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Bankruptcy -- Discharge of Judgments Arising Out of Automobile Accident Suits

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Ordinarily, the officer making the arrest in speeding cases is the officer who personally clocked the speed of the violator and no question arises as to the offense having been committed in his presence. However, with the use of the speedmeter, the general practice is for the officer reading the indicator not to pursue an offender. Rather, he relays by radio the description of the speeding car, with or without the license number to a second officer who stops the car when it reaches his post or station.[35] This second officer makes the arrest or issues the summons without a warrant and without having witnessed the crime.

Even here no problem would seem to arise if the second officer only issues a summons and does not detain the motorist further if the summons is refused, as the issuance of a summons is not an arrest.[36] If, however, the motorist refuses to accept the summons, his arrest by the officer would seem to be unlawful.

In conclusion it may be said that in the absence of a showing of general scientific acceptance, appellate courts would probably refuse to admit testimony founded upon information obtained by the use of the radar speedmeter. It would also appear that evidence based upon the device may not be given the probative value conceded to certain other scientific devices because the limited training course may prevent the operator from qualifying as an expert witness in radar. Furthermore, the arrest procedure now generally used in connection with the machine does not seem to meet the strict requirements of the North Carolina law of arrest.

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Bankruptcy—Discharge of Judgments Arising Out of Automobile Accident Suits

When a money judgment is obtained for damages resulting from an automobile accident, and the judgment debtor is subsequently declared bankrupt, a difficult question is frequently presented. Does the judgment survive the bankruptcy proceedings or is the judgment debtor discharged?

Section 17(a) of the United States Bankruptcy Act[1] provides that: "A discharge in bankruptcy shall release a bankrupt from all of his provable debts,[2] whether allowable in full or in part, except such as

[35] N. Y. Times, Nov. 18, 1950, p. 17, col. 4; Greensboro (N. C.) Daily News, Aug. 19, 1951, §4, p. 1, col. 1; personal observation by writer of speedmeter in actual operation in Greensboro, N. C., and Winston-Salem, N. C.

[36] MACHEN, THE LAW OF ARREST 8 (1950).

[1] 30 STAT. 550 (1898), as amended, 11 U. S. C. §35 (Supp. 1951).

[2] It must be borne in mind that non-provable claims are never dischargeable. In order to be provable, a claim arising out of an automobile accident *must be reduced to judgment* before the filing of the petition in bankruptcy, or the action *must be instituted* prior to and pending at the time of the filing of the petition in bankruptcy. 30 STAT. 562 (1898), as amended, 11 U. S. C. §103 (Supp. 1951).

. . . are liabilities . . . for willful and malicious injuries to the person or property of another." The United States Supreme Court has not yet directly answered the question of what constitutes a "willful and malicious injury," and has delegated to the various state courts the duty of interpretation of the effect of an order of discharge in bankruptcy.[3]

It is universally held that liability for *simple negligence* in the operation of a motor vehicle which results in an injury to another is not excepted from a discharge in bankruptcy as a "willful and malicious" injury.[4] Moreover, it is also well settled that liability arising out of *clearly intentional* injury is not discharged.[5] However, the courts have disagreed as to whether liability for injury resulting from acts of a character greater than simple negligence, yet short of intentional injury, is discharged in bankruptcy.

A majority of the courts,[6] influenced by a dictum of the Supreme Court in *Tinker v. Colwell*,[7] have adopted the theory that no degree of *negligence* can produce a "willful and malicious injury" as contemplated by the Bankruptcy Act. Although this dictum was handed down long before reckless driving of automobiles became a public menace, and at a time when the court could only have had in mind the negligent opera-

[3] Local Loan Co. v. Hunt, 292 U. S. 234 (1934); Harrison v. Donnelly, 153 F. 2d 588 (8th Cir. 1946). While the Federal Court has paramount jurisdiction of the matter, and may, if it so desires, assume jurisdiction, it has been the announced policy of the United States Supreme Court to permit the federal courts to exercise jurisdiction only where unusual circumstances are present.

[4] Greenfield v. Tuccillo, 129 F. 2d 854 (2nd Cir. 1942); *In re* Kubiniec, 2 F. Supp. 632 (W. D. N. Y. 1932); *In re* Madigan, 254 Fed. 221 (S. D. N. Y. 1918); Bissing v. Turkington, 113 Conn. 737, 157 Atl. 226 (1931); Bielawski v. Nicks, 290 Mich. 401, 287 N. W. 560 (1939); Wyka v. Benedicts, 226 App. Div. 1025, 44 N. Y. S. 2d 907 (1943); Randolph v. Edmonds, 185 Tenn. 37, 202 S. W. 2d 664 (1947); *Ex parte* Cote, 93 Vt. 10, 106 Atl. 519 (1918).

[5] *In re* Wegner, 88 F. 2d 899 (7th Cir. 1937); *In re* Phillips, 298 Fed. 135 (S. D. Ohio 1924); *In re* Wilson, 296 Fed. 845 (D. Md. 1920); Rodgers v. Doody, 119 Conn. 532, 178 Atl. 51 (1935).

[6] Rodgers v. Doody, 119 Conn. 532, 178 Atl. 51 (1935); Prater v. King, 73 Ga. App. 471, 37 S. E. 2d 155 (1946); Campbell v. Norgart, 73 N. D. 297, 14 N. W. 2d 260 (1944); Freedman v. Cooper, 126 N. J. L. 177, 17 A. 2d 609 (1941); Randolph v. Edmonds, 185 Tenn. 37, 202 S. W. 2d 664 (1947); Panagopulas v. Manning, 93 Utah 198, 69 P. 2d 614 (1937); Ely v. O'Dell, 146 Wash. 667, 246 Pac. 715 (1928); Francine v. Babayan, 45 F. Supp. 321 (E. D. N. Y. 1942); *In re* Ellman, 48 F. Supp. 519 (W. D. N. Y. 1942); *In re* Tillery, 16 F. Supp. 877 (N. D. Ga. 1936); *In re* Longdo, 45 F. 2d 246 (N. D. N. Y. 1930); *In re* Vena, 46 F. 2d 81 (W. D. Wash. 1930); *In re* Phillips, 298 Fed. 135 (S. D. Ohio 1924); *In re* Roberts, 290 Fed. 257 (E. D. Mich. 1923); *In re* Wilson, 269 Fed. 845 (D. Md. 1920); *Ex parte* Harrison, 272 Fed. 543 (D. Mass. 1921); *In re* Madigan, 254 Fed. 221 (S. D. N. Y. 1918). *See* Laugharn, *The Effect of Discharge in Bankruptcy Upon Automobile Accident Judgments*, 281 INS. L. J. 394 (1946).

[7] 193 U. S. 473 (1904). "It is not necessary in the construction we give to the language of the exception in the statute to hold that every willful act which is wrong implies malice. One who negligently drives through a crowded thoroughfare and negligently runs over an individual would not, as we suppose, be within the exception. True he drives negligently, and that is a wrongful act, but he does not intentionally drive over the individual."

tion of the horse and buggy, it has been consistently cited as authority for the discharge of automobile accident judgments. Under the *Tinker* rule "not only the action producing the injury but the resulting injury must in intentional. A willful and malicious injury is one caused by design."[8] But a "spirit of spite, hate and malevolence is not essential."[9]

In recent years, however, there has been a distinct trend in state and federal court decisions away from the dictum of the *Tinker* case.[10] As early as 1918 one state court[11] held that liability resulting from a "wrongful act done intentionally and without cause or excuse falls within the exception."[12]

Under this latter view "willful and malicious conduct" has been frequently defined as "that degree of neglect arising where there is a reckless indifference to the safety of human life, or an intentional failure to perform a manifest duty to the public. . . ."[13] It is interesting to note that while the courts which adopt this view necessarily repudiate the *Tinker* dictum, they very frequently quote other language[14] contained in the opinion in support of their position.[15] Thus there are two groups of authorities citing the same opinion as supporting opposite views.

Many of the opinions are confusing because courts following one rule often cite and quote from cases based on the opposite view.[16] What was said in regard to a particular fact situation, or as to words used in a pleading or finding in a case decided under one view has no application to a similar fact situation or to the meaning of those words in a decision based on the other view. The meaning and effect of language

[8] Rodgers v. Doody, 119 Conn. 532, 178 Atl. 51 (1935).

[9] Panagopulos v. Manning, 93 Utah 198, 69 P. 2d 614 (1937).

[10] Harrison v. Donnelly, 153 F. 2d 588 (8th Cir. 1946); Greenfield v. Tuccillo, 129 F. 2d 854 (2nd Cir. 1942); *In re* Green, 87 F. 2d 951 (7th Cir. 1937); Fitzgerald v. Herzer, 78 Cal. App. 2d 127, 177 P. 2d 364 (1947); Breitowich (Tharp) v. Standard Process Corp., 323 Ill. App. 261, 55 N. E. 2d 392 (1944), *cert. denied*, 323 U. S. 801 (1945); Rosen v. Shingleur, 47 So. 2d 141 (La. App. 1950); McClure v. Steele, 326 Mich. 286, 40 N. W. 2d 153 (1949); Mockenhaupt v. Cordie, 181 Minn. 582, 233 N. W. 314 (1930); Wyka v. Benedicts, 266 App. Div. 1025, 44 N. Y. S. 2d 907 (1943); Doty v. Rodgers, 213 S. C. 361, 49 S. E. 2d 594 (1948); *Ex parte* Cote, 93 Vt. 10, 106 Atl. 519 (1918); Saueressig v. Jung, 246 Wis. 82, 16 N. W. 2d 417 (1944).

[11] *Ex parte* Cote, 93 Vt. 10, 106 Atl. 519 (1918).

[12] *Id.* at 521, 106 Atl. 519 (1918).

[13] See, *e.g.*, Rosen v. Shingleur, 47 So. 2d 141 (La. App. 1950); Reell v. Central Illinois Electric and Gas Co., 317 Ill. App. 106, 45 N. E. 2d 500 (1942); *In re* Dutkiewicz, 27 F. 2d 335 (W. D. N. Y. 1928).

[14] ". . . [A] willful disregard of what one knows to be his duty, an action 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, so as to come within the exception." Tinker v. Colwell, 193 U. S. 473, 485, 487.

[15] See, *e.g.*, Harrison v. Donnelly, 153 F. 2d 588 (8th Cir. 1946); Greenfield v. Tuccillo, 129 F. 2d 854 (2nd Cir. 1942); *In re* Green, 87 F. 2d 951 (7th Cir. 1937); *Ex parte* Cote, 93 Vt. 10, 106 A. 519 (1918).

[16] See, *e.g.*, *In re* Wegner, 88 F. 2d 899 (7th Cir. 1937); *In re* Kubiniec, 2 F. Supp. 632 (W. D. N. Y. 1932).

used in opinions depends wholly upon what has been said of its meaning in other cases following the same view.

Under the more liberal view whether a particular claim arising out of an automobile accident will be excepted from discharge depends, to a large extent, upon the particular facts and circumstances surrounding the injury and the specific acts of misconduct charged against the tort-feasor.[17] Only those judgments survive discharge where the record of the proceeding in which the judgment was rendered shows a sufficient degree of negligence to come within the meaning of "willful and malicious injury" as defined by the courts adopting this view.[18] There is by no means complete unanimity as to what type of conduct evidences this degree of neglect.[19] However, as to several types of conduct there is general agreement among these courts.

In most cases involving injuries arising out of automobile accidents where it appeared that the bankrupt was guilty of drunken driving,[20] deliberately disregarding a traffic signal,[21] driving his car on the sidewalk,[22] driving on the wrong side of the road,[23] or attempting to pass

[17] *In re* Wegner, 88 F. 2d 899 (7th Cir. 1937); Breitowich (Tharp) v. Standard Process Corp., 323 Ill. App. 261, 55 N. E. 2d 392 (1944), *cert. denied*, 323 U. S. 801 (1945); Rosen v. Shingleur, 47 So. 2d 141 (La. App. 1950); *Ex parte* Cote, 93 Vt. 10, 106 Atl. 519 (1918).

[18] Where the judgment is general in its terms, the court will ordinarily look behind the judgment in order to ascertain whether the debt upon which it was founded is excepted from discharge. 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). For such purpose it is proper to consider and review the entire record of the proceedings in which the judgment was rendered. *In re* Greene, 87 F. 2d 951 (7th Cir. 1937); Campbell v. Norgart, 73 N. D. 297, 14 N. W. 2d 260 (1944). There is also authority for the view that the nature of a debt may be established by extrinsic evidence where the record is not illuminating on this score. Greenfield v. Tuccillo, 129 F. 2d 854 (2nd Cir. 1942); Fitzgerald v. Herzer, 78 Cal. App. 2d 127, 177 P. 2d 364 (1947).

Where the judgment is not general in its terms, ordinarily it must be accepted as true for the purpose of determining whether the debt is within the exception to discharge. *In re* Greene, 87 F. 2d 951 (7th Cir. 1937). Thus the verdict of the jury or the findings of the trial court that the acts of the bankrupt on which the judgment was based were done willfully and maliciously will in most cases be binding. *But cf.* Crow v. McCullen, 235 N. C. 380, 70 S. E. 2d 198 (1952).

[19] *Compare* Bielawski v. Nicks, 290 Mich. 401, 287 N. W. 560 (1939), *with* Saueressig v. Jung, 246 Wis. 82, 16 N. W. 2d 417 (1944). See also Greenfield v. Tuccillo, 129 F. 2d 854 (2nd Cir. 1942), and Greenfield v. Tuccillo, 265 App. Div. 343, 38 N. Y. S. 2d 758 (1942).

[20] Saueressig v. Jung, 246 Wis. 82, 16 N. W. 2d 417 (1944); Harrison v. Donnelly, 153 F. 2d 588 (8th Cir. 1946). *But see* Bielawski v. Nicks, 290 Mich. 401, 405, 287 N. W. 560, 561 (1939). *Contra* (following the *Tinker* dictum): *In re* Tillery, 16 F. Supp. 977 (N. D. Ga. 1936); *In re* Wilson, 269 Fed. 845 (D. Md. 1920); Tippett v. Sylvester, 3 N. J. M. 125, 127 Atl. 321 (1925).

[21] Greenfield v. Tuccillo, 129 F. 2d 854 (2nd Cir. 1942); Breitowich (Tharp) v. Standard Process Corp., 323, Ill. App. 261, 55 N. E. 2d 392 (1944), *cert denied*, 323 U. S. 801 (1945). *But cf.* Wolkoff v. Minker, 42 N. Y. S. 2d 87 (1943). *Contra: In re* Longdo, 45 F. 2d 246 (N. D. N. Y. 1930) (following the *Tinker* dictum).

[22] McClure v. Steele, 326 Mich. 286, 40 N. W. 2d 153 (1949). *Contra: In re* Gout, 88 Vt. 318, 92 Atl. 646 (1914) (following the *Tinker* dictum).

[23] *In re* Dutkiewicz, 27 Fed. 2d 335 (W. D. N. Y. 1928); *Ex parte* Cote, 93

another vehicle when it was impossible to see ahead,[24] these courts have held such injury "willful and malicious" within the meaning of the act.[25] On the other hand, mere excessive speed, though willful, does not imply malice, and there must be some other evidence of a reckless disregard for the rights of others before speed can cause "willful and malicious" injury.[26] Where there is a combination of several of these factors there is little chance that the liability will be discharged through bankruptcy in a court following the liberal view.[27]

As pointed out above, the larger number of cases, adhering to the dictum of the *Tinker* case, have held that *all* automobile accident judgments are dischargeable in bankruptcy. But in many of these cases it appears that the judgments were only for simple negligence which would, of course, be dischargeable under either view.[28] If these courts are faced with a situation involving gross negligence they might well adopt the opposite view. Further, one court which felt bound by the Supreme Court dictum has expressed disapproval of the results which it creates.[29]

In view of the conflicting theories adopted by the courts which have faced this question, and in view of the fact that a majority of the state courts (including North Carolina[30]) have not yet been presented with this question, a decision by the Supreme Court clarifying this subject is definitely needed.

In the absence of an authoritative decision by the Supreme Court the courts have tended definitely away from the *Tinker* dictum. In the

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Vt. 10, 106 Atl. 519 (1918). *But cf.* Wyka v. Benedicts, 266 App. Div. 1025, 44 N. Y. S. 2d 907 (1943).

[24] Margulies v. Garwood, 36 N. Y. S. 2d 946, 178 Misc. 970 (1942). *Contra:* Bielawski v. Nicks, 290 Mich. 401, 287 N. W. 560 (1939) (following the liberal rule). Bazemore v. Stephenson, 24 Ga. App. 180, 100 S. E. 234 (1919); Pozanovic v. Gilardine, 174 Minn. 89, 218 N. W. 244 (1928); Randolph v. Edmonds, 185 Tenn. 37, 202 S. W. 2d 664 (1947); Panagopulos v. Manning, 93 Utah 198, 69 P. 2d 614 (1937).

[25] It has been held that a criminal conviction, based on the same facts which gave rise to the civil liability, does not necessarily prevent the discharge of the judgment even where the defendant has pleaded guilty. Greenfield v. Tuccillo, 129 F. 2d 854 (2nd Cir. 1942).

[26] *In re* Greene, 87 F. 2d 951 (7th Cir. 1937).

[27] Harrison v. Donnelly, 153 F. 2d 588 (8th Cir. 1946); Rosen v. Shingleur, 47 So. 2d 141 (La. App. 1950); Doty v. Rodgers, 213 S. C. 361, 49 S. E. 2d 594 (1948) (intoxicated, speeding, driving on wrong side of road).

[28] See, *e.g.*, *In re* Vena, 46 F. 2d 81 (W. D. Wash. 1930); *In re* Roberts, 290 Fed. 257 (E. D. Mich. 1923); *Ex parte* Harrison, 272 Fed. 543 (D. Mass. 1921).

[29] "If the court were permitted to do moral justice instead of legal justice it would refuse to discharge the bankrupt of the judgments. There are too many accidents resulting in judgments which are wiped out in bankruptcy. . . . Instance after instance can be pointed out of the injustice that is done to the victims of auto accidents by virtue of the Bankruptcy Law." Francine v. Babayan, 45 F. Supp. 321 (E. D. N. Y. 1942).

[30] In Gray v. Griffin, 215 N. C. 182, 1 S. E. 2d 361 (1939), the only North Carolina case dealing with this question, this point was not before the court since the injury involved only simple negligence. The court cited opinions following both views.

last few years most courts have chosen to follow the opposite view.[31] This position would appear to be consistent with the purpose of the Bankruptcy Act,[32] and in line with the policy of the Supreme Court in upholding state "financial responsibility" statutes. These statutes suspend a defendant's driver's license when a judgment obtained against him in an automobile accident case remains unpaid, notwithstanding the fact that the judgment debtor has obtained a discharge in bankruptcy.[33]

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Bills and Notes—Purchaser in Good Faith and Without Notice Under the Negotiable Instruments Law and the New Uniform Commercial Code

In a recent federal court case,[1] the court applied to an alleged bona fide purchaser of stolen bearer bonds a rule taken from a New York case:[2] "Even if his [holder's] actual good faith is not questioned, if the facts known to him should have led him to inquire, and by inquiry he would have discovered the real situation, in a commercial sense he acted in bad faith. . . . One who suspects [that there are infirmities or defects in the instrument], *or ought to suspect* [italics added], is bound to inquire and the law presumes that he knows whatever proper inquiry would disclose." The purchaser was ruled not a holder in due course.[3] The instruments in question were four bearer bonds issued by United States corporations.[4] They were taken from four Netherland

[31] See notes 5 and 9 *supra.*

[32] To discharge "the honest debtor and not the malicious wrongdoer." Tinker v. Colwell, 193 U. S. 473 (1904).

[33] All but three states have some form of financial or safety responsibility legislation. PRESIDENT'S HIGHWAY SAFETY CONFERENCE, COMMITTEE LAWS AND ORDINANCE REPORT (1949). See, *e.g.*, N. C. GEN. STAT. §§20-224 through 279 (1947). The North Carolina Act expressly provides that a discharge in bankruptcy of the judgment debtor is not to be treated as equivalent to payment of the debt for purposes of the act. N. C. GEN. STAT. §20-244 (1947).

Thus under an act of this type the judgment creditor is either compelled to waive the benefit accorded him by the discharge or accept the alternative of being deprived of the privilege of operation of a motor vehicle. It was argued in the case of Reitz v. Mealey, 314 U. S. 33 (1941), that this pressure brought about by the financial responsibility law was repugnant to the purposes of the Bankruptcy Act and hence unconstitutional. This argument was rejected by the Supreme Court of the United States in a 5-4 decision.

[1] State of Netherlands v. Federal Reserve Bank of New York, 99 F. Supp. 655, 667 (S. D. N. Y. 1951).

[2] Rochester and C. T. R. Co. v. Paviour, 164 N. Y. 281, 284, 58 N. E. 114, 115 (1900).

[3] It will be presumed throughout this note that the purchaser seeks recovery from the drawer or maker of a negotiable instrument who has a valid defense of fraud, duress, false representation, breach of warranty, etc., making it necessary for the purchaser to prove he took the instrument in good faith and without notice in order to be a holder in due course.

[4] The instruments in this case being bearer bonds, the same case arising under the new Uniform Commercial Code would probably be decided under Article 8,