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## Aspects of the Turnover Proceeding in Bankruptcy

### Cover Page Footnote

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## ASPECTS OF THE TURNOVER PROCEEDING IN BANKRUPTCY

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THE trustee in bankruptcy is vested, upon his qualification, with title to all the non-exempt property which belonged to the bankrupt on the date the petition was filed.<sup>1</sup> But whereas this title placidly comes to rest with him by operation of law, strenuous effort on the part of the trustee may be required to gather together all the assets of the estate, wherever they may be found. His search for missing property may lead him to the bankrupt or to third parties, often the bankrupt's friends or relatives or officers of a bankrupt corporation, who are found to be concealing or withholding money or goods which are part of the estate in bankruptcy. In such circumstances the trustee,<sup>2</sup> as the chosen representative of the creditors,<sup>3</sup> has the right and duty to vindicate his title and right of possession. To that end, he may effectively institute a summary proceeding to compel those who have the property to surrender it to him. This form of remedy is commonly known as the "turnover proceeding."

The turnover proceeding is begun by petition and order to show cause, is heard and determined by the referee in bankruptcy,<sup>4</sup> and, if successful, culminates in an order directing the respondent<sup>5</sup> to surrender or turn

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1. Bankruptcy Act § 70, 11 U. S. C. A. 110.

2. A receiver, though he has no title, may sometimes commence proceedings to compel the surrender of assets of the estate in bankruptcy. *Kattelman v. Madden*, 88 F. (2d) 888 (C. C. A. 8th, 1937); *In re J. H. Jackson Co.*, 15 F. (2d) 614 (C. C. A. 2d, 1926); *In re Harry L. Sugarman, Inc.*, 3 F. (2d) 436 (C. C. A. 2d, 1924). Usually, however, the turnover petition is filed by the trustee. The trustee may be substituted for the receiver in a pending proceeding. *Cf. In re Goldberg*, 91 F. (2d) 996 (C. C. A. 2d, 1937).

3. Bankruptcy Act § 44; 11 U. S. C. A. 72.

4. After adjudication and reference the designated referee had jurisdiction of all the proceedings except those required by the Bankruptcy Act or General Orders to be had before the Judge. GENERAL ORDERS IN BANKRUPTCY No. 12, SUB. 1. *In re Goldberg*, 91 F. (2d) 996, 997 (C. C. A. 2d, 1937). Bankruptcy Act § 1(9), 11 U. S. C. A. 1(9) provides: "'Court' shall mean the judge or the referee of the court of bankruptcy in which the proceedings are pending."

5. The person against whom the trustee seeks the turnover order is called the respondent and the trustee, the petitioner.

over to the trustee certain property constituting part of the assets of the estate in bankruptcy, said property having been found to be in respondent's possession or under his control.

It is important to note that this form of relief is granted in what is known as a summary proceeding.<sup>6</sup> Summary jurisdiction exists only when the court has in its possession the property which is the subject of controversy.<sup>7</sup> Upon the filing of the petition in bankruptcy all the bankrupt's property passes into the custody of the court of bankruptcy,<sup>8</sup> and when actual possession of the property is taken by the court, through its officers, the court of bankruptcy thereby acquires summary jurisdiction to hear and determine all questions respecting the title, possession or control of the property.<sup>9</sup> Such power to pass judgment on property in its possession is not peculiar to a court of bankruptcy but is inherent in any competent court and independent of authorization by statute.<sup>10</sup>

For the exercise of the court's summary jurisdiction, however, it is not necessary that the court, through its officers, have actual possession of the property in dispute. Constructive possession will suffice, and will be found to exist when assets of the estate in bankruptcy claimed by the trustee are in the actual possession or control of some third party who either makes no claim of right to the property or whose claim of right is merely colorable.<sup>11</sup> Since in the turnover proceeding the trustee

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6. The nature of the summary proceeding is discussed in 5 REMINGTON, BANKRUPTCY (4th ed. 1936) § 2400.

7. Not every dispute involving the rights of a trustee in bankruptcy may be adjudicated in a summary proceeding. When the court lacks the requisite possession of the property in controversy, the trustee must resort to the ordinary plenary suit, unless there is a specific statutory grant of summary jurisdiction. *Taubel-Scott-Kitzmiller v. Fox*, 264 U. S. 426, 430, 431 (1924).

8. *Ex parte Baldwin*, 291 U. S. 610, 615 (1934); *Mueller v. Nugent*, 184 U. S. 1, 14 (1902).

9. *Murphy v. Hofman Co.*, 211 U. S. 562 (1909).

10. *Murphy v. Hofman Co.*, 211 U. S. 562 (1909); *Ex parte Baldwin*, 291 U. S. 610, 615 (1934).

11. "Constructive possession is sufficient. It exists where the property was in the physical possession of the debtor at the time of the filing of the petition in bankruptcy, but was not delivered by him to the trustee; where the property was delivered to the trustee, but was thereafter wrongfully withdrawn from his custody; where the property is in the hands of the bankrupt's agent or bailee; where the property is held by some other person who makes no claim to it; and where the property is held by one who makes a claim, but the claim is colorable only. As every court must have power to determine, in the first instance, whether it has jurisdiction to proceed, the bankruptcy court has, in every case, jurisdiction to determine whether it has possession actual or constructive. It may conclude, where it lacks actual possession, that the physical possession held by some other

is seeking the surrender of property alleged to be in the actual physical possession of a third party, it is apparent that it is *constructive* possession of the bankrupt's property which there forms the foundation for the exercise of the court's summary jurisdiction. Thus before the trustee may successfully prosecute a turnover proceeding he must be able to show as a jurisdictional requirement that the respondent has no more than a colorable claim to the property.<sup>12</sup> If a substantial question of law or of fact is presented by respondent's adverse claim to the property in dispute, he may at the outset challenge the summary jurisdiction of the court and the trustee will be relegated to his plenary suit.<sup>13</sup> If the respondent does not by the assertion of a substantial adverse claim take exception to the court's summary jurisdiction that objection is waived.<sup>14</sup> When the issue is raised by timely objection, the court is called upon to decide at the threshold of the proceeding whether the adverse claim asserted by the respondent has substance or is merely colorable.<sup>15</sup> Such an inquiry may require extended hearings and the heart of the controversy may often be laid bare by an investigation which in its nature is only preliminary for the purpose of determining whether the trustee has brought the controversy to the proper forum.<sup>16</sup>

### *The Issues*

For the purposes of this article, we will assume that no preliminary challenge of the court's jurisdiction has been successfully made by the respondent's assertion of a substantial adverse claim to the property. Even with that assumption, however, the trustee will not become entitled to a summary order for the surrender of the property unless an affirmative answer is found to each of the following questions:<sup>17</sup>

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persons is of such a nature that the property is constructively within the possession of the court." *Taubel-Scott-Kitzmilller v. Fox*, 264 U. S. 426, 432 (1924).

12. *Harrison v. Chamberlain*, 271 U. S. 191, 194 (1926).

13. *Harrison v. Chamberlain*, 271 U. S. 191, 193 (1926). For the distinction between summary proceeding and plenary suit see *Central Republic Bank & Trust Co. v. Caldwell*, 58 F. (2d) 721, 731, 732 (C. C. A. 8th, 1932).

14. *In re Pinsky-Lapin & Co., Inc.*, 98 F. (2d) 776, 777 (C. C. A. 2d, 1938); *Page v. Arkansas Natural Gas Corp.*, 286 U. S. 269 (1932); *In re Hopkins*, 229 Fed. 378, 380 (C. C. A. 2d, 1916). No formal consent or submission to the jurisdiction is required.

15. "In every case the bankruptcy court has power, in the first instance, to determine whether it has that actual or constructive possession which is essential to its jurisdiction to proceed." *Harris v. Brundage Co.*, 305 U. S. 160, 163 (1938); *cf. Muller v. Nugent*, 184 U. S. 1 (1902).

16. Note, *Scope of the Summary Jurisdiction of the Bankruptcy Court* (1940) 40 *Col. L. Rev.* 489.

17. *In re Gordon & Gelberg*, 69 F. (2d) 81 (C. C. A. 2d, 1934)—"The appellee (trustee) had the burden of establishing by clear proof (a) title to the property in the trustee as

1. Has the trustee title to the property in question as part of the assets of the estate in bankruptcy?

2. Did respondent acquire possession of or control over the property sought by the trustee?<sup>18</sup>

3. Does respondent still have possession of or control over the property at the time the turnover order is to be made?<sup>19</sup>

The required affirmative answer to these questions must be supported by "clear and convincing evidence."<sup>20</sup> A mere preponderance of evidence is not enough.<sup>21</sup> Highly persuasive proof by the trustee is demanded for the respondent's protection, since the remedy for non-compliance with the turnover order is the contempt proceeding,<sup>22</sup> wherein it is too late collaterally to attack the turnover order. If it was a mistake to issue the turnover order, the respondent is in danger of being imprisoned for his failure to do the impossible.<sup>23</sup> The only way the respondent may avoid the penalty of his failure to comply with the court's order is by establishing that events subsequent to the issuance of the order

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part of the bankrupt estate and (b) that the appellants at the date of the bankruptcy and when the order was made were in possession and control of the books which had been kept and concealed from the trustee." *Id.*, at 83. *In re Pinsky-Lapin*, 98 F. (2d) 776, 778 (C. C. A. 2d, 1938); *In re Goldman*, 62 F. (2d) 421 (C. C. A. 1st, 1932).

18. Where respondent has objected to the court's summary jurisdiction by asserting an adverse claim to the property, it is obvious that receipt of the property by respondent will be thereby admitted.

19. It has been held in some cases that it is sufficient to establish possession on the date of filing the petition in bankruptcy. *Frederick v. Silverman*, 250 Fed. 75 (C. C. A. 3d, 1918); *Epstein v. Steinfeld*, 210 Fed. 236 (C. C. A. 3d, 1914). The matter of a subsequent disposal of the property is something to be considered later upon a proceeding to punish for contempt. These decisions have been properly criticized. 5 REMINGTON, BANKRUPTCY (4th ed. 1936), § 2418—"The correct date, it would seem, is the date of the filing of the summary petition itself. At any rate it is the earliest date." It would seem, however, since inability to comply excuses the respondent no matter how reprehensible his conduct has been, that possession at the date of the issuance of the turnover order is required. Recent cases, at least impliedly, have taken this view. *In re Pinsky-Lapin*, 98 F. (2d) 776 (C. C. A. 2d, 1938); *Danish v. Sofranski*, 93 F. (2d) 424 (C. C. A. 2d, 1937); *In re J. L. Marks & Co.*, 85 F. (2d) 392 (C. C. A. 7th, 1936); *In re Schoenberg*, 70 F. (2d) 321 (C. C. A. 2d, 1934).

20. *Oriel v. Russell*, 278 U. S. 358, 362 (1929).

21. *Oriel v. Russell*, 278 U. S. 358, 362 (1929). The proof need not be beyond a reasonable doubt.

22. "The proceeding is one in which coercive methods by imprisonment are probable and are foreshadowed." *Oriel v. Russell*, 278 U. S. 358, 363 (1929).

The turnover order is "not for the payment of a debt, but for the delivery by the bankrupt of the assets of his estate to his trustee in bankruptcy". *In re Schlosinger*, 102 Fed. 117, 119 (C. C. A. 2d, 1900). Hence state laws forbidding imprisonment for debt are not violated. See also *Sinsheimer v. Simonson*, 107 Fed. 898, 905 (C. C. A. 6th, 1901).

23. *Sinsheimer v. Simonson*, 107 Fed. 898, 905 (C. C. A. 6th, 1901).

have made it impossible for him to obey.<sup>24</sup> The court in consequence must approach its consideration of the evidence adduced upon the turnover proceeding with great caution and circumspection.

After a consideration of all the facts, the court may have no doubt whatsoever in its mind that the property sought by the trustee is part of the estate in bankruptcy and that the respondent is the one who made off with it. But does he still have it? The answer to this question may be shrouded in doubt, and the finding that the respondent once took the property may or may not help in proving he still has it in his possession or control. The reason for this may be the length of time elapsed since the taking or the character of the goods. If \$1000 was abstracted from the coffers of the bankrupt corporation by its president just before the receiver arrived to take possession, how can the court know, in the absence of straightforward information from the respondent or direct proof of the facts, that he still has the money two months later when a turnover order is applied for? Or two years later? Should the court's requirement of proof of the respondent's ability to comply with a turnover order vary as it appears that the property sought was a stock of perishable vegetables or a diadem of indestructible jewels? Should it be supposed, in the absence of proof, that the vegetables or the jewels were sold? If so, how much did they bring and what has happened to the proceeds? May the respondent, wrongful taker of the property and the one person who must know what happened to it, sit by and make no offer of proof on this issue and thus defeat the trustee? Questions such as these have perplexed the courts. It is the writer's purpose herein to examine the approach made and the principles applied in solving the difficulties thus encountered.

Let us pose a problem and see how, under varying circumstances, the courts might dispose of it. Let us assume that the Black Shoe Corporation, engaged in the retail shoe business, was adjudicated a bankrupt as a result of a creditors' petition and that a trustee has been elected. The trustee conducted an investigation into the affairs of the bankrupt corporation as a result of which it was discovered that one of the corporate books is missing—the retail sales record, let us say. Bank records establish that on the day before the involuntary petition was filed, Jerome

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24. "Thereafter on the motion for commitment the only evidence that can be considered is the evidence of something that has happened since the turnover order was made showing that since that time there has newly arisen an inability on the part of the bankrupt to comply with the turnover order." *Oriel v. Russell*, 278 U. S. 358, 363 (1929).

Prior to *Oriel v. Russell supra*, the lower courts in many cases had, upon proceedings to punish for contempt, examined into the propriety of the issuance of the turnover order. These decisions are collected in 5 *REMINGTON, BANKRUPTCY* (4th ed. 1936) § 2428.

Black, the sole stockholder and managing officer of the bankrupt, withdrew from the corporate bank account the sum of \$1000. Taking of inventory, examination of purchasing records of the bankrupt corporation and other available data have established a shortage of at least 100 pairs of shoes, valued at \$500. Let us further assume that on a date six months subsequent to the filing of the petition, the trustee applies for an order directing Jerome Black to turn over to him the missing sales record, the money, and the shoes. An order to show cause is issued on the trustee's petition and Black is served.<sup>24a</sup> Black answers the petition and denies that he ever had possession of any of the property sought by the trustee. How will the court decide the controversy?

### *Books and Records*

The trustee has title to all the books and records of the bankrupt.<sup>25</sup> Upon the hearing before the referee, the trustee proves the existence of the missing sales record by the testimony of an employee of the bankrupt, who frequently saw the book at the bankrupt's place of business and last saw it there within a few days prior to the bankruptcy.<sup>26</sup> The witness further testifies without contradiction that Jerome Black alone had custody of the book. The trustee can produce no witness who saw Black make off with the book or who has seen it in Black's possession since the bankruptcy. May the trustee rest his case for the surrender of the book upon the proof thus far adduced? Has he made out a *prima facie* case?

It has been held that it is sufficient for the trustee to trace the book to the possession of the respondent at the time of the bankruptcy or just prior thereto.<sup>27</sup> Such proof, it is said, gives rise to an inference that the respondent made off with the book since it would be of no value to a stranger and may be of great importance to the respondent, as

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24a. Due process requires notice to the respondent of the relief sought and reasonable opportunity to be heard. *In re Rosser*, 101 Fed. 562 (C. C. A. 8th, 1900); *In re Frank*, 182 Fed. 794 (C. C. A. 8th, 1910). See *In re Jackson Co.*, 15 F. (2d) 614 (C. C. A. 2d, 1926); *In re Sugarman*, 3 F. (2d) 436 (C. C. A. 2d, 1924).

25. Bankruptcy Act § 70, 11 U. S. C. A. 110.

26. In the absence of such direct evidence of the existence of books and records, it has been possible to prove their existence by expert testimony to the effect that the bankrupt's bookkeeping system required such a book or record. Also, books of account which have come into the trustee's possession, may contain notations of reference to the other missing records and thus establish the existence of the latter. See *In re Marcus Millinery Co., Inc.*, 37 F. (2d) 94 (C. C. A. 2d, 1930).

27. *In re M. & M. Mfg. Co.*, 71 F. (2d) 140 (C. C. A. 2d, 1934); *In re Arctic Leather Garment Co.*, 89 F. (2d) 871 (C. C. A. 2d, 1937).



erstwhile manager of the bankrupt's business.<sup>28</sup> Thus it will be inferred that Black took the sales record since he alone would have an interest in doing so.<sup>29</sup>

The taking and concealment by the respondent being thus established a further inference is raised, in the absence of explanation to the contrary, that respondent has continued in possession of the missing property down to the date of the turnover proceeding.<sup>30</sup> As a consequence, in order to prevent the issuance of a turnover order it becomes incumbent upon the respondent to rebut this inference with credible evidence.<sup>31</sup> His bald denial that he took the book will not do.<sup>32</sup> An imaginative account of the loss or destruction of the book which is too much for the court to believe will not help the respondent.<sup>33</sup> Refusal on the part of the respondent to explain what happened to the book or to answer questions on the ground that his testimony would tend to incriminate him will be of no avail.<sup>34</sup>

Thus we see that the trustee, who has the initial duty to trace the missing book to the respondent's possession, sustains that duty by showing the existence of the book in the possession of the respondent at or near the time of the bankruptcy. There then arises an inference of continued possession which is regarded as an inference of fact<sup>35</sup> and is

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28. ". . . books are absolutely useless to any one but the bankrupt and may be vitally important to him. . . . Thus, upon satisfying the judge that they were at hand until just before a trustee or receiver took possession, no conclusion is reasonably possible but that he took them." *In re Arctic Leather Garment Co.*, 89 F. (2d) 871, 872 (C. C. A. 2d, 1937). The inference is one of fact, a logical conclusion from the evidentiary facts.

29. The fact that respondent had a motive for concealing the record is of assistance to the trustee in proving the ultimate fact of the taking. *In re M. & M. Mfg. Co.*, 71 F. (2d) 140 (C. C. A. 2d, 1934).

30. "When property is traced into a bankrupt's possession shortly before bankruptcy, his failure to produce it or to explain what became of it, supports an inference that it is still subject to his control, and justifies the entry of a turnover order." *In re M. & M. Mfg. Co.*, *id.* at 141. See *In re Jackson Co.*, 15 F. (2d) 614 (C. C. A. 2d, 1926).

31. *In re Goldberg*, 91 F. (2d) 995 (C. C. A. 2d, 1937).

32. *In re M. & M. Mfg. Co.*, cited note 29 *supra*. The court in *In re Marcus Millinery Co., Inc.*, cited note 26 *supra*, indicated its belief that the obvious falsity of the respondent's testimony evidenced a fraudulent concealment of the records in question. The only express reference to the requirement of present possession or control is found in the concluding sentence of the opinion, ". . . if the appellants have the will to comply with it (the order), the ability to do so should not be wanting." *Id.* at p. 95.

33. *In re Arctic Leather Garment Co.*, cited note 28 *supra*; *In re Marcus*, cited note 26 *supra*; *United States v. Moore*, 294 Fed. 852 (C. C. A. 2d, 1923); see *In re Jackson Co.*, 15 F. (2d) 614 (C. C. A. 2d, 1926).

34. *Dittmar v. Michelson*, 281 Fed. 116 (C. C. A. 3d, 1922).

35. There is a well recognized distinction between an inference of fact which is a logical deduction from the evidentiary facts and a real presumption which is a rule of law. 9 WIGMORE, EVIDENCE (3rd ed. 1940) § 2491.

deemed sufficient to make out the trustee's *prima facie* case on the further requirement of possession or control by the respondent at the time of the turnover proceeding. It is the respondent's obligation to rebut this inference of continued possession. It has been said that the strict burden of proof on the question of present possession always remains with the trustee who has the affirmative of the issue and that the respondent has the duty merely to go forward and neutralize the inference that has arisen.<sup>36</sup> Whether the so-called inference is a justified conclusion of fact flowing from the proof so far adduced by the trustee or is instead a real presumption or rule of law to regulate the conduct of the proceeding will be studied later.

An examination of the decisions where the turnover proceeding involved the production of books and records of the bankrupt reveals that the trustee has uniformly met success where he has traced the books to respondent's possession, unless the respondent has gone forward with evidence to show his present inability to surrender them. It has been suggested that the reason for this may lie in the nature of the property whose return is sought by the trustee.<sup>37</sup> The books seem to be regarded as having more permanence than money or saleable merchandise. Thus, in our hypothetical case, it is probable that, if Black persists in his denial that he ever took the missing sales record and says no more, the trustee will succeed in getting a turnover order against Black for the surrender of the book. The only way Black may avoid the issuance of the order is by abandoning his position on the issue of the taking and showing by credible proof that something has happened since he took the book which makes it impossible for him now to surrender it to the trustee.

### *Money*

Let us now pass to a consideration of the proceeding insofar as it concerns the trustee's effort to compel Black to surrender the sum of \$1000. We have assumed that through the production of bank records and the examination of witnesses the trustee has established the withdrawal by Black of \$1000 from the funds of Black Shoe Corporation on the day

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36. *Sheinman v. Chalmers*, 33 F. (2d) 902, 904 (C. C. A. 3d, 1929). But the court seemed to regard the granting of the turnover order as inevitable unless the respondent took up his burden. The court said: "This burden he may assume or ignore as he may wish, but he will suffer the consequences of not taking it up and carrying it." *Id.* at 904.

37. "Thus in the case of chattels which have no value, like books of account, it is enough to show that he (the respondent) has secreted them (citing cases). The chance that he has destroyed them is deemed too remote to impose upon the trustee the duty of disproving it by anticipation." *Danish v. Sofranski*, 93 F. (2d) 424, 426 (C. C. A. 2d, 1937), *cert. denied*, 303 U. S. 641, (1938) 7 FORDHAM L. REV. 254.

before the petition in bankruptcy was filed.<sup>38</sup> Does such proof make out a *prima facie* case for the trustee? Does there arise an inference of continued possession of the money, even as in the case of the missing sales record?

Though the trustee has surmounted the initial hurdle by the necessary margin of clear and convincing proof, it is clear that an order to turn over the sum of \$1000 should not issue against Black if to do so would be to demand an impossibility.<sup>39</sup> But has the trustee the obligation to prove in the first instance that the entire sum or some definite part of it is still in Black's possession or must Black at his peril take the lead and show that he no longer has the money and that compliance with the proposed turnover order would be therefore impossible?

In our supposed state of facts, Black has denied in his answer to the trustee's petition that he ever received the money. It has been held in a number of cases, where the respondent denied receiving the property or refused any explanation, that the trustee, after prevailing on the initial issue of the taking, may rest without any further proof being required of him on the issue of continued possession,<sup>40</sup> the burden of explanation being thrown upon the respondent.<sup>41</sup>

In the case of *Danish v. Sofranski*<sup>42</sup> this line of cases was noticed and an attempt was made to find the reason for the rule that charges the respondent with the duty of explanation. After emphasizing that the cases involved fact situations where the respondent denied having ever re-

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38. Of course, it will be the rare case, where such convincing proof is so readily available. More often the money taken will be cash receipts of the business and will continue over a period of time, and the culprit will be more efficient in destroying clues.

39. Present possession or control of the money at the time of the turnover order must be established. *In re Redbord*, 3 F. (2d) 793 (C. C. A. 2d, 1924); *In re Holden*, 203 Fed. 229 (C. C. A. 6th, 1913); *Sinsheimer v. Simonson*, 107 Fed. 898 (C. C. A. 6th, 1901).

40. *In re Weinreb*, 146 Fed. 243 (C. C. A. 2d, 1906); *In re Steinreich Associates*, 83 F. (2d) 254, 255 (C. C. A. 2d, 1936), where the court said: "There is no question of any adverse claim to the money. The appellant simply says he never had it. Accepting as we do the finding that he did have it, it follows that in the absence of any explanation as to what he has done with it, he is subject to summary order to turn it over to the trustee; the inference being that he still has it in his possession or under his control." Cf. *Dittmar v. Michelson*, 281 Fed. 116 (C. C. A. 3d, 1922).

41. *In re Steinreich Associates*, cited note 40 *supra*; *Danish v. Sofranski*, 93 F. (2d) 424, 426 (C. C. A. 2d, 1937), where the court said: "At other times in the summary proceeding itself, the respondent either denies having ever received the property or refuses to give any explanation; and then too the trustee need not prove his ability to comply; the burden of explanation is the respondent's." See also *In re Meier*, 182 Fed. 799 (C. C. A. 8th, 1910).

42. 93 F. (2d) 424 (C. C. A. 2d, 1937).

ceived the property or refused to give any explanation, the court went on to say:<sup>43</sup>

"The ground for this has never been stated, but a valid explanation is that, as the supposed excuse would contradict his denial, it may be assumed that he would not make it; and that his refusal to answer, when he so refuses, may be assumed to continue. Logically no doubt there is still a hiatus, but the respondent may be said to have removed the issue from the case."<sup>44</sup>

In the *Danish* case the respondents, who were respectively president and secretary-treasurer of the bankrupt corporation, and with their wives owned all its stock, admitted they had received over \$2500 from the bankrupt corporation in the form of withdrawals and dividends over the course of some seven months prior to the adjudication in bankruptcy. They attempted to justify the receipt of the money and to establish their status as adverse claimants so as to defeat the court's summary jurisdiction. The circumstances left no doubt, however, that they were engaged in a fraudulent scheme to loot the corporation against the day when a claim long in suit would become a judgment. The objection to the court's jurisdiction was accordingly overruled. The respondents gave no evidence as to what happened to the money. The money was withdrawn in the period between October 1934 and March 1935. The bankruptcy adjudication was made May 2, 1935 but the turnover order not until March 2, 1937.<sup>45</sup> Despite the lapse of over two years, the referee granted an order directing the respondents to turn over the sum of \$2532. The order of the referee, as amended on July 15, 1937, was affirmed by the District Court. The Circuit Court of Appeals reversed the order, for the reason that there was

"a fair doubt whether any of the money which they took remained unspent two years later; and if any did, it is impossible even to guess how much it was; the chances are that it was all gone, but it would be the merest fancy to fix an amount."<sup>46</sup>

The fact that in the *Danish* case the respondents admitted receipt of the money was held to distinguish it from the situation where the respondent denies ever having received it and the court took the position

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43. *Id.* at p. 426, per Learned Hand, J.

44. Compare the concurring opinion of Learned Hand, J. in *In re Pinsky-Lapin Co.*, 98 F. (2d) 776 (C. C. A. 2d, 1938).

45. Upon appeal to the District Court from the order of March 2, 1937, the proceeding was returned to the Referee, who corrected the previous order by reducing the sum in question from \$3,282.80 to \$2,532.80. The corrective order was dated July 15, 1937 and it was from said order that the appeal was taken.

46. 93 F. (2d) 424, 426 (C. C. A. 2d, 1937).

that, whereas in the latter case it is not necessary for the trustee to prove continued possession or control, in the former that burden is upon the trustee.<sup>47</sup> As the court said:

"The trustee must make out his case upon this issue just as he must upon the original taking."<sup>48</sup>

If the distinction between the duties of proof consequent upon denying rather than admitting receipt of the money be accepted, it would follow that in our hypothetical case the situation of the respondent, Black, would be different if, instead of a general denial of possession at any time, he should admit that he took the money, asserting that in his belief the financial condition of the corporation was sound and as sole stockholder of the corporation he had the right to pay himself a dividend, or simply admit receipt of the money and assume an agnostic attitude towards its disposal. If the distinction be accepted, it would seem that, simply by a change of tactics without any change in the merits, the respondent Black could place a greater burden upon the trustee by requiring him to establish how much, if any, of the money remained on hand at the time of the turnover order.

The validity of the distinction made in the *Danish* case was called in question in *In re Pinsky-Lapin Co.*,<sup>49</sup> decided by the same court<sup>50</sup>

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47. One of the cases cited by the court as an instance where the taking of the property was admitted was *In re J. L. Marks & Co.*, 85 F. (2d) 392 (C. C. A. 7th, 1936). There the respondent, president and sole stockholder of the bankrupt corporation, admitted the receipt of \$6,500, the proceeds of two checks drawn to the order of the bankrupt. One check in the sum of \$2,500 was cashed August 4, 1933; another for \$4,000 was cashed August 17, 1933. The respondent testified that the money so received was all paid out during August to customers of the bankrupt so that on September 2, 1933, when the petition in bankruptcy was filed, he had nothing left from the proceeds of the checks. The lower court on March 10, 1936, over two and one half years later, granted a turnover order for the surrender of \$6,500. The order was reversed, the circuit court not being "satisfied that the evidence is sufficient to support a finding that he possessed the money either at the time the bankruptcy proceedings were instituted or when the order to turn over the money was entered." Nothing was said about an inference of continued possession. It was unnecessary for the court to consider the issue of possession at the time of the turnover order for there was no proof that the bankrupt had the money when the petition in bankruptcy was filed. Hence it was not established that the money ever existed as an asset of the estate. Furthermore, the respondent did not refuse to go forward and explain what happened to the money. The Marks case cannot therefore give support to the proposition for which it was cited in the Danish case.

48. 93 F. (2d) 424, 426 (C. C. A. 2d, 1937).

49. 98 F. (2d) 776 (C. C. A. 2d, 1938).

50. In the Danish case the court was composed of Manton, Learned Hand, and Swan, Circuit Judges, with Judge Learned Hand writing the opinion. In the Pinsky-Lapin case the court was composed of Learned Hand, Augustus N. Hand, and Chase, Circuit Judges,

within nine months of the *Danish* case. There the court restated the distinction<sup>51</sup> and criticized it as follows:

"It seems to us that such distinction cannot determine whether a 'turnover' order should issue. Where he denies receiving, but the court finds that he did receive, we think that the result is legally the same as where he concedes possession. In each case there is *ex hypothesi* a finding of possession, in one based on an admission, in the other based on proof so compelling that the denial is of no avail. In each situation we think there is the same burden on the trustee to prove possession at the time of the making of the 'turnover' order. The result is determined either by evidence of possession at the time of the order or by the strength of the inference of continued possession, once possession is conceded or found to exist at the time of adjudication. The strength of the inference depends on the circumstances, which include the amount and nature of the property, the time which has elapsed, and the credibility of any explanation which the respondent may give. A distinction between the burden imposed on the trustee in cases where misappropriation by a respondent is admitted, and in cases where it is found to exist in spite of his denial, is a strong inducement to a fraudulent respondent to choose the former alternative. It is bound to become a favorite method of avoiding 'turnover' orders in cases which do not differ essentially from those of unqualified denials of receiving except in the favorable result to the guilty party."<sup>52</sup>

While technically this criticism of the *Danish* case may be classified as *obiter*, it is so strong and deliberate as to leave no doubt of the court's purpose to depart from the position taken in the former decision. Judge Learned Hand so regarded the *Pinsky-Lapin* opinion,<sup>53</sup> and, writing separately, reaffirmed his personal conviction that the doctrine of the *Danish* case was right.<sup>54</sup>

This criticism of the distinction drawn in the *Danish* case may well be considered sound, for, if the law requires the trustee to shoulder the burden of proving present possession, he should not be absolved from it

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with Judge Augustus N. Hand writing the opinion. Judge Learned Hand in the *Pinsky-Lapin* case wrote a separate opinion in which he concurred in the result reached by the court. See note 44 *supra*.

51. "In *Danish v. Sofranski*, 2 Cir., 93 F. (2d) 424, the distinction is made between a complete denial by a respondent that he has ever received property of a bankrupt and an acknowledgment that he has received the property, where in each instance he has failed to account for its disposal. It is said that in the former situation the trustee need not prove the ability of the respondent to comply with a 'turnover' order but that in the latter he must." *In re Pinsky-Lapin*, 98 F. (2d) 776, 780 (C. C. A. 2d, 1938).

52. *Ibid.*

53. ". . . I cannot see how our decision in *Danish v. Sofranski*, 2 Cir. 93 F. (2d) 424, is material here; any comment upon it is inevitably *obiter*. But since my brothers think it desirable to overrule it, I wish to dissent pro tanto."

54. 98 F. (2d) 776, 781 (C. C. A. 2d, 1938).

by the position assumed by the respondent on the separate issue of the taking.<sup>55</sup> The *Pinsky-Lapin* case seems definitely to place upon the trustee the strict burden of establishing in all cases possession by the respondent at the time of the order. If direct evidence of continued possession is available to the trustee, that will probably sustain the burden and carry the day. In many cases, however, the trustee will be left to rely upon the so-called inference of continued possession, the strength of which is said to vary with the circumstances. In the *Pinsky-Lapin* case the court seems to have in mind a true inference of fact, rather than a procedural rule or true presumption which is designed to assist the trustee by compelling the respondent to assume, at his peril, a duty of proof. Whether there is any logical foundation for the inference of continued possession as drawn from the established fact of the taking may well be doubted, but a discussion of the worth of the inference may well be reserved at this point.

Whereas the *Pinsky-Lapin* case may be regarded as increasing the trustee's task by weakening the inference upon which he may be forced to rely as his sole support, the fact that the burden is not insuperable is demonstrated in the *Pinsky-Lapin* case, itself, where, among the items sought by the trustee, money in the sum of \$591.14 was ordered turned over to the trustee, in spite of a lapse of a considerable period of time between the taking and the turnover order. The moneys were taken in a period between two and four months prior to the adjudication, and the turnover order was made nine months after adjudication. The referee found in the face of respondent's denial that his possession or control of the moneys had continued up to the time of the order—a conclusion which the appellate court was unwilling to upset.<sup>56</sup> Apparently the trustee's method of proving the amount of money still on hand will have to be guided by the facts of each case. Cases decided since *In re Pinsky-Lapin* have asserted that circumstantial evidence will suffice<sup>57</sup> and that

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55. Judge Learned Hand in *Danish v. Sofranski*, 93 F. (2d) 424 (C. C. A. 2d, 1937) admitted that to dispense with proof by the trustee on the issue of present possession in a case where respondent denies ever receiving the property involved a logical hiatus. And in *In re Pinsky-Lapin*, 98 F. (2d) 776, 781 (C. C. A. 2d, 1938) the Judge conceded there was "a slip in the formal reasoning."

56. "A contrary conclusion on our part would be giving too much weight to things we know nothing about and too little weight to an inference drawn by the referee as to continued possession of the property", 98 F. (2d) 776, 780 (C. C. A. 2d, 1938). The inference of continued possession was here somewhat bolstered by testimony of the respondent which limited his expenditures and thus reduced the possibility of his having spent the money.

57. *In re Fisher*, 32 F. Supp. 69 (D. C. Md. 1940).

the courts must be reasonable in their requirement of proof.<sup>58</sup> On the other hand, it seems obvious that the trustee's efforts to get a turnover order for money are doomed to defeat in many cases where the tight-lipped respondent has so successfully covered his trail that a long period of time must necessarily elapse before his depredations can be discovered and a turnover proceeding commenced against him. The longer the respondent's guile can delay the commencement of the turnover proceeding the weaker will be the inference of continued possession and consequently, the greater the respondent's chances for success. Such a result is undesirable as placing a premium upon craft.

Returning to our hypothetical case of the Black Shoe Corporation, what will be the result insofar as the money is concerned? If the doctrine of the *Danish* case had not been overruled, we have seen that Black could impede the trustee's efforts to make him disgorge his loot by admitting the taking and refusing any credible testimony about present possession. But, whether he admits or denies the taking, under the *Pinsky-Lapin* case the burden of proving present possession is on the trustee who is, however, aided by an inference that respondent has continued in possession of the loot. Will this inference be enough to justify the granting of a turnover order against Black in default of any credible explanation from him as to what happened to the money? It is difficult to say, because there may be such a doubt in the court's mind of Black's ability to comply that the order will be refused, despite the fact that the money was traced to Black who has declined to tell what happened to it. If the sum of \$2000 was taken three months ago the order might well issue, possibly with a deduction for living expenses if it were shown that Black had no other income. But if two years had passed, the order would in all probability be refused. What if the sum were \$100 and one month had passed? Where the line should be drawn is hard to say. If the respondent will but take the stand and tell a credible story of how the money was spent, he may relieve himself of any possibility of a turnover order being made against him.

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58. "How far a trustee can produce evidence of the bankrupt's having money in his possession at the date of the turnover order as the opinion in *Danish v. Sofranski*, 2 Cir., 93 F. (2d) 424, probably requires (subject, however, to *Re Pinsky-Lapin Co.*, 2 Cir., 98 F. (2d) 776), is an interesting question about which much might be written. Certain it is that the bankrupt who will admit that he has the money which he has been called upon to disgorge, would be so rare a curiosity that he would never be encountered in the flesh by a Referee in Bankruptcy. Consequently a District Judge must be satisfied with something less than the performance of a miracle by a trustee in the presentation of his case." *In re Hersh*, 29 F. Supp. 274, 276 (E. D. N. Y. 1939) per Byers, D. J.



Perhaps it is because the respondent cannot help himself by his testimony that he remains silent—perhaps it is this consideration that is at the root of the inference of continued possession. But under the law as it now stands, the respondent who has made away with money cannot be compelled to speak under pain of inevitable defeat. The trustee may fail to get his turnover order despite the respondent's failure to give an explanation. Certain it is that, the trustee cannot be near so confident of getting a turnover order for the money as he can for the missing sales record.

### *Saleable Merchandise*

Now to consider the trustee's application for the return of the shoes. We assume that the trustee is able to establish the shortage of at least 100 pairs of shoes by an analysis of the purchasing records and other books of account of the bankrupt though, of course, he is handicapped by the absence of the sales record.<sup>59</sup> If available evidence leaves some doubt as to the precise amount of merchandise taken, the court will protect the respondent by reducing it to a minimum.<sup>60</sup> Thus the trustee has again passed the initial barrier and has established the respondent's possession of the missing merchandise at a time near the bankruptcy. But he can prove no more, the subsequent history of the shoes being unknown to him. Does an inference of continued possession again arise so as to complete the trustee's *prima facie* case?

The courts have held in a number of cases that once the abstraction of the merchandise is established, there arises, in the absence of a satisfactory explanation of what became of it, an inference of continued possession and concealment sufficient to justify the granting of a turnover order.<sup>61</sup> In *In re Magen*, a leading decision in the second circuit, the court expressed itself as follows:

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59. The misappropriation of the goods is usually established by some such method. *In re Cohan*, 41 F. (2d) 632, 633 (C. C. A. 3d, 1930). It is not often that direct evidence of the taking is at hand as in the case of *In re Briklod*, D. C. N. Y. No. 72426 (unreported), where a policeman saw the bankrupt packing cases all Sunday night and shipping the goods off early Monday morning. Cf. *Cooper v. Dasher*, 290 U. S. 106, 103 (1933); *Kirsner v. Taliaferro*, 202 Fed. 51, 56, 57 (C. C. A. 4th, 1912).

60. *In re Cohan*, 41 F. (2d) 632, 633 (C. C. A. 3d, 1930); *In re Glassberg*, 59 F. (2d) 209 (S. D. N. Y. 1932). Cf. *In re Schlesinger*, 102 Fed. 117 (C. C. A. 2d, 1900), where money was taken and the court reduced the sum to a minimum of \$6,500 "to be entirely within the limits of any possible doubt."

61. *In re David Eisner & Co.*, 22 F. Supp. 746 (S. D. N. Y. 1938); *In re Mur-Mo Dress, Inc.*, 25 F. Supp. 12 (S. D. N. Y. 1938); *In re Glassberg*, 59 F. (2d) 209, 211 (S. D. N. Y. 1932); *In re Magen*, 10 F. (2d) 91 (C. C. A. 2d, 1925) and cases there cited; *In re Chavkin*, 249 Fed. 342 (C. C. A. 2d, 1918); *Kirsner v. Taliaferro*, 202 Fed. 51 (C. C. A.

"Unscheduled property traced to one, who received it before the filing of the bankruptcy petition, may be presumed to continue in such possession, until a credible explanation is made, showing what has become of such property."<sup>62</sup>

Although the term "presumed" is used, the inference is regarded not as a presumption of law but rather as one of fact based upon a combination of the proof of the taking and the absence of explanation,<sup>63</sup> although the absence of explanation from the respondent has sometimes received greater emphasis than the proof of the pilfering of the goods.<sup>64</sup> However, the inference has not always brought success to the trustee for circumstances may be such as to bar an inference of continued possession, as where it is equally probable that the merchandise may have been disposed of, and there the court will refuse to draw the inference despite the respondent's failure to explain what happened to the goods.<sup>65</sup>

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4th, 1912); *In re Levy*, 142 Fed. 442 (C. C. A. 2d, 1905). See *In re Gordon & Gelberg*, 69 F. (2d) 81 (C. C. A. 2d, 1934) where the court found respondent had overturned the presumption by the evidence presented.

62. 10 F. (2d) 91, 96 (C. C. A. 2d, 1925).

63. In the *Magen* case cited note 62 *supra*, at 93, the court described the foundation of the inference as follows: "If a bankrupt is shown to have purchased large amounts of property within a short period prior to his bankruptcy, and has only a nominal amount in his possession at the time of his bankruptcy, and is unable or unwilling to explain what he has done with it, it is not unreasonable to infer that he has it in concealment. As proof of a fact the law permits inferences from other facts, and there arises a presumption of fact, which is a reasonable and natural inference of the existence of one fact from the proof of some other fact established by direct evidence." *In re Cohan*, 41 F. (2d) 632, 633 (C. C. A. 3d, 1930). See also L. Hand, J., concurring in *In re Pinsky-Lapin*, 98 F. (2d) 776, 781 (C. C. A. 2d, 1930).

64. See *In re Glassberg*, 59 F. (2d) 209, 211 (S. D. N. Y. 1932); *In re Levy*, 142 Fed. 442, 444 (C. C. A. 2d, 1905).

65. *In re Schoenberg*, 70 F. (2d) 321 (C. C. A. 2d, 1934). The property sought by the trustee had been transferred about a year before by the bankrupt to a newly organized personal corporation, the respondent in the turnover proceeding. The court found that "the corporation is a mere cloak for the bankrupt and its adverse claim merely colorable." A turnover order granted below was reversed. The court at p. 323 said: "In the case at bar the trustee made no attempt to show what part of the merchandise originally transferred was still on hand or that the appellant had the sum of money which in the alternative it was directed to pay over. The corporation had been conducting the business for more than a year; its books were not called for by the trustee; so far as appears, the proceeds received from disposal of the merchandise may have been used in business expenses and paying merchandise creditors." The court stated the *Magen* case was inapplicable because here there was "no evidence of any concealment of merchandise or money." The validity of such a distinction may well be doubted. The rules for proof of the taking of the goods and present possession thereof should not be made to vary as the taking is brazen and barefaced rather than secret and stealthy.

*In re Schoenberg supra* was one of the cases cited in *Danish v. Sofranski* cite note 57

The distinction drawn in *Danish v. Sofranski* between the consequences of admitting rather than denying the taking, together with the criticism thereof in the *Pinsky-Lapin* case, had reference to saleable goods as well as to money.<sup>66</sup> It was there intimated that since the merchandise may readily be disposed of, the inference of continued possession is not entirely dependable, especially where the lapse of time has been substantial. The view that the strength of the inference will vary with the character of the goods and the amount of elapsed time undoubtedly has force if, as the courts have done, we consider the inference to be one of fact.<sup>67</sup> For example, if the goods taken from the estate were fruits and vegetables<sup>68</sup> or meats and provisions,<sup>69</sup> it is evident that an inference of continued possession by respondent would be well nigh impossible even after the lapse of but a short time. Such a case further demonstrates the impropriety of the distinction drawn in *Danish v. Sofranski* and hereinabove commented upon, for if the fruit, even with modern refrigeration, would not last more than a week, then the court should not infer that it is still in respondent's possession months later when a turnover proceeding is brought, and respondent's admission or denial of the taking can have no bearing on the strength of the inference.

But goods and merchandise do not have to be inherently perishable to disappear. It is a fair assumption that the man who has taken merchandise from the estate will turn it into cash at his earliest opportunity. Perhaps in the light of this probability, it is the common practice to apply for an order in the alternative directing a surrender of the merchandise or its proceeds.<sup>70</sup> If it thereafter develops that the goods were sold, the order may direct the surrender of the proceeds.<sup>71</sup> A decree in the alternative is sometimes made without requiring any proof that a sale was actually made.<sup>72</sup> Where this is done, it would seem tantamount

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*infra*, as an instance where the abstraction of the property was conceded and the trustee has in consequence the burden of proving present possession.

66. *Danish v. Sofranski*, 93 F. (2d) 424, 426 (C. C. A. 2d, 1937); *In re Pinsky-Lapin*, 98 F. (2d) 776, 780 (C. C. A. 2d, 1938).

67. See note 63 *supra*.

68. *Cf. In re West Produce Corporation*, 33 F. Supp. 991 (E. D. N. Y. 1940).

69. See *In re Korin*, 25 F. Supp. 323 (E. D. N. Y. 1938).

70. *Reiss v. Reardon*, 18 F. (2d) 200 (C. C. A. 8th, 1927); *In re Chavkin*, 249 Fed. 342 (C. C. A. 2d, 1918); *In re Cohan*, 41 F. (2d) 632 (C. C. A. 3d, 1930), where the court found it proper to grant an order for the surrender of "the precise goods concealed or their concealed proceeds." See *In re Fisher*, 32 F. Supp. 69, 72 (D. C. Md. 1940).

71. *Reiss v. Reardon*, 18 F. (2d) 200 (C. C. A. 8th, 1927); *cf. Hirsch v. Schilling* 28 F. (2d) 171 (C. C. A. 3d, 1928).

72. See *In re Cohan*, 41 F. (2d) 632 (C. C. A. 3d, 1930); *In re Levy*, 142 F. 442 (C. C. A. 2d, 1905).

to a confession that the court doesn't know what the present status really is.<sup>73</sup> When such a decree is made, it is obvious that obedience is impossible, if the merchandise has actually been disposed of, unless the specified sum of money be on hand for surrender to the trustee. But, there being no proof of a sale, there is of course no proof of the price at which the goods were sold. The goods may have been sold at a sacrifice price, or on the other hand at a handsome profit. This difficulty is sometimes avoided by granting an order for the surrender of the goods or their *value*.<sup>74</sup> Such an alternative order would seem to be the result of a guess that the *proceeds* of the sale equalled the *value* of the merchandise sold, since the trustee would have a right to the money only if it represented the missing merchandise under a change of form. However, if the goods were disposed of otherwise than by sale or if a sale actually brought a price less than the value of the goods, then the effect of the order is to grant a money judgment against the wrongdoer for damages suffered by the estate, a function which is beyond the scope of the summary proceeding.<sup>75</sup> Such an alternative order would seem open to the same criticism that is levelled at a turnover order for a sum of money alone, being the value of concealed assets, in a case where there is no proof that a sale was actually made.<sup>76</sup> It has been suggested that the proper understanding of such an alternative decree is that it merely gives the respondent an option to pay the value.<sup>77</sup> Again this would seem a perversion of the true function of the turnover proceeding, namely to

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73. Cf. *In re Sax*, 141 Fed. 223 (E. D. Pa. 1905).

74. *In re Eisner*, 22 F. Supp. 746 (S. D. N. Y. 1938); *Kirsner v. Taliaferro*, 202 Fed. 51 (C. C. A. 4th, 1912). Cf. *In re West Produce Corp.*, 33 F. Supp. 991 (E. D. N. Y. 1940), where the District Judge sent the proceeding back to the Referee "to take proof of the present value" of the goods.

75. 5 REMINGTON, BANKRUPTCY (4th ed. 1936) § 2423, where it is said that an order in the alternative for the goods or their *proceeds* is proper but not when it is for the goods or their *value*.

76. *Samuel v. Dodd*, 142 Fed. 68 (C. C. A. 5th, 1906); *In re Goldman*, 62 F. (2d) 421 (C. C. A. 1st, 1932); *In re Miller & Harbaugh*, 54 F. (2d) 612 (C. C. A. 9th, 1931).

77. *In re Goldman*, 62 F. (2d) 421 (C. C. A. 1st, 1932); "In some instances where the bankrupt has been found to have concealed merchandise of a certain value, he has been ordered to turn it over, but has been given the option of paying over its value in cash." *Ibid.* p. 424. *In re David Eisner*, 22 F. Supp. 746 (S. D. N. Y. 1938). The District Court in the Magen case, cited note 62 *supra*, affirmed the referees order for the surrender of "the said silk and cotton yarn of the value of \$32,779.74, or, at the option of the respondent, in lieu of the said merchandise, to pay to the said trustee, within the said period of five days, the sum of \$32,779.74 in cash." No point was raised as to the form of the order and the Circuit Court of Appeals affirmed. The mention of the value of the property may sometimes be made for the purpose of identification. As such it is unobjectionable.

recover assets of the estate in respondent's possession, for it permits the respondent to buy his way out by contributing a sum of money which may bear no relation to the proceeds of his loot.<sup>78</sup> A new provision<sup>79</sup> in the Bankruptcy Act may give some assistance to the trustee in fixing the amount of the proceeds of a sale of the goods by raising a rebuttable presumption that property sold by the bankrupt was sold at not less than cost. The degree of its effectiveness would seem difficult to predict at this time.<sup>80</sup>

Either the respondent has the goods or he has disposed of them.<sup>81</sup> Unless the court is just guessing instead of relying on a valid inference of fact, it would seem that the order should be restricted to the goods, in a case where no sale is proved, or where a sale is proved, then the order should be definite in requiring a surrender of the proceeds.<sup>82</sup> The tendency to make a turnover order in the alternative seems to be an implied admission that the inference of continued possession is unreliable.

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78. In *Kirsner v. Taliaferro*, 202 Fed. 51 (C. C. A. 4th, 1912) the order directed the surrender of merchandise, consisting of dry goods, notions and ladies clothing "to the value of at least \$4,166.54 wholesale price" or, in the alternative, payment of \$3,000 in cash, which the court fixed as the equivalent cash value of the goods. The respondent objected to the alternative form of the order. The court answered that he could not complain about having the option. "He need not avail himself of it, if he does not wish to do so. He can be in no way injured by being allowed to pay the money if he wants to." *Ibid.* at 58.

79. Bankruptcy Act § 21 (1); 11 U. S. C. A. 44 (1).

80. In the first place, the section applies by its terms only where the bankrupt is the respondent. The presumption would probably not apply where the respondent was a third party, though what interpretation would be given the section where the respondent was an officer of a bankrupt corporation may be in doubt. This section should be read in connection with Sec. 7a (11) of the Bankruptcy Act which requires the bankrupt, when so ordered, to file a cost inventory. See H. R. REP. No. 1409, 75th Cong., 1st Sess. (1937) 25, 26; WEINSTEIN, *THE BANKRUPTCY ACT OF 1938* (1938) 35, 36.

81. *Cf. Samuel v. Dodd*, 142 Fed. 68 (C. C. A. 5th, 1906).

82. *Cf. In re Elias*, 240 Fed. 448, 460 (E. D. N. C. 1917) where the following comment was made on the court's speculation when it grants a turnover order for merchandise or its value without definite proof that a sale was made; "The conclusion that he had the goods or their equivalent, in money, on February 1, 1917, or at this time, is based upon the presumption or inference of his possession of them May 4th, 1916. Discarding his answer and looking at the question from the reason of the thing, reasonably natural deductions based upon what is apparent, I would find difficulty in reaching the conclusion that he now has the specific goods which I feel certain he had May 4, 1916, or the specific money which he received for them, if sold. To find that he now has the money would require a presumption that he sold the goods, and a further presumption that he received \$4,047.90 in money for them and the further presumption that he had, and now has, the identical money which he received. This would violate a well-known rule of evidence which forbids the indulgence of a presumption upon a presumption."

Furthermore, if there is justification for the hesitancy to grant turnover orders for money—owing to the fact that our common knowledge of how fast money goes weakens the inference of continued possession—the same consideration should make the court equally hesitant to grant a turnover order for merchandise or its proceeds. If the merchandise was saleable, it may well have been sold and if, for all the court knows, it may thus have been converted into money, the situation met by the trustee is practically on a par with the case where money was the subject of the original taking. However, such a hesitancy on the part of the court seems not to be so marked in cases involving merchandise as it is where money was taken and, as the law now stands, the probability is that in our hypothetical case Black would be ordered to surrender the shoes or the proceeds of their sale, unless he explains what happened to the shoes. If his explanation is that he sold them he must explain what became of the proceeds.

*Apportionment of the Duty of Proof*

Throughout our discussion thus far a consideration of the nature of the inference of continued possession, its reliability and the propriety of the duty of proof which it casts upon respondent has been merely the subject of passing comment, a more complete discussion being reserved. Accordingly, we shall now proceed to a consideration and analysis of the inference of continued possession which is such a prominent factor in the turnover cases.

There is no doubt but that the trustee who seeks a turnover order has the burden of tracing the assets of the bankrupt estate to the respondent's possession. If he fails to do so, his petition is certain to be denied. The burden of proving the abstraction is usually a heavy one. The trustee, elected by creditors of the bankrupt to represent them, is almost invariably a stranger to the bankrupt's affairs. Unfamiliar as he is with the bankrupt's business and bookkeeping methods, the trustee often labors under severe handicaps in mastering the situation and tracking down clues to missing assets. He has to deal with bankrupts who have a profound scorn for truthful testimony.<sup>83</sup> Persistent grilling

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The court went on to say that "an order based upon an alternative finding cannot be made the basis of an order of commitment for contempt."

83. "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"; per Augustus N. Hand, J., in *In re Abesbaum*, 70 F. (2d) 628 (C. C. A. 2d, 1934).

of unwilling witnesses<sup>84</sup> and accountant's analyses of incomplete and misleading records are necessary to point out the wrongdoer. The identification of the culprit and his booty must be definite, not doubtful, and must measure up to the requirement of clear and convincing proof.<sup>85</sup> Throughout our discussion we have assumed that the trustee has succeeded in his arduous task of proving that the respondent is the one who made off with the missing assets. It is hoped that such assumption has not had the effect of minimizing the difficulty involved.

Having established the taking, what more should be required of the trustee? Shall he have the burden also to establish possession at the time of the turnover proceeding? Clearly he has the affirmative of that issue. Considerable though his difficulties may have been in proof of the taking, it is easy to understand how in the average case they would be slight by comparison with those to be encountered if the trustee must affirmatively establish in the first instance as part of his *prima facie* case that the respondent still has the property. Of course, in the rare case where direct proof of present possession or lack of it is available to the trustee, the difficulties we have been considering do not arise.

We have seen that the trustee is aided in completing his case by the so-called inference of continued possession. The somewhat uncertain effect of this inference has been considered in the preceding pages. The *Pinsky-Lapin* decision<sup>86</sup> has warned that this inference is by no means a guaranty of success by the trustee. The inference has been regarded as one of fact—a conclusion of fact deducible from other facts proved in the proceeding—and, upon analysis, appears to be attributed to two distinct factors: first, proof that the respondent made away with the property; second, failure of the respondent to explain what happened to it.<sup>87</sup>

Is the inference of present possession justified as an inference of fact? Does proof of the taking, the first stone upon which it rests, afford a solid foundation for the conclusion of present possession? It is submitted that from the mere fact of the taking, it is a mistake, or at least a guess, to conclude that the culprit still has his loot. It must be borne in mind that we are not concerned with a standard of action or an average; with the question of whether the wrongdoer ought to have the property or whether in the average case he would still have it on hand.

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84. Examinations under Section 21a of the Bankruptcy Act constitute a weapon upon which the trustee must rely heavily in the course of his investigation.

85. *Oriel v. Russell*, 278 U. S. 358 (1929).

86. 98 F. (2d) 776 (C. C. A. 2d, 1938).

87. See notes 63, 64 *supra*.

We are concluding that in a definite instance a certain individual has specific property which he is called upon to surrender. The conclusion or inference of continued possession has no logical foundation because based on a false major premise—"All wrongdoers hold on to their loot"—clearly false because at war with the facts of experience. It may be urged that, conceding the lack of certainty about the inference, it is nevertheless some evidence of continued possession. But evidence must have a tendency to prove the ultimate fact, and even if that tendency were here present, it would be so conjectural as to fall far short of the requirement of clear and convincing evidence, in the absence of which no turnover order should issue.<sup>88</sup>

Is the inference justified by the second factor to which it has been attributed—namely, the failure of the respondent to explain what happened to the property? In the first place, it may be noted that if we view the inference as an aid to the trustee in making out his *prima facie* case so as to defeat a motion to dismiss the proceeding at the end of his evidence, then the failure of the respondent's case should not yet be weighed in the balance. The respondent's case is yet to be heard. The question raised by the motion to dismiss is whether the state of the proof requires the respondent to present any case at all. But disregarding that point in favor of the informal nature of this non-jury proceeding, what can be the reason for penalizing the respondent for his failure to speak? If the trustee is to gain by the respondent's failure to explain, it must be because the respondent was remiss in performing some duty that was upon him.

We have demonstrated that such a duty cannot be attributed to any necessity of counteracting or neutralizing evidence of present possession offered by the trustee, for the trustee has merely proved the taking. The duty of explanation must have some other source. Charging the respondent with present possession of the property if he fails to explain its loss is justified only if he is under a duty to speak about the matter. It is submitted that it is perfectly proper to place such a duty upon the

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88. In *United States v. Moore*, 294 Fed. 852 (C. C. A. 2d, 1923), it was established that certain books of account had been taken by respondent. The court stated there was a presumption that they continued in his possession and that the burden was upon him satisfactorily to account for them. Said the court, "This is in accordance with the rule that the proof of the existence at a particular time of a fact of a continuous nature gives rise to an inference that it exists at a subsequent time" *Ibid* at 857. The precise difficulty however is that the rule as stated does not apply because possession of the property is not "a fact of a continuous nature"—certainly not if the property is cash or saleable merchandise nor even in the case of books of account, the quick destruction of which may best serve respondent's purposes. *Cf.* 9 WIGMORE, EVIDENCE (3d ed. 1940) § 2530.



respondent because he has peculiar knowledge of the subsequent history of the property which has been traced to his possession. It is only reasonable to call upon a party to the suit to divulge that information which may be exclusively within his knowledge. As Lord Mansfield has said:

"All evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other side to have contradicted."<sup>89</sup>

But if this is the source of the respondent's duty of explanation, the trustee, in proving present possession of the property, should not be forced to rely upon a rational inference of fact<sup>90</sup> flowing from other facts proved in the proceeding. Rather he should be assisted in making out his *prima facie* case by a real presumption,<sup>91</sup> which should be frankly labeled a rule of law placing a duty upon the respondent to tell what happened to the goods—not because the trustee has offered evidence which, in the absence of proof to the contrary by respondent, would justify a conclusion of continued possession, but because the respondent must divulge the information which is peculiarly available to him.

Much of the uncertainty that has arisen in the cases is due to a failure to recognize the source and character of the obligation which requires the respondent to explain what happened to the missing assets. The respondent's duty to make proof arises from a rule of law established for the fair regulation of the judicial inquiry—not from the necessity of meeting or counteracting the trustee's proof. It should be frankly acknowledged that present possession of the property is presumed with-

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89. This frequently cited quotation is from *Blatch v. Archer*, 1 Cowp. 63, 65, 93 Eng. Reprints 969, 970 (K. B. 1774). The United States Supreme Court made reference to it in *Cooper v. Dasher*, 290 U. S. 106, 109 (1933).

90. For the distinction between an inference of fact and a true presumption see 9 WIGMORE, EVIDENCE (3d ed. 1940) § 2491. The term "presumption of fact" is often used as a term equivalent to "inference." Wigmore states that ". . . 'a presumption of fact', in the loose sense, is merely an improper term for the rational potency, or probative value, of the evidentiary fact. . . . There is in truth but one kind of presumption; and the term 'presumption of fact' should be discarded as useless and confusing."

Wigmore goes on to say ". . . the peculiar effect of a presumption 'of law' (that is, the real presumption) is merely to invoke a rule of law compelling the jury to reach the conclusion *in the absence of evidence to the contrary* from the opponent. If the opponent *does* offer evidence to the contrary (sufficient to satisfy the judge's requirement of some evidence), the presumption disappears as a rule of law, and the case is in the jury's hands free from any rule." See THAYER, PRELIMINARY TREATISE ON EVIDENCE (1898) 313-352, especially 314-317; Morgan, *Some Observations Concerning Presumptions* (1931) 44 HARV. L. REV. 906. Com. *Molasses Corp. v. N. Y. Tank Barge Corp.*, 114 F. (2d) 248 (C. C. A. 2d, 1940).

91. *Ibid.*

out proof<sup>92</sup> and that this is done for the reason that the evidence to prove or disprove present possession is so often beyond the reach of the trustee while the respondent always holds it in the hollow of his hand. It is because the so-called inference of present possession is considered one of fact and as such is without logical foundation and hardly more than a good guess that the courts strive to make the speculation as accurate as possible by varying the strength of the inference with various factors such as the character of the goods and the amount of elapsed time between the taking and the turnover proceeding.

When the court draws the inference of present possession of property from mere proof that it was taken, it cannot be unaware that it is dealing with "speculative unrealities."<sup>93</sup> Money goes fast but some persons manage to hold it much longer than others. There is a market for shoes but some bankrupts may prefer to hide rather than sell them, at least until the storm blows over. Books of account, unlike vegetables, do not perish of themselves, but some bankrupts may put them in the fire before a grand jury subpoena can be served. However, the guesswork will be eliminated if we acknowledge that the trustee need not in the first instance prove present possession because the respondent, who knows the facts, is under an obligation to tell the court whether he burned the books or sold the shoes or spent the money.

The law, in like situations, has not hesitated to place the duty of coming forward with the pertinent information and sometimes even the strict burden of persuasion<sup>94</sup> upon the person whose familiarity with the facts makes him best able to produce it. Thus the bailee of goods who fails to surrender them to the bailor upon demand has the burden of showing facts to excuse his non-delivery thereof, and so rebut a presumption of his negligence which arises upon his non-return of the goods.<sup>95</sup> If they were stolen or destroyed without his

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92. "It is therefore a fallacy to attribute (as do some judges) an artificial probative force to a presumption, increasing for the jury the weight of the facts, even when the opponent has come forward with *some* evidence to the contrary." 9 WIGMORE, EVIDENCE (3d ed. 1940) § 2491. See MORCAN, *op. cit. supra* note 90, at 908. "Presumptions . . . are artificial rules which have a legal effect independent of any belief, and stand in the place of proof until the contrary be shown." *Smith v. Asbell*, 2 Strobb. 141, 147. (S. C.)

93. A term used by Mr. Justice Frankfurter in *Helvering v. Hallock*, 309 U. S. 106, 120 (1940).

94. Ready availability of proof has been recognized as a justification for placing even the strict burden of proof upon the informed person. 9 WIGMORE, EVIDENCE (3d ed. 1940) § 2486.

95. *Stewart v. Stone*, 127 N. Y. 500, 28 N. E. 595 (1891); *Galowitz v. Magner*, 208 App. Div. 6, 203 N. Y. Supp. 421 (2d Dep't 1924); *Corbin v. Gentry Cleaning Co.*, 181 Mo. App. 151, 167 S. W. 1144 (1914); *Hanes v. Shapiro*, 168 N. C. 24, 84 S. E. 33

fault, the bailee is in the best position to prove it; if the bailee is unable to return the goods, he cannot defeat the bailor's suit by sitting back and remaining silent while demanding that the bailor prove facts which only the bailee knows.<sup>96</sup> The purpose of raising the presumption of liability is to assist the bailor in his predicament and to require that proof come from the party to whom it may be exclusively available. The presumption is not a logical inference of fact flowing from the non-delivery of the bailed goods, for it does not follow in reason that because the bailee cannot produce the goods he has not done his duty in caring for them.<sup>97</sup> If the bailor may win his case by simply proving the bailment and non-return of the goods, unless the bailee shoulder the burden of at least adducing some proof to absolve himself from the presumption of negligence, it would seem proper, by an equality of reasoning, to grant a turnover order in favor of the trustee upon proof of the taking of the goods plus a failure by the respondent to at least go forward with evidence tending to show his inability to surrender them at the time of the turnover proceeding.<sup>98</sup>

It may be argued that, in the turnover proceeding, no presumption of continued possession should be raised and no duty of proof should be

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(1915). These cases represent the majority view which places upon the bailee the burden of proceeding with evidence to rebut the presumption of his liability. There is a vigorous minority view which takes the position that, not merely the duty to proceed, but the affirmative burden of proving facts in excuse, rests upon the bailee. *Rustad v. Great Northern R. Co.*, 122 Minn. 453, 142 N. W. 727 (1913); *Security Storage & T. Co. v. Martin*, 144 Md. 536, 125 Atl. 449 (1924). See BROWN, *PERSONAL PROPERTY* (1936) § 87.

96. "Since the bailor is generally at a disadvantage in obtaining accurate information of the cause of the loss or damage, the law considers he makes out a case for the application of the rule of *res ipsa loquitur* by proof of the bailment and the failure of the bailee to deliver the property on proper demand." *Corbin v. Gentry Cleaning Co.*, 181 Mo. App. 151, 152, 167 S. W. 1144, 1145 (1914). "Considerations of fairness put upon the warehouseman the burden of proving his own freedom from negligence. The goods are intrusted to him. He has charge and control of them. He determines the manner of keeping them. He is in possession of such evidence as there is as to the circumstances attending the loss. The bailor trusts the warehouseman and has no proof. It is not unjust to the warehouseman to require him to sustain the burden of proving its (*sic*) freedom from negligence." *Rustad v. Great Northern R. Co.*, 122 Minn. 453, 454, 142 N. W. 727, 728 (1913). For other instances of a similar presumption see MORGAN, *op. cit.* *supra* note 90, at 926, 927.

97. BROWN, *PERSONAL PROPERTY* (1936) § 87.

98. There are of course some differences between the two situations. The *quantum* of proof in the turnover proceeding—clear and convincing evidence—would have to be adhered to. The fact that in the bailment there is a voluntary entrustment of the property whereas in the turnover proceeding a fraudulent taking and concealment has been proved should not justify any lesser requirements but should if anything call for the application of more stringent rules against the respondent.

cast on respondent, because defeat would be fraught with such serious consequences to him. Of course, the apportionment of the duty of making proof in the turnover proceeding must result from a judicious balancing of the respective positions of trustee and respondent.<sup>99</sup> The trustee must not be unreasonably impeded in his administration of the estate in bankruptcy nor should the respondent be subjected to unreasonable requirements. But the question of placing a duty of proof upon respondent does not arise until the trustee has by clear and convincing evidence traced the property to respondent's possession. What reasons can he then have for refusing to take up the story? He may be unwilling to show how he disposed of the property because he would first have to admit the taking and he may still have hopes of prevailing on that issue due to the obstacles he has strewn in the trustee's path.<sup>100</sup> In other words, it may be considered bad "tactics" or "strategy" to abandon the position taken on the first issue before that point is definitely lost, as where the referee may have reserved decision on the motion to dismiss the trustee's case for failure to prove the taking. Such a viewpoint has little to recommend it for it regards the proceeding as a game of wits rather than a judicial inquiry into the truth of the matter. The respondent knows the truth and should be guided accordingly. Again the respondent may be unwilling to tell what he knows because he fears his testimony will tend to incriminate him. Or his refusal may be nothing more than defiance. The respondent's predicament, however, is always of his own making and deserving of little sympathy when balanced against the desirability of stating a rule which will result in increased dividends for creditors by making it less easy for the respondent to flout the law.<sup>101</sup>

It is submitted that it is a wise rule of law, realistically facing the practical aspects of a difficult situation, which raises a presumption of continued possession and thus requires the respondent to assume the burden of going forward with evidence to show his inability to comply

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99. ". . . the conscience of judges in weighing the evidence under a clear perception of the consequences . . . will restrain the courts from recklessness of bankrupt's rights on the one hand and prevent the bankrupt from flouting the law on the other." *Oriel v. Russell* 278 U. S. 358, 364 (1929).

100. This thought was probably in the court's mind in *Danish v. Sofranski*, 93 F. (2d) 424 (C. C. A. 3d, 1937), where the court said that the respondent by denying the taking had removed the issue of present possession from the case.

101. Compare the court's statement in *Dittmar v. Michelson*, 281 F. 116, 117 (C. C. A. 3d, 1922): "While, of course, a witness may properly decline to incriminate himself, yet the fact that crime may make it more difficult and possibly hazardous to tell what became of assets, does not destroy the presumption of the continued possession of assets, whose disappearance is not accounted for."

with the proposed order. When the trustee, in the face of severe difficulties, has succeeded in tracing missing assets to the possession of the respondent who can assert no substantial adverse claim to them, then the law should say that the trustee has done enough. From then on, it is only fair to expect the respondent to take up the story and tell the succeeding chapters. He surely knows, for he is the author.

In the past the courts have failed to take the presumption of continued possession for what it really is and apply it in the light of its purpose. Had they done so, much of the uncertainty that surrounded the "inference" of fact, would have been avoided. If, for valid reasons, there arises a real presumption of continued possession, without any proof by the trustee of that fact, the presumption is equally applicable whether the property taken by respondent is money, diamonds, vegetables or books of account, and no matter how long ago or how recently they were taken. The practical results of employing the presumption rather than the inference may be illustrated by a reconsideration of *Danish v. Sofranski*.<sup>102</sup> There the money sought by the trustee had been taken two years before the turnover order. The respondents were silent on what had happened to the money. The court refused the order because there was a fair doubt whether any of the money remained unspent and even if there were some on hand it would be the "merest fancy" to fix the amount. It is possible, however, that the respondents still had the entire sum or some fraction thereof, and if that were the fact, the trustee should have succeeded. He failed, however, because the inference of fact upon which the court was forced to rest was unreliable. If a real presumption of law had been indulged and the duty placed upon the respondents to explain what happened to the money some certainty might have resulted. If respondents refused to tell what they knew, the turnover order would have been granted and the respondents would have only their own defiance to thank for it, if compliance was impossible. If the respondents in straightforward manner attempted to explain how they spent the money over the two year period the court would have been ready to credit their testimony. And here the observations of the courts regarding their reluctance to grant turnover orders in the case of money or saleable merchandise would have forceful application—not to weaken the inference of continued possession—but to make the court the more ready to credit the respondent's testimony that he sold the goods and spent the money. But if the respondent by credible proof could not account for the money that had been traced into his hands or could explain how he disposed of only a portion of it, then the court,

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102. 93 F. (2d) 424 (C. C. A. 3d, 1937).

with some degree of assurance, might have granted a turnover order for the whole or a definite balance of the money. Thus, while it is possible that in applying the presumption of law rather than the inference of fact in the *Danish* case, the same result might well have been reached, it would be due not to guesswork or a sense of futility, but because the facts were required to be made known by the man who knew them best. And the trustee, and through him the creditors, would gain, as gain they should, if the respondent's version of the facts disclosed the whole or a balance of the money remaining in his possession.

The presumption of continued possession has the effect merely of compelling respondent to go forward with evidence to show that he does not have the property in question. It does not place upon him the burden of persuasion on that issue.<sup>103</sup> The effect of raising the presumption therefore does not take from the trustee's shoulders the strict burden of proof on all the issues. If the respondent performs his duty to go forward, the effect of the presumption is removed and the trustee must satisfy the court as a matter of fact that the respondent has the ability to comply with the proposed order.<sup>104</sup>

It may be urged with considerable force that even the strict burden of proof, on the issue of present possession of the property sought by the trustee should fall upon the respondent.<sup>105</sup> It is true that the trustee has the affirmative of the issue but that consideration, while helpful, is not the sole determinant of the incidence of the burden of persuasion.<sup>106</sup> Rather a sound policy for the just and efficient regulation of the judicial inquiry should govern.<sup>107</sup> In certain situations the burden of proof is placed upon the party who has peculiar knowledge of the facts in issue.<sup>108</sup> For example, in the bailment cases discussed above, there is a strong minority view which places upon the bailee the

103. Cf. *Sheinman v. Chalmers*, 33 F. (2d) 902 (C. C. A. 3d, 1929); *In re Fisher*, 32 F. Supp. 69 (D. C. Md. 1940).

104. 9 WIGMORE, EVIDENCE (3d ed. 1940) § 2491; THAYER, *op. cit. supra* note 90 at 336, 337. The respondent of course fulfills his obligation to go forward only when he produces evidence such as the trier of the fact will believe. MORGAN, *op. cit. supra* note 90 at 926, 927.

105. In *Oriel v. Russell*, 278 U. S. 358 (1929), though the Supreme Court spoke at some length on the *quantum* of the proof required on the turnover proceeding, no statement was made on the matter of the incidence of the burden of proof.

106. 9 WIGMORE, EVIDENCE (3d ed. 1940) § 2486; MORGAN, *op. cit. supra* note 90, at 911.

107. "The truth is that there is not and cannot be any one general solvent for all cases. It is merely a question of policy and fairness based on experience in the different situations." 9 WIGMORE, EVIDENCE (3d ed. 1940) § 2486.

108. "... the generally accepted reasons for creating presumptions correspond to a large degree with the considerations determining the allocation of the burden of persuasion." Morgan, *op. cit. supra* note 90, at 929.

strict burden of proving that the goods bailed were not lost or destroyed through his negligence.<sup>109</sup> This is done for the same reason that the majority rule requires the bailee to go forward with evidence to meet the presumption of negligence—the fact that the bailee is in a far better position to offer the proof.

In other phases of the bankruptcy proceeding, Congress, by affirmative provision in the Bankruptcy Act, has placed the burden of proof upon the bankrupt where the facts are well known to the bankrupt and relatively unavailable to creditors. In an involuntary proceeding, where the petition alleges insolvency at the time of the commission of an act of bankruptcy and this is denied by the alleged bankrupt, he must lay bare all his books, papers and accounts and come into court ready and willing to be examined. If he fail to do so, the burden of proving solvency shall rest upon him.<sup>110</sup> This statutory provision is founded upon a recognition of the relative positions of petitioning creditor and alleged bankrupt. The latter knows vastly more about his own financial condition than the creditor, and so it is made his duty to make known the facts. Again, if less than three petitioners commence an involuntary proceeding and the alleged bankrupt in his answer asserts the existence of twelve or more creditors, seeking thereby to dismiss the proceeding, he must file a sworn list of all his creditors. It is for the alleged bankrupt, who knows the facts, to speak, not for the creditor who may be in the dark.<sup>111</sup> Again, where the bankrupt applies for a discharge and objections are made, the Act provides

“That if, upon the hearing of an objection to a discharge, the objector shall show to the satisfaction of the court that there are reasonable grounds for believing that the bankrupt has committed any of the acts which . . . would prevent his discharge in bankruptcy, then the burden of proving that he has not committed any of such acts shall be upon the bankrupt.”<sup>112</sup>

Congress has not hesitated to place upon the bankrupt the burden of

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109. See note 95 *supra*.

110. Bankruptcy Act § 3d. See *Hollister v. Oregon Hardwood Mills*, 15 F. (2d) 787 (C. C. A. 9th, 1926).

111. Bankruptcy Act § 59d.

112. Bankruptcy Act § 14b; see *Federal Provision Co. v. Frshovskv.* 94 F. (2d) 574, 575 (C. C. A. 2d, 1938) where the court spoke as follows: “The amendment of 1926 has revolutionized the procedure in discharge; the bankrupt may no longer remain inert, standing upon the infirmities of the evidence against him; once a *prima facie* case appears, the laboring oar passes to his hands and he must bring the boat to shore. It is he who has caused the loss, who has access to the facts, and who alone knows what the explanation is; let him make it, let him satisfy the court that it really explains. Else he will not be discharged.”

absolving himself from the charge, when the objector has gone far enough to establish "reasonable grounds" for believing it is true. And this in the matter of obtaining a discharge, so important from the bankrupt's viewpoint. Thus Congress has thought it proper that, in the administration of the Bankruptcy Act, the burden should rest upon the shoulders of the bankrupt in situations where he has not the affirmative of the issue but where the necessary information is peculiarly available to him. Accordingly it may be urged that the same principle should be applied in the turnover proceeding and the respondent be required to sustain the strict burden of proving his inability to comply with the proposed order. However, the courts have never gone so far and perhaps with good reason. The nature of the proceeding, the *quantum* of proof required and the punishment for contempt that is foreshadowed in the event of a failure to obey are weighty matters which give pause before the strict burden of proof is placed on the respondent. Be that as it may, however, the fact that courts and legislatures have placed the burden of proof upon the person who has peculiar knowledge of the facts, strengthens our conclusion that, in the turnover proceeding, to raise up a presumption of continued possession and thus require respondent to speak is good policy and good law.

It is believed, therefore, that the time is ripe for a reconsideration by the courts of the so-called inference of continued possession of the estate assets which respondent is shown to have taken. It should be recognized that the inference considered as one of fact leads only to confusion and uncertainty while as a real presumption it serves a most desirable function by requiring the respondent to contribute his information to the court's fund of knowledge so that a just decision may be rendered. The looter will soon learn that defiance brings only defeat and that it does not pay to flout the law.