Published by Executive Office for United States Attorneys,
Department of Justice, Washington, D. C.

April 2, 1965

United States

DEPARTMENT OF JUSTICE

Vol. 13 No. 7

UNITED STATES ATTORNEYS

BULLETIN

UNITED STATES ATTORNEYS BULLETIN

Vol. 13 April 2, 1965 No. 7

ANTITRUST DIVISION

Assistant Attorney General William H. Orrick, Jr.

Newspaper Charged With Violations of Sherman Act And Clayton Act. United States v. The Times Mirror Company, (S.D. Calif.) D.J. File 60-127-77. This is a civil antitrust suit filed March 5, 1965, to require the Times-Mirror company, publisher of the Los Angeles Times, to divest itself of three San Bernardino newspapers which it acquired last June 24. The complaint as charged that the acquisition has increased any may further increase concentration in the newspaper business in the Los Angeles area to the detriment of actual and potential competition, in violation of Section 1 of the Sherman Act and Section 7 of the Clayton Act.

The acquisition was of controlling interest in the Sun Company of San Bernardino, which publishes three newspapers in San Bernardino: the Morning Sun, 51,000 daily circulation; the evening Telegram, 16,000 daily circulation; and the Sunday Star-Telegram, with 68,000 circulation. In addition, the Sun Company owned the Acme Colorprint Company, which printed color comic supplements for newspapers. Prior to the acquisition the Sun Company was the Times' largest competitor in San Bernardino County.

The prayer seeks divestitures by the Times-Mirror Company of its stock in the Sun Company and an injunction to prevent the Times-Mirror Company from acquiring any other newspaper in the metropolitan Los Angeles area.

Besides the Los Angeles Times, one of the nation's leading newspapers in terms of advertising lineage, The Times-Mirror Company also publishes, through its Orange Coast Publishing Company subsidiary, the Costa Mesa Globe-Herald Daily Pilot, the Newport Harbor Daily Pilot, and the Huntington Beach Daily Pilot. The Times-Mirror Company and its subsidiaries also are engaged in commercial printing, book publishing and newsprint production.

The Los Angeles Times has the largest circulation of any California newspaper, with about 760,000 copies daily, of which about 15,000 copies are sold in San Bernardino County. Its Sunday circulation is about 1,090,000, of which about 31,000 copies are sold in San Bernardino County.

The Times is the only moring , newspaper sold throughout metropolitan Los Angeles and surrounding areas. Local suburban and community newspapers provide competition in this territory.

Staff: Bernard Hollander and John Poole (Antitrust Division)

Court Denies Defendants' Motion to Dismiss Complaint in Sherman Act Case. United States v. Bowling Proprietors' Association of America, Inc., (S.D. N.Y.) D.J. File 60-277-19. On February 24, 1965, Judge Croake denied "in all respects" defendant's motion to dismiss the complaint on grounds that it fails to state a claim upon which relief can be granted. (Rule 12 (b) 6 F.R.C.P.)

The complaint as summarized by Judge Croake

> . . . alleges several violations of the Sherman Anti-Trust Act by the defendant, a national association of bowling alley operators. These alleged violations include, among others, a combination and conspiracy by the members of the association to unlawfully restrain interstate commerce and trade in the operation of bowling alleys; a combination and conspiracy by the members of the defendant association to monopolize interstate commerce and trade in the operation of bowling alleys; a combination and conspiracy to participate in an unlawful primary boycott and/or a per se unlawful secondary boycott of competing non-member bowling alley proprietors.

In essence, defendant's motion to dismiss challenged the sufficiency of the complaint on three grounds: (1) it fails to allege facts establishing a direct and substantial effect on interstate commerce; (2) it fails to allege a conspiracy in unreasonable restraint of trade; and (3) it fails to allege facts establishing a conspiracy to monopolize.

Judge Croake disposed of point (1) by holding,

> The complaint is replete with allegations concerning alleged activities of defendant conducted on a nationwide scale which, if established by adequate proof, would indicate that the allegedly unlawful practices of defendant could or do have a "direct" and "substantial" effect upon interstate commerce and trade in the operation of bowling alleys.

Citing U.S. v. Insurance Bd. of Cleveland, 188 F. Supp. 949 (N.D. Ohio, E.D. 1960), he disposed of point (2) by holding,

> Even assuming for the purpose of discussion that the activities of the defendant which the complaint alleges may not be unlawful per se, they may, nevertheless, as alleged in the complaint, constitute an unreasonable restraint of trade. A determination of the foregoing certainly requires the presentation and consideration of all available evidence.

As to point (3) and various other issues raised by defendant's motion, Judge Croake pointed out that "the plaintiff has alleged the essential elements necessary to show several possible violations of the Sherman Anti-Trust Act." and concluded

> . . . that in view of the conflicting characterizations of the

> practices involved and contentions of the parties, this matter should not and cannot be disposed of summarily.

citing Radovich v. National Football League, 352 U.S. 445, 453 (1957) and U.S. v. Employing Plasterers Assn. of Chicago, 347 U.S. 186, 189 (1954).

Judge Croake declined to resolve many of the legal issues presented by this motion because

> . . . the result in cases similar to this one under the antitrust laws depend not so much on the legal characterizations of the challenged practices taken out of context, but upon the existence of certain facts that can be determined only after a full inquiry has been held.

Staff: John J. Galgay, J. Paul McQueen and Howard Breindel (Antitrust Division)

Consolidated Bank Ordered to Divest, Appeals to Supreme Court From Contempt Order. United States v. First National Bank and Trust Company of Lexington, et al., (E.D. Ky.) File No. 60-111-148. On March 18, 1965, Judge Mac Swinford following argument by the parties entered an order of divestiture requiring that defendant First Security National Bank and Trust Company "shall without delay take all necessary steps to create a separate, competitive and independent commercial bank which shall be the equivalent of the former First National Bank and Trust Company of Lexington, including, but not limited to its name, its directors, its officers and personnel, its offices, furniture and equipment, its capital surplus and undivided profits, and loans, savings, checking and trust accounts, plus its proportionate share of any increments and improvements since that date. Subject to such limitations on the eligibility of stock to be voted as may be appropriate to insure the independence of operation of the banks, all of the capital stock of the banking association to be created by the defendant, First Security National Bank and Trust Company of Lexington, shall be issued in the name of a corporate trustee to be held by it until directed by order of this court to be distributed to the proper shareholders."

"There shall be no interlocking directorates or identity of personnel on any level between the present banking institution and the new banking institution to be created."

The divestiture order further provided that directors of the two new institutions will be the same as the consolidating institutions until the stockholders elect new directors; and that the consolidated bank is to change its name to its original name and take further steps to cease advertising or otherwise showing that it is operating as a combined institution.

The order further provided that "The purpose of this order is to establish competitive banking between the institutions involved as it existed prior to the unlawful merger on March 1, 1961. Any effort to circumvent that purpose on the part of any individual or corporate institution will be treated as a contempt of this court."

Jurisdiction was retained and the Department given access to books and records to see that the divestiture is being carried out and it is also to be kept fully advised of the progress made.

The Court entered a second order sustaining the Government's motion that a master not be appointed, that defendant should not be held in contempt for violating the order of the court of March 6, 1961 (pertaining to separation of books and accounts to facilitate divestiture) since its response to a motion to show cause was deemed sufficient. It left standing the contempt order entered on February 16, 1965, and overruled plaintiff's motion for entry of an order of divestiture attached to its motion. The Court's order of divestiture substantially adopted the order proposed by the Government but in some respects strengthened such order.

On the same day defendant filed a motion to stay the contempt order which was overruled. On March 22, 1965, defendant filed with Mr. Justice Stewart a motion to stay the contempt order pending appeal to the Supreme Court.

This is the first time in history that a consolidated bank has been ordered to divest itself of assets sufficient to create a competitive entity disappearing as a result of the unlawful consolidation.

Staff: Larry L. Williams, Melvin Spaeth and Larry Noble (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General John W. Douglas

COURT OF APPEALS

CIVIL PROCEDURE

Motion to Vacate Dismissal, on Grounds of Mistake, Filed More Than One Year After Entry of Dismissal Is Untimely Under Rule 60(b), F.R.C.P. Karl Boehm v. Office of Alien Property (C.A.D.C., No. 18601, February 18, 1965). DJ File 9-21-2870. In this action, appellant sought to vacate a voluntary dismissal with prejudice of his suit, under Section 34(f) of the Trading With the Enemy Act, to review the denial of a claim filed with the Office of Alien Property. The order of dismissal was filed in December 1960. More than three years later, appellant filed his motion to vacate the dismissal on the ground that he had been induced by mistake to consent to its entry. The district court denied the motion. On appeal, the District of Columbia Circuit held that the district court had not abused its discretion in so ruling. The Court noted that Rule 60(b)(1), F.R.C.P., requires that relief from a dismissal entered by mistake be sought within one year of entry and that no showing of extraordinary circumstances warranting relief under Rule 60(b)(6) had been made.

Staff: John C. Eldridge and Harvey L. Zuckman
(Civil Division)

CIVIL SERVICE DISCHARGE

Admission of Creditors' Letters Showing Employee's Delinquency in Paying Debts Does Not Constitute Prejudicial Error in Civil Service Commission Hearing, Where Employee Does Not Deny Debts; Four Instances of Failure to Pay Debts Are Sufficient Support For Finding That Employee's Neglect of Debts Brought Discredit on Employing Agency. McEachern v. Macy et al. (C.A. 4, No. 9639, February 19, 1965). D.J. File 35-68-2. Plaintiff, a hearing examiner of the Social Security Administration, was discharged on the basis of charges of instances of financial irresponsibility, and the general charge of bringing discredit on the Social Security Administration by repeated failure to pay debts. The Civil Service Commission sustained four of the specific charges and the general charge. The Court of Appeals affirmed the district court's decision refusing to upset the Civil Service Commission's findings. Rejecting plaintiff's argument that admission into evidence of creditors' letters before the Commission violated his rights to confront and cross-examine witnesses, the Court of Appeals stated that "in other contexts" admission of such letters might be a "valid basis for complaint." However, the Court felt that plaintiff's argument was sufficiently answered by his admissions that he owed the debts in question.

The Court also rejected plaintiff's contention that there was no support for the general finding that his neglect of debts discredited the Social Security Administration. The Court stated that the four specific charges of failure to pay debts, which plaintiff admitted, were ample support for the Commission's finding.

Staff: John C. Eldridge (Civil Division)

CIVIL SERVICE DISCHARGE

Discharge of Air Reserve Technician For Failure To Maintain Active Reserve Membership Conforms to Requirement That Discharge of Preference Eligibles Be For Such Cause as Will Promote Efficiency of Service. Baum v. Zuckert et al., (C.A. 6, No. 15880, March 9, 1965). DJ File 35-72-2. The Court of Appeals upheld plaintiff's discharge from his civil service job with the Air Force, premised upon the requirement that he maintain active membership in his local Air Force Reserve unit. He lost his active reserve status through an incident of insubordination, which resulted in his being transferred to the inactive reserve. No procedural rights were available to him in connection with his loss of active reserve status. The Court of Appeals held that the discharge did not violate plaintiff's rights under the Veterans Preference Act, permitting discharges only "for such cause as will promote the efficiency of the service." The Court stated that it could not say that the requirement of active reserve membership did not promote the efficiency of the service. In addition, the Court held that no procedural error had been committed in connection with plaintiff's civil service discharge.

Staff: Robert V. Zener (Civil Division)

GOVERNMENT CONTRACTS

Federal Law Governs Construction and Validity of Government Contracts; Contractor Liable for Liquidated Damages for Days of Delay Caused by Contractor, Even Though Other Days of Delay Were Attributable to Government; Liquidated Damages Clause Valid Despite Government's Admission That It Suffered No Actual Damage, Where at Time Contract Was Signed It Was Expected That Damages Would Be Difficult to Ascertain and Amount of Damages Fixed by Contract Was, at Time of Signing, a Reasonable Estimate of What Damages Would Be. Southwest Engineering Company v. United States (C.A. 8, No. 17,795, March 1, 1965). D.J. File 78-43-29. Plaintiff had four construction contracts with the Government, the completion of which was delayed for various reasons. Each contract contained the standard provision requiring the contractor to pay liquidated damages for each day of delay not caused by "unforeseeable causes beyond the control and without the fault or negligence of the Contractor." It was administratively determined, pursuant to the disputes clause of the contracts, that plaintiff was entitled to an extension of time for some of the days of delay, but that for other days

plaintiff remained responsible for liquidated damages at the stipulated rate ($50 a day for three of the contracts, and $100 a day for the fourth). In this action to recover amounts due under the contracts, against which the Government had offset the liquidated damages assessed administratively, plaintiff contended (1) that it could not be held liable for any delay where some of the delay had been caused by the Government, and (2) that liquidated damages could not be assessed in view of the Government's admission that it had suffered no actual damage as a result of the delay.

The Court of Appeals rejected both contentions and upheld the district court's affirmance of the administrative findings. Noting that federal law governed these questions, the Court rejected the first contention on the authority of Robinson v. United States, 261 U.S. 486. With respect to the second contention, the Court noted that there are two factors to consider in determining whether a liquidated damages clause is unenforceable as a penalty: whether the amount fixed is a reasonable forecast of just compensation for the breach, and whether the harm caused by the breach is incapable or very difficult of accurate estimation. Relying on Priebe & Sons, Inc. v. United States, 332 U.S. 407, the Court held that the validity of the liquidated damages provision must be determined as of the time the contracts were executed. The Court further held that, despite the fact that no actual damage occurred, there was no showing that, at the time these contracts were executed, the two tests set forth above were not satisfied.

Staff: United States Attorney F. Russell Millin and Assistant United States Attorney William A. Kitchen (W.D. Mo.)

INDISPENSABLE PARTIES

Members of Civil Service Commission Indispensable Parties in Action to Review Civil Service Discharge; Case Remanded With Directions to Allow Plaintiff Leave to Amend Complaint so as to Join Indispensable Parties. Coughlin v. Ryder (C.A. 3, No. 14945, January 8, 1965). D.J. File 35-62-20. Plaintiff, a former employee of the Immigration and Naturalization Service, sued the Regional Director, Third Civil Service Region, alleging wrongful discharge, and seeking back pay and reinstatement. The Court held that plaintiff could not obtain the relief he sought from the defendant alone, and that the members of the Civil Service Commission should have been brought in as parties defendant. In view of 28 U.S.C. 1391(e), permitting this to be done, the Court remanded the case with directions to permit plaintiff to so join the members of the Civil Service Commission.

Staff: Stanley D. Rose (Civil Division)

LANDRUM-GRIFFIN ACT

Completion of Union Election Moots Individual Union Member's Suit Challenging Eligibility Requirement For Union Office. McDonough v. Johnson (C.A. 6, No. 16,072, February 24, 1965). DJ File 156-57-132. McDonough brought suit under 29 U.S.C. 411 and 412 (a provision of Title I of the Landrum-Griffin Act) challenging union requirements that, to be nominated for union office, a prospective candidate must have prepaid his union dues for one year in advance. The district court rejected McDonough's contentions and refused to enjoin the election. While the case was pending on McDonough's appeal, the election was completed. On the Government's motion, based on the contention that once a union election is completed under Title IV of the Landrum-Griffin Act only the Secretary of Labor has standing to bring an action to set it aside, 29 U.S.C. 483, the Court of Appeals vacated the decision of the district court and ordered the complaint dismissed on grounds of mootness and want of jurisdiction.

Staff: Richard S. Salzman (Civil Division)

MALPRACTICE

District Court Finding of no Negligence on Part of VA Doctor Affirmed on Ground That Doctor Conformed to Local Standard of Care. Correia v. United States (C.A. 1, No. 6337, December 30, 1964). D.J. File 157-36-908. In this Tort Claims Act action, the Court of Appeals affirmed the district court's finding that the doctor treating plaintiff at a VA hospital was not negligent. Stating that the doctor "might have used more extreme precautions in practicing a well-recognized procedure known in rare instances to have serious side effects," the Court nevertheless noted that "a preliminary clinical examination of the patient disclosed no need for extreme precautions," and upheld the finding that the doctor conformed to the local standard of care.

Staff: United States Attorney W. Arthur Garrity, Jr. and Assistant United States Attorneys William F. Looney, Jr., and John Paul Sullivan (D. Mass.)

SOCIAL SECURITY ACT

Payments to Employee During Temporary Layoff From Fund Financed by Employer Constitute Wages For Purposes of Determining Whether Employee's Earnings Rendered Him Ineligible For Social Security Benefits. Kore v. Celebrezze (C.A. 7, No. 14791, March 9, 1965). D.J. File 137-23-195. Old-age benefits under the Social Security Act are reduced upon the receipt of earnings exceeding certain limitations. Section 203(f)(1)(D) of the Act provides that there shall be no reduction for any month in which the claimant "did not render services for wages" of more than $100. During the month in issue, claimant, who was a motion picture operator, received $600 from a fund financed by the employers' association

to provide employee benefits. Claimant rendered no services during this month, since he was on a vacation enforced for the purpose of spreading the work among the members of the operators' union.

The Court of Appeals upheld the Secretary's decision that claimant did "render services for wages." The Court relied on Social Security Board v. Nierotko, 327 U.S. 358, decided under a predecessor statute in which the test was "wages with respect to regular employment." There the Supreme Court held that back pay awarded by the NLRB was "wages." The Court of Appeals held that the result in Nierotko was not changed by the amendment which wrote the present test into the statute. The Court held that claimant "rendered service" during a month in which he performed no actual work, since he "continued in an unbroken tenure of employment." In addition, the Court agreed with the administrative determination that the payments here were "wages" because they were "part and parcel of the wage package" and because they were "in the nature of vacation pay."

Staff: United States Attorney Edward V. Hanrahan, and Assistant United States Attorneys John Peter Lulinski, Thomas W. James, and Frederick E. McLendon, Jr. (N.D. Ill.)

TORT CLAIMS ACT
CIVIL AIR REGULATIONS

Failure to Mark Aerial Wires Held Negligence on Part of Coast Guard; Pilot's Violation of Civil Air Regulations Governing Preflight Inquiry Into Potential Hazards and Minimum Altitudes Held Contributory Negligence. El Paso Natural Gas Co. v. United States, (C.A. 9, No. 19,445, March 3, 1965). D.J. File 157-82-308. El Paso Natural Gas Company brought suit under the Tort Claims Act to recover for damage caused to its airplane when it collided with a 2,000 foot long aerial span of wires maintained at an altitude of 150 feet by the Coast Guard in the vicinity of LaPush, Washington. While the wires conformed to all applicable laws and regulations, the district court held the Coast Guard negligent for failing to place aviation warning devices on them in view of a history of low altitude flights in the area and a previous aircraft collision with this same span. The district court denied recovery to El Paso, however, on the ground of contributory negligence by its pilot, who, in violation of the Civil Air Regulations, had failed to acquaint himself with potential hazards before attempting low level flight.

The Court of Appeals affirmed, holding that the findings of the district court were not clearly erroneous. The Ninth Circuit went on to state that, in addition, by flying below a 1,000 foot altitude within 2,000 feet of a "congested area" (the town of LaPush), the pilot had also negligently violated another Civil Air Regulation, 14 C.F.R. §91.79. The Court thus accepted the

Government's interpretation of that Regulation as precluding flights in such airspace without special clearance by the F.A.A. This is the first interpretation of 14 C.F.R. §91.79 in any court.

Staff: Richard S. Salzman (Civil Division)

UNIVERSAL MILITARY TRAINING AND SERVICE ACT

Where Actual Practice Conflicts With Apparent Terms of Collective Bargaining Agreement, Actual Practice Governs Re-employed Veterans' Rights to Retroactive Seniority and Promotions. James W. Witty v. Louisville & Nashville R.R. Co., et al. (No. 14,662, C.A. 7, March 2, 1965). D.J. File 151-265-410. In this veteran's re-employment case under 50 U.S.C. App. 459, the district court had dismissed the veteran's claim for retroactive seniority because, under the collective bargaining agreement, advancement was not "automatic," the Railroad having the right to choose which "helpers" it would promote to "journeyman." The Court of Appeals reversed and remanded the case for trial. The Seventh Circuit held that, notwithstanding the theoretical discretion retained by the Railroad, the veteran was entitled to retroactive seniority if he could demonstrate that, in actual practice, promotions were based on seniority alone and, but for his absence in service, he would in fact have been advanced automatically at an earlier date.

The significance of the case lies in its acceptance of the Government's interpretation of the Supreme Court decisions in Tilton v. Missouri Pacific R. Co., 376 U.S. 169, and Brooks v. Missouri Pacific R. Co., 376 U.S. 182, that, where the collective bargaining agreement and actual employment practice conflict, the latter determines the rights to be accorded the re-employed veteran under the Universal Military Service and Training Act.

Staff: Richard S. Salzman (Civil Division)

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

COUNTERFEITING OF FOREIGN CURRENCY

Statutory Construction; Meaning of "Without Lawful Authority" in 18 U.S.C. 481. United States v. William Grosh and Mario Garcia Kohly (C.A. 2, February 26, 1965). D.J. File 146-1-18-528. Mario Kohly claimed to have been active in efforts to overthrow the incumbent Castro regime in Cuba and engaged in a scheme to print counterfeit Cuban peso notes, some of which would be sold to Cuban exiles in this country, the rest to be dropped from the air into Cuba in an effort to undermine the Cuban economy. Arms for a potential invasion were to be purchased with the proceeds remaining from the sales to exiles after deduction of an amount adequate to cover costs and a profit to Kohly and his associates. The evidence developed at trial disclosed that neither the United States, nor the Castro Government (the government recognized by the United States) had authorized this operation.

Appellants contended that they did not "without lawful authority . . . [possess a plate] from which . . . may be printed any counterfeit note . . . of any foreign government . . .," because they possessed the plates and would have been printing the notes with the authority of a Cuban government-in-exile, albeit a self-constituted one. In rejecting this claim, the Court observed that the plates were to be used to print notes purporting to be the currency of the present Cuban government [and not notes of any government-in-exile]; otherwise they could not accomplish their subversive function. The Court concluded with the observation:

> Where there is a recognized foreign government--surely included in "any foreign government"-- whose notes are intended to be printed without that government's authority, we cannot doubt that the clear meaning of the statute has been met. Whether or not the present Cuban government is approved of, the purposes of the statute are served by providing this measure of protection for Cuban currency, just as with any other country's currency. x x x

Such a construction of the law accords with the reciprocal obligations one nation owes another in its international relations, notwithstanding its approval or disapproval of the other's form of government or internal policies. Furthermore, if a foreign country's currency can be counterfeited here in the United States with impunity, we might suffer the same consequences with respect to the counterfeiting of American currency abroad. Cf. United States v. Arjona, 120 U.S. 479 (1887).

Staff: United States Attorney Robert M. Morgenthau; Assistant United States Attorneys Charles J. Fanning and Charles A. Stillman (S.D. N.Y.).

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

IMMIGRATION

Alien Beneficiary Has Standing to Challenge Denial of Visa Petition Hom Sin v. Esperdy (S.D. N.Y., 63 Civ. 2901, February 17, 1965.) D.J. File 39-51-1968. This is a declaratory judgment action brought to challenge the denial by the Immigration and Naturalization Service of a petition to accord first preference quota status to the alien plaintiff. Petitioner, owner of a Chinese restaurant, contended that his employee, the plaintiff, was entitled to be classified as a first preference quota immigrant based on his qualifications as a Chinese chef. The petition was denied by the defendant District Director, and appeal from his decision was dismissed by the Regional Commissioner. The Regional Commissioner concluded that petitioner had failed to establish that the position offered called for, or that the beneficiary, the plaintiff, possessed the high degree of skill necessary to warrant a finding of first preference quota eligibility as a supervisory chef.

Petitioner did not seek judicial review of the denial of the petition. The sole question before the Court raised by defendant's motion for summary judgment was whether plaintiff, the beneficiary of the petition, had legal standing to bring the action. However, before deciding this issue, the Court held that it had jurisdiction of the action notwithstanding the provisions of section 106 of the Immigration and Nationality Act, as amended 8 U.S.C. 1105a, which vests courts of appeal with jurisdiction to review final orders of deportation.

Defendant contended that plaintiff had no standing to bring this action under section 10 of the Administrative Procedure Act, 5 U.S.C. 1009, because he could not show as required by the section that he had suffered legal wrong or been adversely affected or grieved by the denial of the visa petition. Defendant urged the Court to hold that only the petitioning restaurant owner had standing to bring this review action. After review of the authorities and noting the general tendency to favor judicial review of administrative actions in immigration cases, the Court held that plaintiff had standing to sue and dismissed defendant's motion for summary judgment.

Staff: United States Attorney Robert M. Morgenthau; and Assistant United States Attorney James G. Greilsheimer (S.D. N.Y.)

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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 March 8, 1965, Robert Glenn Thompson entered a plea of guilty to Count One of the indictment which alleged that he conspired with agents of the USSR to commit espionage against the United States.

Thompson, a former Air Force enlisted man assigned to the Air Force Office of Special Investigations in Berlin, Germany, had been indicted of January 7, 1965, on charges of conspiring to commit espionage, conspiring to act as an agent of the USSR in the United States, and acting as an agent of the USSR in the United States. He had previously pleaded not guilty to the indictment.

Sentencing has been set for May 13, 1965.

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

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LANDS DIVISION

Acting Assistant Attorney General J. Edward Williams

Public Lands: Mineral Leasing Act; Withdrawal of Public Land; Administrative Construction of Executive Order. Udall v. Tallman (S.Ct. No. 34, October Term, 1964, Mar. 1, 1965) D.J. File 90-1-18-560. A 1941 Executive Order created a moose range in Alaska and removed the land from "settlement, location, sale, or entry, or other disposition." The Secretary of the Interior construed this as not removing the land from the operation of the Mineral Leasing Act, and allowed the filing of applications and the issuance of leases thereunder. Pending a study of feasibility, the issuance of leases was suspended from 1953 until 1958, when the southern half of the range was closed to leasing and the northern half opened. Pending applications were granted. Tallman applied for a lease on the opened portion after 1958 but his application was rejected because a lease had been issued on the land applied for pursuant to an application filed in 1955. The Secretary decided that the land had at all times been open to application because the withdrawal order prohibited only disposition involving alienation of title of the United States.

The district court affirmed the Secretary's decision but the court of appeals reversed on the grounds that the 1941 order withdrew the land from all forms of disposition, including the Mineral Leasing Act, and the Secretary's decision to the contrary was unreasonable. The court also declared that all leases issued pursuant to applications filed prior to 1958 were nullities.

The Supreme Court reversed and in a lengthy opinion fully substantiated the traditional position of the Department of Justice that a decision of the Secretary of the Interior interpreting a statute, regulation, or executive order within the sphere of his administration need only be reasonable to be conclusive. The Court stated, "The Secretary's interpretation may not be the only one permitted by the language of the orders, but it is quite clearly a reasonable interpretation; courts must therefore give it credence." In elaborating the rationale of its decision the Court breathed new life into most of its older decisions on the subject of administrative finality. With the recent decisions in Boesche and Humboldt, the instant decision just about "wraps up" the scope of the Secretary's authority and the weight to be given his decisions with respect to the public lands.

Staff: Wayne Barnett (Solicitor General's Office) and Edmund B. Clark (Lands Division)

Condemnation: Wherry Housing Valuation; Evidence of Reproduction Costs; Evidence of Other Wherry Sales; Excess Mortgage Proceeds (Windfall); Exclusion of Defense Department and FHA Memorandum on Suggested Valuation Techniques and Windfall Respectively; Inadequacy of Verdict; Court's Comments to Jury. Winston v. United States (C.A. 9, No. 19106, Mar. 2, 1965) D.J. File 33-5-2102). The district court entered judgment on a jury verdict in the amount of $696,300 substantially below the sponsor's claim of $2,111,063 for his interest in Bayview Gardens, San Diego, California.

On the sponsor's appeal, the Court of Appeals affirmed, holding that (1) evidence of reproduction costs was properly excluded, (2) evidence of sales of other Wherrys was properly admitted to support the experts' capitalization rate, (3) the district court's finding that there were excess mortgage proceeds (windfall) was supported by the evidence and the district court properly permitted the jury to consider the effect of "windfall" on an application for rent increase, (4) a Defense Department memorandum with respect to appraising Wherrys, on the basis of capitalization of income before debt service, was properly excluded as was an FHA letter indicating that a "windfall" would have a different effect on an application for rent increase than urged by the Government, (5) the verdict was within the range of admissible testimony and could not be set aside as inadequate, and (6) the district court's strong comments to the jury against accepting the sponsor's valuation were within the court's prerogative of fair comment particularly since it instructed the jury that it was not bound by the comments.

This opinion, together with the opinions of the Second Circuit in Fort Hamilton (12 U.S. Attys Bull., No. 2, p. 37), and the Tenth Circuit in Sill Corporation (13 U.S. Attys Bull., No. 6, pp. 126-127), appear to settle all of the troublesome problems of Wherry condemnation law in favor of the Government.

Staff: Edmund B. Clark (Lands Division)

Condemnation: Rule 71A(h) Commission; Findings and Conclusions; Review of Transcript by Trial Judge; Clearly Erroneous Standard. United States v. Certain Lands in City of Statesboro (Addison) (C.A. 5, Feb. 25, 1965) D.J. File 33-11-438. A Rule 71A(h) commission was appointed to conduct a hearing to determine the compensation to be awarded for certain tracts of land taken by the United States for the construction of a post office in the city of Statesboro, Georgia. The commission, after hearing conflicting valuation testimony, filed its report with the district judge, together with findings of fact and its conclusions. The United States filed detailed objections to the report, which the district judge recognized to be inadequate in view of United States v. 2,872.88 Acres in Clay and Quitman Counties, 310 F.2d 775. The district judge instructed counsel for the landowners to prepare more detailed findings which were to be submitted to the commission for approval. Government counsel had previously refused the district judge's request to prepare or approve findings to be submitted to the commission.

The Court of Appeals held that, since counsel for the landowners denied having anything to do with the preparation of the amended findings, the report "reflects 'the path followed by the Commission in reaching the amount of the award,' rather than speculation by counsel for the landowners as to the path the Commission might have followed."

The Court of Appeals, in reversing the judgment of the district court, held that the district judge may not, in arriving at his decision on objections to a commission report, rely solely upon the attorneys' versions of the evidence adduced before the commission. Under the circumstances of this case, the Court of Appeals held that, in order to test the findings of the commission under the

clearly erroneous standard, the district judge could not consider the Government's objections without a review of the record. The assistance of counsel in pinpointing the specific issues under attack could not relieve the district court of its burden of reviewing the record.

Staff: Roger P. Marquis and George R. Hyde (Lands Division)

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CIVIL TAX MATTERS
District Court Decisions

Jurisdiction; District Court Holds That Government Could Enjoin Various Claimants From Proceeding With Cases in State Courts Involving Conflicting Claims to Property Against Which Foreclosure of Tax Liens Were Sought. United States v. Edward M. Gilbert, et al. (S.D. N.Y., December 21, 1964). (CCH 65-1 U.S.T.C. ¶9145). In this action the Government sought to foreclose federal tax liens against valuable paintings and a stamp collection and stock, and various parties asserting conflicting claims against the property were named defendants. These parties had instituted several state court proceedings involving the same property at substantially the same time the Government levy and assessment procedures had been initiated. The Government removed one of the state court actions but was unsuccessful in removing a second state court action. After several procedural maneuvers by claimants in the state court in an apparent attempt to secure jurisdiction over the United States without its consent in an interpleader suit, this foreclosure suit was filed in federal court and the Government sought to enjoin claimants from proceeding with the cases in the state courts involving the conflicting claims to the property against which the tax liens were sought to be foreclosed.

In granting the Government's motion for injunctive relief, the Court noted that only in this action could there be a complete and dispositive determination of the rights of all of the conflicting claimants, as well as a determination of the tax liabilities, and that the Government should not be compelled to enter "the morass of the state litigation when there is a direct and dispositive vehicle here for resolution of the entire problem." The Court ruled, therefore, that the injunction sought by the Government was necessary and appropriate as part of the Court's equitable power in aid of its jurisdiction and to protect any judgment which would be entered in this action.

Staff: United States Attorney Robert M. Morgenthau; and Assistant United States Attorney Clarence M. Dunnaville (S.D. N.Y.).

Internal Revenue Summons; Accountant-client Privilege Held Inapplicable to Federal Investigations and Enforcement of Summons Held Not to Violate Rights of Stockholders of Corporate-taxpayers Under Fourth and Fifth Amendments. United States v. Melvin R. Bowman, et al. (M.D. Pa., December 23, 1964). (CCH 65-1 U.S.T.C. ¶9134). An accountant refused to comply with an Internal Revenue summons for the production and examination of certain work papers, schedules, memoranda, correspondence, and accounting reports prepared for corporate-taxpayers on the basis of the Pennsylvania statute which makes communications between an

accountant and his client privileged. The sole stockholders of the corporate-taxpayers were allowed to intervene in this summons enforcement proceeding to assert their rights under the fourth and fifth amendments.

In ordering compliance with the summons, the Court ruled that investigations by federal administrative agencies are not judicial proceedings and are not, therefore, restricted by rules of evidence applicable in courts of law and that investigations for federal purposes may not be prevented by matters depending upon state law. The Court also noted that there is no accountant-client privilege recognizable in the federal system. In rejecting the stockholders' asserted rights under the fourth and fifth amendments, the Court noted that it appeared doubtful that they had standing to raise the objections because the summons was directed to the accountant, and the Court ruled that it was untenable to equate the enforcement of the summons with an unreasonable search and seizure because the summons is issued for the purpose of "ascertaining the correctness" of an income tax return and the fact that a possible criminal prosecution may result from the examination does not necessarily mean that there will be a prosecution. The claim of privilege against self-incrimination under the fifth amendment was also rejected because it is personal in nature and cannot be raised by a party not in possession of the subject matter of the summons and because the privilege does not extend to corporations.

Staff: United States Attorney Bernard J. Brown (M.D. Pa.); and Stephen G. Fuerth (Tax Division).

Priority of Liens; Federal Tax Lien Held Entitled to Priority as Against Claims of Judgment Creditors Who Failed to Serve Third Party Subpoena and Restraining Order in Supplementary Proceedings Against Taxpayer's Judgment Debtor. Dean Construction Co., Inc. v. Simonetta Concrete Construction Corp., et al. (S.D. N.Y., February 11, 1965). (CCH 65-1 U.S.T.C. ¶9253). Federal tax liens amounting to $90,000 were filed against taxpayer, Simonetta Concrete Construction Corporation, on various dates between March 20, 1959, and December 5, 1960. The Local Steel and Supply Company, Inc. (Local) obtained a judgment against taxpayer on October 1, 1959, and execution was issued on the judgment on October 9, 1959. The Royal National Bank of New York (Royal) obtained a judgment against taxpayer on June 13, 1960, but no execution was issued on Royal's judgment. Royal also received an assignment of accounts receivable from taxpayer on May 20, 1959, in connection with loans made by Royal to taxpayer. The assignment included an account receivable admittedly owed to taxpayer by the interpleading plaintiff.

The United States intervened in this interpleader action to assert its claim against the fund and filed a motion for summary judgment on the ground that the federal tax liens were entitled to priority over the claims of the judgment creditors. The Court, in granting partial summary judgment, ruled that under New York law a judgment lien is acquired against the personal property of a judgment debtor by delivering an execution to the sheriff and a judgment lien is acquired against funds of a judgment debtor in the hands of a third

party upon the service of a third party subpoena and restraining order in supplementary proceedings. Since neither Royal nor Local had commenced supplementary proceedings to reach the fund held by the interpleading plaintiff, the Court ruled that they did not acquire judgment liens on the $10,000 fund. With respect to Royal's claim to priority based on its assignment of accounts receivable, the Court held that there was a question of fact regarding whether the assignment constituted a choate lien prior to the filing of the federal tax liens. Though the assignment met the first two requirements of choateness, to wit, the identity of the lienor (Royal), and the amount of the lien (the loans made by Royal to the taxpayer), there was some question whether the account receivable assigned by the taxpayer was for work already performed as of the date of the assignment so as to meet the third test of choateness, namely, that the property subject to the lien is specific and definite. Since one federal tax lien was filed prior to May 20, 1959, the date the assignment of accounts receivable was executed, the Court entered a partial summary judgment in favor of the United States for that amount, reserving for trial the question of priority between the Government and Royal as to the balance of the interpleaded fund.

Staff: United States Attorney Robert M. Morgenthau; and Assistant United States Attorney Arthur M. Handler (SD NY).

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