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STATUTES OF LIMITATION AND THE EX POST FACTO
CLAUSES

By Forrest Revere Black*

HISTORICAL INTRODUCTION

"Nullum tempus occurrat regi" is a well known and ancient
maxim of the common law. In the absence of some statutory bar,
a prosecution can be brought no matter how long the time which
has elapsed since the crime charged was committed. While
there was no general statute of limitations in personal actions
until the Seventeenth Century, limitations of time in criminal
and real actions have existed for centuries.1 The early English
common law, based as it was on a rough *lex talionis* knew nothing
of such limitations, and even for some time after their intro-
duction they were viewed as mere acts of process, to be
construed in doubtful cases against the defendant, and not as
acts of grace.2 But in the last century, the views of the courts
have changed. In 1830, Mr. Justice McLean speaking for the
Supreme Court of the United States said, "Of late years, the
courts in England and this country have considered statutes of
limitations more favorably than formerly. They rest upon
sound policy, and tend to the peace and welfare of society. The
courts do not now, unless compelled by the force of former
decisions, give a strained construction, to evade the effect of
those statutes."3 Mr. Justice Story has said, "A statute of
limitations instead of being viewed in an unfavorable light as
an unjust and discreditable defense, should have received such
support from courts of justice as would have made it, what it
was intended emphatically to be, a statute of repose."4

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1 Some Procedural Aspects of the Statute of Limitations, Thos.
2 Wharton, Criminal Pleading and Practice, 8th Ed., p. 211 note.
3 M'Cluny v. Silliman, 3 Peters (U. S.) 270 (1830).
4 Bell v. Morrison, 1 Peters (U. S.) 349, 360 (1828).
THE PROBLEM STATED

The question here for consideration relates to the power of the state or federal legislatures to make laws extending the statute of limitations in criminal actions. First, Can a legislature enact a law extending existing statutes of limitations so as to revive cases in which the statutory period has already run? and Second, Can the period be extended in cases where the statutory period has not run?

ANALYSIS OF QUESTION ONE

As to the first question, the case material and the text authorities seem to be in agreement that if the statutory period of the statute has fully run and the bar has once attached so that the defendant could not be prosecuted under the existing statute, the law cannot be changed by future legislation so as to extend the period of limitation as to past offenses, already barred. Such a law would violate the ex post facto clause. The leading case on this point is Moore v. State, decided by the New Jersey Court of Appeals. It involved the validity of a state statute which attempted to extend the statute of limitations in criminal cases from two to five years. The plaintiff in error contended that by the lapse of two years he acquired a vested right not to be prosecuted or punished for his offense, which the legislature could not take away and that the later act, so far as it purports to reach his case, is an ex post facto law. The court held that the statute extending the time previously limited for the prosecution of criminal offenses was an ex post facto law and void as to offenses upon which the time previously limited has already run.

A careful critique of this well-reasoned case will throw light on the principles involved. (1) The first point in the court's analysis was formulated as follows: "Every reason

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5 See Wood, Limitations of Actions, 3rd Ed., p. 34; Black, Constitutional Prohibitions, pp. 297-298; Angell on Limitations, 6th Ed., p. 17 note; Wharton, Criminal Pleading and Practice, 8th Ed., p. 211, 212 note.

6 There are two ex post facto clauses in the Constitution, one, Art. 1, Sec. 9, cl. 3, limiting the federal government, and Art. 1, Sec. 10, cl. 1, limiting the states. The same policy and principles apply to each. See Federalist No. 44, 84; Story, Constitution of the United States, 4th Ed., v. 2, p. 236.

which has pressed courts to ascribe finality to the limitation of civil remedies, when once it has attached, impels this court to predicate the same conclusiveness of the bar against criminal prosecutions.” The court then proceeded to answer two objections that had been raised. (A) The learned Chief Justice, in this case in the Supreme Court had declared “that it would seem to run into the absurd for a criminal to assert an indefeasible right against the legislature, not to be tried or punished for his offense after a specified time, for such a claim assumes the semblance of an assertion that the criminal act was done in reliance on such an expectation.” The court answers this objection by stating that the Chief Justice has overlooked the fact, that even in civil matters, the indefeasibility of the bar is not made to at all depend upon the notion that the statutory limitation entered into the thoughts of the defendant when doing the act to be defended. (Parties do not look forward to a breach of their bargains, but to the performance. Ogden v. Saunders, 12 Wheat. 213.) This idea is expressly repudiated in the cases, for if of any force, it would make the statute unchangeable as soon as the prescribed term began to run, a claim which no court has ever sanctioned. It is a defence acquired, not the hope of one, which is indefeasible. Until the fixed period has arrived, the statute is a mere regulation of the remedy, and like other such regulations, subject to legislative control; but afterward it is a defence not of grace, but of right; not contingent but absolute and vested; and like such other defences, not to be taken away by legislative enactment.

(B) The court also answers the suggestion of Mr. Bishop in his treatise on Statutory Crimes, section 266, to the effect ‘that a criminal statute of limitations simply withholds from the courts jurisdiction over the offense after the specified period, and it is competent for the legislature to revive the old jurisdiction or create a new one, when the prosecution may proceed.’ In addition to the fact that Mr. Bishop cites no authority for his view, the court pointed out that such a doctrine would upset the uniform train of decisions in civil causes. Further such a theory would place a strained interpretation upon the language of the act involved in this case. The act reads, “no person shall be prosecuted, tried or punished.” It does not relate to the
courts, but to the person accused. It would be a tortured construction to hold that this statute simply withholding jurisdiction from the courts.

(2) The next point in the court's analysis is that the running of the statute has the same legal effect as an act of amnesty. The court quotes with approval the statement of Wharton\(^8\) that "the statute of limitations is not a statute of process, to be scantily and grudgingly applied, but an amnesty, declaring that after a certain time oblivion shall be cast over the offense." The court then discusses the case of *State v. Keith*\(^9\) where after the prisoner's crime, an act of amnesty was passed, by force of which he was relieved from liability to punishment; subsequently this act was repealed by ordinance of the State Convention, and then the prosecution was instituted. The court held that the ordinance was an ex post facto law and invalid. In answer to the argument that it is not permissible to consider such a statute as an amnesty or pardon, because these are always granted after the crime, and are intended to absolve the guilty, while the statute in the case at bar is enacted before the fact and is designed to protect the innocent, the court said, "It is not the passage of the limitation law, but its maintenance unrepealed for the requisite period after the offense, which creates the amnesty," and its very terms indicate that the guilty, and not the innocent, were those the legislature had in view; it begins to run only on the "committing of the offense." True an innocent man may set it up, but so may he a general amnesty. It is not inapt then to call the bar of such a statute an amnesty. But name it as you will, at least the act of extension in the case at bar purported to do with the plaintiff what the North Carolina ordinance attempted to do with Keith, and for which it was adjudged unconstitutional; it made punishable what before its passage was not so, and took from the plaintiff his vested right to immunity."

(3) The court, next insisted, that the running of the statute had the same legal effect as if the law prescribing the punishment for the plaintiff's crime had been repealed. As to that offense, it had expired; hence it was the same thing with regard to that transaction, as if it had never existed. The sanction of the law was dead. The plaintiff's act stood as though it had

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\(^8\) Criminal Pleading and Practice, Sec. 316.

\(^9\) 63 N. C. 140 (1869).
been perpetrated in the face of a statute which forbade it, but declared that he should not be prosecuted, tried or punished for doing it. Then the extension act (in the case at bar) restoring the expired law, had precisely the same effect as though the offense had not been punishable originally, but had been made so for the first time by the restoring act. Such a law is within the spirit of the constitutional prohibition.\textsuperscript{10}

\textbf{ANALYSIS OF QUESTION TWO}

Can the period be extended in criminal cases where the statutory period under preexisting law has not run? Perhaps the leading case on this point is \textit{Commonwealth v. Duffy}\textsuperscript{11} decided by the Supreme Court of Pennsylvania in 1880. Here a state statute dealing with criminal procedure increased the time of limitation from two to five years. The court held that a defendant in whose favor the original period of two years had not fully run at the time of the passage of the five year limitation act, may be indicted within the newly established time, although the time of the former limitation has run at the time of the indictment.

The leading case which attempts to define an "ex post facto law" is \textit{Calder v. Bull}\textsuperscript{12}. It is interesting to note that the only question before the court was whether a law of Connecticut granting a new hearing in a civil cause was forbidden as being an ex post facto law; and when the court determined that the interdict did not extend to civil statutes it decided the cause. But Mr. Justice Chase, by way of obiter, proceeded to define the classes of criminal cases falling within the ex post facto limitation, and this definition has become classic: "Every law that makes an action done before the passing of a law, and which was innocent when done, criminal, and punished such action. Every law that aggravates a crime, or makes it greater than it was, when committed. Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime, when committed. Every law that alters the legal rules of

\textsuperscript{10} For a similar doctrine see State v. Sneed, 25 Texas Supp. 66 (1860).
\textsuperscript{11} 96 Pa. St. Rep. 506 (1880). The U. S. Supreme Court has not passed on the question.
\textsuperscript{12} 3 Dallas 336 (1798).
evidence, and requires less or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender."

In the case of *Commonwealth v. Duffy*, the lower court held that "it would be altering the legal rules of evidence" to apply the new bar of five years to a case which was only subject to the bar of two years when the offense was committed. Because five years are more than two, the lower court argued that "the testimony required by the Commonwealth in the former case is less than in the latter." The Supreme Court of Pennsylvania answered this by saying, "This argument assumes that there is something more to be proved than the commission of the offense. But it will be seen at once that whether the bar be five years or two years, the proof of the Commonwealth is precisely the same in either case. The period of limitation is not a subject of proof at all. The Commonwealth proves that the offense was committed, giving the circumstances in evidence, and necessarily as part of the factum, the time when it was committed. The Commonwealth proves no more and no less in one case than in the other. Hence both the quantum of proof and the rules of evidence are the same in both cases, and there is no change in these respects in changing the time of the bar."

The final ground in the case was based upon the distinction between an extension of the limitation "during" and "after" the former period has run as applied to the defendant in a particular case. The court said, "When a right to acquittal has not been absolutely acquired by the completion of the period of limitation, that period is subject to enlargement or repeal without being obnoxious to the constitutional prohibition against ex post facto laws." During the running of the limitation, no vested right has been acquired. Then the only consideration involved is a regulation of the remedy which may be changed by the legislature in its discretion as a matter of public policy. The difference between "after" and "during" the running of the period is the difference between a *right* and the *chance or possibility of a right*. The court concluded by saying, "That retroactive legislation is not necessarily unconstitutional, especially where it only affects remedies, has been so many times decided that a mere reference to some of the authorities will be sufficient."

*Supra*, n. 11.
It should be pointed out that in the Reporter’s note to the case of Moore v. State a reference is made to the case of People v. Lord and it is claimed that this case is inconsistent with the case of Commonwealth v. Duffy discussed supra. In our opinion such a contention is untenable. The only point decided in People v. Lord and the only proposition for which it stands is that in construing a statute of limitation, it should never be allowed a retroactive operation, where this is not required by express command or by necessary and unavoidable implication. In the absence of express command or unavoidable implication, the court said that these statutes speak and operate upon the future only. The court in the Lord case, following this interpretation held that the law was inapplicable to offences already committed before the law was passed. A criminal statute was involved extending the time from three to five years. There was no necessity to discuss the ex post facto doctrine. Further the court in the Lord case had ample authority to cite for this orthodox theory of construction. But in finding a reason for this rule, the court relied on a statement by Wharton wherein it seems, at first blush, that he distinguished statutes of limitations in criminal cases and in civil cases in such a way as to contradict the first point decided in the case of Moore v. State.

Wharton says, “A mistake is sometimes made in applying to statutes of limitation in criminal suits the construction that has been given to statutes of limitation in civil suits. The two classes of statutes, however, are essentially different. In civil suits the statute is interposed by the legislature as an impartial arbiter between two contending parties. In the construction of the statute, therefore, there is no intendment to be made in favor of either party. Neither grants the right to the other; there is therefore no grantor against whom the ordinary presumptions of construction are to be made. But it is otherwise

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(Citing Satterlee v. Matthewson, 16 S. & R. 179; Hepburn v. Curtis, 7 Watts 300; Kenyon v. Stewart, 8 Wright 191; Schenley v. Commonwealth, 12 Casey 29; Waters v. Bates, 8 Wright 473.)

14 39 Am. Rep. at 577, 578.
15 12 Hun. 282 (1877).
16 Wood, Limitations of Actions, 3rd Ed., p. 38; Angell on Limitations, 6th Ed., sec. 22. For long list of cases so holding see footnote 3 on pages 38 and 39 of Wood, ibid.
17 Criminal Pleading and Practice, 8th Ed., pp. 209, 213.
when a statute of limitation is granted by the state. Here the
state is the grantor, surrendering by act of grace its right to
prosecute, and declaring the defense to be no longer the subject
of prosecution. The statute is not a statute of process, to be
scantily and grudgingly applied, but, on the contrary, declaring
that after a certain time oblivion shall be cast over the offense;
that the offender shall be at liberty to return to his country, and
resume his immunity as a citizen, and that from henceforth he
may cease to preserve the proofs of his innocence, for the proofs
of his guilt are blotted out. Hence it is that statutes of limi-
tation are to be liberally construed in favor of the defendant,
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 ratification by the legislature
of the fact that time, while it gradually wears out proofs of
innocence, has assigned to it fixed and positive periods in which
it destroys proofs of guilt."

The court in the Lord case misapprehends Mr. Wharton's
meaning. We submit that in stressing the distinction between
statutes of limitation in civil and criminal cases, Mr. Wharton
is not arguing that the legislature in passing the latter type
surrenders its right to alter that statute by a later act extending
the time, as applied to a case wherein the first statute has not
run. Such were the facts in the Lord case. That case should
have been decided on the sole ground that since there was no
express command or unavoidable implication in the extension
statute that the legislature intended it to be retroactive, that
therefore it was not applicable.

Before leaving this somewhat ambiguous Wharton state-
ment, two curious comments should be made. After attempting
to establish a distinction between civil and criminal statutes
of limitation and after stressing the point "that time, while
it gradually wears out proofs of innocence, has assigned to it
fixed and positive periods in which it destroys proofs of guilt",
Wharton in footnote says that 18 "this principle is powerfully
exhibited in a famous metaphor by Lord Plunkett to the effect
that 'Time with his scythe in his hand, is ever mowing down
the evidence of title; wherefore the wisdom of the law plants in

18 At page 210.
his other hand the hour-glass, by which he metes out the periods of that possession that shall supply the place of the muniments his scythe has destroyed.' Obviously Lord Plunkett had in mind, civil, rather than criminal actions, and Mr. Wharton, by relying on this celebrated passage, has blurred the very distinction he is trying to establish. The second curious comment follows in the next footnote following the Wharton quotation. Commenting on the Act of Congress of March 3, 1869, by which the time for finding indictments in the "late rebel states" is extended for the period of two years from and after said states are restored to representation in Congress, Mr. Wharton says, "So far as this statute undertakes to authorize prosecutions for offenses which prior statutes of limitations have canceled, it is not merely an ex post facto law, and hence void, but is void in undertaking to make punishable an offense which has previously been extinguished by an act of grace. This statute has never been judicially invoked, and has now practically expired. But it is important here to recall the principle appicatory to any future legislative attempts to institute prosecutions for offenses which prior statutes have canceled."

Thus it would appear that Mr. Wharton is the best authority in support of the views herein defended. We submit that Congress cannot constitutionally enact a law extending existing statutes of limitation in criminal cases so as to revive cases in which the statutory period has already run, but that it is within the constitutional competence of a legislative body to extend the period in cases where the statutory period, under preexisting statutes, has not yet run.

At pp. 211, 212.