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Assistant Attorney General Donald F. Turner

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City of New York, et al. v. United States, et al.; School District of Philadelphia, et al. v. United States, et al. (O. T. 1967, Nos. 1141 and 1146; April 22, 1968; D. J. 60-26-26)

On April 18, 1967, the United States filed 18 separate civil suits in the Northern District of Illinois against publishers of children's books. Each suit charged that the defendant publisher and numerous wholesalers to whom it sold had conspired to "fix, maintain, and stabilize" the wholesaler's resale prices on library editions of children's books, in violation of Section 1 of the Sherman Act. Negotiation of possible consent judgments began thereafter and, on October 23, 1967, a proposed consent judgment was filed in each case. The proposed judgments included both general, permanent injunctions against price fixing, collusive bidding, and other unlawful pricing practices with respect to the sale of any books to any persons and specific prohibitions against a variety of practices by which the publishers might influence the prices at which wholesalers resell books to schools, libraries, and governmental agencies. After the proposed decrees were filed, various states, municipalities, and local school boards sought intervention as of right under Rule 24(a) of the Federal Rules of Civil Procedure or, alternatively, discretionary intervention under Rule 24(b). These parties argued that no decree should be entered unless it contained an admission of violation of Section 1 of the Sherman Act that could be used under Section 5(a) of the Clayton Act as prima facie evidence in treble-damage actions, a so-called "asphalt clause". On November 13 and 16, 1967, the district court (Judge Marovitz) held hearings and listened to the arguments of the would-be intervenors as amici and their suggestions for other modifications of the proposed decrees. On November 20, the court entered an order impounding all documents, grand jury subpoenas, and transcripts of grand jury testimony for possible future release to state and local governments. On November 27 the court approved and entered the modified consent judgments, and denied intervention. The would-be intervenors then appealed to the Supreme Court.

The United States moved to affirm the order of the district court. (The 18 defendant publishers also moved to affirm.) The motion to affirm argued

that Rule 24(a)(2) does not permit intervention where a third party seeks only collateral benefits which will result from the successful litigation of the primary suit. It emphasized that, as Rule 24(a)(2) is written, the applicants for intervention were required to show that as a practical matter their ability to protect their interests would be impaired or impeded. But nothing in the consent judgments as a practical matter prevents the appellants from obtaining the full measure of relief they are seeking in their private suits. In addition, Section 5 of the Clayton Act specifically provides that no prima facie effect is to be given "to consent judgments or decrees entered before any testimony has been taken * * *." Thus, Congress decided that the public interest is best served by achieving settlement in Government antitrust litigation without the delay and uncertainty that necessarily accompany a trial on the merits. It was further pointed out that more than 70 percent of the antitrust injunctive suits brought by the Division are terminated by consent judgments and that requiring "asphalt clauses" in such judgments would seriously impair the Division's consent decree program, thus straining its limited resources and reducing the number of cases which could be investigated and filed.

On April 22, 1968, the Supreme Court granted the motions to affirm and affirmed the judgment of the district court per curiam without opinion. Mr. Justice Black would have noted probable jurisdiction and Mr. Justice Douglas did not participate in the decision.

Staff: Howard E. Shapiro, James S. Campbell and Seymour H. Dussman (Antitrust Division)

CLAYTON ACT

GOVERNMENT'S MOTION TO AFFIRM GRANTED IN SECTION 7 OF ACT CASE AGAINST NEWSPAPER.

Times Mirror Co. v. United States (O. T. 1967, No. 1162; April 22, 1968; D. J. 60-127-77)

On April 22, 1968, the Supreme Court summarily affirmed the judgment of the District Court for the Central District of California that the 1964 acquisition by the Times Mirror Company, publisher of the Los Angeles Times, the largest daily newspaper in California, of the Sun Company of San Bernardino, the largest remaining independent daily newspaper publisher in Southern California, violated Section 7 of the Clayton Act. The district court had held that the acquisition had the effect of substantially lessening competition in the relevant market, which it found to be the daily newspaper business in San Bernardino County, and ordered Times Mirror to divest itself of the Sun Company.

The essence of Times Mirror's jurisdictional statement was that the district court had incorrectly defined the relevant product and geographic markets. It argued that the Times and the Sun did not compete for readership or advertising, but rather were complementary newspapers. It contended that the Government's failure to prove "interchangeability of use and cross-elasticity of demand" was fatal to the argument that the papers were competitive. With respect to the geographic market, Times-Mirror argued that San Bernardino County is merely a political boundary which does not conform to economic reality. Finally, appellant urged that the district court's delineation of the relevant market was inconsistent with the standard applied in United States v. Citizen Publishing Co. (Civ. No. 1969-Tucson, D. Ariz., January 31, 1968), in which the Los Angeles Times was excluded from the relevant market in measuring the market power of the two merging Tucson newspapers.

The Government's motion to affirm argued that this case was well within precedent established in prior Section 7 cases, and that the district court's application of settled criteria for defining the relevant market to the facts of this case raised no issue warranting the Court's plenary consideration. That daily newspapers constitute an appropriate product market, and that the Times and Sun were a part of that market, was amply demonstrated, in our view, by testimony of newspaper readers, advertisers, economists and publishers. Cross-elasticity of demand based on price sensitivity is not necessarily the test of competition in a low priced product which is a package of items and services designed to appeal to diverse preferences. Competition based on quality and composition of product, no less than price competition, is protected by the antitrust laws. The geographic market also was properly defined. We pointed out that San Bernardino County encompassed almost the entire area in which the Times and the Sun's circulations overlapped, and that appellant itself had used the county as an appropriate area in which to measure circulation for the purpose of appealing to advertisers. Finally we explained that inclusion of the Times in the San Bernardino market was not inconsistent with its exclusion from the Tucson market; rather it accurately reflected competitive differences between the two markets. In San Bernardino County the Times sold 16,000 daily and 31,000 Sunday papers; in Pima County, Arizona (Tucson) the Times' sales were measured in the hundreds and the combined circulation of all out-of-town newspapers was only 4.4 per cent of total sales.

In support of the district court's conclusion that the acquisition substantially lessened competition we emphasized that Times Mirror after the acquisition controlled a market share of 54.8 per cent of weekday, 99.5 per cent morning and 64.3 per cent Sunday circulation in the county. We further pointed to strong evidentiary support for the court's conclusions that the acquisition eliminated competition between the Times and the Sun for national advertising, and substantially raised barriers to entry into the daily newspaper business in San Bernardino County.

Under the rules of the Supreme Court, Times Mirror has twenty-five days in which to petition for reconsideration. Its counsel has indicated that such a petition will be filed shortly.

Staff: Gregory B. Hovendon and Bernard M. Hollander (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General Edwin L. Weisl, Jr.

COURT OF APPEALS

FEDERAL TORT CLAIMS ACT

RULE OF FERES v. UNITED STATES, 340 U.S. 135, HAS CONTINUED VITALITY AND APPLIES EVEN WITHOUT PROOF OF ADVERSE EFFECT ON DISCIPLINE IN THE PARTICULAR CASE.

Buckingham v. United States (C.A. 4, No. 12,073; April 29, 1968; D.J. 157-79-836)

Plaintiff's decedent, a Master Sergeant in the United States Air Force stationed at an Air Force Base in Virginia, became ill while on active duty. After reporting to the emergency room at the Base Hospital he was treated, given a prescription, and sent home. Thereafter, his condition worsened, and he was ultimately admitted to the Base Hospital where he died. In this Tort Claims Act suit, plaintiff alleged that the Base Hospital physicians and attendants negligently delayed decedent's admission to the Hospital, thereby causing his death. The district court granted the Government's motion for summary judgment, finding that the suit was barred by the rule of Feres v. United States, 340 U.S. 135, 146, which held "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to Service".

The Fourth Circuit affirmed in a per curiam opinion. The Court of Appeals rejected appellant's contention (1) that the Feres rule had been "eroded" by United States v. Brown, 348 U.S. 110, and other decisions; and (2) that the Feres rule does not in any event apply since there was no showing in the particular case that allowance of the suit would adversely affect military discipline.

Staff: Leonard Schaitman (Civil Division)

SOCIAL SECURITY ACT

IN DETERMINING WHETHER APPLICANT IS DISABLED, HEARING EXAMINER MUST CONSIDER EVIDENCE RELATING TO AN OPERATION PERFORMED WITHIN A YEAR AFTER DATE EARNINGS REQUIREMENT WAS LAST MET.

Michael Carnevale v. Gardner (C. A. 2, No. 31,678; April 30, 1968; D. J. 137-50-70)

Appellant, applying for disability benefits under the Social Security Act, had to demonstrate that he was disabled within the meaning of the Act as of March 31, 1961, the time appellant last met the earnings requirement of the Act. In support of his application, appellant submitted evidence relating to an operation to close a perforation of a duodenal ulcer performed in June, 1960, as well as evidence of another operation relating to the ulcer performed in August, 1961. The Court of Appeals noted that the hearing examiner, in denying benefits, failed to consider the operation performed after March 31, 1961. The Court held that the 1961 operation, even though performed after the earnings requirement was last met, was relevant to the issue of disability as of March 31, 1961, as an ulcer requiring an operation in August of 1961 could well impose some limitations on appellant's activities in March, 1961. Moreover, the Court reasoned, the fact that appellant later underwent another ulcer operation should have been taken into consideration in evaluating the success of the June, 1960 ulcer operation. Accordingly, the decision of the district court affirming the administrative denial of benefits was reversed and the matter remanded to the Secretary for consideration of the evidence relating to the subsequent operation.

Staff: United States Attorney Justin J. Mahoney;
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URBAN RENEWAL

COURT HOLDS AMENDMENTS TO FEDERAL HOUSING ACT WITHDRAW JURISDICTION OF COURTS TO HEAR PENDING CASES INVOLVING "RELOCATION PAYMENTS"

George Merge, et al. v. Richard Troussi, et al. (C. A. 3, No. 16, 673; May 2, 1968; D. J. 130-64-2223)

Under the Federal Housing Act of 1949, 42 U.S.C. 1441, et seq, the Urban Renewal Administration of the Department of Housing and Urban Development (HUD) in 1960 entered into a contract with the Pittsburgh Housing Authority providing for the federal Government to reimburse the Authority for "relocation payments" the Authority makes to business owners whose property has been condemned as part of an urban renewal project. The "relocation payments" primarily encompass "reasonable and necessary moving expenses" (42 U.S.C. 1465(b)(1)). In 1963, plaintiffs, alleging they were not given the proper amount of moving expenses, commenced suit against HUD and the Authority in federal district court. The district court dismissed the suit on the ground that 1964 amendments to the Federal Housing Act removed jurisdiction from the courts. On appeal, the Court of Appeals for the Third Circuit affirmed.

The Court of Appeals noted that 1964 amendments to the Housing Act provided that the Urban Renewal Administration could provide for reimbursement to local housing authorities for "relocation payments" on the condition that such payment would be "final and conclusive for any purposes and not subject to redetermination by any court . . . ." (42 U.S.C. 1456). The amendments further provided that contracts between the federal Government and local authorities entered into before 1964 could be amended to comply with the new provisions regarding relocation payments. Under these new statutory provisions, in 1965, HUD issued regulations making determinations by local housing authorities regarding relocation payments "final and conclusive". HUD also amended the contract between it and the Pittsburgh authority so as to incorporate the new provisions. Accordingly, the Court concluded that it had no jurisdiction to entertain a suit involving relocation payments even though the suit was pending when Congress amended the Act.

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(Civil Division)

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CIVIL RIGHTS DIVISION

Assistant Attorney General Stephen J. Pollak

SCHOOL DESEGREGATION

DISTRICT COURT WITHOUT SUBJECT MATTER JURISDICTION OVER PROCEEDINGS INSTITUTED BY SCHOOL DISTRICTS TO REVIEW PROCEEDINGS OF COMMISSIONER OF EDUCATION RESULTING IN TERMINATION OF FEDERAL FINANCIAL ASSISTANCE FOR FAILURE TO COMPLY WITH FEDERAL DESEGREGATION REQUIREMENTS

School District of Georgetown County, S. C. v. Gardner, et. al. (No. 68-156, ___ F. Supp. ___ D. S. C., March 26, 1968)

Four South Carolina School Districts instituted proceedings in the United States District Court to set aside orders of the Secretary of Health, Education and Welfare and of the Commissioner of Education terminating federal financial assistance to these districts for failure to comply with HEW's desegregation requirements promulgated pursuant to Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, et seq. The respondents, HEW officials and the United States moved to dismiss the proceedings on the grounds that exclusive jurisdiction over the subject matter was vested in the United States Court of Appeals for the Fourth Circuit. The District Court sustained the Government's jurisdictional contentions and dismissed the review proceedings.

Section 603 of the Civil Rights Act of 1964, 42 U.S.C. 2000d-2, provides that agency action pursuant to the Act "shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency or other grounds". Approximately 95% of the federal financial assistance at issue in the litigation was authorized under Title I of the Elementary and Secondary Education Act and other statutes 1/ which provide that a State dissatisfied with agency action may seek review in the appropriate Court of Appeals.

Citing Gardner v. Alabama, 385 F. 2d 804 (5th Cir., 1967), cert. denied ___ U.S. ___ (No. 752, 1968), the District Court (Hemphill, J.) stated that "The underlying consideration in cases of this type revolve around the issue of whether or not the State would ordinarily be the complaining party. This would require a speedy and final judicial review in the Court of Appeals. On the other hand, if litigation would logically be initiated by an individual, this litigation would begin in the district court .... There can, in cases of this

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1/ 20 U.S.C. §§241j, 241k, 827, 35d, 15cc, 15ccc.

nature, be no contention that a private individual would logically be the one to initiate litigation."

The Court concluded that since the circuit courts have exclusive jurisdiction of such proceedings where the State is the petitioner, they have the same exclusive jurisdiction by implication over "similar actions" brought by school districts, since "it would be totally incongruous to say that the State review of orders applicable to individual districts is in the circuit court, while the individual school district might seek review in the district court."

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CRIMINAL DIVISION

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SPECIAL NOTICES

FEDERAL RULES OF APPELLATE PROCEDURE

This is to remind you that the Uniform Federal Rules of Appellate Procedure governing the procedure in all appeals to the United States Courts of Appeals become effective July 1, 1968. These rules may be found in 43 F.R.D. 61; as part of the advance sheets to all West publications of January 1, 1968, and in pamphlet form as distributed to various offices by the West Publishing Company. All members of your staff who have duties related to the preparing, filing and arguing of cases before courts of appeals should become familiar with the uniform appellate procedures. Your attention is also directed to the fact that your particular Court of Appeals may make and amend rules for practice before the circuit which are not inconsistent with the uniform rules. See Rule 47 of the Federal Rules of Appellate Procedure.

Of particular importance is the time limitation of 14 days in which to petition for a rehearing under Rule 40. In this connection, please bear in mind that you must secure the prior permission of the Solicitor General to suggest a rehearing en banc under Rule 35. As in the past, you should promptly notify the Department of decisions adverse to the Government (see Vol. 15, United States Attorneys' Bulletin, p. 668).

Particular attention should be given to the new uniform rules on the contents of briefs as set forth in Rule 28; the alternative methods of preparing an appendix in Rule 30; and the form of briefs and the appendix prescribed in Rule 32.

MILITARY SELECTIVE SERVICE ACT OF 1967

PROSECUTION OF MINISTERS OF RELIGION AND STUDENTS PREPARING FOR THE MINISTRY WHO HAVE BEEN RECLASSIFIED AND REPORTED AS DELINQUENTS.

Under the provisions of Section 456(g), Title 50 Appendix, United States Code, Congress has granted specific exemption (vis-a-vis deferment) from military training and service to ministers of religion and students preparing for the ministry.

Regulations of the Selective Service System authorize local boards to reclassify as a delinquent any registrant who "has failed to perform any duty

or duties required of him under the selective service law * * *" (32 C.F.R. 1642.4(a)), and require that such delinquent be given the highest priority for induction into the Armed Forces (32 C.F.R. 1631.7(a)(1)).

It has come to our attention that in some instances a person who had a IV-D classification as a minister of religion or as a theological student, was declared delinquent by his local board, reclassified I-A, and ordered to report for induction. Prosecution of such a person must not be initiated under any circumstances without prior authorization from the Criminal Division.

NARCOTICS - TRANSFER OF FUNCTIONS

The Reorganization Plan No. 1 of 1968 transfers the functions of the Bureau of Narcotics and the Commissioner of Narcotics to the Attorney General. The functions of the Secretary of Health, Education, and Welfare under the Drug Abuse Control Amendments of 1965, except the regulating of the counterfeiting of drugs which are not controlled "depressant or stimulant" drugs, are also assigned to the Attorney General. 33 Fed. Reg. 5611 (1968).

Department of Justice Order No. 393-68 establishes within the Department the Bureau of Narcotics and Dangerous Drugs. 33 Fed. Reg. 5580 (1968). The powers of the Attorney General pursuant to the Reorganization Plan are delegated to the Director of the Bureau of Narcotics and Dangerous Drugs, and alternatively to the Associate Directors, by Department of Justice Order No. 394-68, 33 Fed. Reg. 5590 (1968).

As a result of the reorganization, indictments charging violations of Title 21, United States Code, for unauthorized importation of narcotics and marihuana, should refer to the absence of authorization by the "Director of the Bureau of Narcotics and Dangerous Drugs". The issuance of tax stamps and order forms pursuant to Chapter 39, Internal Revenue Code, remains a function of the Secretary of the Treasury. Consequently, no modification of the customary indictments under those statutes is required.

Agents of the Bureau of Narcotics and Dangerous Drugs have been delegated the combined arrest authority of agents of the former Bureaus of Narcotics and Drug Abuse Control. In addition to the above documents the following indicate the delegation of authority:

1) B.N.D.D. Order No. 1, 33 Fed. Reg. 5590 (1968)

2) B.N.D.D. Order No. 2, 33 Fed. Reg. 5591 (1968)

3) B.N.D.D. Directive No. 3, Fed. Reg. No. 3 (1968)

COURT OF APPEALS

MAIL FRAUD

USE OF THE MAILS TO RETURN DISHONORED CHECK.

United States v. Hendrickson (C. A. 6, May 10, 1968; D. J. 36-71-57)

The appellant was convicted for mail fraud in connection with the deposit of a check drawn on a bank in another city. His local bank honored checks which depleted the account prior to the clearing of the deposit. The check of deposit was sent to the bank in the other city by bus and was returned, dishonored, by mail. In affirming the conviction, the Court of Appeals for the Sixth Circuit rejected the argument that the scheme had been completed prior to the use of the mails. The Court found that there was evidence that the appellant and his accomplices selected an out of town bank for the purpose of gaining a time interval between the deposit of the check and its return dishonored from the other city. Although the mails were used only for the return of the check, this return contributed to the time interval for cashing checks which the appellant sought. It was an integral part of the scheme.

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With this issue of the United States Attorneys Bulletin there is being transmitted a copy of an article entitled "The Problems of the Prosecutor in the Marihuana Controversy" by Donald E. Miller, Acting Chief Counsel, Bureau of Narcotics and Dangerous Drugs, Department of Justice, originally published in The Prosecutor, Vol. 4, No. 1, pp. 11-15.

The Problems Of The Prosecutor In The Marihuana Controversy

By Donald E. Miller

DONALD E. MILLER

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INTRODUCTION

Public apprehension about the increasing crime rate, juvenile delinquency, civil disorders and civil disobedience, is a daily item in newspaper reports or editorials, and is frequently linked to the spreading problem of drug abuse. 1/

In the past, most drug abusers in the United States were in the lower social and economic levels of our society. This is still true with respect to cocaine and the opium derivatives such as heroin, morphine and Dilaudid. To some extent, it is also true concerning marihuana. However, there has been a growing marihuana and other hallucinogenic drug abuse problem in the middle and even the upper strata of our society. Some talented, even brilliant persons have taken marihuana and other hallucinogens and are adding an aura of intellectualism to such abuse.

In searching for the causes of the problem, one reason immediately appears. The Learys, the Ginsbergs, LeMar, and the hippies sell copy. Consequently, many newspapers and magazines have failed to present a full and objective discussion of the controversy. A few articulate people have been putting forth tyrannical opinions, often without adequate opposition, and are influencing many young and impressionable persons. The permissivists have attempted to associate all manner of virtues with the use of marihuana, and to picture the substance as a "benevolent herb" free of any danger to the user. As a result, many people are confused, and infractions of the laws have become more prevalent. One fact seems certain — unless the dangerous aspects of marihuana are treated accurately and sensibly, even more damage will be done.

Marihuana is the most widely used of all drugs currently abused. A recent Gallup poll conducted on 426 college campuses found that six percent of the students had used marihuana on one or more occasions. 2/ Other polls have indicated the extent of abuse may be even higher. In any event, although a small percentage of Americans are using marihuana, we are still talking about several hundred thousand abusers. Many areas which were formerly free of drug abuse, now have a persistent traffic, centering on the "hippie" element and college campuses. Undoubtedly, the traffic in marihuana has increased in the past five years. 3/ Considering the many arrests and the quantities seized, it is evident that we will have to deal with the problems for some time to come.

LEGAL CONSIDERATIONS

Charged with the responsibility for the health and safety of its citizens, the various State legislatures have enacted programs for controlling possession and sale of marihuana by finding that marihuana and such drugs as those of the opium family have sufficiently similar social and physiological effects to warrant proscription in a single category labeled "narcotics".

In the course of developing their statutory schemes, the legislators were recipients of a substantial amount of information bearing on the social and physiological effects of marihuana. The Uniform Narcotic Drug Act, including the proscription against marihuana as a "narcotic", is now in force in 48 of the States. 4/ The other two States also control marihuana under statutes similar to the control of narcotic drugs.

What is the right of States to classify marihuana as a "narcotic"? Despite some psychological and physiological differences in the effects of the drugs in the opium family and marihuana, the inclusion of marihuana in the statutory definition of "narcotic" is not constitutionally improper. The word "narcotic" is commonly used to designate drugs having the consciousness-altering characteristics of marihuana, i. e., stupor, mental lethargy, marked alterations of mood, and possible physiological harm. 5/

The issue was presented and considered by the Supreme Court of Colorado in the case of *People v. Stark,* 400 P. 2d 923 (Colo. 1965) (*en banc*). That court sustained the Colorado Narcotic Drug Act against the appellant's challenge that the inclusion of marihuana in a class with heroin and other physically addicting drugs was an unreasonable and arbitrary classification violative of due process and equal protection of the law. Noting that its statute was in the language of the Uniform Narcotic Drug Act, 6/ the court observed that legislative classifications are constitutional when based on a grouping of disparate items, if these items all bear some reasonable relation to the public purpose sought to be achieved by the legislation involved. It concluded that the use of marihuana and other drugs identified in the statute presented such a substantially similar danger

to the community that the legislature could properly proscribe them in a single category. Many cases have been in accord with the Colorado holding. [7/]

It, therefore, seems conclusive that the term "narcotic" as currently used, is a legal term with no precise technical meaning, and it is used to describe a varied assortment of harmful and dangerous drugs. There is a problem of semantics, but the classification should not be upset merely because it is not made with mathematical nicety or because in practice the equating of marihuana and the drugs of the opium family results in some inexact reasoning. The wide degree of judicial accord is an indication that the classification of marihuana with the drugs of the opium family is a rational use of the legislature's power.

In developing their programs, the legislators are not bound by any one school of thought, nor are they bound to rely on only uncontroverted factual propositions. So long as the legislation rests on some rational basis, it is not to be declared unconstitutional. It is beyond dispute that the legislature, and not the courts, has the duty to assess and weigh the various and often conflicting considerations in legislative programs. *Katzenbach v. Morgan*, 384 U. S. 641, 653 (1966). The legislature is not bound by any orthodoxy, but rather can range over the whole spectrum of human knowledge and experience in developing its legislature programs. "It makes no difference that . . . facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate such contrarity." *Rast v. Van Deman & Lewis Co.*, 240 U. S. 342, 357 (1916). [8/]

Thus, all defendant-appellants have an extremely heavy burden to carry. It will not suffice to show merely that a body of scientific opinion, however sizable and respected, regards the legislative assumptions about the social and physiological effects of marihuana to be incorrect. Rather, the appellants must show that the assumptions are completely without support; that is, that no reputable body of opinion whatsoever exists on which the legislature might have rested its decision to proscribe marihuana in a statute dealing with drugs "narcotic" in character.

The information available to the legislators at the time of the enactment of the inclusion of marihuana within the proscriptions against marihuana was abundant. The legislative history of the United States Congress in enacting the Marihuana Tax Act of 1937, reveals there was a great deal of agreement among medical and scientific groups concerning the harmful effects of marihuana. The Seventy-fourth and Seventy-fifth Congresses were the beneficiaries of a large volume of material describing a variety of different experiences with marihuana, both in controlled environments and in real life. [9/]

In 1942, the National Conference of Commissioners on Uniform Laws recommended that marihuana be included in the controls of the Uniform Narcotic Drug Act. [10/] The legislative histories in the various States will also support the proposition that a rational basis for controlling marihuana existed at the time of the enactment of their statutes.

For a complete handling of all the various defenses being raised today in opposition to the marihuana controls, all prosecutors will be interested in reading the extensive opinion of Chief Justice G. Joseph Tauro, of the Suffolk Superior Court at Boston, Massachusetts, in the case *Commonwealth v. Leis and Weiss*, Nos. 28841-2, 28844-5, 28864-5, 1967 (as yet unreported). After a thorough judicial inquiry in which many well qualified experts testified on the subject, Judge Tauro stated in part:

> "It is my opinion, based on the evidence presented at this hearing, that marihuana is a harmful and dangerous drug", (op cit p. 9), and "I do not find that the inclusion of marihuana in the statutory definition of a narcotic drug is constitutionally offensive" (op cit p. 8).

DANGERS OF MARIHUANA

There has been evidence of physical and mental harm due to abuse of marihuana. In India, evidence has been cited of damaged health for 42 percent of chronic users, [11/] and in the Near East, a high incidence of insanity. [12/] This evidence has been questioned on the ground that it relates to a more powerful concentration of marihuana than is usually found in the United States.

The term "marihuana" embraces all of the fancy and vernacular names you hear, the so-called "American type", the so-called "Mexican type", "hashish", "bhang", "ganja", "charas", "cannabis", "cannabis resins", "cannabidol", "cannabinol", "tetrahydrocannabinol", "pot", "tea", or "weed". It is true that there are varying degrees of potency ranging from almost innocuous effects of poorly harvested marihuana to the severe effects of "hashish" or "charas". Most of the marihuana consumed in the United States is made up of the leaves and flowering tops of the marihuana plant. To a lesser extent, but which is definitely on the increase, "hashish" is also being consumed by the users in the United States. Whether a person is using the so-called "Mexican type" marihuana or the more potent **"hashish"**, the potential for abusive use is ever present. The only difference is, that a user of "hashish" will not need to smoke as much to reach the desired result. But, make no mistake about it, a person can continue the intake of the weaker substance and attain the same results as the person using "hashish".

The formal list of reported physiological and psychological effects of the intake of marihuana is quite varied and lengthy. For example, the 1965 report on Drug Dependence for the World Health Organization lists the following:

> "Among the more prominent subjective effects of cannabis . . . are: hilarity . . . carelessness; loquacious euphoria . . . distortion of sensation and perception . . . impairment of judgment and memory; distortion of emotional responsiveness; irritability, and confusion. Other effects, which appear after repeated administration . . . include: lowering of the sensory threshold, especially for optical and accoustical stimuli . . . illusions, and delusions that predispose to antisocial behavior; anxiety and aggressiveness as a possible result of the various intellectual and sensory derangements; and sleep disturbances." [13/]

It is the effects upon the central nervous system which are most profound, but which have been the

least explored by research. Little is known about the psychopharmacological aspects of marihuana, even though it has been the most widely used psychoactive drug in the world. However, there is still a lot of literature indicating its effects are detrimental to the central nervous system. For example, Dr. Donald Louria in his book *Nightmare Drugs* states that marihuana may produce all of the hallucinogenic effects of which LSD is capable. [14]

A medical symposium sponsored by the Ciba Foundation in 1965, summarizes much of the current research and opinions of leading medical authorities. Included in the conclusions of these studies, are the following comments:

> "One can easily imagine the difficult situation to which society would be condemned if the selling of hashish were legal.
>
> "It is well known that taking hashish causes both pathological and psychic disturbances, thus rendering the addict a burden to society." [15]

Research conducted by Dr. Harris Isbell, et al., on human beings using a natural occurring tetrahydrocannabinol of marihuana, which he calls THC, has led to the conclusion that in sufficient dosage the properties of marihuana "can cause psychotic reaction in almost any individual". [16]

Because of these findings, marihuana has earned a reputation for inducing criminal behavior. One prominent team of researchers which has studied the problem in India where there has been long and widespread abuse of marihuana in all of its potent forms concludes that:

> "Excessive indulgence in cannabis is apt to produce in healthy individuals and more so in susceptible individuals, mental confusion which may lead to delusions with restlessness and disordered movements. Intellectual impairment as well as disorientation may show itself in various ways, such as weakening of moral sense, habit of telling lies, prostitution, theft, pilfering, sex perversions and other disgraceful practices. Sometimes indulgence may release subconscious impulses and lead to violent crimes." [17]

Earlier studies in 1939 in New Orleans disclosed that the number of marihuana users among major criminals was very high. [18] Even the LaGuardia report of 1944, which is so often cited as support for the harmlessness of marihuana, found that in a number of test subjects:

> ". . . there were alterations in behavior giving rise to antisocial expression. This was shown by unconventional acts not permitted in public, anxiety reactions, opposition and antagonism, and eroticism. Effects such as these would be considered conducive to acts of violence." [19]

and further that:

> "The conclusion seems warranted that given the potential make-up and the right time and environment, marihuana may bring on a true psychotic state". [20]

Moreover, it is important to note that these observations were based on the study of subjects in a rigidly controlled environment and who were not themselves chronic users. The street environment is, of course, not nearly so restraining as that of a prison clinic.

Of special significance is the investigation of Professor C. G. Gardikas in which he analyzed a group of 379 hashish-smoking criminals. He found that 117 of these became criminally inclined only after their habituation to hashish. Also, they had between them more than 420 sentences for assaults, woundings, threats, robberies, manslaughter, and sex offenses. [21] P. O. Wolff refers to various other reports from Greece, Turkey, Tunis, and Egypt which bear out this finding. [22] Wolff also lists a number of specific incidents taken from his own observations in Latin America. In India, the Chopras state that:

> "Fits of aggressive mania are not infrequently observed after indulgence in cannabis, particularly by smoking . . . The studies carried out in mental hospitals and in prisons show that not infrequently addiction to cannabis preparations was the immediate cause of sudden crime such as murder". [23]

The manner in which marihuana causes or induces criminal behavior is not clear and seems to vary with the individual, the dosage, and the circumstances. A general survey of the literature indicates that it may stimulate criminal conduct in any of the following ways: (1) use by criminals to fortify their courage prior to committing crimes: (2) chronic use resulting in general derangement and demoralization; (3) use resulting in the lowering of inhibitions and bringing out suppressed criminal tendencies, and (4) use resulting in panic, confusion or anger induced in otherwise normal persons who have not been previous users.

A psychoactive drug such as marihuana does different things to different people, and even to the same person, depending on external and internal circumstances. Environmental and psychological factors, mood, disposition, attitude, suggestion, expectancy, motivation, and any abnormal behavioral patterns will determine the drug's effects. As stated by J. H. Jaffe, "The subjective effects (of marihuana) are exquisitely dependent, not only on the personality of the user, but also on the dose, the routine of administration, and the specific circumstances in which the drug is used". [24]

We are now in a wave of ever-increasing juvenile delinquency. More youngsters are getting arrested every year — at lower ages and for more serious offenses. These young people are often predisposed to impulsive and aggressive behavior. Coupled with an equally complex adult problem involving hundreds of thousands of neurotic and psychotic persons in our midst, would it be wise to make available to them a chemical agent which would most likely release their inhibitions? We should not exaggerate the hazards of smoking a marihuana cigarette by a college student, who may be otherwise normal, and is seeking social acceptance from a group of his peers. But, on the other hand, it is appalling when we so often read that "there is no reliable evidence that marihuana causes crime". Both the logic and the evidence clearly support the proposition that marihuana can be a potent triggering chemical in persons predisposed to criminal behavior.

One particularly grave danger of habitual marihuana use is that there is often a clear pattern of

graduation from marihuana to the stronger addictive opiates. Those who seek personal well-being and exhilaration through the stimuli of drugs ultimately discover that the opiates have more to offer. This point has been disputed, of course, particularly in the case of student experimentation. Certainly, it is true that not all persons who ever smoked a marihuana cigarette have gone on to the use of heroin, but actual experience leaves little room for doubt that a large majority of addicts began their drug taking with marihuana. This pattern of graduation has been observed in the United States, the Near East, and in Africa, [25] though admittedly, the exact causal connection is unknown. In a sample of 96 heroin users examined in the United States, 83 admitted to the use of marihuana prior to their addiction. [26]

A good review of the subject is that of P. A. L. Chapple who studied 80 English heroin addicts. He found that 70 of these had first used marihuana and apparently considered its effects to be second only to those of heroin. [27] In studying these patients, Dr. Chapple was led to the conclusion that the connection between marihuana and heroin could not be accounted for, simply on the basis of the "mutual influence of availability in illegal society . . . ." [28] In an intensive research project conducted by Dr. John C. Ball, Chief Sociologist of the United States Clinical Research Center in Lexington, Kentucky, it was found that of 2,213 narcotic addicts examined, 70.4 percent had used marihuana prior to their addiction. This sample included addicts from all classes and professions, representing 46 States. Moreover, in those States classified as areas in which marihuana is often available, it was found that of 1,759 addicts, 80 percent had first used marihuana. [29]

A very significant survey has been made by Lee N. Robins, Ph.D., and George E. Murphy, M. D., of 235 persons in St. Louis. The report indicates that about 50 percent of the persons in the survey who had used marihuana had also gone on to the use of narcotic drugs. [30]

It seems very reasonable that the more people we have who are experimenting with marihuana, the greater the danger that many of them will not be able to rid themselves of a new habit. They will then be contaminated as a consequence of association in sub-cultures involved with all types of drug abuse, barbiturates, amphetamines, LSD, and even heroin. If this assumption is true, and if the apparent increase in marihuana abuse continues unabated, it is certainly within reason that there will be a sharp rise in the incidence of narcotic addiction in the near future. In fact, there is already an indication that the increased use of marihuana is beginning to show an increase of addiction in persons under the age of 21 years. [31]

The question of the permanency of the effects of marihuana remains open for investigation. More likely than not, the earlier failures in finding such effects in this country resulted from the unavailability of chronic users of high quality marihuana. Further scientific study is needed, and the National Institute of Mental Health is presently carrying on a complete plan of research, covering all aspects of marihuana use. At this juncture it seems important to make one point. In order to be open-minded on the subject, one must assume that the studies may show that the conclusions heretofore reached as to the dangers of marihuana are right, wrong, partially right or partially wrong. However, pending the results of these new studies, no off-the-cuff decision should be made which is contrary to the existing belief — that marihuana is a harmful and dangerous substance which should be controlled in the best possible way. While these studies are going on, it is axiomatic that a heavy burden of proof must rest upon the proponents of measures removing any controls.

Marihuana does differ significantly from the opium and "opiate" classes of drugs in that it does not produce addiction of the morphine type. Abstinence does not produce a physiological withdrawal syndrome in the user, however, its use does result in a psychological dependence, and according to Dr. David Ausubel, chronic users go to great lengths to insure that they will not be without the drug. Moreover, deprivation may result in "anxiety, restlessness, irritability, or even a state of depression with suicidal fantasies, sometimes self-multilating actions or actual suicidal attempts", [32] all symptoms of a psychological withdrawal syndrome. For these reasons, marihuana is more often said to be habituating rather than addicting, although one investigator claims, that at least from a psychiatric point of view, there is little difference. [33] It is somewhat incredible that the lack of physical dependence liability has been cited by some observers as though it were a positive virtue of marihuana.

One argument used by the permissivists that strikes many observers as naive is the comparison of marihuana and alcohol. Their reasoning is, "What is so bad about marihuana, it is no worse than alcohol". The best reply to this is that a public health problem is not the less odious because it is sanctioned by a majority of the people. Before accepting the argument that marihuana is no worse than alcohol, one must consider the price paid by society for its inability to control abuse of alcohol. While no one can envisage return to Prohibition as a politically achievable goal, and very few would desire it even if such were the case, the fact is that according to the Public Health Service there are today some 5 million chronic alcoholics. These in turn adversely affect the lives of at least 20 million other persons, principally members of their families. One half of the annual toll of fatal accidents, or the death of more than 26,000 people, can be attributed in some measure to alcohol abuse. Over one half of all crime in the United States has been said to be connected with alcohol. Despite all this, alcohol has been socially acceptable in our civilization for many, many years. This does not necessarily mean that now for the first time marihuana, the recent fad of isolated groups of pseudo-intellectuals and hippies, should gain social acceptance. The result in any case can only be added damage from a new source. We now have more than 62,000 reported active narcotic drug addicts, untold thousands of amphetamine and barbiturate abusers, and millions of persons who drink too much alcohol. That seems to be quite enough.

1. Not without cause. See *New York Times*, Oct. 25, 1967, where New York Police Commissioner Howard R. Leary stated that crime growing out of drug abuse is the No. 1 police problem in the city.

2. Dickenson, F. "Drugs on Campus: A Gallup Poll", *Reader's Digest*, Nov. 1967, pp. 114-115.
3. In 1963, about 6,500 pounds of marihuana were seized at borders and in the United States, and about 50,000 pounds were seized in 1967. There were about 6,800 arrests by State officers in 1963 for marihuana violations, which steadily increased to about 24,000 in 1966. It is anticipated that the 1967 figures are much higher.
4. See 9B *Uniform Laws Annotated*, 1964 Supp. at 110. The exceptions are California and Pennsylvania. Legislation in some States is only in part based on the Act. Also, there have been varying amendments in a number of States. Consequently, the law in those States is not entirely "uniform".
5. *Webster's New Collegiate Dictionary* (1966); *Roget's Thesaurus* (1966); *Steadman's Medical Dictionary*, 21st ed. (1966); *Dorland's Illustrated Medical Dictionary*, 24th ed. (1965); *J. E. Schmidt's Attorneys Dictionary of Medicine*.
6. See Eldridge, W., *Narcotics and the Law*, p. 135, par. (14), which defines "narcotic drugs" as follows:

   > "(14) 'Narcotic drugs' means coca leaves, opium, cannabis (the international term describing marihuana), and every other substance neither chemically nor physically distinguishable from any of them. . ."

7. *Spence v. Sacks*, 173 Ohio St. 419, 183 N. E. 2d 363 (1962); *Locke v. State*, 168 Tex. Cr. R. 507, 329 S. W. 2d 873 (1959); *State v. Page*, 395 S. W. 2d 146 (Mo. 1965); *Jenkins v. State*, 215 Md. 70, 137 A. 2d 115 (1957); *People v. Mistriel*, 110 Cal. App. 2d 110, 241 P. 2d 1050 (Dist. Ct. App. 1952); *People v. Woody*, 40 Cal. Reptr. 69, 394 P. 2d 813 (1964) (*en banc*).
8. See also *United States v. Carolene Products Co.*, 304 U. S. 144, 152 (1937); *Radice v. New York*, 264 U. S. 292, 294 (1923); *Bordens Co. v. Baldwin*, 193 U. S. 194, 209, 210 (1934). The *Carolene* case, supra, held that legislation ". . . is not to be pronounced unconstitutional unless . . . it is of such character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators."
9. See Hearings on H. R. 6906, July 12, 1937, before the U. S. Senate, 75th Cong., 1st Sess., and Hearings on H. R. 6385, April 27-30, 1937, before the House of Representatives, 75th Cong., 1st Sess.. Included in the record as secondary references were many papers relating to marihuana, e. g., Bromberg, W., *Marihuana Intoxication, Clinical Study of Cannabis Sativa Intoxication*, Am. Jour. Psychiatry, vol. 91, pp. 303-330 (Sept. 1934); Bragman, L., *The Weed of Insanity*, Med. Jour. and Rec., pp. 416-417, Syracuse, N. Y. (Oct. 1925); Arny, H., *Principles of Pharmacy*, (3rd ed.), W. B. Saunders Co., pp. 767-768 (1926); Munch, J., *Bioassays; A Handbook of Quantitative Pharmacology*, William and Wilkins Co., pp. 190-197 (1931).
10. *Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings*, 1942, p. 173.
11. Ausubel, D., *Drug Addiction*, p. 273, Random House, 1958.
12. DeRopp, Robert S., *Drugs and the Mind*, p. 97, 1957, St. Martin's Press.
13. Eddy, N., Halbach, H., Isbell, H., Seevers, M., Drug Dependence: Its Significance and Characteristics, *Bull. Wld. Hlth Org.*, pp. 728, 729, vol. 32, 1965.
14. Louria, D., *Nightmare Drugs*, p. 32, Pocket Books, 1966.
15. Joachimoglu, G., *Hashish, Its Chemistry and Pharmacology*, p. 5, Little Brown, 1965.
16. Isbell, H., et al., *Studies of Tetrahydrocannabinol*, Feb. 1967. A copy may be obtained from the Bureau of Narcotics, Washington, D. C. 20226.
17. Chopra, I. and Chopra, R., *The Use of the Cannabis Drug in India*, Bulletin on Narcotics, v. 9, no. 1, p. 23, Jan.-Mar., 1957.
18. Bromberg, W., *Marihuana — A Psychiatric Study*, JAMA, v. 113, no. 1, p. 19, 1939, (reprint).
19. The Mayor's Committee on Marihuana, *The Marihuana Problem in the City of New York*, p. 215, Jacques Cattell Press, 1944.
20. Id., p. 51.
21. Gardikas, C., *Hashish and Crime*, p. 5, Engephale, no. 2-3, Aug. 1950.
22. Wolff, P., *Marihuana in Latin America, the Threat it Constitutes*, p. 27, Linacre Press, 1949.
23. Chopra, supra (note 17), p. 24.
24. Jaffe, J., Drug Addiction and Drug Abuse, In Goodman, L. and Gilman, A. (Editors), *The Pharmacological Basis of Therapeutics*, 3rd ed., MacMillan, p. 300, 1965.
25. Maurer, D. and Vogel V., *Narcotics and Narcotic Addiction*, 2nd ed., p. 245, Thomas, 1962.
26. Chein, I., et al., *The Road to H.*, p. 149, Basic Books, 1964.
27. Chapple, P., *Cannabis: A Toxic and Dangerous Substance — a Study of 80 Takers*, Brit. Jour. of Addictions, v. 61, p. 293, 1966.
28. Id., p. 276.
29. Ball, J., et al., *The Association of Marihuana Smoking With Opiate Addiction in the United States*, presented at the Annual Meeting of the Am. Sociological Assoc., San Francisco, Aug. 1967.
30. Robins, L. and Murphy, G. *Drug Use in a Normal Population of Young Negro Men*, Am. Jour. Pub. Hlth., v. 57, No. 9, pp. 1580-1596, 1967.
31. Statement of Commissioner of Narcotics Henry L. Giordano before the House Subcommittee on Public Health and Welfare, February 27, 1968, where he stated:

   > "In 1963, only 13.9 percent of the new addicts reported were under the age of 21 years. In 1967, 21.2 percent of the new addicts reported were under the age of 21 years . . . Also, preliminary reports show that the largest increases in youthful addiction are in areas other than the traditional addiction centers. Thus, as I predicted, we are beginning to register the ultimate result of the increase in youthful experimentation with marihuana."

32. Ausubel, supra (Note 11), p. 97.
33. Chapple, supra (Note 27), p. 279.

TAX DIVISION

Assistant Attorney General Mitchell Rogovin

DISTRICT COURT

LIEN FOR TAXES

FEDERAL TAX LIEN NOT ENFORCEABLE AGAINST $168,400 OBTAINED BY COUNTY OFFICIALS AS CONTRABAND FROM ILLEGAL GAMBLING ACTIVITIES, AS GAMBLER WHO HAD RECEIVED THE MONEY HAD NO PROPERTY INTEREST IN IT AT THE TIME THE FEDERAL TAX LIEN WAS PERFECTED.

State of New Jersey, et al. v. Joseph V. Moriarty, et al. (Super. Ct. of N. J., Law Div., Hudson Co., Docket No. L-32627-63; Nov. 10, 1967; D.J. 5-48-5833)

The taxpayer, Joseph V. Moriarty has a criminal record dating from the 1930's pertaining to his violation of the gambling laws of the State of New Jersey. On July 28, 1960, Moriarty was arrested, and subsequently indicted by the Hudson County grand jury for possession of lottery slips. He pleaded guilty to that indictment, and on March 2, 1962, he was sentenced to a two-to-three year term in the state prison. Moriarty remained in custody continuously from February 20, 1962, throughout the rest of 1962, and for a considerable time thereafter. On July 3, 1962, several workmen who were renovating private garages in Jersey City discovered, in an old car, the sum of $2,438,110 in currency, and numerous articles of gambling paraphernalia as well as letters, papers, etc., belonging to Joseph V. Moriarty. The currency was turned over to the federal authorities and presently is the subject of litigation in the Federal District Court of New Jersey. Farley v. $2,438,110, Civil Action 819-62 (USDC N.J.), D.J. file 5-48-5192.

On July 5, 1962, the District Director of Internal Revenue made a jeopardy assessment against Joseph V. Moriarty for income taxes and interest due and owing in the amount of $3,422,792.66. Thereafter, on July 6, 1962, members of the Jersey City Police Department forcibly entered another garage and recovered numerous shopping bags and a cardboard box containing lottery slips and other gambling paraphernalia, and $168,400.97 in currency. Their discovery of $168,400.97 was a direct result of a general investigation of the area triggered by the July 3, 1962 discovery. On July 9, 1962, the District Director of Internal Revenue served on the prosecutor of Hudson County a notice of levy on the property and rights to property belonging to Joseph V. Moriarty, pursuant to the July 5, 1962 assessment. The prosecutor advised the District Director that the funds belonging to Moriarty were never in his possession. On July 10, 1962, the currency was placed in

a deposit account at the Hudson County National Bank in the name of "Jersey City Police Department, William V. McLaughlin, Director of Police, Austin J. Conley, Chief of Police, as agent".

On July 12, 1962, Joseph V. Moriarty was again indicted by the Hudson County grand jury on multi-count indictment charging him with violating the state's gambling laws. On June 3, 1963 Moriarty pleaded guilty to a count of that indictment, charging him with violation of N. J. S. 2A: 121-3(b) (possession of lottery slips) on divers dates from December 14, 1961, to July 6, 1962, inclusive. The lottery slips confiscated from the garage on July 6, 1962, reflected bets taken by Moriarty on various dates between December 14, 1961 and February 19, 1962, inclusive. On September 6, 1962, a levy for the sum of $771, 802. 55 was served by the District Director of Internal Revenue on the Hudson County National Bank, the Jersey City Police Department, Chief of Police, Austin J. Conley, and Director William V. McLaughlin, which levy represented a claimed tax obligation of Moriarty.

The County of Hudson commenced the present action on February 13, 1964, and obtained an order to show cause why the $168, 400. 97 should not be forfeited to Hudson County as contraband because it was used by the taxpayer, a convicted gambler, in his illegal gambling operations. The United States asserted a priority claim to the fund involved based on the jeopardy assessment made against the taxpayer on July 5, 1962. On October 20, 1967, the New Jersey Superior Court, Law Division, rendered an opinion determining that the $168, 400. 97 should be forfeited to the full use and gain of Hudson County. The Court in rendering its opinion found that the County officials had seized the monies on July 6, 1962, and that under New Jersey law the taxpayer was divested of any rights to the monies at the time of the commission of the unlawful act of gambling, which act took place not later than February 19, 1962, i. e., one day before the taxpayer's arrest. Hence, the Court concluded that the lien of the United States which arose on July 5, 1962 did not attach to the monies. The United States has appealed this matter to the Superior Court of New Jersey, Appellate Division.

Staff: United States Attorney David M. Satz, Jr.; First Assistant United States Attorney Vincent J. Commissa (D. N. J.); Jerome H. Fridkin (Tax Division)

JURISDICTION - NONTAX STATUTE OF LIMITATIONS

MILLER ACT SUIT BROUGHT BY TAXPAYER AGAINST ITS DEBTOR WHICH WAS BARRED BY STATUTE OF LIMITATIONS MUST BE DISMISSED DESPITE GOVERNMENT INTERVENTION TO FORECLOSE TAX LIEN AGAINST DEBT.

United States of America, for the use and benefit of Smith Construction Co. of Florida, v. E. L. Walker, Inc., et al., (N. D. Fla., Civil No. 1322; April 3, 1968; D. J. 5-17-430) (68-1 USTC Par. 9342)

The plaintiff-taxpayer corporation brought suit under the Miller Act, 40 U. S. C. 270(a), against the prime contractor for claims arising from work done and material furnished under a Government contract. The United States intervened to foreclose federal tax liens against any sums found owing to the plaintiff-taxpayer and to reduce the tax liabilities to judgment.

At the hearing, uncontroverted testimony was introduced showing that the suit was not brought within the year following the last date work was performed by the plaintiff. The defendant then moved to dismiss the action on the basis that the Miller Act statute of limitations barred this suit. The Government argued that its intervention served to confer jurisdiction upon the Court to hear and determine the claim; the Government further argued that, in any event, the claim of the Government against the taxpayer corporation should be allowed to continue despite dismissal of the debtor--prime contractor.

The Court could find no language in any of the various tax statutes or general jurisdictional statutes which would "obviate the plain threshold requirement that a viable cause of action be presented" to the Court. The Court found that the statute of limitations had run and there was no right to force the plaintiff-taxpayer to continue a suit or to force the defendant--prime contractor to defend when the statute provided protection against such suits. The Court thereupon dismissed the entire action.

The Government is considering taking an appeal from this decision.

Staff: United States Attorney Clinton Ashmore; Assistant United States Attorney C. W. Eggart, Jr. (N. D. Florida)

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