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UNITED STATES ATTORNEYS
BULLETIN

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APPOINTMENTS - UNITED STATES ATTORNEYS

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

Washington, Eastern - Smithmoore P. Myers

Mr. Myers was born March 26, 1914 in Cheyenne, Wyoming, and is single. He attended Gonzaga University, Spokane, Washington, from 1932 to 1936 when he obtained his B.S. degree, and from 1936 to 1939 when he obtained his LL.B. degree summa cum laude. He was admitted to the Bar of the State of Washington in 1940. From 1939 to 1942 he was Investigator and Briefing Clerk in the Spokane County Superior Court. From 1942 to 1946 he served in the United States Navy as Lieutenant Commander. From 1945 to 1947 he was Assistant to the Attorney General of Washington. From 1947 to 1955 he was engaged in the private practice of law in Seattle, Washington. From 1955 to 1965 he was Dean of the Law School of Gonzaga University. From 1957 to 1959 he also served intermittently as Special Master in the United States District Court for the Eastern District of Washington. He was nominated as United States Attorney on March 25, 1966.

The nomination of the following new appointee as United States Attorney has been submitted to the Senate for confirmation:

Washington, Western - Eugene G. Cushing

The nomination of the following incumbent United States Attorney to a new four-year appointment has been confirmed by the Senate:

Delaware - Alexander Greenfeld

In addition to those listed in previous issues of the Bulletin, the nominations of the following incumbent United States Attorneys have been submitted to the Senate for confirmation:

Indiana, Northern - Alfred W. Moellering
Louisiana, Western - Edward L. Shaheen
Mississippi, Southern - Robert E. Hauberg
Virgin Islands - Almeric L. Christian

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ANTITRUST DIVISION

Assistant Attorney General Donald F. Turner

Interstate Movement Involved in Hauling and Disposal of Refuse Held to Be Proper Subject of Interstate Commerce. United States v. Pennsylvania Refuse Removal Association, et al., (C.A. 3) DJ File 60-337-7. The Court of Appeals affirmed the conviction of the Association and its principal figures for violation of Section 1 of the Sherman Act in the refuse removal business in the Philadelphia area. On appeal, defendants did not challenge the sufficiency of the evidence to establish price-fixing and other illegal conduct, but asserted that their conduct was not in restraint of interstate commerce. The Government has asserted that the illegal acts were "in commerce" because a substantial amount of the refuse collected in Philadelphia was transported across the bridge to New Jersey and dumped there. The evidence showed that refuse was transported across state lines when it was cheaper and more practical to do so, and that in one year the charges for the removal of refuse so transported amounted to about $300,000. The trial court charged the jury that interstate commerce would be established if it found a regular movement of appreciable quantities of refuse across state lines.

The Court of Appeals held that the hauling and disposal of the refuse was an integral part of the removal business and that the interstate movement involved in that "vital element of the one business operation" made it "a proper subject of interstate commerce." It rejected defendants' attempt "to split their refuse business into two parts" and held immaterial that the amount of refuse crossing statelines was relatively small and that it was the property of the removers at that time.

Staff: Lionel Kestenbaum and Gerald Kadish (Antitrust Division)

Brewing Company Found to Have Violated Section 7 of Clayton Act and Ordered to Divest Acquired Companies. United States v. Jos. Schlitz Brewing Company, et al., (N.D. Calif.) DJ File 60-0-37-762. On March 24, 1966, Judge Stanley A. Weigel held that defendant Schlitz's acquisition of the assets of Burgermeister Brewing Corporation and of 39.3% of the stock of John Labatt, Ltd., constituted violations of Section 7 of the Clayton Act. Trial of this matter was held over a three-week period, commencing on August 16, 1965. Thereafter, post-trial briefs were filed, together with proposed findings of fact, conclusions of law, and a proposed final judgment. The opinion contains 125 findings of fact and 13 conclusions of law completely supporting the Government's position on substantially every issue in the case.

The Court found that beer was a line of commerce, and that defendant Schlitz's argument that premium and non-premium beer constituted separate lines of commerce was not supported by the evidence. The court found that there is very little difference in price or quality between the cheapest and the most expensive ingredients used in brewing beer, that there are no significant differences in the costs of labor or equipment for production of the various brands of beer, that beer sells at a wide spectrum of prices, and that all brands and types of beer compete with each other in price, image, point of sale advertising, media advertising, shelf space, floor display, refrigerator position, and in attention from wholesalers and retailers.

Judge Weigel found that the United States as a whole, the eight Western States area of California, Oregon, Washington, Idaho, Montana, Nevada, Utah and Arizona, the State of California, and the State of Hawaii, were each separate geographic markets for the production and sale of beer. In so finding, the Court held that freight rates were a substantial factor in the sale of beer, that over 94% of the beer produced in the eight Western States area in 1963 was sold in that area, and that, for profit purposes, brewers attempt to sell a maximum amount of their production as close as possible to the producing brewery. Judge Weigel stated that defendant Schlitz's insistence that the entire United States was the only relevant section of the country overlooked the fact that only three brewers actually compete on a national basis, and that the competitive "mix" of suppliers in the beer industry in any section of the country is composed of the three national brewers and a varying group of local and regional brewers.

The Court found that the Schlitz acquisition of 39.3% of the stock of John Labatt, coupled with John Labatt's control of 63.5% of General Brewing's common stock, would make Schlitz the largest seller of beer in the eight Western States area, and in the States of California and Hawaii, and that the control of General Brewing by Schlitz will result in a substantial lessening of competition in the sale of beer in each of the four geographic markets. The Court made specific holdings to the effect that a strong trend toward concentration exists in the brewing industry, that from 1953 to 1963 the shares of beer sales accounted for by the ten largest and the twenty-five largest brewers have increased from 40% and 60% to 57% and 82%, that this trend will continue unabated, and that acquisitions and mergers have played an important part in this trend. Judge Weigel also found that distributors are extremely important to successful competition of brewers in the brewing industry, and that the control of General Brewing by Schlitz would place General's distributor system in Schlitz's hands and would result in a significant competitive advantage to Schlitz, and a substantial competitive disadvantage to its competitors. The Court also found that at the time it acquired the Labatt stock, Schlitz attempted to eliminate potential competition of Labatt by attempting to halt the introduction of Labatt beer into the United States by General Brewing, and that Labatt and General Brewing's plans for expansion in the United States represent substantial potential competition, which would be eliminated if Schlitz were allowed to control Labatt. Schlitz had strongly contended that the issue of potential competition was not significant in this case due to the fact that Labatt was not now a substantial competitor in the United States, and that there was no evidence of Labatt's plans to expand its efforts in the United States. The Court noted that this statement was "patently erroneous" and that the evidence clearly demonstrated that Labatt had the desire, the intention, and the resourcefulness to enter the United States markets, and to make General Brewing a stronger competitor in those markets.

Schlitz had contended that it never wanted control of General Brewing and that it would use its power as controling stock holder of Labatt to arrange for an immediate sale of General Brewing. Judge Weigel stated that this argument was irrelevant inasmuch as the "test of a violation of §7 is whether, <u>at the time of the suit</u>, there is a reasonable probability that the acquisition is likely to result in the condemned restraints." The court noted, furthermore, that it was not convinced that from the outset of Schlitz's negotiations with Labatt that Schlitz had no desire to control General Brewing. The Court pointed out that if this were true, Schlitz could have done much more in the way of conditioning its purchase on the sale of General Brewing. Judge Weigel stated that entry into the American brewing markets by new American firms is highly unlikely, and that the most probable source of potential competition is represented by the large Canadian brewers. He noted that smaller American breweries would not have the resources to give General Brewing the necessary financial and technical help, and that the purchase of General Brewing by any large American brewer would create substantial antitrust problems.

As to Schlitz's acquisition of the assets of Burgermeister Brewing Corporation in 1961, Judge Weigel found that at the time of its acquisition, Burgermeister was a solvent corporation, in a healthy financial position, that it had one of the most modern plants in the United States, that it had an exceptionally strong distributor organization, that at the time of its purchase it was not in a deteriorating, declining or failing condition, and that the acquisition of its assets by Schlitz resulted in a substantial lessening of competition in the eight Western States area and in California. The Court stated that it was true that Burgermeister's sales and profits were declining at the time of its acquisition, but that this was undoubtedly true of many firms which decide to sell out to a competitor, and that "Allowing an acquiring company to successfully raise the defense that its acquired former competitor showed declining sales and profits in the years immediately preceding the acquisition surely would provide an exception to Section 7 large enough to eviscerate the statute." The Court also found that Schlitz's ability to choose between Schlitz and Burgermeister wholesalers when it acquired Burgermeister caused substantial detriment to other brewers whose beers were handled by the Schlitz or Burgermeister wholesalers, and that Schlitz would have introduced its own popular priced beer on the West Coast if it were not for its acquisition of Burgermeister.

Defendant Schlitz attempted to argue that there had been some type of implied clearance given this merger by the fact that, at the time of the acquisition, the Division orally informed Schlitz that it would not bring suit. Judge Weigel found that there was no clearance given to this acquisition, and that the Department was in no way estopped or restrained from attacking this acquisition. Defendant Schlitz's further contentions that John Labatt, Ltd., was not a corporation engaged in commerce within the meaning of Section 7, and that the acquisition of John Labatt stock was an investment exempt from the prohibition of Section 7, were both rejected by the Court.

Judge Weigel found that the necessary relief was divestiture. In addition to ordering that Schlitz divest itself of the Burgermeister assets and the Labatt stock, Schlitz was perpetually enjoined from acquiring the stock of any corporation, or any interest in any brewery, engaged in the brewing of beer in the State of California. In addition, for a period of ten years, Schlitz is enjoined from acquiring any brewery outside the State of California, except with the prior written consent of the Government or after approval by the Court upon an affirmative showing that the effect of the acquisition will not be substantially to lessen competition.

Staff: Lyle L. Jones, Anthony E. Desmond, Gilbert Pavlovsky, James E. Figenshaw, Udell Jolley and John T. Cusack (Antitrust Division)

District Court Opinion Enjoining Standard Oil From Acquiring Potash Company of America Filed. United States v. Standard Oil Company (New Jersey), et al. (D. N.J.) DJ File 60-0-37-809. On March 31, 1966, Judge Robert Shaw filed an opinion authorizing the entry of a judgment permanently enjoining defendant Jersey from acquiring Potash Company of America.

The Court found that the probable effect of the proposed acquisition may be to substantially lessen competition in the United States potash market. It found a probability that Jersey will not abandon its efforts to achieve its ultimate goal of a self-developed potash project. Jersey is likely to enter on a grass-roots basis "just as soon as continued exploration for a good potash ore body develops the opportunity", the Court said.

In the first fifty-two pages of the fifty-seven page opinion, the Court sets forth its findings as to the business of the companies involved, the nature of the industry, and the extent of Jersey's investment and interest in the development of a potash market through its subsidiaries, both domestic and Canadian. It also found that Jersey was a substantial purchaser of potash for its world-wide fertilizer operation.

The Court considered the vertical and horizontal aspects of the proposed acquisition separately and based its conclusion upon the conjoined evaluation of these aspects.

Jersey was the largest industrial corporation in the world in terms of assets and second largest in terms of net profits. Potash Company was the largest United States producer of potash and the second largest North American producer, the Court found.

Jersey's activities included ownership interests in fertilizer plants in seven countries approximating $90,300,000, as of January 15, 1965, and contemplated additional investment, at that time, in excess of $132,000,000. One of the three primary ingredients in the manufacture of fertilizer is potash. Jersey's estimated requirements for potash "would at least equal all and perhaps surpass the present productive capacity of two of the smallest United States producers. It would absorb approximately 29% of Potash Company's total projected productive capacity /and/ would absorb the major part of Potash Company's present Canadian production . . ." the Court found. Nonetheless, Jersey's potash requirements represented slightly less than 1% of the free world consumption and could be expected to increase to only slightly less than 2%.

In 1959 and 1960, Humble, a wholly-owned subsidiary of Jersey, acquired potash rights and conducted potash exploration activities in New Mexico and Utah. Preliminary studies of potash deposits were made in Montana and North Dakota, and consideration was given to a potash exploration project in Peru. The Court stated that, although the efforts of Humble never reached the point where definite plans were formulated to bring a particular potash project into development, it nevertheless appeared that Humble had not abandoned the idea of locating and developing a profitable potash project.

Imperial Oil, Ltd., a controlled Canadian subsidiary of Nersey, conducted independent potash studies in Canada. It was the activity of Imperial upon which the Court mainly relied to support the conclusion that Jersey was a potential competitor in the potash industry, because Canadian potash is competitive with U.S. potash in both domestic and foreign markets. The Court, discussing Imperial's activities in detail, specifically touched upon the following: Imperial's acquisition of two Crown potash permits covering approximately 200,000 acres in the Regina region of Saskatchewan; the discovery of extremely rich deposits of potash on the permit property; and, the expenditure by Imperial of in excess of $2 million in test drillings to delineate a mineable ore body. By May 1964, Imperial officials were recommending a grass-roots potash venture in Saskatchewan. At the time, however, Jersey was also considering the acquisition of Potash Company and ultimately decided upon the latter venture. With respect to all these activities, Judge Shaw concluded that Jersey had a continuing interest since at least 1961 in obtaining its own captive source of potash. Allied to this motive for entering the potash industry was the knowledge that the potash industry was a highly profitable one.

In discussing defendant's contention that the evidence would not support a conclusion that Jersey would, absent the acquisition, probably enter the potash industry independently because the profit would not be comparable to other investment opportunities, that Jersey had no experience in potash production or marketing and that the Government had not shown that it would be economically feasible for Jersey to mine potash in Saskatchewan, the Court stated:

(1) While the profit aspect of a PCA acquisition would be much more attractive than a self-developed potash project, in the absence of the acquisition of PCA, Imperial would still pursue the opportunity for a self-developed project in Saskatchewan;

(2) The absence of Jersey experience in producing or marketing potash would not be a hindrance for Jersey has not, in the past, hesitated to enter new fields because of a previous lack of experience; and,

(3) Jersey's evidence did not support a conclusion that <u>it would not be feasible</u> to develop a potash mining operation in Saskatchewan, for the testimony of Jersey's expert geologist, when treated in the light most favorable to Jersey, merely indicated that further exploratory work in Saskatchewan was necessary.

With that, the Court held that Jersye's acquisition of the assets of PCA would foreclose other U.S. potash producers from competing for sales to Jersey. Judge Shaw stated that "measured solely and strictly in terms of mathematical percentage /less than one per cent/, the immediate impact of acquisition of PCA upon competition in the United States market would not appear to be substantial, but such a narrow approach in not consistent with the objective of Section 7 . . . ." Concentration in the industry must also be considered and, in this case, concentration in the potash industry is great and the margin of existing competition is narrow. A slight change in the structure of the market would probably produce a substantial anti-competitive effect.

Jersey and PCA contracted for the acquisition on September 16, 1964. One month later, a complaint charging a violation of Section 7 of the Clayton Act was filed and a temporary restraining order was issued on October 23, 1964 by

Judge Shaw after a hearing. Defendants agreed to the entry of an injunction pendente lite on condition that the Government expedite the trial. Accordingly, trial was concluded four months later on February 24, 1965. On July 13, the Court denied Jersey's motion to life the preliminary injunction to allow Jersey to acquire and hold separately the Potash Company's assets pending a final adjudication. The Court ruled that the acquired Company would not continue to be "the same operating corporate entity" as it had been should he allow Jersey to consummate the transaction. He ruled that any rights of defendant in the merger agreement were "subordinate to the public interest" which required that the corporation be kept apart. Defendants had contended that unless the injunction were lifted, the parties would be unable to complete all details necessary to distribute Jersey's stock to Potash Company's shareholders by October 1965, as required by the contract for the sale.

Staff: Lewis Bernstein, Peter Adang and three former Division attorneys (Fred Turnage, Nicolaus Bruns, Jr., and Richard T. Colman) (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General John W. Douglas

COURT OF APPEALS

AGRICULTURAL MARKETING AGREEMENT ACT

Provision of All Milk Marketing Orders Barring Actions by or Against Producers' Settlement Fund After Two Year Limitation Period Held Valid; Secretary's Interpretation of Order to Bar Interest on Refund Upheld. The Lawson Milk Company v. Freeman (C.A. 6, Nos. 16269, 16270, March 28, 1966). D.J. File 105-57-134. Plaintiff, a non-fully-regulated milk handler under the Cleveland Milk Marketing Order, was required to make compensatory payments into the producers' settlement fund from 1947 to 1952. By then, its business in the area had expanded sufficiently to make it fully regulated. In 1953, it brought administrative proceedings seeking to recover all the compensatory payments it had made. Having lost before the Secretary and the district court, the case was on appeal when the Supreme Court decided Lehigh Valley Cooperative Farmers, Inc. v. United States, 370 U.S. 76, which construed the type of compensatory payment made by Lawson as inconsistent with another section of the Act and therefore invalid. Plaintiff then sought refunds on the basis of Lehigh Valley, and the case was remanded to the Secretary for a ruling on whether, pursuant to a section of the order in question, the request for refunds was time-barred. On remand, the Secretary determined that the refunds were in part barred by the limitations provision of the Order, but that the money paid in during the two year period before the administrative action was begun should be refunded. He construed the order as not providing for interest on the money to be refunded.

In court, plaintiff argued that the Secretary had no power to impose a limitation period by regulation, and that the determination denying it interest on the refund was erroneous. The Sixth Circuit affirmed the district court's decision that the limitation of action provision of the order was necessary to effectuate the other provisions of the order, and not inconsistent with the Act, and thus authorized under 7 U.S.C. 608c(7)(D). As to the Secretary's interpretation of his order as denying interest, it reversed the district court, holding that the Secretary was correct. It noted that the construction given the order by the Secretary was in accordance with the administrative practice, and that when construction of a regulation is in issue, great deference will be given to the interpretation given it by the officers charged with its administration. In the latter connection, the Court cited Udall v. Tallman, 380 U.S. 1.

Staff: Robert C. McDiarmid (Civil Division).

Stay Pending Appeal Denied Bank Ordered to Comply with Subpoena Duces Tecum Issued by Department of Agriculture. Orville L. Freeman, etc. v. Fidelity-Philadelphia Trust Company (C.A. 3, No. 15822, April 14, 1966). D.J. File 106-63-72. The Third Circuit denied Fidelity-Philadelphia's motion for a stay pending appeal of the order of the district court directing enforcement of a subpoena duces tecum issued by the Department of Agriculture in connection with its investigation to determine whether, inter alia, one of the bank's depositors was obtaining, on behalf of a dairy company, rebates from milk producers in violation of the Agricultural Marketing Agreement Act of 1937. In its motion, the bank had stressed that unless the stay were granted, its appeal would be moot. It also called the Court's attention to the fact that in a case involving identical issues (Freeman v. Brown Brothers Harriman & Co. (C.A. 2 No. 30335, reported at page 150 of Vol. 14 of this Bulletin) the Second Circuit had recently granted a stay pending certiorari. In opposing the stay, the Government urged that (1) the grant of the stay would seriously harm the public interest; (2) immediate enforcement of the subpoena would not irreparably injure either the bank or its depositor; and (3) there was no reasonable likelihood that the bank would prevail on the merits of the appeal.

Staff: Alan S. Rosenthal and Howard J. Kashner (Civil Division).

BANKRUPTCY ACT

Filing of Chapter XIII Wage Earner Petition Held Assignment Sufficient to Give United States Priority Under 31 U.S.C. 191; Priority Held to Apply to Chapter XIII Proceedings. United States v. Sidney Belkin (C.A. 6, No. 16275, March 31, 1966). D.J. File 130-017-37. In this wage earner proceeding under Chapter Thirteen of the Bankruptcy Act, the district court, following In re Bailey, 188 F. Supp. 47, held that the statutory priority given the United States in insolvency cases by 31 U.S.C. 191 and 11 U.S.C. 104(a) did not extend to Chapter Thirteen cases. After an appeal was taken in this case by the Government, the Court of Appeals for the Eighth Circuit decided United States v. National Furniture Co., 348 F. 2d 390, holding that the filing of a Chapter Eleven petition by an insolvent did not precipitate the priority of the United States under 31 U.S.C. 191, as it was neither an act of bankruptcy nor a voluntary assignment.

The Sixth Circuit resolved both these issues in our favor. It disposed of the original issue by noting that 11 U.S.C. 1059 specifically incorporated the priority scheme of 11 U.S.C. 104(a) into Chapter Thirteen. On the basic question of whether a 31 U.S.C. 191 priority could be precipitated at all by the filing while insolvent of a petition under Chapters Ten through Thirteen of the Bankruptcy Act, the Sixth Circuit expressly refused to follow the Eighth Circuit's holding in National Furniture. Instead, it held that at least in cases where the petition calls for a composition rather than a mere extension, the filing of a Chapter Thirteen petition constitutes a voluntary assignment to the bankruptcy court by operation of law, which is sufficient to satisfy the requirements of 31 U.S.C. 191.

This decision should be of assistance to the Government in our continued assertion of priority claims in proceedings under Chapters Ten-Thirteen of the Act.

Staff: Robert C. McDiarmid (Civil Division).

FALSE CLAIMS ACT

Government Entitled to Recover When False Claim Filed, Even Though Claim Not Paid. United States v. Ridglea State Bank, et al.; United States v. Bank of

Commerce, et al., (C.A. 5, Nos. 21841 and 21842, March 14, 1966). D.J. File 29-73-425. The two banks in these cases had filed eight different claims (four each) for FHA reimbursement of their losses upon defaulted FHA-insured home improvement loans. A former employee of both banks, one Hubbard, had approved the eight applications for FHA-insured loans, knowing that the applications were false and fraudulent, and had received kickbacks from the applicants. After he left the employ of the two banks, the loans were defaulted, the banks filed their claims for reimbursement, and the FHA paid five of the eight claims. It refused, however, to reimburse the Ridglea Bank on three of its four claims. Pursuant to the provision in the False Claims Act that the Government is entitled to a forfeiture of $2,000 for each false claim filed, the Government filed one action against Ridglea Bank and Hubbard and another action against the Bank of Commerce and Hubbard, seeking from each the $2,000 for each false claim filed. As to the three claims which the FHA refused to pay, the district court dismissed the complaint against both Ridglea and Hubbard. With respect to the other five, which went to trial, the court held Hubbard liable but exonerated both banks, finding that Hubbard's fraud was not designed to benefit his employers but only himself and that no other employees of the banks were aware of the fraud.

On the Government's appeal, the Fifth Circuit reversed in part and affirmed in part. As to the three claims which the FHA refused to pay, the Court of Appeals agreed with our position that payment by the Government was not required, and that the Government is entitled to recover the statutory amount of $2,000 when a false claim is filed, regardless of payment. On the counts relating to these claims, the Court held that we were entitled to a trial as to both Hubbard and Ridglea Bank. However, with regard to the five counts involving paid claims which went to trial, the Fifth Circuit held that the banks were not liable for Hubbard's fraud, as his intention was solely to benefit himself, and as no other employees of the banks were aware of the fraud.

Staff: John C. Eldridge (Civil Division)

FEDERAL TORT CLAIMS ACT

Presumption of Virginia Law That Child Seven to Fourteen Years of Age Is Incapable of Contributory Negligence Overcome by Government. Henry James Taylor, etc. v. United States (C.A. 4, No. 10239, April 13, 1966). D.J. File 157-79-537. In this Tort Claims Act suit to recover for injuries suffered by a seven and one-half year old boy when he crawled under a fence and into an electrical transformer station on Fort Belvoir, the Court of Appeals for the Fourth Circuit sustained the district court's finding that the Government had overcome the presumption under Virginia law that a child between the ages of 7 and 14 is incapable of contributory negligence. In so doing, the Court of Appeals pointed out that it was not necessary for it to determine whether it agreed with the finding of contributory negligence, since the district court was "in a better position" to make that determination and it was enough that its finding was not "clearly erroneous."

Staff: Jack H. Weiner (Civil Division).

OFFICIAL IMMUNITY

Suit by Discharged Employee Against Former Supervisors for Damages Arising Out of Their Actions in Effecting Her Removal Held Barred. Frances B. Chapin v. Dr. Harry D. Pratt, et al. (C.A. 5, No. 22343, March 16, 1966). D.J. File 145-16-136. By this action, appellant sought damages from her former supervisors at the Public Health Service where she had been employed as a secretary. The actions complained of were taken by the appellees in effecting appellant's involuntary retirement on account of disability. Applying the official immunity doctrine of Barr v. Matteo, 360 U.S. 564, the Fifth Circuit held that since all of the acts and statements were performed by the appellees in discharge of their duties as federal employees, they were absolutely immune from suit. Additionally, after a lengthy discussion, the Court rejected the contention that the failure to provide an employee with a hearing before retiring her involuntarily on account of disability was not open to attack on constitutional grounds.

Staff: Edward Berlin (Civil Division)

DISTRICT COURT

FEDERAL TORT CLAIMS ACT

Constitutionality of Federal Medical Care Recovery Act (42 U.S.C. 2651-2653) Upheld. Phillips v. Trame, United States, Intervenor (E.D. Ill., Civil No. 64-72, March 24, 1966). D.J. File 77-0-1. The United States intervened to present a claim pursuant to the Federal Medical Care Recovery Act, 42 U.S.C. 2651-2653, for the amount spent on the medical treatment of plaintiff. Defendant moved to dismiss the intervention, asserting that the Act is unconstitutional. Relying on United States v. Standard Oil Co., 332 U.S. 301, the Court upheld the Act stating that Congress had the power to create liability for such medical expenses in order to protect federal funds. The Court also held that the Bureau of the Budget rates for hospital and medical care could not be challenged on the ground that they are unreasonable or arbitrary. This case is the first to challenge the constitutionality of the Act.

Staff: United States Attorney, Carl W. Feickert (E.D. Ill.)
Lawrence A. Klinger (Civil Division).

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CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

UNIVERSAL MILITARY TRAINING AND SERVICE ACT

Notification by Department of the Army of Registrant's Refusal to Submit to Induction. Whenever a registrant refuses to submit to induction after reporting to the induction station, the station commander, in accordance with paragraph 40(c) of Army Regulation 601-270, prepares a letter of notification of refusal to submit to induction. The original of this letter is sent to the United States Attorney for the district in which the registrant refused to be inducted, and copies are distributed to the appropriate State Director of Selective Service and to the local board which delivered the registrant to the induction station.

The notification to the United States Attorney is for information only. Criminal prosecution should not be considered or initiated until the registrant is reported delinquent by the local board on Delinquent Registration Report (SSS Form 301).

ARMED SERVICES - BRIBERY

Solicitation of Names of Inductees by Insurance Company Personnel. In the past, insurance company officials and salesmen have bribed personnel at various military posts in order to receive, prematurely, information regarding the names and addresses of parents of recently enlisted or inducted servicemen. In such cases we have successfully prosecuted those responsible under 18 U.S.C. 201. Lacking the element of bribery, it appears there is no violation of Federal law.

When United States Attorneys receive complaints from families of recent enlistees or inductees concerning the activities of insurance company representatives, it should be suggested that the complaint be transmitted to the authorities of the military post where the serviceman's enlistment or induction occurred. If a post receives a volume of such complaints, investigation will be initiated to determine whether Federal laws have been violated. A military post receiving any information, allegation, or complaint of violation of any provisions of Title 18, United States Code, involving Government officers or employees is required by 5 U.S.C. 311a to expeditiously report same to the Department of Justice.

POSTAL OFFENSES

Indictment Charging Concealment and Retention of Fifty-one Postal Orders "of a Value in Excess of $100.00" Was Not Defective Where Money Orders Were Blank and Therefore Without Particular Value. United States v. Ralph George Ciogoli (C.A. 3, March 23, 1966). Section 641 of Title 18, upon which the controverted indictment was predicated, pertinently provides that "[W]hoever receives, conceals or retains ... [any property of the United States] with intent to convert it to his own use or gain, knowing it to have been ... stolen ...

/s/hall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100.00, he shall be fined not more than $1,000 or imprisoned not more than one year, or both." On motion by defendant, in which it was averred that "the money orders were blank and had no face or par value nor any market value and that the cost of said money orders were less than $100.00," the trial court dismissed the indictment without prejudice.

The Third Circuit reversed this ruling on two grounds. First, since the essential wrong proscribed is the knowing misappropriation of Government property, no particular value need be demonstrated for conviction. It is only the degree of punishment which is subject to distinctions as to value. Federal Rule of Criminal Procedure 31(c), moreover, expressly provides that a "defendant may be found guilty of an offense necessarily included in the offense charged." Second, it was deemed that the trial court acted prematurely in not affording the Government the opportunity to present its proofs regarding value at trial. Thus, the Third Circuit reasoned that mere concession that the money orders were blank does not preclude the possibility that in the course of illegal trade, value could exceed $100.

Staff: United States Attorney Gustave Diamond;
Assistant United States Attorney Thomas A. Daley
(W.D. Pa.).

FORFEITURES: JURISDICTION

Forfeitures: Jurisdiction of District Court. Jary Leasing Corporation v. United States (E.D. N.Y.). One 1963 Buick Riviera was seized pursuant to 26 U.S.C. 7302. Its appraised value was less than $2,500 and no claim and cost bond was filed. Plaintiff, lessor of the vehicle, filed a petition for remission with the delegate of the Secretary of the Treasury; and it was denied. Plaintiff thereafter filed suit in the District Court. In granting defendant's motion to dismiss the complaint, the Court held that it lacked jurisdiction to review the administrative action of the delegate. It was also held that the Administrative Procedure Act did not empower the Court to review the actions of the delegate.

Staff: United States Attorney Joseph P. Hoey;
Assistant United States Attorney Ralph A. Bontempo
(E.D. N.Y.).

* * *

TAX DIVISION

Assistant Attorney General Mitchell Rogovin

CRIMINAL TAX MATTERS
Appellate Decision

Subscribing to False Return Under Penalties of Perjury--Materiality--Question of Fact or Law. Sam Hoover v. United States (C.A. 5, April 1, 1966). Appellant was convicted on a four count indictment for willfully making and subscribing under the penalties of perjury false income tax returns which he did not believe to be true and correct "as to every material matter", in violation of Section 7206(1), I.R.C. The principal assignment of error was that the trial court failed to instruct the jury on all the essential elements of the offense, particularly on the term "material". Although the court had given a general recitation of the elements of the offense, which included the phrase "as to every material matter", it did not specifically instruct the jury on the meaning of the word "material". However, the jury was instructed that the omission of income, if it should find there was such an omission, must be "substantial". The Court of Appeals held this adequate to inform the jury that such omission of income, if any, must be of a "material matter".

The Court of Appeals went on to say that the only question arising as to the element of "material matter" under Section 7206(1) is whether materiality is an issue of fact to be submitted to the jury, or whether it can be decided by the court as a matter of law. The Court noted that in perjury prosecutions, which it felt to be analogous, materiality has been consistently held to be a matter of law. When the issue of materiality is submitted to the jury, however, there is clearly no prejudice to the defendant.

The Department feels that the safer course in such a prosecution is to submit the question of materiality to the jury under proper instructions. A more appropriate charge than the one given here was used in Sherwin v. United States, 320 F. 2d 137 (C.A. 9), cert. den. 375 U.S. 964 (not quoted in the opinion):

> ********* you must be satisfied beyond a reasonable doubt that the failure of defendant to report additional income received by him, if you so further find, was a material omission; in this connection, I instruct you that omission of a substantial part of the taxpayer's gross income from his tax return constitutes a material omission * * *

For the overstatement of deductions as "a material matter", see United States v. Rayor, 204 F. Supp. 486 (S.D. Calif. 1962).

Staff: United States Attorney, Woodrow Seals; Assistant United States Attorneys, William M. Schultz and James R. Gough (S.D. Texas)

CIVIL TAX MATTERS

Appellate Decision

Internal Revenue Summons; Accountant-client privilege Created by Pennsylvania Statute Does Not (by Its Own Terms) Immunize Accountant's Workpapers and Reports, Based on Audit of Client's Records, From Compulsory Production in Tax Investigation. United States et al v. Melvyn R. Bowman et al (C.A. 3), April 7, 1966 (C.C.H. 66-1 U.S.T.C., par. 9358). An accountant refused to comply with an Internal Revenue summons requiring the production of work papers, memoranda, correspondence and reports prepared in audits of a corporate client's records, relying on the Pennsylvania statute creating an accountant-client privilege, and asserting that all the requested information was derived from the client's records. On appeal from the district court's enforcement order, the Third Circuit found it unnecessary to decide whether the Commissioner's authority to investigate can be curtailed by a state enactment creating a privilege not recognized at common law, because it interpreted the Pennsylvania statute as excepting from the privilege information derived from an audit or examination of a client's books and records. The Court noted that similar statutes in other states do not contain a comparable exception. The Government in its brief had sought a decision on the broader ground mentioned above, citing especially Falsone v. United States, 205 F. 2d 734 (C.A.5), certiorari denied, 346 U.S. 864; Colton v. United States, 306 F. 2d 633, 636 (C.A. 2), also F.T.C. v. St. Regis Paper Co., 304 F. 2d 731 (C.A. 7).

Staff: John M. Brant and Joseph M. Howard (Tax Division); United States Attorney Bernard J. Brown (M.D. Pa.)

Fraudulent Conveyance: Date on Which United States Becomes Creditor for Purposes of State Statute and Sufficiency of Evidence to Establish Prima Facie Case of Fraud. United States v. Violet Hickox, et al. (C.A. 5, No. 22,317; February 25, 1966). (CCH 66-1 U.S.T.C. Par. 15,679). The United States brought a suit to reduce assessments for distilled spirits excise taxes to judgment and, under state law, to set aside the conveyance of a farm by the taxpayer to his sister on September 26, 1958, and then from his sister to his wife on April 9, 1960. Taxpayer defaulted and judgments against him were entered, which judgments were based on seizures of two stills occurring on November 28, 1956, and April 9, 1960. At the trial of this case, without a jury, the Government introduced evidence which established that the first transfer was made after taxpayer had been indicted for liquor violations on November 12, 1956; taxpayer was insolvent immediately after the transfers; the deed to his sister lacked revenue stamps and the deed to his wife had revenue stamps of only $1.10; taxpayer remained in possession and used the property as security for a loan from a bank after the transfer to his sister; taxpayer admitted in 1963 to an agent that he owned the farm; and the farm had a fair market value on the date of transfer of $14,900. Defendants moved for a so-called "directed verdict" at the close of the Government's case in chief which was granted by the district court.

On appeal, the Court reversed, holding that the evidence was sufficient to establish a prima facie case of a fraudulent conveyance under state law, and remanded the case to the district court to allow defendants the opportunity to present evidence in their defense. In so holding, the Court--relying on evidence introduced by the United States as to each point--specifically held that: (1) the United States became a creditor of the taxpayer when the first still was seized--as opposed to the date of the actual assessment of the taxes; (2) the transfer rendered taxpayer insolvent (a point conceded by the appellees on appeal); (3) the revenue stamps on the deeds or the lack thereof permitted an inference as to the adequacy or inadequacy of the consideration; (4) the close relationship between taxpayer and the two grantees required the district court to make inquiry concerning the transfers; and (5) possession retained by the vendor is prima facie evidence of fraud which may be explained. These circumstances, the Court held, were sufficient to shift the burden of showing good faith to the parties to the conveyance.

Staff: Edward Lee Rogers and Joseph Kovner (Tax Division).

District Court Decisions

Sale of Seized Property: Notice of Seizure and Sale Mailed to Taxpayer's Last Known Address According to Records in Office of District Director Complied With Section 6335(a) and (b) Even Though Taxpayer Was Temporarily in Prison. Crump v. United States, et al. (N.D. Ga., November 11, 1965). (CCH 66-1 U.S. T.C. Par 9308). Taxpayer brought suit seeking the return of property alleged to have been wrongfully taken by the Government to satisfy his income tax liability. The gravamen of his complaint was that after his automobile was seized, notices of seizure and sale required by Section 6335(a) and (b) of the 1954 Code should have been mailed to him in prison, rather than to his home, his last known address as shown by the District Director's records. The Court, relying on Cohen v. United States, 297 F. 2d 760 (C.A. 9), granted the Government's motion to dismiss, pointing out that the notices of seizure and sale were properly mailed because taxpayer's prison address was temporary and that it would impose an impossible administrative burden on the Commissioner of Internal Revenue and his delegates to keep records of every taxpayer's temporary address, whether hotel, hospital, vacation resort, or jail.

Staff: United States Attorney Charles L. Goodson; Assistant United States Attorney Slaton Clemmons, (N.D. Ga.); and Harry D. Shapiro (Tax Division).

Tax Liens: Community Property Wages: In Texas, a Community Property State, Wife's Separate Earnings Not Liable for Husband's Debts. Leslie S. Mulcahy v. United States, et al. (S.D. Tex., March 11, 1966). (CCH 66-1 U.S.T.C. Par. 9336). The plaintiff's wife instituted suit against the United States and the District Director of Internal Revenue to restrain their agents from levying upon her personal earnings, and for a declaratory judgment that those earnings could not be seized in satisfaction of her husband's tax liability. The question presented was whether Article 4616, Vernon's Texas Civil Statutes, which exempts a wife's earnings from payment of the husband's debts, is merely an exemption statute--in which case the United States is not bound by its terms, or a statute creating property rights in the wife and hence binding on the United States. The Court rejected the Government's argument that the statute merely created an exemption and had no force and effect as against federal tax liens (see United States v. Bess, 357 U.S. 51) and held that the definition of the wife's property rights found in Article 4616 envisioned a significant increase in the wife's rights and a corresponding diminution in the husband's rights, and that in enacting it the Texas Legislature was lawfully defining the wife's rights in both her separate estate and common property, as expressly authorized by the Texas Constitution. The Court's determination was based upon its interpretation of Texas decisions to the effect that the legislature could not contravene the constitutional scheme with respect to the designation of what constitutes community and separate property, but that the legislature could rearrange the management and control of that property to effectuate its policies regarding the beneficial use of the separate and community estates. Accordingly, the Court held that the federal tax lien did not attach to the wife's earnings and that such earnings could not be seized in satisfaction of the husband's tax debt.

The matter of appeal is under consideration.

Staff: United States Attorney Woodrow B. Seals; Assistant United States Attorney William Butler (S.D. Tex.); and Joel P. Kay (Tax Division).

Federal Tax Liens Foreclosed Against Property of Taxpayer, but Government's Motion for Summary Judgment Praying for Appointment of Receiver and for Deficiency Judgment Denied. United States v. John Platon, Ann Platon, and Cinderella Shop, Inc. (W.D. Wisc., January 12, 1966). (CCH 66-1 U.S.T.C. Par. 9292). The United States brought an action to foreclose its federal tax liens against taxpayer's property, including his stock in a ladies ready-to-wear retail store; for the appointment of a receiver to liquidate the corporate assets of the store; and for a deficiency judgment. Thereafter, the United States moved for summary judgment asserting that the tax liabilities sought to be enforced had been previously determined by the Tax Court and therefore were res judicata. It also renewed its request that a receiver be appointed, asserting that liquidation of the corporate assets or sale of the business as a going concern would produce more than would be realized through an administrative sale. The Court ordered foreclosure, but denied the Government's request for appointment of a receiver on the ground that there was a dispute as to the material facts alleged in the complaint as a basis for the appointment of a receiver; it also denied the prayer for a deficiency judgment as "inappropriate." A motion for reconsideration of this decision has been filed and is now pending.

Staff: United States Attorney Edmund A. Nix; Assistant United States Attorney Michael J. Wyngaard, (W.D. Wisc.); John F. Beggan (Tax Division).

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