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Bills and Notes - Statute of Limitations - Accommodation Maker

William J. Nuss

RECENT DECISIONS

BANKRUPTCY—INSOLVENCY PROCEEDINGS—ACTS OF BANKRUPTCY.—The debtor had filed its petition as a Michigan corporation praying for dissolution under the local statutes [MICH. COMP. LAWS (1929) § 15310]. The debtor corporation was in fact insolvent. The Michigan court entered its decree dissolving the corporation and appointed a receiver to carry out the liquidation of the company's affairs. Within four months thereafter a creditor petitioned the bankruptcy court to have the corporation adjudicated a bankrupt, alleging as an act of bankruptcy the debtor's petitioning voluntarily for dissolution when it was insolvent. The bankruptcy court denied a motion by the equity receiver to dismiss the petition. On appeal, *held,* order affirmed; the operation of the bankruptcy laws cannot be defeated by voluntary dissolution under state statutes. *Austin* v. *Thomas,* 78 F. (2d) 602 (C.C.A. 6th, 1935).

Although a corporation has ceased to exist in the eyes of its own domestic courts it is not beyond the reach of the bankruptcy court. *Hammond* v. *Lyon Realty Co.,* 59 F. (2d) 592 (C.C.A. 4th, 1932); see also *in re Watts and Sachs,* 190 U.S. 1, 23 Sup Ct. 718, 47 L.ed. 933 (1902). The Federal Constitution [Art. 1, § 8 (4)] gives Congress exclusive power to establish uniform laws on the subject of bankruptcy, and any state law may be a bankruptcy law in substance and in fact which provides for the administration and distribution of the estates of insolvents. *Barks* v. *Kleyne,* 15 F. (2d) 153 (C.C.A. 8th, 1926). State insolvency laws are suspended to the extent that they conflict with the Bankruptcy Act. *Stellwagon* v. *Clum,* 245 U.S. 605, 38 Sup. Ct. 215, 62 L.ed. 507 (1917). The court, in the principal case, was not required to fix the precise time when the act of bankruptcy was committed. The voluntary petition for dissolution was filed, the decree for dissolution was entered, and the receiver appointed, all within four months before the filing of the involuntary petition in bankruptcy. The appointment of a receiver to liquidate the affairs of a corporation dissolved on a voluntary petition to the Michigan equity court under the local statutes is not an act of bankruptcy if the corporation is not in fact insolvent. *Vassar Foundry Corp'n.* v. *Whiting Corp'n.,* 2 F. (2d) 240 (C.C.A. 6th, 1925). If the corporation is not in fact insolvent the statutory scheme under which the equity court through its receiver is supervising the liquidation of the dissolved corporation's affairs is not an "insolvency law" in conflict with the Bankruptcy Act. *Vassar Foundry Corp'n* v. *Whiting Corp'n., supra.* It is submitted that a voluntary dissolution by a special majority vote of the stockholders under the Wisconsin statutes [WIS. STAT. (1933) c. 181] would not by itself be an act of bankruptcy. Some conduct thereafter on the part of the statutory trustees, the old corporation directors, or previous conduct on the part of the directors, as such, just before dissolution, together with the fact of insolvency as defined in the Bankruptcy Act [see § 1 (15), 30 STAT. 544 (1898), 11 U.S.C.A. 1 (15) (1926)] would have to be shown to justify the bankruptcy court's adjudicating the dissolved corporate debtor a bankrupt and supervising the liquidation of the estate. The opinion in the principal case, however, indicates quite definitely that if the requisite facts are present the estate of such a dissolved corporation-debtor would not be outside the scope of the bankruptcy court's jurisdiction.

CLYDE F. BALEY.

BILLS AND NOTES—STATUTE OF LIMITATIONS—ACCOMMODATION MAKER.—A claim was filed against the estate of the decedent on a promissory note executed by the decedent along with five other joint makers. The decedent had

signed as an accommodation party. The note was executed on January 13, 1919, and was payable one year from that date. Interest had been paid on the note until 1932 by the principal debtors, the other co-makers. The claim against the estate was dismissed by the county court because it was barred by the statute of limitations. *Held,* on appeal, order affirmed; the accommodation maker by "waiving notice" of renewals had not consented to payments to be made on his behalf. *In re Schmidt's Estate,* (Wis. 1935) 261 N.W. 240.

Under the common law rule, payments by one co-maker tolled the statute of limitations as to both. *Cox* v. *Bailey,* 9 Ga. 467, 54 Am. Dec. 358 (1851); *Burgoon* v. *Bixler,* 55 Md. 384, 39 Am. Rep. 417 (1881). An accommodation indorser is not a co-obligor with the maker of a promissory note. The indorser's responsibility on a negotiable note must be fixed by presentment for payment and the giving of notice of dishonor. WIS. STAT. (1933) §§ 116.75, 117.07. Thereafter any conduct by the principal debtor, in the way of the payment of interest or the acknowledging of the indebtedness, cannot toll the statute with respect to the accommodation party without the latter's express authority. *Smith* v. *Dowden,* 92 N.J.L. 317, 105 Atl. 720 (1919); and *cf. Bishop* v. *Genz,* 212 Wis. 30, 248 N.W. 771 (1933) where the accommodation party was not technically an indorser but a "guarantor." Nor should any conduct by the accommodation indorser affect the position of the principal debtor-maker with respect to the tolling of the statute. *Cf. White* v. *Pittsburgh Vein Coal Co.,* 266 Pa. 116, 109 Atl. 873 (1920). The effect of payment by one co-obligor, principal debtor or accommodation party, upon the tolling of the statute as to all is frequently covered by express statutory provisions. See *Ford* v. *Schall,* 110 Or. 21, 221 Pac. 1052, 222 Pac. 1094 (1924). The Wisconsin statute provides that payment of interest or payment of a part of the indebtedness by one will not affect the position of the other joint debtor. WIS. STAT. (1933) § 330.47. But the other joint debtor can in fact consent to such payment of interest and such consent will then toll the statute with respect to both parties. *Gillitzer* v. *Duchorme,* 203 Wis. 269, 234 N.W. 503 (1931). This section is not limited by express terms to cases involving principal debtors and accommodation parties, nor to cases involving obligations evidenced by negotiable paper. Where the joint co-makers of negotiable paper purport to agree by provisions written onto the face of the note to all extensions and partial payments before and after maturity without prejudice to the holder, the court has held that such is, in effect, a power of attorney by each co-maker to the others authorizing partial payments on behalf of all. *Kline* v. *Fritsch,* 213 Wis. 51, 250 N.W. 837 (1933). In the principal case there was literally a waiver of notice as to extensions on the note. And the court felt that this meant the execution by the principal debtor of a new note and the taking of that note by the holder. The court refused to construe the literal provision with respect to extensions as amounting to consent to the payments which the other co-debtors had made.

WILLIAM J. NUSS.

CHATTEL MORTGAGES—FORECLOSURES—CONSTITUTIONALITY OF PENALTIES IN FORECLOSURE STATUTES.—The plaintiff brought this action to foreclose a real estate mortgage which was executed together with two chattel mortgages on live stock and farm machinery as security for a $5,500 promissory note. The mortgagors set up as a defense the seizure without their consent of the property covered by the chattel mortgages and the sale thereof in contravention of Sections 241.13 and 241.15 [WIS. STAT. (1933)] which provide that for any violation of any provision thereof the owner of the equity may recover damages sus-