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DEPARTMENT OF JUSTICE

Vol. 14 No. 20

UNITED STATES ATTORNEYS

BULLETIN

UNITED STATES ATTORNEYS BULLETIN

Vol. 14 September 30, 1966 No. 20

APPOINTMENTS - UNITED STATES ATTORNEYS

The nominations of the following new appointees as United States Attorney have been submitted to the Senate for confirmation:

California, Eastern - John P. Hyland
California, Southern - Edwin L. Miller, Jr.

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

Minnesota - Patrick J. Foley

Mr. Foley was born May 10, 1930 at Wabasha, Minnesota, is married and has one child. He attended St. Thomas College, St. Paul, Minnesota, from 1949 to 1953, and the St. Paul College of Law from February to June, 1953. From 1953 to 1956 he attended the Catholic University of America, Washington, D.C., from which he received his LL.B. degree. He served in the United States Naval Reserve from 1948 to 1949. He was admitted to the Bar of the State of Minnesota in 1956, and of the District of Columbia in 1959. He engaged in the private practice of law in Rochester, Minnesota from 1956 to 1959, during part of which time (1957-1958) he also served as Probate Juvenile Judge of Dodge City, Minnesota. From 1959 to 1961 he was a partner in the law firm of Foley and Foley, Washington, D. C. In 1961 he was appointed Assistant United States Attorney in the District of Minnesota, and on July 1, 1966 was appointed United States Attorney by the Court.

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ANTITRUST DIVISION

Assistant Attorney General Donald F. Turner

Government to Cooperate With Private Plaintiffs With Whom Government Has Been Consolidated for Discovery. United States v. American Pipe and Construction Co., et al. (S.D. Calif.) D.J. File 60-16-59. On July 1, 1966, Judge Pence entered an order in the West Coast Pipe cases which allows the counsel for the United States to cooperate with private plaintiffs, with whom the Government has been consolidated for the purposes of discovery, to cooperate in preparing for joint depositions of 48 witnesses between September 19 and December 16, this Fall.

The order permits counsel for the United States to (1) Suggest to other plaintiffs' counsel subject matters of inquiry for particular witnesses; and (2) Discuss with other plaintiffs' counsel those matters into which the Government desires that inquiry be made.

No direct revelation of the transcript is permitted by the Judge's order "except to the witness himself in order to refresh his recollection or confront him with inconsistencies with his present and prior testimony".

During the deposition program Government attorneys will not question the witnesses but will be on hand with the grand jury transcript to see that the witnesses testify in accordance with their grand jury appearances. Various plaintiffs' attorneys have been appointed to conduct each of the depositions and this fact necessitated the above order.

On August 8, 1966, the defendants moved for a reconsideration of the Court's order or, in the alternative, for an amendment to the order to include a statement certifying it as appealable to the Supreme Court pursuant to the provisions of 28 U.S.C. 1292(b).

The defendants maintained in their brief that the Judge's order permitted disclosure of matters occurring before the grand jury without there being a particularized or compelling need for such disclosure and that this issue involved a "controlling question of law".

On August 24, 1966, Judge Pence denied both of the defendants' requests, pointing out that Rule 6(e) specifically authorizes Government attorneys to use matters occurring before the grand jury in the performance of their duties and that under the Publicity of Taking Depositions Act all Government depositions must be taken in public and further that since he had ordered the depositions to be taken on a joint basis, then it would be possible for Government attorneys to act as interrogating counsel in all depositions and that the grand jury transcripts would be available for use by them in such interrogation. The Court stated, however, that it was never its intention that "the Government counsel would be saddled with the burden of examining all deponents", that the order was necessary in order to facilitate a "tightly timed series" of depositions and that "if there is not close cooperation between Government and other plaintiffs' counsel . . . this court's discovery program aimed at bringing on Government case to trial in October 1967 and making all other plaintiffs' cases

ready for trial within a very short period thereafter will fail". The Court ruled that these were "compelling reasons" for his order and that the question of grand jury secrecy is left to the judicial discretion of the district court. In its strongly-worded opinion, Judge Pence stated "If the discovery program is to proceed with the speed and efficiency demanded, there is a compelling need for the disclosure requested. Such disclosure is also here required in further and vigilant enforcement of the antitrust laws applicable to these defendants".

With respect to the order allowing revelation of grand jury testimony to the witness, the Court stated "It is now well settled that disclosure rather than suppression of relevant materials in grand jury minutes ordinarily permits the proper administration of justice, both civil and criminal, and it is no longer necessary in every case that the trial judge, like a fussy hen, scratch through the grand jury transcript in camera before permitting disclosure of relevant testimony therein" (referring to the Dennis case).

Staff: Barbara J. Svedberg, Thomas M. Lawty and John D. Gaffey (Antitrust Division)

Court Orders Divestiture. United States v. General Dynamics Corporation (S.D. N.Y.) D.J. File No. 60-212-5. On November 8, 1962, a complaint was filed alleging violations of both Section 7 of the Clayton Act and Section 1 of the Sherman Act, as a result of the acquisition by General Dynamics Corporation of The Liquid Carbonic Corporation on September 30, 1957. The gist of the charge was that the systematic use by Liquid Carbonic of the purchasing power leverage of General Dynamics to obtain sales of carbon dioxide and industrial gas by Liquid had resulted in contracts which unreasonably restrained trade under Section 1 of the Sherman Act and had made clear that the acquisition might tend to substantially lessen competition, in violation of Section 7 of the Clayton Act. The Court later permitted the complaint to be amended by the addition of a charge that the merger itself violated Section 1 of the Sherman Act, since the evidence indicated that the parties had entered into the merger agreement with the intention of using General's reciprocity power to benefit Liquid. The Section 7 charge was limited to the carbon dioxide field, but the Section 1 charges involved the other industrial gases sold by Liquid as well.

The Government had moved for production of documents almost immediately after the filing of the complaint, and its case consisted almost entirely of documents obtained from defendant's own files. No witnesses were called during the Government's case, which required 3 1/2 trial days in January 1965. On April 9, 1965, the Court denied defendant's motion to dismiss, setting forth his reasoning in a memorandum opinion filed July 28, 1965 (246 F.Supp. 156). The defense consisted almost entirely of the testimony of officers and ex-employees of General Dynamics and Liquid Carbonic. The gist of the defense was that, although an extensive reciprocity program had been established for the use of the Liquid Division, it had been ineffective because of the unwillingness of other General divisions to cooperate in Liquid's program, and because the Armed Services Procurement Regulations (ASPR) made it impossible for General to favor Liquid's customers in any way.

In a 98-page memorandum opinion dated August 26, 1966, Judge John M. Cannella

found that the acquisition of Liquid Carbonic violated both Section 7 and Section 1. In so doing, the Court relied upon the following facts:

1. That General Dynamics was by 1957 one of the nation's 20 largest industrial corporations, with annual purchasing power in excess of $500,000,000, having attained its position through a series of prior mergers.

2. That Liquid Carbonic was the nation's largest producer of carbon dioxide, with about 35-40% of that market in 1957.

3. That the carbon dioxide market was already a highly concentrated market with the top 4 firms accounting for 75% of the market.

4. That Liquid Carbonic's long history of antitrust violations indicated that it might abuse any power obtained through the merger.

5. That the firms merged with the intention of using General Dynamics' large purchasing power to gain carbon dioxide and other industrial gas sales for Liquid Carbonic by reciprocal arrangements.

6. That after the merger a systematic reciprocity program had immediately been put into effect by Liquid Carbonic with the active support of General Dynamics.

7. That this reciprocity program had been effective as indicated by General's internal reports, by Liquid Carbonic's reversal of its former declining market share and by the fact that Liquid did better with its reciprocity accounts than it did with its other accounts.

In rejecting the charge that the sales contracts between Liquid Carbonic and its reciprocity accounts were illegal under Section 1 of the Sherman Act, the Court found that although the Government had proven contracts of a reciprocity nature it had not proven by direct evidence the dollar amount of business obtained as a direct result of reciprocity. However, the Court did analogize reciprocity arrangements to tying contracts and concluded that reciprocity arrangements could be treated in the same summary fashion as the Supreme Court had treated tying arrangements, if a sufficient amount of commerce were affected. The Court specifically noted that mutual reciprocity was as damaging to competition as outright coercive reciprocity. However, the Court required proof that specific contracts were the result of reciprocity and that the specific amounts involved were not insubstantial.

The Court ordered General Dynamics to divest itself of its Liquid Division and to restore that enterprise to its previously independent corporate status by serving all common ties of ownership and management. In addition, the defendant was ordered to cease and desist from using reciprocity to secure sales of carbon dioxide or other industrial gases. A plan for divestiture

implementing the Court's order is to be submitted by the plaintiff within 60 days of the decision, preferably with the concurrence of the defendant.

Staff: Bernard M. Hollander, Robert W. Tobin, Allen E. McAllester and Lionel Epstein (Antitrust Division)

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CIVIL DIVISION

Acting Assistant Attorney General J. William Doolittle

HANDLING OF GOVERNMENT DRIVERS ACT CASES WHERE PLAINTIFF HAS NO REMEDY UNDER FEDERAL TORT CLAIMS ACT

Problems have arisen in a number of districts recently involving various factual situations in which a defendant driver was acting within the scope of his employment for the Federal Government but the plaintiff had no remedy under the Federal Tort Claims Act within the meaning of the Government Drivers Act, 28 U.S.C. 2679(b) - (e). The three basic situations in which questions have arisen involve (1) plaintiffs who are also federal employees acting within the scope of their employment and whose exclusive remedy against the United States is under the Federal Employees Compensation Act, 5 U.S.C. 751, 757; Johansen v. United States, 343 U.S. 427 (1952); (2) plaintiffs who are in the military service and who were acting incident to service at the time of the accident, and are barred from suing the United States under the doctrine of Feres v. United States, 340 U.S. 135 (1950); and (3) situations in which the two year statute of limitations under the Federal Tort Claims Act (28 U.S.C. 2401(b)) has expired, but the state statute of limitations against the Government driver has not yet expired.

The present instructions contained at page 463 of the Federal Tort Claims Practice Manual provide that the provisions of the Drivers Act will not be invoked unless the plaintiff has a remedy under the Federal Tort Claims Act. This position was taken in order to give effect to the last sentence in 28 U.S.C. 2679(d), which provides that if a U.S. District Court determines that a case removed from state court under the Drivers Act is one in which there is no remedy against the United States, the case shall be remanded to the state court.

After further consideration of this matter and after approximately four years' experience in administering this Act, it has been concluded that hereafter if the defendant Government driver is acting within the scope of his employment and he properly requests representation, we will invoke the provisions of the Government Drivers Act and defend him regardless of whether or not plaintiff has a remedy under the Federal Tort Claims Act. Ordinarily, the suits against the Government drivers are filed in state court; upon ascertaining that defendant driver is a federal employee acting within the scope of this employment who has complied with the requirements of 28 U.S.C. 2679(c) in requesting representation, the United States Attorney should certify that the defendant was acting within the scope of his employment and remove the case to Federal Court. Thereafter, a motion to dismiss should be filed on the basis of the exclusivity of the Federal Employees Compensation Act remedy, the Feres doctrine, or the expiration of the statute of limitations, as the case may be. If the suit against the Government driver is originally filed in Federal Court, it will be unnecessary to certify scope of employment, and in that case the United States should be substituted as party defendant and a motion to dismiss filed. If the defendant driver has insurance which also covers the United States, an opportunity should be given to the insurance company to assume the defense of the case before invoking the provisions of the Drivers Act. In some cases, the insurance companies have preferred to allow

the cases to remain in state court without substituting the United States as party defendant, and if the policy coverage is adequate to protect the driver, we have no objection to this procedure.

COURTS OF APPEALS

SOCIAL SECURITY ACT

Hearing Examiner's Reliance on Medical Text Which Was Not in Record, and Disregard of Opinions of Medical Experts, Held Reversible Error. Willena Ross v. John W. Gardner (C.A. 6, No. 16,383, July 29, 1966). D.J. File 137-31-72. This disability case involved a 51 year old woman, with a sixth grade education, who had undergone six or seven operations and was suffering from acute ileofemoral thrombosis left and pulmonary infarction, chronic bilateral phlebitis and venous insufficiency.

Claimant's attending physician was of the opinion that she was completely disabled from doing her prior work (e.g, waitress, bottlewasher, binder); he did not know of any other work she could do. Other doctors confirmed the diagnosis of phlebitis. The hearing examiner, relying on his own understanding of a medical textbook and believing that medical evidence of disability was not supported by adequate clinical findings, denied the disability claim. This decision was affirmed by the appeals council and by the district court.

The Sixth Circuit reversed, holding that the Secretary's findings were not supported by substantial evidence. The Court stated that it was error for the hearing examiner to rely on his own medical research in disregard of expert medical testimony, and it criticized the hearing examiner's use of the text without prior notice to claimant. The Court stated that the Social Security Act does not require that physicians' conclusions be supported by objective clinical findings, and that where such conclusions tend to show disability denial of a claim by the Secretary would be erroneous.

Staff: Former United States Attorney Boyce F. Martin and Assistant United States Attorney John E. Stout (W.D. Ky.)

Denial of Benefits Held Supported by Substantial Evidence. Harvey W. Easttam v. Secretary of Health, Education and Welfare (C.A. 8, No. 18,282, August 11, 1966). D.J. File 137-76-101. Claimant, 53 years old, alleged that he was disabled by reason of high blood pressure, loss of vision in one eye and poor vision in the other, and constant pain in his side. The Secretary denied the application for benefits, and the district court affirmed. The Court of Appeals, noting that "the case for us, on the cold record might possibly be somewhat close," also affirmed, holding that the inconclusive record presented "the classic situation for resolution by the trier of fact."

Staff: United States Attorney Charles M. Conway and Assistant United States Attorney Robert E. Johnson (W.D. Ark.)

TORT CLAIMS ACT -- PROXIMATE CAUSE

Government Driver's Statutory Violation Held Not Cause of Automobile

Collision. Mary S. Beesley and Hiram L. Beesley v. United States, et al. (C.A. 10, No. 8289, July 27, 1966). D.J. File 157-60-106. Two Government employees, driving a government vehicle within the scope of their employment, ran out of gas and stalled on a two-lane road in Oklahoma; they remained in their stalled vehicle, signalling oncoming traffic from inside the car. The Beesley's, approaching from the rear, stopped their car some twenty-five feet behind the Government vehicle. Shortly thereafter, a truck struck the Beesley's car, causing personal and property injuries to them.

This Tort Claims Act suit was brought against the United States. The district court held that the Government employees were negligent per se in violating the Oklahoma "stopping and standing" statute, but rendered judgment for the United States on the ground that its employees' negligence merely created a condition which "set the stage" for the subsequent collision caused by the negligence of the truck driver. The Court of Appeals affirmed, holding that, under Oklahoma law, the proximate cause of the collision had been the "independent intervening" negligence of the driver of the truck.

Staff: United States Attorney B. Andrew Potter
and Assistant United States Attorney
Robert L. Berry (W.D. Okla.)

WAREHOUSING RECEIPTS

Sham Warehouse Receipts Held Invalid in Bankrutpcy Proceeding. Whitney National Bank of New Orleans, et al. v. William C. Sandoz, Trustee (C.A. 5, No. 21551, June 23, 1966). D.J. File 105-33-49. The district court affirmed a referee's order holding invalid warehouse receipts issued under a field warehousing arrangement. The Court of Appeals affirmed, noting that the warehouse receipts -- issued by persons acting for the company which borrowed on them -- were a sham. The Court held irrelevant the State's certification that the warehousing was properly conducted, stating that "the issuance by a state commission of a warehouseman's license and of certificates of proper performance by the warehouseman will not supply the lack of the essentials of validity in the field warehousing arrangement."

Staff: United States Attorney Edward L. Shaheen
(W.D. La.)

DISTRICT COURT

CONTRACTS -- CONFLICT OF INTEREST

Claim of Improper Relationships With Government Personnel and Conflicts of Interest in Contract Negotiations Held Not Supported by Evidence; Actual Profits More Than Twice Foreseeable Profits Found Not Exorbitant. United States v. The Goldfield Corporation (D. Colo., Civil No. 8252, June 15, 1966). D.J. File 46-958. In 1962, a Senate investigation committee referred the transcript of hearings concerning a stockpile contract for chromite ore performed by the American Chrome Company to this Department. The contract, entered into in 1952, called for the mining and stockpiling of 900,000 tons of chromite ore.

Suit was instituted against The Goldfield Corporation, as successor to the American Chrome Company, in October, 1963. It was alleged that American Chrome's president and consulting engineer (both deceased) had maintained improper relationships with the Government negotiators and had induced conflicts of interest on the part of these negotiators, as a consequence of which the contract had been drawn to the disadvantage of the United States, enabling the company to earn and retain profits far in excess of those originally contemplated. Recovery of exorbitant and unconscionable profits was sought on the grounds of a breach of public policy.

After a trial to the court, Judge Arraj found that the American Chrome representatives and one of the Government contract negotiators, Holderer, had engaged in a practice of communicating concerning the contract negotiations outside proper channels, between Holderer's home and the company representatives' offices on the West Coast. However, the Court found that these and other questionable activities by this Government agent did not wrongfully influence him in representing the interests of the United States.

With respect to Lukens, the Government negotiator who had been largely responsible for formulating the financial aspects of the contract, the Court found that he had been offered a job as Comptroller of American Chrome after the basic provisions of the contract had been drafted but before final agreement, and that Lukens accepted the offer sometime during the month preceding the execution of the contract. The Government had contended that this job offer had been made prior to the preparation of the draft contract.

The contract restricted price redeterminations to the first two production years. The Government endeavored to show that provision should have been made for such price adjustments throughout the eight production years. Based on the rate of profit originally included in the contract, the projected total profit was $2,403,000. The Court found that the company actually gained profits of $5,335,696.

The Court held that the evidence was insufficient to establish that the offer and acceptance of the job by Lukens influenced the manner in which the contract was negotiated or had any material bearing on the formulation of the price redetermination provision, and entered judgment for the defendant. Judge Arraj determined that the Government had not proved that the profits realized were excessive and exorbitant in the circumstances. In this regard, the Court relied mainly on expert testimony adduced by defendant to the effect that mining generally is a high risk, speculative industry, and concluded that the contract negotiators had not intended to fix the profit ratio throughout production with certainty, due to the insufficiency of prior cost experience.

It had been contended by the Government that profits of more than twice the amount originally contemplated should be considered excessive, per se, when coupled with the alleged improprieties in the negotiations. Essentially, the Court answered this argument as follows: "...While these profits are large, the Court cannot say that they are so unrelated to the nature of this contract as to be regarded as unconscionable. As in Bethlehem Steel, [315 U.S. 289, (1942)], these profits, '...may justly arouse indignation. But indignation based on notions of morality of this or any other court cannot be judicially transmuted into a principle of law...'"

The Court accepted the Government's contention that improper relationships and conflicts of interest in Government contracting violate public policy, but sustained the validity of defendant's contention that public policy also "favors the upholding of contracts." Commenting on this juxtaposition of doctrines, Judge Arraj said: "...Only when it is shown by clear and convincing evidence that the policy promoting fair and uncompromising dealings in regard to public contracts has been breached will the Court exercise its power and grant appropriate relief...."

The question of appeal is now under consideration.

Staff: Louis S. Paige (Civil Division); United States Attorney Lawrence Henry (D. Colo.)

STATE COURT

RAILROAD RETIREMENT ACT -- RECOVERY OF PAYMENTS MISTAKENLY MADE

United States Held Entitled to Recover Annuity Payments Mistakenly Made to Former Railroad Employee Despite Absence of Statutory Authorization for Recovery From Estate; Annuitant's Minimal Service to Closely-Held Corporation Constituted "Compensated Service" Making Him Ineligible for Annuity. Estate of Samuel R. Hursh (Orphans' Court of Montgomery County, Pa., No. 65004, July 29, 1966). D.J. File 57952. The Railroad Retirement Act renders eligibility for annuity payments conditioned upon the worker's having "ceased to render compensated service to any person" (45 U.S.C. 228(b)), and authorizes the Railroad Retirement Board to recover annuity payments incorrectly made to a deceased individual by means of "set-off or adjustments * * * in subsequent payments due * * * to the estate, designee, next to kin, legal representative, or surviving spouse * * *." In this case, the United States sought to recover from the estate of Hursh, a deceased railroad employee, payments made to Hursh without knowledge that he had performed "compensated service" for a closely-held family corporation.

The Court granted recovery to the United States. It held, first, that the absence of specific statutory authorization for recovery from the estate was irrelevant, citing United States v. Wurts, 303 U.S. 414, 415-416. Second, the Court held that although Hursh's service to the family corporation -- whose sole asset was a license to sell and install an apparatus which Hursh had patented -- was minimal, it did constitute "compensated service," making him ineligible to receive annuity payments under the Act.

Staff: United States Attorney Drew J. T. O'Keefe and Assistant United States Attorney Joseph R. Ritchie (E.D. Pa.)

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CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

POSTAL VIOLATIONS

Criminal Division Bulletin, Vol. 8, No. 12, July 5, 1949, contained the following paragraph under the above heading:

> Thefts of Mail - Sentences. Recently the Post Office Department called the attention of this Division to the fact that during the past three years the number of complaints involving losses of mail has increased substantially. This increase is due, in part at least, to the increase in the number of depredations against the mails. In this connection, it is a matter of grave concern that the number of arrests of postal employees for thefts of mail has also increased. The Post Office Department advises that the United States Attorneys throughout the country have responded in splendid fashion to that Department's requests for action in connection with postal violations. In light of the increase in the number of these offenses, that Department requests that United States Attorneys be urged to prosecute vigorously cases involving thefts from the mail. In such cases where there have been convictions and the courts ask the United States Attorneys for recommendations as to sentences, it might be helpful to point to the fact that there has been this increase in losses of mail, and especially of thefts of mail by postal employees. More drastic sentences may serve as a warning which will tend to discourage violations.

During 1965 and again recently the Post Office Department has called our attention to various cases involving theft from the mails by postal employees where felony charges have been reduced to misdemeanors and a small fine is levied or charges have been dismissed altogether following restitution. Following such action, after a relatively short time, the Civil Service Commission can and does recommend the rehiring of such persons in the Postal Service. However, when a postal offender is convicted under an appropriate felony statute, the postal authorities have ample and sound basis for opposing reemployment. Reinstatement of former employees found guilty of postal offenses tends to lower personnel morale in the service generally.

We are of the view that vigorous enforcement of the laws relating to mail thefts, particularly by postal employees, and imposition of appropriate penalties for such violations have a deterrent effect. Accordingly, it is urged that, except in most unusual circumstances, employees who loot the mails be vigorously prosecuted and that substantial sentences be recommended to the courts.

FEDERAL JUVENILE DELINQUENCY ACT

Provisions of Youth Corrections Act Held Inapplicable to One Committed as a Juvenile Delinquent. David Allen Fish v. United States, No. 17146 (D. Md.).

Fish, age 15 at the time, had been committed to the custody of the Attorney General for a period of 5 years under the Federal Juvenile Delinquency Act for violation of the Dyer Act. He was twice paroled under the supervision of the Youth Division of the Parole Board. On each occasion parole was revoked for cause. Fish was held beyond the maximum term of 5 years on the theory that the time spent at large on parole cannot be applied to the term he was committed to serve.

Judge Thompson in denying a petition for writ of habeas corpus filed by Fish held that the time he was at large on parole cannot be credited on the term for which he was committed and consequently he could be retained in custody until he reached his twenty-first birthday as provided by Section 5034, Title 18.

Judge Thompson specifically ruled that the provisions of the Youth Corrections Act did not apply to one committed as a juvenile delinquent. Pursuant to such ruling this committed juvenile offender may be held beyond the maximum term of 6 years as provided by Section 5017(c), Title 18, U.S.C., but may not be confined beyond his minority as provided by Section 5034, Title 18, U.S.C., the Juvenile Delinquency Act.

NATIONAL STOLEN PROPERTY ACT

Proof of Value of Drug Cultures and Related Documents Sufficient for Conviction Under 18 U.S.C. 2314. United States v. Caesar Bottone, Seymour Salb, Nathan Sharff (C.A. 2, August 4, 1966). The defendants in this case were all receivers of cultures and complicated scientific trade secret data representing the fruits of expensive scientific research used to produce leading broad spectrum antibiotics. Employees of Lederle Laboratories, a division of American Cyanamid Company, Pearl River, New York, engaged in a scheme for massive extraction from Lederle of microorganisms used in the production of three antibiotics and a steroid, and instructions for the drugs' manufacture. The drugs were covered by patents, but improved strains of the microorganisms and detailed manufacturing processes developed by Lederle were not. The lack of patent protection in certain foreign countries created a market and furnished a substantial incentive for theft. Cultures were stolen and preserved and documents outlining manufacturing procedures were temporarily removed and copied. The cultures and the copies were then sold for ultimate exportation to Europe. The persons responsible for the thefts and the copying of the documents pleaded guilty and were principal witnesses for the Government. Counts one and eight charged transportation of cultures and related documents in interstate or in foreign commerce. Count nine charged transportation of cultures only from New York to Italy and Count 10 charged conspiracy to steal, transport, and sell cultures and related documents over a period of time.

The problem of whether the copies and notes of Lederle documents were also within the statute arises only because substantive counts one and eight and the conspiracy count 10 charged the transportation of both cultures and documents and the jury made no finding that the cultures alone were worth $5,000. The Circuit Court accepted the Government's suggestion that the judgment may

stand even if the statute does not reach far enough to include the copies and notes. Each count included and the evidence showed transportation of cultures which were stolen "goods" in any view. Count nine charged only the transportation of a culture which the jury necessarily found within the statutory minimum in convicting Sharff and Bottone, and the Circuit Court pointed out that in view of concurrent sentences it need go no further as to them. Salb's conviction also stands since the transportation of the culture charged in count nine was in furtherance of the conspiracy alleged in count 10.

In further discussion of the point of law raised by appellants regarding the value of the materials transported in interstate commerce, the Circuit Court had no doubt that papers describing the manufacturing procedures are goods, wares, or merchandise, as was held with respect to geophysical maps in United States v. Seagraves, 265 F. 2d 876, and United States v. Lester, 282 F. 2d 750, cert. denied, 364 U.S. 957. The Court also expressed no concern over value of the papers, since secret processes for which European drug manufacturers were willing to pay five and six figures were obviously worth the $5,000 required to subject them to Federal prosecution. See United States v. Schaffer, 266 F. 2d 435, affirmed, 362 U.S. 511. The Court further said that if Abbott v. United States, 239 F. 2d 310, is to be considered as ruling out evidence of value in a thieves' market, it preferred the contrary Third Circuit Court holdings in United States v. Seagraves, supra, and United States v. Lester, supra. In the Court's view, the serious question in this case was whether on the facts the papers showing the Lederle processes that were transported in interstate or foreign commerce were "goods" which had been "stolen, converted or taken by fraud," in view of lack of proof that any of the physical materials so transported came from Lederle's possession. The standard procedure was for the documents to be removed from Lederle's files at Pearl River, New York, taken to one of the conspirator's homes within New York State where photocopies, microfilms, or notes were made, and then restored to the files; only the copies and notes moved or were intended to move in interstate or foreign commerce. The Court noted that the case differs in this respect from the Third Circuit cases of Seagraves and Lester, where the photostats and tracings delivered by the Gulf Oil geologist were the property of the company, having been made in the company's office, on its paper and with its equipment. The Court then stated that it was not persuaded that a different result should obtain simply because the intangible information that was the purpose of the theft was transformed and embodied in a different physical object. The Court noted that where no tangible objects were ever taken or transported, a court would be hard pressed to conclude that "goods" had been stolen and transported within the meaning of Section 2314 and that the statute would presumably not extend to the case where a carefully guarded secret formula was memorized, carried away in the recesses of a thievish mind, and placed in writing only after a boundary had been crossed. The Court further noted that it would offend common sense to hold that these defendants fall outside the statute simply because, in efforts to avoid detection, their confederates were at pains to restore the original papers to Lederle's files and transport only copies or notes, although an oversight would have brought them within it. The Court stated that when the physical form of the stolen goods is secondary in every respect to the matter recorded in them, the transformation of the information in the stolen papers into a tangible object never possessed by the original owner should be deemed immaterial and the defendants could have not

doubted the criminal nature of their conduct. Circuit Judge Friendly delivered the opinion for the panel which included Circuit Judges Moore and Feinberg.

Staff: United States Attorney Robert M. Morgenthau; Assistant United States Attorneys John S. Martin, Jr., Daniel R. Murdock, Stephen F. Williams and John E. Sprizzo (S.D. N.Y.).

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

DEPORTATION

Federal Record of Conviction Sufficiently Authenticated for Admission Into Deportation Hearing Record. Nagel Jacob Maroon v. INS (C.A. 8, No. 17,926, August 25, 1966) D.J. File 39-43-27.

Petitioner, a native and citizen of Mexico, was ordered deported on the charge that he had, subsequent to entry, been convicted of two crimes involving moral turpitude. In these proceedings he challenged the validity of the order for his deportation on several grounds including an allegation that he had been denied due process in that one of the records of his conviction for income tax evasion had not been authenticated under Rule 44(a) of the Federal Rules of Civil Procedure as required by the ruling in Chung Young Chew v. Boyd, 9 Cir., 309 F.2d 857. The authentication of the conviction record had been made on Form A.O. 132 approved for use by clerks of federal courts and described the clerk as the "keeper" of the record. Petitioner argued that since the form did not state that the clerk had "legal custody" of the record in accordance with the language of Rule 44(a) the certification was faulty and that the conviction record should not have been admitted in evidence.

The Eighth Circuit rejected petitioner's argument and found that the certification satisfied the requirements of Rule 44(a). The Court judicially noticed that the clerk of a United States district court is the legal custodian of the records in his office and ruled that the certificate that the clerk was the "keeper of the records" sufficiently constituted a certificate that the clerk had "legal custody" of the records. The Court further noted that the exacting requirements of judicial admissibility are not ordinarily applicable to administrative proceedings.

Staff: United States Attorney Richard D. Fitzgibbon, Jr.;
Assistant United States Attorney Stephen H. Gilmore
(E.D. Mo.)

Of Counsel: Paul Nejelski and Maurice A. Roberts
(Criminal Div.)

* * *

TAX DIVISION

Assistant Attorney General Mitchell Rogovin

SPECIAL NOTICE

Delivery of Checks by U.S. Attorneys to Opposing Counsel and Taxpayer in Civil Tax Refund Cases

The instructions contained in this Bulletin revise and consolidate those heretofore published in Bulletin Items, Vol. 6, No. 9 and Vol. 10, No. 12, which are as of this date, repealed.

Pursuant to procedures set out in T.D. 6292 (published in 23 Federal Register number 78), refund checks are mailed directly to United States Attorneys for delivery to taxpayers or their attorneys of record. The checks are made to the order of taxpayers who had obtained judgments against the Government in civil tax refund cases, or who had been authorized a refund through a settlement of pending court cases.

In accordance with this procedure, all U.S. Attorneys should be sure to (1) obtain from counsel or taxpayer the appropriate document for terminating each case (a dismissal, if the case has been settled, or a satisfaction if the case went to judgment); (2) tender the check immediately by registered mail, receipt requested, to counsel of record, or to the taxpayer if counsel has so indicated. The covering letter should provide, with particularity, that the check is being tendered unconditionally. This will avoid any question with respect to the Government's liability for additional interest; (3) file the document in court, close the case on your records and advise the Tax Division immediately in order that the case may be closed on the Department's records. Until the Tax Division is so advised, the case remains open on its records and charged to your office.

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 make an unconditional tender of the refund check by registered mail, receipt requested, in those cases where it is clear that the objection of the taxpayer's counsel is mathematical only. The covering letter should specify, with particularity, that (1) the check is being tendered unconditionally and (2) 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) IRC 1954. If taxpayer's counsel persists in his refusal to furnish the appropriate documents, please advise the Tax Division immediately and we will instruct you as to the filing of an appropriate motion to dismiss or motion to enter satisfaction of judgment. 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.

If, however, in settlement cases, the objections raised indicate that there may not have been a meeting of the minds between the Government and the taxpayer as to the terms of the settlement, or, in judgment cases, the

objections appear to be well-founded, 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.

Where a dispute has arisen with respect to the statutory interest computation, the check again should be unconditionally tendered in the manner above indicated and counsel advised to take this matter up directly with the District Director. For your information, the computation of the refundable amount made by the National Office of the Internal Revenue Service covers only the principal amount of the overpayment. All statutory interest computations are made by the District Director concerned.

CIVIL TAX MATTERS

District Court Decisions

Federal Tax Lien: Tax Liens Attached to Coal Silt, Personalty Under State Law, Deposited by Taxpayer on Land of Another When Intent to Exercise Dominion Found on Part of Taxpayer; Tax Liens Did Not Attach to Coal Silt Created by Second Taxpayer When Intent Found to Abandon Upon Deposit. Gilberton Contracting Co. v. Hook, United States v. The Rhoads Co., United States v. Gilberton Contracting Company (E.D. Pa., June 22, 1966). (66-2 USTC 9579) Suit was filed by Gilberton Contracting Company for the purpose of effecting release of federal tax liens on coal silt deposited, on land subsequently purchased by Gilberton, by the taxpayers Rhoads Company and Park Trent. Separate actions were filed by the United States to reduce the tax liens to judgment.

The land in question, some 69 acres in Schuylkill County, Pennsylvania, was originally owned by Counties Coal, and leased to the Rhoads Company, a corporation substantially owned by the same parties as Counties. To secure the erection of a coal breaker on the land, Rhoads Company executed a chattel mortgage on the breaker and Counties executed a mortgage on the real property. Silt, a resulting product of the coal breaker operation of marginal value, was deposited on the land of Counties by Rhoads. Under Pennsylvania law, coal silt at all times remains personal property. The Court found as a matter of fact that Rhoads, by its failure at any time to exert dominion over the silt, abandoned ownership to Counties as it was deposited. The right to conduct breaker operations on the land was subsequently assigned by Rhoads to Park Trent Company, which added more silt atop that previously deposited on the site.

Park Trent, encountering financial difficulties, ceased operations in October, 1955. Hazleton National Bank, which held both the real property and chattel mortgages, foreclosed on the real property the same month. During 1956 Hazleton sold the property to Gilberton, the deed reciting the passage of silt banks and breaker as well as the realty. Park Trent, which had sold a portion of the silt during its operation, was refused entry onto the site for the purpose of silt removal by Gilberton.

The amount of federal tax liens assessed against Rhoads and against Park Trent was not in dispute and the Court entered judgment in the respective

amounts of $204,917.07 and $36,345.80, plus interest from the assessment dates between 1954 and 1963. The Court found that by virtue of its abandonment of the silt upon deposit there was never a property interest of Rhoads to which the federal tax liens could attach. This silt passed to Counties by abandonment, to Hazleton National Bank by foreclosure, and to Gilberton by purchase. The Park Trent-created silt, never having been abandoned, remained the property of Park Trent subject to the tax liens and to the claim of Gilberton for compensation for use and occupancy of its land.

The actual amount of the coal, its fair market value, and the respective amounts owned by Gilberton and Park Trent, were not established and were reserved by the Court for determination in later proceedings.

Staff: United States Attorney Drew J. T. O'Keefe; Assistant United States Attorney Sullivan Cistone (E.D. Pa.); and David H. Hopkins, Jr., (Tax Division).

Federal Tax Liens; Ohio Liquor License Held "Property" to Which Lien Attaches; Under Uniform Commercial Code, as Enacted in Ohio, Finance Company's Security Agreement and Financing Statements, Properly Recorded, Perfected Secured Interest in Liquor License; Since Security Agreement, Under UCC, Creates Only Security Interest and Does Not Attempt to Transfer Title, This Interest Is Not Contrary to Ohio's Policy of Protecting Public Against Unapproved Licenses; Therefore, Government's Lien Did Not Have Priority Over Security Interest Recorded and Perfected Three Years earlier. Paramount Finance Co. v. Cleveland's Peppermint Lounge, Inc. (Court of Common Pleas, Cuyahoga County, December 6, 1965). (CCH 66-2 U.S.T.C. ¶9565). This is a receivership proceeding in which a receiver was appointed in aid of executing on a cognovit judgment. The executing creditor, Paramount Finance Company, had a security interest specifically encumbering the debtor's Ohio liquor permit, together with all of the chattels used in the operation of his tavern business. This security interest was recorded prior to the time that notice of the federal tax lien was filed against the property of the same debtor; the receiver was also appointed before recordation of the federal tax lien.

At the hearing to determine the relative priority of the liens of the Government and the plaintiff, the Government urged that although the plaintiff's security interest was prior as to the proceeds resulting from the sale of various chattels sold in conjunction with the sale of the taxpayer's business, the federal tax lien was entitled to priority as to the proceeds attributable to the transfer of the taxpayer's liquor license, since controlling state decisions held that such licenses were merely privilege and not "property" which can be mortgaged. But the Court held that the doctrine posited by previous decisions was superseded by provisions of the Uniform Commercial Code under which the liquor license should be classified as a "general intangible", encumbered by plaintiff's prior security interest.

The Court based its holding on its view that the rationale behind state court decisions disallowing a mortgage of liquor licenses was that the mortgage "sought to transfer title to the liquor permit," contrary to the nature of the permit as a license whose transfer the state has absolute discretion to approve or disapprove. The Court reasoned that a "security interest" under the Uniform

Commercial Code is different in that it does not purport to transfer title, so that a liquor license might be considered as a valuable property subject to the security interest without infringing upon the state's right to contrive its disposition. Because of the broad ground given for the Court's decision, sweeping aside previous controlling authority, it was unnecessary for the Court to consider whether the appointment of a receiver, specifically empowered to take possession of a liquor permit by Regulation 14 of the Ohio Department of Liquor Control, perfected the plaintiff's purported judgment lien against the liquor permit and elevated him to the status of a prior "judgment creditor" protected from a subsequent federal tax lien under Section 6323 of the Internal Revenue Code of 1954.

The Solicitor General determined that the Government will not appeal this decision.

Staff: United States Attorney Merle M. McCurdy; Assistant United States Attorney Robert J. Rotatori, (N.D. Ohio).

Tax Liens: Priority as to the Assignee of Taxpayer; Creditor of Taxpayer-Salesman Who Had Satisfied Latter's Debt to One Insurance Company Did Not Have Priority Over Government's Tax Claims as to Fund Established by Second Insurance Company Under Assignment Executed by Taxpayer Since Creditor Failed to Carry Burden of Proof That He Was "Purchaser" Within Meaning of Section 6323, I.R.C. Union Life Insurance Co. v. Lynn W. Perkins, et al. (E.D. Ark., June 30, 1966). (CCH 66-2 U.S.T.C. ¶9556). Plaintiff interpleaded a fund arising out of commissions earned by the taxpayer because of the conflicting claims presented by the Government for its taxes and a subrogee (Castillo) of another insurance company (Franklin) to whom the taxpayer had assigned part of his commissions.

In 1961, taxpayer had become indebted to Franklin by whom he was employed through an agency operated by Castillo; under the terms of the agency agreement between Franklin and Castillo, the latter was secondarily liable for the debts of taxpayer. Thereafter, taxpayer started selling insurance for plaintiff and, on June 11, 1962, authorized the plaintiff insurance company to withhold 25% of his commissions and to pay this amount to Franklin. Later, Castillo satisfied the obligation of the taxpayer to Franklin and became subrogated to the rights of the latter.

On March 23, 1962, prior to the assignment of commissions, the Internal Revenue Service assessed taxpayer with respect to 1960 income taxes. On July 28, 1964, the Government filed its notice of tax lien. The position of the Government was that, by virtue of Sections 6321 and 6322 of the Internal Revenue Code, its lien attached to the commissions earned by taxpayer; that the fact that the assignment was prior in time to the recording of the tax lien was not significant since the assignee did not come within any of the protected categories of Section 6323 of the Code; and, that in any event, the assignment was invalid as to third parties since it had not been recorded pursuant to Arkansas law (U.C.C.). Castillo claimed that Franklin was a "purchaser" within the purview of Section 6323 by virtue of its having agreed to withhold suit against taxpayer in return for the assignment.

The Court brushed aside the Government's argument regarding the failure to record the assignment; however, it found that Castillo had not shown by a preponderance of the evidence that he was entitled to the benefit of Section 6323. In this regard, the Court noted that the only evidence presented on the question of consideration for the assignment were conflicting depositions of Castillo and taxpayer, by which Castillo was not discharged from his burden of proof.

Staff: Assistant United States Attorney James W. Gallman, (E.D. Ark.).

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