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CONSTITUTIONALITY OF EMERGENCY RENTAL  
REGULATION

BY WALTER F. DODD\*

As a result of the World War an acute shortage of houses developed throughout practically all of the civilized countries. Building operations were almost completely suspended over a series of years, and existing dwellings were insufficient to house properly the increasing population, and particularly the increasing population of cities. This situation led to legislation not only in the United States, but in many other parts of the world as well. Great Britain sought to solve the problem by entering upon an enormous enterprise of dwelling construction. Some states whose constitutions permitted it (as New York and New Jersey) exempted new dwellings from taxation for a certain period of years. Legislation for the purpose of directly or indirectly regulating rates of rental was enacted by Congress for the District of Columbia; by the legislature of Wisconsin for Milwaukee County; and by New York, Massachusetts and Illinois. A full review of legislation with respect to housing, and of the decisions under such legislation through the year 1920, will be found in an article by the present author and Carl H. Zeiss, on "Rent Regulation and the Housing Problem," which appeared in the Journal of the American Bar Association for January, 1921.

In connection with the important decisions upon this type of legislation during the year 1921, it may be worth while to summarize briefly the more important legislation having to do with the regulation of rents.

The Ball rent law enacted on October 22, 1919,<sup>1</sup> provided for a commission with power to regulate the rental and matters of service in connection with the letting of dwelling premises, business property, and hotels within the District of Columbia. It also provided that a tenant should not be evicted so long as he paid the rent

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<sup>1</sup> 41 U. S. STAT. AT L. 298.

fixed by the commission, unless the owner himself or a *bona fide* purchaser from the owner, wished to occupy the premises. The effect of this law was limited to two years, and a rental commission was promptly established under its terms. Congress had in 1918 passed the so-called Saulsbury resolution which prohibited eviction within the District of Columbia so long as the tenant paid the rent and behaved himself, unless the premises were required by the landlord or a *bona fide* purchaser for occupation while in government employ. The Saulsbury resolution was held invalid by the District of Columbia Court of Appeals, in *Willson v. McDonnell*.<sup>2</sup>

At a special session held in 1920 a law was enacted in the state of Wisconsin, effective June 9, 1920, giving the Railroad Commission of Wisconsin the power to fix reasonable rents in any city or village in a county having a population of 250,000 or over. By its terms this law was applicable only to Milwaukee County, and it was to continue in effect only until April 30, 1923.

In 1920 several important acts were passed by the legislature of New York for the regulation of rentals. Only the more important of these are here referred to. Chapters 942 and 947, Laws of 1920, provided that there shall be no summary dispossession or eviction where the tenant holds over after the expiration of his term, unless the landlord proves him to be objectionable; or seeks to occupy the premises himself; or desires to build a new building for dwelling purposes, plans for which have already been filed and approved; or has sold the building to a tenant's cooperative owning corporation. Chapter 945, Laws of 1920, made it a defense to a proceeding to dispossess, that the rent is unjust and unreasonable, and the agreement oppressive. If this defense were interposed, the landlord was required within five days to file a bill of particulars showing full facts with regard to his investment and operating costs, from which the court might determine the reasonableness of the rent. Chapter 944, Laws of 1920, made it a defense to an action for rent that the rent was unjust and unreasonable, and the agreement under which it was sought to be recovered unreasonable. Where it appeared that the rent had been increased over the rent as it existed one year prior to the time of the agreement under which the rent is sought to be recovered, such an agreement was presumptively unjust, unreasonable, and oppressive. This chapter amended chapter 136 of the regular 1920 Session

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<sup>2</sup> 265 Fed. 432.

Laws which made a 25 per cent increase presumptively unreasonable, but which was found to be generally misunderstood. Chapters 942, 944 and 945 did not apply to new buildings. These acts were to expire November 1, 1922. Several of the New York rental laws applied only to New York City and surrounding communities. Others applied to all cities of the first class.

By Chapter 577, General Acts of 1920, Massachusetts permitted the court in summary proceedings for possession, where the tenancy had terminated without the fault of the tenant, to grant a stay where the tenant showed that he could not find suitable premises elsewhere, the stay to be for not to exceed six months in the discretion of the court. Pending the stay the tenant was required to deposit in court the reasonable rental determined by the court. Chapter 578 of Massachusetts General Acts of 1920 provided that unjust, unreasonable, and oppressive agreements for rent should be unenforceable, and made a 25 per cent increase presumptively unreasonable. The Massachusetts laws were to be in effect only until February 1, 1922.

By legislation of 1921, the Illinois General Assembly enacted statutes providing that in forcible entry and detainer and in ejectment cases, the court might in its discretion grant to a tenant a stay of execution not exceeding six months from the expiration of the term or tenancy, upon the giving of bond by the tenant or the paying of the total amount of the rental determined to be due for the period of the stay. The court is authorized to fix the compensation to the landlord during the period of the stay "at the rate for which the defendant was liable as rent for the month immediately prior to the expiration of his term or tenancy, plus such additional amount, if any, as the court may determine to be reasonable." The Illinois legislation ceases to be in effect January 1, 1923.

From the review given above of legislation for the regulation of rentals, it will be seen that this regulation falls into two classes: (1) For the District of Columbia and for Milwaukee County, Wisconsin, a direct power to fix rents was vested in an administrative board, subject to judicial review. In these cases the rental of dwelling property was regulated in much the same manner as the rates and services of public utilities. (2) New York, Massachusetts, and Illinois, on the other hand, enacted legislation for the purpose of preventing eviction, and vested in the courts in a proper proceeding the authority to determine a reasonable rental

upon which the tenant might remain in possession for a limited time, if the court thought that he should not be evicted.

Rental legislation in all these states was definitely based upon the existence of an emergency, and its continuance in force was explicitly limited to a short period. Such legislation was broad enough to cover not only new contracts of rental, but also existing relations already entered into between landlord and tenant.

The Wisconsin legislation applicable to Milwaukee County was held unconstitutional in the case of *State ex rel Milwaukee Sales and Investment Co. v. Railroad Commission of Wisconsin*.<sup>3</sup> The decision in Wisconsin may be dismissed without very full comment. It was based upon the ground that the Wisconsin statute denied the equal protection of the law because applicable to communities in only one county of the state. The Wisconsin decision in no way presented an issue as to the broad questions regarding the validity of rent regulation, though the Wisconsin court rejected a classification of large communities for this purpose which was held proper by the United States Supreme Court in passing upon the New York laws.

The New York Court of Appeals on March 8, 1921, decided three cases directly involving the merits of the New York rental statutes: *People ex rel. Durham Realty Corporation v. La Petra*,<sup>4</sup> *Guttag v. Shatzkin*,<sup>5</sup> and *Edgar A. Levy Leasing Company v. Siegel*.<sup>6</sup>

In these three cases the court discussed with great fullness all of the constitutional issues involved, and held the New York rental statutes involved in these cases to be constitutional. Judge Crane concurred in the result on the basis of a separate opinion in *Guttag v. Shatzkin*; and Judge McLaughlin in the Siegel Case dissented from the view taken in all three of the cases.

The chief constitutional objections urged against the New York laws were: deprivation of property without due process of law, denial of the equal protection of the laws, and impairment of the obligations of contract. The majority of the court squarely took the view that:

“Aside from the war power, the regulation of prices, except for public utilities is unusual, although usury statutes which forbid the taking of exorbitant interest on the loan of

<sup>3</sup> 133 N. W. 687 (Wis. 1921).

<sup>4</sup> 230 N. Y. 429.

<sup>5</sup> 230 N. Y. 634.

<sup>6</sup> 230 N. Y. 647.

money are common. The power of regulation exists, however, and is not limited to public uses or to property where the right to demand and receive service exists or to monopolies or to emergencies. It may embrace all cases of public interest, and the question is whether the subject has become important enough for the public to justify public action.’

The court took the view that this legislation was enacted for the purpose of meeting a real emergency, and that the obligation of existing contracts might be impaired in the proper exercise of legislative power. The court through Judge Pound said in the *La Fetra* Case that:

“The conclusion is, in the light of present theories of the police power, that the state may regulate a business, however honest in itself, if it is or may become an instrument of widespread oppression; . . . that the business of renting homes in the city of New York is now such an instrument and has, therefore, become subject to control by the public for the common good; that the regulation of rents and the suspension of possessory remedies so far tend to accomplish the purpose as to supervene the constitutional inhibitions relied upon to defeat the laws before us.”

Judge Crane in his concurring opinion emphasized the temporary character of the New York legislation.

In the case in which Judge McLaughlin dissented, a renewal lease entered into before the passage of the act was directly involved. Judge McLaughlin took the view that it was a deprivation of property without due process of law, and a denial of the equal protection of the laws, to force upon the landlord a tenant during a two-year period, if the tenant desired to remain, but without any correlative obligation upon the part of the tenant. He also took the view that to require the landlord to submit to the rental to be fixed by the court, and the denial to him of the right to recover his property, constituted an unconstitutional deprivation of property. He contended also that the act denied the equal protection of the laws in that it adopted one rule for the owner of property completed at the time the act was passed, and another as to buildings completed or constructed after the passage of the act. Finally, Judge McLaughlin urged that the New York legislation took private property for a private use in that it gave to one private individual a definite right in property of another individual.

The New York legislation came before the Supreme Court of the United States in the case of *Marcus Brown Holding Company v.*

*Feldman*, on appeal from the United States District Court for the southern district of New York, less than a month and a half after the decision of the New York Court of Appeals.<sup>7</sup>

The *Feldman* Case was decided at the same time as the case of *Block v. Hirsh*,<sup>8</sup> upholding the validity of the Rental Commission Act for the District of Columbia, and the two decisions must of necessity be discussed together. Justice Holmes speaking for a bare majority of the court in these two cases upheld both the act as to the District of Columbia and the New York rental legislation. Justice Holmes took the broad view that these acts are constitutional as a means of meeting a great and immediate necessity. In the New York case the court assumed that an emergency existed, and said:

“The chief objection to these acts has been dealt with in *Block v. Hirsh*. In the present case more emphasis is laid upon the impairment of the obligation of the contract of the lessees to surrender possession and of the new lease which was to have gone into effect upon October 1, last year. But contracts are made subject to this exercise of the power of the state when otherwise justified, as we have held this to be.”

It was urged that the New York laws were discriminatory both as to cities affected, and because not extending to new buildings or buildings then in course of erection. The court replied to this:

“But as the evil to be met was a very pressing want of shelter in certain crowded centers the classification was too obviously justified to need explanation, beyond repeating what was said below as to new buildings, that the unknown cost of completing them and the need to encourage such structures sufficiently explain the last item on the excepted list.”

In the case of *Block v. Hirsh*, the court more fully discussed the general merits of the legislation in dispute, and said: “Plainly, circumstances may so change in time or so differ in space as to clothe with such an interest what at other times or in other places would be a matter of purely private concern;” and added that “All the elements of a public interest justifying some degree of public control are present.”

Justice McKenna presented in dissenting opinions the views of four members of the court, urging that the District of Columbia and New York rent laws directly violate constitutional guarantees

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<sup>7</sup> 41 Sup. Ct. 465 (U. S. 1921).

<sup>8</sup> 41 Sup. Ct. 549 (U. S. 1921).

as to due process of law, equal protection of the laws, and the obligation of contracts. In the dissenting opinion in the *Block v. Hirsh* case, Justice McKenna indulged in a good deal of generalization as to the tearing down of constitutional rights, and urged that the majority view of the court set no definite bounds to the exercise of the power held proper. Justice McKenna sought to dismiss the point that the legislation both in New York and for the District of Columbia was for a limited period of time, and said:

“If it can be made to endure for two years, it can be made to endure for more. There is no other power that can pronounce the limit of its duration against the time expressed in it, and its justification practically marks the doom of the judicial judgment on legislative action.”

It is doubtful whether Justice McKenna in speaking for a minority of the court was justified in his broad language regarding the complete break-down of judicially enforced limitations upon legislative power, through the action of the majority in the two cases before the United States Supreme Court. Clearly, there was in fact an emergency as to the housing situation, and clearly also there was need for some governmental action to meet this emergency. Such governmental action through the legislative department was before the court, limited to a definite period, and safeguarded in such a manner as to protect the landlord in such a rental as might be determined by judicial action to be reasonable. This involved no material or permanent breakdown of constitutional guarantees; nor did it involve a judicial sanction for a legislative embarkation upon unlimited projects for the regulation of prices. The decision of the New York Court of Appeals contains broader statements than do the opinions of Justice Holmes; but such broad statements are easily limited to the facts before the court.

It is doubtful whether the courts of this country will be permanently influenced in their attitude upon matters of social and industrial legislation by the decisions of the New York Court of Appeals and of the United States Supreme Court, with respect to the temporary regulation of rentals during a time of great emergency. The decisions of these courts can easily be limited to the situations which presented themselves, and need in no way be extended to justify permanent price-fixing under governmental authority. However, should other situations present themselves similar to those with respect to the rental of dwelling property,



the courts may be expected to recognize this fact and under such conditions to apply principles similar to those announced by the majority of the United States Supreme Court.

The decisions in these cases justify no great alarm upon the part of those opposed to further governmental regulation, and no great encouragement to those favoring such a policy. Yet they do make it clear that private rights may not defeat governmental power to meet new problems as they arise. The limits of such governmental power are, however, as fully subject to judicial determination as heretofore; and no new principle has been laid down for the judicial determination of such limits. Although a liberal view has been taken in these cases, each new issue under the police power remains for decision upon its own particular facts. The liberality of the court in one case establishes no legal guidance as to the view which may be taken in the next. In these cases the New York Court of Appeals and the United States Supreme Court but recognize the shifting nature of the police power. Judge Pound sums up the situation in the statement that: "The law of each age is ultimately what that age thinks should be the law." Of course, in the adaptation of broad constitutional provisions to new social needs, the courts are occasionally a generation behind, but the fact remains that the shifting lines of legislative power must in each doubtful case be finally drawn by judicial action.<sup>9</sup>

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<sup>9</sup> For recent discussions of rent regulation, see: Charles K. Burdick, "Constitutionality of the New York Rent Laws," 6 CORNELL L. QUAR. 310; George W. Wickersham, "The Police Power and the New York Emergency Rent Laws," 69 U. OF PA. L. REV. 301; Nathan Isaacs, "The Revival of the *Justum Pretium*," 6 CORNELL L. QUAR. 381.