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UNITED STATES ATTORNEYS
BULLETIN

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APPOINTMENTS - UNITED STATES ATTORNEYS

In addition to those published in previous Bulletins, the nominations of the following United States Attorneys to new four-year terms were pending before the Senate on October 11, 1965:

Montana - H. Moody Brickett
New York, Western - John T. Curtin

The nominations of the following United States Attorneys have been confirmed by the Senate:

Mississippi, Northern - H.M. Ray
Nebraska - Theodore L. Richling
North Carolina, Eastern - Robert H. Cowen
North Carolina, Middle - William H. Murdock
North Carolina, Western - William Medford
Oklahoma, Western - B. Andrew Potter
Pennsylvania, Middle - Bernard J. Brown
Tennessee, Western - Thomas L. Robinson

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

Iowa, Southern - Donald M. Statton

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ANTITRUST DIVISION

Assistant Attorney General Donald F. Turner

Court Denies Motion to Transfer Case And for Certification to Court Of Appeals. United States v. American Hospital Supply Corporation, et al. (N.D. Texas) D.J. File 60-0-37-838. On July 12, 1965, defendants filed a joint motion in the United States District Court for the Northern District of Texas, Dallas, Division, requesting that the case be transferred under 28 U.S.C. §1404(a) to the United States District Court for the Northern District of Illinois, Eastern Division, sitting in Chicago.

Defendants contended that one defendant, American Hospital Supply Corporation, has its main office in Evanston, Illinois, its counsel is in Chicago, and several of its officers, who must necessarily attend the trial, are essential to its operations.

American Hospital also made the customary argument that its records are located in Chicago and that all parties would find it more convenient in the transferee forum. American Hospital stressed its contention that approximately 70 persons whom it intended to call as witnesses were located in the North, primarily from the Chicago area. American Hospital listed each of its witnesses by name, address, and subject matter of testimony. American Hospital then submitted affidavits listing the comparative costs of transportation to it if these witnesses had to be brought to either Chicago or Dallas, purporting to show that its costs would be far greater if trial were held in Dallas.

The Government contended that a plaintiff, especially in an antitrust action, has a presumption in favor of his choice of forum and that the defendant has the burden of showing a marked balance of conveniences in his favor before transfer should be granted.

The Government argued that the defendant Curtin was located in Houston, Texas, did no business in Chicago, had no representatives there, and a trial in Chicago would be about as inconvenient to Curtin and the Government as trial in Dallas would be to American Hospital.

Both Curtin and American have large regional warehouses and offices in Dallas whereas Curtin has no offices located in Chicago and American Hospital has none in Houston. Because of this, the Government contended that the competitive overlap in Dallas was greater than elsewhere and the Government's witnesses would come primarily from the South and Texas in particular.

The Government also contended that the interest of justice required an early trial and that Judge Hughes' calendar was current whereas trial in Chicago would be delayed because of congested trial dockets. The Government, at the oral hearing held on August 27, 1965, submitted affidavits purporting to show that defense counsel's lists of witnesses were less than determinative because most of the persons named had never been contacted, many had nothing to do with the industry involved, and some did not reside in the geographic areas listed.

The Court ruled from the bench at the end of oral argument on August 27, 1965, that defendants' motion for transfer was denied. Defendants orally requested certification of the order under 28 U.S.C. §1292(b) to the United States Court of Appeals for the Fifth Circuit.

On August 30, 1965, the Court received a written motion by the defendants for certification of the Court's order.

On September 21, 1965, the Court declined to certify its order.

Staff: John E. Sarbaugh, Bertram M. Long, Lawrence H. Eiger, Howard L. Fink and Patricia M. Lines (Antitrust Division)

Government Considering Appeal From Judgment Dismissing Complaint. United States v. Chas. Pfizer & Co., Inc. (E.D. N.Y.) D.J. File 60-122-62. The Government moved under Rules 52(b) and 59(e) of the Federal Rules of Civil Procedure to amend the findings of fact and conclusions of law and opinion filed on May 5, 1965 by Judge Jacob Mishler, and the judgment dismissing the complaint entered on May 6, 1965. Oral argument on the motion was had on June 22, 1965 after both sides had briefed the question and on July 15, 1965 we submitted our proposed amended findings and conclusions. The prime purpose of the motion and proposed findings was to obtain an adjudication on the issue of the attempted monopolization by the defendant. The Court's opinion was silent on this allegation and referred only to the other two charges, namely, monopolization and lessening of the competition in violation of Section 3 of the Clayton Act.

On September 7, 1965, Judge Mishler denied the motion to amend. We had contended, during trial, that the relevant market for the purposes of the monopolization charge, was the food, beverage and pharmaceutical acidulent market. The Court had held that we had failed to prove the portion of that market occupied by citric acid made by the defendant (as opposed to substitutes which he held were to be included in that market) and therefore had dismissed all charges, including that of attempting to monopolize. Our motion was based on our argument that proof of relevant market is not essential to a claim of attempted monopolization; that to support such a charge we need only prove an attempt to monopolize the manufacture and sale of an appreciable part of trade and commerce, in this case, citric acid itself, and also a specific intent to monopolize that part of trade and commerce. The Court rejected that contention and specifically held that proof of the relevant market (defined in his findings and conclusions and opinion as including substitutes for citric acid) was necessary to a claim of attempted monopolization.

He reasoned that acts of attempted monopolization "are those performed with the specific intent to unlawfully monopolize, but falling short of the goal" and concluded that "since the monopolization of citric acid does not offend §2 of the Sherman Act, an attempted monopolization is equally inoffensive."

The question of an appeal from the judgment dismissing the complaint is now pending.

Staff: John J. Galgay, John D. Swartz and Hermann G. Gelfand (Antitrust Division)

* * *

CIVIL DIVISION

Assistant Attorney General John W. Douglas

COURT OF APPEALS

ADMIRALTY

Charterer's Cause of Action for Overpayments of Charter Hire to Government Did Not Accrue Until Final Audit of Its Accounts by Maritime Administration, and Therefore Was Not Barred by Two-year Statute of Limitations of Suits in Admiralty Act. Black Diamond S.S. Corp. v. United States (C.A. 4, No. 9933, September 8, 1965). D.J. No. 61-35-164. From 1946 through 1949, Black Diamond S.S. Corporation chartered vessels from the Government, paying a basic fixed rental, plus a percentage of its yearly profits. The payments from Black Diamond's profits were, under the charter, preliminary and subject to adjustment either at the time Black Diamond submitted "preliminary statements" of its profits, or at final audit. In 1950, the Maritime Administration issued a regulation confirming that, for purposes of final accounting, profits owed the Government by charterers would be calculated on an annual basis. In 1956, Black Diamond filed its libel in this case, alleging that the regulation was invalid and that it should be permitted to calculate profits over the life of the charter, rather than on an annual basis, so that it could offset profits earned in the first years of operations with later losses.

The Court of Appeals, reversing the district court, held that Black Diamond's cause of action did not accrue until the time of final audit, and that there had been no final audit prior to two years before the filing of the libel, so that the libel was timely filed. This decision is in direct conflict with two Second Circuit cases ruling that the cause of action on such claims accrued before there was a final audit of charter operations (American-Foreign S.S. Corp. v. United States, 291 F. 2d 598, cert. denied, 368 U.S. 895; American Eastern Corp. v. United States, 133 F. Supp. 11 (S.D.N.Y.), aff'd per curiam, 231 F. 2d 664, cert. denied, 351 U.S. 983.).

Staff: Walter H. Fleischer (Civil Division).

COMMODITY CREDIT CORPORATION

Association Formed to Purchase Tobacco From Farmers to Insure Higher Market Prices for Commodity Is Not Producer Within Meaning of 7 U.S.C. 1425; Reimbursement of Agent by Principal for Agent's Expenses Only Required Where Agency Agreement Is Silent as to Such Reimbursement. Tennessee Burley Tobacco Growers' Association v. Commodity Credit Corporation (C.A. 6, Nos. 15899 and 15900, September 2, 1965). D.J. No. 120-70-21. The Tennessee Burley Tobacco Growers' Association, whose membership consisted of 70,000 Tennessee tobacco growers, brought this action against the Commodity Credit Corporation on the theory that Commodity owed the Association $221,825.48 as reimbursement for overhead expenses incurred by the Association in connection with the tobacco price support program. The program operated pursuant to the

Agricultural Act of 1949, 7 U.S.C. 142 et seq., the announcements of the Department of Agriculture, and loan agreements between Commodity and associations of producers. Under it, when tobacco farmers in an area failed in the open market to receive the 90% of parity price for a particular year's tobacco crop, the producers' association in the area would purchase the tobacco paying each farmer the 90% of parity price. The Association would then re-dry and store the tobacco, and attempt to sell it later at a higher price so as to recoup the amounts paid to the farmers as well as the Association's direct and overhead expenses. The funds used by the Association for the purchase of the tobacco and its expenses came from low interest non-recourse loans from Commodity secured by the tobacco, which Commodity hoped to recoup upon the later sale of the tobacco. The Association could also use money received from the growers as fees and other funds belonging to the Association to help pay overhead expenses.

For the five-year period involved in this case, the Tennessee Association borrowed $12,361,217.97 (principal and interest) from Commodity to administer the program; the tobacco was sold for $11,153,944.38; and the $1,207,273.59 deficiency was borne by Commodity. In addition to the loan funds, the Tennessee Association expended $48,704.32 received as fees from growers and $173,121.16 of its own funds, for overhead expenses in connection with the program, none of which was recouped from the sale of the tobacco. The district court held that under the contracts, Commodity did not have to reimburse the Association for the $48,704.32. However, the court held Commodity liable for the $173,121.16 on the theories that (1) this was the congressional intent embodied in 7 U.S.C. 1425 which provides that "no producer shall be personally liable for any deficiency arising from the sale of the collateral securing any loan * * * ; "and (2) this result was also required by the agency rule that a principal has an implied in law contractual duty to reimburse his agent for necessary expenses incurred by the agent in the performance of the principal's business.

On our appeal to the Sixth Circuit, that Court reversed the judgment against Commodity, rejecting both theories applied by the district court and directing the entry of judgment in favor of Commodity. The Court of Appeals held that the Association was not a producer within the meaning of 7 U.S.C. 1425; that the farmers were not being required to absorb any deficiency, as each received and has retained the 90% of parity price, with Commodity having absorbed the deficiency between the amounts loaned and the sale proceeds of the tobacco; and that the deficiency contemplated by the statute did not encompass the sums spent by the Association. As to the agency theory, the Sixth Circuit held that the reimbursement rule is only applicable in the absence of an express agreement between the principal and agent, and that under the agreement in question, Commodity was only liable to reimburse the Association for expenditures expressly approved by Commodity. On the Association's cross-appeal involving the $48,704.32, the Sixth Circuit agreed with our argument that the contracts did not require Commodity to reimburse the Association for the expenditure for overhead of sums received from the farmers as fees.

Staff: John C. Eldridge (Civil Division).

FEDERAL TORT CLAIMS ACT

Prisoner's Receipt of Compensation Benefits Under 18 U.S.C. 4126 Does Not Preclude Suit for Damages Under Tort Claims Act. Stephen Robert Demko v. United States of America (C.A. 3, No. 15087, September 21, 1965). D.J. No. 157-64-185. While an inmate in a federal prison, Demko was injured during the course of his employment in prison maintenance work. He was awarded compensation benefits for those injuries under 18 U.S.C. 4126, which authorizes the Attorney General to provide such benefits for federal prisoners injured while at work. Notwithstanding Demko's receipt of compensation benefits, the Third Circuit affirmed a judgment entered in his behalf under the Tort Claims Act. The Court of Appeals ruled that a federal prisoner could sue the Government under the Tort Claims Act and that nothing in 18 U.S.C. 4126 indicated any intent on Congress' part to take away that right. The Third Circuit thus rejected the Government's argument that, where provided by Congress, compensation remedies have always been held to provide the exclusive avenue of relief against the United States and that Congress could not have intended to treat federal prisoners more favorably than other federal employees.

The Department has not acquiesced in the Third Circuit's decision. The identical question is now pending before the Second Circuit in Granade v. United States (C.A. 2, No. 29,698). D.J. No. 157-51-1234.

Staff: Richard S. Salzman (Civil Division)

No Duty Imposed on United States to Warn of Obvious Dangerous Conditions on Its Property; Third-Party Defendant Entitled to Judgment When Its Liability Is Contingent on Liability of Main Defendant and Main Defendant Held Not Liable. Van Der Veen v. United States v. Snow Valley, Inc. (C.A. 9, No. 19,625, August 19, 1965). D.J. File No. 157-12-926. On a slope of the San Bernardino National Forest on which the United States permitted Snow Valley, Inc. to operate a toboggan run, plaintiff suffered serious injuries when she was thrown from a toboggan which had allegedly hit a "bump" in the snow. At the time she embarked on her toboggan ride, plaintiff was aware of the dangers of such a venture but claimed that she had no reason to fear a "bump" in the snow would dislodge her from the toboggan. She also asserted that she saw no signs warning of such dangerous conditions. She sued the United States under the Tort Claims Act, and the United States filed a third-party action against Snow Valley, Inc., on the basis of an indemnity agreement between Snow Valley, Inc. and the United States. The district court, following trial, entered judgment for the United States in the main action based on its finding that there was no evidence of negligent acts or omissions by any employee of the United States relating to the condition of the ski slope. The district court also entered judgment in favor of Snow Valley, Inc. in the third-party action.

The Ninth Circuit affirmed both judgments of the district court, ruling that (1) the findings of the district court were not plainly erroneous; (2) there was no duty upon the United States to warn of the dangers of the slope when such dangers should have been and were, in fact, obvious to plaintiff; and (3) entry of judgment on the merits in favor of the third-party defendant

was proper since Snow Valley's liability was contingent upon the Government's liability and that liability was found not to exist.

Staff: United States Attorney Manual Real (S.D. Calif.)

DISTRICT COURT

Malpractice: Failure to Diagnose Unusual Condition Not Negligence In and of Itself. Hicks v. United States (E.D. Va., Civil No. 4858, September 21, 1965). Suit was brought by plaintiff, administrator of a 25-year-old Navy wife, alleging that the negligent diagnosis, care and treatment rendered decedent at the U. S. Naval Dispensary at Little Creek, Virginia, was the proximate cause of her death. Decedent, a childhood diabetic, came to the dispensary at 4:00 a.m., Sunday, August 25, 1963, complaining of severe abdominal pain, nausea, and fever. The Navy doctor made a tentative diagnosis of gastroenteritis, prescribed a mild pain killer and mild antispasmodic drug and requested the patient to return in 8 hours. At 12:20 p.m. the next day decedent collapsed and was brought back to the dispensary dead on arrival. An autopsy indicated the woman died from a high abdominal obstruction caused by a volvulus of the bowel into an abnormal hiatus of the peritoneum. At the trial two local general practitioners stated that the failure to diagnose and properly treat this condition did not comply with the standards of competency and skill usually demonstrated by general practitioners in the Norfolk area. The Government expert, stated that with the short duration and general nature of the symptoms no clear diagnosis could have been made at that time. He also stated that while he would not have made the diagnosis of gastroenteritis, such a diagnosis was not negligent. The district court ruled that the decedent had a rare and unusual condition; that the Navy doctor was neither negligent in his diagnosis nor his treatment; and that plaintiff failed to prove that the erroneous diagnosis was the proximate cause of decedent's death.

Staff: Assistant United States Attorney Roger T. Williams (E.D. Va.); Lawrence A. Klinger (Civil Division)

LONGSHOREMEN'S AND HARBOR WORKERS' ACT

Superseding Workmen's Compensation Award Order May Be Entered by Deputy Commissioner Only if Based on Mistake in Determination of Facts Supporting Original Order or on Change in Claimant's Condition Subsequent to Original Order. Pistorio v. Einbinder (C.A.D.C., No. 19152, September 9, 1965). D.J. No. 83-16-265. The Deputy Commissioner on August 20, 1962, entered a compensation order for claimant which included a permanent partial disability rating of 50 per cent. That award was modified by order filed March 27, 1964 reducing the disability rating to 15 per cent retroactive to June 1, 1962. In review proceedings, the district court entered summary judgment for the Deputy Commissioner.

The District of Columbia Circuit reversed the judgment of the district court with instructions to remand the case to the Deputy Commissioner for reinstatement of the 1962 compensation order. Section 922 of the Longshoremen's

and Harbor Workers' Compensation Act authorizes entry of a new compensation order "on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner." The Court of Appeals ruled that since the second order was not predicated on a mistake of fact and the record was devoid of substantial evidence of any change in claimant's condition from the date of the original order, the Deputy Commissioner was without authority to enter the second compensation order.

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

STATUTES OF LIMITATION

State Statute of Limitations Cannot Bar Suit by United States to Enforce Right Acquired by RFC. United States v. 93 Court Corporation (C.A. 2, No. 29699, August 31, 1965). D.J. No. 105-51-53. This suit was brought by the United States to recover a debt owed to the Reconstruction Finance Corporation, by foreclosing on property mortgaged to secure the debt. The district court ordered the appointment of a receiver on the mortgaged property. Appellants argued that the suit was untimely, because the general rule exempting the United States from state statutes of limitation did not apply where the Government sued on an RFC claim since Congress had not specifically extended to the RFC the general governmental immunity from the operation of such statutes. The Second Circuit affirmed. It refused to hold "that Congress must specifically endow each government corporation it creates with an expressed exemption from the bar of statutes of limitations or from the defense of laches," and ruled that the State statute could not bar a Government suit on an RFC claim.

Staff: Florence Wagman Roisman and Morton Hollander. (Civil Division)

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CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

ELKINS ACT

Credit Extension by Carrier to Shipper for Freight Charges. United States v. Portland Traction Company and United States v. Pacific and Atlantic Shippers, Inc. (D. Ore.). D.J. File 59-8-812. The practice of extending unauthorized credit for freight charges by a carrier to a favored shipper has the effect of providing the shipper with working capital. When a shipper obtains this advantage or concession the purpose of the Elkins Act (49 U.S.C. 41(1)) that all shippers be treated alike is defeated.

Portland Traction and the shipper-forwarder, Pacific and Atlantic, which was on a legally permissible 48 hours after presentation of freight bill credit list of the carrier, acquiesced in a course of conduct whereby the shipper was continually allowed to pay its freight bills late (by anywhere from 16 to 43 days) and the outstanding overdue bills at one time were in excess of $91,000.

The carrier and the shipper were charged in separate informations of 5 counts each with respectively granting and receiving unlawful concessions. The shipper pleaded and was fined $2,000. The carrier, however, went to trial and was convicted by a jury on all 5 counts, and was fined $1,000 on each for a total of $5,000, which has been paid.

The carrier in both pretrial and postverdict motions (which were denied) had relied upon the Court of Appeals decision of that circuit in United States v. Continental Shippers' Association, 328 F. 2d 966 (C.A. 9, 1964). In that somewhat similar case the evidence showed that the carrier tried to prevent continued credit violations by removing the shipper from the credit list and by requiring payments in cash prior to delivery of the goods. The Court of Appeals had said that "A mere violation of the Interstate Commerce Act credit regulations does not necessarily violate the Elkins Act" and that there was in the Continental case "a failure of evidence to support the charge" but stated as well that "Of course, if the evidence had shown a long-standing record of unobjected-to late payments, a course of action amounting to the giving and receiving of discriminatory credit might be found." In the instant case the carrier never once suspended the shipper's credit or exercised its undisputable right to require payment in cash prior to delivery of the goods.

Staff: Assistant United States Attorney Charles H. Habernigg (D. Ore.).

FRAUD - FHA

18 U.S.C. 1010

False Statements; Unnecessary to Prove Government Was Defrauded or Reliance by Government Officials. Ernest Henninger v. United States (C.A. 10, September 16, 1965). Appellant, convicted on a three count information charging violations of 18 U.S.C. 1010 in making false statements on applications for Title I FHA home

improvement loans, contended it was necessary that the Government prove that the admittedly false statements actually influenced the Federal Housing Administration to insure the loans.

Quoting the statute, the Court concluded that the essence of the crime lies in the making, passing uttering or publishing of a false application with the intent to influence the Administration and is not dependent upon the accomplishment of that purpose, Cohen v. United States, 178 F. 2d 588 (C.A. 6), cert. denied 339 U.S. 920; Bins v. United States, 331 F. 2d 390, 392 (C.A. 5), cert. denied 379 U.S. 880. The crime is one of subjective knowledge and intent and requires no defrauding of the Government nor reliance upon the part of its officials. Brilliant v. United States, 297 F. 2d 385, 389 (C.A. 8), cert. denied, 369 U.S. 871; United States v. Pesano, 293 F. 2d 229, 231 (C.A. 2)

Staff: United States Attorney Lawrence M. Henry;
Assistant United States Attorney Milton C. Branch
(D. Colo.).

FRAUD

Violations of Securities Laws; Immunity From Prosecution; Delay in Presenting to Grand Jury. United States v. Kane, 243 F. Supp. 746 (S.D. N.Y., 1965). D.J. File 113-51-161. Defendants were indicted for conspiracy and the sale of unregistered stock of American Dryer Corporation. One of the defendants moved to dismiss the indictment on the ground, inter alia, that he had obtained immunity from prosecution. He had appeared, pursuant to a subpoena, before an officer of the Securities and Exchange Commission and refused to testify, claiming his privilege against incrimination. He alleged that several months later an SEC investigator questioned him on two occasions concerning stock transactions without advising him that the information could be used in a criminal prosecution. The investigator denied the interrogations, but the Court found it unnecessary to resolve the fact issue. It was held that this defendant was not "compelled" to answer any questions, as required by Section 22(c) of the Securities Act of 1933 (15 U.S.C. 77v(c)). The Court noted that the defendant acknowledged that his counsel was present at the first interview, and found that he responded voluntarily and not under compulsion, real or imagined.

The Court found "troubling" the delay in presenting the case to the Grand Jury, the indictment having been returned only shortly before the statute of limitations would expire. The motion to dismiss on this point was denied, in the absence of any showing of bad faith on the part of the Government or prejudice to the defendants. The Court stated, however, that the denial was without prejudice to a renewal at the trial, and also that the delay was not condoned. Because of this factor, the Court granted a full and broad discovery.

Staff: United States Attorney Robert M. Morgenthau;
Assistant United States Attorney Paul R. Grand
(S.D. N.Y.)

WIRE FRAUD - CONSPIRACY

Wire Tapping - Telephone Company Not Prohibited From Monitoring Its Own

Lines and Divulging Communications; Motions to Dismiss Indictment and to Suppress Evidence Denied. United States v. Gilbert L. Beckley et al (N.D. Ga.). D.J. File 122-51-149. On January 7, 1965 defendants were charged in a 20-count indictment with violating the wire fraud (18 U.S.C. 1343) and conspiracy statutes (18 U.S.C. 371) by defrauding the telephone company of the honest services of its employees, moneys due it for its services, and causing the Company to violate 47 U.S.C. 203(c), which prohibits a carrier from furnishing services contrary to its tariffs filed with the Federal Communications Commission. Defendants were alleged to have secured the services of a long distance telephone company employee and through him covertly placed free interstate and foreign gambling telephone calls.

Defendants filed motions to dismiss the indictment and suppress evidence. On September 29, 1965 Senior District Judge Boyd Sloan, overruled these motions, holding: (1) Contrary to defendants' contention that the interstate wires were not used to execute any fraud, but their use was the fraud itself, that "Where the use of the wires is an essential part of the scheme to defraud such use is 'for the purpose of executing' the scheme" (emphasis supplied), citing Gregory v. United States, 253 F. 2d 104, 109-110 (C.A. 5, 1958). (2) False representations or promises are not necessary allegations to a charge of wire fraud; all that is required is a scheme reasonably calculated to deceive and a use of the wires in execution of it. (3) By virtue of 47 U.S.C. 501 which makes it an offense for "any person (to) knowingly cause....to be done any...thing in this chapter prohibited..." the defendants were capable of causing the telephone company to violate 47 U.S.C. 203(c). (4) The evidence of the telephone conversations was not secured in violation of the wiretapping statute (47 U.S.C. 605) or the defendants' Fourth Amendment right against unreasonable searches and seizures.

Wiretapping without trespass on the defendant's premises does not violate the Fourth Amendment, citing Olmstead v. United States, 277 U.S. 438, 457, 466 (1928). "Section 605 does not prohibit the telephone company from monitoring its own lines.... (or) deprive the... company of the right to employ reasonable means to detect and prevent violations thereof by its own employees (especially) where, as is here alleged, a corrupt employee allows long distance calls to be covertly made without charge and in a manner which bypasses the regular bookkeeping procedures of the company..." Divulgence by the telephone company of the communications does not violate any of the defendants' rights to privacy under Section 605 since they were unlawfully on the lines in the first place. Casey v. United States, 191 F. 2d 1, 4(C.A. 9, 1951), reversed on other grounds 343 U.S. 808 (1952); and Sugden v. United States, 226 F. 2d 281, 285 (C.A. 9, 1955), aff'd. per curiam 351 U.S. 916 (1956).

Staff: Messrs. Dougald McMillan and David P. Bancroft (Criminal Division).

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

DEPORTATION

Second Circuit Rules That Deportability of Long-time Alien Resident Must Be Established Beyond a Reasonable Doubt. Joseph Sherman v. INS (C.A. 2, No. 29487, September 22, 1965) D.J. File 39-36-329. Petitioner, an alien resident of the United States since 1920, brought this action under Section 106(a) of the Immigration and Nationality Act, 8 U.S.C. 1105a, to review an order for his deportation predicated upon an alleged illegal entry into the United States by him in 1938 as a citizen of the United States. He contended that the Special Inquiry Officer and the Board of Immigration Appeals in making their determination of deportability should have required the Immigration and Naturalization Service to prove beyond a reasonable doubt that he had made an illegal entry. Circuit Judge Waterman writing for the majority of the Court agreed with petitioner that this standard of proof should be applied in the deportation cases of long-time alien residents. He said it was for the Board of Immigration Appeals to decide in the first instance as to what deportation cases involved long-time alien residents and required the application of the high degree of persuasion announced by the Court in its opinion. The Court remanded the case for further administrative proceedings not inconsistent with the opinion.

Circuit Judge Friendly dissented on the ground that the imposition of a special judicially prescribed burden of persuasion on an ill-defined group of cases would introduce confusion and uncertainty into deportation law. It was his view that the provisions of the Immigration and Nationality Act and its legislative history clearly indicated that in all deportation cases deportability was to be established upon the basis of reasonable, substantial, and probative evidence and that since the Government had met this burden of proof in petitioner's case, his petition for review should have been denied.

The Government is considering whether to petition for a rehearing.

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

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LANDS DIVISION

Assistant Attorney General, Edwin L. Weisl, Jr.

Condemnation: Impairment of Navigation; Tucker Act; Government Can Only Be Made to Take Property Described in Declaration of Taking; Damages Arising After Date of Taking. First National Bank of Brunswick, Trustee under the will of Lucy Carnegie v. United States (C.A. 5, No. 20650, September 14, 1965, D.J. File 33-11-393). The United States condemned 492 acres of marshland located on Cumberland Island, Georgia, to provide a place to deposit spoil being dredged for a ship channel. Due to the apparent failure of the Government's contractor to properly contain the deposit of spoil within the limits of this property, the use of a previously navigable tidal stream was greatly diminished. Appellants claimed damages in the amount of $100,000, which was the estimated cost to replace the dock and harbor facilities they had lost due to the shoaling of the tidal stream. Appellants' holdings on Cumberland Island consisted of 13,051 acres valued before the taking at $4,000,000. Appellants claimed and obtained a judgment for $15,000 as compensation for the acreage taken but were denied any compensation for the loss of the tidal stream and dock.

The Court of Appeals affirmed the district court's denial of appellants' claim for loss of their dock and the use of a navigable stream. The Court refused to rule, as argued by the United States, that appellants did not have a vested right in a navigable stream and to follow the holding of United States v. Commodore Park, 324 U.S. 386 (1945), which was clearly controlling in this case. Instead, the Court avoided the basic issue presented and held that "Every condemnation action cannot be opened for the inclusion of subsequent damages which may actually result although not plainly demonstrable at the time of taking. There must be a cutoff period in condemnation suits in order for the determination of fair compensation to all parties involved."

The Court distinguished this case from West Virginia Pulp & Paper Co. v. United States, 200 F.2d 100 (C.A. 4, 1952), and United States v. Grizzard, 219 U.S. 180 (1911), on the grounds that the damage here was not reasonably foreseeable by either party at the time of taking.

Staff: George R. Hyde (Lands Division).

Condemnation; Right to Take; Valuation of Separate Parts Which Contributed to Value of Whole; Experts Permitted to State Their Qualifications and Reasoning to Show How They Arrived at Their Opinions of Value; Findings of Commission Shall be Accepted Unless Clearly Erroneous; Necessity of Taking Not Reviewable; Excessive Taking of Land Is Authorized or Licensed Arbitrariness; Admission Into Evidence of Charts and Summaries of Testimony Is Discretionary; Burden of Proof Rests on Landowner; Instructions Must Be Considered as Whole and Not Piecemeal; Remote or Speculative Possibilities Cannot Become Guide for Ascertainment of Value. Wendell S. Wilson v. United States (C.A. 10, No. 7867, D.J. File 33-52-182-7). The United States condemned the fee simple title to lands determined to be necessary for use in the construction and operation of the Flaming Gorge Reservoir, Colorado River Storage Project. The issue of just compensation was referred to a commission appointed under the provisions of Rule 71A(h), F.R.Civ.P. The commission obviously relied heavily on the Government's expert witnesses in determining the amount of money due the landowners

because of the taking. The award varied only slightly from the Government's experts' testimony.

The Court of Appeals, in affirming the district judge's acceptance of the commission's findings, approved the method used by the Government's valuation experts of breaking down the value attributed to the whole property by soil types and location. The Court stated that, unless experts state the grounds of their opinions, their testimony would be of little value. The Court went on to hold that "findings of a commission in a condemnation case shall be accepted by a trial court unless they are clearly erroneous. This court will not retry the facts and a finding based on sharply conflicting evidence is conclusively binding here."

The Court, in answering appellant's charge that excessive land was taken for the project, stated that 40 U.S.C. 258 does not require proof of necessity for land taken, but that the question of need depends solely on the opinion of the federal officer. The nature, extent or necessity for the interest to be acquired were stated to be not reviewable or questions for judicial determination. The Court here has expressly approved an apparently excessive taking as "authorized" or "licensed" arbitrariness because it was made with some determining principle.

The Court approved the use by the Government of charts and summaries of the testimony of experts as a proper exercise of the court's discretion, fully justified because of the nature of the testimony given.

In addition, the Court treated a number of arguments and principles which are frequently presented in condemnation cases. For example, the Court held that the burden of showing damages rests with the landowner; that remote and speculative possibilities cannot become a guide for the ascertainment of value; that valuation testimony concerning property not described in the complaint and declaration of taking should not be admitted into evidence; and that in reviewing instructions given to a commission, they must be considered as a whole, and not piecemeal. The Court also expressly approved and quoted the Government's instruction concerning highest and best use.

Staff: George R. Hyde (Lands Division).

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TAX DIVISION

Acting Assistant Attorney General Richard M. Roberts

CIVIL TAX MATTERS

District Court Decisions

Jurisdiction of Bankruptcy Court Over Claim for Tax Penalties; Bankruptcy Court Lacks Jurisdiction to Adjudicate Claim for Tax Penalties Once Arrangement Under Chapter XI of Bankruptcy Act Has Been Confirmed and All Allowed Claims Have Been Paid in Full. In re WNCN, Inc. (S.D. N.Y., July 21, 1965). (CCH 65-2 U.S.T.C. ¶9596). A plan of arrangement filed by the debtor WNCN, Inc. was confirmed by the Bankruptcy Court on April 15, 1964, pursuant to which all creditors were to be paid 100 per cent of their claims in cash. Among the claims paid was a tax claim for $8,517.78 paid to the District Director of Internal Revenue on June 9, 1964. After payment in full of all allowed claims, there remained a surplus of $1,207.23. Thereafter, the District Director served a notice of levy representing tax penalties in the sum of $796.72, on the allowed tax claim of $8,517.78. The debtor filed a petition to have the Referee disallow the claim of the District Director for the tax penalties on the ground that the penalties were not allowable under Section 57j of the Bankruptcy Act. The Referee, however, ruled that he had no jurisdiction to adjudicate the claim for tax penalties. In affirming the Referee's decision, the District Court ruled that upon confirmation of a plan of arrangement, the Referee has no jurisdiction to adjudicate claims unless jurisdiction is expressly retained after confirmation, in accordance with Sections 369 and 370 of the Bankruptcy Act. The Court further ruled that since all the allowed claims had been paid in full pursuant to the order of confirmation, Sections 369 and 370 were rendered inapplicable.

By way of dictum, the Court stated that the surplus remaining in the hands of the debtor was available to the District Director for the payment of the tax penalties. The Court felt that the reasoning of Bruning v. United States, 376 U.S. 358, holding that post-petition interest on an unpaid tax debt not discharged by the bankruptcy proceedings remains, after bankruptcy, a personal liability of the debtor, was equally applicable to the collection of tax penalties out of the surplus remaining in the hands of the debtor. The Court felt that a contrary holding against the District Director would permit a debtor inconvenienced by tax penalties to do what the debtor did in the instant case, namely, enter into an arrangement proceeding, thereby eliminating a valid tax liability, pay all creditors the full amounts of their claims, and, having avoided the tax penalties, distribute a surplus to its stockholders.

Staff: United States Attorney Robert M. Morgenthau;
Assistant United States Attorney Dawnald R. Henderson (S.D. N.Y.)

Jurisdiction; Court Is Without Jurisdiction to Hear Action by Taxpayer to Enjoin Collection of Tax and for Declaratory Judgment That Assessments Are Null and Void. Julius J. Kaufman v. Thomas E. Scanlon. (E.D. N.Y., May 27, 1965). (CCH 65-2 U.S.T.C. ¶9462). An assessment of a responsible officer penalty had been made against plaintiff pursuant to Section 6672, Internal Revenue Code of

1954, because of his failure to withhold and pay over certain payroll taxes. Plaintiff's complaint sought a declaratory judgment declaring the assessment null and void and an injunction against the District Director and his delegates from collecting the assessment. Jurisdiction was claimed by virtue of 28 U.S.C. 1340 and 1345 and §6672 of the Internal Revenue Code of 1954.

The complaint sought to come within the jurisdictional caveat of Enochs v. Williams Packing Co., 370 U.S. 1, i.e., "under the most liberal view of the law and the facts, the United States cannot establish its claim." To do this, plaintiff alleged that the company primarily liable for the withholding taxes never was incorporated, that plaintiff never was an officer, and that he never had control over the funds.

In moving to dismiss for lack of jurisdiction, the Government filed factual affidavits showing that plaintiff had signed the company's tax return and that he had authority to sign company checks. It was submitted that the above-stated facts were sufficient to preclude jurisdiction.

The Court treated the Government's motion to dismiss as a motion for summary judgment, Central Mexico Light & Power Co. v. Munch, 116 F. 2d 85 (C.A. 2), and, in granting the motion, held:

> Plaintiff, upon the statements in his own papers and the exhibits he supplies or does not dispute, fails as a matter of law to satisfy the stricture of Enochs' prerequisite to jurisdiction found, that the assessee demonstrate "under the most liberal view of the law and the facts the United States cannot establish its claim" and the Botta and Vuin [Botta v. Scanlon 314 F. 2d 392 (C.A. 2d); Vuin v. Burton, 327 F. 2d 967 (C.A. 6th)] addendum requiring the existence of extraordinary circumstances as a further basis for the jurisdiction asserted. A showing of extreme hardship resultant from immediate enforcement and irreparable injury in consequence is insufficient to overcome the barrier of §7421(a).

Staff: United States Attorney Joseph P. Hoey and Assistant United States Attorney Barry Bloom (E.D. N.Y.); Charles Simmons, (Tax Division).

Jurisdiction; Taxpayer Held Not Entitled to Question Merits of Tax Assessment in Suit Instituted to Quiet Title to His Property. Libro J. Galanti v. United States, et al. (D. N.J., August 17, 1965). Taxpayer instituted this action to quiet title to his property and to expunge tax liens filed against his property after examining the merits of the assessments of 100 per cent penalty assessments made against him as a responsible officer of a corporation who willfully failed to withhold and pay over payroll taxes. He also sought to enjoin levies against his property. The United States was named pursuant to 28 U.S.C. 2410 (waiving sovereign immunity in certain lien foreclosure cases and quiet title actions).

The United States moved to dismiss the complaint based on the failure of

the Court to have jurisdiction to grant the requested relief. The Court granted the Government's motion citing the growing list of the cases denying the right of a taxpayer to invoke Section 2410 in a sought-for examination of the merits of tax assessments underlying liens sought to be expunged. Portions of the opinion in the Third Circuit case of Quinn v. Hook, 341 F. 2d 920 were cited in the opinion. The Court noted that the Third Circuit opinion had effectively overruled the holding in Sonitz v. United States, 221 F. Supp. 62 (D. N.J.), which had held that district courts had jurisdiction of such suits.

Staff: United States Attorney David M. Satz (D. N.J.) and Arnold Miller (Tax Division).

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