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The Law of Moratoria

C. L Young

There are now in force in this State the following Uniform State Laws:

Acknowledgment Act,
Act Regulating Traffic on Highways,
Aeronautics Act,
Air Licensing Act,
Declaratory Judgments Act,
Desertion and Non-Support Act,
Firearms Act,
Illegitimacy Act,
Motor Vehicle Anti-Theft Act,
Motor Vehicle Registration Act,
Negotiable Instruments Act,
Proof of Statutes Act,
Reciprocal Transfer Tax Act,
Sales Act,
Veterans' Guardianship Act,
Warehouse Receipts Act,
Act to secure the attendance of non-resident witnesses in Criminal Cases.

A. P. PAULSON,
A. W. AYLMER,
H. A. BRONSON.

Local Organization

Your Committee on Local Organization beg to report:

1. That owing to the financial circumstances it has been thought best to make no considerable expense on the part of this committee.

2. The District Bar Associations have held splendid, enthusiastic and very profitable sessions.

3. The various counties' organizations have held different meetings with such success and doing a lot of splendid help in their communities. Both the District and County Bar Associations have sent speakers free of charge to all of the schools inquiring for them in their various counties, and various different local associations have entertained teachers and principals of various town high schools over the state, and on the whole the local associations have been doing good throughout the past two years.

JOHN KNAUF, Chairman.

THE LAW OF MORATORIA

C. L. YOUNG

The word moratorium is used to designate a suspension of all or of certain legal remedies against debtors. We commonly think of it as an incident of war. There was some legislation of the kind during the Civil War. During the World War the federal government made provision for the protection of soldiers and sailors engaged in war service through the *Soldiers' & Sailors' Civil Relief Act of 1918.* A number of our states, including North Dakota, passed similar statutes. In popular discussion it is assumed that such legislation in the emergency

of war is universally valid. That, however, is not the unfailing rule. There are cases in which moratorium acts passed even under such an emergency have been declared invalid.

It is urged that similar provision be made to suspend certain remedies against certain debtors on account of extraordinary financial distress incident to the economic collapse usually termed "the depression." Consistent with this theory efforts have been made through legislation to defer, in divers ways, the enforcement of mortgages on account of defaults therein. We are concerned in ascertaining whether these efforts constitute valid moratoria.

At the very threshold of our consideration we are faced with the provision of the federal constitution that no state shall pass any law impairing the obligations of contracts. From time immemorial it has been the rule that the laws which subsist at the time and place of making a contract enter into the contract and are a part of it as definitely as if they were expressly incorporated in its terms. Otherwise it never would be possible to determine what is the extent of the obligations into which the contracting parties have entered. When a contract has been made the law requires one party to perform the thing contracted for and gives to the other the right to enforce performance by the remedies then in effect. If by a later law the duty of one contracting party is diminished the rights of the other are impaired. The result is a change in the obligation of the contract which favors one party and injures the other. It is such changes which states are proscribed from making. This rule is absolute and the question is whether the moratorium legislation of recent months violates it.

The answer I think is furnished by the decision of the supreme court of the United States in *Barintz v. Beverly, 163 U. S. 118, 41 L. ed. 93.* The case involved a Kansas statute enacted in 1893 under conditions similar to those now prevailing. The act allowed a period of redemption from foreclosure or judicial sales where none previously existed. The controversy in the case centered about the argument that the legislature changed only the remedy available to mortgagees and judgment creditors. The courts said that whether the change be deemed a change of remedy or of some other rule of law relating to the contract, it deprived the plaintiff of a right which had been made inherent in her contract. The change was one so marked that it seriously interfered with the enforcement of the contract and such interference impaired the obligation of the contract, within the meaning of the constitution. That I think is the case with much of the legislation recently enacted.

One of the difficulties met in discussing such a subject is the unfortunate notion commonly held that the constitutional rule happens to be applied always in favor of creditors. This of course is untrue. It is applied indiscriminately by the courts whether the party whose rights are invaded happens to be the creditor or the debtor. It is most often that such legislation is enacted to favor the so-called debtor class and for that reason it seems to the suspecting that it is that class of legislation which commonly is held invalid. However, the supreme court of the United States in an earlier case, *(Brine v. Hartford Fire Ins. Co., 96 U. S. 627, 24 L. Ed. 858)*, as widely cited as the Harnitz case, applied the rule in favor of the mortgagor, who by a decree of

court was being divested of the right to redeem from foreclosure sale which was accorded to him by the statutes of Illinois in force at the time his mortgage was executed. The rule is general and has been applied impartially in favor of debtors or of creditors, as the circumstances required.

It is urged that the depression through which we have been passing constitutes an emergency which justifies the exercise of the police power in disregard of contract rights and obligations. That is to say, business conditions may reach such an extremity that the legislature by its fiat may suspend the operation of the constitutional inhibition against the impairment of the obligation of contracts.

The police power of course is a convenient refuge for all who seek the interposition of government in some particular enterprise. It must be conceded that the United States supreme court, in its own language, "has refrained from any attempt to define with precision the limits of the police power." *(242 U. S. 530.)* Concededly the power is a broad one. It, however, does have limits, though they have not been specifically defined. Whatever may be the tests of the validity of its exercise financial loss is not one of them.

Those seeking to justify a moratorium on the ground that it is a police regulation apparently rely upon the decisions of the United States Supreme Court sustaining the District of Columbia Rents' Act and a similar New York statute. In general these acts gave a tenant the right to occupy rental property notwithstanding the expiration of his term, subject to regulation by designated officials so long as he paid the rent and performed the conditions as fixed by the lease or as modified by these officials. These were measures induced by conditions arising out of the World War. There was a tremendous influx of people into the cities of Washington and New York resulting from unprecedented activities relating to the conduct of the war. Housing conditions were so acute that the demand and need for homes far exceeded the supply. New construction was unprofitable and at a standstill. Landlords profiteered in connection with new leases and demanded exhorbitant rentals. Tenants in possession who were unable to comply with these demands were evicted upon expiration of their leases and found it most difficult to obtain other housing facilities. This condition became acute and in the fall of 1920 in New York alone proceedings for the summary eviction of tenants whose leases had expired were pending to the number of one hundred thousand. The housing situation reached a point where the public health and sanitation and morals and general welfare of the cities were in danger. *(Block v. Hirsch, 256 U. S. 135, 65 L. ed. 865; Marcus Brown Holding Co. v. Feldman, 256 U. S. 170, 65 L. ed. 877.)*

Since these decisions appear to be the basis of the claim that the moratoria now so widely enacted should be upheld, it is important that we observe their purport in the light of what the decisions themselves contain and in view of the later attitude of the supreme court itself with reference to them.

It must be noted first that the acts sustained did not in any way seek to modify any existing leases. They did not contravene in the least respect the constitutional prohibition against impairing the obligations

of contracts except possibly in providing that property need not be surrendered on the expiration of a lease. They were enacted because the public health, safety, morals and general welfare were in jeopardy on account of the housing congestion.

In the next place, the court in the Block case reiterated what it sometimes had said in previous decisions, that a legislative declaration of facts that are material only as a ground for enacting a rule of law, for instance, that a certain use is a public one, will not be held conclusive by the courts. It happened that in that case there was an emergency which was notorious but the legislature could not by its declaration that an emergency existed which warranted the legislation, justify the legislation from the constitutional point of view if under well recognized principles it contravened the constitution.

Then too the court bases its decisions upon the proposition that the public health, morals and welfare of the city were involved. It says: "It is with this condition and *not with economic theory* that the state had to deal in the existing emergency." The court in the later case of *Chastleton Corporation v. Sinclair, 264 U. S. 543, 68 L. Ed. 841,* said this: "If about all that remains of war conditions is the increased cost of living that is not in itself a justification of the act." In the Block opinion Justice Holmes said: "Housing is a necessity of life. All the elements of a public interest justifying some degree of public control are present. The only matter which seems to us open to debate is whether the statute goes too far. For just as there comes a point at which the police power ceases and leaves only that of eminent domain, it may be conceded that regulations of the present sort pressed to a certain height might amount to a taking without due process of law."

That these cases mark the limit to which the police power can be stretched under the federal constitution is evident from what Justice Holmes said in another decision, *(Pennsylvania Coal Co. v. Mahon, 260 U. S. 393, 67 L. Ed. 322)*: *"In general it is not plain that a man's misfortunes or necessities may justify the shifting of damages to his neighbor's shoulders.* *** 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 degree 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."

It seems to me that these rental cases and their subsequent interpretation by the court lead inevitably to the conclusion that the police power may not be invoked in the existing emergency to sustain the legislation in question. The subject matter of the new legislation differs materially from that of the rent cases. Commendable as the efforts to afford relief under existing conditions may be, it should be done in the constitutional way. They go farther than the rent cases. As those go to the verge of the law these go beyond.

But the efforts to establish moratoria are not confined to the legislative field. In some states executive proclamations have been used to secure delay in the use of certain legal remedies. Such proclamations have been issued here. There is no provision either in our constitution or in our statutes conferring upon the governor of this state the express authority to proclaim a moratorium. The making of law is a legislative function. The governor is without power in his own right to make law, but he is required to take care that the laws made by the legislative assembly be faithfully executed.

There is rather a widespread idea that the operation of statutes may be temporarily suspended by a declaration of martial law. The executive here has not gone so far though he has used the military power to enforce his orders. In this connection it should be remembered that under our constitution the military shall be subordinate to the civil power; that all courts shall be open, and every man for any injury done him in his lands, goods, person or reputation shall have remedy by due process of law, and right and justice administered without sale, denial or delay, and that the governor shall be the commander in chief of the military and naval forces of the state except when they shall be called into service of the United States, and may call out the same to execute the laws, suppress insurrection and repel invasion.

There has been no insurrection nor invasion, and no failure of courts to function. Under these conditions may the governor lawfully declare the existence of a situation for the purpose temporarily of putting into effect with reference to property rights executive orders for which no express constitutional or statutory authority exists? This question I think is answered by the supreme court of the United States in the recent case of *Sterling v. Constantin, ... U. S. ...., 77 L. ed. 254,* dealing with the attempt of the governor of Texas to limit the production of oil by martial law. There proclamations were issued stating that in certain counties of Texas a state of insurrection, tumult, riot and a breach of the peace existed and declaring martial law in that territory. The militia of the state was ordered to enforce and uphold the majesty of the law subject to the orders of the governor. An injunction against the enforcement of the governor's order was sought. On the trial of the case it was found that there was no insurrection nor riot, no closure of the courts, and no failure of civil authorities.

While the court says that by virtue of his duty to cause the laws to be faithfully executed the executive is appropriately vested with the discretion to determine whether an emergency requiring military aid for that purpose has arisen and is permitted a range of honest judgment as to the measures to be taken in meeting force with force, it does not follow that every sort of action the governor may take, no matter how unjustified by the exigency or subversive of private right or the jurisdiction of the courts otherwise available, is conclusively supported by mere executive fiat. The conclusion was that the governor there instead of affording protection in the lawful exercise of rights as determined by the courts sought by his executive orders to make that exercise impossible; that in the place of judicial procedure available in the courts

which were open and functioning he set up his executive commands which brooked neither delay nor appeal; that martial law established on such a basis destroys every guaranty of the constitution and makes the military power independent of and superior to the civil power; and that civil liberty and this kind of martial law cannot endure together. So it was held that there was no exigency in Texas which justified the governor in attempting to substitute executive orders for the action of the courts, and if there was need of the exercise of the military power it should have been called to the aid of civil authority for the purpose of maintaining the exercise of its jurisdiction by the court, and not for the purpose of over-riding it.

In the light of that very recent pronouncement it is quite obvious to me that there is no situation now existing in this state which would sustain the proclamation whereby the governor declares a moratorium. No one is seeking to interfere with the orderly processes of the courts. They are open for business and should be permitted to function. In passing it should be noted that the case just discussed confirms the view taken by our own court when a former executive, pursuant to a declaration of martial law, took charge of certain coal mining properties on account of an existing strike. The supreme court decided the case without filing written opinions, but an able opinion was filed by the district court. There it was said that the reason for martial law is necessity to rehabilitate the courts, not to destroy them or usurp their powers. Specific mention was made of the danger of despotism if the governor could become supreme merely by declaring a state of insurrection to exist. In such case, it was said, he could overstep into the legislative department and say what laws shall be and into the judicial department and say how the laws shall be interpreted.

Having dealt with legislative and executive moratoria it remains for us to consider the powers of courts with reference to deferring the use of legal remedies otherwise available. A few cases have had to deal with the question. Recently an attempt was made in North Carolina to restrain the sale of real estate in an action for the foreclosure of a mortgage on the ground that there is a condition of depression throughout the entire country in finance and real estate, that business conditions are unprecedently bad, and that on account of the scarcity of money and poor market conditions it is impossible to obtain the fair market value of lands at forced sales thereof. The writ was denied on the ground that a financial depression or the unprecedented scarcity of money for ordinary transactions or the enforced stagnation of the real estate market, is not sufficient to warrant the exercise of the equitable powers of the court in the restraint of a sale. A number of cases dealing with similar questions are cited. The court appears to deal with the matter sympathetically and states that perhaps no court is wise enough to declare with absolute finality that no economic or financial stringency or distress would warrant the intervention of equitable principles in restraining the power of sale in instruments securing debts. *(Bohlich v. Prudential Ins. Co., 202 N. C. 789, 164 S. E. 335, 82 A. L. R. 974).*

While the question before the Wisconsin court in a recent case *(Suring State Bank v. Giese, 246 N. W. 556)* dealt with a wholly

different situation, I think one might conclude from the opinion that it would be inclined to go further in the direction demanded by the complainant in the North Carolina case than the court of that state was willing to go. The Wisconsin case dealt with a deficiency judgment situation. Property claimed under ordinary conditions to have been worth two or three thousand dollars was sold at a foreclosure sale. After paying the costs, about $500.00 was credited on the mortgage debt and a deficiency judgment of nearly $1,400.00 was rendered upon an original loan of $2,000.00. There was an application to confirm the sale which the court denied. The supreme court takes judicial notice of the fact that the present economic depression has not merely resulted in a serious dislocation of the value of real estate, but also in the almost complete absence of a market for real estate so there is no cash bidding at sales upon foreclosure. The court says the question arises whether a court of equity is wholly impotent to rise to the needs of justice and see that the parties are fairly and properly protected. This is not a situation in which ordinary logic with respect to values has much vitality. The court repudiates the proposition that real estate is worth what purchasers will pay for it and no more, and that if the only price offered constitutes but a negligible part of its theretofore assumed value, it nevertheless represents the value of the real estate at that time for the reason that such a conclusion is shocking to the conscience of the court, or as the old equity courts said, "to the conscience of the chancellor and to all notions of justice as applied to the situation."

It is the conclusion of the court that without the aid of a statute it may in the light of the present emergency and because of the inadequacy of a judicial sale to establish the fair value of the security, do one or all of three things. It may decline to confirm the sale where the bid is substantially inadequate, or it may take notice of the emergency and after a hearing fix a minimum or upset price at which the premises must be bid in if the sale is to be confirmed, or it may upon application for confirmation, if an upset price has not been fixed, establish the value of the property after a hearing, and as a condition to confirmation require that the fair value of the property be credited upon the judgment.

While the precise conclusion with reference to a deficiency judgment in that case throws no light directly upon the question of a judicial moratorium, the decision appears to me to be most illuminating upon the attitude which that court at least might take upon an application of a mortgagor for delay in some form in the prosecution of an action to foreclose to final judgment. For instance, in the matter of extending the time for answer to a complaint a court has a considerable discretion and its action will be reviewed only in case of clear abuse of that discretion. Likewise after issue is joined a trial court again is vested with a large discretion in the matter of continuances of suits. It would seem to me that if the economic depression may be given the consideration which the Wisconsin court gave it in the case mentioned for the purposes of that suit, a trial court would be justified in giving it some consideration in case of applications either for extensions of time to answer or for postponement of trial, without subjecting itself to reversal

on the ground of an abuse of discretion. To the extent that that may be true the courts have the power without legislation to effect a moratorium in any case in which the facts justify it.

Just so far as this may be the case a judicial moratorium is preferable to any other which may be established for the simple reason that each case there can be bottomed upon its own facts. A moratorium can be granted to the extent that it may appear to be wise to grant it. Where the facts do not warrant it, it can be denied. Extension or denial under such circumstances is a mere incident in the dispensation of justice. A blanket moratorium is bound to work injustice because it must be operative as to all of the class covered for a definite period and without respect to the merits of an individual case. That is a valid criticism both of legislative and executive moratoria to the extent that they may be effective. It is my judgment therefore that any plan for delaying the exercise of remedies in favor of creditors should be administered by the courts so that the relief granted to the debtor may accord with the merits of his financial situation.

There is no virtue in speculating as regards the power of courts at this time, independently of statutes. House Bill No. 182 which takes effect July 1st makes specific provision for the extension of time to serve and file papers, for the staying of the entry of judgment or execution thereon, and for the deferring of terms of court if necessary. I perhaps have indicated with sufficient clearness that I am inclined to the view that the courts might recognize the emergency to the extent of exercising these powers without the aid of the statute. Certainly with the statute in force there will be no question as to the existence of the power.

It is conceivable, however, that a question may arise as to the extent to which a court may go constitutionally even under this act. While the statute relates to the remedy only it has long been settled that this fact is not conclusive on the question of validity. Changes in the remedy may not go so far as to impair the obligations of contracts. *(Bronson v. Kinzie.)* If a court through the liberality of its orders should produce that result its act probably would be subject to modification. However, it is to be expected that a reasonable use will be made of the power granted.

I had hoped also to discuss the moratorium of necessity. That seems to me a very practical subject and one which is more effective than all the other moratorium schemes yet devised. Time, however, forbids its consideration here.

In conclusion, it may be said that the law of moratoria is in the making. Never before, I believe, has there been so widespread an attempt to assure delays in the enforcement of remedies against debtors. All sorts of ingenious remedial devices have been incorporated in new statutes. There will be a flood of litigation in state and federal courts in which their validity will be adjudicated. We may expect some new conceptions of the lengths to which such relief may go. But in the meantime we shall have to adhere for our guidance to the principles which appear to us now to be well defined and sound.—(Address at Capital District Meeting, 1933.)