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## THE PROVABILITY OF TORT CLAIMS IN BANK- RUPTCY.

### I. INTRODUCTORY.

Since the Statute 13 Eliz., c. 7, limited the operation of the earlier act of 34 Hen. VIII, c. 4, to only such persons as have "used the trade of merchandise," and provided for the compulsory liquidation and distribution of the estates of such traders among their creditors, the character of Anglo-Saxon legislation upon the subject of bankruptcy has remained essentially commercial in spirit. The exigencies of business life provide the need for bankruptcy legislation, and the evolution of bankruptcy law is the result of statutory revision continued in the effort to adjust the law to commercial conditions and broaden its scope so that the remedies of the law may be commensurate with the relief desired in the business world. The discharge of the bankrupt from debts, the extension of the system so as to include others than traders, the incorporation of provisions for voluntary, in addition to those for involuntary, proceedings

mark the progress of bankruptcy legislation. A broader definition of the term "bankrupt" has enlarged the class of debtors whose estates may be administered in bankruptcy. Successive legislation has enlarged the class of creditors who may take part in the bankruptcy proceedings as the possessors of provable claims, so that in *Ex parte Adamson*, L. R., 8 Ch. Div. 820, it was declared by James, L. J., that "every debt which a person could, either in his own name or in the name of any other person, recover at law or in equity was a provable debt in bankruptcy."

It is only as the possessor of a provable claim that a creditor is a party interested in the bankruptcy proceedings. Only provable debts are discharged in bankruptcy. Only those creditors who have provable claims may file or resist petitions, vote at meetings for the election of trustees or other purposes, or share in the distribution of the estate. From the creditor's point of view, participation in the distribution of the estate is the main object of the proceedings. The more numerous is the class of creditors entitled to prove, the larger is the number among whom the estate is divided. Limitations upon the right to prove, therefore, are properly made in accordance with the principles that determine the limitations that should be placed upon the right to participate in the distribution. In general, those creditors should share in that distribution whose claims are based upon liabilities of the bankrupt incurred in and about the accumulation of the bankrupt's estate. With respect to the subject of tort claims, it is apparent that in the application of this general principle it is necessary to distinguish between those torts which result in the increase of the tort-feasor's estate, such, for example, as the wrongful taking, withholding, or conversion of another's property, and those torts which, consisting in the violation of the personal rights of another, as in the case of libel or assault and battery, result in no increase of the estate of the tort-feasor. Under the principle stated, the former class of tort claims, based upon liabilities of the bankrupt incurred in the accumulation of his estate, should be provable in bankruptcy, while tort claims of a personal character should not be provable. And this *a priori* conclusion represents the gen-

eral state of the law. "Every possible demand, every possible claim, every possible liability, except for personal torts, is to be the subject of proof in bankruptcy," said James, L. J., of the English law, in *Ex parte Llynvi Coal and Iron Co.*, L. R. 7 Ch. App. 28. "The general policy of bankrupt acts has been not to include in provable debts claims for damages for personal wrongs," declared a United States District Court in *In re Hirschman*, 4 A. B. R. 715.

If, then, it is assumed as the first test for the provability of tort claims, whether they arose from wrongs leading to the increase of the bankrupt, the tort-feasor's estate, before the conclusion is drawn that no claims are provable in respect of personal torts, which result in no increase of the wrong-doer's estate, there is another principle of classification that must be applied. Tort claims may be liquidated and the cause of action merged in a judgment, or they may be unliquidated. When reduced to judgment claims for personal torts acquire, as judgments, qualities they theretofore did not possess. They become a species of property for the first time. They then become assignable, they pass as property from a decedent to his representatives. As the owner of a judgment the injured party may issue execution and out of the estate of the tort-feasor obtain pecuniary satisfaction for the wrong done. When, then, an unliquidated claim for a personal tort is reduced to judgment it should be admitted to proof in bankruptcy like all other judgments. Bankruptcy has been said to be an execution in favor of all creditors, and though from the class of creditors, within the meaning of that statement, creditors possessing only unliquidated claims for personal torts be excluded, there is no reason to exclude them when their claims are merged in judgments upon which they could themselves have issued execution had bankruptcy not intervened. It follows, then, that tort claims should be provable in bankruptcy when liquidated and reduced to judgment before the initiation of bankruptcy proceedings, the time when the provability of claims is determined; and if not in judgment at that time, tort claims should be provable when they arise from wrongs which enriched the bankrupt's estate, and should

not be provable when they arise from wrongs of a personal character that do not enrich the bankrupt's estate.

These conclusions represent, speaking broadly, the conclusions to be reached as well from a study of the modern bankruptcy statutes, English and American, and the decisions construing them, as from a consideration of the general principles that should determine the question of the provability of claims.

Since, however, bankruptcy law is statutory, the provability of claims in practice must be determined by a study of the statute and not from any considerations derived from general principles. Congress has legislated upon the subject, and according as the Act of 1898 admits of or denies the right of proof, claims are or are not provable. Only in the construction of the statute is there any opportunity for moulding statutory law, as a fact, to conform to the general results attained under other laws or from general principles; and it is worthy of notice, as the provisions of the act itself are considered, to how great an extent the courts have, by construction, so interpreted the Act of 1898 that the rules above stated, which define the law in England, and under the Federal Act of 1867, also fairly represent the conclusions to be drawn from the decisions construing the Act of 1898 rendered prior to the present time. The terms of the Act of 1867 differ from those of the Act of 1898; but, while there are authorities to countenance a contrary view, it is submitted that the cases, whether they be rightly or wrongly decided, sustain the view that the law is to-day practically the same as it was under the Act of 1867 and as it was stated above, so far as concerns the provability of tort claims.

Section 63 of the Bankruptcy Law of 1898, entitled "Debts which may be Proved," provides as follows:

*a.* Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would

have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt; (4) founded upon an open account, or upon a contract express or implied; and (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interest accrued after the filing of the petition and up to the time of the entry of such judgments.

(b) Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against the estate.

It will be observed that there is no specific provision for the proof of torts. There can be no pretence that under clauses (2) and (3) of paragraph *a*, which relate to the provability of costs, tort claims are provable. Nor does clause (5) of subsection *a* admit of the proof of tort claims not provable under the other clauses of the section. This clause does not enlarge the number of provable debts as defined in the other clauses; it merely preserves their provability if, being provable debts, they are reduced to judgment after the filing of the petition. Whether or not the debt thus reduced to judgment is provable depends upon the other provisions of the section. This leaves for consideration, as possibly warranting the proof of tort claims, clause (1) of subsection *a*, providing, *inter alia*, for the proof of fixed liabilities, "as evidenced by a judgment;" clause (4) of subsection *a*, providing for the proof of debts "founded

. . . upon a contract express or implied;" and subsection *b*, providing for the liquidation and proof of unliquidated claims. These are the provisions of the statute under which tort claims, if at all, may be proved. Recalling the classification of tort claims made above, torts reduced to judgment are within Section 63, *a* (1); torts not reduced to judgment, to be provable, must come within Section 63, *a* (4), unless Section 63, *b*, admits of their proof, and, as will appear, it is conceded that of the unliquidated tort claims none are within Section 63, *a* (4), unless they are based upon torts which result in the unjust enrichment of the bankrupt, the tort-feasor; if, then, subsection *b* does not authorize their proof, unliquidated claims for personal torts are not provable under the Act of 1898.

## II. PROOF OF TORT-CLAIMS REDUCED TO JUDGMENT. ACT 1898, SECTION 63, *a* (1).

Judgments obtained prior to the initiation of proceedings in bankruptcy are provable, upon whatever cause of action they may have been obtained. Whether the cause of action was one *ex contractu* or one *ex delicto*, or, if *ex delicto*, whether the wrong enriched the wrong-doer or was a merely personal tort, the incidents of the judgments in which they become merged are alike. Their lien upon the debtor's real estate is the same. They furnish the same basis for an execution upon the debtor's property. This right to enforce collection out of the debtor's estate is preserved in bankruptcy by admitting the judgment creditor to proof, and, as a provable creditor, to participation in the distribution of the bankrupt estate. The rule is the same under all statutes, however their phraseology may differ. In England, of a large number of cases, there may be mentioned *Robinson v. Vale*, 2 B. & C. 762 (1824), and *Greenway v. Fisher*, 7 B. & C. 436 (1827), in the former of which a judgment in an action of trespass *de bonis asportatis*, and in the latter a judgment in trover, were declared to be provable.<sup>1</sup> The National Bankruptcy Act of 1841 provided:

<sup>1</sup> See also Williams: Bankruptcy Practice, 8th Edition (1904), p. 126.

“That all creditors coming and proving their debts . . . the same being bona fide debts, shall be entitled to share in the bankrupt’s property and effects. . . .”

A judgment is a debt whether obtained in a contractual or a tort action.<sup>2</sup> Hence, under the Act of 1841 judgments in tort actions were provable<sup>3</sup> because “debts” within the meaning of the statute. In *In re Comstock*,<sup>4</sup> 22 Vt. 642 (1842), Judge Prentiss said: “There is no distinction, under the Bankrupt Law, between a judgment in an action arising *ex delicto*, and a judgment in an action arising *ex contractu*. They are both *debts* within the meaning of the law, and both provable against the estate of the bankrupt.”

The language of the Act of 1867 was not dissimilar. It provided:

“That all debts due and payable from the bankrupt at the time of the adjudication of bankruptcy, . . . may be proved against the estate of the bankrupt.”

In *In re Wiggers*, 2 Biss. 71 (1868), Judge Drummond said, “This judgment was recovered for a tort, but it is still a debt, because it has passed into judgment.” Instances of the admission to proof, as debts, under the Act of 1867, of judgments obtained in actions for merely personal torts are found in *In re Hennocksburgh & Block*, 7 N. B. R. 37, where the action was one for assault and battery and false imprisonment, and *Howland v. Carson*, 16 N. B. R. 372, where the action was brought for the seduction of the plaintiff’s daughter.

In clause (1) of subsection *a*, Section 63, of the Bankruptcy Act of 1898 specific provision is made for the proof of judgments without any discrimination being made as to the causes of action upon which they may have arisen. While not numerous, yet the decisions sustain the right to prove judgments obtained upon tort claims of any nature whatsoever. A judgment in an action for seduction was

<sup>2</sup> *Gray v. Bennett*, 3 Metcalf, 522; *Stone v. Railroad*, 7 Gray, 539.

<sup>3</sup> *Comstock v. Grout*, 17 Vt. 512. *In re Book*, 3 McLean, 317.

<sup>4</sup> A case in the U. S. District Court for the District of Vermont.

proved in *In re McCarty*, 7 A. B. R. 40.<sup>5</sup> In *McDonald v. Brown*, 10 A. B. R. 58, a judgment was proved which had been obtained in an action for libel. In *In re Yates*, 8 A. B. R. 69, the provability of a judgment for wilful and malicious injury to the person was assumed, as was the provability of a judgment obtained in an action for crim. con. in *In re Tinker*, 3 A. B. R. 580,<sup>6</sup> and of a judgment secured for the alienation of a husband's affections in *Leicester v. Hoadley*, 9 A. B. R. 318.

The provability of claims, as was stated above, is determined as of the date of the institution of bankruptcy proceedings. Without anticipating the discussion of the provability of unliquidated claims for personal torts, but assuming for the present the conclusion that such claims are not provable unless liquidated by judgment obtained before bankruptcy, it is important to fix definitely the time when such liquidation must have occurred, in order to admit of their proof. Under the Act of 1867 that time was the date of the adjudication.<sup>7</sup> All tort claims if reduced to judgment prior thereto were provable.<sup>8</sup> Under the Act of 1898 the provability of claims is determined as of the date of filing the petition.<sup>9</sup> If the claim is provable only when reduced to judgment, judgment must have been entered upon the claim before the petition is filed to admit the claim to proof. A question has arisen under the present act, in the case of such claims, whether the rendering of a verdict, without the entry of judgment thereupon, before the filing of the petition, will not entitle the plaintiff to prove in bankruptcy. The general rule under other acts is well settled that personal torts are provable only when reduced to judgment prior to the proceedings in bankruptcy, and the rendering of a verdict is not equivalent to the entry of

<sup>5</sup> Further decisions on the provability of judgments for the same cause of action are *In re Sullivan*, 2 A. B. R. 30, and *In re Freche*, 6 A. B. R. 479.

<sup>6</sup> See also *Tinker v. Cokwell*, 11 A. B. R. 568; decision of U. S. Supreme Court.

<sup>7</sup> Act 1867, Section 19.

<sup>8</sup> *In re Henricksburgh & Block*, 7 N. B. R. 37.

<sup>9</sup> *In re Garlington*, 8 A. B. R. 602; 115 Fed. Rep. 999. *In re Bingham*, 2 A. B. R. 223; 94 Fed. Rep. 796.

a judgment and will not authorize the proof of such a claim.<sup>10</sup> With all due deference to the opinion of the able referee in *In re Sullivan*, 2 A. B. R. 30, holding the contrary, the rule under the present act should be the same, and verdicts rendered upon demands provable only when reduced to judgment should not, without the entry of judgment upon the verdict prior to the filing of the petition, convert the non-provable demand into a provable claim. In *In re Sullivan*, *supra*, application was made in bankruptcy for a stay upon a suit in a state court. The suit was one by a father for the seduction of his daughter, and had proceeded to trial and a verdict had been rendered without the entry of judgment when the petition in bankruptcy was filed. Under Section 11 of the Act of 1898 stays may be granted only upon suits on claims released by the discharge in bankruptcy. Under Section 17 no claims are released by the discharge in bankruptcy unless they are provable. The referee, Hotchkiss, first held that the verdict upon the claim was tantamount to a judgment and was provable, that such a judgment would be released by the discharge in bankruptcy, and that the suit in the state court should be stayed. By reason of the amendment to Section 17, excepting liabilities for seduction from discharge, the decision in *In re Sullivan* is no longer good law. Indeed, even before the amendments of 1903 there was respectable authority holding, contrary to Referee Hotchkiss, that judgments for seduction were not discharged.<sup>11</sup> It is, however, with the position taken by the referee, that the entry of verdict before the filing of the petition was equivalent to judgment and sufficient liquidation of the damages to render the claim provable, that exception is here taken.

The language of Section 63, *a* (1), is that debts are provable which are "a fixed liability, as evidenced by a judgment . . . , absolutely owing at the time of the filing of the petition. . . ." There is no necessity, to entitle a

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<sup>10</sup> *Bass v. Gilbert*, 2 M. & S. 70; *Ex parte Brooke*, 3 Ch. D. 494; *Hodges v. Chance*, 2 Wend. 248; *Kellogg v. Schuyler*, 2 Denio, 73; *Zimmer v. Schleeauf*, 115 Mass. 52; *Black v. McClelland*, 12 N. B. R. 481.

<sup>11</sup> *In re Freche*, 6 A. B. R. 479.

claim to be proved under that clause, that it be reduced to judgment, if it be otherwise "a fixed liability . . . absolutely owing at the time of the filing of the petition." But is a verdict such a liability? This question was squarely raised in *Black v. McClelland*, 12 N. B. R. 481, where the United States Circuit Court for the Western District of Pennsylvania held that the mere entry of a verdict created no fixed liability. Its reasoning amply sustains that conclusion. "It"—*i.e.*, a verdict—"is subject to the control and discretion of the court, and may be superseded altogether by arresting judgment upon it, or by the allowance of a new trial. No action could be maintained upon it; it does not bear interest, and no determinate character is imposed upon it until the court has pronounced its judgment that the plaintiff do recover from the defendant the amount of it. The judgment establishes the indebtedness and impresses the obligation of payment, and so may be said to create the debt. Not until it has passed is there a debt due and payable." A judgment is conclusive evidence of a fixed liability; a verdict is valid evidence of nothing.<sup>12</sup> It would seem, therefore, that if the provability of a tort claim depends upon its reduction to judgment before the petition is filed, the rendering of a verdict without the entry of judgment thereupon before that time will not entitle the claim to be admitted to proof.

Judgments in tort actions should not be confounded with fines inflicted by the court as a punishment for crime in criminal actions against the bankrupt. Such fines are not provable. Though within the letter of Section 63, *a* (1), as being fixed liabilities evidenced by a judgment, they are not within the spirit or intent of the act, and their exclusion from proof in bankruptcy is based upon public policy and sound reasoning.<sup>13</sup> If provable, the act does not pro-

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<sup>12</sup> Black: Judgments (2d Ed.), Sections 609 and 682, and cases there cited.

<sup>13</sup> In *In re Moore*, 6 A. B. R. 590; 115 Fed. Rep. 145, the district judge, Evans, said: "In my opinion it was never intended in this indirect way (in derogation of the exclusive right of the chief executive to pardon offenders or to remit fines imposed upon them) to relieve criminals from penalties incurred for criminal acts. It seems to me that to rule

vide for their exception from release by discharge in bankruptcy; and it cannot be pretended that bankruptcy proceedings were designed for the relief of criminals. There is sufficient reason for admitting judgments in tort actions to proof in the fact that the persons wronged were entitled by virtue of their judgment to proceed upon civil process to exact satisfaction out of the estate of the bankrupt had bankruptcy not occurred; and, indeed, when provision is made by law for the collection, by civil process, of fines or penalties imposed as a punishment for crime, claims for such fines and penalties may be provable in bankruptcy.<sup>14</sup> But for the same reason that pardon from the punishment for crime should not be obtainable by proceedings in bankruptcy, so too public policy dictates that the penalties imposed for heinous private wrongs in the civil court by way of damages in actions *ex delicto* be not excused or remitted by the discharge in bankruptcy, although the judgment be admitted to proof; hence the provisions in the various statutes exempting such liabilities from release by a discharge in bankruptcy.

### III. PROOF OF TORT CLAIMS NOT REDUCED TO JUDGMENT.

Observing the classification made above of unliquidated tort claims as arising from either torts which result in the enrichment of the tort-feasor or torts which, not so resulting, are merely personal, the discussion of the proof of

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otherwise would make the bankrupt court the means of frustrating proper efforts to enforce criminal statutes enacted for the public welfare. Congress, in my opinion, never so contemplated or intended. . . . The provisions of the Bankrupt Act have reference alone to civil liabilities as demands between debtor and creditor as such, and not to punishments inflicted *pro bono publico* for crimes committed." In *In re Alderson*, 3 A. B. R. 544; 98 Fed. Rep. 588, the court permitted proof to be made upon a fine inflicted as a punishment for crime; but the better view is that of *In re Moore, supra*. The cases under earlier acts support the latter decision; under the Act of 1841, *People v. Spalding*, 10 Paige, 284, affirmed by New York Court of Errors in 7 Hill, 301, affirmed by United States Supreme Court in 4 How. 21; under the Act of 1867, *In re Sutherland*, 3 N. B. R. 314. Adjudications under the Act of 1898 in accord with *In re Moore* may be found in the notes in 1 Natl. Bankr. News, 48 and 59.

<sup>14</sup>*In re Rosey*, 8 N. B. R. 509; *Barnes v. U. S.*, 12 N. B. R. 526.

unliquidated torts may be profitably divided in accordance with that classification; and since there is authority for holding the former class provable under Section 63, *a* (4), of the present act of Congress, and the latter class of personal torts provable under Section 63, *b*, their admission to proof will be considered in conjunction with those clauses of the act.

*A. Proof of Unliquidated Claims for Torts which Enriched the Tort-Feasor. Act of 1898, Section 63, a (4).*

In Section 19 of the Act of 1867 it was provided, *inter alia*, as follows:

“All demands against the bankrupt for and on account of any goods or chattels wrongfully taken, converted, or withheld by him may be proved and allowed as debts to the amount of the value of the property so taken or withheld, with interest.”

The section also provided for the assessment of damages upon such demands, when unliquidated, and for proof when and as assessed. Under this section proof could be made in all cases where the bankrupt had obtained the property of another wrongfully and had thereby unjustly enriched himself at the expense of the claimant. The incorporation of some such provision in every bankruptcy statute is necessary if the statute is satisfactorily to attain its purpose—viz., furnish remedies commensurate with the necessities and demands of the business world. Trade in merchandise and the exchange of property and goods is, in the main, conducted through the medium of contracts, express or implied in fact. The right to prove upon all such contracts, therefore, is a complete remedy in the great majority of commercial transactions. But business conditions are such that frequently no contract exists as a basis for proof in bankruptcy. Liabilities arise *ex delicto* and not *ex contractu* as well within as without the operations of trade and commerce; and the business world, not distinguishing, as the law does, between causes of action based upon torts and those based upon contracts, demands the

right to prove upon claims arising from all commercial transactions whether they create a cause of action contractual or delictual in law. The right to prove should, therefore, exist in all those numerous cases where through fraud and trickery, and without a contract of sale being made, the bankrupt has obtained the goods or property of another, and where by false representations and fraud contracts of sale are made, but rescinded without the return or recovery of any or all the goods sold. Such transactions are incidental to the conduct of business. No contract exists upon which a claim can be made in bankruptcy. The claims are tort claims, but from their commercial character they come properly within the scope of a bankruptcy statute; and, as a commercial law, it should distinguish in the admission of claims to proof in favor of such claims as opposed to those purely personal torts of which a measure designed to relieve commercial conditions need take no cognizance. The framers of the Act of 1867 apparently recognized these principles. At all events they made abundant provision for the proof of claims arising from the unjust enrichment of the bankrupt by his wrongfully taking, withholding, or converting another's property.

Are the provisions of the Act of 1898 adequate to meet and satisfy commercial conditions, so as to admit to proof claims for torts that result in the unjust enrichment of the tort-feasor? Several District Courts have declared the act to warrant the proof of such claims, and have construed Section 63, *a* (4), which provides for the proof of debts "founded . . . upon a contract express or implied," as authorizing the proof not only of contracts express or implied in fact, but also of contracts implied in law,—the so-called *quasi*-contracts, which are contracts in name only, and that merely in right of the form of remedy, but in substance and origin are delictual. When the tort results in the unjust enrichment of the tort-feasor, these cases hold that the tort may be waived and a claim may be proved based upon a contract said to be implied in law to reimburse the owner for his property, with which the bankrupt has unjustly enriched himself.

Upon familiar principles in the law of "quasi-contracts" the right to waive a tort and recover in assumpsit is one conferred by law irrespective of the intention of the parties. No real contract based upon the assent of the parties, either express or implied in fact, exists in such cases. The obligation thus sought to be enforced in an action of assumpsit is one imposed by law, and does not arise from the mutual agreement of contracting parties. The adequacy of the provisions of the Act of 1898 to admit of the proof of unliquidated tort claims based upon the unjust enrichment of the bankrupt at the expense of the claimant therefore depends upon the construction of Section 63, *a* (4). Do the terms "contract express or implied" contemplate only contracts in fact, the obligation whereof is created by the parties themselves, or are they broad enough to include as well "contracts implied in law," which are not contracts at all, but whose obligation is created by law and enforced in an action contractual in form?

The leading case in support of the liberal construction of this clause is *In re Hirschman*, 4 A. B. R. 715; 104 Fed. Rep. 69. The question there arose upon a petition for the liquidation of claims against the bankrupt. The bankrupt had been a retail dealer in boots and shoes. The petitioners alleged that he had made purchases from them upon fraudulent representations. They elected to rescind the sales and prayed for the recovery *in specie* of the shoes not sold by the bankrupt which were in possession of the trustee, and claimed the right to prove for the proceeds of the shoes which the bankrupt had sold, and prayed that this claim might be liquidated under the direction of the court. Upon the subject of the provability of the claim for the proceeds of the shoes converted, the court, after ruling that the petitioners must bring themselves within Section 63, subsection "a," in order to prove their debt, said: "Section 63, subsection 'a,' does not authorize the proof of any claim arising *ex delicto*, unless a recovery may be had *quasi ex contractu*. Under subsection 4, claims founded upon a contract, express or implied, may be proved. The implied contract intended includes the fictitious contract

implied in law—only treated as a contract for the sake of the remedy—and the true contract implied in fact. As the petitioners rescinded the several contracts of sale, the goods must be considered as tortiously acquired by the bankrupt, except as against a purchaser without notice. If the goods were sold by the bankrupt, the petitioners can treat the sales as made for them, and maintain a claim for the consideration obtained by the bankrupt as money had and received to their several use. This is said to be waiving the tort and suing in contract. In truth, it is but an election of remedy, as the tort is not waived, but insisted on as the basis for the rescission of the contract.” Leave was then given for the filing of the claims, for their liquidation and subsequent proof. The facts of this case render it typical of the class of cases wherein the tort has led to the unjust enrichment of the bankrupt. The contract of sale was rescinded. There was, therefore, no substantive consensual contract as a basis for proof. An action, however, could be framed in assumpsit, as for money had and received, to recover the proceeds of the goods, and the court held that the purely procedural contract in such an action was as well within the phrase “contract express or implied” as were the substantive consensual contracts.

*In re Hirschman* was the decision of the District Court of Utah. The District Court for the Southern District of New York reached the same conclusion in *In re Filer*, 5 A. B. R. 834, affirming the ruling of the referee in the same case, 5 A. B. R. 582. In that case some of the claims of the petitioners were for money obtained from the petitioners by the bankrupt, in part upon indorsements forged by him, and in part by his abstracting it from their cash-drawer and concealing the withdrawals by false entries in the books. Obviously such claims are purely tortious. There never was a contract between the petitioners, Kohn & Co., and the bankrupt with respect to these sums of money. Following *In re Hirschman*, *supra*, the referee admitted the claims to proof, saying: “The objection that the debts due Kohn & Co. are not provable in bankruptcy must be overruled. The several debts are susceptible of two

constructions. They may be treated as a contract in law, or as claims based upon a tort. It is well settled that where a claim arises *ex delicto*, but is also of such a character as to constitute a claim on the theory of quasi-contract, the debt is provable in bankruptcy. The creditor has the election to waive the tort and sue in contract. *In re Hirschman*, 4 Am. B. R. 715; *In re Lazarovic*, 1 Am. B. R. 476.<sup>15</sup> I can add nothing to the well-considered opinion in *In re Hirschman*." The same rule is reiterated by the referee in *In re Wigmore*, 10 A. B. R. 661, the latest judicial utterance found upon the question.

These cases clearly decide that where the bankrupt has unjustly enriched himself at the expense of a claimant, and the latter might have proceeded at law had bankruptcy not intervened and procured redress in an action of assumpsit for money had and received, waiving his right to sue in an action *ex delicto*, he may prove in bankruptcy in virtue of his possessing a right of action contractual in form. No question can be raised as to the propriety of the principle that seems to have guided the courts in reaching their decisions. A bankruptcy statute should admit of the proof of claims for torts which result in the enrichment of the bankrupt. But unless warranted by a proper construction of the statute, the rule established by those cases is but judicial legislation in relief of a defective statute which may be effectually vetoed when the question reaches the Supreme Court. The clause of the Act of 1867 above quoted<sup>16</sup> was a wise provision under which claims for torts enriching the bankrupt were provable. Some similar provision should be incorporated by amendment in Section 63

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<sup>15</sup> *In re Hirschman* undoubtedly sustains the view of the referee in *In re Filer*; but it is difficult to see how he can derive any support from *In re Lazarovic*. In that case the proof of claim was for goods procured by the bankrupt from the claimants by purchases induced by his fraudulent representations. The referee treated the claim as one for goods sold and delivered, refusing to consider the question of fraud. The claim was allowed as for a debt upon an express contract between the parties. Only if the contract had been rescinded for fraud, and there was no allegation in the proof of claim of such rescission, would opportunity have been afforded for the application of quasi-contractual principles.

<sup>16</sup> At page 484.

of the present act if the Supreme Court should hold, contrary to *In re Hirschman*, that the phrase "contract express or implied" refers only to substantive contracts and not to the procedural contracts in tort claims that may be prosecuted in action by a suit in assumpsit. So far as the decided cases go our present statute is adequate to the purpose; but since a doubt as to the provability of these "quasi-contractual" claims under the act has been raised by some authorities,<sup>17</sup> it may not be altogether amiss to state some of the reasons that might be urged for holding that such claims are not properly provable.

In England claims are provable which are based upon torts which, in the choice of a remedy, may be waived and upon which an action of assumpsit for money had and received would lie.<sup>18</sup> Recovery in such cases is for a sum certain. They are therefore not within the inhibition of the English statutes<sup>19</sup> upon the proof of demands for unliquidated damages, and are within the terms of those statutes for the proof, save as to certain exceptions, of "all debts or liabilities . . . to which the debtor is subject. . . ." This phraseology is evidently of broader signification than is that of Section 63, *a* (4), of our present statute. The term "liabilities" includes claims not included in the term "contracts." Under the Act of 1867 there was no question as to the provability of demands against the bankrupt on account of goods wrongfully taken, withheld, or converted by him, by reason of the statutory provision admitting such claims to proof, but except in such cases as were within that provision of the statute unliquidated tort claims could not be proved, although upon them an action might have been brought in assumpsit as for money had and received. The English rule in favor of the proof of *quasi-contract* claims upon torts, as enunciated in *Watson v. Holliday*, L. R. 20, Ch.

<sup>17</sup> Lowell: "A Treatise on the Law of Bankruptcy" (1899), pages 486 and 487.

<sup>18</sup> *Watson v. Holliday*, L. R. 20 Ch. Div. 780 (1881). *Ex parte Adamson*, L. R. 8 Ch. Div. 807 (1878).

<sup>19</sup> English Bankruptcy Act of 1869, Section 31; English Bankruptcy Act of 1883, Section 37.

Div. 780, was expressly disapproved in *In re Boston and Fairhaven Iron Works*, 23 Fed. Rep. 880, the facts of both cases being the same and raising the question of the provability of a claim for the profits accruing from the infringement of a patent right. There is, therefore, nothing in either the English or the earlier American bankruptcy law that throws light upon the question of the provability, as *quasi-contracts*, of claims for torts resulting in the unjust enrichment of the bankrupt under a statute like that of 1898 admitting the proof of "contracts express or implied." We are left in the construction of those words to such guidance as is afforded by the construction of similar words in other statutes, or by an independent construction of the words in the Act of 1898.

Keener, in his work on *Quasi-Contracts*,<sup>20</sup> points out that the terminology of the law that gives the name "implied contracts" or "quasi-contracts" to obligations imposed by law, in the absence of any agreement of the parties, which are enforced through the medium of an *assumpsit* action, has rendered difficult the construction and interpretation of statutes employing the word "contract," or the phrase "contracts express or implied." By the use of those terms does the legislature intend to include with the substantive, consensual contracts the obligations known as "quasi-contracts," obligations the law imposes without or in opposition to the consent of the parties, which are not contractual in essence though enforceable through the procedure invoked to enforce substantive contracts? The usual construction is that the words denote only consensual, and not procedural or "quasi" contracts. Perhaps the leading case is *Dusenbury v. Speir*, 77 N. Y. 144, wherein the legality of an arrest turned upon the meaning to be given to the phrase "contract express or implied," as used in a statute regulating arrests in civil actions. The plaintiff had been arrested in an action, corresponding to the common law action, for money had and received, brought to recover money fraudulently obtained by him, upon the theory that the

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<sup>20</sup> Page 11 *et seq.*

action was that of contract express or implied within the meaning of the statute. It was held that his liability was in *quasi*-contract, and not in contract, and that as the phrase "contract express or implied" was used in the statute with reference solely to genuine contracts, the arrest was illegal.<sup>21</sup> In *O'Brien v. Young*, 95 N. Y. 428, the same court said that the term "contract" used in a statute reducing the rate of interest applied only to genuine contracts based upon the agreement of the parties, and did not include *quasi*-contracts. The Supreme Judicial Court of Massachusetts, in *Inhabitants of Milford v. Massachusetts*, 144 Mass. 64, held that, under a statute giving it jurisdiction of claims against the commonwealth based upon contracts for the payment of money, it could take cognizance only of actual contracts arising from the consent or agreement of the parties, and that it had no jurisdiction of claims based upon obligations arising *ex lege* which are enforced as if they arose *ex contractu*. In Pennsylvania the same conclusion was reached as to the jurisdiction of justices of the peace under a statute<sup>22</sup> giving those officials jurisdiction "of all causes of action arising from contract, either express or implied," etc. Judge Gibson

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<sup>21</sup> This statement of the facts of the case is taken from Keener: *Quasi-Contracts*, page 12. In the course of his opinion in the case Mr. Justice Danforth said: "... We think that the express contract referred to in the statute is one which has been entered into by the parties, and upon which, if broken, an action will lie for damages, or is implied, when the intention of the parties, if not expressed in words, may be gathered from their acts and from surrounding circumstances; and in either case must be the result of the free and *bona-fide* exercise of the will, producing the *aggregatio mentium*, the joining together of two minds, essential to a contract at common law. There is a class of cases where the law prescribes the rights and liabilities of persons who have not in reality entered into any contract at all with one another but between whom circumstances have arisen which make it just that one should have a right, and the other should be subject to a liability, similar to the rights and liabilities in certain cases of express contract. Thus if one man has obtained money from another through the medium of oppression, imposition, extortion, or deceit, or by the commission of a trespass, such money may be recovered back, for the law implies a promise from the wrong-doer to restore it to the rightful owner, although it is obvious that it is the very opposite of his intention. Implied or constructive contracts of this nature are similar to the constructive trusts of courts of equity, and in fact are not contracts at all."

<sup>22</sup> Act March 20, 1810; 5 Sm. L. 161, Sect. 1.

said: "The 'causes of action arising from contract, either express or implied,' which appertain to the jurisdiction of a justice of the peace, are those which arise from the agreement or understanding immediately between the parties. It is evident, therefore, that it is not the form of the action, but the nature of the subject-matter of it, which must decide the question of jurisdiction."<sup>23</sup>

The decisions of the state courts construing statutes in which occur the words "contracts express or implied" sustain the view that those terms include and relate only to consensual or genuine contracts and not the merely procedural *quasi*-contracts. Of peculiar significance would be decisions of the United States Supreme Court construing that expression; but in the cases in which the construction of a statute using those terms was before that court the statute was that of a state and not an act of Congress. Following the well-established rule, the United States Supreme Court adopted the construction placed upon the state statute by the highest judicial body of the state, and in *Morley v. Lake Shore Ry Co.*, 146 U. S. 162, the construction of the term "contract" in a New York statute was determined by the decision in *O'Brien v. Young*,<sup>24</sup> above quoted, as including only consensual or substantive contracts.<sup>25</sup> The word "contract" does, however, appear in the Federal Constitution in the clause prohibiting states from passing laws impairing the obligation of "contracts;" and the decisions of all courts are uniform in restricting the prohibition to cases involving true contracts based upon the assent of the parties, and in excluding from its operation laws that impair obligations in *quasi*-contracts, arising *ex lege* independently of the agreement of the parties. In *Louisiana v. Mayor of New Orleans*, 109 U. S. 285, Mr. Justice Field said: "The term 'contract' is used in the

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<sup>23</sup> *Schaffer et al. v. McNamee*, 13 S. & R. 44. To the same effect are *Ziegler v. Gram*, 13 S. & R. 102; *Zell v. Arnold*, 2 P. & W. 292; and *Seitzinger v. Sternberger*, 12 Pa. 379.

<sup>24</sup> 95 N. Y. 428.

<sup>25</sup> See also *Evans-Snyder-Buel Co. v. McFadden*, 105 Fed. Rep. 293; affirmed in 185 U. S. 505.

constitution in its ordinary sense, as signifying the agreement of two or more minds, for considerations proceeding from one to the other, to do, or not to do, certain acts. Mutual assent to its terms is of its very essence. . . . The prohibition of the Federal Constitution was intended to secure the observance of good faith in the stipulation of parties against state action. Where a transaction is not based upon any assent of parties, it cannot be said that any faith is pledged with respect to it, and no case arises for the operation of the prohibition."<sup>26</sup> Chief Justice Bermeudez, in *State v. City of New Orleans*, 38 La. Ann. 119,<sup>27</sup> said: "No principle is better recognized by law or jurisprudence than that he who receives what is not due to him, whether he receives it through error or knowingly, obliges himself to restore it to him from whom he unduly received it, and that he who has thus paid through his mistake, believing himself a debtor, may reclaim what he has paid. . . . It does not, however, follow that the right to claim reimbursement and the obligation to refund arise from a contract, express or implied, which is protected from impairment or invasion by the Constitution of the United States. . . ." Statutes changing the obligations imposed by law independently of the stipulations of the parties, he held, were not within the prohibition of the constitution.

The phraseology and intent of the Federal Constitution are such that the decisions construing the term "contracts" in the constitution may not be conclusive or even persuasive of the construction of Section 63, a (4), of the Bankruptcy Statute. It is difficult, however, to distinguish the terms of that statute from the similar terms of the state statutes above referred to, or to suggest any other reason why their construction should not be the same than that the provisions of the Bankruptcy Act are to be liberally construed, and that, in the liberal construction of its phrases, the courts, as in fact they do, may ignore the construction

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<sup>26</sup> See also *Chase v. Curtis*, 113 U. S. 452; *Morley v. Lake Shore Ry. Co.*, 146 U. S. 162; *Evans-Snyder-Buel Co. v. McFadden*, 105 Fed. Rep. 293; affirmed 185 U. S. 505.

<sup>27</sup> 58 Am. Rep. 168.

of identical phrases in other acts. It is contrary to the prevailing rule in other cases, but, so far as the cases decided in the District Courts can establish the principle, settled under the Bankruptcy Act, that torts enriching the tortfeasor, which may be sued out in actions contractual in form, are provable as being "contracts implied" within the meaning of the statute. *In re Hirschman* and *In re Filer*, supporting that view and discussed above, have been expressly disapproved in none of the decisions, and unless the Supreme Court, adhering to the stricter construction of *Dusenbury v. Speir*, and the cases like it, overrules *In re Hirschman*, the proof of unliquidated claims for torts which enriched the bankrupt under the act will be limited only by the limitations imposed by the law of quasi-contracts. In but one decision, *In re Cushing*, 6 A. B. R. 22, and that subject to criticism from other points of view, was the right of proof denied under Section 63, *a* (4), of a tort claim on which a quasi-contractual remedy lay.

If the rule of *In re Hirschman* is to prevail, and unliquidated tort claims are to be provable, provided the tort enriched the tort-feasor and an action in contract may be framed upon the claim, then the extent of this right of proof will vary among the states according as the right to waive the tort and sue in assumpsit is broad or narrow in the several jurisdictions. Where the bankrupt has converted and sold the claimant's property or where the bankrupt has wrongfully obtained possession of money belonging to another, the tort may universally be waived and an action brought in assumpsit as for money had and received.<sup>28</sup> Where, however, the goods wrongfully taken or withheld

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<sup>28</sup> The decisions are collected in Keener on Quasi-Contracts, page 170. See also 15 A. & E. Encyc. (2d Ed.), page 1113. This rule obtains even in states wherein, as stated below, a tort may not be waived and an action of assumpsit brought as for goods sold and delivered where the goods wrongfully taken are retained *in specie* and not converted, and an action of assumpsit as for money had and received would not lie: Mass., *Gilmore v. Wilbur*, 12 Pick. 124; Ala., *Thornton v. Strauss*, 79 Ala. 164; Ark., *Hudson v. Gilliland*, 25 Ark. 100; Mo., *Dougherty v. Chapman*, 29 Mo. App. 233; Vt., *Stearns v. Dillingham*, 22 Vt. 624; Penna., *Willet v. Willet*, 3 Watts, 277; *Boro' v. Fire Ins. Co.*, 81 Pa. 445; *Satterlee v. Mellick*, 76 Pa. 62.

are retained *in specie* and not converted, in which case an action of assumpsit for money had and received would not lie, the right to prove as upon an assumpsit count for goods sold and delivered exists in some states but not in others. In many instances this question may be avoided by the claimant's proceeding, not as a creditor seeking to prove a claim, but as the owner of property in the possession of the bankrupt or his trustee, for whose recovery *in specie* he may petition the court. Reclamation proceedings of this character are preferable to the right to prove as a general creditor for obvious reasons. They afford a complete remedy, restoring the petitioner to the position he occupied before the commission of the tort. Regaining his property *in specie*, he suffers no abatement of his claim as do general creditors in the distribution of the assets of the estate.<sup>29</sup> The right to reclaim property in the possession of the trustee is, however, subject to abuse. It is always a proper remedy where the bankrupt obtained the goods tortiously and without any contract of sale having been made. In such case title to the property never vested in the bankrupt. But where the goods are obtained under a contract of sale upon fraudulent representations, the propriety of the remedy is not so clear. Title has actually passed to the bankrupt, and though an equity resides in the vendor to rescind the sale for fraud, to permit him to exercise this right after bankruptcy intervenes enables him practically to work a preference for himself. It gives to such a vendor a right not possessed by other creditors. He can rely upon the contract of sale so long as it is to his interest so to do, and when, upon the adjudication in bankruptcy, his interest is to terminate the contract, he is privileged to do so and permitted to reclaim as his own what, but for bankruptcy, he would have treated as the bankrupt's property. The right to rescind sales for fraud might well be limited to the period prior to the filing of a petition in bankruptcy. The present state of the law encourages vendor-creditors to cry "fraud" whenever their

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<sup>29</sup> Such proceedings were had in *In re Hirschman*, 4 A. B. R. 715; *In re Weil*, 7 A. B. R. 90; *Coleman v. Sherman*, 8 A. B. R. 763.

vendee becomes a bankrupt, and reclamation proceedings would denude the estate of a trader of its assets if the courts did not restrict their operation to only clear and indisputable cases. The trend of the authorities is to narrow the scope of such proceedings.<sup>30</sup> The diversity of the authorities upon the right to sue in assumpsit for goods tortiously taken or withheld and retained *in specie* and not sold, is important only if reclamation proceedings may not be had. Only if the claimant cannot recover his property *in specie*, is it of consequence whether or not he can prove for its value as upon a contract. In some states the tort may be waived and action brought in assumpsit for goods sold and delivered; in other states the fictional contract adopted for the sake of the remedy is confined to the assumpsit count of money had and received and the tort remedy may not be waived in favor of assumpsit for goods sold and delivered.<sup>31</sup> In the early cases in which effect was given to the rule embodied in the maxim, "*nemo debet locupletari ex alterius incommodo*," the unjust enrichment resulted in the tort-feasor's coming into the possession of money which *ex aequo et bono* he should have refunded to the person wronged. An action for money had and received would lie in such case.<sup>32</sup> There was, however, no common law action *ex contractu* that afforded a remedy in cases of unjust enrichment where the count for money had and received would not lie. Hence the remedies were not sufficient to give complete effect to the maxim quoted in actions of assumpsit. Where the unjust enrichment resulted in the acquisition and retention by the tort-feasor of personal property, there was no contractual remedy at common law, and in the

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<sup>30</sup> *In re O'Connor*, 7 A. B. R. 428. *In re Murphy-Barbee Shoe Co.*, 11 A. B. R. 428.

<sup>31</sup> In California, Georgia, Illinois, Indiana, Kansas, Michigan, Mississippi, New York, North Carolina, Ohio, Tennessee, Texas, West Virginia, and Wisconsin the tort may be waived, and assumpsit brought for goods sold and delivered. The contrary rule prevails in Alabama, Arkansas, Connecticut, Delaware, Iowa, Kentucky, Maine, Massachusetts, Mississippi, New Hampshire, Pennsylvania, South Carolina, and Vermont. See Keener on Quasi-Contracts, pages 193, 194; 15 A. & E. Encycl. of Law (2d Ed.), page 1116, where the decisions are collected.

<sup>32</sup> *Lamine v. Dorrell*, 2 Ld. Raymond, 1216.

states which adhere to the principles of the common law the tort may not, in such cases, be waived in favor of an assumpsit action. In the other jurisdictions an action of assumpsit for goods sold and delivered may be brought, although no contract of sale exists in fact.<sup>33</sup>

Under the Act of 1867 proof could be made upon unliquidated claims for torts arising from the unjust acquisition of another's goods, whether the goods were retained *in specie* or converted into money. Even if the rule of *In re Hirschman* prevails, and proof may be made under the Act of 1898 for torts which are the subject of a contractual remedy, the right to prove will vary with the states according to the existence or non-existence of the right to waive the tort and sue in assumpsit when the goods tortiously obtained are retained *in specie*, and not converted. And when it is recalled that there is no inconsiderable authority that may sway the Supreme Court to deny the right under Section 63, *a* (4), to prove any but substantive contracts, and thus hold that unliquidated claims for torts resulting in the unjust enrichment of the bankrupt are not provable, it will be seen that our present statute is defective where the Act of 1867 was adequate in affording a right of proof properly desired by the business community.

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<sup>33</sup> The leading cases expressive of these two views are *Jones v. Hoar*, 5 Pick. 285, wherein the court declares that an action for goods sold and delivered lies only when a contract of sale exists in fact; and *Terry v. Munger*, 121 N. Y. 161, wherein the court took the position that if an assumpsit count lies to recover money unjustly obtained, there was no reason why an assumpsit count as for goods sold and delivered should not lie to recover goods unjustly obtained. In Pennsylvania where the goods wrongfully taken are retained *in specie*, no contract of sale can be sued on, as a basis for recovery of their value, unless there be a contract express or implied in fact. *Willett v. Willett*, 3 Watts, 277; *Satterlee v. Mellick*, 76 Pa. 62; *Boro' v. Fire Ins. Co.*, 81 Pa. 445; *Boyer v. Bullard*, 102 Pa. 555. In such cases the tort may not be waived. Where, however, the goods wrongfully taken are consumed, an action in assumpsit, as for goods sold and delivered, will lie. *Philada. Co. v. Parks Bros.*, 138 Pa. 346; see also *Satterlee v. Mellick*, *supra*. There are dicta to the effect that such an assumpsit action might lie and the tort be waived where there was any fraud or unfair dealing in the taking. *Deysher v. Triebel*, 64 Pa. 383; *Satterlee v. Mellick*, *supra*; *Boro' v. Ins. Co.*, *supra*.

*B. Proof of Unliquidated Claims for Personal Torts. Act 1898, Section 63, b.*

The rule under the English and earlier American statutes is that unliquidated claims for personal torts are not provable. The opinion of the court in an English case has already been referred to as expressive of the English rule.<sup>34</sup> Under our former Bankruptcy Acts unliquidated claims for torts, except for the taking, withholding, or conversion of goods under the Act of 1867, were not provable. Unliquidated claims for personal torts were, therefore, not provable.<sup>35</sup> Section 63, *b*, of our present act provides as follows:

“Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate.”

The editor of the fourth edition of Collier on Bankruptcy, Referee Hotchkiss, in discussing this section of the act inclines to the opinion that by reason of subsection *b* all unliquidated tort claims of whatever nature are provable, and in support of this opinion he cites *In re Cushing*, 6 A. B. R. 22, and *In re Lazarovic*, 1 A. B. R. 476. Such a rule would be an innovation in bankruptcy law. The general rule both in England and under our former acts of Congress is against the provability of such claims. If Collier's be the correct view, however, then it is immaterial whether or not, as discussed above, under Section 63, *a* (4), torts may be proved provided an assumpsit action may be used in the choice of a remedy thereupon; for according to the text of Collier subsection *b* provides for the proof of unliquidated demands both for torts that enriched the tort-feasor and for merely personal torts.

There is nothing in *In re Lazarovic* to sustain Collier. It was a case wherein a claimant sought and was permitted

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<sup>34</sup> James, L. J., in *Ex parte Llynvi Coal and Iron Co.*, L. R. 7 Ch. App. 28; and page 475 *ante*.

<sup>35</sup> *Kellogg v. Schuyler*, 2 Denio, 73; *In re Henmacksburgh*, 7 N. B. R. 37; *Black v. McClelland*, 12 N. B. R. 481; *In re Schuhardt*, 15 N. B. R. 161.

to prove for the balance due upon goods sold upon credit. In his proof of claim he averred that the sale and extension of credit were secured through fraud and false representations. The referee refused to consider the allegations of fraud. Nor was any rescission of the contract of sale alleged. The proof was therefore upon the original contract and the case does not even suggest the meaning of subsection *b*.

In *In re Cushing* a claim was presented for the value of goods whose sale to the bankrupt was alleged to have been induced by false representations. The referee, Moss, seemed to distinguish between torts of a personal character and torts enriching the tort-feasor. Of the former class he said: "It may be that the language of paragraph *b* is broad enough, as has been suggested by Collier in notes to this section in his valuable work on bankruptcy, to include claims for damages for such personal wrongs as assault or slander." But he refused to express an opinion thereupon. The case before him was of the other class of torts. Under *In re Hirschman* proof might have been made under Section 63, *a* (4); but the referee held that the claim was not provable under subsection *a*, but might have been proved under subsection *b* had application for its liquidation first been made. For default thereof the claim was disallowed. This case goes no farther than to hold that where the tort enriches the bankrupt the claim is provable under paragraph *b* of Section 63. It illustrates the tendency of the courts to seek an avenue through which to admit to proof torts of that character; and for that purpose alone it holds that paragraph *b* defines a new class of provable debts. It is authority for nothing as to personal torts.<sup>36</sup> A carelessly added dictum in *Beers v. Hanlin*, 3 A. B. R. 745, is the only authority to support the view that under paragraph *b* unliquidated claims for personal torts may be proved.

The question raised by Collier and the cases just mentioned, briefly stated, is whether paragraph *b* of Section 63

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<sup>36</sup> *In re Morales*, 5 A. B. R. 425, bears some resemblance to *In re Cushing*.

states a class of provable debts, under which unliquidated tort claims may be proved, additional to the classes of provable debts defined in Section 63, *a*; or whether paragraph *b* merely provides for the liquidation of unliquidated claims provable under paragraph *a*. Does paragraph *b* add to the number of provable debts defined in paragraph *a*? If it does, all claims for torts are provable. If it does not, unliquidated claims for personal torts are not provable, and similar claims for torts enriching the tort-feasor are provable, if at all, only under Section 63, *a* (4).

The view last expressed is undoubtedly correct. Its first clear expression was given in *In re Hirschman*.<sup>37</sup> Judge Marshall there said: "For the petitioners it is contended that Section 63, subsection 'b,' of the Bankrupt Act of 1898 authorizes the liquidation and subsequent proof of claims *ex delicto*. Except as to causes of action which, at the option of the claimant, permit a recovery in *quasi-contract* or in tort, I am unable to accede to this proposition. . . . The intent of Congress was to specify in subsection 'a' all provable debts, and in subsection 'b' to provide for the liquidation of such as, falling under subsection 'a,' were yet unliquidated." Inasmuch as the court held the claim provable under Section 63, *a* (4), it might be urged that its statements as to paragraph *b* were merely *obiter*, and not persuasive as to the construction of that paragraph when purely personal torts come before the court for admission to proof under paragraph *b*.

Such personal torts were under consideration in *In re Yates*, 8 A. B. R. 69.<sup>38</sup> The provability of an unliquidated claim for a wilful and malicious injury to the person of the petitioning creditor was there discussed. Referring to subdivision *b* of Section 63, the court, citing *In re Hirschman*, said: "This subdivision is not to be construed as authorizing the proof of claims not declared in subdivision 'a' to be provable. Its object is simply to provide that unliquidated claims which fall within the scope of subdivision 'a'

<sup>37</sup> See page 486, *ante*, for facts.

<sup>38</sup> See also *In re Brinckmann*, 4 A. B. R. 551.

are to be liquidated in such manner as the court shall direct." The claim was held not to be provable, and the petition was dismissed. In *In re Wigmore & Sons Co.*, 10 A. B. R. 661, the court denied the right to prove for damages for negligence resulting in the injury of the claimant. In the course of his scholarly opinion the referee, Helm, said: "It is conceded, following the decision in *In re Hirschman*, 4 Am. B. R. 715, 104 Fed. 69, that subsection *b* of Section 63 of the Bankruptcy Act of 1898, which provides for the liquidation by the court of unliquidated claims against the bankrupt and that they may thereafter be proved against the estate, covers only such claims as when liquidated are provable debts under the classification of the preceding subsection *a*, and does not authorize the liquidation and proof of claims arising *ex delicto*, unless they are of such a nature that the claimant might at his election waive the tort and recover in *quasi-contract*." A similar view of the law is taken in the cases cited in the notes.<sup>39</sup> They were not cases involving the right to prove for personal torts, as were the foregoing cases, but their statement of the law is in accord with the quotations just made.

Finally, the United States Supreme Court has expressed its opinion upon the subject. The question was raised in *Dunbar v. Dunbar*, 10 A. B. R. 140, 190 U. S. 340, a case involving the provability of a contractual liability for the support of wife and children. The provability of claims for personal torts was not before the court, but there is no reason to believe that the statement of Mr. Justice Peckham will not represent the views of the court when a tort claim is before it. He said:<sup>40</sup> "In Section 63, *b*, provision is made for unliquidated claims against the bankrupt, which may be liquidated upon application to the court in such manner as it shall direct, and may thereafter be proved and allowed against his estate. This paragraph *b*, however, adds nothing to the class of debts which might be proved under para-

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<sup>39</sup> *In re Marcus*, 5 A. B. R. 19. *In re Big Meadows Gas Co.*, 7 A. B. R. 697.

<sup>40</sup> 10 A. B. R. 149; 190 U. S. 350.

graph *a* of the same section. Its purpose is to permit an unliquidated claim, coming within the provisions of Section 63, *a*, to be liquidated as the court should direct."

Paragraph *b* of Section 63 therefore does not specify a class of provable debts additional to those stated in paragraph *a*. It merely provides for the liquidation and proof of such unliquidated claims as are provable under paragraph *a*. Claims for personal torts not reduced to judgment are not provable under paragraph *a*. They are, therefore, not provable. Only when the tort enriched the bankrupt is an unliquidated tort claim provable under the Act of 1898; and that, under the decisions of the District Courts, is because upon such a claim an action in *quasi*-contract would lie which would render the claim provable under Section 63, *a* (4).

To summarize the results of this discussion it may be said that under the Act of 1898 tort claims reduced to judgment before the filing of the petition are provable. The rendition of a verdict prior to that time is not sufficient liquidation of such claims to render them provable as liquidated claims under Section 63, *a* (1). Tort claims unliquidated when the petition is filed are not provable if they arise from personal torts. When based upon wrongs which enriched the bankrupt the decided cases hold that unliquidated tort claims may be proved under Section 63, *a* (4), if the claimant can waive his remedy *ex delicto* and sue in *quasi*-contract. This last right is not conceded without a reservation as to its validity. It is urged that it is created only by a forced and strained construction of the act, by giving to the expression "implied contract" a meaning accorded it in no other statute. Even if this construction be correct, the remedy afforded is scarcely adequate to the relief desired. The right to prove should exist whenever the bankrupt's estate has been enriched by the unjust acquisition or conversion of the claimant's property; but under the most liberal construction of the Act of 1898 the right to prove in such cases exists only when an assumpsit action can be brought upon the tort.

In reaching these conclusions attention has been centred upon Section 63 of the act to the exclusion of all other sections, and, in particular, Section 17. The latter section specifies the debts not affected by a discharge in bankruptcy. None but provable debts are discharged, and of the provable debts all are discharged except those specifically exempted. By reason of the phraseology of Clause 2, as amended in 1903, exempting from discharge "liabilities" for several stated classes of torts, it has been argued that unliquidated demands for these torts are provable.<sup>41</sup> It is true that the term "liabilities" includes liabilities arising from unliquidated as well as from liquidated demands, but as used in Section 17, *a* (2), the word must be held to relate only to "provable" liabilities. Provable liabilities are defined in Section 63, and its provisions cannot properly be extended by the terms of another section, which, assuming the definition of provable debts to be made by Section 63, excepts certain of them from the general rule that all provable debts are discharged. The amendments of 1903 do not render unliquidated claims for such personal torts as seduction and crim. con. provable. They merely exempt from discharge liabilities for such torts when provable, and they are provable under Section 63 only when reduced to judgment. If not reduced to judgment they are not discharged because they are not provable. The language of Referee Remington in *In re Rouse*, 1 A. B. R., is in point. He said: "It seems to the referee that we must find in Section 63 our limitation as to what claims or debts are and what are not provable in bankruptcy, and that it is untenable for us to assume that the list is enlarged or its interpretation affected by the wording of Section 17, making provision as to what debts are not affected by a discharge. Section 17 expressly refers to 'provable' debts, and we must therefore seek elsewhere for the determination of what debts are provable."<sup>42</sup>

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<sup>41</sup> Collier: Bankruptcy (4th Ed.), page 443.

<sup>42</sup> See also *In re Cushing*, 6 A. B. R. 22.