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Criminal Procedure - Three-Year Prescription on Indictments

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have refused to tamper with the Florida judgment and yet refrained from holding the statute unconstitutional. The result of the decision might be that similar suits will be precluded even where the facts present a desirable case for modification. By holding the statute unconstitutional, it appears that the Colorado Supreme Court has unnecessarily limited the power of its state's courts to adjudicate matters involving recognition of foreign judgments.

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CRIMINAL PROCEDURE — THREE-YEAR PRESCRIPTION ON INDICTMENTS

On September 21, 1951, a bill of information was filed against defendants charging them with unlawful possession of narcotics. The arraignment was held on October 15, 1951, but the case was not set for trial until September 30, 1954. On the date of the trial, defendants filed a plea of prescription based upon article 8 of the Code of Criminal Procedure.[1] They contended that since more than three years had elapsed without trial since the date of the filing of the bill of information, the charge should be dismissed. The state contended, on the other hand, that under article 9 of the Code of Criminal Procedure[2] the arraignment of defendants was a prosecutive step which started a new three-year prescriptive period and that the date set for trial was within the new period. The trial court rejected the state's contention and sustained defendant's plea of prescription. On appeal, *held,* affirmed. Articles 8 and 9 of the Code of Criminal Procedure establish separate three-year prescriptive periods. Under article 8, if three years elapse in a felony case

invoked in the instant case) a Texas decree ordering a husband to support a daughter in his wife's custody until the age of sixteen, was not a final judgment and not entitled to full faith and credit. It ordered the husband to pay additional future alimony.

1. LA. R.S. 15:8 (1950). The pertinent provisions of article 8 state: "In felony cases when three years elapse from the date of finding an indictment, or filing an information, . . . 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."

2. LA. R.S. 15:9 (1950): "Whenever it shall have been established to the satisfaction of any court in which any criminal prosecution shall be pending that the prescriptive periods as herein provided have elapsed since the last date upon which any steps shall have been taken by the state in such prosecution, and that the district attorney has not entered his nolle prosequi, the court shall order the dismissal of said prosecution . . . ."

from the date of filing the bill of information without trial of an accused or without interruption of prescription by an act of the accused, the court may cause a nolle prosequi to be entered. *State v. Bradley,* 227 La. 421, 79 So.2d 561 (1955).

The Louisiana Constitution[3] guarantees the accused in a criminal prosecution the right to a speedy trial. Articles 8 and 9 of the Code of Criminal Procedure are designed to assure the accused in a felony[4] case that this right will be protected by providing that, except for certain interrupting circumstances, the accused must be tried within three years of the date of the charge. Until the instant case, the possibility of there being two distinct prescriptive periods of three years under articles 8 and 9 does not seem to have been considered by the Supreme Court.[5] In previous holdings the Supreme Court treated article 8 as establishing the prescription of three years on dormant charges, and article 9 as setting forth the procedure by which a defendant could obtain a judicial nolle prosequi.[6] In two of these earlier cases, the court characterized the period within which the accused must be brought to trial under articles 8 and 9 as "the prescriptive period."[7]

The instant case, however, placed before the Supreme Court for the first time the problem of interpreting the language of article 9 to the effect that "whenever . . . the prescriptive periods . . . have elapsed since the last date upon which any steps shall have been taken by the state in such prosecution" the prosecution shall be ordered dismissed. The state relied upon this language to support its contention that a new prescriptive period had begun on the filing of the arraignment, which constituted the last prosecutive step.[8] Under this interpretation, however,

3. LA. CONST. art. I, § 9.

4. Articles 8 and 9 also provide for a prescriptive period of two years from the indictment in non-felony cases. Only the three-year period applicable to felony cases will be discussed in this note, but the discussion is equally applicable to the two-year period in non-felony cases.

5. For a discussion prior to the instant case of the three-year prescription, see Comment, *Prescription of Criminal Prosecutions in Louisiana,* 15 LOUISIANA LAW REVIEW 192, 196 (1954).

6. Comment, *Prescription of Criminal Prosecutions,* 6 LOUISIANA LAW REVIEW 274, 279 (1945).

7. State v. Shushan, 204 La. 672, 681, 16 So.2d 227, 230 (1943); State v. Gunter, 188 La. 314, 317, 177 So. 60, 61 (1937).

8. See State v. Edrington, 11 Orl. App. 288, 289 (La. App. 1914) for a definition of prosecutive step as "some formal move before the court, intended to hasten the judgment." It is defined in a civil case, Augusta Sugar v. Haley, 163 La. 814, 816, 112 So. 731, 732 (1927) as "something more than a mere passive effort to keep the suit on the docket of the court." See Note, 16 LOUISIANA LAW REVIEW 199 (1955) for a discussion of this problem in civil cases.

it would be within the power of the district attorney to keep a charge pending indefinitely, simply by taking a step in the prosecution whenever the three-year period was about to elapse. The court appears to have alluded to this problem in the recent case of *State v. Murray*.[9] There the court indicated that the right to be tried within three years of an indictment is absolute, unless the delay results from the accused's own action or inability to stand trial. This interpretation of article 8 would preclude any idea that article 9 provides a second prescriptive period. It would also constitute a rejection of the contention that article 9 provides the state with a method of interrupting prescription.

The decision in the instant case in effect constitutes a rejection of the approach suggested in the *Murray* case. Although the court gave no reason for doing so, a possible explanation would be that the approach of the *Murray* case would render the relevant portions of article 9 ineffective. By holding that articles 8 and 9 provide for two prescriptive periods the court apparently felt that it had given effect to the language of both articles. It is submitted, however, that the interpretation given in the instant case also fails to present a complete solution to the problem.

In the instant case, the court concluded that the two articles were drawn to provide two separate and unrelated prescriptive periods; the period under article 8 running from the date of the charge, and that under article 9 from the date of the last prosecutive step. The court found support for this distinction in the fact that articles 8 and 9 are couched in different language. Article 8 states that the court "*may* . . . cause such nolle prosequi to be entered," while article 9 states "the court *shall* order dismissal of said prosecution." (Emphasis added.) Thus, if the accused is not brought to trial within three years from the date of the charge, the trial judge *may, in his discretion,* enter a nolle

9. 222 La. 950, 64 So.2d 230 (1953). In discussing the possibility that, in a theft case, the state could reduce the original charge by one dollar each year and file a new bill, thus keeping the charge hanging over the accused for many years, the court said: "But, apart from this, there is no reason to suppose that the courts would permit the State to indulge in the practice feared by counsel as LSA—R.S. 15:8 also provides that, in felony cases, the accused must be brought to trial within 3 years from the date of finding an indictment or filing an information, and, if he is not, the court may cause the charge to be nolle prosequied. Accordingly, any use of the privilege accorded the State to recharge a defendant with crime based on the same facts is specially limited by this requirement that he be tried within three years from the date of the original charge." *Id.* at 956, 64 So.2d at 232. The problem is also discussed in the subject case. State v. Bradley, 79 So.2d 561, 564 (La. 1955).

prosequi. On the other hand, if the accused is not brought to trial within three years of the last prosecutive step, the trial judge *must* enter a nolle prosequi.

This interpretation could prove troublesome. By holding the language of article 8 to be permissive, the Supreme Court seems to have granted the trial judge power to defeat the purpose of the three-year prescriptive rule, which is to assure the accused the right to a speedy trial. Under this interpretation, the trial judge could refuse to nolle prosequi an indictment despite the fact that the accused has been available for prosecution during the entire three-year period. It is improbable, however, that the Supreme Court would permit the trial judge to exercise his powers in such arbitrary fashion[10] and would no doubt find the refusal to nolle prosequi the indictment to be an abuse of discretion.[11] This would raise a further question as to whether the second prescriptive period provided for in article 9 would ever be applicable. To hold it to be an abuse of discretion to refuse to nolle prosequi an indictment in such case would in effect prevent application of the second prescriptive period, since the first period would, in most cases, expire before the second.

There are other practical problems presented by the Supreme Court's designation of two separate prescriptive periods. Notable among these is the question whether or not the mandatory prescriptive period from the last prosecutive step, as set out in

10. In the instant case the court stated: "It is conceivable that three years could elapse after the filing of a bill of information without the defendant's being brought to trial, and that the district attorney would refuse to enter a nolle prosequi because he felt that there was a valid reason for the State's delay. If the trial judge on motion of the defendant rules the district attorney to show cause why a nolle prosequi should not be entered, and after hearing decides that the trial of the accused has been delayed for a justifiable reason, the court can refuse to enter a nolle prosequi." State v. Bradley, 79 So.2d 561, 563 (La. 1955). The court does not indicate what would be a justifiable reason for delaying the trial beyond three years. However, in light of the purpose of the prescriptive period, and the opinion in the case of State v. Murray, 222 La. 950, 64 So.2d 230 (1953), it is submitted that the only justifiable reasons for a delay in excess of three years would be acts of the accused which prevent his being brought to trial, or the occurrence of circumstances beyond the control of the state which prevent the accused from being brought to trial. See note 14 *infra*.

11. In other areas where the trial judge has been granted discretionary powers, the court has held that these powers must be reasonably exercised. See, *e.g.*, State v. Pearson, 224 La. 393, 69 So.2d 512 (1953) and State v. Leming, 217 La. 257, 46 So.2d 262 (1950) (trial judge's refusal to grant a change of venue will be reversed if an abuse of discretion is shown); State v. Verdin, 192 La. 275, 187 So. 666 (1939) and State v. Soileau, 173 La. 531, 138 So. 92 (1931) (refusal of a trial judge to allow a change in plea held to be an abuse of discretion); State v. Wilson, 181 La. 61, 158 So. 621 (1935) and State v. Martin, 145 La. 35, 81 So. 747 (1919) (refusal of the trial judge to grant a continuance held to be an abuse of discretion).

article 9, can be interrupted or suspended. Article 8 expressly provides the methods by which the period set forth in that article can be interrupted,[12] but the only provision of article 9 which mentions interruption of prescription refers to the period established in article 8.[13] This may give rise to the argument that the mandatory period cannot be interrupted by acts of the accused. If this position were taken, an accused who absconds from justice after a step is taken in his prosecution would be entitled as of right to a nolle prosequi after three years has expired. It is unlikely that the Supreme Court would allow such a result to occur. To avoid this anomaly, the court could apply article 8 by analogy to article 9 by holding that the mandatory period can be interrupted by acts of the accused which prevent his being brought to trial within the prescriptive period. A similar result could be achieved by application of the principle established by the jurisprudence, that the accused must have been amenable to prosecution at all times during the period for the prescription to run.[14]

Nevertheless, the action of the court in the instant case, in dismissing the prosecution, appears to be correct under either interpretation of articles 8 and 9. If the articles provide for two prescriptive periods, it was within the trial judge's discretion to enter a nolle prosequi under article 8. The same result would be reached under the concept of a single period. As pointed out previously, a prosecutive step taken by the state should not be allowed to interrupt a period which has been established to insure the defendant's being brought to trial with reasonable promptness.

12. "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."

13. "[T]hat unless the defendant has posted requisite appearance bond, the prescription established in Art. 8 hereof shall be interrupted by the absence of the defendant from the jurisdiction of said court without the written consent of the court first obtained and entered upon the minutes, or filed in the records of the cause."

14. The decision in State v. Theard, 212 La. 1022, 34 So.2d 248 (1948) is an illustration of this principle. In the *Theard* case, the accused was charged with the crime on September 1, 1936. In December of 1937, he applied for the appointment of a lunacy commission, and on April 20, 1938, he was adjudged insane. On May 11, 1944, the accused was adjudged to be presently sane, but he was not arraigned until March 11, 1947. The court held that the prescriptive period was suspended by the insanity of the accused, since his insanity was a circumstance beyond his control. The action was held to be prescribed since the time between the charge and the decree of insanity together with the time that had expired from the judgment of sanity exceeded three years. In arriving at the decision the court pointed out the fact that the defendant was not amenable to prosecution during the time of his insanity, and thus prescription could not continue to run.

Much of the confusion in the present law relating to prescription of criminal prosecutions results from the cumbersome structure of these two articles. Article 8 contains provisions relating to three different prescriptive periods,[15] and article 9 either supplements article 8 or adds a fourth prescriptive period. Although the decision in the subject case was an attempt to bring order to this confusion, it does not appear to have improved upon the original situation. It is submitted that the most logical remedy to the situation is corrective legislation. In order to avoid the present confusion in structure and language, the prescriptive period for charging the crime and the period for bringing the defendant to trial after the charge is filed should be stated in separate articles, each including its own provisions as to interruption and suspension. The provision for the three-year period should include the following:

(1) The period should begin to run from the date of the charge.

(2) After the lapse of three years, an accused should have an absolute right to a nolle prosequi if he can show that nothing has occurred that would cause the period to be interrupted or suspended.

(3) Interruption of the period should be limited to acts of the accused as now provided in articles 8 and 9.

(4) A provision for suspension of the period by occurrences not within the control of the state or the accused should also be included in order to codify the rules developed by the courts on the subject.[16]

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LABOR LAW — RIGHT TO WORK ACT — RESTRAINT OF PEACEFUL PICKETING

Plaintiff was engaged in the business of operating a supermarket. Two of its employees, both of whom were meatcutters

15. Article 8 provides for a one-year prescription upon the filing of the indictment running from the time the offense has been made known to the authorities. It also provides for a prescription of six months from the date of the offense on prosecutions for any fine or forfeiture.

16. *E.g.*, concerning the insanity of the accused, see State v. Theard, 212 La. 1022, 34 So.2d 248 (1948). For a general discussion see Annot., 30 A.L.R.2d 462 (1953).