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SUPPLEMENTARY PROCEEDINGS IN ENFORCEMENT OF JUDGMENTS*

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A layman might suggest as a subtitle for this article, "Back 'em up to the wall" or "How to pick their pockets legally." The source of the legality of such conduct is to be found in Rule 69 of the Colorado Rules of Civil Procedure. It is important at the outset to explain this rule briefly together with its history. The rule is divided into eight parts, subparagraphs "A" through "H". Those parts are as follows:

A. Process to enforce a money judgment shall be a writ of execution, unless the court directs otherwise.

B. Execution for costs may issue in like manner, as upon a judgment.

C. Any person who is a judgment debtor after issuance of an execution against property, may pay the sheriff the amount of the debt and such payment will discharge the judgment.

D. Whenever execution may issue on a judgment, the judgment creditor shall be entitled to an order for the debtor to appear before the court, or a master, at a specified time and place to answer concerning his property. If a debtor resides outside the country, the court may make just orders as to mileage and expenses. If it appears to the court that there is danger of the debtor absconding it may issue an order of arrest, bring him before the court, and require a bond conditioned on his appearing at the time of the hearing and upon disposing of any of his property. If he does not post such a bond, he may be committed to jail.

E. A debtor of the judgment debtor may be required to appear and be questioned.

F. The court, or master, may order any property of the judgment debtor not exempt from execution in the hands of such debtor or any other person, or due to the judgment debtor, to be applied towards the satisfaction of the judgment. Violation of this order is punishable by contempt. Nothing in the rule shall be construed to prevent an action in the nature of a creditor's bill.

G. Witnesses may be required to appear and testify as at any trial.

H. Depositions may be taken in the same manner of any person upon order of court obtained ex parte.

The above rule is copied, to a great extent, from the former Code of Civil Procedure. Only two significant changes were made

* This is in substance the discussion given by Mr. Newcomb at the first session of the Denver Bar Association's institute on creditors' rights, January 24, 1950.

in the rule: First, it no longer provides that execution must issue and be returned *nulla bona* as a prerequisite to supplementary proceedings, and, secondly, the motion seeking such an order need not be verified. It should also be noted that in turn the Code is "almost a literal transcript of the provisions of the Code of California on the same subject, and are similar to the provisions of the codes of Wisconsin and New York." [1]

PURPOSE OF RULE 69

There are, it is believed, three fundamental objectives in the use of Rule 69. Behind all of them, however, there lurks the haunting suspicion of counsel that the debtor has some property somewhere that could be applied to the judgment. If the defendant is obviously judgment-proof, it is useless to invoke the rule. If it is suspected he is not judgment-proof, a creditor's lawyer has three things in mind in the use of Rule 69:

(1) Discover his assets.

(2) Have those assets applied on the judgment in a summary fashion at the time of the hearing.

(3) Discover facts concerning the debtor's past and present financial condition and transactions as a basis for additional proceedings, such as a creditor's bill, or involuntary bankruptcy to recover a preference.

In view of these purposes, it is clear that counsel, before embarking upon the use of Rule 69, should have at least a general understanding of the substantive law in the whole field of creditors' rights. If he doesn't, he is not apt to ask the right questions to get at the important facts. For example, if the debtor is a corporation, counsel would want to know if there are any stockholders who have not paid for their stock. He must know the Bulk Sales Act, the laws on fraudulent conveyances, the various acts of bankruptcy, and voidable preferences. It has been said that there are two rules to follow: (1) Always follow-through on questioning to get the complete story. (2) Make sure questions are founded upon the applicable substantive law.

It would be fruitless for anyone to attempt to discuss in detail the exact questions which should be submitted to the debtor or to the debtor's debtor. Suffice it to say that one may find an excellent beginning point in the pamphlet of the Practicing Law Institute, entitled, "Collecting Claims."

METHOD OF INVOKING RULE

Two papers have to be prepared by the lawyer invoking Rule 69 with regard to summoning the judgment debtor—the motion and order. The motion need allege only two things, to-wit: Judgment has been entered and that execution may issue. The order,

[1] Hexter v. Clifford, 5 Colo. 168 (1879).

which must be prepared by counsel in advance, should contain the time and place for the appearance of the debtor. This order may be directed to the clerk to issue a citation, which may then be served by the sheriff on the debtor, or the order could be prepared in duplicate and provide in itself that a copy of the order may be served upon the debtor in the same manner as a summons under Rule 4. It is advisable in preparing the order to leave the time for the hearing blank so that the judge and his clerk may fill it in when it is presented. This proceeding, of course, is ex parte.

ORDERS FOR PROPERTY TO BE APPLIED

In order to discuss this phase of the problem it is necessary to indulge in several assumptions, namely: the judgment debtor has been brought into court and questioned exhaustively as to his property; "his pocket has been picked" of any cash that he might have had on his person and the court has ordered it paid into the registry of the court to be applied on the judgment; and similar orders have been procured with respect to any jewelry or other thing of value he may have had on his person not exempt from execution, such as wearing apparel. It further may be assumed that questioning has developed certain fact situations:

(a) that the debtor has cash in his control.
(b) that the debtor has other intangible personal property.
(c) that the debtor has real estate.
(d) that he has property located outside the state.
(e) that he has money owing him by his debtors.

(a) Cash in Control of Debtor

Where it is learned that the debtor has cash either in a bank account or in some place where he has access to it, is it necessary to adjourn the hearing, deliver a writ of execution to the sheriff, and attempt to race the debtor to the location of the cash? It is not. The authorities are clear that the court may then and there order the debtor to go get the money and either pay it to counsel, to the sheriff, or to the clerk of the court. Conceivably, it may even be possible for the court to order the defendant to make out a check drawn on any bank account which he has admitted he has. Some of the cases dealing with these fascinating possibilities are, as follows:

Hosmer v. Mutual Reserve Ins. Co.[2] In this case the court ordered that the defendant insurance company pay over $250.00 from its surplus to the plaintiff after a full hearing had been had into the financial condition of the company. Incidentally, it was argued in this case that since the company was a mutual fire insurance company, the other members had an equal right to the surplus, but the court said: "Diligence justifies a preference."

[2] 145 Kan. 381, 65 P. 2d 295 (1937).

Medical Finance Ass'n v. Short.[3] Upon examination the defendant disclosed that she had in her possession and under her control a check in her favor in the sum of $47.50 as services rendered to a governmental agency, the Works Progress Administration. The lower court refused to order that she apply any portion of this check to the judgment. The appellate department, however, reversed, and said:

> Although the intangible credit could not be reached by plaintiff in such a proceeding as this while it remained a mere debt due from the government to defendant, it became available and amenable to control of the court when its status and character were changed to the extent of its becoming tangible property in the actual possession and control of defendant, i.e., when she received the check. If necessary or expedient in securing the conversion of the check into legal tender and the application of one-half thereof toward saisfaction of the judgment, the court may appoint a receiver for that purpose.

Wilson v. Columbia Casualty Co.[4] In this case it appeared that shortly after the judgment had been entered, the defendant, who was in Ohio, sent $1250:00 to his brother in Washington, Pennsylvania. It was admitted that the brother held this fund in trust for the defendant. The court, in a supplementary proceeding, found as follows:

> Said Addison R. Wilson (the defendant) owns and has the absolute control and disposition of the sum of $1250.00 which he wrongfully and fraudulently has sent out of the State of Ohio with intent to prevent the same being applied on the judgment in the foregoing action, and should be applied on said judgment, and said application is therefore granted.

The court thereupon ordered the defendant to pay over the said sum to the sheriff to be applied on the judgment. The defendant refused to do so and appealed from his sentence for contempt of court. The Supreme Court of Ohio affirmed the sentence, in the following language:

> Plaintiff in error urges that, since the money sought to be reached was not in the physical possession of Addison R. Wilson, the court was without jurisdiction to make any order respecting the fund. This contention, however, is incorrect. The court of common pleas could not make an order upon the brother in Washington, Pa., to pay the money upon the judgment, nor could it attach or sequester the fund in Washington, Pa., but it could and did order the defendant in Cleveland, Ohio, to take such action that the fund in Pennsylvania could be applied to the satisfaction of the judgment. The jurisdiction of the court over the defendant was undoubted.
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> Obviously the direction from Wilson must be sent from Cleveland to Washington, Pa. When the fund is in the possession of the brother in Pennsylvania, the brother in Ohio cannot physically turn it over in Ohio; but the brother in Ohio can and must set in

[3] 36 Cal. App. 2d 745, 92 P. 2d 961 (1939).
[4] 118 Ohio St. 319, 160 N.E. 906 (1928).

process the train of action which will result in the same being applied upon this judgment, and that the brother in Ohio, according to this record, has not even begun to do.

(b) Intangible Personal Property of the Debtor

With respect to intangible personal property, the immediately preceding case is important, and in addition, there is the case of *Iowa Methodist Hospital v. Long*,[5] in which it was disclosed upon examination that the defendant had under his control a number of Series "E" Government bonds. It was determined by the lower court that some of them had been purchased directly from the wages of the defendant and were therefore exempt under the statutes of Iowa, which exempt wages, but that some of them had not been so purchased. The court held:

> It is therefore ordered that the defendant sell the balance of the fourteen bonds heretofore not declared exempt to him, and pay the proceeds into the office of the clerk of the municipal court by noon of the 30th day of July, 1943.

On appeal, the Supreme Court held that none of the bonds were exempt and that the order of the lower court should have applied to all of them.

(c) Real Estate of the Debtor

With respect to real estate, the cases are not in accord. In *Walker v. Staley*,[6] the Colorado court said:

> Sec. 270, supra (referring to the Code) does not contemplate that real property may be sold under order of court made in a supplementary proceeding, even when title stands in the name of the judgment debtor. In such case the judgment creditor may cause execution to be levied upon the property; it requires no order of court.

In this case, however, it appeared in the supplementary proceeding that title to the property was in the defendant's wife's name, but more of that later. It should be noted, however, that this case was decided before the Rules of Civil Procedure were adopted. Since, under Rule 69, this proceeding may be instituted without an execution being returned *nulla bona*, the reason for *Walker v. Staley, supra,* no longer seems to apply. Consequently, if the question were argued again it is possible that the Colorado Supreme Court would follow the majority rule as stated below.

Cleverly v. District Court,[7] seems to state the majority view of this question. In this case, on a supplementary proceeding, the lower court found that a piece of real estate standing in the names of the defendants was not exempt as a homestead, directed the sheriff to proceed against the property and to apply the proceeds from the sale thereof towards satisfaction of the judgment. The Supreme Court affirmed, in these words:

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[5] 234 Ia. 843, 12 N.W. 2d 171, 150 A.L.R. 440 (1944).
[6] 89 Colo. 292, 1 P. 2d 924 (1931).
[7] 85 Utah 440, 39 P. 2d 748 (1939).

> Every species of property is included in the term "any property," so that the order may be made applicable to any species of property of a judgment debtor, including real property or an interest therein.

(d) Property of Debtor Outside the State

Where the questioning reveals that the judgment debtor owns real estate or other tangible property in another state there is a serious problem as to how far the Colorado court can go in subjecting that property to the Colorado judgment. There is a scarcity of cases on this point, but what decisions there are seemed to be summed up in 21 *Am. Jur.* 329, as follows:

> A judgment debtor who has property in a foreign state may not be compelled by proceedings supplementary to execution to go there, get the property, and apply it on the judgment. However, it is sometimes regarded as a proper practice to require the judgment debtor to make an assignment of such property to the receiver.

The theory of such cases, of course, is that the order of the court acts *in personam,* and jurisdiction over the property itself is not necessary. In the case of intangible personal property located outside of the state, the cases cited above and particularly *Wilson v. Columbia Casualty Company, supra,* state the general rule.

(e) Debtor of the Judgment Debtor

The next problem involves the situation where inquiry of the judgment debtor reveals that property belonging to him is in the name or hands of another person, or that someone owes him money. It is clear that counsel cannot then and there procure an order directed to the third party, since he is not as yet a party to the proceeding. *Walker v. Staley, supra.* In this case, the lower court, upon the questioning of the defendant alone, found that title to a piece of real estate in the name of his wife really belonged to defendant. The court appointed a receiver of the property and directed him to take charge of it and sell it, pay the receiver's expenses, the court costs and the judgment. Mrs. Walker was never a party to the proceeding. The Colorado Supreme Court reversed, in these words:

> It was beyond the jurisdiction of the court to make such an order. The court had no power to order the receiver to take possession of the property and sell it without first according to Mrs. Walker her day in court. That she never had.

The court also said that the proper remedy was a creditor's suit.

Bond v. Bulgheroni,[8] held that a creditor's bill was the proper remedy where there were adverse claimants to the property involved. *Brindjonc v. Brindjonc,*[9] took a somewhat different approach. In this case the proceedings developed that a third party

[8] 215 Cal. 7, 8 P. 130 (1932).
[9] 96 Mont. 489, 31 P. 2d 725 (1934).

held funds which the defendant claimed belonged to the defendant. The court stated that no order could be made requiring the third party to pay over the money to the plaintiff at that time. The proper procedure was to continue the hearing and order the third party in to determine whether he had any claim to the property and, if he disclaimed any interest, the appropriate order could be made.

PENALTIES FOR DISOBEYING ORDERS UNDER RULE 69

Under Rule 69(f) the court, or master, has ample authority to punish any party or witness for contempt for disobeying any proper order. It has also been held in Colorado in the case of *Handler v. Gordon,*[10] that where the judgment debtor in the supplementary proceeding committed perjury, and it was so established in the hearing itself, the court has the right summarily to punish him for contempt without leaving the punishment to formal criminal processes. The theory, of course, is that perjury causes an obstruction of justice.

The case of the lying judgment debtor, however, presents many very serious problems. Assuming that the debtor is prepared to perjure himself concerning his assets, he has the questioner at a psychological disadvantage from the beginning because he is generally smart enough to know that the examiner doesn't know all that he knows, or he would not have been summoned into court to answer questions. Consequently, there is some slight incentive to lie about the matters inquired into. Here the examiner must resort to all the techniques generally known to the trial lawyer as to how to treat the perjuring witness. There is no one satisfactory answer to it. The author's experience in such a case has been to wish fervently that our humane laws had not abolished the debtor's prison.

MISCELLANEOUS POINTS TO BE CONSIDERED UNDER THE RULE

(a) Interim period between service of the order on the debtor to appear and the hearing. Isn't there the danger that the judgment debtor will cover up his property during that period of time? In other words, is one entitled to a restraining order? There is no mention made of this in the rule, and the only Colorado case is *Rule v. Gumeer.*[11] In this case, the lower court included in its order requiring the defendant to appear an order restraining him from transferring any of his property, real or personal. The defendant moved to vacate the restraining order, his motion was overruled, and he appealed. The supreme court denied the appeal without considering the merits on the ground that the order was not appealable. The moral seems to be: get the order ex parte to be safe. The

[10] 111 Colo. 234, 140 P. 2d 622 (1943).
[11] 12 Colo. 591 (1889).

author has been able to find no cases from other jurisdictions; it should be pointed out, however, that the New York Code specifically provides for it.

(b) Interim period between time of hearing and levy, or other action contemplated, such as a creditor's bill. It is clear that a court has inherent authority to issue such a restraining order, in view of the authority given to the court in the first place by Rule 69(f) to require the debtor to apply his property to satisfaction of the judgment.

(c) Documents may be required to be produced. Rule 69(g) provides for the subpoena of witnesses as upon the trial of any civil action. It would seem possible, therefore, to cause a subpoena duces tecum, under Rule 45(b), to be directed to the defendant along with the order requiring him to appear, and get the necessary business records, etc. An interesting question in this case would be the right to compel the production of retained copies of income tax returns. *Leonard v. Wargon*,[12] held that a judgment debtor may be questioned concerning recent Federal income tax returns filed by him, and he may be required by order of the court to produce copies of such returns in the debtor's possession. The court points out, of course, that the judgment creditor may not compel the production of the originals of any federal agency or employee. There is a conflict on this point, however, with regard to discovery rules in the trial of a civil action.

(d) Does the discovery of assets through Rule 69 give a judgment creditor a priority? There is a distinct possibility of this. The question is annotated for your further consideration in 92 A. L. R. 1430, which states:

> Although the question is largely one of statutory interpretation, the prevailing view is that a judgment creditor who institutes supplementary proceedings, at some stage of the proceedings, acquires a lien upon the property disclosed thereby.

This may be of great importance where there are other judgment creditors after the same assets. One of the cases cited by 92 A. L. R. is *Ex parte Roddey*.[13] There were three judgment creditors involved here. One of them instituted supplementary proceedings which disclosed that the debtor had certain securities of the value of about $1000 which had been hypothecated in New York to secure an indebtedness of about $185. The lower court issued an order directing the sheriff to levy upon this property. Pursuant to this order, the holder of the securities forwarded them to a bank in South Carolina. In the meantime, all three judgment creditors had placed their writs of execution in the hands of the sheriff. He took the three executions, levied on the securities, and sold them. Then the dispute arose as to whether all three of the judgment creditors should share pro rata in the balance of the sales price

[12] 55 N. Y. Supp. 2d 626 (1945).
[13] 171 So. Car. 489, 172 S.E. 866 (1934).

after the payment of the debt for which they were pledged. The Supreme Court of South Carolina granted a priority to the judgment creditor who had instituted the supplementary proceeding, and said:

> It is patent that supplementary proceedings are equitable in their nature and designed to aid the enforcement of rights which cannot be enforced by the legal process of execution. That being so, it much follow that Judge Stoll (the lower court) had authority to direct the payment of the proceeds of the sale of the debtor's property to the judgment creditor whose diligence had discovered the property of the judgment debtor and brought it into court.

In Hexter v. Clifford,[14] it was recognized that supplementary proceedings are analogous to creditors' bills. However, the case holds that supplementary proceedings under the Code became an exclusive remedy and that a creditors' bill could not be maintained in any case where supplementary proceedings would lie. The theory back of that case has certainly been changed by Rule 69, which says: "Nothing in this Rule shall be construed to prevent an action in the nature of a creditor's bill." Consequently, the matter is still very much an open question in this state but is certainly an arguable possibility.

RECOMMENDED AMENDMENTS TO RULE 69

There are two glaring deficiencies in Rule 69 which the author would recommend be changed in accordance with New York procedure: First, there is the problem which is mentioned briefly above concerning the interim period between the time of service of the order to appear and the time of the hearing itself. In New York there is a specific provision which allows the court on an ex parte application to include in its order to appear a blanket restraining order enjoining the debtor (or the debtor of the judgment debtor, as the case may be) from making any transfer, assignment or other disposition of his property. This restraining order may be continued from time to time during the pendency of the hearing.

Secondly, there is the problem of the wage earner debtor in this state. Our present practice is to run a garnishment on his wages. This is not only likely to disappoint the creditor so far as results are concerned, but also, in many cases, results in a loss of job or subterfuges where it appears that the garnishment is going to become a weekly or monthly problem. Such a result benefits no one. The New York Code, however, provides that in such a case the court, after a full hearing, may order the debtor to pay over to the creditor, or into court, a certain sum of money out of each pay check. The amount to be paid is fixed by the Code as to that amount over and above the necessary living expenses of the debtor and his family. This is certainly a much more sensible approach to the problem and one that could well be considered in this state.

[14] 5 Colo. 168 (1879).