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Ex post facto Laws

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of authority and importance in the trial from the judge to the jury and the counsel. The delays are due to this and to the making of minute rules of procedure, the too rigid rules of evidence and the strict restraint upon the judge's reference to evidence, a trap in which to catch the trial court on a writ of error. Endless proceedings follow, especially if the defendant is able to pay for it. The public is tired. The court is tired. The prosecution is tired. And the escape of the guilty defendant or his inadequate punishment which is too often the result is demoralizing to society and does not restrain future violation of law.

The trial by newspaper is a danger that some method ought to be devised to prevent. It does not conduce to justice. It creates a false atmosphere in the courtroom.

Simplicity of procedure and dispatch of trial will do much to obviate the greater defects. Then if appellate courts could be given power to say that an error committed in the trial is not ground for reversal unless it shall affirmatively appear from the record that a just result was not reached, technicalities would cease to be useful as an obstruction to justice.

I do not despair of substantial judicial reform. I think the lawyers of the country are aroused to the necessity of taking away from the enemies of constitutional government and the institutions of civil liberty, the only real arguments that they have against our judicial system by promoting dispatch in the disposition of litigation and reducing the cost thereof to the poor litigant.

EX POST FACTO LAWS.

To What Extent are Laws Valid That Admit Different or Other
Evidence Than Was Permissible at the Time of the
Alleged Act?

The writer is acquainted with the high character and legal standing of the late Justice Harlan of Kentucky, and appreciates his valuable services as a jurist, but earnestly desiring to have a correct understand-

ing of the question of ex post facto law, and for no other reason, he is moved to make this consideration of this case.

In the case of *Thompson v. Missouri*, 171 U. S. 380, decided in 1898, Thompson was indicted for murder in 1894, on purely circumstantial evidence. One issue of fact was the authorship of a prescription for strychnine and a letter to a church organist. Thompson denied that he had written either, and on the first trial certain letters written by him to his wife were admitted in evidence for comparison with the writing in the other documents. Thompson was convicted, but a new trial was ordered on appeal to the Supreme Court of Missouri, the court holding that the letters to his wife were erroneously admitted in evidence. Subsequently, in 1895, the legislature of Missouri passed an act permitting such a comparison to be made. On the second trial in 1896, the letters were again used in comparison, and he was again convicted.

The question in this case is, was the act of the legislature of 1895, admitting the comparison of the letters, when such comparison was not permitted at the time of the commission of the alleged crime, ex post facto, as regards this case? „

The opinion in this case was delivered by Mr. Justice Harlan, who holds that this act of the legislature as applied to this case was not an ex post facto law.

What is an *ex post facto* law? Mr. Justice Chase, in the case of *Calder v. Bull*, U. S. Supreme Court, 1798, 3 Dall, 386, lays down what he considers ex post facto laws, as follows:

“1. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal.

“2. Every law that aggravates a crime, or makes it greater than it was, when committed.

“3. Every law that changes the punishment and inflicts a greater punishment than the law annexed to the crime, when committed.

“4. Every law that alters the legal rules of evidence, and receives less or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender.”

The question in this case comes under the fourth section above.

Does this law, passed by the Missouri legislature, change the rules of evidence, or receive different evidence than was required at the time of the commission of the offense? As was said before, it is not the purpose of this article to criticise the weighty opinion of the learned justice in this case, but the writer is unable to reach the same conclusion as did Mr. Justice Harlan—that this act of the Missouri legislature was not *ex post facto*, in so far as it relates to the present case.

The Constitution of the United States, Art. 1, Sec. 10, lays several restrictions on the authority of the legislatures of the different states, and among them that “No state shall pass any *ex post facto* law.” What are *ex post facto* laws was decided in the case of *Calder v. Bull*, *supra*.

Mr. Justice Harlan, in the case of *Thompson v. Utah*, 170 U. S., 343, says:

“It is not necessary to review the numerous cases in which the courts have determined whether particular statutes come within the constitutional prohibition of *ex post facto* laws. It is sufficient now to say that a statute belongs to that class, which by its necessary operation and ‘In its relation to the offense, or its consequences, alters the situation of the accused to his disadvantage.’”

Does this act of the Missouri legislature operate materially to the disadvantage of the accused in this case? As the evidence was purely circumstantial, would not the admission of the comparison of the handwritings operate to his disadvantage, since the comparison was not allowed when the offence is alleged to have been committed? It is true that the accused has the right to disprove the handwriting, if he can, and he may be able to do so, but suppose he does not. In the first case it is adding an additional burden on him that he did not before have, and if he is not able to disprove successfully the handwriting, what influence or weight would this have with the jury? If he does not disprove it, he is convicted where but for the admission of the comparison, he would most probably have been acquitted, or received a less punishment than he did, as a result of such admission.

It was held in the case of *Hopt v. Utah*, 110 U. S., 574:

“That a statute that takes from the accused a substantial

right given to him by the law in force at the time to which his guilt relates, would be ex post facto in its nature and operation, and that legislation of that kind cannot be sustained, simply because, in a general sense, it may be said to regulate procedure. The difficulty is not so much as to the soundness of the general rule that an accused has no vested right in particular modes of procedure as in determining whether particular statutes by their operation take from an accused any right that was regarded, at the time of the adoption of the constitution, as vital for the protection of life and liberty, and which he enjoyed at the time of the commission of the offense charged against him."

To overrule the rule laid down in the above case, would tend to lower the standing of such a court as our Supreme Court,, and take away from it its stability and authority and endless confusion and uncertainty would result.

It is beyond question that statutes may change the procedure in minor details, from that at the time of the commission of the act, and the accused has no right to demand a trial under exactly the same procedure as was in force at the time he was charged with the commission of the crime. Mr. Cooley, in his treatise on Constitutional Limitations, Ch. 9 (6th Ed.), page 326, says:

"The legislature may abolish courts and create new ones, and it may prescribe altogether different modes of procedure in its discretion, though it cannot lawfully, we think, in so doing, dispense with any of those substantial protections with which the existing law surrounds the person accused of crime."

In the case of *Hart v. State*, 40 Alabama, 32, 88 Am. Dec., 752, the question of admissibility of evidence, or change in the evidence, that rendered the defendant more liable to be convicted, than was permitted at the time of the commission of the crime was before the court. Quoting from this opinion:

"Defendant in the lower court was indicted in 1860, for playing cards, which was prohibited by law. At the time the indictment was found and before the alleged commission of the offence, the statute of Alabama said that a conviction could not be had on the testimony of an accomplice, unless he is corroborated by other evidence that tends to connect the defendant with the commission of the offense. Subsequently, and before the trial of the case, the legislature passed an act, in effect, that the statute

should not refer or extend to trials on indictment for misdemeanor. The offense for which the defendant is indicted is a misdemeanor, and on the trial in the circuit court, an accomplice in the criminal case was introduced against him. By the sole, uncorroborated testimony of this accomplice, the defendant, under the ruling of the court, was convicted, convicted by testimony which the law declared insufficient to produce conviction at the time of the alleged commission of the offense. By a change in the law—by an act of the legislature—under the influence of which the court must have acted, which altered a legal rule of evidence, and received less testimony than the law required at the time of the commission of the offense in order to convict the offender." The court held in this case that the law, in so far as it related to this case, was *ex post facto*.

Is there a material difference between "less testimony" and testimony of a "different character?" What could be a material change of the rules of evidence if these are not? In 8 Cyc., 1031, it says:

"Laws which make conviction easier by changing the rules of evidence, so that less or different evidence is required to convict, are *ex post facto* as to prior offenses."

In the case of *Frisby v. United States*, 37 L. R. A. (N. S.), 96, decided in 1912, it is held that:

"The repeal, after the commission of an alleged forgery, of a statute which prevents the use against accused of any discovery or evidence obtained from him by means of any judicial proceeding, so far as to permit the use against him of the paper alleged to have been forged, which was originally exhibited by him in an equity suit, and of his testimony in that suit, is *ex post facto* and invalid, where the crime could not have been established without the aid of the record in the other suit."

Could the defendant Thompson in this case have been convicted without the comparison of the handwriting? It is mere conjecture to say, but it can be said that without this his conviction would have been less probable. That the situation of an accused may be altered to his disadvantage either by excluding evidence in his behalf, which was admissible at the time of the alleged commission of his offense, or by admitting evidence against him which was inadmissible at such time, appears to be incontrovertible from the cases cited.

The right to have evidence admitted or rejected, is a vital right. It is by evidence alone that one can be convicted, and if the rules regarding evidence are changed materially, what will be the result? Would the rights which the Constitution of these United States of ours give us still be secure and inviolate, and would our system of laws and procedure retain their uniformity and consistency? The writer dares to say that there can be but one answer to this, and any other would be useless conjecture.

It seems, if the statement will be pardoned, that Mr. Harlan would have run truer to form, and maintained his standing, if this were his dissenting opinion instead of the opinion of the court.

The writer hopes that those who read this article will be kind in their criticism. It was written only through a desire to arrive at a correct understanding of this subject.

NAT. H. AARON—"17."