No. 12,158

IN THE

United States Court of Appeals

For the Ninth Circuit

SUCKOW BORAX MINES CONSOLIDATED, INC., et al.,
Appellants,

vs.

BORAX CONSOLIDATED, LTD., et al.,
Appellees.

Reply of Appellants to Supplemental Memoranda of Appellees

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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Appellees American Potash & Chemical Corporation has filed a supplemental memorandum in response to appellants' reply brief discussing solely the question of the Moratorium; the remaining appellees have also filed a supplemental memorandum which in effect is no more than a summary of their reply brief.

We shall reply first to the memorandum of the Borax Consolidated Group.

I.

AS TO THE BURNHAM DECISION

Here it is stated that the Burnham case was not decided after a jury trial and that there was a summary judgment. **This is absolutely incorrect and not the fact!** We are sur-

prised that counsel should make such a statement. The facts are as follows: The complaint was filed; the defendants filed a motion to dismiss and also one for summary judgment. The motion for summary judgment was denied but the court decided to send the case to the jury on the special issue of the statute of limitations and directed defendants to answer as to that point alone. **Accordingly, the defendants filed an answer denying those allegations of the complaint claimed to have tolled the statute of limitations!** The case was then set for trial before a jury. The jury was impaneled and evidence heard for the sole purpose of determining whether or not plaintiff had been in possession of sufficient facts to put it on notice as to the existence of a conspiracy under the antitrust statutes and sufficient to start the running of the statute. Two days of trial were consumed in receiving evidence and at the conclusion of the case of both parties, a motion for an instructed verdict was made by defendants and granted. The court, in effect, entered a verdict for the jury, the court deciding that the evidence showed that the plaintiff was put on notice of the formation of the conspiracy by the defendants through their activities and that it (the plaintiff) should have been able to tell that such conspiracy had been formed and, therefore, should have commenced its action within the statutory period.

Here the situation is entirely different. The complaint herein alleges the facts and was met by a motion to dismiss and also one for summary judgment. Such motions were heard and decided upon the record as it stood; no special issues of fact were presented and, therefore, no answers as such were filed by the defendants. We are therefore confronted by the cold record and the rules of law applicable thereto, namely, that all of the facts of the complaint are admitted to be true and that such facts cannot be controverted by affidavits filed in support of such motion for summary judgment. The authorities in our opening and closing briefs are full and conclusive on these points. Therefore, the Burnham decision is no precedent of any kind for the present situation. The former case was decided on

the merits, while this case is presented strictly on the legal motions.

II.

AS TO THE CLAIM THAT SHAM ALLEGATIONS CREATE NO ISSUE

To escape the rule as to the admission by the appellees as to the facts of the complaint, appellees claim that there are no sufficient allegations in the complaint and that allegations shown to be sham by affidavits can not support the motion. There are two answers to these contentions: (1) It is impossible for any fair-minded person to read the complaint and the charges set forth therein, all of which are admitted by the appellees, without at once realizing the wrongs inflicted upon appellants by the appellees and the great injuries done to them by the fraud and activities of the appellees. This case is so much stronger than most of these treble damage antitrust cases that there is no comparison. Here, the bankruptcy fraud and all of its ramifications, is alone sufficient to bring the defendants within the bar of this court. (2) The rule contended for by counsel is only applicable where a case after a trial on the merits would be subject to a motion to dismiss for failure to state a case. Such is the full purport of the Christianson case cited by counsel. Here most of the allegations set forth in the affidavits filed by appellees in support of their motion are denied by the affidavits of Mr. Tobeler and Mr. Buren. Thus questions of fact have been presented which cannot be passed on in the manner sought by appellees but must be left to a trial on the merits.

In addition, counsel have asked this Court to pass on the questions of fact as to whether the allegations of the complaint are sham and in so doing immediately state themselves out of court, for by the unquestioned line of authority neither this nor the District Court on the hearing of motions such as the present has jurisdiction to pass upon facts.

We cannot bring ourselves to the conclusion that the moral outlook of counsel has become so blasted by contact with

appellees such as they represent herein as to permit them to honestly feel that the facts as alleged in the complaint herein do not constitute wrongs, frauds and evil doings. If such a tendency should be creeping upon counsel we suggest to them a re-reading of *Stephens Co. v. Foster and Kleiser,* 311 U.S. 255.

III.

AS TO THE CONTINUING CONSPIRACY THEORY

Here again counsel attempt to distinguish between civil and criminal cases in the application of the rule of a continuing conspiracy.

So far as we have been able to ascertain no court has ever held that such a distinction exists. *Foster and Kleiser v. Special Site Sign Co.,* 85 Fed.(2) 742, makes passing reference to this distinction but *does not* make a definite holding in connection therewith. Therefore, this particular point is open and we respectfully ask this Court to decide specifically the same. Justice Holmes in deciding *United States v. Kissel,* 218 U.S. 601, did not make any such distinction, nor has counsel ever at any time during their discussion of this particular point afforded any reason why such a distinction should exist.

IV.

AS TO THE AVAILABILITY OF DEFENSE OF STATUTE OF LIMITATIONS ON MOTION

Counsel attempt to brush aside the authorities which we have cited in support of the claim that the statute of limitations cannot be raised by such motions as are here presented by the claim that such cases are poor law and inconsistent with the decisions of this Court in the Burnham and Gifford cases. Neither of such cases held to the contrary of our contention, particularly in the Burnham case, there is no reference whatsoever by the District Court, this Court, or the Supreme Court as to this particular point.

If Rule 8(c) means what it says, there is no answer to such contention for it is definitely laid down in such Rule that the plea of such statute can only be raised as an affirmative defense. There is no ambiguity in the wording of such rule; in fact it is confirmed by Rule 12(b), as set forth on page 79 of our opening. The fact that such question has never definitely been passed upon is immaterial, and we respectfully request that this Court do so on this hearing.

The statute of limitations like the statute of frauds is a personal privilege. Neither of such statutes make a contract or cause of action void in themselves and the defendants do not have to raise such pleas if they are otherwise so inclined; such is the reason of Rules 8 and 12. The recent case of *Toobert v. Woods,* 174 Fed.(2) 861 (9th Cir. decided May 7, 1949), definitely held that the plea of the statute of frauds is a personal plea which may be waived. The same applies to the statute of limitations. See 16 *Cal. Jur.,* p. 567. Therefore, we reiterate that such statute does not in itself invalidate the contract or situation involved but constitutes a personal privilege of the defendant which he does not have to exercise unless he is so inclined and such being the fact the rules govern and such plea must be raised in the form of an affirmative defense.

V.

AS TO THE RELEASES

This point raises the same questions as presented in the foregoing contention as to the statute of limitations. If Rules 8 and 12 mean anything, it is exactly what is set forth therein. There is no ambiguity present and they control such situations exactly as they do any other positions or steps covered by such rules, statements of counsel to the contrary, notwithstanding. Both of the releases in question when read in the light of the facts show conclusively the intention and endeavor to conceal and deceive for had appellees been acting honestly they certainly would have made reference in such releases to the antitrust claims so vigor-

ously pressed at various times by appellants. If the purpose and effect of the rules can be obviated where they are disagreeable to a defendant by the mere statement of counsel that the rules set forth are bad law we would be nowhere and the effect of the Supreme Court's approval and adoption of the rules would be but airy persiflage.

VI.

AS TO ATTEMPT TO GO BEHIND FINAL JUDGMENTS

Of course, a stipulated judgment is as conclusive as a judgment rendered after trial but such rule has no application here for it is not applicable to the present facts. In all of such actions in which the judgments were stipulated there was an appeal pending and part of the settlement of the dispute was the agreement that the appeal should be withdrawn and the judgments allowed to stand as though no appeal had been taken. This was another step in the total fraud intended and imposed by defendants and by no means has the effect desired to be contended for by counsel.

VII.

AS TO THE FAILURE OF ALLEGATIONS OF DAMAGE FROM ALLEGED ACTS OF 1942

This subdivision is no more than a brief summary of what was contained in the answering brief of appellees. In turn, we believe that we have completely answered any such contentions here made by Subdivision (3) of our reply, page 10 thereof, and to which we respectfully refer. In addition, the complaint sets forth, beginning with paragraph 85 thereof (Tr. p. 69) through paragraph 92 (Tr. p. 78), various facts and overt acts occurring subsequent to the 1934 release and which bring the case squarely within the rule of *Yurie v. Thompson,* 69 S. Ct. p. 1018, and referred to at various times in our reply, commencing with page 10, and wherein is also discussed the events occurring after the 1934 release. Such allegations set forth

the activities of the appellees and the overt acts committed subsequent to 1934 and fully warrant all of the comments made by appellants in their reply.

VIII.

AS TO RE RASOR'S ESTATE

We deny that the motion of Rasor's estate was one of the grounds presented below in support of the motion to dismiss. All motions made in behalf of Rasor were sole and separate, involving only the points raised on that particular motion. By no stretch of the imagination can such motion be brought within the folds of the general motion to dismiss. Such was wholly apart from the general motions and must stand on its own legs. No ruling was made by the lower court thereon and, therefore, this Court has no jurisdiction over such motion on this appeal. Furthermore, the authorities cited by us are, we respectfully submit, controlling.

IX.

RE MOTION TO SET ASIDE JUDGMENT TO PERMIT THIRD AMENDMENT OF COMPLAINT

Previous amendments have no bearing on this question for there may be as many amendments as the Court will permit and there are no limitations in the rules or otherwise as to such number of amendments allowable. We reaffirm our statements in our reply on this point.

X.

AS TO "MISCELLANEOUS"

Here counsel endeavor to add up the sums of money involved in the various litigations disposed of by the settlement of 1942 and handle the same as though these cases had gone to final determination on appeal and had been affirmed. Defendants have no right in the particular situation involved to take credit as alleged by them and there is no statement or allegation in

any of the pleadings or affidavits to the effect that such amounts constituted payments on account of the settlement arrived at for the purposes of the 1942 release. In addition, all of such contentions raise *facts* which are not relevant or permissible on these motions.

In failing to refer to Rules 8 and 12 in replying to subdivisions (9) and (10) of appellees' supplemental memorandum, we do not mean to waive such points and again contend that neither the question of the "statute" nor "release" can be raised on these motions.

For the reasons set forth herein, as well as those appearing in the reply of appellants to the briefs of appellees, we respectfully submit that the judgment should be reversed.

As to the Memorandum of Appellee American Potash & Chemical Corporation Re Moratorium

A. AS TO THE CLAIM THAT THE WORDING OF THE ACT OF NOVEMBER, 1942 SHOWS CLEARLY THAT PRIVATE ACTIONS ARE NOT INCLUDED.

We are yet unable to ascertain by what method of reasoning counsel reaches such a conclusion in the face of the very clear wording of the Act in question and of the Rules definitely laid down in the recent case of *Ex Parte Collett,* 69 S. Ct. 944 and the two other cases decided by the Supreme Court upon the same day. These are set forth on page 29 of appellants' reply to the briefs of appellees. Such decisions dispose completely of the contentions made by counsel in their original reply brief and also in their memorandum. The construction contended for by counsel is strained and without basis in fact or in law now that the Collett, et al. cases have been announced. Counsel, in effect, admit that if the word "action" had been used, they would have no case with respect to the statute. This effort to obviate the clear words of a statute is extremely dangerous for to permit such practice wuold be to open up every case involving a statute to an interpretation of what the enacting body meant. To permit such practice would be to create chaos in the trial of causes and would be to substitute the thoughts of various witnesses as to what the enacting body meant or had in mind when the provision in question was passed, no matter how clear the wording of the act. It is only in extreme cases of questionable interpretation or of doubt that reference to legislative intent can with safety be applicable. This is the effect of the Collett, et al. cases and evidently the Supreme Court had such possibilities in mind when it stated:

> "The plain words and meaning of a statute cannot be overcome by legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction."

There seem to be no such instance as contended for by counsel in the use of the words in the United States Code. Section 16 uses the word "proceeding" with reference to a private suit.

B. AS TO THE CLAIM THAT THE HEARINGS ON S-2431 ARE NOT PART OF THE LEGISLATIVE HISTORY OF S-2731 WHICH BECAME THE MORATORIUM ACT.

While the two bills may have been separate in their presentation they, nevertheless, had the same purpose in end, that is, to secure the business people with whom the Government desired to continue large war-time operations against liabilities under the antitrust laws. The fact that various bills may have been introduced in an effort to accomplish the purpose desired does not detract from the fact that they were all presented and considered as part of the legislative history of the act which finally emerged from such Congressional considerations and discussions. The paragraph cited by counsel on page 7 from the case *Church of Holy Trinity v. United States* and referred to on page 6 of such memo illustrates this point. It is as follows:

> "Again, another guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body."

Liability of the business interests involved for treble damages were certainly a present and live one and it cannot be conceived that during the discussion as to the liabilities of such parties to the Government under the antitrust laws, Congress, as well as such parties, did not have the possibility of such treble damage liabilities also in mind. Had this not been so, it would have been very easy for Congress to have specifically stated that the exceptions referred to in the Moratorium Act did not include situations arising under the treble damage provision. It cannot be contended that Congress acted without such possibility in mind.

C. AS TO THE LEGISLATIVE HISTORY.

We believe that what we have said before both in this and in the original reply, aside from the rules laid down in the Collett, et al. cases, have demonstrated that the act as passed is all-embracing both as to Government and private suits; in addition we might add that at the threshold of this discussion is the question as to whether the "legislative history" is the history of the particular bill or whether it is the history of the *problem* with which the legislature is concerned. Usage here is very clear. It happens habitually that bills are introduced and referred to committees for no other purpose than to provide a cause for the hearing. At the end of the hearing, the bill may be amended or an entirely new bill may be drawn. In the course of a hearing, a half dozen bills may in succession be before the legislative body. Legislative history has significance only if it is functional and really interprets the act which emerges. In respect to the suspension or antitrust actions some three or four bills were at one time or another considered, all dealing with aspects of the same thing. It is perfectly clear that the bill to exempt from the antitrust actions was before the Senate. It was likewise before the Judiciary Committee which eventually reported out the Moratorium Bill. The legislative history must be the legislative history of a bill which is only one of a number of answers which were considered. In fact, there is no legislative history for the particular bill which was passed. *The legislative history is in respect to the proposed exemption from the antitrust laws.*

The reference to Section 12 (Memo. p. 14) of the Small Business Act is quite without relevancy. That act originated in the Senate. Section 12 was tacked on by the House. Consequently it does not stand in succession to the discussion of the exemption bill in the Senate. It is in fact an independent source of origin. Section 12 was tacked on in the House before the hearings on the so-called Patterson or Suspension Bill in the Senate.

However, there are here other infirmities to be noted. Note that Section 12 is part of a Small Business Bill. It is not small

business but large business which generally speaking violates the antitrust acts. Consequently, it covered only a small area of the economy. Note, too, that Section 12 is not in the nature of an exemption but in the form of a procedure.

It is stated in the memo (p. 14) that the intention of the Moratorium statute was "to enable the government to carry out the gentleman's agreement." The answer is obvious. The gentleman's agreement was self-operating. No statute of the government was necessary to enforce it. The memo tries to make much of other actions. Note for example the footnote on page 3. The libel on the case has been invoked in only 3 or 4 cases in almost 60 years of the antitrust acts, and consequently is of no consequence. Almost all of the other types of suit referred to are follow-up actions of one sort or another. They do not have to do with the date by which the original proceeding must be begun.

There is no answer to the rationale which we put forward in our original brief. Businessmen demanded security against antitrust suits and the threat in the private action was far greater than that in the government action. The excerpts from Secretary Patterson's testimony are here eloquent.

We respectfully submit that in view of the Collett, et al. cases no more need to have been offered in reply to the memo of counsel than the citation of such controlling precedents; the points urged by counsel in those cases in favor of a legislative interpretation are largely similar to those presented herein, but in view of the very clear wording of the present Moratorium there can be no necessity for the use of the doctrine of legislative interpretation. To permit the extension of such doctrine to the extent that counsel now alleges would be to open up in every case involving statutory wording, such investigation no matter how clear, precise and exact the wording of the statute might be.

We respectfully submit that there is no possibility of or reason for the exemption of private suits from the provisions of

the act in question and that accordingly this judgment should be reversed.

Respectfully submitted,

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