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Creditor's Rights

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CREDITOR'S RIGHTS

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MOTOR VEHICLE TITLE AND REGISTRATION LAW: IMPACT ON CHATTEL MORTGAGE AND POSSESSORY LIENS

In *City Finance Co. v. Perry*,[1] the Tennessee Supreme Court was called upon to construe a portion of the new and rather involved Motor Vehicle Title and Registration Law, which was enacted by the 1951 legislature.[2] The *Perry* case construed the provisions which have to do with the recordation of liens upon the certificate of title as constructive notice thereof. These require owners of motor vehicles to register them in the name of the owner with the Motor Vehicle Division of the Tennessee Department of Safety and to procure from it a certificate of title and a title card. This certificate is delivered to the owner if there is no lien or encumbrance appearing thereon. Otherwise, it is delivered to the person holding the lien shown on the certificate, and it is held by such person until the lien is discharged.[3] Section 68 provides:

> "No conditional sales contract, chattel mortgage, or other lien or encumbrance or title retention instrument upon a registered vehicle, other than a lien dependent upon possession entered into after the effective date of this act shall be valid against the creditors of an owner or subsequent purchasers or encumbrances [sic] until the requirements of this article have been complied with, unless such creditor, purchaser, or encumbrancer has actual notice of the prior lien."[4]

Section 69 (a) provides:

> "Such filing and the notation of the lien or encumbrance upon the certificate of title as provided in this act shall constitute constructive notice of all liens and encumbrances against the vehicle described therein to creditors of the owner, to subsequent purchasers and encumbrances [sic] except such liens as may be authorized by law dependent upon possession. . . ."[5]

Section 69 (b)[6] provides that this method of giving constructive notice of a lien or encumbrance upon a motor vehicle shall be exclusive, except as to liens dependent upon possession.

In the case at hand, the owner of a motor vehicle had executed a chattel mortgage to the plaintiff, and the lien had been noted on the

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1. 257 S.W.2d 1 (Tenn. 1953).
2. TENN. CODE ANN. §§ 5538.101-5538.197 (Williams Supp. 1952).
3. *Id.* § 5538.135(d).
4. *Id.* § 5538.168.
5. *Id.* § 5538.169(a).
6. *Id.* § 5538.169(b).

certificate of title and the certificate delivered to the mortgagee as provided in the Act. Thereafter, the owner took the automobile to the garage of the defendant, who had no actual notice of the chattel mortgage, and repairs were made. When the owner did not pay the garage bill, defendant retained possession of the automobile so as to preserve his common law lien. After the owner defaulted on the payment of the chattel mortgage, plaintiff instituted this replevin suit to recover the automobile. The defendant garage owner resisted the suit on the ground that his common law lien was superior to the chattel mortgage lien of the plaintiff.

Defendant took the position that by reason of the provisions of section 69 (a) of the statute the recording of the lien on the title certificate was not constructive notice to him, since he had acquired a subsequent common law lien. It will be noted that the notation of the lien on the certificate of title constitutes "constructive notice of all liens and encumbrances against the vehicle . . . to creditors of the owner, to subsequent purchasers and encumbrances *except such liens as may be authorized by law dependent upon possession.*" (emphasis supplied) However, the Court permitted the chattel mortgagee to replevy the automobile, holding that the statute was constructive notice to defendant, even though his lien was one which was dependent upon possession. The Court reasoned, in part, that, if the defendant's argument were adopted, it would be impossible for the plaintiff to protect his lien against subsequent common law liens of artisans, because section 69 (b) provides that notation on the certificate of title shall be the "exclusive" method of giving constructive notice of liens, except as to liens dependent upon possession. In interpreting section 69 (a), the Court construed the clause "except such liens as may be authorized by law dependent upon possession" as an expression which refers to notice of such possessory liens and concluded that the true meaning of the section is obtained by transposing the exception clause to make the section read as follows:

> "[S]uch filing and the notation of the lien or encumbrance upon the certificate of title as provided in this Act shall constitute constructive notice of all liens and encumbrances, except such liens as may be authorized by law dependent upon possession, against the vehicle described therein to creditors of the owner, to subsequent purchasers and encumbrances [sic]."

It supported this transposition with the view that the section would be meaningless under any other construction, because notice is not given *to* liens, but notice is given *of* liens.

It occurs to the writer, at the outset, that this transposed version of the exception clause of section 69 (a) does not cure the flaw of giving notice *to* liens. As the Court has the exception clause placed, it is still giving notice of all liens "to creditors of the owner, to subsequent

purchasers and [*to*] encumbrances." The fact of the matter seems to be that there is a scrivener's error in the statute and that it should read:

> "That such filing and the notation of the lien or encumbrance upon the certificate of title . . . shall constitute constructive notice of all liens and encumbrances against the vehicle described therein to creditors of the owner, to subsequent purchasers and encumbran*cers* (not encumbran*ces*) except such liens as may be authorized by law dependent upon possession."

In short, the scrivener left the letter "r" out of "encumbrancers," thus making the word in the statute "encumbrances." If that mistake is corrected, the recordation of a lien would give notice to "encumbrancers," not to "encumbrances." The writer ventures to suggest that there is a scrivener's error for two reasons. In the first place, that part of the statute relative to giving notice "to encumbrances" is meaningless. Notice is not given *to* encumbrances; it is given *of* encumbrances. In the second place, the Tennessee Act likely came from the Uniform Vehicle Code, which uses the word "encumbrancers" rather than "encumbrances."[7]

What could the Tennessee Court have done about the scrivener's error which left the "r" out of "encumbrancers"? In interpreting a uniform statute, such as is involved in this case, the courts are very careful to preserve a uniform interpretation of the uniform law.[8] So important do the courts consider this principle of uniformity, when construing a uniform statute, that they have applied the principle to restore uniformity to a section of a uniform law which has been mutilated by a legislature.[9] While the Court did not address itself to this problem in the case at hand, such an approach would seem entirely applicable; the legislature's scrivener undoubtedly mutilated the law in question. It can be assumed that, in enacting this Uniform Vehicle Code, the Tennessee legislature intended to enact the sense of the statute, which means that it intended to use the word "encumbrancers" rather than the word "encumbrances." The Court quite properly could have so interpreted the Act.[10]

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7. Act I, MOTOR-VEHICLE ADMINISTRATION REGISTRATION, CERTIFICATE OF TITLE, AND ANTITHEFT ACT (1944). Section 65 of that Act reads thus: "(a) Such filing and the issuance of a new certificate of title as provided in this article shall constitute constructive notice of all liens and encumbrances against the vehicle described therein to creditors of the owner, to subsequent purchasers and encumbrancers except such liens as may be authorized by law dependent upon possession." It will be noticed that this section, which closely parallels the Tennessee statute, gives notice "to creditors of the owner, to subsequent purchasers and encumbrancers," and not to "encumbrances."

8. See Note, *Uniformity of Uniform Laws*, 28 MARQ. L. REV. 32 (1944).

9. Castenada v. National Register Co., 43 Ariz. 119, 29 P.2d 730 (1934) (construing the Uniform Conditional Sales Act).

10. One need look only to the Tennessee Court for support in this connection. "It is settled in this State that the title of an Act may be looked to in aid of

That still leaves open the question of the effect of the exception clause, "except such liens as may be authorized by law dependent upon possession," of section 69(a). It is suggested that the contention of the defendant garageman that the notation was not constructive notice to him is not too far-fetched, even if it would make it impossible for the holder of a chattel mortgage to protect his lien against subsequent common law liens of artisans dependent upon possession. Unfortunately, a search of authorities has not revealed any other case construing this point.

Some support is given to the Tennessee Court's interpretation of the exception clause by section 69(b), which provides that this method of recordation "shall be exclusive *except as to liens dependent upon possession.*" (emphasis supplied) That suggests that a lien dependent upon possession of the motor vehicle by the garageman would be constructive notice to a *subsequent* creditor, purchaser or encumbrancer. Also, it is somewhat doubtful if there was any intention to render it impossible for the chattel mortgagee to protect himself against subsequent common law liens dependent upon possession. For example, a simple pledge of the automobile would defeat the chattel mortgagee's rights if the defendant's construction of the statute were adopted. As a practical matter, the Court pointed out that the exercise of reasonable prudence would require the garageman to inquire about the certificate of title when the vehicle was brought to him for repair, because he was charged with knowledge of the law. It does, however, require some twisting of the statute to arrive at the conclusion reached by the Court.

EQUITY OF REDEMPTION AND STATUTORY RIGHT OF REDEMPTION

Procedure for Reaching Mortgagor's Equity of Redemption as an Asset for Creditors. In *Chumbley v. Carrick*,[11] the Supreme Court of Tennessee had before it the question of the procedure by which a mortgagor's equity of redemption can be reached by the mortgagor's creditors. The question arose through a suit to obtain possession of the real property and to set aside a trust deed as a cloud on plaintiff's title. Plaintiff was the purchaser at a sheriff's sale where the equity of redemption of the encumbered land was sold under an execution at law in favor of a judgment creditor. At the time of the levy of execution and at the time of the sale to plaintiff, the property was encumbered by a properly recorded trust deed from defendant, Carrick, and his wife to Casey, as trustee, to secure the payment of a note. Subsequent

the construction of the body, Southern Ry. Co. v. Rowland, 152 Tenn. 243, 276 S.W. 638, and to effectuate the legislative intent words may be modified, altered or supplied. Hudgins v. Nashville Bridge Co., 172 Tenn. 580, 113 S.W.2d 738; Scales v. State, 181 Tenn. 440, 181 S.W.2d 621." Churchwell v. Callens, 252 S.W.2d 131, 133 (Tenn. App. W.S. 1952).

11. 254 S.W.2d 732 (Tenn. 1953).

to the sale, this deed of trust was released, but the Carricks later made another trust deed to Shields, as trustee, to secure another indebtedness for money borrowed. Plaintiff sued to obtain possession of the land and to set aside the trust deed to Shields as a cloud on the title which he claims by reason of the deed made to him at the sheriff's sale. The Court held that the execution and sale to plaintiff were void on the ground that Carrick's equitable interest in the real estate — his equity of redemption — could not be levied on by execution at law. Since the execution and sale were void, reasoned the Court, the execution sale gave plaintiff no interest which would ripen to his benefit upon the discharge of the first trust deed.

A mortgagor's equity of redemption constitutes an asset for creditors.[12] However, the method of reaching this asset presents another problem. It seems rather well settled that, in the absence of a statute to the contrary, an execution at law operates only on legal rights and titles, not on equitable interests in the sense that the equitable interest could be subjected to levy and sale under a writ of execution issued against the debtor.[13] The reason for the rule seems purely historical, with very little by way of a pragmatic or useful basis. On the other hand, equitable interests can be reached as assets in a court of equity.[14] Whether Carrick had an interest which could be reached by levying an execution at law seems to depend upon whether Tennessee has a "lien" or a "title" theory of mortgages. If a "lien" theory, the creditor may levy upon the mortgagor's interest and sell the land subject to the mortgage, because the mortgagor's interest is legal, but if the "title" theory obtains, the equity of redemption can be reached only through a court of equity under a judgment creditor's bill or a similar equitable remedy.[15]

Tennessee still adheres to much of the basic common law notion that the mortgage vests the mortgagee with the legal title to the land.[16] However, Tennessee is really a hybrid sort of a state in this respect, and in certain respects it follows doctrines that are inherent only in the "lien" theory of mortgages.[17] Does the fact that the security device

12. 1 GLENN, MORTGAGES § 37.1 (1943).

13. Franklin Savings & Loan Corp. v. Snapp, 179 Tenn. 151, 154, 163 S.W.2d 332, 333 (1942); see 21 AM. JUR., *Executions* § 425 (1939) and cases there cited. In certain instances, however, equitable title can be reached through an execution at law. If the holder of the equitable title is entitled to the legal title also, the equitable interest can be reached by an execution at law. Smitheal v. Gray, 20 Tenn. 491 (1840); see CARUTHERS, HISTORY OF A LAWSUIT § 477 (7th ed., Gilreath, 1951).

14. TENN. CODE ANN. § 10352 (Williams 1934); CARUTHERS, HISTORY OF A LAWSUIT § 477 (7th ed., Gilreath, 1951).

15. 1 GLENN, MORTGAGES § 37.1 (1943).

16. See Howell v. Tomlinson, 33 Tenn. App. 1, 9, 228 S.W.2d 112, 115 (M.S. 1950).

17. Thus, Tennessee follows the lien theory measure of damages in a suit by the mortgagee. Before he can recover damages for the impairment of his security, he must show that the injury reduced the value of the remaining

in the case at hand was a deed of trust rather than a mortgage make any difference as to the passage of title out of the debtor who gave the security? While pointing out that there is some authority to the effect that either a mortgage or a deed of trust passes title, a leading authority has declared that the general rule is that the trustee under a deed of trust acquires no title or estate in the land but is a mere agent for both parties, invested, however, with a power of sale in case of default, which, when properly exercised, will pass to the purchaser all the debtor's title and interest together with the mortgagee's right with respect to the security.[18] Tennessee, however, does not go along with the general rule. Instead, she seems to take the view that title does pass to the trustee.[19] Therefore, in Tennessee, mortgages and deeds of trust indifferently pass the legal title out of the debtor so that he retains only an equitable interest which cannot be levied on by execution at law.[20]

Since the levy and sale in the case at hand were void, what rights, if any, could the purchaser at execution sale acquire in the property when the trust deed in force at that time was subsequently discharged and there was a period of time before the execution of the second trust deed during which the property was free from encumbrances by way of deeds of trust? While there is somewhat of a paucity of authority on the subject, what little authority there is seems to hold that the purchaser at an execution sale, which is void for the reason that an equitable interest was levied on, gets nothing. The whole matter is a nullity.[21] In Tennessee, moreover, the purchaser at an execution sale is not a bona fide purchaser for value; he buys at his peril.[22]

While the result reached in the case at hand is perhaps in line with authority, it is rather harsh on the plaintiff if it is too late to resort to any other remedy. This is particularly true because there is some doubt that the creditor under the second deed of trust is entitled to the preferred position of a bona fide purchaser for value.[23] This case,

mortgaged property below the amount of the debt secured. Lieberman, Loveman & Cohn v. E. C. Knight, 153 Tenn. 268, 283 S.W. 450 (1925). In a strict title state, the mortgagee may recover the full value of damages done to the property, notwithstanding the security for his debt is still ample. Byrom v. Chapin, 113 Mass. 308 (1873). For a discussion of the measure of damages under both theories, see OSBORNE, MORTGAGES § 128 (1951).

18. 1 GLENN, MORTGAGES § 20 (1943).

19. Johnson v. Roland, 61 Tenn. 203 (1872).

20. Johnson v. Roland, 61 Tenn. 203 (1872); Wilkins v. Johnson, 54 S.W. 1001 (Tenn. Ch. App. 1899); CARUTHERS, HISTORY OF A LAWSUIT § 477 (7th ed., Gilreath, 1951); GIBSON, SUITS IN CHANCERY § 882 (4th ed., Higgins & Crownover, 1937); cf. Franklin Savings & Loan Corp. v. Snapp, 179 Tenn. 151, 163 S.W.2d 332 (1942) (purchaser's equitable interest under a conditional sales contract held not liable to execution at law).

21. Keith v. Leath, 1 Tenn. Cas. 430 (1875); Wilkins v. Johnson, 54 S.W. 1001 (Tenn. Ch. App. 1899); Maynard v. Thompson, 193 Ky. 130, 234 S.W. 959 (1921).

22. Evans v. Belmont Land Co., 92 Tenn. 348, 21 S.W. 670 (1893).

23. See Smitheal v. Gray, 20 Tenn. 491 (1840) (case silent as to any claim that he was such; execution proceedings may have been notice).

therefore, lends support to the point already made that the reason for refusing to permit a creditor to levy on an equitable interest is historical, with but little by way of a useful purpose to support it. This appears to be especially so because the creditor could reach the equitable interest by a suit in equity.

Scope of Statutory Right of Redemption of Land Sold to Satisfy Judgment. In the related cases of *Fite v. Jennings*[24] and *Fite v. Wood*,[25] the Supreme Court of Tennessee had before it the question whether a junior judgment creditor can reach land sold under a senior judgment creditor's execution after the judgment debtor's statutory right of redemption has been exercised by a purchaser of the land from the judgment debtor. Rhodes obtained a judgment against his debtor, Jennings, an execution was levied on land owned by the debtor and the land was sold to Rhodes at a sheriff's sale, but no deed was made at that time. After the Rhodes judgment, but before the Rhodes execution sale, Fite also obtained a judgment against Jennings. Five days after Rhodes had purchased at the execution sale, Jennings sold and conveyed his interest in the land to Wood, who promptly recorded her deed. Wood then exercised the judgment debtor's right of redemption, which had been assigned to her along with the conveyance.[26] Wood paid the purchaser at the execution sale, Rhodes, the amount which he had paid for the land, with interest and expenses. About five weeks later, Fite, the second judgment creditor, filed a suit in equity and he also had an attachment issued and levied on whatever interest Jennings had in the land. This proceeding was based on the theory that the Fite judgment was a lien on the land. Fite later filed a supplemental bill alleging that, since his judgment was a lien on Jennings' interest at the time Wood purchased from Jennings, the deed to Wood should be declared fraudulent, null and void (*Fite v. Jennings*). Fite lost his case, the Court reasoning that he had no lien on Jennings' interest in the land at the time of the conveyance to Wood or at the time when Wood redeemed from Rhodes. The Court said that Fite's judgment would not attach to Jennings' naked legal title and his equity of redemption.

At the outset, the writer ventures to suggest that it is more consonant with legal principles and may avoid trouble in other cases, to designate Jennings' right of redemption a statutory right of redemption rather than an equity of redemption. Strictly speaking, equity of redemption, which lies only at the heart of mortgage law, is a mortgagor's

24. 193 Tenn. 250, 246 S.W.2d 1 (1952).
25. 250 S.W.2d 543 (Tenn. 1952).
26. TENN. CODE ANN. § 7738 (Williams 1934), which authorizes the judgment debtor to redeem, was held to allow redemption by the assignee of the debtor. See also TENN. CODE ANN. § 7736 (Williams Supp. 1952) and annotations to this section and its predecessor for the time limits and conditions on statutory redemption.

interest in his property before that right has been cut off by foreclosure and thereby destroyed for all purposes. The statutory right of redemption, which is involved in the case at hand, springs into existence immediately upon perfection of the foreclosure process; it is a new right which a statute confers upon the debtor. In short, the statutory right of redemption has nothing to do with the equity of redemption.[27] In a proper case, it would be of importance to observe this distinction, because it makes a vital difference whether it is a mortgagor's true equity of redemption or a statutory right of redemption which a creditor is seeking to reach as an asset. While a mortgagor's equity of redemption is an asset for creditors, it is generally held that a debtor's statutory right of redemption is immune to attachment, execution or equitable levy under a judgment creditor's suit.[28]

After the debtor's land has been sold under an execution, apparently the only right left to an unsatisfied junior lienor, such as Fite, is to exercise whatever right of statutory redemption is available to him. Therefore, in its conclusion that a lien will not attach to the debtor's (statutory) right of redemption, the Court is in accord with the general view. There is very considerable doubt, however, as to the extent to which this doctrine is applicable to the rights of Fite. To support its conclusion that Fite's judgment would not attach as a lien, the Court expressly said that, while Jennings had naked legal title, the equitable title was in the purchaser of the land at the sheriff's sale. Those are not quite the facts, however. Fite had gotten his judgment *before* the execution sale, and at that instant his judgment became a lien.[29] Therefore, when Fite's judgment was rendered, with the accompanying lien on the real estate of the debtor, the equitable title was not in the purchaser at the execution sale; both the equitable and legal title were still in the debtor. The Court relied on *Huffaker v. Bowman*[30] to sustain its position that Fite's judgment did not attach to the debtor's interest. The *Huffaker* case will not support such a decision. It merely held that the lien of a judgment will not attach to a naked legal title when equitable title is in another. However, there was a

27. See 2 GLENN, MORTGAGES § 237 (1943); OSBORNE, MORTGAGES § 8 (1951).

28. Ewing v. Cook, 85 Tenn. 332, 3 S.W. 507 (1887); see Pellston Planing Mill & Lumber Co. v. Van Wormer, 198 Mich. 648, 165 N.W. 724, 726 (1917). As to the application of this doctrine where there is a statutory right of redemption after a mortgage foreclosure by a senior lienor, see Powers v. Andrews, 84 Ala. 289, 4 So. 263 (1888); Sayre v. Vander Voort, 200 Iowa 990, 205 N.W. 760 (1925); Higgs v. McDuffee, 81 Ore. 256, 158 Pac. 953 (1916). The mortgagor's equity of redemption clearly can be reached as an asset. See 1 GLENN, MORTGAGES § 37.1 (1943). But the creditor may encounter trouble as to the method by which it is reached. For a discussion of that point, see the treatment of Chumbley v. Carrick, 254 S.W.2d 732 (1953), in the preceding subsection of this section.

29. Shepard v. Lanier, 192 Tenn. 608, 241 S.W.2d 587 (1951).

30. 36 Tenn. 89 (1856).

union of both legal and equitable title in the debtor when Fite's lien came into existence. Huffaker did not purport to say that the sheriff's sale would wash out and nullify the *prior* judgment lien of Fite, and so the case is not authority for the conclusion that there was nothing to which Fite's lien could attach. If junior liens could be shaken off so easily, as the Court in the present case by implication seemed to hold they can, such liens would be worth very little. A foreclosure of a senior lien would effectively sabotage all of the rights of a junior lienor. As will be seen presently, the Court may have reached a correct result by deciding against Fite, but the approach used seems to contain a flaw.

Whether the decision reached is correct depends upon the nature of the suit brought by Fite. It is not possible from the opinion to determine whether it might have been possible to treat Fite's suit as one to redeem from the purchaser at the execution sale. If it could have been treated as such an action, he should have been permitted to redeem. That Fite did have a right to redeem from the execution sale purchaser is clear.[31] Even where a senior lienor has foreclosed his lien by legal proceedings, making the junior lienor a party to the proceedings, the junior lienor may make a timely redemption.[32] Fite apparently was not even a party to any foreclosure proceedings. Also, had the debtor redeemed from the purchaser at the execution sale, as he could have,[33] the property would have come back to the debtor subject to the lien of Fite's judgment. The debtor, by redemption, would have, in effect, bought back property of which he had been divested by the sheriff's sale and thus would have brought it again into a position where it could be subjected to the payment of the junior lienor's judgment against him much the same as could any other property acquired by the debtor.[34] But does the junior lienor have the same rights when the debtor's grantee redeems the property from the execution sale purchaser? That was the point in the second instant case of *Fite v. Wood,* where Fite undertook to redeem from Wood, who had purchased the land in question from the debtor, Jennings.

In *Fite v. Jennings,* the first of the two cases in point of time, the Court expressed the view that Fite could still redeem from Wood. This expression of opinion was followed by Fite's action involved in the case of *Fite v. Wood,* in which he sought to redeem as a subsequent judgment creditor of Wood's vendor, Jennings. Despite their dictum

31. TENN. CODE ANN. § 7740 (Williams 1934).
32. See Cooper v. Maurer, 122 Iowa 321, 98 N.W. 124, 125 (1904).
33. TENN. CODE ANN. § 7738 (Williams 1934).
34. See Anderson v. Renshaw, 229 Iowa 93, 294 N.W. 274, 278 (1940); Cooper v. Maurer, 122 Iowa 321, 98 N.W. 124, 126 (1904); 2 GLENN, MORTGAGES § 234 (1943); Note, *Redemption from Judicial Sale,* 5 U. OF CHI. L. REV. 625, 630, 632 (1938).

in *Fite v. Jennings* that Fite could redeem from Wood, the Court held *in Fite v. Wood* that Fite could not redeem. The Court predicted its holding squarely on the interpretation of the Tennessee statutes authorizing redemption of land after an execution sale. Wood had proceeded as the grantee of the judgment debtor, Jennings, to exercise the right of redemption given to Jennings as such debtor by virtue of the Tennessee statute.[35] Under another Tennessee statute, a bona fide creditor can redeem the land sold at a sheriff's sale, but he must hold it subject to redemption by any other such creditor of the judgment debtor.[36] But redemption by a judgment debtor (or his vendee-assignee) of land sold at an execution sale is not necessarily the same as redemption by a judgment creditor. The statutory provision for redemption by the judgment debtor does not say that the debtor holds the land subject to the right of a bona fide creditor to redeem from him.[37] Therefore, the Court concluded, a redeeming judgment debtor does not hold his redeemed land subject to further redemption by a bona fide creditor. Since Wood was the purchaser of the land from the judgment debtor, the Court felt that a creditor's redemptive rights against her were no greater than his redemptive rights against the judgment debtor and that, therefore, she did not hold the land subject to further redemption by a bona fide creditor.[38]

The decision that Fite could not redeem from Wood is perhaps in line with the ordinary practice in such matters.[39] If the property is more than sufficient to pay the senior lienor's debt, the junior lienor can protect himself either by bidding at the sale or by exercising his right of redemption from the purchaser at the execution sale or from any creditor who may hold the land, or in the instant situation, as has been shown, if the debtor redeemed, the land would have been subject to Fite's lien. However, the debtor's grantee who redeems does not stand in the debtor's shoes; hence, the liens which the debtor has created are not those of the redeeming grantee.[40] Therefore, the junior lienor cannot redeem from the grantee of the debtor. Of course, the sale by the debtor must be bona fide and for a substantial consideration, else the creditor is defrauded by the conveyance to the redeeming grantee and he can lay hold of the land as redeemed by the grantee.[41]

35. TENN. CODE ANN. § 7738 (Williams 1934).
36. TENN. CODE ANN. § 7740 (Williams 1934).
37. TENN. CODE ANN. § 7738 (Williams 1934).
38. See Reaves v. Bank of Hartsville, 64 S.W. 307 (Tenn. Ch. App. 1900), which gave the quietus to Carden v. Spilman, 1 Tenn. Cas. 10 (1847), although making no mention of the *Carden* case.
39. Barry v. Harnesberger, 148 Fed. 346 (7th Cir. 1906); Cooper v. Maurer, 122 Iowa 321, 98 N.W. 124 (1904); see Note, *Redemption from Judicial Sales*, 5 U. OF CHI. L. REV. 625, 633 (1938).
40. See 2 GLENN, MORTGAGES § 234 (1943).
41. Svalina v. Saravana, 341 Ill. 236, 173 N.E. 281 (1930).

BANKRUPTCY

Claims Barred by Bankruptcy Discharge

A discharge in bankruptcy is a defense to certain types of liabilities and has no effect upon others. The discharge releases the bankrupt from all of his provable debts[42] which were duly scheduled in time for proof and allowance or which were held by creditors with notice or actual knowledge of the bankruptcy proceedings, with certain exceptions. One of the exceptions is a claim against the bankrupt for willful and malicious injuries to the person or property of another.[43]

The discharge which the bankrupt receives in bankruptcy proceedings does not enumerate the debts which are thereby released, but is couched in the general language of "all of his debts which are provable in bankruptcy, except such as are excepted by this title."[44] A question often arises as to what court determines whether a particular claim is released by a discharge, since the certificate of discharge is silent as to the claims affected.[45] The general rule is that the bankruptcy court merely determines the *right* to a discharge, but it does not, except under unusual circumstances, determine the *effect* of the discharge.[46] Whether a particular claim has been released by a discharge normally is decided when the question actually arises; and usually that happens when suit is brought upon the claim. The logical process which then takes place corresponds precisely to the forms of

42. Not all claims against the bankrupt are provable in bankruptcy proceedings, and any claim that is not provable is not affected by a discharge. See 1 COLLIER, BANKRUPTCY § 17.03 (14th ed. 1940, Supp. 1952). The claims which are provable are set forth in § 63 of the Bankruptcy Act, 30 STAT. 562 (1898), as amended, 11 U.S.C.A. § 103 (Supp. 1952). Thus, a tort claim not reduced to judgment before the bankruptcy petition is filed is not provable unless it is a negligence claim where the action has been started against the bankrupt prior to the filing of the bankruptcy petition and is still pending at the time of the petition or unless the tort can be waived and the claim proved in contract. An otherwise nonprovable tort claim which has been reduced to judgment before the petition is filed is provable. Lewis v. Roberts, 267 U.S. 467, 45 Sup. Ct. 357, 69 L. Ed. 739 (1925).

43. Section 14 of the Bankruptcy Act, 30 STAT. 550 (1898), as amended, 11 U.S.C.A. § 32 (1953), authorizes a general discharge, while § 17a of the Act, 30 STAT. 550 (1898), as amended, 11 U.S.C.A. § 35 (1953), expressly reserves from the operation of the discharge debts not affected by the discharge and lists several types of claims that are not affected by the discharge. Among the claims not released are those for willful and malicious injuries to persons and property.

44. BANKRUPTCY ACT § 1(15), 30 STAT. 544 (1898), as amended, 11 U.S.C.A. § 1(15) (Supp. 1952); BANKRUPTCY ACT § 17a, 30 STAT. 550 (1898), as amended, 11 U.S.C.A. § 35 (1953); see Randolph v. Edmonds, 185 Tenn. 37, 39, 202 S.W.2d 664, 665 (1947); 7 REMINGTON, BANKRUPTCY § 3439 (5th ed. 1939).

45. 1 COLLIER, BANKRUPTCY § 17.28 (14th ed. 1940).

46. See 1 COLLIER, BANKRUPTCY § 17.28 (14th ed. 1940, Supp. 1952). For treatment of the unusual circumstances under which the bankruptcy court will determine whether a debt is dischargeable, see Local Loan Co. v. Hunt, 292 U.S. 234, 54 Sup. Ct. 695, 78 L. Ed. 1230 (1934); Greenfield v. Tuccillo, 129 F.2d 854 (2d Cir. 1942); Harrison v. Donnelly, 153 F.2d 588 (8th Cir. 1946); Csatari v. General Finance Corp., 173 F.2d 798 (6th Cir. 1949); Glenn, *Effect of Discharge in Bankruptcy: Ancillary Jurisdiction of Federal Court*, 30 VA. L. REV. 531 (1944).

common law procedure. Suit upon the claim having been instituted, the defendant-bankrupt sets up his discharge in bankruptcy as a defense. The question at bar then is simply whether the particular debt is of the class that was released by the discharge; to try that issue does not involve any attack upon the efficacy of the discharge. Where a judgment had been rendered against the bankrupt before the bankruptcy proceedings, the parties may come to grips on the issue of dischargeability of the claim when the claimant, after the bankruptcy discharge and in proceedings supplementary to the claimant's judgment, seeks to reach some asset of the bankrupt to satisfy the claim.[47]

Dischargeability of Automobile Accident Claims. In *Seward v. Gatlin*,[48] the Supreme Court of Tennessee was presented with the problem of the dischargeability of a claim allegedly stemming from a willful and malicious injury to the person and property of the aggrieved claimant, a nondischargeable claim. The judgment on which the claim was based grew out of an automobile collision caused by bankrupt in which plaintiff was injured. It was rendered on a declaration containing three counts. The first count charged that "the defendant [bankrupt], acting *wilfully, deliberately* and *wantonly* was operating his automobile in a grossly negligent and reckless manner and while so operating his automobile he caused it to crash headlong into and upon the plaintiff's automobile." (emphasis supplied) The second count set out the Tennessee statute prohibiting the operation of an automobile on the left of the center of the highway and charged "that the defendant in total disregard for the safety of the plaintiff and his property, *recklessly, wantonly* and *negligently* drove his automobile upon the left of the center of the highway into the face of oncoming traffic and directly into and against the plaintiff's automobile." (emphasis supplied) The third count charged that defendant was driving his automobile while under the influence of intoxicants so that he was unable properly to control his car. The plaintiff won a verdict and a judgment, which included $5,000 punitive damages. The Tennessee Supreme Court held that the record of the tort case did not show willfulness and maliciousness, both of which are necessary to prevent a discharge in bankruptcy.

The burden of showing that a claim is not released by the discharge which the bankrupt has received is upon the claimant resisting

47. *E.g.*, Marbry v. Cain, 180 Tenn. 500, 176 S.W.2d 813 (1944), *cert. denied*, 321 U.S. 800 (1944), where, after bankrupt had been discharged, claimant instituted proceedings to garnishee insurance money due bankrupt. The same pattern was followed in Fleshman v. Trolinger, 18 Tenn. App. 208, 74 S.W.2d 1069 (E.S. 1934), and Randolph v. Edmonds, 185 Tenn. 37, 202 S.W.2d 664 (1947). Or the bankrupt may raise the issue in a suit to enjoin a garnishment or execution by the creditor. *In re* Ellman, 48 F. Supp. 518 (W.D.N.Y. 1942); Bell Mfg. Co. v. Cross, 123 S.C. 507, 117 S.E. 196 (1923).

48. 193 Tenn. 299, 246 S.W.2d 21 (1952).

the discharge.[49] Whether the wrong on which a judgment was based was willful and malicious within that provision of the Bankruptcy Act which excepts such a claim from the effect of a discharge is determined by the record of the case in which the judgment was recovered.[50] In the well-recognized work *Remington on Bankruptcy,* it is pointed out that, "[i]n determining the character of the debt, the allegations of the complaint or declaration are to be considered, the instructions of the court in submitting the case to the jury, the verdict of the jury and the judgment of the court; and the allegations of the pleading must charge clearly that the acts were done intentionally."[51] Where the judgment is general in its terms, and thus not determinative of the question whether the injury was willful and malicious, the court may look behind the judgment in order to determine whether the claim upon which it was founded was of such nature that it was not released by the discharge.[52] For such purpose, it is proper to examine the entire record of the proceeding in which the judgment was rendered.[53]

While a claim based on negligence — in many states, including Tennessee, even gross negligence — does not constitute such a willful and malicious injury as to be nondischargeable,[54] the line between "willful

49. Hill v. Smith, 260 U.S. 592, 43 Sup. Ct. 219, 67 L. Ed. 419 (1923); Peerson v. Mitchell, 205 Okla. 530, 239 P.2d 1028 (1950), *cert. denied,* 324 U.S. 866 (1951).

50. See *In re* Burchfield, 31 F.2d 118 (W.D.N.Y. 1929); Randolph v. Edmonds, 185 Tenn. 37, 202 S.W.2d 664 (1947); 1 COLLIER, BANKRUPTCY § 17.17 (14th ed. 1940, Supp. 1952).

51. 7 REMINGTON, BANKRUPTCY 812 (5th ed. 1939).

52. McClure v. Steele, 326 Mich. 286, 40 N.W.2d 153 (1949); Campbell v. Norgart, 73 N.D. 297, 14 N.W.2d 260 (1944); *Ex parte* Cote, 93 Vt. 10, 106 Atl. 519 (1918).

53. *In re* Greene, 87 F.2d 951 (7th Cir. 1937); Barbery v. Cohen, 183 App. Div. 424, 170 N.Y. Supp. 762 (1st Dep't 1918); Campbell v. Norgart, 73 N.D. 297, 14 N.W.2d 260 (1944). The pleadings, of course, are not necessarily conclusive. Freedman v. Cooper, 126 N.J.L. 177, 17 A.2d 609 (1941); Doty v. Rogers, 213 S.C. 361, 49 S.E.2d 594 (1948). Evidence introduced at the trial of the original cause ordinarily may not be resorted to as part of the record to determine whether conduct was willful and malicious. Peerson v. Mitchell, 205 Okla. 530, 239 P.2d 1028 (1950), *cert. denied,* 342 U.S. 866 (1951). For a case where the court did look to the testimony, see *In re* Ellman, 48 F. Supp. 518 (W.D.N.Y. 1942). Nor can the parties go outside the record. *In re* Danahy, 45 F. Supp. 758 (W.D.N.Y. 1942).

54. See 1 COLLIER, BANKRUPTCY § 17.17 (14th ed. 1940). A very substantial number of states hold that an injury is dischargeable however great the degree of negligence. *E.g., In re* Wegner, 88 F.2d 899 (7th Cir. 1937) (wanton and reckless conduct charged); *In re* Ellman, 48 F. Supp. 518 (W.D.N.Y. 1942) (culpable and willful negligence); *In re* Tillery, 16 F. Supp. 877 (N.D. Ga. 1936) (dischargeable however great the negligence); Rogers v. Doody, 119 Conn. 532, 178 Atl. 51 (1935) (injuries resulting from reckless disregard of rights of others); Prater v. King, 73 Ga. App. 393, 37 S.E.2d 155 (1946) (dischargeable however great the negligence). This seems to be the Tennessee view. In addition to the *Seward* case, see Mabry v. Cain, 180 Tenn. 500, 176 S.W.2d 813 (1944). Some writers think that the majority of courts adhere to the theory that negligence, however gross, cannot produce nondischargeable willful and malicious injury. See NADLER, BANKRUPTCY § 786 (1948); Laugharn, *Can Automobile Accident Judgments Be Discharged in Bankruptcy?* 20 J.N.A. REF. BANKR. 110, 111 (1946).

and malicious" action on the one hand and negligence on the other is considerably blurred. The well-spring for the view that negligence is not tantamount to "willful and malicious" conduct is a dictum in the 1904 United States Supreme Court case of *Tinker v. Colwell*,[55] in which Justice Peckham declared that "[o]ne who negligently drives through a crowded thoroughfare and negligently runs over an individual would not, as we suppose," commit a nondischargeable act. Since the date of that utterance, there has been a plethora of cases on the subject of what is a "willful and malicious" injury.[56] In order that a discharge be denied, the injury must be both willful and malicious,[57] but an injury may be both willful and malicious within the provisions denying effect to a discharge without there being personal hatred, spite or ill will.[58] The *Tinker* opinion undertook to give additional guidance for determining the purview of "willful and malicious" conduct. The Court said, in part:

> "In order to come within the meaning as a judgment for a willful and malicious injury to person or property, it is not necessary that the cause of action be based upon special malice, so that without it the action could not be maintained.[59]
>
> "[A] willful disregard of what one knows as his duty, an act which is against good morals and wrongful in and of itself, and which necessarily causes injury and is done intentionally, may be said to be done willfully and maliciously."[60]

It was not a long step from this test to the conclusion that "willful and wanton" conduct is sufficient to constitute willful and malicious injury to persons and property;[61] the latter view has carried over into the field of litigation involving liabilities resulting from injuries inflicted by motorists, which has been a prolific source of litigation revolving around the dischargeability of the claim of an aggrieved

55. 193 U.S. 473, 489, 24 Sup. Ct. 505, 48 L. Ed. 754 (1904). This case actually involved the dischargeability of a judgment for criminal conversation. The justice must have been thinking about the negligent operation of a horse and buggy rather than the present-day automobile with its potentialities for destruction.

56. See 1 COLLIER, BANKRUPTCY § 17.17 (14th ed. 1940).

57. *Ibid.*

58. *In re* Greene, 87 F.2d 951 (7th Cir. 1937); Matter of Halper, 82 Misc. 205, 143 N.Y. Supp. 1005 (N.Y. City Ct. 1913); see 1 COLLIER, BANKRUPTCY § 17.17 (14th ed. 1940).

59. Tinker v. Colwell, 193 U.S. 473, 485, 24 Sup. Ct. 505, 48 L. Ed. 754 (1904).

60. 193 U.S. at 487.

61. McIntyre v. Kavanaugh, 242 U.S. 138, 37 Sup. Ct. 38, 61 L. Ed. 205 (1916) (unexcused and wanton conversion); Maryland Cas. Co. v. Fant, 181 Tenn. 492, 181 S.W.2d 753 (1944) (conversion by way of theft); Peerson v. Mitchell, 205 Okla. 530, 239 P.2d 1028 (1950) (malice and willfulness inherent in a judgment for knowingly harboring a vicious dog); see 7 REMINGTON, BANKRUPTCY § 3551 (5th ed. 1939, Supp. 1952). However, an "innocent and technical" conversion is not willful and wanton. Davis v. Aetna Acceptance Co., 293 U.S. 328, 55 Sup. Ct. 151, 79 L. Ed. 393 (1934); Woelfle v. Giles, 182 Tenn. 88, 184 S.W.2d 177 (1945).

party.[62] There is much authority, too, for denying a discharge where the bankrupt-motorist is guilty of various degrees of recklessness.[63] And where the judgment contains an award of punitive damages, there is good authority for the proposition that it is not dischargeable.[64] Very respectable authority has held that a judgment for punitive damages against the bankrupt because of "wanton and reckless" conduct is conclusive evidence of every element of "willful and malicious" conduct.[65]

An examination of the *Seward* case indicates a liberality of attitude toward the bankrupt on the matter of a discharge of the claim against him. The Court went far in extending the bar of the discharge to a claim alleged to be "willful and malicious." Although the tort declaration alleged that the bankrupt "willfully," "wantonly," "recklessly" and "deliberately" injured the claimant, while the bankrupt was under the influence of intoxicants, and the claimant was awarded punitive damages, nevertheless the Court was not satisfied that the injury was willful and malicious.[66] The Court pointed out that there was nothing in the tort judgment against the bankrupt to indicate willfulness and maliciousness. Neither, apparently, was there anything to *negative* these two requirements, both of which, according to much excellent authority, are well pleaded when, as in the *Seward* case, the declaration charges that the bankrupt "willfully, wantonly, deliberately and recklessly" injured the claimant.[67] Moreover, the claimant's ver-

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

63. Harrison v. Donnelly, 153 F.2d 588 (8th Cir. 1946) (default judgment for punitive damages for injuries caused where motorist in wanton and reckless disregard of the safety of others was driving truck on wrong side of road while intoxicated); *In re* Greene, 87 F.2d 951 (7th Cir. 1937) (excessive and dangerous rate of speed, running stop signal); *In re* Dutkiewicz, 27 F.2d 334 (W.D.N.Y. 1928) (complaint alleged that defendant negligently, carelessly and wantonly drove his auto head on against claimant on wrong side of road); Fitzgerald v. Herzer, 78 Cal. App.2d 127, 177 P.2d 364 (1947) (default judgment where complainant merely pleaded grossly negligent and reckless conduct); Breitowich v. Standard Process Corp., 323 Ill. App. 261, 55 N.E.2d 392 (1944), *cert. denied,* 323 U.S. 801 (1945) (red-light crashing); Reell v. Central Illinois Elec. & Gas Co., 317 Ill. App. 106, 45 N.E.2d 500 (1942) (declaration charged that bankrupt recklessly, willfully and wantonly operated automobile); Rosen v. Shingleur, 47 So.2d 141 (La. App. 1950) (motorist drunk); McClure v. Steele, 326 Mich. 286, 40 N.W.2d 153 (1949) (declaration charged negligence that was willful, wanton, gross and malicious); Greenfield v. Tucillo, 265 App. Div. 343, 38 N.Y.S.2d 758 (1st Dep't 1942) (running red light, speeding, guilty of criminal negligence); Margulies v. Garwood, 178 Misc. 970, 36 N.Y.S.2d 946 (Sup. Ct. 1942) (driving on wrong side of highway, speeding, guilty of reckless driving); Doty v. Rogers, 213 S.C. 361, 49 S.E.2d 594 (1948) (driving on wrong side of highway at excessive speed while intoxicated and colliding at crest of hill); Saueressig v. Jung, 246 Wis. 82, 16 N.W.2d 417 (1944) (operating automobile in a drunken condition in a reckless, willful and wanton disregard of the safety of others).

64. Harrison v. Donnelly, 153 F.2d 588 (8th Cir. 1946); 7 REMINGTON, BANKRUPTCY 814 (5th ed. 1939). *Contra:* Randolph v. Edmonds, 185 Tenn. 37, 202 S.W.2d 664 (1947).

65. Harrison v. Donnelly, 153 F.2d 588 (8th Cir. 1946). *Contra:* Randolph v. Edmonds, 185 Tenn. 37, 202 S.W.2d 664 (1947).

66. *Cf.* Randolph v. Edmonds, 185 Tenn. 37, 202 S.W.2d 664 (1947) (discharge granted although judgment included punitive damages).

67. See note 63 *supra.*

dict and judgment against the bankrupt included $5,000 for punitive damages, and, as already noted, there is good authority that an award of punitive damages is conclusive of every element of a "willful and malicious" injury.[68] However, the Tennessee Court explained away the effect of punitive damages on the ground that such damages may be awarded for gross negligence, of which malice is not a necessary element.[69] The Court then presumably inferred that the *Seward* verdict and judgment could have been predicated on gross negligence,[70] which, of course, is enough for "willfulness and maliciousness" in a good many states.[71] Further, there is good authority which holds that, when the creditor's declaration contains several counts, some based on malice and others on negligence only, and the verdict is general — which was the situation in the case at hand — the presumption is that the verdict was based upon the cause of action involving malice.[72]

Automobiles have become vehicles of terror and destruction when in the hands of a drunken speed maniac. One might well inquire, as did a Louisiana court, whether the Bankruptcy Act was ever intended to shield such persons from the consequences of their indifference and utter disregard for the safety of others.[73] The purpose of the Bankruptcy Act, as stated by the most authoritative tribunal in the land on that subject, is "to relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes."[74] In some respects the *Seward* decision is not completely impeccable.

Dischargeability of Unscheduled Claims. The Tennessee Supreme Court case of *Ingram v. Carruthers*[75] also involved the question of whether a discharge in bankruptcy released a particular debt. A bankruptcy discharge will not release debts that "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."[76] Discharge of a given debt thus requires either the proper and timely scheduling of the debt, though the creditor had neither notice nor actual knowledge of

68. See note 64 *supra.*
69. Randolph v. Edmonds, 185 Tenn. 37, 202 S.W.2d 664 (1947).
70. *Cf.* Randolph v. Edmonds, 185 Tenn. 37, 202 S.W.2d 664 (1947).
71. See note 63 *supra.*
72. Buck v. Alex, 350 Ill. 167, 182 N.E. 794 (1932); Reell v. Central Illinois Elec. & Gas Co., 317 Ill. App. 106, 45 N.E.2d 500 (1942). *Contra: In re* DeLauro, 1 F. Supp. 678 (D. Conn. 1932); Freedman v. Cooper, 126 N.J.L. 177, 17 A.2d 609 (1941).
73. Rosen v. Shingleur, 47 So.2d 141 (La. App. 1950).
74. Williams v. U.S. Fidelity and Guaranty Co., 236 U.S. 549, 554, 35 Sup. Ct. 289, 59 L. Ed. 713 (1915).
75. 250 S.W.2d 537 (1952).
76. BANKRUPTCY ACT § 17, 52 STAT. 851 (1938), as amended, 11 U.S.C.A. § 35 (1953).

the proceedings in bankruptcy, or, in the absence of such proper and timely scheduling, that the creditor "had notice or actual knowledge of the proceedings in bankruptcy."[77]

In the present case, after the discharge, bankrupt was sued on a debt which arose before his bankruptcy. When he interposed the discharge as a defense, claimant took the position that the debt was not released on the ground that it had not been duly scheduled and that claimant had no notice or knowledge of the bankruptcy proceedings. Claimant's name was *W. G.* Ingram, the debt was scheduled under the name of *L. E.* Ingram, it was stipulated that notice was mailed to *L. E.* Ingram, and claimant denied receipt of notice. It was stipulated also that a witness would swear that, about a week before the bankruptcy, bankrupt told a truck driver of claimant about the pending bankruptcy. Claimant denied receipt of this information. The Supreme Court affirmed the trial court's decision that the debt was not released for the reason that it was not duly scheduled and that claimant had no notice or knowledge of the bankruptcy proceedings prior to the discharge. The case may be correctly decided, but some of the reasoning of the Court is disturbing.

While only "duly scheduled" debts are discharged (unless the creditor had notice or knowledge), what is and what is not due scheduling must depend largely upon the facts of each case.[78] In order that a debt be duly scheduled, the name of the creditor must be included in the schedule; just what constitutes satisfactory performance of this requirement, again, is dependent upon the facts of the particular case.[79] Thus, while exactness is necessary in scheduling the creditor by name, in some instances a misnomer may not be fatal because of the principle of *idem sonans*.[80] However, a misnomer may be fatal to proper scheduling if the name is not of *idem sonans*.[81] Therefore, in the present case, the Court probably was correct in deciding that scheduling *W. G.* Ingram as *L. E.* Ingram, was not "due scheduling" and that the claim was not affected by the bankruptcy discharge. That is, the debt would not be released unless the creditor had notice or knowledge of the claim,[82] and that, in turn, depended upon whether

77. 7 REMINGTON, BANKRUPTCY § 3560 (5th ed. 1939, Supp. 1952); *In re* Seigel, 43 F. Supp. 778 (N.D. Ga. 1942); Levine v. Katz, 293 Mich. 493, 292 N.W. 466 (1940).

78. 7 REMINGTON, BANKRUPTCY § 3561 (5th ed. 1939).

79. 1 COLLIER, BANKRUPTCY § 17.23 (14th ed. 1940).

80. 7 REMINGTON, BANKRUPTCY § 3561 (5th ed. 1939).

81. 1 COLLIER, BANKRUPTCY § 17.23 (14th ed. 1940); 7 REMINGTON, BANKRUPTCY, §§ 3561, 3562 (5th ed. 1939). *Louis* Cohen instead of *Max* Cohen is not "due scheduling." See Cohen v. Pinkus, 126 App. Div. 792, 111 N.Y. Supp. 82 (1st Dep't 1908). Likewise, William *J.* Davidson's debt was not discharged when he was scheduled as William *F.* Davidson. Collins v. Davidson, 34 Ohio Cir. Ct. 668 (1908).

82. BANKRUPTCY ACT § 17a(3), 52 STAT. 851 (1938), as amended, 11 U.S.C.A. § 35 (1953).

the notice given the truck driver of the creditor would be imputed to the creditor.

Knowledge of an employee of the creditor may be knowledge of the creditor where the employee was an agent authorizd to receive such notice for his principal,[83] but such knowledge will not be imputed where it has not been shown that the employee who received the notice was authorized to receive notice for his principal.[84] Since the one who attempts to bind a principal with notice through an agent has the burden of proving that the putative agent was authorized to receive such notice, the Court probably was correct in holding that a mere stipulation that the bankrupt had given notice to a "truck driver" of the creditor, without more, was not enough proof that the truck driver was an agent with authority to receive such information for the creditor. Thus, the Court was on firm ground in holding that the creditor had no timely notice or knowledge of the bankruptcy proceedings so as to discharge the debt.

The most disturbing aspect of the case, however, is the Court's interpretation of clause (3) of section 17 of the Bankruptcy Act. The caption of that section is "Debts Not Affected by A Discharge." Clause (3) provides that debts are not released where they "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. . . ." (emphasis supplied)[85] The bankrupt had contended that the phrase, "if known to the bankrupt," relieved the bankrupt of doing more than scheduling the name of the creditor as he knew it. He had stated his position in his brief in the following proposition; "Of course, in no event is the bankrupt obligated to insert the correct name of the creditor in the schedule if the name is unknown to him." The Court rejected this contention of the bankrupt as novel and concluded that the phrase "if known to the bankrupt" modified and referred to the caption of section 17, which reads "Debts Not Affected by A Discharge," rather than modify and refer to the phrase "with the name of the creditor." The Court concluded that it would do no violence to section 17 if the phrase "with the name of the creditor" and the phrase "if known to the bankrupt" were inverted and section 17, clause (3), be made to read that debts are not affected by a discharge which *"have not been duly scheduled in time for proof and allowance . . . if known to the*

83. 1 COLLIER, BANKRUPTCY § 17.23 (14th ed. 1940).

84. Collins & Toole v. Crews, 3 Ga. App. 238, 59 S.E. 727 (1907) (notice to agent who sold goods not sufficient); Continental Purchasing Co. v. Norelli, 133 N.J.L. 550, 45 A.2d 310, *aff'd,* 48 A.2d 816 (1946) (notice to attorney who represented creditor at time judgment was entered but by not at time of bankruptcy proceedings did not charge creditor with notice sufficient to discharge claim); *see* Gilmore v. Farmer, 156 Ill. App. 70 (1910).

85. BANKRUPTCY ACT § 17, 52 STAT. 851 (1938), 11 U.S.C.A. § 35 (1952).

bankrupt, . . . with the name of the creditor, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy." (emphasis by Court)[86]

In adopting the tortured view that the phrase "if known to the bankrupt" modifies the caption of section 17, "Debts Not Affected by A Discharge," rather than modifying the "name of the creditor," the Court seems to stand alone. In fact, the contention of the bankrupt — rejected by the Court as novel and unsupported by authority — that, "[o]f course, in no event is the bankrupt obligated to insert the correct name of the creditor in the schedule if the name is unknown to him," states the law exactly as it is stated in the authoritative work, *Collier on Bankruptcy.*[87] Another great work, *Remington on Bankruptcy,* likewise disagrees with the Tennessee Court and gives clear and unequivocal support to the bankrupt's position in these words: "It is not necessary that the name of the creditor be shown *if it is not known,* as is likely to be the case with negotiable paper in the hands of indorsers."[88] All the cases found are to the same effect — namely, that in order for the bankrupt to obtain a discharge it is not imperative that he schedule the creditor's name, if the bankrupt does not know the name of the creditor.[89]

As has already been suggested, the rule that does not require the bankrupt to schedule the name of his creditor, if not known to the bankrupt, has its principal application where, unknown to the bankrupt, the debt has been transferred to another party.[90] There, he may schedule the claim in the name of the original debtor with impunity, since the bankrupt ordinarily is under no duty to ascertain independently whether any other parties have obtained an interest in the claim.[91] However, a debt scheduled under the name of the original creditor is not dischargeable if the bankrupt knew or ought to have known that the debt had been transferred and could have scheduled the debt in the name of the present owner.[92]

86. 250 S.W.2d at 538.
87. 1 COLLIER, BANKRUPTCY § 17.23 (14th ed. 1940).
88. 7 REMINGTON, BANKRUPTCY § 3561 (5th ed. 1939).
89. Representative of this position is the following: "The Bankruptcy Act does not require the impossible, but provides for the listing of the names of creditors 'if known to the bankrupt' and not otherwise. Failure to state the names of unknown creditors does not impair the efficacy of the discharge." Levin v. Katz, 293 Mich. 493, 292 N.W. 466, 468 (1940), quoting for Broderick v. Adamson, 240 App. Div. 229, 268 N.Y. Supp. 766, 769 (1st Dep't 1934). Many other cases take the same position. *E.g.,* Kreitlein v. Ferger, 238 U.S. 21, 35 Sup. Ct. 685, 59 L. Ed. 1185 (1915); Cleveland v. Summerfield, 194 Ark. 727, 109 S.W.2d 438, 440 (1937); Hunter v. Hall, 60 Ga. App. 493, 4 S.E.2d 69, 70 (1939).
90. *E.g.,* New Netherlands Bank of New York v. Harris & Cohen, 233 Ill. App. 378 (1924); Levin v. Katz, 293 Mich. 493, 292 N.W. 466 (1940); 7 REMINGTON, BANKRUPTCY § 3561 (5th ed. 1939).
91. 1 COLLIER, BANKRUPTCY § 17.23 (14th ed. 1940).
92. 1 COLLIER, BANKRUPTCY § 17.23 (14th ed. 1940, Supp. 1952).