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UNITED STATES ATTORNEYS

BULLETIN

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Vol. 14 May 13, 1966 No. 10

APPOINTMENTS - UNITED STATES ATTORNEYS

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

Washington, Western - Eugene G. Cushing

Mr. Cushing was born August 24, 1965 in Portland, Oregon, is married and has 3 children. From 1924 to 1929 he attended the University of Washington where he obtained his LL.B. degree. He was admitted to the Bar of the State of Washington in 1930. From 1930 to 1941 Mr. Cushing was engaged in the private practice of law in Vancouver, Washington. From 1935 to 1941 he was also Prosecuting Attorney for Clark County, Washington. He served in the United States Army from 1941 to 1946 as a Colonel. From 1946 up until his appointment as United States Attorney, Mr. Cushing was Judge of the Clark County Superior Court, Vancouver, Washington.

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

Mississippi, Southern - Robert E. Hauberg

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NOTICE

In the case of Wright, et al. v. United States, Volume 14, No. 7, page 127, of the Bulletin, staff credits should have included the names of Former Assistant United States Attorney William L. Schulz, who participated in the trial of the case, and Assistant United States Attorney James R. Gough, who wrote the brief and argued the case on appeal.

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ANTITRUST DIVISION

Assistant Attorney General Donald F. Turner

Supreme Court Reverses District Court in Favor of Government. United States v. General Motors Corporation (No. 46 - OT 1965) D.J. File 60-107-75. The Supreme Court unanimously reversed the judgment of the district court and held that General Motors and its Los Angeles area dealers had engaged in " a classic conspiracy in restraint of trade" in cutting off the sale of Chevrolets through discount houses. The district court decision was that General Motors had acted unilaterally in its legitimate interest in preventing the undermining of its dealer franchise system and the violation by dealers of the provision prohibiting them from establishing any new place of business without the manufacturer's prior approval. On appeal, despite our urging, the Supreme Court declined to decide whether General Motors could legally prohibit sales through discount houses by separate vertical agreements with each of its dealers. It held that regardless of the validity of such agreements, of the location clause or of the franchise system itself, the conduct of the parties in this case violated the Sherman Act because of the "joint and collaborative action" which "was pervasive in the initiation, execution, and fulfillment of the plan." Justice Fortas described the joint efforts of the Los Angeles dealers and dealer associations to eliminate sales through discount houses and to enlist the aid of General Motors; the conduct of General Motors in eliciting from all the area dealers "substantially interrelated and interdependent" agreements "that none of them would do business with the discounters," recognizing that "substantially unanimity" was essential; and the combined action of the company and dealers in policing the agreement. The conspiracy was held illegal under the boycott cases because it deprived the discounters of access to merchandise, eliminating them from the market. Such concerted action is per se unlawful, and cannot be justified "by reference to the need for preserving the collaborators' profit margins or their systems for distributing automobiles." In addition, the conspiracy also involved "a substantial restraint upon price competition" since one of its purposes was to protect franchised dealers from the real or apparent price competition of discounters; "the per se rule applies even when the effect upon prices is indirect." Justice Harlan concurred on the ground that the result was compelled by U. S. v. Parke, Davis & Co., 362 U.S. 29, but opined that General Motors "is not precluded from enforcing the location clause by unilateral action, and I find nothing in the Court's opinion to the contrary."

Staff: Lionel Kestenbaum and Robert C. Weinbaum (Antitrust Division)

Schenley Industries Charged With Violation of Section 7 of Clayton Act. United States v. Schenley Industries, Inc., et al., (S.D. N.Y.) D.J. File 60-0-37-818. On April 25, 1966, a complaint was filed charging Schenley Industries, Inc. and The Buckingham Corporation with a violation of Section 7 of the Clayton Act by reason of Schenley's acquisition on August 31, 1964, of in excess of 50% of Buckingham's outstanding common stock. It is alleged that the effect of this acquisition may be to substantially lessen competition or tend to create a monopoly in that, among other things, (a) competition between Schenley and Buckingham in the sale of Scotch whiskey may be eliminated; (b) competition generally in the sale of Scotch whiskey and distilled spirits may be substantially lessened; (c) concentration of the sale of Scotch whiskey has been

increased to the detriment of competition; (d) concentration of the sale of distilled spirits in the hands of the Big Four (Seagram, National Distillers, Hiram Walker and Schenley) has been increased to the detriment of competition; and (e) Schenley's competitive advantage over other companies in the sale of distilled spirits and Scotch whiskey may be enhanced to the detriment of competition.

It is alleged that Schenley is the fourth largest company in the nation engaged in distilling, importing and distributing distilled spirits. A substantial portion of the growth of Schenley and the three larger companies has been through acquisitions or mergers. The Schenley company today is the product of more than 50 acquisitions effected since national prohibition ended in 1933.

In 1964, the Big Four accounted for about 50 percent of the sales of distilled spirits in the United States. Schenley's portion was about 10 percent of the national total. In 1964, Schenley sold nine percent of the Scotch whiskey sold in the United States. Dewar's is the most popular brand of Scotch sold by Schenley.

Buckingham, the exclusive United States distributor of Cutty Sark Scotch whiskey, ranked first in Scotch sales with 13 percent and 16th in distilled spirits sales with 1.5 percent.

The relief to be sought is a preliminary injunction enjoining Schenley from voting the stock of Buckingham or in any way attempting to exercise control of the operation of said corporation or from acquiring any additional stock pending final adjudication on the merits.

The ultimate relief sought is a judgment ordering Schenley to divest itself of all its Buckingham stock and an injunction against further acquisitions by Schenley of any other company engaged in the production, importation or sale of distilled spirits in the United States.

Staff: John D. Swartz, Louis Perlmutter and Bertram M. Kantor
(Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General John W. Douglas

COURT OF APPEALS

AGRICULTURAL MARKETING AGREEMENT ACT

Handler Challenging Post-Audit Milk Reclassification by Market Administrator Must Show Its Actual Use of Milk in Order to Demonstrate Incorrectness of Reclassification. Boonville Farms Cooperative, Inc. v. Freeman, Secretary of Agriculture (C.A. 2, No. 29479, March 9, 1966). D.J. File 145-8-626. The cooperative, a milk handler subject to regulation under the New York-New Jersey Milk Marketing Order, sought review by the Judicial Officer of the Department of Agriculture of a ruling of the Market Administrator assessing additional charges to be paid by it into the producer settlement fund. At an administrative hearing, the cooperative introduced a single witness, a "dairy consultant," who testified that he examined the relevant records and found them in agreement with the reports filed by the cooperative; he also stated that the Administrator's assessment of additional charges after audit was incorrect. The Judicial Officer held that the cooperative failed to sustain its burden of proving the assessment incorrect.

Agreeing with the district court's affirmance of that decision, the Second Circuit noted that under 7 C.F.R. 927.50 the handler had the burden of establishing that the Administrator's classification of the milk was incorrect. And, under Newark Milk & Cream Co. v. Benson, 287 F.2d 681 (C.A. 3, 1961), to do this it had to show the actual use of the milk. The Court agreed with the Judicial Officer that Boonville Farms totally failed to carry this burden since it had not even shown why, in its view, the assessment was incorrect or produced its underlying records. The Court of Appeals also agreed with the district court that the Judicial Officer did not abuse his discretion in denying a rehearing for the cooperative to introduce additional evidence.

Staff: Martin Jacobs (Civil Division)

CONSTITUTIONAL LAW

Suit for Judgment Declaring That Representation of Southern States in House of Representatives Should Be Reduced Under Fourteenth Amendment for Denying Negroes the Right to Vote Dismissed as Premature. Daisy E. Lampkin, et al. v. John T. Connor, Secretary of Commerce, et al. (C.A.D.C., No. 19,383, April 14, 1966). D.J. File 145-9-190. Members of the NAACP brought this action against the Secretary of Commerce and the Director of the Census. Relying on Section 2 of the Fourteenth Amendment, they sought a judgment declaring it to be the duty of those officials in conjunction with the 1970 census to count the number of persons "unconstitutionally" denied the right to vote in certain Southern states and, on the basis of that count, to reduce the representation of those states in the House of Representatives. The Government urged that

while the Fourteenth Amendment requires that state congressional representation "shall" be reduced whenever citizens are denied the right to vote, it is not clear whether the provision is self-executing or whether only Congress itself can place that reduction into effect.

The district court awarded judgment for the Government. The District of Columbia Circuit affirmed, noting that recent civil and voting rights legislation, together with the invalidation of all poll tax requirements for voting as a result of the Twenty-fourth Amendment and the Supreme Court's recent decision, has resulted in the registration of large numbers of new voters in the South. Since it is not clear whether the discriminations complained of would still be effective at the time of the next census in 1970, the Court ruled that this declaratory judgment action was pre-mature. However, the Court concluded its opinion with the following caveat: "In telling appellants that events have made their complaint unsuitable for judicial disposition at this time, we think it also premature to conclude that Section 2 of the Fourteenth Amendment does not mean what it appears to say."

Staff: J. William Doolittle, First Assistant, and Richard S. Salzman (Civil Division).

FEDERAL EMPLOYEES' COMPENSATION ACT

Courts Have No Jurisdiction Under Tort Claims Act to Review Decision of Bureau of Employees' Compensation Rendered Under Federal Employees' Compensation Act. Gunston v. United States (C.A. 9, No. 19,821, March 22, 1966). D.J. Files 157-11-1231, 157-11-1311. By this Tort Claims Act suit, plaintiff sought to have reviewed a decision of the Bureau of Employees' Compensation denying benefits for the alleged aggravation of his mental condition during his federal employment. The district court's dismissal of the complaint was affirmed by the Ninth Circuit, which held that the Tort Claims Act conferred no jurisdiction in the federal courts to review administrative decisions under the Federal Employees' Compensation Act.

Staff: Harvey L. Zuckman (Civil Division)

MORTGAGES

Receiver Appointed Under FHA Mortgage to Manage, Control, Etc., Mortgaged Premises (Nursing Home) and Not Judgment Creditor of Home Is Entitled to Receive County Welfare Funds for Services Rendered During Receivership. United States v. Glendale Nursing Home, et al. (C.A. 3, No. 15413, January 27, 1966, reported at 356 F.2d 651). D.J. File 130-48-5783. On January 28, 1965, after the nursing home defaulted on an FHA-insured mortgage, a receiver was appointed by the district court to take immediate possession of the property and manage and control it. On or about February 1, 1965, the Atlantic County Welfare Board was to have paid the home $4,748.62 ($3,864.93 of which was an advance for the maintenance and treatment of certain county welfare patients for February and $883.69 for care rendered during January). On January 29, 1965, pursuant to a judgment obtained against the nursing home by Peterson Construction Co., the sheriff levied on funds in the hands of the Welfare Board and received a check for $4,748.62. This suit involved the apportionment of that amount between the United States and the judgment creditor.

The district court ordered $883.69 paid to the judgment creditor and the balance to the United States. The Court of Appeals affirmed, reasoning that the $3,864.93 did not represent a debt owed by the Board to the home but rather an advance in consideration of treatment and care to be rendered in February. Since the court-appointed receiver and not the actual owners of the nursing home rendered those services during February, the Court held that the receiver and not the nursing home was legally due those funds; accordingly, there was no debt owed the nursing home by the Welfare Board which could be levied on by the judgment creditor.

Staff: United States Attorney
David M. Satz, Jr. (D. N.J.)

SOCIAL SECURITY ACT

Fifth Circuit Holds That in Disability Case Where Record Shows Numerous Severe Impairments, It Is "Wholly Unrealistic" for Secretary to Believe in Absence of Affirmative Evidence to That Effect That Any Employer Would Hire Claimant. Ollie Alsobrooks v. Gardner (C.A. 5, No. 22587, February 25, 1966). D.J. File 137-41-81. Claimant, a former carpenter and laborer, sought to recover disability benefits, alleging disability as of age 56 because of "heart trouble, lung congestion, bronchitis, and hearing trouble." During the administrative proceedings, it appeared that in addition to those impairments, claimant also suffered from osteoarthritis, inguinal hernia, and hemorrhoids. Four doctors reported that in their opinion claimant was totally and permanently disabled. The Secretary found that while claimant could not do his former work, he could engage in work of a light or sedentary nature, and denied benefits.

The district court affirmed the decision as supported by substantial evidence. In reversing, the Fifth Circuit, in an opinion by Judge Coleman, held that it was "wholly unrealistic" for the Secretary to suppose, "in the absence of some affirmative evidence to that effect," that any employer would hire a man having the variety of severe impairments Alsobrooks had. "Faced with this kind of record," the Court stated, "it is no answer to say that claimant might theoretically be capable of performing some kind of light job, the nature of which and the availability of which was not shown by any affirmative proof."

Staff: Martin Jacobs (Civil Division).

AGRICULTURAL LIENS

District Court

Filing of Agricultural Lien Contract Sufficient Under Puerto Rico Law to Put Purchaser of Encumbered Crops on Notice of Lien and Make Him Liable as Converter. United States v. Jules Roche Rivera, et al. (D. P.R., Civil No. 144-64, March 8, 1966). D.J. File 136-017-65. The Farmers Home Administration made a loan to the Riveras and secured it with a crop lien which was duly recorded in the Registry of Agricultural Contracts in Puerto Rico. While the lien was still in effect, Rivera sold some of the coffee encumbered by the lien to a third party. After the Riveras defaulted on the loan, the Government brought this

suit against them and the third party. Judgment by default was entered against the Riveras. After a trial, the District Court held the third party purchaser was also liable on the ground that, under local law the recording of the crop lien in the Registry of Agricultural Contracts put the purchaser on notice of the lien, and therefore it was liable as a converter.

Staff: United States Attorney Francisco A. Gil, Jr. and Assistant United States Attorney Candita R. Orlandi (D. P.R.).

FEDERAL TORT CLAIMS ACT

SBA Decision as to When to Sell or Dispose of Collateral Is Within Discretionary Function Exception Where No Specific Time Spelled Out in Loan Agreement; Tort Claim Against "Sue-And-Be-Sued" Agency Is Cognizable Only Under Tort Claims Act. United States v. Delta Industries, Inc. (N.D. Ohio, Civil No. C 65-84, March 31, 1966). D.J. File 105-57-39. The Government brought this action on behalf of the Small Business Administration to collect a defaulted loan. Defendant entered a counterclaim for $150,000, claiming that SBA's failure timely to sell or otherwise dispose of the collateral for the loan resulted in a severe decline in its value. The Government moved to dismiss the counterclaim on the grounds (1) if the counterclaim sounded in contract, the Court lacked jurisdiction over it because of the $10,000 Tucker Act jurisdictional limitation on contract claims; and (2) if it sounded in tort, it fell within various exceptions to the Tort Claims Act.

The District Court dismissed the counterclaim holding it barred by the discretionary function exception to the Tort Claims Act. The Court reasoned that since it was not alleged that SBA had a duty to realize on the collateral at any particular time, its selection of the time at which to do so was a discretionary function. Relying on 28 U.S.C. 2679(a), the Court rejected defendant's claim that because SBA could "sue and be sued" in its own name, the counterclaim was assertable apart from the Tort Claims Act. Section 2679(a), the Court pointed out, expressly provides that the authority of an agency to sue and be sued "shall not be construed to authorize suit against such federal agency on claims which are cognizable under" the Tort Claims Act.

Staff: United States Attorney Merle M. McCurdy, Assistant United States Attorney Robert S. Turoff (N.D. Ohio); Robert Mandel (Civil Division)

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CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

MAIL FRAUD

Chain Referral Scheme. Fabian v. United States (C.A. 8, March 28, 1966). D.J. File 36-28-47. Appellants were convicted on charges of mail fraud in the Southern District of Iowa. They had sold stereo sets, for which they paid approximately $100, on installment contracts with the total price reaching about $500. Purchasers were told that they would receive $15 for each name of a prospective customer.

On appeal it was contended that it was error to admit testimony concerning the representations made by salesmen out of the presence of the appellants, when no foundation evidence had been adduced to connect appellants with a scheme to defraud. The Court of Appeals rejected this argument, stating that the foundation may be laid, and the testimony rendered admissible, by subsequent proof. "If that later proof shows, as it did here, that the defendants against whom the evidence is offered. did formulate and participate in a scheme to defraud, and the salesmen's statements were in furtherance of that scheme, then a proper foundation has been laid."

Staff: Former United States Attorney Philip T. Riley; Assistant United States Attorney Jerry E. Williams (S.D. Iowa).

FRAUD

Instructions to Jury. United States v. Meyer (C.A. 7, April 18, 1966). D.J. File 113-25-7. Defendant had been convicted on charges of mail fraud and fraud in the sale of securities in connection with the sale of stock of Business and Professional Women's Holding Company. He represented that the company had purchased or had an option to purchase a life insurance company which would issue insurance to women at greatly reduced rates.

On appeal, defendant claimed error in connection with a charge to the jury that his ignorance of the falsity of his representations to prospective investors could not be excused if he could have ascertained the true facts by the exercise of that degree of care expected of a reasonably prudent person. He contended that he had been charged with the making of wilful statements, not reckless statements. In affirming the conviction, the Court of Appeals rejected this contention, stating that the instruction was given in connection with the defense of good faith and in that regard was a correct and applicable statement of the law.

Staff: United States Attorney Richard E. Eagleton; Special Assistant to the United States Attorney Edward R. Phelps (S.D. Ill.).

COPYRIGHTS

"For Profit" in Section 104 of Title 17 U.S.C. (Copyright Infringement) Construed to Mean "for Purposes of Profit." United States v. Bert Rose (S.D. N.Y., April 18, 1966). D.J. File 28-490. This was a criminal prosecution charging defendant with 60 counts of wilfuly and for profit infringing copyrights. The subject matter of the case is musical "fake books," a collection of 1,000 standard show tunes in fairly common use among professional musicians.

The Government's proof included testimony that defendant caused over 12,000 books to be printed, for which he paid over $17,000 in cash during a six-week period in 1964. Expert musical witnesses were called to demonstrate the similarity of the fake book music and the copyrighted sheet music on a piano which had been loaned to the United States Attorney's office and delivered to the Federal Court House by Steinway & Sons, Inc. Admissions and false exculpatory statements were also offered.

Defendant moved for judgment of acquittal under Rule 29(a) on the ground that the Government had not put in proof of profit and had not offered any direct proof of sales. This motion was denied by the Court on the ground that "for profit" in Section 104 of Title 17 means for purposes of commercial advantage, or a profit motive, rather than actual profit accruing to defendant. The Court's decision was based upon dictionary definitions of the preposition "for" and a recent statement of the Register of Copyrights interpreting Section 104 in the way contended by the Government.

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

DEPORTATION

Second Circuit Defines Scope of Judicial Review of Denials of Suspension of Deportation. Wong Wing Hang v. INS (C.A.2, No. 29,335, March 28, 1966.) This action was a petition to review an order of the Board of Immigration Appeals which, in the exercise of discretion, denied petitioner's application for suspension of deportation.

The Court first found that administrative findings of fact made in determining an alien's eligibility for suspension of deportation must be supported by reasonable, substantial and probative evidence on the record considered as a whole. The Court then turned to the issue of what standard was to be applied in reviewing a refusal to exercise discretion in favor of an eligible alien when the facts are undisputed or properly found. Since the review provisions of Section 106 of the Immigration and Nationality Act, 8 U.S.C. 1105a, shed no light on the issue, the Court looked to the provisions of Section 10 of the Administrative Procedure Act, 5 U.S.C. 1009, but found only conflict as to the extent of review of administrative discretionary decisions. The Court noted that it had previously held that denials of suspension of deportation were judicially reviewable for an abuse of discretion and that it was not precisely clear as to what constituted abuse. The Court said it would facilitate judicial review if the Attorney General or his delegate would outline certain bases deemed to warrant the affirmative exercise of discretion and other grounds generally militating against it. After examining other judicial precedents, the Court ruled that a denial of suspension to an eligible alien would be an abuse of discretion if it were made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis such as an invidious discrimination against a particular race or group, or on considerations that Congress could not have intended to make relevant. After reviewing the reasons given for denying suspension of deportation to the petitioner, the Court held that it could not find the decision to be so wanting in rationality as to be an abuse of the discretion on the part of the immigration authorities. The petition to review was denied.

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

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LAND AND NATURAL RESOURCES DIVISION

Assistant Attorney General Edwin L. Weisl, Jr.

NOTICE TO UNITED STATES ATTORNEYS:

Land Acquisition - Small Tract Program

Analysis of a recent tract distribution report reflects that as of April 1, 1966, 72.4% of the pending condemnation tracts fall within the scope of our Small Tract Program. This program, you will recall, has recently been expanded to include tracts up to $4,000 in value. A copy of the brochure covering that program was sent to each of you with the suggestion that it be filed behind tab "W" in I Condemnation Seminar 1962 ring binder. Please review that brochure and make every effort to secure the cooperation of your local judges in processing the pending cases to an early conclusion. Please make sure that the judges in your district realize that the Government is not seeking jury trials in these cases and that we are not only willing but anxious to try them to the court. Most judges will be willing to work with you toward the end of reducing the backlog of pending cases.

Please bear in mind that these small tracts are within your authority to settle with the concurrence of the local representative of the acquiring agency. The closest possible coordination with such representatives should be established and maintained to effect the earliest possible settlement or trial of the pending cases.

Navigable Waters: Congress May Constitutionally Authorize Bridge Which Obstructs Some Existing Navigational Uses of Stream. Levingston Shipbuilding Co. v. Ailes, Secretary of the Army, et al. (C.A. 5, April 15, 1966, D.J. File 90-1-3-1136). Levingston sought by this suit to enjoin construction of a fixed span bridge across the Sabine-Naches Waterway at Port Arthur, Texas. The Waterway is presently spanned by an old bascule-type bridge which is hazardous to most navigation. Congress, in 1962, authorized a project to widen and deepen the canal and replace the bridge with a new fixed-span bridge having a vertical clearance of 138 feet above mean low tide. Levingston's shipyard is upstream from the new bridge, and a substantial part of its business is building and repairing off-shore drilling equipment. Many of the rigs constructed or repaired by Levingston exceed 138 feet in height and therefore will not go under the new bridge.

The district court dismissed with prejudice this suit to enjoin the Secretary of the Army and subordinate officials, and the Court of Appeals affirmed. The Court of Appeals held that Congress has clearly authorized the bridge which the Corps of Engineers proposed to build, and that Congress had power to do so under the Commerce Clause. "That some obstruction to particular uses of the Waterway will result does not render construction of the new bridge as planned unconstitutional." It also held that Levingston had no standing to insist on compliance of local governmental interests, here Jefferson County, Texas, with an agreement "To hold and save the United States free from damages resulting from the project."

Staff: A. Donald Mileur (Land and Natural Resources Division).

Res Judicata: Collateral Attack on Condemnation Judgment; Action for Injunction Against Federal Officer; Unconsented Suit Against United States. Robert Jayson, et al. v. Lawson B. Knott, Individually (App. D.C. No. 19768, April 28, 1966, D.J. File 90-1-3-1294). This was an action in the United States District Court for the District of Columbia to enjoin Lawson B. Knott, Individually, from entering into contracts involving the use of premises located at 1020 Commerce Street, in the City of Dallas, Texas, from razing the building on the property, or from constructing a building on the property or making use of it. The property was formerly owned by Jayson and was acquired by the United States by condemnation in a proceeding in the United States District Court for the Northern District of Texas in 1958. The property was a portion of a tract under different ownerships, which was acquired for the construction of a federal building. An appeal was taken in that proceeding, and the judgment in condemnation was affirmed in Jayson v. United States, 294 F.2d 808 (C.A. 5, 1961).

Lawson B. Knott, who was Administrator of the General Services Administration, moved to dismiss the action on the following grounds: (1) The complaint fails to state a claim upon which relief can be granted. (2) Complainants were barred from maintaining the action by the doctrine of res judicata or estoppel by judgment. (3) The Court lacked jurisdiction because the action was a suit against the United States to which it has not consented. (4) The suit is an improper attempt to attack collaterally a final judgment of the Federal Court. The District Court held that the suit was, in fact, a suit against the United States to which it had not consented, denied complainants' motion for preliminary injunction, and dismissed the action. The Jaysons appealed. Their principal argument was that because certain individuals in Dallas had agreed to indemnify the United States against the cost of a tract of land above a certain amount, the officer authorized to select the site had not exercised his authority, but had allowed the individuals to select the site, hence, their property was taken without due process of law. This argument was made in the District Court and the Court of Appeals in this action, and also in the Fifth Circuit in the former case.

The Court of Appeals entered a judgment in this action without an opinion, stating that, "after consideration of the record, briefs and oral arguments, consideration of the issues raised by appellants is barred by the doctrine of res judicata (see Jayson v. United States, 294 F.2d 808 (5th Cir. 1961))." The judgment of the District Court was affirmed.

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

Condemnation: Government Held to Be Holdover Tenant When It Retained Possession of Property After Expiration of Lease; Government Could Not Acquire by Condemnation Less Than It Already Had by Implied Contract of Holdover Tenancy; Condemnation Proceeding Ordered Dismissed. Security Life and Accident Insurance Company v. United States (C.A. 5, No. 21287, February 25, 1966, D.J. File 33-1-341). The Veterans Administration occupied a building in Montgomery, Alabama, under a lease from Security Life and Accident Insurance Company, for a term of five years ending June 30, 1962, with an option to renew from year to year for an additional five years at the same rental, upon notice being given in writing to the lessor at least 60 days before the expiration of the lease.

A building was under construction which was to be used by the Veterans Administration and other Government agencies, which was expected to be ready for occupancy within a few months after expiration of the lease. Negotiations were had with the lessor for a short term lease. No agreement was reached, and the Government remained in possession of the building. On July 30, 1962, it filed condemnation proceedings for a term ending December 31, 1962, with option to renew for another month or two. The district court refused the Government's request for possession as of July 1, 1962. The lessor contended that by holding over after the expiration of the lease the Government became a tenant for a five-year period or, in the alternative, for a one-year period. The lessor appealed from a judgment on a jury verdict of $75,000 based on rental for the period from August 1 to December 31, 1962, with option to renew.

The Court of Appeals stated that "the law will not imply a premise contrary to the express intention of the party to be charged." It held that the attempt to negotiate a new lease was not sufficient to rebut the presumption or implication of a holdover tenancy. Applying Alabama law, the Court held that the United States became a holdover tenant for the extended term of one year beyond the date fixed in the lease for its expiration. It stated: "This being so, it could not acquire by condemnation something less than it already had by the implied contract of holdover tenancy." The court was of the opinion that the district court should have entered an order dismissing the condemnation proceeding, and so that such an order may be entered it reversed the judgment and remanded the cause.

A petition to rehear has been denied.

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

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TAX DIVISION

Assistant Attorney General Mitchell Rogovin

CIVIL TAX MATTERS

District Court Decisions

Federal Tax Liens; Tax Liens Attached to Bank Account. United States v. Ingemar Johansson, Feature Sports, Inc., et al. (S.D. N.Y., March 25, 1966). (CCH 66-1 U.S.T.C. ¶9334). In February 1961 simultaneous complaints were filed in the United States District Court for the Southern District of Florida and the Southern District of New York against Ingemar Johansson, Feature Sports, Inc., et al. The purpose of these actions was to collect federal income taxes due from Johansson based on receipts from his personal appearances and boxing contracts during the year 1960. Shortly thereafter, the complaints were amended to collect taxes on income earned by Johansson from his March 11, 1961, title fight with Floyd Patterson.

On December 15, 1961, a judgment was entered by the United States District Court for the Southern District of Florida determining that Johansson was indebted to the United States in the amount of $1,009,801.92. The United States thereafter amended its complaint in the New York proceeding, alleging the judgment obtained in the Florida proceeding to foreclose its liens upon a fund of $71,000 held in an account entitled "Feature Sports-Scanart-Special Account" in the Franklin National Bank, New York City. This account had been opened by the promotors, Feature Sports, Inc., in order to segregate monies due Johansson as a result of the March 11, 1961, title fight. Feature Sports contended that it owed nothing to Johansson and that this fund belonged to it. However, the Court determined that Feature Sports owed Johansson, at the very least, $100,151.74 and that this entire fund of $71,000 belonged to Johansson. Accordingly, the Court ordered that this fund of money be turned over to the United States in partial satisfaction of Johansson's federal income tax liabilities.

Staff: United States Attorney Robert M. Morgenthau; Assistant United States Attorney Laurence Vogel, (S.D. N.Y.); and John J. McCarthy (Tax Division).

Federal Tax Lien; Levy and Distraint; District Court Rules That Government Properly Seized Blank-Payee Money Orders From Delinquent Taxpayer in Accordance With 26 U.S.C. 6331, Became Bona Fide Holder of Said Money Orders and Was Entitled to Payment From Issuer Upon Surrender and Presentation of Such Instruments for Payment. United States v. Ben G. Milton, (N.D. Ohio, February 23, 1966). (CCH 66-1 U.S.T.C. ¶9304). The defendant, Ben G. Milton, d/b/a Service Check Company, sold blank payee money orders in the sum of $7,300 to one, Birns, a judgment tax debtor, who was subsequently arrested and placed in legal confinement by the Police Department of Cleveland, Ohio. The money orders in the delinquent taxpayer's possession were taken and held by the Police Department in accordance with police regulations regarding property of persons held in custody. The United States Attorney filed a praecipe for a writ of execution to attach the subject money orders in partial satisfaction

of tax liens outstanding against Birns' property. On the same day, a United States Marshal served a copy of the Writ on the Chief of Police, who surrendered the money orders to the Marshal. A return was made on the writ of execution and the money orders were delivered to the United States. Birns was later released from custody and he issued stop payment orders as to the said money orders to the defendant Milton and to the drawee bank. Two days later, no money orders having been presented for payment to Milton or the drawee bank, Milton returned to Birns the sum of $7,300 paid for the money orders. Thereafter, the Internal Revenue Service entered its name on the money orders as payee and presented same to drawee bank where payment was refused and the Government was notified of the stop-payment order. Demand was made by the United States upon the defendant, Milton, who refused to honor the instruments. The United States then brought suit against Milton to recover the value of the money orders.

The Court reasoned that money orders are "property" or "rights to property" within the meaning of 26 U.S.C. 6321, and after the federal tax lien attaches, the property in a sense is owned by the taxpayer and, to the extent of the lien, the Government. Comm'r v. Coward, 110 F. ed 725, 727 (C.A. 3); Simpson v. Thomas, 271 F. 2d 450 (C.A. 4). In accordance with state law there was no right to stop payment on a money order. Cross v. The Exchange Bank Co., 110 Ohio App. 219; State ex rel. Babcock v. Perkins, 165 Ohio St. 185, 187. Hence, the Court ruled that the United States, having acquired possession and virtual ownership of the money orders, became a bona fide holder in possession to whom the defendant was obligated to pay the face amount of the money orders upon surrender and presentment.

Staff: United States Attorney Merle M. McCurdy; Assistant United States Attorneys Bernard J. Stuplinski and Russell E. Ake (N.D. Ohio).

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