Asst. Chief Crim.

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Vol. 14 October 14, 1966 No. 21

ADMINISTRATIVE DIVISION

Assistant Attorney General Ernest C. Friesen, Jr.

The following Memoranda applicable to United States Attorneys Offices have been issued since the list published in Bulletin No. 18 Vol. 14 dated September 2, 1966.

MEMOS	DATED	DISTRIBUTION	SUBJECT
409 S-2	8/25/66	U.S. Attys. & Marshals	Combined Federal Campaigns
482	8/15/66	U.S. Attys. & Marshals	Delegating Certain Authority With Respect To Training By, In Or Through Non-Government Facilities.
483	9/9/66	U.S. Attys. & Marshals	Authorizations With Respect To Personnel And Certain Admin. Matters.
484	9/8/66	U.S. Attorneys	To Revise Practices Re Bail To Assure That All Persons, Regardless Of Their Financial Status, Shall Not Needlessly Be Detained Pending Their Appearance To Answer Charges, To Testify, Or Pending Appeal, When Detention Serves Neither The Ends Of Justice Nor The Public Interest, Public Law 89-465, 89th Congress 2nd Sess.
485	9/15/66	U.S. Attys. & Marshals	Administration Of Within-Grade Salary Increases For Employees In Positions Subject To The Classification Act Of 1949, As Amended.

ORDERS	DATED	DISTRIBUTION	SUBJECT
367-66	8/31/66	U.S. Attys. & Marshals	Designating The Commissioner Of Immigration And Naturalization And Immigration Officers As Local Authorities And Competent Officers For The Purposes Of Article XIII Of The Convention Between The United States And Greece.

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ANTITRUST DIVISION

Assistant Attorney General Donald F. Turner

Newspapers Charged With Violating Section 7 of the Clayton Act. United States v. World Journal Tribune, Inc., et al. (S.D. N.Y.) D.J. File 60-217-87. On September 14, 1966, the Department filed in the District Court for the Southern District of New York a complaint against the World Journal Tribune, Inc., Hearst Corporation, New York World Telegram Corporation and New York Herald Tribune, Inc., charging a violation of Clayton Act - Section 7 in the acquisition by the World Journal Tribune of assets of the Herald Tribune.

At the start of 1966, six daily newspapers of general circulation were being published in New York City. Merger negotiations involving three of the six newspapers were held in early 1966 among the Hearst Corporation, publisher of the afternoon Journal-American, World Telegram Corporation, publisher of the afternoon World-Telegram & Sun, and Herald Tribune, Inc., publisher of the morning Herald-Tribune. On April 1, 1966, the three publishers entered into a merger agreement to form a new corporation, World Journal Tribune, Inc., into which they would consolidate their publishing operations in New York City. The new corporation was to receive the assets of the three newspapers and was to publish one daily afternoon paper to be known as the "New York World Journal;" a morning daily representing the continuation of the Herald Tribune; and a Sunday newspaper to be called the "New York Sunday World Journal and Tribune."

Prior to the execution of the merger agreement the parties voluntarily submitted to the Department the terms of the proposed agreement, various statements concerning the reasons for the merger and contemplated future plans, and data in support of the contention that all three newspapers were on the verge of failure. After review of the data the Department, on April 20, 1966, issued a statement indicating it had decided to take no action. The decision was based on "the severe operating losses sustained by the three papers, the probability that such losses would continue, the lack of alternative purchasers, and the apparent absence of any other alternatives that would be likely to insure the continuance for any length of time of a greater number of independent major newspapers." The statement also noted that the Department remained "free to challenge the arrangement in the future if subsequent developments or information not now available indicates that such action is warranted."

On August 15, 1966, after several months of a labor dispute which had prevented the publication of any paper by the new corporation, it was announced that the morning Herald Tribune would not be published at the end of the strike. Instead, the new corporation would publish one daily afternoon newspaper, to be known as the "World Journal Tribune," and the originally conceived Sunday newspaper.

With the strike now at an end the New York City daily newspaper market consists of four newspapers - the morning New York Times and the News, and the afternoon World Journal Tribune and New York Post.

The complaint charges that the acquisition of substantially all the New York City newspaper publishing assets, including the contracts and commitments pertaining to syndicated columns and other features of the Tribune, may substantially lessen competition and tend to create a monopoly in the publishing of daily newspapers of general circulation and daily afternoon newspapers of general circulation in New York City by giving the World Journal Tribune a decisive competitive advantage over the only other daily afternoon newspaper in New York City, the New York Post.

The Department's suit asks that the new newspaper be required to waive its present rights to the features and columns, thereby making it possible for all New York dailies, including the World Journal Tribune, to compete on an equal basis for the publication rights. The Department also intends to ask for an interim order which would permit the World Journal Tribune to publish the old Herald Tribune features only if they also are available for publication in the New York Post.

Staff: John Sirignano, Jr., Bertram M. Kantor, Ralph T. Giordano and Joan Sidor (Antitrust Division)

Indictment and Complaint Under Section 1 of the Sherman Act Against - United States v. Bowling Proprietors' Association of Northern Ohio, Inc., et al. and United States v. Bowling Proprietors' Association of Northern Ohio, Inc. (N.D. Ohio) D.J. File 60-277-20, D.J. File 60-277-25. On September 14, 1966, a grand jury for the Northern District of Ohio (Cleveland) returned an indictment charging a trade association of bowling establishments, its Executive Secretary and two officials of the association with fixing prices of open, league and tournament bowling in the Cleveland area, in violation of Section 1 of the Sherman Act. It also charged the elimination of competition by prohibiting price inducements or promotions without association approval. The association was also named defendant in a companion civil complaint filed on the same date.

The indictment and civil complaint charged that the conspiracy began sometime in 1960 and continued to date. Approximately 80 per cent of the area bowling lanes are represented in the association. Approximately $8,000,000 is spent by bowlers in association establishments.

Named as defendants in the indictment were:

Bowling Proprietors' Association of Northern Ohio, Inc.,
Sam Levine, Executive Secretary
Charles Spehar, former President of the Association
Milton Kravitz, member and former Chairman of the Board of Governors.

At the arraignment on September 30, 1966, before Judge Girard E. Kalbfleisch all defendants entered pleas of not guilty.

Staff: Carl L. Steinhouse, Lester P. Kauffmann and Paul Y. Shapiro (Antitrust Division)

Complaint Under Section 1 of the Sherman Act. United States v. General Electric Company (S.D. N.Y.) D.J. File 60-9-172. On September 27, 1966, a civil action under Section 1 of the Sherman Act was filed in New York against the General Electric Company charging that the defendant has been and is now a party to contracts in unreasonable restraint of trade in the sale of General Electric large lamps (commonly called "electric light bulbs" by the general public). The complaint alleges that the contracts consist of a large number of agency agreements between General Electric and its distributors and retailers under which GE large lamps are consigned to distributors and retailers. The substantial terms of these agreements are that prices, terms, and conditions for the sale of such lamps are fixed and maintained at both the distributor and retailer levels. In 1963, the complaint alleges, General Electric's large lamp sales exceeded $173 million and constituted about 50% of total industry sales of large lamps. In that year sales of GE large lamps through distributors and retailers operating under agency agreements with General Electric are alleged to be in excess of $135 million.

In United States v. General Electric Co., 272 U.S. 476 (1926) the Court first considered General Electric's agency contracts and found at page 484 "nothing in the form of contracts and the practice under them which makes the so-called . . . [General Electric] agents anything more than genuine agents of the company, or the delivery of the stock to each agent anything more than a consignment to the agent for his custody and sale as such." The Court recognized General Electric's patent monopoly and pointed out at page 485 that "under the patent law the patentee is given by statute a monopoly of making, using and selling the patented article" and that "the comprehensiveness of his control of the business in the sale of the patented article is not necessarily an indication of illegality of his methods." In concluding its consideration of General Electric's agency system of distributing large lamps the Court said at page 488:

> The owner of an article, patented or otherwise, is not violating the common law, or the Anti-Trust law, by seeking to dispose of his article directly to the consumer and fixing the price by which his agents transfer the title from him directly to such consumer. [Emphasis added.]

In a complaint filed in 1941 the Department again challenged the use by General Electric of agency agreements to accomplish price-fixing at each level of distribution of large lamps. Some years before the institution of this case General Electric's basic and controlling patents in the large lamp field had expired. Thus it could be argued that the facts had changed significantly, and that the District Court was not compelled to follow the language of the Supreme Court, quoted above, which obviously was obiter dicta as to any articles not covered by valid patents. Nevertheless the Court followed the doctrine announced by the Supreme Court in 1926, and held that General Electric might continue to impose price-fixing requirements in its agency agreements. There is perhaps some question as to whether the Court reached this conclusion through following stare decisis or res judicata, but this would make no difference from the point of view of antitrust enforcement. United States v. General Electric Co., 82 F. Supp. 753 (D. N.J. 1949).

More recent decisions, particularly Simpson v. Union Oil Co., 377 U.S. 13, and cases following, have cast great doubt upon the proposition that price-fixing or any unreasonable restraints of trade may be justified merely by the use of an agency or consignment method of distribution. The decision in Simpson quite strongly points out that a consignment or agency system of distribution may be a perfectly lawful and proper method of doing business, but nevertheless fail to immunize price-fixing. The present case against General Electric should present this issue clearly, and hopefully obtain a decision destroying an important obstacle to antitrust enforcement.

Staff: Joe Nowlin and George J. Luberda
(Antitrust Division)

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CIVIL DIVISION

Acting Assistant Attorney General J. William Doolittle

COURTS OF APPEALS

ADMINISTRATIVE SUBPOENAS

Second Circuit Directs Enforcement of Administrative Subpoenas Issued By The Federal Maritime Commission For The Production of Documents Located Both Here And Abroad. Federal Maritime Commission v. Carragher (C.A. 2, No. 30041, August 3, 1966; DJ File 61-18860) and Federal Maritime Commission and Ludlow Corporation v. A. T. DeSmidt (C.A. 2, Nos. 363-364, August 31, 1966; DJ File 61-514529). In these two cases, the Second Circuit directed the enforcement of administrative subpoenas issued by the Federal Maritime Commission in investigations instituted by the Commission to determine whether rates of shipping lines carrying cargo in foreign commerce were so unreasonably low or high as to be detrimental to the commerce of the United States.

In Carragher, the district court had denied enforcement of part of the Commission's subpoena which pertained to its investigation of conference rates in foreign commerce, on the ground that the Commission's subpoena power was limited to investigations of "alleged violations" of the Act and that an investigation to determine whether rates should be disapproved was not such an investigation. On our appeal, the Second Circuit reversed, rejecting this contention as inconsistent with both the ostensible purpose of the regulatory pattern established by the Shipping Act of 1916 and the legislative history of Section 27. The court instead accepted our broad view that the Commission has subpoena power in regard to any of its investigations which lead to adjudicatory determinations. The court also rejected the contention that the Government's delay of almost 11 months in seeking enforcement of the administrative subpoena barred the Commission from seeking relief; the court noted that (1) respondents did not indicate how they were prejudiced by the delay, and (2) the United States is exempt from statutes of limitations and the defense of laches.

In DeSmidt, the court of appeals affirmed the district court's enforcement of administrative subpoenas issued by the Commission to require the production of documents located both in this country and abroad. Following its decision in Carragher, the court held that the Commission had the power to subpoena documents in a proceeding instituted upon the formal complaint of a private shipper to determine whether a proposed rate issued by a conference carrier is so unreasonably high as to be detrimental to the commerce of the United States. In addition, the court ruled that the Commission has authority to issue a subpoena requiring the production of evidence from outside the United States, stating that it would require "strong evidence to show that Congress wished to render an agency responsible for regulating an important segment of the foreign commerce of the United States powerless." The court pointed out that Congress, by use of the phrase "from any place in the United States," intended that the Commission should be able to require a resident to produce documents under his control wherever they are located, as can the Interstate Commerce Commission, other regulatory agencies and the federal courts. The court recognized that the Commission may have difficulty in requiring foreign shipping lines to

produce documents located abroad, but said that this potential difficulty in enforcement should not affect the judicial construction of the Commission's subpoena power.

Staff: David L. Rose and Jack H. Weiner (Civil Division)

ADMIRALTY

Government Recovers Expenses Incurred in Controlling a Burning Ship. China Union Lines, Ltd., et al. v. A. O. Andersen & Co., et al. (C.A. 5, No. 21367, July 27, 1966). DJ File 61-74-361. After a collision, the United States District Engineer found that one of the ships, a "flaming derelict," constituted a special danger to navigation; he therefore took control of the ship, pursuant to the emergency provisions of 33 U.S.C. 415. Subsequently, the government sought to recover the cost of (1) removing and re-anchoring the vessel, (2) providing shipkeepers, etc., to preserve the property, and (3) having a tug stand-by to prevent the vessel from moving and re-blocking the channel. The district court permitted the government to recoup all of these expenses, and the Fifth Circuit affirmed. The court of appeals' only reservation was as to a three-day period during which the government had provided shipkeepers as well as a stand-by tug. Noting that the district court might have overlooked this overlap, the court suggested that the shipkeeper expense for that period be re-examined "in the other proceedings which must be hereafter conducted" in the district court.

Staff: United States Attorney Woodrow Seals and Assistant United States Attorneys Jack Shepherd and James R. Gough (S.D. Tex.)

LABOR LAW

An Aggrieved Union Member May Not Intervene In An Action Instituted By The Secretary of Labor To Enjoin The Election. Charles J. Stein v. Wirtz (C.A. 10, No. 8704, September 16, 1966). DJ File 156-49-22. Following the June 1964 elections of Local 611 of the International Brotherhood of Electrical Workers, the appellant complained to the Secretary of Labor of the union's refusal to permit him to be a candidate for office. The Secretary investigated and concluded that the union had in fact violated Section 401(e) of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. 481(e). Accordingly, pursuant to 29 U.S.C. 482(b), the Secretary instituted suit to have the election, as it pertained to the office in dispute, set aside. In November 1965, an answer not yet having been filed, the union and the Secretary stipulated that if he maintained his good standing in the union appellant would be permitted to participate as a candidate in the June 1966 Election. The parties to that stipulation then requested that the action be held in abeyance until the conclusion of that election after which, if the stipulation were complied with, the Secretary would move to dismiss the action. In December 1965 the appellant moved to intervene, claiming to be the real party in interest. The Secretary of Labor resisted, arguing that the Act confers upon him the exclusive right to prosecute Title IV (election) actions. The district court and Court of Appeals agreed, holding that the district court had no jurisdiction to permit the the intervention of an individual union member.

Staff: Edward Berlin and Robert C. McDiarmid (Civil Division)

Second Circuit Overturns District Court's Refusal To Stay Union Election Pending Outcome of Secretary of Labor's LMRDA Suit Attacking Prior Election. Wirtz v. Local Unions Nos. 545, 545-A, 545-B, and 545-C, International Union of Operating Engineers (C.A. 2, No. 30745, September 13, 1966). DJ File 156-50-69. This suit was brought by the Secretary of Labor under Section 402 of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), to attack a union election held in 1963. It was alleged that the union violated the Act in three respects, all of which are required by the constitution of the International Union of the Operating Engineers: (1) by requiring all candidates for office to have paid their monthly dues on or before the first day of each month for the year preceding the election, (2) by requiring all candidates to file a written declaration of candidacy some 4 months before the election, and (3) by restricting union office to members of the parent local, despite the fact that four-fifths of the membership was in branches governed by the parent. While the suit was pending, the union started to conduct its regularly scheduled 1966 election. On August 1, 1966, the Second Circuit held in another case that the holding of a union election renders moot the Secretary's challenge under the LMRDA to a prior election. Wirtz v. Local Unions 410, et al., and Local 30, International Union of Operating Engineers. Accordingly, the Secretary in the present case moved for a preliminary injunction against the 1966 election in order to preserve the court's jurisdiction to hear the attack on the 1963 election. The district court denied the motion, stating that if the same violations of the LMRDA that the Secretary alleged in connection with the 1963 election persisted in the 1966 election the court would expedite any suit the Secretary might bring challenging the new election.

The court of appeals reversed, ordering the district court to issue the injunction and to hear and determine the case on the merits with all possible speed. First, the court of appeals stated that "it appears likely that the Secretary will succeed" in his challenge to the 1963 election. The court noted that, under the Secretary's allegations, less than 5% of the union membership was eligible for nomination at the 1963 election. Next, the court observed that continuance in office of the present union officers would make little if any difference in the conduct of the union's affairs during the lawsuit. Finally, the court concluded that if the present case were rendered moot, enforcement of the LMRDA would be prejudiced: "Although the 1966 officers would have been elected under conditions substantially the same as those which obtained in 1963 * * *, the requirements of the statute for the bringing of suit would have to be complied with anew with the consequent loss of time in assembling the facts regarding the 1966 election. Moreover, the loss of more than two and a half years in reaching the merits of the controversy between the Secretary and the union, could well cause such discouragement and frustration of those members of the union whose rights have been violated than none of them would be willing to come forward to make the complaint which is required to permit the Secretary to bring suit." Stating that it was "loath to disagree with the district court in the matter of granting a stay, because weight must always be given to the discretion of a trial court", the court of appeals nevertheless concluded that its intervention was required in this case by the public interest in enforcing the LMRDA and in protecting the rights of union members.

Staff: Robert V. Zener (Civil Division)

OFFICIAL IMMUNITY

Government Officials May Not Be Held Personally Liable for Official Acts Even If Alleged To Be Part of a Conspiracy To Violate Anti-Trust Laws; Where the Moving Party Files Affidavits In Support of a Motion To Dismiss, Summary Judgment Must Be Entered Unless Counter Affidavits Are Filed Which Raise a Genuine Issue As To A Material Fact. S & S Logging Co., Inc. v. Chriswell, et al. (C.A. 9, No. 19,896, August 24, 1966). DJ File 145-8-604. This action was brought by appellant, against several corporate and individual defendants, seeking damages for their alleged conspiracy to restrain trade in violation of the Sherman Act (15 U.S.C. 1 et seq.), by preventing appellant from taking part in competitive bidding for the purchase of Forest Service timber located in Mt. Baker National Forest. Appellees Chriswell and Benecke, officials of the United States Department of Agriculture, moved for summary judgment. The motion was based on the appellant's failure to state a claim against appellees Chriswell and Benecke in view of the immunity from suit to which government officers are entitled with respect to acts committed within the scope of their authority. The gravamen of appellant's complaint was that appellees Benecke and Chriswell had conspired with others to violate the Sherman Act. Specifically, it was alleged that there was a conspiracy to prevent appellant from engaging in a second competitive bid for timber and, thus, from "enjoying the profits and results" of its first successful bid. Appellees moved for summary judgment on the ground that the acts complained of were absolutely privileged under the "official immunity" doctrine of Barr v. Matteo, 360 U.S. 564. In opposing this motion, the appellant offered nothing to controvert the showing in the affidavits and depositions that, at all critical times, the appellees were acting in the discharge of their official responsibilities as officers of the Department of Agriculture. Accordingly, the district court granted the motion and dismissed the complaint.

The Ninth Circuit affirmed. It held that under the regulations appellees properly ordered a new sale and since the appellant had not filed counter-affidavits which challenged appellees' sworn contention that their acts were authorized, summary judgment properly should have been granted in response to the appellee's motion to dismiss. A majority of the court went on to rule that the allegation that Federal officials engaged in a conspiracy to violate the anti-trust laws does not remove the matter from the protection of the official immunity doctrine, any more than do other allegations of malice, bad faith, or conspiracy. Judge Merrill wrote a concurring opinion, disagreeing with the latter holding.

Staff: Alan S. Rosenthal and Edward Berlin (Civil Division)

SOCIAL SECURITY

"Employment" As Nurse For Mother Held To Constitute Service As a Member of Family and Not As An Employee For Old Age Insurance Purposes. Martha E. Foss v. Gardner (C.A. 8, No. 18,214, July 14, 1966). DJ File 137-39-86. In an endeavor to qualify for old age insurance benefits, claimant, a retired nurse, entered into an employment relationship with her brother wherein she agreed to care for their aged and infirmed mother in the family home. She was paid $300 per month for six quarters. Another sister previously had performed

those services without remuneration. Payments ceased immediately after sufficient payments had been made to qualify the claimant for old age insurance; however, she continued to care for her mother for some five additional years until the latter's death. The Secretary held that a bona fide employment relationship did not exist and denied benefits. The district court and the court of appeals agreed. Additionally, a belated contention that the claimant qualified for benefits as a self-employed individual was also rejected. Even though the Secretary had not passed on that assertion, the Eighth Circuit saw no need to remand the action as it was convinced "that the work was done in fulfillment of a family obligation rather than for money."

Staff: Edward Berlin (Civil Division)

DISTRICT COURT

SOCIAL SECURITY ACT

District Court Holds The Secretary of Health, Education And Welfare May Rely On Hearsay Statements In Hearings Under Title II of the Social Security Act. McGuire v. Gardner (D.C. N.D. Ind., No. 4243 June 22, 1966). DJ File 137-26-69. Plaintiff appealed the decision of the Secretary denying him old age benefits because he did not have the requisite quarters of coverage. Plaintiff contended that the reliance of the Secretary upon hearsay statements and reports submitted by Government employees who were not subject to cross examination was error. The Court held that the strict rules of evidence do not apply to such hearings. The Court noted that the plaintiff had an opportunity to examine the documents prior to the hearing and that he was notified of his right to subpoena witnesses prior to the hearing. In addition, plaintiff asserted the Act is unconstitutional in that it limits court review to a determination of whether "substantial evidence" supports the decision. The Court rejected plaintiff's constitutional contention stating that Congress has the power to formulate the scope of judicial review of administrative proceedings.

Staff: United States Attorney Alfred W. Moellering and Assistant United States Attorney Richard F. James (N.D. Ind.)

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THE ABOVE CHANGES APPLY ONLY TO STANDARD FORM 57 AND DO NOT, AND WERE NOT INTENDED TO, APPLY TO PERSONNEL SECURITY QUESTIONNAIRES, SUCH AS CIVIL SERVICE COMMISSION STANDARD FORM 86, AND DEPARTMENT OF DEFENSE FORM DD-398, AND OTHERS. In these personnel security questionnaires, the arrest record information previously required to be disclosed remains unchanged. As indicated by the quotation from the Civil Service Commission letter, arrest record information continues to be material, even though not required to be disclosed in Form 57 in the future.

COUNTERFEITING

Check Protector as A Tool or Implement Used or Fitted to be Used in Falsely Making Securities. Timothy George Elledge v. United States, 359 F. 2d 404 (C.A. 9, 1966). D.J. File 122-8-34.

The defendant was convicted of the crime of interstate transportation of counterfeiting equipment in violation of Title 18, U.S.C., Section 2314. The equipment involved was a check protector. A check protector is an instrument used in the normal course of business to perforate the check in order that the amount of the check cannot be altered. The check protector did not have a signature plate attached.

The one count indictment closely followed Paragraph 4 of Title 18 U.S.C., Section 2314.

The Court of Appeals for the Ninth Circuit upheld the indictment and affirmed the conviction. The Court held that it is the fraudulent purpose of the transportation, rather than the criminal character of the thing transported, which constitutes the offense.

The Ninth Circuit's interpretation of the statute would appear to broaden the previous position of the Department that this portion of the statute was aimed primarily at counterfeiting dies, plates, and tools, which are specifically designed or adapted to counterfeiting, as contrasted with check protectors and checkwriters, which have ordinary business use.

Staff: United States Attorney William P. Copple;
Assistant United States Attorneys Henry L. Zalnut
and Morton Silver (D. Ariz.)

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LAND AND NATURAL RESOURCES DIVISION

Assistant Attorney General Edwin L. Weisl, Jr.

Condemnation: Appealable Order; Order Confirming Commission's Report Filed under Rule 71A, F.R.Civ.P., Held Not to Be a Final Judgment From Which Appeal Can Be Taken. United States v. D. W. & Edith Evans, C.A. 10, No. 8665, August 17, 1966 (D.J. Files 33-17-218-269, 33-17-218-270, 33-17-218-431). - In this condemnation case, the issue of just compensation was referred to a commission appointed pursuant to Rule 71A, F.R.Civ.P. The Government filed objections to the commission's final report. On July 15, 1965, the district court entered a memorandum decision overruling the government objections and confirming the commission report in all respects, including the findings as to just compensation. On July 23, 1965, a formal order was entered, stating the action of the court as reflected by the memorandum decision. Thereafter, no action was taken by either party until on October 4, 1965, when the landowners filed their motion to require the Government to deposit the deficiency. At the hearing on this motion, the Government orally moved for the entry of judgment in the matter. The court sustained the landowners' motion in "Order Sustaining Motion to Direct United States of America to Pay Deficiency Plus Interest and Judgment and Order of Distribution." This order was entered on October 14, 1965. It contained, in addition to an order directing the Government to pay the deficiency necessary to satisfy just compensation including interest, all the usual findings and orders of the final judgment in a condemnation case.

The Government filed an appeal from the order of October 14, 1965, and the landowner moved to dismiss, claiming that notice of appeal should have been filed from the order of July 23, 1965, and was therefore untimely. The landowners' motion was denied, the court of appeals holding that it put great importance on the intention of the judge. Here, the earlier order was incomplete in that it did not contain sufficient findings on which the clerk could compute a money judgment, including interest on the award. When the district court's subsequent order bears all the earmarks of a final judgment, and the district court expressly refused to say that the earlier order was intended as a final judgment, the court of appeals felt compelled to hold that the order of July 23 was not a final judgment.

A warning should be issued about the second part of the court of appeal's opinion in this case. It can be read as indicating that Rule 54(b) is applicable to federal eminent domain cases. If this were true, in condemnation cases containing more than one tract, no judgment as to any of the tracts would be final until judgment had been entered in all tracts in the case unless the judgment contained the recital required by Rule 54(b). Since this is contrary to the Department's understanding of the law, a petition for rehearing was filed. The petition was denied. Condemnation cases should not contain Rule 54(b) recitals except in highly unique circumstances. Please consult the Department before submitting or agreeing to judgments with such a reiital.

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

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TAX DIVISION

Acting Assistant Attorney General Richard C. Pugh

CIVIL TAX MATTERS
District Court Decisions

Sovereign Immunity: Court Lacked Jurisdiction Over a Bill in the Nature of Interpleader Under 28 U.S.C. 1335 as Distinguished From a Quiet Title Action Under 28 U.S.C., Section 2410(a). J. A. Tobin Construction Co. v. Fidelity and Casualty Co. of N. Y., et al (W.D. Mo., No. 15952-2, decided September 9, 1966.) Plaintiff brought a bill in the nature of interpleader under 28 U.S.C., Section 1335 to determine disposition of a sum of money remaining to be paid to the defendant-taxpayer under a subcontract. The United States served a notice of levy on the plaintiff, claiming part of the money for unpaid taxes of the defendant-taxpayer. The Court described the action as one in the nature of interpleader because plaintiff claimed a set-off (in excess of the amount of the taxes) for damages resulting from the defendant-taxpayer's breach of the subcontract. Other defendants claimed various amounts of the balance due the taxpayer by virtue of assignments or for labor and materials supplied to the taxpayer for performance of the subcontract.

The United States moved to dismiss as to it on the ground that there was no waiver of its sovereign immunity to suit in this type of action. Relying on Logan Planing Mill Co. v. Fidelity & Gas. Co. of N. Y., 212 F. Supp 906 (S.D. W.Va., 1962), the plaintiff claimed that the Government had waived its immunity under 28 U.S.C., Section 2410(a), which allows the Government to be named a party defendant in a suit "to quiet title to or for the foreclosure of a mortgage or other lien upon real or personal property on which the United States has or claims a mortgage or other lien". The Court distinguished the Logan Co. case on the ground that it involved a claim to title of a specific fund under an assignment which effected a completed transfer of a definite fund, thus giving the Logan Co. a sufficient equitable title to support a quiet title action. In the instant case, on the other hand, the Court pointed out that the plaintiff had no actual title to the fund interpleaded, but merely a claim which it hoped to use to lessen its own liability.

Accordingly, the Court concluded that while there may be similarities between the present action in the nature of interpleader and an action to quiet title, the present action was not a quiet title action within the meaning of Section 2410(a); hence, it ruled that the motion of the United States for dismissal on the basis of sovereign immunity should be sustained.

Staff: United States Attorney F. Russell Millin; Assistant United States Attorney Bruce C. Houdek (W.D. Mo.)

Priority of Federal Tax Lien Held to be Superior to the Rights of a Checkholder Whose Claim Arose One Month after the Date of Assessment. Todd Eugene Harrell, et al. v. United States. (E.D. Ark., decided June 18, 1965). (CCH 66-1 U.S.T.C. ¶9237). Plaintiffs instituted this action for the purpose of

obtaining a release of property that had been seized by agents of the Internal Revenue Service. Plaintiffs alleged that they were the owners of the property that had been levied upon, including a bank deposit of 4,000 silver dollars.

The taxpayer, who was the leader of a religious cult, had jumped bail prior to his trial on charges of harboring a deserter, had taken an assumed name and had gone into hiding on a farm in Strawberry, Arkansas. His identity was revealed when the local sheriff uncovered the body of the child of one of his followers, which had been buried on the farm after an accidental death. The taxpayer was arrested by agents of the Federal Bureau of Investigation as a fugitive from justice.

At the time of his apprehension, tax assessments were made and notice of federal tax lien was filed in Arkansas. Agents of the Internal Revenue Service levied upon the personal property on the taxpayer's farm, which included a cache of arms and ammunition. Approximately one month after the taxpayer's arrest, his followers deposited 4,000 silver dollars in a local bank. The money was deposited so that a check could be drawn for the payment of fines that had been levied upon the taxpayer, and several others, because of the illicit burial of the child.

The check was delivered to the sheriff, who, when the sheriff found out that the revenue agents were going to levy upon the bank account, dispatched a deputy to the bank for the purpose of cashing the check. Unknowingly, the revenue agents, who were on their way to levy upon the account, were involved in a race to the bank. The agents arrived at the bank and had completed their levy when the deputy sheriff arrived.

When the complaint came on for trial, everything was settled except for the claim of the plaintiff-sheriff, who was claiming prior interest in the bank account by virtue of the $2,800 check.

The Court held that the silver dollars were those of the taxpayer, and since the federal tax lien had attached to all of his property at the date of assessment, the Government's claim was prior in time, and therefore prior in rights.

Staff: United States Attorney Robert D. Smith, Jr.; Assistant United States Attorney Lindsey J. Fairley, (E.D. Ark.); and Carl H. Miller (Tax Division).

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