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Hector Currie

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BANKRUPTCY

Hector Currie*

TITLE OF TRUSTEE

In *Halleron v. United Companies Mortgage & Investment, Inc.*,¹ a bankrupt sued for damages for alleged breach of a contract to lend money. Defendant filed an exception of no right of action on the ground that plaintiff's right, if any, had passed to his trustee in bankruptcy. The exception was sustained, and the court of appeal affirmed. If there was a breach of contract it occurred prior to the date of bankruptcy. Section 70a(6) of the Bankruptcy Act provides: "The trustee of the estate of a bankrupt . . . shall . . . be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this Act, except insofar as it is to property which is held to be exempt, to all the following kinds of property wherever located . . . (6) rights of action arising upon contracts"²

EFFECT OF DISCHARGE

*All State Credit Plan Broad, Inc. v. Calmes*³ was an action by discharged bankrupts to annul a default judgment against them. The discharge had been received before the date of the judgment, and the bankrupts accordingly were under a necessity to plead their discharge as an affirmative defense.⁴ They had failed to do so, and annulment of the default judgment thus was improper. This problem, which has frequently been presented to Louisiana courts,⁵ should arise less often in the future by reason of a 1970 amendment to the Bankruptcy Act, which will be summarized below.

A valid lien on property not administered in bankruptcy is

* Professor of Law, Louisiana State University.

1. 256 So.2d 475 (La. App. 2d Cir. 1972).

2. 11 U.S.C. § 110(a)(6) (1970).

3. 262 So.2d 528 (La. App. 4th Cir. 1972).

4. LA. CODE CIV. P. art. 1005.

5. See *The Work of the Louisiana Appellate Courts for the 1970-1971 Term—Bankruptcy*, 32 LA. L. REV. 291 (1972); *The Work of the Louisiana Appellate Courts for the 1969-1970 Term—Bankruptcy*, 31 LA. L. REV. 307 (1971); and *The Work of the Louisiana Appellate Courts for the 1968-1969 Term—Bankruptcy*, 30 LA. L. REV. 267 (1970).

unaffected by the discharge.⁶ *Finance System, Inc. v. Terrell*⁷ illustrates this rule. In *Louisiana National Bank v. Wicker*,⁸ the chattel mortgage sought to be enforced was not valid under Louisiana law and in any event was inferior to other secured interests.

Property subject to a valid mortgage may be unadministered in bankruptcy for the reason that it was disclaimed by the trustee as fully encumbered or otherwise without value to the estate, or that it was exempt.⁹ If exempt property later loses its exempt status, as where a homestead is abandoned, a judicial mortgage may then be enforced against it.¹⁰ A conventional or a judicial mortgage may not be enforced against property acquired after bankruptcy by a discharged bankrupt,¹¹ as this would frustrate one of the principal purposes of the Bankruptcy Act.

In *Kayda v. Johnson*,¹² a discharged bankrupt filed under R.S. 9:5166¹³ a rule to show cause why the inscription of a judicial mortgage should not be cancelled. The clerk of court (ex officio recorder of mortgages) and the judgment creditors were defendants. The statute reads:

"Upon rule to show cause by any interested party against the clerk of court and ex officio recorder of mortgages . . . , the judgment creditor and a judgment debtor discharged in bankruptcy, the court shall order the cancellation of the inscription of any dischargeable judgment rendered twelve months previously unless the judgment creditor can prove that he continues to possess a secured interest in the property affected by such judgment, or any judgment rendered in a tort proceeding wherein the judgment debtor's liability arose out of his wilful negligence, or any judgment for taxes due or any other judgment otherwise not discharged in bankruptcy."

The trial court recalled and vacated the rule, and the judgment debtor appealed. Being uncertain whether the 1970 Act

6. 1A W. COLLIER, BANKRUPTCY § 17.29 (1971).

7. 259 So.2d 583 (La. App. 1st Cir. 1972).

8. 259 So.2d 646 (La. App. 1st Cir. 1972).

9. 11 U.S.C. § 75(a)(6) (1970).

10. *Schexnaider v. Fontenot*, 147 La. 467, 85 So. 207 (1920).

11. *Huff v. Justice*, 174 So.2d 164 (La. App. 4th Cir. 1965).

12. 252 So.2d 708 (La. App. 1st Cir. 1971).

13. La. R.S. 9:5166 (1950), as amended by La. Acts 1970, No. 588.

had been applied and whether the judgment creditor had been given an opportunity to meet its burden under the statute of proving a continuing secured interest in the property affected by the judgment (here an exempt homestead), the court of appeal reversed, and remanded the case for trial. After a hearing the trial court ordered that the inscription of the judgment be cancelled, and the judgment creditor appealed. The court of appeal again reversed.¹⁴

The 1970 statute created a new procedure for the cancellation of inscriptions by rule, but made no change in the existing substantive law. Under that law, a judgment inscribed prior to the debtor's bankruptcy could not affect "property acquired by the debtor after . . . bankruptcy. *Schexnailder v. Fontenot*, 147 La. 467, 85 So. 207 (1920). As an extension of this rule," *Jaubert Bros., Inc. v. Landry*¹⁵ held "that equity accrued by payments made on a secured obligation, affecting the property the bankrupt owned prior to . . . bankruptcy, would be considered as property acquired after . . . bankruptcy and therefore not affected by a judgment."¹⁶ In *Jaubert* the court had said that if the judgment debtor "can show . . . that at the time of the adjudication the property set apart to him as a homestead was worth no more than the balance due on the purchase price, he could have the homestead declared free from the judicial mortgage . . ."¹⁷ The conclusion was rightly drawn in *Kayda* that

"where the inability of the judgment creditor to enforce his judgment against the bankrupt is due to the homestead exemption rather than a lack of equity on the part of the bankrupt because of conventional obligations against the property, the law has been, and remains that the inscription of the judgment acquired prior to . . . bankruptcy is not cancelled. Were the rule otherwise, the homestead status of the property could change and the judgment creditor would have no recourse."¹⁸

At the time of bankruptcy, the property in *Kayda* had a value of \$16,600. It was subject to two conventional mortgages, the first with a balance owed of \$11,826 and the second with a

14. 262 So.2d 171 (La. App. 1st Cir. 1972).

15. 15 So.2d 158 (La. App. 1st Cir. 1943).

16. *Kayda v. Johnson*, 262 So.2d 171, 174 (La. App. 1st Cir. 1972).

17. 15 So.2d at 161.

18. 262 So.2d 171, 174 (La. App. 1st Cir. 1972).

balance owed of \$1,650. "Thus the inability of the judgment creditor to enforce his judgment against the property was due to the homestead exemption as well as the prior conventional mortgages."¹⁹ The court of appeal correctly held that cancellation of the inscription should have been denied. *United States Fidelity & Guaranty Co. v. Ballard*²⁰ took the same view, though without reference to the statute.

*Ferguson v. Citizens Bank & Trust Co.*²¹ was an action by judgment debtors who had been discharged in bankruptcy, against a judgment creditor and the sheriff to cancel a judgment and to enjoin seizure and sale of property that had been set apart by the bankruptcy court as the debtors' homestead. After a hearing at which no evidence of the value of the property was introduced, the trial court dismissed the rule to cancel the judicial mortgage and the rule for injunction. The court of appeal reversed and rendered judgment for plaintiffs. Under R.S. 9:5166 a discharged bankrupt is entitled to cancellation of any judgment against him unless the judgment creditor can prove a secured interest in the property "by showing that the debtor had an equity therein over and above all encumbrances bearing against it *Kayda v. Johnson*, 262 So.2d 171 (La. App. 1st Cir. 1972), . . . held that in determining whether there is a 'secured interest,' the homestead exemption may not be considered"²² As the judgment creditor had failed to carry its burden of proof, the judgment debtors were entitled to have the judicial mortgage cancelled.

In *Fulmer v. Harper*,²³ the issue was whether post-bankruptcy wages of a wife, who had been discharged in bankruptcy, were subject to garnishment by a creditor whose claim had been duly scheduled as a liability of the estate. The creditor got judgment in November, 1962 against husband and wife for the balance due on a promissory note. Husband and wife both became bankrupt. The wife was discharged in September, 1963; the husband did not receive a discharge. In January, 1971 the judgment creditor caused the wife's employer to be cited as garnishee. The wife then filed a rule to vacate the garnishment proceeding on the ground that the debt had been dis-

19. *Id.*

20. 250 So.2d 217 (La. App. 1st Cir. 1971).

21. 265 So.2d 250 (La. App. 1st Cir. 1972).

22. *Id.* at 251.

23. 265 So.2d 355 (La. App. 4th Cir. 1972).

charged in bankruptcy. The trial court entered judgment vacating the garnishment. The court of appeal set aside this judgment and remanded the case for further proceedings. The debt was discharged as to the wife's separate estate, but it remained a debt of the husband's separate estate and of the community; and wages earned by a wife who is living with her husband are community assets.

However logical this conclusion may seem, it cannot be accepted as consistent with the Bankruptcy Act. The United States Supreme Court in the leading case of *Local Loan Co. v. Hunt*²⁴ held that a bankruptcy court in Illinois had properly enjoined a creditor, whose debtor had been discharged in bankruptcy, from enforcing a pre-bankruptcy assignment of wages thereafter to be earned. Under the Illinois decisions such an assignment of future wages created a lien effective from the date of the assignment which was not invalidated by the assignor's discharge in bankruptcy. The Supreme Court, however, rejected the Illinois decisions as destructive of the purpose and spirit of the Bankruptcy Act. *Fulmer v. Harper* is subject to the same objection.

DEBTS UNAFFECTED BY DISCHARGE

Section 17a (2) of the Bankruptcy Act provides in part:

"A discharge in bankruptcy shall release a bankrupt from all of his provable debts . . . except such as . . . (2) are liabilities for obtaining money or property by false pretenses or false representations, or for obtaining money or property on credit or obtaining the extension or renewal of credit in reliance upon a materially false statement in writing respecting his financial condition made or published or caused to be made or published in any manner whatsoever with intent to deceive"²⁵

Where after his debtor's bankruptcy a creditor brings action on a claim that was properly scheduled and is met with a plea of discharge in bankruptcy, the plaintiff has been required to show: "(1) [t]hat defendant made false representations; (2) that these representations were made with the intention of

24. 292 U.S. 234 (1934).

25. 11 U.S.C. § 35(a)(2) (1970).

defrauding the plaintiff, and (3) that the plaintiff relied upon and was misled by the false pretenses or representations."²⁶

Recently, of six such cases five were decided in favor of the discharged bankrupt. In one case²⁷ it was held that the statement was not materially false and that the creditor did not rely on it. In another case,²⁸ the representations though false were made without fraudulent intent. In two cases,²⁹ there was no fraudulent intent and no reliance by the creditor. In yet another case³⁰ there was no falsity, no fraudulent intent, and no reliance. Only in a single instance³¹ did the creditor prevail.

Section 17a(2) provides further:

"A discharge in bankruptcy shall release a bankrupt from all of his provable debts . . . except such as . . . (2) are liabilities . . . for willful and malicious conversion of the property of another. . . ."

Section 17a(8) adds: "or (8) are liabilities for willful and malicious injuries to the person or property of another other than conversion as excepted under clause (2) of this subdivision."

*Southern Fleet Leasing Corp. v. Brown*³² decided that the sale of business machines, in violation of the terms of a so-called lease under which the machines were held, gave rise to a liability that was not discharged in bankruptcy. It is clear that "the conversion of another's property without his knowledge or consent, done intentionally and without justification and excuse, to the other's injury, is a willful and malicious injury within the meaning of the exception."³³ *Credit Plan, Inc. v. Domingue*,³⁴ however, recognized that disposal of mortgaged chattels which had become valueless was neither a willful and malicious conversion of property nor a willful and malicious injury to property.

26. *Delatour v. Lala*, 131 So. 211, 212 (La. App. Orl. Cir. 1930).

27. *Finance System, Inc. v. Terrell*, 259 So.2d 583 (La. App. 1st Cir. 1972).

28. *CHF Fin. Discount "A" Co. v. Robinson*, 249 So.2d 217 (La. App. 4th Cir. 1971).

29. *All State Credit Plan, Inc. v. Wilson*, 254 So.2d 315 (La. App. 4th Cir. 1971); *All State Credit Plan Harahan, Inc. v. Anderson*, 250 So.2d 806 (La. App. 4th Cir. 1971).

30. *Louisiana Nat'l Bank v. Wicker*, 259 So.2d 646 (La. App. 1st Cir. 1972).

31. *King Fin. Co. v. Johnson*, 265 So.2d 658 (La. App. 4th Cir. 1972).

32. 257 So.2d 819 (La. App. 1st Cir. 1972).

33. 1A W. COLLIER, *BANKRUPTCY* § 17.17 (1) (1971).

34. 253 So.2d 652 (La. App. 3d Cir. 1971).

Section 17a(3) provides:

"A discharge in bankruptcy shall release a bankrupt from all of his provable debts . . . except such as . . . (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt unless such creditor had notice or actual knowledge of the proceedings in bankruptcy"

*Central Credit Corp. v. Ravencraft*³⁵ was an action by the assignee of a note. The defense was discharge in bankruptcy. Defendant prevailed in the trial court but lost on appeal. The debt had been scheduled by the bankrupt not in the name of the assignee but in the name of the payee of the note. Where a debtor does not know of an assignment, he may duly schedule the debt in the name of the original creditor, and he is under no duty to ascertain whether an assignment has been made.³⁶ But where as here he knows of the assignment, he must schedule in the name of the assignee. The debt accordingly was not duly scheduled, and the burden was on the debtor to prove that the creditor had notice or knowledge of the proceeding.³⁷ Publication in the "Daily Legal News" of defendant's bankruptcy did not amount to notice, and actual knowledge by the creditor was not shown.

In *United States Fidelity & Guaranty Co. v. Ballard*,³⁸ defendant had duly scheduled the debt in plaintiff's name with plaintiff's home office given as the address, and notice had been mailed to plaintiff at that address by the referee in bankruptcy. The court of appeal rightly held that defendant's personal liability was discharged notwithstanding plaintiff's alleged failure to receive the notice.³⁹

The date of bankruptcy in all the foregoing cases was earlier than December 18, 1970, the effective date of Public Law 91-467. Among other changes, this latest amendment to the Bankruptcy Act empowered courts of bankruptcy to determine the dischargeability of any debt; to render judgment for a non-dischargeable debt and order enforcement; to nullify any judgment as a determination of personal liability on a discharged debt; and

35. 258 So.2d 560 (La. App. 1st Cir. 1972).

36. 1A W. COLLIER, BANKRUPTCY § 17.23 (3) (1971).

37. *Hill v. Smith*, 260 U.S. 592 (1923).

38. 250 So.2d 217 (La. App. 1st Cir. 1971).

39. *U. Koen & Co. v. Accardo*, 188 So.2d 99 (La. App. 4th Cir. 1966).

to enjoin creditors from suing on, or using any process to collect, a discharged debt.

PROMISE TO PAY DISCHARGED DEBT

A new promise to pay a debt discharged in bankruptcy is actionable without new consideration, in Louisiana⁴⁰ as elsewhere.⁴¹ The promise may be made at any time after the filing of the petition in bankruptcy,⁴² but it must be "definite, express, distinct, and unambiguous."⁴³ These requirements were satisfied in *Credithrift of America, Inc. v. Nash*,⁴⁴ where the court found a specific promise to pay at a fixed future time. A mere acknowledgement of the debt with an expression of intent to pay at an indefinite time would not have been sufficient.⁴⁵

CONFLICT OF LAWS

Robert A. Pascal*

NON-DOMICILIARIES' "JOINT ACCOUNTS" IN LOUISIANA

Louisiana law of *things* does not admit of co-ownership with right of survivorship, the essence of "joint" interests in things according to the traditional Anglo-American law. Thus, two Mississippians having a joint bank account in Mississippi justifiably could expect to have the survivor of them become owner of the whole. Conversely, two Louisianians having what is known here as a "joint" bank account should not expect the survivor of them to become owner of the whole; they should understand that the "jointness" of an account is not a reference to ownership thereof, but to the right of either of them to withdraw funds therefrom without prejudice to the depository. On the other hand, Louisianians having a joint bank account in Mississippi *might or might not* anticipate the result under Mississippi law, and Mississippians having a "joint" bank account in Louisiana *might or might not* expect the result under Louisiana law.

40. *Irwin v. Hunnewell*, 207 La. 422, 21 So.2d 485 (1945).

41. 1A W. COLLIER, BANKRUPTCY § 17.33 (1971).

42. *Id.* § 17.36.

43. *Id.* § 17.34.

44. 256 So.2d 308 (La. App. 1st Cir. 1971).

45. *Securities Fin. Co. v. Washington*, 195 So.2d 733 (La. App. 1st Cir. (1967)).

*Professor of Law, Louisiana State University.