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THE LIMITS TO LEGISLATIVE POWER IN THE PASSAGE OF CURATIVE LAWS.

There has always been some regret that, when the Federal judiciary was called upon to interpret and apply the prohibition in the Constitution of *ex post facto* laws,¹ it did not reach the conclusion that retrospective laws were forbidden, as well where they applied to civil rights as when they concerned criminal liabilities or penalties. The famous twenty-ninth chapter of the great charter placed the protection of liberty and property upon the same basis, and the power to reach the one by indirection is subject to the same objections in principle, that could be urged against the power to reach the other by the same method. This is so strongly felt that the courts, while compelled by authority to admit the power to pass retrospective laws, nevertheless refuse to find that the power has been exercised in a particular case, unless the terms of the statute are such as imperatively to require it.² Some States have deemed it wise to forbid retrospective laws altogether, and this has relieved the judicial mind of some embarrassment, though such a prohibition must still leave open the question what a retrospective law is. In New Hampshire it is held, that a statute regulating and modifying remedies is not retrospective, though made to apply to causes of action previously existing.³ The same ruling has been had in Tennessee;⁴ and even in criminal cases the modification of remedies may be made to apply to previous offenses, provided the modifications are not such as to deprive accused parties of substantial rights.⁵ On the other

hand, to give a right of action where none existed before, is clearly retrospective.⁶

A retrospective law is one which is made to operate upon some subject, transaction or contract which existed before its passage, and which is intended to give it a different legal effect from that it would have had without it. The definition itself is sufficient to show that such a law must be inoperative so far as its effect would be to impair any obligation which has been assumed by contract;⁷ but the power to affirm and give legal validity to an invalid contract which parties had previously attempted to make on sufficient consideration, has often been affirmed,⁸ and is often strictly just.

The chief practical difficulty arises, when an attempt is made to cure defects which have occurred in judicial and other proceedings by reason of the failure to obey the requirements of law. That this may be done in a great variety of cases, is undoubted.⁹ That it can not be done in other cases, is equally certain. But what are the cases in which it may be done, and what those in which it may not be?

The principle on which the decided cases have ranged themselves is clear enough. A retrospective act which merely takes away a technical defense is not unjust and not incompetent. Therefore a mere informality in judicial or administrative proceedings may be cured retrospectively, provided the legislature which attempts to cure it, has power at the time to authorize such a proceeding as was actually had.¹⁰ This is on the ground that a merely technical defense is not a meritorious defense, and therefore the party has

¹ *Calder v. Bull*, 3 Dall. 390; *Satterlee v. Matthewson*, 2 Pet. 380; *Carpenter v. Pennsylvania*, 17 How. 463; *Cummings v. Missouri*, 4 Wall. 277.

² *Dash v. Van Kleck*, 7 Johns. 477; *Gerry v. Stoneham*, 1 Allen, 319; *Donahoe v. Coleman*, 46 Conn. 319; *Chicago v. Rumsey*, 87 Ill. 348; *Rogers v. Greenbush*, 58 Me. 395; *Danville v. Pace*, 25 Gratt. 1; *Garrett v. Beaumont*, 24 Miss. 377; *State v. Ferguson*, 62 Mo. 77; *Baldwin v. Newark*, 38 N. J. 158.

³ *Rich v. Flanders*, 39 N. H. 304; *Simpson v. Savings Bank*, 56 N. H. 466. See *De Cordova v. Galveston*, 4 Texas, 470; *Officer v. Young*, 5 Yerg. 320.

⁴ *Negroes v. Dabbs*, 6 Yerg. 119.

⁵ *State v. Wilson*, 48 N. H. 398; *Walter v. People*, 32 N. Y. 147; *Warren v. Commonwealth*, 37 Pa. St. 45; *Jones v. State*, 1 Geo. 610; *Seeley v. Thomas*, 31 Ohio St. 301.

⁶ *Woard v. Winnich*, 3 N. H. 473; s. c. 14 Am. Dec. 384; *Clark v. Clark*, 10 N. H. 380.

⁷ Const. U. S., Art 1, sec. 10, cl. 1; *White v. Crawford*, 84 Pa. St. 433.

⁸ *Goshen v. Stonington*, 4 Conn. 225; s. c. 10 Am. Dec. 121; *Lewis v. McElvain*, 16 Ohio, 347; *Hers v. Werts*, 4 Serg. & R. 360; *Savings Bank v. Allen*, 28 Conn. 97; *Woodruff v. Seruggs*, 27 Ark. 26; s. c. 11 Am. Rep. 777; *Thompson v. Morgan*, 6 Minn. 292; *Journey v. Gibson*, 56 Pa. St. 57; *Grove v. Todd*, 41 Md. 633. Compare *Chestnut v. Shane*, 16 Ohio, 599 and *Barnet v. Barnet*, 15 Serg. & R. 72; s. c. 16 Am. Dec. 516, with *Railroad Co. v. Van Horn*, 57 N. Y. 473, and *Williams v. Wilbur*, 67 Ind. 42.

⁹ A large number of cases affirming the right are collected in the note to *Goshen v. Stonington*, 10 Am. Dec. 121, 131.

¹⁰ *Kimball v. Rosendale*, 42 Wis. 407; s. c. 24 Am. R. 421.

no right to demand protection in it. On the other hand, the legislature can not retrospectively make valid what it could not originally have authorized, and, therefore, can not validate judicial proceedings when the defect to be cured extends to the jurisdiction of the court which assumed to take them. It is equally powerless to validate private acts or administrative proceedings, when the defects are of a similar nature. It can not, for example, validate a deed whereby a party undertakes to convey, contrary to the express terms under which he holds;¹¹ or one which is a fraud upon other parties concerned;¹² or a fraudulent tax sale.¹³

Perhaps more often than in any other cases, the legislature has attempted to exercise its curative power to make good the sales of lands for taxes, where there has been a failure to comply with the law. In some cases this is done prospectively; the legislature declaring that such and such defects shall not invalidate the proceedings. This is the same as saying that the defects enumerated shall be deemed immaterial; and there is no doubt of the competency so to declare, where substantial rights do not depend upon them. The power to do this has been carried to very great lengths in some cases.¹⁴

It has been generally agreed that the failure of the proper officer to give any notice to which the tax payer was entitled, and which was important to the protection of his interests, was such a defect as the legislature could not retrospectively cure. The recent case in Massachusetts of *Forster v. Forster*,¹⁵ is very clear on this point, and at the same time, perhaps, comes as near the line between what is admissible and what is not, as any case to be found in the books. The tax collector was required by law, when taxes on real estate were delinquent, to advertise that he would sell so much of the real estate, or the rents and profits of the whole estate, for

such term of time as should be sufficient to discharge the taxes and charges. The collector, instead of obeying this law, advertised that he would sell the estate, or such undivided portion thereof as might be necessary. The court held that all sales made under this notice were void. Retrospectively the legislature attempted to cure them, and was held to be without power for the purpose.

We say this case is near the line, because here a notice was given, which was as likely to attract the attention of the parties concerned, as would be one which complied with the law; and presumptively he had every legal opportunity to redeem his lands. It may therefore be urged that he was not injured by the irregularity, and that it should be classed with others which give the opportunity for a mere technical defense. But the notice is not given for the information of the delinquent tax-payer exclusively; it is meant for the information of the public, and to invite the public to the proposed tax sale. The intent is that enforcing the tax shall be as little burdensome as possible to the party taxed; and if this intent is defeated by the notice actually given, he has a right to complain.

Now the notice actually given in this case was erroneous on its face. It notified a tax sale, but not a legal tax sale. The public would not be invited by it to attend the sale, because they would know from its terms that a sale under it would be invalid under the law as it then stood. They could not know that any curative statute would be passed, and would not, therefore, be likely to appear at the sale. The result would be that the owner of the estate would lose the benefit of the competition at the sale which the statute meant to give him. This would be a substantial loss, and the error in the notice could not be a mere irregularity.

But while all this is perfectly true, and the decision, as we think, undoubtedly sound, there is very great difficulty and some uncertainty in applying the principle. The very object of curative statutes is to make good proceedings in which statutory requirements have not been observed; and it is supposable in almost any case that, by reason of the neglect, some other act, which would have been important to the party, has not been done. If one curative law may be held good, and an-

¹¹ *Shouk v. Brown*, 61 Pa. St. 327.

¹² *Railroad Co. v. Railroad Co.* 50 N. H. 50.

¹³ *Conway v. Cable*, 37 Ill. 82.

¹⁴ See *Eldridge v. Kuehl*, 27 Iowa, 160; *Rhodes v. Sexton*, 33 Iowa, 540. Compare *Wilson v. McKennon*, 52 Ill. 43; *Reed v. Tyler*, 56 Ill. 288; *Silsbee v. Stockle* (Sup. Ct. Mich.), 7 North West. R. 227; *Reading v. Finney*, 73 Pa. St. 467.

¹⁵ 11 Cent. L. J. 407.

other not good, the result is that the validity of legislation in this class of cases must depend upon the view the court may take of its justice. If, in the opinion of the court, it operates unjustly, it must be held void; but if not, it may be upheld.¹⁶ This is not a satisfactory condition of the law; for the theory of our Government undoubtedly refers all mere considerations of equity in the enactment of laws to the legislature itself, with powers of final decision.¹⁷ Nevertheless, there are some cases where the course of legislation itself forces upon the court the necessity of such a decision. A legislature, for example, passes an act for the limitation of actions, and makes it applicable to causes of action already existing. It is unquestionable that this may be done; *provided*, a reasonable time is allowed in which to bring suit. But what is a reasonable time? The question is one of justice and fair dealing; and the court will sustain one act and declare another null, according as it shall think its operation would be just or unjust.¹⁸ And the distinction between directory and mandatory provisions of a statute rest largely upon the same principle. Infinite mischief would be done, were the courts to hold that all legislative enactments must be strictly complied with—elections would fail, and tax proceedings fall to the ground, especially all those which are special and exceptional in their nature. The courts sustain some, and they refuse to sustain others; and in many cases they have no other guide than their judgment, whether the irregularities which have intervened are of a nature to operate unjustly upon the rights of parties.¹⁹

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¹⁶ *Watson v. Bailey*, 1 Binney, 477; *Goshone v. Purcell*, 11 Ohio St. 641.

¹⁷ *Bennett v. Boggs*, Baldw. 74; *Pennsylvania R. Co. v. Reblet*, 66 Pa. St. 164, 169.

¹⁸ *Terry v. Anderson*, 95 U. S. 628.

¹⁹ *French v. Edwards*, 13 Wall. 506; *Toney v. Milbury*, 21 Pick. 67; *Koch v. Bridges*, 45 Miss. 247.