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CONSTITUTIONAL LAW - IMPAIRMENT OF CONTRACTS - LEGISLATIVE REGULATION OF DEFICIENCY JUDGMENTS

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CONSTITUTIONAL LAW — IMPAIRMENT OF CONTRACTS — LEGISLATIVE REGULATION OF DEFICIENCY JUDGMENTS — A North Carolina statute¹ provided that when a mortgagee purchases property at his own sale conducted under a power of sale, and then brings action for the deficiency, the debtor may as a matter of defense show that the true value of the property at the time and place of sale exceeded the sale price and thus defeat the deficiency claim in whole or in part. In a recent case the plaintiff, mortgagee of an \$8,000 mortgage, conducted a sale according to law and bought the land for \$3,000. On the

¹ N. C. Laws (1933), c. 275, § 3, Code (Supp. 1933), § 2593 (d).

plaintiff's subsequent action for the deficiency the defendant pleaded the statute. The defendant alleged and the jury found that the property at the time and place of sale was fairly worth the entire amount of the debt. The plaintiff admitted that the statute affected only the remedy for enforcing the contract, but challenged its validity on the ground that the alteration of the remedy was so substantial as to impair the obligation of the contract. The United States Supreme Court, affirming the decision of the state court, *held* that the statute did not so circumscribe or deny the existing remedies as to seriously impair the value of the contractual right. In its opinion the Court pointed out that the plaintiff was not entitled to be enriched at the expense of the defendant. The essence of the contract was a loan and the plaintiff's right was to have repayment of the loan plus interest. The altered remedy still allows the plaintiff to recover what he contracted for—namely payment in full. It was also pointed out that there still remained to the plaintiff the classic remedy of equitable foreclosure or foreclosure by suit. This remedy has always been considered fair to both parties, and so the legislature could have gone further and abolished the power of sale had it so desired. *Richmond Mortgage & Loan Corporation v. Wachovia Bank & Trust Co.*, (U. S. 1937) 57 S. Ct. 338.

The contract clause of the Constitution² has undergone a very interesting history. It is said that very little, if any, thought was given to it in the constitutional convention.³ Without a doubt it was inserted to protect the creditor class during periods of economic depressions.⁴ Impairment of contracts by legislative acts during financial hard times was not unknown to the colonist.⁵ However, the clause assumed a great importance during the early period of our national history.⁶ It did much to further the prestige of the national government and its tribunal in the days of Marshall.⁷ The prohibition, although rigid in form, has by the process of distinguishing between "remedy" and "rights"⁸ and by the recognition of the superiority of the police power of the state⁹

² Art. I, § 10 (1): "No state shall . . . pass any . . . law impairing the obligation of contracts. . . ."

³ I WATSON, *THE CONSTITUTION* 774 et seq. (1910); I COOLEY, *CONSTITUTIONAL LIMITATIONS*, 8th ed., 556 (1927); Perlman, "Mortgage Deficiency Judgments During an Economic Depression," 20 VA. L. REV. 771 at 778 (1934).

⁴ *Edwards v. Kearzey*, 96 U. S. 595 at 606, 24 L. Ed. 793 (1877); Sutherland, J., dissenting in *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U. S. 398 at 453 et seq., 54 S. Ct. 231 (1934), noted 47 HARV. L. REV. 660 at 664 (1934); Feller, "Moratory Legislation: A Comparative Study," 46 HARV. L. REV. 1061 at 1067 (1933).

⁵ Feller, "Moratory Legislation: A Comparative Study," 46 HARV. L. REV. 1061 at 1067 (1933); *Edwards v. Kearzey*, 96 U. S. 595 at 604-607, 24 L. Ed. 793 (1877); I WATSON, *THE CONSTITUTION* 777 (1910).

⁶ The more important cases were *Fletcher v. Peck*, 6 Cranch (10 U. S.) 87, 3 L. Ed. 162 (1809); *Sturges v. Crowninshield*, 4 Wheat. (17 U. S.) 122, 4 L. Ed. 529 (1819); *Dartmouth College v. Woodward*, 4 Wheat. (17 U. S.) 518, 4 L. Ed. 629 (1819). See generally, I WATSON, *THE CONSTITUTION* 781 (1910); I COOLEY, *CONSTITUTIONAL LIMITATIONS*, 8th ed., 556 et seq. (1927).

⁷ See 32 COL. L. REV. 476 (1932).

⁸ 32 COL. L. REV. 476 (1932); 33 MICH. L. REV. 1261 (1935); 85 UNIV. PA. L. REV. 114 (1936).

⁹ For a good discussion of police power of a state in connection with the contract

become a flexible prohibition against unreasonable impairments of substantive rights of the contracting parties. Thus it has been said that the importance of the clause has waned, and that it has become submerged in the due process clause of the Fourteenth Amendment.¹⁰ Be that as it may, during every period of financial depression the contract clause has been the reef upon which many legislative attempts to help the debtor class have floundered.¹¹ During the last depression the Supreme Court recognized that while an emergency does not suspend the constitutional prohibition it is an important factor in determining whether or not it has been violated.¹² Thus many recent statutes relieving the hardship of the mortgage debtors have been upheld.¹³ However, the North Carolina statute questioned in the principal case was held by the state supreme court not to be emergency legislation¹⁴ and so must be judged in the light of ordinary economic conditions.¹⁵ Even under such conditions there can be little criticism of the Supreme Court's decision. As was pointed out by the state supreme court, the act merely provides for judicial supervision of sales made and conducted by the mortgagee as trustee.¹⁶ This leaves untouched the alternative remedy of equitable foreclosure which has always been considered a fair and adequate remedy, especially in normal times.¹⁷ It is true that in many

clause, see Perlman, "Mortgage Deficiency Judgments during an Economic Depression," 20 VA. L. REV. 771 at 780 et seq. (1934); also Denny, "The Growth and Development of the Police Power of the State," 20 MICH. L. REV. 173 at 183 et seq. (1921).

¹⁰ 32 COL. L. REV. 476 at 478 (1932); 2 WILLOUGHBY, CONSTITUTIONAL LAW 1252, § 781 (1929).

¹¹ *Bronson v. Kinzie*, 1 How. (42 U. S.) 311, 11 L. Ed. 143 (1843); *McCracken v. Hayward*, 2 How. (43 U. S.) 608, 11 L. Ed. 397 (1844); *Gantly v. Ewing*, 3 How. (44 U. S.) 707, 11 L. Ed. 794 (1845); *Howard v. Bugbee*, 24 How. (65 U. S.) 461, 16 L. Ed. 753 (1860); *Edwards v. Kearzey*, 96 U. S. 595, 24 L. Ed. 793 (1877); *Barnitz v. Beverly*, 163 U. S. 118, 16 S. Ct. 1042 (1895); also 47 HARV. L. REV. 660 at 664 et seq. (1934); 82 UNIV. PA. L. REV. 261 at 266 (1934).

¹² *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U. S. 398 at 426, 54 S. Ct. 231 (1934). See also, rent cases: *Marcus Brown Holding Co. v. Feldman*, 256 U. S. 170, 41 S. Ct. 465 (1921); *Levy Leasing Co. v. Siegel*, 258 U. S. 242, 42 S. Ct. 289 (1922).

¹³ *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U. S. 398, 54 S. Ct. 231 (1934); *State ex rel. Lichtscheidl v. Moeller*, 189 Minn. 412, 249 N. W. 330 (1933); *State ex rel. Roth v. Waterfield*, 167 Okla. 209, 29 P. (2d) 24 (1933); *Wilson Banking Co. Liquidation Corp. v. Colvard*, 172 Miss. 804, 161 So. 123 (1935); *Craig v. Waggoner*, 218 Iowa 876, 256 N. W. 285 (1934); *Reiman v. Rawls*, 188 Ark. 983, 68 S. W. (2d) 470 (1934). For statute allowing fair value of land to be deducted from debt, see *Klinke v. Samuels*, 264 N. Y. 144, 190 N. E. 324 (1934).

¹⁴ *Richmond Mortgage & Loan Corp. v. Wachovia Bank & Trust Co.*, 210 N. C. 29, 185 S. E. 482 (1936).

¹⁵ "The fact that a statute does not purport to be emergency legislation should not be conclusive against it [being so held]. . . . The question should be . . . What is the purpose of the legislation?" Perlman, "Mortgage Deficiency Judgments During an Economic Depression," 20 VA. L. REV. 777 at 800 (1934).

¹⁶ *Richmond Mortgage & Loan Corp. v. Wachovia Bank & Trust Co.*, 210 N. C. 29, 185 S. E. 482 (1936).

¹⁷ Sale under power is not recognized by all states. *Ariz. Rev. Code* (1928), §

cases where the mortgage is small it would be more convenient to foreclose by power of sale; but mere inconvenience of remedy has not been considered impairment of contracts.¹⁸ Whether the statute would have been upheld if it had also applied to judicial sales is dubious. If the statute was limited to the period of the depression it might well be upheld.¹⁹ If, however, it was construed not to be so limited, in all probability it would be invalid. In the case of no outside fair bids it compels the mortgagee to bid in the property at its fair value or lose his security, thus paying him off in land rather than money as was contracted.²⁰

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2322; Idaho Code (1932), § 9-101; Ill. Rev. Stat. (1935), c. 95, ¶ 24; Iowa Code (1931), § 12372. An appraisal statute broader in scope has long been in effect in Connecticut. Conn. Rev. Stat. (1930), § 5083.

¹⁸ 2 WILLOUGHBY, CONSTITUTIONAL LAW 1222, § 748 (1929).

¹⁹ *Klinke v. Samuels*, 264 N. Y. 144, 190 N. E. 324 (1934); Perlman, "Mortgage Deficiency Judgments During an Economic Depression," 20 VA. L. REV. 771 at 797 (1934); 85 UNIV. PA. L. REV. 114 (1936). But see *Vanderbilt v. Brunton Piano Co.*, 111 N. J. L. 596, 169 A. 177, 89 A. L. R. 1080 at 1087 (1932), and *Sayre v. Duffy*, 13 N. J. Misc. 458, 179 A. 459 (1935); *Fidelity Union Trust Co. v. Bryant*, (N. J. L. 1936) 183 A. 825; *Beaver County Bldg. & Loan Assn. v. Winowich*, 323 Pa. 483, 187 A. 481 (1936), noted 35 MICH. L. REV. 830 (1937). For a résumé of recent cases, see 104 A. L. R. 375 at 385 (1936).

²⁰ *Vanderbilt v. Brunton Piano Co.*, 111 N. J. L. 596, 169 A. 177 (1932); *Fidelity Union Trust Co. v. Bryant*, (N. J. L. 1936) 183 A. 825.