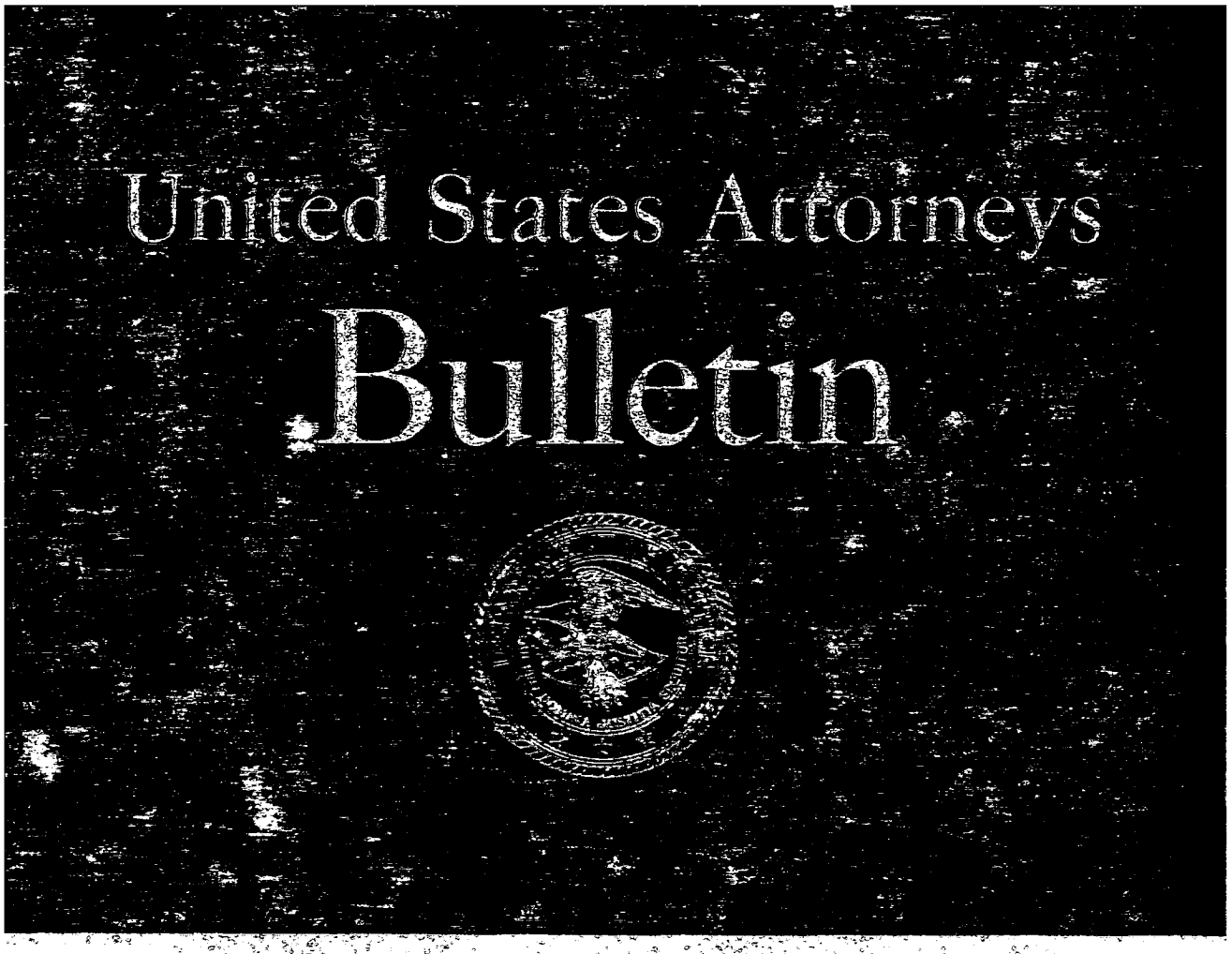

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TABLE OF CONTENTS

ANTITRUST DIVISION

Assistant Attorney General Donald F. Turner

DISTRICT COURT

CLAYTON ACT

COMPLAINT AND PROPOSED JUDGMENT UNDER SECTION 7 OF ACT.

United States v. Gulf & Western Industries, Inc., et al. (C.D. Calif., Civ. 67-1057-CC, July 25, 1967; D.J. 60-0-37-947)

On July 25, 1967, a complaint was filed in Los Angeles charging Gulf and Western Industries, Inc. (G & W) and Desilu Productions, Inc. (Desilu) with violating Section 7 of the Clayton Act.

The complaint charges that the acquisition by G & W of the assets of Desilu may substantially lessen competition or tend to create a monopoly in the rental of studio facilities used for the production of television programs or feature films. Ownership of production stages in the Los Angeles area is highly concentrated with four firms owning 48.7% of the total 240 stages. As of March 1967 Desilu, with 34 stages, accounted for 14.2% while G & W, through its wholly-owned subsidiary Paramount Pictures Corporation with 17 stages, had 7.1%. The complaint further charges that independent producers of television programs who do not own studio facilities may be foreclosed from the use of the acquired Desilu facilities.

A proposed judgment, consented to by G & W and Desilu, was filed along with the complaint, with the usual 30-day stipulation. The judgment requires G & W to sell, within two years, two of the three Desilu studios. The Culver City studio and backlot and the Cahuenga studio, with a total of 20 stages, are to be sold to purchasers who will file with the court an undertaking to operate the properties as studio facilities. The decree also requires G & W, for a limited period of time, to furnish certain additional services to the purchaser. And for a period of three years G & W is to keep available, from December 1 until March 15, thirty production stages for rental to producers of television programs. This number is to be reduced by the number of production stages that G & W sells under the terms of the judgment.

The consent judgment also enjoins G & W, for a period of ten years, from acquiring any production stages located in California.

Staff: Jerome A. Hochberg, Roy E. Green, Lionel Epstein and William D. Kilgore, Jr. (Antitrust Division)

COURT ORDERS DIVESTITURE IN SECTION 7 OF CLAYTON ACT CASE.

United States v. Reed Roller Bit Company, et al. (W.D. Okla., Civ. 66-248, July 25, 1967; D.J. 60-0-37-901)

On July 25, 1967 Judge Luther B. Eubanks, United States District Judge, Oklahoma City, entered a final judgment which ordered Reed Roller Bit Company (Reed) to divest itself of the tool joint and drill collar facilities of AMF American Iron Inc. (American Iron). In an opinion handed down June 22, 1967 Judge Eubanks held that the December 1965 acquisition of the assets of American Iron by Reed violated Section 7 of the Clayton Act. The court concluded that a decree should be entered requiring Reed to divest itself of the competing lines of commerce, i.e. tool joints and drill collars.

Accordingly, the order directs Reed to divest itself of the American Iron tool joint and drill collar facilities within 12 months. Further, if the facilities are not sold within the 12-month period the court will either (1) appoint an independent business broker to effectuate the divestiture and/or (2) take such actions as it deems appropriate at the time.

Other provisions of the decree require Reed (1) to maintain the acquired tool joint and drill collar facilities until sold; (2) at the option of the buyer to discontinue the use of the tradename American Iron on all of its products; and (3) to provide the buyer with all the necessary technical assistance and "know how" needed by the buyer in the relocation and operation of the facilities.

Reed is enjoined for a period of 10 years, except by agreement of the parties, from acquiring any interest in any firm engaged in the manufacture and sale of tool joints and/or drill collars, and for an additional 10-year period is similarly enjoined except with notice to the plaintiff and an affirmative showing to the court that the acquisition will not lessen competition or tend to create a monopoly in the manufacture and sale of tool joints and/or drill collars.

The parties agreed to the form of the judgment.

Staff: John E. Sarbaugh, Raymond P. Hernacki, John T. Cusack, and Paul D. Carrier (Antitrust Division)

* * *

CIVIL DIVISION

Acting Assistant Attorney General Carl Eardley

COURTS OF APPEALS

GOVERNMENT EMPLOYEES

SCOPE OF REVIEW IN SUIT FOR REINSTATEMENT BY DISCHARGED GOVERNMENT EMPLOYEE IS LIMITED TO DETERMINING WHETHER ADMINISTRATIVE AGENCY SUBSTANTIALLY COMPLIED WITH APPLICABLE STATUTORY PROCEDURES.

Grace Mancilla v. United States, et al. (C. A. 9, No. 21,173, July 28, 1967; D. J. 35-11-8)

Appellant Grace Mancilla was a civilian employee of the Department of the Army. That agency directed her removal on grounds of insubordination, inefficiency and unsatisfactory performance of duties. The Civil Service Commission sustained that action. Appellant then brought suit in the district court for reinstatement to her former position, and the Government's motion for summary judgment was granted. On her appeal, appellant contended that she had been "tricked" by the Civil Service Commission into believing that it would arrange for the presence of witnesses at her C. S. C. hearing whose testimony would have been favorable to her. The appellate court affirmed the judgment of the district court, finding that appellant's charge was clearly refuted by the C. S. C. record. In so doing, the Court described the scope of review in a case such as this as follows:

> The court's only function, assuming that statutory procedures meet constitutional requirements, is to determine if the administrative body substantially complied with those procedures.

Staff: Howard J. Kashner and Jack H. Weiner (Civil Division)

INDISPENSABLE PARTIES

SECRETARY OF ARMY INDISPENSABLE PARTY IN SUIT TO ENJOIN GOVERNOR OF CANAL ZONE FROM ENFORCING SECRETARY'S PAY REGULATION; SECRETARY HELD AUTHORIZED TO VARY "TROPICAL DIFFERENTIAL" ALLOWANCE PAID GOVERNMENT EMPLOYEES IN CANAL ZONE.

Leber, Governor of the Canal Zone, etc. v. Canal Zone Central Labor Union, etc., et al. (C. A. 5, No. 23,316, July 25, 1967; D. J. 145-4-1446)

Section 146 of Title 2 of the Canal Zone Code (76A Stat. 17) provides that, in addition to their regular salary, American citizens employed by the Federal Government in the Panama Canal Zone "shall be paid . . . an overseas (tropical) differential not in excess of an amount equal to 25%" of their basic compensation. Zone employees and their union brought suit against the Governor of the Zone, who is also ex officio President of the Panama Canal Company, to enjoin him from complying with a directive of the Secretary of the Army reducing from 25% to 15% the rate of "tropical differential" payable to Canal Zone employees. The district court declared the Secretary's regulations invalid, as contrary to Section 146 of Title 2 of the Canal Zone Code, and enjoined the Governor from enforcing them. 246 F. Supp. 998. The Fifth Circuit reversed and directed that the action be dismissed.

The Court of Appeals ruled that the suit should have been dismissed (1) for want of jurisdiction as an unconsented suit against the United States, and (2) because the Secretary of the Army, to whom the President had properly delegated authority over Canal Zone pay matters, was an indispensable party and had not been joined in the action. (The Secretary could not be served in the Zone, and the venue amendment to the Judicial Code providing that suits against Government officials can be brought where the plaintiffs reside, does not apply to the District Court for the Canal Zone. 28 U. S. C. 1391(e).)

The appellate court went on to discuss the merits of the case because of the possibility of Supreme Court review. It accepted fully the Government's contentions that both the language of the Canal Zone Code authorizing the payment of the 25% "tropical differential" and the legislative history of that provision indicated that the differential rate up to the 25% limit to be paid Zone employees was a discretionary matter to be determined by the Secretary of the Army. The Fifth Circuit also agreed that the Secretary of the Army could restrict payment of the differential to Zone employees who were heads of households and thus exempt minor children and dependents living in the Zone from receipt of the supplement. Cf. 5 U. S. C. 3031, et seq.

Had the district court's decision been upheld, the cost to the Treasury would have exceeded $4,000,000 annually.

Staff: Richard S. Salzman (Civil Division)

SOCIAL SECURITY ACT -- ATTORNEY'S FEE

DISTRICT COURT'S AWARD OF ADDITIONAL ATTORNEY'S FEE UPHELD IN ACTION IN WHICH SECRETARY, UPON REMAND FROM DISTRICT COURT, HAD AWARDED BOTH DISABILITY BENEFITS AND ATTORNEY'S FEES.

Conner v. Gardner (C. A. 4, No. 11,136, July 25, 1967; D. J. 137-80-154)

The Secretary of Health, Education and Welfare denied Conner's application for disability benefits, and Conner sought review of that denial in the district court. On Conner's motion, the district court remanded the action to the Secretary for further proceedings without entering any judgment awarding benefits. The Secretary then awarded benefits to him and allowed his attorney a fee of $1,000 for services performed in the administrative proceedings. Conner's attorney sought an additional fee in the district court, and the court awarded him $844.16 for services performed before it.

The Secretary appealed, contending that under 42 U.S.C. 406(b)(1), the district court could award an attorney's fee only when it rendered a "judgment favorable to [the] claimant", and that such a "judgment" was one which awarded benefits to the claimant. Since the district court simply remanded the case to the Secretary for further proceedings, the Secretary contended, the court could not award any fee under the statute. The Court of Appeals, however, affirmed the district court's fee award.

The Fourth Circuit held that 42 U.S.C. 406(b)(1) permitted the district court to award a fee for substantial services performed before it, even when it merely remanded the case to the Secretary for further proceedings and the Secretary later awarded benefits. The Court of Appeals stated that its construction advanced the purpose of the statute, to provide reasonable compensation to attorneys for court services, and that the total fee awarded by the Secretary and the district court was within the limits set forth by 42 U.S.C. 406(b)(1). Thus, the Fourth Circuit's decision suggests that the court's fee award should take into account the fees awarded by the Secretary so that the claimant is not overly taxed with fees. See in this regard, Robinson v. Gardner, 374 F. 2d 949 (C. A. 4).

Staff: Morton Hollander and William Kanter (Civil Division)

* * *

CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

COURTS OF APPEAL

KIDNAPPING

WHERE INDICTMENT FAILED TO SPECIFY THAT VICTIM WAS LIBERATED UNHARMED, A CAPITAL CRIME UNDER THE KIDNAPPING STATUTUE WAS CHARGED AND DEFENDANT WAS ENTITLED TO BENEFITS OF 18 U.S.C. 3432 AND RULE 24(b) OF F.R.Cr. P.

Irwin and Amsler v. United States (C.A. 9, No. 19509; May 3, 1967; D.J. 51-12-482)

Appellants were jointly indicted, with one Barry Worthington Keenan, on a six-count indictment arising out of the kidnapping and interstate transportation of Frank Sinatra, Jr. Count two of the indictment charged a violation of 18 U.S.C. 1201 but did not specify whether or not Sinatra was released unharmed.

Apparently it was conceded and understood by the court and counsel throughout the proceedings, including pretrial, that Sinatra was released unharmed. For this reason it appears that the offense was considered and tried as a noncapital offense. The defense counsel did not request certain rights available to defendants in capital cases only -- the right to a list of the names and addresses of all the prospective jurors and witnesses at least three days before trial (18 U.S.C. 3432) and the right to at least twenty peremptory challenges (Rule 24(b) F.R.Cr. P.).

The jury returned verdicts of guilty against Keenan and Amsler on all six counts. A guilty verdict was returned against Irwin on all counts except count two.

Upon appeal from the judgment of conviction of Amsler and Irwin, the Ninth Circuit reversed and remanded to the district court for retrial. The Court held, relying upon the Supreme Court's construction of 18 U.S.C. 1201 in Smith v. United States, 360 U.S. 1 (1959), that since the indictment did not allege that the victim was released unharmed it charged a capital offense and Section 3432 and Rule 24(b) were applicable. In Smith, the Supreme Court reasoned that the kidnapping statute creates a single offense of transporting a victim across state lines which may be punished by death if the prosecution at trial shows that the victim was released in a harmed condition. Consequently, "when the offense as charged is sufficiently broad

to justify a capital verdict, the trial must proceed on that basis, even though the evidence later establishes that such a verdict cannot be sustained because the victim was released unharmed." Id. at 8.

The Court of Appeals further held that the appellants were entitled to the aforementioned rights as a matter of law even though they never specifically requested their application or objected to their nonapplication.

The Solicitor General has declined to seek review of the instant case.

In order to limit possible future reversals of kidnapping prosecutions, there should be a specification in the indictment that the victim was "liberated unharmed" where there is no intent to charge a capital offense.

Staff: United States Attorney Wm. Matthew Byrne, Jr.; Assistant United States Attorneys Robert L. Brosio and Donald A. Fareed (C. D. Calif.)

SEARCH WARRANTS

SUFFICIENCY OF AFFIDAVIT OF PROBABLE CAUSE TO OBTAIN SEARCH WARRANT.

United States v. David Perry (C. A. 2, No. 30,620; July 12, 1967; D. J. 12-51-7291)

A Federal Narcotics agent made an affidavit containing specific and detailed information given by an informant as to David Perry's narcotic activities. The affidavit also contained the agent's corroborating statement that the informant was known to the agent and on previous occasions had given information that was correct to the agent's personal knowledge. A search warrant was granted and a quantity of heroin was seized in Perry's apartment.

Perry's pre-trial motion to suppress the seized heroin because of the insufficiency of the affidavit on its face was overruled. At trial Perry renewed this motion and demanded an evidentiary hearing at which the informant could be questioned as to the time and circumstances concerning the information related in the affidavit. This request was denied. Perry was convicted of violation of federal narcotics laws. 21 U.S.C. 173 and 174.

On appeal the Circuit Court affirmed, holding that the affidavit was sufficient on its face to establish probable cause since it contained detailed statements as to the commission of a crime made of his own knowledge by an informant for whose reliability the affiant vouched on the basis of the

affiant's experience. The Court noted that, while this affidavit was sufficient, it is better practice for affiants to state the length of time they have known and dealt with the informant, and the approximate number of times the affiant had received information from him.

The Court further held that Perry's motion to suppress and demand for an evidentiary hearing were properly denied since the accuracy of the information provided by the informant is not relevant. If the informant's allegations, if true, establish illegality and the affiant has reasonable grounds to believe in the truth of the allegations, probable cause has been established.

Staff: United States Attorney Robert M. Morgenthau; Assistant United States Attorneys Douglas S. Liebhafsky and Andrew M. Lawler, Jr. (S. D. N. Y.)

DISTRICT COURT

OBSTRUCTION OF JUSTICE

"SHAKEDOWN" OF PLAINTIFFS IN CIVIL ACTION, PROMISING FAVORABLE JUDICAL DECISION, NOT AN OBSTRUCTION OF JUSTICE.

United States v. Patch (S. D. Fla., No. 67-146-CR-CA; April 24, 1967; D. J. 51-18-248)

Indictment charging a violation of 18 U. S. C. 1503 stated that defendant promised to obtain a favorable decision for plaintiffs in their pending civil suits in return for a $250 payment to be used to "buy off" the United States District Judge before whom the civil actions were pending. The indictment further alleged that defendant accepted payment. However, it did not aver that the defendant ever attempted or ever intended to contact the United States District Judge or anyone else connected with the civil actions.

Upon motion of the defendant, the judge dismissed the indictment because it failed to state a crime against the United States. The dismissal was based on a Ninth Circuit case, Ethridge v. United States, 258 F. 2d (1958) where the defendant advised the victim that he could insure that he would get probation for his tax evasion conviction. The victim, however, realized the defendant was a "fake", and therefore refused to cooperate. The Ninth Circuit in Ethridge reversed the conviction, holding,

> ***there is a total absence in the government's proof or in the averments in the indictment that appellant ever did, or ever intended (even if the solicited money was paid to him)

> to write to, personally contact, or try to contact, any person (official or otherwise) who at any time had any connection whatever with the prosecution ***.

In the instant matter, the judge ruled in effect that to state a crime against the laws of the United States pursuant to 18 U.S.C. 1503, the indictment must aver that the defendant intended to contact the judge before whom the case was pending.

Staff: United States Attorney William A. Meadows, Jr. and Assistant United States Attorney Edward A. Kaufman (S.D. Fla.)

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EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

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

APPOINTMENTS

UNITED STATES ATTORNEYS

The nomination of United States Attorney Louis M. Janelle, District of New Hampshire, to a new four-year term, has been confirmed by the Senate.

The nomination of United States Attorney William A. Meadows, Jr., Southern District of Florida, to a new four-year term, has been submitted to the Senate for confirmation.

ASSISTANT UNITED STATES ATTORNEYS

Arkansas, Eastern - ROBERT FUSSELL, ESQ.; University of Arkansas, LL.B., and formerly attorney with N.L.R.B. and in private practice.

District of Columbia - CLARENCE JACOBSON, ESQ.; Harvard University, LL.B., and formerly law clerk with the D.C. Juvenile Court and law clerk in the U.S. Court of Appeals.

Florida, Middle - ALLAN CLARK, ESQ.; University of Florida, J.D., and formerly teacher of commercial law at Florida University.

Michigan, Eastern - JOSEPH ZANGLIN, ESQ.; University of Detroit, LL.B., and formerly in private practice.

Minnesota - WILLIAM FALVEY, ESQ.; William Mitchell College of Law, J.D., and formerly in private practice and in Attorney General's Office, St. Paul, Minnesota.

New York, Eastern - THOMAS O'BRIEN, ESQ.; Fordham University, LL.B., and formerly law clerk U.S. District Court.

* * *

IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

COURT OF APPEALS

DEPORTATION

THIRD CIRCUIT ADOPTS NARROW INTERPRETATION OF STATUTE PROVIDING FOR REVIEW OF DEPORTATION CASES BY CIRCUIT COURTS OF APPEALS.

Cheng Fan Kwok v. INS and Chan Kwan Chung v. INS (C. A. 3, Nos. 16005 and 16027, August 4, 1967; D.J. 39-62-270)

The above actions involve petitions for review under Section 106, as amended, 8 U.S.C. 1105a, which provides that United States courts of appeals have jurisdiction to review final orders of deportation. In Foti v. INS, 375 U.S. 217 (1963), the Supreme Court construed Section 106 and held that courts of appeals could review not only determinations of deportability but also ancillary orders entered in the deportation hearing such as the designation of the place of deportation and the denial of applications for discretionary relief such as suspension of deportation, voluntary departure, adjustment of status, registry and the withholding of deportation because of anticipated persecution for race, religion or political opinion in the proposed country of deportation. Subsequently, in Giova v. Rosenberg, 379 U.S. 18 (1964), the Supreme Court ruled that the denial of a motion to reopen a deportation hearing was also reviewable, under Section 106. The question then arose as to whether courts of appeals had jurisdiction under Section 106 to review determinations made outside the deportation hearing which could delay or nullify the deportation order such as decisions on visa petitions, applications for refugee classification, applications by exchange visitors for waiver of the foreign residence requirement and applications to district directors for stays of deportation. The United States Court of Appeals for the Seventh Circuit liberally construed Section 106 and reviewed the denial of a visa petition in Skiftos v. INS, 332 F.2d 203 (1964), and the denial of a stay of deportation in Melone v. INS, 355 F.2d 533 (1966). The Sixth Circuit took a similarly liberal view and reviewed the denial of a waiver of the foreign residence requirement of an exchange visitor in Talavera v. Peterson, 334 F.2d 52(1964). Other circuit courts have narrowly construed Section 106 and limited their jurisdiction to review only determinations made in the deportation hearing. The Second Circuit in Tai Mui v. Esperdy, 371 F.2d 772 (1966), cert. denied 386 U.S. 1017, declined to review a denial by a district director of

an application for stay of deportation and an application for refugee status. However, in the later case of Li Cheung et al. v. Esperdy, No. 31299, decided 5/19/67, ___F.2d___, the Second Circuit, while not overruling Tai Mui did pass on the merits of petitions to review the denial of stays of deportation by a district director. The Eighth Circuit in Mendez v. Major, 340 F.2d 128 (1965), construed Section 106 in the same manner as the Second Circuit in Tai Mui.

The Third Circuit in the present cases was asked to review the denial by a district director of stays of deportation for the petitioners. After reviewing the decisions of the Supreme Court in Foti and Giova and decisions by other circuits, the Third Circuit concluded that Section 106 conferred jurisdiction on courts of appeals to review only determinations made in the deportation hearing. In its opinion new legislation is necessary to rescue the courts and lawyers from fruitless jurisdictional disputes as to the scope of review under Section 106. The petitions were dismissed for lack of jurisdiction.

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

* * *

INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

DISTRICT COURT

MILITARY PERSONNEL

CIVIL JUDICIAL REVIEW OF COURT-MARTIAL CONVICTION IS LIMITED TO DETERMINING WHETHER ISSUES RAISED BY MILITARY DEFENDANT WERE FULLY AND FAIRLY CONSIDERED THROUGHOUT MILITARY TRIAL AND APPELLATE PROCEEDINGS, OR WERE AVAILABLE FOR EXPLORATION THEREIN.

Joseph P. Kauffman v. Secretary of the Air Force (D. D. C., Civil No. 1456-65, June 2, 1967; D. J. 146-1-12-6441)

Kauffman, a former Air Force Captain, was convicted by a general court-martial on April 18, 1962, of failure to report attempts by agents of Russia and East Germany to induce him to reveal security information and to cultivate him socially. Air Force Boards of Review and the U. S. Court of Military Appeals in 1963 and 1964 upheld his conviction, and he was discharged from the Air Force on June 30, 1964. At the time of his discharge he was no longer in confinement, having already served his two-year term of imprisonment. Kauffman sued for judgment declaring the court-martial proceedings null and void for loss of jurisdiction through numerous violations of his constitutional rights, and for an order directing his reinstatement to active duty.

The Court, McGarraghy (J.), in an opinion filed June 2, 1967, held that the power of a civil court to review courts-martial proceedings when the jurisdiction of the court-martial is challenged is not restricted by the finality clause of the Uniform Code of Military Justice, 10 U. S. C. 876, to habeas corpus cases, although in a declaratory judgment action the extent of judicial review is limited, just as in the habeas corpus cases.

The Court granted the Government's cross-motion for summary judgment on the basis that all of the issues raised by Kauffman were fully and fairly considered at the court-martial and throughout the military appellate proceedings, or were available for exploration therein, following a similar limited determination made in the habeas corpus case of Burns v. Wilson, 346 U. S. 137 (1953).

Staff: Garvin L. Oliver (Internal Security Division)

* * *

TAX DIVISION

Assistant Attorney General Mitchell Rogovin

DISTRICT COURT - CIVIL CASES

SUMMARY JUDGMENT

SUMMARY JUDGMENT HELD INAPPROPRIATE IN ACTION TO FORECLOSE TAX LIENS ON FUND HELD BY POLICE.

United States v. Hertzfeld, et al. (S.D. N.Y., No. 65-429, July 21, 1967; D.J. 5-51-9250)

The taxpayer was arrested on a charge of being an abortionist. At the time of the arrest, $13,150 was seized from the taxpayer's apartment. After pleading guilty to one count of an ensuing multiple count indictment, the taxpayer fled the country leaving the $13,150 in the possession of the police. The Government brought an action to foreclose tax liens on that fund and eventually moved for summary judgment. The motion was denied.

The Court found that under New York law the Police Property Clerk (Rosetti) was entitled to keep seized funds and eventually declare title to them forfeited if it were suspected that they were the proceeds of a crime. Administrative Code of the City of New York §435-4.0. To retrieve such funds the claimant must bring an action in which he must bear the burden of showing that the money was not derived from illegal sources. Administrative Code of the City of New York §435-4.0(f). It was held that in this action the Government would have to establish the legality of the source of the funds involved; and since this was a disputed question of fact summary judgment could not be granted.

The Government argued that the New York statute, placing the burden of proving a legal source on the person claiming seized funds, was unconstitutional. The Court refused to decide that issue, suggesting that until all the evidence was produced at trial it would not be possible to determine whether the burden of proof rule raised any constitutional problem.

Staff: United States Attorney Robert M. Morgenthau and Former Assistant United States Attorney Dawnald R. Henderson (S.D. N.Y).

FORECLOSURE

FEDERAL TAX LIENS ORDERED FORECLOSED AGAINST CASH SURRENDER VALUE OF TAXPAYERS LIFE INSURANCE POLICIES, FORECLOSURE TO TAKE PLACE ONE YEAR AFTER JUDGMENT.

United States v. Walter Sterkowicz, et al. (N.D. Ill., No. 64 C 1563; D.J. 5-23-4642); (CCH 67-1 U.S.T.C. ¶9474)

The United States brought this action to foreclose federal tax liens against the life insurance policies of the taxpayer. The whereabouts of the taxpayer, a fugitive from justice, was unknown. The most recent official record of the taxpayer's whereabouts was his appearance in a criminal proceeding in the federal district court on October 18, 1961.

The taxpayer and the beneficiaries of his policies were served by publication pursuant to 28 U.S.C. 1655. A guardian ad litem was appointed for the beneficiaries who were minors. It was contended on behalf of these beneficiaries that the taxpayer's disappearance indicated his demise and, therefore, the beneficiaries had a vested interest in the face value of the policy. The United States contended that even if the beneficiaries had a vested interest in the face value of the policies, this interest was subject to federal tax liens. Moreover, it was shown that under the laws of Illinois the taxpayer was presumed to be alive since he had not yet been absent for seven years.

The Court found that in view of the presumption of life the beneficiaries had not raised a question of fact as to the life or death of the taxpayer. It granted the Government's motion for summary judgment ordering that the cash surrender value of the policies be paid to it by the insurance company. However, as this would cancel the policies, execution of the order was delayed for one year. This was done to preserve the policies and protect the rights of the beneficiaries, who, being served by publication pursuant to 28 U.S.C. 1655, had an absolute right to appear within one year and vacate the judgment.

Staff: United States Attorney Edward V. Hanrahan; Assistant United States Attorney Laurence Weiner (N.D. Ill.); and Thomas H. Boerschinger (Tax Division)

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