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CONSTITUTIONAL LAW-MORTGAGE FORECLOSURE MORATORIUM STATUTES

CONSTITUTIONAL LAW — MORTGAGE FORECLOSURE MORATORIUM STATUTES*— The present economic crisis has been productive of much drastic legislation which is directed at the relief of the debtor class. Rather than let the depression run its course, legislative bodies have endeavored to alleviate some of the evils by so-called "emergency" statutes. A common type of such enactment is that designed to protect mortgagors against foreclosure and sale of their property. Some of these statutes provide that the period of redemption after foreclosure sale shall be extended for a definite period,[1] others that the courts may stay foreclosures,[2] and some provide that there shall be no foreclosure sales unless a certain fraction of the value of the property is bid at the sale.[3] Twenty-one States have passed laws which seek to effect some sort of mortgage foreclosure moratorium.[4] There has been serious doubt as to the validity of these statutes under the state and federal constitutions. A few state courts have passed on their validity.

In North Dakota the moratorium statute extended the period of redemption after sale from one year to two years. The Supreme Court of that State held this statute unconstitutional as to mortgages existing at the time the statute was passed; it held that the statute impaired the obligation of contracts and deprived the mortgagee of his property without due process of law.[5] In Minnesota, however, the Supreme

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[1] North Dakota.

[2] Michigan.

[3] Arkansas.

[4] In addition to those above they are: Arizona, California, Illinois, Iowa, Minnesota, Montana, Nebraska, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, South Dakota, Texas, Vermont, West Virginia, and Wisconsin.

[5] State ex rel. Cleveringa v. Klein, (N. D. 1933) 249 N. W. 118.

Court held valid a statute giving judges power to extend the period of redemption; it admitted that the enactment did " . . . temporarily impair obligations of contract . . . , " but justified it upon the ground that it embodied a legitimate exercise of the police power.[6] The Minnesota court said:

> "But our conclusion is that the Legislature, under the police power of the state, has the authority to enact laws to relieve a public emergency even though such laws temporarily impair obligations of contract, provided the impairment is no more than reasonably necessary. To that extent the police power is supreme." [7]

The Minnesota case considered the North Dakota case mentioned above and attempted to distinguish it on the ground that the North Dakota statute absolutely extended the redemption period, while the Minnesota statute left the whole matter to the discretion of the court. But the Court of Civil Appeals of Texas has held a statute very similar to that of Minnesota unconstitutional.[8] Likewise, a statute in Arkansas which does away with deficiency judgments by requiring that the mortgagee bid the amount of the loan plus interest and costs, or the fair value of the property if the value is more than the loan, was held unconstitutional by the Supreme Court of that State.[9] A district court in Oklahoma has, however, in an unreported case, upheld similar legis-

[6] Blaisdell et al. v. Home Bldg. & Loan Ass'n, (Minn. 1933) 249 N. W. 334. The Minnesota court in State ex rel. Lichtscheidl v. Moeller, Sheriff, (Minn. 1933) 249 N. W. 330, also upheld a statute giving the sheriff power to suspend foreclosure sales for a period not exceeding ninety days.

[7] Blaisdell v. Home Bldg. & Loan Ass'n, (Minn. 1933) 249 N. W. 334 at 338. At another point in the decision the court said, at p. 335: "Respondent concedes that under the police power the state may impair the obligations of contract. Courts have so held." The cases cited at this point do not sustain the position assumed by the court. Four of them, Perley, et al. v. State of North Carolina, 249 U. S. 510, 39 Sup. Ct. 357, 63 L. ed. 735 (1919); Miller, et al. v. Schoene, 276 U. S. 272, 48 Sup. Ct. 246, 72 L. ed. 568 (1928); State ex rel. Twin City Building and Investment Co. v. Houghton, 144 Minn. 1, 176 N. W. 159, 8 A. L. R. 585 (1920); State ex rel. Beery v. Houghton, 164 Minn. 146, 204 N. W. 569, 54 A. L. R. 1012 (1925), are due process cases which recognize that private rights must give way to the police power to a certain degree. The other case cited (Sligh v. Kirkwood, 237 U. S. 52, 35 Sup. Ct. 501, 59 L. ed. 835 (1915)) involves a conflict between the state police power and the commerce clause of the federal Constitution. The dissent in the instant case points out that, in a way, mortgage moratorium statutes accentuate one evil to remedy another. Persons and institutions who have previously loaned money on mortgage security are going to be hesitant to make advances in the future if their loans are rendered practically uncollectible by moratorium legislation.

[8] Life Ins. Co. of Virginia v. Sanders et al, (Tex. Civ. App. 1933) 62 S. W. (2d) 348.

[9] Adams v. Spillyards, (Ark. 1933) 61 S. W. (2d) 686.

lation,[10] as has a district court in Kansas.[11] Unfortunately, these decided cases assist only in raising the principal problems involved, and do not contribute materially to their solution.

The Constitutional Problems Involved

The attacks on this sort of legislation may be based on two grounds: (1) that it violates the Fourteenth Amendment of the federal Constitution and the corresponding sections of the state constitutions which prohibit the taking of property without due process of law, and (2) that it violates Article I, section 10 of the federal Constitution which forbids any State to pass a law which impairs the obligations of contract.

Probably there is little if any difference between these two contentions. Whatever impairs the obligation of a contract will also be a violation of the due process clause, and these statutes, being directed as they are at the remedy for enforcing the mortgagee's contract, will not deprive him of due process unless they impair the obligations of his contract. Both clauses forbid infringement of private rights. But as both clauses are interpreted, their prohibitions are not absolute but a matter of degree;[12] they only forbid arbitrary and unreasonable curtailment of private rights. The application of both clauses equally involves a weighing of considerations of fairness to the individual as against public needs. For our purpose, then, the question whether the creditor's contract rights have been impaired by the mortgage moratorium statute, and the question whether his vested rights have been taken away without due process of law, present substantially the same legal problem for decision.

One respect in which it commonly has been said that the creditor's contract rights or vested property interests could be impaired or taken away is in the matter of procedure for enforcement. Or, to use the conventional phrase, the matter of remedy. But it is futile to attempt to adopt such illusory distinctions of terms as a working rule. To say that only the remedy is affected in one case and that the right is affected in another is nothing more than an allocation of emphasis. In other words,

[10] Cochran v. Wilson et al., (D. C. Okla. 1933) 1 U. S. WEEKLY L. J. 457 (Aug. 8, 1933).

[11] Lingerfelt et al. v. Heironimus et al., (D. C. Kan. 1933), noted in 1 J. B. A. KAN. 306 (May 1933).

[12] The language of the contracts clause is more definite in form than that of the due process clause; it might be argued that the application of the former should be more rigid. Some early views and judicial utterances lend support to this position. In Planter's Bank v. Sharp et al., 6 How. (47 U. S.) 301 at 327, 12 L. ed. 447 (1848), the Court, speaking of the protection afforded to a contract by the contracts clause, said: "It is not, by the Constitution, to be impaired at all. This is not a question of degree or manner or cause, but of encroaching in any respect on its obligation, dispensing with

the remedy and the right shade into each other and are a part of the same thing, i.e. the contract or the vested interest. When it is said that the remedy may be altered, all that is meant is that up to a certain point private rights must give way to other considerations; that even though legislation is, in form, directed exclusively at the remedy or means of enforcement, that, too, is a matter of degree, and the line will be drawn at some indefinite point in view of the interests involved.

The problem, then, narrows itself to a consideration of whether or not these mortgage moratorium statutes affect the remedy so much that they contravene constitutional guarantees. It should be borne in mind in this connection that as the whole question is one of degree, and involves setting off private rights against the public interest, the public need for the legislation in view of an existing emergency may be of great importance, if not controlling, in determining whether or not any legislation is valid. In the early cases the courts were inclined to hold that the remedy to enforce a contract could be altered without impairing the obligation, but beginning with the case of *Sturges v. Crowninshield* [13] they have recognized that even the remedy cannot be altered without limit. In that case Chief Justice Marshall points out that the "distinction between the obligation of a contract, and the remedy given by the legislature to enforce that obligation . . . exists in the nature of things." And he goes on to say that the remedy may be modified without impairing the obligation. But this language was clarified and qualified by a subsequent decision in the Supreme Court. In *Walker v. Whitehead,* Justice Swayne, speaking for the Court, said:[14]

> "These propositions may be considered consequent axioms in our jurisprudence:
>
> "The laws which exist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it. This embraces alike those which affect its validity, construction, discharge, and enforcement;
>
> "Nothing is more material to the obligation of a contract than the means of its enforcement. The ideas of validity and remedy

any part of its force." But the modern authorities, as will be seen from the discussion which follows, do not support any such position.

[13] 4 Wheat. (17 U. S.) 122, 4 L. ed. 529 (1819).

[14] 16 Wall. (83 U. S.) 314 at 317, 21 L. ed. 357 (1873). To the same effect is Edwards v. Kearzey, 96 U. S. 595, 24 L. ed. 793 (1878), where it is said, at p. 601: "In Green v. Biddle, 8 Wheat. 1, this court said, touching the point here under consideration: 'It is no answer, that the acts of Kentucky now in question are regulations of the remedy, and not of the right to the lands. If these acts so change the nature and extent of existing remedies as materially to impair the rights and interests of the owner, they are just as much a violation of the compact as if they overturned his rights and interests.'" See also Oshkosh Waterworks Co. v. Oshkosh, 187 U. S. 437, 23 Sup. Ct. 168, 47 L. ed. 249 (1903).

are inseparable, and both are parts of the obligation which is guaranteed by the Constitution against impairment; . . .

"It [the contract] must be left with the same force and effect, including the substantial means of enforcement, which existed when it was made. The guarantee of the Constitution gives it protection to that extent."

Apt illustrations of the application of the principles laid down by Justice Swayne are to be found in the attitude of the courts toward statutes requiring the stay of executions on judgments for certain periods. These statutes have generally been declared invalid.[15] In *Jones v. Crittenden*,[16] the Court used the following language:

"Every one will agree, that a law, which should deny to all creditors the power of instituting the action of debt, covenant, assumpsit, or a bill in chancery, would invade the constitution; that a law which should limit the recovery of all debts to so short a period after its passage, that it would be impossible, according to the course of the courts, to obtain a judgment, would also be null and void; though such laws, ostensibly, bear only on the remedy, yet they do in reality annihilate the right. The law before us, it is conceded, does not go to the extent of either instance; yet it certainly diminishes the importance and the value of the right. It is difficult to conceive how a law could otherwise impair an existing right. . . ."

In a few cases these stay laws have been upheld where the purpose was not solely to further private rights by benefiting the debtor, but to promote public welfare through better administration of justice. Thus, laws staying executions against soldiers and sailors absent because of military service have been upheld.[17]

But, in general, to alter the remedy materially to the detriment of one of the parties impairs the obligations of the contract. In this respect the contracts clause offers a somewhat more difficult problem than the due process clause. By tracing the history of the contracts clause back as far as the framing of the Constitution, it becomes apparent that the very purpose of that clause was to prevent legislation designed to

[15] Jones v. Crittenden, 1 Car. L. Repos. 385, 6 Am. Dec. 531 (1814); State v. Carew, 13 Rich. Law. (S. C.) 498, 91 Am. Dec. 245 (1866); Burt v. Williams, 24 Ark. 91 (1863); Luter v. Hunter, 30 Tex. 689, 98 Am. Dec. 494 (1868). The slightly different Pennsylvania rule may be seen in Billmeyer v. Evans, 40 Pa. 324 (1861), and Lewis v. Lewis, 47 Pa. 127 (1864). See also Feller, "Moratory Legislation," 46 HARV. L. REV. 1061 (1933).

[16] 1 Car. L. Repos. 385 at 389, 6 Am. Dec. 531 (1814).

[17] McCormick v. Rusch, 15 Iowa 127, 83 Am. Dec. 401 (1863); Granger v. Luther, 42 S. D. 636, 176 N. W. 1019 (1920).

relieve debtors in time of financial stress. This was brought out very clearly by the Supreme Court of South Carolina when it said:[18]

"It may be that in great emergencies, in periods of general embarrassment, this extraordinary power of interfering for the relief of the citizen ought to have been reserved to the State Legislatures.

"It remains only to inquire whether this particular matter was not fully considered by the framers of the Constitution. When Luther Martin, a delegate from Maryland, returned to his constituents, he was opposed to several provisions of the Constitution which had been adopted, and thus expresses his dissatisfaction with the clause prohibiting the States from passing any law impairing the obligation of contracts: 'I considered, (said Mr. Martin) that there might be times of great public calamity and distress, and of such extensive scarcity of specie, as would render it the duty of the government, for the preservation of even the most valuable part of its citizens, in some measure to interfere in their favor by passing laws totally, or partially, stopping Courts of justice, or authorizing the debtor to pay by instalments, or by delivering up his property to his creditors at a valuation, etc. Such times have been and may again arrive. I therefore voted against depriving the states of this power.' (I Elliott's Deb. 376.). . . .

"The venerable Chancellor DeSaussure had walked with those who fought in the Revolution, and with those who framed the Federal Constitution. The following is his note to *Glaze v. Drayton*, (1 Des. R. 110): 'The Legislature, in consideration of the distressed state of the country after the war, had passed an Act prohibiting the immediate recovery of debts, and fixing certain periods for the payment of debts far beyond the periods fixed by the contract of the parties. These interferences with private contracts became very numerous with most of the State Legislatures, even after the distress arising from the war had ceased in a great degree. They produced distrust and irritation throughout the community to such an extent that new troubles were apprehended; and nothing contributed more to prepare the public mind for giving up a portion of the State sovereignty, and adopting an efficient national government, than these abuses of power by the State Legislatures.'"

In addition to the attitude of the framers of the Constitution, which might be adduced as opposed to debtor relief of this character, there

[18] State v. Carew, 13 Rich. Law (S. C.) 498 at 520, 91 Am. Dec. 245 (1866). The court in this decision states many other facts and reviews much contemporary opinion which leads to the conclusions established by the material quoted.

have been quite a number of judicial decisions which have held invalid legislation intended to benefit debtors. The Illinois legislature, to relieve conditions existing after the panic of 1837, passed a statute providing that the equitable estate of the mortgagor should not be extinguished for twelve months after sale under a decree in Chancery, and prohibiting any sale unless two-thirds of the amount at which the property was valued by three appraisers was bid. In the case of *Bronson v. Kinzie,* this statute was held unconstitutional by the United States Supreme Court as applied to pre-existing contracts.[19] The next year the Supreme Court had occasion to pass on this statute again with the same result.[20] It is submitted that while an emergency may have existed when these statutes were passed, and it may be conceded that an emergency existed or the statutes would not have been considered, yet these cases mean little as precedents upon which the courts today may work. Emergency legislation is necessarily of a temporary character, and while it is the province of the legislature to say that an emergency exists, and the courts can review the legislative declaration only as to reasonableness, the court always has the power to decide that the emergency is at an end.[21] As to the above decisions it is significant that the statutes in question did not declare that an emergency existed, and the courts might well hesitate to find such an emergency independent of legislative sanction and suggestion. Then, too, the seriousness of the emergency certainly weighs in the balance. In view of these points these earlier decisions cannot be conclusive as precedents controlling the validity of mortgage moratorium legislation.

There is still another variable factor to be considered in endeavoring to solve constitutional problems in the light of past decisions, i.e., the changing judicial attitude toward constitutional questions. There is no group of cases which more clearly indicates a liberal attitude on the part of the Supreme Court than the post World War rent-law cases. In general, the rent laws provided that a tenant should not be evicted from property occupied by him, even though his term was up, if he would pay a reasonable rental as fixed by impartial commissioners. These statutes were intended to meet the housing shortage prevailing in New York and Washington, and were passed to prevent unscrupulous landlords from taking advantage of the situation. The

[19] 1 How. (42 U. S.) 311, 11 L. ed. 143 (1843).

[20] McCracken v. Hayword, 2 How. (43 U. S.) 608, 11 L. ed. 397 (1844). To the same effect are Bradley v. Lightcap, 195 U. S. 1, 24 Sup. Ct. 748, 49 L. ed. 65 (1904); Barnitz v. Beverley, 163 U. S. 118, 16 Sup. Ct. 1042, 41 L. ed. 93 (1896); Howard v. Bugbee, 24 How. (65 U. S.) 461, 16 L. ed. 753 (1861).

[21] Blaisdell et al. v. Home Bldg. & Loan Ass'n, (Minn. 1933) 249 N. W. 334; Block v. Hirsh, 256 U. S. 135, 41 Sup. Ct. 458, 65 L. ed. 865 (1920), where Justice Holmes says, at p. 157: "A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change."

Supreme Court of the United States held these statutes constitutional by a five to four vote in two cases.[22] The New York Court of Appeals sustained the statute of that State in three decisions.[23] The case of *Block v. Hirsh* involved only the due process clause, but in *Marcus Brown & Co. v. Feldman*[24] the Supreme Court was confronted with the contracts clause and disposed of it in the following language:

> "The chief objections to these acts have been dealt with in *Block v. Hirsh.* In the present case more emphasis is laid upon the impairment of the obligation of the contract of the lessees to surrender possession and of the new lease which was to have gone into effect upon October 1, last year. But contracts are made subject to this exercise of the power of the State when otherwise justified, as we have held this to be."

As may be seen from this quotation, the same considerations contribute to solving problems under both the contracts clause and the due process clause, and this case brings out better than any other the fact that the contracts clause is now interpreted in the same flexible sense as other clauses of the Constitution. Judge Pound, of the New York Court of Appeals, in the case of *People v. LaFetra*[25] goes into the matter more fully:

> "But constitutional limitations on the power of government are self-imposed restrictions upon the will of the people and qualify the despotism of the majority. Such limitations do not yield to strong opinions merely. They are incorporated in the fundamental law to restrict arbitrary legislative power. They forbid government to take from the owner without compensation whatever private right to control the use of his property the many may earnestly desire to deprive him of. Isolated expressions of the courts may suggest that whatever the legislature enacts on grounds of public policy should be sustained, but the courts may not uphold the exercise of arbitrary power. What is arbitrary and what is beneficent must be decided by common sense applied to a concrete set of facts. To uphold private contracts and to enforce their obligation is a matter of high public consequence, but the legislature has a wide latitude in doing what seems in accordance with sound judgment and reasonableness in order to bring about

[22] Block v. Hirsh, 256 U. S. 135, 41 Sup. Ct. 458, 65 L. ed. 865 (1920); Marcus Brown Co. v. Feldman, 256 U. S. 170, 41 Sup. Ct. 465, 65 L. ed. 877 (1921).

[23] People ex rel. Durham Realty Corp. v. La Fetra, 230 N. Y. 429, 130 N. E. 601 (1921); Levy Leasing Co. v. Siegel, 230 N. Y. 634, 130 N. E. 923 (1921); Guttag v. Shatzkin, 230 N. Y. 647, 130 N. E. 929 (1921).

[24] 256 U. S. 170 at 198, 41 Sup. Ct. 465, 65 L. ed. 877 (1921).

[25] 230 N. Y. 429 at 451, 130 N. E. 601 (1921).

a great good to a large class of citizens, even at some sacrifice of private rights."

This way of looking at the matter reduces the question to one of fact as to the consequences of the legislation in question. It is submitted that this faces the problem squarely, discarding arbitrary governmental interference, and at the same time deciding what is beneficent by the rule of common sense.

While the rent-law cases are very important in that they go further than any other cases to sustain legislation which cuts across the contracts clause, there are important differences to be noted between the statutes under which they were decided and the various types of mortgage moratorium statutes. In the first place, the rent laws declared that the business of letting houses had become "affected with the public interest." This places the emphasis on the direct public benefit to be derived from the acts, and it may be argued that rent contracts were only incidentally impaired. The mortgage statutes, on the other hand, are designed to benefit directly the debtor class, and it may be said that the public benefit is incidental. This distinction was hinted at by the North Dakota court in holding its mortgage statute void.[26] In addition, the rent laws dealt with future rents and did not interfere with previously made contracts except in cases where the tenant had contracted to leave when his term was up. The rent-law cases went further than any previous cases in liberally interpreting the Constitution so that emergency legislation might be brought within it; and while Justice Holmes, in a subsequent decision, said that they went "to the verge of the law," [27] there is reason to believe that the "verge" might now be still further extended. This is true, especially in view of the fact that much of the recent federal and state legislation is of the same extreme sort.

It is possible, however, that a distinction must be made between types of moratorium legislation. Those extreme laws which absolutely extend the redemption period might well be declared invalid, while those which leave the whole question of leniency to the discretion of a court might be sustained. In view of the fact that a court of equity possesses some inherent power to stay foreclosure sales and give relief to debtors in certain instances, certainly statutes which go no further than this may be upheld. It may be said that a proper judicial discretion as to time and conditions of sale is calculated to protect not only the debtor but the creditor as well, and that its exercise will not take from the creditor anything substantial. The word "impair" means to

[26] State ex rel. Cleveringa v. Klein, (N. D. 1933) 249 N. W. 118. See also Coppage v. Kansas, 236 U. S. 1, 35 Sup. Ct. 240, 59 L. ed. 441 (1915).

[27] Pennsylvania Coal Co. v. Mahon, 260 U. S. 393, 43 Sup. Ct. 158, 67 L. ed. 322 (1922).

"cut down" or "diminish," and if it can be held that these statutes do not operate to the detriment of the mortgagee, then it can be argued that the contract obligation is not in fact impaired.[28] It is common knowledge that the number of foreclosures has dropped off greatly due to the decrease in property values. The holder of the mortgage is no longer anxious to bid in property at a figure below the amount of the loan, and take a worthless deficiency judgment. Perhaps it is to the creditor's advantage to wait and give the debtor an opportunity to pay off the loan if economic conditions become better. It is safe to say that most mortgage holders today would be content if they were assured of interest on their loans. They should be protected to this extent in any event. And this protection could be assured by proper judicial control over the time and conditions of sale.

D. P. K.

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[28] Brearley School v. Ward, 201 N. Y. 358, 94 N. E. 1001, 40 L. R. A. (N. S.) 1215 (1912).