and later the Supreme Court of the U. S. do if and when the price fixing feature of the Ohio Milk Marketing Act is tested? According to decisions rendered in the Nebbia Case, supra, and Hegeman v. Baldwin, supra., it seems that the decision in the Cuyahoga County Court of Appeals upholding the regulatory feature of the Ohio Act will be affirmed in the higher courts, and the price fixing feature will also be upheld.

SEYMOUR ARTHUR TREITELMAN

STATE MORATORY LEGISLATION

Among the deleterious results of the economic cataclysm of 1929, were the hysterical desire of mortgagors to liquidate their debts and the falling of property values. To the debtor the situation was most oppressive. To him it meant that if prices and values fell 50 per cent, the burden of the repayment of his debts was increased 50 per cent. To the creditor it meant securing dollars in payment that would now buy twice as much in commodities. It is the plight of the mortgagor as a debtor with which we are here concerned. His property was mortgaged to the limit. His outstanding indebtedness was in many cases as large as the appraised value of the property. The mortgagor had three ways of attacking his problem; he might assign his property to the mortgagee, refinance his indebtedness, or allow the property to go by foreclosure. The first two possibilities were often unavailable or inexpedient and too often foreclosure was the inevitable outcome. But the pathetic aspect of the mortgage situation was that at the foreclosure sale, so little was secured that the result was a deficiency judgment hurdled upon the mortgagor. The greatest factor contributing to this desperate situation was the fact that there was no market for real estate. The market had completely disappeared. It was this breakdown of the functioning of our economic system that rendered impossible the fulfillment of mortgage contracts. Under these circumstances our court procedure was ill equipped to meet the crisis. Our mortgage laws ignored economic forces—fluctuations in price and property values.

It is estimated that the total mortgage indebtedness of the country centers about 45 billion dollars, 9 billions of which is on farm mortgages, 21 billions on urban house mortgages, and 15 billions on big building mortgages.[1] Foreclosures during the first five months of this year were three times what they were the whole year of 1926.[2] In the State of Ohio alone, during the first six months of this year we have had 1031 complete foreclosure actions involving judgments totalling over 5 million dollars.[3] That some form of relief for the overburdéned debtor became necessary cannot be doubted in view of the crisis. The mortgagors raised their voices to the legislature to recognize human values even at the cost of going to the "verge of the law."

[1] Business Week, October 27, 1934, page 6.

[2] Business Week, July, 1934, page 10.

[3] See report compiled by the department of Rural Economics of the State of Ohio and Ohio State University entitled, Report on Foreclosures, Summary of Year ending June 30, 1934.

Various groups, some public, some private, have attempted to meet the mortgage indebtedness problem prior to the moratorium acts:

1. Private creditors of wealth, such as national banks and insurance companies as well as small considerate mortgagees voluntarily procrastinated in the enforcement of their rights in cases where the mortgagor was in possession.

2. Public pleas, such as gubernatorial entreaties requesting mortgagees to desist from instituting foreclosure proceedings were frequent.[4]

3. The federal government passed acts creating succoring bodies as the HOLC, FHA, etc., and enacted much legislation for farm mortgage relief.

4. Judicial initiative by way of direct relief or dilatory tactics has abated to a degree the wholesale loss of homes.

While the first three methods were used, there was nothing imperative about their use; and consequently their efforts were not as widespread as desirable. The extent of judicial effort in aiding the mortgagor was humble even though the courts sought to be liberal in their views. The general rule is that equity will not enjoin foreclosure proceedings because the mortgagor thinks the market value is too low.[5] As a result courts are limited in their power to postpone foreclosure sales or periods of redemption until such time as it would be possible to secure a price more in keeping with the property's appraisal value at the time the mortgage indebtedness was contracted. A few courts have, however, exercised such power without the aid of statutory authority. An Associated Press dispatch of Feb. 2, 1933, tells of a case in the ninth state judicial district of New York where a group of judges agreed to refuse foreclosure proceedings without any legislative authority for its act.[6] A trial court in Illinois, in a case decided April 11, 1933, forbade the mortgagee to foreclose upon condition that the mortgagor constitute himself a trustee in possession for the mortgagee, with the duty of collecting rentals and applying them to taxes and maintenance of the property as well as the payment of interest upon the indebtedness.[7] This formula is the basis of several of the subsequent moratory statutes which thirty States, including Ohio, have now enacted. These statutes were enacted primarily because the courts were thought not to be invested with the power which the Illinois court here exercised. It remained for the legislature to yield to the cries of the distressed mortgagors.

The History of Moratory Legislation

What is a Moratorium Statute? Mr. A. H. Feller in his enlightening article on the matter has defined moratorium as a "postponement of the ful-

[4] Business Week, February 15, 1934, p. 14. See also, Alliance Trust Co. v. Hall, 5 Fed. Supp. 285, wherein the proclamation of the governor of Idaho suspending foreclosures was held unconstitutional as an impairment of contract.

[5] Bolich et ux v. Prudential Insurance Co. et al., 202 N. C. 789, 164 S.E. 335 (1923) See 81 Univ. of Pa. Law Review 87 (1932) for other cases.

[6] Illinois Law Review 799 (1932). Some cases have held oppositely: see Fifth Avenue Bank of New York v. Compson, 113 N.J. Eq. 152, 166 Atl. 86 (1933); also Koller v. John Hancock Mutual Life 168 Atl. 36.

[7] 82 Univ. of Pa. Law Review 262 (1933), citing First Union Savings Bank vs. Division State and in Cook County Circ. Ct., General B262438.

fillment of an obligation, decreed by the States through the medium of the courts or legislation. Its essence is the application of sovereign powers."[8]

Moratorium statutes are not of recent origin. History shows its use time and again in periods of economic stress. Their birth dates from 555 A.D. in Greece where laws provided for the postponement of business debts on account of war.[9] Proceedings against debtors could be stayed. In Roman Law a debtor upon giving some security might obtain an extension of time within which to pay the debt through an order from the Emperor.[10] We find the use of the moratorium again during the Napoleonic Wars. In the United States we find its use during the Revolutionary period, before and during the Civil War and again during the World War. The more recent use of the moratorium was in March 6, 1933, when a bank holiday was declared by the President. Thus the States of the Union had much precedent upon which to base their mortgage moratory legislation.

The Recent Mortgage Moratorium Statutes

By 1932, the position of the mortgagor was so distressing that hurried moratrium enactments were written into the statute books throughout the country. The Ohio Statute was passed May 18, 1933.[11]

Mortgage moratorium statutes take one of three forms or a combination of the three:

1. Some States provide for a stay of foreclosure sales for a period of time. Courts in some cases may determine the time of the stay imposing upon the mortgagor certain terms such as upkeep of the property, payment of the taxes thereon, etc.[12]
2. Some States extend the period of redemption upon condition of the mortgagor's payment of the taxes.[13]
3. Some States provide for complete releases from deficiency judgments or have statutes requiring deficiency judgments based upon a fair value of the property.[14]

In addition to these types of mortgage moratoria enacted by the States, the Federal Government had enacted a special farm mortgage moratorium by way of an amendment to the Bankrutcy Act.[15] For lack of space we must confine ourselves to the State statutes. Suffice it to say, Section 75 has been upheld in at least one District Court and declared unconstitutional in another.

The Impairment of Contracts Clause v. Moratorium Statutes

While many of the State Moratory Statutes have been declared unconstitutional on the grounds that they impair the obligation of the contract,[16]

[8] 46 Harv. Law Rev. 1061 (1933).
[9] Ibid. 1061, 1064.
[10] 28 Yale Law Journal 325 (1918).
[11] 115 Ohio Laws 227; General Code, sec. 11588.
[12] Ark., Ariz., Iowa, Minn., Mont., Neb., N. H., N. Y., N. D., Ohio, Okla., Penna., Tex., Vt., Wis., see 82 U. of Penna. Law Rev. 265.
[13] Ark., Iowa, Kans., Mont., N. H., N. D., S. D., Vt., Wis., all have this provision in their statutes. Ibid.
[14] Ark., Calif., Idaho, Kans., Minn., Neb., N. Y., N. C., N. D., S. C., S. D., Ibid.
[15] Section 75 of the Bankruptcy Act, subsection (c).
[16] Hanauer v. Republic Bldg. Co., 255 N.W. 136 (Wis. 1934). See also Life Insurance Co. of Va. v. Saunders, 62 S.W. (2d) 348, where a statute postponing a foreclosure sales was held unconstitutional.

the Ohio statute as it now stands, although yet untried by the courts, is a good example of a well constructed statute. It is similar in many of its terms to those statutes which have withstood the constitutional test in other jurisdictions.

The Ohio statute provides that in a foreclosure proceedings which is had on or before Feb. 1, 1935, the court, after a full hearing, "may order the sale to be postponed and that proceedings to enforce the debt . . . be restrained until such time, not not later than Feb. 1, 1935, as the court may in its discretion believe to be just . . . but in no event to postpone such proceedings or sale UNLESS current taxes and interest from and after the date of said postponement shall be paid as due." This statute was specifically declared to be an emergency act and temporary in its existence;[17] and while subject to some constitutional dubiousness by a strict interpretation of the constitution, its validity may be prophesied in view of a recent United States Supreme Court decision, Home Building and Loan Ass'n. v. Blaisdell upholding a statute somewhat similar to that of Ohio.[18]

Previous to the incorporation into the United States constitution of the Impairment clause[19] it was the "sport" of the States to impede the collection of debts by stay laws, by the issuance of depreciated currency and by-laws permitting the payment of debts in personal property or real estate.[20] The years 1783-1789 were filled with stay laws.[21] The legislative frolic of the States was the cause of the insertion of the Impairment clause into the constitution of the United States. The Federal Constitution sought by this clause to prohibit all the State laws impeding in any way the collection of debts. Despite the constitutional warning against the passage of such laws, the decade prior to the Civil War was replete with moratory statutes, many of which were surprisingly upheld as constitutional.[22] By far the majority of stay laws passed by the States were held unconstitutional.[23]

The World War moratoria were upheld without as much resistance. Almost every State enacted laws precluding proceedings against the soldier debtor away at war.[24] While the moratory legislation during the Civil and World Wars did not deal strictly with mortgage moratoria, the principles of law therein contained are applicable to present day legislation. So our concern is with the mortgagor-mortgagee relationship as affected by this legislation.

What is this relationship? If B, a mortgagee, contracts to loan a sum

[17] House Bill 144 has just been presented to the Ohio State legislature seeking an extension of two years (to Feb. 1, 1937) for the operation of the Ohio moratorium.

[18] 290 U. S. 398, 78 L. ed. 255.

[19] Art. 1, sec. 10, Clause 1, U. S. Constitution.

[20] U.S.C.A. Title, Constitution, P. 5, part 2.

[21] 27 Illinois Law Rev. 800 (1932).

[22] See tabular analysis of moratory legislation in the United States. 46 Harv. Law Rev. at page 1081.

[23] A Texas statute suspending all laws for the collections of debts, and liabilities on notes and contracts for a period of twelve months after peace with the Confederate States was held unconstitutional. Gattner v. Hunter, 30 Texas 688.

A Florida statute staying execution on judgment for twelve months after peace with the Confederate states was held unconstitutional. Garlington v. Priest, 13 Fla. 550.

An Arkansas statute suspending all suits until peace between the U. S. and the Confederate States was held unconstitutional. Burtt et al. v. Wms., 24 Ark. 91.

[24] See 9 A.L.R. 11.

of money to A, a mortgagor, B has as his security the property upon which the mortgage attaches and ordinarily a note for the loan. In case of default in principal or interest, the mortgagee has a right to foreclose upon the property and is entitled to a decree ordering the sale of the property to satisfy the mortgage indebtedness. The common law gives the mortgagor an opportunity to redeem prior to the sale. Many States, in addition, provide for a statutory period of redemption after the foreclosure sale.[25] The relationship thus gives rise to two remedies for the mortgagee: he may have the property sold to satisfy the indebtedness, and he may sue on the note. In some States he has title subject to divestment upon payment of the mortgage indebtedness during the period of redemption where such a statute exists. And after the lapse of the period the mortgagee gains complete title. The parties to the mortgage may be said to have contracted with reference to certain existing enactments relating to this relationship. So that when a statute is enacted which changes the remedies or the laws relating to such a relationship by postponing the sale, or suit upon the note, or extending the statutory period of redemption, can we say that the mortgage contract has been impaired? In answer to this question we ask another. Is the remedy separate from or merged with the obligation? In the former case the courts will generally say that there is no impairment of the obligation; in the latter case the courts will reason, that since the statute affects the remedy which merges into the obligation, it necessarily affects the obligation.

Proponents of the constitutionality of these stay laws sought reinforcement in the words of Chief Justice John Marshall, "Without impairing the obligation of the contract, the *remedy* may certainly be modified as the wisdom of the nation shall direct."[26] This view followed the doctrine that the obligation was separate and distinct from the remedy and that that which acted upon the remedy did not act upon the obligation.[27] In many instances the court accepted this way out (*Baumbach* v. *Bade*, 9 Wis. 559) 1859, and as long as the statute acted upon the remedy and did not alter the express terms of the contract, they were upheld. But this doctrine was limited by *Bronson* v. *Konzoe* et al, 1 How. 311 at 317 (1843), the court here stating that depriving the debtor wholly of his remedy or burdening the remedy with such new conditions or restrictions as to make the remedy not worth pursuing, renders such a statute unconstitutional. Well constructed statutes do not intend to destroy the rights altogether, but rather to postpone their enforcement until after the emergency for which they were created. Thus stay laws in Georgia and Kentucky suspending the jurisdiction of the courts in all civil actions for one year and seven months have been upheld on the ground that a State may alter its general judicial and remedial system as it wishes.[28]

[25] In Ohio there is no statutory redemption period; but under the Ohio common law, the right of the mortgagor to redeem continues only until the sale is confirmed by the court. 27 Ohio Juris. 727.

[26] See Sturges v. Crowninshield, 4 Wheat. 122,200, 4 L. Ed. 529.

[27] City of Clèveland, Tenn. v. U. S. et al., 166 Fed. 677; Cramer, Inc. v. Patterson, 25 O.A. 130, 157 N.E. 398 holds modification of the remedy not an impairment.

[28] Grimball v. Ross, T.U.P. Charl 175 (Ga. 1808) and 3 Metc. 566 (Ky. 1861). In Oshkosh Water Co. v. Oshkosh, 187 U. S. 437, 47 L. Ed. 249, the court held that the legislature may change existing remedies or modes of procedure if a substantial or

Another line of authority has not followed the doctrine of separation of the remedy from the obligation, holding that the "obligation" is really the remedy provided by law for the enforcement of the contract. This is the doctrine that the obligation and the legal remedy so merged that whatever impaired the remedy impaired the obligation.[29] A law which operates retroactively upon the mortgage obligation or remedy is an impairment of the obligation.[30] The United States Supreme Court in *McCracken* v. *Hayward*, 2 How 608, 612 (1844) said that if a contract is made, it is under the laws then existent; and if a State by subsequent legislation diminishes the debt or impairs the right or remedy, it necessarily bears upon the obligation in favor of one party and to the injury of the other.

Courts today generally uphold the separation doctrine and hold the mortgage moratorium valid, provided its effect does not "materially affect the obligation" or "substantially alter the rights of the parties." The remedy may be altered but a substantial remedy must remain.[31]

Two foundation cases must not escape the attention of the reader. The first is the New York Housing Act cases in 1919 and 1920. The act sets up a rent commission with power to fix reasonable rents and compel the landlord to extend existing leases at such rents as fixed by the commission. After the first major decision[32] it seemed as though the impairment of contracts clause was to be read that no State may impair contracts except for public purposes. The United States Supreme Court upheld the New York Housing Act on the ground that this was a valid exercise of police power, reserved to the States. The decision in the Block case and the Feldman case was to establish the doctrine that the State may in the exercise of its police power without violating the true intent of the impairment clause, prevent the immediate and literal enforcement of contractual obligations, by temporary or conditional restraint.[33]

efficacious remedy remains or is provided. But all remedies may not be withdrawn. See also Louisiana v. New Orleans, 102 U. S. 203, 26 L. Ed. 132, and Conley v. Barton, 260 U. S. 677, where the court said, "It is recognized that the legislature may modify existing remedies without impairing the obligation of the contract if a substantial remedy remains."

[29] Barwitz v. Beverly, 163 U. S. 118, 41 L. Ed. 93 (1895) hold that an extension of the redemption period is unconstitutional as an impairment of the remedy. Sturges v. Crowninshield, 17 U. S. 122, 4 L. Ed. 529, Court said that the remedy may not be altered without limit . . . In Seibert v. Lewis, 122 U. S. 284, 30 L. Ed. 1161 the court said that the parties contract with reference to an existing law and that law is as much a term as if incorporated therein. In Blair v. Williams, 14 Ky. 35 (4 Littel) the court said that the legal obligation of a contract consists in the legal remedy. One court said that and extension or shortening of the period of redemption is an impairment of contract, State ex rel Cleveringa v. Klein, 249 N.W. 118, 86 A.L.R. 1523.

[30] Walker v. Whitehead, 16 Wall. (U. S.) 314, here it was held that the remedy or the means of enforcing the contract is a part of that obligation of a contract which the constitution protects against being impaired by any later law passed by the State. See also Palowski v. Eskofski, 209 Wis. 189, 244 N.W. 611, 613, wherein the court said, "If a statute substantially lessens the value of a pre-existing contract, the constitutional provision (Impairment clause) bars application of it to the contract.

[31] "The withdrawal of all remedies for the enforcement of the contract constitutes an impairment of the obligation," Sliosberg v. New York Life Ins. Co., 244 N. Y. Supp. 215, 155 N.E. 749. See also Tenn. v. Reed, 96 U. S. 69, 24 L. Ed. 610 as to the effects of altering methods of enforcing an obligation.

[32] Marcus Brown v. Feldman, 256 U. S. 170 (1921), 65 L. Ed. 877.

[33] Block v. Hirsh, 256 U. S. 135. See also Atlantic Coastline R. R. Co. v. City of Glassboro, N. C., 232 U. S. 548, where it was held that the impairment clause cannot override the power of the State in its reasonable exercise of police power.

The second case is the *Home Bldg. and Loan Ass'n.* v. *Blaisdell*, 290 U.S. 398, 78 L. Ed. 255, 54 Sup. Ct. 231 (1934) testing the constitutionality of the Minnesota Mortgage Moratorium act which provided for a two-year stay on foreclosures. The court by a decision of five to four upheld the constitutionality of the act and relied upon principle and the New York Housing cases for its decision.

The principle upon which this case is based is that the limitations conferred by the impairment clause are not limitations upon the exercise of police power when an emergency justifies its exercise. The majority of the court bluntly facing the issue, felt that where the common weal was in question, the constitutional guaranties contained in the impairment clause are subordinate to the State police power. That is, "conditions may arise in which a temporary restraint of enforcement may be consistent with the spirit and purpose of the constitutional provisions and thus be found to be within the range of the reserved power of the States to protect the vital interests of the community." (*Home Bldg. & L. Ass'n.* v. *Blaisdell*, 290 U. S. 398, 439).

The minority opinion adheres to a strict interpretation of the impairment clause stating that the constitutional limitations are of constant application and invariable; and that the police power of the State is subordinate to the impairment clause despite the pressure of circumstance. The minority believed that in order for the statute to stand, it must be in harmony with the constitution as "long respected" so that this may be a government of "stable laws" and not laws that yield to the "caprice" of the moment.[34]

Which is the preferable point of view depends upon the individual. The socially conscious person may desire a liberal interpretation of the law; and the individualist may favor a strict interpretation of the law to safeguard his rights even though the public interest is at stake. But should we hold for the individualist and sacrifice human values for legal principles? Or should we infringe upon the mortgagee's rights given him by the constitution in order that society may be more greatly benefited? From one point of view it appears unfair to take funds out of one pocket and put them into another for however temporary a time. It appears also unjust to require the mortgagee alone to assume the burden which society as a whole has cast upon the unfortunate mortgagor. The spirit of our economic system lies in, among other things, the freedom to contract. And when a law acting retrospectively changes directly or indirectly the terms of or rights in a contract, the consequence is not only to impair the mortgagee's rights, but in the words of one court, "it would invade personal rights, and disturb and destroy the safety of business transactions." But whatever point of view is taken, it cannot be denied that the mortgagor needs relief for the benefit of the community and that thus far the moratorium is the best means to effect that end.

B. BERNARD WOLSON

[34] What could dissenting Justice Sutherland have thought of the recent holding in the New York Court of Appeals, where the court said that in times of public stress, that the government may nullify private contracts is an implied term in every contract, Sliosburg v. New York Life Ins. Co., 244 N. Y. 482, 155 N.E. 749.