ORIGINAL

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,
Appellant,

v.

MINAS DE ARTEMISA, S. A.
(*a Mexican corporation*),
Appellee.

No. 10907

BRIEF FOR APPELLANT

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STATEMENT OF JURISDICTION

This is an appeal from (1) an order entered by the District Court for the District of Arizona on July 3, 1944, pursuant to Section 22(b) of the Securities Act of 1933 (15 U. S. C. § 77v(b)),[1] which denied the Commission's application for enforcement of a subpœna *duces tecum* requiring the appellee to appear before an officer of the Commission and to produce certain of its corporate books, papers and documents (R. 261v), and (2) a final judgment entered by the same court on September 19, 1944, which dismissed the

[1] "In case of contumacy or refusal to obey a subpena issued to any person, any of the said United States courts, within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides, upon application by the Commission may issue to such person an order requiring such person to appear before the Commission, or one of its examiners designated by it, there to produce documentary evidence if so ordered, or there to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof."

same application "for lack of jurisdiction to compel the production of books and records of Respondent Minas de Artemisa, S. A., which books and records are located in the office of Respondent in the Republic of Mexico" (R. 273-74).[2]

STATUTE INVOLVED

In general, the Securities Act of 1933 affords protection to the investing public by requiring disclosure of the material facts and circumstances bearing on the value of securities which are publicly offered through the mails or in interstate commerce.[3] Dissemination of information is achieved by the requirement that a "registration statement" describing the securities and the issuer be filed with the Securities and Exchange Commission, and by the further requirement that a "prospectus" summarizing the information contained in the registration statement be furnished to each person to whom the securities are offered. These requirements are found in Section 5 of the Act (15 U.S.C. § 77e). Section 17(a) (15 U.S.C. § 77q(a)) prohibits fraudulent sales of securities through the mails or in interstate commerce. The Act contains no exception for persons incorporated outside the United States; even foreign governments must register in order to sell securities in this country (Section 7 and Schedule B, 15 U.S.C. §§ 77g and 77aa).

[2] The printed transcript of record incorrectly gives the style of the case as *"Securities and Exchange Commission, Appellant,* vs. *Artemisa Mines, Ltd. (an Arizona Corporation),* and *Minas de Artemisa, S. A. (a Mexican Corporation), Appellees."* Artemisa Mines, Ltd., is not a party to this appeal, as explained *infra* note 6; the District Court granted the Commission's application for an order enforcing the subpœna directed to that company and the company took no appeal.

[3] The Securities Act was last before this Court in *Penfield Company of California* v. *S. E. C.,* 143 F.(2d) 746 (1944), *cert. denied,* — U. S. — (Nov. 6, 1944), likewise a subpœna enforcement case.

The Commission does not pass on the merits or value of any security (Section 23, 15 U.S.C. § 77w). Its function is to enforce the registration and anti-fraud requirements of the Act in order that the investing public may be afforded accurate and adequate information on the basis of which each investor may form his own judgment as to the merits of the securities offered to him.

Other sections of the Act make provision for the administration and enforcement of the substantive provisions of Sections 5 and 17(a). Thus the subpœna presently sought to be enforced was issued pursuant to Section 19(b) (15 U.S.C. § 77s(b))[4] in the course of an investigation instituted by the Commission under Section 20(a) (15 U.S.C. § 77t(a)).[5] On the basis of the information obtained through such investigations, the Commission is authorized by Section 20(b) (15 U.S.C. § 77t(b)) to institute actions in the District Courts to enjoin existing or threatened violations of the Act, and to place the facts it has obtained before the Attorney-General for criminal prosecution.

[4] "For the purpose of all investigations which, in the opinion of the Commission, are necessary and proper for the enforcement of this title, any member of the Commission or any officer or officers designated by it are empowered to administer oaths and affirmations, subpœna witnesses, take evidence, and require the production of any books, papers, or other documents which the Commission deems relevant or material to the inquiry. Such attendance of witnesses and the production of such documentary evidence may be required from any place in the United States or any Territory at any designated place of hearing."

[5] "Whenever it shall appear to the Commission, either upon complaint or otherwise, that the provisions of this title, or of any rule or regulation prescribed under authority thereof, have been or are about to be violated, it may, in its discretion, either require or permit such person to file with it a statement in writing, under oath, or otherwise, as to all the facts and circumstances concerning the subject matter which it believes to be in the public interest to investigate, and may investigate such facts."

FACTS

On March 3, 1941, the Commission issued an order under Section 20(a) directing an investigation to determine whether Artemisa Mines, Ltd. (hereinafter referred to as "the Arizona corporation"), Minas de Artemisa, S. A. (hereinafter referred to as "the Mexican corporation" or "the appellee") and Oliver O. Kendall, president of both companies, had violated Section 5(a) of the Act in the sale of stock of the two companies to persons in the United States (R. 8-12). The Commission's order appointed officers for the purpose of the investigation and empowered each of them to administer oaths and affirmations, subpœna witnesses, compel their attendance and require the production of any books, papers, correspondence or other records deemed relevant to the inquiry.

In the course of the investigation subpœnas were issued to both companies and were personally served upon Kendall, an American citizen, at his residence in Nogales, Arizona, on December 22, 1942 (R. 12-17). The subpœna directed to the Mexican corporation required the production of certain stock certificates, books and records, promissory notes, cash receipt books and records, bank statements, paid or cancelled checks, check stubs, and selling literature, all relating to the sale of securities by that company (R. 14-17).

Kendall appeared before the officer of the Commission on February 16, 1943, the date set by the subpœnas, but produced none of the books and records required. Instead he filed a statement claiming that their production might tend to incriminate him (R. 31). He was given an opportunity until April 6, 1943, to reconsider his refusal (R. 31-32). When this date passed without compliance (R. 32), the Commission filed an application on April 8 for an order enforcing both subpœnas (R. 2-7). The application was served upon both companies through personal service upon Kendall in Arizona (R. 17-18). On May 17, 1943, the Arizona corporation filed an answer denying that it had possession or control of the documents sought to be produced. The Mexican corporation, however, filed a "motion to dismiss for lack of jurisdiction" on the ground (1) that it was a corporation organized and existing under the laws of Mexico with its domicile in Nogales, Sonora, Mexico, and was not doing business or subject to process within the District of Arizona, and (2) that the documents and things sought to be produced were in Mexico and were by Mexican law required to be kept at all times at its place of business in that country (R. 19-20). On the same day, after hearing, the court issued an order enforcing the subpœna directed to the Arizona corporation and submitted the application as to the Mexican corporation for further order of the court.[6]

At the hearing on May 17, Kendall expressed his consent in open court to having a representative of the Commission examine in Mexico the books and records of the Mexican corporation which he claimed were in that country (R. 33). Repeated efforts to obtain such examination, however, proved unsuccessful (R. 137-39, 231-33). It was assumed, therefore, that Kendall's consent was not given in good faith, and the Commission pressed its application to enforce the subpœna against the Mexican corporation under the jurisdiction reserved by the court in its order of May 17.

The testimony given at the hearing in the lower court on May 17, 1943 (R. 20-48), together with various affi-

[6] On November 15, 1943, Kendall was ordered committed for contempt for failure to comply with the court's order of May 17. Kendall has not been apprehended since the issuance of the contempt order and is reported to be staying in Mexico, essentially a fugitive from justice. As we have already indicated (*supra* note 2), the Arizona corporation is not a party to this appeal. Kendall's absence from the country does not, of course, deprive the court of jurisdiction as to the Mexican corporation if it was properly served with the Commission's application while Kendall, its president, was physically in Arizona. The border is being watched in the event Kendall attempts to re-enter the country, and the Commission is prosecuting this appeal with a view to obtaining information relevant to the possible institution of injunctive or criminal proceedings if Kendall is apprehended.

davits subsequently submitted by permission of the court (R. 49-244), reveals the following background of the two companies and Kendall's relationship to them: [7]

In 1931 Kendall owned all but the qualifying shares of Sonora Copper Mining Company, a Colorado corporation, which held certain mining claims in Sonora, Mexico. That company was organized in 1910 for a period of 20 years. By 1930 the corporate term had ended and, in addition, legislation had been passed in Mexico denying non-Mexican corporations the right to hold any interest in Mexican mining claims after the expiration of their terms of existence. Apparently the Mexican authorities took no immediate action. In any event Kendall in 1931 organized Artemisa Mines, Inc., under the laws of Arizona, and took 6,000,000 of its authorized 10,000,000 shares in exchange for the stock of Sonora Copper Mining Company. At this point, therefore, Sonora Copper Mining Company was owned by the Arizona corporation, which was in turn controlled through majority stock ownership by Kendall.

In 1936 Kendall caused the organization of Minas de Artemisa, S. A. in Sonora, Mexico, which issued its stock to Sonora Copper Mining Company in exchange for the mining claims. Sonora Copper Mining Company then transferred the stock of the Mexican corporation to the Arizona corporation as a liquidating dividend. Thus the mining claims are now owned by the Mexican corporation, all the stock of which is owned by the Arizona corporation, and the latter company is in turn controlled by Kendall.

None of the companies has had anything but dummy directorates. All of the business of the companies has been transacted by Kendall, who has managed the companies from his homes in Bisbee and Tucson, Arizona (R. 187-88, 211, 59-60):

[7] Unless otherwise stated, the facts here summarized appear in Exhibit A of Burr's affidavit (R. 63-82), which is a report prepared by M. C. Little, Esq., Kendall's attorney in Nogales, Arizona.

The stock books and cash receipt records of the appellee, some of the very items called for by the subpœna, have been kept at Kendall's residence in Tucson (R. 188-89, 211-12, 60). Certificates of stock have been made up in Arizona and mailed or distributed from that state (R. 212, 188, 235-36, 87, 89, 90, 99). Numerous letters on behalf of the appellee have been mailed from Arizona (R. 60, 231, 235-37, 87-90, 96-101). Conferences have been held with stockholders in Arizona concerning the affairs of the appellee, and Kendall has used his residence telephone to place and receive local and long distance calls in connection with the appellee's affairs, his phone bills running as high as $75 a month (R. 60-62, 188-90, 211, 235); the appellee does not even have a telephone at the site of its mining property in Mexico (R. 190). Until November 26, 1941, a bank account was maintained by "Oliver O. Kendall, Trustee" in a Tucson bank (R. 165-86), and the appellee maintained a checking account in its own name in another Tucson bank until December 28, 1942, six days after the service of the subpœna (R. 139-64, 17). The appellee has been represented generally by an attorney with offices in Nogales, Arizona; *some of the appellee's books and documents have been kept in that office;* and much of the appellee's correspondence has been sent from there (R. 59-62, 231, 189, 135). It has acquired land upon which to build a smelter at Bisbee Junction, Arizona, and materials for the building of the smelter have been accumulated there (R. 60, 191). Transactions have been carried on from Tucson with the American Smelting and Refining Company of El Paso, Texas, on behalf of the appellee in the sale of silver, lead and copper ores (R. 62, 131-33). Meetings for the sale or lease of the appellee's Mexican properties have been held at Tucson and Nogales, Arizona (R. 135, 62). Kendall has registered with the Arizona Corporation Commission to sell stock of Artemisa Mines, Ltd., the Arizona corporation, with the proviso that stock of the Mexican corporation would be given as a "bonus" with each share of stock of the Arizona corporation

(R. 25-27, 24h). And Kendall's wife, a director of the appellee, has carried on the business of the appellee in Arizona through the medium of letters, telephone conversations and personal conferences (R. 188, 235-44, 98-100).

In short, the case involves an American citizen who organizes a corporation under the laws of a foreign country, carries on from his residence in Arizona all of the company's affairs except the actual operation of its mines, and sells securities of the corporation through the United States mails to United States citizens in various parts of the country. The issue is whether such a person can escape the normal investigatory powers of the Commission and of the courts by the expedient of foreign incorporation and by keeping the company's books and records across the border.

At the hearing of May 17, 1943, the Mexican corporation introduced a witness (Judge Espinosa) to testify that under Mexican law the books and records of a Mexican corporation must be kept in that country (R. 37). Thereafter the Commission instituted steps through the appropriate channels of the State Department to obtain an opinion on this point. Pursuant to a commission issued in the court below to the United States Consul or any Vice-Consul at Mexico City (R. 245-47), interrogatories, cross-interrogatories and redirect interrogatories were submitted to Sr. Lic. Antonio Correa M., an active member of the Mexican Bar (R. 247-57). The expert testimony of the witness Correa (R. 257-61r), which thoroughly explains the relevant Mexican statutes and the practice thereunder, demonstrates (as summarized in the argument) that enforcement of the subpœna would involve no violation of Mexican law.

On July 3, 1943, the District Court entered a minute order, without any findings of fact or conclusions of law, denying the Commission's application for enforcement of its subpœna directed to the appellee (R. 261v). The Commission thereupon moved the court to make findings of fact, to state its conclusions of law, and to enter an appropriate final order (R. 261s-u, 262-70). In response to that motion the court made certain findings of fact as to the Mexican law

and other matters, concluded that it was "without jurisdiction" to compel the production of the appellee's books located in Mexico and that "in the exercise of its judicial discretion, it should not order an act to be done in the Republic of Mexico which contravenes the law of that country," and entered a judgment dismissing the application "for lack of jurisdiction over the person of Respondent and over the subject matter of the action" (R. 270-74).

The court made no reference to whether the appellee was "found" in the District of Arizona within the meaning of Section 22(b) of the Securities Act, presumably because the appellee did not press its objection on that score. In any event we think it could not be seriously contended, in the light of the appellee's pervasive activities in the District of Arizona, that it was not "found" in that district.[8] Nor can there be any serious question as to jurisdiction over the person, since the appellee was served by means of personal service on its president in a district in which it was so clearly doing business (R. 17-18). Its defense based upon the alleged requirements of Mexican law (R. 19-20) has nothing to do with jurisdiction either over the person or over the subject matter. Despite the reference in the court's conclusions of law and its judgment to "lack of jurisdiction" (R. 272-74), the question whether the court should have ordered production of the appellee's books and records located in Mexico is a question not of jurisdiction but of substantive conflict of laws.[9] Jurisdiction over the subject

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[8] *Washington-Virginia Ry. Co.* v. *Real Estate Trust Company of Philadelphia*, 238 U. S. 185 (1915); *Weitzel* v. *Weitzel*, 27 Ariz. 117, 230 Pac. 1106 (1924). *Cf. Colorado Iron-Works* v. *Sierra Grande Mining Co.*, 15 Colo. 499, 25 Pac. 325 (1890); *Tripp State Bank of Tripp* v. *Jerke*, 45 S. D. 448, 188 N. W. 314 (1922) (single sale of stock in South Dakota by foreign corporation held to constitute "doing business" under South Dakota "Blue Sky Law").

[9] Section 94 of the "Restatement of Conflict of Laws" states: "Whether such a decree [ordering an act to be done in another state] will be rendered is not a question of the jurisdiction of the court but a question of whether such jurisdiction will be exercised in the particular case."

matter of the application in the case at bar is, of course, granted by Section 22(b) of the Securities Act.

QUESTIONS PRESENTED

This brief will seek to establish the following propositions:

I. Under substantive principles of conflict of laws the court should have ordered the production of records of the appellee which were in Mexico, provided that compliance with such a decree would not contravene Mexican law.

II. The record demonstrates that compliance with such a decree would not contravene Mexican law.

III. If the first two propositions are established, this court's mandate should require enforcement of the Commission's subpœna without any further pleading, because an application to enforce a Commission subpœna under Section 22(b) of the Securities Act of 1933 is a summary proceeding to which the Rules of Civil Procedure do not apply and the appellee's so-called "motion to dismiss" was not limited to an attack upon the court's jurisdiction but was in reality an answer raising substantive defenses.

ARGUMENT

I.

A Court in One Country May Order a Person Subject to Its Jurisdiction to Produce Books and Records from Another Country, Provided Compliance with Its Decree Will Not Contravene the Law of the Second Country.

The rule is clear. As stated in Section 19 of the "Restatement of Conflict of Laws": "A state can exercise jurisdiction through its courts to make a decree directing a party subject to the jurisdiction of the court to do an act in another state, provided such act is not contrary to the law of the state in which it is to be performed." And as the term "state" is used in conflict of laws and specifically defined in the Restatement, it makes no difference that the required records in this case are alleged to be in a foreign country rather than a sister state of the Union.[10]

This power has been exercised in many cases to require the production of books and papers which are outside the territorial limits of the court. In *Consolidated Rendering Company* v. *Vermont*, 207 U. S. 541 (1908), the Supreme Court of the United States affirmed a decision of the Vermont Supreme Court which ordered a Maine corporation to produce in Vermont books and records kept in its principal office in Massachusetts.[11] In *Independent Order of For-*

[10] The word "state" is defined in the "Restatement" (§ 2) to denote "a territorial unit in which the general body of law is separate and distinct from the law of any other territorial unit." In other words, "state" may mean Arizona or the United States or Mexico.

[11] The Vermont Supreme Court in that case stated: "No corporation, whether foreign or domestic, can evade its testimonial duty, which rests upon it while it is here doing business, by merely sending to the home office, in another state, documents pertaining to said business which are required as evidence in legal proceedings here, and refuse to produce them

esters v. *Scott*, 223 Iowa 105, 272 N. W. 68 (1936), a Canadian corporation was ordered to bring its books from Canada to Iowa. In *Copper King of Arizona* v. *Robert*, 74 Atl. 292 (N. J. Ch. 1909), the defendant obtained discovery of books of the plaintiff, which was an Arizona corporation with no office in New Jersey. In *Holly Mfg. Co.* v. *Venner*, 86 Hun 42, 33 N. Y. Supp. 287 (Sup. Ct. 1895), a partner was ordered to produce in New York books from the office of his firm in Massachusetts. In *National Distilling Co.* v. *Van Emden*, 120 App. Div. 746, 105 N. Y. Supp. 657 (1907), the plaintiff, a Wisconsin corporation, was ordered to produce verified copies of books from its Wisconsin office for the defendant's inspection in connection with his counterclaim for royalties. And in *Muller* v. *Philadelphia*, 118 App. Div. 276, 103 N. Y. Supp. 387 (1907), the court ordered discovery against the plaintiffs, executors of a testator who had died in Paris, even though certain of the papers sought to be inspected were in a foreign jurisdiction, presumably France.

Indeed, the courts, in ordering persons within their jurisdiction to perform acts in other jurisdictions, have gone much further than requiring merely the production or inspection of documents kept outside of the state of forum. In *Madden* v. *Rosseter*, 114 Misc. 416, 187 N. Y. Supp. 462 (Sup. Ct. 1921), the court ordered the defendant, who was a California resident, to ship a race horse from California to Kentucky pursuant to his contract with the plaintiff. In *The Salton Sea Cases*, 172 Fed. 792 (C. C. A. 9, 1909), this Court held that a court of equity could enjoin a continuing injury to real property within its jurisdiction as a result of flooding caused by improper construction of works maintained by the defendant in Mexico, even though compliance with the decree would require the performance of acts in

when required by authority of law. In contemplation of law they are still in this jurisdiction for such purpose, and in control of the corporation doing business here." *In re Consolidated Rendering Co.*, 80 Vt. 55, 66 Atl. 790, 799 (1907).

Mexico. And in *Vineyard Land & Water Co.* v. *Twin Falls Salmon River Land & Water Co.*, 245 Fed. 9 (C. C. A. 9, 1917), this Court affirmed a decree of the United States District Court for Idaho fixing the amount of water to which the defendant was entitled and ordering the defendant to install in its irrigation ditches in Nevada automatic measuring devices.

The appellee relied below upon the late Professor Beale's disagreement with the theory of extraterritorial operation of equitable decrees as announced in the "Restatement of Conflict of Laws" and illustrated by these cases. Professor Beale states in his "Conflict of Laws" (vol. I, § 94.2, pp. 412-13 (1935)): "According to the generally accepted doctrine, a court neither of law nor of equity will order an act, even a ministerial act, to be done outside the territory over which the court has power." We believe this statement goes too far. The statement is a *non sequitur* from the fears earlier expressed by Beale (at p. 412) that an order of a court of State *A* to be performed in State *B* might involve a violation of the law of State *B*. This may or may not be so in particular cases. To deny to the courts of State *A* the power ever to order the performance of acts in State *B* because sometimes the law of State *B* might be violated is unnecessary. All that is necessary is to condition the rule, as the proviso in Section 94 of the Restatement does, upon the absence of a conflict between the decree and the law of the state in which it is to be performed. The very fact that the American Law Institute, of whose "Restatement of Conflict of Laws" the late Professor Beale was a reporter, did not see fit in its Section 94 to follow his position indicates that that position does not represent the generally accepted view.[12]

[12] Professor Beale sought to distinguish the cases in which decrees with an extraterritorial effect have been granted on the ground that a court, while powerless to order the performance of acts beyond its jurisdiction, may enjoin the performance of acts within its jurisdiction even though the injunction may be obeyed only by the performance of some act

Under the generally accepted view the Commission is entitled to an order enforcing its subpœna, subject only to the absence of any conflict with Mexican law, unless common law principles of conflict of laws have been in some manner restricted by Congress in the Securities Act itself. No such restriction is created, we believe, by the provision in Section 19(b) of the Securities Act, referred to by the court below in its conclusions of law, to the effect that the Commission, for purposes of all proper investigations, may require the attendance of witnesses and the production of documentary records "from any place in the United States or any Territory at any designated place of hearing" (R. 272).[13]

In mentioning this provision the court apparently believed that the reference to the production of books and rec-

in another state. Aside from the fact that this theory is not justified in the light of the cases we have cited, the distinction sought to be drawn is a purely formalistic one depending upon whether the court's decree is phrased affirmatively or negatively. Questions involving potential conflicts between sister sovereignties should not be decided on so technical a basis. Compare *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125 (1939), the case repudiating the former "negative order doctrine" whereby orders of administrative agencies which were negative in form were not subject to judicial review. What the Supreme Court there said about the inappropriateness of the terms "affirmative order" and "negative order" seems equally applicable to Beale's attempt to distinguish between (1) affirmatively ordering acts to be done abroad and (2) enjoining the continuation of acts in the forum although compliance with the injunction will require performance of acts abroad. The Court pointed out (at pp. 140-42) that it had "had occasion to find that while an order was 'negative in form' it was 'affirmative in substance.'" "'Negative' and 'affirmative,' in the context of these problems, is as unilluminating and mischief-making a distinction," the Court stated, "as the outmoded line between 'nonfeasance' and 'misfeasance.'"

[13] The court obviously meant Section 19(b) of the Securities Act of 1933 when it referred to "Title 15, U. S. C. A., Sec. 80(a), 41(6)." 15 U. S. C. §80a-41(b) contains the comparable, but not identical, provision in Section 42(b) of the Investment Company Act of 1940, which is in no way involved in the case at bar. Section 19(b) of the Securities Act (15 U. S. C. §77s(b)) is quoted *supra* note 4.

ords "from any place in the United States or any Territory" was a limitation on the power of the Commission so that documentary evidence which was outside the United States could not be required to be produced. If so, it misconstrued the function of the word "from" in that section. The phrase "from any place in the United States or any Territory," we believe, gives the Commission power to require the attendance of witnesses or the production of documentary evidence at a designated place of hearing "from" *the place of service of the subpœna* anywhere in the United States; it does not refer to the physical location of the witness or the documentary evidence. This is in accord with the enforcement and venue provisions contained in Section 22(a) of the Securities Act (15 U.S.C. § 77v(a)) and other statutes whereby process runs throughout the United States although venue is limited to a particular district. The witness' obligation to respond applies even though he may find it necessary, between the time of the service and the hearing, to go to a third place either inside or outside the United States in order to obtain information necessary to testify or to obtain documents required to be produced.[14] Under this view the phrase "from any place in the United States or any Territory" creates no loophole for corporations incorporated abroad and doing business in the United States. Subpœnas may, of course, be served only in the United States and the statute makes it clear that, when subpœnas are served, the records may be required to be produced anywhere else in the United States. The statute does not deal with the acts which the person subpœnaed may have to perform in order to comply with the subpœna; it leaves those matters to be determined by general rules. In the present case the records are required to be produced "from" Nogales, Arizona, where the subpœna was served on the president of the appellee, to the designated place of hearing, in Tucson (R. 14-17).

[14] *Cf. Crittenden* v. *Barkin*, 276 Fed. 978 (S. D. N. Y. 1921), where Judge Learned Hand allowed a witness mileage from the place of service of the subpœna rather than the place of his residence.

In other words, in Section 19(b) Congress intended not to restrict the Commission's subpœna power to something less than would be permissible under generally applicable provisions of law, but rather to override any territorial restrictions which would have followed from adopting the practice prescribed by Section 876 of the Revised Statutes (28 U.S.C. § 654) with respect to court subpœnas. Under this practice (now incorporated into Rule 45(e)(1) of the Rules of Civil Procedure) the Commission would have been limited to requiring compliance with subpœnas served (1) within the judicial district in which they were returnable or (2) without the district but within 100 miles of the place of return. The effect of Section 19(b) is to override this restriction and permit a Commission officer located in New York to serve a subpœna upon a person in California requiring him to appear and produce documents at a hearing in Illinois.

The authorities we have discussed above (pages 11-13) indicate the propriety, under generally applicable principles of conflict of laws, of requiring a person who is duly served with a subpœna to produce documents within his control wherever they may be. Congress could hardly have intended, in a statute designed to prevent fraud, to restrict these principles and to permit evasion of the investigatory powers of the Commission where persons otherwise subject to its subpœna powers may see fit to keep relevant books and records outside the territorial limits of the United States. Such a conclusion would be inconsistent with the entire structure and purpose of the Securities Act, which in other respects expands rather than restricts common law principles, and the general intention of Congress to create an effective rather than a limited subpœna power.[15]

[15] The report of the Senate Committee on Banking and Currency on the bill which became the Securities Act stated: "It is intended that those responsible for the administration and enforcement of the law shall have full and adequate authority to procure whatever information may be necessary or material in carrying out the provisions of the Bill." H. R. Rep. No. 47, 73d Cong., 1st Sess. (1933), p. 2. And the courts have given a liberal scope to the enforcement of subpœnas issued by the Commission and similar administrative agencies. *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501 (1943); *Consolidated Mines of California* v. *S. E. C.*, 97 F. (2d) 704 (C. C. A. 9, 1938); *McGarry* v. *S. E. C.*, —— F. (2d) —— (C. C. A. 10, Feb. 7, 1945).

To sum up this point, the court erred (1) in holding that it was "without jurisdiction" to compel the production of the specified books and records alleged to be in Mexico, and (2) in its apparent construction of Section 19(b). These errors of law precluded the exercise of any discretion which the District Court might have exercised in the matter. In that connection we trust that this Court will not be misled by the second conclusion of law, which refers to the "exercise of judicial discretion * * * not [to] order an act to be done in the Republic of Mexico which contravenes the law of that country" (R. 272). Once it be established that compliance with the subpœna could be required (I) consistently with applicable standards of conflict of laws and (II) without involving the appellee in a violation of the laws of Mexico, we submit that the record presents nothing more than the clearest case of contumacious refusal to comply with a lawful subpœna. There is thus no room left for the exercise of discretion to withhold an enforcement order. As we show in Point III, the summary nature of the proceeding emphasizes the desirability of a decision by this Court which would cover all aspects of the case and obviate the necessity of further controversy in the District Court and perhaps further appeals.

II.

Production of the Specified Books and Records Would not Contravene Mexican Law.

Mr. Correa, an active member of the Mexican Bar since he obtained his law degree in Mexico in 1924, and one-time Professor of Commercial Law in the *Escuela Libre de Der-*

echo in Mexico City (R. 259), testified as follows in response to the written interrogatories which were posed to him:

In answer to Direct Interrogatory No. 2, Mr. Correa stated (R. 248, 259):

> "Q. Would Mexican law prohibit a Mexican corporation which is a respondent in an action pending in the District Court of the United States for the District of Arizona from complying with an order of the said Court requiring it to produce in Arizona, for a period long enough to permit inspection by officers of the Securities and Exchange Commission, an agency of the United States Government, any of the following books and papers of the corporation and, if so, which ones: (a) its stock books, (b) its cash receipt books, (c) its bank statements, (d) its cancelled checks, and (e) its check books, all relating to sales of securities after January 2, 1940, and (f) duplicate originals or other evidences of promissory notes issued by the corporation after that date?
>
> "A. No Mexican legislation expressly prohibits a Mexican corporation from complying with an order of an Arizona Court requiring it to produce certain books of accounts in Arizona, although neither is there any legal means of obliging a Mexican corporation to comply with an order of a Court in the United States of America. It may be observed that in stating that no law prohibits such compliance, such should be construed in a strict sense of the term, for there are legal provisions requiring merchants to maintain available their books of accounts in their place of business, the violation thereof involving sundry penalties of a pecuniary nature." [16]

The appellee's cross-interrogatories asked Mr. Correa merely to produce copies of nine specified sections of various

[16] The remainder of the direct interrogatories go to whether or not Mexican law would be contravened by an order of the court requiring the corporation to produce in the United States *copies* of the specified documents, or correspondence as distinguished from official books, or an order requiring the corporation to permit inspection of the specified books and records at its offices in Mexico. This testimony is discussed below.

Mexican statutes (R. 250-55).[17] The only one of these statutory provisions which seems directly in point is Article 65 of the *Ley General del Timbre* or Stamp Tax Law of Mexico (R. 261h), which provides as follows:

> "Books of accounts must be available at the warehouse, shop or office of the taxpayer, unless in the possession of some judicial or fiscal authority.
>
> "If the taxpayer wishes to have the books provisionally in the office of someone maintaining the accounts in the same city, he may do so pursuant to advice to the Federal Treasury Office of such jurisdiction, setting forth therein the domicile of the provisional situs of the books for the purpose of fiscal inspection, in case necessary.[18]

[17] The Spanish versions are appended to the deposition as Exhibits A to I, inclusive, and the English translations as Exhibits A-1 to I-1, inclusive (R. 261h-261r).

[18] In addition, the following provisions may have some bearing:

Article 42 of the *Codigo de Comercio* or Commercial Code of Mexico (R. 261q) provides: "No official investigation by a Court or any authority can be made to inquire if merchants do or do not carry proper books. They must, nevertheless, exhibit them upon request for the simple purpose of determining if they bear the proper stamp taxes."

Article 228, Section I, of the *Codigo Fiscal de la Federacion* or Fiscal Code of the Federation (R. 261i) provides that "Failure to comply with the obligation to file or furnish the notices, declarations, petitions, information, reports, copies, books, and documents required by the fiscal laws, or untimely presentation or furnishing of same" shall "constitute violations for which the debtors or presumed debtors of a fiscal obligation are guilty." And Section XXIII of the same article (R. 261*l*) makes it a like violation to fail "to furnish the data and reports which inspectors are lawfully empowered to demand."

Article 236, Sections I and II, of the Fiscal Code (R. 261n) then provide that each violation of Section I of Article 228 shall be punishable by a fine of from $1 to $1,000, and that each violation of Section XXIII of Article 228 shall be punishable "with a fine of three times the unpaid tax if amount of same can be determined; and, when it cannot be determined or in any other case, with a fine of from $1.00 to $10,000.00 for each violation."

As to Article 65 of the Stamp Tax Law, as well as all the other statutes adduced in response to the cross-interrogatories, Mr. Correa testified as follows in answer to the Commission's Redirect Interrogatory No. 1 (R. 255-56, 261d-261e):

"Q. Is there any provision in any of the statutes specified in Respondent's Cross Interrogatories (and, if so, which ones) which would make it unlawful for a Mexican corporation (Respondent in an action pending in the District Court of the United States for the District of Arizona) to comply with an order of the said Court requiring it to produce in Arizona, for a period long enough to permit inspection by officers of the Securities and Exchange Commission, any of the books and papers of the corporation specified in Applicant's Direct Interrogatory No. 2.?

"A. *I do not believe that there is any provision in any of the statutes, copies of which I have furnished under Respondent's Cross Interrogatories, which would make it unlawful for a Mexican corporation to exhibit books of accounts or documents mentioned in question (2) of the Direct Interrogatories.* All the legal provisions invoked by the Defendant, copies of which laws I have furnished, describe the obligation of merchants to maintain their books of accounts in their place of business. The reason for such provision is obvious. Fiscal authorities have the right to inspect periodically books of accounts of merchants for the purpose of determining compliance with fiscal legislation, and the only means of being assured of the availability of such books is their maintenance in merchants' place of business. *There is no provision in any law prohibiting merchants from removing the books of accounts from their place of business.* Article 65 of the Stamp Tax Law provides that such books must be available in the warehouse, office or shop of merchants, *unless in the possession of some judicial or fiscal authority, all of which confirms my statement that no positive prohibition is incorporated in the Mexican law.* The second paragraph of said Article 65 corroborates my statement by permitting the taxpayer to keep his books provisionally in the office of the party entrusted with maintenance

of accounting records, pursuant to notification thereof being furnished the proper Federal Treasury Department Office, which advice should contain the provisional address for the use of inspectors. It seems clear, therefore, that the sole reason for the above described legal provision is to maintain control of the books of accounts, *within which supervision by authorities, books may nevertheless be withdrawn from the customary place of business without such act being considered illegal.* Authorities make *approximate annual examination of the books,* and merchants who have such records elsewhere at the time of such inspection could hardly prejudice the work of authorities and, therefore, *such temporary failure to present the books could not very well be considered as subjecting such party to any penalty whatsoever.* Small businesses in Mexico are accustomed to deliver their books elsewhere than the place of business for the corresponding entries to be made therein, and *if the taxpayer can show the authorities that the books are justifiably in the possession of someone else when an examination is made, no penalty is imposed.* I know of several cases in which the merchant upon receiving an inspection has not had the books available, since they were with some authority, and in these cases the Treasury Department refrained from fining the taxpayer." [19]

Mr. Correa also stated in reply to Redirect Interrogatory No. 5 (R. 257, 261f-261g):

"Q. Please cite and discuss any statutory or judicial or other authorities in support of your answers to Applicant's Direct and Redirect Interrogatories.

"A. The answers contained in these Interrogatories have been formulated on the basis of the interpretation which should be given the pertinent legal provisions. *I have not found in any of the Mexican legislation a provision which prohibits definitely the removal of books of accounts of merchants from their place of business.* On the contrary, *the law authorizes the removal of books of accounts from the domicile of the merchant for presentation before judicial or administrative authorities,* or to maintain them provisionally in the domicile of someone entrusted with the accounting. (Article 65 of the Stamp Tax Law.)

[19] Italics throughout quotations in this brief are supplied.

"Apart from the foregoing, the only penalties established by law in case books of accounts are not in the possession of a merchant are of a pecuniary nature and consist of fines imposed to the end of obliging the merchant to have the books available to fiscal authorities. Notwithstanding the foregoing, such fines may be avoided *through the solicitation of authorization from fiscal authorities to send the books abroad for inspection.*"

It appears to be clear from this testimony that compliance with a court order requiring the appellee to produce in the United States the books and records specified in the subpœna would not contravene Mexican law. The provision in Article 65 of the Stamp Tax Law making specific exception to the general rule when the books of accounts are "in the possession of some judicial or fiscal authority" seems conclusive, as Mr. Correa confirms in the redirect interrogatories above quoted. The second paragraph of the answer to Redirect Interrogatory No. 5, when read in connection with the first paragraph of that answer as well as the answer to Redirect Interrogatory No. 1, was apparently included by Mr. Correa simply to emphasize (1) that penalties, when applied, take the form of fines rather than imprisonment, and (2) that even the possibility of a fine may be avoided by obtaining authorization from the fiscal authorities to send the books abroad for inspection. These statements must be taken to apply only to situations where the books are taken abroad otherwise than pursuant to "some judicial or fiscal authority," in which event Article 65 of the Stamp Tax Law creates an express exception to the rule requiring the books of accounts to be available at the taxpayer's office.

In any case, even if the automatic exception in Article 65 be read (notwithstanding Mr. Correa's testimony) as referring only to some judicial or fiscal authority *in Mexico*, there is no reason why the appellee should not be ordered at least to solicit authorization from the fiscal authorities to send its books temporarily to Arizona for inspection. Especially in view of the fact that the books are examined only once a year, and in view of Mr. Correa's testimony that "temporary failure to present the books could not very well be considered as subjecting [a] party to any penalty whatsoever," it seems clear that as a practical matter the Court's mandate could be so worded or qualified as to preclude any possible conflict with the provisions of the Mexican statutes requiring the books to be available for inspection by the fiscal authorities. Moreover, if the Court's mandate should require enforcement of the subpœna and the appellee should show that it had attempted in good faith to comply but that compliance had actually been precluded by the actions or threatened actions of duly constituted Mexican authorities, the Commission would have no proper basis for moving to have the appellee held in contempt and, if it did so move, the District Court would presumably not enter a contempt citation.

Indeed, it is not at all clear that the testimony of the appellee's witness Espinosa (R. 37), so far as it goes, is really in conflict with the testimony of the witness Correa:

(1) Judge Espinosa testified as follows:

"Q. What is the Mexican law, Judge Espinosa, with reference to the place or places where books, records and documents of a Mexican business concern can be kept? What is the law in that respect?

"A. The same law requires that all books and records of the corporation must be in the place of business of the company."

This answer apparently refers to Article 65 of the Stamp Tax Law, and if that is so we agree with the answer so far as it goes. Judge Espinosa simply omitted the exception contained in Article 65 for cases where the books of accounts are "in the possession of some judicial or fiscal authority," and he did not go on to explain, as Mr. Correa did, what the actual practice is under Article 65 and how in any event any possibility of a fine may be avoided by obtaining

authorization from the fiscal authorities to send the books abroad for inspection. Judge Espinosa's omission should not be taken to imply a disagreement with the clear and detailed testimony of Mr. Correa.

(2) Judge Espinosa testified further:

"Q. And if they are removed, what is the penalty, or is there a penalty for such removal?
"A. Yes, there are severe penalties.
"Q. It is a fine if they are taken away from the legal place of doing business?
"A. Yes."

This apparently refers to the provisions of Article 228, Sections I and XXIII, and Article 236, Sections I and II, of the Fiscal Code (R. 261i, 261*l*, 261n), referred to *supra* note 18. Here again we agree as to the existence of provisions for penalties, but Judge Espinosa simply did not explain, as Mr. Correa did, the inapplicability of the penalty provisions to the case at bar.

(3) Judge Espinosa went on to state:

"Q. In judicial proceedings in Mexico, when inspections of papers and records of a business concern are made, how is that done?
"A. They must be examined in the place of business of the company. They cannot be taken out of the office.
"Q. Suppose in the federal court in Mexico there is some question of the books or records of a company, can they be taken into the court?
"A. No, sir.
"Q. How is that examination made?
"A. The judge goes to the place of business to make the examination."

These statements apparently were made in reliance on Articles 44 and 45 of the *Codigo de Comercio* or Commercial Code of Mexico (R. 261r), which seem to provide that, when it is necessary to examine a person's books in connection with judicial proceedings in Mexico, the examination shall be made at the person's office rather than in court or elsewhere. This difference between the Mexican practice and our own is irrelevant. The answer is that we do not need to rely on any *affirmative authority* under Mexican law to assist the Commission in obtaining an examination of the specified books. We have ample sanction by resort to the contempt powers of the United States courts, which may be exercised against the appellee and its property in Arizona, or against Kendall as they have been in connection with the subpoena directed to the Arizona corporation. The Court has jurisdiction over the appellee's person. The only condition upon the exercise of that jurisdiction is that compliance with the Court's decree shall not involve *an actual violation* of Mexican law. Therefore, the Mexican practice—under which the books do not come to the court but the court goes to the books—is irrelevant for our purposes. No Mexican lawsuit is necessary.

(4) Judge Espinosa testified finally:

"Q. Can such books, records and instruments of such enterprise be taken into a foreign country?
"A. No."

This, of course, is the ultimate fact to be found; and we submit, in view of Mr. Correa's testimony, that the conclusion reached by Judge Espinosa does not represent the correct application of Mexican law, and that, insofar as the testimony of the two gentlemen is in conflict, the court should have preferred that of Mr. Correa. We are all aware of the extent to which lawyers representing clients with diverse interests may conscientiously differ in their interpretations of an applicable provision of law. There is no reason to assume that this is any less true of foreign law than of domestic law. Hence we by no means question Judge Espinosa's good faith or qualifications when we observe that according to his testimony he organized the appellee and has represented it since its organization (R. 35). Mr. Correa, on the other hand, has no relation whatever to the Commission, but testified without any fee purely as a matter of courtesy to the United States Embassy at Mexico

City. Moreover, Judge Espinosa's testimony consists simply of a number of unsupported conclusions without explanation or citation of authority, whereas Mr. Correa cited chapter and verse and explained in detail the policy of the Mexican statutes and the practice thereunder.

We submit, therefore, that the court could and should have granted the Commission's application by ordering all of the books and documents specified in the subpœna to be produced as required, with the assurance that the appellee in doing so would not violate any Mexican law within the meaning of the proviso contained in Section 94 of the "Restatement of Conflict of Laws." *It is very significant that the appelle's stock certificate books, minute book and other documents were in the United States when Kendall wanted them to be here,* some of them in the possession of his Arizona counsel (R. 211-12, 231, 188-89, 135). Apparently the appellee (and its attorneys if they were consulted) were not concerned with any requirement of Mexican law that those books be kept at all times in that country.

In any event, even if it be assumed *arguendo* that Mexican law would be contravened by literal compliance with the subpœna, the court erred in not entering an order along one or more of several alternative lines which the Commission stated it would be willing to accept if it could not have literal enforcement:

(a) It is certainly clear from Mr. Correa's answers (and there is nothing to the contrary in Judge Espinosa's testimony) that the court could have ordered the production of *copies* of the several items specified in the subpœna without raising any conflict with Mexican law (R. 248-49, 260, 256, 261e-261f). *Copies* of papers maintained abroad or in another state have been ordered produced on petitions for discovery.[20] Moreover, an analogy for the production of

[20] *Muller* v. *Philadelphia,* 118 App. Div. 276, 103 N. Y. Supp. 387 (1908); *National Distilling Co.* v. *Van Emden,* 120 App. Div. 746, 105 N. Y. Supp. 657 (1907).

copies where the originals cannot be removed from the place where they are required to be kept is afforded by Rule 44 of the Rules of Civil Procedure with respect to proof of official records. Since official records normally cannot be removed from the offices in which they are kept,[21] Rule 44 provides for the authentication of copies.

(b) In order to cause the least possible interference with the appellee's business, the Commission took the position that it would be satisfied if the court, in the alternative, should order the appellee to permit the inspection of the required books and records at its Mexican office on a specified date—the Commission suggested a date within ten days of the court's order—and to furnish to representatives of the Commission authenticated copies of any of the specified books and records which they might request as a result of the inspection. See, for example, *National Distilling Co.* v. *Van Emden,* 120 App. Div. 746, 105 N. Y. Supp. 657 (1907), where the New York court ordered a Wisconsin corporation to exhibit the relevant portions of its books to the defendant at its Wisconsin office.[22] Here again, Mr. Correa's testimony is clear (R. 249, 260-61, 256-57, 261f), and there is nothing to the contrary in anything that Judge Espinosa said. As

[21] *Corbett* v. *Gibson,* 16 Blatchf. 334, Fed. Cas. No. 3221 (E. D. N. Y. 1879); 8 Wigmore, *Evidence* (3d ed. 1940) § 2373.

[22] See also *National Labor Relations Board* v. *Northern Trust Co.,* 56 F. Supp. 335, 339 (N. D. Ill. 1944), where the court stated:

> "The order requiring compliance with the subpœna should provide a convenient method of compliance, one which will not interfere with the business of the bank. I think the order should provide, too, that in so far as the bank will permit inspection of the books and papers at its place of business it need not be required to produce them before the Examiner."

Failure of the appellee to comply with such an order would, of course, result in contempt proceedings in the United States District Court. It would still be unnecessary to resort to any Mexican court for positive assistance.

we have already noted, Kendall stated at the hearing below, in the presence of his counsel, that he would have no objection to examination by a Commission representative of such of the appellee's books as might be in Mexico (R. 33).

(c) At the very least, it is certainly beyond dispute that Mexican law would not be contravened by ordering the production of the advertising material and the correspondence specified in Item 8 of the subpœna (R. 16, 248-49, 260, 256, 261f). This alone requires a reversal of the court's order and judgment.

(d) Finally, there is the possibility, which we did not mention in the District Court but which we have previously mentioned in this brief (*supra* pages 22-23), that the Court's mandate requires the appellee to apply to the Mexican fiscal authorities for authorization to remove the books temporarily.

We mention these alternatives, however, only to demonstrate that, under any interpretation of the evidence as to the Mexican law with respect to literal compliance with the subpœna, the court still erred in denying or dismissing the application outright. We would rather accept a handicap and proceed with our investigation on one of these alternative bases than have the application denied entirely, but we submit that we are entitled to production of the originals of all the specified books and documents pursuant to the literal wording of the subpœna.

III.

SINCE AN APPLICATION TO ENFORCE A COMMISSION SUBPŒNA IS A SUMMARY PROCEEDING TO WHICH THE RULES OF CIVIL PROCEDURE DO NOT APPLY AND THE APPELLEE'S SO-CALLED "MOTION TO DISMISS" WAS NOT LIMITED TO AN ATTACK ON THE DISTRICT COURT'S JURISDICTION, THE COURT'S MANDATE SHOULD REQUIRE ENFORCEMENT OF THE SUBPŒNA WITHOUT FURTHER PLEADING.

If the Court agrees with the Commission on the first two propositions, the final question arises whether the Court should reverse the order and judgment below and require enforcement of the subpœna, or whether it should merely reverse and remand the case in order to give the appellee an opportunity to file an answer upon denial of its "motion to dismiss." The appellee took the position below that, if its motion were denied, it should have an opportunity to file an answer within ten days under Rule 12(a) of the Rules of Civil Procedure. It is our position that the Rules of Civil Procedure do not apply to applications by the Commission to enforce its subpœnas; that such applications are purely ancillary to administrative proceedings and are governed by the summary procedure prescribed in Section 22(b) of the Securities Act; and that on this record the Court should require enforcement of the Commission's subpœna without any further pleading.[23]

[23] We do not mean to foreclose the possibility of applying certain provisions of the Rules of Civil Procedure by analogy, in so far as this would not be inconsistent with the summary procedure intended by Congress. See *Walling* v. *Patterson Newsprinting Co., Inc.*, —— F. (2d) —— (C. C. A. 3, March 5, 1945); *Perkins* v. *Endicott-Johnson Corp.*, 128 F. (2d) 208, 226-27 (C. C. A. 2, 1942), *affirmed, Endicott-Johnson Corp.* v. *Perkins*, 317 U. S. 501 (1943). Those cases held that it was quite proper to follow the *appellate* procedure prescribed by Rule 81 in subpœna enforcement cases.

Several courts which have squarely considered the question of the applicability of the Rules of Civil Procedure to similar proceedings to enforce administrative subpœnas have concluded that the Rules are inapplicable; that an application to enforce an administrative subpœna is purely ancillary to an administrative proceeding; and hence that the enforcement proceeding should be summary in nature. In *Goodyear Tire and Rubber Co.* v. *National Labor Relations Board*, 122 F. (2d) 450, 451 (C.C.A. 6, 1941), the court held:

> "The company urges that the proceeding is a civil suit and that the District Court must be reversed for failure to issue process, to grant a hearing, and to make findings of fact and conclusions of law in accordance with such rules. We agree with the District Court that *the proceedings plainly are of a summary nature* not requiring the issuance of process, hearing, findings of fact, and the elaborate process of a civil suit. We think the procedure to be followed in the District Court is controlled by § 11 (2) of the Act, Title 29, U. S. C., § 161 (2), 29 U. S. C. A. § 161 (2) which reads: [The court here quoted Section 11 (2) of the National Labor Relations Act, which is substantially identical with Section 22 (b) of the Securities Act of 1933, and went on to say:]
>
> "It is significant that the statute calls for an 'application' rather than a petition, for an 'order' rather than for a judgment, and that it details no other procedural steps. *Obviously, if the enforcement of valid subpœnas, the issuance of which is a mere incident in a case, were to require all of the formalities of a civil suit, the administrative work of the Board might often be subject to a great delay.* We think that such was not the intention of the Congress, and that this clearly was indicated by the use of the simple and unambiguous words with which it described this proceeding. Our conclusion is fortified by the Notes of the Advisory Committee as to Rule 45 of the Federal Rules, which state that it 'does not apply to the enforcement of subpœnas issued by administrative officers and commissions pursuant to statutory authority. The enforcement of such subpœnas by the district courts is regulated by appropriate statutes.'

> "A similar conclusion has been reached as to this question in numerous cases arising in the District Courts and in one Circuit Court case, *Cudahy Packing Co.* v. *National Labor Relations Board*, 10 Cir., 117 F. (2d) 692 [1941]. The cases relied upon by appellants as requiring a contrary conclusion were decided before the adoption of the rules and do not construe either the rules or the particular statute. We think they are not controlling here."

The Second Circuit, too, has stated, although by way of dictum, that the Rules "may not be fully applicable to the pre-appellate stages of this type of proceeding"—in that case a proceeding to enforce a subpœna of the Secretary of Labor under the Walsh-Healey Public Contracts Act. *Perkins* v. *Endicott-Johnson Corp.*, 128 F. (2d) 208, 226-27 (C. C. A. 2, 1942), *affirmed, Endicott-Johnson Corp.* v. *Perkins*, 317 U.S. 501 (1943).

Similarly, the late Mr. Chief Justice Wheat of the District Court for the District of Columbia, in an unreported oral opinion enforcing a Commission subpœna under Section 21(c) of the Securities Exchange Act of 1934 (15 U. S. C. § 78u(c)), which is similar to Section 22(b) of the Securities Act of 1933, stated:

> "* * * I have reached the conclusion as I said yesterday, that *these new rules are not intended to apply literally to such proceedings as this. I think the statute contemplates a proceeding in the nature of a summary proceeding*, and I do not believe the ordinary rule was intended to cover such a case.
>
> "The statute provides for application to the Court, when there has been disregard for a subpœna, for an order requiring the witnesses to testify or produce the papers and documents that are called for. That is what has been done in this case. There was a refusal, and application was made to the Court for an order requiring the witnesses to do those things. I think the Court can make the summary order under such circumstances * * * *I think any other construction would render the statute useless* * * * the statute does contemplate something besides wasting months of

time in motions, extensions of time, and all that. I think it is intended to be a summary proceeding. * * *"

S. E. C. v. *Clayton*, 1 S. E. C. Jud. Dec. 670 (D. D. C., Mar. 16, 1939).[24]

In *Martin* v. *Chandis Securities Co.*, 128 F. (2d) 731, 734 (C. C. A. 9, 1942), this Court *assumed* that the Rules applied to the enforcement of a subpœna issued by an Internal Revenue agent, but in that case the agent contended that the Rules applied. The court there stated:

> "The Internal Revenue Code contains no provision specifying the procedure to be followed in invoking the jurisdiction of the court below. We believe, as appellant contends, that the Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c, are applicable. The pleading denominated a 'Petition' will be treated as a complaint, there being no provision for a 'Petition'. Under Rule 8 (a), it was necessary for the complaint to contain 'a short and plain statement of the claim showing that the pleader is entitled to relief.'"

Section 3633 of the Internal Revenue Code (26 U. S. C. §3633), the section involved in that case, provides without elaboration:

> "If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data."

It will be noted that this section leaves the "appropriate process" undefined, and does not refer (as do Section 22(b) of the Securities Act and the comparable provision of the National Labor Relations Act construed by the Sixth and

[24] This is the entire relevant portion of the opinion. Following this quotation the court proceeded to a consideration of the merits of the application. See also the commentary on "Applicability of the Federal Rules to Enforcement of Administrative Subpœnas," 2 Fed. Rules Serv. 629-32 (1940).

Tenth Circuits) to an "application" and an "order"—language which, as the Sixth Circuit held, is not the language of the Rules. Moreover, aside from the differences in the statutory provisions involved, it is clear from the opinion in the *Martin* case that the applicability of the Rules was not challenged, and that neither party brought to the court's attention either the cases in the Sixth and Tenth Circuits or the considerations mentioned by all of the courts which had held the Rules inapplicable to proceedings to enforce administrative subpœnas. We submit, therefore, (1) that the *Martin* case is distinguishable on its face and (2) that in any event this Court, in the light of the considered views of four other courts including three Circuit Courts of Appeals, should not feel itself bound by an assumption made in a case in which the applicability of the Rules was not in controversy.

To say that the Rules are inapplicable by no means leaves the procedural vacuum here that might have been left in the *Martin* case. The Commission's application is governed by the summary procedure specified in Section 22(b) of the Securities Act itself. As the Sixth Circuit pointed out in the *Goodyear Tire and Rubber Company* case, *supra*, the section calls for an "application" and an "order." Within those specifications the District Court may hear the matter in any way which is consistent with the summary procedure intended by Congress. It would obviously be at odds with this intention to permit a respondent to delay the proceedings—and perhaps to bog down the Commission's investigation until the statute of limitations shall have run [25]—by making a piecemeal defense to the application.

[25] The statute of limitations on criminal prosecutions under Section 24 of the Securities Act (15 U. S. C. §77x) is three years (18 U. S. C. § 582), and there is no provision for tolling the statute pending the enforcement of a subpœna. (Whether the statute is tolled while the respondent is a fugitive is, of course, another matter.) It is now more than two years since the issuance of the subpœna in the case at bar.

If Rule 12(a) does not apply, the appellee has no automatic right to file any further pleading. Within the summary procedure contemplated by Section 22(b), the question whether a respondent should be permitted to file any further pleading after the denial of a so-called motion to dismiss should be decided by the courts according to the circumstances of each case. The appellee's motion and its defense thus far have not been confined to an attack upon the court's jurisdiction. Indeed, as we have already noted, the appellee in its brief below apparently abandoned any argument of lack of jurisdiction over its person or of incorrect venue, for it rested its argument exclusively on its position as to the non-extraterritorial operation of equitable decrees and its version of the Mexican law, all of which amounts to a substantive defense (see note 9, *supra*). As we have seen, it introduced testimony in support of that defense. And the Commission likewise has not treated the appellee's motion as a genuine motion to dismiss for lack of jurisdiction. If we had chosen to treat it so, it would have sufficed for us to point out simply that the motion should be denied because it did not go to the jurisdiction of the court. We, like the appellee, have fully argued the appellee's contention as to the impropriety of granting the application under relevant principles of conflict of laws, and it is difficult for us to see what new defense not wholly frivolous could possibly be raised in any further pleading.[26]

[26] Any attack on the breadth of the subpœna would, we submit, be frivolous in the light of this Court's recent opinion in the *Penfield* case (*supra* note 3). The evidence sought by the eight items of the subpœna is "not plainly incompetent or irrelevant to any lawful purpose of the Commission," as the Court there stated, and hence the subpœna more than satisfies the Supreme Court's requirement in *Endicott-Johnson Corp.* v. *Perkins*, 317 U. S. 501 (1943). Moreover, the subpœna directed to the appellee is very similar to that directed to Kendall's second *alter ego*, the Arizona corporation, whose only defense was a denial that it had possession or control of the documents sought to be produced (which the court disbelieved).

It follows that the appellee would be asking for its day in court twice on the same question.[27] In view of the delays which have already marked this proceeding—and the conduct of Kendall (who completely controls both corporations) in contumaciously ignoring the decree entered by the District Court against the Arizona corporation—we believe that the policy against delaying investigations of the Commission by long drawn-out subpœna enforcement proceedings applies here with particular force. As the Supreme Court said in *Cobbledick* v. *United States*, 309 U. S. 323, 325 (1940), "To be effective, judicial administration must not be leaden-footed." We submit, therefore, that the court below should have denied the appellee's motion and entered an order enforcing the Commission's application without further pleading.

[27] As a matter of fact, even under the Rules of Civil Procedure the appellee is not entitled to file a further pleading. Rule 12(b) permits a defendant, before filing an answer, to file a motion to dismiss at his option, but only to raise the defenses of "(1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) failure to state a claim upon which relief can be granted." Since substantive defenses can be raised only by answer, the appellee's "motion to dismiss" should be treated by the Court as an answer, which is the way we considered it in trying the case below. "The name given to a pleading does not change the nature of the pleading," and a pleading designated as a motion to dismiss will be treated as an answer if it is such in substance. *Baker* v. *Sisk*, 1 Fed. Rules Serv., 130, 132 (D. Okla. 1938). A defendant is entitled to only one answer. Rule 12(h) provides that "A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply," with certain exceptions not here relevant.

CONCLUSION

The order and judgment of the court below should be reversed, and this Court should require enforcement of the Commission's subpœna.

Respectfully submitted,

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