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TAXATION-PROCEEDING BEFORE UNITED STATES BOARD OF TAX APPEALS -VALIDITY OF SUBPOENA DUCES TECUM - UNREASONABLE SEARCH AND SEIZURE

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TAXATION — PROCEEDING BEFORE UNITED STATES BOARD OF TAX APPEALS — VALIDITY OF SUBPOENA DUCES TECUM — UNREASONABLE SEARCH AND SEIZURE — In a proceeding for judicial process to compel defendant to obey a subpoena duces tecum issued by the United States Board of Tax Appeals, defendant asserted that the documents called for were irrelevant to the issue involved, and that the subpoena was a violation of the Fourth Amendment to the Federal Constitution. *Held*, a witness is not entitled to resist a subpoena for mere incompetency or irrelevancy. To question admissibility, the papers must be so manifestly irrelevant as to make it plain that it is a mere "fishing expedition." One paragraph of the subpoena was declared invalid, as lacking specification. *United States v. Union Trust Co. of Pittsburgh*, (D. C. Pa. 1936) 13 F. Supp. 286.

Since the leading case of *Boyd v. United States*, it has been established that the prohibition against unreasonable search and seizure in the Fourth Amendment applies not only to actual search, but equally to any measure which accomplishes the same result, hence to a subpoena duces tecum.[1] To be reasonable, it is usually required that the books, papers, etc., called for by the subpoena be specified with reasonable certainty,[2] that they be relevant to the case,[3] and that the subpoena does not unreasonably interfere with witness' business,[4] and be not used for a "fishing expedition" or search for evidence.[5] It is on the question of relevancy or materiality that the instant case is significant, though it contains but little discussion. Judge Gibson states that, "A witness is not entitled to resist a subpoena for mere incompetency or irrelevancy," unless it is so manifestly irrelevant as to make it plain that a "fishing expedition" is attempted, and that it is sufficient even if a stretch of the imagination is required to induce a belief that the papers mentioned will become evidence.[6] This would seem to have the effect of relaxing the requirements which a subpoena duces tecum must satisfy. Many authorities indicate that immateriality is a valid objection.[7] "Some ground must be shown for supposing that the documents called for do contain it, (evidence). . . . Some evidence of the materiality of the papers demanded

[1] Boyd v. United States, 116 U. S. 616, 6 S. Ct. 524 (1886); Hale v. Henckel, 201 U. S. 43, 26 S. Ct. 370 (1906); Wilson v. United States, 221 U. S. 361, 31 S. Ct. 538 (1911). That the Boyd case could have been based solely on the Fifth Amendment, see Fraenkel, "Concerning Searches and Seizures," 34 HARV. L. REV. 361 (1921), which discusses the history and theory of the Fourth Amendment.

[2] United States v. Babcock, 3 Dill. 566, Fed. Cas. No. 14,484 (1876); Kullman, S. & Co. v. Superior Court, 15 Cal. App. 276, 114 P. 589 (1911). It is pointed out by Handler, "Constitutionality of Investigations," 28 COL. L. REV. 708, 905 (1928), that if specification were not observed, a general subpoena for a large number of records would give opportunity to conduct a "fishing expedition," or reveal self-incriminating evidence.

[3] Federal Trade Commission v. American Tobacco Co., 264 U. S. 298, 44 S. Ct. 336, 32 A. L. R. 786 (1924); collections of cases in 31 L. R. A. (N. S.) 835, 58 A. L. R. 1263 (1929), 15 Ann. Cas. 643 (1910), 56 C. J. 1169 (1932).

[4] Hale v. Henckel, 201 U. S. 43, 26 S. Ct. 370 (1906).

[5] Note 3, supra. Mechem, "Fishing Expeditions by Commissions," 22 MICH. L. REV. 765 (1924).

[6] United States v. Union Trust Co., (D. C. Pa. 1936) 13 F. Supp. 286 at 287.

[7] Note 3, supra.

must be produced." [8] The subpoena in the instant case was issued by the Board of Tax Appeals, one of the ever increasing number of administrative tribunals. Because of its dual character as a judicial and administrative body, the administrative tribunal issues a subpoena which it itself wishes to use in its investigatory function. It is possible that there is an unvoiced tendency in this *Union Trust Company* case and some other cases to be less strict in the application of the requirements for a subpoena duces tecum when the subpoena is issued for investigatory purposes by the investigatory body, than when issued by a court at the instance of one of two independent parties appearing before the court. There is no doubt that for the efficient enforcement of present day commercial regulation, there must be some adequate means of discovering infractions of the law.[9] Motivated by a policy with such objective, the administrative tribunal would have a natural tendency to liberality, which has been upheld by the courts. In its investigatory function, the administrative tribunal is somewhat analogous to a grand jury,[10] and grand jury cases might be expected to evidence the same tendency. In a Pennsylvania civil suit, in reference to a subpoena duces tecum issued on behalf of one of the parties, it was said that some specific book must be demanded and described.[11] But in *Consolidated Rendering Company v. Vermont*, a grand jury case, it was indicated that to specify each paper would be impractical, and that a subpoena calling for all papers, books, correspondence, etc., between certain dates and persons would be sufficient.[12] In another grand jury case, specific papers were not required, a subpoena being sustained which called for practically all documents, etc., which referred to any of the list of eighteen subjects set out in the subpoena.[13] Some cases indicate that the Government has special visitory powers over corporations created by it, and can call for all corporate books to see if the law has been observed,[14] one case even saying that the Government can conduct a "fishing expedition" into a corporation.[15] In the case of public utilities, it is probably true under recent decisions that there is no right to resist inquisitorial processes if carried on for any legitimate pur-

[8] Federal Trade Commission v. American Tobacco Co., 264 U. S. 298 at 306, 44 S. Ct. 336, 32 A. L. R. 786 (1924).

[9] See Colclough, "S. E. C. Power of Search," 3 GEO. WASH. L. REV. 356 at 363 (1934).

[10] There is the view that a grand jury does not have independent powers of investigation, and should proceed only on matters within their own knowledge, or which are presented by the prosecuting attorney or court. 2 WHARTON, CRIMINAL PROCEDURE, 10th ed., §§ 1260-1264 (1918). The better view would seem to be that a grand jury has broad powers of investigation and inquisition, and can proceed on matters of their own knowledge, or from the calling of witnesses without specific charges being first placed. Hale v. Henckel, 201 U. S. 43, 26 S. Ct. 370 (1906); Blair v. United States, 250 U. S. 273, 39 S. Ct. 468 (1919).

[11] American Car & Foundry Co. v. Alexandria Water Co., 221 Pa. 529, 70 A. 867, 15 Ann. Cas. 641 (1908).

[12] 207 U. S. 541 at 554, 28 S. Ct. 178, 12 Ann. Cas. 658 (1908).

[13] Brown v. United States, 276 U. S. 134, 48 S. Ct. 288 (1928). Similar United States v. Watson, (D. C. Fla. 1920) 266 F. 736.

[14] Hammond Packing Co. v. Arkansas, 212 U. S. 322, 29 S. Ct. 370, 15 Ann. Cas. 645 at 652 (1909).

[15] United States v. American Tobacco Co., (C. C. N. Y. 1906) 146 F. 557.

pose.[16] The same seems to be true of certain businesses which are not public utilities in the strict sense, but in which, because of peculiar circumstances, the public has a principal interest in publicity.[17] Where certain records are required to be kept by law by either artificial or natural persons, there is authority that they may be treated as quasi-public records, and not subject to the Fourth Amendment protection to private papers.[18] The court in *United States v. Watson* states, "The inquisitorial authority of a grand jury should not be limited, impeded, or thwarted by what may appear to the witness as impracticable or irrelevant." [19] However, not all authority reflects such pronounced favoritism to investigatory functions, and it is certain that under normal circumstances the Fourth Amendment does offer protection against unreasonable demands, to either corporation or individuals.[20]

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[16] Smith v. Interstate Commerce Commission, 245 U. S. 33, 38 S. Ct. 30 (1917).

[17] Bartlett Fraizer Co. v. Hyde, (C. C. A. 7th, 1933) 65 F. (2d) 350.

[18] United States v. Mulligan, (D. C. N. Y. 1920) 268 F. 893; Wilson v. United States, 221 U. S. 361, 31 S. Ct. 538 (1911); State v. Davis, 108 Mo. 666, 18 S. W. 894 (1892); Colclough, "S. E. C. Power of Search," 3 GEO. WASH. L. REV. 356 (1934).

[19] (D. C. Fla. 1920) 266 F. 736 at 738.

[20] Federal Trade Commission v. American Tobacco Co., 264 U. S. 298, 44 S. Ct. 336, 32 A. L. R. 786 (1924); United States v. Terminal Ry. Assn., (C. C. Mo. 1907) 154 F. 268; Hale v. Henckel, 201 U. S. 43, 26 S. Ct. 370 (1906).