United States Attorneys Bulletin

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

VOL. 16 APRIL 26, 1968 NO. 9

UNITED STATES DEPARTMENT OF JUSTICE

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ADMINISTRATIVE DIVISION

Assistant Attorney General Leo M. Pellerzi

SUPPLEMENTAL NOTICE

PAYMENT OF COURT COSTS WHEN JUDGMENTS ARE AGAINST THE U. S. --P. L. 89-507, 7/18/66, 80 STAT. 308, AMENDING 28 U. S. C. 2412.

The United States Attorneys Bulletin for February 2, 1968 (Vol. 16, No. 3, p. 73), described procedures for paying court costs taxed against the United States. Those instructions continue to apply to most judgments.

However, National Service Life Insurance cases must be handled differently, since such benefits are paid directly by VA from a special fund. In those cases, U. S. Attorneys should send certified copies of judgments to the General Claims Section, Civil Division, which in turn will forward them to VA for eventual payment under 38 U. S. C. 3020.

If an NSLI judgment additionally imposes costs against the Government, the U. S. Attorney should furnish the Civil Division two certified copies. One will be forwarded to VA in the usual manner, and the Civil Division will send the other to GAO for payment of the costs, which are charged against a separate appropriation covering litigation expenses (see 44 Comp. Gen. 463, 465, B-155915).

Although 28 U. S. C. 2412 now permits the imposition of certain costs, interest still cannot be recovered from the Government in NSLI cases. United States v. Worley, 281 U. S. 339.

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ANTITRUST DIVISION

Assistant Attorney General Donald F. Turner

SUPREME COURT

SHERMAN & CLAYTON ACTS

BANK MERGER CASE REMANDED TO DISTRICT COURT.

United States v. Third National Bank in Nashville, et al. (O. T. 1967, No. 86; March 4, 1968; D. J. 60-111-759)

In 1964, the United States filed this civil action charging that the merger of the Third National Bank in Nashville, Tennessee with the Nashville Bank and Trust Company violated §7 of the Clayton Act and §1 of the Sherman Act. Third National was the second largest bank in the county with 33.6% of bank assets; Nashville Bank was the fourth largest with 4.8%. The acquisition increased from 93.1% to 97.9% the percentage of assets held by the three largest banks. Notwithstanding this, and reports of adverse competitive effects by the Department of Justice, Federal Reserve Board and Federal Deposit Insurance Corporation, the merger was approved by the Comptroller of the Currency.

Before the case went to trial, Congress passed the Bank Merger Act of 1966 which prohibits bank mergers which may tend to substantially lessen competition, to create a monopoly or otherwise restrain trade unless the anticompetitive effects are clearly outweighed in the public interest by the probable effects of the merger in meeting the convenience and needs of the community to be served. The Act directed the courts to apply this standard in all cases (including this one) still pending on the Act's effective date. Because the Comptroller had participated in the trial and addressed himself to the standards of the 1966 Act, the district court did not remand to him for reconsideration under the new Act. Instead it held the merger to be lawful.

The district court construed the 1966 Act as changing the standard for determining whether a merger substantially lessens competition, essentially by reviving United States v. Columbia Steel Co., 334 U.S. 495 (which had been confined to its special facts in the Lexington Bank case, 376 U.S. at 572). Under this revived standard, the district court held , the merger had no substantial anticompetitive effects. Assuming that it did, such effects were clearly outweighed by the merger's benefits to the Nashville community.

On appeal by the United States, the Supreme Court reversed and remanded. It held, first, that the 1966 Act did not change the antitrust standards previously applicable to banks. Rather, Congress intended bank mergers to be

subject to the usual antitrust analysis. (By footnote, the Court also indicated that omission of the term "line of commerce" from the 1966 Act was not intended to effect any change in the traditional method of defining relevant markets and agreed with the district court that commercial banking was the appropriate market.) Applying the criteria set forth in United States v. Philadelphia National Bank, 374 U.S. 321, the Court found that the merger substantially lessened competition under Section 7 of the Clayton Act.

Second, the Court held that under the 1966 Act, the public interest, as determined by balancing convenience and needs against anticompetitive effects, is the ultimate criterion. Factors not previously relevant in appraising bank mergers under the antitrust laws are now to be considered. Thus, an increase in loan limits which benefits the community served by the merging banks, found irrelevant in Philadelphia Bank, is now relevant, as are correction of dangerous institutional weaknesses that fall short of the failing company doctrine, and better banking services resulting from improved management. The Court held, however, that the trial court must make specific findings denoting how such factors benefit the community and how they outweigh the competitive consequences of the merger. Here, the Court ruled, the district court had failed to make such findings.

Third, the Court held that benefits to the community cannot justify a substantially anticompetitive merger unless defendants show that those benefits cannot reasonably be obtained by other means. Thus, although the acquired bank was not in danger of failing, it had significant problems, ultimately rooted in a problem of management. Solution of the management problem by merger improved the community's banking services. But, the defendants had not shown that the owners of the acquired bank had "made reasonable efforts to solve the management dilemma [of the bank] short of merger with a major competitor but failed in these attempts, or that any such efforts would have been unlikely to succeed." (The owners had acquired control in January 1964 and merger with Third National was approved by the banks' boards of directors in March.)

Finally the Court held that the burden of showing that an anticompetitive bank merger is in the public interest because of benefits to the community rests on the merging banks.

The Court remanded to the district court with instructions to consider again the application of the Act of 1966 to the facts of this case and to permit the introduction of new evidence in the light of the intervening interpretations of the Act.

Staff: B. Barry Grossman and W. Richard Haddad
(Antitrust Division)

DISTRICT COURT

SHERMAN ACT

VIOLATION OF SECTION 1 CHARGED IN LICENSE AGREEMENTS ON INSECTICIDE.

United States v. Farbenfabriken Bayer A.G., et al. (D.C. Civ. 586-68 March 7, 1968; D.J. 60-213-7)

On March 7, 1968, a civil suit was filed in the Federal District Court for the District of Columbia against Farbenfabriken Bayer A.G., and Chemagro Corporation, a subsidiary of Bayer, alleging a violation of §1 of the Sherman Act. Defendant Bayer is a German company. The complaint challenges as unlawful more than 100 license agreements under a United States patent owned by Bayer and exclusively licensed to Chemagro. This patent relates to the insecticide O, O diethyl S-2 (ethylthio) ethyl phosphorodithioate ("diethyl"). When diethyl is spread upon the soil near a plant, it is absorbed into the plant's system rendering its sap poisonous. Thus, diethyl kills fauna which bite or suck the treated plant, but it does not harm fauna which do not attack the plant. Because of the foregoing properties, diethyl is a valuable insecticidal product, the utilization of which is rapidly growing. In 1966, Chemagro's total diethyl sales amounted to approximately $3 million.

Since 1964, Chemagro has entered into and maintained more than 100 contracts with purchasers of diethyl, which according to the complaint, are in unreasonable restraint of trade, in violation of Section 1 of the Sherman Act. Bayer combined with Chemagro and participated inthe violation by, among other things, granting an exclusive license on diethyl under the Bayer patent to its subsidiary, Chemagro.

The contracts provide that Chemagro agrees to sell diethyl to the purchaser and to license the purchaser to use it, and that the purchaser agrees not to resell diethyl except as further processed or formulated into particular products or mixtures, to be resold only for restricted purposes and to restricted classes of customer. Many of the contracts further require the purchaser to limit the territory in which diethyl-containing products will be sold to the United States, and many agreements require the purchaser to place a label on each package of diethyl-containing products, purporting to restrain the use and resale of such products by subsequent purchasers. The "licenses" are divided into the "commercial" field and the "home and garden" field. These fields are sub-divided into various sub-fields, such as (1) the treating of cottonseeds, (2) the formulation of pesticide, (3) the formulation of fertilizer containing 1% diethyl, and (4) the formulation of fertilizer containing 2% diethyl.

The complaint alleges that the effect of the contracts is or may be:

(a) To limit and prevent competition among Chemagro's vendees, and between them and Chemagro, in the sale and distribution of diethyl-containing products;

(b) To prevent and restrain Chemagro's vendees and customers of such vendees from using and re-selling diethyl and diethyl-containing products;

(c) Unreasonably to restrain trade and commerce in diethyl and diethyl-containing products; and

(d) Otherwise to deprive the public of the benefits of free and open competition.

The Government requests that defendants be perpetually enjoined from maintaining, by contract, understanding, or refusal to sell, any restriction on the use to which diethyl purchased from defendants, or from any licensee under the Bayer patent, may be put, and to whom, for what purpose, or where diethyl-containing products may be sold or used.

Staff: Richard H. Stern, Thomas R. Asher and James H. Wallace, Jr. (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General Edwin L. Weisl, Jr.

SUPREME COURT

SOCIAL SECURITY ACT -- ATTORNEYS' FEES

MAXIMUM ATTORNEY'S FEE UNDER 42 U.S.C. 406(b) IS TWENTY-FIVE PERCENT OF PAST-DUE BENEFITS PAYABLE BOTH TO CLAIMANT AND HIS DEPENDENTS.

Raymond Hopkins v. Cohen (No. 276, April 2, 1968; D.J. 137-26-60)

In this Social Security Act case, the district court awarded disability benefits to claimant Raymond Hopkins. Thereafter, pursuant to Section 206(b) of the Act, 42 U.S.C. 406(b), the Court allowed Hopkins' attorney a fee of 25 per cent of past-due benefits payable to claimant alone, without including in the fee any percentage of benefits payable to claimant's dependents. The Seventh Circuit affirmed that fee allowance, holding that Section 206(b) did not permit the district court to allow a fee in excess of 25 per cent of accrued benefits payable to claimant alone. 374 F. 2d 726.

On writ of certiorari, granted to resolve the conflict between the Seventh Circuit's decision and that of the Fourth Circuit in Redden v. Celebrezze, 370 F. 2d 373, the Supreme Court reversed in a 5-3 decision. The Court held that "proof of the husband's [disability] 'claim' results in a package of benefits to his immediate family; and those benefits inure to the benefit of the head of the family who files the 'claim'." Thus, the accrued benefits payable to claimant and to his dependents are chargeable with attorneys' fees in Social Security Act cases.

It is important to note, however, that this decision deals solely with the maximum permissible fee under the Act. As the Fourth Circuit made clear in Redden: "Routine approval of the statutory maximum allowable fee should be avoided in all cases. In a great majority of the cases, perhaps, a reasonable fee will be much less than the statutory maximum." Thus, in each case we should urge the court to award a reasonable fee based on the services rendered. A fee which would include a percentage of dependents' benefits should be reserved for the unusual case. Where the district court awards a fee in excess of that for which we have contended, normal appellate procedures should, of course, be followed.

Staff: Harris Weinstein (Office of the Solicitor General); Morton Hollander and William Kanter (Civil Division)

COURT OF APPEALS

FARMER'S HOME ADMINISTRATION

LIABILITY FOR CONVERSION ON LIVESTOCK SUBJECT TO FHA CHATTEL MORTGAGE IS GOVERNED BY FEDERAL LAW.

Cassidy Commission Co. v. United States (C. A. 10, No. 9511; November 8, 1967; D. J. 136-59-467)

Appellant livestock commission house sold at auction, on behalf of one Ferguson, cattle owned by Ferguson. The cattle were covered by a chattel mortgage held by the United States as security for a Farmer's Home Administration loan. The proceeds of the auction sale were paid by appellant to Ferguson. Neither Ferguson nor appellant obtained a release of the chattel mortgage or otherwise obtained the consent of the FHA to the sale. The United States brought suit against the commission house for conversion to recover the value of the sold cattle.

The Tenth Circuit, in affirming the district court's judgment in favor of the United States, noted that a uniform federal rule was essential to protect the security interests of the United States. Accordingly, in determining liability, the court ruled that federal rather than state law is to be applied. By holding federal law applicable in such circumstances, the Tenth Circuit rejected the holdings of the Fourth and Eighth Circuits that state law is applicable, United States v. Union Livestock Sales Co., 298 F. 2d 755 (C. A. 4), United States v. Kramel, 234 F. 2d 577 (C. A. 8), and aligned itself with decisions of the Third, Sixth and Ninth Circuits applying federal law. United States v. Sommerville, 324 F. 2d 712 (C. A. 3), certiorari denied, 376 U. S. 909; United States v. Carson, 372 F. 2d 429 (C. A. 6); United States v. Matthews, 244 F. 2d 626 (C. A. 9).

Staff: United States Attorney B. Andrew Potter; Assistant United States Attorney Givens L. Adams (W. D. Okla.)

FEDERAL TORT CLAIMS ACT

GOVERNMENT HAS NO DUTY TO ANTICIPATE THAT ANY GOLFER WOULD DRIVE GOLF CART INTO ROUGH 3 OR 4 FEET HIGH; PUERTO RICO RECOGNIZES COMMON LAW DISTINCTION BETWEEN DUTY OWED LICENSEE AND INVITEE.

United States v. Florence Marshall (C. A. 1, No. 6888; March 27, 1968; D. J. 157-65-176)

Plaintiff, a social guest of a base officer, was playing golf on the course maintained on Ramey Air Force Base, Puerto Rico, when it began to rain. Rather than utilize the rain shelter created for that purpose, she drove her golf cart into rough found to be 3 or 4 feet high in order to reach the shelter of a spreading almond tree which was somewhat nearer than the shelter. Unfortunately, the rough, in addition to concealing the base of the tree, also concealed the fact that it grew out of the side of a steep ravine, and plaintiff was injured as her golf cart plunged down the incline. The district court rejected our contention that Puerto Rico adopted the common law distinction between the duty owed a licensee and an invitee, and held the Government liable for failing to erect a protective fence or to give warning of the existence of the ravine. It also found plaintiff not negligent.

On our appeal, the First Circuit held that the Puerto Rican cases plainly did adopt the licensee-invitee distinction, and that plaintiff clearly was merely a licensee. The duty owed by a landowner to a licensee was held to be that set out at 2 Restatement of Torts (2d) § 342. The Court then held that, in the circumstances, there could be no duty on the United States to anticipate that any one would drive a golf cart into rough of this nature. Thus, as a matter of law, there could have been no breach of any duty owed the plaintiff, and the decision below was reversed with costs.

Staff: John C. Eldridge and Robert C. McDiarmid (Civil Division)

SMALL BUSINESS ADMINISTRATION

MORTGAGE LIENS OF SBA TAKE PRIORITY OVER STATE LIENS FOR SALES AND WITHHOLDING TAXES UNDER FEDERAL RULE THAT "FIRST IN TIME IS FIRST IN RIGHT".

Director of Revenue, State of Colorado v. United States (C. A. 10, No. 9640; April 1, 1968; D. J. 105-13-85)

In 1964 SBA loaned $350,000 to the Puebloan Motor Hotel, and took as security for that loan a chattel mortgage and deed of trust covering all the real and personal property of the Motor Hotel. Those security instruments were duly recorded in May of 1964.

In late 1965 and in early 1966 the Motor Hotel failed to remit sales and withholding taxes to the State of Colorado. Accordingly the Director of Revenue of the State of Colorado, on April 14, 1966, padlocked the restaurant and bar of the motel, so as to seize the personal property over which he asserted a lien for the unpaid state taxes. The Director proposed to sell the personal property for the taxes. In the meantime, however, on April 20, 1966, after payments on its loan to the motel were in default, SBA brought

suit to foreclose its mortgage and deed of trust. On SBA's motion, the Director's sale of the motel's personal property was stayed pending resolution of the relative priority of the liens of the parties.

The district court ruled that the determination of the relative priority to be accorded the liens of the SBA was a question of federal law, and that the federal rule was "first in time, first in right". Since, therefore, SBA's mortgage lien was recorded long before the state's tax liens matured, SBA was entitled to priority. The court further held that 15 U.S.C. 646 did not subordinate SBA's liens to those of the state, because the state liens did not arise from taxes "due on the property".

Before entry of final judgment, the Director moved for a new trial or for rehearing. Thereafter the district court entered final judgment confirming its adjudication of priorities. Still later the court overruled the Director's motion for a new trial or for rehearing. The Director filed a notice of appeal more than sixty days from the entry of final judgment, but within sixty days from the court's overruling of his motion for rehearing or a new trial.

On the Director's appeal, the Tenth Circuit affirmed. The Court upheld the ruling that Federal law controlled and that priority was to be based upon the "first in time, first in right" principle. Since the federal mortgage lien was clearly first in time, that lien was entitled to priority. And it made no difference that the Director had seized the property bound by SBA's prior lien before SBA sought to foreclose its mortgage. The Court also accepted our argument that the waiver of S.B.A. priority in 15 U.S.C. 646 applied only to liens arising from state property taxes, and that the sales and withholding taxes in this case did not fall in that category.

With respect to the timeliness of the Director's appeal, the Court held, in effect, that the Director's motion for a rehearing or a new trial filed before judgment was a proper motion under Rule 59, F.R. Civ. P., and tolled the running of the appeal time until it was expressly overruled, regardless of the fact the final judgment was entered before the motion for rehearing or a new trial was ruled on. But see, Mosier v. Federal Reserve Bank of New York, 132 F.2d 710 (C.A. 2); Agostino, et al. v. Ellamar Packing Co., 191 F.2d 576 (C.A. 9); Cohen v. Curtis Publishing Co., 333 F.2d 974 (C.A. 8), certiorari denied, 380 U.S. 921. Thus the Court ruled that the Director's notice of appeal -- filed within sixty days of the denial of his motion under Rule 59 -- was timely.

Staff: William Kanter (Civil Division)

STANDING: FEDERAL ELECTRIC POWER PROGRAMS

UTILITY HAS NO STANDING TO CHALLENGE ALLEGEDLY ILLEGAL REA LOAN TO COMPETING UTILITY; REA AND BORROWER HELD IMMUNE FROM ANTI-TRUST SUIT.

Alabama Power Co. v. Alabama Electric Cooperative, et al. (C. A. 5, No. 23,061; April 2, 1968; D. J. 145-8-676)

Plaintiff private power company commenced suit to enjoin the Rural Electrification Administration from granting a loan to a competing generation and transmission rural electric cooperative. The REA and the borrower were named defendants. Plaintiff alleged that, in authorizing the loan, REA exceeded its authority under the REA Act. Additionally, it was claimed that a 35 year requirements contract which REA required the borrower to enter into with its member distributing cooperatives, violated federal anti-trust laws. The district court dismissed the suit for lack of standing.

On appeal to the Court of Appeals for the Fifth Circuit, the dismissal was affirmed, one judge dissenting. Citing a prior opinion of the Court, REA v. Central Louisiana Elec. Co., 354 F. 2d 859, the majority held that Congress did not intend to make the propriety of loans of the REA reviewable in the courts. Thus a competing power company had no standing to challenge a loan even though it is alleged the loan was made in violation of the REA Act. Similarly, with regard to plaintiff's contention that it had standing to sue under the anti-trust laws, the majority of the Court noted that the anti-trust laws were not intended to authorize restraint of governmental action. Relying upon Barr v. Matteo, 360 U. S. 564, which held officials of Government immune from suits for activities within the "outer perimeter" of their statutory authority, the Court found the REA's conduct was within this "outer perimeter" and that, therefore, it was not subject to anti-trust laws. Moreover, since the REA program necessarily included the existence of a borrower, the immunity from a suit for anti-trust violations was held to extend to the cooperative.

Staff: Alan S. Rosenthal (Civil Division)

VETERANS

INSURED'S CHANGE OF NATIONAL LIFE INSURANCE BENEFICIARY EFFECTIVE DESPITE STATE COURT ORDER BARRING CHANGE.

Ruth Iola Hoffman V. United States, et al. (C. A. 9, No. 21,959; March 13, 1968; D. J. 146-55-3772)

A Major in the United States Army purchased two National Life Insurance policies, naming his then wife as beneficiary. Subsequently, the insured divorced his wife and the decree of divorce of the Superior Court of the State of Washington required the insured to maintain his former wife as the sole beneficiary under the National Life Insurance policies. Nevertheless, the insured executed a change of beneficiary. Upon the insured's death, the former wife and the newly designated beneficiary claimed the insurance proceeds. The Veterans Administration determined that the newly designated beneficiary was entitled to the proceeds. The former wife, claiming that the state court decree made her the sole beneficiary, commenced suit to obtain the insurance, naming the United States and the newly designated beneficiary as defendants.

The district court ruled that the proceeds of a National Life Insurance policy were outside the reach of a state court in entering a property settlement decree and therefore upheld the award of the proceeds to the beneficiary most recently named by the insured. On appeal, the Court of Appeals for the Ninth Circuit affirmed. The Court noted that by federal statute, 38 U.S.C. 1717(a), the insured had a right to name his beneficiary and concluded that due to the Supremacy Clause of the United States Constitution this federal statutory right could not be limited in any way by a state court decree.

Staff: United States Attorney Eugene G. Cushing; Assistant United States Attorney Albert E. Stephon (W.D. Wash.)

DISTRICT COURT

FALSE CLAIMS ACT

PAYEE'S ENDORSEMENT AND NEGOTIATION FOR COLLECTION OF GOVERNMENT CHECK ISSUED BY MISTAKE AND TO WHICH HE KNOWS HE IS NOT ENTITLED CONSTITUTES VIOLATION OF THE FALSE CLAIMS ACT.

United States v. Fowler (Civ. No. 67-C-758, E.D.N.Y., March 15, 1968; D.J. 137-52-251)

The Government brought suit under the False Claims Act (31 U.S.C. 231), based on the defendant's receipt from the Social Security Administration in 1964 of seven monthly checks for disability benefits to which he was not entitled because his disability, as previously determined by Social Security Administration in 1962, had ceased. Defendant had not made a specific demand for the issuance of the 1964 checks so that it could not be urged that he himself made a "claim" for the payments represented thereby. Rather, the Government's theory of False Claims Act liability was that, by endorsing the checks to which defendant knew he was not entitled and by depositing the same for collection, he fraudulently caused the bank's presentation of "claims" to the Treasurer of the United States for payment. On rehearing the Court

adopted the Government's theory and entered judgment under the False Claims Act for double the amount of the payments plus seven forfeitures of $2,000 each. The Court cited United States v. Scolnick, 219 F. Supp. 408 (D. Mass. 1963), aff'd 331 F. 2d 598 (1st Cir. 1964), in support of its determination.

Staff: United States Attorney Joseph P. Hoey; Assistant United States Attorney Frank P. Natoli (E.D. N.Y.)

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CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

SPECIAL NOTICES

FEDERAL-STATE RELATIONS

It has been recently brought to our attention that a Federal authorization of a Dyer Act violation was in effect frustrating the efforts of state authorities to proceed against the same defendants under several serious state felony charges. Two defendants in this instance had escaped from a local county jail where one was being held pending transfer to the state reformatory to serve a 1-15 year sentence for burglary and larceny and the other was scheduled to enter a plea of guilty to grand larceny, punishable by 1-7 years. Shortly after their escape, they broke into a local auto dealership and made off with two new cars. They were subsequently apprehended in a neighboring state by state authorities. Prior to their apprehension, jail break charges (1-5 years) had been filed against each of them. After their apprehension they were charged in the state of theft with breaking and entering (1-15 years) and auto larceny (1-7 years). The United States Attorney authorized on the Dyer Act charge even though the state in which the defendants were wanted was most desirous of their expeditious return and had communicated that fact to the United States Attorney's office concerned.

It is not our desire to use Federal prosecution to defeat or inhibit state prosecutions for more serious offenses. In many instances where a Federal prosecution preempts the local state action the defendants involved lose an opportunity for a speedy trial on more serious state charges and at the same time the state's case is dissipated by the passage of time.

We wish to stress that when a United States Attorney becomes aware of outstanding state charges of a more serious nature or if, on balance, offenses of an equal nature are determined to be primarily of state concern, he should as a matter of courtesy accommodate the interested state when that state demonstrates a desire to proceed with its local prosecution.

NARCOTIC ADDICT REHABILITATION ACT

Your attention is directed to Title III (42 U.S.C. 3411, et seq.) of the Narcotic Addict Rehabilitation Act, P. L. 89-793. Every effort should be made to assure that the commitment process authorized by the Title proceeds swiftly and smoothly. The cooperation of the district judges should be sought in assuring that the period between the initial petition to the United States Attorney and the actual transportation of the addict to the appropriate Clinical Research Center is as brief as possible. When the period of commitment for

examination is nearing an end, an order directing the return of the addict to the committing court should be secured and dispatched to the appropriate Center, unless the addict has signed a waiver of his right to a hearing. No discharge order (where the Center doctors submit a negative report) should, however, be secured until the addict has been returned from the Center to the locale of his commitment. The National Institute of Mental Health has been advised that it may in appropriate cases, upon receiving a copy of the court order directing the return of the addict, return him to the locale of his commitment and take his personal recognizance to appear in court at the time stated in the order.

All commitments under both Title III and Title I of the Act should be followed up to make certain that no addict is waiting long periods at a Center for the next court order and that each court order is promptly transmitted to the appropriate Center and, where possible, to the NARA Branch of the National Institute of Mental Health, 5454 Wisconsin Avenue, Chevy Chase, Maryland, 20203.

Where information or assistance is required of a Center, inquiry should be directed through the Office of the Chief of the Center.

COURTS OF APPEAL

INSANITY

GOVERNMENT HAS RIGHT TO PSYCHIATRIC EXAMINATION OF DEFENDANT WHEN SURPRISE DEFENSE OF INSANITY INTERPOSED AT TRIAL.

United States v. Jerry Neale Albright (C.A. 4, January 4, 1968; D.J. 48-84-378)

On the day of Albright's trial for forging and uttering United States postal money orders, his counsel interposed a surprise defense of insanity. When its efforts to preclude the defendant from presenting psychiatric testimony failed, the Government moved the court to order defendant to submit to a psychiatric examination pursuant to 18 U.S.C. 4244, and obtained the order over the objections of defendant. After a 23 day recess, the trial resumed with both sides presenting psychiatric testimony, and Albright was convicted.

Appellant contended that the order for a psychiatric examination by a doctor for the Government violated his Fifth Amendment right against self-incrimination, that his right to counsel was abridged because his counsel was not permitted to be present during the examination, and that he was deprived of his right to a speedy trial due to the 23 day recess.

In affirming the conviction, the Court ruled that ordering the psychiatric examination was proper because there was reasonable cause to believe appellant was insane at time of trial and the trial court had inherent power to require a psychiatric examination of one who had raised a defense of insanity and submitted to examination by his own doctors. Relying on Pope v. United States, 372 F. 2d 719 (8th Cir. 1967); United States Attorney's Bulletin, Vol. 15, No. 8, p. 174, April 14, 1967, and Winn v. United States, 270 F. 2d 326 (D.C. Cir. 1959), the Court ruled that appellant's right not to incriminate himself was not violated per se by requiring him to submit to a mental examination, and that since the Government had the burden of proving sanity once an insanity defense had been raised, it could not be denied access to the only reliable means of ascertaining the truth concerning appellant's sanity. The Court noted that 18 U.S.C. 4244 specifically prohibits the use of any statement made by an accused during the course of examination on the issue of guilt in any criminal proceeding, but indicated that appellant admitted his guilt and presented such evidence by his own psychiatrist, thereby waiving the privilege.

The Court ruled that appellant had no federal or state constitutional right to an attorney's presence at a psychiatric examination and that, under the circumstances, 23 days was not an exceptional length of time for examination of this type or a denial of a speedy trial. See also Pope v. United States, supra.

Citing United States v. Wade, 388 U.S. 219 (1967), and Gilbert v. California, 388 U.S. 263 (1967), the Court also held that the taking of handwriting examplars does not violate the Fifth Amendment privilege against self-incrimination and is not such a critical stage of a criminal proceeding as to make applicable the Sixth Amendment right to counsel.

Staff: United States Attorney Milton J. Ferguson and Assistant United States Attorney W. Warren Upton (S.D. W. Va.)

MAIL FRAUD

EXAMINATION OF CORPORATE RECORDS BY GOVERNMENT INVESTIGATORS.

Stephen M. Speers, et al v. United States (C.A. 10, November 30, 1967; D.J. 36-29-88)

(Previously discussed under Rule 17(b), United States Attorneys Bulletin dated March 29, 1968, Vol. 16, No. 7, p. 249).

The defendants in this case were found guilty of mail fraud (18 U.S.C. 1341) and conspiracy (18 U.S.C. 371). On appeal they alleged, inter alia, that

a Government investigator had inspected and made copies of records of the accused without permission or court order while the Government was in the process of preparing its case. The Circuit Court in rejecting this contention held that not only was the examination of the records consented to by the office manager who was one of the defendants, but further the corporation which was registered under the Packers and Stockyards Act (7 U.S.C. 203) could not refuse to disclose any matters which the Act required it to record, report or disclose. Therefore, the investigators were guilty of no misconduct since they had authority given them by Congress to prosecute the inquiry under Section 222 of the Act which provides "The Secretary [Secretary of Agriculture] in person or by such agents as he may designate, may prosecute any inquiry necessary to his duties under this chapter in any part of the United States."

Staff: United States Attorney Newell A. George and Assistant United States Attorney James R. Ward (District of Kansas)

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EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

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

SPECIAL NOTICES

FEDERAL WRITS OF HABEAS CORPUS AD PROSEQUENDUM AND TESTIFICANDUM FOR PRODUCTION OF STATE PRISONERS IN FEDERAL COURTS

In the past, the local institutions in Maryland required the United States Attorney's office to prepare a petition and order for the signature of a state judge whenever a federal Writ of Habeas Corpus Ad Prosequendum or Testificandum issued out of another district for a state prisoner in one of the Maryland penal institutions before such prisoner would be released therefrom to the U. S. Marshal.

In an effort to eliminate what he thought was unnecessary paper work, United States Attorney Sachs discussed the matter with the Commissioner of the Maryland Department of Correction. As the result thereof, the Commissioner has issued a policy memorandum, in which the only requirement is that the federal writ must have incorporated in it the statement that the prisoner is to be returned to the said institution immediately after trial or testifying.

United States Attorneys are requested to see to it that the above-mentioned statement is incorporated in any federal writ sent from another district for the production in that district of prisoners incarcerated in Maryland institutions.

MILITARY SERVICE BY RESIDENT ALIENS

The Attorney General recently has ruled that the United States must honor certain treaties which include provisions creating an obligation of the United States to exempt from military service foreign nationals residing here. The opinion states that aliens admitted for permanent residence from countries with which the United States has treaties creating such obligations, may, if they apply, receive exemption from military service. A treaty alien who applies for and is granted such relief will be subject to the bar against eligibility for citizenship imposed by Section 315 of the Immigration and Naturalization Act. Copies of the opinion of the Attorney General are available upon request addressed to the Office of Legal Counsel.

APPOINTMENTS

UNITED STATES ATTORNEYS

The nominations of the following United States Attorneys have been confirmed by the Senate:

Arkansas, Eastern - Wilbur H. Dillahunty

Mr. Dillahunty was born June 30, 1928, in Memphis, Tennessee, is married and has one child. He received his LL. B. in 1954 from the University of Arkansas and was admitted to the Bar of the State of Arkansas in 1954. Mr. Dillahunty served in the Army from 1946 to 1948, and was in private practice from 1954 until his appointment as United States Attorney.

South Carolina - Klyde Robinson

Mr. Robinson was born March 13, 1922, in Charleston, South Carolina, and is married. He received his B. A. degree (1946) from the Citadel Military College, Charleston, South Carolina, and his LL. B. (1949) from Harvard Law School. Mr. Robinson was admitted to the Bar of the State of South Carolina in 1949. He served in the Army from 1943 to 1945, was in private practice from 1949 to 1961, and was County Council Attorney from 1957 to 1961. From 1961 until his appointment as United States Attorney, he was an Assistant United States Attorney for the Eastern District of South Carolina.

ASSISTANT UNITED STATES ATTORNEYS

California, Central - JACK W. HORNBECK; Michigan Law School, LL. B., and formerly a Deputy District Attorney.

California, Central - EDWARD JENS WALLIN; University of Minnesota Law School, J. D., and formerly in private practice.

Illinois, Northern - MICHAEL B. COHEN; University of Wisconsin Law School, LL. B., and formerly in private practice.

Nebraska - WILLIAM J. TIGHE; Creighton University Law School, J. D., and formerly in private practice.

New York, Southern - LEONARD M. MARKS; Yale University Law School, LL. B., and formerly in private practice.

Oklahoma, Eastern - CLIFFORD K. CATE, JR.; Oklahoma University Law School, J. D., and formerly in private practice.

LAND AND NATURAL RESOURCES DIVISION

Assistant Attorney General Clyde O. Martz

COURT OF APPEALS

PUBLIC PROPERTY

SOVEREIGN IMMUNITY: FEDERAL OFFICIAL CANNOT BE ENJOINED FROM BARRICADING LANDOWNER'S ACCESS TO GOVERNMENT-OWNED PARKWAY; EQUITABLE CONSIDERATIONS ARE IRRELEVANT.

Malcolm Gardner v. Robin Harris, M. D. (C. A. 5, No. 24485, March 26, 1968, D. J. 90-1-23-1216)

Harris brought this suit against the Superintendent of the Natchez Trace Parkway to force the removal of a barricade which the Superintendent caused to be erected across an access easement which Harris allegedly owned. Harris claimed that as a result of this action by the Superintendent he has been deprived of property, causing him irreparable damage for which only equity can provide a proper remedy. The United States, on behalf of its Superintendent, raised the defense of sovereign immunity. The district court, finding the Superintendent had exceeded his statutory authority, granted injunctive relief. On appeal by the United States, this was reversed.

The Court of Appeals held that if the relief sought would expend itself on the public treasury, interfere with public administration, or if the effect would be to restrain the Government from acting or compel it to act, the defense of sovereign immunity would be applicable. Forcing the Superintendent to remove the barricade would both compel the Government to act and interfere with public administration.

The only exceptions to the general rule were if the Superintendent acted under an unconstitutional statute or exceeded his statutory powers. There was no challenge to the constitutionality of the statute. Nor was his authority under the statute exceeded. The statute, 16 U. S. C. 460, broadly charged the Secretary of the Interior with administering and maintaining the Natchez Trace. Merely because the Superintendent may have committed a wrong under either property or tort law in the exercise of his delegated authority does not mean that he was acting beyond his statutory authority. The Court of Appeals noted, however, that this does not preclude a timely action for just compensation if any property rights belonging to Harris have been taken. The Court expressed its frustration at being compelled to apply sovereign immunity regardless of apparent equities. The opinion commenced:

> Blackstone said that the concept "that the king can do no wrong is a necessary and fundamental principle of the English constitution." Now in the 20th Century and in at least a part of the world long made safe for democracy the law persists in the view that seems to say that Blackstone is still right. And not even equity--the King's conscience--can help. As a result we must hold in this case that a private citizen, deprived of his property right of access to the historic Natchez Trace because of barricades erected by the Federal Superintendent of that highway project, has no remedy in equity for their removal, since to permit the suit would be to allow the citizen to sue the federal government without its consent, thereby breaching the wall of sovereign immunity. Thus plaintiff's remedy, confined to one at law, is not available in this suit for equitable relief only and this action against the Superintendent must be dismissed. [Footnotes omitted.]

Footnote 3 stated:

> With so much done, e.g., Suits in Admiralty Act, 46 U.S.C.A. §742; Public Vessels Act 46 U.S.C.A. §782; Federal Torts Claims Act, 28 U.S.C.A. §1346; and more recently in 28 U.S.C.A. §§1361, 1391(e), to give the citizen access to a home-based Federal Court, frequently in cases that involve millions of dollars or which affect comprehensive governmental programs, the persistence with which the Government successfully asserts immunity as to property claims gives rise to several reactions. Not only does the result appear unusual to many, but the fact that Congress does not ameliorate these hardships appears even more unusual. The immunity is, however, very much alive. See Dugan v. Rank, 1963, 372 U.S. 609, 83 S.Ct. 999, 10 L.Ed.2d 15; Malone v. Bowdoin, 1962, 369 U.S. 643, 82 S.Ct. 980, 8 L.Ed.2d 168; Larson v. Domestic & Foreign

Commerce Corp., 1949, 337 U.S. 682, 69 S. Ct. 1457, 93 L. Ed. 1628.

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

CONDEMNATION

RIGHT TO TAKE; DISTRICT COURT'S ADOPTION OF MINORITY COMMISSIONER'S REPORT; ENHANCEMENT DUE TO RESERVOIR AND SUBSTITUTE ROAD FACILITY; DAMAGES DUE TO LOSS OF LEGAL ACCESS TO NEW ROAD; COURT OF APPEALS' MODIFICATION OF AWARD ON RECORD.

O'Brien, et al. v. United States (C. A. 5, No. 24291, March 22, 1968; D.J. 33-45-897-367)

The United States condemned certain interests in appellants' land for reservoir purposes and for providing the City of Waco, Texas, with a substitute road facility. The highest and best use of the land was for residential subdivision. After three recommittals of the cause to a divided Rule 71A(h) commission, the district court adopted the minority commissioner's reports. On the landowners' appeal, the Government contended that the taking for the road relocation was authorized and that the district court properly adopted the minority commissioner's reports because the majority commissioners' findings were clearly erroneous and based upon a mistaken view of controlling law.

The Court of Appeals affirmed. It ruled: (1) The taking of land for a substitute road facility which would accommodate more than the two-lane road taken was authorized.

> [T]he exercise of the sovereign right of eminent domain is within the legislative power and mere questions of its range and extent in particular cases are ordinarily not subject to judicial correction and control. [Citations omitted.] Absent improper or corrupt subversion of legally delegated authority to define the extent of condemnation, this decision rests with the appropriate Executive officer concerned. * * *

(2) The district court properly adopted the minority commissioner's reports. The Court of Appeals held that it reviews the district court, not the commission, a proposition with which the Government in general disagrees but upon

which it does not believe that this case turns. (3) The increased water frontage and the improved relocated road were correctly considered as enhancing the value of the remaining lands, in applying the "test of market value of the whole before and after the taking * * *." (4) The minority commissioner erred in failing to award a specific amount for the "loss of legal access" to a public road from part of the remainder. The Court of Appeals modified the award by adding an amount the undisputed evidence showed it would cost to replace access to that part of the remainder.

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

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TAX DIVISION

Assistant Attorney General Mitchell Rogovin

DISTRICT COURT - CIVIL CASE

PROPERTY SUBJECT TO LEVY

MONEY DEPOSITED IN BANK SAVINGS ACCOUNT IN TAXPAYER'S NAME ALONE HELD TO BE SUBJECT TO LEVY SERVED UPON BANK DESPITE TAXPAYER'S CONTENTIONS DISAVOWING OWNERSHIP OF BALANCE IN THE ACCOUNT.

Raymond A. O'Connor, et al. v. Farmers & Mechanics Savings Bank, Defendant and Third-Party Plaintiff v. United States of America. (W. D. N. Y., Civil No. 10,505; February 9, 1968; D. J. 5-53-2156). (68-1 USTC Par. 9235)

A levy (United States Treasury Form 668-A) was served upon Farmers & Mechanics Savings Bank in connection with the outstanding federal tax liabilities of Raymond A. O'Connor. Pursuant to said levy, the bank paid the Internal Revenue Service $9,059 representing the balance in their bank account No. 80306 opened by and maintained under the name of "Raymond A. O'Connor".

The taxpayer and his four children sued the bank and the bank joined the United States as a third-party defendant by reason of the levy served upon the bank.

The court heard evidence by the taxpayer to the effect that (1) the taxpayer had opened the savings account for his children, and (2) that the balance in the account represented the proceeds of a gift to the taxpayer's children from a relative. The court rejected the testimony of the taxpayer and found that the evidence supported the conclusion that the savings account was the property of the taxpayer. As persuasive evidence of the taxpayer's ownership, the court noted: that the account had been opened in the taxpayer's name alone, that there was no indication that the taxpayer intended to open a trust account, that the taxpayer's name alone appeared on the passbook for the account, that insufficient evidence was presented to establish that the deposits represented the proceeds of gifts by relatives to the taxpayer's children, and that the taxpayer exercised dominion and control over the passbook.

Having determined that the savings account was the property of the taxpayer, the court held that the balance at the time of the service of the levy upon the bank was subject to levy pursuant to the Internal Revenue Code. Payment of the balance of the account to the Internal Revenue Service was therefore held to be legal and proper.

Staff: United States Attorney Thomas A. Kennelly; Assistant United States Attorney C. Donald O'Connor; and Levon Kasarjian, Jr. (Tax Division)

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