File

Published by Executive Office for United States Attorneys,
Department of Justice, Washington, D. C.

November 2, 1962

United States

DEPARTMENT OF JUSTICE

Vol. 10 No. 22

UNITED STATES ATTORNEYS

BULLETIN

UNITED STATES ATTORNEYS BULLETIN

Vol. 10 November 2, 1962 No. 22

ANTITRUST DIVISION

Assistant Attorney General Lee Loevinger

CLAYTON ACT - SHERMAN ACT

Restraint of Trade; Elimination of competition - Refined Petroleum Products. United States v. Richfield Oil Corporation, et al. (S.D. Calif.). On October 9, 1962, a civil antitrust complaint was filed charging violations of Section 1 of the Sherman Act and Sections 7 and 8 of the Clayton Act. Named as defendants are Richfield Oil Corporation, Cities Service Company, Sinclair Oil Corporation, H. L. O'Brien, B. W. Watson, J. Ed. Warren, P. C. Spencer and E. L. Steiniger. Also named as defendants are Sinclair Delaware Corporation, a wholly-owned subsidiary of Sinclair, and Empire Gas & Fuel Company, a wholly-owned subsidiary of Cities Service. Each subsidiary holds beneficially for its parent approximately 30% of the Richfield common stock outstanding.

The complaint alleges that beginning at least as early as January, 1936, and continuing thereafter to date, Cities Service, Sinclair, and Richfield have been and are engaged in combination and conspiracy in unreasonable restraint of trade and commerce in the marketing of refined petroleum products in violation of Section 1 of the Sherman Act. The substantial terms of the allegedly illegal agreement have been (1) that Cities Service and Sinclair will not compete with each other or with Richfield in the marketing of refined petroleum products in the six-state area of California, Oregon, Washington, Idaho, Nevada and Arizona and (2) that Richfield will not compete with Cities Service or Sinclair in the marketing of refined petroleum products outside the six-state area. (Richfield has been marketing refined petroleum products solely within the six-state area since at least 1936, while Cities Service and Sinclair have been marketing such products outside the six-state area in most states in the United States for many years.)

The Section 7 Clayton Act count alleges that over a period of years, beginning in approximately 1936, Cities Service and Sinclair each acquired and presently owns substantial amounts of stock in Richfield and that through such stock interests and representation of the Richfield Board of Directors, Cities Service and Sinclair have dominated and continue to dominate the management of Richfield.

The complaint further alleges that beginning in or about 1937, and for each year thereafter, directors of Cities Service and Sinclair have been at the same time directors of Richfield in violation of Section 8 of the Clayton Act. At the time the complaint was filed, the individuals named as defendants simultaneously held positions as directors of Richfield and of Cities Service or Sinclair.

The effects listed by the complaint as flowing from the Clayton and Sherman Act violations include: (1) the elimination and prevention of substantial competition between Cities Service and Sinclair and between either

of them and Richfield in the marketing of refined petroleum products in the six-state area; (2) the elimination and prevention of substantial competition between Richfield, on the one hand, and Cities Service and Sinclair, on the other, in the marketing of refined petroleum products in states outside the six-state area; (3) the substantial lessening of competition between Richfield, on the one hand, and Cities Service and Sinclair, on the other, in the marketing of automotive gasoline in the six-state area, and (4) an increase in concentration in, or control by the major oil companies over the production and refining of crude oil and the marketing of refined petroleum products in and outside the six-state area.

The complaint asks, among other things, that Cities Service, Sinclair, and Richfield be perpetually enjoined from participating in any practice having the purpose or effect of continuing the market allocation; that Cities Service and Sinclair be required to divest themselves of Richfield stock; that the above-named individuals be ordered to resign their directorships in Richfield, and that Richfield, Cities Service and Sinclair each be perpetually enjoined from permitting to be elected or allowing to serve as director any person who is at the same time a director of a competitor engaged in interstate commerce.

Staff: Harry W. Cladouhos, David R. Melincoff, Charles W. K. Gamble and Leonard M. Berke. (Antitrust Division)

Judgments Entered In Philadelphia Electrical Cases. (E.D. Pa.) On October 1, 1962, Judge J. Cullen Ganey signed eighteen consent judgments in twelve of the nineteen Philadelphia electrical equipment civil cases. Entry of these judgments closed out only ten of the cases since H. K. Porter Company had not consented to judgments in two of the cases.

One judgment entered was applicable to General Electric Company only and, by stipulation, the Court approved dismissal as to GE of the complaints in seventeen of the cases. The GE judgment applies to (1) all of the eighteen products in cases in which GE was a defendant; (2) all other electrical products manufactured by GE which are of the type designed for use directly in the generation, distribution or transmission of electric energy; and (3) electric rotating motors and generators. The GE judgment plus the stipulations thus ends all of the Philadelphia proceedings by the Antitrust Division against that company.

One of the judgments entered was applicable only to Westinghouse Electric Corporation and Allis-Chalmers Manufacturing Company. This judgment in the steam turbine-generator case was broadened to cover all electric rotating motors and generators.

As to the content of the judgments, while they vary in terms, their format is about the same. Enjoined are agreements with other manufacturers or sellers to fix prices, rig bids, allocate customers, give advance notice with respect to bids or their terms, or exchange price information. All of the judgments require review of defendants' agreed upon prices, some require sending copies of the judgments to past customers and notifying

periodically Governmental authorities that upon request the defendants must submit affidavits of non-collusion with each bid.

Of some significance, in aid of less-than-full-line manufacturers, a few of the judgments enjoin defendants from refusing to sell certain items of equipment to a manufacturer or assembler if the defendant sells that equipment to another manufacturer or assembler.

Staff: Donald G. Balthis, John E. Sarbaugh, Walter L. Devany, Morton M. Fine, John J. Hughes, Stewart J. Miller, Baddia J. Rashid and William D. Kilgore, Jr. (Antitrust Division)

* * *

CIVIL DIVISION

Acting Assistant Attorney General Joseph D. Guilfoyle

STATUTES

Jurisdiction of Federal District Courts (Public Law 87-748, approved October 5, 1962).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That chapter 85 of title 28 of the United States Code is amended ----

(a) By adding at the end thereof the following new section:

§ 1361. Action to compel an officer of the United States to perform his duty.

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

(b) By adding at the end of the table of sections for chapter 85 of title 28 of the United States Code the following:

§ 1361. Action to compel an officer of the United States to perform his duty.

SEC. 2. Section 1391 of title 28 of the United States Code is amended by adding at the end thereof the following new subsection:

(e) A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, may, except as otherwise provided by law, be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action.

The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.

Public Law 87-748 amends the Judicial Code (1) to confer upon all federal district courts jurisdiction in all actions in the nature of

mandamus against any officer or employee of the United States, and (2) to permit service to be had in such actions by certified mail beyond the territorial limits of the district.

An extensive memorandum on this important enactment is presently being prepared for distribution to all United States Attorneys.

COURTS OF APPEALS

NATIONAL SERVICE LIFE INSURANCE

Insured's Ignorance of Existence of Disease and Its Totally Disabling Effect May Constitute "Circumstances Beyond His Control" Sufficient to Excuse His Failure to Make Timely Application for Waiver of Premiums. Hazel D. Klish v. United States (C.A. 5, October 2, 1962). Appellant brought this action as beneficiary of two National Service Life Insurance policies. Her complaint alleged that the insured paid premiums on the policies up to August 1, 1958, but not thereafter. On that date, the complaint alleged, the insured was suffering from incurable cancer, a totally disabling disease, but this fact was unknown to him. Because of ignorance of his condition, the insured failed to apply for a waiver of premiums, to which he was entitled under 38 U.S.C. 712, until July 28, 1960 when he first learned of his condition. Insured also filed a nonmedical application for reinstatement on May 16, 1960. Both applications were denied by the Veterans Administration and appellant brought this action as beneficiary of the policies. The district court granted judgment on the pleadings on the grounds that the application for reinstatement was not timely filed and that, as a matter of law, the ignorance of the insured that he had a serious disease entitling him to a waiver of premium because of total disability was not a "circumstance beyond his control" excusing the requirement that he make application for waiver of premiums within one year after the premium was due.

On appeal, the Fifth Circuit reversed. The Court agreed that the application for nonmedical reinstatement was not timely filed, but held that lack of knowledge of the existence of a disease or its seriousness and effect and lack of knowledge of total disability arising in the life of the policy may, as a matter of fact, be found to be due to circumstances beyond the control of the insured and, hence, excuse the failure to make timely application for waiver.

Staff: United States Attorney Floyd M. Buford and Assistant United States Attorney Truett Smith (M.D. Ga.)

PACKERS AND STOCKYARDS ACT

Agreement between Competitive Buyers to Split or Share Purchase of Top Grade Livestock Violates Section 202 of Packers and Stockyards Act; Dissemination of Price Information by Packer to Country Dealers is Not Illegal per se, But Violates Section 202 of Act Only if Done For

Purpose of Limiting Competition, Manipulating Livestock Prices, or Controlling Movement of Livestock. Swift & Company v. United States (C.A. 7, October 11, 1962). Petitioner, a meat packing company, sought to set aside an order issued by the judicial officer of the Department of Agriculture prohibiting as violations of Sections 202 and 401 of the Packers and Stockyards Act, 7 U.S.C. 192 and 221, certain practices of petitioner in the purchase of livestock. The judicial officer found that petitioner entered a country auction market and began competing with country dealers for the purchase of top grade livestock. The competition resulted in an increase in the price paid to farmers for such livestock. Petitioner and a country dealer therefore entered into an agreement that the country dealer would furnish to petitioner whatever quality of livestock petitioner wanted at the price paid by the country dealer plus trucking charges. The judicial officer also found that petitioner disseminated to country dealers information as to the price it would pay for various types and groups of livestock prior to the time the dealers would make their purchases. Both these practices were condemned by the judicial officer and prohibited by his order.

On appeal, the Seventh Circuit granted the petition to set aside that portion of the order prohibiting the dissemination of price information to country dealers, but denied the petition to set aside that portion of the order prohibiting the petitioner from entering into any agreement with country dealers to split or share the purchase of top grade livestock. The Court held that the dissemination of price information to country dealers in not illegal per se, but only if done for the purpose of restricting or limiting competition, manipulating livestock prices, or controlling the movement of livestock. Since there was no record evidence and no finding that the purpose of the dissemination of price information by petitioner was other than to consummate a sale, there was no illegal practice to prohibit. As to the agreement between competitive buyers to split or share the purchase of top grade livestock, however, the Court held that the essential nature and necessary result of such an agreement or practice was to eliminate competition and was properly prohibited.

The Court also rejected petitioner's contention that the nationwide scope of the order was unnecessarily broad because the violations found were limited to a four state area. The Court held that the nature of sanctions imposed must be left largely to the regulatory agency unless there are serious reasons for limitation.

Staff: Neil Brooks, Assistant General Counsel, Department of Agriculture.

UNIVERSAL MILITARY TRAINING AND SERVICE ACT

Veteran Who Enters Military Service While Apprentice, and Who Completes Apprenticeship After Honorable Discharge, Held Not Entitled to Retroactive Seniority from Date He Would Have Completed Apprenticeship Had He Not Entered Service. Missouri Pacific Railroad Co. v. Brooks (C.A. 8, October 11, 1962). A veteran entered the armed forces while he was serving a 1040 day apprenticeship period with the appellant

railroad. After his honorable discharge, he returned to his former employment and completed the apprenticeship period. The veteran brought this action to have his seniority as a journeyman computed from the date he would have completed his apprenticeship had he not entered the service, instead of from the date that he actually completed it. The veteran argued that he was entitled to his retroactive seniority because the evidence indicated that because of a shortage of qualified journeymen, he automatically would have been employed as a journeyman had he not entered the service. The Court denied the veteran's claim on the ground that advancement from apprentice to journeyman was not automatic but depended on the railroad's discretionary choice.

Staff: John G. Laughlin (Civil Division)

DISTRICT COURTS

FALSE CLAIMS ACT

Judgment Includes Interest on Single Damages. United States v. Zuckerberg (N.D. Indiana, October 8, 1962). A suit commenced by the United States in 1957 contained a count under the False Claims Act, 31 U.S.C. 231, demanding double damages and forfeitures based on defendant's fraudulent performance in 1952-1953 of a contract with the Army Corps of Engineers for the supply of floating treadway bridges. The Court found after trial that the False Claims Act had been violated, that the Government's "single damages" amounted to $42,046.28, and that defendant had submitted eight false vouchers for partial payment under the contract. The Court therefore held that the Government was entitled to judgment for $84,092.56, representing double damages, plus $16,000, representing eight statutory forfeitures. In addition, the Court concluded that plaintiff having been induced by fraudulent representations of the defendant to pay money to him, interest computed from the time the money was wrongfully received by the defendant will be included in the judgment. Since the amount of damages to the United States through the overpayment was not ascertainable until the contract was terminated on June 3, 1953, interest on the amount of overpayment in the sum of forty-two thousand forty-six dollars and twenty-eight cents ($42,046.28) should be charged only from that date.

Staff: United States Attorney Alfred W. Moellering, and Assistant United States Attorney Joseph F. Eichhorn (N.D. Indiana)

* * *

CIVIL RIGHTS DIVISION

Assistant Attorney General Burke Marshall

Racial Discrimination in Airports. United States v. City of Shreveport, et al. (W.D. La.) The United States filed an action to enjoin the City of Shreveport from maintaining racial designations on the restroom doors at the Shreveport Municipal Airport, and to enjoin Dobbs House, Inc. from discriminating against Negroes in the airport restaurant service. The complaint asserted that the discriminatory conduct of the defendants imposed an unconstitutional burden upon interstate commerce and violated the non-discrimination provision of the Civil Aeronautics Act (49 U.S.C. 316(d)).

On October 15, 1962, District Judge Ben C. Dawkins, Jr. rendered judgment for the United States upon the basis of facts previously stipulated to between the parties. The Court concluded that segregated restrooms and segregated dining facilities, whether required by state statutes or existing as the result of municipal or individual action, imposed an undue burden upon interstate commerce. While rejecting a Government contention that the city and restaurant operator were "air carriers" within the meaning of 49 U.S.C. 1301(3), the Court concluded that the facilities and services which they offered were an "integral part" of interstate commerce and were therefore subject to the non-discrimination provisions of the Act under the holding in Boynton v. Virginia, 364 U.S. 454 (1960). The Government was given until October 30 to submit proposed findings, conclusions, and a decree.

Staff: United States Attorney Edward L. Shaheen (W.D. La.) and St. John Barrett (Civil Rights Division).

* * *

CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

BANKRUPTCY
18 U.S.C. 152, par. 6.

Concealment of Corporate Assets in Contemplation of Bankruptcy. United States v. Blalock, et al. (W.D. Ark., September 13, 1962). On May 24, 1962, an indictment was returned against nine defendants charging them with unlawfully transferring and concealing valuable assets of Villa Mobile Homes Manufacturing Corporation, at a time when the officers of the Corporation were contemplating bankruptcy, in violation of 18 U.S.C. 152, paragraph 6.

Four of the defendants moved to dismiss the indictment contending that it does not allege that the defendants were officers or agents of the Corporation at the time the alleged acts occurred. They further argued the legislative history of Section 152 indicates that Congress, in amending paragraph 6, was concerned primarily with imposing penal liability upon an individual who might dispose of his personally owned property in contemplation of his personal bankruptcy, which liability did not exist under paragraph 6 as originally drawn. Thus, they argued that the amendment did not reach them as they had done nothing in contemplation of bankruptcy proceedings by or against themselves personally.

The Court did not accept this argument and overruled the motion. It stated that under the 1960 amendment, the statute is plain and unambiguous, and that despite the legislative intent motivating the amendment, the language of paragraph 6 is broad enough to cover any person, without regard to his status or proprietary interest in the contemplated bankrupt. Thus the Court's decision precludes a hiatus in which persons can depredate the assets of a contemplated bankrupt corporation with impunity.

NATIONAL MOTOR VEHICLE THEFT ACT

Conviction Obtained Based on Transportation Only of Rear Half of Stolen Automobile. United States v. Keith L. Register (S.D. Iowa). Defendant was convicted by a jury on all counts of an indictment under 18 U.S.C. 2312, 2313 and 371 based on interstate transportation of portions of stolen motor vehicles. In one stolen vehicle the engine and transmission were replaced by salvaged parts, and in another the front end assembly, engine and transmission were replaced by parts legitimately obtained. In still another instance, the top of a stolen automobile was removed and a cut was made through the frame in the area of the front seat, the rear half of the vehicle being transported interstate. The front half of the vehicle was disposed of in the same state in which it was stolen.

Regarding the latter vehicle, the District Court felt it was justified in submitting the evidence to the jury inasmuch as this was the type of operation which Congress sought to control by the Dyer Act, and because a defendant should not be permitted to avoid conviction by piecemealing the transportation and sale of the stolen vehicle.

Neither the legislative history of the Act nor reported decisions revealed by our research aids in defining or determining what part or parts in combination comprise an automobile or motor vehicle as those terms are used in 18 U.S.C. 2311 and 2312. Section 2311 simply states that "motor vehicle" includes an automobile or any other self-propelled vehicle designed to run on land but not on rails. The opinion in Williams v. United States, (C.A. 8, 1959) 272 F. 2d 40, affirming conviction involving a salvaged body substituted for the body of the stolen vehicle, made no mention of any question raised concerning identity of the vehicle transported interstate.

Consequently, the instant case is the first to our knowledge in which the evidence showing interstate transportation of a non-self-propelling portion of the stolen car was submitted to the jury as proof of interstate transportation of a stolen motor vehicle. Sentence has not yet been imposed, and the possibility of appeal by defendant is noted.

Staff: United States Attorney Donald A. Wine (S.D. Iowa)

FRAUD BY WIRE

Conspiracy; Sufficiency of Evidence. United States v. Whiting, et al. (C.A. 2, September 20, 1962). Appellants were found guilty after a jury trial on three substantive counts charging violations of 18 U.S.C. 1343 by sending cables between New York City and Rio de Janeiro and one count of conspiracy to send the fraudulent cables. Each defendant received a prison term.

Apart from claims of erroneous and prejudicial rulings, the appeal was based primarily on the sufficiency of the evidence. All issues were resolved against appellants. The Court found these facts.

In August 1960 appellant Sarnitz approached defendants Kunz and Mari, employees of Bank of America International in New York with an offer of money for sending a cable from the bank to Banco de Brazil in Rio de Janeiro using a confidential international cable code. The offer was accepted, meetings were held and telephone calls placed to appellant Whiting in Rio de Janeiro. A cable, first naming Whiting and later appellant Crowe as beneficiary, was drafted. The cable which was the basis of count one was transmitted to Brazil indicating receipt in New York of a $3,000,000 payment order which at the instructions of Crowe as beneficiary was to be transferred and credited to the Brazil Bank "or your

assignee". The message was repeated five times each in the amount of $3,000,000 and a sixth time in an amount of $5,000,000 totalling $20,000,000. A return cable requested confirmation but Whiting in Brazil sent a cable to New York, which was the basis of the second count, to disregard and cancel such request. The next day in New York Sarnitz sent a cable to Brazil, the basis of the third count, after first learning the confidential code for that day from Kunz confirming payment orders in all particulars except the reference to "or your assignee". When the Brazil bank again cabled for confirmation the Bank of America instituted an investigation leading to defendants' arrest.

It was concluded from the above that the jury could find 1) a scheme to defraud the interested banks by means of false representations, 2) the defendants caused the sending of communications in interstate or foreign commerce for the purpose of executing such scheme, and 3) they acted as part of an illegal conspiracy.

Staff: United States Attorney Vincent L. Broderick; Assistant United States Attorney Arnold N. Enker (S.D. N.Y.)

MOTION TO VACATE

Motion to Vacate Denied after Full Inquiry into Mental Status of Petitioner at Time of Entry of Plea of Guilty. United States v. Herold Wayne Davis (C.A. 6, May 15, 1962). In support of his motion to vacate, appellant relied exclusively upon an order of a state court dated May 20, 1941, stating that he was mentally ill and insane. Appellant contended the fact that this order was never set aside, modified or vacated raises a presumption of his mental incapacity at the time of his plea of guilty in 1958. However, at neither the time that the plea of guilty was entered nor at the time sentence was imposed was mention made of appellant's prior alleged mental incapacity.

The district court denied appellants motion. In reaching its decision the trial court had the benefit of a psychiatric report, prepared pursuant to 18 U.S.C. 4245, in which the Alcatraz Psychiatric Board found that appellant was mentally competent at the time of his trial. In addition, prior to a hearing on the motion to vacate, the court appointed two qualified psychiatrists to examine appellant. These psychiatrists likewise found no evidence of mental illness having existed on March 12, 1958, the date of sentencing. The district court also reviewed a Department of the Army communication dated April 4, 1944, which recounted appellant's statements that he had feigned his mental illness in 1941 in order to avoid serving the rest of his prison sentence.

The Court of Appeals, in affirming the district court's denial of appellant's motion, indicated that the legal requirement of Frame v. Hudspeth, Warden, 309 U.S. 632, upon which appellant relied, requires

only that the district court make "full inquiry into the mental status of the petitioner at the time he entered the pleas of guilty." The Court of Appeals concluded that the district court completely afforded appellant that right, and affirmed the findings of the district court as "not clearly erroneous."

* * *

INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Subversive Activities Control Act of 1950; Registration of Communist-action Organizations. United States v. Communist Party, U.S.A. (Dist. Col.). The Communist Party was indicted on December 1, 1961, for failure to register as a "Communist-action" organization in accordance with the Internal Security Act of 1950 (See United States Attorneys Bulletin, Volume 9, No. 25, p. 731). In pre-trial motions filed January 1962, the Party moved to dismiss the indictment alleging inter alia, that the Act was unconstitutional in that it violates the self-incrimination clause of the Fifth Amendment, denies the defendant a trial by jury on the issue of whether or not it was a Communist-action organization, and that its cumulative penalties constitute cruel and unusual punishment. It was also alleged that the registration forms promulgated by the Attorney General violate the First Amendment by requiring a public confession of guilt. A separate motion was made to dismiss on the grounds of the presence of Government employees on the grand jury, or, in the alternative, for a hearing on the qualifications of the grand jurors. Motion was also made for the right to challenge for cause any petit juror solely on the grounds of Government employment or, in the alternative, for a hearing on the qualifications of the petit jury panel. The answering memoranda of the Government were filed February 1962, and the motions were called on October 12, 1962. The District Court, Judge Curran, denied all motions, and trial date has been set for December 11, 1962.

Staff: F. Kirk Maddrix and Robert L. Keuch (Internal Security Division)

* * *

LANDS DIVISION

Assistant Attorney General Ramsey Clark

Report on Small Tract Program in Eastern District of Oklahoma

During the last nine fiscal years the Eastern District of Oklahoma had closed a total of 729 tracts, as a result of which a large backlog of condemnation cases had accumulated. During the week of October 8, 1962, judgments determining compensation were entered as to 774 tracts, 685 of which resulted from the prosecution of a well-organized "small tract" program. The 685 small tract judgments entered involved a total of 2852 interests, and required the mailing of notices to 1195 persons. Not content to rest on their laurels, United States Attorney Ed Langley and Assistants Jim Conrad and Bruce Green have set for November 5th an additional 191 small tracts, involving 487 individuals and 764 separate interests. By the end of November, United States Attorney Langley reports that he will have no small tract pending which was filed prior to June 22, 1962. Attention then will be directed to the preparation and trial of larger tracts.

The details of the small tract program employed in the Eastern District of Oklahoma show what can be accomplished by hard work and good organization. After completion of service and publication where necessary, 713 tracts involving just compensation of less than $1,000 were set on October 8, 9 and 10. Without contest or by settlement 457 judgments were entered at not more than the amount of the Government's deposit and 228 were entered which involved small deficiencies, all of which were concurred in by the Corps of Engineers. Only 28 tracts were contested and a jury demanded, and it is anticipated that all but 6 of these will be settled without difficulty. This is less than 1% actual trials.

On Friday, October 12, an additional 119 tracts, all involving more than $1,000 estimated compensation were set for pre-trial. Thirty tracts were contested, and set for trial. Approximately 20 of these will be settled, according to present estimates. This is about 10% actual trials of cases exceeding $1,000, and therefore not processed as a part of the small tract program.

Full cooperation was received from the Court and the local bar, and Mr. Langley reports that the efforts made by his office in cleaning out the backlog of pending small tracts has resulted in favorable newspaper coverage. He adds also that excellent cooperation has been extended by the Corps of Engineers, without which the small tract program could not have succeeded.

Eminent Domain-Power of District Court to Dismiss Condemnation Suit-Delay in Performance of Contract to Purchase as Grounds for Termination-Contract to Purchase Terminated for Unreasonable Delay as Evidence of Value. United States v. 2,974.49 Acres of Land in Clarendon County, South

Carolina (C.A. 4, September 17, 1962.) In December 1956, the United States exercised an option to purchase land from the South Carolina Public Service Authority. One year later, and without intervening correspondence, the Authority declared the option terminated because the one-year period was an unreasonable delay. The United States, within three months, offered to complete the transaction but the Authority refused to convey. In November 1958, the United States condemned the land, relying on the option price as establishing just compensation. The issue of reasonableness of the elapsed periods was decided against the United States erroneously, in the Government's view, as based on irrelevant evidence of an increase in the value of the land and consideration of the entire period up to condemnation. The district court dismissed the condemnation suit on the grounds that a fair trial was impossible under the complaint containing the option.

The Court of Appeals reversed in part and remanded for determination of just compensation. The Court held that the district court had no power to dismiss a condemnation proceeding authorized by a constitutional statute. While affirming submission of the issue of reasonableness to a jury and confirming the jury verdict, the Court further held that the option contract, although no longer binding, could be used as evidence of value.

Staff: Edmund B. Clark (Lands Division).

* * *

TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CIVIL TAX MATTERS

Appellate Decision

Corporation Denied Nonrecognition of Gain from Sale of Fully Earned Accounts Receivable to Third Party Pursuant to Plan of Liquidation Under Section 337, I.R.C. 1954; Commissioner Sustained in Recomputation of Income from Incomplete Contract Transferred in Liquidation to Partnership Among Shareholders; Sole Shareholders Held Liable for Tax as Transferees of Liquidated Corporation. Commissioner v. Henry A. Kuckenberg, Transferee, et al.; Henry A. Kuckenberg, Transferee, et al. v. Commissioner (October 11, 1962 (C.A. 9). Pursuant to a plan of complete liquidation adopted within the previous twelve months, the Kuckenberg Construction Company, a family-owned cash basis corporation engaged in the heavy construction business, sold three construction contracts, the income from which had been fully earned, to an independent purchaser for $327,000. Under Section 337(a) of the 1954 Code, a corporation does not recognize gain or loss from the sale of "property" pursuant to a plan of liquidation adopted during the prior year. The Tax Court held that the corporation's accounts receivable were "property" and that the gains from the sale of such property were not excluded from the tax benefits of nonrecognition by any of the specific exclusion provisions of Section 337. The Ninth Circuit reversed on the grounds that the Commissioner had authority to require that the corporation's income be reported by a method which clearly reflected income and that Section 337(a) were not intended to permit a cash basis taxpayer to receive unequal and advantageous treatment over an accrual basis taxpayer by allowing him to avoid tax by an anticipatory assignment of earned income. The Tax Court's view probably would have made an inequitable tax benefit available to a substantial number of closely held cash basis taxpayers with large accounts receivable which could be discounted. The decision of the Ninth Circuit in this case apparently precludes tax benefits of the type claimed by the Kuckenbergs under Section 337 generally. Thus in Family Record Plan, Inc., et al. v. Commissioner, decided October 22, 1962, which involves a purchase of the capital stock of a cash basis taxpayer followed by a sale of accounts receivable pursuant to a plan of liquidation, the Ninth Circuit held the liquidating corporation subject to tax on its income from sale of the receivables and specifically applied the reasoning of the Kuckenberg opinion in preference to the Tax Court's reasoning in its Family Record opinion that the income was taxable to the liquidating corporation because it was not derived from a sale of "property" but of "installment obligations" within the meaning of Section 337(b).

In the Kuckenberg case the Ninth Circuit also sustained the Tax Court's decision on other issues, holding that the shareholders were liable as transferees for the corporation's tax liabilities and that the Commissioner properly had recomputed the corporation's income from an incomplete construction

contract which had been transferred in liquidation to the partnership among the shareholders which continued the corporation's business.

Staff: David O. Walter and Norman H. Wolfe (Tax Division)

District Court Decision

Injunction: Suit to Enjoin Collection of Assessment as Being Based Upon Alleged Illegal Search and Seizure Barred by Section 7421, I.R.C. 1954; Court Refused to Pass on Admissibility of Assessment Based Upon Alleged Unlawful Search and Seizure as Being Premature. Robert Turner v. Melvin J. Burton, Director (N.D. Ohio, October 2, 1962). Taxpayer instituted this suit to enjoin the District Director of Internal Revenue at Cleveland, Ohio, from collecting wagering excise taxes assessed against him of approximately $92,000. Taxpayer alleged, inter alia, that he was not in the business of accepting wagers and that whatever information was used as a basis for the assessment was obtained through an unlawful search and seizure by Cleveland police. Furthermore, that he has no adequate remedy at law and unless an injunction is granted he will suffer irreparable harm; his business and other assets will be sold at distress prices; and he will be deprived of the financial means to contest the alleged illegal taxes.

The Court in granting the Government's motion to dismiss this action as barred by Section 7421(a) I.R.C. 1954, relied exclusively on Enochs v. Williams Packing & Navigation Co., 370 U.S. 1 (1962). Noting the reliance plaintiff placed upon Miller v. Standard Nut Margarine Co., 284 U.S. 498 (1932) the Court characterized the holding in Williams Packing as an attempt by the Supreme Court to clarify the Standard Nut case "without overruling or undermining that decision." Specifically the Court held that plaintiff failed to meet the stringent test laid down in Williams Packing that the taxpayer, before he can maintain an injunction suit, must show that "under the most liberal view of the law and the facts, the United States cannot establish its claim." The Court went on to say that the term "'liberal' in this context is not to be confused with the rule of liberality toward the taxpayer as an axiom in the construction of tax laws. It can only be analogous to the test invoked in determining the propriety of granting judgment on pleadings or summary judgment." The Court noted that it was following the same sequence in making its determination as used by the Supreme Court in Williams Packing, viz., having concluded that Section 7421 was inapplicable, thereby barring "the issuance of any injunction and even the maintenance of any such suit," it was not necessary to consider the adequacy of the legal remedy.

As to the unlawful search and seizure allegation, the Court stated that this was "not the time to rule on the admissability [sic] of evidence, nor to press the Government to produce enough admissable [sic] evidence to prove the possibility of establishing its claim."

Staff: United States Attorney Merle M. McCurdy; Assistant United States Attorney Bernard J. Stuplinski (N.D. Ohio); and Frank J. Violanti (Tax Division).

* * *