

1877

Effect of a Change in the Law Upon Rights of Actions and Defences

Thomas M. Cooley

University of Michigan Law School

Follow this and additional works at: <http://repository.law.umich.edu/articles>

 Part of the [Contracts Commons](#), [Legal Remedies Commons](#), and the [Legislation Commons](#)

Recommended Citation

Cooley, Thomas M. "Effect of a Change in the Law Upon Rights of Actions and Defences." *Southern L. Rev.* 3 (1877): 33-49.

This Article is brought to you for free and open access by the Faculty Scholarship at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Articles by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

III. THE EFFECT OF A CHANGE IN THE LAW UPON RIGHTS OF ACTION AND DEFENCES.

A very interesting and important question frequently is, what effect has been produced upon a right of action, or upon a previously existing defence to an action, by a change in the law effected by statute after the right has accrued, or the cause of action has arisen, to which the defence was applicable. The question is encountered in a great variety of cases, and is sufficiently important to be considered under the several heads where the cases seem to range themselves. This is done imperfectly below.

1. *Cases where Laws are Repealed which Imposed Penalties, or some Loss or Deprivation in the Nature of a Penalty.*—In cases of this nature there seems to be little room for hesitation regarding the proper rule. Where the right to recover the penalty, or to insist on enforcing that which is to cause loss to another, comes wholly from the statute, it must necessarily cease to exist the moment the statute is repealed. The result is inevitable, since the repeal of the statute takes away the foundation of the right. As the penalty, before it is recovered, is not property, and the right to it is not in the nature of a contract, the power to take it away is not inhibited by any provision of the constitution, and the legislative power of repeal is unquestionable. Nor is it of any importance in this connection whether the right to take advantage of the statute was given to the public, or to a common informer, or to some individual specially concerned; it being a mere statutory right not yet enforced, it cannot have force or vitality beyond that of the statute itself. This is the rule where a criminal penalty is provided,¹ but it applies to civil cases with equal force.

¹ *Miller's Case*, 1 Bl. Rep. 451; *Anonymous*, 1 Wash. C. C. 84; *The Irresistible*, 7 Wheat. 551; *United States v. Tynen*, 11 Wall. 88; *Commonwealth v. Duane*, 1 Binn. 601.

The point arose in a case of no little interest and importance, which was brought under the statutes of the United States for the reclamation of fugitive slaves, and was passed upon by the federal Supreme Court. The statute of 1793, on that subject, imposed a penalty of five hundred dollars upon any person who should knowingly or wilfully obstruct or hinder any owner, his agent or attorney, in arresting a fugitive from labor, or should rescue one after his arrest, or harbor or conceal one, knowing that he was a fugitive from labor. The penalty was recoverable by the claimant for his own use, and was doubtless intended to some extent as a compensation to him for losses and expenditures which he would be likely to suffer or incur. The statute of 1850 made new provisions, which, in the opinion of the court, repealed this. A penalty having accrued under the first statute before the second was passed, suit was brought for its recovery. Mr. Justice Catron, delivering the unanimous opinion of the court, declared that the repeal of the statute which gave the penalty took away all right of recovery. The penalty, being given by the legislature, might be remitted by the legislature. There was, and could be, no vested right in it.² In rendering this conclusion the court only followed previous decisions in the same court, all to the same effect.³ The decisions to the like effect in the state courts are very numerous, and it may almost be said that the doctrine has been held without dissent,⁴ there being scarcely an instance

² *Norris v. Crocker*, 13 How. 429.

³ *Yeaton v. United States*, 5 Cranch, 281; *Schooner Rachel v. United States*, 6 Cranch, 329; *State of Maryland v. Baltimore & Ohio R. R. Co.*, 3 How. 534. This last case was also one of considerable interest, the penalty, which was remitted, being one of \$1,000,000, imposed for the benefit of one of the counties of Maryland, in order to compel the railroad company to locate its line so as to accommodate and benefit that county. See, also, *Confiscation Cases*, 7 Wall. 454. In those cases it was decided that the attorney-general might remit penalties under the revenue laws even after judgment, against the remonstrance of the informer, who would lose his interest thereby.

⁴ See *Wilson v. Hardesty*, 1 Md. Ch. Dec. 66; *Potter v. Sturdevant*, 4 Me. 154; *Oriental Bank v. Freese*, 18 Me. 107; *Lewis v. Foster*, 1 N. H. 61; *O'Kelly v. Athens Manuf. Co.*, 36 Geo. 51; *Engle v. Shurtz*, 1 Mich. 150; *Cole v. Madison County*, Breese, 115; *Parmelee v. Lawrence*, 48 Ill. 331;

in which the doctrine has been denied, that no individual can have in a statutory penalty any vested right which the legislature would be precluded from taking away, or which would remain after the statute under which it was claimed had been repealed.

In some of the cases which have been referred to, that which the statute permitted to be recovered, or which was forfeited under it, was not designated a penalty, but, as in the fugitive slave case, assumed the form of, or was intended as, compensation to a party for a wrong done or injury suffered by him. One of the cases in Maine was of this description. The statute entitled the plaintiff, in case of the breach of a prison bond given by his debtor, to recover in a suit upon it the amount of his debt, costs, and expenses, with twenty-five per centum interest. Obviously this would exceed the damages suffered by him, and might be very greatly in excess. A later statute repealed this, and substituted a recovery of the actual damages the creditor had suffered, to be estimated by a jury. This recovery, it was held, was all that the creditor could demand, though the breach had occurred previously. All that the first statute gave in excess of the actual damages was in the nature of a penalty, whether so denominated or not, and the control over it did not depend on what it was called.⁵

Other cases involved the validity of statutes which mitigated the penalties against usury, and of these the same view was taken.⁶ If a party promises to pay usury, it is only by the favor of the law that any special remedy or protection is given him, and he can have no special claim to—certainly no vested right in—a favor which, at the same time, is a punishment to his creditor.

Where the penalty is taken away by statute, it seems to be immaterial that a suit has been previously commenced for the

Chicago etc. R. R. Co. v. Adler, 56 Ill. 345; People v. Livingston, 6 Wend. 526; Thompson v. Bassett, 5 Ind. 535.

⁵ Oriental Bank v. Freeze, 18 Me. 107, citing Potter v. Sturdevant, 4 Me. 154.

⁶ Wilson v. Hardesty, 1 Md. Ch. Dec. 66; Parmelee v. Lawrence, 48 Ill. 331; Engle v. Shurtz, 1 Mich. 150; Curtis v. Leavitt, 15 N. Y. 9; Welch v. Wadsworth, 30 Conn. 149; Wood v. Kennedy, 19 Ind. 68.

recovery of the penalty. This is on the ground that the court, in rendering a decision, can only apply the law which is then in force.⁷ And this rule applies even on appeal, though the judgment appealed from may have been rendered before the law was changed.⁸ There is, indeed, a case in New York which seems to be opposed to this view. In that case a tenant had incurred a forfeiture by removing property from the demised premises to avoid a distress for rent, and a judgment was recovered against him for the statutory penalty. He appealed, and, pending the appeal, the legislature abolished the remedy by distress, but without in express terms abolishing the penalty. Jewett, J., in passing upon the case in the supreme court, says: "At the instant the thing was done for which the penalty was given, it became a debt or duty, vested in the plaintiff. It is in the nature of a satisfaction to him, as well as a punishment of the offender."⁹ The plaintiff having acquired a vested right to the penalty, the statute abolishing the right of distress, subsequently passed, which did not in terms repeal the section in question, in no way affects that right."¹⁰

With great respect, it seems to us that the learned judge begs the question when he assumes that a vested right was acquired in the penalty. Certainly there is a great weight of judicial authority against this view. But he may have been right in attaching importance to the fact that the provision which gave the penalty was not expressly repealed.

⁷ *Schooner Rachel v. United States*, 6 Cranch, 329; *Yeaton v. United States*, 5 Cranch, 281; *United States v. Passmore*, 4 Dall. 372; *Norris v. Crocker*, 13 How. 429; *Confiscation Cases*, 7 Wall. 484; *United States v. Tyner*, 11 Wall. 88; *Satterlee v. Mathewson*, 16 S. & R. 169, and 2 Pet. 580; *Maynes v. Moore*, 16 Ind. 116; *Bacon v. Callendar*, 6 Mass. 303; *Cowgill v. Long*, 15 Ill. 203; *Butler v. Palmer*, 1 Hill, 324; *Commonwealth v. Leftwich*, 5 Rand. 657; *Commonwealth v. Welch*, 2 Dana, 330; *State v. Squires*, 26 Iowa, 340; *Mather v. Chapman*, 6 Conn. 54; *Engle v. Shurtz*, 1 Mich. 150; *People v. Herkimer Com. Pl.*, 4 Wend. 206; *McMinn v. Bliss*, 31 Cal. 122.

⁸ *McCardle's Case*, 7 Wall. 506; *Bristol v. Supervisors*, 20 Mich. 95; *Ludlow v. Jackson*, 3 Ohio, 553; *State v. Norwood*, 12 Md. 195.

⁹ *Citing Company of Cutlers in Yorkshire v. Ruslin, Skinner*, 363; *Grosset v. Ogilvie*, 5 Brown P. C. 527; *College of Physicians v. Harrison*, 9 B. & C. 524.

¹⁰ *Palmer v. Conly*, 4 Denio, 374.

True, it would become inoperative as to future cases when the remedy by distress was taken away, but there was nothing inconsistent in taking away that remedy and still leaving the penal provision applicable to the cases that would come within it; that is to say, to the cases that previously had occurred. On this ground the case may, perhaps, be harmonized with those decided in other courts.

2. *Cases where Statutes are Repealed with Saving of Rights Accrued.*—But while it is entirely competent to take away statutory penalties after they have accrued, it is also competent, by the proper clause in the repealing statute, to save them. This is often done; the effect being to continue in force, for the purpose of recovering the penalty, the statute which gave it.¹²

3. *Cases where Laws are Repealed which Forbade Particular Contracts.*—These cases present more difficulties than those already considered, and there has not often been occasion to pass directly upon the effect of a repeal where the repealing statute contained no express provision on the subject of the previous invalid contracts. It might be urged with some plausibility that if the contracts were such as the common law would have sanctioned, and which, therefore, would have been valid but for the statute, the repeal of the statute, thereby removing everything which constituted an impediment to their validity, must leave them subject to the rules of the common law, and, therefore, enforceable. An illustration may be taken from the prohibitory liquor laws, so called. These laws, in general, forbid the making of certain contracts which, at the common law, would have been perfectly legal and valid. Remove the statute, and what impediment remains to the enforcement of such a contract? All the elements of a recovery then exist—an agreement of minds and a consideration—and nothing is in the way, unless it be the statute which has now been repealed. Has the dead statute vitality for any such purpose? But, on the other hand, the condition of things at the time the statute

¹² *The Irresistible*, 7 Wheat. 551; *Broughton v. Branch Bank*, 17 Ala. 828; *People v. Gill*, 7 Cal. 356; *Cochran v. Taylor*, 13 Ohio N. S. 382.

was repealed cannot be ignored. If there was then no contract, how can the repeal of the statute bring a contract into existence? The general rule unquestionably is, that a negotiation between parties must depend for its validity and construction upon the law in force at the time when, and the place where, it was executed. This is so even where the remedy is pursued in another jurisdiction; the tribunal which is called upon to enforce rights under it ascertains what those rights are by enquiring what force and effect was given to the contract by the law of the place at the time of contracting. This is elementary. If, therefore, that law utterly forbade any contract of the nature of that which is relied upon, it is not perceived how any change in the law, which simply removes an impediment to enter into a contract, could impart vitality to a void negotiation, any more than it could import new terms into a valid agreement. If there was no contract while the law was in force, there remains none after it was repealed. This seems plain.¹²

It is possible, however, that the terms of the statute which preclude a recovery may have something to do with the effect of the repeal. If the statute forbade any contracts, its repeal, as already stated, can create none. But if, on the other hand, the statute only permitted a certain defence to be made to a contract, there would at least be plausibility in an argument that, when the statute which gave the defence was taken away, the contract remained and would be enforceable. The distinction is a somewhat nice one, and it would not be safe to act upon it without satisfactory evidence in the statute itself that its purpose was not to make all contracts of the kind absolutely null and void, but rather to give a defence as a privilege. Such a privilege could only become available when suit was brought; and if before that time the law which gave it was taken away, the privilege would be gone. But a void contract must be treated as invalid whenever the facts which constitute its invalidity are brought to the attention of the court.

The question of the legislative right to make valid an agree-

¹² See *Milne v. Huber*, 3 McLean, 212.

ment which, by the law under which it was made, was invalid, would seem to be now so conclusively determined as not any longer to be the subject of discussion. The right has been affirmed in a great variety of cases, and the argument that, in validating the invalid agreement, the legislature is in effect making for the parties a contract where no contract existed before, has almost invariably been put aside as unsound. The legislature, it is said, is only furthering the apparent design and purpose of the parties when it removes the statutory impediment to the validity of their arrangements, and gives them legal effect. It can wrong no one to remove a legal bar to the accomplishment of that which he has attempted.

A leading case on this point was that in which the Supreme Court of Pennsylvania affirmed the right of the legislature to validate one of the Connecticut leases of land in that Commonwealth, which the courts had previously declared, as a result of state legislation on the subject, were void, and could not create the relation of landlord and tenant. The legislature subsequently, by declaratory act, affirmed the validity of such leases, and of the relation of landlord and tenant under them. This presented very squarely the question of legislative power, which is above suggested, and it was squarely met by the court in an able opinion, often since that time followed in that and other states.¹³ In this case the legislation was attacked as destructive of vested rights, and as violating the obligation of contracts. It certainly violated no vested rights, unless an inequitable defence could be held to be one, for a defence against a fair contract must always, so far as the party himself is concerned, be inequitable.¹⁴ Neither did it violate the obligation of contracts.

¹³ *Satterlee v. Mathewson*, 16 S. & R. 169. For other Pennsylvania cases affirming the same principle see *Walton's Lessee v. Bailey*, 1 Binn. 477; *Haas v. Wentz*, 4 S. & R. 361; *Underwood v. Lilly*, 10 S. & R. 101; *Barnet v. Barnet*, 15 S. & R. 72; *Tate v. Stooltzfoos*, 16 S. & R. 35; *Bleakney v. Bank of Greencastle*, 17 S. & R. 64; *Menges v. Wertman*, 1 Penn. St. 218; *Journey v. Gibson*, 56 Penn. St. 57.

¹⁴ See *Foster v. Essex Bank*, 16 Mass. 245; *Welch v. Wordsworth*, 30 Conn. 149.

Its purpose, on the other hand, was to perfect the contract and do away with the difficulty in its enforcement.¹⁵ We cannot give the facts of other cases, many of which are equally strong and pointed; nor is it at all necessary when the principle is so firmly settled. Some further cases affirming it are given in the note.¹⁶

In all these cases it is to be understood that the statute not only removes the legal impediment which before existed to a lawful contract, but it expressly assumes to validate the contracts attempted before. The question, therefore, does not arise on a mere repealing statute, and, consequently, the cases do not conflict with what has above been said—that a repealing statute leaves previous invalid arrangements in the same state of invalidity in which it found them. But this is not a necessary result; the legislature may retrospectively affirm that which would have been valid but for the statute repealed, provided that, in express terms, they declare their purpose to that effect. There are, indeed, certain limitations upon their power; it is generally conceded that they cannot retrospectively, by their affirmance of a contract, divest rights which have been acquired in reliance upon its invalidity;¹⁷ nor could they validate a contract obtained by fraud or duress, or from an insane person.¹⁸ These are very plain exceptions to the general power; they rest upon

¹⁵ *Satterlee v. Mathewson*, 2 Pet. 380. See *Watson v. Mercer*, 8 Pet. 88; *Carpenter v. Pennsylvania*, 17 How. 456.

¹⁶ *Lewis v. McElvain*, 16 Ohio, 347; *Johnson v. Bentley*, *ibid.* 97; *Chestnut v. Shane's Lessee*, 16 Ohio, 599; *Trustees v. McCaughy*, 2 Ohio N. S. 152; *Goshen v. Stonington*, 4 Conn. 209; *Beach v. Walker*, 6 Conn. 190; *Norton v. Pettibone*, 7 Conn. 319; *Savings Bank v. Allen*, 28 Conn. 97; *Bass v. Columbus*, 30 Geo. 845; *Winchester v. Corina*, 55 Me. 9; *Andrews v. Russell*, 7 Blackf. 474; *Grimes v. Doe*, 8 Blackf. 371; *Maxey v. Wise*, 25 Ind. 1; *Boyce v. Sinclair*, 3 Bush, 264; *Payne v. Treadwell*, 16 Cal. 220; *Deutzl v. Waldie*, 30 Cal. 138; *Sticknoth's Estate*, 7 Nev. 227; *Harris v. Rutledge*, 19 Iowa, 389; *Gibson v. Hibbard*, 13 Mich. 215; *State v. Norwood*, 12 Md. 195.

¹⁷ *Greenough v. Greenough*, 11 Penn. St. 489; *Southard v. Railroad Co.*, 2 Dutch. 22; *Brinton v. SeEVERS*, 12 Iowa, 389; *Sherwood v. Fleming*, 25 Texas, 408; *State v. Warren*, 28 Md. 338.

¹⁸ *White Mountains R. R. Co. v. White Mountains R. R. Co. of N. H.*, 50 N. H. 50; *Routsong v. Wolf*, 35 Mo. 174.

rules of right, the force of which is universally felt and conceded. The contract of a married woman, however, or of an infant, entered into after he had arrived at an age when only the statutory impediment could stand in the way of his acting independently, might, as we think, be validated.¹⁹

What has above been said is applicable not only to cases of contracts forbidden, and to those which have been executed by parties while laboring under legal disabilities, but also to contracts which are required to be made under particular formalities, and are invalid because the formalities are not complied with.

4. *Cases in which a Change in the Policy of the Law might Affect Contracts.*—The cases are numerous in which contracts are held to be invalid because they contravene some general policy of the state. This policy may be declared or established by statute, or it may result from the common law as it is accepted and enforced in the state. It is now a rule of general acceptance that, whenever a thing is forbidden by statute, it is illegal to do it, and any contract having in view to circumvent and defeat the purpose of the statute is also illegal, and, therefore, void.²⁰ Nor need the prohibition be direct; it is sufficient that the statute has in view a purpose which it undertakes to accomplish, and that the contract is either designed to defeat that purpose, or will tend naturally to do so.²¹ Therefore a contract, the object of which is to evade the revenue laws of the country, or a contract originating in a business transaction on Sunday, when such transactions are forbidden, are as much void when not directly so declared as when they are.²² And the

¹⁹ See *Chestnut v. Shane's Lessee*, 16 Ohio, 599; *Goshorn v. Purcell*, 11 Ohio N. S. 641; *Dulany's Lessee v. Tilghman*, 6 G. & J. 461; *Walton's Lessee v. Bailey*, 1 Binn. 477; *Journeay v. Gibson*, 56 Penn. St. 57.

²⁰ *Bartlett v. Vinor*, Carth. 252; *s. c.*, *Skinner*, 322; *Drury v. Defontaine*, 1 Taunt. 136; *Fowler v. Scully*, 72 Penn. St. 456; 1 Pars. on Cont. 457-459.

²¹ *O'Hara v. Carpenter*, 23 Mich. 410.

²² 2 Pars. on Cont. 753, 757, and cases cited. There are, of course, exceptions to this as to all other rules. If a statute imposes a penalty for the doing of a certain act, and it seems to be the intention, in passing it, that the payment of the penalty shall be the sole liability for the doing of such act, the act itself may be valid. *Pangborn v. Westlake*, 36 Iowa, 546.

rule is the same where the infirmity in the contract is because of its contravening some general principle of the common law. An immoral contract, a contract which tends to corrupt legislation, a contract in general restraint of marriage, a champertous contract—all these are incapable of enforcement for the reason above assigned.²³ And as such contracts would be unlawful in their inception, it is not believed that a statutory change in the policy of the state, effected by legislation after such contracts had been entered into, would render them susceptible of enforcement. If they were not contracts when the legislation was enacted, doing away with the cause of the invalidity would not impart life to them. The cause had accomplished the mischief before. The repeal of a statute of limitations does not revive a cause of action previously barred by it, and the principle would seem to apply in all cases where an agreement of parties is, for any reason, incapable of enforcement. If originally invalid, it is not called into existence as an effective engagement by removing, *ex post facto*, that which precluded its being formed; if once valid, and afterwards put an end to, it cannot be revived by removing that which had destroyed it.

But the question might still remain, whether an express legislative recognition of contracts, originally invalid for repugnancy to some rule of public policy, might not give them legal force? Suppose, for example, a contract void because in restraint of trade; what principle should preclude its being retrospectively validated, that would not be equally applicable to a contract invalid because expressly prohibited by law? In either case the legislature would be giving effect to the manifest purpose of the parties, in entering into the agreement, by removing the impediment which they had encountered. Indeed, the reasons for interference would commonly be stronger in those cases than in the case of contracts rendered invalid by statute; for public policy, in its application to contracts, is not always so clear and distinct as to apprise parties with reasonable certainty what compacts they may, and what they may not, make; and

²³ Pothier on Obligations, 1-9; 2 Pars. on Cont. 747.

those which are entered into in perfect good faith are sometimes held invalid because opposed to a public policy which the parties themselves failed to comprehend. The illustration of contracts in restraint of trade is very pertinent here. It is utterly impossible for any one to determine at this time, from the reported cases, how far the old common law on this subject is now in force. That it is greatly modified, in the changed circumstances of this country, may be safely affirmed in the light of the most recent decisions;²⁴ and it would seem not only an act warranted by law, but by sound reason and good morals, to put at rest the questions relating to such contracts as far as possible—not only for the future, but for existing arrangements also. If it is allowable to validate a contract which the statute at the time would not sanction, still more certainly ought it to be to affirm one only forbidden by some vague and uncertain rule of public policy, respecting the existence of which even an expert might reasonably be in doubt. Indeed, where the policy itself had been growing fainter and more uncertain in the lapse of time, as it has in the case referred to, until even the courts are in doubt whether it should be recognized at all, a legislative declaration that it should no longer be recognized might possibly be held to be evidence that the policy itself had previously disappeared, so that courts might feel at liberty to enforce previous contracts entered into in good faith, and which, if made since the legislation, would be plainly and unmistakably legal.

The repeal of a law which forbade certain contracts might possibly raise questions of the right to recover back that which had been paid upon, or received in consideration thereof. If a contract is illegal, and something has been given for or done under it, the general rule of law is that the courts will not interfere to aid either party. If they have engaged in an unlawful negotiation, and one has suffered in consequence, the law will not undertake to relieve. The law cannot concern itself with a settlement of equities growing out

²⁴ Oregon Steam Nav. Co. v. Winsor, 20 Wall. 64; Schwalm v. Holmes, 49, Cal. 665; Beal v. Chase, 31 Mich. 490.

of a transaction in which, by reason of their disobedience of law, none of the parties have any claim to consideration. Possibly an exception might be made to this rule in cases where to interfere might be the most likely means of making the law respected in the future, and where not to interfere would only encourage future disobedience.²⁵ And sometimes it is expressly provided by statute that whatever is received on a specified illegal transaction shall be deemed to be received without consideration, and may be recovered back. Of such a statute there might possibly be room for saying that it was penal in its nature, and its repeal took away the right of recovery it gave. But as it only provides that one shall have back what another has unlawfully obtained from him, there would be at least equal reason for saying that it could fairly be called a remedial statute. The right under it would be a right to recover money had and received by the defendant to the plaintiff's use—a right sounding in contract; and, in general, such rights, when they once accrue, are not to be affected by the mere repeal of the statute, or the change in the common law under which they arise.

5. *Cases where Statutes undertake to give a New Defence to Contracts.*—The general rule of law which requires statutes to be so construed as to apply prospectively only, unless by their terms a retrospective effect is clearly intended, would prevent the statutes here referred to applying to existing contracts where a purpose to that effect is not explicitly declared or plainly evidenced by the statute. Supposing such a purpose to be apparent, the question will remain, how far it is competent to give it effect. In certain cases it is unquestionably admissible; in others it is not in the power of the legislature to authorize that to be accepted as a defence to a contract which was not such when the contract was entered into. The distinction between the two classes of cases would seem to be this: If the new defence would

²⁵ Compare *Adams v. Gay*, 19 Vt. 358; *Smith v. Bean*, 15 N. H. 577; *Tucker v. Mowrey*, 12 Mich. 378; *Sumner v. Jones*, 24 Vt. 317; *Dodson v. Harris*, 10 Ala. 566; *Myers v. Meinrath*, 101 Mass. 366; *Holman v. Johnson*, 4 Cowp. 343; *Waymell v. Reed*, 5 T. R. 599.

defeat a contract previously valid, or take away any right assured to the party by it, then the defence could not be allowed, for it would come within the prohibition of that clause of the constitution of the United States which forbids the states passing laws which impair the obligation of contracts. But if the new defence only presents legal objections in some new way, or is designed only to make available an existing equity, the provision for it should be regarded as affecting the remedy only, and for that reason competent and admissible. But it is admitted that this classification is not very exact; for a contract may possibly be legal, and yet opposed to some plain equity which the law ought to recognize, if it does not. Whether a defect in the law in this regard may not be remedied, and the amended law applied to existing arrangements, will be considered further on.

Of the cases in which new defences have been held not admissible, we may refer to those relating to slave contracts, which were entered into while slavery was lawful and enforced afterwards, notwithstanding positive legislative or constitutional enactments declaring that it should be admissible to show in defence what was the consideration, and that it should constitute a complete defence. Remembering that the whole policy of the country had been changed by the constitutional declaration of the illegality of slavery, it would seem that if any class of contracts could be declared invalid in consequence of the subsequent legislation, then these must certainly be. If made now, they would not only be declared invalid on constitutional grounds, but also because, to sustain them at all, positive law would be required. Slavery rests upon positive law, and cannot exist independent of it. Nevertheless, such contracts entered into while such positive law existed must be enforced. We may think them unwise, impolitic, immoral if you please, but the law recognizes them now because it did so when they were made. The new defence, which would import into them an infirmity not then recognized, cannot be admitted.²⁶

But it is familiar law that remedies are always under leg-

²⁶ *White v. Hart*, 13 Wall. 646; *Osborn v. Nicholson*, *ibid.* 654.

islative control, and may be changed at will, provided the change does not go to the extent of depriving the one party of substantial redress, or of fastening upon the other some new obligation.²⁷ In the exercise of this legislative control it is often deemed just and proper that new defences be given in order to work out more perfectly, by means of them, the real equities of the parties. If this is all that is sought, it cannot be inadmissible. A technical rule of law may be removed where only injustice would result from its enforcement. A legal defence may be allowed where only an equitable defence existed before. A set-off, or recoupment, may be substituted for a cross-suit, and so on. Nothing of this nature violates the obligation of contracts. It is only in the direction of giving a reasonable and just effect to contracts, and the policy of the law would favor rather than forbid it. To give more complete and effectual defences, so long as they only bring out the just rights of the parties, is no more unjust, nor, as we believe, more unwarranted, than to take away merely technical or inequitable defences. In either case, justice is promoted, and no rights entitled to protection are violated.²⁸

On this branch of our subject, reference may be made to some early cases in Massachusetts. It was decided by the supreme court of that state that a prisoner within the jail limits was not at liberty to enter upon the premises of private individuals, though they were within the prison bounds, and that a breach of his bond for the jail limits was committed if he did so. Subsequently the legislature changed the law in this regard, and enacted that no person, having

²⁷ That a statute is void which takes away all remedy is a principle that would seem to require no support from authorities. A few are referred to. *Call v. Hagger*, 8 Mass. 423; *Bruce v. Schuyler*, 4 Gilm. 321; *West v. Sansom*, 44 Geo. 295; *Coffman v. Bank of Kentucky*, 40 Miss. 29; *Jacobs v. Smallwood*, 63 N. C. 112; *Hudspeth v. Davis*, 41 Ala. 389; *Griffin v. Wilcox*, 21 Ind. 371; *Rison v. Farr*, 24 Ark. 461; *McFarland v. Butler*, 8 Minn. 116.

²⁸ *Hope v. Johnson*, 2 Yerg. 123; *Brandon v. Green*, 7 Humph. 130; *Lewis v. McElvain*, 16 Ohio, 347; *Bolton v. Johns*, 5 Penn. St. 145; *Sunderland v. De Leon*, 1 Texas, 250; *Steamboat Co. v. Barclay*, 30 Ala. 120; *Cutts v. Hardee*, 38 Geo. 350.

given bond for the liberty of the yard, should be considered as having committed an escape in consequence of having entered into or upon any private estate or property lying within the limits of such jail-yard. In suits subsequently brought, the court applied this statute to breaches which had previously occurred.²⁹ We should say of these cases that they go to the very extreme limit of what is admissible, for they *seem* to change the legal effect and obligation of the contract itself, and to render that not a breach which was a breach when the contract was entered into. It is to be observed, however, on an examination of the cases, that the reasons for the passing of the act were the doubt which had existed on the subject before, and the fact that parties had passed the prison limits in the full belief that the law permitted what they were doing, and without any intention to violate their contract. There was, therefore, in their cases something in the nature of mistake; of law, it is true, rather than of fact; but a mistake of law always presents some claim to equitable consideration, and it may be deserving of serious reflection whether to permit relief in cases of such mistakes would not be fairly within the competency of the legislature under principles already recognized. The reasons for permitting equity to relieve against mistakes of fact, but not against mistakes of law, are not very plain to the common apprehension, and cases often occur which it would seem just to make exceptions.³⁰

We have referred to the statute of limitations as cutting off rights under contracts. It is a general and very just rule that new conditions cannot lawfully, by legislation, be imported into contracts;³¹ but reasonable regulations are always admissible, even though they might result in a loss of remedy when not complied with. A statute of limitations would come under this head; so would a provision for the compul

²⁹ *Walter v. Bacon*, 8 Mass. 468; *Patterson v. Philbrook*, 9 Mass. 151; *Locke v. Dane*, *ibid.* 359. Compare with these *Fisher v. Cockerill*, 5 T. B. Monr. 122; *Lewis v. Brackenridge*, 1 Blackf. 220.

³⁰ That new defences may be made available in suits pending when they were provided for, see *U. S. Bank v. Longworth*, 1 McLean, 35.

³¹ *Robinson v. Magee*, 9 Cal. 81.

sory registry of deeds and other like instruments. Possibly such provisions might be so unreasonable as to require the courts to declare that they took away rights under pretence of regulating them; but we speak of those cases where the regulations are such in fact, and not in pretence merely.

6. *Cases of New Recognition of Rights where there has been Wrongful Action.*—From time to time the law of torts is changed, and remedies given where none existed before. It is not customary to make legislation of this character retrospective, and the right to do so is sufficiently questionable to justify its not being attempted. But it would also be impolitic in a high degree. It might possibly not be held to come within the technical definition of *ex post facto* legislation, but, in substance and effect, it would differ from it so little that a court might well hesitate to enforce it. The question of the right to provide for and recognize new defences in the case of wrongs previously committed would be different. It might not be admissible to make an act a tort which was not so when done, but it might be perfectly just to allow a tort previously committed to be mitigated by all those circumstances which would in any way tend to excuse it, or to relieve the responsible party from any of the consequences.

We have always believed that when the question of the power of the legislature to narrow, qualify, or take away, rights of action was in question, too much importance was usually attached to the circumstance that the right did or did not arise out of contract. True, the federal constitution undertakes to defend contracts only; but did they really need this defence? Would they not, on general principles of constitutional law universally recognized in this country, be inviolable by legislative authority, whether expressly guarded as they now are or not? The question may not now be of practical importance, but it is not perceived how the legislature could be powerless to take away a man's horse, and yet competent to confiscate his commercial paper. The one is property as well as the other. And where a right of action results from the principles of the common law, and has once

become fixed and vested, it would seem that this also should be considered inviolable on the same reasons.³² We use the word "contract" here in its ordinary sense, as the framers of the constitution doubtless did also. Of chartered rights we have no occasion now to speak.

But there are some defences in the case of torts that are not wholly reasonable, and that often operate unjustly. An instance may be taken of the rule that a party who has suffered by reason of the negligence of another shall not be allowed to recover if his own negligence directly contributed to the injury. On public grounds the rule may be wise, but it very often works gross injustice. If two parties are alike negligent, and the whole injury has chanced to fall upon one, there is no just reason, when we consider the cases of the two parties, why the other should not be compelled to share the loss with him. The courts of admiralty require this, and the courts of some other countries apportion the loss as best they may be able under all the circumstances. Suppose the legislature to require our courts of common law to do so, and apply the new rule to previous transactions; what would be the ground of complaint? Only, as we should suppose, this: that taking away the defence was really creating a new right of action. It purports to affect the remedy, but it really gives a right; it is an indirect method of accomplishing an inadmissible result. Legislation may not create torts; but to limit by statute the recovery for torts to what is just and right, as between the parties, wrongs no one, even though the recovery be based upon transactions which took place before the statute was adopted.

T. M. COOLEY.

ANN ARBOR, MICH.

³² See *Griffin v. Wilcox*, 21 Ind. 370; *Hubbard v. Brainerd*, 35 Conn. 563; *Bryan v. Walker*, 64 N. C. 146. Compare *White v. Hart*, 13 Wall. 646.