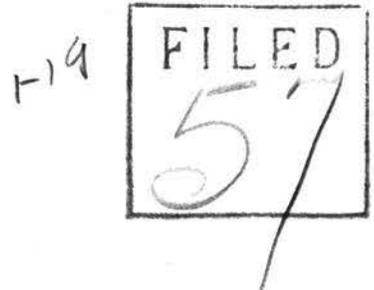


CRIMES & PUNISHMENT: When statute of limitations runs and when suspended, on felonies and misdemeanors. State must have consent of U. S. Attorney General to obtain Federal Prisoner for trial in State court.

December 29, 1938



Honorable G. Logan Marr  
Prosecuting Attorney  
Morgan County  
Versailles, Missouri

Dear Sir:

This will acknowledge receipt of your letter of December 20, 1938, which is as follows:

"In November 1934, W. L. Beavers sold Chas. Ensminger of Morgan County, Mo. some bonds that were issued in Oklahoma, and were not registered under the securities act of Missouri. W. L. Beavers did not have any license to sell foreign or domestic bonds in Missouri, and was not registered as such a bond salesman.

"According to Mr. Ensminger, W. L. Beavers in the course of the transaction stated that he was a resident of Kansas City, Missouri. When W. L. Beavers registered at the cabin hotel on the Lake of James E. Dunn at Gravois Mills, Mo., he registered as being of Kansas City, Mo.

"He originally had lived in Oklahoma City.

"May 8th, 1936, W. L. Beavers was sent to the State Penitentiary at McAllister, Oklahoma, on a manslaughter charge for killing two persons with a car. In the prison record, W. L. Beavers claimed his residence in Oklahoma City, Oklahoma.

"Sometime after his committment to the Oklahoma Prison, the federal authorities apprehended, Beavers, and he was sentenced in the Federal Court for using the mails to defraud in his fraudulent bond racket. He was then lodged in the Federal penitentiary at Leavenworth. In November 1937, Beavers was lodged in the Federal pen, but Chas. Ensminger did not know he was and what his real name was. He had sold the bonds to Ensminger under another name.

"In December 1938, Beavers is still confined in the Federal penitentiary in Leavenworth."

Upon these facts you present these questions. (1) Is a prosecution barred by the statute of limitations? (2) If Beavers was in fact a resident of Oklahoma in November 1934, when he represented himself to be a resident of Missouri, would this make any difference in limitations? (3) Are Missouri authorities barred from obtaining Beavers for trial in Morgan County, because he is now in the Federal Prison at Leavenworth?

One of the offenses that has been committed here is a felony. Section 7748 R. S. Mo. 1929 provides:

"Any person who shall do \* \* \* \* any act made unlawful by any of the provisions of sections 7736 or 7744 of this chapter shall be guilty of a felony \* \* \*."

Section 7744 R. S. Mo. 1929 provides:

"No dealer or salesman shall engage in business in this state as such dealer or salesman or sell any securities including securities exempted in section 7726 of this chapter and excluding those mentioned in section 7727 of this chapter, unless he has been registered as a dealer or salesman in the office of the commissioner pursuant to the provisions of this section."

Under these sections it is clear that Beavers not being registered as a dealer or salesman has violated the law and is guilty of a felony unless the sale he made falls within the terms of Section 7727 R. S. Mo. 1929. If it falls within the terms of this statute he has committed no offense.

The other offense that has been committed is a misdemeanor. Section 7748 R. S. Mo. 1929 provides:

"Any person who violates any provision of this chapter other than the provisions of sections 7736, 7744 and 7749 thereof, shall be guilty of a misdemeanor \* \* \* \*."

Sections 7728, 7729 and 7730 R. S. Mo. 1929 as amended Laws 1937, p. 456, require certain securities to be registered before being sold in this state. The securities sold by Beavers not being registered when sold brings into force the punishment provided in the preceding quotation. However if these securities fall with those enumerated in Section 7726, Laws 1937, p. 456, which are not required to be registered, there has been no offense committed.

The limitations of criminal offenses, both felony and misdemeanor, are contained in Sections 3392 and 3393 R. S. Mo. 1929.

Section 3392 provides:

"No person shall be tried, prosecuted or punished for any felony, other than as prescribed in the next preceding section, unless an indictment be found or information be filed for such offense within three years after the commission of such offense \* \* \* \*."

Section 3393 provides:

"No person shall be prosecuted, tried or punished for any offense, other than felony, \* \* \* \* unless the indictment be found or prosecution be instituted within in one year after the commission of the offense, \* \* \* \*."

Sections 3394 R. S. Mo. 1929 suspends the operation of these limitations and is as follows:

"Nothing contained in the two preceding sections shall avail any person who shall flee from justice; and in all cases, the time during which any defendant shall not have been an inhabitant of or usually resident within this state shall not constitute any part of the limitations prescribed in the preceding sections."

The correct disposition of the first two questions revolves around the meaning to be given that part of section 3394, supra, which stops the running of the statute. This being "the time during which any defendant shall not have been an inhabitant of or usually resident within this state,"

Does this mean mere physical absence from the state, or the termination of legal domicile in the state?

This question, of course, assumes that Beaver was a legal resident of Kansas City, Missouri at the time of the offense. In *State v. Snyder*, 182 Mo. 462, it is held that the terms "inhabitant of" or "usually resident" in the state are synonymous and their use does not create two conditions which suspend the running of the limitations statute. Further in this case, at l. c. 512, the court quoted with approval from other jurisdictions. The case of *Graham v. Commonwealth*, 51 Pa. St. 255 is quoted from, with the court remarking that a statute the same as Missouri's has been in force there for years, it is said:

"The only question we have to deal with is, whether the facts found do or do not establish that the defendant Graham was an inhabitant and usually a resident of the State, during the two years after the Commission of the offense. His residence at the time' (of the commission of the offense) 'was in Indiana county, where he remained for several months after committing the offense charged, until he entered the service of the United States as a soldier. He served

in Maryland and Virginia, and returned home to his family several times, and remained for considerable periods, once as a paroled prisoner, and at other times on furlough, and when eventually discharged in June, 1865, returned to his family and residence at his home in Indiana county.' The court throughout its opinion treated the phrases 'an inhabitant of the State' or 'usual resident therein' as synonymous, and said: 'We think all the time he was in the service his absence was temporary and that he remained 'an inhabitant of the State or usual resident therein,' so that there was not the least obstacle in the way of instituting a prosecution against him, or even in claiming him to answer. His usual residence was not changed by the fact that he obeyed the call of the President, and volunteered to fight for his country at her command.' Further on, the court says, "'Usual' residence means 'customary,' 'common.' If the offender's customary residence is in the State during the two years, this is all the act requires. That it was in this case the facts found show. . . . If we were to yield to the construction contended for, namely, that a man is not an inhabitant of the State, and can not be usually a resident of it, who is not within it all the time during the two years, we would in effect repeal the limitation as it regards many persons, who, residing near the borders of the State, or whose business requires it, are out of the State numerous times within every two years. In such cases they could be forever liable, unless they tarried some time or other, during two whole years in the State. The proviso does not apply to such cases.'"

Further, in the Snyder case, l. c. 513 the court quoted from the case of People v. McCausey, 65 Mich. 72, and italicized for emphasis this statement:

"It is not mere absence from the state this statute refers to, but such absence as destroys residence."

The statute in Michigan, which suspended the running of limitations on criminal offenses reads "usually and publicly a resident in the State."

Considering the above, it is clear that section 3394, supra, contemplates severance of legal domicile rather than physical absence from the State. That a person might be physically absent yet maintain his legal residence here and the statute of limitations would continue to run. This being the meaning of said section then, if Beavers was actually a resident of Kansas City, Missouri in November 1934 when he represented himself to be such and has continued to keep Missouri as his residence, the statute of limitations on both offenses has run at this date. If he was actually a resident of Oklahoma at that time then the statute has not run and could not until Beavers takes up residence here and shall have been "an inhabitant of or usually resident" within this state for the period of limitations as prescribed in Sections 3392, 3393, supra. However if Beavers was actually a legal resident of Missouri in November 1934 and later terminated his legal residence here and took it up in Oklahoma and continues to claim Oklahoma as his residence then the running of the statute of limitations was suspended on the date he ceased to be a resident of Missouri.

Another thing which bears on the correct disposition of questions one and two is the meaning to be given that part of Section 3394, supra, which tolls the statute of limitations on a "person who shall flee from Justice."

In State v. Miller, 188 Mo. 370, 378, the court had this phrase before them and said:

"This court, in State v. Harvell, 89 Mo. 588, had presented the sole question as to the bar of the Statute of Limitations under a similar section of the statute. In the construction of the statute, Henry, J., speaking for this court, in no uncertain or doubtful terms gave expression to the views of the court as to the true and correct meaning of the terms "flee from justice" or "fugitive from justice."

He said: "Was he a fugitive from justice within the meaning of section 1706? We are of the opinion that he was. It was not essential that he should have left the State before he could be regarded as a fugitive from justice. One who commits an offense and conceals himself to avoid arrest, is a fugitive from justice. If he successfully hides or conceals himself so as to evade punishment for his crime, although such concealment may be upon his own premises, he is as much a fugitive from justice as if he had escaped into Canada. We are, therefore, of opinion that the defendant could not avail himself of the Statute of Limitations."

Thus if Beavers left the state after the commission of these offenses in an effort to conceal himself and avoid arrest the statute was tolled on the date he commenced said concealment.

Whether or not limitations has barred a prosecution for these offenses in Missouri depends upon the facts which may exist pertaining to Beavers legal residence or his fleeing from justice and you of course can apply those facts to the legal principles set forth here.

Your third question seems to be answered in the case of Ponzi v. Fessenden, 285 U. S. 254, 66 L. Ed. 607, 22 A. L. R. 879. In that case the petitioner, Ponzi, raised the point that he could not be tried in state courts while serving a sentence of a Federal court in a Federal penitentiary. The court ruled against petitioner and in the course of the opinion stated, A. L. R. 884:

"Until the end of his term (in the Federal penitentiary) and his discharge, no state court could assume control of his body without the consent of the United States. \* \* \* \*

There is no express authority authorizing the transfer of a Federal prisoner to a state court for such pur-

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poses. Yet we have no doubt that it exists and is to be exercised with the consent of the Attorney General. In that officer, the power and discretion to practice the comity in such matters between the Federal and state courts is vested."

Under this ruling it is apparent that Beavers cannot be obtained for prosecutions in this state until the end of his term and his discharge from the Federal prison, unless the consent of the Attorney General of the United States is obtained.

#### CONCLUSION

Therefore, it is our opinion that the statutes of limitation on criminal offenses do not run if, at the time of the offense, the offender is not a legal resident of Missouri and said statutes do not commence to run until he becomes such resident. That the running of the statute is suspended when the offender, if a legal resident of the state at the time of the offense, severs his residence in the State and does not again commence to run until the offender takes up again legal residence in Missouri. The statute is also suspended if after commission of the offense, the offender flees from justice and conceals himself to avoid arrest.

It is also our opinion that the authorities of Missouri cannot obtain an inmate of a Federal Prison for trial in the courts of this State until the end of his term and his discharge from said prison, unless the consent of the Attorney General of the United States is first obtained.

Respectfully submitted,

APPROVED:

TYRE W. BURTON  
Assistant Attorney General

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J. E. TAYLOR  
(Acting) Attorney-General

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