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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

JURY RETURNS VERDICT OF GUILTY AS TO OIL COMPANY.

United States v. Socony Mobil Oil Co., Inc., et al. (D. Kansas, Cr. KC CR 873; September 29, 1967; D.J. 60-206-28)

On September 29, 1967 after 12 days of trial before Judge Arthur J. Stanley, Jr., a jury of 5 men and 7 women returned a verdict of guilty against the Wilshire Oil Company of Texas, a Delaware corporation (Wilshire). Wilshire, on April 6, 1966, together with 9 other oil companies was indicted by a Kansas grand jury and charged with rigging bids in the sale of liquid asphalt to the State of Kansas. The indictment charged that the corporate defendants had allocated among themselves 400 delivery locations in the 6 highway divisions for the sale of liquid asphalt to the State of Kansas, during the period beginning prior to 1959 and continuing until at least 1965.

Nine of the corporate defendants prior to trial had tendered nolo pleas, which the Court accepted over the Government's objection. In opposing nolo pleas the Government argued in part that the case should be tried to aid the State of Kansas in its pending civil action against 10 of the same corporate defendants wherein the State of Kansas was seeking to recover over $12,500,000 in the State court of Kansas under Kansas statutes. The Attorney General of the State of Kansas also argued in opposition to the nolo pleas as amicus curiae. After accepting the nolo pleas of the 9 corporate defendants, Judge Stanley imposed fines ranging from $25,000 to $40,000, making a total of $280,000.

At the trial of Wilshire, the Government limited its proof of conspiracy to the period from December 30, 1960 to August 9, 1963. The indictment had charged that Wilshire acquired Riffe Petroleum Company, an Oklahoma corporation, on December 30, 1960 and thereafter operated Riffe Petroleum Company as a division of Wilshire until August 9, 1963 when Wilshire sold its Riffe Division to C. B. & K. Industries.

Wilshire at trial, contended it was not legally responsible for the conspiratorial acts committed by its agents during the period December 30, 1960 to August 9, 1963 because:

(1) The Board of Directors of the defendants Wilshire had no knowledge of the conspiracy and would not have approved the rigging of bids to the State of Kansas had the Board of Directors been aware of its agents' participation in the conspiracy from December 30, 1960 to August 9, 1963.

(2) Ed Riffe, executive vice president and a member of the Board of Directors of Wilshire from January 1961 to 1963, may have known of the bid rigging yet Ed Riffe concealed such activities from the Board of Directors of Wilshire.

The Government's proof of the conspiracy at trial consisted of the testimony of employees of the oil companies who participated in private hotel meetings at which 10 oil companies "cut up" the entire State of Kansas for the sale of liquid asphalt to Kansas for maintenance purposes.

## Use of Grand Jury Transcript

Following the testimony of the first Government trial witness who had also been a grand jury witness, defense counsel demanded the grand jury testimony of the trial witness. The Court pointed out that under the recent case (August, 1967) of Cargill v. United States, Tenth Circuit (unreported), a showing of "particularized need" is met by the statement of counsel that the grand jury testimony is needed to properly cross-examine a witness who has testified. The Government did not object to the Court making the grand jury testimony available to the defense counsel. However, the Government argued that the Government should then be permitted on redirect examination to use the grand jury testimony of the witness. The Court agreed with the Government and said if the grand jury transcript is used by one party it would be made available for use by the other party.

## Alleged Prejudicial Newspaper Stories and Requests for Mistrials

As the trial was drawing to a close, defense counsel claimed the jury had been prejudiced by newspaper stories, some of which headlined an attempt by the oil companies to settle the State of Kansas claim.

Defense counsel asked for a mistrial by reason of an article in a front page headline in the Topeka Daily Capital on September 28, 1967. The newspaper story carried the headline "Legislator Seeks Suit Settlement for 12 Oil Firms."

The State legislator was also counsel for Phillips Petroleum Company, which company was a defendant in the State of Kansas case. The newspaper article listed the defendants in the suit filed by the State of Kansas which included Wilshire Oil Company of Texas. The newspaper article described a

meeting held by the Highway Commission of the State of Kansas with attorneys for the oil companies. Defense counsel called the Court's attention to the newspaper story and requested a mistrial. The Court polled the jury concerning the newspaper stories. Under the procedure adopted by the Court and agreed to by counsel, each juror was brought into the court room and separately examined by the Court concerning the juror's seeing or reading the newspaper story. The Court pointed out that it was following the procedure which was suggested by the Tenth Circuit case, Arthur Mares v. United States (No. 9346, July Term, 1967). Counsel for the defendants and the Government did not participate in the examination of the jurors, though the Court asked each counsel whether counsel desired to examine. The jurors had not seen or read the Topeka newspaper.

A second request for a mistrial was made by counsel on September 29, 1967 when the Topeka Daily Capital of September 28, 1967 was found in the jury room. The Court similarly examined the jurors with respect to this newspaper which also carried an article covering attempts of the oil companies to settle their case with the State of Kansas. Though the Court again examined each juror separately and asked if they had any knowledge as to how the newspaper got into the jury room, none of the jurors had any information pertaining thereto. Thus, it still remains a mystery as to how the newspaper got into the jury room.

Following the verdict of guilty, defense counsel again claimed that newspaper stories were prejudicial to Wilshire. Judge Stanley again polled the jury and followed the same procedures as hereinabove outlined. The Court marked each newspaper story as a court exhibit, and thereafter examined each juror separately with respect to such newspaper stories. Three jurors had seen headlines concerning the case. At the conclusion of the trial the Court gave the defendant 30 days to file all motions together with supporting briefs. The Court also gave the Government 15 days to file briefs in opposition.

## Double Jeopardy Claim of Defendant

Assuming that the defendant's motions will be overruled, there remains the matter of the claim of double jeopardy of defendant Wilshire.

Wilshire, following the Kansas indictment, claimed double jeopardy by reason of the Missouri indictment of Wilshire in United States v. American Oil Company et al. The Missouri case included Wilshire among 18 corporate defendants and 17 individual defendants. These defendants pleaded nolo contendere and the court imposed total fines in the amount of $609,500 which included a $10,000 fine of Wilshire. Defendant Wilshire alleges that the Kansas indictment of Wilshire placed Wilshire in double jeopardy. To support its double jeopardy claim, Wilshire contends there was one conspiracy among all the oil companies to divide the gallonage of road oil sold to Missouri and

Kansas. The procedure for a hearing on the double jeopardy motion of Wilshire was the subject of a pre-trial conference. At the pre-trial conference counsel agreed with the Court's approval that upon conviction a post-trial hearing would be held wherein testimony would be taken by both sides.

Staff: Raymond D. Hunter, John Edward Burke, James E. Mann, Harold E. Baily, Harry H. Faris and Elliott B. Woolley (Antitrust Division)

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# CIVIL DIVISION

Assistant Attorney General Edwin L. Weisl, Jr.

## SPECIAL NOTICES

### FEDERAL TORT CLAIMS ACT

In a recent Federal Tort Claims Act case, the District Court for the Southern District of Mississippi reduced a damage award, in a motor vehicle collision case, from $150,000 to $75,000 based upon the Court's finding that the plaintiff's failure to have fastened an available seat belt was negligence and a fifty-percent contributing cause of the injuries sustained. Kelly v. United States, Civil No. 4094 (S. D. Miss.). Though the decision represents an application of the comparative negligence law of Mississippi, there may be a growing disposition on the part of the courts generally to treat the failure to utilize seat belts as contributory negligence or as a basis for reducing a damage award where the failure is casually related to the injuries complained of. See, 1 University of San Francisco Law Review 277.

The United States is presently a part to more than 900 suits arising out of motor vehicle collisions in which damages totalling approximately $75,000,000 are sought. Where the failure to use seat belts is a certain contributing cause of personal injuries in any of these cases, the United States Attorneys' offices should consider asserting this fact as a defensive mechanism in settlement negotiations and at trial.

### MORTGAGE FORECLOSURES

It will not be necessary to join state and local governmental units asserting real property tax liens only in the complaints filed in Veterans' Administration and Federal Housing Administration single family mortgage foreclosures or in Farmers Home Administration or Small Business Administration foreclosures. These agencies are willing to pay these taxes even though our mortgage lien may have priority under the Federal rule of "First in time, first in right". See 38 U. S. C. 1820(2)(6); 12 U. S. C. 17066; 7 U. S. C. 1984; 15 U. S. C. 646.

If the client agency will not have a representative present to bid at the foreclosure sale, please be certain that a single protective bid is entered on its behalf. A written bid in the amount authorized by the agency can be presented through the United States Marshal who conducts the sale.

## COURTS OF APPEALS

### FEDERAL TORT CLAIMS ACT

DISTRICT COURT'S FINDING, THAT TRADE USAGE EXISTED IN FLORIDA, INCLUDING MIAMI AREA, WHEREBY FIXED-BASE OPERATOR ASSUMED RISK OF DAMAGE TO NEGLIGENTLY OPERATED RENTED AIRCRAFT, AFFIRMED AS NOT "CLEARILY ERRONEOUS".

Tursair Executive Aircraft Services, Inc. v. United States (C. A. 5, No. 24, 336; October 12, 1967; D. J. 157-18-499)

The nominal plaintiff, Tursair, sued the United States under the Tort Claims Act to recover for damages to an aircraft negligently operated by an employee of the Federal Aviation Agency, which had rented the plane from Tursair pursuant to an "open market" (an oral, over-the-counter) rental agreement. Tursair, doing business in the Miami area of Florida, was a "fixed-base" operator -- a lessor of aircraft to qualified members of the public. The plane was covered by "hull" (collision) insurance, except for a $250 deductible. After paying the claim, the insurance company sought to enforce alleged subrogation rights against the United States. The United States defended on the ground that the subrogee stood in the shoes of its subrogor, Tursair, and that Tursair assumed the risk of damage to the aircraft pursuant to a trade usage in Florida which, by implication, was incorporated into the "open market" rental agreement between Tursair and the FAA.

The district court found that a trade usage existed in Florida, including the Miami area, whereby the hull insurance, except for the $250 deductible, was intended to inure to the benefit of the pilot-lessee whose ordinary negligence damaged the aircraft, and that the parties to the contract in this case intended to incorporate this trade usage into their open market rental agreement. The district court concluded, therefore, that the United States was only obligated to the plaintiff in the amount of $250. The insurance company appealed, contending that the evidence of a trade usage was not sufficiently "certain", that the trial court had relied upon "opinion" and "hearsay" evidence, and that there was no specific proof of the existence of the trade usage in the Miami area. The Court of Appeals affirmed per curiam, holding that the trial court's findings were not "clearly erroneous".

Staff: Leonard Schaitman (Civil Division)

## GOVERNMENT CONTRACTS - RENEGOTIATION ACT OF 1951

RENEGOTIATION ACT OF 1951, AS APPLIED TO CONTRACTS ENTERED INTO PRIOR TO ITS ENACTMENT, HELD CONSTITUTIONAL.

Baltimore Contractors, Inc. v. Renegotiation Board (C. A. 4, No. 10,090; September 13, 1967; D. J. 152-953 and 954)

In March of 1951, or 9 months after the outbreak of hostilities in Korea, Congress enacted a Renegotiation Act, modeled after the Renegotiation Act of 1942 and authorizing the recovery of excessive profits under certain Government contracts. The statute was made applicable retroactively to amounts received or accrued under Government contracts after January 1, 1951, unless the contracts had been executed prior to the commencement of the Korean conflict in July, 1950.

In October of 1950, petitioner entered into two contracts for the construction of fire prevention facilities at Government warehouses used to store crude rubber and other strategic materials. After the construction work was finished in 1952, the Renegotiation Board determined that petitioner had received excessive profits of $150,000 during 1951 and 1952. The Tax Court reduced this to $125,000 but otherwise affirmed the Board's determination.

Petitioner then took a further appeal to the Fourth Circuit, contending that the Act was unconstitutional. That Court, accepting our argument that Lichter v. United States, 334 U.S. 742 was controlling, rejected petitioner's argument and ruled that the Korean War had a sufficient effect on the national economy to justify the use by Congress of its war powers (1) to direct renegotiation of the contracts in question and (2) to provide for retroactive application of the Act to those contracts. The Court accordingly affirmed the Tax Court judgment.

Staff: David L. Rose (formerly of Civil Division)

## GOVERNMENT EMPLOYEES - CIVIL SERVICE COMMISSION

WHERE PROCEDURAL ERROR OCCURS AT CIVIL SERVICE HEARING REVIEWING EMPLOYEE DISCHARGE, EMPLOYEE IS ENTITLED TO BACK PAY TO DATE OF SECOND CIVIL SERVICE HEARING AT WHICH PROCEDURAL ERROR IS CORRECTED.

Williams v. Brown (C. A. D. C., Nos. 19,803, 20,504; October 17, 1967; D. J. 35-16-193)

In Williams v. Zuckert, 372 U.S. 765, the Supreme Court remanded

this Civil Service discharge proceeding to the district court to determine whether the Air Force, which had discharged Williams, had violated regulations by preventing the appearance of witnesses whom Williams had requested at the Civil Service Commission hearing. The district court found that the Air Force had refused to produce witnesses requested by Williams. At this point, Williams contended he was entitled to reinstatement and back pay. The district court disagreed, and remanded the case to the Civil Service Commission for a hearing on the merits of the discharge. No. 19,803 is Williams' appeal from the order of remand. This appeal was dismissed without prejudice, and was reinstated after the Civil Service Commission remand proceedings were terminated.

On remand, the Commission sustained the discharge (Williams offered no testimony to support his case, resting on his position that the procedural error entitled him to reinstatement without more). The district court then sustained the discharge and denied the claim for back pay, holding that the second hearing was procedurally correct; that the Commission's determination was supported by the record; and that the procedural error at the first hearing did not entitle Williams to reinstatement and back pay. The district court recognized that in Hanifan v. United States, 354 F. 2d 358 (1965), the Court of Claims had held that a procedural error at a Civil Service Commission hearing vitiates the discharge and entitles the employee to back pay. Williams appealed (No. 20,504).

On appeal, the Government did not seek to distinguish Hanifan, but asked the Court of Appeals to go into conflict with it. The Government's position was that the Civil Service Commission's hearing is akin to an appeal; that an error in an appeal proceeding does not vitiate the discharge itself, but merely requires that a new, procedurally correct, appeal hearing be held. The Court of Appeals disagreed, holding that because of Williams' lack of opportunity for a hearing before the Air Force, the Civil Service Commission proceeding, which was his first chance for a hearing, was not in the nature of an appeal. However, the Court of Appeals thought that Williams should not be entitled to reinstatement in view of the second Commission determination, and so awarded him back pay only to the date of the second determination and refused to order reinstatement. The Court also affirmed the order of the district court which had remanded the case to the Commission for the second hearing.

In a significant passage, the Court's opinion refers to the fact that under present regulations, most discharged employees have the right to a hearing at the agency level as well as a second hearing before the Commission. See 5 C.F.R. 771.201, et seq. (Supp. 1967). The Court noted that these regulations went into effect after Williams' discharge, and thus Williams' first chance for a hearing was before the Commission. The Court points out that,

under the present regulations an employee "may, of course, waive or abandon [an evidentiary hearing at the employing agency level] and pursue only his remedy before the Commission, but such a choice to forego an evidentiary hearing within the employing agency would be the employee's own. Appellant, of course, had no such choice; and it goes without saying that it is only his case that we are deciding."

This language, coupled with the Court's ruling that Williams' hearing before the Commission was not an "appeal" because it was his first chance for a hearing, indicates that under the present regulations the Court would decide that a procedural error at the Commission level does not entitle the employee to anything more than a new hearing.

Staff: Robert V. Zener (Civil Division)

## NATIONAL BANKING ACT - BRANCH BANKS

STATE BANK COMMISSIONER ENTITLED TO INTERVENE UNDER RULE 24, F.R. CIV. PR., IN SUIT AGAINST COMPTROLLER INVOLVING BRANCHING OF NATIONAL BANKS.

William Neusse, Commissioner of Banks, State of Wisconsin v. William Camp, Comptroller of the Currency, et al. (C. A. D. C., No. 20, 529; October 4, 1967; D. J. 145-3-792)

A Wisconsin state bank brought suit against the Comptroller of the Currency to enjoin his authorizing the branching of a national bank. Under federal law, a national bank may branch only if under state law "state banks" may branch. The validity of the national bank branch depended upon the meaning of the term "state banks" as used in the federal statute. The district court denied the Wisconsin State Bank Commissioner leave to intervene in the action under Rule 24, F. R. Civ. Pr., primarily on the ground that the Commissioner lacked the requisite interest since the sole issue was the meaning of a term used in a federal statute. The Court of Appeals for the District of Columbia Circuit, noting that Rule 24 is to be liberally construed in favor of intervention, reversed. The Court held that the litigation in which intervention was sought involved an "admixture of national and state policies" which created in the state official directly concerned in effectuating state policy, a sufficient interest to intervene as a matter of right to protect state policy. With regard to the requirement of Rule 24 that there also be a showing of impairment of the intervenor's interest if intervention is denied, the Court held that the possibility of an adverse precedent constitutes sufficient impairment so as to give rise to a right of intervention. The third requirement of intervention as of right, that representation of the intervenor's interest be inadequate, was found to be satisfied by a showing of a "serious possibility" that

the prospective intervenor's interest would not be adequately represented. Finally, the court held it was error to deny permissive intervention where it would not cause undue delay or expense and the intervenor was a state official seeking to vindicate the public interest in a litigation which as a practical matter involved construction of state law administered by the state official.

Staff: Norman Knopf (Civil Division)

## DISTRICT COURTS

### ADMINISTRATIVE PROCEDURE ACT - PUBLIC INFORMATION SECTION

NATIONAL LABOR RELATIONS BOARD INVESTIGATORY FILES AND WITNESSES' STATEMENTS NOT AVAILABLE UNDER NEW PUBLIC INFORMATION LAW, 5 U.S.C. 552.

Barceloneta Shoe Corporation and Luis Benitez Carle, its agent v. Raymond J. Compton, et al. (D.P.R., Civil Action No. 505-67; July 31, 1967)

Plaintiffs were the respondents in an unfair labor practice proceeding before the NLRB. Plaintiffs attempted to compel the Regional Director to make available under 5 U.S.C. 552 (P. L. 90-23) any statements or evidence received by him during the NLRB investigation leading to the administrative proceeding prior to the holding of that proceeding. The Court held that these records fell within the specific exemptions of 5 U.S.C. 552 because they were investigatory files compiled for law enforcement purposes and not available by law to plaintiffs (Exemption 7) and because they were trade secrets and commercial or financial information obtained from a person and privileged or confidential (Exemption 4). The Court relied heavily on the Attorney General's Memorandum on the Public Information Section.

Staff: The case was handled by attorneys at the NLRB.

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# CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

## SPECIAL NOTICE

### TRAVEL BY PERSONNEL OF INVESTIGATION AGENCIES

It is requested that United States Attorneys give personal attention to the need for the personal appearance of investigative agents for the purpose of grand jury presentations, pre-trial conferences and trial testimony, when appearance involves travel from another district. The necessity for the appearance must be balanced against the time-loss of the agents from their investigative duties. This is not intended to discourage justified requests. It is important, however, that we not impose any undue burden when circumstances do not warrant it.

## COURTS OF APPEAL

### FRAUD

CHAIN REFERRAL SCHEME.

Nickles v. United States (C. A. 10, August 21, 1967; D. J. 36-77-53)

The appellant and others operated a typical chain referral scheme in connection with the sale of television sets. They represented that the plan was sponsored by RCA. When that company received complaints, the local distributor refused to provide additional sets, and appellant's business terminated. On appeal from his conviction, the appellant contended that his motion for a directed verdict of not guilty or for a new trial should have been granted since the evidence did not show a failure to pay commissions earned prior to the time the sets became unavailable, and did not establish that any referral purchaser was improperly disqualified in violation of the sales presentation and agreement.

In affirming the conviction, the Court of Appeals for the Tenth Circuit held that the issue was not restricted to the narrow issue of whether or not referred prospective buyers were improperly disqualified. The Court stated that the indictment described a broad scheme and artifice to defraud and there was abundant evidence relating to the misrepresentations alleged therein. These false representations were made during the period the appellant was receiving the sets, and the cause of the termination of the business had no relation to the proof. In reply to the contention that the agreement signed by a buyer contained the entire agreement, the Court stated that oral testimony

is admissible to show the presence of fraud notwithstanding proof of the execution of documents.

Staff: United States Attorney William T. Thurman; Assistant United States Attorney F. T. Wetzel (D. Utah)

CIRCUMSTANTIAL EVIDENCE, FROM WHICH REASONABLE INFERENCE OF GUILT CAN BE DRAWN, WILL SUPPORT GUILTY FINDING EVEN THOUGH THERE MAY BE HYPOTHESES OTHER THAN GUILT.

United States v. Roberts (C. A. 6, September 13, 1967; D.J. 130-37-4874)

The appellant and his co-defendants were convicted on a charge of violating 18 U.S.C. 1010. The charge arose out of their application for a Title I FHA insured loan. The gravamen of the charge was that they had falsely stated that the loan was for building construction, whereas in fact they intended to use the loan proceeds for other purposes.

Such direct borrower loan prosecutions are often most difficult because of the requirement that the borrower's state of mind at the time of the application be shown. This can usually be done only by circumstantial evidence. The Sixth Circuit here held that documentary evidence of immediate disbursement of the loan proceeds for purposes inconsistent with the application would support a jury verdict.

Staff: United States Attorney Lawrence Gubow

## DISTRICT COURT

### FOOD, DRUG AND COSMETIC ACT

DECLARATORY JUDGMENT ACTION TO CLASSIFY AS DEVICES ARTICLES USED BY SURGEONS FOR LIGATING BLEEDING VESSELS.

Amp Incorporated v. Gardner (S. D. N. Y. September 29, 1967; D.J. 21-51-544)

Under the provisions of the Federal Food, Drug, and Cosmetic Act, "new" drugs (those not generally regarded as safe and effective) must be approved by the Food and Drug Administration before being marketed. New devices, however, are not subject to such "preclearance", being subject to enforcement action for adulteration or misbranding after shipment in commerce.

In this case a manufacturer of ligature devices designed for use by surgeons in tying off bleeding vessels and employing a novel principle of design first sought approval of his products as new drugs. Then, deciding that the products are more properly classifiable as devices, withdrew the application for investigational approval. The Commissioner of Food and Drugs then informed the company that the products are drugs and that failure to comply with the regulations governing use of drugs for investigational purposes might result in commencement of regulatory action. The company then brought this action for a judgment declaring its products to be devices and for an injunction against application of the "new drug" provisions of the Act to its ligating products.

Plaintiff contended its products are mechanical instruments, the nylon ligature loop and locking device merely components, parts, or accessories, and that therefore the whole product is a device. Defendants contended plaintiff's products are actually sutures, which are drugs within the meaning of the statute since they are listed in the U. S. Pharmacopoeia, the instruments being merely a new method of applying such sutures, that since such method "is not generally recognized among experts ... as safe and effective for use ..." they are new drugs under 21 U. S. C. 321(p). Judge Tenney granted the Government's cross-motion for summary judgment holding that the essential element of plaintiff's products is the suture and that the hemostat or tube is no more than a container for and method of applying the suture. The Court noted that the definitions within the Act of "drug" and "device", contain overlapping elements but concluded that where an item is capable of coming within two definitions, that definition according the public the greatest protection should be accepted.

Judge Tenney did not agree with the Government's argument that a listing in an official compendium is the crucial distinction between a drug and device. He held that such a listing is merely "some evidence" that the item is a drug. The Court further stated that since the method of administration of plaintiff's drugs is new and there is a lack of general recognition of the safety of the sutures, they must be classified as new drugs.

Staff: United States Attorney Robert M. Morgenthau; Assistant United States Attorney James G. Greilsheimer (S. D. N. Y.)

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## EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

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

## APPOINTMENTS

Department

### Assistant Deputy Attorney General - John R. McDonough

Mr. McDonough was born May 16, 1919 in St. Paul, Minnesota, is married and has two children. He received his LL.B. degree from Columbia University in 1946, and was admitted to the Bar of the State of California in 1949. Except for the period 1949-1952 when he was in private practice, Mr. McDonough has been associated with Stanford University Law School since 1946; as Assistant Professor of Law (1946-1949); as Acting Dean (1960 and 1962-1964); and as Professor of Law from 1952 until his appointment as Assistant Deputy Attorney General. From 1954 to 1959, he was executive secretary of the California Law Revision Commission, a state agency responsible for recommending improvements and reforms in the state laws. He was appointed by Governor Brown as a public member of the Commission in 1959 and was its vice chairman from 1961 to 1963, and chairman from 1963 to 1965. Mr. McDonough played a major role in the creation of a new evidence code enacted by the California Legislature, was also one of the founders of the Stanford Law Review, and is a member of the American Law Institute.

### John K. Van de Kamp
### Deputy Director, Executive Office for U. S. Attorneys

Mr. Van de Kamp was born February 7, 1936 in Pasadena, California, and is single. He received his B. A. degree (1956) from Dartmouth College and his LL.B. degree (1959) from Stanford University Law School. Mr. Van de Kamp was admitted to the Bar of the State of California in 1960. From 1960 until his appointment as Deputy Director he served as an Assistant United States Attorney for the Central District of California, except for the period 1966-1967 when he was court-appointed United States Attorney for that District.

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# INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

## COURTS OF APPEALS

### NAVY DISCHARGE

Van Bourg v. Nitze, Secretary of the Navy (C. A. D. C.) October 17, 1967; D. J. 145-6-785

In 1951 plaintiff, who had been on active duty in the Naval Reserve, 1944 to 1946, and was a member of the Naval Reserve on inactive duty, tendered his resignation "for the good of the service". His letter stated that he understood that he would receive a discharge under "conditions other than honorable." He had received a memorandum from the Chief of Naval Personnel advising him of information casting doubt upon his loyalty. The memorandum referred to Navy Regulations implementing Executive Order No. 9835 and was accompanied by a "Narrative Statement" charging that: (1) He had been a member of the Communist Party since 1946 and a Party officer in 1947; (2) In 1949 he subscribed to the "Daily Peoples World", a Party official organ; (3) In 1939 he attended a student camp which was cited as a "Communist front"; and (4) In 1948 he circulated petitions to qualify the Independent Progressive Party on the California ballot.

Plaintiff's resignation was accepted and in 1951 he received a discharge "under conditions other than honorable".

In 1963 plaintiff applied to the Naval Discharge Review Board for review of the nature of his discharge; under 10 U.S.C. 1553 such an application may be made within 15 years.

Plaintiff appeared represented by counsel at the Review Board hearing in 1963. He testified that he submitted his resignation in 1951 because his then counsel advised him that at a hearing he would not have the right to confront his accusers, and, even though he was innocent, in the political climate of 1951 he was afraid to make an issue of the charges because of his desire not to hurt people associated with him, including his partners in an architectural firm. He also testified that in 1963 he felt that he could take the risk of making the nature of his discharge public, with the change in the climate of the times, an established architectural practice, new partners, and a change in the law. (Bland v. Connally, 110 U.S. App. D.C. 375, 293 F(2d) 852 (1961)). He testified he never was a member of or officer of the Communist Party, that he subscribed to the People's World because of an intellectual interest, and started a petition to qualify the Progressive Party because he thought

there should be a third voice in politics and because he admired Henry Wallace. He also testified as to his attendance at the camp in 1939, but that pre-induction conduct was irrelevant. Harmon v. Brucker, 355 U.S. 579.

The Review Board decided that "the discharge accurately reflects petitioner's conduct and character during the period of service which was terminated by the discharge", and ordered no change.

The Review Board had considered ex parte reports of the Office of Naval Intelligence, and plaintiff next applied to the Board for Correction of Naval Records which denied his application in 1965.

On November 23, 1965 plaintiff sued in the District Court for declaratory relief. The defendant Secretary filed an affidavit of the Chief of Naval Personnel that reliable information as to plaintiff's membership and office-holding in the Communist Party had been furnished by one Bartlett, who died in 1953.

The District Court granted the Secretary's motion for summary judgment. It found that at the hearing before the Review Board plaintiff's counsel had requested to see the ex parte reports, and the request had been denied. He concluded, however, that by tendering his resignation "for the good of the service" in 1951, plaintiff had waived his rights to confrontation and cross-examination of witnesses.

The Court of Appeals (Bastian, Senior Circuit Judge, Tamm and Leventhal, Circuit Judges) reversed and remanded. In an opinion by Judge Leventhal the Court emphasized that the Discharge Review Board was authorized to review "every separation from the naval service, irrespective of the manner evidenced or brought about", and that that Board should have considered furnishing plaintiff at least with a summary of the contents of the classified reports, or declassifying them; the Navy had to follow its own regulations on the subject. The Court also held that the Board, and also the Corrections Board, failed to make the required findings of fact; that any waiver of rights by plaintiff in 1951 did not deprive him of the procedural rights he was entitled to in 1963. The plaintiff was held not to be barred from relief by laches because under the statutes he was entitled to apply to the Discharge Board within 15 years and to the Corrections Board within 3 years thereafter, so his applications were made within a reasonable time, and he had exhausted his administrative remedies. The Court further held that the Secretary had not been prejudiced by the delay and the loss of Bartlett's information, because the Review Board could consider plaintiff's refusal in 1951 to answer interrogatories, and his tender of his resignation; that the Board should consider whether to declassify the reports or furnish plaintiff with a summary, and consider Bartlett's statement even when contradicted by a current explanation by plaintiff.

The Court ordered the case remanded with instructions that the District Court enter an order retaining jurisdiction pending further considerations by the Review Board.

Staff: Appeal argued by George B. Searls.
With him on the brief were Kevin T. Maroney and Lee B. Anderson (Internal Security)

* * *

## LAND AND NATURAL RESOURCES DIVISION

Acting Assistant Attorney General J. Edward Williams

### IMPORTANCE OF PROMPT TRIAL OF CONDEMNATION CASES.

A recent letter from an acquiring agency stated, inter alia:

> Although we recognize that the setting of parcels for trial is solely in the discretion of the court, it is our belief that the long lapse of time between the filing of the declaration of taking and the trial in this instance was a contributing factor to the high award. Of course the delay was entirely responsible for the high amount of interest on the deficiency.
>
> In view of the abnormal added cost to the Government of the deficiency and the interest on this parcel it is urged that every effort be made to bring the matter of just compensation to trial in other pending condemnation cases as soon as possible, particularly in cases involving properties of this value.

Since some five years elapsed between the filing and the trial of the case in question, the acquiring agency had just cause to complain. The file reflects repeated urging by the Department to field counsel to expedite the settlement or trial of the case. But that fact obviously is no excuse for the long delay and added cost. It is the team made up of the Department in Washington and the United States Attorney in the field which is responsible for the efficient prosecution of cases on behalf of the United States.

At the recent United States Attorneys' Conference you were advised with respect to the goal entitled "Settlement or Trial Within a Year." This goal is spelled out in a paper by Mr. Harold S. Harrison, Chief, Land Acquisition Section, which paper was mailed to you for study and implementation by you and your Assistants assigned to lands cases. The paper, which is styled "Goal: Settlement or Trial Within a Year", bears the suggestion that it be filed behind tab "S" in the IV Condemnation Seminar 1966 ring binder and that it be added to the table of contents in the front of that binder. That paper contains ten specific suggestions designed to aid in the accomplishment of our goal of settling or trying cases within one year. Please adhere to the suggested 10-point program to the fullest extent possible.

SUPREME COURT

## FEDERAL POWER COMMISSION LICENSE

### COMMISSION REQUIRED TO DEVELOP RECORD ON ISSUES OF FEDERAL VERSUS PRIVATE DEVELOPMENT OF WATERWAY AND ON NEED FOR POWER SUPPLY VERSUS ALL OTHER PUBLIC INTERESTS.

Udall v. Federal Power Commission (387 U.S. 428, D.J. 90-1-2-737)

Pacific Northwest Power Company sought a license from the Federal Power Commission to build High Mountain Sheep Dam (hydroelectric) in the Snake River on the border between Oregon and Idaho. A competing application was filed by Washington Public Power Supply System. In addition to generating at-site power, the dam would impound waters in a large reservoir which, by controlled releases, could regulate the flow of water to the nine run-of-the-river federal dams downstream that fully occupy the river to the Pacific Ocean. Late in the proceedings, the Secretary of the Interior urged FPC to recommend to Congress federal construction because of the many federal interests involved (the nine dams, salmon, flood control, water quality, recreation, reclamation, etc.). FPC granted the license to PNPC. On appeals by the Secretary and WPPSS, the District of Columbia Circuit affirmed (358 F.2d 840).

The Supreme Court (by Justice Douglas) reversed. The Court held that "the issue of federal development has never been explored in this record" as required by Section 7(b) of the Federal Power Act, 16 U.S.C. 800(b), which provides: "Whenever, in the judgment of the Commission, the development of any water resources for public purposes should be undertaken by the United States itself, the Commission shall not approve any application for any project affecting such development, but shall * * * submit its findings to Congress with such recommendations as it may find appropriate * * *."

Also, the Court noted that Section 10(a) of the Act provides that "the project adopted" shall be such "as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway * * * and for other beneficial public uses, including recreational purposes [emphasis by Court]." The Court indicated that FPC had given too little attention to this aspect of its duties, saying that FPC's action was based on "the assumption that this project must be built and that it must be built now. * * * But neither the Examiner nor the Commission specifically found that deferral of the project would not be in the public interest or that immediate development would be more in the public interest than construction at some future time or no construction at all."

The test is not whether the region can use the additional power, but "whether the project will be in the public interest. And that determination can be made only after an exploration of all issues relevant to 'public interest,' including future power demand and supply, alternate sources of power, the public interest in preserving reaches of wild rivers and wilderness areas, the preservation of anadromous fish for commercial and recreational purposes and the protection of wildlife." The Court did not reach the issue raised by WPPSS that, as a "municipality" under the Act, it was entitled to a preference.

Justices Harlan and Steward dissented on the ground that Congress had intrusted the question to the Commission's discretion and that there was ample evidentiary basis for its action, even though the evidence was not directed to the issues in question.

Staff: Louis F. Claiborne, Assistant to the Solicitor General.

## COURT OF APPEALS

### CONDEMNATION

RIGHT TO TAKE; ADMINISTRATIVE DETERMINATION OF EXTENT OF TITLE NEEDED; BAD FAITH EXCEPTION TO RULE OF FINALITY; AUTHORITY TO CONDEMN MINERAL INTERESTS FOR AIR STATION USES.

Southern Pacific Land Co. v. United States (367 F.2d 161, C.A. 9, 1966, cert. den., 386 U.S. 1030 (1967) D.J. 33-5-2036-1)

Proceedings were brought to condemn in fee 17,750 acres of land for a naval air station near Lemoore, California. Southern Pacific, which owned 4,600 acres in the area, objected that mineral interests should not be taken but merely subordinated to air station uses. After preliminary proceedings, which included the taking of depositions of the acquiring agency as to reasons for taking the fee, the district court sustained the taking, holding that, once public use appeared, it had no authority to inquire whether a fee or lesser interest should be taken. The Ninth Circuit affirmed on different grounds. It said that there was substantial basis for an argument that, when the taking as a whole is for an authorized purpose, the agency decision as to what property or what interest is needed is not subject to judicial review. On the other hand, the Court said that there was dictum in courts of appeals that an exception exists when the administrative decision is alleged to be arbitrary, capricious or in bad faith. This question need not be decided, the Court held, because here the taking was not shown to be arbitrary, capricious or in bad faith. It held possible reduction of

marketability of land when it should become surplus because of outstanding mineral interests was a legitimate consideration, saying "Advantageous liquidation of the Government's investment is a legitimate consideration in determing the estate to be taken."

Five days earlier, the Ninth Circuit had held in Chapman v. Public Utility District No. 1 of Douglas Co., Wash., 367 F. 2d 163 (1966), that the action of a licensee under the Federal Power Act which brought proceedings to condemn fee title, rather than an easement, was not arbitrary or capricious. It said (at p. 168):

> Both federal and state authorities recognize that the power of eminent domain is not confined to the taking of property for which there is an absolute and immediate need. It extends also to the taking of property which is reasonably necessary, and for which a need will probably exist within a reasonable time. [Citations omitted.] As the court said in Welcker, "a 'stitch in time' has never been considered capricious. And, the fact that expert witnesses may disagree as to the desirability of one method of protection, as opposed to another, does not perforce render the choice of one arbitrary."

Staff: Roger P. Marquis (Land and Natural Resources Division)

ENHANCED VALUE FROM PROJECT EXCLUDED IN SECOND TAKING; FEDERAL PROJECT IS AN ENTITY EVEN WHEN PORTIONS ARE DEVOTED TO NONFEDERAL OPERATION.

United States v. First Pyramid Life Insurance Co. (C.A. 8, No. 18,684, Oct. 3, 1967, D.J. 33-4-274-431)

The City of Heber Springs, Arkansas had a water intake facility in the Little Red River which would be flooded by a federal dam and reservoir. It was agreed that the city would acquire land and relocate it, the United States paying the cost. Site A was selected by the city for the relocation; but it was rejected by the State Board of Health. Site B was then selected, but was rejected by the United States because of high construction costs due to the terrain. Site C was finally agreed upon. Also, the procedure was changed from city acquisition of the site to federal acquisition, thereupon the United States filed this condemnation action. It had already concluded all acquisitions of lands needed for the reservoir and, in so doing, had taken some land from a parcel of which Site C had been a part.

The landowner, First Pyramid Life Insurance Company, had bought the land after Site B, some distance away, was selected, but before it was rejected. The land, which was on a high bluff overlooking the reservoir, was bought for development of lakeshore housing. The price paid reflected the large enhanced value caused by the reservoir.

The district court, adverting to its belief that under state law the city would have had to pay this enhanced value upon condemnation, held that the United States must pay it, even though the value was generated by its project. It distinguished United States v. Miller, 317 U.S. 369 (1942), and United States v. Crance, 341 F.2d 161 (C.A. 8, 1965), on the ground that here the Government was not taking the land for its own use. [Neither was it in Miller.]

The Court of Appeals reversed. It referred to the Miller rule that, when the Government takes certain lands and subsequently takes adjacent lands which have increased in value because of the project, it does not pay this enhanced value, if those lands "were probably within the scope of the project from the time the Government was committed to it," and, further, broadly stated:

> In addition, giving consideration to the size of these large flood control projects and the manner in which the Government must necessarily proceed therewith, a particular tract of land is not excluded from the area of probable taking merely because it was not specifically included in the original planning of the Corps of Engineers or specifically delineated in the preliminary maps and drawings.

It found no merit in a distinction based on whether the lands "are used or controlled ultimately by the federal government, local political entities or private interests."

Staff: S. Billingsley Hill (Land and Natural Resources Division)

FINDING THAT WIDELY SEPARATED PARCELS USED IN CATTLE BUSINESS CONSTITUTED "SINGLE TRACT" AS BASIS FOR SEVERANCE DAMAGES UPHELD.

United States v. D. W. and Edith Evans (380 F.2d 761, C.A. 10, 1967, D.J. 33-17-218-269, 33-17-218-270, 33-17-218-430)

This case grows out of the rule that when part of a single tract of land is taken, just compensation is determined by the value of the tract before

the taking, less the value of the remainder afterward. Specifically, the issue is what constitutes the "single tract" to be valued before the taking. In this case, the landowner owned 18 parcles of land, totaling 11,270 acres, spread over seven counties and separated by distances of up to 60 miles. The Government took the entirety of three separate parcels, containing 524 acres, and small flowage easements of six acres on two other parcels. The landowner contended that the "single tract" to be valued was the entire 11,270 acres. The Government, while recognizing that the 11,270 acres were used for the same business of raising cattle, contended that physical contiguity, manner of acquisition, and types of property normally sold as separate tracts must be considered, as well as unity of business use. The Government urged that, prima facie, each separate parcel which was taken in whole or in part should be separately valued. The Government contended that the burden of proving severance damages was on the landowner, and that he had not clearly shown that the remaining 15 separated parcels were worth less after the taking than before. The Government's third point on appeal was that the commission appointed under Rule 71A, F. R. Civ. P., had not shown how it arrived at the award.

On an appeal taken by the Government from the adverse rulings of the district court, the Tenth Circuit affirmed. The Court of Appeals largely agreed with the Government's legal arguments, but reached a different conclusion based on the facts of this case. The Court agreed that the burden of proof to show severance damages was on the landowner. The proof of those damages should be supplied by evidence of market value "if it is available." The Court quotes and does not disagree with the Government's argument that contiguity is not the sole test, but it is the primary one in determining what constitutes a single tract.

On the facts, the Court acknowledged that "This case must be considered to be an extreme one, as to the noncontinguous tract problem * * *." However, the Court found the factual determinations of the trial court were supported by substantial evidence. The Court, after reviewing the record, found substantial evidence to support both the finding that the lands taken were part of the larger unit whose integrity was destroyed by the taking and the finding that the pasture would bring less when sold without the bottomland taken. It recognized the business loss problem but held that that was not the basis of the award here. The Court noted that severance damages had not been awarded for all of the 11,270 acres but only those parcels closest to headquarters.

On the lack of adequate findings, the Court of Appeals held that the report of the commission "shows how the result was arrived at as a practical matter".

Staff: A. Donald Mileur (Land and Natural Resources Division)

## INDIAN LANDS

GRANT OF FEE TITLE TO TRACT WITHIN RESERVATION DOES NOT INCLUDE IMPLIED EASEMENT OF ACCESS TO REACH PARCEL FOR ALL PURPOSES; SOVEREIGN IMMUNITY.

Superior Oil Co. v. United States (353 F. 2d 34, C. A. 9, 1965; D. J. 90-1-23-1116)

In 1910, fee title to a tract of land within the Hopi Indian Reservation was granted to the Women's American Baptist Home Mission Society. After litigation had cleared title to the Hopi Reservation, that tribe, with assistance of the United States, undertook a program for orderly development of its oil and gas resources by first securing drilling of test wells of limited depth, etc. To avoid such limitations, Superior secured an oil and gas lease from the Society and a State of Arizona permit to drill wells inconsistent with the Hopi restrictions. When it sought to bring heavy drilling equipment to the site over access roads through the reservation, it was stopped by Indian police. Suit was brought for an injunction against federal and tribal officers and for damages. Defenses of sovereign immunity were asserted. The suit was dismissed.

The Court of Appeals affirmed. It reasserted that lack of consent of the United States to suit for an injunction was fatal if the officer defendants were acting within the scope of their authority. This latter question would depend in part on whether Superior had an implied easement of access to the parcel. The Court stated its decision as follows:

> Appellant's position is simply that since the patent to the Mission was in unrestricted fee simple it carried with it by implication a way of necessity over lands of the United States for all purposes to which the conveyed land might lawfully be put.
>
> [1] Such is not the law. The scope and extent of the right of access depends not upon the state of title of the dominant estate, nor the existence or lack of limitations in the grant of that estate, but upon what must, under the circumstances, be attributed to the grantor either by implication of intent or by operation of law founded in a public policy favoring land utilization.
>
> [2] Under either approach there are factors here which in our judgment preclude the implication of an

> easement for appellant's purposes. [Footnotes omitted.]

The three factors were (1) the purpose of the grant was to aid mission work among the Indians; (2) the fact that the grant was a donation; and (3) the fact that the United States, as trustee, was making a grant in aid of the Indians' interests, not in derogation of them.

Staff: Roger P. Marquis (Land and Natural Resources Division)

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# TAX DIVISION

Assistant Attorney General Mitchell Rogovin

## COURT OF APPEALS--CIVIL CASE

### LIENS

U.S. HELD ENTITLED TO PRIORITY OF PAYMENT OF TAX DEBT AGAINST INSOLVENT DECEDENT'S ESTATE OVER COMMONWEALTH OF KENTUCKY WHICH, PRIOR TO INSOLVENCY, HAD NOT ISSUED EXECUTION OR TAKEN OTHER ACTION TO SUBJECT ASSETS TO PAYMENT OF JUDGMENT.

Commonwealth of Kentucky v. United States (C.A. 6, No. 17239; September 29, 1967; D.J. 5-30-464)

This appeal presented the question of whether a judgment for unpaid state income taxes obtained by the Commonwealth of Kentucky against a taxpayer, now deceased, took priority over unpaid federal taxes in the distribution of the assets of the insolvent estate of the deceased taxpayer. The Commonwealth had in 1957 reduced its claim for unpaid taxes to judgment, and recorded the judgment in 1958; it did not, however, in order to satisfy its claim, take possession of any of the taxpayer's property by levying execution thereon or by any other means. The United States recorded its tax lien on various dates between 1951 and 1964. Thus, some of the federal tax liens were recorded subsequent to the entry and recording of the state's judgment against the taxpayer.

In a suit commenced by the executrix of the estate to determine the priority of creditors' claims, the United States District Court for the Eastern District of Kentucky held that under Revised Statutes, Section 3466, the tax claims of the United States took priority over the claim and judgment of the Commonwealth.

The Commonwealth conceded that the federal tax liens recorded before its judgment were entitled to priority, but claimed that its judgment took priority over those federal tax liens recorded after the entry and recording of its own judgment. It asserted that the language of Section 6323 of the 1954 Code which provides that a federal tax lien "shall not be valid as against any * * * judgment creditor until notice thereof has been filed" created an exception to the broad priority granted by Revised Statutes, Section 3466 which provides that "whenever * * * the estate of any deceased debtors, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied.

The Sixth Circuit, citing United States v. Vermont, 377 U.S. 351 and United States v. New Britain, 347 U.S. 81, rejected the Commonwealth's claim.

In passing, the Court commented on the fact that the Commonwealth's possible position as a lienholder, by virtue of Kentucky Revised Statutes, Section 134.420, did not aid it in this case. Noting that the Supreme Court has deferred passing definitively on the question of whether the priority granted by Revised Statute, Section 3466 may be overcome by a fully perfected and specific lien, the appellate court here held that the question was not presented in the instant proceeding as the lien which the Commonwealth might in fact have was not, in any event, a perfected and specific lien as no property of the decedent had been reduced to possession by the Commonwealth. United States v. County of Wayne, 378 F. 2d 671 (C.A. 6th).

Staff: United States Attorney George I. Cline (E.D. Ky.); Joseph Kovner and Stephen H. Paley (Tax Division)

## DISTRICT COURT--CIVIL CASES

### LIENS

PROPERTY SUBJECT TO LIEN; COMMUNITY v. SEPARATELY OWNED PROPERTY; EFFECT OF ANTENUPTIAL CONTRACT UPON STATUS OF PROPERTY IN LOUISIANA; EFFECT OF DECLARATION OF HOMESTEAD AND LOUISIANA "ACT OF DONATION" UPON FEDERAL TAX LIEN.

Mrs. Sarah Jennings Carter v. United States of America, ex rel. Director of Internal Revenue (E.D. La., Civil No. 2938, August 31, 1967, D.J. 5-32-681)

The plaintiff, claiming that a personal residence was her separate property, sought to enjoin the District Director of Internal Revenue from seizing and selling the property to satisfy unpaid income taxes assessed against her husband. Plaintiff and her taxpayer-husband were married on April 17, 1954. Three days prior to their marriage plaintiff and the taxpayer entered into a valid marriage contract in which they formally renounced the provisions of the Louisiana Revised Civil Code, which otherwise would have automatically established, upon marriage, a community of acquets and gains between them as husband and wife. In their antenuptial contract, it was agreed that all property owned by them at the time of their marriage and all property acquired by each of them after their marriage would be and remain their separate property; they further reserved to themselves individually administration of their separate estates and the right to separately enjoy the revenues therefrom. On June 11, 1955, plaintiff and taxpayer purchased the property in question and jointly executed a note and mortgage in favor of a local bank

in the principal amount of $16,000, representing the unpaid portion of the purchase price. A down payment in the amount of $10,000 was made at the time of purchase and was paid in the form of a check drawn on the personal account of the taxpayer. The monthly payments on the mortgage were $200 each, and all of these payments made between 1955 and 1964 were made by the taxpayer from his separate earnings. On July 21, 1961, pursuant to a decision of the United States Tax Court, the sum of $102,918.69 was assessed against the taxpayer and a former wife, representing income tax deficiencies for the taxable periods 1948 through 1953. A default judgment in this amount was entered against the taxpayer in this action on April 13, 1966.

On October 4, 1963, the taxpayer and plaintiff executed a Declaration of Homestead, in which they designated the property here involved as their family home. On October 8, 1963, the taxpayer executed an "Act of Donation" by which he purportedly donated his one-half interest in the property to his wife, the plaintiff herein. On January 23, 1964, the property was seized by the District Director and advertised for sale for nonpayment by taxpayer of the aforementioned taxes. The plaintiff then filed this suit to enjoin the sale of the property, and the United States impleaded plaintiff's husband as a defendant and cross claimed to foreclose the federal tax liens against the property in question.

The questions before the Court were (1) was the property involved the separate property of the plaintiff, or the separate property of the taxpayer, or community property belonging to the plaintiff and taxpayer jointly; and (2) in any of the aforementioned events, could the property be seized and sold in order to satisfy the federal tax lien assessed against the taxpayer, notwithstanding the homestead exemption and the purported gift by the taxpayer to his wife.

The Court concluded that in view of the valid antenuptial agreement executed between the plaintiff and taxpayer, coupled with the fact that the down payment and the monthly payments on the property were made by the taxpayer, the property in question was the separate property of the taxpayer. Accordingly, the federal tax lien attached to the property at the time of assessment, and the subsequent Act of Donation executed by the taxpayer and the Declaration of Homestead executed by plaintiff and taxpayer would have no effect upon the tax lien. In addition, the Court noted that even had the Declaration of Homestead been filed before assessment, it would not have affected the Government's lien because state exemption laws are not effective against federal tax liens, citing several federal cases on point and the Louisiana Supreme Court case of Harvey v. Thomas, 239 La. 510, 119 S. 2d 446.

Staff: United States Attorney Louis C. LaCour (E.D. La.); A. A. Simpson, Jr. (Tax Division)

## 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.

The Court granted, in part, the Government's motion for summary judgment on the grounds (1) that the tax liabilities for years prior to a conveyance, but assessed after the conveyance, are to be included as a liability in determining whether or not an individual is insolvent, and (2) that even if defendants established that Hendrik owned assets located outside the United States, the Government could not reach these under the tax treaties with the Netherlands and Switzerland. The Court therefore concluded that Hendrik van der Horst was rendered insolvent by the transfer to the trust.

The Court further found that the children gave no consideration for the creation of their interests in the trust corpus and, hence, the creation of their interests was a fraudulent conveyance. The Court, however, set for trial the question of whether Catharina gave fair consideration in order to be named a beneficiary of the trust.

Staff: United States Attorney Alexander Greenfeld (D. Del.); John J. McCarthy and Jerome H. Fridkin (Tax Division)

* * *