

1968

## Mojave Uranium Company v. Mesa Petroleum Company : Appellant's Brief

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

MOJAVE URANIUM COMPANY,  
*Plaintiff and Appellant,*

- v. -

MESA PETROLEUM COMPANY,  
*Defendant and Respondent.*

Case No.

11286

APPELLANT'S BRIEF

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Appeal from the Judgment of the Third District Court  
in and for Salt Lake County  
Honorable Stewart M. Hanson, Judge

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# INDEX

|  | <i>Page</i> |
|--|-------------|
| Statement of Kind of Case.....   | 1           |
| Disposition in Lower Court.....  | 2           |
| Relief Sought on Appeal.....   | 2           |
| Statement of Facts .....   | 2           |
| Argument   |             |
| Point I—Confirmation of Standard's Plan of Arrangement<br>Did Not Discharge Mojave's Claim, It Being a Secured<br>Claim and Not Provided for Therein. ....   | 5           |
| Point II—Assuming, Arguendo only, that the Defense of Dis-<br>charge were Available Mojave's Debt was Revived.....   | 11          |
| Point III—Assuming, Arguendo, that Standard's Obligation<br>was Discharged in Bankruptcy or Subject to Other<br>Defenses, Mesa's Promise to Standard to Assume and<br>Pay Mojave Created a Valid Contract Enforceable by<br>Mojave. .... | 14          |
| Conclusion .....   | 20          |

## CASES CITED

|   |        |
|---|--------|
| Christensen v. Larsen, ..... Utah .... , No. 11135, July 5, 1968....  | 21     |
| In Re Camp Packing Co., 146 Fed. Supp. 935 (N.D.N.Y.) 1956  | 9      |
| Kelly v. Richards, 95 Utah 560, 83 P.2d 731, (1938).....  | 18, 19 |
| Merchants Protective Ass'n v. Popper, 59 Utah 470, 204 P.<br>107, 110 (1922) .....  | 12, 14 |
| Securities & Exchange Commission v. U.S. Realty & Improve-<br>ment Company, 310 U.S. 434, 60 S. Ct. 1044, 84 L. Ed.<br>1293, 1302, 1303, (1940) ..... | 8      |
| Zavelo v. Reeves, 227 U.S. 625, 33 S. Ct. 365, 57 L. Ed. 676<br>(1913) .....  | 11, 13 |

## STATUTES

|   |    |
|---|----|
| 11 USC, 701-799 (Chapter XI).....           | 2  |
| 11 USC, Sec. 706 (Sec. 306) .....           | 6  |
| 11 USC, Sec. 707 (Sec. 307) .....           | 6  |
| 11 USC, Sec. 722 (Sec. 322) .....           | 11 |
| 11 USC, Sec. 756, 757 (Sec. 356 & 357)..... | 7  |
| 11 USC, Sec. 762, 767.....                  | 6  |
| 11 USC, Sec. 771, (Sec. 371).....           | 10 |
| UCA, Sec. 78-12-23 .....                    | 15 |
| URCP, Amended Rule 56 .....                 | 16 |

## AUTHORITIES CITED

|  |        |
|--|--------|
| 1 Collier on Bankruptcy, 14 Ed. Sec. 17.36, pp. 1760-1761.....   | 13     |
| 1 Collier on Bankruptcy, 14 Ed. Sec. 17.33, 1756.....  | 12     |
| 1 Collier on Bankruptcy, 14 Ed. Sec. 0.01.....   | 5      |
| 3A Collier on Bankruptcy, Sec. 63.04, pp. 1772-1774.....   | 11     |
| 9 Collier on Bankruptcy, 14 Ed., Sec. 9.25, pp. 335-341.....   | 6      |
| 9 Collier on Bankruptcy, 14 Ed. Sec. 8.01, p. 157.....   | 9      |
| 9 Collier on Bankruptcy, 14 Ed. Sec. 9.32, p. 392.....   | 10     |
| 9 Collier on Bankruptcy, 14 Ed. Sec. 7.05, p. 22.....  | 11     |
| 9 Collier on Bankruptcy, 14 Ed. Sec. 9.32, pp. 394, 395, 401.....  | 11     |
| 9 Collier on Bankruptcy, 14 Ed. Sec. 9.32, pp. 404.....  | 13     |
| Feibelman, Secured Creditors and Chapter XI Proceedings,<br>38 Referee's Journal 9 (Jan. 1964).....            | 9      |
| Nadler, The Law of Debtor Relief, Secs. 126, 202 217, 366 ..   | 9      |
| Herzog, Reorganizations and Arrangements under Chapter<br>X and XI, 35 Referee's Journal, 113 (Oct. 1961)..... | 6      |
| Restatement of Contracts, Sec. 133, 134.....   | 17, 18 |
| Williston on Contracts, Revised Edition, Vol. 2, Sec. 356.....   | 18     |
| Williston on Contracts, Revised Edition, Vol. 2, Sec. 361, page<br>1056 .....                                  | 19     |

IN THE SUPREME COURT  
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STATE OF UTAH

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MOJAVE URANIUM COMPANY,  
*Plaintiff and Appellant,*

- v. -

MESA PETROLEUM COMPANY,  
*Defendant and Respondent.*

Case No.

11286

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STATEMENT OF THE KIND OF CASE

This is an action brought by Mojave Uranium Company against Mesa Petroleum Company upon the latter's assumption agreement to pay and discharge a compromise agreement whereunder Standard Gilsonite Company, Mesa's predecessor in interest, agreed to pay \$20,000.00 in exchange for the release of Mojave's mortgage upon personalty belonging to Standard.

## DISPOSITION IN LOWER COURT

The trial court, upon hearing reciprocal motions for summary judgment, denied that of Mojave's and granted Mesa's upon the grounds that Mojave's claim was "barred under the provisions of the Bankruptcy Act."

## RELIEF SOUGHT ON APPEAL

Mojave seeks reversal of the summary judgment granted Mesa, with the cause remanded with directions to enter summary judgment in favor of Mojave.

## STATEMENT OF FACTS

On May 25, 1962, Standard filed its petition for an arrangement under Chapter XI of the Federal Bankruptcy Act (11 USC Secs. 701-799) in the United States District Court for the District of Utah. (Ex. P-1) Prime counsel for Standard in the arrangement proceedings was Bruce E. Coke, an attorney of Salt Lake City, whose deposition was published below. On May 25, 1962 Standard either was, or believed that it was, indebted to Mojave upon a promissory note dated March 2, 1960 in the amount of \$26,000.00, the payment of which was secured by a Chattel Mortgage upon Standard's mining and office equipment and vehicles. (R-54, 55; Exs. P-1, P-2, P-17; Depo. pp. 9, 12, 16, 48, 49, 51) On June 12, 1962, Standard filed in said arrangement proceedings, among other things, its statement of executory contracts and its schedules of debts and assets. In paragraph 3

of the statement of executory contracts and on its A-2 Schedule, Standard duly listed and described the obligation then owing to Mojave and characterized it as *secured* and *neither* contingent, unliquidated or disputed. (Ex. P-2; Depo. 34, 35)

After the filing of the initial petition for arrangement and presumably sometime in June of 1962, Mojave and Standard mutually agreed to recast this debt from a secured to an *unsecured* obligation by a release of Mojave's mortgage in exchange for which Standard agreed to pay the sum of \$20,000.00 with 5% interest at the rate of \$2,000.00 per year. (Exs. P-6, P-7; R-55, 68, 84; Depo. 10, 11, 12, 13, 19, 41, 45, 46) Mojave, as were other *secured* creditors, was dealt with on an individual basis outside the framework of the Chapter XI proceeding, because Coke correctly advised his principals that *only unsecured* creditors could be provided for in a duly confirmed plan of arrangement under Chapter XI. (Depo. 20, 23, 41, 43, 48)

Thereafter, Standard filed with the court a proposed arrangement which was confirmed by Order dated August 13, 1962. (Ex. P-3) The Mojave indebtedness, as compromised, for \$20,000.00 appears on all eight balance sheets and financial statements prepared by or in behalf of Standard subsequent to the date of confirmation to and including the date of the acquisition of Standard by Mesa. These financial statements reflected Standard's liability picture as of August 31, 1962; De-

ember 31, 1963; January 31, 1964; February 29, 1964; December 31, 1964; April 30, 1965; May 31, 1965; and September 10, 1965, this being the date of acquisition. (Exs. P-5, pp. 6 and 7; P-8; P-9; P-10; P-16; Depo. 6, 7, 8, 33, 34) The statements for February 29, 1964 and January 31, 1964 reflect the balance at \$18,000.00, rather than \$20,000.00 because there was apparently a \$2,000.00 payment erroneously credited to the account. (Ex. P-4; Depo. 33, 54) Although assertions were made casting doubt upon the validity of the original Mojave claim, Coke was never furnished any documentation thereof. (Depo. 45, 46, 48, 49)

On the 10th day of September, 1965, Standard transferred substantially all its assets, properties and business to Mesa in accordance with their "Agreement for Purchase and Sale of Assets and Plan of Reorganization" of July 6, 1965. (Exs. P-10, P-11, P-12, P-13, P-14, P-15, P-16) Under the terms of said agreement Mesa agreed, among other things, to deliver to Standard upon the closing "an undertaking whereby Mesa assumes and agrees to pay, perform and discharge all debts, obligations, contracts and liabilities (contingent or otherwise) of Seller set forth in a schedule thereof to be delivered by Seller to Mesa at the closing which debts, obligations, and liabilities shall include only those reflected and reserved for on Seller's Balance Sheet at May 31, 1965" adjusted in event of payment before closing. (Ex. 16) The balance sheet of May 31, 1965, and the notes thereto reflect the indebtedness to Mojave. (Ex. P-6, pp. 19, 20;

Depo. 33, 34) The "undertaking" referred to which was obtained from Mesa's own file relating to the Standard acquisition and which is entitled "Agreement of Assumption of Liabilities" provides that Mesa thereby assumes and agrees to "pay, perform, and discharge the debts, obligations, contracts, and liabilities of Standard set forth on Exhibit A annexed hereto." (Ex. P-10) That annexed thereto as Exhibit A is a list of the liabilities of Standard as of September 10, 1965 and on the first sheet thereof listed third from the bottom is "Note payable Mojave Uranium Company . . . \$20,000.00."

## ARGUMENT

### POINT I

CONFIRMATION OF STANDARD'S PLAN OF ARRANGEMENT DID NOT DISCHARGE MOJAVE'S CLAIM, IT BEING A SECURED CLAIM AND NOT PROVIDED FOR THEREIN.

Chapter XI of the Bankruptcy Act had its genesis in prior congressional enactments designed for the rehabilitation, as opposed to liquidation, of a financially distressed business. The immediate precursor of Chapter XI was Section 74 of Chapter VIII of the emergency bankruptcy legislation of the Act of March 3, 1933. The new Bankruptcy Act of 1938, commonly referred to as the Chandler Act, effected a revision of former Section 74 into what is now known as Chapter XI. 1 Collier on Bankruptcy (14th Ed.) Sec. 0.01. Chapter XI essentially affords relief by way of composition and/or exten-

sion of *unsecured* debts. It affords a measure of judicial protection to the debtor that a common law composition of creditors cannot. Upon the filing of a Chapter XI proceeding the debtor is brought within the protective umbrella of the court which, under the Act, can issue various protective orders for the benefit of the debtor and his business, all with a mind to keep the business going and to give the debtor breathing space while he attempts to work out a satisfactory arrangement with his *unsecured* creditors. See, Herzog, "Reorganizations and Arrangements under Chapters X and XI," 35 Referee's Journal 113 (Oct. 1961). This arrangement, unlike that at common law, requires the approval of only a majority in number and amount of such creditors prior to confirmation; and upon confirmation the plan becomes binding on all. 11 U.S.C. Secs. 762, 767; See, 9 Collier on Bankruptcy (14th Ed.) Sec. 9.25, pp. 335-341.

An arrangement under Chapter XI is defined at Section 306 of the Bankruptcy Act (11 USC 706) as follows:

"Arrangement shall mean any plan of a debtor for the settlement, satisfaction, or extension of the time of payment of his *unsecured* debts. . ."  
(Emphasis supplied)

For the purposes of an arrangement providing for an extension of time for payment of debts, Section 306 of the Act (11 USC 707) defines creditors as follows:

“ ‘creditors’ shall include the holders of all *unsecured* debts, demands, or claims of whatever character against a debtor. . .” (Emphasis supplied)

The same section defines debts or claims as:

“ ‘debts’ or ‘claims’ shall include *all unsecured* debts, demands, or claims of whatever character against a debtor. . .” (Emphasis supplied)

Sections 356 and 357 of the Act (11 USC 756, 757) set forth the mandatory and permissive provisions of an arrangement under Chapter XI as follows:

“Sec. 356. An arrangement within the meaning of this chapter shall include provisions modifying or altering the rights of *unsecured* creditors generally or of some class of them, upon any terms or for any consideration.

Sec. 357. An arrangement made within the meaning of this chapter may include —

(1) provisions for treatment of *unsecured* debts on a parity one with the other, or for the division of such debts into classes and the treatment thereof in different ways or upon different terms;

(2) provisions for the rejection of any executory contract;

(3) provisions for specific undertakings of the debtor during any period of extension provided for by the arrangement, including provisions for payments on account;

(4) provisions for the termination, under specified conditions, of any period of extension provided by the arrangement;

(5) provisions for continuation of the debtor's business with or without supervision or control by a receiver or by a committee of creditors or otherwise;

(6) provisions for payment of debts incurred after the filing of the petition and during the pendency of the arrangement, in priority over the debts affected by such arrangement;

(7) provisions for retention of jurisdiction by the court until provisions of the arrangement, after its confirmation, have been performed; and

(8) any other appropriate provisions not inconsistent with this chapter.

In the case of *Securities and Exchange Commission vs. U. S. Realty & Improvement Company*, 310 U.S. 434, 60 S.Ct. 1044, 84 LEd 1293, 1302, 1303 (1940), the Supreme Court of the United States gave judicial expression to what Congress had so explicitly declared:

"Chapter XI provides a summary procedure by which a debtor may secure judicial confirmation of an 'arrangement' of his *unsecured* debts".

\* \* \*

"Under Chapter XI only the rights of *unsecured* creditors of the debtor may be arranged and this without alteration of the status of any other classes of security holders or of subsidiaries."

\* \* \*

"... the sections under Chapter XI already considered admit of an 'arrangement' only with respect to *unsecured* creditors without alteration of the relations of any other class of security holders. . . ." (Emphasis supplied)

See also, *In re Camp Packing Co.*, 146 Fed. Supp. 935 (N.D.N.Y. 1956); Nadler, *The Law of Debtor Relief*, Secs. 126, 202, 217, 366; Feibelman, "Secured Creditors and Chapter XI Proceedings," 38 *Referee's Journal* 9 (Jan. 1964).

This strict limitation upon the operation of Chapter XI to *unsecured* creditors and *unsecured* debts is one of the most notable characteristics, distinguishing it from other debtor relief provision of the Act. As stated in 9 *Collier on Bankruptcy* (14th Ed.) Section 8.01 p. 157 et seq.:

"The limitation on an arrangement under Chapter XI so that it can deal only with *unsecured* creditors is one of the principal fundamental differences between a Chapter XI proceeding and a proceeding under Chapter X, XII, or XIII. Under Chapter X, secured as well as *unsecured* debts, and rights of stockholders, may be affected by a plan of reorganization. Under Chapter XII, debts secured by real property or a chattel real of a debtor, and *unsecured* debts, may be affected by an arrangement, but *unsecured* debts alone cannot be affected. Under Chapter XIII, secured and *unsecured* debts may be affected by a wage earner's plan." (Emphasis supplied)

Standard's arrangement not only could not make provisions for Mojave's debt, it did not even purport to do so. See the testimony of Standard's attorney, Bruce Coke, at pages 20, 48 and 41 of his deposition published at the hearing below. Mojave's debt, therefore, was not discharged upon the entry of the order of confirmation, since an order confirming an arrangement under Chapter XI operates as a discharge of only those claims provided for therein. Section 371 of the Act (11 USC 771) provides as follows:

"Sec. 371. The confirmation of an arrangement shall discharge a debtor from all his *unsecured* debts and liabilities provided for by the arrangement, except as provided in the arrangement or the order confirming the arrangement, but excluding such debts as, under section 17 of this Act, are not dischargeable." (Emphasis supplied)

Inasmuch as the arrangement can apply only to *unsecured* creditors, the discharge provisions of Chapter XI upon confirmation of the arrangement are likewise limited to *unsecured* creditors. 9 Collier on Bankruptcy (14th Ed.) Sec. 9.32, at page 392, states:

"Debts which can be discharged by confirmation of an arrangement pursuant to Sec. 371 must be '*unsecured* debts and liabilities.' No provision is made for a discharge of secured debts. That is an obvious consequence of the fact that an arrangement may provide for the settlement, satisfaction, or extension of *unsecured* debts but cannot deal with secured debts." (Emphasis supplied)

The fact that Mojave's claim became *unsecured* subsequent to the filing but prior to confirmation is of no moment. The critical date was May 25, 1962, the date of filing of the initiatory petition. The discharge afforded by Section 371, *supra*, relates to those debts as they existed prior to the inception of the proceedings. *Zavelo v. Reeves*, 227 U.S. 625, 33 S. Ct. 365, 57 L. Ed., 676 (1913); See also, 3A Collier on Bankruptcy, sec. 63.04, pp. 1772-1774, and cases and authorities noted therein. It is stated in 9 Collier on Bankruptcy, Sec. 7.05, p. 22, following the rule of *Zavelo v. Reeves*, *supra*:

"Thus, the general time of cleavage, insofar as determining whether a person is a creditor is the date of the filing of the Chapter XI petition in a section 322 case . . ."

Standard's was a section 322 (11 USC 722) case.

Therefore, since the debt of Mojave was not provided for by the arrangement and, indeed, *could* not be provided for by the arrangement, Mojave's debt was not discharged upon confirmation, and for this reason alone was a valid subsisting obligation not subject to the defense of discharge at the time of the commencement of the instant action. See 9 Collier on Bankruptcy, Section 9.32, [4][9] pp. 394, 395, 401.

## POINT II

ASSUMING, ARGUENDO ONLY, THAT THE DEFENSE OF DISCHARGE WERE AVAILABLE MOJAVE'S DEBT WAS REVIVED.

Although it is clear that Standard's obligation to Mojave was not and could not be discharged, the facts of this case nevertheless afford a further support to Mojave's position. Were it to be assumed that Mojave was the holder of an *unsecured* rather than a secured debt and/or that the plan of arrangement could and did, in fact, purport to provide for Mojave's claim, the claim was nevertheless revived by Standard's promise to pay encompassed in the written agreements executed subsequent to the filing of the petition for arrangement. (Exs. P-6, P-7)

The applicable law is generally stated by this Court in the case of *Merchants Protective Ass'n vs. Popper*, 59 Utah 470, 204 Pac. 107, 110 (1922) as follows:

"When a debt has been discharged in bankruptcy the moral obligation continues precisely the same as though no discharge had been made. The obligation is a continuing one, and continues as long as the debt remains unpaid or is otherwise released. The discharge merely destroys the legal remedy to enforce the debt, but the moral obligation to pay continues in force. That moral obligation is a sufficient consideration for a new promise whenever the promise may be made."

It is well settled that an otherwise dischargeable obligation is revived by a promise to pay made subsequent to the filing of an initiatory petition for an arrangement. 1 Collier on Bankruptcy (14th Ed.) Sec. 17.33, p. 1756 and cases noted therein. This is so whether the promise is made prior or subsequent to confirma-

tion. *Zavelo v. Reeves*, 227 U.S. 625, 33 S. Ct. 365, 57 L.Ed. 676 (1913) (construing former Sec. 12); 9 Collier on Bankruptcy (14th Ed.) Sec. 9.32 (13), p. 404; 1 Collier *ibid.* Sec. 17.36, pp. 1760-1761 and cases therein cited.

The *Zavelo* case, *supra*, bears a remarkable similarity to the case at bar; and it is submitted that it is controlling herein, even assuming Mojave's claim to have been *unsecured* as of the date of filing under Chapter XI. That case involved a promise made by the debtor *after* his filing under the Bankruptcy Act for a composition under former section 12 to pay a claim in full that would otherwise be subject to the composition and discharged. The promise was made *prior* to confirmation and discharge. The plaintiffs not only accepted the proposed composition, they were paid and received a dividend thereunder. The Supreme Court, nevertheless, in holding the debtor liable for the full amount upon the theory of revival, stated as follows:

"It is settled, however, that a discharge, while releasing the bankrupt from legal liability to pay a debt that was provable in the bankruptcy, leaves him under a moral obligation that is sufficient to support a new promise to pay the debt. And in reason, as well as by the greater weight of authority, the date of the new promise is immaterial. The theory is that the discharge destroys the remedy, but not the indebtedness; *that, generally speaking, it relates to the inception of the proceedings*, and the transfer of the bankrupt's estate for the benefit of creditors takes effect as of the same time; that the bankrupt becomes a free man

from the time to which the discharge relates, and is as competent to bind himself by a promise to pay an antecedent obligation, which otherwise would not be actionable because of the discharge, as he is to enter into any new engagement. And so, under other bankrupt acts, *it has been commonly held that a promise to pay a provable debt, notwithstanding the discharge, is as effectual when made after the filing of the petition and before the discharge as if made after the discharge. . .*" (Emphasis supplied)

It is respectfully submitted that the agreement between Standard and Mojave, although contemplating delivery of a promissory note, in effect constitutes a clear unequivocal promise to pay Mojave a specified amount upon specified terms upon delivery of the releases provided for therein; and was intended as such by the draftsman, Standard's legal counsel. See Coke's deposition, pp. 10-13. The uncontroverted affidavit of Robert Pinder recites the delivery of said releases. (R-55) Accordingly, this "promissory agreement" thereupon became an effectual promise reviving Mojave's debt. See *Merchant's Protective Ass'n v. Popper, supra*, p. 109.

### POINT III

ASSUMING, ARGUENDO, THAT STANDARD'S OBLIGATION WAS DISCHARGED IN BANKRUPTCY OR SUBJECT TO OTHER DEFENSES, MESA'S PROMISE TO STANDARD TO ASSUME AND PAY MOJAVE CREATED A VALID CONTRACT ENFORCEABLE BY MOJAVE.

Certain factual defenses have been raised in Mesa's answer to Mojave's amended complaint. (R-57-60) They

may be basically reduced to three and summarized as follows: (1) Mojave failed to release its security and therefore, its claim is without consideration; (2) there was never consideration for the original claim inasmuch as the amounts allegedly loaned to Standard were Standard's funds and the transaction resulted from self dealing; and (3) Standard, having failed to release, has therefore, failed to exhaust its security. The other defenses contained in the third, sixth, seventh, and eighth defenses of Mesa's answer are basically questions of law.

The third defense has heretofore been disposed of in Points I and II hereof. The sixth and seventh defenses on their face are without merit. In treating these defenses suffice it to say that Exhibit P-7 clearly qualifies as a memorandum of the agreement reduced to writing; and by its terms the first installment thereunder falls due sometime during the year 1963, well within six years prior to the commencement of this action within the meaning of Sec. 78-12-23, U.C.A., 1953, as amended.

With respect to the factual defenses alleged, it is submitted that each of these defenses were disposed of by the uncontroverted affidavits of Robert J. Pinder and Sterling J. Myer (R-54-55), and Mojave's exhibits received below. Myer's affidavit specifically sets forth that the funds loaned to Standard were in fact the funds of Mojave. Pinder's affidavit sets forth that the release of the security was in fact executed and delivered to either the principal officer of Standard or its coun-

sel. Exhibit P-2, Standard's statement of executory contracts, acknowledges the indebtedness to Mojave in paragraph three thereof. Exhibit P-1 lists the indebtedness to Mojave on Standard's summary of assets and liabilities annexed to the petition for arrangement. On Standard's A-2 Schedule filed in the arrangement proceedings, a copy of which is annexed to Exhibit P-2, the indebtedness to Mojave is listed and shown thereon as being *neither* contingent, unliquidated, or *disputed*. Exhibit P-17 is a certified copy of the chattel mortgage in favor of Mojave which upon its face evidences an indebtedness as of the date it bears in the amount of \$18,325.82, together with "all other future and past indebtedness which the mortgagor may owe." All of Standard's balance sheets and financial statements made subsequent to confirmation (from August 31, 1962 to September 10, 1965) reflect without dispute or qualification the indebtedness to Mojave subsequently assumed by Mesa. (Exs. P-4, P-5, P-8, P-9, P-10, P-11, and P-16) There is not a shred of evidence in the record that controverts these facts. No opposing affidavits were filed, no documentary evidence offered, nor testimony adduced by way of deposition that in any way supports the factual allegations of defendant's answer and contravenes the plaintiff's evidence. Amended Rule 56 (c), U.R.C.P., effective October 1, 1965, provides as follows:

"When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affi-

disputes or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.”

This, Mesa has not done, and accordingly, Mojave’s motion for summary judgment should have been granted.

However, even were we to assume, for the purposes of argument only, that there was a genuine issue or dispute of fact raised relative to the factual defenses asserted; and were we further to assume, *arguendo* only, that the obligation had been barred by the statute of limitations, the statute of frauds, or discharged in bankruptcy, Mesa nevertheless would be liable to Mojave by reason of the former’s assumption agreement with Standard. Mojave was a third party beneficiary of that agreement.

The Restatement of Contracts, Sec. 133, provides in pertinent part as follows:

“(1) Where performance of a promise in a contract will benefit a person other than the promisee, that person is . . . :

\* \* \*

(b) a creditor beneficiary if no purpose to make a gift appears from the terms of the promise in view of the accompanying circumstances and performance of the promise will satisfy an actual *or supposed or asserted* duty of the promisee to the beneficiary, *or a right of the beneficiary against the promisee which has been barred by the Statute of Limitations*

*or by a discharge in bankruptcy, or which is unenforceable because of the Statute of Frauds."* (Emphasis supplied)

Illustration 10 to the comment on said section is as follows:

"10. C asserts that A owes him \$100. *A does not owe this money, or think that he owes it*, but rather than engage in litigation, and in order to obtain peace of mind, A secures, for sufficient consideration, a promise from B to pay C \$100. C is a creditor beneficiary." (Emphasis supplied)

Restatement of Contracts, Sec. 134, Comment a, thereto, provides as follows:

"By the definition of creditor beneficiary a person falls within this designation if performance of the promise will operate to discharge a real or *supposed or alleged* duty and is not intended in whole or in part as a gift." (Emphasis supplied)

This concept has been expressly adopted and approved by this court in the case of *Kelly vs. Richards*, 95 Utah 560, 83 P.2d 731, (1938) where, quoting with approval from Williston on Contracts, Revised Edition, Vol. 2, Sec. 356, the Utah court stated:

"Third person beneficiaries under a contract, although not parties to it may be divided into three classes:

\* \* \*

2. Such person is a creditor beneficiary if no

intention to make a gift appears from the terms of the promise, and performance of the promise will satisfy an actual (*or supposed*) *or asserted duty* of the promisee to the beneficiary. . .'

\* \* \*

To maintain this action, plaintiff or the creditors he represents must fall within the . . . second class." (Emphasis supplied)

Williston on Contracts, Vol. 2, Rev. Ed., Sec. 361, p. 1057, in speaking of the right of a "creditor beneficiary" to enforce the agreement made for his benefit states:

"Nevertheless, the overwhelming majority of American courts, instinctively recognizing the creditor's interest in such a promise, and failing to see the practical importance of making the promisee a party to the litigation . . . have given the third party a direct right of action at law on the contract."

See also, *Kelly v. Richards, supra*.

It is apparent, therefore, that the fact that Mojave's claim against Standard *may* have been subject to the various defenses alleged is quite immaterial. Viewing the record in a light most favorable to Mesa, there was, at the very least, a supposed or asserted duty on the part of Standard to perform and pay the obligation to Mojave. Mesa, for a valuable consideration, to wit: the acquisition of the property and business of Stand-

ard, agreed in clear, unequivocal and unconditional terms to assume, pay and discharge this obligation. The assumption agreement of September 10, 1965, (Ex. P-10) and the purchase agreement and plan of reorganization of July 6, 1965 contained in Exhibit P-16 are unconditional and absolute. Accordingly, Mojave as a classic "creditor beneficiary" was entitled to summary judgment below upon the promise made for its benefit.

### CONCLUSION

It is therefore respectfully submitted that the trial court erred in granting summary judgment against Mojave upon the grounds that its claim was discharged in bankruptcy. Its claim against Standard was secured and therefore, not provided for in the plan of arrangement; in any event said claim was revived by Standard's promise to pay subsequent to the filing of the Chapter XI proceedings; and finally, the assumption of said debt and the promise to pay the same by Mesa removes any supposed bar by reason of a purported discharge in bankruptcy.

It is further respectfully submitted that assuming, without admitting, the validity of the defenses alleged, Mesa's unconditional assumption agreement, which, in the final analysis, is the agreement sued upon herein renders said defenses moot and immaterial. It is conceded that respondent's eighth defense is proper to limit Mojave's recovery herein. Accordingly, this cause should be reversed and remanded with instructions to

enter summary judgment for the sum of \$10,000.00 and interest in favor of appellant, Mojave, against respondent, Mesa, under the doctrine recently announced by this Court in the case of *Christensen v. Larsen*, .... Utah ..., No. 11135, July 5, 1968 and leave to annually enforce collection of the installment balances due.

Respectfully submitted,

HATCH & McRAE and  
HERSCHEL J. SAPERSTEIN