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ANTITRUST DIVISION

Assistant Attorney General William H. Orrick, Jr.

Major Weavers of Glass Fiber Industrial Fabrics Charged With Price Fixing. United States v. Burlington Industries, Inc., et al. (S.D. N.Y.). DJ Nos. 60-14-54 and 60-14-55. On October 9, 1964, there was filed an Information and Complaint charging almost the entire industry engaged in weaving and selling glass fiber industrial fabrics throughout the United States with illegal restraints of trade prohibited by Section 1 of the Sherman Act, as follows:

(a) A criminal case (Information) charging the following defendant weaver companies and individual defendants with conspiring to fix prices between and among each other in the sale of glass fiber industrial fabrics: Burlington Industries, Inc., and the president of its Hess, Goldsmith & Company Division, Harry P. Goldsmith; Clark-Schwebel Fiber Glass Corporation, and its president, Raymond F. Clark, and its vice-president, Jack P. Schwebel; J. P. Stevens & Company, Inc., and the manager of its Industrial Fiber Glass Department, Irwin J. Gusman; United Merchants & Manufacturers, Inc.; all of New York City; Exeter Manufacturing Company, and its vice-president, Robert E. Spoerl, of Exeter, New Hampshire; and Coast Manufacturing & Supply Company, of Livermore, California.

(b) A companion civil case (Complaint) against the above-named defendant weaver companies and individual defendants and, in addition, the following defendant weaver companies: Flightex Fabrics, Inc., of Pawtucket, Rhode Island; Joseph M. P. Ott Manufacturing Company, Inc., Pawtucket, Rhode Island; Ferro Corporation, Nashville, Tennessee; Fiber Glass Industries, Inc., Amsterdam, New York; and Bean Fiber Glass, Inc., Jaffrey, New Hampshire. The civil case asks the Court to issue an injunction prohibiting defendants from continuing to engage in price fixing with competitive weavers in the sale of glass fiber industrial fabrics.

The above Information and Complaint charge that defendants at various times since 1956 held meetings to fix prices, and to implement price fixing agreements, at hotels, restaurants, and other places in New York City, and that they adopted veiled terminology to camouflage communications with each other to avoid detection by others. The cases assert that the effects of the conspiracy have been that prices were artificially raised at high levels, that price competition has been restrained, and that purchasers have been deprived of the benefits of open competition among the defendants.

Glass fiber industrial fabrics are used as a component in products manufactured by companies engaged in the following fields, among others: boat manufacturing; ship manufacturing; submarine manufacturing; aircraft, spacecraft and missile, manufacturing; tool and die making; fishing rods; golf club shafts; roofing; electrical equipment manufacturing; plastic reinforcement; and filtration. Glass fiber industrial fabrics have unique applications because of their

high tensile strength, high temperature resistance, chemical resistance, shrinking and stretching resistance, non-water absorption, and non-corrosive characteristics, among other characteristics, and will retain their strength when exposed to the elements. The United States Government, and the foregoing industries, among others, purchased glass fiber industrial fabrics from the corporate defendants, and also purchased from others products containing as a component therein glass fiber industrial fabrics sold by the corporate defendants.

The companies which are named as defendants in the above cases together sold more than $200,000,000 of glass fiber industrial fabrics since 1956. They comprise at least 95% of the industry weaving glass fiber industrial fabrics.

Staff: Samuel B. Prezis, William F. Costigan, and Lawrence Kill (Antitrust Division)

Merger Called Off and Complaint. United States v. Commercial Credit Company and General Finance Corporation. (N.D. Ill.). DJ No. 60-0-37-808. A complaint under Section 1 of the Sherman Act and Section 7 of the Clayton Act was filed on September 22, 1964, against Commercial Credit Company of Baltimore, Maryland (Commercial) and General Finance Corporation of Evanston, Illinois (General). This complaint charged that the proposed acquisition of General by Commercial would lessen competition or tend to create a monopoly, and increase concentration, in the finance-company industry and in the small-loan segment of that industry, in the United States, and in the various areas where Commercial and General operate offices, including the State of Illinois.

Commercial is the third largest finance company in the United States, and the second largest independent finance company, having, as of December 31, 1963, total assets valued at $2,472,211,079; Commercial ranks third in the United States in the small-loan business and operates, through its finance subsidiaries, over 600 small-loan offices nation-wide. In the last 14 years, Commercial has acquired at least 26 finance companies engaged in the making of small loans, four of which were located in Illinois.

General ranks twentieth among United States finance companies, and fifteenth among independent finance companies, having, as of December 31, 1963, total assets valued at $276,999,524; General is the twelfth largest firm in the small-loan business in the United States and operates 281 small-loan offices in 151 cities in 15 States.

General ranks first in Illinois in the making of small loans. As of December 31, 1963, General operated 58 small-loan offices in Illinois and accounted for 13.8 per cent of the total dollar volume of small loans made under the Illinois Small Loan Act. Commercial ranks sixth in Illinois in the making of small loans. As of December 31, 1963, Commercial's finance subsidiaries operated 38 small-loan offices in Illinois and accounted for 4.36 per cent of the small loans made under the Illinois Small Loan Act. In 1961 Commercial operated four small-loan offices in Illinois and accounted for 0.26 per cent of small loans made. The increase in Commercial's offices and percentage of small loans made in Illinois has been due largely to acquisitions by Commercial. The ten leading companies lending under the Illinois Small Loan Act accounted for

56.7 per cent of the total dollar amount of small loans made by all companies loaning under this Act.

Commercial and General are in direct competition in the small-loan business in a number of cities located in, among others, the States of Illinois, Indiana, Missouri, Michigan, Kentucky, Louisiana, Texas, and Florida.

On June 10, 1964, the boards of directors of Commercial and General entered into an agreement whereby Commercial would acquire General through the issuance of stock having a current market value of well over $50,000,000. The terms of this agreement provided that the acquisition was to take place on September 25, 1964.

On the same day that the complaint was filed, the Government filed a motion for a temporary restraining order to block the acquisition, until the Government's motion for a preliminary injunction pending final determination of the Government's complaint could be heard.

At the September 22, 1964 hearing on the Government's motion for a temporary restraining order, District Judge Hubert L. Will stated that "my predilection in these things is to preserve the status quo" pending final determination of whether a merger violates the antitrust laws. Judge Will also stated, in reply to a statement by General's counsel, that irreparable injury to either of the parties and balancing of the injury to either of the parties was the test for a preliminary injunction in merger cases. He said:

> Certainly there cannot be much argument that, if I let the merger go through, for whatever period of time General . . . is a subsidiary of Commercial there will be a lessening of competition if there is any problem of the Sherman Act involved.
>
> If I find that . . . the acquisition, does have a substantial-- ultimately I find that it does have a substantial effect on commerce, does present a Sherman and Clayton Act problem, then for whatever period of time I have permitted this to exist I have permitted a violation of the Acts, in effect, to exist,...

General's counsel suggested that Judge Will could enter an order to "do whatever is necessary to protect the public interest" after the merger and pending the final outcome of the case but Judge Will stated that he would not think of entering an order after the merger providing that Commercial could not exercise control over General.

During this hearing counsel for General charged that the Antitrust Division had been unfair to the defendants by filing a complaint and a motion for a temporary restraining order three days prior to the effective date of the merger. In reply to this Judge Will stated:

> But Congress has not said that the Sherman Act is applicable only in the event that the Antitrust Division takes action within a reasonable period of time. The requirements of the Sherman Act and the prohibitions of the Sherman Act don't depend on the administrative efficiency or inefficiency of the Department of Justice or Federal Trade Commission or whatever is involved in a particular case.

At the end of the September 22nd hearing, Judge Will stated that he wanted Commercial and General to inform the Court on the next day "what irreparable harm will be done to Commercial and General by the preservation of the status quo."

On the hearing on September 23, 1964 counsel for General stated that the irreparable harm to General by the granting of the temporary restraining order to halt the merger was that the board of directors of General had decided that if the merger did not go through by October 1st, it would be called off. Judge Will stated that this did not constitute irreparable harm and was a boot-strap argument. He stated:

> . . . without some showing of irreparable harm, I will tell you now I am going to grant the temporary restraining order because the government has made a prima facie showing that there will be harm to the public to the extent that this combination will result in a diminution of competition.

At the request of counsel for Commercial and General, the Court delayed a ruling on the Government's motion for a temporary restraining order until September 28, 1964, in order for counsel for the defendants to confer with Washington officials of the Antitrust Division on a possible stipulation which would allow the acquistion to be consummated but would keep the acquired and acquiring firm separate and the acquired firm viable. The Government was unable to reach such an agreement and on September 25, 1964, General announced that its board of directors had voted to cancel the merger.

On September 28, 1964, this was reported to the Court and on September 30, 1964, the Government and the defendants filed a stipulation with the Court that no merger agreement between General and Commercial shall be consummated within six months without 60 days notice to the Government and informing the Government of the complete details of the terms and conditions of the agreement. Also on September 30, on motion of the Government, the complaint was dismissed without prejudice.

Staff: Bertram M. Long, Francis C. Hoyt, John T. Gusack, John E. Burke, Thomas S. Howard, and Howard L. Fink (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General John W. Douglas

COURT OF APPEALS

AGRICULTURAL MARKETING AGREEMENT ACT

Regulated Milk Company May Not Challenge Milk Marketing Order in District Court on Grounds Not Presented to Secretary of Agriculture in Prior Administrative Proceedings. United States v. Lewes Dairy, Inc., and Lewes Dairy, Inc. v. Freeman, (Nos. 14642 and 14643, C.A. 3, October 6, 1964). DJ Nos. 106-15-11, 106-15-12, 106-15-13. Lewes Dairy made a substantial portion of its sales of milk in a Marketing Area regulated by the Secretary of Agriculture. Under the terms of the Secretary's Marketing Order, Lewes Dairy was required to pay certain minimum prices to the farmers supplying it with milk. The company's challenge to the validity of the Marketing Order in administrative proceedings under 7 U.S.C. 608c (15)(A) was rejected by the Secretary. The company sought judicial review of this ruling in the district court as permitted under 7 U.S.C. 608c (15)(B). In court, the company urged a ground for the invalidity of the Marketing Order not presented before the Secretary. Relying upon the Supreme Court's decision in Lehigh Valley Co-op. v. United States, 370 U.S. 76, which was handed down after Lewes had completed its administrative proceedings, the dairy urged that so much of the Secretary's order which required it to pay minimum prices for milk not sold in the Marketing Area was invalid as constituting a "trade barrier," forbidden under 7 U.S.C. 608c (5)(g) as interpreted in Lehigh Valley.

Over the Secretary's objections that this matter was never raised before him and therefore not properly before the court in the judicial review proceeding, the district court invalidated the portions of the Secretary's order complained of as constituting a "trade barrier." The Court of Appeals reversed, holding that the district court could not under the Agricultural Marketing Agreement Act consider the new issue without first permitting the Secretary to pass on it. The appellate court noted that, whether marketing regulations are valid is not a question "of simple solution," and "is not to be decided upon a record without evidence to sustain the factual realities of legal arguments directed toward the issue brought into focus by the subsequent decision of importance (Lehigh Valley), upon which the Secretary has not had an opportunity to exercise his statutory powers and expertise." The Third Circuit vacated the decision of the district court and ordered the cause remanded to the Secretary of Agriculture for further administrative consideration and disposition. Additionally, the Court of Appeals directed that, pendente lite, the company make "expeditious payment" into the registry of the district court its overdue obligation under the Marketing Order.

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

MORTGAGE FORECLOSURE

Failure of Government as Mortgagee to Insure Under Its Option in Mortgage Insurance Clause Upon Mortgagor's Default Imposes no Liability for Storm Damage Loss to Property, Nor Release Guarantor Where Guaranty Is Absolute; Where Parts of Judgment Represent Adjudication of Separable or Divisible Controversies, Acceptance of Separate Favorable Portion Does Not Preclude Challenge of Adverse Portion. United States v. Newton Livestock Auction Market, Inc., et al. (C.A. 10, No. 7602, Sept. 16, 1964). DJ No. 105-29-89. This action was commenced by the United States against the mortgagor, Newton, and three guarantors and a junior lien-holder to foreclose a real estate and chattel mortgage given on a Small Business Administration loan. While the foreclosure action was pending, the mortgagor defaulted in the carriage of insurance on the property. Although the mortgage gave the Government the option in such case to insure at the expense of the mortgagor, the Government permitted the insurance to lapse, advising the agent that it was its own insurer. Prior to sale the property suffered storm damage in the approximate amount of $30,000. At that time the Government was not in possession. Judgment was entered against the mortgagor and the guarantors in the amount of $120,000 plus interest; and sale of the property was ordered. SBA purchased the property for $43,000; and upon objection by the mortgagor and guarantors to the Government's motion to confirm the sale, the court fixed the fair value of the property at $108,000, and gave the Government the option to credit its judgment in such amount or move for a second sale with that upset price. The Government chose the former. The court also required the Government to credit its judgment with the amount of $30,000 "as proceeds from the self-insured loss" to the property from storm damage. Further, the court held that interest was due from the United States on these amounts from the date of sale.

On appeal the Government attacked only those portions of the judgment relating to the $30,000 credit for storm damage and the assessment of interest. The mortgagor moved to dismiss the appeal on the ground that, by accepting the judicially determined fair value of the property and not holding a second sale, the Government had accepted the benefits of the judgment and had acquiesced therein. The Court of Appeals (1) denied the motion to dismiss, and (2) reversed.

First, the Court held that, even if acceptance of the determined fair value was a benefit to the United States, which was not shown, the Government could appeal from the adverse portions of the judgment as adjudications of separable and divisible controversies. On the merits, the Court held that, with respect to the mortgagor, the Government was under no obligation to insure, that insurance and self-insurance were not equivalents, and that the Government did no more than assume the risk of impairment of the value of its collateral. Rejecting the guarantors' contention of release because of increase in their risk through the Government's failure to insure, the Court held that, under the terms and guaranties, the obligations of the guarantors were absolute and unconditional, and that the Government could have released the security entirely and still recovered from the guarantors. Finally, the Court held that the district court was without authority to assess interest against the Government.

Staff: John C. Eldridge and Kathryn H. Baldwin (Civil Division)

NATIONAL MEDIATION BOARD -- MOOTNESS

Court of Appeals Upholds Lower Court's Refusal to Issue Preliminary Injunction Preventing National Mediation Board From Conducting Representation Election; Holding Election Does Not Moot Case. Flight Engineers' International Association, Etc. v. National Mediation Board, et al.; Eastern Air Lines, Inc. v. National Mediation Board, et al. (C.A.D.C., Nos. 18640 and 18643, October 8, 1964). DJ No. 124-16-52. These consolidated appeals arose from a suit by the Flight Engineers union (FEIA) to enjoin the National Mediation Board from conducting an election to determine whether FEIA or the Air Line Pilots Association union (ALPA) would be the certified bargaining representative of the flight engineers of Eastern Air Lines. Eastern sought leave under Rule 24(a)(2), F.R.C.P., to intervene in the action. The district court denied FEIA's motion for a preliminary injunction and Eastern's motion to intervene. These appeals, consolidated in the Court of Appeals, followed.

After filing its appeal, FEIA persuaded the district court to suspend the effect of the order pending disposition of FEIA's application to the Court of Appeals for a stay pending appeal. The Court of Appeals denied the application for a stay and the Board then held the election which resulted in FEIA's rival, ALPA, being certified as the representative of Eastern's flight engineers. The Board then moved to dismiss FEIA's appeal for mootness, or, if the appeal was considered under 28 U.S.C. 1291, for prematurity.

The Court of Appeals refused to dismiss the appeal for mootness, and instead ruled on the merits in FEIA's appeal that the district court had not erred in denying the preliminary injunction. The Court stressed the limited judicial review of determinations in employee representation proceedings before the Mediation Board (see Switchmen's Union v. National Mediation Board, 320 U.S. 297, and General Committee v. M.K.T. Railroad Co., 320 U.S. 323), and said that FEIA's challenge to the Board's certification proceedings here did not come within any exception to the general rule of non-reviewability based on the Supreme Court decision in Leedom v. Kyne, 358 U.S. 184. The Court also rejected FEIA's contention that the Board had failed to determine the issue of the eligibility of the participants in the election, an issue involved in the union representative replacement issue. See Flight Engineers' Int'l Ass'n v. C.A.B., 332 F. 2d 312 (C.A.D.C.).

In Eastern's appeal, the Court ruled that the district court had been correct in denying intervention under Rule 24(a)(2) since there was no adequate showing that Eastern's interest was not or might not be adequate. One judge dissented from this part of the Court's ruling.

Staff: John C. Eldridge (Civil Division)

DISTRICT COURT

FEDERAL TORT CLAIMS ACT

Tort Suit Against Government Dismissed on Basis of Evidence Revealed by Autopsy. Willie Henderson, etc. v. United States (E.D. Penna., Civil Action No. 32317, September 30, 1964). DJ No. 157-62-423. This was an action for

the alleged wrongful death of plaintiff's wife. On three occasions during November and December of 1961, the wife had gone to the United States Naval Hospital in Philadelphia with complaints of vomiting, dizziness, headaches, etc., and had received generalized treatment for the distresses. On December 26, 1961, she appeared again at the hospital, and, while waiting to be seen by a doctor, became unconscious. She failed to respond to treatment and died the next day. Plaintiff refused to permit an autopsy on the body.

In his complaint, plaintiff alleged that the Government doctors were negligent in (a) failing to diagnose the presence of a brain tumor, (b) failing to administer necessary tests and laboratory studies, (c) refusing to admit his wife for treatment prior to December 26, 1961, and (d) failing to treat his wife's condition by recognized methods of treatment and by accepted medical standards. After the action had been pending for more than a year, pursuant to a court order an autopsy on the remains of the decedent was conducted. The examiner's conclusion was that the wife had died as a direct result of spontaneous, naturally occurring heart disease of a relatively rare type, a multiple tumor formation within the muscle of the heart for which there is no known medical or surgical treatment. Based upon this autopsy report, plaintiff's attorneys entered into a stipulation of dismissal of the complaint with prejudice.

Staff: United States Attorney Drew J. T. O'Keefe and Assistant United States Attorney Joseph R. Ritchie, Jr. (E.D. Pa.); Irvin M. Gottlieb and Vincent H. Cohen (Civil Division)

SURETYSHIP - CUSTOMS BOND - SUBROGATION

United States v. Pedro Zugasti and St. Paul Fire & Marine Insurance Company (No. 63244 Civil CF., S.D. Fla.) DJ No. 54-18-170. The suit of the United States was based upon the consumption entry bond executed by the principal, Pedro Zugasti, and the surety, guaranteeing payment of all duties assessed against the merchandise. Pedro Zugasti, who acted as a customs broker for Stephen Messana and Arthur J. Rose, a partnership operating under the name Rose Cement Supplies, Inc., could not be located for service in the United States. The surety company asserted a third party action against Stephen Messana and Rose Cement Supplies, Inc. The third party complaint alleged that, if St. Paul must make payment to the United States, it is entitled to judgment against Messana, since Zugasti made the entries on behalf of the partnership. It was also alleged that, if Zugasti made payment to the United States of the duties, Zugasti would be entitled to reimbursement from the partnership, and therefore the surety upon payment of the duties should be subrogated to the rights against the partnership and Messana as a partner. As to the Government, the surety alleged in its answer that the Collector of Customs failed to give notice of appraisement pursuant to 19 U.S.C. 1501, and that no notice of liquidation was given pursuant to 19 U.S.C. 1505.

The Court found that, under the terms of the bond, the surety bound itself to pay the duties due, and that the defenses of the surety were disproved.

As to the surety, the Court found that its theory of recovery by subrogation was without merit. The Court stated that Zugasti could have relieved himself of liability by having the partnership post a bond and having the partnership designated as the true owner of the importation by following 19 U.S.C. 1485(d). It was also stated by the Court that, when St. Paul satisfies the Government's judgment it will be satisfying Zugasti's bond liability to the United States, and that, since Zugasti was a primary obligor for the payment of the duties, subrogation was denied, citing R. J. Saunders & Co. v. Vincent, 309 F. 2d 65 (C.A. 2, 1962).

On the contention by St. Paul that, if Zugasti had paid the duties he would have acquired a right to be reimbursed by his principal, the partnership, and that, when St. Paul paid Zugasti's obligation to the Government, it should be subrogated to Zugasti's claim for reimbursement against the partnership, the Court found that Zugasti did not deal with St. Paul as an agent for the partnership but rather as a principal, and that the bond shows the relationship between St. Paul and Zugasti to be one of principal and surety. The claim for subrogation was denied, and the Court advised that St. Paul must look to Zugasti for reimbursement and not the third party defendants. Judgment was entered for the United States in the amount of $8,556.07, plus interest from July 10, 1962.

An Order Denying Motions for New Trial and to Amend the Court's Findings and Opinion was filed on October 6, 1964.

Staff: United States Attorney William A. Meadows, Jr. and Assistant United States Attorney Alfred E. Sapp (S.D. Fla.); Hadley W. Libbey (Civil Division)

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CIVIL RIGHTS DIVISION

Assistant Attorney General Burke Marshall

Unlawful Arrest; Deprivation of Rights Under Color of Law and Conspiracy; 18 U.S.C. 242 and 371. United States v. James Ramey, Jr. and Louise Ramey (C.A. 4, 1964). A jury returned guilty verdicts against Constable James Ramey, Jr., and his wife, Louise Ramey, a justice of the peace, on November 8, 1963, for violation of 18 U.S.C. 242 and 18 U.S.C. 371 (conspiracy to violate 18 U.S.C. 242). (See 11 United States Attorneys' Bulletin 19, p. 498; 24 p. 610). Judge John A. Field, Jr., sentenced James Ramey to one year on each of the two counts under which he had been indicted, to be served concurrently, and sentenced Louise Ramey to one year on the count under which she had been indicted, but suspended sentence.

The case grew out of the arrest and incarceration by Constable Ramey of an election official in the early hours of the morning of election day, November 6, 1962, on a false charge of rape. The arrest was based on a complaint and warrant prepared by Ramey's wife. The arrested official intended to challenge the votes of all persons in the precinct believed to be illegally registered to vote in the election in which Ramey was a candidate.

On appeal, Ramey challenged his conviction on these grounds: (1) that the evidence did not sustain the offense charged; (2) that, in any event, the offense charged was not within 18 U.S.C. 242, and (3) that, because of his status as a constable, he was immune from prosecution under 18 U.S.C. 242. In an opinion rendered September 14, 1964, a unanimous Court of Appeals rejected each of these contentions.

The Court found that the evidence "reflects a sufficiency of facts to present the guilt or innocence of appellant to the jury. He has had his day in court and a jury of his peers has passed on the issues of fact." Further, the Court rejected appellant's contention that violence or physical abuse was required to make out a violation of 18 U.S.C. 242. The Court said: "When an officer, knowing a warrant to be illegal, groundless, or fictitious, willfully uses his authority, and/or such an instrument to arrest and incarcerate the accused, such action is a deprivation of the right of the arrested to liberty and a violation of 18 U.S.C. 242. Neither threat nor violence is a necessary ingredient of the offense under such circumstances." Finally, relying on such cases as United States v. Classic, 313 U.S. 299 and Williams v. United States, 341 U.S. 97, the Court concluded that Ramey possessed no immunity from prosecution by virtue of his office.

Staff: Acting United States Attorney Carl Belcher (S.D. W. Va.); Harold H. Greene, Howard A. Glickstein, Edgar N. Brown (Civil Rights Division).

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

CONSPIRACY AND CONFLICT OF INTEREST

Application of the Constitutional Congressional Privilege of "Speech and Debate" as a Bar to Criminal Prosecution for Conspiracy: Application of the Conflict of interest Law to Appearances of a Congressman Before the Department of Justice: Venue in Conflicts of Interest Prosecutions. United States v. Thomas F. Johnson, et al. DJ 51-35-127 (Dist. of Md.) (C.A. 4, September 16, 1964). A resume of the rulings of the District Court was set forth in an attachment to the July 12, 1963 issue of the Bulletin. See also United States Attorneys Bulletin, Volume 11, No. 14, page 392, July 26, 1963. The Court of Appeals reversed the conviction of former Congressman Thomas F. Johnson and remanded for a new trial, but affirmed the convictions of J. Kenneth Edlin and William L. Robinson. Former Congressman Frank W. Boykin did not appeal from his conviction.

Former Congressman Johnson had been convicted on a conspiracy charge of defrauding the United States of his faithful, honest and impartial services resulting from his making a speech on the floor of the House of Representatives and his interceding before the Department of Justice to persuade its officials to cause the postponement and eventual dismissal of a then pending mail fraud indictment against J. Kenneth Edlin and others, and the receipt of compensation for these acts. The Court of Appeals held that his conviction in the District Court on this charge violated his constitutional privilege under that clause of Article I, Section 6, of the United States Constitution, which provides, "and for any Speech or Debate in either House, they (members of Congress) shall not be questioned in any other Place."

The Court was persuaded by its historical review that the constitutional provision should be interpreted liberally and that the privilege applies whenever the motivation for making a speech it called into question. It stated that comments in Kilbourn v. Thompson, 103 U.S. 168 (1880), and Tenney v. Brandhoye, 341 U.S. 367 (1951), to the effect that the courtroom is not the place to question the motives of legislators where they are acting within their traditional sphere and that the claim of an unworthy purpose does not destroy the privilege, confirmed this view. The Court of Appeals concluded that the question with which they were faced was whether these general principles become inapplicable when bribery is a motivating factor for making a speech in a legislative chamber. In an unanimous opinion, recognizing that this was the first case squarely raising the issue, the Court of Appeals found that the general principles applied. It concluded that Count one of the indictment was unconstitutional as applied to Johnson and that the invalidity of that count and the mass of evidence adduced under it was prejudicial to his right to the unbiased consideration of the jury on the seven substantive conflicts of interest counts on which he was also convicted. A petition for a writ of certiorari will be filed in the Supreme Court on this issue.

The appellants also contended that the substantive conflicts of interest counts failed to state an offense on the grounds that the legislative history showed that "court proceedings" were to be exempted from the coverage of the conflicts provision and that a court proceeding is not a proceeding or matter "pending" before the Department of Justice. The Court of Appeals rejected appellants' interpretation of the legislative history and concluded that the legislative history merely showed that it was not intended to prohibit lawyer-congressmen from appearing as counsel in courts, but that it was intended to prohibit them from appearing before executive departments or agencies for compensation. The court observed that the reasons for this distinction continues to this day as governmental departments and agencies are dependent upon Congress for support and such bodies are readily susceptible to pressures from individual Senators and Representatives, while Courts, on the other hand, are surrounded by protections to assure their independence. The Court of Appeals also agreed with the District Court's ruling that Section 281 did not use the word "pending" and that the words "before any department, agency", etc. referred to where the services have been rendered or are to be rendered and not where the proceeding or other matter is pending.

In connection with the issue of proper venue in a conflicts of interest prosecution based on the receipt of checks, the Court of Appeals stated that Burton v. United States, 196 U.S. 283 (1905), makes it clear that the place of the delivery of a check is not the sole determinative of venue. It concluded that Burton was conclusive as to four counts, in which it was alleged that Johnson received checks drawn on one Maryland bank and deposited in another Maryland bank. The Court found that under Maryland banking law the bank of deposit was an agent for collection and when it received final payment from the drawee bank, former Congressman Johnson received compensation through this agent within the contemplation of Section 281. In connection with the three remaining conflicts of interest counts, where the checks deposited in a Maryland bank were drawn on a bank located in Florida, the Court of Appeals accepted the Government's contention that venue in Maryland could be supported on the theory that when a check is involved, the receipt of "compensation" constitutes a continuing offense within the meaning of 18 U.S.C. 3237. Cf. Benson v. Henkel, 198 U.S. 1, 9 (1905).

Staff: United States Attorney Thomas J. Kenney; Assistant United States Attorney Robert Kernon; Special Assistant United States Attorney Hardin J. Marion III (D. Md.). Arthur L. Burnett, Attorney Criminal Division.

BOMB HOAX
(18 U.S.C. 35(a))

False Bomb Remarks; Conjectural Statements; Prosecutions; Policy. It has recently come to our attention that some United States Attorneys have proceeded to prosecution where the remark was worded in conjectural language. Typical of such remarks is, "Excuse me, but I might have a bomb in it" (briefcase). In such instances the juries have returned verdicts of acquittal.

In reviewing bomb hoax cases on a national basis and in approving requests by United States Attorneys to decline prosecution in certain fact situations, we have uniformly applied the principle that where the remark contains the words "might", "may", "could" or words of similar import, such a remark is conjectural and not an imparting and conveying of information as required by the statute. Thus, in general, the words must amount to an affirmative imparting of information and not be a mere inquiry, conjecture or speculation. If there is any question concerning the nature of the remark, the United States Attorney should contact the Criminal Division before initiating prosecution so that a uniform prosecutive policy can be applied.

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INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Subversive Activities Control Act of 1950; Registration of Communist Party Members. Acting Attorney General v. Otis Archer Hood et al. DJ 146-7-1106 (Dist. of Mass.) On September 30, 1964, the Acting Attorney General filed seven additional petitions with the Subversive Activities Control Board at Washington, D. C., pursuant to Section 8(a) of the Subversive Activities Control Act against leading functionaries of the Communist Party, USA, seeking orders of the Board requiring the respondents to register as members of the Party. The respondents are Otis Archer Hood, Chairman of the New England District of the Communist Party; Anne Burlak Timpson, Treasurer of the New England C.P. District; Lewis Martin Johnson and Edward S. Teixeira, members of the District Committee of the New England District; Human Lumer, National Educational Director of the Party; Ralph Nelson, Chairman of the C.P. in Oregon; and Elmer Charles Kistler, Board member of the Northwest District of the Party.

Staff: Francis X. Worthington, James A. Cronin, Jr., John E. Ryan (Internal Security Division)

Trading With the Enemy Act. United States v. Pui Chiu Tam DJ File No. 146-39-149 and United States v. H. Grant Heaton DJ File No. 146-39-147 (N.D. Calif.) Guilty verdicts were obtained recently in each of these cases, tried separately, both of which involved illegal transactions in merchandise originating in Communist China. In the Tam case, at the close of the Government's evidence, the court granted defendant's motion for judgment of acquittal on two of the three counts of the indictment and the court accepted the defendant's plea of nolo contendere to the other count over the objection of the Government. Defendant was sentenced to a fine of $1,000.

The Heaton case involved goods, primarily objects of art, valued at more than $25,000. This case went to the jury which found the defendant guilty and the court sentenced him to 18 months, suspended, 3 years probation, and a $3,000 fine.

Staff: United States Attorney Cecil F. Poole and Assistant United States Attorney James F. Hewitt (N.D. Calif.)

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LANDS DIVISION

Assistant Attorney General Ramsey Clark

Sovereign Immunity; Suits Against the Department of the Interior, Its Bureaus and Subordinate Officials for Relief Against Agency Action Are Suits Against the United States; The Administrative Procedure Act Does Not Afford Consent to Such Suits. Chournos v. United States, 335 F. 2d 918 (C.A. 10, 1964). D.J. File No. 90-1-18-580 - The Secretary of the Interior through administrative proceedings invalidated alleged mining claims. The claimant sued for relief naming the United States, the Department of the Interior, the Bureau of Land Management, and a subordinate official as defendants. The district court dismissed the suit as against the United States without its consent.

The Court of Appeals affirmed, holding (1) that the Department and its bureaus were not suable entities and the suit was against the United States, (2) that the suit against the subordinate official would not lie as he was acting within his authority and was without authority to grant the relief requested, and (3) the Administrative Procedure Act does not give consent to a suit against the United States, and review of agency action may be had under the Administrative Procedure Act only in a court which otherwise has jurisdiction.

Staff: Elizabeth Dudley and Edmund B. Clark (Lands Division)

Public Lands: Sovereign Immunity; No Suit against Public Officials Acting Within Scope of Authority. Switzerland Company v. Udall (C.A. 4, September 30, 1964). D.J. File No. 90-1-23-1048 - In 1938 the North Carolina State Highway Commission condemned and conveyed to the United States a right of way across lands of the Switzerland Company for use in the Blue Ridge Parkway. In the conveyance, North Carolina retained the right to maintain existing public roads within the right of way. After the Parkway was completed, the Switzerland Company was issued a special use permit by the National Park Service, whereby the Company was given access to the Parkway over two private roads within the Parkway right of way. In 1959 the Company refused to execute a renewal of the use permit, contending that the access roads were public roads of North Carolina and that the Park Service could not, under the terms of the original grant by North Carolina, exercise any control over the access roads. The Park Service then closed and barricaded the access roads. Switzerland Company brought this action against Secretary of the Interior Stewart L. Udall and two of his subordinates, alleging that they acted beyond the scope of their authority in closing the roads, and asked for injunctive relief that would reopen the roads and preclude any claim to them by the United States. The district court dismissed the action as an unconsented suit against the United States. Switzerland Company v. Udall, 225 F. Supp. 812 (W.D. N.C. 1964).

The Court of Appeals affirmed the dismissal, relying upon Larson v. Domestic & Foreign Corp., 337 U.S. 682 (1949); Malone v. Bowdoin, 369 U.S. 643 (1962); and, to a lesser extent, Dugan v. Rank, 372 U.S. 609 (1963), and Hawaii v. Gordon, 373 U.S. 57 (1963), all of which, the court held, in effect overruled United States v. Lee, 106 U.S. 196 (1882). The court pointed out that the United States owned the land where the obstructions were maintained and that the defendant United States officials had the statutory duty to administer

the lands. If Switzerland Company's right of access was not effectively taken in the 1938 state condemnation proceeding or if the roads were public roads of North Carolina, the United States officials wrongfully exercised their delegated authority, but they did not exceed it. Thus, under Larson, they were protected by sovereign immunity. The court concluded by noting that the Company might have an action for just compensation if the access rights were not taken in the earlier proceedings, but such a question was not cognizable in this action.

Staff: Richard N. Countiss (Lands Division)

Condemnation: Valuation of Sand and Gravel; Speculative Market Demand and Duration; Sales to Government Excluded; Capitalization Rate Unsupported; Guesswork of Computed Value; Comparable Sales Rejection Error; Comparable Sales Best Evidence; Award Based on Unsupported Expert Opinion Clearly Erroneous; Commission Must Be Carefully Instructed. United States v. Whitehurst (C.A. 4, No. 9341, October 9, 1964). D.J. File No. 33-48-29-15 - The United States condemned 273 acres for extension of runways at the Naval Air Station near Norfolk, Virginia. The Air Station was originally constructed between 1942 and 1945. The expansion commenced in 1950. The tract taken was then being used as a truck farm along with the adjoining 161 acres (not taken) in the same ownership. A 15-acre borrow pit was located on the farm from which sand, fill material and top soil had been removed. The bulk of that material had been used between 1943 and 1945 in the original construction of the Air Station. That area was also the site of a small asphalt paving plant which had been put there for work on the original Air Station and had continued a small operation thereafter. After work had begun to extend the runways, four firms having contracts with the Navy had bought and removed sand and fill from 70 acres in 1950-1951 almost wholly for work on the airport. But some had been used in the construction of the Virginia Beach Boulevard.

The Government's witness appraised the property taken at $156,400. Most of this value was attributed to its use as a truck farm. But since the north boundary abutted a railroad line, he valued a strip along the length of that side and 400 feet deep (30 acres) as industrial land. He relied upon comparable sales of farm properties.

As background for his witnesses to valuation, the owner offered extensive testimony by engineers and contractors relative to quantity and types of materials in the tract, the "market" for such materials and prices. It was testified that excavation of the tract to a depth of 27 feet would yield 12,500,000 cubic yards of usable materials; that this is the only land in the Norfolk-Princess Anne County area containing its soil type adjacent to a railroad; that less than six percent (8,000 acres) of the land in Princess Anne County contains that soil type; that zoning authorities oppose the opening of new borrow pits in the county; and that this and one other were the only operating pits in the vicinity.

The owner's valuation witness was an experienced appraiser often employed by the Government. He acknowledged, however, that he had never appraised a borrow pit which was the use for which he appraised the tract. He derived his information and figures as to market, quantity, quality and price from the other witnesses for the owner. Relying "on other peoples judgment" he found no comparable sales. His valuation: He estimated the annual yardage sale of sand

and divided that into the total available which gave him a 35-year period. He assigned that period to the other two types of materials. He placed a cubic yard price on each type to reach an annual gross return of $43,260. Then deducting $3,000 for bookkeeping and taxes, he had a net of $40,260 which he capitalized, using the Inwood present worth table, at a (risk) rate of ten percent for a valuation of $385,000.

The condemnation commission adopted all those figures except the capitalization rate which it changed to 15 percent for a valuation of $226,400. The district court sustained the commission. The Fourth Circuit reversed for the following reasons:

1. Land having sand or gravel may not be valued on the basis of conjectural future demand. There must be some objective support for the future demand, including volume and duration. Mere physical adaptability does not establish a market.

2. In ascertaining demand, the requirements of the Government for the project must be totally excluded. The estimated sales here of 357,280 cubic yards per year "is unrealistic, speculative and lacking the necessary objective factual support" when sales to the Government are eliminated.

3. The selection of a capitalization (risk) rate requires great care because "a change of even a fraction of one percent will produce a surprisingly material change in the result." It requires objective support. The rate used by the owner's witness "based on my judgment and experience" is without such support.

4. The commission's use of a different rate "has no support whatever in the record, in comparable investments or otherwise."

5. The mathematically computed 35-year period is "guesswork and not supported by competent evidence. This will not meet the standards required in arriving at a proper determination of fair market value."

6. The commission rejected the comparable sales of the Government, even though some were lands containing very similar materials. "Possibly the commission was laboring under the impression that these sales were not comparable because the lands were sold as farm land and not as borrow pits. If so, it was grossly mistaken."

7. Rejection of a recent sale because the seller did not know it would be used as a borrow pit and would not have sold it for the price, if he had known that, was also error. "All the indicia of an arms length transaction were present." That reason "was personal to him and was not based on any increased value in the land for sale as a borrow pit." There is no indication that the parties to the comparable sales used by the Government "were all economic idiots." The fact is that the presence of such materials did not appreciably enhance values in the market.

8. Comparable sales are the best evidence of market value. Real property may be unique and the comparable sales too few to establish a conclusive market

price, but that does not put out of hand the bearing which the scattered sales may have on what an ordinary purchaser would have paid for the property.

9. Where the factfinder bases a finding on opinion testimony of an expert witness whose stated reasons for his opinion are patently unsound and without support in the record, the reviewing court should reject the finding as clearly erroneous.

10. A condemnation commission should be carefully instructed. United States v. Merz, 376 U.S. 192 (1964), must be carefully considered by the district court. "It was there held (p. 200) that, on remand, the court, in the exercise of its informed discretion, will determine whether the matters should be resubmitted in whole or in part to the commission, or whether the court itself should resolve the disputes on the existing record or on the record as supplemented by further evidence."

Note: It is our view that in this case the court must either enter judgment in the amount of the Government's valuation, or, since the issue involves credibility of witnesses, require a new trial. It would be "unfair" to the Government to retry the case to the same commission. United States v. Featherston, 325 F. 2d 539 (C.A. 10, 1963).

Staff: S. Billingsley Hill (Lands Division)

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CIVIL TAX MATTERS
District Court Decisions

Jurisdiction; Taxpayer Precluded From Attacking Merits of Tax Assessment by Instituting Suit Against United States to Quiet Title to His Property Pursuant to 28 U.S.C. 2410. Broadwell, et ux. v. United States. (E.D. N.C., September 14, 1964). (CCH 64-2 U.S.T.C. ¶9768). The taxpayers instituted this suit naming the United States a defendant pursuant to 28 U.S.C. 2410 for the purpose of removing the cloud of a tax lien on title to their property. They also sought to enjoin the Government's collection of an assessed income tax deficiency, and, toward these ends, they attacked the validity of the assessment upon which the tax lien was based.

The Court held that an action pursuant to Section 2410 does not, in the light of that Section's legislative history, contemplate a taxpayer, through the vehicle of a suit to quiet title, attacking the merits of a tax assessment, since the purpose of Section 2410 is to permit the United States to be made a party-defendant in suits to quiet title or to foreclose a lien or mortgage. The relinquishment of the Government's sovereign immunity, which is the effect of Section 2410, does not extend to permitting attacks upon the merits of the tax assessment itself.

The Court summarily disposed of the attempt of the taxpayers to obtain injunctive relief by citing Sections 7421 and 7422, Internal Revenue Code of 1954, which specifically bar such relief. The Court noted that, while these sections do not, as may first appear, prohibit all suits to restrain the assessment or collection of a tax, such suits are maintainable only when there are some special or extraordinary circumstances sufficient to bring the case within some acknowledged head or principle of equity and when, under the particular factual situation, the Government could under no circumstances ultimately prevail. The Court found that the prerequisite circumstances were not here present.

Staff: United States Attorney Robert H. Cowen; and Assistant United States Attorney Gerald L. Bass (E.D. N.C.).

Equity Jurisdiction; Writ of Ne Exeat Republica Will Issue In Tax Case Only Where There Is Showing That Taxpayer Is About to Leave Country Resulting in Defeat of Court's Power to Give Effective Relief and That Government Will Be Substantially Prejudiced Thereby. United States v. David Robbins, et al. (E.D. Ark., August 31, 1964) (CCH 64-2 U.S.T.C. ¶9775). In a suit to establish federal tax liabilities and to foreclose asserted liens for such taxes, service

was had upon all parties except the taxpayers, Mr. and Mrs. David Robbins, who were then in Mexico. They returned to the United States a month later and the Government filed an application for a writ ne exeat republica against David Robbins. The substance of the application and the affidavit in support thereof was that Robbins was in the course of liquidating all of his assets and transferring them to Mexico. It was therefore claimed by the Government that, unless the writ should issue, Robbins would leave the country and thus seriously jeopardize the enforcement and collection of the Government's tax liens. A temporary writ requiring $200,000 bail was issued and Robbins moved to quash it. The Court granted taxpayer's motion.

In so ruling, Judge Henley pointed out that at common law there were two requirements for the issuance of the writ: (1) a threatened departure of the defendant from the jurisdiction; and (2) a resulting defeat of the Court's power to give effective in personam relief due to its loss of control over the defendant's person. These requirements have been incorporated into the federal statutes, and, since Internal Revenue Code Section 7402(a), which expressly authorizes the District Courts to issue the writ of ne exeat republica in tax cases, does not spell out the exact terms of its issuance, it was reasoned that these requirements were applicable here.

In this case, the Court concluded that the Government had failed to carry its burden of proof, because Robbins' testimony was to the effect that he was in Mexico for a vacation only and that he intended to remain in the United States to contest the tax claim, and the Government had not produced evidence, including hearsay evidence, direct or circumstantial which would impel the Court to disbelieve Robbins. The Court also concluded that there had been no showing of prejudice to the Government, because most of Robbins' assets were still in the United States and therefore were subject to the Court's jurisdiction, and because there was no substantial evidence that he had been transferring assets to Mexico for the purpose of escaping the claims of the Government.

This case is noteworthy since it sets forth guidelines for the issuance of writs of ne exeat in federal tax cases.

Staff: United States Attorney Robert A. Smith, Jr. (E.D. Ark.); and Norman E. Bayles (Tax Division).

Statute of Limitations; Proceeding in Court for Collection of Taxes; Proof of Claim Timely Filed in Estate Proceeding Constitutes Special "Proceeding in Court" Within Meaning of Six Year Statute of Limitations for Collection of Taxes, Thereby Entitling Government to Compulsory Accounting to Collect Taxes. Matter of Weinbaum. (Surrogate's Court, Nassau County, New York, September, 1964). The taxpayer died intestate in 1945. Assessments for federal income tax deficiencies for the years 1943, 1944, and 1945 were made in 1944, 1945, and 1947. Notices and demands to pay the respective assessments were served upon the administratrix, and thereafter proofs of claim were served on the administratrix in 1945 and 1948. The administratrix rejected the claims.

On November 1, 1954, the United States instituted a compulsory accounting proceeding which was consolidated by the court with a second petition for an accounting filed by the Government on March 28, 1960. On July 1, 1963, the Court granted the petition for an accounting, but allowed the administratrix to file objections to its order. The administratrix objected to the Court's order on the ground that the filing of the proofs of claim did not constitute a "proceeding in court" within the meaning of the federal statute of limitations (Section 276(c) of the Internal Revenue Code of 1939), which would suspend the running of the statute of limitations, and on the ground that the Government had not taken any other administrative or judicial action to collect the taxes within six years of the assessment dates, citing Matter of Feinberg, 244 N.Y.S. 2d 646, reargued 250 N.Y.S. 2d 609 (Surrogate's Court, Kings County, New York) (U.S. Attorneys' Bulletin, Vol. 12, No. 8).

The Surrogate, however, rejected the Feinberg decision and, relying on the construction of Section 211 of the Surrogate's Court Act set forth in Matter of Schorer, 272 N.Y. 247, ruled that the filing of a proof of claim pursuant to Section 211 "is deemed the institution of a special proceeding in the Surrogate's Court for collection of such claim and the equivalent of a proceeding for the purpose of tolling the (Federal) statute." Accordingly, the fact that the first compulsory accounting proceeding was not commenced until after the expiration of six years from the assessment dates was of no consequence, since a "proceeding in court" was commenced within six years by the filing of the proofs of claim pursuant to Section 211.

Staff: United States Attorney Joseph P. Hoey; and Assistant United States Attorney Joseph Rosenzweig (E.D. N.Y.).

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