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CONSTITUTIONAL LAW--IMPAIRMENT OF OBLIGATION OF CONTRACT--MORTGAGE MORATORIUM--DETERMINATION OF THE EXISTENCE OF AN EMERGENCY

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CONSTITUTIONAL LAW—IMPAIRMENT OF OBLIGATION OF CONTRACT—MORTGAGE MORATORIUM—DETERMINATION OF THE EXISTENCE OF AN EMERGENCY—In 1943 the New York State Legislature extended its moratorium legislation for another year, thereby continuing the suspension of mortgage foreclosure proceedings on real property due to default in payments on principal.[1] The legislature declared that an emergency still existed and therefore the continuance of legislative action, first taken in 1933, was justified.[2] The law made payment of interest, taxes, insurance and amortization charges a prerequisite to suspension of foreclosure.[3] Appellant brought an action to foreclose a mortgage on appellee's property for the non-payment of principal, contending that the suspension of foreclosure proceedings resulted in an impairment of the obligation of contract contrary to Article 1, Section 10 of the federal Constitution.[4] Previous cases [5] sustaining this type of legislation were distin-

[1] N.Y. Laws (1943) c. 93. Moratorium legislation was first enacted in New York in 1933. Year by year (except in 1941 when an extension for two years was made) the statute has been renewed. Yearly extensions were again provided for in 1944 and 1945.

[2] While the 1943 statute, cited supra, note 1, embodies a legislative declaration that the emergency still exists, the legislative report [New York Legislative Doc. No. 45 (1942)], recommending re-enactment of the existing law was based on the ground that the sudden termination of moratorium legislation "might well result in an emergency more acute than that which the original legislation was intended to alleviate."

[3] In 1944 [N.Y. Laws (1944) c. 562] the amortization charges were increased to 2 per cent and then increased to 3 per cent in 1945 [N.Y. Laws (1945) c. 378]. (In 1943 the rate was 1 per cent.)

[4] Art. 1, Sec. 10 states, "No state shall . . . pass any bill . . . impairing obligation of contracts. . . ."

[5] Maguire & Co. v. Lent & Lent, 277 N.Y. 694, 14 N.E. (2d) 629 (1938);

guished on the ground that whereas an emergency did exist when the law was first enacted, it no longer existed at the time the present statute was enacted or at least did not exist when this action was brought.[6] The trial court [7] and the New York Court of Appeals [8] sustained the legislative findings and upheld the statute and the case came to the United States Supreme Court on appeal. *Held*, whether an emergency exists justifying the exercise of the police power of the state is a matter for legislative determination. The court will not substitute its judgment for the considered determination of the legislature. And justification for the 1943 enactment is not negatived because the factors that induced and supported the 1943 law were different from those which resulted in the passage of the 1933 act. *East New York Savings Bank v. Hahn*, (U.S. 1946) 66 S. Ct. 69.

In *Home Building and Loan Association v. Blaisdell*,[9] the United States Supreme Court upheld the Minnesota moratorium law [10] and rested its decision on the fact that the then existing emergency justified the exercise of the police power of the state for the protection of the vital interests of the community.[11]

Klinke v. Samuels, 264 N.Y. 144, 190 N.E. 324 (1934). This case also involved the constitutionality of a state statute limiting recovery on deficiency judgments after foreclosure to the difference between the fair value of the mortgaged property and the outstanding indebtedness. This provision was also upheld.

[6] The trial court, aside from finding that the legislation was justified in 1943, took cognizance of plaintiff's allegation that the emergency at least had ended by the time the action was instituted by finding "that an emergency still existed at the time this action was brought." The United States Supreme Court, however, did not allude to this allegation. In the Blaisdell case the court, speaking about the fact that the law had a free time limit, said, "that period may be reduced by the order of the court under the statute, in case of a change in circumstances, and the operation of the statute itself could not validly outlast the emergency. . . ." Id. at 447. And again, "It is always open to judicial inquiry whether the exigency still exists. . . ." Id. at 442. [To the same effect, see Chastleton v. Sinclair, 264 U.S. 543, 44 S. Ct. 405 (1923).] However, it does seem that once the court finds that the legislation was justified, the statute should continue in effect for the full period fixed, otherwise the court will be interpreting the statute to read that such legislation shall be valid only until it is determined that an emergency no longer exists. Aside from the matter of interpretation it seems that the reliance and expectancy created by passage of the statute should serve to prevent judicial interference for the time specified. As a practical matter, since these statutes are of short duration, it is unlikely that if conditions were such as to justify legislative action they would change before the statute expired.

[7] 182 Misc. 863, 51 N.Y.S. (2d) 496 (1944).

[8] 293 N.Y. 622, 59 N.E. (2d) 625 (1944).

[9] 290 U.S. 398, 54 S. Ct. 231 (1934).

[10] For a description of the events leading to the passage of the Minnesota moratorium law, see Prosser, "Minnesota Mortgage Moratorium," 7 So. CAL. L. REV. 353 (1934). The law was modelled after the New York Emergency Housing Act of 1920, upheld by the court in Marcus Brown Holding Co., Inc., v. Feldman, 256 U.S. 170, 41 S. Ct. 465 (1921), and Levy Leasing Co. v. Siegel, 258 U.S. 242, 42 S. Ct. 289 (1922). Yet there was apprehension about the value of these precedents inasmuch as the court in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 at 416, 43 S. Ct. 158 (1922), in talking about these cases said, "they went to the very verge of the law."

[11] The gist of Chief Justice Hughes' approach is that the reservation of the

That decision foreshadowed the present controversy for it was inevitable that the constitutionality of such subsequent enactments would be attacked on the ground that the emergency which justified legislative action no longer existed. Conceivably, when faced with this issue, the court could have taken the position that the question as to whether an emergency does exist is (1) a political question and therefore for legislative determination and not subject to judicial review; [12] (2) solely a matter for judicial determination with the legislative declaration of evidentiary value in the process of the court's determination; [13] or (3) a legislative function subject only to the condition that such body give adequate consideration to the problems.[14] Dictum in the *Blaisdell* case (and the attitude of the court generally throughout its history) seemed to rule out the possibility of exclusive legislative control and pointed toward judicial determination.[15] The case of *Chastleton Corporation v. Sinclair*, which the court dismissed summarily in the principal case, where the constitutionality of the District of Columbia Rent Control Act was contested on the same ground, seemed to substantiate this impression.[16] And some state courts, relying heavily upon the

reasonable exercise of the protective power of the state is read into all contracts. He also suggests that there was not an actual impairment of a contract obligation but merely a change in remedy.

[12] It has been suggested that the court could have avoided declaring unconstitutional the many laws relating to broad social and economic policies by adopting the view that they were "political" questions. See Finkelstein, "Judicial Self-Limitation," 37 HARV. L. REV. 338 (1923); Weston, "Political Question," 38 HARV. L. REV. 296 (1925); Barnett, "Constitutional Interpretation and Judicial Self Restraint," 39 MICH. L. REV. 213 at 229 (1940). However, this would be an unwarranted abdication of judicial power and a renunciation of a basic premise of our federal system.

[13] For a consideration of this approach to legislation, see "Consideration of Facts in 'Due Process' Cases," 30 COL. L. REV. 360 (1930); "The Presumption of Constitutionality Reconsidered," 36 COL. L. REV. 283 (1936); Biklé, "Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action," 38 HARV. L. REV. 6 (1924).

[14] For an analysis of the approach of the present court to this entire problem, see Barnett, "Constitutional Interpretation and Judicial Self-Restraint," 39 MICH. L. REV. 213 (1940); White, "New Theories of Constitutional Construction," 92 UNIV. PA. L. REV. 238 (1944).

[15] "It is always open to judicial inquiry whether the exigency still exists upon which the continued operation of the law depends." Home Building & Loan Assoc. v. Blaisdell, 290 U.S. 398 at 442, 54 S. Ct. 231 (1934).

[16] 264 U.S. 543, 44 S. Ct. 405 (1923). The court dismissed summarily the contention that the case was precedent for the proposition that the existence of an emergency was a matter for judicial determination. It said, "The court dealt with quite a different situation. The differentiating factors are too glaring to require exposition." The original Rent Control Act for the District of Columbia was passed in October, 1919. In May of 1922 it was re-enacted (the act of 1919 had previously been extended to May, 1922). A bill in equity was brought by complainant to restrain the enforcement of an order of the rent commission cutting down the rents in the Chastleton Apartments on the ground "that the emergency that justified interference with existing private rights in 1919 had come to an end. . . ." Though there was a question as to whether the order was valid as to the corporation, the court did see fit to consider the constitutional question involved. At the close of its decision the

dictum in the *Blaisdell* case, when this issue was raised before them, invalidated re-enacted moratorium legislation after taking judicial notice of the termination of the emergency. But in the principal case the Supreme Court refused to substitute its judgment for the reasoned deliberations of the New York State Legislature. The determination of the existence of an emergency, involving as it does a consideration of complex economic and social conditions, logically belongs to the policy making branch of our government.[18] The power of the court should be exercised in cases of this kind only to restrain arbitrary and unreasonable declarations of policy. The court in the principal case strongly emphasized the fact that the 1943 statute was enacted upon recommendations arising out of exhaustive studies made by both a joint legislative committee of the legislature and the governor of the state,[19] Justice Frankfurter quotes with emphasis the finding of the joint legislative committee that "the sudden termination of the legislation which has dammed up normal liquidation of these mortgages for more than eight years might well result in an emergency more acute than that which the original legislation was intended to alleviate." [20]

court declares, "if the question were only whether the statute is in force today we should be compelled to say that the law has ceased to operate. Here, however, it is material to know the condition of Washington at different dates in the past. Obviously, the facts should be accurately ascertained and carefully weighed, and this can be done more conveniently in the supreme court of this district than here." It then sent the case back to be retried. It would have been helpful if the court in the principal case had pointed out what the differentiating factors were.

[17] Pouquette v. O'Brien, 55 Ariz. 248, 100 P. (2d) 979 (1940). First Trust Co. of Lincoln v. Smith, 134 Neb. 84, 277 N.W. 762 (1938); First Trust Joint Stock Land Bank of Chicago v. Arp, 225 Iowa 1331, 283 N.W. 441 (1939). The court said, "In the instant case the record shows, without controversy, that practically all of the depressed conditions existing in 1933, do not exist at this time, and the court can and does take judicial notice of such fact."

See generally: 37 MICH. L. REV. 1240 (1939); Skilton, "Mortgage Moratoria Since 1933," 92 UNIV. PA. L. REV. 53 (1943).

[18] In the principal case at 71, the court remarks about appellant's contention that on the basis of expert opinion, documentary evidence and economic arguments the court should take judicial notice that the emergency was over, "We are invited to assess not only the range and incidence of what are claimed to be determining economic conditions insofar as they affect the mortgage market—bank deposits and war savings bonds; increased payrolls and store sales; available mortgage money and rise in real estate values—but also to resolve controversy as to the causes and continuity of such improvements, namely the effect of the war and of the termination, and similar matters. Merely to enumerate the elements that have to be considered shows that the place for determining their weight and their significance is the legislature not the judiciary."

[19] The New York State Legislature established a joint legislative committee to review the mortgage situation in New York. This committee submitted a report contained in New York Legislative Doc. No. 45 (1942), recommending extension of the moratorium legislation. The governor of New York also urged such legislation in New York Legislative Doc. No. 1, p. 9 (1943).

[20] The court quoted, at 71, from New York Legislative Doc. No. 45, p. 25 (1942). Justice Frankfurter, principal case at 71, says, "The whole course of the New York moratorium legislation shows the empiric process of legislation at its

Just how far a legislature has to go in the way of analysis and study before it can be free of judicial interference is not indicated, but when dealing with a complex problem it does seem that the mere pooling of common legislative knowledge should not be sufficient. It may also be that the degree of "judicial scrutiny" may depend upon the type of legislation involved.[21] Granting that the legislative determination of the existence of an emergency can be supported, there is still the question as to whether the remedy adopted is reasonable and appropriate.[22] Justice Frankfurter stressed that here there was no "studied indifference to the rights of the creditor." Clearly the rights of the creditor should be protected; yet here, again, it seems that the legislation should be upheld unless the inappropriateness of the remedy is clearly established. However, the principal case is significant, not so much because of any criteria established by the court to guide legislative policy, but rather because it further illustrates a continued trend of judicial self-limitation with a consequent enlargement of the area of legislative supremacy of both the state and federal governments.[23] A compelling force in this approach is the reasoned respect and deference for a co-ordinate branch of the government and the recognition that in the area where value judgments predominate it is an unwarranted judicial intrusion for the court to impose its will upon the legislature.[24] Though not an issue in the principal case, it does not seem inappropriate to give some thought to the basic

fairest: frequent reconsideration, intensive study of the consequences of what has been done, readjustment to changing conditions and safeguarding the future on the basis of responsible forecasts."

[21] Justice Frankfurter, principal case at 70, states that "once we are in this domain of the reserve power of a State we must respect the 'wide discretion on the part of the legislature in determining what is and what is not necessary.'" That the extent of judicial scrutiny might depend upon the type of legislation with which the court is faced was also suggested in United States v. Carolene Products Co., 304 U.S. 144, 58 S. Ct. 778 (1938). See particularly, footnote 4 to court's opinion, id. at 152.

[22] Home Building & Loan Assoc. v. Blaisdell, 290 U.S. 398 at 445, 54 S. Ct. 231 (1934). ". . . relief . . . in order not to contravene the constitutional provision could only be of a character appropriate to that emergency, and could be granted only upon reasonable conditions."

Cases holding that such requirement of reasonable conditions was not met: Worthen Co. v. Kavanaugh, 295 U.S. 56, 55 S. Ct. 555 (1935), where statute made extreme dilatory tactics possible; Worthen Co. v. Thomas, 292 U.S. 426, 54 S. Ct. 816 (1934), involving statute exempting the proceeds of life insurance policy from payment of prior debts. For cases holding that such requirement was met, see Richmond Mortgage & Loan Corp. v. Wachovia Bank, 300 U.S. 124, 57 S. Ct. 338 (1937), limiting deficiency judgment to difference between fair value of property and outstanding indebtedness; Honeyman v. Jacobs, 306 U.S. 539, 59 S. Ct. 702 (1939); Veix v. Sixth Ward Building & Loan Association, 310 U.S. 32, 60 S. Ct. 792 (1940), involving a modification of procedure for withdrawal of value of shares from Building and Loan Associations; Faitoute Co. v. Asbury Park, 316 U.S. 502, 62 S. Ct. 1129 (1942), where provision for composition of creditors of bonded debt of city of Asbury was held valid.

[23] See note 14, supra.

[24] Missouri, Kansas & Texas Railway Co. of Texas v. May, 194 U.S. 267, 24 S. Ct. 638 (1904); Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134, 60 S. Ct. 437 (1940).

approach to the problem of moratorium legislation. Emphasis, to date, has been placed upon the emergency nature of the problem. However, if, despite the war, when real estate values soared and personal incomes increased appreciably, there still remains a necessity for such legislation, it may be that the general characteristics of the mortgage situation and the expectancy created by twelve years of legislative action demand a basic reformation of the contracts involved. Emergency interference with private contract rights was based on the assertion that all contracts contain an implied condition subjecting them to the police power of the state. If this is the justification, then it should follow that whether the legislation is temporary or permanent its constitutionality should not be affected, once it is determined that the paramount interest of the state is at stake.[25]

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[25] Veix v. Sixth Ward Building & Loan Association, 310 U.S. 32, 60 S. Ct. 792 (1940); Gelfert v. National City Bank, 313 U.S. 221, 61 S. Ct. 898 (1941); 47 YALE L. J. 124 (1937); 37 MICH. L. REV. 1240 (1939); Skilton, "Mortgage Moratoria Since 1933," 92 UNIV. PA. L. REV. 53 (1943).