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Limitation of Actions—Condition Precedent; Pensions—Vested Rights—Survival to Estate of Petitioner; Statutes of Limitations—Interpretations—Removal of Bar; Taxation—Compensating Use Tax—Application to Property Not Available for Purchase Within the State; Workmen's Compensation—Pre-existing Disease—Injury

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RECENT CASES

LIMITATIONS OF ACTIONS—CONDITION PRECEDENT. The state sold shore lands to a proprietor, contiguous to the proprietor's uplands; both parties had assumed the lake bordered by the shore lands was a navigable body of water. Ten years after payment to the state the proprietor brought an action to have the lake declared non-navigable and to recover the purchase price. *Held:* That a judicial decree that the lake was non-navigable was a condition precedent to bringing the action and hence the Statute of Limitations did not begin to run until such decree. *Purdy v. Washington*, 99 Wash. Dec. 563, 92 P. (2d) 880 (1939).

Prior to this case the rule in this state has been that the Statute of Limitations commences to run from the time a cause of action could have been perfected by the exercise of reasonable diligence, and that where demand or some other prerequisite is necessary to the institution of a cause of action, a party may not prolong the statute by failing or neglecting to take the necessary steps to perfect his cause of action. *Spokane County v. Prescott*, 19 Wash. 418, 53 Pac. 661, 67 Am. St. Rep. 733 (1898) (leave of court before suing county official on his bond); *Skinning v. Pierce County*, 20 Wash. 126, 54 Pac. 1006 (1898); *Bennett v. Thorne*, 36 Wash. 253, 78 Pac. 936 (1904) (assessment before suing on superadded liability of bank stockholder); *Brooks v. The Trustee Co.*, 76 Wash. 589, 136 Pac. 1152 (1913); *Douglas County v. Grant County*, 98 Wash. 355, 167 Pac. 928 (1917); *Carstens Packing Co. v. Granger Irrigation District*, 160 Wash. 674, 295 Pac. 930 (1931) (appointment of board of appraisers as provided by contract before suing for damages); *Mood v. Mood*, 171 Wash. 210, 18 P. (2d) 21 (1933) (final settlement of guardian's account before minor sues guardian); *Temirecoeff v. American Express Co.*, 172 Wash. 409, 20 P. (2d) 23 (1933); *Harris v. Puget Sound Bridge & Dredging Co.*, 179 Wash. 546, 38 P. (2d) 354 (1934) (demand before suing for return of money).

The instant case can be attacked from two points of view. First the court found that the determination of navigability by judicial decree was a condition precedent to suing to recover the price paid. There is no statute so providing nor does the Commissioner of Public Lands have the authority to determine navigability. Such matter is left entirely with the courts. *Snively v. Washington*, 167 Wash. 385, 9 P. (2d) 772 (1932). It is upon this ground that the case can be distinguished from the cases cited as authority by the purchaser in the instant case, for in each of those cases there was a condition to be performed before access to the courts was allowed. *United States v. Louisiana*, 123 U. S. 32 (1887) (must have approval of United States Commissioner of Public Lands before bringing action); *Sweeny v. Butte*, 64 Mont. 230, 208 Pac. 943 (1922) (must establish right to office in special type judicial action before bringing action); *In re Harris*, 12 Misc. Rep. 223, 33 N. Y. Supp. 1102, *aff'd*, 90 Hun. 525, 36 N. Y. Supp. 29 (1895) (must have comptroller annul title of state before bringing action).

Assuming the determination of non-navigability is a condition precedent to plaintiff's recovery, yet, as shown above, the Washington court does not recognize such conditions as sufficient to toll the Statute of Limitations when the power to bring about fulfillment rests in the plaintiff.

It is submitted that the rule stated should have been applied to the instant case. It is significant to note, in weighing the court's decision, that the briefs very inadequately discussed the prior Washington cases. That four judges dissented is an indication of the unsatisfactory reasoning of the decision at which the majority arrived.

R. K. K.

PENSIONS—VESTED RIGHTS—SURVIVAL TO ESTATE OF PENSIONER. Action by the administrator of a deceased blind person's estate against Grays Harbor County to recover the amount of accrued pension owing to the deceased at the time of his death. *Held:* "The benefits of the act were intended for the personal use of the pensioner and no right to accrued pension passed to his estate." *Hart, as Administrator, v. Grays Harbor County,* 197 Wash. 604, 86 P. (2d) 198 (1939).

In the absence of contract a pension is generally considered merely a bounty or gratuity to which no rights can vest in the recipient. *Whitaker v. Clausen,* 57 Wash. 268, 106 Pac. 745, 107 Pac. 832 (1910) (involving a veteran's pension). *In re Snyder's Petition,* 93 Wash. 59, 160 Pac. 12 (1916), 3 A. L. R. 1233 (1919), *aff'd per curiam,* 248 U. S. 539 (1918) (involving a pension for an abandoned wife).

However there is a line of authority holding that when any particular payment has become due under a pension act, the pensioner has a vested right to such payment. *Foot v. Knowles,* 45 Mass. 386 (1842); *Slade v. Slade,* 65 Mass. 466 (1853); *Gibbs v. Minneapolis Fire Dept. Relief Assn.,* 125 Minn. 174, 145 N. W. 1075, Ann. Cas. 1915C, 749 (1914). A Washington case coming to the same conclusion is that of *Conant v. State,* 197 Wash. 21, 84 P. (2d) 378 (1938). In the *Conant* case six judges came to the conclusion that under the state social security act (Wash. Laws 1935, c. 182, p. 855, as amended by Wash. Laws 1937, c. 156, p. 548), an applicant who could qualify under the terms of the act providing for an old age pension had a vested right to payments thereunder from the date of her application, a sum in excess of $400.00, in addition to the right to future payments as they became due.

In the *Hart* case the pensioner's right to the pension had been judicially established. *State ex rel. Hart v Gleeson,* 189 Wash. 292, 64 P. (2d) 1023 (1937). Hence under the rule of the *Conant* case the pensioner had a vested right to collect the full amount of his pension from the date of his application. But if a vested right existed in the *Hart* case it would seem that such right should have survived to the estate of the pensioner.

The *Conant* and *Hart* cases cannot be distinguished on the grounds of intended benefits of the acts providing the pensions. The *Hart* case determined that the pensioner has no vested right which can pass to his estate on his death because the intent of the act was only to provide for him while living, but it may be fairly stated that the intent of the state social security act also was merely to provide for the old-age pensioner while he was living.

Thus if the theory of the *Conant* case is correct, then the result in the *Hart* case appears to be erroneous. But if the theory of the *Hart* case is correct, that the pensioner gets no vested right to pension from the date of application, then the result in the *Conant* case is incorrect. It is submitted that the *Hart* case does not directly over-rule the *Conant* case, but

in any event it appears to be a modification or weakening of the rule in that case.

It is significant that in deciding the *Hart* case five members of the court thought that the rule of the *Conant* case should govern. The three concurring judges admitted that proposition but were anxious to see the rule of the *Conant* case reversed. These judges are the same ones who dissented in the *Conant* case, and their position is apparently that the pensioner should never receive a vested right to such pension as is here under discussion. The two dissenting judges in the *Hart* case based their dissent largely on the *Conant* case. These two were with the majority in the *Conant* case, and their position seems to be that the pensioner should always have a vested right to accrued pension. The other four judges subscribed to the prevailing opinion in the *Hart* case and were with the majority in the *Conant* case. The position of these four judges, a minority of the court, has become the law of this state because of concurrence in the decision on each occasion by some of the other five judges, all of whom disagreed with the result reached in one or the other of the cases. The rule seems to be, if both the *Conant* and *Hart* cases are taken into account, that the petitioner whose application is accepted has a vested right to all payments from the date of the application until his death, but his "vested right" is subject to be divested on his death and no right of action for any accrued payments passes to his estate.

J. M. D.

STATUTES OF LIMITATION—INTERPRETATION—REMOVAL OF BAR. Clark, a longshoreman, received an award under Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424 (1927), 33 U. S. C. A. § 901 *et seq.* (Supp. 1938), which provided in Section 921 that any compensation order should become final at the expiration of thirty days, and in Section 922 that any award could be modified within one year from the date of last payment of compensation. Libelants paid compensation pursuant to the award which became final on September 26, 1931, there having been no attempt to modify or set aside the award. An additional award was made to Clark following the enactment of a private statute of April 10, 1936, 49 Stat. 2244 (1936), dispensing as to Clark the previously existing time limit for appealing awards, and authorizing an additional award. Libelants attacked the private act as unconstitutional. *Held:* "The invalidity of the private statute is not so free from doubt as to overcome the presumption of its validity . . ." *Paramino Lumber Co. v. Marshall, Deputy Com'r*, 27 F. Supp. 823 (1939).

Under the prevailing view Statutes of Limitation are considered procedural, and changes or modifications of the statutes are treated as affecting merely remedies, not rights. *Oliver et al. v. Crewdson's Adm'r et al.*, 256 Ky. 797, 77 S. W. (2d) 20 (1934); *Hulbert v. Clark*, 128 N. Y. 295, 28 N. E. 638 (1891); STUMBERG, CONFLICT OF LAWS (1937) p. 141. And under this view even though defences have been perfected by the complete running of a statute, legislation which removes the bar and destroys the defence is not unconstitutional, for rights remain unaffected and remedies alone are altered. *Cambell v. Holt*, 115 U. S. 620 (1885); *W. B. Herr v. Lewis Schwager*, 145 Wash. 101, 258 Pac. 1039 (1927). For minority cases see Note (1925) 36 A. L. R. 1316. As an exception to the general rule it

is well recognized that when an act which creates a new cause of action also imposes a time limitation for instituting suit, the Statute of Limitations is substantive in nature and the right of action is extinguished when the time prescribed for maintaining suit has expired. *Harrisburg v. Richards*, 119 U. S. 199 (1886); *La Floridienne, J. Buttgenbach Co. v. Seaboard Air Line R. Co.*, 59 Fla. 196, 52 So. 298 (1910); GOODRICH, CONFLICT OF LAWS (2d ed. 1938) p. 203; see *Davis v. Mills*, 194 U. S. 451, 454 (1904).

Constitutional authority is agreed that the revival of a liability barred by a Statute of Limitations which pertains to and qualifies rights is a deprivation of property within the purview of the Fifth and Fourteenth Amendments to the Federal Constitution; *Danzer & Co. v. Gulf & Ship Island R. R. Co.*, 268 U. S. 633 (1924); *Peninsula Produce Exchange v. New York P. & N. R. Co. et al.*, 152 Md. 594, 137 Atl. 350 (1927); but where the time limitation is extended before the statute has expired, the constitutional objection is not encountered, for defences do not vest until the falling of the bar. *Davis v. Mills, supra.*

In the instant case the statute which created the right of action also imposed time limitations for its enforcement. It is submitted that the court, by adopting the reasoning of the above line of authorities, could have found, without doing violence to the usual presumption of constitutionality, that the statute was substantive in nature; and that having expired, it conferred a vested defence, the impairment of which by the act in question amounted to a deprivation of property.

However the foregoing rationale might be inapplicable if substance be found in the distinction that in the cases above noted the limitation was imposed on the time within which suit could be brought on a cause of action created by the same act, whereas the limitation in the instant case is directed to the right to appeal an award made under the act. One line of authority in dealing with the latter situation holds that there are no vested rights in any mode of procedure, and that statutes giving and regulating the right to appeal are remedial, *Sampeyraec and Stewart v. United States*, 7 Pet. 222 (U. S. 1833); 2 AM. JUR. 849, § 7; while a second line of authority rules that rights vest under a final judgment after the time for appeal has lapsed, and a statute extending or granting a new right to appeal is a deprivation of property without due process of law. *Germania Sav. Bank, Kings County v. Village of Suspension Bridge*, 159 N. Y. 362, 54 N. E. 33 (1899); *Livingston v. Livingston*, 173 N. Y. 377, 66 N. E. 123 (1903); *In re Handley's Estate*, 15 Utah 212, 49 Pac. 829 (1897). For collection of conflicting authority see Note (1925) 36 A. L. R. 1316.

M. D. L.

TAXATION—COMPENSATING USE TAX—APPLICATION TO PROPERTY NOT AVAILABLE FOR PURCHASE WITHIN THE STATE. The City of Spokane brought action to abate a 2 per cent use tax assessed by the state tax commission upon personal property purchased outside the state and used within the state by the plaintiff. Plaintiff contended the tax was invalid and unconstitutional because a prior interpretation of the statute had held it inapplicable to goods purchased outside the state which were not available for purchase within the state, thereby leaving the tax applicable only to goods purchased outside the state which competed with similar goods available for purchase within the state. This result was alleged to be an

arbitrary and unreasonable classification, granting special privileges and immunities in violation of Art. 1, § 12 of the Washington Constitution and denying the plaintiff equal protection of the laws in violation of the Fourteenth Amendment to the Federal Constitution. *Held:* The tax was intended to apply to all goods purchased outside the state and used within the state whether or not similar goods were available for purchase within the state. *City of Spokane v. State of Washington,* 198 Wash. 682, 89 P. (2d) 826 (1939).

Although the actual effect of the portion of the compensating use tax statute here involved (Wash. Laws 1935, c. 180, § 31; Wash. Laws 1937, c. 191, § 1) is to impose a tax burden solely upon goods purchased outside the state and used within the state, it does not impose an unconstitutional burden upon interstate commerce. *Henneford v. Silas Mason Co.,* 300 U. S. 577 (1937); *Vancouver Oil Co. v. Henneford,* 183 Wash. 317, 49 P. (2d) 14 (1935).

In *Pacific Tel. & Tel. Co. v. Henneford,* 195 Wash. 553, 81 P. (2d) 786 (1938), *cert. denied,* 59 S. Ct. 483 (1938), the use tax as applied to property of the telephone company was held to be invalid on two grounds: first, that the property involved was not available for purchase within the state and the legislative intent was to tax only that property which competed with goods sold within the state; second, that since the property involved was equipment purchased specially for use on telegraph and telephone lines over which a mixed interstate and intrastate business was carried on, the tax imposed thereon was an unconstitutional burden upon interstate commerce.

In the instant case the court expressly reversed its first basis of decision in *Pacific Tel. & Tel. Co. v. Henneford, supra,* so that the use tax now applies to all goods purchased outside the state since May 1, 1935, and used within the state, whether or not similar goods are available for purchase within the state. The second basis of decision in *Pacific Tel. & Tel. Co. v. Henneford, supra,* was apparently demolished by the United States Supreme Court in companion cases involving a California use tax similar to the Washington tax. Cal. Laws 1935, c. 361. The Supreme Court found no burden upon interstate commerce even though the equipment taxed was installed for use in interstate operations immediately upon its arrival within the state, but discovered instead "a taxable moment when the former had reached the end of their interstate transportation and had not yet begun to be consumed in interstate operation." *Southern Pac. Co. v. Gallagher,* 306 U. S. 167 (1939); *Pacific Tel. & Tel. Co. v. Gallagher,* 306 U. S. 182 (1939).

These cases, reenforced by legislation in 1939 (Wash. Laws 1939, c. 225, § 14), effectively restore the use tax to the full vigor of a levy upon the use within the state of all property, not specifically exempt, which was brought into the state subsequent to May 1, 1935. The court has, however, refused to reopen the telephone case, *Pacific Tel. & Tel. Co. v. Henneford,* 99 Wash. Dec. 411, 92 P. (2d) 214 (1939); thus, the injunction decreed therein remains intact to give the telephone company an individual exemption from taxation on property subject to the statutes of 1935 and 1937. One of two 1939 statutory provisions may, however, vest the state with a present power to assess and collect the use tax on the telephone equipment which is, by effect of the injunction granted in the first tele-

phone case, immune from taxation under the statutes of 1935 and 1937. The first of these statutes (Wash. Laws 1939, c. 9, § 2), containing an express retroactive provision, was in force from February 8, 1939, to March 20, 1939; then it was repealed without a saving clause by the other statute (Wash. Laws 1939, c. 225, § 14) which amended and reenacted the original tax law and may itself operate retroactively to May 1, 1935.

D. G. S.

WORKMEN'S COMPENSATION — PRE-EXISTING DISEASE — INJURY. A widow claimed compensation under the Workmen's Compensation Act for the death of her husband while doing his customary work in a mine. Deceased was found to have been suffering from heart disease and hardening of the arteries at the time of his death. There was little if any evidence of a shock or unusual exertion as a contributing cause to the death. *Held:* Compensation granted on grounds that an injury arises out of employment when the required exertion producing the injury is too great for the man undertaking the work, whatever the degree of exertion or the condition of the man's health. *Bergagna v. Dept. of Labor & Industries,* 99 Wash. Dec. 232, 91 P. (2d) 551 (1939).

Workmen suffering from a disease are not precluded from recovering for injuries sustained in the course of their employment. Note (1929) 60 A. L. R. 1299. It is well settled that where pre-existing disease is aggravated by strain, unusual exertion or shock, the resultant injury is compensable. Note (1922) 19 A. L. R. 110.

The majority and minority opinions in the instant case represent two different interpretations of the Washington statute defining "injury". The Washington Act reads: "The word injury as used in this act means a sudden and tangible happening of a traumatic nature, producing an immediate or prompt result, and occurring from without, and such physical condition as results therefrom." REM. REV. STAT. § 7675. The minority opinion adopts a strict construction, as set out in *Flynn v. Dept. of Labor & Industries,* 188 Wash. 346, 62 P. (2d) 728 (1936), where the court stated that the statute is plain, clear, and concise, and therefore not subject to construction, so that there must be an external act or occurrence which causes the injury. But the Flynn case may be distinguished from the instant case in that, in the Flynn case, the decedent's actual labor had nothing to do with his death.

The majority opinion, interpreting the statute liberally, extends the definition to cover cases where a workman dies from a pre-existing disease while at his ordinary work without any unusual exertion, where such labor contributed to his death. In support of its position, it cites the following cases: *Metcalf v. Dept. of Labor & Industries,* 168 Wash. 305, 11 P. (2d) 821 (1932), where a logger died while working in an inconvenient position and in a great hurry which caused *extra strain; McKinnie v. Dept. of Labor & Industries,* 179 Wash. 245, 37 P. (2d) 218 (1934), in which a dockman died after an *extraordinary exertion* in mooring a boat; *Daugherty v. Dept. of Labor & Industries,* 188 Wash. 626, 63 P. (2d) 434 (1936), in which a brakeman died while unloading logs, from what the court termed an "untoward accident"; *Devlin v. Dept. of Labor & Industries,* 194 Wash. 549, 78 P. (2d) 952 (1938), in which a steam engineer died after exerting himself *more than usual.* These cases all seem to involve factual

situations in which workmen experienced unusual and extraordinary exertion in pursuit of their work. The court also cites *Frandila v. Dept. of Labor & Industries*, 137 Wash. 530, 243 Pac. 5 (1926), decided under an earlier statute defining "injury" merely as "that resulting from a fortuitous event", with no requirement for a "tangible happening . . . occurring from without". In that case, the deceased died from a heart attack while digging a ditch, and the court held that the employment was a contributing, proximate cause of his death even though it required only normal exertion.

Although the court did not expressly so say, the decision here seems to be based on the proposition that when injury results from the workman's ordinary labor involving no unusual strain, the employment itself is the outside factor required by the statute which causes a "traumatic injury" to the workman when combined with his pre-existing disease.

The instant case is the first case in this jurisdiction, since the passage of the 1927 act defining injury, where compensation was given for death arising out of the ordinary work in the absence of unusual exertion.

J. S. A.