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CRIMINAL LAW AND PROCEDURE - STATUTE OF LIMITATIONS - INCOME TAX PROSECUTION

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CRIMINAL LAW AND PROCEDURE — STATUTE OF LIMITATIONS — INCOME TAX PROSECUTION — Defendant was indicted for wilfully attempting to evade and defeat payment of part of his income tax for the taxable year

1930 by filing a false return in violation of the Revenue Act of 1928.[1] A motion to quash was entered because the indictment had not been found and returned within six years of the alleged commission of the offense. The indictment had been actually found and filed six years and one hundred sixty-six days from the day upon which the return was filed. Defendant was absent from the district on various business and pleasure trips for more than the additional one hundred sixty-six days during the period. *Held*, defendant was not absent in such a way as to suspend the running of the statute. The absences must be such as to interfere with the orderly method of filing an indictment or with the execution of process. *United States v. Mathis*, (D. C. N. J., 1939) 28 F. Supp. 582.

An important distinction is found in the fact that there are different limitation statutes applicable to criminal prosecutions and to civil actions for violation of income tax statutes.[2] The customary method of computing time for the running of the statute was followed here by omitting the day of filing the return but including the day of finding and filing the indictment.[3] The court mentioned but did not follow the holding in *Bowles v. United States* [4] that the statute did not begin to run until the expiration of the time for filing returns. Although not recognized by the court, the distinction between the two cases is clear, since the indictment referred to in the *Bowles* case was for filing no return. This case presents the first clear holding that the offense was committed on the date of filing.[5] If the prosecution is for failure to file a return, the statute does not start to run until such failure becomes wilful,[6] since wilfulness is an essential element of the crime.[7] There are no cases holding that it must be shown that the filing of a false return was wilful before the statute will run, the element of wilfulness apparently being imputed to those who file false returns. The holding in the instant case in relation to the exception contained in the limitations statute is entirely logical and follows the accepted state practice where similarly worded statutes are in force.[8] In pleading the matter

[1] 45 Stat. L. 791 at 835 (1928), § 146(b), re-enacted 48 Stat. L. 725 (1934), 26 U. S. C. (1934), § 145(b).

[2] A criminal limitation is found in 18 U. S. C. (1934), § 585; civil limitations in 48 Stat. L. 745-746 (1934); 26 U. S. C. (1934), §§ 275-277. For an excellent discussion of the peculiarities of the limitation on civil actions, see Kent, "Mitigation of the Statute of Limitations in Federal Tax Cases," 27 CAL. L. REV. 109 (1939).

[3] Wiggins v. United States, (C. C. A. 9th, 1933) 64 F. (2d) 950; Burnet v. Willingham Loan & Trust Co., 282 U. S. 437, 51 S. Ct. 185 (1931).

[4] (C. C. A. 4th, 1934) 73 F. (2d) 772.

[5] Principal case, 28 F. Supp. at 584.

[6] Arnold v. United States, (C. C. A. 9th, 1935) 75 F. (2d) 144; Capone v. United States, (C. C. A. 7th, 1931) 51 F. (2d) 609, 76 A. L. R. 1534 at 1549.

[7] Hargrove v. United States, (C. C. A. 5th, 1933) 67 F. (2d) 820, 90 A. L. R. 1276 at 1280; United States v. McCormick, (C. C. A. 2d, 1933) 67 F. (2d) 867; United States v. Murdock, 290 U. S. 389, 54 S. Ct. 223 (1933); United States v. La Fountaine, (D. C. Mich. 1931) 54 F. (2d) 371.

[8] Malokoff v. Frye, 158 Misc. 171, 284 N. Y. S. 22 (1935); Clegg v. Bishop, 105 Conn. 564, 136 A. 102 (1927); Hibernian Banking Assn. v. Commercial Nat. Bank of Chicago, 157 Ill. 524, 41 N. E. 919 (1895); Pells v. Snell, 130 Ill. 379, 23 N. E. 117 (1889); Platt v. Carter, 187 Iowa 777, 174 N. W. 786 (1919); Perkins

of absence, the burden is on the defendant and an indictment may not be questioned merely because it appears on its face to be barred by the statute.[9] The word "absent" is used in the revenue limitation [10] in place of the exception to the general limitation which prevents its application to persons fleeing from justice.[11] In view of the definition of the phrase "fleeing from justice" adhered to in the federal courts,[12] the substituted clause might preclude a prosecution in some cases, but would lengthen the time for bringing the action in the great majority of cases where the defendant is not a resident of the district in which the action is brought. Intent to avoid prosecution is not required under the absence clause to suspend the running of the statute, as is true in the situation where immunity is claimed under the "fleeing from justice" provisions. This distinction was clearly recognized in the principal case.[13] A large majority of state courts follow the rule here applied, even where service of process could be had only because of the appointment of an agent for such purpose under some statute.[14] But a few state courts have refused to apply the rule where a state statute made the use of the highways within the state equivalent to the appointment of the secretary of state as agent for the service of

v. Davis, 109 Mass. 239 (1872); Campbell v. White, 22 Mich. 178 (1871); Johnson v. Smith, 43 Mo. 499 (1869); Bell v. Lamprey, 52 N. H. 41 (1872); Keith-O'Brien Co. v. Snyder, 51 Utah 227, 169 P. 954 (1917).

[9] This rule is based on the old case of United States v. Cook, 17 Wall. (84 U. S.) 168 (1872), where the questions of pleading exceptions contained in statutes is discussed rather fully. Recent internal revenue prosecutions following this case are United States v. Anthracite Brewing Co., (D. C. Pa. 1935) 11 F. Supp. 1018; United States v. Smith, (D. C. La. 1926) 13 F. (2d) 923; and Capone v. Aderhold, (D. C. Ga. 1933) 2 F. Supp. 280.

[10] 18 U. S. C. (1934), § 585.

[11] 1 Stat. L. 119 (1790), 18 U. S. C. (1934), § 583: "Nothing in sections 581 and 582 of this title shall extend to any person fleeing from justice."

[12] Brouse v. United States, (C. C. A. 1st, 1933) 68 F. (2d) 294 at 295; citing United States v. O'Brian, 3 Dill. 381, Fed. Cas. No. 15,908 (1873); Streep v. United States, 160 U. S. 128, 16 S. Ct. 244 (1895); Ferebee v. United States, (C. C. A. 4th, 1924) 295 F. 850. See also: United States ex rel. Demarois v. Farrell, (C. C. A. 8th, 1937) 87 F. (2d) 957; Porter v. United States, (C. C. A. 5th, 1898) 91 F. 494.

[13] Principal case, 28 F. Supp. at 584, by Avis, D. J., "I am inclined to believe that when Congress passed the act in question sub judice, it intended to cover that situation so that a person who was a party to the commission of an offense in a district, although residing out of the district and never being actually therein, could still be indicted if he came into the district at any time within the six year period or thereafter."

[14] Wall v. Chicago & N. W. Ry., 69 Iowa 498, 29 N. W. 427 (1886); Lawrence v. Ballou, 50 Cal. 258 (1875); Red Men's Fraternal Accident Assn. v. Merritt, 2 W. W. Harr. (32 Del.) 1, 117 A. 284 (1921); Roess v. Malsby Co., 69 Fla. 15, 67 So. 226 (1915); McLaughlin v. Aetna Life Ins. Co., 221 Mich. 479, 191 N. W. 224 (1922); Sidway v. Missouri Land & Live Stock Co., 187 Mo. 649, 86 S. W. 150 (1905); King v. National Mining & Exploring Co., 4 Mont. 1, 1 P. 727 (1881); Colonial & U. S. Mortgage Co. v. Northwest Thresher Co., 14 N. D. 147, 103 N. W. 915 (1905); Turcott v. Yazoo & M. V. Ry., 101 Tenn. 102. 45 S. W. 1067 (1898).

process.[15] In view of an old holding by the Supreme Court in *Express Co. v. Ware*,[16] there is no reason to believe that the present rule would be contrary to the majority view in an income tax prosecution against a non-resident corporation with a resident agent against whom service could be had.

[15] Bode v. Flynn, 213 Wis. 509, 252 N. W. 284 (1934). The New York situation is interesting. A line of cases since Olcott v. Tioga R. R., 20 N. Y. 210 (1859), have held that the fact that service could be had on an agent within the state did not allow the statute of limitations to run. This rule was changed by section 19 of the New York Civil Practice Act, Amendment of 1928. However, the recent case of Maguire v. Yellow Taxi Corp., 253 App. Div. 749, 1 N. Y. S. (2d) 749 (1938), held that the appointment of the secretary of state to receive service of process was not such a "designation" as required by section 19, supra. In spite of a strong dissent in this case, New York still follows the minority rule. For the better view, see Coombs v. Darling, 116 Conn. 643, 166 A. 70 (1933); Nelson v. Richardson, 295 Ill. App. 504, 15 N. E. (2d) 17 (1938).

[16] 20 Wall. (87 U. S.) 543 (1874).