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Criminal Law - Ex Post Facto Doctrine - Negligent Homicide

Gene W. LaFitte

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Notes

CRIMINAL LAW—EX POST FACTO DOCTRINE—NEGLIGENT HOMICIDE—Sometime between July 18, 1940, and May 6, 1942, the defendant contractors negligently deviated from specifications in the installation of gas pipes beneath the structure of a certain housing project. This negligence resulted in a leakage, and the consequent accumulation of gas under the project caused a violent explosion on February 19, 1946. The Louisiana Criminal Code¹ meanwhile became law on July 29, 1942, three months after the negligent acts occurred. This law changed the old crime of involuntary manslaughter to negligent homicide,² making it easier for the state to obtain a conviction.³ It was under the new negligent homicide statute that the state charged the defendants. The defense was that its application was ex post facto, and a denial of liberty without due process of law. The Louisiana Supreme Court sustained the defense and affirmed a judgment quashing the indictment. *State v. Masino*, 43 So.(2d) 685 (La. 1950).

The court resolved the issues down to the question: When did the crime occur? The analysis proceeded along these lines: If the act of the defendants, the negligent installation of piping, be defined as the crime, then the statute allegedly violated would be ex post facto in its application to the persons charged. On the other hand, if the crime were not committed until the fatal explosion occurred, this act of the legislature would not be retroactive in operation. Delivering the opinion of the majority of the court, Justice Moise concluded that the crime was committed on the date on which the deed, the original act, was performed, and not on the date of the victim's death.⁴ It is this analysis, and not the actual holding that the law was ex post facto in its application, which is questioned.

It should be noted that although the ex post facto doctrine is fairly simple, the question of the application of that doctrine to the instant case is not free from difficulty. The nature of the ex post facto doctrine, and the reasons for its existence are

1. La. R.S. (1950) tit. 14.

2. Art. 32, La. Criminal Code of 1942 [La. R.S. (1950) § 14:32].

3. See the majority opinion of *State v. Masino*, 43 So.(2d) 685, 686 (La. 1950), for the view that the new criminal code Article 32 was a burden on the defendants. But see Justice McCaleb's dissent, *id.* at 689.

4. 43 So.(2d) 685, 686 (La. 1950).

worthy of comment.⁵ In the leading case of *Calder v. Bull*⁶ the United States Supreme Court classically defined an ex post facto law as one which (1) makes an act criminal that was innocent when done, (2) makes a crime greater than it was when done, (3) inflicts a greater punishment for a crime than was attached to it when committed, or (4) alters the legal rules of evidence to the prejudice of the offender. In general, an ex post facto law deprives an offender of some advantage that he enjoyed when he acted, or imposes some disadvantages from which he was free when he acted. In speaking for the court in *Calder v. Bull*, Mr. Justice Chase significantly declared:

"This fundamental principle flows from the very nature of our free republican governments, that no man should be compelled to do what the laws do not require; nor to refrain from acts which the law permits."⁷

"The prohibition, in the letter, is not to pass any law concerning, and after the fact; but the plain and obvious meaning and intention of the prohibition is this: that the Legislatures of the several states, shall not pass laws, after a fact done by a subject or citizen, which shall have relation to such fact, and shall punish him for having done it."⁸

These observations call attention to at least one outstanding principle contained in the ex post facto prohibition—that the doctrine is concerned with the *conduct of an individual* who believes that he is within the law in his behavior. The theory is based on the notion that a man should be permitted to rely on the law existing at the time of his act. The prevailing law is his guide, and the prohibition against ex post facto legislation is to prevent the changing of that law so as to create criminal responsibility after the individual has depended upon it. Yet in the instant case the court failed to invoke this principle in its reasoning. No emphasis was placed upon the fact that the defendants had already performed their acts before the passage of the law which they were charged with violating. Instead, the court concluded that the crime had been committed at the time of the negligent conduct which later resulted in the explosion and deaths.

5. The Constitution of the United States prohibits the passage of ex post facto laws by the Congress (U.S. Const. Art. I, § 10), and by the legislatures of the several states (U.S. Const. Art. I, § 10).

6. 3 U.S. 386, 1 L. Ed. 648 (1798).

7. 3 U.S. 386, 388, 1 L.Ed. 648, 649.

8. 3 U.S. 386, 390, 1 L.Ed. 648, 650.

The categorical statement that a crime is committed when the offender performs his act is open to serious objection. Since some crimes occur over an extended period of time, it is only with extreme difficulty that the exact time of the commission of the crime can be established. These situations simply do not lend themselves to this type of factual analysis. Although this is true, it is at the same time possible to determine the time of *completion* of such crimes. It is not until some prescribed criminal consequences have been produced by an act that the crime is complete. A crime is not the individual's act, nor the consequences of his act. It is rather a combination of the two elements.⁹ For a crime to exist, both must prevail; neither alone will suffice. The very fact that the court rationalized in terms of act plus consequences, instead of dealing with acts alone, indicates its realization of this concept. In the present case the careless installation of pipe by the defendants was a necessary factor of criminal liability; but standing alone, it did not constitute a crime.

It is respectfully submitted that this case calls for the plain application of the *ex post facto* theory, and nothing more; it was the time of the defendants' conduct alone that should have received the attention of the court.

That the court recognized the basic purposes for the prohibition against *ex post facto* statutes is evidenced by the ultimate result. But the fact that the consequences of the defendants' acts occurred after the effective date of Article 32 of the Louisiana Criminal Code confused the issue so that although the court decided correctly, it was drawn to tangents of irrelevancy which could produce unintended results. They attempted to reconcile the decision with a definition of when a crime was committed. Fortunately, there was no compulsion to do so.

GENE W. LAFITTE

LABOR LAW—CONSTITUTIONALITY OF INJUNCTION AGAINST PEACEFUL PICKETING—Defendants, members of a labor union composed in part of retail ice peddlers, sought to induce non-union peddlers to join the union by obtaining from the wholesale ice distributors in Kansas City agreements not to sell ice to non-union peddlers. When the plaintiff, Empire Storage and Ice Company, refused to agree after all other distributors had

9. See the cases of *Brockway v. State of Indiana*, 192 Ind. 656 (1923) and *Alderson v. State of Indiana*, 196 Ind. 22 (1925).