

12-1961

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### Recommended Citation

T. A. Smedley, *Determination of the Effect of a Discharge in Bankruptcy*, 15 *Vanderbilt Law Review* 49 (1961)

Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol15/iss1/3>

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# Determination of the Effect of a Discharge in Bankruptcy

T. A. Smedley\*

*This article examines the operation of the system under which the granting of the discharge is the function of the bankruptcy court but the construction of the effect of the discharge falls within the power of any court in which a creditor happens to bring suit to enforce an obligation of the bankrupt. The customary practice of leaving to the lower state courts the task of determining the dischargeability of specific debts is evaluated, and the bases for having this determination made in the bankruptcy court instead are explored.*

## I. THE GENERAL DISCHARGE

The primary purposes of bankruptcy proceedings are commonly said to be: (1) to secure an equitable distribution of the debtor's assets among his creditors in partial payment of his debts; and (2) to release the debtor from the burden of his obligations so that he may be given a new economic start in life.<sup>1</sup> It is to serve this latter aim that the Bankruptcy Act authorizes the bankruptcy courts to grant discharges to debtors who have been duly adjudicated bankrupts.<sup>2</sup> Under the procedure prescribed in section 14, the court makes its determination as to whether the bankrupt is deserving of this privilege. The act directs that "the court shall grant the discharge" unless it finds that the debtor has committed one or more of certain enumerated wrongful acts which render him unworthy of being released from his obligations.<sup>3</sup> Seven types of such wrongdoing are listed in section 14(c). Most frequently invoked are those which involve fraudulent conduct in the creation of a liability and those which tend to frustrate the achievement of a fair distribution of a debtor's assets to his creditors. Objections to the granting of a discharge may be raised by the creditors, the trustee in bankruptcy, or an attorney acting for the United States. If none of the statutory grounds for denial is established, the court enters an order which in general terms discharges the bankrupt "from all debts and claims which are made provable by said [Bankruptcy] Act against his estate, except such

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1. *Williams v. United States Fid. & Guar. Co.*, 236 U.S. 549, 554 (1915). See *Echelbarger v. First Nat'l Bank*, 211 Ind. 199, 5 N.E.2d 966, 968 (1937).

2. Bankruptcy Act § 2(12), ch. 541, 30 Stat. 545 (1898), 11 U.S.C. § 11a(12) (1958).

3. See *In re Thomas*, 92 Fed. 912 (S.D. Iowa 1899).

debts as are, by said Act, excepted from the operation of a discharge in bankruptcy."<sup>4</sup>

When a discharge order becomes final, it binds all other courts on the issue of whether the debtor was entitled to be released from legal liability for the debts covered by the general terms of the discharge.<sup>5</sup> The order, however, being general in terms, does not determine whether any specific debt is within its operation.<sup>6</sup> Even though a creditor opposes the granting of a discharge on the ground that his claim was created as a result of conduct by the bankrupt which serves both as a ground for denial of a discharge under section 14 and as a basis for rendering the claim non-dischargeable under section 17, the court's ruling that the conduct does not bar a general discharge is not *res judicata* on the issue of the dischargeability of the individual debt.<sup>7</sup>

Thus, the question remains as to what debts are exempt from the effect of the discharge under section 17a. This section states that "a discharge in bankruptcy shall release a bankrupt from all of his provable debts . . .," except those falling within the six types of obligations thereafter enumerated. It is to be noted that two classes of debts are recognized as non-dischargeable. First, debts which do not fall within the classification of "provable" debts as set out in section 63 can not be discharged. These include, among others, (1) unliquidated or contingent claims which are not allowed because they are not capable of reasonable estimation,<sup>8</sup> and (2) most unliquidated tort claims except rights to recover damages in actions for negligence which are pending when the bankruptcy petition is filed.<sup>9</sup> Second, a wide variety of debts, though provable in nature, are made non-dischargeable by section 17a. The most significant of these are liabilities for committing fraud while acting in a fiduciary capacity, for obtaining money or property by false representations, and for willfully and maliciously injuring persons and property.<sup>10</sup>

4. BANKRUPTCY FORM 45.

5. *Joyner v. Bank of Menlo*, 156 Ga. 750, 120 S.E. 4 (1923); *First Discount Corp. v. Applegate*, 104 Ohio App. 84, 143 N.E.2d 868 (1957); 1 COLLIER, BANKRUPTCY § 17.27 (14th ed. 1956) [hereinafter cited as COLLIER].

6. COLLIER § 14.02; *In re Legon*, 85 F. Supp. 946 (S.D.N.Y. 1949).

As to the power of the court to issue a limited discharge which specifies that certain debts are not affected by it, see text accompanying notes 118-40 *infra*.

7. *Friend v. Talcott*, 228 U.S. 27 (1913). See Oglebay, *Some Developments in Bankruptcy Law*, 18 REF. J. 9, 14 (1943).

8. Bankruptcy Act §§ 57d, 63a(8), 63d. See MACLACHLAN, BANKRUPTCY § 139 (1956); COLLIER § 17.27.

9. Bankruptcy Act § 63a(7), ch. 541, 30 Stat. 562 (1898), as amended, 11 U.S.C. § 103(a)(7) (1958). See MACLACHLAN, *op. cit. supra* note 8, § 138; 8 REMINGTON, BANKRUPTCY § 3306 (6th ed. 1955) [hereinafter cited as REMINGTON].

10. Bankruptcy Act §§ 17a(2), (4), ch. 541, 30 Stat. 530 (1898), as amended, 11 U.S.C. §§ 35(a)(2), (4) (1958). Also included are liabilities for: certain taxes, § 17a(1); alimony or separate maintenance, and damages for seduction, § 17a(2); wages earned by employees within three months of the bankruptcy, § 17a(5); money of an

## II. DETERMINATION BY STATE COURTS OF THE DISCHARGEABILITY OF SPECIFIC DEBTS

Since the bankruptcy court ordinarily is called on to decide only the issue of the debtor's right to a discharge, the question of the effect of the discharge on any of his various liabilities is generally declared to be a matter for decision by the court in which the creditor chooses to bring suit on the obligation<sup>11</sup>—typically, the state court with jurisdiction over the place where the debtor resides or owns property. A creditor is not barred from attempting to enforce his cause of action in a state court merely because he has failed to exercise his rights to oppose the granting of a general discharge to the bankrupt,<sup>12</sup> or to file his claim for payment in the bankruptcy proceedings,<sup>13</sup> nor does the fact that he has participated in the proceedings by filing his claim and receiving partial payment bar him from subsequently suing for the unpaid balance.<sup>14</sup> Thus, a suit by a creditor to collect his debt after a discharge has been granted does not constitute a collateral attack on the discharge order,<sup>15</sup> and the creditor does not act in contempt of the bankruptcy court merely because he brings suit with knowledge that a general discharge has been granted.<sup>16</sup>

If the creditor prosecutes his action on the debt after the discharge has been obtained, the bankrupt then has the opportunity to assert his discharge by pleading it in defense.

The right to a discharge is one thing, and the effect of it, when granted, is another,

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employee retained by the bankrupt to secure faithful performance, § 17a(6); and debts not duly scheduled by the bankrupt, if the creditor had no notice of the bankruptcy proceedings, § 17a(3).

11. *Grand Union Equip. Co. v. Lippner*, 167 F.2d 958 (2d Cir. 1948); *Otte v. Cooks, Inc.*, 113 F. Supp. 861 (D. Minn. 1953); *Kendrix v. Superior Egg Co.*, 99 Ga. App. 575, 109 S.E.2d 59 (1959); *Wasyliw v. Jendrowski*, 52 N.J. Super. 243, 145 A.2d 351 (Ch. Div. 1958); COLLIER §§ 14.62, 17.28.

While the creditor's remedy usually lies in a state court, it may also be pursued in a non-bankruptcy federal court if the proper elements of federal jurisdiction are present in the case.

12. *Personal Fin. Co. v. Hadden*, 142 F.2d 896 (6th Cir. 1944); *Time Fin. Co. v. Nelson*, 312 Ky. 255, 227 S.W.2d 189 (1950). See text accompanying notes 74-76 *infra*.

13. *In re Lewensohn*, 99 Fed. 73 (S.D.N.Y. 1900); *Wasyliw v. Jendrowski*, *supra* note 11; *Ohio Fin. Co. v. Greathouse*, 110 N.E.2d 805 (Ohio App. 1947); *Gehlen v. Patterson*, 83 N.H. 328, 141 Atl. 914 (1928). *But see* *Friedman Fin. Co. v. Shirley*, 168 Ohio St. 273, 154 N.E.2d 148 (1958). The creditor was denied enforcement of a judgment entered summarily on a cognovit note because he had failed to file a claim on the debt in the bankruptcy proceedings; the court noted that in the summary proceeding to obtain the judgment, the debtor had had no opportunity to raise the defense of discharge in bankruptcy.

14. *Friend v. Talcott*, *supra* note 7; *Katzenstein v. Reid, Murdock & Co.*, 41 Tex. Civ. App. 106, 91 S.W. 360 (1905).

15. *First Discount Corp. v. Applegate*, *supra* note 5; *Katzenstein v. Reid, Murdock & Co.*, *supra* note 14.

16. *In re Weisberg*, 253 Fed. 833 (E.D. Mich. 1918).

and wholly distinct, proposition. . . . The issue upon the effect of a discharge will arise when a creditor seeks to enforce a judgment or claim, and the debtor pleads his discharge in bar thereof. . . . [Therefore,] the proper place and time for the determination of the effect of the discharge is when the same is pleaded or relied upon as a defense to the enforcement of the particular claim.<sup>17</sup>

In answer to this defense, the creditor may allege that the debt is of a character which is not affected by the discharge, either because it was not provable at the time the petition in bankruptcy was filed, or because it falls within one of the specific exceptions set out in section 17a.<sup>18</sup> In this manner the issue of dischargeability is properly presented to the state court for decision.

If the claim has already been prosecuted to judgment prior to the granting of the discharge, so that the bankrupt had no opportunity to plead his discharge in defense, his remedy lies in following whatever procedure the state provides for preventing enforcement of the judgment. Typically, the remedy consists of enjoining the creditor from employing the ordinary processes of execution, attachment, garnishment, and so on.<sup>19</sup> But in some jurisdictions the bankrupt may resort to special statutory proceedings, such as a motion to vacate a default judgment entered through mistake, surprise, inadvertence, or excusable neglect,<sup>20</sup> or an application

17. *In re Rhutassel*, 96 Fed. 597, 598 (N.D. Iowa 1899). See also *State Fin. Co. v. Morrow*, 216 F.2d 676 (10th Cir. 1954); *Gathany v. Bishopp*, 177 F.2d 567 (4th Cir. 1949); *Matter of Siegel*, 164 F. Supp. 709 (E.D.N.Y. 1958); *Jenkins v. Bishop Apartments, Inc.*, 144 Conn. 389, 132 A.2d 573 (1957); REMINGTON § 3239.

If the creditor has instituted his suit before the petition in bankruptcy is filed, the bankrupt may preserve his rights to plead his anticipated discharge in defense by obtaining from the bankruptcy court a stay of the proceedings in the state court until the discharge is granted. Bankruptcy Act § 11a, ch. 541, 30 Stat. 549 (1898), as amended, 11 U.S.C. § 29 (1958). *Eistrat v. Cekada*, 50 Cal. 2d 289, 324 P.2d 881 (1958). See text accompanying notes 49-61 *infra*.

18. Though the rule may differ in the various jurisdictions, it is said that in most states the creditor is not required to plead the non-dischargeability of his debt in order to be allowed to prove that factor. REMINGTON § 3241.

19. *Kendrix v. Superior Egg Co.*, *supra* note 11 (to set aside garnishment and obtain money already withheld by garnishee); *Shabaz v. Henn*, 48 Ga. App. 441, 173 S.E. 249 (1934) (to obtain perpetual stay of execution); *Wofford Oil Co. v. Womack*, 46 Ga. App. 246, 167 S.E. 331 (1933) (to obtain temporary stay of execution pending grant of discharge); *First Discount Corp. v. Applegate*, *supra* note 5 (to plead discharge in defense to creditor's proceeding in aid of execution); *Kruegel v. Murphy & Bolanz*, 59 Tex. Civ. App. 482, 126 S.W. 680 (1910) (to enjoin creditor from requiring issuance of execution). See COLLIER § 17.32.

20. *Tradesmen's Nat'l Bank & Trust Co. v. Cummings*, 38 N.J. Super. 1, 118 A.2d 80 (App. Div. 1955). See CAL. CODE CIV. PROC. § 473 (Deering 1953). This type of remedy is especially appropriate in situations in which the creditor files suit prior to the bankruptcy, delays for a long period, and then suddenly prosecutes the suit to judgment. Under such circumstances, a default judgment may be obtained without the debtor even being aware that the case is being tried. See *Holmes v. Rowe*, 97 F.2d 537 (9th Cir. 1938) (suit filed prior to bankruptcy; default judgment obtained, without notice to debtor, 2½ years after bankruptcy); *In re Innis*, 140 F.2d 479 (7th Cir. 1944) (suit filed prior to bankruptcy, default judgment obtained 4½ years after

for cancellation of record of a judgment discharged in bankruptcy.<sup>21</sup> Several states have moved to protect the bankrupt by means of such judgment-cancellation statutes, most of them being similar in terms to the New York act, which provides:

At any time after one year has elapsed since a bankrupt or debtor was discharged from his debts . . . the bankrupt or debtor . . . may apply, upon proof of the bankrupt's or debtor's discharge, to the court in which a judgment was rendered against him . . . for an order, directing that a discharge or a qualified discharge of record be marked upon the docket of the judgment.<sup>22</sup>

In the pursuit of any of these types of remedies, the discharge in bankruptcy is asserted as the basis for relief, and the court must determine whether the obligation on which the judgment was rendered was dischargeable in nature. By putting a certified copy of the discharge order in evidence, the bankrupt, by virtue of section 21f of the Bankruptcy Act, establishes a prima facie defense,<sup>23</sup> and the creditor then has the burden of proving that the debt is in the non-dischargeable class.<sup>24</sup> In order to sustain this burden, he must prove affirmatively all of the elements making up the offense which, under the terms of the Bankruptcy Act, causes the obligation to be excepted from the discharge. Thus, if the creditor contends that the debt is within section 17a(2) as a liability "for obtaining money or property by false pretenses or false representations," he must show that "the bankrupt's representations were material and false in fact; that they were made with intent to deceive and defraud or made recklessly without knowledge of its truth and as a positive assertion; and that the creditor must have believed, acted, and relied upon them to his preju-

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bankruptcy and 3½ years after discharge); *Gathany v. Bishopp*, *supra* note 17 (enforcement of judgment more than 12 years after discharge).

21. *Application of Julien*, 145 N.Y.S.2d 60 (Sup. Ct. 1955); *Application of Nothing*, 137 N.Y.S.2d 96 (Sup. Ct. 1954), *aff'd without opinion*, 285 App. Div. 1023, 139 N.Y.S.2d 905 (1955). See *In re Devereaux*, 76 F.2d 522, 523 (2d Cir. 1935); *REMLINGTON* § 3245.

22. N.Y. DEBT. & CRED. LAW § 150. For similar statutes see: CAL. CODE CIV. PROC. § 675(b) (Deering 1953); MINN. STAT. § 548.18 (1953); N.D. CENTURY CODE § 28-20-30 (1960).

23. *Woertor v. David*, 311 Ill. App. 595, 37 N.E.2d 448 (1941); *Leeds, Inc. v. Love*, 104 Ohio App. 145, 145 N.E.2d 154 (1957); *COLLIER* §§ 17.23, 17.31. Section 21f of the Bankruptcy Act provides: "A certified copy of any order or decree entered in a proceeding under this Act shall be evidence of the jurisdiction of the court, the regularity of the proceedings, the fact that the order or decree was made, and the contents thereof . . ."

24. *Whelan v. United States Guarantee Co.*, 252 F.2d 851 (D.C. Cir. 1958); *In re Noble*, 42 F. Supp. 684 (D. Colo. 1941); *Morris v. Drubin*, 165 Cal. App. 2d 467, 332 P.2d 371 (Dist. Ct. App. 1958); *Accounts Supervision Co. v. Atley*, 89 So. 2d 508 (La. App. 1956); *Hunter v. Commercial See. Co.*, 237 Miss. 41, 113 So. 2d 127 (1959); *Wasylikiw v. Jendrowski*, *supra* note 11; *National Fin. Co. v. Valdez*, 11 Utah 2d 339, 359 P.2d 9 (1961); *Zerega Distrib. Co. v. Gough*, 52 Wash. 2d 443, 325 P.2d 894 (1958).

dice."<sup>25</sup> One qualification to the general rule regarding burden of proof exists. If the creditor relies on section 17a(3)<sup>26</sup> to except his debt from the discharge, and proves that the bankrupt failed to schedule that debt properly in time to permit the proof and allowance of the claim in the bankruptcy proceedings, he is deemed to have fulfilled his burden of showing his debt was not discharged. Thereupon, the bankrupt must bear the burden of proving that the creditor is excluded from the protection of this exception because he knew of the bankruptcy proceedings even though his debt was not scheduled.<sup>27</sup>

The opinions reflect some uncertainty about what evidence the court should consider when called upon to make a determination as to the dischargeability of a debt. When the discharge is raised as a defense to the creditor's original suit on the debt, it seems clear that the court will determine the character of the obligation on the basis of whatever relevant evidence, admissible under general rules of law, the parties offer to show that the obligation is within or without the operation of the discharge. And if the suit is brought on a note given by the bankrupt to evidence an obligation in other form, the creditor may prove that the original obligation was non-dischargeable in order to refute the bankrupt's contention that the obligation on the note was discharged as a simple contract debt.<sup>28</sup> When the discharge is asserted to bar enforcement of a judgment already obtained by the creditor or to secure a cancellation of such judgment, the decisions as to what evidence should be considered are in confusion, and probably in conflict. If the judgment itself determined, or if the entire record of the suit in which the judgment was obtained conclusively demonstrated, that the debt was either dischargeable or non-dischargeable, it appears that neither party will be allowed to controvert that conclusion in the proceeding to enforce or to cancel the judgment.<sup>29</sup> If neither the judg-

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25. *Zerega Distrib. Co. v. Gough*, *supra* note 24, at 896. See *National Fin. Co. v. Valdez*, *supra* note 24; Annot., 17 A.L.R.2d 1208 (1951). However, it has been argued that it may be relatively easy for the creditor to make a prima facie case of fraudulent misrepresentation, after which a difficult burden of rebutting this case then shifts back to the bankrupt. Note, *Bankruptcy Act: Abuse of Sections 14c(3) and 17a(2) by Small Loan Companies*, 32 IOWA L. REV. 151, 159 (1957). Illustrating this process, see *Morris Fin. & Loan Co. v. Dickerson*, 57 So. 2d 786 (La. App. 1952).

26. Bankruptcy Act § 17a(3) excepts debts which "have not 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 . . . ."

27. *Hill v. Smith*, 260 U.S. 592 (1923); *Woerter v. David*, *supra* note 23; COLLIER § 17.23.

28. *United States Credit Bureau, Inc. v. Manning*, 147 Cal. App. 2d 558, 305 P.2d 970 (Dist. Ct. App. 1957); *Gregory v. Williams*, 106 Kan. 819, 189 Pac. 932 (1920); *Ohio Fin. Co. v. Greathouse*, *supra* note 13; *National Fin. Co. v. Valdez*, *supra* note 24; Annot., 170 A.L.R. 368 (1947).

29. *Citizens Mut. Auto. Ins. Co. v. Gardner*, 315 Mich. 689, 24 N.W.2d 410 (1946); *Karger v. Orth*, 116 Minn. 124, 133 N.W. 471 (1911); *Harrington & Goodman v.*

ment nor the record conclusively establishes the nature of the debt on which the judgment was entered, the question arises as to the admissibility of evidence outside the record to show whether the debt was dischargeable or not. While it is conceded that neither the form in which the judgment was entered nor the type of cause of action on which the suit was brought controls the matter of the character of the obligation, a majority of the decisions holds that the court must make its determination on the basis of the implications of the entire record, and cannot properly admit outside evidence on the issue.<sup>30</sup> Thus, it has been declared:

[T]he overwhelming weight of authorities . . . appears to be to the effect that in cases of this character, when suits have been brought on an obligation and same has been reduced to judgment, the character of the obligation and the question whether same is dischargeable in bankruptcy must be determined from the entire record of the suit, but that no evidence is admissible to contradict or to go behind or beyond the entire record of the suit.<sup>31</sup>

On the other hand, a rather determined minority holds that evidence outside of the record of the action may be admitted to establish the character of the debt on which the judgment is based.<sup>32</sup> This view is grounded on the following reasoning: when the discharge is pleaded in a suit on a note, proof is admissible to show that the debt for which the note was given was of a non-dischargeable character; the entry of a judgment on a debt does not change the character of the obligation; therefore, the nature of the original obligation is controlling and should be provable by any available

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Herman, 172 Mo. 344, 72 S.W. 546 (1903); *Wasyliw v. Jendrowski*, *supra* note 11; *Scott v. Corn*, 19 S.W.2d 412 (Tex. Civ. App. 1929); COLLIER § 17.17, at 1617.

30. *In re La Porte*, 54 F. Supp. 911 (W.D.N.Y. 1943) (debtor's evidence rejected); *In re Danahy*, 45 F. Supp. 758 (W.D.N.Y. 1942) (creditor's evidence rejected); *Consolidated Plan v. Bomitatibus*, 130 Conn. 199, 33 A.2d 140 (1943); *Horner v. Nerlinger*, 304 Mich. 225, 7 N.W.2d 281 (1943); *Rice v. Guider*, 275 Mich. 14, 265 N.W. 777 (1936); *National Sur. Corp. v. Toale*, 188 Misc. 359, 67 N.Y.S.2d 44 (Munic. Ct. 1946); *In re Benoit*, 124 App. Div. 142, 108 N.Y.S. 889 (1908); *Campbell v. Norgart*, 73 N.D. 297, 14 N.W.2d 260 (1944); *United Mercantile Agencies v. Williams*, 87 Ohio App. 273, 94 N.E.2d 572 (1950); *Chambers v. Kirk*, 41 Okla. 696, 139 Pac. 986 (1914). It should be noted that decisions cited as authority for this proposition often go no further than holding that the court should go beyond the judgment and consider the entire record; only by implication do they bear on the question of the admissibility of outside evidence. *E.g.*, *Halligan v. Dowell*, 179 Iowa 172, 161 N.W. 177 (1917); *Bonnici v. Kindsvater*, 275 Mich. 304, 266 N.W. 360 (1936); *In re Pulver*, 146 Wash. 597, 264 Pac. 406 (1928).

31. *Aetna Cas. & Sur. Co. v. Sentilles*, 160 So. 149, 150 (La. App. 1935).

32. *Whelan v. United States Guarantee Co.*, *supra* note 24; *United States Credit Bureau, Inc. v. Manning*, *supra* note 28; *Fitzgerald v. Herzer*, 177 P.2d 364 (Cal. App. 1947); *Fidelity & Cas. Co. v. Golombosky*, 133 Conn. 317, 50 A.2d 817 (1946); *Levin v. Singer*, 30 U.S.L. WEEK 2242 (Md. Nov. 20, 1961); *Fireman's Fund Indem. Co. v. Caruso*, 252 Minn. 435, 90 N.W.2d 302 (1958). Other cases cited in the opinions of the foregoing decisions as adopting this view often go no further than holding that the court may "go behind the judgment" to determine the nature of the obligation, and do not expressly state that evidence outside of the record may be admitted.



evidence.<sup>33</sup> And it is further argued that by limiting consideration to the record, the creditor will frequently be prevented from showing the true character of the obligation on which the judgment is based; if this happens, the purpose of the Bankruptcy Act—to leave the bankrupt still liable on debts dishonestly incurred—will be frustrated.<sup>34</sup> Because the creditor has the burden of proof that the debt is non-dischargeable, the decisions under the restrictive rule will go against him whenever the record is inconclusive as to the dischargeable nature of the original obligation.<sup>35</sup> Thus, the debtor will ordinarily be relieved of a non-dischargeable liability when the creditor's suit was based on a note given for a prior non-dischargeable debt, or on a tort cause of action involving willful and malicious conduct not brought out by the creditor in his complaint or proof.<sup>36</sup> In view of this inclination of the courts to restrict their consideration to the record, any creditor bringing suit on an obligation owing to him should take care to plead and prove any factors which would tend to establish the non-dischargeable nature of the debt; otherwise, the subsequent bankruptcy of the debtor will prevent enforcement of the judgment obtained in the suit.

Though in theory the discharge affords a bankrupt protection against liability on dischargeable debts, in actuality this protection often proves inadequate because of the limited effect which the law attributes to a discharge order. It is settled that a discharge does not extinguish the bankrupt's obligations, but rather only provides a personal defense against their enforcement.<sup>37</sup> Therefore, the granting of a discharge does not itself affect even a debt which is dischargeable in nature; only when pleaded by the bankrupt as an affirmative defense in a suit on that debt, or in a proceeding to enforce a judgment based on that debt, does the discharge serve its purpose of protecting the bankrupt from liability.<sup>38</sup> If the bankrupt fails

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33. *Fidelity & Cas. Co. v. Golombosky*, *supra* note 32, at 819. This case and its reasoning are heavily relied on in the *Manning* and *Caruso* cases, *supra* note 32.

34. *Fidelity & Cas. Co. v. Golombosky*, *supra* note 32, at 820.

35. *E.g.*, *Halligan v. Dowell*, *supra* note 30, at 180.

36. The minority courts also note the lack in opinions of the majority courts of any apparent affirmative reason for restricting consideration to the record. *Fidelity & Cas. Co. v. Golombosky*, *supra* note 32, at 819-20.

It has been suggested that the fact that the judgment was based on a note given for a prior obligation is of some significance in explaining the divergence of opinion—that a court which would approve going behind the record to determine the character of the original obligation on which the judgment was directly based will not consent to going behind both the record and the note to look at the original obligation. See Annot., 170 A.L.R. 368 (1947). However, the cases cited in note 30 *supra*, supporting the majority rule, do not bear out this analysis.

37. *Zavelo v. Reeves*, 227 U.S. 625 (1913); *First Nat'l Bank v. Henderson*, 243 Ala. 636, 11 So. 2d 366 (1942); *Crandall v. Durham*, 348 Mo. 240, 152 S.W.2d 1044 (1941); *First-Citizens Bank & Trust Co. v. Parker*, 232 N.C. 512, 61 S.E.2d 441 (1950); *Friedman Fin. Co. v. Shirley*, *supra* note 13; *National Fin. Co. v. Valdez*, *supra* note 24.

38. The pleading of a discharge in bankruptcy does not constitute collateral attack

to plead this defense properly, it is regarded as waived by him, and the creditor is allowed to enforce his claim against the post-bankruptcy assets of his debtor.<sup>39</sup>

Of course, there can be no objection to allowing a bankrupt to waive his defense and voluntarily acknowledge his liability to pay the debt. If he takes that step intentionally, he is commendably exercising his choice to satisfy a moral obligation which could not be legally enforced. However, all too frequently it appears that the bankrupt's failure to assert his defense is not deliberate and is not based on an intention to be bound on the obligation; rather, is due to inadvertence or misunderstanding on his part. Mistakenly but naturally supposing that the discharge operates automatically to release him from liability, or regarding himself as financially unable to afford counsel to represent him, he fails to respond to the creditor's suit on a debt; the result is a default judgment entered against him without the matter of the dischargeability of the debt ever being passed on by any court.<sup>40</sup> On other occasions the bankrupt is lulled into a false sense of security because the creditor, after a long delay following the discharge, quietly and sometimes without notice to the defendant prosecutes a suit which was filed before the bankruptcy proceedings began.<sup>41</sup> The courts generally show no inclination to disapprove a rule which produces such an unsatisfactory result in so many instances,<sup>42</sup> though now and then a judicial voice is raised in protest,<sup>43</sup> and even more rarely a court refuses to recognize such an inadvertent waiver. However, a federal court has recently taken the position that it has discretionary power

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on a judgment on the debt rendered by a state court. *Friedman Fin. Co. v. Shirley*, *supra* note 13.

39. *Household Fin. Corp. v. Dunbar*, 262 F.2d 112 (10th Cir. 1958); *In re Innis*, *supra* note 20; *Covington v. Robinson*, 242 Ala. 337, 6 So. 2d 421 (1942); *Aiken v. Bank of Georgia*, 101 Ga. App. 200, 113 S.E.2d 405 (1960); *Elliott v. Warwick Stores, Inc.*, 329 Mass. 406, 108 N.E.2d 681 (1952); *Leeds, Inc. v. Love*, *supra* note 23; COLLIER § 17.27.

40. *E.g.*, *Beneficial Loan Co. v. Noble*, 129 F.2d 425 (10th Cir. 1942) (bankrupt was advised by legal aid society employee to ignore creditor's suit because he had been adjudicated a bankrupt); *Helms v. Holmes*, 129 F.2d 263 (4th Cir. 1942) (bankrupt "thought the discharge . . . operated as an automatic defense to any subsequent action brought against him by a creditor on a claim which came within the discharge . . . ."); *Tune v. Vaughan*, 90 Ark. 971, 281 S.W. 906 (1926) (bankrupt "suffered judgment to be entered against him under the misapprehension that his discharge automatically terminated the pending suit against him").

41. *E.g.*, *Gathany v. Bishopp*, *supra* note 17; *In re Innis*, *supra* note 20; *Holmes v. Rowe*, *supra* note 20.

42. For the usual reaction, see *In re Innis*, *supra* note 20: "[The state court] was not compelled to take judicial notice of the proceeding in bankruptcy in another court, however seriously that proceeding might affect the rights of the parties to the suit already pending. It was the duty of the state court to proceed to judgment between the parties unless, by some proper pleading, it was informed of the changed relation of any of the parties to the suit's subject matter." 140 F.2d at 480.

43. See the dissent of Judge Paul in *Helms v. Holmes*, *supra* note 40, at 269.

to give effect to a discharge even though it was not pleaded by the bankrupt. In that case the creditor sued to foreclose a trust deed in the same federal court which had previously granted a discharge in bankruptcy to the debtor, whose notes were secured by the trust deed. In the foreclosure proceeding the debtor appeared as a witness, and evidence of the discharge was admitted, but the debtor did not assert it as a defense because the deed of trust lien survived the bankruptcy. Nevertheless, the district court refused to enter a deficiency judgment against the debtor, and the Court of Appeals for the Eighth Circuit sustained that ruling, declaring:

While upon this record the court would perhaps have been justified in granting a personal judgment against the bankrupt on his notes, we do not believe that the court was compelled to do so. A court of equity has some discretion in determining the relief it will grant. The validity of defendant's discharge is not challenged. We find nothing in the record to indicate the Bank was in any manner prejudiced by the bankrupt's failure to assert the discharge as a defense by answer. . . . The court had an opportunity to see and hear the bankrupt as a witness and could well have formed an impression that the bankrupt had no intention to waive his discharge rights.<sup>44</sup>

Furthermore, it has been held in New York that failure of the bankrupt to plead his discharge as a defense in the creditor's suit does not prevent him from subsequently obtaining relief in a statutory proceeding for cancellation of the judgment rendered on a debt discharged in bankruptcy.<sup>45</sup>

Since the requirement that the bankrupt affirmatively plead his discharge so often operates to enable creditors to impose severe hardships on their bankrupt debtors and thereby to frustrate one of the main purposes of the Bankruptcy Act, it seems that the rule should be modified. While a bankrupt should be permitted to forego the benefits of his discharge if he knowingly chooses to do so, a rule requiring some positive action by the bankrupt to constitute a waiver of the defense of discharge would eliminate the worst evils of the present situation. Under such a rule a creditor, in order to enforce a dischargeable debt, would have to show that the debtor is affirmatively waiving his discharge defense; in this way the current practice of taking advantage of a bankrupt's ignorance of the nature of his rights and of the necessity of asserting his defense would be largely forestalled. Since there appears to be no likelihood of the courts revising the established practice, legislation would be necessary to achieve this result.

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44. *National Bank v. General Mills, Inc.*, 283 F.2d 574, 579 (8th Cir. 1960).

45. *Home Owners' Loan Corp. v. Breskin*, 173 Misc. 1002, 18 N.Y.S.2d 704 (Sup. Ct. 1940); *Neish v. Doyle*, 143 Misc. 694, 256 N.Y.S. 896 (Sup. Ct. 1932); *Rukeyser v. Tostevin*, 188 App. Div. 629, 177 N.Y.S. 291 (1919). The New York statute (quoted in the text accompanying note 22 *supra*) was construed to be mandatory, requiring cancellation whenever the debt on which the judgment was based has been discharged in bankruptcy. In California, the decisions under a very similar statute seem to be in disagreement on this point. See *Davison v. Anderson*, 271 P.2d 233, 236 (Cal. Super. 1954); *Maryland Cas. Co. v. Lipscomb*, 104 P.2d 525, 526 (Cal. App. 1940).

Perhaps a simple amendment to section 17 of the Bankruptcy Act, specifying that the discharge bars enforcement of all dischargeable debts unless the bankrupt manifests his waiver of the defense by clear and affirmative action, would provide the most effective solution.

The traditional practice of conferring on the state courts the function of determining what debts are discharged in bankruptcy is open to criticism on several grounds. First, it produces an anomalous system under which the bankruptcy court is empowered to grant a discharge order, but can issue only "a strange form of decree which must be taken to another court for an interpretation of its effect."<sup>46</sup> In order to obtain that interpretation, the parties are put to the trouble, delay and expense of prosecuting and defending an independent suit in another court, after having already been before the bankruptcy court in a proceeding which directly concerned the rights of the bankrupt and his creditors. The creditor, who may have proved his claim in bankruptcy in order to receive payments out of the estate and who may have also shown the nondischargeable character of his debt in opposing the grant of a general discharge, must now bear the burden of again asserting his cause of action in a state court and proving that the obligation is not dischargeable. The debtor, in turn, must marshal his proof that the debt was discharged, and in many cases this effort must be made years after the debt was incurred and after the evidence needed to establish the nature of the transaction out of which the obligation arose has been dissipated. Furthermore, there is some cause to suspect that the lower state courts may tend to restrict unduly the scope of the discharge, to the prejudice of the bankrupt. This tendency may be due to the relatively stronger influence of the creditor in the community, or to the common lack of understanding of, or sympathy with, the social purposes of the Bankruptcy Act. The federal bankruptcy courts, being directly involved in the operation of the bankruptcy system, may be in a better position than the state courts to view the matter in its proper perspective. And to leave the determination of the effect of a bankruptcy discharge in the hands of innumerable state courts of varying types and qualities is to destroy all hope of ever achieving any semblance of uniformity of decision.<sup>47</sup>

### III. DETERMINATION BY THE BANKRUPTCY COURT OF THE DISCHARGEABILITY OF SPECIFIC DEBTS

Because of the disadvantages, real or fancied, which may arise from re-

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46. *Twinem, Discharge—What Court Determines the Effect Thereof*, 21 REF. J. 33, 34 (1946).

47. "The object of the Bankruptcy Act was to establish a uniform system of bankruptcy, and with that end in view to take from the state courts the decision and determination of all such questions and controversies as are by the act placed within the jurisdiction of the bankruptcy courts." *Bothwell v. Fitzgerald*, 219 Fed. 408, 415 (9th Cir. 1915).

liance on the state courts for decisions as to whether particular debts are dischargeable, the determination of the issue of dischargeability is frequently sought in the federal bankruptcy courts. There is presently no provision in the Bankruptcy Act specifically conferring this power on the bankruptcy courts, though attempts to amend the act so as to grant such authority have been made on a number of occasions.<sup>48</sup> However, even without an express grant, jurisdiction to make determinations as to dischargeability of debts has been established on at least four different bases.

#### A. *The Power To Grant Stay Orders Under Section 11a*

Section 11a provides that any suit which is pending against a person at the time he files a bankruptcy petition and which is based on a claim that would be released by a discharge in bankruptcy (a) *shall* be stayed pending an adjudication or dismissal of the petition, and (b) *may* be further stayed, after an adjudication, until the question of the granting of a discharge is settled.<sup>49</sup> The purpose of such a temporary stay is to enable the debtor to forestall attempts of his creditors to enforce their claims against him before he is able to obtain a discharge which can be pleaded as a defense to the enforcement of his liabilities.<sup>50</sup> The term "suits . . . pending" is construed to include not only an original action to obtain a judgment, but also a proceeding to enforce a judgment already rendered, such as levy of execution, garnishment, and so on.<sup>51</sup>

Since the power to grant a stay exists only in regard to suits on claims "from which a discharge would be a release,"<sup>52</sup> the bankruptcy court must

48. Two such recent attempts are represented by: (1) H.R. 11543, 84th Cong., 2nd Sess. (1956), which would have added a paragraph 22 to section 2a of the Bankruptcy Act, beginning as follows: "Determine the dischargeability or nondischargeability of all provable debts . . ." No action was taken on this bill, which died with the adjournment of Congress. The same proposal was reintroduced in the Eighty-fifth Congress as House Bill 106 and was approved by the House of Representatives. (2) H.R. 4150, 86th Cong., 1st Sess. (1959), also proposing an addition of paragraph 22, beginning as follows: "Upon application of the bankrupt and the creditor concerned determine the dischargeability or non-dischargeability of all provable debts . . ." This bill was passed by the House of Representatives on September 7, 1959; but, like H.R. 106, *supra*, it was never adopted by the Senate.

49. For general discussion, see COLLIER §§ 11.02-.08. The "shall" and "may" terminology is taken to mean that the grant of the stay is mandatory prior to adjudication but discretionary after adjudication. *In re Locker*, 30 F. Supp. 642 (S.D.N.Y. 1940); *Smith v. Phlegar*, 73 Ariz. 11, 236 P.2d 749 (1951).

50. *Matter of Palter*, 151 F. Supp. 278 (E.D.N.Y. 1957); *In re S. W. Straus & Co.*, 6 F. Supp. 547, 548 (S.D.N.Y. 1934); *In re De Lauro*, 1 F. Supp. 678, 680 (D. Conn. 1932); *In re Nuttall*, 201 Fed. 557, 563 (S.D.N.Y. 1912).

51. COLLIER § 11.03; *In re Adler*, 144 Fed. 659 (2d Cir. 1906); *Greenfield v. Tucillo*, 129 F.2d 854 (2d Cir. 1942); *Matter of Palter*, *supra* note 50; *Shabaz v. Henn*, *supra* note 19.

52. Bankruptcy Act § 11a, ch. 541, 30 Stat. 549 (1898), as amended, 11 U.S.C. § 29a (1958). 11 U.S.C. § 29a (1960 Supp.). See *Family Small Loan Co. v. Mason*, 67 F.2d 207 (4th Cir. 1933); *Holmes v. Davidson*, 84 F.2d 111 (9th Cir. 1936); *Binnian v. Bookey*, 48 Wash. 2d 342, 294 P.2d 410 (1956).

necessarily pass on the dischargeability of the claim in the process of deciding whether a stay shall issue.<sup>53</sup> In the case of *In re Metz* it was declared:

It therefore became the duty of the learned judge below to determine whether or not, under section 11 of the Bankruptcy Act, the debt was dischargeable in bankruptcy, in passing upon the stay sought and obtained. This was not a matter of discretion. It was his duty to inquire into the nature of the cause of action pending in the state court, the character of the judgment, so as to determine the facts upon which the decree in the state court was based . . . and, after such knowledge, then to determine whether or not the application of the petitioner for a stay in the proceedings in the state court should be granted.<sup>54</sup>

In such a proceeding, the burden is on the creditor to prove that his claim is non-dischargeable, and if the nature of the claim is reasonably debatable in this respect, the stay should be granted.<sup>55</sup> Here again, there appears to be some difference of opinion on the question of what evidence the bankruptcy court may consider in making its decision as to the dischargeable character of the debt. It has been declared that "where a state court action has not been tried, the character of the claim is determined from the plaintiff's pleading";<sup>56</sup> therefore the plaintiff has been cautioned to draw his pleadings so as to show that the cause of action is non-dischargeable, in order to avoid having a stay ordered pending the hearing on the matter of the bankrupt's general discharge.<sup>57</sup> When a judgment has already been rendered in the state court and the debtor seeks a stay of its enforcement, some courts have stated that the bankruptcy court will not go behind the judgment as shown by the record of the action in which the judgment was remitted.<sup>58</sup> However, in *Greenfield v. Tuccillo* the Court of Appeals for the Second Circuit asserted that "if the record does not disclose the nature of the claim it may be proved aliunde."<sup>59</sup>

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53. *Greenfield v. Tuccillo*, *supra* note 51; *In re Scheffler*, 68 F.2d 902 (2d Cir. 1934); *In re Byrne*, 296 Fed. 98 (2d Cir. 1924). See *Hisey v. Lewis Gale Hosp.*, 27 F. Supp. 20, 23 (W.D. Va. 1939).

It is to be noted that the power to grant the stay is not limited to the bankruptcy court. Either that tribunal or the state or federal court in which the creditor's suit is pending may act in this regard, and the "proper procedure" is sometimes declared to be to apply first to the court in which the suit is pending. If the stay is refused there, the debtor should then seek relief in the bankruptcy court. *In re Innis*, *supra* note 20; *Smith v. Phleger*, *supra* note 49; COLLIER § 11.08.

54. 6 F.2d 962, 963-4 (2d Cir. 1925).

55. *Greenfield v. Tuccillo*, *supra* note 51; *In re Millkofsky*, 17 F. Supp. 127 (W.D.N.Y. 1936); *In re Kimmel*, 28 F. Supp. 942 (S.D.N.Y. 1939); *In re De Lauro*, *supra* note 50.

56. *Binnian v. Bookey*, *supra* note 52, at 412; *In re Alvino*, 111 F.2d 642 (2d Cir. 1940).

57. *In re Lusch*, 251 Fed. 316 (E.D.N.Y. 1918); *Bohn v. Watson*, 130 Cal. App. 2d 24, 278 P.2d 454 (Dist. Ct. App. 1954).

58. *Harper v. Rankin*, 141 Fed. 626 (4th Cir. 1905); *In re Lusch*, *supra* note 57, at 317; *In re Kimmel*, *supra* note 55, at 943. See COLLIER § 17.28.

59. 129 F.2d 854, 856 (2d Cir. 1942). See *In re Millkofsky*, *supra* note 55, at 128;

The finding of the bankruptcy court that a stay should be granted does not bind the state court in a subsequent action brought by the creditor to enforce his claim on the ground that it is non-dischargeable.<sup>60</sup> One court has explained that the granting of a stay is a step taken as an incident to the administration of the Bankruptcy Act—presumably to prevent a creditor from frustrating the purposes of the act by collecting his debt in full from the inadequate assets of the debtor and by depriving the debtor of the benefit of his discharge. And “any determination of the question [of the dischargeability of a particular claim] made by this court as an incident to administration is not binding upon the parties in independent proceedings arising in the state courts, after the administration of bankruptcy has been concluded.”<sup>61</sup>

The relief available to a bankrupt under section 11a is subject to two serious limitations. First, the stay can be granted only against suits which are pending when the bankruptcy petition is filed; it is not available to protect against proceedings begun after the filing of the petition. Second, the stay serves only as a temporary bar to prosecution of the suit until the matter of bankrupt's discharge is determined; it does not effect a dismissal of the action nor finally establish the dischargeability of the claim on which the suit is based. Thus, the debtor must look to other remedies to guard against the eventual enforcement of dischargeable debts.

*B. The Power To Make Orders Necessary for the Enforcement of the Provisions of the Bankruptcy Act Under Section 2(15)*

A few courts have relied on another section of the Bankruptcy Act as a source of authority for the granting of permanent relief against attempts of creditors to collect dischargeable claims. Section 2, the general grant of power to the bankruptcy courts, provides in subsection 15 that these courts may “make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this Act . . . .” In contrast to the situation under section 11a, the court's power to intervene is not limited to suits pending at the time of the filing of the petition, and the effect of its intervention does not terminate when the discharge in bankruptcy is granted. Rather, under section 2(15) the court may restrain any proceedings when such a move is necessary to enforce the provisions of the Bankruptcy Act.

It has been authoritatively observed that this subsection, notwithstanding its broad language, was enacted for the sole purpose of giving the court the

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Swig v. Tremont Trust Co., 8 F.2d 943, 945 (1st Cir. 1925); Family Small Loan Co. v. Mason, *supra* note 52.

60. *In re Millkofsky*, *supra* note 55; COLLIER § 11.04.

61. *In re De Lauro*, *supra* note 50, at 681.

power needed to protect its own custody of the bankrupt's estate and to prevent interference with its administration of that estate.<sup>62</sup> In this view, the distinction is drawn that while section 11a authorizes the court to restrain in personam suits against the bankrupt in order to protect him against harassment before his discharge is granted, the power conferred by section 2(15) is intended to be applied to restrain in rem actions which "tend to impair or defeat the paramount jurisdiction of the bankruptcy court in administering the bankrupt estate."<sup>63</sup> This power would ordinarily be invoked by the bankruptcy trustee or receiver as a means of protecting the estate, primarily for the benefit of the bankrupt's creditors.

Nevertheless, in several instances section 2(15) has been made the basis for a bankruptcy court's jurisdiction to protect the bankrupt by enjoining a creditor's attempt to collect a debt. In determining that this relief was to be given, the courts of course found it necessary to pass on the question of the dischargeability of the debts involved. Thus, in *Seaboard Small Loan Corp. v. Ottinger*<sup>64</sup> a lender was permanently enjoined from enforcing an assignment of future wages which the borrower had given, prior to his bankruptcy, to secure repayment of the loan. Having decided that the debt was discharged and that the assignment could not create a lien on future wages which would survive the discharge of the debt purported to be secured, the court stated the ground for its jurisdiction in these words:

In view of this purpose of the act [to give the debtor a fresh start economically] and of the express provision that the bankrupt shall be released from all provable debts, it would be indeed a strange situation if the court vested with jurisdiction to enforce the act were without power to stay the hand of a creditor whose debt has been discharged by bankruptcy, but who nevertheless persists in harassing the bankrupt with efforts to collect it. . . . The demand under an assignment order, in an effort to collect a debt discharged by bankruptcy, is nothing less than an attempt to circumvent the order discharging same and to deprive the bankrupt of the benefit of that order. It was to meet situations such as this that the bankruptcy court was vested with the general power under section 2, subsection 15 . . . to "make such orders, issue such process, and enter such judgments . . . as may be necessary for the enforcement of the provisions of this title."<sup>65</sup>

In more recent decisions the Court of Appeals for the Sixth Circuit has twice relied on this provision of the act as a grant of power to enjoin the

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62. See COLLIER §§ 2.61, 11.02.

63. *In re S. W. Straus & Co.*, *supra* note 50.

64. 50 F.2d 856 (4th Cir. 1931) (citing *In re Home Discount Co.*, 147 Fed. 538 (N.D. Ala. 1906) as a decision to the same effect).

65. 50 F.2d at 859. This decision was relied on as authority for enjoining a creditor's action to enforce a mortgage to collect a discharged claim in *Sims v. Jamison*, 67 F.2d 409 (9th Cir. 1933). And see *Hisey v. Lewis-Gale Hosp.*, *supra* note 53, at 25, referring to § 2(15) as a basis for granting a temporary injunction pending discharge to restrain a creditor from prosecuting a suit which was filed subsequent to the bankruptcy petition and therefore not subject to being stayed under § 11a.



enforcement of claims found by the court to be discharged in bankruptcy.<sup>66</sup> In view of the approval accorded the result of the *Ottinger* case in numerous other decisions, this basis of jurisdiction might have been invoked more frequently in later cases had not the Supreme Court shortly supplied the bankruptcy courts with a more reliable foundation for the exercise of their injunctive powers against creditors.

*C. The Power of an Equity Court To Entertain an Ancillary Bill  
To Effectuate a Prior Adjudication*

In 1934, only three years after the decision in the *Ottinger* case, the question of the bankruptcy courts' jurisdiction to pass on the dischargeability of a debt and to enjoin a creditor from enforcing a dischargeable debt was finally presented squarely to the Supreme Court in *Local Loan Co. v. Hunt*.<sup>67</sup> Here again, the debtor borrowed a small sum from the loan company and as security for repayment executed an assignment of wages to be earned in the future. In about six months the debtor filed a voluntary petition in bankruptcy in a federal district court in Illinois, listing this loan among his liabilities, and in due time he was granted a discharge in bankruptcy. One week after the discharge, the loan company brought suit in a Chicago municipal court to enforce the wage assignment against wages earned subsequent to the adjudication in bankruptcy. The debtor immediately commenced a proceeding in the bankruptcy court to enjoin the company from further prosecuting the municipal court action or in any other way attempting to enforce the claim under the wage assignment. The injunction was granted, and was upheld by the court of appeals.<sup>68</sup> Before the Supreme Court, the company argued that (1) the bankruptcy court had no jurisdiction to enjoin prosecution of the municipal court suit; (2) if such jurisdiction did exist, the suit should not have been enjoined because it was brought to enforce a valid lien created by the wage assignment; (3) regardless of the rule in other jurisdictions, under the law of Illinois such a lien was valid, and the federal courts were bound by the Illinois law in this case. All three contentions were rejected, and the lower court's decision was affirmed.

In establishing the jurisdiction of the bankruptcy court to issue the injunction, the Supreme Court cited the *Ottinger* case with approval, but did not rely on section 2(15) of the Bankruptcy Act. Rather, the Court declared: "That a federal court of equity has jurisdiction of a bill ancillary to an original case or proceeding in the same court, whether at law or in

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66. *General Protestant Orphan's Home v. Ivey*, 240 F.2d 239 (6th Cir. 1956); *Evans v. Dearborn Mach. Movers Co.*, 200 F.2d 125 (6th Cir. 1953).

67. 292 U.S. 234 (1934).

68. *Local Loan Co. v. Hunt*, 67 F.2d 998 (7th Cir. 1933). In granting relief, the court relied on its own decision in *In re Skorcz*, 67 F.2d 187 (7th Cir. 1933), which in turn relied on *Seaboard Small Loan Corp. v. Ottinger*, *supra* note 64.

equity, to secure or preserve the fruits and advantages of a judgment or decree rendered therein, is well settled. . . . These principles apply to proceedings in bankruptcy."<sup>69</sup>

Having thus broadly confirmed the existence of the bankruptcy court's authority to "determine the effect of the adjudication and order, and enjoin [the company] from its threatened interference therewith," the Supreme Court immediately advised restraint in the use of this power:

It does not follow, however, that the court was bound to exercise its authority. And it probably would not and should not have done so except under unusual circumstances such as here exist. . . . As will be shown in a moment, the sole question at issue is one which the highest court of the State of Illinois had already resolved against [the bankrupt's] contention. The alternative of invoking the equitable jurisdiction of the bankruptcy court was for [the bankrupt] to pursue an obviously long and expensive course of litigation, beginning with an intervention in a municipal court and followed by successive appeals through the state intermediate and ultimate courts of appeal, before reaching a court whose judgment upon the merits of the question had not been predetermined. The amount in suit is small, and . . . such a remedy is entirely inadequate because of the wholly disproportionate trouble, embarrassment, expense, and possible loss of employment which it involves.<sup>70</sup>

The Court then went on to lay down the rule that the assignment of future wages did not, within the meaning of the Bankruptcy Act, constitute a lien which could be enforced against wages earned after the adjudication, because the debt which the assignment was intended to secure was released by the discharge in bankruptcy. And the Illinois rule which would recognize such a lien was declared not to be binding on the bankruptcy court, because such a view would be subversive of the general purpose of the Bankruptcy Act to give the honest but unfortunate debtor a fresh economic start in life unburdened by pre-existing debts.

With the existence of the bankruptcy courts' power to intervene to prevent the enforcement of a discharged debt in a state court thus finally established, attention now shifted to the problem of determining what circumstances justify the exercise of that power. The Supreme Court has not spoken further in the matter, and, as might be expected, a wide variety of opinion has been expressed elsewhere on this point.<sup>71</sup>

In support of limiting this authority narrowly, emphasis is placed on the Supreme Court's reference to "unusual circumstances such as here exist." This means, it is argued, that the bankruptcy court should interfere only

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69. 292 U.S. at 239-40. Several lower court cases cited by the loan company were noted by the Supreme Court, but were repudiated: "To the extent that these cases conflict with the view just expressed they are clearly not in harmony with the general rule in equity announced by this court." 292 U.S. at 240.

70. 292 U.S. at 241-42. The court referred to *Seaboard Small Loan Corp. v. Ottinger*, *supra* note 64, as support for the assertion in the final sentence quoted.

71. See Boroff, *The Proper Forum for the Determination of the Effect of a Discharge in Bankruptcy*, 34 *REF. J.* 81 (1960).

in the specific situation which was involved in the *Hunt* case—that is, (a) where the rule of law in force in the state courts in which the creditor is suing would make non-dischargeable an obligation which is regarded as discharged under federal bankruptcy law, and (b) where the debtor obtains relief from the federal court before any judgment has been entered in the creditor's action by a state court. In such a situation, the federal court will not be required to pass on any disputed issue of fact as regards the circumstances under which the debt was incurred; rather, it will merely apply a rule of bankruptcy law to an agreed state of facts. Furthermore, since the state court has not yet made any determination of the issues in the case, the principle of *res judicata* does not apply to prevent the federal court from taking jurisdiction.

To sustain the view that this authority should be broadly asserted, emphasis is placed on the Supreme Court's reference to the inadequacy of the remedy available to the debtor outside of the bankruptcy court. The crux of the reasoning in the *Hunt* decision, it is argued, is that the federal court should intervene on behalf of the bankrupt whenever the remedies which he might pursue in the state courts are for any reason inadequate to afford him due protection against the enforcement of a dischargeable debt. The insufficiency of these remedies may arise from a wide variety of factors other than an adverse rule of law such as was encountered in the *Hunt* case. And the bankrupt's need for relief may be demanding enough in some situations to justify intervention by the federal court even after a state court judgment has been rendered in favor of the creditor.

In the process of applying the rule of the *Hunt* case over a period of a quarter of a century, different lower federal courts have apparently adopted each of these extreme interpretations, as well as several intermediate positions, in passing on bankrupts' requests for relief.

#### *1. Relief Sought by the Bankrupt Prior to Judgment in State Court.*

Since the *Hunt* decision granted relief in the form of an injunction against prosecution of a suit still pending in the state court, its rule would seem to extend most clearly to situations in which the creditor had not yet obtained a judgment. However, the reports contain relatively few cases in which the bankrupt's request for relief from the bankruptcy court was made prior to entry of a judgment for the creditor in the state court. Presumably, this is due to the fact that a bankrupt who becomes aware, at this stage of the proceedings, of the danger of the dischargeable debt being enforced, ordinarily follows the customary procedure of pleading his discharge as a defense in the state court action. If this move is effective, he needs no aid from the bankruptcy court. If it is not effective, a decision in favor of the creditor results and the bankrupt then turns to the bankruptcy court to prevent the enforcement of the judgment.

No court seems to have been called on to apply the *Hunt* rule to the

same type of situation as was there involved. The Supreme Court's positive declarations apparently have convinced creditors that the federal court would properly intervene on behalf of the bankrupt when the law controlling the state court would enable the creditor to enforce a debt which is dischargeable under bankruptcy law.<sup>72</sup>

In the post-*Hunt* cases in which the bankrupt has sought to have the bankruptcy court enjoin the creditor from prosecuting a suit to collect a debt, it was not predetermined that either the state court's application of the law or its resolution of fact issues would necessarily be adverse to the bankrupt. Observing the Supreme Court's cautionary note, the federal courts have generally agreed that they should refuse to interfere with the state court proceeding when the bankrupt fails to show any unusual circumstances which would render inadequate his remedy of pleading his discharge as a defense.<sup>73</sup> In this regard, it has been held that neither the creditor's failure to enter an objection to the granting of a general discharge nor his abstention from filing a claim for payment of his debt in the regular course of the bankruptcy proceedings estops him from later suing to collect the debt on the theory that it is not dischargeable. A creditor is under no legal duty to oppose a discharge nor to notify the bankruptcy court that a ground for refusing a discharge exists.<sup>74</sup> And a creditor with a claim which he believes to be non-dischargeable may pursue the alternative courses of filing his claim in order to obtain payment in the distribution of the assets of the bankrupt estate or of suing on the debt in a non-bankruptcy court in order to obtain payment out of the debtor's after-acquired property.<sup>75</sup> Although it may be desirable to motivate creditors to

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72. It is to be noted that in *In re Skorcz*, *supra* note 68, the Court of Appeals for the Seventh Circuit had reached this conclusion a year before the Supreme Court's decision in the *Hunt* case. The facts in the two cases were basically the same, except that in the *Hunt* case the bankrupt's discharge had been granted before federal court intervention was sought, whereas in the *Skorcz* case, the discharge was still pending.

73. *White v. Public Loan Corp.*, 247 F.2d 601 (8th Cir. 1957); *California State Bd. of Equalization v. Coast Radio Prods.*, 228 F.2d 520 (9th Cir. 1955). See *Grand Union Equip. Co. v. Lippner*, 167 F.2d 958, 960 (1948).

74. *White v. Public Loan Corp.*, *supra* note 73. Relying on *In re Walton*, 51 F. Supp. 857 (W.D. Mo. 1943), the bankrupt contended that the creditor was estopped from enforcing his claim because he had failed to object to the granting of a general discharge. The court of appeals denied that any such estoppel exists, and expressly repudiated the *Walton* case. In accord on this point: *State Fin. Co. v. Morrow*, 216 F.2d 676 (10th Cir. 1954); *In re Barber*, 140 F.2d 727 (3d Cir. 1944); *Watts v. Ellithorpe*, 135 F.2d 1 (1st Cir. 1943); *In re Anthony*, 42 F. Supp. 312 (E.D. Ill. 1941).

75. *California State Bd. of Equalization v. Coast Radio Prods.*, *supra* note 73. The bankrupt contended that the creditor should be barred from collecting the debt because if he had filed his claim in bankruptcy he would have received full payment, since he had a priority claim. The district court sustained this argument, on the reasoning that to allow the creditor to collect his debt out of the debtor's post-bankruptcy assets "would be inequitable and unjust and would deny to bankrupts the benefits of the bankruptcy act . . ." 228 F.2d at 522. The court of appeals rejected this point

disclose matters which make the bankrupt unworthy of a discharge, and although it may be somewhat unfair for a creditor deliberately to choose to collect his debt out of post-bankruptcy assets, neither of these factors has been viewed by the courts as creating unusual circumstances of the type which justify interference with state court proceedings.<sup>76</sup>

However, in several instances the federal courts have found what they regarded as exceptional factors which gave rise to a need for intervention for the bankrupt's protection. Some decisions have laid emphasis on the concern expressed in the *Hunt* case regarding the "trouble, embarrassment, expense and possible loss of employment" which may threaten the bankrupt left solely to the pursuit of his remedy in the state courts. Thus, in *State Finance Co. v. Morrow*,<sup>77</sup> the Court of Appeals for the Tenth Circuit approved the issuance of a permanent injunction against the prosecution of a creditor's suit in which the bankrupt had not even appeared to plead his discharge as a defense. In the course of his opinion, Judge Murrah observed:

True, a rightful regard for state court proceedings requires the bankruptcy court to inquire into the nature of the remedy in the state court. But it is important to bear in mind that the remedy afforded to the bankrupt by federal law is not merely a legal remedy in the form of burdensome litigation with successive appeals to reach a court of record. It is a remedy adequate to meet the full requirements of justice—a remedy which comports with the spirit and purpose of the bankruptcy act to secure to the bankrupt the full and complete benefits and advantages of his discharge.<sup>78</sup>

The court's examination of the "judicial processes" in the justice of the peace court in which the creditor's suit was pending produced the conclusion that "for all practical purposes the bankrupt was defenseless [there]," because "the issues are so loosely cast" that it could not be determined whether a judgment for the creditor might be based on "the debt for which the note was given [which was dischargeable] or the fraud which may have induced it."<sup>79</sup>

Years earlier a federal district court in Georgia granted the same type of relief to a bankrupt, declaring that this suit was merely one instance of many in which:

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of view and declined to enjoin the creditor from enforcing his debt. See Oglebay, *Some Developments in Bankruptcy Law*, 18 REF. J. 9, 14 (1943).

76. *In re Walton*, *supra* note 74, which held to the contrary on the basis of the public interest in the prevention of unwarranted discharges of dishonest debtors, was severely criticized before being discarded by the *White* case. See COLLIER § 14.07 n.4; Oglebay, *Some Developments in Bankruptcy Law*, 18 REF. J. 68, 74 (1944).

77. 216 F.2d 676 (10th Cir. 1954).

78. *Id.* at 680.

79. *Ibid.* The court continued: "It is these practical considerations which prompt bankruptcy courts to exercise their equitable protective powers. Indeed, it is these considerations which impose upon them the inescapable duty to vouchsafe the integrity of their decrees." *Ibid.*

[C]reditors . . . follow the practice of ignoring the bankruptcy court and virtually annulling its orders of discharge by coercive measures, taken after discharge, in the nature of suits in state courts on dischargeable debts, or threats of garnishment proceedings against, or of notices to employers of bankrupts which would result in loss of their employment; and by harassing them in many other ways.<sup>80</sup>

This court went on to note that in many instances bankrupts are deprived of their intended economic rebirth because they are either ignorant of the necessity of pleading their discharge in the state suit or are not financially able to employ counsel to represent their interests in such suits. "It is this situation and these conditions which constitute the equity of petitions of this kind and which should cause this court to do what it can to stop such practices in defiance of its own orders . . . and to afford to debtors the relief to which they are entitled under the bankruptcy law . . ." <sup>81</sup>

The "unusual circumstances" basis for injunctive relief has also been found in a chapter XII arrangement proceeding in which the court granted a general discharge and expressly enjoined the United States from attempting to collect certain penalties and interest on a delinquent tax claim.<sup>82</sup> The government contended that the issue of the dischargeability of these debts should be left for decision in whatever court they might later be sued upon; but the federal court rejected this argument because the government's claim was based on a statutory lien which would need no judgment to make it effective, and therefore the bankrupt would apparently not have any opportunity to plead his discharge as a defense.

Employing the familiar language of the *Hunt* case to support their jurisdiction, but not specifying precisely the nature of the unusual circumstances in the cases, federal courts have enjoined creditors' actions to enforce debts found to be discharged as a result of a chapter X reorganization<sup>83</sup> and a chapter XI arrangement.<sup>84</sup>

*2. Relief Sought by the Bankrupt Subsequent to Judgment in State Court*  
*(a) Decisions Refusing To Exercise Jurisdiction To Determine the Dischargeability of a Debt.*—In most of the reported cases in which the bankrupt has sought the protection of the bankruptcy court, he has, for various reasons, failed to make this move until after the creditor has ob-

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80. *In re Cleapor*, 16 F. Supp. 481, 483-84 (N.D. Ga. 1936).

81. *Id.* at 484.

82. *United States v. Mighell*, 273 F.2d 682 (10th Cir. 1959). *Accord*, *National Foundry Co. v. Director*, 229 F.2d 149 (2d Cir. 1956).

83. *Evans v. Dearborn Mach. Movers Co.*, *supra* note 66: "[T]he district court, in issuing the injunction appealed from, did no more than act to secure and preserve for [the debtor] the fruits and advantages of its decree . . ." 200 F.2d at 128.

84. *Sword Line, Inc. v. Industrial Comm'r*, 212 F.2d 865 (2d Cir. 1954): "While injunction against state proceedings is undesirable, it is nevertheless recognized as necessary where preservation of federal dispositions in bankruptcy and protection and enforcement of federal decrees in legal rehabilitation of corporations are necessary." 212 F.2d at 870.

tained a judgment on the debt in a state court. In some instances, he has appeared in the state court at some stage of the proceedings and contested the creditor's right to enforce the debt. In other cases he has failed to participate in the state suit and has suffered a default judgment, either deliberately or through ignorance or inability to employ counsel. In either situation, the courts which have rejected the plea for injunctive relief against attempts of the creditor to enforce the judgment have indulged in one or more of three courses of reasoning.

Most often the principle of *res judicata* is cited as preventing the issue of the dischargeability of the debt from being relitigated in the bankruptcy court. Thus, only a year after the *Hunt* case, the Court of Appeals for the Second Circuit in the case of *In re Devereaux* declared:

Here the bankrupt voluntarily initiated a proceeding in the state court to have his discharge adjudicated a bar to collection of the judgment; the judgment creditor appeared and contested; and the court found the facts and the law against the bankrupt's claim that the judgment was released. To permit the same issue to be relitigated in the bankruptcy court, while the order of the state court remains unreversed, is contrary to the most elementary principles of *res judicata* and the comity which exists between federal and state courts.<sup>85</sup>

The same principle was applied by the Tenth Circuit Court of Appeals in a case in which the bankrupt had, at the suggestion of an ill-advised legal aid society employee, refrained from defending in the creditor's suit and so suffered a default judgment.<sup>86</sup> When the creditor started garnishment proceedings, the debtor sought the aid of the referee in bankruptcy, who found the debt to be dischargeable and enjoined further attempts to enforce the judgment. The bankruptcy court sustained the injunction, with the observation that "if the referee was wrong in his finding and decision, then these loan companies have at last discovered a very effective means of collecting their debts and defying the bankruptcy court, and the latter may as well close up."<sup>87</sup> In spite of this portentous warning, the court of appeals held the issuance of the injunction to be error, because the matters heard and determined in the state court could not be relitigated in the federal court. However, it was observed that the bankruptcy court would have the power to enjoin the creditor from enforcing the state court judgment if it could be shown that the judgment was obtained through "extrinsic or collateral fraud."

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85. 76 F.2d 522, 523 (2d Cir. 1935). This case was followed in *In re Epstein*, 48 F. Supp. 436 (S.D.N.Y. 1942). See *In re Grover*, 63 F. Supp. 644, 647 (D.C. Minn. 1945); *In re Marshall*, 24 F. Supp. 1012 (S.D.N.Y. 1938) (creditor, having sued on the debt in state court which ultimately found debt dischargeable, sought a federal court injunction to prevent bankrupt from pleading discharge in defense of judgment enforcement proceedings).

86. *Beneficial Loan Co. v. Noble*, *supra* note 40. See *In re Cox*, 33 F. Supp. 796, 799 (W.D. Ky. 1940).

87. *In re Noble*, 42 F. Supp. 684, 688 (D. Colo. 1941).

One court which held that federal court relief must be denied under the *res judicata* doctrine suggested that this rule would not apply in a case in which the creditor had obtained his judgment prior to the time the bankrupt was granted his general discharge; presumably, this was because in such a situation the discharge could not have been pleaded in defense and therefore the state court could not have passed on the question of whether the debt was released by the discharge.<sup>88</sup> However, most of the courts appear to regard this factor as irrelevant to the application of *res judicata*.<sup>89</sup> The latter position may be supported by the fact that the state court could determine that the debt was of a non-dischargeable character even though the discharge had not yet been granted, and that there are various post-judgment remedies in the state courts which afford the bankrupt an opportunity to assert his discharge as a bar to the enforcement of the judgment already entered.

The second reason commonly advanced for denying an injunction against the enforcement of a judgment is that the bankrupt, by his negligence in failing to plead his discharge in defense in the state suit, has disqualified himself from invoking the protection of equity. This point of view was most forcefully stated by Judge Dobie in *Helms v. Holmes*:

It is a matter of Hornbook learning that a defendant in an action at law who has a valid defense to a suit which is fully cognizable in a court of law and within its jurisdiction, and which he has an adequate opportunity to interpose, is chargeable with gross negligence if he fails to set up this defense, in the absence of fraud, accident or surprise. Moreover, he cannot later seek relief in equity against the enforcement of the judgment in that action, on the same grounds which constituted his original defense.<sup>90</sup>

The fact that the failure to assert the defense of discharge is due to the bankrupt's mistaken impression that the bankruptcy court's order of dis-

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88. *Otte v. Cooks, Inc.*, 113 F. Supp. 861 (D. Minn. 1953).

89. The following are cases in which the *res judicata* principle was applied even though the creditor's judgment was rendered prior to the bankruptcy discharge: *Csatari v. General Fin. Corp.*, 173 F.2d 798 (6th Cir. 1949); *Walters v. Wilson*, 142 F.2d 59 (9th Cir. 1944); *In re Devereaux*, 76 F.2d 522 (2d Cir. 1935); *In re Epstein*, *supra* note 85. *In re Harris*, 28 F. Supp. 487 (E.D. Ill. 1939), in which the discharge preceded the judgment, also relied on *res judicata* as a basis for refusing injunctive relief to the bankrupt.

90. 129 F.2d 263, 265 (4th Cir. 1942). This language was specifically approved in *In re Innis*, 140 F.2d 479, 480 (7th Cir. 1944). It is to be noted that in the *Helms* case, the creditor delayed for 2½ years after the discharge was granted before bringing suit in state court, where the judgment was entered by default. He then waited another 6 years before making any move to enforce the judgment. At that time he docketed the judgment in another county, and then after a delay of another 1½ years he started execution proceedings. Thus, the creditor delayed a full decade after the discharge before attempting to enforce the judgment. See Judge Paul's long and persuasive dissenting opinion in which he argues that the case presented a situation in which the bankruptcy court's power to enjoin a creditor who is ignoring the discharge order should be exercised. 129 F.2d at 268.



charge operates automatically to release him from liability on all of his dischargeable debts is not regarded as a sufficient excuse for his inaction.<sup>91</sup> As is to be expected, in most of the cases applying this reasoning, the discharge has been granted some time prior to the entry of the creditor's judgment;<sup>92</sup> however, even where the discharge was not obtained until after the judgment, the bankrupt's failure to assert the discharge in bar in subsequent proceedings brought by the creditor to enforce the judgment may constitute such negligence as will preclude equitable relief.<sup>93</sup>

The third line of reasoning, sometimes appearing alone in an opinion but more often complementing one of the other considerations, is that no "unusual circumstances" exist in the particular situation to justify intervention by a federal court in the state judicial processes being employed by the creditor.<sup>94</sup> While some opinions fail to explain why the court found the bankrupt not to need its protection,<sup>95</sup> in most of the cases denying relief the opinions point out the state remedies which would have provided or still do provide adequate means with which the bankrupt could prevent enforcement of the judgment if the obligation on which it is based was discharged. In some instances the remedy is merely an appeal to a higher state tribunal for reversal of the judgment entered for the creditor in the trial court.<sup>96</sup> In other states, there are various statutory proceedings in which the bankrupt may obtain cancellation of a judgment obtained prior to the issuance of his discharge, apparently even after the time has passed for appeal in the suit which resulted in the judgment.<sup>97</sup>

Rarely have the courts attempted to explain in general terms what types

91. *Helms v. Holmes*, *supra* note 90; *In re Innis*, *supra* note 90.

92. See cases cited note 91 *supra*. See also *Household Fin. Co. v. Dunbar*, 262 F.2d 112 (10th Cir. 1958); *In re Harris*, *supra* note 89.

93. *Gathany v. Bishopp*, 177 F.2d 567 (4th Cir. 1949). The judgment was obtained in an Illinois court prior to the debtor's bankruptcy adjudication in a federal court in North Carolina in 1934. The bankrupt's failure to oppose the creditor's proceeding in the Illinois court to revive the judgment in 1943 was held to bar him from equitable relief.

94. Some cases simply declare that where a final judgment has been rendered in the state court, the matter of "unusual circumstances" becomes irrelevant because the res judicata principle precludes all further inquiry. *In re Devereaux*, 76 F.2d 522 (2d Cir. 1935); *Otte v. Cooks, Inc.*, 113 F. Supp. 861 (D. Minn. 1953).

95. *Ciavarella v. Salituri*, 153 F.2d 343 (2d Cir. 1946); *Matter of Siegel*, 164 F. Supp. 709 (E.D.N.Y. 1958).

96. *In re Devereaux*, *supra* note 94 (the court recognized the fact that this process might require successive appeals through the state courts and finally to the United States Supreme Court—all to avoid a \$500 judgment); *Otte v. Cooks, Inc.*, *supra* note 94.

97. *Csatari v. General Fin. Co.*, *supra* note 89; *In re Epstein*, *supra* note 85; *In re Grover*, *supra* note 85; *In re Stoller*, 25 F. Supp. 226 (S.D.N.Y. 1938) (cancellation cannot be secured until one year after the discharge under the New York statute, but in the meantime the bankrupt may apply to the state court for modification of the garnishment order on the ground that the debt was discharged). See *In re Cox*, *supra* note 86, at 799. The New York statute is set out in the text accompanying note 22 *supra*.

of circumstances are to be regarded as "unusual"; rather, in refusing to grant an injunction, they have merely pointed out wherein the bankrupt's remedy in the state court lay in the particular situation involved. However, the Court of Appeals for the Seventh Circuit has traced the general boundaries which confine the power of the bankruptcy courts to interfere with the enforcement of a state court judgment:

A court of equity treats all proceedings at law as valid and grants relief against the consequences thereof only because the rights acquired thereby cannot be retained in good conscience. . . . A court of equity does not interfere on the ground that injustice has been done, that a judgment is wrong in fact or law or that its enforcement will work a great hardship, unless the complaining party was, without his fault, deprived of his opportunity to present his defense on the merits. . . . Chancery will intervene, therefore, only when the complainant was prevented from presenting a meritorious defense by the inequitable conduct of his adversary unmingled with negligence or fault on his own part . . . .<sup>98</sup>

(b) *Decisions Exercising Jurisdiction To Determine the Dischargeability of a Debt.*—Since the federal courts which see fit to exercise their jurisdiction to determine whether a specific debt is dischargeable derive their authority from the *Hunt* case, the familiar language of the Supreme Court's opinion is regularly referred to in explaining what constitutes "unusual circumstances" for this purpose. Thus, the opinions in these cases commonly contain such general statements as: The bankruptcy court should take jurisdiction "to secure or preserve the fruits and advantages" of its discharge order and to prevent the frustration of the Bankruptcy Act's purpose "to afford the debtor a fresh start"; or the state remedy is inadequate because its pursuit will cause the bankrupt serious "trouble, embarrassment, expense and possible loss of employment." In some instances the courts are content to use only such general terminology in designating the basis for the bankrupt's need for relief;<sup>99</sup> in others, the factors which call for federal court intervention to protect the bankrupt are spelled out with particularity and at length.

On one occasion, post-judgment relief has been justified on the existence of the same type of situation as gave rise to the *Hunt* case. The rule of law in effect in the courts of Georgia, where the creditor had obtained his judgment, made the debt non-dischargeable as one incurred by false representations. However, the bankruptcy court found, and the court of appeals subsequently agreed, that under the admitted facts of the case, the bankrupt's actions did not amount to a making of false representations

98. *In re Innis*, 140 F.2d 479, 481 (7th Cir. 1944). This case was quoted with approval in *Household Fin. Co. v. Dunbar*, 262 F.2d 112, 115 (10th Cir. 1958).

99. *Holmes v. Rowe*, 97 F.2d 537 (9th Cir. 1938); *General Protestant Orphan's Home v. Ivey*, *supra* note 66; *In re Nichols*, 22 F. Supp. 694 (W.D. Ky. 1938); *In re Patt*, 43 F. Supp. 754 (E.D. Tenn. 1941); *In re Buzas*, 58 F. Supp. 717 (N.D. Cal. 1944) (injunction denied on merits).

within the meaning of section 17a of the Bankruptcy Act.<sup>100</sup> Though the appellate court did not specify the basis of federal court jurisdiction in the matter, the same absence of adequate state remedy existed here as in the *Hunt* case; that is, the bankrupt would have been required to litigate all the way through the hierarchy of Georgia courts with the result predetermined against him, and would eventually have had to resort to the United States Supreme Court to prevent enforcement of the debt.

In the usual case, the lack of adequate protection for the bankrupt arises from some factor of less obvious nature than an erroneous rule of state law, and the question of whether the situation is one justifying federal intervention is more difficult to answer. In *Personal Industrial Loan Corp. v. Forgay*, one of the most notable of the decisions granting relief, the Court of Appeals for the Tenth Circuit explained:

The power to enjoin proceedings in a state court involving a debt listed in the bankruptcy proceedings or a judgment obtained on such a debt in a state court, either during the bankruptcy proceedings or thereafter, is not an absolute power and may be exercised only under *such conditions as appeal to the equitable conscience of the court*.<sup>101</sup>

Here, the loan company failed to file any claim in the bankruptcy proceeding, but rather instituted suit on the debt in a city court, alleging that the borrower had made fraudulent representations as to his financial status to procure the loan. A default judgment was entered, but thereafter the bankrupt received his discharge and made several unsuccessful attempts in the state courts to have the judgment set aside. When the company attached his wages, the bankrupt sought and received from the bankruptcy court an injunction against enforcement of the judgment by execution or garnishment.<sup>102</sup> The court of appeals, in affirming, re-emphasized the lower court's concern regarding loan companies which readily grant loans without investigating the responsibility of the borrowers, and then, after the debtor has resorted to bankruptcy, bypass the federal court and sue in a non-record state court, where a default judgment is very often obtained without much deliberation because the debtor is ignorant of the need for defending or is financially unable to employ counsel. This is a strong recurring theme in the opinions of most of the decisions in which creditors are restrained from enforcing judgments based on discharged debts.<sup>103</sup> A number of federal

100. *In re Caldwell*, 33 F. Supp. 631 (N.D. Ga. 1940), *aff'd sub nom. Davison-Paxon Co. v. Caldwell*, 115 F.2d 189 (5th Cir. 1940).

101. 240 F.2d 18, 19 (10th Cir. 1957). (Emphasis added.)

102. *Matter of Forgay*, 140 F. Supp. 473 (D. Utah 1956). The district court wrote a long and persuasive opinion reviewing fully both the authorities supporting the issuance of an injunction and the strong practical reasons demanding the granting of such relief.

103. *Holmes v. Rowe*, *supra* note 99; *In re Tillery*, 16 F. Supp. 877 (N.D. Ga. 1936); *Hisey v. Lewis Gale Hosp.*, 27 F. Supp. 20 (W.D. Va. 1939); *In re Nichols*, *supra* note 99; *In re Taylor*, 29 F. Supp. 656 (N.D. Ga. 1939). See the dissenting

district judges have apparently been greatly disturbed by the unprincipled tactics of some creditors, especially certain small loan companies, in this regard.<sup>104</sup>

In the *Forgay* case, the court pointed out that the bankruptcy courts "should give special attention to small debtors to the end that they are not harassed by being dragged through expensive state court proceedings"; it was further observed that to require a bankrupt to exhaust his state remedies before resorting to the federal court "would entail delay and costs which the discharged debtor could ill afford and . . . would in a large part deny him the benefits of an adjudication by the bankruptcy court."<sup>105</sup> Other courts have regarded the prohibitive cost of pursuing an appeal in the state courts as justifying injunctive relief,<sup>106</sup> especially in cases in which the creditor has obtained a garnishment against the bankrupt's wages, the federal courts are often moved to find the kind of trouble, embarrassment, oppression and harassment of the debtor which justifies the exercise of jurisdiction under the *Hunt* rule.<sup>107</sup> The fact that the creditors' suits on relatively small debts are generally brought in state courts of very inferior standing, where the judicial processes may be of questionable quality, may well have some bearing on the decision of the federal courts to intervene for the bankrupt's protection.<sup>108</sup>

In spite of the positive declarations made in some cases that the principle of *res judicata* precludes a federal court from intervening after a

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opinion in *Helms v. Holmes*, *supra* note 90, at 269. See Note, *Bankruptcy Act: Abuse of Sections 14c(3) and 17A(2) by Small Loan Companies*, 32 *IND. L.J.* 151 (1957).

104. See especially: *Matter of Forgay*, *supra* note 102, at 477-78; *In re Caldwell*, *supra* note 100, at 635; *In re Taylor*, *supra* note 103, at 657; *Helms v. Holmes* *supra* note 40, at 269 (dissent). See also *In re Anderson*, 104 *F. Supp.* 599 (E.D. Wis. 1952).

105. 240 *F.2d* at 19.

106. *In re Connors*, 93 *F. Supp.* 149, 150 (N.D. Ind. 1950): "The amount involved is so insignificant when considered with the costs of an appeal that the bankrupt in all likelihood would be compelled, if only for economic reasons, to forego an appeal. Thus, a right granted by the Bankruptcy Act . . . is apt to be sacrificed and the purposes of that law defeated."

107. The garnishment factor was present in most of the cases cited in notes 99-104 *supra*, and was especially emphasized in *In re Caldwell*, *supra* note 100, at 635; *In re Tillery*, *supra* note 103, at 879; *In re Taylor*, *supra* note 103, at 657. See *Poolman v. Poolman*, 289 *F.2d* 332, 334 (8th Cir. 1961): "Since, in the instant case, [the creditor's] attempts to collect her judgment by tying up the bankrupt's wages and perhaps jeopardizing his continued employment can be considered extra-ordinarily burdensome if, in fact, she had no enforceable judgment after his discharge in bankruptcy, *Local Loan Co. v. Hunt* . . . would seem to authorize the granting of injunctive relief." (Relief was denied on the merits.) See *Whelan v. U.S. Guarantee Co.*, 252 *F.2d* 851 (D.C. Cir. 1958) (no discussion of basis of jurisdiction). See *Twinem, Discharge—What Court Determines the Effect Thereof*, 21 *REF. J.* 33, 34 (1946).

108. See *Personal Industrial Loan Corp. v. Forgay*, *supra* note 101, at 20; *State Fin. Co. v. Morrow* *supra* note 74, at 680. In the *Holmes*, *Tillery*, *Hisey* and *Nichols* cases, *supra* note 103, and in the *Patt* case, *supra* note 99, the creditors sued in courts of approximately justice of the peace court standing.

final judgment has been rendered in the state court,<sup>109</sup> relief has been given in such situations, without regard to whether the creditor's judgment had preceded the grant of the discharge or had followed it, or whether the debtor had suffered a default judgment or had participated unsuccessfully in the state suit. In most of the instances in which the bankruptcy courts have found the unusual circumstances necessary to allow them to take jurisdiction, their opinions contain no discussion of the effect of *res judicata*.<sup>110</sup> In *Holmes v. Rowe*, the Court of Appeals for the Ninth Circuit, citing the *Hunt* and *Ottinger* cases as authority, concluded: "Nor do we consider that the failure of the [debtor] to exhaust his remedies in the state court would preclude the District Court from exercising its jurisdiction in the matter."<sup>111</sup> Apparently the bar which *res judicata* would ordinarily create is obviated by the necessity for intervention to prevent circumvention of the orders of the bankruptcy court and frustration of the purposes of the Bankruptcy Act. Though in most cases the creditor's conduct has not involved actual fraud but rather conduct which is inequitable in some degree, the federal court may be regarded as acting under the same type of power which enables an equity court to enjoin enforcement of a judgment obtained by fraud.<sup>112</sup> If this is the course of reasoning followed, the act of knowingly resorting to harassing judicial procedure to collect a discharged obligation seems to be regarded as amounting to fraud in this situation.

In a few instances more specific reasons have been offered to explain why *res judicata* does not prevent intervention by the bankruptcy court. In one case it was asserted that the judgment in the state suit was not *res judicata* on the question of whether the debt was dischargeable because the judgment was entered prior to the granting of the discharge.<sup>113</sup> However, this factor does not seem to be controlling, as the federal courts have taken jurisdiction to decide the question of dischargeability in several in-

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109. See cases cited in note 94 *supra*, and discussion in text accompanying notes 85-89.

110. *Poolman v. Poolman*, *supra* note 107; *In re Nichols*, *supra* note 99; *In re Taylor*, *supra* note 103; *In re Patt*, *supra* note 99; *In re Buzas*, *supra* note 99; *In re Connors*, *supra* note 106.

111. See note 99 *supra*, at 540.

112. Thus, the injunction granted in the *Holmes* decision, *supra* note 99, has been said to be justified by the fact that there prior to the filing of the bankruptcy petition, the creditor had told the debtor that a judgment on the debt had already been rendered by the state court, which was not true. "If that had been true, the judgment would have been discharged by the bankruptcy, but it was not true and the bankrupt was deceived by something asserted to be a fact which was not a fact, the existence or non-existence of which very materially affected his legal rights. Consequently, the court of equity properly intervened to grant relief from a judgment at law obtained thereafter because of the deception practiced by the judgment creditor. This was relief from fraud." *In re Innis*, *supra* note 98, at 481-82.

113. *Davison-Paxon Co. v. Caldwell*, *supra* note 100, at 191.

stances in which the discharge order preceded the judgment in time.<sup>114</sup> Even though the discharge has not yet been granted, the state court can, and apparently often does, decide that the creditor's claim is non-dischargeable in nature; moreover, though the bankrupt cannot plead the defense in the original suit, he can assert it in bar of judgment-enforcement proceedings brought by the creditor subsequent to the issuance of the discharge order.

The factor more often mentioned as the basis of the federal court's right to make its own determination on the question of dischargeability is the failure of the creditor to plead facts in his complaint which sustain his allegation that the obligation sued on was incurred through the false representations of the debtor. A pleader's conclusion unsupported by facts does not indicate that the judgment was in fact based on a non-dischargeable claim.<sup>115</sup> And in failing to appear and so permitting a default judgment to be entered, the debtor admits only facts well and properly pleaded.<sup>116</sup> These decisions suggest the conclusion that where the record in the state court suit shows that the judgment was based on a cause of action for fraud not dischargeable in bankruptcy, the principle of *res judicata* prevents the issue of dischargeability from being relitigated in the bankruptcy court; but where the record either indicates that the judgment was on a type of debt not dischargeable in nature or is indefinite in this regard, the bankruptcy court is free to enjoin the enforcement of the judgment on its own determination that the debt was discharged.<sup>117</sup>

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114. *Holmes v. Rowe*, *supra* note 99; *In re Connors*, *supra* note 106; *In re Buzas*, *supra* note 99.

115. *Personal Industrial Loan Corp. v. Forgay*, *supra* note 101, at 20; *In re Caldwell*, *supra* note 100, at 634-35.

116. *Personal Industrial Loan Corp. v. Forgay*, *supra* note 101, at 20; *In re Tillery*, *supra* note 103, at 879.

117. *Matter of Forgay*, *supra* note 102, at 474. The court distinguished *Beneficial Loan Co. v. Noble*, 129 F.2d 425 (10th Cir. 1942), on this basis, saying that there the state judgment was entered in an action for damages for fraud, while here the judgment was on the debtor's note. See *Whelan v. U.S. Guarantee Co.*, 252 F.2d 851 (D.C. Cir. 1958).

See *General Protestant Orphan's Home v. Ivey*, *supra* note 66, at 240: "While the subject matter of the state court suit and of the bankruptcy proceedings as to this particular claim was identical, the causes of action were not identical. The judgment of the state court did not determine whether the debt had been discharged. All that it established was that [the creditor] . . . had a valid outstanding claim against [the debtor] which was due and unpaid. The state court action in no way involved the question whether the debt was included in 'Debts not affected by discharge . . .' [under Sec. 17a(2)]. This question was decided by the Bankruptcy Court in the negative. . . . As the causes of action were not identical, the doctrine of *res judicata* has no application."

*D. The Power To Exempt Specific Debts in Granting a General Discharge Under Section 14*

A further means of having the bankruptcy court determine the dischargeability of a particular debt lies in a *creditor's* petition to the court that the general discharge order be so phrased as expressly to exempt the debt from its operation. When this practice is followed, if the debt is declared to be discharged both the creditor and the debtor are spared the useless delay, trouble and expense of engaging in independent litigation to establish the nature of the creditor's claim; and if the debt is declared to be non-dischargeable, the debtor may well be induced to arrange for payment without the claim being reduced to a judgment. Because of these obvious advantages, creditors frequently request the referees in bankruptcy to grant the so-called "split" or "limited" discharge, and it is apparently not unusual for them to comply.<sup>118</sup>

The source of the bankruptcy court's authority to except a specific debt from the general discharge is difficult to identify. Section 2(12) of the act empowers these courts to "discharge or refuse to discharge bankrupts," and section 17a provides that "a discharge in bankruptcy shall release a bankrupt from all of his provable debts" except types of obligations enumerated in the qualifying clauses of that section.<sup>119</sup> No power to make express exceptions of individual debts is specifically granted by the act,<sup>120</sup> and in a few cases bankruptcy courts have held that they have no such authority because the dischargeability of a particular debt "is a matter for another court to determine when and if steps are taken by the particular creditor to enforce the claim under consideration."<sup>121</sup>

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118. See *Twinem*, *supra* note 108: "Quite a number of Referees have already followed the practice of declaring a particular obligation non-dischargeable." See *Hamby v. St. Paul Mercury Indem. Co.*, 217 F.2d 78 (4th Cir. 1954), and other cases cited in notes 120, 123-132 *infra*.

One situation in which the bankruptcy courts are inclined to make express exceptions of certain debts in a general discharge is that in which the debtor has been adjudicated a bankrupt in former proceedings and for some reason was not granted a discharge then. The debts which were provable in the previous proceeding are not released by a discharge granted in a subsequent proceeding. COLLIER §§ 14.05, 17.06. The obligees of these debts may have them expressly excepted from the operation of the discharge granted in the second bankruptcy proceeding. *In re Summer*, 107 F.2d 396 (2d Cir. 1939). See *Hisey v. Lewis-Gale Hosp.*, *supra* note 103, at 25; *Oglebay, Some Developments in Bankruptcy Law*, 18 REF. J. 9, 10, 14 (1943).

119. BANKRUPTCY FORM 45, for the discharge of the bankrupt, is phrased in terms similar to those of section 17a, but without a list of the exceptions to the operation of the discharge.

120. See *In re Tamburo*, 82 F. Supp. 995, 997 (D. Md. 1949); *In re Anthony*, *supra* note 74, at 312.

121. *In re Lowe*, 36 F. Supp. 772, 773 (W.D. Ky. 1941) (referee had complied with creditor's request for an exception). See also *In re McCarthy*, 45 F. Supp. 323 (E.D.N.Y. 1942); *In re Borek*, 180 F. Supp. 567 (D.N.J. 1960); REMINGTON § 3234. In the *Borek* case the referee not only ruled that the creditor's claim was non-dischargeable, but also entered a judgment on it. When the creditor subsequently applied

However, the greater number of courts which have passed on the question have concluded that the bankruptcy court does have power to grant a limited discharge, though this is a discretionary matter in the court, and the creditor has no right to such action.<sup>122</sup> As a basis for this power, some of the courts have pointed to the *Hunt* case. Thus, in *Harrison v. Donnelly*, the Court of Appeals for the Eighth Circuit declared: "[S]ince the decision of the Supreme Court in *Local Loan Co. v. Hunt* . . . the jurisdiction of a bankruptcy court to limit the effect of its own order of discharge is no longer questioned. But the court is not bound to exercise such jurisdiction and does not do so under usual circumstances."<sup>123</sup>

Of course the decision in the *Hunt* case that the bankruptcy court, in order to protect the bankrupt, may entertain an ancillary bill in equity to enjoin the enforcement of a dischargeable debt by a creditor does not necessarily authorize such court to declare, at the creditor's request, that a particular debt is not affected by the general discharge being granted to the bankrupt.<sup>124</sup>

Those courts which take the trouble to try to explain the basis for their power to grant limited discharges concede that it "must be gathered from the implications of the [Bankruptcy] Act."<sup>125</sup> And these implications have been found in the general authority of the bankruptcy court to determine the proper construction and application of that statute or of the effect of the court's orders entered in a bankruptcy proceeding,<sup>126</sup> or in the "inherent equity jurisdiction to control the effect of its own order of discharge . . ."<sup>127</sup> The most recent explanation offered by a court of appeals is a simple declaration that "the bankruptcy court was clothed with inherent equity jurisdiction to determine that question [dischargeability of a debt] and mold its order of discharge accordingly."<sup>128</sup>

It is generally agreed that this discretionary power should not be exercised in the ordinary case, but only where, due to some unusual circumstances,

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for an execution on the judgment, the bankruptcy court held the judgment to be void as beyond the jurisdiction of the referee to enter, and ordered it stricken from the record. The court recognized that it had power to hold a debt to be dischargeable, but limited this jurisdiction to cases in which the *debtor* was seeking relief because his remedy in the state courts would not adequately protect him.

122. See cases cited in notes 123-39 *infra*. See also, *Hamby v. St. Paul Mercury Indem. Co.*, *supra* note 118.

123. 153 F.2d 588, 589-90 (5th Cir. 1946). See also *In re Zitzman*, 46 F. Supp. 314 (E.D.N.Y. 1942). See Note, 28 VA. L. REV. 650 (1942).

124. *In re Barber*, *supra* note 74, at 728 observed that the question of the bankruptcy court's duty to declare a debt non-dischargeable at the creditor's request "was not even inferentially involved" in the *Hunt* decision. See *Personal Fin. Co. v. Hadden*, 142 F.2d 896, 879 (6th Cir. 1944).

125. *In re Anthony*, *supra* note 74, at 314.

126. *In re Anthony*, *supra* note 74, at 315. See *Hisey v. Lewis-Gale Hosp.*, *supra* note 103, at 25.

127. *In re Tamburo*, *supra* note 120, at 998.

128. *Haerynck v. Thompson*, 228 F.2d 72, 74 (10th Cir. 1955).



a failure to do so will result in "embarrassment" or "unfairness" to either the bankrupt or the creditor,<sup>129</sup> or where exercise of the power is needed to achieve the purposes of the Bankruptcy Act or to "do equity" in the bankruptcy proceeding.<sup>130</sup> However, in the relatively few cases found in which a limited discharge has been approved by the courts, the opinions usually fail to indicate what special conditions existed to create a need for this extraordinary action.<sup>131</sup> One court specified that there was need to protect a creditor of the bankrupt "from unnecessary, harassing and expensive duplication of litigation,"<sup>132</sup> while another justified the limited discharge procedure as one which is "convenient, [and] which works no hardship on either the bankrupt or the creditor . . ."<sup>133</sup>

In cases in which the courts refuse to except a specific debt from the discharge though recognizing their authority to do so, the opinions uniformly point out that the creditor may protect his rights adequately by pursuing the ordinary procedures of opposing the issuance of any discharge to the bankrupt or of suing on the debt in a state court and there proving his debt to be nondischargeable.<sup>134</sup> These courses of action being effective to prevent the debt from becoming barred by the debtor's bankruptcy, the circumstances do not require extraordinary measures. Furthermore, it is often noted that the basic purposes of the Bankruptcy Act will not be served, and may even be hindered, by the bankruptcy court's following a practice of granting limited discharges. Certainly the release of the debtor from the burden of his debts will not be facilitated,<sup>135</sup> nor will the aim of achieving an equitable distribution of the debtor's assets among all of the creditors be furthered by the court's declaration that certain debts are nondischargeable.<sup>136</sup> Instead, the speedy and efficient consummation of the bankruptcy proceedings would be hampered if the court were to take time to pass on the dischargeability of various claims before granting a

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129. *Harrison v. Donnelly*, *supra* note 123, at 590; *In re Tamburo*, *supra* note 120, at 998.

130. *In re Anthony*, 42 F. Supp. 312, 315 (E.D. Ill. 1941).

131. No such reasons are set out in: *Harrison v. Donnelly*, *supra* note 123; *Rees v. Jensen*, 170 F.2d 348 (9th Cir. 1948); *Haerynck v. Thompson*, *supra* note 128; *In re Zitzmann*, *supra* note 123; *In re Wernecke*, 1 F. Supp. 127 (W.D.N.Y. 1932). In the *Haerynck* case, the bankrupt requested the referee to declare a specific creditor's claim discharged, but the referee found it to be non-dischargeable. The bankruptcy court overruled the referee and granted a full discharge, but the court of appeals found that the referee's appraisal of the debt was correct, and therefore reversed the discharge order "insofar as it discharged the bankrupt from liability upon the judgment" in question.

132. *In re Tamburo*, *supra* note 120, at 1001.

133. See *Hisey v. Lewis-Gale Hosp.*, *supra* note 103, at 25.

134. See cases cited in note 120 *supra* and note 138 *infra*. Also *In re Sutton*, 19 F. Supp. 892 (S.D.N.Y. 1937).

135. *In re Anthony*, *supra* note 130.

136. *In re Barber*, 140 F.2d 727 (3d Cir. 1944); *In re Anthony*, *supra* note 130. See *In re Borek*, *supra* note 121, at 571.

discharge. The delay and expense involved in making these determinations would operate to the detriment of the bankrupt and all of his other creditors.<sup>137</sup> Other arguments against granting a creditor's request for an exemption from the discharge are that such procedure deprives the debtor of the privilege of having a jury trial on the issue of the dischargeability of the debt,<sup>138</sup> and that declaring the debt exempt from the discharge does not give the creditor a complete remedy, since he must still bring suit in another court to obtain a judgment so that the obligation may be enforced.<sup>139</sup> In this connection, it may be significant that in all six instances found in which a limited discharge was ordered, the creditor petitioning to have his debt exempted had already obtained a judgment in a state court,<sup>140</sup> in cases denying the creditor's petition, no judgment on the debt had yet been rendered.

#### IV. CONCLUSION

The early reaction to the *Hunt* case tended to be adverse to the idea that the federal courts should be called upon to determine the dischargeability of specific debts, and some prominent authorities predicted that the exercise of this power would be confined to very narrow limits.<sup>141</sup> This attitude was probably engendered both by the desire to protect the jurisdiction of the state courts and by the fear of overburdening the bankruptcy courts by the addition of this function to their already heavy load. On the other hand, there is obvious benefit in having the same court which issues the discharge also determine the scope of its application, since this tribunal already has assumed jurisdiction over the general matter of the debtor's obligation to

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137. *Watts v. Ellithorpe*, 135 F.2d 1 (1st Cir. 1943); *In re Biscoe*, 45 F. Supp. 422 (D. Mass. 1952). In the case of *In re Barber*, *supra* note 136, it is further pointed out that the whole effort of declaring a specific debt non-dischargeable may be a waste because the bankrupt may subsequently be denied a discharge.

A contrary position is taken by Referee Coleman, *A Plea for "One Stop Service" in Bankruptcy*, 25 REF. J. 31 (1951), who thinks that a reduction in the amount of litigation would be achieved in sufficient measure to offset any disadvantages in this procedure.

138. *Watts v. Ellithorpe*, *supra* note 137; *In re Anthony*, *supra* note 130; *In re Biscoe*, *supra* note 137.

139. *In re Anthony*, *supra* note 130. *In re Borek*, *supra* note 121.

140. The only opinions mentioning the matter of the evidence on which the dischargeability of the debt is to be determined state that the bankruptcy court must act on the basis of the record of the proceedings in the court in which the judgment was rendered. *Harrison v. Donnelly*, *supra* note 123; *In re Tamburo*, *supra* note 120. See *Rees v. Jensen*, *supra* note 131, at 350. However, it seems probable that the same difference of opinion exists here as in the situation in which a state court is passing on the character of a debt on which a judgment has already been obtained in prior state proceedings. See the text discussion accompanying notes 28-36 *supra*.

141. Circuit Judge Swan in *In re Devereaux*, 76 F.2d 522 (2d Cir. 1935); Glenn, *Effect of Discharge in Bankruptcy*, 30 VA. L. REV. 531 (1944); Oglebay, *Some Developments in Bankruptcy Law*, 18 REF. J. 9, 13-14 (1943); Oglebay, *Some Developments in Bankruptcy Law*, 20 REF. J. 115 (1946).

his creditors, has a background of information as to the debtor's situation and often as to the nature of the creditor's claim, and is familiar with the purposes and experienced in the operation of bankruptcy law. Furthermore, the interests of both the honest debtor and the honest creditor are served by an expeditious determination of the question of the enforceability of the bankrupt's debts.

These advantages are substantial enough to have induced the bankruptcy courts and referees to undertake this task often enough that the existence of the power and the feasibility of its exercise in selected cases is no longer open to serious doubt. There remains only the question of the extent to which this jurisdiction will be invoked by both creditors and debtors. The state courts will probably continue to handle the bulk of the litigation regarding the dischargeability of specific debts, inasmuch as creditors appear generally to prefer to seek enforcement of their claims in the local tribunals. However, it seems likely that the bankruptcy courts will gradually extend the exercise of their jurisdiction in this matter, first by more freely granting the requests of debtors for injunctions against state court proceedings to collect the debts claimed to be barred by the discharge, and eventually by more frequently granting creditors' requests for the issuance of split discharges. The process may well be accelerated by congressional action amending the Bankruptcy Act to encourage or even require bankruptcy courts to determine the effect of their own discharge orders. While such a development may promote the purpose of the act to release the bankrupt from his debts, it may at the same time obstruct the purpose to secure a prompt distribution of the bankrupt's assets to his creditors, because the time and attention of the bankruptcy courts will often be diverted from distribution matters to discharge controversies.