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German marks payable *in this country*. The overwhelming mass of decisions follows the rule, as set down in the above cases, that if the contract is payable in foreign currency and in a foreign country the rate of exchange shall be computed as of the date of judgment but, where the contract is payable in foreign money in this country, the exchange shall be figured as of the date of breach.[4]

Why should there be this distinction between the two types of cases? In the *Deutsche Bank* case, Mr. Justice Holmes points out, "An obligation in terms of the currency of a country takes the risk of currency fluctuations and whether creditor or debtor profits by the change the law takes no account of it. . . . Here we are lending our Courts to enforce an obligation . . . arising from German law alone and ought to enforce no greater obligation than exists by that law. . . ."[5] It is obvious that by converting the currency according to the rate of exchange existing at the time of the judgment the plaintiff gets that for which he bargained in the foreign currency. This justifies the holding in the *Deutsche Bank* case, but why is there a difference when the contract is performable or payable in this country? The Court points out in the *Hicks case* that when the contract is performable here the plaintiff has the option, upon the breach by the defendant, to demand damages in dollars and can no longer be compelled to accept foreign currency.[6] Thus the courts, by assuming the exercise of such option, conclude that the rate of exchange to be used in this type of case is that which prevailed at the time of the breach.

The results reached in these cases would appear to be most equitable. When the action arises wholly out of foreign law and our courts are lent merely for the enforcement thereof, the injured party gets exactly what he bargained for—or, to be more exact, its equivalent in American currency. On the other hand, when the plaintiff's cause of action arises here in the United States, he receives his damages as of the date of breach.

CRIMINAL LAW — PROCEDURE — DISCOVERY — PRIVILEGE AGAINST DISCLOSURE OF IDENTITY

Defendants, charged with conspiracy to violate the Smith Act,[1] moved for issuance of a subpoena *duces tecum* directing the United States Attorney

4. Deutsche Bank Filiale Nurnberg v. Humphrey, 272 U.S. 517 (1926); Hicks v. Guinness, 269 U.S. 71 (1925); Tillman v. Russo Asiatic Bank, 51 F.2d 1023 (2d Cir. 1931); Det Forenede Dampskibs Selskab v. Ins. Co. of North America, 31 F.2d 658 (2d Cir. 1929); The Integritas, 3 F. Supp. 891 (D. Md. 1933); Royal Ins. Co. v. Compania Trasatlantica Española, 57 F.2d 288 (E.D. N.Y. 1932); The Muskegon, 10 F.2d 817 (S.D. N.Y. 1924). The English view holds that in all cases the rate of exchange is to be computed as of the date of breach, Société des Hôtels v. Cummings, [1921] 3 K.B. 459, *rev'd on other grounds*, [1922] 1 K.B. 451.

5. Deutsche Bank Filiale Nurnberg v. Humphrey, 272 U.S. 517, 519, 520 (1926).

6. Hicks v. Guinness, 269 U.S. 71, 80 (1925).

1. 62 STAT. 808 (1948), 18 U.S.C. § 2385 (Supp. 1951) (advocating and teaching the duty and necessity of overthrowing the Government of the United States by force and violence).

to produce all documents, books, papers and objects, obtained by counsel, in any manner, other than by seizure or process.[2] The Government refused to comply upon the ground that "compliance would be unreasonable"[3] and moved to modify the subpoena to provide "adequate safeguards . . . to protect against disclosure of identity of the informants. . . ." *Held*, public policy forbids disclosure of informants' identities under the discovery provision[4] of the Federal Rules of Criminal Procedure. *United States v. Schneiderman*, 104 F. Supp. 405 (S.D. Cal. 1952).

Prior to the adoption of the Federal Rules of Criminal Procedure,[5] it was doubtful if discovery existed in criminal cases.[6] The courts, however, did grant the defendant an opportunity to inspect impounded documents belonging to him.[7] Rule 16[8] restates this procedure and in addition permits discovery of objects and documents obtained from others by seizure or process, on the theory that the evidential matter would have been available to the defendant.[9] But Rule 16, providing for pre-trial discovery, is discretionary[10] and is the *only* rule providing for discovery.[11]

In the instant case, the defendants sought to view reports and Communist Party membership cards which would reveal the identity of the informants.[12] Generally, "public policy forbids disclosure of an informer's identity unless essential to the defense."[13] The privilege applies only to the identity of the informant, not to the information supplied.[14] In anti-trust actions, however, both the informants' identities and the contents of their state-

2. Bowman Dairy Co. v. United States, 341 U.S. 214, 217 (1951); United States v. Maryland & Va. Milk Producers Ass'n, 9 F.R.D. 509 (D. D.C. 1949).

3. FED. R. CRIM. P. 17(c) (provides for subpoena for the production of documentary evidence, further providing that the court "may quash or modify the subpoena if compliance would be unreasonable and oppressive.")

4. FED. R. CRIM. P. 16.

5. 54 STAT. 688 (1940), 18 U.S.C. § 3771 (Supp. 1951) as amended, 55 STAT. 779 (1941), 18 U.S.C. §§ 3771, 3772 (Supp. 1951) and 56 STAT. 271 (1942), 18 U.S.C. § 3731 (Supp. 1951).

6. Shores v. United States, 174 F.2d 838 (8th Cir. 1949); United States v. Rosenfeld, 57 F.2d 74 (2d Cir. 1932), *cert. denied* 286 U.S. 556 (1933); Rex v. Holland, 4 T.R. 691, 100 Eng. Reprint 1248 (1792). See Notes of Advisory Committee on Rules, FED. R. CRIM. P. 16, 18 U.S.C.A. at page 224; 6 WIGMORE, EVIDENCE § 1845 (3d Ed. 1940).

7. United States v. Goedde, 40 F.Supp. 523 (E.D. Ill. 1941).

8. FED. R. CRIM. P. 16 (provides for the discovery of "designated books, papers, documents or tangible objects . . . upon a showing that the items sought may be material to the preparation of his defense.")

9. See Notes of Advisory Committee on Rules, FED. R. CRIM. P. 17(c), 18 U.S.C.A. at page 224; United States v. Black, 6 F.R.D. 270 (N.D. Ind. 1946) (limits material that is subject to seizure under Rule 16 to material that was in existence prior to the government's obtainment of it by process or service).

10. United States v. Schiller, 187 F.2d 572 (2d Cir. 1951).

11. *See* Bowman Dairy Co. v. United States, 341 U.S. 214, 220 (1951) ("Rule 17(c) was not intended to provide an additional means of discovery").

12. 21 U.S.L. WEEK 2069 (Aug. 5, 1952).

13. Scher v. United States, 305 U.S. 251, 254 (1938); Sorrentino v. United States, 163 F.2d 627 (9th Cir. 1947); United States v. Li Fat Tong, 152 F.2d 650 (2d Cir. 1945); Wilson v. United States, 59 F.2d 390 (3d Cir. 1932); Smith v. United States, 9 F.2d 386 (9th Cir. 1925).

14. 8 WIGMORE, EVIDENCE § 2374 (3d Ed. 1940).

ments have been held privileged.[15] *Bowman Dairy Co. v. United States,*[16] relied on by this court, reaffirmed the general rule that all material admissable as evidence, obtained by the Government through solicitation or volunteered by third persons, is subject to subpoena, but the court should be "solicitous to protect against disclosures of the identities of the informants."[17]

Defendants contend that such confidential informants "promise to become something more than mere informers."[18] They have testified before the grand jury and will probably be called as witnesses at the trial. The Government may finally elect not to use a given document rather than reveal the identity of an informant.[19] Writings not used at the trial but which have been presented to the grand jury are also protected from disclosure by a strong policy favoring secrecy of grand jury proceedings.[20] Furthermore, the denial of pre-trial inspection does not preclude further discovery during the trial.[21]

Only persons charged with treason or other capital offenses can demand as a matter of right a list of witnesses prior to the trial.[22] The court can take appropriate measures[23] to protect the rights of the defense in event of undue surprise during the course of the trial. Defendants' discovery of reports revealing the identity of informants would have afforded them a list of the Government's witnesses. This list is not essential to the defense, but would enable the Communist Party to police its ranks. The court recognized this, and prevented the circumvention of an established principle of law, by defendants' use of a procedural rule.

CRIMINAL LAW — TRIAL — INSTRUCTION AS TO THE POSSIBILITY OF PAROLE AS REVERSIBLE ERROR

The jury requested the court to advise them as to the probability of the defendant serving a full life sentence without parole, if they returned a

15. United States v. Deere & Co., 9 F.R.D. 523 (Minn. 1949); United States v. Kohler, 9 F.R.D. 289 (E.D. Pa. 1949).
16. 341 U.S. 214 (1951).
17. *Ibid* at 221.
18. Sorrentino v. United States, 163 F.2d 627 (9th Cir. 1947); Wilson v. United States, 59 F.2d 390 (3d Cir. 1932).
19. United States v. Coplon, 185 F.2d 629, 638-639 (2d Cir. 1950); United States v. Krulewitch, 145 F.2d 76, 78-79 (2d Cir. 1944); United States v. Andolschek, 142 F.2d 503, 506 (2d Cir. 1944).
20. Goodman v. United States, 108 F.2d 516 (9th Cir. 1939); Metzler v. United States, 64 F.2d 203 (9th Cir. 1933); United States v. Amazon Industrial Chemical Corp., 55 F.2d 254, 261 (D. Md. 1931).
21. Shores v. United States, 174 F.2d 838, 844 (8th Cir. 1949); United States v. Krulewitch, 145 F.2d 76, 78 (2d Cir. 1944).
22. 62 STAT. 831 (1948), 18 U.S.C. § 3432 (Supp. 1951).
23. Rubio v. United States, 22 F.2d 766, 768 (9th Cir. 1927), *cert. denied* 276 U.S. 619 (1928) (The court had power to grant a continuance or a new trial upon a proper showing that the defendant's rights were not safeguarded because of surprise).