Chapter XI

STATUTES OF LIMITATIONS, AND JUDGMENT

THESE topics deserve a separate chapter for several reasons. First, there is scarcely any available literature on them in connection with the subject of these lectures. Secondly, they are rather wider in their application than would justify their treatment as a mere incident in the discussion of the relations between tort and contract. Thirdly, it is suggested that there are broad principles which will cover the relations of tort, not only to contract, but to several other branches of the law as well.

The problem is this. Where there are variant periods of limitation for barring different kinds of action (or different claims in the same action), between the same plaintiff and defendant, which period is the defendant entitled to plead? Facts which constitute a tort may also constitute a breach of contract, or a breach of bailment, or a quasi-contractual claim, or an injury to property, or a breach of trust. What is the position of a plaintiff whose claim is alive under one of the heads of the law and dead under another?

In the first place, the statutes themselves must be consulted. It must not be hastily inferred that no question at all arises if the periods of limitation be alike in any two departments of the law, for it does not follow that the rules for ascertaining the moment at which the period begins to run will necessarily be the same.

The principal statute relevant to simple contracts and to tort is the Statute of Limitations, 1623–1624 (21 Jac. I, c. 16, s. 3). Its effect, as amended by the

Mercantile Law Amendment Act, 1856, is that all actions on the case (except slander), actions of account, of trespass *quare clausum fregit*, of debt upon loan or contract without specialty, of debt for arrears of rent, of detinue, of trover, and replevin, must be brought within six years; actions of assault, battery, wounding and imprisonment within four years after the cause of action has arisen; and actions of slander within two years next after the words spoken. The reforms made by the Judicature Act, 1873, did not affect the Act of James I. One result of them was to alter in some measure the nomenclature of actions, but the Statute of Limitations still applies to the circumstances which constituted the actions named in it.[1] The Act of 1623–1624 says nothing of *assumpsit*, but it was held that both it and *indebitatus assumpsit* came within the equity of it.[2] This equates a large body of the claims on quasi-contract to claims on a simple contract, at any rate so far as the number of years goes; for *indebitatus assumpsit* was the remedy for most of the cases of genuine quasi-contract. Further, it will be seen from the express words of the statute that six years is the period not only for all simple contracts but also for most torts. That removes many possibilities of conflict where a plaintiff, on the same set of facts,[3] has alternative claims in tort, in contract, or in quasi-contract, but it does not remove every such possibility. The period for assault, battery, wounding, and imprisonment is four years. Suppose that conduct of the defendant which is any one of these torts is presumptively negatived (so far as the law allows such negation at all), by a contract with the plaintiff, as in

[1] *Per* Brett L.J. in *Gibbs* v. *Guild* (1882) 9 Q.B.D. 59, 67.

[2] *Roche* v. *Hepman* (1729) 1 Barnardiston, 172. *Chandler* v. *Vilet* (undated) 2 Wms Saund. (ed. 1871) 391. Cf. *In re Mason* [1928] Ch. 385, 393–394.

[3] It is important to emphasize this. E.g. the facts were not the same in *Gloucestershire Banking Co.* v. *Edwards* (1887) 19 Q.B.D. 575.

medical or quasi-parental restraint, or in lawful games, and that the plaintiff sues more than four, but less than six, years after the perpetration of an injury which he alleges goes outside the contract. Is the defendant entitled to plead that the action is statute-barred? There is no direct authority in answer to this, and indeed it is unlikely that, as a matter of tactics, the plaintiff would go to law at all upon such a stale grievance;[1] but if he did, it might be urged that the defendant's plea ought to be bad because, when parties have fixed their relations to each other by a lawful contract, a claim upon it ought not to be transferred, for the benefit of the defendant, to another branch of the law under which it would have fallen if there had been no contract. The defendant's liability here is certainly of longer duration in contract than in tort, but it might be said that he had brought it upon himself, and that if he chose to make a contract, he must take its usual legal consequences, one of which is that a right of action on a simple contract is not barred until six years have elapsed. But it may be doubted whether this line of argument goes to the root of the matter. A better test is "What was the substantial cause of the action?" If it was tort, then the tort period of limitation ought to apply; if it was contract, then six years would be allowable. A decision from which this test may be inferred is *Howell* v. *Young*.[2] The plaintiff had employed the defendant, an attorney, to ascertain the sufficiency of certain securities upon which the plaintiff proposed to lend money to *X*. He sued the defendant for negligent misrepresentation as to the value

[1] Note that staleness of demand, as distinguished from the Statute of Limitations and analogy to it, may furnish a defence *in Equity* to an equitable claim: *per* Lindley J. *In re Sharpe* [1892] 1 Ch. 154, 168. For laches as an equitable defence, see 13 *Laws of England* (Halsbury) §§ 203 *seq.*

[2] (1826) 5 B. & C. 259. See too *Brown* v. *Howard* (1820) 2 B. & B. 73.

of the securities. The action appears to have been framed alternatively in *assumpsit* (contract) or upon the case for negligence (tort). It was argued that if it were the former then the period of limitation ran from the moment at which the breach of contract took place, but that if it were the latter then from the moment that the damage occurred. It was held that the only question was "What cause of action did the declaration disclose?" Here the negligence of the attorney was the gist of the action and it mattered nothing whether the plaintiff elected to sue in tort or upon the contract. The time must be reckoned as commencing from the date of the occurrence of the negligence and not from the date of the accrual of the damage. The actual *decision*, then, was that whether negligence is sued upon as a tort or as a breach of a co-existent contract, the accrual of the cause of action is at the moment at which the negligence was committed, not that at which the damage arose. Beyond that it did not go. But the reasoning in the decision seems to indicate that the test for settling which of two competing periods of time ought to be adopted is "What is the substantial cause of action?" And Bayley J's touchstone for determining substantiality may be paraphrased in this way. If all reference to one cause of action were omitted from the declaration, would there still be enough left to support the other cause of action?[1] It is conceivable that *both* causes of action may be substantial. At any rate nothing is said in *Howell* v. *Young* in negation of this possibility. In the problem which we put with respect to assault, battery, and false imprisonment overlapping with contract, more would have to be known of the facts, and variant cases would have to be taken on their own merits. If the gist of the action were tort, then the four years period would apply; if it were breach of contract, then

[1] At pp. 263–264.

the six years period. If it were as substantial a claim in contract as in tort, then the plaintiff ought not to be deprived of the longer period; indeed it is difficult to see how he could be thus deprived without altering the Statute of Limitations by judicial legislation. Suppose a patient were kept unjustifiably in detention in a private hospital into which he had contracted to go until he was cured, and he sued an action for false imprisonment against the proprietor of the hospital five years after the detention had ceased; is his claim substantially in tort or on contract? It would appear to be on both. If so, the action is not repelled by a mere plea of the Statute of Limitations, whatever may be its fate on other grounds.

Similar problems may be imagined on other discrepant periods of limitation. The time for a contract under seal is twenty years.[1] Such contracts are repeatedly made by corporations. Assume that a corporation commits the tort of negligence in the execution of such a contract. Is the period within which the action must be brought twenty years or six years? Here the plaintiff might well come into court without creating an unfavourable atmosphere that he had slept upon his rights, for, as noted above, in negligence the period runs from the date of the negligent act or omission and not from the date of the damage, and he may have perceived nothing of the latter until long after the former had been perpetrated. Again, it is suggested, the test of substantiality ought to be applied.

Take again nuisance as a tort. Six years is the span within which the action for damages for it is maintainable. Is this prolonged to twenty years by a covenant under seal with the plaintiff, an adjacent owner, that the defendant will not create or suffer any nuisance on the premises which he occupies? Yes, according to one writer; but the authority cited in support of the opinion

[1] 3 & 4 Will. IV c. 42 s. 3.

is wide of the mark, and there is no discussion of principle which, we contend, ought to be that which is stated above.[1]

Another aspect of the same problem arises where the plaintiff waives a tort and sues in contract. This has been the subject of some litigation in the United States in jurisdictions where the statutes of limitation prescribe a shorter period for tort than for contract or *assumpsit*, and the longer period has been regarded as that applicable.[2] The general principle laid down was that "the statute of limitations applicable depends upon the nature and character of the action, and not upon its form."[3] This appears to be sound enough, and it might well be the rule in English law, though no direct authority on the point is traceable. It amounts in effect to the principle of substantiality already considered. There has been copious litigation on the particular moment at which the Statute of Limitations begins to run in claims of a quasi-contractual nature, such as those for money had and received and actions by cosureties against one another, but none of it is of practical help in the present discussion.[4]

Nor is any direct decision discoverable on the period of limitation where the plaintiff waives a tort and sues in quasi-contract. There is some show of authority for the proposition that if trover be waived and an action for money had and received be sued, the time runs from the conversion, and not from the moment of receiving the money.[5]

[1] Banning, *Limitation of Actions* (3rd ed. 1906), 73.

[2] Keener, *Quasi-Contracts* (1893) 195, note 2. Cf. Woodward, *Quasi contracts* (1913), § 294.

[3] *Kirkman* v. *Phillips* (1872) 7 Heisk. 222.

[4] The cases are collected in 32 *English and Empire Digest* (1927) Limitation of Actions, 328 *seq.* See too 41 *Harvard Law Review* (1928), 1051–1055.

[5] *Denys* v. *Shuckburgh* (1840) 4 Y. & C. 42, 48.

Where bailment and contract co-exist, it is conceived that if the plaintiff frames his action on contract, the usual period of six years applies. That would be the same if he were to sue in tort, but detinue runs only from the date of demand for, and refusal of, return of the goods bailed.[1]

What is the position where a breach of trust which is also a tort has been committed? A trustee's wrongdoing may often answer the description of the tort of negligence, or of conversion, or of deceit. The law as to limitation of actions against trustees is contained in the Trustee Act, 1888, which modified the old rule that a claim against an express trustee for breach of trust could not be barred by mere lapse of time. Sect 8 of the Act provides that all rights and privileges conferred by any Statute of Limitations shall apply as if the trustee or person claiming through him had not been a trustee or person claiming through him, and that if the action or other proceeding is brought to recover money or other property and is one to which no existing Statute of Limitations applies, the trustee can plead lapse of time in like manner and to the like extent as if the claim had been against him in an action of debt for money had and received. The Act does not apply where the claim (i) is founded on any fraud or fraudulent breach of trust to which the trustee was a party, or (ii) is to recover trust property, or the proceeds thereof, still retained by the trustee, or (iii) is to recover trust property, or the proceeds thereof, previously received by the trustee and converted to his own use. The section applies to constructive, as well as express, trustees. Apart from the exceptions mentioned, the Act covers cases in which the relief sought against the trustee is in the nature of damages for breach of duty by him in the conduct of the trust, e.g. for loss arising from his negligence.[2]

[1] *Wilkinson* v. *Verity* (1871) L.R. 6 C.P. 206.

[2] Lewin, *Trusts* (13th ed. 1928) 918, 919–920.

The trustee is entitled to the protection of the several Statutes of Limitations as if the actions or proceedings for breaches of trust were mentioned in them.[1]

If, then, an action for negligence be brought against a trustee, it is immaterial from the point of view of limitation whether the plaintiff sue as for a pure tort or as for a breach of trust. The defendant can plead the Act of 1623–1624 and the period will be six years either way.[2] If the action were for deceit or for conversion, then the older law applies and no Statute of Limitations helps the trustee. Of course if the plaintiff knows the defendant to be a trustee, he would not be so foolish as to sue him otherwise than as a trustee, but if the trustee were only a constructive one, he might turn out to be so only after an action of this kind had been commenced; in that event he cannot have the benefit of the Act of 1888, and he loses the advantage of pleading the ordinary period of limitation for deceit or conversion, which would have been open to him if it had never appeared that he was a trustee. We can deduce this from *In re Exchange Banking Co.*,[3] which was decided before the Act of 1888. It was held that directors who had committed a breach of trust could not plead the Statute of Limitations, for their conduct was impeached as a breach of trust and not as a tort, though they had certainly committed negligence, if not actual fraud.

Where the Trustee Act, 1888, does apply in the trustee's favour, it may be a question as to which of the various Statutes of Limitations ought to apply. Thus, if he undertook his trust by virtue of a covenant under seal, and he be sued for negligence, the period appropriate would presumably be that fixed for a contract under seal.[4]

[1] *How* v. *Winterton* [1896] 2 Ch. 626.
[2] See *In re Bowden* (1890) 45 Ch. D. 444.
[3] (1882) 21 Ch. D. 519.
[4] *How* v. *Winterton* [1896] 2 Ch. 626, 642.

As to actions for the recovery of land, there does not seem to be much probability of any difficulty arising from their coincidence with remedies in tort. The question of title to land might be raised incidentally in an action for trespass done to it. Under the Statute of 1623–1624, trespass *quare clausum fregit* is barred after six years, while under the Real Property Limitation Act, 1874, s. 51, an action to recover land is kept alive for twelve years. There can be no doubt that the longer period should be allowed where title comes in question in an action of trespass. The substance of the claim is the recovery of the land and it is the trespass that becomes of secondary importance in the primary point at issue, which is "Who was entitled to the land?".[1]

To sum up, it would appear that where disparate periods of limitation apply to claims founded alternatively on tort, contract, quasi-contract, bailment, breach of trust or ownership, the question as to which period is to be selected ought to be determined by settling which is the substantial claim, and that where several or all of the claims are equally substantial the plaintiff can rely upon that one which puts him in the most favourable position under the Statutes of Limitations. Mere juggling with procedure on the part of either plaintiff or defendant is just as likely to be discouraged by the courts in this connection as in any other part of the borderland between tort and other provinces of the law. As was said by a great master of the Common Law, the substance of the matter is to be looked at, and the foundation of an action consists in those facts which it is necessary to state and prove in order to maintain it, and in no others.[2] This may look like a truism, but it is one

[1] Cf. *Keyse* v. *Powell* (1853) 2 E. & B. 132. Darby and Bosanquet, *op. cit.* 298–299, 545.

[2] Bramwell L.J. in *Bryant* v. *Herbert* (1878) 3 C.P.D. 389, 390. So too A. L. Smith L.J. in *Turner* v. *Stallibrass* [1898] 1 Q.B. 56, 58.

that has not always been given sufficient prominence in the very scanty literature on the subject of this chapter.

There is, of course, no connection between the respective effects of statutes of limitations and of judgment on alternative claims, but judgment may be conveniently dealt with here. If a plaintiff sues upon one of two alternative claims grounded upon the same facts, and judgment is given in that action, can he afterwards pursue the other claim in a second action? The answer to this depends upon the rules as to *res judicata*. In general, judgment in the one action will prevent any later action. *Nemo debet bis vexari pro eadem causa*. If the same facts have given rise to substantially one and the same ground of complaint, no further action can be brought, and this is so even though there are technical and formal differences between the two causes of action, or the two remedies have different names. Unless the causes of action are essentially separable, judgment upon the one bars the other. There is no positive law (except so far as the County Court Acts have from an early date dealt with the matter) against splitting demands which are essentially separable; but the High Court has inherent powers to prevent vexation or oppression, and, by staying proceedings or by apportioning the costs it has always ample means of preventing any injustice arising out of the reckless use of legal procedure.[1]

It has been held that a plaintiff who elected to sue in trover for the value of his goods at the time they were wrongfully sold by *X*, and who had recovered judgment against *X*, could not afterwards sue *Y*, who had received the proceeds of the sale, for money had and received.[2] Modern examples of the principle seem to be scarce.[3]

[1] *Per* Bowen L.J. in *Brunsden* v. *Humphreys* (1884) 14 Q.B.D. 141, 151.

[2] *Buckland* v. *Johnson* (1854) 15 C.B. 145.

[3] See Spencer Bower, *Res Judicata* (1924), §§ 327–332. As to conduct amounting to election between contract and tort, see *Valpy* v. *Sanders* (1848) 5 C.B. 886, and cases therein cited. For election between tort and quasi-contract see *ante*, p. 176.