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BULLETIN

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Vol. 13 December 6, 1965 No. 25

ADMINISTRATIVE DIVISION

Acting Assistant Attorney General for Administration John W. Adler

Witnesses -- Armed Forces -- Cancellation

The Office of the Judge Advocate General, Department of the Army, has directed our attention to several instances where the travel of military witnesses has been cancelled direct without notification to the Washington office. We appreciate your contacting the witnesses immediately to stop unnecessary travel but request that you also forward a notice by letter to the office of Assistant Attorney General for Administration, as soon as convenient, so that this office can keep the armed forces informed.

All branches of the armed forces operate on limited funds for travel as witnesses. For this reason any release of obligated funds is important.

The following Memoranda applicable to United States Attorneys Offices have been issued since the list published in Bulletin No. 22, Vol. 13 dated October 29, 1965:

MEMOS	DATED	DISTRIBUTION	SUBJECT
429-S1	11/5/65	U.S. Attorneys & Marshals	Amendment of the Retirement Act to Provide Increases in Annuities.
430	10/25/65	U.S. Attorneys	Minimum Standards of Currency Applicable to the Civil Caseload.
431	10/29/65	U.S. Attorneys & Marshals	Deeds in Federal Housing Admin. Single Home Family Foreclosures.
431-S1	11/12/65	U.S. Attorneys & Marshals	Deeds in Fed. Housing Admin. Single Home Family Foreclosures.
432	11/3/65	U.S. Attorneys & Marshals	Federal Employees Salary Act of 1965.
433	11/3/65	U.S. Attorneys & Marshals	Federal Employees Salary Act of 1965.
433-S1	11/8/65	U.S. Attorneys	Federal Employees Salary Act of 1965.
434	11/5/65	U.S. Marshals	Collections in Seamen Cases.
435	11/9/65	U.S. Attorneys	Successive Federal-State Prosecution; Wagering Tax, Liquor Tax, and Narcotic Tax Violations.
436	11/12/65	U.S. Attorneys	Improved and Expedited Handling of Collections.

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ANTITRUST DIVISION

Assistant Attorney General Donald F. Turner

Beer Companies Charged With Violation Of Section 7 Of Clayton Act. United States v. Rheingold Corporation, et al. (S.D. N.Y.) D.J. File No. 60-0-37-749. On November 9, 1965, a suit was filed under Section 7 of the Clayton Act challenging the acquisition of assets of Jacob Ruppert by Rheingold Breweries, Inc. The complaint prayed for the issuance of a temporary restraining order and a preliminary injunction to enjoin the parties from consummating the proposed acquisition pending adjudication of the matter on the merits.

Rheingold Breweries is the eleventh largest seller of beer in the nation and the second largest in the Northeast. In 1964, Rheingold sold 3.1% of all beer sold in the United States and 13.3% of all beer sold in the Northeast. Rheingold is the largest seller of beer in the New York metropolitan area and in 1964 sold in excess of 16% of all beer sold in that area. Jacob Ruppert is the twentieth largest seller of beer in the nation and the fifth largest in the Northeast. In 1964, Ruppert sold 1.6% of all beer sold in the United States, 6.6% of all beer sold in the Northeast and over 5% of the beer sold in the New York metropolitan area.

Concentration in the beer industry has been steadily increasing during the last fifteen years. In 1964, the top ten brewing firms in the nation sold over 57% of all beer sold in the United States. In 1964, the top nine brewing firms in the Northeast accounted for over 70% of all beer sales in that area, while in the New York metropolitan area the top nine firms in that area accounted for over 90% of total beer sales.

The complaint alleges that: (1) competition between Ruppert and Rheingold Breweries will be eliminated; (2) competition generally in the production and sale of beer may be substantially lessened; (3) concentration in the production and sale of beer will be substantially increased, and (4) mergers and acquisitions in the beer industry may be fostered to the detriment of competition.

On November 10, 1965, Judge John F. X. McGohey approved a stipulation entered into by the parties requiring Rheingold to use due diligence to maintain the volume of sales of beer under Ruppert's brand names and to report to the Government each calendar quarter the volume of such beer sold in each State. The stipulation also provided the Government with visitation rights for the purpose of securing adherence by Rheingold to the stipulation. The Government in turn agreed not to apply for a temporary restraining order or a preliminary injunction. On November 11, 1965, the acquisition was consummated.

Staff: John J. Galgay, John D. Swartz, Bertram M. Kantor and Philip F. Cody (Antitrust Division)

Seven Corporations Given Maximum Fines For Sherman Act Violations. United States v. The American Oil Company, et al. (E.D. Mo.) D.J. File No. 60-206-413. On November 19, 1965, United States District Court Judge John K. Regan accepted nolo contendere pleas of the 18 corporate defendants and the 17 individual defendants and imposed fines totalling $609,500. Judge Regan also sentenced each of the 17 individual defendants to six months in jail. The court suspended the serving of the jail sentence and placed each individual defendant on probation for a period of one year.

In imposing sentences Judge Regan said he believed the penalties were commensurate with the gravity of the fines. Judge Regan also stated:

> This was a flagrant violation against the people of the State of Missouri.

The Judge expressed the hope that the penalties imposed will deter anyone else from committing a similar offense.

The defendants had tendered nolo pleas, the acceptance of which the Government had opposed in oral argument on October 19, 1965. The Government argued that in view of the flagrant nature of the offense against a sovereign State that a trial of the case was a more appropriate disposition of the case than the acceptance of nolo pleas. Judge Regan fined the defendants as follows:

The American Oil Company	$50,000
Phillips Petroleum Company	50,000
Socony Mobil Oil Company, Inc.	50,000
Skelly Oil Company	50,000
Shell Oil Company	50,000
Sinclair Refining Company	50,000
Kerr-McGee Oil Industries, Inc.	50,000
American Petrofina Company of Texas	30,000
Apco Oil Corporation	25,000
Union Asphalts & Roadoils, Inc.	25,000
Delta Refining Company	20,000
Missouri Petroleum Products Company	15,000
Rock Hill Asphalt & Construction Company	15,000
Allied Materials Corporation	15,000
Saunders Petroleum Company	15,000
Trinidad Asphalt Mfg. Co.	15,000
Wilshire Oil Company of Texas	10,000
Hydrocarbon Specialties, Inc.	2,500
Edward P. Gomes, President Missouri Petroleum Products Company	7,500
Charles Harrison, Jr., President Rock Hill Asphalt & Construction Company	7,500
John C. Heman, President Trinidad Asphalt Manufacturing Company	7,500
Patricia Miller Lorenz, President Union Asphalts & Roadoils, Inc.	7,500

F. P. Coggeshall, Jr., Manager Asphalt Department The American Oil Company	$4,000
Jack D. Dahlgren, Sales Manager Allied Materials Corporation	4,000
Siegfried Diegel, Area Manager of Asphalt Sales, Sinclair Refining Company	4,000
K. E. Gardner, Manager Wholesale and Export Sales Phillips Petroleum Company	4,000
Guy W. Glass, Assistant Sales Manager Asphalt Division, Delta Refining Company	4,000
E. F. McNeilly, Assistant Manager Asphalt Department, The American Oil Company	4,000
R. L. Saunders, Vice President Saunders Petroleum Company	4,000
Robert O. Wilson, General Manager Asphalt Sales, American Petrofina Company of Texas	4,000
A. C. Jones, Area Manager of Highway Sales Socony Mobil Oil Company, Inc.	2,000
Orville L. Miller, Area Manager of Asphalt Sales, Shell Oil Company	2,000
Jack Mitchell, Manager, Asphalt Sales Kerr-McGee Industries, Inc.	2,000
O. Homer Riffe, Vice President Riffe Petroleum Division of Wilshire Oil Company of Texas	2,000
Rollin J. Smith, Manager, Asphalt Sales Skelly Oil Company	2,000

It is believed the total fines in this case, wherein 18 corporations and 17 individuals were charged with a conspiracy to rig bids and fix prices in the sale of liquid asphalt to the State of Missouri, are the largest ever imposed in the history of the Antitrust Division in a single count Sherman Act indictment. In settlement of potential treble damage claims, the defendants on the eve of the indictment in exchange for covenants not to sue paid the State of Missouri more than $2,000,000. Payments made by some of the defendants to the State of Missouri were as follows:

The American Oil Company	$533,953
Phillips Petroleum Company	345,000
Shell Oil Company	342,926
Socony Mobil Oil Company	158,097
Sinclair Refining Company	134,500
Kerr-McGee Oil Industries, Inc.	91,032
American Petrofina Company of Texas	79,444
Missouri Petroleum Products Company	75,000
Skelly Oil Company	67,848

Staff: Raymond D. Hunter, John Edward Burke, William T. Huyck, Joseph E. Paige, Harry H. Faris and Elliott B. Woolley (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General John W. Douglas

COURT OF APPEALS

GOVERNMENT CONTRACTS

Exculpatory Clause in Lease Bars Suit Under Federal Tort Claims Act For Damages By Poisoning of Cattle Through Alleged Negligence of the United States. Aaron Bailey v. United States, (C.A. 5, No. 22219, decided November 12, 1965). DJ File 157-1-155. Plaintiff, a lessee of grazing land from the Government, sued under the Tort Claims Act for damages for the poisoning of its cattle, allegedly caused by negligence of the United States, which occurred on the leased property. The Fifth Circuit affirmed the district court's grant of summary judgment for the Government, holding that an exculpatory and hold-harmless clause in the lease between the parties which provided in part that "the United States * * * shall not be responsible * * * for damages to the property of the lessee" was controlling and a bar to recovery by the plaintiff.

Staff: Martin Jacobs (Civil Division)

LIMITATIONS-ADMINISTRATIVE LAW

Secretary of the Treasury May Consider Only Misconduct Occurring Within Five Years of the Date Upon Which a Revocation Proceeding Was Instituted, in Determining Whether a Customhouse Broker's License Should Be Revoked. H. P. Lambert Co. v. Secretary of the Treasury, (C.A. 1, No. 6493, November 15, 1965). DJ File 145-3-744. This decision is the first by a court of appeals dealing with the revocation by the Secretary of the Treasury of licenses of customhouse brokers under the authority of 19 U.S.C. 1641(b). The court rejected, inter alia, the contentions of the brokers that the Louisiana collector of customs could not institute revocation proceedings against individual residents of Massachusetts who exercised supervision and control over the operation of a customhouse broker's office in Louisiana and that the Assistant Collector of Customs had no authority to act as hearing officer in this proceeding.

However, the court remanded the case to the Secretary, holding that in view of 28 U.S.C. 2462, the Secretary, in determining whether the license should be revoked, should have considered only misconduct occurring within five years of the date upon which the revocation proceeding had been instituted.

Staff: Alan S. Rosenthal, Jack H. Weiner (Civil Division)

NATIONAL BANKS

Comptroller of the Currency May Authorize Branch of National Bank Without Hearing, But Court Reviewing Action of Comptroller Will Try Facts De Novo. First National Bank of Smithfield, North Carolina v. James J. Saxon, Comptroller of the Currency, (C.A. 4, No. 9795, decided October 21, 1965) DJ File 145-3-625. The court of appeals, reversing the district court, held that the Comptroller of the Currency could approve the establishment of a branch of a national bank

without holding a hearing conforming to the requirements of the Administrative Procedure Act. The court noted that there was no statutory requirement for hearing and that the uniform administrative practice of the Comptroller for many years, and with the apparent sanction of Congress, was to make such authorizations without an adversary hearing.

However, the court also ruled that a court reviewing the Comptroller's determination could try the facts de novo, and that review in such circumstances would not be limited to the ascertainment of whether substantial evidence supported the Comptroller's action. In dissent Judge Sobeloff stated that in his view the Comptroller was required to afford banks objecting to a proposed authorization of a branch the information and representations upon which the application was based, as well as the informal conference which was actually accorded, before the authorization was made.

Staff: David L. Rose (Civil Division)

Establishment of Branches By National Banks Held to Be Limited to Circumstances in Which State Banks Authorized By State Law to Branch. Walker Bank & Trust Co. v. James J. Saxon, Comptroller of the Currency, (C.A. 10, No. 7981, October 26, 1965), and Saxon v. Commercial Security Bank, (C.A. D.C., No. 19357, November 18, 1965). DJ Files 145-3-617 and 145-3-619. This action was brought by a state bank to obtain a declaratory judgment decreeing the action of the Comptroller, authorizing a national bank in Utah to establish and operate a branch bank in the city in which it was located, to be illegal. A state bank could not under the applicable Utah statute establish a branch in the same city unless it took over an existing bank. The issue here was whether this limitation in state law applied to national banks by virtue of 12 U.S.C. 36(c)(1). Rejecting the Comptroller's argument that so long as establishment of branch banks was generally sanctioned by state law no other limitations of the state law were applicable to national banks within the state, the court of appeals ruled that Congress intended "that the measuring stick of national branch banks is state law." The court reasoned that Congress intended to create and maintain a competitive equality between state and national banks.

On the authority of the Tenth Circuit's decision in the Walker case the District of Columbia Circuit reached the same result in the Commercial Security case presenting the same issue less than three weeks later.

Staff: David L. Rose, Kathryn H. Baldwin (Civil Division)

SOCIAL SECURITY ACT

Social Security Disability; Use of Vocational Studies and Medical Texts By Secretary in Making His Disability Determinations Disapproved. Edward E. Haley v. Gardner, (C.A. 10, No. 8154, decided October 6, 1965). DJ File 137-59N-18. In this Social Security disability case the Tenth Circuit became the first appellate court to reject outright the Secretary's practice of relying upon governmental vocational publications such as the Dictionary of Occupational Titles and Estimates of Worker Trait Requirements for 4,000 Jobs and pertinent medical texts in support of determinations that particular claimants are not disabled but may engage in substantial gainful employment. The Tenth Circuit gave as its reason for the rejection of this practice the general nature of the

publications. The court ruled that only material specifically relating to the individual claimants might be relied upon by the Secretary in making his determinations. The Tenth Circuit, therefore, reversed the judgment of the district court affirming the Secretary's denial of the claimant's application here and ordered the case remanded to the Secretary for further proceedings.

Staff: John M. Imel, United States Attorney and Hugh V. Schaefer, Assistant United States Attorney (N.D. Okla.)

WALSH-HEALEY ACT

Agreement to Furnish Supplies As Ordered By the Government Falls Under Walsh-Healey Act, Despite Failure of Contract to Mention Any Dollar Amount; Military Commissary Purchases Are Not Covered By Open-Market Exemption to Walsh-Healey Act. United Biscuit Company of America v. Wirtz, et al., (C.A. D.C., No. 18,489, decided November 19, 1965). DJ File 219715-261. The Walsh-Healey Act -- which provides for the setting of wage standards for employees working on government contracts -- covers contracts for the furnishing of supplies "in any amount exceeding $10,000." United Biscuit Company signed a "Purchase Notice Agreement" with the Military Subsistence Supply Agency, which committed United to supply such of its products as the Government might order, at specified prices or at any lower price that United might offer to any other purchaser. In return, the Agency agreed to distribute the list of United's products to military commissaries and that domestic military purchases would not be made from middlemen. Total purchases under the Agreement were several hundred thousand dollars, but no single order totalled over $10,000. United argued that the Agreement committed the Government to nothing and was thus not a "contract" -- that each order under the Agreement was a separate "contract". Alternatively, United argued that the Agreement was not a contract in the dollar amount required by the Act.

The court of appeals noted that United is one of the largest companies in its field, that actual purchases under the Agreement far exceeded $10,000, and that the parties must have realized this when the Agreement was signed. The court further noted that the price quotations took place when the Agreement was signed, the commissaries being committed to purchase at the quoted price. Thus any pressure on wages deriving from low price quotes would operate when the Agreement was signed. In the circumstances, the court concluded that the Agreement fell within the purposes and language of the Act.

United also argued that purchases under the Agreement fell within the Walsh-Healey exemption for open-market purchases. However, purchases under the Armed Services Procurement Act are not covered by the open-market exemption. United argued that the Armed Services Procurement Act was inapplicable because it applies only to purchases with appropriated funds. Commissary purchases are made out of revolving "stock funds," which are charged for purchase of inventory, and replenished when the inventory is sold. Under this arrangement, United argued, the Government was using moneys paid for commissary goods by commissary customers, rather than appropriated funds, to purchase its products under the Agreement. The court rejected this argument, noting that a Supreme Court dictum and an administrative ruling had said that these funds constituted appropriated moneys.

Staff: Robert V. Zener (Civil Division)

DISTRICT COURT

FEDERAL RULES OF CIVIL PROCEDURE

Failure of Substitution Pursuant to Rule 25(a)(1) After Government Filed Suggestion of Death Resulted in Granting of Government's Motion to Dismiss. Ina Marie Chase and Arthur Chase v. United States (E.D. Pa., Civil No. 34575, October 25, 1965). DJ File 157-62-466. Mrs. Chase sued under Tort Claims Act alleging injuries sustained in a Navy hospital. Thereafter on February 24, 1964, she died from an unrelated cause. The United States filed a suggestion of death on March 4, 1964, and when no substitution of a personal representative was made within the 90 day period provided under F. R. Civ. P. 25(a)(1), moved to have the wife's action dismissed.

Counsel claimed excusable neglect, but the Court found that one reason for the delay was, unhappily, counsel's failure to acquaint himself with the Rules, which did not constitute a legal excuse.

Staff: Mr. Drew J. T. O'Keefe, United States Attorney, Mr. John Patrick Kelley, Assistant United States Attorney (E.D. Pa.) and Mrs. Alice K. Helm (Civil Division)

FEDERAL TORT CLAIMS ACT

Doctrine of Estoppel By Judgment Invoked to Prevent Relitigation of Issue Decided Against Plaintiff in State Court Action Against Private Defendant, in Subsequent Federal Tort Claims Act Suit By Same Plaintiff Against Government. Falk v. United States, (S.D. Ohio, No. 3983) decided October 18, 1965. DJ File 157-58-109. An automobile driven by plaintiff's decedent was struck from the rear by another automobile while standing at a stop light during a heavy rain. Decedent was drenched while reporting the accident to the police and subsequently returned to his automobile and waited inside it. A few minutes later, after a Government vehicle skidded into decedent's automobile, decedent again was exposed to the rain. Plaintiff alleged that his decedent contracted pneumonia as a result of his exposure to the rain, and died as a result of a reaction to penicillin administered to him to treat the pneumonia.

Plaintiff's action in State court against the driver of the first automobile was dismissed. Subsequently, in this action under the Federal Tort Claims Act the federal district court granted the Government's motion for summary judgment, ruling that although the parties in the two suits were not identical, the doctrine of estoppel by judgment would be invoked to prevent relitigation of an identical issue.

Staff: Joseph P. Kinneary, United States Attorney, Charles G. Hyde, Assistant United States Attorney (S.D. Ohio)

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CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

UNIVERSAL MILITARY TRAINING AND SERVICE ACT

Counseling, Aiding or Abetting Refusal to Serve in the Armed Forces; Prosecutive Policy - Authorization from Department. A number of individuals and organizations are actively protesting United States foreign policy with respect to Vietnam. Some have circulated leaflets or petitions that condemn military activity of any nature and that urge others to refuse to serve in the Armed Forces or to engage in employment connected with armament or military fields. The publication and distribution of such propaganda may be in violation of that clause of Section 462(a), Title 50, U.S.C. App., which forbids any person knowingly to counsel, aid, or abet another to refuse or evade registration or service in the Armed Forces.

The Criminal Division will request the Federal Bureau of Investigation to conduct investigation of these incidents and copies of the reports will be furnished the appropriate United States Attorney as well as the Criminal Division.

In view of the right of free speech accorded under the First Amendment of the Constitution, uniformity in the enforcement of the statute must be achieved. Therefore, upon the completion of the investigation, the Criminal Division will advise the United States Attorney concerned as to what, if any, action should be taken. Under no circumstances should criminal proceedings be instituted without specific authorization from the Criminal Division.

GAMBLING

Failure to Pay Wagering Tax; Jury Instruction; Lesser-Included Offense Instruction Only Proper Where Charged Greater Offense Requires Jury to Find Disputed Factual Element Which Is Not Required for Conviction of Lesser-Included Offense. United States v. Stanley Joseph Markis (C.A. 2, October 29, 1965). D.J. File No. 160-14-221. Stanley Joseph Markis was convicted on a two-count information charging him with wilful failure to pay the special gambling occupational tax, 26 U.S.C. 7203, and with wilful failure to register, 26 U.S.C. 4412. Defendant's attorney requested the District Court to charge the jury:

> If you find that the Defendant was required under the Statute to register and pay the tax but that he did not wilfully, . . . , fail to pay such tax or wilfully fail to so register but that he merely did not pay the tax or register, then you may find him guilty of the lesser included offense set forth in 26 U.S.C. 7262.

This request to charge was denied. The requested charge was based upon Rule 31(c), Federal Rules of Criminal Procedure which provides that a defendant "may" be convicted of any "offense necessarily included in the offense" charged.

The Court of Appeals for the Second Circuit found that wilfulness was not an essential element of §7262, hence §7262 was an included offense within §7203. However, the Court of Appeals held that the above finding alone was not sufficient to reverse the conviction. In addition, the Court stated quoting United States v. Sansone, 380 U.S. 343, 350 (1965), that "A lesser-included offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense (emphasis supplied)." The Court held, therefore, that "The lesser-included offense charge is not required simply because a jury could exercise its power of acquitting on the greater charge for no reason at all 'in the teeth of both law and facts.' Horning v. District of Columbia, 254 U.S. 135, 138 (1920); there must be a rational basis for its doing so."

In Markis the defendant's extrajudicial admission as to his wilfulness was neither attacked nor contradicted. The Second Circuit found, therefore, that the issue of wilfulness was not in "dispute". Although the element of wilfulness was not an ingredient of the lesser offense, the Court held that since it was never placed in dispute the requested charge was properly denied.

Staff: United States Attorney Jon O. Newman; Assistant United States Attorney Howard R. Moskof (D. Conn.).

WAGERING

Interstate Transmission of Bets and Wagering Information (18 U.S.C. 1084). United States v. Lesly Cohen (U.S.D.C., N.D. Calif.). D.J. File No. 164-11-8. Defendant, a well-known bookie operating out of Las Vegas, Nevada, was indicted, tried and convicted for transmitting bets and wagering information from Las Vegas to San Francisco, California. The case was developed through the testimony of bettors who regularly used interstate telephone facilities to place bets with the defendant, the identity of such witnesses being ascertained through a systematic examination of telephone toll records relating to phones used by the defendant.

The investigative approach used involved the selection of prospective bettor witnesses known to have no criminal background. In certain cases examination of telephone toll records of such individuals revealed a pattern of interstate telephone communications transmitted to the defendant from telephones available to the bettors. Interviews by investigating agents and interrogation of such witnesses before a grand jury disclosed sufficient evidence upon which to base an indictment. At the trial only two witnesses testified as to bets made by phone from the district of trial; however, two others testified as to interstate phone bets made from other jurisdictions. The latter proof was admitted to show the defendant's knowledge and intent to use interstate facilities and as additional proof that defendant was in the business of betting and wagering.

Of particular interest in this case and others developed in a similar manner, is the fact that in appropriate situations approved by the Criminal Division, the immunity provision contained in the Federal Communications Act

(47 U.S.C. 409(1)) may be utilized to obtain needed testimony. Though immunity was not conferred in the instant case, it is known that the availability of the procedure was a significant factor in obtaining the testimony of key witnesses.

Staff: United States Attorney Cecil F. Poole; John C. Keeney and Louis Scalzo, Criminal Division.

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INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Trading with the Enemy Act (50 U.S.C. App. 5(b)); H. Grant Heaton v. United States (C.A. 9) (D.J. 146-39-147). The Court of Appeals for the Ninth Circuit affirmed appellant's conviction for violation of the statute which was based on certain transactions in merchandise originating in Communist China. The merchandise consisted of numerous art objects valued at more than $25,000.

Section 5(b) of the Act permits the President or his designee to prohibit the importation of "any property in which any foreign country or nation has any interest". Pursuant to the rule making authority of the statute, the Secretary of the Treasury has been authorized to issue regulations to implement the statute, and the Secretary's regulations, in order to control importation of goods from certain countries, including Communist China, require a license for the importation of goods from designated countries.

In affirming appellant's conviction, the court rejected his contention that because, as he claimed, the merchandise in question was outside China before the effective date of the regulations, the regulations were either inapplicable to such goods, or would be unconstitutional if retroactively applied. The Court, pointing out that the statute and regulations permit the importation of goods outside China at the time the regulations became effective, held that the licensing procedure was a reasonable method of control and, further, that appellant's crime was not his prior dealing in such merchandise but the present importation in violation of the licensing regulations.

Appellant also contended that the regulations exceeded the authority granted by the Act because the regulations prohibit the unlicensed importation of any goods which originated in mainland China, whereas the statute authorized the exclusion only of goods in which a foreign nation or national "has an interest". Pointing out that the purpose of the statute and regulations is to deny Communist China an outlet for its goods in the United States market and that this purpose is frustrated whenever goods produced in Communist China reached the United States market, whether directly or indirectly, and without regard to who may hold title to the goods, or, within broad limits, without regard to how much time has elapsed between its exportation from Communist China and its ultimate importation into the United States, the Court accepted the Government's position that Communist China "has an interest", within the meaning of the Act, in any goods produced in its territory which enter the channels of foreign trade, and, in so doing, the Court cited with approval the broad announcement of this principle in United States v. Broverman, 180 Fed. Supp. 631.

Staff: Robert L. Keuch (Internal Security) argued the case. With him on the brief were Kevin T. Maroney and Gary W. Hart (Internal Security).

Immigration and Nationality Act - Area Restrictions - Traveling Without a Passport (8 U.S.C. 1185(b)). Travis v. United States (C.A. 9, November 19, 1965) (D.J. 146-7-23-546). The Court of Appeals for the Ninth Circuit affirmed

appellant's conviction of having unlawfully departed the United States for travel to Cuba without a passport specifically endorsed for such travel. 8 U.S.C. 1185(b) makes it a crime, during a period of national emergency, to depart from or enter the United States without a valid passport. In Zemel v. Rusk, 381 U.S. 1, a civil action brought to compel the Secretary of State to issue a valid passport for travel to Cuba, the Supreme Court, upheld the power of the Secretary of State to impose area restrictions but declined to rule on whether or not 8 U.S.C. 1185(b) did or constitutionally could provide for criminal penalties for violation of area restrictions. In United States v. Worthy, 328 F. 2d 386, the Fifth Circuit had held that the statute applied to travel in violation of all restrictions but that the re-entry provisions, under which Worthy had been tried, was unconstitutional since it constituted banishment to make it a crime to re-enter a citizen's own country. This case, then, is the first appellate affirmance of criminal penalties for the violation of area restrictions.

The Court of Appeals in holding that the Act imposed criminal penalties for violation of the area restrictions the Court stated that the statute and regulations thereunder "demonstrates the plain and unambiguous meaning to be that a person is subject to criminal penalties on leaving the United States for Cuba without a valid passport." The Court also rejected a contention by appellant that hers was not an illegal "departure for Cuba" based on the fact that she traveled to Cuba via Mexico--for which a passport is not required-- and that at the time she departed Cuba she did not have that country's consent to enter, but received such consent in Mexico. The Court held that leaving the United States with the intent to go to Cuba constituted a "departure" for the purposes of the statute, pointing that a different holding would permit a citizen to circumvent the statute and render it a nullity.

Staff: Robert L. Keuch (Internal Security Division) argued the case. With him on the brief was Kevin T. Maroney (Internal Security Division).

Exportation of Munitions U.S. v. Randall Lee Etheridge, et al (S.D. Fla.) (See Bulletin of June 25, 1965, Vol. 13 No. 13) 146-1-18-1474. Prior to trial the indictment was dismissed against the defendant Baboun on motion of the Government. The trial was concluded on August 6, 1965, and a verdict of guilty was returned against all defendants on all counts of the indictment.

On December 1, 1965, after denying motions for a new trial, the Court sentenced two of the defendants, Etheridge and Dorsay, to imprisonment for three years on Count I and one year on Counts II and III, sentences to run concurrently, with the right to parole under 18 U.S.C. 4208(a)(2). The other two defendants, Smith and Spining, were sentenced to three years on the two counts under which each was charged, the sentences being split to imprisonment for four months and the balance on probation, sentences to run concurrently.

Appeal bonds were set at $5000.

Staff: United States Attorney William A. Meadows, Jr. and Assistant United States Attorney Lloyd G. Bates, Jr. (S.D. Fla.); Joseph T. Eddins (Internal Security Division)

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LAND AND NATURAL RESOURCES DIVISION

Assistant Attorney General Edwin L. Weisl, Jr.

Indians. Enforcement of Restrictions on Allotted Indian Land During Trust Period. Unauthorized Contracts Absolutely Null and Void. Indian Is Not Necessary Party to Suit Brought on His Behalf by United States. Duty of Court to Adjudicate Issues Submitted to it. United States v. Earl F. Emmons and Andreas Corporation (C.A. 9, No. 19,842, October 6, 1965, D.J. File No. 90-2-4-59). Action was brought by the United States in ejectment, to quiet title, for cancellation of instrument, and for damages, for benefit of a member of the Agua Caliente (Palm Springs) Band of Mission Indians. During the term of an approved lease, the Indian entered into a side agreement with the lessees for a long-term lease to commence at the expiration of the approved lease, and for payment of extra amounts during the term of the approved lease. The side agreement was not approved by the Bureau of Indian Affairs, as required. The statute for the relief of this band of Indians, 26 Stat. 712, provided that any contract touching the allotted lands during the trust period "shall be absolutely null and void." A long-term lease was never entered into. The district court held that the contract was null and void as to the United States, but the Indian was not before the court, and it "expresses no opinion and makes no ruling concerning the validity of the side agreement" between the Indian and the defendants. The court also refused to give the Government a judgment for damages, rent for the property for the time defendants remained on the property after the expiration of the approved lease, except insofar as the amount claimed exceeded the amount defendants had paid directly to the Indians. They had paid her considerably more than the Government's appraiser fixed as the rental value of the premises. Hence, on appeal, the Government sought only to reverse the judgment on the point that the district court erred in refusing to hold the side agreement null and void for all purposes.

The court of appeals reversed on this point, stating: "The Government in this type of suit acts in its capacity as guardian on behalf of the Indians involved. It has no pecuniary interest to protect for itself, and needs none. Despite the fact title is in the Indian allottee, 'It was not necessary to make these grantors parties, for the Government was in Court on their behalf. Their presence as parties could not add to or detract from the effect of the proceedings to determine the violation of the restrictions and the consequent invalidity of the conveyances.'" Citing Heckman v. United States, 224 U.S. 413, 445. The court further held that the statute makes a holding of absolute nullity mandatory, and the district court had no option not to adjudicate all rights submitted to it. The matter was remanded for entry of a judgment adjudging the side agreement null and void for all purposes.

Staff: Elizabeth Dudley (Land and Natural Resources Division).

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TAX DIVISION

Acting Assistant Attorney General Richard M. Roberts

CRIMINAL TAX MATTERS

Court of Appeals Decisions

Willful Attempt to Evade and Defeat Taxes; Politician Could Not Believe That Campaign Contributions Which Were Diverted to His Personal Use Were Non-taxable. United States v. Jett (C.A. 6th, No. 16105; October 26, 1965). In an evasion prosecution based on the net worth method the defendant, who was elected sheriff of Davidson County, Tennessee, in 1960, contended that the Government failed to prove willfulness because in 1960 he had not believed that campaign contributions constituted taxable income. He asserted that this law was not established until the case of O'Dwyer v. Commissioner, 266 F. 2d 575 (C.A. 4th), which was decided only the year before his political campaign. The Court of Appeals rejected this argument, pointing to the earlier decision to this effect in Paschen v. United States, 70 F. 2d 491, 500 (C.A. 7th) and and in Reichert v. Commissioner, 19 T. C. 1027, affirmed on other grounds 214 F. 2d 19, certiorari denied, 348 U.S. 909. The court also pointed to Rev. Rul. 54-80, 1954-1 Cum. Bull. 11, promulgated in 1954, holding that campaign funds diverted for personal use were income.

Staff: United States Attorney James F. Neal and Assistant United States Attorney Carrol D. Kilgore (M.D. Tenn.).

Willful Attempt to Evade And Defeat Taxes; Fact That Taxpayers Might Have Been Entitled to Larger Depreciation Deduction For Indictment Years Admissible Only for Such Bearing As It Might Have on the Question of Intent; Where Government Proves Its Case by the Net Worth Method It Does Not Also Have to Prove It By The Bank Deposits Method. Fowler v. United States (C.A. 8th, No. 17,881; November 4, 1965). In an evasion prosecution based on the net worth method of proof the defendants attempted to show that they would have been entitled to greater depreciation deductions in the indictment years if they had recomputed the useful life of certain assets, thus reducing the net worth bulge. The Eighth Circuit held that the District Court properly limited such evidence to the question of intent, pointing out that the defendants had not elected to recompute the lives of these assets during the years involved, and so in the criminal case they are bound by the depreciation figures which they used at the time. The defendants also complained that although the Government, in a bill of particulars, said it would corroborate its net worth analysis with an analysis of their bank accounts, it failed to do so. The Court of Appeals held this was not error, pointing out that the net worth analysis was sufficiently corroborated during the trial, and that the defendants had failed to claim or show how they were prejudiced by this omission. The court commented that if the Government's bank deposits analysis had been vital to their defense the taxpayers could have presented it themselves, as it was equally available to both parties.

Staff: United States Attorney Robert D. Smith, Jr. and Assistant United States Attorney James W. Gallman (E.D. Ark.).

CIVIL TAX MATTERS

District Court Decisions

Notice of Deficiency; District Court Would Not Enjoin Collection of An Assessment Because the Notice of Deficiency, Despite a Typographical Error in the Address, Was Received by the Taxpayers Within Three Days of Mailing. O. W. Goolsby, et ux. v. Laurie W. Tomlinson, et al. (S.D. Fla., September 29, 1965). (CCH 65-2 U.S.T.C. ¶9690). On January 5, 1965, a statutory notice of deficiency, pursuant to Section 6212 of the Internal Revenue Code of 1954, asserting income tax liabilities for the years 1961, 1962, and 1963, was mailed to the taxpayers. The notice was addressed to the plaintiffs at 90 Miami Drive, Fort Lauderdale, Florida. Although the taxpayers' correct address was 90 Nurmi Drive, Fort Lauderdale, Florida, the notice was received on January 8, 1965.

The Court, in granting the Government's Motion to Dismiss the taxpayers' suit seeking an injunction, determined from the record that the address appearing on the notice was the result of a typographical error and that the taxpayers received the notice within three days of mailing which gave sufficient time to petition the Tax Court. The Court distinguished its earlier decision in Green v. Tomlinson (unreported) on the basis that in that case the notice was mailed to a former address of the taxpayers and forwarded to their new residence and received by them after the statute of limitations on filing a petition with the Tax Court had expired.

Staff: United States Attorney William A. Meadows, Jr.; Assistant United States Attorney Alfred E. Sapp (S.D. Fla.); and Harry D. Shapiro (Tax Division).

Federal Tax Liens; 28 U.S.C. 2410 Does Not Confer Jurisdiction Upon Federal District Court in an Action Against District Director of Internal Revenue Seeking Cancellation of a Federal Tax Lien; Taxpayer Cannot Question Amount of Taxes Due or Enjoin Enforcement of a Tax Lien Under Section 2410. William H. Seff v. Irving Machiz, District Director of Internal Revenue. (Md., September 15, 1965). (CCH 65-2 U.S.T.C. ¶9691). The taxpayer commenced this action for the cancellation of a tax lien filed by the United States, alleging jurisdiction under 28 U.S.C. 2410, which waives soverign immunity in certain foreclosure and quiet title actions. The taxpayer alleged that he and the Commissioner of Internal Revenue had entered into a compromise agreement for the payment of the taxpayer's income taxes for the years 1941 to 1944. He further alleged that the sum of $1,582.50 represented the outstanding balance due and owing on the compromise agreement, and that he was prepared to tender this sum to the proper official upon the cancellation and extinguishment of the tax lien. The taxpayer also alleged that the District Director refused to cancel the tax lien upon payment of this sum, and he prayed that the court ascertain that the correct amount payable under the compromise agreement was the sum of $1,582.50, and that upon payment of this sum the federal tax lien be cancelled against his property.

In granting the District Director's motion to dismiss for lack of jurisdiction, the court noted that the United States is an indispensable party to any action to remove or cancel a federal tax lien. The court observed that the United States might be added by amendment, but that the action would still have to be dismissed for lack of jurisdiction, on the ground that Section 2410 was not intended to grant jurisdiction over a suit by a taxpayer to question the amount of taxes due or to enjoin the enforcement of a tax lien, citing Broadwell v. United States, 343 F. 2d 470 (C.A. 4th), and Cooper Agency, Inc. v. McLeod, 235 F. Supp. 276 (E.D. S.C.). The plaintiff has filed a notice of appeal from the court's decision.

Staff: United States Attorney Thomas J. Kenney; Assistant United States Attorney Robert W. Kernan (Md.); and Levon Kasarjian, Jr. (Tax Division).

Receivers; Surety for Receiver Held Liable, to Extent of its Bond, for Employment Tax Liabilities Incurred by the Receiver During the Course of Administering an Operating Receivership. United States v. Western Surety Company. (D. Minn., July 19, 1965). (CCH 65-2 U.S.T.C. ¶9644). L. D. Williams was appointed by the District Court of Hennepin County as a receiver of the assets of Lou Olson Dahl, d/b/a The Dahl House of Beauty, on August 13, 1951, and in connection therewith he was required to furnish a bond with surety to ensure the faithful performance of his duties. The Western Surety Company furnished the surety on the bond. The receiver operated the business of the debtor for a period of time, and during the course of such operation failed to collect and pay over certain Federal Withholding and FICA taxes. The receiver thereafter died, and the United States failed to file a timely proof of claim for the unpaid federal taxes with the probate estate.

A successor receiver to L. D. Williams was appointed by the District Court for Hennepin County, who furnished a new bond. Moreover, L. D. Williams was formally discharged as receiver. The United States then initiated a civil action in the United States District Court against Western Surety Company to recover on the bond the unpaid taxes which the receiver had failed to collect and pay over.

The bonding company's main defense was that the discharge of its principal, L. D. Williams, thereby resulted in a discharge of the surety under the bond from any liability for the breaches of its principal.

The Court found that L. D. Williams' failure to collect and pay over the Withholding and FICA taxes was a breach of his duties as a receiver which was covered by the bond. Moreover, the Court expressly found that although L. D. Williams, the bonding company's principal, had been discharged from any liabilities as a receiver, that the discharge of the principal from such liability did not release the surety from its liability on the bond, Koski v. Pakkala, 121 Minn. 450, 141 Minn. 450, 141 N.W. 793; Manchester Savings Bank v. Lynch, 151 Minn. 349, 186 N.W. 794.

Judgment was entered in favor of the United States in the amount of $2,000.00, the face amount of the bond.

Staff: United States Attorney Miles W. Lord; Assistant United States Attorneys Sidney P. Abramson and Patrick J. Foley (Minn.); and Willy Nordwind, Jr. (Tax Division)

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