United States Attorneys' Bulletin

Published by Executive Office for United States Attorneys
Department of Justice, Washington, D.C.

VOL. 15 AUGUST 18, 1967 NO. 17

UNITED STATES DEPARTMENT OF JUSTICE

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Assistant Attorney General Ernest C. Friesen, Jr.

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ANTITRUST DIVISION

Assistant Attorney General Donald F. Turner

DISTRICT COURT

SHERMAN ACT

MOTION TO DISMISS INDICTMENT BECAUSE OF ALLEGED PREJUDICIAL DELAY AND RELATED MOTION TO PRODUCE DOCUMENTS DENIED

United States v. Chas. Pfizer & Co., Inc., et al. (61 Cr. 772 - S.D. N.Y.; June 9, 1967; D.J. 60-21-108)

On June 9, 1967, the Court heard motions by the three corporate defendants to (1) dismiss the indictment on the grounds that the Government has, to their prejudice, purposefully delayed in bringing them to trial; and (2) under Rule 57(b), F.R.Cr.P., to copy and inspect documents in the Government's files that relate to the motions to dismiss the indictment.

Because of the interrelation of both motions argument was heard at the same time. The motion to dismiss was based on the contention that the Government purposefully delayed in empanelling a grand jury in order to await the outcome of hearings based on similar facts being conducted by the Federal Trade Commission; that the Government thereby obtained the benefit of a "dress rehearsal" of the trial; suggested that the defense in the Commission proceeding would have been conducted differently if defendants had been aware of the possibility of a subsequent criminal proceeding; that the Government misled them after grand jury subpoenas were issued. In support of their contention, defendants moved to inspect the Government files relating to the sequence of events leading to the empanelling of the grand jury.

The Government contended that there was no delay, purposeful or otherwise, and that it was perfectly proper, under the Sherman Act and the Federal Trade Commission Act, to conduct simultaneous or successive criminal and civil proceedings. To support its position that there was no purposeful delay, the Government submitted an affidavit reciting a chronological account of the events from March 1955, when the Government initiated an inquiry into the broad spectrum antibiotics industry (which was subsequently closed), to the time of the hearing of this motion.

While the Court has rendered no formal decision, remarks from the bench indicate that the motion to dismiss will be denied. The Court did not think that defendants were misled concerning the possibility of a criminal prosecution; it believed, on the contrary, based on defendants' own submissions, that they were fully aware during the Commission proceeding of the

potential prospect of a criminal prosecution; that the claim of Governmental misbehavior was totally without foundation; and that:

> to warrant dismissal of an indictment of this kind, I think would require an overruling of the precedents of the Supreme Court and the inferior courts, which have held that necessarily the scheme of the anti-trust laws lodges a considerable measure of discretion in enforcement authorities as to when and how they will proceed, and gives them the power to bring successive proceedings under the different statutes they are charged with administering. [Transcript of June 9, 1967, pp. 96-97]

As to defendants' discovery motion, the Court asked whether they would be willing to make available to the Court, for an in camera inspection, documents in their files and the files of their attorneys showing an awareness that a criminal antitrust action might be instituted and plans or precautions based upon the possibility of such a proceeding. Counsel for defendants agreed to conduct a search for such documents and produce them for in camera inspection, and signed a stipulation in which they waived, with the express consent of their clients, any privilege which might attach to the documents produced, which are to cover the years 1957 to the date of the indictment. It was also agreed that the Government will produce, also for in camera inspection only those documents defendants sought in their motion.

On June 21, the Court heard argument and ruled on certain additional motions.

(1) In response to defendants' motion under Rule 16(a)(3) and 6(e) to obtain grand jury transcripts of ten officers, agents and employees, he ordered the Government to produce transcripts of (a) officers, and (b) others among these ten who had testified in the related Federal Trade Commission proceeding. He pointed to the peculiar circumstances of this case, i.e., the length of time between the return of the indictment and the trial and the lengthy F. T. C. hearings. These transcripts are to be produced on or before, August 1. Delivery of these transcripts is conditioned on their use solely by the attorneys for the defendants in the preparation of their defense and to refresh the memory of the witness.

(2) Defendants moved pursuant to Rule 16(b) for production of (1) "all books, papers, documents, tangible objects"; (2) "names and addresses of witnesses with knowledge of the facts"; and (3) "statements of witnesses whom the Government does not intend to call at trial," in the possession, custody or

control of the Department of Justice, obtained from sources other then defendants by seizure, process or voluntarily, which relate to the action. In their motion papers they limited their request to eliminate materials "which they have in their possession or to which they have access through the record in the Federal Trade Commission proceeding."

The Government opposed defendants' motion, except that it did not object to entry of an order permitting defendants to inspect and copy "all books, papers, documents, and tangible objects (excluding grand jury transcripts) in the possession, custody or control"of the Department of Justice, which were not already in the possession of defendants or to which they had access through the record in the Federal Trade Commission proceeding, provided the order was conditioned to permit the Government to make a motion under Rule 16(c), within 30 days, to inspect and copy or photograph "books, papers, documents, tangible objects, or copies or portions thereof, which the defendants intend to produce at the trial and which are within their possession, custody or control."

Judge Frankel ruled that the Government should produce the materials requested in the first category, which it had agreed to produce, on or before August 1. This was made subject to the condition that attorneys for Olin-Mathieson Chemical Corp. (Squibb) and the Upjohn Company would be allowed to read documents they had supplied to the Government on a confidential basis prior to their production to the defendants and, if necessary, to apply to the court for a protective order.

The Court refused to order production under Rule 16(b) of "names and addresses of witnesses with knowledge of the facts" and "statements of witnesses and prospective witnesses whom the Government does not intend to call at trial" on the ground that these items are not covered by that rule and that the latter statements are covered by the Jencks Act.

(3) In what to our knowledge is the first instance of use of Rule 16(c), which provides for discovery by the Government where defendants obtain discovery under Rule 16(a) or (b), Judge Frankel treated the Government's request to condition the order as a motion and order defendants to produce all documents within their possession or control which they intend to introduce at trial. The schedule for the production of documents by the defendants, under Rule 16(c), was left to be worked out by both parties through stipulation.

(4) Defendants moved under the Fifth Amendment and pursuant to Brady v. Maryland, 373 U.S. 83 (1953), to require disclosure of exculpatory materials in the possession of the Department of Justice or known by that Department to be in the possession of another branch of the Government.

Arguing that "neither the Government nor this Court is really in a position to determine what might be exculpatory" and that "only defense counsel can

make such determinations," defendants contended that they "should be permitted to review the materials in the Government's possession to determine what might be exculpatory." The Government submitted an affidavit which stated that there were no exculpatory materials in the possession of the Department of Justice; that it had no knowledge of any exculpatory materials in the possession of any other branch of the Government; and that defendants should not be permitted to search the Government's files in order to determine what might be exculpatory, arguing that such a procedure would do away with the Rules of Criminal Procedure. On the basis of the Government's affidavit, the Court denied defendants' motion, observing that we still have an adversary system and that to follow the procedure suggested by defendants would go beyond any requirement of the Constitution or the Federal Criminal Rules.

(5) In connection with the Government's statement that it would furnish to defendants the grand jury testimony of any person the Government calls as a witness at trial, the Court ordered that such transcripts be turned over to the defendants five days, exclusive of Saturdays, Sundays, holidays, before the witness takes the stand.

Being informed that the Government does not have any Jencks Act statements in its possession, the Court ordered that should the Government come into possession of such statements they shall also be turned over to the defendants five days, exclusive of Saturdays, Sundays and holidays, before the witness testifies.

(6) Defendants had also moved under Rule 6(e) to obtain a transcript of the grand jury testimony of the former President of alleged co-conspirator Upjohn. Both the Government and counsel for the witness opposed production, and defendants withdrew the motion after submission of briefs but prior to oral argument thereon.

A further pre-trial conference has been scheduled for August 21.

Trial in the above case is set to commence on October 9.

Staff: Norman Seidler, Harry G. Sklarsky, Herman Gelfand, Robert K. Johnson and Ira Postel (Antitrust Division)

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CIVIL DIVISION

Acting Assistant Attorney General Carl Eardley

COURT OF APPEALS

AGRICULTURE

BOUNDARY LINES FOR "LOCAL ADMINISTRATIVE AREAS" USED IN ADMINISTRATION OF MAJOR AGRICULTURAL PROGRAMS NOT CONTROLLED BY NATURAL RESOURCE FACTORS

Drew v. Lawrimore, et al. (C. A. 4, No. 11,117; June 19, 1967; D. J. 106-67-288)

The Soil Conservation and Domestic Allotment Act, 16 U. S. C. 590(h), provides that the Secretary of Agriculture shall designate "local administrative areas", which are called "communities", for the administration of major farm programs. The Secretary of Agriculture has consistently taken the position that communities could be established solely on the basis of administrative requirements, such as the number of farms and the administrative workload. Plaintiff, a tobacco farmer whose tobacco allotment was governed by the community location of his farm, instituted suit in the district court to compel the redrawing of communities based on natural resource factors, such as rainfall and type of soil. Pursuant to an order of the district court, the Secretary drew the boundaries taking into account both administrative and natural resource factors. The court, however, rejected the boundaries as so drawn. It held that natural resource factors alone controlled community boundaries and ordered the Secretary to redraw community boundaries accordingly.

On the Secretary's appeal, the Fourth Circuit reversed and reinstated the original boundaries. The Court of Appeals held that natural resource factors did not control the location of boundaries. At the most, as the Court of Appeals stated, these factors had to be given some consideration along with administrative requirements. Since the Secretary had given some consideration to natural resource factors in establishing the boundaries attacked by plaintiff, the Court found it unnecessary to determine whether it would have been improper to draw boundaries without any consideration of these factors. The Court stressed that its failure to decide the question was not to be viewed as any indication of approval of the district court's position.

Staff: Norman Knopf (Civil Division)

COLLATERAL ESTOPPEL

SUIT AGAINST FEDERAL RESERVE BANK BARRED BY COLLATERAL ESTOPPEL WHEN DISPOSITIVE ISSUES HAVE BEEN RESOLVED IN PRIOR SUIT BY UNITED STATES AGAINST PLAINTIFFS

Hart v. Federal Reserve Bank of Atlanta (C. A. 6, No. 17,170; June 21, 1967; D.J. 145-4-494)

This action was instituted by the guarantors of a note against the Federal Reserve Bank of Atlanta for allegedly mishandling collateral securing the note. The Bank had acted as fiscal agent of the United States under the "V" loan program, guaranteeing to lending banks payment of the "V" loans. The dispositive issues in the case had been resolved adversely to the guarantors in an earlier suit by the United States on the guarantee. See United States v. Hart, 215 F. Supp. 35 (M.D. Tenn.), affirmed, 312 F. 2d 127 (C.A. 6). In the instant case, the district court held that the Federal Reserve Bank, although not a party to the earlier suit, could invoke the doctrine of collateral estoppel to preclude retrial of the issues involved in the prior action, since it had acted as agent of the United States with respect to the transactions involved in the suits. Judgment was entered for the Bank.

The Sixth Circuit affirmed upon the opinion of the district court. In addition, it specifically rejected plaintiffs' claim that the Federal Reserve Bank "was without authority . . . to guarantee the payment to the banks of 90 percent of any deficiency", concluding that the Bank was authorized to act as it did. See 56 Stat. 351 §7.

Staff: Robert C. McDiarmid (Civil Division)

NATIONAL BANK ACT

"MOVE" OF EXISTING BRANCH BANK HELD ESTABLISHMENT OF NEW BRANCH

Bank of Dearborn v. Manufacturers National Bank (C. A. 6, Nos. 16, 912 and 16, 913; May 24, 1967; D.J. 145-3-603)

The Manufacturers National Bank of Detroit maintained several branches in the City of Dearborn, Michigan. Under Michigan law, it was not entitled to establish a "new" branch in that city, but was entitled to place new branches in an adjoining township. In order to maximize its banking facilities, Manufacturers applied to the Comptroller of the Currency for authorization (1) to build a new branch in the township just outside Dearborn's city limits and two blocks away from an existing branch which was within

the city limits; and (2) to "move" the existing branch in the city limits to a new shopping center also in the city limits. The Comptroller approved both proposals.

The Bank of Dearborn sued Manufacturers and the Comptroller to enjoin the approved moves. After a full hearing, the district court entered a permanent injunction against the moves. It held that the transactions taken together amounted to a "sham" or "subterfuge", and that Manufacturers would be establishing a new branch in Dearborn, contrary to Michigan law, and "moving" its existing branch two blocks across the city line. On appeal, the Comptroller argued that his findings of fact pertaining to the move were conclusive because supported by "substantial evidence." The Sixth Circuit, however, affirmed, agreeing with the district court's holding that the transaction was a subterfuge and that the Comptroller's approval of the proposals was an "abuse of discretion."

Staff: Walter H. Fleischer (Civil Division)

RAILROAD ARBITRATION

ATTACK ON PROCEDURES FOLLOWED BY SPECIAL BOARDS OF ADJUSTMENT HELD BARRED BY RES JUDICATA

Brotherhood of Railroad Trainmen v. Chicago, M., St. P. & Pac. R. Co. (C.A.D.C., Nos. 19,867, 20,003-20,004; May 19, 1967; D.J. 124-16-62)

Brotherhood of Railroad Trainmen v. St. Louis Southwestern Ry. Co. (C.A.D.C., Nos. 20,212-20, 213; May 19, 1967; D.J. 124-16-64)

These actions were brought to contest the validity of awards of Special Boards of Adjustment created pursuant to the terms of the Award of Arbitration Board 282, established by Public Law 88-108 (77 Stat. 132) in August 1963 to avert a national railroad strike. The Brotherhood of Railroad Trainmen contended that the awards of the Special Boards of Adjustment, reducing the number of men on train crews, were invalid because those boards failed to conduct their arbitration in conformance with Sections 7, 8 and 9 of the Railway Labor Act (45 U.S.C. 157-159), by failing to take evidence under oath, and by failing to make a transcript of the testimony. The district court refused to set the awards aside.

The Court of Appeals affirmed by a 2-1 vote, holding that res judicata barred such an attack on the validity of the procedures followed by the Special Boards. The appellate court noted that the terms of the Award of Board 282 prescribed procedures for the Special Boards of Adjustment clearly inconsistent with Sections 7-9 of the Railway Labor Act, and ruled that the question of whether the Special Boards were required to follow those provisions of the Act in conducting

their arbitration, was one which the Trainmen could have litigated in a prior action, to which they were a party, attacking the Award of Board 282 itself. See Brotherhood of L.F. & E. v. Chicago, B. & O.R. Co., 225 F. Supp. 11 (D. D.C.), affirmed 331 F. 2d 1020 (C. A. D.C.), certiorari denied, 377 U.S. 918. The Court of Appeals thus accepted our position that the Trainmen were barred from litigating not only issues actually decided in the prior proceeding, but also any other matters which could have been litigated in it. In Nos. 19,867, 20,003 and 20,004, the Court, citing United States v. Tucker Truck Lines, Inc., 344 U.S. 33, 37, further held that the union could not object to the procedures followed by the Special Boards because it purposefully refused to participate in the proceedings before them.

Staff: Walter H. Fleischer (Civil Division)

SOVEREIGN IMMUNITY

SUIT BY CORPORATE DEBTOR UNDER CHAPTER XI OF BANKRUPTCY ACT AGAINST RECEIVER AND TREASURY OFFICIALS TO OBTAIN REPAYMENT OF FEES PAID INTO REFEREES' FUND HELD PROPERLY DISMISSED FOR WANT OF JURISDICTION AS UNCONSENTED SUIT AGAINST UNITED STATES

American Guaranty Corp. v. Burton (C. A. 1, No. 6855; July 14, 1967; D.J. 145-3-815)

This case arose out of the second largest corporate arrangement proceeding ever processed under Chapter XI of the Bankruptcy Act. The debtor American Guaranty Corporation sued the bankruptcy receiver, the Treasurer of the United States, the Secretary of the Treasury, the Judicial Conference of the United States, and the Director of the Administrative Office of the United States Courts. The purpose of the suit was to recover some $220,000 in fees paid from the corporation's assets to the Referees' Salary and Expense Fund pursuant to 11 U.S.C. 65, 68 and 79. More than $140,000 of that sum had been remitted to the Treasury; the remainder was held by the receiver pendente lite. The fees in question were fixed by the Judicial Conference at 1% of the obligations paid out by the receiver. The Conference set the fees pursuant to authority granted it by 11 U.S.C. 65(b)(1) to establish "schedules of graduated additional fees" in Chapter XI proceedings.

The corporation claimed that the 1% fee was not a "graduated" fee, and was therefore totally invalid and void. On this basis, it claimed entitlement to the return of all the fees it paid. The district court dismissed the action for want of jurisdiction as an unconsented suit against the United States.

The First Circuit affirmed the dismissal. With regard to the moneys already in the hands of the Treasurer, the Court of Appeals held, on the authority of Dugan v. Rank, 372 U.S. 609, that the action was plainly one against the United States because the judgment "would expend itself on the public treasury." The Court also affirmed the dismissal as to the fees collected but retained by the receiver. As to these, the Court held that even though the receiver was not a Government officer, his position as a stakeholder meant that any judgment against him would necessarily be a holding that the United States had no interest in the fund. Therefore, the Court of Appeals concluded, the Government was an indispensable party which had not consented to be sued, and the action against the receiver was also properly dismissed.

In addition, assuming arguendo that it had jurisdiction to hear the case, the First Circuit went on to state that the Government was entitled to judgment on the merits as well. The Court of Appeals ruled that the Judicial Conference fee of 1% was a "graduated fee" because it necessarily increased in an amount proportional to the size of the estate being administered.

Staff: Richard S. Salzman (Civil Division)

WELFARE AND PENSION PLANS DISCLOSURE ACT

INVESTMENT ADVISERS ARE SUBJECT TO BONDING REQUIREMENTS OF ACT; DISTRICT COURT DIRECTED TO DETERMINE THE REASONABLENESS OF REGULATION EXEMPTING BANKS BUT NOT INVESTMENT ADVISERS FROM ACT'S BONDING REQUIREMENTS

Fiduciary Counsel, Inc. v. W. Willard Wirtz (C.A.D.C., No. 20,620; July 7, 1967; D.J. 156-16-110)

This is the first appellate case under the Welfare and Pension Plans Disclosure Act. 29 U.S.C. 301-309. It was brought in the district court by an investment adviser, subject to regulation by the Securities and Exchange Commission, to obtain a declaratory judgment against the Secretary of Labor, who adminsters the Act, that it was not subject to the Act's bonding requirement (29 U.S.C. 308d), and that if it were, it was entitled to a statutory exemption. The district court and the Court of Appeals concluded that the adviser was covered by the Act. The courts held that the investment adviser of a pension trust, even though at no time in physical possession of the trust assets, was subject to the Act's bonding requirements because it "receive[d], handle[d], disburse[d], or otherwise exercise[d] custody or control" of the assets of a pension plan. In so holding, the Court of Appeals recognized "the Congressional concerns about the jeopardy in which pension assets had

been placed by the dissipation which can flow from either direct thievery or dishonest investment."

The Court of Appeals, however, remanded the case to the district court for a determination as to the reasonableness of the Secretary's regulation exempting state or federally regulated banks and trust companies, but not investment advisers. See 29 U.S.C. 308d(e); 29 C.F.R. 464.4(e). The Court noted that in some states banks are subject to minimal supervision, and that investment advisers are extensively regulated by the S.E.C. The Court then stated:

> It is just possible * * * that the employees * * * are in no greater danger of having their pension assets diminished by reason of the dishonest investment advice emanating from appellant than they would be if this advice were supplied by a state bank which is either not bonded at all or in an amount less than that required by the Act or which is not examined at all or only in a perfunctory manner.

The district court had not commented upon this aspect of the case.

Staff: Jack H. Weiner (Civil Division)

DISTRICT COURT

DEBT ACTIONS

UNITED STATES NOT SUBJECT TO DEFENSES OF FRAUD, ESTOPPEL OR STATE STATUTES OF LIMITATIONS IN DEBT ACTIONS BROUGHT BY RFC

United States v. Annis (W.D. Tenn., No. C-65-295; March 23, 1967; D.J. 105-72-32)

Defendant guaranteed a note for $91,500 payable to the Reconstruction Finance Corporation by a corporation. Following the corporation's default, RFC demanded payment from Annis, but he could not meet its demand. RFC and Annis then agreed that the latter would liquidate part of the debt by paying $17,500 in cash and executing a note to RFC for $2,500. In addition, Annis executed an "Acknowledgement of Indebtedness", which recited that he owed RFC $35,860.42. Annis failed to pay the note, and the United States brought this action to recover on it and on his "Acknowledgement of Indebtedness."

Annis interposed three defenses: fraud, estoppel and Tennessee's six year statute of limitations. The fraud and estoppel defenses were based on alleged representations by a Government agent that his debt would be "satisfied" and "forgotten" as a result of his $17,500 payment. Annis further alleged that the "Acknowledgement of Indebtedness" had been executed by him because he was told that it was "merely a bookkeeping entry which was necessary in order to charge off the debt."

The case was tried before a jury. At the close of the evidence, the Court directed a verdict for the Government on the defenses of fraud and estoppel, ruling that the United States was not bound by the representations of an agent acting beyond his authority and that estoppel was not available as a defense against the Government. In addition, the Court in its opinion ruled that the United States was not subject to state statutes of limitations in actions on RFC claims. See United States v. 93 Court Corp., 350 F. 2d 386 (C. A. 2), certiorari denied, 382 U.S. 984.

Staff: United States Attorney Thomas L. Robinson and Assistant United States Attorney Bart C. Durham, III (W.D. Tenn.); George H. Jones (Civil Division)

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CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

COURTS OF APPEALS

BANKRUPTCY -- FRAUDULENT CONCEALMENT OF ASSETS

SEPARATE PARAGRAPHS OF 18 U. S. C. 152 AND SEPARATE TRANSFERS UNDER PARAGRAPH SIX OF SECTION CREATE SEPARATE OFFENSES, WHICH MAY BE CHARGED IN SEPARATE COUNTS

United States v. Irvin Gordon, et al. (C. A. 2; July 5, 1967; D. J. 49-14-207)

Defendants were charged with violations of paragraphs 1, 2 and 6 of 18 U. S. C. 152 and 371 in eight separate counts. They had transferred goods and money from a store in Connecticut to a store and bank in New York prior to bankruptcy. At the trial, the extent of the misappropriation was shown by the expert testimony of two accountants.

In affirming the conviction of the defendants, the Court of Appeals held that the separate paragraphs of Section 152 create separate crimes and each offense may be charged separately; also separate transfers in violation of paragraph 6 constitute separate offenses. The Court noted but did not decide possible error in charging in separate counts the concealment of money in the banks in one count and the concealment of a truck in another count in view of the fact that sentences imposed on each count ran concurrently.

Staff: United States Attorney Jon O. Newman (D. Conn.)

GAMBLING

COURSE OF CONDUCT PLEADING IN 18 U. S. C. 1084 WAGERING PROSECUTION NOT DUPLICITOUS; "MAIL COVER" UPHELD; DEFENDANT NOT ENTITLED TO NARDONE HEARING AS MATTER OF RIGHT; PROHIBITIONS CONTAINED IN 18 U. S. C. 1084 NOT RESTRICTED TO PRINCIPALS IN WAGERING OPERATIONS; INSTRUCTION RELATING TO REBUTTABLE PRESUMPTION OF KNOWLEDGE OF LAW APPROVED; NATURAL AND PROBABLE CONSEQUENCES INSTRUCTION QUESTIONED

Cohen v. United States (C. A. 9, May 5, 1967; D. J. 160-46-12)

Appellant was convicted on two counts of an indictment charging that he knowingly utilized interstate telephone facilities for the transmission of wager and wagering information from Las Vegas, Nevada, to San Francisco, California, in violation of 18 U. S. C. 1084(a). On appeal, he urged that one of the

counts was duplicitous because a bill of particulars specified that proof of the count would involve a number of telephone calls, each of which might have been made the subject of a separate count. Appellant also argued that the Court should consider a "mail cover" used during investigation of appellant as an interference with constitutional rights and as violative of federal criminal statutes dealing with obstruction of the mails (18 U. S. C. 1701-1703). In this regard, it was asserted that a motion to suppress evidence erroneously thought to have been disclosed by the "mail cover" and alleged wire tapping should not have been decided against the appellant without affording him a hearing of the type required in Nardone v. United States, 308 U. S. 338 (1939). Among jury instructions referred to as a basis for appeal were those relating to language in 18 U. S. C. 1084(a) requiring that the Government prove one charged with a violation to be a person "engaged in the business of betting or wagering". In this regard, it was asserted that the quoted phrase should be restricted by authorities construing the phrase, "engaged in the business of accepting wagers," as the latter phrase is used in the Internal Revenue Code [26 U. S. C. 4401(c)], thus arguing that 18 U. S. C. 1084(a) should be limited to those shown to be principals in gambling operations.

Objections were also interposed concerning an instruction that there is a rebuttable presumption that one knows what the law forbids, and it is reasonable to infer that a person ordinarily intends all the natural consequences of acts knowingly done or knowingly omitted.

In affirming the conviction the Court noted that the bill of particulars and subsequent proof adduced during trial could not have the effect of rendering a count duplicitous, that the count charged a single offense of transmitting wagering information over interstate telephone facilities over a three-month period, and that even if each telephone call might have been made the basis of a separate violation, this factor could not have been prejudicial to the appellant. In this regard, the Court indicated that the treatment of multiple calls over a period as one crime instead of several, inured to the benefit of the appellant, and commented that the Government should be commended rather than criticized for pleading the violation this way.

On the question of the legitimacy of the "mail cover," the Court adopted earlier favorable authorities in the Second, Third and Eighth Circuits and held that the mere showing of the existence of a "mail cover" without more does not indicate a violation of federal criminal statutes, nor deprivation of constitutional rights.

In ruling that an evidentiary hearing on the admissibility of evidence was not improperly denied, the Court held that evidentiary hearings should not be set as a matter of course, and that the moving papers filed by the appellant in connection with a motion to suppress evidence allegedly obtained through a "mail cover," and wiretapping, contained general and speculative averments

which failed to meet the criteria enunciated in Nardone v. United States, 308 U. S. 338 (1939).

The Court rejected the contention that resort should be made to wagering excise tax provisions in the Internal Revenue Code in construing 18 U. S. C. 1084(a), and noted that the former appropriately applied to principals in wagering operations whereas the prohibitions in the latter were intended by Congress to be made applicable to those engaged in the business of gambling on their own behalf and those engaged in that business on behalf of others.

With respect to the instruction to the jury that there existed a rebuttable presumption that appellant knew what the law forbade, the Court cited Edward v. United States, 334 F. 2d 260, 366-368 (C. A. 5, 1964), cert. denied, 379 U. S. 1000, and held that there is a rebuttable presumption that an accused has knowledge of the law in a case of this nature.

The Court provided a caveat with regard to the quoted "natural and probable consequences" instruction by pointing out that it is "an invitation to reversal" and by criticizing its continued use by trial courts. In this regard, it was noted that its language was general, abstract and unclear. However, the Court held that in this case the instructions viewed as a whole could not have prejudiced or misled the jury.

Staff: United States Attorney Cecil F. Poole (N. D. Calif.); John C. Keeney and Louis Scalzo (Criminal Division)

DISTRICT COURT

FARM LABOR CONTRACTOR REGISTRATION ACT

FIRST SUCCESSFUL PROSECUTION UNDER ACT

United States v. Bernethea Williams (M. D. Pa., Cr. No. 14332; May 29, 1967; D. J. 59-12-1304)

The United States Attorney for the Middle District of Pennsylvania has reported the first successful prosecution of a farm labor contractor for violation of the Farm Labor Contractor Registration Act, 7 U. S. C. 2041-2053. The defendant, Bernethea Williams, whose insurance had been cancelled a few months before and who had failed to obtain a certificate of registration, recruited a crew of farm laborers from Florida and transported them by bus to Pennsylvania. As the bus carrying the crew was descending a hill, the brakes failed, the bus ran away and was wrecked, killing one laborer and injuring others.

Williams was charged under 7 U.S.C. 2048 with having failed to obtain the certificate of registration required by Section 2043. She entered a plea of guilty, was fined $100, and placed on probation for one year.

Staff: United States Attorney Bernard J. Brown;
Assistant United States Attorney Carlon M. O'Malley, Jr.
(M. D. Pa.)

* * *

EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

Assistant to the Deputy Attorney General John W. Kern, III

ADDRESS BY ATTORNEY GENERAL RAMSEY CLARK
BEFORE THE WASHINGTON CITIZENS COUNCIL OF
THE NATIONAL COUNCIL ON CRIME AND DELINQUENCY
SEATTLE, WASHINGTON
JULY 10, 1967

It was twenty five hundred years ago that Ezekiel wrote "the land is full of bloody crimes and the city is full of violence." In 1910, an American author asserted that "crime, especially its more violent forms and among the young, is increasing steadily and is threatening to bankrupt the nation." In 1929, Herbert Hoover identified the most malign danger facing America as "disregard and disobedience of law." In 1967, President Johnson's Crime Commission found that "the existence of crime, the talk about crime, the reports of crime and the fear of crime have eroded the basic quality of life of many Americans."

Thus do we recall that ours is not the first time there has been concern about crime. Thus do we see that crime does not yield to easy and permanent solutions. From these two lessons we can draw the wisdom and strength necessary to fashion a comprehensive strategy to control crime in America.

Our agencies of criminal justice represent society in its relations with the lawless. They can bring a higher level of public safety through their own perfection. This will require definitive planning. History can tell us little about law enforcement needs of the future. A renaissance of awareness and commitment is required. We must disenthrall ourselves from the dogmas of the quiet past to think anew and act anew. Urbanization, population explosion, science and technology are causing sweeping and accelerating change.

The renaissance has begun. It is reflected in a growing commitment of resources to the tasks of law enforcement and criminal justice by the federal Government, the states and municipalities, and the people. It is reflected in the programs of the National Council of Crime and Delinquency and its Washington Citizens Council, in the Safe Streets and Crime Control Act proposed by President Johnson, in the penetrating study by the President's Crime Commission, in the increasing vitality of state and local governments in criminal justice, and in the enlightened concern of citizens.

The renaissance will be stimulated by the Crime Control Act which is based on the urgent need for more resources, better applied, to improve the estate of criminal justice in America. That the promise of the Act can be

attained is demonstrated by current developments on the state and local levels--the expanding use of modern techniques, the formation of state crime commissions, the unification of the instruments of criminal justice, the new concern for such aspects of law enforcement as police--community relations, the revisions of criminal and penal codes. Many of these endeavors, including several in Washington State, such as the excellent work release program of the King County Sheriff's Department, have been supported by the two-year-old Law Enforcement Assistance Act, the forerunner of the Crime Control Act.

It is sometimes said that approaches being stressed and methods being tested represent a "soft" attitude which cannot cope with crime. The alternative suggested is to "get tough." It is not always clear what this means for there are at least two definitions of the word "tough" that could be applied. One is "unruly or vicious, rowdyish, ruffianly" and the other is "strength arising from a texture or spirit that is firm and unyielding."

Using the second definition the actions contemplated by the Crime Control Act represent the toughest course yet taken in the fight against crime.

It is certainly not tough to stick with the 19th Century techniques so prevalent today, or to deal only with the surface symptons of crime while neglecting its deeper roots or to deny the need for more resources for all agencies of criminal justice. It is not tough to divert attention from the real problems by criticizing the courts as if they changed human nature or caused crime. Nor is it tough to panic. Alarm and crisis do not produce wisdom, effectiveness or efficiency, and our circumstances require all three.

It is not easy to be tough. Discomfort always results when long-established practices are scrutinized and changed--even more so when so rigid an area as criminal justice is challenged to do better. But tough we must be, in a meaningful and effective manner.

This will require a vast improvement in the capability of law enforcement. For today only one in four serious crimes reported to police are solved. And less than half of all crimes and in areas perhaps as few as ten percent are even reported. What could be more meaningful to the public safety than upgrading law enforcement so that more crimes are discovered and solved, and more violators assured firm, sure, speedy justice?

There is no easy way--only hard, relentless, comprehensive improvement.

To the service we must bring the best and most dedicated talents among us. These we must train and perfect. We must bring out the best in all who

serve. The direct impact of police, judges and corrections officers on the well being of each of us increases annually. We cannot afford less than the best.

We must engage in a continuing conversation--a free interchange of experience. Effective coordination among all agencies is necessary and research and development should be available for every criminal justice need.

It requires toughness too, to recognize many of our jails and prisons for what they are: temporary cell-blocks which prepare inmates for further crime. Realism, not softness, demand that we move forward in corrections.

We are beginning to realize how much can be done. Four in five felons were first convicted of misdemeanors. If we can cut that rate of crime repetition in half as present experience tells us we can, then clearly corrections is the answer to a major part of our crime. It is a key to protecting society. Is it too tough for us because we know it will require many thousands of highly skilled and dedicated workers and will cost hundreds of millions more than we now spend? Because we have been soft in our commitment in corrections, we pay a heavy price in crime.

To be tough is to ask more, to be hospitable to new evidence, to see the relation of social reform to the control of crime and to ensure that there is a continuing and developing strategy tailored to our great diversity. It is to expand the scope of the whole effort to control crime.

Toughness must be evaluated by realism, by effectiveness, by its capacity to meet the challenge laid down by President Johnson to "arrest and then reverse" the trend toward lawlessness in America. By these tests, we will choose and find a safer America with respect for the rights of others in the hearts of its citizens.

APPOINTMENTS

DEPARTMENT OF JUSTICE

The nomination of Warren M. Christopher as Deputy Attorney General has been confirmed by the Senate.

Mr. Christopher was born October 27, 1925 in Scranton, North Dakota, is marred and has four children. From 1943 to 1946 he was on active duty with the Naval Reserve. He received his LL.B. degree in 1949 from Stanford University. From 1949 to 1950 he was a law clerk to Justice Douglas, and from 1950 until his appointment he was in private practice in Los Angeles.

He was on leave from his firm to serve as special counsel to former California Governor Edmund G. Brown from January to April, 1959.

Beginning in 1961, he served as a consultant to the office of the Under-secretary of State. In this connection he served as chairman of the United States delegations to the U.S.-Japan Cotton Textile Negotiations in 1961 and to the Geneva Conference on Cotton Textiles in 1961. He also was a special representative of the Secretary of State for wool textile meetings in London and Rome in 1964 and in Tokyo in 1965.

Mr. Christopher has served since 1960 as a public member of the Coordinating Council for Higher Education of the State of California, and was its president from 1963 to 1965. Earlier he was a member of the California State Board of Education, and also a member of the Board of Trustees of Occidental College in Los Angeles and of the Visiting Committee of the University of Chicago Law School.

Since 1966 he has been chairman of the Standing Committee on Aeronautical Law of the American Bar Association and a member of the Board of Bar Examiners of the State Bar of California. In 1955 and 1956, he was editor-in-chief of the Los Angeles Bar Bulletin.

Mr. Christopher was Vice-Chairman of the Governor's Commission (1965-1966) which investigated rioting in Los Angeles. He is a member of the Executive Committee and the Board of Directors of the Lawyers Committee for Civil Rights Under Law.

UNITED STATES ATTORNEY

The appointment of the following United States Attorney has been confirmed by the Senate:

Maryland - Stephen H. Sachs

Mr. Sachs was born January 31, 1934 at Baltimore, Maryland, is married and has two children. He attended Haverford College, Haverford, Pennsylvania from 1950 to 1954 when he received his B.A. degree and New College, Oxford, England from 1954 to 1955 on a Fulbright Scholarship. He attended Yale University Law School from 1957 to 1960 when he received his LL.B. degree. From 1959 to 1960 Mr. Sachs was an Assistant in Instruction of Political Science at Yale University. He was admitted to the Maryland Bar in 1960. He served in the Army from 1955 to 1957, was a Law Clerk from 1960 to 1961 in the U.S. Court of Appeals, Washington, D.C., and an Assistant United States Attorney from 1961 to 1964 for the District of Maryland. From 1964 until his appointment as United States Attorney, he was an associate and partner in a private law firm in Baltimore, Maryland.

ASSISTANT UNITED STATES ATTORNEYS

Florida, Middle - RICHARD HIRSCH, ESQ.; Stetson University College of Law, J.D.

Florida, Southern - THEODORE KLEIN, ESQ.; University of Miami, LL.B., and formerly an attorney in private practice.

Illinois, Northern - ROBERT KRAJCIR, ESQ.; John Marshall Law School, LL.B., and formerly in private practice.

Illinois, Northern - GERALD SBARBORO, ESQ.; Catholic University, LL.B., and formerly legal counsel to Senator, Chief Enforcement Attorney, Illinois State Government, Legislative Counsel, Illinois State Legislature, and attorney with the National Bank of Chicago.

Indiana, Northern - RICHARD KIESER, ESQ.; Indiana University, LL.B., and formerly in private practice.

Indiana, Southern - PATRICK BARTON, ESQ.; Indiana University, LL.B., and formerly Deputy Attorney General, Indiana, attorney with OPA, Indianapolis county judge, Superior Court judge, and in private practice.

New Jersey - MARLENE GROSS; Columbia University, LL.B., and formerly in private practice.

New York, Southern - STERLING JOHNSON, ESQ.; Brooklyn Law School, LL.B., and formerly detective with the New York City Police Department.

Pennsylvania, Eastern - JEROME RICHTER, ESQ.; Temple University, LL.B., and formerly Assistant City Solicitor, Philadelphia, and in private practice.

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TAX DIVISION

Assistant Attorney General Mitchell Rogovin

COURT OF APPEALS--CRIMINAL CASES

SUFFICIENCY OF PROOF

COMPLETE OMISSION OF WHOLE SEGMENT OF INCOME HELD TO CONSTITUTE VIOLATION OF SECTION 7206(1) CONCERNING FALSE RETURNS; CONVICTION FOR FAILURE TO FILE RETURN AFFIRMED WHERE GOVERNMENT PROVED ONLY GROSS RECEIPTS, NOT GROSS INCOME UNDERLYING FILING REQUIREMENT

Siravo v. United States (C. A. 1, No. 6847; May 15, 1967; D. J. 5-66-312; 67-1 U. S. T. C. par. 9446)

The first three counts of the indictment charged that taxpayer willfully filed false returns for 1958, 1959 and 1960, in violation of Section 7206(1) of the 1954 Code. Taxpayer's returns reported only income from wages, and omitted all reference to a jewelry-assembling business in which he had gross receipts of over $20,000 each year. Appellant argued that Section 7206(1) requires an affirmative misrepresentation and does not cover a mere omission of income. The First Circuit affirmed on these counts, holding that "a return that omits material items necessary to the computation of income is not 'true and correct' within the meaning of 7206". The Court held this construction necessary to give effect to the self-assessment system of income taxation.

A fourth count charged that taxpayer willfully failed to file a return for 1961 in violation of Section 7203. The Government proved that taxpayer's business had gross receipts of $71,362.73, and that he had substantially no costs for raw material. There was, however, no evidence as to labor costs, and appellant argued that there was no proof that he had gross income in excess of $600. The First Circuit applied the rule of evasion cases, i.e., that evidence of unexplained receipts shifts to the taxpayer the burden of coming forward with evidence of offsetting expenses. United States v. Hornstein, 176 F. 2d 217 (C. A. 7). Appellant argued that the Hornstein line of cases was inapplicable in a failure to file case, because in Hornstein, etc., the taxpayers had filed returns in which they admitted certain offsetting expenses, and the Government was entitled to rest on the inference that the taxpayers would have claimed more deductions if they had any. The First Circuit rejected this argument "on considerations of fairness to both parties and of reasonable access to relevant evidence. * * * To allow the defendant, who can readily keep records that would establish his capital costs, to file no return, however great his receipts, and then challenge the government to

prove the amount of these costs, would be to effectively frustrate the purposes of Section 7203." The Court modified its own prior holding in Winkler v. United States, 230 F. 2d 766.

While the peculiar facts of this case seem to justify the application of the Hornstein rule, United States Attorneys should be wary of its use in failure to file cases. There is danger that, instead of shifting the burden of coming forward with evidence to rebut the Government's prima facie case, the burden of proof may be shifted to the defendant.

Staff: Former United States Attorney Frederick W. Faerber, Jr.; Former Special Assistant United States Attorney Alton W. Wiley (D. Rhode Island)

APPEALABILITY

PRE-INDICTMENT ORDER DENYING SUPPRESSION AND RETURN NOT APPEALABLE; ISSUE OF NEED TO ADVISE OF RIGHT TO COUNSEL NOT REACHED BY COURT OF APPEALS

Smith v. United States (C. A. 3, No. 15,874; June 2, 1967; D. J. 5-48-6322; 67-1 U.S. T.C. par. 9485)

Appellant, whose income tax returns were being investigated, accepted the offer of a formal interview with the special agent and brought his records with him. He was not at that time advised of his right to counsel. Some time later he filed what was in effect a proceeding for suppression and return of evidence. After a hearing, the motion was denied (67-2 U.S. T.C. par. 9543) and appellant was indicted shortly thereafter.

The Third Circuit dismissed the appeal on the basis of DiBella v. United States, 369 U.S. 121, holding that the appeal was not solely from an order denying return of property, since appellant also sought suppression; and holding further that appellant's action was not an independent proceeding since it was clearly tied to an incipient criminal prosecution which was "in esse" in the sense that phrase is used in DiBella.

Judge Hastie dissented on the appealability issue, but would have affirmed the decision of the district court on the merits.

Staff: United States Attorney David M. Satz, Jr.; Assistant United States Attorney Matthew J. Scola (D. N.J.)

COURT OF APPEALS--CIVIL CASE

LIENS

SECURITY AGREEMENT COULD INCLUDE LIQUOR PERMIT UNDER "GENERAL INTANGIBLE" PROVISION OF UNIFORM COMMERCIAL CODE IN OHIO

The Paramount Finance Co. v. United States (C. A. 6, No. 17,005; June 28, 1967; D. J. 5-57-4425)

This recent case involved the competing claims of a holder of a security agreement and a lien of the United States on the proceeds generated by the sale of a liquor permit. Paramount's security agreement, filed in accordance with the Uniform Commercial Code adopted in Ohio, covered not only all of a tavern's furniture and fixtures, but also its liquor permit. Subsequently, the United States assessed a tax deficiency against the tavern owner and filed a lien in the proper state recording office. Thereupon, the United States seized all of the tavern's assets, including its liquor permit, the latter being sold to the highest bidder subject to the approval of the Ohio Department of Liquor Control. At issue was whether Paramount's security agreement could cover a liquor permit which is transferable only by approval of the above administrative body.

In the district court, the Government argued that in Ohio a liquor permit was not property subject to a mortgage under the Ohio Supreme Court decision of Abraham v. Fioramonte, 158 Ohio St. 213, 107 N. E. 2d 321. The Government contended, however, that the liquor permit was subject to the federal tax lien under the broad language of Section 6321 of the 1954 Code and that its lien, enforced by levy, entitled it to prime the prior-recorded mortgage. Paramount urged that it was a prior-recorded mortgagee under Section 6323 of the 1954 Code which enabled it to gain priority over the United States tax lien. The district court rejected both arguments, holding that under Ohio law the liquor permit was not property subject to either the mortgage or the federal tax lien or levy, but that the proceeds resulting from the sale of the license did constitute valuable property to which the liens would attach in the order of their recordation.

On appeal, the Government argued that under Ohio law a liquor permit was not property subject to a mortgage and that no private creditor could obtain rights in the proceeds from the sale or transfer of a liquor permit until he secured the appointment of a receiver, who took possession of all of the business assets of the licensee, including the liquor license. Consequently, since the mortgagee here took no action before the federal tax lien was recorded and the liquor permit seized by a levy, the Government, not the mortgagee, was entitled to the proceeds of the sale of the permit.

Paramount disavowed the reasoning of the district court and argued that the Uniform Commercial Code had overruled the Abraham decision and that the liquor license was a "general intangible" to which a security interest could attach under the Uniform Commercial Code.

The Court of Appeals found that the tavern owner could and did transfer to the lender a security interest in the liquor license, which constituted property with unique value. It further concluded that the fund produced by the sale of the tavern and liquor permit represented the value of its business which was included under Paramount's security agreement. The Court did not discuss the Government's main contention on appeal--that in order for Paramount to obtain priority it had to secure the appointment of a receiver who could seize and sell the liquor license.

Staff: Joseph Kovner and Howard J. Feldman (Tax Division)

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