



5-1-1933

## Recent Amendments to the Bankruptcy Act

Elton E. Richter

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### Recommended Citation

Elton E. Richter, *Recent Amendments to the Bankruptcy Act*, 8 Notre Dame L. Rev. 460 (1933).

Available at: <http://scholarship.law.nd.edu/ndlr/vol8/iss4/7>

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## RECENT AMENDMENTS TO THE BANKRUPTCY ACT\*

The relation between debtor and creditor has been described as always delicate, and always dangerous whenever it divides society and draws out the respective parties into different ranks and classes.<sup>1</sup> History has recorded for us the degree of hatred and passion which may possess the parties who stand in relation of debtor and creditor. In the primitive communities where bankruptcy systems were unknown individual creditors were left to pursue their remedies by such means as the law or practice of the community might sanction and these were generally of a very drastic character. Under the Roman law of the Twelve Tables, the creditor might, as a last resort, cut the debtor's body into pieces each of them taking his proportionate share.<sup>2</sup> Shakespeare reminds us of the harsh character of the early law when he has Portia say:

"Why, this bond is forfeit, and lawfully by this the Jew may claim a pound of flesh, to be by him cut off nearest the merchant's heart."<sup>3</sup> There is no doubt that the creditor in older days had the power of selling the debtor and his family into slavery. That this was the practice among the Jews is shown by the old testament story of the woman who sought the help of Elisha, saying:

"Thy servant, my master is dead, and thou knowest that thy servant did fear the Lord, and the creditor is come to take unto him my two sons to be bondsmen."<sup>4</sup>

We rejoice that Elisha was able to increase the oil so many fold that he could say to the woman:

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\* The Act amendatory of the Bankruptcy Act of 1898, and Amendments thereto, discussed herein, was approved on March 3, 1933. H. R. 14359.

<sup>1</sup> Daniel Webster in his argument in *Ogden v. Saunders*, 12 Wheat, 213 (1827).

<sup>2</sup> Broom & Hadley's *Blackstone*, Vol. I, p. 825.

<sup>3</sup> *The Merchant of Venice*.

<sup>4</sup> II King's, Ch. IV.

"Go sell the oil, and pay thy debt, and live thou and thy children of the rest."

The practice of selling the debtor and his family into slavery as a means of collecting the debt was habitually practiced in Greece and Rome.

The ancients were, it seems, also plagued with immovable debt burdens, over production, and the shift of property from the hands of the many into the hands of the few and thus they were told:

"Six years thou shalt sow thy field, and six years thou shalt prune thy vineyard and gather in the fruits thereof."

"But in the seventh year shall be a Sabbath of rest unto the land, a Sabbath for the Lord, thou shalt neither sow thy field nor prune thy vineyard." <sup>5</sup>

And further,

"And ye shall hallow the fiftieth year, and proclaim liberty throughout all the land unto all the inhabitants thereof: it shall be a jubilee unto you and ye shall return every man unto his possession, and ye shall return every man unto his family."

"In the year of this jubilee ye shall return every man unto his possession. According to the number of years after the jubilee thou shalt buy of thy neighbor, and according unto the number of years of the fruits he shall sell unto thee." <sup>6</sup>

These provisions clearly contemplate a general cancellation of debts at stated periods. One cannot help wondering how this theory of inalienable fee and leases limited to fifty years would function in our modern society where it seems that due to inherent defects of our system large percentages of our population at frequent intervals and many times without fault of their own, find themselves without homes or earning power. Perhaps the fifty-year period is too long for modern society where the economic cycle seems to turn completely in from twenty to thirty years or even less. Certainly it would seem that a near possibility of returning to former possessions within a relatively

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<sup>5</sup> Leviticus, Ch. XXV.

<sup>6</sup> *Op. cit. supra* note 5.

short time would be a great comfort to the millions now homeless. Of course, in such an economic order, the problem of original acquisition and large scale production would exist, but I suppose Moses did not overlook these and similar problems.

The savage severity of the early laws was, however, found to be inconsistent with the development of more humane ideas and the growth of popular rights; and tended, as in the case of Greece and Rome, to create serious disturbance in political relations between the Patricians, who usually composed the wealthier or creditor class, and the Plebeians, in whose ranks the majority of the debtors were to be found. Later legislation consequently substituted imprisonment in a public prison for the right of selling the person of the debtor. Under the feudal systems of Europe the state generally insisted on its subjects being left free for military service, and debts could not therefore be enforced against the person of the debtor; but as trade began to develop it was found necessary to provide some means of bringing personal pressure to bear upon debtors for the purpose of compelling them to meet their obligations, and under the practice of the English Courts of law the rights of the creditor to enforce his claims by the imprisonment of his debtor was gradually evolved, and this practice continued until comparatively recent times.

The state of the prisons and the condition of the unfortunate persons imprisoned for failure to pay their debts have been the themes for many noted English writers. Dickens touches on the theme in *The Pickwick Papers*. Concerning the state of the prisons, he writes:

“In the burrow high street, near St. George’s Church, and on the same side of the way, stands, as most people know, the smallest of our debtors prisons, the Marshalsea. Although in later times it has been a very different place from the sink of filth and dirt it once was, even its improved condition holds out little temptation to the extravagant or consolation to the improvident. The condemned felon has as

good a yard for air and exercise in Newgate, as the insolvent debtor in the Marshalsea prison. Want and misfortune are pent up in the narrow prison; an air of gloom and dreariness seem, in my eyes at least, to hang about the scene, and to impart to it a squalid and sickly hue."

And as to the effect of imprisonment on the unfortunate debtors:

"Many eyes that have long since been closed in the grave, have looked round upon that scene lightly enough, when entering the gates of the old Marshalsea prison for the first time for despair seldom comes with the first severe shock of misfortune. A man has confidence in untried friends, he remembers the many offers of service so freely made by his boon companions when he wanted them not; he has hope, the hope of happy inexperience—and however he may bend beneath the first shock, it springs up in his bosom and flourishes there for a brief space, until it droops beneath the blight of disappointment and neglect. How soon have those same eyes, deeply sunken in the head, glanced from their faces wasted with famine and sallow from confinement, in days when it was no figure of speech to say that debtors rotted in prison, with no hope of release, and no prospect of liberty; the atrocity in its fullest extent, no longer exists but there is enough of it left to give rise to occurrences that make the heart bleed." <sup>7</sup>

Of the state of the debtors' prisons, Goldsmith says:

"I next attended the sheriff's officers to the prison, which had been built for the purposes of war, and consisted of one large apartment, strongly grated, and paved with stone, common to both felons and debtors at certain hours of the four and twenty. Besides this, every prisoner had a separate cell, where he was locked in for the night." <sup>8</sup>

Concerning the condition of the imprisoned debtors Goldsmith wrote:

"I am told that even in this very room a debtor of his, no later than last year, died for want." <sup>9</sup>

The practice for imprisonment for debt spread to English colonies in America. Professor Channing discusses prison conditions during the colonial period, an early period of the United States. He says:

<sup>7</sup> The Old Man's Talk About The Queer Client, Ch. XXI.

<sup>8</sup> The Vicar of Wakefield.

<sup>9</sup> *Op. cit. supra* note 8.

“The crime of debt was the cause of the confinement of more men than any infraction of the law. Debtors were confined in prisons unfit for the habitation of the most loathsome beast. Newgate prison near Granby, Connecticut, was an old worked out copper mine in the hills accessible only by a ladder let down into a shaft. In some of the dungeons, prisoners were lodged in hammocks swung one over the other. The pillory and the whipping post worked over-time, the tread mill worked continuously, the shears dripped with blood and the branding iron emitted the stench of burning human flesh.”<sup>10</sup>

The practice of imprisonment for debt continued until comparatively recent times, being abolished in England by the Debtors Act in 1869, and in the United States in the middle of the nineteenth century. Generally, however, imprisonment for debt in the United States in certain cases where there is a suspicion of fraud or where the debtor has an intention of removing from the state to avoid his debts, is still possible. An interesting case illustrating possibilities is *Leach v. Whitbeck*.<sup>11</sup> A part of the report of the case is as follows: “Petitioner is 58 years old and is imprisoned in a civil suit upon a *capias ad satisfaciendum*. His imprisonment began April 11, 1907, and until July 2nd, 1907, he was allowed certain liberties and privileges. His wife and friends visited him. They furnished him newspapers. His wife provided him an easy chair, a strip of carpet for the narrow alley in his room and a small rug before his cot. He is not kept with the prisoners detained for criminal offenses, but in that portion of the jail provided for civil prisoners. This is a compartment 11 by 14 feet with a solid iron door and window. Within the compartment are two cells, seven feet square, leaving an alley in front of them about four feet wide and fourteen feet long. After July 2nd, 1907, realtor was locked up within this small space, deprived of the chair, carpet, and rug furnished by the wife, and also of all newspapers, and was not permitted during that time to come out for exercise or any other purpose until

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<sup>10</sup> E. Channing, *History of the United States* (1925).

<sup>11</sup> 115 N. W. 253 (Mich. 1908).

brought before the court, August 17, 1907, upon the hearing of his petition, with one exception, when he was before the court on the return day of the order to show cause." The Supreme Court, reversing the trial court, directed the sheriff to desist from further confining the realtor in the matter above stated, and to give him opportunity for daily exercise in the main corridor or elsewhere, and to open the door of his room for sufficient time to give complete change of air. The books do not tell us what eventually happened to the debtor.

There must be some system for enforcing payment of debts; for without some system it would be impossible for the commerce of the world to be carried on, for modern commerce is necessarily founded largely on credit. One of the country's extensively read writers recently wrote:

"At the present time credit is the most gigantic species of property in this country and the trade in debts is beyond all comparison the most colossal branch of commerce."

And further:

"A careful examination of the debt figures and the production figures of this country, and these figures have been repeatedly checked and cannot be brushed aside, reveals the appalling facts that for years our debts have been increasing at a rate faster than production and both of them faster than the rate of population."<sup>12</sup>

To the writer, these and similar statements are interesting but hardly explanatory of the great increase in the amount of debts. To understand the causes of this great debt increase one must examine the factual situations. At the outset there must be a division between public and private debts.

There are few excuses for the existence of public debts so extensive in amount as to be barely comprehensible. A great social emergency such as a war is generally thought to be such an excuse. However, at the present time there is much diversity of opinion even on this, many people thinking,

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<sup>12</sup> "Technology Smashes The Price System," by Howard Scott, Harpers, January, 1933.

and perhaps rightfully so, that capital should be enlisted for the public service in time of war for rewards other than the lure of excessive profits. Recent experiences tend to raise a doubt in the minds of the capitalists whether excessive profits enjoyed by creating unlimited public debts is not after all detrimental to capital. Post-war experiences in Germany, France, and to lesser degrees in England and United States, lead one to believe that profits enjoyed by creating public debt is largely illusory. But perhaps from a practical viewpoint it is better in cases of social emergency to enlist the willing aid of capital by the lure of profits, even though later these profits are made illusory by inflation of the currency. Other social emergencies seemingly justify creation of a public debt, such as providing necessities for the needy in times of economic distress. But even here it is commonly understood that the distress must not be too extensive or last too long, otherwise the whole governmental scheme will be dragged down by the destruction of the public credit. It is also commonly thought that certain semi-permanent improvements, such as roads and buildings, justifies increasing the public debt. Even here the charge is properly made of spending anticipated income and the great number of homes lost because of taxes and special assessments and the defaulted improvement issues is convincing proof that the argument as to semi-permanent improvements is vulnerable. The proposition of meeting current expenses by increasing the public debt is of course insupportable except as to those persons enjoying the bounties of the government and even they, like the war-time profiteers, may later see that their policies were against their permanent good.

The incurring of private debts takes place in one of the following factual situations:

A. Where a person borrows for the purpose of acquiring consumptive goods or services. The goods may be necessities or otherwise.



B. Where a person, natural or artificial, borrows to acquire fixed assets.

C. Where a person, natural or artificial, borrows to buy current assets for business purposes.

D. Where an artificial person borrows to pay running expenses of a business.

A loan under (A) necessarily involves some degree of risk. Such loans are generally unsecured and the mere fact that the loan is requested is proof, in a great majority of cases, that the borrower is in close financial circumstances. These borrowers are usually wage earners and the debts usually evidenced by open book accounts. It is estimated that credit extensions under this class reach as high as twenty-five million dollars per year.

Under (B) we have the cases of borrowing for business and non-business purposes. An example of borrowing for non-business purposes would be the case where an individual in a city borrows to purchase a home. The debt must be paid by earnings derived from sources other than the home. An individual may borrow to buy a farm, this adventure has the aspects both of the business and non-business case. The farmer's residence is on the farm and the farm is a source of his income from which he expects to pay his debts. These loans are usually made and should always be made by financial institutions engaged in making long term loans such as building and loan associations and saving institutions where the depositors understand that their money may not be forthcoming on demand.

The typical case of borrowing to buy fixed assets for business purposes is a new railroad. Here thousands of dollars per mile will be borrowed, the loan secured by a mortgage on the fixed assets of the road. Of course, other types of business enterprises such as electric companies, gas companies, and manufacturing companies engage in the same sort of borrowing. The lender in these cases is usually an investment bank and the loan will be evidenced by the bor-

rowers' promissory notes generally secured. The ultimate holders of these notes hope that the business will be successful and the notes paid from the earnings of the business.

The case of borrowing to buy current assets is illustrated in the seasonal businesses. For instance, a coal dealer in the fall desires to put in a large inventory, he perhaps will borrow to pay for a part of this inventory. The loan will be repaid when the coal is sold. The lender in this case will probably be a commercial bank.

Borrowing to pay running expenses of a business is rarely justified and the loans are extremely dangerous. Such a loan is made only to save prior loans and in the hope of a change in the financial situation of the borrower.

All of these cases of incurring debts have some common factors; the lender expects the loan to be repaid, the borrower, in most cases at least, expects to repay. The lender understands that on the present state of affairs the borrower has or will have ability to repay and the honest borrower thinks he has or will have the means with which to repay. Both the lender and the borrower base their expectations on the hope that, in the case of old businesses, present conditions will continue; and, in case of a new business, that anticipations will become realities.

Both lender and borrower understand that the further into the future that the completion of the adventure is projected, the more difficult it becomes to forecast the state of affairs which will exist when the day for repayment arrives. Consequently, on the short time loans of class (A) which are carefully made, the losses from bad debts run as low as one-half of one per cent of credit sales. Of course the more liberal and reckless the credit extension policy and the poorer the collection system, the greater the loss from bad debts. The risks incurred by the creditor here are honest debtors suddenly becoming dishonest, debtor's loss of income or increased expense due to death, sickness, loss of position, or decrease in rate of compensation.

A loan falling under class (B) is usually projected far into the future, consequently engulfed in unforeseeable risks. To protect both creditor and lender, the loan should be small in proportion to the security. The proper proportions were set forth by wise English judges long ago: "Thus it has been laid down that in a case of ordinary agricultural lands the margin ought not to be less than one-third of its value; whereas in cases where the subject of the securities derives its value from buildings erected upon the land, or its use for trade purposes, the margin ought not be less than one-half. I do not think that these have been laid down as hard and fast limits up to which trustees will be invariably safe, and beyond which they can never be in safety to lend, but as indicating the lowest margins which in ordinary circumstances a careful investor of trust funds ought to accept."<sup>13</sup> Where money is loaned to a manufacturer the margin of safety should be higher still, for, in case of failure, the security will usually be little more than worthless.

In loans under class (C) made for the purpose of acquiring current assets, conditions existing at time of loan are or should be known and since the credit extension is for a short period the risks are consequently limited.

Loans under class (B) are necessarily dangerous, and are understood to be so by the lender when the loan is made.

In all cases of credit extension the borrower is charging future expected income in order to acquire present goods or services. Conceding that the loan will be repaid, the natural result is increased business activity during the period that credit is being utilized and decreased business activities during the period that credit is being repaid. Consequently a period of liberal credits results in stepping up the production of goods in a short period which ought to be produced and sold evenly over a much longer period. In order to meet this expanded demand for goods, due to easy

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<sup>13</sup> In *Re Salmon*, L. R. 42 Ch. Div. 351 (1889).

credits, productive capacity is enlarged and more debts incurred, the resulting high degree of business activity itself furnishing the basis for additional credit extensions. Suddenly credits become stringent, business volume is decreased, anticipated income fails to mature, and current income which should be used for purchasing goods must be used to pay past debts. This aggravates the matter and ushers in a period of declining business. Lenders and borrowers now find that they were mistaken when they assumed at the time the loan was made that existing conditions would continue. The debtors cannot pay. The lenders have made mistakes; bankers entrusted with management of the social savings have failed in the performance of their functions, commercial bankers forgot their proper functions and acted foolishly in the investment fields, investment bankers knowingly led their clients into reckless speculative adventures, and speculators turned fakers. The economic order is hopelessly mired, not so much because the scheme is wrong as to failure of those at the throttle, the financiers, to regulate credit extensions.

The question is how to best salvage the wreckage. Extensive losses have occurred; on whom must they fall? The social order is threatened by clashes between debtors and creditors. Regular legal means for enforcing the fulfillments of financial contracts by the device of taking property from the debtor and giving it to the creditor fails because the debtor's property is no longer valuable, though in quantity he may have as much as ever. Society is faced with the necessity of devising some system which is just to creditors and not unduly harsh on debtors, a system which discriminates between involuntary inability to meet obligations and wilful refusal or fraudulent evasion, a system which will secure to creditors as between themselves an equi-

table share of such of the debtor's assets as may be available for the payment of his liabilities and discharge the honest but unfortunate debtor from his liabilities for unpaid balances. Society has found this desired system in the bankruptcy laws. In noting the history of Bankrupt laws in the United States, one cannot help recalling Coke's observations in *Twyne's* case.<sup>14</sup> He said:

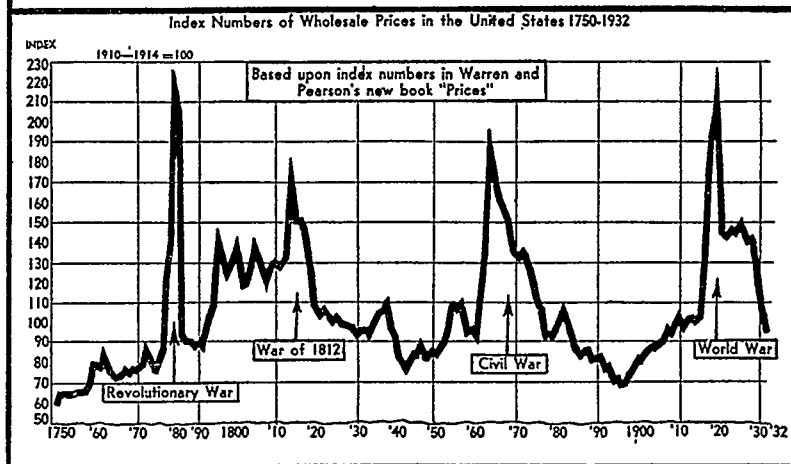
"To one who marvels what should be the reason that acts and statutes are continually made at every parliament without intermission, and without end; a wise man made a good and short answer both of which are well composed in verse: 'Quaeritus ut crescunt tot magna volumina legis? In promptu causa est, crescit in orbe dolus.'"

Thus the first bankrupt law enacted by Congress was passed in 1800, following the inflation period of the Revolutionary war. The law was repealed in 1803. Inflation again followed the War of 1812. This inflation resulted in wide agitation for the bankrupt law. The Panic of 1837, greatly increased the volume of this agitation with the result that our second bankrupt law was enacted in 1841, and this act was repealed in 1843. The Panic of 1857, and the inflation of the Civil war period laid the economic basis for the bankrupt law of 1867. This act continued to be the law through the post Civil war deflation including the panic period of 1873. It was repealed in 1878. Prior to 1893 the American people had indulged extensively in over investments on credit and the economic depression of 1893 followed. The resulting clamor of debtors to be relieved from debts which they were not able to pay resulted in the enactment of the bankrupt law of 1898, which, with subsequent amendments, is the bankrupt law of today. The accompanying chart shows with telling effect the coincidence between economic depressions and the passing of our bankrupt laws.

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<sup>14</sup> 3 Coke, 80 F.

## Four Inflation Periods in American History Came With Wars-Four Deflation Periods Followed Them



—Courtesy of Chicago Daily Tribune.

This brief summary of the history of our bankrupt laws shows that President Hoover was but acting in accord with firmly established national policy when, on January 11, 1933, he transmitted the following message to Congress relative to the revision of the Bankrupt laws:

"To the Senate and the House of Representatives: On February 29th, last, I addressed the Congress on the urgent necessity for revision of the Bankrupt laws, and presented detailed proposals to that end. These proposals were based upon most searching inquiry into the whole subject which has been undertaken by the Attorney General at my direction. While it is desirable that the whole matter should be dealt with, some portions of these proposals as an amelioration of the present situation are proving more urgent every day. With view of early action, the department, committees and members of the Congress, have been collaborating in further development of such parts of these proposals as have, out of the present situation, become of most pressing need. I urge that the matter be given attention in this session, for effective legislation would have most helpful economic and social results in the welfare and recovery of the nation.

"The process of force liquidation through foreclosure and bankruptcy sales of the assets of individual and corporate debtors who, through no fault of their own, are unable in the present emergency to

provide for the payment of their debts in ordinary course as they mature, is utterly destructive of the interests of debtor and creditors alike, and if this process is allowed to take its usual course misery will be suffered by thousands without substantial gain to their creditors, who insist upon liquidation and foreclosure in the vain hope of collecting their claims. In the great majority of cases such liquidation under present conditions is so futile and destructive that voluntary readjustments through the extension or composition of individual debts and the reorganization of corporations must be desirable to a large majority of the creditors.

“Under existing law, even where majorities of the creditors desire to arrange fair and equitable readjustment with their debtors, their plans may not be consummated without prohibitive delay and expense, usually attended by the obstruction of minority creditors who oppose such settlements in the hope that the fear of ruinous liquidation will induce the immediate settlement of their claims.

“The proposals to amend the Bankruptcy Act by providing for the relief of debtors who seek the protection of the court for the purpose of readjusting their affairs with their creditors, carry no stigma of an adjudication in bankruptcy and are designed to extend the protection of the court to the debtor and his property, while an opportunity is afforded the debtor and a majority of his creditors to arrange an equitable settlement of his affairs, which, upon approval of the court, will become binding upon minority creditors. Under such process it should be possible to avoid destructive liquidation through the composition and extension of individual indebtedness and the reorganization of corporations, with the full protection of the court extended to the rights and interests of creditors and debtors alike. The law should encourage and facilitate such readjustments, in proceedings which do not consume the estate in long and wasteful receivership.

“In the case of individual and corporate debtors all creditors could be stayed from the enforcement of their debts pending the judicial process of readjustment. The provisions dealing with corporate reorganizations should be applicable to railroads, and in such cases the plan of reorganization should not become effective until it had been approved by the interstate commerce commission.

“I wish again to emphasize that the passage of legislation for this relief of individual and corporate debtors at this session of Congress is a matter of the most vital importance. It has a major bearing upon the whole economic situation in the adjustment of the relation of debtors and creditors. I therefore recommend its immediate consideration as an emergency action.”

In response to the request from the President, which no doubt represented popular demand, the seventy-second Congress added Chapter Eight to the Bankrupt Law of 1898. Chapter VIII includes sections 73, 74, 75, 76, and 77. The sections deal with three specific subjects: (1) compositions and extensions; (2) agricultural compositions and extensions; and (3) reorganization of railroads engaged in interstate commerce. Section 73 extends the jurisdiction of the bankrupt courts to certain additional cases. The section reads:

"In addition to the jurisdiction exercised in voluntary and involuntary proceedings to adjudge persons bankrupt, courts of bankruptcy shall exercise original jurisdiction in proceedings for the relief of debtors, as provided in sections 74, 75, and 77 of this act."

Section 74 is devoted to compositions and extensions.

"SEC. 74. COMPOSITIONS AND EXTENSIONS.—(a) Any person accepting a corporation may file a petition, or, in an involuntary proceeding before adjudication, an answer within the time limited by section 18 (b) of this Act, accompanied in either case, unless further time is granted, by his schedules, stating that he is insolvent or unable to meet his debts as they mature, and that he desires to effect a composition or an extension of time to pay his debts. The term 'debt' for the purposes of an extension proposal under this section shall include all claims of whatever character against the debtor or his property, including a claim for future rent, whether or not such claims would otherwise constitute provable claims under this Act. Upon the filing of such a petition or answer the judge shall enter an order either approving it as properly filed under this section, if satisfied that such petition or answer complies with this section and has been filed in good faith, or dismissing it. If such petition or answer is approved, an order of adjudication shall not be entered except as provided in subdivision (1) of this section: *Provided, however,* That in staying the action for adjudication in an involuntary proceeding the court shall make such stay conditional upon such terms for the protection and indemnity against loss by the estate as may be proper, and that in any other proceeding under this section the court may, as the creditors at the first meeting may direct, impose similar terms as a condition of delaying the appointment of a trustee and the liquidation of the estate. Any person by or against whom a petition is filed shall be referred to in the proceedings under this section as 'debtor.' The term 'creditor' shall include for the purposes of an extension pro-



posal under this section all holders of claims of whatever character against the debtor or his property including a claim for future rent, whether or not such claims would otherwise constitute provable claims under this Act. A claim for future rent shall constitute a provable debt and shall be liquidated under section 63(b) of this Act.

“(b) After the filing of such petition or answer the court may upon reasonable notice to creditors and attorneys of record appoint a custodian or receiver, who shall inventory the debtor’s estate and exercise such supervision and control over the conduct of the debtor’s business as the creditors at any meeting or the court shall direct.

“(c) The custodian or receiver, or if none has been appointed, the court, shall promptly call the first meeting of creditors, stating in the notice that the debtor proposes to offer terms of composition or extension, and inclosing with the notice a summary of the inventory, a brief statement of the debtor’s indebtedness as shown by the schedules, and a list of the names and addresses of the secured creditors and the fifteen largest unsecured creditors, with the amounts owing to each as shown by the schedules. Any creditor may appear at or before the first meeting and controvert the facts alleged in the petition. In such case the court shall determine as soon as may be the issues presented, without the intervention of a jury, and unless the material allegations are sustained by the proofs shall dismiss the petition.

“(d) At the first meeting (1) the debtor may be examined; (2) the creditors may nominate a trustee, who shall thereafter be appointed by the court in case it becomes necessary to liquidate the estate as provided in subdivision (1) of this section; and (3) the court shall, after hearing the parties in interest, fix a reasonable time within which application for confirmation shall be made. The court may later extend such time for cause shown, and may require, as a condition of such extension, additional terms for the protection of and indemnity against loss by the estate as may be proper.

“(e) An application for the confirmation of a composition or extension proposal may be filed in the court of bankruptcy after, but not before, it has been accepted in writing by a majority in number of all creditors whose claims if unsecured have been allowed, or if secured are proposed to be affected by an extension proposal, which number must represent a majority in amount of such claims; and the money or security necessary to pay all debts which have priority unless waived and the costs of the proceedings, and in case of a composition the consideration to be paid by the debtor to his creditors, have been deposited in such place as shall be designated by and subject to the order of the court.

“(f) A date and place, with reference to the convenience of the parties in interest, shall be fixed for a hearing upon each application for the confirmation of the composition or extension proposal, and such objections as may be made to its confirmation.

“(g) The court shall confirm the proposal if satisfied that (1) it includes an equitable and feasible method of liquidation for secured creditors whose claims are affected and of financial rehabilitation for the debtor; (2) it is for the best interests of all creditors; (3) that the debtor has not been guilty of any of the acts, or failed to perform any of the duties, which would be a ground for denying his discharge; and (4) the offer and its acceptance are in good faith, and have not been made or procured except as herein provided, or by any means, promises, or acts herein forbidden. In application for extensions the court shall require proof from each creditor filing a claim that such claim is free from usury as defined by the laws of the place where the debt is contracted.

“(h) The terms of an extension proposal may extend the time of payment of either or both unsecured debts and secured debts the security for which is in the actual or constructive possession of the debtor or of the custodian or receiver, and may provide for priority of payments to be made during the period of extension as between secured and unsecured creditors. It may also include specific undertakings by the debtor during the period of the extension, including provisions for payments on account, and may provide for supervisory or other control over the debtor’s business or affairs during such period by a creditors’ committee or otherwise, and for the termination of such period under certain specified conditions: *Provided*, That the provisions of this section shall not affect the allowances and exemptions to debtors as are provided for bankrupts under title 11, chapter 3, section 24, of the United States Code, and such allowances and exemptions shall be set aside for the use of the debtor in the manner provided for bankrupts.

“(i) Upon its confirmation an extension proposal shall be binding upon the debtor and his unsecured and secured creditors affected thereby: *Provided, however*, That such extension or composition shall not reduce the amount of or impair the lien of any secured creditor, but shall affect only the time and method of its liquidation.

“(j) Upon the confirmation of a composition the consideration shall be distributed as the court shall direct, and the case dismissed: *Provided*, That the debts having priority of payment under title 11, chapter 7, section 104, of the United States Code, for bankrupt estates, shall have priority of payment in the same order as set forth in said section 104 under the provisions of this section in any distribution, assignment, composition, or settlement herein provided for. Upon

the confirmation of an extension proposal the court may dismiss the proceeding or retain jurisdiction of the debtor and his property during the period of the extension in order to protect and preserve the estate and enforce the terms of the extension proposal.

“(k) The judge may, upon the application of the parties in interest, filed at any time within six months after the composition or extension proposal has been confirmed, set the same aside and reinstate the case, if it shall be made to appear upon a trial that fraud was practiced in the procuring of such composition or extension, and that knowledge thereof has come to the petitioners since the confirmation thereof.

“(1) If (1) the debtor shall fail to comply with any of the terms required of him for the protection of and indemnity against loss by the estate; or (2) the debtor has failed to make the required deposit in case of a composition; or (3) the debtor’s proposal has not been accepted by the creditors; or (4) confirmation has been denied; or (5) without sufficient reason the debtor defaults in any payment required to be made under the terms of an extension proposal when the court has retained jurisdiction of the debtor or his property, the court may appoint the trustee nominated by the creditors at the first meeting, and if the creditors shall have failed to so nominate, may appoint any other qualified person as trustee to liquidate the estate. The court shall in addition adjudge the debtor a bankrupt if satisfied that he commenced or prolonged the proceeding for the purpose of delaying creditors and avoiding an adjudication in bankruptcy, or if the confirmation of his proposal has been denied. No order of liquidation or adjudication shall be entered in any proceeding under this section instituted by or against a wage earner or a person engaged chiefly in farming or the tillage of the soil unless the wage earner or a person engaged chiefly in farming or the tillage of the soil consents.

“(m) The filing of a debtor’s petition or answer seeking relief under this section shall subject the debtor and his property, wherever located, to the exclusive jurisdiction of the court in which the order approving the petition or answer as provided in subdivision (a) is filed. In proceedings under this section, except as otherwise provided therein, the jurisdiction and powers of the court, the title, powers, and duties of its officers and, subject to the approval of the court, their fees, the duties of the debtor, and the rights and liabilities of creditors, and of all persons with respect to the property of the debtor and the jurisdiction of appellate courts shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor’s petition or answer was filed and any decree of adjudication thereafter entered shall have the same effect as if it had been entered on that day.

“(n) In addition to the provisions of section 11 of this Act for the staying of pending suits, the court, on such notice and on such terms, if any, as it deems fair and equitable, may enjoin secured creditors who may be affected by the extension proposal from proceeding in any court for the enforcement of their claims until the extension has been confirmed or denied by the court.

“(o) The judges of the courts of bankruptcy shall appoint sufficient referees to sit in convenient places to expedite the proceedings under this section.

“(p) Involuntary proceedings under this section shall not be taken against a wage-earner.”

#### COMMENTS ON SECTION 74:

A. *Who may take advantage of Section 74?* Natural persons only may take advantage of the provisions in this section, corporations being expressly excepted.

B. *Initiation of Proceedings under Section 74.* Proceedings under this section may be initiated by the debtor's filing a voluntary petition or by the debtor's filing an answer in an involuntary proceeding before adjudication. The question whether creditors may file an involuntary proceedings under this section is interesting. If they can, what are the jurisdictional facts which must be alleged in their petition? If proceedings are initiated by the debtor the debtor's petition must state that petitioner is insolvent or unable to pay his debts as they mature, and that he desires to effect a composition or extension of time to pay his debts. It should be noted here that insolvency and inability to pay debts as they mature are not necessarily the same thing. Insolvency under the Bankrupt Act, Section I, Part 15, is defined as follows:

“A person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts.”

A voluntary petition to be adjudged a bankrupt requires no allegation of insolvency.

There is language in the sections suggesting that involuntary proceedings may be commenced under this section; thus in subdivision 1, "No order of liquidation or adjudication shall be entered in any proceedings under this section instituted by or against a wage-earner or a person engaged chiefly in farming or the tillage of the soil unless the wage-earner or a person engaged chiefly in farming or the tillage of the soil consents." Subdivision P provides that "Involuntary proceedings under this section shall not be taken against a wage-earner." The latter language would seem to imply that involuntary proceedings under this section could be taken against others than wage-earners and this will probably be the interpretation. Conceding that creditors may initiate proceedings, excepting in the excluded cases, you then have the interesting question of jurisdictional facts. Need the creditor show any act of bankruptcy as defined in Section 3 of the act? If not, the door is opened to involuntary bankruptcy adjudication even though the debtor has not committed any of the acts of bankruptcy. Also, how many creditors must unite in bringing the action? The section is silent as to the answer of this question. The creditor's petition would probably have to allege only the debtor's insolvency or inability to meet his debts and the advisability of a composition.

It will also be noted that if the debtor desires to offer a composition only, action may be taken either under Section 12 or Section 74. If action is under Section 12, the offer of a composition may be made either before or after adjudication. If under Section 74 and by way of answer to an involuntary petition the offer must be made before adjudication. It would also seem that offers of composition under Section 12 where the proceedings were voluntary could only be made after adjudication.<sup>15</sup>

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<sup>15</sup> Bankruptcy Act, Section 18, Part G: "Upon the filing of a voluntary petition the judge shall hear the petition and make the adjudication or dismiss the petition. . ."

C. *Claims effected.* Under Section 1, Part 11, a debt is defined as any debt, demand, or claim provable in bankruptcy. Provable claims are defined in Section 63.<sup>16</sup> Under Section 74, a debt includes all claims of whatever character against the debtor or his property, including a claim for future rent.<sup>17</sup> This definition undoubtedly includes tort claims. Time may be extended on unsecured claims but neither the amount of nor the lien shall be impaired. Secured claims are thus not subject to a composition under Section 74. By Part E, unsecured creditors cannot determine action to be taken by secured creditors. The provisions for liquidating claims for future rents, Part A, Section 64, raises interesting problems, especially in those states which hold that suits for breach of a lease cannot be maintained until the end of the term.<sup>18</sup>

D. *Who may accept debtor's offer?* Section 74E provides that an application for confirmation of a composition or an extension can be filed after but not before, it has been accepted in writing by a majority in number of all creditors, whose claims unsecured have been allowed, or if secured are proposed to be effected by an extension proposal,

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<sup>16</sup> Bankruptcy Act, Section 63: "Debts of a bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against a voluntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in action to recover a provable debt; (4) founded upon an open account, or upon a contract expressed or implied; and (5) founded upon provable debts reduced to judgment before the filing of the petition and before the consideration of the bankrupt's application for a discharge, less cost incurred and interest accrued after the filing of the petition and up to the time of the entry of such judgments."

<sup>17</sup> Bankruptcy Act, Section 74 B: "The term 'debt' for the purposes of an extension proposal under this section shall include all claims of whatever character against the debtor or his property, including a claim for future rent, whether or not such claims would otherwise constitute provable claims under this act. . ."

<sup>18</sup> *Hermitage Co. v. Levine*, 248 N. Y. 333, 162 N. E. 97 (1928).

which number must represent a majority in amount of such claims. With exceptions of provisions relating to extensions, these provisions are practically the same as those of Section 12, Part B. In addition to creditors' consent, the court, under Part G, must approve the scheme before it can become effective.

E. *Proceedings after acceptance of debtor's offer.* Upon the confirmation of the composition, the consideration shall be distributed as the court shall direct and the case be dismissed. Upon confirmation of an extension proposal, the court may dismiss the proceedings or retain jurisdiction of the debtor and his property during the period of extension in order to protect and preserve the estate and to enforce the terms of the extension proposal.

F. *Is a formal adjudication as a bankrupt possible under this section?* Section 74, Part 1, provides for bankruptcy adjudication in certain cases. "If (1) the debtor shall fail to comply with any of the terms required of him for the protection of and indemnity against loss by the estate; or (2) the debtor has failed to make the required deposit in case of a composition; or (3) the debtor's proposal has not been accepted by the creditors; or (4) confirmation has been denied; or (5) without sufficient reason the debtor defaults in any payment required to be made under the terms of an extension proposal when the court has retained jurisdiction of the debtor or his property, the court may appoint a trustee nominated by the creditors at the first meeting, or if the creditors shall have failed to so nominate, may appoint any other qualified person as trustee to liquidate the estate. The court shall in addition adjudge the debtor a bankrupt if satisfied that he commenced or prolonged the proceedings for the purpose of delaying creditors and avoiding an adjudication in bankruptcy, or if the confirmation of his proposal has been denied. No order of liquidation or adjudication shall be entered in any proceedings under this section instituted

by or against a wage-earner or a person engaged chiefly in farming or the tillage of the soil unless the wage-earner or a person engaged chiefly in farming or the tillage of the soil consents.”

G. *Utility of this section.* Concerning the provision relating to compositions, the section provides little that was not already available to the debtor under section 12. True the debtor may file a composition petition without naming it a petition in bankruptcy, but with the exception of wage-earners and farmers, the proceedings may result in formal bankruptcy adjudication without the consent of the debtor and without the debtor's having committed any of the acts of bankruptcy enumerated in Section 3. Prior to the enactment of Section 74, the proceedings started out as bankruptcy proceedings and might end with a composition, now they start out as a petition for a composition or extension and may end with an adjudication in bankruptcy. The provisions relating to extensions is definitely additional, whether of utility or not remains to be seen. Considering the financial condition of most insolvent debtors their utility is extremely doubtful. In cases of insolvent estates against which there are both secured and unsecured claims, the secured claims will, in many cases, be so extensive in amount as to make a composition impossible, since the debtor bound by his secured debts will not be able to get the consideration with which to effect a composition with his unsecured debtors. It is to be regretted that the court was not granted authority to order an extension, for in cases where it is advantageous to secured creditors to realize on their security at once they will probably refuse to agree to an extension and thus in cases where the debtor would profit from an extension the extension will not be obtainable. Of course the section could not force a composition upon the secured creditors as long as unsecured creditors were getting anything without a violent infringement upon the rights of



the secured creditors. Any attempt to deprive the secured creditors of their security would probably be unconstitutional.

Section 75 is devoted to agricultural compositions and extensions.

"SEC. 75. AGRICULTURAL COMPOSITIONS AND EXTENSIONS.—(a) Courts of bankruptcy are authorized, upon petition of at least fifteen farmers within any county who certify that they intend to file petitions under this section, to appoint for such county one or more referees to be known as conciliation commissioners, or to designate for service in such county a conciliation commissioner previously appointed for an adjacent county. In case more than one conciliation commissioner is appointed for a county, each commissioner shall act separately and shall have such territorial jurisdiction within the county as the court shall specify. A conciliation commissioner shall have a term of office of one year and may be removed by the court if his services are no longer needed or for other cause. No individual shall be eligible to appointment as a conciliation commissioner unless he is eligible for appointment as a referee and in addition is a resident of the county, familiar with agricultural conditions therein and not engaged in the farm-mortgage business, the business of financing farmers or transactions in agricultural commodities or the business of marketing or dealing in agricultural commodities or of furnishing agricultural supplies. In each judicial district the court may, if it finds it necessary or desirable, appoint a suitable person as a supervising conciliation commissioner. The supervising conciliation commissioner shall have such supervisory functions under this section as the court may by order specify.

"(b) Upon filing of any petition by a farmer under this section there shall be paid a fee of \$10 to be transmitted to the clerk of the court and covered into the Treasury. The conciliation commissioner shall receive as compensation for his services, including all expenses, a fee of \$10 for each case docketed and submitted to him, to be paid out of the Treasury. A supervising conciliation commissioner shall receive, as compensation for his services, a per diem allowance to be fixed by the court, in an amount not in excess of \$5 per day, together with subsistence and travel expenses in accordance with the law applicable to officers of the Department of Justice. Such compensation and expenses shall be paid out of the Treasury. If the creditors at any time desire supervision over the farming operations of a farmer, the cost of such supervision shall be borne by such creditors or by the farmer, as may be agreed upon by them, but in no instance shall the farmer be required to pay more than one-half of the cost of such

supervision. Nothing contained in this section shall prevent a conciliation commissioner who supervises such farming operations from receiving such compensation therefor as may be so agreed upon. No fees, costs, or other charges shall be charged or taxed to any farmer or his creditors by any conciliation commissioner or with respect to any proceeding under this section, except as hereinbefore in this section provided. The conciliation commissioner may accept and avail himself of office space, equipment, and assistance furnished him by other Federal officials, or by any State, county, or other public officials. The Supreme Court is authorized to make such general orders as it may find necessary properly to govern the administration of the office of conciliation commissioner and proceedings under this section; but any district court of the United States may, for good cause shown and in the interests of justice, permit any such general order to be waived.

“(c) At any time within five years after this section takes effect, a petition may be filed by any farmer, stating that the farmer is insolvent or unable to meet his debts as they mature, and that it is desirable to effect a composition or an extension of time to pay his debts. The petition or answer of the farmer shall be accompanied by his schedules. The petition and answer shall be filed with the court, but shall, on request of the farmer or creditor, be received by the conciliation commissioner for the county in which the farmer resides and promptly transmitted by him to the clerk of the court for filing. If any such petition is filed, an order of adjudication shall not be entered except as provided hereinafter in this section.

“(d) After the filing of such petition or answer by the farmer, the farmer shall, within such time and in such form as the rules provide, file an inventory of his estate.

“(e) The conciliation commissioner shall promptly call the first meeting of creditors, stating in the notice that the farmer proposes to offer terms of composition or extension, and inclosing with the notice a summary of the inventory, a brief statement of the farmer's indebtedness as shown by the schedules, and a list of the names and addresses of the secured creditors and unsecured creditors, with the amounts owing to each as shown by the schedules. At the first meeting of the creditors the farmer may be examined, and the creditors may appoint a committee to submit to the conciliation commissioner a supplementary inventory of the farmer's estate. The conciliation commissioner shall, after hearing the parties in interest, fix a reasonable time within which application for confirmation shall be made, and may later extend such time for cause shown. After the filing of the petition and prior to the confirmation or other disposition of the composition or extension proposal by the court, the court shall exercise such control over the property of the farmer as the court deems in the best interests of the farmer and his creditors.

“(f) There shall be prepared by, or under the supervision of, the conciliation commissioner a final inventory of the farmer’s estate, and in the preparation of such inventory the commissioner shall give due consideration to the inventory filed by the farmer and to any supplementary inventory filed by a committee of the creditors.

“(g) An application for the confirmation of a composition or extension proposal may be filed in the court of bankruptcy after but not before (1) it has been accepted in writing by a majority in number of all creditors whose claims have been allowed, including secured creditors whose claims are affected, which number shall represent a majority in amount of such claims, and (2) the money or security necessary to pay all debts which have priority unless waived, and in case of a composition, the consideration to be paid by the farmer to his creditors has been deposited in such place as shall be designated by and subject to the order of the court.

“(h) A date and place, with reference to the convenience of the parties in interest, shall be fixed for a hearing upon each application for the confirmation of the composition or extension proposal and upon such objections as may be made to its confirmation.

“(i) The court shall confirm the proposal if satisfied that (1) it includes an equitable and feasible method of liquidation for secured creditors and of financial rehabilitation for the farmer; (2) it is for the best interests of all creditors; and (3) the offer and its acceptance are in good faith, and have not been made or procured except as herein provided, or by any means, promises, or acts herein forbidden. In applications for extensions the court shall require proof from each creditor filing a claim that such claim is free from usury as defined by the laws of the place where the debt is contracted.

“(j) The terms of a composition or extension proposal may extend the time of payment of either secured or unsecured debts, or both, and may provide for priority of payments to be made during the period of extension as between secured and unsecured creditors. It may also include specific undertakings by the farmer during the period of the extension, including provisions for payments on account, and may provide for supervisory or other control by the conciliation commissioner over the farmer’s affairs during such period, and for the termination of such period of supervision or control under conditions specified: *Provided*, That the provisions of this section shall not affect the allowances and exemptions to debtors as are provided for bankrupts under title 11, chapter 3, section 24, of the United States Code, and such allowances and exemptions shall be set aside for the use of the debtor in the manner provided for bankrupts.

“(k) Upon its confirmation a composition or extension proposal shall be binding upon the farmer and his secured and unsecured creditors affected thereby: *Provided*, That such composition or extension

shall not reduce the amount of nor impair the lien of any secured creditor, but shall affect only the time and method of its liquidation.

“(1) Upon the confirmation of a composition the consideration shall be distributed under the supervision of the conciliation commissioner as the court shall direct, and the case dismissed: *Provided*, That the debts having priority of payment under title 11, chapter 7, section 104, of the United States Code, for bankrupt estates, shall have priority of payment in the same order as set forth in said section 104 under the provisions of this section in any distribution, assignment, composition or settlement herein provided for. Upon the confirmation of an extension proposal the court may dismiss the proceeding or retain jurisdiction of the farmer and his property during the period of the extension in order to protect and preserve the estate and enforce through the conciliation commissioner the terms of the extension proposal. The court may, after hearing and for good cause shown, at any time during the period covered by an extension proposal that has been confirmed by the court, set the same aside, reinstate the case, and modify the terms of the extension proposal.

“(m) The judge may, upon the application of any party in interest, file at any time within six months after the composition or extension proposal has been confirmed, set the same aside and reinstate the case, if it shall be made to appear upon a trial that fraud was practiced in the procuring of such composition or extension, and that knowledge thereof has come to the petitioners since the confirmation thereof.

“(n) The filing of a petition pleading for relief under this section shall subject the farmer and his property, wherever located, to the exclusive jurisdiction of the court. In proceedings under this section, except as otherwise provided herein, the jurisdiction and powers of the court, the title, powers, and duties of its officers, the duties of the farmer, and the rights and liabilities of creditors, and of all persons with respect to the property of the farmer and the jurisdiction of the appellate courts, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the farmer's petition or answer was filed.

“(o) Except upon petition made to and granted by the judge after hearing and report by the conciliation commissioner, the following proceedings shall not be instituted, or if instituted at any time prior to the filing of a petition under this section shall not be maintained, in any court or otherwise, against the farmer or his property, at any time after the filing of the petition under this section, and prior to the confirmation or other disposition of the composition or extension proposal by the court:

“(1) Proceedings for any demand, debt, or account, including any money demand;

“(2) Proceedings for foreclosure of a mortgage on land, or for cancellation, rescission, or specific performance of an agreement for sale of land or for recovery of possession of land;

“(3) Proceedings to acquire title to land by virtue of any tax sale;

“(4) Proceedings by way of execution, attachment, or garnishment;

“(5) Proceedings to sell land under or in satisfaction of any judgment or mechanic’s lien; and

“(6) Seizure, distress, sale, or other proceedings under an execution or under any lease, lien, chattel mortgage, conditional sale agreement, crop payment agreement, or mortgage.

“(p) The prohibitions of subdivision (o) shall not apply to proceedings for the collection of taxes, or interest or penalties with respect thereto, nor to proceedings affecting solely property other than that used in farming operations or comprising the home or household effects of the farmer or his family.

“(q) A conciliation commissioner shall upon request assist any farmer in preparing and filing a petition under this section and in all matters subsequent thereto arising under this section and farmers shall not be required to be represented by an attorney in any proceeding under this section.

“(r) For the purpose of this section and section 74, the term ‘farmer’ means any individual who is personally bona fide engaged primarily in farming operations or the principal part of whose income is derived from farming operations, and includes the personal representative of a deceased farmer; and a farmer shall be deemed a resident of any county in which such farming operations occur.”

COMMENTS ON SECTION 75:

A. *Who may take advantage of Section 75?* By part P, farmers only can take advantage of this section.

B. *Initiation of proceedings.* Before proceedings can be taken under this section it would seem that at least fifteen farmers within the same county must petition for the appointment of a conciliation commissioner. This seems to be a provision designed to limit the operation of the section to localities where general distress exists among the farmers. Upon the appointment of the commissioner the farmer may file his petition with the court. Part C provides:

“The petition or answer of the farmer shall be accompanied by his schedule. The petition or answer shall be filed with the court, but shall on request of the farmer or creditor be received by the commissioner.” These provisions seem to indicate that a creditor may file a petition under the section. Otherwise, it is difficult to see to what petition the debtor could file an answer since, of course, the creditor cannot file involuntary petition to have a farmer adjudicated a bankrupt. On the other hand, the first sentence of Part C contemplates filing of a petition only by the farmer. Perhaps the policy of limiting the provisions of the bankrupt act to farmers only when the farmer desires to take advantage of the act should not be reversed by implication and the law held to provide only for voluntary petitions by the farmers. The petition must allege that the farmer is insolvent or unable to meet his debts and that it is desirable to effect a composition or an extension of time to pay his debts.

C. *Proceedings subsequent to filing petition.* Upon the petition being filed, the commissioner calls first meeting of creditors and sends to the creditors a statement of the farmer's assets and liabilities. At first meeting of creditors the farmer may be examined by the creditors. Also at this meeting commissioner fixes time within which application for confirmation shall be made. The application for confirmation or extension cannot be made until it has been accepted in writing by a majority in number of all creditors whose claims have been allowed, including secured creditors whose claims will be effected, which number shall represent a majority in amount of such claims and the money or security necessary to pay all debts which have priority unless waived, and in case of composition, the consideration to be paid by the farmer to his creditors has been deposited in such place as shall be designated by the court. What happens when the creditors refuse to accept the composition or extension is not clear. Part C provides: “If any such petition is filed, an order of adjudication shall not be entered

except as provided hereafter in this section." The only thing concerning adjudication thereafter is in Part N. Part N seems to indicate that in case the creditors fail to agree to the petition suggestion, the farmer's estate may be liquidated as a bankrupt estate. Part O provides for suspension of suits prior to the confirmation or other disposition of the composition or extension proposal by the court. Just what is included in other disposition is not stated. In case of the proposed composition or extension being rejected by the creditors it would seem that the court could do only one of two things: retain jurisdiction and liquidate the estate as a bankrupt estate under part N or dismiss the petition. Of the two, the former would seem preferable as this would permit an equitable division of the assets among the creditors while to dismiss the petition will open the door to preferences. The farmer could, of course, in case petition was dismissed, file a voluntary bankruptcy petition. The position of secured creditors would be the same under either alternative unless the security was obtained under such circumstances as to constitute a preference.

D. *Utility of the section.* In the vast majority of cases, the farmer who finds himself insolvent or unable to meet his obligations has his farm encumbered by a mortgage. A few tenant farmers undoubtedly would be in the same position, but in case of tenant farmers the personal property will probably be covered by chattel mortgages. The results will be that the provisions pertaining to compositions will be of little value since a composition or extension shall not reduce the amount of nor impair the lien of any secured debt, but shall effect only the time and method of its liquidation. Extensions then will be the only relief which the farmer in the great majority of cases can expect under this section since his debts are usually secured. What advantage would the farmer gain from extensions? There would be a temporary abeyance of law suits. The farmer will practically be in receivership since by the terms of the extensions, provisions

may be made for supervision or other control by the conciliation commissioner over the farmer's affairs during such extension period. Farming under a conciliation commissioner will certainly be a unique experience for the American farmer and I presume a refusal to follow instructions from the commissioner as to how best to milk a bossy cow would subject the farmer to contempt proceedings. It will be remembered that the rule that a receiver could not be appointed for an individual has been steadfastly adhered to in equity.<sup>19</sup> Now at least the farming population, creditors consenting, may be mothered by conciliation commissioners. In the end what will the farmer profit by the credit extension? Unless one is happily optimistic and thinks that under proper leadership the 1918 price level will be restored, then the farmer at end of credit extension period, suffering from bad doses of credit inflations and conciliation commissioners' orders, will probably need an undertaker.

The question of adjudication as a bankrupt is left unsettled and hazy. Is the farmer to file a petition for an extension and then when extension is refused by the creditor find himself to be an adjudicated bankrupt? It is to be regretted that Section 75 is not clear on this point. Under Part N, if the farmer is not in bankruptcy, he certainly is in a condition equivalent to it. In conclusion, it appears that Section 75 will be of little utility to get burdened farmers in their frantic efforts to save their farms and that they still must depend upon the success of some price-fixing *nostrum* issuing from Washington, aided, perhaps, by reduced expenses due to refinancing and lower tax rates.

Sections 74 and 75 present interesting questions in Constitutional law. The power of congress to enact a bankruptcy law is derived from the provision in the federal constitution that "Congress shall have power to establish uniform laws on the subject of bankruptcies throughout the

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<sup>19</sup> Davis v. Hayden, 238 Fed. 734 (1916).



United States.” The question necessarily involved is, what is a bankrupt law? One leading writer has answered the question: “The general object of all bankrupt and insolvent laws is, on the one hand, to secure to creditors an appropriation of the property of their debtors, pro tanto, to the discharge of their debts, whenever the debtor is unable to discharge the whole amount, and on the other hand, to relieve unfortunate and honest debtors from perpetual bondage to their creditors, either in the shape of unlimited imprisonment to coerce payment of their debts, or of an absolute right to appropriate and monopolize all their future earnings.”<sup>20</sup>

The same subject is treated of in one of the leading cases as follows: “I have not pretended to give a definition but purposely avoided any attempt to define the mere word ‘bankruptcy.’ It is employed in the constitution in the plural, and as part of an expression, the subject of bankruptcies. The ideas attached to the word in this connection are numerous and complicated; they form a subject of extensive and complicated legislation; of this subject Congress has general jurisdiction and the true inquiry is, To what limits is that jurisdiction restricted? I hold that it extends to all cases where the law causes to be distributed the property of the debtor among his creditors, this is its least limit. The greatest is the discharge of the debtor from his contracts and all intermediate legislation, affecting substance and form, but tending to further the great end of the subject, distribution and discharge, are in the competency and discretion of Congress.”<sup>21</sup>

Do Sections 74 and 75 tend to effect distribution and discharge? As to compositions the answer plainly must be in the affirmative. As to extensions the case is not so clear. However, the legislation pertaining to unsecured claims is

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<sup>20</sup> Story's Commentaries on the Constitution (1833) pp. 383-389.

<sup>21</sup> Hanover National Bank v. Moyses, 46 Law. Ed. 1113 (1901).

fairly clear, a power to discharge would certainly include a power to extend time of payment. In the secured claims cases, the rights of the creditors interfered with is the right to subject the security to the payment of the claim, neither amount of claim nor nature or lien is interfered with. Do said provisions tend to distribution and discharge? They certainly seem to interfere with present distribution and discharge. Perhaps the provisions that "Upon the confirmation of an extension proposal the court may dismiss the proceedings or retain jurisdiction of the debtor and his property during the period of the extension in order to protect and preserve the estate and enforce the terms of the extension proposal" are sufficient to label these provisions pertaining to extensions as bankruptcy provisions since they tend to preservation and ultimate distribution to creditors if the claims are not paid.

If the provisions should be held to be non-bankruptcy provisions, then does Congress have any power to enact them and do they violate the fifth amendment to the federal constitution, which provides that no person shall be deprived of life, liberty, or property without due process of law? Here the property right involved is of course the right to collect the debt when due.

Section 76 concerns the rights of sureties on claims falling within the preceding sections. "Extensions made pursuant to the foregoing provisions of this chapter shall extend the obligation of any person who is secondarily liable to any person for the prompt payment of such debt or debts, or any part thereof, and a copy of the order confirming such extension, certified as required by the provisions of law with reference to judgments and proceedings in courts of the United States, shall be sufficient evidence that such extension has been confirmed in any suit or proceeding brought against any such person so liable."

Section 77 pertains to the reorganization of railroads engaged in inter-state commerce.

“SEC. 77. REORGANIZATION OF RAILROADS ENGAGED IN INTERSTATE COMMERCE.—(a) Any railroad corporation may file a petition stating that the railroad corporation is insolvent or unable to meet its debts as they mature and that it desires to effect a plan of reorganization. The petition shall be filed with the court in whose territorial jurisdiction the railroad corporation, during the preceding six months or the greater portion thereof, has had its principal executive or operating office, and a copy of the petition shall at the same time be filed with the Interstate Commerce Commission hereinafter called the commission: *Provided*, That when any railroad, although engaged in interstate commerce, lies wholly within one State, such proceedings shall be brought in the Federal district court within the State in which the railroad is located. The petition shall be accompanied by payment to the clerk of a filing fee of \$100, which shall be in addition to the fees required to be collected by the clerk under other sections of this Act. Upon the filing of such a petition, the judge shall enter an order either approving it as properly filed under this section, if satisfied that such petition complies with this section and has been filed in good faith, or dismissing it if not so satisfied. If the petition is so approved, the court in which such order approving the petition is entered shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor and its property wherever located. The railroad corporation shall be referred to in the proceedings as a ‘debtor.’ Any corporation, the majority of the capital stock of which having power to vote for the election of directors is owned, either directly or indirectly through an intervening medium, by any railroad corporation filing a petition as a debtor under this section, or substantially all of whose properties are operated by such a debtor under lease or operating agreement may file, with the court in which such other debtor had filed such a petition, and in the proceeding upon such petition under this section, a petition stating that it is insolvent or unable to meet its debts as they mature and that it desires to effect a plan of reorganization in connection with, or as a part of, the plan of reorganization of such other debtor; and thereupon such court shall have the same jurisdiction with respect to it, its property and its creditors and stockholders as the court has with respect to such other debtor. Creditors of any railroad corporation having claims or interests aggregating not less than 5 per centum of all the indebtedness of such railroad corporation as shown in the latest annual report which it has filed with the commission at the time when the petition is filed, may, if the railroad corporation has not filed a petition under this section, but subject to first having obtained the approval of the Interstate Commerce Commission, after hearing, upon notice to such railroad corporation, file with the court in which such railroad corporation might file a petition under the

provisions of this section, a petition stating that such railroad corporation is insolvent or unable to meet its debts as they mature and that such creditors propose that it shall effect a reorganization; upon such filing of such a petition copies thereof shall be filed with the commission and served by the petitioning creditors forthwith upon the railroad corporation; the railroad corporation shall, within ten days after such service, answer such petition; if such answer shall admit the jurisdiction of the court, that the claims of the petitioning creditors constitute the amounts necessary to entitle them to file such petition under this section, and that the railroad corporation is either insolvent or unable to meet its debts as they mature, the court shall, upon the filing of the recommendations of the commission in writing, enter an order approving the petition as properly filed under this section if satisfied that it complies with this section and has been filed in good faith, or disapprove it if not so satisfied; and if so approved the proceedings thereon shall continue with like effect as if the railroad corporation had itself filed a petition under this section; if such answer shall deny either the jurisdiction of the court or that the claims of the petitioning creditors constitute such necessary amounts or that the railroad corporation is insolvent or unable to meet its debts as they mature, the court shall summarily try the issues, and if after the filing of the recommendations of the commission in writing it shall find that the petition complies with this section, and has been filed in good faith, the court shall enter an order approving the petition as properly filed under this section, and the proceedings thereon shall continue with like effect as if the railroad corporation had itself filed a petition under this section; otherwise the court shall dismiss the petition.

“(b) A plan of reorganization within the meaning of this section (1) shall include a proposal to modify or alter the rights of creditors generally, or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise; (2) may include, in addition, provisions modifying or altering the rights of stockholders generally, or of any class of them; (3) shall provide adequate means for the execution of the plan, which may, so far as may be consistent with the provisions of sections 1 and 5 of the Interstate Commerce Act as amended, include the transfer or conveyance of all or any part of the property of the debtor to another corporation or to other corporations or the consolidation of the properties of the debtor with those of another railroad corporation, or the merger of the debtor with any other railroad corporation and the issuance of securities of either the debtor or any such corporation or corporations, for cash, or in exchange for existing securities, or in satisfaction of claims or rights, or for other appropriate purposes; and (4) may deal with all or any part of the property of the debtor. The term ‘securities’ shall include evidences of indebtedness, either secured or unsecured,

bonds, stocks, certificates of beneficial interest therein, and certificates of beneficial interest in property. The term 'stockholders' shall include the holders of voting trust certificates. The term 'creditors' shall, except as otherwise specifically provided in this section, include, for all purposes of this section and of the reorganization plan, its acceptance and confirmation, all holders of claims, interests, or securities of whatever character against the debtor or its property, including claim for future rent, whether or not such claims, interests, or securities would otherwise constitute provable claims under this Act.

"(c) Upon approving the petition as properly filed the judge (1) may temporarily appoint from a panel of standing trustees qualified for such service to be selected and designated in advance by the commission a trustee or trustees of the debtor's estate, who shall have all the title and, subject to the control of the judge and consistently with the provisions of this section, shall exercise all the powers of a trustee appointed pursuant to section 44 or any other section of this Act, and, subject to the judge's control and the jurisdiction of the commission as provided by the Interstate Commerce Act as amended, shall have the power to operate the business of the railroad corporation; (2) shall fix the amount of the bond of such trustee or trustees and require the debtor, the trustee, or trustees to give such notice as the order may direct to creditors and stockholders and to cause publication thereof to be made at least once a week for two successive weeks of a hearing to be held within thirty days after such appointment, at which hearing or any adjournment thereof the judge may make permanent such appointment, or may terminate it and may, in the manner herein provided for the appointment of trustees, appoint a substitute trustee or substitute trustees, and in the same manner may appoint an additional trustee or additional trustees, and shall fix the amount of the bond of the substitute or additional trustee or trustees; the trustee or trustees and their counsel shall receive such compensation as the judge may allow within a maximum approved by the commission; (3) may for cause shown, and with the approval of the commission, in accordance with section 20 (a) of the Interstate Commerce Act as amended, authorize the trustee or trustees to issue certificates for cash, property, or other consideration approved by the judge, for such lawful purposes and upon such terms and conditions and with such security and such priority in payments over existing obligations, secured or unsecured, as might in an equity receivership be lawful; (4) shall require the debtor, at such time or times as the judge may direct and in lieu of the schedules required by section 7 of this Act, to file such schedules and submit such other information as may be necessary to disclose the conduct of the debtor's affairs and the fairness of any proposed plan; (5) shall determine a reasonable time within

which the claims and interests of creditors and stockholders may be filed or evidenced and after which no such claim or interest may participate in any plan except on order for cause shown; the manner in which such claims and interests may be filed or evidenced and allowed, and, for the purposes of the plan and its acceptance, the division of creditors and stockholders into classes according to the nature of their respective claims and interests; (6) shall cause reasonable notice of such determination, or of the dismissal of the proceedings, or the allowance of fees or expenses, to be given creditors and stockholders by publication or otherwise; (7) if a plan of reorganization is not proposed or accepted, or, if proposed and accepted, is not confirmed, within such reasonable time as the judge may, upon cause shown and after considering any recommendation which has been filed by the commission, allow, may dismiss the proceeding; (8) may, within such maximum limits as are fixed by the commission, as elsewhere provided in subdivision (f) of this section, allow a reasonable compensation for the services rendered and reimbursement for the actual and necessary expenses incurred in connection with the proceeding and plan by officers, parties in interest, reorganization managers, and committees or other representatives of creditors or stockholders, and the attorneys or agents of any of the foregoing, and by such assistants as the commission with the approval of the judge may specially employ; and (9) may on his own motion or at the request of the commission refer any matters for consideration and report, either generally or upon specified issues, to one of several special masters who shall have been previously designated to act as special masters in any proceedings under this section by order of any Circuit Court of Appeals and may allow such master a reasonable compensation for his services. The Circuit Court of Appeals of each circuit shall designate three or more members of the bar as such special masters whom they deem qualified for such services, and shall from time to time revise such designations by changing the persons designated or reducing or adding to their number, as the public interest may require: *Provided, however,* That there shall always be three of such special masters qualified for appointment in each circuit who shall in their respective circuits hear any matter referred to them under this section by a judge of any District Court. For all purposes of this section claims against a railroad corporation which would have been entitled to priority over existing mortgages if a receiver in equity of the property of the debtor had been appointed by a Federal court at the date of the filing of the petition hereunder shall be entitled to such priority, and holders of such claims shall be treated as a separate class of creditors. If in any case in which the issues have not already been tried under the provisions of subdivision (a) of this section any of the debtor's creditors shall, prior to the hearing provided for in subdivision (c), clause (2),

of this section, appear and controvert the facts alleged in the petition, the judge shall determine, as soon as may be, the issues presented by the pleadings, without the intervention of a jury, and unless the material allegations of the petition are sustained by the proofs shall dismiss the petition. Any creditor or stockholder shall be heard on the question of the permanent appointment of any trustee or trustees, the proposed recommendation, approval, or confirmation of any reorganization plan, and upon filing a petition for leave to intervene on such other questions arising in the proceeding as the judge shall determine. The debtor, or the trustees if appointed, shall within fifteen days or, upon cause shown, such other time as may be directed by the judge, prepare (1) a list of all known bondholders and creditors of, or claimants against, the debtor or its property, and the amounts and character of their debts, claims, and securities, and the last known post-office address or place of business of each creditor or claimant, and (2) a list of the stockholders of the debtor, with the last known post-office address or place of business of each. The contents of such lists shall not constitute admissions by the debtor or the trustees in a proceeding under this section or otherwise. Such lists shall be open to the inspection of any creditor or stockholder of, or claimant against, the debtor, during reasonable business hours, upon application to the debtor or trustees, as the case may be.

“(d) Before creditors and stockholders of the debtor are asked finally to accept any plan of reorganization, the Interstate Commerce Commission shall after due notice hold a public hearing at which the debtor shall present its plan of reorganization and at which, also, such a plan may be presented by the trustee or trustees, or by or on behalf of creditors of the debtor, being not less than 10 per centum in amount of any class of creditors. Following such hearing, the commission shall render a report in which it shall recommend a plan of reorganization (which may be different from any which has been proposed) that will, in its opinion be equitable, will not discriminate unfairly in favor of any class of creditors or stockholders, will be financially advisable, will meet with the requirements of subdivision (g) of this section, and will be compatible with the public interest. In such report the commission shall state fully the reasons for its conclusions, and it may thereafter, upon petition for good cause shown, and upon further hearing if the commission shall deem necessary, modify any of its recommendations and conclusions in a supplemental report stating the reasons for such modification. Thereafter the plan of reorganization recommended by the commission shall be submitted in such manner as the commission may direct to the creditors and stockholders of the debtor for acceptance or rejection, together with the report or reports

of the commission thereon; and the commission may at the same time afford an opportunity to accept or reject any other plan of reorganization filed as in this subdivision (d) provided.

“(e) A plan of reorganization shall not be finally approved by the commission until it has been accepted in writing and such acceptance has been filed in the proceeding by or on behalf of creditors holding two-thirds in amount of the claims of each class whose claims or interests would be affected by the plan, and by or on behalf of stockholders of the debtor holding two-thirds of the stock of each class: *Provided, however,* That if adequate provision is made in the plan for the protection of the interests, claims, and liens of any class of creditors or stockholders in the manner provided in clauses (5) and (6) of subdivision (g), of this section, then the acceptance of the plan by such class of creditor or stockholders shall not be requisite to the approval of the plan: *And provided further,* That the acceptance of stockholders shall not be requisite to the confirmation of the plan if (1) the judge shall have determined (a) that the corporation is insolvent, or (b) that the interests of stockholders will not be adversely affected by the plan, or (c) that the debtor has pursuant to authorized corporate action accepted the plan, and its stockholders are bound by such acceptance. For the purposes of this section acceptance by a creditor or stockholder shall include acceptance in writing executed by him; or acceptance by his duly authorized attorney or committee acting under authority executed by him subsequent to the recommendation of the plan by the commission. Upon acceptance of the plan in accordance with the provisions of this subdivision (e) the commission may, without further proceedings, grant authority for the issue of any securities, assumption of obligations, transfer of any property, or consolidation or merger of properties, to the extent contemplated by the plan consistent with the purposes of the Interstate Commerce Act as amended. If the United States of America is directly a creditor or stockholder, the Secretary of the Treasury is hereby authorized to accept or reject a plan in respect of the interests or claims of the United States.

“(f) If the plan recommended by the commission is accepted as provided in subdivision (e), the commission shall thereupon certify the plan to the court together with its approval thereof and that the same has been so accepted, together with a report of the proceedings before it and its conclusions thereon. If the plan accepted as provided in subdivision (e) differs from the plan recommended by the commission it shall, upon acceptance, be submitted to the commission, which shall hear all interested parties upon such notice and subject to such rules and regulations as it shall prescribe. If after such hearing the commission determines that the accepted plan in its opinion is equitable and will not discriminate unfairly in favor of any class of creditors



or stockholders; will be financially advisable; will meet the requirements of subdivision (g) of this section; and will be compatible with the public interest; the commission shall thereupon certify the plan to the court, together with its approval thereof and that the same has been duly accepted, and together with a report of the proceedings before it and its findings and conclusions thereon. The commission shall also, after hearing if necessary, fix the maximum compensation and reimbursement which may be allowed by the court pursuant to clause (8) of subdivision (c) of this section: *Provided*, That unless good and sufficient reasons appear therefor no allowances for fees or compensation shall be made to officers of corporations who have acted as managers or in any capacity in connection with the reorganization when such corporation had an interest in the matter. No plan of reorganization shall be confirmed in any proceeding under this section except upon the approval of the Interstate Commerce Commission certified to the court. If the commission shall decline to issue such a certificate it shall file in the proceeding its decision, specifying the particular grounds upon which it bases its disapproval of the plan.

“(g) Upon such approval by the commission, and after hearing such objections as may be made to the approved plan, the judge shall confirm the plan if satisfied that (1) the approved plan complies with the provisions of subdivision (b) of this section, is equitable and does not discriminate unfairly in favor of any class of creditors or stockholders; (2) all amounts to be paid by the debtor or by any corporation or corporations acquiring the debtor’s assets, for services or expenses incident to the reorganization and cost of financing, have been fully disclosed and are reasonable, or are to be subject to the approval of the judge; (3) the offer of the plan and its acceptance are in good faith and have not been made or procured by any means or promises forbidden by this Act; (4) the approved plan provides for the payment of all costs of administration and other allowances made by the court, except that compensation or reimbursement provided for in subdivision (c), clause (8), of this section may be paid in securities provided for in the plan if those entitled thereto will accept such payment and the court finds such compensation reasonable; (5) the approved plan provides, with respect to stockholders of any class the acceptance of which is requisite to the confirmation of the plan, and who would not become bound by the plan under the provision of subdivision (h) of this section, and of which more than one-third have not accepted the plan, adequate protection for the realization by them of the value of their equity, if any, in the property of the debtor dealt with by the plan either by a sale of the property at not less than a fair upset price, or by appraisal and payment in cash either of the value of their stock or, at the objecting stockholder’s election, of the value of the securities, if

any, allotted to such stock under the plan; (6) the plan provides with respect to any class of creditors the acceptance of which is requisite to the confirmation of the plan, and who would not become bound by the plan under the provisions of subdivision (h) of this section, adequate protection for the realization by them of the value of their securities, liens, and claims, either (a) by the sale of such property subject to their liens, if any, or (b) by the sale free of such liens at not less than a fair upset price, and the transfer of such liens to the proceeds of such sale, or (c) by appraisal and payment in cash of either the value of such liens and claims or, at the objecting creditors' election, the value of the securities allotted to such liens and claims under the plan. Section 57, clause (h), of this Act shall be applicable to the appraisal of securities under this section, and the value of the unpaid balance shall be appraised as an unsecured claim; and (7) the debtor, and every other corporation issuing securities or acquiring property under the plan, is authorized by its charter or by applicable State or Federal laws, upon confirmation of the plan, to carry out the plan. In the case of a sale or appraisal under clause (5) or (6) of this subdivision (g) the court shall refer to the commission for its consideration and determination the amount to be fixed as the upset price and the appraisal of any securities.

“(h) Upon such confirmation the provisions of the plan shall be binding upon (1) the corporation, (2) all stockholders if the judge shall have determined (a) that the corporation is insolvent, or (b) that the interests of stockholders will not be adversely affected by the plan, or (c) that the debtor has pursuant to authorized corporate action accepted the plan and its stockholders are bound by such acceptance, (3) all stockholders of each class of which two-thirds in amount shall have accepted the plan, (4) all creditors whose claims are payable in cash in full under the plan, (5) all creditors entitled to priority under subdivision (c) of this section, whose claims are not payable in cash in full under the plan, provided two-thirds in amount of such creditors shall have accepted the plan in writing filed in the proceeding, (6) all other unsecured creditors, provided two-thirds in amount of such creditors shall have accepted the plan in writing filed in the proceeding, and (7) all secured creditors of each class of which two-thirds in amount shall have accepted the plan. The confirmation of the plan shall discharge the debtor from its debts except as provided in the plan. Upon confirmation of the plan by the judge, the debtor and other corporations affected by the plan, or organized or to be organized for the purpose of carrying out the plan, shall, subject to the jurisdiction of the Commission, have full power and authority to put into effect and carry out the plan and the orders of the judge relative thereto, the laws of any State or the decision or order of any

State authority to the contrary notwithstanding. In the event that the judge should disapprove the plan he shall file an opinion stating his reasons therefor.

“(i) The provisions of sections 721, 722, 723, 724, and 725 of the Revenue Act of 1932 shall not apply to the issuance, transfers, or exchange of securities or filing of conveyances to make effective any plan of reorganization confirmed under the provisions of this section.

“(j) Upon the confirmation of the plan the property dealt with by the plan, when transferred and conveyed to the debtor or other corporation or corporations provided for by the plan, or if no trustee or trustees have been appointed when held by the debtor pursuant to the plan, shall, as the court may direct, be free and clear of all claims of the debtor, its stockholders and creditors, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan or directing such transfer and conveyance, and the court may direct the trustee or trustees, or if there be no trustee or trustees the debtor, to make any such transfer and conveyance, and may direct the debtor to join in any such transfer or conveyance made by the trustee or trustees. Upon the termination of the proceeding a final decree shall be entered discharging the trustee or trustees, if any, making such provisions as may be equitable, and closing the case.

“(k) If a receiver of all or any part of the property of a corporation has been appointed by a Federal or State court, whether before or after this amendatory Act takes effect, the railroad corporation may nevertheless file a petition or answer under this section at any time thereafter, but if it does so and the petition is approved the trustee or trustees appointed under the provisions of this section shall be entitled forthwith to possession of such property, and the judge shall make such orders as he may deem equitable for the protection of obligations incurred by the receiver and for the payment of such reasonable administrative expenses and allowances in the prior proceeding as may be fixed by the court appointing said receiver within maximum limits approved by the commission. If a receiver has been appointed by a Federal or State court prior to the dismissal under subdivision (c), clause (7), of a proceeding under this section, the judge may include in the order of dismissal appropriate provisions directing the trustee to transfer possession of the debtor's property within the territorial jurisdiction of such court to the receiver so appointed, upon such terms as the judge may deem equitable for the protection of obligations incurred by the trustee and for the payment of administrative expenses and allowances in the proceeding hereunder. For the purposes of this section the words 'Federal court' shall include the district courts of the United States and of the Territories and possessions to which this Act is or may hereafter be applicable, the Supreme Court of the District of Columbia, and the United States Court of Alaska.

“(l) In addition to the provisions of section 11 of the Act for the staying of pending suits against the debtor, such suits shall be further stayed until after final decree the judge may, upon notice and for cause shown, enjoin or stay the commencement or continuance of any judicial proceeding to enforce any lien upon the estate until after final decree.

“(m) A certified copy of an order confirming a plan of reorganization shall be evidence of the jurisdiction of the court, the regularity of the proceedings, and the fact that the order was made. A certified copy of an order directing the transfer and conveyance of the property dealt with by the plan as provided in subdivision (j) of this section shall be evidence of the transfer and conveyance of title accordingly, and if recorded shall impart the same notice that a deed if recorded would impart.

“(n) In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and his property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition was filed.

“(o) No judge or trustee acting under this Act shall change the wages or working conditions of railroad employees, except in the manner prescribed in the Railroad Labor Act, or as set forth in the memorandum of agreement entered into in Chicago, Illinois, on January 31, 1932, between the executives of twenty-one standard labor organizations and the committee of nine authorized to represent Class 1 railroads.

“(p) No judge or trustee acting under this Act shall deny or in any way question the right of employees on the property under his jurisdiction to join the labor organization of their choice, and it shall be unlawful for any judge, trustee, or receiver to interfere in any way with the organizations of employees, or to use the funds of the railroad under his jurisdiction, in maintaining so-called company unions, or to influence or coerce employees in an effort to induce them to join or remain members of such company unions.

“(q) No judge, trustee, or receiver acting under this Act shall require any person seeking employment on the property under his jurisdiction to sign any contract or agreement promising to join or to refuse to join a labor organization; and if such contract has been enforced on the property prior to the property coming under the jurisdiction of said judge, trustee, or receiver, then the said judge, trustee, or receiver, as soon as the matter is called to his attention, shall notify the employees by an appropriate order that said contract has been discarded and is no longer binding on them in any way.

“(r) The term ‘railroad corporation’ as used in this Act means any common carrier by railroad engaged in the transportation of persons or property in interstate commerce, except a street, suburban, or inter-urban electric railway which is not operated as a part of a general railroad system of transportation or which does not derive more than 50 per centum of its operating revenues from the transportation of freight in standard steam railroad freight equipment.

“(s) In proceedings under this section, claims for personal injuries to employees of a railroad corporation, and claims of personal representatives of deceased employees of a railroad corporation arising under State or Federal laws, shall be preferred claims against the assets of such railroad corporation in receivership or in reorganization as herein provided, such claims to be subordinate only to costs of administration of such receivership or reorganization.”

“SEC. 2. This Act shall take effect and be in force from and after the date of its approval, and shall apply as fully to debtors, their stockholders and creditors, whose interests or debts, whether secured or unsecured, have been acquired or incurred prior to such date, as to debtors, their stockholders and creditors, whose interest or debts have been acquired or incurred after such date. Proceedings under section 1 of this Act may be taken in proceedings in bankruptcy which are pending on the effective date of this Act.

“SEC. 3. In all bankruptcy proceedings the officers and agents in charge of the bankrupt funds are authorized to deposit the same without limit as to amount in the postal savings depositories at the prescribed interest rate in all cases where local banks are unable or unwilling to give the required security. Such deposit or any portion thereof may be withdrawn as required in the bankruptcy proceedings.”

COMMENTS ON SECTION 77:

A. *Who is entitled to take advantage of the provisions of this section?* In the enactment of Section 77, Congress presumably is exercising the power granted to regulate commerce among the several states, since the provisions of the section are expressly applicable only to railroads engaged in inter-state commerce. The term “railroad corporation,” as used in the act, is defined in Part R of said section. The railroads as therein defined which are insolvent and unable to meet their debts and any corporation, the majority of the capital stock of which having the power to vote for the election of directors is owned, either directly or indirectly,

through an intervening medium, by any railroad filing a petition as a debtor under this section, or substantially all of whose properties are operated by such a debtor under a lease or operating agreement and which is insolvent or unable to meet its debts, are the only debtors enabled to take advantage of this section. It is to be noted, of course, that it is not necessary for a railroad to be located in more than one state in order to be engaged in inter-state commerce. It is also to be noted that any corporation, even though it may not be a railroad, is permitted to file a petition under this section if its stock is owned by a railroad as set out in Part A of the section.

B. *Initiation of proceedings.* Part A provides that any railroad may file a petition stating that the railroad corporation is insolvent or unable to meet its debts as they mature and that it desires to effect a plan of reorganization. The court, having jurisdiction, is the court in whose territorial jurisdiction the railroad corporation, during the preceding six months or the greater portion thereof, has had its principal executive or operating office. Provision is made for filing a copy of petition with interstate commerce commission in Part A. Creditors of the railroad may also initiate proceedings under this section. The creditors, however, cannot file a petition without the consent of the interstate commerce commission. The commission cannot give its approval until after notice and hearing to the railroad. Since the commission must consent to filing the creditor's petition, it is presumed that this preliminary hearing must be held before the commission and that the purpose of the hearing is to enable the commission to ascertain whether or not facts exist which would enable creditors to sustain their petition. This procedure will protect railroads from undue harassing by creditors. The creditors filing the petition must have claims aggregating not less than five per cent of all the indebtedness of such railroad corporation as shown in the latest annual reports which it has filed with the com-

mission at the time when the petition is filed. In case of creditors filing the petition, the court having jurisdiction is the same as when the railroad filed the petition.

Where the railroad lies wholly in one state, the proceedings shall be brought in the federal district court within the state in which the railroad is located. Nothing is said pertaining to the case where said railroad lies in the territorial jurisdiction of more than one federal district court. In such a case the court having territorial jurisdiction of the place where the principal executive or operating offices are located would probably be held to have jurisdiction.

C. *Approval of petition.* The judge shall approve the petition if satisfied if such petition complies with this section and has been filed in good faith. The judge finding otherwise, the petition will be dismissed. In case the petition is approved the judge may appoint a trustee or trustees for the debtor's estate. The commission determines a panel of standing trustees from which panel the judge makes his selection. By implication, one can infer that it is not necessary for the court to appoint trustees for the debtor's property. For instance, Part C provides: "The debtor, or the trustee if appointed." Part J uses like language: "The court may direct the trustee or trustees, or if there be no trustee or trustees, the debtor." In actual practice, the writer understands that in certain cases trustees have not been appointed. If no trustee is appointed, interesting questions may arise under Part K. For instance, where a receiver has been appointed for part of a debtor's property, would such a receiver be divested of jurisdiction by proceedings under this section where no receiver is appointed? If so, the section provides a novel way for officers of the railroad to reclaim property from the jurisdiction of receivers.

D. *The reorganization plan.* Part B of said section defines what is meant by reorganization plan.

E. *Initiation of reorganization plan.* By Part D, the debtor may propose a plan, the trustee or trustees may propose a plan, and not less than ten per cent in amount of any class of creditors may propose one. The interstate commerce commission after due notice shall hold a public hearing on the proposed plans. After the hearing the commission recommends a plan. This plan may be different from any of the proposed plans. The recommendation is made to the court and to parties in interest, that is, the creditors and stockholders. In order for any plan to receive the recommendation of the commission, it must in the opinion of the commission be equitable, not discriminate unfairly in favor of any class of creditors or stockholders, will be financially advisable, meet the requirements of subdivision G of Section 75, and will be compatible with the public interest. The commission must accompany *its* favored plan with a full explanation of it.

No reorganization plan can be confirmed without approval of the commission, Part B, and the commission shall not finally approve the plan until the provisions of Part E are complied with. Subdivision E in part provides that "A plan of reorganization shall not be finally approved by the commission until it has been accepted in writing and such acceptance has been filed in the proceedings by or on behalf of creditors holding two-thirds in amount of the claims of each class whose claims or interests will be affected by the plan, and by or on behalf of stockholders of the debtor holding two-thirds of the stock of each class." But if the interest of the dissenting creditors and stockholders is protected as provided in clause 5 and 6 of subdivision G, then the commission may approve a plan without consent of the two-thirds. Also, the assent of stockholders to the plan is not necessary if the judge shall have determined, (a) that the corporation is insolvent, (b) that the interest of stockholders will not be adversely affected by the plan, or (c) that the



debtor has, pursuant to authorized corporate action, accepted the plan, and its stockholders are bound by such acceptance.

The fact that the commission has refused approval of any plan submitted by trustee or trustees, the debtor, or creditors at first hearing does not preclude these parties from devising the successful plan. Part F provides that the commission may accept a plan which is approved by the necessary two-thirds majority of creditors or stockholders as provided in Part E, providing plan meets requirements as specified in Part F. The successful plan, that is, the plan winning the approval of the commission and the required consent of the interested parties, is now certified to the court. Part G specifies under what conditions the judge shall give his approval to the plan. The judge finding that the plan in all respects meets the legal requirements, approves it.

F. *Who is bound by the reorganization plan?* Part H specifies who is bound by the plan. Previous sections having been complied with, all creditors and stockholders of the debtor are bound by the plan.

G. *Execution of the reorganization plan.* Parts E and H provide that the commission, the debtor and other corporations affected by the plan, or organized or to be organized for the purpose of carrying out the plan, shall, subject to the jurisdiction of the commission, have full power and authority to put into effect and carry out the plan and the orders of the judge relative thereto.

H. *Failure or disapproval of plan.* Part 7 of subdivision C states that "If a plan of reorganization is not proposed or accepted, or, if proposed and accepted, is not confirmed, within such reasonable time as the judge may, upon cause shown and after considering any recommendation which has been filed by the commission, allow, may dismiss the proceeding." It is stipulated in Part H that in the event the

judge shall disapprove the plan he shall file an opinion stating his reasons therefore. In case the proceedings are dismissed and the railroad is insolvent and unable to meet its obligations, an equitable receivership would probably follow.

I. *Labor provisions.* Subdivisions O, P, and Q show clearly the influence of the labor lobby. Owners and creditors may be wiped out but no direct action may be had to adjust labor conditions to changed economic conditions.

J. *Utility of the section.* During the few months elapsing since the enactment of the section the Chicago Tribune reports the following roads as having filed petitions under the section: Chicago and Eastern Illinois; Missouri Pacific, and Subsidiaries; New Orleans, Texas, and Mexico; International Great Northern; The Akron, Canton and Youngstown; and the Minarets and Western. In all cases the writer understands that the petition was filed by the debtor and, in part of them, at least, no receivers were appointed. When one remembers that nothing can be done under this section that could not be accomplished in an equitable receivership, he wonders just why the debtors make such great haste to file under the section. In the past, receivers have proven themselves capable of successfully operating roads that could not be so operated under the old management. Receivership was a way of ridding the road of inefficient management, and, considering the present state of many railroads, one is left with a suspicion that inefficiency in management may not be unknown. Under Section 77 the judges may appoint receivers and this may be sufficient to take care of the bad management cases. A distinct advantage under this section would appear to be smaller reorganization costs. However, few receivers ever out-salaried the current crop of railroad executives, so perhaps the saving is mythical. Dispatch in reorganization is also assumed to be an advantage of the section. However, it is difficult to see how a reorganization can be effected until the volume of

business in normal times can be determined. This cannot of course, be ascertained under present conditions. The aid of the interstate commerce commission in reorganization would seem to be an advantage; however, present capitalizations in most cases originally won the approval of the commissions.

Summarizing, the utility of the section seems to rest on the doubtful advantage accruing to the management by debtor's officers, over-management by receivers, and to the knowledge and skill which the Interstate Commerce Commission is able to bring to the problems of reorganization.

*Elton E. Richter.*

University of Notre Dame.