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THE NEW YORK MORTGAGE MORATORIUM STATUTE

THE current economic asthenia has focused anew the attention of lawyers and legislators on a problem that troubled the nation during its early infancy.¹ Dissatisfaction with the widespread relief of debtors at the expense of creditors gave rise to the inclusion of the contracts clause² in the Federal Constitution.³ This limitation on the power of the states has, during the ensuing periods of business depression, proved a generally effective bar to moratory legislation.⁴ Recently, however, the Supreme Court of the United States has indicated a changed attitude.⁵ Whether, should the question arise, this will lead ultimately to the approval of the New York statute⁶ is the problem with which we are here primarily concerned.⁷

JUDICIAL RELIEF IN THE ABSENCE OF STATUTE.

In the absence of legislative intervention the mortgagor turning to the courts for relief could hope for little more than expressions of sympathy. Depressed land values is not a sufficient ground for enjoining a foreclosure sale at the

¹ Ogden v. Saunders, 7 U. S. 132, 214 (1827); 1 BEARD, RISE OF AMERICAN CIVILIZATION (1927) 303-306, 327-328.

² U. S. CONST. Art I, §10.

³ Feller, *Moratory Legislation; A Comparative Study* (1933) 46 HARV. L. REV. 1061, 1067.

⁴ *Id.* at 1081-1085. An 1812 stay law was held unconstitutional in *Jones v. Crittenden*, 4 N. C. 55, 1 Car. L. Rep. 385 (1814). During the Civil War period the difficulty became acute, but the decisions were clearly against the validity of such laws. *Garlington v. Priest*, 13 Fla. 559 (1870); *Halloway v. Sherman*, 12 Iowa 282, 79 Am. Dec. 537 (1861); *Coffman v. Banhof*, Ky., 40 Mo. 29, 90 Am. Dec. 311 (1866); *Barnes v. Barnes*, 53 N. C. 366 (1861); *Jacobs v. Smallwood*, 63 N. C. 112 (1869); *Johnson v. Winslow*, 64 N. C. 27 (1870); *Wood v. Wood*, 14 Rich. 148 (S. C. 1867); *Earle v. Johnson*, 31 Tex. 164 (1868); *Taylor v. Stearns et al.*, 18 Gratt. 244 (Va. 1868). *Contra*: *Stone v. Basset*, 4 Minn. 298, 4 G. 215 (1860); *Farnsworth & Reaves v. Vance & Fleming*, 2 Cald. 108 (Tenn. 1865).

⁵ *Blaisdell v. Home Building & Loan Assn.*, 290 U. S. 398, 54 Sup. Ct. 231 (1934).

⁶ N. Y. C. P. A. (1933) §§1077 a-g, 1083 a, b.

⁷ While the New York statute is the basis of this paper, certain more general subjects are discussed which render more intelligible the main theme.

request of the debtor.⁸ Similarly, such aid has been denied an unsecured creditor of the mortgagor who feared that disposal of the property at existing prices would leave nothing for his protection.⁹ Prevailing financial hardship will likewise furnish by itself no basis for a suit to set aside or a motion to refuse to confirm a sale.¹⁰ While these results are usually rested on a lack of power, only one court has gone so far as to suggest that the restriction is constitutional.¹¹ But the tribunal was overzealous in rationalizing its decision, for the contracts clause has no application to impairment by judicial pronouncement.¹² It should be noted that if other grounds for relief exist, inadequacy of price may then be considered in withholding confirmation.¹³ The verbal application of this rule in many cases where the decreased value of the land is the sole determining element is not unlikely.¹⁴ This is especially true in the light of indications, in the form

⁸ *Bolich v. Prudential Ins. Co. of America*, 202 N. C. 789, 164 S. E. 335 (1932); *Floore v. Morgan*, 175 S. W. 737 (Tex. 1915); *Muller v. Bayly, et al.*, 62 Va. 521, 21 Gratt. 521 (1871); *Capterton, Adm'r v. Landcraft*, 3 W. Va. 540 (1869).

⁹ *Commonwealth Bank and Trust Co. v. MacDonnell*, 49 S. W. (2) 525 (Tex. 1932).

¹⁰ *Hanan v. Threadgill, et al.*, 296 Fed. 569 (S. D. Fla. 1924); *Southern Grocery Co. v. Merchants' & Planters' Title & Investment Co.*, 186 Ark. 615, 54 S. W. (2) 980 (1932); *Robertson v. Mathews*, 200 N. C. 241, 156 S. E. 496 (1931); *Dunlop v. Chenoweth*, 90 N. J. Eq. 85, 105 Atl. 592 (1918); *First National Bank of Millburn v. Cahill, et al.*, 160 Atl. 649 (N. J. 1932).

¹¹ *Federal Land Bank of Omaha v. Wilmarth, et al.*, 252 N. W. 507 (Iowa 1934).

¹² BLACK, *CONSTITUTIONAL LAW* (4th ed. 1927) 709. Referring to the contracts clause, the author says, "But the prohibition is directed against the legislative actions of the state (whether by the legislature or by a constitutional convention) and not against the determinations of its judicial department."

¹³ *Johnson v. Funk*, 132 Kan. 793, 297 Pac. 670 (1931) (Not only was the price inadequate here, but it was merely nominal—four tracts of land sold for \$1 each); *Griswold v. Bardon*, 146 Wis. 35, 130 N. W. 952 (1911) (The additional ground here was failure to notify defendants of the sale). See also *Farmers' Life Ins. Co. v. Stegink, et al.*, 106 Kan. 730, 189 Pac. 965 (1920); *Gandy et al. v. Cameron State Bank*, 2 S. W. (2) 971 (Tex. 1928).

¹⁴ See *Johnson v. Funk*, *supra* note 13 and the language in *Griswold v. Bardon*, *supra* note 13. In the latter case, the court, after stating the rule that resale will not be granted for mere inadequacy of price, says it "must be strictly confined to cases where there is absolutely no fact appearing, except that the price is inadequate."

of dicta¹⁵ and decisions,¹⁶ that there is discontent with the present law as outlined above. The highest court of Wisconsin¹⁷ came out in open revolt and a lower court of Missouri¹⁸ has joined the opposition.

EARLY ATTITUDE OF SUPREME COURT TOWARDS MORATORY LEGISLATION.

Early legislative efforts to champion the cause of the mortgagor, threatened with ruin by one of the periodic financial slumps, were promptly discouraged by the Supreme Court of the United States. A dictum in *Bronson v. Kinzie*¹⁹ propagated a line of decisions adverse to the moratorium statutes.²⁰ A bill for foreclosure was brought in a federal court. After the execution of the mortgage, but before the action had been commenced, Illinois passed a law giving a twelve-month period of redemption and providing that no

¹⁵ *Dunlop v. Chenoweth*, 90 N. J. Eq. 85, 105 Atl. 592 (1918) (the court said that it would refuse to confirm the sale if the price were so inadequate as to "shock the conscience"); *Columbia Theological Seminary v. Arnette*, 168 S. C. 272, 167 S. E. 465 (1932) (statement made that the court, in setting the time for a foreclosure sale, can exercise an equity power to take into consideration the present economic depression).

¹⁶ See *infra* notes 17, 18.

¹⁷ *Suring State Bank v. Giese, et al.*, 210 Wis. 489, 246 N. W. 556 (1933). Original loan, \$2,000. Property then worth over \$2,000. Sold at foreclosure sale for \$600. Judicial notice is taken of the depression. That the value of the land is only the dollars and cents obtainable on the market, shocks the conscience of the court. Court of equity without aid of statute can do one of three things: (1) Decline to confirm sale where the bid is substantially inadequate. Where inadequacy of price resulted from mistake, misapprehension, etc., courts have always refused to confirm. Inadequacy plus emergency should give same result. (2) Fix upset price as courts do in case of foreclosure of large corporate property, where competitive bidding is precluded by the size of the property. (3) Court can conduct a hearing to establish the fair value of the property and confirm the sale on condition that such value be credited on the foreclosure judgment. If case (3) is adopted, plaintiff should be given option to accept or reject. If he rejects, then new sale should be ordered.

¹⁸ *Mississippi Valley Trust Co. v. Sopluan*, Circuit Ct. Mo., 4 M. Bar. Jour. 55 (April). Case decided March, 1933. The decree was not identical with that of the *Suring State Bank* case, *supra* note 17.

¹⁹ 14 U. S. 628, 11 L. ed. 143 (1843).

²⁰ *McCracken v. Hayward*, 43 U. S. 608 (1844); *Howard v. Bugbee*, 65 U. S. 461 (1860); *Barnitz v. Beverly*, 163 U. S. 118, 16 Sup. Ct. 1042 (1895); *Burt v. Williams*, 24 Ark. 91 (1863); *Adams v. Spillyards* 187 Ark. 641, 61 S. W. (2) 686, 86 A. L. R. 1523 (1933); *First Nat. Bank v. Bovey, Shute & Jackson*, 49 N. D. 450, 191 N. W. 765 (1922); *State ex rel. Cleveringa v. Klim*, 63 N. D. 396, 249 N. W. 116 (1933).

sale or foreclosure shall be allowed unless two-thirds of the value of the land, as determined by three householders, is bid. The plaintiff moved for a sale to the highest bidder regardless of the statute. The court, holding in his favor, stated that the provisions as to redemption and evaluation were unconstitutional. It then urged that while a change in remedy is not itself a violation of the contracts clause, if it is so drastic as to effect a change in right, as here, it is invalid.²¹ In his dissenting opinion, Justice McLean considers the discussion of constitutionality unnecessary and points out that state procedural law is to be applied in the federal court only when adopted by rule of court. He says that such a step had not been taken.²² But whether or not we regard the declarations of the court as dicta, and whether or not the application of the right-remedy tests is productive of specious reasoning,²³ and whether or not there have been sporadic state court decisions to the contrary,²⁴ the fact remains that up to the time of the recent *Blaisdell* case, the opinion in *Bronson v. Kinzie* has been definitive of the constitutionality of mortgage moratoria.²⁵

It is interesting to observe at this point that cases have arisen in the Supreme Court involving the question whether a statute, passed after execution of the mortgage and before the sale, changing the rights of the purchaser at foreclosure violates the contracts clause. Where the purchaser is not

²¹ The right remedy test for determining the application of Article I, Section 10 of the Constitution has frequently been invoked. See cases *supra* note 20; *Johnson v. Higgins*, 60 Ky. 566 (1861); *Von Baumbach v. Bade*, 9 Wis. 559, 76 Am. Dec. 283 (1859). For a decision which rejects this test in favor of the one by which the validity of the law is made to depend on whether the value of the contract is impaired by the change, see *Edwards v. Kearzey*, 96 U. S. 595, 24 L. ed. 793 (1877). *Accord*: *Bank of Minden v. Clement*, 256 U. S. 126, 41 Sup. Ct. 408 (1921). Neither of these tests is useful, nor are they descriptive of the actual processes by which the courts reach their results. For a discussion of the rights and remedies, see Llewellyn, *A Realistic Jurisprudence* (1930) 30 COL. L. REV. 431.

²² On the rule of court argument see also *McCracken v. Hayward*, *supra* note 20, a case arising the year following on the same statute.

²³ A product of such reasoning is *Johnson v. Higgins*, 60 Ky. 566 (1861), where civil operations of the courts were suspended for about seven months. This was held constitutional since it merely affected the remedy.

²⁴ *Johnson v. Higgins*, *supra* note 23; *Von Baumbach v. Bade*, *supra* note 21; *Blaisdell v. Home Building & Loan Assn.*, 189 Minn. 422, 249 N. W. 334 (1933); *McCarty v. Prudence-Bonds Corp.*, 149 Misc. 13, 266 N. Y. Supp. 629 (1933); *Chadwick v. Moore*, 8 W. & S. 49 (Pa. 1844).

²⁵ *Supra* notes 4, 20.

the mortgagee it is clear that as to him the statute is not unconstitutional.²⁶ Where he was the mortgagee it has been held that his contract rights were impaired.²⁷ It is difficult to approve of this result since the mortgagee acts in an entirely different capacity when he buys at the sale. In the latter capacity he had no subsisting contract to be impaired at the time of the change in law. An earlier case so held.²⁸ The only possible justification for the later decision is that the mortgagee is unfavorably affected by a subsequent law which places additional burdens on the purchaser at foreclosure sale and which therefore discourages prospective bidders.²⁹ But even under this approach the case must be condemned, for no great hardship was placed on the purchaser by the new law. He was merely required to procure a deed within a prescribed time. In any event, where the argument does hold good, it is acceptable if the purchaser is mortgagee or not.

THE GROWTH OF POLICE POWER CONCEPT—THE RENT CASES.

This, however, is but a variation of the main theme, to which we now return. Although nearly a century elapsed before any direct incursion³⁰ was made into the rule of *Bronson v. Kinzie*, there was being developed during much of that time a new tool with which to pry loose from their

²⁶ *Hooker v. Burr*, 194 U. S. 415, 24 Sup. Ct. 706 (1904). There was a mortgage foreclosure and sale to plaintiff (an independent party). At the time of execution of the mortgage, the law allowed redemption in six months at 2% interest. After execution of the mortgage, but before sale, the law was changed to twelve months at 1%. Defendant sheriff gave a deed to mortgagor's creditor, who redeemed under the new law. Suit to set aside the deed. *Held*, for defendant. Plaintiff not a party to an impaired contract. There was change of law since his contract of purchase.

²⁷ *Bradley v. Tightrap*, 195 U. S. 1, 24 Sup. Ct. 748 (1904). Court says there is a distinction between case of purchase by mortgagee and case of purchase by independent party having no connection with the original contract.

²⁸ *Connecticut Mutual Life Insurance Co. v. Cushman*, 108 U. S. 51, 2 Sup. Ct. 236 (1882).

²⁹ This point was urged in *Connecticut Mutual Life Insurance Co. v. Cushman*, *supra* note 28, but rejected on the ground that such a contingency was too remote to affect the value of the contract.

³⁰ *Supra* note 5.

traditional rigidity many of the constitutional restraints. The police power was at first of a narrow scope.³¹ By gradual accretions it grew not only in the purposes for which it could be exercised,³² but in the extent to which it could expand to the exclusion of other rights. One such encroachment was upon the contracts clause of the Constitution.³³ This latter development rendered possible the emergency rent cases which, accepting economic stress as an occasion for the further use of police power, cleared the way for recognition of the validity of mortgage moratoria.

During the years immediately following the World War a shortage of housing in certain localities caused considerable suffering. Legislative relief appeared in the form of statutes providing, among other things, for reduced rentals and holding over after the term upon reasonable payment being made. In *Bloch v. Hirsch*³⁴ the constitutionality of the District of Columbia statute was called in question by a landlord who wished to re-enter at the expiration of the term without complying with the statutory prescriptions. Referring to the due process clause of the Fourteenth Amendment, Mr. Justice Holmes used language expressive of the court's attitude here and in other cases,³⁵ which are more in

³¹ See WILLOUGHBY, CONSTITUTIONAL LAW OF THE UNITED STATES (2d ed. 1930) 761 *et seq.* The author very briefly traces the term police power from its application to merely the residuary powers of the state to its use as a device for fostering public welfare at the expense of private constitutional rights.

³² "And it is also settled that the police power embraces regulations designed to promote the public convenience or the general welfare and prosperity, as well as those in the interest of the public health, morals, or safety." Pitney, J., in *Chicago & Alton R. R. v. Traubarger*, 238 U. S. 67, 35 Sup. Ct. 678 (1914).

³³ *Manigault v. Springs*, 199 U. S. 473, 26 Sup. Ct. 127 (1905). Defendant built a dam across stream. Plaintiff objected it interfered with his right of passage and irrigation. Compromise reached and contract made by which defendant was to remove dam. State then passed a bill giving defendant authority to erect another dam. This was for reclamation of swamp lands. Bill for an injunction against maintenance of dam. Bill dismissed. Plaintiff argued statute impaired the contract, therefore invalid. Police power "is paramount to any rights under contracts between individuals." This was a valid exercise of police power. Though it does not come under health, lives, or morals, it does come under general welfare. *Accord*: *Union Dry Goods Co. v. Georgia Public Service Corp.*, 248 U. S. 372, 39 Sup. Ct. 117 (1919); *Producers Transportation Co. v. Railroad Commission of the State of Cal., et al.*, 251 U. S. 228, 40 Sup. Ct. 131 (1920). Both these cases involve statutes regulating public utilities and affecting former contracts.

³⁴ 256 U. S. 135, 41 Sup. Ct. 458 (1921).

³⁵ See *infra* notes 36, 37.

point, involving state legislation. He said, "Plainly circumstances may so change in time or so differ in space as to clothe with [public interest] what at other times or in other places would be a matter of purely private concern." When the New York statute came before the Supreme Court the same year in *Marcus Brown Holding Co. v. Feldman, et al.*,³⁶ a similar conception of the police power resulted in a holding that the contracts clause was not violated. These cases rest on the existence of an emergency, which the court will notice even in the absence of legislative declaration, although the latter will be given great weight.³⁷ The constitutionality of legislation depending for its validity on an emergency is coextensive in time with the continuance of the crisis.³⁸

HOME BUILDING & LOAN ASSOCIATION V. BLAISDELL.

With this background at its disposal, with these legal premises from which to draw, the Supreme Court on January 8, 1934, handed down its decision in *Home Building & Loan Association v. Blaisdell*.³⁹ After the mortgage in question had been executed Minnesota passed a law⁴⁰ providing that a court can extend the period of redemption up to May 1, 1935, and that during the extension the mortgagor shall pay the reasonable rental value of the premises towards interest, taxes, insurance, and the mortgage indebtedness. Plaintiff petitioned for an order extending the redemption period. The

³⁶ 256 U. S. 170, 41 Sup. Ct. 465 (1921). The court said, " * * * contracts are made subject to this exercise of the power of the state, when otherwise justified as we have held this to be." *Re* "otherwise justified" see *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393, 43 Sup. Ct. 158 (1922).

³⁷ *Levy Leasing Co. v. Siegel*, 258 U. S. 242, 42 Sup. Ct. 289 (1922). It seems that a legislative factual investigation may influence the court to accept as true the statutory declaration of emergency.

³⁸ *Chastleton Corp. v. Sinclair*, 264 U. S. 543, 44 Sup. Ct. 405 (1924). Bill in equity to enforce an order of the Rent Commission made under an act which was passed after the expiration of the first rent act of Washington, D. C., renewing the latter and amending it. The second act declared an emergency to still exist. Bill dismissed. Reversed. If the emergency no longer exists, the law is no longer constitutional. If it were merely a question of court's knowledge of conditions, the second act would be held bad.

³⁹ *Supra* note 5.

⁴⁰ Minn. Laws 1933, c. 339, p. 514.

court below held for the defendant, but was reversed by the Supreme Court of the state.⁴¹ Judgment was then rendered extending the period, determining the reasonable rental value, and ordering payment thereof. This appeal to the United States Supreme Court was taken from an affirmance of the judgment in the highest court of the state.⁴² Affirmed. Chief Justice Hughes, in the majority opinion, stated, "While emergency does not create power, emergency may furnish the occasion for the exercise of power." He later says, "Whatever doubt there may have been that the protective power of the state, its police power, may be exercised—without violating the true intent of the provision of the Federal Constitution—in directly preventing the immediate and literal enforcement of contractual obligations by a temporary and conditional restraint, where vital public interests would otherwise suffer, was removed by our decisions relating to the enforcement of provisions of leases during a period of scarcity of housing." After reviewing a large number of decisions the court says these criteria are established: 1. An emergency existed which furnished a proper occasion for the exercise of police power. The fact of its existence is not only judicially noticed by this court, but is declared by the legislature and state court of Minnesota. 2. The relief granted was reasonable. a. The mortgagor while remaining in possession during the extension must pay the reasonable rental value as determined by the courts. b. The law is not for the advantage of particular individuals but for protection of society. Most mortgagees are insurance companies, banks, mortgage companies, etc. which are not seeking homes or farms. The law is for benefit of mortgagees as well as mortgagors. c. The law provides for exercise of a power which historically belonged to equity—the granting of a period of redemption. Of course, a court may not alter the statutory maximum period, but the law gives it some power to vary the period within limits. 3. The legislation is temporary in operation and the court may change the period of redemption as circumstances require.

⁴¹ 789 Minn. 422, 249 N. W. 334 (1933).

⁴² 189 Minn. 448, 249 N. W. 893 (1933).

IS THE NEW YORK STATUTE CONSTITUTIONAL?

What, then, can be said as to the validity of the New York moratorium statute? ⁴³ *Home Building & Loan Asso-*

⁴³ The following is a brief summary of its main provisions:

An Act to amend the C. P. A. in relation to foreclosure of mortgages and actions for judgments on bonds secured by mortgages (L. 1933, c. 793).

Section 1—Declaration of emergency.

Section 2—The C. P. A. is amended to read as follows:

Section 1077-a. Foreclosure for default in payment of principal is suspended during the named emergency period. The act does not affect other defaults authorizing foreclosure.

Section 1077-b. Suspends action on bond or other indebtedness contracted simultaneously with and secured solely by a mortgage. Also suspends suits on guaranty of such indebtedness.

Section 1077-c. A person who would, except for the foregoing provisions, have a right to foreclose may make an application to the court and if it then appears that the mortgaged property during six months before the application produced a surplus over taxes, interest, and other carrying charges, the court may order the payment of such surplus to past due principal. On failure to make such payment or on failure to produce the necessary records, the court may order foreclosure. This section shall not apply to farm property or dwelling property occupied by the owner.

Section 1077-d. A waiver of 1077-a and b is void as against public policy.

Section 1077-e. 1077-a, b, and d shall apply to pending actions.

Section 1077-f. A proceeding in the scope of this act which would have been maintainable at any time during the emergency, shall not be barred by statute of limitations during one year after the end of the emergency.

Section 1077-g. This act not applicable to certain mortgages held by savings and loan associations, nor to mortgages dated after July 1, 1932. The period of emergency shall be from the date the act takes effect (Aug. 26, 1933) until July 1, 1934.

Section 3—If part of act is declared unconstitutional the rest shall not be affected.

An Act to amend the C. P. A. in relation to deficiency judgments and actions on bonds secured by mortgage on realty (L. 1933, c. 794).

Section 1—Declaration of emergency.

Section 2—The C. P. A. is amended as follows:

Section 1083-a. No deficiency judgment shall be rendered except as herein provided. On making motion to confirm sale the creditor may move for a deficiency judgment upon notice to the other party. The court shall determine the fair market value as of the time of sale. It shall enter a deficiency judgment for the full judgment, plus prior liens, plus costs, minus the market value of the property as determined by the court or the sale price, whichever shall be higher.

Section 1083-b. In an action on an indebtedness secured by a mortgage (simultaneously and solely), the defendant may set off the fair market value of the premises less prior liens. In action to foreclose after the emergency a deficiency judgment may be recovered in normal way, except for a deduction for anything recovered as provided in this section.

ciation v. Blaisdell does not open the door indiscriminately to all legislation passed on the pretext of an emergency.^{43a} That the decision is not to function as a blanket approval of all mortgage relief legislation has been indicated in judicial⁴⁴ and academic circles.⁴⁵ It might well be argued that it does not even give sanction to all extensions of the redemption period. The payment of a reasonable rental by the mortgagor during the prolongation has been suggested as a requisite to constitutionality not only in the opinion but in prior⁴⁶ and subsequent⁴⁷ cases. Implicitly conceding that

Section 3—If part of act declared unconstitutional, the rest shall not be affected.

Section 4—The period of the emergency shall be from the date this act takes effect (Aug. 28, 1933) until July 1, 1934. This act shall not apply to any mortgage or indebtedness dated after July 1, 1932.

Recent cases interpreting the terms of the above legislation but not dealing with the problem of constitutionality are: *Joseph E. Marx Co., Inc. v. Hatton, et al.*, — App. Div. —, 269 N. Y. Supp. 210 (2d Dept. 1934); *Weisel v. Hagdall Realty Co., Inc.*, 241 App. Div. 314, 271 N. Y. Supp. 629 (2d Dept. 1934); *Loporto v. Druiss Co., Inc.*, 241 App. Div. 419, 273 N. Y. Supp. 11 (1st Dept. 1934); *Cole v. Miller, et al.*, 150 Misc. 32, 268 N. Y. Supp. 443 (1934); *Sherwin v. Jonas*, 150 Misc. 342, 269 N. Y. Supp. 121 (1934).

^{43a} *W. B. Worthen Co. v. Thomas*, — U. S. —, 54 Sup. Ct. 816 (1934). Debt contracted, judgment rendered for plaintiff, and life insurance policy became payable to defendant before passage of a statute exempting proceeds of life insurance policies from judicial process. After passage of the statute plaintiff garnished the insurance proceeds. Defendant's motion to dismiss the garnishment granted. Reversed. Chief Justice Hughes, who gave the opinion, wrote, "The legislature sought to justify the exemption by reference to the emergency which was found to exist. But the legislation was not limited to the emergency and set up no conditions apposite to emergency relief." The *Blaisdell* case was thus distinguished. The concurring opinion of Mr. Justice Sutherland, who dissented in the mortgage case, denies that any distinction is possible.

⁴⁴ *Mathews, et al. v. Warner*, Md. Circ. Ct. No. 2 of Baltimore, U. S. Law Week, Apr. 3, 1934; *State ex rel. Roth, Trustee v. Waterfield*, 29 P. (2) 24 (Okla. 1934).

⁴⁵ (1934) 22 CALIF. L. REV. 350.

⁴⁶ *State ex rel. Cleverings v. Klein*, 249 N. W. 118 (N. D. 1933). The court distinguishes the rent cases, pointing out that there the landlords were at least given reasonable rental value during the extension of the lease. Here, during the period of redemption the purchaser gets nothing. As early as 1895, the Supreme Court in *Barnitz v. Beverly*, 163 U. S. 118, 16 Sup. Ct. 1042, said, in referring to a new redemption statute as applied to pre-existing contracts, "What is sold under this act is not the estate pledged, * * * but a remainder—an estate subject to the possession for 18 months, of another person who is under no obligation to pay rent or account for profits." It is not intimated that the courts at that date would have upheld the statute had it provided for payment of rent, but the language is significant in the light of later developments. See also the state court opinion in the *Blaisdell* case, *supra* note 41.

⁴⁷ *State ex rel. Roth, Trustee v. Waterfield*, *supra* note 44. This case does

the latest pronouncement of the Supreme Court of the United States is not to be construed as validating all moratoria, a recent comment on that case in the Columbia Law Review ⁴⁸ states that on the basis of the tests enumerated in the opinion of Chief Justice Hughes the New York statute should be upheld. The writer says, "In determining 'reasonableness' in the much-discussed field of mortgage moratoria, the principal case, as have other recent cases, stresses three factors all of which are present in the rent cases: a discretionary application of the statute by the courts, provision for the payment of 'rent' during the moratorium, and a definite limitation upon the duration of the moratorium. In view of its provisions in this respect, the New York Mortgage Moratorium Law, * * * appears within the permissible limits."

While the New York courts have taken a friendly attitude towards the statute,⁴⁹ the conclusion reached in the quotation just given should be closely scrutinized. As to the first test enunciated, it is submitted that the author errs in asserting that the New York statute complies with it. The right to foreclose and to sue for principal default is suspended in absolute terms.⁵⁰ It is true that on request by the mortgagee the court may, if earnings are sufficient, order payment of part of principal and that in the event default in such payment is made, foreclosure becomes possible.⁵¹ Whether this is such "discretionary application" as is referred to remains a debatable question. In any event the provision expressly exempts from its operation farm and dwelling property, and as to these at least the requisite is not fulfilled. The second test calls for payment of rent

not involve a redemption period, but rather an extension of time in which to answer in a mortgage foreclosure suit. Nevertheless, one ground on which the court distinguishes the Blaisdell case is that there the statute called for payment of rental value.

⁴⁸(1934) 34 Col. L. Rev. 361.

⁴⁹In addition to the cases at the end of note 43 *supra* which assume the constitutionality of the statute without discussing it, see *McCarty v. Prudence-Bond Corp.*, 149 Misc. 13, 266 N. Y. Supp. 629 (1933) (before the Blaisdell case) and *Matter of People (Title & Mortgage Guaranty Co.)*, 264 N. Y. 69, 190 N. E. 153 (1934) (after the Blaisdell case). The latter decision is not on the statute under discussion, but on the related Schackno Act.

⁵⁰N. Y. C. P. A. §1077 a, b, *supra* note 43.

⁵¹N. Y. C. P. A. §1077 c, *supra* note 43.

during the moratorium. No such item is to be found in the statute under discussion. The third criterion, a definite limitation upon the duration of the moratorium, is complied with, but the more basic question arises as to whether it is in fact a test. In the light of *Chastleton Corp. v. Sinclair*,⁵² the emergency rent case in which the court considered itself bound to prematurely terminate emergency legislation when the critical conditions cease, it is difficult to see why a self-limiting provision in the statute is essential. So far as the cases indicate, the only purpose in requiring a limit on the duration of the enactment is to prevent its operation after the cessation of the emergency. Since it is the duty of the court to determine the life of the statute, as stated in the *Chastleton* case, it can never function after the emergency whether or not the legislature defines the length of its existence. True, there is language in *W. B. Worthen Co. v. Thomas*^{52a} which indicates a contrary conclusion, but the discussion on the point in the opinion is purely gratuitous. It is not likely that the court will deviate from the path of logic to follow this dictum.^{52b}

If the language of a recent New York Supreme Court decision⁵³ can be taken seriously, an argument might be made in favor of the validity of the deficiency judgment clause⁵⁴ on the ground that the statute made no substantial change in the law and hence no impairment of contract. Mr. Justice Schmuck vacated a deficiency judgment, stressing the "present dilemma in real estate" and "unusual conditions working acknowledged harm." If the deficiency judgment can be vacated, *a fortiori*, it can be granted on the conditions prescribed by the new law. But the trouble with the argument is that New York took the traditional attitude,⁵⁵ at

⁵² See note 38 *supra*.

^{52a} "In the instant case the relief sought to be afforded is neither temporary nor conditional." *E. B. Worthen Co. v. Thomas*, *supra* note 43a.

^{52b} Lehman, J., "Failure by the Legislature to limit the operations of the law to a definite term does not render the law invalid so long as the conditions which justify the passage of the law remain." *Matter of People (Title and Mortgage Guaranty Co.)*, *supra* note 49. See also (1934) 34 *Col. L. Rev.* 1134.

⁵³ *N. Y. Life Ins. Co. v. Johar Realty Corp.*, *N. Y. Sup. Ct. Spec. I.*, Schmuck, J., *N. Y. L. J.*, July 22, 1933, p. 259.

⁵⁴ *N. Y. C. P. A.* §1083-a.

⁵⁵ See the second paragraph of this paper and notes thereto. On the New York Law see *McGown v. Sanford, et al.*, 9 *Paige* 290 (*N. Y.* 1841); *Whitbeck*

least prior to the statute,^{55a} towards relieving the mortgagor from the effects of foreclosure because of particular hardships resulting from a financial slump. Hence the deficiency judgment could not properly be vacated on the grounds quoted above. The case may be approved on its facts, since there was, in addition to the hardship, inequitable conduct on the part of the mortgagee in that he delayed procuring the sale during a rapidly declining market.⁵⁶ Such a view of the case, of course, renders it valueless as a basis from which to argue that there has been no substantial change in the law.

CONCLUSION.

The court, in the *Blaisdell* case, is not very clear as to the force intended by it to be given to the tests enunciated. Whether they are to be treated as necessary prerequisites or merely as influencing factors remains open to doubt. Much of the New York statute cannot stand if these criteria are to be rigidly applied. While the recent tendency of the Supreme Court towards liberality⁵⁷ (albeit of the five-to-four variety) militates against the probability of such application, it is unwarranted optimism to assume that the entire New York Mortgage Moratorium law is made constitutional by *Home Building & Loan Association v. Blaisdell*.

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v. Rowe, 25 How. Pr. 403 (N. Y. 1862); McEwen v. Butts, *et al.*, 65 Hun 624 (N. Y. 1892); Condert v. DeLogerot, 77 Hun 610 (N. Y. 1894); Housman v. Wright, 50 App. Div. 606, 64 N. Y. Supp. 71 (2d Dept. 1900).

^{55a} Probably the law remains the same today, but some doubt is created by Dry Dock Savings Institution v. Harriman, 150 Misc. 861, 271 N. Y. Supp. 604 (1934) and Monaghan v. May, 242 App. Div. 64, 273 N. Y. Supp. 475 (2d Dept. 1934).

⁵⁶ Billington v. Forbes, 10 Paige 487 (N. Y. 1843) (Inadequate price plus inequitable conduct of a co-defendant. *A fortiori*, inequitable conduct of mortgagee will produce same result).

⁵⁷ See for example, *Nebbia v. People of State of New York*, 288 U. S. 594, 54 Sup. Ct. 505 (1934).