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CONSIDERATIONS REGARDING THE LATE DEFICIENCY JUDGMENT ACTS

FREDERICK C. FIECHTER, JR.*

Recent decisions of our Supreme and Superior Courts¹ holding unconstitutional the Deficiency Judgment Acts have raised anew in Pennsylvania the century-old question, peculiar to our unique American doctrine of judicial review,² regarding the effect of an unconstitutional statute, or rather, the effect of a decision holding a statute unconstitutional.³

How important the question is may be gathered by the fact that between January 17, 1934 and October 5, 1936 over 35,000 mortgages were foreclosed in Philadelphia alone. Seven or more cases reached the Supreme Court of the state.

For almost two hundred and thirty years⁴ Pennsylvania law gave a mortgagee the right to foreclose against the real property covered by the mortgage and to sooner or later⁵ recover the difference between the price he received on the sale of the real property (a price conclusive as to its value) and what the mortgagor had promised to pay under his bond. He might proceed by execution against personal or other real property to satisfy the deficiency judgment.

The Act of Jan. 17, 1934, P.L. 243 entitled—

"An act to protect the owners of mortgaged property during the present emergency by limiting the amount of deficiency judgments during a certain period."—

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¹Beaver County B. & L. Assn. v. Winowich, decided by the Supreme Court of Pennsylvania, October 5, 1936; Shallcross et al. Receivers v. North Branch-Sedgwick B. & L. Assn., decided by the Superior Court of Pennsylvania, November 13th, 1936.

²Attacks on this power are older than the New Deal. In 1809 a Judge of the Supreme Court of Ohio barely missed impeachment for finding an act unconstitutional.—Salmon P. Chase, "Preliminary Sketch of the History of Ohio" in the Preface to his collection of the Statutes of Ohio 1788-1883, pages 38-40. See also Von Moschzisker, "Pending Attacks on Power of Courts to Review the Constitutionality of Legislation," an address delivered in 1924 contained in his *Judicial Review of Legislation*.

³The same problem exists to some extent in Arizona, Arkansas, California, New Jersey, Georgia and Texas, but, so far as the writer could ascertain, no cases have been reported showing the effect of the holdings declaring their Deficiency Judgment Acts unconstitutional.

⁴January 12, 1705, 36 Sm. L. 59.

⁵Stay laws have been passed at various times in Pennsylvania. They are enumerated in a note to the majority opinion in the Beaver County case, *supra*.

altered this remedy by providing—

"That whenever any real property is sold⁶ on any execution on the foreclosure of any mortgage, or on a judgment entered on any obligation secured by mortgage, and the sum for which such property was sold is not sufficient to satisfy the debt, interest and costs, the plaintiff or use-plaintiff shall, within six months after such sale, petition the court out of which such writ of execution issued to fix the fair value of the property sold . . . Such petition shall be heard by a judge of such court sitting without a jury, or may . . . be referred to a master for hearing and determination, subject to confirmation by the court. . . .

"At all such hearings any party in interest may introduce in evidence testimony of the fair value of the premises sold at the time of the sale. In the event that the fair value so determined is greater than the price for which the property was sold, the amount of such fair value shall be deducted from the amount of the judgment, interest and costs, and a deficiency judgment entered for the balance.

"If the plaintiff or use-plaintiff shall fail to present such petition within six months after such sale, the prothonotary shall, upon application of the defendant or other party in interest, enter satisfaction of such judgment. Such satisfaction shall have the effect of terminating as well the liability of all persons bound by any obligation securing the payment of such mortgage debt.

"The act makes provision, for notice of the presentation of the petition, and also provides for a jury trial to determine the fair value if either party so desires. By its terms it was to become effective immediately upon its enactment and remain in force until July 1, 1935."⁷

The Act of July 1, 1935, P.L. 503 was a continuation and revision of the 1934 Act placing still greater restrictions upon the recovery of a mortgage indebtedness.

Violation of provisions in the state and federal constitutions against impairing the obligation of contracts was the basis of the holdings. It is the writer's hesitant opinion, however, that the acts will be considered unconstitutional even where the mortgage agreement was executed *after* the passage of the act, thus

⁶The act applied only to cases where the property was exposed to sale after January 17, 1934. *St. Charles B. & L. Ass'n. v. Hamilton*, 319 Pa. 220 (1936).

⁷Exposition of act contained in majority opinion of the Beaver County case, *supra*.

eliminating the impairment of contractual obligations argument.⁸ At any rate some of the ensuing discussion is based on that opinion.

The problems fall naturally into two divisions, those concerning mortgages executed *before* the passage of the Act⁹ and those concerning mortgages executed *after* the passage of the Act.¹⁰ But before going into the ramifications of the mortgage problem a view of the effect of a declaration of unconstitutionality in other situations may be helpful. The immediate reaction of most lawyers is best expressed by Judge Cooley who said:

"When a statute is adjudged to be unconstitutional it is as if it has never been. Rights cannot be built up under it; contracts which depend upon it for their consideration are void; *it constitutes a protection to no one who has acted under it*, and no one can be punished for having refused obedience to it before the decision was *made*."¹¹ (Italics supplied).

Although the traditional doctrine of American courts as to the effect of declaring an act unconstitutional, a study of the cases indicate that this metaphysical conception is less than half correct. The pioneering student of the subject is Professor

⁸While it is true the Court said: "Whatever validity the Mortgage Deficiency Judgment Act of 1934 may have as to mortgages executed after its passage, it is violative . . . of . . . Constitutions . . . in the present case," the plaintiff contended the Act violated Article III, sec. 7 of the Pennsylvania Constitution providing against local or special legislation impairing liens or changing the methods of collecting debts. He also contended that the Act violated Article III, Sec. 3 of the Pennsylvania Constitution requiring the subject of an Act to be clearly expressed in its title.

Furthermore, the Act of 1934 contains no statement that it applies where a mortgage "has been given" to secure a debt before the effective date of the Act. Instead of upholding the act by interpreting it as not applying to such obligations—as did the California Court—our Court construed the Act as intended to apply to obligations entered into before its passage, thus making it unconstitutional.

The Act of 1935 (Sec. 11) attempts to continue the 1934 Act; however, by virtue of its severability provision insuring constitutionality of the remainder if part of the act falls, Sec. 11 would not be fatal. Section 1 of the 1935 Act specifically covers a mortgage which "is or has been given." This alone is ground for arguing that since an integral section of an act cannot be winnowed, and since part of this section is unconstitutional the whole section and the whole act must fall. On the other hand, it is plausible to contend that Sec. 1 as well as Sec. 11 may be stricken and the remainder of the act will be effective.

⁹The word "Act" is used to indicate both the 1934 and the 1935 Acts.

¹⁰Under the view taken here it makes no difference whether or not the 1935 act is construed as having its effective date go back to the date of the 1934 enactment.

¹¹Constitutional Limitations (7th ed.) p. 259. To the same effect, see *Norton v. Shelby County* 118 U. S. 425, 6 Supreme Ct. Reporter 1126, 30 Lawyer's Ed. 178, 1886. See also 6 *Ruling Case Law*, Section 117, and 118 where it is said—

"Protection of Rights under Unconstitutional Laws. The general rule is that an unconstitutional act of the legislature protects no one. It is said that all persons are presumed to know the law, meaning that ignorance of the law excuses no one. Consequently, if any person acts under an unconstitutional statute, the general rule is that he does so at his peril, and must take the consequences."

See also 12 *Corpus Juris Sec.* 228; 53 *A.L.R.* 269.

Oliver Peter Field whose book ¹² is an exhaustive authority on the pertinent general law.

Actually there are several views as to the effect of an unconstitutional statute held by the Supreme Court of Pennsylvania, just to illustrate with one court. The difficulty comes in trying to ascertain which view the Court will apply to a particular situation.

Most enunciated by the horn books is the void *ab initio* theory which eliminates the statute from the consideration of a case both as law and as a fact. Enactment by the legislature and reliance on it by the people are immaterial.

This cuts some hard knots principally in the case of criminal convictions under statutes subsequently declared unconstitutional. Habeas corpus is always available to help the convict in this situation. Also, where one act attempts to repeal another, and the repealing act is held unconstitutional, it is said the reason for not having to reenact the first statute is that the repealer was void *ab initio*. The same is true in the case of an unconstitutional amendment to a valid statute.

Another view is that the statute should be given sufficient effect to constitute one of the *facts* in the case. Its validity is presumed because parties were led to assume its validity and were warranted in their assumption. This view is the *raison d'etre* of the majority of the Pennsylvania cases. The *de facto* doctrine and that of mistake of law and estoppel are used to support this view to a greater or less extent according to how willing the court is to admit that an unconstitutional statute has some legal effect. Generally the court tries to find an "out" to avoid making this concession. Thus where viewers in an eminent domain proceeding were appointed under an act later declared unconstitutional, it was held that the defendant could not take advantage of their lack of jurisdiction because he had already appealed their assessment to the Common Pleas and his objection to the viewers' jurisdiction was too late.¹³ In the case of taxes paid under unconstitutional acts some courts have paid lip service to the void *ab initio* theory by allowing recovery where taxes were paid under coercion,¹⁴ and there we incline to the presumption of validity theory. Where a borough tax, part of which was legal and part illegal, was paid by the person assessed, without protest or notice that he would reclaim the part illegally assessed, the Court held he could not recover, saying—

¹²"The Effect of an Unconstitutional Statute," Univ. of Minnesota Press, 1935. See review by T. R. Powell, 48 Harv. L.R. 1271-3, May, 1935; H. E. Willis, 83 Univ. of Pa. 1042-3, June, 1935. The first results of Field's study are contained in 1 Indiana Law Journal, 1926.

¹³Wilson v. City of Scranton, 141 Pa. 621, (1891).

¹⁴Protest with notice that if party is not liable, he will seek recovery, is not coercion in case of assessments paid for streets.

"The case is very different from that of payment to an individual by mistake. It was submission to legitimate authority which was *prima facie* right in its exercise It is a contribution to a common fund in the benefits of which he, as a citizen or property-holder, participates. It is intended for immediate expenditure for the common good, and it would be unjust to require its repayment, after it has been thus, in whole or in part, properly expended, which would often be the case if suit could be brought for its recovery without notice having been given at the time of payment and there would be no bar against its insidious spring but the statute of limitations¹⁵."

The *de facto* doctrine is best exemplified in Pennsylvania in decisions dealing with acts creating public offices. Thus the court refuses to allow the office of a judge¹⁶ or that of an assistant district attorney¹⁷ to be questioned by one already affected by their acts. But if quo warranto issues, and the statute creating the office held by defendant is unconstitutional, ouster will be granted.¹⁸

Nor will *de facto* officers be held civilly or criminally liable for official acts performed before the statute creating their office is declared unconstitutional.¹⁹ Similarly, private individuals acting for them will not be held liable.²⁰

Municipal improvement cases show how unworkable the void *ab initio* theory may be. Acts performed by municipal officers in opening a street for gas pipes, to take a common example, are not rendered invalid when the statute under which they were done is declared "void." In one case²¹ a taxpayer brought a bill to restrain the maintenance of gas pipes after he had paid an assessment for having them laid. Our Court treated the matter as follows:²²

"It is now objected against the legality of the defendant in laying its pipes, that the city government had no power to proceed in the opening of this street, because the act of 1887 was unconstitutional in certain respects. However this contention might suffice to prevent the city from laying out and opening streets in the future, it does not

¹⁵*Peebles v. City of Pittsburgh*, 101 Pa. 304 (1882). *Borough of Allentown v. Saeger*, 20 Pa. 421 (1853). Similarly, *Robert Taylor v. Board of Health*, 31 Pa. 73 (1855).

¹⁶*Coyle v. Commonwealth*, 104 Pa. 117 (1883).

¹⁷*Commonwealth v. McCombs*, 56 Pa. 436 (1867).

¹⁸*Commonwealth ex. rel. Hite v. Swank*, 79 Pa. 154 (1875). Here the office of clerk of court was questioned, but not by one who thus sought to avoid acts already performed by the clerk.

¹⁹*Clark v. Commonwealth*, 29 Pa. 129 (1858); *Campbell et al. v. Commonwealth*, 96 Pa. 344 (1880); and especially *Dunn v. Mellon et al.*, 147 Pa. 11 (1892).

²⁰*Dunn v. Mellon*, *supra*.

²¹*King v. Philadelphia*, 154 Pa. 160 (1893).

²²*Ibid.* pages 167, 168, 170.

follow by any means that it will suffice to overthrow such work previously done under color of authority conferred by the act The opening of a street ordinarily is followed by the erection of buildings on both sides, by the laying of gas and water pipes, and the construction of sewers. If after all this has taken place, it is discovered, and judicially decided, that the law under which the municipal authorities have acted in the premises, is unconstitutional, surely it cannot be said that all the improvements, works, and buildings, carried on and constructed under apparent legal authority, must be abandoned or destroyed. . . .

"We do not consider that any question of estoppel arises against the plaintiff by reason of the payment by him of assessed benefits. We decide the case upon the ground that there was a compliance with the existing law in the laying of the pipes, *and that the defendant is not responsible for the law of 1887, or its want of conformity to the constitution.*" (Italics supplied).

Here there is a moral obligation to preserve the *status quo*, and since it will cost nothing, it is carried out. But where a county undertook to pay mink bounties and the act was held unconstitutional, accrued bounties were not paid²³

As we should expect, the presumption of validity theory is also applied where the court first holds an act constitutional, and then holds it unconstitutional, to rights acquired in reliance upon the first decision.²⁴

An important doctrine in Pennsylvania in support of this theory is that of estoppel. It is a less exacting doctrine, be it remarked, than the classical estoppel by misrepresentation found in other branches of the law. Under our doctrine a shareholder is estopped from defending against an action by a receiver to collect an assessment, merely by showing that the statute under which an organization took place was invalid.²⁵

The most important Pennsylvania case on this kind of estoppel is *Bidwell v. City of Pittsburgh*.²⁶ In that case Bidwell was active in procuring an ordinance for the grading and paving of streets, was charged with the superintendence of the improvement and sold bonds to defray its cost. When the time came to pay the assessment on his own land, he attempted to avoid payment on the ground that the law authorizing the improvement was unconstitutional. The Court held that Bidwell's conduct made him liable, saying *inter alia*,

²³*Teeple v. Wayne County*, 23 C.C. 361 (1900).

²⁴*Dictum in Ray v. Natural Gas Co.*, 138 Pa. 576 (1890).

²⁵*Freeland v. Pa. Central Insurance Co.*, 94 Pa. 504 (1880); *Commonwealth v. County of Philadelphia*, 193 Pa. 236, 44 Atl. 336 (1899).

²⁶85 Pa. 412 (1877).

"In *Pickard v. Sears*, 6 Ad. & El. 469, a leading case of estoppel by conduct, it was said 'the rule of law is clear that where one by his words or conduct wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time.'

"It may now be declared as a general rule, that where an act is done, or a statement made by a party, the truth or efficacy of which it would be a fraud on his part to controvert or impair, the character of an estoppel shall be given to what otherwise would be a mere evidence. It is not necessary that the party against whom an estoppel is alleged, should have intended to deceive: it is sufficient if he intended that his conduct should induce another to act upon it, and the other relying on it, did so act: Bisp. Eq., Sec. 290.²⁷

. . . . "It is true every one is presumed to know the law, and knowledge thereof is said to be equally open to all. Conceding that the city had knowledge of the law, or ought to have had it, the like legal presumption applies to the plaintiff in error, and his equities derive no strength from that presumption. The city had no reason to believe that he would allege any invalidity in the law which he was praying to have extended over him. The city was misled, not by expressive silence merely of the plaintiff in error, but by his decided and persistent action. It has been held that where a party has acted upon a particular construction of a contract which has been acquiesced in by the other, the latter is estopped from contesting it as the proper construction: *Mercer Mining and Manufacturing Co. v. McKee*, 17 P. F. Smith 170."²⁸

Finally, there is the view which refuses to take an attitude and which makes a statute constitutional in some circumstances and unconstitutional in other circumstances. Professor Field calls it the case-to-case theory and points the appellation by a quotation from the United States Supreme Court: "a statute may be invalid as applied to one state of facts and valid as applied to another."²⁹ This is a type of partial unconstitutionality and will be relevant to our discussion only to the extent we speculate concerning the validity of the Deficiency Judgment Act as to mortgages executed after its passage.

²⁷Ibid., p. 417.

²⁸Ibid., p. 418.

²⁹*Dahnke-Walker Milling Company v. Bondurant*, 257 U. S. 282, 42 Sup. Ct. 106, 66 L. Ed. 239 (1921).

So much for the bare outlines of the Pennsylvania law on the subject in general. They are only sufficient to illustrate the fact that there is no invariable meaning to the words "declared the act unconstitutional." Because the hardship occasioned by reliance on the supposed (and frequently judicially expounded)³⁰ validity of a statute, subsequently declared unconstitutional, offends our sense of justice, Pennsylvania courts among others have not consistently adhered to a policy dictated by logic alone.

The principal permutations of the Pennsylvania situations are as follows. First with regard to mortgages executed *before* the Act.

I.

Where foreclosure proceedings were not had until after October 5th, 1936,³¹ it is reasonably clear that the effect will be just as though there had been no act because the circumstances to be affected by the act arise for the first time when the act is admittedly no longer effective.³²

II.

Where foreclosure proceedings were begun and the sheriff sale took place before October 5th, but no appraisal was made at the request of the plaintiff mortgagee we have the exact case which the Supreme Court decided.

"Plaintiff failing to ask the court to determine the fair value of the property and to fix the amount of the deficiency judgment, defendants, on December 12, 1934, petitioned that the judgment be marked satisfied . . . and the *prothonotary* thereupon entered satisfaction."³³ (Italics supplied)

The case was heard on a petition and rule to strike off the satisfaction. The doctrine of precedent or *stare decisis* would seem to control, i. e. the Court would be asked to follow its own earlier decision unless conditions had so changed as to make the rule unwise or inapplicable. At this writing the conditions have not so changed.

III.

Where foreclosure proceedings were begun and an appraisal was made at either party's request before October 5th, the answer is not so clear. Most discus-

³⁰The lower court in the Shallcross case for example specifically stated the Act was constitutional because it did not impair the obligations of contracts (24 D. & C. 496) about a year before the Supreme Court found the Act unconstitutional. Similarly Commercial Building Association v. Steen et ux., 24 D. & C. 575 (1935).

³¹Date of Supreme Court decision in Beaver County case, *supra*.

³²*Titus v. Poland Coal Co.* 275 Pa. 431, 119 Atl. 540 is cited in the annotation on "Reliance on Unconstitutional Statutes" in 53 A.L.R. 273, as an example of the rule that reliance on a statute after it is declared unconstitutional is no defense. It seems to the writer, however, that the reliance in that case was before the declaration of unconstitutionality.

³³Quoted from majority opinion in Beaver County case, *supra*.

sion centers around this situation. It has suggested the following problems among others:³⁴

1.—Where a mortgagee has invoked the Act is he precluded from attacking his deficiency judgment?

2.—Does a mortgagor who was ready, willing and able to bid at the sheriff's sale have any rights by reason of the fact that he did not bid but relied on protection of the Act?

3.—Where deficiency judgments have been satisfied; are such satisfactions automatically voided, are they not to be controverted, or may mortgagees file petitions to have such satisfactions stricken off?

4.—What is the effect on the rights of a bona fide purchaser of real estate on which such a judgment has been satisfied?

Is a deficiency judgment entered after an appraisal has been made under judicial auspices *res adjudicata*? If it is, the four questions just set down are all answered at once.

Freeman says "though the enforcement or application of a legislative act would seem to be predicated upon an assumption of its validity, yet, since courts seldom undertake to pass upon the validity or constitutionality of legislation where the issue is not raised by the parties, a judgment enforcing or applying such an act is not *res adjudicata* of its constitutionality in a subsequent case between the same parties in which this issue is made, *but involving a different claim* or cause of action"³⁵. (Italics supplied) Among other cases the author cites *Philadelphia v. Railway*, a Pennsylvania case³⁶. This is the key case of the present discussion and merits careful consideration.

In 1872 our legislature passed an act which, *inter alia*, reduced the amount of tax previously imposed by the charter of the Ridge Avenue Railway Company of Philadelphia. An adjudication of the corporation's liability was made under this act in 1883,³⁷ and taxes were paid accordingly during a considerable period. Subsequently, in an independent suit³⁸ by the city to recover for paving Ridge Avenue, the Supreme Court held the act unconstitutional. The City of Philadelphia immediately commenced action against the company to recover the difference between the reduced taxes paid under the invalid statute, and the amount that would have been due according to the original 1858 Charter, for the period from 1880 to 1888 inclusive. In the Common Pleas the City recovered. On appeal,

³⁴See *Fiduciary Review* for October, 1936.

³⁵2 Freeman on Judgments 711, p. 1501.

³⁶*Philadelphia v. Ridge Avenue Railway*, 142 Pa. 484, 21 Atl. 982 (1891).

³⁷*City of Phila. v. Ridge Ave. Railway Co.*, 102 Pa. 190.

³⁸*Ridge Ave. Pass. Ry. Co. v. Philadelphia*, 124 Pa. 219.

it was held that the prior litigation determining the taxes for the years in question, though brought under the unconstitutional Act of 1872, was conclusive of the cause of action there involved, that the judgment rendered in that suit was *res adjudicata*, and the subsequent decision holding the act unconstitutional could not alter the effect of such prior judgment. As our former Chief Justice puts it:

“ . . . in short, the first suit had determined the whole liability as to the taxes which were then claimed, — the law and facts in regard to that subject-matter had been settled once and for all, however erroneous the view taken of the law might have been. This case well shows the binding force in the field of law of the doctrine under discussion when a particular cause of action, already reduced to judgment, again comes before the courts in another suit between the same parties.”³⁹

It should be noted that it is explicitly stated⁴⁰ that in the earlier decision in 102 Pa. 190 the constitutionality of the act of 1872 was not drawn in question. Said the Court:⁴¹

“The argument of the company's counsel now is that, although, in the case referred to, the *point does not appear to have been made or decided*, yet the constitutionality of the act of 1872 must be taken to have passed in *rem judicatem*; that the judgment in that case necessarily involved a decision that the statute imposing the tax was to that extent valid, and, although the cause of action is not the same, the city is estopped of record from re-litigating that question. In support of this doctrine they cite *Beloit v. Morgan*, 7 Wall. 619; *Aurora City v. West*, 7 Wall. 85; *Durant v. Essex Co.*, 7 Wall. 107; *Corcoran v. Canal Co.*, 94 U. S. 741; *Wilson v. Deen*, 121 U. S. 525; and *Duchess of Kingston's Case*, 2 Smith Lead. Cas., 8th ed., 941.

“Whilst the general rule declared in these authorities is undoubtedly correct, it does not extend to estop a person from setting up the unconstitutionality of a statute, when the cause of action is not the same. The former judgment is absolutely conclusive upon the parties, as to the cause of action involved in it, although the statute upon which the proceedings were taken was not constitutional; that judgment can only be impeached collaterally for fraud or want of jurisdiction. *It is a matter of no consequence now that the act of 1872, upon which judgment was entered for the amount of the tax, was un-*

³⁹Von Moschizsker, “Res Judicata,” 38 Yale Law Journal, 299, 30-302 (1929).

⁴⁰*Phila. v. Ry Co.*, supra. p. 493.

⁴¹*Ibid.*

constitutional and void; judgment having been entered, and no appeal taken, the subject matter of the issue in that suit is res judicata. The former judgment, therefore, operates as a bar to any subsequent action founded on the same demands; Bigelow on Estop., 80-88. In the case at bar, however, whilst the point in issue may perhaps be the same, the cause of action is different; and, although the verdict, with the judgment thereon, would furnish conclusive evidence of the matters in controversy upon which the verdict was rendered, and operate as a bar to the further litigation thereof, it would not preclude the plaintiff in this suit from asserting the unconstitutionality of the act upon which the previous action proceeded: Bigelow on Estop., 90-103." (Italics supplied).

To clinch its reasoning the court appeals to equity as follows:

"It is plain that if the parties had treated the act of 1872 as unconstitutional, and the taxes had been paid and received pursuant to the original charters, a subsequent adjudication that it was a valid enactment would not entitle the company to receive back the excess, and this is but the converse of the proposition now advanced by the city. It is said to be a poor rule that will not work both ways. The city cannot occupy inconsistent positions. Having chosen to treat the act of 1872 as constitutional, and proceeded against and treated with the company accordingly, she will not now be permitted to rip up the annual settlements, made under it, to the prejudice of others' rights."

The last language quoted is a supplemental reason for the decision and does not weaken the case,⁴² so far as it is an authority for the proposition that when the Court has passed on transactions actively consummated according to a statute they may not be opened when that act is declared unconstitutional.

Res adjudicata in the Federal and other state courts is relaxed in the constitutional field only when overwhelming considerations such as those raised by habeas corpus proceedings demand it.⁴³ Stepping outside of Pennsylvania for the moment, in election contest cases,⁴⁴ suits upon private bonds,⁴⁵ in actions on partnership accounts⁴⁶ and in homestead decrees,⁴⁷ to take cases cited by Professor Field,

⁴²In *Borough of Allentown v. Saeger*, supra, however, the fact that the government was a party was given more weight than here.

⁴³Field, *Effect of An Unconstitutional Statute*, p. 157.

⁴⁴*People ex. rel. McCarty v. Wilson*, 6 Cal. App. 122, 91 Pac. 661 (1907).

⁴⁵*Cassell v. Scott*, 17 Ind. 514 (1861).

⁴⁶*Fuqua v. Mullen*, 76 Ky. 467 (1877).

⁴⁷*Brandhoefer v. Bain*, 45 Neb. 781, 64 N. W. 213 (1895).

res adjudicata or the doctrine of preventing collateral attack has been applied to deny attempts to evade or reopen judgments, even if they had been given under invalid statutes.

An Indiana case is particularly interesting.⁴⁸ It was a suit to restrain the collection of a judgment rendered on bonds filed with the county auditor under an act regulating the sale of spirituous liquors. The plaintiff argued that since the act under which the bonds were filed had subsequently been declared unconstitutional, and was therefore void, the judgment was a nullity. The Court held that the judgment was *erroneous*—because the bonds were not supported by legal consideration (owing to the unconstitutionality of the act),—but was not void, and that it had to be regarded as operative until reversed by a court of error.

In Pennsylvania the appeal period of three months since the deficiency judgment was entered will have passed in most cases.

Now consider a few cases which have been settled out of court or in court on the assumption that the governing statutes were valid. They invoked more elements of estoppel than of *res adjudicata*. Both federal and state courts have denied bills of review in these cases.⁴⁹ In a Pennsylvania case⁵⁰ an act of 1907 authorized boroughs to acquire waterworks owned by private persons and provided a procedure for doing so. Appraisers were to be appointed to appraise the property and they were to file their report in the prothonotary's office. The report was to be final if not appealed from in ten days after notice of filing. The owner of the plant was required in due time after the value was fixed to elect to sell at that valuation. In default of consent the company lost its exclusive privilege of supplying the community with water, and the community could install its own plant.

Here the matter proceeded to an appraisers' hearing when the company alleged the act was unconstitutional; which the boro denied. Subsequently the company filed a paper declining to sell at any price and admitting default under the act. This disclaimer was filed of record. Then the company sought to enjoin the borough from erecting a plant alleging unconstitutionality of the act. The borough contended that the company was estopped and was upheld by the courts below and above. The upper court quoted the lower court as follows.⁵¹

"The plaintiff in this case (the water company) contends that the waiver amounted to nothing, that the act of 1907 is unconstitutional, and of no effect. I do not take that view of the matter. Granted that the act of 1907 may be unconstitutional, it is neverthe-

⁴⁸Cassell v. Scott, *supra*.

⁴⁹Hoffman et al v. Knox et al, 50 Fed. 484, C.C.A. 4 (1892); Harrigan v. County of Peoria, 262 Ill. 36, 104 N.E. 172 (1914).

⁵⁰Water Co., v. Catasaqua Boro, 231 Pa. 290 (1911).

⁵¹*Ibid*, p. 294.

less true that the company, in order to get rid of the suit, agreed upon a basis of settlement. They admit certain rights as residing in the borough. Why should it not be bound by its admission? The borough relying upon it spent money. . . . 'He who seeks equity, must do equity.'" The plaintiff cannot blow hot and cold"

The upper court continues,

"In 11 Am. & Eng. Ency. of Law (2nd ed.) 446, it is said: 'It has been laid down as a general proposition, that where a party assumes a position in a legal proceeding and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in, the position formerly taken by him.'"

The Court, after quoting the *Bidwell* case, makes the following significant statement,

"The decree dismissing the application (for a court decree to build) as well as the action of the borough in proceeding to erect the plant were based upon the disclaimer or waiver filed by the water company. *It was filed of record, and prevented any further prosecution of the borough's application under the act of 1907, and defeated the borough in having its right to erect a water plant adjudicated by the court.* (Italics supplied).

"There is no merit in the contention that the water company is relieved from the effect of its disclaimer because the act of 1907 may be unconstitutional. If it be conceded that the act does offend the constitution, the proceedings and decree in the case remain unimpeached and cannot be attacked collaterally: *Ferson's Appeal*, 96 Pa. 140; *Bidwell v. Pittsburg*, 85 Pa. 412; *Northampton County v. Herman*, 119 Pa. 373. The validity of the estoppel does not depend upon the constitutionality of the statute."

A New York case⁵² presents an excellent example of payment under a mistake as to the constitutionality of a statute, although unfortunately the opinion is not reported in full. A bond and mortgage were executed in 1860. In 1870 mortgagor and mortgagee entered into a contract by which it was agreed the former should pay the principal and interest in legal tender and further should execute a satisfaction-piece covering the difference between the amount due in legal

⁵²*Doll v. Earle*, 59 N. Y. 638 (1874).

tender, and that due in gold, and deposit that sum in escrow. The parties further determined to submit the question of what amount should be paid to the court, delaying the same until the United States Supreme Court should decide the legal tender cases. The agreement was carried out except as to submission. After the Supreme Court of the United States had held the legal tender act void as to contracts executed prior to its passage the mortgagor paid the money in escrow. Now he seeks to recover the money paid, but,

"Held that the payment was made voluntarily on a claim of right under no mistake of fact and could not be recovered back; although by the subsequent decision of the United States Supreme Court (*Knox v. Lee*, 12 *Wall.*, 457), it appeared the payment was made under a mistake of law."

It would thus appear that for reasons of estoppel, *res adjudicata*, mistake of law, equity or a combination of all, where appraisals were made and deficiency judgments were marked satisfied, in the absence of fraud or inadvertence, the "mistake" of law does not preclude the validity of an actual satisfaction.

It perhaps remains necessary to further differentiate the second and third situations in order to allay a feeling that the recent decisions will control both.

Where no petition for appraisal has been filed by either party and — rare situation—no satisfaction has been entered, clearly there is no *res adjudicata*. The Court has not passed on the deficiency judgment question directly or indirectly, according to the Act or aside from the Act. The original judgment stands except as estoppel may interfere. But where, as in the *Beaver County* case, satisfaction has been entered by the prothonotary, at the order of the defendant, the question becomes somewhat difficult. The motion of the defendant must bear the written approval of a judge of the court out of which the execution issued.⁵³ Is this written approval an adjudication of the right of the defendant to a default satisfaction?

While a matter need not be litigated in order to be adjudicated,⁵⁴ no phase of the question of deficiency judgment or that of satisfying the full judgment has been argued before the court. We have a default satisfaction of a default judgment. At best the *res adjudicata* argument is not strong here.

The estoppel argument is likewise subject to serious weakness. The question is whether the defendant's failing to avail himself of his right to bid at the sheriff's sale will now estop the plaintiff from vacating the satisfaction and recovering the full judgment. Apparently the answer is that there is no estoppel, since

⁵³Sec. 8 of 1935 Act. That an order of the Court was not necessary, see *Stetler et al v. Cohen et al*, 23 D.& C. 420 (1935).

⁵⁴*Hey v. Hillegas et al*, 275 Pa. 497 (1923); *Long v. Lebanon Nat'l Bank*, 211 Pa. 165 (1905); *Philadelphia v. Ridge Ave. Ry.*, *supra*.

the defendant did not suffer by not bidding if laches does not preclude his right to raise the question of fair value in equity. In his concurring opinion the Chief Justice suggests that, aside from the Act, the mortgagor could have obtained relief in the lower court by filing a petition to have the sale set aside,

"for gross inadequacy in price such as would in law amount to a fraud on the debtor's right. While mere inadequacy in price where there is competitive bidding would not be sufficient to cause the court to act . . . gross inadequacy amounting to a legal fraud would be sufficient. Upon such a petition the evidence would disclose the true value of the property and the court could order a resale, fixing, if necessary, an upset price. This practice has been frequently followed in equity, and as the court below is administering equitable principles through common law forms there would seem to be no reason why counsel should not have availed himself of this procedure. It would require quite a stretch of the imagination to contend that \$900 the proceeds of the sale of a property worth \$14,000 was not grossly inadequate, and because of stringent economic conditions, a fraud on the debtor's right."

It is the writer's opinion that in this situation the plaintiff has a right to reinstate his judgment because the matter has not been adjudicated and there is no estoppel. He has several appropriate remedies other than that used in the *Beaver County* case.⁵⁵ While the right is limited,⁵⁶ the plaintiff would have to satisfy only the discretion of the court. But in the third situation the magic line seems to have been crossed and *res adjudicata* and estoppel join against opening the judgment regardless of whether or not it has been satisfied.

⁵⁵The usual remedy is a motion in the original action for an order cancelling the entry or return of satisfaction and directing execution to issue for so much of the judgment as remains unpaid. *Hottenstein v. Haverly*, 185 Pa. 305. Or he may use a rule to show cause. *Pette's Appeal*, 126 Pa. 420 and *Beaver County* case, *supra*. However, by laches or failure to disavow an unauthorized entry a party may ratify or estop himself to deny authority for the entry. *Miller v. Preston*, 154 Pa. 63.

⁵⁶The court is not bound to set aside on motion a satisfaction voluntarily entered though without consideration. An entry of satisfaction will not be vacated to the injury of innocent third persons who have acted on the strength of the record, as in the case of a bona fide purchaser of property who became such when the judgment appeared by the record to be satisfied. *Freeman on Judgments* 1166, p. 2410 citing *McCune v. McCune*, 164 Pa. 611; *Parsons v. Shaeffer*, 65 Cal. 79; *Van Sickle v. Harmeyer*, 172 Ill. App. 218.

There is no question regarding the bona fide purchaser of the land executed upon since he is protected by his sheriff's deed: *Loram v. Mayneo*, 22 D. & C. 216 (1934); *Menges v. Dentler*, 33 Pa. 495 (1859).

Let us now turn briefly and in conclusion, to questions arising where mortgages were executed *after* the passage of the Act.⁵⁷ In these cases, at least where there was no express provision excluding it, the Act became a part of the contract. The situation is reversed and it is the recent decision of the court which itself impairs the obligation of contracts. This sort of impairment is condoned by both state and federal courts,⁵⁸ however.

One Pennsylvania case,⁵⁹ without having the exact problem before it, contains some interesting dicta on the matter. The plaintiff leased gas lands to the defendant with the express understanding that the plaintiff was to remain in possession. If the defendant did not drill wells he was to pay a certain sum monthly to plaintiff and plaintiff had option to terminate the lease. At the time the agreement was drawn, Pennsylvania law had provided for seventy-three years that non-performance of any covenant by the party of the second part where there was a condition and forfeiture clause *ipso facto* ended the contract so no action could be brought by lessor against lessee. Subsequent to the date of the agreement the earlier cases were overruled, and the plaintiff brought an action for the monthly sums. The defense was impairment of the obligations of contract. In upholding the plaintiff the court said by way of dictum:

"The courts of highest authority of all the states, and of the United States, are not infrequently constrained to change their rulings upon questions of the highest importance. In so doing, the doctrine is, not that the law is changed, but that the court was mistaken in its former decision, and that the law is, and really always was, as it is expounded in the later decisions upon the subject. The members of the judiciary in no proper sense can be said to make or change the law; they simply expound and apply it to individual cases. To this general doctrine there is a well-established exception, as follows: — 'After a statute has been settled by judicial construction, the construction becomes so far as contract rights are concerned as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in effect on contracts as an amendment of the law by means of a legislative enactment'; *Douglass v. Pike Co.* 101 U. S. 677. See, also, *Anderson v. Santa Anna*, 116 U. S. 361, and cases there cited; *Cooley, Const. Lim.*, 474-477. To this effect, and no more, we under-

⁵⁷The present consideration is likely to be purely academic since it concerns only mortgages executed after January, 1934 and foreclosures before October 5, 1936. And it is based on the very large assumption that the Act is unconstitutional even where it does not impair the obligation of contracts.

⁵⁸*Ray v. Natural Gas Co.*, 138 Pa. 576 (1890); *Gilpeke v. Dubuque*, 1 Wall. 175, 17 L. Ed. 520 (U. S. 1864).

⁵⁹*Ray v. Pittsburgh*, *supra*.

stand to be the cases of *Ohio Trust Co. v. Debolt*, 16 How. 432; *Gelpeke v. Dubuque*, 1 Wall. 175; *Havemeyer v. Iowa Co.*, 3 Wall. 294; *Olcott v. Supervisor*, 16 Wall. 678. In *Ohio Trust Co. v. Debolt*, supra, the doctrine is thus stated: "The sound and true rule is that if a contract, when made, was valid by the laws of the state, as then expounded by all the departments of the government and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent act of the legislature, or the decision of its courts altering the *construction* of the law." The ruling applies, it will be observed, not to the general law, common to all the states, but to the laws of the state, 'as expounded by all the departments of its government;' and it is held that contracts valid by these laws may not be impaired, 'either by subsequent legislation, or by the decisions of its courts altering their construction.' The reference is of course to the statute law."

While we are all presumed to know the law, those of us who are members of the bar recognize the fact that we do not know what the courts will decide the law to be. It is this anomaly plus the well-known doctrine that equity particularly regards the circumstances of each case which prevent categorical conclusions in a discussion of this sort. But we may be confident that wherever possible our courts will apply the maxim:

"Interest reipublicai ut sit finis litium."

Philadelphia, Pa.

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