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UNITED STATES ATTORNEYS

BULLETIN

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CASELOAD REDUCTION

The Executive Office for United States Attorneys congratulates the following districts which reduced their caseloads in excess of 5% during fiscal 1965. This reduction was accomplished in the face of a 5.1% increase in the national pending caseload.

Connecticut
Georgia, Southern
Illinois, Eastern
Illinois, Southern
Indiana, Southern
Iowa, Southern
Minnesota
New Hampshire
North Carolina, Middle
Ohio, Northern
Ohio, Southern
Oklahoma, Eastern
Oregon
Pennsylvania, Western
South Carolina, Western
Texas, Northern
Utah
Vermont
Virginia, Western
Wisconsin, Eastern

Special commendation is given to the following districts which reduced their caseloads by more than 15% - an outstanding record.

Alabama, Middle
Alaska
Mississippi, Northern
Oklahoma, Northern
South Carolina, Eastern

Without the fine cooperation of these 25 districts the increase in the overall pending caseload, which amounted to 5.1 per cent or 1,733 cases during fiscal 1965, would have been appreciably higher.

APPOINTMENTS--UNITED STATES ATTORNEYS

The nominations of the following United States Attorneys to new four-year terms were pending before the Senate as of September 10, 1965:

Alabama, Northern--Macon L. Weaver
Alabama, Southern--Vernol R. Jansen, Jr.
Nebraska--Theodore L. Richling
Pennsylvania, Middle--Bernard J. Brown

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

Indiana, Southern--Richard P. Stein
Wyoming--Robert N. Chaffin

As of September 10, 1965, the nomination of the following appointee as United States Attorney was pending before the Senate:

Iowa, Southern--Donald M. Statton

The nomination of the following appointee as United States Attorney has been confirmed by the Senate:

Illinois, Southern--Richard E. Eagleton

CIVIL RIGHTS ACT OF 1964

Since the enactment of the Civil Rights Act of 1964 on July 2, 1964, United States Attorneys and their Assistants have given more than 500 talks on the Act to civic groups, law enforcement officers, professional associations, employer and employee groups, university student bodies, etc. with an estimated total audience of 55,000. United States Attorneys have also appeared for this purpose on 13 radio and television programs with an estimated total audience of more than 750,000.

MONTHLY TOTALS

During July the pending caseload showed a very encouraging reduction of 1,733 cases, or 4.9 per cent from the preceding month. This unusual development was a departure from the usual pattern in which the pending caseload drops temporarily at the end of the fiscal year, and then rebounds to an even higher total in the first month of the new fiscal year. We hope that the July activity will continue and increase during the coming months and that a substantial part of the six-year increase of over 9,000 cases can be whittled down.

	July, 1964	July, 1965	Increase or Decrease Number	%
Filed				
Criminal	2,322	2,296	- 26	- 1.12
Civil	2,460	2,465	+ 5	+ .20
Total	4,782	4,761	- 21	- .44
Terminated				
Criminal	2,232	2,212	- 20	- .90
Civil	2,391	2,194	- 197	- 8.24
Total	4,623	4,406	- 217	- 4.69
Pending				
Criminal	10,252	11,330	+ 1,078	+ 10.52
Civil	23,465	22,291	- 1,174	- 5.00
Total	33,717	33,621	- 96	- .28

During July the gap between cases filed and cases terminated was over 7 per cent. The effect of this gap upon the pending caseload, if continued in the coming months, needs no elaboration. As has been stated many times previously, the caseload can be reduced only by seeing to it that the number of cases terminated exceeds the number of cases filed each month.

	Filed			Terminated		
	Crim.	Civil	Total	Crim.	Civil	Total
July	2,296	2,465	4,761	2,212	2,194	4,406

For the month of July, 1965, United States Attorneys reported collections of $4,469,456. This is $953,703 or 27.13 per cent more than the $3,515,753 collected in July, 1964.

During July $7,818,648 was saved in 83 suits in which the government as defendant was sued for $10,205,354. 54 of them involving $8,614,635 were closed by compromises amounting to $2,130,851 and 8 of them involving $292,902 were closed by judgments amounting to $255,855. The remaining 21 suits involving $1,297,817 were won by the government. Compared to July, 1964 the amount saved decreased by $13,786,805 or 63.81 per cent from the $21,605,453 saved in July, 1964.

The cost of operating United States Attorneys' offices for July, 1965 amounted to $1,628,100 as compared to $1,565,394 for July, 1964.

DISTRICTS IN CURRENT STATUS

Set out below are the districts in a current status as of July 31, 1965.

CASES

Criminal

Ala., N.	Idaho	Mich., E.	N.Y., W.	Tenn., E.
Ala., S.	Ill., N.	Mich., W.	N.C., E.	Tenn., M.
Alaska	Ill., E.	Minn.	N.C., M.	Tenn., W.
Ariz.	Ill., S.	Miss., N.	N.D.	Tex., E.
Ark., E.	Ind., N.	Mo., E.	Ohio, N.	Tex., N.
Ark., W.	Ind., S.	Mo., W.	Ohio, S.	Tex., S.
Calif., S.	Iowa, N.	Mont.	Okla., N.	Tex., W.
Colo.	Iowa, S.	Neb.	Okla., E.	Utah
Conn.	Kan.	Nev.	Okla., W.	Vt.
Del.	Ky., E.	N.H.	Ore.	Wash., E.
Dist.of Col.	Ky., W.	N.J.	Pa., E.	Wash., W.
Fla., N.	La., E.	N.Mex.	Pa., M.	W.Va., N.
Fla., M.	La., W.	N.Y., N.	Pa., W.	W.Va., S.
Fla., S.	Me.	N.Y., E.	P.R.	Wis., E.
Ga., S.	Md.	N.Y., S.	R.I.	C.Z.
Hawaii	Mass.		S.D.	Guam

CASES

Civil

Ala., N.	Colo.	Ga., S.	Kan.	Minn.
Ala., M.	Conn.	Hawaii	Ky., E.	Miss., N.
Ala., S.	Del.	Idaho	Ky., W.	Miss., S.
Alaska	Dist.of Col.	Ill., N.	La., W.	Mo., E.
Ariz.	Fla., N.	Ill., S.	Me.	Mo., W.
Ark., E.	Fla., S.	Ind., N.	Mass.	Mont.
Ark., W.	Ga., N.	Ind., S.	Mich., E.	Nev.
Calif., S.	Ga., M.	Iowa, S.	Mich., W.	N.H.

CASES (Contd.)

Civil (Contd.)

N.J.	Ohio, N.	R.I.	Tex., N.	Wash., E.
N.Mex.	Okla., N.	S.C., E.	Tex., E.	Wash., W.
N.Y., E.	Okla., E.	S.C., W.	Tex., S.	W.Va., N.
N.Y., W.	Okla., W.	S.D.	Tex., W.	W.Va., S.
N.C., E.	Ore.	Tenn., E.	Utah.	Wyo.
N.C., M.	Pa., E.	Tenn., M.	Vt.	C.Z.
N.C., W.	Pa., M.	Tenn., W.	Va., E.	Guam
N.D.	Pa., W.		Va., W.	V.I.

MATTERS

Criminal

Ala., N.	Ga., M.	La., W.	N.C., M.	S.D.
Ala., S.	Ga., S.	Me.	N.C., W.	Tenn., W.
Alaska	Hawaii	Md.	N.D.	Tex., N.
Ariz.	Idaho	Mich., W.	Okla., N.	Tex., S.
Ark., E.	Ill., E.	Miss., N.	Okla., E.	Tex., W.
Ark., W.	Ind., N.	Miss., S.	Okla., W.	Utah
Calif., S.	Ind., S.	Mo., W.	Pa., E.	Vt.
Colo.	Iowa, N.	Mont.	Pa., M.	Va., E.
Conn.	Iowa, S.	Neb.	Pa., W.	Wash., W.
Del.	Kan.	N.H.	R.I.	W.Va., N.
Fla., N.	Ky., E.	N.J.	S.C., E.	Wyo.
Ga., N.	Ky., W.	N.Mex.	S.C., W.	C.Z.
				Guam

MATTERS

Civil

Ala., N.	Idaho	Miss., N.	Okla., N.	Tex., S.
Ala., M.	Ill., N.	Miss., S.	Okla., E.	Tex., W.
Ala., S.	Ill., S.	Mont.	Okla., W.	Utah
Alaska	Ind., N.	Neb.	Pa., E.	Vt.
Ariz.	Ind., S.	Nev.	Pa., M.	Va., E.
Ark., E.	Iowa, N.	N.H.	Pa., W.	Va., W.
Ark., W.	Iowa, S.	N.J.	R.I.	Wash., E.
Calif., S.	Kan.	N.Mex.	S.C., E.	Wash., W.
Colo.	Ky., W.	N.Y., E.	S.C., W.	W.Va., N.
Conn.	La., W.	N.Y., S.	S.D.	W.Va., S.
Del.	Me.	N.C., M.	Tenn., E.	Wis., E.
Dist.of Col.	Md.	N.C., W.	Tenn., M.	Wis., W.
Fla., N.	Mass.	N.D.	Tenn., W.	Wyo.
Ga., M.	Mich., E.	Ohio, N.	Tex., N.	Guam
Ga., S.	Mich., W.	Ohio, S.	Tex., E.	V.I.

* * *

ANTITRUST DIVISION

Assistant Attorney General Donald F. Turner

Conviction of Dairy Corporation For Violation of Section 1 of Sherman Act And Section 3 of Robinson-Patman Act Affirmed by Eighth Circuit. National Dairy Products Corporation v. United States (C.A. 8, No. 17734). D.J. File 60-139-128. On August 27, 1965, the Court of Appeals affirmed the district court's judgment of conviction of National Dairy Products Corporation on seven counts of an indictment charging a conspiracy to fix prices and eliminate competition in violation of § 1 of the Sherman Act, and on six counts charging sales of milk at unreasonably low prices for the purpose of destroying competition in violation of § 3 of the Robinson-Patman Act.

National Dairy alleged six basic points of error relating to: (1) the procedure for handling of grand jury minutes and appellant's motion to inspect portions used; (2) the court's instructions to the jury; (3) the court's attitude; (4) rulings on evidence; (5) the court's rejection of the circumstantial evidence rule and (6) the insufficiency of the evidence to make a jury case on Counts 1 and 11 relating to Sherman Act violations, and Counts 2 and 13 relating to Robinson-Patman Act violations.

The Court rejected National's contention that all of the Government's evidence was circumstantial, that the circumstances did not exclude every hypothesis other than that of guilt, and that the district court was therefore required to direct a verdict of acquittal. The Court first noted that there was some direct evidence establishing National's guilt, and then stated that

> even if we were to view the evidence as wholly circumstantial, the court would not be compelled to determine that all hypothesis flowing from the evidence were as consistent with innocence as with guilt; it would be for the jury to determine the guilt or innocence of the defendant.

The Court went on to find that there was sufficient evidence to support the jury's verdict.

The Court held the trial court did not err in permitting the Government to use the grand jury minutes to refresh the memory of certain witnesses, without permitting appellant to inspect the portions of the minutes used by the Government. It noted that this is primarily a matter for the trial court's discretion, Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395,399, reviewed the procedure followed by the trial judge in controlling the Government's use of the transcript, and held that this discretion had not been abused. The Court rejected the argument that the trial court had been improperly influenced by an ex parte Government memorandum on the use of such transcript.

The Court also held that the district court was not required to charge that a defendant's sales must be below "direct" costs to constitute a violation of Section 3 of the Robinson-Patman Act. Rather, it held, it is a fact

question for the jury whether sales below "fully distributed" costs were unreasonably low and were made for the purpose of destroying competition or eliminating a competitor.

The Court rejected National Dairy's claim that the court's summary and outline of the various charges in the indictment and the evidence relating to those charges had been prejudicial to the defense, holding that the court's charge was fair in every respect and conformed to all the applicable legal standards. Finally, the Court rejected summarily appellant's contentions that the trial court's attitude was highly prejudicial (characterizing the claim as one which "borders on the frivolous"), and that it had admitted hearsay evidence into the record. The Court concluded:

> Both the Government and appellant were represented in the district court and on appeal by highly competent and skilled advocates. This prosecution has produced a history of every conceivable motion and numerous legal memoranda. The case has twice been to the Supreme Court. From the filing of the indictment to the filing of the notice of appeal fourteen volumes of "pleadings" have been amassed. In such a hotly contested and protracted legal battle, mistakes do occur. "The human element cannot be eliminated from lawsuits." But, as always, the crucial question is, were there any mistakes or errors of a prejudicial nature? We conclude there were not.

Staff: Robert B. Hummel, I. Daniel Stewart, Jr., and Raymond P. Hernacki (Antitrust Division)

* * *

CIVIL DIVISION

Assistant Attorney General John W. Douglas

NEW LEGISLATION

District Courts May Determine Attorneys' Fees in Social Security Cases. Section 332 of Public Law 89-97 amends Section 206 of the Social Security Act (42 U.S.C. 406) by adding a new section, (b), which permits a district court to allow as part of a judgment a reasonable attorney's fee, not to exceed 25% of the total past-due benefits. The text of the new section reads as follows:

> (b) (1) Whenever a court renders a judgment favorable to a claimant under this title who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment, and the Secretary may, notwithstanding the provisions of section 205(i), certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits. In case of any such judgment, no other fee may be payable or certified for payment for such representation except as provided in this paragraph.
>
> (2) Any attorney who charges, demands, receives, or collects for services rendered in connection with proceedings before a court to which paragraph (1) is applicable any amount in excess of that allowed by the court thereunder shall be guilty of a misdemeanor and upon conviction thereof shall be subject to a fine of not more than $500, or imprisonment for not more than one year, or both.

COURTS OF APPEALS

AGRICULTURAL MARKETING AGREEMENT ACT

Provisions of the New York - New Jersey Milk Marketing Order Establishing Different Classification and Price For Cream Delivered to Different Parts of Marketing Area Held Reasonable and Valid Exercise of Secretary's Authority. Windham Creamery, Inc. v. Freeman (C.A. 3, No. 15078, August 13, 1965), D. J. No. 145-8-530. Plaintiff, a milk handler, brought this action for judicial review of his unsuccessful administrative challenge of those provisions of the New York - New Jersey Milk Marketing Order which establish a different classification and a higher price to be paid by the handlers for fluid cream disposed of in the New York City area than for the same product disposed of elsewhere in the New York - New Jersey marketing area. The Secretary had established the distinction because he found that the economic value of cream was lower outside

of the New York City area where less stringent local health regulations and other factors created competitive conditions different from those within the New York City area. Plaintiff, who had distributed cream to ships moored on the New York side of the Hudson River (in the New York City area) and on the New Jersey side (outside of the New York City area) for transportation to foreign ports, contended that the resulting difference in classification and price of the same product based upon geographic movement and place of delivery was contrary to the Secretary's statutory authority in 7 U.S.C. 608c(5)(A), requiring the classification of milk only in accordance with "the form in which or the purpose for which it is used." The Secretary contended that as the basic concern and objective of the Congressional scheme of milk regulation was the achievement of a price structure which respects differences in the utilization value of milk, the statutory authority to classify milk according to the purpose for which it is used comprehended classifications determined by differences in utilization value.

The Third Circuit affirmed a lower court ruling in favor of the Secretary. The appellate court was of the view that the Secretary's action was both reasonable and respectful of his statutory authority, and that it would be improper for the Court to invalidate the classification scheme based on the significant factual differences in utilization value found by the Secretary. The Court also rejected the handler's contention that as applied to its cream shipments the order's provisions resulted in a prohibited regulation of foreign commerce.

Staff: Alan S. Rosenthal and Frederick B. Abramson
(Civil Division)

BANKRUPTCY ACT

S.B.A. as Partially Secured Creditor Held Entitled to Participate in Ch. XI Arrangement to Extend Debt Owed Was Not Covered by Collateral; Filing of Ch. XI Petition Held Not Act of Bankruptcy Which Would Give Government Priority Under 31 U.S.C. 191. United States v. National Furniture Co., Inc. (C.A. 8, No. 17743, July 23, 1965), D.J. No. 105-10-33. National (debtor) filed for a Chapter XI arrangement, its petition showing assets of $38,650 and liabilities of $52,932.94. SBA was owed a balance of $18,810.39 plus some interest by debtor, and was secured to the extent of a lien on business equipment worth $2,500. SBA asserted that it was due the priority given the Government by 31 U.S.C. 191 and section 64a of the Act and that it was entitled to participate in the arrangement to the extent that its debt was unsecured. The district court adopted the referee's finding that SBA could not participate in the arrangement because it was a secured creditor. In addition, it noted that, since the debtor had neither been adjudicated a bankrupt nor committed an act of bankruptcy, SBA was not entitled to a 31 U.S.C. 191 priority.

The Court of Appeals held, first, that where there is an excess of indebtedness over security, the creditor must to that extent be deemed unsecured and entitled to participate in a Ch. XI proceeding, and that the personal guarantees of three individuals held by SBA did not affect this result. The Court went on to hold, however, contrary to the position of the United States, that the debtor did not commit an act of bankruptcy when it filed its Ch. XI petition, and SBA,

therefore, could receive no priority under the arrangement. In reaching this result, the Court relied upon the fact that the duties of a receiver in a Ch. XI proceeding are limited, and that frequently a receiver is not required, the debtor being allowed to remain in possession under the supervision of the court. The Court of Appeals did not mention King v. United States, 379 U.S. 329, in which the United States was held entitled to hold a distributing agent in a Ch. XI arrangement for the monies due it under its priority, nor did it mention United States v. Anderson, 334 F. 2d 111 (C.A. 5), certiorari denied, 379 U.S. 879, in which the United States was held entitled to priority in a Ch. X reorganization. Consideration is being given to filing a petition for certiorari.

Staff: Samuel J. Heyman and Alan S. Rosenthal (Civil Division)

EXECUTIVE ORDER 10988: FEDERAL EMPLOYEE UNIONS

Postmaster General's Determination, That Election Is Non-representative if Fewer Than 60% of Eligible Employees Participate, Is Not Subject to Judicial Review. Manhattan-Bronx Postal Union, et al. v. Gronouski (C.A.D.C., No. 18,882, July 29, 1965), D.J. No. 145-5-2689. A union of postal employees, claiming to have been selected by "a majority of the employees" under E.O. 10988, brought suit to compel the Postmaster General to recognize it as exclusive bargaining agent for the employees involved. The Postmaster General had refused, relying upon a Postal Bulletin which declared that an election was not regarded as "representative" unless 60% of the employees in the unit participated. The District Court dismissed the action on jurisdictional grounds and in the alternative granted appellee's motion for summary judgment. The Court of Appeals affirmed the dismissal for lack of jurisdiction. The Court held that the suit was barred by sovereign immunity, reasoning that the relief sought would impose upon apellee the obligation of dealing with the union as exclusive representative; that appellee's action was not unconstitutional; and that the "60%" rule, even if an improper interpretation of the terms of the Order, was within appellee's discretion under a provision of the Order empowering him to issue rules governing the recognition of unions. In the alternative, the Court of Appeals sustained the dismissal on the theory that the Order and decisions made thereunder involve an Executive Program, in which the judiciary was to have no role. This is the first case under the Executive Order to come before a court of appeals.

Staff: United States Attorney David C. Acheson; Assistant United States Attorneys Frank Q. Nebeker, Ellen Lee Park and Jerome Nelson (Dist. Col.)

FEDERAL TORT CLAIMS ACT

United States Can Recover as "Person or Organization Legally Responsible for the Use" of Government Employee's Truck Being Driven Within Scope of Federal Employment. Government Employees Insurance Co. v. United States (C.A. 10, No. 7998, July 22, 1965), D.J. No. 145-7-264. The United States had been sued under the Federal Tort Claims Act on account of the negligence of its employee who, while driving his own truck within the scope of his federal employment,

was involved in an accident causing injury to the plaintiffs. Government Employees Insurance Company had issued a liability insurance policy to the employee which defined "insured" as including "any person or organization legally responsible for the use" of the vehicle. The United States filed a third-party complaint against GEICO alleging that it was included within this definition as an insured and that therefore GEICO was liable to it for the amount of any judgment against the United States in the Tort Claims Act suit. After plaintiffs' action had been settled with the consent of all parties, the district court entered judgment for the United States against the third-party defendant for full amount of the settlement.

The Tenth Circuit affirmed, recognizing that the United States was asserting a direct contract right against the insurer and holding that by the terms of the policy and the Tort Claims Act the United States was an additional insured. The Court noted that the Tort Claims Act had rendered the Government liable as a private individual would be under like circumstances and that a private individual as employer of the named insured would be covered under the policy. The Court also said that by virtue of its knowledge that the named insured was an employee of the United States the insurer must have intended to insure the United States, and that the insurer could have excluded the United States as an insured. While numerous district courts have reached the same result, this is the first court of appeals decision holding that the United States can recover as an additional insured under the standard omnibus clause in a private liability insurance policy.

Staff: Robert J. Vollen (Civil Division)

Government Employee Has No Action For "Invasion of Privacy" Based on Veterans' Administration's Release of His Hospital Records to Agency Which Employs Him. Flowers v. United States (C.A. 10, No. 8002, July 22, 1965), D.J. No. 157-60-90. The Court of Appeals affirmed the district court's holding that plaintiff's "right of privacy" had not been invaded by the VA's release of hospital records to the Internal Revenue Service, plaintiff's employer. The Court based its decision on 38 U.S.C. 3301, which prohibits disclosure of VA documents except, inter alia, "when required by any department or other agency of the United States Government," and VA Regulation 506 (38 C.F.R. 1.506), which directs that all records or documents required for official use by another federal agency "shall be furnished in response to an official request, written or oral, from such department or agency."

Staff: United States Attorney B. Andrew Potter;
Assistant United States Attorney Robert L.
Berry (W.D. Okla.)

Under Georgia Law, Res Ipsa Loquitur Cannot Be Invoked Where Identity of Instrumentality Causing Injury Has Not Been Established. Barnes v. United States (C.A. 5, No. 21736, August 12, 1965), D.J. No. 157-2-60. While standing in a salvage yard at Fort Benning, Georgia, plaintiff was struck in the eye by an unidentified object. Five minutes before the accident, a truck had completed dumping a load of scrap metal near the scene of the accident; at trial, plaintiff introduced expert testimony to establish that the probability was that the injury had been caused by a sliver of metal which snapped off from that scrap

metal. The district court found that plaintiff had failed to establish the identity of the object which caused his injury, and that in Georgia the doctrine of res ipsa loquitur could not be invoked in the absence of such proof. The Court of Appeals affirmed.

Staff: United States Attorney Ben Hardeman;
Assistant United States Attorney
Rodney R. Steele (M.D. Ala.)

INTERSTATE COMMERCE ACT

In Loss And Damage Suit Controlled by Carmack Amendment, After Shipper Establishes Prima Facie Case Carrier Must Prove That Loss Was Due Solely to Cause For Which It Is Not Liable. Super Service Motor Freight Co. v. United States (C.A. 6, No. 15872, August 13, 1965), D.J. No. 78-71-16. This was an action brought by an interstate motor carrier to recover sums concededly due to it for transportation services performed but withheld by the Government and set-off in partial recovery for damage, to a Government camera, allegedly caused by the carrier's negligence; the case turned on whether the carrier was liable for the damaged camera. That question was controlled by the Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. 20(11), codifying the common law rule that, when a shipper establishes that goods have been delivered undamaged to a common carrier and that the goods were returned in a damaged condition, the carrier is liable for the damages without proof of negligence unless the carrier shows that the damage was due solely to a cause for which the law exempts it from liability, such as an act of God or improper packaging by the shipper. Purporting to apply this rule, the district court held that the carrier had proved that the camera had been improperly packaged and the Government bore the burden of proving that the damage was due to the carrier's negligence. The court felt that the Government had not sustained this burden and therefore denied its counterclaim and rendered judgment for the carrier.

The Sixth Circuit held that the district court had erred. The appellate court said that once the shipper establishes its prima facie case by showing delivery in good condition and return in a damaged condition, the burden of proof shifts to and remains upon the carrier to establish that the damage was due to an excepted cause and not to the carrier's negligence. Missouri Pacific R. v. Elmore & Stahl, 377 U.S. 134 (1964), was cited as controlling authority.

Staff: Frederick B. Abramson (Civil Division)

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

Injury on Building Way Not Covered by Longshoremen's and Harbor Workers' Compensation Act. O'Leary v. Puget Sound Bridge & Dry Dock Company (C.A. 9, No. 19,273, July 29, 1965), D.J. No. 83-82-87. The Longshoremen's and Harbor Workers' Compensation Act provides compensation for injuries "occurring upon the navigable waters of the United States (including any dry dock)." 33 U.S.C. 903(a). Claimant was injured while working on the construction of a new ship, which was taking place on a building way. The building way is a permanent shipyard structure used for construction of new ships. The seaward end of the building way extends into the water on an incline, permitting the new ship to be

launched by sliding it into the water. The tide ebbs and flows around this portion of the building way. Claimant fell onto the building way from a scaffold. The part of the building way onto which he fell is submerged in certain tides, but was not submerged when he fell.

The Court of Appeals affirmed the holding of the district court, which overturned the administrative award of benefits on the ground that a building way is not a dry dock. The Court of Appeals believed that ship construction is not a maritime activity and that the case thus involved an injury sustained on dry land in the course of performing a nonmaritime contract. In such a situation, the Court felt that constitutional questions concerning the scope of admiralty jurisdiction would be raised by construing a building way to be a "dry dock" for purposes of the Act. The Court stated, however, that it would consider a building way to be a "dry dock" if it were being used for ship repair rather than for construction.

This holding is in apparent conflict with Port Houston Iron Works v. Calbeck, 227 F. Supp. 966 (S.D. Tex.).

Staff: Leavenworth Colby (Civil Division)

Deputy Commissioner's Finding That Decedent's Injury and Death Did Not Arise "Out of and in the Course of Employment" Was Influenced by "Inconsequential" Factors And Reached in Apparent Disregard of Presumption in Favor of "Employee or his Dependent Family"; Cause Remanded to Deputy Commissioner For Further Consideration. Howell v. Einbinder (C.A.D.C., No. 19,086, August 6, 1965), D.J. No. 83-16-263. Decedent, a carpet mechanic within the coverage of the District of Columbia Compensation Act (36 D.C. Code 501), unknowingly suffered a brain aneurysm on June 13. On June 16, he returned to the strenuous work involved in his job. On June 18 he was hospitalized; on June 29 he died. The medical evidence was in sharp conflict as to whether decedent's labors on June 16 had aggravated his condition; the Deputy Commissioner placed great reliance on the fact that decedent and his wife (neither of whom knew the nature of his condition) did not attribute his death to his work. The Court of Appeals noted that the latter factors were "inconsequential" and suspected that the Deputy Commissioner had failed to consider "the presumptions favorable to the employee or his dependents." It therefore remanded the case to the Deputy Commissioner for further consideration.

Staff: United States Attorney David C. Acheson; Assistant United States Attorneys Charles T. Duncan and Frank Q. Nebeker (Dist. Col.); Charles Donahue, Solicitor of Labor; George M. Lilly and Alfred H. Myers, Attorneys, Department of Labor

NEGOTIABLE INSTRUMENTS

Treasurer of United States Has Reasonable Time in Which to Examine and Dishonor Government Checks For Forgery. Bank of America, etc. v. Federal Reserve Bank of San Francisco (C.A. 9, No. 19,650, August 3, 1965), D.J. No. 145-105-19. On August 3, 1965, the Ninth Circuit affirmed the decision of the district court

that the Treasurer of the United States has a "reasonable time" in which to refuse to pay a Treasury check on the ground of forgery of the Government disbursing officer's signature. The Bank of America had sued to recover $15,000 which it had paid out on such forged instruments; it urged that the Treasurer is bound by the rule, applicable to commercial banks, that a check not dishonored by midnight of the next business day following receipt is deemed "paid."

The Court of Appeals accepted the Government's contention that this rule does not apply to the Treasurer, who must examine and pay some 500,000,000 checks annually. Rather, the Court ruled that Treasury regulations giving the Treasurer a "reasonable time" in which to complete a "first examination" for forgery, inter alia, governed (31 C.F.R. §202.25(e)(1)(iv)). The Court affirmed the trial court's finding that, in this case, the "first examination" was timely conducted and payment properly refused by the Treasurer.

Staff: Richard S. Salzman (Civil Division)

SOCIAL SECURITY ACT

First Circuit Holds That, Despite Heart Ailment, Claimant Is Capable of Engaging in Regular or Similar Occupation. Rodriguez v. Celebrezze (C.A. 1, No. 6467, August 2, 1965), D.J. No. 137-65-37. Claimant applied for disability benefits on the ground that he was unable to work because of a heart condition. The Secretary's denial of claimant's application was upheld by the district court. The Court of Appeals affirmed, holding that there was substantial evidence to support the administrative decision that, despite his heart condition, claimant could engage in his regular or similar occupation.

Staff: Lawrence R. Schneider (Civil Division)

Disability Case Remanded to Secretary for Purpose of Allowing Him to Offer Evidence Showing That There Is "Generally Available Employment" of Kind Which Claimant Can Perform. Torres v. Celebrezze (C.A. 1, No. 6468, August 2, 1965), D.J. No. 137-65-39. The Secretary denied Social Security Act disability benefits to a forty-three year old claimant who had a third grade education and suffered from several rather severe impairments. The denial was affirmed by the district court. Since it was obvious that claimant could not return to his former work as a laborer, and inasmuch as the Secretary had made no job availability findings, in the Court of Appeals we argued, as an alternative, for remand. The First Circuit did remand the case to the district court with instructions to remand to the Secretary for the purpose of allowing him "to offer evidence showing there is generally available employment of the kind for which [claimant] is fit and qualified."

Torres and Rodriguez are the first disability cases decided by the First Circuit.

Staff: Lawrence R. Schneider (Civil Division)

Remediability: Claimant May Not Be Denied Disability Benefits Because His Conceded Disability Might Be Remedied by Operation Which Has Not Been Shown to Have Reasonable Chance of Success. Purdham v. Celebrezze (C.A. 4, No. 9921,

July 2, 1965), D.J. No. 137-35-83. Claimant concededly is disabled within the meaning of the Social Security Act. The Secretary and the district court held that claimant was not entitled to disability insurance benefits because his disabling impairment--a bad back--might be remedied by an operation. The Court of Appeals held that claimant's back condition could not "reasonably be regarded as remediable." Approving the Sixth Circuit's decision in Ratliff v. Celebrezze, 338 F. 2d 978, the Fourth Circuit said: "To deny this claimant disability benefits because he has not undergone a serious and painful operation which not only would definitely limit his ability to bend but which also had not been unequivocally declared by any medical authority as likely to strengthen his back so that he can return to work would in our judgment be an unduly harsh and restrictive interpretation of a remedial statute."

Staff: United States Attorney Thomas J. Kenney;
Assistant United States Attorney Robert J.
Carson (D. Maryland)

Denial of Social Security Disability Benefits Held Based on Erroneous Standard. Dodsworth v. Celebrezze (C.A. 5, No. 21731, July 26, 1965), D.J. No. 137-74-88. Claimant, a 53 year old laborer, applied for benefits and a period of disability on the basis of asserted tuberculosis. It became apparent, however, that claimant did not, in fact, suffer from active T.B., but did suffer from a number of other minor impairments and from a strongly paranoid personality. The Secretary found that there was nothing to show that claimant was in worse condition than he had been when he last worked as a laborer and, accordingly, denied benefits and a period of disability. The Court of Appeals reversed and remanded, stating that the Secretary had applied the wrong legal standard to claimant's neurosis. No attempt had been made, said the Court, to evaluate the evidence of paranoid personality in light of the clear impression afforded from all evidence of record, that claimant had psychosomatic difficulties which in fact kept him from obtaining work. The question, the Court said, "is whether in the light of all the evidence it is medically demonstrable that from the operation of these mental psychological defects on his general physical condition, it was improbable that he would obtain and hold gainful employment." Thus the case was remanded to the Secretary for further evidence and further proceedings in accordance with the opinion.

Staff: United States Attorney Woodrow Seals;
Assistant United States Attorneys
Jack Shepard and James R. Gough (S.D. Tex.)

DISTRICT COURTS

FEDERAL TORT CLAIMS ACT

Acceptance of Any Part of Administrative Award Bars Suit Under Federal Tort Claims Act. Kalpin v. United States, et al. (D. N.D., No. 4131), D.J. No. 157-56-32. In this case of first impression, the District Court held that acceptance of any recovery under an administrative claim filed under the Tort Claims Act and allowed in full bars a suit under the Act. The Court held that those who successfully pursue their administrative remedy are bound by the declaration in Standard Form 95, used for filing the administrative claims: "I agree to accept

said amount in full satisfaction and final settlement of this claim."

Staff: United States Attorney John O. Garaas: Assistant United States Attorney Richard V. Boulger (D. N.D.); Eugene Hamilton (Civil Division)

Veterans' Administration Doctor Not Negligent in Decision to Operate or Performance of Operation; Physician Is Held to Standard of Average Physician in Locality, Not That of Most Eminent Expert. Toma v. United States (S.D. N.Y., No. 61 Civ 2311), D.J. No. 157-51-1028. To relieve plaintiff's obliterative arterial vascular disease of the right leg, VA doctors performed a sympathectomy and a bypass graft operation. Infection set in; after five operations designed to cure the infection, the graft was deleted. Subsequently, plaintiff's right leg was amputated above the knee. The Court held that the VA doctor had not been negligent in either prescribing or performing these operations; it found infection to be a risk inherent in all surgery and held the doctor to the standard of the average doctor in his locality, not to the standard of the most eminent expert. The Court noted that even if the doctor had exercised bad judgment, that alone would not suffice to support a finding of negligence.

Staff: United States Attorney Robert Morgenthau; Assistant United States Attorney Arthur M. Handler (S.D. N.Y.); Vincent H. Cohen (Civil Division)

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CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

FRAUD

Procurement Fraud. United States v. Tyminski, et al. (E.D. N.Y.). D.J. File 46-52-493. On August 18, 1965, a 41-count indictment, charging violations of Sections 287 and 371, Title 18 United States Code, was returned in Brooklyn, New York, as a result of an extensive investigation into charges that Belock Instruments Corporation, College Point, New York, a Government contractor for guidance instruments on missiles, had transferred costs from fixed price contracts to cost plus contracts, resulting in an alleged overcharge of $1,200,000. Named as defendants are Walter V. Tyminski, Marvin Levy and Jacob Silverstein, President, Vice President for Operations, and Vice President, Comptroller, respectively, of the firm. Belock Instruments Corporation and other employees are listed as co-conspirators but not as defendants.

Staff: Assistant United States Attorney Leonard Theburg (E.D. N.Y.)

NATIONAL FIREARMS ACT

Transportation of Unregistered Firearms. United States v. Valmore J. Forgett, Jr. (C.A. 6, Aug. 26, 1965). Defendant's conviction under 26 U.S.C. 5855 for interstate transportation of firearms not registered as required by the Act (26 U.S.C. 5841), was affirmed by the Sixth Circuit.

Forgett contended, in reliance on Russell v. United States, 306 F. 2d 402 (C.A. 9, 1962), that since there could be no prosecution for failure to register a firearm as required by Section 5841 without violating a defendant's Fifth Amendment privilege against self-incrimination, there could be no prosecution under Section 5855 for transporting a firearm not registered in accord with Section 5841, without violating the same privilege, and that in this regard Section 5855 is like Section 5841 unconstitutional.

The Court of Appeals, however, held that prosecution under Section 5855 was not subject to constitutional infirmity, following the same rationale by which conviction under Section 5851 for possession of a firearm not registered in accord with Section 5841 was upheld in Frye v. United States, 315 F. 2d 491 (C.A. 9, 1963), cert. den. 375 U.S. 491 (discussed in U.S. Attorneys Bulletin, Vol. 11, p. 228); Starks v. United States, 316 F. 2d 45 (C.A. 9, 1963); and Sipes v. United States, 321 F. 2d 174 (C.A. 8, 1963).

Moreover, the Sixth Circuit indicated it did not understand that registration of the firearms by Forgett would have required him to admit criminality, inferring that it did not agree with the Russell rationale to the effect that

the act of registration was self-incriminating on the ground that under the presumption clause in Section 5851 proof of possession would establish a prima facie violation. The Sixth Circuit's interpretation is that the presumption alone would be insufficient to establish a prima facie case, and that additional proof would be necessary that the firearms had not been registered or that they had been transferred in violation of one or more of the Act's provisions.

Staff: United States Attorney Merle M. McCurdy (N.D. Ohio);
A. A. Dash (Criminal Division).

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

IMMIGRATION

Denial of Adjustment of Status to Mala Fide Nonimmigrant Alien Held Proper. Jesus Garcia Castillo v. INS (C.A. 9, No. 19,728, August 23, 1965) D.J. File 39-11-583.

Petitioner, a Peruvian national, brought this action to challenge the denial of his application to change his status from a nonimmigrant visitor alien to a permanent resident alien, which denial resulted in an order for his deportation.

Petitioner fraudulently procured a visitor's visa from an American consul by concealing his intention of remaining permanently in the United States through the process of adjusting his status under 8 U.S.C. 1255 to a permanent resident alien. After entry he made application for adjustment and was granted a change of status by a Special Inquiry Officer. An appeal from this decision by the Immigration and Naturalization Service was sustained by the Board of Immigration Appeals. The Board denied petitioner adjustment of status as a matter of discretion. The Board found that he had flagrantly disregarded the lawful visa procedures of the United States, and asserted that the bona fides of an applicant for discretionary relief under 8 U.S.C. 1255 in securing a nonimmigrant visa was a persuasive factor in the exercise of discretion under that law. Petitioner contended that the Board abused its discretion in denying his application. He pointed out that a 1960 amendment to 8 U.S.C. 1255 eliminated a requirement in the law that an alien be a bona fide nonimmigrant to be eligible for its relief.

The Ninth Circuit rejected Petitioner's argument and affirmed the Board's decision. The Court was of the opinion that flagrant disregard of lawful visa procedures must be pertinent to the exercise of discretion under Sec. 245 for otherwise, disregard for the immigration laws would be encouraged.

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.

Federal Lands: Submerged Lands; Limits of State Ownership. United States v. California, 381 U.S. 139 (1965), D.J. File 90-1-18-34. In 1947 the Supreme Court held in this case that the United States rather than the State was entitled to the submerged lands and resources extending three geographical miles seaward from the line of ordinary low water and the outer limit of inland waters. 332 U.S. 19. The problem of identifying those lines was referred to a Special Master, who filed his report in 1951. Soon afterward, Congress passed the Submerged Lands Act, giving to coastal States the submerged lands and resources within their boundaries, limited in the Atlantic and Pacific to a maximum distance of three geographical miles from the line of ordinary low water and the outer limit of inland waters. 43 U.S.C. 1301-1315. The parties remaining in disagreement over the definition of those lines, the United States was allowed to file a supplemental complaint, redefining the issues in the light of the Submerged Lands Act (375 U.S. 927), and the Court considered the exceptions of both parties to the Special Master's report.

Rejecting California's contention that the Submerged Lands Act presents a wholly new question, the Court held, in an opinion by Justice Harlan, that the line of ordinary low water and outer limit of inland waters referred to in the Act are essentially the same as those referred to in the original decree herein, so that the Special Master's report remains equally relevant to the issues as now modified; the only difference being that the State's ownership, which formerly ended at those lines, now extends three miles farther seaward. With certain modifications, the Court approved the Special Master's report.

The Court held that the "inland waters" referred to by Congress in the 1952 statute are those now recognized as internal waters by the Convention on the Territorial Sea and the Contiguous Zone, drafted in 1958, ratified by the United States in 1961, and effective September 10, 1964. These include, in bays whose area is not less than that of a semicircle drawn on a closing line across the entrance, the waters landward of a line not over 24 geographical miles long drawn across the entrance or, if the entrance is wider, where the bay first narrows to that width. (The 24-mile limit was an international innovation in 1958; previously the United States and other nations had used a 10-mile limit which we argued should be applied in construing this 1952 statutory grant.) Applying this rule, the Court awarded to California Monterey Bay, 19.6 miles wide, but rejected its claims to Santa Monica and San Pedro Bays, which do not meet the semicircle test. The Convention also recognizes bays that a nation has historically treated as inland waters; but the Court agreed with the Special Master that California has failed to prove any such in the coastal segments now adjudicated (with the possible exception of Monterey Bay, where application of the 24-mile rule makes consideration of historic claims unnecessary).

The Convention also recognizes as internal waters those that a nation elects to enclose by duly publicized "straight baselines" drawn between salient points or islands along certain rugged coasts; but the Court agreed with us that such lines must be drawn by the Federal Government, which has drawn none either in California

within the navigable air space and consequently there was no taking of an easement over plaintiffs' properties.

The Court, sustaining the Government's motion, pointed out that under the present law and regulations enacted thereunder navigable air space is defined as 1,000 feet above congested areas and 500 feet above open land. 49 U.S.C. 1301(24) and 1348(a); 14 C.F.R. 60.17.

In support of its decision that there had been no taking warranting just compensation, the Court cited the decisions in the cases of Batten v. United States, 306 F.2d 580; Avery v. United States, 330 F.2d 640, 643; United States v. Causby, 328 U.S. 256; and Griggs v. Allegheny County, 369 U.S. 84.

Plaintiffs claimed that they had a right to bring a class action under Rule 23, F.R.Civ.P. As to this contention, the Court said:

> The potential parties are not so numerous as to require a class action, if such would otherwise be proper in this case. The plaintiffs cannot represent those not presently before the Court; consequently, it is not a true class action, and "common relief" is not sought herein such as if injunctive relief were being requested. Here the parties merely claim "similar relief." Interestingly, the plaintiffs cannot know that no land owner in Oklahoma City is claiming more than $10,000, and since they have elected to bring a class action, they must show that the Court has jurisdiction of every claim by each member of the class.

Staff: United States Attorney B. Andrew Potter and Assistant United States Attorney David A. Kline (W.D. Okla.)

Water Rights: 1929 Decree Changed by Adding Provisions Allegedly Omitted by Clerical Error; 43 U.S.C. 666; Appellate Procedure: Contentions as to Laches and Lack of Jurisdiction Not Considered Under Local Practice Absent Cross-Appeal Where Rejected by Court Below. Alamo Irrigation Co., Inc., et al. v. United States (Nev. S.Ct., No. 4820, Jul. 15, 1965) D.J. File 90-1-2-734. The rights to the waters of Pahranagat Lake and its tributaries were adjudicated in a state court proceeding in 1929. In 1963 the United States purchased the lands and water rights of a party to the 1929 decree to establish the Pahranagat National Wildlife Refuge. In 1964 petitioner filed a motion, served on all water users and appropriators, in the state district court seeking to correct an alleged clerical error in the 1929 decree. The alleged error was the omission of provisions concerning diversions for stock watering and for leaching salt from the soil. In addition to urging laches (reliance on the 1929 decree as written, lapse of time, and adverse effect on the operation of the Refuge if the provisions were added), the Government contended that the Act of July 10, 1952, 66 Stat. 560, 43 U.S.C. 666, does not constitute consent to this type of suit. The district court claimed jurisdiction but denied petitioner's motion, ruling that the omission was not the result of clerical error.

The Supreme Court of the State of Nevada reversed, ruling that the evidence was clear and convincing that the omission was a result of clerical error. It noted that the parties to the 1929 decree had used the waters through the years

or elsewhere. California's claim to enclose large areas of the ocean by straight lines drawn out from the coast around distant offshore islands was rejected.

Again following the Convention, the Court recognized as inland waters areas enclosed by permanent harbor works, but not open roadsteads. The Convention measures the width of the marginal sea from the low-water line as shown on official charts. For coasts like California's, where there are two daily tides of unequal height, the low-water line that is shown on Coast and Geodetic Survey charts (where distinguishable from the high-water line that provides the basic coastal delineation) is the line of mean lower low water. Consequently the Court adopted that as the line of "ordinary low water" here, rather than the mean of all low waters. The Court hold that the baseline from which the State's submerged lands are measured is an ambulatory one, subject to continuous change by both natural and artifical means (subject to the usual federal control over artifical changes in navigable waters). However, it held that any future changes in the international rules, such as a change in the 24-mile rule for bays, will not affect the State's rights under the Submerged Lands Act, as the result would be too unsettling to land titles. A useful footnote (p. 171) approved the rule of United States v. Turner, 175 F.2d 644, cert. den., 338 U.S. 851, that a body of navigable water is considered such even in its shallow parts.

Justices Black and Douglas dissented on the ground that Congress intended to take a more liberal view of a State's historic claims, as to which they would refer the case to a Special Master for further evidence. The Chief Justice and Justice Clark did not participate.

California has asked for a rehearing on historic bay questions.

Staff: Archibald Cox, Solicitor General; George S. Swarth (Lands Division)

Eminent Domain; Damages to Property And Annoyances to Property Owners Allegedly Resulting From Sonic Boom Made by Aircraft Flying at Altitude of Six to Nine Miles Above Surface of Ground Do Not Constitute Compensable Taking Within Provisions of Fifth Amendment to Constitution; Tucker Act; Purported Class Action. John E. Bennett, et al. v. United States, (W.D. Okla. August 20, 1965) D.J. File 90-1-23-1121. Plaintiffs brought this action against the United States to recover just compensation for the alleged taking of an avigation easement over their properties. Jurisdiction of the district court was predicated upon the provisions of the Tucker Act, 28 U.S.C. 1346(a)(2). Plaintiffs claimed the right to bring this suit as a class action under Rule 23, F.R. Civ.P. The taking was predicated upon the sonic boom caused by United States aircraft between February 3, 1964, and July 31, 1964, while engaged in a sonic boom test program at Oklahoma City, to determine the public acceptability and the effect on ground structures of booms anticipated from future super sonic transport flights.

The material facts which were agreed upon were that the test flights were made at altitudes in excess of six miles above ground level. The Government filed a motion for summary judgment on the ground that the aircraft were flying

as if the omitted provisions were in the decree and that such provisions "are integral, necessary, and indispensable to the territorial area concerned." It refused to consider the Government's contentions because it said the trial court had rejected them and the Government failed to prosecute its own appeal, which it seemed to indicate was necessary even as to jurisdictional questions under its practice. The Government's petition for rehearing was denied. The filing of a petition for a writ of certiorari is being considered.

Staff: United States Attorney John W. Bonner (D. Nev.); and Raymond N. Zagone (Lands Division).

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TAX DIVISION

Acting Assistant Attorney General John B. Jones, Jr.

CIVIL TAX MATTERS

District Court Decisions

Injunctions; Actions to Quiet Title; Taxpayer's Action, to Quiet Title to Real Estate and to Remove Cloud of Federal Lien for Cabaret Taxes, Dismissed For Lack of Jurisdiction Since Government Did Not Withdraw Sovereign Immunity and Consent to Be Made Party to Action; Court Also Without Jurisdiction to Grant Injunctive and Declaratory Relief. Fred Floyd v. United States (W.D. S.C., May 27, 1965). (CCH 65-2 U.S.T.C. ¶15,642). Plaintiff alleged in this suit that the Government was claiming erroneously that he and his wife, as a partnership, owned and operated a supper club and that he was, therefore, liable for payment of cabaret taxes allegedly due as a result of the operation of the club. He claimed that his wife had always been the sole owner of the club, that he had never been a partner, and that he had never had an interest in the business. He therefore sought a declaratory judgment to this effect, a cancellation of certain tax liens and levies against his property and an injunction against further collection activities.

In granting the Government's motion to dismiss, the Court concluded that this suit was essentially a suit to determine the validity of the tax assessed against plaintiff and that there was no waiver of sovereign immunity to such an action under the provisions of 28 U.S.C. 2410 (waiving sovereign immunity in certain quiet title and lien foreclosure actions), and that the Court was, therefore, without jurisdiction to entertain the action. The Court also concluded that it was without jurisdiction to enjoin the collection of the assessment made against plaintiff because it was unable to hold as a matter of law that plaintiff was not a taxpayer, and, therefore, under the authority of Enochs v. Williams Packing and Navigation Co., 370 U.S. 1, an injunction could not issue.

Staff: United States Attorney John C. Williams (W.D. S.C.); and Herbert L. Moody (Tax Division).

Internal Revenue Summons; Witnesses Required to Take Oath Prior to Examination; Custodian of Corporate Books and Records Required to Identify Documents Produced Pursuant to Summons. United States, et al. v. Robert S. Lewis, Jr., et al. (W.D. Tenn., June 25, 1965). (CCH 65-2 U.S.T.C. ¶9534). Internal Revenue summonses were served on an employee and on the custodian of the records of the taxpayer-corporation. Each respondent, upon advice of counsel, refused to take the oath required by Section 7602 of the Internal Revenue Code of 1954 prior to being examined. Their attorney took the position that they would answer the questions directed to them, read and study the transcript, make any necessary corrections, and then affirm the facts stated in the transcript before a notary. The custodian also refused to identify the records produced in response to the summons.

After a hearing, the Court held that respondents would not be denied any right or privilege by being required to take the usual oath that statements made or testimony given in their examination will be the truth, prior to being examined. The Court further held that before approving the transcript of the examination under oath, respondents should be given an opportunity to carefully correct any transcription errors and to offer explanations regarding any statements in the transcript, which is part of the recognized procedure of the Internal Revenue Service in matters of this kind. Finally, the Court held that the custodian of the corporate books and records can be compelled to produce such documents and he is required to identify them as the records called for in the summons.

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

Transferee Liability; Trust Fund Doctrine; Assets Received From Insolvent Estate Renders Transferee Personally Liable to Extent of Value of Assets Received and Administratrix Is Personally Liable For Making Such Transfers Even Though Made Pursuant to Probate Court Order. United States v. Esther Lee Purdome (W.D. Md., June 4, 1965). (CCH 65-2 U.S.T.C. ¶9544). The widow of the deceased taxpayer was appointed administratrix of her husband's estate and she made transfers of the estate property to herself and her son pursuant to a final settlement order entered by the Probate Court. These transfers were made without consideration and they left the estate insolvent and without assets with which to satisfy any part of deceased's tax liabilities.

In this suit against the administratrix, the Government contended that she was personally liable under the trust fund theory to the extent of the assets received by her from the estate and that she was personally liable under Section 3467 of the Revised Statutes (31 U.S.C. 192) for making distributions in violation of the requirements of Section 3466 of the Revised Statutes (31 U.S.C. 191), giving the United States an absolute priority over the other creditors where an estate is insolvent.

In finding for the Government on both theories, the Court noted that the fact that the amount of the tax claim had not yet been definitely determined at the time the transfers were made was not controlling, nor was the fact that the transfers were made pursuant to an order of the Probate Court. The Court also ruled that the administratrix could not, in this action, question the assessment of fraud penalties made after she had signed a Form 870-AS agreeing to such assessments, even though such forms may not be construed as closing agreements. Because, under the factual situation presented--the statute of limitations on further collection action had expired as had the statute of limitations on making a new assessment--the Court held that the administratrix was estopped from questioning the assessments made pursuant to the agreement embodied in Form 870-AS.

Staff: United States Attorney F. Russell Millin (W.D. Mo.); and Louis J. Lombardo (Tax Division)

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