UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 26 | Number 4 Article 7

6-1-1948

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Bankruptcy—Turnover Order as Res Judicata in Contempt Proceedings—Limiting the Rule in Oriel v. Russell

In granting the petition for a turnover order by the trustee in bankruptcy, the Second Circuit Court of Appeals[1] held that possession at the time of adjudication of bankruptcy, or before or after such adjudication, gave rise to a presumption of continuing possession at the time of the request for a turnover order.[2] In contempt proceedings brought for failure to obey the turnover order, the bankrupt persistently claimed inability to comply with the order and claimed that he did not have possession of the property at the time of issuance of the order. The Second Circuit Court of Appeals,[3] admitting the facts indicated that he was actually unable to comply with the order, nevertheless affirmed the holding of the district court that the bankrupt be jailed until he complied. On appeal to the United States Supreme Court,[4] the judgment was vacated and it was held that the controlling factor in the contempt proceedings was the issue of the present ability of the bankrupt to comply with the turnover order, and that the decision in *Oriel v. Russell*[5] did not compel the court to commit the bankrupt for contempt despite the presence of a belief of inability to comply.

The case of *Oriel v. Russell* establishes the rule that in contempt proceedings where the purpose of the proceedings is not to punish the bankrupt for refusal to obey the order but rather to aid as a part of the bankruptcy procedure in coercing the bankrupt to produce assets which have been judicially determined to be in his possession in the proceedings for the turnover order,[6] the decision of the court in issuing the turnover order is res judicata and cannot be attacked collaterally.[7] Reaffirming this holding, the majority of the court in the instant case says, "But application of that rule in these civil contempt cases means only that the bankrupt, confronted by the order establishing prior possession, at a time when continuance thereof is the reasonable inference, is thereby confronted by a prima facie case which he can successfully

[1] Zeitz v. Maggio, 145 F. 2d 241 (C.C.A. 2d 1944), *cert. denied*, 324 U. S. 841 (1945).

[2] The second circuit applies this presumption with almost conclusive effect. Cohen v. Jeskowitz, 144 F. 2d 39 (C.C.A. 2d 1944); Robbins v. Gottbetter, 134 F. 2d 843 (C.C.A. 2d 1943); Seligson v. Goldsmith, 128 F. 2d 977 (C.C.A. 2d 1942).

[3] *In re* Luma Camera Service, Inc., 157 F. 2d 951 (C.C.A. 2d 1946).

[4] Maggio v. Zeitz, 68 Sup. Ct. 401 (1948).

[5] 278 U. S. 358 (1929).

[6] 52 STAT. 843 (1938), 11 U.S.C. §11(a) (13) (1940); 52 STAT. 859-860 (1938), 11 U.S.C. §69 (1940); *In re* MacNaught, 225 Fed. 511 (Mass. 1903) (the power to commit is used to compel obedience, not punish for disobedience).

[7] Oriel v. Russell, 278 U.S. 358 (1929); *cf. In re* Free and Flinck, Inc., 18 F. Supp. 802 (E.D. N.Y. 1937) (newly discovered evidence). *Contra: In re* Elias, 240 Fed. 448 (E.D. N.C. 1917) (Many cases before the decision in *Oriel v. Russell* held that evidence of happenings before or after the issuance of the turnover order could be considered in the contempt proceedings.).

meet only with a showing of present inability to comply. He cannot challenge the previous adjudication of possession, but that does not prevent him from establishing lack of present possession."[8] Any evidence that the bankrupt may give which satisfies the court that he does not presently have possession of the property, and cannot comply with the order, is sufficient.[9]

It must be kept in mind that this is a civil contempt[10] which is not for the purpose of punishment for concealment of assets but rather for use in coercing the bankrupt to turn over assets when it appears that no other sanction is accomplishing this. It can hardly be denied that the conclusion of the court in the instant case is just and proper because if it is proven to the court's satisfaction that the bankrupt does not have possession of the goods, there can be no purpose in imprisonment to coerce him into giving up that which he does not have. The dissent, affirming the decision of the circuit court of appeals, would in effect commit the bankrupt fruitlessly as the court must release him immediately since it already is satisfied that he cannot comply with the order.

There are two important considerations the court must note in laying down the law applicable to this contempt proceeding. First, there is the desire to aid the trustee in his administration of the bankrupt estate and to prevent the bankrupt from escaping his duties under the law because of a weak weapon in the hands of that law.[11] Second, there is the feeling that the bankrupt should not be imprisoned unless the court is reasonably certain that in so doing its purpose will be effected—to put him into jail otherwise would be punishment for debt rather than an instrument of coercion.[12] The bankruptcy act provides specifically for an action by the trustee against the bankrupt for fraudulent con-

[8] Maggio v. Zeitz, 68 Sup. Ct. 401, 411 (1948).

[9] Toplitz v. Walser, 27 F. 2d 196 (C.C.A. 3d 1928) (bankrupt sufficiently answers the inquiry as to the property previously adjudged in his possession having passed out of his control by convincing the court that he is physically unable to obey the order). See Kreitman, *The Presumption of Continued or Present Possession in Turnover Proceedings,* A3 CORP. REORG. AND AM. BANKR. REV. 326 (1940).

[10] *See* Gompers v. Buck's Stove and Range Co., 221 U. S. 418, 442 (1911).

[11] *See* Oriel v. Russell, 278 U. S. 358, 363 (1929) (the contempt proceedings are intended to compel, against the reluctance of the bankrupt, performance by him of his lawful duty). In California the trustee in bankruptcy may obtain a money judgment in the state court against the bankrupt in case the contempt proceedings are unavailing because of absence of proof by the trustee of his ability to comply with the order. Sampsell v. Gittelman, 55 Cal. App. 2d 292, 130 P. 2d 486 (1942), A5 CORP. REORG. AND AM. BANKR. REV. 35.

[12] *In re* Heppellee, 2 F. Supp. 663 (Mass. 1932) (contempt is not a substitute for imprisonment for debt); *In re* MacNaught, 225 Fed. 511 (Mass. 1903). It is now settled that punishment for contempt for disobedience of the turnover order is not imprisonment for debt since the bankrupt does not owe the property but rather is obliged to turn over that which has been placed in the custody of the trustee in bankruptcy for distribution to the creditors pursuant to the provisions of the bankruptcy law. 5 REMINGTON, BANKRUPTCY §2410 (4th ed. 1936).

cealment of assets[13] and this civil contempt must not be confused with that nor used in its place. But between the two considerations there must be some rule of law which will in some measure effect both.

The generally accepted rule of evidence in contempt proceedings for disobedience of the turnover order is the same as is necessary for the issuance of the order itself, namely; that it be "clear and convincing"[14] that the bankrupt can comply with the turnover order. Then, if he refuses to do so, he may be put into prison until such time as the court is satisfied that he is not able to comply.[15] The length of time he will be kept in prison will depend on the amount and type of property involved, the surrounding circumstances, and the discretion of the court. But this discretion as to the length of imprisonment must not be abused and the imprisonment must be no longer than necessary for the court to satisfy itself that the bankrupt cannot comply with the order.[16]

In holding that the evidence for commitment for contempt must be beyond a reasonable doubt,[17] the concurring opinion is concerned solely with the desire to keep from committing the bankrupt to imprisonment unless the court is positive that he is able to comply with the order. This, of course, in requiring a different rule of evidence for commitment for contempt from that necessary to the issuance of the turnover order, rebuts any notion that the turnover order cannot be attacked collaterally in the contempt proceedings[18] and can only result in dissipating the bankruptcy law because under this rule the bankrupt can, by injecting any element of doubt in the mind of the court, escape the coercive arm of the law. It is true that imprisonment is a heavy weapon, but when all else has failed, it is one that must be resorted to in order that the bankrupt not be allowed to escape from his moral and

[13] 52 STAT. 855-856 (1938), 11 U.S.C. §52(b) (1940).

[14] "With reference to the character or degree of proof in establishing a civil fraud, the authorities are quite clear that it need not be beyond a reasonable doubt, because it is a civil proceeding. . . . We think it would be going too far to adopt the severer rule of criminal cases and would render the bankruptcy system less effective." Oriel v. Russell, 278 U. S. 358, 364, 365 (1929).

[15] *In re* Roxy Liquor Corp., 107 F. 2d 533 (C.C.A. 7th 1939) (the bankrupt has the legal power to end his confinement by turning over the property and the assumption is he would do this if able rather than endure a prolonged confinement).

[16] "Where it [commitment] has failed, and when a reasonable interval of time has supplied the previous defects in the evidence, and has made sufficiently certain what was doubtful before, namely the bankrupt's inability to obey the order, he has always been released, ..." Oriel v. Russell, 278 U. S. 358, 366 (1929).

[17] Before *Oriel v. Russell,* there was a split in authority as to whether the proof had to be beyond a reasonable doubt or a mere preponderance. *In re* Elias, 240 Fed. 448 (E.D. N.C. 1917) (a mere preponderance); Stuart v. Reynolds, 204 Fed. 709 (C.C.A. 5th 1913) (beyond a reasonable doubt); *In re* Adler, 170 Fed. 634 (E.D. Okla. 1908) (beyond a reasonable doubt); Moody v. Cole, 148 Fed. 295 (Me. 1906) (beyond a reasonable doubt); *In re* Switzer, 140 Fed. 976 (S.C. 1905) (beyond a reasonable doubt); *See In re* Felson, 124 Fed. 288, 289 (N.D. N.Y. 1903) (a mere preponderance). See also 5 REMINGTON, BANKRUPTCY §2411 (4th ed. 1936).

[18] *But see* Oriel v. Russell, 278 U. S. 358, 362 (1929).

legal duty, that of providing his assets for the satisfaction of creditors.[19] He is given the advantage of being able to start life anew once the bankruptcy proceedings are completed, and is only fair that he submit to the powers of the court which only wants him to do his part.

The dissent would have the evidence confined in all cases to the showing of events since the turnover order making it impossible for the bankrupt to comply,[20] and would make it incumbent upon the bankrupt to produce this evidence or else be adjudged in contempt without regard to any other factors. If this be so, then we have the very situation as in the instant case where the court admits the inability to comply with a turnover order issued by it, and yet because of precedent from which the court cannot extricate itself,[21] it commits the bankrupt for contempt. Holding that the bankrupt, in order to escape imprisonment for contempt, must show something happening since the issuance of the turnover order[22] puts him into a difficult position, to say the least.

The issues in both the petition for the turnover order and the contempt proceedings are present possession of the property, but possession as of different dates. The issuance of the turnover order determines the property to be in the possession of the bankrupt on the date of the order, but the court must be convinced that the bankrupt still has the property or its proceeds in his custody at the time of the contempt proceedings before it can properly commit him to jail for disobedience of the order. As for the evidence necessary on the part of the bankrupt to prove nonpossession at the time of the contempt proceedings, the court says in the instant case: "Of course we do not attempt to lay down a comprehensive or detailed set of rules on this subject. They will have to be formulated as specific and concrete cases present different aspects of the problem."[23]

The Supreme Court in the instant case neither discards the rule of the *Oriel* case as it pertains to the res judicata[24] effect of the turnover order nor reverts to the holdings of many cases before *Oriel v. Rus-*

[19] 5 REMINGTON, BANKRUPTCY §2410 (4th ed. 1936).

[20] Justice Frankfurter delivered the dissent.

[21] The second circuit has six circuit judges who never sit *en banc* and presumably deem it undesirable for the majority of one panel to have a different view from that of another panel.

[22] *In re* Kasimov, 81 F. 2d 531 (C.C.A. 6th 1936); Sarkes v. Wells, 37 F. 2d 339 (C.C.A. 6th 1930); *In re* Siegler, 31 F. 2d 972 (C.C.A. 2d 1929). See Kreitman, *The Presumption of Continued or Present Possession in Turnover Proceedings,* A3 CORP. REORG. AND AM. BANKR. REV. 325, 326 (1940). See also McGovern, *Aspects of the Turnover Proceedings in Bankruptcy,* 9 FORD. L. REV. 316 (1940).

[23] Maggio v. Zeitz, 68 Sup. Ct. 401, 411 (1948).

[24] For application of the doctrine of res judicata there must be (1) identity of the thing, (2) identity of the cause, and (3) identity of the parties in the character in which they are litigant. W. A. and G. Packet Co. v. Sickels, 65 U. S. 242 (1860).

sell[25] to the effect that the issuance of the turnover order has no probative value in the contempt proceedings. But it is held that the turnover order, once established by the trustee in bankruptcy, puts the burden upon the bankrupt to prove to the satisfaction of the court that he is physically unable to comply with that order.[26] He cannot attack the validity of the turnover order, but he can meet the burden imposed upon him by the issuance of that order with evidence showing that he is not now in possession of the property and thus incapable of complying. The bankrupt is not bound to the showing of happenings since the issuance of the order making him unable to comply, in order to escape imprisonment, unless the court issuing the turnover order followed the rule of the *Oriel* case that the evidence should be "clear and convincing"[27] before the order can issue, and in the majority of cases the courts will have adhered to that rule. However, when the order upon its face indicates that the court did not issue it upon "clear and convincing" evidence, but rather because of an inflexible rule of law which they feel constrained to follow because of precedent,[28] the Supreme Court cannot justifiably continue the unreasonable presumption that the bankrupt has in his possession the goods and can comply with the order when such is obviously not the fact. This was not the intent of the *Oriel* case but would be rather a perversion of the rule there established, which rule must be applied by the court only when the circumstances warrant.[29]

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Discovery—Inspection of Chattels

In a recent case,[1] the plaintiff sued a bottling company for damages for an illness allegedly resulting from the consumption of part of a bottled drink containing a deleterious substance. Before trial, the defendant requested that the plaintiff allow it to have a chemical analysis made of the remaining contents of the bottle. Plaintiff refused, and the defendant moved that he be required to deposit the bottle with the clerk of court so as to permit an analysis to be made. The trial court denied the motion. In affirming, the South Carolina Supreme Court *held:* There is no statutory authorization for requiring a party to pro-

[25] *In re* Elias, 240 Fed. 448 (E.D. N.C. 1917). 5 REMINGTON, BANKRUPTCY §2428 (4th ed. 1936).

[26] Power v. Fuhrman, 220 Fed. 787 (C.C.A. 9th 1915).

[27] See note 14 *supra.*

[28] Other circuits limit the presumption of continued possession according to circumstances. Brune v. Fraidin, 149 F. 2d 325 (C.C.A. 4th 1945), 31 VA. L. REV. 938, *affirming* 55 F. Supp. 129 (D.C. Md. 1944), 31 VA. L. REV. 204.

[29] In 95 U. OF PA. L. REV. 789 (1947) the decision of the circuit court of appeals in committing the bankrupt for contempt is strongly condemned.

[1] Welsh v. Gibbons, 211 S. C. 516, 46 S.E. 2d 147 (1948).