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DEPARTMENT OF JUSTICE

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UNITED STATES ATTORNEYS
BULLETIN

UNITED STATES ATTORNEYS BULLETIN

Vol. 14 September 2, 1966 No. 18

DISTRICTS IN CURRENT STATUS

Set out below are the districts in a current status as of June 30, 1966.

CASES

Criminal

Ala., N.	Ill., N.	Mich., W.	Ohio, S.	Tex., W.
Ala., S.	Ill., E.	Minn.	Okla., N.	Utah
Alaska	Ill., S.	Mo., E.	Okla., E.	Vt.
Ariz.	Ind., N.	Mo., W.	Okla., W.	Va., E.
Ark., E.	Ind., S.	Mont.	Ore.	Va., W.
Ark., W.	Iowa, N.	Nev.	Pa., E.	Wash., E.
Calif., S.	Iowa, S.	N.H.	Pa., M.	Wash., W.
Colo.	Kan.	N.J.	Pa., W.	W.Va., N.
Conn.	Ky., E.	N.Mex.	P.R.	W.Va., S.
Dist.of Col.	Ky., W.	N.Y., N.	R.I.	Wis., E.
Fla., N.	La., E.	N.Y., E.	S.C., E.	Wyo.
Fla., M.	La., W.	N.Y., S.	Tenn., E.	C.Z.
Ga., N.	Me.	N.C., E.	Tenn., W.	Guam
Ga., M.	Md.	N.C., W.	Tex., N.	V.I.
Ga., S.	Mass.	N.D.	Tex., E.	
Hawaii	Mich., E.	Ohio, N.	Tex., S.	

CASES

Civil

Ala., N.	Ga., S.	Mass.	N.C., W.	Tex., E.
Ala., M.	Hawaii	Minn.	N.D.	Tex., W.
Alaska	Idaho	Miss., N.	Ohio, N.	Utah
Ariz.	Ill., N.	Miss., S.	Ohio, S.	Vt.
Ark., E.	Ill., E.	Mo., E.	Okla., N.	Va., E.
Ark., W.	Ill., S.	Mo., W.	Okla., E.	Va., W.
Calif., S.	Ind., N.	Mont.	Okla., W.	Wash., E.
Colo.	Ind., S.	Neb.	Ore.	Wash., W.
Del.	Iowa, N.	Nev.	Pa., M.	W.Va., S.
Dist.of Col.	Iowa, S.	N.H.	Pa., W.	Wis., W.
Fla., N.	Kansas	N.J.	S.C., W.	Wyo.
Fla., M.	Ky., E.	N.Mex.	Tenn., E.	C.Z.
Fla., S.	Ky., W.	N.Y., E.	Tenn., M.	Guam
Ga., N.	La., W.	N.C., E.	Tenn., W.	V.I.
Ga., M.	Me.	N.C., M.	Tex., N.	

MATTERS

Criminal

Ala., N.	Ga., S.	La., W.	N.C., W.	Tex., S.
Ala., M.	Hawaii	Me.	Okla., N.	Tex., W.
Alaska	Idaho	Minn.	Okla., W.	Utah
Ariz.	Ill., E.	Miss., S.	Pa., M.	Vt.
Ark., E.	Ind., N.	Mont.	Pa., W.	Wash., E.
Ark., W.	Ind., S.	Neb.	S.C., E.	Wis., E.
Colo.	Iowa, N.	N.H.	S.C., W.	Wyo.
Fla., N.	Iowa, S.	N.Y., E.	Tenn., W.	C.Z.
Ga., M.	Ky., W.	N.C., M.	Tex., N.	Guam

MATTERS

Civil

Ala., N.	Idaho	Miss., S.	Okla., N.	Tex., W.
Ala., M.	Ill., N.	Mo., W.	Okla., E.	Utah
Alaska	Ill., E.	Mont.	Okla., W.	Vt.
Ariz.	Ill., S.	Neb.	Pa., E.	Va., E.
Ark., E.	Ind., N.	Nev.	Pa., M.	Va., W.
Ark., W.	Ind., S.	N.H.	Pa., W.	Wash., E.
Calif., N.	Iowa, N.	N.J.	S.C., E.	Wash., W.
Calif., S.	Iowa, S.	N.Mex.	S.C., W.	W.Va., N.
Colo.	Ky., W.	N.Y., E.	S.D.	Wis., E.
Conn.	La., W.	N.Y., W.	Tenn., E.	Wis., W.
Dist.of Col.	Me.	N.C., M.	Tenn., M.	Wyo.
Fla., N.	Mass.	N.C., W.	Tenn., W.	C.Z.
Ga., M.	Mich., W.	N.D.	Tex., N.	Guam
Ga., S.	Minn.	Ohio, N.	Tex., E.	V.I.
Hawaii	Miss., N.	Ohio, S.	Tex., S.	

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ADMINISTRATIVE DIVISION

Assistant Attorney General Ernest C. Friesen, Jr.

NOTES ON WITNESSES

Under the law a witness (other than a Government employee or a person convicted under any law) in any court of the United States, is entitled to mileage at the rate of 8 cents for going from and returning to his place of residence, and a fee of $4 for each day's attendance and for travel time both ways. Per diem of $8 for expenses of subsistence, including time necessary in going to and returning from the place of attendance, is also allowed if the distance is too great to return home the same night. The regulations prescribed by the Attorney General applicable to a Government employee subpoenaed to testify as a witness for the Government, allow per diem in lieu of subsistence at the rate of $16 and mileage at 10 cents if privately owned automobile is used; otherwise, actual cost of common carrier is allowed. (Exception: Alaska, where Department Order No. 214-60 applies.) 28 U.S.C. 1821 & 1823.

The term "residence" as used in the statute is not limited in its application to the legal residence, but includes either a permanent or temporary residence of the witness to which the subpoena is sent. The purpose of the statute is to transport the witness at the expense of the litigant from the place at which he may be temporarily or permanently residing and to which it is presumed he will return after testifying. 27 C. D. 149.

A witness who receives a subpoena at his temporary residence to appear at a hearing held at the place of his permanent residence may be paid mileage from his temporary residence even though there is no return to his temporary residence. Also, whenever a witness whose residence is not at the place of holding court is summoned while he is at the place of trial, he will be allowed mileage for returning to his residence but not for coming to the court. However, no mileage will be allowed a witness who is subpoenaed on the day and at the place of the trial in which he is subpoenaed to attend. 30 C.G. 317; 27 C.D. 149.

A witness subpoenaed at his place of residence for future appearance at court and then goes to a more distant place on personal business receives mileage, etc., only from and to his residence, as does the traveling man who is known to be in a travel status the greater portion of his time. 26 C.D. 570.

A witness is entitled to a fee if he appears and testifies, even if a subpoena is not issued, or if he appears under subpoena and does not testify. A-49634, 7/13/33; 17 C.D. 615.

A party called and examined as a witness on his own behalf is not entitled to fees for travel or attendance. 10 Fed. 239.

Government employees subpoenaed in private litigation or by some party other than the Federal Government to testify, not in their official capacity but as individuals, are entitled to the usual fees and expenses, but the time absent by reason thereof must be taken as annual leave or leave without pay. Generally,

rules of the courts or the statutes of the various States provide for the payment of witness fees and allowance for expenses of travel and subsistence. However, where the value of the witness' testimony in private litigation arises from his official capacity and he is subpoenaed solely because of and to testify in that capacity or to produce official records, he may be regarded as in a duty and pay status during the period of his necessary absence in responding to such subpoena. Under the circumstances, as the United States is deprived of his services while so testifying, the employee should be instructed to collect the authorized witness fees and allowances (under state law) for expenses of travel and subsistence. (No per diem in lieu of subsistence may be claimed from the Federal Government.) All amounts so collected over and above the amount of his actual expenses should be accounted for and deposited as miscellaneous receipts. 15 C.G. 196; 23 C.G. 628; 27 C.G. 83; 29 C.G. 195; 2 C.G. 534; 4 C.G. 91; 7 C.G. 690; 43 C.G. 171.

A full-time, temporary Government employee, as distinguished from a substitute, whenever actually-employed employee, or a part-time employee not serving a regular tour of duty, is entitled to the same allowances as a permanent employee under 28 U.S.C. 1823. 38 C.G. 307.

A government employee testifying on behalf of an indigent defendant must take leave, or leave without pay; he is entitled to witness fees under 28 U.S.C. 1821. B-127978, 9/24/57.

A salaried government doctor subpoenaed from a government hospital, such as the Springfield Medical Center, Veterans' Administration, etc., who testifies with respect to an examination of a defendant is paid for transportation and per diem in lieu of subsistence from the witness appropriation. Generally, the cases in which these doctors testify do not involve the functions or activities of these hospitals. It is understood, of course, that in a tort action involving a government hospital, the expenses of travel and subsistence of an employee of that hospital appearing as a witness are payable by the hospital. 28 C.G. 47; B-80441, 10/27/48.

The following Memoranda applicable to United States Attorneys Offices have been issued since the list published in Bulletin No. 14 Vol. 14 dated July 8, 1966:

MEMOS	DATED	DISTRIBUTION	SUBJECT
278-S6	7/18/66	U.S. Attorneys	Forwarding of Material in Social Security Cases
475	7/18/66	U.S. Attorneys	Request for Corrections in Listing of Criminal Fines and Forfeitures as of May 31, 1966
477	7/20/66	U.S. Attorneys & Marshals	Federal Employees Salary Act of 1966
477-S1	7/25/66	U.S. Attorneys & Marshals	Federal Employees Salary Act of 1966

MEMO	DATED	DISTRIBUTION	SUBJECT (Continued)
478	7/25/66	U.S. Attorneys	Employment of Expert Witnesses (Except Federal Government Employees and Experts in Lands and Natural Resources Cases).
479	8/1/66	U.S. Marshals	Form USM-282, Return on Service of Writ.
480	8/3/66	U.S. Attorneys & Marshals	Use of Zip Code Numbers on Official Correspondence
470-S1	8/4/66	U.S. Marshals	USM-19, Revised, Description of Appointment Requirements and Procedures for Position of Deputy U.S. Marshal.

ORDER	DATE	DISTRIBUTION	SUBJECT
364-66	6/27/66	U.S. Attorneys & Marshals	Authorizing Lloyd P. LaFountain to Perform the Functions and Duties of U.S. Attorney for the District of Maine During the Vacancy in that Office.
365-66	7/5/66	U.S. Attorneys & Marshals	Nondiscrimination; Equal Employment Opportunity; Policies and Procedures.
366-66	8/2/66	U.S. Attorneys & Marshals	Equal Employment Opportunity Regulations.

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ANTITRUST DIVISION

Assistant Attorney General Donald F. Turner

Florist Association Charged With Violations of Sections 1 and 2 of the Sherman Act. United States v. Florists' Transworld Delivery Association. (E.D. Mich.) DJ File 60-232-3. On August 1, 1966, the above civil complaint was filed in Detroit, Michigan against Florists' Transworld Delivery Association (FTD), a trade association with approximately 11,000 retail florist members in the United States. The complaint charges violations of Sections 1 and 2 of the Sherman Act. The terms of the comspiracy as set out in the complaint are as follows.

(a) Nation-wide prices for floral arrangements conforming to certain specific designs be fixed, stabilized, maintained, promulgated, and disseminated by the Association;

(b) Nation-wide commissions for sending Florists be fixed, stabilized, maintained, promulgated, and disseminated by the Association;

(c) Sending florists separately charge the customer purchasing a wire order the full cost of transmitting the order to the filling florist;

(d) A nation-wide service charge of 50 cents to be charged the customer purchasing a wire order by the sending florist be fixed, maintained, promulgated, and disseminated by the Association;

(e) Official membership lists of the Association name each member florist only under the city or town where its shop is located;

(f) Member florists refrain from advertising in the FTD News their willingness to deliver flowers to any city or town outside the city or town where their shops are located unless there is no other Association member located in such city or town.

(g) Member florists refrain from listing their shops under the FTD trademark in the yellow pages of any telephone book other than the one published for the area in which their shops are located;

(h) The Association police and restrict the competitive activities of member florists, including their advertising practices, affiliation with directories and lists of competitive floral associations, use of communication techniques, and other activities;

(i) Florist shops which are not principally engaged in the florist business which are located in supermarkets or other large stores, which are not located at street level, or which are connected with a mortuary or cemetery, be excluded from membership in the Association;

(j) Member florists refrain from settling accounts between themselves directly without the use of the Association's clearing house, and refrain from settling accounts between themselves by means of any clearing house other than the one operated by the Association;

(k) The officials and management of the Association disparage the activities of competitive floral associations, and discourage member florists from joining said competitive floral associations.

The complaint states that there are over 19,500 retail florist establishments in the United States with total sales of over $750,000,000 per year. A substantial portion of the sales of retail florists is due to the use of intercity orders for flowers. When a sending florist obtains a wire order from a customer, he collects from the customer the price for the flowers, plus the cost of transmitting the order, and, generally, a service charge. The order is then transmitted by telephone, telegraph, mail, or other means to the filling florist, who delivers the flowers to the recipient. The sending florist retains the transmission charge, the service charge, and a portion of the price of the flowers as a commission, and remits the remainder to the filling florist. The remittance from the sending florist to the filling florist is made either directly or by means of a clearing house.

The complaint states the FTD operates the largest florist clearing house in the United States, which handles $76,000,000 worth of orders per year. The total value of orders processed through all clearing houses in the United States is less than $90,000,000.

The complaint asks that FTD be enjoined from:

(a) Publishing, suggesting, or circulating any price for any goods sold to the public by retail florists;

(b) Publishing, suggesting, or circulating the amount of any service or other charge to customers by retail florists, or any amount of commissions to be paid to sending florists;

(c) Regulating or restricting the content of members' advertising;

(d) Regulating, restricting, or otherwise discouraging the affiliation of members with any other organization, or any list or directory of any other organization whatsoever, whether or not said list, directory, or organization is composed entirely of members of the defendant Association;

(e) Regulating or restricting the use or non-use of any clearing house by any member on any wire order;

(f) Excluding retail florists from membership for any reason other than poor credit or poor quality of floral services.

The complaint also asks that FTD be required to:

(a) Allow members to advertise in the FTD News and in other publications, the cities and towns in which they desire to make deliveries, their prices, both for special arrangements sponsored by the defendant Association and for other goods and services, and the sending florists' commissions which they are willing to allow;

(b) Publish monthly and circulate to all members the FTD Membership List, substantially as it is now published, except that it shall list under every city and town all member florists regardless of location who wish to list delivery services to said city or town;

(c) Make appropriate arrangements for the defendant Association's clearing house to handle each wire order on the basis of the commission agreed upon by the parties to that wire order.

Staff: Raymond P. Hernacki, William T. Huyck and Lawrence H. Eiger (Antitrust Division)

Court Grants Defendants' Motion to Dismiss On Grounds of Double Jeopardy. United States v. Koontz Creamery, Inc., et al. (D. Md.) DJ File 60-139-134. In March 1961, seven companies and four men were indicted in United States v. Milk Distributors Association for rigging Baltimore City milk bids from 1946 to the fall of 1957. A second count charged them and one other concern with allocating both Baltimore City and Baltimore County school milk contracts in the school year 1959-1960. An information was later substituted for the indictment, charging the individuals under §14 of the Clayton Act. On February 23, 1962, all defendants were allowed to plead nolo contendere to these charges of of two conspiracies, over the Government's opposition.

On December 20, 1962, a grand jury returned another indictment charging most of the same defendants with a continuing conspiracy to fix the prices at which milk and milk products would be sold to the regular retail and wholesale trade ("street milk") (other than to institutional customers purchasing by competitive bidding) in the Baltimore area from 1956 to 1960. Penn Dairies, ineligible to do business in Baltimore City, was not charged, but High's Dairy, selling no milk to schools and not charged in the school milk case, was named a defendant in this second indictment.

Greenspring Dairy, Inc.,
The H. E. Koontz Creamery, Inc.,
National Dairy Products Corporation
William Sears Hebb (Aristocrat Dairy)
John M. Lescure (official of National Dairy),
Will's Dairy, Inc.,
George C. Oursler, and
James J. Ward, Jr.

moved for dismissal on the ground of double jeopardy.

On July 22, 1966, the Court granted dismissal as to movants, finding that

the later indictment charged the same offense as those for which they were convicted on their nolo pleas in the "school milk" case.

Movants had requested a separate trial or hearing on the double jeopardy issue, by the Court without a jury and before trial of the general issue. The Government opposed on the ground that it was entitled to a unitary trial by jury. On August 4, 1964, Judge R. Dorsey Watkins ruled for defendants. The double jeopardy "trial" occurred in July 1965. It consumed nine trial days, in the course of which sixteen witnesses testified. Almost all the witnesses were officers or employees of the defendant dairies.

The Government's principal contentions were: (1) In order to make it appear that the two bid rigging conspiracies were the same as the street-fix, defendants had to impeach the earlier judgments by showing them to be for one offense only; (2) The evidence disclosed that the street-milk conspiracy and the school-milk bid rigging were different conspiracies, with different purposes, different modes of operation, each having members who could not possibly have had a stake in the outcome of the other; (3) The evidence showed that in the year during which there was no bid rigging the street-price conspiracy terminated, was recommenced and failed again; hence, whatever else was true, the short-lived conspiracy to fix the street milk prices, having begun and ended while no bid rigging conspiracy existed, had to be regarded as a different offense from any that had been charged before.

Defendants answered saying: (1) Their pleas of nolo had been offered as a convenience to them; they were not bound by anything said in obtaining leave to enter them; notwithstanding that they were convicted of two offenses, they might show those to have been actually only one offense in the double jeopardy proceeding and that, whatever the earlier convictions were for, if the conduct leading to them appeared to be part of the later alleged conspiracy, they would have shown themselves doubly jeopardized; (2) Viewed with a broad enough perspective, it could be seen that the conspirators in all three alleged conspiracies had certain aims (overall price stability in the Baltimore area) in common which each alleged conspiracy tended to support to some extent, that recurrent meetings of the trade organization to which many of them belonged, and whose meetings all but Penn had attended at one time or another, displayed a kind of general and continuing agreement to avoid competition such that each specific trade restraining agreement achieved by its members was simply part of a single overall conspiracy in restraint of trade; (3) Even if it happened that the members of the overall conspiracy were from time to time unable to agree, and fell to competing with one another, there still remained a sufficient consensus among the distributors' association members and other distributors that some agreed upon way to eliminate competition should be sought that it could not fairly be said that their conspiracy had really terminated.

In general, the Court agreed with movants. Although expressing itself as concerned by the inconsistency of its present finding with the earlier convictions, it was more troubled by what it deemed the absurd possibility, under the Government's view, that one defendant could show the first school conspiracy to be the same as the street milk conspiracy; another could show the second

school conspiracy to be the same as the street milk conspiracy, but that neither could show both to have been the same as the street milk conspiracy. The Court found that defendants had as a common purpose the object of maintaining market price stability and that, during all the times in question, there existed an arrangement and agreement with respect to the maintenance of non-competitive milk prices in the Baltimore Metropolitan area.

The court's opinion does not lay out the precise factual basis for its finding that a continuing agreement respecting prices existed. In part, it rested its decision on the fact that during a period of apparent non-collusion in 1959, the dairies did not disturb one-half gallon glass jug deposits, which had been an element of an earlier agreement among them. The court also appeared to rely heavily on the fact that the Government had pleaded the street milk conspiracy as a continuous offense and that it had argued in connection with a motion for severance by High's Dairy that discontinuity was improbable.

The problem of shared "stake-in-the-venture" that High's lack of interest in school agreements and Penn Dairies' lack of interest in Baltimore area street-price agreements presented was solved, in the court's view, by its finding that both High's and Penn wanted market stability and that the success of the school-milk bid rigging promoted High's chances of getting that while success in fixing street-prices contributed something towards bringing about stable school marketing for Penn.

The criminal charges against Cloverland Farms Dairy, Inc., High's of Baltimore, Inc., Milk Distributors Association, Inc., Royal Farms Dairy, Inc., Clyde Shugart and James J. Ward, Sr. are still pending. A civil action based on the street milk conspiracy has been stayed pending final disposition of the criminal case.

Staff: Edna Lingreen, Sinclair Gearing and Leonard Henzke, Jr. (Antitrust Division)

* * *

CIVIL DIVISION

Assistant Attorney General John W. Douglas

COURTS OF APPEALS

CIVIL SERVICE

Employees Transferred to Post Office In Connection With a Transfer of Operations Must Be Paid Salaries Equalling Previous Government Pay. Caputo v. Resor (C.A. 2, No. 30242, May 16, 1966). DJ File 35-52-14. Plaintiffs, maintenance employees at a building formerly operated by the Army, were transferred to the Post Office payroll when responsibility for operating the building was transferred from the Army to the Post Office. Each plaintiff was assigned to the salary level for his job required by statute or regulation. Each salary level in the Post Office has several steps. The lowest step for the salary levels of plaintiffs' jobs carried salaries lower than the salaries which plaintiffs had been receiving from the Army prior to their transfer. Plaintiffs protested this cut in pay, contending that Section 14 of the Veterans Preference Act, 5 U.S.C. 863, prohibited reductions in compensation except for cause. The Civil Service Commission referred the case to the Comptroller General, who ruled that 39 U.S.C. 3551 prohibited the Post Office from placing plaintiffs at a salary step other than the first step of their salary level. The Commission then denied plaintiffs' appeal, ruling that this shift of personnel was a transfer of function under Section 12 of the Veterans Preference Act, and that Section 14 was inapplicable. The district court refused to overturn the administrative determinations.

The court of appeals reversed. It ruled that 39 U.S.C. 3551 does not limit what the Post Office may pay employees who are transferred to it "along with a transfer of operations not previously part of the Post Office Department." The court also held that Section 14 of the Veterans Preference Act protected these employees against any reduction in compensation without cause.

Recent pay legislation has amended 39 U.S.C. 3551 retro-actively to achieve the result reached by the court of appeals. Section 401, Federal Salary and Fringe Benefits Act of 1966, P.L. 89-504, July 18, 1966. Thus this aspect of the case no longer has any prospective importance. The case, however, also apparently holds that Government employees falling under Section 14 of the Veterans Preference Act who are transferred in connection with a transfer of operations are protected against reductions in compensation. Our brief had taken the position that the only protection was the requirement that seniority be observed in connection with any "bumping."

Staff: Robert V. Zener (Civil Division)

CONTRACTS

Government Held Liable For Error in Describing Space In Invitation to Bid on Contract For Cleaning Government Building; But District Court Measure of

Damages Held Improper. Eastern Service Management Co. v. United States (C.A. 4, No. 10372, June 15, 1966). DJ File 78-67-22. In an invitation to bid on a contract for cleaning a federal office building for one year, General Services Administration stated that "total space to be serviced consists of approximately 129,300 square feet of office space, 42,700 square feet of warehouse space and 6,000 square feet of cafeteria dining space." Plaintiff was low bidder, receiving the contract on a bid of $40,438. After plaintiff began to perform, it was discovered that the office space to be cleaned was 8700 square feet more than estimated in the invitation, an error caused by a failure of the government to add in corridor, lobby and rest-room space in making the estimate. The court of appeals rejected the government's position that the error was small enough to be permissible in view of the fact that the invitation stated only that the space was "approximately" 129,300 square feet of office space. The court said that square footage was clearly a material factor in computing the cost of cleaning the building, that the testimony showed that it was not the practice in the industry to measure the footage in a building before bidding but rather to rely on the figures provided by the government, that the error of more than 6 percent in the office space was not a mere rounding off or measurement error, and therefore plaintiff had reasonably relied on the stated figures.

The court of appeals, however, reversed the district court's damage award, holding that the proper measure of damages should have been "the lesser of the reasonable costs of cleaning the additional area of available office space or the amount additional that the contractor would have bid according to the formula used by the contractor in bidding this job had he known the true size of the building." The district court, relying solely on an affidavit of plaintiff's officials, had made an award almost four times that derived from the above formula. The court of appeals, citing 28 U.S.C. 2411(b) and 31 U.S.C. 724a, also ruled improper the district court's allowance of pre-judgment interest against the government.

Staff: Walter H. Fleischer (Civil Division)

FEDERAL TORT CLAIMS ACT - LANDOWNER'S LIABILITY - INDEPENDENT CONTRACTORS

Under Delaware Law, United States as Landowner Having Relinquished Control Over Premises Is Not Responsible For Ameliorating Dangerous Conditions; Tort Claims Act Does Not Waive Sovereign Immunity From Suit For Negligence of Independent Contractor's Employees. Gilbert Earl Yates v. United States (C.A. 4, No. 10,089, July 29, 1966). DJ File 157-79-377. Yates, an employee of a government contractor, sued under the Tort Claims Act for damages resulting from a fall he suffered while working on government premises. The district court rendered judgment for the government, holding (1) that the government owed no duty to Yates because it had relinquished to the contractor control over the premises and equipment involved in the accident and (2) that if the government did owe any duty to Yates, it was merely to eliminate dangers of which it had notice, and it had not had notice of the dangers involved in this accident.

The court of appeals affirmed, noting as to (1) that the government's retention of control over suchitems as major repairs was not inconsistent with its

relinquishment of control over the "house-keeping" functions pertinent here, and holding that Delaware would adhere to the general rule governing this aspect of the case; and agreeing as to (2) that any duty which might be owed would not be owed here, since the government had neither actual nor constructive notice of the dangerous conditions. The Court also noted that the Tort Claims Act does not constitute a waiver of the sovereign's immunity from suit for the negligence of employees of an independent contractor.

Staff: Florence Wagman Roisman and Edward Berlin
(Civil Division)

GOOD SAMARITAN DOCTRINE

District Court's Holding, That Government Is Not Liable Under "Good Samaritan Doctrine" For Failure to Restrict Soldier To Base, Affirmed. Paul Tilden et al. v. United States (C.A. 7, Nos. 15506 and 15507, July 19, 1966). DJ File 157-26-49. Plaintiff Arlene Tilden suffered personal injuries, and her three children were killed, when an intoxicated Army cook drove his automobile into a car owned by plaintiff Paul Tilden, and driven by Mrs. Tilden, at 6 P.M. Monday, November 19, 1962. Early Saturday, November 17, 1962, the Army cook had been arrested on charges of drunken driving. He was jailed, and then taken, by a Lieutenant Bateman of the NIKE Site at which he was stationed, to the court of a local justice of the peace, where he pled guilty to the charge of drunken driving and was fined. Lieutenant Bateman, the justice of the peace, and an Indiana State Trooper who had arrested the cook, subsequently gave conflicting testimony with regard to an alleged agreement by Lieutenant Bateman to restrict the cook to the NIKE Site. The district court found that the undertaking was only to restrict the cook for approximately two days, until the following Monday, and that consequently the government by so restricting him had carried out any undertaking it had made. Noting that the Lieutenant was without authority to restrict the cook to base for a longer time than was necessary for his Battery Commander to investigate the matter, the court of appeals stated that "amid this conflicting testimony, there was ample support for [the district court's finding]."

The court also held that even had the government failed to perform its promise plaintiffs still had not made out a case for recovery under the Good Samaritan Doctrine, because it was "rank speculation" to think that had no undertaking been made at all, the cook would have been restricted in any way at the time of the accident. The Court accepted our view that a worsening of plaintiffs' position is necessary to impose liability under the Good Samaritan Doctrine, and rejected the view that an undertaking and its negligent performance are sufficient to establish liability under the doctrine.

Staff: Walter H. Fleischer and Jack H. Weiner
(Civil Division)

HABEAS CORPUS

In a Habeas Corpus Attack Upon An Order Of Arrest On a Charge Of Criminal Contempt in a Distant District, The Court Is Limited To the Question of the Jurisdiction of the Trial Court to Act; the Trial Court Had Jurisdiction To

Determine Its Own Jurisdiction in the First Instance; And the Final Order in the Habeas Corpus Proceeding Was Appealable. Jack T. Stewart (Stuart) v. Vardaman S. Dunn (C.A. 5, No. 22,081, June 28, 1966). DJ File 145-12-900. As counsel for the plaintiff in a civil action pending in the district court for the Northern District of Oklahoma, Dunn was ordered to show cause why he should not be held in contempt for willful and deliberate disobedience of a temporary restraining order, prohibiting him from going forward with the prosecution of the same cause of action in a state court in Mississippi while the federal court determined its power to enjoin the state court proceedings. When Dunn, who resided in Mississippi, ignored the order to show cause, the judge, characterizing the charge as criminal contempt, issued an order for his arrest. In a habeas corpus challenge to the validity of the order of arrest, the district court for the Northern District of Mississippi released and discharged Dunn, on the grounds that the defendant in the underlying action in Oklahoma had failed to make out a prima facie case for injunctive relief; that the district court in Oklahoma was prohibited by 28 U.S.C. 2283 from enjoining the state court proceedings; that the proceedings leading to the issuance of the order of arrest did not comply with the notice requirements of Rule 42(b), Fed.R.Crim.P., for criminal contempt; and that Dunn was not guilty of contempt.

On appeal by the United States Marshal, the court of appeals reversed. Preliminarily the court ruled, contrary to appellee's position, that the order in habeas corpus was an attack upon the validity of the order of arrest and not on any order of removal, since no order to remove had been issued, and was therefore a final appealable order under 28 U.S.C. 2253. The court also accepted the Government's contentions on the merits, holding that (1) absent exceptional circumstances, which did not exist here, the scope of review on habeas corpus was limited to a determination of the jurisdiction of the district court in Oklahoma; (2) the application of 22 U.S.C. 2283 did not present a jurisdictional question but was simply a limitation upon the court's equity powers to be challenged on direct appeal; (3) in addition, the district court in Oklahoma in the circumstances of this case had jurisdiction to determine its own jurisdiction in the first instance, with power to enter a valid temporary restraining order to maintain the status quo, under the decision in United States v. United Mine Workers, 330 U.S. 258; and (4) appellee Dunn was sufficiently apprised that the charge was criminal contempt to satisfy the notice requirement of Rule 42(b), Fed.R. Crim.P.. Appellee has now advised the district court for the Northern District of Oklahoma that he will submit himself to the court's jurisdiction.

Staff: Kathryn H. Baldwin (Civil Division)

INTERSTATE COMMERCE ACT - EXHAUSTION OF ADMINISTRATIVE REMEDIES

Car Service Orders of the Interstate Commerce Commission May Be Challenged Only Before a Three-Judge Court After Exhaustion of Administration Remedies, And May Not Be Challenged in An Enforcement Proceeding; Validity of Commission's Service Order To Deal With Boxcar Shortage Upheld. United States v. Southern Railway Company (C.A. 5, No. 22,588, July 27, 1966). DJ File 59-14-219. To deal with what it regarded as an emergency transportation situation caused by the continuing shortage of railroad boxcars in the country and the failure of the railroads' voluntary rules to improve the situation, in May 1962 the

Interstate Commerce Commission issued Car Service Order No. 939, prescribing limitations on the movements of certain types of boxcars. The order was issued without prior hearing and on only limited notice. In this regard, the Commission acted under Sec. 1(15) of the Interstate Commerce Act, 49 U.S.C. 1(15), which permits the Commission, whenever it is of the opinion that an emergency exists, to take such action as it deems appropriate with or without notice, hearing, or the making or filing of a report. The order was continued in effect until November 1963. Any carrier affected was free to question the order's validity at any time under procedures established by the Interstate Commerce Act providing first for administrative review by the Commission (49 U.S.C. 17(6)-17(8)) and then for judicial review by a three-judge district court (49 U.S.C. 17(9) and 28 U.S.C. 2321-2325). However, the order had to be obeyed until set aside or until the Commission gave relief from compliance (49 U.S.C. 1(17)). No carrier, including the defendant in this case, made any challenge or complaint. But when the Government brought this action under 49 U.S.C. 1(17) to collect penalties for violation of the order, the defendant resisted by challenging the validity of the orders, and particularly the Commission's bypassing of the notice and hearing requirements provided in 49 U.S.C. 1(14)(a) for the issuance of Commission orders. The defendant also contended that the order was unconstitutionally vague.

The district court, rejecting the Government's contention that Southern could not attack the validity of the order in a suit to enforce it, ruled that the order was invalid on both of the grounds advanced by the railroad. On our appeal, the Fifth Circuit reversed. It first held that the statutory procedure for administrative, then judicial, review provided by the Act was the exclusive method for questioning the validity of Commission service orders. A challenger thus not only had to exhaust his administrative remedies first, but then could obtain judicial review only before a three-judge district court.

The Fifth Circuit also held that, in any event, the district court had erred in setting the order aside. The court noted that as judicial review even in a proper suit would be limited to the record that was before the Commission -- here only the order itself -- there was no basis for the district court to have substituted its opinion for that of the Commission as to the existence of an emergency. The presence of the emergency, said the court, permitted the Commission validly to bypass the Sec. 1(14)(a) procedures and under Sec. 1(15) to take the action it deemed appropriate without prior hearings or notice. The court also found no merit to the contention that the order was too vague to be understood, noting that the order's wording closely followed that of the railroads' own rules which had attempted to alleviate the problem.

Staff: Frederick B. Abramson (Civil Division)

SCOPE OF EMPLOYMENT - CHANGE OF DUTY STATION

Government Employee Returning From Temporary Duty Station In Private Automobile Held Within The Scope of His Employment. United States v. Richard M. Romitti (C.A. 9, No. 19853, July 18, 1966). D.J. File 157-12-1137. The court of appeals affirmed a holding that a civilian electronic engineer assigned to Edwards Air Force Base in California was acting within the scope of his employment while returning to Edwards in his private automobile from El Centro,

California, with certain materials he had used there in connection with parachute jump tests which were related to his job. The court held that under California law, and in view of the facts of the case, the district court had been justified in determining that the engineer was acting within the scope of his employment, even though his decision to travel by private vehicle was motivated at least in part by considerations of personal comfort and convenience.

Staff: Morton Hollander and Walter H. Fleischer
(Civil Division)

SOCIAL SECURITY ACT

Sixth Circuit Sustains Secretary's Denial of Benefits To Claimant Who Lost An Arm. Sam May v. Gardner (C.A. 6, No. 16629, June 30, 1966). DJ File 137-30-256. Claimant lost his left forearm below the elbow in a mine accident in 1948 but worked as a dispatcher in the mine until the mine shut down in 1953. The court of appeals, reversing the district court, held that the Secretary's determination that claimant could engage in his former trade or occupation, i.e., dispatcher, was supported by substantial evidence, and that the Secretary therefore was not required to show what other forms of gainful work claimant was capable of doing and the availability of such work. The court said that a different result would in effect "order unemployment insurance under the guise of disability insurance."

Staff: Alan S. Rosenthal and Walter H. Fleischer
(Civil Division)

"Run-Down" Condition Caused By Smoking And Drinking Does Not Constitute Substantial Impairment; Secretary Need Not "Find a Job" For Claimant. Doyle J. Hirst v. Gardner (C.A. 7, No. 15412, July 21, 1966). DJ File 137-26S-95. The Seventh Circuit here affirms the denial of claimant's application for disability benefits, holding that the record supports the Secretary's contentions that claimant's incapacity (primarily a "run-down" condition) is not substantial and could be conquered if claimant ceased the "voluntary dissipation of his physical energies by smoking and drinking." The court notes that the Secretary has found that claimant could perform his former work, but comments that this finding was unnecessary "in view of the determination that plaintiff is not suffering from any substantial impairment," adding that a contrary holding "might indicate that we believe an obligation rests on the Secretary to find a job for plaintiff."

Staff: United States Attorney Richard P. Stein
and Assistant United States Attorney
James Manahan (S.D. Ind.)

Tenth Circuit Finds Substantial Evidence To Support The Secretary's Denial of Benefits; District Courts Are Admonished To State Reasons For Reversing Administrative Determinations. Gardner v. Butler O. Bishop (C.A. 10, No. 8390 July 1, 1966). DJ File 137-59-39. Claimant, a missile parts inspector, claimed that he became disabled (shortly after his employment was terminated) as a result of a lung and bronchial condition, chronic sinusitis and a bowel condition. Only one of the several doctors who treated or examined claimant, his own physician, indicated that he was so seriously impaired as to be totally disabled. The

Secretary found that he was not disabled and denied benefits. The district court, without indicating any basis for its action, reversed this determination.

The Tenth Circuit reversed the judgment of the district court, holding that there was substantial evidence in the record to support the Secretary. In addition, the court of appeals requested district courts in its jurisdiction to state reasons for their actions in social security disability cases, particularly where reversing the Secretary, because the appellate court had "no other means of knowing the legal basis of the court's decision in such cases."

Staff: Harvey L. Zuckman (Civil Division)

STATUTE OF LIMITATIONS

Cause of Action Under Tucker Act "Accrues" When The Government Breaches The Contract; The Period of Limitation Is Not Affected By The Contractor's Pursuit of His Administrative Remedy. Crown Coat Front Co. v. United States (C.A. 2, No. 29710, June 22, 1966). DJ File 78-51-685. On October 4, 1961, counsel for Crown invoked the administrative procedures established by the standard "Disputes" clause of its contract with the government, which was executed and fully performed in 1956. The final decision of the Armed Services Board of Contract Appeals, denying Crown's claim, was rendered in February 1963. Crown brought this suit, to recover both refund of an allegedly unwarranted "price adjustment" and an equitable adjustment for allegedly unwarranted increased costs of production, in July, 1963, approximately six and one-half years after final delivery of the material sold by Crown to the government, but only five months after the Armed Services Board of Contract Appeals affirmance of the contracting officer's decision that Crown was not entitled to any recovery. The district court granted the government's motion for summary judgment on the ground that the suit was barred by the six-year period of limitation in the Tucker Act (28 U.S.C. 2401(a)).

The court of appeals, en banc, affirmed the district court's decision. It held that Crown's cause of action accrued, at the latest, when final delivery was made -- "at the time of the breach of the agreement by the Government and not at some later time" -- relying on its decision in States Marine Corp. v. United States, 283 F. 2d 776 (involving the Suits in Admiralty Act). The court also held that the period of limitation was not tolled during the administrative proceeding, again relying on States Marine but conflicting with the Third Circuit's recent decision in Northern Metal Co. v. United States, 350 F. 2d 833 (involving the Suits in Admiralty Act). Finally, the court rejected Crown's contention that the period of limitation began to run on November 14, 1962, when the Government refunded prompt payment discounts which had been withheld erroneously.

Judge Anderson (with whom Judge Kaufman, Hays and Feinberg concurred) dissented, agreeing that the cause of action accrued on December 14, 1956, but maintaining that the period of limitation should be tolled during the pendency of the administrative proceeding. Judge Friendly, while casting the decisive vote for affirmance on the grounds of stare decisis, indicated in his concurring opinion that he might have agreed with the dissent if the matter were one of first impression.

A petition for certiorari has been filed, and, in order to resolve the conflict between circuits, the United States has acquiesced to the petition.

Staff: United States Attorney Robert M. Morganthau
and Assistant United States Attorneys
Arthur M. Handler and Alan G. Blumberg
(S.D.N.Y.)

VETERANS' ADMINISTRATION

Ninth Circuit Holds Jurisdiction Lacking For Review of Veterans' Administrator's Denial of Benefits Claimed for Alleged Service-Connected Death. Redfield v. W. J. Driver, Administrator, Veterans Administration (C.A. 9, No. 20,597, August 2, 1966). DJ File 146-56-79. Appellant sought review of the Administrator's denial of benefits to her as the widow of a veteran who suffered from service-connected mental disability and had disappeared near desert territory. The Administrator had held that the evidence did not establish that the veterans' death, presumed by reason of seven years of absence, was due to service-connected disease. The court of appeals, upon the basis of 38 U.S.C. 211(a), sustained the dismissal of the complaint for lack of jurisdiction, citing, inter alia, Milliken v. Gleason, 332 F. 2d 122 (C.A. 1), certiorari denied, 379 U.S. 1002.

Staff: J. F. Bishop (Civil Division)

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CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

FRAUD

When Books and Records of Corporation Are Voluntarily Surrendered to Trustee in Bankruptcy and Trustee Assents to Government Inspection of Them, Corporate Officers Have No Standing to Challenge the Search and Seizure. Elbel v. United States, C.A. 10, No. 8306, (July 28, 1966). D.J. File 113-29-9.

Defendant, president of the bankrupt Coffeyvill Loan and Investment Company, Inc. ("CLIC") was indicted on twenty-three counts of violating the anti-fraud provisions of the Securities Act of 1933 and the mail fraud statute by employment of a scheme to defraud purchasers of investment certificates issued by CLIC. He was convicted on thirteen counts and sentenced to fifteen years' imprisonment.

Relying on United States v. Kanan, 225 F. Supp. 711, which held that corporate officers possessed requisite standing to complain of a search and seizure of corporate records, the defendant had moved to suppress the CLIC records turned over to government agents by the corporation's trustee in bankruptcy. In affirming the conviction the Court of Appeals held that the trial court had properly denied the motion to suppress on the grounds that a trustee in bankruptcy, who had complete custody and control of the books and records had authority to disclose them to the government agents and that the fiduciary nature of the trustee's obligation imposed a duty upon him to make such revelations to government agents. The Court of Appeals further agreed with the trial court's conclusion that since defendant had no right to custody or control over the records he lacked standing to complain of the search and seizure.

Staff: United States Attorney Newell A. George;
Assistant United States Attorney Thomas E. Joyce
(D. Kan.).

FRAUD

Unauthorized Use of Credit Card; Prosecution for False Pretenses. United States v. Alexander James Turner (Virgin Islands). D. J. File 122-65-8. The defendant made extensive purchases in the Virgin Islands, posing as the owner of an American Express credit card. An information charging violations of 18 U.S.C. 2314 was filed, but this information was dismissed after the Department instructed that this statute should not be used as a basis for credit card prosecutions. He was thereafter charged with violations of the Virgin Islands Code, obtaining money or property by false pretense, and a warrant was issued for his arrest. A federal warrant was also issued on an information charging him with unlawful flight to avoid prosecution (18 U.S.C. 1073). He was apprehended in Puerto Rico. He was tried by a jury in St. Thomas, Virgin Islands, and found

guilty of violations of the Virgin Islands Code. On May 5, 1966, the defendant was sentenced to ten years in prison on each of two counts, the sentences to run concurrently.

Staff: United States Attorney Almeric L. Christian
(D. Virgin Islands).

* * *

TAX DIVISION

Assistant Attorney General Mitchell Rogovin

SPECIAL NOTICE

A recent review of the practices of United States Attorneys' offices concerning the issuance of U. S. Treasury checks in satisfaction of judgments obtained against the United States in civil tax refund suits or pursuant to the settlement of such cases, has disclosed that in some instances where counsel for taxpayers raise the objection that the amount of the check is insufficient, the checks have not been tendered to counsel but rather held in the office of the United States Attorney pending his consultation with the Tax Division. As a result of this practice, the United States has become liable for a considerable amount of additional interest. Accordingly, we are herewith reprinting an excerpt from the United States Attorneys' Bulletin Item, Vol. 10, No. 12, dated June 15, 1962, entitled Delivery of Checks by United States Attorneys to Opposing Counsel and Taxpayer in Civil Tax Refund Cases.

The following reprinted portion of the aforementioned Bulletin is self-explanatory and adherence to its instructions should result in a considerable financial savings to the United States:

> "Some questions have arisen as to the tender of refund checks in situations where opposing counsel will not agree to the filing of a dismissal (if the case has been settled) or a satisfaction (if the case went to judgment). If opposing counsel raises the objection that the amount of the check is insufficient, you should tender the check immediately and specifically advise that acceptance of the refund check is without prejudice to his right to claim additional amounts. (Section 6611(b) (2), Internal Revenue Code of 1954). This will avoid any question with respect to the Government's liability with respect to additional interest. The District Director usually sends a notice of adjustment with the check, but the check should be tendered whether or not the notice of adjustment (Form 1331-B) has been received."

Your attention is further directed to page 58 of Title 4 of the United States Attorneys' Manual, which provides instructions for situations where opposing counsel fails to furnish a stipulation of dismissal. The pertinent provision contained therein states:

> "***In some cases the United States Attorney will receive a refund check or notice of credit and the taxpayer's counsel will not have furnished him with a stipulation for dismissal. The United States Attorney should notify the taxpayer's counsel of the receipt of the check or notice of credit, and again request that he be furnished with a stipulation of dismissal. If the taxpayer's counsel raises objection at this point, the United States Attorney should make an unconditional tender of the refund check in those cases where it is clear that the objections

of the taxpayer's counsel are mathematical only and will not affect the validity of the settlement agreement. The United States Attorney should advise the taxpayer's counsel that acceptance of the refund check will not prejudice the taxpayer's right to a further refund, if such be determined to be due the taxpayer. Section 6611(b)I.R.C. 1954."

If, however, the objections raised indicated that there may not have been a meeting of the minds between the Government and the taxpayer as to the terms of the settlement, then the United States Attorney should promptly notify the Tax Division and should hold the check pending further instructions. If the United States Attorney is in doubt as to whether the dispute signifies a lack of mutual agreement, he should resolve this doubt in favor of requesting advice of the Tax Division."

CIVIL TAX MATTERS

Appellate Decisions

Internal Revenue Summons; Summons to Produce Records Is "Invalid" if Summonee Has Neither Possession Nor Control, But District Court Has Discretion to Deny Discovery Proceedings Sought by Summonee in Summons-enforcement Action. United States v. John A. Howard (C.A. 3, April 27, 1966.). When a summons for corporate records was served on the corporation's president, he could not produce the records because the United States Attorney was temporarily in possession, but when the district court later ordered compliance with the summons, the summonee then had the records. Nevertheless, the Third Circuit holds that the summons was invalid ab initio, because the records originally were not in the summonee's control; but a new summons may now be issued. This decision gives no significance to the fact that the summonee never pleaded lack of ability to comply, but confined himself to allegations that the investigation was unnecessary. The opinion could prove helpful on another point, however, viz., that in summons cases a district court has discretion to deny the use of discovery proceedings to explore allegations of official lack of good faith, founded on mere alleged suspicion. But dicta on two other points are potentially troublesome: (1) that where the re-examination provisions of Section 7605(b) apply (held, that section was inapplicable in this case), the Government must show that the Regional Commissioner personally investigated in deciding whether re-examination was necessary; (2) that a summons should be "complete on its face," requiring no supplementary letter setting a new date for compliance (here, a new date was set by letter after the summonee lost an initial round of litigation to quash the summons). It seems likely, however, that neither of these dicta will prove persuasive, at least in other circuits. The criticism of the supplementary-letter technique was cursory and was closely connected with the basic ruling that here the original summons was invalid (itself an odd view, but arising from unique facts). Also, the Government often could rely on a court order setting a new date, rather than on a supplementary letter. The other dictum could be more troublesome, since its requirement is deemed administratively impossible. At

the least, however, the Government should be prepared to show that one of the Agent's superiors has personally reviewed his request for permission to re-examine. Cf. United States v. Powell, 379 U.S. 48, 55-56. The Government will not seek certiorari.

Staff: John M. Brant and Joseph M. Howard (Tax Division); United States Attorney Gustave Diamond and Assistant United States Attorney Thomas A. Daley (W.D. Pa.)

Federal Tax Liens; Federal Rule Is That Situs of Intangible Personal Property Is Taxpayer's Domicile; Hence Federal Tax Liens Filed at Taxpayer's Domicile Were Entitled to Priority to Proceeds of Sale of Mortgage Because Under State Law, a Mortgage and the Note Constitute Intangible Personalty. United States v. Goldberg, (C.A. 3, 66-2 U.S.T.C. par. 9523). Taxpayer, a Pennsylvania resident, was also the holder of a note secured by a mortgage on real property located in New Jersey. On July 12, 1962, the Government filed notice of its liens in Philadelphia County, Pennsylvania (taxpayer's domicile). On December 6, 1962, appellant purportedly purchased a one-fourth interest in the mortgage indebtedness. On May 12, 1964, the Government filed notice of its liens in Atlantic County, New Jersey (situs of the realty). Taxpayer's property was put into the hands of receivers who, pursuant to an order of the district court, sold the note and mortgage. Appellant then filed a petition in which she asserted a claim to a proportional share of the proceeds.

Appellant contended that under New Jersey law, an interest in the mortgage indebtedness constituted an interest in realty and therefore, the federal tax liens filed at taxpayer's domicile were ineffective. She maintained that the only effective notice was in Atlantic County but since this filing was done after she had purchased her interest, she was entitled to priority. The Government contended that the situs of property was a question to be answered by federal, not state, law. The Government's position was that a mortgage is merely a means of securing a debt and that the federal rule fixes the situs of intangible property (debt) at the domicile of the taxpayer. It was also noted that even under New Jersey law, there was ample authority that a mortgage is merely security for the underlying debt.

The appellate court held that under New Jersey law, a mortgage is nothing more than a lien which is held as security for the debt due under the note. In other words, the note and mortgage constituted a chose in action. Therefore the proper place for filing notice of the tax liens was Philadelphia County in accordance with the federal rule that the situs of intangible personal property is taxpayer's domicile. Having done so prior to appellant having obtained any interest in the mortgage, the Government was entitled to priority to the proceeds of the sale.

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

District Court Decision

Priority of Liens: Summary Judgment: Federal Tax Lien Primes Prior Inchoate Judgment; Partial Summary Judgment Can Be Entered as to Priority Even Though Validity of Tax Claims Not Established; Third Party Cannot Contest Merits of Tax Assessment. United States v. Harlow S. Pearson, et al. (S.D. N.Y., May 27, 1966), CCH 66-1 USTC ¶9448. In this action to reduce tax assessments to judgment and foreclose tax liens against taxpayer's interest from a testamentary trust, the Government moved to dismiss five affirmative defenses and counterclaims of taxpayer's former wife (Annabelle) and for summary judgment on the issue of priority as to these two parties. The issue was whether Annabelle had any lien upon the specific personal property against which the United States sought to enforce its tax liens. In granting the Government's motion the Court found that the issue of priority could be determined without considering the validity of the tax liability; that a third party, Annabelle, could not contest the merits of the assessment against her former husband, and that Annabelle's claim "that the United States is estopped from asserting the alleged priority of its liens because it prevented her from perfecting her liens" was without merit.

On the key issue of whether Annabelle's 1954 judgment from the United States District Court for the Virgin Islands was, as to the personal property (fund) involved in this action, prior to the Government's 1965 tax assessment, the Court found in favor of the United States; the crux of the opinion is the finding that under New York law Annabelle's judgment was not a choate lien on the fund. As the Court stated: "Federal law determines whether a judgment-creditor has a choate and perfected lien. United States v. Security Trust & Savings Bank, 340 U.S. 47 (1950). In applying this principle, however, it is clear that if state law characterizes a lien as inchoate, that characterization will be accepted by the federal courts. Ersa, Inc. v. Dudley, 234 F. 2d 178, 181 (3rd Cir. 1956)."

Staff: United States Attorney Robert M. Morgenthau; Assistant United States Attorney Alvin H. Meadow (S.D. N.Y.); and Charles A. Simmons (Tax Division).

CRIMINAL TAX MATTERS

Appellate Decisions

Willful Attempted Tax Evasion; Understatement of Numbers Business Income Shown by Net Worth Method; Understatement and Willfulness Held Supported by Sufficient Evidence; Conviction Affirmed. United States v. Thomas Pepe (C.A. 3, May 12, 1966). Taxpayer was the operator of a numbers (gambling) business and hired an accountant to prepare his income and other tax returns. Professing an inability to keep books because of the possibility of police raids, taxpayer informally gave the accountant periodic figures said to represent his income. The accountant, however, resorted to a net worth method and increased the stated figures by amounts which he thought sufficient to result in a reported income adequate to account for all business and personal expenditures. The Government made its own net worth computation and arrived at a

gross income for 1957 in the amount of about $65,000, as compared with reported gross income of about $18,000. Willfulness was the principal issue, and it could be inferred from the accountant's testimony and worksheets that he had failed to include in his net worth computation very large expenditures of which he was well aware, including income tax payments and investments in real estate. The Court of Appeals held that the evidence nevertheless permitted the jury to resolve the issue of willfulness against the taxpayer.

Staff: United States Attorney Alexander Greenfeld (D. Del.)
John M. Brant and Joseph M. Howard (Tax Division)

Willful Attempt to Evade Tax by Failing to Include Embezzled Funds in Income Tax Return; Conviction Affirmed, Where Tax Return Was Filed After Supreme Court's Decision in James v. United States. Harry B. Nordstrom v. United States (C.A. 8, May 20, 1966.) The issue on appeal was whether taxpayer could be convicted for failing to report funds obtained by embezzlement on May 12, 1961 (three days before the decision in James v. United States, 366 U.S. 213) in a return filed in March, 1962, almost a year after that decision. Taxpayer offered no evidence that he relied on Commissioner v. Wilcox, 327 U.S. 404, which was repudiated by James, but contended that he could not be convicted because James allegedly left in doubt the taxability of pre-James embezzlements. The Court, affirming the conviction, held that the significant date was when the return was filed, and that, in view of James, on that date it was clearly the law that embezzled funds, whenever embezzled, are taxable. Cf. Estate of Geiger v. Commissioner, 352 F. 2d 221 (C.A. 8). Petition for certiorari has been filed.

Staff: Former United States Attorney Miles W. Lord and
Assistant United States Attorney Hartley Nordin (D. Minn.)

District Court Decision

Suppression of Evidence: Rule 41(e), Criminal Rules: Constitutional Rights: On Basis of Allegations in Pre-indictment Petition to Suppress and Enjoin Use of Evidence Allegedly Obtained by Internal Revenue Agents in Violation of Plaintiffs' Constitutional Rights, and Supporting Affidavits, District Court Granted Government's Motion to Dismiss Without Prejudice to Plaintiffs' Right to Renew Their Application at Trial Following Any Indictment That Might Be Returned. John P. Parrish and Frances S. Parrish v. United States, et al. (E.D. Va.). By a pleading captioned "Petition for Injunction", plaintiffs, husband and wife, sought (1) to enjoin the United States and officials and employees of the Internal Revenue Service, viz, the District Director of Internal Revenue, the Chief of the Intelligence Division at Richmond, Va., a Special Agent, and an Internal Revenue Agent, from using evidence, alleged to have been obtained by fraud and deceit in violation of their constitutional rights, for the purpose of instituting criminal proceedings against them, or from using the evidence "in any way"; (2) to suppress for the use as evidence all matter obtained by the defendants "whether it be documentary or in the form of oral admissions and statements made by plaintiffs"; and (3) to obtain an order of court that all copies of their "books and records and summaries and compilations thereof" be destroyed. Plaintiffs alleged that during the

course of an examination and investigation of their federal income tax returns for the years 1961, 1962 and 1963, a revenue agent illegally microfilmed and copied their books and records and illegally questioned them and their accountants in violation of their constitutional rights under the Fourth, Fifth, and Sixth Amendments. This alleged illegality was based on assertions that the revenue agent was not engaged in a routine audit of their income tax returns for the purpose of ascertaining their correct income tax liability, but, in reality, was acting under the direction and control of Intelligence Division agents for the purpose of obtaining evidence which could be used against them in a criminal prosecution, and that this was done without disclosure by the defendants of their true purposes and pursuant to a conspiracy to deprive plaintiffs of their constitutional rights.

The petition recited that it was brought under the equity powers of the Court and Rule 41(e) of the Federal Rules of Criminal Procedure. The Government moved to dismiss the petition for lack of jurisdiction over the defendants and the subject matter and on the ground that plaintiffs had an adequate remedy at law. Relying on Austin v. U.S., 353 F. 2d (C.A. 4) and Smith v. Katzenbach, 351 F. 2d 810 (App. D.C.), the Court denied the motion to dismiss for lack of jurisdiction. However, relying on comment by the Supreme Court in DiBella v. U.S., 369 U.S. 121, 129, to the effect that ordinarily district courts should reserve ruling on Rule 41(e) motions until the criminal trial, the Court denied plaintiffs' application for relief and granted the Government's motion to dismiss "without prejudice to the plaintiffs' right to seek further relief if an indictment is returned against them." The Court gave four reasons for its ruling. First, because the plaintiffs had an adequate remedy at law under Rule 41(e) whereby they could seek vindication of their constitutional rights after the issues were narrowed and defined by indictment; in this regard, the Court observed that since the Government had not seized any of their property, there was none to be returned, and that any motion to suppress evidence could be urged if and when the plaintiffs were brought to trial. Secondly, because the relief sought was so sweeping that it would deny the Government the opportunity of using the information obtained in attempting to establish civil tax liability, notwithstanding plaintiffs' admission that they voluntarily furnished it for civil purposes. Thirdly, because neither the allegations of the petition, nor the supporting affidavits, showed any clear deprivation of plaintiffs' constitutional rights. Finally, because the plaintiffs' bill lacked equity insofar as it sought to suppress evidence to prevent the return of an indictment. Drawing an analogy from U.S. v. Ben Blue, 34 U.S. Law Week 4409, the Court said that even assuming that the Government had acquired evidence in violation of the Fifth Amendment, plaintiffs would at most be entitled to suppress it at the time of trial.

Staff: United States Attorney C. Vernon Spratley, Jr. (E.D. Va.); and George F. Lynch, (Tax Division).

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I N D E X