SUPREME COURT OF UNITED STATES

Mccarthy

Vs.

Arndstein.

No. 404.

Reargued Nov. 27, 1923.

Decided Oct. 20, 1924.

Mr. Selden Bacon, of New York City, for National Surety Co.

[Argument of Counsel from pages 35-37 intentionally omitted]

Messrs. Solicitor General Beck, of Washington, D. C., and Saul S. Myers and Walter H. Pollak, both of New York City, for appellant.

Mr. Lindley M. Garrison, of New York City, for American Surety Co. and others.

Mr. Wm. J. Fallon, of White Plains, N. Y., for appellee.

Mr. W. Randolph Montgomery, of New York City, for National Ass'n of Credit Men.

Mr. Justice BRANDEIS delivered the opinion of the Court.

In 1920, Arndstein was adjudged an involuntary bankrupt in the Southern district of New York. Pursuant to a subpoena, he appeared before a special commissioner for examination as to his assets

under section 21a of the Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 544, 552, as amended by Act Feb. 5, 1903, § 7 (Comp. St. § 9605), was sworn as a witness, and freely answered some questions. Others he refused to answer on the ground that to do so might tend to incriminate him. Having persisted in this refusal, after the District Judge ordered him to answer, Arndstein was committed for contempt. He did not appeal from the order or file a petition to revise. Instead he applied to another judge sitting in the same court for a writ of habeas corpus. The petition was denied, on the ground that the bankrupt had waived his privilege by complying without objection to the order that he file a schedule of his assets.1 The judgment denying the writ was reversed by this court, but the mandate required merely that the lower court issue the writ and then proceed as usual. Arndstein v. McCarthy, [1920] USSC 149; 254 U. S. 71, 41 S. Ct. 136, 65 L. Ed. 138; Id.[1920] USSC 190; , 254 U. S. 379, 41 S. Ct. 136, 65 L. Ed. 314.

Thereupon the District Court issued the writ of habeas corpus. The marshal made a return which included a transcript of the entire proceedings. The court held that, despite certain oral answers given, the bankrupt was entitled to cease disclosure. The judgment, which discharged the bankrupt from custody, was affirmed by this court. McCarthy v. Arndstein, [1923] USSC 134; 262 U. S. 355, 357, 358[1923] USSC 134; , 43 S. Ct. 562, 67 L. Ed. 1023. The case is not before us on rehearing, granted in order to permit argument of the proposition, not presented by counsel before, that the privilege against self-incrimination does not extend to an examination of the bankrupt made for the purpose of obtaining possession of property belonging to his estate. 263 U. S. 676, 44 S. Ct. 33, 68 L. Ed. 501.

The right to examine the bankrupt, here in question, rests wholly on section 21a. This section provides that the court may 'require any designated person, including the bankrupt and his wife, to appear in court * * * to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration. * * *' The subject-matter of the examination is thus specifically prescribed by the act. There is no provision prescribing the rules by which the examination is to be governed. These are, impliedly, the general rules governing the admissibility of evidence and the competency and compellability of witnesses.2 The section contains no in dication of an intention, on the part of Congress, to take from any witness the privilege against self-incrimination. Moreover, the section makes clear the purpose not to differentiate between the bankrupt and other witnesses, nor to differentiate examinations which relate to the property from those which relate to the acts or the conduct of the bankrupt.3 This court has already decided that the privilege was not waived, either by the bankrupt's filing the schedule or by his answering orally certain questions. The contention now is that the privilege against self-incrimination ought to have been disallowed because, under the Constitution, it does not extend to the examination of a bankrupt in a bankruptcy proceeding.

The government insists, broadly, that the constitutional privilege against self-incrimination does not apply in any civil proceeding. The contrary must be accepted as settled. The privilege is not ordinarily dependent upon the nature of the proceeding in which the testimony is sought or is to be

used. It applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it. The privilege protects a mere witness as fully as it does one who is also a party defendant. It protects, likewise, the owner of goods which may be forfeited in a penal proceeding. See Counselman v. Hitchcock, [1892] USSC 17; 142 U. S. 547, 563, 564[1892] USSC 17; , 12 S. Ct. 195, 35 L. Ed. 1110.

The government urges more strongly a narrower contention. It claims that the constitutional privilege does not relieve a bankrupt from the duty to give information which is sought for the purpose of discovering his estate. It asserts that in England such an exception to the common law privi lege prevails, and that the exception had been established there prior to the Declaration of Independence.4 Whatever may be the rule in England, it is clear that in America the constitutional prohibition of compulsory self-incrimination has not been so limited.5

The cases which hold that a bankrupt must surrender books and papers, although they contain incriminating evidence, rest upon a principle different from that here involved. Matter of Harris, [1911] USSC 83; 221 U. S. 274, 31 S. Ct. 557, 55 L. Ed. 732; Johnson v. United States, [1913] USSC 136; 228 U. S. 457, 33 S. Ct. 572, 57 L. Ed. 919, 47 L. R. A. (N. S.) 263; Ex parte Fuller, [1923] USSC 79; 262 U. S. 91, 43 S. Ct. 496, 67 L. Ed. 881; Dier v. Banton, [1923] USSC 118; 262 U. S. 147, 43 S. Ct. 533, 67 L. Ed. 915. The law requires a bankrupt to surrender his property. The books and papers of a business are a part of the bankrupt estate. Section 70a(1) being Comp. St. § 9654. To permit him to retain possession, because surrender might involve disclosure of a crime, would destroy a property right. The constitutional privilege relates to the adjective law. It does not relieve one from compliance with the substantive obligation to surrender property.

Section 21a, on the other hand, deals specifically and solely with the adjective law—with evidence and witnesses. When the bankrupt appears before a commissioner under this section, he comes, like any other person, merely to testify. In that connection he may, like any other witness, assert the constitutional privilege; because the present statute fails to afford complete immunity from prosecution. If Congress should hereafter conclude that a full disclosure of the bankrupt estate by the witnesses is of greater importance than the possibility of punishing them for some crime in the past, it can, as in other cases, confer the power of unrestricted examination by providing complete immunity. Compare Brown v. Walker, [1896] USSC 83; 161 U. S. 591, 16 S. Ct. 644, 40 L. Ed. 819; Glickstein v. United States, [1911] USSC 142; 222 U. S. 139, 142[1911] USSC 142; , 32 S. Ct. 71, 56 L. Ed. 128; Ensign v. Pennsylvania, [1913] USSC 56; 227 U. S. 592, 33 S. Ct. 221, 57 L. Ed. 658.

Judgment reaffirmed.

In re Tobias, Greenthal & Mendelson (D. C.) 215 Fed. 815.

See People's Bank of Buffalo v. Brown, 112 F. 652, 50 C. C. A. 411; In re Pursell (D. C.) 114 F. 371; In re Josephson (D. C.) 121 F. 142; Brown v. Person, 122 F. 212, 58 C. C. A. 658; In re Hooks Smelting Co. (D. C.) 138 F. 954, 956; In re Ruos (D. C.) 159 F. 252.

Substantially the same provision was made in Act April 4, 1800, c. 19, §§ 14, 18, 24, 2 Stat. 25, 26, 28; in Act Aug. 19, 1841, c. 9, § 4, 5 Stat. 440 (in part); in Act March 2, 1867, c. 176, § 26, 14 Stat. 517, 529. See, also, Act Feb. 5, 1903, c. 487, § 7, 32 Stat. 797, 798. The purpose may have been, in part, to render the bankrupt and others competent as witnesses. Compare Ex parte Haes, [1902] 1 K. B. 98. The bankrupt (and many other witnesses) would, under the rules prevailing in the common law court at the time the earlier bankrupt laws were enacted, have been incompetent as witnesses, on the ground of interest, but for such a provision, and the wife would have been incompetent because of her particular relationship.

See Ex parte Meymot, 1 Atk. 196, 198, 200; Ex parte Cossens, Buck's Cases, 531, 540; In re Heath, 2 D. & Ch. 214. The requirement under the English practice referred to is, perhaps, more like the American requirement of the filing of a schedule of assets under section 7a(8), being Comp. St. § 9591, than the submission to examination as a witness provided for in section 21a.

In re Scott (D. C.) 95 F. 815; In re Rosser (D. C.) 96 F. 305; In re Franklin Syndicate (D. C.) 114 F. 205; United States v. Goldstein (D. C.) 132 F. 789; In re Bendheim (D. C.) 180 F. 918; In re Tobias, etc. (D. C.) 215 F. 815; In re Naletasky (D. C.) 280 F. 437. Compare In re Feldstein (D. C.) 103 F. 269; In re Walsh (D. C.) 104 F. 518; In re Shera (D. C.) 114 F. 207; In re Nachman (D. C.) 114 F. 995; In re Levin (D. C.) 131 F. 388. But see Mackel v. Rochester, 102 F. 314, 42 C. C. A. 427.