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PROPERTY, MORTGAGED LAND, AND THE FRAZIER-LEMKE ACT*

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"What is property?" Scarcely less profound than the classic query of Pilate concerning the nature of truth, and long debated by philosophers, political and social economists and legal scholars, this question has become for American farmers and their creditors a matter of very pressing moment. For Congress, within the past two years, has added to the Bankruptcy Act provisions for the relief of financially distressed farmers, the operation, and indeed the constitutionality, of which will be affected largely by the meaning ascribed to the words, "the debtor's property."

On March 3, 1933, Section 75 was added to the Bankruptcy Act, permitting compositions and extensions for the benefit of farmers, similar to those provided for in Section 74 for the benefit of individuals and partnerships. Upon the filing of a petition under Section 75 "the farmer and his property, wherever located," are brought under the exclusive jurisdiction of the bankruptcy court, and all proceedings against him "or his property" automatically stayed. Subsection 75 (s), popularly known as the Frazier-Lemke Act, was added in June, 1934. While the original Section 75 did little more than effect a moratorium on the enforcement of claims and security rights against the farmer, the Frazier-Lemke Act scales down the indebtedness of the farmer to the present value of his property, which he is permitted to "buy," free from the claims of his creditors, by paying the appraised value on the installment plan over a period of six years, he retaining possession in the meantime.[1]

Should any secured creditor affected thereby object to this partial-payment plan of purchase by the farmer, a second course is to be pursued. The court must then stay all proceedings for a period of five years, allowing the farmer to retain possession of his property upon payment of a reasonable rental. At the end of the five years the farmer may then buy his property by paying its appraised value. Under either plan the amount of the indebtedness is scaled down to the value of the property as appraised. Secured creditors retain their liens up to, but

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[1] No payment on principal is required to be made the first year, 2½ per cent. in the second and third years, 5 per cent. in the fourth and fifth years, and the balance of the principal (85%) at the end of the sixth year.

not exceeding, the appraised value until paid. Unsecured creditors are given a general lien, subordinate to prior liens. But in no case can creditors ever thereafter assert, either against the farmer or his property, claims for any amount in excess of the appraised value of the property at the time of filing of the petition.[2] And in any event the usual avenues for realizing upon their security are closed to creditors upon the filing of the petition.

The importance of determining what the act means when it speaks of "the debtor's property" is apparent. What is the property which the bankruptcy court is to appraise and sell to the farmer, or allow him to hold for five years by paying a reasonable rental? What are the proceedings to be stayed by the Bankruptcy Act?[3]

Prior to the 1933-34 amendments, bankruptcy proceedings did not affect secured creditors at all. The trustee took only such interest as the bankrupt had.[4] The Frazier-Lemke Act, however, undoubtedly does contemplate impinging upon secured creditors. Indeed, the main purpose of its sponsors was to provide relief to farmers from overburdening mortgage indebtedness and the harshness of loss of their farms through foreclosure in a period of unprecedented depression.[5] Nevertheless, it is not possible to determine to what extent that purpose has been effectuated until we have construed the actual provisions of the enactment. We shall confine the discussion in this article to consideration of the effect of the Frazier-Lemke Act upon real estate security. Problems concerning the unencumbered property of the debtor under the Act may be solved in the light of the decisions under the older sections of the Bankruptcy Act. The most important problems concerning his encumbered property will be covered herein by considering his mortgaged real estate.

Despite the well known purpose of the act, quite a respectable argument can be made to the effect that under the language used the mort-

[2] A creditor having a security lien upon real estate may demand a reappraisal at the end of the five-year period, should the second plan be followed. §75 (s) 7. This will protect him against losing the increase in value (if any) during the five year interval, but as to property other than realty on which there is a mortgage the debtor is the beneficiary of any such increase if he finally buys the land or personal property. If he does not buy, then the unsecured creditors would seem to reap the advantage.

[3] See Hanna, *Agriculture and the Bankruptcy Act* (1934) 19 MINN. L. REV. 1; and Hanna, *The Frazier-Lemke Amendments to Section 75 of the Bankruptcy Act* (1934) 20 A. B. A. J. 687, for an excellent general discussion of the recent amendments and the problems raised.

[4] The trustee took title (§70a) to property "which the bankrupt might by any means have transferred." The trustee, therefore, had to fulfill whatever conditions the bankrupt himself would have had to meet in order to obtain possession of or clear title to property which the bankrupt had pledged or mortgaged as security.

[5] See Senate Report on S. 3580, May 28, 1934. Also Hanna, *loc. cit. supra*, note (3).

gagee of real estate is not within its provisions. It is "the debtor's property" which the act declares to come under the jurisdiction of the bankruptcy court. What, then, *is* the farmer's "property" in land which he has mortgaged? Is it the land itself, or his interest therein—his rights in respect to the land?

In early times property was thought of as being the thing itself, a boar, an ax, a piece of ground. Hence possession was the chief, if not the only, test of ownership. Gradually men came to conceive of property as being, not a relation between a person and a thing, but rather a relation between the owner and other persons. To-day the technically acceptable view of property is that it is those rights and interests in respect to a thing which are legally recognized and protected.[6] With the acceptance of the idea that property is not a thing, but the rights and interests of a person in respect to a thing, there developed the view that the sum of the rights and interests making up complete ownership or the absolute property in the thing might be split up, part of "the sticks in the bundle" being in one person, part in another. This being true, is not the mortgagor's "property" in land which he has conveyed as security for a debt merely the rights and interests which remain in him, the mortgagee having acquired part of those rights and interests which before the execution of the mortgage constituted the totality of the owner's absolute property in the land? And if the land itself is not drawn into the proceedings under the Frazier-Lemke Act, certainly the *mortgagee's* property in the land cannot be included under the words, "the debtor's property."

Strictly applied, this view would result in the conclusion that only the mortgagor's "equity of redemption," whatever the nature of that interest might be, would come within the act, leaving the mortgagee powerless to foreclose during the five or six year period, but preserving the debt without scaling down.[7] But we must first determine whether the mortgagee really has any property *in the land,* whether the mortgagor has actually parted with any of the "sticks" which make up the "bundle" of absolute ownership.

A mortgage is in form a conveyance, vesting in the mortgagee upon its execution a conditional estate which becomes absolute upon breach

[6] See POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW (1922) pp. 191-235; HOLMES, THE COMMON LAW (1881) Ch. VI, X, XI; Cohen, *Property and Sovereignty* (1927) 13 CORN. L. Q. 8.

[7] The mortgage lien would not be scaled down to the appraised value of the land, nor would the mortgagor be permitted to "buy" the land at that valuation. Since, however, proceedings against the farmer and his property are stayed by the act (§75, n, o, s), and any action to enforce security rights necessarily would be against the farmer or his property, a moratorium against foreclosure and sale of the mortgaged land will be in effect, whatever view we take of the meaning of "the debtor's property."

of the condition. At law and in equity it was originally treated as being just what it purported on its face to be, and was held to carry with it all the rights and incidents of ownership. The right of the mortgagee to be treated as owner of the mortgaged premises could be defeated only by the performance of the condition, payment of the debt, on the due day. Courts of chancery, however, recognizing the intention of the parties to effect merely a security for the repayment of the debt, and in order to prevent the forfeiture which arose upon failure of the mortgagor to make payment on the "law day," came to permit an equitable action for the redemption of the mortgagor's former estate after default.[8] Since redemption might be allowed a very long while after default, the mortgagee was in the uncertain position of never knowing when the land was surely his; hence the chancellor permitted him an action to foreclose the mortgagor's equitable right to redeem, the decree debarring the mortgagor of any further right or interest in the land and making the mortgagee's title absolute.

The reality of the mortgage transaction as a security device merely, the equity of redemption being the substantial and beneficial estate in the land, was further emphasized by holdings that the widow of the mortgagor, and not of the mortgagee, is entitled to dower in the land; that the land passes to the heir or devisee of the mortgagor, subject to the mortgage debt, and the mortgage passes with the mortgage debt as personalty to the personal representative of the mortgagee; and that attachment and execution may be levied upon the land by creditors of the mortgagor, and not by those of the mortgagee.

The majority of the American states, following the lead of New York, have now gone further, and deny even at law that the mortgagee has title to the land, his interest being treated as a security lien throughout, legal title continuing in the mortgagor until foreclosure. These are the so-called "lien" states. In the eighteen "title" states the courts still say that legal title passes to the mortgagee upon execution of the mortgage.

What, now, is the nature of the mortgagee's interest? In those states in which the mortgage is held to pass the legal title to the land at its execution, it is pretty clear that the mortgagee has an estate in land, even though the mortgagor is regarded for many purposes as being the beneficial and real owner.[9] The matter is more difficult in the "lien" states, which hold that no title passes until foreclosure. There are a few scattered statements in the decisions to the effect that a mortgage

[8] Savings & Loan Society v. Multnomah County, 169 U. S. 421, 18 Sup. Ct. 392, 42 L. ed. 803 (1898), contains a review of the common law mortgage relationship.

[9] See Savings & Loan Society v. Multnomah County, 169 U. S. 421, 18 Sup. Ct. 392, 42 L. ed. 803 (1898) and review of cases therein.

is merely a chose in action[10] or a contract and creates no interest in the land, legal or equitable. But this is absolutely inconsistent with the many accepted situations in which the mortgagee's rights are treated as being *in rem.* There are opposing views as to whether the lien created by the mortgage is equitable or legal. Professor Durfee has ably, and satisfactorily, it appears to the writer, contended that it is a legal lien, creating from the date of execution a present interest in the land.[11]

It would profit us little to go into the equitable lien vs. legal lien controversy, or into the distinction between an interest in land and an estate in land. Under our theory of property herein advanced, certainly the mortgagee has a part of those rights which make up the sum of complete ownership of the land if he has an interest in land, as we have seen to be the case at the least in "lien" states, and *a fortiori* if he has an estate in land, as in the "title" states. Hence the mortgagor has less than the whole property in the land, and it is only his property that comes under the jurisdiction of the bankruptcy court in procedings under the Frazier-Lemke Act.

It may be objected that, while the analysis above presented is technically unimpeachable, no court would apply it in construing the statute in question. Perhaps this is true; "the feeling of the language" of the act certainly is against it. Nevertheless, the act says the farmer's *property,* not his *land;* and admitting that the mortgagor is substantially the owner of the land, his property is merely his part of the bundle of rights in respect to the land. And should the courts feel that if otherwise interpreted the Frazier-Lemke Act will work an undue hardship on the mortgagee, perhaps to the extent of an unconstitutional taking of his property,[12] the reasoning suggested furnishes at least a possible construction.

The state of Indiana presents an instance of legislative recognition that the mortgagor's property is his interest, and not the land itself, in a situation which may fairly be said to be analogous to the matter in question. There the mortgagor is permitted to deduct from the value of the

[10] This expression is found even in one case in Massachusetts, which is a "title" state. Eaton v. Whiting, 20 Mass. 484, 488 (1826).

[11] *The Lien or Equitable Theory of the Mortgage—Some Generalizations* (1912) 10 MICH. L. REV. 587-607; *The Lien Theory of the Mortgage—Two Crucial Problems* (1913) 11 MICH. L. REV. 495-505 (1913).

[12] *In re* Bradford, 7 F. Supp. 665 (D. Md. 1934), held the Frazier-Lemke Act unconstitutional. Judge Chestnut took the position that the act did include land conveyed as security for a debt and hence took the mortgagee's property without due process of law in that the mortgagor is permitted to buy the mortgagee's interest at a price in which the mortgagee has no part in fixing and without his consent to sell. Other grounds of unconstitutionality are denial of due process in that proceedings to realize on security are held up for a fixed period, without provision for terminating the stay in the event that the debtor's condition should improve within the five or six year period.

land as appraised for taxation the amount of any mortgage indebtedness thereon, taxes being paid only on the excess.[13] Another statute[14] declares that where real estate is mortgaged, the mortgagor shall, for purposes of taxation, be deemed the owner of the land until the mortgagee shall have taken possession of the premises, after which the mortgagee shall be deemed the owner. In the face of this latter statute declaring the mortgagor the owner of the land, the former statute treats his property as being the value of the land above the mortgage debt. Could there be clearer recognition that though the mortgagor may "own" the land, nevertheless his "property" is not the land?

This is made doubly clear in a case involving the constitutionality of the tax statute.[15] The Indiana constitution requires that the legislature shall prescribe such regulations as will secure "a just valuation for taxation of all property." The court held that "all property" was being taxed, even though the owner who had legal title might deduct the amount of the mortgage debt. The constitution also requires equality and uniformity in taxation, and it was argued that this was denied when the owners of two tracts of land of equal value were taxed different amounts if one tract was encumbered and the other not. The court denied this contention, saying in effect that the mortgagor's property was not the land but the extent of his interest therein.

The leading case of *Savings & Loan Society v. Multnomah County*,[16] involving the validity of an Oregon tax law, presents the other side of the picture. The Oregon law permitted the mortgagor to deduct the full amount of any mortgage indebtedness from the assessed valuation of the land, and taxed the *mortgagee* on his mortgage and the debt secured thereby *as real estate*. The tax law was attacked by a non-resident mortgagee on the ground that a mortgage debt, being a mere chose in action, could not be taxed at the situs of the land mortgaged to secure the debt, but might be taxed only in the jurisdiction in which the mortgagee was resident. The United States Supreme Court recognized that by the law of Oregon a mortgage of real estate does not convey the legal title, but creates only a lien or encumbrance as security for the mortgage debt; and that the right of possession, as well as the legal title, remains in the mortgagor both before and after condition broken, until

[13] IND. ANN. STAT. (Burns, 1933) §64-209. The deduction for mortgage indebtedness must not exceed $1000 or one-half the appraised value of the land. This does not affect our thesis, however, it was expressly held not to be an exemption law, State v. Smith, 158 Ind. 543, 63 N. E. 25 (1902). Oregon permits deduction of the total amount of mortgage indebtedness (discussed *infra*). The Indiana instance is used because of the appositeness of the cases interpreting the statute.

[14] IND. ANN. STAT. (Burns, 1933) §64-507.

[15] State v. Smith, 158 Ind. 543, 63 N. E. 25 (1902).

[16] 169 U. S. 421, 18 Sup. Ct. 392, 42 L. ed. 803 (1898).

foreclosure. Notwithstanding this, the court held that what was taxed was "nothing but the real estate mortgaged, the interest of the mortgagee therein being taxed to him, and the rest to the mortgagor."

Thus the legislatures and the courts of Indiana and Oregon, and the United States Supreme Court, by legislative declaration and judicial decision, buttress in a way not merely philosophical our contention that property, when used in a statute or constitution—and when speaking in terms of ownership of real estate, not merely in the broad sense that any valuable right is the subject of property—may mean only the interests of a particular person therein, not the land itself.

Certain decisions on the law of fraudulent conveyances furnish another analogy which may be of some help. The Statute of Elizabeth and its American counterparts make invalid any transfer of a debtor's property in fraud of creditors. Yet it is held in a minority of jurisdictions that where a debtor has conveyed land under circumstances which amount to a fraudulent transfer, but the land is subject to a mortgage to the extent of its value, creditors of the debtor cannot set the conveyance aside.[17] The reasoning is that the debtor's property was of no value, because the mortgage debt exceeded the value of the land, and that therefore the creditors had not been defrauded of anything. Though it may be objected that the creditors should be permitted to try to realize something out of the mortgagor's equity if they can, and hence that the holding is wrong in denying creditors that right, nevertheless, these decisions are another recognition that the ownership of the land and the mortgagor's "property" are different concepts.

There is another ground on which the mortgagee might be held not affected by the Frazier-Lemke Act, at least in the "title" states, even should the courts turn a deaf ear to our interpretation of what is meant by "the debtor's property." Statements abound in the decisions of those states that, while it is recognized that the mortgage transaction is a security device and hence in matters affecting one of the parties and third persons the interest of the mortgagor will be treated as realty and that of the mortgagee as personalty, in matters between the mortgagee and mortgagor, or in any case where it is necessary to the protection of the mortgagee, the mortgagee's legal title will be regarded. In *Brobst vs. Brock,*[18] the United States Supreme Court said:

"It is true that a mortgage is in substance but a security for a debt or an obligation to which it is collateral. As between the mortgagor and all others than the mortgagee it is a lien, a security, and not an estate. But as between the parties to the instrument, or their privies, it is a

[17] Aultman, etc., Co. v. Pikop, 56 Minn. 531, 58 N. W. 551 (1894).
[18] 77 U. S. 519, 19 L. ed. 1002 (1870).

grant which operates to transmit the legal title to the mortgagee, and leaves the mortgagor only the right to redeem."

Certainly the question whether the mortgagor may "buy his property" from the mortgagee under the Frazier-Lemke Act is "between the parties."

In *Hutchins vs. King,*[19] Mr. Justice Field said that the interest of the mortgagee is treated as real estate insofar "as may be necessary for the protection of the mortgagee and to give him the full benefit of his security." If ever the mortgagee needed protection it is called for in construing "the debtor's property" as used in the Frazier-Lemke Act!

Enough has been said to make it clear that the Court may, if it will, so interpret the act as to prevent the mortgagee's debt being scaled down to the value of the property, with the exclusive right in the *mortgagor* to buy the land. Judge Chesnut, of the Maryland District Court, would have liked to do so. In *Re Bradford*[20] he said: "The substantial effect is to transfer the property of one person to another by requiring the mortgagee to sell his interests in the property *to the mortgagor* at a price which the former has no part or influence in fixing. It is quite like taking private property for *private* use." The solution that we have suggested was not urged upon him, and he held the act unconstitutional. Judge Dawson, of the Western District of Kentucky, felt the same way as to the harshness of the act, and, though reluctantly holding it constitutional, said: "For me this case has been one of unusual difficulty. I approached its consideration with a very definite conviction of its unconstitutionality. Frankly, I regret that on more mature deliberation I cannot conscientiously adhere to that view. I consider the legislation, in some of its provisions, unfair to creditors and unwise even as to farmer debtors, for it inevitably closes to them all private sources of long-time credit."[21] Our solution was not presented to him, either. It is fair to assume that the Court may be glad to seize upon a way out of the difficulty. The suggestion herein offered obviates the greatest potential harshness of the Frazier-Lemke Act to mortgage creditors, and at the same time affords the farmer-mortgagor, in meritorious cases, protection against immediate foreclosure.

Should the courts nonetheless hold that the Frazier-Lemke Act does apply to land of which the farmer-mortgagor is substantial owner, some interesting and important questions will arise as to when the substantial ownership of the mortgagor ceases. The act, it will be recalled, permits the debtor to "buy his property," and the filing of a petition under the

[19] 68 U. S. 53, 17 L. ed. 544 (1863).
[20] 7 F. Supp. 665 (D. Md. 1934), noted (1934) 48 HARV. L. REV. 332.
[21] *In re* Radford, 8 F. Supp. 489 (W. D. Md., 1934).

act has the effect of staying all proceedings against the debtor or his property. Obviously, if the mortgagee has done no more than file his complaint for foreclosure when the debtor-mortgagor files a petition for composition and extension under the Frazier-Lemke Act, the foreclosure proceeding cannot be further prosecuted. It is equally apparent that if the foreclosure proceedings have been finally completed, the purchaser at the sale having received a deed and the mortgagor having no further time within which to redeem, it is then too late for the debtor to cause the act to apply by filing a petition for composition and extension. At what intermediate stage in the foreclosure proceedings is the dividing line to be drawn?

There are two distinct situations in which the problem may arise, one depending upon when the common law equity of redemption is extinguished, the other having to do with the nature of the statutory right to redeem from the sale.

(a) The usual foreclosure proceeding consists of complaint for foreclosure, reference, decree of foreclosure, sale, confirmation, and deed to purchaser—and possibly an action to put the purchaser in possession. At what point is the common law equity of redemption lost? The statutes and the practice vary in the different states in regard to foreclosure,[22] and there are few decisions which say precisely when the right to redeem by payment of the debt is lost. Strict foreclosure still is permitted in some states, and there the decree is *nisi*—that the mortgagor be debarred of any further interest in the land unless he pay the debt by a day set; foreclosure is not complete until the lapse of the time reserved for redemption. Ordinarily, however, the statutes require a sale, and the sale must be confirmed (usually) before the purchaser's title is complete. In some states the decree for sale is also *nisi,* reserving a period for redemption, and it seems to be generally considered that in the absence of such a reservation of a specified redemption period the right to redeem continues at least until the sale.[23] This is entirely proper. Setting a future day for sale acts as a final warning to the mortgagor and allows him additional days of grace, after the analogy of the *nisi* decree in strict foreclosure. But does the equity of redemption survive the sale and continue until confirmation? In the opinion of the writer it should not,[24] since confirmation is required merely to in-

[22] For the statutes of the several states, see 3 JONES, MORTGAGES (8th ed. 1928) Ch. 30.

[23] See generally, on the question of foreclosure of the equity of redemption and on statutory redemption rights, Durfee and Doddridge, *Redemption from Foreclosure Sale* (1925) 23 MICH. L. REV. 825, and cases and authorities therein cited.

[24] In the case before Judge Chestnut, *In re* Bradford, 8 F. Supp. 489 (W. D. Md. 1934), the farmer-mortgagor filed his petition after foreclosure sale but before final confirmation of the sale. It was said that the Frazier-Lemke Act would apply under those circumstances, were the act itself not unconstitutional,

sure that the sale is a fair one. Its purpose is equally to protect mortgagee and mortgagor in having the land bring the highest possible amount. It should not be twisted into a further *locus poenitentiae* for the mortgagor. If the law were settled that redemption might be effected after sale and before confirmation it would be conclusive that the debtor might, by filing his petition under the Frazier-Lemke Act in the interim, upset the foreclosure proceedings. But it is not settled, and it should not now be determined in such a way as to permit that result, especially when the mortgagor is not offering to *pay* the mortgage indebtedness but demands that it be scaled down and a moratorium on its enforcement be effected for five or six years. *A fortiori,* the mere fact that a deed has not been given the purchaser, or that he has not been put into possession,[25] should make no difference. Our conclusion is, therefore, that absent a further statutory period for redemption from the sale, a farmer may successfully invoke the provisions of the Frazier-Lemke Act by filing his petition any time before sale, but should not be able to do so after the foreclosure proceeding has passed that stage.

(b) The matter is worse confounded by the provisions in many states allowing a statutory period for redemption *from the sale.* This is an entirely different right from the equitable right of redemption, coming into existence when the latter ceases.[26] Redemption from the sale is effected by payment of the amount of the bid at the sale, not the amount of the mortgage debt, and is usually granted to lienors of the

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since under the Maryland cases the purchaser was in the position of merely offering to buy until confirmation, and had no interest in the land. But granting that as to the purchaser, may it not still be true that the mortgagor has lost his common law right to redeem? In North Carolina, N. C. CODE ANN. (Michie, 1931) §2591, foreclosure sale is not deemed closed until ten days have elapsed, and a resale is to be ordered if certain advance in bid is made within that time. In *In re* Sermon's Land, 182 N. C. 122, 108 S. E. 497 (1921), it was held that the highest bidder at the sale acquires no interest in the land until the lapse of the ten day period, and that if the building on the land burns within the interval the loss falls on the owner (mortgagor); *i.e.,* the purchaser was not required to take title and another sale was ordered. Cherry v. Gillian, 195 N. C. 233, 141 S. E. 594 (1928), comes very close to being a holding that the equitable right of redemption may be exercised after the sale and within the ten day period. There the mortgagor sold the "equity of redemption" within the ten day period and his grantee paid the amount of the mortgage debt to the mortgagee, which was assumed to effect a redemption and upset the sale. The precise action was by the highest bidder at the sale against the mortgagor and his grantee for damages for making it impossible for him to get title to the land. Clearly, he was not entitled to damages in any event, and it was not decided, merely assumed, that payment of the mortgage debt to the mortgagee did annul the sale.

[25] Expressly so held in *In re* Compton, 7 F. Supp. 676 (D. Md. 1934). There the foreclosure sale had been finally confirmed, the mortgagor refused to give the purchaser possession and filed his petition under the Frazier-Lemke Act. Held, no title remained in the debtor and his farm was not subject to administration under the act; nor was the issuance and levy of a writ of dispossession a proceeding "against the debtor or his property," within the meaning of the act.

[26] Powers v. Andrews, 84 Ala. 289 (1887).

mortgagor as well as to the mortgagor. Let us suppose, now, that there has been a sale under foreclosure and confirmation of the sale. The mortgagor's equitable right of redemption is gone, but he has a statutory right of possession for a year, and the right to redeem from the sale within the year. What is the debtor's "property" now? Is it merely the right to redeem from the sale, at the sale price, the mortgagee being out of the picture, save as he may incidentally be concerned as probable purchaser at the sale? Or is the property of the debtor the same estate that he had before foreclosure, the statutory redemption privilege suspending the final effect of the foreclosure? If it be the latter, the mortgagor, by filing his petition for composition and extension, may upset the entire foreclosure proceedings. The results would be complicated, not to say absurd. Would the court—and which court, state court or bankruptcy court—recall the mortgagee, who thought himself out of the picture some months previously, order him to refund to the purchaser the money received from the sale, and tell him to wait five years, or six, in the hope that the mortgagor will then pay the appraised value of his property, the mortgage lien, which was extinguished by the sale, being in some miraculous way revived and revested?

The usual statute employs language to the effect that redemption "annuls the sale."[27] But that cannot be literally the case, for then all liens would reattach and the debtor and his lien creditors be in the same position as before foreclosure, and the foreclosure process and redemption from sale be repeated indefinitely; such is not the effect which the courts have given to redemption from the sale.[28] The mortgagee is out of it. The matter is entirely between the mortgagor and the purchaser. If the mortgagee got a deficiency judgment he may, of course, after redemption, levy upon the land as any judgment creditor of the mortgagor might, but he cannot enforce his former lien for any deficiency.

Persuasive also in favor of the view that the statutory right of redemption is a new creation, distinct from the common law equity of redemption, is the analysis of Professor Durfee.[29] He points out that statutory periods for redemption from sale were not necessary to give the mortgagor a longer time within which to exercise his equitable right of redemption, for that could have been accomplished more directly by delaying the sale for a longer period after the decree; hence the purpose must have been to spur the mortgagee, who ordinarily is the only bidder at foreclosure sales, to bid something like the value of the land, on pain of having the land taken from him by redemption by the mortgagor or his lienors if he does not bid a fair amount. Add to this the

[27] 3 JONES, MORTGAGES (8th ed. 1928) Ch. 30.
[28] See *supra*, note 24. [29] *Ibid.*

points above pointed out, that the amount paid for statutory redemption is the amount bid at the sale, not the amount of the debt, and that the land cannot again be sold under the mortgage lien, and it becomes apparent that the rights of the mortgagor during the statutory period for redemption from sale represent a new and distinct interest, and not a continuation of the mortgagor's estate before foreclosure. Consequently, filing of a petition by the debtor during that period would not upset the foreclosure proceedings, for the "property" of the mortgagor against which the mortgagee had an adverse claim no longer exists.

But what of the purchaser? What can the mortgagor do to him by filing a petition under the act before the statutory period for redemption has expired? There are three possibilities. (a) Filing of a petition will have no effect whatever, if the mortgagor no longer has any property in the land but a mere personal right to defeat the sale, which right will be lost automatically without further action by court or purchaser if not strictly exercised. (b) Delivery of the sheriff's deed at the end of the period for redemption might be construed as a "proceeding against the debtor," which the act would stay for five years, entitling the mortgagor to retain possession in the meantime and extending the time for the mortgagor to redeem from the sale. (c) The land might be considered as the mortgagor's, which he could "buy" from the purchaser by paying the appraised value, not the sale price, with six years in which to make payment. Which it shall be will depend upon the nature of the interest which the mortgagor has during the statutory period for redemption, and the relationship existing between him and the purchaser. It is impossible to make any general statement concerning the matter, since, the right being wholly statutory, there are almost as many different constructions as to what that right is as there are statutes granting it. Some cases define it as a purely personal right, which the mortgagor cannot alienate.[30] Others say that he may voluntarily sell it, but that creditors cannot sell it under execution.[31] The statutes and decisions of the particular state will have to be consulted in each case.

By way of summary, it may be said that the Frazier-Lemke Act, while prompted by a very laudable desire to protect oppressed farmers from loss of their homes and farms in a time of widespread depression, is, upon the most obvious interpretation of its wording, unduly harsh upon holders of mortgages upon farm lands. We have, therefore, advocated an interpretation of "the debtor's property" in such a way as

[30] Powers v. Andrews, 84 Ala. 289 (1887).

[31] Under the Kentucky statute the mortgagor may sell his right, or it may be sold under execution by judgment creditors once, from which latter sale the mortgagor may redeem. CARROLL'S KY. STAT. (Baldwin's Rev. 1930) §2365.

to allow a petition under the act to effect a moratorium on enforcement of the mortgagee's lien by foreclosure proceedings, but at the same time protecting the mortgagee against scaling down of his debt, and preserving to him the valuable right to protect his interest by becoming owner of the land upon foreclosure at the end of the moratorium period if he be the highest bidder at the foreclosure sale. That right he contracted for, and it is utterly unwarrantable to require him to sell his interest in the land to the mortgagor instead, and at a price which he has no part in fixing, but which, rather, is fixed by the farmer-mortgagor's neighbors acting as appraisers. Should the courts, however, not heed this plea, we have shown that it will be possible for the mortgagor, by filing his petition for composition and extension at any time before sale under foreclosure proceedings, to invoke the act; that after sale, this should not be possible. Where there is a further statutory period for redemption from the sale the mortgagee is nevertheless out of the picture. What effect the filing of a petition within that period will have upon the purchaser's rights will depend upon the nature of the respective interests of purchaser and mortgagor under the peculiar statutory wording and the judicial decisions in each state.