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FREEDOM OF THE PRESS—ADMINISTRATIVE CENSORSHIP—THE "ESQUIRE" DECISION—One of the most important cases before the courts was decided by the Circuit Court of Appeals of the District of

Columbia on June 4[1]—a case involving asserted absolute discretion in a government official to determine the right to second-class mail privileges, and thereby, indirectly, to censor the press. The background facts of the case are essential to appreciation of its importance.

Various federal statutes make certain things non-mailable. "Obscene" matter of any sort, for example, is "declared to be non-mailable matter and shall not be conveyed in the mails."[2] Matter which is mailable is divided by the Postal Service law into classifications by which the rate of postage is determined. The classification here concerned covers "second-class matter," which is defined as embracing "all newspapers and other periodical publications which are issued at stated intervals, and as frequently as four times a year and are within the conditions named in sections 225 and 226 of this title."[3] Section 225 permits the insertion in periodicals of advertisements permanently attached, and further provides only that "matter of the second class may be examined at the office of mailing, and *if found to contain matter which is subject to a higher rate of postage,* such matter shall be charged with postage at the rate to which the enclosed matter is subject."[4] Section 226 specifies certain required details, such that the matter shall bear a date of issue and be consecutively numbered, and, what is here important, that

> "It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers."[5]

In 1933 the magazine *Esquire* was granted second-class mailing privileges in conformity with this statute. In September 1943, the then Postmaster General, Frank C. Walker, issued a citation directing the publisher of *Esquire* to show cause why its second-class privilege should not be withdrawn. The only ground alleged in the citation was that nine issues during 1943 had contained matter of "an obscene, lewd and lascivious character" such as "is non-mailable within the meaning of" the criminal code.[6] The citation added that "because of the inclusion of such matter in the publication it has not fulfilled the qualifications of

[1] Esquire, Inc. v. Walker, Postmaster General, (App. D.C. 1945).

[2] 18 U.S.C. (1940), § 334.

[3] 39 U.S.C. (1940), § 224.

[4] 39 U.S.C. (1940), § 225; the italics are added because, in view of the way in which the particular case developed, it is important to appreciate that "obscene matter" is not subject to a higher rate of postage, does not bring the publication in which it appears into a different classification, but is not mailable at all.

[5] 39 U.S.C. (1940), § 226.

[6] 18 U.S.C. (1940), § 334.

second-class mailing privileges established by the fourth condition of 20 Stat. 359 (39 U.S.C. 1940, 226)."

The ineptness of expression in this citation, whereby the charge of "obscenity"—which makes matter non-mailable at all—was used as a basis for denying second-class privilege—which requires only devotion to literature, science, art, or some special industry—can be explained only on the ground of carelessness, or on the theory that obscene matter cannot be literature, science or art.[7] This confusion of idea between what is obscene, hence not mailable at all, and what is not literature, hence not entitled to second-class privilege, seems to have permeated the whole case.

Section 232 of the statute provides that "when any publication has been accorded second-class privileges, the same shall not be suspended or annulled until a hearing shall have been granted to the parties interested."[8] Accordingly, the matter was brought, beginning October 19, 1943, before a "Hearing Board" composed of the Fourth Assistant Postmaster General, Walter D. Myers, as chairman; the Chief Clerk and Director of Personnel, Frank H. Ellis; the Deputy First Assistant Postmaster General, Tom C. Cargill. The hearing lasted for seventeen days and forty-eight witnesses were heard. At the end of a week, the Government's Solicitor, Mr. Hassell, suddenly took the position that *even if the matter in Esquire was not obscene, the magazine still was not entitled to second-class privileges*—apparently, though his theory is not clear from the record, because it was not devoted to literature, science, or art.[9]

The Hearing Board, on November 11, 1943, reported its findings that:

> "(1) The charge of obscenity in the original and amended citations has not been supported and proved in fact or in law.
>
> "(2) The publication has not failed to comply with the fourth condition of section 226, title 39 of the U.S. Code as to its second-class mailing entry."[10]

[7] Obviously it was not the draftsman's belief that literature, science, or art, is never obscene.

[8] 39 U.S.C. (1940), § 232.

[9] Record of hearing, p. 601 ff. In a letter to counsel for *Esquire*, prior to the hearing, Mr. Hassel had said, "As I explained to you when you called here, I shall not contend in the hearing aside from the nonmailable obscenity angle that the publication does not comply with the Fourth condition of the Second-Class Act."

At the hearing he said, "I should not have said that." But he did not then explain wherein the magazine failed to comply with the fourth condition.

[10] Record of hearing, p. 1838. The character of much of the testimony at the hearing is fairly suggested by that of Father Thomas Verner Moore, head of the Department of Psychology and Psychiatry, Catholic University. He had in direct examination stated only that in his opinion much of the matter in *Esquire* was obscene. But

Section 232 of the Code, in its declaration that second-class privileges once granted "shall not be suspended or annulled until a hearing shall have been granted," does not expressly add that the privilege shall not be revoked unless the findings of the hearing are adverse to the claimant of the privilege, though such might be assumed its reasonable implication. The mere futile formality of requiring a hearing, the findings of which can be disregarded as completely as though it had never been held, is obvious; one may well doubt if Congress ever so intended. Nevertheless, the Postmaster General did disregard the findings of the hearing, and in contradiction to its specific recommendation entered an order revoking *Esquire's* second-class privilege.[11]

The publishers thereupon began proceedings in the United States District Court for the District of Columbia to enjoin enforcement of the order. As a consequence of pre-trial conference, counsel for the Government stipulated that *the order revoking the privileges was not*

on cross-examination, apparently to test the value of such an opinion as coming from him, the record shows the following:

"Q. Are you familiar with the reputation of Sholem Asch? A. No.
Q. Did you ever hear of him? A. No.
Q. Did you ever hear of Theodore Dreiser? A. No.
Q. You never heard of him? A. No.
Q. Did you ever hear of John Dos Passos? A. No.
Q. Never heard of him? A. No.
Q. Did you ever hear of Havelock Ellis? A. Yes.
Q. Did you ever hear of Leon Feuchtwanger? A. No.
Q. Did you ever hear of F. Scott Fitzgerald? A. No.
Q. Did you ever hear of Maxim Gorky? A. Yes.
Q. Did you ever hear of Ernest Hemingway? A. No.
Q. Did you ever hear of D. H. Lawrence? A. No.
Q. Did you ever hear of Thomas Mann? A. The name is a little bit familiar.
Q. You don't know who he is, though? A. No.
Q. Did you ever hear of Maurice Maeterlinck? A. No.
Q. Did you ever hear of Andre Maurois? A. No.
Q. I spell it on account of my pronunciation: M-a-u-r-o-i-s. A. No.
Q. Did you ever hear of Franz Molnar? A. No.
Q. Did you ever hear of Luigi Pirandello? A. No.
Q. Did you ever hear of Jacob Wassermann? A. No.
Q. Did you ever hear of Arnold Zweig? A. No.
Q. Did you ever hear of Thomas Wolfe? A. No.
Q. Did you ever hear of John Steinbeck? A. No.
Q. So the fact that all of these gentlemen whom I have named have been contributors to *Esquire* would mean nothing to you? A. It would mean very little. I would have to examine what they wrote." Hearing Record, p. 1726.

[11] The Hearing Committee had reported, after its findings of absence of obscenity and no violation of second-class requirements, "It is, therefore, respectfully recommended that the proceeding herein be dismissed and that the second-class entry of the magazine *Esquire* be continued in full force and effect." Hearing Record, p. 1839.

based on the ground that Esquire is obscene within the provisions of 18 U.S.C. 334, or is non-mailable under that or any other statute.[12]

Thus the exclusion of the magazine from second-class privileges rested solely on the allegation that *Esquire* is not published "for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry." It could hardly, like a newspaper, be classified under the first clause; nor within the last. Thus the exclusion had to be justified on the ground that *Esquire* is not devoted to "literature, the sciences, arts."

That raises two problems: (a) What is literatre or art within the meaning of the statute? (b) In whom is the *ultimate* power to determine whether or not material falls within the definition—in the Postmaster General, or in the courts?

Happily, the esthetic question—if there were one—of whether obscenity can ever be literature, is entirely eliminated; if not by the finding of the Hearing Committee that the matter was not obscene, certainly by the Government's stipulation of that fact.

Much of the material in *Esquire* was, and is, in the normal form of literature, and is written by men recognized as leaders in the field of literature. On what Mr. Walker based his conclusion that the writings of Dos Passos, Dreiser, Hemingway, Mann, and men of like standing is not literature, he did not reveal in the order.[13]

The petition for injunction was denied by the district court,[14] which in a confused, rambling opinion given to moralizing, laid down the propositions that, "a court will not review or overturn an act of an executive officer charged with the performing of a given duty unless the act is arbitrary, capricious or unlawful"; the action of the Postmaster General was not arbitrary, capricious or unlawful; his ruling that the content of *Esquire* was not such as is entitled to second-class privileges would not be disturbed.

Thus the district judge set up the personal tastes of an appointed governmental official as the standard by which any magazine's enjoyment of second-class mailing privileges is determined. That *Esquire's* articles had the conventional form of literature, that they were not obscene (that, it should be remembered, was the stipulated agreement) was immaterial. If for some undisclosed reason—something other than obscenity—they met with the Postmaster General's disapproval, the magazine which carried them must pay higher postage rates than others.

In this opinion for the first time there begins to appear a very defi-

[12] Brief for *Esquire*, p. 7.

[13] One evil of his action is the discrediting reasons, ascribed variously to personal spite, religious intolerance, censorship objectives, *et cetera ad lib*, which were promptly rumored.

[14] Judge Davidson, called in from a Texas district.

nite, though not precisely stated, proposition that the magazine was, and could be, deprived of its second-class privileges not because its content was not "literature," but because it had not the *content* and *character* of literature—even though not obscene—which ought to be allowed such privileges.

By the same logic, articles in literary form criticizing the government or party which the Postmaster General represents, or hostile to his particular form of religion, or preaching economic views which he resents, can likewise be declared by him to be an undesirable type of literature and can be excluded from the second-class privilege. The indirect result of this decision would be complete subordination of freedom of speech and the press—to the development of totalitarian government.

The district judge relied primarily upon *United States ex rel. Milwaukee Social Democratic Publishing Company v. Burleson.*[15] But in that case, the Postmaster General having excluded the petitioner's paper because he found that it carried matter specifically declared "nonmailable" by statute,[16] the Supreme Court said:

> "For this cause, exercising the power which we have seen had been invested in the Postmaster General by statute for almost forty years, and which had frequently been exercised by his predecessors, the respondent revoked the second-class privilege which had been granted to the relator. A similar executive authority with respect to matters within their jurisdiction has been given to the heads of all the great departments of our Government and is constantly exercised by them.
>
> "This is neither a dangerous nor an arbitrary power, as was argued at the bar, for it is not only subject to review by the courts (the claim of the relator was heard and rejected by two courts before this re-examination of it in this court) but it is also subject to control by Congress and by the President of the United States. Under the Constitution, which we shall find it vehemently denouncing, the rights of the relator were, and are, amply protected by the opportunity thus given it to resort for relief to all three departments of the Government, if those rights should be invaded by any ruling of the Postmaster General."[17]

[15] 255 U.S. 407, 41 S. Ct. 352 (1921).

[16] Act of June 15, 1917, title XII, 40 Stat. L. 217 at 230.

[17] The idea that the Postmaster General's original discretion is not exempt from judicial review is clearly expressed also in Pike v. Walker, (App. D.C. 1940) 121 F. (2d) 37 at 40,

"In bringing their suit in the District Court for a review of the decision of the Postmaster General, appellants had a full and free opportunity to show that the complaint against them was unfounded. It is quite true the measure of proof required to

In *American School of Magnetic Healing v. McAnnulty*[18] it appeared that the Postmaster General had ordered the petitioner excluded from the mails as operating a scheme to defraud.[19] The issue as formulated by the court was whether or not the clearly established "facts" of the case could properly be said to constitute "fraud," within the meaning of the statute—just as in the *Esquire* case the question seemed to be whether or not what was in fact published was "literature." The court itself thereupon reviewed the facts and repudiated the Postmaster General's findings.[20]

The Court of Appeals was able to dispose of the Postmaster General's order in the *Esquire* case on an even clearer ground than mere abuse of discretion—on the ground that he had acted where he possessed no discretion. Its decision, by Arnold, J., is concise and to the point:

upset the order of the Postmaster General is greater than that which would be required in a de novo trial of guilt in a court of law; and consequently if the proof of guilt here had been such as to which reasonable men might differ, the irregularity in the administrative proceeding, if there was irregularity, would have presented the case in a different aspect and made necessary a decision on the constitutional question as to which we express no opinion. But appellants in the lower court satisfied themselves as to this phase of the case by filing the transcript of testimony taken in the proceeding in the Department, and the judge of the trial court examined that testimony and reached the conclusion, and so found as a fact, that there was ample evidence tending to show the fraudulent nature of plaintiffs' scheme."

[18] 187 U.S. 94, 23 S. Ct. 49 (1902).

[19] Rev. Stat. 3929, "The Postmaster General may, *upon evidence satisfactory to him* that any person is engaged in conducting . . . any other scheme or device for obtaining money through the mails by means of false or fraudulent pretenses . . ." exclude letters from the mail. Italics added.

[20] Post Publishing Co. v. Murray, (C.C.A. 1st, 1916) 230 F. 773, cert. denied, 241 U.S. 675, 36 S. Ct. 725; action for relief from order of Postmaster in excluding from mail as a lottery; "The exercise of executive power, like that of excluding newspapers and other publications from the mails, is highly arbitrary in its character, and can only be justified where the statute is clearly applicable to the supposed objectionable publication"; relief from order granted. Postmaster General's action actually reviewed, though not reversed, Houghton v. Payne, 194 U.S. 88, 24 S. Ct. 590 (1904); Bates and Guild Co. v. Payne, 194 U.S. 106, 24 S. Ct. 595 (1904); Smith v. Hitchcock, 226 U.S. 53, 33 S. Ct. 6 (1912).

See also Brooklyn Daily Eagle v. Voorhies, (C.C.N.Y. 1910) 181 F. 579, action of postmaster reviewed and reversed.

Lewis Publishing Co. v. Wyman, (C.C.Mo. 1907) 152 F. 787, "Federal courts have jurisdiction to reexamine the action of the Postmaster General in denying a periodical publisher the right to have his publication mailed as second-class matter, when it is asserted that such executive officer acted without authority of law or in excess of the power granted to him by Congress." Syllabus, p. 787. People's United States Bank v. Gilson, (C.C.A. 8th, 1908) 161 F. 286, making a differentiation between review of a finding of fact and review of the Postmaster General's conclusions therefrom. So also Leach v. Carlile, 258 U.S. 138, 42 S. Ct. 227 (1922).

"The theory of the ruling depriving Esquire of second-class mailing privileges, while at the same time permitting it to be mailed at higher rates, is stated by the Postmaster General as follows: 'A publication to enjoy *these unique mail privileges*[21] ... is bound to do more than refrain from disseminating material which is obscene or bordering on the obscene. It is under a positive duty to contribute to the public good and the public welfare.'

"No doubt such a duty exists. But it does not follow that an administrative official may be delegated the power first to determine what is good for the public to read and then to force compliance with his ideas by putting editors who do not follow them at a competitive disadvantage. It is inconceivable that Congress intended to delegate such power to an administrative official or that the exercise of such power, if delegated, could be held constitutional....

"... The key to an understanding of this extraordinary contention is found in the Postmaster General's reference to second-class mailing rates as 'unique privileges.' He appears to think of his duty under the statute, not as administration of nondiscriminatory rates for a public service, but as analogous to the award of the Navy E for industrial contributions to the war. The Navy E is an award for exceptional merit. The second-class mailing rate is conceived by the Post Office to be an award for resisting the temptation to publish material which offends persons of refinement.

"But mail service is not a special privilege. It is a highway over which all business must travel. The rates charged on this highway must not discriminate between competing businesses of the same kind. If the Interstate Commerce Commission were delegated the power to give lower rates to such manufacturers as in its judgment were contributing to the public good the exercise of that power would be clearly unconstitutional. Such a situation would involve freedom of competitive enterprise. The case before us involves freedom of speech as well.

"Little more need be said to decide this case. Nevertheless, since we hope that this is the last time that a government agency will attempt to compel the acceptance of its literary or moral standards relating to material admittedly not obscene, the voluminous record may serve as a useful reminder of the kind of mental confusion which always accompanies such censorship."

The court then sets forth at length some of the rather amazing, and if it were not so serious, amusing testimony.

[21] Emphasis supplied by Arnold, J.

"The three examples cited above effectively illustrate the intellectual standards required for the kind of censorship exercised in this case.

"We intend no criticism of counsel for the Post Office. They were faced with an impossible task. They undertook it with sincerity. But their very sincerity makes the record useful as a memorial to commemorate the utter confusion and lack of intelligible standards which can never be escaped when that task is attempted. We believe that the Post Office officials should experience a feeling of relief if they are limited to the more prosaic function of seeing to it that 'Neither snow nor rain nor heat nor gloom of night stays these couriers from the swift completion of their appointed rounds.' *Reversed and Remanded*."[22]

*John B. Waite**

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[22] The lack of authority in an executive officer to expand or narrow a statute, if it were ever reasonably doubted, would seem to have been clearly determined by Morrill v. Jones, 106 U.S. 466, 1 S. Ct. 423 (1882), repudiating a secretary of the treasury's ruling that statutory permission for importation of animals "for breeding purposes" was limited to breeding animals of "supreme stock." This, said the court, "is manifestly an attempt to put into the body of the statute a limitation which Congress did not think it necessary to prescribe."

See also Payne v. National Railway Pub. Co., 20 App. D. C. 581 (1902), holding that the Postmaster General could not limit "information of a public character" to merely current news.