IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SIXTH CIRCUIT.

No. 10,286.

CONSUMERS' HOME EQUIPMENT COMPANY and AVERY B. CHERETON, *Appellants,*

v.

THE UNITED STATES OF AMERICA, *Appellee.*

BRIEF FOR APPELLEE.

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COUNTERSTATEMENT OF QUESTIONS INVOLVED.

I. Does the evidence support the findings of the trial court in adjudging appellants guilty of criminal contempt of the court's order of injunction?

Appellee answers, "Yes".
Appellants answer, "No".
Trial court answered, "Yes".

II. Did the trial court err in its rulings upon the evidence?

Appellee answers, "No".
Appellants answer, "Yes".
Trial court answered, "No".

III. Were appellants or either of them deprived below of any alleged right of constitutional immunity from self-incrimination?

Appellee answers, "No".
Appellants answer, "Yes".
The question was not raised before the trial court.

IV. Are appellants entitled in this proceeding to attack the validity of Regulation W?

Appellee answers, "No".
Appellants answer, "Yes".
Trial court answered, "No".

INDEX.

	Page
Counterstatement of Questions Involved	i
Counterstatement of Facts	1
The Regulation Involved	3
Argument	5
(A) The evidence supports the findings and judgment	5
(B) The Court did not err in its rulings on evidence	10
(C) No claim of self-incrimination is available to appellants or either of them	18
(D) The defense that Regulation W is invalid is not available to appellants in this case	21
Relief	23

CITATIONS.

Cases.

Bowles v. Glick Bros. Lumber Company, 146 F. (2d) 566 (C. C. A. 9th, 1945), cert. den. 325 U. S. 877, rehearing den. 326 U. S. 804	21
Butler v. Thompson, 92 U. S. 412	12
Heiman v. Stoutamire, 26 F. Supp. 301 (D. C. Fla., 1939)	23
Howat v. Kansas, 258 U. S. 181	22, 23
Locke v. United States, 75 F. (2d) 157 (C. C. A. 5th, 1935), cert. den. 295 U. S. 733	23
McLeod v. Majors, 102 F. (2d) 128 (C. C. A. 5th, 1939)	23
Moskowitz v. White Bros., Inc., 166 N. Y. Supp. 15	13
Murray v. Doud, 47 N. E. 717	13
Rodgers v. United States, 138 F. (2d) 992 (C. C. A. 6th, 1943)	21
Schriner v. Meyer, 55 So. 156 (Ala., 1911)	12
Spevak v. United States, 158 F. (2d) 594 (C. C. A. 4th, 1946)	21

Page

United States v. Darby, 312 U. S. 100 21
United States v. French, 9 F. Supp. 30 (D. C. Mich., 1934) 23
United States v. John L. Lewis, —— U. S. —— (decided March 6, 1947) 23
Wilson v. United States, 221 U. S. 361..... 19

STATUTES.

"Trading with the Enemy Act", Act of October 6, 1917 (40 Stat. 415), § 5(b), U. S. C., Title 12, § 95(a) 3, 21

MISCELLANEOUS.

American Jurisprudence, Vol. 55 11
Executive Order 8843, August 9, 1941.....3, 21
Regulation W of the Board of Governors of the Federal Reserve System, § 4(a) 4, 14
Regulation W of the Board of Governors of the Federal Reserve System, § 4(d) 13, 14
Regulation W of the Board of Governors of the Federal Reserve System, § 12(h) 19
Restatement, Law of Agency, Vol. 1, §§ 7, 8.. ... 11

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BRIEF FOR APPELLEE.

COUNTERSTATEMENT OF FACTS.

This case is before the Court on appeal from a judgment sentencing appellants, Consumers Home Equipment Co. (hereinafter referred to as Consumers or the Company), and A. B. Chereton, its president, following their conviction before the United States District Court at Detroit of criminal contempt of court. The facts giving rise to their prosecution are as follows:

Consumers is engaged in the retail merchandising of household commodities, by means of outside salesmen or house-to-house canvassers (R. 27, 104) who act as its agents in this connection (R. 113). At all of the times referred to herein Chereton was president of Consumers (R. 104) and the Company was under his direct management and control (R. 104, 108, 152, 153). Almost all of Consumers' sales are made on the instalment basis (R. 27, 38, 66, 147). The

Company operates over a wide area, having branches in twelve States (R. 104) in six different Federal Reserve districts (R. 39).

As an instalment sales vendor of listed articles Consumers is subject to the requirements of Regulation W of the Board of Governors of the Federal Reserve System (hereinafter referred to as the Board) (Government Exhibit 1). During the times here in question, that Regulation, among other things, required that, in all instalment sales of listed articles, the seller should obtain a down payment of at least one-third of the cash price of such articles (Government Exhibit 1).

On July 19, 1945, the United States, as plaintiff, commenced a civil action against Chereton and Consumers, alleging, inter alia, that they had violated the down payment requirements of Regulation W, and praying for injunctive relief. On the same day counsel for Chereton and Consumers signed a stipulation agreeing "that the [District] Court has jurisdiction over the parties to the action and the subject matter thereof, and that the complaint states claims upon which relief may be granted," and consenting to the entry of a decree enjoining them from violating the said Regulation. The injunction order, which was issued by Judge O'Brien, among other things enjoined appellants "from making instalment sales subject to the requirements of Regulation W of the Board of Governors of the Federal Reserve System without obtaining the cash down payment required by section 4(a) of said Regulation." (Government Exhibit 2)

No appeal was taken from the entry of said judgment.

Thereafter and on April 25, 1946, this proceeding was commenced as a separate criminal action, under a petition for a rule to show cause why Chereton and Consumers should not be punished for criminal contempt for having violated the aforesaid order of injunction (R. 1). The petition for the rule to show cause alleged, among other things, that, notwithstanding Judge O'Brien's order, appellants,

by their employees and agents, had violated the injunction by making instalment sales of listed articles without obtaining the minimum cash down payment as required by section 4(a) of Regulation W.

The trial below consumed approximately four full trial days (R. 11, 196). Thirty customers of Consumers were presented as witnesses on behalf of the Government (R. 72-102). A number of these witnesses resided in or near Detroit, the home office of Consumers, but numerous others were from other States, including Ohio, Pennsylvania, Illinois, Indiana, New York and Maine. All of these witnesses testified that they had purchased listed articles from Consumers' salesmen at prices in excess of ten dollars and had either failed to make any down payment whatever or had made a down payment in a lesser amount than one-third of the price of such articles.

THE REGULATION INVOLVED.

Regulation W was issued by the Board pursuant to the authority vested in it by Executive Order 8843 issued by President Roosevelt on August 9, 1941 (Govt. Exh. 2B). The Executive Order, in turn, was predicated upon the President's authority under Section 5(b) of the Trading with the Enemy Act of 1917, as amended (U. S. C. title 12, sec. 95a).

The Regulation itself was designed as an anti-inflationary measure to combat certain economic conditions of the country brought on first by the national defense program and later by the war and the consequences thereof. Diversion of productive facilities to the manufacture of armaments during the national defense period was materially reducing the supplies of goods and services available for purchase by the civilian population, particularly supplies of consumers' durable goods. At the same time, as employment spread and wages rose, incomes were growing rapidly. The result of shorter supply and larger purchasing power was a strong inflationary pressure on prices. In these circum-

stances it was important that demand for goods and services should not be augmented by large resort to buying on credit. Regulation W was therefore designed to restrain the use of credit by setting maximum periods within which repayments should be made and, in the case of the purchase of consumers' durable goods, by requiring substantial down payments.

After the United States entered the war, the inflationary pressures became stronger and Regulation W was both broadened and tightened. The standard terms became one-third down and twelve months to pay the balance due. These terms continued into the transition period following V-J day when supplies of goods were beginning to come forward again in gradually increasing amounts but were still far short of demand. As conditions improved, the Regulation was reduced in scope and liberalized.

Section 4(a) of the Regulation (Govt. Exh. 1) is the only pertinent part material to this appeal. It provides as follows:

> "Except as otherwise permitted by this regulation, each instalment sale shall comply with the following requirements:
>
> "(a) Down Payment.—The down payment shall not be less than one-third of the cash price of the listed article, except that:
>
> "(1) In the case of pianos and furniture as defined in *Group* B of section 13(a), the down payment need not be more than one-fifth of the cash price;
>
> "(2) In the case of articles listed in *Group* C of section 13(a), no down payment is required; and
>
> "(3) In the case of articles the cash price of which is $10.00 or less, no down payment is required.
>
> "In any case involving a used automobile, any article for which the Federal price authorities have prescribed a maximum retail price, or any article on which there is a trade-in by the purchaser, the amount of the down payment must be computed in accordance with the applicable provisions of section 13."

ARGUMENT.

(A) The Evidence Supports the Findings and Judgment.

The factual issue before the lower court was a very narrow one. As stated above, each of the customer witnesses testified to having purchased a listed article at a given price on which Consumers did not obtain the one-third down payment. There was no question but that these sales were subject to the Regulation and a one-third down payment should have been obtained if the "cash price" of the articles sold was over ten dollars. Consumers contended that, notwithstanding the fact that in each instance the sales price to the customers was in excess of ten dollars, nevertheless such price was the "time price" of the article and that Consumers had a bona fide "cash price" for the same article of ten dollars or less, and hence no down payment was required. The sole factual issue, therefore, was whether Chereton and Consumers actually maintained a bona fide "cash price" of ten dollars or less for articles which were sold in each instance here involved for approximately fifteen dollars each.

First as to the direct evidence on this issue. Each of the customer witnesses testified that, at the time when the Consumers' salesman called upon her and made the sale, only one price was quoted to her, that being the price which she agreed in writing to pay for the article purchased (R. 72-102). In all instances that price was in excess of $10.00, usually $14.95. Furthermore, with one exception, not only did the Consumers' salesmen make no oral reference to the customer's alleged right to buy for cash for approximately one-third less than she had agreed to pay, but the sales agreement which each customer signed in no instance contained any breakdown showing such an alleged "cash price". Indeed, in some instances the sales agreement had no place for the insertion of an alleged "cash price" (Govt. Exhibits 16, 17, 21, 32A, 35, 36) while in others the "time price" was inserted as the "cash price" (Govt. Exhibits 14, 26, 37). In the one exception referred to, the customer was

given a sales agreement containing such a breakdown, but was told by the salesman that the breakdown was required by an "OPA regulation" and was not told he could buy for cash (R. 93).

In addition to the above sales there was another vitally significant group of transactions concerning which evidence was introduced on behalf of the Government. Exhibit 40 (R. 103), which is a statement of approximately 50 transactions at the main office of Consumers in Detroit, shows that in each instance *in sales for cash* the "time price" and not the "cash price" was charged for listed articles of the same character as these sold to the customer witnesses in this case. This shows that it was the Company's policy to charge the time price even when selling for cash and wholly destroys any claim that it maintained a bona fide cash price different from that which it regularly charged for time purchases.[1]

There are numerous other circumstances which support the conclusion just stated. Thus, the record shows that the listing and office inventory sheets prepared by Consumers pursuant to the requirements of the Office of Price Administration contained but one price—the time price—for the kinds of merchandise sold in this case (R. 61, 123). In addition, the record further shows that for all goods priced below ten dollars the Company did not make any pretense of maintaining a cash price—time price differential (R. 61, 117, 120, 123). Again, the Consumers' salesmen were paid commissions on the highest amount which the customer paid, hence they had every incentive to sell at the time price (R. 71). These facts seem clearly to establish that, with relation to the sales here involved, the alleged "cash

[1] Chereton testified that a great number of sales were made at the cash price (R. 151). However, Chereton's attorney had previously stated to the Board that "the cash sales have been a very small percentage of the total sales" (R. 147). In any event Chereton produced no documentary evidence to support his statement. If the situation had been as Chereton testified, the Company's records would certainly have been available for introduction in evidence.

price" had no shadow of substance, but was merely a device to provide an anchor to windward against the provisions of Regulation W. And this conclusion would seem to be all the more warranted when we consider Chereton's own words in explaining why the alleged cash price was used only in connection with those sales subject to Regulation W. He said:

> "The regulation does not require us to do otherwise. Why should we go through a great amount of unnecessary accounting work to do things that are not required by the Regulation?" (R. 123). "Why should we have a breakdown on non-listed articles where such is not required by the Regulation?" (R. 127)

While all of this direct and, with the one exception, completely uncontradicted evidence is, we think, more than sufficient to support the judgment below, there is also much else in the record to assist the Court to reach the conclusion that the alleged cash price—time price differential was adopted by Chereton and Consumers solely as a device to avoid the impact of Regulation W upon their affairs.

The evidence adduced below shows that, not long after the Regulation was issued in 1941, Chereton was requested to come to the Federal Reserve Bank at Chicago[1] to attend the first of what later developed into a series of disciplinary conferences to discuss alleged violations of Regulation W by Consumers (R. 16). The "disciplinary conference" is an enforcement procedure utilized by the Reserve Banks in those cases where it appears that a registrant is persistently violating the Regulation. Its purpose is both to educate registrants concerning the provisions of Regulation W and to obtain future compliance. The General Counsel of the Chicago Reserve Bank testified that, over a three-year

[1] The administration of Regulation W is decentralized, being handled in large part by the twelve Federal Reserve Banks and their branches. As Consumers' main office is in Detroit, the Federal Reserve Bank at Chicago integrated the enforcement program respecting that Company.

period, officials of the Bank held five disciplinary conferences with representatives of Consumers, in addition to six others which were not strictly "disciplinary" in their nature, but which concerned the sales methods employed by Consumers (R. 16, 19, 20, 24, 29, 32, 33, 36, 37). Chereton attended five of these conferences (R. 16, 20, 24, 36, 37). This record is to be contrasted with the fact that in the entire Chicago District the Reserve Bank officials, over the five-year period, conducted a total of only about 75 such disciplinary conferences[1] (R. 39).

All of the disciplinary conferences, and most of the others, were held as a result of the discovery from time to time by the investigators of the Chicago Reserve Bank of various practices employed by Consumers to circumvent the requirements of Regulation W. In all, six of these plans were used, the cash price—time price differential being the last one in point of time. As will be seen, however, each one had this in common with the others—each obviously was a scheme for avoiding the down payment requirements of the Regulation. In the order of their appearance these schemes were as follows:

(1) An article sold for $30.00, but was marked up to $45.00 on the Company's records, the difference of $15.00 being recorded as the "down payment" (that is, the one-third down payment required by the Regulation). The customer never paid the $15.00, but only paid the "balance" of $30.00, which was paid in instalments. No down payment was in fact received, although the Company's records indicated that $15.00 had been received (R. 16).

(2) An article on which the down payment was required by the Regulation was sold at the same time as an article not subject to the Regulation, but on the records of the Company the sale was described as a sale of the latter article only, so that the records would indicate that no down payment was required (R. 17-18).

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[1] There were approximately 50,000 registrants in this district (R. 57).

(3) A double blanket, on which a down payment was required because sold for more than $6.00, was recorded as two single blankets, priced at less than $6.00 each, on which no down payment was required. (At that time no down payment was required on articles sold for $6.00 or less (R. 21).

(4) A set of 100 dishes was divided into 7 packages, 6 priced at $5.82 each, the seventh package being given to the customer as an inducement to purchase the entire set. The required down payment was actually one-third of the total price of $39.87 plus tax, but this device made it appear that the articles were sold for less than $6.00 each and therefore did not require a down payment (R. 24).

(5) A set of dishes retailing for $21.71 was offered to the customer with an American flag, the latter not being a listed article under Regulation W and not requiring a down payment. By using a code number to indicate the real price and by inserting a fictitious price for the two articles it was made to appear on the Company's books that the dishes sold for less than $6.00 and therefore required no down payment, and that the flag (or other gift) was sold for the balance of the total purchase price (R. 25).

(6) The price of the article was broken down into a "cash price" and a "carrying charge" in such a manner as to make the "cash price" less than $10.00 (the Regulation had been amended in the meanwhile so as to raise the $6.00 down-payment exemption to $10.00; R. 31). This is the scheme involved in the present case (R. 27).

Briefly to summarize this point, then, we find that:

(1) Almost from the inception of Regulation W Chereton has been more concerned with devising ways and means for evading the Regulation than in seeing that his Company so conducted its affairs as to obey its requirements.

(2) Each of the six plans successively devised by him were adapted to the end of circumventing the Regulation and were so intended by him.

(3) That the latest of these plans—the cash price—time price differential—was not conceived in good faith is evidenced by (a) the failure of the Company to make such a distinction on sales not subject to the Regulation, (b) the failure of the Company to make such a distinction on its list of prices posted under the requirements of the Office of Price Administration, (c) the incentive held out to salesmen to sell at the time price, (d) the numerous sales for cash at the so-called "time price" at the head office of Consumers, and (e) the practice of salesmen throughout the organization not to bring to the attention of the customer the existence of the alleged "cash price". We submit that this evidence amply supports the findings and judgment of the lower court.

(B) The Court Did Not Err in Its Rulings on Evidence.

In their brief appellants challenge as error two rulings of the trial court made during the course of the trial. The first of these was the court's ruling that the sales agreement, which was executed at the time the Consumers' salesman called upon the customer, constituted a complete and binding contract between the parties. The second, which was the natural outgrowth of the first, denied appellants the right to cross-examine the customer witness as to certain events which were alleged to have transpired after the sales agreement was executed. As these rulings thus have a direct causal connection, appellants' contentions respecting them may be considered and answered together.

The direct testimony of each of the customer witnesses was limited to describing what took place between the customer and the Consumers' salesman. Each testified in substance that the salesman offered certain merchandise for sale at the time price, accepted the order, executed the sales agreement and, in most instances, accepted a small deposit. In addition the salesmen, in many instances, also delivered the merchandise.[1] Defendants attempted to develop from

[1] See Govt. Exhibits 13, 14, 17, 23, 24, 27, 28, 29, 30, 31, 32, 32A, 35, 37; see also R. 80, 90.

these witnesses that, subsequent to the salesman's visit and the execution of the sales agreement, another person called a "verifier" called upon the customer, and another paper, purporting to be the contract of sale, was executed by her. This was objected to on the ground that such evidence was irrelevant as occurring after the sale and as merely self-serving on the question of whether the Company maintained a bona fide cash price for the goods sold. The court sustained the objection, holding that the sales agreement on its face indicated a completed contract of purchase and sale (R. 73-77).

Appellants contend that this ruling was incorrect. Apparently in support of this contention, but without so much as a single record reference or other discussion elaborating the point, appellants' brief simply refers to a statement appearing in *55 Am. Juris.* to the general effect that a traveling salesman "whose authority extends only to the solicitation of orders" may not bind his principal until the latter accepts the order. We take it from this that appellants' position in this case is that the salesmen had no authority to bind Consumers because of some limitation upon their authority. If that be their contention, the answer is simple.

It is the most elementary principle of the law of agency that when an agent acts within the apparent scope of his authority the principal is bound by the acts of the agent whether authorized or not. *Restatement, Law of Agency,* Vol. 1, §§ 7, 8. Specific limitations upon the agent's authority, unless communicated to those with whom the agent deals, do not bind third parties who have the right to rely upon the doctrine of apparent authority. Id. So that even if the Consumers' salesmen had been specifically enjoined from making sales (which was not the case), nevertheless the record here is totally barren of any facts which would indicate that such limitations were brought home to the customers with whom they dealt.

Far from indicating any limitations upon the authority of the salesmen, the evidence here all points to precisely the reverse conclusion.

Thus, each Consumers' salesman was furnished with a batch of samples, a book of sales agreement forms and authorized to make sales on an instalment basis. The sales agreements—the one document which the customer was sure to see—contained no mention at all of the salesmen having authority only to solicit orders, or that the agreement to be binding must first be approved by the Company. Quite the contrary. The form identified the transaction as being made in the name of Consumers Home Equipment Company; it provided spaces for identifying the article sold, the price at which it was sold, the sales tax, the deposit, if any, and the terms of repayment; it recited simply that the articles were "sold to" the customer; and it had signature lines for both salesman and customer. Clearly such a document when executed is a binding contract of sale judged by any rules of legal responsibility. Furthermore, as we have seen, actual delivery was made by the salesmen in a number of instances.

We submit that the mere recitation of the above facts is sufficient without more to vindicate the ruling of the trial court. However, the cases are so clear on the question that we think it may be helpful to refer to a few of them. Thus, in *Butler* v. *Thompson,* 92 U. S. 412 (1875), the Supreme Court held that a memorandum signed by agents of A and B reciting that certain goods had been "sold for" A "to" B at a certain specified price was a contract of sale, as against the contention that the memorandum was ineffective to bind the parties. The court observed that "the memorandum in question, expressing that iron had been sold, imported necessarily that it had been bought. The contract was signed by the agent of both parties, the buyer and the seller, and in our opinion was a perfect contract, obligatory upon both the parties thereto."

In *Schriner* v. *Meyer,* 55 So. 156 (Ala., 1911) the court held that a paper executed and delivered by one party to another which announced that the former had "received from" the other a certain price for certain enumerated

property, "though in form a receipt, was in legal effect a bill of sale evidencing the contract between the parties." And in *Murray* v. *Doud,* 47 N. E. 717 (Ill., 1897), the court held that memoranda indicating that one party had "sold" and the other party had "bought" certain produce at specified price, both memoranda being signed by the agent of the respective parties who were mentioned therein, were "competent evidence to establish a contract".

In *Moskowitz* v. *White Bros., Inc.,* 166 N. Y. Supp. 15 (N. Y. Sup. Ct., 1917), we have a case almost identical to that here presented. In that case the plaintiff sued for a breach of an agreement for the sale of an automobile. The plaintiff in his dealings with defendant's salesman had been presented with an "order blank" containing all the terms of the sale, which was signed by the plaintiff and by Schuler as a salesman, the order blank being entitled at the top with defendant's name. However, defendant subsequently sent plaintiff a more formalized agreement signed by itself and requesting the plaintiff to sign it also, but the terms of this more formalized agreement were different from those in the order blank. The court specifically held that defendant's contention that the order blank was not a contract of purchase and sale was without merit. The court observed that the order blank was "a perfectly good contract; the signature of the salesman being quite meaningless and totally unintelligible, unless it be considered to imply an acceptance of the order and a reciprocal agreement to sell."

Next, appellants contend that the trial court's ruling denying them the right to cross-examine the customer witnesses as to what transpired subsequent to the sale prevented them from making full defense to the charge of contempt, in that they were denied an opportunity to prove substantial compliance with the Regulation. To give color to this contention they point to the fact that Section 4(d) of Regulation W requires that a statement of transaction shall be furnished a customer giving certain information,

including the cash price of the article, "as promptly as circumstances will permit." Appellants' offer of proof, they say, was made to show that the Company "had complied with that part of Regulation W by adhering faithfuly to a business practice in which it did give a statement of transaction to the customers promptly after completion of the transactions." (Appellants' Br. p. 24.)

Quite apart from the admission contained in this language that the documents offered on behalf of appellants were "after" the sales transactions had been completed, the complete answer to appellants' argument is that their conviction of contempt did not flow from their failure to provide a "statement of transaction" as required by Section 4(d) of the Regulation, but rather from their failure to obtain the down payment required by Section 4(a) of such Regulation. On that issue and that issue alone were they convicted. And on that issue, whether or not appellants were required to obtain a down payment depended entirely upon whether the goods they sold had a bona fide "cash price" of ten dollars or less. This was to be determined not by the contents of any self-serving document delivered to the customer after the terms of her obligation had become legally fixed, but rather by what were the terms of offer at the time the sale was consummated.

Next, appellants argue that their offer to prove what occurred subsequent to the sale should have been received by trial court because it would have shown substantial compliance with an alleged arrangement approved by the Board as evidencing the bona fides of the cash price—time price differential. Their brief refers to certain communications between the Chicago Reserve Bank and Consumers' representatives concerning procedures which Consumers volunteered as a means of demonstrating the existence of a bona fide cash price for their merchandise. The circumstances giving rise to these communications were as follows:

On December 8, 1943, one of the above-mentioned series of disciplinary conferences was held in Chicago between

representatives of the Reserve Bank and Chereton.[1] It was at this conference, which lasted over an eight day period, that there was discussed for the first time the latest of Chereton's sales practices—the cash price—time price differential (R. 27). On December 31, 1943, counsel for the Chicago Bank wrote to counsel for Consumers and notified him (R. 28) that the use of this sales practice should be discontinued until a written request for its approval had been filed with and acted upon by the Board.[2]

On January 4, 1944, counsel for Consumers addressed a lengthy communication (R. 128-135) to the Chicago Reserve Bank which attempted to justify the existence of the cash price—time price differential and outlining a series of proposed changes in the Company's forms and sales methods for securing to the customer actual knowledge of the existence of a cash price of the merchandise. One of these changes was to be the addition of a legend on the face of the sales agreement that the articles purchased could be bought for cash at a price set forth on the face of that agreement. The letter promised that salesmen would be instructed to fill in all blanks on these forms "and that no sales slips will be accepted [by the Company] unless all blanks are filled in". There followed certain other proposed procedures, including a subsequent call upon the customer of a so-called verifier, and the preparation and execution of a new document denominated by Consumers' lawyer as the "contract", the latter also to contain on its face a breakdown of the cash price—time price differential.

A reply to this letter was sent out by the Reserve Bank on February 10, 1944. In that letter, which asked that the

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[1] This conference resulted in a consent closing agreement dated December 28, 1943, under which Consumers' license to make instalment sales of listed articles was suspended for one week by the Board for violations of Regulation W (R. 26).

[2] As part of the consent closing agreement Chereton had agreed to submit all new sales practices for the consideration of the Board (R. 28).

Board be supplied with certain additional information, the following significant paragraph was included (R. 138):

> "As you know the practical problems arising under Regulation W in connection with the operations of house-to-house canvasser organizations are in most cases peculiar to those organizations. This fact was brought out on various occasions by your client and others during the recent conferences at this bank. It is equally difficult and often improper, therefore, to apply an unqualified interpretation of the Regulation to the instalment sale business of your client and to the business of another Registrant making instalment sales at a single place of business on an 'over-the-counter' basis, because interpretations of the Regulation and answers to questions arising from operations of Registrants thereunder are based, in most instances, on the particular or specific facts submitted."

Thereafter, the Reserve Bank was furnished with the information which it had requested. Following receipt of this information and on March 17, 1944, Consumers was notified by the Chicago Reserve Bank as follows (R. 149):

> "We have been advised by the Board of Governors today that the bona fide cash price within the meaning of Section 2(j) of the Regulation is established whenever merchandise is actually offered for sale for cash at the 'cash price' under such circumstances as to give each customer reasonable notice of the offer and a reasonable opportunity to accept it and that, upon further consideration of the matter, the procedure outlined in your letters of January 4 and February 21, 1944 would establish a cash price within the meaning of Section 4(a)(3) of the Regulation."

It is apparent from the extract just quoted that the essence of the Board's approval of the cash price—time price differential was conditioned upon merchandise actually being "offered" for cash at the cash price. In other words, so far as the Board was concerned the critical period in the entire transaction occurred at the time when the customer

was being solicited and before she undertook any binding obligation. If at that time the customer unequivocally was offered the opportunity to buy the article for cash, at the alleged cash price, no one could justifiably challenge the existence of such a cash price.

And this is precisely what would have been the situation under the plan submitted by Consumers' counsel had the Company lived up to the proposals therein contained. If, as promised, the customer had been given the opportunity to buy for cash at the "cash price", that fact would have appeared either through the verbal offer of the salesman or in the written terms of the sales agreement. But the evidence below conclusively establishes that no such opportunity was afforded the customer, and in every instance the fact that a cash price was supposed to exist came as a later surprise to the witness. With one exception already noted, not one of the sales agreements contained any breakdown showing the cash price of the article sold. Indeed, a number of them, as we have seen, did not even contain the legend or a space for the alleged cash price.

It must be remembered that these are the same forms which Consumers' counsel stated would not be accepted from the salesmen by Consumers "unless all blanks are filled in". If the salesmen had filled in the blanks on the original after leaving the customer but before turning them in to the Company, surely they would have been introduced in evidence on appellants' behalf to show their good faith in complying with this promise.

It follows, therefore, that at no time during the critical period in the sales here in question did Consumers live up to the procedures outlined by its counsel, and upon the basis of which the Board approved the cash price—time price differential. Under these circumstances the trial court was wholly justified, we submit, in rejecting appellants' offer to prove what was done after the sales were consummated. Clearly such evidence, even if it disclosed full compliance with the post-sale procedure outlined in the letter referred to above, could not establish that the customer was afforded

an opportunity to buy for cash or that the Company was operating in good faith under the plan approved by the Board. As stated by Judge O'Brien (R. 77):

> "a customer certainly must be told the conditions of the contract he is entering into under any conditions, whether Federal Reserve conditions or the ordinary contracts of sale. That is what that is, a contract of sale. The customer is entitled to know the conditions under which he is buying, and having had a written document before him, he is entitled to depend on that as a basis of the sale."

(C) No Claim of Self-Incrimination is Available to Appellants or Either of Them.

As a part of their argument under Point B of their brief appellants raise a rather vague point as to self-incrimination. They say that, had the Government proceeded directly to enforce the criminal penalties under the Act, they could have availed themselves of the constitutional protection against self-incrimination. From this, they go on to say that the protection should also prevail in a case like this where the Government elected first to apply a civil remedy, in the course of which it acquired intimate knowledge of appellants' business, and then, at a later date, converted the proceedings into one of a criminal nature. This, say appellants, is mere evasion of the constitutional protection against self-incrimination.

Appellants' brief makes no reference to the records alleged to have been used in violation of the claimed protection, nor indeed to any circumstance occurring during the trial which supports their claim. Furthermore, no objections were raised at the trial which even remotely suggested a basis for their present claim, and Government's counsel are therefore in the dark as to the precise application of appellants' argument to the case at bar.

Presumably appellants are referring to the fact that un-

der Regulation W (Section 12 (h))[1] Consumers was required to maintain certain records and that these records were inspected by investigators of the Chicago Reserve Bank, who in turn reported violations on the basis of such examinations. Whether this be their contention or not, however, the complete answer to any claim respecting official use of records of Consumers here pertinent is to be found in the decisions of the Supreme Court as well as those of this and other Federal courts.

The leading case on this general subject is that of *Wilson* v. *United States,* 221 U. S. 361 (1911). In this case defendant appealed from orders committing him for contempt and from dismissal of writs of habeas corpus. The facts revealed that, pursuant to a grand jury investigation for alleged violations of Federal statutes by defendant and others, the grand jury issued a subpoena to the company of which defendant was president, demanding the production of certain records. The subpoena specifically pointed out that the records were needed in regard to an alleged violation of the statutes of the United States by defendant Wilson, who refused to obey the subpoena, claiming his constitutional freedom from self-incrimination.

In affirming the judgments below the court pointed out that the answer to the question presented turned upon "the nature of the documents and the capacity in which they were held." The court further observed that, in the case of public records and official documents which are kept in the

[1] "12(h) Preservation of Records.—Every Registrant shall preserve, for the life of the obligation to which they relate, such books of account, records, and other papers (including any statements required by or obtained pursuant to this regulation) as are relevant to establishing whether or not an extension of credit within the scope of this regulation was in conformity with the requirements thereof, provided, however, that the Statement of the Borrower obtained pursuant to section 6(d) or 7(d) shall be preserved for the life of the obligation to which it relates or for one year, whichever period is longer, and provided further that the Registrant may preserve photographic reproductions in lieu of such books of account, records or papers."

administration of public office, "the fact of actual possession or lawful custody would not justify the officer in resisting inspection, even though the record was made by himself and would supply evidence of his criminal dereliction." It was the court's view that this principle applied not only to public documents in public offices,

> "but also to records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established. There the privilege, which exists as to private papers, cannot be maintained."

The court acknowledged that books and papers of a private corporation organized for the advantage of the corporate organizers "are not public records in the sense that they relate to public transactions, or, in the absence of particular requirements, are open to general inspection or must be kept on file in a special manner." The court went on to say, however, that:

> "the corporate form of business activity, with its chartered privileges, raises a distinction when the authority of government demands the examination of books. That demand, expressed in lawful process, confining its requirements within the limits which reason imposes in the circumstances of the case, the corporation has no privilege to refuse. It cannot resist production upon the ground of self-incrimination. Although the object of the inquiry may be to detect the abuses it has committed, to discover its violations of law and to inflict punishment by forfeiture of franchises or otherwise, it must submit it books and papers to duly constituted authority when demand is suitably made. This is involved in the reservation of the visitorial power of the State, and in the authority of the National Government, where the corporate activities are in the domain subject to the powers of Congress."

In conclusion on this point, the court observed that Wilson held the corporate books subject to the corporate duty,

and that if the corporation were guilty of misconduct, he could not withhold its books to save it. Furthermore,

> "if he were implicated in the violations of law, he could not withhold the books to protect himself from the effect of their disclosures. The reserved power of visitation would seriously be embarrassed, if not wholly defeated in its effective exercises, if guilty officers could refuse inspection of the records and papers of the corporation. No personal privilege to which they are entitled requires such a conclusion. It would not be a recognition, but an unjustifiable extension of the personal rights they enjoy."

See also *United States* v. *Darby,* 312 U. S. 100 (1941); *Rodgers* v. *United States,* 138 F. (2d) 992 (C.C.A. 6th, 1943); *Bowles* v. *Glick Bros. Lumber Company,* 146 F. (2d) 566 (C.C.A. 9th, 1945), cert. den. 325 U. S. 877, rehearing den. 326 U. S. 804; *Spevak* v. *United States,* 158 F. (2d) 594 (C.C.A. 4th, 1946).

(D) The Defense that Regulation W is Invalid is Not Available to Appellants in This Case.

The major portion of appellants' brief is devoted to an attack upon the validity of Regulation W. Appellants first argue that Executive Order 8843 under which the Regulation was promulgated has no support in Section 5(b) of the Trading with the Enemy Act, under which it was issued. Secondly, they contend that, if Section 5(b) of that Act be construed to authorize the Executive Order, the Act itself is unconstitutional as containing an unwarranted delegation of legislative power. Third, they contend that Executive Order 8843 does not sufficiently identify the statute under which it was issued. And finally, they contend that the amendments of Regulation W by the Board have been so numerous as effectively to prevent a registrant from keeping informed as to its current requirements.

We do not join issue with appellants on these arguments. The law is clear that none of these arguments is available to appellants in this proceeding. The record shows that

when appellants were served with the civil complaint charging violations of Regulation W, they were represented by counsel, who filed a stipulation on their behalf with the Court admitting that the Court "has jurisdiction over the parties to the action and the subject matter thereof, and that the complaint states claims upon which relief may be granted" (Govt. Exh. 2). Furthermore, appellants consented to the entry of the injunction order and no appeal was taken from that order.

That appellants are precluded from collaterally attacking the validity of the injunction order in a proceeding for contempt of that order was decided by the Supreme Court in the case of *Howat* v. *Kansas,* 258 U. S. 181 (1922), which involved a situation precisely analogous to that here presented. In that case plaintiffs in error had been enjoined by the District Court of Crawford County, Kansas, from calling a strike contrary to the provisions of a Kansas law requiring compulsory arbitration of labor disputes. No appeal was taken from the order of injunction. Thereafter plaintiffs in error were convicted of contempt for having violated the injunction. In the contempt proceeding they asserted the alleged invalidity of the labor statute, but this defense was rejected by the trial court. In sustaining this ruling the Supreme Court said as follows (pp. 189-190):

> "* * * An injunction duly issuing out of a court of general jurisdiction with equity powers upon pleadings properly invoking its action, and served upon persons made parties therein and within the jurisdiction, must be obeyed by them however erroneous the action of the court may be, even if the error be in the assumption of the validity of a seeming but void law going to the merits of the case. It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished. *Gompers* v. *Bucks Stove & Range Co.,* 221 U. S. 418, 450; *Toy Toy* v. *Hopkins,* 212 U. S. 542, 548. See also *United States* v. *Shipp,* 203 U. S. 563, 573."

It is interesting to note that the above quotation from the *Howat* case was recently quoted with approval by the Supreme Court in the opinion sustaining the conviction of John L. Lewis and the United Mine Workers for contempt of a temporary restraining order issued by the District Court in Washington. *United States* v. *John L. Lewis*, —— U. S. —— (Mar. 6, 1947).

The rule announced in the *Howat* case has also been followed in numerous other Federal cases. See *Locke* v. *United States*, 75 F. (2d) 157 (C. C. A. 5th, 1935), cert. den. 295 U. S. 733; *McLeod* v. *Majors*, 102 F. (2d) 128 (C. C. A. 5th, 1939); *United States* v. *French*, 9 F. Supp. 30 (D. C. Mich., 1934); *Heiman* v. *Stoutamire*, 26 F. Supp. 301 (D. C. Fla., 1939).

RELIEF.

We respectfully submit that no error was committed in the trial of appellants and that the appeal should be dismissed and the judgment affirmed.

Respectfully submitted,

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