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Bankruptcy - Frazier-Lemke Act Nature of Proceedings

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progress in the ever expanding administration of justice under new and changing conditions.

Of course our courts should distinguish the change—but brevity is still the soul of wit—and it can well be repeated that "adequate" brevity in this constantly increasing stream of the legal opinions of our courts would be much appreciated by the profession.

And while we are not advocates of statutory control of the decisions or the fixing of rules by that method to obtain stability, our labor is still an endless organic process to insure law to the undying body of society, it is still to the accurate, keen, just and fearless spirits of our profession to function and perform in the life of the law as it has been in the past. It is still not words but things that make the body of our law and if you haven't given much thought to old Stare Decisis you better begin to do so, before he gets out of control.

SEC.

EMERGENCY LAWS

For the past several years, your association has arranged with the Bismarck Tribune for the publication of the Emergency Laws and they have been sent to each member as a part of a regular issue of the Tribune. They are sent in this way to save expense. Each year we have paid part of the cost and have assisted in selecting the laws to be published. You can readily understand that it would be a useless expenditure to publish all of the Emergency Laws. For instance the renewal of the sales tax law; some repeals; some appropriations, etc. We intend to include everything of general interest, as well as those that are vital and important.

However, it takes time to obtain copies of all such laws. The force in the Secretary of State's office have their regular work and are getting out mimeograph copies of these laws as rapidly as possible. Those to be printed have been selected and are being set up for publication as fast as received from the Secretary of State's office. Headings on all of those not printed in full will be given, so that, if necessary, copies can be secured from the Secretary of State. We hope to have the publication in your hands within the next week or ten days.

SEC.

BANKRUPTCY - FRAZIER-LEMKE ACT
NATURE OF PROCEEDINGS

A farmer-debtor seeks to have the land appraised and be allowed to redeem it at that appraised amount. The secured creditor, however, claimed that according to Section 75 subsection (s) (3), its request for a sale took precedence over any such

right of the debtor. The lower courts affirmed the contentions of the secured creditor. Upon appeal to the Supreme Court it was held: the debtor was entitled to have the property reappraised or the value fixed at a hearing; that the value having been determined at a hearing in conformity with his request, he was then entitled to have a reasonable time, fixed by the court, in which to redeem at that value; and that if he did so redeem, the land should be turned over to him free and clear of encumbrances and his discharge granted. Only in case the debtor failed to redeem within a reasonable time would the court be authorized to order a public sale. Modified and remanded. Wright v. Union Central Life Insurance Company et al, 61 Sup. Ct. 196 (1940).

To see the effect of this case it might be well to consider the background as set out by prior decisions. Under the provisions of subsection (s) (3) the farmer is given the right to pay the amount of the appraisal into court and to secure title to and full possession of the property at the end of three years or at any time prior thereto. However, this is followed by a proviso that upon request in writing by any secured creditor or creditors, the court shall order the property upon which such secured creditors have a lien to be sold at public auction. This provision had been construed by the Supreme Court to give the secured creditor a right to bid at the public sale. In the words of the court — "but it must be assumed that the mortgagor will not get the property for less than its actual value. The act provides that upon the creditor's request the property must be appraised or sold at public auction; and the mortgagee may by bidding at such sale fully protect his interests." Wright v. Vinton Branch, 300 U. S. 440, 57 Sup. Ct. 556 (Va. 1937). As to the question whether the debtor had a right to purchase at the appraised value, quoting the words of the court in In re Anderson, 22 F. Supp. 928 (D. C. N. D. 1938) "this debtor apparently assumed that he could force the mortgagee to accept the appraised value. The Supreme Court in Louisville Joint Stock Land Bank v. Redford, 295 U. S. 555, at page 580, 55 Sup. Ct. 854, 859, 79 L. Ed. 1593, 97 A. L. R. 1106, said: 'this right of the mortgagee to insist upon full payment before giving up his security has been deemed of the essence of a mortgage.'" As a result of these decisions ". . . if the provisions regarding a public sale are strictly interpreted to permit creditors to demand public auctions arbitrarily and automatically and to bid the full amounts of their claims at such sales arbitrarily, it is evident that a farmer's hope of retaining his farm at its fair value is dependent entirely on the whim of his secured creditor." Alfred Letzler, Bankruptcy Reorganizations for Farmers, (1940) 40 Col. Law Rev. 1133, 1153. In In re Shenorhokian, 22 F. Supp. 695 (S. D. Cal. 1938) at page 696, the court said: "the right of a secured creditor to the amount of his debt or ultimately to bid that amount at a sale of the property . . . cannot be taken away from the creditor."

In the light of these decisions it would seem that the purpose and object of the FRAZIER-LEMKE ACT had been violated. In

a congressional committee report it was stated: "the object of section 75 is to save and protect the farmer's home and farm. Obviously that cannot be done if the mortgagee says 'I do not care what the value is. I will bid the full amount of the mortgage.' Vengeance and hatred should not be permitted by Congress or by courts when it has for its object the destruction of a home." Sen. Rep. No. 1045, 76th Cong., 1st. Sess. (1939). In a comprehensive and well-written article on this point (Bankruptcy Reorganizations for Farmers, supra), the author stated in footnote 73, p. 1155, "doubts have been expressed as to the constitutionality of a complete denial to creditors of the right to have a public sale and to bid thereat. . . . But a limited prohibition effected through a farmer's right to take the property at a fair appraised value would not seem an unreasonable requirement or an unconstitutional deprivation of any genuine property right." By the court's latest decision in the principal case this suggestion has been fulfilled.

What is the present position of the farmer-debtor? He now has an increased and effective bargaining power to aid in bringing about a composition agreement under section 75 subsections (a) to (r). Up to this time this section has been practically useless because the creditor could always have his public sale and bid the full amount thereof. There was no incentive for him to accept a less amount in full settlement. Now, however, if the creditor refuses the composition agreement presented by the farmer, he suffers the chance that upon appraisal the value may be set at a lower figure than that offered by the farmer. He, of course, now has the absolute prior right to purchase at that appraised value before a public sale can be demanded by the creditor. It would appear, then, that the Supreme Court by the decision in our instant case has put teeth in the FRAZIER-LEMKE ACT by permitting the farmer to secure part of that relief which it was the ultimate purpose of the Act to give. However, there is still an opening for the creditors under subsection (s) (3) which reads, "if, however, the debtor at any time fails to comply with the provisions of this section, or with any orders of the court made pursuant to this section, or is unable to refinance himself within three years, the court may order the appointment of a trustee, and order the property sold or otherwise disposed of as provided for in this act." Although the phrase "unable to refinance" appears to give the creditor a lenient method to terminate the three-year stay, the court has interpreted this section to the effect that a farmer under this section is entitled to a three-year stay, which can be terminated prior to the end of the three years only if he fails to comply with the provisions of the law or with the orders of the court. Borchard v. California Bank, 107 F. (2d) 96 (C. C. A. 9th, 1940). "Under this interpretation, the court would not be authorized to terminate the stay and order the property sold prior to the end of the three-year period merely upon a showing that the debtor could not be rehabilitated." Bankruptcy Reorganizations for Farmers, supra, page 1149. However, the court was not too explanatory on this point and con-

sequently if the provisions of subsections (s) (3) are construed strictly, there is the questtion of what is meant by "inability to refinance" and also when may the creditor use this as a basis for a sale. In the case of Wright v. Vinton Branch, supra, the court appeared to take the stand that there must be evidence only after a "reasonable time" that the debtor is unable to refinance himself, and the case of Bartels v. John Hancock Mutual Life Insurance Company, 100 F. (2d) 813 (C. C. A. 5th, 1938), aff'd, 308 U. S. 180, 60 Sup. Ct. 221 (1939), would seem to interpret the "reasonable time" liberally. Nevertheless, the Supreme Court held in the instance case that even though the creditor does secure a termination of the three-year stay, the debtor still has the right to purchase at the appraised or reappraised value prior to a public sale.

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COURTS—AUTHORITY OF STATE DECISIONS IN FEDERAL COURTS

In an action to compel a corporation to restore remaindermen's rights in shares of stock which the corporation had wrongfully transferred to a life tenant without any disclosure of the limitation appearing upon the certificate, an intermediate appellate court of Ohio denied relief upon the ground that under Ohio law it was a prerequisite to recovery that remaindermen allege and prove demand upon the corporation to restore the remaindermen's rights, and that corporation had refused said demand. Demand was then made by the remaindermen and suit was instituted in a federal court, there being diversity of citizenship. Held, that federal courts are bound to apply a decision of an intermediate appellate state court as the "state law," when there has been no determination of the point in question by the state supreme court, and in the absence of persuasive data that the highest court of the state would decide differently. West et al. vs. American Telephone and Telegraph Company, 311 U. S. —, 61 S. Ct. 179, 85 L. ed. 146 (Ohio, 1940).

This is the farthest the Supreme Court has ever extended the doctrine of "state law" as defined in Sec. 34 of the Judiciary Act of 1789, 28 U. S. C. A. Sec. 725, 8 F. C. A. Tit. 28 Sec. 725; 28 U. S. C. Sec. 726; said provision reading: "The laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the Courts of the United States, in cases where they apply."

The construction of this section as announced in Swift v. Tyson, 16 Pet. 1, 10 L. ed. 865 (1842), was followed for almost a century, and with increasing dissatisfaction by many judges and attorneys. In brief, the Swift case held that "state law" under