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THE MINNESOTA MORTGAGE MORATORIUM CASE

JOSEPH V. HEFFERNAN*

"There are thousands and thousands of contracts, whereof equity forbids an exact literal performance. . . . Pass that government (the Constitution) and you will be bound hand and foot."—Patrick Henry.

Thus Patrick Henry, foremost foe of adoption of the United States Constitution, upon the "contract clause" (article 1, No. 10)¹ in the great Constitutional debates in the Virginia convention of 1788 called to consider ratification of the "new government". On January 8th of this year the Supreme Court of the United States struck out with cold courage to give its answer to the charge of the orator of the Revolution.² Are we "bound hand and foot"? Four of the Justices³ believed that we are, for our ultimate good.⁴ The Court, speaking by Chief Justice Hughes for the other five,⁵ held that we are not.⁶

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¹ "No state shall . . . pass any . . . law impairing the obligation of contracts. . . ."

² In the case of *Home Building & Loan Association v. Blaisdell et ux.*, — U. S. —, 54 S. Ct. 231 (Jan. 8, 1934).

³ Justices Sutherland, Butler, VanDeVanter, McReynolds.

⁴ 54 S. Ct. 250: ". . . 'ultimately these debtor-relief-laws have always proved to be injurious to the very class they were designed to relieve' . . .".

⁵ Chief Justice Hughes, and Justices Brandeis, Stone, Roberts, and Cardozo.

⁶ 54 S. Ct. 231.

THE STATUTE UNDER REVIEW

The decision has become popularly known as the Minnesota Mortgage Moratorium case. The action was instituted by Blaisdell and wife against the Home Building & Loan Association. Judgment for the plaintiff was affirmed by the state Supreme Court, and the appeal is by the defendant. The validity of chapter 339 of the Laws of Minnesota of 1933, p. 514, approved April 18, 1933, is questioned, as being in contravention of the contract clause (article 1, No. 10) and the due process and equal protection clauses of the Fourteenth amendment of the United States Constitution.

The preamble of the act recites the existing emergency, in general, conditions known to all of us as a result of the depression, as applicable to mortgagors of real property. It then declares that during the continuance of the emergency foreclosure of mortgages by advertisement is abrogated, and relief may be had by foreclosure by action; that foreclosure sales may be postponed (part 1, No. 2), and periods of redemption may be extended, but in no event beyond May 1st, 1935 (part 1, No. 4, No. 7). The act is to remain in effect "only during the continuance of the emergency and in no event beyond May 1, 1935". No extension of the period of redemption and no postponement of sale is to be allowed which would have the effect of extending the period of redemption beyond that date (part 2, No. 8).

There is the usual separability clause (part 1, No. 9). Although there are still other provisions not mentioned, the court specifically limits the decision in the present case to the validity of part 1, No. 4.⁷ This section authorizes the district court to extend the period of redemption from foreclosure sales "for such additional times as the court may deem just and equitable" (but not beyond May 1, 1935). The extension is to be made upon application to the court, on notice, for an order determining the reasonable value of the income of the property, or, if it has no income, then the reasonable rental value of the property, and directing the mortgagor to "pay all or a reasonable part of such income or rental value, in or toward the payment of taxes, insurance, interest, mortgage or judgment indebtedness at such times and in such manner" as shall be ordered by the court. . . . "Provided . . . that if such mortgagor . . . shall default in the pay-

⁷ 54 S. Ct. 232.

ments, or any of them, in such order required . . . his right to possession shall cease and the party acquiring title to any such real estate shall then be entitled to immediate possession of said premises. . . . Provided, further, that prior to May 1, 1935, no action shall be maintained . . . for a deficiency judgment until the period of redemption as allowed by existing law or as extended under the provisions of this Act, has expired". Part 1, No. 4.

Appellees invoked the provisions of this section, setting out in their petition the execution of the mortgage, foreclosure, and the sale to the mortgagee (appellant) for the full amount due, \$3,700.98. The time for redemption in the foreclosure suit expired May 2nd, 1933. Upon the application of appellees, the court extended this time to May 1st, 1935, subject to the condition that appellees pay to appellant \$40 per month, to go to the payment of taxes, insurance, interest, and mortgage indebtedness. The appeal is from this judgment.

IMPAIRMENT AND POLICE POWER

The writer hesitates to comment, except to commend the brilliance of the decision of the Chief Justice.. It marks him as a student of the law who has thought deeply and courageously of the problems of sociological jurisprudence; and as a Constitutional lawyer of remarkable prescience. As was John Marshall's custom before him, he chose to write the opinion himself in a case so important in its implications. The result is a review of the development of Constitutional principles which displays a thorough mastery of the precise points involved in the case presented. His record of the majority view proceeds by close but realistic progression to the conclusion that the statute is a valid exercise of the police power of the state. It should be read as a whole. Something of its force as a body of connected thought is lost by the reproduction of excerpts.

Briefly stated the case seems to settle the following principles: that the contract clause (article 1, No. 10) as interpreted by the Supreme Court requires that the states shall not impair the obligation of contracts, public or private: but "the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula";⁸ . . . "the reservation of essential

⁸ 54 S. Ct. 236.

attributes of sovereign power is . . . read into contracts as a postulate of the legal order . . .";⁹ i. e., a state may interfere with contracts if it does so by a proper exercise of its police power; the statute in question here is a proper exercise of the police power of the state—"An emergency existed in Minnesota which furnished a proper occasion for the exercise of the reserved power of the state to protect the vital interests of the community . . ."¹⁰—and for that reason the law is Constitutional.

This result is plainly evident in these especially significant passages from the opinion of the Chief Justice:

"To ascertain the scope of the constitutional prohibition (against impairment of the obligation of contracts) we examine the course of judicial decisions in its application. These put it beyond question that the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula. . . .¹¹ Not only is the constitutional provision qualified by the measure of control which the state retains over remedial processes, but the state also continues to possess authority to safeguard the vital interests of its people. It does not matter that legislation appropriate to that end 'has the result of modifying or abrogating contracts already in effect'. *Stephenson v. Binford*, 287 U. S. 251, 276, 53 S. Ct. 181, 189, 77 L. Ed. 288. Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order.¹² . . . The Legislature can not 'bargain away the public health or the public morals'.¹³ . . . The economic interests of the state may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts.¹⁴ . . . With a growing recognition of public needs and the relation of individual right to public security, the court has sought to prevent the perversion of the clause, through its use as an instrument to throttle the capacity of the states to protect their fundamental interests. . . . The prin-

⁹ 54 S. Ct. 239.

¹⁰ 54 S. Ct. 242.

¹¹ 54 S. Ct. 236.

¹² 54 S. Ct. 238.

¹³ 54 S. Ct. 239.

¹⁴ 54 S. Ct. 239.

ciple of this development is, as we have seen, that the reservation of the reasonable exercise of the protective power of the state is read into all contracts.¹⁵ . . .”

It may be conceded to the minority of the court that this was not always the law. It would seem that the contract clause of the United States Constitution is one phase of Constitutional law which has shown unmistakable development from one stage to another to its arrival in its present form as announced by the Chief Justice. It may be of service to sound analysis to trace some of the steps in this progression.

The contract clause (article 1, No. 10) was first invoked in the Supreme Court as against state legislation in the case of *Fletcher v. Peck* (1810), 6 Cranch 87. The litigation involved the famous “Yazoo Land Fraud”. In one of the greatest legislative swindles in history, the state of Georgia by special act made grants of the state lands to certain corporations organized to purchase them. These companies proceeded to sell off the lands to other persons. Shortly after the time of the first grant, a succeeding legislature passed an act purporting to repudiate the former grant and resume the land. The Supreme Court held that the first grant was a contract, and that the subsequent legislation attempting to avoid the grant impaired the obligation of that contract, and was, for that reason, unconstitutional.

The first instance of a private contract, i. e., one between one individual and another, as opposed to a contract between the state and an individual, to come before the Supreme Court for consideration under this clause was that of *Sturgis v. Crowninshield* (1819), 4 Wheaton 192. This decision held that a state bankruptcy law, in so far as applicable to a contract made before the enactment of the bankruptcy legislation, was unconstitutional as an impairment of the obligation of the contract. But in his opinion Chief Justice Marshall saw fit to add what the present Chief Justice refers to as “the seeds which the fathers planted”:¹⁶ a statement that he was ready to imply as a condition to the contract clause that the state retained a power over contracts already in force to legislate in the interests of humanity by abolishing imprisonment for debt.

“To punish honest insolvency by imprisonment for life, and to make this a constitutional principle, would be an excess of

¹⁵ 54 S. Ct. 242.

¹⁶ 54 S. Ct. 242.

inhumanity which will not readily be imputed to the illustrious patriots who framed our constitution, nor to the people who adopted it".¹⁷

The case which has caused most confusion in the interpretation on the contract clause is Marshall's most celebrated one—the Dartmouth College case.¹⁸ Dartmouth College had been incorporated by grant of royal charter in 1769. The charter fixed the number, rights, and privileges of the trustees who were constituted the governing body of the school. By act of 1816 the legislature of New Hampshire sought to vest authority in the state for the appointment, by the governor, of a board of supervisors of the college and otherwise to take charge of the management of the school. Marshall's famous holding was that the corporate charter of the college was a contract; and that the legislation of 1816 purporting to alter it in the manner indicated was an impairment of the obligation of the contract, and hence void.

The characteristically firm language of Chief Justice Marshall in the opinion was interpreted to mean something not precisely stated: that all corporations, including private business corporations, hold their charters immune from subsequent legislation enacted as a proper exercise of the taxation power,¹⁹ and the police power of the state.²⁰ It is this interpretation that is generally regarded as the doctrine of the Dartmouth College case.²¹ The result was to give corporation a special advantage over individuals, whose private contracts among one another were never held to be guaranteed such an immunity by the contract clause.

Three definite and progressive modifications of this doctrine of the Dartmouth College case have appeared in the development of the jurisprudence of the Supreme Court. The first was the doctrine of strict construction of the charter against the grantee-corporation. This rule was announced by Chief Justice Taney in the case of *Charles River Bridge v. Warren Bridge* (1837), 11 Peters 420, 9 L. Ed. 773. The effect of this doctrine was to hold in each case that unless the corporate charter ex-

¹⁷ 4 Wheaton 200.

¹⁸ *Trustees of Dartmouth College v. Woodard* (1819), 4 Wheaton 518.

¹⁹ *Piqua Branch of State Bank of Ohio v. Knopp* (1853), 16 Howard 369.

²⁰ *Bridge Proprietors v. Hoboken Co.* (1864), 1 Wallace 116.

²¹ Beveridge, *The Life of John Marshall* IV:278.

pressly prohibits the exercise of the police power of the state with respect to it, the state still has that power over it.

The second modification of the doctrine of the Dartmouth College case was accomplished by the widespread enactment of general laws reserving to the legislature the right to alter or repeal corporate charters.²² The third development brings us to the present doctrine of the Supreme Court as re-asserted in the case under review: that a charter is a contract, but that its grant is impliedly subject to the reserved right of the state to exercise its power of eminent domain²³ and its police power^{24, 25} over the terms of the contract. The principle involved in this latter development was first announced in the Supreme Court by Justice Miller in 1869, in a dissenting opinion.²⁶ It became the doctrine of the court, so far as the exercise of the police power over contracts is concerned, in the year 1879.²⁷ Hence it would seem that the decision of the case under review announced no radically new principle, the journalistic comment to the contrary notwithstanding.

But a further distinction is to be observed. Both the Dartmouth College case (which caused the confusion) and the cases which announced the modifications of the doctrine of that case were instances in which public contracts were involved, i. e., contracts between the state and a private individual or individuals. The case under review is not an example of a public contract, but a private contract between private persons entirely. In spite of the fact that the doctrine of the Dartmouth College case was for a time interpreted by the Supreme Court to protect public contracts from any interference with them by the police power of the state, no case in the Supreme Court has ever held

²² *Ibid.*, IV:278. Also, *Covington v. Kentucky* (1899), 173 U. S. 231. It is of interest to note that Indiana never passed such a statute.

²³ *West River Bridge v. Dix*, 6 Howard 507, 12 L. Ed. 535. *Long Island Water Company v. Brooklyn*, 166 U. S. 685, 17 S. Ct. 718, 41 L. Ed. 1165.

²⁴ By dictum in *Boston Beer Co. v. Massachusetts* (1878), 97 U. S. 25, 32, 33, 24 L. Ed. 989. By squarely so holding in *Stone v. Miss.* (1879), 101 U. S. 814, 819, 25 L. Ed. 1079. Also in *Butchers' Union Co. v. Crescent City Co.* (1883), 111 U. S. 746, 750, 4 S. Ct. 652, 28 L. Ed. 585; *Ill. Central R. R. Co. v. Illinois* (1892), 146 U. S. 387, 13 S. Ct. 110; *Texas & N. O. R. R. Co. v. Miller* (1911), 221 U. S. 408, 414, 31 S. Ct. 534, 55 L. Ed. 789.

²⁵ Except as to rates of public callings, 13 Va. L. R. 158.

²⁶ In *Washington University v. Roush*, 8 Wall. 438, 443, 444. This is a taxation case, but it is submitted the principle is the same.

²⁷ *Stone v. Mississippi*, *supra*.

that private contracts carried the same immunity. *Manigault v. Springs* (1905), 199 U. S. 473, 26 S. Ct. 127, 50 L. Ed. 274, squarely held that such contracts are subject to that limitation, and other cases since have reiterated the principle, Mr. Justice Holmes, with his characteristic felicity of expression, stated the result of these cases involving private contracts:

“One whose rights, such as they are, are subject to state restriction, can not 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”.²⁸

The reason for the rule developed by these cases finds one of its best expressions in the first decision which made it the principle of the Supreme Court.²⁹ Speaking through Chief Justice Waite the court said:

“All agree that the legislature can not bargain away the police power of a state . . . the power of governing is a trust committed by the people to the government, no part of which can be granted away. The people, in their sovereign capacity, have established their agencies for the preservation of the public health and the public morals, and the protection of public and private rights. These several agencies can govern according to their general authority, while in power; but they can not give away nor sell the discretion of those that are to come after them, in respect to matters, the government of which, from the very nature of things, must vary with varying circumstances.”

These decisions³⁰ of the Supreme Court clearly marked the path as a guide for the opinion of the Justices in the case under review. The principle had already been settled that the state had the right to deal with the terms of the contract after the fact provided it did so as a proper exercise of its police power, i. e., that there was present some social interest which justified this particular legislation. This brings us to that part of the opinion of the Chief Justice most often quoted:

²⁸ *Hudson County Water Company v. McCarter*, 209 U. S. 357, 28 S. Ct. 529, 531, 52 L. Ed. 828, 14 Ann. Cas. 560.

²⁹ *Stone v. Mississippi*, *supra*, note 27.

³⁰ See note 24, *supra*.

“Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the federal government and its limitations of the power of the States were determined in the light of emergency, and they are not altered by emergency. . . . While emergency does not create power, emergency may furnish the occasion for the exercise of power. . . .”³¹

To the minority these words are simply incomprehensible. Of them Justice Sutherland says:

“I can only interpret what is said on that subject as meaning that, while an emergency does not diminish a restriction upon power, it furnishes an occasion for diminishing it; and this, as it seems to me, is merely to say the same thing by the use of another set of words, with the effect of affirming that which has just been denied”.³²

And to Edward S. Corwin, author of an article upon the case under review,³³ in which some otherwise good points are made, the words of the Chief Justice as set out just above are also regarded as a contradiction. But to this writer his statement would seem but a dramatic way of saying that: it is not the emergency which calls into existence the police power of the state (“While emergency does not create power”); that power is already present, but in abeyance until an appropriate factual situation calls for and justifies its use; the existence of the emergency may furnish the appropriate factual situation which justifies a proper exercise of the police power of the state (“emergency may furnish the occasion for the exercise of power.”). Or in other words, a social interest may be present in an emergency which would not be present in normal times. Such social interest present only during the emergency would furnish justification for the exercise of the police power during the emergency.

³¹ 54 S. Ct. 235.

³² 54 S. Ct. 252.

³³ “Moratorium Over Minnesota,” 82 U. of Pa. L. Rev. 315.

“. . . the reservation of the reasonable exercise of the protective power of the state is read into all contracts”.³⁴ At this time this principle of our constitutional jurisprudence is too deeply imbedded to be denied. The minority do not attempt to do so. They concede:

“It is quite true also that ‘the reservation of essential attributes of sovereign power is also read into contracts’; and that the Legislature can not ‘bargain away the public health or the public morals’”.³⁵

Justice Sutherland, writing for the minority, then contends that this principle is inapplicable to the statute under review. If the writer properly understands the Justice’s view it is that whenever the police power has been invoked against contracts in the class of cases given,³⁶ it has totally destroyed the contract, rendered performance of each and every term of the contract unlawful. “The contract is frustrated—it disappears in virtue of an implied condition to that effect read into the contract itself”.³⁷ (Citing an English case). But in the case under review he argues the statute “does not have the effect of frustrating the contract by rendering its performance unlawful”, but merely postpones the time of performance.³⁸ On that ground he believes it is to be distinguished from the rule established by the cases cited.³⁹

It would seem to the writer that this is an attempt to demonstrate that the legislature may not use its police power to strike down—“frustrate”—a single provision of a contract where the social interest requires interference with that one provisions only, while conceding that the state has the power to invalidate—“frustrate”—the whole contract. An assertion that the ax of the state police power is powerful enough to fell the whole tree, but not strong enough to prune a limb.

³⁴ 54 S. Ct. 242.

³⁵ 54 S. Ct. 253.

³⁶ See note 24, *supra*. Curiously enough, however, upon the discussion of this point the minority do not cite these cases given in note 24, although they are the leading ones, but cite three English cases. *Marshall v. Glanville* (1917), 2 K. B. 87, 91; *In re. Shipton, Anderson & Co. Ltd. v. Anglo-Mexican Petroleum Products Co., Ltd.* (1916), 2 A. C. 397.

³⁷ 54 S. Ct. 254.

³⁸ 54 S. Ct. 254.

³⁹ See note 24, *supra*.

IS THE STATUTE A FAIR ONE?

It is worthwhile to repeat that the residuum of protective power which the state has over contracts among its citizens does not justify any and every interference with the obligation of the contract. The legislation must be reasonable in tenor, and called into existence by the presence of a social interest which justifies its being.⁴⁰ In the case under review the existence of the emergency recited in the preamble of the act furnished the social interest for the enactment of the measure. This the minority does not deny, but proceeds upon the theory that no emergency, no matter how great, justifies interference with the obligation of contracts, in the manner here attempted, at least.⁴¹

Nevertheless the task remained for the Chief Justice to demonstrate that the section of the statute under review (Part 1, No. 4)⁴² was a "reasonable exercise of the protective power of the state". After reviewing briefly the emergency conditions, he states that the relief afforded to the mortgagor under the statute "could be granted only upon reasonable conditions".⁴³ Such conditions he finds fulfilled.⁴⁴ During the extended period of redemption the integrity of the mortgage indebtedness is not impaired; interest continues to run; the sale is not invalidated. While the mortgagor may retain possession during the extended period, he must pay for that privilege the rental value of the property as judicially ascertained. Thus the mortgagee is not without compensation during the time that possession is withheld from him. That the Chief Justice is a believer in the logic of realities is then demonstrated by his disposition to take judicial notice that mortgagees are predominately corporations, such as insurance companies, banks, and investment and mortgage companies.⁴⁵ As such their concern is for a fair return upon their investment; not possession of the mortgaged real estate. The statute was designed to provide for this object, during the continuance of the existing emergency.

In contesting the fairness of the statute, the minority is upon safer ground. Some ghost-dancing can always be done upon the meaning of the word "fair". Justice Sutherland is con-

⁴⁰ 54 S. Ct. 242.

⁴¹ 54 S. Ct. 250.

⁴² 54 S. Ct. 232.

⁴³ 54 S. Ct. 242.

⁴⁴ 54 S. Ct. 242, 243.

⁴⁵ 54 S. Ct. 243.

vinced that the State of Minnesota has not kept faith with the mortgagee. He takes up one by one the record of the former cases of legislative interposition on behalf of the mortgagor. *Bronson v. Kinzie* (1843), 1 How. 311, 11 L. Ed. 143, which held invalid a statute extending the period of redemption for twelve months after the sale, and another preventing a sale unless a bid of two-thirds of the appraised value of the property should be made. *Gantly's Lessee v. Ewing* (1845), 3 How. 707, 11 L. Ed. 794, held unconstitutional as applied to a pre-existing mortgage, an act of the Indiana legislature which provided that no real property should be sold on execution for less than half its appraised value. *Howard v. Bugbee* (1860), 24 How. 461, 16 L. Ed. 753, declared invalid a statute which authorized a redemption of mortgaged property within two years after the sale. *Barnitz v. Beverly* (1896), 163 U. S. 118, 16 S. Ct. 1042, 41 L. Ed. 93, struck down a statute which extended the period of redemption for a period of eighteen months, during which time the mortgagor was to remain in possession and receive the rents and profits, except as necessary for repairs.

These cases were not ignored by the Chief Justice. Of them he says: "None of these cases . . . is directly applicable to the question now before us in view of the conditions with which the Minnesota statute seeks to safeguard the interests of the mortgagee-purchaser during the extended period".⁴⁶ Surprisingly enough the minority concede that there is some "substantial difference" between the statute under review and those stricken down in the cases just above cited by them, in these words:

"The only substantial difference between those cases and the present one is that there the extension of the period of redemption and postponement of the creditor's ownership is accompanied by the condition that the rental value of the property shall, in the meantime, be paid".⁴⁷

Justice Sutherland then contends that "A conclusion that payment of the rental value during the two-year period of postponement is even the approximate equivalent of immediate ownership and possession is purely gratuitous".⁴⁸ He points out

⁴⁶ 54 S. Ct. 238.

⁴⁷ 54 S. Ct. 255.

⁴⁸ 54 S. Ct. 255.

that full ownership in the mortgagee, as originally contracted for, might prove very necessary to him; that "the financial needs of appellant may become so pressing as to render it urgently necessary that the property shall be sold for whatever it may bring".⁴⁹ The writer believes that the minority have a point here; not a point of sufficient importance in the probable course of events to outweigh the larger social considerations which justify the interposition of the police power in this case; but nevertheless a point of some weight. If a mortgagee were so placed as urgently to need whatever cash he could get, the writer submits the minority is correct in asserting that actual ownership is a condition of realization of that end. It would be virtually impossible to negotiate a sheriff's certificate of sale, subject to two years of possession in a man with a grievance, to any purchaser except at a ruinous discount. The Indiana foreclosure statute of 1931⁵⁰ has recognized this principle, by postponing the sheriff's sale until the end of the year of redemption, thus enabling the purchaser to receive his deed at once, and thereby encouraging competitive bidding at the sale.

The Chief Justice expressly limited the decision to consideration of one section of the act (Part 1, No. 4).⁵¹ The order of the district court under this section seems as fair as possible to the mortgagee. The statute represents a high tide in judicial discretion, so enthusiastically championed by Dean Roscoe Pound⁵² and Jerome Frank.⁵³ It allows the district court to fix the payment of rental value during the extended period of redemption "at such times" as shall be ordered by the court.⁵⁴ The statute could be circumvented by an order that the rental value for the two year interim period be paid in a lump sum at the end of the extended time. Part 1, No. 2, abrogates foreclosure by advertisement, and requires that the proceeding be by action. In suits already commenced as a condition of this relief the mortgagor must pay the costs incurred in the advertisement proceeding. But "not including attorney's fees".⁵⁵ The legislature likes to show its teeth to the lawyers. Part 1,

⁴⁹ 54 S. Ct. 256.

⁵⁰ Acts of 1931, p. 257.

⁵¹ 54 S. Ct. 232.

⁵² "The Decadence of Equity" (1905), 5 Col. L. R. 20.

⁵³ Jerome Frank, *Law and the Modern Mind*. Part 2, Ch. 1.

⁵⁴ Part 1, No. 4.

⁵⁵ Part 1, No. 2.

No. 3, authorizes the court to order a resale of the property "if it appears . . . that the sale price is unreasonably and unfairly inadequate". The court could order a resale in any case where the bid by the mortgagee made possible a deficiency judgment. It is not contended that the district court judges will push these possibilities to their extreme. To do so would seem an abuse of judicial discretion. But the possibilities are there.

PRACTICAL ASPECTS OF SUCH LEGISLATION

Both the majority⁵⁶ and the minority⁵⁷ take the position that the court is not concerned with the wisdom of such legislation. Its only problem is the constitutionality of the statute. This, of course, is correct. Yet in view of the magnitude of interests involved the subject should be worthy of some discussion here. The ordinary estimate is that there are twenty billion dollars of real estate mortgages outstanding in the United States, held principally by savings banks, insurance companies, building and loan associations, and land banks. Each person interested in these companies, as investor, bondholder, or policy-holder is, or should be, vitally concerned with this type of legislation.

From the historical standpoint, there would seem to be no doubt that one of the prime considerations which prompted men of standing in the community to favor the adoption of an entirely new plan of government to supplant the Articles of Confederation was the desire on their part to secure the strong arm of a central power as a guaranty of the stability of contracts, and thereby to restore confidence in commercial intercourse.⁵⁸ "Finance, commerce, and business assembled the historic Philadelphia Convention; although it must be said that statesmanship guided its turbulent councils".⁵⁹ The evil of interference by the states with the obligation of contracts under the Articles of Confederation had become so great as to paralyze trade, destroy all confidence between man and man, and reduce the flow of credit far below the normal needs of the community.⁶⁰ To remedy this condition, "Finance, commerce, and business" inserted

⁵⁶ 54 S. Ct. 243.

⁵⁷ 54 S. Ct. 256.

⁵⁸ *Ogden v. Saunders*, 12 Wheaton 213, 354, 455, 6 L. Ed. 606.

⁵⁹ Beveridge, *The Life of John Marshall* 1:310.

⁶⁰ *Ogden v. Saunders*, *supra*, note 58.

the contract clause (article 1, No. 10) in the United States Constitution.⁶¹

Many considerations for and against such legislation would seem to lie on the surface. In the words of one newspaper comment: "The decision is hailed by farmers and their political friends as a great victory when as a matter of fact it will eventually be a costly decision to the class moratoriums are supposed to benefit".⁶² The thought behind this observation is of course that the creditor will be frightened by the possibility of such legislation, and credit streams will dry up, causing a horribly frozen real estate market. It would seem incontrovertible that the sale price of any property is determined to a considerable extent by its availability as collateral or security. If it has no collateral or security value, it becomes a prime example of a frozen asset. The result in the real estate field is the depreciation of the capital value of all holdings. On the other hand the proponents of this type of legislation regard the paramount necessity of arresting the inexorable march of deflation as worth the risk of future credit impairment. To them each dispossession by process of foreclosure is a social scar deserving of greater attention than the forecast of a credit drought in another decade. Suggestions that the debtor's troubles are due to prodigal borrowing⁶³ make them see red.

In the opinion of the writer the requirement that the rental value of the property be paid to the mortgagee during the extended period of redemption amply safeguards his interest, and for that reason the statute is a fair exercise of the police power of the state. However, the writer is considerably puzzled to

⁶¹ It is true that the clause was inserted hurriedly, at the last minute, and almost without discussion. "The framers of the instrument apparently had in mind, however, the danger of the violation of contracts through depreciated paper money rather than the invalidation of agreements by direct action of the State Legislatures. . . . Madison best stated the reason for the adoption of the contract clause: 'A violations (sic) of Contracts had become familiar in the form of depreciated paper made a legal tender, of property substituted for money, of Instalment laws, and of the occlusions of the Courts of Justice; although evident that all such interferences affected the rights of other states, relatively Creditor, as well as Citizens Creditors within the State.' (Ib., 548.) Roger Sherman and Oliver Ellsworth explained briefly that the clause "was thought necessary as a security to commerce." (Letter to the Governor of Connecticut, Sept. 26, 1787, Ib., 100.) Beveridge, *The Life of John Marshall*, Vol. III, p. 557, note 3.

⁶² Helena, Montana, "Independent": *The Literary Digest* 117:5.

⁶³ In the minority opinion, 54 S. Ct. 252.

know how such a statute can be of material benefit to any worthwhile number of debtors. It is his belief that had the mortgagor paid a sum equal to the rental value of the property to the mortgagee all along there would have been no foreclosure; that not one mortgagee in a hundred would refuse to carry the debt, even though in technical default, if such payments were made. Hence it would seem that those persons who seek mortgage moratoria are not the ones who are paying the rental value of the property to the mortgagee, but they who are not making any such return. This class will not be satisfied with legislation of the type sustained by the Supreme Court. They will want terms more favorable to themselves, and necessarily less favorable to the mortgagee. The agitation for a different law must then continue. If this is the meaning of the passage from Justice Sutherland's opinion most widely quoted:

"He simply closes his eyes to the necessary implications of the decision who fails to see in it the potentiality of future gradual but ever advancing encroachments upon the sanctity of private and public contracts",⁶⁴

there would seem to be merit in it as an indictment of the wisdom of this type of legislation. Faced with the constant danger of interference with his contract in a manner which may prove unreasonable, the investor may become discouraged with the outlook for mortgage loans, and turn to other fields for capital placement, with the consequent freezing of the real estate market in the manner already indicated. Insurance companies and savings banks are in a position to begin such a policy of "switching" their investments at any time.⁶⁵

To the writer there would seem to be no cause for alarm in the camp of the mortgagee in the result of the case under review. For the last half century it has been the doctrine of the Supreme Court that the state retains a power over the contracts of its citizens, as the cases already reviewed have shown. But the

⁶⁴ 54 S. Ct. 244.

⁶⁵ To which the answer might be made: is there any field to which they can switch and escape the long arm of the police power reaching out to protect "the vital interests of its people"? Long regarded as the prime investment for safety, United States government bonds payable "in United States gold coin of the present standard of weight, measure and fineness" have been made payable in dollars by recent legislation after the fact." Mason's U. S. Code, Title 31, No. 430-4.

limits of that power as applicable to the mortgage contract were but obscurely defined. The present decision adds much in reassuring us that the last word in these matters is not the word of the demagogue, nor the political word, but that in each instance there will be a judicial examination of the competing claims of the contract to precise enforcement and the economic interests of society as a whole in interfering with the provisions of the agreement upon terms fair to both contracting parties. The holding of the court is authority for the point that the mortgagee must be treated fairly at the hands of the state. No citizens in a complicated social order can ask more.

THE SIGNIFICANCE OF THE CASE

It would seem that the case has a greater significance as a guide to the probable action of the court upon other great constitutional problems likely to come before it as the outgrowth of "new deal" legislation, than for its bearing upon mortgage moratoria. The opinions of majority and minority seem evidence of the outlook of each member of the court upon the relative importance of individual rights as against the interests of the social group. These distinct viewpoints seem to correspond with two of the periods of Anglo-American legal history as defined by Dean Roscoe Pound and expounded by Prof. Hugh E. Willis.⁶⁶ These are the "Period of Maturity", and the "Period of Socialization". The end of the law in the period of maturity was "the protection of property and freedom of contract".⁶⁷ This period began about 1793. For the minority in the case under review it has never ended. Dean Pound states that the end of the law in the period of socialization is: "The satisfaction of as many de facto human interests as possible in so far as they involve a social advantage". For the majority this is the present period of the history of American jurisprudence. For the minority it has not yet begun.

It is true that Justice Sutherland does not deny that legislation in the larger social interest has been sustained although the rights and liberties of the individual were thereby interfered with.⁶⁸ But he would seem to have little sympathy with that

⁶⁶ Willis, "Introduction to Anglo-American Law," p. 64.

⁶⁷ *Ibid.*, p. 119.

⁶⁸ It is quite true that the Legislature can not "bargain away the public health or the public morals". 54 S. Ct. 253.

trend whenever it adversely affects contractual rights. He quotes with approval the following: "Policy and humanity are dangerous guides in the discussion of a legal proposition".⁶⁹ His approach to the case under review is ample evidence that to him the preservation from encroachment by the state of the rights of the individual, his freedom of contract, and the sacrosanct character of his engagements should be the prime concern of judicial safeguards. This was precisely the object of the law in the period of maturity: the protection of the contract as property. It is the typical laissez-faire attitude—a doctrine which naively assumes that each man, trusted to his own resources, will care for himself. The gratuitous assumption of this theory is that each man knows his own interest and can pursue it. Time has discredited that premise. And yet four members of the court decline to acknowledge that the period of socialization of the law is not merely a wilful iconoclasm, but the liquidation of an older order of human relations.

In abrupt contrast to this view stands one of the most remarkable judicial declarations of the object of the law made in this generation. The words of the Chief Justice deserve to be set out at length:

"It is manifest from this review of our decisions that there has been a growing apprehension of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare. The settlement and consequent contraction of the public domain, the pressure of a constantly increasing density of population, the interrelation of the activities of our people and the complexity of our economic interests, have inevitably led to an increased use of the organization of society in order to protect the very bases of individual opportunity. Where, in earlier days, it was thought that only the concerns of individuals or of classes were involved, and that those of the state itself were touched only remotely, it has later been found that the fundamental interests of the state are directly affected; and that the question is no longer merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends".⁷⁰

⁶⁹ 54 S. Ct. 252, from *Edwards v. Kearzey* (1877), 96 U. S. 595, 604, 24 L. Ed. 793.

⁷⁰ 54 S. Ct. 241.

He proceeds immediately to the application of these principles to the constitutional question before the court:

“It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. . . . It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning: ‘We must never forget, that it is a constitution we are expounding’ (*McCulloch v. Maryland*, 4 Wheaton 316, 407, 4 L. Ed. 579); ‘a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs’. *Id.*, page 415 of 4 Wheaton.”⁷¹

From these general statements considerable help is given in forecasting the decision of the court upon such questions as may be presented to it under the “gold clause” legislation, and the regulations requiring all gold to be surrendered to the federal government. If the minority can be counted to agree with every statement made by Justice Sutherland, then four votes would seem to be “in the bag” to strike down any act of Congress which would attempt to make obligations payable in gold coin dischargeable by tender of something else. For he says:

“Certainly, if A should contract with B to deliver a specified quantity of wheat on or before a given date, legislation, however it might purport to act upon the remedy, which had the effect of permitting the contract to be discharged by the delivery of corn of equal value, would subvert the constitutional restriction.”⁷²

Substitute “gold” for “wheat” and “dollars” for “corn” and you have it. Of course the contract clause (article 1, No. 10) does not forbid action by congress. But the due process clause of the Fifth amendment to the United States Constitution has been interpreted to protect contracts from action by Congress just as the contract clause protects them from action by the states. The theory of the holding is that contracts are property; to impair their validity is not due process of law.⁷³

⁷¹ 54 S. Ct. 242.

⁷² 54 S. Ct. 256.

⁷³ *The Sinking Fund cases*, 99 U. S. 700.

But on the other hand a prediction of what the court may do in these cases yet to come before it would seem to be justified by the attitude of the majority in the decision under review expressed in their profound appreciation of the vast ebb and flow of forces which sway and condition human destinies. There would appear to be no distinction in principle between this case and those. The thorough understanding of the aims and trend of sociological jurisprudence which furnished the solution to the decision in this case would seem to be applicable there as well.