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ANTITRUST DIVISION

Assistant Attorney General Donald F. Turner

Supreme Court Grants Government Motion To Affirm In - Jos. Schlitz Brewing Co. v. United States, et al. DJ File 60-117-26. Joseph Schlitz Brewing Company ("Schlitz") purchased all the assets of Burgermeister Brewing Company ("Burgermeister"), a substantial California and West Coast brewer, in 1961. In 1964, Schlitz purchased a controlling interest in the stock of John Labatt Ltd. ("Labatt"), the third largest brewer in Canada, and the owner of controlling interest in General Brewing Company ("General Brewing"). General Brewing, like Burgermeister, was a substantial factor in California, and on the West Coast.

On February 19, 1964, a complaint was filed challenging each of the above acquisitions under Section 7 of the Clayton Act. The matter came on for trial before Judge Stanley Weigel in the Northern District of California during summer of 1965. Judge Weigel held that both acquisitions violated Section 7. On the merits, his findings and opinion stress the following factors. (1) There has been a precipitate trend to concentration in the brewing industry. The high costs of introducing a new brand and of building a brewery deter new entry into this market. (2) The acquisitions made by Schlitz would substantially increase the concentration within the brewing industry. The market share of Schlitz in California increased from 3.9% to 14.6% after the acquisition of Burgermeister, and, to 23.3% after the acquisition of General Brewing. (Schlitz indirectly obtained control over General Brewing by purchasing control over its parent, Labatt.) Market shares within other regional markets - the state of Hawaii, an eight Western state market, and the nation - were also relied on. (3) Potential competition would be suppressed by each acquisition. The judge found that Schlitz would have expanded its commitment in California but for its acquisition of Burgermeister. Labatt was found to be a potential entrant into the United States market, and General Brewing was found to have plans for expansion eastward from its regional base; acquisition of Labatt and General Brewing by Schlitz would eliminate these sources of potential competition.

Finding both of the Schlitz acquisitions illegal, the judge ordered that Schlitz divest itself of the assets of Burgermeister and of the stock of Labatt.

On direct appeal to the Supreme Court, Schlitz declined to challenge the correctness of the district court's decision on the merits. The intervening

decisions of the Supreme Court in United States v. Pabst Brewing Company and United States v. Von's Grocery made it clear that antitrust standards had been correctly applied by the trial judge.

In its Jurisdictional Statement, Schlitz raised three collateral issues. (1) The trial judge abused his discretion in ordering that Schlitz divest its stock in Labatt; Schlitz should have been permitted to bring about the sale of General Brewing. The Government argued that the exercise of discretion in ordering relief was justified to prevent new adverse effects on competition arising from sale of General Brewing and acquisition by Schlitz of Labatt. (2) Because, at the time of the Burgermeister acquisition, the Antitrust Division had made an investigation and had orally informed defendant that it did not intend to bring suit at that time, Schlitz argued that the Government should be put to a proof that material changes of condition had occurred which justified the commencement of proceedings. But on this point, the Government contended, there is clear authority that the Government cannot "clear" or immunize transactions which violate the law. The so-called "clearance", therefore, expressed only the intent, as of that time, not to bring a suit. (3) Schlitz appealed the disposition by Judge Weigel of various procedural motions. The record, the Government asserted, showed that full and fair consideration had been given to the motions advanced by Schlitz, and that the judge had acted within the scope of his discretion in refusing to lift the temporary restraining order, refusing to allow more time under a local rule for depositions, and refusing to re-open trial for the taking of additional evidence.

On November 7, 1966, per curiam order from the Supreme Court granted the motion of the Government to affirm the judgment of the district court on the papers. Justice Harlan expressed the view that probable jurisdiction should have been noted.

Staff: Stephen G. Breyer, Jonathan DuBois, Lyle L. Jones, John Cusack and Anthony Desmond (Antitrust Division)

Government Not Required To Produce Grand Jury Testimony. United States v. Socony Mobil Oil Company, Inc., et al. (D. Kan.) DJ File 60-206-28. On October 19, 1966, Chief Judge Arthur J. Stanley, Jr., of the District Court, District of Kansas entered an order denying the production of the Missouri grand jury testimony of the witness Thomas Masterson to counsel for the defendant Wilshire Oil Company of Texas (Wilshire).

On August 24, 1966, Judge Stanley had ordered, subject to the approval of the District Court for the Eastern District of Missouri, the production of the Missouri grand jury testimony of the witness Thomas Masterson, for examination by counsel for defendant Wilshire.

On August 26, 1966, District Court Judge John K. Regan for the Eastern District of Missouri ordered the Missouri grand jury testimony of the witness Thomas Masterson made available to the District Court of Kansas "for the purpose of authorizing said District Court for the District of Kansas, upon a showing to it of a particularized need therefor to make and enter such orders as it may deem advisable with respect thereto." The August 26, 1966, order of Judge Regan found there had been no showing of a "particularized need," for lifting the veil of secrecy of the Missouri grand jury testimony of the witness Masterson. Judge Regan said:

> All of the authorities cited by movant involve attempts to obtain disclosure of testimony upon order of the trial judge. None involve a situation even remotely comparable to the instant one. Upon the showing made to us, we do not believe the ends of justice require that we lift the veil of secrecy from the grand jury proceedings which led to movant's indictment and subsequent conviction in this court on another charge. There has been no showing of a "particularized need", particularly in view of the disclosure of Masterson's testimony before the Grand Jury in Kansas. That the testimony here sought may be helpful in the civil action is irrelevant.

Judge Stanley in modifying his August 24, 1966, order by his October 19, 1966, order said:

> I have examined the transcript of Mr. Masterson's testimony before the Missouri grand jury, for the purpose of determining whether I was in error in ordering its production for examination by defense counsel. Having done so, I have concluded that the order of August 24, 1966, was erroneously entered insofar as it directed production of the testimony before the Missouri grand jury. It is, therefore, upon the court's own motion,
>
> ORDERED that the order entered herein August 24, 1966, be modified by deleting therefrom the direction that government counsel produce the testimony of Thomas Masterson before the grand jury of the Eastern District of Missouri.

Staff: Raymond D. Hunter, John Edward Burke, Harold E. Baily, Harry H. Faris, William T. Huyck, Joseph E. Paige, Elliott B. Woolley (Antitrust Division)

Court Denies Modification Of Subpoena Duces Tecum And An Ex Parte Impounding Order - In Re Grand Jury Investigation Of Alleged Restraints In the Purchase And Sale of Cottonseed Oil And Soybean Oil. (D. N.J.) DJ File

60-147-18. On September 21, 1966, the A. E. Staley Manufacturing Company, one of the companies served with a subpoena duces tecum in the captioned investigation, moved the court to modify the subpoena duces tecum and an ex parte impounding order. It was the position of Staley that by virtue of the impounding order it would of necessity be forced to copy the thousands of documents demanded by the subpoena thereby incurring an expense in excess of a thousand dollars. Staley sought to have the Government search the documents in the office of its counsel and to have those documents which were selected copied at Government expense.

The Government took the position that the motion to modify was not made "promptly" as required by Rule 17(c) of the Federal Rules of Criminal Procedure; that movant did not contend that the subpoena was "unreasonable or oppressive"; and that if movant elected not to send the documents to Washington, as was provided in the impounding order, it had no other choice but to produce them before the Grand Jury sitting in Newark, New Jersey.

Argument was heard on the motion on October 24, 1966, and Judge Wordendyke denied the motion. On November 2, 1966, Staley filed a notice of appeal, and on November 12, 1966, moved the court for a stay of its order pending appeal. The stay was denied.

Staff: J. E. Waters and Leonard J. Henzke, Jr. (Antitrust Division)

* * *

CIVIL DIVISION

Assistant Attorney General Barefoot Sanders

COURTS OF APPEALS

ADMIRALTY

United States as Shipowner Owes No Duty To Employees of Independent Contractor Performing Repair Work Where The Shipowner Turns Over Control and Supervision to the Contractor and Does Not Interfere With the Work. Lee McKinney et al. v. United States (C.A. 9, No. 20,842, October 26, 1966). DJ File 157-82-372. This suit in admiralty against the United States (authorized by the Suits in Admiralty Act, 46 U.S.C. 741, 781) was brought to recover for an illness plaintiff suffered as a result of inhaling toxic welding fumes. The plaintiff was an employee of an independent contractor which the Government had hired to do conversion work on one of its ships. The work involved the enlarging of the carrying capacity of the ship by cutting the hull in two, and inserting a new, separately fabricated mid-body section. The plaintiff inhaled the fumes while he was welding aboard the mid-body prior to its insertion into the ship. He was using ventilating equipment supplied by his employer, and was under the employer's control and supervision. The surfaces to be welded were coated with "Zinkote," a substance which serves substantially the same purposes as galvanizing. All parties knew that welding on Zinkote produces toxic fumes, but that the operation is reasonably safe if adequate ventilation and respiration are provided. Government personnel, only aboard the mid-body section occasionally for inspection purposes, gave no orders or directions to the plaintiff or the other employees, and did not interfere in the conduct of the work.

The trial court held that although the Government was the owner of the mid-body section, it owed no duty to provide or insure that the contractor provided the plaintiff with proper ventilation and respiration equipment since possession of the mid-body and control of the work had been completely turned over to the independent contractor. This holding was in line with a decision reached by the Supreme Court in a case involving a similar fact situation, West v. United States, 361 U.S. 118.

On appeal, the plaintiff tried to show that the facts of his case were more closely analagous to those in United Pilots Assn. v. Halecki, 358 U.S. 613, where it was held that the shipowner, who had directed an aspect of the independent contractor's work, had a duty to take reasonable precautions to see that the work was done safely, and it was for the trier of fact to decide whether that duty had been breached. In affirming the district court's decision, the Ninth

Circuit held that in light of the facts of plaintiff's case, the case was controlled by the West decision rather than the Halecki holding.

Staff: Frederick B. Abramson (Civil Division)

AGRICULTURAL MARKETING AGREEMENT ACT OF 1937

Tenth Circuit Holds United States Entitled to Mandatory Injunction Against Continuing Violation of Federal Milk Order; Milk Company's Attempt to Bring Itself Within the Order's Exemption Rejected. Fred A. Brown, et al., d/b/a Gem Dairy v. United States (C.A. 10, Nos. 8291 and 8292, October 27, 1966). DJ Files 106-13-155 and 106-13-171. These cases arose under the Agricultural Marketing Agreement Act of 1937 and concerned the federal milk marketing order for the Eastern Colorado area promulgated in 1961 by the Secretary of Agriculture under the authority of that Act. Under the order, milk companies ("handlers") in the area are required to pay certain minimum prices for the milk that they buy from milk farmers ("producers"). However, a "producer-handler," i.e., a milk company which obtains its milk from its own dairy farm, is exempt from such payment provisions and, in effect, from the order as a whole.

Prior to the proposal of the milk order for the area, Gem Dairy purchased its milk from six farmer-producers. After the order was proposed, but before it took effect, Gem entered into contracts with these farmers under which Gem purchased a 1/10 share in each of the farmers' cows supplying the milk and title to the milk itself. Gem assumed no control over the management and care of the cows under the agreements, and the contracts resulted in no real change in the parties' method of doing business.

When the milk order went into effect Gem Dairy refused to comply, claiming that it was a producer-handler (i.e., a farmer) and thus exempt. This claim was presented to the Secretary in an administrative proceeding provided for by the Act, and was rejected in a decision made for the Secretary by his Judicial Officer. Gem then brought suit for judicial review. As a separate action, the Government sought a mandatory injunction to have Gem comply with the order. The actions were heard together and the district court affirmed the Secretary's administrative determination, holding that the contractual arrangements were not effective to make Gem a producer-handler within the meaning of the milk order, and ordered a judgment requiring Gem to pay sums due prior to the institution of the action. The court refused, however, to grant the Government the injunction requiring Gem to comply in the future.

On appeal, the Tenth Circuit affirmed the Secretary's administrative determination and held in addition that the Government was entitled to an injunction against Gem's continuing violation of the order. The court of appeals

rejected Gem's contentions that the Secretary could not delegate to the Judicial Officer the authority to hear and determine its case, and that the Agricultural Marketing Agreement Act does not provide a constitutionally adequate procedure for the hearing of a handler's grievance.

Staff: Frederick B. Abramson (Civil Division)

BANKRUPTCY - SBA LOAN GUARANTY

The United States May Not Recover From Its Unconditional Guarantors On a SBA Loan a Deficiency On the Indebtedness Which, in Effect, Represents the Payment Out of the Security of the Cost and Expenses of Administration In Chapter X Reorganization Proceedings of the Corporate Debtor. United States v. Robert P. Anderson, et al., (C.A. 10, No. 8134, Sept. 30, 1966) DJ File 105-13-16. This action was commenced by the United States against the guarantors on an unconditional guaranty of payment of a Small Business Administration loan, seeking to recover a deficiency remaining after the defaulting corporate debtor had been liquidated in Chapter X reorganization proceedings. In those proceedings the property was sold to the United States for more than the amount of the indebtedness on its loan, but the reorganization court took out of the purchase price of the property the cost and expenses of the reorganization, leaving a deficiency on the payment actually recovered by the United States on its claim. The district court held that the reorganization court could validly take costs and expenses of administration out of the security, and that the question was, therefore, whether such costs and expenses as paid by the United States could be passed on to the guarantors. The Court concluded that the note and guaranty did not contemplate such expenses as part of the indebtedness, and that the Government could recover only principal and interest, costs and expenses directly attributable to the sale and preservation of the collateral, including insurance, repairs, and local property taxes.

On appeal, the court of appeals affirmed. The court rejected the Government's argument that what took place in reorganization was a sale of the property for cash, the use of a part of that cash by the Trustee for payment of costs and administration expenses, and the application of the balance for credit on the Government's claim, all as reflected by the Trustee's accounting schedules; and that the Government was seeking to recover, not expenses, but the deficiency on the indebtedness. It held that on the unconditional guaranty of payment the Government could have proceeded against the guarantors immediately after default; that SBA's participation in the Chapter X proceedings was unnecessary to protect its interests; and that, therefore, the guarantors were not liable for the unnecessary costs incurred in the administration of the attempted reorganization.

Staff: Kathryn H. Baldwin (Civil Division)

CONSTITUTIONAL LAW

Federal Courts Must Notify the Attorney General of Every Case Between Private Parties in Which the Constitutionality of a Federal Statute is Questioned. 28 U.S.C. 2403. Constitutionality of 40 U.S.C. 290 Upheld. Wallach v. Lieberman, (C.A. 2, No. 28510, September 21, 1966). DJ File 157-51-1108. Plaintiff, injured while working for an independent contractor hired to paint a post office building located on a federal enclave in New York, sued his employer to recover damages for those injuries. The employer defended on the ground that, under New York law, workmen's compensation was plaintiff's exclusive remedy. Plaintiff challenged the applicability of the State compensation law to the federal enclave and questioned the constitutionality of 40 U.S.C. 290, which purports to allow state workmen's compensation laws to apply in these circumstances.

Deeming the constitutional challenge unsubstantial, the district court declined to certify the question to the Attorney General as required by 28 U.S.C. 2403 and entered judgment for defendant. See 219 F. Supp. 247 (S.D. N.Y.). On appeal, the Second Circuit requested a brief from the government as amicus curiae on the effect of the district court's failure to certify the constitutional question.

The Second Circuit adopted the position urged in the amicus brief and held: (1) that the certification provisions of 28 U.S.C. 2403 are mandatory and must be followed whether or not the court itself thinks the constitutional question to be substantial, Congress having intended that determination to be made by the Attorney General; (2) that while it was error for the district court not to have certified the question to the Attorney General, the error was harmless and did not affect the trial court's jurisdiction where it had upheld the constitutionality of the challenged statute; and (3) that the request for the brief amicus was the equivalent of the necessary certification to the Attorney General (the government had declined to intervene.). The Second Circuit went on to affirm the trial court's decision upholding the constitutionality of 40 U.S.C. 290.

Staff: Richard S. Salzman (Civil Division)

FALSE CLAIMS ACT - ESTOPPEL

United States Estopped to Bring False Claims Action - FHA Requirement That Bank Submit Claims Based on Fraudulently Obtained Home Improvement Loans Before Ruling Made on Insurability of the Loans Held to Constitute estoppel Where Bank Aware That FHA Knew of the Underlying Fraud. United States v. Fox Lake State Bank, (C.A. 7, Nos. 15340-15341, August 22, 1966). DJ File No. 130-23-2331. The United States brought this action under the Civil False Claims Act, 31 U.S.C. 231, for forfeitures and double damages on 21 allegedly

false claims made by the defendant bank against the FHA for insurance on defaulted home improvement loans. These loans had been fraudulently made through the unlawful conduct of the bank's agent, who was dismissed when the bank's officials discovered the fraud. As a result of the defaults, and other bad loans, the bank's stability was questioned, and the FDIC and the state banking agency required the bank to obtain a ruling from FHA whether the defaulted loans were insured despite the fraud. FHA officials stated that they could make no ruling until the claims for insurance were actually submitted to the FHA. The bank submitted the claims but without indicating on the claim forms what the bank knew FHA was aware of, i.e., that the loans had been fraudulently made. Subsequently, the United States brought this False Claims action and the bank counterclaimed for payment of the claims. The district court, following trial, granted judgment for the Government in the full amount sought by it under the statute and denied the counterclaim.

The Seventh Circuit affirmed the denial of the counterclaim but, on a divided vote, reversed so much of the judgment as provided for a monetary award to the United States under the False Claims Act. The majority ruled first that the record did not support a conclusion that knowingly false claims had been presented to FHA by the bank and second, that FHA's insistence that the bank file the claims to obtain the needed ruling on insurance eligibility created an estoppel against the Government to bring the false claims action.

Staff: James Gaither (Civil Division)

FEDERAL COURTS - ATTORNEYS

Third Circuit Rules That 28 U.S.C. 1654 Bars Corporation From Appearing in Federal Courts By Its Non-Lawyer President. Simbraw, Inc. v. United States (C.A. 3, No. 15782, October 5, 1966) DJ File 78-63-9. Simbraw, Inc., brought suit against the United States, apparently under the Tucker Act, with a complaint signed by its non-lawyer president, by whom it sought to appear in court. On the government's motion to dismiss for failing to appear properly by an attorney, as required by 28 U.S.C. 1654 for those who do not appear in propria persona, the district court dismissed the suit (first giving plaintiff time to appear by an attorney, which it failed to do). On the corporation's appeal, as to which it appeared specially by an attorney, the Third Circuit affirmed. The Court noted that "The sole question in this appeal as stated by the attorney at law representing appellant corporation is 'Must a corporation, to litigate its rights in a court of law, employ an attorney at law to appear for it and represent it in the court or courts before whom its rights need to be adjudicated?' *** The unequivocal answer to the above question is Yes."

Staff : Robert C. McDiarmid (Civil Division)

FEDERAL TORT CLAIMS ACT-FEDERAL PRISONERS

Assault by One Federal Prisoner on Another Not Sufficient in Itself to Establish the Government's Liability Under the Tort Claims Act to the Injured Prisoner. Fleishour v. United States, 365 F. 2d 126 (C.A. 7) (July 7, 1966) DJ File 157-23-694. Plaintiff was assaulted and injured by a fellow prisoner at a time when both were assigned quarters in the same prison dormitory. A wall-mounted fire extinguisher was used as the weapon in the attack, which had occurred while plaintiff was asleep. The trial court rejected plaintiff's claim that the prison officials had been negligent in assigning both plaintiff and his attacker to the same dormitory and in having fire extinguishers in the room (244 F. Supp. 762, N.D. Ill.)

The court of appeals affirmed, upholding the district court's finding that the responsible prison officials had acted reasonably in a manner consistent with accepted prison practices as supported by the record and not "clearly erroneous" within the meaning of Rule 52(a) of the Federal Rules of Civil Procedure. The court thus accepted the government's contentions that the government's duty to take reasonable care of federal prisoners did not impose liability upon it for every assault by one inmate upon another and recognized that absolute protection against injuries of this nature could be achieved only by segregating almost every prisoner, a highly undesirable solution which would have serious adverse consequences on prisoner rehabilitation programs.

Staff: Richard S. Salzman (Civil Division)

LABOR LAW

Attorneys Who Engage in "Persuasive Activities" Under Title II of LMRDA Must File Reports Under Act Even Though Those Activities Are Within Normal Practice Of Labor Law. In Conflict With Fourth Circuit, However Fifth Circuit Holds That Annual Reports Must Be Filed Only As To Arrangement In Which Such Activities Were Undertaken. Wirtz v. Cody Fowler, et al. (C.A. 5 No. 22,350, October 19, 1966) DJ File 156-18-83. The consultant reporting provisions of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 433 et seq., require that when, pursuant to an arrangement with an employer, a person undertakes activities where an object is, inter alia, to persuade employees as to the manner of exercising their rights to collective bargaining, or to supply the employer with information as to the activities of employees in connection with a labor dispute, he must file certain reports. These comprise a "30 day" report, which must contain a detailed statement of the terms and conditions of the arrangement, and an annual report, which must contain a statement of "receipts of any kind from employers on account of labor relations advice or services, designating the sources thereof," and of disbursements in connection with such services and the purposes thereof. 29 U.S.C. 433(b). An exclusionary clause provides that nothing in the section

should be construed to require any person "to file a report covering the services of such person by reason of his giving or agreeing to give advice" to an employer or representing or agreeing to represent an employer before a court, administrative agency or arbitration tribunal, or engaging or agreeing to engage in collective bargaining on behalf of such employer with respect to conditions of employment or the negotiation of an agreement. 29U.S.C. 433(c). And a further section provides that attorneys need not include in any report filed information lawfully communicated to them by their clients in the course of a legitimate attorney-client relationship. 29 U.S.C. 434.

This action was brought by a Florida law firm (Fowler) for a declaratory judgment that the Act did not apply to it or that if it did, it was unconstitutional and void. The Secretary counterclaimed for an injunction requiring Fowler to report. The evidence which the Secretary was able to introduce, over strong objections by Fowler, showed that firm partners and associates had, for four employers, engaged in direct contacts with employees, in speeches and individual interrogations, which were clearly "persuasive". These contacts had been carried out in situations where the attorneys had been clearly identified as lawyers for the employers. On these facts, the district court entered summary judgment for Fowler, on the grounds that the attorneys were acting openly as attorneys and that the activities were of a legal nature in the course of the attorney-client relationship. This, the district court felt, was sufficient to exclude these activities from the reporting requirements under 29 U.S.C. 433(c) and 434. In addition, it held, the Act was not intended to reach persuasive activity carried out by disclosed agents of the employer. Fowler v. Wirtz, 236 F. Supp. 22 (S.D. Fla.).

On appeal, the Fifth Circuit concluded that disclosure was not a substitute for the reports required by Congress, and that it was irrelevant whether the activities carried out were "within the legitimate practice of labor law," if they were also "persuasive." Thus, the Court held, Fowler would be required to report, as to each persuader arrangement, at least the name of its client, the receipts and disbursements pursuant to such arrangements, and the general activities on behalf of these clients, which information could not be considered to have been exempted by 29 U.S.C. 434.

In deciding what had to be reported in the annual reports, however, the court divided. The majority rejected our argument that the annual financial reports were required to contain information as to receipts and disbursements for all labor relations clients, regardless of whether arrangements for persuasive activities had been entered into with them, holding that the annual reports need cover only receipts and disbursements connected with the actual arrangements by which "persuasive" activities were undertaken. Judge Jones, dissenting as to this point, agreed with our position and that of the Fourth

Circuit in Douglas v. Wirtz, 353 F. 2d 30, certiorari denied 383 U.S. 909. As to this point, a direct conflict among the circuits now exists.

Staff: Robert C. McDiarmid (Civil Division)

LIEN PRIORITIES

New York Court of Appeals Holds That Congress Has Waived the Government's First-In-Time, First-In-Right Priority In the Case of Judgment Liens Arising From National Housing Act Activity. Jamaica Savings Bank v. Herman Williams (N. Y. Court of Appeals, October 18, 1966). DJ File 101-52-2507. The Federal Housing Administration, as a result of its insurance of home improvement loans under Title I of the National Housing Act, holds judgment liens on numerous parcels of real property in New York. The Government, consequently, is frequently made a party to mortgage foreclosure actions there, pursuant to 28 U.S.C. 2410. In two such foreclosure actions, brought in State courts by The Dime Savings Bank of Brooklyn and the Jamaica Savings Bank, first mortgage holders, the Government was named a party defendant to cut off its FHA judgment liens. The judgment liens had attached subsequent to the liens of the mortgages, and therefore under the federal rule that the lien first in time is first in right (United States v. City of New Britain, 347 U.S. 81) the mortgage liens enjoyed priority. The problem was, however, that State tax liens also encumbered the properties. The tax liens had attached subsequent to the mortgage and judgment liens and thus under the federal rule of priority the tax liens would have been inferior to those of the mortgages and judgments. But State law provided for State tax liens to be paid.

The Government contended that regardless of the priority that State law provided as between State tax liens and private liens, federal law (and the first in time, first in right rule) governed the priority relationship between the federal liens and all other nonfederal liens. Thus we contended that the State tax liens, being subsequent in time to our judgment liens, could not be given the first priority provided for by the State law. The trial court ruled in favor of the Government in each case, see 41 Misc. 2d 998 and 42 Misc. 2d 747, and the Banks appealed. The Appellate Division, Second Department, reversed, 23 App. Div. 2d 297, 260 N.Y.S. 2d 500. It agreed with the contention that federal law and the rule of first in time, first in right, applied. But it said that, with respect to National Housing Act judgment liens, Congress had waived this usual priority in 12 U.S.C. 1706b, which provides that any "real property" held by FHA shall not be exempt from taxation.

The New York Court of Appeals reviewed this holding by means of a certified question from the Appellate Division in the Jamaica Savings Bank case. The certified question was whether the Appellate Division's decision was

correct. The Court of Appeals decision answers the certified question in the affirmative and affirms the Appellate Division on that court's opinion.

Staff: United States Attorney Joseph P. Hoey, and Assistant United States Attorney Joseph Rosenzweig, (E.D. N.Y.)

SOCIAL SECURITY ACT - DISABILITY BENEFITS

Disability Claimant Residing in Depressed Region May Be Expected to Seek Employment Outside of His County of Residence. Emanuel R. Hilton v. Anthony J. Celebrezze, Secretary of Health, Education, and Welfare (C.A. 4, No. 10,254, October 4, 1966) DJ File 137-80-112. Claimant, a forty-one year old former coal miner with a sixth grade education, applied for Social Security disability benefits, alleging that he became unable to work at the age of 39 because of tuberculosis, asthma and emphysema. The Secretary denied his application, finding that claimant was able to work as an assembler of electrical appliances and that such work was available within a reasonable distance of claimant's home. The district court overruled the Secretary's decision on the ground that there was no evidence of any gainful activity available in the claimant's county of residence which he could perform.

On the Secretary's appeal to the Fourth Circuit, that court vacated the district court's decision and ordered the case remanded to the Secretary for the taking of further evidence. However, in so doing, the court ruled that claimant apparently possessed the residual capacity to engage in some type of substantial gainful employment. As to the ground of the district court's reversal of the Secretary, the court of appeals ruled that the district judge was unduly restrictive since county lines do not provide a feasible guide in determining the area in which a claimant may be expected to find available work. In particular, the court upheld the Secretary's determination as to availability which was based on expert vocational testimony that the work which claimant was found able to perform was available some 70-90 miles from his home, outside of his state and county of residence, which the court described as a heavily depressed region.

Staff: Howard J. Kashner (Civil Division)

Actual Work Performed By A Claimant On A State Work Project To Aid Unemployed Fathers Is Evidence Of Ability To Work. Jessie J. Canaday v. Gardner, (C.A. 4, No. 10233, September 28, 1966) DJ File 137-84-327. The Court of Appeals for the Fourth Circuit has affirmed the district court's decision upholding the Secretary's denial of Social Security disability insurance benefits. The Court found that although the claimant, a former coal miner, suffered an impairment, there was actual evidence in the record that claimant was able to engage in light or moderately heavy physical activity on a regular basis. Specifically, there was medical evidence on which the Secretary relied

showing that claimant could engage in such work. In addition, it appeared that claimant had been working on the West Virginia Aid to Dependent Children program, cleaning ditches and cutting brush along the highways.

The Court, in affirming, relied heavily on a statement by the State supervisor for the Aid to Dependent Children project that the claimant worked regularly and "always put in a good day's work." It pointed out that this concrete evidence was quite different from the Secretary's reliance on "abstractions based on the * * * Dictionary of Occupational Titles."

Staff: Jack H. Weiner (Civil Division)

Fifth Circuit Holds That the Test for Disability Under the Social Security Act Is The Claimant's Ability To Obtain Work In His Geographic Area in Addition to His Ability To Perform the Work. Gardner v. Luther L. Smith (C.A. 5, No. 22392, October 11, 1966). DJ File 137-75-64. Alleging that he became disabled from all work at age 48 because of a back injury, the claimant applied for Social Security disability benefits. The claimant, who had a 4th grade education, testified that he was unable to do any work, not even his last job which, while not completely sedentary, was not strenuous. However, the Secretary concluded that the evidence established a back and mental impairment which did not show an inability to perform claimant's last job, and that, in any event, there were other, completely sedentary jobs, in the national economy, which claimant was able to perform. A vocational witness had testified to the existence of sedentary-type jobs in the labor market as a whole as well as in cities within a 150-mile radius of the claimant's home in Texas. The vocational witness, however, admitted that, because of employer hiring practices and policies, including such things as automation, competition from younger employees, the necessity for pre-employment physicals, and racial discrimination, it would not be easy for the claimant actually to obtain the jobs he suggested although it might be possible.

When the Secretary denied his application for benefits, the claimant brought this action for judicial review under 42 U.S.C. 405(g). The district court reversed the Secretary and ordered that benefits be awarded. That court felt that the record showed the claimant would be unable to obtain any of the suggested jobs in the geographic locality of his home. The court thought that this was the legally relevant consideration rather than the Secretary's view that the question was the availability in the national economy of the type of sedentary work which claimant had the physical, mental and vocational capacity to perform.

On the Secretary's appeal, the Fifth Circuit affirmed. It agreed with the lower court that the test was whether, looking at the situation realistically and practically, rather than merely theoretically, there were jobs for which a claimant could reasonably be expected to compete, not anywhere in the nation,

but within the geographic area in which he would normally be expected to consider if regularly in the labor market. The court noted that the vocational witness' testimony had included consideration of employment opportunities within a 150-mile radius of the claimant's home and that therefore the Secretary's use of the nationwide test had not been an error actually prejudicial to the claimant.

But the court found that the Secretary had adopted on erroneous legal standard in contending that the test was the claimant's ability to perform a job rather than his ability to obtain that job and that this error had been prejudicial. The opinion stressed that there had to exist a reasonable opportunity for the claimant to be hired:

> If, in practice, the claimant could not reasonably expect to be hired, then no job exists for him. The Act asks if the claimant is able to engage in substantial gainful work. If no one would hire him, he cannot engage in substantial gainful work.

Thus, the Court determined that the proper question for the Secretary should have been whether the claimant's physical or mental impairment would prevent him from being hired to fill jobs if such jobs were open in the area in which the claimant could reasonably be expected to compete.

In concluding that the Secretary had applied the wrong legal standard, the court recognized that ordinarily the case would have to be remanded to have the Secretary make his determination on the basis of the correct legal standard. However, it was felt that because six years already had elapsed since the plaintiff had filed his application, and the record was probably as developed as it could be, the court properly could determine for itself the question of whether there would be substantial evidence to support the Secretary had the correct test been applied. The court concluded that there would not have been substantial evidence under the correct test.

Staff: Frederick B. Abramson (Civil Division)

DISTRICT COURT

FEDERAL TORT CLAIMS ACT - INSURANCE COVERAGE

Endorsement Added to Government Employees Automobile Insurance Policy Excluding the United States From Coverage Invalid When Issued Without Reduction in Premium. Christine O. Engle, etc. v. United States v. Southern Farm Bureau Casualty Insurance Company (W. D. Ark.). As a result of a series of court decisions holding that the United States is an additional insured under the standard omnibus clause of an automobile insurance policy issued to a Government employee (see, for example, United States v. Myers, 363 F. 2d 615

(C.A. 5, 1966)), a number of insurance companies have issued endorsements excluding the United States from coverage. Ordinarily these endorsements have been issued without any reduction in premium.

The District Court for the Western District of Arkansas (Miller, J.) has held that such an endorsement is invalid since it is lacking in consideration. Judge Miller's opinion is in accord with the only previous decision on this question, Kimball v. Pratt (W.D. Mo., 1966), an unreported opinion. This decision, which apparently will be reported, should be useful in a number of cases in which Government employees are involved in accidents while using their private automobiles in the scope of their employment for the United States. As an alternative ground, Judge Miller held that the endorsement was ineffective since it had not been received by the insured.

Staff: United States Attorney Charles Conway, Assistant United States Attorney Robert E. Johnson (W. D. Ark.); James B. Spell (Civil Division)

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CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

BAIL REFORM ACT - APPELLATE PROCEEDINGS

In order to survey the legal problems occurring under the Bail Reform Act of 1966 it will be helpful to receive copies of motions and briefs filed in appellate proceedings. Copies of all motions and briefs which have been filed or will in the future be filed in appellate proceedings pursuant to the Bail Reform Act of 1966 should be sent to the Department of Justice, Criminal Division, Legislation and Special Projects Section. We would appreciate receiving these copies as promptly as possible.

PHYSICAL DISABILITY

Alleged Incapacity of Defendant or Witness to Appear and Testify.

On occasion situations arise where defendants or proposed witnesses before grand juries or other bodies claim they cannot appear for reasons of poor health. The heart condition disability would appear to be the most often used excuse.

In situations where a defendant or a proposed witness may be exaggerating his disability and where the administration of justice is being unduly delayed, consideration should be given to testing the defendant's or witness' claim.

When we have indications of a defendant's or witness' physical activities which appear to be inconsistent with his alleged disability, we should (a) seek a court-ordered examination in a U. S. Public Health Hospital, if available, or by an impartial physician, and (b) consider a hearing in open court wherein associates of the defendant or witness are subpoenaed to testify regarding the individual's physical activities.

The court will be better informed to decide on a course of conduct after having the benefit of an independent examination and a hearing in open court.

Several options are available to the court such as finding the defendant's or witness' disability claim to be valid or alternatively finding the disability claim invalid and consequently ordering a defendant to trial or to appear before a particular body. There is a middle ground which the court may choose and that is the maintenance of a daily diary so that the court may periodically review the situation as was ordered by the District Court in United States v. Colozzo, affirmed October 25, 1966. (See United States Attorneys Bulletin, Vol. 14, page 159, Apr. 15, 1966, for District Court's action).

Staff: Thomas J. McKeon (Criminal Division)

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

DEPORTATION

Rulings in Escobedo and Massiah Cases Held to Have No Application to Deportation Cases. Ah Chiu Pang v. INS, CA 3, No. 15841, October 3, 1966.

Petitioner by this action challenged the validity of an order for his deportation. He first contended that a statement taken from him by an immigration investigator through an interpreter should not have been admitted into the deportation record because of lack of identification. The Court disagreed with the petitioner holding that the testimony of the investigator and the interpreter gave ample authentication to the statement not only under the flexible rules regarding admission of evidence before administrative tribunals in deportation proceedings but would likely meet the stricter requirements of admissibility in Court. Noting that the Government had proved the alienage of petitioner and that under 8 U.S.C. 1351 the burden then shifted to petitioner to justify his presence in the United States, the Court held that he had failed to prove he was not deportable.

Petitioner also argued that the deportation order was unconstitutional on the ground that when he was apprehended he was not offered the benefit of counsel and notified of his constitutional rights as required in criminal cases by Escobedo v. Illinois, 378 U.S. 478, and Massiah v. United States, 377 U.S. 201. The petitioner when apprehended was advised that any statement he made should be voluntary and might be used by the Government as evidence in proceedings against him. Observing that petitioner's counsel at oral argument conceded he had no decisions to support his argument, the Court declined to extend to aliens in deportation proceedings the same immunities to be accorded defendants in criminal cases as claimed by petitioner.

Petitioner finally argued that a seaman's discharge book in his name containing information coinciding with information he had given in his statement and bearing a photograph in his likeness should not have been admitted in evidence. Since the book had been used only to determine the country to which the petitioner was to be deported the Court found no error in its admission. The petition for review was denied.

Staff: United States Attorney Drew J. T. O'Keefe, Assistant United States Attorneys Merna B. Marshall and Joseph H. Reiter, (E. D. Pennsylvania).

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LAND AND NATURAL RESOURCES DIVISION

Assistant Attorney General Edwin L. Weisl, Jr.

Indians: State Courts of Nevada are Without Jurisdiction Over Intra-tribal Matters of Indian Tribes. Harry Sampson v. Tellivan Eben, et al., No. 226324, Second Judicial District Court of the State of Nevada, Washoe County, Oct. 4, 1966 (D. J. File No. 90-2-4-91). The plaintiff, a member of the Reno-Sparks Indian Colony, and an unsuccessful candidate for Tribal Councilman, brought this suit to contest the tribal election in which the defendants were the successful candidates for members of the Council. At the request of the Department of the Interior, the United States Attorney represented the defendants.

The court granted the defendants' motion to dismiss, holding that it was without jurisdiction to interfere with the internal matters of the Tribe.

Staff: United States Attorney Joseph L. Ward (Nevada).

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TAX DIVISION

Assistant Attorney General Mitchell Rogovin

SPECIAL NOTICE

The "Federal Tax Lien Act of 1966" (P. L. 89-719) was signed by the President and became law on November 2, 1966. The Act is effective immediately and applies to all pending litigation. Therefore, each assistant handling federal tax collection litigation matters should familiarize himself with the provisions of the Act since it will be necessary to review all pending cases in the light of the new law. By this time, each United States Attorney's office should have received a copy of Memo No. 495, dated November 7, 1966, pertaining to this Act, as well as a copy of the Act and accompanying reports.

CIVIL TAX MATTERS

District Court Decisions

Federal Tax Liens: Priority of Factor: Court Confirmed Stipulation Between United States and Factor as to Priorities to Fund Due and Owing to Taxpayer. United States of America to the Use of James R. Undlin v. Roscoe-Ajax Construction Co., et al. (S. D. Calif., October 30, 1966), CCH 66-2 USTC 9721. In a Miller Act suit brought by the taxpayer-subcontractor against the contractor and another subcontractor for additional payments on alleged extra work beyond the scope of the original contract, the United States intervened to enforce its tax liens against any recovery by the taxpayer. The federal tax liens arose on June 7, 1963; August 9, 1963; March 9, 1964; May 19, 1964 and August 19, 1964.

The only competing claimant was a factor which had entered into agreements with the taxpayer between January 15 and February 21, 1964 by which specific and existing accounts receivable were assigned to the factor. Based on these agreements, the factor extended financing to the taxpayer on various dates in January and February of 1964.

The Government and the factor stipulated that the United States had prior liens with respect to those liens which arose in 1963, but that the factor had priority over the remaining tax liens. The rationale behind the stipulation was that the factor had a "choate" lien prior to the 1964 tax liens because (1) the identity of the assignee was certain, (2) the amount of consideration for which the assignment was given was fixed, and (3) the property which was the subject of the assignment was specific.

Note: Since the decision in the above case was entered, the Federal Tax Lien Act of 1966 has become law. Under that law, determination of the priorities between the United States and the factor would have to be considered in the light of the provisions of Section 6323(c) and (d) of the Internal Revenue Code, as amended by the new act.

Staff: United States Attorney Cecil F. Poole; Assistant United States Attorney John M. Youngquist.

Government's Right of Set-off With Regard to Federal Construction Contract Superior to Assignment of Contract Rights to Builder's Surety. Trinity Universal Insurance Co. and First National Bank in Dallas v. United States (ND Texas, October 7, 1966) CCH 66-2 USTC ¶9712. The Taxpayer, a now defunct builder, contracted with the United States for the erection of certain Government installations. The contract contained the standard provision for assignment pursuant to the Assignment of Claims Act and further provided that any assignments made by the contractor would not be subject to the Government's right of set-off if such assignments were made to a bank or other financing institution.

The contractor, after having failed to pay federal employment taxes, entered into a loan agreement with the First National Bank in Dallas and its surety company whereby a loan was made ostensibly to the contractor, but in reality was controlled by and utilized for the benefit of the surety who guaranteed the note. The loan was secured in part by an assignment of contract rights from the builder to the bank and from the bank to the surety following the builder's default on the note and the surety's payment pursuant to its guarantee obligation.

Following the assignment, the Government off set the employee taxes due and owing from the contractor against retainages held by it.

The Court held that the assignment to the bank was used solely as a device to deprive the Government of its right of set-off with respect to the taxes and was wholly ineffective for that purpose. Thus, the provisions of the Assignment of Claims Act and the contract which provided for no set-off as to loans made to financing institutions were ineffective as against the surety company as it was not a financing institution within the meaning of said provisions, and the United States enjoyed its common law and statutory right of set-off against the insurance company, as assignee, notwithstanding any rights it enjoyed by way of subrogation or otherwise.

Staff: United States Attorney Melvin M. Diggs; Assistant United States Attorney Kenneth J. Mighell (N. D. Texas); and Howard A. Weinberger (Tax Division).

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