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BANKRUPTCY-CONTEMPT-PRESUMPTIONS-FINALITY OF TURNOVER ORDERS IN CONTEMPT ACTIONS AND THE PRESUMPTION OF CONTINUED POSSESSION

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COMMENTS

BANKRUPTCY—CONTEMPT—PRESUMPTIONS—FINALITY OF TURN-OVER ORDERS IN CONTEMPT ACTIONS AND THE PRESUMPTION OF CONTINUED POSSESSION—Problems of jurisprudence and bankruptcy are raised by *Maggio v. Zeitz*,¹ a recent decision of the United States Supreme Court. The facts were these: In April, 1942, the Luma

¹ 333 U.S. 56, 68 S.Ct. 401 (1948).

Camera Service was adjudged a bankrupt. Defendant was its principal officer. The bankrupt's books showed a large and unusual merchandise shortage for November and December, 1941. Despite defendant's denial, the referee and district judge were satisfied that defendant had extracted the property from the estate before bankruptcy. But there was no evidence that defendant retained the goods or their proceeds. Relying on a presumption of continued possession, the referee ordered defendant to return the property or the proceeds, set at \$17,500. The turnover order was affirmed by the district court in December, 1943.² The circuit court of appeals affirmed,³ and the Supreme Court denied certiorari.⁴ Defendant did not obey the order, and in a contempt action he reiterated his inability to comply and his denial of the taking. But he was committed for contempt of court in June, 1945; he would stay in jail, said the order, until he produced the property or \$17,500. The primary basis of committal was the presumption of continued possession. The circuit court of appeals again affirmed,⁵ but stated that the presumption was fictitious and that the court knew that defendant could not comply with the order. On certiorari, the Supreme Court reversed and remanded to the district court for further proceedings. Justice Jackson, for the majority, stated that while the basis of the turnover order is *res judicata*, present possession is in issue in the contempt proceeding, and rigid application of the presumption of continued possession is unwarranted. Justices Black and Rutledge felt that the entire proceeding was illegal, and wanted the case dismissed. Justice Frankfurter dissented.

I

The turnover order is a judicial gloss on the Bankruptcy Act. While there are criminal sanctions for fraudulent concealment by bankrupts,⁶ "criminal prosecutions do not recover concealed treasure."⁷ The desire to recover hidden assets led to the turnover order and its summary nature. Specific justification, however, is more illusory. The

² *In re Luma Camera Service, Inc.*, (D.C. N.Y. 1943) 57 F. Supp. 632.

³ Without opinion, *Zeitv v. Maggio*, (C.C.A. 2d, 1944) 145 F. (2d) 241.

⁴ 324 U.S. 841, 65 S.Ct. 587 (1945).

⁵ *In re Luma Camera Service, Inc.*, (C.C.A. 2d, 1946) 157 F. (2d) 951. "Although we know that Maggio cannot comply with the order, we must keep a straight face and pretend that he can, and must thus affirm orders which first direct Maggio 'to do an impossibility and then punish him for refusal to perform it.'" *Id.* at 955. Judge Frank wrote the opinion, in which Judge L. Hand concurred. Judge Swan concurred in the result. Noted, 95 UNIV. PA. L. REV. 789 (1947); 42 ILL. L. REV. 396 (1947).

⁶ Bankruptcy Act, § 29(b), 52 Stat. L. 842 at 855 (1938), 11 U.S.C. (1940) § 52(b).

⁷ Principal case at 404.

statute enjoins bankruptcy courts to "cause the estates of bankrupts to be collected";⁸ they may make such orders "as may be necessary for the enforcement of the provisions of this Act."⁹ But these are generalizations, and prove very little.¹⁰ Another argument often advanced is that the very assumption of possession of the bankrupt's estate leads to two results: power to issue and enforce orders which will make the jurisdiction mean something,¹¹ and power to make the trial of issues speedy and ancillary to the main action (that is, summary rather than plenary).¹²

Justices Black and Rutledge are not convinced by this rationale. They would wait for Congressional authorization before sanctioning procedure which culminates in imprisonment of the defendant. Their opinion, however, appears unique in judicial circles, for the courts have had no trouble in finding a basis for jurisdiction in the limited number

⁸ Bankruptcy Act, § 2(a)7, 52 Stat. L. 842 at 843 (1938), 11 U.S.C. (1940) § 11(a)7.

⁹ Bankruptcy Act, § 2(a)15, 52 Stat. L. 842 at 843 (1938), 11 U.S.C. (1940) § 11(a)15.

¹⁰ Section 2(a)7, *id.*, is an aid in establishing jurisdiction; but re the summary nature of the proceedings (see note 12, *infra*), the language is harmful rather than helpful. There is a clause stating that the courts have this jurisdiction "except as herein otherwise provided." And section 23, *id.* at 854, clearly contemplates plenary suits. But see *Williams v. Austrian*, 331 U.S. 642, 67 S.Ct. 1443 (1947), noted in 33 VA. L. REV. 764 (1947).

Section 2(a)15, 52 Stat. L. 842 at 843 (1938) proves too much so far as the summary character of the suit is concerned. If it authorizes summary procedure in any case, it authorizes it in every case—an argument negated by other terms of the act.

The act specifically provides for summary jurisdiction in §§ 41(b), 50(n), 57(l), 57(n), and 67(a)4. *Expressio unius est exclusio alterius*—?

See note 12, *infra*.

¹¹ *Mueller v. Nugent*, 184 U.S. 1, 22 S.Ct. 269 (1902); *Marcus v. Pennsylvania Trust Co. of Pittsburgh*, (C.C.A. 3d, 1927) 23 F. (2d) 303, and bankruptcy cases cited at 304; *Morehouse v. Pacific Hardware and Steel Co.*, (C.C.A. 9th, 1910) 177 F. 337; *In re Purvine*, (C.C.A. 5th, 1899) 96 F. 192. On the "inherent" power of any court to punish for contempt of its orders, see *Ex Parte Robinson*, 19 Wall. (86 U.S.) 505 at 510 (1874), and other cases cited in this footnote.

¹² See *Murphy v. John Hofman Co.*, 211 U.S. 562 at 568, 29 S.Ct. 154 (1909); *Taubel-Scott-Kitzmilller v. Fox*, 264 U.S. 426, 44 S.Ct. 396 (1924); Ross, "Federal Jurisdiction in Suits by Trustees in Bankruptcy," 20 IOWA L. REV. 565 (1935); *Williams v. Austrian*, 331 U.S. 642, 67 S.Ct. 1443 (1947), noted in 33 VA. L. REV. 764 (1947). "Summary" proceedings are generally of a speedy and informal character; a "plenary" action is full-blown and time-consuming. For the advantages of a fast administration in bankruptcy and the countervailing caution that efficiency may breed injustice, see Joint Hearings before Subcommittees of the Committees on the Judiciary on S. 3866, 72d Cong., 1st. sess., p. 608 (1932).

The vagaries of "constructive possession" bringing jurisdiction and summary procedure are detailed in comment, 40 COL. L. REV. 489 (1940). See 5 REMINGTON, BANKRUPTCY, 4th ed., § 2400 (1936).

of cases in which defendants have bothered to raise the issue.¹³ The profession has quite generally assumed that the turnover order is a plausible method for enforcing the statute.¹⁴ The *Maggio* case confirms this assumption. But the holding does not dispose of all the jurisdictional problems: defendant did not have a jury trial before he was jailed, and he may well claim that he is being imprisoned for debt.

Since the chancellor's hold on bankruptcy existed long before the Constitution,¹⁵ the denial of jury trial is seldom questioned. What questioning is recorded in the books, however, is directed toward the guarantee of a jury in civil actions.¹⁶ The general constitutional grant of bankruptcy power¹⁷ contains no words suggesting common law jurisdiction,¹⁸ and it is therefore reasonable to assume that no such radical change was anticipated when the Constitution was drafted. But should the grant of power be construed to exclude jury trial when the action is criminal? That the present Court would so conclude is doubtful, to say the least.¹⁹ Justice Black's objection is predicated on the thesis that the turnover order is essentially a judicial substitute for criminal proceedings for the bankrupt's fraudulent concealment of assets. His theory, then, is not the kind to be dismissed by a casual reference to the history of equity jurisdiction in bankruptcy. Yet his objection is based upon an assumption which the courts have uniformly held unwarranted: that the turnover-contempt process is an unjustified assertion of legislative power by the judiciary.²⁰

¹³ See cases in notes 11 and 12, *supra*.

¹⁴ The assumption is implicit, of course, in every turnover case. The flat statements in 2 COLLIER, BANKRUPTCY, 14th ed., 517 (1940), and 5 REMINGTON, BANKRUPTCY, 4th ed., § 2401 (1936), seem to reflect the long understanding of the profession.

¹⁵ The first English bankruptcy act vested jurisdiction in the Chancellor. Equitable jurisdiction has continued ever since. See 8 HOLDSWORTH, A HISTORY OF ENGLISH LAW, 2d ed., 238 (1937).

¹⁶ Holding that the denial of jury trial is constitutional, *Hirschfield v. Bryant*, (C.C.A. 8th, 1926) 14 F. (2d) 931; *Kattelman v. Madden*, (C.C.A. 8th, 1937) 88 F. (2d) 858.

¹⁷ "The Congress shall have power . . . to establish . . . uniform laws on the subject of Bankruptcies throughout the United States." U.S. Const., Art. I, § 8.

¹⁸ "In suits at common law . . . the right of trial by jury shall be preserved. . . ." U.S. Const., Amendments, Art. VII.

¹⁹ "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ." U.S. Const., Amendments, Art. VI. But see cases holding defendant in *criminal* contempt of a turnover order: *Morehouse v. Pacific Hardware and Steel Co.*, (C.C.A. 9th, 1910) 177 F. 337; *Clay v. Waters*, (C.C.A. 8th, 1910) 178 F. 385; *Matter of Ferri*, (D.C. Mo. 1911) 33 Am. Bank. Rep. 565. The Sixth Amendment, of course, does not apply to criminal contempt proceedings. See note 27, *infra*. That it does apply to full-dress criminal prosecutions, see 2 COLLIER, BANKRUPTCY, 14th ed., § 19.07 (1940).

²⁰ Frontier justice is obviously not the only alternative to jury trial. Defendant surely receives a fair hearing from a modern federal judge. See the language in Walker

Justices Black and Rutledge also believe that the contempt committal constitutes imprisonment for debt, and is thus in violation of the federal statute²¹ which prohibits such imprisonment if the state where the district court is sitting so declares.²² Again a battery of precedent may be levelled against this view.²³ Implicit in the cases is the feeling that the desirability of efficient enforcement devices against the bankrupt outweighs judicial and legislative abhorrence of imprisonment for debt. An analogy is the contempt action in alimony cases.²⁴ But if the refusal to pay alimony is caused only by financial inability, defendant is not in contempt,²⁵ and the committal regains its character of imprisonment for debt. Of course if we concede that the finding of continued possession is correct, there is no basis whatever for calling

v. Sauvinet, 92 U.S. 90 (1875), holding that the due process clause of the Fourteenth Amendment does not include jury trial. But defendants may be wary of the mercies of bankruptcy judges surfeited with tall tales. Consider the sympathy of Judge Augustus Hand: "The stories of bankrupts who conceal assets have assumed a form almost as conventional as the plots one finds in the plays of Plautus and Terence. Indeed, if they were told with art and possessed more fertility of imagination, a new anthology might be gathered for American literature from the bankruptcy field. As it is, they contain little more than standardized forms of falsehood so often reiterated as to be neither credible nor interesting." *In re Abesbaum*, (C.C.A. 2d, 1934) 70 F. (2d) 628.

²¹ 28 U.S.C. (1940) § 843, 14 Stat. L. 543 (1867). No case found discusses the "fraud" exception to some imprisonment for debt prohibitions with reference to bankrupts' original fraudulent taking. Would the present court determine that the purpose of the Bankruptcy Act imports a Congressional exception to the above statute?

²² Justice Black is not so specific as the text suggests. He says that the procedure "flavors too much of the old discredited practise of imprisonment for debts—debts which people are unable to pay." Principal case at 413. New York, where the district court sat in the *Maggio* case, has no constitutional objection to imprisonment for debt. Nor does the federal Constitution. Justice Black's remarks are probably directed toward a desirable policy for the judiciary when Congress has not spoken—or are not intended for the particular case at bar.

²³ See, e.g., *Mueller v. Nugent*, 184 U.S. 1 at 13, 22 S.Ct. 269 (1902); *In re Rosser*, (C.C.A. 8th, 1900) 101 F. 562; 1 COLLIER, BANKRUPTCY, 14th ed., 247 (1940). If a return of books of account is ordered, the problem is obviously different in many respects. See McGovern, "Aspects of the Turnover Proceeding in Bankruptcy," 9 FORDHAM L. REV. 313 at 318-332 (1940).

Logically extended, Justice Black's reasoning would apply to the criminal prosecution for fraudulent concealment (note 6, supra). But this part of the Bankruptcy Act would surely be considered an exception to the statute noted in note 21, supra. See also 22, supra.

²⁴ See annotation, 30 A.L.R. 130 (1924).

²⁵ Annotation, 22 A.L.R. 1256 (1923), supplemented in 31 A.L.R. 649 (1924), 40 A.L.R. 546 (1926), 76 A.L.R. 390 (1932), 120 A.L.R. 703 (1939). The statement that inability to pay is not excused where it is caused by plaintiff's "fault" does not seem supported by the cases, if "fault" is used in the sense of *previous* fraud or error. See *Register v. State*, 8 Minn. 185 (1863), reaffirmed in dictum, *Hurd v. Hurd*, 63 Minn. 443 at 445, 65 N.W. 728 (1896); see note 48, infra.

the turnover order imprisonment for debt. Assuming possession, the procedure is directly parallel to a court's order to a testamentary trustee to distribute assets in his hands; or a direction to a bankruptcy trustee to pay a dividend. The central issue, then, is the measure of proof required in demonstrating ability to pay. And this is the real problem in turnover cases.

2

The law must act on probabilities, not certainties.²⁶ "Proof" is a question of degree. Yet a large measure of probability in turnover cases may be obtained by placing the burden of proof on the trustee, and demanding "clear and convincing" evidence of the bankrupt's possession. This is the rule of *Oriel v. Russell*,²⁷ reaffirmed in the *Maggio* case. But it is usually very difficult for the trustee to secure evidence of the bankrupt's possession,²⁸ and, to aid him, the lower federal courts have used the presumption that goods once traced to a person remain in his possession until the contrary appears.²⁹ The force of this presumption has varied among the several circuit courts of appeals;³⁰ but in some circuits, particularly the second, the presumption is often the whole basis for meeting the burden of proof, even when such previous possession as is proved occurred long before the turnover order.³¹

This is a presumption based on policy, not logic.³² Proof of the original taking is not difficult, relatively speaking. But without the presumption of continued possession, trustees are hamstrung by bankrupts' notable reluctance to reveal the present resting place of the

²⁶ "Every year if not every day we must wager our salvation upon some prophecy based upon imperfect knowledge." Holmes, J., dissenting, in *Abrams v. United States*, 250 U.S. 616 at 624, 630, 40 S.Ct. 17 (1919).

²⁷ 278 U.S. 358, 49 S.Ct. 173 (1929). In the *Maggio* case the Court dismisses Justice Black's suggestion of a "beyond reasonable doubt" test by saying that this is not a criminal contempt proceeding. See Moskowitz, "Contempt of Injunctions, Civil and Criminal," 43 COL. L. REV. 780 at 783, 818 (1943); 1 COLLIER, BANKRUPTCY, 14th ed., 244 (1940). Would the Court uphold a committal for criminal contempt of a turnover order? See note 19, *supra*.

²⁸ See McGovern, "Aspects of the Turnover Proceeding in Bankruptcy," 9 FORDHAM L. REV. 313 at 332, 333 (1940).

²⁹ 2 WIGMORE, EVIDENCE, 3d ed., § 382 (1940); 9 *id.*, § 2530.

³⁰ The cases are myriad and the views of the circuit courts of appeal various. For an excellent summary of those views, see 42 ILL. L. REV. 396 (1947).

³¹ Justice Frankfurter collects many of the cases in his dissenting opinion, principal case at 417, note 17. At page 414 he explains the Second Circuit's peculiar doctrine of precedent, which led, for example, to affirmance of the contempt committal in the *Maggio* case although two of the three judges were unalterably opposed to its basis and the Supreme Court had not spoken. Other collections of cases in the Second Circuit and other circuits "rigidly applying" the presumption: McGovern, "Aspects of the Turnover Proceeding in Bankruptcy," 9 FORDHAM L. REV. 313 at 321-329 (1940); principal case at 403; 42 ILL. L. REV. 396 at 399 (1947).

³² See THAYER, A PRELIMINARY TREATISE ON EVIDENCE 314 (1898).

property or money which they have extracted.³³ If the bankrupt wishes to rebut the presumption by showing what he did with the property, he may do so: all agree that this is a "presumption of fact."³⁴ But the bankrupt's rebuttal involves an admission of criminal liability for the original taking,³⁵ and his reticence is understandable. It is easy to answer that if he did commit a crime the law should not be chary of his feelings, and that a forced admission still accomplishes results from the point of view of bankruptcy administration. This, however, is an admission that the presumption is based on policy, and does not elicit the truth of present possession. The lack of rebuttal is not all that is artificial in this picture. As Judge Learned Hand put it, "there is not the slightest reason to suppose that such loot remains unspent in the hands" of the bankrupt.³⁶ If money or salable merchandise is extracted, the whole character of the transaction points to quick dissipation. When yesterday's possession is shown, today's possession is logical; but when many months have elapsed and the presumption is used to sustain the whole burden of proof, it is clear that policy alone supports the result.

This raises several fundamental questions. The first is whether a turnover order retains its character as a civil proceeding, and an order for "return" of property or proceeds, when it is not bottomed on the fact that defendant retains the goods or money. Justice Black's contentions about jury trial and imprisonment for debt take on color and substance in this context.³⁷ And a due process consideration enters the scene.³⁸ A presumption must have some *rational* connection with the fact to be proved to be valid under the Fifth³⁹ and Fourteenth Amendments.⁴⁰ Although the Supreme Court's opinion in the *Maggio* case

³³ See note 28, *supra*.

³⁴ McGovern, "Aspects of the Turnover Proceeding in Bankruptcy," 9 *FORDHAM L. REV.* 313 at 319 (1940). See 9 *WIGMORE, EVIDENCE*, 3d ed., § 2491 (1940).

³⁵ See note 6, *supra*.

³⁶ *Robbin v. Gottbetter*, (C.C.A. 2d, 1943) 134 F. (2d) 843 at 844.

³⁷ Justice Black does not seem to rest his contentions on the fact that the presumption of continued possession is a fiction. But he quotes Judge Frank's remarks in the lower court: "We would hold that a *turnover proceeding may not, via a fiction, be substituted for a criminal prosecution so as to deprive a man of a basic constitutional right, the right of trial by jury.*" In re *Luma Camera Service*, (C.C.A. 2d, 1946) 157 F. (2d) 951 at 953-954 (1946). (Italics are Judge Frank's.) The clause "via a fiction" in the above statement seems to mean that Judge Frank objects mainly to the presumption, not the turnover-contempt process in general.

Judge Frank also believes that "one consequence of the fiction is that respondent may be twice punished for the same offense." *Ibid*.

³⁸ As a psychological factor, at least. On courts' action as governmental action for the purposes of due process clauses, see 45 *MICH. L. REV.* 733 (1947).

³⁹ *Tot v. United States*, 319 U.S. 463 at 467, 63 S.Ct. 1241 (1943).

⁴⁰ *Western and Atlantic R.R. v. Henderson*, 279 U.S. 639, 49 S.Ct. 445 (1929).

does not discuss these issues, they are surely a consideration in the Court's disapproval of the rigid use of the presumption. The Court states that one-time possession should serve only as one fact among many considered in the issue of plaintiff's ability to comply.

Even if we concede that the constitutional barriers are hurdled, we must decide whether the policy supporting the presumption is one warranting its use. The *Maggio* case is a powerful blow at the entire turnover procedure. Without sweeping use of the presumption of continuing possession, the trustee is usually without evidence. Can this result be called desirable?

We have assumed that the turnover procedure usually gains assets for the bankrupt's creditors. Superficially, at least, that assumption seems justified. The case reports, however, are no help if we would consider practical consequences. Men experienced in the day to day workings of bankruptcy must be consulted. And they are not in agreement. Judge Augustus Hand feels that the process yields dollars-and-cents results.⁴¹ Judge McPherson agrees.⁴² Mr. McGovern is convinced that the turnover procedure is so helpful that the burden of persuasion should be placed on the bankrupt when the issue of inability to comply is raised.⁴³ But Judge Learned Hand disagrees: "It would not disturb us that without the presumption such proceedings would generally fail, except when they were directed against specific articles like books of account. We are not persuaded that after allowances and expenses are all paid, substantial sums often reach the creditors. . . ." ⁴⁴ He says further: "And though it were not so, it would be at too high a cost that the law should proceed in the face of a baser ignorance which it dares not aver and must cover by a transparent fiction; such abuse of its processes discredits it generally and impairs its integrity, which in the end depends on unswerving allegiance to the truth, so far as truth is accessible."⁴⁵

3

But the *Maggio* case reached the Supreme Court in its second stage, the contempt proceeding. Generally, an equity decree cannot be

⁴¹ "Nor am I persuaded that the creditors of thieving bankrupts should be curtailed in employing the only practical means of obtaining restitution and one which frequently results in substantial recoveries." Concurring opinion, *Robbin v. Gottbetter*, (C.C.A. 2d, 1943) 134 F. (2d) 843 at 845.

⁴² See *In re Epstein*, (D.C. Pa. 1913) 206 F. 568, *affd.*, *Epstein v. Steinfeld*, (C.C.A. 3d, 1914) 210 F. 236, quoted at length by Chief Justice Taft in *Oriel v. Russell*, 278 U.S. 358 at 366, 49 S.Ct. 173 (1929).

⁴³ McGovern, "Aspects of the Turnover Proceeding in Bankruptcy," 9 *FORDHAM L. REV.* 313 at 332 (1940).

⁴⁴ *Seligson v. Goldsmith*, (C.C.A. 2d, 1942) 128 F. (2d) 977 at 979.

⁴⁵ *Ibid.*

collaterally attacked,⁴⁶ and *Oriel v. Russell*⁴⁷ held that the turnover order is *res judicata* in the contempt action. In his dissent, Justice Frankfurter states that in the *Maggio* case the time had passed for repairing any damage caused by the presumption of continued possession. If *Oriel v. Russell* precludes examination of the turnover order, how can defendant purge his contempt by simply continuing his denial of the taking? Although there was no unanimity before the *Maggio* case, the lower federal courts seemed to sustain Justice Frankfurter's interpretation of the *Oriel* opinion.⁴⁸ Only after an indefinite time in jail has "shown" that defendant does not retain the goods should he be released.⁴⁹ But as Justice Jackson points out, the turnover-contempt procedure is unlike the usual contempt action so far as attacking the original finding is concerned. "In the two successive proceedings the same question of possession and ability to produce the goods is at issue, but as of different points of time."⁵⁰ The majority in the *Maggio* case believe that mere passage of time may constitute a "change of facts." Justice Frankfurter would demand that the change be of a more substantial nature.

It is almost impossible to pigeon-hole the results as to "desirability" or "undesirability." The threat of imprisonment is materially reduced by the *Maggio* holding. The contempt committal has been used as a kind of experiment—to see whether defendant still controls the property he took. "I have known brief confinement to produce the money promptly, thus justifying the court's incredulity, and I

⁴⁶ *Howat v. Kansas*, 258 U.S. 181, 42 S.Ct. 277 (1922), and cases cited. See note, 59 HARV. L. REV. 293 (1945); *Krentler-Arnold Hinge Last Co. v. Leman*, (C.C.A. 1st, 1931) 50 F. (2d) 699, *affd.*, 284 U.S. 448, 52 S.Ct. 238 (1932). If Justice Black's view were adopted, however, this rule might be of no avail: collateral attack is said to be effective if the court originally had no "jurisdiction over the subject matter." *In re Sawyer*, 124 U.S. 200, 8 S.Ct. 482 (1888). But see 45 MICH. L. REV. 469 at 499 (1947); and *United States v. United Mine Workers*, 330 U.S. 258, 67 S.Ct. 677 (1947).

⁴⁷ 278 U.S. 358, 49 S.Ct. 173 (1929). See L. Hand, J., *In re Frankel*, (D.C. N.Y. 1911) 184 F. 539.

⁴⁸ See 42 ILL. L. REV. 396 at 399 (1947). And see *In re Epstein*, (D.C. Pa. 1913) 206 F. 568, *affd.*, *Epstein v. Steinfeld*, (C.C.A. 3d, 1914) 210 F. 236, quoted at length by Chief Justice Taft in the *Oriel* case, 278 U.S. 358 at 366, 49 S.Ct. 173 (1929).

The alimony analogy seems to support the majority. See cases in note 16, *supra*. Chief Justice Taft also cites *Hurd v. Hurd* in his *Oriel* opinion, *id.* at 365.

⁴⁹ See, however, *In re Roxy Liquor Corp.*, (C.C.A. 7th, 1939) 107 F. (2d) 533, where bankrupt's fifty-four days in jail failed to rebut the presumption of possession. The statement in *Clements v. Coppin*, (C.C.A. 9th, 1934) 72 F. (2d) 796 at 799, has substantial support in dicta: "The inability of the offender to comply with the order may at any time, in its discretion, on a proper application, be inquired into by the District Court." See 5 REMINGTON, BANKRUPTCY, 4th ed., § 2428 (1936).

⁵⁰ Principal case at 410.

have also known it to fail.”⁵¹ This experimentation is obviously a hardship on an innocent bankrupt.⁵² It is equally obvious that a trustee’s threat is enfeebled by the *Maggio* case, if we assume that the bankrupt is guilty.⁵³ Policies of efficient bankruptcy administration and protection of the innocent debtor conflict. Whether or not the result is desirable depends upon which of these policies is emphasized.

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⁵¹ *In re Epstein*, (D.C. Pa. 1913) 206 F. 568, *affd.*, *Epstein v. Steinfeld*, (C.C.A. 3d, 1914) 210 F. 236, quoted by Chief Justice Taft in the *Oriel* case, 278 U.S. 358 at 366.

⁵² One facet of that hardship may be deduced from the fact that bankruptcy no longer carries the social stigma that imprisonment does. See Radin, “Debt,” 5 *ENCR.C. Soc. Sci.* 2 at 38 (1931).

⁵³ The easiest way out, of course, is to apply the presumption of continued possession and the contempt committal only to those who are guilty and who still have the goods.