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Mortgage Foreclosure--Deficiency Judgment (National City Bank of New York v. Gelfert, 284 N.Y. 13 (1940))

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in the board to devise punitive measures.[9] The affirmative action of the board is limited to an adjustment between employer and employee to effectuate the policies of the National Labor Relations Act. The board is not empowered to rectify losses sustained by governmental agencies in connection with work relief,[10] for if such function had been intended, the legislature would have expressly conferred it upon the board. The board's orders must be addressed to employees and employers for the purpose of adjusting their conflicting interests and compensating employees [11] for what they have lost through discriminatory discharge.

Although the courts have maintained that the policy of the Act is, essentially, remedial and that orders of the board must also be remedial in nature, we are still faced with the actuality that the employer is penalized when he is ordered to pay back pay to a wrongfully discharged employee for his period of unemployment for he is compelled to pay something for which he received no benefits. However, had the legislature been more explicit and precise in defining the affirmative action that the board should take, then the courts would not have found it necessary to classify orders of the board as punitive or remedial.

J. R. D.

MORTGAGE FORECLOSURE—DEFICIENCY JUDGMENT.—Defendant's testator executed and delivered to plaintiff a real property mortgage on December 29, 1932. Having defaulted in the terms of the mortgage, this action was brought by plaintiff to foreclose and satisfy its lien. Upon the sale of the property a deficiency owing plaintiff-mortgagee, amounting to $16,162.12, was found by the referee. By virtue of the new amendment to Section 1083 of the Civil Practice Act

N. L. R. B. is to recognize and furnish means of enforcing the rights of labor to deal on an equal footing with employers).

[9] N. L. R. B. v. Fansteel Metallurgical Corp., 306 U. S. 240, 59 Sup. Ct. 490 (1939) (the statutory authority of the N. L. R. B. to require "affirmative action" to "effectuate the policies of the Act" is broad, but not unlimited, is remedial, but not punitive, and is to be exercised in aid of the board's authority to restrain violations and avoid or remove the consequences of violations which may tend to thwart the purposes of the Act. The Court held it was beyond the board's power to order reinstatement of employees who participated in criminal acts, for that would not effectuate the policies of the Act). *Contra:* N. L. R. B. v. Carlisle Co., 99 F. (2d) 533 (C. C. A. 9th, 1938), *cert. denied,* 306 U. S. 646, 59 Sup. Ct. 586 (1939). The purpose of this section was not to reward employees, but to punish employers who were guilty of unfair labor practices, therefore, the Court should not construe provisions on the basis of what might be considered just between employer and employees, but should endeavor to ascertain the intent of Congress. International Ass'n v. N. L. R. B., 110 F. (2d) 29 (App. D. C. 1939), *aff'd,* 311 U. S. 72, 61 Sup. Ct. 83 (1940).

[10] See note 5, *supra.*

[11] Note (1939) 48 YALE L. J. 1265.

enacted in 1938, the Appellate Division ruled that since no motion for a deficiency judgment had been made as prescribed therein, the order of the Special Term should be modified by striking therefrom the direction for entry of a deficiency judgment. *Held,* reversed. Section 1083 of the Civil Practice Act as amended by Chapter 510 of the Laws of 1938 cannot be constitutionally applied to mortgage contracts previously made. As to such contracts the former Section 1083 is in force and effect. *National City Bank of New York* v. *Gelfert,* 284 N. Y. 13, 29 N. E. (2d) 449 (1940).

The new enactment[1] neither invokes the general welfare nor sets up conditions pertinent to emergency relief. It, therefore, cannot be deemed an act of police power passed by the legislature and applicable to a given crisis. Even if this were true the results of this case would be undisturbed inasmuch as the deficiency judgment act,[2] defining the limits of the emergency, makes it applicable only to mortgages executed prior to the first day of July, 1932. We note that defendant executed his mortgage to plaintiff on December 29, 1932.[3] Section 1083, prior to amendment, has been interpreted to mean: that the measure of a deficiency judgment was the residue of the debt remaining unsatisfied after the application of the proceeds of a judicial sale of the mortgaged premises pursuant to the directions contained in the judgment of foreclosure and sale.[4] This meant that the mortgagor was entitled only to the net proceeds after deduction of liens or taxes, etc., and burdened with resultant liability for any deficiency.[5] In view of this construction the estate of the deceased mortgagor is liable for any deficiency which the plaintiff is entitled to recover. The change brought about by the amendment necessarily involves the question of the right of the legislature to modify or change existing remedies without impairing the obligation of contracts as guaranteed by the Federal Constitution.[7] It is well settled that the legislature may modify existing remedies or prescribe new modes of procedure without impairing the obligation of contracts, providing a substantial remedy is substituted by which the parties may without embarrassment and undue delay enforce their rights under the contract.[8] However, under the remedy as substituted by the amended Section 1083 of the Civil Practice Act it is apparent that the legislature not only modified and changed the remedy left to the parties of the contract, but it so

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[1] N. Y. Civ. Prac. Act § 1083 ("... If no motion for a deficiency judgment shall be made as herein prescribed the proceeds of the sale regardless of amount shall be deemed to be in full satisfaction of the mortgage debt ...").

[2] N. Y. Civ. Prac. Act § 1083-a.

[3] Chase v. Harvey, 253 App. Div. 15, 1 N. Y. S. (2d) 541 (3d Dept. 1937); Syracuse Trust Co. v. Corey, 167 Misc. 506, 4 N. Y. S. (2d) 349 (1938).

[4] Morris v. Morange, 38 N. Y. 172 (1868); Frank v. Davis, 135 N. Y. 275, 31 N. E. 1100 (1892).

[5] Marshall v. Davis, 78 N. Y. 414 (1879).

[6] See note 1, *supra.*

[7] U. S. Const. Art. I, § 10.

[8] Osh Kosh Waterworks v. Osh Kosh, 187 U. S. 437, 23 Sup. Ct. 234 (1903).

impaired their rights existing under the contract at the time of execution thereof that to hold it applicable would clearly be a violation of the Constitution.[9] The remedy, to be applied retroactively, must be substantial substitution for the rights acquired by each party at the time the obligations are incurred.

E. R. D.

NATIONAL LABOR RELATIONS ACT—LIMITING EMPLOYER'S FREEDOM OF SPEECH—BOARD'S CONFORMITY TO JUDICIAL STANDARDS.—Employees found written notices in their pay envelopes stating that as the plant was always going to operate as an "open shop" they need not join a union, and that the defendant company would deal individually with any employees so desiring.[1] Relations between defendant and employees became strained, and a strike ensued. A company union was fostered by the defendant who signed a contract with it.[2] Findings of fact made by a trial examiner were reversed by the National Labor Relations Board. The Board found the company guilty of unfair labor practices and ordered it to rehire the strikers, to cease giving effect to the contract with the company-dominated union and to post proper notices which would proclaim that defendant had violated the law. The entire order was affirmed in the Circuit Court of Appeals.[3] On appeal, *held, certiorari* denied. *N. L. R. B.* v. *Elkland Leather Co., Inc.*, — U. S. —, 61 Sup. Ct. 170 (1940).

The defendant contended that the constitutional guaranty of free speech protected its "open shop" statement and, if the National Labor Relations Act sought to embrace that writing as an unfair labor practice,[4] the Act was unconstitutional as contrary to the First Amendment.[5] The right of free speech is a qualified, not an absolute right.[6] Employees have a right to organize and to bargain collec-

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[9] Barnitz v. Beverly, 163 U. S. 118, 16 Sup. Ct. 1042 (1896).

[1] "You are under no obligation to join any union and cannot be forced to do so as this tannery will always operate as an open shop. This company will deal individually with any employee that wishes to do so at any time."

[2] Elkland Leather Workers Association, Inc.

[3] 114 F. (2d) 221 (C. C. A. 3d, 1940).

[4] 49 STAT. 452, 29 U. S. C. A. § 158 (1935) (It shall be unfair labor practice for an employer (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section seven . . .). 49 STAT. 452, 29 U. S. C. A. § 157 (1935) ("Employees shall have the right to self-organization, . . . to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining. . . .").

[5] U. S. CONST. AMEND. I ("Congress shall make no law abridging freedom of speech. . . .").

[6] Robertson v. Baldwin, 165 U. S. 281, 17 Sup. Ct. 326 (1897); United States v. Toledo Newspaper Co., 247 U. S. 402, 38 Sup. Ct. 560 (1918); Frowerke v. United States, 249 U. S. 204, 39 Sup. Ct. 249 (1919).