LEGISLATION AND ADMINISTRATION

THE IMPAIRMENT OF CONTRACTS: MORTGAGE AND INSURANCE MORATORIA*

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THE Bar is destined, during the next year, to give more attention to the Contracts Clause than it has for a long time. State laws, of a sort not seen since the hard times of the 90's, will force Courts and lawyers to retrace old paths, and to explore some new ones.

The acts referred to are chiefly of two sorts: (1) those relating to mortgages, and designed to assist mortgagors in various ways, and (2) those relating to insurance contracts, and intended to authorize an official moratorium of loans on and cash surrenders of life insurance policies. Both classes result from the depression, are expressly temporary (expiring in 1935 or sooner), and commonly refer to the economic emergency as their reason and justification.

The insurance laws follow, in general, one pattern. After reciting an emergency condition, they authorize the Commissioner or Superintendent of Insurance (sometimes with the approval of the Governor) to make rules and regulations for the conduct of the business of insurance, which rules and regulations, it is sometimes stated, "may be contrary to existing laws," and when in force such rules and regulations shall supersede existing laws in conflict with them.¹

Most of the acts say nothing about superseding contracts. But part of their purpose in fact was to enable the Commissioners to declare a moratorium against new loans on life insurance policies, and against the surrender of such policies for cash, and the rules and regulations in fact made under them were, in almost all the States, to that effect. Substantially all life insurance policies outstanding when the acts were passed contained

* No one interested in this subject can afford to overlook the able paper by Mr. A. H. Feller, "Moratory Legislation," in the *Harvard Law Review* for May, 1933 (46 *Harv. L. Rev.* 1061). What is there said as to the history, purpose, and directives of moratory laws makes any further treatment of those points superfluous. My excuses for this further treatment of another part of the same field are two: (1) the passage, since Mr. Feller wrote, of numerous new acts, and (2) the fact that, as it seems to me, Mr. Feller somewhat underrates the Constitutional difficulties.

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¹ The emergency insurance acts so far available are listed in Appendix I.

express agreements to loan stated sums, in cash, "on the sole security of this policy," either on demand or within a stated period after application made, and also promises to pay stated amounts in cash upon the surrender of the policy before maturity, at the option of the holder. The regulations made under these statutes limit and prohibit, until further order, the performance of these clauses of the contracts. They act directly on the contracts, and clearly (though temporarily) impair them.

The mortgage legislation is not so uniform in character.² Some laws simply stay proceedings for foreclosure for a stated time; some authorize the Court to do so upon terms (as to possession, care of the property, taxes, disposition of the income, etc.); some abolish the "foreclosure by advertisement" previously authorized, and require all foreclosures to be made by action; some extend redemption periods six months or longer; some do the same thing on condition that the mortgagor pay interest and taxes; some authorize the Court to extend the period upon fair terms; some abolish deficiency judgments during the emergency, and some provide that in determining deficiencies the actual fair value of the land, and not the bid at the foreclosure sale, shall govern. Some acts lay down flat rules applicable to all cases, others vest power in Courts of equity to deal with each case individually. Most of the acts apply only to mortgages on land, and not to chattel mortgages, contracts for the sale of real estate, conditional sales of personal property, or pledges. Some apply to execution sales of real estate as well as mortgage sales. Where delay of proceedings or extension of the redemption period is granted, the added time runs from six months to two years. Most of the laws apply to all mortgages on land, including, therefore, wild lands and also business and industrial properties as well as farms and homes. All are intended to apply to mortgages existing at the enactment of the act, and some in terms do not apply to future mortgages. Substantially all are expressly stated to expire in 1935 or sooner; they are not intended as permanent reforms, but as temporary emergency expedients.³

The Contracts Clause declares:

No State shall . . . coin Money; emit Bills of Credit; make anything but Gold and Silver Coin a Tender in Payment of Debts; pass any . . . Law impairing the Obligation of Contracts. . . ."³

These provisions resulted from the history of the time when they were written. The men who wrote them had lived through the Revolutionary

² These acts are listed, and their main provisions very briefly summarized, in Appendix II.

³ Constitution of the United States, Article I, Section 10, Clause 1.

War, and through the "critical period" that followed it; they had experienced stay laws, valuation laws, the indiscriminate emission of legal tender paper money, and the accompanying disappearance of individual and public credit. Rightly or wrongly, they were of opinion that a constitutional guaranty against State legal tender laws, and against laws impairing contracts generally, was necessary to lay a basis for individual credit under the new government.⁴ They were concerned, in these provisions, primarily with money contracts, and not with franchise grants or corporate charters. This is not to criticize the doctrine of the Dartmouth College case. The point is that as that doctrine, so far as we can tell, was not in the mind of the Constitutional Convention, so also it and the vast body of learning and decision based upon it are mostly foreign to the present inquiry. We are back where the Constitutional Convention stood, in the field of money contracts, and are confronted by what seem plain words. How absolutely did the men who used those words intend to bind the States, and how much leeway did they mean to leave for laws to ease the burden of the debtor class in times of economic stress?

The language that was used is absolute in form. Perhaps it was intended to be so in fact. We shall see later that that is not the law, but at least the language used, compared with the vagueness of the substantially contemporaneous language of the Fifth Amendment, shows that the Contracts Clause was meant to be comparatively stringent; and its construction has certainly been stricter in substance than that of either the Fifth or the Fourteenth Amendment. If the new laws are not invalid as impairing contracts, they are clearly safe against the claim that they take property without due process.

Whether a given law impairs the obligation of a contract is a question of fact and not of form. A State may regulate the procedure of its Courts, and may legislate on remedies,⁵ but when such legislation, though directed only to the remedy, results in a real change of substantial rights under an existing contract, it impairs it. Whether the impairment violates the Constitution may depend on other factors, but a substantial change in

⁴ This was Chief Justice Marshall's view. See his language in *Ogden v. Saunders*, 12 Wheat. 212, 354-55 (1827). It was strongly stated and greatly relied on by the Court much later. *Edwards v. Kearzey*, 96 U.S. 595, 604-607 (1877). But, as Mr. Feller points out (46 Harv. L. Rev. 1068), the record of the Convention itself is very meager.

⁵ *Sturges v. Crowninshield*, 4 Wheat. 122, 200 (1819). The very numerous cases in which Chief Justice Marshall's dictum have been analyzed are well edited in *Rose's Notes to 4 Wheat. 122* at p. 878 of the Revised Edition. See especially *Penniman's Case*, 103 U.S. 714 (1880); *Antoni v. Greenhow*, 107 U.S. 769, 2 Sup. Ct. 91 (1883); *Oshkosh Waterworks Co. v. Oshkosh*, 187 U.S. 437, 23 Sup. Ct. 234 (1903).

fact, by any form of law, of the real status of a party under an existing contract constitutes impairment.⁶

That these new laws, or most of them, do change existing rights in a substantial way cannot be doubted. The laws relating to insurance (or rather the regulations under them which, if otherwise valid, have the force of law and so are "Laws" under the Contracts Clause⁷) act directly on the contracts, and deny to holders of insurance contracts the rights, clearly stated in their policies, to borrow on them and surrender them for cash. The mortgage laws purport to act only on the remedy, but that they, or most of them, in fact amend substantial rights is clear.

The holder of a mortgage, who has become the purchaser upon foreclosure sale, is entitled by mere lapse of a time stated in the law, there being no redemption, to become the owner of the land. The time passes, and there is no redemption. He should now be the owner, and therefore be entitled, among other things, to possess and use the land, to rent it, or to sell it. But in the meantime a new statute has extended the redemption period a year. He is therefore not the owner, he is not entitled to possession, he has no right to rent the land, and he cannot give a marketable title. If this condition lasts a year, it will cost the mortgagee at least 10 per cent of the sum loaned,⁸ plus any intervening depreciation of the property. If redemption is ultimately made he gets his money back, but redemptions have been very scarce, in western States, these last ten years. What the new time really means is a new option in the mortgagor, plus a new year's possession, at the mortgagee's expense. The substantial rights of both parties are changed in an important way by such an act, and in any rea-

⁶ The cases on the point are myriad. For present purposes the following are quite enough: *Green v. Biddle*, 8 Wheaton 1 (1823); *Bronson v. Kinzie*, 1 How. 310 (1843); *von Hoffman v. Quincy*, 4 Wall. 535 (1866); *Edwards v. Kearzey*, 96 U.S. 595 (1877); *Louisiana v. New Orleans*, 102 U.S. 203 (1880); *Barnitz v. Beverly*, 163 U.S. 118, 16 Sup.Ct. 1042 (1896); *Bank of Minden v. Clement*, 256 U.S. 126, 41 Sup.Ct. 408 (1921); *Harrison v. Remington Paper Co.*, 140 Fed. 385 (1905).

⁷ *Grand Trunk Western Ry. v. Railroad Commn. of Indiana*, 221 U.S. 400, 31 Sup. Ct. 537 (1911); *Ross v. Oregon*, 227 U.S. 150, 162-63, 33 Sup. Ct. 220, 228 (1913).

⁸ 6 per cent for interest, plus about 4 per cent for taxes and insurance. The latter are of course not dependent on the size of the loan, and 4 per cent may be far from the fact in individual cases, but is believed to be a fair general average. The calculation is of course subject to correction for any payment which the Act or the Court requires the mortgagor to make.

Such considerations are not absent when mortgage loans are made. Substantially more money can safely be, and it is believed in fact commonly is, advanced on property worth \$1,000.00 in, for instance, Texas, where foreclosure proceedings are comparatively simple and periods of redemption short, than on property of the same value in, for instance, Illinois, where foreclosure proceedings take much time and periods of redemption, under ordinary law, may run for 15 months.

sonable meaning of the words the law impairs the obligation of their contract.⁹

If the extension comes before foreclosure sale, instead of at the end of the redemption period, the result is not materially different. Every mortgage contemplates foreclosure, and most provide for it. The mortgagee is entitled, on default, to proceed in the customary way to hold a sale. The proceedings are subject to certain known delays, varying from State to State, but the average time from the institution of proceedings to the sale in any State is reasonably calculable. An artificial long extension of that time prolongs the option to redeem, extends the possession of the mortgagor, and has substantially the same effect, in fact, as an extension of redemption after the sale occurs. In either case the mortgagor has new substantial benefits and the holder of the mortgage new substantial burdens. In either case the substance of their contract has been changed, and its obligation is impaired within all the definitions.¹⁰

The main provisions of these laws then, without going into further details, impair the obligation of existing contracts. If the Contracts Clause is read as literal and absolute, they violate it. The remaining question is whether and how far, in the emergency which existed in the spring of 1933, the police power of the States was competent to grant relief to debtors, in the manner and to the extent that these laws do, notwithstanding contracts are impaired.

Some of the limitations of the Constitution are intended to be absolute, in peace and war, and persist through all emergencies. *Ex parte Milligan*¹¹ is enough to settle that. Some of these are included in the clause before us.

⁹ *Bronson v. Kinzie*, 1 How. 310 (1843); *Howard v. Bugbee*, 24 How. 461 (1860); *Brine v. Insurance Company*, 96 U.S. 627 (1877); *Barnitz v. Beverly*, 163 U.S. 118, 16 Sup. Ct. 1042 (1896). For collection of cases, see 1 A. L. R. 143.

¹⁰ Specific decisions of the Supreme Court of the United States on the validity of "stay laws" are difficult to find. *Daniels v. Tearney*, 102 U.S. 415 (1880) is, technically, such a decision, but it relies so much on the fact that the Virginia ordinance of 1861 was in aid of secession that it should not be too greatly relied on for the general proposition. Statements that stay laws are invalid and that prolonged delay constitutes impairment are rather numerous. See *Edwards v. Kearzey*, 96 U.S. 595, 601 (1877); *Louisiana v. New Orleans*, 102 U.S. 203, 207 (1880); *Seibert v. Lewis*, 122 U.S. 284, 297-8, 7 Sup. Ct. 1190 (1887); *Oshkosh Waterworks Co. v. Oshkosh*, 187 U.S. 437, 439, 443-4, 23 Sup. Ct. 234 (1903). Conflicting State decisions on stay laws are collected in Mr. Feller's paper, 46 Harv. L. Rev., 1070-1072 (1933). It is not now necessary to decide the general proposition. We are dealing with mortgages. It is settled that a new or greatly lengthened right of redemption impairs the mortgage contract (cases in previous note) and there is no difference in fact, and should be no constitutional difference, between a long and artificial postponement before sale and an extended option of redemption afterwards.

¹¹ 4 Wall. 2 (1866). The famous passage is at pages 120-21.

Thus no State can grant letters of marque and reprisal, coin money, pass legal tender laws, or grant titles of nobility, in any circumstances. The view has often been expressed that the Contracts Clause is similarly absolute. But it is now quite clear that in some circumstances, for some purposes, and to some extent, States can impair the obligation of existing contracts.

This was first held as a limitation on the doctrine of the Dartmouth College case. Rights were asserted under public grants to private institutions, so difficult for society to live with that they had to be withdrawn. It has for some time been well settled that there are certain subjects concerning which even States cannot make contracts, and that if they undertake to do so they can later change their minds.¹² The cases were summed up as follows by Mr. Justice Pitney in 1915:

It is established by repeated decisions of this court that neither of these provisions (the contracts clause and the due process clause) of the Federal Constitution has the effect of overriding the power of the State to establish all regulations reasonably necessary to secure the health, safety, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise.¹³

It will not be useful, for the present purpose, to explore in detail the scope and limits of this principle. The light that the cases upon public contracts throw upon the power of States over the private contracts of their citizens is at best oblique and indirect. In some fields contracts made by States are binding, but those made by private parties are subject to impairment.¹⁴ It is perhaps important that where the subject matter of a public contract is primarily financial, as an exemption from taxation¹⁵ or a public utility rate structure,¹⁶ the contract is generally held not subject to impairment. But the analogy cannot be pressed too far.

¹² *Northwestern Fertilizer Co. v. Hyde Park*, 97 U.S. 659 (1878); *Stone v. Mississippi*, 101 U.S. 814 (1879); *C.B. & Q.R.R. Co. v. Nebraska*, 170 U.S. 57, 18 Sup. Ct. 513 (1898); *Northern Pacific Ry. Co. v. Duluth*, 208 U.S. 583, 28 Sup. Ct. 341 (1908); *Texas & New Orleans R.R. v. Miller*, 221 U.S. 408, 31 Sup. Ct. 534 (1911); *Chicago & Alton R.R. v. Tranbarger*, 238 U.S. 67, 35 Sup. Ct. 678 (1915); *Denver & Rio Grande R.R. v. Denver*, 250 U.S. 241, 39 Sup. Ct. 450 (1919). But see *Grand Trunk Western R.R. v. South Bend*, 227 U.S. 544, 33 Sup. Ct. 303 (1913).

¹³ *Chicago & Alton R.R. v. Tranbarger*, 238 U.S. 67, 76-77, 35 Sup. Ct. 678 (1915).

¹⁴ Compare *Los Angeles v. Los Angeles City Water Co.*, 177 U.S. 558, 20 Sup. Ct. 736 (1900), and *Detroit v. Detroit Street Ry. Co.*, 184 U.S. 368, 22 Sup. Ct. 410 (1902), with *Union Dry Goods Co. v. Georgia P.S. Commn.*, 248 U.S. 372, 39 Sup. Ct. 117, 9 A.L.R. 1420 (1919).

¹⁵ *New Jersey v. Wilson*, 7 Cranch 164 (1812); *Home of the Friendless v. Rouse*, 8 Wall. 430 (1869); *Washington University v. Rouse*, 8 Wall. 439 (1869).

¹⁶ *Los Angeles v. Los Angeles City Water Co.*, 177 U.S. 558, 20 Sup. Ct. 736 (1900).

We come then to the cases upon private contracts. The ground on which they rest was stated thus by Mr. Justice Holmes:

One whose rights, such as they are, are subject to State restriction, cannot remove them from the power of the State by making a contract about them. The contract will carry with it the infirmity of the subject matter.¹⁷

This gem of insight throws a flood of light upon the doctrine that it illustrates, but does little to define the limits of its operation. The Justice would be the first to admit that this is so. In the same opinion he explained:

All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. The limits set to property by other public interests present themselves as a branch of what is called the police power of the State. The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side.¹⁸

There is therefore no escape from a statement of the facts of some of the main cases.

In 1859, in Georgia, White sold Hart a slave, and took his note in payment. The Civil War was fought, the Thirteenth Amendment proposed and ratified, and Georgia adopted a new Constitution prohibiting its Courts from enforcing "any debt the consideration of which was a slave." White then sued upon the note. One would have thought, if the police power can abrogate a contract, that here was a clear case. But the Court held the provision of the new Georgia Constitution void under the Contracts Clause, and White got judgment.¹⁹

In 1868 North Carolina adopted a new Constitution, and by it exempted from execution "every homestead, and the dwelling and buildings used therewith, not exceeding in value \$1,000.00, to be selected by the owner thereof." Edwards had a judgment against Kearzey, based on contracts dating before 1868. He levied upon Kearzey's homestead, which did not exceed the value stated. Chief Justice Taney had already spoken of certain possible exemptions as being within the State's authority to grant.²⁰ But the Court held this exemption a violation of the Contracts Clause. The police power was dismissed abruptly:

¹⁷ *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 357, 28 Sup. Ct. 529 (1908).

¹⁸ 209 U.S. 355 (1871).

¹⁹ *White v. Hart*, 13 Wall. 646 (1871); *Osborn v. Nicholson*, 13 Wall. 654 (1871).

²⁰ In *Bronson v. Kinzie*, 1 How. 311, 315 (1843).

Policy and humanity are dangerous guides in the discussion of a legal proposition. He who follows them far is apt to bring back the means of error and delusion. The prohibition contains no qualification, and we have no judicial authority to interpolate any.²¹

In 1898 Manigault and Springs, riparian proprietors on Kinloch Creek, in South Carolina, agreed, in settlement of an existing controversy, that a dam maintained by Springs across the creek should be removed by 1901, and that both should thereafter have clear passage through the creek. In 1903 a State law authorized Springs by name to build a dam at the same point, and the suit was to prevent his doing so. The new law was held valid. It is easy to appreciate that the State's control over its public waterways cannot be limited by private contract, but the Court's statement goes much beyond that application, and is in striking contrast to the one last quoted:

It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the public weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort, and general welfare of the people, *and is paramount to any rights under contracts between individuals.*²²

*Hudson County Water Co. v. McCarter*²³ is to much the same effect. The Water Company had rights to take water from the Passaic River, in New

²¹ *Edwards v. Kearzey*, 96 U.S. 595 (1877). The passage quoted is at page 604. The language used did not have the sympathy of all the judges. See the concurring opinion of Mr. Justice Clifford, pp. 608-10, and of Mr. Justice Hunt, pp. 610-11.

In various other cases, where private money contracts were held unlawfully impaired, though no reference is made to the police power, facts were present which would have justified such reference, if the relief of debtors is at all within its scope. The statute held invalid in *Bronson v. Kinzie*, 1 How. 311 (1843), was passed in Illinois in 1841. Current conditions as to values, credit, money, banks, and debt were then about as bad as possible, and the repeal of the National Bankruptcy Act in 1843 did not make the plight of debtors any easier. The reaction to the decision was quite violent. See Charles Warren, *The Supreme Court in United States History*, Vol. II, pp. 375-79. The statute held invalid in *Barnitz v. Beverly*, 163 U.S. 118 (1896), was a Kansas act of 1893. Farmer debtors in the western states were certainly not happy in the 90's. But nothing is said in the opinion about any police power.

²² *Manigault v. Springs*, 199 U.S. 473, 26 Sup. Ct. 127 (1905). The passage quoted is at pp. 480-81. The italics are the present writer's.

Though Mr. Justice Brown here says that the rule announced is settled, it will be noted that the cases cited in support of it (at p. 481) all deal with public contracts. It is believed there is a real difference between contracts of the State with citizens and contracts solely between private persons, and that the controlling rules are not necessarily the same in the two cases. But it is certainly not intended to criticize the doctrine or result of *Manigault v. Springs*. No private persons should be able, by any form of deal, to control the public right to regulate the level of public navigable waters.

²³ 209 U.S. 349, 28 Sup. Ct. 529 (1908). The two quotations from Mr. Justice Holmes at page 255 above are from the opinion in this case.

Jersey, and had made contracts and laid pipes to carry it to Staten Island, in New York. New Jersey passed an act prohibiting the transport of any waters of the State outside its boundaries. The Court held the act within its power.

It is also clearly settled that though a rate contract between a city and a municipality is binding, a contract with a private person, giving him a certain rate, does not control the State, and may be abrogated to prevent discrimination.²⁴ Again, it is easy to agree with the result, but again the Court's statement is extremely broad. After referring to the prior cases the Court said:

These decisions, a few from many to like effect, should suffice to satisfy the most skeptical or belated investigator that the right of private contract must yield to the exigencies of public welfare when determined in an appropriate manner by the authority of the State.²⁵

So the matter stood until the war. In 1919 and 1920 the housing situation in the cities of New York and Washington became acute. Statutes were passed in both setting up a rent commission, with power to fix reasonable rents, etc., and obliging landlords to extend existing leases at the rents fixed by the commission. In the first case from New York two contracts were abrogated by the statute. The first lease had contained the universale clause (so essential that the law would certainly imply it if it were overlooked) that the tenant should surrender his possession at the conclusion of the term. The term ended, and the landlord made a lease to other tenants. But the first tenant was still there, and claimed the right to stay in by the statute. The Court held the statute good.²⁶ The majority declared:

The chief objections to these acts have been dealt with in *Block v. Hirsch*. 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.

It began to look as if the Contracts Clause was to be read that no State should impair the obligation of contracts except for public purposes. But while the Court had the rent cases before it there was argued and decided

²⁴ *Knoxville Water Co. v. Knoxville*, 189 U.S. 434, 438, 23 Sup. Ct. 531 (1903); *Portland Railway Co. v. R.R. Commn. of Oregon*, 229 U.S. 397, 33 Sup. Ct. 820 (1913); *Union Dry Goods Co. v. Georgia Public Service Commn.*, 248 U.S. 372, 39 Sup. Ct. 117 (1919).

²⁵ 248 U.S. 377, 39 Sup. Ct. 147 (1919).

²⁶ *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170, 41 Sup. Ct. 465 (1921). The passage quoted is at page 198. The italics are the present writer's. See also *Levy Leasing Co. v. Siegel*, 258 U.S. 242, 248-49, 42 Sup. Ct. 289 (1922).

Bank of Minden v. Clement.²⁷ This involved a Louisiana statute that exempted the proceeds of certain life insurance policies from the debts of the insured. The statute was held void as to debts that existed before the passage of the act. The Court quoted with approval from *Planters' Bank v. Sharp*:

One of the tests that a contract has been impaired is that its value has by legislation been diminished. 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 any part of its force.²⁸

It is perhaps no wonder that the dissenting justices in the *Marcus Brown* case were a little startled, and that commentators are confused.

It will be necessary to refer to only one more case. The owners of coal lands in Pennsylvania had made deeds of the surface, reserving however the right to mine all coal, whether the surface fell or not, and the grantees had released all damages that might result. The city of Scranton was laid out and built up, in large part, upon such lands. The owners were about to mine, but a state law was passed prohibiting mining under cities to such an extent as to cause subsistence of dwelling houses, public buildings, streets, or the facilities of public services. It was supported as essential for the safety of the lives of persons in the city. But the Court held the act invalid.²⁹ One more quotation cannot be avoided:

Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts. . . .

The rights of the public in a street purchased or laid out by eminent domain are those that it has paid for. If in any case its representatives have been so short sighted as to acquire only surface rights without the right of support, we see no more authority for supplying the latter without compensation than there was for taking the right of way in the first place and refusing to pay for it because the public wanted it very much. . . .

We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. As we have already said, this is a question of de-

²⁷ 256 U.S. 126, 41 Sup. Ct. 408 (1921). The *Marcus Brown* case was argued March 3, 7, 1921, and decided April 18, 1921. The *Bank of Minden* case was submitted March 21, 1921, and decided April 11, 1921.

²⁸ 6 How. 301, 327 (1848). The italics are the present writer's.

²⁹ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 Sup. Ct. 158 (1922). The passages quoted are from pages 413, 415, and 416.

gree—and therefore cannot be disposed of by general propositions. But we regard this as going beyond any of the cases decided by this Court. The late decisions upon laws dealing with the congestion of Washington and New York, caused by the war, dealt with laws intended to meet a temporary emergency and providing for compensation determined to be reasonable by an impartial board. They went to the verge of the law but fell far short of the present act.

We are warned that general propositions cannot settle questions in this field. But a few do seem to be permissible:

1. Existing contracts can, for some purposes and to some extent, be impaired by the police power.

2. Such impairment is permitted, for the most part, when the main purpose of the act is something else—some other legitimate object of statutory regulation—to which some impairment of existing contracts is a necessary incident. Direct impairment of existing contracts, as the sole or main purpose of the law, can seldom be legitimate.

3. Money contracts are protected more stringently than others. This seems to be the result of the decisions, and is believed to be correct for two main reasons: (1) as we have seen, such contracts were the original main object of the Contracts Clause, and (2) the Federal Government has direct power to deal with them under the bankruptcy power and the power over money and currency. It is almost safe to say that the relief of debtors from the claims of creditors is not of itself a legitimate object of State laws.

4. The question is one partly of degree. An impairment without compensation is more serious than one where compensation is provided. A postponement for two years is more serious than one for thirty days.

5. Some things are proper in emergencies which would not be so in normal times.³⁰ It is believed that this applies to money contracts. An act passed March 6, 1933, granting days of grace on obligations and extending all redemption rights until a general reopening of banks within the State, would have been proper.³¹ The emergency insurance statutes passed in March of 1933 are probably also good upon this ground.³² Emergency enlarges power, not because hard times make impairment proper as an object in itself, but because it is always proper to protect the abodes and occupations of the people and the institution of credit on which so much

³⁰ *Block v. Hirsh*, 256 U.S. 135, 41 Sup. Ct. 458 (1921); *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170, 41 Sup. Ct. 465 (1921); *Levy Leasing Co. v. Siegel*, 258 U.S. 242, 42 Sup. Ct. 289 (1922). The Court must be satisfied that a real emergency exists, and is not controlled by recitals in the act. *Chastleton Corporation v. Sinclair*, 264 U.S. 543, 44 Sup. Ct. 405 (1924).

³¹ See *State v. Moeller*, 249 N.W. 330 (Minn., 1933).

³² See below, pages 263, 264.

depends; and when emergency is great enough to threaten these, the State has power to come to their assistance although some impairment of existing contracts necessarily accompanies the effort. In the first half of 1933, the emergency was of this class.

But the limits must be strictly drawn. It is not proper to forget that the Constitutional Convention was familiar with hard times, and with the collapse of values and of credit, but they are not mentioned in the Contracts Clause. Acts impairing money contracts are passed only in hard times, and if they can be sustained generally then, little remains of the constitutional provision. In particular it is not proper for the State to transfer property of real substantial value from one party to another without paying for it. That "the public wants it very much" is not sufficient reason for a real impairment of real rights without fair payment.³³

Is it then possible to reach conclusions as to any of the legislation which we set out to study? Fools rush in where angels fear to tread, but some will be attempted.

1. A long and uncompensated stay of the foreclosure sale, or extension of redemption after sale, is almost certainly invalid.³⁴ We have already seen that such an act takes rights of real substantial value from the mortgagee and confers them on the mortgagor. This cannot be done without compensation, even in an emergency.

2. The chances of validity are better if the new time is paid for. The mortgagee's strict right, as we have seen, is to title at a stated day, with the right to sell and rent, but his original position was as lender, and if he receives the interest upon his loan (as the South Dakota act provides) or the reasonable rental value of the land, his substantial original position is to some extent maintained.³⁵ It seems, however, impossible to justify an extension of redemption, with possession, for less than either interest or the fair current rental value of the land. Provisions contemplating payment of sums smaller than either interest or rental value force the mortgagee to rent his land for less than market (already very low) and give the mortgagor a partial present of a year's possession. He may be entitled to the present, but if so it should be paid for by the public.

3. Laws limited to homes, farm lands occupied by owners, and business properties that constitute the owner's job, have substantially more claim

³³ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 Sup. Ct. 158 (1922).

³⁴ See cases in note 9.

³⁵ It was partly on this ground that the Supreme Court of Minnesota sustained the act of that State, and distinguished the prior decision of the Supreme Court of North Dakota holding its act void. *North Dakota, Laws of 1933*, c. 157; *State rel. Cleveringa v. Klein*, 249 N.W. 118 (No. Dak. 1933); *Minnesota, Laws of 1933*, c. 339; *Blaisdell v. Home Bldg. & Loan Assn.*, 249 N.W. 334 (Minn., 1933).

to be held valid than those that cover everything. There is a public interest (*Edwards v. Kearzey*³⁶ to the contrary notwithstanding) in the individual ownership of places of abode, of farms, and of "the tools of the mechanic" (which may be a butcher shop), which does not equally apply to the protection of investment properties from the enforcement of agreed securities granted for business purposes. It is hard to see that in general wild lands, farms occupied by tenants, great hotels, apartment buildings, office buildings and factories are necessarily more beneficial to the State in one ownership than in another. Perhaps they are, but among business people, in a capitalist system, credit is also of importance, and credit involves and contemplates the giving of security, and, if need be, its enforcement. Business losses and hard times, except as they threaten the institution of credit itself, or the abodes or occupations of the people, do not justify impairment.

4. Those acts, which, like one passed in Kansas, seek merely to define the power of courts of equity, have, within limits, a substantial basis. Equity invented the right of redemption after default to prevent one sort of an injustice, and its foreclosure to prevent another. It is not safe to assume that its power of growth has ceased. Even under code systems of procedure courts in which foreclosures are conducted have some residuum of power over the date of sale and over confirmation.³⁷ Statutes which point out these powers, or remove code restrictions on them, have a basis which the Constitution will respect.

This does not mean that anything is valid if it is committed to a court to order it. An act like that of Iowa, which orders courts to continue all foreclosure causes to March 1, 1935, unless good cause is shown to the contrary, does not differ very much, so far as the Constitution is concerned, from one that makes the same postponement absolute.

5. The abolition of deficiency judgments in all cases is difficult to justify. A note is after all a note, and is a claim on later acquisitions as well as on the debtor's present property.³⁸ When the security is really of less value than the debt, to forbid a judgment for the balance substantially impairs the contract.³⁹

The best protection against unfair judgments for deficiencies is to have redemption from the sale, not from the mortgage, and to make the option to redeem assignable. Then the mortgagee cannot afford to bid much less

³⁶ 96 U.S. 595 (1877).

³⁷ The Supreme Court of Wisconsin has recently shown what a bold chancellor can do in this regard, without the aid of any statute. *Suring State Bank v. Giese*, 246 N.W. 556 (1933).

³⁸ *Sturges v. Crowninshield*, 4 Wheat. 122, 198 (1819).

³⁹ See *Barnitz v. Beverly*, 163 U.S. 118, 131, 16 Sup. Ct. 1042 (1896).

than he really thinks the property is worth. Where redemption still pre-
cedes the sale, a rule that the mortgagee shall be refused a confirmation
unless he credits on the debt, not the price bid, but the fair present value
of the property acquired, is in the interest of justice and should be sus-
tained.⁴⁰

6. The insurance statutes probably are valid. The emergency they met
was real, and the impairment that they authorized appropriate to meet it.
The situation is perhaps not generally understood, and requires an ex-
planation.

The main object of a life insurance contract is insurance upon life.
Policies are written, for an average long period of years, at premium rates
based on a net investment income of from 3 to 4 per cent. Such rates are
not available on bank deposits, nor (at most times) on any form of short
term paper appropriate for the investment of other people's money. Ac-
cordingly all companies, under the various State laws, invest heavily in
mortgages and long term bonds. Few life companies hold cash equal to
more than 2 per cent of total assets. Short term United States securities
may be another 2 or 3 per cent, and the other 95 is in bonds of various ma-
turities, equipment trust certificates, loans on policies, and mortgages.

At the same time every company has obligations to make loans or to
pay surrender values, on demand or on short notice, amounting, substan-
tially, to the reserve on its outstanding policies less loans already made.
These obligations equal perhaps 50-60 per cent of total assets, that is, say
twenty times the cash available.

Such a position sounds precarious, but over a long period of years had
caused no trouble, because few people demanded loans or surrendered
policies at once. From 1929 through 1932 requests for loans were heavy,
but the companies were able to comply, and many even added to their
cash. But in February, 1933, statewide bank holidays began, and then
real trouble started. Runs on banks were followed by runs on life insur-
ance companies. By the morning of March 6 every bank in the United
States was closed by order of the President. And men who had cash
claims on life insurance companies demanded cash.⁴¹

The legislature of New York was then in session. It was confronted
with the problem either (1) to let those cash demands proceed to be en-
forced, require the dumping of the best securities of all the companies, and

⁴⁰ See *Suring State Bank v. Giese*, 246 N.W. 556 (Wis. 1933).

⁴¹ So far as I know no official figures have ever been published as to the volume of actual
demands for loans on New York companies during the bank holiday. The figures unofficially
quoted at the time were startling. It was said also that they were, in great part, from holders
of the largest policies.

run the chance of bankrupting all companies and destroying life insurance as an institution, or (2) to prohibit loans on policies and the surrender of policies for cash, and to preserve the chief purpose of the institution, insurance upon lives. It chose the second course. Its action heightened runs on companies in other States. The New York statute was a precedent, and acts upon like plans were passed in quick succession in the other important insurance States. The Insurance Commissioners cooperated closely with each other, their regulations were kept generally uniform, and the restrictions imposed were gradually lightened as the run subsided.⁴² Payment of death claims, disability benefits, regular installments of annuities, etc., was never interfered with.

Existing contracts unquestionably were impaired. But they were impaired to save them. Their less important terms were cancelled temporarily to insure the ultimate performance of their main provision. Insurance is a business affected with a public interest in many ways, and has long been closely regulated. It is believed the temporary and emergency suspension of some clauses of insurance contracts, made to save their more important features, was, in the situation then existing, a legitimate exercise of the emergency police power of the States.⁴³

APPENDIX I

EMERGENCY INSURANCE ACTS OF 1933

(In the order of their passage)

NEW YORK: Laws of 1933, c. 40 (approved March 7).

MASSACHUSETTS: (session laws unpublished).

CONNECTICUT: Cumulative Supplement to the General Statutes 1933, c. 217, §1087b.

MICHIGAN: (session laws unpublished).

NEW JERSEY: (session laws unpublished).

PENNSYLVANIA: (session laws unpublished).

⁴² I do not know of any publication, generally available, of these regulations. They will no doubt be published ultimately in the annual reports of the various commissioners for 1933. In general they

1. Required additional days of grace for premium payments.
2. Prohibited loans on policies, the payment of cash surrender values, and other extraordinary cash withdrawals, of more than \$100.00 at a time, except for certain purposes. The permissible amount was gradually raised, and the field of authorized purposes gradually broadened. It is believed that now (August, 1933) loans and surrenders are almost everywhere available, up to the limits of the policies, for almost every purpose except hoarding.

⁴³ A personal *caveat* should here be entered. The writer had a part in the preparation of the Minnesota bill, and in its presentation to the committees of the legislature. One gets a bent from his employment.

Neither is it intended to express any view as to the delegation of legislative power to the Commissioners involved in all these statutes. I am concerned in this paper wholly with the Contracts Clause, and for the purpose of raising that question have assumed that the acts are otherwise valid and that the regulations made under them have the force of law.

- INDIANA: Laws of 1933, c. 148, § 3 (approved March 8). c. 149, § 2 (approved March 8).
- MINNESOTA: Laws of 1933, c. 78 (approved March 13).
- IOWA: Laws of 1933, c. 145.
- KANSAS: Laws of 1933, c. 203.
- NORTH CAROLINA: Laws of 1933, c. 121.
- MARYLAND: Laws of 1933, c. 152.
- ILLINOIS: H.B. No. 507, approved May 11. (Smith-Hurd Rev. Stats., 1933, Chapter 73, §§ 580-86).
- MAINE: Laws of 1933, c. 262.

APPENDIX II

EMERGENCY MORTGAGE ACTS

- IDAHO: Laws of 1933, c. 150. The fair value of the land sold on foreclosure (not the sale price) determines deficiency judgments.
- ILLINOIS: 1933. H.B. 507, § 3 (Smith-Hurd Rev. Stats. 1933, 73, 582). The Governor or the Commissioner of Insurance may stay foreclosures, or extend time for the payment of either principal or interest, on mortgages on farms or homesteads owned by insurance companies. The act is a section of the emergency insurance act.
- IOWA: Laws of 1933, c. 179. All redemption periods are extended to March 1, 1935, unless good cause is shown to the contrary. Extension is by order of the Court on application of the mortgagor. The mortgagor is entitled to possession pending the extension, and the Court is to order the application of a just and equitable amount of the income to taxes, and the balance of the income as the Court shall direct.
- C. 182. All pending and future foreclosure cases are continued to March 1, 1935, unless good cause is shown to the contrary. The Court is to make an order for possession (giving preference to owners in possession) and for the application of income to taxes, insurance, maintenance, and upkeep, in that order, and any balance as the Court may further direct.
- KANSAS: Laws of 1933, c. 218. Declares the power of Courts of Equity to refuse confirmation unless the sale is fair.
- C. 232. Six months extension of all redemption periods, with power in the Governor to increase the extension another six months if the emergency continues. No compensation provided.
- MINNESOTA: Laws of 1933, c. 44 (approved March 2). Authorizes sheriffs to postpone certain sales until after April 30, but not more than ninety days, and validates certain postponements already made. This act held valid in *State v. Moeller*, 249 N.W. 330 (Minn. 1933).
- C. 339. Foreclosures by advertisement suspended when requested by mortgagors. Courts authorized to extend periods of redemption to May 1, 1935, upon terms to be fixed. Deficiency judgments suspended until same date. This act held valid in *Blaisdell v. Home Building & Loan Assn.*, 249 N.W. 334 (Minn. 1933). Appeal now pending in the Supreme Court of the United States.
- MONTANA: Laws of 1933, c. 116. Authorizes Courts to stay proceedings upon application and cause shown, and to fix terms as to possession, crops, care of the property, rents, income, interest, taxes, etc.

NEBRASKA: Laws 1933, c. 65. Authorizes courts to stay proceedings upon application and cause shown, and to fix terms as to possession, crops, care of property, taxes, etc.

See c. 41 for a provision depriving the courts of power to enter a deficiency judgment, without recital of the emergency as its justification and no limitation as to duration of the provision.

NORTH CAROLINA: Laws of 1933, c. 275. Fair value of the land (not sale price) to determine deficiency judgment.

NORTH DAKOTA: Laws of 1933, c. 157. Extends all periods of redemption for an additional year. No compensation provided. This act held invalid in *State v. Klein*, 249 N.W. 118 (N.D. 1933) except as to mortgages subsequent to act.

C. 158. Foreclosure by advertisement abolished except on mortgages held by the State or by the University.

OREGON: (1933) H. J. R. 2. Appoints a joint committee to consider the subject and introduce a bill, but apparently no legislation passed.

SOUTH DAKOTA: Laws of 1933, c. 135. Foreclosures by advertisement suspended when requested by mortgagor.

C. 137. Redemption period extended additional year on condition that the mortgagor pay taxes, back interest, interest since the sale, interest one year in advance, and the costs of the foreclosure.

C. 138. Prohibits deficiency judgments.

WISCONSIN: Laws of 1931 (Special Session), c. 29, § 7. Extends period of redemption additional year, mortgagor to pay taxes and interest.

Laws of 1933, c. 11, 125.

BRITISH AND AMERICAN UTILITIES: A COMPARISON

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WHILE Great Britain (and most European countries for that matter) has been experimenting with mixed undertakings and public utility trusts, our American states have been content to muddle along with the railroad and public utility commissions in forty-seven states.¹ Public utility regulation is preeminently American, although the public utility concept was derived from English rather than from American sources.² In contrast with the maze of learned articles on public utilities which have been produced by American writers, information on British public utilities is

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¹ Mosher and Crawford, *Public Utility Regulation*, New York, 1933. Delaware is the only state that has not created a public utility commission.

² B. P. McAllister, *Lord Hale and Business Affected with a Public Interest*, 43 Harv. L. Rev. 759 (1930); Walton Hamilton, *Affectation with a Public Interest*, 39 Yale L. Jour. 1099 (1930).