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UNITED STATES DEPARTMENT OF JUSTICE

ADMINISTRATIVE DIVISION

Assistant Attorney General Ernest C. Friesen, Jr.

MEMOS & ORDERS

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549	11-22-67	U.S. Attorneys	Termination of Authority to Qualify as Surety on Federal Bonds
551	12-7-67	U.S. Attorneys	Bail Reform Act Form No. 1
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124R-S8	12-1-67	U.S. Attorneys	Docket and Reporting System Manual Revision #1, USA Codes Issued Under Memo 124, Supplement 7, July 1, 1967

ORDERS	DATED	DISTRIBUTION	SUBJECT
386-67	11-28-67	U.S. Attys. & Marshals	Transferring the Executive Office for U.S. Marshals to the Administrative Division
387-67	11-29-67	U.S. Attys. & Marshals	Settlement of Tort Claims

ORDERS	DATED	DISTRIBUTION	SUBJECT
388-67	12-1-67	U.S. Attys. & Marshals	Designation Harold S. Harrison to Act as Asst. Atty. Gen. in Charge of the Land and Natural Resources Division

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CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

COURT OF APPEALS

INFORMANTS

DISCLOSURE OF INFORMANT'S IDENTITY REQUIRED ONLY IF ESSENTIAL TO FAIR DETERMINATION.

United States v. Jackson (C. A. 3 No. 16375; October 17, 1967; D. J. 123-66)

Eugene L. Jackson and his wife Ruth Jackson were both convicted on two counts for violation 26 U. S. C. 4742(a) and 4744(a)(2) of the federal narcotics law. An informer introduced an agent of the Federal Narcotics Bureau to Eugene Jackson and the agent subsequently purchased marihuana from that defendant. Sometime later the informer and the agent went to the Jackson residence for the purpose of furthering the investigation against Eugene Jackson. Eugene was not at home, but Ruth Jackson sold marihuana to the agent. Defendants asked that the name of the informer be revealed so that he could be questioned to determine his possible usefulness as a witness for the defense. The trial judge ruled against disclosure in both instances.

In affirming the District Court's ruling, the Court of Appeals for the Third Circuit cited Roviaro v. United States, 353 U.S. 53 (1957), as holding that the Government has a privilege of non-disclosure, but that the privilege must give way "where the disclosure of an informer's identity, or the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, ..." 353 U.S. 53 at 60, 61.

At the trial of Eugene Jackson the informer was questioned in camera by the trial judge as to the possible physical danger he would encounter if disclosure were allowed and as to any testimony he could offer that might aid the defendant's cause. The Court of Appeals examined the camera record and found that disclosure of the informer's identity would not have been helpful or essential to a fair determination of the cause.

At the trial of Ruth Jackson the trial judge did not have an opportunity to conduct an in camera investigation of the informer. The Circuit Court held that, absent any evidence showing that the informer would have offered

testimony in support of the offense, an appeal cannot be based on the ground that the informer's identity should have been disclosed.

In a concurring opinion Circuit Judge Biggs stated that if the testimony of the informer, by the in camera examination, is shown to be "highly material" or of substantial assistance to the defendant the name of the informer must be disclosed to the defendant or the Government's case dismissed.

Staff: United States Attorney Gustave Diamond
and Assistant United States Attorney Lawrence Zurawsky
(W.D. Pa.)

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INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Subversive Activities Control Act of 1950, 50 U.S.C. 781, et seq.

United States v. Robel (Sup. Ct., No. 8, October Term 1967, D.J. 146-7-82-576)

The case was briefed and argued during the October Term, 1966; but the Court set the case over and ordered a further brief and reargument in the 1967 Term.

On December 11, 1967 the Supreme Court held Section 5 (a) (1) (D) of the Subversive Activities Control Act to be unconstitutional. This section of the statute makes it unlawful for any member of a organization required to register under the Act as a Communist-action organization to engage in any employment in any defense facility so designated by the Secretary of Defense. The Supreme Court (6-2) affirmed the district court's dismissal of the indictment charging Robel with a violation of Section 5(a) (1) (D) in that he unlawfully and willfully engaged in employment at Todd Shipyards Corporation, Seattle, Washington, a defense facility so designated by the Secretary of Defense, while a member of the Communist Party with knowledge that the Communist Party had been ordered to register as a Communist-action organization and with knowledge and notice that the shipyards had been designated as a defense facility by the Secretary of Defense. The district court, in order to overcome what it viewed as a "likely constitutional infirmity" read into the statute the requirement of "active membership and specific intent" (which the indictment did not allege). The Government did not wish to accept that narrow construction of the statute and the case was certified to the Supreme Court.

The Supreme Court held that the statute cannot be saved by limiting its application to active members of Communist-action organizations who have the specific intent of furthering the unlawful goals of such organizations. The Court said that because the statute "sweeps indiscriminately across all types of associations with Communist-action groups, without regard to the quality and degree of membership, it runs afoul of the First Amendment". The Court also pointed out that it was "not unmindful of the Congressional concern over the danger of sabotage and espionage in national defense industries, and nothing we hold today should be read to deny Congress the power under narrowly drawn legislation to keep from sensitive positions in defense

facilities those who would use their positions to disrupt the Nation's production facilities." Justice Brennan wrote a separate concurring opinion. Justices White, Harlan joining, dissented.

Staff: Kevin T. Maroney (Internal Security) argued the case for the Government. With him on the brief were John S. Martin, Jr., Assistant to the Solicitor General, Assistant Attorney General Yeagley and Lee B. Anderson (Internal Security)

Subversive Activities Control Act of 1950, 50 U.S.C. 781, et seq.

DuBois Clubs of America v. Clark (Sup. Ct., No. 515, October Term 1967, D.C. 146-1-9155)

On December 11, 1967 the Supreme Court handed down a per curiam decision, with Justices Douglas and Black dissenting, in which the Court affirmed the lower court's dismissal of this suit, which sought to enjoin the Attorney General's proceedings against the organization before the Subversive Activities Control Board seeking an order to require the organization to register as a Communist-front organization under the registration provisions of the Subversive Activities Control Act (50 U.S.C. Section 782(4), 786).

The Attorney General on March 4, 1966 petitioned the Subversive Activities Control Board for an order requiring DuBois Clubs of America to register as a Communist-front. Before hearings were heard DuBois Clubs sued in the District Court for the District of Columbia, alleging the Communist-front registration provisions of the Act were unconstitutional. The complaint asked the Court for an order declaring the Communist-front provisions unconstitutional and also an order enjoining the Attorney General and the subversive Activities Control Board from enforcing them. The District Court (3 judges) dismissed the complaint on the ground that appellants had failed to exhaust their administrative remedy. The case was appealed to the Supreme Court under 28 U.S.C. 1253. The Supreme Court in affirming this dismissal pointed out that the Act provides for full evidentiary public hearing, with right to offer evidence and conduct cross-examination; and the Act provides that the Subversive Activities Control Board must make a written report and state its findings of fact, and, if aggrieved, the organization may obtain review in the United States Court of Appeals for the District of Columbia Circuit, which may set aside the order if it is not supported by a "preponderance of the evidence", and upon motion of a party the Court of Appeals may order the Board to take additional evidence. And, the Court added, if the Board and Court of Appeals find the Act does cover the organization it may challenge the constitutionality of the statute either as applied or on its face.

Thus it is evident that the Act provides a way for raising constitutional claims. Therefore, the Court refused to pass on the important and difficult constitutional issues "devoid of factual context". On this basis the Court distinguished its decision in Dombrowski v. Pfister, 380 U. S. 479 (1965). The Court pointed out that the complaint constituted no more than conclusory allegations that the purpose of the threatened enforcement of the Act was to "harass" the Dubois Clubs. For these reasons the Supreme Court affirmed the Attorney General's motion to affirm the judgment of the lower court dismissing the suit.

Staff: Ralph Spritzer, Acting Solicitor General; Assistant Attorney General Yeagley, Kevin T. Maroney, George B. Searls, Lee B. Anderson (Internal Security)

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LAND AND NATURAL RESOURCES DIVISION

Acting Assistant Attorney General Harold S. Harrison

SUPREME COURT

SUBMERGED LANDS ACT

TEXAS' HISTORIC BOUNDARY, DELIMITING STATUTORY GRANT OF SUBMERGED LANDS BEYOND USUAL THREE-MILE LIMIT, IS IMMOVABLE LINE LOCATED AT ITS POSITION ON DATE OF STATEHOOD.

United States v. Louisiana, et al. (No. 9, Orig., December 4, 1967; D.J. 90-1-18-260)

The Submerged Lands Act, 67 Stat. 29, 43 U.S.C. Secs. 1301-1315, gave States the submerged lands within their boundaries, not exceeding three geographical (nautical) miles from the coast, except that in the Gulf of Mexico it gave beyond that distance, to the state boundary "as it existed" when the State became a member of the Union or as approved by Congress prior to the Act, not exceeding three leagues (nine geographical miles) from the coast. When Texas entered the Union in 1845, it had a statute defining its boundary as "three leagues from land" in the Gulf of Mexico; and in United States v. Louisiana, et al., 363 U.S. 1 (1960), the Court held Texas entitled to the special historic grant on that basis. The Court did not locate any boundaries at that time, but retained jurisdiction for further proceedings for that purpose.

In United States v. California, 381 U.S. 139 (1965), the Court held that the "coast" from which the standard three-mile grant was measured was an ambulatory line, to be determined by the principles of the Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. (Pt. 2) 1606, and that it included existing and future harbor works as provided by Article 8 of that Convention. Harbor works extending from the Texas coast two or three miles into the Gulf of Mexico were begun at Galveston about 1874 and at Sabine Pass about 1883; and following the California decision, Texas offered for mineral leasing some submerged lands within three leagues of those works but more than three leagues from the natural shore. The United States opposed this, on the ground that the lands in question were beyond the state boundary "as it existed" in 1845, both because the structures were not in existence then, and because the practice of measuring maritime limits from such structures was not followed at that time either by Texas or by other countries.

The Court (Black, J.) sustained the position of the United States, pointing out that while the general three-mile grant under which California claimed is measured from the "coast line," without reference to any particular date, the additional grant under which Texas claims is measured not with reference to the coast line but by the state boundary "as it existed" when the State became a member of the Union. The State "is being given the same area it had when it entered the Union * * * * the boundaries of which are determined by fixed historical facts". Post-1845 developments are disregarded.

Justice Stewart concurred specially; Justice Harlan dissented.

Staff: Louis F. Claiborne (Assistant to the Solicitor General); George S. Swarth (Land and Natural Resources Division)

ACCRETION

FEDERAL LAW CONTROLS RIGHTS UNDER FEDERAL PATENT, AND ENTITLES PRE-STATEHOOD PATENTEE TO SUBSEQUENT ACCRETIONS TO OCEAN FRONT LAND DESPITE CONTRARY STATE RULE.

Hughes v. Washington (No. 15, Dec. 11, 1967; D.J. 90-1-18-767)

Before Washington became a State in 1889, the United States patented to Mrs. Hughes' predecessor ocean front land to which there has since been substantial accretion. The State claimed that Article 17 of its original constitution, asserting state title to the beds of navigable waters up to the line of ordinary high tide or ordinary high water, established an immoveable boundary as of the date of statehood, so that subsequent accretion belonged to the State. Mrs. Hughes sued in a state court to quiet her title against that claim. Judgment in her favor was reversed by the Washington Supreme Court. On Mrs. Hughes' petition for certiorari, the Supreme Court requested the views of the United States, which filed an amicus curiae memorandum in support of the petition and, when certiorari was granted, a brief in support of the petitioner. The Supreme Court reversed.

The Court (Black, J.) reaffirms the holding of Borax, Ltd. v. City of Los Angeles, 296 U.S. 10, 22 (1935), that "the extent of this federal grant, that is, as to the limit of the land conveyed, or the boundary between the upland and the tideland is necessarily a federal question". The fact that Borax involved the general definition of ordinary high-water mark, rather than the specific aspect of accretion, is no ground for distinguishing that case. All questions regarding the extent of federal grants must be determined by federal law (which may adopt state law, but has not done so

here). The federal rule is well settled that the boundary between the upland and tideland is ambulatory, and that gradual, natural accretion belongs to the upland owner. The Court cites United States v. Washington, 294 F. 2d 830 (C. A. 9, 1961), cert. den., 369 U. S. 817, which reached the same conclusion where the United States was the upland owner.

Justice Stewart, concurring specially, emphasizes the general power of the State to change its real property law, but not in such a way as to take property without compensation. He points out that the interpretation of the State constitution, ordinarily conclusive on federal courts, is not so where the question is as to the existence of a federally protected right. He reaches the independent conclusion that the State court's interpretation of the State constitution is inconsistent with its own precedents, and so constitutes an unconstitutional taking of rights that the State itself formerly recognized.

Staff: Edwin L. Weisl, Jr. (Assistant Attorney General, Civil Division); Robert S. Rifkind (Assistant to the Solicitor General); George S. Swarth (Land and Natural Resources Division)

COURTS OF APPEALS

CONDEMNATION

MEASURE OF VALUE IN PARTIAL TAKING CASES; BENEFITS TO REMAINING LANDS DUE TO GOVERNMENT PROJECT ARE TO BE SET OFF AGAINST VALUE OF LANDS TAKEN; SALES OF SIMILAR PROPERTY ARE BEST EVIDENCE OF MARKET VALUE AND MAY NOT BE REJECTED BY FACTFINDER WITHOUT EXPLANATION; USE OF SALES BEFORE AND AFTER DATE OF TAKING TO SHOW BENEFITS; INADEQUACY OF RULE 71A(h) COMMISSION'S FINDINGS; VALUE TO OWNER REJECTED; RIVERS AND HARBORS ACT OF 1918; RECORD ON SUBSEQUENT APPEAL.

United States v. Trout (C. A. 5, No. 24186, Dec. 4, 1967; D. J. 33-45-866-38)

In 1960, the United States condemned 210 acres of a 731-acre ranch in connection with the Canyon Reservoir on the Guadalupe River in Comal County, Texas. After three separate hearings and reports, the Rule 71A(h) commission awarded compensation in the amount of $72, 202. The commission's reports were adopted by the district court. On appeal, the Government contended that the amount awarded should have been reduced by the benefits to the remainder and that the commission's reports were inadequate to show how it reached its award. To demonstrate benefits, i. e., an increase in the value of the remaining lands for lakeside subdivision due to the reservoir project, the Government relied upon three sales of similar

property about the time of the taking and also sales of lakeside subdivision lots of the very same remainder after the date of taking. Concerning benefits, the Government repeated the position advanced in other recent cases: (1) In a federal condemnation case, where only part of a tract is taken, the measure of compensation is the difference between the market value of the entire tract at the time of taking, excluding any enhancement from the project, and the market value of the remainder, including enhancement from the project. (2) Sales of similar property in the area before and after the taking will demonstrate whether the project has enhanced area property values and will serve to eliminate claims of speculation and conjecture. (3) An attempted distinction between "general" and "special" benefits only obscures, rather than clarifies, the issue.

The Court of Appeals reversed, ruling that "the correct measure of value in a case involving condemnation of a part of a tract is the fair market value of the entire tract immediately before the taking less the fair market value of the remainder immediately afterwards". While it declined in this case to clarify the purported distinction between special and general benefits, as requested by the Government, the Court of Appeals clearly did not bar the Government's position. It regarded as settled law that increases in the value of a remainder attributable to the public improvement are to be set off against the value of the lands taken, citing inter alia, Bauman v. Ross, 167 U. S. 548 (1897), and Section 6 of the Rivers and Harbors Act of 1918, 40 Stat. 904, 911, 33 U. S. C. 595. It reaffirmed "that an increase in the market value of the remainder caused by its frontage on the body of water contemplated by the Government project is a special benefit within the meaning of the statute. The benefit signified by increased market value is a special one even though market values in the community have increased generally because of the Government project."

Emphasizing that recent sales of similar property constitute the best evidence of market value and may "prove that special benefits to the remainder nearly offset the landowners' loss of 210 acres," and that three sales occurring between 1958 and 1960, relied upon by the Government, were "certainly not too remote" in point of time to be considered, the Court commented that "the Government was making as strong a case as could be expected" and had presented "a persuasive case for special benefits".

Although not ruling as clearly erroneous the commission's finding that there were no special benefits, it reversed because that finding was conclusory and, without explanation, prevented judicial review--quoting at length United States v. Merz, 376 U. S. 192 (1964). "If the best evidence of market value, i. e., evidence of comparable sales, indicates that there were special benefits to the remainder, it cannot be rejected without an adequate explanation." If the commission believed that the Government's sales

were not truly "comparable," the Court requires that the commission specify the reasons for its belief.

The discussion makes clear that any attempt to avoid the force of the market data, for the asserted reason that the dam and reservoir were not in existence or that the structure and capacity of the reservoir could not at the time of trial be definitely known, would be unrealistic and unacceptable: "the building of Canyon Dam was not a matter of speculation."

The Court also rejected as "inadequate" the landowners' testimony of value: "The value of land to the owner has nothing to do with market value * * *." Concerning the propriety in a partial taking case of valuing the remainder for its highest and best use after the taking, the court said that the landowners' expert "testimony seems to add very little inasmuch as he admittedly had not appraised the remainder as a separate unit."

On remand, the district court was given "the widest possible discretion"--to hear additional testimony, or to refer the case to the same commission or to appoint different commissioners for a de novo hearing. In the event of another appeal, the parties were given permission to refer to the present record.

Staff: Raymond N. Zagone (Land and Natural Resources Division)

REPORT OF RULE 71A COMMISSION ASSESSING SEVERANCE DAMAGES HELD NOT CLEARLY ERRONEOUS AND ADEQUATE FOR JUDICIAL REVIEW; COURT DID NOT ABUSE DISCRETION IN APPOINTING COMMISSIONER WHO HAD SERVED AS ATTORNEY FOR ANOTHER LANDOWNER IN THE SAME CONDEMNATION CASE.

United States v. Certain Parcels of Land Located in Fairfax and Loudoun Counties, Commonwealth of Virginia (A. Smith Bowman Distillery, Inc.) (C. A. 4, No. 11,205, Oct. 20, 1967; D. J. 33-48-646-2)

The United States brought this condemnation proceeding to acquire a strip of land for the access road to Dulles International Airport through a 7,000-acre tract of land owned by Bowman Distillery. A commission was appointed pursuant to Rule 71A, F. R. Civ. P., to ascertain the value of the property. The roadway cut approximately through the center of the Bowman tract. The commission found the value of the 175-acre strip of land taken to be $263,000. It also found severance damages to the south parcel of the remainder to be $280,000. This award was affirmed by the district court over Government objections. The United States appealed the case on three grounds, and the Court of Appeals affirmed.

First, the Government argued that there was no substantial evidence to support the award for severance damages. In particular, there was no market data to show that the two 3,000 plus acre tracts left after the taking were worth any less than before the taking. Therefore, it was argued that the appraisers' testimony of such depreciation was not substantial evidence because not based on objective fact. The Court of Appeals largely ignored this argument, and pointed out the minor difficulties which might arise because access between these two large tracts of land was diminished. It found the commission's ultimate conclusions on severance damages were not "clearly erroneous".

On the inadequacy of the commission's report, the Government had pointed out that the report did not explain how the severance damages were calculated, but merely gave the ultimate result. It was urged that this was inadequate under United States v. Merz, 376 U.S. 192 (1964). The Court of Appeals obviously had some problems with this point, but concluded that the report "was not fatally lacking in specificity" (Slip Op. 7). After reciting the several factors mentioned in the commission's report, most of which were not controverted, the Court of Appeals resolved the issue by stating (Slip Op. 8):

> Substantially, the only fact not disclosed was the components which, when added together, aggregated that amount. But the total arrived at, although its basis was not fully disclosed, was well within the range of the testimony as to severance damages adduced before the commission, and we cannot say, when the commission was dealing with such a substantial tract, having so many subsidiary problems with regard to severance damages, that this omission renders the report defective.

On the third issue, the Government had argued that the head of the commission should have been disqualified because she had acted as an adversary in the same condemnation proceeding. The Court of Appeals relied on the fact that she had acted as attorney for a different landowner who had no connections with the Bowman Distillery. It also noted that no actual bias against the United States was shown. Therefore, it was concluded that the district court had not abused its discretion in refusing to disqualify the commissioner.

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

DISTRICT COURT

CLEAN AIR ACT

ADMINISTRATIVE PROCEEDINGS NOT SUBJECT TO PRE-ENFORCEMENT JUDICIAL REVIEW; ADMINISTRATIVE PROCEDURE ACT.

Bishop Processing Co. v. Gardner (D. Md., Nov. 16, 1967; D. J. 90-1-2-804)

The Bishop Processing Company operates a chicken processing plant at Bishopville, Maryland, across the State line from Selbyville, Delaware. State authorities were unable to secure abatement of the interstate air pollution caused by the Bishop plant, and proceedings were initiated under the Federal Clean Air Act, 42 U. S. C. 1857. Such proceedings included a conference held on November 9 and 10, 1965, and a Hearing Board held on May 17 and 18, 1967, both convened by the Secretary of Health, Education and Welfare. The Hearing Board made findings and recommendations which were forwarded to the Secretary and which included specific recommendations for remedial action by the Bishop Company. The Secretary notified the Company to take action in accordance with the recommendations of the Hearing Board by December 1, 1967.

The Clean Air Act provides that if action reasonably calculated to secure abatement of the air pollution within the time specified in the Notice following the public hearing is not taken, the Secretary may request the Attorney General to bring a suit on behalf of the United States to secure abatement of the pollution. Upon receipt of the Notice and without waiting until an enforcement action could be instituted against it by the Attorney General, the Bishop Company brought suit for declaratory judgment and for judicial review under the Administrative Procedure Act, in the United States District Court for Maryland, asking the Court to review the proceedings of the Hearing Board. A Motion to Dismiss was filed on behalf of the Secretary. The primary issue tendered by the Company was whether the Court in an enforcement proceeding would accord the defendant therein the right to challenge the constitutionality of the Clean Air Act, the Composition of the Hearing Board, the adequacy of the proceeding before the Board, including the admissibility of specific evidence, and consider matters of procedural due process. The Bishop Company relied upon the recent Supreme Court decision in Abbott Laboratories v. Gardner, 387 U. S. 136 (1967), in which the Supreme Court permitted pre-enforcement judicial review of regulations promulgated by the Secretary under the Food, Drug and Cosmetic Act.

Chief Judge Thomsen held (1) that the Administrative Procedure Act does not require or authorize the Company's suit and that the Federal Rules of Civil Procedure are sufficiently flexible to afford the Company adequate opportunity to raise its points in an enforcement proceeding brought under the Clean Air Act; (2) that the dispute between the parties is not ripe for judicial decision; and (3) that venue is properly laid in the District Court of Maryland.

Staff: Assistant United States Attorney Theodore R. McKeldin, Jr. (D. Md.); Walter Kiechel, Jr. (Land and Natural Resources Division)

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TAX DIVISION

Assistant Attorney General Mitchell Rogovin

SUPREME COURT - CRIMINAL CASES

EVIDENCE

SPECIAL AGENT MAY PROPERLY INTERVIEW TAXPAYER WITHOUT ADVISING OF RIGHT TO COUNSEL.

The Supreme Court has rejected two further attempts to apply the rule of the Miranda case to Internal Revenue Service investigations.

On December 4, 1967, the Court denied a rehearing in Selinger v. Bigler, a summons enforcement case from the Ninth Circuit which squarely presented the question of the applicability of Miranda. The denial of the petition for certiorari was noted at page 763 of the Bulletin for November 24, 1967. Petitioner's request for a rehearing was based solely on the Court's grant of certiorari in Mathis v. United States, 376 F. 2d 595 (C.A. 5), which, as was noted on the same page of the November 24 issue of the Bulletin, involved very exceptional circumstances.

On December 18, 1967, the Court denied the petition for certiorari from the decision of the Seventh Circuit in Mansfield v. United States. As was pointed out at pages 605-606 of the Bulletin for September 29, 1967, the Mansfield case in effect overruled Judge Will's widely quoted opinion to the contrary in United States v. Turzynski, 268 F. Supp. 847 (N.D. Ill.).

Staff: Joseph M. Howard and Richard B. Buhrman
(Tax Division)

COURTS OF APPEALS - CRIMINAL CASES

APPEALABILITY

PREINDICTMENT ORDER DENYING PETITION FOR RETURN AND SUPPRESSION OF EVIDENCE, FOLLOWED IMMEDIATELY BY INDICTMENT, NOT APPEALABLE.

Stern v. Robinson (C.A. 6, No. 17,768; December 15, 1967; D.J. 5-72-364)

Appellant filed a complaint asking that the United States and its agents be directed to return evidence obtained from him in violation of the rule of the

Miranda case, and that the United States and its agents be restrained from presenting such evidence to the grand jury. The District Court for the Western District of Tennessee denied the petition (Stern v. Robinson, 262 F. Supp. 13), and an indictment was returned a few days thereafter.

The Sixth Circuit found that the order was interlocutory and dismissed the appeal in reliance on Austin v. United States, 353 F. 2d 512 (C. A. 4), and DiBella v. United States, 369 U.S. 121.

Staff: United States Attorney Thomas L. Robinson, Assistant United States Attorney Henry L. Klein (W. D. Tenn.)

DISTRICT COURT

BANKRUPTCY-LIENS

RELATIVE PRIORITY STATUS OF LIENS OF THE U. S. FOR FEDERAL TAXES ASSESSED PRIOR TO BANKRUPTCY AND VALID AGAINST TRUSTEE AND STATE SALES TAX LIENS ALSO VALID AGAINST TRUSTEE IS UNAFFECTED BY THE PRESENCE OF BANKRUPTCY PROCEEDINGS AND TAX LIENS OF THE UNITED STATES ARE SUPERIOR IN LAW TO THE LIENS OF THE STATE WHERE, WHEN THE FEDERAL LIENS AROSE AND WHERE PERFECTED, TAXPAYER HAD FILED NO SALES TAX RETURNS DISCLOSING ITS SALES TAX LIABILITY AND THE STATE HAD MADE NO ATTEMPT TO DETERMINE THE AMOUNT OF SUCH TAX OR MAKE AN ASSESSMENT THEREOF.

United States v. First National Bank and Trust Co. of Fargo, North Dakota, Trustee of Travis Bros. Body Works, Inc., Bankrupt (C. A. 8, No. 18,666 Bankruptcy; December 4, 1967; D. J. 5-56-338)

On March 30 and April 19, 1960, the District Director of Internal Revenue assessed and made demands upon Travis Brothers for withholding taxes for the fourth quarter of 1959 and the first quarter of 1960 and filed notice of such liens on April 1 and April 22, 1960, in the amount of $8,774.72, plus accrued interest. In June of 1960 Travis filed past due sales tax returns for the third and fourth quarters of 1959 and the first quarter of 1960, with the North Dakota Tax Commission. Sales tax was then computed and notice of sales tax liens covering each of the three quarters was filed on June 6, 1960. Subsequently on June 29, 1960, the debtor filed a petition for voluntary bankruptcy.

The District Court held that the federal tax liens arose and were perfected on the assessment dates but held that under North Dakota statutes the state sales tax became a lien on the last day of the month immediately following the taxable quarter, which was prior to the time the federal liens had become

perfected, and thereby awarded priority to the state tax liens for the third and fourth quarters of 1959. On appeal the Eighth Circuit reversed.

The Court of Appeals agreed with the United States that its right to priority did not rest on Rev. Stat. §3466 (31 U.S.C.A., Sec. 191) inasmuch as Rev. Stat. §3466, giving priority to the United States on claims against insolvent debtors, does not apply to bankruptcy proceedings. The Court further held that although Congress has effected to a limited extent the priority of tax liens in a bankruptcy proceeding (see Section 64a and 67b, c) nevertheless, the Bankruptcy Act does not impair the relative priority of liens valid against the trustee and that the relative priority of such tax liens is to be governed under the same principles as in a non-bankruptcy matter.

The Court went on to determine the relative priorities and that under the "first in time, first in right" doctrine, as a matter of federal law, the state liens had not become perfected prior to the federal tax liens notwithstanding a contrary possible interpretation under state law. Prior to the time the federal tax liens arose and were perfected, Travis had filed no sales tax returns disclosing its sales tax liability and the state had made no attempt to determine the amount of such tax or make an assessment thereof. Thus, the state lien was not a choate lien according to federal standards. Hence, the lien of the United States was entitled to priority of payment.

Staff: Crombie J. D. Garrett, Jeanine Jacobs (Tax Division)

LIENS

FEDERAL TAX LIEN ON CONSTRUCTION MATERIALS ATTACHED PRIOR TO EXERCISE OF MATERIALMAN'S RIGHTS UNDER NEW YORK LAW TO REPOSSESS AND REMOVE MATERIALS; SUCH RIGHT TO REPOSSESS DOES NOT CREATE PROPERTY INTEREST.

Bethlehem Steel Corp. v. John E. Foley, District Director, et al (W.D. N.Y. No. 11447, October 23, 1967; D.J. 5-53-2615) (CCH 67-2 U.S.T.C. ¶9729)

The plaintiff, Bethlehem Steel Corp., commenced this action to have it declared the owner of uninstalled materials consisting of various reinforcing bars and bearing piles located along the construction site on the Kensington Expressway Arterial Highway, Buffalo, New York.

In September 1964, the plaintiff contracted with the defendant, Schwab Bros. Trucking, Inc., to furnish the necessary steel materials to be used in constructing a section of the Kensington Expressway. Following assessments and the filing of notices of federal tax liens, the District Director, on March 5, 1965, levied upon and seized numerous pieces of equipment of the taxpayer,

Schwab Bros., situated along the highway construction site, including the uninstalled materials delivered by the plaintiff.

The parties stipulated that the federal tax liens attached to the property interest of Schwab Bros. in and to the uninstalled materials and that the District Director seized said property interest before plaintiff exercised its rights to repossess and remove the uninstalled materials. It was further stipulated that the plaintiff shall be treated as if it had repossessed and removed all such materials by exercising its rights under Section 39-c of the New York Lien Law subsequent to the levy and seizure.

Section 39-c is a remedy given to the supplier of materials where there are unused materials on a job site and the improvement has been completed or abandoned. The materialman, who has not received payment, may repossess and remove such materials under this section of the Lien Law, without obtaining the consent of the buyer.

The issue, as determined by the Court, was whether the plaintiff by exercising its rights under Section 39-c in repossessing the uninstalled materials obtained a property right which extinguished any property interest of the taxpayer. If the taxpayer no longer had an interest in the property, the United States, whose interest is derived through the taxpayer, could not affect or diminish the plaintiff's right, citing, Aquilino v. United States, 363 U.S. 509 (1960).

The Court ruled that Section 39-c confers upon a materialman an extraordinary remedy of self help, rather than creating a property interest or right. The purpose of Section 39-c, as stated by the Court, is to afford the materialman a more equitable remedy than that previously provided under New York law. The remedy provided does not result in the creation of a new property interest, but flows from recognition of the materialmen's lien interest and the peculiar needs dictated by the circumstances.

Since the federal liens attached prior to the exercise of rights under Section 39-c, judgment was entered for the Government.

Staff: United States Attorney John T. Curtin; Assistant United States Attorney C. Donald O'Connor (W.D. N.Y.); and Lee A. Satterfield (Tax Division)

JURISDICTION

COURT DID NOT HAVE JURISDICTION OF CONTRACT ACTION AGAINST UNITED STATES AND DISTRICT DIRECTOR WHERE AMOUNT IN CONTROVERSY EXCEEDED $10,000.

Sol Nehf, et al. v. United States and E. C. Coyle, District Director (N. D. Ill., No. 66 C 1260, October 27, 1967; 67-2 USTC, ¶9755; D. J. 5-23-5305)

Plaintiffs sought enforcement of an alleged agreement between themselves and a former District Director of Internal Revenue, wherein the Director agreed to pay $15,814.58 to the plaintiffs.

In the complaint, jurisdiction is claimed under 28 U.S.C. 1331. The Government moved to dismiss for the reason that this is a suit on an express contract where the amount in controversy exceeds $10,000, and by the statute the United States has consented to be sued only in the Court of Claims.

Plaintiffs, in their opposition to the motion to dismiss, sought leave to add Section 1340, 2410 and 2463 of Title 28 as additional and further basis for jurisdiction. The Court held that of the additional sections only 2410 waived the immunity of the United States to suit and that this section was not applicable. The suit was also defective as to defendant E. C. Coyle inasmuch as the suit against the District Director was an attempt to circumvent the doctrine of sovereign immunity by suing an agent of the Government.

The motion to dismiss as to both defendants was granted and an order was entered dismissing the suit without prejudice.

Staff: United States Attorney Edward V. Hanrahan; Former Assistant United States Attorney Thomas J. Curoe (N. D. Ill.); and Carl H. Miller (Tax Division)

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