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Bankruptcy: Discharges: Exceptions

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RECENT DECISIONS

BANKRUPTCY—DISCHARGES—EXCEPTIONS.—The acceptance company made a series of loans to the automobile dealer to finance the latter's purchases from the manufacturer. In this particular case the creditor advanced to the dealer ninety per cent of the factory price of the automobile. The dealer furnished the other ten per cent, paid the manufacturer and obtained the car. Upon receipt of the car the dealer executed and delivered a note to the creditor for the sum advanced. He executed and delivered to the creditor, also, a bill of sale covering the automobile, a chattel mortgage, and a trust receipt, wherein he agreed to hold the car for the creditor and to sell only with the latter's consent. The dealer sold the car in the regular course of business, but he did not account to the creditor for the proceeds from the sale. The creditor requested payment. The dealer promised prompt remittance. Soon thereafter he filed a voluntary petition in bankruptcy and was eventually discharged from his debts. The creditor brought this action alleging a conversion of the automobile, and the debtor pleaded the discharge in bankruptcy. The trial judge overruled the plea and ordered judgment for the plaintiff. That was affirmed in the state appellate court. *Held,* on *certiorari* to the Supreme Court, judgment reversed; the claim is not for the conversion of the car, but for money loaned, which is barred by the discharge in bankruptcy. *Davis* v. *Aetna Acceptance Co.,* 55 Sup. Ct. 151 (1934).

Liabilities for wilful or malicious injuries to property are not affected by a discharge in bankruptcy. Bankruptcy Act, § 17 (2), 11 U.S.C.A. § 35. A pledgee's sale of securities when the pledgor is not in default makes the pledgee a tortfeasor, and any pecuniary responsibility he may owe therefor to the pledgor is not affected by the pledgee's subsequent discharge in bankruptcy. The act is deemed to be wilful and malicious within the scope of § 17 (2). *McIntyre* v. *Kavanaugh,* 242 U.S. 138, 37 Sup. Ct. 38, 61 L.Ed. 205 (1916). And a sale of goods by a debtor, who has given the creditor a chattel mortgage covering the things sold and who had retained the possession and use of the goods, is such a wrongful and malicious act that the debtor's subsequent discharge in bankruptcy will not bar an action for damages against him by the unsatisfied creditor. *Mason* v. *Sault,* 93 Vt. 412, 108 Atl. 267, 18 A.L.R. 1426 (1919). The measure of the creditor's subsequent claim for damages is not the value of the things sold, nor necessarily the amount of the original secured claim, but the pecuniary loss he has sustained in fact by reason of the debtor's misuse of the security. *Sabinal Nat. Bank* v. *Bryant,* 221 S.W. 940 (Tex. Comm. App. 1920). In the instant case the court held that the sale of the automobile was not a tort. The creditor's interest was a security interest. The sale could not have been wilful and malicious because it was made by the debtor in the regular course of business and as the parties must have intended it to be made. *Cf. Bank of Williamsville* v. *Amherst Motor Sales,* 234 App. Div. 261, 254 N.Y.Supp. 825 (1932).

The creditor-plaintiff in the instant case contended, too, that the debtor's failure to account for the proceeds was a breach of a fiduciary obligation and that it was within the exception of § 17 (4) of the Bankruptcy Act, and was not affected by the discharge in bankruptcy. The responsibility of a factor to account to his principal is not such an obligation as comes within this exception. See *Chapman* v. *Forsyth,* 2 How. 202, 11 L.Ed. 236 (1844), cited with approval in the principal case. When goods have been sold on consignment, the seller must show something more than resale by the buyer to fix upon him any such responsibility as will be unaffected by his subsequent discharge in bankruptcy. *Swift & Co.* v. *Bullard & Son,* 3 F. (2d) 814 (N.D. Ga. 1925). He must show that the buyer has first collected the price of the goods re-sold, perhaps that he has

assigned the re-sale accounts, too, as security for the original price, or that the buyer, if he is an individual, has appropriated the proceeds so collected to his own personal use and not for any purpose incidental to the business enterprise. *Baker* v. *Bryant Fertilizer Co.*, 271 Fed. 473 (C.C.A. 4th, 1921). The court in the principal case has recognized that some such showing might affect the position of a creditor like the plaintiff herein, because the court pointed out that the record did not present any question with respect to the "wilful conversion" of the proceeds from the sale.

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BILLS AND NOTES—ADEQUACY OF CONSIDERATION.—An aged boarder executed two negotiable promissory notes for $1,000 each; one was payable to the husband and the other to his wife, proprietors of the boarding house where the maker resided. The notes were given as payment for personal services rendered to the boarder, at his request, by the payees of the notes, beyond those included as board; *e.g.*, tending him while ill, taking him for outings, reading to him and writing his letters. The boarder was not related to the payees. In an action on the notes after the death of the maker, the defendant claimed lack of sufficient consideration for the notes. *Held,* for plaintiff. Sufficient consideration exists to establish the validity of the notes. *In Re McAskill's Estate,* (Wis. 1934) 257 N.W. 177.

The mere fact that the notes were of a negotiable character implies a consideration. Wis. Stats. (1933) § 116.29. This presumption, however, is not conclusive, but has a bearing on the burden of proof. See Wickhem, *Consideration and Value in Negotiable Instruments* (1926) 3 Wis. L. Rev. 321, 326. The effect of the seal on the instrument is also only presumptive evidence of consideration, which may be overcome. Wis. Stats. (1933) § 328.27. Absence or failure of consideration as a matter of defense against one not a holder in due course is incorporated in the negotiable instruments act in Wisconsin. Wis. Stats. (1933) § 116.33. In the instant case the payees performed the services at the maker's request and for which the maker acknowledged indebtedness beyond his board bill. Under the circumstances therefore the payees were not mere volunteers so that the services could be presumed gratuitous. The performance is consideration for the promises to pay for these services. *Messmer* v. *Block,* 100 Wis. 644, 76 N.W. 598 (1898). Since the payees and the maker were not related in any degree the presumption arises that payment for them is intended and that there is consideration for such payment. *McCurdy* v. *Boring,* 27 N.D. 1, 146 N.W. 730 (1914). Also under the circumstances the notes were not intended to be and were not mere promises to make a gift and as such unenforceable after the donor's death. *Tyler* v. *Stitt,* 127 Wis. 379, 106 N.W. 114 (1906). On the contrary, the notes constituted a present, definite, and absolute obligation to pay. See *Sheldon* v. *Blackman,* 188 Wis. 4, 205 N.W. 486 (1925). The determination of the value or sufficiency as decided by the parties to the instrument is usually prevailing. *Holz* v. *Hanson,* 115 Wis. 236, 91 N.W. 663 (1902). The court does not usually weigh the quantum of consideration, but allows the parties to be the sole judges of the benefits to be derived from their bargains. 3 R.C.L. 932 § 127 and cases cited. When payment is made for services the value of which is indefinite or indeterminate, or largely a matter of opinion, the courts will not substitute its judgment for that of the contracting parties. *Sheldon* v. *Blackman,* 188 Wis. 4, 205 N.W. 486 (1925). The value of the services is considered conclusively fixed by the