In the Supreme Court of the United States

October Term, 1969
No. 40 Original

COMMONWEALTH OF PENNSYLVANIA et al.,
Petitioner

v.

STATE OF NEW YORK et al.

PETITION FOR REHEARING

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PETITION FOR REHEARING

The petitioner herein respectfully moves this Court for an order (1) vacating its order of June 19, 1972, which adopts the decree recommended by the Special Master and (2) listing this matter for rehearing or, in the alternative, remanding to the Special Master for the submission of further evidence concerning the items raised in the Court's majority opinion and this petition herein. As grounds for this motion, petitioner states the following:

1. The Special Master Had Available to Him Evidence Regarding the Percentage of Unknown Addresses in Money Order Transactions

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At page 8 of the slip opinion the Majority states as follows:

> "Thus, the only arguable basis for distinguishing money orders is that they involve a higher percentage of unknown addresses. But we are not told what percentage is high enough to justify an exception to the *Texas* rule, nor is it entirely clear that money orders constitute the only form of transaction where the percentage of unknown addresses may run high."

However Pennsylvania submitted evidence to the Special Master in the form of an examination of all escheatable items concerning Western Union telegraphic money orders in the year 1963 which showed that out of 2,951 escheatable transactions, the sender's address was not given on 1,066, or 36% of the applications. (Of the 1,885 applications where the sender's address was given, the address coincided with the state of origin in 93% of the transactions.) At page six of his report, the Special Master rejected this evidence as "immaterial" and not "in the least helpful in deciding the case," presumably because 1963 was the year following the last year covered by Pennsylvania's Complaint. Similarly, though the Special Master agreed ". . . to consider American Express travelers cheques and any other similar instruments, inasofar as the disposition of unclaimed funds from such transactions shed light on a proper disposition of unclaimed funds arising from Western Union telegraphic money orders" (Report, p. 4), his Report contained no reference to the brief and statement filed *amicus curiae* by American Express (and accepted by the Special Master), which indicates that with respect to their commercial money orders American Express neither retains nor requires a record concerning the purchaser or payee (*Statement,* p. 4; Brief, p. 7), and with

respect to their countless travelers cheque transactions, American Express retains records of the purchasers' addresses (if given) for the "relatively short period of time" necessary to protect the issuer and purchaser should the latter report his cheques missing or stolen. The practice with respect to "over-the-counter" money orders cited above was stipulated to by all the parties (*Stipulation,* p. 27, footnote 10; p. 19, footnote 17), but was not raised or discussed by the Special Master in his report. (It is relevant to note, in assessing the degree of windfall gained by the State of New York under the decree proposed by the Special Master and presently adopted by the Court that American Express, by far the interstate issuer of commercial money orders and travelers cheques, is incorporated in that State. Petitioner is advised by counsel for American Express that as of January 1, 1972, that Company holds $2,221,200.00, representing the proceeds of travelers cheques alone which have been unclaimed for a period of 15 years. As American Express' 1971 Annual Report indicates that it had one billion dollars in travelers cheques, money orders and drafts outstanding as of that date, with a growth in this figure of over 75% since 1964, the parameters of this windfall, and the corresponding loss of income to the other States and their citizens, are considerable.) Thus it is submitted that the Special Master's seventh finding of fact (on which the above quoted statement from the Court's Majority opinion was presumably based) which says in part that "Nowhere in the pleadings or in the Stipulation is there any more specific statement of how frequently this omission (to fill in the sender's address) occurs" was misleading and was not indicative of the evidence offered either with

respect to Western Union or the other types of commercial instruments issued by that company and others which bear on the consideration expressed by the Court.

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2. The Survey Contemplated by the Majority Opinion Will Authoritatively Provide the Required Information

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The 1963 survey mentioned above was objected to by New York on narrow grounds of authentication and relevancy. Pennsylvania believed those objections to be groundless given the matters already stipulated to by the parties which were the result of similar investigations, and the obviously prospective and broad effect of any Court decision in the exercise of its quasi-legislative rule-making capacity in this area of litigation between the States. However, the survey to be undertaken by Western Union (or independent auditors) in executing the proposed decree of the Special Master, presently adopted by the Court, will clearly remove any such objections by either New York or the Special Master since it will concern exclusively the transactions involved in this litigation. At the same time, this survey will answer the questions raised both by the Special Master and the Court's majority as to the percentage of instances where addresses are not available.

At the initial meeting of the parties, called by the Special Master on November 13, 1970, it was proposed by the State of New York that such a survey be undertaken by Western Union. This was objected to by Western Union because of the costs involved, which might prove to be unnecessary either in whole or part depending

on the Rule adopted by the Court. (*Memorandum of Joseph H. Resnick, Esq.*, pp. 3-4; see also *Stipulation*, §32, pp. 16-17). As it now appears that the results of such a survey would be pertinent to the Court's application of its rule-making power, it is submitted that the interests of justice require that the Court withhold final adoption of a decree until its completion. This is particularly so given considerations of equity and fairness, the quasi-legislative role of the Court in this case (*Minority Opinion*, pp. 1-2), and the Majority's acknowledgment that the present result is inconsistent with ". . . our refusal in *Texas* to make the debtor's domicile the primary recipient of unclaimed intangibles." (*Majority Opinion*, p. 8.)

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3. Pennsylvania Has Suggested a Distinction Which Differentiates the Present Case from Texas v. New Jersey While Limiting the Possible Categories of Facts

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At page 8 of its opinion the Majority cites *Texas v. New Jersey*, 379 U.S. 674 (1965), for the proposition that the Court should avoid adoption of a rule which would require consideration of each escheat case on its particular facts ". . . or to devise new rules of law to apply to ever developing new categories of facts." 379 U.S. at 679. This proposition had been made by Mr. Justice Black within the context of the "contacts" rule proposed in that case by Texas which would have required a court to "examine the circumstances surrounding each particular item of escheatable property on its own peculiar facts and then try to make a difficult, often quite subjective decision as to which State's claim to

those pennies or dollars seems stronger than another's." However, the factual range of the rule proposed by Pennsylvania was limited. As suggested by the Minority at page 6 of its opinion, "The debtor either will or will not maintain creditors' addresses in the ordinary course of business." Further, Pennsylvania raised both in its Reply Brief to the Court, and at oral argument, two distinct and self-limiting categories of transactions from which escheatable obligations arise—those incurred by an enterprise in exchange for services rendered, and those incurred as part of the business for which it is organized. The former comprehended the eight classes of debt involved in the *Texas* case—including those four where there were a limited number of creditors who had no last addresses indicated, while the latter comprehends the money order business, where the recording or retention of such addresses is not required by commercial necessity. This distinction was not challenged at oral argument and is urged again upon the Court as a basis for resolving this case in a manner which is consistent with commercial convenience and the considerations of equity and fairness which encouraged such a favorable reception among the States to the Rule of *Texas v. New Jersey.* The consistency of the Rule proposed by Pennsylvania and the other States—save New York—with that adopted by the Court in *Texas v. New Jersey,* and the corresponding distinction between the categories of transactions involved in the two cases is best demonstrated by the fact that application of the Pennsylvania rule to the intangible obligations in the earlier case would not have resulted in any change in their eventual allocation among the States.

4. The Court's Position on the Constitutional Considerations Raised by the Special Master Should Be Clarified

As pointed out by the Majority at page 6 of its Opinion, the Special Master expressed strong reservations regarding the constitutionality under *Pennoyer v. Neff,* 95 U.S. 714 of any presumption which equated creditor's residence for purposes of *Texas v. New Jersey* with the state of purchase of an intangible obligation. All parties seemed to agree that the considerations of *Pennoyer* and its progeny had been removed with respect to the States' power to escheat intangible obligations—certainly with respect to their ability to take custodially—by the succeeding line of cases in this field. *Security Savings Bank v. California,* 263 U.S. 282 (1923); *Anderson National Bank v. Luckett,* 321 U.S. 233 (1943); *Connecticut Insurance Co. v. Moore,* 333 U.S. 541 (1947); *Mullane v. Central Hanover Bank,* 339 U.S. 306 (1949); *Standard Oil Co. v. New Jersey,* 341 U.S. 428 (1951). Furthermore in the *Texas* case, the Court specifically agreed with the then Master that its concern was not "with the technical domicile of the creditor, . . ." but with considerations of equity and ease of administration. 379 U.S. 674, 681 n. 11, 683. Petitioner is concerned that adoption of the Decree proposal by the Special Master without specific resolution of the reservations raised with respect to the constitutionality of the place of purchase test will encourage holders of escheatable funds to withhold them from States which have adopted the Revised Uniform Disposition of Unclaimed Property Act or similar legislation, even where the state of corporate domicile does not have appropriate legislation, and thus foster future litigation.

5. The Ability of the States To Apply Remedial Legislation Should Be Briefed

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The Majority opinion rests at least in part on the assumption that the States separately, can draft and enforce remedial legislation which will at least prospectively remove any inequity resulting from its decision. It is submitted that this assumption may not be totally correct given the commercial economics involved and the relatively small sums of unclaimed funds in relation to the total volume of relevant transactions. If this conclusion formed a substantial part of the majority's reason for dismissing the Exceptions, it is respectfully requested that reargument be allowed on this point.

Conclusion

For the reasons set forth above, as well as those contained in its Exceptions to the Report filed by the Special Master, and its Reply to the Brief filed by the State of New York in support thereof, petitioner prays that this Court grant rehearing of the order dismissing Exceptions and either grant reargument or remand to the Special Master for proceedings as indicated. If indicated, on Rehearing, petitioner shall ask leave to join American Express as party defendant so that any objection to the presentation of evidence regarding the great majority of

transactions where no record of a creditor's address is returned can be removed.

Respectfully submitted,
HERMANN ROSENBERGER, II
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DANTE MATTIONI
Deputy Attorney General for Eastern Pennsylvania
J. SHANE CREAMER
Attorney General of the Commonwealth of Pennsylvania
Counsel for Petitioner

MICHAEL EDELMAN
Of Counsel

CERTIFICATE OF COUNSEL

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay.

HERMANN ROSENBERGER, II
Counsel for Petitioners.

EXHIBIT "A"

COMMONWEALTH OF PENNSYLVANIA
OFFICE OF THE ATTORNEY GENERAL
404 Pennsylvania Building
Philadelphia, Pa. 19102

November 13, 1970

RE: COMMONWEALTH OF PENNSYLVANIA vs. STATE OF NEW YORK, ET AL., UNITED STATES SUPREME COURT—OCTOBER TERM, 1969, NO. 40 ORIGINAL.

MEMORANDUM OF MEETING

In accordance with the directive by Honorable John F. Davis, the Master appointed by the United States Supreme Court in the above entitled matter, a conference was held in the East Conference Room of the United States Supreme Court on Thursday, November 12, 1970 at 11:00 A.M.

Present were the Honorable John F. Davis, Master, and the representatives of the following states:

NEW YORK—Samuel A. Hirshowitz, First Assistant Attorney General and Julius Greenfield, Assistant Attorney General, Theo. Spitz, Esq., John J. Mullens.

FLORIDA—Winifred L. Wentworth, Assistant Attorney General.

CONNECTICUT—F. Michael Ahern, Assistant Attorney General.

VIRGINIA—Lee F. Davis, Jr., Assistant Attorney General.

OREGON—Philip J. Engelgaw, Assistant Attorney General.

INDIANA—

PENNSYLVANIA—Joseph H. Resnick, Assistant Attorney General, and Michael Edelman, Esquire, Escheator.

also:

WESTERN UNION—Peter Oakes, Esquire.

AMERICAN EXPRESS—Francis Ellis, Esquire.

The Master stated that he did not have any stenographer present but would make an order for each state to pay $200.00 towards the expenses of the Master, including a stenographer. He did not feel that it should include Western Union since they were a stake-holder in the case, although they were one of the defendants. New York protested the exclusion of Western Union from the $200.-00 assessment and the Master stated he would make up his mind on that score when he issued the order.

The Master made an inquiry concerning any other states who were interested and Mr. Resnick informed him that in answer to the service of Pennsylvania's Complaint and Brief to all fifty states that he heard from approximately twenty-three states who were interested in possible intervention in the case. The Master stated that he was disposed to permit any state that wished to intervene to do so and asked all the defendants wether they had any objections. There were no objections on the part of any of the Defendants and the Master advised them to so inform the Clerk of the United States Supreme Court so that there would be no delay in allowing the states that wished to do so to intervene.

He also asked Mr. Resnick, of Pennsylvania, since he had been corresponding with those states, to advise them of his action.

Thereupon ensued a discussion between all the parties as to the format and presentation of the issues before the Master. The Master was of the opinion that the Supreme Court would give a declaratory judgment in the case as it did in the Texas vs. New Jersey case and what we wanted, therefore, would be evidence or a stipulation as to the facts that would establish the state or states as to Western Union's liability for the escheat money which they held as stake-holder.

New York was of the opinion that Western Union should furnish the Master and the parties with a detailed survey of all the escheat money that they held in their possession as to which amount was allocated to the state of origin, the state of destination and the various subdivisions of those two categories as to drafts received and not paid, drafts for money orders cancelled, drafts not issued, etc. Western Union protested that such a survey would cost between $175,000 and $200,000 and thought that the Supreme Court should issue its judgment first as to whom the escheat money should be paid. For example, if the Supreme Court held that it should go to the state of incorporation then they would not have to make such a survey, or if it was decided that the escheat money went to the state of origin they would not have to make such a detailed survey.

Pennsylvania and the Master both agreed with Western Union and the Master stated for the present that was the way he felt unless he could be persuaded to the contrary by New York. He ordered Western Union to provide him and the various states with a copy of the survey

and stipulation that they made in the earlier cases of Pennsylvania vs. Western Union which was decided by the United States Supreme Court in 1962.

The discussion then centered on the role of the American Express Company in the instant case, since they expressed an opinion that travelers checks escheat money (which they held as stake-holder) would be affected by the decision in this case. The Master was of the opinion that he could not include American Express travelers checks in the case unless they were made a party defendant to the action by Pennsylvania, since only the question of money orders was in front of him and the Court. He suggested that possibly American Express could enter as a friend of the court and explain their position, which might have a bearing on the Supreme Court's decision. He directed counsel for American Express to prepare a statement of the facts showing the modus operandi of the American Express travelers checks for submission to the Master and the various states, from which it can be determined whether or not travelers checks should be included in the case.

The Master then ordered Pennsylvania and New York to confer with Western Union concerning the preparation of a stipulation based on their survey above mentioned and report back to him. The parties arranged to meet in New York on January 5, 1971 for that purpose.

The Master hoped that the case could be concluded within the present term of the Court, but the parties were doubtful whether this could be accomplished based on the experience of the Texas vs. New Jersey case and the possible intervention of many of the other states.

The meeting thereupon was adjourned.

EXHIBIT "B"

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF JUSTICE
Philadelphia Office

[Copy]

November 18, 1970

Honorable John F. Davis
4704 River Road
Washington, D.C. 20016

RE: PENNSYLVANIA vs. STATE OF NEW YORK, ET AL.
UNITED STATES SUPREME COURT
OCTOBER TERM 1969
NO. 40 ORIGINAL

Dear Mr. Davis:

I am enclosing herewith a sample letter and list of states I contacted concerning your request to notify them in the event they wished to intervene.

I am also enclosing a copy of notes of the November 12th meeting which I had made for my own records. If I left anything out that was essential or needs correction, I would appreciate hearing from you.

Sincerely yours,

Joseph H. Resnick
Assistant Attorney General
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JHR:mg
encs.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1969
No. 40 Original

Commonwealth of Pennsylvania et al.,
Petitioner

vs.

State of New York et al.

PROOF OF SERVICE

I, Hermann Rosenberger, II, Assistant Attorney General of the Commonwealth of Pennsylvania, hereby certify that I am one of the attorneys for the Plaintiff, COMMONWEALTH OF PENNSYLVANIA, that I am a member of the Bar of the Supreme Court of the United States, and that on the 12 day of July, 1972, I served copies of the foregoing Petition for Rehearing on each of the parties by depositing such copies, postage prepaid, in a United States Post Office addressed as follows:

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