St. John's Law Review

Volume 12
Number 2 *Volume 12, April 1938, Number 2*

Article 13

Constitutional Law--Legislative Powers--Impairment of the Obligation of Contracts--Deficiency Judgments--Sections 1083-a and 1083-b Civil Practice Act Construed (Honeyman v. Hanan, 275 N.Y. 382 (1937))

St. John's Law Review

voked, however, to save a subscription where the request or invitation that the promisee go on with his work can be implied from the subscription agreement.[16]

The old concept which regarded a contract as creating a strictly personal obligation and was, therefore, not assignable, has long been abandoned by common law [17] and by statute.[18] The rule at present is that any property right, not necessarily personal is assignable.

H. P. M.

CONSTITUTIONAL LAW—LEGISLATIVE POWERS—IMPAIRMENT OF THE OBLIGATION OF CONTRACTS—DEFICIENCY JUDGMENTS—SECTIONS 1083-A AND 1083-B CIVIL PRACTICE ACT CONSTRUED.—Plaintiff was the assignee of a bond and mortgage executed prior to the mortgage moratorium legislation of 1933.[1] On September 22, 1933, a foreclosure action was commenced and after the sale of the property plaintiff duly made a motion for the resulting deficiency. The trial court denied the motion [2] whereupon the plaintiff discontinued the foreclosure action as against the defendant and brought the present action on the bond for the deficiency. The dismissal of this complaint by the lower court on the ground that it failed to state a cause of action [3] was affirmed by the Appellate Division and the Court of Appeals.[4] Upon certiorari to the Supreme Court of the United States, the appellant argued that Sections 1083-a and 1083-b of the Civil Practice Act were unconstitutional as they impaired the obliga-

---

WHITNEY, *op. cit. supra,* at p. 106. "Certain at least it is that we have adopted the doctrine of promissory estoppel as the equivalent of consideration in connection with our law of charitable subscriptions," per Cardozo, J., in Allegheny College v. National Chautaugua County Bank, 246 N. Y. 369 at p. 374, 159 N. E. 173.

[16] Instant case.

[17] Hopkins v. Upshur, 20 Tex. 89 (1857) (charitable subscription case).

[18] PERS. PROP. LAW § 41; Rosenthal Paper Box Co. v. National Folding B. & P. Co., 226 N. Y. 313 (1919); Oconto Chamber of Commerce Co. v. Gradwell, 175 Wis. 447, 185 N. W. 544 (1921). The duties created by such a contract are non-assignable. Langel v. Betz, 250 N. Y. 159, 164 N. E. 890 (1928); Smith v. Morin Bros., Inc., 233 App. Div. 562, 253 N. Y. Supp. 368 (4th Dept. 1931).

[1] Laws of 1933, c. 793 and 794, in effect Aug. 28, 1933.

[2] CIV. PRAC. ACT § 1083-a provides that a deficiency judgment may not be obtained where the market value of the mortgaged premises exceeds the amount of the judgment plus other liens, encumbrances and expenses of the action.

[3] CIV. PRAC. ACT § 1083-a provides an exclusive manner for the granting of a deficiency judgment and it must be granted in the foreclosure action.

[4] 271 N. Y. 562, 3 N. E. (2d) 186 (1936), *aff'd,* on reargument 271 N. Y. 662, 3 N. E. (2d) 473 (1936) (where the remittitur was amended to state that "a Federal question was presented and necessarily passed upon" in order to facilitate an appeal to the Supreme Court).

tions of contracts.[5] The Supreme Court refused to review the decision but vacated the judgment and remanded the cause for further proceedings.[6] Upon the rehearing, *held,* Sections 1083-a and 1083-b of the Civil Practice Act are constitutional and do not violate the inhibition of the Federal Constitution and therefore plaintiff's action on the bond for the deficiency was properly dismissed. *Honeyman* v. *Hanan,* 275 N. Y. 382, 9 N. E. (2d) 970 (1937).[7]

The statutes which have been recently enacted in many states[8] for the relief of mortgagors reflect not alone the plight of those victims of the depression, but also the inability[9] or unwillingness[10] of courts of equity, in general, to afford them uniform relief. However, prior to the enactment of such legislation some courts attempted to cope with the problem under the guise of the "inherent powers of equity."[11] The outstanding example of such judicial relief was the case of *Suring State Bank* v. *Giese.*[12] In that case the court, taking

---

[5] U. S. CONST. Art. I, § 10.

[6] 300 U. S. 14, 57 Sup. Ct. 350 (1937) (where the Court stated: "Before the Supreme Court may review a decision of a state court, it must appear affirmatively from the record that a Federal question was necessarily passed upon. A certificate from the state court so stating is insufficient").

[7] This decision was again affirmed by the Supreme Court, — U. S. —, 58 Sup. Ct. 273 (1937).

[8] See list of states in Note (1934) 47 HARV. L. REV. 660. For a discussion of such statutes see Bunn, *The Impairment of Contracts: Mortgage and Insurance Moratoria* (1933) 1 CHI. L. REV. 249; Feller, *Moratory Legislation: A Comparative Study* (1933) 46 HARV. L. REV. 1061; Allen, *Constitutional and Economic Aspects of Mortgage Moratorium Legislation* (1933) 17 MARQ. L. REV. 200; (1933) 32 MICH. L. REV. 71; (1934) 19 CORN. L. REV. 316.

[9] Pound, *The Decadence of Equity* (1905) 5 COL. L. REV. 20. But see dissenting opinion of Justice Cardozo in Graf. v. Hope Bldg. Corp., 254 N. Y. 1, 171 N. E. 884 (1930) ("Let the hardship be strong enough, and equity will find a way, though many a formula of inaction may seem to bar the path"). *Contra:* Loma Holding Corp. v. Cripple Bush Realty Co., 147 Misc. 374, 265 N. Y. Supp. 115 (1933), where the court denied that it had discretion to grant the relief sought.

[10] Attempts to interpose a defense of actual value have been consistently unsuccessful. See Floore v. Morgan, 175 S. W. 737 (Tex. Civ. App. 1915), where it was said: "It is a well settled rule that an unpropitious market for the sale of properties is no ground for enjoining the sale." See also discussion of Bolick v. Prudential Ins. Co., 164 S. E. 335 (N. C. 1932), discussed in Notes (1932) 81 U. OF PA. L. REV. 87; (1932) 11 N. C. L. REV. 172. For a list of cases consistent with the above statement see 42 YALE L. J. 960 (1933).

[11] Federal Title & Mtge. Guar. Co. v. Lowenstein, 113 N. J. Eq. 200, 166 Atl. 538 (1933) (court refused to confirm a sale under a mortgage foreclosure which had resulted in a grossly inadequate price, unless the mortgagee assented to credit the bond with the fair value of the property); Lurie v. J. J. Hackenjos Co., 113 N. J. Eq. 504, 167 Atl. 766 (1933). See also Cary, Brammer-Smith and Sullivan, *Powers of Courts of Equity* (1935) 27 ILL. L. REV. 855. *Contra:* Bank of Manhattan Co. v. Ellda Corp., 241 App. Div. 131, 271 N. Y. Supp. 522, *aff'd,* 267 N. Y. 554, 196 N. E. 576 (1934) (which reversed a decision of the lower court and ordered foreclosure).

[12] 210 Wis. 489, 246 N. W. 556 (1933). This case has been extensively annotated. See (1933) 8 WIS. L. REV. 286; (1933) 17 MARQ. L. REV. 154; (1933) 7 COL. L. REV. 744; (1933) 27 ILL. L. REV. 950; (1933) 18 ST. LOUIS L. REV. 265; Note (1933) 42 YALE L. J. 960, where it is thus succinctly stated:

judicial notice of the economic depression and the resultant lack of a substantial market for realty, denied a deficiency judgment on the ground that the *present* value [13] of the premises was greater than the amount of the mortgage. The reasoning in this decision formed the basis [14] upon which a good part of the emergency legislation was formulated.

Several state courts held such emergency legislation unconstitutional on the ground that the legislation impaired the obligations of contracts.[15] However, this trend was halted by a Supreme Court decision [16] upholding the "emergency legislation" of Minnesota. In resolving this issue in favor of the validity of the statute, the Court relied upon the hitherto vaguely defined "emergency doctrine" formulated in the famous *Rent* cases.[17]

The New York Legislature passed its mortgage moratorium legislation in the summer of 1933 as a temporary emergency measure [18] to give relief to mortgagors and to prevent their becoming burdened with deficiency judgments sometimes as large as the mortgage. The Court of Appeals, in the instant case, in sustaining this legisla-

---

"The Wisconsin court appears to have taken the initial step in the judicial field toward a solution of the mortgage problem."; (1933) 17 MINN. L. REV. 821.

[13] "Present value is that price which property will bring when it is offered for sale by one who wishes but is not obliged to sell, and it is bought by one who is willing but not obliged to buy." See Bonbright, *The Problem of Judicial Valuation* (1927) 27 COL. L. REV. 476. The court also suggested the use of the "upset price" in land foreclosure sales to protect the mortgagor, *i.e.*, the price at which any subject, as lands or goods, is exposed to sale by auction, below which it is not to be sold (Bouvier's Law Dict.). See also Gilligan and Stern, *Protecting the Rights of Mortgagors,* N. Y. L. J., Aug. 29, 1933, p. 688, col. 1; (1934) 47 HARV. L. REV. 305.

[14] The *"fair market value"* doctrine espoused in the case of Suring State Bank v. Giese is found in §§ 1083-a, 1083-b of the CIV. PRAC. ACT.

[15] North Dakota, Oklahoma, Texas and Minnesota. In Minnesota the court held that the statute impaired the obligation of contracts, but upheld it as a valid exercise of emergency police power. Blaisdell v. Home Bldg. & Loan Ass'n, 189 Minn. 422, 249 N. W. 334 (1933).

[16] Home Bldg. & Loan Ass'n v. Blaisdell, 290 U. S. 398, 54 Sup. Ct. 231 (1934), where Hughes, Ch. J., speaking for the majority of the Court in a 5-4 decision, said: "Although an emergency does not create power, it does furnish the occasion for the exercise of power." *Cf. Ex Parte* Milligan, 4 Wall. 2 (U. S. 1866).

[17] Block v. Hirsch, 256 U. S. 135, 41 Sup. Ct. 458 (1920); Marcus Brown Co. v. Feldman, 256 U. S. 170, 41 Sup. Ct. 465 (1920); Edgar A. Levy Leasing Co. v. Siegel, 258 U. S. 242, 42 Sup. Ct. 289 (1921); People *ex rel.* Durham Realty Corp. v. La Fetra, 230 N. Y. 429, 130 N. E. 601 (1921); Guttag v. Shatzkin, 230 N. Y. 647, 130 N. E. 929 (1921).

[18] The legislation was limited until July 1, 1934, but by subsequent enactments the "emergency legislation" has been extended to July 1, 1938. It is most likely that such legislation will be extended. But see the case of Chastleton Corp. v. Sinclair, 264 U. S. 543, 44 Sup. Ct. 405 (1923) where it was said: *"It is always open to judicial inquiry whether the emergency still exists upon which the continued operation of the law depends."* It is not improbable that Section 1083-a will be continued on the statute books as a permanent law. What effect such a course would have on the sale of mortgages is left open.

tion, relied upon the aforementioned emergency doctrine,[19] *i.e.*, economic conditions may arise in which a temporary restraint of enforcement of contracts will be consistent with the spirit and purpose of the contract clauses and thus be within the range of the reserved power of the state to protect the vital interests of the community.[20] This holding is in line with the fundamental principle of constitutional law that the interdiction of statutes against impairment of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal and the protection of the public.[21] It is apparent that such right of the state is paramount to any rights under contracts between individuals.[22] Furthermore, it may be argued that the "obligation of a contract is not impaired by a law modifying the remedy for its enforcement but not so as to substantially impair the rights secured by the contract." [23] Although the mortgagee's vested cause of action is property,[24] and is protected from arbitrary interference, he has no property right, in the constitutional sense, in any partitcular form of remedy; all that he is guaranteed by the Constitution is the preservation of his substantive right to redress by some effective procedure.[25]

In considering the decision of the Court of Appeals, the Supreme Court of the United States did not pass upon the constitutionality of that part of Sections 1083-a and 1083-b of the Civil Practice Act which allowed the mortgagor to set off the fair market value of the property in a suit by the mortgagee for a deficiency judgment.[26] The Court dismissed the appeal on the ground that no substantial [27] federal question was involved inasmuch as the right of the state to declare that a deficiency judgment must be secured in the foreclosure action is not open to federal inquiry. It seems quite probable, however, that if this question is actually brought before the Supreme Court, the legislation will be upheld on the theory that it is a proper exercise of the police power of the state.

G. A. R.

---

[19] See note 17, *supra*.

[20] *Ibid.*

[21] Marcus Brown Co. v. Feldman, 256 U. S. 170, 41 Sup. Ct. 465 (1920) ("All contracts are made subject to the exercise of the police power of the state").

[22] Manigault v. Springs, 199 U. S. 473, 26 Sup. Ct. 123 (1905).

[23] Home Bldg. & Loan Ass'n v. Blaisdell, 290 U. S. 398, 54 Sup. Ct. 231 (1934).

[24] Pritchard v. Norton, 106 U. S. 124 (1881).

[25] Gibbes v. Zimmerman, 290 U. S. 326, 54 Sup. Ct. 140 (1934).

[26] — U. S. —, 58 Sup. Ct. 273, 274, the Court stated: "The question of the validity of the State legislation could have been raised in the foreclosure action and brought to this court in accordance with applicable rules."

[27] Terry v. Anderson, 95 U. S. 628 (1877); Iowa Central Ry. v. Iowa, 160 U. S. 389, 16 Sup. Ct. 344 (1896); Backus v. Fort Street Union Depot Co., 169 U. S. 557, 18 Sup. Ct. 445 (1898); Cincinnati Street Ry. v. Snell, 193 U. S. 30, 24 Sup. Ct. 319 (1903); Gasquet v. Lapeyre, 242 U. S. 367, 37 Sup. Ct. 165 (1916); Gibbes v. Zimmerman, 290 U. S. 326, 54 Sup. Ct. 140 (1933); Lansing Drop Forge Co. v. Am. State Sav. Bank, 297 U. S. 697, 56 Sup. Ct. 593 (1935); Chisholm v. Gilmer, 299 U. S. 99, 57 Sup. Ct. 65 (1936).