

Property - Illinois Possibility of Reverter Act Held Constitutional

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PROPERTY—ILLINOIS POSSIBILITY OF REVERTER ACT
HELD CONSTITUTIONAL

In two separate actions, trustees of township schools brought suit under the Reverter Act of 1947¹ to have possibilities of reverter attached to school lands declared invalid. The possibilities of reverter in both cases had been in existence over 50 years. The conditions were then broken. The circuit court entered a decree in each case that the Reverter Act of 1947 was unconstitutional as being *ex post facto* legislation and in violation of the due process clauses of the state and federal constitutions. On appeal the Supreme Court of Illinois, consolidating the two cases, held that the Reverter Act was constitutional.² Due to indecision by the trial court as to when the terminating conditions had actually occurred, the Supreme Court applied sections 4 and 5³ of the Reverter Act to find that no right existed in any of the former holders of the possibilities of reverter. *Trustees of Schools of Township No. 1 v. Batdorf*, 6 Ill. 2d 486, 130 N.E. 2d 111 (1955).

Possibilities of reverter and rights of re-entry for conditions broken became known many hundreds of years ago.⁴ Although they are in continuous use today, courts, even though lacking appropriate legislation, have gone to great lengths to obviate forfeitures brought about by the breach of these conditions subsequent.⁵ Courts have refused to enforce a condition because an unreasonable time had elapsed since its creation.⁶ In *Bonniwell v. Madison*,⁷ lack of knowledge by the landholder of the breach

¹ Ill. Rev. Stat. c. 30, § 37 (b) to 37 (h) (1955).

² The Illinois statute was noted in dictum in *Calumet v. Standard Oil Co.*, 167 F. 2d 539 (C. A. 7th, 1948) and cited by the Supreme Court of Illinois in *Deverick v. Bline*, 404 Ill. 302, 89 N.E. 2d 43 (1949) but its constitutionality was not discussed.

³ Ill. Rev. Stat. c. 30 § 37 (e): "Neither possibilities of reverter nor rights of entry or re-entry for breach of condition subsequent, whether heretofore or hereafter created, where the condition has not been broken, shall be valid for a longer period than fifty years from the date of creation of the condition or possibility of reverter. If such a possibility of reverter or right of entry or re-entry is created to endure for a longer period than fifty years, it shall be valid for fifty years.

§ 37 (f): "If by reason of a possibility of reverter created more than fifty years prior to the effective date of this Act, a reverter has come into existence prior to the time of the effective date of this Act, no person shall commence an action for the recovery of the land or any part thereof based upon such possibility of reverter, after one year from the effective date of this Act."

⁴ *Pakenham's Case*, Y.B. 42 Edw. III, (1368); *Bordwell*, *The Common Law Scheme of Estates*, 18 Iowa L. Rev. 425 (1933); *Denissen*, *Illinois Reverter Act*, 36 Ill. Bar J. 263 (1948).

⁵ *Post v. Weil*, 115 N.Y. 361, 22 N.E. 145 (1889); cf. *White Land Co. v. Christenson*, 14 S.W. (2d) 369 (Tex. Civ. App., 1928).

⁶ *Sanford v. Sims*, 192 Va. 644, 66 S.E. 2d 495 (1951).

⁷ 107 Iowa 85, 77 N.W. 530 (1898).

of the condition was considered a sufficient reason for its non-enforcement. A delay of a year before commencing suit has been held sufficient to bar the holder of the right of re-entry from enforcing his right.⁸

States have been reluctant to enact legislation to alleviate the troublesome aspects of these conditions. Prior to the Illinois statute only four states attempted to alert the common law conditions by legislation.

Massachusetts, the first state to attempt to curtail conditions on land, showed by the nature of its act⁹ that it was approaching the problem with caution. Only restrictions coming into existence after the date of the statute were affected by its thirty-year limitation period. The Massachusetts statute applies only to restrictions unlimited in time. Thus, a grantor by express provision, could make a restriction valid for hundreds of years.

Two states, Michigan and Wisconsin, have identical statutes.¹⁰ They do not provide a specific time limit for the conditions, leaving it to the discretion of the court as to when these conditions should be cut off. Although the courts in these states favor the presumption that the conditions are invalid, they are very reluctant to declare them unenforceable.¹¹

The Minnesota Statute¹² has the provisions found in the Michigan and Wisconsin Statutes and in addition has a maximum thirty-year limitation for all conditions. This statute is the closest in form to the present Illinois Reverter Act.

Under the Illinois Statute the life of the condition does not depend on the discretion of the court as in Michigan and Wisconsin, but rather a specific limitation of 50 years is provided. Where an act occurred breaking the condition before the passage of the Reverter Act, only one year is allowed from the date of the act to bring an action. Thus, the Illinois act is the first to retroactively cut off conditions.

The defendants in the instant case contended that the statute was unconstitutional because it was *ex post facto* legislation, impaired the obligation of contracts, and deprived persons of their property without due process of law, in violation of both the Illinois and the United States Constitutions. The argument that the act is *ex post facto* legislation was not considered by the Illinois court.¹³

⁸ *Tough v. Netsch*, 83 N.H. 374, 142 Atl. 702 (1928).

⁹ Mass. Acts and Resolves 1887, c. 418; cf. 6 Mass. Laws Ann. (1953) c. 184 sec. 23.

¹⁰ Mich. Stat. Ann. § 26.46 (1937); Wis. Stat. § 230.46 (1937).

¹¹ *Baxter v. Ogooshevitz*, 205 Mich. 249, 171 N.W. 385 (1919); *E. G. Whealkate Mining Co. v. Mulari*, 152 Mich. 607, 116 N.W. 360 (1908).

¹² 11 Minn. Stat. § 500.20 (1953).

¹³ Courts, generally however, hold that the inhibition against the passage of an *ex post facto* law applies only to criminal proceedings. Cf. *Mahler v. Eby*, 264 U.S. 32 (1924). Retrospective laws as to civil rights, not contractual in nature, and not vested rights of property, are valid. Cf. *People v. Chicago, B. & Q. R. Co.*, 323 Ill. 536, 154 N.E. 468 (1926).

The retroactive aspects of the Reverter Act, cutting off interests prior to the passing of the statute, present the greatest difficulty in justifying the constitutionality of the statute. What must be considered is twofold; first, whether the statute impairs the obligation of contract,¹⁴ and secondly, whether the statute violates the constitutional guarantee of due process in regard to property.¹⁵

The Court does not discuss the argument concerning the impairment of contract. However, it can be seen that a contract is an agreement which creates an obligation and one of its essentials is mutuality of obligation. Conditions subsequent and rights of re-entry have been held to impose no obligations of performance on either party.¹⁶ Therefore, since there seems to be no contract, there can be no impairment of one.

A possibility of reverter may be defined not as an estate but only a possibility of having an estate at a future time. A North Carolina court in *Bass v. Roanoke Nav. & Water Power Co.*¹⁷ set the stage for future legislative change by holding that a mere possibility of reverter could be defeated by statute. Since these rights are not vested, they do not come under the protection of the due process clause of the Constitution. On this point, the Illinois Supreme Court said in *People v. Lindheimer*:

That the legislature cannot pass a retrospective law impairing the obligation of contract, nor deprive a citizen of a vested right, is a principle of general jurisprudence, but a right, to be within its protection, must be a vested right. It must be something more than a mere expectation based upon an anticipated continuance of the existing law. It must have become a title, legal or equitable, to the present or future enjoyment of property or to the present or future enjoyment of the demand, or a legal exemption from a demand made by another. If, before rights become vested in particular individuals, the convenience of the State induces amendment or repeal of the laws, these individuals have no cause to complain.¹⁸

Justice Schaefer in the instant case reasons by analogy in justifying the retrospective aspects of the statute that since other legislation concerning inchoate rights of dower and curtesy and contingent remainders has been held constitutional, this statute affecting what he feels are more remotely expectant rights must also be ruled constitutional.

Thus, the Illinois court in declaring the statute constitutional has shown the other states a way out of the dilemma of centuries-old law which has outlived its usefulness.

¹⁴ U.S. Const., Art. 1, § 10; Ill. Const., Art. 2, § 14.

¹⁵ U.S. Const., Art. 14, § 1; Ill. Const. Art 2, § 2.

¹⁶ *Powell v. Powell*, 335 Ill. 533, 167 N.E. 802 (1929); *Sanitary District v. Chicago Title and Trust Co.*, 278 Ill. 529, 116 N.E. 161 (1917).

¹⁷ 111 N.C. 439, 16 S. E. 402 (1892).

¹⁸ 371 Ill. 367, 21 N.E. 2d 318 (1939). ¹⁹ *Ibid.* at 373 and 321.