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Bankruptcy--Constitutional Law--Mortgages (Louisville Joint Stock Land Bank v. Radford, Sr., 295 U.S. 555 (1935))

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BANKRUPTCY — CONSTITUTIONAL LAW — MORTGAGES. — The plaintiff bank obtained a judgment of foreclosure and sale two days subsequent to the passage of the Frazier-Lemke Act of 1934, whereupon the defendant farmer filed his petition for relief thereunder. By the provisions of §75(s) of the Bankruptcy Act, a farmer who had failed to obtain the requisite consents to a composition in bankruptcy was given alternative rights in respect to mortgaged property upon being adjudicated a bankrupt: (1) if the mortgagee assented, the bankrupt was given the right to purchase the land at its appraised value, or (2) if the mortgagee refused consent, the farmer could require the bankruptcy court to stay all proceedings for five years, and place the bankrupt in possession, subject only to the payment of a reasonable annual rental, with the option of obtaining clear title upon the payment of the appraised value. *Held*, the Frazier-Lemke Act of 1934 violates the Fifth Amendment of the Constitution. *Louisville Joint Stock Land Bank v. Radford, Sr.*, 295 U. S. 555, 55 Sup. Ct. 854 (1935).

The Frazier-Lemke Act of 1934 was the initial attempt to alleviate agricultural land mortgage conditions through the federal bankruptcy power.¹ Through this medium Congress may discharge a debtor's personal obligations because, unlike the states, it is not prohibited from impairing contractual obligations.² However, the bankruptcy power, like the war power,³ the power to tax,⁴ the power to regulate commerce,⁵ and the power to exclude aliens,⁶ is subject to the Fifth Amendment.

The Fifth Amendment commands that, however great the nation's need, private property shall not be taken, even for the public benefit, without just compensation.⁷ The mortgagee's right to retain his security in the property is the essence of the mortgage.⁸ To strip him of this right,⁹ to prevent realization of his security by

¹ Act of 1800, c. 19, §§34, 35, 2 STAT. 19, 30, 31; Act of 1841, c. 9, §3, 5 STAT. 440, 443; Act of 1867, c. 176, §14, 14 STAT. 517, 522.

² *Mitchell v. Clark*, 110 U. S. 633, 643, 4 Sup. Ct. 170 (1884).

³ *Ex parte Milligan*, 71 U. S. 2, 119 (1866); *Ochoa v. Kentucky Distilleries Co.*, 251 U. S. 146, 155, 40 Sup. Ct. 1033 (1919).

⁴ *United States v. Railroad Co.*, 84 U. S. 322 (1872); *Boyd v. United States*, 116 U. S. 616, 6 Sup. Ct. 524 (1885); *Barclay & Co. v. Edwards*, 267 U. S. 442, 450, 45 Sup. Ct. 348 (1924); *Nichols v. Coolidge*, 274 U. S. 531, 542, 47 Sup. Ct. 710 (1927); *Hejner v. Donnan*, 285 U. S. 312, 326, 52 Sup. Ct. 358 (1932).

⁵ *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 336, 13 Sup. Ct. 622 (1893); *United States v. Joint-Traffic Ass'n*, 171 U. S. 505, 571, 19 Sup. Ct. 25 (1898); *United States v. Lynah*, 188 U. S. 445, 471, 23 Sup. Ct. 349 (1903); *Carrol v. Greenwich Insurance Co.*, 199 U. S. 401, 410, 26 Sup. Ct. 66 (1905); *United States v. Cress*, 243 U. S. 316, 326, 37 Sup. Ct. 380 (1916).

⁶ *Wong Wing v. United States*, 163 U. S. 228, 236, 237, 238, 16 Sup. Ct. 977 (1896).

⁷ 2 COOLEY, CONSTITUTIONAL LIMITATIONS (8th ed. 1927) 743.

⁸ 1 JONES, MORTGAGES (7th ed. 1915) §8.

⁹ *Ky. Code Civ. Pract.* §§375, 376; *Insurance Co. of North America v. Cheatham*, 221 Ky. 668, 299 S. W. 545 (1927).

public sale,¹⁰ and to withhold the right to control the property during default,¹¹ violates the due process clause of the Fifth Amendment.

Heretofore, the bankruptcy power has been utilized primarily to relieve the debtor of the discouraging weight of business misfortune,¹² not to provide him with capital with which to engage in business in the future. The Frazier-Lemke Act is not designed merely to discharge contractual obligations but its avowed purpose is to take the mortgagee's rights in specific property and transfer them to the mortgagor.¹³

Measures adopted for the relief of necessitous mortgagors, including moratorium legislation, have been held constitutional when they have resulted primarily in a stay.¹⁴ This has been upon the theory that no substantive right of the mortgagee has been impaired since payment of the debt with interest has been deemed full compensation.¹⁵ The Act in question cannot be supported as emergency legislation, for the fixed period of five years in which it is to operate may outlast the emergency conditions which called it into being.¹⁶

The Court refused to pass upon whether the bankruptcy clause confers upon Congress generally the power to abridge the rights of mortgagees in specific property. It merely asserted that to apply it retroactively would violate the Fifth Amendment.¹⁷

In the closing days of the 74th Congress, §75(s) of the Bankruptcy Act was redrawn in an effort to conform to the adverse decision of the Supreme Court. The new section became law on August 28, 1935 and provided: (1) that upon an adjudication in bankruptcy all proceedings be stayed for a period of three years, unless in the discretion of the court the emergency shall cease to exist in that locality; (2) that possession of the property remain in the bankrupt, subject to the control of the court and to the existing mortgages, on the payment into court of a semi-annual rental, based

¹⁰ *Id.* KENTUCKY CODE §374.

¹¹ *Brasfield & Son v. Northwestern Mutual Life Insurance Co.*, 233 Ky. 94, 25 S. W. (2d) 72 (1930); *Watt's Adm'r v. Smith*, 250 Ky. 617, 63 S. W. (2d) 796 (1933).

¹² *Local Loan Co. v. Hunt*, 292 U. S. 234, 244, 54 Sup. Ct. 695 (1934).

¹³ See SEN. REP. No. 1215, 73d Cong., 2d Sess., Ser. No. 3580 (1934) 3; H. R. REP. No. 1898, 73d Cong., 2d Sess., Ser. No. 9865 (1934) 4, incorporating a memorandum of Representative Lemke.

¹⁴ For a list of moratorium legislation enacted in the various states see Commerce Clearing House, Bank Law Federal Service, "L" Unit, 128 C. C. H. pp. 7802, 7809; A. H. Feller, *Moratory Legislation* (1933) 46 HARV. L. REV. 1061, 1081.

¹⁵ *Home Building and Loan Ass'n v. Blaisdell*, 290 U. S. 398, 54 Sup. Ct. 231 (1933); *W. B. Worthen Co. v. Thomas*, 292 U. S. 426, 54 Sup. Ct. 816 (1934); *W. B. Worthen Co. v. Kavanaugh*, 295 U. S. 56, 55 Sup. Ct. 555 (1935).

¹⁶ *Home Building and Loan Ass'n v. Blaisdell*, 290 U. S. 398, 54 Sup. Ct. 231 (1933).

¹⁷ However, to apply the act to future mortgages would destroy the farmer's future mortgage credit as was pointed out by Senator Bankhead in 78 CONG. REC. 12,074 (1934).

on community market value; and (3) that the debtor may obtain clear title to the property by payment of the appraised value, including the amount of the incumbrances, subject to the demand of the secured creditor that the property be sold at public sale.¹⁸

J. E. H.

BROKER—LIABILITY OF THIRD PARTY TO AGENT—COMMISSIONS.
—Plaintiffs, real estate brokers, were employed by the owner of certain premises to effect the sale of the premises. Plaintiffs approached the defendants to induce them to purchase the property. Several proposals were made by the plaintiffs and rejected by the defendants. In the course of one of the conferences, one of the plaintiffs suggested: "I have got an idea where I can show you how you can buy the property without any cash at a price of \$145,000. Would you be interested?" The owner consented to the terms offered by the plaintiffs and orally accepted by the defendants, but the latter changed their minds and the plaintiffs sue, alleging an employment of them by defendants, a breach by defendants of that contract of employment and demand as damages a sum measured by the amount of the commissions which defendants were alleged to have prevented plaintiffs from receiving from the owner. The Court of Appeals affirmed the decision for the defendants on the ground that the evidence failed to prove a contract of employment of plaintiffs by defendants. *Grossman et al. v. Herman et al.*, 266 N. Y. 249, 194 N. E. 694 (1935).

The mere fact that brokers have been employed by an owner to procure a sale or lease of real estate need not in itself necessarily prevent such brokers, under proper circumstances, from accepting employment also from a purchaser or a lessee.¹ But in order to recover commissions from the latter, the broker has the burden of proving a contract of employment between them.² Such a contract has been inferred although the broker was already under contract with the owner.³ In the instant case the facts did not constitute an employment between the brokers and the prospective purchasers. The latter's acceptance of the proposition made by the brokers who were then acting for the owner would not justify the inference of an

¹⁸ *In re Slaughter*, U. S. Dist. Ct., N. D. Texas, Oct. 12, 1935, reported in Commerce Clearing House, Bankruptcy Law Service, p. 3621 (holding the new section constitutional). *Contra: In re Young*, N. Y. Times, Oct. 22, 1935, at 1, reporting a decision of the U. S. Dist. Ct., Ill. *In re Sherman Bkpt.*, N. Y. Times, Nov. 11, 1935, at 6, reporting a decision of U. S. Dist. Ct., Va.

¹ *Knauss v. Gottfried Krueger Brewing Co.*, 142 N. Y. 70, 36 N. E. 867 (1894).

² *Parker v. Simon*, 231 N. Y. 503, 132 N. E. 404 (1921).

³ *Pease & Elliman, Inc. v. Gladwin Realty Co.*, 216 App. Div. 421, 215 N. Y. Supp. 346 (1st Dept. 1926).