Cornell Law Review

Volume 20
Issue 3 *April 1935*

Article 3

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THE EXTRATERRITORIAL EFFECT OF THE NEW YORK MORTGAGE MORATORIUM

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"The mortgage moratorium statutes do not apply where the mortgaged realty is outside the state. They are based upon a legislative finding that an emergency exists in New York. The Legislature would not know and would not ordinarily inquire whether a similar emergency exists in all the other states. Its efforts *to protect the mortgagors of New York realty* cannot by implication be extended to the owners of real property beyond its limits. Consequently *the restrictions placed on actions on bonds secured by mortgages on real estate are applicable only where the real estate is located in New York* . . . "[1]

In the foregoing succinct statement a New York Supreme Court justice[2] solves reasonably the problem presented by suit, in New York upon an obligation secured by a mortgage upon foreign realty, to which the New York moratorium was pleaded. It was held not to bar the suit. It is the counter-problem with which the present discussion is concerned; namely, the possibility of suit in a foreign jurisdiction upon an obligation secured by a mortgage on New York realty, and in which the New York moratorium is relied upon as a defense. The implications of the italicized portions of the sentences above quoted are, it is believed, broader than would appear at first glance. By what principles may the legislature's "efforts to protect the mortgagors of New York realty" be exerted in foreign forums? To what extent must other states find applicable "the restrictions placed on actions on bonds secured by mortgages on real estate [located in New York]"?

If one were to adopt the assumption that mortgage moratoria relate merely to the remedy rather than to substance, it would normally result that the law of the forum would control. This would mean that each state in which suit was brought on an obligation secured by a mortgage in another state would apply to such suit its own moratory laws. Yet the court in *Berkowitz v. Mengel Co.*, from which the opening quotation is taken, arrives at a solution directly contrary to this.

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[1]Italics added.

[2]Rosenman, J., in Berkowitz v. Mengel Co., N. Y. L. J., Nov. 30, 1934, page 2092 (Supreme Court, New York County); see also Hackensack Trust Co. v. Voight, C.C.A. (2d) 1935 N.Y.C.C.H. 660.

Some months earlier a New York Municipal Court judge,[3] in deciding a case with facts similar to those in the *Berkowitz* case, dealt with the problem in this language:

> "While the law unquestionably is that in so far as the remedy is concerned, the law of the forum where the remedy is invoked governs, yet for the reasons already stated, namely, that the New York mortgage moratorium laws refer to the remedy only in so far as it relates to real estate located in the state of New York, the said moratorium laws do not control."

The New York law, of course, was not enacted for the benefit of mortgage debtors who happened to be New Yorkers only by virtue of domicile or residence, nor was it enacted in order to make New York a haven in which mortgagor-defendants, domiciled elsewhere, could set up a perfect defense because they happened to be sued in New York during the moratory period. Coupling the statement quoted above with the opinion of Justice Rosenman quoted at the outset, we have one premise of first importance regarding the scope of the remedy as affected by the moratorium. Because of the fact that the moratorium is concerned only with *local land* and obligations secured thereby, it is impossible to dispose of problems arising in this connection, either in our own courts or elsewhere, simply by resorting to the unmodified formula, "remedy, therefore *lex fori*."

Apparently no case has arisen in which an obligation secured by a New York realty mortgage (within the protection of the moratorium) has been sued upon in a foreign forum. Moratory legislation affecting matters other than mortgages has, however, been invoked as a defense in many instances where suit has been brought outside the immunized territory, and the decisions have been conflicting in theory. Recent cases involving the effect of moratory laws as between different states within the United States are few. One, involving an emergency banking act in Maryland,[4] holds that the act cannot apply in New York so as to suspend remedies of depositors, creditors,

[3]Sulzberger, J., in Porte v. Polachek, 150 Misc. 891, 270 N. Y. Supp. 807 (N. Y. Mun. Ct., April 1934). In this case the bond and mortgage were executed in Illinois, the mortgage being on Illinois realty. Illinois had passed no mortgage moratorium statutes. Suit was brought on the bond in New York, and the defendant pleaded Section 1083-b of the New York Civil Practice Act as a partial defense. In addition to holding the New York moratorium a defense only when New York realty was involved, the court held that the Illinois law controlled in any event, since the contract was made there (citing Stumpf v. Hallahan, *infra* note 38).

[4]Doty v. Baltimore Trust Co., 147 Misc. 868, 265 N. Y. Supp. 66 (Supreme Court, New York County, Special Term 1933). The case came up on a motion by the defendant, appearing specially, to vacate a warrant of attachment issued *ex parte* and served upon a bank depository of the defendant's funds.

and shareholders.[5] A creditor was therefore permitted to attach funds of a Maryland bank on deposit in New York. It is submitted, however, that this decision was practically inevitable on the ground that the provisional remedy of attachment is entirely procedural, and therefore to be invoked pursuant to the law of the forum.

As between nations, the cases wherein the moratory laws of a foreign country play a part[6] have usually turned in some measure upon the law of the place of performance. In the case of *Perry v. Norddeutscher Lloyd*[7] a German corporation was sued on a bond in New York, payable there. A German moratorium was pleaded as a defense. It was not determined where the contract was made, and the holding that the German moratorium was not operative by way of defense may have been due to failure of proof of the German law, or simply to an application of the well-known, though perhaps obsolescent, principle that impossibility of performance by reason of foreign law does not preclude recovery for failure to perform. In discussing some years ago the effect of moratory legislation as between nations[8] Professor Lorenzen concluded that nations should give effect to moratory statutes enacted at the place where the obligation was performable, although indicating some doubt[9] as to whether a similar rule should obtain as between states in our Union, in view of certain constitutional objections to be considered later in this discussion.

[5]The Maryland Emergency Banking Act of 1933 purported to suspend temporarily all remedies of depositors, creditors, stockholders, and others.

[6]Rouquette v. Overman, L. R. 10 Q. B. 525 (1875); Perry v. Norddeutscher Lloyd, 150 Misc. 73, 268 N. Y. Supp. 525 (N. Y. Mun. Ct., 1934). *Semble contra:* Taylor v. Kouchakji, reported only in 56 N. Y. L. J. 813 (Supreme Court, New York County, Dec. 2, 1916), annotated in (1917) 30 HARV. L. REV. 390, and in (1917) 26 YALE L. J. 771. See Sokoloff v. National City Bank of New York, 239 N. Y. 158, 145 N. E. 917 (1924) (restitution allowed in a New York suit in spite of a Russian decree of confiscation; the language of Cardozo, J., at p. 170 indicates that a decree of the place where the obligation was payable might have been a defense to an action for damages); Goldmuntz v. Spitzel, 91 Misc. 148, 154 N. Y. Supp. 1025 (Supreme Court, New York County, 1915), complaint dismissed 170 N. Y. Supp. 467 (Supreme Court, New York County, 1916) (stress laid upon place of performance, although *lex loci contractus* and *lex loci solutionis* were identical). See also Merchants Bank v. Eliot [1918] 1 West. Week. Rep. 698, 9 A. L. R. 58 (1920) (British Columbia War Relief Act suspending right to sue soldiers held to relate only to procedure and not to bar suit in England on contract, it not appearing where contract was performable). *Cf.* Dougherty v. Equitable Life Assurance Co., 266 N. Y. 71, 80, 193 N. E. 897 (1935).

[7]*Supra* note 6.

[8]See Lorenzen, *Moratory Legislation Relating to Bills and Notes and the Conflict of Laws* (1919) 28 YALE L. J. 324.

[9]See Lorenzen, *op. cit. supra* note 8, at 352.

At least one other eminent writer in the field of Conflict of Laws[10] is of the opinion that moratory legislation should receive extra-territorial recognition. He says:

> "Suppose in a time of national emergency the lawmaking power postpones the time for payment of obligations. Such moratory legislation is common in war time and was quite general during the late World War. It would seem, following the discussion above, that the legislation should be held applicable to all obligations performable in the state where the moratory legislation was in force, and that the effect of such a moratorium should be recognized wherever the question arises, as postponing the time for performance until the time set by the state enacting the legislation . . . "[11]

It is clear that Professor Goodrich has in mind two criteria in determining which law governs: first, the one relating to place of performance regardless of where the obligation may have arisen; second, the broader view that any obligation performable in a state where moratory legislation is passed should carry with it the protection of the moratorium regardless of where suit happens to be brought. He cites no supporting authority, however, other than the article by Professor Lorenzen.[12] The argument of both writers seems to be that moratory laws, like the laws respecting grace, medium of payment, *etc.*, relate to the time and manner of payment and therefore that cases in which such moratory laws apply should be governed by the law of the place of performance.[13]

By looking to the place of performance for the governing law, perplexing questions of "substance" and "procedure" may be avoided, together with their usual irresolute analysis. It is obvious that neither Professor Goodrich nor Professor Lorenzen conceives of moratory legislation as relating to procedure. If they did, then by clear authority they would have to admit that such statutes could have no extraterritorial effect, whereas in fact both argue that they should be given such effect. Judicial authority, however, for the proposition that the mortgage moratory laws under consideration do not relate to the remedy is not so readily forthcoming. Indeed, in *Klinke v.*

[10] GOODRICH ON CONFLICT OF LAWS (1927) 247.

[11] It is difficult to ascertain whether Professor Goodrich intends this solution to apply as between states or merely as between nations.

[12] *Supra* note 8.

[13] It is well established that matters relating to the time and manner of payment are governed by the law of the place of performance. Scudder v. Union National Bank, 91 U. S. 406 (1875); Union National Bank v. Chapman, 169 N. Y. 538, 62 N. E. 672 (1902). "The law of place of performance governs the postponement of performance by operation of law." RESTATEMENT, CONFLICT OF LAWS (1934) §§ 358, 363.

Samuels[14] the New York Court of Appeals, in upholding the constitutionality of one phase[15] of the New York mortgage moratoria, declared:

> "As to the constitutionality of these provisions we must remember that the limitation upon the *remedy*[16] in both or all instances is until July 1, 1934."[17]

The court was not, however, passing upon the question of whether the moratoria related to substance or to remedy, and if the full import of the problem in the Conflict of Laws had been before it, it is doubtful whether the term, "remedy," would have been employed.[18] It seems far more satisfactory to treat the moratory statutes, or at least those concerning merely the suspension of remedy,[19] as matters relating to the time and manner of performance. In this way questions, always difficult, of what is substance and what is procedure are avoided. Furthermore, it was probably the intention of the parties that if an emergency should suddenly arise, the law of the place of performance should control. An argument of comity, strong as between nations, and persuasive even as between states, can be made for this rule.[20] It is submitted that if the New York mortgage moratorium is pleaded as a defense in a foreign forum, that forum should not be constrained in passing upon the question by the dictum, quoted above, in *Klinke v. Samuels*.

Assuming then that the moratory laws do not relate merely to the remedy or procedure, there is still the constitutional objection, first adverted to by Professor Lorenzen,[21] which remains to be considered. If the moratoria affect substance rather than remedy or procedure, do they impair the obligation of contract, so as to have no validity

[14]264 N. Y. 144, 190 N. E. 324 (1934).

[15]NEW YORK CIV. PRAC. ACT (1920) § 1083-b, providing that in an action upon an obligation secured by a mortgage the fair value of the premises must be deducted from the amount recovered.

[16]Italics added.

[17]The period of the emergency was thereafter extended successively by NEW YORK CIV. PRAC. ACT (1920) § 1077-g, and by New York Laws 1935, c. 1 & 2 (approved January 18, 1935) until July 1, 1936. For a general discussion of the New York mortgage moratoria, see (1934) 19 CORNELL LAW QUARTERLY 316, 324.

[18]It must be admitted, however, that the language of Judge Sulzberger in Porte v. Polachek, *supra* note 3, seems to deal with the moratoria as matters of procedure.

[19]Such as NEW YORK CIV. PRAC. ACT (1920) § 1077-b.

[20]See LORENZEN, THE CONFLICT OF LAWS RELATING TO BILLS AND NOTES (1919) 161. It is not the purpose of this discussion to set out at length the arguments in favor of the adoption of this rule. This has been ably done elsewhere. See GOODRICH, *loc. cit. supra* note 10; Lorenzen, *op. cit. supra* note 8.

[21]*Supra* note 9.

either in the state of enactment or in a foreign forum? In New York the most dubious phase of the moratorium, Section 1083-b of the Civil Practice Act, has already been held constitutional.[22] Unless the holding in the *Klinke* case should be reversed upon appeal to the Supreme Court of the United States,[23] it is probable that it would be taken as strongly persuasive authority by any other state court, if the constitutional question of impairment were raised in a suit outside of New York upon an obligation secured by a New York real estate mortgage. Furthermore, although two or three decades ago decisions very probably would have been rendered upon the premise that any law affecting the substantive contractual obligation must be within the prohibition of Article I, Section 10 of the Federal Constitution, the recent trends in the field of state legislation give freer and freer rein to the police power of the state.[24] In the *Blaisdell* case[25] Chief Justice Hughes gives unequivocal expression to present judicial thought when he says:[26]

> "The economic interests of the state may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts."

And in the recent case of *Matter of People (Title and Mortgage Guaranty Company)*[27] Judge Lehman, after quoting with approval the above language of Chief Justice Hughes, goes on to say:

> "... At times postponement of the enforcement of contractual obligations or *their temporary impairment* may be the means reasonably adopted to meet a temporary condition."[28]

[22]Klinke v. Samuels, *supra* note 14.

[23]The moratory statute of Minnesota which was held constitutional in Home Building & Loan Association v. Blaisdell, 290 U. S. 398, 54 Sup. Ct. 231 (1934), did not contain provisions such as those found in Sections 1083-a and 1083-b of the New York Civil Practice Act, relating to the deduction of the fair value of the premises from any deficiency judgment recovered. Certain language of Chief Justice Hughes at page 425 in the Blaisdell case casts some doubt upon the validity of this phase of the New York moratoria. It is believed, however, that the Supreme Court might consistently hold that there is no fundamental difference between the sections above referred to and Section 1077-b of the Act (providing that no foreclosure be instituted for default in principal), since Sections 1083-a and 1083-b might be construed as suspensive statutes, full recovery being permitted if the mortgagee is willing to wait until the moratory period elapses.

[24]See *The Contract Clause of the Federal Constitution* (1932) 32 COL. L. REV. 476, 479, where it is argued that the issue of the contract clause (of the Federal Constitution) in a private contract presents no problem supplemental to that of due process; (1933) 32 MICH. L. REV. 71, 73.

[25]*Supra* note 23. [26]At page 437.

[27]264 N. Y. 69, 96, 190 N. E. 153, 162 (1934).

[28]Italics added.

At the time when Professor Lorenzen wrote, one analyzing the problem of the extraterritorial effect of mortgage moratoria was faced with a dilemma. If he treated them as affecting the remedy, they could obviously have no extraterritorial effect. If he treated them as affecting the substance of the obligation, they would be held to impair the obligation of contract and therefore have no effect in any state. Today, when it is recognized that laws may alter the substance as well as the remedy of contracts if otherwise consistent with due process, it is believed that it can be argued successfully that moratory laws may affect substance rather than procedure and still be constitutional, fully entitled to recognition elsewhere as the law of the place of performance.[29] In several well considered cases New York courts have already held the moratoria constitutional, and even though the use of the term, "remedy," by the Court of Appeals, be deemed not to restrict the interpretation of the laws in question to procedure alone, it is submitted that the constitutional objection hinted at by Professor Lorenzen should not be upheld today by a foreign forum.[30]

All of the discussion thus far is applicable particularly to Section 1077-b of the New York Civil Practice Act, which suspends the right to sue on an obligation secured by a mortgage where no foreclosure could have been had. Sections 1083-a and 1083-b present a more special problem, though in a sense they too might be deemed suspensive statutes.[31] Section 1083-a provides that in the type of action in which foreclosure is possible, a motion must be made within ninety days after the consummation of the sale for a deficiency judgment,[32] and that from the judgment for the amount due must be

[29] *Cf.* (1933) 42 YALE L. J. 1236, 1241, where it is said: "Any relief measure which does not substantially modify the debtor's obligation fails of its purpose. Chief Justice Marshall's distinction [between substance and remedy] is therefore wholly inadequate as a test of constitutionality."

[30] In the Blaisdell case, *supra* note 23, the majority opinion cites numerous instances wherein laws have been upheld which impaired rights under contracts and states that it is irrelevant whether this results directly or indirectly from the legislation.

[31] See the discussion of this point *supra* note 23.

[32] The section further provides that if no motion for a deficiency judgment is made within the ninety-day period, the proceeds of the sale will be deemed to be in full satisfaction of the debt. If no motion were made within the required period and subsequently suit were brought in a foreign forum, the question whether it would allow the suit or recognize the New York law would be raised. It is believed that a foreign forum would not allow the suit. Several New York cases dealing with a similar provision in a New Jersey statute have denied the right after the statutory period has elapsed to move for a deficiency judgment in New York. See Apfelberg v. Lax, 255 N. Y. 377, 174 N. E. 759 (1931); Hutchinson v. Ward, 192 N. Y. 375, 85 N. E. 390 (1908).

subtracted the fair value of the premises if it is greater than the sale value. Section 1083-b provides that in an action on an obligation secured by a mortgage the fair value of the premises must be deducted from the amount recovered. Whether a foreign forum would enforce the New York law by requiring the deduction of the fair value of the premises from a recovery in that forum on the bond or other evidence of indebtedness is a close question of law.

It is strongly arguable that these sections affect the manner of discharge of the obligation, and that therefore the law of the place of performance should control.[33] If the sections be regarded only as a limitation upon the right to sue for the indebtedness, authority is available to support the theory that a transitory cause of action such as this may be sued upon in any state where jurisdiction of the defendant is obtained, and that the statutory limitation upon the right to sue is confined to the state of its enactment.[34] Yet there is also authority to the effect that such restrictions concern themselves with the substantive right of action.[35] In the case of *Maxwell v. Ricks*[36] action was brought in Washington on a note secured by a mortgage on realty in California. The defendant pleaded a California statute providing that a foreclosure must precede any suit on a debt secured by a mortgage. The court held that the note represented a transitory cause of action suable wherever jurisdiction of the defendant could be obtained; that the California statute merely limited the remedy without affecting the right, and was therefore no defense. A contrary decision was rendered in New York on facts substantially similar.[37]

In *Stumpf v. Hallahan*[38] the mortgagee was a resident of New Jersey. The mortgagors were residents of New York. A bond and mortgage were executed in New York. The mortgage was on New

[33]It is generally held that matters relating to the discharge of a contract are governed by the law of the place of performance. See Thompson-Houston Electric Co. v. Palmer, 52 Minn. 174, 53 N. W. 1137 (1893); Mountain Lumber Co. v. Davis, 9 F. (2d) 478 (S. D. N. Y. 1925), *aff'd*, 11 F. (2d) 219 (C. C. A. 2d, 1926); Benton v. Safe Deposit Bank, 255 N. Y. 260, 174 N. E. 648 (1931).

[34]Maxwell v. Ricks, 294 Fed. 255 (C. C. A. 9th, 1923); Commercial National Bank of Los Angeles v. Catron, 50 F. (2d) 1023 (C. C. A. 10th, 1931).

[35]Robinson v. Stratman, 141 Misc. 393, 252 N. Y. Supp. 557 (Supreme Court, Erie County, 1931).

[36]*Supra* note 34.

[37]Robinson v. Stratman, *supra* note 35.

[38]101 App. Div. 383, 91 N. Y. Supp. 1062 (1st Dept. 1905), *aff'd*, without opinion 185 N. Y. 550, 77 N. E. 1196 (1906). It would seem, however, that this case could have been decided on the ground that the limitation was not a general, but a special, one. Such limitations, unlike a general statute of limitations, are generally governed by *lex loci contractus*. See GOODRICH, *op. cit. supra* note 10, at page 170.

Jersey land. The court held the bond payable in New Jersey on the ground that the mortgagee lived there and that a debtor must seek out his creditor to make a payment. The New Jersey law required that suit for a deficiency judgment be brought not later than six months after the sale. The New York court held that the New Jersey law governed, since the land was in New Jersey and the bond was payable there. The case indicates that such limitations on the right to sue are governed by the law of the place of performance, although the court seemed to have the "essential validity" of the obligation in mind rather than the manner of its performance.[39]

The decisions bring forth no clear-cut rule, but it appears that there is authority for the proposition that statutes restricting in some manner the complete freedom to sue on a bond secured by a mortgage affect the substance rather than procedure. By analogy it might be successfully argued that Sections 1083-a and 1083-b of the New York Civil Practice Act should be given effect in a foreign forum.

Underlying all of the previous discussion is the possibility, adumbrated by the comparatively recent case of *Bradford Electric Light Company v. Clapper*,[40] that recognition of the New York moratoria would be granted in a foreign forum, not by virtue of comity or the

[39]In Thompson v. Lakewood City Development Co., 105 Misc. 680, 174 N. Y. Supp. 825 (1919), *aff'd*, 188 App. Div. 996, 177 N. Y. Supp. 926 (2nd Dept., 1919), a corporate mortgage was given on property in New Jersey. The bonds were executed in New York and payable there. New Jersey law required foreclosure before suit could be brought on the bond. Suit was brought in New York on the bond prior to foreclosure. The New York law was held to control since it was both *lex loci contractus* and *lex loci solutionis*. The *Stumpf* case is distinguishable because of the difference in the place of performance. But see Robinson v. Stratman, *supra* note 35. *Cf.* Hall v. Hoff, 295 Pa. 276, 145 Atl. 301 (1929).

Statutes in several states require foreclosure before suit may be brought on the bond. It is generally held that such statutes do not bar suit prior to foreclosure where the mortgaged property is in another state. Mantle v. Dabney, 47 Wash. 394, 92 Pac. 134 (1907); Denver Stockyards Bank v. Martin, 177 Cal. 223, 170 Pac. 428 (1918); Colton v. Salomon, 67 N. J. L. 73, 50 Atl. 588 (1901). See also Felton v. West, 102 Cal. 266, 36 Pac. 676 (1894). If such a statute is in force in the state where the mortgaged property lies, some courts have held it a defense to a suit brought elsewhere on the bond. Robinson v. Stratman, *supra* note 35; *cf.* Stumpf v. Hallahan, *supra* note 38; McGirl v. Brewer, 132 Ore. 422, 285 Pac. 208 (1930); Newman v. Brigantine Beach R. Co., 15 Pa. Co. 625 (1874). There is authority to the contrary in what may be called the federal rule. Maxwell v. Ricks, *supra* note 34; Commercial National Bank of Los Angeles v. Catron, *supra* note 34. *Cf.* Thompson v. Lakewood City Development Co., *supra*.

[40]286 U. S. 145, 52 Sup. Ct. 571 (1932), annotated in (1932) 46 HARV. L. REV. 291; (1933) 27 ILL. L. REV. 573; (1932) 11 N. C. L. REV. 116; (1932) 19 VA. L. REV. 64; (1932) 42 YALE L. J. 115. See also Scott v. White Eagle Oil & Ref. Co., 47 F. (2d) 615 (D. Kan. 1930).

"better view" in the Conflict of Laws, but as a matter of constitutional right under the "full faith and credit" clause of the Federal Constitution, which embraces not only judgments but "public acts" of sister states.[41] In the *Clapper* case the decedent was killed while in in the employ of a Vermont corporation as he was making emergency repairs in New Hampshire. His administratrix brought an action under the New Hampshire death act pursuant to a provision thereof permitting an election of the common-law recovery after injury. The defendant pleaded a Vermont statute to the effect that compensation thereunder should be the sole remedy of an employee whether the injury occurred in Vermont or elsewhere. The Supreme Court of the United States held that the Vermont statute must be given full faith and credit by New Hampshire.

In connection with the *Clapper* case, the case of *Ohio v. Chattanooga Boiler & Tank Company*[42] must be considered. At first glance it might appear that much of the force of the "*Clapper* doctrine" is lost in the subsequent decision. In the *Chattanooga* case the facts and the workmen's compensation statute involved were almost identical with those in the *Clapper* case.[43] The court, however, chose to distinguish the *Clapper* case on the ground that the Vermont statute did not permit suit elsewhere, while in the *Chattanooga* case the Tennessee statute, although similarly phrased, had been held by the court of last resort in Tennessee *not* to exclude suit elsewhere.

A strict interpretation of the *Chattanooga* decision would seem to point to the conclusion that the *Clapper* doctrine will be restricted

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[41]See Langmaid, *The Full Faith and Credit Required for Public Acts* (1929) 24 ILL. L. REV. 383.

[42]289 U. S. 439, 53 Sup. Ct. 663 (1933).

[43]One Tidwell, an employee of Chattanooga Boiler & Tank Company (a Tennessee corporation with its principal place of business in that state) was killed in Ohio while erecting a tank for the company. His contract of employment, entered into in Tennessee, provided that he serve also in other states. The corporation had no regular place of business in Ohio and had not qualified to do business there. Both Tidwell and the corporation were residents of Tennessee and had accepted the provisions of the Tennessee workmen's compensation act. After Tidwell's death his widow filed her claim, however, under the Ohio workmen's compensation act. The Ohio Commission made an award, and upon failure of the Chattanooga company to pay it, it was paid from the Ohio insurance fund. Ohio then invoked the original jurisdiction of the Supreme Court of the United States in an action against the company for reimbursement. The company, relying upon the rule of Bradford Electric Light Company v. Clapper, set up the defense that Ohio should have given full faith and credit to the Tennessee workmen's compensation act in making the original award. The court, in refusing to accept this defense as valid, said that the "full faith and credit" clause did not require that *greater* effect be given the Tennessee statute elsewhere than is given in the courts of that state.

to the recognition of statutes which contain a clause precluding suit elsewhere.[44] But the opinion in the *Clapper* case hardly seems to contemplate such drastic restriction, and the *Chattanooga* decision does not compel it. The *Clapper* doctrine, as originally stated, seemed to be substantially this: that where parties have by their conduct subjected themselves to certain obligations under the law of a given state, choosing thereafter to litigate their rights in a forum which has only a casual interest in the suit, the forum will be compelled to recognize the obligation as created under the law of the sister state.[45] The points stressed in the case were the casual nature of the interest of the forum in the suit, and the irremediable liability consequent upon a refusal "to give effect to a substantive defense under the applicable law of another state."[46] In the *Chattanooga* case, while it is true that Ohio had the same sort of "casual interest" in the suit that New Hampshire had in the *Clapper* case, the Tennessee statute, as interpreted by its own court, did not present a substantive defense "under the applicable law of another state," for the reason that it did not exclude suit elsewhere. The New York mortgage moratoria, on the other hand, clearly constitute such "substantive defenses."[47]

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[44]Beale, *Two Cases on Jurisdiction* (1935) 48 HARV. L. REV. 620, seems to take this view.

[45]Even before the *Chattanooga* decision it had been suggested that the doctrine of the *Clapper* case would be confined to decisions in the fields of insurance and workmen's compensation. See (1932) 46 HARV. L. REV. 291, 295. In this connection see Supreme Council of the Royal Arcanum v. Green, 237 U. S. 531, 35 Sup. Ct. 724 (1915); Modern Woodmen of America v. Mixer, 267 U. S. 544, 45 Sup. Ct. 389 (1925); Horovitz, *How Far Workmen's Compensation Acts Can Apply to Maritime Law, Interstate Commerce, and the Doctrine of Extraterritoriality* (1932) U. S. DEPT. OF LAB.: BUREAU OF LAB. STAT. 15. On the other hand it had also been argued that the *Clapper* doctrine might ultimately be held to cover any case wherein the foreign forum had only a "casual interest" in the obligations created by or under the law of the sister state. See (1932) 42 YALE L. J. 115.

The *Clapper* doctrine does not amount to giving state legislation extraterritorial effect, Mr. Justice Brandeis points out, since recognition under the full faith and credit clause does not embody the concept of local law controlling courts beyond state lines. The word, "extraterritorial," in the title to this discussion is used in a loose and non-technical sense, solely for the purpose of conveying immediately to the reader the scope and content of the discussion.

[46]Bradford Electric Light Co. v. Clapper, 286 U. S. 145, 160, 52 Sup. Ct. 571, 576 (1932).

[47]To restate the distinction briefly: it is possible that the presence of a clause precluding suit elsewhere may be held a factor of importance only in determining whether the statute of the sister state presents a substantive defense. If the statute contains a substantive defense irrespective of such a clause, and the other requirements of the *Clapper* doctrine are satisfied, the statute may be given recognition elsewhere regardless of such a clause.

It is believed by at least one writer[48] that the *Clapper* doctrine, even though interpreted in the narrow sense previously suggested, is a pernicious one, tending to throw into confusion many of the established doctrines in Conflict of Laws, and likely to bring about a "race of diligence between states to get in the first statute"[49] containing a clause to preclude suit elsewhere. In spite of this, the possibility that recognition of the New York mortgage moratoria would be compelled under the "full faith and credit" clause of the Federal Constitution should not be overlooked, particularly where the mortgaged land is in New York, the parties are New York residents, and the bond and mortgage were executed and payable in New York.[50]

CONCLUSIONS

1. A foreign forum probably would not apply its own moratory laws to a suit there on an indebtedness secured by a mortgage on New York land; in other words, as to such suits the law of the forum would not control.

2. If suit were brought in a foreign forum on an obligation performable in New York and secured by a mortgage on New York land, and under Section 1077-a of the New York Civil Practice Act the mortgage itself could not be foreclosed, the foreign forum probably would give effect to Section 1077-b of the Act, suspending the right of action on the obligation.

3. If suit were brought in a foreign forum on this sort of obligation, and under circumstances whereby Section 1083-a or Section 1083-b of the Act would apply if suit had been brought in New York, the foreign forum would probably give effect to these sections by requiring the deduction of the fair value of the premises from any judgment recovered. It is possible that a different result might be reached in the federal courts, which have shown a tendency to disregard the restrictions imposed by a foreign state upon the right to sue.

4. Under circumstances such that the foreign forum has only a "casual interest" in the suit, it might be required by the Federal Constitution to give full faith and credit to the New York moratorium, provided that the land were situate in New York, and the obligation sued upon were performable there.

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[48]See Beale, *op. cit. supra* note 44.

[49]Beale, *op. cit. supra* note 44, at page 625.

[50]The court commented in the *Clapper* case upon the fact that Clapper was not a resident of New Hampshire. Whether the decision would have gone the other way if he had been a resident of New Hampshire is not clear, though it may be doubted. Compare the language of Sulzberger, J., in Porte v. Polachek, *supra* note 3 where it is said that the benefits of the New York moratoria were intended for *citizens* of New York state.