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SPECIAL NOTICE

OBTAINING COPIES OF TAX RETURNS

The Treasury Department has asked that all agencies use restraint in obtaining copies of tax returns. The Department of Justice appreciates the concern of the Treasury Department over unwarranted disclosure of information. All requests for returns should be examined to make sure it is necessary to the proper discharge of your responsibilities as representatives of the United States. Your attention is directed to Treasury Regulation 301.6103(a) - 1(g) and (h) as to the proper procedure to be used in requesting copies of returns.

ANTITRUST DIVISION

Assistant Attorney General Donald F. Turner

SUPREME COURT

CLAYTON ACT

SUPREME COURT REVERSES DISTRICT COURT AND REMANDS TWO BANK CASES FOR TRIAL.

United States v. First City National Bank of Houston, et al. (No. 914 O. T. 1966, March 27, 1967; DJ File 60-111-1081.)

United States v. Provident National Bank, et al. (No. 972 - O. T. 1966, March 27, 1967; DJ File 60-111-1003.)

These civil suits were filed by the United States under Section 7 of the Clayton Act to prevent two bank mergers - one in Houston, Texas between First City National Bank of Houston and the Southern National Bank of Houston, and one in Philadelphia, Pennsylvania between the Provident National Bank and the Central Penn National Bank. The Comptroller had approved the mergers under the Bank Merger Act of 1966. That Act provides that a merger whose effect may be substantially to lessen competition is unlawful unless the anticompetitive effects of the merger are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served. The Comptroller intervened. The district courts dismissed the Government's complaints on the ground that they failed to state a cause of action. In the Houston case the Court held that in addition to pleading a violation of Section 7, the Government should have alleged and proved under the Bank Merger Act that the anticompetitive consequences of the merger were not clearly outweighed in the public interest by the banking factors. In the Philadelphia case, the Court held that the Government had the same burden of proof.

The Supreme Court, Justice Clark not taking part, unanimously held that the failure of the Government to base these actions on the Bank Merger Act of 1966 does not constitute a defect in the pleadings. Section 7 of the Clayton Act condemns mergers where "the effect of such acquisition may be substantially to lessen competition." The Bank Merger Act of 1966, the Court noted, does not change that standard, but merely provides a new defense to Section 7 in the "convenience and needs" clause. Banks proposing mergers which the Government proves to be in violation of the competitive standards of Section 7, must carry the burden of establishing that the merger falls within the exception created by the new defense.

Section 1828(c)(7)(B) of the 1966 Bank Merger Act provides that in a judicial proceeding attacking a merger on the ground that it violates the antitrust laws, "the standards applied by the court shall be identical with" those the banking agencies must apply. And 12 U.S.C. § 1827(c)(7)(A) states that "In any such action, the court shall review de novo the issues presented." Rejecting defendants' contention that this phrase--"review de novo"--directed the court to give presumptive weight to the banking agency's views, the Court held that traditionally, in antitrust actions involving regulated industries, "the courts have never given presumptive weight to a prior agency decision, for the simple reason that Congress put such suits on a different axis than was familiar in administrative procedure." [Citing, United States v. Radio Corporation of America, 358 U.S. 334; United States v. El Paso Natural Gas Co., 376 U.S. 651; United States v. Philadelphia National Bank and Trust Co., 376 U.S. 665]. The Court found no indication that Congress intended a different result under the 1966 Act. Accordingly, the Court stated that "it is the court's judgment, not the Comptroller's that finally determines whether the merger is legal."

The Court also rejected defendant's argument that the courts would be assuming non-judicial responsibilities by determining whether the anti-competitive aspects of the merger were clearly outweighed by the banking factors. The Court, noting that the courts have often administered the rule of reason in cases requiring a weighing of competitive and other factors, found no constitutional problems here not present in those cases. In addition, the Court stressed that the "convenience and needs" defense under the 1966 Act is related, though perhaps remotely, to the failing-company doctrine, long known to the courts in antitrust merger cases.

The 1966 Act provides that a timely antitrust action "shall stay the effectiveness of the agency's approval unless the court shall otherwise specifically order" [§ 1828(c)(7)(A)]. Interpreting this provision, the Court held that the stay should remain in effect until the antitrust litigation has run its course. The Court also indicated that a stay should normally be granted unless the Government's complaint was frivolous. The Court felt such an interpretation was required to avoid the necessary unscrambling of the merger--a primary concern of Congress when it passed the 1966 Bank Merger Act.

The cases were argued by Mr. Turner.

Staff: Assistant Attorney General Donald F. Turner (Antitrust Division); Richard A. Posner, Solicitor General's Office; Stephen G. Breyer, Lawrence G. Meyer, Thomas R. Asher and Jonathan Rose (Antitrust Division)

DISTRICT COURT

SHERMAN ACT

NEWSPAPER IN ILLINOIS CHARGED WITH VIOLATING SECTIONS 1 AND 2 OF ACT.

United States v. Lindsay-Schaub Newspapers, Inc. (Civ. 67-48D, March 27, 1967; DJ File 60-127-65).

On March 27, 1967, a civil action was filed in the United States District Court in Danville, Illinois, against Lindsay-Schaub Newspapers, Inc., the owner of the Champaign-Urbana Courier and other newspapers published in the State of Illinois.

The complaint charges that the defendant and its co-conspirators engaged in a combination and conspiracy in restraint of and to monopolize, and in an attempt to monopolize the dissemination of news and advertising through daily and Sunday newspapers of general circulation published in the Champaign-Urbana, Illinois area in violation of Sections 1 and 2 of the Sherman Act.

The substantial terms of the offenses charged were that the defendant and its co-conspirators did, among other things, the following:

(a) Intentionally operated the Courier at substantial annual losses which in many years totaled approximately $500,000 per year;

(b) Subsidized the Courier's losses out of the profits derived by Lindsay-Schaub and its subsidiaries from publishing and circulating local newspapers in communities other than Champaign-Urbana, Illinois;

(c) Sold at special reduced rates national advertising in the Courier in combination with the Decatur newspapers;

(d) Sold subscriptions to the Courier at unreasonably low prices, particularly in the years prior to the commencement of the Government's investigation of Lindsay-Schaub;

(e) Sold local advertising space in the Courier to selected advertisers at rates lower than the Courier's published advertising rates;

(f) Sold at special reduced rates pre-print advertising in the Courier in combination with one or more of the other newspapers owned by Lindsay-Schaub and its subsidiaries;

(g) Made numerous attempts to purchase from the Champaign News-Gazette, Inc., the News-Gazette, and other properties owned by said corporation or to merger the News-Gazette with the Courier.

On the same date the complaint was filed, there was also filed a stipulation and a final judgment consented to by the parties. The stipulation provided in part that the Government may withdraw its consent to the final judgment anytime within the 30-day period, commencing with the date of filing.

The final judgment, among other things, enjoins the defendant from:

(a) Refusing to contract to sell or refusing to sell advertising in the Courier separate from its other newspapers;

(b) Selling advertising in the Courier in combination with its other newspapers at a special combination rate;

(c) Maintaining advertising or subscription rates below those of its competitor in Champaign-Urbana for the purpose or with the necessary effect of eliminating competition;

(d) Acquiring or selling any stock or any financial interests in the business of a competing Champaign-Urbana newspaper.

Staff: Bertram M. Long, James E. Mann and William T. Huyck (Antitrust Division)

* * *

CIVIL DIVISION

Assistant Attorney General Barefoot Sanders

SUPREME COURT

TRADING WITH THE ENEMY ACT

PERSONS LATE IN FILING SUIT TO RECOVER "DEBT CLAIMS" UNDER ACT MAY RECOVER OUT OF VESTED ASSETS REMAINING AFTER TIMELY CLAIMS HAVE BEEN SATISFIED.

Ayako Honda, et al. v. Ramsey Clark, Attorney General. (No. 164, Oct. Term, 1966, April 11, 1966; DJ File 9-21-2935.)

The Supreme Court reversed a decision of the Court of Appeals for the District of Columbia Circuit and held that a suit by some 4,000 Japanese-Americans under § 34 of the Trading With the Enemy Act (50 U.S.C. App. 34) for payment of their "debt claims" out of the vested assets of a Japanese bank seized during World War II was timely filed. Petitioners' suits challenging the Attorney General's rejection of their debt claims were not instituted within the 60-day period prescribed in the statute (50 U.S.C. App. 34(f)). However, analogizing the debt claims legislation to proceedings in bankruptcy, the Court pointed out that one who files a late claim in bankruptcy proceedings is not absolutely barred from all recovery, but may share in any assets remaining after the timely creditors have been paid. The Court ruled that the Congressional purpose in allowing debt claims suits would be best served by giving a similar treatment to the limitations provisions of section 34. The Court held that the limitations period was "tolled" pending disposition of a prior, timely suit by persons with similar debt claims and that petitioners were entitled to have their own claims satisfied out of any vested assets remaining after disposition of the timely suit.

In reaching this result, the Court stressed that the Government was a mere "stakeholder" in the action (the money in suit would be paid out to a different class of claimants if the Japanese-Americans had not prevailed) and that the usual rules regarding the "jurisdictional" nature of statutes limiting the time for suit against the United States were inapplicable.

Staff: Richard Posner (Office of the Solicitor General)
David L. Rose, Richard S. Salzman (Civil Division)

COURTS OF APPEALS

ADMIRALTY

EXCLUSIVE REMEDY PROVIDED GOVERNMENT SEAMEN BY FEDERAL EMPLOYEES COMPENSATION ACT HAS NOT BEEN AFFECTED BY PRINCIPLES OF REED v. THE YAKA, 373 U.S. 410

Andrew Anthony Aho v. United States, (C.A. 5, No. 23866, March 23, 1967; D.J. File 61-32-445.)

Mr. Aho, a Government seaman, brought this libel in admiralty against the United States for injuries and ailments aggravated by service on two Government vessels. The Government moved for summary judgment on the ground that libellant's exclusive remedy was under the Federal Employees Compensation Act. The district court granted the Government's motion for summary judgment, rejecting libellant's contention that it could sue under the Suits in Admiralty or Public Vessels Act.

On appeal, libellant relied upon Reed v. The Yaka, 373 U.S. 410, in which the Supreme Court had held that where the same party was both the stevedore and shipowner, such party as shipowner could be held liable in a personal injury action to a longshoremen-employee despite the exclusivity provision in the Longshoremen and Harbor Workers' Compensation Act. Libellant in this case argued that the principle of The Yaka was applicable to this action against the Government by a Government-employed seaman. The Fifth Circuit, however, affirmed, holding that the Supreme Court's decision in The Yaka was not applicable to this case. The Court of Appeals invoked the well-settled principle that the Federal Employees Compensation Act provided the exclusive remedy against the United States by a Government-employed seaman.

Staff: Jack H. Weiner (Civil Division)

CONSTITUTIONAL LAW -- CRIMINAL CONVICTIONS BY NON-ARTICLE III COURTS

CONSTITUTIONALITY OF COURTS RUN BY DEFENSE DEPARTMENT ON OKINAWA UPHELD.

Eiko U. Rose v. McNamara (C.A. D.C., No. 20323, March 23, 1967; DJ File 145-15-90).

Appellant, a naturalized American citizen residing in Okinawa, was convicted by a jury in the Superior Court of the United States Civil Administration of the Ryukyu Islands (USCAR) for evasion of the Ryukyu Islands income

tax, by failing to report income she derived from operations of Tea House August Moon. Mrs. Rose brought a declaratory judgment action in which she challenged the constitutionality of the USCAR courts on the ground that they were established pursuant to an Executive Order, rather than by Congress under Article III of the Constitution. The Court of Appeals affirmed the decision of the district court upholding the validity of the Court. The Court of Appeals rejected appellant's contention that she could be tried for a crime only in an Article III court. Citing Madsen v. Kinsella, 343 U.S. 341, the Court of Appeals said that there was "an extensive power in the President, absent Congressional provision, to set up special tribunals in occupied foreign lands to try American citizens for crime," that this power sometimes may survive the cessation of hostilities, and that under the special circumstances of our relationship to Okinawa, which this country controls on an interim basis with the expectation of eventual restoration to full Japanese sovereignty, that power can survive the 1952 Treaty of Peace with Japan.

The principal significance of this decision is its refusal to construe Reid v. Covert, 354 U.S. 1, as requiring that American civilians residing abroad be tried only in courts established by Congress.

Staff: Walter H. Fleischer (Civil Division)

FALSE CLAIMS ACT

ACT HELD INAPPLICABLE TO APPLICATIONS FOR GOVERNMENT LOANS.

United States v. Neifert-White Company, (C.A. 9, No. 2945, 372 F. 2d 372; January 20, 1967; D.J. File 120-44-88.)

The Neifert-White Company applied for low interest Government loans from the Commodity Credit Corporation, which applications were based on invoices deliberately falsified to overstate the costs of the items to be financed by the loans and upon which invoices the C.C.C. was intended to and, in fact, did rely in approving the Government loans. In the Government's suit for penalties under the False Claims Act, 31 U.S.C. 231, the district court rendered judgment for the company and the Ninth Circuit affirmed. The Court of Appeals held that the False Claims Act applies only to "assertions of legal right against the government," i.e., claims of entitlement to public monies as a matter of right, as distinct from mere applications for Government loans.

The Court reached its conclusion principally on its reading of the Supreme Court's decision in United States v. Cohn, 270 U.S. 370. We believe that the Court of Appeals misinterpreted Cohn, which case turns on the fact that Cohn did not attempt to obtain anything of value from the United States.

We also think that the Ninth Circuit's error is pointed up by the Supreme Court's language in the later case of U.S. ex rel Marcus v. Hess, 317 U.S. 537, 544-545, where the Court stated that the False Claims Act was intended to "reach any person who knowingly assisted in causing the government to pay claims grounded in fraud, without regard to whether that person had direct contractual relations with the government."

The decision of the Ninth Circuit conflicts in result, if not in holding, with decisions of several other Courts of Appeals: See, United States v. Lagerbusch, 361 F. 2d 449 (C.A. 3, 1966); United States v. Alperstein, 291 F. 2d 455 (C.A. 5); Smith v. United States, 287 F. 2d 299 (C.A. 5); United States v. Rainwater, 244 F. 2d 27 (C.A. 8), affirmed, 356 U.S. 590; Sell v. United States, 336 F. 2d 467 (C.A. 10); United States v. Brown, 274 F. 2d 107 (C.A. 4); Toepleman v. United States, 263 F. 2d 697 (C.A. 4). See also, United States v. Cherokee Implement Co., 216 F. Supp. 374 (N.D. Iowa). The question of certiorari is now being considered by the Solicitor General.

Staff: Alan S. Rosenthal, Lawrence Schneider (Civil Division)

TORTS

DECISION OF DEPARTMENT OF JUSTICE TO PROSECUTE OR INVESTIGATE ALLEGED LAWBREAKERS HELD TO BE DISCRETIONARY FUNCTION WITHIN EXCEPTION OF TORT CLAIMS ACT.

Alex Carl Smith v. United States, (C.A. 5, No. 23305, April 3, 1967; D.J. File 157-19M-198).

During 1963, plaintiff's store in Albany, Georgia, was picketed by civil rights groups, allegedly because of his prior service on a federal jury and a verdict assented to by him. Plaintiff brought this action under the Tort Claims Act for damages caused by the picketing. He alleged that he had requested the United States Attorney and the F.B.I. to investigate and prosecute the picketers for violation of 18 U.S.C. 1503; that after an initial investigation to ascertain that the attorney for the losing party in the original lawsuit was not involved in the picketing, the United States Attorney and the F.B.I. refused to take further action; and that as a result of such inaction, plaintiff's business was destroyed. The district court dismissed the complaint for failure to state a claim, and the Fifth Circuit affirmed.

The Court of Appeals held that the acts charged in the complaint fell within the "discretionary function" exception of 28 U.S.C. 2680(a). Rejecting the "planning" - "operational" distinction argued by plaintiff as "specious" and "so finespun and capricious as to be almost incapable of being held in the mind for adequate formulation," the Fifth Circuit held that the real question was "the nature and quality of the discretion involved in the acts complained

of." "The discretion of the Attorney General," the Court held, "in choosing to prosecute or not to prosecute, or to abandon a prosecution already started, is absolute". "This discretion," it noted, "exercised in even the lowliest and least consequential cases, can affect the policies, duties, and success of a function placed under the control of the Attorney General by our Constitution and statutes." Therefore, as the Court of Appeals went on to hold, 28 U.S.C. 2680(a) "exempts the government from liability for exercising the discretion inherent in the prosecutorial function of the Attorney General, no matter whether these decisions are made during the investigation or prosecution of offenses."

Staff: Robert C. McDiarmid (Civil Division)

UNDER CIVIL AIR REGULATIONS, PILOT OF COMMERCIAL AIRPLANE IN CONTROL ZONE IS PRIMARILY RESPONSIBLE FOR OPERATION OF PLANE.

Gordon Tilley v. United States (C.A. 4, No. 10,732, April 3, 1967; D.J. File 157-67-342).

Plaintiff, a passenger in a Delta DC-8, brought suit against Delta and the United States, alleging back injury when the nosewheel of the plane went off the runway at Kennedy International Airport, New York, in the course of the plane's being turned around in response to instructions from the control tower to the pilot to clear the runway and return to the taxiway. The jury exonerated Delta; but in the Federal Tort Claims Act case tried to the judge, the district court found the air traffic controller negligent in spacing the planes when he cleared Delta to taxi onto the runway and hold, and in subsequently instructing the pilot to clear the runway back to the taxiway.

On appeal the Court of Appeals reversed. It found that, on the record, the controller's instructions were proper both in spacing the planes on the runway and later in instructing the Delta plane to clear the runway so that another plane could land. Further, it found that the controller did not undertake to instruct the pilot in the physical operation of the plane in turning it around. The Court held that under applicable Civil Air Regulations of the F.A.A. the pilot has the primary responsibility for the operation of the aircraft, and that the controller cannot give his undivided attention to one plane, but must give his attention to all aircraft in the control zone.

Staff: Kathryn H. Baldwin (Civil Division).

INSURANCE -- FEDERAL MEDICAL CARE RECOVERY ACT

UNITED STATES HELD ENTITLED TO RECOVER AS INSURED UNDER UNINSURED MOTORISTS ENDORSEMENT OF AUTOMOBILE LIABILITY INSURANCE POLICY.

Government Employees Insurance Company v. United States (C. A. 4, No. 10,756, April 3, 1967, D. J. File 77-79-950).

The United States brought this action for a declaratory judgment that it was an "insured" under the uninsured motorists provisions of an automobile liability insurance policy issued by GEICO to a private individual, and that, therefore, its claim against an uninsured motorist for the amount of medical care furnished to a dependent of a member of the Armed Forces was covered by the policy. The policy obligated the company to pay all sums which the "insured" was legally entitled to recover as damages from the owner or operator of an uninsured automobile because of bodily injury sustained by the "insured" in an accident involving the uninsured automobile. The policy defined "insured" to include (a) the named insured and any relative; (b) any occupant of the insured automobile; and (c) "any person, with respect to damages he is entitled to recover because of bodily injury * * * sustained by an insured under (a) or (b) above."

The district court entered judgment for the United States, and the Court of Appeals affirmed. The Court of Appeals reasoned:

> The United States, by the provisions of the Federal Medical Care Recovery Act, 42 U.S.C.A. Section 2651 (a), is given an independent right to recover of a tortfeasor the value of medical care furnished an injured person to whom it owes a legal duty to furnish such case. Krebs [the military dependent] was admittedly a person to whom the United States owed the duty of furnishing medical care; he was, also, a person "occupying" the insured car, entitled to recover under the "uninsured motorist" clause of appellant's policy covering such car. In this situation, the United States, as the district court held, clearly meets the definition set forth in subsection (c) of Part IV of appellant's policy as "a person" entitled to recover damages of the uninsured tortfeasor because of injuries sustained by Krebs.

The decisions in this case constitute the first court determinations that the United States may recover on such insurance contracts for hospital and medical care and treatment so furnished.

Staff: Howard J. Kashner (Civil Division)

SMALL BUSINESS INVESTMENT ACT

SBA MAY REQUIRE SMALL BUSINESS INVESTMENT COMPANIES TO FILE PROGRAM EVALUATION REPORTS AND MAY SUSPEND LICENSES FOR FAILURE TO FILE THOSE REPORTS.

Wyatt Investment Corp. v. SBA (C. A. 1, No. 6837, March 4, 1967; D. J. File 106-36-146).

Petitioner, who was licensed by SBA to do business as a small business investment company, failed to file the program evaluation reports required by SBA's regulation, 13 C. F. R. 107.802(i), as amended by 31 Fed. Reg. 4954. Such reports contain financial and other information on small business concerns that have been financed by the SBA investment company. Petitioner admitted failure to file the reports, but contended that SBA had no authority under the statute to require the filing of those reports. In addition, petitioner contended that since the reports would be used for providing information for Congressional use in considering possible further legislation with respect to the small business investment company program, SBA's regulation constitutes an unconstitutional assumption of legislative functions. Moreover, petitioner contended that the suspension of his license until it filed the program evaluation reports was unreasonable, as petitioner had no legal right to require the small business concerns that it had financed in the past to supply that information. Finally petitioner contended that SBA, which had instituted licensing suspension proceedings, was required to hold an evidentiary hearing and to permit an oral argument.

The First Circuit dismissed the petition to review the SBA's order suspending petitioner's license until it filed the program evaluation reports. In a per curiam opinion, the Court of Appeals stated:

> The contention that the Small Business Administration cannot frame a regulation, specifically 13 C. F. R. 107.802(i) as amended 31 Fed. Reg. 4954, conditioning the continuance of the license of small business investment companies upon the furnishing of so-called program evaluation reports, is too ill founded to require discussion.

Staff: Alan S. Rosenthal and Leonard Schaitman (Civil Division)

SOCIAL SECURITY ACT

SECRETARY'S DENIAL OF BENEFITS TO DISABILITY CLAIMANT WITH PERMANENT IMPAIRMENT UPHELD WHERE SECRETARY HAS SHOWN THAT CLAIMANT WAS ABLE TO ENGAGE IN OTHER JOBS IN VICINITY: PROOF THAT PARTICULAR CLIENT WITH PARTICULAR INJURY COULD OBTAIN PRESENTLY OPEN JOB AT SOME NAMED AND IDENTIFIED COMMERCIAL ENTERPRISE, NOT REQUIRED.

James E. Lane v. Gardner (C. A. 6, No. 16,660, March 10, 1967; D. J. File 137-70-111).

After the Secretary had denied Social Security disability benefits to a claimant who allegedly became permanently disabled at the age of 38 when his right leg was gored by a boar hog, the district court reversed the Secretary's decision and ordered that benefits be granted. The Sixth Circuit reversed holding that although claimant had an admittedly permanent impairment rendering him unable to engage in his prior occupation, the Secretary had nevertheless sustained his burden of showing that claimant was able to engage in lighter work in jobs which existed and were being performed in the vicinity of claimant's residence. A vocational expert had testified that there existed in the metropolitan area about 2,000 jobs which could be performed by the claimant but "he did not know of a specific job in a specific plant that would be available" to claimant. The Sixth Circuit held that this was sufficient proof, as there is no requirement that the Secretary demonstrate "that the particular plaintiff with his particular injury--a drop-foot--could obtain a presently open job at some named and identified commercial enterprise, if he applied for it."

Staff: Florence W. Roisman (Civil Division)

DISTRICT COURT

TORTS

UNITED STATES NOT LIABLE FOR DEATH RESULTING FROM UNPREDICTABLE SIDE EFFECT OF DRUG COMPAZINE DUE TO IDIOSYNCRASY OF PATIENT.

Debra Ann Smith, et al. v. United States (S. D. Miss., Civil No. 3228, March 21, 1966, D. J. File 157-41-140).

This action under the Federal Tort Claims Act was brought for the death of a woman who had entered an Air Force Hospital for a gallbladder operation and appendectomy. After the operation, the patient became very nauseated, and she was given ten milligrams (the maximum dosage) of compazine. When she reacted adversely to the drug, her physician gave her an antidote. However, she died several days later from side effects caused by the drug. The drug is manufactured by a reputable drug house and is in common use throughout the country. The drug had been used many times in the same manner on other patients, and the maufacturer's literature did not warn that the drug might be lethal if given within a certain time after the operation.

The district court held that "[t]he doctrine of res ipsa loquitur does not apply where it is shown that every reasonable professional attention was given the patient and that injury resulted from an allergy or idiosyncrasy to an ordinarily and reasonably safe drug." The Court further held that

plaintiffs had not satisfied the burden of proving the Government doctors negligent in giving the first dosage of this drug. The Court emphasized that the "hospital and its doctors were not insurers of the absolute safety of their patients or that such treatment would be absolutely free of any possible errors or mistakes." Plaintiff has noted an appeal.

Staff: United States Attorney Robert E. Hauberg; Assistant United States Attorney E. R. Holmes (S.D. Miss.)

* * *

CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

COURTS OF APPEALS

FRAUD

CIVIL DISCOVERY WHILE CRIMINAL ACTION IS PENDING.

United States v. Carl Simon, et al. (C. A. 2, March 3, 1967, D. J. 113-51-177.) The defendants were accountants for Continental Vending Machine Coporation, a firm under reorganization in the Eastern District of New York pursuant to Chapter X of the Bankruptcy Act. They were charged in the Southern District of New York with mail fraud, conspiracy and the filing of false reports with SEC, by reason of a financial statement they prepared for the bankrupt corporation.

The Chapter X trustee filed a civil action against the defendants one year prior to their indictment. His efforts, after the indictment, to take the depositions of the defendants, were upheld in the Eastern District of New York. The defendants thereafter moved in the Southern District of New York to stay the depositions pending resolution of the criminal proceedings pending in that District on the grounds that (1) the depositions would involve disclosure of their defenses, and (2) since they were reputable accountants they "would lose their professional lives" if they invoked their privilege against self-incrimination. The District Court enjoined the taking of depositions, finding power under the All Writs Act (28 U.S.C. 1651(a)) and the Court's inherent supervisory power. 262 F. Supp. 64.

The Court of Appeals reversed, not on the ground that the District Court lacked power to order a stay, but because the defendants had not shown that the depositions would interfere with the defense or the trial of the criminal case. It distinguished this case from those in which there is an identity of parties in parallel criminal and civil cases such as United States v. Steffes, 35 FRD 24 (D. Mont. 1964), and a seeking of advantage by one party, and also from those in which a party sought to be deposed was claiming his privilege against self-incrimination. Paul Harrigan & Sons, Inc. v. Enterprise Animal Oil Co., Inc., 14 FRD 333 (E.D. Pa., 1953).

The Circuit Court stated that its decision might be otherwise were there a clear showing that depositions would interfere with a criminal trial

or with the preparation of a defense. It did not accept defendants' argument that their status as accountants gave them some special privilege to refrain from pleading their privilege against self-incrimination in order to preserve their professional reputations.

The defendants are filing a petition for a writ of certiorari.

Staff: United States Attorney Robert M. Morgenthau; Assistant United States Attorneys Stephen E. Kaufman and Hugh C. Humphreys (S. D. N. Y.).

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EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS
Assistant to the Deputy Attorney General John W. Kern, III

ASSISTANTS APPOINTED

Colorado - THOMAS SEAWELL, ESQ.; Colorado University, LL. B., and formerly in private practice.

District of Columbia - ROBERT BENNETT, ESQ.; Georgetown University, LL. B., and formerly law clerk to Federal Judge.

District of Columbia - DANIEL J. GIVELBER, ESQ.; Harvard University, LL. B., and formerly in private practice and Special Attorney, United States Attorney's Office, District of Columbia.

Missouri, Western - ANTHONY NUGENT, ESQ.; Harvard University, LL. B., and formerly an attorney in the Criminal Division, Assistant Prosecuting Attorney, and in private practice.

IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

DISTRICT COURT

IMMIGRATION

DISTRICT COURT HAS JURISDICTION OF HABEAS CORPUS PROCEEDINGS, NOTWITHSTANDING PETITIONER NOT IN PHYSICAL CUSTODY OF RESPONDENT, AND HAS JURISDICTION TO REVIEW DENIAL OF VISA PETITION; DENIAL OF VISA PETITION HELD IMPROPER.

U. S. ex rel. Jamshid Nourani v. District Director, Immigration and Naturalization Service (N.D., Cal. No. 46106, March 31, 1967, D.J. File 39-11-614).

In this writ of habeas corpus proceeding the petitioner, an Iranian national, challenged the validity of an order for his deportation and the denial of a visa petition submitted in his behalf by his United States citizen wife, Joan M. Nash.

Petitioner entered the United States as a student in 1960. On March 26, 1963 he married a United States citizen, Linda Young, and upon the basis of her visa petition approved on April 23, 1963 he was accorded nonquota status. On the same date his status was adjusted from a student to a permanent resident under 8 U.S.C. 1255. He divorced Linda Young in 1965 and married his present wife in 1966. On February 8, 1965 pursuant to the provisions of 8 U.S.C. 1256 he was served with a notice that his status as permanent resident was to be rescinded because his marriage to Linda Young was invalid. Petitioner failed to answer the allegations in the notice and his permanent resident status was revoked. After a hearing he was ordered deported and directed to surrender for deportation on December 6, 1966. The petition for writ of habeas corpus was filed on December 5, 1966.

The first issue decided by the Court was whether it had jurisdiction of the writ proceedings. Although respondent did not have physical custody of petitioner when the petition was filed the Court held that the warrant of deportation and the notice to report for deportation constituted sufficient technical custody to support habeas corpus jurisdiction. The Court also ruled that in determining the validity of the deportation order it could under the theory of ancillary jurisdiction review the denial of the visa petition.

Respondent had denied the visa petition of petitioner's second wife pursuant to 8 U.S.C. 1154(c) on the ground that petitioner had been previously accorded nonquota status by reason of a marriage determined by the Attorney General to have been entered into for the purpose of evading the immigration laws. After examining the record of the 8 U.S.C. 1256 rescission proceedings the Court concluded that no finding had been made in those proceedings that petitioner had entered into his first marriage for the purpose of evading the immigration laws and that in fact 8 U.S.C. 1256 did not require such a finding. The Court then ruled that the visa petition had been improperly denied and directed petitioner's release from the custody of the respondent.

Staff: United States Attorney Cecil F. Poole; Chief Assistant United States Attorney Charles Collett, (N.D., Cal.)

* * *

TAX DIVISION

Assistant Attorney General Mitchell Rogovin

SPECIAL NOTICE

FILING AND DOCKETING OF APPEALS, DESIGNATION OF PARTS OF TRANSCRIPT AND STATEMENT OF ISSUES.

Some confusion has arisen under the 1966 amendments to the Federal Rules of Civil Procedure as to (1) the procedure for obtaining extensions of time for filing and docketing the record in the Court of Appeals, and (2) the necessity for filing a designation of the parts of the transcript to be included in the record and a statement of the issues to be presented on appeal. The pertinent rules are as follows:

1. Under Rule 73(a), notice of appeal must be filed with the District Court within 60 days of the entry of the judgment from which an appeal is to be taken.

2. Under Rule 73(g), unless an extension is obtained , the appellant must cause the record on appeal to be filed with the Court of Appeals and the appeal to be docketed within 40 days of filing the notice of appeal.

A. The District Court may extend the time for filing and docketing the record in the Court of Appeals but not to a day more than 90 days from the date of filing the first notice of appeal provided that the motion is filed on or before the 40th day. (Rule 73(g).)

B. "The motion of an appellant for an extension shall show that his inability to effect timely filing and docketing is due to causes beyond his control or to circumstances which may be deemed excusable neglect." (Rule 73(g).)

3. Rule 75(a) provides that the record on appeal shall consist of the original papers, exhibits, transcript of proceedings, and a certified copy of the docket entries.

4. Rule 75(b) provides that "Within 10 days after filing the notice of appeal the appellant shall order from the reporter a transcript of such parts of the proceedings not already on file as he deems necessary for inclusion in the record. Unless the entire transcript is to be included, the appellant shall, within the time above provided, file and serve on the appellee a description of the parts of the transcript which he intends to include in the record and a statement of the issues he intends to present on appeal."

5. Rule 75(e) provides that "Within the time provided or fixed under the provisions of Rule 73(g) for filing the record and docketing the appeal, the

clerk of the district court shall transmit the record to the clerk of the Court of Appeals. The appellant shall comply with the provisions of subdivision (b) of this rule and shall take any other action necessary to enable the clerk to assemble and transmit the record."

The responsibility continues to rest with the United States Attorney to see that required notices are filed or extensions are requested pending a decision by the Solicitor General as to whether an appeal will be prosecuted. See United States Attorneys' Manual, Title 4, page 45. The affidavit needed in order to make the showing required by Rule 73(g) for an extension of time for docketing will ordinarily be prepared by the Tax Division attorney responsible for the case when the extension is requested and will be forwarded to the United States Attorney. If such an affidavit has not been received by the United States Attorney at least three days prior to the date on which a motion for extension must be filed, the United States Attorney should telephone the Section Chief responsible for the case.

Rule 75 appears to relieve an appellant of the requirement of filing a designation of record where the entire record is to be filed with the appellate court and most district clerks no longer make such a requirement. If the local district clerk so interprets Rule 75 a designation need not be filed where all the trial record is to be transmitted to the Court of Appeals. If the local clerk, however, takes a contrary position, such a designation should be prepared and filed by the United States Attorney. (The Tax Division would appreciate being advised of any District where practice or rule still requires the filing of a designation.) If the entire transcript is not to be included, the Tax Division attorney charged with the case will prepare for service and filing a description of the parts of the transcript to be included in the record together with a statement of the issues to be presented on appeal.

The foregoing relates to documents to be filed in the District Court relative to the transmission of the record to the Court of Appeals--which are not, of course, to be confused with similar documents additionally required in some circuits to be filed in the Court of Appeals in connection with the printing or reproduction of the record in the Court of Appeals.

CIVIL TAX MATTERS

DISTRICT COURT

INJUNCTION

INJUNCTION GRANTED PRECLUDING COLLECTION BY LEVY OF DECEDENT'S TAXES FROM ASSETS DISTRIBUTED BY ESTATE TO HEIR.

Lawrence v. United States (N. D. Tex., January 9, 1967, 67-1 U.S.T.C. 9329); D.J. File 5-73-1984.

The plaintiff under the will of her deceased husband was designated as the independent executrix of the estate, and as such administered the estate independently of the Texas probate court for approximately two years until September of 1962. In February of 1965 assessments were made against the decedent as responsible officer of Casa View Country Club for federal excise and employment taxes incurred prior to his death. Collection of these liabilities was attempted by levy on bank accounts in plaintiff's name.

In granting the injunction against such manner of collection the Court ruled that since the decedent's estate had been closed even before the assessment of the tax liabilities the taxes could be collected only by suit against the sole heir as transferee of the estate's assets. Moreover, it was determined that only by such a suit could the Government now establish its claim against the decedent's property.

Staff: United States Attorney Melvin M. Diggs; Assistant United States Attorney Kenneth J. Mighell; and Joel P. Kay (Tax Division).

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