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The Dischargeability of Debts in Bankruptcy

Paul J. Hartman*

To many debtors, the discharge is the raison d'être of the bankruptcy laws. In this article, Professor Hartman discusses the history of the discharge, its availability and application in certain situations, and its personal nature.

I. INTRODUCTION

From the viewpoint of the bankrupt debtor, a discharge from his obligations is, no doubt, the most important facet of bankruptcy proceedings. The bankruptcy discharge is designed to relieve the honest debtor from his financial entanglements, and to give him an opportunity to reinstate himself in the business world.¹ A debtor is now entitled to a discharge as a matter of right, unless he has been guilty of certain specified offenses against the Bankruptcy Act.² For many generations the idea of a discharge from one's debts has been the relieving feature of bankruptcy. However, it has not always been so. The first English bankruptcy acts—in which American bankruptcy law finds its origin—did not contain even the germ of an idea of a discharge.³ On the contrary, each English bankruptcy law contained express provision that the bankrupt's remaining debts should not be construed to be released notwithstanding the fact that all his assets were divided up ratably among his creditors; in addition, the bankruptcy law under Elizabeth expressly provided that, if the bankrupt should after-

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1. See *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934); *Williams v. United States Fid. & Guar. Co.*, 236 U.S. 549 (1915); *In re Rinker*, 107 F. Supp. 261 (D.N.M. 1952).

2. Section 14 of the Bankruptcy Act specifies seven grounds for objecting to the discharge. In brief, they are as follows: (1) Nine different criminal offenses that are "knowingly" and "fraudulently" committed, as provided under 18 U.S.C. § 152 (1958). These include such offenses as (a) conversion of the bankrupt's property, (b) taking a false oath in the bankruptcy proceedings, and (c) filing a false claim in the bankruptcy proceedings, etc. To deprive the bankrupt of a discharge, it is not necessary that he be convicted of one of the enumerated offenses. It is enough if it be shown by clear and convincing evidence that he has been guilty of any such offense. *In re Shear*, 201 Fed. 460 (W.D.N.Y. 1913). (2) Interference with or failure to keep financial records, unless the failure is justified. (3) Obtaining money or credit by false statements in writing. (4) Fraudulent conveyances or concealments within twelve months preceding the filing of the bankruptcy petition. (5) Prior discharge within six years. (6) Refusal to obey any lawful order of, or to answer any material question approved by, the court. (7) Failure to explain losses or deficiency of assets to meet his liabilities. Bankruptcy Act § 14c, ch. 541, 30 Stat. 550 (1898), as amended, 11 U.S.C. § 32 (1958).

3. GLENN, LIQUIDATION § 180 (1935).

wards acquire any new property, the right to it should immediately vest in all his creditors, both old and new, and that it should be administered by the bankruptcy commissioners as part of the bankrupt's estate, no matter how long a period of time might have elapsed.⁴ The entrance of the idea of a discharge into the bankruptcy system first came about through the consent of the creditors, who allowed the debtor the privilege of a discharge upon his presentation to the court of a certificate signed by the requisite percentage of claims.⁵ It was not until the reign of Queen Anne that an act was passed in 1705, granting the privilege of a discharge to a debtor from his remaining debts, provided he had surrendered all his assets and made full disclosure to his creditors.⁶

Although the first actual bankruptcy law of the United States was passed in 1800, during the administration of John Adams, we are told that it was not until our second bankruptcy act, passed in 1841, that a discharge and release of the debtor from his remaining debts made its appearance in our bankruptcy jurisprudence.⁷

Even though the bankrupt receives a discharge, it is not an effective defense to all of his obligations. Section 17 of the Bankruptcy Act provides that the discharge shall release a bankrupt "from all of his *provable* debts, whether allowable in full or in part," except those debts listed later in section 17 of the act as not being affected by the discharge.⁸ At the outset, therefore, it can be seen that an obligation of a bankrupt is not discharged unless it is *provable* against the bankrupt's estate at the time it is offered up for liquidation. Claims that are not *provable* are not impaired by the bankrupt's discharge; they ride through bankruptcy. This is as it should be, because a claim that is not provable never had a chance at the bankrupt's estate, and it should not be dischargeable.

However, it should be made clear that not all debts that are provable are dischargeable. There are certain kinds of debts that are not dischargeable in bankruptcy even though they may be provable and share in the distribution of the bankrupt's estate. Such debts will be examined below in considerable detail. Moreover, the scheduling of a non-provable debt in the bankruptcy proceedings does not operate to make the debt dischargeable.⁹ For the purpose of the discharge, provable debts include not only those which have actually been proved against the estate, but also those capable of being proved.¹⁰ Thus, a contingent claim that might have been

4. 1 REMINGTON, BANKRUPTCY § 4 (5th ed. 1950).

5. GLENN, LIQUIDATION § 358 (1935).

6. 1 REMINGTON, BANKRUPTCY § 4 (5th ed. 1950).

7. 1 REMINGTON, BANKRUPTCY § 8 (5th ed. 1950).

8. Bankruptcy Act § 17a, ch. 541, 30 Stat. 550 (1898), as amended, 11 U.S.C. § 35 (1958). See also Bankruptcy Act § 1(15), ch. 541, 30 Stat. 544 (1898), as amended, 11 U.S.C. § 1 (1958).

9. *In re Cushman*, 3 F.2d 449 (S.D.N.Y. 1924).

10. 1 COLLIER, BANKRUPTCY ¶ 17.04 (14th ed. 1956).

proved, liquidated or estimated, and allowed, is dischargeable.¹¹

In order to approach the subject of what debts are dischargeable, it is necessary to inquire at the outset what claims are provable against the estate of the bankrupt. Only those debts listed in section 63 of the Bankruptcy Act are provable.

II. PROVABILITY OF CLAIMS

A. Claims That Are Provable

Section 63a of the Bankruptcy Act lists nine types of claims which are provable against the bankrupt's estate.¹²

1. Fixed Liabilities, Absolutely Owing

The first type of claim that is made provable under section 63a of the act is a debt that is founded upon "(1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition by or against him [bankrupt], whether then payable or not . . ." ¹³ A "judgment" within the purview of this type of provable claim is "absolutely owing" when rendered and entered, irrespective of a pending appeal, at least where no supersedeas bond has been filed.¹⁴ Since a verdict is not the equivalent of a judgment, a verdict is not entitled to proof as a judgment.¹⁵ Likewise, certain types of judicial action, evidencing financial obligations of the debtor, do not fall within this clause of provability. Thus, neither a fine for violation of law,¹⁶ nor a forfeiture,¹⁷ nor an order and judgment for support of an illegitimate child,¹⁸ nor alimony

11. 1 COLLIER, BANKRUPTCY ¶17.04 (Supp. 1960). The provability of contingent claims will be dealt with later. See text accompanying notes 58-64 *infra*.

12. Bankruptcy Act § 63a, ch. 541, 30 Stat. 562 (1898), as amended, 11 U.S.C. § 103 (1958).

13. "Debts of the bankrupt may be proved and allowed against his estate which are founded upon (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition by or against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest . . ." Bankruptcy Act § 63a, ch. 541, 30 Stat. 562 (1898), as amended, 11 U.S.C. § 103 (1958).

14. *Moore v. Douglas*, 230 Fed. 399 (9th Cir. 1916). See 3 COLLIER, BANKRUPTCY ¶ 63.10 (14th ed. 1956).

15. *In re Eads*, 17 F.2d 813 (W.D. Wash. 1926). See 3 COLLIER, BANKRUPTCY ¶ 63.10 (14th ed. 1956) for a more extensive treatment of provability where the liability is evidenced by a judgment.

16. *In re Moore*, 111 Fed. 145 (W.D. Ky. 1901) (fine imposed in *criminal* prosecution). A fine imposed for contempt of court is not a dischargeable liability. *In re Thomashefsky*, 51 F.2d 1040 (2d Cir. 1931). However, a *civil* contempt fine imposed on the bankrupt is provable and dischargeable. *Parker v. United States*, 153 F.2d 66 (1st Cir. 1946). See 3 COLLIER, BANKRUPTCY ¶ 63.12 (14th ed. 1956) for discussion of provability of fines and penalties.

17. See 1 COLLIER, BANKRUPTCY ¶ 17.05 (14th ed. 1956):

18. *Ibid.* A judgment that the bankrupt is the father of an illegitimate child,

payable for the support of a wife,¹⁹ is provable. These various obligations will be discussed further on in this article.

As the excerpt above shows, a fixed debt "absolutely owing" may be provable under clause (1) of section 63a of the act, although it is not a "judgment," if it is evidenced by an "instrument in writing."²⁰ The phrase "instrument in writing" includes any document or written evidence of the agreement from which the debt arises, such as bonds and promissory notes.²¹ It can be seen, moreover, that the debt referred to under clause (1) of section 63a must be "absolutely owing," although the time of payment is immaterial; the debt need not be due at the time of the filing of the petition in order to be provable as an obligation "absolutely owing."²²

A judgment obtained by the date of the filing of the bankruptcy petition may be provable against the bankrupt's estate, even though the judgment is not founded upon a provable claim. This proposition finds its best illustration in the area of tort liabilities. Aside from certain exceptions later to be discussed,²³ tort claims, as such, cannot be proved against the bankrupt's estate. Perhaps we can best understand why tort claims are not provable against the estate of the bankrupt if we remember that bankruptcy laws, both in England and in our country, were first intended only for traders, brokers and merchants—in general, those dealing in money and in buying and selling.²⁴ Non-traders did not enjoy the benefits of bankruptcy until 1861.²⁵ While the trader at present is not the only person to whom bankruptcy can apply, nevertheless the idea has persisted that the misfortunes of the tort-feasor were different from the financial embarrassments of the unfortunate debtor. Hence, tort liability as such, not presentable as an action *ex contractu*, still lies beyond the scope of bankruptcy.²⁶ However, while a tort *claim* is not provable (and therefore not dischargeable), a tort *judgment* is provable, although based upon the debtor's non-provable tort, provided the judgment is entered prior to the filing of the bankruptcy petition.²⁷ In short, one judgment ostensibly is

requiring him to pay a sum for its support, is not dischargeable. *Breeden v. State ex rel. Ferguson*, 183 Tenn. 102, 191 S.W.2d 167 (1945).

19. *Wetmore v. Markoe*, 196 U.S. 68 (1904); *Audubon v. Shufeldt*, 181 U.S. 575 (1901).

20. Bankruptcy Act § 63a(1), ch. 541, 30 Stat. 562 (1898), as amended, 11 U.S.C. § 103 (1958).

21. See 3 COLLIER, BANKRUPTCY ¶ 63.14 (14th ed. 1956) for a more extensive treatment of this point.

22. See 3 COLLIER, BANKRUPTCY ¶ 63.14 (14th ed. 1956) for a discussion of this matter.

23. See text accompanying notes 37-40 *infra*, and text accompanying notes 46-51 *infra*.

24. 1 REMINGTON, BANKRUPTCY §§ 6,7 (5th ed. 1950).

25. See HANNA & MACLACHLAN, CASES ON CREDITORS' RIGHTS 288 (5th ed. 1957).

26. *Schall v. Camors*, 251 U.S. 239 (1920). See GLENN, LIQUIDATION §§ 361, 466 (1935); 3 COLLIER, BANKRUPTCY ¶ 63.25 (14th ed. 1956).

27. *Lewis v. Roberts*, 267 U.S. 467 (1925).

treated the same as another with respect to provability, with no distinction being made regarding the grievance upon which the judgment happened to have been obtained.²⁸ Since a verdict is not the equivalent of a judgment, a tort claim upon which a verdict has been rendered, without judgment having been entered, does not become provable.²⁹

A tort judgment, although provable, may not be dischargeable if it falls within the ban of section 17 of the Bankruptcy Act, which will be examined somewhat in detail below.³⁰ There it will be seen that a judgment founded upon tort liability, which is exempted from the operation of a discharge, does not become dischargeable by virtue of the fact that the non-dischargeable tort claim is reduced to a provable judgment. It must never be forgotten, of course, that provability of debts is not synonymous with dischargeability of debts.

2. Taxable Costs Where Bankrupt Was Plaintiff

A second type of claim that is provable against the estate of the bankrupt consists of costs taxable against a bankrupt who was, at the time of the filing of the petition by or against him, a plaintiff in a cause of action which would pass to the trustee in bankruptcy and which the trustee declines to prosecute after notice.³¹ In this connection, it is important to know what causes of action will pass to the trustee in bankruptcy. In brief, section 70a(5) of the Bankruptcy Act provides that the bankrupt's cause of action against a third party will pass to the trustee if (1) the bankrupt could have transferred the cause of action, or (2) if the cause of action could have been levied upon and sold by judicial process.³² Whether the

28. While the proof of tort claims evidenced by a judgment indicates that the claims are treated as having been merged in the judgment, nevertheless this doctrine of merger has not been applied to judgments or decrees for alimony, where such claims at one time were held not dischargeable because not provable. Such claims are expressly made nondischargeable now. See notes 121-26 *infra* and accompanying text. *Wetmore v. Markoe*, 196 U.S. 67 (1904). See 3 COLLIER, BANKRUPTCY ¶ 63.10 (14th ed. 1956) for more extensive treatment of this matter.

29. See 1 COLLIER, BANKRUPTCY ¶ 17.08 (14th ed. 1956).

30. See "Wilful and Malicious Injuries to Person or Property of Another," notes 86-120 *infra*, for a discussion on the nondischargeability of tort judgments.

31. Bankruptcy Act § 63a(2), ch. 541, 30 Stat. 562 (1898), as amended, 11 U.S.C. § 103 (1958).

32. The kinds of claims that pass to the trustee in bankruptcy are set forth in § 72(5) of the Bankruptcy Act, which provides that the trustee is "vested by operation of law with the title of the bankrupt . . . to . . . (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered: *Provided*, That rights of action *ex delicto* for libel, slander, injuries to the person of the bankrupt or of a relative, whether or not resulting in death, seduction, and criminal conversation shall not vest in the trustee unless by the law of the State such rights of action are subject to attachment, execution, garnishment, sequestration, or other judicial process . . ." Bankruptcy Act § 70a(5), ch. 541, 30 Stat. 565 (1898), as amended, 11 U.S.C. § 110 (1958).

cause of action can be transferred or levied upon is determined by relevant state law.³³

3. *Taxable Costs Where Bankrupt Was Defendant*

Section 63a(3) of the Bankruptcy Act makes provable debts founded upon costs incurred by a creditor in good faith before the filing of the petition in an action to recover a provable debt.³⁴

4. *Debts on Open Account or Implied Contract*

Section 63a(4) of the Bankruptcy Act provides that debts of the bankrupt which are founded upon an open account, or a contract express or implied,³⁵ may be proved against his estate. Perhaps the bulk of the claims filed in the ordinary bankruptcy proceedings fall within this category.³⁶ This group of claims covers a balance due on a running account as well as claims based on tort, where the tort may be waived and an action brought on implied or quasi-contract.³⁷ As we have already seen, a large class of claims excluded from proof against the bankrupt's estate are unliquidated tort claims.³⁸ While tort claims as such are not provable, the creditor may nevertheless have a claim which could support either an action in tort on the one hand, or an action in contract or quasi-contract on the other hand. Such claims are provable under section 63a(4) of the act, even though the claim has not been reduced to judgment.³⁹ Since such claims are provable, they are dischargeable,⁴⁰ unless excepted from the operation of the discharge. Whether such claims are dischargeable depends upon whether they are excluded from the operation of the discharge by section 17 of the Bankruptcy Act, which will be dealt with below.

5. *Judgments Recovered After Bankruptcy*

The fifth class of provable claims relates to provable debts reduced to judgment *after* the bankruptcy petition has been filed and before the consideration of the bankrupt's application for a discharge.⁴¹ By virtue of

33. Bankruptcy Act § 70a(5), ch. 541, 30 Stat. 565 (1898), as amended, 11 U.S.C. § 110 (1958).

34. Bankruptcy Act § 63a(3), ch. 541, 30 Stat. 562 (1898), as amended, 11 U.S.C. § 103 (1958).

35. Bankruptcy Act § 63a(4), ch. 541, 30 Stat. 562 (1898), as amended, 11 U.S.C. § 103 (1958).

36. See 3 COLLIER, BANKRUPTCY ¶ 63.23 (14th ed. 1956).

37. See MACLACHLAN, BANKRUPTCY § 134 (1956).

38. See note 26 *supra* and accompanying text.

39. *Frederic L. Grant Shoe Co. v. W. M. Laird Co.*, 212 U.S. 445 (1909) (breach of warranty claim); *Tindle v. Birkett*, 205 U.S. 183 (1907) (conversion claim); *Crawford v. Burke*, 195 U.S. 176 (1904) (conversion claim).

40. *Ibid.* Also, to same effect is *Davis v. Aetna Acceptance Co.*, 293 U.S. 328 (1934) (technical conversion).

41. Bankruptcy Act § 63a(5), ch. 541, 30 Stat. 562 (1898), as amended, 11 U.S.C. § 103 (1958).

section 63a(5) of the Bankruptcy Act, such claims are provable, less the costs incurred after the petition was filed, provided the claim upon which the suit is based is provable against the bankrupt's estate.⁴²

6. *Workmen's Compensation Awards*

The sixth class of claims that is made provable by section 63a(6) of the Bankruptcy Act is awards by a workmen's compensation board where the injury occurred *prior to the adjudication*.⁴³ Prior to a 1934 amendment of the Bankruptcy Act, workmen's compensation awards were not provable obligations against the bankrupt.⁴⁴ The reasoning of the court in denying the provability of such a claim was that the award cannot be traced to any contract between the employer and employee because the law is compulsory; nor may the award be considered as a judgment because by the very terms of the workmen's compensation law such awards are subject to revision by the commission.⁴⁵

7. *Negligence Claims*

The somewhat anomalous nature of our bankruptcy laws regarding the provability of tort claims has been shown. That is to say, a tort claim, as such, is not provable against the bankrupt's estate; but if the tort has been reduced to judgment before the filing of the bankruptcy petition, then the tort judgment can be proved as a claim.⁴⁶ The same anomaly further appears with respect to the provability of negligence claims against the bankrupt where the claim has not been reduced to judgment before the date of the petition. We have seen that the exclusion of tort claims from the category of obligations that are provable against the estate of the bankrupt apparently stems from the old idea that bankruptcy originally was only for traders.⁴⁷ It is likely that the increase in claims arising out of automobile accidents created the requisite pressure to cause Congress to take action regarding negligence claims. The result was a 1934 amendment of section 63 of the Bankruptcy Act, plus a 1938 clarifying amendment, providing a half-way measure regarding the provability of negligence claims.⁴⁸ A claim for damages resulting from the negligence of the bankrupt is now provable if an action for negligence is pending against the bankrupt tort-feasor at the time of the filing of the bankruptcy petition.⁴⁹

42. *Ibid.*

43. Bankruptcy Act § 63a(6), ch. 541, 30 Stat. 562 (1898), as amended, 11 U.S.C. § 103 (1958).

44. *Lane v. Industrial Comm'r*, 54 F.2d 338 (2d Cir. 1931).

45. *Ibid.*

46. See notes 23-27 *supra* and accompanying text.

47. See notes 24-26 *supra* and accompanying text.

48. See 1 COLLIER, BANKRUPTCY ¶ 17.08 (14th ed. 1956) for a discussion of this development.

49. Section 63a of the Bankruptcy Act now provides that the debts of the bankrupt may be proved and allowed against his estate which are founded upon "(7) the right

Of course, by limiting the provable tort claims to those that are based on negligence, many actionable wrongs are excluded. Such wrongs as trespass, libel and slander still remain as non-provable obligations against the bankrupt. Being non-provable, they are not discharged; instead, these claims survive the bankruptcy and remain as obligations against the bankrupt despite the fact that he has received a discharge in bankruptcy.

A natural result of the present law governing the provability of negligence claims is that a person having a particular negligence claim hanging over him is under pressure not to file a bankruptcy petition until after suit is started against him on the negligence claim. On the other side of the coin, if the tort claimant wants a non-dischargeable claim, and is willing to forego participation in the bankrupt's then current estate, he will seek to precipitate a bankruptcy proceeding against the tort-feasor before suit has been started against the tort-feasor on the negligence claim.

One further test must be satisfied before the holder of a negligence claim will be permitted to share in the assets of the bankrupt's estate. Not only must his claim be provable (action pending at time petition is filed), but the claim must also be *allowable*. Since a claim based on negligence is unliquidated, it will be *allowed* as a claim against the bankrupt's estate only when it has been liquidated within the time and in the manner directed by the court.⁵⁰ If such liquidation will unduly delay the administration of the bankrupt's estate, then the claim will not be allowed.⁵¹

Whether a provable negligence claim will then be dischargeable depends upon whether the tort was tainted with the ingredients of one of the categories of claims that are made non-dischargeable by reason of section 17 of the Bankruptcy Act. Further on in this article the dischargeability of claims growing out of automobile accidents will be discussed.⁵²

By way of summary and recapitulation, it has been shown that tort claims generally are not provable against the bankrupt's estate, and consequently are not dischargeable. In the early history of bankruptcy only commercial debts were provable, and this historical development apparently continues to influence bankruptcy law. In more recent years the scope of provable claims has been expanded to include some tort claims, such as tort judgments obtained prior to bankruptcy;⁵³ workmen's compensation awards;⁵⁴ claims where the tort may be waived and proof made in contract or quasi-

to recover damages in any action for negligence instituted prior to and pending at the time of the filing of the petition in bankruptcy." Bankruptcy Act § 63a, ch. 541, 30 Stat. 562 (1898), as amended, 11 U.S.C. § 103 (1958).

50. Bankruptcy Act § 57d, 52 Stat. 866 (1938), 11 U.S.C. § 93 (1958).

51. *Ibid.* Section 63d of the Bankruptcy Act provides that claims disallowed for this reason shall be deemed not provable. Bankruptcy Act § 63d, ch. 541, 30 Stat. 562 (1898), as amended, 11 U.S.C. § 103 (1958).

52. See notes 108-20 *infra* and accompanying text.

53. See note 27 *supra* and accompanying text.

54. See notes 43-45 *supra* and accompanying text.

contract;⁵⁵ and negligence claims where an action is pending against the bankrupt tort-feasor at the time of the filing of the petition in bankruptcy,⁵⁶ provided the liquidation of the negligence claim will not unduly delay the administration of the bankrupt's estate.⁵⁷

8. *Contingent Debts and Contingent Contractual Liabilities*

By and large, contingent claims were not provable prior to 1938. However, by a far-reaching amendment of the Bankruptcy Act in 1938, contingent debts and contingent contractual liabilities were expressly made provable obligations against a bankrupt's estate.⁵⁸ This was accomplished by the addition of section 63a(8) of the Bankruptcy Act.⁵⁹

But such contingent debts and contingent contractual liabilities are subject to the limitation imposed by section 57d of the Bankruptcy Act. This section provides that such claims will not be *allowed* as claims against the bankrupt's estate unless they are capable of reasonable estimation, and unless they can be liquidated without unduly delaying the administration of the bankrupt's estate.⁶⁰ Where such a contingent or unliquidated claim has been proved, but has not been allowed, the Act provides that the claim shall not be deemed provable.⁶¹ That means, of course, that such disallowed claims are not discharged, since only claims that are made provable under the Bankruptcy Act may be discharged.⁶²

Perhaps a word should be said about the claim of an accommodation party where his principal debtor is the bankrupt. The accommodation party's claim, of course, is contingent, but he may file a claim against the estate of the bankrupt principal debtor if the creditor fails to file a proof of claim. However, the accommodation party files in the name of the

55. See notes 39-40 *supra* and accompanying text.

56. See notes 48-49 *supra* and accompanying text.

57. See notes 50-51 *supra* and accompanying text.

58. See 3 COLLIER, BANKRUPTCY ¶ 63.30 (14th ed. 1956).

59. Bankruptcy Act § 63a(8), ch. 541, 30 Stat. 562 (1898), as amended, 11 U.S.C. § 103 (1958).

60. A loan by a creditor to the bankrupt to be repaid from the proceeds of the bankrupt's business "as soon as said business is in a sound financial position" was held not capable of reasonable estimation so as to satisfy section 57d of the Bankruptcy Act; hence it was not provable. *Thompson v. England*, 226 F.2d 488 (9th Cir. 1955). See also *Maynard v. Elliott*, 283 U.S. 273 (1931), which is regarded as a leading case in this area. For a history of efforts to make contingent claims provable before the 1938 amendment of the Bankruptcy Act, see 3 COLLIER, BANKRUPTCY ¶ 57.15 (14th ed. 1956); MACLACHLAN, BANKRUPTCY § 139 (1956).

61. Bankruptcy Act § 63d, ch. 541, 30 Stat. 562 (1898), as amended, 11 U.S.C. § 103 (1958).

62. Bankruptcy Act § 17a, ch. 541, 30 Stat. 550 (1898), as amended, 11 U.S.C. § 35 (1958). See notes 8-11 *supra* and accompanying text for further elaboration of this point. For a discussion of the history of provability of contingent claims, see MACLACHLAN, BANKRUPTCY § 139 (1956).

creditor.⁶³ If the accommodation party has paid the debt in full before the filing of the bankruptcy petition against the principal debtor, then he is subrogated to the rights of the creditor and may file a proof of claim in his own name.⁶⁴

9. *Claims for Future Rent and Damages for Anticipatory Breach of Contract*

As early as 1916 the Supreme Court of the United States handed down a decision which authoritatively established that a claim for anticipatory breach of contract constituted a provable obligation in bankruptcy.⁶⁵ Bankruptcy itself, of course, constitutes an anticipatory breach of contract if the trustee rejects the contract.⁶⁶

The landlord has always had a provable claim for rent that had accrued before the bankruptcy petition was filed.⁶⁷ As for claims for rent arising after the filing of the petition in bankruptcy, the landlord had no provable claim prior to 1934. Until that date such claims were not provable because a lease was viewed, not as a contract, but as a real property arrangement under which claims for damages could arise only in connection with continued use and occupation of the premises; rent, like a profit, was thought to issue only out of the land as the rent came due.⁶⁸ Hence, claims for future rent would not be allowed against the bankrupt's estate. Lawyers are an ingenious lot, however, and various devices were tried with a view to making a claim for future rent a provable debt against the bankrupt lessee's estate. It thus developed in the decisional law that a liquidated damage clause in a lease would be regarded as a contract claim and therefore provable. It worked in this fashion. A covenant would be inserted in the lease, creating a liability for damages on the filing of a petition in bankruptcy, measured by the difference between the present fair value of the remaining rent and the present fair rental value of the premises for the balance of the term. This device produced a provable contract claim for future rent.⁶⁹ Such a condition resulted in inequality among creditors, as well as among bankrupts, since recovery by claimants depended solely

63. Bankruptcy Act § 57i, ch. 541, 30 Stat. 560 (1898), as amended, 11 U.S.C. § 93 (1958).

64. Bankruptcy Act § 57i, ch. 541, 30 Stat. 560 (1898), as amended, 11 U.S.C. § 93 (1958).

65. *Central Trust Co. v. Chicago Auditorium Ass'n*, 240 U.S. 581 (1916).

66. Bankruptcy Act § 63c, ch. 541, 30 Stat. 560 (1898), as amended, 11 U.S.C. § 103 (1958).

67. See 3 COLLIER, *BANKRUPTCY* ¶ 63.32 (14th ed. 1956).

68. See *Irving Trust Co. v. A. W. Perry, Inc.*, 293 U.S. 307 (1934) and *Oldden v. Tonto Realty Corp.*, 143 F.2d 916 (2d Cir. 1944) for a recognition of these doctrines.

69. Efforts by lawyers to make such claims provable obligations reached fruition in *Irving Trust Co. v. A. W. Perry, Inc.*, 293 U.S. 307 (1934). See *Connecticut Ry. & Lighting Co. v. Palmer*, 305 U.S. 493, 497 (1939). See Note, 9 *NOTRE DAME LAW*. 423 (1934), collating the types of leases or covenants drawn to circumvent the general rule that claims for future rent are not provable against the bankrupt's estate.

upon the artistry with which their leases were drafted, and discharged bankrupts were often left saddled with surviving claims for rent, thus hobbling their efforts at rehabilitation.

By amendments to the Bankruptcy Act in 1934, Congress provided that claims for anticipatory breaches of contract, including leases of real or personal property, should be provable claims.⁷⁰ These amendments then limit provable landlords' claims to injury resulting from the rejection by the trustee of such unexpired lease or for damages or indemnity under a covenant contained in such lease, limiting the provable damages at one year in bankruptcy and three years in reorganizations.⁷¹ The present sections of the Bankruptcy Act allowing claims for future rent or for damages under a lease obviously were a compromise, making future rent claims provable (and dischargeable), but only in a limited amount. Future rent claims for the residue of the lease remain nonprovable liabilities against bankrupts.

B. The Time for Determining the Existence of a Provable Indebtedness

As a general rule, the provability of a claim depends upon its status at the time of the filing of the bankruptcy petition.⁷² The filing of the petition in bankruptcy, by and large, stops the clock in so far as the creation of provable claims is concerned. There are certain exceptions. Thus, section 63b of the Bankruptcy Act provides that in the interval after the filing of an involuntary petition and before the appointment of a receiver or the

70. The Bankruptcy Act now expressly makes claims for unexpired leases of real or personal property provable. Bankruptcy Act § 63a(9), ch. 541, 30 Stat. 562 (1898), as amended, 11 U.S.C. § 103(a)(9) (1958). Rent claims also are made provable obligations in corporate reorganizations, Bankruptcy Act § 202, 52 Stat. 893 (1938), 11 U.S.C. § 602 (1958), and in arrangements, Bankruptcy Act § 353, 52 Stat. 910 (1938), 11 U.S.C. § 753 (1958).

71. Debts of the bankrupt may be proved and allowed against his estate which are founded upon "(9) claims for anticipatory breach of contracts, executory in whole or in part, including unexpired leases of real or personal property: *Provided, however,* That the claim of a landlord for damages for injury resulting from the rejection of an unexpired lease of real estate or for damages or indemnity under a covenant contained in such lease shall in no event be allowed in an amount exceeding the rent reserved by the lease, without acceleration for the year next succeeding the date of the surrender of the premises to the landlord or the date of reentry of the landlord, whichever first occurs . . ." Bankruptcy Act § 63a(9), ch. 541, 30 Stat. 562 (1898), as amended, 11 U.S.C. § 103(a)(9) (1958). *Oldden v. Tonto Realty Corp.*, 143 F.2d 916 (2d Cir. 1944) held that the landlord could not prove for a year's rent in addition to a deposit which he had required the tenant to put up to secure rent payments. The Court thought that would enable the landlord to get more than one year's rent. In corporate reorganizations, and in arrangements, claims up to a maximum of rent for three years are provable. Bankruptcy Act § 353, 52 Stat. 910 (1938), 11 U.S.C. § 753 (1958) (arrangements); Bankruptcy Act § 202, 52 Stat. 893 (1938), 11 U.S.C. § 602 (1958) (corporate reorganizations).

72. *United States v. Marxen*, 307 U.S. 200, 207 (1939) ("[T]he rights of creditors are fixed by the Bankruptcy Act as of the filing of the petition in bankruptcy. This is true both as to the bankrupt and among themselves."). See 3 COLLIER, BANKRUPTCY ¶ 63.04 (14th ed. 1956).

adjudication, whichever occurs first, a claim arising in favor of a creditor by reason of property transferred or services rendered by the creditor to the bankrupt for the benefit of the estate is provable to the extent of the value of such property or services.⁷³ Moreover, as was pointed out above, workmen's compensation awards are provable where the injury occurs prior to the bankruptcy *adjudication*.⁷⁴

III. NONDISCHARGEABLE DEBTS

As mentioned above, section 17 of the Bankruptcy Act provides that the discharge shall release a bankrupt from all his *provable* debts, except certain obligations which are not affected by the discharge even though they may be provable as claims against the bankrupt's estate.⁷⁵ Section 17 then goes on to specify certain classes of provable debts that are not dischargeable. That means that any claim against the bankrupt which falls within one or more of these classes rides through the bankruptcy, and the discharge will not be a defense to the claim. Even though the creditor proves his claim in the bankruptcy proceeding and receives a dividend on his claim from the bankrupt's estate, the discharge will not be a defence to the residue of a claim that is of a nondischargeable variety.^{75a}

I. Taxes

Section 17a(1) expressly excepts from the effect of a discharge provable debts which "are due as a tax levied by the United States, or any State, county, district, or municipality."⁷⁶ The bankrupt is thus not able to shift to others his obligation to contribute to the support of governmental units.

The inability of the bankrupt to shake off tax liabilities through a bankruptcy discharge has produced much hardship on bankrupts due to the increasing number and weight of taxes. The National Bankruptcy Conference, American Bar Association committees, and the Committee on Bankruptcy of the Commercial Law League of America have advocated amending the Bankruptcy Act so as to discharge tax debts except for taxes for which the bankrupt has become liable (1) within one year before bankruptcy; (2) before such year, if not assessed because of failure to make a return required by law; or (3) before such year if the bankrupt

73. Bankruptcy Act § 636, ch. 541, 30 Stat. 562 (1898), as amended, 11 U.S.C. § 103(b) (1958).

74. Bankruptcy Act § 63a(6), ch. 541, 30 Stat. 562 (1898), as amended, 11 U.S.C. § 103(a)(6) (1958).

75. Bankruptcy Act § 17a, ch. 541, 30 Stat. 550 (1898), as amended, 11 U.S.C. § 35(a) (1958). See Smedley, *Determination of the Effect of a Discharge in Bankruptcy*, 15 VAND. L. REV. 49 (1961).

75a. *Strang v. Bradner*, 114 U.S. 555 (1885).

76. Bankruptcy Act § 17a(1), ch. 541, 30 Stat. 550 (1898), as amended, 11 U.S.C. § 35(a)(1) (1958).

made a false or fraudulent return with intent to evade the tax.⁷⁷

H.R. 4473, a bill introduced into the 87th Congress, First Session, would carry out proposals similar to these, except that it limits the nondischargeability of tax claims to a period of three years prior to bankruptcy and permits the discharge of taxes which accrue prior to that period.

2. Liability for Obtaining Money or Property Under False Pretenses

One of the very large categories of nondischargeable liabilities are those arising from the bankrupt's obtaining money or property by false pretenses or false representations.⁷⁸ Section 17a(2) of the act expressly excepts from the effect of a discharge "liabilities for obtaining money or property by false pretenses or false representations, or for obtaining money or property on credit or obtaining the extension or renewal of credit in reliance upon a materially false statement respecting his financial condition made or published or caused to be made or published in any manner whatever with intent to deceive . . ."⁷⁹

Troublesome questions arise as to what constitutes a "false pretense or false representation." Thus, a promise to be executed by the bankrupt in the future is not sufficient to render a debt nondischargeable, even though there is no excuse for the subsequent breach by the bankrupt.⁸⁰ However, a misrepresentation by the bankrupt of his intention may amount to a false representation, which will serve as a basis for excluding the claim from the operation of the discharge. Hence, a purchase of goods on credit by a bankrupt who has no intention of paying for them constitutes a false representation.⁸¹ A loan induced by a false financial statement is not

77. For a discussion of this problem and these proposals, see Olive, *Taxes in Bankruptcy Proceedings*, 25 TAXES 5 (1947).

78. See Rifkind, *Bankruptcy Law: Non-Dischargeable Debts*, 45 A.B.A.J. 685, 686 (1959).

79. Bankruptcy Act § 17a(2), ch. 541, 30 Stat. 550 (1898), as amended, 11 U.S.C. § 35(a)(2) (1958). For an exhaustive treatment of this class of non-dischargeable liabilities, see 1 COLLIER, *BANKRUPTCY* ¶ 17.16 (14th ed. 1956).

80. *Ames v. Moir*, 138 U.S. 306 (1891); *Proctor Sec. Corp. v. Handler*, 7 Misc. 2d 9, 162 N.Y.S.2d 209 (Sup. Ct. 1957); *Lilly v. Barron*, 144 Ark. 422, 222 S.W. 712 (1920).

81. *Forsyth v. Vehmeyer*, 177 U.S. 177 (1900) (bankrupt falsely represented that he had certain assets with which to pay); *Wells v. Blitch*, 182 Ga. 826, 187 S.E. 86 (1936). In *Davison-Paxon Co. v. Caldwell*, 115 F.2d 189 (5th Cir. 1940), *cert. denied*, 313 U.S. 564 (1941), the court held that the debt was dischargeable even though credit was obtained through the concealment of insolvency and present inability to pay. This case has been subject to critical comment. 54 HARV. L. REV. 873 (1941); 89 U. PA. L. REV. 979 (1941). Furthermore, the *Caldwell* case seems to run counter to several state court decisions. Thus, in *Crawford v. Davison-Paxon Co.*, 46 Ga. App. 161, 166 S.E. 872 (1932), it was held that a purchase by one who was so grossly insolvent that he must be presumed not to have intended to pay, constituted an obtaining of property by false pretenses within this exception of the Bankruptcy Act, thus preventing a discharge of the debt. See also *Rowell v. Ricker*, 79 Vt. 552, 66 Atl. 569 (1907).

dischargeable.⁸²

A bankrupt is bound by the fraud of an agent acting within the scope of his authority;⁸³ therefore, a fraudulent representation by one partner within the scope of the partnership business will be imputed to the remaining partners, and the debt as to the remaining partners will not be released by a discharge.⁸⁴ It is not necessary that the false statement be made to the particular creditor who is seeking to have the debt excepted from the operation of the discharge; it is enough that such false statements were made to a mercantile agency in order to obtain credit, and the creditor relied upon such statement, and property was obtained from the bankrupt as the result thereof.⁸⁵

3. *Wilful and Malicious Injuries to Person or Property of Another*

Several diverse exceptions from a bankruptcy discharge are lumped together under the second clause of section 17a of the Bankruptcy Act. Thus, as we have just seen, the exception concerning liabilities for obtaining money or property under false pretenses or false representations is contained in the second clause.⁸⁶ Likewise contained in the second clause of section 17a is the exception which provides that liabilities for wilful and malicious injuries to person or property of another are not dischargeable.⁸⁷ Thus, claims for wilful and malicious injuries to the person or property of another are exempt from discharge, even though the claims may be provable against the estate of the bankrupt and share in the estate.⁸⁸ The "wilful and malicious" injuries to the person or property of another which are not dischargeable obligations relate generally, of course, to torts, rather than to breaches of contract.

The phrase "wilful and malicious" has received considerable construction by the courts, and has been construed to mean that the injuries must have been both wilful *and* malicious.⁸⁹ But an injury to person or property may be a wilful and malicious injury, and excepted from the discharge, if it is wrongful and without just cause or excuse, even in the absence of

82. *In re Alvino*, 111 F.2d 642 (2d Cir. 1940); *Personal Fin. Corp. v. Robinson*, 27 N.Y.S.2d 6 (Sup. Ct. 1941).

83. *In re Maloof*, 2 F.2d 373 (N.D. Ga. 1924).

84. *Strang v. Bradner*, 114 U.S. 555 (1885); *Griffin v. Bergeda*, 152 Tenn. 512, 279 S.W. 385 (1926).

85. *Friend v. Talcott*, 228 U.S. 27 (1913) (claim was not dischargeable since bankrupt obtained the sale through false representations).

86. Bankruptcy Act § 17a(2), ch. 541, 30 Stat. 565 (1898), as amended, 11 U.S.C. § 35 (1958).

87. Bankruptcy Act § 17a(2), ch. 541, 30 Stat. 565 (1898), as amended, 11 U.S.C. § 35 (1958).

88. See 1 COLLIER, BANKRUPTCY ¶ 17.03 (Supp. 1961).

89. See *In re Levitan*, 224 Fed. 241 (D.N.J. 1915); *In re Kubinieć*, 2 F. Supp. 632 (W.D.N.Y. 1932); *Seward v. Gatlin*, 193 Tenn. 299, 246 S.W.2d 21 (1952). See Rifkind, *Bankruptcy Law: Non-Dischargeable Debts*, 45 A.B.A.J. 685, 687 (1959).

personal hatred, spite or ill will.⁹⁰ "Wilful" seems to mean nothing more than intentional.⁹¹ Thus, a wrongful act done intentionally, which necessarily produces harm and is without just cause or excuse, constitutes a wilful and malicious injury.⁹²

Injuries within the meaning of "wilful and malicious" are not confined to physical damage or destruction. An injury to intangible property rights is sufficient.⁹³ Thus, it was held many years ago that a deliberate conversion of corporate stock by the bankrupt, without justification and excuse, constituted a wilful and malicious injury to property, and that a claim based upon such conversion is not dischargeable.⁹⁴ However, a technical conversion may well not constitute a wilful and malicious injury to property, necessary to except the liability from discharge.⁹⁵ Damages resulting from a wrongful attachment have been held to fall within the purview of wilful and malicious injury to property.⁹⁶ Appropriation of funds of a dissolved partnership by a partner likewise constitutes a wilful and malicious injury to property.⁹⁷

A judgment based on physical injuries to the person of another, of course,

90. *Tinker v. Colwell*, 193 U.S. 473 (1904), held that a judgment obtained by a husband against the bankrupt for damages for criminal conversation is predicated upon a liability for wilful and malicious injury, and therefore not dischargeable, even though the wife consented and the bankrupt had no personal malevolence toward the husband. *In re Halper*, 82 Misc. 205, 143 N.Y. Supp. 1005 (New York City Ct. 1913), points out that "wilful and malicious" injury does not involve hatred or ill-will as a state of mind, but is present when a wrongful act is done intentionally without just cause or excuse. See also *Henderson v. Freshour*, 199 Tenn. 539, 287 S.W.2d 929 (1956) to the same effect. See 1 COLLIER, *BANKRUPTCY* ¶ 17.17 (14th ed. 1956) for a more extensive discussion of the meaning of "wilful and malicious" injury. Presently we will see the application of the "wilful and malicious" injury exception to the discharge of judgments growing out of automobile collisions. See notes 108-120 *infra* and accompanying text.

91. See *Peters v. United States ex rel. Kelley*, 177 Fed. 885 (7th Cir. 1910); *Orrill v. District Court*, 324 Mass. 8, 84 N.E.2d 459 (1949).

92. *Tinker v. Colwell*, 193 U.S. 473 (1904); *In re Drowne*, 124 F. Supp. 842 (D.R.I. 1954); *McChristal v. Clisbee*, 190 Mass. 120, 76 N.E. 511 (1906); *Weeks v. Streicher*, 74 Ohio App. 253, 58 N.E.2d 415 (1943); *Fleshman v. Trolinger*, 18 Tenn. App. 208, 74 S.W.2d 1069 (E.S. 1934). See Rifkind, *Bankruptcy Law: Non-Dischargeable Debts*, 45 A.B.A.J. 685, 687 (1959), collecting many cases illustrating the meaning of "wilful and malicious" injuries.

93. See 1 COLLIER, *BANKRUPTCY* ¶ 17.17 (14th ed. 1956).

94. *McIntyre v. Kavanaugh*, 242 U.S. 138 (1916); *Maryland Cas. Co. v. Fant*, 181 Tenn. 492, 181 S.W.2d 753 (1944). See Annot., 98 A.L.R. 1454 (1935), for collection of cases of conversion preventing a discharge.

95. *Davis v. Aetna Acceptance Co.*, 293 U.S. 328 (1934) (sale without consent by a car dealer who had cars under trust receipt was not wilful and malicious injury where prior dealings had permitted such sale); *Massachusetts Bonding & Ins. Co. v. Lineberry*, 320 Mass. 510, 70 N.E.2d 308 (1946); *Brown v. Garey*, 267 N.Y. 167, 196 N.E. 12 (1935). See Annot., 98 A.L.R. 1454, 1458 (1935), for collection of cases of conversions by bankrupt which did not prevent the debt from being discharged.

96. *Barbadiano v. Allen*, 192 F.2d 836 (9th Cir. 1951).

97. *Lyon v. Prescott*, 103 Vt. 442, 156 Atl. 679 (1931).

can constitute a nondischargeable claim, by reason of the fact that the injuries were wilfully and maliciously inflicted. Thus, liabilities arising from an assault or an assault and battery are generally considered to be founded upon a wilful and malicious injury and are, therefore, not dischargeable.⁹⁸ Damages resulting from an assault upon a boy with an air gun to frighten him away have been held nondischargeable, because wilful and malicious.⁹⁹

Injuries to character, reputation, good name and fame can constitute the basis of a nondischargeable claim, by virtue of the fact that such injuries are wilful and malicious. Thus, a judgment obtained in an action for slander¹⁰⁰ or libel¹⁰¹ may fall within the category of wilful and malicious injuries. A judgment based on malicious prosecution¹⁰² and a judgment for false imprisonment¹⁰³ can be based upon a nondischargeable wilful and malicious injury. A judgment for alienation of affection likewise is not dischargeable.¹⁰⁴

While a claim based merely upon simple negligence does not, of course, constitute such a wilful and malicious injury as to be nondischargeable, nevertheless the line between "wilful and malicious" action, on the one hand, and various degrees of negligence on the other, is often considerably blurred. The judicial well-spring for the view that negligence is not tantamount to "wilful and malicious" conduct seems to be a dictum in the 1904 United States Supreme Court case of *Tinker v. Colwell*,¹⁰⁵ where Justice Peckham declared that "one who negligently drives through a crowded thoroughfare and negligently runs over an individual would not, as we suppose," commit a nondischargeable act. Since the date of that judicial declaration, there has been a plethora of cases dealing with the question whether various degrees of negligence can amount to "wilful and malicious" injury.¹⁰⁶

The *Tinker* opinion also undertook to establish additional guide lines for determining the purview of "wilful and malicious" conduct which would give rise to a nondischargeable claim. The Court said, in part: "[A] willful

98. *Western Sur. Co. v. Rich*, 141 F. Supp. 872 (W.D. Okla. 1956); *In re Drowne*, 124 F. Supp. 842 (D.R.I. 1954); *Kite v. Hamblen*, 192 Tenn. 643, 241 S.W.2d 601 (1951).

99. *In re Drowne*, 124 F. Supp. 842 (D.R.I. 1954).

100. *In re Dowie*, 202 Fed. 816 (S.D.N.Y. 1912).

101. *Thompson v. Judy*, 169 Fed. 553 (6th Cir. 1909).

102. *Koch v. Segler*, 331 S.W.2d 126 (Mo. App. 1960). See Annot., 78 A.L.R.2d 1226 (1961), for collection of cases holding that judgment based on malicious prosecution is a wilful and malicious injury, and therefore not dischargeable in bankruptcy.

103. *McChristal v. Clisbee*, 190 Mass. 120, 76 N.E. 511 (1906).

104. *Leicester v. Hoadley*, 66 Kan. 172, 71 Pao. 318 (1903); *Ernst v. Wise*, 94 N.E.2d 806 (Ohio C.P. 1950).

105. 193 U.S. 473, 489 (1904). The justice no doubt was thinking about the negligent operation of a horse and buggy rather than the present-day automobile. This case actually involved the dischargeability of a judgment for criminal conversation.

106. See 1 COLLIER, BANKRUPTCY ¶ 17.17 (14th ed. 1956) for cases.

disregard of what one knows to be his duty, an act which is against good morals and wrongful in and of itself, and which necessarily causes injury and is done intentionally, may be said to be done willfully and maliciously.¹⁰⁷ It was not a long step from this judicially created concept of what constitutes "wilful and malicious" conduct to the conclusion that "wilful and wanton" conduct likewise is sufficient to constitute wilful and malicious injury to persons and property.¹⁰⁸ This idea has carried over into the field of litigation involving liabilities resulting from injuries inflicted by motorists, resulting in a prolific source of litigation revolving around the dischargeability of the claim of an aggrieved party.¹⁰⁹

The upshot of this development has been a great deal of authority denying a discharge from a particular obligation where the bankrupt-motorist is guilty of various degrees of recklessness, especially where there is a combination of several acts of wrongful conduct causing the injury.¹¹⁰

107. 193 U.S. at 487.

108. *McIntyre v. Kavanaugh*, 242 U.S. 138 (1916) (unexcused and wanton conversion); *Maryland Cas. Co. v. Fant*, 181 Tenn. 492, 181 S.W.2d 753 (1944) (conversion by way of theft). See 8 REMINGTON, BANKRUPTCY § 3328 (6th ed. 1955).

109. See NADLER, BANKRUPTCY § 786 (1948).

110. *Haerynck v. Thompson*, 228 F.2d 72 (10th Cir. 1955) (pleading alleged that bankrupt was driving while under the influence of intoxicating liquor; that he failed to keep his automobile under control; that he failed to keep a proper lookout; and that he drove at an excessive rate of speed, in wilful and wanton disregard of the rights of other users of the highway); *Harrison v. Donnelly*, 153 F.2d 588 (8th Cir. 1946) (default judgment for punitive damages for injuries caused where motorist in wanton and reckless disregard of the safety of others was driving truck on wrong side of road while intoxicated); *In re Greene*, 87 F.2d 951 (7th Cir. 1937) (excessive and dangerous rate of speed, running stop signal); *In re Dutkiewicz*, 27 F.2d 334 (W.D.N.Y. 1928) (complaint alleged that defendant negligently, carelessly and wantonly drove his auto head-on against claimant on wrong side of road); *Fitzgerald v. Herzer*, 78 Cal. App. 2d 127, 177 P.2d 364 (Dist. Ct. App. 1947) (default judgment where complainant merely pleaded bankrupt defendant guilty of grossly negligent and reckless conduct); *Breitowich v. Standard Process Corp.*, 323 Ill. App. 261, 55 N.E.2d 392 (1944), *cert. denied*, 323 U.S. 801 (1945) (red light crashing); *Reell v. Central Ill. Elec. & Gas Co.*, 317 Ill. App. 106, 45 N.E.2d 500 (1942) (declaration charged that bankrupt recklessly, wilfully and wantonly operated automobile); *Rosen v. Shingleur*, 47 So. 2d 141 (La. App. 1950) (motorist drunk); *McClure v. Steele*, 326 Mich. 286, 40 N.W.2d 153 (1949) (declaration charged negligence that was wilful, wanton, gross and malicious); *Greenfield v. Tucillo*, 129 F.2d 854 (2d Cir. 1942) (running red light, speeding, guilty of criminal negligence); *Margulies v. Garwood*, 178 Misc. 970, 36 N.Y.S.2d 946 (Sup. Ct. 1942) (driving on wrong side of highway, speeding, guilty of reckless driving); *Doty v. Rogers*, 213 S.C. 361, 49 S.E.2d 594 (1948) (driving on wrong side of highway at excessive speed while intoxicated and colliding at crest of hill); *Henderson v. Freshour*, 199 Tenn. 539, 287 S.W.2d 929 (1956) (driving while under influence of intoxicants; failing to keep automobile under control; failing to keep proper lookout; driving at excessive rate of speed, in wilful and wanton disregard of rights of others); *Saueressig v. Jung*, 246 Wis. 82, 16 N.W.2d 417 (1944) (operating automobile in a drunken condition in a reckless, wilful and wanton disregard of the safety of others).

It is difficult to determine just what many of the cases mean with respect to wilful and malicious conduct of the bankrupt, since the creditor's pleadings in his tort action against the bankrupt-tort-feasor are often festooned with profuse and at times incon-

Where the judgment against the bankrupt-motorist for injuries inflicted contains an award of punitive damages, the courts are in disagreement on whether this facet of the case by itself is enough to justify the conclusion that the injury was wilful and malicious, so as to bar the dischargeability of the claim. Under the law of some states punitive damages can be awarded even though the tort-feasor's conduct was not wilful, and in these jurisdictions an award of punitive damages against the bankrupt does not, of itself, render the tort judgment nondischargeable.¹¹¹ Much respectable authority, however, has taken the position that a judgment for punitive damages against the bankrupt because of "wanton and reckless" operation of his motor vehicle is conclusive evidence of every element of "wilful and malicious conduct."¹¹² The fact that no punitive damages were awarded does not, of course, make the judgment dischargeable.¹¹³

Many courts, however, take the position that no degree of negligence—even gross negligence—can produce a wilful and malicious injury. Under this view a liability arising out of automobile accidents is dischargeable however great the degree of negligence.¹¹⁴ Courts of this persuasion take

sistent (e.g., allegations that tort-feasor wilfully and negligently injured creditor) verbiage. Many of the opinions do not make clear just what was found as a fact, because the verdicts ordinarily are general. The cases are complicated by another factor in this respect. When the declaration in a tort action contains several counts, some based on malice and others on negligence only, and the verdict is general—which is often the case—the courts are split on whether the verdict was based upon the cause of action involving malice. Some courts hold that, in such cases, there is a presumption that the verdict is based upon the cause of action involving malice. *Buck v. Alex*, 350 Ill. 167, 182 N.E. 794 (1932). Other courts are *contra* on such a presumption. *In re De Lauro*, 1 F. Supp. 678 (D. Conn. 1932); *Freedman v. Cooper*, 126 N.J.L. 177, 17 A.2d 609 (Sup. Ct. 1941). It seems that Tennessee falls in this latter category. See *Seward v. Gatlin*, 193 Tenn. 299, 246 S.W.2d 21 (1952).

111. *Seward v. Gatlin*, 193 Tenn. 299, 246 S.W.2d 21 (1952); *Bandolph v. Edmonds*, 185 Tenn. 37, 202 S.W.2d 664 (1947).

112. *Harrison v. Donnelly*, 153 F.2d 588, (8th Cir. 1946); *San Francisco & Suburban Soc'y Bldg. v. Leonard*, 17 Cal. App. 254, 119 Pac. 405 (Dist. Ct. App. 1911); 7 REMINGTON, BANKRUPTCY § 814 (6th ed. 1955). In *In re Buzas*, 58 F. Supp. 717 (N.D. Cal. 1944), the court considered punitive damages as *prima facie* evidence of wilful and malicious conduct.

113. *In re Wernecke*, 1 F. Supp. 127 (W.D.N.Y. 1932); *In re Franks*, 49 F.2d 389 (W.D. Pa. 1931); *Thibodeau v. Martin*, 140 Me. 179, 35 A.2d 653 (1944).

114. *In re Wegner*, 88 F.2d 899 (7th Cir. 1937) (wanton and reckless conduct charged); *In re Ellman*, 48 F. Supp. 518 (W.D.N.Y. 1942) (culpable and wilful negligence charged); *In re Tillery*, 16 F. Supp. 877 (N.D. Ga. 1936) (dischargeable however great the negligence); *Rogers v. Doody*, 119 Conn. 532, 178 Atl. 51 (1935) (injuries resulting from reckless disregard of rights of others); *Prater v. King*, 73 Ga. App. 393, 37 S.E.2d 155 (1946) (dischargeable however great the negligence); *Seward v. Gatlin*, 193 Tenn. 299, 246 S.W.2d 21 (1952). *But cf.* *Henderson v. Freshour*, 199 Tenn. 539, 287 S.W.2d 929 (1956). Elsewhere, the writer has suggested that *Henderson* sapped the vitality of the *Seward* rationale, and further suggested that *Henderson* reaches a result that is more consonant with the purposes and objectives of the discharge feature of the Bankruptcy Act. See Hartman, *Creditors Rights—1956 Tennessee Survey*, 9 VAND. L. REV. 974, 976 (1956). Some writers think that the majority of courts adhere to the theory that negligence, however gross,

the position that exceptions tend to impair the bankrupt's remedy, and that since the Bankruptcy Act is highly remedial, these exceptions to the discharge of a debt should be so construed as to affect that remedy only so far as is necessarily required by the express terms of the act.¹¹⁵

Much criticism has been levied on the notion that a bankrupt-motorist should be able to wipe clean his slate by obtaining a discharge in bankruptcy and thereby ridding himself of a judgment arising out of an automobile accident. Members of the judiciary have been among those who have most vigorously voiced the view that liabilities resulting from automobile accidents should not be dischargeable. This position is well illustrated by the language of the court in *Francine v. Babayan*.¹¹⁶

If the Court were permitted to do moral justice instead of legal justice it would refuse to discharge the bankrupt of the judgments. There are too many accidents resulting in judgments which are wiped out in bankruptcy. The practice has grown up wherein a person will negligently operate his automobile and then when a judgment for such injuries is filed against him, will obtain the protection of the Bankruptcy Law by filing a voluntary petition in bankruptcy . . . Operators of automobiles may drive in a careless and negligent manner and go unscathed of justice by filing a petition in bankruptcy.

Motor vehicles have become instruments of terror and destruction when in the hands of speed maniacs. One might well inquire, as did a Louisiana court, whether the Bankruptcy Act was ever intended to shield such persons from the consequences of their indifference and utter disregard for the safety of others.¹¹⁷ The purpose of the Bankruptcy Act, as stated by the most authoritative tribunal on that subject, is "to relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes."¹¹⁸

Some states have found a partially effective way to prevent negligent drivers from using the bankruptcy discharge as a passport to the privileged sanctuary of financial safety. Legislatures have enacted statutes giving authority to revoke driving permits until tort judgments are paid, and providing that a discharge in bankruptcy shall not relieve the judgment debtor from the revocation. Over the objection that such statutes are in contravention of the Bankruptcy Act, the Supreme Court of the United States has upheld such a statute which provided for the suspension of the

cannot produce nondischargeable wilful and malicious injury. See NADLER, *BANKRUPTCY* § 786 (1948); Laugharn, *Can Automobile Accident Judgments Be Discharged in Bankruptcy?*, 20 REF. J. 110, 111 (1946).

115. E.g., *Randolph v. Edmonds*, 185 Tenn. 37, 41, 202 S.W.2d 664 (1947); Note, *Dischargeability of Bankrupt's Liability for Personal Injuries Caused by Reckless Driving*, 11 WASH. & LEE L. REV. 176 (1954), reprinted in 29 REF. J. 70 (1955).

116. 45 F. Supp. 321, 322 (E.D.N.Y. 1942).

117. *Rosen v. Shingleur*, 47 So. 2d 141 (La. App. 1950).

118. *Williams v. United States Fid. & Guar. Co.*, 236 U.S. 549, 554 (1915).

license of the operator of an automobile because of an unsatisfied judgment against the bankrupt arising from motor car operation by him, even though the bankruptcy petition was filed after the judgment was taken.¹¹⁹

For further public protection against the increasingly alarming menace of recklessness on the highways, it might be well for Congress to consider extending the scope of nondischargeable obligations so as to reach more liabilities arising out of motor vehicle injuries.¹²⁰

4. Alimony

Section 17a(2) of the Bankruptcy Act expressly provides that a discharge in bankruptcy does not release a bankrupt from alimony due or to become due.¹²¹ This provision of the Bankruptcy Act was put there by an amendment in 1903.¹²² But prior to that amendment it had been held that an award for alimony was not barred by a discharge in bankruptcy on the ground that alimony was not a provable claim against the bankrupt's estate.¹²³ Under this exception from the discharge, an award of counsel fees under a statute permitting the court to require payment of such fees by the husband in a matrimonial matter is a nondischargeable obligation of the bankrupt.¹²⁴ Likewise not dischargeable is a judgment for costs obtained in an action for alimony.¹²⁵ However, an obligation to make payments under a property settlement agreement, incorporated into the divorce decree, is a dischargeable obligation.¹²⁶

5. Liabilities for Maintenance and Support

Section 17a(2) of the Bankruptcy Act also provides that a discharge in bankruptcy shall not be a defense to claims for maintenance or support of wife or child.¹²⁷ This exception from the operation of a discharge was also

119. *Rietz v. Mealey*, 314 U.S. 33 (1941) (New York statute involved). Other states have taken a page out of *Mealey* in passing financial responsibility statutes requiring license suspension of discharged debtors until satisfaction of accident judgments. *Doyle v. Kahl*, 242 Iowa 153, 46 N.W.2d 52 (1951); *De Vries v. Alger*, 329 Mich. 68, 44 N.W.2d 872 (1950); *Smith v. Hayes*, 133 N.E.2d 443 (Ohio C.P. 1955).

120. In *Francine v. Babayan*, 45 F. Supp. 321 (E.D.N.Y. 1942), although the court deplored doing so, it felt driven to the conclusion that under present law, the liability resulting from an automobile injury was dischargeable. The court felt that the remedy for such a miscarriage of justice is not for the courts to provide.

121. Bankruptcy Act § 17a(2), ch. 541, 30 Stat. 550 (1898), as amended, 11 U.S.C. § 35 (1958).

122. Bankruptcy Act § 17a(2), ch. 541, 30 Stat. 550 (1898), as amended, ch. 487, 32 Stat. 798 (1903), as amended, 11 U.S.C. § 35 (1958).

123. *Wetmore v. Markoe*, 196 U.S. 68 (1904); *Dunbar v. Dunbar*, 190 U.S. 340 (1903).

124. *In re Brennen*, 39 F. Supp. 1022 (E.D.N.Y. 1941); *Merrinan v. Hawbaker*, 5 F. Supp. 432 (E.D. Ill. 1934).

125. *Smith v. Smith*, 7 F. Supp. 490 (W.D.N.Y. 1934).

126. *Goggans v. Osborn*, 237 F.2d 186 (9th Cir. 1956).

127. Bankruptcy Act § 17a(2), ch. 541, 30 Stat. 550 (1898), as amended, 11 U.S.C. § 35 (1958).

made part of the Bankruptcy Act by an amendment in 1903.¹²⁸ However, prior to the date of the amendment, such claims were not barred by a discharge, for they were treated as nonprovable (and hence nondischargeable) obligations of the bankrupt.¹²⁹ This clause of the Bankruptcy Act, which provides that obligations for maintenance or support of a wife or child are not dischargeable, covers only the liability involuntarily imposed upon a husband and father by the common law for support of wife or child.¹³⁰ It is immaterial that the liability is imposed for the support of an illegitimate child; it remains nondischargeable.¹³¹ Since the exception to the operation of a discharge applies only to liabilities involuntarily imposed by law, the discharge, rather strangely, will be a defense to the husband or parent's contractual liability to third parties for necessities furnished for the wife or child.¹³² Thus, a husband or father's liability for goods purchased from a third party, and used by the wife or child, will be barred by a discharge,¹³³ even for medical services furnished.¹³⁴ In holding that the bankrupt's discharge released him from a debt for clothing purchased for his children and used by them (found to be necessities), the court reasoned that the "purchaser was free to do what he liked with the goods. They were a matter of free bargain and sale."¹³⁵

The nondischargeable nature of a husband's liabilities for maintenance or support of his wife and children extends to the situation where the duty to support has been expressly provided for in a contract between the husband and wife.¹³⁶ Consequently, the husband's liabilities for payments

128. See note 122 *supra*. See 1 COLLIER, BANKRUPTCY ¶ 17.19 (14th ed. 1956), containing a more extensive treatment of this subject.

129. *Dunbar v. Dunbar*, 190 U.S. 340 (1903); *In re Baker*, 96 Fed. 954 (D.C. Kan. 1899).

130. See *In re Lo Grasso*, 23 F. Supp. 340 (N.D.N.Y. 1938); *General Protestant Orphans' Home v. Ivey*, 240 F.2d 239, 240 (6th Cir. 1956). A court order to support a child in a state humane institution is not dischargeable. *State v. Murzyn*, 142 Conn. 329, 114 A.2d 210 (1955). However, where the commissioner of welfare obtained a judgment against the debtor pursuant to a state law imposing an obligation on the debtor for relief payments made to debtor's wife and family at a time when he had sufficient property for their support, the obligation was discharged in bankruptcy. *Hilliard v. De Ciuceis*, 202 Misc. 197, 115 N.Y.S.2d 5 (Sup. Ct. 1952).

131. *Breeden v. State ex rel. Ferguson*, 183 Tenn. 102, 191 S.W.2d 167 (1945).

132. *General Protestant Orphans' Home v. Ivey*, 240 F.2d 239 (6th Cir. 1956) (claim of orphan's home for board and room furnished to bankrupt's three children, *held*, dischargeable); *In re Ostrander*, 139 Fed. 592 (D.C.N.Y. 1905); *Schwoll v. Meeks*, 76 Ohio App. 231, 63 N.E.2d 831 (1944) (liability for room rent for room occupied by bankrupt, his wife and minor children, dischargeable); *Wintrobe v. Connors*, 67 Ohio App. 106, 35 N.E.2d 1018 (1941).

133. *In re Lo Grasso*, 23 F. Supp. 340 (W.D.N.Y. 1938); *Leman v. Locke*, 240 Mass. 551, 134 N.E. 343 (1922); *Schellenberg v. Mullaney*, 112 App. Div. 384, 98 N.Y. Supp. 432 (1906).

134. *In re Meyers*, 12 F.2d 938 (W.D.N.Y. 1926).

135. *Schellenberg v. Mullaney*, 112 App. Div. 384, 98 N.Y. Supp. 432 (1926).

136. *Blair v. Blair*, 44 Cal. App. 2d 140, 112 P.2d 39 (Dist. Ct. App. 1941); *Holahan v. Holahan*, 77 N.Y.S.2d 339 (Sup. Ct. 1948); *Rape v. Lenz*, 151 Wash. 675

due a wife under a contract entered into prior to a divorce whereby the husband promised the wife certain payments for her support and maintenance, are not released by a bankruptcy discharge, where the post-divorce residue can properly be considered as payments due for maintenance of the wife.¹³⁷

6. *Seduction, Breach of Promise and Criminal Conversation*

The Bankruptcy Act expressly provides that liability for seduction of an unmarried female, breach of promise of marriage accompanied by seduction and criminal conversation are not dischargeable in bankruptcy. The bankruptcy discharge was designed to relieve the honest debtor from his financial burdens, and to give him an opportunity to restate himself in the business world. While men of business have their failings, nevertheless the philanderer, the roué and rake, who have been caught with the evidence, have no place in company with the unfortunate business man. And so today the Bankruptcy Act forbids a discharge as to judgments which have been obtained "for seduction of an unmarried female, or for a breach of promise of marriage accompanied by seduction or for criminal conversation."¹³⁸ Even before the amendments in 1903 and 1917, making such liabilities non-dischargeable, it was held that a judgment for *crim. con.*¹³⁹ was not barred by the judgment debtor's discharge in bankruptcy; the reasoning was that criminal conversation with another man's wife constituted "wilful and malicious injury to the property of another,"¹⁴⁰ which, as we have seen, is another category of non-dischargeable obligations.¹⁴¹ Where the claim against the bankrupt is for breach of promise only, unaccompanied by seduction, the liability is dischargeable.¹⁴² The act, of course, makes a liability for breach of promise nondischargeable only when accompanied by seduction.

It seems that such liabilities must first be reduced to judgment in order

276 Pac. 868 (1929).

137. *In re Adams*, 25 F.2d 640 (2d Cir. 1928). Cf. *In re Avery*, 114 F.2d 768 (6th Cir. 1940) (where the obligation was a judgment representing the amount of arrears due under a divorce decree which had confirmed a property settlement between the parties, and the settlement showed that the amounts due were for alimony and support of the wife, not dischargeable).

138. Bankruptcy Act § 17a(2), ch. 541, 30 Stat. 550 (1898), as amended, 11 U.S.C. § 35 (1958).

139. "Crim. Con. An abbreviation for criminal conversation . . . This term is used to denote the act of adultery in a suit brought by the husband of the married woman with whom the act was committed, to recover damages of the adulterer." BOUVIER, LAW DICTIONARY (Baldwin student ed. 1946).

140. *Tinker v. Colwell*, 193 U.S. 473 (1904).

141. See notes 86-119 *supra* and accompanying text.

142. *In re Komar*, 234 Fed. 378 (N.D.N.Y. 1916); *Irish v. Owen*, 98 N.J.L. 483, 120 Atl. 184 (Sup. Ct. 1923) (nor is it a nondischargeable wilful and malicious injury).

to be provable; else they would be nonprovable torts.¹⁴³

7. Debts That Have Not Been Scheduled by the Bankrupt

If a creditor has never had an opportunity to share in the bankrupt's estate, his claim should not be discharged. It is not surprising, therefore, that the Bankruptcy Act takes just that position. Section 17a(3) of the act provides that a discharge shall not release a bankrupt from debts which have not been duly scheduled, unless such creditor had timely notice or actual knowledge of the proceedings in bankruptcy.¹⁴⁴ The bankrupt's schedule, of course, furnishes the basis for the notice which the referee or the judge is to give to the creditors. The importance of a reasonably strict compliance with the scheduling requirements is obvious. The act wisely provides, therefore, that where the debt has not been duly scheduled it will not be discharged, unless the creditor had timely notice or actual knowledge of the proceedings. A bankrupt is required to list all of his creditors in his schedules.¹⁴⁵ Such creditors will then receive notice of the bankruptcy proceedings and will be apprised of the necessity of filing proofs of claim. By omitting a creditor from his schedules, the bankrupt penalizes only himself, for the effect of the failure to schedule a debt is to make an otherwise dischargeable liability nondischargeable. Even after the discharge, the nonscheduled creditor can pursue his remedies against the bankrupt, unaffected by the discharge.¹⁴⁶

Under the Bankruptcy Act of 1867 a debt could be discharged, even though a creditor was omitted from the schedules and had no notice or knowledge of the proceedings, provided the omission was neither wilful nor fraudulent.¹⁴⁷ That has been changed now, and it is immaterial whether the faulty scheduling was innocent, fraudulent, or careless; the fact of

143. For a discussion of this facet of tort claims, see notes 23-28 *supra* and accompanying text.

144. Bankruptcy Act § 17a(3), ch. 541, 30 Stat. 550 (1898), as amended, 11 U.S.C. § 35 (1958).

145. It is provided in the Bankruptcy Act that the bankrupt shall "(8) prepare, make oath to, and file in court within five days after adjudication, if a voluntary bankrupt, a schedule of his property, showing the amount and kind of property, the location thereof and its money value, in detail; and a list of all his creditors, including persons asserting contingent, unliquidated, or disputed claims showing their residences or places of business, if known, or if unknown that fact to be stated, the amount due to or claimed by each of them *Provided, however,* That the Court may for cause shown grant further time for the filing of such schedules if, with his petition in a voluntary proceeding or with his application to have such time extended in an involuntary proceeding, the bankrupt files a list of all such creditors and their addresses." Bankruptcy Act § 7a(8), ch. 541, 30 Stat. 548 (1898), as amended, 11 U.S.C. § 25 (1958).

146. *Milando v. Perrone*, 157 F.2d 1002 (2d Cir. 1946) (bankrupt not permitted to reopen a long-closed estate to amend his schedules to include claim so that it would be barred); *Tyler v. Jones County Bank*, 78 Ga. App. 741, 52 S.E.2d 547 (1947).

147. 1 COLLIER, BANKRUPTCY ¶ 17.23 (14th ed. 1956).

nonscheduling and not the intent controls.¹⁴⁸ Section 17a(3) of the act now expressly provides that a debt is not released by a discharge unless it has 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."¹⁴⁹

It will be seen that in order for the debt to be "duly scheduled," the name of the creditor, if known to the bankrupt, must be included in the schedule of the bankrupt. What is and what is not sufficient performance of this requirement must depend largely upon the facts of each case.¹⁵⁰ Thus, while exactness is essential in scheduling the creditor's name, in some instances a misnomer may not be fatal because of the principle of *idem sonans*, or if for some other reason the misnomer could not be misleading.¹⁵¹ However, a misnomer may be fatal to proper scheduling, and a discharge denied, if the name is not of *idem sonans*.¹⁵² Thus, a mistake in the name of the creditor, although a relatively slight defect, if it would be likely to cause confusion and result in his not receiving notices or recognizing their purport, can amount to a lack of "due scheduling" so as to make the claim nondischargeable for this reason.¹⁵³ The use of the wrong name in scheduling a claim is immaterial, of course, if the creditor in question had timely notice of the bankruptcy proceedings,¹⁵⁴ as we will see presently.¹⁵⁵

It will readily be seen from reading section 17a(3) of the Bankruptcy Act that the bankrupt is not required to insert the correct name of the creditor in the schedule, if the name is unknown to the bankrupt.¹⁵⁶ Consequently, in order for the bankrupt to obtain a discharge, it is not imperative that he schedules the creditor's name, if the bankrupt does not know

148. *Ibid.*; 8 REMINGTON, BANKRUPTCY § 3347 (6th ed. 1955).

149. Bankruptcy Act § 17a(3), ch. 541, 30 Stat. 550 (1898), as amended, 11 U.S.C. § 35 (1958).

150. See *Kreitlein v. Ferger*, 238 U.S. 21 (1915) (involving sufficiency of residence address); 8 REMINGTON, BANKRUPTCY § 3348 (6th ed. 1955).

151. 1 COLLIER, BANKRUPTCY ¶ 17.23 (14th ed. 1956); 8 REMINGTON, BANKRUPTCY §§ 3348, 3350 (6th ed. 1955).

152. *Louis Cohen* instead of *Max Cohen* is not "due scheduling." *Cohen v. Pinkus*, 126 App. Div. 792, 111 N.Y. Supp. 82 (1908). Likewise, *William J. Davidson's* debt was not discharged when he was scheduled as *William F. Davidson*. *Collins v. Davidson*, 34 Ohio C.C.R. 668 (Cir. Ct. 1908). *L. E. Ingram* is not "due scheduling" for *W. G. Ingram*. *Ingram v. Carruthers*, 194 Tenn. 290, 250 S.W.2d 537 (1952).

153. 8 REMINGTON, BANKRUPTCY § 3350 (6th ed. 1955).

154. *Cohen v. Pinkus*, 126 App. Div. 792, 11 N.Y. Supp. 82 (1908).

155. See notes 169-85 *infra* and accompanying text, for treatment of the effect of creditor's knowledge of the bankruptcy proceedings, even though his claim was not scheduled.

156. Bankruptcy Act § 17a(3), ch. 541, 30 Stat. 550 (1898), as amended, 11 U.S.C. § 35 (1958).

the name of the creditor.¹⁵⁷ This rule has its principal application where, unknown to the bankrupt, the debt is transferred to another party.¹⁵⁸ In the event the bankrupt does not know the name of the present owner of the claim, it is enough if the bankrupt schedules the claim in the name of the original creditor.¹⁵⁹ Of course, if the bankrupt, knowing that the claim has been transferred by the original creditor and either knowing or should be knowing the identity of the present owner of the claim, nevertheless schedules the claim in the name of the original creditor, the claim is not properly scheduled and is not discharged.¹⁶⁰

Great care and caution must also be taken by the bankrupt in giving the residences of his creditors. Section 7a(8) of the Bankruptcy Act requires the bankrupt to include in his schedules not only the names of his creditors, but also "their residences or places of business, if known, or if unknown that fact to be stated . . ."¹⁶¹ Thus, proper scheduling within the purview of the Bankruptcy Act requires that the residences or places of business of creditors, if known to the bankrupt, be set forth in the schedule; and if the bankrupt is ignorant of such information, this fact must be expressly stated in his schedule.¹⁶² If the bankrupt lists the residence of a creditor as "unknown," but knows the address or by the exercise of reasonable diligence could have ascertained the residence, the debt has not been properly scheduled and will not be discharged where the creditor had no notice or actual knowledge of the proceeding.¹⁶³ In short, he

157. "The Bankruptcy Act does not require the impossible, but provides for the listing of the names of creditors 'if known to the bankrupt' and not otherwise. Failure to state the names of unknown creditors does not impair the efficacy of the discharge." *Levin v. Katz*, 293 Mich. 493, 292 N.W. 466, 468 (1940), quoting *Broderick v. Adamson*, 240 App. Div. 229, 268 N.Y. Supp. 766, 769 (1934). Many other cases take the same position. *E.g.*, *Kreitlein v. Ferger*, 238 U.S. 21 (1915); *Cleveland v. Summerfield*, 194 Ark. 727, 109 S.W.2d 438, 440 (1937).

158. *New Netherland Bank v. Harris*, 233 Ill. App. 378 (1924); *Levin v. Katz*, 293 Mich. 493, 292 N.W. 466 (1940).

159. 1 COLLIER, BANKRUPTCY ¶ 17.23 (14th ed. 1956).

160. *Ismay v. Tyler*, 169 Cal. App. 2d 883, 337 P.2d 257 (Super. Ct. 1959); *State ex rel. Nilsen v. Bean*, 218 Ore. 506, 346 P.2d 652 (1959); see 1 COLLIER, BANKRUPTCY ¶ 17.23 (14th ed. 1956); 8 REMINGTON, BANKRUPTCY § 3354 (6th ed. 1955). An assigned claim which is scheduled in the name of the assignor is barred, however, where the assignor is the agent of the assignee and has actual notice of bankruptcy. *Katz v. Kowalsky*, 296 Mich. 164, 295 N.W. 600 (1941).

161. Bankruptcy Act § 7a(8), ch. 541, 30 Stat. 548 (1898), as amended, 11 U.S.C. § 25 (1958).

162. *Ibid.*

163. *Miller v. Guasti*, 226 U.S. 170 (1912); *In re Dvorak*, 107 Fed. 76 (N.D. Iowa 1901); *Parker v. Murphy*, 215 Mass. 72, 102 N.E. 85 (1913); *Wyser v. Estrin*, 285 App. Div. 827, 136 N.Y.S.2d 744 (1955). Where the wrong address is scheduled, and there is nothing to indicate that the bankrupt exercised reasonable diligence in ascertaining the correct address of the creditor, the claim may not be discharged because it is not duly scheduled. *King v. Harry*, 131 F. Supp. 252 (D.D.C. 1955) (bankrupt apparently knew correct address four months prior to filing of bankruptcy petition).

is required to use reasonable diligence in ascertaining the correct address of his creditors.¹⁶⁴

Where the bankrupt is unable to ascertain the residence or place of business of a creditor, he not only should show that fact but should also show what efforts he has put forth to ascertain that information.¹⁶⁵

Just what constitutes satisfactory designation of the residence or place of business of the creditor must depend upon the particular facts and circumstances of each case.¹⁶⁶ The act itself does not spell out what must be done with respect to giving the street number or other location of the creditor. If the scheduled address of the residence or place of business of the creditor is wrong, however, his claim will not be discharged, in the absence of proof that the creditor had knowledge of the bankruptcy proceedings.¹⁶⁷ Nor will the claim be duly scheduled where the bankrupt lists an incorrect address for the creditor, if by using reasonable diligence, he could have ascertained the correct address.¹⁶⁸

Although the bankrupt fails to comply with the requirements of scheduling the claim, name and address of the creditor, the claim may yet be discharged. Section 17a(3) of the Bankruptcy Act provides that the claim of an unsecured creditor is discharged if he had timely notice or actual knowledge of the proceedings in bankruptcy.¹⁶⁹ A crucial question is what constitutes "notice or actual knowledge"? This does not mean that creditors are charged with constructive notice of bankruptcies upon the theory that bankruptcies are a matter of public record, because such a construction would be stultifying.¹⁷⁰ Nor is publication of notice of bankruptcy proceeding in a newspaper sufficient notice to comply with the act, if the creditor did not in fact see such notice.¹⁷¹ Nor will notice of the bankruptcy proceedings given to one agency of the United States be imputed to another agency which is the creditor of the bankrupt.¹⁷²

In short, it seems that, except in the case of imputation of notice of an agent to his principal, such notice or knowledge must be actual; con-

164. *Ibid.* See 8 REMINGTON, BANKRUPTCY § 3352 (6th ed. 1955).

165. *In re Dvorak*, 107 Fed. 76 (N.D. Iowa 1901). See *Union Trust Co. v. Rosenstein*, 51 N.Y.S.2d 396 (1944).

166. See *Kreitlein v. Feger*, 238 U.S. 21 (1915), for an extensive discussion of this problem.

167. *Van Denburgh v. Goodfellow*, 19 Cal. 2d 217, 120 P.2d 20 (1941); *McGehee v. Brookins*, 140 S.W.2d 963 (Tex. Civ. App. 1940). Nor will the bankrupt be permitted to amend his schedule to show the correct address of the creditor after the time for filing of the creditor's claim has expired. In the *Matter of Pierce*, 150 F. Supp. 529 (E.D.N.Y. 1957).

168. *Salmon v. Sarno*, 265 App. Div. 114, 37 N.Y.S.2d 870 (1942).

169. Bankruptcy Act § 17a(3), ch. 541, 30 Stat. 550 (1898), as amended, 11 U.S.C. § 35 (1958).

170. See MACLACHLAN, BANKRUPTCY § 105 (1956).

171. *Tyler v. Jones County Bank*, 78 Ga. App. 741, 52 S.E.2d 547 (1949); *Industrial Loan & Inv. Co. v. Chapinan*, 193 So. 504 (La. App. 1940).

172. *United States v. Golenburg*, 175 F. Supp. 415 (N.D. Ohio 1959).

structive notice or knowledge is not sufficient.¹⁷³ It is not necessary that notice be served upon the creditor; it is enough that facts show that he had knowledge of the proceedings.¹⁷⁴ Actual knowledge is sufficient however it is acquired; it is a fact question and may be proved by circumstantial evidence.¹⁷⁵ Thus, knowledge of the bankruptcy received by the creditor from reading the newspaper is sufficient.¹⁷⁶

With regard to the requirement of notice or knowledge on the part of the creditor, the ordinary laws of agency apply. Hence, notice to, or knowledge of, an agent of the creditor will be treated as knowledge of the principal (creditor) where the agent is authorized to receive such notice for his principal.¹⁷⁷ Consistent with the general principles of agency, the knowledge of the creditor's agent will not be imputed to the creditor where the agent is acting adversely to his principal.¹⁷⁸

In order for the notice or knowledge of the bankruptcy proceedings to be effective, so as to render the claim dischargeable, the notice or knowledge must be timely. Even though the creditor may have actual knowledge of the proceedings, such knowledge may not be sufficient because of the time when the creditor received the information. As contemplated by the Bankruptcy Act, actual knowledge of the proceedings, in order to be sufficient, must be received in time to allow the creditor to prove his claim and to have an opportunity to participate along with other creditors in the estate of the bankrupt.¹⁷⁹ It has been suggested that the court may well

173. See 1 COLLIER, BANKRUPTCY ¶ 17.23 (14th ed. 1956).

174. See 1 COLLIER, BANKRUPTCY ¶ 17.23 (14th ed. 1956).

175. See *Hill v. Smith*, 260 U.S. 592 (1923); *Ingram v. Carruthers*, 194 Tenn. 290, 250 S.W.2d 537 (1952).

176. See *Morrison v. Vaughan*, 119 App. Div. 184, 104 N.Y. Supp. 169 (1907) (reading newspaper and verbal knowledge); *Bank of Wrightsville v. Four Seasons*, 21 Ga. App. 453, 94 S.E. 649 (1917).

177. See 8 REMINGTON, BANKRUPTCY § 3357 (6th ed. 1955). Thus, the bankrupt's own attorney, who represented him during the proceedings, could hardly claim ignorance of the proceedings. *Pate v. Morrow*, 91 Ga. App. 864, 87 S.E.2d 357 (1955). Where the creditor in question had placed his claim in the hands of an attorney to be collected, and the attorney informed the creditor that the debtor intended to file a petition in bankruptcy, and the attorney did receive actual knowledge through notices sent to creditors that the petition had been filed, the creditor had sufficient knowledge to render the debt dischargeable, although his claim was not scheduled. *Rosenfeld v. Moore*, 112 N.Y.S.2d 18 (Broome County Ct. 1952). However, notice sent to an attorney after he had ceased to represent the creditor in question is not sufficient to make the claim dischargeable. *Wilkotz v. Ziss*, 13 N.J.L. 3, 57 A.2d 568 (Sup. Ct. 1948). A notice sent to an attorney who represented the creditor at the time judgment was entered but did not represent the creditor at the time of the bankruptcy proceedings was not sufficient notice or knowledge to make the claim dischargeable. *Continental Purchasing Co. v. Norelli*, 133 N.J.L. 550, 45 A.2d 310 (1946), *aff'd*, 135 N.J.L. 93, 48 A.2d 816 (Ct. App. 1946).

178. See *Dight v. Chapman*, 44 Ore. 265, 75 Pac. 585, 590 (1904).

179. In order to be dischargeable, the act provides that the scheduling must have been "in time for proof and allowance." Bankruptcy Act § 17a(3), ch. 541, 30 Stat. 550 (1898), as amended, 11 U.S.C. § 35 (1958). Section 57 of the Bankruptcy Act

inquire into the circumstances of the particular case to see whether a creditor lost any substantial practical rights or privileges by a late scheduling or a late notice of the facts, assuming always that scheduling and notice, if there was notice, occurred so as to come within the language of the Bankruptcy Act "in time for proof and allowance."¹⁸⁰

Questions arise regarding who has the burden of proving due scheduling so as to make the claim dischargeable. To start with, the plea of a discharge in bankruptcy is an affirmative defense, which the bankrupt has the burden of establishing.¹⁸¹ However, when the bankrupt has introduced a certified copy of the order of discharge, he has established prima facie proof of the discharge of his debts.¹⁸² The burden of proof of lack of due scheduling then apparently rests on the creditor.¹⁸³ That is to say, the creditor must show that his claim was not duly scheduled in time for proof and allowance.¹⁸⁴ But once the creditor has discharged that burden (as by showing that his residence was not included in the bankrupt's schedule), then the burden apparently is on the bankrupt either to show that he used reasonable diligence in attempting to ascertain the creditor's residence, or that the creditor had actual knowledge or notice of the bankruptcy proceeding in time to participate therein.¹⁸⁵

Although a particular debt is not barred by a discharge because of a failure to schedule the claim, this will not prevent the bankrupt from properly scheduling the debt and obtaining an effective discharge therefrom in a subsequent bankruptcy.¹⁸⁶ There is one limitation: a subsequent bankruptcy discharge cannot be obtained within six years, since that is one of the specified grounds for refusing to grant a discharge.¹⁸⁷

fixes the time when a claim must be filed. There are exceptions contained in section 57 which allow a longer time, but the normal time for filing is six months from the first date set for the first meeting of creditors. Bankruptcy Act § 57, ch. 541, 30 Stat. 560 (1898), as amended, 11 U.S.C. § 93 (1958). The problem of what is timely scheduling is dealt with in *Birkett v. Columbia Bank*, 195 U.S. 345 (1904); *Davis v. Findley*, 201 Ala. 515, 78 So. 869 (1918); *Milando v. Perrone*, 157 F.2d 1002 (2d Cir. 1946) (bankrupt not permitted to open proceedings and schedule claim after time had elapsed); *Industrial Loan & Inv. Co. v. Chapman*, 193 So. 504 (La. App. 1940).

180. MACLACHLAN, BANKRUPTCY § 116, at 106 (1956).

181. See 1 COLLIER, BANKRUPTCY ¶ 17.23, at 1637 (14th ed. 1956).

182. See *Kreitlein v. Ferger*, 238 U.S. 21 (1915); *Eldrington v. Gee*, 30 S.W.2d 360 (Tex. Civ. App. 1930); *Manufacturers Trust Co. v. Schwartzman*, 150 N.Y.S.2d 827 (Sup. Ct. 1956); 8 REMINGTON, BANKRUPTCY § 3359 (6th ed. 1955).

183. See *Hill v. Smith*, 260 U.S. 592 (1923); *Kreitlein v. Ferger*, 238 U.S. 21 (1915).

184. *Ibid.*

185. *Hill v. Smith*, 260 U.S. 592 (1923); *Caldwell v. Eastman*, 248 Mass. 332, 142 N.E. 765 (1924).

186. *In re Lyons*, 287 Fed. 602 (E.D.N.Y. 1922); *In re Baker*, 275 Fed. 511 (S.D.N.Y. 1920).

187. Section 14c of the Bankruptcy Act provides that the court shall grant the discharge unless satisfied that the bankrupt has "(5) in a proceeding under this Act commenced within six years prior to the date of the filing of the petition in bankruptcy . . . been granted a discharge, or had a composition or an arrangement by way of

8. *Fiduciary Debts*

Section 17a(4) of the Bankruptcy Act provides that a discharge does not release the bankrupt from debts created by the fraud, embezzlement, misappropriation or defalcation of the bankrupt "while acting as an officer in any fiduciary capacity."¹⁸⁸ In order for a particular liability to be excepted from the effect of the discharge, it must arise from either (a) fraud, (b) embezzlement, (c) misappropriation, or (d) defalcation; and in all cases the liability must have been created by such misconduct while the bankrupt was acting as an officer or in a fiduciary capacity.¹⁸⁹

At the outset, questions will arise as to the meaning of the qualifying phrase "while acting as an officer or in any fiduciary capacity." First, what is the meaning of "officer"? The Bankruptcy Acts of 1841 and 1867 exempted from the operation of the discharge those specified wrongs of the bankrupt committed while acting as a *public* officer.¹⁹⁰ The Act of 1898 omitted the qualifying word "public,"¹⁹¹ and we are told that this exception to the discharge has not been amended since.¹⁹² The term "officer," as now used in this exception from the operation of the discharge, includes officers of a private corporation,¹⁹³ as well as a public officer.¹⁹⁴ A director of a corporation is an officer within the statutory intentment of this exception from the discharge.¹⁹⁵ Likewise within this exception from the operation of a discharge is a president of a corporation,¹⁹⁶ and a vice-president.¹⁹⁷

As we have seen, the four types of misconduct that are made nondischargeable by section 17a(4) of the Bankruptcy Act can be committed either while acting as an "officer" or while acting "in any fiduciary capacity."

composition or a wage earner's plan by way of composition confirmed under this Act." Bankruptcy Act § 14c, ch. 541, 30 Stat. 550 (1898), as amended, 11 U.S.C. § 32 (1958).

188. Bankruptcy Act § 17a, ch. 541, 30 Stat. 550 (1898), as amended, 11 U.S.C. § 35 (1958).

189. See *Crawford v. Burke*, 195 U.S. 176 (1904), where the Supreme Court held that the phrase, "while acting as an officer or in any fiduciary capacity," qualifies all of the four enumerated wrongs, and not just "defalcation," which immediately precedes the phrase.

190. See 1 COLLIER, BANKRUPTCY ¶ 17.24, at 1646 (14th ed. 1956).

191. *Ibid.*

192. 8 REMINGTON, BANKRUPTCY § 3362 (6th ed. 1955).

193. *In re Bernard*, 87 F.2d 705 (2d Cir. 1937); *Bloemecke v. Applegate*, 271 Fed. 595 (3d Cir. 1921) (president); *Kaufman v. Lederfine*, 49 F. Supp. 144 (S.D.N.Y. 1943) (officer and director); *Pacific Indem. Co. v. Hargreaves*, 36 Cal. App. 2d 338, 98 P.2d 217 (Dist. Ct. App. 1939) (bank president); *In re Weil's Estate*, 249 Wis. 385, 24 N.W.2d 662 (1946).

194. See *Bloemecke v. Applegate*, 271 Fed. 595, 598 (3d Cir. 1921).

195. *In re Hammond*, 98 F.2d 703 (2d Cir. 1938), *cert. denied*, 305 U.S. 646 (1938); *Boyd v. Applewhite*, 121 Miss. 879, 84 So. 16 (1920).

196. *Pacific Indem. Co. v. Hargreaves*, 36 Cal. App. 2d 338, 98 P.2d 217 (Dist. Ct. App. 1939) (bank president).

197. *In re Harper*, 133 Fed. 970 (W.D. Va. 1904), *aff'd*, 141 Fed. 626 (4th Cir.), *cert. denied*, 200 U.S. 621 (1905).

We have gotten some idea of the meaning of "officer." It now remains for us to explore the meaning of "fiduciary." The word "fiduciary," as here used, does not cover all agencies. This exclusion from the operation of the discharge, perhaps unfortunately, has been confined by and large to a technical trust relationship, or fiduciary relationships created by statute, thus excluding a vast area where duties of accounting are imposed because of one's conduct with respect to another's property. It is not enough that by the act of wrong-doing out of which a contested claim arises the bankrupt has become chargeable as a constructive trustee; he must have been a fiduciary before the wrong and without reference thereto.¹⁹⁸ Thus, this exception from the effect of the discharge has been construed to have no application to constructive trusts.¹⁹⁹ Nor does this exception from the discharge apply to misconduct of factors,²⁰⁰ brokers,²⁰¹ agents,²⁰² bailees,²⁰³ and partners.²⁰⁴ Moreover, acts in violation of a "trust receipt" are not done while acting in a "fiduciary capacity" and are not made nondischargeable by this section of the act.²⁰⁵ Of course, the ordinary debtor-creditor relationship is not within the meaning of this statutory exemption from the discharge; otherwise a discharge would have but little meaning. Consequently, the frauds of the ordinary debtor in disposing of his property to defraud his creditors do not come within the purview of this exclusion from the effect of the discharge.²⁰⁶

Executors and administrators,²⁰⁷ guardians²⁰⁸ and receivers,²⁰⁹ as well as

198. See *Davis v. Aetna Acceptance Co.*, 293 U.S. 328, 333 (1934).

199. See *Davis v. Aetna Acceptance Co.*, 293 U.S. 328 (1934); *Addison v. Addison*, 96 Ohio App. 191, 118 N.E.2d 225 (1953); 8 REMINGTON, BANKRUPTCY § 3364 (6th ed. 1955).

200. *Crawford v. Burke*, 195 U.S. 176 (1904) (commission merchant and factor who sold goods for others and remitted proceeds); *In re Adler*, 152 Fed. 422 (2d Cir. 1957) (factor to sell goods for others and remit proceeds).

201. *In re Ennis & Stoppani*, 171 Fed. 755 (D.N.Y. 1909).

202. *Noble v. Hammond*, 129 U.S. 65 (1889); *In re Wenham*, 153 Fed. 910 (S.D.N.Y. 1906); *American Sur. Co. v. Koff*, 268 App. Div. 1055, 52 N.Y.S.2d 463 (1945).

203. *In re Toklas Bros.*, 201 Fed. 377 (E.D.N.Y. 1912).

204. *Stephens v. Miliken*, 35 Ga. App. 287, 133 S.E. 67 (1926); *Gee v. Gee*, 84 Minn. 384, 87 N.W. 1116 (1901).

205. *Davis v. Aetna Acceptance Co.*, 293 U.S. 328 (1934).

206. *Reeves v. McCracken*, 69 N.J. Eq. 203, 60 Atl. 332 (Ch. 1905).

207. *Brown v. Hannagan*, 210 Mass. 246, 96 N.E. 714 (1911); *Arnold v. Smith*, 137 Minn. 364, 163 N.W. 672 (1917).

208. *Indemnity Ins. Co. v. Leibrock*, 55 N.Y.S.2d (Sup. Ct. 1945).

209. *Central Hanover Bank & Trust Co. v. Herbst*, 93 F.2d 510 (2d Cir. 1937) (bankrupt appointed receiver by state court in foreclosure suit was allowed money as commission by lower court; he spent money pending appeal; case reversed on appeal; liability for spent commission not discharged). In the *Herbst* case Justice Learned Hand traces the legislative background and meaning of § 17a(4) of the Bankruptcy Act, exempting fiduciaries from the effect of the discharge because of their misconduct.

trustees of express trusts,²¹⁰ are "fiduciaries" within the statutory intentment. Agents and representatives other than trustees of express trusts, executors, administrators and guardians have sometimes been held to be "fiduciaries" within the meaning of this statutory exclusion from the effect of the discharge. Thus, an employee who has been entrusted with funds and embezzles or misappropriates them has been held guilty of misconduct that gives rise to a nondischargeable liability.²¹¹ Of course, attorneys at law occupy a fiduciary relationship to their clients, and if guilty of any of the four specified types of misconduct while so acting, they will be impaled on this exclusion from the operation of the bankruptcy discharge.²¹²

It would be most unfortunate if a dishonest person, simply because he had not been an officer of some sort or a fiduciary, could use bankruptcy as a means of escaping liability for defaults that morally were of the same texture as the worst acts an officer or a fiduciary can commit. This has been prevented, by and large, by holdings that the term "wilful and malicious injury to person and property" (which makes a liability nondischargeable) covers the area which is occupied by such persons as agents, bailees, brokers, factors and partners, who prove unfaithful by converting property of others.²¹³

In order for the liabilities of the bankrupt to be nondischargeable under section 17a(4) of the Bankruptcy Act, they must have been created, as we have seen, either by the (a) fraud, (b) embezzlement, (c) misappropriation, or (d) defalcation of the bankrupt while acting as an officer or in any fiduciary capacity. Having examined the meaning of the legislatively specified words "officer" and "fiduciary," it remains for us to explore briefly, at least, the meaning of the four types of misconduct that will give rise to the nondischargeable obligation.

"Fraud" means actual, positive fraud, or fraud in fact, involving moral turpitude or intentional wrong; and not implied fraud, or fraud in law, which may exist without the imputation of bad faith or immorality.²¹⁴ The Supreme Court has said that such an interpretation of the word "fraud" is consonant with equity and consistent with the object and intention of Congress in enacting a general law by which the honest citizen may be relieved from the burden of hopeless insolvency.²¹⁵

210. *Bracken v. Milner*, 104 Fed. 522 (C.C.W.D. Mo. 1900) (trustee under deed of trust); *Fine v. Saul*, 183 Ga. 309, 188 S.E. 439 (1936).

211. *Maryland Cas. Co. v. Fant*, 181 Tenn. 492, 181 S.W.2d 753 (1944). In *Hamby v. St. Paul Mercury Indem. Co.*, 217 F.2d 78 (4th Cir. 1954), the misappropriation by a real estate agent of funds entrusted to him for the purpose of paying off liens on claimant's property were held to create a liability that was nondischargeable.

212. See *In re Kane*, 48 F.2d 96, 98 (2d Cir. 1931).

213. See notes 86-97 *supra* and accompanying text, where this exception from the discharge is discussed.

214. *Neal v. Clark*, 95 U.S. 704, 709 (1877).

215. *Ibid.*

"Embezzlement" as used in section 17a(4) has been construed to mean the fraudulent misappropriation by the bankrupt officer or fiduciary of funds entrusted to his custody. It differs from larceny in the fact that in embezzlement, the original taking of the property was lawful, or with the consent of the owner, while in larceny the felonious intent must have existed at the time of the taking.²¹⁶

"Misappropriation" of funds within the purview of section 17a(4) of the Bankruptcy Act seems similar to embezzlement and involves the wrongful use of funds.²¹⁷ It is said by the courts that misappropriation must be due to a known breach of duty, and not to mere negligence or mistake.²¹⁸ However, even though the fiduciary has no actual knowledge of his legal duties, he is chargeable as a matter of law with knowledge of his duties as imposed on him by law, so as to make his misuse of funds an intentional breach, resulting in a nondischargeable liability based on misappropriation.²¹⁹

"Defalcation" would include a shortage by a fiduciary of his accounts; it is a broader term than embezzlement, and probably broader than misappropriation.²²⁰ "Defalcation," it is said, covers innocent as well as intentional defaults where there is a surcharging of accounts for legally improper expenditures or appropriations of funds.²²¹ Where a fiduciary (receiver appointed by court) spent the court awarded commission while the case was on appeal, and the award was reversed, he was guilty of "defalcation" so that his liability was nondischargeable.²²²

9. Wages

Section 17a(5) of the Bankruptcy Act provides that the bankruptcy discharge shall not release the bankrupt from claims for wages earned

216. See *Moore v. United States*, 160 U.S. 268 (1895).

217. *In re Hammond*, 98 F.2d 703 (2d Cir.), *cert. denied*, 305 U.S. 646 (1938) (director took over corporation's contract for his own profit); *In re Bernard*, 87 F.2d 705 (2d Cir. 1937) (director and president, knowing a corporation to be insolvent, appropriated part of its assets to liquidate his own claims and those of his son who was another officer; held to be a misappropriation since bankrupt knew corporation was insolvent and that the interests of other creditors would be sacrificed for the benefit of bankrupt and son); *In re Adelson*, 187 Misc. 691, 65 N.Y.S.2d 162 (Sup. Ct. 1946) (corporate officer caused corporation to prefer debts on which he was surety).

218. *In re Bernard*, 87 F.2d 705 (2d Cir. 1937). See note 217 *supra*.

219. *In re Hammond*, 98 F.2d 703 (2d Cir.), *cert. denied*, 305 U.S. 646 (1938). For going behind a judgment on a note given to cover misappropriations in a fiduciary capacity, so as to render liability nondischargeable, see *Fidelity & Cas. Co. v. Golombosky*, 133 Conn. 317, 50 A.2d 817 (1946).

220. See *Central Hanover Bank & Trust Co. v. Herbst*, 93 F.2d 510 (2d Cir. 1937); *Kaufman v. Lederfine*, 49 F. Supp. 144 (S.D.N.Y. 1943). To the effect that defalcation is broader than embezzlement or misappropriation, see *In re Butts*, 120 Fed. 96 (D.N.Y. 1903).

221. See 8 REMINGTON, BANKRUPTCY § 3363 (6th ed. 1955).

222. *Central Hanover Bank & Trust Co. v. Herbst*, 93 F.2d 510 (2d Cir. 1937) (the court did not consider bankrupt completely innocent in this case, however).

within three months prior to bankruptcy, due to workmen, servants, clerks, traveling or city salesmen, on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt.²²³ Moreover, it should also be remembered that such claims are granted priority of payment under the Bankruptcy Act up to \$600.²²⁴ Under section 17a(5) there is no limitation as to the amount of wages exempt from the discharge. Consequently, the entire unpaid amount of wages will be excluded from the effect of the discharge, provided the wages were earned within the three-month period.

Presumably wage earners are given these two preferred positions in bankruptcy on the ground that they are not as well situated as other creditors to bear a pro rata share of the losses in the event of bankrupt employers.²²⁵

10. Money Received or Retained for Faithful Performance

The last category of claims which are not released by a discharge is found in section 17a(6) of the Bankruptcy Act.²²⁶ This section of the act expressly excepts from the discharge debts due for moneys of an employee received or retained by his employer to secure the faithful performance by such employee of the terms of his contract of employment. The employer may well retain such a fund from the employee who is entrusted with the funds of the employer.

IV. THE PERSONAL NATURE OF THE DISCHARGE

While a discharge in bankruptcy constitutes a complete defense to a creditor's claim on a dischargeable debt scheduled in the bankruptcy proceedings, nevertheless the discharge does not ipso facto relieve the bankrupt from all future liability for debts covered in the discharge. Since no court, other than the bankruptcy court, is bound to take judicial notice of the discharge, it must be properly pleaded and proved in a suit against the bankrupt in order to bar a judgment against him; if not so pleaded, it is waived as a defense.²²⁷ In short, the bankrupt loses the benefit of the

223. Bankruptcy Act § 17a(5), ch. 541, 30 Stat. 550 (1898), as amended, 11 U.S.C. § 35 (1958).

224. Bankruptcy Act § 64a(2), ch. 541, 30 Stat. 563 (1898), as amended, 11 U.S.C. § 104 (1958).

225. See MACLACHLAN, BANKRUPTCY § 106 (1956).

226. Bankruptcy Act § 17a(6), ch. 541, 30 Stat. 550 (1898), as amended, 11 U.S.C. § 35 (1958). See *In re Thomashefsky*, 51 F.2d 1040 (2d Cir. 1931) (such claim not dischargeable).

227. *Dimock v. Revere Copper Co.*, 117 U.S. 559 (1886); *In re Innis*, 140 F.2d 479 (7th Cir. 1944); *Elliott v. Warwick Stores, Inc.*, 329 Mass. 406, 108 N.E.2d 681 (1952); *Murray v. Bass*, 184 N.C. 318, 114 S.E. 303 (1922). See *Personal Industrial Loan Corp. v. Forgay*, 240 F.2d 18 (10th Cir. 1956); *Helms v. Holmes*, 129 F.2d 263, 266 (4th Cir. 1942); 8 REMINGTON, BANKRUPTCY § 3240 (6th ed. 1955). However,

defense of a discharge if he does not interpose it when sued. Because of the personal character of the discharge, it releases the bankrupt's personal liability only; consequently, a valid lien on the bankrupt's property is not released by the discharge.²²⁸

Moreover, since the bankrupt's obligation itself survives bankruptcy—only the remedy of the creditor being affected—the bar of the discharge can be removed by the bankrupt.²²⁹ It is now generally agreed that the defense of the discharge may be waived by the bankrupt's making a new promise. Here, again, the filing of the petition is the dividing line, since the discharge, as we have seen,²³⁰ relates to debts in existence at the date of the petition. So a promise by the bankrupt to pay a provable debt, notwithstanding his discharge, is as effectual to lift the bar when made after the filing of the petition and before the discharge as if made after the discharge.²³¹ Hence, it is immaterial whether the promise is made before or after the discharge, just so it is made after the date the petition is filed.²³² Of course, a promise to waive a discharge made before the petition is not valid and enforceable after the discharge.²³³ The policy of the Bankruptcy Act in relation to discharges would clearly be defeated if a creditor could circumvent the discharge by the simple expedient of exacting such a waiver as a price of giving credit.²³⁴

in *Gore v. Goreman's, Inc.*, 143 F. Supp. 9 (W.D. Mo. 1956), the bankrupt successfully maintained against his creditor a suit for malicious prosecution when the creditor, with knowledge that his claim had been discharged, twice brought suit against the bankrupt in an attempt to enforce the collection of the debt which had been discharged in bankruptcy. The creditor, by way of defense to the malicious prosecution suit, asserted that the discharge in bankruptcy was not an extinguishment of his debt, but only gave the bankrupt the right to plead the discharge affirmatively as a defense, and unless pleaded, it was waived. The court rejected the contention of the creditor, holding that the bankruptcy discharge did release the debt. In his malicious prosecution suit, the bankrupt recovered punitive damages, as well as compensatory damages, the court finding that the creditor had instituted his suits with malice and without probable cause. The court felt that the suits were only for the purpose of harassing the bankrupt into paying the discharged liability.

228. *Robinson v. Exchange Nat'l Bank*, 28 F. Supp. 244 (W.D. Okla. 1939); *Prebyl v. Prudential Life Ins. Co.*, 98 F.2d 199 (8th Cir. 1938), *cert. denied*, 305 U.S. 641 (1938). We know, of course, that under certain circumstances valid liens obtained by judicial proceedings within four months of bankruptcy can be avoided by the trustee. Bankruptcy Act § 67a, ch. 541, 30 Stat. 564 (1898), as amended, 11 U.S.C. § 107 (1958).

229. See 1 COLLIER, BANKRUPTCY ¶ 17.23 (14th ed. 1956) and SUPPLEMENT.

230. See notes 72-74 *supra* and accompanying text.

231. See *Zavello v. Reeves*, 227 U.S. 625 (1913).

232. *Ibid.*

233. *Federal Nat'l Bank v. Koppel*, 253 Mass. 157, 148 N.E. 379 (1925) (promissory note delivered by the bankrupt before the filing of the petition in bankruptcy contained a clause "waiving all benefits of whatever kind or nature that any laws give or intend to give for the advantage or protection of the maker hereof." Maker's discharge in bankruptcy was held a good defense in an action on the note).

234. See *Federal Nat'l Bank v. Koppel*, 253 Mass. 157, 148 N.E. 379, 380 (1925); MACLACHLAN, BANKRUPTCY § 111 (1956).

The Bankruptcy Act does not provide for the manner in which debts can be revived after bankruptcy; such matters are left to the laws of the various states. Consequently, it is settled generally that the defense of the discharge is waived by a new promise to pay the debt, even if no new consideration is given by the creditor for the debtor's promise to pay the debt that was covered by the discharge.²³⁵

No doubt it would be within the power of Congress to enact provisions in the Bankruptcy Act governing the matter, but there is no such provision and each state is at liberty to apply its own rules as to the type of promise that will be enforceable. Some states, by statute, require that a new promise to pay a debt barred by bankruptcy must be in writing in order to be effectual,²³⁶ but at common law such a promise may be oral.²³⁷

Although a bankrupt's discharge is regarded as a personal defense to the creditor's remedy, the discharge can be set up as a defense to a debt by the bankrupt's privies.²³⁸

Section 17a of the Bankruptcy Act specifies the classes of liabilities from which the bankrupt cannot obtain relief through a discharge in bankruptcy. These we have discussed in some detail. Some years ago the late Garrard Glenn, a truly great scholar in the field of creditors' rights, wrote, with respect to liabilities that are not released by the discharge, that there are "certain obligations which no right minded person would allow a certificate (of discharge) to release."²³⁹ The reader will form his own opinion whether the judicial construction of those statutory exemptions from the discharge has been in line with Mr. Glenn's appraisal of the nondischargeability of debts.

235. See 1 WILLISTON, CONTRACTS § 158 (3d ed. 1957).

236. 1 WILLISTON, CONTRACTS § 158 (3d ed. 1957).

237. *Ibid.*

238. *Fleitas v. Richardson*, 147 U.S. 550 (1892) (mortgages of bankrupt could set up discharge); *Upshur v. Briscoe*, 138 U.S. 365 (1891) (widow, the fraudulent grantee of bankrupt, entitled to benefit of discharge).

239. GLENN, LIQUIDATION § 358 (1935).

