

THE  
AMERICAN LAW REGISTER.

---

NOVEMBER 1886.

---

THE CONSTITUTIONAL OBJECTIONS TO RETRO-  
SPECTIVE AND EX POST FACTO LAWS.

I. *Under the Constitution of the United States.*—All *ex post facto* laws are necessarily retrospective in their operation ; but not all retroactive legislation is *ex post facto* in the sense in which the latter term is used in the phraseology of constitutional law. Retrospective legislation is an expression sufficiently comprehensive to include all statutes, whether civil or criminal, which operate upon antecedent transactions, rights or remedies. *Ex post facto*, on the other hand, is a technical term applying solely to crimes and their punishments. It is thus defined by Mr. Justice STORY : “ It has been solemnly settled by this court that the phrase, *ex post facto* laws, is not applicable to civil laws, but to penal and criminal laws which punish a party for acts antecedently done which were not punishable at all, or not punishable to the extent or in the manner prescribed. In short, *ex post facto* laws relate to penal and criminal proceedings which impose punishments or forfeitures, and not to civil proceedings which affect private rights retrospectively :” *Watson v. Mercer*, 8 Pet. 110 ; *Calder v. Bull*, 3 Dall. 386 ; *Locke v. Dane*, 9 Mass. 363 ; *Grim v. School District*, 57 Penn. St. 435 ; *Bridgeport v. Hubbell*, 5 Conn. 240 ; *Baughner v. Nelson*, 9 Gill 299. Now the Constitution of the United States prohibits the several states from passing any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts. But it follows from the distinctions above taken that state enactments retroactive in their operation, even such as must necessarily divest vested rights, do not fall within the provisions of

the federal constitution, unless their effect is to impair the obligation of contracts, or unless they partake of the character of *ex post facto* laws. And this is the unanimous voice of the decisions: *Satterlee v. Matthewson*, 2 Pet. 380; *Watson v. Mercer*, 8 Id. 110; *Charles River Bridge v. Warren Bridge*, 11 Id. 539; *Carpenter v. Pennsylvania*, 17 How. 456; *Locke v. New Orleans*, 4 Wall. 172; *Albee v. May*, 2 Paine 74; *Grim v. School District*, 57 Penn. St. 435; *Lane v. Nelson*, 79 Id. 407; *People v. Supervisors*, 63 Barb. 85; *Wilson v. Hardesty*, 1 Md. Ch. 66; *State v. Squires*, 26 Iowa 340; *Drehman v. Stifel*, 41 Mo. 184; *Reed v. Beall*, 42 Miss. 472. Except in these two cases, therefore, no objection can be taken to an act of a state legislature, under this clause of the national constitution, however injuriously it may affect private rights, or however impolitic or unjust may be its provisions. It must stand or fall according to the terms of the organic law of the particular state.

II. *Under State Constitutions.*—Although most of the state constitutions contain prohibitory clauses against this general species of legislation, yet their language, and the particularity with which the forbidden acts are described, exhibits a wide diversity. Thus the North Carolina Constitution of 1876 inhibits “*ex post facto* laws.” Those of Massachusetts and Maryland are directed against “any *ex post facto* law or bill of attainder.” In Alabama, Illinois, Indiana, Kentucky, Mississippi, Oregon, Pennsylvania and Rhode Island (the constitution last adopted being in each case intended), it is provided that “no *ex post facto* law nor any law impairing the obligation of contracts shall be passed.” A still more comprehensive expression—“no bill of attainder, *ex post facto* law, or law impairing the obligation of contracts shall ever be passed”—is incorporated in the constitutions of Arkansas, California, Florida, Iowa, Maine, Michigan, Minnesota, Nebraska, Nevada, South Carolina, Virginia, West Virginia and Wisconsin. In the states of Colorado, Missouri, Tennessee and Texas, the prohibition is against *ex post facto* laws, laws impairing the obligation of contracts, and laws retrospective in their operation. In the New Hampshire Constitution of 1792, it is said: “Retrospective laws are highly injurious, oppressive and unjust. No such law, therefore, should be made, either for the decision of civil causes or the punishment of offences.” In the constitution of Louisiana of 1868, the following language is held: “No *ex post facto* or retroactive law, nor any

law impairing the obligation of contracts, shall be passed, nor vested rights be divested, unless for purposes of public utility and for adequate compensation made." In New Jersey (constitution of 1844) the clause reads, "The legislature shall not pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or depriving a party of any remedy for enforcing a contract which existed when the contract was made." And in Ohio (constitution of 1851, art. II., § 28), it is provided that "the general assembly shall have no power to pass [retrospective laws], but may, by general laws, authorize the courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties and officers, by curing omissions, defects and errors in instruments and proceedings, arising out of their want of conformity with the laws of this state." From this it will be seen that while *ex post facto* laws are expressly prohibited in thirty-one states (in addition to the controlling force of the federal constitution), *retrospective* legislation, as such, is in terms forbidden in only seven.

III. *Substantive Harmony of the Decisions.*—Notwithstanding this lack of uniformity in the constitutional provisions of the several states, there seems to be good ground for the hope that an ultimate harmony both in theory and practice will be reached, and both on the part of legislatures and courts. For, in the first place, all theories on this subject start with the postulate that the legislature of an individual state may enact *any* law, of any character or on any subject, unless it is prohibited, either in express terms or by necessary implication, in the Constitution of the United States or of that state. Yet in those states where retrospective legislation is *not* expressly forbidden, the courts have frequently refused to give their sanction to such statutes when they were palpably unjust, or impaired vested rights, or destroyed remedies, basing their authority to declare the acts unconstitutional on the ground that they were contrary either to the spirit of the constitution and the implications necessarily drawn from it, or to those cardinal principles of the social compact which antedate all laws and enter into the very framework of all representative government. Thus in Connecticut, while there is nothing in the constitution of that state to prohibit retrospective legislation, Judge BUTLER has said: "But the power of the legislature in this respect is not unlimited. They cannot entirely disregard the fundamental principles of the social contract. Those principles underlie all legislation, irrespective of constitu-

tional restraints, and if the act in question is a clear violation of them, it is our duty to hold it abortive and void. \* \* \* Although it is to be assumed that the legislature supposed they had authority to pass the particular retrospective act, and judged it to be reasonable and just, yet they may have erred; and if it is shown to the court, with entire clearness and certainty, to be so unreasonable and unjust in its operation upon antecedent legal rights that the action of the legislature cannot be vindicated by any reasonable intention or allowable presumption, it is our duty to declare it void:"

*Welch v. Wadsworth*, 30 Conn. 149. And a careful reading of the leading case of *Calder v. Bull*, 3 Dall. 386, will show that the judges entertained practically the same views as above expressed, though their decision was concerned with other principles. And see, in general, *Kendall v. Dodge*, 3 Vt. 360; *Ham v. McClaugh*, 1 Bay 93; *Coosa River Steamboat Co. v. Barclay*, 30 Ala. 120; *Clarke v. McCreary*, 12 Sm. & Mar. 347. It must be confessed, however, that a contrary doctrine is strongly maintained in Pennsylvania. BLACK, C. J., says: "We are urged, however, to go further than this, and to hold that a law, though not prohibited, is void if it violates the spirit of our institutions, or impairs any of those rights which it is the object of a free government to protect, and to declare it unconstitutional if it be wrong and unjust. But we cannot do this:" *Sharpless v. Mayor*, 21 Penn. St. 161; *Weister v. Hade*, 52 Id. 474. Now, on the other hand, in those states where retrospective legislation is expressly and in terms forbidden, the courts have nevertheless held that statutes which are of a wholesome and salutary effect, such as confirm and strengthen vested rights instead of abridging them, or operate only upon remedies, and are not in hostility to natural justice and the guarantees of the social compact, although explicitly invested with a retrospective effect, are neither concerned with the mischiefs intended to be guarded against by that prohibition, nor properly to be regarded as within its spirit. This proposition is amply supported by the following cases: *Rich v. Flanders*, 39 N. H. 304; *Rairden v. Holden*, 15 Ohio St. 207; *New Orleans v. Poutz*, 14 La. Ann. 853; *De Cordova v. Galveston*, 4 Tex. 470; *Paschal v. Perez*, 7 Id. 348. In reality, therefore, these different doctrines amount to no more than a contemplation of the same rule from two different points of view. The one side regards the *obverse* of a great principle of legislation, the other the *reverse*; but the principle is the same—that

no injustice must be done by a retrospective statute and no vested rights invaded.

IV. *The Rule of Construction.*—There is, nevertheless, a strong latent sentiment against retrospective legislation, probably in consequence of the injustice and oppression to which it *might* give rise if allowed to affect antecedently acquired rights or destroy the obligation of existing contracts. Witness the constitution of New Hampshire, where it is stigmatized as “highly injurious, oppressive, and unjust;” and the case of *Underwood v. Lilly*, 10 S. & R. 101, where it is said, “retrospective laws being in their nature odious, it ought never to be presumed the legislature intended to pass them, where the words will admit of any other meaning.” Hence the rule is inflexible that a statute will not be so construed as to have a retrospective operation, unless the intention of the legislature to give it that effect is expressed in terms too clear and explicit to admit of a reasonable doubt: *State v. Hays*, 52 Mo. 578; *State v. Ferguson*, 62 Id. 77; *People v. Supervisors*, 63 Barb. 85; *Wade v. Strack*, 1 Hun 96; *Thompson v. Alexander*, 11 Ill. 54; *Garrett v. Beaumont*, 24 Miss. 377; *Thorne v. San Francisco*, 4 Cal. 127; *Briggs v. Hubbard*, 19 Vt. 86; *Gault's Appeal*, 33 Penn. St. 94; *Plumb v. Sawyer*, 21 Conn. 351; *Baldwin v. Newark*, 38 N. J. L. 158; *Vreeland v. Bramhall*, 39 Id. 1. And even where admitted to retrospective operation, the statute will be subjected to the most circumscribing construction possible, consistent with the intention of the legislature: *Hedger v. Rennaker*, 3 Met. (Ky.) 255.

V. *Statutes not to impair Vested Rights.*—The legislature of a state cannot take away vested rights by giving to a statute a retrospective operation: *Houston v. Bogle*, 10 Ired. 496. And since the impairment of vested rights is frequently made the test of the constitutionality of a retrospective statute, it becomes important to determine what interests are properly to be included in that phrase. And in the first place, a statute is not objectionable as retrospective because it purports to operate on prior contingent or qualified rights: *Clarke v. McCreary*, 12 Sm. & Mar. 347. Thus an act giving to property owners in a certain city two years to redeem from sales for municipal claims may apply to cases of sales made before its passage, but in which no deeds had been executed to the purchasers: *Gault's Appeal*, 33 Penn. St. 94. So the repeal of a statute giving a right of action for a penalty in certain cases, will purge all past transac-

tions of their penal character under that statute, but saving all vested rights to the penalty; however, when the act gave the penalty to any one of a class named who should first sue for it, there is no vested right in any one until suit brought, even if there is before judgment: *Lakeman v. Moore*, 32 N. H. 413. But where the statute gives the penalty to an individual, his right cannot be taken away although no proceedings for its recovery have been commenced at the time of the repeal: *Dow v. Norris*, 4 N. H. 16; *per contra*, *West Troy Fire Dep't. v. Ogden*, 59 How. Pr. 21. And a right to a three-fold forfeiture of all the interest reserved on a contract, on account of usury, is not a vested right which the legislature cannot take away: *Parmelee v. Lawrence*, 44 Ill. 405. So a right to recover damages in an action of forcible entry and detainer is not a vested right of property: *Drehman v. Stifel*, 41 Mo. 184. And a statute making joint heirs tenants in common applies to estates existing at its passage: *Stevenson v. Cofferin*, 20 N. H. 150. On the other hand, where the law stood thus—that a party who failed to take out a writ of error until an adjudication had been made by the appellate court on his adversary's writ of error, waived or lost his right to do so, it was held that a subsequent statute giving the right to any litigant to take out a writ of error after an adjudication upon a former one taken by the opposite party in the same case, could not apply to a case already determined on one writ of error, because it would impair the vested right of the successful party to rely upon the conclusiveness of the judgment: *McCabe v. Emerson*, 18 Penn. St. 111. So an act of the legislature awarding a new trial in an action which has been already determined in a court of law, is an exercise of judicial power, and also disturbs a vested right, and for these two reasons is unconstitutional: *Merrill v. Sherburne*, 1 N. H. 199. But a statute which takes away the right to a future appeal in an action pending and undetermined when the statute takes effect is not unconstitutional, for the right of appeal is not yet vested while the cause remains open: *Grover v. Coon*, 1 N. Y. 536.

VI. *Statutes Valid if affecting the Remedy alone.*—A law which applies solely to the remedy may be allowed a retroactive effect. A distinction is to be taken between vested rights and the remedies provided for their protection and enforcement. Parties have a vested right to a remedy, but not to any particular one in such sense that the legislature cannot change it: *Lockett v. Usry*, 28 Ga. 345.

Hence the legislature has authority under the constitution to take away a particular form of remedy by a retrospective statute, filling its place with one substantially as good: *People v. Supervisors*, 70 N. Y. 228; *United States v. Samperyac*, 1 Hempst. 118; *Hinton v. Hinton*, Phill. (N. C.) 410. So "the legislature, provided it does not violate the constitutional prohibitions, may pass retrospective laws, such as in their operation may affect suits pending, and give to a party a remedy which he did not previously possess, or modify an existing remedy, or remove an impediment in the way of recovering redress by legal proceedings:" *Hepburn v. Curts*, 7 Watts 300; *Searcy v. Stubbs*, 12 Ga. 437. So a retrospective statute which makes a mere debt a lien on the debtor's realty is constitutional, as affecting the remedy merely; but not where a purchaser of the property has paid a valuable consideration for the property sought to be subjected to the lien, before the passage of the act: *Bolton v. Johns*, 5 Penn. St. 145. Again, a statute which extends the time and releases the conditions prescribed in a former statute in regard to the issuing of executions, may apply to judgments recovered before the passage of the act without being liable to the objection of affecting vested rights: *Henschall v. Schmitz*, 50 Mo. 454.

VII. *Curative and Confirmatory Acts*.—These are the most common examples of retrospective laws; and they are generally held constitutional in so far as they operate merely to validate or strengthen previously acquired rights. But they are nevertheless to be subjected to a rigid scrutiny, lest the confirmation of a previously defective interest or title should have the effect to impair intervening and established rights. For example, an act validating defective acknowledgments of deeds may be allowed a retrospective operation, because it is supposed not to affect the deed itself, but only the mode of proof: *Journey v. Gibson*, 56 Penn. St. 57; *Barnet v. Barnet*, 15 S. & R. 72. So the legislature has the constitutional power to declare deeds valid which are defective through the failure of a notary to affix his seal to the acknowledgment: *Macey v. Wise*, 25 Ind. 1. But an act declaring the acknowledgment of all recorded deeds within the state to be valid, whether acknowledged in compliance with previously existing laws or not, will be unconstitutional in so far as it impairs vested rights: *Brinton v. Seevers*, 12 Iowa 389; and see *Good v. Zercher*, 12 Ohio 364. So where the mode in which a wife can relinquish dower has

been prescribed by statute, the legislature cannot declare in a subsequent act that deeds executed in a certain way previously to its passage, but not following the provisions of the former law, shall operate to deprive a wife of her dower; she has a vested right therein which the legislature is incompetent to deprive her of: *Russell v. Rumsey*, 35 Ill. 362; and see *Routson v. Wolf*, 35 Mo. 174. And the legislature cannot constitutionally confirm a patent or survey of land which was absolutely void, so as to divest a title legally acquired before the attempted confirmation: *Sherwood v. Fleming*, 25 Tex. Sup. 408. Again, the legislature has constitutional authority to pass a law affecting the execution of wills and to give it a retrospective effect upon all wills already made but which have not yet taken effect by the death of the testator; because no interests are vested or fixed under a will until the testator's decease: *Baptist Union v. Peck*, 10 Mich. 341; *Loveren v. Lamprey*, 22 N. H. 434. But it is not competent to the legislature to validate a will which, at the time of its execution, was void for want of signature, where the testator has died before the passage of the validating act: *McCarty v. Hoffman*, 23 Penn. St. 507; *Greenough v. Greenough*, 11 Id. 489. And a retrospective law cannot operate to make anything devisable which could not be devised previously: *Southard v. Rd.*, 26 N. J. L. 13. An Act of Assembly validating a city ordinance, for the grading and paving of certain streets, which had become null and void for want of due record, is not unconstitutional because it provides that the omission to record shall not affect or impair the lien of the assessments against the lot-owners: *Schenley v. Com.*, 36 Penn. St. 29. And an act validating certain usurious contracts previously made and which, under the statute against usury, were void in part, is not unconstitutional: *Savings Bank v. Allen*, 28 Conn. 97. So an act confirming the levies of executions in certain cases, where they were previously defective, is valid: *Mather v. Chapman*, 6 Conn. 54. And whereas it is sometimes suggested that the rule which renders it impossible for an individual to confirm that which was a mere nullity should apply also to legislative bodies, the court in Connecticut say: "Although individuals may not have power to make good *ab initio* that which was originally void, by subsequent deeds or acts of confirmation, yet this cannot be true of acts of sovereignty—acts of legislation not conflicting with constitutional rights:" *Bridgeport v. Rd.*, 15 Conn. 495.

VIII. *Statutes Expository of Prior Acts.*—The rule generally prevails that the legislature has power, by the enactment of a new statute, to declare and settle the construction of an old one, and such enactment will apply at least to all such existing cases as have not already passed to judgment: *Dash v. Van Kleeck*, 7 Johns. 477. A legislative exposition of a doubtful law is possibly the exercise of a judicial power, but if it interferes with no vested rights, impairs the obligation of no contract, and is not in conflict with the primary principles of the social compact, it is in itself harmless, and may be admitted to retroactive efficiency; but if rights have grown up under a law of somewhat ambiguous meaning, then it cannot interfere with them, for the construction of the old law belongs to the courts: *McLeod v. Burroughs*, 9 Ga. 213; *Baker v. Hendon*, 17 Id. 568; *McManning v. Farrar*, 46 Mo. 376. In Vermont, however, it is distinctly denied that a statute amending a prior statute by declaring that it shall read in a given manner can have any retrospective effect: *Kelsey v. Kendall*, 48 Vt. 24. This point is involved in a good deal of uncertainty and confusion, but the Supreme Court of Pennsylvania seems to have given expression to the most reasonable views, in the following language: "A state or any other party to a grant, may certainly consent, at any time after its execution, that it shall be interpreted differently from its expression; but there seems to be no reasonable principle on which expository statutes can be founded beyond this, except by regarding them as creative of a new law, and not as interpreting an old one. Law, in its proper sense, is a rule of *future* conduct, and not a test of conduct that precedes it. Legislation and interpretation are naturally and radically distinct functions. Every man must, in the first instance, interpret the law for himself in endeavoring to obey it. It becomes matter of official interpretation only when a case arises in which it is alleged to have been violated; and then, of necessity, the courts must ascertain the interpretation, not according to the terms of any *post facto* expository statute, but according to the terms of the law, as it stood when the act was done. In the very nature of things interpretation follows legislation, and is not to be confounded with it, either as an act or as an authority. The duties are as distinct as possible, and the performance of them is given to different offices; yet without preventing the legislature from embodying in a statute rules for its interpretation, or from making a new law, by changing the application or interpretation of

an old one relative to future cases:" *West Branch Co. v. Dodge*, 31 Penn. St. 288.

IX. *Statutes affecting Judicial Proceedings.*—A person whose property has been taken under the power of eminent domain has a right to maintain his action and have a trial by jury, and he cannot constitutionally be required, by retroactive legislation, to submit his claims to a tribunal not proceeding according to the course of the common law: *In re Townsend*, 39 N. Y. 171. And again, an act passed after the commencement of an action, which changes the mode of procedure, can have no application to such cause, and the action must be tried according to the law existing at the commencement of the suit: *Merwin v. Ballard*, 66 N. C. 398. But retrospective laws changing merely the rules of evidence or the rules of practice are not within the scope of the constitutional objections. Thus an act making parties to pending suits competent witnesses on the trial thereof is not unconstitutional: *Little v. Gibson*, 39 N. H. 505. So the legislature has power to pass a statute providing that the validity of existing marriages shall not be questioned in the trial of collateral issues on account of the insanity of either party: *Goshen v. Richmond*, 4 Allen 458. And an act providing that in actions between husband and wife either shall be a competent witness in his or her behalf against the other, may apply to civil actions pending at its passage: *Southwick v. Southwick*, 49 N. H. 510. And again, a statute declaring that an uncontested probate, by the register of the proper county, of a will of realty, shall be conclusive after five years from its date, may properly apply to a will proved before its passage: *Kenyon v. Stewart*, 44 Penn. St. 179. But a statute authorizing the probate court to entertain a bill to review its own decrees, has not a retrospective effect so as to support a bill to review a decree rendered before the passage of the act: *Stewart v. Davidson*, 10 Sm. & Mar. 351. "While the legislature may not by a retroactive law render valid judicial proceedings which were utterly void for want of jurisdiction, it is equally clear that in cases where the jurisdiction has attached, and there has been a formal defect in the proceedings, where the equity of the party is complete, and all that is wanted is legal form, it is within the recognised power of the legislature to correct such defect and to provide a remedy for the legal right:" *Lane v. Nelson*, 79 Penn. St. 407.

X. *Statutes creating new Liabilities.*—While this species of legislation is not in general objectionable if it affects remedies only, yet the legislature has no constitutional power to enact retrospective laws which create personal liabilities where none before existed. A statute making members of corporations personally liable for the corporate debts is within this restriction, and can be held to operate prospectively only: *Coffin v. Rich*, 45 Me. 507. It is frequently said, however, that where a moral obligation exists, the legislature may give it legal effect by a statute retrospective in its operation: *Lycoming v. Union*, 15 Penn. St. 166; *Sedgwick Co. v. Bunker*, 16 Kans. 498. To much the same effect is the language of Mr. Justice FIELD in *New Orleans v. Clark*, 95 U. S. 654: “The constitution of Louisiana of 1868, which provides that no retroactive law shall be passed, does not forbid such legislation [as that now in question]. A law requiring a municipal corporation to pay a demand which is without legal obligation, but which is equitable and just in itself, being founded upon a valuable consideration received by the corporation, is not a retroactive law,—no more so than an appropriation act providing for the payment of a pre-existing claim. The constitutional inhibition does not apply to legislation recognising or affirming the binding obligations of the state, or of any of its subordinate agencies, with respect to past transactions. It is designed to prevent retrospective legislation injuriously affecting individuals, and thus protect vested rights from invasion.”

XI. *Statutes of Limitation.*—It is competent for the legislature to pass statutes of limitation, prescribing the time within which actions shall be brought on demands already accrued, provided the time is not so unreasonably shortened as to practically deprive parties of their remedy altogether: *Korn v. Browne*, 64 Penn. St. 55; *Fiske v. Briggs*, 6 R. I. 557; *Griffin v. McKenzie*, 7 Ga. 163; *Cox v. Berry*, 13 Id. 306; *Call v. Hagger*, 8 Mass. 430; *Holcombe v. Tracy*, 2 Minn. 241; *Maltby v. Cooper*, 1 Morris (Ia.) 59; *Pearce v. Patton*, 7 B. Mon. 162; *Billings v. Hall*, 7 Cal. 1. But where such a statute allows only thirty days for the commencement of suits on existing debts, it must be regarded as unconstitutional, because that time is unreasonably and oppressively short: *Berry v. Ransdall*, 4 Met. (Ky.) 292. And where property rights have been acquired by virtue of a limiting act, they cannot be divested by a subsequent statute enlarging the time for bringing suits: *Sprecker v. Wakeley*, 11 Wis. 432.

XII. *Marriage and Divorce*.—A law validating previous defective marriages is good and constitutional: *Goshen v. Stonington*, 4 Conn. 209. So is a statute, remedial in its nature, and intended to legitimate the issue of marriages otherwise void: *Brower v. Bowers*, 1 Abb. App. Dec. 214. But a statute prohibiting the intermarriage of a white person with an Indian, enacted after such a marriage, cannot make it void: *Illinois Co. v. Bonner*, 75 Ill. 315. Thus far the way is clear. But when we approach the subject of divorce legislation, with the inquiry whether or not it may constitutionally be allowed a retrospective operation, we are met with much confusion and embarrassment. To state the question concisely—is it competent for the legislature to authorize the courts to grant divorces for causes occurring before the passage of the authorizing statute, and which, at the time of their happening, furnished no ground for the dissolution of the marriage relation? A direct affirmative answer is given in the cases of *Carson v. Carson*, 40 Miss. 349, and *Jones v. Jones*, 2 Tenn. 2; and an equally emphatic negative in that of *Clark v. Clark*, 10 N. H. 387, where such a statute is not only regarded as clearly retrospective within the meaning of the state constitution, but is characterized as eminently deserving of the epithets therein applied to such laws—"highly injurious, oppressive and unjust." Space will not allow an extended review of the other authorities on this point; but the reader is referred to Mr. Bishop's excellent Treatise on Marriage and Divorce (vol. I., §§ 696-701), where the whole subject is discussed with much learning and candor. A few pertinent suggestions, however, may be added. In the first place, under the definitions already given, such a law is most certainly not *ex post facto*; it is in no sense penal or criminal. In the second place, it has been decided again and again that as marriage is not properly to be regarded as a contract, for judicial purposes, a statute authorizing its dissolution for prescribed causes is not open to the objection of "impairing the obligation of contracts:" *Maguire v. Maguire*, 7 Dana 183; *Adams v. Palmer*, 51 Me. 481; *Cronise v. Cronise*, 54 Penn. St. 255; *Carson v. Carson*, 40 Miss. 349; *Noel v. Ewing*, 9 Ind. 37. And again, as we have already seen (*ante* III.), the practical tendency of the constitutional learning of *all* the states is to restrict the meaning of the word "retrospective" to such statutes as are calculated to impair or divest antecedently acquired rights of property: the advocates of the theory that retroactive divorce legislation is unconstitutional

are therefore driven to the necessity of holding that the *marital status itself* is a species of property vested in each of the parties to that relation, and such that it may not lawfully be taken away by subsequent legislation. The only other ground from which this position could receive a semblance of support would be that the enactment of such a statute would amount to an assumption of judicial power on the part of the legislative body. Both these views are satisfactorily confuted by Mr. Bishop in the chapter already referred to. As to the rule of construction, his conclusion is (§ 102): "It being the primary object of the divorce suit to regulate the order of society and purify the fountains of morality, while still as between the parties it is a private controversy,—and the proceeding being in the highest degree remedial, so that the spirit and reason of the divorce statutes should be pre-eminently the guides to their interpretation,—we should, in all cases where the legislative intent is not plain in the words, prefer the construction which makes the statute applicable to past offences, the same as to future."

XIII. *Statutes adverse to the State's own Interest.*—The state has an undoubted right to pass a retrospective law impairing her own rights: *Davis v. Dawes*, 4 W. & S. 401; for when a state legislature passes a retroactive law which operates only on property belonging to such state, no private rights are infringed: *Lewis v. Turner*, 40 Ga. 416.

XIV. *More particularly of Ex Post Facto Laws.*—The term *ex post facto* received an authoritative exposition in the leading case of *Calder v. Bull*, 3 Dall. 386. The definition there given by Mr. Justice CHASE may be regarded as having settled the law for this country, inasmuch as it has been followed in numberless cases, and no court has been found to deviate from it. It is in the following language: "I will state what laws I consider *ex post facto* laws within the words and the intent of the prohibition. 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed. 4th. 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 offence, in order to convict the offender." And see *Marion v. State*, 5 Crim. Law Mag. 859; *Kring v. State*, 4 Id. 550. To these should probably be added the case where the period of limitation for the prosecution of offences has been enlarged, and it is attempted to include within it an instance where a right to acquittal had been absolutely acquired by the completion of the period prescribed when the offence was committed: *Com. v. Duffy*, 96 Penn. St. 506. But it must be noted that the prohibition against *ex post facto* laws relates to crimes and their punishments and not to criminal proceedings: *In re Perry*, 3 Gratt. 632; *People v. Mortimer*, 46 Cal. 114. Thus a statute erecting a new tribunal, or giving jurisdiction to an existing court, to try past offences, is not *ex post facto*: *Com. v. Phillips*, 11 Pick. 28. Neither is a statute giving to the state a certain number of peremptory challenges of jurors, though extending to the trial of offences committed before its passage: *State v. Ryan*, 13 Minn. 370; *Walston v. Com.*, 16 B. Mon. 15.

The rule against aggravating the crime or increasing the punishment is rigorously applied. Thus a law increasing costs on conviction for an offence cannot be applied to acts committed before its passage: *Caldwell v. State*, 55 Ala. 133. Again, in the language of the head-note to *Ross's Case*, 2 Pick. 165, "an enactment that where a person has been convicted of a crime punishable by confinement to hard labor, he shall, upon conviction of another offence punishable in like manner, be sentenced to a punishment in addition to the one prescribed by law for this last offence, is not *ex post facto* when applied to a case in which the second offence was committed after the passing of the statute; *aliter*, if applied where the second offence was committed before the statute was passed." But a law which plainly reduces or mitigates the punishment for a past offence is not *ex post facto*; on the contrary it is an act of clemency, and open to no constitutional objection: *State v. Arlin*, 39 N. H. 179; *Com. v. Wyman*, 12 Cush. 237; *Hartung v. People*, 22 N. Y. 105. In the case last cited DENIO, J., says: "In my opinion, it would be perfectly competent for the legislature, by a general law, to remit any separable portion of the prescribed punishment. For instance, if the punishment were fine and imprisonment, a law which should dispense with either the fine or the imprisonment might, I think, be lawfully applied to existing offences; and so, in my opinion, the term of imprisonment might be reduced,