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CONSTITUTIONAL LAW-DUE PROCESS-RETROACTIVE APPLICATION OF STATUTE OF LIMITATION TO PREVIOUSLY BARRED CLAIM

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RECENT DECISIONS

NOTES

CONSTITUTIONAL LAW—DUE PROCESS—RETROACTIVE APPLICATION OF STATUTE OF LIMITATION TO PREVIOUSLY BARRED CLAIM—In 1943 appellee Rowley, filed claim with the Department of Labor and Industry, under the Washington Industrial Insurance Act,[1] for compensation for aggravation of an injury suffered, while employed by appellant in 1937, in the course of his employment. The claim was barred by a provision of the then existing statute [2] which placed a three year limit on the filing of such claims; but by amendment [3] in 1941 the time limit was extended to five years, with a proviso, under which appellee claimed, that "any such applicant whose compensation has heretofore been established or terminated shall have five years from the taking effect of this act within which to apply for such readjustment." Under neither law was a time limit imposed on the department's power to reopen the claim on its own motion to determine aggravation or termination of injuries. Under the Washington Act individual cost experience comprised 60 per cent of the tax chargeable to appellant the following year for the maintenance of the Industrial Insurance Fund.[4] Since the allowance of Rowley's once-outlawed claim would result in an increased charge against appellant by reference to the individual cost experience factor, appellant challenged the proviso as a retroactive measure which deprived it of its property without due process of law contrary to the Fourteenth Amendment. The Washington Supreme Court reversed the department's denial of Rowley's claim.[5] On appeal to the United States Supreme Court, *held*, appeal dismissed. An employer under the Washington Industrial Insurance Act does not suffer such a certain or substantial injury in the granting of an award to his employee that he may contest the constitutionality of the award. Two Justices voted to affirm the judgment below. *Gange Lumber Company v. Rowley*, (U.S. 1945) 66 S. Ct. 125.

Although the Court disposed of the appeal by denying that the appellant's interest was sufficient to permit him to raise a constitutional issue,[6] both the majority and minority opinions considered and rejected appellant's arguments

[1] Wash. Laws (1911) c. 74, p. 345; Wash. Rev. Stat. (Remington, 1932) §§ 7673 et seq.

[2] Wash. Laws (1927) c. 310, § 4(h), p. 844; Wash. Rev. Stat. (Remington, 1932) § 7679 (h).

[3] Wash. Laws (1941) c. 209, § 1; Wash. Rev. Stat. (Remington, Supp. 1941) § 7679.

[4] The Washington law provides the following insurance features: classification of Washington industries according to hazard; a separate fund for each class; a privilege tax for the maintenance of this fund, assessed against the employer, based 60 per cent on the individual employer's cost experience for the preceding five years, 40 per cent on the group cost experience for the preceding two years; an upper limit on this tax of 160 per cent of the basic class rate; adjustment of the rate according to the current condition of the fund.

[5] Lane v. Dept. of Labor and Industries, 21 Wash. (2d) 420, 151 P. (2d) 440 (1944).

[6] In Mattson v. Department of Labor, 176 Wash. 345, 29 P. (2d) 675 (1934), the Washington Supreme Court had held that accident insurance funds were public

on the merits and reaffirmed, in so doing, the doctrine of *Campbell v. Holt.*[7] It was there decided that the Fourteenth Amendment did not preclude the retroactive extension of statutes of limitation to tort and contract claims already barred [8] under a previous statute, observing, however, a distinction as to property claims founded in adverse possession which were held to create in the defendant a vested right.[9] As to contract and tort actions it was said that the defendant acquired no vested right in his defense by virtue of the limitation, which was construed as terminating plaintiff's remedy but not his right. In support of this distinction between right and remedy, the Court relied on the rule allowing the right to be asserted after the remedy was barred if defendant waived the defense of the statute, and on the rule allowing the right to be recognized in a foreign country whose limitation did not bar the action.[10] This conception of rights existing apart from remedies for their enforcement has been thought too tenuous by a majority of the state courts, which construe statutes of limitation as being statutes of repose creating vested rights capable of protection under due process clauses of state constitu-

monies in which neither employer nor employee had any vested rights. Consequently, appellant based his injury on the antcipated effect of the award on the yearly computation of the privilege tax for the ensuing five years. The court, after considering the meagre size of the award ($460.50), the fact that it would directly affect only 60 per cent of the tax, and the fact that it would be averaged with awards to appellant's employees for a five year period—all indications that appellant's injury would be insubstantial—pointed out that appellant had not proved the certainty of any damage by failing to prove (1) that he was not already paying the maximum of 160 per cent of the basic class rate, and (2) that the class fund was not in such a condition that no tax would be required at all. (See note 5, supra). Yet, as the minority opinion pointed out, since the employer's damage, if any, will be spread over five successive annual taxes, it will never be possible for an employer to prove the condition of the fund as well as the amount of his own cost experience in the future. Hence, no employer will ever be able to challenge the constitutionality of any award, despite its obvious effect over the years upon an employer's cost of operations. The minority suggested that it would be equally reasonable to exclude the employer's claim because of the possibility that fire or some other cataclysm might put him out of business before the apprehended damage was suffered. It can hardly be said of the employer challenging a claim of his own employee that he ". . . suffers in some indefinite way in common with people generally," in the language of Frothingham v. Mellon, 262 U.S. 447 at 488, 43 S. Ct. 597 (1923), denying the interest of a federal taxpayer to challenge federal appropriations. Cf. Copperweld Steel Company v. Industrial Commission of Ohio, 324 U.S. 780, 65 S. Ct. 1006 (1945).

[7] 115 U.S. 620, 6 S. Ct. 209 (1885). *Accord:* Donaldson v. Chase Securities Corp., 216 Minn. 269, 13 N.W. (2d) 1 (1943); Herr v. Schwager, 145 Wash. 101, 258 P. 1039 (1927); Orman v. Van Arsdell, 12 N.M. 344, 78 P. 48 (1904). See federal cases collected at 133 A.L.R. 388 (1941).

[8] It is generally conceded that the Fourteenth Amendment does not prevent a state legislature from extending the limitation as to claims pending and not yet barred under the previous limitation. See cases collected at 46 A.L.R. 1101 (1927).

[9] For cases illustrating the general rule that vested rights accrue to the holder of property for the statutory period, see 133 A.L.R. 384 at 386 (1941).

[10] Citing Jones v. Jones, 18 Ala. 248 (1850); Williams v. Jones, 13 East 439, 104 Eng. Rep. 441 (1811).

tions.[11] A few cases have adopted an intermediate position which recognizes legislative power to enact remedial measures in hardship cases, without subscribing to either interpretation of such statutes as an immutable rule.[12] The reasoning of *Campbell v. Holt* has not been thought applicable to claims arising out of statutes containing their own limitation, it being there held that the limitation becomes part of the definition of the right, which is extinguished along with the remedy when the action is barred, and which may not be reinstated consistently with the requirements of due process.[13] Appellant placed its reliance on this exception. The Washington Industrial Insurance Act terminated common law causes of action of employees and substituted a statutory claim against the insurance fund. Appellees, however, asserted that the law could not be a statute of non-claim nor the limitation a law of repose because of the department's power to reopen the claim, at any time, on its own motion. Because of this perpetual power the employer could never claim to have a vested right in the settlement of his employee's claims. Thus was presented to the Court a situation which was at once within the rule of *Campbell v. Holt* and the exception carved from it—a situation where the right had been terminated while the liability survived. Without extended discussion the Court observed that the employer's liability and the employee's right were not correlative and that because no vested right had accrued in the employer's favor, the case was within the holding of *Campbell v. Holt*. It thus appears that the legislature is free to enact retroactive limitations if either the plaintiff's right or the defendant's liability survives the bar of the limitation. The reasoning would appear to include cases where one of several alternate causes of action has been barred or where one of several bases of liability in a single cause has been barred. The latter was the case in *Chase Securities Corp. v. Donaldson*,[14] decided the previous term, where plaintiff sued to recover the purchase price of unregistered securities, proceeding under both common law and statutory definitions of defendant's duty. Subsequent to an appeal to the

[11] Eingartner v. Illinois Steel Co., 103 Wis. 373, 79 N.W. 433 (1899); Raymer v. Comley Lumber Co., 169 Okla. 576, 38 P. (2d) 8 (1934); Wasson v. State, 187 Ark. 537, 60 S.W. (2d) 1020 (1933); Tennant v. Hulet, 65 Ind. App. 24, 116 N.E. 748 (1917); Rhodes v. Cannon, 112 Ark. 6, 164 S.W. 752 (1914); Board of Education v. Blodgett, 155 Ill. 441, 40 N.E. 1025 (1895); McCracken County v. Mercantile Trust Co., 84 Ky. 344, 1 S.W. 585 (1886); Whitehurst v. Dey, 90 N.C. 542 (1884). For criticical comment on the doctrine of Campbell v. Holt, see 2 COOLEY, CONSTITUTIONAL LIMITATIONS, 8th ed., 760 at seq. (1927); 1 WOOD, LIMITATION OF ACTIONS, 4th ed., § 11 at pp. 47-49 (1916); 10 CORN. L. Q. 212 (1925); 24 COL. L. REV. 803 (1924).

[12] Danforth v. Groton Water Co., 178 Mass. 472, 59 N.E. 1033 (1901); Dunbar v. Boston & Providence R.R. Corp., 181 Mass. 383, 63 N.E. 916 (1902); Robinson v. Robins Dry Dock & Repair Co., 238 N.Y. 271, 144 N.E. 579 (1924), where the statutory remedy under which *P* was drawing a monthly award was declared unconstitutional after the common law remedy had been barred—subsequent curative act extending the common law remedy held valid.

[13] Danzer & Co., Inc. v. Gulf & Ship Island R.R. Co., 268 U.S. 633, 45 S. Ct. 612 (1925); Interstate Commerce Act; Davis v. Mills, 194 U.S. 451, 24 S. Ct. 692 (1904) (state foreign corporations law); Link v. Seaboard Air Line R. Co., (C.C.A. 4th, 1934) 73 F. (2d) 149 (wrongful death act); Bussey v. Bishop, 169 Ga. 251, 150 S.E. 78 (1929) (workman's compensation law).

[14] 325 U.S. 304, 65 S. Ct. 1137 (1945).

Minnesota Supreme Court,[15] which determined that the Blue Sky limitaton had been barred, that limit was extended so as to revive plaintiff's claim. The United States Supreme Court held that the Blue Sky Law merely defined a common law duty, that the common law cause of action which it in part defined remained intact to preserve defendant's liability. The Court reasserted the doctrine that statutes of limitation are arbitrary definitions of public policy regarding the privilege to litigate, not intended to create vested rights in defense to tort and contract actions, and held that the Fourteenth Amendment permits the legislature to restate that policy as regards such actions already barred. Whatever view may be adopted as to the rule of *Campbell v. Holt*, the results reached in both the *Chase Securities* case and the principal case appear justifiable. For were it conceded that a defendant acquired a vested right in a defense involving his entire liability, the same result should not be reached as to a defense to a particular remedy, where the liability continued on another footing.[16] Whatever degree of repose is conceived to be the legislative intent in creating a limitation, it can hardly be thought to extend to repose qualified by continuing liability on the same transaction. An interesting aspect of the opinion in the *Chase Securities* case is the Court's defense of *Campbell v. Holt*, which the Court was asked to overrule in consideration of the general disapproval accorded it by state courts. The Court observed that the ease with which state constitutions can be amended might well prompt state courts to adopt constructions limiting legislative powers, whereas a contrary construction was necessary as to the federal Constitution. It thus appears that a doctrine originating in a now widely discredited interpretation of statutes of limitations has earned survival as a means of implementing the present Court's attitude toward due process as a tool of judicial review.

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[15] Donaldson v. Chase Securities Corp., 209 Minn. 165, 296 N.W. 518 (1941).

[16] Power v. Telford, 60 Miss. 195 (1882); Gotham National Bank v. Strunsky, 162 Misc. 673, 293 N.Y.S. 961 (1936).