"5) that plaintiff acted in reliance upon it; and

"6) that he thereby suffered injury:

"All of these facts must be proven with a reasonable degreee of certainty and all of them must be found to exist." [52]

Furthermore, the burden of proof is on the creditor, as in the "wilful and malicious" cases. In both situations, the creditor is claiming that his debt is excepted from the operation of the discharge in bankruptcy because of the alleged fraud.[53] The usual procedure for the plaintiff in these cases is to introduce in evidence the bankrupt's financial statement filed when the loan application was made and compare it with the schedule of debts listed in the bankruptcy petition. This usually creates a prima facie case of fraud, the finance company maintaining that these financial statements are "credit granting" instruments relied upon by loan company managers in approving loans. The finance company manager then testifies that he would not have approved the loan if the debtor submitted an accurate financial statement. The burden of proof shifts to the bankrupt to show non-reliance by the loan company.

The greatest weakness of the creditors' cases is that the loan companies know that these statements are not true and often do not rely on them. It may even be that loan companies actually encourage a debtor *not* to list all his debts. This fact, however, is difficult to prove. The debtor must have an unusually well-documented case to prove non-reliance.[54]

If the defendant can show that he and the plaintiff company had done business over a long period of time, and therefore that the company was really loaning him money because of the established relationship, not in reliance on the statement, he might be able to win. In *Excel Finance Treme, Inc.* v. *Noel*,[55] the facts showed that fifteen previous loans had been transacted between the same parties and that the defendant had been told to just list just one of his debts. The court said that the procedure of having the debtor list a debt on his application was a mere formality —the financial statement played no actual part in the process of granting the loan.

The task of post-discharge attorney is to gather as much evidence as possible to indicate methods used other than the financial statement in the processing of loans. Some loan companies, for example, will send their investigators into the debtor's neighborhood to check his reputation and appraise the security. In such cases a court may find that a debt has been discharged in spite of the incorrect statements on the application.[56]

The debtor's literacy may also be a factor. In *Accounts Supervision Co.* v. *Atley*,[57] the debtor was illiterate, but the loan company manager nevertheless had him make some scrawlings on the application. The manager, though admitting the illegibility of the marks, claimed that they were supposed to say, "I owe Accounts Supervision Co. only." The debtor thought he had written, "Don't owe no loan company but Asco." The judge felt that this statement would not have been executed with any intent to defraud.[58]

A closing word of warning is in order. It should not be assumed that the authors feel that a debtor who willingly and fraudulently makes gross misrepresentations in order to obtain credit should receive the benefit of a bankruptcy discharge. This was not the intention of the Bankruptcy Act. The concern here is to protect the innocent debtor from abuses arising out of his ignorance.

EXISTING STATE REMEDIES (STATUTORY)

A few states, notably New York, California, Minnesota, and North Dakota, have adopted legislation of the following nature:

"At any time after one year has elapsed since a bankrupt was discharged from his debts, pursuant to the acts of congress relating to bankruptcy, the bankrupt, his receiver, trustee or any other interested person or corporation, may apply upon proof of the bankrupt's discharge, to the court in which a judgment was rendered against him . . . for an order, directing the judgment to be cancelled and discharged of record . . ." [59]

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[52] See *Tyler* v. *Hartford Accident and Indemnity Co.*, 195 Okla. 523, 159 P. 2d 722 (1945).

[53] *DeLatour* v. *Lala*, 15 La. App. 276, 131 So. 211 (1930).

[54] *Personal Industrial Loan Corp.* v. *Forgay*, 240 F. 2d 18 (19th Cir., 1957), *cert. denied*, 354 U.S. 922 (1957).

[55] 138 So. 2d 654 (La., 1962).

[56] *Accounts Supervision Co.* v. *Atley*, 89 So. 2d 508 (La. App., 1956).

[57] *Ibid.*

[58] *Id.* at 510.

[59] N.Y. Debtor and Creditor Law, § 150.