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ANTITRUST DIVISION

Assistant Attorney General Donald F. Turner

Sherman Act

Court Overrules Motion to Dismiss Indictment. United States v. Bowling Proprietors' Association of Northern Ohio, Inc., et al. (N. D. Ohio). D. J. File 60-277-20. Defendants filed a motion requesting dismissal of the indictment for failure to charge an offense and, in the alternative, an order for a bill of particulars.

Dismissal was asked on the ground that the allegations were conclusions of law and failed to state an offense. More fully, the indictment was attacked on its Trade and Commerce provisions, defendants claiming that the court had no jurisdiction, since the charge related to the fixing of prices for local bowling at retail bowling establishments and not to interstate commerce.

The indictment's interstate commerce allegations were principally based upon: (1) the interrelationship between the local bowling proprietors association and the National Association (BPAA) in membership constitution, finances and operations; (2) the indispensable dependency of nationwide tournaments on BPA local league bowling and local association operation of such tournaments including the setting of prices for the qualifying rounds; and (3) the effect upon the flow of commerce in the sales and rentals of bowling equipment and supplies.

Defendants, in substance, argued that: (1) the bowling activities alleged to be subject of the restraint by the local association occurred only in Cleveland; (2) the act of bowling must, of necessity, be a local activity; (3) the "Effects" section alleged purely local restraints; and (4) the Government has not alleged that the flow of bowling materials has been "suppressed, restrained or inhibited."

The Court, without opinion, on January 13, 1967 overruled the motion to dismiss, thus sustaining our reply that the allegations clearly set forth restraints on interstate commerce both under the "In Commerce" and "Affecting Commerce" doctrines. At the same time, the Court granted the alternative motion for a bill of particulars on defendants' assertions that it was necessary to adequately prepare their defense.

In the companion civil case, U. S. v. Bowling Proprietors Association of Northern Ohio, Inc., Civil 66-649, defendants filed an alternative motion similar to that in the criminal case, asking for dismissal or an order to make more definite and certain. We responded by filing a motion to stay proceedings until final action in the above criminal case which the defendants opposed. The Court sustained our motion in his January 13th decisions.

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

Clayton Act

Judgment Of Divestiture Entered. United States v. Von's Grocery Company, et al. (C. D. Calif.) D. J. File 60-0-37-342. On May 31, 1966, the Supreme Court held that the acquisition by Von's Grocery Company of all of the capital stock and assets of Shopping Bag Food Stores violated Section 7 of the Clayton Act, and remanded the case to the District Court to fashion a decree of divestiture. On January 30, 1967, Judge Charles H. Carr entered a stipulated final judgment requiring Von's to divest a group of 38 to 44 supermarkets to operate as a unit under the Shopping Bag name.

On March 28, 1960, Von's, the third largest retail grocery chain in Los Angeles, acquired Shopping Bag, the sixth largest. At that time Von's total annual sales were $94 million and Shopping Bag's were $89 million. Together they accounted for 7.5% of the retail grocery sales in the Los Angeles metropolitan area. On December 16, 1964, the district court found for the defendants and on appeal to the Supreme Court the decision was reversed.

Under the divestiture order Von's must complete divestiture within 27 months, either by sale to an eligible purchaser or by public financing or spin off. The definition of eligible purchasers excludes any retail grocery operator with a sales volume in excess of $20 million in the Los Angeles market, or in excess of $60 million in the California market, or in excess of $600 million in the United States.

If the stores are not divested within six months, they shall become the assets of a new corporation to be set up by defendant. In the event a sale is not consummated within 15 months Von's must make provision to spin off the stock of the new corporation or to offer the shares of the new corporation at public sale. In any event, Von's must either sell or spin off the new corporation within 27 months of the effective date of the final judgment. If divestiture is by spin off, the shares distributed to the principal stockholders of Von's will be deposited in trust to be finally disposed of within a 5 year period.

At the time of the merger Shopping Bag, the acquired chain, operated 38 retail supermarkets. Since the acquisition ten of these markets have been remodeled and three have been closed. The final judgment requires Von's to divest itself of the remaining 35, including the ten which have been remodeled. Total annual sales of these stores is about $110 million. Von's must also add to the group of stores to be divested 3 to 5 additional outlets with sales of $11.5 million. The additional stores are to be selected by agreement between Von's and the purchaser. Furthermore, for each full five month period that elapses between the date six months after the final judgment and the date of divestiture (i.e., on the 11th, 16th, 21st and 26th months), an additional supermarket must be added to the unit to be divested.

Von's is further prohibited, for a period of five years, from acquiring the stock or assets of any other grocery chain without the permission of the plaintiff.

Plaintiff was awarded taxable costs.

Staff: James J. Coyle, John F. Hughes and Lewis E. Rubin (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General Barefoot Sanders

COURTS OF APPEALS

ADMINISTRATIVE LAW--PRIMARY JURISDICTION

Courts Will Not Pass Upon Effectiveness of Krebiozen or Need for Exemption From Food and Drug Act Until After Administrative Agency Has Exercised Its Primary Jurisdiction. Michael Tutoki et al. v. Celebrezze (C. A. 7, No. 15701, January 23, 1967). D. J. File 145-16-152. This action was brought against the Secretary of Health, Education and Welfare and the Commissioner of the Food and Drug Administration to obtain a declaratory judgment based upon their conduct in prohibiting the interstate shipment of Krebiozen to the alleged detriment of the plaintiff-appellants, all cancer patients. The Government moved to dismiss.

Section 505 of the Food, Drug and Cosmetics Act, 21 U. S. C. 355 permits the shipment of drugs in interstate commerce only where, after application, the Secretary has approved the drug or exempted the drug for research. The Act also provides for judicial review after the application has been denied by the Secretary.

The Court of Appeals held that the district court correctly dismissed the complaint, since plaintiffs had not made any application to the F. D. A., and the F. D. A. has not promulgated any order or passed upon any application. The Court noted that this determination is a matter within "the primary jurisdiction" of the F. D. A. and the courts have "neither the facilities nor the expertise to pass on Krebiozen in the first instance."

Staff: United States Attorney Edward V. Hanrahan; Assistant United States Attorneys John Peter Lulinski and William J. Hurley (N. D. Ill.)

ADMIRALTY

Tugboat That Negligently Maneuvers Its Tow Into Lock Is Responsible for Resulting Damage to Lock and Dam Structure; Tug Not Absolved of Its Negligence by Regulations Stating Authority of Lockmasters. Logan Charter Service, Inc., et al. v. Cargill, Inc., et al., and the United States (C. A. 8, No. 18,088, February 6, 1967.) D. J. File 61-39-17. Lock and Dam No. 3 on the Mississippi River is one of many such installations owned by the United States and operated by the Corps of Engineers. On June 7, 1963, the tug CITY OF JOLIET, while attempting to maneuver into position to push her

six-barge-tow into the lock chamber, lost control of the tow. The barges were caught in a cross-current and one of them crashed into the dam structure and sank. In this consolidated litigation resulting from the crash, the owners of the tug claimed that the negligence of the Government's lockmaster and his assistant in supervising the approach of the tow was the cause of the crash; the Government urged that the tug and her crew were solely at fault.

After a trial, the district court found that the negligence of the crew of the tug was the sole cause of the crash and resulting damage to the dam and the barge. Judgment was entered in the Government's favor for $56,500--$56,000 for actual damage to the dam and $500 as a statutory penalty under 38 U.S.C. 408, 411, 412--plus interest and costs.

The Eighth Circuit affirmed, holding that the district court was clearly correct "in finding appellant guilty of negligence which caused the collision and that the Government was guiltless of actionable negligence". The Court of Appeals further held that 33 C.F.R. § 207.300(a)--a regulation stating the authority of lockmasters--does not "absolve the crew of an approaching vessel from negligence" in failing to maneuver the flotilla into proper position to enter the lock.

Staff: Martin Jacobs (Civil Division)

GOVERNMENT CLAIMS--USE OF STATE PROCEDURES TO PROTECT GOVERNMENT'S FINANCIAL INTEREST

United States May Take Advantage of State Procedures to Protect Financial Interests of Government in One of Its Money Lending Transactions. Albert J. Lillygreen et al. v. United States (C.A. 10, No. 8661, December 28, 1966) D.J. File 105-13-50. The Small Business Administration had sold real estate and personal property to two individuals. After paying the down payment and the stipulated interest, the parties defaulted. While in default, they assigned the rights to the property to a corporation which they owned and controlled.

The United States then brought this action seeking recovery of possession of the land and equipment, and damages for withholding of possession, a remedy available under the applicable Colorado statutes. The district court, after trial, found in favor of the United States. The Court of Appeals affirmed the Government's right to proceed under the applicable state law. The Court pointed out that "It is true that the Small Business Administration operates throughout the United States, but such fact raises no presumption of the desirability of a uniform federal rule with respect to proceedings to protect the financial interests of the Government in one of its money lending transactions. To deny the Small Business Administration the use of the well

established procedure in the State of Colorado would not be warranted except under the most compelling reason of federal policy."

Staff: United States Attorney Lawrence M. Henry; Assistant United States Attorney David I. Shedroff (D. Colo.).

GOVERNMENT CONTRACTS

Government Contractor Who Fails to Utilize Appeal Procedure Under Disputes Clause May Not Later Contest, in Action Brought by Government for Recovery, Determination of Contracting Officer That Contractor Is Liable to Government for Specific Amount. United States v. A. L. Ulvedal, etc., (C. A. 8, No. 18,495, February 8, 1967) D. J. File 77-56-132. This action was instituted by the Government, seeking to recover $7,963.34, which a contracting officer, in a determination under a standard "disputes" clause of a construction contract, had determined to be due it from the contractor. That determination had not been appealed by the contractor, and accordingly, under the express terms of the disputes clause, was final and conclusive on the parties. The district court rejected the Government's motion for summary judgment in its enforcement suit, and apparently intended to allow the contractor to attempt to show that, as it contended, the decision of the contracting officer had been erroneous.

On our interlocutory appeal, the Eighth Circuit agreed that the decision of the contracting officer was made final by contract and that there was no distinction between affirmative use of the decision by the Government and defensive use, contrary to the views of the contractor and the district court. The Court of Appeals disposed of the contractor's laches and estoppel arguments by noting that the United States was not subject to such defenses. The Court then reversed with directions to grant the motion of the United States for summary judgment in the amount prayed for.

Staff: Robert C. McDiarmid (Civil Division)

HOUSING--URBAN RENEWAL

Federal Courts Have No Jurisdiction Over Suit Attacking Urban Renewal Plan, Despite Allegations of Discrimination in Violation of Civil Rights Act of 1964; Urban Renewal Plan Is Not Illegally Discriminatory Because of Its Failure to Provide for Integrated Relocation. Green Street Association, et al. v. Daley, et al., (C. A. 7, No. 15619, January 25, 1967) D. J. File 145-115-492. Plaintiffs, residents of the Central Englewood area in Chicago, brought this suit attacking an urban renewal plan covering the area. They alleged that the plan was a conspiracy to rid the area of Negroes, that the plan violated Section 601 of the Civil Rights Act of 1964, 42 U.S.C. 20001 (which forbids

discrimination under a federally-assisted program) by failing to provide for integrated relocation, and that the hearing held by the local officials prior to their adoption of the plan was insufficient. Both the City officials who adopted the plan, and the federal officials responsible for granting federal aid, were joined. The district court dismissed the complaint on the authority of Harrison-Halsted Community Group, Inc. v. Housing & Home Finance Agency, 310 F. 2d 99 (C. A. 7), certiorari denied 373 U.S. 914, in which the Court of Appeals had held that residents of an urban renewal area have no standing to attack an urban renewal plan.

The Court of Appeals affirmed. As to the charge that the local defendants had conspired, under color of state law, to deprive plaintiffs of their civil rights, the Court held: "cases presenting challenges to urban renewal programs are matters for the condemnation proceedings in the state courts if the taking is ostensibly for a public purpose, even though violations of federally guaranteed rights are claimed. Only in those exceptional cases like [Progress Development Corp. v. Mitchell, 286 F. 2d 222 (C. A. 7)], where the facts alleged indicate to all outward appearances that the taking is designed solely to deny constitutional rights, is the power of eminent domain subject to the prior scrutiny of the federal courts."

With respect to the allegations of procedural error, the Court found its earlier decision in Harrison-Halsted dispositive (similar allegations had been made there). The Court found no reason to re-examine that decision.

As to the charge that the relocation provisions of the plan violated Section 601 of Title VI of the Civil Rights Act of 1964, the Court also held that plaintiffs had no standing to sue the federal officials. The Court pointed out that Title VI provides an administrative procedure to be followed by federal officials before cutting off funds on the grounds of discrimination. The Court concluded: "If an individual suit for an injunction against the federal officials were permitted, the administrative procedure would be bypassed. We do not think that section 601 was intended to permit the termination of federal participation in a given program by this means."

Finally, the Court concluded that the allegation of failure to provide for integrated relocation did not state a claim against the local officials under the Civil Rights Act of 1964. The Court concluded that the relocation provisions of the plan simply recognized the fact of segregated housing in Chicago--a fact which the defendants were powerless to change: "The city admittedly could not require relocation in any particular area; it may only determine what housing is available in fact and offer whatever assistance it can in furnishing this information to displacees. The local defendants may not be enjoined from proceeding with the plan simply because the plan fails to include

what the local defendants would be powerless to enforce--integrated relocation."

Staff: Martin Jacobs, Robert V. Zener (Civil Division)

SOCIAL SECURITY ACT--DISABILITY

Substantial Evidence Required of Availability of Employment Opportunity for Disability Claimant in Geographic Area in Which He Can Be Expected to Seek Work When Unable to Return to Prior Work; Relevance of Medical Evidence Not Contemporaneous With Claimed Period of Disability. Gardner v. Ellice C. Brian (C. A. 10, No. 8342, November 29, 1966). D. J. File 137-59-20. In this Social Security disability case, the district court reversed the Secretary of Health, Education and Welfare's decision denying benefits to claimant on the ground that the medical evidence relied upon by the Secretary was not contemporaneous with the claimed period of disability and was, therefore, irrelevant. The district court further suggested that its decision was also based on the unavailability of jobs which claimant might still be able to perform (considering his medical impairments) in his immediate geographic area.

The Tenth Circuit affirmed the district court's judgment by a 3-2 vote following an en banc hearing. The Court rejected the district court's reasoning that non-contemporaneous medical evidence is irrelevant. The majority, however, ruled that geographic job availability was a relevant consideration in determining disability within the meaning of the Social Security Act where claimant is unable to return to the kind of work which he formerly performed. The majority found no substantial evidence in the record that jobs were available to claimant in his home area, and sustained the district court's judgment on that ground.

The two dissenting judges would reject, as irrelevant to a disability determination under the Social Security Act, the test of geographic job availability. They could find nothing in the wording of the Act or its legislative history indicating Congressional intent to hinge disability determinations on the availability of job opportunities to a claimant in the georgraphic area in which he could be expected to seek work.

Staff: David L. Rose; Harvey L. Zuckman (Civil Division)

SOCIAL SECURITY ACT--DISABILITY

Substantial Evidence of Availability of Employment Opportunities in Geographic Area in Which Claimant Can Be Expected to Seek Work Required in Record. Lydia L. Kirby v. Gardner (C. A. 10, No. 8755, December 2,

1966) D. J. File 137-29-118. There was no dispute in this disability case as to the Secretary's finding that claimant, despite painful arthritis in the hands and back, could still engage in sedentary work which did not involve fine manipulation of the hands. Following its recent en banc decision in Gardner v. Ellice C. Brian (November 29, 1966, D. J. File 137-59-20), digested supra, the Tenth Circuit nonetheless reversed the district court's order upholding the Secretary's denial of disability benefits, on the ground that there was no substantial evidence in the record that jobs were available to the claimant in the geographic area in which she could reasonably be expected to seek employment.

Staff: Harvey L. Zuckman (Civil Division)

SOCIAL SECURITY ACT--NON-GENUINE NATURE OF EMPLOYMENT

Entitlement to Social Security Benefit Not Established by Purported Wages That Are Merely Circuitous Return of Rents Otherwise Due Claimant. Eastman v. Gardner (C. A. 6, No. 16,791, February 13, 1967) D. J. File 137-57-112. Claimant asserted entitlement to Social Security benefits on the basis of alleged successive employments as a photo-finisher and parking lot attendant for his stepsons. During this period he received substantially lesser sums from real estate that was being managed for him, or being leased from him, by one of the stepsons. There was evidence of actual performance by claimant of his work as photo-finisher and parking lot attendant but the Secretary, without reaching questions of the extent of this work, held that there was no genuine employment relationship. The district court held that the Secretary's finding was unsupported by substantial evidence.

The Court of Appeals, reversing the district court and dismissing claimant's action, found substantial evidence to support the Secretary's conclusion that the "paper facade of 'wages' paid to claimant represented a mere circuitous, indirect return to claimant of portions of rentals from his own property." The Court also adverted to the somewhat high "wages" given claimant for his type of work, as against prevailing wages, but this disparity was not a strong one. This case is an example of the rule, specifically reenunciated by the Court, that actual payment of pseudo-wages "does not in itself prove an employment relationship."

Staff: J. F. Bishop (Civil Division)

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CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

BANKING

Acting Comptroller of the Currency William B. Camp issued a memorandum dated December 28, 1966, to all Regional Administrators and Regional Counsel directing them to refer all reports of possible criminal violations of the Federal banking statutes from the regional offices of the Comptroller of the Currency directly to the United States Attorney for the district in which the alleged violations occurred.

GAMBLING - ENTRAPMENT

Signed Agreement by Supplier of Gambling Paraphernalia to Cease and Desist From Manufacturing, Printing, Sale or Distribution of Certain Items of Gambling Paraphernalia Previously Sold by Him Does Not Constitute Entrapment as Matter of Law. United States v. Wert Lanelvin Akins (C. A. 6, No. 16,941, February 6, 1967) D.J. File 165-72-6.

Appellant was found guilty by a jury on five counts of a six count indictment charging him with causing gambling supplies and equipment to be shipped in interstate commerce with the intent of carrying on his unlawful gambling business in Tennessee, in violation of 18 U.S.C. 1952.

During September and October 1964, and January 1965, appellant caused certain gambling supplies and paraphernalia to be shipped to him in Memphis by REA Express from Chicago, Illinois. The gambling supplies were shipped to appellant from Chicago by Charles P. Stahl, doing business as Taylor and Company. For some time prior to 1964, FBI agents had been conducting an investigation of Stahl's operations in Chicago. In 1964, Stahl signed an agreement to cease and desist from the manufacturing, printing, sale or distribution of certain items of gambling paraphernalia previously sold by him.

The Appellant contended that the gambling paraphernalia shipped to him by Stahl was not included in the "cease and desist" agreement and that Government agents led Stahl to believe that he could ship such items legally in interstate commerce and could inform his customers to that effect. He argued that this constituted entrapment, and that the district court should have decided the issue of entrapment in his favor as a matter of law instead of submitting it to the jury.

The Court of Appeals held that the "cease and desist" agreement executed by Stahl did not constitute entrapment as a matter of law, and that the defense of entrapment presented an issue of fact which properly was submitted by the district judge to the jury under the facts of this case.

Staff: United States Attorney Thomas L. Robinson; Assistant United States Attorneys William A. McTighe and Jerry B. Albright (W.D. Tenn.).

INTERSTATE TRANSPORTATION OF STOLEN GOODS

Privately-owned Boat Stolen From Florida and Sailed Into Gulf of Mexico Held "Goods" Under National Stolen Property Act. United States v. Lloyd (E.D. La., August 31, 1966, D.J. File 122-32-101).

Defendant stole a forty-four foot schooner from a Pensacola, Florida private dock and sailed it into the Gulf of Mexico off New Orleans, where he was spotted by the Coast Guard. He stated to the FBI that he had intended to sail to South America, and subsequently entered a plea of guilty to a charge of having violated 18 U.S.C. 2314.

Thefts of privately-owned vessels from waters within a state's boundaries or jurisdiction have been held not to violate 18 U.S.C. 661 (theft within special maritime and territorial jurisdiction). The interpretation of section 2314 suggested by the instant case is, therefore, noteworthy in that it brings the transportation of such stolen vessels within the jurisdiction of the Federal courts. This interpretation is consistent with earlier constructions of 2314, which held that the phrase "goods, wares, merchandise," embraces all items that are (or could be) the subject of commerce.

Staff: United States Attorney Louis C. LaCour; Assistant United States Attorney John C. Ciolino (E.D. La.).

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LAND AND NATURAL RESOURCES DIVISION

Assistant Attorney General Edwin L. Weisl, Jr.

Condemnation

Remittitur; Calculation of Interest on Judgment Where Remittitur Is Ordered; Right to Jury Trial in Federal Condemnation. Gila River Ranch, Inc., et al. v. United States (C. A. 9, Nos. 20,643 and 20,644, October 13, 1966, amended November 28, 1966) D. J. Files 33-3-200-29 and 33-3-200-32. The district court entered a judgment upon a jury verdict of $1,132,000, plus interest. The court then denied the United States' motion for a new trial conditioned upon the owners' remitting $125,000 from the verdict. The owners agreed to remit $125,000 from the judgment. Upon motion by the United States and over the owners' objections, the court then entered a new judgment based upon a remittitur of $125,000 from the verdict, plus interest. The difference in interest between the two judgments amounted to $28,125.

The Court of Appeals reversed, holding that there was no merit to the owners' basic claim that interest should be calculated upon the verdict before remittitur. The Court recognized that, contrary to appellants' argument, there is no right under the Seventh Amendment to a jury trial in a federal condemnation case. However, since the owners had not consented to, or at least misunderstood the remittitur directed, the Court held it was error to enter the second judgment. Accordingly, the case was remanded to the district court to enter the appropriate judgment, if the owners consent, or to reconsider the motion for a new trial in the court's discretion.

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

Public Lands

Mines and Minerals: Mineral Leasing Act Did Not Repeal or Modify Scope of President's Authority Under Pickett Act to Issue Executive Order Withdrawing Public Lands From Oil Shale Leasing. Mecham v. Udall, 369 F. 2d 1 (C.A. 10, 1966) D. J. File 90-1-18-692. Appellants filed applications for oil shale leases on lands belonging to the United States in Utah pursuant to the Mineral Leasing Act, 30 U. S. C. 241. The applications were rejected by the Secretary of the Interior on the grounds that the lands had been withdrawn from oil shale leasing by Executive Order No. 5327, issued by President Hoover on April 15, 1930, pursuant to the Pickett Act, 43 U. S. C. 141. Appellants contended that the Executive Order was only to be temporary in nature and that it was void because the President's authority under

the Pickett Act authorized him to withdraw lands from "settlement, location, sale or entry" and not from leasing.

The district court dismissed appellants' action in the nature of mandamus to compel the Secretary to issue the leases and the Court of Appeals affirmed, pointing out that the procedure adopted by the Government for making its mineral lands available for development was changed by the Mineral Leasing Act, and that this change was from "location" to leasing, but there was no indication by the Mineral Leasing Act of any intention of Congress to alter the authority of the President expressed in the Pickett Act relative to changes in land status. The Court said (369 F. 2d at p. 3):

> There is no reason to narrow the scope and change the purpose of the Pickett Act by reason of a change in the method for developing the lands when the purpose of the Pickett Act can be continued and nothing is presented to show that Congress intended to change it by providing for leasing. The status of the lands is a matter separate and distinct from methods of developing or disposing of the lands.

The Court held that the decisions of Udall v. Tallman, 380 U. S. 1 (1963), and Wilbur v. United States, 46 F. 2d 217 (C. A. D. C. 1930), answered the argument of appellants and demonstrate that the Executive Order is, and was, valid to withdraw the lands from leasing. The Court further pointed out that the Mineral Leasing Act did expressly "authorize" the Secretary to lease oil shale deposits, but that this was not a requirement that he lease nor was it different from other general authorizations to lease where lands may be withdrawn. The Court said (369 F. 2d at p. 3):

> The power is given subject to the existing status of the land, and it must also be construed to be subject to existing restrictions or limitations of whatever nature not expressly altered. * * * The authority was given to provide for the eventuality of a change of status.

Answering appellants' argument that the Pickett Act authorized only "temporary" withdrawals and not a withdrawal from 1930 to present, the Court said (369 F. 2d at p. 4):

> We cannot say that from the Government's viewpoint and considering its permanence compared to the life of man, and significance of oil shale as a national resource, that this has not been temporary. There is evidence that investigations and studies are being conducted to carry out the purposes of the withdrawal.

The Court concluded that appellants could seek a revocation of the order from either the President or from Congress if they feel the withdrawal has extended beyond what a temporary one should.

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

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TAX DIVISION

Assistant Attorney General Mitchell Rogovin

CIVIL TAX MATTERS
District Court Decisions

Bankruptcy: Penalties for Failure to Pay Over Withheld Taxes Incurred by Debtor-in-possession During Pendency of Chapter XI Bankruptcy Proceeding Do Not Carry Over and Attach to Bankrupt Estate in Subsequent Adjudication of Bankruptcy. In the Matter of Samuel Chapman, Inc. (S. D. N. Y., January 25, 1967). (CCH 67-1 U. S. T. C. Par. 9209). On January 21, 1964, the bankrupt, Samuel Chapman, Inc., filed a petition for arrangement under Chapter XI of the Bankruptcy Act. Samuel Chapman, Inc. was continued in the arrangement proceeding as debtor-in-possession. As debtor-in-possession, it had the duty of purchasing biweekly depositary receipts and filing employer's quarterly tax returns for taxes withheld from the wages of employees. As a result of the failure of the debtor-in-possession to perform these duties, penalties were assessed against it by the Internal Revenue Service pursuant to Sections 6651 and 6656 of the Internal Revenue Code of 1954. Subsequently, on November 9, 1964, Samuel Chapman, Inc. was adjudicated bankrupt. The Internal Revenue Service filed a proof of claim requesting that the trustee in bankruptcy pay the penalties as administrative expenses of the superseded arrangement proceeding. The trustee filed an objection to the claim.

The question presented was whether an estate in a liquidating bankruptcy may be subject to penalties previously incurred by the debtor-in-possession in a superseded Chapter XI proceeding.

The referee found that the question was not controlled by Nicholas v. United States, 384 U.S. 678 (1966), which did not decide whether penalties incurred by a debtor-in-possession could be assessed against a superseding trustee, or by Boteler v. Ingels, 308 U.S. 57 (1939), which held that section 57j of the Bankruptcy Act did not prevent the collection of a penalty from a trustee when the penalty had been incurred by the trustee. Also, the referee admitted that under 28 U.S.C. 960 the debtor-in-possession operating the business pursuant to order of bankruptcy was subject to taxes in the same manner as any other corporation and was, therefore, subject to penalties assessed by the Internal Revenue Service to enforce collection. However, it was found that this did not necessitate holding that the penalties assessed penetrated a subsequent adjudication of bankruptcy and were collectible from the trustee. Rather, it was held that there were important differences between a debtor-in-possession and trustee in bankruptcy, in that a trustee was appointed by the creditors and could be surcharged; therefore, they could

not be treated as one person and the liabilities of the debtor-in-possession were not necessarily those of the trustee.

Noting that the policy underlying the bankruptcy laws was opposed to the imposition of penalties which reduce the return to creditors, the referee concluded that although section 57j might not apply to penalties occurred in the debtor-in-possession period, its philosophy did. Accordingly, the referee ruled that in the proper exercise of its equity powers the bankruptcy court should extend the effect of section 57j and bar all claims for penalty, whether incurred prior to the arrangement proceeding or during its existence. As a result, the referee sustained the trustee's objection to allowance of the penalties and expunged the Director's claim.

The filing of a petition for review to the District Court is under consideration.

Staff: United States Attorney Robert M. Morgenthau; Assistant United States Attorney Ezra Friedman (S. D. N. Y.).

Suit to Restrain Collection of Interest on Income Tax Deficiencies and Additions to Tax (Penalties) Determined by Tax Court Held Barred by Section 7421(a) of 1954 Code. Gajewski v. United States, acting through District Director of Internal Revenue (D. N. D. , January 5, 1967) (67-1 U. S. T. C. , Par. 9227). Taxpayers instituted suit to enjoin the District Director of Internal Revenue for the District of North Dakota from collecting, by levy, interest on income tax deficiencies and additions to tax (penalties) determined by the Tax Court pursuant to stipulation of the parties. Money orders and personal checks tendered by the taxpayers in payment of the deficiencies and additions to tax bore restrictive endorsements to the effect that they were tendered and accepted in full settlement of the tax liabilities as determined by the Tax Court. After having cashed the checks and money orders, the District Director determined that certain sums, representing interest on the deficiencies and additions to tax, were due and owing and sought to effect collection by levy on personal property owned by the taxpayers. This suit resulted.

The District Director moved to dismiss the action on the grounds that the complaint failed to state a claim upon which relief could be granted and that the Court lacked jurisdiction over the subject matter because of the prohibition of Section 7421(a) of the 1954 Code barring suits to enjoin the assessment and collection of any "tax", except in circumstances not relevant here. Taxpayers contended that the levy was not for taxes and hence that their suit fall within the exceptions to Section 7421(a) stated in Enochs v. Williams Packing Co., 370 U.S. 1.

At this point it may be noted that the Tax Court has no jurisdiction to determine a taxpayer's liability for interest. The reason is that once a petition is filed with the Tax Court for a redetermination of proposed deficiencies, the deficiencies may not be assessed until liability for the tax has been finally determined. Matters involving interest must await the outcome of such redetermination. M. Schuster v. Commissioner, 312 F. 2d 311, 319 (C. A. 9).

Once a tax is assessed, Section 6601(a) provides that interest shall be charged from the due date to the date of payment at the rate of 6 percent. Subsection (f)(1) provides that such interest shall be paid upon notice and demand, and shall be assessed, collected and paid in the same manner as taxes. Subsection (f)(3) provides that if assessed penalties or additions to tax are not paid within 10 days from the date of notice and demand, interest shall be imposed from the date of notice and demand to the date of payment. Noting that under Section 6601(f)(1) the word "tax" was deemed to refer to "interest" imposed on such tax, and that Section 6601(a) required the payment of interest on any tax imposed but not paid on or before the last date prescribed for payment, the Court concluded that the District Director was required to assess and collect interest due on delinquent taxes and that such interest was a "tax" within the meaning of Section 7421(a). Accordingly, the Court granted the Government's motion to dismiss the complaint.

Staff: United States Attorney John O. Garaas (D. N. D.); Thomas H. Boerschinger (Tax Division)

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