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Vol. 11 November 1, 1963 No. 21

ANTITRUST DIVISION

Assistant Attorney General William H. Orrick, Jr.

Government Files Suit to Block Merger of California Banks. United States v. Crocker-Anglo National Bank, et al. (N.D. Calif.). On October 8, 1963, a complaint was filed charging that the proposed acquisition of Citizens National Bank of Los Angeles by Crocker-Anglo National Bank of San Francisco will be in violation of Section 1 of the Sherman Act and Section 7 of the Clayton Act. The merger, if consumated, would bring together California's fifth largest bank, with 7.2% of both deposits and loans and its eighth largest bank, with 2.5% of deposits and 2.1% of loans. By this acquisition Crocker-Anglo would move from fifth to fourth place in the already highly concentrated California banking market, and would raise the percentage of deposits held by the five largest of 129 banks from 78.6 to 81.1; the percentage of loans and discounts from 79.7 to 81.8, and the percentage of offices from 74.7 to 78.

While Crocker-Anglo presently operates primarily in northern and central California and Citizens operates primarily in southern California, nevertheless, each of these large banks is rapidly approaching the other through branching and each represents a nucleus which can expand into a state-wide system by such branching, as permitted by California law. Consummation of the merger would thus not only eliminate this potential competition between the participating banks, but would also substantially reduce the competitive potential in the state-wide banking market in the rapidly expanding California economy.

A Motion for a Preliminary Injunction was filed with the complaint, together with a certificate requesting a three-judge court under the Expediting Act. Hearing on the motion has been set for October 21.

The complaint also charges that a 1956 consolidation, wherein the Crocker First National Bank of San Francisco combined with Anglo California National Bank to form the present Crocker-Anglo, violated both Section 1 and Section 7. The complaint further charges that the cumulative effect of this acquisition and nine other acquisitions by Crocker-Anglo since 1956, and three acquisitions by Citizens, and the proposed merger between Crocker-Anglo and Citizens, is in violation of Section 7.

Staff: Herbert G. Schoepke, Charles A. Degnan, Robert J. Staal, John D. Gaffey and Frank Taylor (Antitrust Division)

SHERMAN ACT

Complaint Under Section 1 of Sherman Act Filed Against 19 Corporations. United States v. Container Corporation of America, et al. (M.D. North Carolina). On October 14, 1963, a civil action was filed in the Middle District of North Carolina. The complaint charged nineteen corporations with restricting competition in the sale of custom made corrugated shipping containers in a seven-state area in the southeastern United States.

Named as defendants were the following companies: Container Corporation of America; Albemarle Paper Manufacturing Company; Carolina Container Company; Continental Can Company, Inc.; Crown Zellerbach Corporation; Dixie Container Corporation; Dixie Container Corporation of North Carolina; Inland Container Corporation; International Paper Company; The Mead Corporation; Miller Container Corporation; Owens-Illinois Glass Company; St. Joe Paper Company; St. Regis Paper Company; Tri-State Container Corporation; Union Bag-Camp Paper Corporation; West Virginia Pulp and Paper Company; Weyerhaeuser Company; and The Waterbury Corrugated Container Co.

The complaint alleges that the defendants prevented unrestricted price competition by continuously exchanging among themselves information as to prices being charged or to be charged specific customers for the customers for the custom made containers.

The complaint asks that the defendants be enjoined from exchanges of any price information relating to specific customers.

Staff: Wharey M. Freeze and John L. Sliney (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General John W. Douglas

COURT OF APPEALS

ADMIRALTY

Stevedore Timekeeper Entitled to Recover Damages from United States for Injuries Resulting from Unseaworthiness of Government Vessel; Ship's Log Properly Excluded as Hearsay on Question of Seaworthiness; United States Entitled to Indemnification by Stevedoring Company by Reason of Express Contract Provision. Shenker v. United States (C.A. 2, August 21, 1963). This action was lodged against the United States by a stevedore timekeeper who was injured while aboard a Government vessel. The United States impleaded claimant's employer on the basis of an express indemnity clause in the stevedoring contract. The district court held that (1) claimant was entitled to recover damages for his personal injuries, and (2) the United States was entitled to indemnification by its stevedoring company, claimant's employer.

The Second Circuit affirmed both aspects of the judgment. (1) With respect to the basic claim, it held that the Government vessel had been unseaworthy and that the duty to maintain a seaworthy vessel, owed not only to seamen, but also to longshoremen and stevedores, extended to the claimant in his work as a stevedore timekeeper. (On this issue the Court of Appeals affirmed the district court's refusal to consider, because hearsay, the ship's log.) (2) As to the indemnity award, the Court of Appeals agreed that the stevedoring contract expressly provided for such recovery by the United States.

Staff: Louis E. Greco (Civil Division).

INTERLOCUTORY APPEAL

Order Continuing Mortgage Foreclosure Suit for Three Years Pending Mortgagor's Efforts to Refinance Debt and Become Current on Interest Payments Held Appealable Under 28 U.S.C. 1292(a)(2) and Reversed as Unwarranted Interference With Government's Contract Right to Foreclosure. United States v. Sylacauga Properties, Inc. (C.A. 5, October 1, 1963). This action to foreclose a Rental Housing Mortgage held by the Federal Housing Commissioner was commenced in May 1959. The appointment of a receiver pursuant to a clause in the mortgage was requested. The mortgagor resisted the appointment of a receiver on the ground that it would depress the foreclosure sale price. The district court, through a series of orders, continued the cause for three years during which time the resident manager of the rental units was appointed "to receive rents" and the mortgagor was ordered to make certain payments on accruing interest charges. Subsequently, over the Government's objections the cause was continued for three more years, during which the mortgagor was ordered to pay all arrearages of interest as well as currently accruing interest charges. No payments of principal were ordered. The Government appealed from the three-year continuance, alleging that the order was a refusal to wind up a

receivership, made appealable by 28 U.S.C. 1292(a)(2). In the alternative, a petition for a writ of mandamus was filed. Rejecting the mortgagor's contention that no receiver had ever been appointed, the Court of Appeals held that there was a receivership, that the continuance was appealable as a refusal to wind up a receivership, and that the continuance was an erroneous interference with the Government's right to foreclose. The cause was remanded with instructions to appoint a disinterested receiver to proceed with foreclosure.

In addition, the appellate court decided that the force and meaning of the receivership clause in the mortgage was to be determined in accordance with federal and not state law. This is the first Fifth Circuit decision on the applicability of federal law to federal housing contracts. The Fifth Circuit has thus joined the First (Garden Homes v. United States, 200 F. 2d 299), the Fourth (United States v. Woodland Terrace, Inc., 293 F. 2d 505, cert. denied 368 U.S. 940), the Sixth (United States v. Helz, 314 F. 2d 301) and the Ninth (United States v. View Crest Garden Apartments, 268 F. 2d 380, cert. denied 361 U.S. 884).

Staff: Morton Hollander and Barbara W. Deutsch (Civil Division).

SOCIAL SECURITY ACT

Disability "Freeze" and Disability Benefits Claimant's Statutory Burden of Proof at Least Encompasses Demonstration of Inability to Do His Former Work, in Absence of Which Administrative Denial of Benefits Will Be Affirmed. Dupkunis v. Celebrezze (C.A. 3, October 9, 1963). The Secretary had determined that claimant's established impairments, anthracosilicosis and a lumbosacral sprain, did not result in such a loss of respiratory function as would bar substantial gainful activity, and, while preventing heavy labor, did not affect remaining capacity for weight-bearing, walking, standing, sitting, stooping, grasping, lifting, and reaching. The applications for a disability "freeze" and disability benefits were denied, and the district court affirmed. The Court of Appeals held that the administrative determination of the extent of impairment was supported by "the great preponderance of the evidence." The Court also held that the administrative denial was proper since claimant had not shown that he was unable to do work of the character of the last employment position he had held. Claimant had testified that subsequent to his being laid off (for economic reasons) his conditions had so worsened as to prevent his performance of that work in the future. The Court noted that the objective medical evidence did not confirm his testimony of subjective ailments, and affirmed.

Staff: David J. McCarthy, Jr. (Civil Division).

SOCIAL SECURITY ACT

Governmental and Industrial Studies Rejected as Evidence Supporting HEW Secretary's Denial of Social Security Disability Benefits on Ground That Claimant Could, Despite Impairment, Engage in Substantial Gainful Activity. Stancavage v. Celebrezze (C.A. 3, October 9, 1963). Claimant

suffered from moderately advanced anthracosilicosis which rendered him unable to return to the employment as a coal miner which he had left because of his impairments. His applications for a disability "freeze" and disability benefits were denied at the administrative level and the denial was affirmed by the district court. The Third Circuit agreed with the Secretary as to the extent of the impairment, but ruled that there was insufficient evidence to support the administrative determination that the impairment did not result in an inability to engage in any substantial gainful activity. The Court, while noting other courts' approval of Government and industrial studies as warranting the Secretary's determination of available employment opportunities, nevertheless rejected the use of such studies in the instant case as showing "221 jobs that can be performed by persons with minimal education and that are sedentary in character or require only light exertion." The Court stated that such evidence is not far from the realm of conjecture and theory condemned by its previous opinions. "The failure of the Secretary to establish the existence of that kind of genuine employment opportunity is patent." The judgment was reversed and the case was remanded for entering of judgment for the claimant.

Staff: David J. McCarthy, Jr. (Civil Division).

TORT CLAIMS ACT

Finding That Tort Claimant Was Contributorily Negligent in Crossing Street Not at Crosswalk Held Not Clearly Erroneous. Footlik v. United States, (C.A. 7, October 11, 1963). This tort action was brought to recover damages for injuries incurred when plaintiff was struck by a Post Office vehicle while crossing the street not at a crosswalk. The district court found the Government driver negligent, but also found plaintiff contributorily negligent in the matter in which he crossed the street, and consequently awarded judgment for the Government. The Seventh Circuit affirmed, holding that the finding of contributory negligence was not shown to be "clearly erroneous."

Staff: United States Attorney James P. O'Brien, Assistant United States Attorneys John Peter Lulinski, John Powers Crowley and Barry J. Freeman (N.D. Ill.).

DISTRICT COURT DECISIONS

SALES

Notice Requirements of Uniform Sales Act Applied to Claim by Government for Breach of Warranty. United States v. Farr & Company (S.D. N.Y., September 30, 1963). The Government contracted with Farr and Company, who was acting as an agent for a foreign supplier, for the procurement of sugar for use in Iran under the foreign aid program. Upon the arrival of the sugar in Iran it was found to be defective, and the Iranian Government rejected it as unfit for human consumption. In the above action Farr & Company interposed the defense that it had not been given notice of the Government's claim within a reasonable time, as required by the Uniform

Sales Act, Section 49. The Government argued that federal law should govern, but the court held that, even applying federal law, the result would be no different because the federal rule would follow the Uniform Sales Act. However, the Court denied a motion by Farr & Company seeking summary judgment, on the ground that a trial was necessary to determine what constituted a reasonable time for giving notice.

Staff: United States Attorney Robert M. Morgenthau, Assistant United States Attorney Arthur S. Olick (S.D. N.Y.); Robert Mandel (Civil Division).

TORT CLAIMS ACT

Mere Unexplained Skidding of Motor Vehicle Sufficient Evidence of Negligence. Mollie P. and Francis C. Brezniak v. Bernard Schur (Postal Employee) (D. Mass., September 27, 1963.) Plaintiffs sued the defendant Bernard Schur, an employee of the Post Office Department, for the negligent operation of a postal vehicle resulting in personal injury and property damage.

The evidence produced at the trial showed that the postal employee was traveling 15 miles per hour approximately 40 feet from the rear of the plaintiffs' car over an ice glazed road. The postal vehicle was equipped with chains and the brakes were in sound condition. When plaintiffs' vehicle stopped, defendant applied his brakes and skidded forward into the rear end of plaintiffs' vehicle.

The Court entered judgment for defendant on the ground that there was no evidence to show that the proximate cause of the collision was anything other than the icy glaze and the skidding. The postal driver was found to have exercised due care and to have employed every precaution that could be expected from a reasonably prudent man under the existing circumstances.

Staff: United States Attorney W. Arthur Garrity, Jr., Assistant United States Attorney A. David Mazzone, (D. Mass.) Vincent H. Cohen (Civil Division).

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

NATIONAL BANKRUPTCY ACT

Merchandise Shortage as Basis for Charge of Concealment in Contemplation of Bankruptcy. United States v. William E. Mathies, Jr. (W.D. Pa.). On October 16, 1963, a jury returned a verdict of guilty on all counts against defendant. One count charged concealment in contemplation of bankruptcy, and five counts charged false oath in bankruptcy proceedings, involving false statements in schedules and false testimony given before the Referee.

The first count, charging concealment in contemplation, was based upon a merchandise shortage of about $200,000 in value over a one year period, the Government not knowing the precise merchandise transferred or concealed. Since the concealment was in contemplation of bankruptcy and no bankruptcy officers existed at the time, concealment from the creditors was alleged. Although the Government did not know whether some of the merchandise had been sold and the proceeds concealed, concealment of merchandise in contemplation was alleged, inasmuch as variance in proof has been held immaterial where the indictment charged only concealment of merchandise and the evidence showed concealment of proceeds derived from sale of merchandise. Defendant's motion to dismiss the indictment had been denied on August 30, 1963.

Staff: United States Attorney Gustave Diamond; Assistant United States Attorney Sebastian C. Pugliese, Jr. (W.D. Pa.).

FRAUD

Scheme to Defraud in Sale of 10% Earnings Program. Farrell v. United States (C.A. 9, 321 F. 2d 409). The Court of Appeals upheld the convictions of David and Oliver Farrell for conspiracy, violations of the mail fraud statute, and violations of the anti-fraud provisions of the Securities Act of 1933. The district court had sentenced David Farrell to 10 years in prison and fined him $86,500; and Oliver Farrell to 4 years' imprisonment and a fine of $52,000, for their activities in the operation of the Los Angeles Trust Deed and Mortgage Exchange and affiliated companies.

The Court of Appeals found that there was no error in the trial court's instructions on the definition of a "security" in the Securities Act of 1933, including notes and evidence of indebtedness, and that investment contracts could include the Secured 10% Earnings Program trust deed investments. The Court of Appeals also found no error in the short summary given by the trial court of civil proceedings initiated by the Securities and Exchange Commission against LATD & ME prior to the indictment, the court noting that a part of the scheme to defraud was the allegation that the plan conformed to all applicable laws.

The defendants urged on appeal that the district court erred in allowing testimony of witnesses as to their losses. The Court of Appeals stated that,

while the Government was not required to prove that anyone was defrauded or sustained a loss in prosecutions of this nature, such evidence was relevant and material in establishing the quality of the trust deeds and the financial condition of LATD & ME. The Court rejected the contention that the defendants had been prejudiced by the testimony of little old ladies as to their losses, finding that the Government had fairly presented a cross-section of investor witnesses.

Staff: United States Attorney Francis C. Whelan; Assistant United States Attorneys Thomas R. Sheridan, Edward M. Medvene and J. Brin Schulman (S.D. Calif.).

SENTENCING

Waiver of Presence and Allocution at Sentencing Granted to Absent Defendant Hospitalized When Supported by His Sworn Affidavit Requesting Imposition of Sentence. United States v. Thomas F. Johnson, Frank W. Boykin, et al. (D. Md., October 7, 1963). On October 7, 1963, the date set for sentencing following conviction for conspiracy to defraud the United States and conflict of interest, counsel for the defendant Boykin presented to the Court a waiver of his rights, under Rules 43 and 32(a) of the Federal Rules of Criminal Procedure, to be present at the imposition of sentence upon him and to make any statement in his own behalf in mitigation of punishment. The waiver was supported by an affidavit signed and sworn to by Boykin stating that he was a patient in a hospital suffering from a recurrence of his heart trouble; that his doctors had advised it would be "extremely dangerous" for him to leave the hospital to attend the sentencing proceedings; that his attorneys had explained to him his legal right to be present at the sentence and of his right to allocution; that, with full understanding of these legal rights, he did not wish to take advantage of them; and that he was content to be represented by his attorneys and desired that sentence be passed upon him without his being personally present.

The Court, noting that no precedent had been found, granted Boykin's request, having satisfied itself that Boykin was unable to come to Court, that he was suffering from a serious heart condition, and that further uncertainty and worry would be detrimental to his health. The Court concluded that justice and mercy alike dictated that whatever sentence was to be imposed after hearing from Boykin's counsel should be made promptly, notwithstanding the fact that the spirit, if not the letter, of Rules 43 and 32(a) requires that ordinarily the defendant should be present when sentence is imposed, except in the cases specifically provided for in Rule 43 - crimes for which the punishment is a fine or imprisonment of not more than one year. In this case, Boykin could have been sentenced to a total of 19 years if the Court had seen fit to impose maximum and consecutive sentences on all counts. The actual sentence imposed was a $40,000 fine, $5,000 on each of the eight counts and a suspended sentence of six (6) months.

ARREST

Probable Cause; Suppression of Evidence. Tindle v. United States (C.A. D.C., October 10, 1963). On conviction for robbery under 22 D.C. Code, Section

2901, defendant appealed on grounds that his arrest without a warrant was unlawful because it was not supported by probable cause, and that, because of this, certain identifying evidence should have been suppressed prior to trial and excluded during the trial. Some of the information upon which the arrest was made was obtained from another person, who, the court assumed, had been unlawfully arrested. The Court said the total information possessed by the arresting officer, including that from the illegally arrested informant, gave him probable cause to arrest appellant. The Court further stated that any connection between the defendant's conviction and information stemming from the illegal arrest of the informant was so attenuated as to dissipate any possible taint, citing Nardone v. United States, 308 U.S. 338, 341 (1939).

Staff: Assistant United States Attorney William H. Willcox (Dist. of Col.)

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IMMIGRATION AND NATURALIZATION SERVICE

Raymond F. Farrell, Commissioner

DEPORTATION

Judgment of Guilt and Order of Probation is a Conviction Under the Narcotic Deportation Statute; Samuel Murillo Gutierrez v. INS; CA 9, No. 18,565; October 11, 1963.

The petitioner, a Mexican national requested the Ninth Circuit to review and set aside an administrative order for his deportation.

In 1962 an information was filed against petitioner in a Superior Court of the State of California charging him with illicit possession of marijuana. The Court found petitioner guilty as charged, suspended proceedings and placed him on probation for three years. Because of these criminal proceedings, the petitioner was found deportable under Section 241(a) (11) of the Immigration and Nationality Act, 8 U.S.C. 1251(a) (11), as an alien who had been convicted for the illicit possession of marijuana.

Petitioner first argued that he had not been "convicted" under the laws of California and therefore was not deportable. No merit was found in this argument because after a review of the California authorities the Court was satisfied that a conviction occurs under California law where a person enters a plea of guilty or is found guilty by a jury.

Appellant finally argued that because he was placed on probation the criminal proceedings lacked sufficient finality to support the deportation order. The Court was not persuaded by this argument finding the order of probation for petitioner to be a final judgment since it was appealable under California law. The petition for review was dismissed.

Staff: Francis C. Whelan, United States Attorney
Donald A. Fareed and James R. Dooley, Assistant United States Attorneys

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LANDS DIVISION

Assistant Attorney General Ramsey Clark

Condemnation: Service by Publication Is Not an Adequate Substitute for Actual Notice When Giving Actual Notice is Practical; Condemnation Judgment Void Where No in rem Jurisdiction Over Land Was Acquired; There Was No in rem Jurisdiction Where Actual Notice to Owner was Lacking, Where Published Notice Did Not Describe the Land Condemned and Where the Government Never Seized Possession of the Land. United States v. Chatham, et al. (C.A. 4, Sept. 23, 1963). - The United States brought this action to quiet its title to certain mountain lands, to prohibit further trespass thereon and to collect damages for timber which had been cut. The defendants claimed title which had come from W. P. Head. The Government claimed its title through a 1935 condemnation proceeding where the estate of R. Y. McAden was alleged to be the owner of the property.

The Government did not, in the present case, question the validity of the Head title up to the time of the condemnation proceeding. The Government's contention was that in the condemnation action, being an in rem proceeding, it acquired title good against the world. It was argued that the Head title was covered by service of publication on unknown owners. The district court agreed with the Government and also held the Government had good title by adverse possession, if no other.

The court of appeals reversed. It held, under the particular facts of this case, that the Government could have ascertained with very little trouble that the Heads claimed to be owners of this land. In these circumstances, it was held that the publication of notice did not comply with the requirements of due process. The court further held that the published notice was deficient because the Head lands were not properly described.

It found there was no in rem jurisdiction over the land, and therefore the condemnation judgment, insofar as it purported to affect the Head lands, was void. The court of appeals held the lands were not seized and that the contention that in rem jurisdiction was acquired must rest solely upon the published notice. But the court found the "published notice was so deficient in its description of the land that it was not only unenlightening but positively misleading."

Finally, with respect to adverse possession, the court held that such acts of dominion as were exercised by the Government were sporadic and equivocal. It ruled that to validate a claim under color of title there must be an actual possession not a technical one, and that the Government's possession here could not qualify.

Staff: A. Donald Mileur (Lands Division).

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INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Industrial Security; Defense Contractor's Employee Granted Absolute Immunity in Libel Actions. Taglia v. Poole; Becker v. Poole (Cir. Ct., Arlington Co., Va.) The defendant, as an assistant security officer of a defense contractor, reported, in writing to the corporate security director, security violations on the part of co-employees of the defense contractor. The security director subsequently notified the Government of these violations and the plaintiffs became respondents before an industrial security hearing board, a quasi-judicial body of the Office of the Secretary of Defense.

The defendant was sued for libel by these employees, on the grounds that her report was false and malicious. She moved to dismiss the action on the grounds that in performing the duties of her office of assistant security officer, which duties were assigned to her by her employer to carry out the purpose of a security agreement entered into between her employer and the Defense Department, she was performing a function of Government and as such could not be sued for libel based on the contents of her report.

On October 22, 1963, the Court, after hearing the testimony of a Deputy Assistant Secretary of Defense, among others, that immunity from civil suit for contractor employees was necessary to insure the faithful and unhesitating performance of their duty to safeguard classified defense information, ruled that the defendant was entitled to the same absolute immunity normally accorded Government employees for reports made in the performance of their duties.

The Court also recognized that absolute immunity normally attached to individuals submitting reports to quasi-judicial bodies and that Mrs. Poole also came under this rule.

While the Attorney General did not formally intervene in the defense of this action, attorneys of this Division assisted Mrs. Poole's attorneys in the preparation of the defense of the case.

Staff: Oran H. Waterman and Benjamin C. Flannagan IV (Internal Security Division)

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CIVIL TAX MATTERS
District Court Decisions

Probate - Executor With Knowledge of Federal Tax Liabilities Against Decedent Is Required to Pay Tax Liability Regardless of Whether or Not the United States Has Filed Timely Tax Claim in Probate Proceedings. Lynne Baker, Executor Estate of Ril T. Baker, deceased v. Charles District Director. (Probate Court, Montgomery County, Ohio). Decided September 26, 1963. Taxpayer died testate on February 2, 1961, and the executor was appointed on February 17, 1961. Under Ohio probate procedure claimants had four months (or until June 17, 1961) during which to file their claims. The Internal Revenue Service filed its claim on October 21, 1962 in the amount of $530.35. This claim was disallowed by the executor as being filed out of time. Subsequently the executor filed a Petition for Instructions with the court. There was no dispute about the tax liability.

The court felt that the case should be decided on the grounds of Ohio statutory requirements that the executor or administrator with knowledge of certain debts (including federal taxes) was required to pay them regardless of when the claim was filed. He said that a sovereign whose claim was rejected by the probate court was not obliged to file an action within two months of the rejection, for such statute was one of limitation and could not bind the sovereign. The court held the limitations expressed in Sections 2117.06, 2117.07 and 2117.12 of the Ohio Statutes do not apply to the United States.

Staff: United States Attorney Joseph P. Kinneary; Assistant United States Attorney Ronald G. Logan (S.D. Ohio); and Maurice Adelman, Jr. (Tax Division).

Materialman's Lien: Subcontractor Perfecting Its Lien Under State Law Entitled to Payment Out of Fund Held by Owner on Theory of No Property Interest in Taxpayer-Contractor While Subcontractor Who Failed to Perfect Lien Under State Law Subordinated to Tax Liens of United States. Board of Education v. Bruce Electric Co., Inc., et al. (ND Ill.) Decided January 16, 1963. (CCH 63-2 USTC ¶9508). Plaintiff was obligated to the taxpayer for work done pursuant to an agreement for electrical contracting. The taxpayer in turn was indebted to two materialmen, Simplex Time Recorder Co. and Hyland Electrical Supply Co., Inc., for materials furnished in connection with the construction contract. Simplex had served plaintiff with written notice of its claim against the taxpayer on December 21, 1960 and had filed an action for an accounting against both plaintiff and the taxpayer on December 12, 1960. A default judgment was awarded Simplex on January 27, 1961. Hyland had served plaintiff with written notices of its claim against the taxpayer on December 10, 1959 and January 19, 1960, but had not filed suit for an accounting. The United States had made various assessments

against the taxpayer on December 4, 1959, February 19, 1960, and June 3, 1960. Notices of federal tax liens were filed on February 19, 1960, April 20, 1960 and July 29, 1960. The court found that Simplex had perfected its materialman's lien to the fund under Illinois law, while Hyland had failed to perfect its lien. The court thereupon ruled that the fund held by plaintiffs to the extent of the claim of Simplex was not property of the taxpayer to which the federal tax liens could attach. However, the balance of the fund after payment of the claim of Simplex was held to be property of the taxpayer subject to the tax liens, which were accorded priority over the unperfected lien of Hyland.

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

Injunction: Cross Motions for Summary Judgment Denied. Iraci v. Scanlon. (ED N.Y.). Decided June 7, 1963. (CCH 63-2 USTC ¶9538). The plaintiffs were officers of the DuBois Concrete Products Corps. DuBois was the prime contractor for the Hudson Contracting Corp. The plaintiffs alleged that from December 1952 through December 31, 1954, DuBois employees were engaged in the performance of Hudson's contract. Upon certification by DuBois of its payroll, Hudson would deposit the net payroll to its special account after deducting federal withholding and social security taxes. It was further alleged that monies representing the withholding and social security taxes were retained by Hudson, and that the accountant for DuBois filed the corporate tax forms without payment of the tax when Hudson refused to sign the check representing the taxes due.

The Commissioner assessed 100 per cent penalties under Section 2707(a) and (d) of the 1939 Code and Section 6672 of the Internal Revenue Code of 1954 against the plaintiffs who were officers in the DuBois Concrete Products Corporation. DuBois was allegedly liable for withholding and social security taxes for the period ending June 30, 1953 through December 31, 1954 in the amount of $8,261.25.

The plaintiffs sued to enjoin the collection of the penalties. The Government moved to dismiss under Rule 12(b) of the Federal Rules of Civil Procedure on the ground that Section 7421(a) of the Internal Revenue Code of 1954 prohibited suits to restrain assessment or collection. On December 12, 1961 the Court denied the Government's motion (62-1 USTC ¶9166). The Court adhered to this decision on reargument (62-1 USTC ¶9269, January 30, 1962).

Subsequent to the decision of the Supreme Court in Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, the plaintiffs and the United States filed cross motions for summary judgment. In denying the plaintiff's motion the court recognized that the opinion of the Second Circuit in Botta v. Scanlon, 314 F. 2d 392 (63-1 USTC ¶9532, February 18, 1963), classified 100 percent penalty assessments as taxes within the meaning of Section 7421 of the Internal Revenue Code of 1954. The Court then quoted the portion of the opinion of the Supreme Court in Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 7, to the effect that a suit for an injunction may be maintained only if it is apparent at the time of suit, under the most liberal view of

the law and facts, that the United States cannot establish its claim. The Court stated that it could not infer non-liability from the facts submitted. The Court denied the Government's cross motion for summary judgment because it was supported only by an affidavit of the trial attorney containing "conclusory" statements that the assessments were made in good faith and that, at the time of suit, the District Director believed that the plaintiffs were officers of DuBois who were under a duty to pay over to the United States the taxes in question.

Staff: United States Attorney Joseph P. Hoey (E.D. N.Y.).

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