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## THE SALE OF COLLATERAL SECURITY BY THE PLEDGEE THEREOF AFTER THE INTER- VENTION OF THE BANKRUPTCY OF THE PLEDGOR

By RICHARD ROBINSON MCGINNIS\*

The more frequent occurrence of the necessity, because of depressed economic conditions, for lenders of money to realize upon security pledged by the borrower to secure the payment of the loan has revived interest among the profession in several questions of vital interest and great practical importance. Whether this necessity presently increases or decreases, questions of this nature sufficient to produce considerable litigation and controversy have already arisen.

Among these questions the one now considered has given rise to numerous suits attended with considerable delay and expense in connection with the satisfaction of the indebtedness, and in some, if not in fact in many, instances, the unsatisfactory condition of the law has already resulted, and, if permitted to continue, will further result, in large financial loss to both the lender—pledgee and the borrower—pledgor. Banks have been advised following a recent decision of the Supreme Court of the United States<sup>1</sup> that sales of securities pledged to them to secure their loans, the loan being overdue and the borrower in default, could not be made by them without the permission and perhaps except under the direction of the Bankruptcy Courts. Although arising on a creditor's bill in equity and not in a bankruptcy proceeding, the opinion of Judge Lindley in the now famous In-

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\*Of the Evansville Bar.

<sup>1</sup> In *re Isaacs v. Hobbs Tie & Timber Co.* (Feb. 24, 1931), 282 U. S. 734, 75 L. ed. 645.

sull cases,<sup>2</sup> in which some of the recent bankruptcy cases are discussed and cited, and the reversal of Judge Lindley's decision by the Circuit Court of Appeals for the Seventh Circuit<sup>3</sup> on the question of the jurisdiction of the Court over the securities pledged without a determination of the merits of the fundamental question here considered, have given rise to considerable doubt in the minds of lawyers as to the present condition of the law and an equal amount of speculation as to what the law ultimately will be in the premises. And, generally, uncertainty and doubt as to the rights of the lender of money who, having taken a pledge of sufficient securities, thought himself or itself secure, notwithstanding the institution of insolvency proceedings by the pledgor or the pledgor's other creditors, have been widely expressed and have muddled the opinions of legal counsellors accustomed to frequent dealing with problems of that nature to such an extent that their opinions are of but little value to the troubled banker or other lender of money confronted with the necessity of coming to an immediate decision as to what action to pursue, following the hopeless default of the borrower, in the best interests of himself or his institution and its customers. While these doubts, uncertainties and opinions, it is submitted, have been expressed and given as much perhaps by a subconscious consideration, or a feeling, of what sometimes appears, at first blush, to be the "equities" of the case when a pledgor is about to be "sold out," as from any too great uncertainty as to the state of the law in the premises, an examination of the opinions of the Courts dealing with this problem reveal a wide difference of opinion as to the proper principles which should underlie a decision on this question, so that what will be the ultimate decision of the Courts, if such has not already been reached, can now be but little more than a guess. Even the most cursory review of the situation and examination of the opinions of the Courts in those cases in which the Courts have spoken upon the question is convincing of the urgent desirability of a speedy settlement of the law on the point or a general recognition that the law is already settled, if indeed that be true.

Briefly stated, the question is: The indebtedness being overdue and the obligor in default, has the pledgee of securities

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<sup>2</sup> *Cherry v. Insull Utility Investments, Inc.*, *Schoeneman v. Corporation Securities Co.* (May 28, 1932), 58 F. 2d 1022.

<sup>3</sup> *Guaranty Trust Co. of N. Y. v. Fentriss, et al.*, and five other cases (Oct. 17, 1932), 61 F. 2d 329.

pledged to secure the debt the absolute right to sell the securities after the intervention of the bankruptcy of the obligor—pledgor without the permission or consent of the Bankruptcy Court so long as he does so pursuant to the contract or agreement of pledge and in strict conformity to its terms?<sup>4</sup> Or, to put it in another way, has a Court of Bankruptcy the authority to interfere in any manner with such a sale by the pledgee or to compel the pledgee to refrain from realization upon the security until the Bankruptcy Court gives its consent to the sale?

Cases in which, in connection with the sale, fraud or oppression of the pledgor exist or are made to appear are not within the scope of his discussion and are not considered.

It should be stated at the outset that the security referred to throughout these observations is to be understood as being limited to collateral securities in the signification in which those words are commonly used in the banking and commercial world, such as stocks, bonds, insurance policies, promissory notes and other choses in action and tangible personal property of similar kind and character and similarly evidenced. For the purposes of this discussion no difference between these different kinds of collateral securities will be noticed, for it is submitted that the same legal principles and considerations apply to all of them and that no difference in these principles and considerations has ever been or can validly be made on account of a difference in the nature of the personalty constituting the pledged security. The foreclosure of mortgages and the realization by a lender—mortgagee upon real estate security in the event of bankruptcy will, however, be considered in so far as a consideration thereof is

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<sup>4</sup> The necessity for an exact compliance by the pledgee with a contract or agreement of pledge has been illustrated in a recent Indiana case. In *Eppert v. Lowish* (1930), 91 Ind. App. 231, 168 N. E. 616, it was held that even though the pledge agreement authorized a sale of bonds by a pledgee "at public or private sale without advertising the same, or demanding payment or giving notice," the only provision for a public sale by the pledgee was "without advertisement" and the pledgee having elected to sell at public sale after giving a notice (which the Court said was not within the power given the pledgee by the pledge agreement) and having, therefore, elected to sell at public sale with public notice and the notice actually given by the pledgee having been, in the opinion of the Court, insufficient, the two paragraphs of complaint stated a cause of action for conversion and the Court below erred in overruling demurrers to them. In its opinion the Court expressly stated that the averments of fraud appearing in the first paragraph of complaint were being disregarded by it. (Petition for rehearing denied, 91 Ind. App. 238, 169 N. E. 884.)

helpful or of importance in connection with a thorough discussion of the problem at hand. It having been stated by one learned District Judge in a case arising on a creditor's bill in equity for the appointment of receivers and the preservation of a corporation's property<sup>5</sup> that "no good reason appears why there should be any difference in principle in the power of the Court to restrain action by a court or a party from foreclosure of a lien upon realty without consent of Court and that to restrain sale of securities whose situs is within the Court's jurisdiction," the importance of a consideration of such cases is apparent. In point of fact, an inquiry as to whether there is any distinction between cases of the foreclosure of real estate security and cases of the sale of collateral securities is of the essence in any examination of this problem. The advice of counsel to holders of collateral securities that they cannot sell such security without the permission of the Bankruptcy Court in view of the decision in *In re Isaacs v. Hobbs, etc.*, *supra*, is of necessity predicated upon there being no such distinction at all.

In the Bankruptcy Act of 1898 (U. S. C. Title 11)<sup>6</sup> is to be found whatever power and authority there may be, if there be any, in the courts of bankruptcy to prevent such sales of collateral security by a pledgee.

No provision in express terms granting such power or authority to such courts is contained in the Act. Section 2 thereof (U. S. C. Title 11, Sec. 11) provides "That the courts of bankruptcy as hereinbefore defined . . . are hereby made courts of bankruptcy and are hereby invested . . . with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings . . . to . . . (15) make such orders, issue such process and enter such judgment in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act. . . . Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated. (As amended by Acts of February 5, 1903, and June 25, 1910.)" Does this section of the Act invest bankruptcy courts with such power and authority?

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<sup>5</sup> Lindley, District Judge, in the *Insull* cases, *supra*.

<sup>6</sup> No provisions relating to the problem here discussed have been included in any of the acts amendatory of said Act, namely: the Acts of February 5, 1903, June 15, 1906, June 25, 1910, March 2, 1917, January 7, 1922, May 27, 1926, February 11, 1932, or March 3, 1933.

It has been suggested that this section, standing alone, gives bankruptcy courts such power and authority. It is submitted that a contention that this section of the Act confers any such power or authority is untenable. The power to enforce obedience to its lawful orders is inherent in every court. This provision of the Act is simply declaratory of that power. Having been given power to make orders necessary to carry out the provisions of the bankruptcy laws, the courts of necessity must possess the power to enforce such orders. The declaration of this power by the Congress is the full intendment of this section. If the court has the power to make an order enjoining, let us say (an application to the Bankruptcy Court for a restraining order or an injunction is, in the nature of the case, the way in which the question has most frequently arisen and will most frequently arise) a sale by the pledgee of collateral security after the intervention of bankruptcy, it of course has the power to enforce it. But whether the power to make such an order, or any order interfering in any way with such sale, is possessed by the bankruptcy courts is another matter and we must look elsewhere in the Act than to this section to find it. Is there any provision of the Act which by implication or upon reasonable construction can be said to give the bankruptcy courts power to make a lawful order to this effect?

An examination of the Act reveals no provision prohibiting, either by implication or upon a reasonable construction thereof, the sale by a pledgee of collateral security held by the pledgee under a valid<sup>7</sup> agreement of pledge and pursuant to its terms.

It would seem that the pledge itself, together with the lien thereof, is expressly recognized, protected and preserved by the Act. Section 67d of the Act (U. S. C. Title 11, Sec. 107d) provides:

“Liens given or accepted in good faith and not in contemplation of, or in fraud upon, this act, and for a present consideration, which have been recorded according to law, if record

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<sup>7</sup> Any question of the validity of the contract or agreement of pledge is of course not within the scope of this discussion and the validity of the contract or agreement of pledge is throughout this discussion assumed. It may be said in passing that the contract or agreement of pledge and the rights of the respective parties thereto are governed by the laws of the state where the same is made. *Hiscock v. The Varick Bank*, (1907) 206 U. S. 28, 51 L. ed. 945.

thereof was necessary in order to impart notice, shall, to the extent of such present consideration only not be affected by the act."

That pledges of collateral security are such liens as receive the recognition of this provision and come within its protection, seems to be clearly settled. Even those courts which refuse to permit the sale except with their permission do not attempt to declare that such pledges and the liens thereof do not fall within this provision. They concede that this is the case, but assert that there is a difference between the pledgee's substantive right on the one hand and his remedy on the other, and that, while the former is recognized and protected by the Act, the latter must be pursued and enforced only with the permission of the court of bankruptcy.

That pledges of collateral securities come within this provision of the Act is obviously sound. Such pledges are of course liens upon the security and liens are the subject matter of section 67d. It is of importance to note the large proportion that pledges of personal property bear to the total number and amount of liens in existence today, amounting into the billions of dollars.<sup>8</sup> It was the purpose and intendment of the Congress in enacting a national insolvency law to preserve rather than destroy any of the rights or advantages enjoyed by creditors under the laws of the states unless the same were repugnant to some specific provision of the Bankruptcy Act. This provision (Sec. 67d) of the Act is in line with this spirit of the Act and in harmony with other provisions of the Act which evidence and carry into effect this purpose and intendment of the legislature. For example, under Sections 70a of the Act (U. S. C. Title 11, Sec. 110a) it has been held that the trustee in bankruptcy takes no better title than the bankrupt has as to bona fide lienors, and under that provision (Sec. 70e, U. S. C. Title 11, 110e) which gives the trustee power to avoid any transfer, including liens fraudulent as to creditors, all bona fide transactions are recognized and protected. A clear statement of this spirit and inten-

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<sup>8</sup> As of June 30, 1933, the loans, unsecured and secured by all forms of security, of the 4,902 national banking associations existing in the United States on that date totalled \$8,116,972,000.00. While exact figures are not available at the present time, at least 50% of this amount is secured by collateral securities of the kind considered in this discussion, according to a conservative estimate.

tion of the Bankruptcy Act is found in *In re Mertens, et al.* (1906) (C. C. A. 2d) 144 Fed. 818, which case is affirmed by the Supreme Court in *Hiscock v. The Varick Bank* (1907), 206 U. S. 28, 51 L. ed. 945:

"That Congress did not intend that lienors or pledgees should be prejudiced in enforcing their rights by the commencement of the proceedings in bankruptcy is indicated by the change made in the present Act with respect to the proof of claims by secured creditors. By the former Act it was provided that a secured creditor should be admitted as a creditor only for the balance of his debt after deducting the value of the pledged property ascertained by an agreement between him and the assignee in bankruptcy, or by a sale under the direction of the Court. Under that provision, if a pledgee sold the pledged property prior to the appointment of the assignee without the permission of the Court, he was precluded from proving his claim or from obtaining any share of the bankrupt's estate to which he otherwise would have been entitled. The present Act provides that the value of his security may be determined, among other methods, by converting it into money pursuant to his contract rights, and thus after he has enforced it as the contract with the debtor allowed, he is permitted to prove the unsatisfied balance of his claim."

The pledge itself being recognized and protected and preserved from destruction by this provision of the law in the event of the bankruptcy of the pledgor, what are the provisions of the Act and what have been the holdings of the bankruptcy courts upon the question: Can the holder of such a lien proceed to enforce his lien by a sale of the pledged securities without the consent of the bankruptcy court and apart from the direction and superintendence of that court?

Just as Section 67d deals with the preservation of the pledge itself and the lien thereof, so another section of the Act deals with the question of the conversion of securities into money and the ascertainment of their value. Section 57h (U. S. C. Title 11, Sec. 93h) provides:

"The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors *or* by such creditors and trustee by



agreement, arbitration, compromise or litigation, as the Court may direct, and the amount of such value shall be credited upon such claims and a dividend shall be paid only upon the unpaid balance."

It would seem that the clear language of this section gives to the pledgee the right to convert the pledged securities into money according to the terms of the contract or agreement of pledge. The two methods of determining the value of securities set out in this section are connected only by the word "or." This is in the disjunctive, and to read the statute as if the word "and" occupied the place of the word "or" and in such a way as to say that it means that, while the right to convert the securities into money according to the agreement pursuant to which they were delivered to the pledgee is recognized, this must also be done "by agreement, arbitration, compromise or litigation, as the Court may direct" would be to misread the language of the act and to pervert its clear purpose and meaning.

On this matter Remington in his treatise on Bankruptcy, 3rd Ed., Vol. 2, Sec. 923, says:

"If the agreement under which the securities were delivered provides the method for converting them into money, the creditor holding the security has the right to have the security converted into money according to such method, providing he follows such method. (Cases cited)."

In *In re Mertens*, supra, the Court said, in considering this matter:

"Section 57, subdivision h, prescribes several modes of valuation, and the one referred to is exclusive of the others and is superfluous and useless unless it is intended to authorize the creditor, without interference by the trustee or the court, to value his own security, provided he turns it into money, 'according to the terms of the agreement pursuant to which' it was delivered to him."

And, in view of the following language of the Supreme Court of the United States construing this section (57h) in *Hiscock v. The Varick Bank* (1907), 206 U. S. 28, 51 L. ed. 945: "The Court was by this subdivision empowered to direct a disposition

of the pledge, or the ascertainment of its value, where the parties had failed to do so by their own agreement. It is only when the securities have not been disposed of by the creditor in accordance with his contract that the Court may direct what shall be done in the premises," it is submitted for consideration whether any interference by a court of bankruptcy with a sale by a pledgee of collateral security pursuant to the contract or agreement of pledge and in strict conformity to its terms, in the absence of course of any fraud or oppression, is not a direct contravention of this provision of the bankruptcy law.

To examine critically all of the cases bearing upon the question would require more time and space than is permitted, but in the recently decided cases hereinafter considered most of the cases dealing with the problem have been analyzed or at least cited.

Two lines of cases each reaching a diametrically opposite result seem to constitute the case-book authorities upon the question under consideration. An examination and analysis of these cases leads one to a consideration of whether the difference in the result obtained is not occasioned by a difference of opinion on the bench as to these underlying propositions or problems, which, broadly stated, are (1) whether there is or should be any valid distinction in the case of a pledge of collateral securities between the substantive right of the pledgee and his remedy; and (2) whether any particular result should be reached in the case of a pledge of collateral securities because of the nature of such property or the nature and purpose of such pledges and the liens thereof and their position and usage in the present business world. This statement of the underlying considerations concerning which there is a contrariety of opinion resulting in conflict in the decisions is not made either as an accurate statement of the exact reasons given by the courts or as a summary statement of the entire problem, but rather as a general guide that may or may not be helpful in a critical examination of the cases themselves.

In *Hiscock v. The Varick Bank*, *supra*, certain policies of life insurance had been assigned to the bank as collateral security. In upholding the right of the bank to sell the policies Mr. Chief Justice Fuller, speaking for the Court, said:

"When the petition in the present case was filed the bank had a valid lien upon these policies for the payment of its debt. The

contracts under which they were pledged were valid and enforceable under the laws of New York, where the debt was incurred and the lien created. The bankruptcy act did not attempt, by any of its provisions, to deprive a lienor of any remedy which the law of the state vested him with; on the other hand, it provided, Sec. 67d: 'Liens given or accepted in good faith and not in contemplation of, or in fraud upon, this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this act.' "

This case, it would seem, is clear authority for the proposition that a pledgee has the absolute right to sell collateral security pursuant to the contract or agreement of pledge and in conformity with the terms thereof without the consent of the Bankruptcy Court or under the direction of that Court, in the absence of fraud or oppression. No modification of this decision of the Supreme Court appears to have been made by that tribunal and it is perhaps not too much to say that this case states the law controlling the problem considered.

Some of the more important other cases commonly cited as authority for the existence of the pledgee's right of independent sale it may be profitable to briefly refer to. The most recent adjudication in the Circuit Courts of Appeal supporting the right is *In re Hudson River Navigation Corp., Ex Parte Ten Eyck*, Appeal of Chase National Bank (C. C. A. 2d) (April 4, 1932), 57 F. 2d 175. After considering the nature of the pledgee's interest in the securities the Court said:

"It seems unnecessary to refine too far; in substance entire control over the obligation passes to the pledgee, who certainly gets possession of the documents, without which, so long as the pledgee acts in accord with the agreement, the pledgor cannot assert any rights as obligee. For practical purposes the pledgee has therefore immediate dominion as between the two, and with it goes the power to resist any action by the bankruptcy court, which must be founded on the fact that the bankrupt had such dominion when the petition was filed. This was implicit in our ruling in *In re Mertens*, 144 F. 818, and we directly held so in *In re Mayer*, 157 F. 836; since when it has been generally understood that bankruptcy does not touch the power of a pledgee of shares of stock to close out his collateral. Nothing would be

more disturbing to transactions of the kind than a doubt thrown upon that ruling. Millions of dollars are daily lent upon like collateral, which fluctuate from hour to hour; unless the pledgee is free to choose his time to sell, his security may disappear. The same is not indeed true of shares like those at bar, or of notes, neither of which vary rapidly in value; but the same legal reasons exist as to them also. The pledgee, having taken possession of the documents, supposes himself for just that reason to be the sole judge of his necessities and lends on that understanding. So long as he keeps within the terms of the agreement, he need not concern himself with the pledgor's fate, or that of his creditors, who must stand in his shoes."

This was a case in which the bankrupt had pledged, for loans made by it, together with other collateral, two notes of the bankrupt company secured by a chattel mortgage upon a steel steamer. The agreement of pledge assigned these securities to the bank and provided that it might sell them without notice upon default, as it was proposing to do. The trustee in applying for an order enjoining the proposed sale did not allege that the pledge was invalid or that the bank was not proceeding in accord with the agreement, but simply that the sale at that time would result in great sacrifice of the collateral which was amply sufficient to protect the loans, that some of the securities were essential to the conduct of the bankrupt's business and that a reorganization of the bankrupt concern was in contemplation.

Whatever one's opinion as to the correctness of the Court's decision, the common-sense and sound reasoning of the opinion, which does not seem during the past year and a half to have been disturbed or distinguished on any ground, supplies strong support for the result reached by the Court.<sup>9</sup>

In *In re Ironclad Mfg. Co.* (C. C. A. 2d) (1912), 192 F. 318, the same Circuit Court of Appeals, being presented with the petition of an unsecured creditor, representing half of all the creditors, alleging that a receiver in bankruptcy had been appointed, that the bankrupt company had created a bond issue and that certain banks holding the bonds as collateral security were taking steps to sell the same and that a restraining order should be issued effective for sixty days after the election of a trustee

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<sup>9</sup> It does not appear that a petition for a Writ of Certiorari was ever passed upon by the Supreme Court in this case, and, presumably, no such petition was filed.

in order that irretrievable loss to the unsecured creditors of the bankrupt estate might be prevented, denied the petition on the authority of *Jerome v. McCarter*, (1877) 94 U. S. 734, 24 L. ed. 136.

*Jerome v. McCarter* is a case involving a mortgage covering a canal and certain franchises, as well as certain bodies of land, supporting certain bonds which had been issued and were outstanding. A detailed examination of this case is not permitted because of lack of time and space, but the following language of the Court with reference to the bonds of the bankrupt concern should be noted:

"There is some proof that, when the company became bankrupt some of the bonds were held as collaterals for loans made to the company smaller in amount than the bonds pledged. The bonds were subsequently sold by the pledgee and the present holders own them by absolute right. The position that the pledgees could not sell the pledge after the adjudication in bankruptcy is quite untenable. It is sustained by nothing in the Bankruptcy Act. The bonds were negotiable instruments. They passed by delivery and even were there no expressed stipulation in the contracts of pledge that the pledgee might sell on the default of the pledgor, such a right is presumable from the nature of the transaction. Certainly the Bankruptcy Act has taken away no right from a pledgee secured to him by his contract."

The statements of the leading text writers on the subject under immediate consideration are contained in a footnote.<sup>10</sup>

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<sup>10</sup> "Pledgees and other lienholders in possession of securities upon property of the bankrupt estate will not be enjoined from selling their securities in accordance with the contract unless there be fraud or oppression. In *re* Mayer, *Leslie v. Bayles*, 19 A. B. R. 356, 157 Fed. 836 (C. C. A. N. Y.). Compare *In re Searles*, 29 A. B. R. 635, 200 Fed. 893 (D. C. N. Y.); *In re Hasie*, 30 A. B. R. 83, 206 Fed. 789 (D. C. Tex.); *Griffin v. Smith*, 41 A. B. R. 354, 177 Cal. 481, 171 Pac. 92. Contra, inferentially, *In re Cobb*, 3 A. B. R. 129, 96 Fed. 821 (D. C. N. Car.) wherein the Court seems to consider that pledgees in possession at the time of bankruptcy must nevertheless submit their securities to the Bankruptcy Court. This case was decided, it must be remembered, before the decision of the U. S. Supreme Court in *Bardes v. Bank*, 178 U. S. 524, 44 L. ed. 1175, 20 Sup. Ct. Rep. 1000, 4 A. B. R. 163."

Remington on Bankruptcy, 3d Ed., Vol. 5, Sec. 2510.

Again this same authority says: "It is not necessary to ask the direc-

Notwithstanding these decisions above cited, is a lawyer safe in advising his client that he may sell the collateral security held by him, so long as he does so pursuant to the valid contract or agreement by which he holds the same and in strict conformity to its terms, after a petition in bankruptcy has been filed by or against the pledgor?

It is not too much to say that perhaps greater interests have been affected by the decision of the Supreme Court of the United States in *In re Isaacs v. Hobbs Tie & Timber Co.* (Feb. 24, 1931), 282 U. S. 734, 75 L. ed. 645, than by any decision of that Court in recent years.<sup>11</sup>

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tion or permission of the court to realize on the security where it is realized on according to the terms of the contract."

Remington on Bankruptcy, 3d Ed., Vol. 2, Sec. 923.

Collier in his work on Bankruptcy, Collier on Bankruptcy, 13th Ed., Vol. 1, p. 110, says: "A bankruptcy court may not restrain a sale by the pledgee of property held by him under a valid agreement of pledge by the bankrupt and pursuant to its terms. *Matter of Mayer* (C. C. A. 2d Cir.), 19 Am. B. R. 356, 156 Fed. 432." (Note: Under this statement the author in the supplement to his 13th Edition of 1931 and 1932 cites *Matter of Purkett-Douglas & Co.* (D. C. Cal.), 17 Am. B. R. (N. S.) 568, 50 F. 2d, 435, as authority for the proposition that a bankruptcy court may enjoin sale of securities belonging to the bankrupt and pledged as security for payment of a note until adverse claims of the parties can be adjudicated in a plenary suit. This case will be considered *infra*.) "Such a pledge and the rights of the parties thereto are governed by the law of the state where made, *Hiscock v. Varick Bank*, 206 U. S. 268, 18 Am. B. R. 1, and being valid and not forbidden by any provision of the bankruptcy act, cannot be interfered with by the court."

<sup>11</sup> The case has attracted great attention among the profession. The decision of the Court even within the limits of its holding upon the facts of the case has been adversely criticized. It is stated with alarm by some that it has apparently changed the law relative to the obtaining of the consent of the bankruptcy courts to bring proceedings to foreclose a mortgage in a state court after the adjudication. It is stated by others that the Court's decision is in harmony with the past decisions and with statutory authority although it does perhaps interpret the Act differently and more closely follow the Act.

It is contended on the one hand that the decision of the Court to the effect that the consent of the Bankruptcy Court must first be had before a state or federal court (other than the bankruptcy court) has jurisdiction, after an adjudication, to deal with the bankrupt's real estate or liens thereon, implies that if such consent be obtained, such jurisdiction in the state or other federal court would exist and is therefore inconsistent with the statement of Mr. Justice Roberts in the opinion "Indeed a court of bankruptcy itself is powerless to surrender its control of the administration of the estate." On the other hand it is pointed out that this state-

In this case one Henrietta A. Cunningham, who owned real estate in both Texas and Arkansas, had mortgaged certain of the land in Arkansas to secure a note. The note and mortgage were held by appellee. She filed a petition in bankruptcy in Texas and was duly adjudged a bankrupt. Isaacs was elected trustee and qualified. Thereafter the appellee instituted foreclosure proceedings in a state court in Arkansas to foreclose said mortgage, named the trustee as a party defendant, recited the bankruptcy proceedings and stated that it had not filed its secured note as a claim therein. Isaacs appeared in the state court for the purpose of petitioning for a removal of the cause to the U. S. District Court for the Western District of Arkansas. After the removal the trustee filed an answer, in which he set up, *inter alia*, his right and title as trustee, his lack of information as to the execution of the note and mortgage, and the fact that the land had been scheduled in the Texas District Court as an asset of the bankrupt. He further averred that as trustee he had taken and then held peaceable possession of the land; that there was an equity in the same above the mortgage debt; that a sale in foreclosure would prejudice the rights of general creditors; that he required time for investigation as to the most favorable method of sale; that neither he nor the Bankruptcy Court had

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ment occurs in the concluding paragraph of the opinion and that in that concluding paragraph the Court was simply disposing of the contention of the plaintiff (the losing party on the appeal) that the trustee by appearing in the foreclosure proceeding in the other Federal Court had waived any question of jurisdiction, and that if the whole opinion is considered in its entirety the decision simply pronounces a well established rule of bankruptcy law, namely, that the filing of a petition in bankruptcy is a caveat to the world and that thereafter no other court can interfere with its jurisdiction.

In view of the conflict in the interpretation of the Court's opinion and the importance of the question, it has already been suggested that an amendment to the Bankruptcy Act is desirable. The suggestion is that Section 2, defining the jurisdiction of bankruptcy courts, should be amended by adding a new subdivision (21) authorizing courts of bankruptcy to permit the foreclosure of mortgages and other liens in other courts during the pendency of the bankruptcy proceedings, whenever the bankruptcy court is convinced that there is no equity for the bankrupt estate or where the property is burdensome. Section 23, which defines the jurisdiction of the U. S. and State courts, could be also amended by adding similar provisions. (Mr. Max Isaac, in 7 Am. B. Review, 361.) Sed query, since the principal case, although it uses very broad language, deals solely with the foreclosure of mortgages on real estate, whether Mr. Isaac's suggestion that "other liens" need to be included in the amendment is necessary.

In the same article Mr. Isaac adds that there is no statutory justifica-

consented to the foreclosure of the mortgage; that the Bankruptcy Court had entered an order authorizing him to sell the land; that the Court had exclusive jurisdiction to ascertain the facts and administer the property; that the Federal District Court in Arkansas could proceed no further than to ascertain the interests of the defendant, the validity of the mortgage debt and the amount of the debt. The answer prayed that after these preliminary steps the court should refuse an order of sale, because of its want of jurisdiction to enter one. On motion of the plaintiff the court struck out so much of the answer as sought to delay judgment and sale, and entered on the pleadings, a decree of foreclosure and sale containing a proviso that if there should be any surplus of purchase-money over the amount of the judgment, interest and costs, the same should be paid to the trustee. The case was taken to the Circuit Court of Appeals for the 8th Circuit and that Court certified up to the Supreme Court the following question: "After the Bankruptcy Court has acquired jurisdiction of the estate of the bankrupt and the referee therein has entered an order requiring sale by the trustee of all the property of the bankrupt but before the trustee has taken any steps to sell land (part of such estate) entirely located in another judicial district, can a suit to foreclose a valid mortgage thereon

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tion for the action of the bankruptcy court in "relieving the situation by permitting foreclosures in state courts." In view of Mr. Isaac's interpretation of the opinion of Mr. Justice Roberts, the language of the Circuit Court of Appeals for the 2nd Circuit in a decision handed down since the decision in the principal case, in which the Circuit Court of Appeals denied a leave to appeal from an order of the District Court granting such permission, should be noted. That Court said: "The application for leave to appeal is based upon the claim that the District Court has no power to oust itself from jurisdiction over property of an estate in bankruptcy and after jurisdiction is once obtained by the court it is exclusive. Counsel argues that in view of the recent decision in *Isaacs as Trustee v. Hobbs Tie & Timber Co.* (75 L. ed. 332), March, 1931, Am. B. Rev. 241, the court cannot permit a foreclosure in the State Supreme Court. Justice Roberts, writing in that case, expressly held that after the bankruptcy court has acquired jurisdiction of the estate, other courts are without jurisdiction 'save by consent of the bankruptcy court.' In the *Isaacs* case, the foreclosure was instituted without application to the bankruptcy court in the district having jurisdiction of the bankruptcy proceeding. At bar the mortgagee proceeded to obtain consent of the bankruptcy court, in the Southern District, having jurisdiction of the above named bankrupt and upon satisfying the Court it obtained consent to proceed with the foreclosure in the State Supreme Court. This we think is within the rule announced in *Isaacs v. Hobbs, etc., supra.*" In *re Schulte-United, Inc., Bkpt.* (April 22, 1931), 49 F. 2d. 264.



and an order of sale thereunder be made over the objection of the trustee by the court of the latter District?" The decision of the Supreme Court was that the judgment of the District Court be reversed and the cause remanded for further proceedings in accordance with the Court's opinion.

This case would seem to be clear authority for the proposition that a mortgagee of the real estate cannot foreclose his mortgage without the permission of the bankruptcy court, the foreclosure suit having been instituted after the date of the filing of the petition.<sup>12 and 13</sup>

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<sup>12</sup> It is of importance to note that if the foreclosure suit is brought before the filing of the petition in bankruptcy the law is definitely settled that the foreclosure suit may proceed and the bankruptcy court will not interfere. *Eyster v. Gaff* (1876) 91 U. S. 521, 23 L. ed. 403, is a direct authority for the proposition that a foreclosure suit instituted before the date of the filing of the petition in bankruptcy will not be interfered with.

*Straton v. Andy New* (April 20, 1931), 285 U. S. 318, 75 L. ed. 1060, decided after *In re Isaacs v. Hobbs, etc.*, supra, is the latest authority for this proposition. In this case the court in refusing to enjoin the prosecution in a state court of a creditor's bill filed prior (5½ months) to the filing of the bankruptcy petition seeking an order to sell certain real estate of the bankrupt upon which the creditor had a lien by virtue of a judgment obtained and entered more than four months (sixteen months) before the filing of the bankruptcy petition, said: "Most of the cases cited by the appellees to the effect that the initiation of bankruptcy proceedings confers on the district court jurisdiction to enjoin pending suits in state courts deal with the situation where a lien was acquired within four months of the filing of the petition, or where, after the filing of the petition an action was begun to enforce a lien valid in bankruptcy. As heretofore noted, there are a few cases which have held that the bankruptcy court may enjoin proceedings, brought prior to the filing of the petition, to enforce valid liens which are more than four months old at the date of bankruptcy; but these cases are contrary to the decision of this Court and to the great weight of federal authority." The Supreme Court's decision in this case, written by Mr. Justice Roberts, who also wrote the opinion in *In re Isaacs v. Hobbs, etc.*, supra, indicates that *Isaacs v. Hobbs, etc.*, supra, will be limited in its application to its factual situation, at least in some particulars.

Does not *Straton v. New*, supra, show that *In re Isaacs v. Hobbs*, supra, would not have been decided as it was had the creditor or the Court in which he had instituted the suit to foreclose his lien taken possession of the mortgaged property prior to the filing of the petition in bankruptcy?

See *New Albany Nat. Bank v. Brown* (1916), 63 Ind. App. 391, 114 N. E. 486, in which case the Court said: "As an abstract proposition of law possession is the essence of pledge . . ."

<sup>13</sup> It apparently makes no difference in which form the question arises, that is, whether upon an application for an injunction by the officers of

Does this case have any applicability to the question here considered? Could it properly be cited by a court upon enjoining such a sale of collateral securities as is now under discussion as authority for its action in so doing?

Thus far in this discussion an attempt has been made simply to state the opinions and the decisions of the courts with respect to the problem without an attempt at critical analysis of their reasoning or their policy. With the idea in mind that it is of the greatest desirability to be able to reasonably anticipate the future opinions of the Courts on the point, an examination of some of the underlying considerations in connection with this problem may be helpful.

In the course of his opinion in the *Insull* cases, *supra*, Judge Lindley said:

"The order entered does not contravene any vested right of the pledgee. The rule established by statute in bankruptcy cases to the effect that all liens in third parties are recognized and preserved is but declaratory of rights at common law and under the Constitution. Consequently the same rule controls in receiverships in equity. But the rule does not require that the parties shall be left to the same remedies as existed before the jurisdiction of the court attached. A particular form of remedy is not within constitutional protection. (Cases cited.) . . . The determination of the question here involved does not affect in any manner the right of the pledgees to seek relief in this court. Here they may have enforced any right to which they may be entitled under and by virtue of their contract of pledge. 'The court and not the lienors is to decide' as to the mode of sale. (Cases cited.) . . . It is insisted, however, that the court should not restrain a sale of pledged property, and reliance is placed upon *In re Hudson River Nav. Corp.* (C. C. A.), 57 F. 2d, 175, decided recently by the Circuit Court of Appeals for the 2d Cir-

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the bankruptcy court or, as *In re Isaacs v. Hobbs*, etc., *supra*, for Mr. Justice Roberts says: "Such injunctions are granted solely for the reason that the Court in which foreclosure proceedings are instituted is without jurisdiction after adjudication in bankruptcy to deal with the land or liens upon it save by consent of the bankruptcy court. The appellant—trustee might have instituted ancillary proceedings in the District Court for the Western District of Arkansas and there obtained an injunction to restrain the appellee from foreclosing its mortgage. There is no reason however why he should not have followed the course here pursued of pleading the adjudication in Texas in abatement of the foreclosure proceeding."

cuit. If the opinion in that case cited is intended to announce the rule that a court of equity may not under any circumstances restrain foreclosures of liens on sales of pledged property, it is at odds with *Isaacs v. Hobbs Tie & Timber Co.*, 282 U. S. 734, 51 S. Ct. 270, 75 L. ed. 645, and *Straton v. New*, 283 U. S. 318, 51 S. Ct. 465, 75 L. ed. 1060."

Passing, without comment, the learned Judge's facile connection of equity cases with bankruptcy cases by stating that since the bankruptcy statute preserving liens is but declaratory of the common law and that "consequently the same rule controls in receiverships in equity" and his easy manner of disposing of *In re Hudson River Nav. Corp.*, it is sufficient to observe that he considers there to be a distinction in the case of collateral securities between the right of a pledgee of securities and his remedy, and that he does not draw a distinction between the case of a mortgage of real estate and the case of a pledge of collateral securities.

In *re Purkett-Douglas & Co.* (March 30, 1931) (D. C. So. D. of Cal.), 50 F. 2d 435, the District Judge restrained the sale by a pledgee of certain bonds pledged to secure the payment of a promissory note, after differentiating from that case the cases holding (which cases will be considered later in this discussion) that the Bankruptcy Court cannot, where it lacked actual possession of the res, adjudicate in a summary proceeding the validity of an adverse claim as to the pledged property, without the consent of the adverse party, and said: "What is here sought, and what this Court has undertaken to accomplish, is to restrain the sale of said securities by respondent until the adverse claims of the respective parties can be adjudicated in a plenary suit before the appropriate tribunal." The Court cites *In re Jersey Island Packing Co.*, 138 Fed. 625, which was a case involving only the foreclosure of a mortgage on real estate, in which case it is said: "The provision of the bankruptcy act that such a lien shall not be affected by the bankruptcy proceeding has reference only to the validity of the lienholder's contract. It does not have reference to his remedy to enforce his right. The remedy may be altered without impairing the obligation of his contract, so long as an equally efficient and adequate remedy is substituted." In *re Jersey Island Packing Co.* (which case will be considered later) was decided in 1905 by the Circuit Court of Appeals for the 9th Circuit, and before the decision of the Supreme Court in *His-*

cock v. The Varick Bank, *supra*. In *re Purkett-Douglas & Co.*, it should be noted, is a case in which an adverse claim relative to the pledged securities was asserted by the petitioner on the ground that the transfer (pledging) of the security to the respondent was a usurious payment of interest on account of said loan. It should be pointed out also that the petition alleged that the respondent, unless restrained, would sell the collateral for a sum grossly disproportionate to the true value thereof and thereby would cause irreparable loss to the estate of petitioner and great injury to the creditors of the petitioner. What is the status of this District Court case as authority in a case where no adverse claim to the pledged property is or can be asserted? If it be claimed that it is an authority in support of the right of a bankruptcy court, through its receiver, to enjoin the sale by a pledgee of collateral securities under a valid pledge it is directly contrary to the decision of the Circuit Court of Appeals for the Circuit embracing that District in *International Banking Corp. v. Lynch* (1920), 269 Fed. 242. This case, *International Banking Corp. v. Lynch*, is a case where the pledgee after the appointment of a receiver for the pledgor's property and after an order had been issued by the bankruptcy court restraining all persons from interfering with the property of the pledgor—bankrupt in the receiver's possession, sold the pledged property. In holding that the sale was not a violation of this order the Court said: "The receiver appointed in this suit had the undoubted right to pay the indebtedness for which the stock was held as security and thereupon to receive possession thereof, as the property of the insolvent owner; but it is equally clear, without paying such indebtedness he had no such right of possession. The stock remains subject to sale by its pledgee pursuant to the terms of the pledge agreement."

In *re Isaacs v. Hobbs, etc.*, *supra*, is a case of real estate and real estate mortgages. It is fundamental that the aid of a court must be obtained in connection with the realization upon such liens. This is not true in the case of collateral securities, which may simply be taken out of their place of safe-keeping and sold with no more formality than is required in the contract or agreement of pledge. The jurisdiction of the bankruptcy court being paramount, in a proper case, it is obviously sound that that jurisdiction should not be interfered with by another court. The doctrine of comity between courts, the obvious desirability of preventing conflict of jurisdiction, and the necessity of preserving

a legal court's very existence by protecting its jurisdiction and power as against other legal courts, alone would support such a conclusion. The absolute necessity, in order to avoid hopeless confusion, for a court to maintain its jurisdiction and power in a case where it has paramount jurisdiction, or has first acquired jurisdiction, as against another court having the same power to enforce its decrees as the former court, is of course apparent. It is submitted for consideration whether the imperative necessity for such a legal doctrine and state of affairs in a society having more than one court having concurrent jurisdiction, or rather power, in any given case, does not alone afford the basis for the rule of *In re Isaacs v. Hobbs*, etc., *supra*, whether the same is expressed and recognized or but subconsciously felt. This case has been cited, however, as authority for the proposition that a sale by a pledgee of collateral security may be restrained by a court of bankruptcy in any case.

In *In re Henry* (June 10, 1931), 50 F. 2d 453, the pledgees were restrained from selling certain investment securities pledged to them for loans by the bankrupt by the District Court for the Eastern District of Pennsylvania. Judge Dickinson said:

"We are not impressed with the objection to the exclusive control of the bankruptcy courts on the ground that the control given to the pledgee was given by contract and hence any interference with it by the bankruptcy court impairs the obligation of a contract. If a bankruptcy court has no lawful power to do anything which impairs the obligation of contracts, there is very little left which a bankruptcy court can do. We have nothing to do with the doctrine of the inviolability of contracts. The whole question is embraced in these fact situation propositions. The loan for which the pledge was given must be paid; it cannot be paid without a sale of the pledge. The sole question is whether the bankruptcy court has exclusive jurisdiction to make the sale or whether in defiance of the bankruptcy court some other court or the pledgee himself can sell. It is admitted that the case of *Isaacs, Trustee v. Hobbs*, etc., rules that another court cannot decree the sale of assets in the possession and under the control of the bankruptcy court without the leave of the latter court. The ruling in the cited case can be readily understood. Its propositions are very clearly stated. The only differences of opinion are over the implications and whether the doctrine of that case extends to another case in which the fact situation is different.

The cited case was one of a pledge of land for the payment of a loan with the right to sell the land pledged through the processes of a court. After the land had become bankruptcy assets the cited case rules that it could not without the leave of the bankruptcy court be sold by another court under the pledge.

"In the instant case there is a like pledge, not of land but of personal property, and the pledgee has the right to sell not merely through the processes of a court but to sell himself without recourse to any court.

"In the cited case it was ruled that the pledgee could not sell the pledged land through an execution but that it could be sold by a bankruptcy court (or by its leave). Should a like ruling be made in the instant case? The learned referee thought that under the cited case it should and so ordered. This is the order under review.

"We are in full accord with the proposition that the possession of the pledge cannot be disturbed by any summary action of the bankruptcy court but the right of the pledgee is open to attack only by plenary suit. This, however, is not the question before us. The question is the quite different one of the right of the pledgee to take the assets of the bankruptcy court out of the control of the bankruptcy court by selling them. The power to stop such sales is exercised daily by bankruptcy courts. Mortgagees to whom seized lands have been conveyed are so restrained; likewise judgment creditors who have taken lands on execution; in like manner landlords who have distrained property for rent; plaintiffs in attachment in execution proceedings are also so restrained. No such pledgees are permitted to enforce their pledges by sale. Is the pledgee under so-called collateral loans an exception to the general rule? The only theory, so far as we can discover, on which this case can be differentiated from that of other pledgees is that the collateral holder is not a pledgee in the lien holder sense but is an owner. As he is such owner the thing pledged is his and forms no part of the bankruptcy assets or at the most the bankruptcy court does not have possession but only the right to possession which can be reduced to possession only by a plenary suit.<sup>14</sup> This theory is

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<sup>14</sup> Numerous decisions of the Supreme Court could be cited to the proposition that actual possession by the bankrupt court is the indispensable condition of its exclusive and of its summary jurisdiction in cases of this character. In *Taubel, etc., v. Fox* (1924), 264 U. S. 426, 68 L. ed. 770, Mr. Justice Brandeis said: "Wherever the bankrupt court had possession it

provocative of discussion which has no end. The property here is theoretically of the type known as choses in action. The pledgee of bonds or of stocks holds possession of nothing except the evidence of a debt due the pledgor or of his right to share in assets of a corporation. A mortgagee is in form not a pledgee but the owner of the land described in his mortgage subject to a defeasance. All which is left to the mortgagor or owner is the right of redemption. None the less the now accepted view is that the mortgagee is a pledgee or lien holder. The ordinary form of corporate bonds or certificates of stock, it is true, have come to be regarded not as evidences of debt or of a share in corporate assets but as in themselves property. Pledgees of bonds or stocks are none the less pledgees with a right of lien. This is the only real right they have. We see no difference in this respect between them and the pledgees of land. We are not unmindful of the difference between the possession of a power and the propriety of its exercise. A bankruptcy court is as much bound to have regard to the rights of pledgee creditors as of any other creditors and not to forget that the latter may have priority of right. A pledgee, because of this, should always be at liberty to apply to the court for leave to enforce his pledge."

The foregoing opinion is cited at some length because of some of the rather startling statements therein contained. No authorities except *In re Isaacs v. Hobbs*, etc., *supra*, are cited in the course of the Court's remarks.

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could, under the Act of 1898, as originally enacted, and can now determine in a summary proceeding controversies involving substantial adverse claims of title under subdivision 2 of Sec. 67, under subdivision b of Sec. 20 and under subdivision 2 of Sec. 70. But in no case where it lacked possession, could the bankrupt court, under the law as originally enacted, nor can it now (without consent) . . . In this case the sheriff had, before the filing of the petition in bankruptcy, taken exclusive possession and control of the property; and he had retained such possession and control after adjudication and the appointment of the trustees. The bankrupt court, therefore, did not have actual possession of the res. The bankrupt court, therefore, did not acquire jurisdiction over the controversy in summary proceedings. Nor did it otherwise."

Would not this be true, a fortiori, in a case where there is no adverse claim and cannot be any as to the pledged property?

It is hardly necessary to point out to anyone carefully examining the opinions of the courts on this question the vital importance which the courts attach, and which of necessity attaches, to the fact of possession. It is of the very essence of the legal reasoning on the subject—the pivotal point of the Courts' thought.

This case, which is a decision of the District Court for the Eastern District of Pennsylvania, was cited in the presentation of the case of *In re Hudson River Nav. Corp.*, *supra*, to the Circuit Court of Appeals for the 2nd Circuit. Although Pennsylvania is not within the 2nd Circuit, what, in view of the fact that it was cited to that Circuit Court of Appeals, can be said of its standing as an authority? The said Circuit Court of Appeals, although having had the opportunity of considering all the language of District Judge Dickinson, adopted just the opposite view on opposite reasoning.

Another case involving real estate is a case of interest in connection with this proposition. In *In re Isaacs v. Hobbs*, *supra*, the Supreme Court considered the question of a conflict of jurisdiction between courts if another rule than that therein laid down should be established. In *Allebach v. Thomas* (1927) (C. C. A. 4th Cir.), 16 F. 2d 853, in which the Supreme Court refused certiorari (274 U. S. 744), the power of sale given in mortgages or deeds of trust which are sanctioned by the laws of some states was practically nullified upon the filing of a bankruptcy petition by or against the owner of the real estate. In this case the Court said:

"The theory of the appellants and petitioners for review is that they have been deprived by the action of the court of some contractual right in respect to their debts and the security taken for payment of the same. This, however, is an entire misconception of the effect of the Bankruptcy Law which in plain terms provides that the bankruptcy proceedings shall not affect the validity of the lien; but it nowhere says that this fact shall in any manner affect the remedy to enforce the lienor's rights. The remedy may be altered without impairing the obligation of the contract so long as an equally adequate remedy is afforded."

Without any desire to quibble over words it is perhaps proper to call attention to the fact that Section 67d uses this broad language: ". . . shall not be affected by the Act." Standard dictionaries give as the meaning of the words "to affect" the following: "to act upon; to produce an effect or change upon." In any view of the rule of those cases which deny to the pledgee the right to independently sell, the courts so holding admit that he is given another remedy. This other remedy, the right to petition the bankruptcy court or to sell



through the bankruptcy court, is obviously a different thing than is given the pledgee in and by the contract of pledge. Do not these cases produce a change in the clear meaning and even in the express language of the Act? Can it be said that they do not affect the lien?

Can this distinction between the "right" of a pledgee of collateral securities and his "remedy" relied upon in the opinions above set out be justified? To take that position, it is submitted, is to completely ignore the opinion of Mr. Chief Justice Fuller in *Hiscock v. The Varick Bank*, *supra*, who said: "The Bankrupt Act did not attempt by any of its provisions, to deprive a lienor of any remedy which the law of the state vested him with." It cannot well be said that the then Chief Justice did not know what he was saying. In the report of the case it is to be noted that this point was presented to the Court in the brief filed by the appellee (the bank). Among other points stated in that brief appears the following: "The Bankruptcy Act does not attempt to deprive a lienor of any right or remedy which the contract vests him with . . ." It is of considerable significance that in none of the District Court cases considered, in which the Courts have drawn this distinction, is this opinion of the Supreme Court even cited. No attempt is made to distinguish or limit it. Is it too much to say that if a case involving the right of a pledgee of any kind of collateral security under discussion here were to reach the Supreme Court it would be decided on the authority of *Hiscock v. The Varick Bank*?

Moreover, on principle, whether a distinction between "substantive rights" and "legal remedies" can be so easily, and even lightly drawn is surely a question of some doubt. Where is the line to be drawn? Is it not conceivable that the deprivation of the right to sell is deprivation of a very substantial right—a part of the security—part of the thing the lender of his money bargained for and loaned his money in reliance on? Cannot the language of the Court in *In re Hudson River Nav. Corp.*, *supra*, be said to be an actual statement of the factual situation? Does not it contain a fair and accurate statement of what the parties do? How many pledge agreements do not contain a power to sell? Of what particular advantage is it to the pledgee to have the pledged securities under his lock and key and nothing more? Is it enough to say to a pledgee: "You have another remedy, the Bankruptcy Court may permit you to sell"? Isn't the right to sell, to exercise his dominion, upon the strength of which he loans his money, of the very essence of the lien? And if this

be true, that is, if the power of sale is a part of the pledge and the lien thereof and not a mere cure, can a Bankruptcy Court correctly say, as the District Court did in *In re Hanry*, supra, "We have nothing to do with the doctrine of the inviolability of contracts"<sup>15</sup> and isn't the power of sale as much as any other part of the lien protected and preserved by Section 67d? The only good purpose to be served by restraining the sale of collateral securities (the Court being under no duty or necessity to protect its jurisdiction) would be to get a better price for the securities in the interests of the general creditors. Of course, where, after the filing of the petition and after receiving notice of the sale, the trustee, if then appointed, or some creditor, properly comes into a bankruptcy court and alleges fraud or oppression or sets up an adverse claim going to the very validity of the pledge, the purpose of holding up the sale until these questions could be determined might be served by an interference by the bankruptcy court with the sale. However, the sale, if fraudulent or made without right, could always be avoided. But as a matter of law and of legal reasoning, the accomplishment of that purpose alone, namely, the obtaining of a better price for the pledged collateral, is not justifiable. As was said in *In re Hudson River Navigation Corp.*, supra, "Any misgivings on the part of the receiver or trustee in bankruptcy that the pledged securities may not bring as much as the trustee or receiver hopes such securities may sometime bring, or that they may even be sacrificed at the proposed sale, is legally immaterial."<sup>16</sup>

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<sup>15</sup> Whether the construction of the Bankruptcy Act resulting in the restraining of sales of collateral securities impairs the obligation of a contract, and the cases concerning that particular phase of this general subject are not considered in this discussion. Numerous cases in which reference thereto is made could be cited. But the question of whether there is a valid distinction with a real difference between the pledgee's "right" and his "remedy" must first be answered in the negative before a detailed consideration of constitutional questions is pertinent and lack of both time and space does not now permit thereof. The magnitude of such a question, in a proper case, is obvious. In finally passing upon it, the Supreme Court would be again confronted squarely with the question of whether there is a distinction with a difference between a pledgee's right and his remedy. It is suggested that that Court has already been presented with and has passed upon that question, as to the provisions of the Bankruptcy Act now under consideration, in *Hiscock v. The Varick Bank*, supra, as pointed out above.

<sup>16</sup> In *Hunter v. First National Bank* (1908), 172 Ind. 62, 87 N. E. 734, the Court said: "In the absence of some special agreement or action the

What interests are to be served by the adoption of a rule which would permit interference with such sales by the bankruptcy court? Is it reasonable to suppose that the bankruptcy court and its officers are better able to judge of the value of the securities and the proper time to sell them so that the greatest amount of money can be realized upon them than is the pledgee who loaned his money on his knowledge of their market and their marketability? If the sale is to be had in the bankruptcy proceeding itself, shouldn't it be considered that it is common knowledge that buyers come to such sales hunting bargains and very frequently find them? And, again, no one is harmed by permitting the pledgee to enjoy his contractual right. The trustee is entitled to any overplus realized from the sale and a pledgee is held to a strict accountability therefor. The sale, if a valid public sale, is as open to the trustee, the pledgor and any interested creditor as to anyone else, and they can attend and see what is done; and if the sale be private or at brokers' boards, full information as to the price obtained and the details of the transaction are always available to the trustee, the pledgor and any interested creditor, who can satisfy themselves that there was no fraud, oppression or injustice.

It is to be noted that with but a few exceptions, the principal ones of which have been set out above, all the cases in which it is held that the pledgee may be restrained or otherwise interfered with, are cases of the realization upon real estate security requiring the aid of some court and its officers and that these few exceptions are cases in which, while the sale of the personal property is enjoined or interfered with by the bankruptcy court, the courts use real estate cases to support their conclusions. Assuming the correctness of the rule arrived at in

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holder of collateral securities is not obliged to watch the market and sell at the highest price at his peril, but may remain wholly passive although he may have notice of a probable decline or depreciation in the value of such collaterals. (Cases cited.)"

In *Crume v. Brightwell* (1919), 69 Ind. App. 404, 122 N. E. 230, the Court said: "It has been held that the holder of collateral security is answerable for reasonable, but not extraordinary, diligence in its collection and that a want of such diligence may be set up as a defense in an action on a note for which such security is given. (Cases cited.) The paragraph of answer under consideration does not allege any special duty on the part of the holders of such collateral security with reference to its collection, nor does it allege that there has been any failure on their part to use reasonable diligence to collect the same. It is, therefore, insufficient and the Court did not err in sustaining the demurrer thereto."

the real estate cases on their facts, cannot a different result be reached in cases involving collateral securities if reasons of fairness, policy or practicality arising in whole or in part from the nature of the property, the nature of the interest of the pledgee in the same, the purpose and circumstances surrounding pledges of such securities and the position and usage of such pledges in the business world, would so urge? Is Judge Lindley correct in saying, in his opinion in the *Insull* cases, *supra*: "No good reason appears why there should be any difference in principle in the power of the Court to restrain action by a court or party from foreclosure of a lien upon realty without consent of court and that to restrain sales of securities whose situs is within the court's jurisdiction"?

As pointed out above, the foreclosure of a mortgage necessarily requires the aid of a Court in most jurisdictions. This further consideration and the cases immediately following, should also be noted. If the Supreme Court and other Federal Courts are correct in holding that the unique jurisdiction of the bankruptcy court over the administration of the bankrupt's property does not relate to the enforcement (see *McHenry v. LaSociete Francaise D'Epargues* (1877), 95 U. S. 58; *In re San Gabriel Sanitorium Co.*, 111 Fed. 892 (C. C. A. 9th, 1911); *In re Victor Color & Varnish Co.*, 175 Fed. 1023 (C. C. A. 2d, 1909), but merely to the ascertainment (see *U. S. Fidelity & Guaranty Co. v. Bray* (1912), 225 U. S. 205, 56 L. ed. 1055), of the validity of liens on property within the possession of the trustee, is it too much to say that Section 57h of the Act, heretofore considered, expressly permits the sale of collateral securities by a pledgee? The value of a mortgage (unless, indeed, it is agreed upon) cannot be ascertained except with the aid of a court. The aid of the court is invoked by a suit and by section 11a of the Bankruptcy Act (U.S.C. Title 11, Sec. 29a), suits may be stayed. This is obviously correct. It is interesting and significant that no similar provision (i. e., similar to Section 11a) is found in the Act giving the Bankruptcy Court power or authority to restrain the exercise by a pledgee of the dominion he has over the pledged securities. To repeat, in the case of a mortgage, not only is the aid of some court required to acquire that dominion, but in most cases to obtain the possession upon which that dominion is founded. No such necessity exists in the situation considered in this discussion.

It is submitted that it is unfair to assume that the general rule is that the enforcement of all liens, except with the consent of the bankruptcy court, can be restrained, and therefore to say or imply that if a different rule is to be followed as to collateral securities it would constitute an exception thereto. Whatever one's opinion as to the result that should be reached, surely the case of collateral securities can stand on its own bottom on principle, and should not be stigmatized in the eyes of the law as an "exception." That there is properly a distinction with a difference between the case of real estate mortgages and cases of personal property collateral held by a pledgee is conceded in one of the leading real estate cases holding to the rule that suits to foreclose mortgages may be interfered with. In *In re Jersey Island Packing Co.* (1905) (C. C. A. 9th), 138 Fed. 625, in which case the foreclosure of a mortgage was restrained, the Court said:

"The petitioners also cite *In re Brown* (D. C. 104 Fed. 762).<sup>17</sup> In that case McPherson, District Judge, while declining to pass on the question whether the court had jurisdiction to interfere and prevent a fraudulent or oppressive exercise of the right of

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<sup>17</sup> The opinion of the Court in this case seems so clear that it is set out in full. The Court said:

"Certain creditors of these bankrupts hold promissory notes for a large amount, secured by the pledge of wool; the notes being in the ordinary collateral form, and giving the creditors power to sell at public or private sale without previous demand or notice. The receivers aver that the power of sale is about to be exercised, and that the bankrupts' equity in the pledged property will probably be sacrificed unless the court intervenes, and so controls the exercise of the power that the receivers are given an opportunity to obtain purchasers for the wool at a full and fair value. The petition asks for an order forbidding the creditors to sell until after, say, 10 days' notice to the receivers that a sale is intended. A temporary restraining order was issued, forbidding a sale under any circumstances, and it is now to be determined whether the court has the power to make the order prayed for, or any other order interfering with the creditors' right to sell.

"I do not pass upon the question, whether the court may interfere to prevent a fraudulent or oppressive exercise of such a right. No such exercise is threatened in the present case. It is agreed that the creditors intend to deal fairly with the property pledged, and will make an honest effort to sell for the best prices that can be obtained. This being so, I am of opinion that the bankrupt act gives the court no authority to intervene between these creditors and their exercise of the right to sell given by the collateral notes. Each of these creditors has a lien, which I must assume, in the absence of evidence to the contrary, was given and accepted in good

sale of personal property which had been pledged by the bankrupt more than four months prior to bankruptcy, in a case where it had been agreed that the creditors intended to deal fairly with the property pledged, and to make an honest effort to sell for the best prices that could be obtained, was of the opinion that the Bankruptcy Act gave the court no authority to interfere between the creditors and the exercise of their right to sell given them by the collateral notes. It may be remarked in this connection that the interest of a pledgee differs from that of a mortgagee. The pledgee has a special interest in the thing pledged which entitles him to the possession, to protect which he may maintain detinue, replevin or trover, and the interest of the pledgor is not subject to execution. The decision in *In re Brown* may be accepted as authority for the proposition that a District Court will not interfere with a sale by a pledgee of the thing pledged, under the power of sale given by the terms of his contract when there is no claim that such power is exercised in a fraudulent or oppressive manner."

What may be regarded as more than an intimation that such might be the holding in the Seventh Circuit is given by that

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faith for a present consideration, and not in contemplation of, or in fraud upon, the statute; and such liens are declared by clause 'd' of Section 67 to be unaffected by the act. The phrase 'unaffected by the act' may perhaps be too broad. Other sections do affect such liens in some respects not now material, but the general meaning of the phrase is clear. Such liens are left as the act finds them, and (passing the question whether the court may interfere in the case of a fraudulent or oppressive enforcement) they may be proceeded upon according to their terms.

"It was argued that clause 'h' of Section 57 gives the necessary power to restrain and regulate the creditors' right to sell. The material part of that clause is as follows:

"The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors, or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the court may direct. . . ."

"Assuming that this clause intends to do something more than provide for a method of determining the value of securities held by secured creditors, if such creditors desire to ascertain and to prove a possibly unsecured balance of their claims, I cannot avoid the conclusion that the court is only permitted to intervene when the agreement between the bankrupt and the creditor fails to provide a method by which the value of the securities may be ascertained—again reserving the question of the court's power in the case of a fraudulent or oppressive conversion. This clause seems to me to be explicit. The value of such securities is to be ascertained 'by converting

Circuit Court of Appeals in *Guaranty Trust Co. v. Fentress, et al.* (Oct. 17, 1932), *supra*. While the case went off on the question of jurisdiction of the pledged property, the Court said:

"As to the merits of the question it is obvious that the rights of the receivers can be no greater than those of their predecessors in title, the pledgors. The pledgors had neither possession of the stock nor the right to possession. While the exact details of the pledges are not set forth, the Court will not presume invalidity of the pledges, in favor of appellees, upon whom rested the burden of alleging and proving facts which justified the entry of the injunctive orders.<sup>18</sup> Rather must we assume that the pledges were of such character as to give the pledgees such right of possession, ownership and disposition as was necessary to effect the object of the transfers. A pledge ordinarily implies a delivery of the personal property pledged, for the purpose, if necessary, of its sale to protect the pledgee against loss in case of the default of the pledgor. In most cases and in this case in particular the pledges were accompanied by delivery of the certificate and transfers of them to the pledgees."

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the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors.' If there be no such agreement, the clause then goes on to say that the value is to be ascertained 'by such creditors and the trustee, by agreement, arbitration, compromise or litigation, as the court may direct.' The supervision of the court is thus confined to the ascertainment of value where the bankrupt and his creditor have themselves failed to deal with this subject. In such an event the court may direct how the value is to be ascertained, and may choose among the methods of 'agreement, arbitration, compromise or litigation,' supervising and controlling either form of proceeding.

"Clause 7 of Section 2, giving the court power to 'cause the assets of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided,' and clause 15 of the same section, giving power to 'make such orders, issue such process and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this act,' must, of course, be read in connection with the rest of the statute, and are necessarily qualified by such provisions as are to be found in clause 'd' of Section 67, concerning liens, and by clause 'h' of Section 57, concerning the method of ascertaining the value of securities held by creditors.

"In each case the restraining order is now dissolved, and the petition of the receivers is refused."

<sup>18</sup> Query, whether this language does not inferentially say that facts showing invalidity in the pledge itself must be alleged and proved?

The Court no doubt uses the word "ownership" advisedly. Query, in view of what is set out above in this discussion, whether it is necessary to go that far. It is to be recalled that in the opinion of District Judge Lindley he had said:

"It is sometimes said that the pledgee receives legal title by virtue of the pledge. However, it is apparent that such so-called title is one of personal property and subject to defeasance (if such term be properly applicable to personal property), and terminates upon compliance with the condition of such defeasance, namely, payment of the loan. There is, therefore, an interest in the pledge that may be divested only by foreclosure sale. Such situation in principle does not differ from that of a mortgagee upon real property, in possession of the mortgaged property, whose title is subject to defeasance by payment and may be perfected as against the mortgagor's interest only by sale after notice or by foreclosure of the mortgage. A difference between the remedies of the mortgagee and those of the pledgee exists when foreclosure is by the terms of the mortgage or by law limited to a court foreclosure. It has never been understood that complete title in its full sense passes under either form of lien. Thus in *Harris v. Chicago Title & Trust Co.*, 338 Ill. 245, 170 N. E. 286, the Court said: 'Possession by a pledgee of certificates of stock endorsed in blank, when held for the purpose of security or pledged for a loan, does not vest the legal title to the stock in the pledgee, but gives him a special property right in the thing pledged. The general property or title in the stock remains in the pledgor, subject to the right of the pledgee, until the pledge is foreclosed in accordance with the terms of the pledge agreement or discharged. This has long been the rule in Illinois.'"<sup>19</sup>

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<sup>19</sup> In *Baxter v. Moore* (1914), 56 Ind. App. 472, 105 N. E. 588, the Court said:

As endorsee of the notes, although pledged as collateral, appellee had the legal title to them. (Cases cited.) But if it should be said that Trook, as such pledgor, still retained his interest in the notes, in that such possible excess belonged beneficially to him, and that, therefore, while appellee held the legal title to the notes he was not in effect the owner thereof, then it may also be said that such conclusion resulting from such argument becomes material, if at all, only on the assumption that the allegation of ownership contained in the complaint is well pleaded. We have shown that such assumption cannot be entertained, but treating it as otherwise then it does not follow, by any means, that the term 'owner' is equivalent to the



While much more could be said, the language of the cases above quoted states about all that need be said relative to the nature of the interest of the pledgee in the pledged securities. To show that question's importance and influence in any consideration of this whole matter the reasoning of *In re Hudson River Navigation Corp.*, *supra*, seems to be sound and as the Court says in that case, "It seems unnecessary to refine too far." A consideration of the nature of the pledgee's interest may be, as the Court said in *In re Henry*, *supra*, "provocative of a discussion that has no end."

### IN CONCLUSION

Involving as it does, (a) a construction of the Bankruptcy Act, (b) an attempt to arrive at an intelligent understanding, by necessary interpretation, of the reasoning of the conflicting decisions, and (c) a consideration of large questions of public policy and the weighing of vital interests of the business world, the problem is one which could perhaps be considered in greater detail. Perhaps enough has been pointed out above, however, to state the present condition of the law and to indicate the great importance of the question and the uncertainty as to what its ultimate solution may be. In the meantime and until a final pronouncement has been made by the Supreme Court, the profession will have to do the best it can in the conference room and the District and Circuit Courts in which they may find themselves.

But may it not be said upon an impartial analysis and review, having in mind all three of these considerations, that the authorities, the better reasoning and the sounder principles support the position that where no fraud or oppression is shown or asserted (and certainly in a case where none can be asserted), a pledgee may independently and without seeking the permission or obtaining the consent of the bankruptcy court sell the collateral securities so long as he does so pursuant to the con-

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term 'absolute owner.' Thus it is said that the word 'owner' is not a technical term. It is not confined to a person who has the absolute right in a chattel. It also applies to a person who has the possession and control of it. . . . It has been applied to a person in possession of personal property, under a contract of hiring, since he has a special property in the thing hired. . . . It does not necessarily imply exclusive or absolute ownership. . . . It is, therefore, apparent that the term 'owner' is consistent with the sort of title held by the pledgee of collateral."

tract or agreement of pledge and in strict conformity to its terms?

Broad though the language of Mr. Justice Roberts in *In re Isaacs v. Hobbs*, supra, may be said by some to be<sup>20</sup> isn't the ratio decidendi of the case to be found in the statement of the Court that "such injunctions are granted solely for the reason that the Court in which foreclosure proceedings are pending is without jurisdiction, after adjudication of bankruptcy, to deal with the land or liens upon it save by the consent of the bankruptcy court," and isn't *Hiscock v. The Varick Bank*, supra, the law on the question we have been discussing? Can the cases, holding contra, decided in the other Federal Courts since that pronouncement of the Supreme Court of the United States in 1907, especially since they do not even refer to that decision, be justified? So far as has been found at the present time and down through the last volume of the Federal Reporter, all of the cases holding that the consent of the bankruptcy court is necessary before the sale of the pledged property by the pledgee, or permitting the interference with such sales, are cases relating to liens asserted in the physical property admittedly in the possession of the bankruptcy courts (or their officers), or to which the officers of the bankruptcy court, standing in the shoes

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<sup>20</sup> The opinion contains this language: "Upon adjudication title to the bankrupt's property vests in the trustee with actual or constructive possession and is placed in the custody of the bankruptcy court. *Mueller v. Nugent*, 184 U. S. 1, . . . the title and right to possession of all the property owned or possessed by the bankrupt vests in the trustee as of the date of the filing of the petition in bankruptcy, no matter whether situated within or without the District in which the Court sits."

If and when the case presenting squarely the right of a pledgee to sell, without obtaining the consent of and without being interfered with by, a court of bankruptcy, collateral securities of the kind considered in this discussion again reaches the Supreme Court, will not that tribunal simply say that the pledgor not only did not possess them but also was not the owner of them (except to the extent of his beneficial interest in the overplus resulting from the sale)?

*Mueller v. Nugent*, 184 U. S. 1, 46 L. ed. 405, simply holds that money which the bankrupt owes third parties and had delivered to one William T. Nugent as his agent, was in the hands of the bankrupt himself inasmuch as it was in the hands of his agent or bailee, and inasmuch as the possession of the agent or bailee is that of his principal, the bankruptcy court had power in a summary proceeding to compel its surrender to a trustee in bankruptcy. This is, of course, the well established law. No adverse claim of any kind was in any way asserted to the property by any one, to say nothing of a pledgee thereof.

of the bankrupt pledgor, had the immediate right to possession. The only recent cases which may be said to be exceptions to this statement are (1) *In re Henry*, which seems to be out of line with all the other cases and authorities on the subject and apparently is both discredited as an authority by *In re Hudson River Navigation Corp.*, *supra*, as pointed out above, and in conflict with *Hiscock v. The Varick Bank*, *supra*, and (2) *In re Purkett-Douglas Co.*, *supra*, which, as elsewhere pointed out, is a case dealing with the validity of the pledge. If a serious attempt should be made by a Court or party to distinguish *Hiscock v. The Varick Bank* from any case involving any of the kinds of collateral security considered here, on the ground that the case dealt with insurance policies only and for that reason would not apply to a case involving, let us say, stocks or bonds, would such an attempted distinction be countenanced? And if the decision of the Supreme Court be correct on this subject when insurance policies are the subject matter of the litigation, then, *a fortiori*, would it not be so where the property involved is those more common forms of securities which are always in the possession and under the "dominion" of the pledgee and in dealing with which there would seem to be even stronger reasons, on a balance of the interests in a fair scale, for the pledgee to have and enjoy unmolested the right he bargained for and expected to get when he loaned his money.