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ANTITRUST DIVISION

Assistant Attorney General Donald F. Turner

Milk Companies Indicted Under Section 1 of Sherman Act. United States v. Robert G. Venn, et al., (S.D. Fla.) DJ File 60-139-149. On December 13, 1965, a grand jury returned an indictment charging eleven corporations and four individuals with a violation of Section 1 of the Sherman Act. The defendants are:

Venn, Cole & Associates, Inc., a Miami public relations firm, and its president, Robert G. Venn;
McArthur Jersey Farm Daily, Inc., Miami, and its president, John N. McArthur;
Foremost Dairies, Inc., San Francisco, California, and its district manager, Frank C. Stouffer;
The Southland Corporation, Dallas, Texas, and the General Manager of its Velda Dairies Division, Mason A. Copeland;
Farm Stores Processing, Inc., Miami Beach, Florida; Alfar-Boutwell Dairy, Inc., Lake Worth, Florida;
Dade County Dairies, Inc., Miami;
Home Milk Producers Association, Miami;
National Dairy Products Corp., New York City;
The Borden Company, New York City; and
Tripson Dairies, Inc., Vero Beach, Florida.

Defendants are accused of entering into a conspiracy to fix and maintain prices in the distribution and sale of milk and milk products in the Miami area, to refrain from taking one another's customers, to report violations of the agreement to a public relations company for correction, and to take various other steps toward preserving market stability.

All the corporate defendants except Venn, Cole & Associates, the public relations firm, are milk distributors. One of the two named co-conspirators is the Dairy Council of South Florida, a trade association, whose members include both milk producers and distributors.

The Miami area trade in milk and milk products runs approximately $50,000,000 a year. Arraignment has been set for January 7, 1966 before Judge William Mehrtens.

Staff: Jerome A. Hochberg and Sinclair Gearing (Antitrust Division)

Court Denies Defendant's Motion to Dismiss for Lack of Jurisdiction. United States v. Burlington Industries, Inc., et al., (S.D. N.Y.) DJ File 60-14-54. On November 12, 1965, Judge William B. Herlands handed down an opinion denying defendant Coast Manufacturing and Supply Company's motion to dismiss on the ground that the Court lacked jurisdiction over it.

The above action against Coast Manufacturing and five other defendants seeks under Count I to recover damages pursuant to the False Claims Act (31 U.S.C. §§231-233) and under Count II, as an alternative, to recover damages pursuant to §4A of the Clayton Act (15 U.S.C. §15A), by reason of an alleged

conspiracy to fix prices of glass fiber industrial fabrics (United States v. Burlington Industries, Inc., et al., (S.D. N.Y. Civil Action No. 64,3090.))

At a hearing before Judge Herlands on September 14, 1965, defendant argued, among other things: (a) that it was a corporation organized and existing under the laws of the State of Delaware; (b) that its principal office and place of business were located in Livermore, California; (c) that the summons and complaint in the instant damage case were served on Coast in Livermore, California; (d) that it is not and never has been authorized by the State of New York to do business in New York State and that it has never had any statutory agent in that State; (e) that no officer, director, employee or agent of Coast resided in or had an office in the State of New York nor was any such person regularly within the State of New York; (f) that it has never had any office in the State of New York; (g) that it has never owned or leased any real or personal property within New York State and it has never owned any certificates or other evidence of intangible property which were kept within the State of New York; (h) that it has never maintained any bank account in the State of New York and that it has never been listed in any telephone directory or directory of any other kind in that State; (i) that the total value of all shipments by it of glass fiber industrial fabrics into the State of New York during the last three calendar years were: $20,625 in 1962, $28,750 in 1963, and $34,941 in 1964, and that these sales were occasional and insubstantial compared to its total sales; (j) that the orders for said shipments were received and accepted by Coast at either its Livermore, California, or its Lancaster, Ohio, plant and in each instance the fabrics ordered were shipped in interstate commerce from one of said plants directly to the purchaser in New York; and (k) that it never has had any ties or contacts of a substantial character with the State of New York and that it would be unreasonably expensive and burdensome to Coast if it were required to appear and defend the damage case in the State of New York.

The Government argued, among other things, that defendant Coast transacted substantial "business" in the State of New York, within the meaning of Section 12 of the Clayton Act, 15 U.S.C. §22, in that (a) it made sales in New York State of approximately $84,000 during the period 1962-1964 and (b) it made purchases in the State of New York during the period from 1956 through the ten months ending October 31, 1962, of approximately $2,000,000 of glass fiber industrial fabrics, pursuant to approximately 100 contracts forwarded from California by defendant to suppliers in the State of New York and that payments pursuant thereto were received in the State of New York.

The Court held, among other things, that the test whether the above sales were "substantial" must be determined from the average businessman's point of view, and not what percentage of defendant's total sales they comprise:

> Were this not so, a large corporation could, with impunity, engage in the same acts which would subject a smaller corporation to jurisdiction and venue.

The Court also considered the amount of purchases made by defendant, and found that the continuity and nature of Coast's sales and purchases comprised substantial "business activity" transacted by defendant in New York which conferred jurisdiction on the Court.

Staff: Samuel B. Prezis, William F. Costigan, Lawrence Kill, William E. Swope, John P. Radnay and Louis Perlmutter (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General John W. Douglas

COURT OF APPEALS

APPELLATE PROCEDURE

Petitioner Seeking Review of Order of Secretary of Agriculture Under Hobbs Act Permitted to Amend Petition to Name United States As a Respondent, More Than Sixty Days After Order of Secretary of Agriculture Issued. W. I. Bowman v. United States Department of Agriculture, Orville L. Freeman, Secretary of Agriculture, and United States, (C.A. 5, No. 22001, November 1, 1965). DJ File 58-16-5. On October 19, 1964, the petitioner filed in the Court of Appeals for the Fifth Circuit a petition for review of an order of the Secretary of Agriculture under the Packers and Stockyards Act, 1921, 7 U.S.C. 181. Review was sought under the Hobbs Act, 5 U.S.C. 1031, which requires the naming of the United States as respondent. Petitioner named the Department of Agriculture and the Secretary of Agriculture as respondents; however, he mailed to the Attorney General a copy of the letter transmitting the petition to the Department of Agriculture. In a brief filed on July 30, 1965, the Government asserted for the first time that the court of appeals lacked jurisdiction over the petition because the United States was not named as a respondent. A subsequent motion to amend the petition to name the United States as respondent was opposed on the ground that the period of sixty days allowed by the Hobbs Act to file a petition for review had expired.

The court of appeals granted the motion to amend the petition. Inasmuch as the Attorney General, as well as the Department of Agriculture, received notice of the filing of the petition and was in fact representing the Government in the proceeding, it appeared that all requirements of the Hobbs Act were met except the formal requirement that the United States be specifically named as respondent on the face of the petition. The court of appeals, noting that no substantial rights of the Government had been impaired, granted the motion to amend and cure what it regarded as a "purely technical defect in pleading".

Staff: Neil Brooks, Department of Agriculture

BANK HOLDING COMPANY ACT

Due Process Does Not Require Public Hearing on Application Under the Act; Substantial Evidence Found to Support Grant of Application. Kirsch, et al. v. Board of Governors of the Federal Reserve System and Society Corporation, (C.A. 6, No. 16180, December 8, 1965). DJ File 145-105-28. The court of appeals sustained a decision of the Federal Reserve Board approving the application of Society Corporation, owner of the shares of Society National Bank of Cleveland, to acquire control of the Fremont Savings Bank. The Board's decision was challenged, upon direct review, by the minority holders of voting trust certificates of the corporation, who asserted, inter alia, the right to a public hearing on the application although such hearing is not required by the statute where, as here, the State banking authority or federal Comptroller of the Currency does

not disapprove the application, and the application is supported by substantial documentary evidence.

Staff: J. F. Bishop (Civil Division)

FEDERAL TORT CLAIMS ACT

Government Held Liable for Negligently Failing to Place Aviation Warning Markers on Overhead Electric Power Transmission Lines Erected By Bonneville Power Administration. United States of America v. State of Washington, et al., (C.A.9 No.19,907,decided October 19, 1965). DJ File 157-81-125. A small airplane participating in a Washington State civil defense search and rescue exercise collided with a 500-foot-high span of power lines in a remote Washington State valley. The existence of the span was noted on the appropriate aviation charts. The wires themselves, however, were nearly invisible, carried no aviation warning devices and their supporting towers were not conspicuously painted. The pilot and a passenger, both civil defense workers, were killed. The State of Washington paid compensation to the widows of the deceased and brought this suit to recover those payments. The court of appeals affirmed the district court's award of judgment to the State for the death of the passenger and the denial of recovery for the death of the pilot on the ground of contributory negligence. The Ninth Circuit ruled that the government had a duty to place warning markers on a span of wires five hundred feet above the floor of a valley where aircraft were known to fly, and noted that at least one other span in Washington State had been so marked.

Staff: United States Attorney Frank R. Freeman and Assistant United States Attorney Carroll D. Gray (E.D. Wash.)

Medical Malpractice Action Against Government Held Time-Barred. Brown v. United States, (C.A. 9, No. 19446, November 16, 1965). DJ File 157-12-1206. Plaintiff, a minor, was born prematurely in February 1955 in a United States Naval Hospital in Texas. Oxygen was heavily administered to save the child's life and the parents were told that the child's vision would be impaired by the use of oxygen. In 1956 the parents were told that the child was totally and permanently blind, and that the blindness was due to the use of oxygen after her birth.

This action was filed in June 1963, alleging negligence in the administering of the oxygen in 1955. The court of appeals affirmed the district court's dismissal of the action as time-barred by the two year statute of limitations in the Tort Claims Act. The court noted that the parents should have known of any malpractice not later than 1956, and adhered to the rule that minority does not toll the limitations period prescribed in the Tort Claims Act. The court also rejected a contention that the statute had not run because of a continuing physician-patient relationship. The court noted that the physicians who had administered the oxygen had not treated the child thereafter.

Staff: Manuel L. Real, United States Attorney, Donald A. Fareed, Assistant United States Attorney, Chief, Civil Section and Dzintra I. Janavs, Assistant United States Attorney (S.D. Cal.)

IMMUNITY OF GOVERNMENT OFFICIALS

Suit Against Federal District Judge For Alleged Malicious Prosecution, Libel and Slander Arising Out of Activities of the Judge Before a Grand Jury Held Properly Dismissed Under Doctrine of Judicial Immunity. O'Bryan v. Chandler, (C.A. 10, No. 7907, November 30, 1965). DJ File 51-60-56. This suit was brought against Stephen S. Chandler, Chief Judge of the United States District Court for the Western District of Oklahoma to recover damages for alleged malicious prosecution, libel and slander. Plaintiff had filed a claim in a bankruptcy proceeding pending in Judge Chandler's court. The judge, thinking the claim was fraudulent, brought the matter before a grand jury convened in the western district of Oklahoma. Plaintiff charged that Judge Chandler, after having consulted privately with the foreman of the grand jury, appeared personally before the grand jury at the request of the foreman, and the judge announced that the room was "a United States court room now instead of a grand jury room", but then proceeded to discuss the O'Bryan matter, and in substance accuse O'Bryan of crimes. Our participation on appeal was limited to the filing of a brief amicus, in which we asserted that the doctrine of official immunity was applicable whether or not the judge's conduct was improper.

The court of appeals ruled in accordance with the doctrine that a judge is not liable in damages for acts performed in a judicial capacity unless there is "clear absence of all jurisdiction" of the subject matter. While acknowledging that the judge's actions here may well have been erroneous, or improper, the court ruled that they were not clearly beyond his jurisdiction, and thus held that the plaintiff's claim for damages was barred by the doctrine of judicial immunity.

Staff: David L. Rose (Civil Division)

SOCIAL SECURITY ACT

Claimant Who Worked After Alleged Onset of Disability Not Disabled; New Administrative Hearing Ordered Because Claimant's Counsel At First Hearing Did Not Render Adequate Assistance. Clyde Arms v. John W. Gardner, (C.A. 6, No. 16251, decided December 1, 1965). DJ File 137-30-210. This case was before the Court of Appeals on our appeal from the district court's holding that the record did not contain substantial evidence to support the Secretary's finding that claimant, who had worked for several years after the alleged onset of disability, was not disabled. The Court of Appeals, agreeing that a claimant who had worked after the onset of his alleged disability was not disabled, held "that there is substantial evidence in the record before us to support the findings of the Secretary adverse to appellee's claim of 'disability'." However, the Court believed that the attorney who had represented claimant in the administrative hearing had "failed * * * to give him the legal assistance he should have had" and, pursuant to what it deemed a request by claimant's new counsel, remanded the case with direction that the Secretary of Health, Education and Welfare grant claimant a rehearing "to present additional testimony and evidence * * *."

Staff: Florence Wagman Roisman (Civil Division)

DISTRICT COURT

MILITARY DISCHARGE

Serviceman Must Exhaust Administrative Remedies Before Discharge Review Board (10 U.S.C. 1553) and Board For Correction of Military Records (10 U.S.C. 1552) Prior to Judicial Review. William Ernest Unglesby v. S. M. Zimny, Individually and as Commanding Officer of the U. S. Naval Receiving Station, et al., (U.S.D.C. N.D. Cal., S.D., Civil Action No. 44378). DJ File 145-6-749. Plaintiff, a Navy enlisted man, sought to enjoin separation from the Naval service with a general discharge under honorable conditions by reason of unfitness (homosexuality) as recommended by an administrative board on the grounds that his constitutional rights were being violated because he was not afforded confrontation and the right to cross-examine witnesses against him and the Navy violated applicable regulations. The court found that, if discharged, plaintiff would suffer irreparable damage and that for plaintiff to remain in the service pending administrative review would not cause harm to the public or other interested persons. However, in denying judicial review prior to exhaustion of administrative remedies, the court distinguished this case from Covington v. Schwartz, 341 F. 2d 537 (C.A. 9, 1964), by ruling that plaintiff had not sustained the burden of showing a necessary element, i.e., likelihood of success on administrative appeal. The court further stated: "There has been no United States Supreme Court decision holding that confrontation and cross-examination are constitutionally required in administrative hearings."

Staff: Cecil F. Poole, United States Attorney; Charles Elmer Collett, Assistant United States Attorney; William P. Arnold, Civil Division

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CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

FIREARMS

National Firearms Act; Possession of Firearm Lacking Easily Replaceable Part; Possession or Transfer of Weapon Together With Parts Required to Convert Weapon to Firearm. In 1962, United States v. Thompson (N.D. Calif.), 202 F. Supp. 503, held that a sawed-off shotgun without a firing pin was not a firearm under the Act. The Criminal Division and the Alcohol and Tobacco Tax Division of Internal Revenue Service feel that the reasoning of the Thompson opinion is not wholly consistent, because while it held that a weapon is not a firearm if it will not actually fire a projectile, it also stated (at p. 507) that the weapon involved was not an "unserviceable" firearm but rather was "at most, temporarily inoperative, and could be restored to working order by the insertion of a firing pin." That opinion apparently accepted the A&TTD position that a disassembled firearm is a firearm under the Act. Inasmuch as the Act defines firearms in terms of being "designed" to fire as well as being capable of firing, even partial destruction of a weapon should not remove it from the definition of firearm but should merely make it an unserviceable firearm which is specifically exempted from transfer taxes. 26 U.S.C. 5812(a)(3); 26 C.F.R. 179.45; Rev. Rul. 54-180, C.B. 1954-1, p. 250.

We thus consider weapons otherwise falling within the Act to be serviceable firearms, even though a part or parts may be missing, if the weapon can be readily restored to a firing condition by replacing the missing part or parts. Some support for this position is found in Sipes v. United States, (C.A. 8, 1963), 321 F. 2d 174, 178, which held a sawed-off shotgun containing a nail used as a firing pin to be a firearm under the Act.

No appellate test of this precise issue has occurred, since none of the cases in which appeal by the Government was possible has been thought to be a satisfactory vehicle for such appeal. Three recent decisions are listed here which point up prosecutive problems due to divergence of opinion among various courts interpreting the Act in such situations. The Criminal Division desires to maintain liaison with all United States Attorneys in an effort to develop a satisfactory approach to such prosecutions and a more uniform interpretation of the Act, and to this end the Division would appreciate being advised of the outcome of trials in such matters and of any court orders or opinions discussing this portion of the Act.

1. In John Cosey (E.D. La., Crim. No. 29763-D, July 21, 1965), the court denied defendant's motion to suppress evidence and to quash an indictment charging unlawful possession of a firearm, i.e., a sawed-off shotgun seized under search warrant. The firing pin was missing from the weapon, but it was successfully test-fired by Government agents who substituted a small nail for the missing pin. Cosey contended the gun was not a firearm because it could not discharge a projectile. Distinguishing Thompson, the Court held it immaterial that a necessary part was missing, stating that the temporarily inoperable weapon can with minimum time and effort be made to fire a shotgun

shell by replacing the firing pin or substituting a small nail for it, and the purpose of the statute would be frustrated or defeated by accepting Cosey's contention.

2. In William H. Garland (S.D. Calif., No. 34292-CD, Sept., 1965), defendant was charged with illegal possession of two M-2 carbines, automatic weapons, which were temporarily not in a fully automatic firing condition but would fire only semi-automatically because three small parts were removed. These parts were kept separately in small boxes in the same room with the carbines and could be (and were) assembled by defendant into the carbines within a period of two minutes. Garland stated that he kept the parts separate from the carbines in order to avoid contravening state law.

The district court entered an order suppressing the evidence seized upon Garland's arrest, feeling that the fact Garland assembled the weapons at the request of undercover agents was a result of unlawful entrapment and could not be received in evidence. Moreover, the court entered a judgment of acquittal, following Thompson, on the basis that the carbines would not fire automatically until the parts were inserted and therefore were not firearms under the Act. As noted above, this interpretation seems erroneous.

3. In Michael Kokin, Gustave David Lange, and Eastern Firearms Co., (D. N.J., Crim. No. 268-54, Sept. 28, 1965), defendants were convicted on three substantive counts of an eight-count indictment charging transfer of firearms contrary to the Act. The case was tried by the court without a jury, on stipulated facts involving two instances of sale of alleged firearms.

In the first instance, investigator Douglas obtained a price list of Eastern Firearms and ordered by mail from that firm an M-1 carbine and stock together with itemized M-2 carbine parts (which would convert a semi-automatic M-1 to an automatic M-2), making payment in advance by personal check. Douglas received by mail from Eastern a package consisting of two boxes, one containing an M-1 carbine and M-2 stock, the other box containing the M-2 conversion parts. From what he had received, Douglas assembled a fully automatic M-2 carbine, a firearm under the Act.

In the second instance, undercover investigator Conover bought from Kokin and Lange at Eastern an M-1 carbine and all parts necessary to convert the M-1 to an M-2 carbine. Conover assembled the M-2, but found it would not function properly because of a defective disconnector lever assembly. Conover took the assembled M-2 back to Kokin and Lange, who replaced the defective assembly with a new one and aided Conover in altering the M-2 stock to fit properly. The M-2 carbine then fired fully automatically.

Kokin and Lange contended that in neither instance did they transfer a firearm, i.e., an automatic weapon under the Act. The court ruled, in the Douglas situation, that the defendants could have intended to sell the M-2 parts upon order only as replacement parts rather than in connection with the M-1 carbine, and concluded that the facts did not show the sale to Douglas to be a transfer of a firearm under the Act.

Concerning the Conover sale, however, the court felt that since defendants were on notice that the ultimate purpose and design of the purchaser was to procure an M-2 automatic weapon, and since defendants actively assisted Conover to that end, a transfer of the firearm within the meaning of 26 U.S.C. 5848 was consummated.

ALTERATION OF COINS

Alteration of Coins by Addition of Mint Marks to Enhance Value. United States v. Barnett, et al. (N.D. Miss.). Dept. File No. 55-40-9. The three defendants in this case were found guilty of a conspiracy to alter mint marks on genuine coins with intent to defraud. Two of the defendants were also found guilty of possessing altered coins.

The defendants purchased a thirty-eight foot yacht in order to travel the Ohio and Mississippi Rivers, using the boat as a base for the alteration of coins to be sold to coin collectors.

This is one of the first cases fully developed by a jury trial since the Department took the position that the alteration of a mint mark on a genuine coin with intent to defraud coin collectors was a prosecutable offense under 18 U.S.C. 331. See United States Attorneys' Bulletin, Vol. 11, No. 24, December 13, 1963.

Staff: United States Attorney H. M. Ray; Assistant United States Attorney Thomas G. Lilly (N.D. Miss.).

BOMB HOAX

Prosecution for Bomb Hoax under Civil Penalty Provisions in District Where Action Accrues. United States v. David A. Dowdy (E.D. Mich., November 19, 1965). Dowdy, a resident of Toledo, Ohio, was served and appeared in the U.S. District Court for the Eastern District of Michigan, the district in which the action accrued, after he made a bomb hoax statement while aboard a plane. Dowdy, represented by counsel, admitted making the remark and was assessed a civil penalty of $500.

This is the first bomb hoax case brought to the attention of the Criminal Division under the new civil penalty provisions where the defendant in effect consented to appear in the place where he made the remark rather than returning to his home and requiring the Government to proceed against him there.

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LAND AND NATURAL RESOURCES DIVISION

Assistant Attorney General Edwin L. Weisl, Jr.

Water Rights; Appropriation; Prescription; Riparian; Acquisition by United States for Use Within a Federal Enclave; Applicability of State Law; Judgments; Changed Conditions as Grounds for Setting Aside. United States v. Fallbrook Public Utility District, C.A. 9, No. 18,931 (D.J. File No. 90-1-2-478). The United States sued to quiet title to waters in the Santa Margarita River. The waters are used to supply the needs of Camp Pendleton, a "federal enclave," which includes land within and outside the watershed of the Santa Margarita. The land and exclusive jurisdiction over it were acquired in 1942-1943 and use of the water started soon thereafter. The claims of the United States, which is the last user before the stream reaches the Ocean, are based upon prior appropriation and prescription by use, riparian ownership, and a 1940 stipulated judgment between its predecessor in title and Vail Company, the most substantial upstream user of the water. That judgment divided the waters as between them two-thirds for the United States and one-third for Vail and provided that the water could be used outside the watershed (not a valid riparian use). The Fallbrook Public Utility District is the owner of an appropriative right to divert and store water from the Santa Margarita at a point between Vail and the enclave with a priority date of 1946.

The district court, after holding the use of the water by the United States to be reasonable and beneficial, set aside the 1940 stipulated judgment because conditions had changed. It found that the basins from which the water was taken by means of wells were an underground stream and rejected the appropriation claims on the grounds that the United States had not filed the application required by California law for appropriation from surface or underground streams. It rejected the prescriptive claim on the grounds that prescription does not run upstream. Finally, the court concluded that until the United States reduced its net use of water outside the watershed to zero it could not call upon upstream users to release water. In calculating whether there is a net export, all savings of water returned or added to the basin are credited against the exported water.

The court of appeals reversed the judgment with respect to Vail and directed reinstatement of the 1940 stipulated judgment subject to Vail's right to seek relief from it under strict limitations as to what would constitute justification. In all other respects the judgment was affirmed, including a cross-appeal by Fallbrook asserting that military use was not a proper riparian use.

With respect to the claim based upon appropriation the court held (1) that the factual finding that the basin was part of the underground stream was supported by evidence and an application was, therefore, required under California law, (2) that a stipulation between the United States and California reduced the issue to ascertainment of the rights acquired by the United States under California law, (3) that prescriptive use had to be adverse and could not be adverse to a subsequent appropriator and (4) that the public use of water, i.e., the military, was not, in effect, enjoined by refusing to allow the United States to demand water from upstream users until it ceased exporting

water. In short, the court avoided the federal questions raised by the United States on the grounds that we had stipulated them out of the case.

Staff: Roger P. Marquis, David R. Warner, and Edmund B. Clark (Land and Natural Resources Division).

Federal Lands; Submerged Lands; Limits of State and Federal Ownership. United States v. Louisiana et al. (S.Ct., No. 9, Orig., Dec. 13, 1965, D.J. File No. 90-1-18-260). The Court's opinion of May 31, 1960, 363 U.S. 1, and decree of December 12, 1960, 364 U.S. 502, established Louisiana's title to the submerged lands within three geographical miles from the coast line (with certain exceptions) and federal title beyond that distance. The widely divergent views of the parties as to the location of the "coast line" were left for future consideration; in the meantime most of the proceeds of the disputed area have been impounded in the Treasury under an interim operating agreement of October 12, 1956, between the United States and Louisiana. On an unopposed motion by the United States, the Court has now quieted the title of the United States to the area more than three geographical miles seaward from a defined line which constitutes the most seaward "coast line" claimed or recognized by either party, and has quieted the title of the State to four limited areas near the shore where recent surveys or legal principles announced in United States v. California, 381 U.S. 139, have required the United States to abandon its former claims. Past receipts, both impounded and unimpounded, from the areas affected (expected to amount to about $170,000,000 for the United States and $33,000,000 for Louisiana) are to be paid or released to the parties entitled, after necessary accounting. The United States expects to move soon to define the limits of state and federal ownership in the remainder of the disputed area, from which receipts of about $650,000,000 are now impounded in the Treasury.

Staff: Archibald Cox (Special Assistant to the Attorney General), George S. Swarth (Land and Natural Resources Division).

Administrative Law: Zoning; Standing to Sue. United States v. Montgomery County Council, Law No. 16570 (Cir. Ct. for Montgomery County, Md., Nov. 24, 1965, D.J. File No. 90-1-0-725). This suit was brought by the United States to set aside the action of the Montgomery County Council in changing the zoning of 12.42 acres of land in Cabin John, Maryland, from single family residential (R-90) to a classification (R-30) which would permit the construction of garden-type apartments. The United States had not appeared formally at the hearing before the Council but the record did disclose that both the Department of the Army and the Department of the Interior opposed the application. The site involved is situated between George Washington Memorial Parkway and MacArthur Boulevard and constitutes a component part of the Maryland "Potomac Palisades." A Master Plan, zoning most of the Cabin John area for single family development, had been adopted in 1957.

Judicial review of the action of the Council was sought in the name of the United States pursuant to a Maryland statute that permits zoning decisions to be appealed by any person "aggrieved." Although a vigorous attack was made on the Government's standing to sue, the court held that, on the basis of its ownership of the two immediately adjoining highways, the United States was an

aggrieved person within the meaning of the statute. See Pattison v. Corby, 226 Md. 97, 172 A. 2d 490 (1961); Town of Somerset v. County Council for Montgomery County, 229 Md. 42, 181 A. 2d 671 (1962); cf. United States v. Whitcomb, 314 F. 2d 415 (C.A. 4, 1963). An argument advanced by the appellee to the effect that the United States could not appeal a zoning decision because it could acquire the land by the exercise of the power of eminent domain and thereafter ignore zoning categories was rejected.

On the merits the court held in its decision dated November 24, 1965, that the zoning was improperly changed because the record failed to disclose either a mistake in the original zoning or a change in the general character of the neighborhood since adoption of the Master Plan in 1957. See MacDonald v. Board of County Commissioners, 238 Md. 549, 210 A. 2d 325. It noted that changes occurring between the date of the original zoning in 1928 and the time the Master Plan was adopted in 1957 could be considered "only when there have been some significant changes in the neighborhood since the adoption of said plan." See Town of Somerset v. County Council for Montgomery County, 229 Md. 42, 181 A. 2d 671 (1962). Although recognizing the rule that a court may not substitute its judgment for that of the County Council, the court held that the record was entirely devoid of any reasons to support the rezoning order.

Because the application had at no time been approved by the Planning Commission and its technical staff, this case involved a different factual situation than that presented in the recent Maryland Court of Appeals decision entitled Beall v. Montgomery County Council, 212 A. 2d 751 (1965), wherein the notion of a "floating zone" is approved and the application of the "change in the neighborhood" concept somewhat limited.

The case is a significant one because it represents the first time that the United States has taken an active part at the trial stage in a local zoning dispute. It also represents an important assist to the Department of the Interior's continued efforts to preserve the natural beauty of the Potomac in the vicinity of the nation's capital.

Staff: Thos. L. McKevitt, General Litigation Section, Robert W. Kernan, Assistant United States Attorney (D. Md.).

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TAX DIVISION

Acting Assistant Attorney General Richard M. Roberts

CIVIL TAX MATTERS

Appellate Decision

Federal Tax Liens; Situs of Property for Filing Federal Tax Lien Is to Be Determined by Federal Law; For This Purpose, Situs of Debt Due Taxpayer Is the Taxpayer's Domicile; Garnishment Prior to Recordation of Federal Tax Lien Was Ineffective Because Amount of Garnished Debt Was Not Fixed Until After Recordation. W. Biddle Walker Co. v. Paramount Engineering Co. and United States (C.A. 6, December 2, 1965). On December 30, 1960, the Government recorded in Wayne County, Michigan, (domicile of the taxpayer) notice of a federal tax lien for 1959 income tax in the amount of $17,000. On March 9, 1961, appellant instituted suit against taxpayer to recover the amount of $23,000 due him for building materials furnished. On May 26, 1961, appellant served a writ of garnishment on the garnishee-defendant, for whom taxpayer had been constructing a building. Taxpayer never completed performance of his contract with the garnishee-defendant. On June 2, 1961, appellant obtained a default judgment against taxpayer in the amount of $22,000. On September 12, 1961, the Government recorded in Wayne County, Michigan, notice of a second federal tax lien for 1960 income tax in the amount of $1,500.

Sometime between October 9, 1961 and November 9, 1961, the garnishee-defendant and taxpayer reached an agreement fixing the amount of the debt due taxpayer at $23,000. On November 6, 1961, the garnishee-defendant paid jointly to the Government and taxpayer the amount of $20,000, thereby satisfying in full the Government's 1959 and 1960 assessments against taxpayer. On September 13, 1962, appellant filed a motion for judgment against the garnishee-defendant in the Wayne County Court, the garnishee-defendant interpleaded the Government, and the Government removed the case to the federal district court.

Appellant contended that it was entitled to priority over both federal tax liens because it was a judgment creditor. It submitted that the filing of notice of the first lien in the amount of $17,000 at taxpayer's residence was ineffective because state law fixed the situs of a debt at the domicile of the debtor. The Government contended that situs for purposes of Section 6323 requiring recordation of the federal tax lien in order to be effective against judgment creditors was a question to be answered by reference to federal law and that the federal rule fixes such situs of intangible property at the domicile of the taxpayer. It was also noted that the state law was in accord with this federal rule. The appellate court sustained the Government's position that the matter was to be resolved under federal law and held specifically that the situs of a debt is the domicile of the taxpayer, which is the only federal appellate decision on this latter point.

As to the second lien in the amount of $1,500, appellant urged that it had a choate garnishment lien because it had issued a writ of garnishment and

had obtained a default judgment, both of which took place prior to the time the tax lien was recorded. However, under the facts of this case, the debt that appellant attempted to reach by garnishment proceedings was not fixed until after the federal tax lien was recorded and thus, appellant's garnishment lien was not choate under federal law. The result is the same under Michigan law.

Staff: Joseph Kovner and Marco S. Sonnenschein (Tax Division).

District Court Decisions

Jurisdiction; Service of Process on Nonresident Taxpayers' Attorney, Who Had Been Authorized by Taxpayers' Powers of Attorney to Represent Them in All Tax Matters, Conferred Personal Jurisdiction Over Nonresident Taxpayers. United States v. Davis, et al. (N.D. N.Y., February 9, 1965). (CCH 65-2 U.S.T.C. ¶9726). In this suit to reduce to judgment jeopardy income tax and transferee assessments, the Government served the summons and complaint upon an attorney who was retained by two of the defendants who had been given powers of attorney by the defendants in connection with the tax liabilities. These defendants moved to vacate and quash service, arguing that the powers of attorney executed by them did not warrant service of process upon their attorney as "an agent authorized by appointment . . . to receive service of process" within the meaning of Rule 4(d)(1), F.R.C.P.

Although the powers of attorney did not contain any wording expressly authorizing the attorney to accept service of process, the Court held that "actual implied appointment to accept service may be readily spelled out." The Court noted that the powers of attorney authorized the attorney "*** to do all things that are necessary in defending me before all tax bodies and all courts ***", and that the powers were drawn and executed for the appearance of the attorney in the particular tax problems upon which the complaint was based. In upholding the validity of the service of process, the Court relied upon United States v. Balanovski, 236 F. 2d 288, 302-303 (C.A. 2d).

Staff: United States Attorney Justin J. Mahoney and Assistant United States Attorney James P. Shanahan (N.D. N.Y.)

Levy and Distraint; District Court Could Not Restrain Sale of Taxpayer's Property Seized by Government for Unpaid Taxes Where Seizure Took Place Prior to Date of Filing of Taxpayer's Bankruptcy Petition. In the Matter of Bel Air Knitting Mills, Inc., (S.D. Cal., July 20, 1965). (CCH 65-2 U.S.T.C. ¶9593). The United States filed tax liens against taxpayer on May 17, 1965, and ten days thereafter, pursuant to the federal tax liens, a Revenue Agent seized certain items of taxpayer's personal property and subsequently gave notice that the property so seized would be offered for sale at public auction, to be held on June 29, 1965. On June 18, 1965, a petition for taxpayer's bankruptcy was filed. The bankrupt then filed an application to restrain the Government's intended tax sale.

The Court found that because the property in question was lawfully seized by the United States, it took dominion, control and possession of the property prior to the filing of the petition in bankruptcy. Hence, the property was never in the actual or constructive control of the Bankruptcy Court. For this reason, the Court held that it had no jurisdiction over the subject property and it dismissed the bankrupt's application to restrain the sale.

Staff: United States Attorney Manuel L. Real and Assistant United States Attorneys Loyal E. Keir and Robert T. Jones (S.D. Cal.).

Priority of Liens; Federal Tax Lien Entitled to Priority to Fund of Money as Against Claim of Taxpayer's Assignee Based on Assignment of Fund Executed After Filing of Tax Lien. United States v. Del Ray Sportswear, Inc., et al. (D. Mass., September 23, 1965). (CCH 65-2 U.S.T.C. ¶9696). On October 2, 1962, the District Director of Internal Revenue made a tax assessment against Del Ray Sportswear, Inc. A notice of federal tax lien pertaining to the assessment was filed on November 2, 1962. On November 9, 1962 taxpayer had completed certain work under a contract with the Sherry Hill Sportswear Co., but was unable to deliver the work because of insufficient funds to pay its employees for the work performed. Therefore, on November 9, 1962, an arrangement was entered into between taxpayer and defendant, Parlane Sportswear Co., Inc., whereby Parlane advanced payroll funds to taxpayer with the understanding that the money to be received from Sherry Hill would be turned over to Parlane. As a result of this arrangement, the work was delivered to Sherry Hill on November 9, 1962, and on that date Parlane's attorney received the amount due taxpayer for the work delivered. This sum was deposited to the attorney's account and remittance was made to Parlane.

In moving for summary judgment, the United States contended that even assuming that the arrangement between Parlane and taxpayer operated as an assignment of the money to be received from Sherry Hill, and that such assignment was sufficient to accord Parlane the status of either a mortgagee or purchaser of the fund within the meaning of Section 6323 of the Internal Revenue Code of 1954, the federal tax lien was entitled to priority as it had been filed prior to the time the assignment claim arose. Parlane opposed the Government's motion on the ground that it was a party to a valid employment contract in force between the workers in its plants, its contractors' plants, and other workers in plants of other members of the New England Sportswear Manufacturers Association. Parlane contended that taxpayer and Sherry Hill also were parties to this employment contract, which provided that each employer-member of the Association who employed contractors shall be responsible to the members of the Union for the payment or underpayment of their total wages for work done by them on garments made for the employer. Parlane further contended that Sherry Hill was obligated under this contract to pay taxpayer's employees the wages due them for the work performed on the goods manufactured for Sherry Hill. Since Parlane paid the employees their wages, Parlane contended that the fund was held by taxpayer as trustee for its employees, who should be deemed to have assigned their rights to the fund to Parlane upon payment of their wages by Parlane.

The Court held that the fund constituted property belonging to taxpayer, and that the federal tax lien, filed on November 2, 1962, was entitled to priority over the claim of Parlane, pursuant to Section 6323 of the Internal Revenue Code of 1954. The Court made no mention in its opinion of the trust contention raised by Parlane. Parlane has filed a notice of appeal from the Court's decision.

Staff: United States Attorney W. Arthur Garrity, Jr.; Assistant United States Attorney William B. Duffy, Jr. (D. Mass.); Thomas R. Manning and Levon Kasarjian, Jr. (Tax Division).

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