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CONSTITUTIONAL LAW - MORTGAGES - MORATORIA ON THE WAY OUT?

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COMMENTS

CONSTITUTIONAL LAW — MORTGAGES — MORATORIA ON THE WAY OUT? — As a general proposition, one might perhaps feel prone to quarrel with the statement that "history repeats itself," but there can be little doubt that it applies full well to legislation aimed at relieving hard-pressed debtors in times of financial crises. From our earliest American history, every economic "winter" has provoked a landslide of pro-debtor legislation.[1] Nor have mortgage debtors been overlooked in this regard.[2] The remedies suggested have been as

[1] See 1 BANCROFT, HISTORY OF THE FORMATION OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 230-236 (1882); 3 MCMASTER, HISTORY OF THE PEOPLE OF THE UNITED STATES 416-417 (1892); 4 ibid. 493-495 (1895); 5 ibid. 161-166 (1901); 6 ibid. 624-626 (1906); 7 ibid. 18, 44-45 (1910).

[2] Bronson v. Kinzie, 1 How. (42 U. S.) 311 (1843); Gantley's Lessee v. Ewing, 3 How. (44 U. S.) 707 (1845); Howard v. Bugbee, 24 How. (65 U. S.)

varied and ingenious as human minds could concoct.[3] A brief review of the past decisions indicates that when they could be said to impair the obligation of contract, such statutes have uniformly cracked up on constitutional rocks.[4] But in some cases they have been sustained on the ground that merely to change the remedy for the enforcement of rights was permissible.[5] Even then, however, the remedy was not allowed to be whittled away entirely.[6]

As regards distressed mortgagors, previous attempts at succor seem sporadic and inconsequential when compared with the concerted movement which began in the early 1930's and which has continued rela-

461 (1860). And see dissenting opinion of Justice Sutherland in Home Bldg. & Loan Assn. v. Blaisdell, 290 U. S. 398 at 448 ff., 54 S. Ct. 231 (1934).

[3] Generally they have taken the following forms: (1) Prohibiting suit to foreclose, as in Burt v. Williams, 24 Ark. 91 (1863), where a statute attempted to close the court. (2) Requiring an upset price on the sale—see Kan. Laws (1933), c. 218; Gen. Stat. Ann. (1935), § 60-3463a; and for the validity of statutes of this sort, see 85 A. L. R. 1480 (1933), supplemented in 89 A. L. R. 1087 (1934). (3) Extending the period of redemption—Bronson v. Kinzie, 1 How. (42 U. S.) 311 (1843). (4) Curtailing or abolishing deficiency judgments—Adams v. Spillyards, 187 Ark. 641, 61 S. W. (2d) 686 (1933); Burrows v. Paulson, 64 N. D. 557, 254 N. W. 471 (1934); see also 108 A. L. R. 891 (1937), supplemented in 115 A. L. R. 435 (1938).

In general, see Feller, "Moratory Legislation: A Comparative Study," 46 HARV. L. REV. 1061 (1933); Prosser, "The Minnesota Mortgage Moratorium," 7 So. CAL. L. REV. 353 at 358 (1934), and the very extensive note as to devices which have been resorted to in 18 MINN. L. REV. 319 (1934).

[4] Bronson v. Kinzie, 1 How. (42 U. S.) 311 (1843); McCracken v. Hayward, 2 How. (43 U. S.) 608 (1844); Edwards v. Kearzey, 96 U. S. 595 (1877); Swinburne v. Mills, 17 Wash. 611, 50 P. 489 (1897); Rawley v. Hooker, 21 Ind. 144 (1863); Rosier v. Hale, 10 Iowa 470 (1860).

Cf. the words of Justice Brandeis in Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555 at 581, 55 S. Ct. 854 (1935): "Statutes for the relief of mortgagors, when applied to preëxisting mortgages, have given rise, from time to time, to serious constitutional questions. The statutes were sustained by this Court when, as in *Home Building & Loan Assn. v. Blaisdell*, 290 U. S. 398 [54 S. Ct. 231 (1934)], they were found to preserve substantially the right of the mortgagee to obtain, through application of the security, payment of the indebtedness. They were stricken down, as in *W. B. Worthen Co. v. Kavanaugh* [295 U. S. 56, 55 S. Ct. 555 (1935)], when it appeared that this substantive right was substantially abridged."

[5] Sturges v. Crowninshield, 4 Wheat. (17 U. S.) 122 (1819). See also the cases cited at note 13 of the majority opinion in Home Bldg. & Loan Assn. v. Blaisdell, 290 U. S. 398 at 434, 54 S. Ct. 231 (1934). Cf. Richmond Mtg. & Loan Corp. v. Wachovia Bank & Trust Co., 210 N. C. 29, 185 S. E. 482 (1936), affirmed in 300 U. S. 124, 57 S. Ct. 338 (1937).

[6] An alteration in the remedy has been held to impair the contract when the complainant is left without an effective remedy: Bronson v. Kinzie, 1 How. (42 U. S.) 311 (1843); or when the change renders the contract less valuable: Edwards v. Kearzey, 96 U. S. 595 (1877). See also the cases cited at note 13 of the majority opinion in Home Bldg. & Loan Assn. v. Blaisdell, 290 U. S. 398 at 434, 54 S. Ct. 231 (1934).

tively unabated until the present time.[7] It should be sufficient to recall that as things went from bad to worse in the financial world following that fatal October day in 1929, repercussions began to be noted in every other field and in every part of the country to a greater or lesser degree. To quote the words of a court in a recent opinion reviewing the situation as it then existed:

> "In 1933, at the birth of the first Moratorium Act, the State, as well as the nation, was confronted with a great emergency: Banks were closed; home owners and farm owners were being ousted from their homes and farms through foreclosure proceedings; farm strikes existed; open, defiant and militant resistance to courts and court orders and decrees was in evidence; labor was unemployed; there was scarcely any price or market for farm products; and the health and social welfare of the people, as well as the sovereignty and perpetuity of organized government, was seriously menaced and in the balance. In the presence of such conditions it is fair to conclude, as did the Legislature of this State, that a great temporary emergency existed, and that the exercise of the reserve police power was necessary to prevent a collapse of our constitutional government."[8]

As just indicated, in the face of such a situation moratoria of every description, first executive and then legislative, put in a speedy appearance.[9] Nor did the judicial branch of the government fail entirely to grant relief.[10] As is apt to be the case in the face of stress and pressure, however, the tendency was to go the limit. Little thought was given to justice or injustice in general or in particular, but sweeping restrictions became the order of the day.[11] It is needless, in view of the mass of periodical data upon the subject, further to discuss here the general

[7] See the remarks of dissenting Justice Paine in First Trust Co. of Lincoln v. Smith, 134 Neb. 84 at 121, 277 N. W. 762 (1938), referring to the statement in 2 GEO. WASH. L. REV. 487 (1934), to the effect that in 1934, twenty-five states had passed moratory legislation and that since that time many more had been added to the list.

[8] Per curiam, First Trust Joint Stock Land Bank of Chicago v. Arp, (Iowa, 1939) 283 N. W. 441 at 442.

[9] See Prosser, "The Minnesota Mortgage Moratorium," 7 So. CAL. L. REV. 353 (1934).

[10] Federal Title & Mtg. Guaranty Co. v. Lowenstein, 113 N. J. Eq. 200, 166 A. 538 (1933); Chemical Bank & Trust Co. v. Adam Schumann Associates, 150 Misc. 221, 268 N. Y. S. 674 (1934); Suring State Bank v. Giese, 210 Wis. 489, 246 N. W. 556 (1933); Stone, "Mortgage Moratoria," 11 WIS. L. REV. 203 (1936).

[11] See Prosser, "The Minnesota Mortgage Moratorium," 7 So. CAL. L. REV. 353, especially at 356 (1934), for the situation in Minnesota. No doubt this was typical.

picture, or even to trace the rise, interpretation and, in some cases, the fall of this legislation.[12]

In any sharp upheaval, the pattern usually consists of reaction followed by counter-reaction; the pendulum, actuated by a surge of feeling and enthusiasm, swings far out on its arc, but sooner or later a swing back occurs. Interesting it is, then, to note current indications heralding a retreat from the broad moratoria so recently imposed.

The situation just adverted to is flatly presented in three cases which have only recently been decided by the Supreme Court of the state of Iowa.[13] All three involve lower court rulings, made in foreclosure actions, wherein the trial judges granted applications of mortgagors praying for an extension of the redemption period. Appeals were taken from the orders entered below on the ground that the statute under which the rulings were made was unconstitutional. The act in question was merely an extension of the original moratory legislation in that state, passed in 1933 by its General Assembly at the height of the demand by mortgagors for relief.[14] In substance it provided for continuances of pending mortgage foreclosures, and for an extension of the time of redemption from execution sales. As was to be expected, its validity was early attacked, and as was to be expected (we may now say, in view of what happened the country over), it was sustained on the ground that an emergency existed in the state which called for an exercise of the reserved police power.[15] In the instant attack on the extended act, the court brushed away without discussion mere questions of form, and addressed itself to the sole issue of whether the

[12] See Sternberg, "Three Theories of Relief Legislation," 24 GEORGETOWN L. J. 82 (1935); Feller, "Moratory Legislation: A Comparative Study," 46 HARV. L. REV. 1061 (1933); 20 VA. L. REV. 719 ff. (1934), a symposium on the deficiency judgment legislation. See also annotations on governmental powers in peace-time emergency, 86 A. L. R. 1539 (1933), supplemented in 88 A. L. R. 1519 (1934), 96 A. L. R. 312, 826 (1935); on financial depression as justification of moratorium or other relief to mortgagors, 90 A. L. R. 1330 (1934), supplemented in 94 A. L. R. 1352 (1935), 96 A. L. R. 853 (1935), 97 A. L. R. 1123 (1935), and 104 A. L. R. 375 (1936). Cf. note on debtor's exemption statutes as impairing obligation of existing contracts, 93 A. L. R. 177 (1934). For other discussions, see title "Moratoria" in periodical indices.

[13] First Trust Joint Stock Land Bank of Chicago v. Arp, (Iowa, 1939) 283 N. W. 441; John Hancock Mut. Life Ins. Co. v. Eggland, (Iowa, 1939) 283 N. W. 444; Metropolitan Life Ins. Co. of City of New York v. McDonald, (Iowa, 1939) 283 N. W. 445.

[14] The original legislation was Iowa Acts (1933), c. 179 and c. 182. It was re-enacted and extended by Iowa Acts (1935), c. 115, and again re-enacted and extended by Iowa Acts (1937), c. 80, the latter being the precise statute in controversy.

[15] Des Moines Joint Stock Land Bank v. Nordholm, 217 Iowa 1319, 253 N. W. 701 (1934). Four judges dissented.

constitutional protection against impairment of contract was offended.[16] Concluding that it was, the rulings below, which had granted the extensions prayed for by the debtors, were reversed.

The result attained does not represent a new or necessarily shocking doctrine. To those who have been interested in the growth and progress of this country, it has been no surprise that situations once held to involve violations of constitutional guaranties have at a subsequent time been found perfectly legitimate and proper.[17] While perhaps the usual course of events has involved a finding of unconstitutionality followed by a finding of constitutionality, the converse has as well taken place.[18] Some twenty years ago the decisions in the so-called "Rent Cases" caused a good deal of furor.[19] It was not long, however, until the Supreme Court, in the *Chastleton* case,[20] ruled that although the existence of an emergency had once justified the legislation upheld in the cases adverted to, it was entirely proper for a court to determine that the emergency no longer existed and that the legislation had thus become invalid.

Small wonder it is, then, to find courts applying similar doctrines to the moratory legislation. In fact, the path to this very result was expressly suggested by the Court in the famous *Blaisdell* case when it said:

> "It is always open to judicial inquiry whether the exigency still exists upon which the continued operation of the law depends."[21]

[16] United States Constitution, art. 1, § 10 and Amendment 14; Iowa Constitution, art. 1, §§ 9, 21, art. 12, § 1.

[17] Witness the minimum hours laws. Cf. Lochner v. New York, 198 U. S. 45, 25 S. Ct. 539 (1905), and Muller v. Oregon, 208 U. S. 412, 28 S. Ct. 324 (1907). And see GERSTENBERG, AMERICAN CONSTITUTIONAL LAW 266, note 4, 268, note 25 (1937). Witness also the recent Supreme Court decision on the taxability by a state of the income of federal employees. Graves v. O'Keefe, (U. S. 1939) 59 S. Ct. 595.

[18] A familiar example of this situation arises in public utility rate cases. A given rate established by a commission is at one time held valid and non-discriminatory, while at a subsequent date the same rate, due to changed conditions, is held invalid under the due process clause as a deprivation of property. See, for example, Newton v. Consolidated Gas Co., 258 U. S. 165, 42 S. Ct. 264 (1922).

[19] Marcus Brown Holding Co. v. Feldman, 256 U. S. 170, 41 S. Ct. 465 (1921); Edgar A. Levy Leasing Co. v. Siegel, 258 U. S. 242, 42 S. Ct. 289 (1922). And see Pennsylvania Coal Co. v. Mahon, 260 U. S. 393 at 416, 43 S. Ct. 158 (1922), wherein Justice Holmes, in referring to the above cases, characterized them as having gone "to the verge of the law."

[20] Chastleton Corp. v. Sinclair, 264 U. S. 543, especially at 548-549, 44 S. Ct. 405 (1924). The case was remanded to the trial court, however, for the purpose of taking evidence bearing on the question of the present existence of an emergency.

[21] Home Bldg. & Loan Assn. v. Blaisdell, 290 U. S. 398 at 442, 54 S. Ct. 231 (1934).

Likewise, in Iowa the present decisions were plainly forecast when the writer of the majority opinion in the *Des Moines* case modified the judgment of the trial court to the extent "that if the emergency passes before that time [the expiration of the act, March 1, 1935], then the appellant shall have the right to have the order for the extension changed."[22]

Prior to 1938, however, no court, either by analogy to the ruling in the *Chastleton* case or on the ground suggested in the *Blaisdell* case, had reached the result indicated there. Arguments of this nature had been presented to courts of last resort in several instances.[23] All declined to terminate judicially the legislatively declared emergency, but certain dicta in the opinions intimated that they would not hesitate to take the step when the proper occasion arose. In 1938, however, the Nebraska court was presented with the question when it was called upon to rule squarely and for the first time as to the validity of moratory legislation under the constitution of that state. The statute in quesion had been enacted originally in 1933,[24] had been twice amended and extended by the legislature,[25] and had been passed on as valid under the Federal Constitution in line with the ruling in the *Blaisdell* case.[26] However, in the instant case the court declared that the emergency no longer existed and that the statute was thus no longer valid.[27] Now, in 1939, the Iowa court, having formerly upheld the local moratory statute, finds that it is no longer valid because the emergency has passed.

Granting the logical soundness of the basic premise in the principal cases, certain collateral factors seem worth considering. First of all, is application of the doctrine proper on the basis of the facts presented? Normally, it is said that legislative determination of a dan-

[22] Des Moines Joint Stock Land Bank v. Nordholm, 217 Iowa 1319 at 1333, 253 N. W. 701 (1934).

[23] National Bank of Aitkin v. Showell, 195 Minn. 273, 262 N. W. 689 (1935); Wilson Banking Co. Liquidating Corp. v. Colvard, 172 Miss. 804, 161 So. 123 (1935); Mutual Bldg. & Loan Assn. v. Moore, 232 Ala. 488, 169 So. 1 (1936). In the latter case, however, the court declined to rule directly because of a pleading technicality. See also Albert v. Milk Control Board, 210 Ind. 283, 200 N. E. 688 (1936), where on the same general question as presented in the above cases, the court refused to say that the emergency was past. The decision was rendered some fifteen months prior to the date the statute was limited to expire.

[24] Neb. Laws (1933), c. 65, p. 301.

[25] Neb. Laws (1935), c 41, p. 158; Neb. Laws (1937), c. 42, p. 183; Comp. Stat. (Supp. 1937), § 20-21,159.

[26] Bell v. Niemann, 127 Neb. 762, 257 N. W. 69 (1934).

[27] First Trust Co. of Lincoln v. Smith, 134 Neb. 84, 277 N. W. 762 (1938). The same ruling controlled the decision in Strehlow v. Krings, 134 Neb. 82, 277 N. W. 784 (1938).

ger or an emergency is entitled to great weight, though of course it is not necessarily conclusive.[28] Further, it has been held necessary to the validity of emergency legislation that it be limited and temporary.[29] In the Iowa and Nebraska cases, the extended statutes would have expired of their own force in the spring of 1939.[30] Considering the short time the statute had left to run and bearing in mind a reasonable interest in certainty, it would seem that the wisest course, especially in the Iowa cases, would have been for the court to have deferred to the legislative determination, and to have held the statute good. It might have reached this result and yet plainly indicated its own opinion that the emergency had passed and sounded a warning that it would so rule if the act should be extended further and cases should subsequently arise thereunder.[31]

Secondly, again granting that the court's premise is sound, were the proper mechanics employed in its application in the principal cases? In both the Iowa and Nebraska cases, determination that the emergency no longer existed was rested essentially on the doctrine of judicial notice. No doubt this method has its advantages. It is speedy. On the other hand, its application does not tend to bring certainty to the law. In our modern society, where accurate statistical data is available, is there not considerable warrant in concluding that on important fact issues, it is unwise for a court judicially to notice such facts? [32] In

[28] Block v. Hirsh, 256 U. S. 135 at 154, 41 S. Ct. 458 (1920); Chastleton Corp. v. Sinclair, 264 U. S. 543, 44 S. Ct. 405 (1924). But see the case of State ex rel. Schorr v. Kennedy, 132 Ohio St. 510, 9 N. E. (2d) 278 (1937), where the court declined to pass on a legislative determination of an emergency. See generally on the conclusiveness of the legislative declaration of an emergency: 7 A. L. R. 519 (1920), supplemented in 110 A. L. R. 1435 (1937).

[29] W. B. Worthen Co. v. Thomas, 292 U. S. 426, 54 S. Ct. 816 (1934). But see People v. Title & Mtg. Guaranty Co., 264 N. Y. 69 at 96, 190 N. E. 153 (1934), to the effect that failure of the legislature to limit the operation of the law to a definite term does not render the law invalid so long as conditions once justifying its passage remain.

[30] Both statutes were slated to expire March 1, 1939. Data is not at hand by which to determine whether the last legislature in each state has again extended them beyond the dates indicated.

[31] It has been decided that as between the immediate litigants a rule established by a former decision would be applied because the parties had presumably dealt on the strength of the rule promulgated by the former decision, but that the rule should no longer be looked to as valid, and should thus be overruled prospectively. Such a decision has been found to infringe no constitutional guaranties, though it has been branded as being manifestly unjust to recognize the legal rule contended for by a party and yet deny him a recovery. See comment on retroactive effect of an overruling decision, 42 YALE L. J. 779 (1933). It would seem that by analogy the argument suggested in the text could thus be said to be supported.

[32] Perhaps a word in clarification should here be added. The writer's position merely is that it should be recognized that the phrase "judicial notice" does not

the instant situations no doubt the court felt times were better and that in general there was no longer an emergency. But is that sufficient? Clearly the legislature directed the statute in question to a particular problem. Before striking it down, should it not definitely appear on a factual basis that the precise problem to which the relief was addressed no longer warrants the sweeping remedies granted? Certainly a busy court is in no position to enter upon a thorough factual investigation of an important and complex issue such as this on its own motion; in all probability it is no better equipped to reach a proper conclusion on the basis of judicial notice. If a court knocks out the legislative remedy upon mere judicial notice that the need no longer exists, and its decision is not well founded in fact, we are apt to be back precisely where we started. A large-scale loss of homes, depressed land values, etc., may result and there may thus be judicially created the problem which was legislatively sought to be remedied. The only alternative would then seem to be a resort to chancery, as in the *Suring State Bank* case [33] where the court on equitable principles declined to confirm a sale had under depressed economic conditions. Surely a court which judicially declared that no emergency existed, and thereby rendered invalid a statute based on the thesis of an emergency, would have little inclination to exercise this equitable discretionary power.

Theoretically the court might submit the question of the existence

necessarily have an established and single meaning. If judicial notice is defined as the court's general feeling or understanding concerning an issue, it clearly has no place in arriving at a judgment upon important and delicate fact issues. On the other hand, if it is thought of as a reasoned determination upon a thorough understanding of the facts, then it has a place in the resolution of constitutional issues. The point is that in the principal cases the courts apparently applied the doctrine on the basis of the first sense suggested. It is this application of the doctrine to which the writer objects. Compare, however, the opinion of the dissenting judge in First Trust Co. of Lincoln v. Smith, 134 Neb. 84, 277 N. W. 762 (1938). Clearly certain basic facts, in cases of the sort here involved, should be presented to the court to which it could apply the doctrine of judicial notice embodied in the second sense indicated above. Just how these facts should or can be presented to an appellate court raises an important and serious problem. As yet little in the way of a constructive solution seems to have been worked out. The problem is too involved to discuss further here. The following, however, present some pertinent considerations: Denman, "Comment on Trials of Fact in Constitutional Cases," 21 A. B. A. J. 805 (1935); 30 COL. L. REV. 360 (1930); 49 HARV. L. REV. 631 (1936). And see the following cases: Muller v. Oregon, 208 U. S. 412, 28 S. Ct. 324 (1907); Bunting v. Oregon, 243 U. S. 426 at 433, 438, 37 S. Ct. 435 (1917); Adkins v. Children's Hospital of the District of Columbia, 261 U. S. 525 at 559, 570, 43 S. Ct. 394 (1923); Jay Burns Baking Co. v. Bryan, 264 U. S. 504, particularly at 533, 44 S. Ct. 412 (1924); Borden's Farm Products Co. v. Baldwin, 293 U. S. 194 at 210, 55 S. Ct. 187 (1934); Ex parte Kair, 28 Nev. 127, 425 (1905). Compare Star Square Auto Supply Co. v. Gerk, 325 Mo. 968 at 996, 30 S. W. (2d) 447 (1930).

[33] Suring State Bank v. Giese, 210 Wis. 489, 246 N. W. 556 (1933).

of an emergency to a referee for determination. Such a solution has been suggested and followed.[34] While such a procedure obviates many of the objections of the judicial notice method, practically it has certain faults. Its use involves both expense and time. Moreover, the result reached on a reference may have the same untoward effect as was pointed out with regard to a judicial determination. That is, a finding that the emergency no longer exists may operate as a boomerang in that by opening the door to foreclosures, a new emergency in the way of forced sales, a peak need for financing, etc., may be created.

On the other hand, a determination that those conditions which gave rise to the legislation are still prevalent, whether that conclusion is reached in a reference or declared by the court, raises an even greater problem. To date most moratory legislation has been sustained on the theory that a grave emergency warranted the state in bringing to bear its reserved police power. If the problem is still present, logically it seems that the emergency still exists and a continued exercise of the power should be justified. Obviously, however, moratory laws cannot be supported indefinitely, nor can their periodic extension or re-enactment be justified, if the word "emergency" is to be given its ordinary meaning. But need we apply an "ordinary meaning" in every situation? As Justice Holmes once put it, we need not necessarily push an argument to a "drily logical extreme." In these moratory cases, therefore, it has been urged that if a power may be exercised over a temporary emergency, it should likewise be available to cope with a situation that has become permanent.[35] The question is whether courts will be willing to adopt such a rule. The Nebraska court, in a case already referred to, when confronted recently with this problem, chose to be less liberal. The writer of the majority opinion, applying the "ordinary meaning," and thereby invalidating the moratory law, said:

> "It appears that there is no crisis now prevailing which involves a general paralysis of business and finance, and that the unfortunate condition now confronting us is strictly a 'continued depression.'"[36]

[34] Chastleton Corp. v. Sinclair, 264 U. S. 543, 44 S. Ct. 405 (1924). See also Lawyers' Trust Co. v. Kingsway Realty & Mtg. Corp., 162 Misc. 13, 293 N. Y. S. 633 (1937), referring the matter to a referee for a determination of the facts; 47 YALE L. J. 124 at 126 (1937).

[35] See 47 YALE L. J. 124 at 127-128 (1937), citing the milk control cases as examples of a validation of the exercise of power on emergency grounds, but stating that they are now held good on much broader principles. Query, however, as to whether conditions may not change so as eventually to provide a basis for the invalidation of this sort of legislation.

[36] First Trust Co. of Lincoln v. Smith, 134 Neb. 84 at 99, 277 N. W. 762 (1938).

Apparently this is the orthodox view, and it is doubtful whether at the present time courts in general would go beyond the result obtained in the case cited.

We may conclude, then, that the premise on which the Iowa court proceeded is correct, i.e., that a statute based on an emergency and once found valid may nevertheless be found invalid if the emergency subsequently disappears. On the facts of the cases presented to the court, however, it is arguable that its application was improper (1) as denying due credit to legislative determination of an emergency, and (2) as being without a sound factual basis beyond mere judicial knowledge. The suggestion may be reiterated that since neither the judicial notice method nor the reference method adverted to above are wholly satisfactory, a court should avoid the necessity for application of either by deferring to the legislative determination in cases where the question will shortly vanish through an expiration of the statute. At the same time, if the court, either on the basis of a reasoned theory of judicial notice or upon the results of a reference, feels a further extension by the legislature would be improper, it may, as has already been pointed out, hold the present act good, but declare what its future rulings would be. While this may not coincide with historical notions of procedure, it has a certain degree of support and certainly commends itself as sensible and just. On the other hand, if on either of the bases just mentioned the court is well satisfied that the emergency no longer exists, it should not hesitate to declare the act unconstitutional.

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