BANKRUPTCY – EXECUTION CREDITOR WITH NOTICE OF ACT OF BANKRUPTCY – SUCH ACT CONSISTING OF EXECUTION LEVIED BY THE CREDITOR HIMSELF

McQuarrie v. Jacques[1]

The goods of a judgment debtor were seized by the sheriff, held by him for seven days, and later sold. Within six months of this act of bankruptcy, but after the sale had taken place, a bankruptcy petition was lodged and a sequestration order made on an act of bankruptcy committed subsequent to the sale by the sheriff. The Federal Court of Bankruptcy held that the execution creditor was not entitled to retain the proceeds of the sale as against the trustee in bankruptcy.[2] On appeal, the High Court affirmed this decision. As against the trustee in bankruptcy, an execution creditor may not retain moneys received from an execution completed by seizure and sale if he knew before the sale of the commission by the debtor of an available act of bankruptcy.

The first question to be determined was: when is an execution completed? For it had been early held that an execution levied after the debtor had committed an act of bankruptcy was nugatory.[3]

In the early nineteenth century it was held that, where 'seizure and sale were perfect' before the act of bankruptcy, 'the general rules and principles of law' protected the execution creditor against the trustee in bankruptcy;[4] as soon as the debt was extinguished by sale or by payment of money the execution was considered to be complete.[5] The goods themselves, however, remained available to the trustee in bankruptcy until the debtor's property in them had been divested by seizure and sale.[6]

Under the English Bankruptcy Act 1869, seizure prior to the act of bankruptcy enabled the execution creditor to retain, as against

[1] [1955] A.L.R. 49. High Court of Australia; Dixon C.J., Webb, Fullagar, Kitto and Taylor JJ.

[2] The Bankruptcy Act 1924-33 provides:

S. 52. 'A debtor commits an act of bankruptcy in each of the following cases. . . .(e) If execution against him has been levied by seizure of his goods under process in an action in any Court, or in any civil proceeding in any Court, and the goods have been either sold or held by the sheriff for seven days. . . .'

S. 92 (1) 'Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due to him, he shall not be entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy unless he has completed the execution or attachment before sequestration and before notice of the presentation of any petition by or against the debtor or before notice of the commission of any available act of bankruptcy by the debtor.'

[3] *Cooper v. Chitty* (1756) 1 Kenyon 395, 417.

[4] *Wymer v. Kemble* (1827) 6 B. & C. 479, 483.

[5] *Morland v. Pellatt* (1828) 8 B. & C. 722, 726.

[6] *Giles v. Grover* (1832) 1 Cl. & F. 72, 77. See also 1 *Wm. Saund.*, (6th edn.) 219, note (c).

the trustee in bankruptcy, the proceeds of a sale which took place after the act of bankruptcy.[7] It was even argued that the delivery of the writ of *fi. fa.* to the sheriff before the act of bankruptcy sufficed to prevent the trustee in bankruptcy claiming the proceeds of a sale occurring after the act of bankruptcy, but this argument was rejected.[8] However, so long as a creditor seized or sold before notice of an act of bankruptcy he was protected. Seizure was sufficient to render an execution effectual.[9] Notice of an available act of bankruptcy gained by the creditor between seizure and sale was of no effect to deprive him of his protection.[10]

The current legislation in England has once again altered the creditor's position, and in order to retain the proceeds of the execution as against the trustee in bankruptcy, he must complete the execution by sale prior to notice of an available act of bankruptcy.[11]

In the present case, s. 92 (2) of the Bankruptcy Act 1924-33 required execution against goods to be completed by seizure and sale, and the Court held that execution was not complete until both seizure and sale had taken place.

A more difficult question was what constituted an 'available act of bankruptcy' within the meaning of s. 92.

An execution by seizure and sale has long been held not to constitute an act of bankruptcy, such as to invalidate that very execution against the trustee in bankruptcy, on the basis that such act of bankruptcy does not take place till after the completion of the execution.[12] Where the act of bankruptcy consisted of the holding of the debtor's goods by the sheriff, however, the position has been held to be different.[13]

On this point, the High Court had no hesitation in applying the doctrines evolved in England, so as to hold that 'any available act of bankruptcy' in s. 92 included an act of bankruptcy taking place in the course of the very execution in question. The creditor was deemed to have notice of such act of bankruptcy. In England, knowledge that a bankruptcy petition has been dismissed is not sufficient to constitute such notice.[14] Seizure and sale by a sheriff under a creditor's own writ has, however, been held constructive notice to the creditor of such act of bankruptcy;[15] and the facts in the present case were held to be sufficiently analogous for the High

[7] *Re Norton* (1870) L.R. 10 Eq. 425; *Re Hall* (1871) L.R. 6 Ch. App. 796.
[8] *Re Davis* (1872) L.R. 7 Ch. App. 314.
[9] *Slater v. Pinder* (1871) L.R. 6 Ex. 228; (1872) L.R. 7 Ex. 95.
[10] *Re Bannister* (1881) 18 Ch. D. 145.
[11] In *re Love* [1952] Ch. 138.
[12] *Wymer v. Kemble* (1827) 6 B. & C. 479, 483; *Ex parte Villars* (1874) L.R. 9 Ch. App. 432.
[13] *Figg v. Moore Bros.* [1894] 2 Q.B. 690. *Trustee of John Burns-Burns v. Brown* [1895] 1 Q.B. 324.
[14] *In re O'Shea's Settlement,* [1895] 1 Ch. 325.
[15] *In re Husband* (1875) L.R. 19 Eq. 438.

Court to apply the latter decision and fix the creditor with constructive notice of the act of bankruptcy.

The remaining problem which faced the Court was to determine whether the moneys received by the creditor from the sheriff's sale were a 'benefit of the execution' within the meaning of s. 92 (1) of the Bankruptcy Act 1924-33.

At the beginning of the present century the phrase 'benefit of the execution' was held to include all moneys received from the debtor during the subsistence of a charge over his goods as security for the debt.[16]

Under the present English legislation, it was at first thought that 'benefit of execution' included only moneys received from the debtor during the period covered by the doctrine of relation back.[17] But, in 1932, it was decided that any moneys received under a compromise of an uncompleted execution were available to the trustee in bankruptcy no matter when the actual moneys had been received:[18] that they had been received by way of compromise made no difference.[19]

This trend, however, was reversed by the decision of Farwell J. in *In re Samuels*,[20] where he held that sums paid by the debtor before the date of the receiving order were not a 'benefit of the execution' within s. 40 of the Bankruptcy Act 1914. This decision was approved and followed in *In re Godwin*[21] and *In re Andrew*.[22]

In the last mentioned case Lord Wright M.R. said:[23] 'The words refer to the charge which the creditor obtains by the issue of the execution; and . . . to the extent that by payment of moneys that charge has been reduced or abrogated, there is *pro tanto* no benefit of the execution to be considered.' In this passage, however, he was referring merely to moneys received in compromise of an execution and the statement does not mean that the proceeds of sale are not a 'benefit of the execution'.

The Court in the present case, in deciding what constituted a 'benefit of the execution', adopted the test used by the Court of Appeal in *In re Andrew*, and held that it did not include moneys coming to the hands of the creditor before sequestration and before knowledge of a petition or available act of bankruptcy. It did, however, cover more than the mere charge on the debtor's goods created by the execution; it included, as well as the proceeds of the execution, any money paid by the debtor after sequestration or after notice to the creditor of a petition or available act of bankruptcy, so long as the creditor had a charge over the debtor's goods.

It is quite clear that the decision was not a necessary result of the bankruptcy' could well be held not to include notice of an act of express words used in the Act; for notice of 'any available act of

[16] *In re Ford* [1900] 1 Q.B. 264, 267.
[17] *Re Fairley* [1922] 2 Ch. 791.
[18] *Re Kern* [1932] 1 Ch. 555.
[19] *Re Brelsford* [1932] 1 Ch 24.
[20] [1935] Ch. 341.
[21] [1935] Ch. 213.
[22] [1937] Ch. 122.
[23] *Ibid.*, 127-8.

bankruptcy occurring in the course of the very execution in question; and, in any case, there was no necessity to fix the creditor with constructive notice. The Court appreciated this, but, for 'reasons of convenience as well as of policy and tradition',[24] preferred to follow the law as it had evolved in England.

The wisdom of this policy has been seen in the instances where it has not been adopted (e.g. in the standard of proof required in divorce cases founded on adultery). It is a policy which eliminates much confusion and provides a far greater breadth of authority for the Courts to draw upon in reaching their decisions.

P. G. NASH
J. T. BENNETT

[24] [1955] A.L.R. 49, 63, *per* Dixon C.J.

CRIMINAL LAW — ACCESSORY AFTER THE FACT — KNOWLEDGE REQUIRED

R. v. Tevendale[1]

One G. D. committed the felony of larceny of a motor car. Within the next ten days T. altered the engine number of the car in order to hinder recognition. T. was charged with being an accessory after the fact to the larceny of the motor car. The presentment alleged that he, 'well knowing the said felony to have been committed, assisted the said G. D.' Before a Court of General Sessions, T. was convicted of this offence. He then applied for leave to appeal against the conviction, alleging that the trial judge was mistaken in his direction to the jury as to the essential ingredients of the offence. His application was dismissed.

Four questions arose for consideration:

1. Were the acts of the applicant, namely the alteration and repainting of the engine number of the car, sufficient to constitute him an accessory after the fact to a felony, according to the common law definition of that crime?

2. Was it open to the trial jury on the facts before them to infer that T. knew both that the motor car had been stolen, and that G. D. had stolen it?

3. What degree of knowledge concerning the principal crime must an accused have?

4. Is a desire for personal gain an essential ingredient of the offence?

The answers given by the Full Court to these questions are as follows:

1. All three judges were unanimous in deciding that the acts of

[1] [1955] A.L.R. 260. Supreme Court of Victoria; Herring C.J., Martin and Sholl JJ.