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Constitutional Law--Impairing Obligation of Contracts--Statute of Limitations on enforcement of Lien of Trust Deed

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RECENT CASE COMMENTS

CONSTITUTIONAL LAW — IMPAIRING OBLIGATION OF CONTRACTS — STATUTE OF LIMITATIONS ON ENFORCEMENT OF LIEN OF TRUST DEED. — In 1909 plaintiffs executed a deed of trust to secure a note. When, in 1934, sale of the property under the deed of trust was attempted by the defendants, this suit was brought to enjoin the sale on the sole ground that all rights under the deed had been extinguished by a statute of 1921, amended and re-enacted in the Code of 1931 providing: “No lien . . . shall be valid . . . after the expiration of twenty years . . . and the provisions of this act shall apply . . . to every such lien now existing.”¹ The statute further provided that its terms should not apply to any suit commenced within two years from the effective date of the statute. From a decree dismissing the bill, plaintiffs appealed. *Held*, that the statute as applied in this case constituted an unconstitutional impairment of the obligation of contract. Decree affirmed. *LeSage v. Switzer*.²

In quoting from a decision of the United States Supreme Court³ that “This court has often decided that statutes of limitations affecting existing rights are not unconstitutional,” the court indicated that it was not unaware of the uniform line of decisions upholding statutes of limitations which provide a reasonable time for bringing actions, even as applied to contracts entered into before the enactment of the statutes.⁴ However, the present court sought to distinguish all such cases on the ground that they involved statutes which merely affected the remedy and did not “extinguish directly a single substantive right arising from a con-

¹ W. VA. REV. CODE (1931) c. 55, art. 2, § 5. The entire statute, in its original form, follows: “No lien, reserved on the face of any conveyance of real estate, or lien created by any deed of trust or mortgage on real estate, shall be valid or binding as a lien on such real estate, after the expiration of twenty years from the date on which the debt or obligation secured thereby becomes due; and the provisions of this act shall apply, with like effect, to every such lien now existing, as well as to every such lien hereafter reserved or created; provided, however, that the said limitation of twenty years prescribed by this act shall not be so construed as to apply to any suit, now pending and undetermined, or to any suit or lawful proceeding, commenced within two years from the time when this act shall go into effect, for the enforcement of any such lien, otherwise legally enforceable but for said limitation.” W. VA. CODE (Barnes, 1923) c. 104, § 5a.

² 182 S. E. 797 (W. Va. 1935).

³ *Terry v. Anderson*, 95 U. S. 628, 632, 24 L. Ed. 365 (1877).

⁴ *Terry v. Anderson*, *supra*; *Sohn v. Waterson*, 17 Wall. 596, 21 L. Ed. 737 (1873). For collections of authorities see annotations in 46 A. L. R. 1101 (1927); 26 L. Ed. 886 (1885); 34 L. Ed. 659 (1891); 79 L. Ed. 309 (1935). 26 L. Ed. 886 (1885); 34 L. Ed. 659 (1891); 79 L. Ed. 309 (1935).

tract.”⁵ It seems clear that a statute which provides that “no action shall be brought” after a specified time merely affects the remedy, and that the present statute providing that “no lien shall be valid” extinguishes the right. And the court’s conclusion that “where the obligation is not impaired the remedy may be reasonably modified”⁶ is amply substantiated in the opinion. But it by no means follows that because the remedy may be constitutionally modified the right may not be constitutionally altered, and for its decision to that effect the court cites no authority whatsoever. That is a question which on its merits is an extremely difficult one and which might legitimately be decided either way in the absence of controlling authority. But a decision of the United States Supreme Court, not mentioned in the opinion of the West Virginia court, seems squarely in point, and since the problem is one involving the construction and application of a clause of the federal constitution, the decision should be deemed binding upon the state court.

*Wheeler v. Jackson*⁷ involved a New York statute which provided: “. . . no action . . . shall hereafter be brought . . . against the city of Brooklyn or the Registrar of Arrears . . . to compel the execution or delivery of a lease upon any sale for taxes . . . made more than eight years prior to the passage of this act, unless such action is commenced within six months after the passage of this act.” Although this clause affected merely the remedy, the statute further provided: “After the expiration of six months from the passage of this act, it shall be the duty of the Registrar of Arrears, to cancel in his office all such sales made more than eight years prior to the passage of this act, upon which no lease shall have been give . . . and thereupon the lien of all such certificates of sale shall cease and determine.” Under previous legislation the tax collector was authorized to sell property on which taxes remained unpaid at a specified time “for the lowest term of years for which any person will take the same, and pay the amount of such tax.” It was provided that the purchaser was to receive a certificate of sale, which should constitute a lien upon the property. The owner of the property was given the right to redeem within two years by paying to the collector for the use of the purchaser the purchase-money, the tax, and fifteen per cent per annum in addition. It was the duty of the collector to execute to the purchaser a conveyance or

⁵ *Supra* n. 2, at 798.

⁶ *Id.* at 799.

⁷ 137 U. S. 245, 11 S. Ct. 76 (1890).

lease of property not redeemed within two years. The effect of the statute of limitation was thus to extinguish the lien represented by the certificate of sale. The court in its opinion discussed the contention of counsel that the statute "destroys the security upon which the purchaser relied when he advanced his money, namely, the lien of the record after sale",⁸ and held that the legislation did not impair the obligation of the plaintiff's contract.

No basis for distinguishing the West Virginia case from *Wheeler v. Jackson* is apparent. In each case a lien existed the enforcement of which was not subject to any statutory limitation prior to the enactment of the statute whose constitutionality was questioned. In each case the questioned legislation had the effect of extinguishing the lien after the expiration of a certain period of time. In each case the holder of the lien had reasonable opportunity to enforce the lien after the effective date of the statute of limitation. In neither case was it necessary to resort to court action to enforce the lien; in the one, only a sale by the trustee under the trust deed was required; in the other, a conveyance executed by the tax collector would suffice. Indeed, all the facts which are material to the problem of constitutionality seem to be virtually identical in the two cases.

Accordingly, the West Virginia decision might well have been for the plaintiff instead of for the defendant, if the case of *Wheeler v. Jackson* had come to the court's attention.

FUTURE INTERESTS — POSTHUMOUS CHILD — CHILD *en ventre sa mère* REGARDED AS IN BEING. — A testatrix by will placed certain property in trust for her children for a period of twenty-one years after her death, but if any child should die within the period "leaving any issue him or her surviving", then in trust for such child absolutely, provided that if the child should die without issue his share should go to the other children. A child died within the period leaving his widow enciente with a child later born alive. *Held*, that he died without "leaving any issue him surviving" on the ground that a child *en ventre sa mère* would only be considered as surviving when it was to receive a direct benefit under the will. *Elliot v. Joicey*.¹

⁸ *Id.* at 256.

¹ (1935) A. C. 209.