## Chapter 1

# Introduction

THE Common Law of real property as it was inherited from the English system by the states in the eighteenth and early nineteenth centuries has undergone much statutory modification. Legal institutions which had their origin in an altogether different milieu have proved unsatisfactory, or have seemed not to be satisfactorily adaptable, and have been abolished or altered. New concepts find their way into statutes to replace the Common Law. Statutes are repealed, amended, and modified.

The constitutional difficulties would be minimal if legislatures always designed statutes so that they would operate only as to interests thereafter to be created. As to future dispositions and acquisitions of interests in land, the sole restriction on the power of the legislature to amend the law is that the liberty of individuals to enjoy and to dispose of their property shall not be unreasonably restricted. Although the courts will strive wherever possible to give a prospective interpretation to a statute, the wording may leave no doubt but that the legislature for one reason or the other designed the statute to apply to existing interests. In such instances expectations may be destroyed in a manner deemed to be forbidden by the constitutional guarantees.

The term retroactive when applied to legislation has been used to suggest a variety of meanings, but the sense in which the term is employed here is that a statute is retroactive when it extinguishes or impairs interests acquired under the previously existing law. The problem to be dealt with is that of

the constitutional limitations on the power of the legislature to effect changes in the institutions of real property law and to make those changes applicable as to interests arising out of these institutions and in existence at the effective date of the statute.

Concern over the validity of a retroactive statute is not always confined to those whose interests are immediately affected upon enactment. It is erroneous to assume categorically that the constitutionality of the statute is of practical interest for only a short time after its enactment. If a statute is unconstitutional, it confers no rights, and acts done under its supposed authority are rendered nugatory, yet a line of title may rest upon the assumed validity of the statute. The defect may some day come to light and cause misfortune to those who did not properly evaluate the validity of the statute in their search of title. Unusual circumstances, such as the longevity of a life tenant, may postpone for half a century or more the day of reckoning when the persons whose interests the statute purportedly extinguished make their appearance to claim their property. Although throughout our discussion we shall be talking about the rights of the owners of interests, it must not be forgotten that the vindication of one man's rights can be to another a denial of rights.

## SCOPE

The legislation to be dealt with is that which affects interests in land by modification or abolition of legal institutions. Legislation regulating land *use* will be touched upon only incidentally and in those areas where differentiation between the regulation of use and the impairment of *static* interests cannot be made. Although legislation regulating use of land is invariably retroactive in the sense that it extinguishes rights and privileges acquired under previous law

(for the legislature cannot suspend the operation of a regulatory statute until all persons owning or possessing land at the date of enactment have transferred their interests), there are good reasons for not undertaking a consideration of regulatory legislation along with other aspects of retroactive legislation. The constitutionality of regulatory legislation has been widely explored and abundantly written upon, whereas the constitutionality of retroactive legislation affecting interests in land has rarely received treatment. To include all phases of retroactivity would be to stake out a field of investigation which would be too huge to treat adequately. Moreover, treatment of legislation affecting *static* interests as a matter separate and distinct from regulatory legislation finds considerable justification in the attitude of the courts. The courts do not as a general rule conceive of regulatory legislation as being retroactive at all, but rather prospective in the sense that conduct which was previously privileged on the part of the owner of the land is *thereafter* forbidden by the statute. This conception prevails even when the court determines that the application of the statute is unconstitutional. The courts simply do not think of the privilege of using one's land as a *static* property interest. If they did, then no doubt regulatory statutes such as zoning laws would always be considered to be retroactive.

Only legislation affecting private interests is to be considered; hence legislation relating to public corporations and bodies is excluded. In the field of private interests exclusions have been made of areas wherein arise special problems meriting separate and extensive treatment: statutes relating to mortgages and security interests, statutes introducing procedural changes, taxation statutes and eminent domain statutes. Curative statutes have been considered only incidentally.

## MODE OF TREATMENT

The subject matter has been broken down in accordance with the type of interest or legal institution affected. Hence the headings refer to specific interests or institutions and the discussion thereunder to the various statutes enacted in the several jurisdictions which affect these specific interests. Division of subject according to interest involved is eminently justified. Whether a statute may constitutionally be applied in a retroactive manner can be determined only in the light of the substantiality of the interest. This entails differentiation and classification.

Treatment according to the interest involved is possible because of the common legal heritage of the United States. The doctrine of fixed interests excludes innovation and unorthodoxy. Similar relations are similarly analyzed by different courts. Legal institutions have a continuing existence; consequently past decisions may be looked to as some guide for the present. The evolution of an institution tends to occur simultaneously in all the jurisdictions where the institution is recognized so that similarity in approach by the courts in the various jurisdictions is not prevented by the development of the institution. Although a legal institution may be recognized in only one jurisdiction, it is far more common for a legal institution to be recognized in a number of jurisdictions, or even in all jurisdictions; hence determinations made by the courts of one jurisdiction will have significance in other jurisdictions.

In many instances the writer had to rely upon constitutional decisions of thirty to one hundred years ago for they are the only authorities relating to the particular points. These older cases unquestionably represent a more protective attitude toward property rights than prevails today, and therefore are not to be relied upon explicitly as indicating how the courts would decide now.

Appraisals of the results reached by the courts necessitates adequate analysis of the nature of the interest involved. For this purpose excellent tools are provided in the concepts of legal relations popularized by Hohfeld. Certain of the Hohfeldian concepts are used throughout: "right" in the sense of a claim; "privilege" in the sense of a freedom to act; "power" in the sense of an ability to affect legal relations; "immunity" in the sense of an absence of liability to have one's legal relation changed; "duty" in the sense of an obligation. Purism in the use of these concepts is not necessary and has not been attempted. In fact, if purism were made a goal, it would defeat the very purpose for which Hohfeldian terminology has been employed by the writer, that is, the achievement of clarity and accuracy. By making reasonable use of these several Hohfeldian terms, one can avoid the morasses in which the courts have often floundered. Many a case has been decided by the name which the court applied to the particular interest. One of the worst impediments to proper analysis is the word "right," which practically invites fallacy. Since the proposition that "vested rights may not be impaired" is more or less in the mind of a court whenever the contention is made that the legislature has unconstitutionally deprived someone of property, the court can easily fall into a closed circuit of reasoning and conclude that since the interest is a "right" it necessarily is immune from legislative impairment. This has occurred a great many times. Avoidance of such pitfalls has been uppermost in the mind of the writer.

A term which is often instrumental in producing obscurity is "property." The assertion is frequently made that the legislature may not destroy or confiscate property rights. As the statement stands it has no particular meaning, for unfortunately "property" is used commonly in at least four

different senses. Sometimes the term refers to the physical object itself, sometimes to ownership of the object (*i.e.*, to the bundle of rights, duties, powers, and privileges which constitute the legal relation called ownership), sometimes to any legally protected interest, and sometimes to any constitutionally protected interest. So far as "property" is used in this last sense, the statement that the legislature may not destroy property rights has no meaning except as a statement of a conclusion reached upon the particular set of facts. Where the word "property" is used hereafter in this and following chapters it is in reference to the physical object itself, real or personal.

The expression "vested rights" has been avoided as much as possible. A "vested right" is an interest which in the opinion of the court is constitutionally protected against impairment. "Vested right" is a label which is attached after analysis and weighing of public and private interests. It is a conclusion and not a point of departure.

### CONSTRUCTION OF STATUTE AND DETERMINATION OF EXISTENCE OF INTEREST

It is a matter of legislative intent whether a statute is to operate retroactively or only prospectively. The intention that it should apply retroactively must be made clear, for generally the courts indulge in the presumption that the legislature intended the statute to have prospective effect only. It is a general rule of construction that statutes are to be construed to operate prospectively wherever they are susceptible of such interpretation. However, when the legislature clearly and unmistakably shows an intention to make the statute retroactive, it is the duty of the court to apply it thus even though the consequence may be that the statute is rendered unconstitutional as applied.

As a preliminary to the determination of the constitutional question, the court must, of course, ascertain whether the alleged interest actually exists. In real property law this is usually a matter of construing instruments. Construction problems are more or less outside the scope of this treatment. For the most part the cases will be taken up at the point where the interest has been identified and only the constitutional question remains. Usually there is no doubt about the *identity* of the interest; the controversy centers about the true *nature* or *characteristics* of the interest.

It is apparent that a court may avoid the constitutional question by refusing to acknowledge the existence of an alleged interest. However, there is probably a limit to the extent to which a court may do this. The decision of the court, it would seem, must rest on a fair basis. If it does not, there may be a deprivation of property without due process.[1]

[1] See Demorest v. City Bank Farmers Trust Co., 321 U. S. 36, 42 (1944); Sauer v. New York, 206 U. S. 536, 547 (1906).