed suit to have its title declared merchantable, and defendants reconvened for revocation of the donation. The court of appeal held that the School Board had no right to sell or rent the lots; failure to continue operation of a school, however, had not resulted in forfeiture of the lots, which the Board could still use for any "school purpose."[3] On certiorari to the Supreme Court of Louisiana, *held*, reversed.[4] The transfer of the two lots was an onerous do-

1. The pertinent part reads: "And the said James J. Manson did further declare that, in consideration of the purchase by the City of New Orleans of the above described property for the price and sum mentioned therein, he does, by these presents, cede, donate, abandon, set over and deliver, without any cost whatsoever to the City of New Orleans, to be used for public school purposes, the following . . . property, to-wit . . . ." Orleans Parish School Board v. Manson, 132 So. 2d 885, 887 (La. 1961).

2. The School Board acquired title to the property from the city in 1955 by virtue of the provisions of LA. CONST. art. IV, § 12, as amended.

3. Orleans Parish School Board v. Manson, 126 So. 2d 82 (La. App. 4th Cir. 1960). The court said: "Whether it must actually conduct classes, or may use it as a school playground, athletic field, library or school warehouse, is not before us in this proceeding. All we are called upon to decide here is whether the School Board can part with title and use the proceeds generally for the public schools." *Id.* at 89.

4. Justice Hamlin dissented, primarily on the ground that the transfer of the lots sold and that of those purportedly donated "are so enmeshed that the entire act is one of sale." Orleans Parish School Board v. Manson, 132 So. 2d 885, 890 (La. 1961). He was of the further opinion that the donor did not intend the