Constitutional Law—Impairment of Contract—Mortgage Moratoria—[Federal].—Laws of Minnesota (1933), c. 339, Part 1, 4, authorizes the district court of the county to extend the period of redemption from mortgage foreclosure for a "just and equitable" period, not beyond May 1, 1935, contingent upon the mortgagor paying the reasonable rental value to be applied to the interest, taxes, and mortgage indebtedness. The mortgagor is to retain possession during this extended period, but interest continues on the loan, and the act preserves the mortgagee's right to title or deficiency judgment if the mortgagor fails to redeem. The petitioner, mortgagor, applied to the court under the provisions of this act, and, over the objections of the mortgagee-purchaser, was granted an extension of the period of redemption until May 1, 1935, conditioned on his paying the reasonable rental value. The Supreme Court of Minnesota denied the mortgagee's contention that this violated the contract clause of the Federal Constitution. (Art. 1, § 10). *Held*, on appeal, the statute as applied does not violate the contract clause of the Federal Constitution; the emergency existing in Minnesota furnished a proper occasion for the exercise of the protective power of the state which is read into all contracts, and the relief afforded is reasonable, protecting the interests of mortgagees as well as mortgagors. *Home Building & Loan Association v. Blaisdell*, 54 Sup. Ct. 231 (1934), Sutherland, Van Devanter, McReynolds, and Butler JJ., dissenting.

The present case would seem to be an affirmation of two propositions; first, that the contract clause is limited by the reserved or police power of the state, and second, that this reserved power must be reasonably exercised. As such, the decision summarizes and furthers the gradual assimilation of the contract clause to the fourteenth amendment. See Sharp, Movement in Supreme Court Adjudications—A Study of Modified and Overruled Decisions, 46 Harv. L. Rev. 361, 375 (1933). This gradual assimilation has been furthered by the upholding of some legislation operating on the enforcement of a contract claim as affecting the remedy and not the right. *Sturges* v. *Crowninshield*, 4 Wheat (U.S.) 122, 200, 4 L. Ed. 529 (1819); *Jackson v. Lamphire*, 3 Peters (U.S.) 280, 287, 7 L. Ed. 679 (1830); *Waggoner v. Flack*, 188 U.S. 595, 23 Sup. Ct. 345, 47 L. Ed. 609 (1903); *Funkhouser v. Preston*, 54 Sup. Ct. 134, 78 L. Ed. 125 (1933); cf. *Curtis v. Whitney*, 13 Wall. (U.S.) 68, 71, 20 L. Ed. 513 (1871); *Edwards v. Kearzey*, 96 U.S. 595, 600, 24 L. Ed. 793 (1877); *Hendrickson v. Apperson*, 245 U.S. 105, 38 Sup. Ct. 44, 62 L. Ed. 178 (1917); *James v. Stull*, 9 Barb. (N.Y.) 482 (1850); *March v. State*, 44 Tex. 64 (1875). And by the recognition that contracts concerned with matters inherently affected with a public interest may be abrogated by legislation for the public welfare. *Fertilizing Co. v. Hyde Park*, 97 U.S. 659, 24 L. Ed. 1036 (1879) (nuisance); *Stone v. Mississippi*, 101 U.S. 814, 25 L. Ed. 1079 (1880) (lotteries); *Mugler v. Kansas*, 123 U.S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205 (1887) (liquor control). Later cases expanded the concept of "affected with a public interest" to include matters temporarily so affected. *Block v. Hirsh*, 256 U.S. 135, 41 Sup. Ct. 458, 65 L. Ed. 865 (1921); *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170, 41 Sup. Ct. 465, 65 L. Ed. 877 (1921); *Levy Leasing Co. v. Siegel*, 258 U.S. 242, 42 Sup. Ct. 289, 66 L. Ed. 595 (1922); Wickersham, The Police Power and the New York Emergency Rent Laws, 69 Univ. Pa. L. Rev. 301 (1921). Whether these contracts be deemed to have been "frustrated" or "appropriated," to use the language of the dissenting opinion in the principal case, 54 Sup. Ct. 231, 253–54, they were subject to a police power reasonably used for a legitimate end. See 47 Harv. L. Rev. 663 (1934).

Debtor relief legislation, however, might well have been excluded from this dis-

pensation given other statutes inasmuch as the historic purpose of the contract clause was to prohibit "laws delaying the collection of matured debts," 1 Beard, The Rise of American Civilization (1927), 328; *Edwards v. Kearrey*, 96 U.S. 595, 604–607, 24 L. Ed. 793 (1877). Thus various forms of stay laws enacted during recurring depressions have been held unconstitutional as impairing existing contracts. *McCracken v. Hayward*, 2 How. (U.S.) 608, 11 L. Ed. 397 (1844) (prohibiting a foreclosure sale for less than two thirds the appraised value of the property); *Bronson v. Kinzie*, 1 How. (U.S.) 311, 11 L. Ed. 143 (1843) (unconditionally extending the period of redemption for one year without provision for payment of rental value); *State v. Klein*, 249 N.W. 118 (N.D. 1933) (extending all periods of redemption for a year with no compensation provided); see Bunn, The Impairment of Contracts: Mortgage and Insurance Moratoria, 1 Univ. Chi. L. Rev. 249 (1933); Feller, Moratory Legislation: A Comparative Study, 46 Harv. L. Rev. 1061, 1081 (1933). The present case now places this class of legislation under the protection and the restrictions of the police power. See Corwin, Moratorium over Minnesota, 82 Univ. Pa. L. Rev. 311, 312 (1934).

The dissent of the minority in the present case, however, would indicate their belief that the use of the reserved power of the state is based on the doctrine of implied conditions, contingent upon an interpretation of the possible intent of the parties. Thus they conclude that although there may be an implied condition that a business affected with a public interest may be prohibited, it "would be more than unreasonable, it would be absurd" to imply a condition that performance of the obligation in the same business may be modified since it must be assumed "that the contract was made on the footing that so long as the obligation remained lawful, the impairment clause would effectively preclude a law altering or nullifying it however exigent the occasion might be." 54 Sup. Ct. 231, 254.

Undoubtedly there is some similarity between the police power and the doctrine of implied conditions. It has been suggested that the real basis for the police power is justice between the parties, Abbot, Police Power and Right to Compensation, 3 Harv. L. Rev. 189, 199 (1890), and the actual basis for implied conditions is said to be fairness between the parties, 2 Williston, The Law of Contracts (1920), 1577, § 825. An implied condition, however, may be negatived by the expressed intention of the parties. 2 Williston, The Law of Contracts (1920), 1575–1576, § 824. There is no such limitation upon the police power. See *Orient Insurance Co. v. Daggs*, 172 U.S. 557, 562, 19 Sup. Ct. 281, 43 L. Ed. 552 (1899). Thus in the present case, if the mortgage had contained an express declaration that the obligation should not be modified during any emergency, an implied condition would have been impossible, yet the court undoubtedly would have held the contract subject to the reserved power of the state. And while the parties might be considered to be contracting away future rights which might be given to them by any stay law, such provisions undoubtedly would be disregarded as are similar attempts to evade the bankruptcy laws. *Nelson v. Stewart*, 54 Ala. 115, 25 Am. Rep. 660 (1875); *Federal National Bank. v. Koppel*, 253 Mass. 157, 148 N.E. 379 (1925); 40 A.L.R. 1443 (1925).

It is clear, however, that legislation which alters existing contracts must be reasonable if it is to be upheld. *Antoni v. Greenhow*, 107 U.S. 769, 774, 775, 2 Sup. Ct. 91 27 L. Ed. 468 (1882). In the present case, the emergency and the protection afforded the mortgagee's interest seem to have been indispensable to a finding of reasonableness. Whether there is any difference, which may be doubted, between an emergency creating a power and the emergency furnishing the occasion for the exercise of the pow-

er (54 Sup. Ct. 231, 235), the emergency is an operative fact without which the statute would not have been upheld. The payment of a fair rental value, the limitation of the extension to a definite and comparatively short time, the continuation of interest, and the preservation of the right to a deficiency judgment are all factors protecting the interest of the mortgagee, and the absence of any one of them might have led the court to declare the statute unreasonable. Thus the fate of less conservative moratoria legislation is doubtful. Cf. *Alliance Trust Co. v. Hall*, 5 F. Supp. 285 (D.C. Ida. 1933). Moreover, should certain moratoria legislation be held unconstitutional as to certain types of property only, as has been suggested, the question of equal protection of the laws may arise. Cf. *Truax v. Corrigan*, 257 U.S. 312, 42 Sup. Ct. 124, 66 L. Ed. 254 (1921); see Bunn, The Impairment of Contracts: Mortgage and Insurance Moratoria, 1 Univ. Chi. L. Rev. 249, 260, 261 (1934); 17 Harv. L. Rev. 660, 666 (1924).

If the fate of future legislation modifying existing contracts is to be dependent upon what the courts will call "reasonable," it is important to know whether the courts will follow the usual rule in determining the constitutionality of a statute and presume reasonableness in the absence of a showing of unreasonableness. 2 Willoughby, The Constitutional Law of the United States (2d ed. 1929), 42. While there is some language in the present case which might indicate that reasonableness will be presumed ("Whether the legislation is wise or unwise as a matter of policy is a question with which we are not concerned." 54 Sup. Ct. 231, 243), the mere declaration by the legislature that an emergency exists will not suffice. *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 44 Sup. Ct. 405, 68 L. Ed. 841 (1924); but see Wigmore, A Constitutional Way to Reach the Housing Profiteer, 15 Ill. L. Rev. 359, 365 (1921). The courts may follow the somewhat analogous treatment of the guarantee of freedom of speech and of press, and perhaps require a greater showing of constitutionality than is usually the case. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 Sup. Ct. 158, 67 L. Ed. 322 (1922); Bunn, The Impairment of Contracts: Mortgage and Insurance Moratoria, 1 Univ. Chi. L. Rev. 249, 251 (1934); but see *Antoni v. Greenhow*, 107 U.S. 769, 775, 2 Sup. Ct. 91, 27 L. Ed. 468 (1882); as to freedom of speech and of press, see *Schenck v. United States*, 249 U.S. 47, 39 Sup. Ct. 247, 63 L. Ed. 470 (1919); *Gitlow v. State of New York*, 268 U.S. 652, 45 Sup. Ct. 625, 69 L. Ed. 1138 (1925); *Stromberg, v. State of California*, 283 U.S. 359, 51 Sup. Ct. 532, 75 L. Ed. 1117 (1931); *Near v. State of Minn. ex rel. Olson*, 283 U.S. 697, 51 Sup. Ct. 625, 73 L. Ed. 1357 (1931); Walsh, Freedom of Speech and Press, 21 Geo. L. Jour. 161, 188 (1933); 14 Ill. L. Rev. 60 (1920).

In its use of reasonableness as the test, the court avoided saying that the legislation involved merely the remedy and not the right. As enunciated by Marshall, the doctrine that legislation impairing the remedy and not the right was not an impairment of contract seems to have been a short hand way of declaring reasonableness. *Sturges v. Crowninshield*, 4 Wheat. (U.S.) 122, 200, 4 L. Ed. 529 (1819). Since then, the distinction has been applied somewhat automatically. See *Von Hoffman v. City of Quincy*, 4 Wall. (U.S.) 535, 554, 18 L. Ed. 403 (1866); 31 Harv. L. Rev. 491 (1918). The court approached the terminology of the remedy-right doctrine, when it pointed out that courts of equity have fixed the time and terms of sale of mortgaged property and have refused upon equitable grounds to confirm sales, and that the statute in question provides a cognate procedure and relief. See *Suring State Bank v. Giese*, 246 N.W. 556, 85 A.L.R. 1477 (Wis. 1933); 8 Minn. L. Rev. 318, 327 (1934); 42 Yale L. Jour. 961 (1933). When applying the remedy-right doctrine courts have reasoned from the practice of a

court to the ability of the legislature. This was recently done by the Supreme Court in *Funkhouser v. Preston*, 54 Sup. Ct. 134, 78 L. Ed. 125 (1933). But an erroneous decision of a court is not an impairment of contract, nor, it would seem, a denial of due process. *Central Land Co. v. Laidley* 159 U.S. 103, 112, 16 Sup. Ct. 80, 40 L. Ed. 91 (1895); *Bonner v. Gorman*, 213 U.S. 86, 29 Sup. Ct. 483, 53 L. Ed. 709 (1908); *Fleming v. Fleming*, 264 U.S. 29, 44 Sup. Ct. 246, 68 L. Ed. 547 (1924); Black, American Constitutional Law (4th ed. 1927) 628, 710; but see 28 Ill. L. Rev. 832 (1934). And what is permitted the court is not necessarily permitted the legislature.

The Supreme Court disregarded the suggestion of the Minnesota Court that the act in question could possibly be maintained as an exercise of the power of eminent domain. *Blaisdell v. Home Building & Loan Association*, 249 N.W. 334, 338 (Minn. 1933); see *Long Island Water Supply Co. v. Brooklyn*, 166 U.S. 685, 692, 17 Sup. Ct. 718, 41 L. Ed. 1165 (1897). The lack of condemnation proceedings or of action taken under an eminent domain statute would not change the essential character of the eminent domain power. *Jacobs v. United States*, 290 U.S. 13, 54 Sup. Ct. 26, 78 L. Ed. 37 (1933). A private individual acting for his own benefit may be given the power to exercise eminent domain for the state. 1 Lewis, Eminent Domain (3d ed. 1909), 15,500, §§ 6,253. Because of the emergency, it would be a public use that mortgagors be left in possession and be given additional rights to regain title. See *Clark v. Nash*, 198 U.S. 361, 25 Sup. Ct. 676, 49 L. Ed. 1085 (1905); *Strickley v. Highland Boy Mining Co.*, 200 U.S. 527, 26 Sup. Ct. 301, 50 L. Ed. 581 (1906); cf. *New State Ice Co. v. Liebman*, 285 U.S. 262, 52 Sup. Ct. 371, 76 L. Ed. 747 (1931); *Connecticut College for Women v. Calvert*, 87 Conn. 421, 88 Atl. 633 (1913); *Palairet's Appeal*, 67 Pa. 479, 5 Am. Rep. 450 (1871); 15 Harv. L. Rev. 900 (1902); 23 Yale L. Jour. 274 (1914). It would seem doubtful, however, whether the fair rental value, while a factor making for reasonableness under the police power, is fair compensation under eminent domain. Cf. *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 13 Sup. Ct. 622, 37 L. Ed. 463 (1893); *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 43 Sup. Ct. 354, 67 L. Ed. 664 (1923); *Olson v. United States*, 67 F. (2d) 24 (C.C.A. 8th 1933). While the inability of the mortgagee to take possession may not be so important inasmuch as the land is desired as security in most cases (The Supreme Court pointed out that most of the mortgagees were corporations. 54 Sup. Ct. 231, 243), the mortgagee is still denied clear title, and the right to make improvements at depression prices. Admitting that the right of immediate sale in a depressed market might not be of much value, the extension of the period of redemption leaves the mortgagee in the position of knowing that if economic conditions improve he will probably never get the land, but if values decrease, he will get the land when it is worth least.

The significance of the present case is perhaps to be found in the declaration by the Chief Justice that "there has been a growing appreciation of public needs and of the necessity of finding rational compromise between individual rights and public welfare." 54 Sup. Ct. 231, 241. This growing appreciation of public needs was expressed in somewhat similar language by Justice Cardozo in Cardozo, Nature of the Judicial Process (1921), 82. To find this rational compromise will involve not only legal reason and acumen, but "the highest attributes of statesmanship." Brown and Hall, The Police Power and Economic Reconstruction, 1 Univ. Chi. L. Rev. 224, 248 (1933); Gray, The Nature and Sources of the Law (1909), 215.

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