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## CRIMINAL LAW AND PROCEDURE - STATUTE OF LIMITATIONS - TIME OF COMMISSION OF OFFENSE MATTER OF DEFENSE OR OF JURISDICTION

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CRIMINAL LAW AND PROCEDURE — STATUTE OF LIMITATIONS — TIME OF COMMISSION OF OFFENSE MATTER OF DEFENSE OR OF JURISDICTION — Defendant pleaded guilty to rape and was sentenced to imprisonment upon an indictment which showed upon its face that the period allowed by the statute of limitations had elapsed since the offense charged had been committed, and there were no allegations setting forth an exception to the running of the statute. Later, defendant moved to set aside the judgment on the ground that the court lacked jurisdiction. *Held*, the judgment was void and the defendant should be released. *People v. McGee*, (Cal. 1934) 36 Pac. (2d) 378.

Although courts look with disfavor upon prosecutions unduly delayed,<sup>1</sup> if there is no limitation prescribed by statute, as to when a criminal action must be brought, a person may be prosecuted at any time after the commission of the offense, and the lapse of time will not bar the right of the state to proceed.<sup>2</sup> Statutes of limitation have been enacted in most jurisdictions<sup>3</sup> imposing a bar in

<sup>1</sup> I WHARTON, CRIMINAL PROCEDURE, 10th ed., sec. 377 (1918). See also *Regina v. Robins*, 1 Cox C. C. 114 (1844).

<sup>2</sup> I BRILL, CYCLOPEDIA CRIMINAL LAW, sec. 193 (1922); *People v. Bailey*, 103 Misc. 366, 171 N. Y. S. 394 (1918); *Commonwealth v. Wilcox*, 56 Pa. Super. 244 (1914). See *People v. Ross*, 235 Mich. 433, 209 N. W. 663 (1926).

<sup>3</sup> See 16 C. J. 222 (1918).

certain types of criminal cases, and generally providing, among other things, that the statute will not run in favor of fugitives from justice. It is well settled that the burden is upon the state to show that the crime was committed during the limitation period.<sup>4</sup> As to whether the bar of the statute is a matter of defense or a jurisdictional factor, there is considerable conflict of authority. One group of cases holds that time is not of the essence, and that the statute is a defense which the accused may plead or waive at his discretion.<sup>5</sup> Under this view, the indictment is good although the date named falls prior to the period limited by the statute,<sup>6</sup> and the state will be permitted to prove upon the trial that the case fell within an exception.<sup>7</sup> And the statute may be taken advantage of by the defendant under the general issue.<sup>8</sup> Many of these decisions purport to be based upon the wording of the statute, in that since the language of the section defining the offense is so entirely separable from the exception that the ingredients constituting the crime may be clearly defined without reference to the exception, it is the duty of the accused to set up the defense if he wishes to avail himself of it.<sup>9</sup> The other group of cases holds that the time of commission of the offense is a jurisdictional factor.<sup>10</sup> An indictment, indicating on its face that the offense fell outside the period limited without alleging facts avoiding the bar, is held bad by these courts upon demurrer, motion to quash, or motion in arrest of judgment.<sup>11</sup> If the

<sup>4</sup> 13 A. L. R. 1446 (1921) for list of cases. Also *State v. Bilboa*, 38 Idaho 92, 213 Pac. 1025, 222 Pac. 785 (1923); *State v. Johnson*, 195 N. C. 657, 143 S. E. 185 (1928).

<sup>5</sup> *People v. Blake*, 121 App. Div. 613, 106 N. Y. S. 319 (1907); *People v. Bailey*, 103 Misc. 366, 171 N. Y. S. 394 (1918); *State v. Thrasher*, 79 Me. 17, 7 Atl. 814 (1887); *Packer v. People*, 26 Colo. 306, 57 Pac. 1087 (1899); *Ex parte Townsend*, (D. C. Neb. 1904) 133 Fed. 74.

<sup>6</sup> *People v. Van Santvoord*, 9 Cow. (N. Y.) 654 (1821); *United States v. White*, 5 Cranch C. C. 73, Fed. Cas. 16-676 (1836); *State v. Bowling*, 10 Humph. (29 Tenn.) 52 (1849); *State v. Hobbs*, 39 Me. 212 (1855); *State v. Hussey*, 7 Iowa 409 (1858); *United States v. Cook*, 17 Wall. (84 U. S.) 168, 21 L. ed. 538 (1872); *State v. Unsworth*, 85 N. J. L. 237, 88 Atl. 1097 (1913); *People v. Bailey*, 103 Misc. 366, 171 N. Y. S. 394 (1918).

<sup>7</sup> HUGHES, CRIMINAL LAW AND PROCEDURE, sec. 2732 (1901).

<sup>8</sup> *United States v. Cook*, 17 Wall. (84 U. S.) 168, 21 L. ed. 538 (1872); *Hatwood v. State*, 18 Ind. 492 (1862); *State v. Hussey*, 7 Iowa 409 (1858).

<sup>9</sup> *United States v. Cook*, 17 Wall. (84 U. S.) 168, 21 L. ed. 538 (1872). See 7 VA. L. REV. 656 (1921).

<sup>10</sup> *State v. Steensland*, 33 Idaho 529, 195 Pac. 1080, 13 A. L. R. 1442 (1921); *State v. Bilboa*, 38 Idaho 92, 213 Pac. 1025, 222 Pac. 785 (1923); *Ex parte Hoad*, 63 Tex. Cr. 519, 140 S. W. 449 (1911); *Moore v. State*, 14 Vroom (43 N. J. L.) 203, 39 Am. Rep. 558 (1881); *Vaughn v. Congdon*, 56 Vt. 111, 48 Am. Rep. 758 (1883); *People v. Ross*, 325 Ill. 417, 156 N. E. 303 (1927); *People v. Moran*, 44 P. I. 387 (1923).

<sup>11</sup> *State v. Colvin*, 284 Mo. 195, 223 S. W. 585 (1920); *People v. Gregory*, 30 Mich. 371 (1874); *Vaughn v. Congdon*, 56 Vt. 111, 48 Am. Rep. 758 (1883); *McLane v. State*, 4 Ga. 335 (1848); *People v. Hallberg*, 259 Ill. 502, 102 N. E. 1005 (1913); *State v. Gibbs*, 1 Root (Conn.) 171 (1790); *Anderson v. State*, 20 Fla. 381 (1883); *State v. Bilbo*, 19 La. Ann. 76 (1867); *People v. Ross*, 325 Ill. 417, 156 N. E. 303 (1927). See BEALE, CRIMINAL PLEADING AND PRACTICE, sec. 150 (1899).

accused fails to raise the point during the trial, he does not waive it.<sup>12</sup> These cases draw a distinction between the construction of limitation statutes in civil suits and that of similar statutes in criminal cases.<sup>13</sup> In civil actions, the limitation is imposed as an impartial arbiter between the parties, so there the statute is not construed in favor of either and is treated as a defense. In criminal suits, the state is the grantor surrendering its rights to prosecute. "Hence it is that statutes of limitation are to be liberally construed in favor of the defendant,"<sup>14</sup> not only because such liberality of construction belongs to all acts of amnesty and grace, but because the very existence of the statute is a recognition and notification by the legislature of the fact that time, while it gradually wears out proofs of innocence, has had assigned to it fixed and positive periods in which it destroys proofs of guilt."<sup>15</sup> The instant case resolved the confusion existing in prior decisions in California<sup>16</sup> by deciding to follow the latter group of cases, even though under the statute involved<sup>17</sup> the exception to the rule of limitations is in a subsequent section. The court seems to be following the trend of modern decisions.

J. W. C.

<sup>12</sup> *State v. Steensland*, 33 Idaho 529, 195 Pac. 1080, 13 A. L. R. 1442 (1921); *Ex parte Hoad*, 63 Tex. Cr. 519, 140 S. W. 449 (1911).

<sup>13</sup> See *Moore v. State*, 14 Vroom (43 N. J. L.) 203, 39 Am. Rep. 558 (1881); *People v. Ross*, 325 Ill. 417, 156 N. E. 303 (1927).

<sup>14</sup> *State v. Locke*, 73 W. Va. 713, 81 S. E. 401 (1914); *State v. Heller*, 76 Wis. 517, 45 N. W. 307 (1890); *Synnott v. State*, 38 Okla. Cr. 281, 260 Pac. 517 (1927); *Hogoboom v. State*, 120 Neb. 525, 234 N. W. 422 (1931); *State v. Colvin*, 284 Mo. 195, 223 S. W. 585 (1920).

<sup>15</sup> I WHARTON, CRIMINAL PROCEDURE, 10th ed., sec. 367 (1918).

<sup>16</sup> *Ex parte Blake*, 155 Cal. 586, 102 Pac. 269 (1909), defense; *People v. Hoffman*, 132 Cal. App. 60, 22 Pac. (2d) 229 (1933), jurisdictional.

<sup>17</sup> CALIFORNIA PENAL CODE (Deering 1931), sec. 800: "An indictment for any other felony than murder, the embezzlement of public money, or the falsification of public records, must be found, or an information filed, within three years after its commission." And sec. 802: "If, when the offense is committed, the defendant is out of the state, the indictment may be found or an information filed within the term herein limited after his coming within the state, and no time during which the defendant is not an inhabitant of, or usually resident within this state, is part of the limitation."