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UNITED STATES ATTORNEYS
BULLETIN

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APPOINTMENTS--UNITED STATES ATTORNEYS

As of August 27, 1965, the nominations of the following appointees as United States Attorneys were pending before the Senate:

District of Columbia--David G. Bress
Illinois, Southern--Richard E. Eagleton

The nomination of the following United States Attorney to a new four-year term was pending before the Senate as of August 27, 1965:

Wyoming--Robert N. Chaffin

DISTRICTS IN CURRENT STATUS

The following districts achieved a level of 90 per cent in remaining current in all four categories of work during fiscal 1965 - a very good record:

Alabama, Northern
Alabama, Southern
Arkansas, Eastern
Arkansas, Western
California, Southern
Canal Zone
Connecticut
Delaware
District of Columbia
Georgia, Southern
Idaho
Illinois, Southern
Indiana, Northern
Indiana, Southern
Iowa, Southern
Kansas
Maine
Mississippi, Northern
New Hampshire
New Jersey
New Mexico
Ohio, Southern
Oklahoma, Northern
Pennsylvania, Middle
Tennessee, Western
Texas, Eastern
Texas, Western
Washington, Eastern
West Virginia, Northern
Wyoming

The following districts have maintained an unbroken record of improvement in the number of times current in all four categories of work (criminal cases, criminal matters, civil cases, civil matters) over the past four fiscal years:

Arizona
California, Southern
District of Columbia
Illinois, Northern
Illinois, Southern
Kentucky, Western
Louisiana, Eastern
New Jersey
North Carolina, Western
North Dakota
Ohio, Northern
Oklahoma, Eastern
Pennsylvania, Middle
Texas, Northern
Texas, Southern

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ANTITRUST DIVISION

Assistant Attorney General Donald F. Turner

Court Imposes Maximum Fines on Steel Companies. United States v. United States Steel Corporation, et al., (S.D. N.Y.) D.J. File 60-138-145. On July 23, 1965, all the corporate and individual defendants in the above case, without objection by the Government and with consent of the Court, withdrew their pleas of not guilty and entered pleas of *nolo contendere*. In their applications for leave to withdraw their pleas of not guilty and to enter pleas of *nolo contendere*, defendants admitted attendance at price discussion meetings and their participation in activities as referred to in the indictment. Defendants further acknowledged that under their pleas of *nolo contendere*, judgments of conviction may be entered for purposes of this case empowering the Court to impose the same sanctions which might be imposed after conviction at trial.

Judge Edward Weinfeld set September 21, 1965, for sentencing of the individual defendants (James P. Barton and W. J. Stephens) after investigation and report by the probation officer. Judge Weinfeld did sentence each of the corporate defendants, imposing the maximum fines permitted by the Sherman Act. The fines imposed against the corporate defendants total $400,000 as follows:

United States Steel Corporation	$50,000
Bethlehem Steel Company	50,000
National Steel Corporation	50,000
Great Lakes Steel Corporation	50,000
Jones & Laughlin Steel Corporation	50,000
Armco Steel Corporation	50,000
Republic Steel Corporation	50,000
Wheeling Steel Corporation	50,000

The indictment which was returned on April 7, 1964, charged the corporate defendants, constituting the major producers of carbon steel sheet, and the individual defendants, with engaging in a continuing combination and conspiracy to eliminate price competition in those steel products. Carbon steel sheets, the sales of which have averaged over 3-1/2 billion dollars a year, constitute about one-third of the Nation's total shipments of finished steel mill products and provide basic steel items used in the manufacture of numerous other products, including automobiles and electrical appliances.

In imposing sentence, Judge Weinfeld emphasized the importance of the antitrust laws and the need for their vigorous and constant enforcement in the interest of the Nation's economic, political and social well-being. He expressed the view that the concept that antitrust violations are minor infractions to be expiated by payment of token fines has no place in the administration of justice. In subjecting the corporate defendants to maximum fines, Judge Weinfeld took into account the vast volume of sales, the impact upon the economy of the price fixing restraints involved in this case, the ability of defendants to meet any fine that may be imposed, and the expense to which the Government was put.

Staff: Samuel Karp, John H. Earle, Marshall C. Gardner, Philip F. Cody, and S. Robert Mitchell (Antitrust Division)

* * *

CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

FRAUD

Violations of Securities Laws; Instruction to Jury. United States v. Roy B. Kelly, et al. (C.A.2, July 29, 1965). D.J. File 113-51-105. After a nine-month trial in the Southern District of New York, three defendants were convicted of conspiracy and three substantive counts charging violations of the securities laws. The indictment had named twenty defendants, some of whom pleaded guilty and testified at the trial. The charges arose out of the sale of stock of Gulf Coast Leaseholds to the public without the disclosure of the true condition of the company, as required by the registration provision of the Securities Act of 1933, and by means of fraud and manipulation of the market. In a lengthy opinion, the Court of Appeals for the Second Circuit affirmed the convictions of defendants Kelly and Hagen, and reversed as to Shuck.

Kelly and Hagen submitted 125 requests for instructions, described by the Court of Appeals as a "hodgepodge." The Court repeated "two generally accepted federal rulings that counsel frequently seem to have forgotten or overlooked." One, that the trial judge does not have to sift through confusing or inaccurate requests for instructions to select the good and reject the bad; "if a proffered request is in any respect incorrect, the denial of such a request is not error." Two, if the trial judge has included accurate instructions, it is not error to restate the same principles of law in the language submitted by counsel. The Court "marvel[ed]" at the patience of the trial judge with the incessant and repetitive arguments of defendants' counsel with respect to the instructions. With respect to the allegation that the trial judge adopted every contention of the prosecutor the Court commended the prosecutor and his associates for a task well done, particularly in formulating the requests for instructions "with such skill and with such regard for the law as laid down in prior cases that these accurate and proper statements were adopted by the trial judge."

The Court of Appeals found "plain error" in the "all or nothing" charge condemned in United States v. Borelli, 336 F. 2d 376 (C.A.2, 1964), certiorari denied, 379 U.S. 960, equivalent to an instruction that the jury could not acquit Shuck on the conspiracy count without also acquitting his co-defendants.

Defendants claimed a violation of their constitutional rights in that the trial judge refused their attorneys' assistance and supervision in replying to a request by the jury, made during the deliberations, for his comment on the basis for the determination of intent and willful participation. The Court of Appeals characterized this as a "presumptuous suggestion" on the part of counsel, and added: "It all sounds like Alice in Wonderland."

The majority of the Court of Appeals deemed the reading of the 160-count indictment to the jury a mistake, saying it was too long, too detailed and too involved to be helpful to the members. However, no prejudicial error was found and the Court stated that the probabilities are that it merely bored the jury.

In addition, the reversal of the conviction of defendant Shuck was based on the fact that extensive testimony was admitted which, although admissible against his co-defendants, was inadmissible as to him. The Court held that this was so prejudicial to Shuck that he should have been severed. The concurring opinion agreed that the admission of the testimony was error, but disagreed that severance should have been granted. "A trial judge until the end of the trial has no way of knowing the nature and extent of the proof which may be offered to tie one or more defendants into the conspiracy and upon which proof the jury may have to decide the character of the conspiracy."

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

BANKRUPTCY FRAUD

Admissibility of Prior Sworn Statements of Conspirators. United States v. Peter Castellana, et al. (C.A.2, July 19, 1965). D.J.File 49-52-273. The six individual defendants and one corporation were convicted on charges of conspiracy and substantive violations of the bankruptcy fraud statute. They agreed to transfer monies and property of Murray Packing Co., Inc., valued at $1,300,000, in contemplation of a bankruptcy proceeding involving the company. In a period of ten days, $747,000 was transferred from the company to the account of one of the defendants.

At the trial, the court permitted the introduction of admissions made by the defendants in the bankruptcy examinations and in depositions in a civil action brought by the company's trustee in bankruptcy against the defendants. On appeal, it was contended that these statements were improperly received as admissions, that they were privileged, and that there was a harmful spill-over effect against the co-conspirators. The Court of Appeals rejected these contentions.

Two of the defendants claimed that their admissions were privileged under Section 7(a)(10) of the Bankruptcy Act (11 U.S.C. 25(a)(10)), which provides that no testimony given by the bankrupt shall be offered in evidence against him in any criminal proceeding, except testimony given by him at the hearing upon objections to his discharge. The Court noted that this privilege applies to officers of a bankrupt corporation, at least when the court designates them to perform the duties of the bankrupt. The Court of Appeals held that these two defendants were not performing the bankrupt's statutorily-imposed duties when they were examined.

The admissions were not put into evidence until the Government produced independent proof of the existence of the conspiracy and also introduced independent extrinsic evidence regarding the subject matter of the defendants' pre-trial statements. The trial court scrupulously pointed out that the statements could be considered only against the particular defendant who made the admission, and there was no indication that the jury was confused or misunderstood the limiting instructions. The Court of Appeals found no prejudicial spill-over effect on the other defendants, except possibly in one instance where it did not rise to reversible error. The Court also found no error in the charge that the jury

might find the defendants guilty of the substantive counts if they were members of the conspiracy at the time of the withdrawal of the funds and the withdrawals were in furtherance of the conspiracy.

The two principal defendants were each sentenced to five years and fined $45,000. Two others were sentenced to 18 and 15 months, respectively, and the remaining two received sentences of one year. The corporation was fined $10,000.

Staff: United States Attorney Robert M. Morgenthau;
Assistant United States Attorney Albert J. Gaynor
(S.D. N.Y.)

* * *

IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

DEPORTATION

Commencement of Deportation Hearing by Order to Show Cause Held Proper; Entry by False Claim to Citizenship Is Entry Without Inspection; Petitioner's Statement Properly Admitted in Evidence. Lawrence Ben Huie v. INS (C.A. 9, No. 19,609, August 18, 1965) D.J. File 39-82-245. Petitioner brought this action under 8 U.S.C. 1105a to have an order for his deportation set aside. Petitioner, a native of China, was first admitted to the United States in 1952 on his claim that he acquired United States nationality by birth abroad of a citizen father. In 1958 he was issued an administrative certificate for citizenship and later a United States passport. In July, 1959, he went to Hong Kong where he married a native of China. He returned to the United States in September, 1959, and was again admitted as a United States citizen. Shortly after his return he petitioned to have his wife accorded non-quota status as a spouse of a United States citizen. The American Consul refused to issue the wife a visa because he had evidence indicating the petitioner was not a United States citizen. Petitioner was investigated by the Immigration and Naturalization Service in 1961 and gave two statements in which he claimed to be a United States citizen. In a third statement in 1962, he conceded that he had no claim to United States citizenship and was an alien. At the request of the Service he surrendered his certificate of citizenship.

In 1963 an order to show cause was issued by the Service charging petitioner with being deportable for entering without inspection in 1959. At the deportation hearing petitioner remained silent and produced no witnesses or evidence. He did assert that the 1962 statement he made was involuntary, unlawfully obtained, taken from him without benefit of counsel, by duress, and that the hearing was criminal in nature and was conducted contrary to law and without due process of law.

In these review proceedings the Court found that four questions were presented; (1) was it proper to commence the deportation hearing by order to show cause; (2) where entry is gained by a false claim to citizenship, was it proper to charge entry without inspection; (3) was the 1962 statement of petitioner properly admitted into the record; (4) was petitioner accorded due process and a fair hearing.

As to the first question, petitioner contended that the Service should have, as provided in 8 U.S.C. 1252, commenced a hearing by issuing a warrant of arrest. The Court found no merit in this contention, pointing out that the order to show cause procedure was approved sub silentio by the same Court in MacLeod v. Immigration and Naturalization Service, 327 F.2d 453. The Court noted that both the Special Inquiry Officer and the Board of Immigration Appeals recognized that the burden of establishing a prima facie deportation case was upon the Government. As to the second issue, the Court followed prior cases and held that an alien enters without inspection where he gained admission by a false claim of citizenship. On both the third and fourth issues, the Court ruled in

favor of the Government, holding that the 1962 statement was properly received in evidence and that petitioner was accorded due process and a fair hearing. The Court found nothing in the record to substantiate petitioner's bare assertions that the 1962 statement was induced by coercion, duress, or other improper action on the part of the immigration officer who took the statement. The Court finally held that contrary to the many assertions in petitioner's brief, deportation proceedings are civil in nature and not criminal.

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

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LANDS DIVISION

Assistant Attorney General, Edwin L. Weisl, Jr.

Condemnation: Warning Re Trade Fixtures and Application of State Law. United States v. Certain Property in Borough of Manhattan (540 Pearl Street), 344 F.2d 142 (C.A. 2, 1965), D.J. File 33-33-907. The Solicitor General has decided not to file a petition for a writ of certiorari to review the decision in this case. (See U.S. Attys Bull. Vol. 13, p.290 for a report of the Court of Appeals decision.) This does not mean that the Government concedes the correctness of the decision. In fact, the contrary is true. The Government's position with respect to "trade fixtures," applicability of state law, and compensation to lessees of improved property remains as set forth in our briefs in this case. Government attorneys throughout the country may well have this case cited against them, particularly where the condemnation involves city property occupied by tenants with "trade fixtures." Strong reliance on this decision by opposing counsel should be reported to the Department in Washington at once and assistance will be forthcoming.

Condemnation: Set Off of Benefits. United States v. Fort Smith River Development Corporation (C.A. 8, No. 17876, August 3, 1965), D.J. File 33-4-262-156. The United States condemned an easement through the middle of an island just off the shore in the Arkansas River to build a revetment for bank and channel stabilization. This resulted in the riverward portion washing away but the remainder was protected, changing its highest and best use from agricultural to industrial. The district court held that the Government was not entitled to set off benefits to the remainder because they were general.

The Court of Appeals reversed on the grounds that the change in highest and best use to the more valuable industrial use was the result of having the bank of the island stabilized which was special and part of the purpose of the condemnation. The Court stated that the district court had erred in limiting its consideration to improvement of navigation, the benefit from which would flow generally to all land in the area. The Court did equate special and direct and held in effect that anytime the highest and best use is changed by the project to a more valuable one the benefits may be set off. The Government had hoped for a broader definition of benefits but the benefits here were too clearly direct and special under any definition to require a broad definition.

Staff: Edmund B. Clark (Lands Division).

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TAX DIVISION

Acting Assistant Attorney General John B. Jones, Jr.

CIVIL TAX MATTERS

District Court Decisions

Internal Revenue Summons; Accountant's Records, Which Are Personal Property of Accountant Who Compiled Them in Connection With Preparation of Taxpayers' Tax Returns, Held Not Subject to Asserted Privilege Against Self-incrimination. Thomas E. Warren, et ux. v. Earl Tate (W.D. Tenn., June 16, 1965). (CCH 65-2 U.S.T.C. ¶9526). An Internal Revenue summons had been issued to the taxpayers' accountant and the taxpayer sought a temporary restraining order under Rule 65(b), F.R.C.P., to restrain the accountant from complying with the summons on the basis that the records sought were the property of the taxpayers and compliance with the summons would be a violation of the taxpayers' privilege against self-incrimination. The Government sought an order directing compliance with the summons.

In denying the taxpayers' application for a restraining order and directing compliance with the summons, the Court rejected the taxpayers' contentions that the accountant's workpapers were privileged, and found that such papers, documents, schedules, and memoranda were, under Tennessee law, property of the accountant and that the taxpayers, therefore, had no standing to object to their production because the privilege is personal and cannot be employed to prevent the production of records in the hands of third parties.

Staff: United States Attorney Thomas L. Robinson (W.D. Tenn.);
Frank N. Gundlach (Tax Division)

Priority of Liens; Federal Tax Liens Entitled to Priority as Against Financing Company's Lien on Accounts Receivable of Taxpayer Where Tax Liens Filed Prior to Date Accounts Receivable Came Into Existence. In Re Nap J. Hudon & Sons, Inc. (D. Mass., December 14, 1964). (CCH 65-2 U.S.T.C. ¶9517). The debtor, Nap J. Hudon & Sons, Inc. was adjudicated a bankrupt following the filing of an involuntary petition in bankruptcy against it on November 6, 1962. Federal tax liens amounting to approximately $22,000 were filed against the taxpayer on April 27, June 15, August 22, and November 30, 1962 respectively. On January 10, 1961, the taxpayer obtained a loan in the sum of $20,000 from Merchants Finance Corporation, pledging as collateral security therefor all its machinery, equipment, stock in trade and accounts receivable, then owned or thereafter acquired. Merchants properly filed financing statements pursuant to the provisions of the Massachusetts Uniform Commercial Code on January 10, 1961. On June 27 and July 9, 1962, the taxpayer received two purchase orders from the Quincy Shipbuilding & Repair Corporation to perform work on certain vessels. The taxpayer submitted invoices to Quincy for the work performed on various dates between August 6 and August 30, 1962.

In ruling that the federal tax liens were entitled to priority as against the security interest in favor of Merchants, the referee held that the determination of the priority of a federal tax lien as against a competing lien created

by operation of state law is governed by federal law. The referee further held that the priority of a state-created lien, such as Merchants' security interest, depended on the time it attached to the property in question and became choate. In the present proceeding, Merchants' lien clearly met the first two requirements of choateness, to wit, the identity of the lienholder (Merchants), and the amount of the lien (the taxpayer owed Merchants a sum in excess of the amount of the accounts receivable prior to the time the federal taxes were assessed and the lien arose). However, the Court held that Merchants' lien did not meet the third requirement of choateness-- that the property subject to the lien be specific and definite--until the respective dates on which the taxpayer submitted invoices to Quincy for the work done under the contracts executed on June 27 and July 9, 1962. For only on those dates did the "property subject to the lien" come into existence. Since federal tax liens exceeding the amount of the accounts receivable were filed prior to the time the invoices were submitted, the referee held that Merchants' lien on the accounts receivable was inchoate as against the federal tax liens. In so ruling, the referee distinguished the case of Crest Finance Co. v. United States, 368 U.S. 347 on the ground that at the time the federal tax liens arose the property against which the competing lien attached was, in Crest, specific and definite (the accounts receivable for the work already performed under the contract) but, in this case, the property was not yet in existence (the purchase orders had not been received).

As an ancillary issue, the referee held that since the District Director had served a notice of levy on the account debtor (Quincy) prior to the date of filing of the involuntary petition in bankruptcy against the taxpayer, the United States had reduced the accounts receivable to possession with the meaning of Section 67(c) of the Bankruptcy Act, thereby entitling the United States to receive payment of the entire fund without diminution of administrative expenses and wage claims under Sections 64(a)(1) and 64(a)(2) of the Bankruptcy Act.

Staff: United States Attorney Arthur W. Garrity, Jr.;
Assistant United States Attorney Murray H. Falk (Mass.);
and Levon Kasarjian, Jr. (Tax Division)

Federal Tax Liens; Property in Custody of Police; Court Granted Taxpayer's Motion for Summary Judgment Declaring Him Rightful Owner of Stolen Property in Custody of Police and Granted Government's Claim of Tax Lien Against Taxpayer's Property in Police Custody. Vincent Zito, et al. v. Tesoriero (E.D. N.Y., June 14, 1965). (CCH 65-2 U.S.T.C. ¶9529). Three defendants named in this suit removed from the taxpayer's home a substantial amount of currency and other personal property, most of which was later found in their possession along with other property purchased with some of the stolen money. Based upon the burglary report that property valued at $107,000 had been stolen, a jeopardy assessment was made against the taxpayer.

At the time of the arrests, the property was turned over to the property clerk of the county police department for safekeeping. The United States filed a notice of tax lien with the property clerk based on an agreement with taxpayer that he owed the Government $26,455.06 in unpaid income taxes. The United States intervened in this suit and the taxpayer moved for judgment declaring him to be the rightful owner of all property taken by defendants, except for the above sum due the United States.

The Court found there was no genuine issue as to the facts and granted the taxpayer's motion for summary judgment and granted the Government's claim for taxes against taxpayer's property held by the property clerk.

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

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