

CHAPTER 2

The Constitutional Guarantees

THE conservatism of the courts when passing upon the constitutionality of legislation which has an adverse effect upon static interests in property is in remarkable contrast to the liberality of the courts when passing upon the constitutionality of legislation restricting the use of land. Since *Euclid v. Ambler Realty Co.*¹ the contemplated use of property, even when the use is not harmful in itself or immoral, is subject to restriction in the public interest. A small number of cases have even held that a present use which is neither immoral nor harmful may be prohibited.² To the owner who purchased in anticipation of a certain use which is now forbidden, it is as though some of his land were taken from him, yet he is not entitled to compensation for the diminution in value which is the consequence of a reasonable regulatory measure. However, when the legislature in the exercise of its police power makes a change in the static real property law, the courts are inclined to hold that there has been an unconstitutional deprivation of property if any interest is extinguished or impaired. In contrast to the readiness with which the courts sustain legislation regulating land use, one finds a marked conservatism in the cases concerned with the impingement of legislation on static interests. One finds in these cases an inclination to concentrate on the private property aspects with little or no attempt to balance private and public interests. Of course,

¹ *Village of Euclid v. Ambler Realty Co.*, 272 U. S. 365 (1926).

² *Hadacheck v. Sebastian*, 239 U. S. 394 (1915); *Realty Co. v. McDonald*, 168 La. 172, 121 So. 613 (1929), cert. den. 280 U. S. 556 (1929).

it must be admitted that when the legislature modifies or abolishes the institutions of real property law, it ordinarily does not do so under the pressure of public need for immediate action. Nor is there usually an irreconcilable conflict between private and public interests (as so often is the case when the legislature undertakes to regulate a private use) which calls for immediate modification and consequent sacrifice of private interest for the public good.

The bias against retroactive legislation is more than an aversion to the destruction of private interests having economic value. It is a bias deeply rooted in Anglo-American law.³ Coke established the maxim that "*Nova constitutio futuris formam imponere debet non praeteritis.*"⁴ Blackstone declared it to be a matter of justice that statutes should be made to operate in the future.⁵ The American decisions abound with condemnations of retroactive legislation. Retroactive statutes seem to do violence to one's sense of justice in a variety of ways. For one thing, they destroy one's feeling of security. Often they are enacted with the knowledge and intention that they will affect particular persons in a specific manner and thus are personal rather than impersonal as legislation is supposed to be. Moreover, a retroactive statute gives the person affected no opportunity to avoid the consequences by rearranging his affairs.

The courts do not always indicate the constitutional provision which they suppose to be applicable when they declare a statute valid or invalid; but it cannot be assumed that a court does not have in mind a specific constitutional provision merely because it does not say so. It is now almost universally held that a court has no power to declare a statute in-

³ Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 Minn. L. Rev. 775 (1936); Smith, *Retroactive Laws and Vested Rights*, 5 Tex. L. Rev. 231 (1927); 6 Tex. L. Rev. 409 (1928).

⁴ 2 Inst. 292.

⁵ 1 Blackstone, *Commentaries*, 46.

valid unless the statute conflicts with some provision of the state or federal Constitution.⁶ The nineteenth century "Vested Rights Doctrine" with the concomitant overtones of natural law and natural rights has been pretty much relegated to the past.⁷ Only now and then does one find a modern case in which a court professes the view that the legislature is limited by principles of natural law.⁸ And when all is said and done, there have really been exceedingly few cases in which a statute was actually declared invalid on natural law grounds,⁹ notwithstanding the many discussions in the earlier cases concerning natural rights, the social compact, and the inherent incapacity of an American government to take away life, liberty, or property except when necessary for the general good.

A suggestion of the Doctrine of Vested Rights in modern cases is the equivocal proposition that the legislature is powerless to divest "vested rights." But usually when a court speaks of "vested rights" it has no intention of reverting to the nineteenth century Doctrine. It means only that in its opinion the legislature has attempted to disturb property interests in a manner forbidden by express constitutional guarantees.

⁶ Gray v. McLendon, 134 Ga. 224, 67 S. E. 859 (1910); Schmitt v. F. W. Cook Brewing Co., 187 Ind. 623, 120 N. E. 19 (1918); Craig v. O'Rear, 199 Ky. 553, 251 S. W. 828 (1923); Ward v. Leche, 189 La. 113, 179 So. 52 (1938); Burrows v. Delta Transp. Co., 106 Mich. 582, 64 N. W. 501 (1895); State ex rel. King v. Sherman, 104 Ohio St. 317, 135 N. E. 625 (1922); Rio Grande Lumber Co. v. Darke, 50 Utah 114, 167 Pac. 241 (1917).

⁷ For a general discussion of the Vested Rights Doctrine see Corwin, *The Basic Doctrine of American Constitutional Law*, 12 Mich. L. Rev. 247 (1914).

⁸ Matter of Estate of Leslie, 92 Misc. 663, 156 N. Y. S. 346 (1915); Nunnemacher v. State, 129 Wis. 190, 108 N. W. 627 (1906).

⁹ Prof. Thayer stated that there is but one such case: Bowman v. Middleton, 1 Bay (1 S. C. L.) 252 (1792); 1 Thayer, *Cases on Constitutional Law*, p. 53 (1895). Another writer cites four cases in which he states that statutes were declared void on the ground that they violated the dictates of natural law: Gardner v. Newburgh, 2 Johns. Ch. 162 (N. Y. 1816); People v. Platt, 17 Johns. Rep. 195 (N. Y. 1819); Bradshaw v. Rodgers, 20 Johns. Rep. 103 (N. Y. 1822); Parham v. The Justices, 9 Ga. 341 (1851).

In the same order as "vested rights" is the idea expressed in some cases that a statute is unconstitutional because it operates to take the property of one person and transfer it to another.¹⁰ Probably no legislature has ever literally taken one man's property to bestow it on another. The court is stating in a roundabout manner that the statute confers on one person rights and powers in respect to another's property in a manner or degree forbidden by the Constitution.

While few modern courts would think of expressly basing a decision upon the Doctrine of Natural or Vested Rights (partly because the Doctrine has so often been renounced, and partly because the broad interpretation given to the constitutional provisions makes recourse to a Natural Rights Doctrine uncalled for), the Doctrine of Vested Rights continues to play a not unimportant role in a metamorphosed state. The Doctrine to a large extent has been incorporated into the language of the constitution by judicial interpretation and is flourishing under the disguise of "due process." The courts today are building on a concept of limitations on legislative power laid down in the Era of Vested Rights,¹¹ with the qualification, of course, that the courts today harbor fewer fears and prejudices against the legislature and are more willing, for the most part, to allow some degree of latitude to the legislature. The concern of a court in respect to an arbitrary or unreasonable act of legislation is very much the same, whether it professes to be bound to look only to the written constitution (as today), or whether it professes to find natural limitations to the power of the legislature (as was once the vogue).

In the cases arising prior to the Fourteenth Amendment, if the given legislative act was held to be constitutionally

¹⁰ E.g., *Lawrence E. Tierney Coal Co. v. Smith's Guardian*, 180 Ky. 815, 203 S. W. 731 (1918).

¹¹ Howe, *The Meaning of "Due Process of Law" Prior to the Adoption of the Fourteenth Amendment*, 18 Calif. L. Rev. 583 (1930).

forbidden, the prohibition necessarily had to be found in the state constitution, except where the impairment of the obligation of a contract was involved. It was some time after the adoption of the Fourteenth Amendment before the courts ceased to rely exclusively on the state constitutions in cases not involving an impairment of the obligation of contract. At present the due process clause of the Fourteenth Amendment is the favored resort against legislative excesses and has greatly overshadowed the Bill of Rights of the state constitutions as a protection against deprivation of property. However, the guarantees of the state constitutions have by no means been supplanted.

A provision similar to the due process clause of the Fourteenth Amendment is to be found in a number of state constitutions; ¹² in others the due process concept is stated more elaborately.¹³ The privilege of possessing and acquiring property is expressly guaranteed in many states.¹⁴ The provision in some constitutions that the "property of no person shall be taken for public use without just compensation therefor" has been taken to signify that private property may not be taken for private uses even if compensation is paid and that the legislature may not arbitrarily or unreasonably interfere with property rights.¹⁵ In the Pennsylvania Constitution it is provided:

"In all criminal prosecutions the accused hath a right to be heard by himself and his counsel . . . ; he cannot be

¹² *E.g.*, Okla. Const., Art. II, sec. 7: "No person shall be deprived of life, liberty, or property, without due process of law."

¹³ *E.g.*, Tenn. Const., Art. I, sec. 8: "That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed or exiled, or in any manner destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or the law of the land."

¹⁴ *E.g.*, Me. Const., Art. I, sec. 1: "All men are born equally free and independent, and have certain natural, inherent and unalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness."

¹⁵ Conn. Const., Art. 1, sec. 11; *Linsley v. Hubbard*, 44 Conn. 109 (1876).

compelled to give evidence against himself, nor can he be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land.”¹⁶

It has been held that if the property of criminals is protected in this way, surely everyone’s property must be likewise protected.¹⁷

In spite of the diversity of phraseology, the provisions cited above appear to have an identity of meaning. If the particular phraseology is significant to the outcome, the significance which the courts attach to the precise wording of the constitutional provision is certainly not articulated. The courts treat the provision, whatever the specific wording, as a guarantee against deprivation of property without due process, and each case resolves itself into a question of whether the legislature has acted arbitrarily and unreasonably.

The constitutions of Georgia, Missouri, Ohio, Texas, Colorado, Louisiana, New Hampshire, and Tennessee contain prohibitions against the enactment of retroactive legislation. The Ohio Constitution, as an example, provides that “the general assembly shall have no power to pass retroactive laws or laws impairing the obligation of contracts.”¹⁸ Such prohibitions are not taken literally to prevent the application of any legislation to existing interests.¹⁹ It was said by the Missouri Supreme Court:

“The constitutional inhibition against laws retrospective in operation (section 15, article 2, Constitution of Missouri) does not mean that no statute relating to past transactions can be constitutionally passed, but rather that none can be al-

¹⁶ Pa. Const., Art. 1, sec. 9.

¹⁷ *Schoenberger v. School Directors*, 32 Pa. 34 (1858).

¹⁸ Ohio Const., Art. 2, sec. 28.

¹⁹ *Denver, etc., Ry. Co. v. Woodward*, 4 Colo. 162 (1878); *Bullard v. Holman*, 184 Ga. 788, 193 S. E. 586 (1937); *Haas v. Haas*, 182 La. 337, 162 So. 5 (1935); *Wallace v. Stearns*, 96 N. H. 367, 77 A. 2d 109 (1950); *Hamilton County v. Rosche*, 50 Ohio St. 103, 33 N. E. 408 (1893); *Deihl v. Jones*, 170 Tenn. 217, 94 S. W. 2d 47 (1936); *Downs v. Blount*, 170 Fed. 15 (5th Cir. 1909) (referring to Texas Constitution).

lowed to operate retrospectively so as to affect such past transactions to the substantial prejudice of parties interested. A law must not give to something already done a different effect from that which it had when it transpired.”²⁰

The definition of retrospective statutes customarily given by courts in the jurisdictions having this type of constitutional provision is that laid down by Justice Story in *Society for the Propagation, etc. v. Wheeler et al.*:

“Upon principle, every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective; and this doctrine seems fully supported by authorities.”²¹

On the whole the courts seem to come out with about the same result whether they apply a provision against retrospective laws or whether they refer to a “due process” clause. However, the Missouri Supreme Court has indicated that in close cases where the court can go either way on the constitutional issue, the express prohibition in the constitution of that state against retrospective legislation requires the court to hold that the statute is invalid, whereas if a “due process” clause were applicable the court might sustain the statute.²²

Retroactive statutes have been declared unconstitutional on the ground that they impair the obligation of contracts. Impairment of the obligation of contract is likely to be the basis of decision where the statute affects an *inter vivos* trust, a leasehold estate, or a mortgage, since the legal relations here are contractual in nature or have contractual aspects. On

²⁰ Willhite v. Rathburn, 332 Mo. 1208, 1217, 61 S. W. 2d 708, 711 (1933). The provision against retroactive legislation is now Mo. Const. 1945, Art. I, sec. 13.

²¹ 22 Fed. Cas. 756 at 767, No. 13, 156 (C. C. D. N. H. 1814).

²² Leete v. State Bank, 115 Mo. 184, 202, 21 S. W. 789, 792 (1893). See also in this regard Mellinger v. City of Houston, 68 Tex. 37, 3 S. W. 249 (1887).

the theory that a deed is a contract, or an instrument sounding in contract, it is sometimes held that the interests created by a deed are contract obligations within the meaning of the contracts clause of the federal Constitution.²³ A will, however, is said not to be within the purview of that clause.²⁴

The view that interests created by deed are necessarily contract obligations is an unwarranted extension of *Fletcher v. Peck*²⁵ wherein it was held that a grant from a state is a contract which is immune, by virtue of the contracts clause of the federal Constitution, from subsequent revocation by the legislature. The holding in *Fletcher v. Peck* probably went beyond what was intended to be the scope of the contracts clause, for it is doubtful whether the framers of the Constitution were thinking of contracts in any other than the usual legal sense of an agreement between two or more parties.²⁶ Certainly the holding in *Fletcher v. Peck* should not be extended beyond the issue in the case. The principle laid down is applicable when a legislature is seeking, without justification, to reinvest the state with title to land which it previously granted or patented. Apparently the contracts clause also would be invocable where a statute purports to extinguish the effect of a conveyance between private parties by divesting the title of the grantee in whole or in part and restoring it to the grantor, or by re-establishing privileges, rights, or powers in the grantor which he had relinquished by the conveyance. Justice Marshall said so in *Fletcher v. Peck*. Also he remarked that:

²³ *Inter alia* *Cress v. Hamnet*, 144 Kan. 128, 58 P. 2d 61 (1936); *Evans v. Cropp*, 141 Ky. 514, 133 S. W. 221 (1911); *Berdan v. Van Riper*, 16 N. J. L. 7 (Sup. Ct. 1837); *Gilmore v. Bright*, 101 N. C. 313, 7 S. E. 751 (1888).

²⁴ *Clarke v. Van Surlay*, 15 Wend. 436 (N. Y. 1836); *Cochran v. Van Surlay*, 20 Wend. 365 (N. Y. 1838).

²⁵ 6 Cranch 87 (U. S. 1809).

²⁶ *Kauper, What Is a "Contract" Under the Contracts Clause of the Federal Constitution?* 31 Mich. L. Rev. 187, 193 (1932).

“A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is, therefore, always estopped by his own grant.”²⁷

Naturally, the contracts clause is applicable when there is an impairment of an actual contract subsisting between grantor and grantee. The clause is no less applicable because the terms of the contract happen to be stated in the deed.

However, when a statute modifies or abolishes a legal institution under which an interest exists, there is ordinarily no impairment of the legal effect of the deed between the grantor and grantee nor a restoring to the grantor of something which he is estopped to claim. If the grantor has in no manner gained by the grantee's loss of an interest, can it be logically and reasonably said that a contract has been impaired? If any constitutional guarantee is infringed, it would seem to be that against deprivation of property without due process. Even in regard to those interests which can be classified either as interests in land or as contract relations, depending on one's viewpoint, such as easements, real covenants, restrictive covenants, it is submitted that the contracts clause is only applicable when the statute purports to affect the legal relations flowing out of the grant or agreement as between grantor (promisor) and grantee (promisee) or third party beneficiary. Be this as it may, legal relations which are recognized to be interests in land have characteristics which set them off from legal relations which are purely contractual. Interests in land are relations *in rem*; they exist not only as to the immediate parties to their creation but as to all persons. Contract relations involve the making of a promise. They are relations *in personam*; third parties are not affected except as to the general duty not to interfere

²⁷ 6 Cranch 87, 137 (U. S. 1809).

with the relations between the contracting parties. It is contrary to common understanding of what is an interest in land to impart to such an interest a contractual quality.

Possibly what has led some courts to hold that interests created by deed are contractual is the ambiguous and inaccurate reference to the deed itself as a contract. This confusing designation completely obscures the fact that the use of a deed in the creation of interests is purely a formalistic requirement. The conveyance is perfected through the execution and delivery of the deed; after these acts the deed is spent.

In the past where the courts have resorted to the contracts clause, they have tended not to want to allow any interference with property interests whatever, apparently on the theory that the prohibition against impairment is not one of degree but that any impairment is within the prohibition.²⁸ But the Supreme Court of the United States in *Home Building & Loan Ass'n v. Blaisdell*²⁹ made it clear that the police power enters into every contract to a degree once not generally admitted. A completely new concept of the contracts clause is evoked by that case; a contract may be impaired if there are reasonable grounds. Therefore, even if we are willing to accept the contracts clause as a tenable ground on which to determine the constitutionality of a retroactive statute affecting interests in land we must reconsider the older cases applying the contracts clause in the impingement of legislation on interests in land. The restrictive determinations once thought to be necessary are no longer deemed to be

²⁸ It has been said (in cases not involving deeds, however) that the prohibition against impairment is commonly not a question of degree for any impairment is within the prohibition. *Bank of Minden v. Clement*, 256 U. S. 126 (1921); *Norfolk & W. R. Ry. Co. v. Boyle*, 12 Fed. Supp. 522 (N. D. Ohio 1935); *Rorick v. Board of Com'rs*, 57 F. 2d 1048 (N. D. Fla. 1932); *Green v. City of Asheville*, 199 N. C. 516, 154 S. E. 852 (1930).

²⁹ 290 U. S. 398 (1934).

required, although perhaps the contracts clause is still more inhibitive than the due process clauses.

Occasionally a statute modifying the existing property law will be held to deny equal protection of the laws. But it is rather exceptional to find a statute of the type to be discussed which operates unequally, however unreasonable it may be.

In some cases it has been contended (and occasionally held) that a retroactive statute entails a forbidden intrusion of the legislature into the province of the judiciary. This argument is based upon the theory that a retroactive statute necessarily declares the law for existing cases, which is a judicial and not a legislative function. Most of these cases appeared in the early nineteenth century and none, apparently, in the last seventy-five years.³⁰

³⁰ See Cooley's *Constitutional Limitations*, p. 131 *et seq.* (7th ed. 1903) for a discussion of the earlier cases.