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ANTITRUST DIVISION

Assistant Attorney General William H. Orrick, Jr.

CLAYTON ACT

Court Denies Defendants' Motion to Dismiss Complaint Based on Abandoned Merger. United States v. Allied Chemical Corporation, et al. (S.D. N.Y.) D.J. File 60-0-37-772. On June 30, 1964, a hearing was held before Judge Edward J. Dimock on Defendants' motion to dismiss the complaint in this action charging that the proposed acquisition of General Foam Corporation, a producer of flexible urethane foam, by Allied Chemical Corporation, a producer of the raw materials used in the manufacture of urethane foam would violate Section 7.

Approximately three weeks prior to the date scheduled for commencement of the trial, defendants Allied and General Foam advised the Government that they had decided to abandon their plans for the acquisition. Dismissal of the action was sought by defendants on the grounds that since the alleged violation of Section 7 was no longer threatened, the Government no longer had a claim for relief and the case was moot.

Responding, the Government contended that the mere voluntary abandonment of allegedly illegal conduct on the eve of trial does not thereof render the case moot and that it was entitled to appropriate injunctive relief and, because Allied may have acquired certain intangible assets of General Foam pursuant to the acquisition agreement and in preparation for the acquisition, additional discovery was necessary to ascertain the nature and extent of the appropriate relief.

Treating defendants' motion as one for summary judgment under Rule 56, F.R.C.P., Judge Dimock denied the motion without prejudice and authorized the discovery sought by the Government directed toward the partial asset acquisition. In reaching its decision the Court pointed out that Section 7 of the Clayton Act expressly condemns partial acquisitions of assets where such acquisitions have anti-competitive effects, and disagreed with defendants' contention that since the complaint was directed toward a total asset acquisition it would not comprehend an acquisition of less than all the assets. Deferred as premature was defendants' argument that whatever Allied may have obtained from General Foam in the way of "know how" or other information was of no value to Allied and would not constitute assets within the meaning of Section 7 of the Clayton Act.

In opposing defendants' motion, the Government also contended that it was entitled to determine whether Allied was contemplating acquisition of other producers of flexible urethane foam. As to this issue, the Court denied the Government's request for discovery stating that the possibility of other mergers of the parties was beyond the ambit of the present complaint.

Staff: Les. J. Weinstein, Carl D. Lobell, Richard T. Colman, Kathleen Devine, Benjamin J. Sterling and Richard Duke (Antitrust Division)

SHERMAN ACT

Court Rules Contrary to Jury Which Had Previously Acquitted Defendants. United States v. Morton Salt Company, et al. (D. Minn.) D.J. File 60-40-7. On August 6, 1964, Judge Gunnar H. Nordbye ruled as charged in a complaint filed by the Government on July 11, 1961, that the Morton Salt Company of Chicago and the Diamond Crystal Salt Company of St. Clair, Michigan had violated Section 1 of the Sherman Act by fixing prices in the sale of rock salt to public authorities under sealed bids.

The ruling is noteworthy in that it is one of the rare occasions when a court, making due allowances for difference in burden of proof, ruled contra to a jury which had previously acquitted defendants after trial in a criminal case on the same charges and on the same evidence. The civil case had been submitted to the Court on the record made in the criminal case.

Rock salt is used as a de-icing agent for removing snow and ice from the highways, and is purchased in substantial amounts by all public authorities with de-icing problems. Areas especially affected and on which proofs were concentrated at trial included Minnesota, Wisconsin, Michigan, Illinois, Ohio and Indiana.

Bids to public authorities have, for a number of years, been identical to the penny; and the general pattern of proofs at trial consisted of showing that this was the result of a subtle interchange of price data between the defendants, accomplished through telephone conversations and at meetings.

Defendants' principal defense was that acting individually and drawing from legitimate sources they simply accumulated information which permitted them to compute matching bids as it was their intent and right so to do. The Court expressly rejected the concept that identity of bids necessarily indicates collusion or conspiracy. On the other hand, the court said, the entire record made it difficult to come to any other conclusion, but that "the multitude of complete identity in the bids to the very penny" was the result of "a plan adopted by consultation and conferences among the parties involved." The fact of sporadic competition or of interruptions in identical bidding, or of competition in areas other than price, did not negate, in the Court's mind, the existence of an overall objectionable plan.

Settlement of a formal judgment is scheduled for September 14, 1964.

Staff: John W. Neville, Jerome A. Hochberg and Herbert F. Peters, Jr. (Antitrust Division).

Court Orders Separate Hearing Without Jury Before Trial on Motion to Dismiss. United States v. The H. E. Koontz Creamery, Inc., et al. (D. Md.) D.J. File 60-139-144. On August 4, 1964, Judge R. Dorsey Watkins filed an opinion ordering a separate "hearing" without jury, in advance of trial on the merits, on defendants' motion calling for dismissal of the present indictment because of double jeopardy. The pending indictment charges price-fixing on milk and other dairy products in sales other than those made through bidding. The moving defendants had been indicted earlier in a two count indictment alleging two conspiracies, separated by a year, with charges limited to

bid-rigging on milk sold to Baltimore area public schools. The Grand Jury investigation into school bid-rigging had produced some evidence of a conspiracy, unrelated to bid-rigging, regulating home-delivery milk prices and the differential in price between home-delivery and store-sold milk. After defendants in the school milk bid-rigging case pleaded nolo contendere in that action, a second grand jury investigated the general conspiracy and returned an indictment charging certain of the same defendants as those involved in the two conspiracies to rig school bids, together with others, with membership in the general price-fixing conspiracy. The indictment on the general price-fixing conspiracy specifically states in the charging paragraph that the general conspiracy did not relate to bid-rigging.

When the moving defendants earlier moved that the present indictment should be dismissed for double jeopardy because, defendants asserted, there was but one broad conspiracy encompassing both general price-fixing and bid-rigging, the Court overruled the motion stating that it was satisfied that the charging papers made out different conspiracies. The present motion for a separate advance non-jury trial followed. Defendants had asked to be allowed to prove, as a matter of fact, that there was but a single conspiracy. The present decision calls for a "hearing" on defendants' motion at which time defendants will have the burden of proving "by a preponderance of the evidence" that the presently charged conspiracy was the same as one or both of the two school milk bid-rigging conspiracies.

In the same opinion the Court overruled defendants' motion for a separate hearing in advance of trial on their motion to dismiss on due process grounds. The due process defense was that the Government, knowing of the general price-fixing conspiracy at the time it obtained the indictment with respect to the two bid-rigging conspiracies, should have taken steps to insure that both indictments would be handed down simultaneously. Another aspect of the due process motion was the assertion that it is improper to indict related conspiracies in separate indictments. The Court pointed out that if, in fact, the conspiracies were all the same, moving defendants would have an opportunity to prevail on their double jeopardy motion, but that if, in fact, the two bid-rigging conspiracies were separate from the general price-fixing conspiracy there would be no violation of due process in indicting the separate conspiracies separately.

An additional portion of Judge Watkins' decision denied defendants access to grand jury transcripts from the first Grand Jury. These were assertedly sought for the purpose of establishing the Government's knowledge of the general price-fixing conspiracy at the time the indictment was handed down on the two bid-rigging conspiracies.

Staff: Lewis A. Rivlin, Sinclair Gearing and Milton A. Kallis (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

IMPORTANT NOTICE

All United States Attorneys are cautioned that, when legal representation is being provided Government employees involved in private tort suits, the defense of immunity from civil liability (see Barr v. Mateo, 360 U. S. 564) is not to be asserted or raised without the prior approval of the Civil Division.

COURTS OF APPEALS

FEDERAL MARITIME COMMISSION

Federal Maritime Commission Held to Have Lacked Authority For Promulgation of Its Pre-hearing Discovery and Production of Documents Rule. Federal Maritime Commission v. Anglo-Canadian Shipping Company, Ltd. (C.A. 9, July 27, 1964) DJ No. 61-11-1089. A contract carrier by water instituted a proceeding before the Commission against a number of other carriers, alleging violations of the Shipping Act, 46 U.S.C. 801. During the course of the proceedings, but before the hearing had begun, complainant moved the Commission, pursuant to its Rule of Practice 12(k) providing for the discovery and production of documents, for an order permitting it to inspect and copy certain documents in the possession of the defendants. The documents were alleged to be relevant and material to the proceeding.

The Commission's hearing examiner granted the motion and ordered that the documents be made available. Provision was made in the order to permit defendants to resist the disclosure of any confidential information. However, defendants refused to comply with the order, alleging that, because the Commission had no express or implied authority to promulgate a pre-hearing discovery rule such as Rule 12(k), the rule and the order issued under it were invalid. The Commission approved the examiner's order and instituted this action for its enforcement. The district court set aside the order, on the ground that it was issued pursuant to an invalid regulation.

The Ninth Circuit affirmed, one judge specially concurring. Relying on the established proposition that regulatory agency rules or regulations which are issued without Congressional authority or which go beyond such authority are void, the Court noted that no statute explicitly empowered the Commission to promulgate Rule 12(k). The Court then rejected the contention that the authority to promulgate such a rule is implicitly authorized by provisions of the Shipping Act, including the general rule-making provision, section 204(b), 46 U.S.C. 1114(b), authorizing the Commission to adopt all necessary rules and regulations to carry out the powers, duties, and functions vested in it by the act. In the Court's view, the potential impact on litigants, inherent in discovery procedure, is so much greater than that associated with ordinary procedural rules, that the failure of Congress to affirmatively authorize the Commission to promulgate discovery rules had to be taken as its deliberate choice to withhold such authority. The Court therefore concluded that the promulgation of a rule such as 12(k) was inconsistent with the Commission's granted

statutory power. The concurring opinion expressed the view that the Commission has the authority to order, at its hearing on the case, the production of the documents here involved under its power explicitly given by Section 27 of the Shipping Act, 46 U.S.C. 826, to issue subpoenas duces tecum.

Staff: Alan S. Rosenthal, Barbara W. Deutsch (Civil Division)

FEDERAL TORT CLAIMS ACT

Airline Awarded Full Indemnity Against Government For Liabilities Arising Out of Las Vegas Mid-Air Collision; But Federal Employees Compensation Act Held to Preclude Any Recovery in Regard to Government Employees. United Air Lines v. Wiener et al., (C.A. 9, June 24, 1964) D.J. File 157-12-699. On April 21, 1958, a United States Air Force jet fighter collided with a United Air Lines DC 7 passenger airplane in the Victor 8 commercial airway, near Las Vegas, Nevada. The district court held (1) that the Government was negligent in scheduling and holding instrument training flights, in which the student pilot flew under a hood, in a busy commercial airway, and (2) that United Air Lines had notice of the dangerous conditions caused by such military training in the area and was negligent in failing to advise its crews of such dangers and in failing to give its crews special precautionary training to lessen the risk of mid-air collisions. In addition, the trial court found the military instructor pilot and the United crew each negligent in failing to see and avoid the other airplane. The court accordingly awarded judgments against United in all 31 cases, and against the Government in the 22 nongovernment employee cases. The district court also found that both the Government and United were guilty of active negligence and were in pari delicto; and awarded contribution to each, denying United's claim to full indemnification against the Government.

The Ninth Circuit affirmed the district court's findings and conclusions that both United and the Government were negligent and were liable to the passengers. The Court nevertheless ruled that the district court's finding that United and the Government were in pari delicto was "clearly erroneous," and held that the culpability for the accident was primarily that of the Government, and that United was entitled to complete indemnity against the Government in the 22 nongovernment employee cases. The effect of the Ninth Circuit's decision is to impose upon the Government the entire burden of satisfying the judgments rather than requiring both United and the Government to share equally, as the district court had done. The Ninth Circuit's decision therefore doubles the amount the Government will be required to pay, from approximately $1,300,000 to approximately $2,600,000. Although the Court recognized that the law of Nevada was controlling, it based its decision on what it believed to be generally accepted principles of common law, because there was no Nevada statute or case law on the subject.

In regard to the nine Government employee cases, the Ninth Circuit affirmed the district court's ruling that the Federal Employees Compensation Act precludes United's claim to indemnity for this land tort, notwithstanding the recent Supreme Court decision in Weyerhaeuser SS Co. v. United States, 372 U.S. 597, which held that that Act did not, in a mutual fault collision at sea, preclude Government liability arising out of the injury to a federal employee and based upon the admiralty rule of divided damages. We are advised that United

intends to seek certiorari on this aspect of the Ninth Circuit's ruling, which, if it stands, will save the Government from more than $750,000 in additional judgments and should provide a very useful precedent.

Staff: United States Attorney Francis C. Whelan; Assistant United States Attorneys Donald Fareed and Donald J. Merriman (S.D. Calif.)

Government Held Not Liable For Failure to Diagnose and Treat Rare Infecting Agent. Rogers v. United States (C.A. 6, July 24, 1964) D.J. Files 157-58-134 and 157-58-138. An eleven-year-old boy was admitted to a military hospital displaying symptoms which led doctors to believe he was suffering from appendicitis. An operation was performed and it was found that, although the boy's appendix was not completely sound, it was not the cause of his illness. After the operation, the boy's condition began to deteriorate. A new diagnosis of intestinal constriction and peritonitis was made and it was decided to transfer the boy to a nearby civilian children's hospital where he could get specialized care. At the children's hospital, the presence of peritonitis was confirmed, and, only because of the expert laboratory facilities there and the fact that an outstanding authority in the field was treating the boy, the cause of the disease was discovered to be bacteroides, an infecting agent which is not destroyed by the usual antibiotics, and which rarely causes peritonitis. While this cause of the boy's illness was being ascertained and before effective treatment could be administered, he suffered numerous and severe complications, resulting in his mental retardation and in his need for permanent medical care and guidance. These suits by his father, on his own behalf and on behalf of the boy, were later instituted, alleging that the military doctors had been negligent (1) during the operation, (2) in not administering antibiotics before and after the operation, and (3) in not immediately diagnosing peritonitis.

The trial court found that there was no negligence during the operation, and that plaintiffs had not proved that there was negligence before or after the operation. Additionally, the court found that, even if negligence were established, there was no proof that it was the proximate cause of the boy's injuries, since, if antibiotics had been administered, they would most likely have been ones which are ineffective against the rare infecting agent.

The Court of Appeals affirmed, noting that, with the extensive and conflicting medical evidence in the case, the district court's findings could not be held to be clearly erroneous.

Staff: Robert E. Long (Civil Division)

LONGSHOREMEN'S ACT

Remand of Proceeding by District Court to Deputy Commissioner For "Further Consideration," Without Other Instructions, Is Not Final Appealable Judgment Under 28 U.S.C. 1291. Gulfport Shipbuilding Corporation, et al. v. Maxime Vallot, et al. (C.A. 5, July 21, 1964) D.J. File 83-75-15. The Deputy Commissioner had initially rejected as untimely Vallot's claim for additional workman's compensation under the Longshoremen's Act, 33 U.S.C. 901. Vallot had sought review of that rejection in the district court. At the instance of the

Deputy Commissioner, the district court remanded the cause to that official "for further consideration." The employer and its insurance company sought to appeal from the remand order.

The Fifth Circuit dismissed the appeal, adopting the Government's argument that, in the circumstances, the remand order was not a final appealable order under 28 U.S.C. 1291.

Staff: Alan S. Rosenthal and Richard S. Salzman (Civil Division)

NON-FINAL JUDGMENT

Judgment Determining Government's Claim to Be Within Coverage of Warehouseman's Bond, But Leaving Open For Subsequent Proceedings Questions of Amounts, Priority, And Other Issues, Held Not Final Decision Under 28 U.S.C. 1291. Merchants Mutual Bonding Co. v. United States (C.A. 8, June 17, 1964) D.J. File 120-27-396. The United States sought to recover, against the surety on a bankrupt warehouseman's bond issued under Iowa law, damages for grain storage losses suffered by the Commodity Credit Corporation. The surety interpleaded its indemnitor and all claimants. One of the parties raised an objection to the Government's claim, alleging that it had been determined that Government grain storage is not within the coverage of the warehouseman's bond prescribed by the Iowa law. See United States v. West View Grain Company, 189 F. Supp. 483 (D. Iowa). The district court held a preliminary hearing on this and other issues, and determined that the present Government claim was within the coverage of the bond. No order or judgment of pecuniary recovery was entered in favor of the United States, the court specifically leaving open for determination by subsequent proceedings the questions of amounts, priorities, etc. See United States v. Merchants Mutual Bonding Co., 220 F. Supp. 163 (D. Iowa). The surety and other parties appealed.

The Eighth Circuit granted the Government's motion to dismiss the appeals, holding that "in this situation there clearly exists no terminative disposition of the rights of or among the various claimants on the bond such as to constitute an appealable order or 'final decision' under 28 U.S.C.A. 1291."

Staff: United States Attorney Donald E. O'Brien (N.D. Iowa)

Remand of Longshoreman's Act Proceeding By District Court to Deputy Commissioner For "Further Consideration," Without Other Instructions Is Not Final Appealable Judgment Under 28 U.S.C. 1291. Gulfport Shipbuilding Corp. v. Maxime Vallot (No. 20,764 C.A. 5, July 21, 1964) D.J. File 83-75-15. See digest under "Longshoreman's Act," above.

SOCIAL SECURITY ACT

Third Circuit Upholds Secretary's Determination That Monthly Payments Paid to Plaintiff by Her Brother For Performance of Household Chores Previously Performed Without Compensation Are Not "Wages" And No Bona Fide Employer-Employee Relationship Existed. Marie D. Palmer v. Celebrezze (C.A. 3, July 17,

1964) DJ File 137-62-118. Plaintiff, an elderly widow, began living with her brother in 1951 in a house they jointly owned. At first she took care of the household chores without any compensation other than room and board. However, in 1955 she was advised that she might qualify for old age insurance benefits if she became an employee of her brother. From that time on, the brother started making monthly payments to her of $50, although her duties in no way changed from those performed previously. Both before and after 1955, plaintiff and her brother contributed to the expenses of the household, she paying the real estate taxes while he paid for supplies, repairs, etc. Plaintiff and her brother testified that it was their intention to create a bona fide employer-employee relationship. The Secretary, however, determined that their real intention was no different from what it had been all along, before wages were thought of, namely to share mutually a comfortable home and its expenses. Benefits were denied and this denial was upheld by the district court.

Relying heavily on the substantial evidence rule, the Third Circuit affirmed, since in its view the entire record afforded ample evidence to support the Secretary's finding.

Staff: Stephen B. Swartz, (Civil Division)

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

ARREST AND RETURN OF DESERTING FOREIGN SEAMAN

Deserter From Spanish Navy Subject to Summary Arrest and Detention for Return to Spain Pursuant to Treaty; Deportation Statutes Inapplicable; Due Process Satisfied. United States ex rel. Emilio Martinez-Angosto v. Redfield Mason, Rear Admiral, United States Navy (S.D. N.Y. July 15, 1964). D.J. File 39-51-2493. This was a petition for a writ of habeas corpus, filed by a 23-year-old seaman in the Spanish Navy, who was brought to the United States aboard an American vessel to serve as a member of the crew of a United States destroyer, to be named the "Alcala Galiano", on its transfer to the Spanish Navy under the Mutual Defense Assistance Program. In November 1960, after the transfer, he deserted. He was apprehended by the Immigration and Naturalization Service in December 1963. In the meantime, he married a United States citizen and became the father of a United States-citizen child. The Consul General of Spain requested respondent, the Commandant of the Third United States Naval District, to take relator into custody for return to Spain pursuant to Article XXIV of the 1903 Treaty of General Relations and Friendship with Spain, by which the contracting nations agreed on procedures to be followed in apprehending and expediting the return of members of the "crew of ships of war or merchant vessels of their Nation, who may have deserted in the ports of the other."

In a lengthy opinion dated July 15, 1964, Judge David N. Edelstein directed dismissal of the petition. In reliance on United States ex rel. Perez Varella v. Esperdy, 285 F. 2d 723 (1960), certiorari denied 366 U.S. 925 (1961), Judge Edelstein rejected relator's contention that Article XXIV of the treaty is not self-executing and that it was rendered nonoperative by the repeal in 1915 of Section 5280 of the Revised Statutes, providing a judicial procedure for the arrest and delivery of deserters on the application of a consul or vice consul of any foreign country having a treaty with the United States for the restoration of deserting seamen. In addition, Judge Edelstein ruled that the summary procedure of the treaty as applied to relator met the requirements of procedural due process; that a warrant of arrest was not required; and that the regular procedures under the immigration laws for the arrest and deportation of aliens did not apply. The fact that relator originally arrived in this country on an American vessel and did not join a Spanish vessel until after his arrival here was held to be irrelevant under the treaty.

An appeal has been noted.

Staff: United States Attorney Robert M. Morgenthau; Special Assistant United States Attorney Roy Babitt. (S.D. N.Y.).

EXTRADITION

Habeas Corpus. United States ex rel. Petrushansky v. Fitzpatrick (S.D. N.Y., July 8, 1964). D.J. File 95-100-385. By a diplomatic note of June 21, 1962, the Government of Mexico requested the extradition of Evsey Petrushansky

from the United States. Evidence submitted with the note reflected that Petrushansky, together with two accomplices, had caused the murder in Mexico of an American businessman. Following a formal extradition hearing, a United States Commissioner in New York found that there was probable cause to believe that the offense was committed by the accused in Mexico. Petrushansky then obtained a writ of habeas corpus. However, following oral argument, the writ was discharged on April 5, 1963. The Second Circuit affirmed, and the Supreme Court denied Petrushansky's petition for a writ of certiorari.

A second petition for a writ of habeas corpus was filed May 12, 1964, based on "newly discovered facts." This evidence was a statement executed by one of the accomplices to the alleged murder. The statement was in direct conflict in one respect with a prior statement by the same individual given to Mexican authorities which implicated Petrushansky in the murder. In his original statement the accomplice stated that Petrushansky had told him of the manner in which the victim was murdered. In the second conflicting statement the accomplice denied that he had ever discussed the murder with Petrushansky. In discharging the writ on July 8, 1964, the District Court pointed out that the sole function of the court in a habeas corpus proceeding is to determine whether the foreign government demanding extradition has established probable cause that the accused committed the crime charged and that the court has no authority to weigh conflicting evidence by the accused. The Court further ruled that while the demanding government may rely on an ex parte statement, the accused may not. However, even assuming that the conflicting statement was admissible, the Court held that there was sufficient evidence apart from the conflicting portion of the first statement to sustain the Commissioner's finding. The Court noted that the District Court and the Court of Appeals in the earlier habeas corpus proceeding had upheld the finding of the Commissioner without relying wholly on that portion of the accomplice's statement now in conflict.

A notice of appeal has been filed in the case.

Staff: United States Attorney Robert M. Morgenthau;
Assistant United States Attorney David M. Dorsen
(S.D. N.Y.)

COUNTERFEITING AND FORGERY

Making or Possessing Likenesses of Coins (18 U.S.C. 489); Making or Possessing Counterfeit Dies for Coins (18 U.S.C. 487). This supplements our previous policy statement, which appears in Volume 12, Number 13 of the United States Attorneys' Bulletin, at p. 324 (June 26, 1964).

Raised impressions of coins on larger objects violate Section 489 if the impression is approximately the size of a genuine coin and is sufficiently in the likeness of the genuine coin to be capable of being passed off as a genuine coin, provided the impression can be physically separated from the larger object in order to be passed off on the unwary. Thus, for example, coin-colored, raised impressions of coins on business cards would violate Section 489, since the impression could be cut out of the card and used to deceive an innocent person. On the other hand, a raised impression on a green glass candlestick could not be passed off as a coin even if it were cut out of the candlestick, and, therefore, would not violate Section 489. An impression that is not approximately the size of a genuine coin, or that is not enough like a real coin to be

capable of being passed off as such, is legal.

Raised impressions of coins on larger objects do not violate Section 487, because that Section prohibits only the actual dies, hubs, or molds from which counterfeit coins can be made. However, the mold from which such a raised impression is made is illegal if it can also be used to make a counterfeit coin. It is irrelevant that this mold is part of the mold for making the larger object.

Molds that can be used only to make objects that would violate Section 489 do not violate Section 487. The legislative history of Section 487 indicates that it was intended to prohibit only the dies from which counterfeit coins are made, and the title of the Section is "making or possessing counterfeit dies for coins" (emphasis added). In addition, Section 487 carries a maximum penalty of fifteen years' imprisonment or a $5,000 fine or both, whereas Section 489 provides for a fine of not more than $100.

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INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Communist Political Propaganda. David McReynolds and Fritz Pappenheim v. Postmaster General (S.D. N.Y.), 63 Civ. 3648, D.J. File 145-5-2678. The action was brought to test the constitutionality of 39 U.S.C. 4008, which establishes a screening program for Communist political propaganda originating abroad and deposited in the United States mail as unsealed mail matter. The Court, Tenney, J., in an opinion handed down on July 31, 1964, relying in part on the holding in Corliss Lamont d/b/a Basic Pamphlets v. Postmaster General, 229 F. Supp. 913 (S.D. N.Y., 1964), (See Vol. 12, No. 11, U.S. Attorneys Bulletin, page 273), denied plaintiffs' motion for summary judgment and for appointment of a three-judge court, and granted the Government's motion to dismiss the complaint.

Both McReynolds and Pappenheim, like Lamont, were addressees who received an inquiry from the Post Office Department with regard to their desire to receive delivery of unsealed mail matter which had been determined to be Communist political propaganda. McReynolds did not answer the inquiry but filed suit on December 17, 1963, to enjoin enforcement of the statute. The Postmaster General considered the filing of the complaint to constitute an expression of McReynolds' desire to receive the matter, and accordingly notified him that his mail would not be detained in the future.

Pappenheim, upon receipt of the notice requesting him to state whether he desired delivery of unsealed mail addressed to him "from a foreign country," wrote the Post Office Department demanding particulars as to what materials were included in the notice and from what foreign country they had come. Receiving no reply, Pappenheim again wrote asking for an extension of time in which to respond to the notice. Subsequently, he received the mail on March 6, 1964. In an amendment to McReynolds' complaint, he alleged on March 30, 1964, that the Post Office Department had unlawfully detained certain unsealed domestic mail addressed to him, which mail consisted of books and documents published abroad but purchased by him at a bookstore in this country. Pappenheim was thereafter notified by the Post Office Department that all such mail would be delivered to him without further inquiry.

In their complaint, both McReynolds and Pappenheim sought damages for being listed as addressees of propaganda mail in post office records.

The Court held that as addressees of mail both McReynolds and Pappenheim stood in the same position as Lamont, and that the same conclusion as to mootness reached in Lamont must be reached here. The Court also ruled that regardless of the validity or invalidity of the statute under which defendants acted and for which actions they were sought to be held accountable in damages, the claim was without merit and presented no justiciable issue. 28 U.S.C. 2680 (1950).

Unlike Lamont, McReynolds alleged a desire to mail Communist political propaganda to another at some future date without having it processed under the statute. The Court held McReynolds' claim relative to such desire to be speculative and not to create a justiciable controversy.

The Court also held that as to Pappenheim's standing to sue as a depositor of mail to himself, the delivery of the mail to Pappenheim in the circumstances can be interpreted as a move to moot his claim as an addressee, and not an admission that any screening of domestically deposited mail was other than an error. The Court then held that since Pappenheim would receive all such mail in the future, his cause of action as it relates to his ability to send mail to himself presents neither a justiciable controversy nor a substantial constitutional question.

Staff: Assistant United States Attorney Eugene R. Anderson (S.D. N.Y.) argued the cause for the defendants. Benjamin C. Flannagan (Internal Security Division) was with him on the brief.

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CIVIL TAX MATTERS
Appellate Decision

Enforcement of Internal Revenue Summons; Summons Issued to Ascertain Name of Unidentified Taxpayer Who Sent $215,000 Check to Internal Revenue Service Enforced; Defense That Its Issuance Was in Furtherance of Criminal Investigation Rejected. Paul W. Tillotson, Special Agent v. Jackson L. Boughner (C.A. 7, June 17, 1964 (13 A.F.T.R. 2d 1740)). Appellant, Boughner, is a lawyer who transmitted a check for $215,000 to the Service allegedly in payment of back taxes of an unidentified taxpayer. Special Agent Tillotson served an Internal Revenue summons on appellant to try to discover this unknown taxpayer's name, in furtherance of his investigation to determine the tax liability which the check was supposed to cover.

The Seventh Circuit rejected Boughner's argument that Section 7602 of the 1954 Code authorizes the issuance of a summons only when the identity of the taxpayer is known. It held that the instant taxpayer, although his name and whereabouts are unknown, has been sufficiently identified to permit the Service to use the summons power in furtherance of its investigation of him.

The Court also rejected the argument that the summons was unauthorized because it was issued in furtherance of a criminal investigation. Special Agent Tillotson testified that in addition to discovering taxpayer's identity, he has been assigned to ascertain whether the correct tax had been paid and whether there might be any civil or criminal fraud penalties. Such duties are authorized, and so justify the issuance of a summons.

Staff: Burton Berkley and Joseph M. Howard (Tax Division)

District Court Decisions

Lien for Taxes; Title to Seized Property Installed by Taxpayer's Solely-Owned Corporation on Property Owned by Taxpayer Found to Be Property of Corporation by Reason of Mode of Annexation to Realty; Unfiled Promissory Note Not Valid Against United States, a Creditor. Giles E. Bullock, et al. v. Dana Latham, et al. (W.D. N.Y., December 11, 1963). (CCH 64-2 U.S.T.C. ¶9608). Taxpayer, was the sole owner of all of the stock of the E. C. Brown Company, a corporation. The corporation was also indebted to the Government for unpaid taxes. Taxpayer leased the premises which he owned to the corporation for its manufacturing operations. The corporation installed considerable heavy manufacturing machinery and equipment. Some of the equipment and machines was bolted down to the floors with lag screws, while some of the machines required compressed air couplings, water fittings and electrical ducts which led to the machines. All of the machines were capable of removal without injury to taxpayer's building. Taxpayer had never claimed that the machinery or equipment was his prior to the time it was seized.

Subsequent to the sale of the machines and other property which had been seized, the proceeds were applied against the tax liabilities of the corporation and taxpayer instituted this action to have the proceeds of the sale applied toward the satisfaction of his own tax liability. The Court held that taxpayer was not the owner of the machinery because the machinery was not so affixed or annexed to the realty as to become a part of it. It was merely screwed down or attached to the realty by removable conduit couplings and the removal of the machinery would not injure the realty.

The Court also held that a promissory note given to taxpayer by the corporation, wherein the corporation assigned some of the machinery to taxpayer as security for payment, created, at most, a lien or chattel mortgage, and did not make taxpayer the owner of the machinery. Further, only the interest of the corporation in the property was sold and the collateral promissory note was held void as against the United States, a creditor of the corporation, because it was not recorded pursuant to the New York Lien Law.

Staff: United States Attorney John T. Curtin (W.D. N.Y.); and Robert L. Handros (Tax Div.).

Internal Revenue Summons: Information Supplied to Bank for Estate Planning Purposes Not Protected by Attorney-Client Privilege. In Re Bretto (D. Minn., June 30, 1964). (CCH 64-2 U.S.T.C. ¶9590). Taxpayer, Joseph T. Bretto, consulted his attorney regarding the drawing up of a will. The attorney contacted the Northern City National Bank, thus taking advantage of a service that banks generally provide to attorneys on a cost-free basis, and arranged a meeting between the taxpayer, himself, and Messrs. Chabot and Kreager, from the bank's estate planning group. During the course of this meeting, the purpose of which was to discuss the will, taxpayer's financial condition was revealed. Subsequently, after a second meeting, the bank prepared a rough draft of the will and sent it to the attorney, who then prepared the final draft and had it executed by taxpayer. Thereafter, the Internal Revenue Service summoned the records of the bank having to do with taxpayer. The bank, and taxpayer as an intervenor, admitted the valid service of the summons, but claimed that the records were protected by the attorney-client privilege.

The Court, noting that Minnesota law prevents disclosure by an attorney or his employee of confidential communications, found that the bank was neither an attorney nor an employee of an attorney, and that, therefore, the privilege did not apply. Recognizing that persons necessary to communications between an attorney and his client also come under the privilege doctrine, the Court decided that the bank, in providing an estate plan for the taxpayer, was not an essential party in the clarification of information between the taxpayer and his attorney, and thus there was no confidential relationship to which the privilege could apply.

Staff: United States Attorney Miles W. Lord; Assistant United States States Attorney Patrick J. Foley (D. Minn.).

Jeopardy Assessment; Suit to Foreclose Tax Liens; Pending Tax Court Action Does Not Stay Foreclosure Suit. United States v. John Clinton, et al. (S.D.N.Y.,

June 22, 1964). (CCH 64-2 U.S.T.C. ¶9617). Taxpayers sought an order to prevent the United States from prosecuting its action to foreclose feferal tax liens on a sum of money impounded by the Property Clerk of the New York City Police Department, pending a determination by the Tax Court of their tax liabilities. The foreclosure action was based upon a jeopardy assessment. Taxpayers had not filed a bond to stay collection as permitted by Section 6863 of the Internal Revenue Code of 1954.

The Court denied petitioners' motion, ruling that collection of a jeopardy assessment cannot be stayed unless taxpayers file a bond. United States v. O'Connor, 291 F. 2d 520 (C.A. 2). The Court also noted that the issue in this case was whether or not taxpayers had a property interest in the impounded fund, while in the Tax Court proceeding the issue was whether or not the assessed deficiency was correct, and, if it were decided that there had been an overassessment, an adequate remedy of obtaining a refund remained. The Court did not discuss taxpayers' right to contest the merits of the assessment in the foreclosure action which had been brought pursuant to Section 7403 of the Internal Revenue Code of 1954.

Staff: United States Attorney Robert M. Morgenthau; Assistant United States Attorney Patricia A. Garfinkel (S.D. N.Y.).

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