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BULLETIN

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POLICY WITH REGARD TO COLLECTIONS

Title 3 of the United States Attorneys Manual has been revised extensively and copies of the revisions have been forwarded to all United States Attorneys. Each United States Attorney, and every assistant and clerk charged with responsibility in the area collections, should be thoroughly familiar with the contents of these revisions. The revised pages, dated January 1, 1965, set forth the Civil Division's policy with respect to the handling of both delegated and non-delegated collection cases. The instructions contained in these revisions cover such matters as: (1) prompt demand and suit on claims for money, (2) immediate suit and expedited handling of all foreclosures, (3) the conditions under which installment payments may be accepted and the frequency and amount thereof, (4) standards governing the compromise and closing of claims and the compromise, inactivation, and closing of judgments, (5) sale on levy of execution, (6) garnishment of wages, and, (7) periodic review of judgments maintained in the "inactive" or "suspense" category. It is important that the standards and instructions contained in Title 3 of the United States Attorneys Manual be adhered to in every case and that prompt and vigorous action be taken on all civil claims, suits and judgments.

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ADMINISTRATIVE DIVISION

Assistant Attorney General for Administration S. A. Andretta

EXPENSES OF OPPOSING COUNSEL--RULE 30(b), F.R.C.P.

In the case of United States v. Vitasafe Corporation, (DJ File 102-1004) the United States District Court for the Southern District of New York upholds the government's position that the per diem expenses of a government attorney and the travel expenses incurred incident to the taking of depositions under Rule 30(b), F.R.C.P., are taxable against the losing defendant.

MEMOS AND ORDERS

The following Memoranda applicable to United States Attorneys Offices have been issued since the list published in Bulletin No. 26, Vol. 12 dated December 25, 1964:

MEMOS	DATED	DISTRIBUTION	SUBJECT
124 Rev.-S5	1-14-65	U.S. Attorneys	Docket and Reporting System Manual.
342-S1	1-12-65	U.S. Marshals	Overtime Regulations--Special Assignments.
395	12-11-64	U.S. Marshals	Form No. USM-40 (Prisoner remand or order to deliver).
396	12-28-64	U.S. Attorneys	Mail Covers.
397	1-19-65	U.S. Attorneys & Marshals	Non-discrimination standard for Federal Fund-Raising Program.

ORDERS	DATED	DISTRIBUTION	SUBJECT
328-64	12-22-64	U.S. Attorneys & Marshals	Authorizing George D. Beter to perform functions and duties of U.S. Attorney for Southern District of West Virginia during vacancy in that office.

ORDERS	DATED	DISTRIBUTION	SUBJECT
329-65	1-12-65	U.S. Attorneys	Subpart U--Additional assignments of functions and designation of officials to perform duties of certain offices in case of vacancy, or absence therein or in case of inability or disqualification to act - certificates concerning applicants for admission to practice before U.S. Court of Appeals for District of Columbia Circuit. Title 28--Judicial Admin. Chapter I--Department of Justice, Part 0, Subpart U.

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ANTITRUST DIVISION

Assistant Attorney General William H. Orrick, Jr.

SHERMAN ACT

Hydraulic Hose Companies Charged With Violating Section 1. United States v. Aeroquip Corporation, et al., (E.D. Mich.). D.J. File 60-182-87. On January 14, 1965, a Detroit grand jury returned an indictment which charged the Aeroquip Corporation; Anchor Coupling Co. Inc., Imperial-Eastman Corporation; National Hose Assemblies Manufacturers Association; Parker-Hannifin Corporation; Stewart-Warner Corporation; Stratoflex, Inc.; The Weatherhead Company; William F. Rogge, Vice President and General Manager, Industrial Division of Aeroquip Corporation; C. A. Thomas, President of Stratoflex, Inc.; Augustus S. Wade, General Sales Manager, Ft. Wayne Division, The Weatherhead Company; and George P. Byrne, Jr., Secretary, National Hose Assemblies Manufacturers Association with violation of Section 1 of the Sherman Act.

The indictment alleges that defendants and certain unnamed co-conspirators engaged in an unlawful combination of conspiracy in restraint of interstate trade and commerce in hydraulic hose. The combination and conspiracy consisted of a continuing agreement, understanding and concert of action to: 1. Secure a price advantage over their competitors in the purchase of hydraulic hose; 2. Persuade and induce hydraulic hose manufacturers to adopt and maintain a classification system based upon qualifications which preclude their competitors from obtaining the lowest price in the purchase of hydraulic hose; 3. Persuade and induce hydraulic hose manufacturers to abide by the qualification system under threat of decreased purchases or promise of increased purchases of hydraulic hose; and 4. Persuade and induce hydraulic hose manufacturers to adjust their prices in such a manner that the price paid for hydraulic hose by defendants was less than that paid by their competitors.

Total sales of hydraulic hose, hydraulic hose assemblies and hose couplings by the corporate defendants for the year 1962 were in excess of $29,800,000.

Staff: Norman Seidler, Dwight B. Moore and Rodman M. Douglas (Antitrust Division)

Hydraulic Hose Companies Charged With Violating Section 1. United States v. Electric Hose and Rubber Company, et al., (E.D. Mich.). D.J. File 60-175-31. On January 14, 1965, a Detroit grand jury returned an indictment which charged the Electric Hose and Rubber Company; the B. F. Goodrich Company; the Goodyear Tire & Rubber Company; H. K. Porter Company, Inc.; United States Rubber Company; Lee National Corporation; George J. Fischer, Manager Hose, B. F. Goodrich Industrial Products Division; Robert E. Mercer, Manager Hose Sales Department, Goodyear Tire & Rubber Company; and V. W. Wells, Vice President and Sales Manager, Electric Hose and Rubber Company with violation of Section 1 of the Sherman Act.

The indictment alleges that defendants and certain unnamed co-conspirators engaged in an unlawful combination and conspiracy to raise, fix and maintain prices in the sale of hydraulic hose. In 1962, dollar volume of sales of hydraulic hose by defendands were in excess of $34,500,000 of a total industry sales of $38,500,000.

Staff: Norman H. Seidler, Dwight B. Moore and Rodman M. Douglas (Antitrust Division)

Circuit Court Of Appeals Upholds Jury Verdict. Esco Corporation v. United States (C.A. 9). D.J. File 60-138-122. In an opinion by Judge Barnes filed on January 20, 1965, the Court of Appeals sustained the jury conviction of Esco Corporation under an indictment charging that the principal West Coast distributors of stainless steel pipe and tubing had engaged in a price fixing conspiracy in violation of Section 1. Three of the four defendants had pleaded nolo and Esco stood trial alone. Its principal contention, rejected by both the district court and the Court of Appeals, was that in such a situation the co-conspirator rule was inapplicable and no evidence concerning the acts or declarations of the three nolo defendants could be admitted against Esco, since it would not be relevant to the issue of Esco's participation in the alleged conspiracy. Noting that an absurd implication of Esco's argument was that when a single party in a multiple-defendant conspiracy refuses to plead nolo he should go free, the Court held that the evidence supported the conclusion that there was a conspiracy among the principal distributors as charged, that Esco's participation was established by independent evidence, and, accordingly, evidence concerning the acts and declarations of the nolo defendants in furtherance of the conspiracy was properly admitted as against Esco.

The Court also ruled: (1) that Judge Solomon did not abuse his discretion by permitting Government counsel to ask leading questions of hostile, industry witnesses; (2) that the trial court's remarks out of the presence of the jury that unfriendly witnesses were not telling the truth could not have influenced the jury in returning its verdict of guilty; (3) that the lower court did not err in permitting the Government at the close of its case to withdraw a specification from the indictment which the court did not believe supported by the evidence; and (4) that the Government made out a prima facie case of authenticity with respect to an anonymous letter implicating some of the alleged conspirators (but not Esco) in the price fixing arrangement and that this factual question was properly submitted to the jury under a correct precautionary instruction.

Staff: Lionel Kestenbaum and Donald L. Hardison (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General John W. Douglas

BANKRUPTCY - CHAPTER XI PROCEEDING

Petitioner in Chapter XI Proceeding Lost Standing to Prosecute Appeal When He Was Adjudicated Bankrupt; Only Trustee in Bankruptcy Then Had Standing To Appeal; Trustee's Attempted Assignment of Appeal Rights to Petitioner Held of No Effect. James A. Wallace v. Lawrence Warehouse Co., Crocker-Anglo National Bank and Small Business Administration (No. 18942, C.A. 9, November 6, 1964). D.J. No. 105-12-73. James A. Wallace, who was in the gypsum business, filed a petition in the district court proposing an arrangement under Chapter XI of the Bankruptcy Act. Becoming vested with all the powers of a trustee in bankruptcy, he filed a petition seeking to classify certain creditors as "unsecured." In his petition, he alleged that the Lawrence Warehouse Company had issued warehouse receipts on certain gypsum as security for an indebtedness which he (Wallace) owed to the Crocker-Anglo Bank and the Small Business Administration despite the fact that Lawrence did not have the gypsum under its control. Wallace urged that Lawrence, the Bank and the S.B.A. should be classified as unsecured creditors. The referee in bankruptcy granted Wallace's petition on the ground that Lawrence did not have possession of the gypsum. Lawrence, the Bank and the S.B.A. then petitioned for review and the district court thereupon reversed the referee's findings. Wallace then appealed to the Ninth Circuit.

On the same day that Wallace appealed, the referee in bankruptcy ordered Wallace adjudicated a bankrupt. Subsequently, F. H. Lang, Jr., was appointed trustee in bankruptcy by Wallace's creditors. Lang then filed a document in the Court of Appeals wherein he purported to assign to Wallace "the cause of action which is the subject matter of [this] appeal." Attached to this document was a certified copy of a petition to the referee for leave to abandon the property.

Thereafter, Lawrence, the Bank and the S.B.A. moved to dismiss the appeal on the ground that the issues involved had become moot by the trustee's abandonment of Wallace's property. The Ninth Circuit granted the motion to dismiss, holding that when Wallace appealed he still had all the rights of a trustee, but that he lost those rights, including standing to prosecute the appeal, when he was adjudicated a bankrupt. At that point, the Court noted, only Lang, as trustee, had standing to prosecute the appeal. The Court concluded that since Lang's attempted assignment of the appeal did not transfer to Wallace the right of appeal, the judgment of the district court should be given effect and the rights of Lawrence, and of the two secured creditors, the Bank and the S.B.A., were established.

Staff: United States Attorney Cecil F. Poole (N. D. Calif.).

CIVIL SERVICE RETIREMENT ACT

Employee May Involuntarily Be Retired For Disability if Unable to Perform Functions of Last Job; Employee Retired Because of Psychiatric Disability Need Not Be Afforded Hearing or Opportunity to Examine Psychiatric Reports Filed With Commission. Cerrano v. Fleishman (No. 28833, C.A. 2, December 28, 1964). D.J. No. 35-52-13. In this action, appellant challenged his involuntary retirement from the Customs Service on account of disability. He contended first that the Commission erred in neither affording him a hearing nor permitting him to see psychiatric reports that had been filed with it, and, further, that it was incumbent on the Commission to consider his suitability for employment in positions other than the one he "last occupied" before involuntarily retiring him. The district court rejected these contentions and the Court of Appeals affirmed. The decision is significant because it represents the first judicial construction of 5 U.S.C. 2251(g), the section of the Civil Service Retirement Act which sets forth the conditions precedent which must be satisfied before an employee is retired, either voluntarily or involuntarily, on account of disability. The opinion holds that "Congress intended to make it clear that the Commission, in retiring an employee, need not search for a similar but less onerous job in another pay grade or class which the employee for a time might fill, and that it is sufficient that the employee is unable, because of disability, to perform useful and efficient service in the specific position which he occupies at the time application is made for his retirement."

Staff: Edward Berlin (Civil Division)

EMPLOYEE DISCHARGE

Reinstatement Action Filed Two Years After Removal Had Been Upheld by Board of Appeals and Review Barred by Laches; Scope of Review Limited to Determination of Whether There was Compliance With Procedural Safeguards. Charles F. Chiriaco v. United States of America, et al. (No. 21206, C.A. 5, December 22, 1964). Appellant was discharged from the Tennessee Valley Authority in 1959. The action of the T.V.A. was affirmed by the Board of Appeals and Review on December 7, 1960. Two years later, appellant instituted an action in the district court challenging his removal from the federal service. Prior to filing suit, appellant had corresponded with the Civil Service Commission and the President's Committee on Government Employment Policy concerning his discharge. The district court ruled against the discharged employee and the Court of Appeals affirmed. The Fifth Circuit, quoting at length from Arant v. Lane, 249 U.S. 367, held that appellant was barred by laches. The Court also held that its scope of review in this type of case was limited to a determination of whether there had been a departure from the required standard of procedural due process. In this connection, the Court held that there had been no such departure and, in any event, even were the merits considered, the action of the T.V.A. was not arbitrary and capricious.

Staff: United States Attorney Macon L. Weaver, Assistant United States Attorney John R. Thomas, Jr. (N.D. Ala.).

Discharge of District of Columbia Employee Upheld; Civil Service Commissioners Have Discretionary Authority to Review Decision of Board of Appeals and Review. William A. Sudduth v. John W. Macy, Jr., et al. (No. 18460, C.A. D.C., December 31, 1964). Appellant, an employee of the District of Columbia Government, was removed from his position on charges of (1) having been under the influence of alcohol or "other drugs" while on duty, (2) refusing to leave the work area when ordered to do so by his superiors, and (3) being arrested and charged with disorderly conduct. As a veteran, appellant was entitled to the protections of the Veterans Preference Act, 5 U.S.C. 863. He appealed his removal to the Appeals Examining Office of the Civil Service Commission. His removal was upheld, after a hearing was conducted. The Board of Appeals and Review reversed the Appeals Examining Office. The District of Columbia then "appealed" this decision to the Civil Service Commissioners who reopened the case and reinstated the Appeal Examiner's decision. Appellant sought judicial review. The district court remanded the case to the Commissioners on the ground that they had improperly accepted evidence of an ex parte nature in reaching their decision. The Commissioners were instructed to reconsider their decision and, if the record was insufficient, to remand to a Hearing Examiner. The Commissioners again sustained the discharge and the district court affirmed.

The Court of Appeals also affirmed the decision removing appellant from his job. The Court rejected appellant's contention that the District of Columbia had no right of appeal to the Civil Service Commissioners from the Board of Appeals and Review, stating that, while there was no right of appeal to the Commissioners, the Commissioners had discretionary authority to pass on decisions of the Board. The Court also rejected appellant's claim that the district court should have reversed rather than remanded the case, the first time it was before the court, pointing out that no appeal was taken by the employee from the court's remand order. With respect to the argument that he should have been allowed to confront the Commissioners on remand, the Court stated that no such request had been made by the employee. In addition, the Court found no merit to the contention that the Commissioners should have made specific findings and set forth the rationale for their decision.

Staff: United States Attorney David C. Acheson, Assistant United States Attorney Frank Q. Nebeker, John E. Hogan and David Epstein (D. D.C.).

EXECUTION ON A JUDGMENT

Receiver Appointed by District Court to Acquire Assets of Government's Judgment Debtor Allowed To Proceed, Under Michigan Statute, Against Purchasers of Debtor's Property in Order to Gain Partial Satisfaction of Deficiency Judgment. United States v. Kathryn Lewis and Garland Lewis (No. 15626, C.A. 6, November 16, 1964), D.J. No. 29-37-232. The Government had obtained a judgment against an import-export corporation on which some $42,000 was still due and owing. In a supplemental proceeding in aid of execution, a receiver was appointed to acquire possession and title to the assets of the judgment debtor. The receiver filed a complaint against one of the corporate officers and her husband, alleging that they had induced the corporation to execute and deliver

to them a chattel mortgage on the corporation's property, for the purposes of defeating the rights of the corporation's creditors, and that they had caused the mortgage to be foreclosed upon in a state court whereupon the property, which was worth over $9,000, was sold to them for $500. The receiver requested that the mortgage be declared void or, in the alternative, that judgment be entered against the purchasers-defendants, pursuant to Michigan Statute Annotated Ch. 261, §26.977(4), in an amount ($2,742.70) equal to the difference between the amount of defendants' claim and the fair cash value of the property. The district court granted the alternative relief prayed for and entered judgment against the purchasers for $2,742.70. The Court of Appeals affirmed. In connection with defendants' contentions on appeal, the Court held: that the district court had not collaterally attacked the judgment of the state court but had merely followed the procedures authorized by the Michigan statute; that statutory authority existed for the appointment of the receiver; that it was not necessary in a supplemental proceeding, such as the instant one, to show that diversity of citizenship or the statutory amount existed; and that the lower courts' findings of fact on the subject of the chattel property were not "clearly erroneous."

Staff: United States Attorney Lawrence Gubow, Assistant United States Attorney Barton W. Morris (E.D. Mich.).

HATCH POLITICAL ACTIVITIES ACT

Decision of Civil Service Commission to Remove Employee from Federal Civil Service May Be Predicated on Hearsay Evidence; If Removed Employee Desires to Examine Any Persons at His Administrative Hearing He Must Arrange For Their Appearance. Festus J. Brown v. John W. Macy, Jr., et al. (No. 21,125, C.A. 5, January 15, 1965). D.J. No. 35-32-5. By this action, plaintiff challenged his removal from the Customs Service for having engaged in political activities in violation of the Hatch Act. He contended that his right to cross-examine witnesses at his administrative hearing had been frustrated. The witnesses to whom plaintiff referred were three individuals who had made statements to a Civil Service Commission investigator. The investigator prepared affidavits reporting those conversations, and the affidavits and the direct testimony of the investigator were introduced at the administrative hearing. The Commission requested the three persons to attend but they failed to do so. There is no subpoena power in Federal Hatch Act cases. Plaintiff made no endeavor to secure their attendance. Nevertheless, he claimed that the introduction of the investigator's hearsay testimony frustrated his right to cross-examine.

Recognizing that it could review only for procedural irregularities, the Fifth Circuit affirmed the removal. The Court held that the right to cross-examine afforded by the regulations which implement the Hatch Act extends only to persons in attendance at the administrative hearing and that the Commission is under no obligation to produce persons the removed employee wishes to examine. The employee himself is responsible for securing their attendance, the court stated. The Court made it clear that the Commission could base its decision to remove on hearsay evidence.

Staff: Edward Berlin (Civil Division).

Employee of Federally Assisted State Agency May Not Campaign For Municipal Office by Virtue of Section 12(a) of Hatch Act; State Agency's Maintainence of Segregated Housing Facilities Did Not Render Hatch Act Inapplicable to Its Employees. In the Matter of Aubrey D. Higginbotham v. United States Civil Service Commission (No. 14,768, C.A. 3, January 12, 1965). D.J. No. 35-64-6. Plaintiff was an employee of the Washington County Housing Authority, an agency of the State of Pennsylvania supported in large measure by federal funds. Although Section 12(a) of the Hatch Act proscribes partisan political activities on the part of employees of such federally assisted state agencies, plaintiff nonetheless campaigned for and was reelected to local municipal office as a Democrat. The Civil Service Commission brought proceedings leading to his ouster from employ with the Housing Authority and he appealed to the district court. That court's affirmance of the ruling of the Civil Service Commission was in turn upheld by the Third Circuit.

The Third Circuit rejected both grounds asserted by appellant for exemption from Hatch Act coverage. It held that the exception in Section 12(a), which permitted "elected officers" to engage in political activities, referred to elected officers of the State Agency, not to employees of that Agency who are elected to positions in some other governmental body. The Court of appeals pointed out that, if appellant's position were accepted, holders of elective office would thereafter be free to take part in partisan political campaigns and thus circumvent the prohibitions against political activities which the Hatch Act intended to insure.

The Court also rejected Higginbotham's alternate ground that, because the State Agency was maintaining segregated housing facilities, the Hatch Act was inapplicable. The Court ruled that, even assuming the existence of such unconstitutional use of the Federal funds, the activities of the State Agency were not attributable to the Civil Service Commission. There is no rule of law, said the Court of Appeals, that prevents one federal agency from enforcing laws of Congress because another agency engaged in or permitted unconstitutional activities.

Staff: Richard S. Salzman (Civil Division).

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

Injury to Union Employee, Sustained in Bathtub While Attending Union Convention, Held to Have Arisen "Out of His Employment" and "In the Course of That Employment." Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, et al. v. Herman Adler, Deputy Commissioner, etc. (No. 18427, C.A. D.C., December 10, 1964). D.J. No. 83-16-253. Claimant, a shop steward and member of the executive board of a union, was injured when he slipped in a bathtub at a Toronto, Canada, hotel while attending a union convention in that city. He had been sent to Canada as an alternate delegate to the convention of the parent international union, receiving transportation reimbursement and per diem from the union. Claimant slipped in the tub, while taking a bath prior to attending a convention banquet. The Deputy Commissioner entered an order awarding compensation to the claimant and the district court affirmed.

On appeal, it was contended that, at the time of injury, claimant was attending to his own personal comfort and convenience and was performing an act in no way incidental to his employment. It was not denied, however, that claimant was employed by appellant. The Court of Appeals, in affirming, reasoned that the Deputy Commissioner's findings were supported by substantial evidence and that his decision was not inconsistent with the law. The Court applied the rule that, when an employer sends an employee upon a journey away from home, all reasonable or expected activity while away is "in the course of" and "arises out of" the employment.

Staff: John C. Eldridge (Civil Division).

SOCIAL SECURITY ACT

Medical Evidence Showing Claimant to Be Disabled as of 1960, Does Not Compel Finding That Claimant's Disability Existed as of Date of Filing of Application. Thelma Davion v. Celebrezze (No. 21375, C.A. 5, January 15, 1965). D.J. No. 137-33-32. Claimant filed an application on September 30, 1957, seeking disability benefits under the Social Security Act. Her claim was denied by the Secretary and, on appeal to the district court, the cause was remanded to the Secretary for the taking of additional evidence. Subsequently, the claim was again denied and this denial was upheld by the district court and the Court of Appeals. The Fifth Circuit pointed out that claimant had to establish an onset of disability as of September 30, 1957. The Court stated that while "the recent 1960-1963 medical evidence would compel a finding of disability at that time and up to the date of the [claimant's] death, [since] . . . the time interval was here great enough, and the nature and extent of applicant's progressively degenerating physical condition such that there was certainly nothing to compel a finding that the recent disability existed in 1957.

Staff: Marilyn S. Talcott (Civil Division).

Denial of Disability Claim Supported by Evidence in Record; Resolution of Conflicting Medical Reports For Secretary. Armando G. Galli v. Celebrezze (No. 19347, C.A. 9, December 29, 1964). D.J. No. 137-11-178. Claimant filed an application for disability benefits alleging an inability to work due to back trouble, dizziness, bronchitis, and an ulcer. The Secretary denied claimant's application and the denial was upheld by the district court. Claimant then took an appeal to the Ninth Circuit. The Court of Appeals affirmed, stating that "the most that can be said is that the medical reports are conflicting and the trier of fact has resolved this conflict against the appellant." The Court noted that the Secretary's findings were supported by substantial evidence.

Staff: United States Attorney Cecil F. Poole, Assistant United States Attorney Charles Elmer Collett (N.D. Calif.).

District Court Erred in Dismissing Claimant's Action, Instituted Pro Se, Seeking Review of Secretary's Decision Denying Her an Increase in Benefits; Suit Filed Within 60 Days of Secretary's Determination. Lillian Reiss v. Celebrezze (No. 29099, C.A. 2, January 13, 1965). D.J. No. 137-52-191. Claimant, who was receiving $59 per month and was requesting $125 per month in disability benefits, filed an action in the district court seeking review of the Appeals Council's denial of her request for review of a hearing examiner's decision. The district court granted the Secretary's motion to dismiss the complaint on the ground that it failed to state a claim upon which relief could be granted. The Court of Appeals reversed and remanded the cause to the district court with instructions to order the Secretary to file an answer and an administrative transcript pursuant to section 205(g) of the Social Security Act, 42 U.S.C. 405(g). The Court noted that the complaint, which had been prepared without aid of counsel, was "ineptly drawn and quite confusing," but it did state that the Secretary had rendered a final decision rejecting her claim for increased benefits. The Court then pointed out that section 205(g) provided in part that "Any individual, after any final decision of the Secretary . . . may obtain review of such decision by a civil action commenced within 60 days after the mailing to him of notice . . ." With respect to the Secretary's contention that the complaint failed to show that it was filed within the required 60 days, the Court stated that claimant had produced at oral argument a refusal-to-review letter from the Appeals Council which showed that the Secretary's decision was less than 60 days prior to the filing of the complaint.

Staff: United States Attorney Joseph P. Hoey, Assistant United States Attorney George L. Barnett (E.D. N.Y.).

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

ANTIRACKETEERING

Sufficiency of Evidence of "Fear" Under Hobbs Act (18 U.S.C. 1951); Interstate Travel in Aid of State Crimes of Bribery and Extortion (18 U.S.C. 1952). United States v. John C. Kubacki and Abraham Minker (Cr. No. 21468 (E.D. Pa.)). D.J. File 123-62-332. Kubacki, ex-Mayor of Reading, Pennsylvania, and Minker, a Reading racketeer, were indicted for conspiring to violate and for violation of 18 U.S.C. 1951 (Counts I and II), and for conspiring to violate and for violation of 18 U.S.C. 1952 (Counts III, IV and V). Counts I and II were based on defendants' alleged extortion in 1960 of $3,000 from a firm seeking to sell parking meters to the City of Reading. Counts III, IV and V were based on defendants' alleged receipt of $7,500 and an $850 grandfather clock from another parking meter firm which sold meters to the City.

On April 17, 1964, the jury returned guilty verdicts on all counts. Both defendants thereafter filed motions for judgment of acquittal and new trial and on January 7, 1965, the Court denied those motions as to Counts III, IV and V but granted the motion for judgments of acquittal as to Counts I and II. Counts I and II charged, and the evidence established, that defendants demanded $15 per meter, later reduced to $6 per meter, from the meter firm under the threat that unless the firm paid that sum to defendants the firm's offers to sell meters to the City of Reading would not be considered and the firm would not receive a then-contemplated contract and order to supply 500 meters to the City. The firm's representative testified he was afraid that if he didn't meet the defendants' demand he would "lose the order." The Court held that that "fear" was no more than "disappointment over failure to obtain a new piece of business," and the Court, reviewing other Hobbs Act cases, stated that in order to have the requisite fear of economic injury under 18 U.S.C. 1951 the victim of the extortion must be "compelled to pay for the exercise or enjoyment of a right or privilege already his, under threat and out of fear that if he did not comply with the demands he would be subjected to unwarranted interference, with resulting substantial harm to his business or property." The Court thus rejected the Government's contention that the harm to the meter firm's business, which would follow upon the denial of the meter purchase contract unless the $3,000 demand were paid, would constitute fear of economic injury within the meaning of 18 U.S.C. 1951.

The Court, in sustaining the verdicts on Counts III, IV and V, held that there was no ex post facto application of 18 U.S.C. 1952 (Interstate Travel in Aid of State Crime of Bribery or Extortion), where the plan to commit the state crimes of bribery and extortion, though begun in 1960, was not fully accomplished until December 1961, three months after the enactment of 18 U.S.C. 1952.

The Court also held that an important Government witness (Reading's former Chief of Police), though an accomplice and an indicted and admitted perjurer testifying under a grant of immunity, was competent to testify under appropriate

cautionary instructions; that the possible variance between the number of conspiracies charged and the number proven was not prejudicial; and that cross-examination of Kubacki as to other payoffs he may have received was proper in the light of the denial in his direct testimony of any such transactions.

Staff: Thomas F. McBride, Henry S. Ruth, Jr. (Criminal Division).

NATIONAL STOLEN PROPERTY ACT
(18 U.S.C. 2314)

Statute Applicable to Scheme to Defraud Victim of $5,000 Even Though Amount Actually Defrauded Was Less Than $5,000. Donald Lyle Hassel v. United States (C.A. 4, Jan. 12, 1965). D.J. File 36-54-61. Hassel, the appellant, along with William Thaw was indicted on three counts charging: (1) violation of 18 U.S.C. 1341; (2) violation of 18 U.S.C. 2341, and (3) conspiracy to violate these two sections of the Code. Defendant was found guilty by a jury on Counts II and III. The Court thereafter directed a judgment of acquittal on Count I.

Count II was drawn under the second paragraph of 18 U.S.C. 2314 reading:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; or"

The question raised on the appeal was whether under this paragraph a victim must be bilked out of $5,000 or more in order for federal jurisdiction to attach.

The evidence showed that in response to a newspaper advertisement one George Shafley traveled from Maryland to Arlington, Virginia where he met Hassel and Thaw who proceeded to try to sell him a bogus distributorship for $5,000. There was some dispute among the parties as to whether the advertisement said $500 and not $5,000, but defendants insisted there had been a typographical error. The evidence adduced substantiated that defendants intended the price to be $5,000 and Shafley was ultimately flimflammed out of $2,200. Hassel contended an essential element to bring him within the statute was missing, i.e., $5,000 or more must have been obtained from the victim.

However, the Court of Appeals rejected this contention. It agreed with the Government that 18 U.S.C. 2314 denounces four crimes: (1) interstate transportation of stolen goods valued at $5,000 or more knowing such goods were stolen or fraudulently obtained; (2) devising a scheme to defraud a person of $5,000 while inducing that person to travel interstate in connection with such scheme; (3) interstate transportation of forged securities or tax stamps; and (4) interstate transportation of tools used in making such forged

securities or tax stamps. While conceding it was an essential element of the first offense that the value of the transported goods be $5,000 or more, it was concluded this was not true of the second offense.

The Court observed that Congress in 1956 inserted the second paragraph of 18 U.S.C. 2314 directed at confidence games and swindles reaching into interstate commerce, i.e., interstate transportation of persons in the perpetration of such schemes. Appellant's contention that a victim must be induced to travel interstate and bring with him $5,000 would, in the Court's view violate the intention of Congress since the legislative history of the enactment clearly demonstrates that all Congress intended was that in order to obtain conviction the Government need show only (1) a devising of a scheme intending a swindle of $5,000 or more and as a result of said scheme; (2) a victim was induced to travel interstate. Analogizing the statute to mail fraud which requiries providing only a scheme intending to defraud rather than an actual defrauding, plus a mailing, the Court found the jurisdictional amount of $5,000 applied to the scheme and not to its execution.

Staff: United States Attorney C. V. Spratley, Jr.; Assistant United States Attorney Plato Cacheris (E.D. Va.).

POSTAL OFFENSE

Protection of 18 U.S.C. 1702 Over Item of Mail Begins When It Is Placed Into Mails and Continues Until It Is Delivered to Addressee or His Authorized Agent. United States v. Murray (Unreported Slip Opinion, D. Md., No. 26479, Dec. 31, 1964). D.J. File 48-35-487). Lechliter, a friend of defendant, moved into a house which had previously been occupied by Lt. Cdr. Christensen. About February 1, 1962 a letter addressed to Lt. Cdr. Christensen arrived at this house, then occupied by the Lechliter family. A member of the Lechliter family removed the letter from the mail box and placed it on a bookcase in the living room of the house. Subsequently, Lechliter and the defendant saw the letter, opened it, extracted the contents, and disposed of the envelope.

Defendant was convicted of a violation of 18 U.S.C. 1702 in the District Court for the District of Maryland. He then presented a motion in arrest of judgment and a motion for judgment of acquittal. In these motions he argued that since he had not taken the letter out of a post office, or an authorized depository for mail matter, or out of the custody of a mail carrier, he could not be convicted of a violation of 18 U.S.C. 1702. Further, he contended that since the letter was delivered in accordance with the instructions and directions of the sender, and was received by a person or persons lawfully authorized to receive the letter, the United States Postal Department had completed its Government function and had lost its control over the letter. The Court in denying defendant's motion stated that this case was controlled by the principle enunciated in Maxwell v. United States, 235 F. 2d 930 (C.A. 8, 1956), cert. den. 352 U.S. 943, and that 18 U.S.C. 1702 prohibited the taking of a letter at any time after it had come into the possession of the Postal Department until it was delivered into the manual possession of the addressee or his authorized agent.

The case at hand again raises the troublesome question of what constitutes a delivery of an item of mail within the meaning of 18 U.S.C. 1702. Neither § 1702 nor its predecessors specify what constitutes a delivery to the addressee. The predecessor of § 1702 (18 U.S.C. 317) had been construed by a long line of cases to apply to letters only between the time they were mailed and the time when they had passed out of the custody of the postal authorities. See United States v. Parsons, 27 Fed. Cas. 451 (CCSD N.Y., 1849); United States v. McCready, 11 F. 225 (C.C.W.D. Tenn. 1882); United States v. Safford, 66 F. 942 (D.C.E.D. Mo. 1895). However, another early line of cases held that letters are delivered only when they are delivered either to the addressee or his authorized agent. See United States v. Sander, 27 Fed. Cas. 949 (C.C.N.D. Ohio 1855); United States v. Bullington, 170 F. 121 (C.C.N.D. Ala. 1908). United States v. Maxwell, 235 F. 2d 930 (C.A. 8, 1956), cert. den. 352 U.S. 943, which was held controlling in the instant case, followed the rationale of the Bullington and Sander cases and held that the delivery intended by 18 U.S.C. 1702 was a delivery into the manual possession of the addressee or his authorized agent. Since the Maxwell case there has been only one other case construing 18 U.S.C. 1702 until the present case. This case was United States v. Chapman, 179 F. Supp. 447 (E.D. N.Y., 1959). In the Chapman case the court returned to the rationale of the earlier cases and in effect held that § 1702 applied only from the time the mail was deposited with the postal authorities to the time when it passed out of their custody. Thus, the significance of the present case is its following of the Maxwell theory of extending Federal control over an item of mail until it is actually delivered to the addressee or his authorized agent.

Granted that the law presently is that a letter remains subject to Federal protection until it is delivered to the addressee or his authorized agent, another very knotty problem immediately arises. This problem is what is an authorized agent within the meaning of the Maxwell rule. What type of agency relation is contemplated by the Maxwell case under which a delivery to the agent will be a delivery to the principal addressee. There are various types of agency relationships under general agency law. There may be an agency relationship arising from an express agreement of the parties or there can be a so-called agency by estoppel which arises solely from a continuous course of conduct in which the principal conveys the impression to the public that another has authority to act for and on behalf of him. The only case giving any insight into the agency relationship contemplated by the Maxwell rule is the Maxwell case itself. In the Maxwell case (p. 931) there is language to the effect that the agent must have express authority from the principal before he is the agent intended by this rule. Another approach to this problem may be that the postal regulations will be critical in determining if a certain individual is an authorized agent of the addressee.

Staff: United States Attorney Thomas J. Kenney; Assistant United States Attorney Thomas P. Curran (D. Md.).

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

DEPORTATION

Resident Alien's Returns to United States After Brief Visits to Canada Not Entries Under Immigration Law. Abraham F. Zimmerman v. Lehmann (C.A. 7, No. 14399, January 7, 1965.) D.J. File 39-23-201.

Plaintiff-appellant, a native of Russia and a permanent resident alien since 1913, visited Canada in 1952 for a week and in 1953 for one day. He alleged that upon his return in 1952 he was admitted as a United States citizen upon his statement that he became a citizen upon the naturalization of his adoptive father. When he attempted to return in 1953 he was, after a hearing, excluded by a special inquiry officer and the Board of Immigration Appeals on the grounds that he lacked the requisite immigration documents and that he was inadmissible as an alien who had been convicted of a crime involving moral turpitude, to wit, evasion of federal income taxes. He challenged the exclusion order in the United States District Court for the Northern District of Illinois by a declaratory judgment action. This appeal is from the judgment of the District Court upholding the validity of the exclusion order.

Upon appeal, plaintiff first contended that he was a citizen of the United States under Section 5 of the Act of March 2, 1907 (34 Stat. 1228) which conferred citizenship upon a resident alien child of a parent who was naturalized during the child's minority. His argument that the term "parent" in the statute included an adoptive parent was rejected by the Seventh Circuit.

He next argued that under the interpretation of the Supreme Court in Rosenberg v. Fleuti, 374 U.S. 449, of Section 101(a) (13) of the Immigration and Nationality Act, 8 U.S.C. 1101(a) (13), defining the term "entry", his brief visits to Canada in 1952 and 1953 did not render him subject to exclusion under the immigration laws upon his return to the United States. The appellate court agreed that Fleuti was controlling and held that plaintiff in returning to the United States on those occasions did not make an illegal "entry" within the meaning of Section 101(a)(13). The judgment of the lower Court was reversed.

Staff: United States Attorney Edward V. Hanrahan;
Assistant United States Attorneys John Peter Lulinski
and John Powers Crowley (N.D. Ill.)

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INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Espionage (18 U.S.C. 794(c); 18 U.S.C. 371 and 18 U.S.C. 951). United States v. Robert Glenn Thompson (E.D. N.Y.) On January 7, 1965, a federal grand jury in Brooklyn, New York, returned a three-count indictment charging Robert Glenn Thompson with conspiring to commit espionage, conspiring to act as an agent of the Union of Soviet Socialist Republics in the United States without notifying the Secretary of State, and with the substantive offense of acting as such an agent. Three Soviets were named as co-conspirators: Fedor Kudashkin, "John Kurlinsky" and "Steven". "Kurlinsky" and "Steven" were the code names used by the conspirators. "Kurlinsky" was subsequently identified as Boris Karpovich, Counsellor to the Soviet Embassy in Washington, D. C. Karpovich was declared persona non grata and expelled from the United States.

Thompson, as an enlisted man in the Air Force, was assigned to the Office of Special Investigations in Berlin, Germany from 1955 through 1957. The indictment alleges that from June, 1957 until July, 1963, in Berlin, Germany and in various places in the United States, he conspired with the named co-conspirators and other individuals to furnish information relating to our national defense to the Union of Soviet Socialist Republics. It is charged that the co-conspirators would communicate with each other through codes, ciphers and by means of short-wave radio. It is also charged that they would conceal their true identities and utilize specific objects, such as distinctive cigarette lighters, to effect recognition.

As overt acts, it is charged that Thompson received money from the Soviets and that he met surreptitiously with his co-conspirators. Thompson also received from the Soviets special writing paper to be utilized in the preparation of secret messages.

Thompson was arraigned on January 7, 1965. He entered a plea of not guilty and was released on $15,000 bail. A trial date has not been set.

Staff: United States Attorney Joseph Hoey; Assistant United States Attorney William Kelly (E.D. N.Y.); Brandon Alvey and James Hulse (Internal Security Division)

Subversive Activities Control Act of 1950; Registration of Communist Party Members. Attorney General v. Michael Saunders et al. On January 13, 1965, the Subversive Activities Control Board issued two orders directing Marvin Joel Markman and Meyer Jacob Stein, of New York City, to register as members of the Communist Party, pursuant to the provisions of Section 8(a) and (c) of the Subversive Activities Control Act of 1950. (See United States Attorneys Bulletin, Vol. 11, No. 23, November 29, 1963).

Staff: Earl Kaplan, Thomas C. Nugent, and Thomas H. Boerschinger (Internal Security Division)

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LANDS DIVISION

Assistant Attorney General Ramsey Clark

Condemnation: Notice of Hearing Must Be Given to Tenant Claiming Interest in Property Being Condemned Under Rule 71A(c) (2), F.R.C.P.; Availability of Funds on Deposit; Findings of Fact and Conclusions of Law Required. United States v. Certain Land in the City of Philadelphia, Samuel Miller, et al. (C.A. 3, Dec. 15, 1964, D.J. File 33-39-741-70). The United States instituted condemnation proceedings to acquire an improved property which was leased for use as a taproom in the City of Philadelphia. The lease contained a condemnation clause providing that all fixtures became the property of the lessor upon termination of the lease and that the lease would terminate upon the property being condemned.

The United States and the fee owner entered into a stipulated settlement as to the value of the property taken. Proceedings were then instituted by the United States, in aid of distribution, to establish the nature and validity of the lessee's claim for compensation for trade fixtures. The district court, being fully apprised of the terms of the lease, held that the matter was res judicata, having been determined by the judgment of condemnation. The Court of Appeals reversed and remanded for findings of fact and conclusions of law to be made, having determined that notice under Rule 71A(c) (2), F.R.C.P. had not been given the tenant who claimed an interest in the property. This indicated lack of service was not raised by appellant, who appeared at the proceedings from which the appeal was taken, but was raised solely by the Court of Appeals in remanding the case to the district court to enable appellant to prove its claim if any, rather than to decide the case on an inadequate record. The Court also held that, since the lessee was not a party to the stipulated settlement, he was not necessarily limited in a possible recovery to the funds on deposit with the court.

The case illustrates the practical fact that, while legally the burden is on the condemnee to prove his right to compensation, the burden is on the United States to see that a full hearing is had.

Staff: Grace P. Monaco, George R. Hyde (Lands Division).

Condemnation; Indispensable Parties Under Rule 71A; Indians; Intervention; Res Judicata. Cheyenne River Sioux Tribe of Indians v. United States and Peter Hiatt (C.A. 8, No. 17,650, December 9, 1964, D.J. File No. 33-43-210-465). The Sioux Tribe by agreement, confirmed by statute, conveyed its interest in tribal lands to the United States for a reservoir project for $5,000,000 and agreed to distribute $2,500,000 to individual members for their interests as appraised. The agreement also provided that any individual could reject the appraisal, in which case the United States would proceed as in condemnation and any award in excess of the appraisal would be paid from tribal funds. Peter Hiatt rejected the appraisal and was awarded more than the appraisal. The Tribe did not attempt to participate in the suit until after the judgment.

Its motion to intervene was denied and no appeal was taken. This suit to vacate followed.

The district court denied the relief sought, on the grounds that the Tribe was barred by res judicata. The Court of Appeals affirmed, holding that (1) the agreement and statute constituted a guarantee by the Tribe to pay just compensation in excess of the appraisal; (2) such a guarantor is not an indispensable party to a condemnation suit; (3) Rule 71A, F.R.C.P., requires naming as defendants only those with an interest in the property condemned, which excludes a guarantor of the Government; and (4) if the Tribe had been an indispensable party, the intervention would have been of right and, hence, having failed to appeal from the denial, it is barred by res judicata.

Staff: Edmund B. Clark (Lands Division).

Public Lands; Grazing Rights; Preference to Landowners. McNeil v. Udall, (C.A. D.C., No. 18,490, December 24, 1964 D.J. File No. 90-1-12-341). The matter of allocating grazing rights on the public domain is a true subject for Philadelphia lawyers wearing boots and spurs. To explain fully the background of this litigation and the operation of the Federal Range Code is a task that defies condensation. Suffice it to say that in McNeil v. Seaton, 108 U.S. App. D.C. 296, 281 F. 2d 931 (1960), the United States Court of Appeals for the District of Columbia Circuit held that a phrase in the Taylor Grazing Act, stating that the award of privileges as "a preference" must be given to landowners and settlers, meant that a special preference had to be given landowners who were operating ranches in the area and using the public domain prior to 1934. It held that a special rule measuring Class I preferences on the basis of range use in 1948-1953 was invalid if, as applied to a pre-1934 user, it operated to deprive such a user of any rights. The dissenting judge stated that he believed the earlier record established the absence of any prejudice to the plaintiff.

In the first grazing year following the earlier decision, McNeil's Class I privileges were measured by his use of the federal range in 1929-1934 but that measure resulted in less Class I rights than McNeil would have obtained under the special rule. He was given Class II rights to make up the difference. McNeil then contended that the earlier opinion had held that his privileges as a pre-1934 user, without reference to Class I or Class II designations, should be measured by the productivity of his pre-1934 owned base land at the present time. The Court of Appeals held that the Secretary of the Interior had complied with the earlier decision and affirmed a district court holding to that effect. The Court of Appeals stated that its earlier opinion required the measuring of a landowner's Class I preference by his use of the public domain in 1929-1934 and that this preference could not be increased by a reference to "the increased productivity of his 1929-34 land or for the additional land acquired by him." The Court did not adopt our suggestion that it re-examine the earlier opinion and withdraw its holding that the Taylor Grazing Act created a special preference for pre-1934 users. Unless plaintiff should now seek certiorari, this opinion should mark the end of litigation which covered a span of ten years. We believe the Court was in error in its original interpretation of the Taylor Grazing Act. However, with the interpretation now

placed on the earlier opinion most of the problems created by that opinion disappear. A special rule changing the preference period will rarely, if ever, diminish the privileges measured by pre-1934 use and maintained as required by the Act. Most pre-1934 users retained their pre-1934 privileges by acquiring yearly licenses in the same amounts.

Staff: Thos. L. McKevitt (Lands Division).

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CIVIL TAX MATTERS

Appellate Decisions

Federal Tax Lien Has Priority Where Notice of Lien Is Filed After Creditor Obtains State Court Judgment But Before Levy of Execution Is Made. Jack E. Fore v. United States (C.A. 5, December 4, 1964.) On October 26, 1962, Fore obtained a personal judgment in a Texas state court against Sunset Drilling Company, the taxpayer. The United States filed its notice of tax lien against Sunset on November 15, 1962. At that time, Fore had taken no steps to satisfy his judgment by attachment or execution upon the judgment debtor's personal property. Fore contended that because his judgment against Sunset was obtained before the Government filed its tax lien, he was entitled to priority under Section 6323(a) of the 1954 Code, which provides in part that the tax lien shall not be valid against a "judgment creditor" until notice has been filed in the appropriate state office. The Government argued that to be protected under the statute, a judgment creditor had to perfect his lien by levying upon the debtor's personal property before notice of the federal tax lien was recorded. The Court of Appeals agreed, and held that the term "judgment creditor" as used in Section 6323(a) means a judgment lien creditor. The judgment alone gave Fore no lien on any personal property of Sunset under Texas law. Until he established his lien by attachment or execution, his claim was no better than any other claimant's. His only superior position was vis-a-vis the judgment debtor. While the Supreme Court has never passed on the issue directly, the Fifth Circuit's reading of Section 6323(a) finds support in Miller v. Bank of America, N.T. & S.A., 166 F. 2d 415 (C.A. 9, 1948) and Ersa, Inc. v. Dudley, 234 F. 2d 178 (C.A. 3, 1956). Fore's petition for rehearing was subsequently denied.

Staff: United States Attorney William W. Justice (E.D. Texas); Joseph Kovner and Alec A. Pandaleon, Tax Division.

Governmental Priority; Personal Liability: Supreme Court Holds Section 3467, Rev. Stats. (31 U.S.C. 192), Which Imposes Personal Liability For Violation of Government's Debt Priority Under Section 3466, Rev. Stats. (31 U.S.C. 191), Applies to Court-appointed Distributing Agent in Chapter XI Proceeding. Elizabeth Simonson King v. United States (S. Ct., December 14, 1964 (33 Law Week 4035)). Cross-reference is made to the report of this case by the Civil Division in the Bulletin. Vol. 13, No. 1, p. 4. While this case did not involve a debt due to the United States for unpaid taxes, it will apply equally where the debt is for taxes. Section 3466, Rev. Stats. (31 U.S.C. 191), provides that when any person indebted to the United States is insolvent or his estate is insufficient to pay all of his debts, the debts due to the United States shall be first satisfied. Section 3467, Rev. Stats. (31 U.S.C. 192),

imposes personal liability upon "Every executor, administrator, or assignee, or other person, who pays, in whole or part, any debt due by the person or estate for whom or for which he acts" before paying the debts due to the United States.

Two courts of appeals, both in cases involving unpaid taxes, had been in conflict on the question whether a court-appointed fiduciary was liable under Section 3467. He was held not liable in United States v. Stephens, 208 F. 2d 105 (C.A. 5), but liable in United States v. Crocker, 313 F. 2d 946 (C.A. 9). In the instant case, handled by the Civil Division, the Supreme Court affirmed the Third Circuit's decision that a court-appointed distributing agent was liable under that section. It held that Section 3467 applied to him even though such a fiduciary was not mentioned by name in the section and even though he acted primarily for the court which appointed him rather than for the debtor. The Court stated that whether or not a fiduciary not mentioned by name falls within the ambit of Section 3467 depends not on the title of his position or the mode of his appointment, but upon the degree of control he was in a position to assert over the allocation among creditors of the debtor's assets in his possession.

District Court Decisions

Inspection of Documents; Executive Privilege; Taxpayer's Motion For Production of Internal Revenue Service Documents Granted Over Government's Claim of Privilege From Discovery. United States v. Charles C. Gates, Jr., et al. (D. Colo., August 5, 1964). (CCH 64-2 U.S.T.C. ¶9832). In this action the Government sought to recover erroneous refunds of income taxes on the basis of disallowing certain charitable deductions for gifts of present interests in income from stock of a family-owned corporation. The taxpayers moved under Rule 34, F.R.C.P., to compel production of certain Internal Revenue Service documents relating to income and gift tax on transfers of such stock other than those involved in this case. On a previous motion for production of documents in this case, where taxpayers sought both Internal Revenue Service and Justice Department documents, the Government filed affidavits of both the Acting Commissioner of Internal Revenue and the Attorney General, asserting executive privilege as to the documents. Since the Court found the Justice Department documents within attorney-client privilege, it was unnecessary to consider executive privilege as to such documents. On this second motion for production, the taxpayers sought only Internal Revenue Service documents, but the Court nevertheless discussed the problem in terms of the claims of executive privilege made by the Attorney General, rather than the Acting Commissioner.

The Court granted the motion for the production of documents and rejected the claim of privilege for three alternate reasons: (1) There was no showing that the documents sought consisted of trial preparation materials embodying the work product of Government attorneys within the scope of the doctrine of Hickman v. Taylor, 329 U.S. 495; (2) Even if the documents sought to be discovered did embody such work product, there was exceptional good cause for their production shown because the interest of the taxpayers in securing information in the historical files of the Internal Revenue Service relating

to the family company was great and possibly imperative in view of the Government's seeming reliance on its analysis of the details of intertwined family and company financial transactions to establish its claim; and (3) The Government's claim of executive privilege had been waived by the institution of this suit.

The Court also denied the request of the Government to take an interlocutory appeal from its ruling.

Staff: United States Attorney Lawrence M. Henry (D. Colo.); and Robert L. Handros (Tax Div.).

Jurisdiction; Federal District Court Disclaims Jurisdiction to Entertain Contract Dispute Brought by Plaintiff-taxpayer Where No Diversity of Citizenship Present; Mere Naming of United States as Defendant (by Reason of Federal Tax Liens Which Encumber Subject Matter) Will Not Provide Requisite Jurisdiction Over Action. Newkirk Investments, Inc. v. United States, et al. (N.D. Ill., October 6, 1964). (CCH 65-1 U.S.T.C. ¶9131). Newkirk Investments, Inc., sold all of its assets to another Illinois Corporation, Illinois Redi-Mix Corporation. When Redi-Mix refused to meet its contract commitment by discharging the balance due on the purchase price, Newkirk brought suit in the District Court, naming the United States as a party by virtue of federal tax liens which encumbered the amount due Newkirk.

The Government moved to dismiss itself as a defendant, and had intended to convert the action into a lien foreclosure suit, after the "pro-forma" dismissal was entered, by immediately filing its complaint. Newkirk opposed the motion to dismiss, insisting that the Court could entertain the action in its original form because of the presence of the federal tax lien; even though no independent jurisdiction was present, e.g., diversity of citizenship (28 U.S.C. 1223).

Judge Edwin Robson granted the Government's motion, and dismissed the suit as well, holding that Sections 1340, 2410, and 2463 of Title 28 U.S.C. are insufficient to invoke jurisdiction over the United States or the subject matter of the suit. Although not discussed, 28 U.S.C., 1359, providing that there is no jurisdiction when a party has been improperly joined to invoke jurisdiction, might have been found applicable under the circumstances.

Staff: United States Attorney Edward V. Hanrahan; Assistant United States Attorney Rita Kopp (N.D. Ill.); and Robert A. Maloney (Tax Div.).

Jurisdiction; Statutory Prohibition Against Suits to Restrain Assessment and Collection of Tax Held Applicable to Assessment of Penalty Against Responsible Officer of Corporation. Daniel J. Mulcahy v. United States, et al. (S.D. Texas, December 21, 1964). A penalty assessment was made against plaintiff under Section 6672 of the Internal Revenue Code as the responsible officer of Houston Steel Drum Company. Thereafter this suit was instituted seeking an injunction against the filing of notices of liens in regard to the assessment.

The Court in granting the Government's motion to dismiss held initially that Section 7421 of the Internal Revenue Code, prohibiting suits to restrain the assessment and collection of any tax, was applicable inasmuch as the assessment did not establish the liability for a penalty but only a tax. Although the statutory notice to plaintiff indicated that he was the president of the corporation, which in fact was not true, the Court reasoned that such a mistake would not absolutely preclude the Government from ultimately prevailing in a properly filed suit involving the validity of the assessment. Moreover, on the basis of United States v. Graham, 309 F. 2d 210 (C.A. 9), the Court held that the fact that plaintiff was not an officer of the corporation would not necessarily preclude the Government from ultimately prevailing.

The Court also found that 28 U.S.C. 2201, which grants jurisdiction to district courts to issue declaratory judgments (except with respect to Federal taxes) precluded a declaratory judgment relating to the assessment of a penalty against plaintiff under Section 6672 of the Internal Revenue Code. Furthermore, the Court rejected plaintiff's argument that it had jurisdiction under 28 U.S.C. 1340 which provides that district courts have jurisdiction of "any civil action arising under any Act of Congress providing for internal revenue ..." because that statute is merely a general grant of jurisdiction and an additional statutory basis, whereby the United States has waived its sovereign immunity in a suit such as this, was held to be a prerequisite to jurisdiction.

Staff: United States Attorney Woodrow B. Seals; Assistant United States Attorney John H. Baumgarten (S.D. Tex.); and Joel P. Kay (Tax Div.).

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