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## Public Law: Bankruptcy

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## PUBLIC LAW

### BANKRUPTCY

*J. Hector Currie\**

#### TITLE OF TRUSTEE

*The Rodrigue Co. v. Gilmore*<sup>1</sup> was a creditor's action against the president and director of a corporate debtor to enforce a statutory liability<sup>2</sup> for unlawful distribution of corporate property. Prior to commencement of the action the corporation had been made bankrupt. A trustee in bankruptcy upon his qualification takes title, with effect from the date the petition in bankruptcy was filed, to the bankrupt's non-exempt property, including rights of action, which the debtor could have transferred or his creditors might have seized.<sup>3</sup> The right to enforce the statutory liability thus had passed to the corporation's bankruptcy trustee, and as the court of appeal recognized, that fact precluded action thereafter by a creditor.

#### DEBTS UNAFFECTED BY DISCHARGE

Section 17a(3) of the Bankruptcy Act 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 . . . .<sup>4</sup>

*Lee v. Rousell*<sup>5</sup> was an action on promissory notes, to which the maker pleaded discharge in bankruptcy. Plaintiff had been listed on defendant's bankruptcy schedule of creditors but his address was given as

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1. 339 So. 2d 527 (La. App. 4th Cir. 1976).

2. See LA. R.S. 12:92(D) (1969). The liability created against directors is owed "jointly and severally to the corporation, or to creditors of the corporation, or to both, in an amount equal to the amount of the unlawful distribution."

3. Bankruptcy Act, § 70a(5), 11 U.S.C. § 110a(5) (1970).

4. 11 U.S.C. § 35a(3) (1970).

5. 347 So. 2d 298 (La. App. 4th Cir. 1977).

"unknown." It was admitted that plaintiff had no actual knowledge of the bankruptcy proceeding.

Section 7a(8)<sup>6</sup> requires a bankrupt to prepare a list of all his creditors "showing their residences or places of business, if known, or if unknown that fact to be stated . . . ." The bankrupt must use "reasonable diligence in ascertaining such addresses."<sup>7</sup> Where an address is given as "unknown," but the bankrupt through the use of reasonable diligence could have ascertained the address, the claim or claims of that creditor will not be discharged.<sup>8</sup>

The trial court held that defendant had made a diligent if unavailing search for plaintiff's address, and dismissed the action. After analysis of the facts, the court of appeal affirmed.

#### PROMISE TO PAY DISCHARGED DEBT

In Louisiana<sup>9</sup> as in other states<sup>10</sup> a new promise to pay a debt discharged in bankruptcy is actionable without new consideration. The new promise however must be definite, express, distinct, and unambiguous.<sup>11</sup> In *Service Finance Co. v. Daigle*<sup>12</sup> the statement by a discharged bankrupt to a creditor that he "was going to continue to pay this account" was held not an unambiguous promise to pay but merely recognition of a moral obligation.

Where a debt was reduced to judgment then discharged in bankruptcy, and the debtor subsequently reaffirmed the debt in what was assumed to amount to a new promise to pay, the creditor could not thereafter enforce the discharged judgment by garnishment but had first to obtain a judgment on the new promise. *Homemakers Loan and Consumer Discount Co. v. Arthur*.<sup>13</sup>

The effect of a new promise to pay a debt discharged in bankruptcy has been explained in various ways. According to Collier,<sup>14</sup> the better view is that discharge in bankruptcy does not extinguish the debt but only

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6. 11 U.S.C. § 25a(8) (1970).

7. 1A W. COLLIER, BANKRUPTCY § 7.11(2) (1976) [hereinafter cited as COLLIER].

8. *Id.* § 17.23(4).

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

10. COLLIER, *supra* note 7, § 17.33.

11. *Id.* § 17.34.

12. 342 So. 2d 1192 (La. App. 1st Cir. 1977).

13. 333 So. 2d 686 (La. App. 4th Cir. 1976).

14. COLLIER, *supra* note 7, § 17.38.

affords a personal defense which may be waived by failure to raise it<sup>15</sup> or by a new promise to pay. This view has had frequent expression in Louisiana where the bankrupt failed to assert his discharge as an affirmative defense.<sup>16</sup> A new promise to pay is equally a waiver of the discharge, and it should logically follow that the creditor to whom the new promise is made may elect to sue on the discharged debt where that is not precluded by the terms of the order of discharge<sup>17</sup> or, if he has a judgment, may enforce it by execution or garnishment. Revival of debts discharged in bankruptcy is however a matter of state law.<sup>18</sup> A debt discharged in bankruptcy<sup>19</sup> like a debt barred by prescription<sup>20</sup> subsists in Louisiana as a natural obligation,<sup>21</sup> and a natural obligation is declared a sufficient consideration for a new contract.<sup>22</sup> It is the new promise therefore on which action must be brought,<sup>23</sup> and the decision in the *Arthur* case seems correct.

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15. Cf. LA. CODE CIV. P. art. 1005.

16. See *O'Neill v. D. H. Holmes Co.*, 232 So. 2d 849 (La. App. 4th Cir. 1970) and cases cited therein. See also *The Work of the Louisiana Appellate Courts for the 1969-1970 Term—Bankruptcy*, 31 LA. L. REV. 307 (1971); *The Work of the Louisiana Appellate Courts for the 1968-1969 Term—Bankruptcy*, 30 LA. L. REV. 267 (1969).

17. See Bankruptcy Act, § 14f, 11 U.S.C. § 32(f) (1970).

18. COLLIER, *supra* note 7, § 17.33.

19. *Bach v. Cohn*, 3 La. Ann. 101 (1848).

20. LA. CIV. CODE art. 1758(3).

21. *Id.* art. 1757(2).

22. *Id.* art. 1759(2).

23. See *Irwin v. Hunnewell*, 207 La. 422, 21 So. 2d 485 (1945); *Service Fin. Co. v. Daigle*, 342 So. 2d 1192 (La. App. 1st Cir. 1977).