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PUBLIC LAW

BANKRUPTCY

*J. Hector Currie**

EFFECT OF DISCHARGE

A valid lien on property not administered in bankruptcy is unaffected by the debtor's discharge.¹ Property 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.² A judgment inscribed prior to the debtor's bankruptcy cannot, however, affect property acquired by the discharged debtor after bankruptcy.³ Accordingly, if the discharged debtor can show that property set apart to him as a homestead was worth, at the date of bankruptcy, no more than the unpaid balance of the purchase price, he is entitled to cancellation⁴ of a judicial mortgage.⁵ But the judicial mortgage will not be cancelled if "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"⁶ Should the exempt property later lose its exempt status, as when a homestead is abandoned, a judicial mortgage may then be enforced against it.⁷

In *Credit Service Corp. v. Bagley*,⁸ at the date of bankruptcy the amount of the homestead exemption was \$4,000 and the debtor owed more than \$14,000, secured by a first mortgage on the property which was worth apparently only \$18,000. In those circumstances a valid judicial mortgage could not have been cancelled. As the judgment of plaintiff's assignor had been recorded within four months of defendant's bankruptcy, the trial court considered it invalid and ordered it cancelled. The court of appeal properly set aside the judg-

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

2. See Bankruptcy Rules 403 & 608 (1973).

3. Schexnailder v. Fontenot, 147 La. 467, 85 So. 207 (1920).

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

5. Jaubert Bros., Inc. v. Landry, 15 So. 2d 158 (La. App. 1st Cir. 1943).

6. Kayda v. Johnson, 262 So. 2d 171, 174 (La. App. 1st Cir. 1971).

7. Schexnailder v. Fontenot, 147 La. 467, 85 So. 207 (1920).

8. 364 So. 2d 624 (La. App. 2d Cir. 1978).

ment of the district court and remanded for further proceedings. Section 67a(1)⁹ of the National Bankruptcy Act, applicable to this case,¹⁰ invalidates a judgment lien or other lien against a debtor's property, obtained by legal or equitable process or proceedings within four months of the debtor's bankruptcy, if the debtor was insolvent, within the meaning of the Act, when the lien was obtained.¹¹ This provision, which is not automatic in its operation, may be invoked by the trustee in bankruptcy or by the bankrupt as to property set apart to him as exempt.¹² Here the bankrupt had invoked section 67a(1) in opposing reinscription of the judgment. The question whether the debtor was insolvent when the judgment was recorded within four months of bankruptcy seems not to have been raised, however; and a finding of insolvency when the lien was obtained was necessary to support the judgment of the district court.

RIGHTS OF TRUSTEE

*Farmers Equipment Sales, Inc. v. Constanza*¹³ was a consolidated action on two notes and an open account. Shortly after bringing the action, plaintiff assigned one note to its accountants and the claim on open account to its attorneys to secure the payment of fees owed; and the assignees were substituted as plaintiffs on the assigned claims. Subsequently the assignor became bankrupt. The trial court found on sufficient evidence that the amounts demanded were owed by defendant. As to the judgment in favor of the attorneys and the accountants, defendant contended that the trial court erred in allowing the assignees to be substituted as parties plaintiff, seemingly on the assertion that the assignments were voidable preferences. As to the judgment in favor of the bankrupt plaintiff, defendant contended that it was erroneous, seemingly on the assertion that the right had passed from the bankrupt to its bankruptcy trustee. Both judgments were affirmed by the court of appeal.

Judgment in favor of the attorneys and the accountants clearly was proper. At the time the rights were assigned, they belonged to the assignor and no claim was made that the assignments were incomplete. Preference is defined by the Bankruptcy Act;¹⁴ and the power of avoidance, where a preference is voidable, belongs solely

9. 11 U.S.C. § 107 (1970).

10. The Bankruptcy Reform Act of 1978 went into effect, in large part, on October 1, 1979, as to cases begun on or after that date.

11. See National Bankruptcy Act § 1(19), 11 U.S.C. § 1(19) (1970).

12. *Fischer v. Pauline Oil & Gas Co.*, 309 U.S. 294 (1940).

13. 370 So. 2d 135 (La. App. 3d Cir. 1979).

14. National Bankruptcy Act § 60a, 11 U.S.C. § 96a (1970).

to the bankruptcy trustee.¹⁵ Consequently, whether the assignments could and should have been attacked as voidable preferences was a question for the trustee alone; and defendant should not have been heard on the issue.¹⁶

Judgment in favor of the bankrupt on the note that was not assigned was likewise proper. The action was begun before bankruptcy at a time when plaintiff was owner of the note.¹⁷ Even though the ownership of the note passed to the trustee in bankruptcy when the bankruptcy petition was filed,¹⁸ notwithstanding the fact that the note was not listed in the bankrupt's schedule of assets,¹⁹ it was evidently the trustee's choice to permit the bankrupt to continue prosecution of the action.²⁰

15. National Bankruptcy Act § 60b, 11 U.S.C. § 96b (1970).

16. In discussing the question whether the assignments were voidable preferences and concluding as did the district court that they were not, the court of appeal confused the elements of preference under section 60a, 11 U.S.C. § 96a (1970), with those of fraudulent conveyance under section 67d, 11 U.S.C. § 107d (1970).

17. Had the action been brought by the bankrupt after the date of bankruptcy it would have been subject to dismissal, *The Rodrigue Co. v. Gilmore*, 339 So. 2d 527 (La. App. 4th Cir. 1976), unless brought in the interval between filing of the petition in bankruptcy and qualification of the trustee, *Johnson v. Collier*, 222 U.S. 538 (1911), or unless taken over by the trustee. See National Bankruptcy Act § 11c, 11 U.S.C. § 29c (1970).

18. National Bankruptcy Act § 70a, 11 U.S.C. § 110a (1970).

19. *Fazakerly v. E. Kahn's Sons Co.*, 75 F.2d 110 (5th Cir. 1935).

20. See *Johnson v. Best Mfg. Co.*, 263 So. 2d 436 (La. App. 1st Cir. 1972); 4A W. COLLIER, BANKRUPTCY § 70.28 (1971).