A PERMANENT BANKRUPTCY CHAPTER FOR FARMERS: AN ANALYSIS OF LEGISLATIVE PROPOSALS

Section 75 of the Bankruptcy Act, popularly known as the Frazier-Lemke Act, lapsed for the third time on March 31, 1947.¹ Pending in Congress at

¹ Section 75 (a) to (r) dealing with farmer-debtor compositions and extensions was enacted in 1933. 47 Stat. 1470 (1933). The demand for further legislation to put teeth into Section 75 produced the Frazier-Lemke amendment (subsection (s)) which established a farm mortgage moratorium procedure. 48 Stat. 1289 (1934). The original subsection (s) was declared unconstitutional in 1935 [Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555] and a new subsection (s) enacted the same year, 49 Stat. 943 (1935). This was upheld by a unanimous court in Wright v. Vinton Branch, 300 U.S. 440 (1937).

By its original terms, Section 75 was to be effective only until March 3, 1938. But by Act of March 4, 1938, its life was extended two additional years to March 4, 1940. 52 Stat. 84 (1938). The Act of March 4, 1940 again re-extended its effectiveness for four years until March 4, 1944. 54 Stat. 40 (1940). In 1944 the first hiatus occurred when there was a seven-day lapse to March 11, 1944 before the Section was re-extended until March 4, 1946. 58 Stat. 113 (1944). A second hiatus of three months occurred in 1946. On June 3, 1946 Section 75 was again re-extended until March 31,
the time were two bills, each of which proposed to rewrite the major provisions of Section 75 in new and permanent form as Chapter XVI of the Bankruptcy Act. The eminent desirability of a permanent chapter for farmers as a part of the Bankruptcy Act, and the probability of action in an early session of Congress on one or the other of the pending bills, suggest a comparative


In addition to these extensions, Section 75 has been amended a number of times. For a résumé of these legislative changes, see 5 COLIER, BANKRUPTCY ¶ 75.02 (14th ed. 1943).

Subsections of Section 75 will hereinafter be referred to by subsection letter only. All references will be to Section 75 with all Amendments to July 1, 1946. 11 U.S.C. § 203 (1940), as amended 11 U.S.C. § 203 (Supp. 1945), 11 U.S.C.A. § 203 (Supp. 1946).

2. The first of these bills is the McCarran-Lemke bill, introduced in the House on January 6, 1947, H.R. 463, 80th Cong., 1st Sess. (1947), and in the Senate on January 27, 1947, S. 422, 80th Cong., 1st Sess. (1947). The other bill was prepared by the National Bankruptcy Conference and introduced in the House by Congressman Reed on March 10, 1947, H.R. 2451, 80th Cong., 1st Sess. (1947). Both bills were referred to the House Committee on the Judiciary and at this writing were awaiting hearings at an undetermined date.

This is not the first time that legislation has been proposed to make the farm bankruptcy provisions a permanent part of the Bankruptcy Act. In 1939, a Frazier-Lemke bill was introduced which proposed to rewrite and make permanent the major provisions of Section 75. S. 1935, H.R. 7528, 76th Cong., 1st Sess. (1939). Hearings were held in 1940 but no action was taken other than to extend § 75 an additional four years.

In 1940, a proposal was made by the National Bankruptcy Conference to revise § 75 into a new and permanent chapter of the Bankruptcy Act. A completely redrafted statute was presented for the consideration of the Subcommittee on Bankruptcy of the House Committee on the Judiciary but failed of adoption. 5 COLIER, BANKRUPTCY 129 n.18 (14th ed. 1943); Oglebay, Some Developments in Bankruptcy Law, 18 J.N.A. REP. BANK. 68, 70, n. 24 (1944).

3. The need for permanent bankruptcy provisions for the benefit of farmers seems clear. An historic objective of American agricultural policy has been the encouragement of the owner-operated farm and the elimination of absentee farm ownership and farm tenancy. See A. W. GRISWOLD, AGRARIANISM AND DEMOCRACY (author's manuscript; scheduled for publication in 1947 by Harcourt, Brace & Co.). Preventive measures for effectuating these policy objectives have been government-financed agencies offering the farmer credit on terms more liberal than private institutions could afford and risking capital in agricultural investment fields where private institutions did not dare to venture. See Comment, Proposed Revisions in the Farm Credit System: Current Legislation, 51 YALE L.J. 649 (1942); GRISWOLD, op. cit. supra. But when the farmer's economic position has reached the stage where preventive measures are ineffective, remedial measures become necessary. Such a remedial measure was the Frazier-Lemke Act, aptly termed by one commentator "bankruptcy reorganization for farmers." See Letzler, Bankruptcy Reorganizations for Farmers, 40 Col. L. Rev. 1133 (1940). Designed to give the farmer an opportunity to scale down his secured debts and to shift the loss of cyclical land value fluctuations to the shoulders of the creditor, it sought to achieve the desirable objective of keeping the farmer the owner of his farm.

Although the Frazier-Lemke Act was concededly designed to protect the farmer in a situation where the creditor ordinarily is dominant and although the rights of creditors were only an incidental consideration, the forebodings of its opponents that it would
analysis of the major features of these two bills in the light of the problems encountered under Section 75.

In broad outline, Section 75 provided two procedures for maintaining the debt-ridden farmer’s ownership of his farm. Any farmer who was insolvent or unable to meet his debts as they matured, could file a petition under subsections 75(a) to (r) stating that he desired to effect a composition or an extension of time to pay his debts. While the farmer and his creditors were attempting to reach a composition or extension agreement, all proceedings against the farmer and his property were stayed. If the negotiations failed or if the farmer felt “aggrieved” by the agreement reached, he could amend his petition, ask to be adjudged a bankrupt, and avail himself of subsection (s). Under this subsection, he was continued in possession and all proceedings against him were stayed for three years, during which the farmer had only to pay a reasonable rental. If within the three year period the farmer paid the appraisal value of his property into court, the property was thereby cleared of all encumbrances and his title became absolute. If, however, he failed to pay

close the farmer off from the credit sources of private institutional investors has proved unfounded. Although the proportion of farm mortgages held by private lenders was markedly reduced between 1930 and 1938, the ratio has progressively increased since 1938 until in 1945 close to 66 percent of the total farm mortgage debt was held by private lenders. Larsen, Distribution by Lender Groups of Farm-Mortgage and Real Estate Holdings, January 1, 1930-45 6-8 (U.S. Dep’t Agric. 1945). This would seem to indicate that Section 75 has not deterred private credit extension in the farm mortgage field.

The argument that lack of use of Section 75, see Comment, 51 Yale L. J. 649, 659 (1942), indicates there is no necessity for permanent farm bankruptcy provisions, likewise seems without merit. Although as agriculture has ridden along on the recent boom Section 75 has seen progressively decreasing use, nevertheless in the fiscal year 1945 it was used more than any other of the relief sections or chapters of the Bankruptcy Act except Chapter XIII. H.R. Rep. No. 1588, 79th Cong., 2d Sess. 1 (1946). Moreover, the immeasurable persuasive effect of Section 75 in encouraging out-of-court debt-scaling agreements cannot be ignored. See Sen. Rep. No. 985, 74th Cong., 1st Sess. 7 (1935); Hearings before House Committee on Judiciary on H.R. 6452 and S. 2215, 75th Cong., 2d and 3d Sess. 55, 152, 168-9, 179 (1937-8); Hearings before House Committee on Judiciary on H.R. 7528 and S. 1935, 76th Cong., 3d Sess. 25, 34 (1940); Hearings before House Committee on Judiciary on H.R. 7356, 77th Cong., 2d Sess. 12 (1942).

But for unfavorable comments on the Frazier-Lemke Act by those who take a dim view of permanent farm bankruptcy legislation, see Hanna, New Frazier-Lemke Act, 1 Mo. L. Rev. 1, 16-18 (1936); Perry, Section 75 of the Bankruptcy Act, Why Has the Congress Extended It?, 20 Calif. S.B.J. 163 (1945); Weinstein, Shall Section 75 Be Made Permanent?, 43 Conn. L. J. 99 (1938); testimony of Peyton R. Evans, General Counsel, Farm Credit Administration, in Hearings before House Committee on Judiciary on H.R. 6452 and S. 2215, 75th Cong., 2d and 3d Sess. 79-112 (1937-8).

4. The best detailed treatment of Section 75 will be found in 5 Collier, Bankruptcy 101-234 (14th ed. 1943). For briefer, but dated, discussions of Section 75, see Diamond and Letzler, The New Frazier-Lemke Act: A Study, 37 Col. L. Rev. 1092 (1937); Hanna, Agriculture and the Bankruptcy Act, 19 Minn. L. Rev. 1 (1934); Hanna, New Frazier-Lemke Act, 1 Mo. L. Rev. 1 (1936); Letzler, supra note 3; Comment, 48 Yale L. J. 859 (1939).
this sum into court by the end of the three years, the property was sold at judicial sale and he was granted a discharge.

Enacted in haste, Section 75 was scarcely a model of sound legislative drafting. It was loosely worded and abounded with ambiguities, repetitions, and omissions, while poor arrangement made it inconvenient to use. Although subsection 75(s) was considerably revised, subsections 75(a)-(r) remained substantially as enacted in 1933. Since the drafters of subsection 75(s) were attempting to meet specific constitutional standards established by the 1935 Supreme Court, they could not fully utilize the broad legislative power in this field which the subsequent shift in judicial attitude has shown to be available. With varying degrees of success, the McCarran-Lemke bill (hereinafter referred to as the Lemke bill) and the National Bankruptcy Conference bill (hereinafter referred to as the N.B.C. bill) attempt to eliminate these defects. The N.B.C. bill, unlike the Lemke bill, codifies much of the judicial effort that has gone into clarifying the verbal vagaries of Section 75, and largely eliminates the remaining ambiguities and omissions by more precise and comprehensive wording. Either bill would be more convenient to use than the former statute, since both bills are divided into Articles following the structural form employed in Chapters X through XIII of the Bankruptcy Act. However, this functional structure, successfully achieved in the N.B.C. bill, is more apparent than real in the Lemke bill. And both bills embody a fuller exercise of the constitutional power in this field than did Section 75.

The analysis which follows will treat the two bills concurrently article by article, pointing out the problems involved under Section 75 and the changes and clarifications effected by these bills in each instance.

CONSTRUCTION AND DEFINITIONS

The precise relation which the general provisions of the Bankruptcy Act, Chapters I through VII, bore to Section 75 was in many instances far from clear. The first article of each bill attempts to clarify this ambiguity by

5. See 5 Collier, Bankruptcy 128 n. 18 (14th ed. 1943).
7. In 1939 it was said that one of the causes of the harsh reception then being given Section 75 by many courts was the draftsmen's "obviously excessive care to avoid the pitfalls of unconstitutionality." Comment, 48 Yale L. J. 859, 872 (1939). The increasingly liberal trend in judicial attitude in interpreting § 75 is discussed in footnote 134 infra.
10. See Letzler, supra note 3, at 1163.
11. For example, did the provisions of Chapters I to VII apply so as to authorize appointment of a trustee? Infra p. 1000. In regard to the provability of future rent claims? Infra p. 1003. So as to authorize the avoidance of preferential and fraudulent transfers? Infra p. 1000. The indicated provisions of the general bankruptcy chapters were said to be inapplicable in the following cases: Harris v. Zion's Savings Bank & Trust Co., 317 U.S. 447 (1943) (§ 8, by implication); In re Fife, 46 F. Supp. 103 (E. D. Wash. 1942)
stating that, where not inconsistent, the provisions of Chapters I through VII are applicable to farm bankruptcy proceedings.\textsuperscript{12}

Following the structure of Chapters X through XIII, the second article of each bill deals with definitions.\textsuperscript{13} Since the definition of “farmer” determines who may file under the Chapter—a matter of much litigation under Section 75—this definition is probably the most important in Article II.\textsuperscript{14} While Section 75 was in effect, who was a farmer under the Bankruptcy Act depended

\textsuperscript{12}Article I of the N.B.C. bill is identical with Article I of Chapter XI. Article I of the Lemke bill is identical with the first article of Chapter XI, save that it omits the last sentence included in § 302.

\textsuperscript{13}The definitions included in Article II of the N.B.C. bill are the following: (1) “Claims”—substantially similar to § 406 (2). (2) “Creditor”—identical with §§ 106 (4), 606 (2). (3) “Debtor”—“shall mean a farmer who files a petition under this Chapter.” (4) “Debts”—identical with §§ 106 (6), 406 (7), 606 (4). (5) “Executory Contracts”—substantially similar to §§ 106 (7), 306 (4), 406 (4). (6) “Farmer”—see infra note 14. (7) “Petition”—“a petition filed in a court of bankruptcy or with its clerk by a debtor praying for the benefits of this chapter.” (8) “Period of Redemption”—substantially similar to § 75 (n). (9) “Plan”—identical with § 606 (7). (10) “Property of a Debtor”—defined substantially as in § 75 (n). The definitions included in Article II of the Lemke bill are the following: (1) “Period of Redemption”—identical with definition in § 75 (n). (2) “Farmer-debtor”—“a farmer who could become a bankrupt under section 4 of this Act and who files a petition under this chapter.” (3) “Farmer”—see infra note 14. (4) “Petition”—“a petition filed under this chapter by a farmer.”

\textsuperscript{14}The N.B.C. bill defines “farmer” as follows:

“‘farmer’ shall mean an individual primarily bona fide engaged in producing products of the soil, or in dairy farming, or in the production of poultry or livestock, or in the production of poultry or livestock products in their unmanufactured state, and the principal part of whose gross income is derived from any one or more of such operations, whether so engaged personally or as a tenant or by tenants, and shall include the executor, administrator, or personal representative of the estate of any such deceased person so engaged at the time of his death in one or more of the foregoing operations. The provisions of this chapter shall be held to apply also to partnerships, to common, entirety, joint, or community ownerships, or to farming corporations where at least 75 per centum of the stock is owned by actual farmers.”

The Lemke bill’s definition of “farmer” is:

“‘farmer’ shall mean—

(a) any individual who is primarily bona fide personally engaged in producing any kind or kinds of commercial products of the soil;

(b) any individual who is primarily bona fide personally engaged in dairy
on whether one applied the definition in Section 1(17) or that in Section 75(r). This conflict of definitions raised two problems. The enactment of Section 1(17) as part of the Chandler Act of 1938 posed the question whether the definition in Section 1(17) had by implication repealed the definition in Section 75(r). When Section 75(r) was subsequently amended in 1940, the further question arose whether this had impliedly repealed Section 1(17). Even with this conflict resolved by limiting the scope of each section, the fact remained that there was one definition for the "farmer" who could not be adjudged an involuntary bankrupt and another definition for the "farmer" who might proceed voluntarily under the farm bankruptcy provisions. Although policy reasons have been suggested for the two variant definitions, such reasons lack persuasiveness and appear to be no more than *ex post facto*

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farming, the production of poultry or livestock, or the production of poultry or livestock products in their unmanufactured state;

"(c) any individual the principal part of whose income is derived from any one or more of the operations specified in clauses (a) and (b), whether such operations are engaged in by the individual or by tenants;

"(d) the executor, administrator, or personal representative of a deceased individual specified in clauses (a), (b), or (c);

"(e) any partnership or any common, entirety, joint, or community ownership composed of individuals specified in clauses (a), (b), (c), or (d); or

"(f) any farming corporation in which at least 75 per centum of the stock is owned by individuals specified in clauses (a), (b), (c), or (d) . . . ."

15. Under the definition in § 75 (r) the two tests of occupation and income are separated by the disjunctive "or," thus making the two tests apparently alternative. But under the definition in § 1 (17) the two tests are separated by "if," thus making them concurrent conditions to qualifying as a farmer. In this, and other respects, the definition in § 1 (17) is generally more restrictive than that in § 75 (r). The two definitions are compared in 1 COULIER, BANKRUPTCY ¶ 4.15 (14th ed. 1940).

16. When the definition of farmer in § 1 (17) was enacted as part of the Chandler Act in 1938, the argument was subsequently made, contrary to what seemed the intent of the draftsmen, that § 1 (17) had by implication repealed § 75 (r) and that the individuals who could petition under § 75 were thus determined by reference to § 1 (17). In Benitez v. Bank of Nova Scotia, 313 U.S. 270 (1941), the Supreme Court refuted this argument and held that for the purposes of proceedings under § 75 the status of "farmer" is determined by the definition in § 75 (r) and not by the definition in § 1 (17). See Note, 26 CORN. L. Q. 308, 310-11 (1941); Note, 18 Ore. L. Rev. 109, 109-10 (1939).

17. In 1940, § 75 (r) was amended by eliminating the reference to § 74. 54 STAT. 40 (1940). However, since the reference to § 4(b) was retained, this poses the question whether this amendment repealed § 1 (17) by implication. For the contention that it did repeal § 1 (17), see Note, 89 U. Pa. L. Rev. 1091, 1092 (1941). For the argument that it did not repeal § 1 (17), see 5 COULIER, BANKRUPTCY 146 n. 10 (14th ed. 1943); Note, 26 CORN. L. Q. 308, 311 (1941). The argument against repeal by implication seems the sounder and more convincing.

18. The policy reason most frequently given is, to restrict exemptions from involuntary bankruptcy and to enlarge the class of debtors permitted rehabilitation. See Note, 26 CORN. L. Q. 308, 311 (1941); Note, 89 U. Pa. L. Rev. 1091, 1092 (1941). A moment's reflection will show, however, that these are not reasons but rather only statements of conclusions.
rationalizations for what is in fact merely an historical legislative accident. Accordingly it would seem desirable that there be but one definition for the entire Bankruptcy Act. The Lemke bill achieves this objective by amending Section 1 (17) so that its definition corresponds, with that in the proposed Chapter XVI. But the N.B.C. bill, which says nothing about Section 1 (17) apparently contemplates continuation of two definitions.

Subsection 75 (r) defined a farmer as one "primarily bona fide personally engaged" in specified farming operations "or" one "the principal part of whose income is derived" from such operations. Since use of the disjunctive "or" apparently established two alternative tests, considerable controversy developed as to whether the absentee landlord who qualified under the second test by deriving the principal part of his income from farming was entitled to avail himself of the provisions of Section 75. As the prime objective of farm bankruptcy proceedings is to keep the farmer the owner of his farm, which usually is his home as well as his place of work, sound policy would seem to dictate that the absentee landlord should be excluded from the benefits.

19. When the Chandler Act, of which § 1 (17) was a part, was passed in 1938, the draftsmen did not concern themselves with § 75 since it was only temporary legislation scheduled then to expire by its own limitation. See excerpt from Committee Print Analysis of H.R. 12889, 74th Cong., 2d Sess. (1936), quoted in Note, 18 Ore. L. Rev. 108, 110 n. 13 (1939). But since § 75 did not expire but instead was reextended for nine additional years, the conflict of definitions continued.

20. Lemke bill, § 2.

21. Despite the fact that the word "personally" would seem to indicate otherwise, it was well settled under § 75 (r) that the debtor did not actually have to till the soil with his own hands to be a farmer. Williams v. Great Southern Life Ins. Co., 124 F. 2d 38 (C.C.A. 5th 1941), cert. denied, 316 U.S. 663 (1942); 5 Collier, Bankruptcy 149 (14th ed. 1943). Accordingly, the N.B.C. bill omits the word "personally" and requires only that the debtor be "primarily bona fide engaged" in farming.

22. In First Nat. Bank & Trust Co. v. Beach, 86 F. 2d 88 (C.C.A. 2d 1936), the Second Circuit held that while the debtor was not primarily personally engaged in farming, he was nevertheless a farmer within the meaning of § 75 (r) because he derived the principal part of his income from farming. On certiorari, the Supreme Court affirmed on the ground that the debtor was primarily personally engaged in farming, specifically reserving the question whether the receipt of income derived from farming would make a farmer out of some one primarily engaged in different activities. First Nat. Bank & Trust Co. v. Beach, 301 U.S. 435 (1937).

The question reserved by the Supreme Court in the Beach case was answered by the Ninth Circuit in Shyvers v. Security-First Nat. Bank, 108 F. 2d 611 (C.C.A. 9th 1940), cert. denied, 309 U.S. 668 (1940). There the debtor was owner of extensive farm lands in California but had been resident in England for a number of years. The principal part of her income was concededly drawn from these farm lands. It was held that she was not a farmer within the meaning of § 75 (r). The Shyvers case is said to have been "erroneously decided" in Note, 30 Corn. L. Q. 389, 391 (1945), and its reasoning "somewhat difficult to follow" in 5 Collier, Bankruptcy 156 (14th ed. 1943); but it is approved as having "adopted an interpretation which is consistent not only with the letter but also with the spirit of the law," in Letzler, supra note 3, at 1140.

The growing weight of authority supports the view of the Shyvers case that an absentee landlord, whose only connection with the farm is that he derives the principal part
of such proceedings. But the Lemke bill appears to include within its definition of farmer the absentee landowner the principal part of whose income stems merely from farm ownership.23 On the other hand, the N.B.C. bill by using the conjunctive "and" makes the two tests of 75(r) cumulative instead of alternative. The absentee landlord thus seems clearly excluded under the N.B.C. bill definition.24

The converse of the position of the absentee landowner is that of the man who, while engaged in farming, does not derive the principal part of his income therefrom.25 Under 75(r), such an individual would have to qualify under the first alternative test which required that he be "primarily, bona fide personally engaged" in specified farming operations. As long as he satisfied these requirements the source of his income was immaterial,26 so that the farmer whose income in a bad year dropped below his outside income,27 if any, or who normally received a greater income from non-farm sources28 could still avail himself of Section 75. But under the N.B.C. bill definition, since the would-be farmer must meet the tests of both occupation and income, it would seem that an individual who derived a greater income from non-farm sources would be excluded regardless of the fact that his primary occupation was farming.29

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23. Were it not for the addition in clause (c) of the new phrase, "whether such operations are engaged in by the individual or by tenants," it might be argued that the reasoning of the Shyvers case would still apply under this clause. However, the addition of this phrase appears to vitiate the Shyvers case rationale, thus including the absentee landlord who does nothing but derive the principal part of his income from farming operations.24 However, since the N.B.C. bill makes it clear that the specified operations may be carried on "by tenants," it would seem that the individual who does not live on the farm and who does not personally till the soil, but whose primary occupation is running farms, would be included. The definition thus embraces some absentee landowners. An absentee landowner such as the debtor in the Williams case would appear to be included. Williams v. Great Southern Life Ins. Co., 124 F. 2d 38 (C.C.A. 5th 1941), cert. denied 316 U.S. 663 (1942). But an absentee landlord in the position of the debtor in the Shyvers case would be excluded.

Although it can be argued that no absentee landowners should be included, the N.B.C. bill at least makes an attempt to exclude the more obvious type of absentee landlord.

25. For examples of individuals who derived the principal part of their income from non-farm sources, see In re Lindsay, 41 F. Supp. 948 (S.D. Tex. 1941); In re Schermerhorn, 41 F. Supp. 447 (E.D. Wash. 1941); In re Knight, 9 F. Supp. 592 (D. Conn. 1934).

26. In re Lindsay, 41 F. Supp. 948 (S.D. Tex. 1941); 5 COLLIER, BANKRUPTCY 156 (14th ed. 1943).
29. Other individuals excluded would be those in the situation of the debtor in In re Schermerhorn, 41 F. Supp. 447 (E.D. Wash. 1941). With income from his farm reduced
In the last analysis, the job of applying the definition must be left to the courts, guided by the policy of the statute and the particular equities of each case. It would thus seem desirable to have a definition which is as flexible as possible. Alternative tests would seem to furnish more flexibility than cumulative ones. Under § 75 (r) the trend of judicial decision was toward applying the alternative tests so as to exclude the absentee landlord and to include the individual who was primarily engaged in farming but did not derive the principal part of his income therefrom. Though the Lemke bill uses alternative tests, the addition of a new phrase precludes the judicial trend toward excluding the absentee landlord. By employing cumulative tests, the N.B.C. bill prevents the farmer whose main income is derived from non-farm sources from availing himself of the Chapter. It is suggested that both definitions are in this respect deficient.

A third problem left largely unsolved by § 75 (r) was whether the definition included a tenant farmer. Since a tenant farmer might have hypothecated as security for loans his leasehold interest, his farming equipment, his crops, to nil, the debtor was forced to seek employment first as a trucker, then with the W.P.A., and finally as a miner. Although almost all of his income was derived from these jobs, the court was able to find that, since he intended eventually to return to farming, he had thus not lost his status as one primarily bona fide personally engaged in farming. The nature of his income was accordingly immaterial. But under the N.B.C. bill, even if the same reasoning were employed to qualify him for the occupation test, he would still be unable to meet the income test and would thus be excluded.

A similar situation arose in Leonard v. Bennett, 116 F. 2d 128 (C.C.A. 9th 1940), where by the same rationale the court was able to find that the debtor was a "farmer." But under the N.B.C. bill's definition such a debtor would be excluded.

Under § 75 (r), the more authoritative view was that in determining whether farm income was the principal part of one's income, gross income was the figure to be considered. The fairly obvious reasons for using gross income are explained in In re Knight, 9 F. Supp. 502 (D. Conn. 1934). The N.B.C. bill specifically provides that gross income shall be considered in making the determination. This would tend to include debtors whose predicament approached but was not as serious as that of the individuals in the Schermernhorn and Leonard cases.

30. See Conard, New Ways to Write Laws, 56 Yale L. J. 458 (1947). "Today, judges do not even pretend to make a mechanical application of the words of statutes. They much prefer to discover and apply the purposes of statutes." Id. at 468.

31. See supra note 23.

32. Another possible shortcoming of the two definitions is illustrated in the recent case of Dunkly v. Erich, 158 F. 2d 1 (C.C.A. 9th 1946) where the court held that since fish were not livestock therefore a "trout farmer" was not a farmer under § 75 (r). Because it had previously been generally held that individuals engaged in cattle and sheep ranching, poultry raising, and dairy farming were not farmers, Congress amended § 75 (r) in 1935 specifically to include those individuals. 5 COLLIER, BANKRUPTCY 145-6 (14th ed. 1943). The Dunkly case's exclusion of "trout farmers" suggests that a similar broadening amendment should be made in the two pending bills.

33. See McLean v. Federal Land Bank, 130 F. 2d 123, 127 (C.C.A. 8th 1942), where the court said that § 75 "is not designed to aid farm hands, farm tenants, share croppers or others who may follow farming as a vocation to newly acquire and hold farm property." See 5 COLLIER, BANKRUPTCY 150-1 (14th ed. 1943).
or structures which he had erected on the land, it would seem that he should be entitled to avail himself of farm bankruptcy proceedings. While the Lemke bill maintains the ambiguous silence of 75 (r) on the status of tenant farmers, the N.B.C. bill seems clearly to include them among the beneficiaries of the Chapter.34

An unfortunate result reached under 75(r)'s definition was the Supreme Court's ruling that the administrator or executor of a deceased farmer could not initiate or continue proceedings under Section 75 without the consent of the state probate court.35 Adopting the position of the commentators36 and the dissenting justices,37 both bills do away with this rule.

CONCILIATION COMMISSIONER

While the N.B.C. bill abolishes the position of Conciliation Commissioner and provides instead for the reference of the proceedings to a referee in bankruptcy, the Lemke bill retains, with some changes, the office of Conciliation Commissioner.38 Under the Lemke bill, as under Section 75, the Commissioner must be familiar with agricultural conditions in the community and must not be engaged in farm credit activities. These qualifications attempt to exclude from the position the farm creditor class and insure the appointment of individuals in sympathy with the farmer's problems.39 In addition it is provided that a referee or special master may not be appointed or serve as a Conciliation Commissioner. This is apparently designed to meet the criticism that referees are creditor-minded and tend to be unduly legalistic in their administration.40 Since farm bankruptcy proceedings are intended to be heavily

34. The N.B.C. bill uses the phrase “whether so engaged personally or as a tenant or by tenants.” [Emphasis supplied.]
36. The decision of the Utah court, affirmed by the Supreme court, is criticized in Note, 8 U. CH. L. REV. 532 (1941). The Supreme Court's decision is questioned in Note, 43 COLUM. L. REV. 516 (1943), and 5 COLIER, BANKRUPTCY 158 n. 46 (14th ed. 1943).
37. Justices Douglas, Black, and Murphy dissented on the grounds that §8 of the Bankruptcy Act was determinative and that the Bankruptcy Act, not local probate law, controlled the administration of a bankrupt's estate. 317 U.S. 447, 453-6 (1943).
38. Lemke bill §§903-9. The Conciliation Commissioner's term of office is extended to four years and his jurisdiction is made co-extensive with that of the court. However, he is no longer required, as he was by §75 (q), to act, in effect, as the farmer's attorney. This is apparently designed to meet the criticism that a Conciliation Commissioner should not perform simultaneously the duties of judge and advocate. See Hearings Before House Committee on Judiciary on H.R. 7528 and S. 1935, 76th Cong., 3d Sess. 48 (1940); 5 COLIER, BANKRUPTCY 135 (14th ed. 1943).
39. In reporting out the original §75 (a) listing the qualifications for Conciliation Commissioner, the Senate Committee on the Judiciary stated that “the plan outlined here for his appointment necessarily prejudices him in favor of the farmer.” SEN. REP. No. 1215, 72d Cong., 2d Sess. 6 (1933).
40. See testimony of Elmer McClain to the effect that referees are opposed to §75, in Hearings Before House Committee on Judiciary on H.R. 6452 and S. 2215, 75th Cong., 2d and 3d Sess. 63 (1937-8).
weighted in favor of the debtor and to be simple, convenient, and non-technical, the Lemke bill's retention of the office of Conciliation Commissioner with its excluding qualifications would appear to be a desirable policy objective.

However, the Lemke bill appears weak from the standpoint of practical administration, since it may not be feasible to find qualified men willing to assume the job. In addition to the qualifications listed above, the prospective Commissioner must possess all the qualifications of a referee in bankruptcy. Nevertheless, his compensation for what might be five years' work, though increased over that formerly allowed, is limited to seventy-five dollars plus administration expenses. Under Section 75, some district judges found it impossible to locate men who were qualified and willing to accept appointments as Conciliation Commissioners. As a result the procedure for appointment specified in 75 (a) was relaxed in 1944, and in 1946 Section 35 was amended to permit referees to act as Conciliation Commissioners, a procedure which some judges had been previously following of necessity. With the even more exclusive qualifications in the Lemke bill, it seems likely that considerable difficulty would be encountered in finding suitable Commissioners.

Were the qualifications enumerated in the Lemke bill changed to permit the appointment of a referee as Conciliation Commissioner where it is impossible to find a qualified individual, the desirable features of the office would be retained in many districts without putting insuperable obstacles in the way of

41. See 5 COLLIER, BANKRUPTCY 126 (14th ed. 1943).
42. Lemke bill, § 961. The Conciliation Commissioner's compensation is directly dependent upon the number of cases filed in his district. This seems less desirable than the recent Referee's Salary Act which placed referees on a salary basis, independent of the fees taxed in the cases referred to a given referee. Pub. L. No. 464, 79th Cong., 2d Sess. (June 28, 1946); 11 U.S.C.A. § 68 (Supp. 1946). It would seem that the Lemke bill should be amended to place Conciliation Commissioners on a salary independent of the number of petitions filed before a given commissioner.
44. Subsection 75(a) had previously required that a Conciliation Commissioner be appointed for every agricultural county having a population of five hundred or more farmers and that he be a resident of the county in which he was to act. 48 STAT. 925 (1934). The amendment of 1944 provided that not more than twenty Conciliation Commissioners should be appointed in any one district and that such commissioner need only be a resident of the district. 58 STAT. 113 (1944), 11 U.S.C. § 203(a) (Supp. 1945). By thus expanding the residency requirement from the county to the district, the draftsmen felt that the judge's job of finding qualified Conciliation Commissioners would be made easier. H.R. Rep. No. 1127, 78th Cong., 2d Sess. 3 (1944).
practical administration in other districts. With the qualifications for the 
office thus changed, it would seem that the N.B.C. bill should be amended to 
include provisions for a Conciliation Commissioner.

**Jurisdiction and Powers of the Court**

Under both bills the court has jurisdiction of the debtor and his property 
wherever located. As in the former 75 (n), property is broadly defined so as 
to foreclose any possible narrow judicial constructions. The jurisdiction, 
powers, and duties of both the trial and appellate courts are the same as in a 
regular bankruptcy proceeding. The N.B.C. bill's article dealing with the 
jurisdiction and powers of the courts is modelled on the jurisdictional articles 
of Chapters X through XIII. It expressly gives the court the power to 
permit the rejection of executory contracts, which by definition include 
leases, thus supplying an omission in the former Section 75. Detailed, clear, 
and concise, the N.B.C. bill here seems superior in draftsmanship to the 
Lemke bill, which is largely a re-working of the old phrases in the former 
subsections 75 (n), (o), and (p).

**Petition, Approval, and Stay**

Under Section 75, a condition precedent to the farmer's taking advantage 
of subsection (s), which provided for a moratorium and a scaling down of 
secured debts, was an attempted composition or extension agreement under 
subsections (a) to (r). Since the farmer always had the option of proceeding 
into subsection (s) by stating that he was "aggrieved" by the composition or 
extension agreement and since subsection (s) was the essential objective of

47. A tabulation of each section in Article III of the N.B.C. bill and its similar sec-
tion in other Chapters of the Bankruptcy Act follows:

<table>
<thead>
<tr>
<th>Section (N.B.C.)</th>
<th>Section (Bankruptcy Act)</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 911</td>
<td>§§ 111, 311, 411</td>
</tr>
<tr>
<td>§ 912</td>
<td>§§ 112</td>
</tr>
<tr>
<td>§ 913</td>
<td>§§ 114</td>
</tr>
<tr>
<td>§ 914(1)</td>
<td>§§ 313(1), 413(1), 613(1)</td>
</tr>
<tr>
<td>§ 914(2)</td>
<td>§§ 119, 313(3), 413(3), 613(2)</td>
</tr>
<tr>
<td>§ 915</td>
<td>§§ 120, 315, 415, 615</td>
</tr>
<tr>
<td>§ 916</td>
<td>§§ 116</td>
</tr>
<tr>
<td>§ 917</td>
<td>§ 118</td>
</tr>
<tr>
<td>§ 918</td>
<td>§§ 121, 316, 416, 616</td>
</tr>
</tbody>
</table>

48. A tabulation of each section in Article IV of the Lemke bill and its counterpart 
in Section 75 follows:

<table>
<thead>
<tr>
<th>Section (Lemke)</th>
<th>Section (Bankruptcy Act)</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 911</td>
<td>§ 75(n)</td>
</tr>
<tr>
<td>§ 912</td>
<td>§ 75(s)</td>
</tr>
<tr>
<td>§ 913</td>
<td>§ 75(t)</td>
</tr>
<tr>
<td>§ 914(1)</td>
<td>§§ 313(1), 413(1), 613(1)</td>
</tr>
<tr>
<td>§ 914(2)</td>
<td>§§ 119, 313(3), 413(3), 613(2)</td>
</tr>
<tr>
<td>§ 915</td>
<td>§§ 120, 315, 415, 615</td>
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<tr>
<td>§ 916</td>
<td>§§ 116</td>
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<tr>
<td>§ 917</td>
<td>§ 118</td>
</tr>
<tr>
<td>§ 918</td>
<td>§§ 121, 316, 416, 616</td>
</tr>
</tbody>
</table>

See notes 35-7 supra.
Section 75, subsections (a) to (r) accomplished little and became mere formalities which had to be complied with, and incidentally offered a means by which the proceedings could be drawn out and a longer moratorium in effect obtained. Accordingly both bills do away with the attempted composition or extension agreement as a condition precedent to a voluntary petition in bankruptcy and recourse to the moratorium and debt-scaling provisions. Instead, a plan of composition or extension is now to be attempted, if at all, during the moratorium period.

The proceedings under both bills are commenced by the filing of a petition stating that the farmer is insolvent or unable to pay his debts as they mature and that he desires to avail himself of the benefits of the Chapter. Each bill...

49. Under § 75(a)–(r), the plan of composition or extension had to be approved by a majority in number and amount of all creditors. Acquiring the approval of a majority in number might not be too difficult, but, since the mortgagee was almost always the largest creditor, the approval of a majority in amount was usually impossible to acquire. See Comment, 44 Yale L. J. 651, 652-3 (1935); Comment, 43 Yale L. J. 1285, 1287 (1934). But while the mortgagee had an effective veto power under §75(a)–(r), his claim was automatically handled by the court under §75(s). Thus §75(s) with its automatic debt scaling and moratorium provisions was the substantive heart of §75. See 5 Collier, Bankruptcy 127 (14 ed. 1943). But for a different, and rather unrealistic, view of the relation of §75(a)–(r) to §75(s), see remarks of Holmes, J. in Baxter v. Savings Bank, 92 F.2d 404, 406 (C.C.A. 5th 1937).

50. See Letzler, supra note 3, at 1164.

51. Commenting on legislation pending in 1940 which proposed, inter alia, to do away with an attempted composition agreement as a condition precedent to the moratorium provisions, Congressman Lemke had the following to say about § 75(a)–(r): "It is a waste of time and litigation. . . . By taking all of this preliminary matter [§ 75(a)–(r)] out of the picture, in the first place the farmer will not be continuously involved in litigation and wasting his time thereon in place of taking care of his farm and handling his crops, and it will shorten the period under which he can hold the property, because when that is done he knows that he has three years." Hearings Before House Committee on Judiciary on H.R. 7528 and S. 1935, 76th Cong., 3d Sess. 11, 22-3 (1940).

On the same subject, Referee Kruse said, "I think he [Lemke] is right about that. In a good many cases the proceedings linger along under these provisions [§75(a)–(r)] and no rents are fixed . . . and it goes along for 2 or 3 years before they come to a point where they make an order fixing the rents." Id. at 46.

52. Such an amendment has been previously suggested. See supra note 51; Letzler, supra note 3, at 1164-5.

53. A tabulation of the sections in Article IV of the N.B.C. bill follows:

<table>
<thead>
<tr>
<th>Section</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>§921</td>
<td>identical with §§ 321, 621.</td>
</tr>
<tr>
<td>§922</td>
<td>substantially similar to §128. Filing fee increased to $45.</td>
</tr>
<tr>
<td>§923</td>
<td>contents of petition.</td>
</tr>
<tr>
<td>§924</td>
<td>statement of executory contracts, statement of affairs, and schedules to accompany petition.</td>
</tr>
<tr>
<td>§925</td>
<td>approval of petition.</td>
</tr>
<tr>
<td>§927</td>
<td>provisions for automatic stay.</td>
</tr>
<tr>
<td>§928</td>
<td>substantially similar to second sentence of §75(n).</td>
</tr>
</tbody>
</table>

The following is a tabulation of the sections in Article V of the Lemke bill:
provides that a prior discharge in bankruptcy shall not bar a Chapter XVI proceeding. In addition the N.B.C. bill specifies that the prior confirmation of an arrangement or plan shall not preclude the initiation of farm bankruptcy proceedings. Under the N.B.C. bill a Chapter XVI proceeding may be commenced by the filing of an original petition or by the filing of a petition in a pending bankruptcy proceeding either before or after adjudication.

Though the Lemke bill seems to contemplate that a pending bankruptcy proceeding may be transformed into a Chapter XVI proceeding, the language it employs is unfortunately not as clear. Similar language was used in Section 75, but the courts were not always willing to hold that a proceeding already commenced in general bankruptcy could, after adjudication, be transformed into a Section 75 proceeding. The N.B.C. bill seems clearly to dispose of these narrow judicial rulings, while the Lemke bill leaves their status unchanged.

Under the provisions of both bills, the filing of a petition operates as an automatic stay of all proceedings against the debtor or his property. In addition the Lemke bill, as if to insure against any possible reversal of previous judicial construction, provides that the filing shall be notice to all persons and all federal and state courts and officials. Under the N.B.C. bill the stay continues automatically for the life of the proceedings, while the Lemke bill provides that the automatic stay is operative only until the time of the order continuing the debtor in possession, at which time it is necessary for the court

§921 — filing of petition. Petition to be accompanied by schedules and inventory
§922 — provisions for automatic stay
§923 — identical with second sentence of §75(n)
§924 — provisions for entry of judicial stay
§925 — provisions for extending moratorium up to two additional years
§926 — provisions for procedure on farmer’s failure to redeem

54. Lemke bill §981; N.B.C. bill §1043. This was so under §75(s) (5). 5 COLLE, BANKRUPTCY 211 (14th ed. 1943).
56. Section 981 of the Lemke bill employs the same language as in the last sentence of §75(s) (5). For an example of how one court construed this sentence to mean the direct opposite of the apparent intent of the words, see In re Reichert, 13 F.Supp. 1, 7 (W.D.Ky. 1936).
58. Lemke bill, §922; N.B.C. bill, §927. Section 75 did not, in so many words, specify that the filing of a petition operated as a stay. But this omission was corrected by judicial construction. It was said that the effect of §75(n), (o), and (p) was to make the filing of a petition operate as an automatic stay of all proceedings against the debtor and his property. Kalb v. Feuerstein, 308 U.S. 433 (1940); 5 COLLE, BANKRUPTCY 180 (14th ed. 1943); Letzler, supra note 3, at 1156; see Adair v. Bank of America, 303 U.S. 350, 355 (1938).
59. Lemke bill, §911. This provision codifies the judicial rule that no notice of the
to enter a judicial stay. From the point of view of simplicity of the proceed-
ings and the avoidance of a possible hiatus between the stays, the N.B.C. bill
here appears superior. 60

A potent barrier to relief under Section 75 during its early years was the
judicial pronouncement of the so-called "good faith rule." Under this rule,
lack of good faith was imputed to a farmer who had no reasonable probability
of financial rehabilitation. Accordingly, since his petition was not filed in
good faith, he was denied relief and his petition was dismissed. 61 This judi-
cially contrived rule was finally buried by the Supreme Court in John Han-
cock Mutual Life Insurance Co. v. Bartels. 62 Although the Bartels case was
viewed with mixed sentiment by the commentators, 63 it seems eminently desir-
able since it took away what had been a potent weapon in the hands of credi-
tor-minded judges. Employing substantially the language used in the Su-
preme Court's opinion, the N.B.C. bill 64 specifically enacts the rule of the
Bartels case while the Lemke bill 65 incorporates its holding by implication.

Both bills make it clear that as long as the farmer has some interest left in
his property, no matter how remote it may be, he may avail himself of the
provisions of the Chapter. 66 In addition to giving the debtor the right, upon

60. The former "good faith" rule is discussed in 5 Collier, Bankruptcy 217-8
(14th ed. 1943); Letzler, supra note 3, at 1141-51; Comment, 48 Yale L. J. 859, 865-71
(1939).

61. 308 U.S. 180 (1939).

62. Deplored in 87 U. Pa. L. Rev. 739 and 26 Va. L. Rev. 817 (1940). Approved in
8 Geo. Wash. L. Rev. 853 (1940) and 53 Harv. L. Rev. 872 (1940).

63. N.B.C. bill, § 926.

64. Lemke bill, § 911 (similar to § 75 (n), first sentence), § 923 (similar to § 75 (n)
second sentence). N.B.C. bill, § 906 (10) (similar to first and second sentences of
§ 75 (n)), § 928 (similar to § 75 (n), second sentence). The broad definition of
"property" employed in § 75 and carried over into both pending bills is discussed in 5
Collier, Bankruptcy 182-90 (14th ed. 1943).
approval of his petition, to immediate possession of the property in the hands of a receiver or trustee, both bills provide that he shall have the right to immediate possession of property in the hands of a pledgee, mortgagee, or trustee under a deed of trust.\(^\text{67}\)

**Proceedings Subsequent to Approval of Petition**

The articles of the two bills dealing with events subsequent to the approval of the farmer's petition differ considerably both in substance and procedure. Under the Lemke bill,\(^\text{68}\) the proceeding is referred to the Conciliation Commissioner, who has the farmer's property appraised, sets off to the farmer his exemptions, and continues the farmer in possession for the duration of the moratorium. The method of appraisal contemplated by the Lemke bill departs considerably from that provided in \(\text{75}\) (s). Each item of property that exceeds twenty-five dollars and each subdivision or separate parcel of land is to be individually appraised.\(^\text{69}\) The farmer and his creditors must first attempt an appraisal by negotiation.\(^\text{70}\) If they fail to reach an agreement, three disinterested appraisers are to be appointed to appraise the property at its fair and reasonable market value.\(^\text{71}\) If the farmer or a majority in number and amount of his creditors feel aggrieved by the appraisal valuation, it is to be reviewed, and approved or modified, by the Conciliation Commissioner. Only

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\(^{67}\) Lemke bill \(\text{§}\) 912; N.B.C. bill \(\text{§}\) 1037. The Lemke bill is modelled in phraseology on the fourth sentence of \(\text{§}\) 75 (s) (4), adding the words "mortgagee or trustee". The N.B.C. bill is modelled on \(\text{§}\) 257 and \(\text{§}\) 537, but adds a provision for the debtor's right to immediate possession of property in possession of a pledgee under a pledge. Under \(\text{§}\) 75 at least one court indicated that there might be some doubt whether the language in the fourth sentence of \(\text{§}\) 75 (s) (4) was broad enough to entitle the debtor on filing his petition to possession of property in the possession of the mortgagee. See In re Casaudonmecq, 46 F. Supp. 718, 724 (S.D. Cal. 1942). Both bills are now so worded as to remove any ground for doubt. Under \(\text{§}\) 257 of Chapter X, on which the N.B.C. bill provision is modelled, "even when the mortgagee is in possession following foreclosure and sale, the court may demand possession so long as the debtor has an equity under the controlling state law." 6 Collier, Bankruptcy 5015 (14th ed. 1943). Cf. In re Franklin Garden Apartments Inc., 124 F. 2d 451 (C.C.A. 2d 1941).

\(^{68}\) Lemke bill \(\text{§}\) 931-40 of the Lemke bill.

\(^{69}\) Lemke bill \(\text{§}\) 932. It was held under \(\text{§}\) 75 that separate valuation of each subdivision of land was not authorized. Paradise Land & Livestock Co. v. Federal Land Bank, 140 F. 2d 102 (C.C.A. 10th 1944); see Rait v. Federal Land Bank, 135 F. 2d 447, 452 (C.C.A. 8th, 1943).

\(^{70}\) Under \(\text{§}\) 75 (s) voluntary negotiation of an appraisal value was not required. Appraisers were to be appointed immediately upon petition of the debtor.

\(^{71}\) The standard to be used under \(\text{§}\) 75 (s) was the same; i.e., "then fair and reasonable market value." This standard is discussed in 5 Collier, Bankruptcy 214-5 (14th ed. 1943).
bona fide residents of the county may testify at the hearings before the Conciliation Commissioner. An appeal from the order of the Conciliation Commissioner may be taken to the District Court by the farmer or a majority in number and amount of his creditors.

After his property has been appraised and his exemptions set off to him, the farmer apparently may then select that part of his property which he wishes to redeem and retain permanently. The Conciliation Commissioner thereupon enters an order continuing the farmer in possession of the property which he has selected for the duration of the moratorium. At this point, the court enters a stay of all proceedings against the farmer and his chosen property. That property not selected by the farmer is released from the protection of the initial legislative stay. Since the farmer apparently has a second opportunity to choose which part of his property he will retain when the time for redemption arrives, it seems probable that he would not make his choice until that later period.

The Lemke bill apparently contemplates that the farmer shall pay no rental on the property retained in his possession during the moratorium period. Instead he is to pay into court annually or semi-annually "not less than one-fourth of the gross or one-half of the net (whichever is designated by the court) farm income." This sum is to be used first for the payment of taxes, insurance, and upkeep of the property, and the remainder is to be applied as a payment on the principal amount of the redemption price of the property. Since it amply protects the creditor and increases the probability of the farmer's retaining ownership of his farm, this provision seems eminently desirable. From the point of view of protecting the creditor, taxes are paid and his security is insured and maintained. Moreover, the court may order the farmer to make payments to the creditor on principal in addition to the excess over

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72. Fear that outside experts might be prejudiced in favor of higher valuation is apparently the motivating factor behind this provision.
73. Lemke bill, § 937. Redemption by a farmer of only part of his property, was said to be not permissible under § 75. See Paradise Land & Livestock Co. v. Federal Land Bank, 140 F. 2d 102, 103 (C.C.A. 10th 1944).
74. Lemke bill, § 937.
75. Lemke bill, § 924.
76. The Court is to enter an order continuing the stay only as to the farmer's "property selected under section 937. . . ." Ibid.
77. The second opportunity is discussed infra p. 1011.
78. Lemke bill, § 938.
79. The words employed are: "... the remainder to be applied on the value established as provided in this chapter, and to be distributed among the secured and unsecured creditors as their interests may appear". Lemke bill § 939.

It is conceivable that one quarter of the gross or one half of the net farm income might not be sufficient to meet payments on taxes, insurance, and upkeep. But since § 938 says only that the farmer is to pay "not less than" the specified fraction of farm income, it would seem that where this was not sufficient to meet the required payments, the court could increase it.
taxes, insurance and upkeep. And from the farmer’s point of view, this provision seems salutary. Since any excess left after payment of taxes, insurance, and upkeep is to be applied on principal, the application of such excess would reduce the final redemption price paid at the end of the moratorium. In short, all payments in excess of taxes, insurance, and upkeep inure exclusively to the farmer’s benefit.

The N.B.C. bill is quite different. It provides that upon approval of the farmer’s petition the proceedings are to be referred to a referee who has the property appraised, sets off to the farmer his exemptions, determines the rental to be paid, and enters an order continuing the farmer in possession for the duration of the moratorium. Instead of requiring an initial attempt to arrive at an appraisal value by negotiation, the bill provides that three appraisers shall be promptly appointed to appraise the farmer’s real and personal property, at its fair and reasonable market value. As in the Lemke bill, each item of real and personal property, is, as far as practicable, to be inventoried and appraised separately. Upon completion of the appraisal, the farmer files a statement of the property which he wishes to retain in his possession and an offer of the amount and terms of rental to be paid. Thereupon the court calls the first meeting of creditors. After hearing objections at the creditor meetings to the appraisers’ report, the referee enters an order either approving, modifying, or disapproving the report. In case of disapproval, a hearing is held and an order entered determining the fair and reasonable market value of the property. Any person aggrieved by the order entered by a referee may have it reviewed under regular bankruptcy appellate procedure.

At the creditors’ meetings, the rental to be paid by the farmer during the moratorium is to be fixed according to certain flexible standards specified in the bill. During the moratorium the court may, upon hearing, vary the amount of the rental and in addition require the debtor to make payments on

80. Lemke bill § 940. There was a similar provision in § 75 (s) (2), last sentence.
81. Proceedings subsequent to approval of the farmer’s petition are treated in Article V, §§ 931–49 of the N.B.C. bill.
82. N.B.C. bill § 932.
83. Ibid. See supra note 69.
84. N.B.C. bill § 934.
85. N.B.C. bill § 935. Under subsection 75 (e), examination of the debtor at the creditors’ meeting was permissive only. While the provisions of the Lemke bill continue to make examination only permissive, the N.B.C. bill provides that examination of the debtor is mandatory, thus making farm bankruptcy proceedings consistent with other parts of the Bankruptcy Act. N.B.C. bill § 939 (1). For a previous suggestion that examination of the debtor should be mandatory, see Letzler, supra note 3, at 1167.
86. N.B.C. bill § 942.
87. Ibid.
88. Ibid.
89. N.B.C. bill § 945.
the principal amount of the appraisal value. Under 75 (s) there was some judicial conflict as to whether the excess of rental payments distributed to creditors after payment of taxes and upkeep was to be considered a payment on principal and thus deductible from the redemption price. Since the N.B.C. bill provides that only those sums which the court orders paid in addition to the fixed rental are to be deductible from the redemption price, it seems clear that the excess of rental distributed to the creditors would not be considered payment on principal. In providing for payment of a given portion of farm income rather than formal rental the Lemke bill, for the reasons previously mentioned, seems superior.

After the rental has been fixed, an order is entered continuing the farmer in possession of the property which he requested to retain for the duration of the moratorium. With respect to the property retained by him the farmer has all the title and powers of a trustee appointed under Section 44, subject, however, to the supervision and control of the court. The property which the debtor does not retain in possession is to be administered by a trustee. Upon application of a creditor and after hearing, the court may vacate the stay affecting any such property administered by the trustee upon which a creditor has a lawfully enforceable encumbrance. As in the Lemke bill, the farmer apparently has a second opportunity to choose which property he wants to retain permanently and so he would probably defer his choice until that time.

An unanswered question raised by the unskillful draftsmanship of Section 75 was whether a trustee might be appointed in the proceedings prior to a liquidation and sale under the terms of 75 (s) (3). A related and similarly unanswered question was whether there might be an avoidance of preferences,

90. N.B.C. bill §§ 946, 948.
92. N.B.C. bill § 948.
93. N.B.C. bill § 947.
94. The title, rights, duties, and powers of the debtor are specified in Article VI, §§ 956–60 of the N.B.C. bill.
95. N.B.C. bill § 966. At the first meeting of creditors, or at any adjournment thereof, the creditors, exclusive of those disqualified to vote for a trustee under § 44, may appoint a trustee. If the creditors do not appoint a trustee, the court shall make the appointment. N.B.C. bill § 940.
96. N.B.C. bill § 927.
97. Although the terms of § 75 (s) (3) specified that a trustee was to be appointed to liquidate the debtor’s estate if the farmer failed to redeem at the end of the moratorium, § 75 was silent regarding the appointment of a trustee under other circumstances. Explaining the provisions of the original § 75 in 1933, Senator Hastings said, “It is not contemplated that any trustee shall be appointed for the farmer, and therefore, the physical possession of his property will be left with him.” 76 Cong. Rec. 4879 (1933), quoted in
fraudulent conveyances, and judicial liens in such a proceeding.\textsuperscript{58} The N.B.C. bill clarifies both of these ambiguities. As previously mentioned, it provides that the property not retained in the debtor's possession shall be administered by a trustee with all the rights, powers, and title of a trustee appointed under Section 44. Furthermore, with respect to the property retained by him, the debtor has all the powers and title of a trustee appointed under section 44.\textsuperscript{59} Therefore it would seem that the power of avoidance exists over all the debtor's property. In contrast, the Lemke bill provides that except for a liquidating trustee, no trustee shall be appointed.\textsuperscript{100} If this is taken as an indication of policy and if it is considered along with the fact that there is no provision for the debtor's having the title and power of a trustee, it would seem clear that under the Lemke bill there is no power of avoidance. Although it is arguable that the lack of such a power is not undesirable,\textsuperscript{101} the provisions of the N.B.C. bill here seem preferable.

Oglebay, \textit{Some Developments in Bankruptcy Law}, 18 \textit{J.N.A. Ref. Bankr.} 68, 70 n.22 (1944). But a trustee was appointed in the following cases: \textit{Wilson} \textit{v. Louisville Joint Stock Land Bank}, 105 F. 2d 302 (C.C.A. 7th 1939), \textit{cert. denied} 308 U.S. 590 (1939) (appointment of trustee merely mentioned by court in passing); \textit{In re Wade}, 54 F. Supp. 572 (N.D. Ohio 1943); \textit{In re Witt Dairy Co.}, 48 F. Supp. 964 (N.D. Cal. 1942) ("liquidating trustee" appointed in proceeding involving farming partnership); \textit{In re Durst}, 44 F. Supp. 486 (S.D. Iowa 1942) (trustee appointed under undisclosed circumstances). The Wade case was a square holding not only that §75 authorized the appointment of a trustee, but also that the trustee might proceed against the farmer and others to set aside an alleged fraudulent conveyance.

On the analogous question of whether a receiver might be appointed under §75, a few cases have held that appointment of a receiver is authorized. Beecher \textit{v. Federal Land Bank}, 153 F. 2d 937 (C.C.A. 9th 1946) \textit{cert. denied} 323 U.S. 871 (1946) (temporary receiver may be appointed between date of filing petition and entry of order continuing debtor in possession, but permanent receiver not authorized); Beecher \textit{v. Federal Land Bank}, 146 F. 2d 934, 938 (C.C.A. 9th 1944) (receiver may be appointed under emergency conditions to prevent loss of property); \textit{Armold} \textit{v. Equitable Life Assur. Soc.}, 83 F. 2d 530 (C.C.A. 7th 1936); \textit{In re Casaudonneq}, 46 F. Supp. 718, 724 (S.D. Cal. 1942).

See Oglebay, \textit{supra} at 70; 5 \textit{Collier, Bankruptcy} 229, 229 (14th ed. 1943).\textsuperscript{98} See 5 \textit{Collier, Bankruptcy} 229-32 (14th ed. 1943). In the Wade case, \textit{supra} note 97, the court said that §75 authorized the setting aside of fraudulent transfers.

99. N.B.C. bill §956. This section is similar to §342 of Chapter XI and §444 of Chapter XII. Since the debtor in possession under these sections has the power of avoidance, it seems clear that the debtor under §956 of the N.B.C. bill would have such power. See 8 \textit{Collier, Bankruptcy} ¶6.32 (14th ed. 1943).

Concerning the debtor's power of avoidance under §75, it was said that "it may be seriously doubted whether the farmer-debtor has any legal basis for taking action". 5 \textit{Collier, op. cit. supra}, at 229. There is broad language in a few cases to the effect that the farmer is a trustee. Beecher \textit{v. Federal Land Bank}, 153 F. 2d 932, 934 (C.C.A. 9th 1946), \textit{cert. denied} 328 U.S. 871 (1946); \textit{Baxter} \textit{v. Emory University}, 107 F. 2d 115 (C.C.A. 5th 1939), \textit{cert. denied} 310 U.S. 624 (1939); \textit{In re Breuer}, 52 F. Supp. 932 (D.N.D. 1943). But none of them deal with the question of whether the debtor has the power of avoidance. \textit{But cf. In re Wade, supra} note 97.

100. Lemke bill §912.

101. See 5 \textit{Collier, Bankruptcy} 231 (14th ed. 1943).
Under section 75, the court could order sold any unexempt perishable property of the debtor or any unexempt personal property not reasonably necessary for the debtor's farming operations. While retaining provisions similar to this, both bills add a new feature in giving the court the power to sell any unexempt real property not reasonably necessary to the farming operations of the debtor. Since under both bills, as under Section 75, the court obtains jurisdiction of the debtor's property wherever located, non-farming property, such as city property, is subject to the court's jurisdiction and to the moratorium and redemption provisions. As the purpose of farm bankruptcy legislation is not necessarily to assist the farmer in maintaining non-farming real estate holdings, it is arguable that the provisions of such legislation should not extend to non-agricultural realty. Furthermore the sale of non-agricultural property, by providing additional funds, could actually assist the farmer to redeem the farm realty. Thus in providing the court with permissive power to sell unexempt real property not reasonably necessary to farming operations, both bills here appear to offer a desirable addition to farm bankruptcy legislation.

**Creditors and Claims**

A regrettable shortcoming of Section 75 was its failure to state what claims were provable and particularly its omission to deal with the provability of future rent claims. The Lemke bill continues the ambiguous silence of Section 75, but the N.B.C. bill includes a separate article dealing with creditors and claims. As in Chapters X, XII, and XIII, claims are broadly defined so as to include all claims of whatever character against the debtor or his

102. Subsection 75(s) (2).
103. Lemke bill § 939; N.B.C. bill § 949.
104. Section 911 of the Lemke bill specifies that the filing of a petition shall subject the farmer "and all his property . . . wherever located" to the exclusive jurisdiction of the court. Section 906 (10) of the N.B.C. bill provides that "property" of a debtor shall include all his property, wherever located, of every kind and nature. Under § 75 it was held that the court took jurisdiction of all of the debtor's property, including both real and personal property in no wise connected with farming operations, such as city property. In re Wilkenson, 25 F. Supp. 217 (W.D. Okla. 1938).
105. See 5 Collie, Bankruptcy 169 (14th ed. 1943).
106. Article VIII of the N.B.C. bill deals with Creditors and Claims. The following is a tabulation of the sections in that article:

- § 976—roughly similar to § 196 and § 451.
- § 977—roughly similar to § 197 and § 452.
- § 978—court shall classify as unsecured any amount in excess of value, established under this chapter, of security held by secured creditor.
- § 979—identical with § 200.
- § 980—persons injured by rejected contracts deemed creditors. Landlord's claim under rejected lease governed by § 63 (a) (9).
- § 981—provisions for claims in a proceeding commenced in regular bankruptcy.
- § 982—provisions for claims in a proceeding remitted to regular bankruptcy.
property, whether or not provable as debts under Section 63. Following similar provisions in Chapters X and XII, the bill also provides that the court shall prescribe the manner in which and fix a time within which proofs of claim may be filed and allowed. The court may divide creditors into classes and must classify as unsecured any amount in excess of the appraisal value of the security held by a secured creditor. In case the court authorizes rejection of an unexpired lease, the landlord’s claim for damages is governed by the provisions of Section 63(a)(9) of the Bankruptcy Act. In thus supplying what was an unfortunate omission in Section 75, the N.B.C. bill seems here superior to the Lemke bill.

**Plan of Composition or Extension**

While negotiations for a plan of composition or extension were a condition precedent to the debtor’s availing himself of the moratorium provisions under Section 75, both bills now provide that such a plan, if attempted at all, is to be negotiated during the moratorium. The N.B.C. bill provides that the debtor must file his plan of composition or extension not later than two years after the beginning of the moratorium. The possible scope of a plan is practically unlimited. It shall alter the rights of creditors, secured or unsecured, upon any terms or for any consideration, may deal with all or any part of the debtor’s property, and may provide for the rejection of executory contracts. If the plan has been accepted by all creditors affected thereby, the court is to confirm it if satisfied that the plan and its acceptance are in good faith and have not been made or procured by means, promises or acts forbidden by the Bankruptcy Act. If the plan has not been accepted by all creditors, then the

107. Claims are defined in § 906 (1) in language similar to that used in § 406 (2), with the addition of the phrase “whether private or public or held by a Federal or State agency or corporation”. See infra note 171.
108. N.B.C. bill § 976.
110. N.B.C. bill § 980.
111. See supra p. 993.
112. Article IV of the N.B.C. bill, embracing §§ 986 through § 1003, deals with the plan of composition and extension.
113. N.B.C. bill § 986. If the proposed plan of composition or extension is still pending at the end of the moratorium, the moratorium is to be continued until the plan is acted upon. §§ 996, 1006.
114. N.B.C. bill § 988. Under § 75 (k) a plan could not reduce the amount of or impair the lien of any secured creditor below the fair and reasonable market value of the property securing such lien. Section 988 of the N.B.C. bill apparently contemplates no such limitation.
115. N.B.C. bill § 989. There was no provision in § 75 for confirmation of a proposal which had been accepted by all creditors, although an amendment to incorporate such a provision was suggested. See Letzler supra note 3, at 1167. A similar provision is found in § 361 of Chapter XI and § 467 of Chapter XII.
court may confirm it if it has been accepted by a majority in number and amount of unsecured and a majority in number and amount of secured creditors, voting by class.\textsuperscript{116} Non-assenting secured creditors need only be paid the appraisal value of the property securing their debts.\textsuperscript{117} Since a secured creditor can be dealt with under the redemption provisions of the Chapter by paying him the appraisal value of his security, this provision, though new, appears logical and sound.

One of the strong criticisms of subsections 75(a) to (r) was that compliance with the provisions of Section 14(c) was not a condition precedent to judicial confirmation of a plan of composition or extension.\textsuperscript{118} Since six of the seven grounds on which a refusal of discharge may be based under 14(c) are predicated on the debtor's personal misconduct, it seemed inequitable not to penalize the farmer equally with other debtors in case of wrongdoings. Accordingly the N.B.C. bill soundly provides that, with the exception of a prior discharge granted or a prior composition or extension confirmed, all acts which would be a bar to a discharge under 14(c) shall also be a bar to confirmation of a plan.\textsuperscript{119} If, after the confirmation of a plan,\textsuperscript{120} the debtor is found to have been guilty of fraud in connection with his plan, the court may, as one possible alternative,\textsuperscript{121} adjudge the debtor a bankrupt and direct that

\textsuperscript{116} N.B.C. bill § 990. A similar provision is found in § 362 of Chapter XI and § 468 of Chapter XII. Under § 75 (g), secured and unsecured creditors were "apparently" to vote as one class. See 5 \textit{COLLIER, BANKRUPTCY} 173 (14th ed. 1943).

Section 991 contemplates that the farmer may obtain written acceptance of creditors before as well as after filing of the proposed plan. Such an amendment, which would speed up the procedure, was suggested for § 75. See \textit{Letzler, supra} note 3, at 1167. A similar provision is included in § 336 (4) of Chapter XI, § 436 (4) of Chapter XII, and § 633 (3) of Chapter XIII.

\textsuperscript{117} N.B.C. bill § 988 (14).

\textsuperscript{118} In \textit{In re Feil}, 46 F. Supp. 108 (E.D. Wash. 1942), it was held that the commission by the debtor of an act which would be a bar to a discharge in bankruptcy under § 14 will not prevent confirmation of a proposal under § 75 (a)-(r). For criticism of this omission in § 75, see testimony of J. I. Weinstein in \textit{Hearings Before House Committee on Judiciary on H.R. 6452 and S. 2215, 75th Cong., 3d Sess. 22} (1937-8).

\textsuperscript{119} N.B.C. bill § 997 (5). Such an amendment to § 75 has been previously suggested. See \textit{Letzler, supra} note 3, at 1168 n. 117.

\textsuperscript{120} The procedure for confirmation is set out in §§ 990-1008. Sections 993-5 provide that the debtor may, after his plan has been accepted, propose alterations and modifications. Section 997 specifies the standards to be applied in confirming the plan. Section 998, subsection (1) of which is identical with § 657 of Chapter XIII, provides for post-confirmation procedure. Section 999 provides for continuing jurisdiction of a plan of extension. Under § 1000, the confirmation of a plan is to discharge the debtor from all debts and liabilities provided for by the plan except such debts as are not dischargeable under § 17. Section 1001 includes provisions for closing the case. Under § 1002, if, before the expiration of the moratorium, the plan is withdrawn or abandoned or is not accepted, or if the consideration required to be deposited is not deposited or the application for confirmation is not filed, or if confirmation is refused, the court is to terminate that part of the proceeding.

\textsuperscript{121} As other alternatives, the court may (1) set the confirmation aside, reinstate the
regular bankruptcy be proceeded with. One of the two exceptions in the
N.B.C. bill to the Section 4b rule that a farmer may not be made an involun-
tary bankrupt, this provision is a new and rather strong sanction, but appears
desirable in view of the cause which would evoke it.

The provisions of the Lemke bill dealing with a plan of composition or
extension are singularly brief and incomplete, suggesting that a detailed Gen-
eral Order would be necessary to implement the procedure. The farmer may
offer terms of composition or extension apparently at any time before the
expiration of the moratorium. This proposal is to be made the basis of
negotiations at which the Conciliation Commissioner is to preside and endeavor
to bring about a just and equitable agreement. The composition shall not be
less than the appraisal value of the property, but the future rate of interest
on all the farmer's debts is limited to four percent. As was the case under
Section 75, secured and unsecured creditors would apparently vote together
and not by class. To be given judicial confirmation, the plan must include
"an equitable and feasible method of liquidation for secured and unsecured
creditors and of the financial rehabilitation for the farmer-debtor." As
under Section 75, the debtor's commission of an act which would be a bar to a
discharge in bankruptcy under Section 14(c) would not prevent confirmation
of the plan. No provision is made either for possible continuing jurisdic-

proceedings, and hear proposals for altering or modifying the plan to correct the fraud,
or (2) reinstate the proceedings and modify or alter the plan to correct the fraud,
provided that the interests of non-assenting parties who did not participate in the fraud or
innocent purchasers for value are not adversely affected. N.B.C. bill § 1003. Regular
bankruptcy may be ordered only if the debtor has been guilty of or has participated in
or has had knowledge of the fraud before confirmation and failed to inform the court.

122. Article VII of the Lemke bill, embracing two short sections, deals with com-
positions and extensions. Those provisions are briefer even than those in § 75 (a)-(r).

123. Failure to specify a time within which a plan must be proposed raises a number
of questions. Suppose the farmer proffers his plan on the last day of the moratorium.
Since there is no provision for extending the stay under such circumstances, it would
seem that the stay would expire. On the other hand, if the stay is continued beyond the
moratorium period while a plan is pending, then by filing his plan on the last day the
farmer can obtain for himself a longer respite from his creditors than the bill otherwise
contemplates.

124. If this means that the lien of a secured creditor cannot be reduced below the
appraisal value of his security, then the purpose of this limitation seems questionable.
Since under the redemption provisions the debtor need only pay the appraisal value of the
property anyway, it is difficult to see what incentive there would be for the debtor's at-
tempting a composition or extension other than to obtain additional time.

125. This provision expressly overrules judicial decision under § 75 (a)-(r) to the
contrary; i.e. Bogart v. Miller Land & Livestock Co., 129 F. 2d 772 (C.C.A. 9th 1942),

126. See 5 COLLIER, BANKRUPTCY 173 n. 1a (14th ed. 1943).

127. Lemke bill § 952.

128. See notes 118-9 supra. It is arguable that under § 902, which makes applicable
the provisions of Chapters I to VII when not inconsistent, § 14(c) would apply here.
But the drafters of the N.B.C. bill, which also contains a similar § 902, apparently thought
tion after confirmation, or for setting aside a plan when it appears after confirmation that fraud has been practised. 129

Although it is questionable whether the composition or extension provisions of either bill would be much used, the N.B.C. bill here appears in every way superior. Substantively it is more equitable and workable; procedurally it is more clear and complete.

**Redemption and Dismissal**

The redemption provisions of the proposed bills embody the substantive heart of the relief contemplated for the distressed farmer. 130 In essence they provide that by paying into court the fair market value of the encumbered property, the debtor acquires title free and clear of all encumbrances. If the fair market value of the security has not fallen below the value of the debt which it secures, the creditor has obviously lost nothing. But where, as was frequently the case in the 1930's, the fair market value has plummeted below the value of the debt secured, 131 the creditor, compelled to take the appraisal value of his security rather than the security itself in discharge of the debt, has thrust on his shoulders to that extent the loss incurred by falling market values. However, since the price which the property would bring at judicial sale and the fair market value of the property are theoretically the same, from the short-term viewpoint the creditor would lose nothing. 132 As a practical matter, in the absence of moratory legislation, he commonly bids in the property himself at judicial sale and retains it until market values have again risen 133—meanwhile leasing to a farmer, often the former debtor. When the

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129. Both § 75(m) and the N.B.C. bill § 1003 provide for setting aside a plan where it appears within six months of confirmation that fraud has been practised. And both § 75 (1) and the N.B.C. bill § 999 provide for possible continuing jurisdiction of an extension plan.

130. The redemption provisions of the Lemke Bill are embodied in § 941. Article X of the N.B.C. Bill, embracing §§ 1006–1010, deals with redemption.

131. "If such an appraisal were made at the depth of the depression, there was much likelihood that it would be less than the amount of the first mortgage." WOODRUFF, FARM MORTGAGE LOANS OF LIFE INSURANCE COMPANIES 119–20 (1937).

132. See Letzler, supra note 3, at 1153.

133. Most of the life insurance companies, who hold a large percentage of the farm mortgage debt, follow a long range program in handling the land they acquire through foreclosure. "They have . . . held on to the land until prices have improved and the land could be sold to owner-operators at prices which are high enough so that they are going to come out without loss on the real estate they acquired by reason of the loans made in the last boom period. . . . Because of their policy of . . . hanging on to the farms until values came back, they are getting out of their real estate account without loss to the policy-holders, and if prices continue to increase they may have a profit." Austin, A Reappraisal of the Frazier-Lemke Act and Its Operation, Proceedings of the Legal Section of the American Life Convention (1946) 9, 41. See WOODRUFF, op. cit supra note 131, at 120.
property market has apparently reached its peak, the creditor sells the farm, possibly by mortgage to the former debtor, thus recovering his original loan and probably taking a profit in addition. Accordingly, from the long-term point of view, it is only fair to concede that it is no small loss which the creditor thus incurs by being deprived of the opportunity to hold and resell the property. If the creditor is an individual investor, such as an elderly farmer who has sold his farm by mortgage and retired to live on the income from it, his loss is painfully apparent. But, in the case of institutional investors, the overriding policy consideration of maintaining the farmer as owner of his farm and of shifting the loss of cyclical land value fluctuations from individual farmers to institutional investors would appear to outweigh the long-term loss to the latter.

The redemption sections of both bills would most probably have been considered repugnant to the Constitution twelve years ago. But a consideration of subsequent constitutional development in this field makes it clear that they are now well within the proper scope of bankruptcy legislation. 134

134. In Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935), the original subsection 75(s) was held unconstitutional because, in depriving the mortgagee of five specified property rights, it was said to be repugnant to the Fifth Amendment. As enumerated by the Court these five rights of the mortgagee were: (1) the right to retain the lien until the indebtedness thereby secured is paid; (2) the right to realize upon the security by a judicial public sale; (3) the right to determine when such sale shall be held, subject only to the discretion of the court; (4) the right to protect its interest in the property by bidding at such sale; (5) the right to control the property during the period of default, subject only to the discretion of the court, and to have the rents and profits collected by a receiver for the satisfaction of the debt. 295 U.S. 555, 594-5 (1935). Congress immediately thereafter enacted a new subsection 75(s) designed to meet the constitutional objections raised in the Radford case. 49 Stat. 943 (1935). The new subsection was given a constitutional bill of clean health by a unanimous court in Wright v. Vinton Branch, 300 U.S. 440 (1937), 37 Col. L. Rev. 1005 (approved), 23 Va. L. Rev. 944 (deplored). See Comment, 35 Mich. L. Rev. 1130 (1937). Stating that it was satisfied that the mortgagee's rights were adequately protected, the Court at the same time commenced a retreat from its extreme position in the Radford case by asserting that the Radford opinion did not hold that the deprivation of any one of the five rights would by itself have rendered the Act invalid. 300 U.S. 440, 457 (1937). Subsequently, in John Hancock Mutual Life Ins. Co. v. Bartels, 308 U.S. 180 (1939), the Supreme Court held, in effect, that the farmer had an absolute right to a three-year stay and that there was no judicial discretion to terminate it earlier, thus eliminating right number 3. Finally, in Wright v. Union Central Life Ins. Co., 311 U.S. 273 (1940), the farmer's right to redeem his property at the appraisal value was established as being superior to the mortgagee's right to a public sale. It was further stated that a secured creditor can have no constitutional claim to more than the appraised value of his security. 311 U.S. 273, 278 (1940). Thus rights numbers 1, 2, and 4 were effectively disposed of, leaving the mortgagee with the curtailed right to receive rent during the period of the stay. The conclusion seems inescapable that the alleged constitutional prohibitions of the Radford case have been sub silentio overruled. See Note, 35 Ill. L. Rev. 878 (1941), for the suggestion that the creditor has lost by virtue of the Union Central case at least some of the rights apparently preserved for him by the Vinton Branch case; and Note, 7 Ohio St. L. J. 433 (1941) for the conclusion that the Union Central case is a silent reversal.
Under the N.B.C. bill the farmer may file an application to redeem all or any integral part of the property retained in his possession any time within the three year moratorium period. Upon his filing an application to redeem, both the farmer and the creditor have a right to the reappraisal of the property. Subsequent to the Union Central case decision that the debtor’s right to redeem was superior to the creditor’s right to a public sale, the sound judicial rule developed that the creditor’s right to a reappraisal in turn took precedence over the debtor’s right to purchase at the original appraisal value. By codifying this rule, the N.B.C. bill insures that through reappraisal the creditor may take advantage of a rise in value during the moratorium while the debtor may profit from any corresponding decline.

Accordingly the N.B.C. bill leaves the mortgagee with none of his Radford case rights save the greatly restricted right to a share of the excess of rental payments. And the Lemke bill deprives the mortgagee even of the curtailed right to receive rental during the moratorium. But since there is no assurance under either the N.B.C. bill or Section 75 that the creditor will necessarily receive anything out of the rental, and since, as has been previously mentioned, the Lemke bill adequately protects the creditor’s security, there would seem to be little doubt that this Lemke bill provision is constitutional.

135. N.B.C. bill § 1006.
136. N.B.C. bill § 1007, quoted in note 140 infra.
138. But cf. In re Carter, 56 F.Supp. 385 (W.D.Va. 1944) holding that at the end of the moratorium the creditor’s right to judicial sale is superior to the debtor’s right to redeem. The case is approved in Note, 17 Rocky Mt. L. Rev. 261 (1945), but severely criticized as not only flying in the face of the Union Central decision but also as ignoring the policy of §75, in Oglebay, Some Developments in Bankruptcy Law, 19 J. N. A. Ref. Bankr. 107, 109-10 (1945). 5 Collier, Bankruptcy 225 n.44 (14th ed. 1946 supp.) states that the Carter case “appears clearly to be an erroneous decision.”

Under §75(s)(3), the debtor also had the right to a reappraisal at the time of redemption. 5 Collier, Bankruptcy 225 (14th ed. 1943).
140. “Sec. 1007. The court shall, upon the request of the debtor or of any creditor affected, order a reappraisal of any property sought to be redeemed by the debtor or of any integral part or parcel thereof. The reappraisal shall be made, reported and acted upon in like form and manner and have the like conclusive and binding effect as provided in this chapter with respect to the original appraisal.”

Two alternative methods of reappraisal were provided by §75(s). Moser v. Mortgage Guarantee Co., 123 F.2d 423 (C.C.A. 9th 1941). But under the terms of §1007 of the N.B.C. bill, the reappraisal is to be made in the same form and manner as the original appraisal.
Like the Lemke bill, the N.B.C. bill clearly contemplates that the farmer may redeem only part of his property and have the rest released for his creditors. Such partial redemption was attempted under Section 75 but was met with the judicial pronouncement that it was not only inequitable but also possibly unconstitutional. Balanced against these arguments, however, is the consideration that partial redemption would enable a farmer who has over-expanded during boom years to reduce his farm holdings to a size commensurate with his present financial capacity to redeem and future financial capacity to operate profitably. Since reappraisal would in fairness have to take into consideration any increase in value of the property redeemed resulting from the partial redemption process, the creditor is to this extent protected. Furthermore, a court of bankruptcy is invested with equitable powers and accordingly could be expected to thwart any unconscionable selection by a farmer of the parts to redeem. This furnishes the creditor an additional protection. Since it provides a more adequate means of rehabilitation on a sound financial basis, the partial redemption feature of both bills seems a desirable substantive addition.

In case the debtor fails to redeem all or any integral part of his property at the end of the moratorium, the N.B.C. bill provides the court with three alternative courses of action. If the petition was filed in a pending bankruptcy proceeding, the court shall direct that the previous proceedings be resumed. If the debtor is able to pay the rental on all his property, it seems likely that he would defer any plans of scaling down his holdings until this point. Payment of rental on property that might possibly not be redeemed would seem to be worth the chance that in some way adequate funds would turn up at the end of the moratorium with which to redeem all the property.

141. Under §1006, the debtor may, at any time before the expiration of the moratorium, "file an application to redeem the property, or any integral part or parcel thereof, retained in his possession". By the terms of §1010, the trustee is to "administer the unredeemed unexempt property retained in possession of a debtor". And §927 specifies that in the case of any property not redeemed by the debtor or being administered by his trustee, the court may, upon application of a creditor holding an encumbrance, vacate the stay affecting such property. Thus the procedure in case of partial redemption would appear to be that the unredeemed property would pass to the trustee who would then release it to the creditors. No provision is made for the bankruptcy court's conducting a judicial sale of the unredeemed property.

142. See Paradise Land & Livestock Co. v. Federal Land Bank, 140 F. 2d 102, 103 (C.C.A. 10th 1944).

143. Section 1007 provides that "the court shall, upon the request of the debtor or of any creditor affected, order a reappraisal of any property sought to be redeemed by the debtor or of any integral part or parcel thereof." [Emphasis supplied]. Since reappraisal would be at the then fair and reasonable market value, and since in fixing such value the appraisers would naturally have to take into consideration increase in value resulting from the creation of a more compact and efficient farm, the N.B.C. bill seems to make ample provision for protecting the creditor at least in respect to valuation.

144. Bankruptcy Act, § 2 (a).
145. N.B.C. bill § 1016.
146. N.B.C. bill §1016(1).
If the petition was an original petition under this chapter, the court shall either dismiss the proceedings or direct that regular bankruptcy be proceeded with, whichever is in the interest of creditors. Modelled on similar provisions in Chapters X through XIII, this provision for dismissal or regular bankruptcy is new to farm bankruptcy legislation. Under 75(s), if the debtor failed to redeem, the property was sold at judicial sale and the debtor had ninety days to redeem at the sale price. Furthermore, since the debtor under 75(s) was in all cases entitled to a discharge, the N.B.C. bill provision that the proceedings may be dismissed represents a considerable innovation. Rearmed with his common law rights following dismissal, the mortgagee could not only foreclose but also obtain a deficiency judgment. The alternative provided in the N.B.C. bill of straight bankruptcy, though a second exception to the rule of Section 4b that a farmer may not be adjudicated an involuntary bankrupt, thus seems preferable in that it not only gives the debtor his discharge but also effects a more equitable distribution among creditors. Upon payment of the redemption price, the debtor, as under 75(s), receives title to the property free of all encumbrances and is discharged of all debts and liabilities except those not dischargeable under Section 17.

The redemption provisions of the Lemke bill vary considerably from others. Discharges under §75(s) were granted subject to §14. Nothing is said in the N.B.C. bill whether compliance with §14 is a condition precedent to granting a discharge, save that a previous discharge or confirmation of a plan shall be no bar to the benefits of the chapter. But under the terms of §902, by which the provisions of Chapters I to VII are, where not inconsistent, made applicable, it would seem that §14 would have to be complied with.

147. N.B.C. bill §1016(2).
148. The similar provisions in other chapters of the Bankruptcy act are: §§236(1) and (2) of Chapter X, §§376(1) and (2) of Chapter XI, §§481(1) and (2) of Chapter XII, and §§661(1) and (2) of Chapter XIII.
149. 5 COLIER, BANKRUPTCY 227-8 (14th ed. 1943).
150. Id. at 228.
151. N.B.C. bill §1009. Any payments made on principal during the moratorium are deductible from the redemption price. N.B.C. bill §1008. See notes 91, 92 supra.
Discharges under §75(s) were granted subject to §14. 5 COLIER, BANKRUPTCY 228 (14th ed. 1943). But cf. In re Feil, 46 F. Supp. 108 (E.D. Wash. 1942). Nothing is said in the N.B.C. bill whether compliance with §14 is a condition precedent to granting a discharge, save that a previous discharge or confirmation of a plan shall be no bar to the benefits of the chapter. But under the terms of §902, by which the provisions of Chapters I to VII are, where not inconsistent, made applicable, it would seem that §14 would have to be complied with.
152. Section 941 of the Lemke bill contains the redemption provisions:
"At any time during the three-year period referred to in section 924, if he so desires, the farmer-debtor may pay into court the amount of the value established as provided in this chapter of any part, parcel, or all of the property of which he retains possession plus 4 per centum interest on unpaid balances, including the amount of encumbrances on his exemptions, up to the amount of the value established as provided in this chapter, less any amount paid into court on such values. No further notice or hearings shall be necessary in connection with that part of the property that the farmer-debtor redeems and pays the money into court unless the redemption of such part would materially affect the value of that part of the property not redeemed, but the court shall then, by an order, turn over possession and title of said property, free and clear of encumbrances, to the farmer-debtor. Any farmer-debtor who has filed a petition under this chapter, and complied with its provisions, whether or not he redeems..."
those of the N.B.C. bill. The moratorium period provided by the Lemke bill may extend two years longer than under either the N.B.C. bill or §75(s). If at the end of three years the farmer has paid at least one-half of the appraisal value of his property into court, the court may extend the moratorium for an additional period not to exceed two years. This provision seems eminently sound. Since the purpose of farm bankruptcy legislation is to maintain the farmer as owner of his farm and rehabilitate rather than liquidate him, it would seem only equitable that, if the farmer has indicated his capacity for rehabilitation by paying one-half of the redemption price during the first three years, he be given an additional time to reestablish himself.

Like the N.B.C. bill, the Lemke bill provides that the farmer may redeem only part of his farm and leave the rest to his creditors. In case the farmer exercises his option of partial redemption at this stage in the proceedings, the Lemke bill provides that "any payments made by the farmer-debtor on any such unredeemed property be paid back to him, less depreciation and 4 per centum interest on the value of such property, as established in this chapter." However, since insurance, taxes, and upkeep have been paid on the property which the farmer retains for the moratorium but does not redeem and since the creditor has received interest and will be compensated for depreciation, his interest in the property is amply protected. Furthermore, as the creditor will now receive his security, and as the policy of the statute is to grant the farmer a discharge and relieve him of a deficiency judgment, there is no apparent reason why the creditor should be entitled to both payments on principal and his security to boot. Not included in the N.B.C. bill, this provision seems desirable.

If redemption of only part of the property materially affects the value of the part not redeemed, further hearings are to be held. Although ambiguous, this reference to further hearings apparently means a reappraisal. But except for this reference, the Lemke bill omits any provision for a reappraisal. While if land values rose during the moratorium period this would work to the farmer's advantage, it is equally apparent that if they fell it would be the mortgagee who profited. In the last analysis, this omission seems neither equitable nor sound.

any part, parcel, or all of his property, shall, unless such petition is dismissed under the provisions of this chapter, be accorded his discharge as provided for in this Act."

153. Lemke bill §925. In this connection it is worth recalling that the original §75(s) provided for a five year moratorium. 48 Stat. 1289 (1934).


155. Lemke bill §926.

156. The same considerations apply to the situation where, at the end of the moratorium, the farmer redeems none of his property. As in the case of partial redemption, there would seem to be no persuasive reason why the creditor should receive not only the property securing his debt but also payments on principal.

157. Lemke bill §162.

158. In In re Whitwer, 44 F.Supp. 466 (D.Neb. 1942), Congressman Lemke, on the
In case the debtor fails to redeem all or any integral part of his property at the end of the moratorium, the Lemke bill, like 75(s), provides for the appointment of a liquidating trustee and a judicial sale following which the debtor has ninety days to redeem at the sale price. In its phraseology, the Lemke bill clarifies two previous ambiguities existing at this point in Section 75. By elimination of the phrase "or otherwise disposed of," it is clear that the liquidating trustee may not abandon the property to secured creditors. And through the use of more judicious sentence structure, there is no question but that the debtor's ninety day redemption period after the sale is absolute. The Lemke bill further provides that unless the debtor has requested dismissal he is in all cases entitled to a discharge, subject to the provisions of Section 14(c). Since this eliminates the possibility of a deficiency judgment, it seems preferable to the N.B.C. provision under which the court has the alternative of dismissing the petition without a discharge.

brief for the debtor, attempted to persuade the court that, under the terms of § 75(s)(3), if the debtor elected to redeem at the original appraisal valuation there was no authority for granting a reappraisal. He has apparently incorporated this position, which he attempted unsuccessfully to maintain under § 75, into his new bill. Since the chances of the farmer's losing are just as great as those of the creditor, it is difficult to see what the motivating reason for this provision is.

159. See supra note 156.
160. Lemke bill § 926:

"If, however, the farmer-debtor at any time fails to substantially comply with the provisions of this chapter, or with any lawful order of the court made pursuant to this chapter, to refinance himself, or redeem all or any part of his property, at the end of three years, the court may then order the appointment of a trustee, and order the unredeemed property sold at public auction in accordance with this Act: Provided, however, That any payments made by the farmer-debtor on any such unredeemed property be paid back to him, less depreciation and 4 per centum interest on the value of such property, as established in this chapter. The debtor shall then have ninety days to redeem any property sold at such sale by paying the amount for which any such property was sold, together with 4 per centum per annum interest from date of sale, into court. But, except as otherwise provided in this chapter, the court shall not dismiss the proceeding without complete liquidation and discharge of the farmer-debtor, unless dismissal of petition is requested by the farmer-debtor and consented to by a majority in number and amount of the creditors."

162. For the position that under § 75(s)(3) the debtor did not in all circumstances have the right to redeem for ninety days following the trustee's sale, see Federal Land Bank v. Nalder, 116 F.2d 1004 (C.C.A. 10th 1941).
163. The phrase "except as otherwise provided in this chapter" in the last sentence of § 926 is ambiguous. Save what is said in the same sentence, there is no provision in the Lemke bill for dismissal. It would thus seem that one must turn to § 902 by which the provisions of Chapters I to VII, in so far as not inconsistent or in conflict with the pro-
Upon payment of the redemption price, the property is turned over to the farmer free and clear of all encumbrances and he is granted a discharge.\textsuperscript{164}

**General Provisions**

The concluding articles of the N.B.C. bill deal with the compensation and allowances of the referee, trustee, appraisers, and debtor's attorney,\textsuperscript{165} the priority and distribution of the estate among creditors,\textsuperscript{166} the relation of the proposed chapter to prior creditor's proceedings,\textsuperscript{167} the suspension of the Statute of Limitations during a proceeding under the proposed chapter,\textsuperscript{168} the exemption from income tax of any "profit" realized by the debtor as a result of debt adjustment under the chapter,\textsuperscript{169} and the effective date of the new chapter if enacted.\textsuperscript{170} These provisions are modelled largely on similar sections in other chapters of the Bankruptcy Act and thus supply tested statutory provisions to fill the omissions of Section 75.

In the concluding articles of the Lemke bill\textsuperscript{171} is one section which attempts...
to lighten the burden of a farmer who has executed a mortgage either on crops growing, or to be grown in the future. The situation of a farmer with either or both of these mortgages who has filed under the farm bankruptcy provisions is apparent. Normally his only source of income from which to raise the money to redeem his farm at the end of the moratorium will be the proceeds from his harvests. On these the mortgagee has a lien which cannot be reduced below the fair market value of the crops. Since the fair market value of the crops is what the farmer receives when he sells them, the mortgagee has a lien upon the entire proceeds. If the mortgage applies only to crops then in existence, this situation prevails for but one season. However, if the mortgage covers crops to be grown in the future, the situation differs considerably. In at least one jurisdiction the lien of a future crop mortgage is said to attach when the mortgage agreement is made and not when the crops come into existence so that the lien stands up in bankruptcy. Under this theory, the lien on future crops could continue for as long as allowed by state law. Under such circumstances it is thus apparent that if the crop mortgage were respected the farmer could not even meet his routine expenses, let alone redeem his property. Accordingly the rights of the holder

allowances, the pertinent provisions of which have been discussed in note 165 supra.

Article IX, embracing sections 971 through 973, covers general provisions. Section 971 states that “the provisions of this chapter shall apply to all judicial or official proceedings in any State or Federal court or under the direction of any State or Federal official, and shall apply to all creditors, public or private, including any Federal or State corporation or Federal or State agency.” Being later in time, this section, if enacted, would seem to repeal by implication § 3(d) of the Bankhead-Jones Farm Tenant Act, 50 Stat. 522 (1937), as amended, Pub. L. No. 731, 79th Cong., 2d Sess., Tit. I, § 3(d) (Aug. 14, 1946), 7 U.S.C.A. § 1003(d) (Supp. 1946), by which § 75 was made inapplicable to the beneficiaries of the Farm Tenant Act until they had repaid at least 15% of the purchase price. Section 973 provides that “Any order inconsistent with the provisions and purposes of this chapter shall be void and shall be reviewable so long as the estate is not liquidated and the case is still pending.” This provision is apparently an attempt to avoid the result of a case like Union Joint Stock Land Bank v. Byerly, 310 U.S. 1 (1940), where an admittedly voidable order of the District Court was allowed to stand because a timely appeal was not taken.

Article X deals with the effect of the new chapter. 172. Lemke bill § 972:

“After the farmer-debtor files his petition under this chapter, the lienholder on livestock, or poultry, or on annual or perennial crops shall have no lien on the increase or on the crops produced in the future unless they are embryonically in existence at the time that the petition is filed. Not less than one-fourth of all such increase of encumbered livestock or crops grown or growing on encumbered lands shall be sold when ready for market, and the proceeds be paid into court and be applied on the value established as provided in this chapter.”


174. On the question of whether a present valid mortgage can be executed on future crops, three views have been adopted. One view, followed in some states, is that such a mortgage is of no effect. Other states have made such mortgages valid by legislative
of a crop mortgage in farm bankruptcy proceedings have of necessity been curtailed in varying degrees by different courts.175

The Lemke bill carries the implications of these decisions to their logical conclusions. It provides that the holder of a future crop mortgage shall have no lien on crops or livestock not embryonically in existence at the time the petition is filed. The mortgagee of crops and livestock in existence at the time of the filing of the petition is limited to receiving not more than three-fourths of the proceeds of such crops and livestock. At least one-fourth are to be paid into court to be applied first to the payment of taxes, insurance, and upkeep and then to the redemption price. The balance apparently is to go to the holder of the mortgage. This section seems a logical solution to an otherwise inescapable dilemma.

CONCLUSION

With a few substantive exceptions, the N.B.C. bill seems far superior to both the Lemke bill and Section 75. Its arrangement is logical and convenient, its phraseology is clear, and its procedure appears complete. The Lemke bill, on the other hand, is not a polished job of legislative drafting. Its apparent logical and convenient arrangement is only superficial. In many places its phraseology is ambiguous. Procedurally incomplete, it would need a detailed General Order to implement it.176 However, it includes a number
of desirable substantive provisions not embodied in its N.B.C. counterpart. These provisions are:

(1) The elimination of the two conflicting definitions of "farmer" in the Bankruptcy Act.
(2) The retention of the position of Conciliation Commissioner.
(3) The extension of the moratorium period for two additional years upon the conditions specified.
(4) The provision for the refund of payments on principal made on property subsequently not redeemed.
(5) The assurance of a discharge, rather than dismissal, except where the debtor has violated one of the six provisions in Section 14(c) predicated on personal misconduct.
(6) The curtailment of the mortgagee's rights under a future crop mortgage.

Were the N.B.C. bill amended to incorporate these six substantive provisions and a more flexible definition of "farmer", it would be a desirable permanent addition to the Bankruptcy Act.