

1940

## Zion's Savings Bank and Trust Company v. Sterling P. Harris : Appellant's Abstract

Utah Supreme Court

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Thomas & Thomas; Attorneys for Appellant;

D. Skeen and E. J. Skeen; Attorneys for Respondent;

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In the  
**SUPREME COURT**  
of the  
**STATE OF UTAH**

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*In the Matter of the Estate of*  
**ANNA L. HARRIS, Deceased.**

**ZION'S SAVINGS BANK AND  
TRUST COMPANY, a cor-  
poration,**

*Appellant*

**vs.**

**STERLING P. HARRIS, admin-  
istrator of the estate of Anna  
L. Harris, deceased,**

*Respondent.*

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**APPELLANT'S ABSTRACT**

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**Appeal from Third Judicial District Court,  
Salt Lake County, Utah  
Honorable P. C. Evans, Judge**

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**THOMAS & THOMAS,**

*Attorneys for Appellant*

**J. D. SKEEN and E. J. SKEEN,**

*Attorneys for Respondent*

**FILED**

**MAR 22 1940**

**CLERK SUPREME COURT UTAH**

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Case No.  
6238

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APPELLANT'S ABSTRACT

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30

ORDER

On Stipulation in open Court by J. D. Skeen,  
attorney for Sterling P. Harris, administrator  
herein and H. P. Thomas, attorney for Zion's  
Savings Bank & Trust Company and good cause  
appearing,

IT IS HEREBY ORDERED, that no application shall be made nor any order entered authorizing said administrator to revive or institute any proceedings in bankruptcy or debtors relief without notice of the application for such order first being served on said Zion's Savings Bank & Trust Company or its attorneys.

Dated and filed March 24, 1939.

(Signed) Allen G. Thurman, *Judge*

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## PETITION

Comes now Sterling P. Harris, administrator of the above entitled estate, and respectfully shows to the court:

That at the time of the death of Anna L. Harris, there was pending in the United States District Court for the District of Utah, a proceeding under Section 75 of the Bankruptcy Act; that said proceeding was abated by the death of said Anna L. Harris.

Your petitioner further shows to the court that unless said proceeding is revived and reinstated, the entire estate of the said deceased is in danger of being lost.

WHEREFORE, said petitioner prays for an order of this court authorizing him to apply to the United States District Court for an order reviving and reinstating the said debtor relief proceeding.

J. D. Skeen, E. J. Skeen,  
*Attorneys for Petitioner*

Sterling P. Harris,  
*Petitioner*

Not dated. Verified February 9, 1940. Filed February 10, 1940.

34      ORDER AUTHORIZING ADMINISTRATOR  
TO APPLY TO UNITED STATES COURT

This cause came on for hearing upon the 10th day of February, 1940, on the petition of Sterling P. Harris, administrator of the estate of Anna L. Harris, deceased, praying for the relief hereinafter provided; notice of said petition and hearing having been previously served upon Zion's Savings Bank and Trust Company, a corporation; the administrator being represented by his attorney, E. J. Skeen and said bank by its attorneys, Thomas and Thomas; and the court having heard said petition and the arguments of counsel and it appearing and the court finds that there was pending in the United States District Court, District of Utah in February, 1938, a proceedings by and on behalf of said Anna L. Harris as debtor under and pursuant to Section 75, Bankruptcy Laws of the United States for relief of debtors, which upon the death of said deceased was thereupon abated by said United States Court in January, 1939; that on March 22, 1939, said administrator was appointed herein and thereafter said bank commenced suit in this court against said administrator to foreclose a mortgage upon farm lands in Salt Lake County, Utah of said deceased, joining others therein as defendants who claimed liens thereon and obtained a judgment of fore-

closure July 17, 1939, and a certificate of sale to said lands at sheriff's sale August 15, 1939, for \$5,417.46, and the period of redemption from said sale will expire by the laws of the State of Utah on February 15, 1940, and no redemption has been made and said proceedings in said United States Court have not been revived,

NOW THEREFORE, it is hereby ordered that said petition be granted and said administrator authorized to apply to said United States District Court for an order reviving and re-instating the said debtor relief proceedings, or instituting new proceedings in said court as advised.

And it is further ordered that said bank may on appeal herefrom to the Supreme Court of the State of Utah, stay the execution and enforcement of this order by giving bond as provided by law for such stay in the sum of \$500.00 to the effect that it will pay, in the event this order is sustained on appeal, all damages which said administrator may sustain by reason of the order having been stayed pending appeal and the administrator not having been allowed to make said application to said United States Court.

Dated and filed February 13, 1940.

P. C. Evans, *Judge*

## ASSIGNMENTS OF ERROR

Comes now the appellant and says there is manifest error in the records, proceedings and

order, given, made and entered the 13th day of February, 1940, by the trial court herein, said order being entitled "Order Authorizing Administrator to Apply to United States Court" (Tr. 34), and appellant hereby assigns the following errors upon which it relies for a reversal of said order, to-wit:

1. The trial court erred in granting the Petition of respondent praying for the order aforesaid, which Petition is signed and verified by appellant the 9th day of February, 1940. (Tr. 31).

2. The trial court erred in making and entering the order herein appealed from, to-wit, "Order Authorizing Administrator to Apply to United States Court" (Tr. 34).

Respectfully submitted,

THOMAS & THOMAS,  
*Attorneys for Appellant*



In the  
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APPELLANT'S BRIEF

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Appeal from Third Judicial District Court,  
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**FILED**  
APR 1 1940

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*Respondent.*

Case No.  
6238

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APPELLANT'S BRIEF

---

1. STATEMENT

Appellant Zion's Savings Bank and Trust Company, the mortgagee and holder of a sheriff's certificate of sale on foreclosure, appeals from an order of the probate court granting the petition of respondent, Sterling P. Harris, administrator, authorizing the administrator

to make application to the United States District Court of Utah to revive a Debtor Relief proceedings (or institute new ones) under the Frazier- Lemke Act commenced by his wife, Anna L. Harris, the mortgagor, but which were abated by order of the federal court upon her death.

The Frazier-Lemke Act relates only to farmer debtors. It is Section 75 of the federal bankruptcy law as amended in 1935. 11 U. S. C. A. Sec. 203. It was enacted in 1933 and is divided into two parts—subsections “a” to “r” relating to compositions and extensions for farmer debtors, and subsection “s” a 3-year moratorium for the farmer, re-enacted in 1935 in somewhat less rigorous terms than its predecessor which had been ruled unconstitutional by the Supreme Court. The entire Act, Section 75, was carried forward into the general revision of the Bankruptcy Law in 1938 by what is commonly known as the Chandler Act.

Under the Frazier-Lemke Act a farmer insolvent in the equity sense, files a petition in federal court under said Section 75 seeking a composition or extension of his debts anytime before the period of redemption on foreclosure or execution expires—in fact, even afterward if sheriff’s deed has not yet actually been issued, and the period of redemption is thereby, without more, ipso facto extended indefinitely and all actions against the farmer are stayed. Johnson’s Commentary, Chandler Act, 11 U. S. C. A. (Sec. 201 to end) p. xxv.

The matter is referred to a conciliation commissioner (conciliator) who calls a creditor’s meeting. The farmer proposes terms of composition and extension. Acceptance in writing of the proposal by creditors of a ma-

jority in number and amount, and confirmation by the judge as an equitable and feasible method of liquidating secured claims and calculated to serve the interests of creditor and farmer alike, must be obtained or the proceedings fail of fruition. This is the first part of the Act, subsections "a" to "r", and failing the approval of both creditor and judge, the proceedings must be dismissed—but, not if the farmer elects (and he always does) to proceed under the last part of the Act, subsection "s."

Subsection "s" takes up where subsections "a" to "r" leave off. Under "s" the debtor, being unsuccessful with his proposal of composition and extension and consequently confronted with a dismissal of his proceedings, "*amends*" his petition, asks to be adjudicated a bankrupt and for retention of the property during a 3-year moratorium. The court orders the 3-year moratorium and installs the debtor securely in possession meanwhile, subject only to payment of certain rent fixed by appraisers and applicable first to taxes and then to all creditor's pro rata. At the end of the 3-year moratorium, or sooner, the debtor may have the property regardless and free of liens for its appraised value. Johnson, Commentaries, Chandler Act. 11 U. S. C. A. (Sec. 201 to end) p. xxv-xxvi.

## 2. HISTORY OF FRAZIER-LEMKE ACT

We have already set out the substance of the Frazier-Lemke Act, Section 75 of the bankruptcy law, 11 U. S. C. A., Sec. 203. Now for its history.

### A. LEGISLATIVE

The Act was depression-born, being first enacted in 1933. It was declared to be only an emergency measure. 11 U. S. C. A. 203 (s)-6. It was to have continued for five years up to March 3, 1938. 11 U. S. C. A. (Sec. 101 to end) Sec. 203 (c) p. 975. But still depression minded, Congress in 1938 extended it two more years to March 4, 1940. 11 U. S. C. A. (Section 201 to end) Section 203 (c) p. 8, and the Act, we are advised, was just recently extended again four more years to March 4, 1944. The last extension is too recent to afford the writer access to its text or reference, and is therefore omitted here; but the bill as reported by the House Committee (February 21, 1940) would grant the farmer heaping measures of congressional favor, in addition to extending the Act, by offering rewards of two years further moratorium in individual cases after the 3-year stay expires, if the court finds he has merited the same. Numerous other broad and significant changes are included. House of Representatives Report, February 21, 1940, No. 1658, 76th Congress, 3rd Session, Sec. "f" p. 11.

### B. BEFORE THE COURTS

Perhaps no Act of Congress ever received more and varied discussion upon its constitutionality than did the Frazier-Lemke law. The books abound with the deci-



sions of the United States courts, both district courts and Circuit Courts of Appeal, upholding it on the one hand, and on the other condemning it upon considerations of constitutional law including due process, equal protection of the laws, and the power of Congress to establish uniform laws on the subject of bankruptcy. Only confusion was the result. No good purpose would be served in a citation of these authorities. They are now only history, for the Act has finally reached the Supreme Court and received its attention in three cases which we shall now note.

### 1. THE RADFORD CASE

The first time the Frazier-Lemke Act was tested by the Supreme Court (1935) subsection "s", the second portion of the Act which provides the 3-year moratorium (then 5) was stricken down. *Louisville Joint Stock Land Bank vs. Radford*, 295 U. S. 555. 79 L. Ed. 1593. 55 S. Ct. 854. 97 A. L. R. 1106.

The unanimous opinion by Mr. Justice Brandeis held the original subsection "s" invalid for depriving the mortgagee of the right to—

- (1) retain his lien until paid;
- (2) realize on the security at a judicial public sale;
- (3) determine when a sale shall be had;
- (4) bid at the sale and thus protect his interest;  
and,
- (5) control the property during the period of default (by a receiver, etc.) and thus receive the rents;



all of which were guaranteed by the applicable Kentucky statute regarding mortgages, and that hence the mortgagee was deprived of due process and his property taken without compensation contrary to the 5th Amendment.

And so, the original subsection "s" was invalidated and the moratorium of the Frazier-Lemke Act was temporarily gone.

## 2. WRIGHT VS. VINTON BRANCH

Soon, however, Congress re-enacted subsection "s" to so pattern it as to avoid the interdiction of the ruling in the Radford case, and with but slight changes it soon reached the Supreme Court again, this time in 1937 in the Virginia case, Wright vs. Vinton Branch of the Mountain Trust Bank of Roanoke, Virginia. 300 U. S. 440. 81 L. Ed. 736. 57 S. Ct. 556. 112 A. L. R. 1455.

Again the ruling was unanimous. Again the opinion was by Mr. Justice Brandeis, but this time subsection "s" was upheld as not unconstitutionally infringing upon the rights of mortgagees and not violative of the 5th Amendment.

Moreover, in justifying its validity, the court discussed the Act's provision for closing the proceedings at any time when it was apparent the debtor could not refinance within three years, saying:

"(The Act) must be interpreted as meaning that the court may terminate the stay if after a reasonable time it becomes evident that there is no reasonable hope that the debtor can rehabilitate himself within the 3-year period . . . And if

the debtor is beyond all reasonable hope of financial rehabilitation, and the proceedings under Section 75 cannot be expected to have any effect beyond postponing inevitable liquidation, *the proceedings will be halted at the outset.*" (Parentheses and italics added.)

Thus, although the Act had been sustained, the rule of *Wright vs. Vinton Branch* had become the law thereof throughout the land. Federal district courts and Circuit Courts of Appeal followed its mandate as final, and for failure to show a reasonable hope of rehabilitation, dismissed on every hand proceedings under the Act and loosed the creditor to pursue his remedy by action to foreclose.

Our own Circuit Court of Appeals (10th) became committed to the rule as being the mandate of the Supreme Court. *Sullivan vs. Tofflemoyer* (C. C. A. 10th 1939) 104 F. (2d) 835. In that case, Judge Bratton cites *Wright vs. Vinton Branch* as binding, and says:

"But the statute presupposes a reasonable probability that the debtor will be able to liquidate his debts. *That postulate is implicit in the act.* A debtor without present or potential equity in his property with no reasonable chance of paying or refunding the liens on his property, and who is beyond all reasonable hope of rehabilitation, is not entitled to invoke the statute and *thus merely defer inevitable liquidation.* A proceeding should be halted when it appears that nothing beyond postponement of *inevitable liquidation can be expected.*" (Italics added.)

Other Circuit Courts of Appeal fell into line. In re:

Borgelt (7th) 79 F. (2d) 929; Massey vs. Farmers, etc. Trust Company (4th) 94 F. (2d) 526; Cowherd vs. Phoenix etc. Bank (8th) 99 F. (2d) 225, certiorari denied 59 S. Ct. 583; Bender vs. Federal Farm Mortgage Corporation (8th) 99 F. (2d) 252; Donald vs. San Antonio etc. Bank (5th) 100 F. (2d) 312; Wilson vs. Alliance Life Insurance Company (5th) 102 F. (2d) 365.

But lawyers and others were destined for surprise, for the rule was not so firmly rooted by Wright vs. Vinton Branch as they had thought, and as we shall presently see.

### 3. THE BARTELS CASE

For nearly three years after Wright vs. Vinton Branch, *supra*, the Federal Courts had confidently followed its reasonable hope doctrine, which our own 10th Circuit Court of Appeals had, as we have seen, deduced from that decision to be the “*postulate implicit in the Act,*” and had dismissed for lack of reasonable hope of the debtor’s rehabilitation. But in December, 1939, due to a disagreement among the judges themselves in the 5th Circuit, the Act was again presented to the Supreme Court, and this time the Court overruled Wright vs. Vinton Branch, and all of the decisions of the Circuit Courts of Appeal and district courts came tumbling down. This time the Court repudiated the reasonable hope rule and held once a farmer suffers a refusal of his proposal for composition and extension (subsections “a” to “r”) and then “*amends*” his petition and under “s” asks and is adjudged to be a bankrupt, he becomes entitled to the 3-year moratorium as a matter of right and the court

cannot dismiss, notwithstanding his utter impoverishment, and no matter that he will never be rehabilitated, *Wright vs. Vinton Branch* to the contrary, notwithstanding.

This case is *John Hancock Mutual Life Insurance Company vs. Bartels* (December 4, 1939) 60 S. Ct. 221. Chief Justice Hughes says in the unanimous opinion there:

“The subsections of Section 75 which regulate the procedure in relation to the effort of a farmer-debtor to obtain a composition or extension contain no provision for a dismissal because of the absence of a reasonable probability of the financial rehabilitation of the debtor.

And that “What is said upon this in Note 6 in *Wright v. Vinton Branch*, 300 U. S. 440, 462, 57 S. Ct. 556, 561, 81 L. Ed. 736, 112 A. L. R. 1455, was not essential to the opinion in that case and is not supported by the terms of the statute.”

This is now the law. The implications of the *Bartels* case are definite. The reasonable hope doctrine is gone. No matter how much a debtor owes or how great his debt exceeds his equity—and oftentimes it is actually manifold, as in the case of second or more remote mortgages; no matter that the creditor has the entire investment and the debtor none whatever left in the property; no matter from indifference born of despair, or even wilfully, he may have long since ceased to look after the property or to cultivate the land, repaint the buildings and preserve the farm; no matter he has suffered it to become increasingly obsolescent; no matter how indulgent a forbearing creditor theretofore may have

been—no matter all these, and the debtor with no interest left and the creditor with all that can be said to be left in the property at a time when he finally should be entitled by State law to take over and attempt to salvage some part of his losses, still the debtor by now virtually a stranger to any interest in the property, takes over and prevents the creditor, to whom it should rightfully belong, from entering and restoring the property while dilapidation, depreciation and obsolescence continue their merciless toll three years longer; perhaps by the new Act for five. But, holds the Supreme Court, the mortgagee is not deprived of due process.

The creditor himself may, by the very operation of the Act, also be rendered impoverished and his resources along with what is left with the debtor's wiped out. The creditor will sometimes be an individual, other times, a life insurance company guardian of the savings of millions of small policyholders, including farmers, or it may even be a trust or foundation for the maintaining of a university, hospital or other charity. But it also is subject if the debtor avails himself of the stay.

The Act applies not only in the case of mortgages, but also to equities of every sort, including contracts for purchase, conditional sales, and even the right of redemption on foreclosure although the statutory period has expired, if the sheriff's deed has not yet been issued. Subsection "n."

### 3. FURTHER STATEMENT

We have discussed the Frazier-Lemke Act at length so the court may have before it the benefit of its origin and history and its present status and effect in approaching this appeal.

We have seen that the Supreme Court first denounced, but later sustained, the Act, establishing for a time the reasonable hope rule, but totally capitulated to its appeal finally in December, 1939, and that now, once a debtor is adjudicated under "s," no creditor may pry him away from the refuge of its 3-year moratorium (now possibly 5) for all his utter impoverishment and stark inability to rehabilitate.

The administrator here asks leave of the probate court to seek the benefits of Section 75 in the bankruptcy court. His wife, Anna L. Harris, had commenced such a proceeding and it was pending in the federal court as early as February, 1938. But she died within a year, whereupon, in January, 1939, the proceedings were abated by order of that court. (Abs. 3, Tr. 34.)

Two months later, March 22, 1939, the probate court appointed respondent as her administrator herein. (Abs. 3, Tr. 34.) But conceding appellant bank, then simply a mortgage holder, the right to be heard, the court simultaneously ordered notice to the bank in the event the administrator should ask for authority to seek a revivor of the abated bankruptcy proceedings. (Abs. 1-2, Tr. 30.)

The bank then proceeded to foreclose. Judgment of foreclosure was entered July 17, 1939. A sheriff's sale was had and the certificate of sale issued to the bank



August 15, 1939, for \$5417.46, and the bank was awaiting the sheriff's deed which was to be due on February 15, 1940. (Abs. 3-4, Tr. 34.)

But five days (February 10) before the redemption period was up and the sheriff's deed was due, the administrator petitioned the probate court for leave to apply in the federal court for a revivor of the bankruptcy proceedings. (Abs. 2, Tr. 31.) This petition was heard on that day, was taken under advisement, and was granted by an order of February 13. The order, however, provides that it may be stayed pending appeal by the bank's giving supersedeas bond which it did immediately the same day. (Abs. 3-4, Tr. 34.) (Tr. 38).

It is from this order that the bank appeals, assigning error in the granting of the petition and entry of the order, (Abs. 5), the administrator lacking authority, and the probate court likewise being powerless under the probate code to permit him, to subject the estate to the processes of the Frazier-Lemke Act as we shall now see.

#### 4. THE ADMINISTRATOR AND THE PROBATE COURT ARE POWERLESS UNDER THE PROBATE CODE TO SUBMIT THE ESTATE TO THE BANKRUPTCY COURT

The administrator applied, as we have seen, to the probate court for authority to go to the federal court. This he did, because such application is a pre-requisite under the Frazier-Lemke Act.

True it is that subsection "r" includes the administrator of a deceased farmer within its definition of the term "farmer."

"(r) For the purposes of this section . . . the term 'farmer' . . . includes the personal representative of a deceased farmer."

But consistent with orderly procedure and cognizant of the jurisdiction of a probate court over its own administrator and pursuant to its rule making powers bestowed by Section 30 of the Bankruptcy Act (11 U. S. C. A., Sec. 53), the Supreme Court on January 16, 1939, promulgated its General Order 50(9) requiring an administrator who would seek the benefit of the Frazier-Lemke Act to first obtain the authority of the probate court which created him and to exhibit in his petition to the federal court his appointment and authorization, thus:

"(9) The personal representative of a deceased farmer who desires in his representative capacity to effect, under section 75, a composition or extension of the debts of the estate, shall attach to his petition, in lieu of schedules, the following papers, certified as correct by the court which appointed him (hereinafter referred to as the



probate court): (a) a copy of the order of his appointment, (b) a copy of an order of the probate court authorizing him to file the petition," . . . etc. General Order 50(9). 11 U. S. C. A. (Sec. 53-100), 1939 Pocket Part, p. 38.

Now the source of an administrator's existence and power, and that of his creator the probate court as well, is exclusively the statute, viz, the Probate Code.

Probate proceedings are statutory.

"Proceedings for the administration of estates of decedents are *purely statutory*. In fact, the whole matter of the disposition of estates of decedents is within the legislative control." (Italics added) 1 Bancroft's Probate Practice 76.

The probate court's jurisdiction is exclusive.

"Jurisdiction of the probate courts to administer upon the estate of decedents is primary and exclusive. *It would be an anomaly in jurisprudence if a court vested with full jurisdiction in matters of probate could be controlled in the exercise of that jurisdiction by a co-ordinate court or even by the same court sitting as a court of general jurisdiction.*" 1 Bancroft's Probate Practice 62. (Italics added.)

And since probate proceedings are exclusively statutory, a statutory grant of specific powers constitutes by implication a limitation on those powers of the probate court.

"Since probate proceedings are everywhere recognized as being *statutory* in their nature, the effect of a specific enumeration of powers of a court exercising probate jurisdiction is to limit such powers by implication to those expressly

conferred.” (Italics added.) 1 Bancroft’s Probate Practice 39.”

In fact this court has already recognized probate proceedings to be strictly statutory. In re: Cloward’s Estate. .... U. .... 82 P. (2d) 336. There, this court said upon the subject:

“The law governing wills and the administration of estates of deceased persons is *statutory*. The court, sitting in probate, *derives its power from the statutes and has only such powers as are granted by statute or reasonably implied or reasonably necessary and proper to effectuate the powers which are given.*” (Italics added.)

Thus an administrator, even the probate court itself his creator, has those and only those powers which the statute provides or which are reasonably necessary to effect those granted. He has no further powers.

Since the administrator possesses only those powers which the statute bestows, it is clear he cannot subject the estate to the jurisdiction of another forum unless the statute says so. And since the powers of the probate court are likewise limited it, too, is helpless to authorize the administrator to do so unless the statute permits.

It results, then, that without a grant, explicit or implied in the Probate Code, the administrator may not transfer, and the probate court is powerless to surrender, the administration of a deceased’s affairs to a bankruptcy court.

It is of no consequence that Section 75 includes the farmer’s administrator and that the General Order permits him to apply for bankruptcy if the probate court

consents, for probate proceedings exist, as we have seen, solely by virtue of State statute, and the agencies employed by the statute in effecting administration and disposition of estates are its creatures, the administrator and the probate court, both controlled exclusively by the limitations it provides.

Clearly subsection "r" and General Order 50(9) were not designed to invade a State Probate Code. Such an attempt would have been idle for State probate statutes are the source and limit of all probate proceedings and a federal court, being a court of limited, and not general jurisdiction, has no jurisdiction of probate proceedings.

"A proceedings for the probate of a will is not a suit of a civil nature at law or in equity within the jurisdiction vested by the Judiciary Acts upon the federal courts, and they have no jurisdiction over such proceedings and of distribution of estates because (1) *the subject is statutory*, and (2) they are in the nature of proceedings in rem, and proceedings in rem are not a part of general equity jurisdiction of any court.

"The federal courts cannot distribute generally because the state courts must first establish the succession. *In truth they have no probate powers or authority.*" (Italics added.) 2 Hughes Federal Practice 216, 217.

The inclusion of the administrator within the term "farmer" and the General Order requiring him to obtain the probate court's authority are simply gestures which beckon him to the bankruptcy court, no more. But before he may accept their invitation he must have the consent of the probate court, *and both he and that court*

*must be authorized by the statute.*

Does the Probate Code of Utah contain such authority? Obviously not.

The Utah Probate Code was enacted long prior to the Frazier-Lemke Act and before the latter was ever conceived. Our own legislature, not to mention Congress itself, had never heard of it and therefore in enacting our Probate Code the legislature could by no power of divination have contemplated it. Consequently, the Probate Code nowhere mentions the Frazier-Lemke Act, Section 75, nor the subject of bankruptcy at all. Since it is nowhere mentioned it follows that nowhere is it provided therein that an administrator may resort to Section 75. The *express* provisions of the Code are exclusively in regard to the administration of a decedent's property *in a probate court* and its distribution to the heirs according to its proper devolution.

Distribution with dispatch is the Code's theme throughout. The representative must "immediately" give notice to creditors. Revised Statutes 1933, 102-9-1. He must file an inventory and appraisement in three months, 102-7-1; is required to account in 30 days after notice to creditors and also six months after his appointment, 102-11-32; pay for the funeral and last sickness as soon as he is in funds, 102-9-21, and may be required to distribute the property when the time for presenting of claims has expired, 102-12-4.

To the end that administration be closed without delay, creditors must present claims in at least four months or they are barred forever, 102-9-4, and must sue on their rejected claims within three months, 102-9-9.

(Yet under the Frazier-Lemke Act, however, they cannot maintain any suit at all against the farmer, so while the three years' moratorium slowly runs, the three months' limitation against the creditors is quickly over. In fact, subsection "o" enjoins all "proceedings" against the farmer in any court. Thus, query if the creditor may even *present* his claim after the administrator gets into the federal court.)

The spirit of the Probate Code is administration and final distribution for the sake of heirs and creditors with dispatch. That of Section 75 is altogether contrary, being delay and eventual avoidance of any distribution.

This court has held that the administrator and the probate court are endowed with only those *implied* powers reasonably necessary to effect the powers *expressed*. In re: Cloward, *supra*. And since nowhere in the Code is there any power *expressed* which authorizes an administrator to resort to the Frazier-Lemke Act or permits the probate court to authorize him to do so; and, since the only *implied* powers are those incident to the administration and distribution of estates *in the probate court* and not in a federal court or court of bankruptcy, (neither of which has jurisdiction in probate), it results that neither the administrator nor the probate court has any power *express* or *implied* to carry the estate and its administration over into the federal court and thus abandon it and the jurisdiction of the probate court to a court of bankruptcy from which it may not be reclaimed.

The court therefore erred in entering its order authorizing the administrator to do so herein and the same must be reversed.

## 5. THE ADMINISTRATOR AND THE PROBATE COURT ARE POWERLESS TO SUBMIT THE REAL PROPERTY OF THE ESTATE TO THE BANKRUPTCY COURT

But in any event the administrator may not submit the real property of an estate to a proceedings under the Frazier-Lemke Act. It has been so held where the question has arisen. We have found only two instances where the question was decided. Both times it was against the administrator.

The case of *in re: Reynolds*, 21 F. Supp. 369, involved the Probate Code of Oklahoma and was decided by a federal district court there in 1937. The facts are strikingly similar to those at bar. Three months after filing his petition under Section 75 (here 1 year) the debtor died and the proceedings were dismissed.

One month later (here, two) the administrator was appointed.

Eleven months thereafter (same as here) the administrator petitioned the federal court to revive the proceedings and was met with a motion to dismiss *the entire* cause on the grounds that title to the real property vested immediately in the heirs under the Oklahoma law. The section in question (O. S. 1931, Sec. 1615) identical with our own Section 101-4-2 is as follows:

“The property, both real and personal, of one who dies without disposing of it by will passes to the heirs of the intestate, subject to the control of the court, and to the possession of any administrator appointed by the court for the purposes of administration.”



The federal court, bound as it was thereby, looked to the state court decisions on the subject of descent and said that the Oklahoma Supreme Court had commented on this section several times and quoted from the state court in *Seal vs. Banes*, 168 Okl. 550; 35 P. (2d) 704:

“Upon a person dying intestate, the heirs of such person become immediately vested with the estate, and the estate is indefeasible, subject to the control of the county court and the possession of the management by the administrator, and it is his duty simply to preserve the estate until distribution to the heirs, unless, and in the manner provided by statute, the necessity should arise for a sale.”

The court also quotes from another state court decision, in re: *Hibdons Estate*, 102 Okl. 145; 228 P. 154:

“Under section 11300, C. L. 1921, all property, both real and personal, of all persons who die intestate passes to the heirs of such intestate, subject to the control of the county court and subject to administration.”

The court continues saying:

“The question of whether or not an administrator can maintain an action in bankruptcy under Section 75 of the Bankruptcy Act has not been passed upon by the higher courts, but in an opinion involving the same substantial provisions of the statute of Illinois as are contained in the Oklahoma statutes, with reference to the powers of executors and administrators, the district court for the Eastern district of Illinois, in the case of in re: *Buxton*, 14 F. Supp. 616 has held, quoting from the sixth syllabus: Deceased farmer’s ad-

ministrator, appointed under Illinois law, could not be adjudicated a bankrupt under statute, notwithstanding statute includes personal representative of deceased farmer within designation of 'farmer' in view of limited authority of administrator over decedent's real estate under Illinois law and his consequent inability to subject decedent's real estate to provisions of statute. (11 U. S. C. A. 203 "r").

"The Illinois statute is so similar to the Oklahoma statute that the court cannot conceive of a different conclusion under the circumstances of this case than that reached by Judge Wham in the Illinois case. It is the judgment of the court that the administrator cannot maintain this action." In re: Reynolds, 21 F. Supp. 369 (D. C. Okl.)

Thus, under statutory provisions identical with those of our own Probate Code regarding descents of real property the court held the administrator was without authority to maintain the Frazier-Lemke proceedings and they were dismissed.

The Illinois federal case, Buxton's Estate, 14 F. Supp. 616, involved a petition to the federal court under Section 75 made in the first instance by the administrator and "amended" later in an attempt to bring him within subsection "s".

The creditors moved a dismissal. The grounds of the motion were that under the Illinois Probate Code administrators are "without power to enter into bankruptcy under Section 75, even though that section has opened the doors to representatives of deceased persons."



The court asks:

“May an administrator of a deceased farmer appointed under the laws of Illinois be lawfully adjudicated a bankrupt under said subsection (s) in view of the fact that said subsection opens the door of bankruptcy thereunder to ‘any farmer’ and that subsection (r) of said Section 75 . . . includes the personal representative of a deceased farmer”? In re: Buxton, *supra*.

It answers thus:

“My conclusion is that while the term ‘personal representative’ as used in subsection (r) of Section 75 may be broad enough to include all executors and administrators of the estates of deceased farmers, *it does not follow that all executors and administrators may lawfully enter into bankruptcy.*” in re: Buxton, *supra*.

And the court continues:

“It was not the purpose of Congress through this legislation to attempt to add to or remove limits from the power and authority conferred by a state statute upon a personal representative created solely by virtue of such statute through an order of court authorized thereon as is an administrator of an estate of a deceased person under the laws of Illinois. Rather it would seem that the sole purpose of Congress was to make Sections 74 and 75 of the Bankruptcy Act available to the personal representatives of deceased farmers, who by statute, will or other creating means are given sufficiently broad powers to take advantage, depending on the extent of such power, of all or any part of the provisions of said sections.” In re: Buxton, *supra*.

As to the administrator's power under the Illinois law it is said:

“An administrator of an estate of a deceased person in Illinois is appointed under statutes giving him strictly limited power. Being a creature of statute, he must derive his entire authority thereunder.

“An administrator takes no title to real estate, either legal or equitable, but it descends to and vests in the heirs at once upon the death of the ancestor.” In re: Buxton, *supra*.

Then coming to the administrator and the Frazier-Lemke Act, the court concludes:

“Accepting the foregoing as an accurate statement of the very limited powers of an administrator under the laws of Illinois, it is difficult to see how he could, within the limitations of those powers, lawfully take advantage of said subsection (s) insofar as it applies to real estate. For him to do so would require him to take and for a period of three years retain possession of the real estate which on the death of his decedent vested in the heirs at law.” In re: Buxton, *supra*.

The Illinois federal court then finally concluded that the administrator with his limited power and authority over the real estate cannot subject it to the provisions of Section 75 and granted the motion to dismiss.

And so by the only decisions available to our knowledge, it is unanimously considered that the administrator is without power to subject the real property of an estate to Section 75 and the order herein must be reversed.

## 6. THE ADMINISTRATOR'S PETITION FAILS TO STATE A CAUSE OF ACTION

Aside from the question of the power of the administrator and probate court under our Code to subject the property, particularly real estate as here, to the bankruptcy court which is clearly lacking, the administrator's petition was wholly insufficient. (Abs. 2, Tr. 31.) The petition follows:

### PETITION

"Comes now Sterling P. Harris, administrator of the above entitled estate, and respectfully shows to the court:

"That at the time of the death of Anna L. Harris, there was pending in the United States District Court for the District of Utah, a proceeding under Section 75 of the Bankruptcy Act; that said proceeding was abated by the death of said Anna L. Harris.

"Your petitioner further shows to the court that unless said proceeding is revived and reinstated, the entire estate of the said deceased is in danger of being lost.

"WHEREFORE, said petitioner prays for an order of this court authorizing him to apply to the United States District Court for an order reviving and reinstating the said debtor relief proceeding."

As the reader will see, the petition wholly fails to state facts sufficient to constitute a cause of action. Only two facts, no more, are stated. These are simply:

(1) That when Mrs. Harris died the Frazier-Lemke proceedings were pending in the federal court; and,

(2) that they were then abated.

The only remaining allegation is not one of *fact* but is purely a *conclusion*:

“That unless said proceedings are revived and reinstated, the entire estate of the said deceased is in danger of being lost.”

The petition is barren of any *facts* showing a reason for the court to grant it. No explanation of how the estate, the heirs and creditors and others concerned would benefit by the bankruptcy proceedings being revived was made therein. No facts were exhibited to show the bankruptcy court could or would better administer the estate than the probate court and that therefore the latter should abdicate and should surrender its jurisdiction to the federal court, or explaining in any way why the probate court should abandon its solemn duty and jurisdiction specially enjoined upon it by statute to administer to a conclusion the estate in its own court to the exclusion of all others.

Probate courts are quite competent to administer the affairs of deceased debtors. In fact, they themselves have authority to authorize compositions by administrators of debtors, which the administrator must admit, would have to be the first objective he would seek in the bankruptcy court under the first part of Section 75, “a” to “r”.

The Probate Code specifically authorizes compositions for harrassed debtors. It reads:

“102-11-12. Whenever a debtor of the decedent is unable to pay all his debts, the executor or administrator, with the approval of the court or judge, may compound with him and give a discharge upon receiving a fair and just dividend of his effects. A compromise may also be authorized when it appears to be just and for the best interests of the estate.”

The petition does not state that the administrator is *unable* to effect a composition or extension in the probate court where he belongs, or that he will be able to effect one at all in the bankruptcy court; or that if he could do so in the state court, that he could do better in the federal court. For all that appears he could have obtained a composition in the probate court as effectively and advantageously as any he could hope for in the federal court.

Nor is his conclusion "that the estate is in danger of being lost" of any aid in his attempting to state a cause of action for—

"conclusions of law are not to be considered in determining whether a pleading states a cause of action." *Gunnison Irr. Co. vs. Peterson* 74 U. 460. 280 P. 715. And see to same effect 1 *Bancroft's Code Pl.* 90. *Id.* 10 Yr. Supp. 26.

And since the petition does not state a cause of action it can be challenged at any time and place, even on appeal, and the failure to demur is inconsequential. 1 *Bancroft's Code Pl.* 157. *Id.* 10 Yr. Supp. 396. 49 C. J. 820. *Id.* 839. For example, it is said:

"1216. An objection that the declaration, petition, or complaint does not state facts sufficient to constitute a cause of action may be raised at any time, and at any stage of the proceedings; it may be raised after answer, after the time to demur or answer has passed, at the trial, before verdict or judgment, after judgment, or even for the first time on appeal." 49 C. J. 820.

Since the petition failed to state a cause of action, the court erred in entering its order thereon and the same must be reversed.



## 7. THE COURT ABUSED ITS DISCRETION IN GRANTING THE ADMINISTRATOR'S PETITION

We have seen that under the Probate Code from which they derive their powers the administrator and the probate court are powerless to enter into bankruptcy and that regardless of their lack of power the petition failed to state a cause of action.

But had they such power and had the petition been sufficient, granting the administrator the authority he sought would not be a matter of right but would involve the exercise of the sound discretion of the court.

Certainly the court in such cases would have the duty to appraise the situation and determine two things: (1) Whether any benefit was likely to result to the estate, the heirs and creditors by its allowance, and, if so, (2) whether such benefits were calculated to *exceed* those available in the probate court. If no benefit were to accrue, obviously the petition should be denied. And although certain benefits may appear likely, still the court should not grant the petition unless the benefits are fairly calculated to *exceed* those available in the probate court. For certainly there would be no proper reason in a probate court's resigning in favor of another unless it were assured such other would do a better job than it. No such assurance was made to appear by this petition.

Now the deceased had journeyed in the bankruptcy court for one year without any benefit before she died. Her administrator also had had charge of the estate with-

in the probate court for another year thereafter. Altogether they had spent two years in the two courts before the petition was filed herein. Both had been unable to pay the debts of the estate. Though both courts had power to authorize a composition with creditors, they had failed to obtain one in either.

After two years of inaction and only five days before sheriff's deed, the administrator set out to effect a composition. He offered no excuse for this previous inaction. Neither did he suggest how a composition might be accomplished. Not even did he say it would be possible. Although, if it could be arranged, the probate court had power to approve it, he avoided that court in this regard. The reason is obvious. He did not seek a composition at all. What he sought was delay. More delay besides the two years already spent. He wanted three more years, which would make five in all (perhaps now seven) to use and withhold the property from the heirs and from the creditor who had invested the savings of its depositors in this farm, and to whom it rightfully should belong. No solution was offered. Nothing but delay and more delay would be the result. The situation was hopeless. But notwithstanding, the lower court granted the petition. In view of all of the circumstances it, in so doing, did not exercise a sound discretion, but its discretion was abused, and its order therefore was erroneous and should be reversed.

## 8. CONCLUSION

Whether an administrator should be empowered to resort to bankruptcy is a question exclusively for the legislature of this State. To date it has not ordained that he may, although it has already met and adjourned four times while the Act has been in force. Each time it has failed to give its authority. Until it does, no court may assume to do so for it.

It is submitted by appellant:

1. That the authority of the administrator and the probate court are limited by the Probate Code to the powers therein contained and the right to enter into bankruptcy is not conferred and the administrator and court are therefore powerless to do so.

2. That since the real property of an intestate instantly devolves upon his heirs, the administrator's limited powers thereover are not sufficient to allow him to resort to the Frazier-Lemke Act and deprive the heirs and creditors of an administration and distribution by a probate court for 3 years—now perhaps 5.

3. That the administrator's petition fails to state facts sufficient to constitute a cause of action.

4. That regardless of the foregoing, the trial court abused its discretion in granting the petition, the deceased and administrator having already spent 2 years in the bankruptcy and probate courts without avail, the latter now seeking a further moratorium of 3 more, aggregating 5 years in all, with the possibility of extending it another 2 years for a total of 7 if the bill as reported by the House Committee becomes law.



5. The order authorizing the administrator to apply to the United States Court is erroneous, and the trial court exceeded its powers thereby and the same should be reversed and set aside with costs to appellant.

Respectfully,

THOMAS & THOMAS,

*Attorneys for Appellant*

March 23, 1940