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

July 23, 1965

United States

DEPARTMENT OF JUSTICE

Vol. 13 No. 15

UNITED STATES ATTORNEYS

BULLETIN

UNITED STATES ATTORNEYS BULLETIN

Vol. 13 July 23, 1965 No. 15

APPOINTMENTS--UNITED STATES ATTORNEYS

As of July 7, 1965, the nomination of the following appointee as United States Attorney was pending before the Senate:

Wisconsin, Western--Edmund A. Nix

In addition to those listed in previous Bulletins, the nominations of the following United States Attorneys to new four-year terms were pending before the Senate as of July 7, 1965:

Georgia, Southern--Donald H. Fraser
Indiana, Southern--Richard P. Stein
Virginia, Western--Thomas B. Mason

The nominations of the following United States Attorneys to new four-year terms have been confirmed by the Senate:

Georgia, Northern--Charles L. Goodson
Hawaii--Herman T. F. Lum
South Dakota--Harold C. Doyle
Virginia, Eastern--C. Vernon Spratley, Jr.*

* The nomination of Mr. Spratley was erroneously reported as a confirmation in the last issue of the Bulletin.

* * *

ANTITRUST DIVISION

Assistant Attorney General Donald F. Turner

Merger; Banks; Violation of Section 1 of Sherman Act and Section 7 of Clayton Act. United States v. Mercantile Trust Company National Association, et al. (E.D. Mo.) D.J. File 60-111-917. On July 7, 1965, a civil action was filed charging that a proposed merger of the Mercantile Trust Company National Association and Security Trust Company would violate Section 7 of the Clayton Act and Section 1 of the Sherman Act.

The complaint alleges that Mercantile Trust is the largest commercial bank in the City of St. Louis and the State of Missouri and is 42nd in size among all commercial banks in the United States; that as of February 28, 1965, it had total assets of $876.8 million, deposits of $737.4 million, and loans of $456.7 million; that it controls the Mercantile-Commerce Trust Company, another St. Louis bank; and that the stock of Mercantile-Commerce is presently held in a voting trust for the benefit of Mercantile Trust stockholders.

The complaint also alleges that Security Trust is the fifth largest bank doing business in the City of St. Louis; and that as of February 28, 1965, it had total assets of $123.9 million, total deposits of $110.4 million, and loans of $59.8 million.

The complaint charges that Mercantile Trust presently has 30.8% of total deposits and 32.6% of total loans within the City of St. Louis. As a result of the proposed merger, Mercantile Trust's share of total deposits and loans will increase to 34.9% and 36.6%, respectively.

The complaint further alleges that as a result of the proposed merger Mercantile Trust would control between 21.5% and 23.6% of the deposits and between 23.6% and 24.6% of the loans held by all banks competing in and around the City of St. Louis.

The complaint alleges that the merger would eliminate competition between Mercantile Trust and Security Trust, substantially lessen competition in the area in and around the City of St. Louis, and substantially increase concentration in commercial banking in the area in and around the City of St. Louis.

The complaint was filed on the afternoon of July 7, 1965, about twenty-four hours before the announced time of the merger. At the time of filing of the complaint the Government moved for a temporary restraining order to maintain the status quo until such time as the Court could hear the Government's motion for preliminary injunction, which was also filed with the complaint. Upon the assurance of defense counsel that no steps would be taken to further the merger, the Court refused to grant the Government's motion for a temporary restraining order and set the hearing for preliminary injunction for July 14, 1965. After the hearing Judge Roy W. Harper denied the motion from the bench.

Staff: Lawrence F. Noble, Daniel R. Hunter, Francis G. McKenna and Barry Waldman (Antitrust Division)

Witness Held in Contempt of Court for Refusing To Testify. United States v. Carnation Company of Washington, et al. (E.D. Wash.) D.J. File 60-139-143. On May 25, 1965, on motion by the Government, Judge Powell reconsidered and reversed his previous order dated February 26, 1965, and ordered that the witness, Robert E. Rutherford, answer the questions asked him by counsel on deposition of November 17, 1964 because he received immunity from all past crimes touched upon in such testimony under 15, U.S.C. 32 when called under process by the Government to testify. The Court's reversal was based on the Ninth Circuit decision in Kronick v. United States, No. 19,852.

Judge Powell ordered Government counsel to draft an order in conformance with his ruling. On May 27, 1965, Government counsel presented a formal order to the court for filing which Judge Powell advised was in conformance with his ruling. Defense counsel objected to the order's entry on the grounds that a substantial question of law was involved and they wished to have a certification that in the Court's opinion it was certifiable under the interlocutory appeals statute. Judge Powell advised that he would enter an order within the week. Subsequently, when no order had been entered the Government served notice that it intended to continue Rutherford's deposition on June 22, 1965, and also served a subpoena on Rutherford to be present for the continuance of his deposition.

Defense counsel informed Government counsel on Friday, June 18, that they were going to request continuance for the taking of the deposition until after a formal motion had been presented to the court on June 22, 1965 that an order be entered stating that substantial question of law is involved and that the question be certified to the appellate court under 28 U.S.C. 1292(b).

On June 23, 1965, the Court entered the formal order proposed and presented by the Government on May 27, 1965. Counsel for Rutherford at once filed and served on Government counsel a new action, entitled Robert E. Rutherford v. United States, Civil No. 2718, asking leave to appeal to the Ninth Circuit under 28 U.S.C. 1292(b) without the formality of resuming the deposition and having Rutherford placed in contempt for refusing to obey the Court's order, together with a proposed order and certification.

The Court ordered that argument be held on the new action in the form of a motion at 10:00 a.m. on June 23, 1965. After argument on June 23, 1965 the Court dismissed the new action and denied the motion for lack of jurisdiction.

The judge then ordered that the questions asked of Robert E. Rutherford on deposition of November 17, 1964, should be read to Mr. Rutherford in open court in his presence. The questions propounded by Government counsel in its November 17, 1964 deposition were then again asked. Mr. Rutherford again refused to answer and claimed his privilege under the Fifth Amendment. The Court then ordered him to answer the questions asked him by Government counsel because of his immunity which replaced his claimed privilege, but in disobedience of the Court's order and in the Court's presence, Rutherford persisted in his refusal to answer.

Defense counsel for Inland Empire Dairy Association then read the questions he had asked of Mr. Rutherford on cross-examination in the deposition of November 17, 1964. Mr. Rutherford refused to answer such questions on the grounds of his Fifth Amendment privilege. The Court ordered Mr. Rutherford to answer the questions because of his immunity, but in disobedience of the Court's order and in the court's presence, Mr. Rutherford persisted in his refusal to answer.

The Court then held Mr. Rutherford in contempt and remanded him to the custody of the Attorney General and sentenced him to 90 days in jail which sentence will be stayed subject to appeal. After appeal is prosecuted, should the order be affirmed, the Court ordered that Mr. Rutherford shall have 60 days within which to purge himself of contempt.

Staff: Marquis L. Smith, Gerald F. McLaughlin and Luzerne E. Hufford, Jr. (Antitrust Division)

* * *

CIVIL DIVISION

Assistant Attorney General John W. Douglas

COURTS OF APPEALS

LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT

Power of Secretary of Labor to Conduct Investigation of Completed Union Election, Under Section 601 of Labor-Management Reporting and Disclosure Act of 1959, Not Limited by Provisions of Section 402 of Act, Dealing With Suits to Set Aside Elections. Local 57, International Union of Operating Engineers (AFL-CIO) v. Wirtz (C.A. 1, No. 6443, May 26, 1965), D.J. No. 156-66-19. In conducting an investigation, under Section 601 of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. 521) of a completed union election, the Secretary of Labor issued a subpoena duces tecum, with which the union failed to comply. The Secretary brought suit to enforce the subpoena in the district court although there had been no complaint by a union member to the Secretary. The union argued that the Secretary may not conduct an investigation of an election unless the requirements of Section 402 are met, including the filing of a complaint with the Secretary by a union member who has exhausted his internal union remedies, these being prerequisites to a civil action by the Secretary to set aside the election.

The district court directed appellant to comply with the subpoena and the First Circuit affirmed, pointing out that the language of Section 601 did not suggest that the requirements of Section 402 were to limit the Secretary's investigatory power and that the lack of such a limitation was consistent with Congress' concern for union democracy. The Court found no difficulty in reading Sections 601 and 402 together since the former authorizes the Secretary to investigate an election and the latter deals with a judicial challenge to an election.

The Court also rejected the union's contention that the Secretary's power to report the results of an investigation under Section 601 is limited to matters required to be reported under the Act, and concluded that the union had not shown that the records sought were not relevant to the investigation.

Staff: Assistant Attorney General John W. Douglas;
Robert J. Vollen (Civil Division)

SOCIAL SECURITY ACT -- DISABILITY

Proof of Subjective Pain Held Insufficient Basis For Claim of Disability. Dvorak v. Celebrezze (C.A. 10, No. 7952, May 18, 1965). D.J. No. 137-49-9. Claimant for disability benefits asserted over-all complaint of pain from back injury in 1932 and reinjury in 1955. Orthopedists agreed that restriction of movement was mild. Three doctors reported the symptoms disproportionate to, or not to be evaluated on, the subjective findings. Claimant

had only had aspirin for several years, and not medical attention. His additional claims of liver trouble and convulsions were not sustained by medical evidence, and his claimed heart condition was found not to be of a severity to prevent gainful activity. Variances in claimant's testimony "reflect[ed] seriously on his credibility."

The Tenth Circuit sustained the denial of benefits as based upon "substantial record support" and inferences that "are fair and reasonable."

Staff: United States Attorney John Quinn; Assistant United States Attorney Luther S. McCarthy (D. N.M.).

SOCIAL SECURITY ACT -- SELF-EMPLOYMENT AND RENTALS

Claimant Acting as Apartment Building Manager For Self and Owners of Remaining Undivided Interest Held Not Employee, But Might Be Receiving Self-Employment Income Due to Services Beyond Those Related Solely to Occupancy. Delno v. Celebrezze (C.A. 9, No. 19,348, June 7, 1965) D.J. No. 137-11-185. Appellant and his wife purchased an undivided half-interest in a 30-unit apartment house and entered into a contract with the owners of the other half under which appellant was to manage the property. Appellant's claim for old-age benefits based upon payments to him as manager was denied by the Secretary as being neither wages nor self-employment income from sources other than the statutorily-excepted rentals. The Ninth Circuit agreed that claimant was not an employee, although stating a caveat against the Secretary's "overriding emphasis * * * upon the factor of control" in determining employment.

The Court remanded for a redetermination as to whether there was here established self-employment income other than "rentals from real estate." The Court remanded for consideration of the following elements: The exception from self-employment income excludes "only payments for space, and, by implication, such services as are required to maintain the space in condition for occupancy." The Court adverted here to services not related to mere occupancy, such as supplying linens and towels (19 units were rented furnished), cleaning apartments, laundry service, servicing washers and dryers, and cleaning and servicing of the swimming pool. The fact that some of the services were not required under the leases was held not intrinsically dispositive, since appellant nevertheless "had no intention of performing a gratuity."

Staff: United States Attorney Cecil F. Poole; Assistant United States Attorney Robert S. Marder (N. D. Calif.).

TORT CLAIMS ACT

Standard Disputes Clause in Government Contract, Covering "Any" Factual Dispute Arising Under Contract, Includes Claims That May Have Basis in Tort; Contractor's Failure to Exhaust Administrative Remedies Provided in Disputes Clause Precluded Recovery Under Federal Tort Claims Act. United States v.

Peter Kiewit Sons' Co. (C.A. 8, No. 17,869, June 1, 1965), D.J. No. 157-45-78. A contractor had supplied trucks and drivers to the United States under a contract of bailment which allocated responsibility for damage to the trucks between the parties and which also contained a disputes clause. During the performance of the contract one of the trucks was damaged due to the negligence of the driver supplied by the contractor and, after submitting a claim to the contracting officer for the cost of repairing the truck and having it denied, the contractor filed suit under the Tort Claims Act. The district court allowed recovery on the theory that the contractor was not bound by the disputes clause because the claim "sounds in tort," and that the driver was an employee of the Government under the "loan-servant" theory.

The Eighth Circuit reversed, holding that "the disputes clause, which covers 'any' factual disputes arising under the contract, necessarily includes claims that might possibly have their basis in tort, as referred to in Article V [responsibility clause], as well as for breach of contract." The Court also declared that even if the contractor had an election -- which the Court did not believe it had -- between proceeding under the disputes clause or under the Tort Claims Act, its initial submission of the claim to the contracting officer under the disputes clause precluded it from proceeding by the alternative method.

Staff: Robert J. Vollen (Civil Division)

DISTRICT COURT

TORT CLAIMS ACT

Indemnity Provisions in Government Contracts Held to Bind Indemnitor For Not Only Its Own Negligent Acts But Also Those of Indemnitee, the United States. Fred N. Maloff v. United States v. Norfolk Dredging Co. (D. Md., June 2, 1965). D.J. No. 157-79-489. As a part of its work in the construction of a hydraulic embankment at an approach to a bridge, the Government contractor set fire to three piles of brush, stumps and other debris. The fire got out of control due to a strong wind, drought conditions, and lack of fire fighting equipment, causing property damage of $71,910. The Court found the contractor negligent and the United States also partly at fault for not having exercised its explicit contractual powers of supervision, control and suspension of work as they related to the burning of debris.

The Court held that the standard "hold harmless" provision in the contract, and a similar provision in the specifications, entitled the United States to full indemnity from the contractor although contracts indemnifying one against the consequences of his own negligence "should be rather strictly construed." The opinion also stated that federal law was controlling as to the Government's rights under the contract, citing United States v. Allegheny, 322 U.S. 174.

Staff: United States Attorney Thomas J. Kenney; Assistant United States Attorney Ronald T. Osborn (D. Md.); M. M. Heuser (Civil Division)

* * *

CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

WAGERING TAX

Failure to Pay Occupational Tax as Lesser-Included Offense to Wilful Failure to Pay Tax (26 U.S.C. 7203, 7262, 7272). Numerous cases have arisen recently in which defendants charged under 26 U.S.C. 7203 with wilful failure to pay the occupational tax imposed on gamblers by 26 U.S.C. 4411 have requested an instruction on 26 U.S.C. 7262 as a lesser-included offense. It is the Department's position that such a request should not be opposed. In Sansone v. United States, 380 U.S. 343, the Supreme Court stated that "/i/n a case where some of the elements of the crime charged themselves constitute a lesser crime, the defendant, if the evidence justifie/s/ it . . . /is/ entitled to an instruction which would permit a finding of guilt of the lesser offense," but that "A lesser-included offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense."

It is our view that the offenses defined in 7203 and 7262 are the same except that the 7203 offense includes an element of wilfulness. This being so, the Sansone decision, supra, would appear to require an instruction as to the lesser-included offense if the defendant requests such an instruction.

The same reasoning, however, does not apply to a charge of failing to register as required by 26 U.S.C. 4412. Charges for failure to register must be under 7203 and require proof of wilfulness. The penalty provided by 26 U.S.C. 7272, however, for failure to register as required by the Internal Revenue Code, is a civil penalty and consequently is not a lesser-included offense to 26 U.S.C. 7203. In this regard, it is noted that some United States Attorneys have on occasion in the past charged criminal offenses under 26 U.S.C. 7272. This practice should be discontinued since a conviction thereunder could not be sustained.

FRAUD

Appeal After Plea of Guilty: Effect on Statute of Limitations Period When Indictment Is Kept Sealed at Defendant's Request. United States v. John Christopher Doyle (C.A. 2, June 28, 1965). D.J. File 113-14-7. An indictment was returned against Doyle and three others in the District of Connecticut on July 2, 1962, charging violations of the securities laws in connection with the sale of stock of Canadian Javelin Limited, of which Doyle is the president. Upon its return, the indictment was impounded because two co-defendants were out of the country. In August 1962, counsel for Doyle, who suspected that an indictment had been returned, conferred with the Department and alleged that Doyle had been promised immunity from prosecution by a representative of the Securities and Exchange Commission in exchange for cooperation in a civil proceeding. The Department inquired into this allegation and conferred with Doyle's attorneys until April 1963, when they were informed that an indictment would be released from impounding. Thereafter, until August 1963, the indictment was kept under seal at counsel's request. Meanwhile, the statute of limitations had run.

The District Court dismissed the indictment as to the co-defendants because of the length of time the indictment had been sealed, but denied Doyle's motion because the continued sealing was caused by his efforts.

At a pretrial hearing to suppress evidence and to dismiss on the ground that he had been promised immunity, Doyle entered a plea of guilty to one count of the indictment charging the sale of unregistered stock. He received a sentence of three years in prison, suspended after three months, and was fined $5,000. After sentencing, the Government dismissed the remaining counts. Doyle then appealed both the conviction and the sentence on the following grounds: (1) that the District Court had erroneously denied his pre-trial motion to dismiss the indictment because the lengthy impounding had deprived him of a speedy trial, (2) that the District Court had erroneously denied his pre-trial motion to dismiss the indictment on the ground that the impounding of the indictment did not stop the running of the statute of limitations, and that the indictment could not be considered "found" during such impounding, and (3) matters concerning sentence.

In affirming the conviction, the Second Circuit held that: "An unqualified plea of guilty, legitimately obtained and still in force, bars further consideration of all but the most fundamental premises for the conviction . . . ." The Court went on to say that the issue of limitations and Sixth Amendment claims could not be relitigated after a plea of guilty and, if they could, a defendant advised by counsel could agree to waive them "and the circumstances compel the conclusion that Doyle did precisely that." "The Government, and the judge, had every reason to consider" that counsel for Doyle had waived any right of appeal on these points and "it is inconceivable" that the Government would otherwise have dismissed the remaining counts.

In passing sentence, the judge had referred first to the fifty shares of unregistered stock involved in the count to which Doyle pleaded guilty. He then referred to the fact that the lack of registration is the important and paramount factor, and the failure to register permitted the sale of two and a half million shares of stock. The Second Circuit rejected the contention that stock transactions other than the fifty shares should not have been considered in sentencing, characterized as "ludicrous" the claims that the court should consider only proven crimes and non-hearsay testimony in probation reports and should not have considered the allegations of the counts which had been dismissed. The Court pointed out, inter alia, that when the Government moved to dismiss nine counts on the defendant's plea of guilty to one count of the indictment, it "was not an adjudication against it on the merits, even though, as a result of the statute of limitations, no further prosecution can occur . . . ." by means of re-indictment on these charges.

Staff: United States Attorney Jon O. Newman (D. Conn.); Herbert Edelhertz and Victor C. Woerheide (Criminal Division)

DEMONSTRATIONS AT FEDERAL BUILDINGS

In the letter to all United States Attorneys on this subject dated April 21, 1965, reference was made to Judge Johnson's opinion in Hosea Williams, et al. v. Wallace. The opinion has now been published and appears in the May 31 issue of the Federal Supplement advance sheets. The citation is 240 F. Supp. 100.

* * *

IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

DEPORTATION

Statute providing for judicial review of deportation orders held Constitutional. Sirigo Tanfara v. P. A. Esperdy (C.A. 2, No. 29,615, June 21, 1965) D.J. Files 39-012 and 39-62-251. This is an appeal from an order of the United States District Court for the Southern District of New York dismissing a writ of habeas corpus allowed on behalf of relator-appellant.

Appellant, a native and citizen of Yugoslavia, entered the United States as an alien crewman in 1945 and became deportable because he overstayed the period of his authorized admission. In deportation proceedings brought against him, he applied for suspension of deportation under Section 19(c)(2) of the Immigration Act of 1917 and for stay of his deportation under Section 243(h) of the Immigration and Nationality Act. Both applications were denied by the Special Inquiry Officer and the denials were upheld by the Board of Immigration Appeals. Appellant then petitioned under 8 U.S.C. 1105a in the Court of Appeals for the Third Circuit for review of the above adverse determinations of the Special Inquiry Officer and the Board of Immigration Appeals. The Third Circuit denied the petition finding as correct, the administrative decision that appellant was deportable and ineligible for any form of discretionary relief from deportation.

Appellant was then transferred to the custody of the District Director of the Immigration and Naturalization Service at New York for deportation. To prevent his deportation, appellant obtained a writ of habeas corpus reasserting his claim that it was error to refuse to suspend his deportation under Section 19(c)(2) of the 1917 Act. The Second Circuit agreed with the District Court that because the deportation proceedings had been reviewed by the Third Circuit, further judicial review by means of habeas corpus was not warranted under the circumstances of this case.

In support of its ruling the Second Circuit relied on the provisions of 8 U.S.C. 1105a(c) which prohibit the entertaining of a petition for review or for habeas corpus if the validity of the deportation order was previously determined in any civil or criminal proceedings, except where the petition presents grounds which could not have been presented in the prior proceedings or where the court finds that the remedy provided by the prior proceeding was inadequate or ineffective to test the validity of the order. The Court found from the legislative history of 8 U.S.C. 1105a that Congress sought to eliminate dilatory litigational actions on the part of aliens subject to deportation and to create a single separate statutory form of judicial review of deportation orders.

Appellant contended that 8 U.S.C. 1105a(c), as applied, unconstitutionally suspends the writ of habeas corpus in violation of Article I, Section 9, Clause 2. This contention was rejected by the Court on the basis that the limitation of the writ to cases where statutory exceptions do not apply and

the administrative decision has not been judicially reviewed serves to conserve institutional resources by preventing repetitious litigation and securing the finality so necessary in a workable judicial system. The Court then added that even if it were to reach the merits of appellant's claim for discretionary relief, it would hold as did the Third Circuit that the administrative decision was proper. The decision of the lower Court was affirmed.

Staff: United States Attorney Robert M. Morgenthau (S.D. N.Y.)
Francis J. Lyons and James G. Greilsheimer of Counsel

* * *

LANDS DIVISION

Assistant Attorney General Edwin L. Weisl, Jr.

Mineral Leasing Act: Discretion of Secretary of Interior to Issue Noncompetitive Lease; Rights of Applicant for Noncompetitive Lease; Administrative Construction of Statute. Deusing, et al. v. Udall (No. 17358, C.A. D.C., June 30, 1965) D.J. Files 90-1-18-540 through 90-1-18-547. The Secretary of the Interior decided to close the southern half of the Kenai Moose Range, Alaska, to oil and gas leasing under the Mineral Leasing Act. Deusing, et al. had applications pending for leases in the area closed. The applications were rejected. The district court upheld the Secretary's decision.

The Court of Appeals affirmed on the grounds that (1) under the Mineral Leasing Act the Secretary had absolute discretion whether to issue oil and gas leases, (2) applicants obtain no vested rights upon filing an application for leases and (3) the Secretary's construction of the Mineral Leasing Act is entitled to great deference by the courts and regulations based upon a reasonable construction will not be overturned.

Staff: Edmund B. Clark (Lands Division)

Indians: Authority of Secretary of Interior to Terminate Attorney's Contract With Tribe; Injunction Against Secretary Restraining Termination. Norman M. Littell v. Stewart L. Udall (Civil No. 2779-63, D.C., May 26, 1965) D.J. File No. 90-1-4-100. In August 1947, plaintiff and the Navajo Tribe entered into a contract whereby plaintiff was retained to serve as General Counsel and Claims Attorney for the Tribe for a period of ten years. The contract was approved by the Secretary of the Interior pursuant to 25 U.S.C. 81. It was renewed with alterations for an additional ten-year term expiring August 1967. The renewal also was approved by the Secretary. The contract as renewed provides that it may be terminated by the Tribal Council, which consists of 74 members elected by popular vote of the Navajos, for good cause. It is silent as to the right of the Secretary to terminate, although section 81 requires Secretarial approval initially for validity.

On November 1, 1963, the Secretary of the Interior notified plaintiff that his performance under the contract was suspended and that, unless plaintiff showed good cause within 30 days, the contract would be terminated for improper activities on the part of plaintiff. On November 29, 1963, plaintiff obtained a preliminary injunction, enjoining the Secretary of the Interior from suspending or terminating the contract and from improperly interfering with plaintiff's performance. The injunction also restrained the Secretary from suspending payment of vouchers in due course for retainer and expenses.

An interlocutory appeal was taken from the order granting the injunction and, by a 2-to-1 decision, the Court of Appeals, on August 13, 1964, affirmed. However, the language of the majority opinion was thought to be ambiguous and a motion for rehearing or clarification was filed but disallowed.

Prior to the decision of the Court of Appeals, plaintiff filed a motion in the district court to cite the Secretary for contempt of court for violating the injunction and charged that the Secretary and his subordinates had conspired to interfere with plaintiff's performance. The specific charges were that the Secretary and his subordinates caused plaintiff to be ejected from a tribal council meeting and thus prevented his reports and violated his contractual rights.

After a lengthy trial on the motion to cite for contempt, during which both the Secretary and the Interior Solicitor testified, the Court overruled the motion but in an oral opinion made findings and conclusions adverse to defendant. However, since the motion was denied, no appeal was possible.

However, after the decision of the Court of Appeals, an answer was filed on behalf of the Secretary reasserting his power to terminate for cause, alleging failure on the part of plaintiff to exhaust administrative remedies, and charging that plaintiff is not entitled to have the injunction made permanent because in his conduct as general counsel he overreached his client and therefore comes into a court of equity with unclean hands.

On February 1, 1965, trial on the merits commenced and continued for two weeks. Plaintiff first asserted that no trial on the merits was necessary or in order because the Court of Appeals decided that the Secretary lacks the power to suspend or terminate. Plaintiff argued, therefore, that all other matters raised by the answer were immaterial. After considerable argument, the court determined to hear the evidence and in behalf of defendant we adduced the testimony of the Chairman of the Tribal Council, a number of other Indians who were tribal employees and councilmen. Again the Secretary and the Solicitor testified.

On May 26, 1965, the Court entered its findings, conclusions and a permanent injunction as requested by plaintiff. Although the court found virtually all of the facts as requested and proved on behalf of defendant, the Court concluded that plaintiff's actions in his dealings with his client were not so reprehensible as to preclude him from obtaining equitable relief in the form of the permanent injunction. The Court also followed the language in the opinion of the Court of Appeals to the effect that the Secretary lacks statutory authority to terminate an attorney's contract. The matter of appeal is now under consideration.

Staff: Herbert Pittle and Thomas L. McKevitt (Lands Division)

Public Land: Origin of Federal Title; Judicial Notice. United States v. Rozar, et al. (Civil No. 65-311-TC, S.D. Cal., May 27, 1965) D.J. File No. 90-1-10-663. The islands off the coast of California are not mentioned in the Treaty of Gualdalupe-Hidalgo. Assuming from this that these islands had therefore not been ceded to the United States, John H. Kimberly and Joe Dean Rozar occupied San Miguel Island, claimed ownership by right of possession, and conveyed each to the other an undivided half interest in the Island.

The United States brought an action to quiet title to San Miguel Island. In a motion for summary judgment, the United States directed the attention of the Court to an Act of Congress, passed in 1852, authorizing the appropriation of twenty thousand dollars for extending the public land surveys to San Miguel Island, and to two subsequent Executive Orders, issued in 1909 and 1934, withdrawing the Island for various purposes. The United States argued that these documents, which are subject to judicial notice, establish that the executive and legislative branches of the Government consider San Miguel Island to be a part of the United States, and that this determination is binding upon the Court. The Court found that title to San Miguel Island is vested in the United States "by virtue of the continuous exercise of sovereign dominion." The Court held the reciprocal deeds executed by the defendants to be null and void, and enjoined the defendants from occupying the Island.

Staff: United States Attorney Manuel L. Real and Assistant United States Attorney James S. Okazaki.

* * *

TAX DIVISION

Acting Assistant Attorney General John B. Jones, Jr.

CRIMINAL TAX MATTERS

Examination of Prospective Jurors' Tax Returns

On June 27, 1958, the Tax Division issued an instruction to all United States Attorneys that no request should be made thereafter for inspection of the Federal income tax returns of potential jurors in connection with income tax prosecution. This instruction was issued in connection with the Government's opposition to the petition for certiorari filed in the case of Frank Costello. In its opposition, the Government stated:

> Assuming, without conceding, that jurors who know that their tax returns have been specially examined might be affected in the performance of their duties, we fail to see that petitioner has standing to complain here. The jurors who sat in this case did not know, and had no way of knowing, that the prosecution had procured inspection of their returns and hence they could not have been affected.
>
> It is recognized, however, that knowledge of the existence of a practice of special inspection of the tax returns of potential jurors raises the possibility that some persons might wish to avoid jury service in the thought that they might thereby avoid some inconvenience or prejudice as taxpayers. To avoid any possible problems in this respect in future cases, United States Attorneys are being instructed not to engage in this practice. Thus, insofar as the action involved in the instant case might be deemed potentially productive of problems in other cases, those problems are being obviated. We re-emphasize that there is no problem here because the instant jury could not have been influenced by what it did not know.

Your attention is called to the fact that this prohibition is still the policy of the Department of Justice, and you should refrain from requesting the tax returns of potential jurors. It is, of course, permissible to ascertain from the Internal Revenue Service whether any potential jurors have been the subject of tax controversy with the Service.

CIVIL TAX MATTERS

Appellate Decision

Federal Tax Liens: Federal Tax Liens Primed Any Lien, Claim or Interest of Appellant Bank With Respect to Account Receivable Assigned to Bank but Which Assignment Ceased to Be Perfected Under State Law Due to Bank's Failure to Renew its Recordation Thereof. Peninsula State Bank v. United States (C.A. 5, No. 21,377, May 20, 1965). Appellant Bank was the assignee of an account receivable due taxpayer. Pursuant to Florida's Account Receivable Act, the

Bank filed notice of its assignment with Florida's Secretary of State on February 22, 1960. However, no renewal of the notice of assignment was thereafter filed. The United States was the holder of tax liens against taxpayer arising from assessments dated December 30, 1960 and March 3, 1961. Notice of these liens were filed on February 20, 1961 and April 19, 1961, respectively.

Determination of the respective priorities of the Bank and the United States to the proceeds of the account receivable depended upon the construction of the Florida Act. That Act provides that a "Protected assignee" (which the Bank claimed to be) is the owner of a "Protected assignment". It was admitted that at the time the United States' first tax lien arose (December 30, 1960), the Bank was such a "Protected assignee". But, the Act further provides that "Unless sooner cancelled, a notice of assignment shall be effective for one year after the filing of the last renewal thereof, or, if no renewal, after the filing of the notice" and also that "A protected assignee remains protected while a notice of assignment * * * [or] a renewal thereof * * * is effective." (The Bank conceded that the United States' second tax lien was superior to its assignment since notice of that lien was filed after the Bank's initial recordation had lapsed.)

The United States took the position that the Bank's failure to renew its recordation at the end of one year caused the Bank's original notice to lose its efficacy and that upon lapse of recordation, the Bank was an unprotected assignee so that the proceeds of the account receivable was subject to seizure by levying and executing creditors, including the United States. The Bank alleged that the United States had valid, existing notice of the assignment at the time its interest accrued under its first tax lien and was bound by such notice.

In applying the rationale of its decision in Miami National Bank v. Knudsen, 300 F. 2d 289 (1962), wherein it held that the Florida Act established a mandatory, exclusive system of perfecting assignments of accounts receivable, the Fifth Circuit upheld the position of the United States. The Court pointed out that the Act provided for a simple notice to be filed and for the filing of an equally simple notice of renewal and that the Act expressly limited the effective period of each notice to one year. The Court concluded that the simplest and most reasonable interpretation of the Act and the one avoiding complicated questions of a circularity of claims is that the assignee had a protected assignment as against another creditor only if the assignee complied with all the filing requirements of the Act.

The decision has importance beyond the Florida statute since it is fairly applicable to similar filing provisions of the Uniform Commercial Code.

Staff: Joseph Kovner and Donald W. Williamson, Jr. (Tax Division)

District Court Decisions

Exemptions Under State Law; Accumulated Salary Deductions Plus Interest in Employees' Retirement Fund, Although Exempt Under State Law, Held Subject to Federal Tax Liens. United States v. Alfred L. Shapiro, et al. (E.D. N.Y., March 11, 1965). (CCH 65-1 U.S.T.C. ¶9398). In this action, the Government

sought to foreclose its tax liens against taxpayer's interest in the New York City Employees' Retirement System, consisting of accumulated salary deductions inclusive of accrued interest. The Administrative Code of the City of New York provides that the rights of a person to the return of contributions or other rights accrued or accruing in the retirement fund are exempt from any state or municipal tax and from execution, garnishment, attachment or other process. However, federal tax liens are not subject to the exemption laws of the states, and the District Court granted the Government's motion for summary judgment and ordered payment of taxpayer's interest in the retirement fund in partial satisfaction of the tax liens.

The New York City Employees' Retirement System, upon making payment of taxpayer's interest to the Government, was released and discharged from all liability to the Government and to the taxpayer.

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

Transferee Liability; Where No Transferee Assessment Has Been Made and Government Pursues Alternative Remedy, Either at Common Law or Under Codified Substantive Law of State, to Reach Assets Alleged to Have Been Fraudulently Conveyed to Transferee, State Statute of Limitations Governing Fraudulent Conveyances Does Not Apply. United States v. Jack R. Decker. (D. Ariz., April 13, 1965). (CCH 65-1 U.S. T.C. ¶9369). The Government brought suit against defendant-transferee for the value of certain personal assets transferred to him by taxpayer on the theory that the transfers were made as a part of a scheme devised by taxpayer to render himself insolvent, and that the transfers were made with the intent to hinder, delay and defraud his creditors, including the United States. The assessment in question was made against taxpayer only, there being no transferee assessment made against defendant under Section 6901 of the Internal Revenue Code of 1954. Defendant-transferee moved to dismiss the complaint on the ground that it failed to state a claim upon which relief could be granted. Defendant cited Commissioner v. Stern, 357 U.S. 39, for the proposition that where the United States proceeds against a transferee outside the scope of Section 6901, the existence and extent of liability are determined by the law of the state wherein the transfers took place. Defendant argued that, under the substantive law of the State of Utah, this action was barred by the statute of limitations, i.e., three years from the date of discovery of the fraud.

The Government opposed the motion on the ground that the United States is not bound by state statutes of limitations unless Congress so provides that it will be. It was also pointed out to the Court that the Stern case, supra, did not contain any discussion that would justify the conclusion that state statutes of limitations should bind the Government in this type of action. The Court held that in absence of a ruling by any other court on the precise question, and due to the fact that Congress has chosen to remain silent on the subject, the six-year period of limitations provided for by Section 6502 of the Internal Revenue Code of 1954 controls the enforceability of the liability against the transferee.

Staff: United States Attorney William P. Copple (D. Ariz.); and John O. Jones (Tax Division)

Federal Tax Liens; Place for Filing; Filing of Federal Tax Liens With Clerk of United States District Court Held Proper Where No Other Office Designated for Filing. United States v. Juan Lao, et al. (D. Puerto Rico, February 24, 1965). (CCH 65-1 U.S.T.C. ¶9399). The Government brought this action to foreclose its tax liens against certain real property located in the Commonwealth of Puerto Rico. At the time of the filing of these liens, Puerto Rico had no statute which designated specifically an office for filing notices of tax liens, although an office had been designated for the recording of mortgages, and the tax liens were, therefore, filed with the Clerk of the United States District Court for the District of Puerto Rico in accordance with Section 6323(a)(2) of the Internal Revenue Code of 1954, which provides for such filing when the State or Territory in which the property subject to the lien is situated has not by law designated an office for the filing of such liens.

The District Court held that the filing of the federal tax liens in this manner was proper and that they were prior to all other claims, mortgages and liens except for two mortgages which had been filed in the appropriate section of the Registry of Property for Puerto Rico prior to the time the federal tax liens had been filed with the Clerk of Court. In so ruling, the District Court followed the legislative history of the statute and United States v. Union Central Life Insurance Company, 368 U.S. 291.

Staff: United States Attorney Francisco Gil (D. P.R.); and Assistant United States Attorney Gilberto Gierbolini.

* * *