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Discovery -- Inspection of Chattels

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

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Discovery—Inspection of Chattels

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

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

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

[27] See note 14 *supra.*

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

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

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

duce and permit inspection of chattels in his posession, and the court possesses no inherent power to grant such relief.

In regard to the discovery of evidence within a party's possession or knowledge, the early common law courts laid down the rule that no one is required to furnish evidence to his adversary.[2] This rule worked a great hardship on litigants when a part or all of their evidence lay exclusively within the knowledge or possession of their opponent. Chancery, to prevent this injustice, and in the exercise of its inherent power to probe the consciences of the suitors, developed the bill of discovery.[3] By means of this bill, a party could require his adversary to give evidence under oath, or to produce papers and documents in his control or possession.[4] The evidence thus procured could then be used in an action at law. However, one could obtain only evidence material to his own case or defense, and not evidence material only to his opponent's case.[5] And the rule of privilege applied.[6] Under the same bill, chancery allowed the inspection of chattels in a party's possession or control when the administration of justice required.[7]

Inspection of chattels has been allowed under a bill of discovery in the United States.[8] It has also been allowed incidentally in suits for relief in equity.[9] Under the codes, some cases have allowed inspection of chattels on the theory that the courts possess inherent power to grant such relief.[10] Other cases have denied inspection for the reason

[2] Union P. R.R. v. Botsford, 141 U. S. 250 (1890); Dell v. Taylor, 6 Dowl. & R. 388 (1825); 3 BL. COMM. *381, 382; 6 WIGMORE, EVIDENCE §1862 (3rd ed. 1940).

[3] People *ex rel.* Lemon v. Supreme Court, 245 N.Y. 24, 156 N.E. 84 (1927); 1 POMEROY, EQUITY JURISPRUDENCE §190a (5th ed., Symonds, 1941).

[4] 1 POMEROY, EQUITY JURISPRUDENCE §190a (5th ed., Symonds, 1941).

[5] Carpenter v. Wynn, 221 U. S. 533, 540 (1910); Combe v. London, 4 Y. & C. 139, 160 Eng. Rep. 953 (1840); Hunt v. Hewitt, 7 Exch. 236, 155 Eng. Rep. 953 (1852).

[6] *Re* Klemann, 132 Ohio St. 187, 5 N.E. 2d 492 (1936); Calcraft v. Guest, [1898] 1 Q.B. 759, 78 L.T. (N.S.) 283; 1 POMEROY, EQUITY JURISPRUDENCE §203 (5th ed., Symonds, 1941).

[7] Marsden v. Panshall, 1 Vern. 403, 23 Eng. Rep. 548 (1686) (inspection of pawned clothes allowed under bill of discovery to enable plaintiff to bring action at law); Earl of Macclesfield v. Davis, 3 Ves. & B. 16, 35 Eng. Rep. 385 (1814) (inspection of heirlooms ordered in suit in chancery); 6 WIGMORE, EVIDENCE §1862 (3rd ed. 1940).

[8] Reynolds v. Burgess Sulfite Fibre Co., 71 N.H. 332, 51 Atl. 1075 (1902) (inspection of broken strap alleged to have caused injury allowed under bill of discovery to enable plaintiff to prepare case at law).

[9] Mutual Life Ins. Co. v. Griesa, 156 Fed. 398 (C.C. Kan. 1907) (exhumation and examination of body of deceased ordered in suit to cancel insurance policy); Diamond Match Co. v. Oshkosh Match Works, 63 Fed. 984 (C.C. Wis. 1894) (inspection ordered in suit to enjoin patent infringement); McLeod Tire Corp. v. B. F. Goodrich Co., 268 Fed. 205 (S.D. N.Y. 1920) (inspection ordered in patent infringement suit); Rowell v. William Koehl Co., 194 Fed. 446 (W.D. N.Y. 1912).

[10] *E.g.*, Arkansas Utilities Co. v. Pipkin, 202 Ark. 314, 150 S.W. 2d 38 (1941) (inspection of equipment and safety appliances on premises); Clark v. Tulare Lake Dredging Co., 14 Cal. App. 414, 112 Pac. 564 (1910) (inspection of machinery on barge allowed); Sinclair Oil Refining Co. v. Nat. L. McGuire Oil & Supply

that they lacked such power.[11]

No case involving inspection of chattels has been reported in North Carolina. The legislature has abolished the bill of discovery,[12] and provided a statutory substitute.[13] No provision is made for inspection of chattels. However, it seems that the statute merely substitutes a simplified procedure for the bill, and does not affect the inherent power of the court in its equitable jurisdiction to do justice between the parties.[14] This conclusion is supported by *Flythe v. The Eastern Carolina Coach Co.*,[15] in which the supreme court held that a trial court has inherent power to order a physical examination of a plaintiff in a personal injury action when it finds that justice to the defendant requires it, even though there is no statutory authorization.

There would seem to be little, if any, reason for a distinction between the power to order an inspection of chattels, and the power to order an inspection of documents which was inherent in equity. Each is a species of personal property. The property rights invaded by an inspection of chattels do not differ in kind or degree from those invaded by an inspection of documents.[16] Such an inspection may be as necessary to the administration of justice as an inspection of documents

Co.,——Mo. App.——, 221 S.W. 378 (1920) (defendant allowed to inspect to see how much oil plaintiff had on hand and its value); State *ex rel.* American Mfg. Co. v. Anderson, 270 Mo. 533, 194 S.W. 268 (1917) (inspection allowed of machinery and premises); Driver v. F. W. Woolworth Co., 58 Ohio App. 299, 16 N.E. 2d 548 (1938) (discovery of tube of mascara allowed in order to have it analyzed).

[11] *E.g.*, Martin v. Elliot, 106 Mich. 130, 63 N.W. 998 (1895); Wilson v Collins, 57 Misc. 365, 109 N. Y. Supp. 662 (1908); Downes v. McAleen, 16 N. Y. Supp. 916 (City Court of New York 1891); Cook v. The Lalance Grojean Mfg. Co., 3 N. Y. Civ. Proc. Rep. 332, 29 Hun. 641 (1883). See cases collected in 33 A. L. R. 16.

[12] N. C. GEN. STAT. §1-568 (1943) (No action to obtain a discovery under oath in aid of the prosecution or defense of another action shall be allowed, nor shall any examination of a party be had on behalf of the adverse party, except in the manner prescribed by this article.). Query: Does this statute abolish all discovery, or merely that seeking testimony of a party under oath? Its terms are limited to examination of parties under oath, with no mention of discovery of documents which is provided for in another article, nor of discovery or chattels, but the court seems to have interpreted it as abolishing the bill of discovery completely. See Dunn v. Johnson, 115 N.C. 249, 20 S.E. 390 (1894).

[13] N. C. GEN. STAT. §§1-570 and §1-571 (examination of parties); §8-89, and §8-90 (inspection of books, papers, and documents).

[14] Dunn v. Johnson, 115 N. C. 249, 20 S. E. 390 (1894); MCINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE §86 (1929); 1 POMEROY, EQUITY JURISPRUDENCE §194 (5th ed., Symonds, 1941).

[15] 195 N. C. 777, 143 S.E. 865 (1928); *accord,* Alabama G. S. Ry. v. Hill, 90 Ala. 71, 8 So. 90 (1890); Johnson v. Southern P. R.R., 150 Cal. 535, 89 Pac. 348 (1907); United R. & E. Co. v. Cloman, 107 Md. 690, 69 Atl. 379 (1908); Hess v. Lake Shore & M. S. R.R., 7 Pa. Co. Ct. 565 (1882); Wanek v. Winona, 78 Minn. 98, 80 N.W. 851 (1899); Carnine v. Tibbetts, 158 Ore. 21, 74 P. 2d 974 (1937). *Contra:* Union Pacific R.R. v. Botsford, 141 U. S. 250, (1890) (Rule 35 of the Fed. R. Civ. Proc. (1938) now authorizes orders for physical examinations of parties); Howland v. Beck, 56 F. 2d 35 (C.C.A. 9th 1932); Yazoo & M. V. R.R. v. Robinson, 107 Miss. 192, 65 So. 241 (1914); Richardson v. Nelson, 221 Ill. 254, 27 N.E. 583 (1906).

[16] Reynolds v. Burgess Sulfite Fibre Co., 71 N. H. 332, 51 Atl. 1075 (1902).

or the physical examination of a party. It would be an illogical situation if one could obtain a physical examination of his injured opponent and yet not be allowed to inspect the chattel alleged to have caused the injury.[17]

Therefore it appears that the North Carolina Supreme Court would be justified in extending the right of inspection to chattels in a proper case. The procedure for obtaining such an inspection would seem to be that approved for physical examinations in the *Flythe* case, *i.e.*, by a motion that the court order the party to allow the inspection.

The South Carolina decision is explainable in the light of another case[18] holding that the court has no power in absence of statute to order a physical examination of a party, although the analogy is not infallible.

A few states have provided for inspection of chattels in their statutes or rules regulating discovery.[19] The Federal Rules of Civil Procedure incorporate inspection of chattels into the liberal provisions for inspection of papers, documents, and premises.[20]

Since other phases of discovery are provided for by statute in North Carolina,[21] it would seem desirable that inspection of chattels be so provided for. In the interest of obtaining uniformity of practice between the state and Federal courts, as well as to settle any doubt as to the power of the court to order an inspection of chattels, it is suggested that an adoption by the legislature of the provisions of Rule 34 of the Federal Rules of Civil Procedure would be in order.[22]

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[17] Arkansas Utilities Co. v. Pipkin, 202 Ark. 314, 150 S.W. 2d 38 (1941) (in which the court said that the power to order inspection of machinery was no different from the power to order an examination of the person).

[18] Easler v. Southern Ry., 60 S.C. 117, 38 S.E. 258 (1901).

[19] Arizona, Colorado, Florida, Hawaii, Maryland, New Jersey, New York, Rhode Island, South Dakota, and Wisconsin.

[20] Rule 34: Upon motion of any party showing good cause therefor and upon notice to all parties, and subject to the provisions of Rule 30(b), the courts in which an action is pending may (1) order any party to produce and permit the inspection, and copying or photographing, by or on behalf of the moving party any designated documents, papers, books, accounts, letters, photographs, objects or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26 (b) and which are in his possession, custody or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated object or operation thereon within the scope of the examination permitted by Rule 26(b). The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just.

[21] Excepting, of course, physical examinations of parties.

[22] Arizona and Colorado have adopted Rule 34 of the Fed. R. Civ. Proc. as it stood before amendment in 1947. See ARIZ. CODE ANN. §21-736 (1939), and Colo. R. Civ. Proc. (1941) Rule 34.