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ANTITRUST DIVISION

Assistant Attorney General Donald F. Turner

GRAND JURY

GOVERNMENT ORDERED TO PRODUCE GRAND JURY TRANSCRIPTS.

United States v. Carnation Company of Washington, et al. (E. D. Wash., February 28, 1967, D. J. File 60-139-143.)

Defendant Inland Empire Dairy Association filed a motion renewing its request for permission to inspect and to copy the grand jury transcript of the testimony of a witness. The court had previously denied defendant's request.

Defendant's motion for reconsideration was based upon United States v. Dennis, 384 U. S. 855. The first four grounds of the five relied on for disclosure in Dennis were present in this case, and defendant needed the transcript of testimony for preparation of its cross examination of the witness at the taking of his deposition.

In argument on defendant's motion for reconsideration, the Government contended that the facts in the Dennis case were different from the facts in the present case because:

(1) The witnesses whose transcripts of testimony were permitted to be disclosed in Dennis had already testified at trial some years after they had testified before the grand jury;

(2) The witness whose grand jury transcript was sought in this case was under a sentence of contempt for refusing to testify when the Government had attempted to take his deposition previously, and the Government did not know whether he would purge himself of contempt by testifying at the time set for the continuation of the taking of his deposition;

(3) The policy of the secrecy of the grand jury should not be violated by disclosure of a witness' grand jury testimony if such witness had not testified and did not choose to purge himself of his contempt;

(4) If defendant did not choose to purge himself of contempt, he has not and could not show a particularized need and disclosure;

(5) One of the reasons for the policy of the grand jury secrecy is to protect the witnesses appearing before the grand jury and premature disclosure violates that policy; and

(6) The proper time, if any, to grant disclosure would be only after the witness had testified at deposition. In this case the deposition was scheduled for March 1, 1967, and thereafter until completed, and a delay after the witness' direct examination, in order to give defendant a chance to inspect the transcript would create no hardship or obstruct any trial or other proceedings.

At the end of argument the Court reversed its previous order denying disclosure and granted defendant's request basing his decision upon Dennis, supra, and Osborne v. United States, No. 20,240 (9th Cir. 1967). The court then ordered that the grand jury transcript be produced in court for defendant's inspection and copying at 3:00 p.m. on February 28, 1967.

On February 28, 1967, the Court entered its order granting disclosure, which after motion by the Government, contained in brief the following restrictions:

(1) That all names of identified jurors should be deleted;

(2) Each defense counsel shall be permitted to examine the transcript and to make one copy of the testimony of the witness for his use; provided, however, (a)

that the original transcript shall be returned to plaintiff's counsel within such reasonable time as may be required to copy such transcript, (b) that all copies shall be retained exclusively in the custody of defense counsel, (c) that no such transcript or copy shall at any time be carried into any place of business of any corporate defendant herein, and (d) that, except as provided in paragraph (3) below, no counsel shall reveal to any other person, including employers of the witness (either by showing such person a copy of the transcript or otherwise), the form or substance of the testimony given by the witness before said grand jury;

(3) Defense counsel shall permit the witness and his counsel to examine the transcript (or a copy thereof);

(4) No counsel for any party shall, by reading from the grand jury transcript or by expressly referring to it, disclose upon the public record (either on depositions or at trial) any matter occurring before said grand jury except as provided by further order of the Court, pursuant to the provisions of Rule 6(e), F. R. Crim. P.;

(5) Immediately upon the termination of the above action, and without regard to whether an appeal is taken by any party, all persons subject to the order (other than counsel for the plaintiff) shall deliver to the Clerk of the Court all grand jury transcripts and copies thereof as may be in their possession, and the Clerk shall hold such transcripts and copies subject to the provisions of Rule 6(e), F. R. Crim. P.

Staff: Gerald F. McLaughlin and Luzerne E. Hufford, Jr. (Antitrust Division)

FALSE CLAIMS ACT AND CLAYTON ACT

GOVERNMENT DISMISSES DEFENDANTS UPON PAYMENT OF DAMAGES UNDER FALSE CLAIMS ACT AND SECTION 4(a) OF CLAYTON ACT.

United States v. Burlington Industries, Inc., et al. (S. D. N. Y., March 20, 1967, D. J. File 60-14-55) and related cases.

Plaintiff's motion dismissing damage cases filed by the Government under the False Claims Act (31 U. S. C. 231-233) and Section 4(a) of the

Clayton Act (15 U. S. C. 15(a)) was granted in consideration of settlement payments totalling $737,500 received by the Antitrust Division. The suits sought double damages plus forfeitures under the False Claims Act or, in the alternative, single damages under the Clayton Act.

Payments by each defendant and the cases to which such payments relate, are as follows:

1. Burlington Industries, Inc.: $382,500

   United States v. Burlington Industries, Inc., et al.
   (65 CIV 2293 - S. D. N. Y.)

   United States v. Burlington Industries, Inc.
   (65 CIV 2294 - S. D. N. Y.)

2. J. P. Stevens & Company, Inc.: $260,000

   United States v. Burlington Industries, Inc., et al.
   (65 CIV 2293 - S. D. N. Y.)

   United States v. J. P. Stevens & Company, Inc.
   (65 CIV 2295 - S. D. N. Y.)

3. Clark-Schwebel Fiber Glass Corporation: $ 45,000

   United States v. Burlington Industries, Inc., et al.
   (65 CIV 2293 - S. D. N. Y.)

   United States v. Clark-Schwebel Fiber Glass Corporation
   (65 CIV 2297 - S. D. N. Y.)

4. Coast Manufacturing and Supply Company $ 50,000

   United States v. Burlington Industries, Inc., et al.
   (65 CIV 2293 - S. D. N. Y.)

Coast Manufacturing and Supply Company was also named as a defendant in United States v. Coast Manufacturing and Supply Company (Civil 43-887, N. D. Cal.,) which was also dismissed on March 20, 1967.

The damage complaints were filed on July 27, 1965. 65 Civil No. 2293 alleged price fixing conspiracies during an eight-year period between and among the defendants which were four of the largest domestic weavers of glass fiber industrial fabrics. The other damage cases

alleged resale price maintenance between each named defendant and its distributors of glass fabrics. The complaints alleged that the price fixing conspiracies resulted in overcharges paid by the Government in its capacity as a purchaser of glass fiber industrial fabrics which were used as a component in many products purchased directly and/or indirectly by the Government from defendants for use in defense, aerospace and missile programs. The complaints covered only direct sales to the Government, and sales to cost-plus fixed-fee contractors of the Government.

The damage complaints paralleled civil and criminal antitrust suits filed on October 9 and November 23, 1964. The criminal case was terminated as the result of the entry of nolo contendere pleas, and fines totalling $106,000 were imposed.

The damage settlements above listed were made under the provisions of both the False Claims and Clayton Acts. Under Revenue Ruling 64-224, the payments of $737,500 are not deductible from corporate income taxes. Previously, the defendant United Merchants & Manufacturers, Inc., settled for $250,000 and the defendant Exeter Manufacturing Company for $75,000, bringing the total damage recoveries to $1,062,500.

Final judgments in civil injunctive suits were also entered on March 20 and prohibit the defendants from conspiring with each other to fix prices, and engaging in resale price maintenance and other practices with independent distributors.

Staff: Samuel B. Prezis, William F. Costigan, Louis Perlmutter and William D. Kilgore, Jr. (Antitrust Division)

CIVIL DIVISION

Assistant Attorney General Barefoot Sanders

COURTS OF APPEALS

APPELLATE PRACTICE -- FINAL JUDGMENT

ORDER DISMISSING COMPLAINT IS NOT FINAL JUDGMENT FROM WHICH APPEAL CAN BE TAKEN.

United States v. John M. Reilly (C.A. 10, No. 8707, D.J. File 157-49-145.)

The United States brought this action to recover by way of indemnity and/or contribution against a joint tortfeasor after the United States had settled five law suits. Defendant's motion to dismiss the complaint was granted, and an appeal was taken from the order of dismissal.

The Tenth Circuit dismissed the appeal as not being from an appealable order since, while the complaint had been dismissed, the action had not been dismissed. The Court of Appeals pointed out that where a complaint is dismissed, the plaintiff should either amend the complaint or advise the district court that it elects to stand on the complaint. At that point, the district court will then enter a final judgment dismissing the action, and from that judgment an appeal can be taken.

Staff: Jack H. Weiner (Civil Division)

CONVERSION OF PROPERTY SUBJECT TO FEDERAL LIEN

FEDERAL LAW GOVERNS LIABILITY IN CONVERSION IMPOSED UPON LIVESTOCK AUCTIONEER WHO SELLS ANIMALS SUBJECT TO LIEN FILED BY UNITED STATES.

United States v. Carson and Ellis (C.A., No. 16801, February 8, 1967, D.J. File 136-72-103.)

Upon obtaining an operating loan under the Bankhead-Jones Farm Tenant Act, 7 U.S.C. 1941, defendant Carson executed a promissory note payable to the United States, secured by a "Mississippi Chattel Deed of Trust" on livestock and other chattels located in Mississippi. The deed of trust was recorded in Mississippi and Carson agreed not to sell or encumber the covered property without Government consent. Contrary to this agreement, he delivered the covered cattle to defendant Ellis, a Tennessee livestock broker, who sold the livestock in Tennessee and transferred the proceeds to Carson, less commission. Subsequently, an order was entered discharging Carson in bankruptcy.

The United States brought this action to recover the fair market value of the cattle allegedly wrongfully converted by defendants. The district court, following a Fourth Circuit decision, United States v. Union Livestock Sales Co., 298 F. 2d 755 (C.A. 4), held that state law should be used in determining Ellis's liability for conversion and that Tennessee law limits recovery to the amount retained by the livestock merchant at the time demand was made.

After noting the conflict in circuits in earlier cases presenting the same issue, with the Third and Ninth Circuits holding that federal law

is applicable and the Fourth and Eighth Circuit holding that state law controls, the Sixth Circuit reversed the district court judgment based on state law and ruled that a uniform federal rule is to be applied. The Sixth Circuit further agreed with the Third and Ninth Circuits that "an auctioneer, is liable for conversion to the holder of a security interest in property which he has sold even if unaware of the existence of the security interest" and that "the appropriate measure of damages would be the fair market value of the property at the time the conversion took place."

Staff: Alan S. Rosenthal (Civil Division)

FEDERAL TORT CLAIMS ACT -- MISREPRESENTATION EXCEPTION

SUIT TO RECOVER DAMAGES ALLEGEDLY RESULTING FROM GOVERNMENT PHYSICIAN'S NEGLIGENT ADVICE TO PLAINTIFF THAT SHE HAD CERTAIN DISEASE, IS BARRED BY MISREPRESENTATION EXCEPTION TO FEDERAL TORT CLAIMS ACT, 28 U. S. C. 2680(h).

Sharon L. DeLange v. United States, (C. A. 9, No. 21,212, February 9, 1967, D. J. File 157-12-1318).

Plaintiff was a Government employee, working as a waitress in a Chief Petty Officers' mess, a non-appropriated fund instrumentality of the Government. She went to a Government physician for an annual physical examination, a procedure required by the Navy Department. After the examination, the physician told her that she had syphilis, although later tests showed that she did not. She allegedly suffered emotional injury from the misrepresentation concerning her condition, and sought damages from the United States.

The district court held that her claim was barred by the misrepresentation exception to the Federal Tort Claims Act, 28 U. S. C. 2680(h), and the Court of Appeals' affirmed, holding that "the communicated diagnosis was a representation" and that "an incorrect representation is a 'misrepresentation' within the meaning of the statute.'" The Court of Appeals also agreed with our alternate argument, that plaintiff's exclusive remedy was to apply for workmen's compensation benefits under 5 U. S. C. (1966 revision) 8171-8173 and 33 U. S. C. 901, et seq.

The Ninth Circuit's decision in this case represents an application of its earlier holding in Hungerford v. United States, 307 F. 2d 99, 102, drawing a distinction between the type of mis-diagnosis falling within the misrepresentation exception and the type falling outside. In

Hungerford, the Court had held that where the mis-diagnosis was coupled by a negligent failure to treat or by negligent treatment, the case was not within the misrepresentation exception, but where there was no breach of a duty to treat, 28 U. S. C. 2680(h) rendered the mis-diagnosis non-actionable.

Staff: Alan S. Rosenthal and John C. Eldridge (Civil Division)

GOVERNMENT CLAIMS -- PRIORITY OF S. B. A. MORTGAGE LIENS OVER STATE TAX CLAIMS UNDER 31 U. S. C. 191

SMALL BUSINESS ADMINISTRATION MORTGAGE LIENS ENTITLED UNDER 31 U. S. C. 191 TO PRIORITY OVER STATE LIENS FOR UNPAID WITHHOLDING TAXES WHERE DEBTOR INSOLVENT.

United States v. Clover Spinning Mills Co., Inc., et al. (C. A. 4, No. 10,529, December 9, 1966, D. J. File 105-68-8.)

The United States brought this action to foreclose real estate and chattel mortgages securing loans by the Small Business Administration to Clover Spinning Mills. Pursuant to the Government's request, the mortgages were foreclosed, a receiver was appointed, the property was sold, and the district court determined the priorities of several creditors' claims against the sale proceeds. In deciding the relative priorities of the claims, the district court held, inter alia, that liens of the South Carolina Tax Commission for unpaid withholding taxes were superior to the mortgage liens of the United States. The district court reasoned that the Government was not entitled to priority under 31 U. S. C. 191 as the debtor had not committed an act of bankruptcy or any of the other acts mentioned in that statute which must be present for the Government to have priority in an insolvency situation. The district court also stated that 15 U. S. C. 646 indicated a Congressional intent that claims of the Small Business Administration be subordinated to state tax claims. The district court further relied on sections of the South Carolina Code providing that withholding taxes shall be deemed to be held by the employer in trust for the State. With respect to another priority question which was concededly governed by state law in light of 15 U. S. C. 646, the court held that certain personal property tax liens of local governmental bodies were under South Carolina law superior to the United States' claims.

We appealed principally because of the district court's decision regarding the priority of the State's claim for withholding taxes, and on this question the Fourth Circuit reversed. The Court of Appeals held

that the relative priorities between debt claims of the United States and debt claims of others were governed by Federal law and that the United States' liens were entitled to priority over the State liens for unpaid withholding taxes under 31 U. S. C. 191, as the debtor was insolvent and had committed an act of bankruptcy by suffering the appointment of a receiver to take charge of all of its property. The Court of Appeals also held that the debtor had committed other acts specified in 31 U. S. C. 191 so as to give rise to the absolute priority of Government claims provided for by that statute. Concerning the provisions of 15 U. S. C. 646, waiving under certain circumstances the United States' Federal law priority for Small Business Administration claims and making the State law order of priorities determinative, the Fourth Circuit held that this statute waived the United States' priority only with respect to state property taxes and that withholding taxes "did not constitute 'taxes due on the property.'" Finally, the Court of Appeals held that the Government's entitlement to priority in payment was not affected by the State statutes providing that sums withheld from employees' salaries are deemed to be held in trust for the state, as no such fund existed in this case. Regarding the relative priority of the United States' claims and the local governments' claims for personal property taxes, the Fourth Circuit agreed with the district court's decision that the latter were superior under 15 U. S. C. 646 and the South Carolina law.

The Fourth Circuit's opinion in this case is quite instructive and useful, particularly because of the discussion of the Government's priority under 31 U. S. C. 191 in insolvency situations. The Court of Appeals deals with a variety of acts by debtors sufficient to bring a case within that statute. In any case involving a priority issue, it would be helpful to consult this opinion in connection with invoking 31 U. S. C. 191.

Staff: John C. Eldridge (Civil Division)

GOVERNMENT EMPLOYEES

AGENCY ACTION IN DISCHARGING EMPLOYEE TWICE CONVICTED OF VIOLATING STATE VAGRANCY STATUTE UPHELD AS NOT ARBITRARY AND CAPRICIOUS, NOTWITHSTANDING CALIFORNIA STATUTE EXPUNGING RECORD OF CONVICTION OF CRIME AFTER PERIOD OF PROBATION HAS BEEN SERVED.

Taylor v. United States Civil Service Commission (C.A. 9, No. 20,968, March 9, 1967, D.J. File 35-12-14.)

Plaintiff, a civilian employee of the Air Force, was twice convicted of violations of a California statute punishing for vagrancy "every lewd or dissolute person, or every person who loiters in or

about public toilets in public parks". When the Air Force learned of this, it discharged the employee for "a major offense of misconduct." After the Civil Service Commission affirmed the agency action, the employee sought review in the district court. The employee's defense was based on a state statute which permitted a criminal defendant, after he had served his period of probation, to have the record of his conviction expunged. The employee contended that the discharge was arbitrary and capricious since he had had the record of his two convictions expunged under state law, and since the Air Force had no evidence he had engaged in misconduct aside from these expunged convictions.

The district court upheld the discharge, and the Ninth Circuit affirmed. The Ninth Circuit found that the employee's removal was predicated not on the fact that he had been convicted of a crime under state law, but on the fact that he had engaged in misconduct. It was thus of no consequence whether the employee was considered as having been "convicted" under state law. The question rather was whether the Air Force could reasonably infer from the proceedings which had taken place in the state courts that the misconduct had in fact occurred. The Air Force could make such an inference in light of the state law requiring no showing of innocence in order to qualify for expungement.

Staff: Robert E. Kopp (Civil Division)

SOCIAL SECURITY ACT - ATTORNEY'S FEES

SECRETARY OF HEALTH, EDUCATION AND WELFARE HAS EXCLUSIVE AUTHORITY TO AWARD ATTORNEY'S FEE FOR REPRESENTATION OF CLAIMANT IN ADMINISTRATIVE PROCEEDINGS.

Gardner v. Oscar Menendez (C. A. 1, No. 6761, March 2, 1967, D. J. File 137-65-60.)

Claimant, through his attorney, instituted an action in the district court to review the denial of disability benefits by the Secretary. Before answer, the Secretary moved to remand the action to him, and the case was remanded for further administrative proceedings. During these proceedings, at which claimant was represented by the attorney who had instituted the court action, the Secretary made an award of benefits. Thereafter, on a petition of counsel, the district court awarded claimant's attorney a fee for all of his services performed in behalf of his client both in proceedings before the Secretary and before the court.

The Court of Appeals vacated the district court's fee award. The Court held that Section 206(a) of the Act, 42 U. S. C. 406(a), vested in

the Secretary the exclusive authority to award fees for services performed before him, and that the district court only had the authority under 42 U. S. C. 402(b), to determine the value of the services rendered before it. The First Circuit pointed out that the district court in this case could award a fee only for the attorney's services in drafting and filing the complaint in the district court.

The Court reached this result by pointing to the enactment of 42 U. S. C. 406(b) as a codification of "the principle that a court is the appropriate one to determine the value of the services rendered before it, and by implication, that it is not for the court to determine the value of services rendered elsewhere." The Court concluded that "There is nothing singular in the fact that counsel who appears in two forums should apply to each for the adequate part of his total fee. This is common practice where counsel obtains in a district court, and in an appellate court, a separate award for his services before each."

Staff: Morton Hollander and William Kanter
(Civil Division)

SOCIAL SECURITY ACT -- DISABILITY

RELEVANCE OF GEOGRAPHIC AVAILABILITY OF EMPLOYMENT OPPORTUNITIES FOR CLAIMANTS IN DETERMINING DISABILITY - METHOD BY WHICH AVAILABILITY OF JOBS IS TO BE DETERMINED.

Warren G. Earnest v. Gardner (C. A. 4, No. 10,536, January 10, 1967, D. J. File 137-84-413.)

Claimant, a coal miner with a limited education, applied for disability benefits under the Social Security Act, alleging that he was unable to work because of an injured right kidney and second stage silicosis. The medical evidence generally indicated that claimant possessed sufficient residual physical capacity to engage in lighter work than he had been doing in the mines, and a vocational expert indicated on the basis of a local manufacturing directory that jobs existed in the claimant's home area which he could perform. The Secretary, therefore, denied the application for disability benefits. The district court reversed, holding that the local availability of employment opportunities for claimant was a relevant consideration in determining his disability under the Social Security Act and that the vocational expert's testimony was not substantial as to job availability since it was based almost entirely on textual material. The district court stated that the Secretary would have to make an individualized survey in the area in which claimant might reasonably be expected to seek work to determine whether jobs which claimant might still perform were actually present and reasonably available.

The Court of Appeals affirmed the district court's judgment. After an extensive review of its previous decisions, the Fourth Circuit pointed out that the standard of determining whether a claimant is disabled is essentially a "practical" and "factual" determination of "whether there is a reasonably firm basis for thinking that this particular claimant can obtain a job within a reasonably circumscribed labor market," with the scope of the labor market to be determined by the "circumstances of the particular case." Although acknowledging that the Secretary does not have to find the claimant a specific job, the Court stated that "arm-chair speculation, even by vocational experts, is insufficient in the absence of dry evidence that employers in the area have hired persons with the claimant's limitations or would be willing to do so." The Court throughout its opinion made it clear that in future cases, it wanted the Secretary to exercise "a common sense judgment as to the practical employability of an impaired person" and "a realistic exploration of the totality of the surrounding circumstances." Applying these criteria, the Court found that in this case the testimony of the vocational witness was deficient since there was no proffered factual basis to support the assertion that jobs were in fact available for someone with claimant's skills in claimant's community.

Staff: Harvey L. Zuckman (Civil Division)

STANDING TO SUE

PUBLISHED ADMINISTRATIVE POLICY BULLETIN GOVERNING CONDUCT OF AGENCY IN GRANTING LOANS DOES NOT CONFER STANDING UPON COMPETITOR OF BORROWER TO CHALLENGE LOAN.

Rural Electrification Administration, et al. v. Northern States Power Co., et al. (C.A. 8, No. 18,519, February 28, 1967, D.J. File 117-39-61.)

The Rural Electrification Administration approved a 5.9 million dollar loan to a rural electric cooperative to permit it to construct its own transmission facilities. Until such time as the transmission facilities were constructed, the cooperative was to continue using the facilities of certain private power companies to transmit its power, for which facilities substantial fees were paid to the private companies. The private companies brought suit to enjoin actual consummation of the loan to the cooperative on the ground that the REA Administrator had violated his own policy bulletin, published in the Federal Register, by failing to advise them wherein their transmission contracts with the cooperative were unreasonable and giving them the opportunity to make their contracts reasonable before approving the cooperative's loan application.

The REA defended the action, inter alia, on the ground that the power companies were without standing to sue since they were complaining only of economic competition and since the policy bulletin did not confer the necessary standing. The district court ruled that because the policy bulletin had been published in the Federal Register it was a regulation binding upon the Administrator. From this the district court reasoned that the private power companies had standing to complain of alleged violations of the regulation by its promulgator. Accordingly, the district court issued a preliminary injunction restraining consummation of the loan.

The Eighth Circuit reversed the judgment and ordered the complaint dismissed. The Court of Appeals, while agreeing with the district court that the policy bulletin was a regulation having the force of law, pointed out that it does not necessarily follow that the legal status of the regulation confers standing to sue. The Eighth Circuit, after noting that increased competition is not in itself sufficient to confer standing to challenge governmental action, held that the power companies had no judicially enforceable rights conferred upon them by the bulletin and could not, therefore, claim standing under it.

This holding follows that of the Fifth Circuit in Rural Electrification Administration v. Central Louisiana Elec. Co., 354 F. 2d 859, certiorari denied, 385 U. S. 815 (D. J. No. 117-33-20). There the Fifth Circuit, in addition to rejecting the contention that the bulletin conferred standing upon competing private electric companies to enjoin REA loans, also rejected the idea that standing to sue could be predicated upon complaints of economic harm from Government-created competition, citing the leading Supreme Court decisions of Alabama Power Co. v. Ickes, 302 U. S. 464 and Tennessee Elec. Power Co. v. TVA, 306 U. S. 118. The Fifth and Eighth Circuit decisions are significant in that they make clear that standing to complain of competition cannot be predicated on mere policy regulations of the type involved in those cases.

Staff: Harvey L. Zuckman (Civil Division).

CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

LEGAL ETHICS

UNETHICAL CONDUCT; CONCEALMENT OF STOLEN MONEY AND SAWED-OFF SHOTGUN BY ATTORNEY IN ORDER TO SECURE HIS CLIENT'S ACQUITTAL IS VIOLATION OF CANONS 15 AND 32 OF CANONS OF PROFESSIONAL ETHICS.

Richard R. Ryder (Civil Action No. 4976 (E. D. Va.), January 23, 1967; D. J. File 29-100-3366.)

On August 24, 1966 a man armed with a sawed-off shotgun robbed a bank in Richmond, Virginia of $7503. Two days later, the suspect rented safe deposit box 14 at a second bank. The suspect was subsequently interviewed by the FBI and thereupon contacted Richard Ryder, his attorney. Ryder took a power of attorney, executed by the suspect, to the second bank where he rented safe deposit box 13 in his own name, presented the power of attorney and entered the suspect's box. He transferred the contents of the suspect's box, a bag containing "bait" money and a sawed-off shotgun, to his own and returned the boxes to the vault.

Upon being advised of this matter, the three District Judges of the Eastern District of Virginia suspended Ryder from practice before the court and requested the United States Attorney to file charges. Ryder was charged with violation of Canons 15 and 32.

After an appropriate hearing, the District Judges issued an order and memorandum opinion suspending Ryder from practice before the district court for eighteen months. The Judges felt that permanent exclusion would have been proper were it not for the fact that Ryder had consulted reputable persons before and after he placed the property in his box and intended to return the money to the bank after his client was tried.

The court held that Ryder's concealment of the stolen money and the sawed-off shotgun in order to secure his client's acquittal was wrong and not justified on the ground he was acting in the best interests of his client. The claim that Ryder's acts were within the attorney-client privilege was rejected because his conduct went far beyond the receipt and retention of a confidential communication from his client.

Ryder has given notice of his intention to appeal this decision to the Fourth Circuit Court of Appeals.

Staff: United States Attorney C. Vernon Spratley, Jr.; Assistant United States Attorneys Samuel W. Phillips and T. P. Baer (E. D. Va.).

FEDERAL YOUTH CORRECTIONS ACT

PROSECUTION OF MISDEMEANOR BY INFORMATION, WITHOUT WAIVER OF INDICTMENT, OF PERSON SUBJECT TO FEDERAL YOUTH CORRECTIONS ACT, VIOLATES EITHER F. R. CR. P., RULE 7(a), OR UNITED STATES CONSTITUTION, AMENDMENT V, OR BOTH.

United States v. Judy Lee Reef (D. Colo., D.J. 48-13-593, February 23, 1967.)

Defendant, nineteen years of age, was charged by information with retarding delivery of the mail in violation of 18 U.S.C. 1701. A violation of this section is a misdemeanor, which imposes a maximum sentence of one year, or a fine of $500, or both. However, because of her age (under 26), defendant was also subject to the provisions of the Federal Youth Corrections Act, 18 U.S.C. 5005 et seq. By the terms of that Act, a youth offender may be committed to the custody of the Attorney General for a period of four years of actual confinement, plus two years of supervision following a conditional release. 18 U.S.C. 5010, 5017.

The Act expressly provides that the youth offender is to receive "treatment and supervision," but the Attorney General has the sole power to designate the place of confinement, which can also be a Federal penitentiary.

Under the Fifth Amendment, offenses punishable by more than one year's imprisonment are indictable as "infamous crimes" because of the nature of the punishment rather than the nature of the crime, and also require indictments under F.R.Cr.P., Rule 7(a), unless waived. See United States v. Moreland, 258 U.S. 432 (1922); Mackin v. United States, 117 U.S. 348 (1886); Ex Parte Williams, 114 U.S. (1885).

The District Court rejected the delicate distinction between "imprisonment" and "confinement in a prison for treatment and supervision," which was urged by the Government because "the defendant is subject to imprisonment for a period exceeding one year, and 'applying the euphemism "treatment" to the discipline during confinement does not alter the arithmetic, and it is immaterial for present purposes.'" Citing Pilkington v. United States, 315 F. 2d 204, 208.

The Government's argument that acceptance of defendant's contentions would create an anomaly whereby defendants under twenty-six years of age would have to be prosecuted by indictment, while those over the age could be proceeded against by direct information, was also rejected by the District Court, because it felt that the Government's position would create an even greater anomaly:

> "All persons who are subject to confinement in prison for a period exceeding one year must, in absence of waiver, be prosecuted by indictment, with the exception of some persons under twenty-six years of age who are sentenced pursuant to the Federal Youth Corrections Act."

According to the District Court, this latter anomaly would threaten to trespass on the rights of youthful defendants, and it granted defendant's motion to dismiss for lack of jurisdiction.

Staff: United States Attorney Lawrence M. Henry; Assistant United States Attorney Richard T. Spriggs (D. Colo.).

FEDERAL RULES OF CRIMINAL PROCEDURE

RULE 8(b). Joinder of Offenses and of Defendants; Joinder of Defendants.

Haggard v. United States, digested in January 20, 1967, issue of Bulletin, Vol. 15, No. 2, was published in 369 F. 2d, at page 968. D. J. File No. 29-43-430.

RULE 14. Relief from Prejudicial Joinder.

Motion for relief from prejudicial joinder filed on basis that serious criminal records of codefendants would unduly prejudice defendant before jury was denied by district court, since facts then in evidence did not establish that any possible prejudice outweighed economy and expedition of single trial; moreover, defendant would be entitled to renew the motion at trial if facts then warranted renewal.

United States v. Margeson, Kadra, and Crehan, 261 F. Supp. 628 (E. D., Pa., 1966), D. J. 29-100-3314 and D. J. 29-36-442.

See discussion of this case under Rule 16 in this issue of the Bulletin.

RULE 16. Discovery and Inspection.

RULE 14. Relief from Prejudicial Joinder.

While Rule 16, F. R. Cr. P., as amended, greatly liberalized right of discovery and inspection, defendant in a non-capital case still not entitled under the Rule to discover the identity of government's witnesses.

Motion for relief from prejudicial joinder filed on basis that serious criminal records of codefendants would unduly prejudice defendant before jury was denied by district court, since facts then in evidence did not establish that any possible prejudice outweighed economy and expedition of single trial; moreover, defendant would be entitled to renew the motion at trial if facts then warranted renewal.

United States v. Margeson, Kadra, and Crehan, 261 F. Supp. 628 (E. D., Pa., 1966); D. J. 29-100-3314; D. J. 29-36-442.

Three defendants were indicted for conspiracy and bank robbery in violation of 18 U. S. C. 2113. One of the three filed a motion for a list of the names and addresses of the government's witnesses and another filed a motion for severance.

In denying the request for names and addresses of government's witnesses, the court pointed out that defendant was not entitled by law, decisions or the recently liberalized Rule 16 of the Federal Rules to discover the identity of government's witnesses. Courts have long refused to furnish the relief here sought. Congress by 18 U. S. C. 3432 specifically provided for disclosure of witnesses in capital cases and, had Congress intended to authorize disclosure in non-capital cases, it would have done so. By legislating specifically in capital cases, the maxim "inclusio unius est exclusio alterious" was applicable. The court therefore refused to broaden the bounds of discovery beyond that which Congress and the Supreme Court have mandated.

The court further denied motion of one defendant for relief from prejudicial joinder on the basis that serious criminal records of codefendants was bound to result to his prejudice in the minds of the jury. The court stated that facts then in evidence did not establish that he would be prejudiced and a single trial of all three defendants would be more expeditious and more economical. However, denial was made without prejudice to renewal of motion during trial, should facts then so warrant. See cases cited.

Motions denied.

RULE 27. Proof of Official Record.

Under Rule 27, F. R. Cr. P., official records in criminal cases may be proved in the same manner as in civil cases; authentication by direct testimony of custodian through whom Selective Service Record was introduced held proper, since admission can be so made as at common law.

Pardo v. United States, 369 F. 2d 922 (C. A. 5, 1966; D. J. File 25-32-682).

Defendant was found guilty of having knowingly failed and neglected to report for induction into the armed forces in violation of the Universal Military Training and Service Act, 50 App. 462, and sentenced to two years' imprisonment.

Admission into evidence of registrant's Selective Service file was not improperly admitted under Rule 44, F. R. Civ. P. (made applicable to

criminal proceedings by Rule 27, F. R. Cr. P.), as contended. Mere showing of non compliance with statute providing specifically for authentication of official documents or subsec. (a), Rule 44, F. R. Civ. P., did not establish error of introduction, since subsec. (c) of the Rule specifically provides that rule does not prevent proof of official records by rules of evidence at common law. At common law an official record can be properly authenticated by direct testimony of a custodian through whom the record is introduced. The attorney-advisor for the Selective Service Headquarters through whom the file was admitted and who testified as to its authenticity was such a custodian. Contentions raised were without merit.

Conviction affirmed.

RULE 31(c). Verdict; Conviction of Less Offense.

Even though law provides that proof of possession is deemed sufficient to authorize conviction for facilitating the concealment or sale of narcotics (absent satisfactory explanation of possession), unlawful possession is not "lesser, included offense".

United States v. Kelly, 370 F. 2d 227 (C. A. D. C., 1966; D. J. File 95-16-1782).

On appeal defendant contended it was reversible error for trial judge to refuse to instruct the jury, in the alternative, that defendant could be found guilty under the District of Columbia Code of unlawful possession of narcotics as a "lesser included offense" of 21 U. S. C. 174, i. e., facilitating the concealment or sale of narcotics.

While under the "lesser included offense" rule found in Rule 31(c), F. R. Cr. P., an accused may be found guilty of an offense necessarily included in the offense charged, all elements of the lesser offense are necessarily elements of the greater offense. Clearly, such was not the case here. Even though the law provides specifically that proof of possession of the narcotics is deemed sufficient to authorize conviction unless possession is explained to the satisfaction of the jury, and facts in this case may have established unlawful possession, one could facilitate concealment or sale of narcotics without ever having had possession. Hence, it may not be concluded that unlawful possession is a lesser, includable offense. What controls is the offense charged in the indictment--not the offense established by proof in a particular case. Neither the prosecutor nor the defendant would be entitled to an instruction such as defendant sought in this case.

Conviction affirmed.

RULE 32(a)(1). Sentence and Judgment; Imposition of Sentence.

(d) Sentence and Judgment; Withdrawal of Plea of Guilty.

RULE 35. Correction or Reduction of Sentence.

Trial judge's failure to comply with Rule 32(a)(1), F. R. Cr. P., when defendant pleaded guilty and before sentence was imposed by specifically inquiring whether defendant wished to make statement in his own behalf, was not such error as could be raised under motion to vacate or Rule 35 when there were no "aggravating circumstances". See Andrews v. United States, 373 U. S. 334.

Motion to vacate judgment and sentence which was filed after sentence (upon acceptance of guilty plea) denied, since record did not show there had been any manifest injustice to defendant.

Sherman v. United States, 261 F. Supp. 522 (D. Hawaii, 1966; D.J. File 36-21-36).

In October 1965 defendant was arrested in Hawaii and charged with fraud by wire (18 U. S. C. 1343).

Following a psychiatric examination, defendant represented by court-appointed counsel was brought before the court and told that, subject to objections based on the medical report, court was ready for trial. A plea of guilty was entered by defendant's attorney on his behalf, no objection being made to the medical report. Before accepting the plea, the judge made specific inquiries as to whether the plea was entered voluntarily, whether defendant had been forced to plead guilty by threats or violence, whether he was under the influence of drugs, it being a matter of record that defendant was an epileptic. Defendant and his attorney represented that defendant was making an intelligent and understanding plea while in full command of his faculties, and was desirous that psychiatric treatment be given him.

The judge failed to specifically inquire whether defendant or his attorney had anything to say prior to imposition of sentence. The court thereupon committed defendant for the maximum 5-year period authorized by law and for study under 18 U. S. C. 4208, stating, however, that the sentence imposed would be subject to modification under subsection (b) upon defendant's return to Hawaii in approximately 90 days.

The district court denied all motions and sustained acceptance of guilty plea and refusal of court to permit its withdrawal. The court stated flatly that "even if the court felt the law compelled it here to vacate and set aside the sentence, and if such a motion to withdraw the plea were then urged, nevertheless on the record before it, this court would not disturb Sherman's plea of guilty, feeling that to do so would impose a manifest injustice upon the court, counsel and the public." Said the court: "A motion for withdrawal of a plea of guilty made after sentence, however, is conditioned upon a showing of manifest injustice to the defendant." Here, the motion was made after defendant started serving time. At time of consideration of the motion the court concluded that "the sum total of all the facts of this case and the law applicable thereto compels this court to find that there is not only no manifest injustice * * * but no injustice at all to him if his motions and petition are denied", and they were accordingly denied.

RULE 32(d). Sentence and Judgment; Withdrawal of Plea of Guilty.

Motion to vacate judgment and sentence which was filed after sentence (upon acceptance of guilty plea) denied, since record did not show there had been any manifest injustice to defendant.

Sherman v. United States, 261 F. Supp. 522 (D. Hawaii, 1966; D.J. File 36-21-36).

See discussion of this case under Rule 32(a)(1) in this issue of the Bulletin.

RULE 35. Correction or Reduction of Sentence.

Trial judge's failure to comply with Rule 32(a)(1), F. R. Cr. P., when defendant pleaded guilty and before sentence was imposed by specifically inquiring whether defendant wished to make statement in his own behalf, was not such error as could be raised under motion to vacate or Rule 35 when there were no "aggravating circumstances". See Andrews v. United States, 373 U. S. 334.

Sherman v. United States, 261 F. Supp. 522 (D. Hawaii, 1966; D.J. File 36-21-36).

See discussion of this case under Rule 32(a)(1) in this issue of the Bulletin.

EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

ASSISTANTS APPOINTED

Arkansas, Eastern - J. WINSTON BRYANT, ESQ.; University of Arkansas, LL. B., and formerly in private practice.

Massachusetts - MRS. MARY M. BRENNAN; Boston College, LL. B., and formerly in private practice

Michigan, Eastern - JOSEPH F. DEEB, ESQ.; Wayne State University, J. D., and formerly in private practice.

Oklahoma, Eastern - WILLIAM J. SETTLE, ESQ.; Tulsa University, J. D., and formerly in private practice.

Puerto Rico - CHARLES FIGUEROA, ESQ.; University of Puerto Rico, LL. B., and formerly Assistant Legal Advisor, P. R. Police Department and later Assistant D. A. and D. A., P. R. Department of Justice.

Washington, Western - ALBERT STEPHAN, ESQ.; Harvard, LL. B., and formerly attorney with ICC, FCC, and in private practice.

TAX DIVISION

Assistant Attorney General Mitchell Rogovin

COURTS OF APPEALS - CIVIL TAX MATTERS

SUMMONS ENFORCEMENT

SUMMONS ENFORCEMENT FOR WORKPAPERS OF ACCOUNTANT; OWNERSHIP OF WORKPAPERS; NO REOPENING LETTER UNDER SECTION 7605(b) NECESSARY; NO ILLEGAL SEARCH OR SEIZURE.

Hinchcliff v. Clarke (C.A. 6, January 19, 1967, 67-1 USTC 9187.)

A revenue agent, who was auditing the returns of a deceased taxpayer, asked the accountant who had prepared the returns for his workpapers, making it clear that he did not want any of the taxpayer's records since some of the years had previously been audited and no "reopening letter" had been sent to the taxpayer's executrix (his wife) under Section 7605(b) of the Internal Revenue Code. The accountant turned over everything he had, including some papers which had belonged to the taxpayer. When the executrix protested, the revenue agent returned all the original

papers to the accountant and served him with a summons to produce his own workpapers. The Government then instituted an enforcement action against the accountant in which the executrix intervened, asking that the summons be quashed and that all evidence obtained by the agent be suppressed. This was a purely civil audit since there was, of course, no possibility of criminal action against the deceased taxpayer, and the district court was assured by the Government that none was contemplated against anyone else.

The district court held that a "reopening letter" should have been sent under Section 7605(b), and that, absent such a letter, the evidence obtained by the revenue agent was the result of an illegal seizure and a violation of the Fourth and Fifth Amendments. The court quashed the summons and ordered the evidence permanently suppressed for all purposes.

The Court of Appeals for the Sixth Circuit reversed and ordered enforcement of the summons for production of the accountant's papers. The Court held (1) that the great majority of the papers involved belonged to the accountant; (2) that a "reopening letter" under Section 7605(b) is only necessary when the taxpayer's own books of account are the subject of a summons; and (3) that the Fourth and Fifth Amendments, as interpreted in Boyd v. United States, 116 U.S. 616, have no application to a properly issued Internal Revenue Service summons in a purely civil audit.

We understand that a petition for certiorari will be filed by the executrix.

Staff: John M. Brant, Joseph M. Howard (Tax Division).

STATUTE OF LIMITATIONS

SUSPENSION OF STATUTE OF LIMITATIONS: FILING OF PROOF OF CLAIM WITH REPRESENTATIVES OF DECEDENT TAXPAYER'S ESTATE CONSTITUTES COMMENCEMENT OF PROCEEDING IN COURT WITHIN MEANING OF SECTION 276(c) OF 1939 CODE (SECTION 6502(a)(1) OF 1954 CODE), THEREBY TOLLING STATUTE OF LIMITATIONS.

In re Feinberg, et al., (Ct. App. N. Y., December 29, 1966) (CCH 67-1 U.S.T.C. ¶ 9185)

The issue considered by the court was presented in two Surrogate's Court cases consolidated on appeal. In Feinberg the decedent-taxpayer died intestate in 1947, and his federal income tax return for that year

was filed by his widow as administratrix of his estate. After auditing the tax return and obtaining a consent extending the time for making an assessment, the District Director assessed an income tax deficiency on May 13, 1954. On August 12, 1954, the District Director filed a verified proof of claim with the administratrix who neither paid nor formally rejected it. In 1957, the Government petitioned the Surrogate's Court to compel an accounting, but the proceeding was terminated in 1960 in view of the failure to serve the administratrix with a citation, as her whereabouts were unknown. After locating the administratrix in 1962, the Government, some eight years after the assessment was made, filed a second petition to compel an accounting and served her with a citation. The administratrix moved to dismiss the proceeding on the ground that it was barred by Section 276(c) of the 1939 Code (Section 6502(a)(1) of the 1954 Code), which provided for the collection of an income tax by the institution of a "proceeding in court" if commenced within six years after the assessment of the tax.

The Field case involved the assessment in 1954 of an estate tax liability against the decedent-taxpayer's estate, based upon a stipulated Tax Court decision. In 1955, the District Director filed a verified proof of claim with the executors who neither paid nor formally rejected it. In 1962, eight years after the assessment had been made, the Government filed a petition for an accounting and also distrained the estate's bank account. The executors moved to dismiss the accounting on the ground that the tax claims were barred by Section 874(b)(2) of the 1939 Code (Section 6502(a)(1) of the 1954 Code), which provided for the collection of an estate tax by the institution of a "proceeding in court" if commenced within six years after the assessment of the tax.

The Surrogate's Court denied the Government's petition for an accounting in both proceedings on the ground that the tax claims were barred by the six-year statutes of limitations. This holding was reversed by the Appellate Division, which granted leave to appeal on the certified question of whether the filing of a proof of claim for unpaid taxes (estate and income) with the representatives of an estate constituted the commencement of a "proceeding in court" within the meaning of Sections 276(c) and 874(b)(2) of the 1939 Code.

In affirming the decision of the Appellate Division in each case, the Court of Appeals noted that the term "proceeding in court" had not been defined by Congress or the Supreme Court. Since the parties agreed that a judicial settlement of claims against an estate would constitute such a proceeding, the court posed the issue in terms of whether the filing of a proof of claim could be regarded as the first step toward the judicial settlement of the claim, thereby constituting the commencement of a proceeding in court. Since, under New York law, the filing of a

verified claim with the representatives of an estate constituted the first step toward having the claim judicially determined, and had been interpreted as constituting the commencement of a special proceeding tolling the state statute of limitations, the court held that the Government had commenced a special proceeding by filing its proofs of claim against the taxpayers' estates, thereby tolling the federal statutes of limitation regarding collection of both the federal income and estate tax liabilities. In so holding, the court dismissed the contention of the taxpayer's representatives that rejection of a claim was a prerequisite to jurisdiction in the Surrogate's Court as being totally without merit. The court reasoned that if the statute of limitations continued to run until after the claim was rejected, the estate could defeat the claim simply by ignoring it, a result which the court felt would be both unreasonable and unfair.

The taxpayers' representatives also contended that the filing of the proofs of claim could not constitute a proceeding in court, because Section 3740 of the 1939 Code (Section 7401 of the 1954 Code) prohibited the Government from instituting a court proceeding without a direction from the Attorney General, which was not obtained at the time the proofs of claim were filed. However, the court also rejected this contention on the ground that Section 3740 was not "designed to apply to the situation where, under State law, litigation is commenced by a communication between the parties which is not filed in court."

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