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Appellate Procedure in the Ninth Circuit

Irving S. Bertram

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I. Appellate Procedure in the Ninth Circuit

A. En Banc Obstacles to Overruling Precedent

The doctrine of stare decisis gives needed stability to the law, but at the same time stifles attempts to overrule precedents which are no longer in harmony with present attitudes and circumstances. The interaction of Rule 35 of the new Federal Rules of Appellate Procedure¹ and the Ninth Circuit Court of Appeals' case of *Upton v. Commissioner*² has increased the burden of any litigant who seeks to have a prior decision of the Ninth Circuit overruled. A dictum in *Upton*³ stated that a three-judge panel of the Ninth Circuit "could not, except in en banc proceedings," overrule a prior decision of that circuit.⁴ The statement has been repeated in several subsequent decisions of the court, and evidently should be considered an unwritten rule of the Ninth Circuit.⁵

Rule 35 provides that a majority of the active circuit judges may order a hearing or rehearing en banc of a case on appeal.⁶ A party may suggest the appropriateness of an en banc hearing, but the suggestion can only be acted upon if an active circuit judge or a judge of the panel that first heard the case requests that the full court consider it.⁷

This note will discuss briefly the history of en banc procedure in the Ninth Circuit, the reasons for such a procedure, and the adherence of the Ninth Circuit to *Upton*.

Background

The history of Rule 35 really begins in 1891. The Evarts Act⁸ of that year established the Circuit Courts of Appeals as intermediate

¹ FED. R. APP. P. 35 (effective July 1, 1968).

² 283 F.2d 716 (9th Cir. 1960), *cert. denied*, 366 U.S. 911 (1961).

³ 283 F.2d 723.

⁴ *Id.*

⁵ *E.g.*, *Carson v. United States*, 310 F.2d 558, 561-62 (9th Cir. 1962); *Halprin v. United States*, 295 F.2d 458, 461 (9th Cir. 1961); *Ellis v. Carter*, 291 F.2d 270, 273 n.3 (9th Cir. 1961).

⁶ FED. R. APP. P. 35(a).

⁷ *Id.* 35(b).

⁸ Evarts Act of 1891, ch. 517, 26 Stat. 326.

appellate courts to relieve the United States Supreme Court of much of its appellate work. The Act provided that each circuit court of appeals should "consist of three judges . . ."⁹ The Judicial Code of 1911¹⁰ continued the provision of three-judge panels,¹¹ but at the same time increased the number of circuit judgeships in several circuits to more than the original three.¹² The ambiguity in the statute did not become apparent until 1938.

By 1938 all but the First and Fourth Circuits had more than three circuit judges.¹³ None, except the District of Columbia Circuit, had ever sat en banc.¹⁴ Instead, the practice of sitting in three-judge panels had developed. Intra-circuit conflicts not resolved by the circuit itself were dealt with in the same way as inter-circuit conflicts, by certification or writ of certiorari to the Supreme Court.¹⁵

In 1938, the Ninth Circuit decided *Lang's Estate v. Commissioner*.¹⁶ An earlier decision of the court, *Bank of America v. Commissioner*,¹⁷ was cited to the court as precedent on a pivotal issue.¹⁸ The *Lang* panel disagreed with the two-to-one decision of the *Bank of America* case, but was "faced with the situation where the decision of two judges of the circuit made a precedent for the remaining five."¹⁹ It dismissed the idea of an en banc hearing to resolve the conflict. "Since no more than three judges may sit in the Circuit Court of Appeals, there is no method of hearing or rehearing by a larger number."²⁰ Rather than overrule *Bank of America*, the panel certified the substantive issue to the Supreme Court²¹ which resolved the conflict but ignored the question of a circuit court of appeal's power to sit en banc.²²

These matters rested until 1940. The Third Circuit, in deciding

⁹ *Id.* § 2.

¹⁰ Act of Mar. 3, 1911, ch. 231, 36 Stat. 1087.

¹¹ *Id.* § 117.

¹² *Id.* § 118.

¹³ Note, *En Banc Hearings in the Federal Courts of Appeals: Accommodating Institutional Responsibilities (Part I)*, 40 N.Y.U.L. REV. 563, 570 & n.59 (1965).

¹⁴ See 55 HARV. L. REV. 663, 665, 666 n.16 (1942).

¹⁵ The Evarts Act of 1891, ch. 517, § 6, 26 Stat. 828, authorized certification to the Supreme Court by the circuit courts of appeals of any question of law upon which they desired instruction. *E.g.*, *Lang's Estate v. Commissioner*, 97 F.2d 867 (9th Cir.), *certified question answered*, 304 U.S. 264 (1938).

¹⁶ 97 F.2d 867 (9th Cir. 1938).

¹⁷ 90 F.2d 981 (9th Cir. 1937).

¹⁸ 97 F.2d at 869.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 869-70.

²² *Lang's Estate v. Commissioner*, 304 U.S. 264 (1938).

the case of *Commissioner v. Textile Mills Securities Corporation*,²³ was in the same predicament as the Ninth Circuit in *Lang*. The court, sitting en banc, rejected the Ninth Circuit's view of the en banc issue and unanimously held that the circuit courts of appeals had the power to sit en banc.²⁴ The court, splitting three-to-two on the substantive issue, overruled a prior decision. On the en banc question the court reasoned that the only logical construction of the Evarts Act, as amended by the Judicial Code of 1911, was that the addition of more judges to some circuits amended by implication the three-judge provision of the Act.²⁵

The Supreme Court affirmed the Third Circuit holding on the en banc issue.²⁶ This decision was codified in 1948 in section 46 of Title 28 of the United States Code.²⁷ In *Western Pacific Railroad Corporation v. Western Pacific Railroad Company*,²⁸ decided in 1953, the Supreme Court held that no litigant has a statutory right to formal consideration of his application for rehearing en banc,²⁹ and that the statute does not compel the adoption of a particular procedure by the circuits.³⁰

The Court did formulate certain guidelines for the circuits: (1) the circuits must make en banc procedure known to litigants; (2) litigants should be able to suggest a hearing or rehearing en banc to the court, although the suggestion is not to be treated like a motion which would require formal action by the court; (3) the circuit courts may initiate en banc hearings sua sponte; (4) the decision to sit en banc might be made by the full court or delegated initially to the panel, although the full court retained authority to revise the procedure and withdraw the delegated power; (5) whether to rehear a case in panel or en banc are two separate issues to be considered independently.³¹

In response to *Western Pacific* most circuits adopted formal rules for en banc hearings.³² The majority formulated procedures similar

²³ 117 F.2d 62 (3d Cir. 1940), *aff'd*, 314 U.S. 326 (1941).

²⁴ *Id.* at 70, 71, 75.

²⁵ *Id.* at 70.

²⁶ *Textile Mills Sec. Corp. v. Commissioner*, 314 U.S. 326 (1941).

²⁷ Judicial Code of 1948, ch. 646, § 46(c), 62 Stat. 871, *as amended*, 28 U.S.C. § 46(c) (1964).

²⁸ 345 U.S. 247 (1953).

²⁹ *Id.* at 259.

³⁰ *Id.*

³¹ *Id.* at 260-62.

³² For the most recent text of the individual circuit court rules in force prior to the adoption of Rule 35 of the Federal Rules of Appellate Procedure see D.C. Cir. R. 26, 28 U.S.C.A. (1967 Supp.); 2d Cir. R. 25, 28 U.S.C.A. (1967 Supp.); 3d Cir. R. 4, 28 U.S.C.A. (1956); 5th Cir. R. 25(a), 29, 28 U.S.C.A. (1967 Supp.); 6th Cir. R. 3, 28 U.S.C.A. (1967 Supp.); 8th Cir. R. 15, 28 U.S.C.A. (1967

to the present Rule 35.³³ The Ninth Circuit, however, adopted more restrictive rules which reflected its earlier apprehension over the deleterious effects on its workload of allowing litigants even to suggest en banc hearings.³⁴ The original panel first had to grant a panel rehearing. If a panel majority decided that en banc consideration of the case was advisable, it so recommended to the full court. Then, a majority of the active circuit judges had to vote for en banc hearing.³⁵ Consequently, two judges on the panel, who might not even be active circuit judges,³⁶ could deny to the majority of the court the opportunity to consider the issue of sitting en banc.

This restrictive procedure was criticized as being contrary to the "spirit and letter of the statute, [frustrating] the salutary purpose of *en banc* procedure."³⁷ A subsequent amendment to Rule 23, the Ninth Circuit rule prior to the adoption of the Federal Rules, dropped the requirement that the panel first must grant a panel rehearing before considering the en banc issue, but otherwise left effective control in the panel.³⁸ The adoption of a uniform en banc procedure by Rule 35 of the Federal Rules of Appellate Procedure has liberalized the practice and made it more consonant with the purpose of en banc hearings.

The Utility of En Banc Hearings

The principal purpose of en banc power is the resolution of intra-circuit conflict.³⁹ Although courts generally respect the principle of stare decisis in the absence of special circumstances, successive panels considering identical issues of law could each reach a different decision, depending on panel composition. Since the decision of a panel is the decision of the whole court of appeals,⁴⁰ a subsequent decision

Supp.); 9th Cir. R. 23, 28 U.S.C.A. (1967 Supp.); 10th Cir. R. 20(7), 28 U.S.C.A. (1956).

³³ See, e.g., 2d Cir. R. 25(b), 28 U.S.C.A. (1967 Supp.); 3d Cir. R. 4(3), 28 U.S.C.A. (1956); 5th Cir. R. 25(a), 28 U.S.C.A. (1967 Supp.); 6th Cir. R. 3, 28 U.S.C.A. (1967 Supp.).

³⁴ See *Western Pac. R.R. Corp. v. Western Pac. R.R. Co.*, 197 F.2d 994, 1014-15 (9th Cir. 1951), *rehearing en banc denied*, 197 F.2d 1016 (1952), *rev'd and remanded*, 345 U.S. 247 (1953).

³⁵ 9th Cir. R. 23, 28 U.S.C.A. (1967 Supp.), *superseded by* FED. R. APP. P. 35 (1968).

³⁶ Both District Judges and Senior Circuit Judges often sit by designation on circuit courts of appeals' panels.

³⁷ Note, *En Banc Proceedings in the United States Court of Appeals*, 22 GEO. WASH. L. REV. 482, 491 (1954) (emphasis by author).

³⁸ 9th Cir. R. 23, 28 U.S.C.A. (1967 Supp.), *amending* 9th Cir. R. 23, 28 U.S.C.A. (1956).

³⁹ *Western Pac. R.R. Corp. v. Western Pac. R.R. Co.*, 345 U.S. 247, 268, 270-71 (1953) (concurring opinion).

⁴⁰ 28 U.S.C.A. § 46(c) Reviser's Note (1968).

necessarily will overrule by implication, if not expressly, a prior conflicting one.⁴¹ This would jeopardize the stability of the law and the prestige of the court and would be highly unfair to litigants. The public should be able to rely on past decisions as settled law and should not be subject to the vagaries of panel composition. There must be some way of maintaining uniformity and, more important, continuity within the circuit.

The circuit courts of appeals are each responsible for the maintenance of this uniformity. The Supreme Court ended the practice of resolving intra-circuit conflict by certiorari to the Supreme Court in 1957. The Court, in *Wisniewski v. United States*,⁴² pointed out that the circuits had the power and the procedure to fulfill their responsibilities of maintaining intra-circuit uniformity.⁴³ En banc procedure is most appropriate because the active circuit judges are the fulltime, permanent judges who make up the circuit court of appeals. They should be the ones who make the final decision on circuit policy on any issue. To have held otherwise would have undermined the authority of the circuit courts of appeals as the courts of last resort in most federal cases.

A discussion of the impact of en banc hearings on court workloads and of the problems inherent in such procedure is outside the scope of this note.⁴⁴ Suffice it to say that en banc consideration of cases requires much more time than do panel hearings. Extensive use of en banc hearings would seriously interfere with the expeditious disposition of cases.⁴⁵ With this in mind, the relative infrequency of en banc hearings is understandable.⁴⁶

Ironically, despite the Ninth Circuit's conservative outlook on en banc hearings, since 1940 it has decided more cases en banc than all but two circuits, the District of Columbia Circuit and the Third Circuit, and one-seventh of the total in all circuits.⁴⁷ This is but a fraction of the total cases decided by the Ninth Circuit. Nevertheless, any substantial increase over this small amount could overload the court's capacity, already strained to the limit. One factor that cer-

⁴¹ See *Baez-Geigel v. American Foreign S.S. Corp.*, 171 F. Supp. 359, 361 n.9 (S.D.N.Y. 1959).

⁴² 353 U.S. 901 (1957) (per curiam).

⁴³ *Id.* at 902; accord, *In re Burwell*, 350 U.S. 521 (1956).

⁴⁴ For an excellent and comprehensive treatment of en banc procedure see Note, *En Banc Hearings in the Federal Courts of Appeals: Accommodating Institutional Responsibilities (Part I & II)*, N.Y.U.L. Rev. 563, 726 (1965).

⁴⁵ For a discussion of the effects of en banc hearings on court case loads see *id.* at 574-75.

⁴⁶ From 1940 until 1964, the circuit courts of appeals decided 422 cases en banc. *Id.* at 746 Appendix V.

⁴⁷ *Id.* at 749.

tainly accounts for the large number of en banc decisions by the Ninth Circuit is the fact that it is one of the busiest circuits. Another could be the *Upton* dictum,⁴⁸ which implies that the rule of overruling cases only en banc had existed long before its expression in that case.

Avoiding Upton

Decisions like *Heisler v. United States*,⁴⁹ a recently decided Ninth Circuit case, tend to indicate that *Upton* is not always adhered to, but sometimes is avoided by distinguishing cases. *Heisler* had been charged with uttering counterfeit money. The indictment charged passing a \$20.00 Federal Reserve Note, when in fact it was a \$10.00 Note. When the error was discovered during trial, the government moved to amend the indictment on the ground of clerical error. The court overruled the defendant's objections, but deferred action on the motion until after trial. The indictment itself was not physically altered, but at the time of conviction the motion was granted.⁵⁰

Heisler appealed to the Ninth Circuit. He claimed that there was a fatal variance between the proof and the indictment and also that the order amending the indictment voided the indictment.⁵¹ The Ninth Circuit held that the variance was harmless error,⁵² a position strongly supported by case law.⁵³ The court had more difficulty with the amended indictment. Its decision in *Carney v. United States*,⁵⁴ 11 years before, held that amending an indictment, which charged counterfeiting "K-14" ration coupons, to read "A-14" coupons, rendered the indictment a nullity.⁵⁵ *Carney's* conviction was reversed⁵⁶ on the authority of *Ex parte Bain*,⁵⁷ an early Supreme Court case. *Bain* held that any change in the indictment was fatal to a verdict brought in under that indictment.⁵⁸

The *Heisler* court admitted⁵⁹ that it was hard to reconcile *Carney* and other similar cases⁶⁰ with cases holding that an amendment would

⁴⁸ 283 F.2d 716 (9th Cir. 1960). See text accompanying note 2 *supra*.

⁴⁹ 394 F.2d 692 (9th Cir. 1968).

⁵⁰ *Id.* at 693-94.

⁵¹ *Id.* at 694.

⁵² *Id.*

⁵³ See cases cited *id.*

⁵⁴ 163 F.2d 784 (9th Cir.), *cert. denied*, 332 U.S. 824 (1947).

⁵⁵ 163 F.2d at 788.

⁵⁶ *Id.* at 788-89.

⁵⁷ 121 U.S. 1 (1887).

⁵⁸ *Id.* at 13.

⁵⁹ 394 F.2d at 695.

⁶⁰ *E.g.*, *Edgerton v. United States*, 143 F.2d 697 (9th Cir. 1944). In this case the Ninth Circuit held that although a court might treat words in an indictment as surplusage, it could not strike words from the indictment even if it did not physically alter the paper. *Id.* at 699.

be proper if it were a matter of form and not of substance,⁶¹ or that it is proper to strike surplusage, but not by amending the indictment.⁶² The *Heisler* court said, “[s]urely, in this enlightened age, it makes little sense to hold that a court may ‘strike’ language from an indictment, and tell the jury to disregard it, but may not actually amend the fact of the indictment to conform to its order.”⁶³ It felt that the “progeny” of *Bain* were “out of joint,” but refused, nevertheless, to overrule them.⁶⁴

The court distinguished the factual situation in *Carney*, rather than overrule *Carney*. It distinguished the case on the basis that *Heisler* was tried to a court, the amendment came after trial, no physical change was made on the paper, and the order to amend was simultaneous with the adjudication of guilt.⁶⁵ The order to amend was treated as a nullity and, therefore, the indictment stood as found and presented.⁶⁶ Because the face amount of the note was not an essential element of the offense, the conviction was valid.⁶⁷ Even though the Ninth Circuit gave valid reasons for distinguishing *Carney*, it was very obviously struggling to avoid overruling it. This manner of distinguishing cases is not new to the law, but it certainly calls into question the force of *Upton*.

Conclusion

In cases like *Heisler*, where the precedent is over 20 years old, the reasons for overruling en banc are not as strong as they are when the court has to deal with a more recent decision. This is particularly true when the legal climate surrounding, and the judicial attitude toward, the point at issue had changed markedly during that time. Distinguishing cases solely to avoid overruling them leads to patchwork results over the long run. A more forthright approach is desirable. In the light of judicial aversion to overruling precedent, the *Upton* dictum seems an unnecessary additional extension of stare decisis.

Upton has the added drawback of limiting the court's flexibility.

⁶¹ 394 F.2d at 695 & n.2, citing *Williams v. United States*, 179 F.2d 656, 659-60 (5th Cir. 1950).

⁶² 394 F.2d at 696 & n.7, citing *Ford v. United States*, 273 U.S. 593, 602 (1927) and *United States v. Krepper*, 159 F.2d 958, 969-71 (3d Cir. 1946), cert. denied, 330 U.S. 824 (1947).

⁶³ *Heisler v. United States*, 394 F.2d 692, 696 (9th Cir. 1968).

⁶⁴ *Id.*

⁶⁵ *Id.* *Carney* was tried to a jury, the amendment came during trial, and the indictment was physically altered. *Carney v. United States*, 163 F.2d 784, 788 (9th Cir. 1947).

⁶⁶ *Heisler v. United States*, 394 F.2d 692, 696 (9th Cir. 1968).

⁶⁷ *Id.*

In many cases where the Ninth Circuit is confronted with an out-moded decision, panel overruling would be entirely appropriate and would save time by decreasing the necessity of convening the court en banc. Only when the panel feels that it would be necessary or proper for the full court to formulate a new rule or when conflicts between views of two more or less contemporary panels arise, should the case be considered en banc. Under Rule 35, any active circuit judge who feels strongly about a particular case can suggest en banc consideration as well.⁶⁸ The result would be a possible diminution in the number of en banc hearings and, at the same time, a more rational development of the case law.

C. A. S.

⁶⁸ FED. R. APP. P. 35(b).

II. Bankruptcy

A. Application of Res Judicata to Denial of Discharge— *Turner v. Boston*, 393 F.2d 683 (9th Cir. 1968).

A discharge in bankruptcy will be denied for any of the seven reasons listed in section 32(c) of the Bankruptcy Act.¹ *Turner v. Boston*² arose from a violation of the fifth clause of the section, the only clause which is not directed at reprehensible conduct.³ It has long been held that denial of a discharge, for any reason, is res judicata as to the debts scheduled in that petition.⁴ However, Judge Browning, speaking for the Ninth Circuit, held that res judicata should not be applied where a discharge was denied for the sole reason that the debtor innocently miscalculated and failed to wait a full six years from the date of his prior discharge before applying for a second one. In so doing, the court reversed the district court decision, reversed its own position taken some 34 years before,⁵ and renewed the conflict between the circuits.

In 1958, Turner voluntarily petitioned for a declaration of bankruptcy and a discharge from his debts. He was declared a bankrupt and the discharge was granted. Over the next five years Turner's business ran at a loss, and his debts again mounted. In 1963, he filed a second bankruptcy petition. By miscalculation, Turner filed one-hundred days before the required six-year period following his prior discharge had elapsed. This violation of section 32(c) (5), the six-year rule, resulted in denial of a discharge. In 1966, Turner filed a third petition and listed among his creditors those whom he had listed in the second proceeding. One creditor objected to a discharge and sought to apply the rule of res judicata to debts which had been scheduled on the second petition. If the court applied res judicata, Turner would

¹ 11 U.S.C. § 32(c) (1964). Section 32(c) provides in pertinent part: "The court shall grant the discharge unless satisfied that the bankrupt has . . . in a proceeding under this title commenced within six years prior to the date of the filing of the petition in bankruptcy . . . been granted a discharge"

² 393 F.2d 683 (9th Cir. 1968).

³ See *Prudential Loan & Fin. Co. v. Robarts*, 52 F.2d 918, 919 (5th Cir. 1931).

⁴ *Freshman v. Atkins*, 269 U.S. 121, 123 (1925); *Harris v. Warshawsky*, 184 F.2d 660, 661 (2d Cir. 1950); see *Bluthenthal v. Jones*, 208 U.S. 64, 66 (1908).

⁵ *McCausland v. International Shoe Co.*, 79 F.2d 1001 (9th Cir. 1935), *dismissing appeal from In re McCausland*, 9 F. Supp. 129 (S.D. Cal. 1934).

never be able to discharge those debts scheduled on the second petition. His innocent violation of the six-year rule would be a very expensive mistake.

Weight of Authority

Turner's dilemma is not unique. Other debtors have made the same error with mixed results.⁶ Two separate and conflicting lines of authority have emerged⁷ even though only three previous cases have reached a court of appeals.⁸ *Prudential Loan & Finance Company v. Robarts*⁹ was the first of these cases. In *Robarts*, the Fifth Circuit held that *res judicata* should not be applied where the second discharge had been refused because of a prior discharge within six years. The court stated that the six-year rule "stands on a different footing from a refusal on any other ground set forth in [section 32 (c)]"¹⁰ and that the rule "was not intended to result in making the provable claims of creditors bankruptcy proof forever."¹¹

In re McCausland,¹² which followed *Robarts* by three years, presented to the Ninth Circuit a preview of *Turner*. The court dismissed McCausland's appeal,¹³ thereby adopting the district court's holding that *res judicata* barred a discharge of debts scheduled in the previous petition. *Robarts* was not followed—conflict had emerged.

In 1942, the Second Circuit also chose not to follow *Robarts*. In *Chopnick v. Tokatyan*¹⁴ it held that a "[d]enial of a discharge from provable debts . . . bars an application in the subsequent proceeding for a discharge from the same debts. . . . We think this equally true whether denial was because of a previous discharge within six years . . . or on some other ground specified in section [32 (c)]."¹⁵

⁶ See *Chopnick v. Tokatyan*, 128 F.2d 521 (2d Cir. 1942), *cert. denied*, 317 U.S. 667 (1942); *Prudential Loan & Fin. Co. v. Robarts*, 52 F.2d 918 (5th Cir. 1931); *In re Masterson*, 240 F. Supp. 543 (N.D. Cal. 1963); *In re Finkelstein*, 62 F. Supp. 1015 (E.D.N.Y. 1945); *In re Newman*, 48 Am. Bankr. R. (n.s.) 781 (N.D. Ohio 1942); *In re McCausland*, 9 F. Supp. 129 (S.D. Cal. 1934), *appeal dismissed sub nom.*, *McCausland v. International Shoe Co.*, 79 F.2d 1001 (9th Cir. 1935); *In re Gilson*, 12 Am. Bankr. R. (n.s.) 325 (M.D. Tenn. 1928).

⁷ See *In re Masterson*, 240 F. Supp. 543 (N.D. Cal. 1963); Annot., 156 A.L.R. 850-851 (1945).

⁸ *Chopnick v. Tokatyan*, 128 F.2d 521 (2d Cir. 1942); *McCausland v. International Shoe Co.*, 79 F.2d 1001 (9th Cir. 1935); *Prudential Loan & Fin. Co. v. Robarts*, 52 F.2d 918 (5th Cir. 1931).

⁹ 52 F.2d 918 (1931).

¹⁰ *Id.* at 919.

¹¹ *Id.*

¹² 9 F. Supp. 129 (S.D. Cal. 1934), *appeal dismissed sub nom.*, *McCausland v. International Shoe Co.*, 79 F.2d 1001 (9th Cir. 1935).

¹³ *McCausland v. International Shoe Co.*, 79 F.2d 1001 (9th Cir. 1935).

¹⁴ 128 F.2d 521 (1942), *cert. denied*, 317 U.S. 667 (1942).

¹⁵ 128 F.2d at 522.

Neither *Chopnick* nor *Robarts* stand alone. The position taken by each case has its adherents.¹⁶ However, the only decision in the 20 years preceding *Turner*,¹⁷ and all the commentators,¹⁸ have recognized that *Robarts* represents the better view.

Origin of the Conflict

Section 32(c) provided reasons for denying a discharge, but denial of a previous discharge was not one of them.¹⁹ Less than five years after a passage of the Act, however, the Second Circuit concluded that where a discharge had been denied because of fraud on the part of the debtor, the denial should be permanent.²⁰ The court applied res judicata to "protect the creditors from an attempt to retry an issue already tried and determined between the same parties [and determined that] the court, for its own protection, should arrest, in limine, so flagrant an attempt to circumvent its decrees."²¹ It reasoned that unless there was some deterrent, there would be little to prevent a dishonest debtor from concealing assets and attempting to obtain a discharge knowing that if he failed he could try again. If a second petition failed, nothing stood in the way of a third. The creditors would have to be vigilant to protect their rights and the judicial process would be abused. The application of res judicata supplied the necessary deterrent to eliminate this burden on both creditors and

¹⁶ Adherents of the *Robarts* position include: *In re Materson*, 240 F. Supp. 543 (N.D. Cal. 1963); *In re Newman*, 48 Am. Bankr. R. (n.s.) 781 (N.D. Ohio 1942); cf. *Holmes v. Davidson*, 84 F.2d 111 (9th Cir. 1936); *In re Simmerly*, 38 Am. Bankr. R. (n.s.) 425 (N.D. Ohio 1938); *In re Dierck*, 37 Am. Bankr. R. (n.s.) 198 (S.D.N.Y. 1938); *In re Perry*, 50 F.2d 464 (N.D. Ga. 1931). Adherents of the *Chopnick* position include: *In re Finkelstein*, 62 F. Supp. 1015 (E.D.N.Y. 1945); *In re McCausland*, 9 F. Supp. 129 (S.D. Cal. 1934); *In re Gilson*, 12 Am. Bankr. R. (n.s.) 325 (M.D. Tenn. 1928).

¹⁷ *In re Masterson*, 240 F. Supp. 543 (N.D. Cal. 1963).

¹⁸ 1 COLLIER ON BANKRUPTCY ¶ 14.53, at 1423 (14th ed. 1968); Moore, *Res Judicata and Collateral Estoppel in Bankruptcy*, 68 YALE L.J. 1, 17 (1958); Oglebay, *Some Developments in Bankruptcy Law*, 18 REF. J. 9, 10 (1943); see 59 HARV. L. REV. 461, 461-62 (1946). See generally 45 HARV. L. REV. 1110 (1932).

¹⁹ The reasons for denying a discharge are: (1) commission of an offense punishable by imprisonment as provided under 18 U.S.C. § 152; (2) destruction, falsification or concealment of financial records; (3) obtaining money on credit by publishing false statements respecting financial condition; (4) transferring, destroying, or concealing property during the twelve months preceding the filing of the bankruptcy petition with the intention of defrauding creditors; (5) having been granted a discharge in a proceeding commenced within six years; (6) refusing to obey any lawful order of, or to answer any material question approved by the court; and (7) failing to explain satisfactorily any losses of assets or deficiencies of assets to meet liabilities.

²⁰ *In re Fiegenbaum*, 121 F. 69 (2d Cir. 1903).

²¹ *Id.* at 70.

courts.²²

Courts, however, have not limited the application of res judicata to cases in which an unscrupulous debtor sought a discharge for a second time. It soon became the rule that "the denial of a discharge, for whatever reason, becomes res judicata, not to be questioned in a later bankruptcy."²³ Under this rule there is no room to examine the record to determine why the earlier discharge was denied. This rule ignores the distinction between the unscrupulous debtor and the debtor who innocently violates the six-year rule by filing too soon. Herein lies the conflict. This punishment of the innocent along with the guilty does not seem to fit the purposes of the Bankruptcy Act, one of which is to "relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from obligations and responsibilities consequent upon his business misfortunes."²⁴ The fact that a bankruptcy court is a court of equity²⁵ seems to be overlooked. The ideas that a discharge should not be denied for mere technical reasons²⁶ or without examining the debtor's intent²⁷ are not considered. Also overlooked is the almost universally stated principle that the Bankruptcy Act should be construed liberally in favor of the debtor.²⁸

The Turner Holding

The court in *Turner* adopted the view that the automatic application of res judicata to bar a discharge, after it had once been denied for violating the six-year rule, would be inequitable. It found that an interpretation of the rule which required such action would severely punish an innocent debtor.²⁹ Judge Browning did not find persuasive either of the reasons urged for barring Turner's discharge. The doctrine of res judicata, the first reason proposed, was held to be a creation of the courts³⁰ which the Ninth Circuit had chosen not to apply once before.³¹ After determining that Congress did not intend a

²² *Id.* at 70-71.

²³ *Harris v. Warshawsky*, 184 F.2d 660, 661 (2d Cir. 1950) (emphasis added); see *In re Dunn*, 251 F. Supp. 637, 640 (M.D. Ga. 1966) (cases cited therein).

²⁴ *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1933) (emphasis added), quoting *Williams v. United States Fidelity & Guaranty Co.*, 236 U.S. 549, 554-55 (1915).

²⁵ *Local Loan Co. v. Hunt*, 292 U.S. 234, 240 (1933).

²⁶ See *Dilworth v. Boothe*, 69 F.2d 621, 624 (5th Cir. 1934).

²⁷ See *In re Pioch*, 235 F.2d 903, 905-06 (3d Cir. 1956).

²⁸ E.g., *Spach v. Strauss*, 373 F.2d 641, 642-43 (5th Cir. 1967); *Gross v. Fidelity & Deposit Co.*, 302 F.2d 338, 340 (8th Cir. 1962).

²⁹ *Turner v. Boston*, 393 F.2d 683, 686 (9th Cir. 1968).

³⁰ *Id.* at 686.

³¹ *Holmes v. Davidson*, 84 F.2d 111, 113 (9th Cir. 1936).

denial of a discharge to last forever,³² the court decided not to apply the doctrine because its application would contravene this congressional intention.³³

The second reason arose from the fear that unless early filing drew a severe penalty a debtor would abuse the Bankruptcy Act by filing prematurely to obtain temporary relief from pressing creditors. This fear was found unsupportable.³⁴ The court found that nothing would prevent a bankruptcy court from acting promptly upon a claim of premature filing, and a creditor met with a stay could move to vacate it "whenever the debtor has been granted a discharge within the six-year period."³⁵ Consequently, the temporary relief afforded the debtor by filing early would be so brief that it would provide little incentive for taking the action.

Conclusion

The Ninth Circuit's holding in *Turner* is significant because it adds considerable weight to the line of cases which rejects the automatic application of res judicata to bar forever the discharge of debts where a prior discharge had been denied for violating the six-year rule.³⁶ It is unlikely that a similar case will reach a court of appeal. *Turner*, if it is submitted, should end the controversy. The Ninth Circuit has adopted the better view. It recognizes that "[t]he policy of the law favors discharges in bankruptcy [and] '[u]nless it clearly appears that the bankrupt has committed some act which precludes his right, he is entitled to a discharge.'"³⁷ The act of filing for a discharge before the six-year period following a prior discharge has elapsed, if innocent, is not such an act.

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³² *Turner v. Boston*, 393 F.2d 683, 686 (9th Cir. 1968).

³³ *Id.*

³⁴ *Id.* at 687.

³⁵ *Id.*

³⁶ For cases adopting the *Robarts* view see note 16 *supra*.

³⁷ *E.g., In re Chaval*, 386 F.2d 127, 129 (3d Cir. 1967).