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# BULLETIN

UNITED STATES ATTORNEYS BULLETIN

Vol. 14 March 4, 1966 No. 5

## ANTITRUST DIVISION

Assistant Attorney General Donald F. Turner

Motions to Dismiss Counts of Indictment Denied by Court. United States v. The American Oil Company, et al., (D. N.J.) D.J. File 60-57-170. In an opinion filed January 26, 1966, Judge Wortendyke denied two motions by defendants to dismiss the various counts of the indictment.

Motion No. 1 alleged that Count I (charging a Section 1 conspiracy) fails to state the essential facts constituting the offense charged with the definiteness, certainty and clarity required by the Fifth and Sixth Amendments and Rule 7(c) of the Federal Rules of Criminal Procedure. Motion No. 2 alleged that Count II (Section 2 conspiracy) and Count III (Section 2 attempt) were defective on the same grounds as Count I, plus the additional ground that these Counts failed to state the essential elements of the crime purported to be charged in that they failed to allege requisite intent to achieve monopoly power and a dangerous probability of success.

In denying the motion addressed to Count I, the court found that Count I descended to the particulars required by stating the time, place, manner, means and effect of the crime charged.

Defendants had argued, in part, that Count I had failed to allege the "means" used in making the agreement to fix gasoline prices, as charged. We argued that an indictment need not allege "means", but that it does have to allege the character and nature of the conspiracy; that in this indictment the character and nature of the conspiracy is alleged to be a continuing agreement to fix tank wagon and retail prices of gasoline; that this description of the character and nature of the conspiracy could be called the "means" of the conspiracy in that it can be said that defendants conspired in restraint of trade by means of an agreement to fix tank wagon and retail prices of gasoline; and that in that sense the defendants were asking for secondary "means" which need not be alleged.

The Court labeled as a description of the "manner" of the crime charged the statement in the indictment that the defendants were engaged in a conspiracy in restraint of trade, and as a description of the "means" the statement in the indictment that the conspiracy consisted of a continuing agreement to fix tank wagon and retail prices of gasoline in the trading area. The Court further stated that this description of "means" was sufficient since agreements to fix prices are illegal per se.

As to Counts II and III, the Court reviewed the allegations in those counts and held them to comply with Rule 7(c). As to defendants' contention that Counts II and III did not allege intent to monopolize or reasonable probability of success, the Court held in effect that when defendants with a 28% share of the market are charged with actually having raised prices and with actually having restricted the amount of product available, the intent to achieve monopoly power and the consequences thereof becomes "glaringly" apparent.

Staff: Bernard Wehrmann, Gerald R. Dicker, Bertram M. Kantor and Robert C. Canty (Antitrust Division)

Court Denies Interrogatories of Certain Defendants Purporting to Test Regularity of Grand Jury Proceedings. United States v. Pennsalt Chemicals Corporation, et al., (E.D. Pa.) D.J. File 60-122-78. On February 3, 1966, Judge A. Leon Higginbotham rendered an opinion denying the interrogatories of certain of the defendants purporting to test the regularity of Grand Jury proceedings preceding the filing of this case. No indictment had been returned in said Grand Jury proceedings, and the purpose of the interrogatories was to discover whether the Grand Jury had been used to elicit evidence for use in a civil case only. The Supreme Court in United States v. Procter & Gamble Company, 356 U.S. 677 (1958) had held that this would constitute an abuse of the Grand Jury processes, entitling the defendants to complete access to the Grand Jury transcripts. Defendants' ultimate object then was the Grand Jury transcripts themselves.

Defendants' interrogatories were most comprehensive. The Government objected on the grounds essentially (other grounds were also stated) that the defendants had to show cause before subjecting the Government to such full-scale inquiry. The defendants, citing Procter & Gamble, relied heavily on United States v. Carter Products Inc., 47 F.R.D. 243 (S.D. N.Y. 1961) which they insisted entitled them, as a matter of right, to whatever discovery they deemed necessary in the circumstances.

Judge Higginbotham, declaring that he was neither bound by Carter Products nor by the lower court's decisions in Procter & Gamble (noting that the Supreme Court, itself, had not determined the rules that would govern in making inquiry) had his own solution. The Government he ruled and ordered, would within twenty days (1) answer for the benefit of the defendants and the record, four simple questions devised by the Court, which in essence would establish when the Government decided not to seek an indictment and when it decided to proceed on the civil side only, and (2) substantiate the answers by documentation from the Government's files (at the highest level of authority) for examination by the court in camera. If in the court's view, the answers showed no misuse of the Grand Jury, and the documentation substantiated the answers "the documents will not be turned over to the defendants and this phase of the proceedings [issue of misuse] will be at an end".

The decision is significant in that it offers a simple test to sustain the "presumption of regularity in governmental activities", and disavows any long and drawn out discovery procedures, by way of deposition or otherwise, as suggested by Carter Products.

Staff: John W. Neville, Jon D. Hartman, L. Barry Costilo and Gordon A. Noe (Antitrust Division)

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# CIVIL DIVISION

Assistant Attorney General John W. Douglas

## ALLOWANCE OF ATTORNEYS' FEES IN TITLE II LITIGATION UNDER SOCIAL SECURITY ACT

In the October 29, 1965, issue of the United States Attorneys Bulletin, Volume 13, page 458, et seq., procedures adopted by the Social Security Administration pursuant to Section 332 of Public Law 89-97 concerning attorneys' fees were set forth. The Department of Health, Education and Welfare is also of the view that where an award of benefits is made administratively after remand to the Secretary pursuant to order of a court, the fixing of an attorney's fee for service performed in the administrative proceeding is for the Secretary alone under 42 U.S.C. 406 and the Secretary's regulations issued pursuant thereto. The District Court for the Northern District of Iowa in an Order dated February 3, 1966, entered in the case of Clarence N. Olson v. Celebrezze, Civil No. 64-C-2003-C, has adopted this view of the Secretary.

Where a petition or motion to the court for an attorney's fee seeks an attorney's fee for services rendered in the administrative proceedings, a formal written objection to the granting of the petition or motion should be filed by the United States Attorney. A similar objection should be made to any part of a request for fees which is based on services rendered in the administrative proceeding even when combined with a request for fees for services in the judicial proceedings. For use in support of such a motion, the General Litigation Section, Civil Division, will forward, upon request, a certified copy of the Court Order entered in the Olson case. The request may be made by telephone to Harland F. Leathers, Chief, General Litigation Section, Civil Division, Area Code 202, Justice Code 187, Extension 3312 or 3311.

## MORTGAGE FORECLOSURES, SINGLE FAMILY

It will not be necessary to join state and local governmental units asserting real property tax liens in the complaints filed in Veterans Administration and Federal Housing Administration single family mortgage foreclosures. Both VA and FHA are willing to pay these taxes even though our mortgage lien may have priority under the Federal rule of "First in time, first in right".

## COURT OF APPEALS

### IMMUNITY OF LEGISLATIVE OFFICIALS

Injunction Seeking Return of Papers in Possession of Senate Subcommittee Denied For Failure to Join Necessary Parties Where Suit Brought Against One Member of Subcommittee And One of Its Staff; Subcommittee Members and Staff Were Immune From Damage Suit. James Dombrowski v. Colonel Thomas D. Burbank, et al. (C.A.D.C., Nos. 18435 and 18544, February 4, 1966). D.J. File 145-11-57. This suit was brought by a Louisiana civil rights organization and its executive director, seeking an injunction requiring appellees, the chairman of the Senate Internal Security Subcommittee and the Chief Counsel of that subcommittee, to

return certain documents illegally seized by Louisiana officials (see Dombrowski v. Pfister, 380 U.S. 479), and sent to the Internal Security Subcommittee under subpoena, and for damages for actions taken by appellees with respect to these records.

The Court of Appeals affirmed the district court's dismissal of the claim for injunctive relief and the grant of appellees' motion for summary judgment on the claim for damages. The Court ruled that the appellants could not obtain injunctive relief for the return of documents held by the full Senate Subcommittee, in a suit against only the chairman and a staff member. The Court also ruled that the acts of the appellees with respect to the papers were, on the undisputed facts, within the outer perimeter of the scope of their official duties, and that they were therefore immune from the damage suit.

Staff: Former United States Attorney David C. Acheson; Assistant United States Attorneys Frank Q. Nebeker, Joseph M. Hannon, Alan Kay (D.C.D.C.)

## SOCIAL SECURITY ACT

Claimant Held Disabled by Reason of Mental Impairment. Ben B. Beggs v. Celebrezze (C.A. 4, No. 10075, January 20, 1966). D.J. File 137-84-314. The Court of Appeals held that the Secretary's determination that claimant was not disabled from substantial gainful activities as of April 5, 1961, was not supported by substantial evidence. Claimant filed an application for a period of disability and disability insurance benefits in January 1961. This application, based upon an alleged tubercular condition and a mental impairment was denied initially and upon review. On July 23, 1963, the hearing examiner denied the application, finding "no significant organic disease" and that claimant's mental impairment was not severe enough to prevent him from returning to his former employment. In the meantime, a second application for benefits by claimant was granted on the basis of a finding that he was disabled by tuberculosis as of June 30, 1963.

The Court of Appeals, reversing the district court, held that substantial evidence did not support the Secretary's determination that claimant was not mentally disabled as of April 1961. While apparently not disputing the Secretary's conclusion that claimant had no organic disease at that time, the Court stated that "the entire record shows a steady and increasing deterioration in the petitioner's mental condition which had already produced totally disabling symtoms by September of 1959." The Court stated that the fact that the mental condition was the result and not the cause of claimant's unemployment did not prevent it from being disabling within the meaning of the statute.

Staff: Michael W. Werth (Civil Division)

Secretary's Determination That Claimant Not Disabled by Brain Damage And Infrequent Epileptic Seizures Held Supported by Substantial Evidence. Luther P. Mitchell v. Gardner (C.A.D.C., No. 19731, February 16, 1966). D.J. File 137-16-113. The Court of Appeals affirmed the decision of the district court that the Secretary's determination that claimant was not disabled by reason of

brain damage and epileptic seizures was supported by substantial evidence in the record. The Court stated that doubts of the frequency and severity of appellant's seizures had been resolved against appellant and that the Secretary's resolution of such doubts was conclusive. The Court stated further that although it did not reach the question of whether the Secretary was required to "spell out" available work opportunities, "it did seem clear that the Secretary does not have that burden."

In dissent, Judge Fahy was of the view that there was nothing in the record upon which to base a conclusion that appellant, who had spent most of the recent years in jail and had been employed only off and on as a cook and part-time barber, could be gainfully employed without serious danger to himself and others. Judge Fahy would have remanded the case to the Secretary for further findings with respect to the extent of the impairment and substantiality of claimant's previous employment.

This case is the first Social Security disability decision of the Court of Appeals for the District of Columbia Circuit.

Staff: United States Attorney David G. Bress; Assistant United States Attorneys Frank Q. Nebeker, Arnold T. Aikens, John A. Terry (Dist. Col.)

Secretary's Refusal to Reopen 1954 Disallowance of Claim For Mother's And Children's Insurance Benefits Held Reviewable; Secretary's Determination That No Good Cause For Reopening Was Shown Held Not Abuse of Discretion. Cappadora v. Celebrezze (C.A. 2, No. 29647, January 28, 1966). D.J. File 137-52-178. This action was brought to review a decision of the Secretary refusing to reconsider or reopen a 1954 disallowance of a claim for mother's and children's insurance benefits. The claim was denied in June 1954, and claimants were told that if they did not agree with that determination, any request for reconsideration "must be filed within six months". In October, 1962, the administratrix of claimant's estate and the guardian of the children, stated that she wished to "appeal" the adverse 1954 determination. The Secretary after a hearing determined that there was no basis for further review of the claim. Thereafter the administratrix brought this suit.

In a lengthy opinion for a unanimous court, Judge Friendly held that although Section 205(g) of the Act, 42 U.S.C. 405(g) provided no basis for judicial review of this kind of order by the Secretary, plaintiffs could obtain judicial review under Section 10 of the Administrative Procedure Act, 5 U.S.C. 1009. He stated that while reopening was a matter of agency discretion "to a considerable extent", it was not "so far" committed to agency discretion that it was wholly immune from judicial examination. However, the Court held that the Secretary had been justified in finding that no good cause had been shown for the eight year delay in requesting a hearing. The Court did not deal with the Regulation relied upon by the Secretary, providing that reconsideration could be granted upon a showing of good cause only within four years.

Staff: Morton Hollander, Max Wild (Civil Division)

DISTRICT COURT

FEDERAL TORT CLAIMS ACT

United States Not Responsible For Injuries to Unauthorized Invitee on Military Aircraft. Hottovy v. United States (D. Ariz., January 24, 1966). D.J. File 157-8-102. An officer on active duty in the United States Army departed on a routine proficiency flight in a military helicopter taking with him as a passenger the plaintiff, a civilian airline hostess. The helicopter crashed, injuring the plaintiff, and she filed suit under the Tort Claims Act. The Army has regulations setting forth with particularity the policy of the United States regarding the transportation of persons on military aircraft, and plaintiff did not meet the qualifications. The District Court, relying on the Restatement of Agency 2d, § 242, and United States v. Alexander, 234 F. 2d 861 (C.A. 4, 1956), cert. den. 352 U.S. 892, held that while the general rule is that an employer is liable for the torts of his servant acting in the scope of his employment, even if the servant's conduct consists of forbidden acts, a recognized exception exists where the plaintiff is an unauthorized invitee of the employee. The Court granted the Government's motion for summary judgment. An appeal has been noted.

Staff: United States Attorney William P. Copple,
Assistant United States Attorney Richard C. Gormley (D. Ariz.);
James B. Spell (Civil Division)

IMMUNITY OF GOVERNMENT OFFICIALS

Serviceman Injured in Performance of Military Duty May Not Recover From His Superior Officer. Dale Eggenberger v. Marvin Jurek and James Donicht, (D. Minn.) D.J. File 145-6-679. This action was brought by a Navy recruiter who was injured when the Government vehicle in which he was travelling on Government business collided with a vehicle driven by Marvin Jurek. The Government vehicle was being operated by plaintiff's superior officer, James Donicht, who was also named as a defendant. After a jury verdict against both operators, the Court granted Donicht's, motion for judgment notwithstanding the verdict holding that: "Plaintiff cannot sue his superior officer for injuries arising out of or in the course of activity incident to military service."

Staff: United States Attorney Miles W. Lord;
Assistant United States Attorney Stanley H. Green (D. Minn.);
Eugene N. Hamilton (Civil Division)

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## CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

### STATUTE OF LIMITATIONS - CONSPIRACY

Conspiracy to Conceal Assets From Trustee in Bankruptcy; Statute of Limitations. United States v. Morris Stein and Sylvan Scolnick (E.D. Pa., January 27, 1966). Defendants, indicted for concealment of assets (18 U.S.C. 152) and conspiracy to conceal assets (18 U.S.C. 371) in connection with a planned bankruptcy fraud, moved to dismiss the conspiracy count on the ground that prosecution was barred by the statute of limitations. In support of their contention defendants cited the holding in Grunewald v. United States, 353 U.S. 391 (1957), that after the central purpose of a conspiracy has been attained, a subsidiary conspiracy to conceal may not be implied from circumstantial evidence showing that the conspiracy was kept a secret.

The Court rejected the defense argument for the reason that:

> ". . . there is a distinction between the concealment alleged in Grunewald and that in the [present] case . . . For there the concealment was done to cover up the traces of a completed conspiracy whereas here the concealment alleged is in furtherance of the objectives of the conspiracy itself - 'the successful accomplishment of the crime necessitates concealment.'"

but granted the motion to dismiss on the ground that the Government had failed to allege an overt act within the period of limitations.

Staff: United States Attorney Drew J. T. O'Keefe;
Assistant United States Attorney Francis Crumlish (E.D. Pa.)

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# IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

## IMMIGRATION

Revocation of Alien's Parole and Visa Petition in His Behalf Ruled Proper. U.S. ex rel. Grigorios Stellas v. Esperdy. (S.D. N.Y., 65 Civ. 3565, February 2, 1966) D.J. File 39-51-2698. Relator, a Greek national, petitioner for a writ of habeas corpus claiming that he was being illegally detained by the Immigration and Naturalization Service. He arrived at New York on June 23, 1961, as a member of the crew of the M/T Andreas and was paroled into the United States to receive medical treatment. He absconded and remained at large until June 11, 1963, when he surrendered to immigration officials in New York City. While at large, he married a U.S. citizen. At time of his surrender, he had a U.S. citizen child and his wife was expecting a second child. Because of his family situation, he was re-paroled by the Service to accord him an opportunity to adjust his immigration status. His wife's petition to accord him nonquota status was approved August 4, 1963. He failed to depart and obtain an immigrant visa. In November 1963 his wife withdrew her visa petition and he was informed by the Service that his parole was revoked. He surrendered to the Service and was about to be deported when this writ of habeas corpus issued. On December 6, 1963, his wife submitted another visa petition but several days later withdrew it.

Relator contended that the summary revocation of his parole without a hearing denied him due process or at least constituted an abuse of administrative discretion. The Court held that since the purpose for his parole no longer existed, that is, the adjustment of his immigration status, the revocation was in conformity with the statute 8 U.S.C. 1182(d)(5) and case law.

Relator last contended that the revocation of his visa petition on the mere withdrawal of his wife's petition constituted a denial of due process. The Court upheld the revocation of the visa petition on the basis of 8 U.S.C. 1156 and the regulation 8 CFR 206.1(b)(1). The Court noted that under this law and regulation an American wife may rid herself of the physical presence of an alien husband on parole by withdrawing her visa petition although there was no matrimonial fault on the husband's part and without regard to any rights or remedies under State domestic relations laws. The habeas corpus proceedings were dismissed.

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

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## LAND AND NATURAL RESOURCES DIVISION

Assistant Attorney General Edwin L. Weisl, Jr.

Condemnation Valuation; Unexercised Options to Purchase Land Are Mere Offers and Not Sales, and Are Inadmissible in Determining Market Value of Property Condemned; Transactions Used as Comparable Sales Must Have Been Completed; Government Entitled to New Trial Where Verdict Is Supported Only by Valuation Based Largely on Unexercised Options; Owners' Value to Them Cannot Support Verdict; Opinion of Expert Witness Based on Undisclosed Assumptions and Not Actual Sales, Where There Is Evidence of Sales, Lacks Probative Value. United States v. Percy Smith, et al. (C.A. 5, No. 22320, February 1, 1966), D.J. File 33-1-344-1. The Government appealed from a judgment on a jury verdict for $25,000 for a tract of bottomland in Wilcox County, Alabama, containing 92.60 acres, taken from a 265-acre tract, on the ground that the district court erred in admitting in evidence three options to purchase comparable property on which the landowners' appraiser relied. The Government's two appraisers valued the land and timber thereon at $12,500 and $15,500, based on comparable sales.

The landowner testified that he would not put any price on the tract and if he had to sell it he would not do so for less than $300 per acre, or $27,780. The Court of Appeals held that this testimony lacked probative value since it was limited to what his own asking price would be as an unwilling seller. He presented a cattle rancher who valued the tract taken at $250 per acre, aggregating $23,150. The Court of Appeals stated that while the district court did permit him to testify as an expert, he stated that he knew of no comparable sales, merely stating that he had knowledge of what goes on pretty generally around the area, and knew enough to form an opinion. The Court stated that here there was evidence of a substantial number of sales of comparable property made reasonably close to the time of taking, and that this witness' opinion, "which was based on undisclosed assumptions and not on actual sales, for he admitted that he did not know of any, was of no probative value."

The landowners' only other witness, Williamson, who was an expert appraiser, valued the land and timber, including severance damage, at $26,150, valuing the tract taken at $225 per acre. He based his valuation on 10 transactions of land he considered comparable, three sales prior to the taking at $65, $100 and $130 per acre, four subsequent sales ranging from $87 to $178.57 per acre, and three options for two years entered into after the date of taking, at $250 per acre. The Court stated that his opinion must have been based in substantial part on the three options since none of the sales he considered would even come close to supporting such value.

The Court agreed with the Government's contention that as options they represent only what a willing seller would take for his land but not, unless and until exercised by the holder of the option, what a willing buyer would give for it. As such, the options were not admissible for consideration either by the expert appraiser witness or by the jury in determining the value of the tract. The Court stated: "Evidence of the price paid for other comparable property must be confined to instances in which the transactions have been completed by an agreement between a seller and a buyer for the sale of the property for a

stipulated price. It is well settled that a mere offer, unaccepted, to buy or sell is inadmissible to establish market value." The Court then cited Sharp v. United States, 191 U.S. 341 (1903), and decisions of appellate courts involving offers. The Court rejected the landowners' argument that it was not error to allow Williamson to testify as to the options since the holder of them had paid a consideration for them, stating that that did not change the basic character of an option or increase its reliability as an indicia of value, as an option, even though paid for, may well have been acquired for purely speculative reasons.

The Court concluded that Williamson's opinion as to the value of the tract, necessarily having been based to a large extent on these inadmissible options, does not find adequate support in the comparable sales which he testified that he considered; therefore, it is not competent to support the jury's verdict. The judgment was reversed and the cause remanded for a new trial.

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

Condemnation: Interest on Award; Date of Taking; Compensable Property Interest; Substitute Facilities Doctrine; Interest Awarded From Date Government Took Possession When No Declaration of Taking Was Filed; Miner Has Compensable Property Interest in Access Road Over Public Domain; Substitute Facilities Doctrine Inapplicable to Private Property. Fibreboard Paper Products Corp. v. United States (C.A. 9, No. 19525, Jan. 21, 1966), D.J. File 33-29-125-11. In an opinion reported at 220 F. Supp. 328, the district court ruled that appellants (mining companies) had a compensable property interest in an access road they had constructed over the public domain leading to their mines. Although the condemnation complaint was filed in October 1952, it was stipulated that appellants' possession of the road was not denied by the Government until about October 1953. No declaration of taking was filed as to this claimed property interest. The valuation trial in 1964 resulted in a jury verdict of $168,700. The district court awarded interest at the rate of 6% from January 1959, when appellants built a substitute road, to the date of deposit.

While the Department does not agree with the district court's conclusion that the mining companies had a compensable property interest in such a road, it was decided not to prosecute an appeal of that question in this case. The appeal by the mining companies presented only the narrow question of the date from which interest should be allowed.

The Court of Appeals reversed, stating: "When the government has not filed a declaration of taking pursuant to 40 U.S.C. §258a, the date of taking is the date upon which the government enters into possession. United States v. Dow, 357 U.S. 17, 24 (1958). From a stipulation of the parties it would appear that the date of taking was at least October 13, 1953, and that interest upon the amount of the judgment should run from that date." It rejected, as inapposite to the taking of private property, the rule of cases involving the taking of public roads which limits compensation to the cost of constructing a necessary substitute facility.

Staff: Raymond N. Zagone (Land and Natural Resources Division).

Condemnation: Valuation of Entire Tract Taken; New Trial, Not Judgment in Amount of Landowners' Lesser Testimony, Best Serves Interests of Justice Where Appellate Court's Assessment of Record Was that Government Appraisers Did Not Value Entire Tract Taken. Benecke v. United States (C.A. 5, No. 22088, Feb. 10, 1966) D.J. File 33-10-580-250-19. The tract condemned consisted of some 26 acres which were not uniform in type and character. While all valuation witnesses said they had appraised the tract taken, cross-examination raised the question whether the Government appraisers had failed to consider the entire acreage condemned. When the Government on rebuttal attempted to clarify any possible misunderstanding by showing that its appraisers considered the entire tract but believed that some of the parts (e.g., 10 acres of submerged land) did not enhance the value of the entirety, the landowners objected and were upheld, on the ground that the Government was seeking to reopen its case in chief. The jury was instructed that the tract consisted of 26 acres and returned a verdict between the parties' valuations.

On the landowners' appeal, the Court of Appeals assessed the record and reversed, concluding that "the testimony of the Government witnesses does not show that they appraised the entire tract taken. On the contrary, it appears that they valued somewhat less than the entire tract. While it may be permissible to infer a value of the whole from the aggregate of the value of the parts, it must appear that all of the parts were included." It rejected the landowners' request that judgment be entered in the amount of the landowners' lesser valuation testimony, stating that a remand for new trial would best serve the interests of justice.

Staff: Raymond N. Zagone (Land And Natural Resources Division).

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# TAX DIVISION

Acting Assistant Attorney General Richard M. Roberts

## CRIMINAL TAX MATTERS
### Appellate Decision

Admissibility of Agent's Admissions; Introduction of Summaries of Unreported Income in Specific Items Case. Earnest C. Harris v. United States (C.A. 5, February 9, 1966.) Appellant was convicted on four counts of wilfully attempting to evade his 1957-1960 income taxes. The evidence showed that he was in the business of placing coin-operated pinball machines in bars and taverns, splitting the proceeds equally with the location owners. The amounts stated on appellant's copies of the collection tickets were posted to a general ledger from which appellant's gross receipts were determined. The Government established that there was substantial unreported income in each year arising from the understatement on many tickets of the amounts actually collected by appellant. A former office employee of appellant testified to certain code markings whereby amounts on some of the tickets were understated by 50% or 75%, and explained that she was advised of the existence and method of operation of this code by appellant's office manager. Appellant urged on appeal that this testimony was inadmissible as hearsay. The Court of Appeals held it to be admissible as an exception to the hearsay rule: statements made by an agent within the scope of his authority are admissible against the principal where the agency is proved independently of the hearsay statements, citing United States v. Miller, 246 F. 2d 486, 490 (C.A. 2).

The investigating agent testified that he had examined some 14,000 collection tickets to ascertain the unreported income, and had summarized them item by item on ledger sheets which were admitted in evidence. The collection tickets themselves were microfilmed and the originals were not admitted in evidence. The Court found no error in the admission of the summaries where the computations were fully explained at the trial, and where appellant had ample opportunity to inspect all the materials relied on by the Government and to cross-examine as exhaustively as he wished.

Staff: Former United States Attorney Barefoot Sanders; Assistant United States Attorney William L. Hughes, Jr. (N.D. Texas)

## CIVIL TAX MATTERS
### District Court Decisions

Bankruptcy; Penalty and Interest to Date of Payment Allowed on Claim for Federal Taxes by Virtue of Service of Notice of Levy Prior to Bankruptcy. In re Edward M. Cohen. (N.D. Ga., Atlanta Div., February 7, 1966). Federal tax liabilities, including penalties and interest, were assessed against Edward M. Cohen and, prior to bankruptcy, notices of levy were served upon the executrix of an estate and her attorney, seizing the bankrupt's interest in the estate as a legatee. Following the institution of the bankruptcy proceeding, the Court directed the executrix of the estate to turn over to the trustee all assets in which the bankrupt would have an interest on final distribution of the estate.

Thereafter, rather than filing a normal proof of claim, the Government filed in the bankruptcy proceeding a petition in intervention seeking so much of the bankrupt's interest in the decedent's estate as would be necessary to satisfy the full amount of the tax liabilities, including penalties and interest to date of payment. Once the bankrupt's interest in the estate was paid over to the trustee by the executrix, the Government filed in the bankruptcy proceeding a petition to reclaim property, again seeking so much of the proceeds as would be necessary to satisfy the entire tax liability, including interest and penalties as provided by Section 6601(f) of the 1954 Code.

The trustee, apparently relying on Section 57j of the Bankruptcy Act, as amended, contended that interest was not allowable on any claim after the commencement of the bankruptcy proceeding and, specifically, that the United States was not entitled to the allowance of penalties with respect to its claim. Affirming the referee, the District Court ruled, as the Government contended, that Section 57j, which deals with allowance of claims against the bankrupt estate, was not applicable, since the Government had reduced its claim to possession by virtue of the pre-bankruptcy levy, and allowed the Government's claim including penalties and interest to date of payment.

Staff: United States Attorney Charles L. Goodson; Assistant United States Attorney Slaton Clemmons (N.D. Ga.); Sherin V. Reynolds and Joel P. Kay (Tax Division).

Federal Tax Liens; Tax Liens and Judgment Lien of United States Held Superior to New York State Franchise Tax Liens and New York City's Real Estate Tax Claims. United States v. Comptroller of the City of New York, et al. (S.D. N.Y., November 26, 1965). (CCH 66-1 U.S.T.C. ¶9143). The United States, the State of New York and the City of New York asserted claims against a fund representing the proceeds of a condemnation award to the taxpayer. The United States claimed priority for taxes assessed in 1957 and a judgment satisfied by the F.H.A., as insurer of the taxpayer, and assigned to the United States, and for which the United States filed a transcript of judgment in 1957. The State of New York claimed priority for corporate franchise taxes for which warrants were filed in 1955 and 1961. The City of New York asserted claims for real estate taxes, water charges, and sewer rents for the years 1955-1959. As against the contention of the State and the City that the federal judgment lien did not prime their later tax liens, the Court ruled that the State received no benefit from Section 7(b) of the National Housing Act (12 U.S.C. 1701 (b)) since it applied only to taxes on real property, whereas the State's claim was for franchise taxes; and that it was unnecessary to determine whether Section 7(b) subordinated the federal judgment lien to the City's tax claims, since the fund was sufficient to satisfy all the claims of both. It further ruled the federal tax and judgment liens were perfected prior to the liens the State perfected by filing warrants, and that the City's claims had statutory priority over the State's claim. Accordingly, the Court ordered distribution (1) in satisfaction of the federal tax and judgment liens, with interest, (2) the City's real estate, water charges, and sewer rent liens, and (3) the balance to the State.

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

Federal Tax Liens; Fraudulent Transfer; Recording of Federal Tax Liens Against Mortgagee's Interest in Real Estate; Statutes of Limitations on Collection; Federal Tax Liens on Indebtedness Owed to Delinquent Taxpayer (Mortgagee of Real Estate) Were Superior to Claim of Purchaser of Note and Mortgage Deed, Evidencing and Securing Indebtedness, Even Though Federal Tax Liens Were Filed at Taxpayer's Domicile (Wareham, Massachusetts) and Not at Situs of Real Estate (Rhode Island); Transfer of Note and Mortgage Deed by Taxpayer Held Fraudulent and Without Present Consideration. Although Suit to Enforce Federal Tax Liens Was Commenced in Rhode Island More Than Six Years After Assessment, Court Held That Institution of Collection Action in Massachusetts Within Six-Year Period Tolled Six-Year Statute of Limitations. United States v. Haddad, et al. (D. R.I., December 27, 1965). (CCH 66-1 U.S.T.C. ¶9175). On July 18, 1952, certain residents of Rhode Island mortgaged real estate to the taxpayer in consideration for a loan made to them of $15,000 by the taxpayer. The mortgagors issued to the taxpayer a promissory note payable in five years, secured by a mortgage on the Rhode Island real estate. On July 21, 1952, the mortgage deed was recorded in accordance with Rhode Island law in the town of Johnston, Rhode Island. On January 25, 1957, the taxpayer executed and delivered to Mr. Badway an instrument of transfer of the mortgage deed and the debt. The transfer instrument recited that the transfer was made "in consideration of the sum of One ($1) dollar and other valuable considerations." This transfer was not recorded in the town of Johnston until April 8, 1957.

On January 20, February 20, and March 9, 1953, notices of federal tax liens, in the amount of $78,404.41 due from the taxpayer, were filed in the office of the Town Clerk, Wareham, Massachusetts. No notice of the federal tax liens was filed in Rhode Island, a "title theory" jurisdiction.

The Court determined that the transfer of the mortgage deed and debt to the taxpayer from Badway was fraudulent and without present consideration. The defendant, Badway, also contended that the United States was not entitled to foreclosure of its federal tax liens, arguing that the notices of said liens were not recorded in Rhode Island (the situs of the real estate) and that the foreclosure suit was not commenced within six years of the federal tax assessment. In response to these arguments, the Court stated: (1) that the "debt then due the taxpayer with interest thereon was intangible personal property belonging to him" and that the "promissory note is merely evidence of said indebtedness and the mortgage deed is merely security for its payment," reasoning that the situs of intangible personal property (i.e., the debt) is at the domicile of its owner, citing Baldwin v. Missouri, 281 U.S. 586, and Kirtland v. Hotchkiss, 100 U.S. 491; (2) and that the institution of a suit against the taxpayer in the Federal District Court for the District of Massachusetts within the six-year period of limitations tolled the statute of limitations.

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