

1934

## BANKRUPTCY-DEBTOR PROCEEDINGS-POWER OF COURT TO ENJOIN STATE COURT ACTIONS

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### Recommended Citation

*BANKRUPTCY-DEBTOR PROCEEDINGS-POWER OF COURT TO ENJOIN STATE COURT ACTIONS*, 32 MICH. L. REV. 1158 (1934).

Available at: <https://repository.law.umich.edu/mlr/vol32/iss8/12>

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**BANKRUPTCY—DEBTOR PROCEEDINGS—POWER OF COURT TO ENJOIN STATE COURT ACTIONS**—A debtor proceeding was initiated in a Florida federal court and an ancillary proceeding was begun in a New York federal court. The latter court enjoined petitioner, who had obtained a tort judgment against the debtor in a New York state court, which judgment had been affirmed by the Appellate Division,<sup>1</sup> from arguing the case as appellee in the New York Court of Appeals and from continuing to prosecute an action commenced by him (petitioner) against the sureties on an appeal bond filed by the debtor pending the appeal to the Appellate Division. Shares of stock had been pledged by the debtor to indemnify the sureties on their undertaking.

<sup>1</sup> *Union Car Adv. Co. v. Collier*, 232 App. Div. 591, 251 N. Y. S. 153 (1931).

On motion to vacate the injunctions, *held*, that whether the petitioner's claim be regarded as dischargeable or not, the court could restrain him from proceeding with his state court actions under the broad definition of debt in section 74 (a) <sup>2</sup> of the Bankruptcy Act, and by virtue of section 74 (m) <sup>3</sup> which confers on the court in a debtor proceeding the powers invested in the bankruptcy courts by sections 11(a) <sup>4</sup> and 2(15).<sup>5</sup> The court added that if the petitioner be regarded as a secured creditor, due to the indemnification of the sureties, he could be restrained under section 74(n),<sup>6</sup> which provides for staying the enforcement of rights of secured creditors. However, the order was revised in part to permit petitioner to argue his case in the Court of Appeals "in the interest of all parties." *In re Collier*, (D. C. S. D. N. Y. 1933) 4 F. Supp. 700.

Since the court did not hold that the creditor's claim was dischargeable, it must be assumed that it was not.<sup>7</sup> Under these conditions, if this had been an old-fashioned bankruptcy proceeding the court would have lacked the power to restrain the petitioner from taking further steps in his action against the debtor under section 11(a) <sup>8</sup> and it would be doubtful, to say the least, whether re-

<sup>2</sup> The provision states: "The term 'debt' for the purposes of an extension proposal under this section shall include all claims of whatever character against the debtor or his property, including a claim for future rent, whether or not such claims would otherwise constitute provable claims under this title." U. S. C. A. tit. 11, sec. 202a (1933 Supp.).

<sup>3</sup> This section provides: "In proceedings under this section . . . the jurisdiction and powers of the court . . . shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition or answer was filed. . . ." U. S. C. A. tit. 11, sec. 202m (1933 Supp.).

<sup>4</sup> Section 11(a): "A suit which is founded on a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him . . . ; if such person is adjudicated a bankrupt, . . . may be . . . stayed until twelve months after the date of such adjudication. . . ." U. S. C. A. tit. 11, sec. 29a (1926).

<sup>5</sup> Section 2(15): "The courts of bankruptcy . . . are invested . . . with such jurisdiction at law and in equity as will enable them to . . . make such orders . . . in addition to those specifically provided for as may be necessary for enforcement of the provisions of this title. . . ." U. S. C. A. tit. 11, sec. 11(15) (1926).

<sup>6</sup> Section 74(n): ". . . the court . . . may enjoin secured creditors who may be affected by the extension proposal from proceeding in any court for the enforcement of their claims until the extension has been confirmed or denied by the court." U. S. C. A. tit. 11, sec. 202n (1933 Supp.).

<sup>7</sup> The claim was based on unfair competition in bidding to secure an advertising contract. Section 17 of the Bankruptcy Act provides that debts which are liabilities for willful and malicious injuries to the property of another are not discharged. U. S. C. A. tit. 11, sec. 35 (1926). See *McIntyre v. Kavanaugh*, 242 U. S. 138, 37 Sup. Ct. 38 (1916), holding a conversion of claimant's property to be a "willful and malicious injury." See also *In re Kroeger Bros. Co.*, (D. C. E. D. Wis. 1920) 262 Fed. 463, where in a state court action pending at time of bankruptcy the appellate court ordered a judgment entered for the creditor *nunc pro tunc* as of a date before bankruptcy petition was filed, but the judgment was held not provable.

<sup>8</sup> See note 4, *supra*. *Family Small Loan Co. v. Mason*, (C. C. A. 4th, 1933) 67 F. (2d) 207; *In re Wollock*, (D. C. M. D. Ill. 1903) 120 Fed. 516; *Bloemcke v. Applegate*, (C. C. A. 3d, 1921) 271 Fed. 595.

course could be had to section 2(15).<sup>9</sup> While proceedings on a dischargeable claim may be stayed under the latter provision,<sup>10</sup> there is the limitation that such proceedings must interfere with the enforcement of the provisions of the Bankruptcy Act.<sup>11</sup> The court in the principal case seems to say that the definition of "debt" in section 74(a) as "all claims of whatever character" taken in connection with the provision in section 74(m) that the powers of the "debtor's" court shall be the same as that of a bankruptcy court after adjudication invests the "debtor's" court with the powers conferred by section 11(a) but releases such court from the restriction that only suits on dischargeable claims may be enjoined. This is not to be found in the letter of any of the new sections, but the same policy which formerly limited the injunctive power of the court to dischargeable debts would now extend the limits to embrace claims which may be extended or composed under c. VIII. This is clearly the rationale of section 74(n) concerning secured debts. But this same section 74(n) founds a counter argument, *expressio unius exclusio alterius*. Can the principal case be rested directly on section 74(n)? Since the petitioner was probably a secured creditor,<sup>12</sup> this section would seem to justify the court in staying the state court proceedings against the debtor. But does section 74(n) give the court the power to enjoin the petitioner's action against the sureties on the debtor's appeal bond? The power of the court of bankruptcy to stay a creditor, even when his claim is dischargeable, from pursuing his remedies against a surety of the bankrupt whom the latter has indemnified has been both affirmed and denied.<sup>13</sup> Whatever be the correct view under the Act before the enactment of section 74(n), the language of that section seems broad enough to allow the "debtor's" court to enjoin proceedings against the sureties as well as against the debtor, and the policy embodied in section 76<sup>14</sup> reinforces this conclusion.

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<sup>9</sup> See note 5, *supra*.

<sup>10</sup> *Morehouse v. Giant Powder Co.*, (C. C. A. 9th, 1913) 206 Fed. 24 (receiver-ship proceedings, not founded on a dischargeable claim); *In re Donnelly*, (D. C. M. D. Ohio 1910) 188 Fed. 1001.

<sup>11</sup> *In re Wollock*, (D. C. N. D. Ill. 1903) 120 Fed. 516; *In re Donnelly*, (D. C. M. D. Ohio 1910) 188 Fed. 1001.

<sup>12</sup> Section 1(23) of the Bankruptcy Act provides: "'secured creditor' shall include a creditor . . . who owns a debt for which some . . . surety, or other persons secondarily liable for the bankrupt has such security upon the bankrupt's assets." U. S. C. A. tit. 11, sec. 1(23) (1926).

<sup>13</sup> Affirmed in *In re Federal Biscuit Co.*, (C. C. A. 2d, 1913) 203 Fed. 37 (attachment proceedings begun within four months of bankruptcy), and in *In re Eastern Commission and Importing Co.*, (D. C. Mass. 1904) 129 Fed. 847 (attachment proceedings begun within four months of bankruptcy). Denied in *In re Franklin*, (D. C. Mass. 1901) 106 Fed. 666, *aff'd in Jaquith v. Rowley*, 188 U. S. 620, 23 Sup. Ct. 369 (1902) (bail bond executed more than four months before bankruptcy) and in *In re Ennis and Stoppani*, (D. C. S. D. N. Y. 1909) 171 Fed. 755 (bail bond executed more than four months before bankruptcy).

<sup>14</sup> "Extensions made pursuant to the foregoing provisions of this chapter shall extend the obligation of any person who is secondarily liable . . . and a copy of the order confirming such extension . . . shall be sufficient evidence that such extension has been confirmed. . . ." U. S. C. A. tit. 11, sec. 204 (1933 Supp.).