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BULLETIN

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SPECIAL NOTICE

Responsibility of United States Attorneys For Filing Notice of Appeal

Page 1 of Title 6 of the United States Attorneys' Manual provides that United States Attorneys shall advise immediately the appropriate Departmental Division of a trial court decision involving the Government or one of its officers; and page 3 of this Title provides that at the time an appeal is about to expire, United States Attorneys should file a notice of appeal in order to preserve the Government's rights without awaiting notice from the appropriate Division in the Department. Reference is also made to page 38 of Title 4 of the United States Attorneys' Manual relating to Tax Division procedures which provides as follows:

> Regardless of whether the United States Attorney has participated in the trial of the case, he should take all steps necessary to protect the Government's rights pending receipt of final instructions from the Department on whether an appeal should be prosecuted. He should take care that notice of appeal is filed within the period of 60 days from the date of entry of judgment.

It is imperative that the United States Attorneys comply meticulously with these instructions.

In recent weeks there have been several tax cases in which the Government's right to prosecute an appeal has been lost because of failure to file a timely notice of appeal. In some of these cases the Department had not been informed of the entry of the adverse judgment. The United States Attorneys are directed to keep a file in which the dates of adverse judgments are reported and an appropriate follow-up system is maintained. The Tax Division will, of course, continue to send instructions relating to the filing of notices of appeal wherever possible but, as pointed out above, the primary responsibility for filing notices of appeal rests with the United States Attorneys.

IMPORTANT NOTICE

In response to inquiries concerning what publications and other materials are furnished to the United States Attorneys by the several divisions of the Department, there is forwarded with this Bulletin a list of such material. United States Attorneys should check to see that copies of all of the material listed are available in their offices. Requests for additional copies should be addressed to the division indicated.

ECONOMY

Economy of operation has been the subject of a number of items in the United States Attorneys Bulletin as well as in individual letters to United States Attorneys. President Johnson's emphasis on economy in Government has made it incumbent on all Federal employees to curtail expenses wherever possible.

In order to cooperate with the President's expressed desire for a reduction in expenditures, one of the United States Attorneys circulated a memo on this subject to his staff. Because the items contained in the letter are applicable to all United States Attorneys' offices, they are being published as a reminder of the many ways in which economy can be practiced without adversely affecting the work:

> Don't travel when a telephone call will do.
> Don't travel or telephone when a telegram will suffice.
> Don't travel, telephone or telegraph when an air mail letter will serve the purpose.
> Don't send it air mail when regular mail will satisfy the time requirements.
> Don't be verbose in your communications as plain and concise language is preferred.
> Don't take more than fifteen minutes for a coffee break.
> Don't take a coffee break if the time is needed to complete the day's assignment.
> Don't shirk or shift your responsibility, always bearing in mind that our duties cannot be transferred to or assumed by the court or any other individual or group.

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ANTITRUST DIVISION

Assistant Attorney General William H. Orrick, Jr.

Trading Stamp Co. Charged With Violating Sections 1 & 2 of the Sherman Act. United States v. Blue Chip Stamp Company, et al. (S.D. Calif., DJ File No. 60-418-3). The complaint in this action was filed on December 26, 1963. It alleges that eight corporations, each of which operates chains of supermarkets in California, and one corporation which operates a chain of drug stores in California, have engaged in a conspiracy in restraint of and to monopolize trade and commerce, and goods, wares and merchandise sold at retail in California, and that defendants and certain others not named as defendants, participated as co-conspirators in monopolizing and attempting to monopolize interstate trade and commerce in the trading stamp business in violation of Sections 1 and 2 of the Sherman Act. The complaint charges that in 1962 the volume of retail sales made by defendant supermarkets in California was about $1,597,000,000, and that such sales represented approximately 30 per cent of all sales made by grocery stores in California and approximately 37 per cent of all sales made by chain grocery stores in California.

It is further alleged that defendant Thrifty Drug Stores Company, Inc. operates the largest chain of pharmacies in California, with about 120 stores in the Los Angeles area; that its sales in 1961 totaled approximately $100 million and that such sales represented approximately 22 per cent of all sales made by pharmacies in the Los Angeles area; that defendant Blue Chip Stamp Company's trading stamp business in California in 1962 amounted to approximately $70 million which constituted approximately 65 per cent of the total trading stamp business in California, and that it issued approximately 40 billion trading stamps in California in 1962 which constituted approximately 71 per cent of all trading stamps issued in California; and that in 1956 there were approximately 53 trading stamp companies doing business in California, of which 40 are now out of business.

It is alleged that the conspiracy began some time in late 1955, that the combination and conspiracy has consisted of a continuing agreement, understanding and concert of action among the defendants and co-conspirators, the substantial terms of which have been and are that defendant retailers and co-conspirators organize and establish defendant Blue Chip Stamp Company as a trading stamp company, and maintain control of its stock, board of directors, and policies and practices would refrain from initiating the use of any trading stamps unless agreed to by said defendant retailers and co-conspirators; and would cause Blue Chip Stamp Company to sell or distribute its stamps at or about cost, so as to prevent other trading stamp companies from effectively competing with it. Other items of the alleged agreement are the use of Blue Chip stamps would be licensed to any retailer desiring to use them in any area in which said stamps are issued, but only upon condition that said retailer would agree to use Blue Chip stamps exclusively;

that competition among defendant supermarkets, and between defendant retailers and other retailers in California, in the use of trading stamps be eliminated; and that defendants and co-conspirators would take whatever additional action was necessary for Blue Chip to achieve and maintain a monopoly position in the trading stamp business in California.

Staff: Stanley E. Disney, and James M. McGrath (Antitrust Division)

Government Considering Appeal From Order Setting Aside Civil Investigative Demand. Petition of Union Oil Company of California For an Order Setting Aside Civil Investigative Demand No. 0179 (S.D. Calif., DJ File No. 60-0-37-713). On August 19, 1963, the United States served a civil investigative demand upon the Union Oil Company of California. The demand recited that it was issued pursuant to the Antitrust Civil Process Act for the purpose of ascertaining whether there is or has been a violation of Section 7 of the Clayton Act by "The proposed acquisitions of fertilizer companies by petroleum companies." It requested, among other things, documents referring "to the maintenance or improvement of [Union's] position in the fertilizer market, including each such document relating to any acquisition, merger, sale of assets, or consolidation consummated or considered by [Union] ." On August 27, 1963, Union filed a petition for an order setting the demand aside. Petitioner urged, inter alia, (1) that Union was not a person under investigation as required by the Act; and (2) that proposed acquisitions cannot be investigated under the Act.

The District Court rejected the first argument, holding that "when the demand is read in conjunction with the schedule of documents which is a part of the demand, it may be fairly inferred that petition is a person under investigation". Judge Stephens went on to state, "The Court has not the slightest doubt but that the Attorney General . . . may validly pursue antitrust investigations designed to ascertain whether the proposed acquisitions of fertilizer companies by petroleum companies violate 15 U.S.C. §18". The Court concluded, however, that the Antitrust Civil Process Act cannot be used to obtain information to facilitate such investigations of proposed acquisitions. It held that --

> Since . . . the investigation is in fact not whether there is or has been a violation of the provisions of 15 U.S.C. §18, but an investigation of proposed acquisitions which if consummated might violate that section, the petition requesting an order that civil investigation demand No. 0179 is void and that it be set aside, should be granted.

An appeal is being considered.

Staff: Robert B. Hummer, Lewis Bernstein, George R. Kucik, and Charles R. Lotter (Antitrust Division)

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C I V I L D I V I S I O N

Assistant Attorney General John W. Douglas

COURT OF APPEALS

PARTIES AND ISSUES

Substantial Similarity of Parties and Virtual Identity of Issues Require Dismissal of Action Previously Disposed of by Another Court of Appeals. Hilton Hotels Corp. v. Weaver (C.A. D.C., November 18, 1963). This is an action to enjoin part of an urban redevelopment program. The district court dismissed and the Court of Appeals affirmed. The latter court noted the virtual identity of the issues and the substantial similarity of the parties in Pittsburgh Hotels Ass'n v. Urban Redevelopment Authority, 309 F. 2d 186 (C.A. 3), and held that "interests of comity and the orderly administration of justice" compelled it to refrain from re-examining, in effect, a decision of a sister circuit. The Court expressly refused to base its decision on principles of res judicata or collateral estoppel.

Staff: United States Attorney David C. Acheson;
Assistant United States Attorneys
Frank Q. Nebeker, Ellen Lee Park and
David Epstein (D. D.C.)

SOCIAL SECURITY ACT

When Claimant Is Unable to Engage in Former Work Secretary Must Inquire Whether He Tried to Do Other Work, or What Kind of Work He Is Able to Do. Cochran v. Celebrezze (C.A. 4, November 20, 1963). Claimant appealed from the district court's affirmance of the Secretary's finding that, although he was unable to engage in his former work (coal miner or truck driver) since 1959, because of residuals of osteomyelitis of the legs, asthma or bronchitis, stomach ulcer, and a chronic skin condition, claimant was capable of engaging in light work. Claimant took the position that due to the severity of his impairments and the lack of any findings as to what jobs he could do, the Court of Appeals should reverse. We contended initially that there was substantial evidence to support the Secretary's finding, and argued, alternatively, that, should the Court disagree, a remand for the taking of additional evidence would be appropriate. The Court of Appeals, in remanding the case to the district court with directions to remand to the Secretary, stated that the Secretary should have inquired into the questions of "whether appellant has in fact tried to do any type of work since 1959, or what, if any, kind of work appellant is able to do, and whether this kind of work, if any, is available to him". The Court, in addition, reaffirmed its holding in Underwood v. Ribicoff, 298 F. 2d 850, that a claimant is not required to go down the list of the nation's industrial occupations and negate his capacity for each of them.

Staff: Lawrence R. Schneider (Civil Division)

TORT CLAIMS ACT

Actual Knowledge of Presence of Children Near Dangerous Instrumentality Not Required Under Virginia Law to Impose Liability for Their Injury on Operator of Such Instrumentality. Henry James Taylor v. United States (C.A. 4, November 15, 1963). This tort claims action was brought to recover damages for severe burns sustained by a minor at a transformer substation located near a residential area on the grounds of Fort Belvoir. The district court held that the Government was not negligent in the manner in which the transformer site was protected, notwithstanding the existence of a hole under the perimeter fence through which the child had entered the transformer enclosure.

The Fourth Circuit remanded the case for retrial, holding that the district court misapprehended Virginia law in requiring plaintiff to prove, for a higher than usual standard of care to apply, that the Government had actual knowledge of the presence of children in the vicinity of the transformer. Relying on Robbins v. Old Dominion Power Company, 131 S.E. 2d 274 (Va.), decided subsequent to the opinion of the district court, the Court of Appeals found that under Virginia law the higher standard would apply if the Government "should know" that children are likely to gather in the area. The case was remanded for a new trial based upon the application of what the Court held to be the correct test for the application of the higher standard.

Staff: Morton Hollander and Ernest J. Ettlinger (Civil Division)

Government Employee Enroute to Permanent Residence After Working Hours, Allegedly For Purpose of Procuring Supplies, Not Acting Within Scope of Employment Under Kentucky Respondeat Superior Law. Gay Marcum v. United States (C.A. 6, November 26, 1963). In this tort claims action plaintiff sought damages for the deaths of his wife and child and injuries to himself as the result of a collision between his automobile and the privately owned pick-up truck of a Government employee. The Government employee, who was concededly negligent, was enroute to his permanent residence after working hours allegedly for the purpose of picking up supplies that would thereafter be needed on the job. Applying controlling Kentucky respondeat superior law, the Sixth Circuit agreed with the district court that the Government employee was not, at the time of the accident, acting within the scope of his employment. Hence, there was no basis for imposing vicarious liability on the United States, as employer.

Staff: Edward Berlin (Civil Division)

Government Not Liable in Tort to Subcontractors for Failure to Require Posting of Miller Act Payment Bond. United States v. Robert Smith, d/b/a Smith Contracting Company (C.A. 5, November 19, 1963). Six subcontractors sued under the Federal Tort Claims Act to recover amounts due them for materials supplied to the prime contractor who defaulted and became insolvent. The contract had been let without requiring the contractor to post the payment bond provided for by the Miller Act, 40 U.S.C. 270a. The district

court found for plaintiffs, holding that the contracting officer had a statutory duty to obtain the bond and that the Georgia prima facie tort statute gave a cause of action for breach of such legal duty.

The Court of Appeals reversed. Finding it unnecessary to determine whether the Miller Act created a legally enforceable duty running to plaintiffs to require the posting of the bond, the Court held that this was not the type of tort intended by Congress to be within the coverage of the Federal Tort Claims Act. Citing, as apposite, language from the Ninth Circuit's decision in Woodbury v. United States, 313 F. 2d 291, 295, the decision holds, in effect, that, where the claim is in substance a breach of contract claim and only incidentally a tort claim, the fact that the Government's tort liability is to be decided on the basis of the law of the various states, while its contract liability is based on uniform federal law, precludes this type of action from falling within the ambit of the Tort Claims Act.

Staff: Kathryn H. Baldwin (Civil Division)

STATE COURTS

TRADING WITH THE ENEMY ACT

Interests in Trust Remainder, Seized Pursuant to Trading With Enemy Act, Vested in Possession at Termination of Trust Despite Subsequent Conclusion of Litigation Between Those Claiming Interests. Northern Trust Co. v. Biddle (Circuit Court, Cook County, Illinois, October 7, 1963). All remainder interests of German beneficiaries under a trust created in 1873 by Louisa G. Bigelow, a Chicago resident, were seized under the Trading with the Enemy Act. The trust terminated in 1951 with the death of the last life beneficiary. After years of litigation, the Supreme Court of Illinois in 1962 affirmed a 1959 decision of the Circuit Court of Cook County determining that the Attorney General is entitled to distribution of the interests seized by the vesting order. The former German owners then moved for summary judgment under Illinois Rules of Civil Practice asserting a right to distribution of the remainder interests on the ground that the Attorney General's interest in the trust had been divested by Public Law 87-846 (50 U.S.C. App. Sec. 41). This statute divests the interests of the Attorney General in trusts seized under the Trading with the Enemy Act which have not become payable or deliverable to or have not vested in possession in the Attorney General prior to December 31, 1961. Movants asserted that, despite the fact that the trust involved terminated in 1951, litigation respecting the persons entitled to the interests had not been concluded prior to December 31, 1961, and that therefore the property had not become payable or deliverable to or vested in possession in the Attorney General prior to the cut-off date. The Court, however, ruled that the motion for summary judgment should be denied upon the ground that it was the purpose of the statute that the Attorney General should retain property in which the right to possession had accrued, whether or not distribution had been effected prior to December 31, 1961, and that distribution should be made as decreed in the 1959 order determining the interests in the trust.

Staff: Lillian C. Scott (Civil Division)

Power of Appointment Granted to German National Ineffective Under Trading With Enemy Act. Estate of Bertha M. Foster (Surrogate's Court, New York County, New York, November 22, 1963). Bertha M. Foster, who died in New York in 1924, created a trust for the benefit of her brother Albert Fox. She gave to him a general power to appoint the trust remainder, and provided that, in default of such appointment, the trust remainder was to be paid to the brother's next of kin. At the entry of the United States into World War II Albert Fox was a resident of Germany. He died in Germany in 1946 leaving a last will and testament, executed in 1939, by which he attempted to exercise the power of appointment under Bertha Foster's will in favor of an American resident.

In 1943 the Alien Property Custodian under the Trading with the Enemy Act vested all interest of Albert Fox and his next of kin in and to the trust created under the will of Bertha M. Foster. The trust remainder became distributable at Albert Fox's death in 1946 and the appointee named in the will of Albert Fox claimed the remainder of the trust. The Government claimed distribution of the trust remainder under the vesting order. The Surrogate held that the attempt of Albert Fox to exercise the power of appointment was ineffective because the regulations issued under Executive Order 8389 prohibited such action on the part of the donee of the power of appointment and the effect of the vesting order was to transfer the interests of the trust remaindermen to the Attorney General, as successor to the Alien Property Custodian. The court ordered distribution of the property of the trust to the Attorney General.

Staff: Lillian C. Scott (Civil Division)

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

PROSECUTIONS

Policy of Department Regarding Dual Prosecutions. Your attention is again called to the policy of this Department with respect to dual prosecutions which was expressed in a memorandum contained in Department press release dated April 6, 1959, from the Attorney General to all United States Attorneys, to the effect that after a State prosecution there should be no Federal prosecution based on substantially the same act or acts unless the reasons are compelling, and then only when a United States Attorney recommends and the Department approves such prosecution. Wagering tax, liquor tax and narcotic tax violations were excluded from the purview of this policy by Department Memo No. 270, dated August 5, 1959.

We also call your attention to the requirement that all offenses arising out of a single transaction should be alleged and tried together and should not be a basis of multiple prosecutions, see Petite v. United States, 361 U.S. 529.

The proper control of litigation and enforcement of the Department's policy depends upon the continued vigilance of the United States Attorneys themselves. Please impress the need for such vigilance upon all members of your respective staffs.

VENUE

Crime on High Seas; Meaning of Term "First Brought" as Used in 18 U.S.C. 3238. United States v. Johnnie Leonard Schwarzauer, (D. Puerto Rico, DJ File No. 45-2258.) Defendant is under indictment in Puerto Rico for the murder of W. J. Hanks aboard the SS. Texaco Mississippi. The U. S. District Court in Puerto Rico recently denied a defense motion to dismiss the indictment for lack of venue, holding that Schwarzauer was "first brought" to San Juan, Puerto Rico, as required by Title 18 U.S.C. 3238.

Following discovery of the murder, the ship put in at Trinidad, B.W.I. Defendant was then turned over to the American consul by the ship's captain. After a brief period of confinement in a local jail in Trinidad, defendant was taken aboard a commercial plane by the American consul and flown to San Juan, Puerto Rico. He was placed under arrest by Federal agents immediately upon his arrival in Puerto Rico.

On September 12, 1963, the U. S. District Court, after a hearing on defendant's application for a writ of habeas corpus, ordered him discharged because of a procedurally faulty complaint. Defendant left Puerto Rico the same day, but was arrested two days later in Mobile, Alabama, and removed to San Juan, to answer to an indictment that, in the interim, had been returned in Puerto Rico.

In his motion to dismiss, defendant argued that implicit within the meaning of the phrase "first brought" as used in Section 3238 is a preceding valid arrest, and that he had not been legally arrested prior to his arrival in, nor while in San Juan. The Court rejected this argument, holding that "the district into which an offender is 'first brought' within the meaning of the statute is that judicial district of the United States into which he is first taken in custody--that is, against his will." The Court cited Chandler v. United States, 171 F. 2d 921 (C.A. 1 1948), certiorari denied, 336 U. S. 918, for the proposition that even where bringing the accused into the jurisdiction against his will is a violation of the law of the forum, it does not divest the court of jurisdiction over the accused. The Court then found from the record that defendant was brought, against his will, from Trinidad to San Juan, Puerto Rico, in the custody of the American consul, and that Puerto Rico was thus the district into which he was "first brought" within the meaning of 18 U.S.C. 3238.

Staff: United States Attorney Francisco A. Gil, Jr; Assistant United States Attorney Benicio Sanchez-Rivera (D. Puerto Rico)

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

IMMIGRATION

Denial of Visa Petition Ruled Illegal. Linda Lee Amarante v. INS (C.A. 9, No. 18,659, January 2, 1964.) Appellant, a citizen of the United States, brought a declaratory judgment action in the United States District Court for the Southern District of California to challenge the denial by the Immigration and Naturalization Service and the Board of Immigration Appeals of her visa petition to accord nonquota status to her alien husband. The lower Court rejected her challenge and she appealed.

The first wife of appellant's husband obtained the approval of a visa petition in his behalf but before he had been issued a visa or had his status adjusted to a permanent resident the approval of the visa petition was revoked by the Service because it was proved that the marriage was a sham and entered into to evade the immigration laws.

Appellant's visa petition was denied under Section 205(c) of the Immigration and Nationality Act, 8 U.S.C. 1155(c), which provides that a visa petition shall not be approved if the alien beneficiary has previously been accorded nonquota status by reason of a marriage determined by the Attorney General to have been entered into for the purpose of evading the immigration laws. The Ninth Circuit agreed with appellant that the denial of her visa petition was improper in that, while a prior petition had been approved, her alien spouse had not been accorded nonquota status. The Court ruled that nonquota status is not accorded by the approval of a visa petition but only by the issuance by an American Consul of an immigrant visa to the alien spouse or by the adjustment of the status of the alien spouse to a permanent resident under Section 245 of the Immigration and Nationality Act, 8 U.S.C. 1255. The judgment of the lower Court was reversed.

Staff: United States Attorney Francis C. Whelan; and Assistant United States Attorneys Donald A. Fareed and Dzintra I. Janavs (S.D. Calif.)

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INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Foreign Agents Registration Act; Conspiracy. United States v. Igor Cassini and R. Paul Englander (D.D.C.). On February 8, 1963, defendants were charged by a four count indictment with violation of the Foreign Agents Registration Act of 1938 (22 U.S.C. 612), and for conspiring to violate the provisions of that Act. (See Bulletin, Vol. 11, No. 4, p. 104 and No. 20, p. 528). On October 8, 1963, Cassini entered pleas of nolo contendere to each of the four counts. Englander entered a similar plea to the first count of the indictment, the substantive violation of failure to register. On January 10, 1964, following a submission of a probation report, Cassini was sentenced to pay a fine of $10,000 on Count 1, and on Counts 2, 3, and 4, imposition of sentence was suspended and defendant placed on probation for six months. Englander was sentenced to six months probation and to pay a fine of $10,000 on Count 1.

Staff: Kevin T. Maroney, Robert Keuch and George Fricker (Internal Security Division)

Foreign Agents Registration Act: Failure to Register. United States v. Elmer Henry Loughlin (D.C.). Defendant, a Brooklyn physician who pleaded nolo contendere to a one count indictment under the Foreign Agents Registration Act of 1938 charging him with failure to register with the Attorney General as an agent of the Government of Haiti, its officers, agents and representatives, was sentenced on January 10, 1964, receiving a suspended sentence of one to four years with probation for a period of four years.

Staff: James C. Hise (Internal Security Division)

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LANDS DIVISION

Assistant Attorney General Ramsey Clark

Condemnation: Wherry Housing Valuation; Comparable Sales; Reproduction Costs; Rule 43(a), F.R. Civ. P., Replacement Reserve Fund; Fair Rental For Possession by Condemnee After Taking. U.S. v. Dayton Development Fort Hamilton Corp. (C.A. 2, Jan. 9, 1964), D. J. File No. 33-33-930. The district court upheld a jury verdict of $875,000, the exact amount of the Government's testimony of value, for the interest of the Wherry sponsor (builder lessee) in Fort Hamilton-Dayton apartments in Brooklyn, New York. In addition, the court upheld an award of $57,000 for fair rental to the Government for six weeks' possession by the sponsor after the taking. Because the deposit of $1,250,000 had been withdrawn, a judgment was entered for the Government in the amount of $432,000.

On appeal by the sponsors, the Court of Appeals affirmed and held: (1) capitalization of income is a particularly appropriate method to value the sponsors' interest in a Wherry project; (2) reproduction costs were properly excluded as direct evidence of value and as support for the sponsors' expert since they were unrelated to developing a capitalization rate; (3) the propriety of using reproduction costs as evidence of value is a question of substantive law and not an evidentiary question governed by Rule 43(a), F.R. Civ. P; (4) the sales of other Wherry and other federally controlled housing were properly admitted in support of the testimony of the Government's expert, especially since he used the relation between selling price and net income to derive his capitalization rates; (5) it was proper for the Government's expert to deduct both the replacement reserve fund, which had been returned to the sponsors, and a further estimate of the cost of immediately needed repairs not covered by the fund, from his estimate of market value; (6) it was proper to determine the short-term fair rental value on the basis of the long-term value adjusted for seasonal factors, i.e., heating and incidental income.

Staff: Edmund B. Clark (Lands Division).

Action in Nature of Mandamus Under 28 U.S.C. §1361; Claims Excepted From Provisions of Federal Tort Claims Act. Merrill P. Smith, et al. v. United States, et al., D. J. File No. 90-1-2-719 (D. Wyo.) This action was initiated by three entrymen on the Riverton Reclamation Project, Wyoming, on behalf of themselves and numerous other entrymen similarly situated, against the United States, the Department of the Interior, the Bureau of Reclamation, the Secretary of Interior, and the Commissioner of Reclamation. Plaintiffs complained that although defendants knew that a serious drainage problem existed on the lands comprising the Riverton Project, they nevertheless opened the lands to entry and induced plaintiffs and other entrymen to enter upon and attempt to farm them, all to the resulting detriment of the entrymen. Plaintiffs alleged that there had been a violation of 43 U.S.C. 412 which requires that before a new reclamation project or division thereof may be commenced, the Secretary of the Interior, after certain studies, must make a finding in writing that the project is feasible for both the United States and the settlers thereon.

The complaint contained two counts, the first being an action in the nature of mandamus under 28 U.S.C. 1361, seeking to compel defendants (1) to provide compensation to the entrymen for the losses which they allegedly sustained, (2) to make a determination on the lack of economic feasibility of the project to Congress, and (3) to request equitable relief from Congress. The second cause of action, founded on the Federal Tort Claims Act, sought $2,520,000 in damages for the alleged losses of the entrymen.

On December 19, 1963, United States District Judge Ewing T. Kerr sustained the Government's motion to dismiss and dismissed both causes of action. In its memorandum opinion, the Court stated that plaintiffs had failed to show that defendants had a duty owed to the entrymen to do any of the acts sought in the first cause of action. In the absence of such a duty, an action in the nature of mandamus under 28 U.S.C. 1361 cannot be maintained. "The Reclamation Act," the Court said, "does not guarantee success to those who enter upon the lands." Also, the opinion said that "it would thwart every constitutional canon for this court to order an arm of the Executive Department to demand action by the Legislative Department." Finally as to the first cause of action, the Court held that 43 U.S.C. 412 required the Secretary of the Interior, not the Court, to make findings of feasibility as to reclamation projects and that the Court has no supervisory power over such findings.

The second cause of action, insofar as it related to misrepresentations and inducements by the defendants, was held barred by the exclusion from the provisions of the Federal Tort Claims Act of claims arising out of misrepresentation. 28 U.S.C. 2680(h). Furthermore, the determination of the feasibility of a new project or division was held to be a discretionary function and any claim based thereon therefore precluded by 28 U.S.C. 2680(a).

Staff: United States Attorney Robert N. Chaffin (D. Wyo.) and Arthur Ayers (Lands Division).

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CIVIL TAX MATTERS
Appellate Decision

Collection Suit; Summary Judgment; Federal Tax Lien Attaches to Property of Taxpayer Absent From Country at Time of Assessment; Government Must Show Deficiency Notice Sent Following Jeopardy Assessment. United States v. Ball, et al. (C. A. 4, January 7, 1964) D. J. No. 5-80-248. Taxpayer left the country leaving unpaid income taxes. Following his departure a jeopardy assessment was made, notice and demand for the amount of the assessment were mailed to taxpayer's last known address and tax liens were filed. Later a collection suit was commenced against taxpayer, the beneficiaries of his insurance policies and the insurance companies who had issued policies on his life. The complaint alleged an assessment, notice and demand under the assessment, the filing of a tax lien and that the assessment remained due and owing. The beneficiaries' answer alleged lack of knowledge or information sufficient to form a belief as to those allegations in the complaint, but they were later stipulated. The district court rejected the beneficiaries' argument that the federal tax lien could not attach to the property of a taxpayer who was outside of the United States when assessment was made. The Court granted the Government's motion for summary judgment and ordered the insurers to pay the cash surrender value of the policies to the Government.

The beneficiaries appealed. At oral argument on appeal, for the first time the question was raised as to whether the deficiency notice required by Section 6861(b) and amended in Section 6212(a) of the 1954 Internal Revenue Code had been sent to taxpayer. Nothing in the record expressly indicated that a valid deficiency notice had been sent.

The Fourth Circuit affirmed the lower court on the issues argued below, but reversed and remanded to require the Government to demonstrate that a valid deficiency notice had been sent to taxpayer. It said that summary judgment required the Government to show a valid legal basis for the tax lien which depended in turn on a valid assessment and a valid notice of deficiency, or the absence of a dispute about such validity. Since the complaint and supporting papers did not establish this validity, i.e., that a deficiency notice had been sent, and since the answer did not admit it, the requirements of Federal Rule 56(c) had not been met. The remand permitted further proceedings either by renewal of the motion for summary judgment or by trial.

Staff: Lee A. Jackson, Joseph Kovner, Michael Mulroney (Tax Division)

Special Appeal From Interlocutory Order Pursuant to 28 U.S.C. 1292(b); Removal of State Court Forfeiture Suit Against District Director Held Not Appealable. Frank J. Farley, Treasurer of County of Hudson and County of of Hudson v. $2,438,110 and All Persons Interested Therein. (C.A., January 9, 1964) D.J. No. 5-48-5192. On July 3, 1962, $2,438,110, along with other personal property, including gambling apparatus, was discovered in one of two cars belonging to Joseph V. Moriarty, stored in garages in Jersey City, Hudson County, New Jersey. The Jersey City police seized the cars and personal property, but the money was seized by FBI Agents and turned over to the United States Marshal. The District Director of Internal Revenue made a jeopardy assessment for delinquent income taxes against Moriarty on July 5, 1962. The following day a lien arising out of the assessment was filed in Hudson County. Upon levy to enforce the lien, the United States Marshal paid the money over to the District Director, who covered it into the United States Treasury.

On September 24, 1962, after the collection had been completed, the Hudson County Treasurer commenced an in rem action, to which the District Director was made a party defendant, in the New Jersey State Court claiming the funds by forfeiture. The State Forfeiture Statute provided for forfeiture to the county in the event that a New Jersey official, in connection with any arrest for violation of the state gambling laws, seized or captured money and deposited it with the County Treasurer. The District Director filed a petition for removal pursuant to 28 U.S.C. 1442(a)(1), on the ground that the action was commenced against him in the State Court for acts performed by him in collecting the revenue pursuant to an Act of Congress. The removal was granted, and remand denied by the District Court on the ground that the money forming the res had never been in the possession or control of the New Jersey State Court as required to confer jurisdiction in an in rem action; that the money had admittedly been covered into the United States Treasury; that the suit in the State Court was necessarily one in personam on the theory that money belonging to the county had wrongfully been taken by the District Director to pay the taxes of Moriarty, and that the action was therefore plainly removable under Section 1442(a)(1). The order denying the remand was entered on December 9, 1963 with the necessary certificate by the District Court authorizing an application for a special appeal pursuant to Section 1292(b).

The Government opposed the application on the ground that there was no disputable controlling question of law involved. The plain fact was that the Hudson County officials never got possession of the money, and lacking possession, there was no legal basis whatever for the in rem forfeiture proceeding in the State Court. The Government also urged that there was no need for a special interlocutory appeal because the case could be disposed of on its merits by summary judgment.

On January 9, 1963, the Court of Appeals for the Third Circuit, without opinion, denied the application for special appeal. (D.J. No.5-48-5192).

Staff: Joseph Kovner, Donald W. Williamson, Jr.
(Tax Division)

District Court Decision

Tax Lien of United States Entitled to Priority Over Claims of Trustee in Bankruptcy, Statutory Lien of State of Michigan, and Attachment Liens. Consumers Power Company v. Arthur James Rubiner, Trustee, et al. (E. D. Mich., November 7, 1963) D. J. No. 5-37-2024. This was an interpleader action involving $24,407.47 belonging to the taxpayer, Harvey B. White, Inc. The United States claimed the entire fund by virtue of its tax liens and a levy, Ocean Accident Insurance Company by virtue of a writ of garnishment, the Michigan Employment Security Commission through both a statutory lien and a writ of garnishment, and the trustee of the taxpayer under Section 67(a) of the Bankruptcy Act allowing a trustee to succeed to the liens of creditors obtained within four months of bankruptcy. Following a trial on these issues, the Court found that taxpayer had been insolvent on January 19, 1961 and for sometime prior thereto, that the Michigan Employment Security Commission had a writ of garnishment served January 19, 1961, that the Ocean Accident Insurance Company also had a writ of garnishment served, this one on March 27, 1961, that the United States filed various tax liens during the latter part of 1960 and served a levy on the interpleading party April 2, 1961, and that taxpayer was adjudicated a bankrupt April 27, 1961.

The Court held: (1) that even if the trustee could succeed to the attachment liens of the State of Michigan and Ocean Accident Insurance Company, nevertheless the claim of the United States would enjoy priority since the tax lien of the United States is a perfected lien as opposed to the attachments not reduced to judgment, and further, the notice of levy served prior to bankruptcy effectively appropriated the debt to the United States as against a later-appointed trustee, citing United States v. Eiland, 223 F. 2d 118 (1955); (2) that the statutory lien of the Michigan Employment Security Commission giving to the Commission a perfected lien on the date the taxes were due and payable (which was before assessment and demand by the United States) must be viewed in the federal sense, United States v. City of New Britain, 347 U.S. 81 (1954), and inasmuch as the State's statutory lien does not attach to specific property it is not perfected and hence not valid as against the perfected United States tax lien; and (3) that the interpleading party here is not entitled to costs and attorneys' fees, since to allow such would in effect be requiring the United States to pay them where the ultimate recovery by the United States would be diminished by that amount. The entire interpleaded fund was awarded to the Government.

Staff: United States Attorney Lawrence Gubow; Assistant United States Attorney Robert F. Ritzenhein (E. D. Mich.); and Raymond L. McGuire (Tax Division).

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