The court in this case held that the liability arising out of a negligent conversion of the plaintiff's property was discharged in bankruptcy. These cases may indicate that even debtors, who owe debts that are secured by collateral no longer in their possession, may find relief in the Bankruptcy Act. Admittedly, there are cases holding to the contrary in this area,[47] but courts are showing an increased concern for the unwary debtor in such matters.

The other aspect of the "wilful and malicious" problem in the bankruptcy field involves judgments arising from negligence suits where one of the counts in the plaintiff's allegation charges "wilful and malicious" or "wilful and wanton" conduct. Often the indigent defendant in such cases cannot afford a lawyer, or fails to retain one because he knows, or thinks he knows, that he is liable. As a result, the wilful and wanton aspect of the complaint is never challenged and remains in the judgment as rendered. Therefore, even though the debtor may subsequently receive a discharge in bankruptcy, normally an adequate defense, the bankrupt is still liable because the "wilful and wanton" tort judgment is not discharged.

In some jurisdictions, if there has been a default judgment, the judge will look behind the decision of the case to the evidence in the record and make an independent determination of the defendant's "wilful and malicious" actions.[48] Some courts have held that negligence alone does not constitute sufficient "malice or wilfulness" to defeat discharge under the Bankruptcy Act.[49] Courts today are increasingly suspect of a defaut judgment decree establishing a debt as wilful and wanton.[50]

B) THE FALSE PRETENSES PROBLEM

"A discharge in bankruptcy shall release a bankrupt from all of his provable debts . . . except such as . . . are liabilities for obtaining money or property by false pretenses or false representations, of for obtaining money or property on credit or obtaining an extension or renewal of credit in reliance upon a material false statement in writing respecting his financial condition made or published in any manner whatsoever with intent to deceive . . ." [51]

In a post-bankruptcy action to recover a debt which would have been discharged in bankruptcy but for misrepresentations by the debtor, loan companies often sue the debtor for fraud rather than for the debt on the contract. Most loan companies usually will only sue a debtor discharged in bankruptcy if they suspect clear-cut and abusive fraud on his part. However, unscrupulous loan companies use this same technique to collect debts which should otherwise have been discharged.

The plaintiff-creditor must prove actionable fraud in order to collect. The evidence must establish:

"1) that the defendant made a material misrepresentation;
"2) that it was false
"3) that when he made it he knew it was false or made it recklessly without any knowledge of the trust and as a positive assertion;
"4) that he made it with the intention that it should be acted upon by the plaintiff;

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[47] *Stephens v. Southern Discount Co.*, 105 Ga. App. 667, 125 S. E. 2d 235 (1962); *Excel Finance Camp, Inc. v. Tannerhill*, 140 So. 2d 202 (La. App., 1962); *Fruchter v. Martin*, 350 Mich. 12, 15 N.W. 2d 125 (1957); *Verheyleweghen v. Klein*, 208 Misc. 783, 145 N.Y. S. 2d 178 (1955).

[48] *Wieczorek v. Merskin*, 308 Mich. 145, 13 N. W. 2d 239 (1944); *Seward v. Gatin, supra*; *Panagopulos v. Manning, 93 Ut.* 198, 69 P. 2d 614 (1937), rehearing denied, 93 Ut. 215, 72 P. 2d 456 (1937); *Globe Indemnity Co. v. Granskov*, 246 Wis. 87, 16 N. W. 2d 437 (1944).

[49] *In re Roberts*, 290 F. 257 (E. D. Mich., 1923; *Wyka v. Benedicts*, 266 App. Div. 1025, 44 N.Y.S. 2d 907 (1943), reversing 41 N.Y.S. 2d 127 (1943).

[50] This has not been the case in Illinois, however. Until very recently Illinois courts have held that where the decalaration consisted of several counts, one or more of which stated a cause of action based on malice, the other counts based on negligence only, the presumption was that a general verdict not stating the specific reason was founded on malice. E.g. *Greene v. Noonan*, 372 Ill. 286, 23 N. E. 2d 720 (1939).

A recent appellate case indicates a possible change in this rule. The First Division of the Illinois Appellate Court, in an opinion by Schwartz, J., said that "[t]he charge of malice, stated in . . . general terms and included with charges of simple negligence, is not sufficient to sustain a judgment as one based on malicious, wilful, and wanton misconduct." *Serpe v. Rivera*, 42 Ill. App. 2d, 84, 191 N. E. 2d 416 (1963). The case came up on an appeal from a default judgment of the Municipal Court of the City of Chicago. The wilful and malicious court was the last of eight; the other seven counts were charges of ordinary negligence. Facts in the complaint did not support the charge of wilful and malicious conduct.

[51] 11 U.S.C. § 35 (1964).