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Execution—Wife of Judgment Debtor in Contempt for Violation of Restraining Provision of C.P.A. § 781

Gerard Ronald Haas

In a vigorous dissent, Judge Learned Hand denied that the *Williams* case, *supra,* was controlling, insisting that the government's action was akin to the illegal use of evidence and entrapment. He urged that since the government may not use evidence it has gained directly or indirectly through illegal methods, *Nardone v. U. S.,* 308 U. S. 338 (1939); *Silverthorne Lumber Co. v. U. S.,* 251 U. S. 385 (1920), any fruits from a bad indictment cannot be utilized by the government. The majority rejected this argument because the *Nardone* and *Silverthorne* cases, dealt with evidence admissible in the prosecution of crimes already committed whereas the instant case deals with a new and separate crime committed *after* the alleged government misconduct.

In *Sorrells v. U. S.,* 287 U. S. 435 (1932), the defense of entrapment was held to be available when the criminal design originated in the mind of government officials who then persuaded the accused to commit the criminal act. The dissenter felt this doctrine should be broadened to cover the instant case, because the government knew that the defendant must inevitably repeat the statements which were the basis of the illegal indictment at the trial or impliedly admit his guilt by his silence. But the majority pointed out that a third avenue was open to the defendant and that was to attack the indictment for its illegality.

This writer suggests that the court was faced with choosing between two wrongs; the government's misconduct and the defendant's *subsequent* perjury. Perhaps what troubled the dissenting jurist was the fact that the government had a marked advantage over the defendant because of the secrecy involved in grand jury proceedings and the difficulty encountered in attempting to obtain the record. The fact that the substantive offense in both indictments was perjury does tend to convey the impression that the defendant was caught in a web, but it was his own weaving that ultimately led to his conviction. The majority decision is sound, legally, but the dissent is indicative of the limit to which a conscientious jurist will go to safeguard an individual's rights in times of political turbulence.

Anthony J. Vaccaro

EXECUTION — WIFE OF JUDGMENT DEBTOR IN CONTEMPT FOR VIOLATION OF RESTRAINING PROVISION OF C. P. A. § 781

In proceedings supplementary to judgment a third-party subpoena was served on the judgment debtor's wife who, in spite of the restraining provision, continued to expend the funds of her husband which were in her bank account for the living require-

ments of the family. *Held* (3-2): Wife in contempt of court. *Matter of Sverd v. Mostel,* 283 App. Div. 128, 126 N. Y. S. 2d 426 (1st Dep't 1953).

The Civil Practice Act provides that upon service of subpoena with the words of § 781 endorsed thereon upon a third-party who has property or money of the judgment debtor in his possession, such third-party may not dispose of such property or money unless it is exempt by law from application to the satisfaction of judgment. C. P. A. § 781. Section 792 states: "This article does not authorize the seizure or other interference with . . .; (c) the earnings of the judgment debtor for his personal services . . . to the extent that such earnings are necessary for the reasonable requirements of the judgment debtor and his family, if dependent upon him . . ."

In a contempt proceeding involving the judgment debtor's employer for violation of a restraining provision under § 781 it was held that the restraint was inoperative until the judgment creditor had shown to the court how much of the debtor's salary was required for the support of the debtor and his family. *Yarmush v. Cohen,* 184 Misc. 41, 52 N. Y. S. 2d 864 (N. Y. City Ct. 1945), *aff'd,* 185 Misc. 118, 55 N. Y. S. 2d 860 (Sup. Ct. 1945). Similarly in a contempt proceeding for violation of the restraining provision of a third-party order under C. P. A. § 779 it was held that the provision could not obligate the debtor's employer to withhold wages until the court had determined the reasonable requirements of the debtor and his family. *Matter of Gill v. Schwartz,* 273 App. Div. 606, 78 N. Y. S. 2d 721 (1st Dep't 1948), *appeal dismissed,* 300 N. Y. 625, 90 N. E. 2d 488 (1950).

Without mentioning the cases cited above, the court in the instant case chose to adopt the approach used in *Hancock v. Sears,* 93 N. Y. 79 (1883) in which a judgment debtor, enjoined from disposing of property by an order in supplementary proceedings under the Code of Civil Procedure, was exonerated in contempt proceedings upon showing that the whole of his wages (the sum spent by him) was not more than adequate for his family's support. The subpoena in the present case was held, therefore, to be a valid restraint on the third-party unless she could show that the funds which she expended were the sole available assets for the provision of necessities for the family of the judgment debtor. The court was not satisfied that there were not other funds available to the debtor.

The dissenting justices felt that the third-party had justified the expenditure of the money by showing that it was in fact spent for necessaries and that there was no intent to divert funds which

would otherwise be applied toward the satisfaction of the judgment. They also expressed their disapproval of the procedure adopted by the judgment creditor in this case of attempting to tie up the very funds which the judgment debtor had given to his wife for necessaries, while failing to proceed against the judgment debtor himself.

The failure of the court in this case to refer to its previous decision in *Gill v. Schwartz, supra* while laying down a rule in broad language which is not in harmony with that case is unfortunate. The use of the *Hancock v. Sears* formula, which previously had been confined to cases involving judgment debtors may find its justification in the proximity of relationship between the debtor and the third-party in this case. It would seem, however, that the better policy in third-party cases would be to allow the third-party to pay out funds for necessaries without peril of contempt until there has been a determination by the court as to how much of the debtor's money may be restrained.

Gerard Ronald Haas

INCOME TAX — ENTERTAINMENT EXPENSE ATTRIBUTABLE TO TAXPAYER DEDUCTIBLE ONLY IF IN EXCESS OF AMOUNT ONE ORDINARILY SPENDS

Taxpayer deducted the cost of food and entertainment which he spent on himself and his family while entertaining prospective clients. *Held:* Such expenditures are not considered ordinary and necessary business expense as there is no evidence to show that the costs were any greater than, or different from, the amounts the taxpayer would spend for his own purposes. *Sutter v. Commissioner,* 21 T. C. No. 20 (1953).

Previously, the deductibility of an expenditure for food and entertainment rested on the ability of the taxpayer to show that his business or profession was benefited, or that it was intended that it be directly benefited. Where the deduction was allowed, it included the amount the taxpayer spent on himself while incurring the expense. *Blackmer v. Commissioner,* 70 F. 2d 255 (2d Cir. 1934); *Johnson v. Commissioner,* 45 F. Supp. 377 (S. D. Cal. 1941); *Louis Boehn,* 35 B. T. A. 1106 (1937).

In the instant case the basis of the decision rests on the proposition that, presumptively, the costs of meals and entertainment paid by the taxpayer for himself and his family, if not incurred while away from home for a business purpose, are by their very nature personal expenditures and non-deductible under Int. Rev.