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EFFECT OF AMENDMENT EXTENDING PERIOD OF PROSECUTION OF CRIMINAL ACTIONS

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The enactment of Sec. 2052 Burns' Supplement, 1929, amending our former criminal limitations act by extending the time for commencement of prosecutions for felonies from two to five years has created a situation pregnant with uncertainty as to the effect which such amendment has on offenses committted prior to its passage.

Since the amending act changing the limitation period fails to declare whether it should apply to past offenses a grave question has arisen as to its effect. In the last analysis the question resolves itself into an inquiry to determine the extent of power reposed in the Legislature to enact, repeal or change limitation acts, and, secondly, to discover what construction ought to be placed on such an act where the intent of the lawmaker is not made apparent by the act itself.

POWER OF THE STATE

The power of the State to prosecute at will is restricted by the Legislature by the establishment of periods of limitation. While the power to *enact* such statutes in the first instance is unlimited, yet, after the exercise of its power to prescribe periods of limitation, it circumscribes its power thereafter to change or repeal the original act. Before the full statutory period has expired the limitation is a mere regulation of the remedy subject to legislative control and it is generally conceded that the Legislature has power to alter, repeal, or extend the provisions of the original statute, and may by clearly expressed intention make the statute operate retrospectively, without violating any constitutional rights of the accused.[1]

It has been intimated that the Legislature has power to revive a crime previously barred and punish the offender there-

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[1] *Rex v. Dharma*, 2 K. B. 335; *Com. v. Duffy*, 96 Pa. 506; *State v. Sneed*, 25 Tex. Supp. 66; Wood, Limitation of Actions, Sec. 13; 12 C. J. 1103; Brill, Cyc. Crim. Law, Vol. 1, Sec. 195.

for.[2] But by the great weight of authority and better reason, it is now well nigh the universal rule that after the lapse of the statutory period the State has no power to revive its right to prosecute.[3] Some authorities base the rule upon the grounds of public policy;[4] others assign the prohibition against *Ex Post Facto* laws as the basis for the rule.[5] Wood, in his treatment of the subject, expresses the opinion that perhaps the offender cannot be said to have a vested right to his freedom by the statutory lapse of time but that the State by its neglect to prosecute can be treated as having condoned the crime so that it is estopped from prosecuting.[6] Judge Dixon, in a well considered opinion[7] states the *Ex Post Facto* theory so ably that we quote him at length:

"The inalienable right to life and liberty is suspended during the period within which the statute has to run; thereafter his title to liberty and life becomes absolute and cannot be taken away under the constitutional guaranty of the right to life and liberty * * * . After it has run it is a defense not of grace, but of right, not contingent, but absolute and vested, and like other defenses, not to be taken away by legislative enactment * * *. The sanction of the law was dead and the Act of 1879, restoring the expired law is within the spirit of the *Ex Post Facto* prohibition and void.

"The impolicy of keeping crimes, not of the deepest dye, punishable during the whole life of the offender, is sufficiently indicated by the common usage of civilized nations in fixing a period for the limitation of criminal prosecutions. The beneficent aims of such a usage are thwarted if the limitation be not absolute and irrevocable. The injustice and oppression of laws repealing the limitation, after persons have once relied upon its finality, must be apparent to all. The innocent, conscious of acts, which when only partly disclosed may seem criminal, preserve the evidence of the whole truth until time has established the legal proof of innocence by barring prosecution. Then their vigilance relaxes and their evidence is lost. What more unjust than that now the Legislature should abate their

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[2] Bishop, Statutory Crimes, Sec. 266.

[3] *Moore v. State,* 43 N. J. Law 203, 39 Am. Rep. 558; *Peo. v. Lord,* 12 Hun. 282; *Martin v. State,* 24 Tex. 61; *State v. Sneed,* 25 Tex. Supp. 66; *Thompson v. State,* 54 Miss. 740; *Dinkerlocker v. Marsh,* 75 Ind. 548 (dicta); Clark & Marshall, The Law of Crimes (2nd Ed.), Sec. 44; Wood, Limitation of Actions, p. 33; Brill, Cyc. Crim. Law, Vol. 1, Sec. 195; Wharton, Crim. Plead. & Pract., Sec. 316; 12 C. J. 222, 1103.

[4] *Moore v. State (supra);* Wood, Limitations (4th Ed.), Vol. 1, Sec. 13.

[5] *Peo. v. Lord (supra); Thompson v. State (supra); State v. Sneed (supra);* Wharton, Crim. Plead. & Pract. Sec. 316; 12 C. J. 1103.

[6] Wood, Limitations (4th Ed.), Vol. 1, Sec. 13.

[7] *Moore v. State (supra).*

protection and leave them to the hazard of half-discovered facts? A guilty man, not wholly lost to honor and hope, passes through the statutory period after his single offense, cowed by the constant dread of detection and disgrace. Then, relieved from danger, he returns to the path of rectitude, forms respectable associations, and gathers around him those who repose in his virtue and depend upon his fair name. Now the law changes, the detective drags to light his long-buried crime; and innocent and guilty alike are overwhelmed in the common ruin. It was of grace that remission was granted; it is the spirit of injustice and oppression that withdraws it."

From the foregoing review it may readily be concluded that our statute cannot apply to offenses against which the bar of the old statute had run at time of its enactment.

It was argued in the *Duffy*[8] *case* that the Legislature had no power to extend the limitation period for *offenses against which the full statutory time had not run,* because it would alter the rules of evidence and make less or different testimony than the law required at the time of the commission of the offense sufficient to convict the accused. If the burden was upon the State to show, in the one instance, that the alleged offense was committed less than two years prior to the commencement of prosecution, and, if the statute is changed and the State is then only required to prove that the offense was committed less than five years before the prosecution was commenced, it was argued that the State would be able to convict upon less and different testimony than the law required at the time of the commission of the offense, thus violating the *Ex Post Facto* prohibition as defined by the United States Supreme Court.[9] The court, however, answered the argument by saying that the extension of time granted for prosecution changed the *quantum* but not the *quality* of the evidence and did not therefore violate Article I of the United States Constitution. Other than the *Duffy case,* we find no case where this particular point has been raised.

As we have pointed out, the State may amend a limitation statute so as to extend the time for commencement of presecution for offenses against which the full statutory time has not expired, if the amendment clearly manifests the intent of the Legislature to make it operate retroactively. Nothing is indicated by our statute as to its application, so we are concerned not so much with a question of power as we are one of intent, to be determined by certain rules of statutory construction.

[8] *Com. v. Duffy, supra,* N. 1.

[9] *Calder v. Bull,* 3 U. S. 386; *Kring v. Missouri,* 107 U. S. 221.

II.

CONSTRUCTION: PROSPECTIVE OR RETROACTIVE OPERATION?

It is a fundamental rule in *civil* actions that statutes of limitation will not be given a retroactive effect unless it clearly appears that the Legislature so intended.[10] Likewise, it is a fundamental rule of criminal jurisprudence that limitation statutes should be liberally construed in favor of the accused and against the prosecution.[11]

Wharton[12] 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, and there is therefor no question as against whom the ordinary presumptions of construction are to be made.

"But it is otherwise when a statute of limitations is granted by the State. Here the State is the grantor surrendering, by act of grace, its right to prosecute, and ordering the offense to be no longer the subject of prosecution.

"The statute is not a process to be strictly and grudgingly applied, but an amity, declaring that after a certain time oblivion shall be cast over the offense and that the offender shall be at liberty to return to his country, and that henceforth he may cease to preserve proofs of his innocence, for the proofs of his guilt are blotted out. Hence it is that statutes of limita-

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[10] *Peo. v. Cohen,* 245 N. Y. S. 419, 157 N. E. 515; *Hickson v. Darlow,* 52 Law J., Ch. 454; *Bedford v. Shilling,* 4 Serg. & R. 400-408; *Charles v. Lamberson,* 1 Ga. 435; *State v. Connell,* 43 N. J. Law 106; *Edelstein v. Carlisle,* 33 Colo. 54, 78 P. 680; *Trapnell v. Burton,* 24 Ark. 371; *Thompson v. Alexander,* 11 Ill. 54; *Lewis v. Brackenridge,* 1 Blackf. 220; *Hopkins v. Jones,* 22 Ind. 310; *Nicklaus v. Conkling,* 118 Ind. 289, 20 N. E. 797; *Henderson v. State,* 96 Ind. 437; Wood, Limitation of Actions, 33; 37 C. J. 681; 16 C. J. 222; 36 C. J. 1212, 1213; 17 R. C. L. 682, Sec. 28.

[11] *Peo. v. Lord,* 12 Hun. 282; *State v. Snyder,* 182 Mo. 468, 82 S. W. 12; *State v. Locke,* 73 W. Va. 713, 81 S. E. 401, 403; *State v. Heller,* 76 Wis. 517, 45 N. W. 307; *Martin v. State,* 24 Tex. 614; *State v. Fulkerson,* 182 P. 725 (Okla.); *Moore v. State, supra,* N. 3; Wood, Limitation of Actions, Chap. 1, p. 28, Sec. 11; Wharton, Crim. Plead & Pract. (9th Ed.), Sec. 316; Bishop, Statutory Crimes (3rd Ed.), Sec. 259; Brill, Cyc. Crim. Law, Vol. 1, Sec. 195; 16 C. J. 222.

[12] Wharton, Crim. Plead. & Pract. (9th Ed.), Sec. 316.

tion are to be liberally construed in favor of defendants, not only because such liberality of construction belongs to all acts of amity 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 assigned to it a fixed and positive period in which it destroys proofs of guilt."

An exhaustive search discloses a paucity of cases wherein the courts have actually decided whether an act such as our own operates retrospectively. In Pennsylvania[13] and Texas[14] the rule seems to be that where a statute of limitations is extended, a defendant, in whose favor the original statute had not fully run at the time of the change, may be prosecuted within the newly established time, although the time of the old limitation period has expired at the commencement of prosecution. On the other hand, it is the rule in New York,[15] and apparently followed in Oklahoma,[16] that where no reference is made to past offenses, an extension of a limitation period only applies to those committed subsequent to the change, thus applying the rule that obtains in civil cases. The New York rule is supported not only by the better reason, but by all the finer traditions of the law because a bare resolution in the mind of the Legislature without manifesting itself in some audible manner ought never to be given any consideration in arriving at the construction to be placed upon its act. Furthermore, we must assume that if they could have spoken in unequivocal terms and did not, their failure to do so should be taken as an indication that they did not intend to include that which was omitted. That few cases have been reported in which such a statute's retroactive operation has been involved is probably due to the fact that trial courts and prosecutors have shared the opinion that a sense of justice compelled them to resolve the ambiguity in favor of the accused. Moreover, in the course of practical events, there would be few cases where the extension of time would be resorted to because in modern times the State, as a rule, either moves swiftly to prosecute, or abandons the notion altogether.

Since there are no records at the Indiana Legislative Reference Bureau to enlighten us, we can only hazard a guess as to

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13 *Com. v. Duffy, supra,* N. 1.

14 *State v. Sneed,* 251 Tex. Supp. 66.

15 *Peo. v. Lord, supra,* N. 3.

16 *State v. Fulkerson, supra,* N. 11.

the purpose of the legislators in changing the old law. At that time a certain public official high in the ranks of his party relied upon the old statute as a defense to a prosecution, and it must have been impressed upon the Legislature that under the two-year statute, more than ample time was allowed a public servant during his last two years to conceal the corruption of his first two years in office, so that at the end of his four years term, he would be immune from prosecution by his successors in office. No one will question the wisdom of the five-year limitation period, but by the insertion of a few words, the Legislature may have saved us the apprehension which provoked us to undertake this research to determine what should be done with the half-dissected body which they left on the operating table.

CONCLUSION

Without a Statute of Limitations a State has power to prosecute at will. In the exercise of its good common sense it recognizes the wisdom of establishing a limitation period in order to prod its public officers to strict application to duty, to free the innocent from the oppression of false accusations, and to afford the guilty an opportunity to reform.

When the State relinquishes its right, and establishes an arbitrary period of limitations declaring that after a certain time the suspended sword of Damocles shall be lifted from the head of the suspected citizen, it makes a solemn bargain with the innocent as well as the guilty which it is morally bound to observe. The State becomes burdened with a *duty to commence prosecution* within a certain time, and as a corollary, the accused has the *right to be prosecuted* within the same prescribed period; it cannot be otherwise, because there cannot be a duty without a corresponding right.

If the State toys with its duty, becomes an Indian giver and calls back unto itself that which it has given, how can such an example impress upon the accused his moral duty to henceforth conduct himself in a manner above suspicion? What security does he have that there remains a *locus poenitentiae* where he may reform, if that period of repentance and redemption is subject to removal farther and farther from his grasp? What hope does he have of reaching the goal of a new era, where bygones are buried in the past and life may be begun anew? If the State

may once change the limitation period by extending the time for commencement of prosecution, it is logical to presume that before the extension of time has expired it may again extend the time, then again and again, hounding the victim of its viciousness to his grave. It would be evil enough for an unconscionable Legislature to break its solemn promise; but if the Legislature be not so bold as to run the gauntlet of criticism for failure to keep its faith, then the judiciary ought not step in where the legislators feared to tread and supply by construction what the latter chose to evade.

Once the beneficent hands of grace have stretched forth to give remission from sin and erase the pains of oppression from the innocent, they ought never again be outstretched except to embrace the persecuted and the penitent recipients of their favor.

In the light of the fundamental rules of statutory construction, in the face of the silence of the Legislatures as to its purpose, and upon the basis of sound logic and the weight of authority, we submit that the Limitation Act of 1929 relating to criminal offenses has no application to offenses committed before its enactment.

PROGRAM MIDWINTER MEETING,

JANUARY 16, 1932

All sessions at Claypool Hotel, Indianapolis.

MORNING

Meetings of committees on call of chairmen.
Meeting Board of Managers, 10:00 A. M.

AFTERNOON

Association convenes at 1:30 P. M.

Reports of Committees:
- Membership.
- Jurisprudence and Law Reform.
- Legal Education.
- American Citizenship.

Addresses: "Lest We Forget"—Hon. James A. Van Osdol.
- Criminal Jurisprudence.
- Grievances.
- Legislation.
- Endowment of Law Journal.
- Illegal Practice of Law.
- Reorganization of Bar.

(Order of these reports subject to rearrangement.)

Miscellaneous Business.

EVENING

Banquet at 6:30 P. M., in Riley Room.
Speaker: Hon. Julius Henry Cohen, New York City.
Subject: Illegal Practice of Law.
Guests: Officers of Indiana Bankers' Association.

Members are permitted to bring their banker friends as their guests. Dinner tickets $1.50. Please notify secretary promptly number of tickets.