HABITUAL CRIMINAL ACTS AND THE EX POST FACTO CLAUSE

The ancient and perplexing problem of the habitual criminal has assumed increasing importance in recent years in spite of the modern advance in the fields of criminology and penology. Just as in the past, the modern method has been that of according the habitual criminal more severe punishment on the repetition of his crimes, the purpose being two-fold: as a means of punishment, and as a means of deterring others from a life of crime. Enactments by the legislative bodies to this end have appeared to be the simplest and most immediately-effective measures; and as a consequence the majority of the American states have adopted Habitual Criminal statutes, the best-known of which is probably the Baumes Act of New York.[1]

A question which has been persistently raised and which merits some consideration is that of the constitutionality of such statutes, where the application of the statutes and the meting-out of the increased punishment takes into account crimes committed before the passage of the laws. The attack on the constitutionality of the acts has been diversified in nature, including the assertions that they are a denial of equal protection of the laws;[2] provide for an imposition of punishment without due process of law;[3] impair the right of trial by jury;[4] impose cruel and unusual punishment;[5] and permit of double jeopardy.[6] The sharpest attack, however, has been in the contention that these statutes are violative of the ex post facto provision of the federal constitution.[7] Art. I, sec. 9, Par. 3 of the Constitution prohibits the United States from passing ex post facto laws, while section 10 of the same article imposes the same prohibition on the states. The question is then directly raised, does a statute which provides for the imposition of a more severe penalty upon a second or third offender have such a retrospective effect as to add, in fact, to the punishment imposed for the previous offenses—offenses which have been committed before the enactment of the habitual criminal act—so as to give those

[1] Chapter 457, N. Y. Laws of 1926, amending secs. 1941, 1942, 1943 of the Penal Law.

[2] McDonald v. Mass. (1901), 180 U. S. 311.

[3] Graham v. W. Va. (1912), 224 U. S. 616.

[4] McDonald v. Mass., *supra.*

[5] People v. Stanley (1873), 47 Cal. 113.

[6] State v. Moore (1894), 121 Mo. 514, 26 S. W. 345; State v. Findling (1913), 123 Minn. 413, 144 N. W. 142.

[7] Herndon v. Commonwealth (1899), 105 Ky. 197, 48 S. W. 989; State v. Le Pitre (1909), 54 Wash. 166, 103 P. 27; Ex Parte Gutierrez (1873), 45 Cal. 429; State v. Collins (1915), 266 Mo. 93, 180 S. W. 866.

statutes an ex post facto operation? If the statute does have such effect it is clearly unconstitutional.

Judge Chase in the early case of *Calder v. Bull*[8] was the first to attempt a definition and classification of ex post facto laws within the prohibition of the constitution. He included:

> "1. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action.
> 2. Every law that aggravates a crime or makes it greater than when it was 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."

These principles, with slight additions and modifications, have formed the basis of all decisions construing the ex post facto clause.

It is to be noted first that although the clause seems to prohibit all retrospective legislation, both civil and criminal, its application has been restricted only to criminal statutes, this being said to have been the intent of the Constitutional Convention. And this limited application has been adhered to throughout.[10] The rule in *Calder v. Bull* that statutes changing the rules of evidence may not have a retrospective effect has been modified by the holding that a statutory change in the rules of evidence made after the commission of a crime does not fall within the ex post facto prohibition where the change does not lessen the amount of proof necessary to convict, and by which no right is given to the prosecution which is not also given to the defense.[11]

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[8] (1798), 3 Dall. (U. S.) 386.

[9] Hall, CONSTITUTIONAL LAW, p. 93. That the members of the Constitutional Convention intended to limit the operation of the ex post facto clause to criminal legislation has been doubted by some writers. See McAllister, Ex Post Facto Laws in the Supreme Court of the United States, 15 Cal. L. Rev. 269. Also Cooley, CONSTITUTIONAL LIMITATIONS, (8th ed.), P. 553.

[10] Kentucky Union Co. v. Ky. (1911), 219 U. S. 140. In Mahler v. Eby (1924), 264 U. S. 32, it was held that a federal statute providing for deportation of undesirable aliens was not a statute imposing criminal punishment, and, since it did not fall within the prohibition of the clause, could be applied to aliens who entered before the passage of the act.

[11] Hopt v. Utah (1884), 110 U. S. 574, holding that a statute which simply enlarges the class of persons who may be competent to testify, or otherwise admits evidence not before admissible, without lessening the requirements

And the corollary rule that a statute enacted after the commission of a crime may not alter the accused's situation to his disadvantage by making procedural changes has been modified to the view that procedural changes may or may not be ex post facto according to whether they do or do not deprive the defendant of "any of those substantial protections with which the existing law surrounds the person accused of crime."[12] Thus in *Beazell v. Ohio*,[13] a statute making the question of a separate trial for persons jointly indicted a matter of discretion with the trial court, instead of mandatory, was held not ex post facto as to prior offenses. The court says, "The constitutional provision was intended to secure substantial personal rights against arbitrary and oppressive legislation, and not to limit the legislative control of remedies and modes of procedure which do not affect matters of substance." In line with this reasoning and in recognition of the right of the state to prescribe the qualifications of those in the professions, it has been held that a statute providing that a person who has been convicted of crime shall not be permitted to engage in the practice of medicine is not ex post facto as to prior convictions.[14]

A pertinent question before considering the habitual criminal statutes presents the converse problem—whether statutes mitigating or changing the punishment for crimes committed previously are valid. Judge Chase in *Calder v. Bull* stated: "I do

for conviction, is not ex post facto in its application to offenses already committed. Thompson v. Mo. (1898), 171 U. S. 380, holding that a state may between the time of the commission of the offense and time of trial modify the rules of evidence regarding proof of handwriting. In Plachy v. State (1922), 91 Tex. Cr. R. 405, 239 S. W. 979, a prosecution for violating the liquor laws, a statute having removed the purchaser from the ranks of accomplice's testimony a conviction was made possible on less evidence, and a refusal to apply the previous law as to accomplice's testimony was held error.

[12] Thompson v. Utah (1898), 170 U. S. 343, holding unconstitutional a statute reducing a criminal jury from 12 to 8, where it was to have a retrospective effect. But the retrospective effect of statutes changing the place of trial, number of judges, and qualifications of jurors has been held valid. Duncan v. Mo. (1894), 152 U. S. 377, and Gibson v. Miss. (1896), 162 U. S. 565. And a statute giving additional challenges to the prosecution and reducing the accused's number of peremptory challenges has been held valid in its operation as to past offenses, as not depriving the defendant of any substantive rights. Harris v. U. S. (1910), 4 Okla. Cr. Rep. 317, 111 P. 982. See also Burdick, THE LAW OF THE AMERICAN CONSTITUTION, P. 446.

[13] (1925), 269 U. S. 167.

[14] Hawker v. N. Y. (1898), 170 U. S. 189. The result was the same in Butcher v. Maybury (1925), 8 F. (2d) 155, where the statute provided for concellation of the physician's license in case of previous convictions.

not consider any law ex post facto, within the prohibition, that mollifies the rigor of the criminal law, but only those that create, or aggravate the crime; or increase the punishment, or change the rules of evidence, for the purpose of conviction." If the statute is clearly in mitigation of the punishment, there is no conflict, the law being valid in spite of its retrospective effect.[15] The courts differ where it is not clear whether the changed punishment is in mitigation or not, with some avoiding the problem by holding all changes invalid as affecting past offenses.[16]

Although habitual criminal laws are illustrative of the modern tendency to classify criminals rather than crimes, the principle of such statutes cannot be said strictly to be recent in origin. In England habitual offenders were subjected to more severe treatment, and it was established by statute[17] that although the fact was alleged in the indictment, the evidence of the former conviction should not be given to the jury until they had found their verdict on the charge of crime; afterwards the jury were to consider the question of identity of the person convicted as a previous offender. And in Massachusetts as early as 1817 increased punishment was provided for the repeating offender.[18]

[15] People v. Hayes (1894), 140 N. Y. 484, 35 N. E. 951, reducing the minimum sentence.

[16] State v. McDonald (1873), 20 Minn. 136. In Shepherd v. People (1860), 25 N. Y. 406, a change from death to life imprisonment was held ex post facto and invalid, because the punishment was of such a different kind that the court was unable to say it was less severe. Commonwealth v. Wyman (1866), 12 Cush. (Mass.) 237 and Turner v. State (1866), 40 Ala. 21, hold that such change is clearly in mitigation and valid. A change from whipping and imprisonment in the common jail to confinement in the penitentiary was held valid as to previous crimes in State v. Kent (1871), 65 N. C. 311. State v. Malloy (1915), 237 U. S. 180, held a retroactive change from hanging to electrocution constitutional.

[17] 6 and 7 Wm. IV, Ch. 11.

[18] This statute applied to convicts whose status as habitual offenders was not known at the time of sentence. It (Mass. Laws of 1817 and 1818, c. 176, P. 602) provided, "That whenever it shall appear to the warden of the state prison, . . . that any convict received unto the same, pursuant to the sentence of any court, shall have before been sentenced, by competent authority of this or any other state, to hard labor for term of life or years, it shall be the duty of the said warden, . . . to make representation thereof, as soon as may be, to the attorney or solicitor general, and they or either of them shall by information, or other legal process, cause the same to be made known to the Justices of the Supreme Judicial Court, . . . and the said Justices shall cause the person or persons so informed against, to be brought before them, in order, that if, he deny the fact of a former conviction, it may be tried according to law, whether the charge contained in such information be true. And if it appear by the confession of such party, by verdict of the jury or otherwise, according to law, that said in-

As indicated above, although such statutes have been subject to persistent attack on constitutional grounds, the courts, with few or no exceptions, have upheld them. They do not provide for double jeopardy, do not deny equal protection of the laws, do not impose punishment without due process of law, do not impair the right of trial by jury, and do not impose cruel and unusual punishment.[19] On the charge that the statutes impose additional punishment for crimes committed before the existence of such acts, the courts have held that the additional punishment is in fact provided for the last offense, not for the previous ones, and that such punishment takes into account the crimial habits of the defendant—a legitimate consideration in the determination of punishment.[20] This view was expressed in *Blackburn v. State,*[21] where a statute providing for sentence of life imprisonment on conviction of a third felony was held not to create a new class of crimes. The court said:

> "A law cannot properly be considered retrospective when it apprises one who has established by previous unlawful acts a criminal character, that if he perpetrates further crimes the penalty denounced by the law will be heavier than upon one less hardened in crime. In such case the party is informed, before he commits the subsequent offense, of the full measure of the liability he will incur by its perpetration, and therefore does not fall within the class that is entitled to the protection afforded by the constitutional guaranty against the enactment of ex post facto or retroactive laws. . . ."

In *State v. Le Pitre, supra,* the court followed similar reasoning:

> ". . . while there are many rules of law which may seem inconsistent with its purpose and the procedure adopted to compass it, it [the habitual criminal statute] is nevertheless sound in principle and sustained by reason. Aside from the offender and his victim, there is always another party concerned in every crime committed—the state—and it does no violence to any constitutional guaranty for the state to

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formation is true, the court shall forthwith proceed to award against such convict the residue of the punishment provided in the foregoing section; otherwise the said convict shall be remanded to prison, there to be held on his former sentence."

[19] McDonald v. Mass., *supra,* note 2, Graham v. W. Va., *supra,* note 3, People v. Stanley, *supra,* note 5.

[20] State v. Adams (1913), 89 Kan. 674, 132 P. 171, holding that a former conviction of crime is a sufficient basis for classification of offenders with respect to the severity of punishment they shall receive.

[21] (1893), 50 Ohio St. 428, 36 N. E. 18.

> rid itself of depravity when its efforts to reform have failed. . . . The spirit of the law is in keeping with the acknowledged power of the Legislature to provide a minimum and maximum term within which the trial court may exercise its discretion in fixing sentence taking into consideration, as it should always, the character of the person as well as the probability of reformation; or the Legislature may take away all discretion and fix a penalty absolutely as it does in many instances."

Following this interpretation, the statutes are prospective rather than retrospective, relating to crimes and sentences to be imposed after its passage, but taking into consideration the character of the offender, this consideration involving an inquiry into his past record.[22]

The validity of the increasingly-rigorous habitual criminal acts has been tested in two recent cases, and has been settled in accord with the above view. In *Ex Parte Rosencrantz*[23] the conviction of the defendant under the statute[24] was upheld, the three previous felonies having been committed before the passage of the statute. In *State v. Zywicki*[25] the defendant was convicted of grand larceny, and sentenced to the State Reformatory. Later, on an information brought against him under ch. 236, Minn. Laws, 1927, charging that defendant had previously been convicted of grand larceny—a felony, the defendant was brought from the Reformatory to answer the charge. A demurrer to the information was overruled and a plea of double jeopardy stricken out. The court, without considering the problem, assumes the validity of the substantive rule of increased punishment, and states the only question to be whether the procedure prescribed by the act deprives the defendant of any constitutional rights. It points out that the information does not charge the commission of a crime; it merely charges a prior conviction which, if proved, will increase the sentence to be imposed, or already imposed, for the later crime of which the defendant then stands convicted. The trial procedure is the same as in other cases if the defendant denies the former conviction,

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[22] Commonwealth v. Graves (1892), 185 Mass. 163, 29 N. E. 579; State v. Collins (1915), 266 Mo. 93, 180 S. W. 866. See also exhaustive note, 64 A. S. R. 378.

[23] Ex Parte Rosencrantz (Cal., 1928), 271 P. 902.

[24] Cal. St. 1927, P. 1066 (amending sec. 644, Penal Code), providing: "Every person convicted in this State of any felony who shall have been previously three times convicted, either in this state or elsewhere of any felony, shall be punished in the state prison for not less than life and shall not be eligible to parole."

[25] (Minn., 1928), 221 N. W. 900.

and thus does not violate any constitutional guarantee. If the charge is found true the sentence is increased, and the time already served is credited. The court says: "When it is borne in mind that the act imposes no new or additional penalty for the prior offense charged, and that the information alleging the prior offense does not charge defendant with any crime, but only discloses facts affecting the punishment to be imposed upon the then pending conviction, and such later conviction was for a crime committed after the law was enacted, the claim that the law operates ex post facto would seem to fall." It is to be noted in passing that the N. Y. habitual criminal act, the Baumes Law, which also provides for the use of the information if the defendant is not known as a habitual offender at the time of his conviction, has had its validity reiterated in a recent case.[26]

Dealing with a similar problem, it was held in a Michigan case,[27] that if a convict has served one term in prison before the enactment of a statute providing that second term convicts shall be entitled to a less favorable reduction of the time of their sentence for good behavior than is allowed to first term convicts, he is subject to the provisions of such statute as applied to the punishment of a crime committed by him after its enactment, and that such a statute is not prohibited by the ex post facto clause. But in *State ex rel. Woodward v. Board of Parole*,[28] a Louisiana case, it was held that the right of one sentenced to penitentiary for life in 1914, when parole for life termers was possible, to have his application for parole considered is not affected by later laws taking away the right of parole from life termers, and that to hold otherwise would be to give the statute an ex post facto effect, even though a parole was discretionary.

An interesting question has arisen as to what is a prior conviction within the meaning of the habitual criminal statute. It has been held[29] that a prior conviction, but with a void sentence, is still a prior conviction within the meaning of the act, but that this is not true of a void conviction. On the question of whether a pardon cuts the prior conviction off from consideration there is conflict—one view being that the pardon blots out the conviction,[30] and the other that since it is the last crime which is being punished a pardon of the prior crime is immaterial.[31]

Only two cases have been cited as opposed to the rule of consti-

[26] People v. Gowasky (N. Y. 1927), 155 N. E. 737.
[27] In re Miller (1896), 110 Mich. 676, 68 N. W. 990.
[28] (1924), 155 La. 699, 99 S. 534.
[29] Kelly v. People (1886), 115 Ill. 583, 4 N. E. 644.
[30] State v. Martin (1898), 59 Ohio St. 212, 52 N. E. 188.
[31] Carlesi v. People (1914), 233 U. S. 51; Herndon v. Commonwealth, *supra*.

tutional validity of the habitual criminal statutes, but it is believed that an analysis of these cases will show that they rest on a principle of statutory construction, rather than on an opposite interpretation of the ex post facto clause. In *Carson v. State*,[32] an Alabama case, it was held that both convictions must follow the passage of the act in order to impose the increased punishment. The statute referred to was relative to the sale of intoxicating liquors. It was amendatory of previous prohibition statutes, and expressly repealed all penalties prescribed in all other prohibition statutes as to all offenses thereafter committed, its object being "to prescribe a uniform penalty for the violation of the prohibition law." The defendant, under indictment for violating this statute, was shown to have been twice convicted previously of a similar offense, the convictions occurring before the passage of the statute. The supreme court in reviewing the instructions of the trial court that the defendant, if convicted of the offense charged, was liable to the maximum fine prescribed for the second and subsequent convictions, held them to be erroneous, since the statute contemplated cases in which the prior conviction followed the enactment of the statute.

The case of *State v. Sanford*[33] has also been cited as opposed to the general holding, but in it the issue was not squarely presented. The act under which the last conviction was had provided that any person convicted of a first violation of the liquor law shall be fined not less than ten dollars nor more than two hundred; and for a second and all subsequent convictions shall be punished by said fine, or by imprisonment not less than ten days nor more than six months, or by such fine and imprisonment both. The act provided that these penalties should be in lieu of those hitherto prescribed by law. The former conviction of defendant was prior to the passage of the act, and it was held that inasmuch as the punishment provided by the first clause of the act for a first violation was greater than that previously prescribed, and would thus be ex post facto if applied to offenses committed before it went into effect, the entire act must be construed as applicable only to offenses committed after the act took effect, and to convictions secured for such offenses only.

As has been indicated previously, two methods are provided by the statutes for the imposition of increased punishment on habitual offenders: (1) the allegation of prior convictions in the indictment and proof on trial; (2) subsequent proceedings, as by information, to determine identity. The latter method has been found necessary in the case of habitual criminals who move from place to place in order to conceal their identity, and whose past

[32] (1895), 108 Ala. 35, 19 S. 32.
[33] (1896), 67 Conn. 286, 34 A. 1045.

record may not be known at the time of sentence.[34] And under such statutes where a previous conviction is charged there must be an allegation and proof of the previous conviction in order to sentence the defendant under the statute, where he does not admit the charge.[35]

In view of the recognized constitutionality of the habitual criminal acts and their undoubted effectiveness as a deterrent force, there appears to be no serious objection, either in law or in policy, against their more widespread adoption and application. Some provision, however, should be made to permit the judge to exercise discretion, within limits, in imposing sentences in exceptional cases. The present provisions providing for the automatic application of the increased punishment on proof of prior crimes have resulted in a few cases in palpably disproportionate punishment for a relatively trivial last offense. Such instances have resulted in severe journalistic criticism and cannot but add to the regrettable disrespect for the laws.

SAM ELSON, '30.

MENTAL INCAPACITY AS AFFECTING CONSENT TO THE MARRIAGE CONTRACT

A voluntary consent to a contract of marriage by both parties is a requisite to its validity.[1] An insane person is not capable of consent, and a marriage in which one of the parties is insane is generally held to be void.[2] By statute, however, in a number of states such marriages are declared to be valid until adjudicated a nullity—in other words, voidable.[3] These statutes are obviously in direct contravention of the common law and have been severely criticized as involving a person in marriage with-

[34] See note, 48 L. R. A. (N. S.) 204, for procedure under habitual criminal statutes.

[35] People v. King (1883), 64 Cal. 338, 30 P. 128.

[1] Wiley v. Wiley (1919), 75 Ind. A. 456, 123 N. E. 252; Rawdon v. Rawdon (1856), 28 Ala. 565; Sims v. Sims (1897), 121 N. C. 297, 28 S. E. 407; Orchard v. Cofield (1897), 171 Ill. 14, 49 N. E. 197; Oswald v. Oswald (Md., 1924), 126 A. 81.

[2] In re Gregorson (1911), 160 Cal. 21, 116 P. 60; Powell v. Powell (1877), 18 Kan. 371, 26 Am. Rep. 774; Orchard v. Cofield, *supra*; Grathering v. Williams (1845), 27 N. C. 487; Williams v. Williams (1928), 83 Col. 180, 263 P. 725.

[3] Mich., Comp. Laws, 1915, sec. 11394; Mass., Gen. Laws, 1921, ch. 207, sec. 6; N. D. Comp. Laws, 1913, 4373; Texas, Complete Stat., 1920, Civil Code, Art. 4630; Vermont, Gen. Laws, 1917, sec. 3547, 3548; Wash., Remington's Comp. Stat., 1922, sec. 8449; W. Va., Hogg's Code, 1913, sec. 3636; Ark., Craw. & Moses Dig., 1921, sec. 2606-9; Ill., Hurd's Rev. Stat. 1921, ch. 89, sec. 2; Ia., Code, 1897, sec. 3182.