Balaban

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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 submitted to the Senate for confirmation:

Minnesota - Patrick J. Foley

The nominations of the following incumbent United States Attorneys to new four-year terms have been submitted to the Senate for confirmation:

Guam - James P. Alger
Indiana, Northern - Alfred W. Moellering

ANTITRUST DIVISION

Assistant Attorney General Donald F. Turner

Oil Companies Charged With Violation of Section 7 of Clayton Act. United States v. Phillips Petroleum Company, et al. (S.D. Calif.) DJ File 60-0-37-905. On July 13, 1966, the Department filed in the District Court for the Southern District of California a complaint against the Phillips Petroleum Company and the Tidewater Oil Company charging that Phillips' acquisition of certain Tidewater assets in the far western states violated Section 7 of the Clayton Act. On the same day the Government also filed a motion for a temporary restraining order seeking to prevent consummation of the acquisition, which was scheduled to be consummated on the following day, pending a hearing on the Government's motion for a preliminary injunction, also filed on July 13.

The complaint charges, inter alia, that the acquisition will eliminate actual and potential competition between Phillips and Tidewater in the sale of motor gasoline in California and in the five western states of California, Oregon, Washington, Arizona and Nevada, and that a substantial source of motor gasoline for independent rebranders or marketers in each such market may be eliminated. Among other things, the prayer for relief seeks a permanent injunction against the acquisition.

By letter agreement dated March 29, 1966, Phillips agreed to purchase the transportation, refining and marketing assets and operations of Tidewater's Western Marketing and Manufacturing Division. These assets include Tidewater's 135,000 barrel per day refinery at Avon, California and approximately 3,654 retail outlets, through which Tidewater brand name petroleum products were sold in the five western states, Idaho and Hawaii.

Phillips, with total assets of over $2 billion, ranks 8th among domestic oil companies and markets refined petroleum products throughout the entire country except California and the western portions of Oregon and Washington. Tidewater, part of the Getty empire, has total assets approximating $1 billion and ranks 15th among such companies.

With respect to the acquired assets, Tidewater and Phillips compete in the sale of refined petroleum products in Arizona, Nevada, Idaho and the eastern portions of Oregon and Washington. In 1965, Tidewater's and Phillips' respective shares of motor gasoline sales in the five western states were: California -- 6.8% and 0%; Oregon -- 5.4% and .6%; Washington -- 4.3% and 2.3%; Arizona -- .7% and 2.8%; and Nevada -- 5.8% and 4.6%. Their respective shares of such sales during 1965 in the combined five states were 7.1% and .6%. Tidewater's and Phillips' total tax-paid sales of motor gasoline in the country amounted to approximately 2.1% and 4.0%, respectively.

Tidewater has for many years sold substantial quantities of unbranded motor gasoline to independent rebranders or marketers in California and in the above-mentioned five western states for resale under their private brand names. Its sales of motor gasoline to such rebranders in California and in the five western states accounted for about 18% and 13%, respectively, of the total motor gasoline sales by said rebranders in each such market.

In denying, on July 14, 1966, the Government's application for a temporary restraining order, Judge Whelan noted that in his opinion there could be little irreparable injury to competition resulting from the acquisition between that date and August 4, 1966, the day on which the Government's motion for a preliminary injunction was scheduled for hearing. Immediately following denial of our motion for a temporary restraining order, defendants proceeded to consummate the transaction, and Phillips began converting the newly acquired assets to its own trademarks and brand names.

The "trial" on the Government's motion for a preliminary injunction was held on August 4 and 5 with Judge Whelan taking the matter under advisement. The Government had sought an order (1) rescinding the letter agreement between Phillips and Tidewater referred to above and (2) requiring defendants immediately to take all appropriate action, consistent with such rescission, for the complete restoration to Tidewater of its Western Marketing and Manufacturing Division pending ultimate resolution of the case on the merits. In the alternative, it had sought an order directing Phillips (1) to establish exclusively the Tidewater brand names and trademarks on all retail outlets and other buildings and places from which they had already been removed, (2) to operate the acquired assets under the Tidewater brand names and trademarks pending ultimate resolution of the case on the merits, and (3) to take all action necessary to maintain the going concern value of said assets while in the company's possession, custody or control.

Staff: Harry W. Cladouhos, Richard P. Delaney, Gregory B. Hovendon and Leonard M. Berke (Antitrust Division)

Indictment Returned Charging Violation of Section 1 of Sherman Act. United States v. American Honda Motor Company, et al. (N.D. Calif.) DJ File 60-233-9. On August 3, 1966, a grand jury in San Francisco returned a one count indictment charging American Honda Motor Company, Inc., Bay Area Honda Dealers Association and seven individuals with conspiring to fix, maintain and stabilize retail prices of Honda motorcycles, parts and accessories sold in the San Francisco Bay Area.

The individuals named as defendants were Joseph A. Quaid, T. C. Browne and Gary Jones, all former district managers for Honda in Northern California; Clifford G. Schmillen, regional manager for Honda in Northern California; Charles N. Miller and Garve L. Nelson, former presidents, and Edward J. Correa, current president of the Bay Area Honda Dealers Association.

The indictment alleges that during 1965 American Honda's regional sales of motorcycles and parts to dealers were $94,641,000, and retail sales of Honda motorcycles and parts amounted to approximately $135,000,000, and that retail sales of Honda motorcycles and parts in the San Francisco Bay Area amounted to approximately $4,150,000 in that same year. Chief Judge George B. Harris on August 3, 1966, ordered summonses issued to all the defendants, returnable on August 31, 1966, and set arraignment for the same date.

Staff: Lyle L. Jones, Melvin J. Duvall, Jr. and Anthony E. Desmond (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General John W. Douglas

COURTS OF APPEALS

AGRICULTURAL ACT OF 1964

1964 Wheat Regulations Upheld. Morrison Milling Co. v. Freeman (C.A.D.C., Nos. 19,794 and 19,795, July 18, 1966). D.J. Files 106-16-57 and 106-16-58. A number of wheat processors brought this suit attacking the wheat regulations issued by the Secretary of Agriculture under the Agricultural Act of 1964. The Act provides that wheat growers shall receive one certificate for each bushel of within-quota wheat produced, and that domestic wheat processors shall pay for these certificates. The statute requires that the processors acquire certificates "equivalent to the number of bushels of wheat contained in" the food produce. 7 U.S.C. 1379d. The regulations provide that the certificates acquired by the processors shall be "equivalent to the number of bushels of wheat used in processing the food products." 7 C.F.R. 777.11. The processors urged that the regulation was invalid on the ground that the number of bushels of wheat "contained" in a product is less than the number of bushels "used in" making the product because a certain percentage of the wheat delivered to the processor goes into by-products, consists of impurities which must be screened out, and is lost as moisture.

The district court rendered summary judgment for the defendants, and the court of appeals affirmed, holding that "contained" and "used" both mean the same thing, i.e., refer to the bushel purchased from the grower. The court of appeals also rejected the processors' argument that the regulations arbitrarily limited the amount of the deduction to be allowed for various forms of loss.

Staff: Carl Eardley (Civil Division)

ALIEN PROPERTY ACT

Due Process does not Require that Cuban National be Permitted to Withdraw Assets from the United States; Three Judge Court Not Required to Consider Attack on Cuban Assets Control Regulations. Sardino v. Federal Reserve Bank (C.A. 2, No. 29560, April 22, 1966). D. J. File 118-982-117. Sardino, a Cuban National residing in Havana, sought possession of $7000 which he had in a savings account in a New York Bank. The bank refused to remit the funds because the Cuban Assets Control Regulations prohibited such a transfer without specific authorization, and the Federal Reserve Bank, as agent for the Secretary of the Treasury, refused to issue the required license. Sardino then brought this suit seeking either a declaration that no license was required or an order directing that a license be issued to him. The district court dismissed the complaint for failure to state a claim upon which relief could be granted.

The court of appeals affirmed. It upheld the constitutionality of both section 5(b)(1) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)(1)) (which delegates to the President the authority to control asset transfers during a

"national emergency") and the derivative delegations of regulatory authority from the President to the Secretary of the Treasury to the Office of Foreign Assets Control. Addressing itself to Sardino's "only substantial contention" -- that the Regulations, as applied to him, deprived him of due process of law -- the court of appeals rejected the government's arguments that Sardino had not suffered any "deprivation" and that non-resident aliens are not entitled to the protection of the Constitution with regard to property in the United States. However, the court agreed that the due process clause does not prohibit the "freezing" of assets belonging to Cuban Nationals.

On its own initiative, the court of appeals also considered whether a three-judge court was required to hear Sardino's case under 28 U.S.C. 2282. It answered its question in the negative, reasoning that the case did not fall within § 2282 because "the substantial constitutional attack was not upon the Trading with the Enemy Act but upon the Cuban Assets Control Regulations."

Staff: Bruno A. Ristau (Civil Division)

American Importer of Diamonds and other Stones from Germany held to be an "Enemy Agent." Von Clemm v. Smith (C.A. 2, No. 30288, June 22, 1966). D.J. File 9-21-2890. Von Clemm, an American citizen of German birth, brought this suit under section 9(a) of the Trading with the Enemy Act (50 U.S.C. App. 9(a)) to recover shares of stock, diamonds, synthetic and semi-precious stones and their proceeds, all of which had been seized prior to the outbreak of war with Germany and vested by the Alien Property Custodian thereafter. The district court denied recovery, finding that (1) prior to the outbreak of war with Germany Von Clemm had been a knowing agent of the German government in importing Belgian diamonds and German semi-precious and synthetic stones, and (2) Von Clemm had failed to carry his burden of proving that he had discontinued these activities after December 11, 1941, when hostilities began. The court of appeals affirmed, holding that the district court's findings were not "clearly erroneous" and approving the district court's holding that the inconclusive evidence relating to the period after December 11, 1941 was inadequate to satisfy Von Clemm's burden of proof.

Staff: Bruno A. Ristau (Civil Division)

FEDERAL HOUSING ACT

Uniform Federal Rule Governs the Distribution of Rents Earned by Foreclosed FHA-Insured Property During the Year of Redemption. Clark Investment Co. v. United States (C.A. 9, No. 19,999, July 21, 1966). D.J. File 130-22-520. The Government brought this action to foreclose an FHA-Insured mortgage which had been assigned to it. After FHA bought the property at the foreclosure sale, the mortgagor gave a quit-claim deed of the property to Clark Investment. Within the one year permitted by Idaho law (Idaho Code § 11-402), Clark redeemed the property from the foreclosure sale, paying FHA the price it had paid for the property plus interest. Clark then petitioned the district court for an order directing the receiver to turn over to it, in accordance with another provision of the Idaho statute (§ 11-407), the net rents earned by the property during the year of redemption, amounting to almost $28,000. The trial court refused to do so.

The Ninth Circuit affirmed, holding first that federal and not state law governed this case. In this connection, the court of appeals pointed out that United States v. Yazell, 382 U.S. 341, rather than requiring a contrary conclusion, "expressly distinguishes such a case as this" involving a "nation-wide act of the Federal Government, emanating in a single form from a single source." The court then adopted the Government's view that the federal rule should be a uniform one under which the rents of the redemption period should be awarded to the mortgagee or his assignee (in this case the United States). The court reasoned that this distribution is the most equitable, since it both reduces the mortgagor's liability on the deficiency judgment and pays the mortgagee (or his assignee). On the other hand, the court pointed out, awarding the rents to the redemptioner would amount to a windfall, in effect giving him the property for its market value less the redemption period rents.

Staff: Martin Jacobs (Civil Division)

OFFICIAL IMMUNITY

Federal Narcotics Agent is Within the Scope of his Authority in Informing Customs Officials of Suspected Smuggling Activity. Chavez v. Kelly (C.A. 10, No. 8293, July 13, 1966). D. J. File 145-3-719. Federal Narcotics Agent Kelly received information suggesting that Chavez and his colleagues were engaged in smuggling narcotics and counterfeit money from Mexico to the United States, and that these persons were planning a trip to El Paso, Texas, in order to smuggle contraband from Juarez, Mexico. Kelly transmitted this information to the federal customs officials at El Paso, who kept Chavez and his companions under surveillance during their stay in El Paso and their journeys to Juarez. When the alleged smugglers were leaving El Paso, they and their automobile were subjected to a customs search (at a point some twelve miles from the border). No contraband was found on their persons or in their automobile.

This suit was filed in a state court, charging that Kelly and his informant had maliciously slandered Chavez and his friends, causing them to suffer assault, battery, illegal search, humiliation, mental anguish, etc. The suit was removed to a federal district court under 28 U.S.C. 1442(a)(1). The district court rendered summary judgment for Kelly, holding that his statements to the customs officials were absolutely privileged under the doctrine of official immunity (Barr v. Matteo, 360 U.S. 564; Howard v. Lyons, 360 U.S. 598); the case against Kelly's informant was remanded to the state court.

The court of appeals affirmed the summary judgment for Kelly, answering in the affirmative the "question of law" whether Kelly's conduct had been within the scope of his authority. The court upheld the district court's refusal to compel Kelly to answer questions relating to the substance of the information given him, holding that his informant's statement that the information came from an "unusually reliable source" was sufficient to justify Kelly's relaying the information to the customs officials.

Staff: Florence Wagman Roisman (Civil Division)

PACKERS AND STOCKYARDS ACT

Consistent Administrative Definition of "Insolvency" Upheld; Failure to Segregate Custodial Accounts is Improper even if Harmless. Bowman v. Department of Agriculture (C.A. 5, No. 22001, July 1, 1966). D.J. File 58-16-5. Bowman, a "stockyard owner," "market agency" and "dealer" under the Packers and Stockyards Act, sought review of an order entered against him by the Department of Agriculture's Judicial Officer. The court of appeals affirmed the administrative order, noting particularly (1) that the Secretary's definition of "insolvency," as an excess of current liabilities over current assets, is "an allowable one"; (2) that the Secretary's classification of liabilities and assets was proper; (3) that Bowman had the burden of proving his solvency before the Judicial Officer; and (4) that Bowman's failure to maintain custodial accounts separate from his own funds was improper even if no harm was caused by that failure.

Staff: Neil Brooks, Jerome S. Ducrest and Robert E. Duncan (Department of Agriculture)

POULTRY PRODUCTS INSPECTION ACT

States May Supplement Federal Requirements for Poultry Labeling. Swift & Company, Inc., et al. v. Wickham, Commissioner of Markets (C.A. 2, No. 30281, July 12, 1966). D.J. File 98-51-131. The Second Circuit, agreeing with the position urged in our brief as amicus curiae, affirmed the district court's decision that the Poultry Products Inspection Act provisions dealing with the labeling of poultry products shipped in inter-state commerce (21 U.S.C. 457) do not preclude New York State from regulating the manner in which such products will be labeled with their net weight when offered for sale at retail in that State. Under New York law, frozen stuffed turkeys to be sold at retail in New York State must be labeled to show the "net weight" of the bird and the "net weight" of the stuffing separately. A lower-echelon Agriculture Department employee, however, had rejected Swift and Armour's attempt so to label their frozen stuffed turkeys, ruling that under the Federal Act these products could bear a label disclosing as "net weight" only the combined weight of the bird and its stuffing.

Rather than appealing from that low-level ruling, Swift and Armour brought suit against New York's Commissioner Wickham to enjoin the application of the New York statute on the ground that the State law was preempted by the Federal Act. The district court's dismissal of their complaint was affirmed by the court of appeals. (The case had previously been appealed to the Supreme Court which had dismissed it for lack of jurisdiction.) The Second Circuit ruled that the Poultry Products Inspection Act was aimed primarily at insuring the wholesomeness of poultry shipped in interstate commerce and was not intended by Congress to oust traditional state regulation of retail weights and measures. The court of appeals recognized that if there were an actual conflict between federal regulations and state law the latter must yield; however, the court accepted our position that no such showing had been made in this case because Swift and Armour had failed to exhaust their administrative remedies and thus had not obtained a definitive ruling on the application of the federal law from the Secretary of Agriculture.

Staff: Richard S. Salzman (Civil Division)

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CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

CIVIL RIGHTS CONSPIRACY

Private Citizens May Be Convicted For Conspiring, Under "Color of Law" To Deprive A Victim of His Civil Rights, When They Cause Police Officers To Make An Invalid Arrest, Notwithstanding That The Police Officers Were Acquitted By the Jury. United States v. Lester (C.A. 6, July 8, 1966).

Three private citizens and three police officers were tried jointly under a two-count indictment charging them with conspiracy and the substantive offense of depriving the victim, the reform candidate for sheriff of Newport, Kentucky, of his civil rights under 18 U.S.C. 242. The jury convicted the two appellants of the conspiracy, and acquitted the other defendants of the conspiracy, and all defendants of the substantive offense.

On appeal, appellants argued that the acquittal of the police officers meant that no conspiracy "under color of law" was possible, and that therefore the conviction of the private citizens could not stand. The Court, in a 2-1 opinion, held that notwithstanding that a private citizen could not himself supply the requisite color of law, a person could, under the language of 18 U.S.C. 2(b), "wilfully cause an act to be done which if directly performed by him or another would be an offense against the United States," and be punishable as a principal. The Court held that if a person could so be held to violate a substantive statute, a fortiori two or more persons could conspire to cause a violation. The Court affirmed the Government's argument that, even assuming the police officers to have been innocent of criminal intent, they could be found to provide the capacity for the offense (i.e., "color of law"), while others, lacking the capacity, could provide the requisite wilfulness and be convicted.

The Court further found that there was ample evidence to convict all of the defendants on both counts, but that the appellants could not take advantage of the apparent inconsistency in the verdict which freed four of the defendants.

Staff: Harry I. Subin and Peter R. Richards, Criminal Division

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

DEPORTATION

Federal Court May in Reviewing a Deportation Order Inquire Into the Validity of a Conviction on Which the Order is Predicated. Roberto Federico Vincent Joseph v. Esperdy (S.D. N.Y., 66 Civil 1555, July 1, 1966) D.J. File 39-51-2771. Petitioner, a native and citizen of Panama, applied for a writ of habeas corpus to examine his detention for deportation by the respondent District Director of the Immigration and Naturalization Service.

Petitioner was ordered deported under 8 U.S.C. 1251(a)(11) because he had been convicted for a violation of a New York narcotic law, possession of heroin. Petitioner contended that his conviction should be vacated because his plea of guilty was involuntary in that the State Court failed to inform him that his conviction would render him deportable. Respondent argued that the Court in this habeas corpus proceeding was bound by the deportation record and could not inquire into the validity of the State conviction. The Court disagreed and ruled that in a proper case the Court could examine the validity of a State conviction and vacate it if warranted. However, the Court refused to grant the petitioner relief, being of the opinion that it was onerous and absurd to expect a Judge to explain to each defendant who pleads guilty the full range of collateral consequences of his plea. The writ of habeas corpus was dismissed.

Staff: United States Attorney Robert M. Morgenthau (S.D. N.Y.)
Assistant U.S. Attorney James G. Greilsheimer of Counsel

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INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Contempt of Congress: Speaker Must Review Committee Statement Before Certifying to United States Attorney. Wilson, et al v. United States (C.A.D.C., August 2, 1966) D. J. File 146-1-16-3371. The House Committee on Un-American Activities undertook to investigate how and why a Japanese professor, said to be a Communist and anti-American, had secured admission to the United States for purposes of a lecture tour. The State Department had recommended a temporary visa, which was granted.

The Committee subpoenaed as witnesses Dagmar Wilson, Donna Allen, and Russell Nixon to testify in executive session. All three appeared before a subcommittee on December 7, 1964, but requested that their testimony be taken in a public session and refused to testify in executive session.

The Subcommittee reported the refusals to the full Committee, which reported to the Speaker of the House, who certified the Committee's statements to the United States Attorney for the District of Columbia, and appellants were indicted, tried by a jury, and convicted.

On December 7, 1964, the House of Representatives was not in session.

Section 194 of Title 2, U.S.C., provides that when a witness fails to appear or refuses to testify before a committee a statement of the facts shall be reported to the House, and "while Congress is in session, or when Congress is not in session," it "shall" be the duty of the . . . Speaker . . . to certify, and he shall so certify the statement of facts . . . to the appropriate United States Attorney, whose duty it shall be to bring the matter before the grand jury for its action."

The Speaker certified to the United States Attorney the statements of facts filed with him by the Committee, and upon the return of Congress informed the House that he had done so "pursuant to the mandatory provisions" of 2 U.S.C. §194.

The Court of Appeals reversed in an opinion by Circuit Judge Leventhal, Circuit Judge Danaher dissenting.

The Court held that the certification by the Speaker to the United States Attorney was invalid, and that consequently the prosecution and convictions could not stand. The Speaker erred, according to the Court, in considering his obligation to certify as mandatory.

Despite the use of the word "shall" in the statute, the Court said that when Congress was not in session the Speaker should review the statement submitted by the Committee to determine the sufficiency of the evidence, whether "wilful contumacy" was stated, or whether the matter should be held for action by the whole House. The Court intimated that one issue that might be considered was

whether executive or public sessions were appropriate, although it also stated that it was not intimating any view as to that question.

The main basis for the decision seems to have been that the Court felt that the consistent course of legislative treatment of such matters when Congress was in session, was to debate and vote on a resolution offered by a member of the Committee, which the Court thought was inconsistent with the view that "shall" made certification mandatory. The clause relating to the procedure when Congress was not in session was added by amendment in 1936, and the Court said that it was intended to require consideration and the exercise of discretion by the Speaker when the Congress was not in session "as a check against rash action", and for the purpose of preventing undue delays in punishing contempts.

The Court also cited dicta in In re Chapman, 166 U.S. 661, 667, and United States v. Costello, 198 F(2d) 200, 204-205 (C.A. 2), cert. denied, 344 U.S. 874.

Staff: The appeal was argued by Robert L. Keuch (Internal Security). With him on the brief were United States Attorney David G. Bress and Kevin T. Maroney (Internal Security).

Authority of Secretary of State to Withdraw Passport Following Unauthorized Travel to Restricted Area Sustained by District Court. Staughton Lynd v. Dean Rusk, Secretary of State (D.D.C.) D. J. File 146-1-19-117. The Secretary of State withdrew Yale professor Staughton Lynd's passport following Lynd's refusal to assure the Secretary that he would not travel again to North Vietnam and other restricted areas in violation of the restrictions against such travel contained in his passport. Lynd would only assure the Secretary that he would not use his passport to effect such travel in the future. In granting summary judgment to the Secretary, the Court, Curran, J., ruled that the Secretary in the exercise of his discretion to prevent trouble when he reasonably foresees trouble has the power not only to extract a promise from Lynd that he will not use his passport to travel to restricted areas but also has the power to condition the restoration of the issuance of the passport on an agreement by Lynd that he will not travel to restricted areas without using his passport.

Staff: Benjamin C. Flannagan and Garvin L. Oliver (Internal Security Division)

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LAND AND NATURAL RESOURCES DIVISION

Assistant Attorney General Edwin L. Weisl, Jr.

Specificity Required of Commission's Report Under Rule 71A(h), F.R.Civ.P.; Jury Trial Favored on Remand. A recent decision of the Eighth Circuit has spelled out in detail and given precise application to the requirement of United States v. Merz, 376 U.S. 192 (1964), that the report of a commission be more than a jury verdict, simply stating its ultimate award. In doing so, the Court accepted, in general, our position that the report must show how the commission reached the amount it did, rather than some other possible amount. It is the path of reasoning to the goal of that amount which Merz required to be shown. In United States v. Rufus M. Bell, et al., July 14, 1966 (D.J. File 33-4-312-112), the Court reversed a judgment in a condemnation action which was tried before a commission appointed pursuant to Rule 71A(h), F.R.Civ.P., and remanded the case, suggesting that retrial be before a jury.

In this case, perpetual flowage easements and a perpetual easement for a right of way for a railroad were taken over about 625 acres of a tract of 1,187 acres of farmland in Arkansas. The landowners and the Government both presented three expert appraisers. They all valued the tract before and after imposition of the easements. The commission's report was objected to by the Government, and the district court ordered it amended in certain respects to comply with the Merz decision. The Government then objected to the amended report, but the court confirmed it, stating that it believed the report was sufficient to meet the requirements of Merz, and that it was"convinced that the findings and conclusions of the commission are not clearly erroneous and they are supported by substantial evidence."

The commission arrived at its award by taking the lowest before-taking value of the landowners' witnesses, $150,000, and reducing it by five percent, giving as its before-taking value $140,000. It based its after-taking value of $85,000 on the Government's lowest after-taking value of $86,500, awarding $55,000. The United States, the Court of Appeals said, "objected because of the obvious inconsistency in the compensation figures." In its second report, the commission admitted that it had in the first instance used a quotient process. The district court confirmed the report.

The landowners did not file a brief or argue the case in the Court of Appeals, but wrote a letter to the Court stating that they did not confess error, as they did not consider there was any error, but that they were willing to have a new trial before any factfinding body. The Court of Appeals stated that, while it need not, the appellate court usually possesses discretion to remand the case for a new trial where the parties so agree. After reviewing the facts, the Court stated:

> In any event, we have carefully reviewed the record in this case and have concluded that the commission's amended report does not meet the requirements of Merz. Our doubt centers in (a) the commission's acceptance of one expert's testimony as to before-taking value and its

> rejection of his testimony as to after-taking value; (b) its acceptance of the testimony of another witness for the after-taking value and its rejection of his testimony for before-taking value; (c) its failure to indicate why these particular partial selections were made and all other testimony disregarded; (d) its unexplained discount of 5% on the before-taking figure it decided to accept; (e) its conceded use of quotients or averages; and (f) the absence of information as to its recognition and use, if any, of comparable sales, severance aspects, improvements and variations in terrain. All this leaves one ill advised as to the reasons for the award amount and as to the path which the commission followed in arriving at its result. That path and the supporting reasons are essential. United States v. Merz, supra, p. 199 of 376 U.S.; Morgan v. United States, 356 F. 2d 17, 23 (8 Cir. 1966). Their absence makes remand necessary. [Emphasis supplied.]

The Court also indicated that a jury trial on remand would avoid such a legal question. It said:

> There remains the question as to how the compensation issue shall be resolved. We are willing to have the trial court determine, in its discretion, whether this task is to be performed by a jury, or by the court, or by the same or another commission. We venture to suggest, however, in the light of the circumstances here, that the issue now be submitted by way of a full trial to a jury. We indulge in this suggestion because the Supreme Court has expressly left open the question of a party's right to a jury trial, notwithstanding Rule 71A(h), when demand therefore is made, United States v. Merz, supra, p. 194 of 376 U.S., footnote 2; because the government made just such a demand here with its complaint; and because the owners have expressed their willingness to have the matter tried to a jury. By so doing, one possible legal question is avoided. See United States v. Leavell & Ponder, Inc., 286 F.2d 398, 407-09 (5 Cir. 1961), cert. denied 366 U.S. 944; United States v. Bobinski, 244 F.2d 299, 301 (2 Cir. 1957); 7 Moore's Federal Practice, Par. 71A.90[3] (2d ed. 1955).

This decision strongly supports the Department's position that a commission's report must show the reasoning by which it reached the amount it awarded, even if it were by tossing a coin or by averaging. Of course, a sufficient record must be built at the trial by showing on cross-examination of the owners' witnesses how they reached their dollar figure and by showing the same on direct examination of our witnesses.

Staff: Roger P. Marquis and Elizabeth Dudley, (Land and Natural Resources Division).

Condemnation: Claimed Minerals Value; Necessity of Showing Present Demand; Admissibility of Opinion of Non-Mineral Expert Based on Market; Sufficiency of Commission Report. Mills v. United States (C.A. 8, No. 18,156, July 13, 1966) D.J. File 33-4-275-326 and Ozark Real Estate Co. v. United States (C.A. 8, No.

18,157, July 13, 1966) D.J. File 33-4-275-354 . The United States took a part of two tracts of land in fee, exclusive of the mineral rights. The Government also imposed a perpetual flowage easement upon additional acres of the above tracts. Both tracts were under-laid with coal. Part of the coal deposits beneath one of the tracts had been removed by mining in prior years, while no coal had ever been mined from the other tract. Since the Government's entry, mining has not been feasible. However, demand for coal from surrounding mining operations within this field has decreased regularly in recent years.

The owners claimed large values for coal deposits, based primarily on a certain royalty times estimated deposit basis. The Government presented agricultural values for the surface and evidence that, for lack of demand, the coal had only a nominal "bonus" value. The commission, appointed by the district court under Rule 71A(h), F.R.Civ.P., found that the coal deposits "had little recognized value." It gave an award based on the Government's evidence plus a nominal bonus for the in place coal. On appeal the appellants did not dispute the standard of measure used by the commission in determining just compensation. In this case, the Eighth Circuit found sufficient compliance by the commission with the standards established by Merz as to the report so as to preclude this point as a basis for appeal.

An issue on appeal involves an allegation that the United States "presented no competent evidence as the value of coal comparably in place." It criticized the Government's witness who based his opinion on market transactions and conceded he was not a coal expert. The Court held that the testimony was permissible and was "not devoid of value."

Appellants also argued that the evidence presented through their own witness was the only competent evidence. However, the valuation of this witness was based solely upon his estimate of the coal reserve. He did not consider such factors as demand, extraction costs, and profit.

The Court of Appeals sustained the district court and the commission's verdict. It held that "although minerals in place is a factor to be considered, there must be more than a mere theoretical future demand and use." In substantiating its decision, the Court quoted from United States v. Whitehurst, 337 F.2d 765, 771-772 (C.A. 4, 1964), where the Court said "there must be some objective support for future demand, including volume and duration. Mere physical adaptability to a use does not establish a market."

Referring to the process of multiplying estimated tons in place by royalty per ton, the Court said:

> If one can assume, in the first instance, that these two figures are appropriate, the result reached by Cobb may properly be regarded as ignoring the large excess of the field's reserves over demand; the significance, expensewise, of the depth of the overlay; the costs of extraction which, in addition to profit, must be recouped by any operator; and the stark facts of mine

abandonments and of limited current mining. Value implies demand and a buyer. Cobb's testimony assumed both but, apart from his own comment that he "would be interested in buying tracts of land such as" those of the owners, afforded proof of neither.

Staff: Roger P. Marquis (Land and Natural Resources Division).

Condemnation: Otherwise Qualified Expert Not Disqualified Because of Lack of Contemporaneous Knowledge of Comparable Sales; Irrelevance of State Law, Especially When Based on Different Concept of "Market Value"; Comparability; Discretion of Trial Court as to Qualifications Not Absolute. United States v. 60.14 Acres of Land, more or less, situate in Warren and McKean Counties, State of Pennsylvania, and Arthur W. Seibel, et al. (C.A. 3, No. 15313, Nov. 5, 1965) D.J. File 33-39-805-118. The United States condemned the appellees' residence. The only evidence submitted by the owner as to the market value of the property was his and his wife's opinion. This was based primarily upon the amount of their investment and not the market value of the property. However, the Court of Appeals allowed the testimony, considering it to fall within the standard of what a willing buyer would pay to a willing seller. The Government offered as evidence the expert opinion of a highly qualified appraiser. Appellees objected to the admission of this testimony on the basis that (1) the Government's witness had never made appraisals in the area where the property was located, (2) he did not know the market in the area, and (3) he did not have any knowledge regarding comparable sales in the area until he contracted with the Government to appraise certain lands, of which the present property is a portion. Despite the fact that the Government's expert spent over two years searching and studying 150 properties in determining comparable sales, the district court excluded his testimony on the ground that he was not qualified. The district court acknowledged the general qualification of the Government's witness, but barred his testimony because his knowledge of values in the area was not acquired contemporaneously with transactions in the course of his business, but rather, retrospectively on the basis of studying past transactions. For the ruling it relied on Pennsylvania law. Up until one week after trial, when the Pennsylvania Eminent Domain Code of 1964 was passed, the district court's reasoning was a statement of the existing state law. The code, however, abolished this rule.

The Court of Appeals, recognizing the general rule that matters of qualification of experts are largely vested in the discretion of the trial court, held that this was not so when the ruling rested on a mistake of law. It determined that "the competency of witnesses in an eminent domain proceeding in a federal court is not determined by conformity to state law." For authority the Court cited Rule 71A(a), F.R.Civ.P.. It pointed out that the Pennsylvania law was founded on a different concept of the meaning of "market value" than that of the federal law. As well, the Court, in a long discussion, gave great weight to Rule 43(a) and the liberal principles which have developed from it regarding the admissibility of evidence. After discussing at length the nature of expert testimony and the qualifications needed the Court said:

> All opinion evidence of market value is to some extent inherently speculative (see Kimball Laundry Co. v. United States, 338 U.S. 1, 6 (1949); United States v. Miller, 317 U.S. 369, 374-75 1943)), for it seeks to describe in the form of a realistic event what is a theoretical construction, -- something which in fact did not occur. Indeed while the expression of opinion of market value based on retrospectively obtained information may seem on the surface to be of inferior quality, it would be naive to suppose that the local expert is not himself obliged to resort to the records of prior transactions, for they obviously are not all matters within his current recollection. The distinction between contemporaneously and retrospectively acquired information if an artificial one, and at the most would affect only the weight of the expert's opinion.
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> We therefore hold that if there be a difference in the reliability of information currently received and that which is retrospectively obtained, it is a difference which goes merely to the weight of the evidence and not to the competency of the witness. This rule is particularly required in this era of vast governmental programs which often require the condemnation of land in sparsely located areas where real estate brokers are few and the government often would be unable to secure impartial expert evidence.

Finally, the Court said:

> The hearsay nature of Minsingers' knowledge of the comparable sales clearly does not justify the exclusion of his testimony. Under the federal rule hearsay evidence of the sales themselves was admissible and Minsinger, therefore, was entitled to rely on them. E.g, United States v. Sowards, 339 F.2d 401, 402 (10 Cir. 1964); United States v. 5139.5 Acres of Land, 200 F.2d 659, 662 (4 Cir. 1952).
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> We need not consider what would be the effect of the absence of any comparable sales. For we believe from our examination of the evidence that the sale prices of the properties which Minsinger deemed comparable would have been admissible as substantive evidence, although of course, the weight of this evidence would be for the jury. Since the evidence was offered not as independent, substantive proof of value, but merely as background support for Minsinger's expert opinion as to value, the requirement of comparability is less strict. See 5 Nichols, The Law of Eminent Domain (Rev. 3d ed. 1962), § 18.42[1],

p. 253; United States v. Johnson, 285 F. 2d 35, 41 (9 Cir. 1961). The properties on which Minsinger relied were sufficiently comparable to support his expression of opinion under this reduced requirement, and its weight was for the jury.

Staff: Edmund B. Clark (Land and Natural Resources Division).

Public Lands; Ejectment; Record Title Strictly Construed; Electric Power Transmission Line Easement Which Was Granted by Party Who Possessed Land Through Mesne Conveyances Going Back Over One Hundred Years Did Not Divest United States of Title and Possession of Land Since Official Records Established No Valid Entry or Patent. United States v. Central Illinois Public Service Company (C.A. 7, No. 15451, June 29, 1966 D.J. File 90-1-10-617). Appellant, Central Illinois Public Service Company, was granted an electric power transmission line easement by a party who possessed and claimed title to the land in question by virtue of mesne conveyances going back over 100 years to one John Nikles, who entered the land, allegedly a part of the public domain, on February 4, 1860, and later received a certificate entitling him to a patent. The official records of the Bureau of Land Management of the Department of the Interior, however, showed that on May 13, 1857, a prior entry-man, one Hiram Walker, entered the land as the assignee of a military warrant for bounty land. The certificate issued to Nikles, the second entryman, was cancelled on December 27, 1860, because it was in conflict with Walker's prior entry. Walker's warrant was later cancelled and declared void on April 26, 1862, after it was discovered it was stolen from its original owner sometime earlier. Nikles, however, continued in possession despite the cancellation and the land was later, by a presidential proclamation in 1939, set aside for the Shawnee National Forest.

Central Illinois appealed from a summary judgment requiring it to vacate the land, claiming the easement by virtue of the Nikles entry. The Court of Appeals for the Seventh Circuit affirmed, pointing out that an entry on public land which is prima facie valid, even though subsequently declared void, segregates the land from the public domain and prevents a second entryman from obtaining any interest in it until the prior entry has been set aside. McMichael v. Murphy, 197 U.S. 304, 311 (1905). The Court further pointed out that since the Walker entry was still a matter of official record, Nikles acquired no interest in the land and his certificate was properly cancelled. Cornelius v. Kessel, 128 U.S. 456, 461 (1888). The Court of Appeals concluded that the land was at all times owned by the United States and became part of the Shawnee National Forest by presidential proclamation.

Staff: Robert M. Perry (Land and Natural Resources Division).

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TAX DIVISION

Acting Assistant Attorney General Richard C. Pugh

CIVIL TAX MATTERS
District Court Decisions

Bankruptcy - Chapter XIII - In a Chapter XIII Wage Earner's Proceeding, Tax Claims Which Are Filed After the Six Month Period Prescribed by Section 57(n) of the Bankruptcy Act Must Nevertheless Be Allowed and Paid if Such Claims Fall Within the Provisions of Section 680 of the Act. In the Matter of George Henry Gates, Debtor, Chapter XIII (USDC, ED Wisc., No. 63-B-610, July 19, 1966) D.J. File 5-85-2252.

On March 29, 1963, the debtor, George Henry Gates, filed a wage earner's petition under Chapter XIII of the Bankruptcy Act. No indebtedness to the United States for taxes was listed on the debtor's schedule. The first meeting of creditors occurred on April 23, 1963, and a plan was confirmed on June 3, 1963.

On April 23, 1964, one year after the first meeting of creditors, the United States filed a proof of claim for $535.38. This amount represented income tax claims for the year 1962, in the amount of $433.08, and for the year 1963, in the amount of $102.30.

The Referee disallowed the Government's claim for the years 1962 and 1963 on the ground that the claims were untimely as they had not been filed within six months as required by Section 57(n) of the Bankruptcy Act. The Referee rejected the Government's argument that the claims were allowable because of the following provisions of Section 680:

> . . . [A]ll taxes which may be found to be owing to the United States or any State from a debtor within one year from the date of the filing of a petition under this chapter, and have not been assessed prior to the date of the confirmation of a plan under this chapter, and all taxes which may become owing to the United States or any State from a debtor shall be assessed against, may be collected from, and shall be paid by the debtor: . . .

Under the referee's view, Section 680 was meaningless becauses taxes per se are not dischargeable under Chapter XIII.

Upon petition for review, the District Court, in a case of first impression, vacated the order of the Referee and held that "Section 680 of the Bankruptcy Act must be given effect in Chapter XIII proceedings by allowance of filing of claims for taxes falling within its provisions."

The Court noted that the instant facts encompassed both categories of tax liabilities dealt with in Section 680: (1) The 1962 pre-petition taxes were found to be owing from the debtor within one year of March 29, 1963, the filing

date of the bankruptcy petition, and they were assessed on January 3, 1964 which was after the date of confirmation of the plans; and (2) The 1963 post-petition taxes became owing during the pendency of the proceeding: With regard to the first category of pre-petition taxes, the Court said that the likelihood of an adequate determination by the Internal Revenue in time to permit filing of a claim within the six month rule of Section 57(n) was remote. As to the second category of post-petition taxes, the Court observed that it would be impossible to comply with the six month requirement, since the 1963 liability would not even be incurred until well beyond that period of time. Consequently, Congress obviously intended that Section 680 and not Section 57(n) should govern whether the Government's tax claims are allowable in a Chapter XIII wage earner's proceeding.

The Court further indicated that under Section 64(a) the tax claim could either have first priority as an expense of administration or fourth priority as taxes legally due and owing. However, the Court said that it was not necessary to decide which priority was applicable here since there was no showing that claims in either the second or third priorities were present. Thus, the tax claims were held to have priority under Section 64(a)(4) "which priority under the circumstances of this and other wage earners' proceedings practically is not inferior to that of expenses of administration."

Staff: United States Attorney James B. Brennan, Assistant United States Attorney Robert J. Lerner (E.D. Wisc.) and Donald J. Gavin (Tax Division).

Federal Tax Liens: Assignment of Life Insurance Policies. Since Federal Tax Liens Were Perfected Prior to the Date of Assignment, the Assignee Took the Policies Subject to the Tax Liens; Hence the United States Had a Right to Collect the Cash Surrender Value of the Policies Prior to the Assignee. United States v. Simon O. LaFarge, et al., (USDC SD N.Y., July 18, 1966). (CCH 66-2 U.S.T.C. ¶9557). This was a suit by the United States to foreclose and reduce to judgment its tax lien against all property and rights to property of the taxpayers-defendant, Simon LaFarge and his deceased wife, Anna, who were represented in this suit by a Public Administrator. Federal tax deficiencies were assessed on December 23, 1957, and notice of the federal tax lien encumbering taxpayers' property was duly filed on March 18, 1960.

At the time the tax deficiencies against him and his wife were assessed, defendant, Simon LaFarge, was the owner of three life insurance policies; each of the policies was assigned to his wife on dates subsequent to the filing of the federal tax lien. The three insurance companies which issued the policies, as well as a subsequent assignee, were made defendants so that the Government could collect the cash surrender value of the policies.

After service was completed and the issue had been joined, the Government moved for default judgment against the defendant-taxpayer and summary judgment against all other defendants. The Court, after finding that the defendant-taxpayer was the owner of the insurance policies described and that none of the policies had been surrendered for its cash value, granted the Government's motions reasoning that since assignment of the policies was subsequent to filing

of the federal tax lien, the assignee, taxpayer's wife, "took the policies subject to the Government's lien . . . and the United States is now entitled to foreclose its lien against the proceeds thereof, irrespective of who the present owner or owners may be".

Staff: Assistant United States Attorney Dawnald R. Henderson (SD N.Y.); Robert E. Ferguson (Tax Division).

State Court Decision

Lien for Taxes: Priority of Judgment Creditor. A Welding Supply Company Was a Judgment Creditor Entitled to the Proceeds of the Sheriff's Sale Where Its Judgment was Entered Before the United States Filed Notice of Its Tax Lien. Capital Welding Supply Company v. William Houser, d/b/a Houser Contracting Company. (Chancery Court, Saline County, Ark., April 4, 1966). CCH 66-2 U.S.T.C. ¶ 9484). The United States made an assessment for taxes due from the defendant, William Houser of Coschocton, Ohio, in the amount of $33,539.32. Notices of federal tax liens were filed in Coshockton County, Ohio, on March 23, 1965, and June 1, 1965. The plaintiff in this case then filed suit in Arkansas, and pursuant to Arkansas law which provides for attachment of property upon the commencement of civil actions, the sheriff took possession of all items of personal property belonging to the defendant which could be found in Saline County, Arkansas. Judgment in favor of the plaintiff was entered on July 23, 1965. Thereafter, on August 5, 1965, a notice of federal tax lien was filed in the Office of the Recorder of Saline County, Arkansas, for the taxes assessed against the defendant.

The United States questioned the priority of this judgment creditor over its tax lien. The Court held that the plaintiff's lien of attachment became choate upon the entry of judgment and that since plaintiff's judgment was entered prior to the filing of the Notice of Federal Tax Lien in Saline County, Arkansas, plaintiff was a judgment creditor within the meaning of Section 6323(a) of the Internal Revenue Code of 1954 and, as such, entitled to priority over the lien of the United States. As a result, the judge dismissed the claim of the Government.

Staff: United States Attorney Robert D. Smith, Jr. and Assistant United States Attorney James W. Gallman (ED Ark.); Howard A. Weinberger (Tax Division).

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