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UNITED STATES DEPARTMENT OF JUSTICE

FRAUDULENT CONVEYANCE

TRANSFER TO TRUST OF ALL ASSETS LOCATED IN UNITED STATES DETERMINED TO BE FRAUDULENT CONVEYANCE.

United States v. Hendrik van der Horst, et al. (D. Del., Civil No. 2949; June 19, 1967; D.J. 5-53-2268, 270 F. Supp. 365)

The United States has tax claims outstanding against Hendrik van der Horst and Catharina van der Horst, husband and wife, for the years 1952 to 1957, inclusive, in the respective amounts of $89,467 and $73,830.42. These taxes were assessed in 1962.

In August of 1960, Hendrik, who at that time was a citizen of the Netherlands and living in Switzerland, attempted to create a trust, the situs of which was in Switzerland, and transferred all of his assets located in the United States to two trustees. The beneficiaries of the trust included, inter alia, Hendrik's wife and their children. One of the assets transferred by Hendrik to the trustees was 5,000 shares of preferred stock of the Van Der Horst Corporation of America, a Delaware corporation.

The United States instituted this action to collect the outstanding tax claims and to set aside the transfer of the 5,000 shares of preferred stock on the grounds, inter alia, that it was a fraudulent conveyance in that it was not made for fair consideration and that Hendrik was rendered insolvent by the transfer. The United States sought to compel Hendrik's appearance by having a sequestrator appointed to sequester the 5,000 shares of preferred stock although the share certificates were, at that time, physically located in Switzerland. The United States was able to sequestrate the shares of stock by virtue of a Delaware statute which provides that the situs of stock of a Delaware corporation is in Delaware. Hendrik failed to appear, but all of the beneficiaries of the trust, except one, appeared in this action. One of the two trustees also appeared. After certain discovery was taken by the United States, the Government filed a motion for summary judgment. The defendants vigorously opposed the Government's motion, contending that the wife's interest in the alleged trust was created for a fair consideration and that Hendrik was not rendered insolvent by the transfer of all his assets located in the United States to two trustees. With respect to the defendants' latter contention, they maintained that the tax liabilities, not being assessed until after the transfer had occurred, should not be included as a liability in determining whether or not he was insolvent; and that the assets which Hendrik owned which were located outside the United States should be included in determining whether or not he was rendered insolvent, since, they claimed, the tax treaties with the Netherlands and Switzerland allowed the United States to obtain these assets.

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ANTITRUST DIVISION

Assistant Attorney General Donald F. Turner

DISTRICT COURT

SHERMAN ACT

IN CAMERA TREATMENT OF ALL PROCEEDINGS RELATING TO MOTIONS TO SUPPRESS DENIED.

United States v. American Radiator & Standard Sanitary Corp., et al. (W. D. Pa., Cr. 66-295; August 17, 1967; D. J. 60-3-146)

United States v. Plumbing Fixture Manufacturers Assn., et al. (W. D. Pa., Cr. 66-296; August 17, 1967; D. J. 60-3-153)

On August 8, 1967, Judge Rosenberg denied defendants' motions for a fact hearing and discovery incident to their combined motions to suppress evidence and to dismiss the indictments. The court also denied an applica- for in camera treatment of all proceedings related to the two motions to sup- press. The order was followed by a written opinion filed on August 17.

The defendants' main motions are based upon claims that certain tape recorded evidence had been obtained illegally and in violation of their Constitutional rights. Defendants contend that the making of the tapes violated Section 605 of the Federal Communications Act (as an "interception"), an Illinois statute outlawing electronic eavesdropping, Federal Communications Commission Regulations (lack of a tone-warning "beep" signal on recorded phone conversations), and a Pennsylvania statute prohibiting telephone interceptions. They also contend that the manner in which the Government obtained the tapes violated their Fourth Amendment rights against unlawful searches and seizures; and that the use of such evidence before the grand jury so tainted the proceeding that the indictments should be dismissed. The Government had filed the affidavits of four persons based upon personal knowledge which set forth the precise manner in which the tapes were made and how they came into the possession of the Government. These affidavits showed that there was no participation or knowledge of any Government officials in the making of the tapes and that they were freely and voluntarily given to Government agents. The affidavits submitted by the defendants failed to controvert the Government's affidavits as to any material fact, particularly on the question of whether there had been consent to the taking of the tapes by the Government. However, the defendants claimed that there were facts additional to those set forth in their affidavits which were exclusively in the possession of the Government and other persons not available to them on a voluntary basis.

The fact hearing and discovery sought by the defendants included the right to inspect all documents in the possession of the Government relative to the circumstances in which the tapes came into its possession as well as the opportunity to subpoena for cross-examination all persons who had participated in the making of the tapes and in their transmittal to the Government. The defendants claimed that IRS (whose agents had obtained the first tapes to come into the Government's possession) was acting as a "cat's paw" for the Antitrust Division, a deception which vitiated the consent to the search and rendered the taking unlawful.

We argued that no showing had been made to justify such discovery and that defendants' application was a mere fishing expedition in the hope of discovering facts to support a groundless theory. The affidavits showed that the tapes obtained by IRS were obtained in the course of a bona fide tax investigation and that IRS was not acting pursuant to any request from the Department of Justice. Although the tapes were obtained without a warrant, the affidavits showed that they were produced voluntarily by the parties in possession of them. We argued that the Government had fulfilled its burden of showing the lawfulness of the search without a warrant and further that the affidavits showed no genuine controversy as to any operative fact, thereby making unnecessary a hearing to "receive evidence" as provided in Criminal Rule 41(e).

In its opinion, the Court observed that the parties had been permitted to support their positions by affidavit and concluded that on the basis of the affidavits submitted, no factual controversy existed which would necessitate a hearing for the taking of evidence.

The application for in camera treatment was based upon an argument that pretrial publicity concerning the "dirty business" of wiretapping and eavesdropping would create public prejudice which would endanger defendants' right to a fair trial by an impartial jury. In his opinion, Judge Rosenberg treated extensively the issues and policy considerations germane to the in camera application, stating that the Sixth Amendment guarantee of a speedy and public trial in all criminal actions reflects a strong and basic policy favoring proceedings in open court. Judge Rosenberg observed that this premise arose from a number of considerations. First, subjecting criminal proceedings to contemporaneous review by the public is an effective restraint against the abuse of judicial power. Second, exposure to public scrutiny greatly improves the quality of testimony since the presence of others who may contradict the witnesses serves as a disinclination to falsify. Third, public scrutiny makes the participants - judge, jury and counsel - more conscientious in the performance of their duties. Fourth, nonparties to the action may be affected by the litigation and have a right to know about it. And fifth, public exposure rather than secrecy increases public respect for law and provides confidence in judicial proceedings.

The defendants argued that public trial is a right belonging to them which can be waived. Judge Rosenberg ruled that the ability to waive a right does not carry with it the right to insist upon the opposite, noting that the guarantee of a "speedy and public" trial, does not grant a corollary right to a "protracted and private" one. The court cited Singer v. United States, 380 U.S. 24, where the Supreme Court stated that the right to a jury trial does not entitle a defendant to insist, as a matter of right, upon a trial before the judge alone.

Judge Rosenberg stated that injury to reputation or humiliation suffered by being required to face criminal charges is not sufficient to justify criminal proceedings outside the public's view, and that businessmen charged with antitrust offenses stand in a position no different from that of other defendants in criminal cases. The Court remarked that with respect to antitrust matters, Congress has declared an express policy favoring public proceedings. Detailed in the opinion were the provisions for treble damages to injured persons, the prima facie effect of judgments in Government suits, and the requirement that antitrust depositions be open to the public. Judge Rosenberg reasoned that secret proceedings in this case would be inconsistent with this Congressional policy.

With respect to the claim that defendants would be deprived of an impartial jury, Judge Rosenberg noted that within the Western District of Pennsylvania was a population of over four million people from whom the jury panel would be drawn. The Court added that even though publicity may require additional time to be spent on the voir dire examination of jurors, it is unlikely that a fair and impartial panel could not be obtained. Judge Rosenberg stated that since the motions concerned the isue of whether the Government's conduct in obtaining and using the tapes was proper and not whether the defendants were guilty of the charges against them, a public hearing on the motions would not be prejudicial to the defendants.

Citing the Sheppard and the Estes cases, Judge Rosenberg observed that a cautious balance must be observed between freedom of the press and the rights of the accused to a fair trial. He concluded that the instant case did not present a situation requiring in camera treatment.

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MOTION TO DISMISS ON GROUNDS OF "PUBLIC INTEREST" DENIED.

United States v. D. D. Bean & Sons Co., et al. (S.D. N.Y. Cr. 66-11; August 23, 1967; D.J. 60-218-4)

On August 23, 1966, Judge Thomas F. Murphy denied a motion made by defendant Lion Match Company, Inc. to dismiss the indictment.

The motion was made on the grounds that dismissal would be in "the public interest" since the defendant corporation had sold its business and was in process of dissolution and without assets when the indictment was returned, had been dissolved shortly thereafter and was now unavailable to defense counsel, since all other defendants had pleaded nolo contendere and had paid substantial fines, and since adequate relief would be obtained against all other corporate defendants in a companion civil suit. It was urged that further prosecution would not further the public interest and that the Court should exercise its inherent powers in the control of its exceedingly heavy calendars and in the dispensation of justice and equity to conserve its time and that of the Department of Justice by dismissing the indictment.

The Government opposed on the ground that there is no authority for the Court, over the opposition of the Government, to dismiss an indictment on other than legal grounds, i.e., defenses and objections contemplated by Rule 12 F. R. Cr. P., such as defects in the institution or prosecution or in the indictment or of lack of jurisdiction or that the indictment fails to charge an offense, or want of prosecution under Rule 48(b) F. R. Cr. P. It also argued that since Lion was a Delaware corporation and Delaware law provided that any "proceeding" begun by or against a corporation before or within three years dissolution shall continue "until any judgments, orders, or decrees therein shall be fully executed", it was an "existing" corporation within the meaning of Section 8 of the Sherman Act and subject to prosecution under that act.

Judge Murphy, in a memorandum opinion, held that the Delaware law "sufficiently continued the corporation's existence for the purpose of Section 8 of the Sherman Act" citing Melrose Distillers, Inc. v. United States, 359 U.S. 271 (1959), and that the Court had "grave doubts" whether it could "without the consent of the Attorney General, dismiss an indictment in the interests of justice".

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DEFENDANT DISMISSED ON GROUNDS OF DOUBLE JEOPARDY AND VIOLATION OF DUE PROCESS OF LAW.

United States v. American Honda Motor Co., Inc., et al. (N. D. Calif., Cr. 40956; September 1, 1967; D. J. 60-233-9)

On September 1, 1967, Judge William T. Sweigert entered an order dismissing the above indictment as to American Honda on the grounds of double jeopardy and violation of due process of law.

As a result of a grand jury investigation in Los Angeles, American Honda, the American distributor for the Japanese Honda motorcycles, parts and accessories, had been charged with engaging in a retail price-fixing conspiracy with its dealers in the Los Angeles area in an indictment returned in March 1966. It pleaded nolo contendere to that charge and was fined $10,000. During the latter part of 1966, American Honda was charged in separate indictments with engaging in similar but distinct local price-fixing conspiracies with its dealers in the San Francisco area, the Chicago area and the Columbus area. Each of these indictments resulted from grand jury investigations in the respective areas, although some documentary evidence concerning each conspiracy had been obtained during the Los Angeles grand jury investigation. American Honda filed identical motions under Rule 12(b), F. R. Cr. P., in San Francisco, Chicago and Columbus, seeking dismissal of the indictments as to it on the following grounds:

(1) There had been only one price-fixing conspiracy of nationwide scope for which American Honda had been convicted and punished in Los Angeles, and further prosecution of it was barred by the double jeopardy clause of the Fifth Amendment;

(2) Section 1 of the Sherman Act is directed at a course of conduct rather than at specific acts, and therefore American Honda's participation in alleged multiple conspiracies pursuant to its nationwide resale price maintenance program constituted only a single violation of Section 1 for which it had been convicted and punished in Los Angeles, regardless of how many conspiracies actually existed;

(3) Multiple grand jury investigations and multiple indictments of American Honda arising from the same general course of conduct constituted such harassment as to violate the due process clause of the Fifth Amendment, even assuming the existence of multiple conspiracies and multiple offenses;

(4) The Government's multiple prosecutions of American Honda were motivated by improper purposes, including anti-Japanese bias and a desire to enlarge the penalties imposed by Section 1 of the Sherman Act, and thus constituted a violation of due process.

Both American Honda and the Government submitted factual affidavits and documents in addition to briefs in connection with the San Francisco hearing on American Honda's motion, although the Government took the position that the double jeopardy issue properly should be submitted to the trial jury if it could not be determined as a matter of law on the basis of the pleadings, citing Short v. United States, 91 F. 2d 614 (C. A. 4, 1937), and Arnold v. United States, 336 F. 2d 347 (C. A. 9, 1964). American Honda took the position that the double jeopardy issue as well as the other issues

should be determined by the Court in advance of trial pursuant to Rule 12(b), F. R. Cr. P. Oral argument and the testimony of two witnesses, one called by American Honda and the other by the Government, was heard on the San Francisco motion in January 1967 and the matter was finally submitted in March 1967. The Chicago motion was argued before Judge Herbert Will and submitted at about the same time. Thereafter Judge Will indicated from time to time that he was in touch with Judge Sweigert with respect to the determination of the motions. However, no decisions have been issued to date with respect to either the Chicago or Cleveland motions.

In his 19-page Memorandum of Decision , Judge Sweigert ruled that the double jeopardy and other issues raised by American Honda should be determined by the Court in advance of trial on the basis of the pleadings and the evidence submitted by both parties, citing the procedure adopted in United States v. H. E. Koontz Creamery, Inc., 232 F. Supp. 312 (D. C. Md. 1964). He then found that there had been only a single Honda price-fixing conspiracy because the Honda dealers in the various local areas to some extent shared with American Honda a common interest in maintaining retail prices nationwide, even though the dealers and American Honda representatives in each local area met separately, agreed upon retail prices only for their respective areas, and were primarily concerned with prices in their respective areas.

Judge Sweigert also ruled, in the alternative, that the multiple prosecutions of American Honda constituted harassment in violation of both the double jeopardy and the due process clauses, even assuming that there were multiple conspiracies and that each conspiracy was a distinct offense under Section 1 of the Sherman Act, since in his view the offenses arose out of "the same transactions and course of conduct." In support of this holding, he cited cases involving several offenses arising out of a single transaction as well as dictum in a separate concurring opinion of Justice Brennan in Abbate v. United States, 359 U. S. 187, to the effect that successive federal prosecutions (rather than a single two-count prosecution) of violations of two federal statutes would, if based on the same acts, offend the double jeopardy clause. Judge Sweigert concluded without elaboration that Justice Brennan's reasoning should apply with even greater force to successive prosecutions for participation in different conspiracies in violation of the same statute.

Judge Sweigert rejected American Honda's argument that Section 1 of the Sherman Act is aimed at a course of conduct, indicating that in his view each distinct conspiracy in restraint of trade constitutes a separate violation of the statute. His decision makes no reference to American Honda's argument that the Government was motivated by improper purposes.

The Government has until October 1, 1967 to appeal the decision to the United States Supreme Court under 18 U.S.C. 3731. The case remains pending against the Bay Area Honda Dealers Association and seven individual defendants.

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CIVIL DIVISION

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COURTS OF APPEALS

FEDERAL TORT CLAIMS ACT - CONTRIBUTION - FEDERAL MEDICAL CARE RECOVERY ACT

NO CONTRIBUTION MAY BE ENFORCED AGAINST UNITED STATES WHERE GOVERNMENT HAS NO UNDERLYING TORT LIABILITY BY VIRTUE OF FERES DOCTRINE; GOVERNMENT'S RIGHT UNDER FEDERAL MEDICAL CARE RECOVERY ACT TO RECOVER ALL MEDICAL EXPENSES EXPENDED ON INJURED SERVICEMEN UPHELD, EVEN THOUGH INJURIES WERE CAUSED IN PART BY GOVERNMENT EMPLOYEE.

Roy Maddux v. James W. Cox, James Darrell Melton, and United States (C.A. 8, No. 18,567; September 6, 1967; D.J. 145-6-777)

This case arose out of a collision between two vehicles, one driven by a serviceman, Melton, acting in the scope of his employment; the other driven by the appellant, Maddux. Riding in the Government vehicle was serviceman Cox, who was also in the course of his Government duties, and riding in the Maddux vehicle was Mrs. Maddux. As a result of the collision, Melton, Cox and Mr. Maddux were injured and Mrs. Maddux was killed. Cox instituted suit against Maddux, and Maddux impleaded Melton. The United States was substituted for Melton pursuant to the Federal Drivers' Act, 28 U.S.C. 2679. The district court found that the accident occurred as a result of the joint and equal negligence of Melton and Maddux and held that Maddux would therefore not be able to recover any damages for his injuries. The Court also found, however, that Cox, who was a passenger in the Government vehicle, could recover from Maddux for his personal injuries, and the Government could recover from Maddux all the medical expenses it expended in treating Cox, under the Federal Medical Care Recovery Act. The Court held, however, that Maddux could not recover contribution from the United States for the damages he would have to pay Cox, because despite Melton's negligence the Government had no underlying tort liability to Cox, who sustained his injuries incident to service, under Feres v. United States, 340 U.S. 135.

Maddux appealed, contending that there was insufficient evidence to sustain the finding that he was negligent; that it was inequitable to deny him contribution from the Government for damages which were contributed to by a Government employee; and that the Government should not be permitted to recover medical expenses where it too had been negligent.

The Eighth Circuit believed that the district court erred in its ultimate conclusion as to the negligence of Maddux and remanded the case for a reconsideration and reevaluation of Maddux's negligence under the Comparative Negligence Statutes of Arkansas. In addition, the Court held, following the decisions of the Ninth Circuit in United Airlines v. Weiner, 335 F. 2d 379, certiorari dismissed, 379 U.S. 951, and Wien Alaska Airlines, Inc. v. United States, 375 F. 2d 536 (petition for certiorari pending, Supreme Court, October Term, 1967, No. 496), that the United States could not be held liable in contribution for injuries sustained by a serviceman incident to service, since it has no underlying liability for such injury. The Court also held that the Federal Medical Care Recovery Act, 42 U.S.C. 2651 et seq., by its plain terms, permitted the Government to recover full medical costs from a negligent party, even where it too was chargeable with some negligence. And in its discussion of the Federal Medical Care Recovery Act, the Court approved the Government's position that that Act gave to the United States both an independent right to recover medical expenses and a right of subrogation.

Staff: David L. Rose and William Kanter (Civil Division)

GOVERNMENT EMPLOYEES

LLOYD-LAFOLLETTE ACT DOES NOT REQUIRE PAYMENT OF BACK PAY TO EMPLOYEE PLACED ON INVOLUNTARY SICK LEAVE WHERE SUCH ACTION WAS JUSTIFIED; PLACING ON INVOLUNTARY SICK LEAVE IS REMOVAL OR SUSPENSION UNDER ACT AND PROCEDURAL SAFEGUARDS ARE MANDATORY.

United States v. Asa Abbett (C.A. 5, No. 24167; August 2, 1967; D.J. 35-1-3)

In this case a Government employee was placed on involuntary sick leave on February 9, 1961, on the basis of certain physical and psychiatric reports in possession of the agency which indicated disabling psychiatric impairment. Thereafter, the Bureau of Retirement and Insurance of the Civil Service Commission granted the agency's application for the employee's involuntary disability retirement. That determination was later reconsidered and reversed by the Bureau on the basis of new evidence, and the Board of Appeals of the Commission upheld the reconsidered determination. As a result the employee returned to work on August 14, 1961. The employee then brought this action to recover for the 732 hours of sick leave and 300 hours of annual leave she expended between February 9, 1961, the date on which she was placed on involuntary sick leave, and August 14, 1961, the date on which the Civil Service Commission determined that she should not be retired. (The employee retired voluntarily in February of 1963.)

The district court awarded judgment of $2,476.80 to the employee under the Lloyd-LaFollette Act, 5 U.S.C. 652(b)(1), on the ground that she was removed without pay and that "such removal or suspension was unjustified or unwarranted".

The Fifth Circuit reversed. The Court of Appeals rejected our contention that the placing of an employee on involuntary sick leave was not a suspension without pay under the Lloyd-LaFollette Act. But the Court held that the suspension was not "unjustified" or "unwarranted", in view of the psychiatric evidence before the Bureau at the time of its initial decision. The Court went on to hold that the procedural safeguards of the Lloyd-LaFollette Act must be applied in proceedings such as this where a person is placed on involuntary sick leave.

In holding that the Lloyd-LaFollette Act is applicable to this type of proceeding, the Fifth Circuit has apparently gone into conflict with the decision of the Court of Appeals for the District of Columbia Circuit in Ellmore v. Brucker, 236 F. 2d 734, certiorari denied, 361 U.S. 846.

Staff: Harvey L. Zuckman (Civil Division)

RAILROAD UNEMPLOYMENT INSURANCE ACT

AWARD OF UNEMPLOYMENT BENEFITS BY RAILROAD RETIREMENT BOARD HELD UNREVIEWABLE.

Western Pacific Railroad Co., et al. v. Howard K. Habermeyer, et al. (C.A. 9, Nos. 21,377 and 20,785; August 23, 1967; D.J. 235460-3613)

In 1963 a special board was appointed by the President to arbitrate a dispute, inter alia, arising out of the fact that the diesel engine had made the job of fireman unnecessary. The railroads wanted to discharge the firemen considered unnecessary, and the unions resisted. The Board ruling permitted the discharge of large numbers of firemen, but in the case of firemen with two to ten years service ruled that if they were offered a comparable job they could accept or could decline and receive severance pay. A great many firemen did take severance pay, left the railroad's employment, were unable to find other suitable work, and applied for unemployment insurance benefits. The Railroad Retirement Board ruled that their election to take severance pay in lieu of other work did not disqualify them from the benefits of the insurance program. The railroads brought suit against the Railroad Retirement Board to enjoin payments to firemen receiving such severance pay, contending that this pay was a substitute for unemployment benefits. They pointed out that employees who "voluntarily" left their jobs were not eligible for unemployment benefits, and argued that firemen who accepted severance pay rather than a comparable job had left their jobs "voluntarily".

The district court upheld the decision of the Retirement Board, and the Court of Appeals affirmed. It held that the Retirement Board had in fact (contrary to the argument of the railroads) made the necessary factual findings. More importantly it held that Section 355(g) of the Railroad Unemployment Insurance Act precluded a court from reviewing an award of unemployment compensation benefits.

Staff: Acting Assistant Attorney General Carl Eardley (Civil Division)

SOCIAL SECURITY ACT - REVIEW OF REMAND ORDERS

ORDER REMANDING SOCIAL SECURITY CASE TO SECRETARY FOR FURTHER ADMINISTRATIVE PROCEEDINGS NOT FINAL APPEALABLE ORDER.

Bohms v. Gardner (C. A. 8, No. 18,605; August 8, 1967; D.J. 137-69-13)

In this case the claimant instituted an action in the district court under Section 205(g) of the Social Security Act, 42 U.S.C. 405(g), to review a denial by the Secretary of disability benefits. After the Secretary answered the complaint the district court, on its own motion, ordered the case remanded for rehearing and taking of further evidence. The court ordered the remand because of reservations it had as to the standard of disability the Secretary had employed, because of claimant's confusion in an action in which he was not represented by counsel, and because of the incompleteness of the evidentiary record.

Claimant appealed the order of remand contending that the district court should have awarded him benefits. The Eighth Circuit, however, dismissed his appeal on the ground that the district court's order of remand was not a final appealable order under 28 U.S.C. 1291.

The Eighth Circuit's ruling in this case makes it clear that a remand to the Secretary which is basically aimed at giving claimant an opportunity to complete the presentation of his case before the Secretary, is not appealable until the purpose of the remand is completed.

Under Section 205(g) of the Act, 42 U.S.C. 405(g), the district court has the power to enter a "judgment affirming, modifying or reversing the decision of the Secretary, with or without remanding the cause for a rehearing". (Emphasis added.) The statute later provides that the "judgment of the court shall be final except that it shall be subject to review . . ." Thus a case which the court remands for a legal error or for lack of substantial evidence would in our view be final and subject to appellate review.

On the other hand, Section 205(g) goes on to provide for a mandatory remand where the Secretary moves for remand before answer; it also permits the court to remand the case "for good cause shown". In these types of cases, the district court retains jurisdiction of the cause until the matter is finally disposed of, and the remand orders are thus not final appealable orders. The remand by the district court in this case, since it was ordered primarily for filling in the evidentiary record, was for "good cause shown" and was thus not appealable.

Staff: United States Attorney Harold C. Doyle; Assistant United States Attorney Gene R. Bushnell (D. S. D.)

VETERANS' AFFAIRS

VETERANS ADMINISTRATION CAN RECOVER COST OF HOSPITALIZATION FROM VETERAN HAVING NONSERVICE CONNECTED DISABILITY WHO HAS EXECUTED FALSE AFFIDAVIT OF INABILITY TO PAY.

United States v. Shanks (C.A. 10, No. 9326; September 7, 1967; D.J. 151-13-608)

This action was instituted by the Government in an attempt to recover the cost of hospitalization furnished defendant after he had executed an affidavit of inability to pay, had been admitted to a V.A. hospital, and had been furnished hospital care. The affidavit was inconsistent with the facts revealed in the financial addendum contained in defendant's application for hospital care, but defendant was required to be admitted by the form of 38 U.S.C. 622.

The Government brought this action seeking recovery on unjust enrichment and quantum meruit theories. The district court dismissed the Government's action, holding that Congress had intended, by the enactment of 38 U.S.C. 622, that the Government be barred from going behind the veteran's affidavit of inability to pay.

On our appeal, the Tenth Circuit reversed. The Court held that the basic entitlement section of the Act only allowed hospitalization for nonservice connected disabilities if the veteran was unable to defray the expenses of hospital care. 38 U.S.C. 610(a). In accordance with our contention, it determined that Section 622 merely provided that no investigation of a veteran's ability to pay could be made prior to admission, not that a veteran who had made a false affidavit could not be required to repay the Government the cost of the care furnished as a result of that false affidavit. The Court distinguished its own decision in United States v. Borth, 266 F. 2d 521, which had held that such a claim for hospital services could not be the basis for a

False Claims Act suit by the Government on the gound that the question of civil liability for the value of hospital services was there expressly left open.

There are a number of actions similar to this one presently in litigation throughout the country, and United States Attorneys representing the Government in such cases should see that this decision is called to the attention of the courts in which such actions are pending.

Staff: Robert C. McDiarmid (Civil Division)

DISTRICT COURTS

FEDERAL DRIVERS' ACT

GOVERNMENT EMPLOYEE RECEIVING FEDERAL EMPLOYEES' COMPENSATION ACT BENEFITS MAY NOT RECOVER FROM UNITED STATES UNDER FEDERAL TORT CLAIMS ACT; FEDERAL DRIVERS' ACT BARS SUIT AGAINST GOVERNMENT DRIVER IN HIS INDIVIDUAL CAPACITY.

John C. VanHouten v. United States, et al. (D. Nev., Civil No. 1838; January 6, 1967; D.J. 157-46-102)

John C. VanHouten v. Ray Arthur Ralls and Gerald L. Byington (D. Nev., Civil No. 1911-N; August 31, 1967; D.J. 157-46-102)

Plaintiff VanHouten, a Government employee, was riding as a guest in the car driven by his co-employee, Byington. The car was involved in a collision with a car driven by Ralls, another federal employee. Plaintiff filed two suits as a result of the accident; one in Federal court against the United States and both drivers, and the other in state court against the two drivers individually.

The United States moved to dismiss the federal action against it and the drivers, contending that suit against it under the Federal Tort Claims Act was barred by the exclusivity provision of the Federal Employees' Compensation Act (5 U.S.C. 8119(c)) and that suit against the drivers was barred by the Federal Drivers' Act (28 U.S.C. 2679(b)-(e)). The Court dismissed the action against the United States because of the exclusivity of the compensation remedy. However, it dismissed the action against the Government drivers because of a lack of diversity of citizenship. In doing so, the Court indicated that the Federal Drivers' Act did not bar suit against the drivers in their individual capacities, and that had the case been removed from a state court it would have remanded it for trial against the drivers pursuant to 28 U.S.C. 2679(d).

Notwithstanding the intimation in the Court's earlier opinion, the United States removed the state court action against the drivers individually to

Federal court and moved to dismiss it as to them, contending once again that suit was barred against the drivers individually by the Federal Drivers' Act, which made plaintiff's exclusive tort remedy the Federal Tort Claims Act (against the United States). Plaintiff moved to remand the case to the state court. Upon reconsideration of its prior opinion, the Court reversed itself and decided that the Federal Drivers' Act immunized a Government driver from all tort liability based on his driving in the scope of his Government employment. The Court therefore held that the suit against the individual drivers in this case was barred, even though plaintiff could not maintain a Federal Tort Claims action against the United States because of the exclusivity provisions of the Federal Employees' Compensation Act. The Court refused to remand the case to the state court for further proceedings against the Government drivers, accepting our contention that the Drivers' Act required dismissal of the action as a matter of law.

This decision, therefore, accepts the Government's position that the Drivers' Act immunizes Government drivers from all tort liability arising out of their driving in the scope of their employment, and that no action survives against those drivers regardless of whether the plaintiff can or cannot successfully maintain an action against the United States under the Tort Claims Act.

Staff: Neil R. Peterson (Civil Division)

MORTGAGE FORECLOSURE

FIRST DECISION INTERPRETING REGULATORY AGREEMENT BETWEEN FEDERAL HOUSING COMMISSIONER AND MORTGAGOR.

United States v. Vance M. Thompson, et al. (E. D. Ark., Civil No. LR-67-C-36; August 24, 1967; D.J. 130-9-810)

This was an action to foreclose a deed of trust insured by the Federal Housing Commissioner and assigned to him upon default. The partnership which owned the property had executed a Regulatory Agreement which, in effect, forbade the distribution of any project income (except from "surplus cash") for other than operating expenses without the express consent of the Federal Housing Commissioner. That Agreement, as well as the deed of trust and note, provided that the mortgagee would look only to the property in the event of default, and that the project owner would not be personally liable for any deficiency on the insured mortgage loan. The Agreement, however, provided for personal liability for breach of any of its provisions. At about the time the Court appointed a receiver for the project in our foreclosure suit, the principal partner withdrew for his own use all of the cash in the project bank account, which admittedly came from rental income. Prior to that time, but after date of default in the mortgage payments, the

partnership also withdrew project income to pay off a bank loan and attorney fees. We amended our foreclosure complaint to add a Count for breach of the Regulatory Agreement seeking recovery of those three withdrawals on the gound that they were not from surplus cash, were not made with the consent of the Commissioner and were not for the payment of operating expenses. The Court granted foreclosure, and found for the United States as to all three withdrawals in question, accepting the Government's position that they were in violation of the Regulatory Agreement. The partners argued that they had advanced personal funds far in excess of the total amount of the withdrawals to keep the project going. The Court ruled that those advances were in the nature of capital investments and that by the terms of the Regulatory Agreement, the Government had priority over the repayment of any such investment. This is the first decision involving a Regulatory Agreement and is considered an important step in our FHA project foreclosure litigation.

Staff: Former United States Attorney Robert D. Smith, Jr.; Assistant United States Attorney J. Winston Bryan (E.D. Ark.); and George H. Vaillancourt (Civil Division)

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CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

SPECIAL NOTICE

REQUEST FOR DISMISSAL

Recently many Requests for Authorization to Dismiss a Criminal Case (Form 900) not signed by the United States Attorney have been received in the Criminal Division. Your attention is directed to the United States Attorney's Manual, Title 2, p. 21 setting forth the procedure when a dismissal of all counts of an indictment or information is requested. It is required that the United States Attorney indicate his approval of the request to dismiss on Form 900.

COURTS OF APPEAL

BANKING

ACCURATE ENTRY IN BANK'S BOOKS OF FRAUDULENT LOAN TRANSACTIONS HELD FALSE ENTRIES.

United States v. James Neal Biggerstaff (C. A. 4, August 1, 1967; D. J. 29-54M-169)

The defendant, a former bank officer, was convicted by a jury on four counts for having knowingly made false entries on the books of the Federally insured bank of which he was an officer, with intent to injure and defraud the bank, in violation of 18 U. S. C. 1005. The pattern followed was for an automobile salesman accomplice of defendant to cause a purchaser of an automobile from his agency to sign a group of documents including an installment sales contract for the full price of the automobile and an unrelated unsecured promissory note for an additional sum characterized as the "down payment". The purchaser was unaware of the tenor of the instruments executed. Under defendant's direction the note and contract were then sold to the defendant's bank and the note was entered as an asset on the bank's books notwithstanding that it had been procured from the customer by fraud and was unenforceable.

Defendant argued in his defense that he "faithfully recorded the transactions as they actually occurred," and therefore no false entry could be made out. The Fourth Circuit in affirming the conviction rejected this reasoning on grounds that the defendant "did not faithfully record actual transactions, but knowingly entered as assets on the books of the bank notes

which the makers were not aware they were signing. * * * [Defendant's] intention was merely to create the illusion of transactions which in reality had no substance."

The Court also rejected the defendant's claim that an incriminating statement given by him to bank officials was inadmissible under Garrity v. New Jersey, 385 U. S. 493 (1967). The Court in distinguishing Garrity noted that the conduct of the bank officials did not constitute Government action or coercion.

Staff: United States Attorney William H. Murdock; Assistant United States Attorney H. Marshall Simpson (M. D. N. C.)

FALSE STATEMENTS

INTRODUCTION OF FALSE STATEMENTS INTO EVIDENCE IN CRIMINAL PROCEEDING NOT WITHIN PURVIEW OF 18 U. S. C. 1001.

United States v. James Erhardt (C. A. 6, August 3, 1967; D. J. 52-31-149)

Erhardt, who had been acquitted on a charge of possession of stolen Government property, 18 U. S. C. 641, was then charged with violations of 18 U. S. C. 1001 and 1621 for introducing a false writing and giving false testimony in the earlier trial. The Court of Appeals concluded the perjury conviction could not stand because the two-witness rule had been violated, and it reversed the conviction under 18 U. S. C. 1001 because that statute does not apply to the introduction of false documents as evidence in a criminal proceeding. Conceding that Bramblett v. United States, 348 U. S. 503 (1955) extended 18 U. S. C. 1001 to the legislative and judicial branches of the Government, it adopted the interpretation of Bramblett in Morgan v. United States, 309 F. 2d 234 (D. C. Cir., 1962), cert. den., 373 U. S. 917 where the Court said:

> We are certain that neither Congress nor the Supreme Court intended the statute to include traditional trial tactics within the statutory terms "conceals or covers up." We hold only, on the authority of the Supreme Court construction, that the statute does apply to the type of action . . . which essentially involved the "administrative" or "housekeeping" functions, not the "judicial" machinery of the court.

We agree with the Sixth Circuit view that a contrary construction would undermine the effectiveness of the two-witness rule and of the perjury statute itself.

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LAND AND NATURAL RESOURCES DIVISION

Assistant Attorney General Edwin L. Weisl, Jr.

COURT OF APPEALS

FEDERAL PROPERTY

EXCLUSIVE JURISDICTION; LACK OF STATE JURISDICTION TO IMPOSE SEVERANCE TAX ON OIL AND GAS PRODUCED FROM FEDERAL ENCLAVE; CONSENT TO INCOME TAX JURISDICTION DOES NOT EMBRACE SEVERANCE TAX; PAUL v. UNITED STATES, 371 U.S. 245 (1963), DISTINGUISHED.

Mississippi River Fuel Corp. v. Cocreham (C.A. 5, No. 23402, September 13, 1967; D.J. 90-1-5-859)

Louisiana ceded exclusive jurisdiction of Barksdale Air Force Base to the United States in 1930, when the base was established. Oil and gas were discovered under the base and such deposits were leased for private development. Louisiana attempted to impose personal property taxes upon lessees for a pipe line and other equipment located on the base. It also attempted to impose on the lessees a severance tax measured by the oil and gas produced from the field. In Humble Pipe Line Co. v. Waggonner, 376 U.S. 369 (1964), the Supreme Court, reversing a Louisiana decision, invalidated the personal property tax, holding (1) exclusive jurisdiction applied even though the property had been donated to the United States, (2) the issuance of the oil and gas leases did not waive the exclusive jurisdiction of the United States and (3) lease provisions requiring the lessees to pay only taxes lawfully assessed were not a pro tanto abandonment of exclusive jurisdiction. Prior to Humble, the Court of Appeals for the Fifth Circuit had held that a severance tax could be imposed on the lessees' operation at Barksdale field. Mississippi River Fuel Corp. v. Fontenot, 234 F.2d 898 (1956). In the present case, instituted after certiorari was granted in Humble, a suit to secure the refund of severance taxes paid, the district court denied the refund.

The Court of Appeals reversed. It first discussed at length a contention, not made in the trial court, that Louisiana's sovereign immunity from suit precluded institution of this suit in the federal court against the collector of revenue. It held not. It then held that, in the light of Humble, the Fontenot case could not stand. Humble overruled the theory, the Court held, that the severance tax did not interfere with exclusive federal jurisdiction, on the ground that jurisdiction to tax was lacking, regardless of whether or not there was conflict with federal regulations or interference with federal functions. The Court further held that no distinction could be made between the personal property tax in Humble and the severance tax here involved.

The Court held that the doctrine of residual jurisdiction, Paul v. United States, 371 U.S. 245 (1962), that laws applicable to a territory continued until changed by a sovereign succeeding to jurisdiction by transfer, did not apply to tax laws. Finally, it held that the severance tax was not an income tax, to the imposition of which within federal areas the United States had consented under the Buck Act, 4 U.S.C. 106, 110.

Staff: Roger P. Marquis (Land and Natural Resources Division) for United States amicus curiae supporting plaintiff.

CONDEMNATION

VALUATION; REFUSAL TO INSTRUCT JURY ON SALES AS EVIDENCE OF VALUE.

United States v. 344 Acres of land, more or less, situate in Perry County, State of Indiana (Roy H. Mullen and Charles L. Mogan, Jr.) (C.A. 7, No. 15823, June 27, 1967, D.J. 33-15-296-21)

After the trial, where the Government's experts had based their testimony of value upon a recent sale of one of the farm properties condemned and upon recent sales of other farm properties in the area, the district court refused to instruct the jury that such sales are the best evidence of value. The landowners' experts did not consider sales in arriving at their much higher estimate of value. The award of compensation was much closer to the estimates of the landowners' witnesses.

On appeal by the Government, the Seventh Circuit affirmed (one judge dissenting), on the grounds that use of the term "best evidence" was misleading and would result in the exclusion of all other evidence. Thus, the Court read the term "best evidence" in the instruction in the exclusionary sense of the original document evidentiary rule. The Court apparently would have approved an instruction using the phrase "best indication" of value. This illustrates the need for precision in requesting instructions and the dangers of making a request for an instruction which goes further than the law justifies.

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

DISTRICT COURT

PUBLIC LANDS

ADMINISTRATIVE LAW; OIL SHALE CLAIMS; EFFECT OF ADMINISTRATIVE DECISIONS BASED ON DEFAULTS.

Pacific Oil Co. v. Udall (D. Colo., Civ. No. 9406, September 12, 1967; D.J. 90-1-18-714)

In 1930, the Department of the Interior instituted contest proceedings challenging the validity of 41 oil shale mining claims, involving approximately 6,400 acres of land, on the ground that dummy locators had been used; i.e., all of the claims had been located, pursuant to agreement, for the benefit of one individual. When the case was set for administrative hearing, the mining claimants stated that they had no money to proceed and requested that the issue be decided on the basis of material already in the record. (A short time before, the "dummy locator" charge, based on the same agreement, had been established in a companion contest.) The Commissioner of the General Land Office denied the contestee's request and, pursuant to departmental rules, which provided for default in the event that a claimant did not appear at the hearing, entered a default judgment declaring the claims null and void.

In 1952, the same claimant, the Wheeler Shale Company, applied for a patent covering most of the same lands without disclosing (in its application) that the claims had previously been declared null and void. Because of a poor record-keeping system in the Department of the Interior, the earlier decision was not discovered by Interior officials until a directive had been entered authorizing the issuance of a patent on 11 of the claims and ordering that a contest be initiated against the remainder on precisely the same grounds involved in the earlier contest. When the earlier decisions were brought to light (in 1956), the Manager withdrew the clear-listing direction, canceled the contest proceedings and denied the patent application. On appeal to the Secretary, the claimant contended, among other things, that the earlier decision was void because it had been entered by default, that other lands had been patented based on locations made by the same individuals and that the Secretary should exercise his supervisory authority to direct the issuance of a patent. On May 16, 1963, the Secretary rejected claimant's appeals.

The present suit was instituted to seek review of the Secretary's decision. A motion for summary judgment, filed on behalf of the defendant, was rejected. Although the Court ultimately accepted the contention that the case was required to be heard on the administrative record, it permitted the introduction of additional evidence, including the testimony of two former highly placed employees of the Department of the Interior, to the effect that they saw no objection to the filing of a second application for a patent without a reference therein to the fact that the claims had previously been declared null and void.

On September 12, 1967, Judge Doyle directed dismissal of the action. In his opinion, holding that the Secretary had acted lawfully, the Court noted that the Department of the Interior is an independent tribunal with authority

to enter default decisions under conditions provided for by its own rules of decision, that the applicant's alleged lack of funds did not constitute good cause for failing to appear at the hearing and that there was no requirement for the present Secretary to exercise his discretionary authority. The Court stated that the claimant's failure to disclose the earlier decisions in its application was an added reason for the Secretary to refuse to reopen. The Court also noted that it was "unimpressed" with the previously described surprising testimony of the former Department of the Interior officials.

Staff: United States Attorney Lawrence M. Henry (D. Colo.); Thos. L. McKevitt (Land and Natural Resources Division)

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TAX DIVISION

Assistant Attorney General Mitchell Rogovin

DISTRICT COURT

SOVEREIGN IMMUNITY

JURISDICTION OF DISTRICT COURT TO DECLARE SECTIONS OF INTERNAL REVENUE CODE UNCONSTITUTIONAL; DECLARATORY JUDGMENT AND INJUNCTION WITH RESPECT TO FEDERAL TAXES; UNCONSENTED SUITS AGAINST UNITED STATES; THREE JUDGE COURTS.

Jules Hairstylists of Maryland, Inc., et al. v. United States and Irving Machiz, District Director of Internal Revenue (D. Md., Civil No. 17,190, May 12, 1967, D. J. 5-35-1280)

The plaintiffs are Maryland, Virginia and District of Columbia corporations which employ beauticians in the operation of their beauty salons. They brought an action against the United States for a declaratory judgment to declare unconstitutional Sections 3102(a) and (c), 3401(f) and 3402(k) of the Internal Revenue Code and to enjoin their enforcement. Those provisions are 1965 amendments to the Code by which Congress required employees who receive $20 or more in tips each month in the course of their employment to report such income in writing to their employers. The employers in turn are required to withhold, account for, and pay over to the Treasury federal income and Social Security taxes on this employee tip income, at least to the extent of employee funds within the employers' control. The primary purpose of the amendments was to insure adequate Social Security coverage for a class of employees who theretofore had not benefited from full annuity rights based upon their entire income, and secondarily, to extend the income tax withholding provisions to an area of income previously neglected. No tax is imposed on the employer as to this tip income.

The plaintiffs, as employers of beauticians who received the requisite amount of tip income, attacked the provisions as ambiguous, arbitrary, discriminatory, an invasion of employee privacy, and offensive to the Fifth Amendment of the Constitution as an undue burden on the employer and an uncompensated taking of property. No collection action had been undertaken by the Internal Revenue Service with respect to these plaintiffs.

The original complaint was dismissed on motion of the United States for failure of the plaintiffs to seek a three judge district court, pursuant to

28 U. S. C. 2282 and 2284, with leave to the plaintiffs to file an amended complaint.

The amended complaint naming the District Director of Internal Revenue as an additional defendant and applying for a three judge court was dismissed on motion of the United States. The suit was dismissed as to the United States because it was held to be an unconsented suit against the sovereign. The Court then ruled that although the District Director of Internal Revenue for Maryland was a doubtful defendant in a suit by the Virginia and District of Columbia corporations, he could nevertheless be enjoined by the Maryland corporation from enforcing an unconstitutional statute, since the claim of sovereign immunity is unavailable to an officer of the United States in such circumstances. The Court then dismissed the action as to the District Director on the grounds that (1) the plaintiffs had not been injured by the statutes complained of and hence lacked standing; (2) injunctive suits to restrain the assessment or collection of taxes are prohibited by 26 U. S. C. 7421; (3) declaratory judgments with respect to federal taxes are barred by 28 U. S. C. 2201; and (4) the equitable exceptions to those prohibitions in the case of nontaxpayers had been cancelled by the recent enactment of 26 U.S.C. 7426, a provision of the Federal Tax Lien Act of 1966 expressly creating a right of action against the United States for nontaxpayers whose property is levied upon in satisfaction of someone else's liability. The Court denied the application for a three judge court on the ground that such a court, if convened, would still lack jurisdiction to grant the relief sought because of the provisions of 26 U. S. C. 7421 and 28 U. S. C. 2201.

Staff: James H. Jeffries, III (Tax Division)

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