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CONSTITUTIONAL LAW - DUE PROCESS AND THE FRAZIER-LEMKE ACTS

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CONSTITUTIONAL LAW — DUE PROCESS AND THE FRAZIER-LEMKE ACTS — Recent decisions involving the constitutional validity of the first[1] and second[2] Frazier-Lemke Acts have again raised the old spectre of due process.[3] The questions involved related to the power of the Federal Government to regulate the rights, duties, and liabilities existent between debtors and creditors in the field of farm mortgages under the bankruptcy power.[4] To forego an extended discussion of the history of due process as a limitation on governmental fiat, let it suffice to say that the concept, which began with Magna

[1] Bankruptcy Act of 1898, § 75 (s), as amended 48 Stat. L. 1289, 11 U. S. C., § 203 (s) (1934).

[2] Bankruptcy Act of 1898, § 75 (s), as amended 49 Stat. L. 943, 11 U. S. C., §§ 203 (p), 203 (s) (1935).

[3] *First Act*: Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555, 55 S. Ct. 854 (1935) [same case below, (D. C. Ky. 1934) 8 F. Supp. 489, (C. C. A. 6th, 1935) 74 F. (2d) 576]; Bradford v. Fahey, (C. C. A. 4th, 1935) 76 F. (2d) 628 [same case (D. C. Md. 1934) 7 F. Supp. 655]; In re Cope, (D. C. Colo. 1934) 8 F. Supp. 778; Galloway v. Union Trust Co., (D. C. Ark 1934) 9 F. Supp. 575; In re Plumer, (D. C. Cal. 1935) 9 F. Supp. 923; In re Cyr, (D. C. Ind. 1935) 9 F. Supp. 697; In re Jones, (D. C. Mo. 1935) 10 F. Supp. 165; In re Moore, (D. C. Pa. 1934) 8 F. Supp. 393; Paine v. Capitol Freehold Land & Trust Co., (D. C. Tex. 1934) 8 F. Supp. 500; In re Miner, (D. C. Ill. 1934) 9 F. Supp. 1; In re Duffy, (D. C. Ill. 1934) 9 F. Supp. 166; In re Doty, (D. C. Mo. 1935) 10 F. Supp. 195; In re Payne, (D. C. Tex. 1935) 10 F. Supp. 649.

Second Act: (a) *Held constitutional*: Wright v. Mountain Trust Bank, (U. S. 1937) 57 S. Ct. 556 [same case below, (C. C. A. 4th, 1936) 85 F. (2d) 973]; Dallas Joint Stock Land Bank v. Davis, (C. C. A. 5th, 1936) 83 F. (2d) 322; In re Slaughter, (D. C. Tex. 1935) 12 F. Supp. 206 [denying that Federal Government has any "moratorium granting power," see In re Slaughter, (D. C. Tex. 1935) 13 F. Supp. 893 at 894]; In re Bennett, (D. C. Mo. 1936) 13 F. Supp. 353; In re Reichert, (D. C. Ky. 1936) 13 F. Supp. 1; In re Cole, (D. C. Ohio 1936) 13 F. Supp. 283. (b) *Held unconstitutional*: Lafayette Life Ins. Co. v. Lowman, (C. C. A. 7th, 1935) 79 F. (2d) 887; In re Sherman, (D. C. Va. 1935) 12 F. Supp. 297; In re Lindsay, (D. C. Iowa, 1935) 12 F. Supp. 625; In re Young, (D. C. Ill. 1935) 12 F. Supp. 30; United States Nat. Bank of Omaha v. Pamp, (C. C. A. 8th, 1936) 83 F. (2d) 493; In re Wogstad, (D. C. Wyo. 1936) 14 F. Supp. 72; In re Davis, (D. C. N. Y. 1936) 13 F. Supp. 221; In re Diller, (D. C. Cal. 1935) 13 F. Supp. 249; In re Tschoepe, (D. C. Tex. 1936) 13 F. Supp. 371; In re Schoenleber, (D. C. Neb. 1936) 13 F. Supp. 375. Just what this terrific diversity of opinion indicates beyond what is suggested in discussion (infra) is difficult to evaluate.

[4] U. S. Constitution, Art. I, § 8, cl. 4.

Carta,[5] ran through early definitions in the United States limiting it to procedural matters[6] and attempts to describe its boundaries by the so-called process of "judicial inclusion and exclusion,"[7] appears today to relate to the reasonableness of the regulation, determinable by a consideration of the evils which are designed to be prevented and the manner in which the legislature has gone about preventing them.[8] Fundamentally, of course, this type of approach may lend itself as well to flexibility as to judicial veto of supposedly progressive legislation. However this may be as a matter of contemporary polity, no field of legislation has been quite so clearly in step with times of economic stress as that having to do with the relations of debtor and creditor, or more specifically, with bankruptcy.[9]

While it is apparently true that bankruptcy legislation originally was designed for the benefit of creditors,[10] it soon began to assume a tinge of sympathy for the harassed debtor in America,[11] perhaps

[5] MCKECHNIE, MAGNA CARTA, 2d ed., 375 (1914) (chapter 39 of Magna Carta). This was a limitation on the powers of the crown by the promise extorted from King John by the Barons, but it has been extended to all Englishmen and to general classes of situations. Ibid., p. 376. Fundamentally, its growth as to applicability to an enlarged class of situations may not have differed far from the growth of due process in the United States. MOTT, DUE PROCESS OF LAW, c. 5, p. 80 (1926).

[6] MOTT, DUE PROCESS OF LAW, c. 7, p. 106 et seq. (1926). See also Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. (59 U. S.) 272, 15 L. Ed. 372 (1856); Burton v. Platter, (C. C. A. 8th, 1893) 53 F. 901; and cf. United States National Bank of Omaha v. Pamp, (C. C. A. 8th, 1936) 83 F. (2d) 493.

[7] Davidson v. New Orleans, 96 U. S. 97, 24 L. Ed. 616 (1878); Twining v. New Jersey, 211 U. S. 78, 29 S. Ct. 14 (1908); Kentucky Ry. Tax Cases, 115 U. S. 321, 6 S. Ct. 57 (1885).

[8] Hurtado v. California, 110 U. S. 516, 4 S. Ct. 111 (1884); Columbia Bank v. Okely, 4 Wheat. (17 U. S.) 235, 4 L. Ed. 559 (1819); United States v. Yount, (D. C. Pa. 1920) 267 F. 861; Worthen Co. v. Kavanaugh, 295 U. S. 56, 55 S. Ct. 555 (1935); Helvering v. City Bank Farmers' Trust Co., 296 U. S. 85, 56 S. Ct. 70 (1935).

[9] 33 MICH. L. REV. 1210 (1935); WARREN, BANKRUPTCY IN UNITED STATES HISTORY, c. 1, pp. 3 et seq., c. 2, pp. 52 et seq. (1935); 44 YALE L. J. 651 (1935); 84 UNIV. PA. L. REV. 545 (1936). Before the first national act passed in relation to the farm crisis, however, the states had begun to move. See 47 HARV. L. REV. 299 (1933); Feller, "Moratory Legislation; A Comparative Study," 46 HARV. L. REV. 1061 (1933); Hanna, "Agriculture and the Bankruptcy Act," 19 MINN. L. REV. 1 (1934).

[10] Continental Ill. Nat. Bank & Trust Co. v. Chicago, R. I. & P. Ry., 294 U. S. 648, 55 S. Ct. 595 (1934) (relating to sections 77 and 77B); Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555, 55 S. Ct. 854 (1935). See also 33 MICH. L. REV. 1210 (1935). 12 LAW JOURNAL 229 (1877) discusses the English acts and their advances in scope in time. See the narrow definition of bankruptcy in Adams v. Storey, (C. C. 2d, 1817) 1 Paine 79.

[11] The Act of 1800 (2 Stat. L. 19-36) apparently was under the older philosophy, providing for arrest of the debtor (§ 4, p. 22), seizure of his property, books, and

as a mirror of some philosophy of the times.[12] Thus it was with the original Frazier-Lemke Amendment to the Bankruptcy Act of 1898,[13] the object of which was to preserve the farmer's land and income to the farmer and to relieve him from the effects of the "farm depression" which has been said to have begun about 1921.[14] Probably no one would question the validity of the purpose of an attempt to relieve from such conditions as are said to have existed. Under the increasingly broadened view of what the bankruptcy power is,[15] there is also little doubt that it could be brought into play to accomplish this purpose.[16]

The generalized approach to the due process question and the Frazier-Lemke Acts now turns to a consideration of the reasonable or arbitrary nature of the regulation to meet the evils and the manner in which this is done.[17] The original act apparently was thought to be unreasonable for a variety of reasons, for while the constitutional prohibition against impairment of contractual obligations does not

papers (§ 5, p. 23), examination of bankrupt in prison (§ 18, p. 27), breaking open of bankrupt's house (§ 20, p. 27). But it did give the bankrupt a five per cent allowance if creditors were paid fifty per cent, or ten per cent if creditors took seventy-five per cent, and "every such bankrupt shall be discharged from all debts" (§ 34, p. 30). The 1841 Statute (5 Stat. L. 440-449) also provided for discharge (§ 4, p. 443), contest of claims by bankrupt (§ 7, p. 446), demand of trial by jury (§ 1, p. 442; § 4, p. 444), and perhaps most important, voluntary petitions (§ 1, p. 441). The 1867 Statute (14 Stat. L. 517-541) also provided for voluntary bankruptcy (§ 11, p. 521), bankrupt not liable to arrest (§ 26, p. 529), majority of creditors to decide what part of estate was to be distributed in dividends at a meeting on notice (§ 27, p. 530), discharge (§ 29, p. 531), involuntary bankruptcy with opportunity to the debtor to appear and show cause (§ 39, p. 536).

[12] For instance, 3 PA. L. J. 1 at 12 (1844), in a brief for another Bankruptcy Act in place of that of 1841 which had been repealed in 1843: "To restore them [bankrupt debtors] to their suffering families, and allow them an opportunity to be industrious, and we may add to be honest, a bankrupt law is passed." See also, Levinthal, "The Early History of Bankruptcy Law," 66 UNIV. PA. L. REV. 223 (1918).

[13] Supra, note 1.

[14] Brief for petitioner Wright in Wright v. Mountain Trust Bank, (U. S. 1937) 57 S. Ct. 556. See also: 47 HARV. L. REV. 299 (1933); Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555, 55 S. Ct. 854 (1935).

[15] 33 MICH. L. REV. 1210 (1935); Continental Ill. Nat. Bank & Trust Co. v. Chicago, R. I. & P. Ry., 294 U. S. 648, 55 S. Ct. 595 (1934); Hanover Nat. Bank v. Moyses, 186 U. S. 181, 22 S. Ct. 857 (1902); Kunzler v. Kohaus, 5 Hill (N. Y.) 317 (1843); In re Reiman, (D. C. N. Y. 1874) 20 Fed. Cas. No. 11,673; WARREN, BANKRUPTCY IN UNITED STATES HISTORY, c. 2, pp. 68, 87 (1935).

[16] This was, however, denied in the original case by the creditor but not passed on except by implication in the Radford case. Again in the Wright case, the creditor contended that such legislation was not within the bankruptcy power (brief for appellees, the Mountain Trust Bank, at p. 8 et seq.), but the Court did not agree. Wright v. Mountain Trust Bank, (U. S. 1937) 57 S. Ct. 556.

[17] Supra, note 8.

apply to the Federal Government,[18] a federal statute cannot deprive a mortgagee of his security interest in specific property.[19] It may well be thought that the objectionable features[20] of the original act[21] were too close to arbitrary spoilation of the mortgagee's rights to be sustained,[22] and it appears difficult to the writer to accuse the Supreme Court of doing mere lip service to the "presumption of validity of a statute" by applying a personal or subjective test to reach a felt conclusion,[23] especially in the light of the decision in the *Blaisdell* case.[24] With the exception of the *Radford* case, however, only one other provision of any federal bankruptcy act has ever been held invalid,[25]

[18] U. S. Constitution, Art. I, § 10, cl. 1, applies only to state legislation. See Sinking-Fund Cases, 99 U. S. 700, 25 L. Ed. 496 (1879); Mitchell v. Clark, 110 U. S. 633, 4 S. Ct. 170 (1884); Hepburn v. Griswold, 8 Wall. (75 U. S.) 623, 19 L. Ed. 513 (1870).

[19] Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555, 55 S. Ct. 854 (1935); or, as was said in a footnote in In re Bennett, (D. C. Mo. 1936) 13 F. Supp. 353 at 355: "The whole opinion in the Radford case clearly indicates that it was not intended to be ruled that the taking away of any one or all of the property rights referred to was a deprivation of property without due process of law unless there was also a substantial impairment of security." See also, Home Building & Loan Assn. v. Blaisdell, 290 U. S. 398, 54 S. Ct. 231 (1933).

[20] Justice Brandeis enumerated five rights which had been infringed by the first Frazier-Lemke Act: (1) To retain the lien until the debt was paid; (2) To have a judicial sale; (3) To determine the time of sale subject only to the court's discretion; (4) To bid at the sale; (5) To interim control of the property. As may be seen, these all relate to the preservation and protection of the creditor's security interest. Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555, 55 S. Ct. 854 (1935).

[21] Supra, note 1.

[22] Hanna, "Agriculture and the Bankruptcy Act," 19 MINN. L. REV. 1 (1934).

[23] 31 COL. L. REV. 1136 (1931).

[24] 290 U. S. 398 at 425, 54 S. Ct. 231 (1933), where Chief Justice Hughes said: "In determining whether the provision for this temporary and conditional relief exceeds the power of the State by reason of the clause in the Federal Constitution prohibiting impairment of the obligations of contracts, we must consider the relation of emergency to constitutional power, the historical setting of the contract clause, the development of the jurisprudence of this Court in the construction of that clause, and the principles of construction which we may consider to be established." In essence the decision allowed the state to impair contractual obligations by moratorium legislation under the state police power subject only to the due process clause of the federal constitution, but from statements made in the Wright case, 57 S. Ct. 556 at 565, it remains a trifle obscure as to what the relation between such state police power subject to due process and federal power subject to due process is.

[25] United States v. Fox, 95 U. S. 670, 24 L. Ed. 538 (1878), holding invalid the portion making it a criminal offense to purchase goods on the pretense of carrying on business, within three months of bankruptcy proceedings brought by the debtor or a creditor. Cf. the reasoning in Schlesinger v. Wisconsin, 270 U. S. 230, 46 S. Ct. 260 (1926), and Helvering v. City Bank Farmers' Trust Co., 296 U. S. 85, 56 S. Ct. 70 (1935) [tax cases involving reasonable or unreasonable administrative-necessity provisions of the inheritance or estate tax law].

but the Court did not state the basis of its decision in the earlier case beyond doubt. Moreover, earlier statements that "The power given must, indeed, be held to be general, unlimited and unrestricted over the subject,"[26] must now, since the *Radford* case, be limited to the existence of the power and not to the mode of its exercise. The *Radford* case reached this conclusion by determining first what right a mortgagee normally had, whether these rights had been impaired, and finally, whether they might reasonably be impaired in the manner attempted.

In substance, the second Frazier-Lemke Act[27] differs from the first by eliminating the provisions for "time-payment" sale to the mortgagor, by giving a judicial sale after a virtual moratorium, by allowing all liens to remain in full force instead of the mere general lien of the first act, by allowing the mortgagor to retain possession only under the custody and control of the court, and by giving the court greater control and discretion over the whole proceeding, especially in allowing an immediate liquidation for the mortgagor's failure to carry out or comply with any orders of the court.[28] The decisions

[26] In re Reiman, (D. C. N. Y. 1874) 20 Fed. Cas., No. 11,673, p. 490 at 496. No case has quoted this portion, but Justice Sutherland cited other parts in Continental Ill. Nat. Bank & Trust Co. v. Chicago, R. I. & P. Ry., 294 U. S. 648, 55 S. Ct. 595 (1934).

[27] Supra, note 2.

[28] (a) *Second Frazier-Lemke Act* [49 Stat. L. 943, 11 U. S. C., § 203 (s) (1935)]: (s) Any farmer failing to get approval of a majority of creditors to composition or who feels aggrieved thereby can petition to be held bankrupt, "that . . . property . . . be appraised . . . unencumbered exemptions or equity [therein] be set aside to him, and that he be allowed to retain possession, under the supervision and control of the court . . . under the terms and conditions set forth in this section . . . either party may file objections . . . and take appeals within four months from the date that the referee approves the appraisal." (1) After appraisal the referee "shall further order that the possession, under the supervision and control of the court . . . shall remain in the debtor . . . subject to all existing mortgages, liens, pledges, or encumbrances . . . and the property covered by such mortgages . . . shall be subject to the payment of the claims of the secured creditors, as their interests may appear." (2) "When the conditions set forth in this section have been complied with, the court shall stay all judicial . . . proceedings . . . against the debtor or any of his property, for . . . three years. During such three years the debtor shall be permitted to retain possession of all or any part of his property, in the custody and under the supervision and control of the court, provided he pays a reasonable rental semiannually. . . . The first payment . . . shall be made within one year . . . to be . . . based upon the rental value, net income, and earning capacity of the property . . . to be used, first, for payment of taxes and upkeep . . . the remainder to be distributed among the secured and unsecured creditors, and applied on their claims, as their interests may appear. The court, in its discretion to protect creditors from loss . . . may order sold any unexempt perishable property or any unexempt personal property not reasonably necessary for the farming operations of the debtor, . . . and may, in addition to the rental, require payments on the principal due and owing by the debtor . . . not

of the lower federal courts holding the amended act invalid[29] seem to have failed to recognize the effect of these changes and to have applied the principles stated in the *Radford* case in a rather mechanical way. But perhaps the most significant conclusions to be drawn about the recent decisions of the Supreme Court in the *Radford* and *Wright*[30] cases and the history of the two acts are these two: (a) that hastily drafted, more or less ill-considered legislation (as to means) will not

inconsistent with the protection of the rights of the creditors and the debtor's ability to pay, with a view to his financial rehabilitation." (3) "At the end of three years, or prior thereto, the debtor may pay into court [the appraised amount less principal payments] *Provided*, that upon request [of creditors or debtor] the court shall cause a reappraisal . . .: *Provided*, that upon request [of secured creditors] the court shall order the property . . . sold at public auction. The debtor shall have ninety days to redeem any property sold at such sale. . . . If however, the debtor . . . fails to comply with the provisions of this section, or with any orders of the court made pursuant to this section, or is unable to refinance himself within three years, the court may order the appointment of a trustee, and order the property sold. . . ." (6) "This Act is hereby declared to be an emergency measure and if in the judgment of the court such . . . ceases to exist in its locality . . . the court . . . may shorten the stay . . . and proceed to liquidate the estate." (b) *First Frazier-Lemke Act* [48 Stat. L. 1289, 11 U. S. C., § 203 (s) (1934)]: (s) Substantially same, (1) is now incorporated under (s) directly, referee appointing the appraisers. (2) Referee sets aside the state exemptions, "and shall further order that the possession, under the control of the court, of any part or parcel or all of the remainder of the debtor's property, shall remain in the debtor subject to a general lien, as security for the payment of the value thereof to the trustee of the creditors . . . such a lien to be subject to and inferior to all prior liens . . . [which] shall remain in full force and effect . . . and shall cover all rental . . . or crops . . . as security for the payment of any sum . . . due . . . under the terms and provisions of the next paragraph. . . ." (3) "Upon request of the debtor, and with the consent of the lien holder . . . the trustee . . . shall agree to sell to the debtor . . . the bankrupt estate at the appraised value upon the following terms and conditions, and upon such other conditions as in the judgment of the trustee shall be fair and equitable:" 1% interest in one year; 2½%, 2½%, 5%, 5%, and the balance in 2, 3, 4, 5, and 6 years with interest at 1%; debtor to pay taxes. (4) For debtor to sell part or all of property on payment of appraised value or bond therefor. (5) "In case the debtor fails to make any payments . . . then secured creditors or the trustee may proceed to enforce their . . . lien. . . ." (6) Debtor may then get a discharge (7) "If any secured creditor . . . shall file written objections to the manner of payments and distribution of the debtor's property . . . then the court . . . shall stay all proceedings for a period of five years, during which . . . the debtor shall retain possession . . . under the control of the court, provided he pays a reasonable rental annually . . . the first payment . . . to be made within six months . . . to be distributed among the . . . creditors, as their interests may appear. . . . At the end of five years, or prior thereto . . . the debtor may pay into court the appraised price of the property of which he retains possession. . . ." Lien holder could cause reappraisal thereupon; Provisions only to apply to preexistent debts. "If the debtor fails to comply with the provisions of this subsection the court may order the trustee to sell the property as provided in this Act."

[29] Supra, note 3 (b).

[30] Wright v. Mountain Trust Bank, (U. S. 1937) 57 S. Ct. 556.

survive the test of due process, while carefully worked out and planned statutes on the same subject and accomplishing substantially the same objects will;[31] and (b) that the due process concept can be based on a careful examination of the facts to determine whether a given regulation (once found to be within the power of the federal government at all) is reasonable or not. It is to be hoped that the approach of the *Radford* and *Wright* cases will become firmly established in American jurisprudence, for it appears to be a truly judicial exercise of judicial power. For where else may legislation (regardless of the fact that the purpose is good and the need is vital) be reviewed as to the reasonableness or arbitrariness thereof? Criticisms of this review in the past have largely been based upon beliefs that the Court was applying an incorrect standard to determine the reasonableness factor, but it is submitted that no such criticism can be levied upon either of the Frazier-Lemke cases.[32]

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[31] Petitioner's brief (p. 9 et seq.) states that the second act was considered portion by portion in the light of the Radford and Blaisdell cases in sub-committee, again before the committee of the whole, and on the floor of both houses, and passed finally without a dissenting vote, backed by Senator Borah, who had opposed the first act on constitutional grounds. Of particular interest is the suggestion found in the Congressional Record that Senator Frazier has presented a bill applicable to city residents which may be forthcoming in the near future. 74th Cong., 1st sess., 79 CONG. REC. 13642 (1935).

[32] For an English viewpoint of why due process has been something of an American legislative bogey, see Heyting, "The Anglo-American Conception of Due Process of Law," 18 GROTIUS SOC. 175 at 190 (1932), stating of the older approach (said to be representative of the "conservative element" of the court): "questions of constitutionality under the due process of law provision of the American Constitution, especially where matters of substantive law are involved, are fundamentally questions of social and political economy rather than of law, and are necessarily questions about which even the greatest lawyers may take the most diverging views depending upon their particular social, political and philosophical outlook." It is the present writer's belief that if this were once true, the approach of Justice Brandeis and the unanimous court in the Radford and Wright cases nears Heyting's statement of what English due process is today, except as to the difference in branches of government to which each is applicable. Certainly in both of the recent Frazier-Lemke cases, the objectivity so much needed is apparent.