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AGRICULTURE AND THE BANKRUPTCY ACT

By JOHN HANNA*

“**W**E learn nothing from history except that we learn nothing from it.” The American way of completing readjustments demanded by the operations of the business cycle has been through administration in bankruptcy. We have had four federal bankruptcy laws, and each has been the product of a depression.¹ Foreign countries might debase their currencies and en-

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¹Four bankruptcy acts have been passed in accordance with the authority in article I, section 8 of the constitution. The first bankruptcy act was adopted April 4, 1800, to be effective June 1, 1800, for five years. This followed the minor depression of 1798. The law was repealed December 19, 1803. The second bankruptcy law was directly the result of the acute distress resulting from the panic of 1837. In 1839 a bankruptcy bill passed the Senate. When the Whigs came into power March 4, 1841, a special session of Congress was called to pass legislation for the relief of debtors. John Tyler, who succeeded to the Presidency on the death of William Henry Harrison, recommended in a special message July 1, 1841, the passage of a bankruptcy law. The act was passed August 19, 1841. This was the first act granting a discharge of debtors who had filed a voluntary petition in bankruptcy. This act was repealed March 13, 1843. In the eighteen months of its existence more than 28,000 debtors had been relieved of nearly \$445,000,000 of obligations by the surrender of less than \$45,000,000 in property.

The minor panic of 1853 and the major panic of 1857, followed by the economic crises of the Civil War, brought renewed agitation for a third bankruptcy law. Thousands of enterprises in the North were ruined by the impossibility of collecting Southern debts after 1860. The 37th Congress, which convened in 1861, received over 40,000 petitions for the enactment of a bankruptcy law. On several occasions thereafter a bankruptcy bill passed one of the houses of Congress. The bill which was to become the Bankruptcy Act of 1867 was introduced in the House of Representatives on April 10, 1866, by Mr. Roscoe Conkling and passed the House on May 22 by a vote of 68 to 59. The Senate reached a favorable vote on the bill with certain amendments February 12, 1867. It became a law on March 3, 1867. The act was useful in facilitating readjustment after the panic of 1873, but it was widely felt that as a result of the act many individuals were ruined who, if they had received more consideration, could

gage in wholesale debt repudiation when confronted by large-scale financial problems. That was not the American practice. The American policy has been to hold debtors to their obligations to the extent of their abilities, to distribute the debtor's property less exemptions as far as it would go among creditors, and then give the debtors a chance to start again relieved of the balance of the old obligations. If American history teaches anything, it is that during a national depression the proper use of the device of bankruptcy becomes an item of major political policy. This is peculiarly true because American history also teaches that during a depression the integrity of the currency can be maintained only by prompt and courageous action to prevent demagogues from mobilizing debtors as a class for the support of plausible but dishonest and dangerous inflationary schemes. Bankruptcy is a direct contrast to inflation. Bankruptcy scales down obligations of individual insolvents in amounts determined by the particular situation. Inflation reduces all obligations irrespective of capacity to pay or the rights of creditors. Far-sighted statesmanship would have sensed this at once and by comprehensive expansion of the bankruptcy administration endeavored to avoid a degree of debtor discontent that would be a public menace. A human sympathy with the perplexity of public authority confronted by responsibility for many-sided activity cannot obscure the fact that the enlargement of bankruptcy law in the present emergency has been tardy and inadequate. Those who have seen the problem as a whole, who have diagnosed the ailments, and have prescribed for them, have lacked the influence to put their ideas into effective operation.

This is not to say that something has not been accomplished. The railroad and business corporation reorganization sections of the act have worked out their difficulties. Dissatisfaction with the act became so general that in 1878 it was repealed by a vote of 38 to 6 in the Senate and by 205 to 40 in the House.

Four years after the repeal of the bankruptcy law of 1867 a similar bill passed the Senate and lacked only four votes of being carried in the House. In every succeeding Congress efforts were made more or less nearly approaching success to enact a federal bankruptcy law. Finally, after the speculative boom between 1883 and 1889, over-stimulation was followed by reaction, and the panic of 1893 ensued. Demand for federal relief measures became imperative. The Senate passed a bankruptcy bill on June 24, 1898, the House on June 28, and President McKinley signed it July 1st. This is the bankruptcy law which, with subsequent amendments, is now on the statute books. See Noel, *History of the Bankruptcy Law* (1919). A brief summary of the four United States bankruptcy laws may be found in Hanna, *Cases and Materials on Creditors' Rights*, 527-537.

the bankruptcy law and the amendment bringing municipal corporations within the purview of bankruptcy have been intelligently drafted to meet exigent problems. The needs of the individual debtors, and particularly individual farmer debtors, whose discontent carries the greatest political menace, have been accorded only the most fragmentary and haphazard treatment by the sponsors of bankruptcy legislation. It is at precisely the point where political wisdom should be best demonstrated that the most crudely conceived legislation has been enacted. The obvious fact is that bankruptcy has not been regarded as a primary instrument for attacking the depression. Instead, various groups have pressed for the enactment of sections meeting their respective problems, and at the last minute a few other provisions have been hastily included as a legislative compromise.

The characteristic feature of the sections added to the Bankruptcy Act in 1933 and 1934 is that they are primarily for the relief of debtors who need not be designated as bankrupts. The emphasis is upon extension, composition and reorganization rather than liquidation. Section 74,² providing a procedure for the relief of individual as distinguished from corporate debtors, represented considerable study. While the searching criticism to which it has been subjected since its passage discloses several uncertainties, it was a fairly adequate piece of draftsmanship. Section 74, however, whatever its potential usefulness as a part of the Bankruptcy Act, was not designed primarily to meet the acute

²11 U. S. C. A. sec. 202, 1 Mason's U. S. Code tit. 11 sec. 202. In 1934, Sec. 74 was amended to provide that the personal representative of a deceased individual with the consent of the probate court might also file a petition under the section. Another amendment to subsection (c) apparently permits an extension or composition proposal to be considered even if the approval of a majority in number and amount of creditors is not obtained. This amendment reads as follows:

"After the first meeting of the creditors as provided in subdivision (c) (sic), the debtor fails to obtain the acceptance of a majority in number of all creditors whose claims are affected by an extension proposal representing a majority in amount, the debtor may submit a proposal for an extension including a feasible method of financial rehabilitation for the debtor which is for the best interest of all the creditors, including an equitable liquidation for the secured creditors whose claims are affected."

An important addition was also made to subsection (m) relating to property subject to the jurisdiction of the bankruptcy court:

"and this shall include property of the debtor in the possession of a trustee under a trust deed or a mortgage, or a receiver, custodian or other officer of any court in a pending cause, irrespective of the date of appointment of such receiver or other officer, or the date of the institution of such proceedings: Provided, That it shall not affect any proceeding in any court in which a final decree has been entered."

needs of a depression. Bankruptcy is on the whole the least expensive way of administering estates of some size. Its considerable machinery is not readily adaptable to small estates. As to these it is expensive and cumbersome. Solicitor General Thacher and Lloyd Garrison in their original drafts of the Hastings Bill attempted to parallel extensions of bankruptcy jurisdiction with reforms in administrative procedure. Whether their proposals were the best possible is an open question. At any rate, persons who thought they would be unfavorably affected by the changes stirred up so much opposition that administration in bankruptcy remains essentially unchanged.³

Section 74, at least in its original form, had another defect in a real depression. Extension and composition proposals had to be approved by a majority in number of creditors, representing

³Three New York City bar associations during 1929-1930, with the assistance of Colonel William J. Donovan as Counsel, investigated the actual operation of bankruptcy machinery. The result of that investigation is embodied in Colonel Donovan's report, entitled *In the Matter of an Inquiry into the Administration of Bankrupt Estates*, submitted to the United States district court for the southern district of New York. Critical analysis of this report appears in the article entitled *Bankruptcy Reform* by Grenville Clark of the New York Bar (1930) 43 Harv. L. Rev. 1189. See also Garrison, *Donovan Bankruptcy Report; A Summary of its Findings and a Discussion of Certain Criticisms* (1930) 16 A. B. A. Jour. 493; see as well Hanna, *Receiver in Bankruptcy—A Study in Bankruptcy Reform* (1930) 3 So. Cal. L. Rev. 241. The New York inquiry was followed in 1930 and 1931 by a nation-wide investigation "into the whole question of bankruptcy law and practice," authorized by President Hoover and conducted by Solicitor-General Thomas D. Thacher and Mr. Lloyd Garrison through the agency of the Department of Justice. Some of the findings of this investigation are set forth in an article by Judge Thacher, "Proposed Change in Bankruptcy Act," (1931) 3 N. Y. S. Bar Ass'n Bulletin 532. The complete findings of the investigation and a discussion of the proposed amendments to the Bankruptcy Act are contained in *The Report of the Attorney General on Bankruptcy Law and Practice*, Senate Document, No. 65, 72d Congress, 1st Session. Changes in our present bankruptcy statutes, designed partly to extend the jurisdiction of the bankruptcy courts, partly to simplify and improve bankruptcy procedure, were proposed to Congress in 1932 by Senator Hastings and others. The bill of Senator Hastings was the outgrowth of a two years' study by the Department of Justice, embodied the conclusions of Solicitor-General Thacher and Mr. Lloyd Garrison, and was recommended by Attorney General Mitchell and President Hoover. The actual law which was passed March 3, 1933, contains few of the provisions of the original Hastings bill. All the administrative sections, the important sections dealing with corporate reorganizations, the detailed provisions bringing general assignments within the purview of bankruptcy, were omitted. The new law followed the Hastings bill in defining a class of debtors who were to have the benefit of the act although they are not to be called bankrupts. So far as it relates to individual debtors, what the Hastings bill says about compositions and extensions has been now enacted into law. In reality, these provisions, as well as the rest of the new law, follow historical precedent in being derived out of the emergency of acute financial distress of a numerous and influential fraction of the population.

a majority in amount of claims. If the debtor has a mortgaged home, this frequently meant the first mortgagee had an absolute veto power over all adjustments. Furthermore, the section still states specifically that the amount and nature of liens of secured creditors may not be affected.

Farmers are among those entitled to file petitions under section 74. They were the only individuals having enough friends in Congress to press successfully for special and additional bankruptcy relief. Neither in 1933 nor in 1934 were the proposals for aiding farmers in bankruptcy a part of the program of the sponsors of the bankruptcy amendments.

Section 75 was a hastily concocted statute dragooned into the Act of March 3, 1933, as the price of the passage of the railroad bankruptcy section. The section as drafted proved almost wholly worthless.⁴ Designed to make the farmer's access to bankruptcy simple and inexpensive, its operation depended upon the appointment in a county of a conciliation commissioner who had to work almost without compensation. To invoke the section at all, fifteen farmers had to join in alleging insolvency or inability to pay their debts and petition for the appointment of a conciliation commissioner. Since the farmer was required to pay only a \$10 fee and since the conciliation commissioner was obliged to do an attorney's work for the farmer, section 75 was considerably better for the farmer than section 74 in the matter of expense. For the tenant farmer, section 74 was preferable since only under section 74 claims for future rent could be considered as provable debts.⁵

⁴Garrison, *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. Jour. 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. Jour. 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.

⁵While the 1934 Amendments made no specific change at this point in section 75, other amendments seem to have made rent claims provable debts under the section. Section (1) (a) (26) defines debt "as any debt,

Neither section was of much utility to the farmer because secured creditors' claims could not be reduced without the creditors' consent. In the case of the farmer particularly, a single mortgagee was apt to represent a majority in amount of claims, and so have a veto power on any proposal. Section 75 was so little used by farmers that after eight months only forty petitions under it had been filed in the entire country.

The efforts of the administration were directed to helping the farmer in other ways than bankruptcy. The Agricultural Adjustment Administration was attempting to raise prices by reducing production. The Farm Credit Administration was attempting to improve the financial status of the farmer by refinancing his mortgage obligations and by making available to him other credits on easy terms. In addition the Farm Credit Administration was working with agricultural debt adjustment committees in nearly all the states for the voluntary reduction of farmers' obligations. The Farm Credit Administration, with its responsibilities to the land banks and to mortgage bond holders, as well as its concern to maintain the integrity of farm credit, was not disposed to any extensive advocacy of bankruptcy as a farm relief measure.

The scope and magnitude of the administration's efforts to aid the farmer might have been expected to allay farm discontent. They did in fact have some such effect but not to a sufficient degree to quiet all agitation for further relief. Some delay was inevitable in setting up new credit agencies and in getting to the farmer the actual benefits of various types of subsidies. In the meantime, the farmer was alarmed by the rise in prices of certain manufactured goods. The inflationists also did what they could

demand or claim provable in bankruptcy." Section 63 (a) (7) as amended in 1934 includes as provable debts

"claims for damages respecting executory contracts including future rents whether the bankrupt be an individual or a corporation, but the claim of a landlord for injury resulting from the rejection by the trustee of an unexpired lease of real estate or for damages or indemnity under a covenant contained in such lease shall in no event be allowed in an amount exceeding the rent reserved by the lease, without acceleration, for the year next succeeding the date of the surrender of the premises plus an amount equal to the unpaid rent accrued up to said date: Provided, That the court shall scrutinize the circumstances of an assignment of future rent claims and the amount of the consideration paid for such assignment in determining the amount of damages allowed assignee hereunder: Provided further, That the provisions of this clause (7) shall apply to estates pending at the time of the enactment of this amendatory Act in which the time for filing such claims has not expired."

The general reference to debts in section 75 therefore presumably now covers claims for future rent.

to keep up farmer dissatisfaction in order to utilize his political power for their own purposes.

Senator Frazier of North Dakota, with the cooperation of Representative Lemke of the same state, had been advocating since 1930 a measure which would require the government to issue \$3,000,000,000 in fiat money for the purpose of buying up farm mortgages. Mortgagors, under this plan, would pay the government 1½ per cent interest per annum and the same annual percentage on the principal. This was the original Frazier-Lemke bill. It was presented again in 1934. This bill found no favor with the administration and was buried in committee as the 1934 session approached adjournment. In the meantime the Senate and House had reached substantial agreement on the new corporation reorganization section of the Bankruptcy Act. Senator Frazier and Senator Long of Louisiana attempted on May 4 to amend the corporate bankruptcy section by an inclusion of the Frazier-Lemke mortgage purchase bill. This attempt was defeated 37 to 11, Senator Long voting "nay" so that he might later move for a reconsideration. A new Frazier-Long proposal was presented several days later as a separate bill to amend the bankruptcy act and referred to the Committee on the Judiciary May 9.⁶ The bill was reported June 1 and shortly thereafter slipped through the Senate by unanimous consent. The House then passed it with the amendment limiting the effect of the bill to existing farm indebtedness. Neither bill included anything about government purchase of farm mortgages.

The Senate and House leaders in the meantime had agreed to a slate of measures, and the Frazier-Lemke bills were not among them. It was generally conceded that further agricultural legislation was dead so far as the 73rd Congress was concerned when Senator Bulkley of Ohio insisted upon consideration of the Omnibus Banking Bill.⁷ Since this was not in the list of agreed bills, Senator Long seized the opportunity to break the slate wide-open and force the passage of Senator Frazier's bankruptcy measure. Senator Long had some difficulty in getting the bill before the Senate, but after he had succeeded in so doing he announced he would talk until something was done for the farmers. Senator Frazier was willing to concur in the House amendment. Senator Long put through a motion to send

⁶Sec. 3580. This bill abandoned the mortgage purchase feature.

⁷Sec. 3748 (73d Congress).

the bill to conference. Senator Long was chairman of the conference committee. After a mix-up involving the loss of one conference committee report, a new report was made advising that the Senate concurred in the House amendment. The report was accepted, and the bill passed the Senate 60 to 16 as the price of early adjournment. There was little debate, though the bill was actively opposed by some large holders of farm mortgages. Senator Lonergan of Connecticut called the bill one "for the wholesale repudiation of obligations—this is taking property without due process of law. I am satisfied as a lawyer that there is not any court in the land that would uphold this bill if it should be enacted as law." Senator Hebert of Rhode Island had much the same opinion. Senator Bankhead feared that because of the act, the farmer would not be able to obtain new credit. On the other hand, Senator Long insisted the bill was conservative legislation, and this opinion was shared by several Senators who did not customarily find themselves in agreement with the Senator from Louisiana. Much of the bill's support came from those who hoped it would be insurance against inflation.⁸ The president held the bill for several days and it is understood received an informal opinion from the attorney general that the bill was constitutional. In signing the bill the president indicated he thought the fears of the opponents of the bill to be based upon misconceptions of its possibilities.⁹

I.

The new law, popularly entitled the Frazier-Lemke Act, is an addition to section 75 of the Bankruptcy Act. Two other amendments not in the Frazier-Lemke Act were also made to section

⁸See for the legislative history of the Frazier-Lemke Act 78 Cong. Rec. (73rd Congress) 8066, 8082, 8362, 10174, 12055 (Long), 12060, 12077 (Long) (Hebert, Lonetgan, Hastings, Robinson, Bankhead) 12356, 12381-2. Among the statements in the House is one by Representative Charles U. Truax of Ohio who said:

"On June 18, 1934, the Congress of the United States passed H. R. 9865, a new declaration of independence for the American farmer. When this law becomes effective I can but wonder what will become of the ruthless money lender when the breath of Gold leaves his feculent body and a financial death stops the rattling of his grasping brain, for he is unfit for the higher realm of life and too foul for the one below. He cannot be buried in the earth, lest he provoke a pestilence; nor in the sea, lest he poison the fish; nor swing in space like Mahomet's coffin, lest the circling worlds in trying to avoid contamination, crash together, wreck the universe, and bring again the noisome reign of chaos and Satan." 78 Cong. Rec. 11923.

⁹The president's statement was as follows:

"This is another bill on which many arguments pro and con have been

75. One of these is a provision for the appointment of one or more conciliation commissioners in all counties having a farm

made. There has been a serious lack of understanding of its provisions and it has been alleged that insurance companies and other mortgagees will suffer severely through the use of this law by farmers to evade the payment of debts that are within their capacity to meet.

"I do not subscribe to these fears.

"I have sufficient faith in the honesty of the overwhelming majority of farmers to believe that they will not evade the payment of just debts.

"Furthermore, contrary to the belief of many uninformed persons, this is not a general or wholesale moratorium privilege. The provisions for appointment of appraisers under the Bankruptcy Act and for the judicial review of their appraisals furnish adequate checks against the possibility of unfair appraisals.

"The actual repugnance with which farmers, like other rightminded people, regard bankruptcy will prevent them from availing themselves of the provisions of this measure except under the force of necessity. The bill is intended to protect not only the farmers, but their creditors also.

"In the actual operation of the law I do not believe that losses of capital will greatly exceed, if they exceed at all, the losses that would be sustained if this measure were not signed.

"On the other side of the picture, it is worth remembering that this act will stop foreclosures and prevent occasional instances of injustice to worthy borrowers. The mere threat of a use of this machinery will speed voluntary conciliation of debts and the refinancing program of the Farm Credit Administration. It will prevent deficiency judgments—a form of liability which, in the judgment of many thinking business men, ought to be abolished entirely.

"The bill is in some respects loosely worded and will require amendment at the next session of Congress. Nevertheless, the reasons for signing it far outweigh the argument on the other side." *N. Y. Times*, June 30, 1934.

The Farm Credit Administration issued a statement on July 2, 1934 in part as follows:

"The Frazier-Lemke amendment to the Bankruptcy Act is in accord with the program of the Farm Credit Administration, since it attempts to prevent occasional selfish creditors from foreclosing on distressed farm debtors. W. I. Myers of the Farm Credit Administration said here today (July 2).

"The program of the Farm Credit Administration has been to prevent farm foreclosures and to refinance excessive debt burden on a basis which would permit good farmers to work out.

"As a result of the general recovery during the past year and the loans of the federal land banks and the Land Bank Commissioner, the great majority of distressed farm mortgage cases have been relieved, leaving a very slight minority of farmers who will have to go into bankruptcy to save their homes.

"Farmers as a class are very slow to take bankruptcy, Governor Myers stated, "and my experience in working with them personally and in the Farm Credit Administration gives me every confidence that they still retain an ever-present urge to pay their debts. More than 86 per cent of the installments on Land Bank Commissioner loans, which generally have been made to the most heavily indebted farmers, which matured prior to June 1 were paid on or before they were due. Of those which are delinquent, two-thirds are for less than 30 days. This shows that even the most heavily indebted farmers are acting in the highest good faith." *F. C. A. Press Service No. 5-75*.

If the Frazier-Lemke Act is used to any large extent by farmer

population of 500 or more. If the farm population is less, counties may be combined to form a district entitled to a conciliation commissioner.¹⁰ The filing fee remains at \$10, but the conciliation commissioner's compensation is raised from \$10 to \$25 per case¹¹ and the commissioner is allowed the franking privilege on official business.¹² The Frazier-Lemke Act is new subsection (s). It is this subsection about which controversy has centered.¹³ Since it cannot be invoked until the farmer has presented an extension or composition proposal under other parts of section 75, it may be well first to review other subsections of the section.

Section 75 is an emergency measure, and petitions may not be filed under it after March 3, 1938.¹⁴ Until then any farmer may file a petition "with schedules" stating that he is insolvent or unable to pay his debts as they mature, i. e., that his liabilities exceed his assets, or that current assets are insufficient to meet current liabilities, and that it is desirable to effect an extension or composition.¹⁵ The \$10 fee which must accompany the petition is all the farmer is required to pay, although if he desires the farmer may agree with creditors to pay half the cost of supervising his operations in the event the proposal is accepted.¹⁶ The conciliation commissioner if requested must assist gratuitously the farmer in preparing the petition and in complying with the pro-

mortgagors, the federal land banks and the joint stock land banks will be among the chief sufferers. In two recent cases joint stock land banks have attacked the constitutionality of the Act. In *re* Bradford, (D.C. Md. 1934) 7 F. Supp. 665 (Potomac Joint Stock Land Bank of Alexandria, Va.); In *re* Radford (D.C. Ky. 1934) 2 U.S. Law Week, No. 12, p. 7. See (1934) 11 Am. Bank. Rev. 42.

¹⁰Sec. 75 (a) 11 U. S. C. A. 203 a.

¹¹Sec. 75 (b).

¹²Sec. 75 (b).

¹³Aside from newspaper comments on the act, few other discussions have appeared up to the time this manuscript is sent to the printer. See Hook, Does the Frazier-Lemke Amendment Grant Relief as to Debts Secured by Liens on Exempt Property, (1934) 11 Am. Bank. Rev. 21; Britton, The Farm Moratorium Amendment, (1934) 9 J. Nat'l. Ass'n. Refer. in Bank. 41; Frazier-Lemke Act Unconstitutional? (1934) 11 Am. Bank. Rev. 42; (a digest of briefs in *Radford v. Louisville Joint Stock Land Bank*, (D.C. Ky. 1934) 8 F. Supp.—; Hunt, Land Titles as Affected by Bankruptcy, (1934) 20 A. B. A. Jour. 719; Mitchell, Misconceptions over the Frazier-Lemke Act; Farmers' Future Credit Unharmful (July 13, 1934) *The Annalist*; Krauthoff, the Frazier-Lemke Act, (1934) 39 Com. L. J. 586; see also Hanna, Ploughing Under the Farm Debt Crop (1934) 27 Am. Bankers A. J. 26; and Hanna, The Frazier-Lemke Amendments to Section 75 of the Bankruptcy Act (1934) 20 A. B. A. Jour. 687.

¹⁴Sec. 75 (c).

¹⁵Sec. 75 (c). A personal representative of a deceased farmer may also file a petition, Sec. 75 (r), G. O. L. 9.

¹⁶Sec. 75 (b).

visions of the law in any other respect.¹⁷ The petition must be filed with the clerk of the United States district court, but this is the responsibility of the conciliation commissioner.¹⁸ The farmer is only required to file it with the commissioner. An inventory of the farmer's estate must be filed within 10 days after the filing of the petition, but this time may be extended by the judge.¹⁹

The conciliation commissioner must call a meeting of creditors promptly,²⁰ but creditors are entitled to at least a ten day notice in writing unless they waive such notice in writing.²¹ The notice to the creditors contains a summary of the inventory and the names and addresses of secured and unsecured creditors with amounts owing to each. Prior to the meeting of creditors the commissioner should set off the farmer's exemptions.²² The exemptions are determined by state law, and it may be necessary for the farmer affirmatively to ask for some of them.

The farmer must attend the first meeting of creditors and may be examined in connection with his schedules and inventory. The creditors if they wish may submit a supplementary inventory.²³ The conciliation commissioner must prepare the final inventory.²⁴ After the hearing the commissioner must fix a time within three months during which application for confirmation must be made.²⁵ This time may be extended for cause. Between the time of filing the petition and disposition of the application for confirmation of the extension proposal the court may exercise such control over the farmer's property as seems necessary.²⁶ No costs or other charges may be taxed against the farmer or the creditors.²⁷ It would seem this does not necessarily mean that costs incident to control by the court may not be charged against the property in accordance with general equity practice. The farmer cannot file his application for confirmation until his proposal has been accepted in writing by a majority in number of all creditors whose claims have been allowed, including secured creditors affected by the proposal.²⁸ The majority in number must

¹⁷Sec. 75 (g).

¹⁸Sec. 75 (c).

¹⁹Sec. G. O. L. (3).

²⁰Sec. 75 (e).

²¹G. O. L. 3; Bkcy. Act, sec. 58.

²²Sec. 75 (e).

²³Ibid.

²⁴Sec. 75 (f).

²⁵G. O. L. 4.

²⁶Sec. 75 (e).

²⁷Sec. 75 (b).

²⁸Sec. 75 (g).

also represent a majority in amount. A further condition to confirmation is that the money or security necessary to pay debts which have priority unless waived, and, in case of a composition, the consideration to be paid to creditors, must be deposited subject to the order of the court. A possible difficulty might arise here when the farmer is borrowing the money to effect the composition. The lenders might not pay the money until the composition is confirmed and security furnished. The dilemma as stated is that the court cannot confirm the composition until the security is deposited, and the lender cannot make the secured loan until the composition is approved. Some persons feared this would make the section unworkable. It seems reasonable to expect that under a liberal interpretation of the section the lender's formal commitment, perhaps with checks or funds deposited in escrow, would be accepted as compliance with this provision.

The section provides that a date and place convenient in both respects to the parties in interest shall be fixed for a hearing upon the application for confirmation.²⁹ The proposal shall be confirmed if it includes a fair and practicable method of liquidation for secured creditors and of financial rehabilitation for the farmer, is for the best interests of all creditors, and its offer and acceptance are in good faith. The court is directed to require each creditor filing a claim to prove that such claim is free from usury. Presumably an affidavit to this effect would be sufficient if not challenged by adverse evidence.

The section, in terms, allows confirmation of an extension or composition proposal by the "court."³⁰ Since a conciliation commissioner is a referee, and since a referee is by definition included within the term "court," it would seem that a conciliation commissioner might approve an application for confirmation. Section 12, the general section on compositions, stipulates that the judge shall confirm a composition although even section 12 does not specifically require that the hearing be before a judge. Little reason is apparent why the judge should have the duty of passing upon applications under section 75 in all cases. If the section is used at all frequently, this additional duty will be a serious burden upon the district judges. In some of the large agricultural judicial districts there are only two or three federal judges, and these sit regularly in relatively few places in the state. Since hearings on

²⁹Sec. 75 (h).

³⁰Sec. 75 (i).

applications for confirmation under section 75 must be held in places convenient to the parties in interest, the law obviously contemplates that the hearings are to be held in other places than those regularly designated for federal court sittings. It ought to be enough if those interested in a confirmation have the privilege of demanding a review by the judge after action by the commissioner. The commissioner almost certainly would thus be able to dispose of many cases without action by the judge. The Supreme Court, however, under General Order L, requires the conciliation commissioner to transmit the application for confirmation to the judge with the acceptances, proofs of allowed and disallowed claims, list of debts having priority, list of secured debts with a description of the security for each, the final inventory with the list of exemptions, a certificate of the depository showing that the final deposit has been made, and the commissioner's recommendation for or against confirmation, with a statement as to the control the commissioner believes should be retained by the court over the farmer's property after confirmation. The General Orders also require that the hearing on the application for confirmation be conducted by the judge.³¹

Any party in interest within six months after the confirmation of the composition or extension proposal may apply to have the proposal set aside. The judge must thereupon hold a trial upon the issue raised. He may set the confirmation aside and reinstate the case on a showing that fraud was practiced in the procuring of the composition or extension and that such fraud was not discovered by the petitioners until after the confirmation.³²

If a composition or extension is not confirmed, or if confirmed is set aside, the case is dismissed.³³ The farmer and his creditors are thereupon remitted to their ordinary legal remedies at law and equity. The farmer does not remain subject to the bankruptcy court as would be the case of any debtor except a farmer or wage earner under section 74.

The obvious intent of section 75 is to place all the farmer's property under the jurisdiction of the bankruptcy court after the petition is filed. While liens of secured creditors cannot be affected as to amount and character of the lien, they cannot be enforced so long as the farmer's petition for debtor relief is pending.

³¹G. O. L. 6 and 7.

³²Sec. 75 (m).

³³Sec. 75 (l).

The section specifically provides that, unless a creditor petitions to the court for permission to institute proceedings against the farmer and the judge grants the petition after a hearing and report by the conciliation commissioner, several different sorts of proceedings may not be instituted after the filing of the petition or, if instituted prior to its filing, cannot be maintained.³⁴ In spite of its detail the subsection dealing with the stay of proceedings leaves a number of questions unanswered.³⁵ In the first place, it should be noted that the introductory sentences of subsection (o) refer to proceedings "in any court or otherwise." The list of proceedings that cannot be instituted or maintained include proceedings involving any money demand, foreclosure of real estate mortgages, cancellation, rescission, or specific performance of an agreement for sale of land or recovery of possession of land, proceedings to acquire title to land as a result of tax sales, proceedings by way of execution, attachment, or garnishment, proceedings to sell land under judgment or mechanics' liens, and seizure or distress sale or other proceedings under an execution or under any lease, lien, chattel mortgage, conditional sale agreement, crop payment agreement or mortgage. Subsection (p) provides that the prohibitions of subsection (o) do not apply to proceedings for the collection of taxes, including interest or penalties, nor to proceedings affecting solely property other than that used in farming operations or comprising the home or household effects of the farmer or his family.

Nothing is said in subsection (o) about the enforcement of pledges, but a pledge may be included in the term "lien." Powers

³⁴Sec. 75 (o).

³⁵Sec. 75, subsection (o) reads as follows: "Except upon petition made to and granted by the judge after hearing and report by the conciliation commissioner, the following proceedings shall not be instituted, or, if instituted at any time prior to the filing of a petition under this section, shall not be maintained, in any court or otherwise, against the farmer or his property, at any time after the filing of the petition under this section, and prior to the confirmation or other disposition of the composition or extension proposal by the court: (1) Proceedings for any demand, debt, or account, including any money demand; (2) Proceedings 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; (3) Proceedings to acquire title to land by virtue of any tax sale; (4) Proceedings by way of execution, attachment, or garnishment; (5) Proceedings to sell land under or in satisfaction of any judgment or mechanic's lien; and (6) Seizure, distress, sale, or other proceedings under an execution or under any lease, lien, chattel mortgage, conditional sale agreement, crop payment agreement, or mortgage." See *In re Smith*, (D.C. Ill. 1934) 7 F. Supp. 863; *In re Faour*, (C.C.A. 2d Cir. 1934) 72 F. (2d) 719.

of sale under chattel or real estate mortgages are not specifically covered, but the language of the subsection in referring to the proceedings "in any court or otherwise" may be broad enough to cover such powers. The law prohibits *sale or other proceedings*. It also says proceedings *in any court or otherwise*. The question of pledge is not particularly important because farmers are not in the habit of securing their obligations by pledges. The power of sale question under real estate and chattel mortgages, however, is of great significance. Mr. Reuben G. Hunt, one of the more acute commentators on the late bankruptcy amendments, in a recent article expresses doubt as to whether subsection (o) applies to proceedings out of court under powers of sale in deeds of trust.³⁶ The very detail with which proceedings to be stayed are listed and the omission of any reference to the relatively common deeds of trust is an argument of considerable weight in support of the contention that trust deed powers of sale are not covered by the subsection. Mr. Hunt restricts his own argument to powers of sale in deeds of trust.³⁷ It seems to me the argument may apply also in some states to powers of sale granted to the mortgagee under ordinary chattel and real estate mortgages, provided the one exercising the power does not need court help. Court help is frequently necessary, and such proceedings would of course be stayed³⁸ under the subsection.

The problem of the extent of the bankruptcy court's authority over property in which a farmer has some interest has an additional importance in view of the extensive privileges accorded to the farmer by the new subsection (s).

II.

Subsection (s) apparently cannot be invoked by the farmer until he has attempted to obtain an extension or composition under the preceding subsections.^{37a} Subsection (s) states that any farmer who fails to obtain the acceptance of the necessary creditors to his proposal or "if he feels aggrieved by the composition or extension," may amend his petition by asking to be adjudged a bankrupt. The "feels aggrieved" expression is puzzling. Bankruptcy administration is statutory but within the broad field of

³⁶Hunt, Land Titles as Affected by Bankruptcy (1934), 20 A. B. A. Jour. 719.

³⁷In some but not in all states a deed of trust is regarded as a mortgage. See 3 Jones, Mortgages, 8 ed. Sec. 2290 et seq.

^{37a}In re Chab, (D.C. Neb. 1934) 8 F. Supp. 195.

equity jurisprudence. An equity court is not accustomed to have its jurisdiction determined by the whim of a litigant. If a farmer presents a composition or extension proposal and it is accepted without conditions by the requisite creditors in number and amount, can it be assumed that a court will permit a farmer to allege he "feels aggrieved" and render the proceedings to that point a nullity? In my opinion a farmer would be estopped to take any such position. If the creditors, although accepting the proposal, stipulate certain onerous conditions of control of the farmer's property, then perhaps the farmer may "feel aggrieved." The farmer should have some substantial basis for his grievance. The fact that the subsection seems to contemplate a hearing on the petition indicates that the court has some discretion in the matter of the adjudication.

Assuming that the farmer's petition that he be adjudged a bankrupt has been granted, the farmer may petition that all his property, whether pledged, encumbered or unencumbered, be appraised, and that his exemptions "subject to any liens thereon" be set aside.

The law speaks of appraisal and appraisers without any further explanation except that the appraisers shall find the fair and reasonable value, not necessarily the market value, at the time of the appraisal. Section 70 (b) requires that all real and personal property belonging to bankrupt estates be appraised by three disinterested appraisers. This unnecessary demand is responsible for much of the excessive expense in administering small bankrupt estates. The General Orders XLV provide that the compensation of appraisers shall be fixed in the order appointing them. Apparently under subsection (s) the referee may appoint the appraisers. Since the number of appraisers is not stipulated in the subsection, I was inclined at first to believe that the number of appraisers might be left to the court. It may be, however, that since subsection (s) deals with a bankruptcy petition, the customary statutory provisions regarding appraisers apply.⁸⁸ The subsection states that appraisals shall be made "in all other respects, with right of objections, exemptions and appeal, in accord-

⁸⁸Sec. 70 (b) reads as follows: "All real and personal property belonging to bankrupt estates shall be appraised by three disinterested appraisers; they shall be appointed by, and report to, the court. Real and personal property shall, when practicable, be sold subject to the approval of the court; it shall not be sold otherwise than subject to the approval of the court for less than seventy-five per centum of its appraised value."

ance with this act." "This act" means presumably the Frazier-Lemke Amendment and may refer merely to the distinction between fair and *market* value. In case of real estate either party may file objections, exceptions and appeal within one year. This introduces another uncertainty. Further orders by the referee depend upon the fixing of the value by appraisal. Does this mean that without the formal consent of the parties a year must elapse before the proceedings may continue? This seems absurd in view of the six and five year terms for the farmer's alternative privileges, but any other result would mean the possibility that the agreement might be upset.

Once the value of the property has been fixed by appraisal, the referee must set aside to the farmer his exemptions as prescribed by state law, subject to existing mortgages or liens up to the value of the exempt property. A common form of exemption is the homestead. This homestead exemption is frequently conditioned upon the farmer's having claimed and recorded his homestead exemptions. In many jurisdictions, the farmer by following statutory procedure may mortgage his homestead. It would seem that when the homestead is set aside the creditor may proceed, so far as state law permits, to enforce his security. Section 75 (o) stays all proceedings to enforce money demands, but this applies in terms only so long as the petition for extension or composition is pending. The stay would doubtless continue while the property was in the jurisdiction of the bankruptcy court, but not, it would seem, thereafter. If this interpretation is correct, section 75 (s) may lose much of its attractiveness for farmers whose exempt property is a substantial part of their assets.³⁹

The property remaining after setting aside the exemptions is subject to a general lien for the payment of its value to the trustee for the creditors, if a trustee is appointed. The general lien is of course subordinate to prior encumbrances held by secured creditors up to the appraised value of the property. Whatever the terms of the contracts for the liens, the law provides that liens on livestock shall cover increase, and liens on real estate shall cover rental received or crops grown thereon by the debtor. The law takes no account of the fact that one creditor may have a mortgage on the land and another on the crops. A literal interpretation of this provision would apparently be unconstitutional

³⁹See Hook, Does the Frazier-Lemke Amendment Grant Relief as to Debts Secured by Liens on Exempt Property, (1934) 11 Am. Bank. Rev. 21.

because it would arbitrarily devote the security of one creditor to satisfy the obligation held by another creditor. Perhaps one may charitably assume that the draftsmen were merely considering the relative position of secured creditors and general, unsecured creditors, i.e., the relation of the general lien to specific liens.

Paragraphs 3, 4, 5 and 6 now offer the farmer one alternative, and paragraph 7, a second alternative.

If the farmer requests (the subsection here as elsewhere still calls him "debtor" though his petition asks that he be adjudged "bankrupt") "with the consent of the lienholder or lienholders," the trustee must agree to sell the farmer all or any part of his property at the appraised value. Some conditions are set out in the Act and others may be imposed, "as in the judgment of the trustee shall be fair and equitable." The trustee, if any, is elected by the creditors. If no trustee, and where there is no equity for general creditors such an official might not be elected, this sale would depend upon the consent of the lienholders. Lienholders would be general creditors to the extent of deficits, and might well stipulate through a trustee additional terms for the sale. Presumably the trustee would be under some control by the referee, but, even so, the farmer might be confronted by not a few difficulties before the sale was made. The conditions stipulated in the subsection are that the farmer pay one per cent interest upon the appraised price within one year from the agreement. Thereafter the farmer pays 2½ per cent. of the appraised price within two and three years, 5 per cent. within four and five years, and the balance (85 per cent.) within six years. Annual interest of one per cent. is also paid on the unpaid balances. The final payment occurs six years from the date of the agreement. Since some time must elapse while a composition and extension proposal is being considered, and since more time is necessary during the bankruptcy proceedings, perhaps with an additional year for an appeal on the matter of appraisal of real estate, the century will be advanced a considerable degree towards its meridian before the case is settled.⁴⁰

⁴⁰Sec. 75 (s) (3) reads as follows: "Upon request of the debtor, and with the consent of the lien holder or lien holders, the trustee, after the order is made setting aside to the debtor his exemptions, shall agree to sell to the debtor any part, parcel or all of the remainder of the bankrupt estate at the appraised value upon the following terms and conditions, and upon such other conditions as in the judgment of the trustee shall be fair and equitable: (a) Payment of 1 per centum interest upon the appraised price within one year from the date of said agreement. (b) Payment of 2½ per

If the agreement in question is reached, and the farmer wishes to consume or dispose of any part of his property, he may do so by paying its appraised value or by putting up a bond to pay such value.⁴¹ If the farmer fails to make the payments provided in the agreement, the creditors or the trustee may enforce their liens in accordance with law. Since the bankruptcy court has jurisdiction of the property, the court could order the property sold free and clear of liens and divide the proceeds as interests might appear, or if there were no equity likely for general creditors, could remit the secured creditors to their remedies under state law.

The farmer is not entitled to apply for a discharge under paragraph 3 of subsection (s) until he has complied with all the provisions of the repurchase agreement. That means that if the farmer through inefficiency or misfortune cannot keep up his payments under any part of the repurchase agreement the creditors may take all his property and yet the farmer will remain liable for deficiencies on all his obligations. The outcome might be worse for the farmer than if he had filed an ordinary petition in bankruptcy in the first place. That at least would give him a prompt discharge.

Paragraph 3 of subsection (s), it will be remembered, provides that the repurchase arrangement with the farmer is conditioned upon the request of the farmer and the consent of the lienholders. Paragraph 7, referring to the plan contemplated by paragraph 3, begins, "If any secured creditor, affected thereby, shall file written objections to the manner of payments and distribution of debtor's property as herein provided for," then the second alternative comes into operation. The general intention of subsection (s) seems to be to provide two alternatives. If creditors do not like one, they may take the other. If, as I assume, that was what the sponsors of the law intended, they might have been more explicit.

cent of the appraised price within two years from the date of said agreement. (c) Payment of an additional 2½ per cent of the appraised price within three years from the date of said agreement. (d) Payment of an additional 5 per cent of the appraised price within four years from the date of said agreement. (e) Payment of an additional 5 per cent of the appraised price within five years from the date of said agreement. (f) Payment of the remaining balance of the appraised price within six years from the date of said agreement. Interest shall be paid on the appraised price and unpaid balances of the appraised price yearly as it accrues at the rate of 1 per cent per annum and all taxes shall be paid by the debtor. The proceeds of such payments on the appraised price and interest shall be paid to the lien holders as their interests may appear, and to the trustee of the unsecured creditors, as their interests may appear, if a trustee is appointed."

⁴¹Sec. 75 (s) (4).

Suppose a lienholder, as to property in which he was interested, merely refused to consent to a sale to the farmer at the appraised price, but filed no written objections to the manner of payments, or method of distribution, would the consequence be that neither alternative of subsection (s) could go into effect, but that administration should proceed as in ordinary bankruptcy proceedings? What does the law mean by objection to "manner of payments?" Is that something different from refusal to consent to the repurchase arrangement of paragraph 3? It might mean something different, because paragraph 3 refers to other conditions which the trustee may impose.

In reaching an understanding of the meaning of paragraphs 3 to 7 inclusive, the first thing that is apparent is the ambiguities. The second thing is that the use of language by the draftsmen throughout the act indicates that they did not give the precise meaning of each word too much significance. The third consideration is that the general purpose of the subsection is apparent. It seems reasonable therefore to read the paragraphs as if they said that while the consent of the secured creditors is necessary, if this is not given the farmer is entitled to the second alternative. The expression "manner of payments and distribution of debtor's property as herein provided for" is merely a general reference to the whole plan of selling the farmer's property to him at its appraised value. The "manner of payments" means the scheme of payments spread over six years. That is the essence of the plan. The simple interpretation is that if the creditor does not consent to the first method he gets the second. A further argument for this understanding is that most, if not all, of the early summaries of the law so interpreted it. Only when the subsection was subjected to close analysis and critical scrutiny was it suggested that a more technical meaning should be given to paragraph 7.

If a secured creditor objects in writing or by the foregoing interpretation if he does not consent, to the resale of property to the farmer, the court, after setting aside the exemptions, must stay all proceedings for five years. The law seems to contemplate that some creditors may object and some consent for it refers to that part of the property of which he retains possession. If this is true, an agreement to buy back property might be in effect as to certain assets and not as to others. The farmer is allowed

to retain possession of all or any part of his property, under the control of the court, providing he pays a reasonable rental annually for the part in his possession. Under the first alternative the farmer pays the stipulated installment and one per cent. interest, under the second he pays rent. The first rental payment must be made within six months. The law requires the payment of a reasonable rental "annually." It does not say that a year's rent needs to be paid within the first six months. The expression is "the first payment of such rental." Since the property is under the control of the court, it seems possible that a court might require partial payments of rent throughout the year. The rental is distributed among secured and unsecured creditors as their interests appear. At the end of five years, the farmer may pay into court the appraised price of any property of which he retains possession and apply for a discharge. Any lienholder on real estate may ask for a reappraisal of such real estate. When the new appraisal is made, the lienholder, not the farmer, has the choice between the two appraisals. When the farmer makes the proper payment, he gets a clear title to his property. The payment is distributed to creditors as their interests appear. The debtor's payment of the appraisal value seems to be a condition precedent to an application for a discharge. If the farmer were buying some property under the first alternative and other property under the second, apparently his complete discharge would have to wait until he has complied with both sets of conditions. If the farmer fails to comply with paragraph 7, that is, if he fails to pay a reasonable rental, the court "may order the trustee to sell the property." Presumably the farmer could not then be discharged. It is possible the farmer might be discharged as to some debts and not as to others. The question has been raised as to the accrual of interest on mortgage and other secured indebtedness during the five year period under the second alternative. Under the prior law, while a creditor could not file a claim in bankruptcy for interest to accrue after the petition was filed, he could hold the security until interest was paid to the date of satisfaction. Bankruptcy legislation prior to 1933 and 1934 did not assume any jurisdiction to scale down secured obligations. It is a characteristic of the recent legislation to do this very thing. It seems reasonable to assume that with the extension of bankruptcy control over secured creditors their claims are fixed as of

the date of the petition. So far as the bankruptcy court is concerned, these will be satisfied to the extent of the value of the property. If the debtor is discharged, his liability is ended.

This interpretation may be attacked as unfair to senior security creditors perhaps even to the point of unconstitutionality. If the farmer's land, for example, is subject to first and second mortgages, under the former law, irrespective of bankruptcy, the second mortgagee or the unsecured creditors would have no rights in the property until the first mortgagee's interest claims had been satisfied in full to the date of payment. A situation might arise where the first mortgage was not due when the petition was filed. Under the present law, it seems that when the property is sold to the farmer at the end of five years, the payment is distributed to those whose interests appear in the amount of the allowed claims. The allowed claims, it will be remembered, are those allowed in the original extension and composition proceeding, and represent sums due when the original petition was filed.

If this operation of the act is unfair to the senior creditor, in other phases it is harsher toward the junior lienholder. Heretofore, if a junior lienor wanted to pay a first mortgage, or in most cases to assume it, even if there was no present equity in the property, he could do so and hope to be reimbursed from the earnings on the property or by an enhancement of its value. That privilege is now cut off. If the appraised value is equal to or less than the first lien, all the junior lienor can expect is a possible dividend on his general claim. The farmer is the only one who can buy the property at the appraised price. The price when paid is distributed as interests appear. At that time the junior lienor's interests are wholly invisible.

The Frazier-Lemke Act applies only to debts existing on June 28, 1934, when the act went into effect.⁴²

III

Mention has already been made of the scope of subsection (o) relating to stays of proceedings against farmers. Subsection (o) in its terms applies only to the period prior to the confirmation or other disposition of the composition or extension proposal. If the proposal is confirmed, presumably it controls the proceedings in respect to various debts either by compromising or extend-

⁴²Sec. 75 (s) (7).

ing the debts or by eliminating them from the proposal. If the proposal is merely dismissed, the creditors may resume their usual remedies. Subsection (s) makes no mention about stays of proceedings but does contemplate that all the farmer's property, whether pledged, encumbered, or unencumbered, be subject to the jurisdiction of the bankruptcy court, because the farmer may petition that all such property be appraised and sold to him at its appraised value. Assume that in a particular case foreclosure proceedings have been brought in the state court prior to the original petition under section 75 and that also prior to the petition the property has been sold but the sale has not been confirmed by the court under whose direction the sale was conducted. The farmer being unable to obtain an acceptance of an extension proposal by the requisite number of creditors, his proposal is dismissed and the farmer files a petition under subsection (s). The state court thereupon immediately confirms the foreclosure sale before the farmer has an opportunity to petition that the property be appraised by the bankruptcy court. While the language of section 75 is not absolutely conclusive on the point, it seems that once the bankruptcy court has acquired jurisdiction of the farmer's property this jurisdiction is continued so long as the case is pending in the bankruptcy court, whether the proceedings are for an extension or a composition or under subsection (s).⁴³ In other

⁴³See *In re Bradford* (D.C. Md. 1934) 7 F. Supp. 665, 672. On the question of stays under sec. 75 Judge Chesnut makes the following observation: "As already outlined, the provision under section 75, with which we are here concerned, regarding the stay of state court suits, is materially different from that under section 74. Under the latter the stay is to be ordered only in the discretion of the district court, on such notice and on such terms, if any, as it deems fair and equitable; but under section 75, subsection (o) there is a self-executing provision that the proceedings therein mentioned (including mortgage foreclosure sales) in any court shall not be maintained, 'except upon petition made to and granted by the judge after hearing and report by the conciliation commissioner,' although the duration of this prohibition is limited to the time 'prior to the confirmation or other disposition of the composition or extension proposal by the court.'

"Counsel for the bankrupt contends for the stay under section 75, subsections (o) and (s) (7). As to (o) it is correctly pointed out on behalf of the mortgage creditor and the purchaser of the property that the stay of proceedings there authorized is no longer applicable under the changed condition brought about by the debtor's amended petition which states that the proposition for composition and extension has failed; and it is argued that subsection (s) now invoked does not expressly authorize a stay of other court proceedings. Counsel for the bankrupt, however, contends that section 7 of subsection (s) does authorize the stay in the phrase 'shall stay all proceedings for a period of five years.' It is not entirely clear whether the words 'all proceedings' refer to the proceedings in the bankruptcy case

words, subsection (o) probably applies to proceedings after subsection (s) is invoked as well as to proceedings under the prior subsections.

When subsection (o) was discussed earlier in this article, attention was directed especially to the proceedings covered by the subsection. A second phase of this subject and a more troublesome one concerns the stay in proceedings for the enforcement of security when the debtor's interest is so far gone that it is uncertain whether this interest can give a bankruptcy court jurisdiction over the property. It has been the established practice in the administration of the general bankruptcy law that if a suit in a state court to foreclose a valid mortgage is commenced prior to the filing of a petition in bankruptcy, the state court may proceed with the foreclosure.⁴⁴ While it may be going too far to say that the bankruptcy courts do not have any *jurisdiction* in such cases, the practice of non-interference with the state proceedings is well established.⁴⁵ In *Stratton v. New*⁴⁶ the Supreme Court said:

"The bankruptcy courts refuse to enjoin the prosecution of foreclosure proceedings under a mortgage, the lien of which is preserved in bankruptcy, if initiated prior to the date of the petition."

These and other similar decisions were applications of the usual

or proceedings in other courts. It is said by counsel for the bankrupt here that subsection (s) must be read as a continuation of section 75, with which it is in *pari materia*, although enacted more than a year later, and that so considered the more reasonable construction in view of the general subject matter is to give the phrase 'all proceedings' the larger rather than the narrower meaning. On the whole I regard this as the more rational construction and adopt it. It follows, therefore, that the stay is authorized by the subsection (s), unless it is unconstitutional, or unless the title to the property had passed from the debtor by virtue of the foreclosure proceedings before the filing of the petition in the case."

⁴⁴In *re Rohrer*, (C.C.A. 6th Cir. 1910) 177 Fed. 381; *Brown Shoe Co. v. Wynne*, (C.C.A. 5th Cir. 1922) 281 Fed. 807; *Metcalf v. Barker*, (1902) 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122; *Blair v. Brailey*, (C.C.A. 5th Cir. 1915) 221 Fed. 1. See (1932) 17 MINNESOTA LAW REVIEW 47, 58.

⁴⁵*Cf. Broach v. Mullis*, (D.C. Ga. 1915) 228 Fed. 551; *In re Morse*, (D.C. N.Y. 1914) 210 Fed. 900. In *Broach v. Mullis*, Judge Lambdin said: "The court is of the opinion that the statement . . . to the effect that the district court of the United States has no jurisdiction is rather too broad, and that a better statement of the principle involved should have been that the district court, under the facts in the case, should not enjoin the sheriff from selling the property under the state court process. In other words, I think that this court would have jurisdiction to stop the sale where absolutely necessary under the facts of the particular case in order to protect the rights of the creditors of the trustee which would otherwise be lost or impaired. It is not a question of jurisdiction but of discretion and policy in each case under its peculiar facts."

⁴⁶(1931) 283 U. S. 318, 51 Sup. Ct. 465, 75 L. Ed. 1060.

rule that where state and federal courts have concurrent jurisdiction the first court obtaining possession and custody of the property through its officers will be permitted to hear and determine all controversies relating to the property. These cases, however, have little application under the bankruptcy legislation of 1933 and 1934 which, for the first time, undertakes to interfere with the liens of secured creditors. Since the federal courts, under the constitution, are vested with exclusive jurisdiction over the bankrupt's property, irrespective of the time when liens against the property were obtained, the mere length of time during which a state court has had jurisdiction over the bankrupt's property will not affect the jurisdiction of the bankruptcy court unless the proceedings in the state court have gone so far that one may say the bankrupt no longer has a property interest.⁴⁷

If the foreclosure proceedings have been completed, the property sold, and the sale confirmed with no right of redemption in the farmer, the bankruptcy court obviously has no jurisdiction over the property.⁴⁸ If everything has been done except confirming the sale, apparently the bankruptcy court would have jurisdiction because until the sale is confirmed by the court it amounts only to an offer by the purchaser.⁴⁹ The result here would not be affected by the non-existence of a right of redemption after sale. If the foreclosure proceedings have been regular and the sale has been completed but the farmer has the right of possession and a statutory right to redeem during a stipulated period, does this give the bankruptcy court authority to administer the property under section 75? May proceedings under section 75 have the effect of rendering all the state proceedings up to that point a nullity, or, in the alternative, do they have the effect of giving the farmer an additional redemption period?

The one assertion that can be made with confidence is that no rule will apply in all states.⁵⁰ It would be nearer the truth to say

⁴⁷See on the question of exclusive as distinguished from concurrent control, *Gross v. Irving Trust Co.*, (1933) 289 U. S. 342, 53 Sup. Ct. 605, 77 L. Ed. 1243; *Isaacs v. Hobbs Tie and Timber Co.*, (1931) 282 U. S. 734, 51 Sup. Ct. 270, 75 L. Ed. 645.

⁴⁸This is specifically declared in sec. 74 (m) but would doubtless be so held in the absence of such a declaration.

⁴⁹See *In re Bradford*, (D.C. Md. 1934) 7 F. Supp. 665, 673.

⁵⁰See, *Durfee*, and *Doddridge*, *Redemption from Foreclosure Sale—The Uniform Mortgage Act*, (1925) 23 Mich. L. Rev. 825; *Walsh*, *Development of the Title and Lien Theories of Mortgages*, (1932) 9 N. Y. L. Q. Rev. 280; 2 *Jones*, *Mortgages*, 8 ed. 1335 et seq.

that the bankruptcy courts must establish different rules for all states. Take the single case that arises in a state where the mortgagee has title, the mortgagor has defaulted, and the mortgagee has entered either by self-help or as a result of a writ of entry. The farmer may have three years in which to redeem. What is the farmer's *property* which is to be appraised by the bankruptcy court? Is it the land, or the equity of redemption? If it is the equity of redemption, does this help the farmer in any degree? If the farmer had a land contract, no one would suppose the land would become his property merely because he filed a petition in bankruptcy. In the lien states and in many of the title states the mortgagor is regarded as the owner until the equity of redemption is gone. There are many statutes relating to redemption. Some have the effect of staying the foreclosure sale, some permit the sale to occur, but the purchaser gets only a certificate until a statutory redemption period has elapsed, when he gets a deed. In others, the sale is consummated at once so far as the purchaser's title is concerned, but the mortgagor and others may redeem during a statutory period.⁵¹ The farmer customarily has the right of possession until the redemption period has run. Does he own the land? Does he have any interest in land?⁵² Does he have only a

⁵¹An example of the diversity in statutory provisions regarding redemption is illustrated by comparing the law of my own state, Nebraska, with the law in the neighboring states of Iowa and Kansas. In Nebraska the statute takes the form of staying execution or foreclosure sale for nine months whenever the defendant, within 20 days after the decree, files a request for a stay. Nebraska, Comp. Stat. 1929, sec. 20-1531. A recent amendment provides that the judge need not confirm a sale at an amount less than the decree if in its opinion the mortgaged premises have a fair and reasonable value greater than the decree. Nebraska, Laws 1933, ch. 45. There is no redemption after the foreclosure sale. Nebraska, Comp. Stat. 1929, sec. 20-1530. For the time being after foreclosure and before confirmation of sale the court may stay proceedings until Mar. 1, 1935, give preference in possession to owner and determine fair value to be paid as rent. Nebraska Laws, 1933, ch. 65.

In Iowa, debtor can redeem real property at any time within one year of sale. Apparently the purchaser is owner during this period although the mortgagor has the right of possession. Iowa, Code 1927, sec. 11774. Emergency legislation has extended the redemption period, with certain qualifications until Mar. 1, 1935.

In Kansas, when a sale or execution or foreclosure is made, the purchaser does not get a deed but a certificate entitling him to a deed if redemption is not made within 18 months. Kansas, Rev. Stat. Ann. 1923, sec. 66-3438.

⁵²See *Sayre v. Vander Voort*, (1925) 200 Iowa 990, 205 N. W. 760 holding that a debtor's statutory right of possession of real estate during the year given for redemption for sale on execution is not subject to levy. The court said the debtor no longer had an interest in real estate. See comment on this case (1926) 26 Col. L. Rev. 363.

right, like a land contract, to obtain land? What is the property which the bankruptcy court is to appraise and sell to the farmer, or allow him to hold for five years by paying a reasonable rental? What are the proceedings to be stayed by the bankruptcy court?

The situation already complex, which involves strict foreclosure, and foreclosure by judicial sale, with or without statutory redemption, appears relatively simple, when one introduces the problem of mortgages with powers of sale, especially in title states, and deeds of trust. What is the mortgagor's property when the mortgagee has ownership and is the donee of a power coupled with an interest? What is the mortgagor's property, when he has a possession, but a trustee has ownership for named beneficiaries, the paramount of which are the creditors? If the farmer's property is not the land but some subordinate estate in it, the Frazier-Lemke Act does nothing for the farmer in many states. If it is the land, the Act is compelling other parties to sell their interests by a proceeding which is little better than confiscation.

It is a relief for me to say that space does not permit an extended attempt to answer the questions just posed, even if there were an opportunity for the study necessary to return informed answers in an article intended for early publication as a brief survey of the new bankruptcy legislation. American courts and statutes have gone far in regarding the mortgagor as the owner of his land, notwithstanding incumbrances. The Frazier-Lemke Act obviously intends that a farmer's land, whatever the nature of its incumbrances, be sold to him at its appraised value under one of two alternatives. Nevertheless, the law says *property* not *land*, and in many jurisdictions it is by no means clear that the terms are synonymous when the farmer has already conveyed his land as security for obligations. Not until we have a series of local studies by courts, practitioners and others interested will it be possible to make a comprehensive statement of the applications of section 75.

First consideration is given naturally to the effect of section 75 upon real estate security, because the farmer's principal property often is land. Farmers also have personal property, and tenant farmers usually have nothing else. The conditional seller always and the chattel mortgagee generally are the owners of the chattels. Petitions will frequently be filed after the sellers and mortgagors have resumed or taken possession. Can it be said here that the

farmer is the owner and that the chattel is the property the bankruptcy court must appraise? Will an implement dealer who has sold a farmer a tractor on conditional sale a month before the petition is filed be compelled after the appraisal to sell the chattel to the farmer at the appraised figure? The depreciation from a month's use may have lessened the value much more than the down payment and the first installment. The tendency of the law is to reduce conditional sales and chattel mortgages to a common denominator. The farmer certainly has some sort of a property interest in the chattel. He has never had title to the article bought on conditional sale. If the seller has filed the conditional sale, and in some states even if he has not filed it, the farmer's creditors cannot reach anything but the farmer's interest in the chattel. I am inclined to think that in the case of the conditional sale, where the farmer has only a contract to buy, the court need not allow an appraisal of the chattel itself, although I assume the sponsors of the act would reach the opposite conclusion.

Some representatives of conditional sellers, who have accepted the law as requiring an appraisal of the chattel sold, and under section 75 (s) (3) its sale to the farmer at the appraisal price, which it must be admitted would often be about the amount due under the contract, have expressed the fear that the farmer would wear out the chattel long before the end of six years, and then would refuse to pay the final 85 per cent. The law on this point safeguards the creditor, because if the farmer does not carry out his agreement he is denied a discharge. That would leave the farmer liable on the original contract and under section 75 (s) (5) apparently also liable on all other obligations. The bankruptcy proceedings would stop the running of the statute of limitations, and the Bankruptcy Act itself would prevent the farmer's filing another petition in bankruptcy for six years.

IV

The constitutionality of the Frazier-Lemke Act has been assailed on several grounds. The principal attack relies on the fifth amendment, but a good deal of ink and energy are used, and, in my opinion, wasted, in trying to show that the Act is not a bankruptcy law.

The argument on the latter point is that the constitutional warrant extends only to bankruptcy laws, that bankruptcy involves

distribution of the bankrupt's assets among his creditors, but that this act permits the bankrupt to keep his property, reduces his debts and grants at least a five-year moratorium on the reduced debts. It is insisted that section 75 does not even purport to be a bankruptcy law but is entitled, or follows section 73, which is so entitled: "Provisions for the relief of debtors."

It is evident that if section 75 can be upset because it is not bankruptcy legislation, sections 73, 74, 76, 77 and perhaps also 78, 79 and 80 are likewise unconstitutional. These sections are all "for the relief of debtors." So is any bankruptcy act which provides for a discharge. These new sections do provide for a distribution of assets to creditors. The method and time differ in degree but not in kind from prior bankruptcy legislation. The avoidance of the term "bankrupt" in the latest amendments is merely to make the remedy more palatable to sick but sensitive patients. Section 75 (s), as already mentioned, continues the debtor designation for farmers even if they ask to be adjudged bankrupts. The net effect is like the attempt to take away the sting of death by the use of a mortician instead of an undertaker. If Marshall's and other opinions of Supreme Court justices⁵³ were not an answer to any narrow conception of the province of bankruptcy legislation, it can be found in practically all the opinions of judges of the lower federal courts who have been called upon to decide cases involving any of the new sections.⁵⁴

Section 75 (s) in respect to attack under the fifth amendment has points of vulnerability not shared by the other new sections.⁵⁵

⁵³In *Sturges v. Crowninshield*, (1819) 4 Wheat. (U.S.) 122, 195, 4 L. Ed. 529, Chief Justice Marshall speaking of the scope of power granted by the 8th section of article I of the constitution said, "The bankrupt law is said to grow out of the exigencies of commerce and to be applicable solely to traders, but it is not easy to say who must be excluded from, or may be included within, the description. It is, like every other part of the subject, one on which the legislature may exercise an extensive discretion." See also *In re Klein*, (1843) 1 How. (U.S.) 277, 11 L. Ed. 130 (opinion by Mr. Justice Catron sitting as circuit judge); *In re Reiman*, (D.C. N.Y. 1874) Fed. Cas. Co. 11673 and (C.C. N.Y. 1875) Fed. Cas. No. 11675; *Hanover National Bank v. Moyses*, (1902) 186 U. S. 181, 22 Sup. Ct. 857, 46 L. Ed. 1113; *Story, Commentaries on the Constitution*, ch. XVI, sec. 1111. The records of the constitutional conventions throw little or no light on what the framers of the constitution intended. See 2 *Farrand, Records of the Federal Convention* (1911) 447, 489, 570, 595, 655.

⁵⁴See *in re Burgh*, *In re Parmenter*, (D.C. Ill. 1933) 7 F. Supp. 184; *In re Landquist*, *In re Parmenter* (C.C.A. 7th Cir. 1934) 70 F. (2d) 929; *In re Chicago, R. I. & P. Ry. Co.*, (C.C.A. 7th Cir. 1934) 72 F. (2d) 443; *In re Jacobs*, (D.C. Ill. 1934) 7 F. Supp. 749. Cf. *In re Conciliation Commissioner of Sanders County, Montana*, (D.C. Mont. 1933). 5 F. Supp. 131.

⁵⁵The fifth amendment is as follows: "No person shall be held to

Under section 74 the lien of the secured creditor cannot be affected and extension and composition proposals cannot be approved without a finding of fairness to all creditors and the existence of a feasible plan for liquidating secured claims. The rights of secured creditors in any class cannot be affected under section 77 without the consent of creditors representing two-thirds of the claims in that class, and even with such consent the court must approve the fairness of the plan. One or the other alternatives of section 75 (s) may be adopted irrespective of what the court thinks about their fairness as applied to a particular situation. The changes brought about in the position of mortgagees especially are material and prejudicial, both as to their remedies and their substantial rights. Judge Chesnut in the recent case of *In re Bradford*,⁵⁶ summarized these changes as follows:

"(1) His right to realize on the security, in event of default, is suspended for five years. This period is fixed and absolute, without relation to the continuance of or change in existing conditions, and without judicial determination of adequate cause, or power of change to adjust to altered conditions; (2) at the end of the period the title to the security is transferred to the mortgagor upon payment of a sum determined by appraisers (subject to a somewhat uncertain judicial review) and which may be for an amount substantially less than the mortgage debt; (3) no provision is made for a deficiency claim by the mortgagee against the bankrupt's estate; (4) during the five year period a reasonable rental is to be paid, but the first payment is to be deferred for six months without security therefor, other than sale upon default. The effect of this may be at least a six months moratorium without any compensation therefor to the mortgagee, during which time the mortgagor retains the use and enjoyment of the property."

The mortgagee, it will be noted, is obliged to sell his interest to the mortgagor at a price which the former has no part in fixing. This looks like taking property by court action for *private* use.

answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law*; nor shall private property be taken for public use, without just compensation." The words italicized constitute the part of the Amendment involved in this discussion. See *Monongahela Nav. Co. v. United States*, (1893) 148 U. S. 312, 336, 13 Sup. Ct. 622, 37 L. Ed. 463; *Nichols v. Coolidge*, (1927) 274 U. S. 531, 542, 47 Sup. Ct. 710, 71 L. Ed. 1184.

⁵⁶(D.C. Md. 1934) 7 F. Supp. 665, 675.

One of the most serious objections to section 75 (s) in its present form is that the court has little or no discretion to adapt it to particular circumstances nor to alter its application if circumstances change during the five or six year period. The only thing the subsection says on this point is that the "trustee" may impose fair and equitable conditions to the resale. Even if it be admitted that the court really will impose the conditions, this is a very narrow discretion to the court. In a recent case the illustration was given of a farmer who owned an unencumbered farm in addition to the encumbered farm. At the time of the appraisal the mortgaged farm was worth less than the mortgage debt. The appraised value of the encumbered farm remains the same during the five or six year period. Oil is discovered in the meantime on the unincumbered farm. No one is entitled to ask for a reappraisal of the unincumbered farm. At the end of the moratorium period the farmer can get both farms by paying their original appraised value.

The facts in a particular case may show, as one attorney put it, that the farmer has been *mining*, rather than cultivating, his farm, i. e., that he has been exploiting its resources without any regard for its permanent value and without making any effort to satisfy his creditors. Whatever his conduct, the farmer is entitled to relief under the act and possession of his farm. The most the court can do is to exercise some degree of control with the farmer in possession.

It was held in the Minnesota moratorium case⁵⁷ that a temporary law proportioned to an emergency and terminating with it may validly create a moratorium against secured claims provided the lienholders are paid a reasonable rental during the moratorium. The time by the statute could not exceed two years and one month and was not fixed arbitrarily but was to be determined by the court within the statutory limit, and might be sooner terminated if conditions warranted. Moreover, the Minnesota law affected only the time of payment, and did not otherwise impair the integrity of the mortgage contract. Under section 75 (s) the five and six year periods, themselves exceedingly extensive, are fixed by statute, and the court has no discretion to modify them. Since section 75 is in effect until 1938, the actual postponement may extend beyond 1944. This certainly has no obvious relation to the

⁵⁷Home Building & Loan Ass'n v. Blaisdell, (1934) 290 U. S. 398, 54 Sup. Ct. 231, 78 L. Ed. 413.

present emergency. Congress is of course not specifically forbidden to pass a law impairing the obligation of contracts, as are the states, and its bankruptcy legislation has express constitutional sanction. Nevertheless, the fifth amendment controls Congress, and since it was adopted after the bankruptcy provisions of the constitution presumably its provision that "no person shall be deprived of life, liberty or property without due process of law" limits the bankruptcy laws which Congress may constitutionally enact. If one interprets the confused phrases of section 75 (o) simply and not too technically in the light of the obvious intention of the framers of the law, it seems not unlikely that Congress in its anxiety to help the farmer has adopted legislation which amounts to arbitrary spoliation.⁵⁸

Whether or not section 75 (s) is constitutional, it is unfair, both in its harshness to creditors and in the implicit discrimination between the protection offered to farmers and other individual creditors. Sections 74 and 75 ought to be redrafted and combined.⁵⁹ The political utility of section 75 is probably too great

⁵⁸One should not overlook the fact, however, that section 75 (s) comes into operation only if the farmer is unable to induce the requisite creditors in number and amount to agree to a plan which must be found by the court to be fair and equitable after a hearing in which creditors have every opportunity to state their position. This assumes that the "feels aggrieved" expression can be given some reasonable limitation. It is also true that in its actual operation section 75 (s) might be used chiefly to coerce mortgagees who would still get everything possible out of the security, except the right to purchase it themselves. Subsection (s) has been held unconstitutional in *In re Bradford*, (D.C. Md. 1934) 7 F. Supp. 665, but has been held constitutional in *In re Radford*, (D.C. Ky. 1934) 2 U. S. Law Week, No. 12, p. 7. The American Bankruptcy Review reports that Judge Charles I. Dawson remarked when the Radford case was argued: "This act, on its face and unless further explained, is in my opinion unconscionable and unconstitutional and if it is held constitutional to my mind there isn't any use having property rights in America. You don't have to argue any further, Mr. Tarrant. I want someone to defend this act now. I am interested particularly in the two questions, first, is it a bankrupt act at all, and second, did Congress have power to pass it?" (1934) 11 *Am. Bank. Rev.* 42. See also, *In re Conciliation Commissioner*, (D.C. Mont. 1933) 5 F. Supp. 131. Judge Bourquin evidently thought section 75 unconstitutional even before the Frazier-Lemke Act was added to it.

⁵⁹This should be done, as the president has indicated, if for no other reason than because of the ambiguities. Some but not all of the difficulties of interpretation have been indicated in this article. Professor Britton points out that the same section uses the following expressions: "fair and reasonable value," "market value," the term "value" without any modifying adjectives; also the terms "actual value," "full value" and "appraised value." Britton, *The Farm Moratorium Amendment*, (1934) 9 *J. Nat. Ass'n. Refer. in Bank.* 41. The confusion as to the meaning of section 75, even if it is constitutional, causes avoidable expense and delay in administration. Section 74 is a better piece of draftsmanship than section 75, but even section 74 can be clarified. See in *re Bradford*, (D.C. Md. 1934) 7 F. Supp. 665, 672; *Molina v. Murphy*, (C.C.A. 1st Cir. 1934) 71 F. (2d) 605; *In re*

to permit this, and in the alternative both sections should be rewritten to provide substantially the same treatment for all individual debtors. It is essential that some coercion be applied to secured creditors if they block reasonable adjustments. Since, in most cases, it is not practicable to make the administration of estates depend upon the approval of a majority of creditors representing a majority in amount, it is worth while to test the constitutionality of an act providing that a court might approve a plan appealing to it as fair and equitable, even if it involved the scaling down of secured obligations. Perhaps the essential features of section 75 (s) should be retained. The statute, however, should stipulate only the outside limits of the court's discretion. Within those limits the court should be allowed to adapt its decree to the circumstances of the case before it.

Looker, (D.C. Pa. 1933) 6 F. Supp. 571; In re Collier, (D.C. N.Y. 1933) 4 F. Supp. 700; In re Landquist, (C.C.A. 7th Cir. 1934) 70 F. (2d) 929; In re Jacobs, (D.C. Ill. 1934) 7 F. Supp. 749; In re Doelger, (D.C. N.Y. 1934) 6 F. Supp. 776; Santos v. Moreda, (C.C.A. 1st Cir. 1934) 71 F. (2d) 608.