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Muriel A. Mawer

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NOTES AND COMMENTS

MORTGAGE MORATORIA LEGISLATION—DEFICIENCY JUDGMENTS¹

In every serious financial period in the history of this country,² there has been a legislative recognition of the imperative need for relief³ for the debtor class. Roughly, the relief afforded can be placed in four classifications.

I. In some states reliance has been placed on the inherent power of a court of equity to alter its usual procedure in the foreclosure of mortgages in order to give relief to the mortgagor-debtor and at the same time to protect the interests of the mortgagee-creditor.

II. In some states, statutes substituting as the only method of foreclosure of mortgages, foreclosure by action for foreclosure by advertisement have been the palliative offered.⁴

¹The material presented in the following articles and comments has been freely used: BARKLEY, "Constitutional Law—Impairment of Contracts—Moratorium," 13 Ore. L. Rev. 156 (1934) BUNN, "Impairment of Contracts—Mortgage and Insurance Moratoria," 1 Univ. of Chi. L. Rev. 249 (1933) CHAMBERLAIN, "Legislatures and Relief of Debtors," 19 A. B. A. J. 474 (1933) CORWIN, "Moratorium Over Minnesota," 82 Univ. of Pa. L. Rev. 311 (1934) FEIDLER, "Emergency Mortgage Redemption Extension Legislation," 9 Wis. L. Rev. 92 (1933) FELLER, "Moratory Legislation; A Comparative Study," 46 Harvard L. Rev. 1061 (1933) HEFFERMAN, "Minnesota Mortgage Moratorium Case," 9 Ind. L. Rev. 337 (1934) KIPP, "Mortgage Foreclosure Moratorium Statutes," 32 Mich. L. Rev. 71 (1933) STEDMAN, "Emergency Extension of Mortgage Redemption Period in Wisconsin," 8 Wis. L. Rev. 174 (1933) WIENKE, "A Mortgage Foreclosure Moratorium," 27 Illinois L. Rev. 799 (1933) "Moratory Legislation for Relief of Mortgagors," 18 Minn. L. Rev. 319 (1933) "Constitutionality of Mortgage Relief Legislation," 47 Harvard L. Rev. 660 (1934).

²See FELLER, "Moratory Legislation: A Comparative Study," 46 Harvard L. Rev. 1061, in which is included a table complete to 1930 of the various types of moratory relief enacted during other depressions.

³Relief legislation in some form has been adopted in: Arizona, Arkansas, California, Idaho, Illinois, Iowa, Kansas, Michigan, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Texas, Vermont, West Virginia, Wisconsin. In several other states, including Washington, similar legislation was proposed.

⁴Minnesota, North Dakota, South Dakota.

III. In some states, general "stay laws" have been adopted

- (a) blanket extensions of the redemption period;⁵
- (b) discretionary extensions of the period of redemption;⁶
- (c) blanket postponement of sale;⁷
- (d) discretionary postponement of sale;⁸
- (e) delay in proceedings, including dilatory pleadings,⁹ continuances,¹⁰ delay of trial or judgment,¹¹ suspension of period of foreclosure.¹²

IV In some states, statutes relating to the deficiency judgment have been adopted

- (a) abolition of deficiency judgments;¹³
- (b) suspension of deficiency judgments;¹⁴
- (c) regulation of the amount of the deficiency judgment, i.e. by the fixing of an upset or minimum price at which the property must be bid in at the foreclosure sale, if the sale is to be confirmed by the court, or by fixing the reasonable value of the property to the amount deducted from the principal sum due in order to determine the deficiency still to be paid by the debtor rather than using the amount bid at the foreclosure sale.¹⁵

Already, cases involving the various types of statute have come before the courts for adjudication. In *Suring State Bank v. Giese*¹⁶ the first type of moratory relief was considered. While this opinion seems contrary to the decisions of many cases which hold that mere inadequacy of price, however gross, unaccompanied by fraud, unfairness, or other inequitable conduct, is insufficient to justify the setting aside or the refusing to confirm a judicial sale,¹⁷ it seems desirable in the light of the circumstances. The desirable test should be "Is the sale under all circumstances one of which the court in justice to all parties should approve?" Where the fact of an inadequate price is coupled with an emergency which oper-

⁵ Kansas, North Dakota, South Dakota, Wisconsin.

⁶ Iowa, Minnesota, Montana, New Hampshire, Oklahoma, Texas, Vermont.

⁷ Texas.

⁸ Arkansas, Minnesota, Nebraska, New Hampshire, North Carolina, Ohio, Pennsylvania, Wisconsin.

⁹ Arkansas, North Dakota, Oklahoma.

¹⁰ Arizona, Iowa, Michigan, Oklahoma, Texas.

¹¹ North Dakota, Oklahoma.

¹² Illinois, Iowa, Minnesota, Montana, Nebraska, New Hampshire, New York, Oklahoma, Vermont.

¹³ Arkansas, California, Minnesota, Nebraska, North Dakota, South Dakota.

¹⁴ Arizona, California, Minnesota, Nebraska, New Jersey, North Carolina, South Carolina, Texas.

¹⁵ Arkansas, California, Idaho, Michigan, Minnesota, Kansas, Nebraska, New Jersey, New York, North Carolina, South Carolina, Texas, West Virginia, Wisconsin.

¹⁶ 246 N. W. 556, 85 A. L. R. 1477 (Wis. 1933) Noted in 8 Wis. L. Rev. 286.

¹⁷ *Kinnard v. Farmers & Merchants' Bank*, 249 Ky. 661, 61 S. W. (2d) 291 (1933) *Omaha Loan & Building Ass'n. v. Clarke*, 250 N. W. 748 (Neb. 1933) *Federal Land Bank of St. Louis v. Floyd*, 61 S. W. (2d) 449 (Ark. 1933) *Hill v. Campbell*, 251 N. W. 106 (Neb. 1933) *Nebraska Commercial Trust Co. of Lincoln v. Bradley*, 251 N. W. 174 (Neb. 1933).

ates to prevent competent bidding, a court of equity is justified in refusing to confirm the sale and in ordering a resale.

Little need be said of the second type of statute because the subject of mortgages is controlled by statute and there seems to be no objection to the alteration of one of the methods of foreclosure.

The most prevalent form of statutory regulation of mortgages during the period of depression is that falling under group three of the above classification. The North Dakota¹⁸ and Minnesota¹⁹ statutes, construed in *State ex rel. Cleveringa v. Klem*²⁰ and *Home Building & Loan Ass'n v. Blaisdell*²¹ are the outstanding examples of this type of relief. The objections raised in both cases were that the statutes, concededly different in certain respects, were unconstitutional because they impaired the obligation of contract, and in the case of the former statute, deprived the mortgagee of his property without due process of law. The former statute was declared to be unconstitutional, the latter constitutional. The *Klem* case is followed in two Texas cases declaring invalid the Texas statute postponing the foreclosure of liens.²² Two other Texas cases have followed the *Blaisdell* case.²³

The Idaho legislation²⁴ which attempted to achieve the same result by action of the Governor was considered in the case of *Alliance Trust Co. v. Hall*.²⁵ This was an action to foreclose a real estate mortgage due prior to the passage of the moratory statute and prior to the Governor's proclamation suspending all real estate mortgage foreclosures in the state. The defense set up by

¹⁸ North Dakota Laws 1933, p. 226, ch. 157, sec. 2: " * * * That the period within which a mortgagor or judgment debtor may redeem from a mortgage foreclosure sale of real estate, but for which deed has not been issued, is hereby extended for a period of 2 years * * *"

¹⁹ Minnesota Laws 1933, p. 514, ch. 339: " * * * the period of redemption may be extended for such additional time as the court may deem just and equitable, but in no event beyond May 1, 1935, providing that the mortgagor or the owner of the property in possession in the case of the mortgage foreclosure proceedings, * * * shall prior to the time of redemption, apply to the district court * * * for an order determining the reasonable value of the income of said property * * * and directing and requiring such mortgagor * * * to pay all or a reasonable part of such income or rental value, in or towards the payment of taxes, insurance, interest, mortgage * * * indebtedness * * *"

²⁰ 249 N. W. 118 (N. D. 1933).

²¹ 54 S. Ct. 231, 78 L. Ed. 255 (1934)

²² *Life Insurance Co. of Virginia v. Sanders*, 62 S. W. (2d) 348 (Texas 1933) *Murphy v. Phillips*, 63 S. W. (2d) 404 (Texas 1933).

²³ *Russell v. Battle Creek Lumber Co.*, 252 N. W. 561 (Mich. 1934) *State v. Waterfield*, 29 Pac. (2d) 24 (Okla. 1934) *Lungo Lumber Co. v. Hayes*, 64 S. W. (2d) 835 (Texas 1933) *Beaumont Petroleum Syndicate v. Broussard*, 64 S. W. (2d) 993 (Texas 1933).

²⁴ Idaho Laws 1933, p. 192, ch. 124, sec. 1. " * * * That the Governor of the State of Idaho be and he is hereby authorized and empowered, whenever, in his opinion, extraordinary conditions exist justifying such action, to declare legal holidays in addition to those now authorized by law, and to limit such holidays to certain classes of business and activities to be designated by him, but no such holidays shall extend for a longer period than 60 days, provided, however, that it may be renewed for one or more periods not exceeding 60 days each, as the Governor may deem necessary."

²⁵ 5 Fed. Supp. 285 (1933).

the mortgagor defendant was a plea in abatement and for the suspension of the action for foreclosure because of the proclamation. The court granted the foreclosure decree after holding that the legislature which was prohibited from passing any law which would impair the obligation of contract could not circumvent this prohibition by delegating to the Governor such authority

The fourth group of statutes, and the group which seems to impose the greatest hardship on the mortgagee and give the greatest relief to the mortgagor because it is usually permanent relief and not a mere postponement of the right to sue, is that relating to deficiency judgments. It is with this type of statute, that the State of Washington has had experience in the past when it was felt necessary to aid mortgage debtors by some form of statutory relief. Provision is made in the Washington statutes for the satisfaction of the debt secured by a mortgage.²⁶ However, during the financial depression of 1897 an attempt was made to abolish the deficiency judgment. In the case of *Dennis v Moses*²⁷ the statute providing that in all proceedings for the foreclosure of mortgages or in judgments rendered upon the debt secured thereby, the mortgagee or the assignee should be limited to the property included in the mortgage was declared unconstitutional as contrary to public policy, being an interference with the liberty to contract and an undue restriction on the pledging of property to secure obligations.²⁸ The *Dennis case* has been used as an authority in several cases declaring unconstitutional the deficiency judgment statutes passed during the 1933 legislative sessions.²⁹ Probably the leading recent case on the subject is that of *Adams v. Spillyards*³⁰ construing the Arkansas statute.³¹ P, trustees, brought suit to foreclose a trust deed form of mortgage without having complied with the provisions of the Arkansas statute. D, mortgagor, plead the statute in defense. The court held for P, arguing that the law in force when and where the contract is made and is to be performed forms a part of the contract, the parties being conclusively presumed to contract with reference to the existing law that the mortgagor's personal liability for a deficiency after foreclosure and sale is a part of the mortgage contract, and that the statute

²⁶ Wash. Rem. Comp. Stat. sec. 1117 to 1123 incl.

²⁷ 18 Wash. 537, 52 Pac. 333 (1898).

²⁸ In spite of this decision, or perhaps because of it, the court has upheld clauses in mortgages limiting the rights of the mortgagee to the property included in the mortgage. *Weikel v. Davis*, 109 Wash. 97, 186 Pac. 323 (1919) *Exchange National Bank of Spokane v. Wolverton*, 11 Wash. 108, 39 Pac. 248 (1895).

²⁹ *Adams v. Spillyards*, 61 S. W (2d) 686 Ark. (1933)

³⁰ Note 29, *supra*.

³¹ "In any foreclosure in any court in the State of Arkansas in which real property is involved, the real estate securing the loan sought to be foreclosed shall be considered to be the value of the loan made, irrespective of the amount which may be realized from the sale of such realty * * * and when real property is sold under the foreclosure decree, said sale shall not be confirmed by the court until and unless said court has inquired into the amount that said property sold for, and hear testimony thereon in order to ascertain whether or not the purchaser bid the fair market value for said property and said sale shall not be confirmed until after said hearing * * *"

prohibiting the deficiency judgment is unconstitutional as an impairment of the obligation of contract.

A subsequent Arkansas case, *Wilson v. Fouke*,³² considered another section of the statute relating to the deficiency judgment and held it constitutional. A debtor executed to the creditor bank a trust deed to 8000 acres of land as security for a debt. The creditor brought suit to foreclose the lien of the deed of trust. The decree granted made provision for the sale of the property at an upset price of \$5 per acre. The trustee appealed from the decree on the ground that the mode of sale was void as depriving him of his contractual right to subject the land to sale. The court, after distinguishing the case of *Adams v. Spillyards*, denied the appeal, saying that although the form of sale was not in common use, it was not prohibited in practice, because it did not deprive the trustee of any interest, the trustee having no interest in the proceeds of the sale in excess of the debt.

The validity of similar statutes enacted in Nebraska and Michigan has not been determined. In two Nebraska cases, *Wallace v. Clements*³³ and *Lincoln Safe Deposit Co. v. Carlson*,³⁴ the court held that the problem of the constitutionality of the statute was not properly raised and so would not be considered. In *Bleakley v. Oakwayne Farms Co.*³⁵ the Michigan court said that the statute of that jurisdiction regulating the foreclosure of real estate mortgages conferred no power on the court to set aside, alter or impair the mortgage contract, fix and upset price on the mortgaged premises, appraise the mortgaged property, and direct the mortgagee to credit on sale at least the appraised value of the property on the debt, but if it had, the statute would have been invalid as a violation of the federal and state constitutions.

The Minnesota provision as to the deficiency judgment has not been before the court. It is suggested that the treatment accorded the other provisions of the statute in the *Blaisdell* case cannot be considered as an indication of the treatment that would be accorded a case raising the deficiency judgment section, in view of the existing decisions in other jurisdictions on the subject.

The Wisconsin statute providing for the upset price is typical. In the case of *Hoelt v. Kuhnz*³⁶ that statute, enacted after the rendition of the decision in the case of *Surving State Bank v. Giese*,³⁷ was held to impose upon the courts the mandatory duty of setting a minimum price at which the property should be bid in at the foreclosure sale some time before the sale.

Within the last few years, there have been several unsuccessful attempts to enact some form of moratory relief legislation in Washington.³⁸

MURIEL A. MAWER.

³² 67 S. W. (2d) 1030 (Ark. 1934)

³³ 250 N. W. 235 (Neb. 1933).

³⁴ 250 N. W. 236 (Neb. 1933).

³⁵ 251 N. W. 354 (Mich. 1933).

³⁶ 252 N. W. 589 (Wis. 1934).

³⁷ Note 16, *supra*.

³⁸ House Bill No. 150, Extraordinary Session, Legislature of the State of Washington, 1933: " * * * 1. No action for the foreclosure of a mortgage upon real estate shall be commenced after the passage of this act until March 15, 1935, in cases where the real estate mortgaged is occupied by