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Vol. 12 October 16, 1964 No. 21

ADMINISTRATIVE DIVISION

S. A. Andretta - Assistant Attorney General for Administration

EXPENSES OF INDIGENTS' ATTORNEYS

Supplementing the item appearing in Bulletin No. 19, Vol. 12, page 437, dated September 18, 1964, please note the following under the heading "Criminal Justice Act."

CRIMINAL JUSTICE ACT

Funds to implement the Criminal Justice Act of 1964 have not yet been appropriated by the Congress. Compensation and reimbursement for court-appointed attorneys and others who render services under the statute are therefore not likely to become available prior to July 1, 1965. The Administrative Office of the United States Courts will be the disbursing office for such payments.

Materials discussing plans and problems in implementing the Act have been distributed to all United States Attorneys by Assistant Attorney General Herbert J. Miller. Questions not answered by these materials should be referred to James Vorenberg, Director, Office of Criminal Justice, Department of Justice. It will be a function of Mr. Vorenberg's office to work with the Judicial Conference of the United States, the Administrative Office and the federal courts in working out procedures for putting the Act into operation.

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ANTITRUST DIVISION

Assistant Attorney General William H. Orrick, Jr.

CLAYTON ACT

Court Finds Alcoa Acquisition of Cupples Violates Section 7 of Act. United States v. Aluminum Company of America, et al. (E.D. Mo.). DJ File 60-0-37-371. On September 22, 1964, the District Court filed its decision in the form of findings of fact and conclusions of law, holding that the acquisition of Cupples (a fabricator of aluminum curtain wall and windows) by Alcoa violated Section 7 of the Clayton Act. The case was tried beginning March 2, 1964 and concluded April 8, 1964, after which post-trial briefs and proposed findings were submitted. Final argument was held on July 8, 1964.

This is a vertical acquisition, but the Government did not rely on vertical foreclosure. Rather, the Government's position was that the competitive advantages accruing to Cupples as a part of Alcoa would probably substantially affect competition among other fabricators of aluminum curtain wall.

Defendants contended that all curtain wall, i.e., all nonload-bearing wall, was the appropriate line of commerce within which to assess the probable anti-competitive effects of the acquisition. It was the Government's position that metal curtain wall and aluminum curtain wall were the appropriate lines. The Court agreed with the Government. It found that there are specialized vendors of metal curtain wall, who do not regard the suppliers of precast concrete as their competitors, and that there are unique production facilities and separate trade associations for each. As for aluminum curtain wall, the Court found unique production facilities, distinct physical characteristics, and cost advantages over other metals, and concluded on the basis of all the testimony that "aluminum dominates the metal curtain wall market." Accordingly it found that metal curtain wall is a line of commerce and that aluminum curtain wall is a well-defined submarket therein.

The only market statistics admitted into evidence were those contained in a 1957 market study made by Alcoa, according to which Cupples at that time possessed 16.6% of the aluminum curtain wall market. The Court relied on that figure and, pointing to evidence of Alcoa's purpose in making the Cupples acquisition of "getting at least 40% of all the business in those items which we would manufacture in the Cupples set-up," concluded that Alcoa had the intention and power to increase Cupples' share from 16.6% to 40%. The Court stated, "If Cupples achieves 40% of the aluminum curtain wall business, it will then remove some of the smaller companies completely from this line of commerce and the larger ones will have a difficult time competing with the combination of Cupples and Alcoa." Among the competitive advantages enjoyed by Cupples over its competitors, the Court referred to unlimited funds, allowing Cupples to operate on a break-even basis or even a loss basis while still making a profit for Alcoa on the aluminum sold to Cupples; Alcoa's reputation, making a guarantee from Cupples more attractive than from Cupples' competitors; Alcoa's engineering knowhow and

research, the results of which it can withhold from others; Alcoa's real estate projects, on which "if a suit was not pending it would be reasonable to find that Cupples would get all this business"; availability of lower prices on aluminum to Cupples; and Alcoa's advertising and prestige. The Court concluded that Alcoa had both the motive and the power to achieve 40% of the market and therefore that the acquisition "can reasonably be expected to substantially lessen competition or tend to create a monopoly in the fabrication and sale of metal curtain wall and aluminum curtain wall, the relevant lines of commerce within the United States."

The Court ordered divestiture of the stock of Cupples. With respect to a plant in California owned by Alcoa and operated by Cupples, the Court has ordered a further hearing "to determine the proper method and the scope of the divestiture." That hearing has been set for October 23, 1964.

Staff: Edna Lingreen, J. E. Waters, James F. Buckley and Lionel Epstein (Antitrust Division).

District Court Denies Motion of Comptroller of Currency to Intervene. United States v. Third National Bank in Nashville, et al. (M.D. Tenn.). D. J. File 60-111-759. On September 24, 1964, Judge Miller entered an opinion denying a motion by the Comptroller of the Currency for leave to intervene as a party defendant in this action. The Court stated that to sustain the right to intervene under Rule 24(a)(2), the Comptroller would be required to demonstrate that he has a proper "interest" in the subject matter of the action and, in addition, that the representation of such interest by existing parties is or may be inadequate. The Court found that neither condition had been satisfied and that the Comptroller's intervention could not be sustained as a matter of right.

In reaching this conclusion the Court stated that the Bank Merger Act of 1960 did not affect the applicability of the Clayton Act to bank mergers, citing Philadelphia National Bank. Instead, Judge Miller recognized that there are "two separate and distinct hurdles" which must be cleared before consummation of a merger, where the resulting institution is a National Bank, i.e. first, the Comptroller of the Currency must give his approval based on his evaluation of seven factors enumerated in the Bank Merger Act, and second, the Department of Justice then has "the right and indeed the duty" to challenge such merger if it deems it to be in violation of the antitrust statutes.

The Court found that the Comptroller's authority had been fully exercised, and his responsibility fully discharged when he granted approval of the merger. "It is the responsibility of the courts in an action properly brought by the government acting through the Department of Justice to determine whether the merger, notwithstanding the fact that it has received the approval of the Comptroller, must be condemned as being in violation of the antitrust statutes."

The Comptroller also relied on Rule 24(b)(2) which allows for permissive intervention of a federal officer or agency "When a party to an action relies for ground of . . . defense" on an order of such federal governmental officer or agency. The Court stated that even assuming, without deciding, that the

defendants rely upon the Comptroller's approval of the merger as a legal defense, intervention is still a matter within the sound discretion of the court. The Court did not believe the Comptroller's presence as a party defendant was necessary in order to place before it his views on the question of the competitive effect of the merger, particularly inasmuch as the Comptroller's views on this point are already before the court in the form of his opinion approving the merger under the Bank Merger Act. These views, the Court said, "are a part of the record . . . and it is difficult to see what more the Comptroller could say in justification of his decision."

The Comptroller further argued that since the Government seeks divestiture relief and that effectuation of such relief may require certain action calling for the approval of the Comptroller, he should be permitted to intervene. The Court did not agree, stating that if it is necessary to invoke action of the Comptroller, "it cannot be assumed that he would arbitrarily or unreasonably withhold approval of steps necessary to effectuate the relief which the court considered necessary . . ." The Court concluded that, in any event, if it was necessary to have the Comptroller before the court he could be made a party when and if such contingency should arise.

Staff: James L. Minicus, Charles A. Degnan and Robert C. Weinbaum (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General John W. Douglas

SUPREME COURT

SMALL BUSINESS ADMINISTRATION

Government to Petition For Certiorari of Fifth Circuit's Holding That State Law Determines Liability of Party to Small Business Administration Loan. United States v. Yazell (C.A. 5, No. 21154, July 13, 1964). D.J. No. 105-76-41. See United States Attorneys' Bulletin, Volume 12, No. 16, p. 386 for a full description of the case and the Fifth Circuit's decision. In substance the Fifth Circuit held that state law is to be applied in determining the obligations of a married woman arising out of a contract executed under the Small Business Act of 1953. Applying Texas Coverture law, the Court held the contract to be unenforceable. In so holding, the Fifth Circuit acknowledged conflict with the Sixth Circuit's decision in United States v. Helz, 314 F. 2d 301 (holding that the defense of coverture accorded by state law is unavailable against the United States in an action brought by it under the National Housing Act to recover on a federally insured loan).

The Solicitor General has authorized the filing of a petition for a writ of certiorari from the Fifth Circuit's decision. The petition, which will be filed during the week of October 4, 1964, will assert that Yazell was erroneously decided. Therefore, in all cases where the validity or the enforceability of a Federal contract is in issue, the Government will continue to assert the applicability of federal law.

Staff: Edward Berlin (Civil Division)

COURTS OF APPEALS

CIVIL SERVICE DISCHARGE

Procedural Errors at Agency Level Cured at De Novo Commission Hearing; Party Desiring Witnesses at Administrative Hearing Must Initially Endeavor to Secure Their Attendance. John J. McTiernan v. Gronouski (C.A. 2, No. 28,818 August 28, 1964). D.J. No. 151-52-809. This action was commenced by a former postmaster who was removed from his position because of failure to conduct post office business in accordance with Post Office Department regulations and instructions. In affirming a district court decision sustaining the removal action, the Second Circuit first acknowledged that it could review only for procedural defects and then rejected each of numerous irregularities alleged by the appellant.

The opinion will be of particular assistance, for it holds that (1) procedural irregularities at the agency level can be cured at the de novo proceeding before the Civil Service Commission, and (2) the removed employee who desires the attendance of other employees as witnesses at his administrative hearing must first endeavor himself to secure their attendance before requesting the assistance of the removing agency and complaining of their absence. Compare Williams v. Zuckert, 371 U.S. 531, 372 U.S. 765.

Staff: Sherman L. Cohn, Edward Berlin, Harvey L. Zuckman (Civil Division)

NATIONAL BANK ACT

Comptroller's Decisions to Create And Terminate Bank Conservatorship Held Not Judicially Reviewable But His Determination as to Existence of "Emergency" Warranting Waiver of Shareholder Approval of Sale of Bank's Assets Held Reviewable. Minichello v. Saxon (C.A. 3, No. 14560, September 18, 1964). D.J. No. 145-3-553. In February 1962, Comptroller of the Currency Saxon, on discovering a $200,000 defalcation at the Exeter National Bank in Pennsylvania appointed a conservator for the Bank under 12 U.S.C. 203. When a bank audit showed the shortage to have exceeded $400,000, the Comptroller urged a reorganization or sale of the Bank. The majority directors of the Bank then agreed to accept an offer to purchase made by the Wyoming National Bank of Wilkes Barre. The Comptroller thereupon terminated the conservatorship so as to allow the directors to sell the bank assets to Wyoming. At the same time, the Comptroller, declaring the existence of an emergency under 12 U.S.C. 181, waived the normal requirement for two-thirds stock ownership approval of the bank sale. The sale was then effected without this approval and Wyoming has been operating the former Exeter Bank as a branch of Wyoming.

In the meanwhile, the plaintiff minority stockholders of Exeter National filed this derivative action in order to set aside the sale to Wyoming. Defendants included the majority directors of Exeter, the Comptroller and the Wyoming Bank. The district court dismissed the complaint as to all defendants.

The Court of Appeals agreed with the district court that the Wyoming offer was the best available offer and that the Exeter directors had not breached any fiduciary duty in accepting that offer. The Court of Appeals, accepting the Comptroller's argument, also ruled that the Comptroller was empowered to terminate the conservatorship not only for the purpose of having Exeter resume business but also for the express purpose of allowing it to be sold to Wyoming and to be operated by Wyoming as a branch. On this phase of the case, the Court of Appeals ruled (1) that plaintiffs lacked the requisite standing to attack the Comptroller's termination of the conservatorship, and (2) that that termination as well as the creation of the conservatorship were within the Comptroller's exclusive discretion and non-reviewable by the courts. However, the Court held that there did exist "some type or measure of judicial review" of the Comptroller's determination of an emergency under 12 U.S.C. 181. That determination, the Court held, was reviewable to the extent of ascertaining, not whether an emergency in fact existed, but whether a reasonable man on the basis of information then available, could have reasonably concluded that an emergency existed. The case was accordingly remanded to the district court to determine whether the Comptroller acted reasonably in declaring an emergency under 12 U.S.C. 181.

Staff: Morton Hollander (Civil Division) and United States Attorney Bernard J. Brown (M.D., Pa.)

SOCIAL SECURITY ACT

Drawing of Check to Old-age Recipient After His Death Held Not "Error" Within Meaning of Section 204(a) of Act so as to Permit Payment to Recipient's Survivor. Angelo Guarino v. Celebrezze (C.A. 3, No. 14765, August 21, 1964).

D.J. No. 137-62-123. A wage-earner made an application to the Social Security Administration for old-age retirement benefits, then died a short time thereafter. Unaware of the wage-earner's death, the Administration issued a check for benefits directly to him. The executor of his estate returned the check, advised the Administration of the facts, and requested a check in the proper amount payable to him as executor. The Administration refused and subsequently paid to the deceased's widow as an "adjustment" to her survivor's benefits, the amount of benefits the deceased was entitled to before his death. The Administration relied on Section 204(a) of the Social Security Act, 42 U.S.C. 404(a), for it action. That section permits the making of payment "adjustments" whenever "an error" has been made with respect to benefits payments.

Over the executor's objections, the Administration's action was upheld by a hearing examiner. The executor then brought this action against the Secretary for judicial review, and was granted summary judgment by the district court. The Third Circuit affirmed, ruling that Section 204(a) was inapplicable since neither the failure to pay the wage-earner before his death nor the issuance to him of a check after his death constituted "errors" within the meaning of the section. The Court reasoned that the term "error" connotes "mistake," and that the nonpayment without mistake which had occurred here did not qualify as error to give the Secretary the authority under the statute to pay the funds to the claimant's widow.

Staff: Robert V. Zener (Civil Division)

Secretary's Denial of Disability Benefits Upheld by Ninth Circuit. Leonard J. McMullen v. Celebrezze (C.A. 9, No. 19139, August 18, 1964). D.J. No. 137-12-311. Claimant, an accountant, sought disability benefits on the basis of a prostate and eye condition. The Secretary denied benefits. The denial was upheld by the district court, and the Court of Appeals affirmed.

The Ninth Circuit rejected the contention, commonly pronounced in the Sixth Circuit (see, e.g., King v. Flemming, 289 F. 2d 808), that the Secretary should have made an express finding with respect to what the claimant could do and what employment opportunities were open to him. The Court said that implicit in the Secretary's decision here was the finding that the claimant failed to show he was disabled from following his usual occupation as an accountant.

The Court questioned whether the use of summary judgment in these cases was ever contemplated by the review statute, 42 U.S.C. 405(g). But the Court, noting that summary judgment is commonly used, said that, in any event, here there had been full compliance with the review statute by the lower court's findings of fact, conclusion of law, and judgment.

Staff: United States Attorney Francis C. Whelan; Assistant United States Attorneys Donald A. Fareed and James E. Biava (S.D. Calif.)

SUITS IN ADMIRALTY ACT

Notwithstanding Unseaworthiness of Its Vessel, United States Entitled to Indemnity From Stevedoring Contractor For Damages Assessed in Favor of Injured Longshoreman. Robert Bernard Smith v. United States v. Whitehall Terminal Corp., (C.A. 4, No. 9405, August 24, 1964). D.J. No. 61-79-250. In this action a longshoreman, injured while working aboard a Government vessel, brought suit against the United States under the Suits in Admiralty Act. The accident was caused by a defective hold ladder. The Government filed a claim for indemnity against the longshoreman's employer and the Government's stevedoring contractor. The district court found that the vessel was unseaworthy but, because of his contributory negligence, reduced the longshoreman's award against the United States by 50%. The Government claim for indemnity against the longshoreman's employer was rejected. Appeals were taken by the United States and the longshoreman.

The Fourth Circuit overturned the finding of contributory negligence as being clearly erroneous. The Court, however, also adopted the Government's arguments on the indemnity issue. On this phase of the case, the Court agreed that, under the standard government contract, the longshoreman's employer "incurred a dual obligation, both to properly instruct employees in accident prevention and immediately to correct unsafe conditions known to it." For breach of those obligations, the Court directed that full indemnity be awarded in favor of the United States. The opinion should prove helpful for it explicitly recognizes that, under the standard Government stevedoring contract, the Government is entitled to indemnity even when its vessel is unseaworthy and that condition proximately contributed to the accident.

Staff: John W. Douglas, Assistant Attorney General and Edward Berlin (Civil Division)

WAR MOBILIZATION AND RECONVERSION ACT

Award of Interest on Government Recovery Under Act Reinstated by Court of Appeals. City of Greeley, Kansas v. United States (C.A. 10, No. 7484, August 18, 1964). D.J. No. 117-29-37. On May 21, 1964, the Court of Appeals upheld a lower court judgment awarding the Government recovery of an advance made to the City of Greeley under the War Mobilization and Reconversion Act of 1944, 50 U.S.C. App. 1671, but set aside the lower court's award of interest, on objections made by the municipality for the first time at oral argument. See United States Attorneys' Bulletin of June 26, 1964, Vol. 12, No. 13.

After consideration of a Government petition for rehearing, the appeals court filed a new opinion upholding the lower court judgment in all respects. With regard to the municipality's challenge of the interest award, the Court's new opinion said that the question would not be considered since it had not been presented to the lower court, included in the city's statement of points, or included in its brief.

Staff: Lawrence Schneider (Civil Division)

DISTRICT COURTS

ADMIRALTY

Federal Court Has Jurisdiction in Admiralty Over Vessel Under Minnesota "One Act" Statute. Cargill, Inc., et al. v. Logan Charter Service, Inc., et al. (D. Minn., Nos. 3-64 Civil 97 and 3-64 Civil 98 (Admiralty), August 21, 1964). D.J. No. 61-30-17. A barge while under tow in the Mississippi River struck a Government-owned lock in Minnesota and sank. Various claimants, including the United States for damage to the lock, sought admiralty jurisdiction over the tug and her owner, a Mississippi corporation, in the Federal District Court in Minnesota under Minnesota Statutes, § 303.13 Subd. 1(3), the so-called "One Act" statute, under which a foreign corporation which either performs a contract or commits a tort in whole or in part in Minnesota is deemed to have been doing business in the state and to have designated the Secretary of State or its agent for purposes of receipt of process in any legal action brought by a Minnesota resident. The tug owner appeared specially, objecting to service on the grounds that (1) the state statute may not be used to give an admiralty court jurisdiction; (2) there was no action involving a Minnesota "resident" as the statute requires; and (3) the application of the statute would be an unconstitutional burden on interstate commerce.

The Court held it had jurisdiction over the tug owner under the statute. The Court ruled that application of state law in Admiralty is permissible where it does not affect or change substantive admiralty rights. The Court liberally construed the term "resident" to include a foreign corporation where the interests of the state would be served by having a law suit tried where the cause of action arose, and held that the service over the tug owner who had sufficient contact in the State of Minnesota was not a violation of the interstate commerce clause.

Staff: Alan Raywid (Civil Division) and Assistant United States Attorney Hartley Nordin (D. Minn.)

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

GRATUITIES ACT VIOLATION

Acceptance of Payments by Employee of Prime Contractor. United States v. Moore, 228 F. Supp. 935 (S.D. Calif.) D.J. No. 46-12-1249. Moore was convicted on two counts of a seven count indictment charging violation of the Gratuities Act (41 U.S.C. 51-54). Moore was an employee of North American Aviation, Inc., a prime contractor of the United States Government, and as such accepted airplane expenses from one North American vendor and a $50 "loan" from another which was never repaid. Defendant was a supervisor of a small group of employees who installed equipment but there was no evidence he had any connection with North American's purchasing department. He did discuss with the vendors in question various aspects of their subcontract work, and in one case advised a vendor its proposed prices were too high.

The Court found that the vendors were subcontractors within the purview of 41 U.S.C. 51-54 and while defendant had nothing to do in any way with the awarding of purchase orders to them, it was concluded the payments to Moore were inducements or acknowledgements of purchase order awards despite the fact that the Government could not tie such payments to specific subcontract awards.

The case is presently on appeal.

Staff: United States Attorney Francis C. Whelan; Assistant United States Attorney Thomas R. Sheridan (S.D. Calif.).

VENUE

Transfer to Another District; Retention of One Count of Seven Count Indictment in Transferor District Ordered on Motion to Transfer Under Rule 21(b). United States v. Louis M. Ray (D.C., Crim. No. 747-64, October 2, 1964). D.J. No. 105-33-90. Defendant was indicted by a Federal Grand Jury in the District of Columbia, charged in seven counts with using the mails to defraud the United States in connection with creation of the capital structure of a Small Business Investment Corporation, a licensee of the Small Business Administration. Defendant moved to transfer the case to the Western District of Louisiana, prior to moving for or obtaining a bill of particulars. Venue in the Western District of Louisiana was apparent, on the face of the indictment, in six of the seven counts. One count of the indictment involved a mailing received in the District of Columbia, the situs of the mailing not being known to the Government.

After hearing oral argument, District Judge Alexander Holtzoff granted the motion to transfer with respect to all counts where the indictment clearly showed venue in the Western District of Louisiana. He ordered that

the remaining count, Count 4, be severed and retained in the District of Columbia, following the rule in United States v. Choate, 276 F. 2d 724 (C.A. 5, 1960). Defendant, while requesting a transfer of the entire indictment to the Western District of Louisiana, refused to stipulate that the jurisdictional mailing in the retained count had been mailed in the Western District of Louisiana, arguing that the Government should be put to its proof of mailing in the transferee district after a transfer. Judge Holtzoff's decision, therefore, did not pass upon the question whether a defendant may, on a transfer motion, cure the absence of venue in a transferee district as shown by an indictment or bill of particulars, by recourse to a binding concession of venue in a transferee district.

Staff: United States Attorney David C. Acheson (Dist. of Col.); Thomas P. Curran and Stephen B. Wizner (Criminal Division).

STATUTE OF LIMITATIONS

Amendment of 18 U.S.C. 3288, 3289 to Permit Indictment After Dismissal of Defective or Insufficient Information. On August 30, 1964, there was enacted P.L. 88-520, 78 Stat. 699, which amends 18 U.S.C. 3288 and 3289 to permit indictment after the expiration of the statute of limitations where a timely information filed after waiver of indictment is dismissed as defective or insufficient. These sections were first enacted prior to the promulgation of Fed. R. Crim. P. 7(b), and, therefore, did not apply where the dismissed pleading was an information. The Department proposed this legislation following the decision in Hattaway v. United States, 304 F. 2d 5 (1962), where a timely information was held defective eight years after the commission of the offense and the Court of Appeals for the Fifth Circuit held a subsequent indictment and conviction barred by the statute of limitations.

P.L. 88-520 further amends these sections to omit all references to terms of court and to provide instead specific time limitations of six calendar months. Under the previous law it was unclear which term of court applied where an indictment was dismissed for improper venue and the new indictment was consequently returned in another jurisdiction. In addition, some districts do not have chronologically defined terms of court. The amendment also specifies that the period for reindictment runs from the time the previous pleading is dismissed by the district court, rather than from the date of an appellate decision invalidating the pleading.

CONTEMPT

Witness Before Grand Jury Compelled to Respond to Questions Relating to Nature of Business Entities. Nick Nitti v. United States (C.A. 10, September 4, 1964). Appellant was held in contempt under Rule 42(a), of F. R. Crim. P., in United States District Court, District of Colorado, after refusing to answer questions previously posed to him as a witness before a Federal Grand Jury in Denver. In refusing, appellant asserted his privilege against self-incrimination with respect to questions designed to ascertain whether records

subpoenaed from firms operated by appellant and in the possession of appellant, were the records of a corporation, partnership, or other form of business entity.

In rejecting the claim of privilege, the Tenth Circuit Court of Appeals noted that questions relating to the nature of the business entity involved were of a preliminary nature, innocent on their face, and necessary to determine the validity of appellant's refusal to produce such records. The Court also indicated clearly that its rejection of the claim of privilege was not incompatible with prior opinions of the Supreme Court in Hoffman v. United States, 341 U.S. 479, and Singleton v. United States, 343 U.S. 944.

Staff: United States Attorney Lawrence M. Henry;
Assistant United States Attorney James A. Clark;
John C. Keeney and Louis Scalzo (Criminal Division).

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

DEPORTATION

Alien Not Deportable For Conviction For Unlawful Use of Narcotics. Roberto Rodriguez Varga v. Rosenberg (S.D. Calif., Central Div., Civil No. 64-796-S, September 23, 1964.) Petitioner, a permanent resident alien, sought a writ of habeas corpus to discharge him from the obligation of reporting to respondent, a District Director of the Immigration and Naturalization Service, pursuant to an order for his deportation.

Petitioner was convicted in 1963 for violation of a California statute prohibiting the illegal use of narcotics. This conviction was the basis for a finding by a Special Inquiry Officer that petitioner was deportable under 8 U.S.C. 1251(a)(11) as an alien who had been convicted of a law relating to the illicit possession of narcotics. Petitioner waived his right to appeal from the decision of the Special Inquiry Officer to the Board of Immigration Appeals, and did not seek review of the deportation order in the Court of Appeals pursuant to 8 U.S.C. 1105a. The six-month period allowed for such review had passed.

After consideration of the legislative history of 8 U.S.C. 1251(a)(11) and other authorities, the Court concluded that the language of the statute "illicit possession of narcotics" did not encompass unlawful use of narcotics for which petitioner was convicted and held the deportation order to be invalid. The Court rejected contentions of the respondent that petitioner was not entitled to judicial review of the deportation order. The respondent argued that habeas corpus did not lie here because he did not have custody of the petitioner. The Court ruled that under Jones v. Cunningham, 371 U.S. 236, actual physical restraint is no longer a prerequisite to habeas corpus relief and that it sufficed here that petitioner, who was at large under bond, was subject to restraints and could be ordered to report for deportation on short notice. Respondent further argued that the Court had no jurisdiction to render habeas corpus relief because petitioner failed to take his administrative appeal. The Court disagreed, finding that the issue here was one of law and that in such cases the utilization of each successive administrative step is not a condition precedent to the Court's jurisdiction. The Court also stated that resort to writ of habeas corpus is not barred by failure to exhaust administrative remedies if the validity of the deportation order is challenged for reasons which appear on the face of the record as distinguished from review of administrative procedures and findings. The writ of habeas corpus was granted and the petitioner discharged from any obligation to report pursuant to the order of deportation.

Staff: United States Attorney Francis C. Whelan, Assistant U. S. Attorneys Donald A. Fareed and James R. Dooley, (S.D. Calif.)

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LANDS DIVISION

Assistant Attorney General Ramsey Clark

TOP TEN DISTRICTS IN LANDS WORK - FY 1964

After a careful analysis of the work of each United States Attorney's office for the last fiscal year, the Lands Division has determined that the following districts (which are listed in alphabetical order) performed the most outstanding work in lands matters:

Arizona

Arkansas, Western

California, Southern

Idaho

Kentucky, Western

Louisiana, Western

Ohio, Southern

Oklahoma, Eastern

Texas, Western

Wyoming

In determining the districts named, the importance and quantity of lands work pending, the attorney power available for the task, and the quality and quantity of the work performed were considered. Important criteria were:

(1) Quality of legal representation as evidenced by pleadings, briefs, trial transcripts, letters and direct contact;

(2) Efficient and systematic effort to settle or litigate cases;

(3) Fair settlement or trial results;

(4) Efficient coordination with the Lands Division.

In addition to high quality and efficient work, the gross product of these 10 districts in condemnation cases exceeded the goals set. While a few other districts performed as well or better than the districts chosen in terms of statistics, for overall performance, these districts are believed to have excelled. Thus, a number of the districts exceeded their goals to a greater degree than those selected but considering matters such as the attorney power available to accomplish the task, the districts did not meet the general achievement level of the districts chosen.

Not all of the districts selected had a heavy lands caseload. For example, the district of Wyoming had only 22 tracts pending at the beginning of last fiscal year and its goal was 22 tracts. The district received 101 new tracts during the year and it closed 76. The 47 tracts pending at the end of the fiscal year were but a new months old -- the situation which we hope will soon prevail in all districts. Wyoming had only a few Lands Division cases in addition to condemnation, but all were handled with expedition and excellence.

Navigable Streams--Right of United States to Assert Its Navigation Authority to Alter Flow of Navigable River Without Liability to Riparian Owners Claiming Damage Thereby: City of Demopolis, Alabama v. United States (Ct. Cls. No. 470-60) D.J. File No. 90-1-23-918. The City of Demopolis, Alabama, claims it is a riparian owner on the Tombigbee River, a navigable stream. Since 1904 the city has been discharging raw sewage into the river. In 1954, the United States completed construction of a dam downstream from the city.

The city, as plaintiff, alleged that: prior to the construction of the dam it had an effective and satisfactory sewage system which poured raw sewage into the river; the dam caused a reduction in the rate of flow of the river which caused the raw sewage to become a health hazard; the State's Water Improvement Commission ordered the city to construct a plant to treat the sewage before pouring it into the river; and, since they can no longer use their old sewage system, the old system was taken without due process of law and without compensation. Thus, plaintiff claimed damages resulting from the altered flow of the river rather than the physical destruction of its sewage system. As a measure of its damage, the city claimed that it was entitled to the cost of construction and operation of a sewage treatment plant.

The Court ruled that the United States' navigation servitude entitled the United States to utilize the flow of the stream for purposes of navigation without liability to others whose use of the flow for other purposes may be impaired. Defendant's motion to dismiss was granted as to this first count.

A second count in plaintiff's petition alleged that section 1 of the Rivers and Harbors Act of 1945, 59 Stat. 10 (1945), stating that:

> . . . it is hereby declared to be the policy of the Congress to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control . . .

gives a cause of action to plaintiff. The contention was that by this language Congress had expressed its intention not to exercise the navigation servitude in connection with the Demopolis project. Cf. United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950); FPC v. Niagara Mohawk Power Co., 347 U.S. 239 (1954). The Court held that this section was simply intended to encourage federal-state cooperation and not to give a riparian user a right of action that it did not have before. The Court also pointed out that the State, through its Water Improvement Commission, had determined that the dam was beneficial and that the city should adapt to the new situation. Defendant's motion to dismiss the second count was also granted.

Plaintiff was given 30 days to file an amended petition to ask for compensation for the flooding of a platted street above the ordinary high water mark of the river if such flooding has actually occurred. The 30-day period has expired and no amendment has been filed.

In dismissing plaintiff's first count, the Court of Claims reached the same result as the United States District Court for the Middle District of Alabama and the Fifth Circuit Court of Appeals in a similar situation in City of Eufaula, Alabama v. United States, 313 F.2d 745 (1963).

Staff: David R. Warner (Lands Division)

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CIVIL TAX MATTERS
Appellate Decision

Federal Tax Lien Need Be Filed Only Once, in Place Designated For Filing of Federal Liens, to Be Valid as Against Motor Vehicle; Lien Need Not Be Filed Second Time With Motor Vehicle Division For Inscription Upon Title Certificate of Encumbered Vehicle. Atlas Finance Company v. G. F. (Jeff) Wilkerson and Jack Dallosta, Jr. v. United States of America, amicus curiae (Sup. Ct.) In the early 1930's, the majority of the states enacted legislation in accordance with the provisions of prior Section 6323(a)(1) of the Internal Revenue Code of 1954, designating a "place" for the filing of federal tax liens. Generally, the place designated was the office of the County Clerk. Subsequently, many states passed laws which provide that a lien which is intended to encumber a motor vehicle is not valid until the lien is inscribed upon the certificate of title of the vehicle.

The Tennessee Supreme Court in its original opinion in this action, filed on May 10, 1963, held that the "Tennessee Motor Vehicle Title and Registration Law" applied to federal tax liens, and, since notice of the Government's lien had not been filed with the Motor Vehicle Division for inscription upon the certificate of title of the vehicle involved in the action, the federal tax lien was inoperative as against the vehicle. Notice of the lien had been filed in the office of the Register of Deeds, the "place" designated by Tennessee for the filing of federal tax liens.

The United States first learned of this decision after the Supreme Court had entered its opinion. The Government was allowed to intervene as amicus curiae, however, and after rehearing the Court withdrew its prior opinion. In a decision entered on September 4, 1964, the Court, in following United States v. Union Central Life Insurance Co., 368 U.S. 291, declared that since the Tennessee Motor Vehicle Act requires a description of the lien-encumbered vehicle, the Motor Vehicle Title Division is not an authorized office within the meaning of Section 6323(a)(1) where the Government is required to file federal tax liens. Accordingly, once notice of federal tax lien is given by the filing of the notice of lien in the office designated for that purpose, the lien is valid against all property of the delinquent taxpayer including his automobile notwithstanding provisions of Motor Vehicle Acts similar to those involved in the above-styled action which suggest that the notice must also be inscribed upon the title certificate.

Staff: United States Attorney Thomas L. Robinson, Assistant United States Attorney O'Dell Horton, Jr. (W.D. Tenn.); Lee A. Jackson, Joseph Kovner, and Robert A. Maloney (Tax Division)

District Court Decisions

Bankruptcy; Assignment For Benefit of Creditors; Federal Tax Lien Against Bankrupt Corporation Held Entitled to Priority Over Assignment For Benefit of Creditors of Bankrupt Where Assignment Was Executed Three Days After Assessment of Taxes Since Assignee Was Not Purchaser Against Whom Notice of Tax Liens Would Have to Be Filed to be Valid. In re Gibson Lithograph Co., Inc. (S.D. Calif., July 17, 1964). (CCH 64-2 U.S.T.C. ¶9749). Gibson Lithograph Co., Inc., executed an assignment for the benefit of creditors on November 21, 1960, and on December 20, 1960, an involuntary petition in bankruptcy was filed. On November 18, 1960, prior to the execution of the assignment, an assessment for withholding taxes was made against Gibson, and on that date, pursuant to Sections 6321 and 6322 of the Internal Revenue Code of 1954, federal tax liens arose and attached to the property of the assignor. The federal tax liens were not recorded.

The Bankruptcy Court ruled that the assignee was not a purchaser within the meaning of Section 6323(a) of the Internal Revenue Code of 1954 against whom notice of federal tax liens must be filed to be valid. The Court also ruled that the expenses incurred and the disbursements made by the assignee which tended to preserve or benefit the bankruptcy estate were entitled to payment out of the proceeds of the bankruptcy estate, but that such payment must await the satisfaction of the federal tax liens since the federal tax liens had priority over the claims of the assignee. The argument advanced on behalf of the assignee that the assignment period is the "forepart" of a bankruptcy proceeding and that the assignee is, therefore, entitled to priority in being reimbursed for his expenses and disbursements, under Section 67c(1) of the Bankruptcy Act, as a person mentioned in clause (1) of Section 64a was rejected, and it was held that the pre-bankruptcy fees and expenses of the assignee were not costs and expenses of administration within the meaning of Section 64a(1) of the Bankruptcy Act.

Staff: United States Attorney Francis C. Whelan and Assistant United States Attorney Thomas H. McPeters (S.D. Cal.).

Bankruptcy; Federal Tax Lien Allowed Secured Creditor Status Against Fund Held by Trustee in Bankruptcy, Secondary to Claim of Mortgagee, Although Mortgage Was Not Recorded. In the Matter of Mesa Steel Corporation. (D. Ariz., May 22, 1964). (CCH 64-2 U.S.T.C. ¶9706). Mr. and Mrs. Davis had given a note secured by a mortgage on certain real property to a mortgagee. The mortgage was mailed to the County Recorder's office for recording, but, through mischange not attributable to the mortgagee, it was not recorded. The mortgaged property was then transferred by the Davises to the corporation controlled by them which later became bankrupt. A proof of claim for federal taxes was filed in the bankruptcy proceeding.

The corporation had assumed all existing liens and encumbrances on the property, and, in addition, transferred shares of its stock to the Davises and made payments reducing the mortgage. However, the Davises had not executed, acknowledged and delivered a deed to the corporation. The corporation, prior to bankruptcy, acting through Mr. Davis, sold the property and certain funds were placed in escrow in connection therewith. Bankruptcy ensued prior to the consummation of the sale, but the trustee elected to complete the sale. Thereafter the mortgagee sought to assert its rights under its unrecorded mortgage.

The District Court, in reversing the Referee in Bankruptcy, ruled that the bankrupt had given full consideration for the property to the Davises, and, therefore, held the complete beneficial interest in the property and could specifically enforce a conveyance to it of legal title; furthermore, since the trustee elected to assume the executory contract of sale made by the bankrupt, he was bound to perform the executory contract of purchase from the Davises who held bare legal title at the time of bankruptcy, and this included paying the mortgage on the property. The Court's opinion did not mention the Arizona statute which provides that unrecorded morgages shall be void as to creditors without notice. An appeal from this decision is being considered.

Staff: United States Attorney Charles A. Muecke and Assistant United States Attorney William J. Knudsen, Jr. (D. Ariz.).

Tax Court Subpoena; Jurisdiction; District Court Has No Jurisdiction to Review Action by Tax Court in Quashing Its Own Subpoena. Albert Gordon MacRae, et al. v. Robert Riddle and Samuel P. Norton, et al. v. Robert Riddle. (S.D. Cal., July 10, 1964). (CCH 64-2 U.S.T.C. ¶9722). Taxpayers had petitioned the Tax Court for a redetermination of alleged income tax deficiencies, and, during the proceeding, had the Tax Court issue a subpoena duces tecum to the District Director. Upon the District Director's motion, the Tax Court quashed the subpoena, and taxpayers then filed suit in the United States District Court seeking an order requiring the District Director to appear in the Tax Court proceeding and comply with the subpoena, contending that the Tax Court did not have power to quash subpoenas.

In granting the District Director's motion to dismiss the District Court action, the Court concluded that the Tax Court had the right to quash subpoenas issued in its own proceeding upon objection made by the party served that the subpoena pertained to documents which were not necessary or appropriate items of discovery. The Court noted that, if a party has objection to the subpoena issued, he could refuse to obey the subpoena, in which case a proceeding to enforce the subpoena could be brought in the District Court, or he could present his objection to the Tax Court which had issued the subpoena. The Court also noted that the Tax Court was in a better position to determine the necessity and propriety of the subpoena issued by it in its proceeding, and, if quashing the subpoena is in error, its determination is subject to review by the United States Court of Appeals.

Staff: United States Attorney Francis C. Whelan; Assistant United States Attorneys Loyal E. Keir and Thomas H. McPeters (S.D. Cal.).

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