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## Alleging the Date of the Offense in the Indictment

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## STUDENT NOTES

ALLEGING THE DATE OF THE OFFENSE IN THE INDICTMENT.—At common law it was necessary to allege, in the indictment, the time the offense was committed but there was no need to prove it as laid unless some specific reason rendered time important.<sup>1</sup> In West Virginia this requirement has been modified by statute,<sup>2</sup> the pertinent part of which is: "No indictment or other accusation shall be quashed or deemed invalid . . . for omitting to state, or stating improperly, the time at which the offense was committed, when time is not of the essence of the offense. . . ." Applying a literal construction to the statute, in all crimes, except in those instances where time is of the essence, not only is an imperfect allegation of time unimportant but such allegation may be omitted entirely. Since its passage, there have been many cases decided under this statute. Unfortunately the results of some cases are inconsistent with such an interpretation and, in a few instances, with each other.

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<sup>1</sup> State v. Bruce, 26 W. Va. 153, 157 (1885).

<sup>2</sup> W. VA. CODE c. 62, art. 2, § 10 (Michie, 1949).

The major problem involved in felonies is the effect of alleging the commission of the offense on a date subsequent to the finding of the indictment. In *State v. Runyon*,<sup>3</sup> the court held that this defect was not cured by our statute and that the indictment was fatally defective. It must appear from the indictment that the offense was committed prior to its finding.<sup>4</sup> However, the court held an indictment, found on March 10, 1953, valid where it alleged the felony to have been committed on the "----- day of ----- 1953".<sup>5</sup> Obviously there is no showing from the indictment that the offense was committed prior to its finding. The court has established an even more liberal rule by holding an indictment for a felony valid where the date of the crime was not fixed.<sup>6</sup> These last two cases would seem to be more in conformity with the spirit of the statute.

In misdemeanors there are two major problems. Is it necessary for the indictment to show that the offense was committed (1) prior to its finding and (2) within the prescribed statutory period? The rule of the cases, in regard to the second problem, may be summarized as follows. It must appear from the indictment, either by alleging a specific date on which the offense was committed or by general allegation, that the commission of the offense was within one year next preceding the finding of the indictment (three years for petit larceny or perjury<sup>7</sup>). This rule seems to have its origin in *State v. Bruce*,<sup>8</sup> where the court, after reciting the West Virginia statute and common law rule, said ". . . it is not now essential to aver the time of the offense in an indictment unless time is of the essence of the offense. In misdemeanors it is essential that it should appear from the indictment that the offense was not barred by the statute of limitations at the time the indictment was found; for, otherwise it would not show that the offense was a subsisting and therefore indictable offense." A misstatement or an omission of the time at which the crime was committed is immaterial except in those cases where time is of the essence or where there is a statutory bar to the offense.<sup>9</sup> It is important here to note that such language excludes the broad field of misdemeanors from the curative effect of this statute. There are many other cases reaching similar results. It must appear, from the indictment for selling

<sup>3</sup> 100 W. Va. 647, 131 S.E. 466 (1926).

<sup>4</sup> *State v. McMillion*, 104 W. Va. 1, 138 S.E. 732 (1927).

<sup>5</sup> *State v. Lewis*, 77 S.E.2d 606 (W. Va. 1953).

<sup>6</sup> *State v. Parsons*, 108 W. Va. 705, 152 S.E. 745 (1930).

<sup>7</sup> W. VA. CODE c. 61, art. 11, § 9 (*Michie*, 1949).

<sup>8</sup> 26 W. Va. at 157.

<sup>9</sup> *State v. Pennington*, 41 W. Va. 499, 23 S.E. 918 (1896).

liquor without a license, that the offense was not barred by the statute of limitations.<sup>10</sup> An indictment for assault is bad unless it shows that the offense was not barred by statute,<sup>11</sup> but this requirement is met by an allegation that the offense charged was committed within one year next preceding the finding of the indictment.<sup>12</sup> Even though the indictment does specify a date on which the offense was committed, there is no need to prove the date as alleged.<sup>13</sup>

It was strongly inferred in one case<sup>14</sup> and directly stated in another<sup>15</sup> that time is of the essence of a misdemeanor. It would seem permissible to presume that such reasoning has greatly influenced the court in narrowly construing this statute. However, as was pointed out in a concurring opinion in the case last cited, a statute of limitations more properly applies solely to the remedy and is no part of the offense at all.

As noted above, the court held an indictment for a felony defective where it alleged the commission of the offense on a date subsequent to the date of its finding. A more liberal rule has been adopted for misdemeanors. In *State v. Rector*,<sup>16</sup> such a defect appeared, but the court held the indictment valid since the mistaken date appeared to be the result of a clerical error. A more desirable result would have been reached if the court had established a uniform rule in felonies and misdemeanors.<sup>17</sup> "Generally an allegation of time in a warrant or an indictment charging a misdemeanor is unnecessary, except to show that the offense is not barred by the statute of limitations and that it was committed prior to the issuance of the warrant or finding of the indictment."<sup>18</sup> Here the court held sufficient an indictment which charged the commission of the offense on "—— day of —— 1944."

An incongruous result was reached in *State v. Price*,<sup>19</sup> and *State v. Rector*.<sup>20</sup> The crime charged in both cases was a misdemeanor. In the *Price* case the indictment stated the date of the offense to be ". . . 1917, and within one year next preceding the finding of this indictment . . ." The indictment was found in

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<sup>10</sup> See note 1 *supra*.

<sup>11</sup> *State v. Price*, 90 W. Va. 365, 110 S.E. 819 (1922).

<sup>12</sup> *State v. Farley*, 76 W. Va. 471, 89 S.E. 738 (1916).

<sup>13</sup> *State v. Farrell*, 22 W. Va. 759 (1883).

<sup>14</sup> See note 11 *supra*.

<sup>15</sup> *State v. Rector*, 130 W. Va. 316, 43 S.E.2d 821 (1947).

<sup>16</sup> *Ibid.*

<sup>17</sup> 51 W. VA. L.Q. 129 (1948).

<sup>18</sup> *State v. Crummitt*, 129 W. Va. 366, 371, 40 S.E.2d 851, 855 (1946).

<sup>19</sup> See note 11 *supra*.

<sup>20</sup> See note 15 *supra*.

April, 1920, and the evidence showed the offense to have been committed in January, 1920. In holding the indictment bad, the court said the question of fact is immaterial since it is necessary that it show an offense not barred by the statute of limitations. In the *Rector* case the indictment, found in April, 1946, alleged the commission of the offense in December, 1946, followed by a recital that it was committed "within one year from (italics supplied) the finding of this indictment." In holding that the lower court did not err in overruling a motion to quash the indictment, the court said that the policy is to sustain indictments for misdemeanors where it is directly alleged that the offense was committed within one year previous to the finding thereof", and this direct allegation will not be overcome by a mistaken date, where from all the circumstances, as here, such mistake appears to have been the result of a clerical error." There appears to be no logical reason why the same rule would not apply in the *Price* case. Of course, the *Price* case alleges a date which would be barred by statute and the *Rector* case states a date subsequent to the finding of the indictment, but it is submitted that this provides no solid ground for distinction. Especially is this true in light of the emphasis on the words used in the recitals, that the offenses were committed within the statutory period. The language in the *Price* case was "next preceding the finding," whereas in the *Rector* case the allegation was "from the finding". The word "from" could be given prospective as well as retrospective connotations. If "from" will cure a defective allegation of time, it seems that "next preceding" should.

W. T. S.

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JOINDER OF CRIMES IN THE SAME INDICTMENT.—While the joining of crimes in the same indictment may be regulated by statute,<sup>1</sup> the practice was familiar at common law.<sup>2</sup> Crimes of the same general character, subject to like punishment and arising from the same transaction could be joined. Trial of like crimes was

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<sup>1</sup> See, for example, W. VA. CODE c. 61, art. 3, § 12; c. 62, art. 2, §§ 5, 24, art. 3, § 19 and art. 9 § 9 (Michie, 1949). Statutes in other jurisdictions allowing a joinder of offenses have been sustained. *Pointer v. United States*, 151 U.S. 396 (1894); *Williams v. United States*, 168 U.S. 382, 390 (1897); *People v. Kelly*, 203 Cal. 128, 263 Pac. 226 (1928); *Commonwealth v. Slavski*, 245 Mass. 405, 140 N.E. 465 (1923).

<sup>2</sup> *Queen v. Castro*, 5 Q.B.D. 490 (1880). No joinder was strictly illegal since the pendency of one accusation could not be pleaded in bar or abatement of another charge. Thus, the court had discretion in ruling on a motion to quash for a misjoinder of offenses. 1 BISHOP, NEW CRIMINAL PROCEDURE § 424 (2d ed. 1913).