

# Time for Urging Objections to Jury Lists and Venires: Article 202, Louisiana Code of Criminal Procedure

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## Time for Urging Objections to Jury Lists and Venires: Article 202, Louisiana Code of Criminal Procedure

Article 202 of the Code of Criminal Procedure of 1928 provides:

"All objections to the manner of selecting or drawing any juror or juryor to any defect or irregularity that can be pleaded against any array or venire must be filed, pleaded, heard or urged *before the expiration of the third judicial day of the term for which said jury shall have been drawn, or before entering upon the trial of the case if it be begun sooner*; otherwise, all such objections shall be considered as waived and shall not afterwards be urged or heard."<sup>1</sup>  
(Emphasis added.)

This article, apparently aimed at providing for prompt objections to jury lists or venires, has been a continuous source of difficulty and confusion.<sup>2</sup> The purpose of this comment is to inquire into the correct interpretation of article 202, to discuss its shortcomings, and to suggest possible legislation that would clarify this area of criminal procedure.

Article 202 of the Code of Criminal Procedure of 1928 was first interpreted as requiring a defendant to object to a jury list or venire no later than the third judicial day of the term for which the jury was drawn, counting from the beginning of the term.<sup>3</sup> It was suggested that, where the accused had been indicted or had allegedly committed a crime after the third day of the jury term, article 202 would have no application,<sup>4</sup> and that the general articles governing the time for quashing indictments

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1. LA. R.S. 15:202 (1950).

2. Bennett, *Louisiana Criminal Procedure—A Critical Appraisal*, 14 LOUISIANA LAW REVIEW 11, 17 (1953); Comment, 18 TUL. L. REV. 462, 481 (1944).

3. *State v. Smothers*, 168 La. 1099, 123 So. 781 (1929).

4. *Ibid.*; for similar cases arising under prior statutes see *State v. Taylor*, 43 La. Ann. 1131, 10 So. 203 (1891); *State v. Ashworth*, 41 La. Ann. 683, 6 So. 556 (1889); *State v. Vance*, 31 La. Ann. 398, 399 (1879) ("We think that section 11 of the act of 1877 must be held not to apply to juries drawn after the first day of the term; nor to persons who had no interest and no right to object to the venire until after the juries had been empaneled. It would be to the last degree unjust to apply it to a person who is indicted during the term for an offense committed after the first day of the term . . ."); *State v. Texada*, 19 La. Ann. 436 (1867).

might apply.<sup>5</sup> In *State v. Wilson*,<sup>6</sup> however, this suggested interpretation was not followed. In that case, the alleged crime was committed and the indictment returned well after the expiration of the third judicial day of the grand jury term. Before trial, but forty-five days after the expiration of the grand jury term,<sup>7</sup> the defendant filed a motion to quash the indictment and the entire jury panel and venire. The motion was denied as not having been timely filed and the defendant was convicted. On appeal, the defendant argued that since he could not possibly have complied with the terms of article 202 and objected to the jury venire within the first three judicial days of the term, article 202 should have had no application, and that his objections should have been allowed at any time prior to trial. Apparently, the Supreme Court felt that article 202 should have general application, but should not be so construed as to render it unconstitutional.<sup>8</sup> In affirming the conviction, the court stated that an accused indicted for a crime must raise his objections to any irregularity regarding the composition of or manner of selecting any grand jury list or venire, before the expiration of three judicial days after the expiration of the term of the grand jury which returned the indictment, or before trial if it be sooner.<sup>9</sup> Thus the phrase "of the term" was in effect changed to "after the term," thereby giving article 202 a strained construction probably not intended by the legislature.<sup>10</sup>

In the very recent case of *State v. Chianelli*,<sup>11</sup> this construction of article 202 was applied in sustaining an objection to the

5. *State v. Gill*, 186 La. 339, 172 So. 412 (1937); *State v. Smothers*, 168 La. 1099, 1104, 123 So. 781, 783 (1929) ("It seems, however, that Article 287, Code Cr. Proc., might be invoked. . ."); cf. *State v. Wilson*, 204 La. 24, 74, 14 So.2d 873, 889 (1943), where Chief Justice O'Niell said in his dissent: "Articles 253, 284, 286, and 287 of the Code of Criminal Procedure . . . have reference to defects in an indictment not founded upon a defect or an irregularity in the selecting or drawing of the venire."

6. 204 La. 24, 14 So.2d 873 (1943).

7. For articles governing length of grand jury terms, see LA. R.S. 15:180, 189, 200 (1950); see also *The Louisiana Legislation of 1940*, 3 LOUISIANA LAW REVIEW 98, 164 (1940).

8. *State v. Wilson*, 204 La. 24, 50, 14 So.2d 873, 881 (1943) ("It must be further remembered that under those circumstances the constitutionality of Article 202 would be seriously involved, because the defendant would be denied an opportunity to present such pleas and objections. . .").

9. *State v. Wilson*, 204 La. 24, 53, 14 So.2d 873, 882 (1943). This holding was approved in *State v. Labat*, 75 So.2d 333 (La. 1954); *State v. Michel*, 225 La. 1040, 74 So.2d 207 (1954).

10. *State v. Wilson*, 204 La. 24, 74, 14 So.2d 873, 889 (1943) (Justice O'Niell, dissenting, "[T]he construction which the trial judge has given to the so-called 'third judicial day' rule, in this case, is not only contrary to the wording of the statute—and contrary to the jurisprudence on the subject—but is in fact an impossible construction.")

11. 76 So.2d 727 (La. 1954).

petit jury venire. There the court noted that inasmuch as article 202 makes no distinction between petit and grand juries, the "third judicial day after the expiration of the term" rule of the *Wilson* case should apply to all juries. However, the court reasoned that, since trial necessarily begins before the end of the petit jury term,<sup>12</sup> article 202 merely requires an accused to raise all objections to petit jury venires before trial.

The present interpretation of article 202, as established by the *Wilson* case and applied to objections to petit jury venires in the *Chianelli* case, is subject to criticism. This construction in regard to objections to grand jury venires, fails to provide for cases in which an accused is not assisted by counsel until on or after the third judicial day after the expiration of the grand jury term. Also, since objections to petit jury venires are permitted until trial, in some instances an accused can substantially delay the trial of his case by waiting until the date fixed for trial to raise such objections.<sup>13</sup> Where the hearing necessary to determine the validity of the defendant's objections continues until the jury term has expired, the result is a postponement of the trial until the next jury term.

The basic problem of statutory construction is one of ascertaining the intent of the legislature. In relation to article 202, the generally applicable canons of statutory construction would lead to a different conclusion from that announced in the *Wilson* case. Thus, under the "plain meaning" rule or "rule of literalness,"<sup>14</sup> it is difficult to say how the phrase "of the term" could be construed as meaning "after the term." However, since a literal interpretation would lead to the incongruous result of depriving many accused persons of the right of objecting to jury venires, the plain meaning of the language of the statute should not be relied upon as conclusively proving the legislative intent.<sup>15</sup> Because of the considerable amount of prior legislation on this special subject, an examination of the legislative

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12. For articles governing length of petit jury term, see LA. R.S. 15:181, 187, 195 (1950).

13. *State v. Chianelli*, 76 So.2d 727, 730 (La. 1954) ("We are conscious of the fact that under the interpretation given to Article 202 by the *Wilson* case and others following it an accused can indefinitely delay the trial of his case.").

14. For a statement of the "plain meaning" rule, see *Caminetti v. United States*, 242 U.S. 470 (1917); *Lake County v. Rollins*, 130 U.S. 662 (1889). See also 2 SUTHERLAND, STATUTORY CONSTRUCTION § 4502 (1943).

15. *Church of Holy Trinity v. United States*, 143 U.S. 457 (1892).

history<sup>16</sup> of article 202 provides a clearer indication of the legislative intent underlying it.

The earliest Louisiana statute dealing with the time for objecting to jury venires provided that "all or any objections . . . shall be made on the first day of the term of said district court, and not afterward."<sup>17</sup> In subsequent acts, applicable in all the parishes except Orleans, a similar "first day of the term" rule was re-enacted.<sup>18</sup> In construing these statutes, the courts always gave the phrase "of the term" its literal meaning.<sup>19</sup> Where it would have been impossible for the defendant to raise these objections on the first day of the term of court, the statutes were considered inapplicable and objections were allowed at a later time.<sup>20</sup> Act 135 of 1898<sup>21</sup> extended the time for raising objections to jury venires by permitting them at any time before trial.<sup>22</sup> Concurrent with these statutes for the "country parishes," separate statutes were in effect in Orleans Parish. The first of these provided that such objections "must be urged within the first three judicial days of the term."<sup>23</sup> Subsequent re-enactments employed substantially the same language.<sup>24</sup> Although no case arose under the Orleans Parish statutes which called for a precise interpretation of the phrase "within the first three judicial days of the term," the phrase "of the term" was common to both the statutes for the "country parishes" and those for the Parish of Orleans and seemingly had a similar meaning in both groups. Thus it logically follows that the uniform inter-

16. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). See also 2 SUTHERLAND, STATUTORY CONSTRUCTION § 5002 (1943).

17. La. Acts 1840, No. 32, § 5, p. 27, re-enacted in La. Acts 1855, No. 243, § 3, p. 297.

18. La. Acts 1877, No. 44, § 11, p. 55: "All objections to the manner of drawing juries, or to any defect or irregularity that can be pleaded against any array or venire, must be urged on the first day of the term, or all such objections shall be considered waived, and shall not afterwards be urged." La. Acts 1894, No. 89, § 10, p. 121; La. Acts 1896, No. 99, § 11, p. 144.

19. *State v. Hebert*, 50 La. Ann. 401, 23 So. 300 (1898); *State v. Collins*, 48 La. Ann. 1454, 1455, 21 So. 86 (1896) (motion to quash denied "upon the ground that it came too late, not having been tendered and filed on the first day of the term of court at which the grand jury was drawn and organized . . .").

20. See note 4 *supra*.

21. La. Acts 1898, No. 135, § 16, p. 216: "All objections to the manner of selecting or drawing the jury or to any defect or irregularity that can be pleaded against any array a venire must be urged before entering on the trial of the case."

22. See *State v. Jenkins*, 160 La. 757, 107 So. 564 (1926); *State v. Thomas*, 141 La. 560, 75 So. 241 (1917); *State v. Flint*, 52 La. Ann. 62, 26 So. 913 (1899).

23. La. Acts 1894, No. 170, p. 211.

24. La. Acts 1921(E.S.), No. 114, § 2, p. 244; La. Acts 1926, No. 337, § 2, p. 652.

pretation of the earlier statutes used in the "country parishes," giving the phrase "of the term" its literal meaning,<sup>25</sup> would have been equally proper in the Orleans statutes.

Article 202 of the Code of Criminal Procedure of 1928 abolished the distinction between the rule applicable in the Parish of Orleans and that in the other parishes.<sup>26</sup> The language of the article, obviously patterned after the statutes previously enacted for Orleans Parish,<sup>27</sup> reflects the legislative approval of the judicial interpretation of the prior statutes.<sup>28</sup> It is submitted that the legislative history of article 202 indicates an intent on the part of the legislature to limit the time in which a defendant may object to jury venires to no later than the third judicial day of the term for which the jury was drawn, counting from the beginning of the term.

Under this interpretation, where a defendant is indicted prior to the beginning of the criminal term of court in which his case is assigned for trial, he is able to raise his objection to the petit jury venire within the first three judicial days of the term or before trial if it be begun sooner. However, this rule would preclude the challenging of petit jury venires where the fixing of the date of trial does not occur until after the first three judicial days of that particular criminal term. Also, when applied in the case of an objection to the validity of a grand jury venire, this interpretation of article 202 would normally be unworkable.<sup>29</sup> It would be a rare occurrence indeed, in which a grand jury could be empaneled, testimony examined, and all or even a majority of its indictments returned, all within the space of three judicial days from the beginning of the term.<sup>30</sup>

25. *State v. Sterling*, 41 La. Ann. 679, 6 So. 583 (1889); *State v. Vance*, 31 La. Ann. 398 (1879). See also *State v. Wilson*, 204 La. 24, 60, 14 So.2d 873, 885 (1943) (O'Niell, C. J., dissenting: "Heretofore this court has held consistently that the expression 'before the expiration of the third judicial day of the term for which said jury shall have been drawn' means before the end of the third judicial day counting from the beginning of the term.").

26. See *State v. Wilson*, 204 La. 24, 65, 15 So.2d 873, 886 (1943) (applicable to both "the Criminal District Court for the Parish of Orleans as it is to the District Courts in the other parishes.").

27. The phrasing of the Orleans Parish statutes (La. Acts 1921(E.S.), No. 114, § 2, p. 244) is "[not] after the expiration of the third judicial day of the term for which said jury shall have been drawn," and in article 202 of the Code of Criminal Procedure of 1928 it is "before the expiration of the third judicial day of the term for which said jury shall have been drawn, or before entering upon the trial of the case if it be begun sooner."

28. See 2 SUTHERLAND, STATUTORY CONSTRUCTION § 5109 (1943).

29. *State v. Wilson*, 204 La. 24, 49, 14 So.2d 873, 881 (1943) ("This would mean that Article 202 of the Code of Criminal Procedure would be rendered absolutely nugatory . . .").

30. Cf. FED. R. CRIM. P. 6(b)(1), which provides that a defendant who has been held to answer in the district court awaiting grand jury action

When any of these situations arise in which the literal interpretation of article 202 would lead to incongruous results, the court is faced with two possible courses of action. It might follow the earlier jurisprudence and hold that since the law does not require impossibilities,<sup>31</sup> the article does not apply to cases in which the crime was committed or the indictment found after the third judicial day of the term. The effect of such a conclusion would render the article practically nugatory. On the other hand, if the court were to apply the article to "all objections to . . . any jury or to any defect or irregularity that can be pleaded against any array or venire"<sup>32</sup> (emphasis added) as its literal meaning suggests, defendants would often be denied an opportunity to challenge the legality of the jury list or venire. Such an interpretation would render the constitutionality of the article extremely doubtful.<sup>33</sup>

It is clear that under either the literal interpretation of article 202 or that adopted in the *Wilson* case, certain undesirable results are sure to follow. This somewhat anomalous situation is the result of the legislative attempt to promulgate a single rule that would govern the time for filing objections to both petit and grand jury venires.<sup>34</sup> Admittedly, the interpretation established in the *Wilson* case seems to have fewer shortcomings than the literal interpretation. However, it is submitted that the court in the *Wilson* case was guilty of judicial legislation.<sup>35</sup> Also, since the Supreme Court can at any time decide that the rule of the *Wilson* case is illogical and revert to the prior rule, an accused person is at the present somewhat insecure in waiting until after the first three judicial days of the term to raise objections to the jury venire. Possibly the only solution lies in the amendment of article 202 by the legislature.<sup>36</sup>

The formulation of a rule which requires prompt objections to jury venires without working a hardship in any case has been most nearly achieved by the American Law Institute in its

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may challenge the array of jurors. *State v. Collins*, 48 La. Ann. 1454, 21 So. 86 (1896) (defendant, who was held in jail at the beginning of grand jury term, but not indicted until later, should have urged objections to grand jury venire on first day of term).

31. See note 4 *supra*.

32. LA. R.S. 15:202 (1950).

33. See note 8 *supra*.

34. See Bennett, *Louisiana Criminal Procedure—A Critical Appraisal*, 14 LOUISIANA LAW REVIEW 11, 17 (1953).

35. See *State v. Chianelli*, 76 So.2d 727, 729 (La. 1954) ("judicial legislation rather than judicial interpretation").

36. *State v. Chianelli*, 76 So.2d 727, 730 (La. 1954) ("Article 202 of the Code of Criminal Procedure requires legislative, not judicial, action.").

Model Code of Criminal Procedure,<sup>37</sup> which treats challenges to the petit juries and grand juries separately. As to grand juries, it provides in effect that the latest time at which objections may be urged as of right to the grand jury panel or to any individual grand juror is at arraignment.<sup>38</sup> Objections to the petit jury panel or venire must be urged before any individual juror is examined.<sup>39</sup>

The Louisiana legislature, by following the example of the Model Code and enacting one article setting forth the time for objections to grand juries and a separate article dealing with objections to petit juries, can eliminate the difficulties and confusion caused by article 202.

The rule in regard to the time for objecting to grand jury venires as stated in the Model Code of Criminal Procedure requires slight changes in order to function most effectively under existing Louisiana criminal procedures. Persons charged with offenses are often arraigned and brought to trial a considerable time after the expiration of the grand jury term, at which time citizens who composed the grand jury venire are likely to be unavailable for any hearing as to its validity. Therefore, the provisions of the Model Code, allowing objections as of right until arraignment, would be unsatisfactory. A workable article might provide:

"All objections to the manner of selecting and drawing any grand juror or to any defect or irregularity that can be pleaded against any grand jury array or venire must be urged before the expiration of the third judicial day after the expiration of the term for which said jury shall have been drawn; or before entering upon the trial of the case if it be begun sooner; otherwise all such objections shall be considered as waived and shall not afterwards be urged or heard; provided, that in his sound discretion, the trial judge may permit such objections to be raised up until trial is begun."<sup>40</sup>

The last clause is inserted to cover those cases in which an

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37. A.L.I., MODEL CODE OF CRIMINAL PROCEDURE (1930).

38. *Id.* § 207, providing in part: "Upon being arraigned the defendant shall immediately, unless the court grants him further time, either move to quash the indictment or information or plead thereto, or do both"; *cf.* FED. R. CRIM. P. 6(b)(1), 6(b)(2) to the same effect.

39. A.L.I., MODEL CODE OF CRIMINAL PROCEDURE § 269 (1930).

40. *Cf.* rule announced in *State v. Labat*, 226 La. 201, 75 So.2d 333 (1954); *State v. Michel*, 225 La. 1040, 74 So.2d 207 (1954); *State v. Wilson*, 204 La. 24, 14 So.2d 873 (1943).

accused is provided with counsel at a very late date, that is, after or immediately prior to the third judicial day after the expiration of the term.<sup>41</sup> This suggested legislation, which allows all defendants a reasonable time in which to file objections to the grand jury venire, would not be open to an attack on constitutional grounds.

In Louisiana, arraignment is the latest time at which many motions in a criminal proceeding can be urged as of right.<sup>42</sup> However, since criminal cases are often assigned for trial before a jury venire is selected,<sup>43</sup> it follows that a rule requiring objections to petit jury venires to be made no later than arraignment would be unsatisfactory. On the other hand, if a defendant were allowed to raise such objections at any time prior to trial, he could often substantially delay the trial of his case by waiting until the date fixed for trial to urge the objection which might necessitate a hearing on the validity of the petit jury array or venire.<sup>44</sup> Nevertheless, an accused should be given ample time in which to raise objections to petit jury lists or venires. In order to resolve this difficulty an article might be enacted to provide:

"All objections to the manner of selecting and drawing or to any defect or irregularity that can be pleaded against any petit jury array or venire must be urged before the fifth day prior to trial; otherwise such objections shall be considered as waived and shall not afterwards be urged or heard; provided, that in his sound discretion, the trial judge may permit such objections to be raised up until trial is begun."

In order to allow a defendant whose trial is scheduled for an early day in the criminal term ample time in which to object to the petit jury venire, a provision is inserted permitting the trial judge to relax the five-day time limit. Such an article, in providing a five-day period immediately prior to trial in which a hearing on the defendant's objections to the jury venire could

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41. See A.L.I., MODEL CODE OF CRIMINAL PROCEDURE § 207 (1930) and FED. R. CRIM. P. 12(b)(3) which permit trial judge to extend time for objections.

42. LA. R.S. 15:284 (1950): "Every objection to any indictment shall be taken by demurrer or by motion to quash such indictment, before the arraignment; and every court before which any such objection shall be taken for any formal defect, may, if it be thought necessary, cause the indictment to be forthwith amended in such particular, and thereupon the trial shall proceed as if no defect had appeared."

43. See, e.g., *State v. Chianelli*, 226 La. 552, 76 So.2d 727 (1954), where arraignment was on June 22, 1953, and trial fixed for January 12, 1954.

44. See note 13 *supra*.

be conducted, should prevent undue delays. The effect of this article would be to require the timely fixing of cases for trial so as to give the accused a reasonable time in which to object to the petit jury venire before the fifth day prior to trial.

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## Venue in Louisiana Criminal Cases under Amended Article 13, Code of Criminal Procedure

The rule governing venue in criminal cases, that an accused ordinarily must be tried in the locality where the crime was committed, has its origin in the common law institution of trial by jury. Under the rules of early English criminal procedure, the jury was composed of the witnesses to the crime.

For the convenience of the forum and the witnesses, the trial was held in the neighborhood where the crime was committed. Later, when the jury became an "impartial weigher of the evidence," not composed of the witnesses to the crime, the requirement of trial at the *locus* of the crime was continued.<sup>1</sup> The continuance of this requirement may be due to the factor of availability of witnesses and other considerations of trial convenience. A strict application of the rule that trial must be in the county where the crime was committed, however, has not always produced the best results. For this reason, most jurisdictions have relaxed the rule by creating certain exceptions.<sup>2</sup> For example, offenses committed within short, specified distances from a county line can be tried in either county.<sup>3</sup> Furthermore, a prosecution for larceny can be brought in any county into which the stolen goods are carried.<sup>4</sup> This exception to the rule has been extended in some states to include other "continuing" crimes.<sup>5</sup>

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1. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 367 (1947); PUTTKAMMER, ADMINISTRATION OF CRIMINAL LAW 156, n. 8 (1953).

2. 1 STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 278 (1883): "A rule which requires eighteen statutory exceptions, and such an evasion as the last one mentioned in the case of theft [the continuing nature of the crime]—the commonest of all offences—is obviously indefensible. . . . [A]ll courts otherwise competent to try an offence should be competent to try it irrespectively of the place where it was committed, the place of trial being determined by the convenience of the court, the witnesses, and the person accused. Of course, as a general rule, the county where the offence was committed would be the most convenient for the purpose."

3. LA. R.S. 15:15 (1950); PUTTKAMMER, ADMINISTRATION OF CRIMINAL LAW 159 (1953).

4. State v. McCoy, 42 La. Ann. 228, 7 So. 330 (1890); PUTTKAMMER, ADMINISTRATION OF CRIMINAL LAW 157 (1953).

5. CAL. PENAL CODE § 786 (1872); S.D. REV. CODE § 4514 (1919).