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Reviving Barred Right of Action

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principal case, as indicating that the cause of action in these cases results from the obligation of the owner of the cattle. If the owner of the cattle has the right to let them roam where they will, as was the rule under *Seeley* v. *Peters,* where they were on a highway or commons, then he could not be liable if in so roaming on the highway they got from an unfenced field adjoining that highway onto a field adjoining that; but, when the common rule was applied again, under which he had no right to let his cattle roam at all, the medium by which they got onto another field was quite immaterial, so long as the injured person's default did not contribute to the injury. E. M. LEESMAN.

OTHER JURISDICTIONS

CONSTITUTIONAL LAW—DUE PROCESS—RETROACTIVE LAWS—REVIVING RIGHT OF ACTION BARRED BY LIMITATIONS.—[New York] In *Robinson* v. *Robins Dry Dock & Repair Co.*[1] a retroactive revival of the completed bar of the statute of limitations was upheld under the following circumstances:

In *Southern Pacific Co.* v. *Jensen*[2] the federal Supreme Court held the states without power to include within their workmen's compensation acts injuries falling within the federal maritime jurisdiction. In October, 1917, Congress purported to authorize such an inclusion.[3] In May, 1918, plaintiff's intestate was killed by an accident of this character due to the alleged negligence of his employer, the defendant. Plaintiff was awarded compensation under the New York act, all of the courts of the state upholding the award, until these decisions were overruled in May, 1920, by the federal Supreme Court in *Knickerbocker Ice Co.* v. *Stewart,*[4] which held the act of Congress invalid; and compensation payments to plaintiff were stopped in October, 1920, by order of the state industrial commission. In December, 1920, plaintiff began suit against defendant upon the original cause of action for negligence that accrued in May, 1918, which was held by the intermediate New York appellate court to be barred by the two-year statute of New York applicable to such actions.[5] In May, 1923, New York passed an act[6] providing that in cases like the present a plaintiff might begin an action "within one year after this act goes into effect," despite a prior completed bar of the statute of limitations. Plaintiff having meanwhile appealed from the decision of the intermediate court, the New York Court of Appeals held the statute of 1923 valid and retroactively applicable to plaintiff's pending action, the decision in which, though properly made in February, 1923, was reversed by the higher court in May, 1924, under the new statute. Three judges of the seven dissented.

1. (1924) 238 N. Y. 271.
2. (1917) 244 U. S. 205.
3. 40 U. S. St. L. 395, c. 97.
4. (1920) 253 U. S. 149.
5. (1923 N. Y.) 204 App. Div. 578.
6. N. Y. L. 1923, c. 392.

Three views have been taken of the validity (under various 'due process' and 'vested rights' clauses of state and federal constitutions) of statutes reviving causes of action barred by limitations. The first affirms in general terms their validity on the ground that the statute of limitations acts only upon the remedy and not upon the right, and that the prior existence and present non-payment of the original obligation make it just to compel its discharge even after a period of non-enforceability, in all cases not involving the title to specific real or personal property (as to which it is well agreed that the bar of the statute creates a vested right that cannot be thus impaired). The leading case for this proposition is *Campbell v. Holt*,[7] which is followed in perhaps half a dozen states.

The second view as broadly denies the proposition, and argues that the right to remain free from future actions on obligations once barred is an interest as desirable to protect as that in specific property, actions for the recovery of which have been barred. Typical leading cases to this effect are *Board of Education* v. *Blodgett*[8] and *Eingartner* v. *Illinois Steel Co.*,[9] which are followed by decisions and dicta in a considerable number of states. The cases are quite fully collected on both sides in a note to *McEldowney* v. *Wyatt*,[10] published in 45 L. R. A. 609-14.

The third view rejects both of these extreme positions, and, while denying any general validity to legislative attempts to revive barred actions for debts or torts, permits them where "the circumstances . . . appeal with some strength to the prevailing views of justice."[11] The leading case for this view is *Danforth* v. *Groton Water Co.*[12] The defendant had taken by eminent domain certain of plaintiff's water rights in November, 1897. Plaintiff's right to compensation was by statute dependant upon his applying first to certain commissioners for an estimate of damage, and then upon his applying in court for an assessment of damages within a year from the taking. Plaintiff filed his suit for damages in October, 1898, without first applying to the commissioners, and it was dismissed for this reason after the year had expired. Plaintiff appealed to the Massachusetts Supreme Court, and shortly thereafter a statute forbade any pending cases to be dismissed solely on this ground. This was held to revive plaintiff's cause of action, Holmes, J., saying:

"The prevailing judgment of the profession has revolted at the attempt to place immunities which exist only by reason of some slight technical defect on absolutely the same footing as those which stand on fundamental grounds. . . . Multitudes of cases have recognized the power of the legislature to call a liability into being where there was none before, if the circumstance were such as to appeal with some

7. (1885) 115 U. S. 620, Bradley and Harlan, JJ., dissenting.
8. (1895) 155 Ill. 441.
9. (1899) 103 Wis. 373.
10. (1898) 44 W. Va. 711.
11. *Danforth* v. *Groton Water Co.* (1901) 178 Mass. 472, 477, by Holmes, C. J.
12. See note 11.

strength to the prevailing views of justice, and if the obstacle in the way of the creation seemed small."[13]

This was followed by the same court in *Dunbar* v. *Boston & P. R. Corp.*[14] where there was no mistake on the part of the plaintiff, but, as the court pointed out:

"Where the original time allowed after actual notice was very short and may have seemed to the legislature inadequate, where the extension was granted within little more than two months of the time when it could have been granted without question and not improbably before the transaction as a whole had been finished, where the plaintiff's claim is held to be barred only by a somewhat doubtful inference, and where in short we cannot say that the legislature with its larger view of the facts may not have been satisfied that substantial justice required its action."[15]

The New York court adopted this view in the present case, saying:

"All the cases, including *Campbell* v. *Holt*,[16] recognize that in some cases the right to interpose a bar to a right of action constitutes in effect a property right which the legislature may not take away, but at the other extreme are cases where both instinct and reason revolt at the proposition that redress for a wrong must be denied because the legislature may not remove a statutory bar which has conferred an immunity which is contrary to all prevailing ideas of justice. . . . Here is no arbitrary deprivation by the legislature of the rights of one party in order to confer a new right upon another party. The legislature originally gave this plaintiff a right of action against these defendants. It imposed a bar after the expiration of a period of time during which it was contemplated a plaintiff would have reasonable opportunity to enforce the right of action. The subsequent assertion of power of the legislature to give an alternative remedy, acquiesced in by the courts of this state, rendered the plaintiff's apparently reasonable opportunity to bring an action within the time limited almost illusory. She has suffered a legal wrong for which the legislature gave a remedy, and by the unforeseen result of subsequent attempted legislation she has in effect been deprived of this remedy. The extension of the time to bring her action was reasonable and this exercise of the legislative power should not be declared invalid because of a constitutional limitation of doubtful application. We are not called upon to decide and do not decide that under any other circumstances an attempted exercise of similar power would be valid."[17]

A similar decision was made in *Gilbert* v. *Selleck*,[18] where the bar of the statute was lifted in favor of persons who had mistakenly brought certain suits in the federal court for Connecticut, which denied its jurisdiction of them too late to allow fresh suits to be brought in the state courts under the existing statute of limitations.

13. (1901) 178 Mass. 472, 476-77.
14. (1902) 181 Mass. 383.
15. 181 Mass. at 386.
16. (1885) 115 U. S. 620.
17. (1924) 144 N. E. 581-82.
18. (1919) 93 Conn. 412.

The court, however, did not expressly limit its doctrine to cases of special hardship, as did the Massachusetts and New York decisions, but was apparently willing to subscribe to the wider doctrine of *Campbell* v. *Holt*.

In appraising these views one naturally compares several analogous situations where it has been held that an existing defence may or may not be taken away by a retroactive statute. The cases fall into several typical groups:

(1) Cases where a party has intended to bind himself by a contract (including marriage) or conveyance inter vivos, which was, however, invalid under some existing rule of law usually of minor importance. It is generally held that the legislative removal of such a defence is valid, where third party rights have not intervened.[19]

(2) Cases of statutory attempts to validate defective wills after the death of the testator. These are generally held incapable of affecting property rights vested at the death of the testator.[20]

(3) Cases of statutory attempts to reopen final judgments after all existing rights of appeal or to a new trial have expired by limitations. These are also generally denied.[21]

(4) Cases of statutory attempts to revive actions barred by limitations, involving the title to specific property. These are denied, even by those courts which permit the revival of other causes of action.[22]

Group (1) of course presents a very appealing situation, and, where third party rights have not intervened or where defendants have not justifiably changed their positions upon the faith of existing non-liability, the arguments for a retroactive statutory validation of such transactions have been generally successful, except where state constitutions expressly forbid retroactive laws. The results of such legislation, designed to carry out the intentions of the parties, are not typically so unjust or arbitrary as to violate the requirement of reasonableness which is the fundamental abstract concept of 'due process.'

Group (4) is at the other end of the spectrum. There the virtual effect of raising the bar of the statute is to take title to specific property out of X, where it now lawfully is, and to vest

19. *Goshen* v. *Stonington* (1822) 4 Conn. 209; *Hewitt* v. *Wilcox* (1840) 1 Metc. 154; *Ewell* v. *Daggs* (1883) 108 U. S. 143; *Steger* v. *Building & Loan Assn.* (1904) 208 Ill. 236. For the kind of third party rights protected, see *Steger* v. *Building & Loan Assn.* supra; *Merchants Bank* v. *Ballou* (1899) 98 Va. 112; *Evans-Snider-Buell Co.* v. *McFadden* (1902) 185 U. S. 505.

20. *Hillyard* v. *Miller* (1849) 10 Pa. 326; *Greenough* v. *Greenough* (1849) 11 Pa. 489; *Southard* v. *Central Rd.* (1856) 26 N. J. Law 13; *State* v. *Warren* (1867) 28 Md. 338.

21. *Merrill* v. *Sherburne* (1818) 1 N. H. 199; *Hill* v. *Sunderlund* (1831) 3 Vt. 507; *Taylor* v. *Place* (1856) 4 R. I. 324; *Griffin's Ex'r* v. *Cunningham* (1870) 20 Gratt. 31; *Germania Bank* v. *Suspension Bridge* (1899) 159 N. Y. 362. But see *Stephens* v. *Cherokee Nation* (1899) 174 U. S. 445; *Freeland* v. *Williams* (1889) 131 U. S. 405; *Peerce* v. *Kitzmiller* (1882) 19 W. Va. 564.

22. *Campbell* v. *Holt* (1885) 115 U. S. 620.

it in A, on account of past transactions for which X's original liability has ceased on account of A's failure to sue more promptly. Comparing (1) with (4): A past intention to assume an obligation or to part with property, coupled with a legally ineffectual effort to do so, is a sufficiently good reason to support a statute validating the transaction; but a past legal obligation to restore or to part with specific property, once ineffectual for lack of prompt prosecution, is not a good enough reason to support a statute revalidating the transaction. Such a distinction is not without good sense, for it is clear that the statutes of group (4) are typically much less likely to appeal to the average sense of justice than those of group (1). To distinguish the revival of actions involving title from the revival of other actions, when all other attendant circumstances are similar, may seem logically unscientific, but here, as in so many instances, history plays its part, and ownership of a chattel, however acquired, was readily conceived as an interest of a higher order and to be more jealously guarded from legislative interference than was a mere defence to a personal action.

The cases in group (2)—attempts to validate defective wills—may be argued to be, like those in group (1), efforts to carry out a frustrated intention; but the decisions against their validity have probably been influenced by the fact that the disappointed testamentary beneficiaries are usually volunteers, without equities arising out of prior specific transactions, as in group (1), as well as by the history and policy of the various statutes of wills. Compare, for instance, the non-statutory cases denying the equitable reformation of wills[23] with those permitting such reformation of conveyances inter vivos to volunteers, where suit is brought against the grantor's heirs after his death.[24]

The cases in group (3) involve substantially the same considerations as those in group (4), inasmuch as a final judgment is generally regarded as property of a higher order than a mere defence to a suit. The policy of this is rational, as encouraging a definite end to litigation that has been once carried through the courts, and seems even stronger than that of statutes of limitations against beginning actions.

On the whole, then, it may be thought that the distinctions taken by the New York and Massachusetts cases are defensible, and consistent not only with the weight of authority in analogous situations but with the most comprehensive conception of the nature of 'due process' in the abstract, i. e., reasonably adapted means to secure reasonably conceived ends. A statute of limitations is designed to secure repose to the status quo after giving to possible litigants a reasonable opportunity to assert their rights. When the letter of the statute has been satisfied, but in fact the 'reasonable opportunity'

23. *Engelthaler* v. *Engelthaler* (1902) 196 Ill. 230; *Sturgis* v. *Work* (1889) 122 Ind. 134; *Sherwood* v. *Sherwood* (1878) 45 Wis. 357.

24. *M'Mechan* v. *Warburton* (1894) L. R. Ir. 1 Ch. D. 435; *Wright* v. *Goff* (1856) 22 Beav. 207; *Cummings* v. *Freer* (1872) 26 Mich. 128; *Huss* v. *Morris* (1869) 63 Pa. 367; *Brock* v. *O'Dell* (1894) 44 S. Car. 22.

has been 'illusory,' some enlargement of this opportunity, given at not too distant a period, is sufficiently reasonable in certain classes of cases to constitute 'due process.' Thus understood and limited, the doctrine of the *Robinson* case seems sound and just.

JAMES PARKER HALL.

EVIDENCE—PRIVILEGED COMMUNICATIONS TO PHYSICIAN; TO NURSE; TO SERGEANT OF ARMY MEDICAL CORPS.—*Culver* v. *Union Pacific R. Co.*[1] [Nebraska] contains an interesting discussion of privileged communications. The suit was for paralysis alleged to have resulted from injuries sustained through defendant's negligence. Defendant claimed that plaintiff's condition was due to syphilis. The evidence as to these opposite theories was evenly balanced.

The Supreme Court correctly stated that at common law there was no privilege as to confidential communications between physician and patient, and referred briefly to the statutory modifications in this country. For a full history of the privilege, we refer the reader to Wigmore on "Evidence."[2] By the Nebraska statute a physician or surgeon is not rendered incompetent to testify, but is not allowed "in giving testimony to disclose any confidential communication, properly intrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline."

1. The trial court excluded the evidence of a former sergeant in the United States Army Medical Corps, not a physician, that while in charge, without presence or supervision of any officer of the Medical Corps or physician, of a prophylaxis station and infirmary on the Mexican border, he had administered prophylactic or preventive treatment to plaintiff, this treatment being required by army regulations and not prescribed by physicians. In holding that the exclusion of this testimony was prejudicial error, the Supreme Court said:

> "The statute is not intended to conceal relevant facts not communicated confidentially to a physician in his professional capacity. A druggist may testify as to the kind of drugs furnished; a dentist is not within the privilege; and a professional nurse not assisting a doctor is not."

2. The trial court also excluded, as a privileged communication, the testimony of a nurse. Defendant offered to prove that she was present when a blood specimen was taken by a physician and sent to the state laboratory for a Wasserman test; that the report returned was positive; and that she had administered to plaintiff various named medicines, presumably indicated in cases of syphilis. The Supreme Court held that this testimony was properly excluded, though a nurse, merely as such, is not within the privileged class under the statute.

1. (1924) 199 N. W. 794.
2. (2d ed.) Vol. V sec. 2380.