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New Frazier-Lemke Act

JOHN HANNA*

I

Congress in 1935 made its third annual attempt to adapt the Bankruptcy Act for the relief of the farmer.¹ The 1933 effort was unimportant except as a basis for what came later. Designed to facilitate extensions and compositions of farmer indebtedness, its machinery proved too cumbersome to be useful, and in any event the dependence of the proposals upon the consent of a majority of creditors holding a majority of claims in most instances gave the first mortgagee an absolute veto over proposed readjustments.² The 1934 law by authorizing conciliation commissioners in every county having a farm population of 500 or over and by increasing the compensation of conciliation commissioners provided a workable mechanism.³ The same law by adding as sub-

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2. Garrison, The New Bankruptcy Amendments: Some Problems of Construction (1933) 8 WIS. L. REV. 291; Recent Amendments to the Bankruptcy Act (1933) 19 A. B. A. J. 330; Hanna, Recent Additions to the Bankruptcy Act (1933) 1 GEO. WASH. L. REV. 448; Bankruptcy Amendments of 1933 (1933) 2 MERCER BEASLEY L. REV. 113; Agricultural Compositions and Extensions Under the Bankruptcy Act (1934) 20 A. B. A. J. 9; Adjustment of Farmers' Debts in Bankruptcy (1934) 12 NEB. L. B. 231; R. Hunt, Provisions of Amended Federal Bankruptcy Act Relating to Agricultural Compositions (1933) 38 COM. L. J. 630; Lusk, Discussion of the Proposed Amendments to the Bankruptcy Act (1933) 7 AM. LAW REV. 852; Richter, Recent Amendments to the Bankruptcy Act (1933) 8 NOTRE DAME LAWYER 460; Simpkins, Statutory Extensions to Individuals Under the Recent Amendments to the Bankruptcy Act (1933) 18 ST. LOUIS L. REV. 324; Stebbins, Constitutionality of the Recent Amendment to the Bankruptcy Law (1933) 17 MARQ. L. REV. 163; Is the Amendatory Act Unconstitutional? (1933) 9 AM. BANK REV. 289; Legislation Notes: (1933) 33 COL. L. REV. 704; (1933) 18 IOWA L. REV. 534; (1933) 3 DETROIT L. REV. 131.
section (s), the first Frazier-Lemke Act,\(^4\) provided a definite boon to farmer mortgagors and its coercive force was sufficient to bring about many so-called voluntary compositions, but the subsection was declared unconstitutional by the Supreme Court. The 1935 Act, also named after Senator Frazier and Mr. Lemke, settles a number of outstanding disputes about various sections of the existing law and attempts to bring subsection (s) within the constitutional limits of bankruptcy legislation.

Amendments to subsections (g) (k) (n) and (p) are the most important of the clarifying changes. Under the original form of subsection (g) a farmer before applying for the confirmation of an extension or composition proposal was required to deposit the money or security covering all claims having priority unless waived, as well as the consideration to be paid creditors in case of a composition. These requirements are now eliminated. Literally construed, the former requirements might have blocked most adjustments. Subsection (k) in its original form did not permit the necessary majority of creditors to reduce or impair the lien of a secured creditor in any way. Under the present law a majority of creditors representing a majority in amount may compel a reduction of interest. The provision does not affect accrued interest. An amendment to subsection (n) also clarifies subsection (o). It is now specifically stipulated that the filing of the petition gives the bankruptcy court jurisdiction over all the farmer's real and personal property, including contracts for purchase, contracts for deed, conditional sales contracts, equities and rights of redemption. When the period of redemption or any moratorium period has not expired, or where rights of purchasers at foreclosure sales have not become absolute, the period of redemption or period of confirmation of sale is extended for the time necessary to carry out the purposes of Section 75. Subsection (p) originally provided that the stays of proceedings mentioned in subsection (o) should not apply to proceedings for the enforcement of taxes nor to proceedings involving property not used in farming operations or as a home. These exceptions were omitted in 1935 and the prohibitions in subsection (o) now apply to all judicial or official proceedings, to all creditors public or private, and in respect to all the farmer's property wherever located.

Subsection (s) is new and can best be understood by a reference to its predecessor.

II

The Frazier-Lemke Act of 1934 provided among other things that the farmer who had tried and failed to effect a satisfactory extension or composition under Section 75 might petition to be adjudged a bankrupt and be then

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entitled to alternative options in respect to his property. By paragraph 3, the farmer, if the lien holders agreed, could purchase the property at its then appraised value, the value being the fair and reasonable, but not necessarily the market, value. Title and immediate possession went to the farmer but payments were deferred so that 2½ per cent was supposed to be paid in the second and third years, 5 per cent in the fourth and fifth years; the balance within 6 years. Deferred payments bore 1 per cent interest. If the lienholders refused assent to such immediate purchase, all proceedings were to be stayed for five years. During this period the farmer might retain all or any part of his property by paying a reasonable rental annually. At the end of five years, or before, the farmer might buy the property by paying into court the appraised price. Any real estate lien-holder could request a reappraisal, however, and the farmer had to pay whichever appraisal price was selected by the lienholder.

The Supreme Court in Louisville Joint Stock Land Bank v. Radford was confronted by an actual situation involving a real estate mortgagee, and after examining the effect of the statute upon the mortgagee’s rights, held it unconstitutional. The Supreme Court found that the operation of the law was to take from the mortgagee several rights given him by the laws of Kentucky under which the mortgage was executed. These rights included (1) the right to retain the lien until the secured indebtedness was paid; (2) the right to realize upon the security by a judicial public sale; (3) the right to determine when such sale shall be held, subject to the discretion of the Court; (4) the right to protect its interest by bidding at such sale whenever held, and thus to assure that the mortgaged property will be devoted primarily to the satisfaction of the debt, either through receipt of the proceeds or by taking the property itself; and (5) the right to control meanwhile the property during the period of default, subject only to the discretion of the Court, and to have the rents and profits collected by a receiver for the satisfaction of the debt.

Two principal arguments were made in the Radford case against the constitutionality of the first Frazier-Lemke Act. First, it was contended that it was not a law “on the subject of Bankruptcies” and hence that it was in contravention of the Tenth Amendment, which declares: “The powers not delegated to the United States by the Constitution, not prohibited by it to the State, are reserved to the States respectively, or to the people.” The Supreme Court, summarizing the arguments on this point, referred to the enlarged scope of bankruptcy legislation since the Constitution was established, quoted from its opinion in Continental Illinois National Bank & Trust Co. v. Chicago, Rock Island and Pacific Ry. Co. and apparently assumed without deciding,

6. See summary of the Radford case in re Young, 12 F. Supp. 30 (S. D. Ill. 1935). This case held the present Frazier-Lemke Act unconstitutional.
7. 294 U. S. 648 (1935)
that the general purposes of the law fairly came within the scope of bankruptcy statutes.

The second argument was that the Frazier-Lemke Act authorized a taking of property without due process of law and was therefore invalid under the Fifth Amendment. The Court held that the bankruptcy power was subject to the Fifth Amendment, found that the property of mortgagees was in fact taken without due process of law and on this ground overturned the statute. The Act was retroactive in terms and purported to take away vested interests in specific property.

The new subsection (s) attempts to assure the mortgagee his vested rights to a greater or less extent. Like the first Frazier-Lemke Act, it allows the farmer who has not obtained the acceptance of a satisfactory extension or composition proposal to petition to be adjudged a bankrupt. It will be recalled that to file his original petition under Section 75 the farmer must allege that he is insolvent or that he cannot pay his debts as they mature. As under the original subsection (s), the farmer can ask that his property be appraised after setting aside his exemptions, encumbered and unencumbered, and that he be allowed to retain possession of his property under the control of this Court. The appraisers are to determine the fair and reasonable market value of the property. All existing encumbrances remain in full force and effect. The farmer's privilege of buying his property at the appraised value is eliminated but instead all proceedings against him or his property are stayed for three years, provided he pays a reasonable rental semi-annually for the property of which he retains possession. The farmer has a year in which to make the first rental payment. The rental is used first to pay taxes and upkeep, and the balance, if any, is distributed to creditors as their interests appear. The Court has discretion to order the sale of unexempt perishable property not necessary for farming operations, may require payments above the amount fixed as rental and may order payments to be made quarterly, semi-annually or annually. The court's discretion must be exercised to protect creditors and at the same time to rehabilitate the farmer.

At the end of three years or earlier, the farmer may pay into Court the appraised value of the property, less amounts already paid on principal. Any creditor or the farmer may demand a reappraisal. After reappraisal and hearing the Court may fix the value of the property, and thereupon shall order a distribution to creditors and turn over to the farmer title as well as possession of his property. Any secured creditor, however, may request in writing that the property be sold at public auction and such a request is mandatory upon the court. One draft of the present law forbade the secured creditors to bid at such auction but this prohibition was eliminated. The mortgagee or other creditor may bid if allowed to do so by statute or contract. Usually the creditor will have this privilege. After the auction sale the farmer has 90 days in which to redeem, by paying the sale price plus five per cent interest. If the farmer
fails to comply with the provisions of the section, the orders of the court, or is unable to refinance himself within three years a trustee may be appointed and the property disposed of as in ordinary proceedings in bankruptcy.

Subsection (s) applies to all existing and future cases so long as Section 75 itself is in effect, that is, until March 3, 1938. All cases dismissed owing to the decision of the Supreme Court or the original subsection (s) are to be reinstated without further filing fees. Any farmer who has filed a petition under the general bankruptcy act may take advantage of Section 75. A previous discharge under another section of the Act is not a bar to a petition under Section 75.

The subsection is declared to be an emergency measure. If in the judgment of the court such emergency ceases to exist in its locality, then the court in its discretion may shorten the stay of proceedings and proceed to liquidate the estate. 8

III

Before considering some of the situations that may arise under the present Frazier-Lemke Act and the constitutional principles applicable to them, one should notice that the problem of varying the interests of a mortgagee was also before the Supreme Court in Home Building and Loan Association v. Blaisdell, the Minnesota moratorium case.

A Minnesota statute approved April 18, 1933, authorized a court in a real estate mortgage foreclosure action, upon application by the mortgagor, to extend the existing one-year period of redemption for such time as was deemed equitable, but not beyond May 1, 1935. The mortgagor was obliged to apply the income or the reasonable rental value of the property to the payment of taxes, insurance, interest and principal. Not only was the duration of the Act limited to two years but it was to expire sooner if the emergency ceased. The Loan Association was the holder of a mortgage in default. The mortgage contained a valid power of sale, which was properly exercised. The property

8. See In re Slaughter, 12 F. Supp. 206 (N. D. Texas 1935). The court although considering the Frazier-Lemke Act on the whole constitutional thought that the provision giving the court the power to determine when the emergency was over in a particular locality, clearly invalid: "I do not mention this emergency section with any thought that it is, in itself, constitutional. It clearly lacks that territorial uniformity which every national law must have. There is no legal way to have a statute applicable in Kaufman county and inapplicable in Potter county, or alive in Texas and dead in the Dakotas. The law must be universal, in so far as it reaches or touches the geography of the nation, and likewise it must be uniform in its application to a given class. Midwest Mutual Ins. Ass’n v. De Hoet, 208 Iowa 49, 222 N. W. 548; Head Money Cases (Edye v. Robertson), 112 U. S. 580, 5 S. Ct. 247, 28 L. Ed. 798." It would seem that the emergency clause satisfied the territorial uniformity requirement as well as does Section 6 of the Bankruptcy Act which allows to a bankrupt his state exemptions. Hanover National Bank v. Moyses, 186 U. S. 181 (1902). See also Block v. Hirsch, 256 U. S. 135.
was bought by the mortgagee. The mortgagor petitioned for an extension of time under the moratorium statute. He alleged that the property was worth more than the mortgage but owing to the economic depression he had been unable to obtain a new loan or to redeem. The mortgagee opposed the petition on the ground that the moratorium statute was unconstitutional. The lower Minnesota court decided in favor of the mortgagee but this was reversed by the Supreme Court of Minnesota. The Supreme Court of the United States by a vote of five to four affirmed the holding of the Minnesota Supreme Court.

The question in the Minnesota moratorium case was whether the State had unconstitutionally impaired the obligation of a contract, while the question under the Frazier-Lemke Act is whether Congress has deprived a creditor of property without due process of law. The criteria for determining the extent to which a State may subject an existing contract to its police power and for ascertaining whether Congress has violated the due process provisions are essentially the same. Contractual rights and other property interests are not absolutely exempt from interference by public authority. The test in either case is one of reasonableness. In the final analysis what is permissible and what is unconstitutional is a matter of degree. Some interferences amount to arbitrary spoliation, others are proper. Chief Justice Hughes in his opinion in the Minnesota moratorium case made five points in summary. First, an emergency existed which justified the exercise of the reserve power of the State; second, the legislation was addressed to a legitimate end, that is it was for the protection of a basic interest of society; third, the relief granted was justified by the emergency; and fourth, it was allowed on reasonable conditions; fifth, the legislation was temporary in operation. In connection with the rights of mortgagees in general the opinion says:10

"In the absence of legislation, courts of equity have exercised jurisdiction in suits for the foreclosure of mortgages to fix the time and terms of sale and to refuse to confirm sales upon equitable grounds where they were found to be unfair or inadequacy of price was so gross as to shock the conscience. The ‘equity of redemption’ is the creature of equity. While courts of equity could not alter the legal effect of the forfeiture of the estate at common law on breach of condition, they succeeded, operating on the conscience of the mortgagee, in maintaining that it was unreasonable that he should retain for his own benefit what was intended as a mere security; that the breach of condition was in the nature of a penalty, which ought to be relieved against, and that the mortgagor had an equity to redeem on payment of principal, interest and costs, notwithstanding the forfeiture at law. This principle of equity was victorious against the strong opposition of the common law judges, who thought that by ‘the

10. Id. at 446.
Growth of Equity on Equity the Heart of the Common Law is eaten out.' The equitable principle became firmly established and its application could not be frustrated even by the engagement of the debtor entered into at the time of the mortgage, the courts applying the equitable maxim 'once a mortgage, always a mortgage, and nothing but a mortgage.' Although the courts would have no authority to alter a statutory period of redemption, the legislation in question permits the courts to extend that period, within limits and upon equitable terms, thus providing a procedure and relief which are cognate to the historic exercise of the equitable jurisdiction. If it be determined, as it must be, that the contract clause is not an absolute and utterly unqualified restriction of the State's protective power, this legislation is clearly so reasonable as to be within the legislative competency."

Several different types of farm estates may be the subject matter of administration under the new bankruptcy law. Perhaps the simplest is illustrated by the case of a farmer owning 160 acres of land, now valued at $8,000, besides miscellaneous farm equipment and household goods. There is a first real estate mortgage of $8,000 in default on which there is unpaid interest of $800, a second mortgage of $2,000 in default, with unpaid interest of $240. In addition, taxes amounting to $400 are unpaid. Under the first Frazier-Lemke Act, if the land were appraised at $8,000 that would represent the maximum the farmer would have to pay for it after five or six years, assuming there were no reappraisal. The second mortgagee would be wiped out at once and the first mortgagee would lose all the back interest and part of the principal. Under the present law, while enforcement of the mortgages will presumably be stayed for three years, at the end of that time even if the appraisal is still the same, either mortgagee can ask that the land be sold at auction and either can bid more than the appraised price. The farmer has 90 days in which to redeem after the sale, but redemption requires the payment of the purchase price and not the appraised valuation.

Going back to the criteria of the Supreme Court in *Louisville Joint Stock Land Bank v. Radford,* under the facts of the illustration, the mortgagees have retained the lien and they have also retained the right to realize upon the security by a judicial public sale, as well as their right to bid at such sale. They have not had the right to determine when such sale shall be held, but the delay of three years is not much longer than delays that frequently occur in enforcing land security. Mortgagees generally do not have the absolute right to determine the time and place of sale. The enforcement of security is traditionally a matter of equity jurisdiction. Bankruptcy courts have always had the privilege temporarily of delaying sales under mortgage. The Supreme

Court in the recent noteworthy case of *Continental Illinois National Bank and Trust Co. v. Chicago, Rock Island and Pacific Ry. Co.*\(^\text{12}\) has upheld an injunction against the sale of pledged assets by a pledgee, when in the opinion of the court such sale would hinder a corporate reorganization under Section 77B. The three year stay under Section 75(s) is rather long but justified in the law by the existence of an emergency. Power to delay foreclosures belongs to equity and to bankruptcy courts irrespective of the equity jurisdiction. The power, admitted to exist irrespective of emergency, may be somewhat more broadly exercised because of the emergency. Furthermore the law stipulates that when the emergency ceases in any locality, the authority under the law is also to end.\(^\text{13}\)

Finally, the Supreme Court in the *Radford* case pointed out that mortgagees have the right during a period of default and pending the enforcement of the security to control the property subject to the discretion of the court and to have the rents and profits collected by a receiver. These rights in the mortgagee are much limited under modern security law. The present Frazier-Lemke law does not greatly curtail such rights. The farmer retains possession of the property, it is true, but subject to the control and supervision of the court. As a practical matter any other arrangement would be uneconomic until a new owner could go into possession. The farmer must pay a reasonable rental and may be required to pay additional amounts. Perishable property and personal property not used in farming operations may be sold without waiting for the expiration of the three year moratorium.

Viewing the problem as a whole, the modification of the mortgagee’s rights does not seem to be an arbitrary spoliation. For a desirable social end in an emergency, some of his remedies are varied and their consummation postponed. That is all. It is difficult to call this a denial of due process.

Unfortunately, from the standpoint of those anxious to uphold the Frazier-Lemke Act, the facts of my illustration do not present the situation where there is the greatest interference with the mortgagee’s rights. In many states the mortgagee has a power of sale entitling him to possession and the right to sell mortgaged property within a comparatively short time after default.\(^\text{14}\) In other states the mortgage takes the form of a deed of trust under which the trustee has the right of possession and a power of early sale. The existence of the power of sale does not always carry with it a right to immediate possession, without an application for a receiver. It is also true that in some states the mortgagor has a period in which he may redeem after the sale. In numerous jurisdictions, however, the application of the Frazier-Lemke Act to power of sale mortgages and deeds of trust to secure debt amounts to a serious diminution in the rights of the mortgagee. At the very least the mortgagee loses his

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13. Section 75(s)(6). *Cf.* n. 9, *supra*.
14. This is of course the situation in Missouri.
right to determine when a sale shall be held and frequently, if not usually, he loses also the right to control the property during the period of the default.

Virginia is a state where a deed of trust is the usual instrument by which land is given to secure debt. On default the trustee has the right of possession and a power of sale after advertisement. Terms and conditions of sale are left largely to the discretion of the trustee. There is no right of redemption after sale. No court proceedings whatever are required. In the recent case *In Re Sherman*, one of the creditors was a sister of the debtor and the debt represented chiefly her share in the purchase price which her brothers had agreed to pay for her portion of land which they had inherited in common. On this debt there was accumulated interest which had accrued through five years of default. Another creditor was the guardian for infants whose share had also been purchased and upon which there was also a considerable accumulation of interest. The real estate consisted largely of apple orchards already neglected to a point where their value was greatly impaired. The debtors were making no effort to maintain the property. Their chief concerns were with other enterprises. The debtors sought under the amended Frazier-Lemke Act, relief, which would have at least allowed them a further three years of delay in paying an obligation already long overdue. The property would remain in the possession of the debtors subject only to that supervision which the court might be able to give to its handling and to the payment of an annual rental. The first installment of the rent would not be paid for a year. The court held that, at least, as applied to the particular case, the Frazier-Lemke Act was a deprivation of property without due process of law and hence unconstitutional under the Fifth Amendment.

Another common case likely to arise under the Frazier-Lemke Act and one to which Congress specifically intended the Act to apply is the one where the mortgage has been foreclosed before the petition under Section 75 has been filed. When the mortgagor comes before the bankruptcy court he has nothing left except a statutory right of redemption. Prior to the enactment of the present subsection (n) a number of courts held that when the farmer had only this privilege to redeem, the land itself was not property which came within the jurisdiction of the bankruptcy court. The only property the farmer had was this personal privilege to redeem. That privilege was given essentially

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16. *In re Smith, 9 F. Supp. 277 (S. D. Iowa 1934) came up on appeal from an order of a conciliation commissioner, denying the application of the mortgagee to release the land from the administration of the bankruptcy court. The court granted the application on the ground that the mortgagor's naked legal title and right of redemption was not property "subject to be administered under section 75 of the Bankruptcy Act as amended (11 U. S. C. A. § 203)." Accord, *In re Borgelt, 10 F. Supp. 113 (S. D. Ill. 1935), aff'd C. C. A. 7th, Nov. 23, 1935, C. C. H. Bankruptcy Law Service 1760.* Cf. *In re Duffy, 9 F. Supp. 166 (E. D. Ill. 1934), which denied the motion of the mortgagee for leave to proceed with fore-*
dependent upon certain obligations and limited in time. If not exercised according to its terms it expired.

Congress recognized that farmers likely to seek relief were apt to be those against whom proceedings had reached the stage of a foreclosure sale. In subsections (m) and (o) therefore, as already mentioned, it sought to stay proceedings against the farmer and bring real estate and personal property under the jurisdiction of the bankruptcy court, even when all the farmer had was a right of redemption after foreclosure sale, a contract for deed or a conditional sales contract. The manifest purpose of Congress was to seize on a tenuous connection between a farmer and tangible real or personal property as a ground for preserving the status quo for three years. Assuming that the Frazier-Lemke Act might be administered constitutionally in certain circumstances, if it goes beyond the constitution in its attempt to cover other situations, and if these unconstitutional provisions are inseparably woven into the Act as a whole the entire statute must fall.

The Seventh Circuit Court of Appeals recently decided a case coming from Indiana, involving a statutory right of redemption. A proceeding had been instituted on January 3, 1933, to foreclose a mortgage for $30,000. The mortgagor filed a petition under Section 75 on July 23, 1934. In connection with this petition she obtained an injunction against the sheriff restraining him from delivering a deed to which the purchaser would have been entitled on August 5, 1934, following the expiration of the twelve month's statutory period of redemption after the foreclosure sale. The purchaser, who was also the mortgagee, sought to have the injunction dissolved after the expiration of the redemption period, but failed in the District Court and before the case was heard by the Court of Appeals the amended Frazier-Lemke Act had been passed. When the mortgagor filed her original petition she was in possession under a lease from the receiver. Her schedule of liabilities showed a contingent liability of $35,000 to the mortgagee in addition to the mortgage debt, and another debt of $4,000 secured by chattel mortgage. Her assets consisted of 320 acres subject to the mortgage of $30,000 and some livestock and farm machinery. Her financial situation was obviously critical and perhaps hopeless.

Under Indiana law, after the foreclosure sale and the expiration of the one year statutory period of redemption, the holder of the sheriff's certificate, which is issued at the time of the sale, becomes vested with an equitable estate in the land. Absolute legal title depends only upon the formality of the delivery of a deed. Congress by the second Frazier-Lemke Act has attempted

closure proceedings to obtain a deed. The court said that the owner of a right of redemption has property which may be subjected to the exclusive jurisdiction of a bankruptcy court. Also see In re Dickinson, 9 F. Supp. 227 (D. C. Wyoming 1934).

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to extinguish this right in the purchaser. All proceedings against the mortgagee are stayed for three years. The only way the purchaser can obtain the property at the end of that time is to demand that it be resold. The mortgagee thereafter has a further 90 days in which to redeem from the new sale. Thus at the end of three years and 90 days, which frequently means in addition to several prior years of default, the mortgagee can receive “what he was entitled to under the completed adjudication according to the laws of the state at the beginning of the period.”

The Seventh Circuit Court of Appeals held that Congress cannot constitutionally extend the period of redemption for three years beyond that fixed by state statutes. The rights of the parties, in the opinion of the court, had become vested under the laws of the state. Statutes providing for redemption from judicial sale constitute a rule of property and are binding upon all courts, state and federal, law and chancery. In the words of the Court, “We think that the fixing of a specific period of redemption of property following foreclosure constitutes such a state regulation of property rights as to bar Congress from altering it.”

A further situation in which Section 75 is apparently intended to operate for the benefit of the farmer is where he goes into possession under a land contract or an option to purchase. As is well known, a land contract is often used instead of deed and mortgage back where the purchaser is able to make only a small initial payment. A common provision is that the one having the contract to buy is entitled to a deed when he has paid half the purchase price. The seller up to such a time is entitled to possession on a default and it may be further stipulated that amounts already paid are to be regarded as rent or liquated damages. Conditional sales of land are frequently used as devices to avoid the complexities and expense of foreclosure. In many instances, the device is unsuccessful for the transaction is considered a mortgage irrespective of what the parties call it. Where the nominal set-up and the realities coincide, A conveys to B, but has an option to repurchase within a specified period. Sometimes the device is used as an incident to the settlement of a defaulted mortgage. It amounts to the mortgagee’s voluntarily granting a redemption period. The one having the option to repurchase often, and perhaps usually, is in possession.

Section 75 (o) 2 forbids the institution or maintenance of any proceeding for foreclosure of a mortgage on land, or for cancellation, rescission, or specific performance of an agreement for sale of land or for recovery of possession of land except upon permission of the bankruptcy judge prior to the disposition of a composition or extension proposal. Subsection (s) further provides for a stay of three years providing there is compliance with the conditions of the section. If the farmer follows the prescribed procedure under subsection (s) the judge has no authority during the three year period to permit any of the proceedings, already stayed as a result of the original petition under Section
75. Subsection (n) specifically subjects to the jurisdiction of the court any equity or right of the farmer in any property including contracts for purchase, contracts for deed, or conditional sales contracts. The intention of Congress seems clearly to be that the bankruptcy court shall allow the farmer three additional years to perform his obligations under contracts of sale and conditional sales contracts. The statute by mentioning personal property would also allow the farmer the same moratorium on conditional sales of personal property without regard to the nature of the property, the extent of the farmer's interest in it or other circumstances. If he were buying an automobile by installments under a conditional sale, he could have the car for three years by paying a reasonable rental and would have the right to buy it at the end of the period at the appraised price unless the seller asked for a public sale. If the car was used in farming operations the court would have no discretion to have it sold before the end of the three year period. It requires no technical knowledge either of motor cars or of forced sales to understand how little protection the seller would have under such an arrangement. While the court might take depreciation into account in fixing the rental, this protection is illusory, because the first rental payment apparently need not be paid for a year. The unavoidable delays incident to the filing of a petition, the temporary stay, the presentation or the composition or an extension proposal, the further petition to be adjudged a bankrupt, the appraisals and hearings, might easily mean that an article of personal property held on conditional sales contract, would be two years old before the first rental payment became due. If there were a default on the rental, the conditional seller would likely realize little or nothing from a sale of the property. Any general application of subsections (n), (o) and (s) to contracts of purchase and conditional sale would almost certainly result in many cases of serious destruction of the property rights of creditors.

In re Tracy,18 recently decided by the Seventh Circuit Court of Appeals illustrates something of what may be expected in the administration of Section 75 in respect to land contracts. The lands in question had originally belonged to the farmer but had been lost as a result of completed foreclosure proceedings. The land was bought by the mortgagee, an insurance company. Thereafter the insurance company agreed to sell the farmer the land for $69,000. He was to pay $7,000 or about one-tenth of the purchase price within four months of the contract, and $5,000 additional in various installments until 1939 when he could have a deed upon giving back a mortgage. The contract provided that upon a default, the option was to be forfeited and payments already made reclaimed as liquidated damages. The farmer paid the first $7,000 but defaulted on the other payments. Demand for possession was made on September 10, 1934, and the farmer notified that in thirty days

an action of forcible entry would be instituted. On October 5, 1934, the farmer filed a petition under Section 75. The Court of Appeals said that Section 75 purports to deal only with property owned by the farmer. The right to enter and take possession after default was property of the insurance company and it is unfair to attribute to Congress any intention to take away such a right. The court, referring to Section 75 (o) and ignoring the further provisions as to stay of proceedings in (s) finds that there is no property of the farmer to come within the jurisdiction of the court. While this decision may be technically correct, even under Section 75, since the notice to vacate came before the petition under Section 75, it is difficult to see how any different result would have been defensible had the farmer filed his petition before the insurance company took the preliminary steps to take possession of the land. Section 75 seems to contemplate giving the farmer the right to invoke the Act and obtain a moratorium even if he has only a contract for a deed. Under the wording of the Section as it existed prior to 1935 one might have argued that in some cases, notably where a farmer had only a statutory right of redemption, the land in respect to which such right might be exercised was not the property which was subject to bankruptcy jurisdiction. Such an interpretation seems out of the question under the Section as amended. If this is true the operation of subsection (s) in connection with (n) and (o), although perhaps not (n) and (o) alone since these standing by themselves contemplate the possibility of temporary stays, seems clearly a violation of the Fifth Amendment.

IV

Prior to the decision in *Louisville Joint Stock Land Bank v. Radford* it was at least arguable that the interference with creditors' rights under Section 75 (s) was not so patently arbitrary, capricious or confiscatory as to make the subjection a violation of the Fifth Amendment. Some interference with mortgagees' rights had already been sustained in the Minnesota Moratorium case. The variation and even the diminution of rights of secured creditors under Section 77 where a majority of the unaffected class consents had been upheld in *Continental Illinois National Bank and Trust Company v. Chicago Rock Island and Pacific Ry.* Since from the nature and size of a farmer's business, no class consent can be expected from secured creditors, some reasonable application of the principles of Section 77 might have been hoped for, if not expected. As I have already stated, it seems not unlikely that Section 75 (s) can be applied to certain mortgage situations so as not to constitute an arbitrary spoliation of creditors' vested interests. If such situations could be clearly separated under the existing law, one might argue that it should be sustained in some cases but not in others. The circumstances of mortgagees

and other secured creditors of farmers vary so greatly, the rights granted these creditors under state laws differ so materially, and the purpose of Congress to help the farmer in the very cases where the rights of creditors are greatest, such as is presented by the farmer having only a statutory right of redemption is so patent that it seems as if subsection (s) is either constitutional or unconstitutional as a whole. The Supreme Court has held that where one or more parts of a statute are unconstitutional and one or more parts are constitutional, the latter will be sustained only if complete without the former and capable of being carried out in accord with the legislative intent. On another occasion it was asserted that the valid parts may be sustained only if one can say that the legislature would have enacted those parts alone if it had known the other parts would be considered invalid. The question is whether valid and invalid parts are inseparably connected in substance. On the problem involving Section 75 (s) it is not so much a matter of separating constitutional and unconstitutional provisions as it is arguing that there are possible constitutional applications of a statute, whose essential authorizations are so broad as perhaps to make them wholly unwarranted under the Fifth Amendment. This at any rate is the opinion of the majority of federal judges who have thus far written opinions in cases involving Section 75 (s) as amended.

Many statutes contain a separability clause. A typical statement is: "If any provision of this Act is declared unconstitutional or the applicability thereof to any person or circumstance is held invalid, the validity of the remainder of the Act and the applicability of such provision to other persons and circumstances shall not be affected thereby." The standard separability provision approved by the National Conference of Commissioners on Uniform State Law reads as follows: "If any provision of this Act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provisions or applications, and to this end the provisions of this act are declared to be severable." No separability clause appears in any part of the bankruptcy act except in respect to the bankruptcy jurisdiction over municipal corporations. The presence of a separability clause does not mean that a court will necessarily hold a statute constitutional in part although unconstitutional in some features, nor does the absence of the clause mean that a court may not uphold a statute after the rejection of certain unconstitutional provisions or applications. Nevertheless where there is such a clause it may aid the court in determining the legislative intent. The tendency of some draftsmen to include separability clauses almost as a matter of form in new statutes, tends to diminish their significance.

23. Bankruptcy Act, § 80 (l).
Perhaps the leading case involving the separability doctrine is *Crowell v. Benson* which sustained in part the Longshoremen's and Harbor Worker's Compensation Act. The article of my colleague, Professor Dowling, in the American Bar Association Journal on the Dissection of Statutes contains an illuminating discussion of the case and of the problems raised by it. The Longshoremen's Compensation Act contained a separability clause in the precise words of the first such clause quoted herein. The Act authorized conclusive findings of fact by an administrative body. An award of compensation was made which involved the finding that the claimant was an employee of the respondent, and was injured while performing services upon the navigable waters of the United States. The district court granted a hearing upon the facts of the law and decided that the claimant was not an employee of the respondent. The court held that certain facts were jurisdictional and under the constitution must be decided independently by the judicial department. This view was sustained by the Supreme Court which at the same time upheld the statute as a whole. Since the administrative body was also intrusted with the responsibility of deciding other facts such as whether the accident was due to the intoxication of the employee or whether it arose in the course of the employment, Professor Dowling uses the phrase "Dissection of Statutes" to describe the process by which the law on the whole was sustained. The argument against the result is that the Court in effect is rewriting the statute. Much attention was given to the separability clause of the statute. The two viewpoints within the court are well illustrated by Professor Dowling's quotations from the prevailing opinion of Mr. Chief Justice Hughes (Justices Van Devanter, McReynolds, Sutherland and Butler concurring) and from the minority opinion of Mr. Justice Brandeis, with whom agreed Justices Stone and Roberts. Mr. Chief Justice Hughes said in part:

"In the absence of any provision as to the finality of the determination by the deputy commissioner of the jurisdictional fact of employment, the statute is open to the construction that the court in determining whether a compensation order is in accordance with law may determine the fact of employment which underlies the operation of the statute. And, to remove the question as to validity, we think that the statute should be so construed. Further, the act expressly requires that, if any of its provisions is found to be unconstitutional, 'or the applicability thereof to any person or circumstances' is held invalid, the validity of the remainder of the act and 'the applicability of such provision to other persons and circumstances' shall not be affected. Section 50 (33 U. S. C. A. § 950). We think that this requirement clearly evidences the intention of the Congress, not only..."
that an express provision found to be unconstitutional should be disregarded without disturbing the remainder of the statute, but also that any implication from the terms of the act which would render them invalid should not be indulged. This provision also gives assurance that there is no violation of the purpose of the Congress in sustaining the determinations of fact of the deputy commissioner where he acts within his authority in passing upon compensation claims while denying finality to his conclusions as to the jurisdictional facts upon which the valid application of the statute depends."

The doctrine seems at variance with that stated by Taft, C. J. in *Hill v. Wallace*\(^2^6\) where in response to a contention based on a separability clause the Chief Justice asserted: "Section 11 did not intend the court to dissect an unconstitutional measure and reframe a valid one out of it by inserting limitations it did not contain. This is legislative work beyond the power and function of the Court." In the same vein in the Longshoremen's case is Mr. Justice Brandeis's argument:

"It is said that the provision for a trial *de novo* of the existence of the employer-employee relation should be read into the act in order to avoid a serious constitutional doubt. It is true that where a statute is equally susceptible of two constructions, under one of which it is clearly valid and under the other of which it may be unconstitutional, the court will adopt the former construction.... But this act is not equally susceptible to two constructions. The court may not, in order to avoid holding a statute unconstitutional, engrat upon it an exception or other provision.... Neither may it do so to avoid having to resolve a constitutional doubt. To hold that Congress conferred the right to a trial *de novo* on the issue of the employer-employee relation seems to me a remaking of the statute and not a construction of it."

Assuming that the Frazier-Lemke Act in at least part of its possible applications is in violation of the Fifth Amendment, and especially in the absence of a separability clause, it seems evident that to sustain any of it the Supreme Court must extend even the broad doctrine of *Crowell v. Benson*. 

V

If the second Frazier-Lemke Act is declared unconstitutional by the Supreme Court the real effect on the farm population as a whole will be negligible. If such a law were constitutional and were in effect for any considerable period it is by no means certain that its net effect would be good. There is

\(^{26}\) 259 U. S. 44 (1922).
little doubt that it would diminish the attractiveness of the farmer as a credit risk. Even government financing agencies so long as they are operated on a business basis, and especially where they depend upon the investment market for funds, would have to take the Frazier-Lemke Act into account. The reaction of private lenders would be more promptly felt, either in refusals to lend to farmers at all or in increased interest rates and other charges.

The financial state of farmers as a whole, was never as desperate as one might have supposed who listened only to the professional and other friends of the farmer. Not all farm land is mortgaged. In Story County, Iowa, in 1931, for example, 59 per cent of the farm land was mortgaged.\(^27\) Not all mortgages are or ever were in default. Except for temporary defaults due to the banking holiday in 1933, mortgage defaults in the country as a whole even during the depression ranged from 2 to 6 per cent annually.\(^28\) The operations of the Farm Credit Administration have put many farm obligations on a long term low rate basis where the farmer is easily able to carry the load. The activities of the A. A. A. and the improvement in business have greatly increased the farmer's income.\(^29\) Many voluntary adjustments of farm debts have been made by creditors, some coerced perhaps by fear of the Frazier-Lemke Act, but not legally dependent upon it, and now established. Certain regions lately affected by drought or other calamity still need rehabilitation and isolated individuals are still financially oppressed. So far as bankruptcy can help such situations at all, it is likely that what is needed are regular bankruptcy proceedings rather than moratoria. One finds a confirmation of this in many cases filed under Section 75. The petitioners are often persons who have no reasonable likelihood of working out of their difficulties in three or five years or ever. Their only chance is to start again quite at the beginning.

Considering the number of farmers in the United States and the organized effort to induce them to take advantage of the first Frazier-Lemke Act, Section

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28. The *Yearbook of Agriculture* (1935) 692, gives the following figures showing the number of farms per 1000 changing hands as a result of forced sales or other defaults. The figures follow:

<table>
<thead>
<tr>
<th>Year</th>
<th>United States</th>
<th>West North Central States</th>
</tr>
</thead>
<tbody>
<tr>
<td>1930</td>
<td>20.8</td>
<td>27.5</td>
</tr>
<tr>
<td>1931</td>
<td>26.1</td>
<td>31.3</td>
</tr>
<tr>
<td>1932</td>
<td>41.7</td>
<td>47.1</td>
</tr>
<tr>
<td>1933</td>
<td>54.1</td>
<td>59.5</td>
</tr>
<tr>
<td>1934</td>
<td>39.1</td>
<td>40.7</td>
</tr>
</tbody>
</table>

The West North Central region comprises Minnesota, Iowa, Missouri, North and South Dakota, Nebraska and Kansas.

29. The United States Department of Agriculture estimates of farm income for the past three years are as follows:

<table>
<thead>
<tr>
<th>Year</th>
<th>Income</th>
</tr>
</thead>
<tbody>
<tr>
<td>1932</td>
<td>$4,328,000,000</td>
</tr>
<tr>
<td>1933</td>
<td>4,868,000,000</td>
</tr>
<tr>
<td>1934</td>
<td>5,950,000,000</td>
</tr>
</tbody>
</table>
75 has been an insignificant item in the work of farmer rehabilitation. Mr. Fred H. Kruse, Referee in Bankruptcy of Toledo, Ohio, reported to the National Association of Referees in Bankruptcy at its Washington meeting in July that 9187 cases had been filed under Section 75 in about four-fifths of the judicial districts. I estimate that the total number for the country was about 11,000. In about one-tenth of the cases, compositions or extensions were approved. In 2,449, petitions were filed under subsection (s). Perhaps the total for the United States was about 3,000. All of these pending cases might have been reinstated after the passage of the second Frazier-Lemke Act. I should be surprised if 1000 additional petitions have been filed since Mr. Kruse’s statistics were compiled. If one doubles this figure and assumes a total of 5,000 Frazier-Lemke cases pending and adds to this 5,000 out of other cases under Section 75, one has only 10,000 cases. If I may be permitted another estimate I should say that in only a minor fraction of these cases does it make any permanent difference to the farmer’s condition whether or not he obtains a moratorium. What that means to the country as a whole is indicated by Mr. Kruse’s references to the 21 counties in one judicial district in Ohio. There were 389 cases under Section 75 out of a total of 51,000 farmers, or three-quarters of one per cent. In 1930 there were 6,288,648 farms in the United States. In about two years the Farm Credit Administration handled about 1,000,000 loan applications. In about the same time there were 11,000 petitions for relief under Section 75. The comparative figures roughly indicate the significance of the Frazier-Lemke Act.

VI

Summarizing this discussion one may say that Congress has made an understandable effort to accomplish the difficult task of effecting in bankruptcy for farmers something of the same results as may be brought about for railroad

30. 10 J. Nat. Ass’n Referees in Bankruptcy 23 (1935).

31. By its second anniversary on May 27, 1935, the Farm Credit Administration had made advances and grants of about $3,000,000,000 to American farmers or an average of about $4,000,000 a day since its organization. This includes the drought relief funds, and crop production loans, and loans to cooperatives, as well as the Land Bank and Land Bank Commissioner’s loans. Farm mortgage loans by the 12 Federal Land Banks and the Land Bank Commissioner aggregate $1,725,000,000. Counting the loans made by Land Banks prior to the establishment of the Farm Credit Administration, such mortgage loans are in excess of $2,000,000,000. Farmers used about 90 per cent of the money lent on farm mortgages to pay their creditors. Commercial Banks received over $400,000,000, insurance companies $235,000,000, joint stock land banks $125,000,000, state and county tax authorities $50,000,000 and individuals and other unclassified creditors $725,000,000. Applications for new loans are being received in greatly reduced volume from the peak periods in 1933 and 1934. (Figures are from the Second Report of the Farm Credit Administration.)

In connection with the amount of new farm credit, attention is invited also to the recent statement of Mr. Rexford G. Tugwell, Undersecretary of Agriculture, that 150,000 voluntary adjustments of farmers’ debts had been effected in the past two years.
and industrial corporations. It may be that the degree of necessary interference with creditors' rights is so great that this end cannot be attained under the Constitution. In the meantime the situation of farmers as a whole has been so much improved by other policies that the ultimate fate of the Frazier-Lemke Act is no longer any life and death matter for agriculture. The technique of testing the constitutionality of the Act is to ascertain in a particular jurisdiction the precise rights of the creditor whose rights are to be affected. If the Act is to be construed to apply at all to the situation, the further question relates to the degree to which the rights are altered. At some point the interference will be so serious as to come within the prohibitions of the Fifth Amendment. If some interferences are so reasonable as to be unobjectionable, as for example where a mortgagee still fully protected is being merely refused the right of acceleration because of some technical default, and some interferences such as the attempt to control land on which a farmer has had but a right of redemption, which has expired before the applicability of the Frazier-Lemke Act is considered are invalid, the final problem is whether the statute can be upheld in some circumstances and not in others. The trend of decisions in the lower federal courts seems to indicate a present opinion that subsection (s) of Section 75 is still unconstitutional.32