A. INTRODUCTION

In the financial and social history of the American people, the real estate mortgage has played an important part. This device is more than a legal instrument: it is a channel through which savings have been directed into the construction of homes and enterprises for a growing community. The parties to the transaction—the mortgagor and the mortgagee—represent groups of great influence in the community. On the one hand are the thousands of investors, some affluent, some too poor to afford a home themselves, the contributors of capital, who have sought and found the opportunity to make their money work. On the other hand are those who have found it necessary to employ others’ capital to supplement their own in the acquisition of a farm, a home, or a business enterprise.

Parallel interests have drawn the parties together. They have incorporated their common purpose into legal form and language. Under favorable conditions, this agreement will suffice; repayments will be made as agreed, and the transaction eventually closed. But events beyond the parties’ control—a national economic collapse for example—will disrupt the amicable relationship. The interests of the parties will diverge. The mortgagee will seek his legal redress: foreclosure and eviction. The mortgagor, dissatisfied with his end of the bargain, will call for governmental aid to alleviate his misfortune. Because the interests at stake are so important it would be idle to suppose that society as a whole could be unaffected. The clash between the parties becomes a public controversy, to be agitated in every legislature and judicial hall in the land.

Such a situation developed in the last great depression. In the decade 1929 to 1939, the durability of the obligation was tested by the impact of the tremendous social changes taking place. The history of the mortgage during the period is more than a study not only in changes in law: it is the story of the clash of interests in the public forum, of pressure groups, politics and policy. In the tidal events, the
structure of the mortgage instrument was reshaped. New concepts began to emerge of the purpose of mortgage lending. The changing attitude toward the function of mortgage lending was manifested by temporary and permanent additions to mortgage law.

Probably chief among the temporary changes introduced in the period were mortgage moratoria—statutes enacted in many states designed to suspend foreclosures. These moratoria, the subject of the present study, were a governmental response to a serious emergency—an emergency characterized by widespread loss in real estate values, inability to pay and dispossessions. The causes of the legislation are to be found in the social problems of the era. But it must not be thought that this manifestation of governmental policy was a radical or novel development.

Moratoria have been frequent in hard times. In every one of the serious depressions of our country there have been many governmental attempts to mitigate the severity of economic conditions upon poor people by suspending debts. These efforts have dashed against the barrier of the contracts clause of the Federal Constitution. Many of them were invalidated, but others passed through the gates of judicial acquiescence. Because the moratoria of previous depressions were not always invalidated, legislatures of the last decade were prompted to hope for constitutional approval, and to try modern versions of old palliatives.

B. Mortgage Moratoria Generally

On February 8, 1933, the first significant mortgage moratorium was enacted in Iowa. Arkansas followed the next day, and then in the same month came similar legislation by South Dakota (February 17), Wisconsin (February 17), North Dakota (February 21). With the suspension of banking activities came many others: Oregon (March 2), Idaho (March 2), Nebraska (March 2), Arizona (March 4), Kansas (March 4), Texas (March 4), Oklahoma (March 7), California (March 10), Montana (March 14), and

8. Laws Neb. (1933) p. 301 (March 2, 1933).
Vermont (March 24). In the same year several other states enacted similar relief: Minnesota (April 18), Illinois (May 11), North Carolina (May 18), Pennsylvania (May 18), Ohio (May 18), Michigan (June 2), New Hampshire (June 15), New York (August 26), Delaware (December 18). A few states passed moratoria in 1934: South Carolina (March 2), Mississippi (April 4), and Louisiana (July 13). In the course of eighteen months, twenty-seven states had taken legislative action to suspend foreclosures.

Type I: The Purely Legislative Moratorium

Practically every type of legislative moratorium was included in the statutes enacted. There was the purely legislative moratorium—an absolute measure granting relief solely according to statutory standards. There was legislation conferring upon the judiciary discretionary power to grant relief by individual treatment of each case. There was legislation conferring similar power upon an administrative official, and legislation providing for compulsory mediation. There was legislation slowing down the judicial process in foreclosure proceedings.

There were different species of each kind. Purely legislative moratoria, for example, were divided into those that required the payment of current charges by the debtor as a condition to relief and those that did not. Other differentiations were possible: a statute might grant relief to all types of mortgage debts, or limit its relief to mortgages on farms and homes.

The New York moratorium on principal payments was representative of the purely legislative moratorium. It applied to all mortgages, regardless of whether a home, farm, or commercial enterprise was involved, and regardless of the underlying reasons for default. In that state the relief afforded was conditioned upon the payment of interest and taxes, but the requirements were all objective: judicial discretion was not involved. The purpose of this moratorium was to preserve equities on commercial properties as well as farms and homes.

15. Laws Vt. (1933) p. 49 (March 24, 1933).
16. Laws Minn. (1933) p. 682 (April 18, 1933).
17. Laws Ill. (1933) p. 649 (May 11, 1933).
20. Laws Ohio (1933) p. 115 (May 18, 1933).
23. Laws N. Y. (1933) c. 793.
Such a blanket moratorium had advantages. Being absolute, it was easy to administer. It benefited all classes of mortgage debtors, and not merely particular groups.

The limitations of the moratorium in New York were also fairly obvious. The debtor was required to pay interest and taxes. This provision made the relief inadequate to the needs of many debtors. There had been comparatively few cases of foreclosures solely for non-payment of principal. On the other hand, there were instances (particularly in the case of commercial properties) where it was unfair to the creditor, merely because current charges were met, to allow the debtor to retain the management of the property, when there was little or no chance that a rise in real estate values would ever restore the highly speculative equity of the debtor. The debtor might permit the property to deteriorate. Furthermore, there were cases where the property involved earned more than interest and taxes, or the debtor might be able to pay on principal from his receipts but might not do so. Where a home or farm was involved, no payment on principal was required, but the statute imposed a duty on the owners of commercial properties to pay principal, if possible. The duty was hard to enforce. The Bureau of Legal Research of the New York State Mortgage Commission reported in 1938 that "in many instances owners of real property are taking advantage of the moratorium law and refusing to finance their obligation even though it is entirely possible for them to do so." 28 The weakness of the statute in this respect is criticized:

"The report points out that while the present provisions permit the owner of a mortgage to apply to the Court for a direction that funds on hand after the expenses of operating the property have been paid, nevertheless the full burden of proof that a surplus exists rests upon the holder of the mortgage and in many instances with regard to the existence of any surplus fund. The report goes on to say further that the time consumed in such a proceeding likewise militates against the holder of a mortgage for the reason that in practically every case many issues of fact arise as to the proper or improper expenditure of moneys by the owner of the property which are reflected in the anticipated surplus. It is therefore entirely possible, the report states, for an unscrupulous owner to prolong proceedings under the section and thus permit undue draining of the income from the property which rightfully belongs to the holder of the mortgage.

"Attention is also called to the fact that many home owners who are financially able to pay amortization charges or are in a position to refinance their mortgagee simply refuse to do so and

take undue advantage of the moratorium to the detriment of many holders of guaranteed certificates as well as owners of the whole mortgages."

The moratorium in New York was cheaply administered and it was certain. But it gave too little protection for some cases; too much for others.

There were other transitory instances of purely legislative moratoria in the depression period. Generally they were merely provisional in purpose, and gave way to legislation granting power to the judiciary to determine the merits of each case. The first California moratorium was of this kind—a blanket moratorium on foreclosure sales of farms and dwellings, regardless of the nature of default. In May, 1933, another blanket moratorium was passed, forbidding foreclosures until January 1, 1934. But the relief was limited to cases of defaults on principal payment only. Finally, in September, 1934, California adopted a moratorium, whose operation was discretionary with the judiciary. The first two moratoria of Texas, also of short duration, were blanket in character. Then on May 1, 1933, Texas passed legislation authorizing a judicial moratorium. In 1933, Kansas legislation granted a six months' moratorium on foreclosures arising from all types of default, and empowered the Governor to extend the relief for an additional period of six months. In 1934, Kansas made the moratorium subject to judicial discretion. In Idaho, a statute was passed empowering the Governor to declare a holiday on the obligations of certain businesses or enterprises for sixty days, with power to renew for an equal period. Accordingly, the Governor suspended real estate mortgage foreclosures.

Probably the harshest of all moratoria, from the creditor's viewpoint, was passed in North Dakota. The act extended the period of redemption after judicial sale from one to two years. It related not only to real estate mortgage foreclosures, but to all other execution sales of real estate as well. No provision was made for payments of

29. Ibid.
30. Supra note 13.
32. A supplementary act was passed on August 29, 1933, forbidding foreclosure on any mortgage executed before May 8, 1933, secured by real property improved with a single family dwelling, on account of non-payment of principal falling due between May 8, and December 31, 1933, until six months from the due date. CAL. GEN. LAWS (Deering, Supp. 1933) Act 5102.
36. Supra note 16.
38. Supra note 7.
39. Supra note 5.
any kind to the creditor during the long period of postponement. The act was declared unconstitutional by the North Dakota Supreme Court.40 Thereafter legislation was passed providing for a judicially-administered moratorium.41

Compared to that of its sister state, the South Dakota legislative moratorium was more than moderate. It also extended the period of redemption to two years,42 but the extension was conditioned upon payment by the debtor of all taxes due upon the land; all interest due on the mortgage at the date of sale; interest at 7% on the total sale price, for one year from the date of sale; interest upon the principal of the mortgage for one year in advance at the mortgage interest rate; and all costs of foreclosure. The provisions seem to justify Woodruff's comment that "of all the moratorium laws in all the states, this was the most generous to the interests of the mortgagee." 43 It was so generous to the mortgagor that it gave practically nothing to the mortgagor.

Type II: Legislation Authorizing Judicial Moratoria

The most usual kind of moratorium passed during the thirties was a hybrid type. Legislatures authorized the judiciary to receive and grant the requests of individual mortgage debtors for relief. The power accorded was highly discretionary. The circumstances that should move a court to grant relief and the conditions that should be attached to the grant were chiefly left for the judges to decide. The first moratorium of this kind was authorized by the Iowa Legislature in February, 1933. The authority was conferred with a vague generality, and later statutes in other states were similarly vague. The defendant in any foreclosure proceeding pending or to be commenced during the life of the act (about two years) was entitled to apply to the court for a continuance, and the court was directed to grant the motion unless upon a hearing "good cause is shown to the contrary." The determination of the circumstances constituting "good cause" for refusing relief was left to the courts. There was little in the act to guide the court in making its decision.

The same was true in other states: there were only a few legislative efforts to set forth the circumstances which should constitute "good cause," or to set limitations upon the exercise of judicial discretion. The Mississippi act of April 4, 1934, provided:

42. Supra note 3.
43. woodruff, Farm Mortgage Loans on Life Insurance Companies (1937)
“Precedent to the granting of an order enjoining said foreclosure in pais it must affirmatively appear in the petition or complaint seeking such injunction that the petitioner is unable under Federal regulations to refinance his indebtedness through any agency or instrumentality of the United States Government, or that the creditor or holder of the indebtedness secured by the instrument sought to be enjoined has refused to accept the terms of the refinancing offered or recommended by an agency or instrumentality of the United States, or that an application for refinancing through a federal agency or instrumentality has been filed and is pending.” 44

It was also stipulated that no postponement should be ordered which would “substantially diminish the value of the security.” The New Hampshire Act of June 15, 1933, provided that the mortgage debtor petitioning for relief in foreclosure proceedings should file an affidavit containing a schedule of all of his debts and assets, and a brief statement of his past conduct in meeting his legal obligations.45 The provision gave some indication to the court that the legislature intended to restrict the relief to honest and industrious debtors whose financial position would be really improved by a moratorium. A provision in the Texas act of May 1, 1933, required the debtor to file a sworn statement that the proposed sale would result in financial injury to him, that the property was in good condition, and that he was not in arrears in taxes beyond four years.46 But except for isolated instances like these, the determination of what should constitute cause for refusing relief was entirely for the courts.

Similar discretion was vested in the courts in determining the conditions to impose upon the grant of relief. Typically the courts were directed to determine the rental value of the premises, and to order the payment to the mortgagee of part or all of the rental value, the exact amount to be fixed by them. These payments were in lieu of interest, and need not be equal to it. Usually, also, the length of the stay decreed was discretionary with the courts. The courts frequently had discretion to decide who should occupy the premises during the period of suspension. In effect, the legislatures granted courts power to decree a series of special moratoria.

There are many advantages in this individual treatment of cases. They are the advantages that judicial action usually has over legislative—elasticity, attention to the equities of each case. The integrity and the prospects of each debtor may be considered. Arbitrary limitations, such as confining the relief to a case of default on principal payments,

44. Supra note 26, ff. § 3.
45. Supra note 22, § 4.
need not be made. The amount of current payments to be made to the creditor can be adjusted to fit each case. Future as well as past obligations may be included. Most important of all, the courts may change their orders in accordance with economic developments. As times improve, they can curtail the number of cases which in their fact-finding power they deem entitled to relief. The withdrawal of a moratorium can be gradual.

There were also disadvantages. There was a considerable increase in judicial business, with a consequent impairment of efficiency and speed in handling cases. Neither creditor nor debtor knew his exact legal position, until the matter was adjudicated.

Type III: Legislation Authorizing an Administrative Moratorium

When Louisiana passed its first moratorium in 1934, it was the type of judicial moratorium on mortgage foreclosures quite common at that time, resembling in general tenor the Iowa statute. But on November 21, 1934, the procedure was radically changed. The State Bank Commissioner, by this act, was constituted the Debt Moratorium Commissioner. For a period of two years, the Commissioner was empowered to suspend all laws relating to the collection of fundamentally all types of debts in existence at the time of the passage of the act. The Commissioner was vested with broad discretionary powers to fix the terms of payment on account of principal or interest which he decided the debtor ought to pay in the moratory period.

An example of the administration of the act may be found in the case of Jordan v. Crichton. As a result of mediation, an agreement was reached between debtor and creditor, whereby the debtor surrendered possession of mortgaged premises, and the creditor agreed in return to furnish the debtor with a home and such land as she could cultivate, rent free. The creditor further agreed "that if he receives full payment of the . . . debt from the sale of any of the oil leases or royalties, he will deliver to the . . . [debtor] any remaining royalties on the mortgaged property." As a condition to removal of the stay, the creditor had been induced to grant the debtor many concessions which were completely beyond the range of judicial or legislative action.

Upon a review of all proceedings in the Supreme Court of the state, it was declared:

"Under the moratorium act the commissioner has the authority to render judgments suspending the order, decrees or judg-

48. 191 La. 920, 186 So. 612 (1939).
49. Id. at 924, 613.
ments of any court in the State where proceedings have been instituted to enforce the collection or payment of debt or for the enforcement or foreclosure of any lien, privilege or mortgage securing the same. The commissioner is invested with jurisdiction to confirm and approve a compromise settlement, or a composition when it is agreed to in writing. The act provides that the decision of the commissioner may be reviewed, and also provides that an appeal may be taken to a court of competent appellate jurisdiction. This clearly shows that the moratorium commissioner can render decisions or judgments and exercise judicial functions.”

The Louisiana legislation was a rare instance in this country of a general moratorium on all debts. It was, in effect, a reorganization statute applied to individual debtors.

*Type IV: The Wisconsin Plan of Compulsory Mediation*

In Wisconsin, legislation created a judicial moratorium with a special variation. Provision was made in the 1933 act for reference to a mediation board on the motion of either party. Local mediation boards, composed of three members each, were created for each county. Two members were selected by the county, the third by the two so selected. Upon submission of a case to mediation, the functions of the board were restricted to the making of recommendations. A time limit of two years was placed on the act. A commentator states:

“As the Wisconsin mortgage relief laws neared their expiration date, much criticism was aimed at the way they had functioned in operation, most of the complaints coming from debtors. One of the principal points of attack was the alleged failure of conciliation under the mediation board system set up by the law. The faults found were that the mediation boards were responsive to political considerations, that creditors had refused to participate in mediations, and that the board had no way to enforce their findings.”

Apparently what the debtors really wanted was a means to compel their creditors to scale down their claims.

In 1935 the moratorium was amended and reenacted. An effort was made to meet some of the objections to the mediation system. It was provided that the third member of each mediation board should be selected by the circuit court. Mediation was made automatic—it was not necessary for either party to ask for it—foreclosure proceed-

50. *Id. at 929, 615.*
52. *STONE, Mortgage Moratoria (1936)* 11 Wisc. L. Rev. 203, 222.
ings were referred to the boards as a matter of course. However, the powers of the boards remained merely advisory.

It has been noted that "the weakness of mediation boards in not being able to enforce their findings is well recognized." Even so, "the county mediation boards set up in the 1933 and 1935 Wisconsin moratorium laws have played a valuable part in solving the mortgage problem. They have been of some benefit in effecting conciliations, and there is no reason why they should not continue to be as beneficial regarding mortgages which will become due in the next two or three years." 55

Type V: Interference With Rules of Practice

A device, extremely popular in the nineteenth century, was employed in Arkansas—the slowing down of the routine of foreclosure, to protract the time between commencement of suit and sale. Section 1 of the Act of February 9, 1933, provided that answers to suits to foreclose mortgages, deeds of trust or pledges executed prior to January 1, 1933, should not be due until three months after the service of summons or the publication of the warning order. Section 2 provided that foreclosure decrees and decrees confirming sales should be rendered only during the first three days of the regular term of court. The legislation purported to be for "the relief of the congested dockets of the Chancery Courts of this State." In 1935, it was continued in slightly amended form, but now the legislature was frank to state that the purpose of the Act was to give time for governmental re-financing. Section 2 was repealed in 1937.58

Special Provisions

Other differences in provisions grew out of the effort of legislatures to meet the special problems of their states. For example, in states where the mortgage debtor had been given a statutory right to redeem after sale, it was appropriate that the relief accorded to the debtor should consist of an extension of the period of this right to redeem. In such states this was typical practice. Such legislation

54. STONE, supra note 52, at 234.
55. Id. at 233.
56. Supra note 2.
59. Extension of period of redemption. California, Idaho, Iowa, Kansas, Michigan, Minnesota, Montana (after 1935), New Hampshire, North Dakota, South Dakota, Vermont, Wisconsin. Of these, California, Iowa, Michigan, and Vermont also had provision for a stay of proceedings before sale. Note that in Wisconsin the redemption period precedes the sale, so that in reality its moratorium was a form of stay before sale.
would afford a broader basis for relief than a stay of pending foreclosure actions, since it could cover cases where foreclosure sales had already taken place, if the period of redemption had not expired. On the other hand, in states not having statutory periods of redemption, the moratorium would have to precede foreclosure sale.

Legislation authorizing courts to extend the period of redemption usually also conferred upon them power to stay foreclosure proceedings before foreclosure sale. The legislation of Iowa and Michigan, among others, was of this sort. Where this dual power was given, a court could interpret the legislation in two ways: (1) as giving the mortgagor the alternative of moving for an extension before sale or waiting until after sale to do so, or (2) as necessitating motion before sale by the debtor,—the power then being in the court to defer sale, or order sale and extend the redemption period. In Michigan the statute was interpreted so as to compel the debtor to move for a continuance before sale, except in those cases where the sale had already taken place at the time of the passage of the moratorium.

Other differences also arose from state law. Where power of sale out of court was a recognized mode of foreclosure, it was usual to include a special provision in the act entitling the mortgage debtor to move in court for an injunction requiring the creditor to act in court.

The original moratory statutes frequently applied only to mortgages created before the passage of the act. The obvious purpose of this limitation was to permit the flow of new capital into mortgages. But in some states, when the legislation was reenacted in subsequent years, the application of the act was extended to cover mortgages created in the meantime. Undoubtedly the result was to discourage further lending in the state.

The question of the application of moratory laws to mortgages held by lending agencies organized under federal aegis, elicited considerable legal controversy. Frequently there was an express provision

60. Stay before sale. California, Arizona, Arkansas, Delaware, Illinois, Iowa, Louisiana, Michigan, Mississippi, Montana (before 1935), Nebraska, New Hampshire, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, Texas, Vermont. Of these states, Oklahoma and Nebraska had statutory redemption periods preceding sale. The states in this group with statutory redemption periods after sale were California, Arizona, Arkansas, Illinois, Iowa, Michigan, Montana, North Dakota, and Vermont. Of these, the only states which did not have accompanying provisions extending the redemption period were Illinois (whose moratorium applied only to mortgages held by insurance companies), Arizona (whose moratorium merely prolonged foreclosure suit), Arkansas (where waiver of redemption period is allowed). With few and usually explainable exceptions, therefore, all states with a statutory redemption period after sale resorted chiefly to a moratorium based on an extension of this right.


62. See, for example, Iowa and Louisiana.
exempting loans by governmental agencies, and under a general provision of this kind it was held in Mississippi that Federal Joint Stock Land Banks were exempted. But shortly after this decision it would appear that the Mississippi legislature made land banks subject to the moratorium. In Michigan it was held, in the absence of express exceptions, that a joint stock land bank, in loaning money on mortgages, subjected itself to the laws of the state by making loans on mortgages and was not entitled to exemption as a federal instrumentality.

Constitutional Problems

The framers of many of the moratory laws were shrewd draftsmen. They profited by a knowledge of the constitutional difficulties which beset the moratory legislation of the nineteenth century. Legislation which gave the creditor no compensation for the period of the stay or extension, had been declared unconstitutional by state and federal courts. A close reading of the Rent Cases suggested that legislation freezing the status quo may be upheld, if proper compensation was given the creditor, and if framed as emergency legislation.

The question was, how much compensation must be given? Logically, full compensation to the creditor would be at least current payment of the interest—so that his position would not deteriorate during the relief period. But to require such payments would limit drastically the scope of the relief, since foreclosures were chiefly on account of failure to meet interest, and not principal, payments. If moratory relief was to be useful to debtors, courts must be empowered to order payments less than interest.

The first case reaching the United States Supreme Court which raised the question of validity of this latest moratory relief was Home Building and Loan Association v. Blaisdell. In that case, the Minnesota Moratorium of 1933 came up for review. In 1928 a mortgage had been placed upon a small tract in Minneapolis improved with a building, occupied in part by the owners as a homestead, and in part rented to others. The mortgage was defaulted during the depression.

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64. This would seem to be the result of Gen. Laws Extra Sess. (1935) p. 171, c. 41 (§ 14 amended to read: "the provision of this act shall not apply to any mortgage held as security for pledge to secure payment of a public debt or to secure payment of the deposit of public funds").
66. As indicative of the care that was expended in considering the framing of the Minnesota Moratorium Act of 1933, see Prosser, The Minnesota Mortgage Moratorium (1934) 7 So. Calif. L. Rev. 353.
67. 290 U. S. 398 (1934).
and the property sold by advertisement under the mortgagee’s power of sale. The total amount of the purchase price (which was also the full amount of the mortgage indebtedness) together with interest and taxes paid by the mortgagee, amounted to $4,056.39. A petition was filed by the owners of the equity before the expiration of the normal period of redemption, for an extension of the redemption period under the moratorium. At the hearing, the respondent’s motion to exclude evidence, on the ground that the moratorium violated the federal and state constitutions, was granted, but upon appeal the Supreme Court of Minnesota reversed the decision and remanded the case. A rehearing was held, and the lower court found that the “reasonable present value” of the premises involved was $6000, and the reasonable rental value of the premises, $40 a month. The court entered an order extending the period of redemption for two years, and directed the petitioners to pay $40 a month, the full rental value as found, for the period of the relief, to be applied to taxes, insurance, interest and principal indebtedness.

For two reasons the equities of the case were favorable to the petitioners: (1) the market value of the premises involved was found to be fifty per cent. in excess of the bid—leaving the inference that federal refinancing would be quite possible; (2) the rental payments ordered were more than adequate to meet in full all current charges.

In a five-to-four decision, the Supreme Court of the United States upheld the constitutionality of the moratorium as applied to the facts of the case. Speaking for the majority, Chief Justice Hughes stressed that “the economic interests of the State may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts.” Reference was made to the Rent Cases to show that a limited and reasonable exercise of the police power could suspend contract remedies:

“In these cases of leases, it will be observed that the relief afforded was temporary and conditional; that it was sustained because of the emergency due to scarcity of housing; and that provision was made for reasonable compensation to the landlord during the period he was prevented from regaining possession.”

The statutes involved in Barnitz v. Beverly and Bronson v. Kinzie were distinguished from the Minnesota moratorium in that they were “unconditional” and “there was no provision, as in the instant case, to secure to the mortgagee the rental value of the property during the extended period.” Hughes concluded:

68. Id. at 441.
"The conditions upon which the period of redemption is extended do not appear to be unreasonable. The initial extension of the time of redemption for thirty days from the approval of the Act was obviously to give a reasonable opportunity for the authorized application to the court. As already noted, the integrity of the mortgage indebtedness is not impaired; interest continues to run; the validity of the sale and the right of a mortgagee-purchaser to title or to obtain a deficiency judgment, if the mortgagor fails to redeem within the extended period, are maintained; and the conditions of redemption, if redemption there be, stand as they were under the prior law. The mortgagor during the extended period is not ousted from possession but he must pay the rental value of the premises as ascertained in judicial proceedings and this amount is applied to the carrying of the property and to interest upon the indebtedness. The mortgagee-purchaser during the time that he cannot obtain possession thus is not left without compensation for the withholding of possession. Also important is the fact that mortgagees, as is shown by official reports of which we may take notice, are predominantly corporations, such as insurance companies, banks, and investment and mortgage companies. These, and such individual mortgagees as are small investors, are not seeking homes or the opportunity to engage in farming. Their chief concern is the reasonable protection of their investment security. It does not matter that there are, or may be, individual cases of another aspect. The legislature was entitled to deal with the general or typical situation. The relief afforded by the statute has regard to the interest of mortgagees as well as to the interest of mortgagors. The legislation seeks to prevent the impending ruin of both by a considerate measure of relief." 69

Justice Sutherland, speaking for the minority, wrote a vigorous dissent in which he relied principally upon the language of previous cases and evidence of the intention of the members of the Constitutional Convention in incorporating the contracts clause into the Federal Constitution. He argued:

"The present exigency is nothing new. From the beginning of our existence as a nation, periods of depression, of industrial failure, of financial distress, of unpaid and unpayable indebtedness, have alternated with years of plenty. The vital lesson that expenditure beyond income begets poverty, that public or private extravagance, financed by promises to pay, either must and in complete or partial repudiation or the promises be fulfilled by self-denial and painful effort, though constantly taught by bitter experience, seems never to be learned; and the attempt by legislative devices to shift the misfortune of the debtor to the shoulders of

69. Id. at 445.
the creditor without coming into conflict with the contract impairment clause has been persistent and oft-repeated.

"The defense of the Minnesota law is made upon grounds which were discountenanced by the makers of the Constitution and have many times been rejected by this court. That defense should not now succeed, because it constitutes an effort to overthrow the constitutional provision by an appeal to facts and circumstances identical with those which brought it into existence. With due regard for the processes of logical thinking, it legitimately cannot be urged that conditions which produced the rule may now be invoked to destroy it." 70

In setting the pace of moratory legislation, the Blaisdell case was most influential. It encouraged legislatures to amend their statutes to correspond in important respects to the Minnesota legislation, and it encouraged state courts to uphold similar legislation, when state constitutional provisions were invoked. The legislatures of the states were primarily responsible for the introduction of the mortgage moratorium; the Supreme Court of the United States was responsible for its continued existence.

For example, in Russell v. Battle Creek Lumber Co. et al,71 the Supreme Court of Michigan upheld the legislation of that state, on the authority of the Blaisdell case. The state contracts clause was involved. The court said:

"Because the Constitutional provision is identical in both Constitutions, we are constrained to adopt the ruling as the construction of the clause in our State Constitution upon the situation at bar." 72

A similar approach was taken by the Mississippi Supreme Court in Wilson Baking Co. Liquidating Corp. et al v. Colvard,73 although the dissent protested that the interpretation of the Mississippi contracts clause should not be governed by the Blaisdell case. These decisions represent the general attitude to moratoria taken by State Courts after the Blaisdell case had been decided.74

There were, however, one or two courts of an independent mind. In 1934, in Travellers' Ins. Co. v. Marshall,75 the Texas Supreme Court declared the state moratorium act unconstitutional under the state contracts clause. The opinion in the case stated that the Texas contracts clause, although modelled after the federal clause, was to be

70. Id. at 471.
72. Id. at 650, 562.
73. 172 Miss. 804, 161 So. 123 (1935).
74. 65 S. D. 337, 274 N. W. 315 (1937) (South Dakota Act unconstitutional).
75. 124 Tex. 45, 76 S. W. (2d) 1007 (1934). See also Harrigan v. Blagg et al., 124 Tex. 117, 77 S. W. (2d) 524 (1934), moratorium held unconstitutional as applied to deed of trust with power of sale.
construed according to the interpretation placed upon the Federal clause by decisions prior to the time of the adoption of the state clause, (1875-76) and deference should not be paid to any subsequent decisions of the Supreme Court. On the basis of these prior decisions, the Supreme Court of Texas decided that the Texas contracts clause was intended to forbid the present type of legislation. The opinion was buttressed by lengthy references to statements of the framers of the federal constitution on the meaning of the contracts clause.

Although the constitutionality of moratoria was widely accepted by state courts after the Blaisdell case, the proper application of the legislation had to be worked out. The language of the Blaisdell case and that of later decisions of the United States Supreme Court, such as Worthen Co. v. Kavanaugh, and Louisville Joint Stock Land Bank v. Radford, indicated that moratory legislation must not be applied to cases where the rights of creditors would be unduly injured. Chiefly under the guise of constitutional interpretation, the state courts, in a vast number of cases, established a series of legal rules which governed the application of the relief measures to particular cases.

The Rise and Fall of Moratoria

A moratorium is more easily started than ended. So it was with the moratoria passed in the last depression. The original relief was based on the assumption that in a short time there would be a rise in land values, which would save some of the equities of the twenties. It was an erroneous assumption.

With few exceptions, the original statutes were limited to a period of two years or less. But when the period drew to a close, the same conditions which had given rise to the legislation were still in existence. Considerations which persuaded legislatures of many states to extend the moratorium for an additional period of two years included (1) the continued low income of the farmer, the continued low level of wages, the large amount of unemployment; (2) the severe drought that affected midwestern agriculture in the summer of 1934; (3) the slowness of the government’s refinancing program.

It is undoubtedly true that, in passing the moratoria, many state legislatures had indulged in wishful thinking—had nurtured the hope

76. State v. Klein, 63 N. D. 514, 249 N. W. 118 (1933) decided before Blaisdell case, and dealing with the rather harsh North Dakota Law described in the text.
77. 295 U. S. 56 (1935).
78. 295 U. S. 555 (1935).
79. See, for example, Arkansas, Iowa, and Wisconsin.
80. See, e. g., Laws Minn. (1935) p. 47.
81. Recited as a chief cause in the preambles of many of the renewing statutes of mid-western states.
82. Expressly stated, for example, as a major purpose in the Arkansas Act of 1935.
that by postponement of the evil of liquidation, the evil would vanish. Improvement would come in a short time. The case of the California legislation is illustrative. From comparatively meagre beginnings, the California moratorium expanded, rather than contracted. Successively, short-term moratoria were enacted in the early part of 1933. They were limited to farms and homes. On May 9, 1933, sales out of court were forbidden on prior mortgages until January 1, 1934, if the only default consisted in failure to pay principal. This act was passed because no redemption period followed a sale out of court in California. On August 29, 1933, foreclosures by judicial action were forbidden until 6 months after the due date of the principal payment, in cases where the default consisted only in failure to pay principal. So far the California legislation had been relatively innocuous. But on September 15, 1934, the moratorium on principal payments was extended to include all types of mortgaged property other than mines. It was provided that until February 1, 1935, there should be no foreclosures on account of defaults in principal payments.

By the Act of June 21, 1935, California adopted the principle of a judicial moratorium, and extended the coverage to include foreclosures for all types of default. The Act was to run until January 1, 1937. Apparently realizing the dubious merit of the action taken, the legislature declared in the preamble:

"In making provisions permitting such delays the greatest care must be taken to prevent an economic result contrary to the purpose of moratoria legislation. Undue restrictions upon, and extended postponement of, the remedies of owners of mortgages, deeds of trust and contracts of land purchase must, of necessity, result both in a material lessening of the loan value of the property of the State and of the value to the property owners of their equity over and above encumbrances, and also in the inability of property owners to refinance their obligations on favorable terms. Such results cannot but impair the financial stability and prevent the financial rehabilitation of property owners of the State, and must eventually precipitate an unduly large number of foreclosures, sales and forfeitures.

"The conflicting economic principles involved in moratoria legislation and the inestimable value to the State, not only of a large body of land owners but also of the existence of sound property values, requires at this time a statement of the policy of this legislation to be that relief by moratoria legislation should not be

83. Supra notes 13, 31.
84. Supra note 32.
85. Supra note 31.
86. Supra note 33.
extended beyond the periods prescribed by this Act, and although such policy will not be binding upon the succeeding legislatures, it may, nevertheless, serve as a recommendation."

If lenders placed reliance upon this statement of intention, they were deceived. The next act, extending the moratorium till July 1, 1939, repeated the admonitions verbatim. But the legislature that passed the 1939 Act, extending the moratorium to July 1, 1941, had the good grace to leave out the pious sentiment.

As the years passed, it became increasingly clear that the moratoria could not be extended indefinitely. Debtors who had not been able to salvage their equities by federal or private refinancing could not expect permanent occupation of property which mortgage creditors in the normal course of legal process would have acquired several years before.

Although there are some cases in which moratory legislation terminated earlier, a discernible recession of the wave of moratoria begins in 1937. In this year most of the statutes reached their expiration date, and several of the legislatures failed to revive the laws. In this manner the moratoria of Idaho, Kansas, Maryland, New Hampshire, and Vermont terminated. South Carolina’s moratorium similarly terminated in 1938.

But termination was not an easy matter in many states. There were active debtor groups at work in support of continuance. In addition, many institutions expressed grave fears that a sudden ceasing of the relief measure would lead to a severe fall in real estate values, because of the large volume of mortgages involved. This was particularly so in New York. Fearing such a crash, the New York legislature for a long time dallied with the problem of termination.

The expedient adopted by a considerable number of legislatures was to whittle down the classes of properties entitled to relief, in an effort to stagger the liquidation process. For example, in 1938, the Michigan moratorium was limited to homestead properties. In 1940 the relief was terminated. In 1941 North Dakota eliminated relief by stay of foreclosure sale, and left the debtor only the privilege of asking for an extension of the redemption period. In 1937 part of the Arkansas moratorium was repealed. In 1941 New York pro-

88. CAL. GEN. LAWS (Deering, 1937) Act 5101.
89. CAL. GEN. LAWS (Deering, Supp. 1941) Act 5099.
91. See supra note 28 (hearings).
93. Termination resulted from a failure to revive laws upon expiration date.
94. Laws N. D. (1941) p. 28.
96. Laws N. Y. (1941) c. 782.
vided for payment of 1 per cent. per year on principal as a condition to continuance of the relief. The only instance of a complete repeal was that of Louisiana in 1940.97

The rising prices of wartime have enabled many states to discontinue their moratoria without undue consequences. California, Montana, Minnesota, and South Dakota took no action to renew their moratoria in 1942 or 1943. As a consequence, they expired. In New York,98 however, the moratorium still continues, with some concession made to creditors by requiring property owners seeking protection to pay 1 per cent. on principal per annum. A curious accident led to the discontinuance of the North Dakota moratorium. A bill designed to continue the moratorium until July 1, 1945, passed both Houses of the legislature, was then engrossed, but was apparently lost before it reached the enrolling clerk. As a consequence the bill was not properly enrolled and signed by the presiding officers of the legislature, and was never signed by the Governor. Upon discovery of the error, the Governor appealed to state judges to exercise their equitable powers to continue foreclosure actions before judgment.

In 1938 the Nebraska Supreme Court seized the initiative in First Trust Co. of Lincoln v. Smith.99 Declaring that the emergency upon which the original Nebraska moratorium had been founded was ended, it held that the renewal of that act was unconstitutional. This decision was, however, merely the culmination of a consistently unfriendly attitude of the court to the moratorium. It was, as a matter of fact, anticlimactic in character.

As these moratoria recede, the question arises, will they leave a permanent imprint upon mortgage law? What residue will remain? Certainly, if they have no other permanent effect, they have accustomed legislatures and people to the suspension of contract obligations. On the other hand, they have probably made mortgage lenders more wary and cautious: they have reason to fear that in future depressions the way has been cleared for a repetition.

Can we expect the entire elimination of moratoria from the statute books eventually? Not in all states. The idea that economic exigencies may afford an excuse for non-payment of mortgage indebtedness will possibly continue (in modified form) in the mortgage law of some

98. Laws N. Y. (1943) c. 93.
99. 134 Neb. 84, 277 N. W. 762 (1938). On January 10, 1939, the Iowa Supreme Court, following suit, in First Trust Joint Stock Land Bank of Chicago v. Arp, 225 Iowa 1331, 283 N. W. 441 (1939) held the 1937 moratorium unconstitutional, declaring: "In the instant case the record shows, without controversy, that practically all of the depressed conditions existing in 1933, do not exist at this time, and the court can and does take judicial notice of such fact."
states. The absolute nature of the mortgage debtor's covenants may be disappearing. We need only refer to the 1939 Iowa permanent statute which followed the emergency moratorium. It was provided that thereafter a mortgage debtor should be entitled to petition the court for relief from foreclosure,

"when and where the default or inability of such party . . . to pay or perform is mainly due to or brought about by reason of drought, flood, heat, hail, storm, or other climatic conditions or by reason of the infestation of pests which affect the land in controversy, or when the Governor of Iowa by reason of a depression shall have by proclamation declared a state of emergency to exist in this state." 100

C. Judicial Construction

An analysis of the particular provisions of moratory legislation is not as important as a description of their operation. Most of the moratoria imposed the responsibility upon the judiciary for granting or refusing relief in individual cases. The application of the laws was therefore highly discretionary in character. Whether the relief was wide or limited, depended fundamentally upon the attitude of the lower court judges. In assessing the importance of the judicial moratorium, therefore, it would be important to know in how many cases trial court judges granted the relief requested, and in how many they refused it. If the cases of relief were few, the moratorium would be of minor significance; if the cases were many, the moratorium would have far-reaching effect. It was entirely up to the judges.

Unfortunately, it would be very difficult to accumulate statistics on the work of the trial court judges on granting and refusing relief. Such statistics could be obtained only by a search of the records of each county court in each state—an undertaking which would require the work of a large staff. Indications are that there were wide variations in judicial attitude among the states, and, in fact, among the counties of each state. Horace Russell states:

"Unfortunately, I have no knowledge of any statistics indicating the frequency of applications for relief or the frequency of the exercise of discretion by the courts in granting such relief. Indeed, according to my experience and observation, which has been extensive in this field, the questions are so much affected by public and private psychology, natural and local sentiments, that statistics on the subject would be somewhat misleading unless they covered a large area.

100. Iowa Code (Reichmann, 1939) § 12383.3.
"In the first place, mortgage moratorium legislation differs in almost every state—enacting such legislation from the extension of slight provision for the mortgagor to the most extreme obstacles to realizing on mortgage security. Furthermore, in the same state operating under the same law a psychology develops in one community which results in a very great number of applications for relief and in another community very little attention is paid to such a law. Likewise, even in the same community one judge will exercise the most liberal discretion in extending relief to the mortgagor whereas another judge, perhaps in the same court, will exercise the most liberal discretion toward the strict enforcement of mortgage contracts." 101

The available evidence seems to support Mr. Russell’s thesis. Professor W. G. Murray, in describing the Iowa situation, remarks that “in general, the district court judges in this state granted continuances freely, both on the foreclosure proceedings and on the period of redemption”. He refers to the results of an unpublished survey in his possession “which gives the total number of existing continuances or stays on farm mortgages in December 1938 as 2,646, representing $28,000,000 in farm mortgages.” During the period of the moratorium, however, foreclosures were by no means stayed in every case; Professor Murray estimates the number of farm mortgage foreclosures in Iowa as 1,450 in 1936, 1,375 in 1937, and 620 in 1938. 102

The judges in all the states were apparently not so liberal. For example, Stone, in describing the moratorium in Wisconsin, refers to the fact that Wisconsin debtors complained “that the judges were not exercising their discretion fairly, and that in many counties and circuits moratoria were sparingly given, and when given, were not on fair terms”. He explains

“Such was the principal contention of farmers appearing before the hearing of the Assembly Committee on Agriculture and the Senate Committee on Agriculture and Labor on February 20, 1935. This has been contended in correspondence from some Wisconsin farmers with whom the writer has communicated but others assert that their judges have been fair. At any event, this correspondence has not been of sufficient magnitude to present a fair cross-section.” 103

Statistical support to these views seems to be found in a survey covering 53.3 per cent. of Wisconsin. This survey reports 7,814 foreclosures in 1932, and 7,617 and 7,290 in 1933 and 1934, respectively—the latter two being years of the moratorium. The number continued high for subsequent years of the moratorium: 5,948 for non-farm

101. Letter to author dated October 23, 1941.
102. Letter to author dated October 29, 1941.
103. Stone, supra note 52, at 222.
properties only in 1935, 5,448 in 1936.\textsuperscript{104} Such figures do not indicate a great liberality in staying foreclosures, particularly in view of the fact that in Wisconsin there is no period of redemption following sale.

The only official report available on the administration of a moratorium is the record of the Louisiana Debt Moratorium Commissioner. During the life of the moratorium his office received 16,124 applications for relief. Of these, 1,810 were withdrawn; 2,019 hearings were continued; 1,243 applications were dismissed for want of jurisdiction; relief was refused in 429 cases and granted in 10,614. The debts involved in applications on which hearings were held amounted to $17,650,000. Including rehearings, a total of 22,924 final hearings were held. These statistics reveal the considerable administrative problem involved in a moratorium in which each case must be considered separately and indicate that debtors received favorable treatment in Louisiana.\textsuperscript{105}

\textit{Limitations Placed on Relief by the Decisions of Appellate Courts}

In states where a judicial moratorium prevailed, the principal administrative burden fell upon the lower courts. Appellate tribunals generally emphasized the discretion of the lower courts. "Granting of relief under the moratorium act . . . is a matter of discretion for the trial court and will be sustained unless abuse of discretion is affirmatively shown," declared the Supreme Court of Michigan.\textsuperscript{106} Nevertheless the appellate courts imposed limitations upon the ambit of the lower court's discretion. In many states, these limitations restricted the possibilities of debtor relief.

The appellate courts justified the imposition of these judicially-created limitations upon two principal grounds. In the first place, they purported to be carrying out the legislative intent—to be fulfilling merely the purposes of the act as they conceived them to be. In the second place, they restricted the scope of the relief to keep the application of the moratoria within constitutional limits, that is, within the type of cases which they conceived to be approved by the \textit{Blaisdell} decision.

\textbf{I. The Question of Good Cause for Refusal of Relief}

The supreme courts of the states were particularly concerned with the question of what evidence was relevant to show that the debtor was

\textsuperscript{104} Foreclosure Report, Federal Home Loan Bank, fn. 983, identical communities, prepared May 29, 1935.
\textsuperscript{105} Letter to author dated October 31, 1941.
\textsuperscript{106} Makar v. Peoples Wayne County Bank of Dearborn, 284 Mich. 489, 492, 280 N. W. 31, 32 (1938).
not entitled to the relief given by the moratorium. There developed a series of criteria or considerations which lower courts must keep in mind in dealing with the problem. None of these criteria, in itself, was necessarily controlling: they were merely factors which should influence the exercise of the lower court's discretion, factors which if not properly weighed, would require a reversal by the appellate court.

It was frequently emphasized that no debtor should be entitled to relief if his economic position was fundamentally unsound. If it was clear that he would eventually lose his land anyway, it was considered to be a waste of time and unjust to the creditor to grant a moratorium. The debtor's prospects of refinancing the indebtedness, the value of the land involved, and his financial condition, were relevant in determining eligibility for relief. An example is the case of Miller v. Ellison.107 A mortgage amounting to $28,000 was involved. According to the defendant's own affidavit, the property was worth only $8,000. Interest, taxes, and court costs brought the creditor's claim to approximately $40,000. If the debtor was given moratory relief, the claim would have increased further. The Iowa Supreme Court set aside the lower court's grant of relief. It said:

"We do not think it could have been the intention of the framers of the law that such results could be brought about under the statute. If so, the statute would be plainly and palpably an absolute confiscation of the rights of the plaintiff to enforce her mortgage, would deprive her of any benefit from it; even then foreclosing, or by the time she would get possession under her mortgage, the debt would have more than doubled. And, further, there is no reasonable prospect showing that the defendant is in any position to redeem the land at the end of either extension period."108

In such a case, where it was clearly most improbable, because of the relation of land value to debt, that the debtor could refinance, there should be little dispute on the merits of the decision. But emphasis on the debtor's ability to refinance could be carried to extremes. There was, for example, the factor of market value. Deference to this factor could be easily overdone. Market values of farms had declined in 1933 to such an extent that there were few cases in which debtors sought relief from foreclosure where the mortgage (according to existing values) was adequately secured. There was also the factor of the debtor's financial position. Under existing conditions, practically all of the debtors asking for relief were insolvent. Unless the court was determined to nullify the legislation, these factors would have to be treated

107. 221 Iowa 1174, 265 N. W. 908 (1936).
108. Id. at 1181, 912.
with caution. If the moratorium was to accomplish the legislative purpose, it was necessary to assume that improving conditions would enhance market value and restore solvency in most cases.

Strict interpretation virtually destroyed the Nebraska moratorium. The Nebraska Supreme Court mercilessly applied a requirement that the land should have a present value in excess of the mortgage. In every case reaching it on appeal (except where the creditor had offered no proof of market value), the debtor was refused relief. The court reasoned that if the present value of the premises was less than the mortgage, the debtor had no equity in the property, and no interest entitled to protection. Its unfriendly attitude toward the moratorium finally crystallized in a 1938 decision holding the legislation unconstitutional.

The policy of the Nebraska Supreme Court was impliedly criticized in a decision by the Federal District Court of Nebraska in Union Central Life Ins. Co. of Cincinnati v. Hoffman. The court rejected the thesis that such kind of proof should prevent the debtor from obtaining relief. In making its own construction of the Nebraska statute, the court said:

"The plaintiff has undertaken to establish by evidence that 'good cause' exists for denying the defendant the benefit of the law, because the present value of the mortgaged property is less

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100. In the following cases the Nebraska Supreme Court sustained a lower court's refusal of moratorium, or reversed a lower court's grant, on the ground that the debtor had no interest in the property because the value as ascertained was below the mortgage debt: Balster v. Keller, 134 Neb. 469, 279 N. W. 156 (1938); Lorenzen v. Stobbe, 134 Neb. 796, 279 N. W. 774 (1938); Luikart v. Graf, 130 Neb. 736, 266 N. W. 641 (1936); Clark v. Hass, 129 Neb. 112, 260 N. W. 792 (1935); First Trust Co. of Lincoln v. Rathborne, 132 Neb. 211, 271 N. W. 428 (1927); American Trust Co. et al. v. Brubaker, 132 Neb. 279, 271 N. W. 793 (1937); Lincoln Nat. Life Ins. Co. v. Richards, 132 Neb. 279, 271 N. W. 793 (1937); Fremont Joint Stock Land Bank v. Satterfield, 132 Neb. 325, 277 N. W. 797 (1938); Slosburg v. Hunter, 132 Neb. 529, 272 N. W. 577 (1937); American Trust Co. v. Lee, 132 Neb. 628, 272 N. W. 767 (1937); Fed. Land Bank of Omaha v. Soehl, 134 Neb. 254, 278 N. W. 384 (1938); Buchanan v. Rahmeyer, 134 Neb. 331, 278 N. W. 558 (1938); Findley v. Peters, 133 Neb. 890, 277 N. W. 595 (1938); Equitable Trust Co. v. Groves, 133 Neb. 177, 274 N. W. 457 (1937). In only a few cases was the lower court moratorium affirmed, and then on the grounds that the creditor had failed to offer any proof of value and had not raised the constitutional question in the lower court: Bell v. Nieman, 127 Neb. 762, 257 N. W. 69 (1934); Continental Co. of Lincoln v. Rathbone, 132 Neb. 902, 273 N. W. 820 (1937). The supervisory power of the Nebraska Supreme Court was particularly great in that in Nebraska foreclosure suits, as other equity cases, are triable de novo in the upper court: Balster v. Keller, supra. The court, in reviewing the evidence, displayed a rather undiscriminating tendency simply to take the average of values as testified by witnesses for both sides: Luikart v. Graf, supra. An example of the strictness of the Nebraska Supreme Court is Willson v. Quein, in which the lower court had found that the property involved has a value of $80,000, as against a debt of $71,005. The court said: "The defendant has no equity in the real estate involved herein. The mortgage, judgment liens, the court costs and the taxes at the time of the application, together with the taxes and interest which would accrue during the period of the suggested stay, exceed the value of the premises." 131 Neb. 615, 617, 269 N. W. 121, 122.

110. First Trust Co. of Lincoln v. Smith, 134 Neb. 84, 277 N. W. 762 (1938).

than the amount due on the mortgage debt; that, because of the economic depression and crop failures, the value of the land has fallen away so that there is now nothing left for the landowner. This is the very reason assigned by the Legislature as warranting the passage of the law as a means of preventing the financial destruction of the farmers of Nebraska. Certain witnesses have been called, and by way of qualification have testified that they were either farmers, real estate men, or field men for the insurance companies, and, because of their business and experience, were acquainted with the value of different real estate, and thereupon arbitrarily fixed a figure at which they said was the value of the land.

"The very heart and purpose of the moratory law in question is to prevent the appraisal of these mortgaged lands by sale at this time during this depression and crop failure, without a 'yard stick', and to prevent the loss to the owner of his property because under the conditions prevailing there is no one to fix a price except the holder of the mortgage, and that too often based on the whim of the moment. In this case a receiver has been appointed to collect and apply the rentals and to protect the buildings by insurance and repair. The position of the mortgagee is just as favorable in so far as the security is concerned now as it would be if the sale was confirmed and the moratory order denied. There is no serious contention in this case that the property is being depreciated by neglect or want of care, the only depreciation to the improvements being that of ordinary wear and the effect of the elements.

"When this economic depression period passes, when the pests have gone, and when it rains again, all of which is sure to happen, values will come back."

For a while it seemed that the Iowa Supreme Court was also leaning toward strictness. In Federal Land Bank of Omaha v. Wilmarth, the debtor had petitioned for a continuance. The property involved was farm land upon which a mortgage of $20,000 had been placed in 1924. The debtors failed to pay instalments of interest and principal in October, 1931, and April, 1932, and 1930 taxes. Foreclosure proceedings, based upon a total claim of $20,204.55, were commenced on October 28, 1932. In March, 1933, at a time when farm prices and land values were lowest, the hearing on the debtor's motion for a continuance was held. Witnesses estimated that the premises were worth approximately $10,000 at that time. The debtor conceded that he was insolvent. The lower court refused the relief requested. The decision was affirmed by the Supreme Court of Iowa. The court observed:

112. Id. at 832, 833.
113. 218 Iowa 339, 252 N. W. 507 (1934).
114. There are other facts in the case that may also have influenced the court. The appellant had left the premises in 1932 and permitted his son to lease the farm in small fractions to various tenants. During the period of default the appellant had not
"The purpose of the statute is to afford the owner of the land an opportunity to refinance or pay up the indebtedness and save his farm within the moratorium period. But the appellant, as already indicated, will not be in a position to pay the obligation and redeem the farm within the period of the moratorium. He is hopelessly insolvent financially. Not only is the appellant insolvent, but he has no property with which to make any payment on the judgment aside from the mortgaged land. While the insolvency is not the deciding point, it is a material consideration. Clearly the appellant has no prospect of refinancing or finding the indebtedness within the moratorium period." 118

A vigorous dissent was written by Justice Mitchell, speaking for himself and Justice Kintzinger. Even assuming that the appellant was insolvent, he argued, "to say that because a man is insolvent a continuance should not be granted would destroy the purpose for which the Legislature passed the statute." Although he refused to concede that the debtor's failure to apply rents and profits to pay taxes, interest and principal should constitute good grounds for refusal of relief, he felt that in any event the debtor had offered to do equity by turning over all the rents received as a condition to relief. Finally, he contended that proof that the market value in 1933 was inadequate to protect the mortgage should not prevent relief, in view of the fact that conditions were very poor at that time, and subsequently the federal government's farm refinancing program had materially improved prospects of refinancing. He contended:

"The Legislature passed the Act for the purpose of assisting the people of this state, and it must be kept in mind that the mortgagor loses nothing, for, under the Act, a receiver is appointed to collect the rents and profits from the real estate. It is of vital public concern to the people of Iowa that the men and women in all parts of the state who, through their own efforts, have secured for themselves and their families a farm or home, be not ousted from their farms or their homes, but that they be given an opportunity with the aid of their government to refinance their farm mortgages." 116

Justice Mitchell's attitude was vindicated by the Iowa legislature. In 1937 it provided expressly:

"A showing of present insolvency of the mortgagor or mortgagors and/or present inadequacy of the security shall in themselves not be sufficient to constitute good cause for refusal to grant a continuance." 117

applied the rents and profits to pay taxes, interest and principal. While these may have been important, the court seemed to place more emphasis on the insolvency of the debtor and the present value of the lands.

115. Supra note 113, at 354, 514.
116. Id. at 357, 516.
Possibly because of this provision—possibly because of the developing possibilities of refinancing through federal aid—the attitude of the Supreme Court of Iowa became friendlier to the debtor. The members of the Court who wrote the opinions in later cases were for a while unwilling to admit that the provision was in any way inconsistent with previous decisions. But there were instances of relief to debtors who were at the time of the hearing completely insolvent and whose properties were at the time wholly inadequate security. "It is evident, from the wording of the statute," said the Court in *Metropolitan Life Ins. Co. of New York City v. Henderson*, "that something more than insolvency or inadequacy of the security must be shown to justify a refusal to grant a continuance." At last, Justice Miller, speaking for the Court in *Prudential Ins. Co. of America v. Redmond*, admitted:

"It appears to us that the Legislature in incorporating section 3 in the present act did so for the very purpose of avoiding the interpretation heretofore placed by this court, to the effect that present insolvency and present inadequacy would result in a showing to the effect that there is no reasonable probability that the mortgagor would be able to pay off, refinance or redeem."

In Iowa, therefore, the test of relief became not the present state of the debtor's property and finances, but simply the prospects of recovery, particularly his chances of securing refinancing. There was room for elasticity of treatment. Relief was readily granted, of course, where the present value of the land was estimated to be more than the mortgage. But it was also granted in other cases where the equities were strong.

There were additional factors, besides solvency and value, which influenced the judicial determination in Iowa and in other states adopting a policy liberal to debtor relief. Among these factors was the character of the use of the land involved. It is clear from a reading of the cases on moratoria that owners of homesteads were much more favorably treated than owners of business enterprises. Most of the statutes were not expressly restricted to homesteads. The fact that premises were not occupied as a homestead did not necessarily preclude relief. In the words of the Iowa Supreme Court in *Anderson v. Fall*,

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118. 224 Iowa 1238, 1241, 278 N. W. 621, 623 (1938).
119. 225 Iowa 166, 279 N. W. 392 (1938).
120. Id. at 170, 394.
122. 221 Iowa 24, 265 N. W. 165 (1936).
"That fact is not of itself determinative of the question before us, the statute under consideration containing no restriction in its application to homestead or non-homestead property. The matter of the mortgaged property being or containing a homestead is only one of the factual elements pertaining to the mortgaged premises that previous opinions of this court have taken into consideration." 123

But the policy of protecting homesteads was undoubtedly a motivating factor of importance in considering the rights of the parties. For example, in Service Life Ins. Co. v. Sutton, 124 the two contestants were the first and second mortgagees of the debtor, vying for the possession of his real estate. No one was involved in the case who wanted to possess the farm in question as a homestead. The question raised was whether the second mortgagee was entitled to a moratorium against foreclosure by the first mortgagee. The court held not. It was stated:

"that phase of the moratorium statute which has for its purpose the retention of the title, ownership, and possession in the hands of those who are interested in holding the possession of the farm as a distinct, individual enterprise, upon which the welfare of the entire country so largely depends, is not involved in this application at all." 125

II. The Good Faith of the Debtor

In passing upon the propriety of decisions of lower courts, appellate courts considered evidence relating to the moral qualities of the debtor petitioning for relief. If for some reason the debtor's purpose in petitioning for relief was not primarily to obtain a breathing spell during which he could refinance or pay off the debt, but rather to exploit the property during the extension period, relief would be refused on the ground that the debtor was not acting in good faith. 126 If, for example, it appeared that an owner (or even part owner) had ample means at his disposal with which to pay off the mortgage immediately, and had refused to do so, he was held not entitled to the moratorium. 127

A circumstance that might influence the court against relief was the fact that a petitioner was not personally liable on the mortgage. This had bearing on his intention to refinance the indebtedness. 128 And the fact that a mortgagor was a corporation, where individual liability

123. Id. at 26, 166.
124. 223 Iowa 1013, 274 N. W. 57 (1937).
125. Id. at 1017, 59.
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did not attach, was an influential factor persuading the Iowa court not to grant relief.\textsuperscript{129} It was said:

"While the moratory statute makes no distinction between individual and corporate debtors, we are inclined to the view that we may take judicial notice of the fact that in an agricultural state like ours these acts were passed primarily for the purpose of preserving the farm and other homes of distressed debtors."\textsuperscript{130}

The courts generally frowned upon petitions for relief made by debtors whose previous conduct had not reflected a bona fide intention to protect the mortgagee as much as possible. Any evidence of bad faith might persuade the court to refuse the petition. For example, in Adler v. New York Life Insurance Company,\textsuperscript{131} the mortgagor did not apply for relief during the foreclosure proceedings; he allowed the sale to take place and waited until the last day before expiration of the time for the redemption period to expire, before he petitioned for relief. In the meantime, he appropriated all of the revenues. It was held that he was not entitled to relief, since his conduct did "not appeal to the conscience of a court of equity." Similarly, the failure of the owner to pay taxes for three years, or to apply the rents received from the property for upkeep, was held to be proper ground for denial of relief.\textsuperscript{132} And where the debtor had, during a two year period after default, collected $1,000 from half of the property, and occupied the other half, paying only $15 toward taxes, he was held not entitled to the moratorium.\textsuperscript{133} But a failure to apply rents toward interest and taxes for the period of only one year before request for relief was held in another case not to preclude the debtors involved.\textsuperscript{134}

Some speculation in land appears to have developed as a result of the moratoria. The practice of "scalping" rents seems to have become fairly frequent. Scalping has been defined as:

"purchasing the naked legal-title in farms heavily mortgaged, for the purpose of leasing the same and assigning the leases, and thereby defeating the mortgagee in his effort to recover the rents secondarily pledged as security for the debt." \textsuperscript{135}

The owner of land in the process of foreclosure would sometimes sell his land (often for a nominal price) to a speculator. The speculator would lease the premises to some farmer, and then assign the leases,

\textsuperscript{130} Id. at 1151, 826.
\textsuperscript{131} 272 Mich. 641, 262 N. W. 377 (1935).
\textsuperscript{134} First Trust Joint Stock Land Bank v. Kilpatrick, 221 Iowa 993, 267 N. W. 688 (1936).
\textsuperscript{135} Equitable Life Assur. Soc. v. Kirby, 221 Iowa 1150, 1151, 266 N. W. 520, 521.
receiving cash consideration in full at the time of the assignment. The mortgagee, not having title, would be unable to prevent such stripping of future rents from the property. When such a purchaser of lands applied to the courts for an extension, he was regularly refused. 138

The speculator might have another motive for his purchase. He might intend to obtain a moratorium, and then attempt to refinance the property, or dicker with the mortgage creditor and persuade him to take less than his claim. As a purchaser he would not, of course, assume any liability on the mortgage. With regard to this situation, the Supreme Court of Michigan declared:

"The provisions of the Moratorium Act may not be invoked by speculators in equities of redemption without assumption of the mortgage obligation, and especially not, as in the instance at bar, where the purchase was made during course of foreclosure and evidently with the view of application for stay in order to obtain time within which to refinance the mortgage or induce the holders of the mortgage bonds to take less than their aliquot share of the mortgage security and thereby increase the profits of the speculator.

"What we have just said, of course, bears no relation to the right of a mortgagor to transfer his equity and obtain what he can get for it, but only to the speculator who purchases during foreclosure with intention to employ the moratorium law as a lever to pry out profits." 137

An express provision in the later Iowa legislation directed the court to refuse relief if the application "is found not to have been made in good faith." 138 In construing this provision, it was held that the insolvency of the owner and the inadequacy of the security did not prevent the petition being filed in good faith, and that a failure of the mortgagor to pay interest and instalments on the mortgage by sale or mortgage of personal property necessary to continue farming was not evidence of bad faith. 139 The fact that, in the last two years before the hearing, all rentals were paid to the mortgagee, and the owner did not use any of the income for his own benefit, was regarded as evidence of good faith. 140

136. Ibid.


138. § 2 of c. 78 of 47th Gen. Ass.


III. Burden of Proof

The courts were also called upon to decide which party had the burden of proof. It is hardly necessary to point out how important in determining cases is a judicial ruling of this kind. Many cases are won or lost merely on a failure of evidence. The express language of the statutes generally gave the court power to grant relief "unless good cause is shown to the contrary." Interpreting this language, state courts generally imposed the burden of proof upon the mortgagee. The Supreme Court of Michigan, however, held that the burden of proof was upon the mortgagor. It declared:

"Whether the clause, 'unless upon hearing of said application good cause is shown to the contrary', casts the burden of proof on the mortgagee, is rather an academic question because the relief is discretionary. The statute provides that the court 'may', not 'must', grant the relief. It is always the rule that a discretionary act will be sustained unless abuse of discretion is affirmatively shown. The clause does not relieve the mortgagor of the burden of showing right to consideration of the court. At most it casts the burden of the mortgagee after the mortgagor has made a prima facie case.

"The character of the showing must depend upon circumstances. Inadequacy of sale price is a factor of relief, but alone would not justify it. It would be absurd to hold that the legislature intended that a mortgagor with ample cash resources at his command or reasonably able to borrow money and pay his debts is entitled to the delay provided by the statute. The legislature committed the subject to the court of equity so that the mortgagee, as well as the mortgagor, should have proper treatment in the particular case."

IV. Rental Payments

The attitude of the Michigan court toward moratory relief is further evidenced by the fact that in certain cases it appeared to indicate that the mortgage indebtedness should not be permitted to grow larger as a result of a moratorium. When, for example, a debtor requested an additional extension of relief after an initial grant, it would be important for him to show that he had been able to pay all current charges, and that the debt had not increased. In Makar v. Peoples Wayne County Bank of Dearborn, the court observed:

141. Supra note 139.
143. Id. at 652, 237.
144. Supra note 106.
“Where defendant's debt will not grow larger during the moratorium period and there appears to be an equity that plaintiff may possibly save, relief may be granted.” 145

In other states there appears to have been no such requirement. The rentals ordered by the courts seemed to bear no relationship to the interest on the mortgage debt. The courts determined the rental on the basis of what the property could bear. Manifestly, in cases of farms which were owner-occupied, it was not the full product of the land. The owner must be allowed some of the product of the soil to support himself and his family. It was rather what the farm would bring if it was rented to a third party.

In fixing the amount of the rents, the lower courts exercised a large amount of discretion. In one case, a lower court allowed the debtor to occupy the premises rent-free for the normal period of his redemption right, since the debtor would have been entitled to free possession for that time, in the absence of a moratorium. 146 The order was upheld, and it was said:

"The act in question was concededly passed by the legislature for the purpose of granting relief to mortgagors during a period of depression, and it was not intended to extend to mortgagees any additional rights in foreclosure proceedings." 147

On the other hand, in Newman v. Reems, 148 the Louisiana Supreme Court upheld the order of a lower court to the debtor to pay to the mortgagee the entire amount of the rents the debtor was getting from tenants, although the debtor claimed the order left him nothing with which to pay for repairs, water, and lights for the building involved.

Such decisions illustrate the elasticity of the judicial moratorium, and the power and control judges assumed over its administration. On the whole, the policy of the judges is clear. They endeavored to limit relief to deserving cases. They did not stay liquidation in cases where it appeared to them that a moratorium would merely postpone the evil. In appropriate cases, they sought to preserve ownership of farms and homes in the hands of the people of the state, but at the same time they tried to protect the interests of the mortgagees as much as possible.

Economic Consequences

The economic consequences that ensued from the passage of these moratoria cannot be adequately assessed. Moratory laws were merely

145. Id. at 492, 32.
146. Prudential Insurance Co. of America v. Brennan et al., 218 Iowa 666, 252 N. W. 497 (1934).
147. Id. at 669, 498.
148. 180 La. 904, 158 So. 13 (1934).
one of many factors affecting the mortgage market. How important a factor they were as compared to other factors, such as the federal refinancing program, the federal mortgage insurance program, in their effect of mortgage financing, cannot be definitely stated. One must beware, however, of a temptation to exaggerate the significance of this form of relief.

Naturally, the effect of moratory relief upon the economic structure differed in each state. It seems clear that the moratorium in midwestern states had a rather limited application. In Iowa, for example, there were only 2,646 farm mortgage foreclosure continuances existing in 1938.149 A considerable number of farm mortgage foreclosure sales took place during the period. Estimated Iowa farm mortgage foreclosures in Iowa for the years 1929-1940150 are:

<table>
<thead>
<tr>
<th>Year</th>
<th>1929</th>
<th>1930</th>
<th>1931</th>
<th>1932</th>
<th>1933</th>
<th>1934</th>
<th>1935</th>
<th>1936</th>
<th>1937</th>
<th>1938</th>
<th>1939</th>
<th>1940</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sales</td>
<td>1500</td>
<td>1500</td>
<td>3400</td>
<td>6400</td>
<td>3700</td>
<td>4100</td>
<td>2000</td>
<td>1450</td>
<td>1375</td>
<td>620</td>
<td>1895</td>
<td>500</td>
</tr>
</tbody>
</table>

These figures show that there were many cases of consummated sales during the moratorium period, either because the mortgagor did not move for a continuance, or because his motion was refused. The fact that when the moratorium was discontinued in 1939, there were only 1895 sales, indicates that the Iowa moratorium had a relatively insignificant effect on farm mortgage foreclosures. In 1940 the flurry of foreclosures completely subsided.

Further evidence that mortgagees were not entirely prevented from exercising their rights on default is furnished by the estimates of corporate-owned land in Iowa, 1933-1939:151

<table>
<thead>
<tr>
<th>Farm Land in Iowa</th>
</tr>
</thead>
<tbody>
<tr>
<td>Area in acres</td>
</tr>
<tr>
<td>Owned by corporations</td>
</tr>
<tr>
<td>1933 September</td>
</tr>
<tr>
<td>1935 January</td>
</tr>
<tr>
<td>1937 January</td>
</tr>
<tr>
<td>1939 January</td>
</tr>
</tbody>
</table>

Over two-thirds of this total (2,750,000 acres) owned by corporations

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149. Estimate furnished author by Professor Murray in letter dated October 31, 1941.
150. Figures a composite of those in op. cit. infra note 151, at 315, and those furnished author by Professor Murray in letter to author dated October 31, 1941.
in 1939, was held by life insurance companies. By acceptance of deed in lieu of foreclosure, by forfeiture or by foreclosure, they enforced their rights in many cases, in spite of moratory legislation. In fact, they were acquiring properties faster than they could dispose of them. The growing real estate overhang, rather than moratory laws, appears to have been the chief retarding factor in the creation of new mortgage loans in depression years.

Whatever the negative effects of the Iowa moratorium may have been, they cannot be proved statistically. No effect on interest rates may be observed—the mortgage interest rates in Iowa decreased, as everywhere, because of the influence of federal lending. No effect on land values may be proved: although land values declined in Iowa from 1933 to 1939, they declined in many states where there was no moratorium. When, in 1939, the moratorium was withdrawn, no appreciable change occurred in land values.

A somewhat parallel situation existed in Montana. Here, as in Iowa, the judicial moratorium cut down, but by no means eliminated, foreclosure sales of farm properties. The estimated number of farm foreclosures in Montana by years is:

<table>
<thead>
<tr>
<th>Year</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>1917</td>
<td>159</td>
</tr>
<tr>
<td>1918</td>
<td>247</td>
</tr>
<tr>
<td>1919</td>
<td>480</td>
</tr>
<tr>
<td>1920</td>
<td>1153</td>
</tr>
<tr>
<td>1921</td>
<td>2692</td>
</tr>
<tr>
<td>1922</td>
<td>3627</td>
</tr>
<tr>
<td>1923</td>
<td>5173</td>
</tr>
<tr>
<td>1924</td>
<td>4786</td>
</tr>
<tr>
<td>1925</td>
<td>3966</td>
</tr>
<tr>
<td>1926</td>
<td>3628</td>
</tr>
<tr>
<td>1927</td>
<td>1672</td>
</tr>
<tr>
<td>1928</td>
<td>1179</td>
</tr>
</tbody>
</table>

153. Average Rates of Interest Charged on Farm Mortgage Recordings of Selected Lender Groups (U. S. Dep't Agric., November, 1940).
155. Whatever the effect of moratoria may have been on the economic structure, there is no doubt that they occasioned considerable annoyance and inconvenience to the creditors involved. Woodruff, commenting on the injurious effects of such legislation upon life insurance companies, states that the rental payments allowed by courts were not as high as contract rents, lists the following:

- (1) Rent paid on a cash or share basis by the borrower, as fixed by the court, tended to be less than rent payments from a tenant renting in the ordinary manner.
- (2) The borrower in possession was less disposed than an ordinary tenant to conserve and increase the value of the property during his relatively long period of occupancy.
- (3) It was impossible for the companies to direct such an occupant in matters of rehabilitation of soil and improvements, so that the property would be in salable condition on the expiration of the period.
- (4) Where serious ill will existed between the company and the occupant of the farm, wastage occurred in spite of the provision of the law to the contrary. Such waste was almost impossible to demonstrate in court.
- (5) No sale would be made of the property until the expiration of the period.

Woodruff, supra note 43, at 114.
156. Renne, Montana Farm Foreclosures (1939) Bulletin No. 368, p. 8 (Montana State College, Agricultural Experiment Station).
From 1933 to 1935 Montana's moratorium consisted of a stay before foreclosure; from 1935 on, the moratorium consisted of an extension of the period of redemption following foreclosure.\textsuperscript{157} In the period 1933 to 1935, therefore, the moratorium would have the effect of holding down the foreclosure sale rate, and, when the change was made in 1935, the rate could be expected to mount. This effect may be observed in the figures. But they also indicate that only a few hundred properties were involved in the moratorium. The insignificance of this number is apparent when it is observed that there were over 5000 foreclosures in 1923—a year of widespread distress in Montana.\textsuperscript{158}

The New York moratorium undoubtedly involved many more properties than the relief measures of western states. But even so, it would be a mistake to assume that it prevented liquidation entirely. During the relief period, foreclosures continued at a fairly rapid rate. From August 26, 1933, when the moratorium began, to August 16, 1937, New York lending institutions had foreclosed on claims of $962,557,801.60 and had acquired an additional $183,382,072.30 of properties by voluntary deed.\textsuperscript{159} In addition, they had the right to foreclose on additional claims of $954,037,425.31, because of default in interest or taxes.\textsuperscript{160} The Federal Home Loan Bank Board, in a survey covering 64.4 per cent. of the population of the State, reported 18,507 foreclosures for 1932, 19,980 for 1933, 23,395 for 1934 and 30,765 for 1935—more foreclosures for the years of the moratorium than before them.\textsuperscript{161}

The most serious effect of the New York moratorium would appear to be that it prevented the voluntary adjustment or refinancing of many debts on terms, such as amortization provisions, more satisfactory to the mortgagee than the status quo. There were also many cases where it would have been fairer if the mortgagor, instead of continuing to possess the property, had simply surrendered it. Even with the liquidation that did take place, New York lending institutions reported in 1937 that a total of 243,585 mortgages, involving $2,138,438,412.13, were outstanding and past due.\textsuperscript{162} At this time, the refinancing of

\begin{tabular}{|c|c|c|}
\hline
Year & Foreclosures & Year & Foreclosures \\
\hline
1929 & 836 & 1934 & 257 \\
1930 & 583 & 1935 & 299 \\
1931 & 624 & 1936 & 569 \\
1932 & 682 & 1937 & 569 \\
1933 & 359 & & \\
\hline
\end{tabular}

\textsuperscript{157} Id. at 57.
\textsuperscript{158} Id. at 10-11.
\textsuperscript{160} Id. at 15.
\textsuperscript{161} Supra note 104.
\textsuperscript{162} Supra note 28, at 15.
mortgages existing in 1930 had been largely completed in other states. But it was still held in abeyance in New York.

The chief criticism that may be made of the New York moratorium is that it was too inclusive. Commercial properties, as well as farms and homes, were protected against the consequences of default in principal. Many of these commercial properties were hopelessly overfinanced, and liquidation at some time or other was virtually inevitable. The "good told times" would not return within a generation. In the light of later events, it is easy to condemn the New York moratorium as unwise and extravagant. Land values continued to decline in New York during the thirties. It became increasingly clear that the mortgagors of many properties could never pay off or refinance their indebtedness. Speaking in 1938 at a hearing of the Joint Legislative Committee on Mortgage Moratorium of the State of New York, James N. MacLean said:

"As a matter of fact a correct analysis of present and past conditions discloses inevitably that the depression did not create an emergency at all in respect to these mortgages. It created instead a permanent condition, although at the beginning everybody thought it was an emergency.

"The fact is that the experiences and the lessons taught by the depression produced a permanent drop in loan values of real property not only in respect to the suspended mortgages but generally. Investors have learned through the saddest of experiences that mortgages, hitherto regarded as the soundest and most gilt-edged of investments were really not sound at all, and that in time of economic distress these investments became instantly frozen and incapable of liquidation.

"This lesson has bitten deeply into the minds of lenders, both institutional and others. It will not be forgotten during the generation now living. It has produced a new vision of mortgage lending, and it is beyond hope that we shall ever return to the pre-depression percentages of loan values and appraisals.

"The mortgage structure existing before the depression was a house of cards. The moratorium has held it up for several years but its collapse is inevitable and always was inevitable.

"Viewing the matter with the aid of the hindsight of later events, it would probably have been better, from an economic standpoint, to have had no moratorium at all and to have left those affected to take the losses at the beginning of the depression which other investors had to take. As it is these investors, which include both lenders and owners who have invested in the equities, have been artificially and temporarily saved from loss which would otherwise have resulted from depressed business conditions, while
other classes of investors had to endure the storm. An unbiased student of economics would be likely to condemn this practice of thus preferring the investors in equities over others, especially when, as it must be admitted, the necessity of ending this protection and the effect of its termination will cause additional losses to other classes of investors by producing some recurrence of depressed business conditions.”

D. Conclusion

The moratoria of the last decade were not in themselves solutions to the mortgage problem. Economic conditions did not improve during the lull they provided, to enable distressed debtors to regain what they had lost. Probably few properties were saved from foreclosure solely by virtue of such relief. But moratory laws did give time—time for the federal government to introduce its refinancing measures, and possibly on that account in many cases served a useful purpose.

The utility of this device, from an economic point of view, will always remain in doubt. If the debtor has lost his equity, it may be contended, his interest should be liquidated. He should not be nurtured with false hopes by temporary relief. His mortgage should not be refinanced, so that he will continue to bear a burden that has proved too great. He should be saved from his own desires.

Government does not act in an atmosphere of rarified theory. In 1933 there were signs of considerable unrest in the country. Too many responsible citizens were being dispossessed by foreclosures. These people were home owners and farmers, on whose support Government must depend.

In most states, the primary purpose of the mortgage moratoria was to preserve the ownership of farms and homes. The action taken may have been misguided, but the motive should engender a feeling of sympathy. If, in prosperous years, it is proper for government to encourage its citizens to acquire homes and farms, it is at least natural in times of depression that government should seek by every plausible means to preserve the ownership it has sponsored.

Ironically, the Second World War has created the circumstances accounting for the cessation of mortgage moratoria in most states—the rising prices and values of a period of universal disturbance. The farmer now gets more for his product; the landlord more for his lease; the worker more for his wage. In many cases greater income eases fixed burdens. Mortgage debts that were onerous ten years ago are now lighter.

163. Id. at 79 ff.
But let us not suppose, because the mortgage moratoria of the Depression are terminating, that we have dealt with a social phenomenon peculiar to the times. With an eye to history, we can see that moratoria are symptoms of economic maladjustment, which have come repeatedly in the life of this nation, and which will probably reappear when the underlying causative factors come back.

As proof of this fact, we may observe that wartime has brought its own kind of moratorium—the Soldiers' and Sailors' Civil Relief Act—which seeks to protect that group of our population which has been particularly affected by the weight of the war. By this statute, servicemen and their dependents may obtain relief from a great variety of obligations, including mortgages, incurred before service. It is a matter causing no surprise that the original Act of 1940 has already been amended to extend the time during which relief may be had into the post-war period.