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Bankruptcy--Debts Not Dischargeable--Wrongful Sale Under Trust Receipt (Davis v. Aetna Acceptance Co., 55 S. Ct. 151 (1934))

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RECENT DECISIONS

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BANKRUPTCY—DEBTS NOT DISCHARGEABLE—WRONGFUL SALE UNDER TRUST RECEIPT.—An automobile dealer purchased a car with moneys borrowed from a finance company, giving back to the lender, as security, a bill of sale, a chattel mortgage, a promissory note, and a trust receipt. The car was sold by an agent of the dealer without the consent of the lender. Sales without such consent had been customary. The dealer, having filed a petition in bankruptcy and having been discharged, the lender contends that his claim for conversion of the car is not dischargeable, since it constituted embezzlement or defalcation of a fiduciary [1] and wilful and malicious injury to property [2] within Section 17 of the Bankruptcy Act. *Held,* that the claim was dischargeable. There was no fiduciary relation existing between the parties and the sale, considered in the light of the custom of business, was not a wilful and malicious act as contemplated by the statute. *Davis* v. *Aetna Acceptance Co.,* U. S. , 55 Sup. Ct. 151 (1934).

Conflict exists as to whether a factor is to be considered a "fiduciary" under subdivision 4 of Section 17. One view is that the statute is broad in scope and is not limited to technical or implied trusts.[3] The prevailing theory is that the statute should be thus limited.[4] It is difficult to conceive of factor and principal as being in relation of trustee and beneficiary, since the factor has the beneficial interest in the goods and the principal's interest is basically that of a lien.[5] In any case, it is well settled that the "fraud" required to render a claim undischargeable connotes acts of moral turpitude, and not merely implied or constructive fraud.[6] Thus, even if a factor be considered as maintaining an express fiduciary relation, where there is evidence [7] disproving a wrongful intent, the liability would be dischargeable.

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[1] BANKRUPTCY LAW, 30 Stat. 550 (1898) §17, subd. 4.

[2] *Id.* subd. 2.

[3] Mathieu v. Goldberg, 156 Fed. 541 (D. C. N. Y. 1889); *In re* Gulick Halle Co., 186 Fed. 350 (D. C. N. Y. 1911).

[4] Hennequin v. Clews, 11 U. S. 676, 4 Sup. Ct. 313 (1891); Noble v. Hammond, 129 U. S. 65, 9 Sup. Ct. 235 (1889); Upshur v. Briscoe, 138 U. S. 365, 11 Sup. Ct. 313 (1891); Crawford v. Burke, 195 U. S. 176, 25 Sup. Ct. 9 (1904).

[5] McIntyre v. Kavanaugh, 210 N. Y. 175, 104 N. E. 135 (1914), *aff'd,* 242 U. S. 138, 37 Sup. Ct. 38 (1916); 2 WILLISTON, SALES (2d ed. 1924) 437, p. 1079.

[6] Neal v. Clark, 95 U. S. 704, 24 L. ed. 586 (1877); Strang v. Bradner, 114 U. S. 555, 5 Sup. Ct. 1038 (1885); 7 C. J. 406.

[7] Instant case.

Although one recent case [8] seems to be in opposition, a perusal of the adjudications interpreting subdivision 2 seems to indicate that the element necessary to constitute an act "wilful and malicious" is that the act be done with a *design* against someone.[9] The boundaries are clearly defined. On the one hand, it is well established that "malice" does not signify hatred or ill will.[10] It is not even necessary that the person seeking the discharge should have participated in,[11] or even have had knowledge of, the act; as in a case where the liability was incurred by the agent without the consent of the principal.[12] On the other hand, a mere showing that there has been a conversion [13] is insufficient to prevent a claim from being discharged. The party opposing the discharge has the burden [14] of presenting facts showing that the design above stated is present as where the conversion would amount to a larceny.[15] A discharge has been allowed where the wrongful act was less innocent than that in the instant case, where a custom of dealing explained the technical conversion and negatived the existence of the design to injure.[16]

J. O'D.

CONSTITUTIONAL LAW—DISMISSAL OF COMPLAINT UPON ITS FACE—NECESSITY OF A HEARING UPON EVIDENCE.—The plaintiff brought suit to enjoin the enforcement of the New York Milk Control Law of April 10, 1933,[1] which law authorized the Milk Control

[8] Brown v. Garey, 241 App. Div. 370, 272 N. Y. Supp. 312 (1st Dept. 1934). A strong dissenting opinion maintained that the conversion therein was merely accidental, though negligent, and therefore dischargeable. For discussion of this case, see 12 N. Y. U. L. Q. 126.

[9] Tinker v. Colwell, 193 U. S. 473, 24 Sup. Ct. 505 (1904); McIntyre v. Kavanaugh, *supra* note 5; *In re* Dixon, 21 F. (2d) 565 (1927); *In re* Vena, 46 F. (2d) 81 (D. C. N. Y. 1909); *In re* Arnao, 210 Fed. 395 (D. C. N. Y. 1914); Matter of Levitan, 224 Fed. 241 (D. C. N. Y. 1915); *In re* Nordlight, 3 Fed. Supp. 486 (1934); *In re* Binsky, 6 Fed. Supp. 789 (1934); Ulner v. Doran, 167 App. Div. 259, 152 N. Y. Supp. 655 (1st Dept. 1915).

[10] Tinker v. Colwell, *supra* note 9; Matter of Barbery v. Cohen, 183 App. Div. 424, 170 N. Y. Supp. 762 (1st Dept. 1919); COLLIER, BANKRUPTCY (11th ed. 1919) 436.

[11] Castle v. Bullard, 23 How. 172 (——); Matter of Peck, 206 N. Y. 55, 99 N. E. 258 (1912).

[12] McIntyre v. Kavanaugh, *supra* note 5.

[13] McIntyre v. Kavanaugh, *supra* note 5; *In re* Dixon, *supra* note 9; *In re* Burchfield, 31 Fed. 118 (D. C. N. Y. 1929); *In re* Ennis & Stoppani, 171 Fed. 755 (D. C. N. Y. 1909); Wood v. Fisk, 215 N. Y. 233, 109 N. E. 177 (1915).

[14] Kreitlein v. Ferger, 238 U. S. 21, 35 Sup. Ct. 685 (1915); Matter of Levitan, *supra* note 9; *In re* Kneski, 290 Fed. 406 (D. C. N. Y. 1903); Manheim v. Loewe, 185 App. Div. 601, 173 N. Y. Supp. 260 (1st Dept. 1918); Miles v. Havens, 198 App. Div. 546, 190 N. Y. Supp. 656 (1st Dept. 1921).

[15] McIntyre v. Kavanaugh, *supra* note 5; *In re* Arnao, *supra* note 9.

[16] *In re* Dixon, *supra* note 9.

[1] Laws of 1933, c. 158 (N. Y. AGRICULTURE AND MARKETS LAW §§300-319).