

In some cases these suits are relatively easy to defend. For example, if a male customer buys a woman's watch, it is obvious that his intention is not to wear the watch himself. Should the creditor attempt to sue the buyer for conversion, the argument can then be made that the seller knew that the property was not purchased for the buyer's own personal use, and therefore he cannot charge the buyer with the wilful and malicious conversion of the watch.

Another technique is to ask for a jury trial in such conversion cases, as well as in all post-bankruptcy cases. For even if the client may technically still be liable on the debt, the cost and inconvenience to the creditor may be great enough that he will drop the case. This "harassment in reverse"—the threat of a lengthy and expensive jury trial—can be a very effective deterrent to unscrupulous creditors. And even if the case does go to trial, the debtor will have the benefit of having a sampling of the public—the jury—hearing his plight and coming to his aid.

If the creditor is going to get judgment for wilful and malicious injury to his person or property and therefore avoid the effect of a discharge in bankruptcy,³⁸ he must prove that the act done was *both* wilful *and* malicious.³⁹ The burden of proof is on the creditor; if he cannot assume it, the bankrupt's discharge will serve as an effective affirmative defense.⁴⁰

The leading case in the conversion area is *Davis v. Aetna Acceptance Co.*,⁴¹ where the court stressed that not all liabilities for conversion of another's property were nondischargeable:

"There is no doubt that an act of conversion, if wilful and malicious, is an injury to property within the scope of this exception . . . But a wilful and malicious injury does not follow as of course from every act of conversion, without reference to the circumstances. There may be a conversion which is innocent of technical, an unauthorized assumption of dominion without wilfulness or malice. [citing cases] There may be an honest, but mistaken belief, engendered by a course of dealing, that powers have been enlarged or incapacities removed. In these and like cases, what is done is a tort, but not a wilful and malicious one."⁴²

A case illustrative of non-malicious conversion is *Rone Jewelry Co. v. Conley*.⁴³ In that case the defendant had purchased a ring and a set of silverware from the plaintiff. He lost the ring and sent the silverware to his mother in New Jersey. The creditor sued the debtor for the illegal conversion of his property. The Tennessee Supreme Court stated:

"We think that section 17 . . . clearly shows that the present case does not fall within this section of the statute for it plainly provides for wilful and malicious injuries to the person or property of another. In this case the defendant merely converted the property by sending it out of the State and this was not a wilful and malicious injury to the property of another as comes within the statute. . . . The giving of this property to defendant's mother was wilful, but in the absence of proof could not be defined as malicious."⁴⁴

A New York Court outlined the scope of the "wilful and malicious" requirement in *Brown v. Garey*,⁴⁵ where it said:

"The court must examine the circumstances of each particular case and say whether it finds among them the elements which the law has come to accept as badges of wilfulness and legal malice. It has been said that 'a wilful disregard of what one knows to be his duty, an act which is against good morals; and wrongful in and of itself, and which necessarily causes injury and is done intentionally, may be said to be done wilfully and maliciously, so as to come within the exception.' (*Tinker v. Colwell*, 193 U.S. 473, 487) . . . A wrongful act done intentionally which necessarily causes harm and is without just cause or excuse constitutes a wilful and malicious injury. (*Kavanaugh v. McIntyre*, 210 N.Y. 175, 182; *aff'd* 242 U.S. 138) . . . Since a wrongful intent is not an essential element of conversion (*Boyce v. Brockway*, 31 N.Y. 490, 493; *Laverty v. Nethen*, 68 N.Y. 522, 527), an act of dominion done under mistake or misapprehension, and without conscious intent to violate right or authority, may yet be a conversion; but it is not a wilful and malicious conversion."⁴⁶

³⁸ *Greenfield v. Tuccillo*, 129 F. 2d 854 (2d Cir., 1942).

³⁹ *Seward v. Gatlin*, 193 Tenn. 299, 246 S. W. 2d 21 (1952).

⁴⁰ *Tudryck v. Mutch*, 320 Mich. 86, 30 N. W. 2d 412 (1948); *cert. denied*, 334 U.S. 819 (1948).

⁴¹ 293 U.S. 328 (1934).

⁴² *Id.* at 332.

⁴³ 204 Tenn. 275, 319 S. W. 2d 245 (1958).

⁴⁴ *Id.* at 277-8, 319 S. W. 2d at 246.

⁴⁵ 267 N.Y. 167, 196 N. E. 12 (1935); *cert. denied*, 296 U.S. 615 (1935).

⁴⁶ *Id.* at 169-70, 196 N. E. at 13.