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DEPARTMENT OF JUSTICE

Vol. 11 No. 2

UNITED STATES ATTORNEYS

BULLETIN

UNITED STATES ATTORNEYS BULLETIN

Vol. 11 January 25, 1963 No. 2

NEW APPOINTMENTS

The names of the following appointees as United States Attorneys have been submitted to the Senate:

Missouri, Eastern - Richard D. FitzGibbon, Jr.
New York, Southern - Robert M. Morgenthau

CASELOAD REDUCTION

The following districts had reduced or eliminated the number of criminal and civil backlog cases pending in their districts as of November 30, 1962:

Ala., S.	Ill., E.	Mo., W.	Okla., N.	Tex., S.
Alaska	Ind., N.	Mont.	Okla., E.	Tex., W.
Ark., E.	Ind., S.	Nevada	Okla., W.	Utah
Ark., W.	Kansas	N. H.	Ore.	Vt.
C. Z.	Ky., E.	N. J.	Pa., W.	Wash., E.
Conn.	La., W.	N.Mex.	P. Rico	Wash., W.
Fla., N.	Maine	N.C., E.	S. C., W.	W. Va., S.
Fla., S.	Md.	N.C., M.	Tenn., M.	Wyo.
Ga., M.	Mass.	N.C., W.	Tenn., W.	
Guam	Minn.	Ohio, S.	Tex., N.	

The following districts terminated more cases than were filed during the 5-month period ended November 30, 1962:

Ala., N.	Ga., M.	Miss., N.	Ohio, S.	Texas, W.
Ala., M.	Guam	Miss., S.	Okla., E.	Utah
Alaska	Hawaii	Mo., W.	Okla., W.	Va., E.
Ark., E.	Idaho	Nebr.	Pa., M.	W. Va., S.
Cal., N.	Ill., E.	Nev.	Pa., W.	Wis., E.
Cal., S.	Iowa, N.	N. H.	R. I.	Wyo.
C. Z.	Iowa, S.	N. Y., W.	S. C., E.	
Colo.	Ky., W.	N. C., E.	S. Dak.	
Fla., N.	La., W.	N. C., M.	Tex., N.	
Fla., S.	Md.	N. C., W.	Tex., S.	

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ANTITRUST DIVISION

Assistant Attorney General Lee Loevinger

CLAYTON ACT

Sections 7 & 8 Clayton Act Case Against Mining Company. United States v. Newmont Mining Corporation, et al. (S.D. N.Y.). On December 31, 1962, a civil action was filed against Newmont Mining Corporation, Magma Copper Company, Phelps Dodge Corporation, and four individual directors of Newmont who were also serving as directors of one of the other companies at the same time, charging violations of Section 7 and 8 of the Clayton Act.

The Complaint alleges that the acquisition and retention by Newmont of capital stock of both Magma and Phelps Dodge constitute three separate violations of Section 7 of the Clayton Act; the first involving the acquisition and retention of over 80% of the capital stock of Magma; the second, the acquisition and retention of about 3% of the capital stock of Phelps Dodge alleged to be one of the largest holdings by a single stockholder; and the third, the acquisition and retention of these stock interests by Newmont in Magma and Phelps Dodge at the same time. Each of these corporations is engaged in the production and sale of copper products, and is one of the nation's major copper producers. In 1961 Phelps Dodge was the second largest and Magma the fourth largest producers of copper ore in the United States. The complaint alleges that Newmont, Magma and Phelps Dodge are competitors and have entered into a number of contractual arrangements with each other pursuant to which they have, among other things, jointly participated in the production, distribution and sale of copper and copper products.

Newmont's 3% stock interest in Phelps Dodge is the smallest acquisition the Department has thus far attacked as violating Section 7. The complaint alleges that the acquisition and retention of this stock was not made solely for investment purposes.

The individuals named in the complaint and charged with violating Section 8 are: Plato Malozemoff, a director and president of Newmont, who also serves as a director of Magma; Roy C. Bonebrake, a director, vice president, and general counsel of Newmont, who also serves as chairman of the board and general counsel of Magma; Franz Schneider, an employee and director of Newmont, who also serves as a director of Phelps Dodge; and Kenneth L. Isaacs, who serves as a director of both Newmont and Phelps Dodge.

The complaint prays that the court order Newmont to divest itself of stock in both Magma and Phelps Dodge that it be enjoined from making further acquisitions; and that the individuals be ordered to resign their directorships in Magma and Phelps Dodge. The prayer for relief also asks for an injunction against Newmont, forbidding it from permitting any of its directors or officers to serve on the board of directors of any company not a wholly owned subsidiary which is engaged in the production or sale of copper or copper products.

Staff: Larry L. Williams and Peter A. Donovan (Antitrust Division)

SHERMAN ACT

Price Fixing-Milk; Guilty Verdict Upheld. Beatrice Foods Company v. United States (C.A. 8). The Court of Appeals affirmed the judgment of the District Court (D. Neb.), entered upon a jury verdict, that the defendant Beatrice violated Section 1 of the Sherman Act by conspiring with two other dairies to fix prices for the sale of milk to certain specified institutions located in and near Omaha, Nebraska. The co-conspirators were sentenced on pleas of nolo contendere. Beatrice moved to dismiss the indictment on the ground that the grand jury was not properly or lawfully selected; this motion was denied after a hearing. Beatrice then pleaded not guilty and moved, on an affidavit of one of its attorneys, to quash the indictment because of alleged acts of misconduct of Government attorneys before the grand jury. The case proceeded to trial. After the close of the Government's case, Beatrice moved for a judgment of acquittal and rested; the jury returned a verdict of guilty, and the Court entered judgment thereon. Beatrice renewed its motions for dismissal of the indictment and for acquittal; these motions were denied.

Defendant urged before the Court of Appeals: (1) improper selection of the grand jury, (2) misconduct of Government counsel before the grand jury, (3) insufficiency of the evidence to support the judgment, (4) error in the reception of the evidence, and (5) error in the judge's instructions.

The Court first dismissed Beatrice's challenge to the grand jury array. Defendant's attack was primarily based on the facts that the names of prospective grand jurors were obtained from sponsors, the questionnaires to prospective jurors did not cover all the qualifications listed in the pertinent statute (28 U.S.C. 1861), and that the clerk of court did not know whether the names she placed in the jury box were those of qualified persons. The Court noted that Beatrice did not allege that any particular juror on the grand jury was not qualified, that at least 300 names, as required by 28 U.S.C. 1864, were not in the jury box, or that it was individually prejudiced by the selection procedures employed; that while the method of selecting grand jurors here employed was less than perfect, it was adequate enough to withstand a challenge to the array based solely on deficiencies in the mechanics of the selective process; and that "At the very most there were mere irregularities in the selection of the grand jury which indicted Beatrice and its codefendants. In the absence of individual prejudice to the defendant, these do not justify dismissal of the indictment".

As to whether Beatrice should have been permitted access to the grand jury minutes and the indictment dismissed because of alleged misconduct of Government attorneys before the grand jury, the Court held that defendant's attorney's affidavit of abuse was insufficient to show the requisite "particularized need" (Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395) for the grand jury transcript;

that the district judge, although he need not have done so, had examined the grand jury transcript in camera, and the sitting panel of the court of appeals had also read it; and that the denial of Beatrice's motion "was not an abuse of discretion".

As to defendant's last three contentions the Court, after reviewing the Government's evidence, stated that it was sufficient to support the jury's conclusion of defendant's guilt; that, although the evidence was mostly circumstantial, there was some supporting evidence of a direct character; that Beatrice failed to introduce any evidence tending to negate the inferences of price-fixing which could be drawn from the record made by the Government; that, although the Court had doubts as to the admissibility of certain testimony, the admission thereof was "harmless error"; and that it could not say the instructions given by the trial judge did not present the issues in a form understandable to the jury.

Staff: Earl A. Jinkinson, James E. Mann, and Robert L. Eisen (Antitrust Division)

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CIVIL DIVISION

Acting Assistant Attorney General Joseph D. Guilfoyle

COURTS OF APPEALS

AGRICULTURAL ADJUSTMENT ACT

Challenge to Constitutionality of Agricultural Adjustment Act Marketing Quotas Presents No Substantial Question Warranting Three-Judge Court; Lien Provision of Act Does Not Impose Exclusive Remedy and Producer May Be Held Personally Liable for Penalties; in Absence of Showing of Existence of Proof to Contrary, It May Be Presumed That Government Officials Act Regularly and Properly; Decision of County ASC Committee Becomes Final if Dissatisfied Farmer Fails to Appeal to Review Board and Farmer Who Has Not Exhausted Review Board Remedy Cannot Seek Judicial Review of Local Committee's Determination. James Weir v. United States (C.A. 8, November 27, 1962). The United States brought this action to recover farm marketing excess penalties for defendant's over-production of rice. Defendant's motion to dismiss for failure to state a claim was denied and he applied for a three-judge court, challenging the constitutionality of the Agricultural Adjustment Act. His application was denied. Over defendant's contention that the Secretary of Agriculture failed to comply with the statutory conditions precedent to establishing rice quotas, and the action should therefore be dismissed, the district court granted the Government's motion for summary judgment.

The Court of Appeals affirmed, holding that defendant's challenge to the constitutionality of the Act presented no substantial question warranting a three-judge court under 28 U.S.C. 2284. The Court also held that the lien provisions of the Act, 7 U.S.C. 1356(d), were not an exclusive remedy. Rather, when the penalty provisions were read as a whole, it was clear that Congress intended that producers could be held personally liable for the penalties on the farm marketing excess. The Court also ruled that appellant's subsequent motion to dismiss the Government's complaint for failure of the Secretary of Agriculture to appear in Arkansas to give his deposition was also properly denied by the district court. Although the Court expressed considerable doubt as to the need for compelling the Secretary to travel to Arkansas, appellant's failure to take any action regarding the deposition for more than one year clearly negatived any abuse of discretion by the district court in denying the motion to dismiss. Rather, the Court held that the Government's motion for summary judgment was properly granted. Appellant's unfounded allegations were insufficient to overcome the presumption that the Government officials acted regularly and properly and complied with all requirements and met all conditions precedent to establishing the quota for rice. Moreover, the Act 7 U.S.C. 1361-68, contains provision for administrative review of farm marketing quotas and appellant's failure to appeal the excess determination of the County ASC Committee to the review board precluded judicial review of the county committee's decision.

Staff: United States Attorney Robert D. Smith; Assistant United States Attorney James W. Gallman (E.D. Ark.)

FARMERS HOME ADMINISTRATION

County Supervisor Had Authority to Waive FHA Mortgage Lien. United States v. S. Herbert Hansen, et al. (C.A. 8, January 3, 1963). Suit was brought by the United States for conversion of certain chattels subject to a Farmers Home Administration mortgage lien. The Government conceded that the FHA County Supervisor had consented to the sale of mortgaged chattels, but argued that the County Supervisor was without authority to waive the mortgage lien under applicable regulations of the Department of Agriculture. The district court found that the County Supervisor had waived the Government's mortgage lien, and it dismissed each of the complaints.

The Court of Appeals affirmed, holding that the County Supervisor acted within the scope of his authority in consenting to the sale of the mortgaged property. The Court pointed out that the regulations authorize County Supervisors to waive liens in some circumstances. However, the Court ignored the Government's contention that this regulation only authorized the release of a mortgage lien after sale of mortgaged property and did not authorize the County Supervisor to take the actions he did, i.e., consent to the release of the mortgage prior to the sale. The Court also held that the failure of the district court "to make a finding on whether the proceeds were disbursed in a manner authorized by the regulations" was not error since it was of the view that "where the sale of mortgaged property is made with the consent of a person authorized to give such consent, any failure of the mortgagor to live up to an agreement he made relating to accounting for the proceeds does not affect the waiver of the lien."

Staff: Jerry C. Straus (Civil Division)

FEDERAL EMPLOYEES
LLOYD-LA FOLLETTE ACT

Federal Employee's Active Part in Organization and Direction of Post Office Workers Union Picketing of Post Office, His Participation in Picketing and in Distribution of Derogatory Handbills Held Sufficient to Uphold His Discharge for Conduct Such as to Bring Post Office Department Into Disrepute and Conduct Unbecoming Postal Employee. Conrad C. Eustace v. Day (C.A.D.C., December 20, 1962). This action was brought by a discharged postal employee seeking to invalidate his discharge and be reinstated to the postal service. The employee was president of a local PWU and took an active part in the organization and direction of union-sponsored picketing of a post office. He also participated in the picketing and distributed derogatory handbills. These activities were found by the Post Office and the Civil Service Commission to constitute conduct tending to bring the Post Office Department into disrepute and was unbecoming a postal employee. The district court denied the employee's requests for reinstatement and granted the Government's motion for summary judgment. The Court of Appeals affirmed, holding that the action of the Post Office Department was not arbitrary, capricious, or unwarranted. The majority of the Court found it unnecessary to consider the employee's

claim that his activity was protected by the Lloyd-La Follette Act, 5 U.S.C. 652. Judge Fahy, in a concurring opinion, concluded that the claimed protection of the Lloyd-LaFollette Act might have merit, but found that, on the facts of the present case, the Court should not set aside the action of the Civil Service Commission.

Staff: United States Attorney David C. Acheson; Assistant United States Attorney Barry Sidman (D.C.)

FEDERAL TORT CLAIMS ACT

Distinguishing Between Decision at "Operational" Versus "Planning" Levels, "Discretionary Function" Provision of Federal Tort Claims Act Held Inapplicable. United States v. Hunsucker (C.A. 9, December 13, 1962). Plaintiffs, owners of land adjoining Oxnard Air Force Base, California, sued under the Federal Tort Claims Act to recover damages to their lands caused by flooding and percolating waters resulting from the construction of the drainage and sewage systems in the reactivation of the Base. The district court rendered judgment for plaintiffs on the grounds that (1) the Government was negligent in diverting flood waters and in failing to take precautions against percolating waters, and (2) the acts occurred at the "operational" level and thus the "discretionary function" exception of the act (28 U.S.C. 2680(a)) was not applicable. The court also awarded plaintiffs prejudgment interest.

The Court of Appeals affirmed on the merits, but remanded for correction to eliminate prejudgment interest (28 U.S.C. 2674). On the critical question of the application of the "discretionary function or duty" exception of the act, the Court looked to the distinction between decisions at the "operational" versus "planning" levels, first mentioned by the Supreme Court in Dalehite v. United States, 346 U.S. 15, and held that "on the basis of the evidence presented in this case it would not be consonant with the purposes of the Tort Claims Act to conclude that the government was immunized from all liability for its failure to take reasonable precautions to prevent damage to appellees' land."

The Government relied almost entirely upon the general directive authorizing the construction of all necessary facilities for the Base, without any clear showing as to what decisions were made, and by whom, respecting the diversion of the flood waters and the construction of the sewage facilities in the particular manner. As the Court pointed out, this directive was very general in its terms and did not specifically authorize the acts or omissions which were the basis for the complaint. Since the opinion, in effect, rests upon a failure of proof on the "discretionary function" defense, it should be possible to limit the adverse impact of the particular facts, and thus prevent the case from becoming authority for the proposition that only decisions by the highest authority are made at the "planning" level.

Staff: Kathryn H. Baldwin (Civil Division)

GOVERNMENT CONTRACTS

Consideration or Elements of Estoppel Necessary For Implied Waivers by Contracting Officer of Government's Right to Terminate Contract for Default. United States v. Chichester, Trustee in Bankruptcy (C.A. 9, January 7, 1963). This action arose upon the Government's proof of claim for $437,000 filed in the bankruptcy of a Government contractor for unliquidated progress payments upon the termination of the contract for (1) default in delivery and (2) anticipatory breach. The pertinent facts as found by the Armed Services Board of Contract Appeals in upholding the validity of the termination on both grounds were not in dispute. The district court affirming the referee in bankruptcy, dismissed the Government's claim on the grounds that (1) the contracting officer had waived the Government's right to terminate for default by (a) accepting less than the number of articles called for by the delivery schedule in successive earlier months, and (b) assisting the contractor in its effort to obtain additional funds from the Government to enable it to continue performance; and (2) statements and conduct by the contractor did not constitute an anticipatory breach.

The Court of Appeals reversed. It held that there was no showing of any consideration for implied waivers of the substantial rights of the Government to terminate for default in delivery; no elements of estoppel were present; and the conduct of the contracting officer was not such clear, decisive, and unequivocal action as was necessary to show an intent to waive the Government's legal rights. The Court found it unnecessary to discuss the question of the validity of the termination for anticipatory breach.

Staff: Kathryn H. Baldwin (Civil Division)

HOBBS ACT

Order of Atomic Energy Commission Denying Request to Alter Contract Obligations With Commission Not Reviewable Under Hobbs Act. Federal-Radorock-Gass Hills Partners v. Atomic Energy Commission (C.A. 10, December 21, 1962). Petitioner brought this original action in the Court of Appeals to review an order of the Atomic Energy Commission which denied to petitioner the right to delay deliveries of certain uranium concentrate beyond the delivery dates established in a contract with the Commission. Jurisdiction was invoked under the Hobbs Act, 5 U.S.C. 1032. The Government moved to dismiss on the ground that the order -- involving neither license rights nor changes in Commission regulations -- was not reviewable under the Hobbs Act. Petitioner contended that, its license and contract rights being inter-dependent, any modification of contract deliveries was a pro tanto modification of its license. The Court of Appeals denied the petition on the ground that the obligation to purchase ore affected only contract rights, not license rights and, hence, the order was not reviewable under the Hobbs Act.

Staff: Barbara W. Deutsch (Civil Division)

NATIONAL SERVICE LIFE INSURANCE

Attorney's Fee in Action on National Service Life Insurance Strictly Limited to Six Per Cent of Monthly Payment to Beneficiaries. Moss v. United States (C.A. 2, December 26, 1962). Plaintiffs, beneficiaries of a National Service Life Insurance policy, obtained a consent judgment providing for monthly payments of the proceeds as had been directed by the insured and payment of legal fees amounting to six per cent of each payment to the beneficiaries. Plaintiffs' moved for immediate payment of the total legal fees in place of installment payments of $3.40 per month for twenty years to their 80 year old attorney and the district court denied their motion. The Court of Appeals affirmed, holding that Congress had provided that the payment of attorneys' fees should be made only out of payments to be made under the judgment, not to exceed 10 per cent of each payment. 38 U.S.C. 784(g). The Court of Appeals rejected plaintiffs' challenge to the constitutionality of the statute and indicated that the attorney need not have undertaken the case if he had felt the statute imposed too severe a limitation.

Staff: United States Attorney Joseph P. Hoey; Assistant United States Attorney Stanley F. Meltzer (E.D. N.Y.)

SOCIAL SECURITY ACT

Administrative Determination That Claimant Was Independent Contractor and Not Employee Upheld. Edgerly v. Ribicoff, (C.A. 5, December 27, 1962). Claimant brought this suit under the Social Security Act seeking a review of the decision of the Secretary holding that claimant was not entitled to old-age insurance benefits because he did not have the requisite minimum quarters of coverage as an employee as required by the Act. Claimant, a graduate engineer with 35 years experience in electrical work and certificates from the City of New Orleans qualifying him as a contractor, undertook to perform the duties of electrical contractor for a construction company engaged in constructing sugar factories. Claimant hired the union personnel, supervised and paid them, and filed tax returns, paid social security taxes, and carried workmen's compensation insurance on them. He did no manual labor, had no specific hours and was engaged, during the same period of time, in other work at a location a considerable distance from the construction here involved. As remuneration, he received 5 per cent of the total wages paid to the electrical workers under him plus an amount based on the greatest number of hours worked by any one of his men. The company filed no returns and paid no social security taxes with respect to claimant. It was contended by claimant that the subcontractor arrangement was entered into between the company and himself as a subterfuge, for the purpose of hiring union personnel, and that he and the company understood that the relationship was in fact that of an employer-employee.

The Court of Appeals affirmed the district court in upholding the Secretary's determination that claimant's work had been performed, not in an employer-employee relationship, but as a subcontractor, and that

claimant therefore lacked the quarters of coverage required for entitlement to social security benefits.

Staff: Pauline B. Heller (Civil Division)

Disability Freeze, Subjective Pain Must Be Considered; Refusal of State's Vocational Rehabilitation Agency to Accept Claimant Because Impairment Too Severe Must Be Considered by Secretary. Hayes v. Celebrezze (C.A. 5, January 3, 1963). This action sought review of a denial by the Secretary of appellant's application for a disability freeze and disability benefits. Claimant, afflicted with arthritis and heart disease, alleged he was in great pain and was unable to work. The district court's affirmance of the Secretary's determination that claimant was not disabled was reversed by the Court of Appeals. The Court held that (1) the Secretary's finding that claimant was able to get about and perform moderately strenuous activity was unsupported in the record which showed significant impairments and uncontradicted complaints of pain, (2) awards under other disability programs (here Veterans Administration) whose standards of disability are similar, while not decisive, should be considered, and (3) the refusal of the state's vocational rehabilitation service to accept claimant because his impairment was too severe and because there were no employment opportunities is significant and must be considered. The Court remanded the case for further proceedings.

Staff: Stanley M. Kolber (Civil Division)

Claimant, Manual Laborer With Limited Education, Held Totally Disabled Within Meaning of Social Security Act by Severe Pain Accompanying Physical Activity. Horace S. Little v. Celebrezze (C.A. 7, December 14, 1962). Claimant brought this action to review a final administrative determination that he was not so disabled as to be unable to engage in any substantial gainful activity within the meaning of the Social Security Act. Claimant suffered a crushed intervertebral disc in an industrial accident. Remedial surgery resulted in additional complications. Consequently, it was painful for him to engage in most physical activities. His education was limited to the 9th grade and his employment experience had been only in occupations requiring strenuous physical exertion. The district court affirmed the administrative decision denying his application for disability benefits. The Court of Appeals reversed, holding that claimant's education and work experience limited him to manual occupations beyond the physical limitations imposed by his painful injuries.

Staff: United States Attorney James P. O'Brien; Assistant United States Attorney John P. Lulinski (N.D. Ill.)

DISTRICT COURT

FALSE CLAIMS ACT

Res Judicata Effect of Prior Criminal Conviction - Defendant's Restitution of Single Damages Pursuant to Criminal Sentence Does Not Relieve Him from Further Civil Liability Under False Claims Act. United States v.

Schien, (D. N.J., December 26, 1962). Defendant had been criminally convicted, on a plea of guilty, to a two-count indictment under 18 U.S.C. 1001, charging him with the making of false statements to the Army relating to the delivery, under a contract, of materials which had not in fact been delivered. Adapting the recitals in the criminal indictment in a form appropriate to allege violation of the civil provisions of the False Claims Act, 31 U.S.C. 231, the United States filed a two-count complaint demanding double damages and forfeitures under that statute. Defendant filed a general denial and the United States moved for summary judgment on the ground that, by virtue of the criminal conviction, defendant was collaterally estopped from denying the similar allegations in the civil complaint. The record on the motion consisted only of the pleadings, certified copy of the criminal indictment and certified copy of the judgment of conviction thereon. The Court ruled that (a) on the first count, defendant was collaterally estopped on the issue of liability for the filing of a false claim, and summary judgment would be entered for a $2,000 forfeiture, the United States would have to establish, independently of the recitals in the criminal indictment, the payment of a claim in a specific sum in order to be entitled to recovery of double damages in the civil False Claims suit, and (b) on the second count, the absence of material recitals in the related count of the criminal indictment precluded the granting of summary judgment in the civil suit.

Defendant's answer in the civil suit included, as an affirmative defense, an allegation that defendant had, prior to the filing of suit, made "complete restitution of any damage" sustained by the Government. Such "restitution" was in the amount of the "single damages" alleged by the Government in the criminal complaint and was made pursuant to the court's criminal sentence as a condition of defendant's probation in lieu of imprisonment. Commenting on that defense, the Court stated that "the mere fact that the defendant has made restitution of any actual loss sustained by plaintiff does not, in the absence of some further controlling consideration, relieve him of the obligation imposed by statute to pay double the amount of such actual loss".

Staff: United States Attorney David M. Satz, Jr., and Assistant United States Attorney Michael F. Caruso (D. N.J.)

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

BRIBERY

Acceptance of Bribe Affecting Hiring Procedure Constitutes Violation of Bribery Statute Even Though Defendant Not Authorized to Hire. United States v. Sidney Fassler and Igmidio Valerio (E.D. N.Y., December 19, 1962). Defendant Fassler was employed by the Military Sea Transportation Service as a Qualification Rating Examiner, in the Employment Division. In conjunction with the co-defendant Valerio, he accepted bribes to assist prospective job applicants to falsely complete their applications. Fassler was convicted of bribery (18 U.S.C. 202) and Valerio was convicted of aiding and abetting him.

The facts indicate that Fassler had no authority to hire job applicants. This was a function solely of the Director of Employment. Fassler's duties consisted of accepting and processing job applications. In addition to rating the applicant's basic qualifications for the job as "eligible or ineligible," which determination was reviewed by his superior, he notified eligible applicants to report for a physical examination, and subsequently administered a comprehension test.

Fassler contended that (1) the money was accepted for services outside the scope of his regular duties, i.e., helping applicants to complete their applications; (2) since the power of appointment resided in the Director of Employment, his acceptance of the money could not have been "with intent to have his decision or action . . . influenced thereby;" and (3) that the payment of the money to him was not for specific consideration.

The Court rejected all of Fassler's contentions and held that the Government was not required to prove that Fassler had the power of appointment or that the action sought to be influenced was within the duties prescribed by statute or Government rule or regulations. So long as the action sought to be affected by the bribe was part of the established procedure within the agency employing the official, the Court held such action to be within the meaning of the phrase "action on any question, matter, cause or proceeding . . .", citing Cohen v. United States, 1944, C.A. 9, 144 F. 2d 984, cert. denied, 65 S. Ct. 440; Whitney v. United States, 1938, C.A. 10, 99 F. 2d 327, 330; Sears v. United States, 1920, C.A. 1, 264 F. 257, 261. The Court also quoted from the opinion in United States v. Louis Gim Hall, 1957, C.A. 2, 245 F. 2d 338, 339 as follows: "Nor need we inquire into the question of how far he was subject to the orders of his superiors or what he could or could not have done to further the scheme of appellants. . ."

The case is significant in comparison with an earlier holding in a similar case, United States v. Reisley, 35 F. Supp. 102, wherein the District Court of New Jersey held that receipt of money for imaginary services falsely represented to have been rendered in a matter decided by others is not a violation of the Federal bribery statutes. In the instant case, defendant received money on the basis of his imaginary ability to hire the applicants. The Court held however, that although his authority did not extend to the limits purported, the acceptance of a bribe did affect the established hiring procedure and therefore constituted a violation of the bribery statute.

DENATURALIZATION

Concealment of Criminal Records at Time of Preexamination Proceedings and in Naturalization Proceeding. United States v. Hugo Rossi (S.D. N.Y.). On December 26, 1962, a judgment was entered setting aside the 1951 naturalization of Rossi, who was convicted in 1954 of conspiracy to violate the narcotics laws and who has been characterized as one of the leading narcotics distributors in New York City. The judgment was based on the fact that Rossi had concealed his extensive criminal record in Italy in obtaining entry into the United States in 1946 through preexamination proceedings and in the naturalization proceeding proper. The criminal record involved a conviction in 1919 of robbery and breaking in; a conviction in 1920 of qualified theft by breaking and entering a private home; a conviction in 1921 in an Italian military court of violating the Italian Military Code; a conviction in 1925 of complicity in inflicting injuries by the use of arms; and a conviction in 1929 of complicity in two homicides.

Staff: Assistant United States Attorney John Paul Reiner (S.D. N.Y.).

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INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Subversive Activities Control Act of 1950: Communication of Classified Information by Government Officer or Employee. Scarbeck v. United States (C.A. D.C., December 31, 1962). Appellant was tried on an indictment which charged him in three counts with communicating classified information to representatives of the Polish Government in violation of 50 U.S.C. 783(b), and in a fourth count with removing a document on file at the U. S. Embassy in Warsaw, in violation of 18 U.S.C. 2071. He was found guilty on the first three counts and not guilty on the fourth.

On appeal, appellant contended there was no showing that he had communicated information which had been personally classified "by the President" ..."as affecting the security of the United States" or by the Secretary of State with the approval of the President. The documents in question had been classified by the Ambassador. The Court stated that such an interpretation would largely reduce the statute to a dead letter. It went on to note that the statute refers to any information "of a kind" classified by the President (or a department head). Those words must mean that the President (or the head of an approved department) is to establish the kinds or categories of documents and information which are to be classified by appropriate authority. This requirement was fulfilled in this case through the issuance of Executive Order 10501 and the regulations promulgated by the Secretary of State. The Executive Order describes the "categories" of information which shall be classified as "Top Secret," "Secret" and "Confidential" and authorizes the head of the State Department to delegate his authority of original classification. The Secretary by State Department regulations delegated the authority to the Ambassador.

Appellant's next contention was that the Government must prove that the documents were properly classified "as affecting the security of the United States," the criterion set forth in Section 783(b). Executive Order 10501, under which the documents were classified, relates to the protection of information involving the "national defense." The Court rejected this argument stating that "defense is one aspect of security and indeed in their broad senses the two terms have a very similar connotation." Thus the documents were "classified...as affecting the security of the United States," within the meaning of Section 783(b). The Court also ruled that the prosecution was not required to show that the documents were properly classified as affecting the security of the United States because there is a clear indication of Congressional intent to make the superior's classification binding on the employee. Cf. Gorin v. United States 312 U.S. 19. If it were otherwise, the trial of the employee would be converted into a trial of the superior. The Government might well be compelled either to withdraw the prosecution or to reveal policies and information going far beyond the scope of the classified documents transferred by the employee. Such a classification could render Section 783(b) useless.

Another point raised on appeal was that four inculpatory statements given by appellant should have been excluded at the trial because the first statement

was coerced and the subsequent statements were products of the first. In the alternative, appellant argued that he was under arrest when the statements were given and thus they were inadmissible under the Mallory rule. The Court reviewed all available material and was unable to find that the admissions were involuntarily given. The Court said the interrogating officers statement that "only moral pressures" were used during the interrogation was in reference to appeals to integrity, conscience, patriotism and the like. Such appeals do not amount to improper coercion. As to the alternative argument, the first statement was obtained by a State Department security officer in Germany who had no powers of arrest and the appellant knew this. He also knew that he had the right to remain silent, and he raised no objection to the questioning. The Court found nothing which would amount to an arrest or duress vitiating appellant's first statement. As to the three subsequent statements obtained by F.B.I. agents who questioned appellant on three successive days at the State Department, the Court held that even though appellant was always accompanied by State Department officials from the first morning until after the last statement was given, this without more did not amount to an arrest.

Appellant's last point was that there was not sufficient corroborative evidence to support his admissions which standing alone were not sufficient under law to prove guilt. Upon a review of the evidence independent of the admissions, the Court found, there was more than ample evidence to support the reliability and truth of the admissions within the scope of Opper v. United States 348 U.S. 84 and Smith v. United States 348 U.S. 147. Affirmed.

Staff: Kevin T. Maroney, Robert S. Brady
(Internal Security Division)

Destruction of War Material, War Premises, or War Utilities (18 U.S.C. 2155) and Failure to Register as Agents of Foreign Governments (18 U.S.C. 951). United States v. Roberto Santiesteban Casanova, Marino Antonio Esteban Del Carmen Sueiro Y Cabrera and Jose Garcia Orellana (S.D. N.Y.) (See Bulletin No. 25, Vol. 10). On November 27, 1962, oral argument was heard on defendant Santiesteban's petition for writ of habeas corpus on the grounds that he held diplomatic immunity. Argument was also heard on defendant's motion to suppress the evidence seized by the FBI at the time of arrest on the grounds that the complaints and search warrants were invalid since they were based solely on evidence illegally obtained by wire tapping. In support of their motions to suppress, defendants had served subpoena duces tecum on a number of Government officials. The Government moved to quash the subpoenas. Judge Weinfeld reserved decision on all motions, set arraignment for December 21, 1962, and reduced the amount of Santiesteban's bail to $75,000 and that of Sueiro and Garcia to $50,000 each. Defendants remain incarcerated in New York City.

In an opinion handed down on January 16, 1963, Judge Weinfeld ruled in favor of the Government on all issues, rejecting petitioner's contentions that he enjoys diplomatic immunity from arrest and prosecution by virtue of (1) Article 105 of the United Nations Charter, (2) Section 15 (2) of the Headquarters Agreement of the United Nations, and (3) the Law of Nations. Judge Weinfeld further rejected petitioner's contention that the United States Supreme Court has exclusive and original jurisdiction to try him under Article II of the Constitution and 28 U.S.C. 1251. In a supplementary opinion handed down at the same time, Judge Weinfeld also denied defendant's

motion to suppress the evidence seized by the FBI at the time of arrest on the grounds that the complaints and search warrants were invalid since they were based solely on evidence illegally obtained by wire tapping.

With respect to petitioner's claim of diplomatic immunity, Judge Weinfeld pointed out that Article 105 of the UN Charter "does not purport to nor does it confer diplomatic immunity," and that the Charter did not contemplate diplomatic immunity but intended only "functional immunity", i.e., "immunity...confined to acts necessary for the independent exercise of functions in connection with the United Nations."

In rejecting the claim of diplomatic immunity under the Headquarters Agreement, Section 15(2), Judge Weinfeld ruled that the question as to whether or not a particular individual is entitled to immunity is one to be decided within the framework of the applicable document (in this instance the Headquarters Agreement) and "is not a political question, but a justiciable controversy involving the interpretation of the agreement and its application to the particular facts." He further noted, however, that "the judicial determination of this issue does not intrude upon the Government's right under section 15(2) of the Headquarters Agreement to refuse its agreement that petitioner is entitled to diplomatic immunity or to agree that he is."

In rejecting the claim that section 15(2) of the Headquarters Agreement contemplates agreement only as to categories and not as to individuals, Judge Weinfeld pointed out that "it would indeed be ironic if under section 15(2),...any person employed as a resident member of a mission to the United Nations thereby gained, without the express agreement of the United States Government, the very same immunity accorded to the high ranking officials..." He ruled that the United States, under section 15(2), is not required, simply by reason of one's employment in a particular category, to grant diplomatic immunity. It retains the right thereunder to agree or not to agree that diplomatic immunity shall extend to individuals who qualify under the broad category "Resident Members of their Staffs."

In his 52 page opinion, Judge Weinfeld further ruled that petitioner's status as an attache and resident member of the Cuban Mission does not by itself entitle him to diplomatic immunity under Section 15(2), nor did the Government by the issuance of a G-1 visa and landing permit by the State Department, give its agreement that petitioner on his entry into the United States was thereby entitled to diplomatic immunity under Section 15(2).

In concluding that petitioner was not entitled to diplomatic immunity by virtue of the Law of Nations, the Court ruled that it is the Headquarters Agreement, the Charter and the applicable statutes of the United States that govern the determination of his rights, not the Law of Nations. "The Law of Nations comes into play and has applicability in defining the nature and scope of diplomatic immunity only once it is found a person is entitled thereto under an applicable agreement or statute."

In ruling that the Court has jurisdiction of petitioner under the indictment returned by the grand jury, Judge Weinfeld noted that the Constitutional provision and the statute which are designed to apply to diplomatic representatives of foreign governments accredited to the United States were not applicable with respect to petitioner since he serves no function in relation to the Government of the United States, nor is he accredited to the United States.

Staff: United States Attorney Vincent L. Broderick; Assistant United States Attorneys Sheldon H. Elsen, Arnold N. Enker and Arthur I. Rosett (S.D. N.Y.); Jean Davis King (Internal Security)

Subversive Activities Control Act of 1950; Registration of Communist Party Members. Attorney General v. Albert Jason Lima. On January 17, 1963, the Subversive Activities Control Board issued an order directing respondent, Albert Jason Lima, to register as a member of the Communist Party (See United States Attorneys' Bulletin, Vol. 10, No. 13, June 29, 1962).

Staff: Oran H. Waterman, James A. Cronin, Jr. Robert A. Crandall, Earl Kaplan (Internal Security Division)

Subversive Activities Control Act of 1950; Registration of Communist Party Members. Attorney General v. Roscoe Quincy Proctor. On January 17, 1963, the Subversive Activities Control Board issued an order directing respondent, Roscoe Quincy Proctor, to register as a member of the Communist Party. (See United States Attorneys' Bulletin, Vol. 10, No. 13, June 29, 1962).

Staff: Oran H. Waterman, Thomas E. Marum, James A. Cronin, Jr. Robert A. Crandall, Earl Kaplan (Internal Security Division)

Subversive Activities Control Act of 1950; Registration of Communist Party Members. Attorney General v. Louis Weinstock. On January 16, 1963, the Subversive Activities Control Board issued an order directing respondent, Louis Weinstock, to register as a member of the Communist Party (See United States Attorneys' Bulletin, Vol. 10, No. 13, June 29, 1962).

Staff: Oran H. Waterman, James A. Cronin, Jr. Robert A. Crandall, Earl Kaplan (Internal Security Division)

Subversive Activities Control Act - Communist Front Organizations. Robert F. Kennedy, Attorney General v. Advance, an Organization of Progressive Youth. On January 10, 1963, the Attorney General petitioned the Subversive Activities Control Board for an order to require Advance, an Organization of Progressive Youth, whose headquarters is in New York City, to register as a Communist-front organization as provided in the Subversive Activities Control Act of 1950. This is the twenty-second case filed before the Board alleging an organization to be dominated, directed, or controlled by the Communist Party, USA, and primarily operated for the purpose of giving aid and support to the Communist Party.

Staff: Cecil R. Heflin, Leo J. Michaloski
(Internal Security Division)

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LANDS DIVISION

Assistant Attorney General Ramsey Clark

Indians; Wills; District Court Erred in Declining to Review Secretary of Interior's Decisions Under Summary Judgment Procedure on Administrative Record; Department Decision Not Arbitrary and Capricious Must Be Affirmed. Asenap v. Udall, et al. (C.A. D. C., Dec. 20, 1962). The Secretary of the Interior confirmed the order of his Examiner of Inheritance, which approved the will of a deceased restricted Indian and which decreed distribution of her estate. The Secretary also treated tax refunds as restricted trust funds for the reason that the tax payments had been made from restricted trust funds. The district court denied motions for summary judgment on the administrative record (granting a trial in substance) and entered a certificate for interlocutory appeal.

The Court of Appeals decided the case on the merits, concluding, per curiam, that the Secretary's decisions were amply supported by the evidence and were not arbitrary or capricious. It held that the review should have been accomplished under the summary judgment procedure on the administrative record.

Staff: Raymond N. Zagone (Lands Division)

Public Lands; Classification Under Section 7 of Taylor Grazing Act; Exercise of Railroad Lieu Selection Rights; Propriety of Summary Judgment. Carl v. Udall (C.A. D. C , October 18, 1962). The Secretary of the Interior rejected selections of public lands made by Carl and two others under 50-year-old lieu selection rights obtained in exchange for lands lying within the grant of the Northern Pacific Railroad. The Secretary held that the lands applied for had been withdrawn in 1935 and were therefore subject to classification under Section 7 of the Taylor Grazing Act, 48 Stat. 1269, 1272, as amended, 43 U.S.C. 315f, and that they were lands which should, in public interest, be retained in public ownership. He then refused to classify the lands as suitable for acquisition in satisfaction of outstanding lieu selection rights. When Carl sued to set aside this ruling, the district court granted summary judgment for the Secretary and the Court of Appeals affirmed.

Appellants argued that, because two general withdrawals in 1934 and 1935 withdrew all public lands and therefore left none for selection, they were entitled, under the rule of United States v. Northern Pacific Ry. Co., 256 U.S. 51 (1921), to ignore the withdrawals and select any public land they wanted. The Court answered that the 1936 amendment of Section 7 of the Taylor Grazing Act, enacted long before appellants' applications, made the lands within the withdrawals subject to classification so as to be available to satisfy such rights as theirs. The fact that the particular tracts selected by appellants have not been classified as available for lieu selection does not create in and of itself such a deficiency in public lands available for selection as had existed in the Northern Pacific case. Appellants still have valid outstanding rights to select lands which meet statutory conditions and "may be restored to selection without injury to paramount public interest."

The Court also held that Section 7 gave the Secretary power to classify lands for retention in public ownership even though there was no such class specifically stated in the statute. In addition to stating several specific

categories in which the Secretary may place land, the statute also allows him to classify it for "any other use." Referring to "the ordinary meaning of the language" the conservation purposes of the Taylor Grazing Act, and its long administrative interpretation, the Court upheld the power of the Secretary to classify lands for public retention even though that is not one of the specific statutory classes.

On appeal, appellants contended that summary judgment should not have been granted against them in the face of their claim that the unfavorable classification was arbitrary, but in the trial court they had moved for summary judgment contending that there was no genuine issue of material fact. The Court of Appeals held: "In this situation the questions were proper for decision by the court as questions of law, including whether the data before the court made out a case of arbitrariness. We think they did not."

Staff: Hugh Nugent (Lands Division).

Condemnation; Adequacy of Reports Filed by Rule 71A(h) Commissioners; Lack of Justification for Reference; Contents of Reports; Comparable Sales Best Evidence of Value; Weaknesses of Testimony by Neighboring Landowners; Inadequate Reports Not Harmless Error Where Awards Exceed Government Contentions; Better Decisions Resulting From Obligation to Make Detailed Reports. United States v. 2,872.88 Acres in Clay and Quitman Counties, Georgia (C.A. 5, December 5, 1962.) The United States appealed three condemnation judgments approving Rule 71A(h) commissioners' awards on the ground that the commissioners' reports were not sufficiently detailed in giving the bases for the awards to permit adequate review by the district court. The Fifth Circuit reversed the judgments and remanded the case for resubmission to the commissioners. The tracts involved were all ordinary farm, timber and pasture land. The reports recited the substance of the valuation testimony given by witnesses for each side, and showed ultimate findings of market value of the property and easements taken and of severance damage. The Court of Appeals stated that the reports did not indicate which evidence the commission credited and which it discredited; gave no indication as to the degree to which the commissioners based its findings upon those opinions that were based on knowledge of comparable sales; gave no indication as to whether indicated sales were truly comparable; and did not indicate to what extent it gave credence to the opinions of the witnesses who, according to the summary of the evidence given in the reports themselves, had little or no familiarity with the ordinary ingredients that are generally considered by the courts to be required to support an opinion of value in a condemnation case.

The Court pointed out that part of the basis for its repeatedly stating that condemnation cases are better tried to juries than to commissioners is that in a jury trial the trial judge can (1) determine the qualifications of so-called expert witnesses and of others who undertake to express valuation opinions, (2) initially determine whether so-called "comparable sales" are sufficiently comparable to justify their consideration by the fact-finder, and (3) in his charge to the jury, point out the defects and weaknesses in the testimony of interested parties, such as the owners of the land involved, and stress the importance of opinion evidence based on comparable transactions. The Court stated that in a trial to a jury under such supervision by a trial judge, it can well be understood why a general verdict of value, plus a general verdict of severance damages can suffice, whereas a hearing before a commission must result in findings much more detailed than a general verdict.

Noting that "the Courts of Appeals of the several circuits are not of a uniform mind as to this," the Court said that it agreed with United States v. Cunningham, 246 F. 2d 330, 333 (C.A. 4, 1957), which held that a commissioners' report which amounts to nothing more than a general verdict by a jury defeats review of the complicated facts and legal principles which supposedly justified the appointment of the commissioners to begin with. The Fifth Circuit also explicitly said that it recognized that its view of the matter is at variance with that expressed in United States v. Merz, 306 F. 2d 39 (C.A. 10, 1962), but that it was in accord with United States v. Lewis, 308 F. 2d 453 (C.A. 9, 1962), which had reversed a district court's holding that a commission's finding "may be as general as the verdict of a jury, and have the same effect." The Solicitor General has authorized the filing of a petition for certiorari in the Merz case, and landowners' counsel in the present case have advised the Department that they intend to petition. Thus it is possible that the Supreme Court may take both cases to resolve the conflict of circuits.

Applying the principles it had stated to the reports in this case, the Court of Appeals said that it did not hold that every contested issue raised on the record before the commission must be resolved by a separate finding of fact, but that there must be sufficient findings of subsidiary facts so that it will appear to the reviewing court that the ultimate finding of value was soundly and legally based; that in determining market value the best test is what the same or similar property is selling for in the locality at or near the day of taking; that the best test of market value is the data concerning comparable sales; that while the commission spoke of comparable sales, there was no finding or expression of opinion as to whether the sales sustained a value of $100 per acre, as found by the commission, in one tract, or whether this value represented a scaling down by the commission of an opinion by others whose opinion of value may have been based as in the case of one witness, on the value he would place on his own land; and that if this is all that the record shows as to this neighbor's qualifications to express an opinion of value of the land, then such opinion would obviously have no probative value.

The landowners asked the Court of Appeals not to consider the Government's appeal because the Government had not alleged that the awards were excessive and therefore any error in the form and substance of the reports would be harmless error within the meaning of Rule 61, F.R.C.P. The Court noted that the awards were substantially in excess of the amounts deposited with the declaration of taking, and it therefore concluded that if errors had occurred in the trial resulting in awards exceeding the amounts contended for by the Government, then such errors would not be harmless within the sense of Rule 61.

The Court closed its opinion by suggesting that the obligation to make reports may lead the commissioners into making better decisions to begin with, and that while it did not even suggest the need for long findings or reports merely for the sake of length, there is much to be said for the view that commissioners like trial judges may be expected to give more careful consideration to the subsidiary facts and the legal principles involved if they are required to be stated in the report.

Staff: Hugh Nugent (Lands Division).

Tort; Damages to Property Attributable to Noise and Vibration Caused by Government Aircraft Flying Over Property Frequently and at Low Level While Taking Off and Landing at Air Base Adjacent to Property May Give Rise to Cause of Action Under Fifth Amendment to Constitution But Not to Action in Tort Under 28 U.S.C. 1346(b). Joseph Benkowski, et ux. v. United States (E.D. Mich., December 19, 1962). Plaintiffs in this action are the owners of real property located adjacent to the Selfridge Air Force Base near Detroit from which jet aircraft has been operating for several years. This suit was filed to recover damages in the amount of $50,000 based on the decreased value of plaintiffs' property and deprivation of its beneficial use and enjoyment by reason of noise and vibration caused by Government aircraft flying at low level from and into the Government air base.

On motion to dismiss by the United States for lack of jurisdiction because plaintiffs sought to recover damages in excess of the $10,000 limitation set forth in 28 U.S.C. 1346(a)(2), plaintiffs contended that the cause of action arose under 28 U.S.C. 1346(b). The Court held that the facts alleged in the complaint failed to state a claim under the Federal Tort Claims Act upon which relief could be granted and permitted plaintiffs to file an amended complaint within 30 days in such manner as to state a proper cause of action under 28 U.S.C. 1346(a)(2).

Staff: United States Attorney Lawrence Gubow;
Assistant United States Attorney Barton W. Morris
(E.D. Mich.).

Eminent Domain; Declaration of Taking; Validity of Taking to Supply Substitute Compensation; No Revesting of Title When Need Ceases. United States v. 10.47 Acres of Land in Strafford County, New Hampshire, and Marlo R. Davis, et al., and Unknown Owners (D. N.H., December 22, 1962.) A declaration of taking, with required deposit, was filed on April 18, 1958, for the acquisition of defendants' property in connection with the construction of the Pease Air Force Base. The avowed purpose of the taking was to provide substitute water facilities to the city of Portsmouth pursuant to an agreement by the Government with the city for lands conveyed by the city to the plaintiff on which a portion of the city's water supply was located. The city's property was actually utilized in the construction of Pease Air Force Base. Subsequent to the taking and before completion of the project to develop the water facilities, the Government constructed the Bellamy River Dam which furnished the city with an adequate water supply and the project on the defendants' lands was abandoned. Defendants asserted a right to a revesting of title, alleging that the Government in taking their land acted in bad faith or so capriciously and arbitrarily that its action was without adequate determining principle or was unreasoned.

The district judge (Gignous, sitting by designation) held that by the terms of the Declaration of Taking Act, the interest to the condemned land vests in the United States as of the date of the taking, subject only to the right of the owner to challenge the validity of the taking as not being for a public purpose. A substitute taking, closely connected with and necessary to the development of a conceded public use, is for a public use and constitutes a legal taking. The subsequent abandonment of the purposes for which the lands were acquired could not affect the validity of the original condemnation. The Court found no support in the record for defendants'

unsubstantiated assertions that the Government in taking their land acted in bad faith or so capriciously and arbitrarily that its action was without adequate determining principle and was unreasoned. Hence, title to defendants' property was vested in the Government on April 18, 1958. And since by statute (40 U.S.C. 258f) Congress entrusted the Attorney General with discretion to determine the property or interest to be excluded from any taking, the Court was without authority to order the revesting of Title in the original owners.

Staff: Assistant United States Attorney, Paul L. Normandin (D. N.H.) and Naneita A. Smith (Lands Division).

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

SPECIAL ATTENTION FOR FORECLOSURE SUITS

United States v. Buffalo Savings Bank (Supreme Court, January 7, 1963). The Supreme Court has reversed per curiam the decision of the New York Court of Appeals in United States v. Buffalo Savings Bank (Buffalo Savings Bank v. Beverly Victory Co.).

The decision, reprinted in full below, reaffirmed the priorities of New Britain, specifically applied these priorities to mortgage foreclosure proceedings, precluded the classification of local real estate taxes arising subsequent to a federal tax lien against the property of a mortgagor-taxpayer as expenses of sale and specifically sustained the Government's contention that Brosnan is concerned with foreclosure procedures rather than priorities.

Per Curiam.

In 1946, respondent Buffalo Savings Bank made a loan secured by a real estate mortgage. The United States filed a notice of federal tax lien against the mortgagor's property in 1953. Thereafter, in 1957 and 1958, liens for unpaid real estate taxes and other local assessments attached to the property. The bank instituted foreclosure proceedings, naming the United States as a party. The trial court's decree ordered the property sold and the payment of local real estate taxes and other assessments as part of the expenses of the sale prior to the satisfaction of the tax lien of the United States. The United States appealed and the New York Supreme Court, Appellate Division, reversed, only to be reversed in turn by the New York Court of Appeals, which reinstated the trial court's judgment on the ground that the federal tax lien attached only to the mortgagor's interest in the surplus after the foreclosure sale and therefore was subordinate to the local taxes as "expenses of sale."

We must reverse the judgment of the New York Court of Appeals for failure to take proper account of United States v. New Britain, 347 U.S. 81. That case rules this one, for there the Court quite clearly held that federal tax liens have priority over subsequently accruing liens for local real estate taxes, even though the burden of the local taxes in the event of a shortage would fall upon the mortgagee whose claim under state law is subordinate to local tax liens.

A similar argument based on the general character of the federal tax lien was made and specifically rejected in New Britain. Moreover, the state may not avoid the priority rules of the federal tax lien by the formalistic device of characterizing

subsequently accruing local liens as expenses of sale. Cf. United States v. Gilbert Associates, Inc., 345 U.S. 361. Finally, respondent's reliance on United States v. Brosnan, 363 U.S. 237, and Crest Finance Co. v. United States, 368 U.S. 347, is misplaced. Brosnan, was concerned with foreclosure procedures, not with priorities, and in connection with the latter subject relied upon New Britain among other cases. Crest is wholly inapposite here.

The judgment is therefore reversed and the cause remanded for further proceedings not inconsistent with this opinion. [Emphasis supplied.]

Reversed and remanded.

MR. JUSTICE DOUGLAS dissents.

CIVIL TAX MATTERS
District Court Decisions

Trustee of Invividual Bankrupt Not Required to File Returns and Report Income From Dividends, Rents, Interest, and Capital Gains Realized in Connection With Liquidation of Bankruptcy Estate. In the Matter of John Henry Kirby (S.D. Texas, August 29, 1962), CCH 62-2 USTC ¶9752. Kirby was adjudicated bankrupt in May 1933 and a trustee was appointed. Kirby died on November 9, 1940, but his bankruptcy was continued pursuant to Section 8, Bankruptcy Act, as amended. The trustee has been liquidating assets of the bankruptcy estate from the date of his appointment up to the present time and has received interest, dividends, rents, and proceeds from the sale of assets. He filed no income tax returns and the Commissioner assessed income taxes of over $500,000 based on receipt by the trustee of the above-mentioned items which were treated as taxable income. The referee held that the trustee was not required by law to file returns or report the items as taxable income and was not subject to penalties for his failure to file returns. The Government contended that the trustee was a separate taxable entity from the bankrupt; was a fiduciary for a trust or an estate under the law and was required under Section 161 of the Internal Revenue Code of 1939 and Section 641 of the Internal Revenue Code of 1954, to return and pay taxes on his estate or trust in the same manner as a fiduciary of any other trust or estate. The trustee contended that there was no law requiring him to return these sums as taxable income; that a fair construction of the regulations was to the contrary; and that he was not operating a business so as to fall under the provisions of 28 U.S.C. 960. Both the referee and the District Court upheld the trustee's position. The District Court wrote no opinion.

The Solicitor General authorized an appeal from the decision of the Court on the issue involving the trustee obligation to file returns, and no appeal from the decision disallowing penalties.

Staff: United States Attorney Woodrow B. Seals (S.D. Texas); and Homer R. Miller and Raymond L. McGuire (Tax Division).

Non-taxpayer Entitled to Judgment of Refund Where Proceeds in Taxpayer's Bank Account Seized by Defendant's Predecessor in Office Resulted From Checks Mistakenly Issued by Plaintiff to Taxpayer Corporation. Machinery Center, Inc. v. Kelley (E.D. Mo., January 2, 1963). Plaintiff mistakenly issued two separate checks to the order of Cashin Copper Corporation, the taxpayer. On September 9, 1958, taxpayer's attorney had the checks (totalling $3,103.65) deposited in taxpayer's bank account. The balance of the account at that time was $13.16. The following day, September 10, the account was levied upon by the Internal Revenue Service. Afterfinal demand was made upon the bank on September 17, 1958, the proceeds were paid over to the then District Director and the account closed. Plaintiff notified the District Director on January 15, 1959 of the error and demanded refund, which demand was refused. A similar demand on November 2, 1960 was made upon the defendant who had succeeded the former District Director on February 21, 1960. Subsequent thereto, plaintiff paid over to the rightful recipient the amount in controversy. Defendant argued that: (1) the Court lacked jurisdiction because the money had been covered into the treasury and therefore was not within the jurisdiction of the Court; (2) defendant was not the proper party despite the substitution provisions of Rule 25, F.R.C.P.; and (3) legal title to the property was in the taxpayer at the time of the seizure. The Court ruled that: (1) it had jurisdiction pursuant to Sections 1340 and 2463 of 28 U.S.C.; (2) defendant detained the money belonging to the plaintiff after lawful demand; (3) substitution of the defendant for his predecessor in office was proper under Rule 25 F.R.C.P.; and (4) the suit was proper although the money had been paid to the treasury because the money while in taxpayer's bank account was "identifiable" as plaintiff's property, citing Stuart v. Chinese Chamber of Commerce of Phoenix, 168 F.2d 709 (C.A. 9); and First National Bank of Emlenton, Pa. v. United States, 267 F.2d 297 (C.A. 3).

Staff: Former United States Attorney D. Jeff Lance (E.D. Mo.); and Louis J. Lombardo (Tax Division).

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