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UNITED STATES DEPARTMENT OF JUSTICE

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NEWS NOTES

AUSA ROGER WILLIAMS COMMENDED BY J. EDGAR HOOVER

April 11, 1969: FBI Director J. Edgar Hoover, in a letter to Attorney General Mitchell has commended the performance of Assistant United States Attorney Roger T. Williams of the Eastern District of Virginia, in the prosecution of the Hendricks case. Mr. Hoover said, "Through his astute examination of a hostile witness he was successful in having introduced into evidence two signed statements which were extremely damaging to the defense. His persuasive and articulate summation was in no small measure responsible for the jury returning a guilty verdict in this trial."

ASSISTANT A.G. LEONARD DEFENDS CIVIL RIGHTS EFFORTS OF NIXON ADMINISTRATION

Jerris Leonard, Assistant Attorney General in charge of the Civil Rights Division, said that the goal of equal rights has been pursued vigorously by this Administration. In a speech before the Anti-Defamation League of B'nai B'rith in Washington, D.C., Mr. Leonard added: "I challenge anyone to answer to this record of the last 90 days which shows the firmest determination to enforce the law where it is applicable, to obtain new court rulings where necessary, to eliminate illegal discrimination wherever it exists, to assure that this President, that this Attorney General, and that this Administration will carry the mandate of humanity, not of partisan politics, to assure our black citizens an equal place in this prosperous society ... In the last 90 days we have filed suits against job discrimination, against housing discrimination, against discrimination in education and in public accomodations, and we will continue. Where more suits are called for, they will be filed. Where negotiation is in order, we will negotiate." The Assistant Attorney General went on to say that the Civil Rights Division can not do the job alone - not with ten times the resources it already has - "for the job must be done by all America and all Americans. But we can ... spark the conscience - bring to the forefront for all our citizenry to see what human injustice is and how extensive it is." He concluded with a plea for a realistic approach to the problems of racial discrimination in our society: "Some idealists, of course, have proposed great crusades. But I assume that you and I are realists and, in the world of reality, money, political power, education and jobs are more concrete foundations upon which to pin our hopes on the elimination of racial discrimination. And these jobs and votes and schools must be provided more quickly. We have seen, in the last two years, the mass destruction which racial resentment has vented in our great cities."

DEPARTMENT SEEKS ELIMINATION OF RACIALLY SEPARATE LONGSHOREMEN'S UNIONS IN MARYLAND

April 22, 1969: The Department of Justice has sought a court order to require the elimination of two racially separate longshormen's union locals in Baltimore, Maryland.

Attorney General John N. Mitchell said the civil suit, filed in U.S. District Court in Baltimore, is the first federal employment discrimination case brought in Maryland.

Named as defendants in the action, brought under Title VII of the Civil Rights Act of 1964, are the International Longshormen's Association and its Atlantic Coast District, and Locals 829 and 858. The suit says that membership of Local 829 is 99 percent white and the membership of Local 858 is 99 percent Negro, although both do substantially similar work in loading and unloading ships in the Port of Baltimore. Local 829 has 1161 members and Local 858 has 1386 members.

Each local, the suit alleges, maintains a hiring hall and sends out almost all work gangs that are either all-white or all-Negro. As a result of the alleged practice, the suit says, Negro longshoremen receive less work and less desirable work than white dock workers.

DEPARTMENT CHARGES MARYLAND REAL ESTATE COMPANY WITH "BLOCKBUSTING"

April 24, 1969: The Department of Justice has charged a Baltimore real estate company with engaging in "blockbusting" in violation of the 1968 Civil Rights Act. The civil suit, which was filed in U.S. District Court in Baltimore, was the first case brought under the 1968 prohibition against "blockbusting" and was the first housing suit brought in Maryland.

The Baltimore suit named Elaine and Allen S. Mintzes, a couple owning and operating Castle Realty Co., as defendants. It asked the court for an injunction to halt the alleged discriminatory practices and an order directing the defendants to "take such affirmative steps as may be necessary and appropriate to correct the effects of the past unlawful practices".

The suit accused the defendants of "inducing and attempting to induce persons to sell dwellings by representations regarding the entry and prospective entry into the neighborhood of persons of a particular race or color".

A.G. URGES BUSINESSMEN TO ACTIVELY ASSIST THE ANTI-CRIME EFFORT

April 28, 1969: Attorney General John N. Mitchell urged the American business community to join a united anti-crime organization "which would solicit volunteer manpower, money and other resources from the private sector to engage in anti-crime programs".

"It is our hope", the Attorney General said in an address before the U.S. Chamber of Commerce, "that the American businessman with his enormous technical resources, imagination and money will make an exciting and effective partner--through this private organization--with state and local governments in their efforts to decrease crime."

Among the programs to which the Attorney General said the private sector can be helpful are juvenile training, prison rehabilitation, court reform, and law enforcement reorganization.

The Attorney General also asked financial institutions to give "special attention" to persons who say that their only other alternative for borrowing is the organized crime loanshark.

Claiming that organized crime's usurious loan business is "a problem of the money market", the Attorney General added: "if the borrower appears to be a bad credit risk, I suggest that the financial institution reevaluate his request and even be prepared to absorb minimal loss and the higher servicing charges that normally are involved.

"If a bricklayer or a stevedore or a small merchant can manage to pay 20 per cent a week to a loanshark--which is the standard rate--certainly a method can be found for him to pay eight or 10 per cent a year to a financial institution. This is the type of ingenuity which has made the American businessman the keystone to our prosperity."

He said that many of organized crime's employees come from the ranks of former convicts and that many of their prospective employees will come from the ranks of juvenile criminals. Perhaps, "the American businessman should make a special effort to compete for this labor pool by offering--as some corporations do now--to employ released offenders if they are skilled, to train the unskilled and to cooperate with penal institutions and work release programs."

Referring to juveniles, he said, "in the ghettoes especially, dope, gambling and petty crime may appear to be a way to escape from slum life. Here again, the businessman may be able to offer plant training programs to give unskilled juveniles a better alternative than numbers running and selling marihuana."

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POINTS TO REMEMBER

BANK ROBBERY

Larceny by Trick Embraced by Bank Robbery Statute - 18 U.S.C. 2113(b)

A question was recently presented to this Division on whether 18 U.S.C. 2113(b) prohibits any form of obtaining money through false representations. This inquiry was brought about by our previous article in the United States Attorneys Bulletin, Vol. 15, No. 13, p. 347, in which we reported the decision in Le Masters v. United States, 378 F.2d 262.

The Le Masters case dealt with a fact situation wherein the substantive crime would be false pretenses, namely, the obtaining of both possession and title to personal property by fraudulent representations. The Court of Appeals for the Ninth Circuit held, and the Department acquiesced, that Congress did not intend to include the crime of false pretenses within the ambit of the Federal bank robbery statute.

False statements by a person which induce a bank to turn over the possession of funds to that person, but where there is no intention on the bank's part to convey title, constitute the crime of larceny by trick in violation of 18 U.S.C. 2113(b). An example is a person who falsely poses as a Wells Fargo employee authorized to pick up certain funds for delivery to a stated place, and by the impersonation induces the bank to relinquish possession of the funds. The bank did not intend to transfer title to the impersonator, just as it had no intention to transfer title to Wells Fargo. Title remained in the bank. Abuse of title is larceny and, as such, is covered by 18 U.S.C. 2113(b).

THREATS TO FEDERAL OFFICIALS BY MILITARY PERSONNEL

Recently, it came to our attention that some military personnel were engaging in a calculated campaign to avoid further military service by writing obscene threatening letters to Federal officials, anticipating that as youthful offenders they would receive light or suspended sentences in Federal court and administrative discharges from the military. The operation of this scheme to terminate military service was thwarted by an agreement between the Department of Justice and Defense in which it was agreed that the military would assume jurisdiction, except in four instances, and would give priority attention to the disposition of these matters. The

Defense Department stated that, absent overriding considerations to the contrary, individuals would not be administratively discharged from the Armed Forces solely by reason of the accusation or conviction of such offenses.

The four exceptions to the policy established by the military, as stated above, are those instances where (a) the United States Secret Service is conducting an ancilliary investigation in some aspect of the case, (b) the facts of the case are of such serious nature as to dictate trial in federal court, (c) there are specific problems hampering trial by court-martial that would not be present in a federal court trial, or (d) the whereabouts of the accused is not known or he is out of the geographical area of the military commander concerned. In those instances the Department of Justice will assume jurisdiction.

The coordinated effort of the Secret Service, the military and United States Attorneys, rapid prosecution of offenders and failure to obtain the objective of release in the military have apparently retarded or halted the spread of this scheme.

CRIMINAL TAX MATTERS

Particular attention is invited to the report and comment in this issue on the Supreme Court's April 2, 1969 decision in the McCarthy case on proceedings on pleas offered in criminal tax cases. The Supreme Court reversed the conviction because Rule 11 had not been strictly complied with because the trial judge did not inquire personally of the defendant whether he understood the nature of the charge. The United States Attorneys should exercise particular care that the record made in cases disposed of by pleas reflect full and precise compliance with each requirement of Rule 11.

TRANSPORTATION OF FEDERAL PRISONERS FOR USE AS WITNESSES AT TRIAL

The Executive Office has received complaints from the Executive Office for U.S. Marshals that the United States Attorneys in certain districts are substantially increasing the expenses involved in transporting witnesses from federal prisoners by their failure to anticipate in advance of trial which witnesses will be called in the trial. When the U.S. Marshal's office is given only a few days to produce a witness, the Marshall must usually use commercial air transportation, which runs into considerable expense because two deputies are usually required to fly to the prison and accompany the prisoner to trial. We would urge that the United States

Attorney avoid this practice of last-minute notification by advising the U.S. Marshal prior to trial of any possible witnesses who would have to be transported from a federal detention center for trial, in order that the Prisoner Coordination Unit of the U.S. Marshal's office can arrange transportation by car.

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ANTITRUST DIVISION

Assistant Attorney General Richard W. McLaren

DISTRICT COURT

CLAYTON ACT

COMPLAINT UNDER SECTION 7 OF ACT.

United States v. Ling-Temco-Vought, Inc., et al. (W.D. Pa., No. 69-438, April 14, 1969; D.J. 60-037-6)

On April 14, 1969 a civil action was filed in the U.S. District Court in Pittsburgh, Pennsylvania, challenging the acquisition by Ling-Temco-Vought, Inc. (LTV) of a controlling stock interest in Jones & Laughlin Steel Corporation (J&L) under Section 7 of the Clayton Act. The case was assigned to Judge Louis Rosenberg.

On the same date on the consent of all parties Judge Rosenberg signed a preliminary injunction. The terms of the preliminary injunction were based on an agreement reached with counsel for the defendants on March 26, 1969, a copy of which was attached to the complaint.

After acquiring 63% of J&L's outstanding shares in June 1968, LTV early this year transferred the shares to a new LTV subsidiary, Jones & Laughlin Industries, Inc. (JLI). On March 17, 1969 LTV, through its subsidiary JLI, offered to buy the remaining J&L common stock in exchange for securities of JLI. Under the terms of the March 26 agreement as implemented by the preliminary injunction, LTV may retain no more than 81% of J&L stock. While such holdings would permit LTV to realize the tax benefits of filing a consolidated tax return with J&L, LTV agreed, in return, to keep completely separate the business and financial operations of J&L. LTV also agreed that if the Government wins the suit on the merits LTV will divest itself of all its stock interest in J&L.

LTV has, since 1961, acquired the stock or assets of 33 corporations including J&L, and has become the 14th largest American industrial corporation with current sales estimated at more than $3 billion a year. LTV, through its subsidiaries, is engaged in the design, development and production of numerous products, and in furnishing services. It is a major manufacturer of jet fighter planes and aerospace equipment (LTV Aerospace Corp.). It is one of the largest nonintegrated manufacturers of copper wire and has begun production of aluminum wire (The Okonite Company). It is the largest

seller of sporting goods in the nation (Wilson Sporting Goods Co.). It is the country's third biggest meat packer (Wilson & Co.). It owns the seventh largest commercial airline (Braniff Airways, Inc.) and the third largest car rental firm (National Car Rental System, Inc.). LTV is an important factor in the sale of loudspeakers and sound equipment (LTV-Ling Altec Co. Inc.). It manufacturers chemicals and pharmaceuticals (Wilson Pharmaceutical & Chemical Co.) as well as electronic controls (LTV Electrosystems, Inc.) and provides computer services (Computer Technology, Inc.).

J&L is a large, fully integrated steel manufacturer, ranking as the country's sixth largest steel producer, 61st largest American industrial corporation with assets of more than $1 billion, and 96th largest domestic company with sales in 1967 of $900 million. J&L's product mix includes: hot and cold rolled and coated sheets and strip; tubular products; hot rolled and cold finished bars; tin plate and black plate; plates and structural shapes; wire products. In 1967 it accounted for 5 to 10 percent of national production of the steel products it manufactured.

The complaint charges that the merger violates the Clayton Act because it may substantially lessen competition or tend to create a monopoly in several respects. First, it alleges that potential competition between the two companies is eliminated. Specifically, it is charged that before the acquisition LTV was a potential competitor in certain product lines in which J&L is a substantial factor, including various phases of the steel industry. Similarly, the complaint alleges that J&L was potentially a competitor in various product lines in which LTV is engaged, such as copper and aluminum wire and cable. The complaint further alleges that both companies were potential competitors in industries in which neither was involved, but which both considered entering, including high alloy steels, primary aluminum, building materials, machine tools, and industrial automation processes.

Second, the complaint states that a firm's reciprocity power and ability to benefit from reciprocity effect grows as its purchasing requirements and product diversity are increased. The complaint alleges that the acquisition of J&L by LTV significantly enhances the ability of the combined company and its suppliers to increase their sales through reciprocity and reciprocity effects, to the detriment of competition. The complaint charges that J&L has actively participated in reciprocity for many years, and alleges that its sales of steel may be benefited by reason of LTV's substantial position as a purchaser of automobiles and a shipper by rail. Similarly, it charges that the sale of mining cable by LTV's Okonite subsidiary may be benefited by reason of J&L's position as a substantial purchaser of mining products.

The complaint alleges that concentration of control of manufacturing assets in the nation is rapidly increasing. In 1948, the country's 200

largest corporations held 48% of the assets; by 1967 this increased to over 58 percent, largely as a result of mergers and acquisitions. Moreover, the scale and pace of merger activity is growing rapidly, with an increasingly large number of very large firms being absorbed by merger and ceasing their independent existence.

Finally, the complaint charges that the acquisition of J&L will further increase concentration and the trend to further concentration will be encouraged thereby (i) reducing the number of firms capable of entering concentrated markets; (ii) reducing the number of firms with the capability and incentive for competitive innovation; (iii) increasing the barriers to entry in concentrated markets; (iv) diminishing the vigor of competition by increasing actual and potential customer-supplier relationships among leading firms in concentrated markets.

The complaint asks the court to adjudge the merger unlawful, and to order LTV and JLI to divest themselves of all ownership interest in J&L.

Staff: Paul A. Owens, Jerry Z. Pruzan, Harold Bressler, Thomas R. Asher, Joel Davidow and Michael Mann (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General William D. Ruckelshaus

COURTS OF APPEALS

FEDERAL TORT CLAIMS ACT

CONTRACTOR'S EMPLOYEE OPERATING EQUIPMENT LEASED TO GOVT. HELD LOANED SERVANT OF GOVT., SO THAT GOVT. IS LIABLE FOR DAMAGE TO CONTRACTOR'S EQUIPMENT CAUSED BY NEGLIGENCE OF OPERATOR.

United States v. N.A. Degerstrom, Inc., et al. (C.A. 9, No. 22,709; March 13, 1969; D.J. 157-81-163)

Plaintiff leased some heavy equipment to the Government, complete with operator, for flood-control work. While obeying the general instructions of a Government employee on the site, the operator negligently damaged the machine. Plaintiff brought an action against the Government for this damage, claiming that at the time of the accident the operator was under the control of the Government and was therefore a "loaned servant", making the Government liable for his torts.

The district court found for the plaintiff, and we appealed. While we contested the finding that the operator was a loaned servant, our basic contention was that, in any event, a clause in the lease agreement shifted the loss to the plaintiff. The clause read:

> Article 5. Contractor's Responsibility. *** /I/t is understood and agreed that the Contractor assumes full responsibility for the safety of his employees, plant and materials and for any damage or injury done by or to them from any source or cause, except damage caused to * * * equipment by acts of the Government, its officers, agents or employees * * *.

The Court of Appeals, however, agreed with the district court and affirmed the judgment for the contractor. First, it refused to overturn his finding that the operator was a loaned servant. It then held that the term "employees" in the above clause did not refer to the general employment relationship, the right to hire and fire, etc. Therefore, during the

time in which the operator was a loaned servant of the Government he was also a Government employee under this provision, and the clause did not operate to shift the loss in any way.

Staff: Stephen R. Felson (Civil Division)

SELECTIVE SERVICE

SEVENTH AND TENTH CIRCUITS CONFLICT AS TO APPLICABILITY OF SECTION 10(b)(3) OF THE MILITARY SELECTIVE SERVICE ACT OF 1967.

James E. Foley v. Lewis B. Hershey (C.A. 7, No. 17,438; April 8, 1969; D.J. 25-265-715)

Joel D. Rich v. Lewis B. Hershey (C.A. 10, No. 13,469; April 1, 1969; D.J. 25-13-835)

These cases were brought by second year graduate students seeking deferments to the end of the school year under Section 6(i)(2) of the Military Selective Service Act of 1967, 50 U.S.C. App. 456(i)(2). They claimed to be entitled to such deferments notwithstanding the fact that they had already been deferred for their first year of graduate study "for one year only" pursuant to 32 C.F.R. 1622.26(b). They contended that their draft board's refusal to grant such additional deferments was "blatantly lawless" and that therefore pre-induction judicial review of their claims was not barred by Section 10(b)(3) of the Act, 50 U.S.C. App. 460(b)(3), under the Supreme Court's holding in Oestereich v. Selective Service Board, 393 U.S. 233. The Tenth Circuit agreed with the Government's position that Rich had "no absolute statutory right" to the additional deferment and that therefore Section 10(b)(3) barred pre-induction judicial review. The Seventh Circuit, on the other hand, held that Foley was entitled to receive such a deferment and that therefore the draft board's action was "blatantly lawless" rendering Section 10(b)(3)'s bar to pre-induction judicial review inapplicable.

Staff: Morton Hollander and Ralph A. Fine (Civil Division) (Foley case)
Former United States Attorney Lawrence M. Henry (D. Colo.) (Rich case)

VETERANS' REEMPLOYMENT

WHERE COLLECTIVE BARGAINING AGREEMENT BASES LENGTH OF VACATION ON YEARS OF "COMPENSATED SERVICE" WITH EMPLOYER, RE-EMPLOYED VETERAN IS ENTITLED TO HAVE TIME SPENT

IN MILITARY COUNT AS QUALIFYING YEARS OF "COMPENSATED SERVICE" IN DETERMINING LENGTH OF HIS VACATION.

R.C. Edwards, Jr. v. Clinchfield Railroad Co. (C.A. 6, No. 18518; March 12, 1969; D.J. 151-70-300)

Edwards, a veteran, began working for the Railroad in 1950. He left the Railroad's employment to serve for two years in the armed forces. He then returned to his job with the Railroad and has been working with them continuously since that time. Under the collective bargaining agreement, the length of Edwards' vacation was based on the number of years in which the employee had performed a minimum number of days of "compensated service". Edwards contended that by the end of 1964 he had performed 15 qualifying years of "compensated service", and he was therefore entitled to a 15-day paid vacation (which the collective bargaining agreement awarded to an employee with 15 years "compensated service"). The Railroad instead awarded Edwards a 10-day vacation which was provided under the collective bargaining agreement for employees who had 3 to 14 qualifying years.

Upon the Railroad's refusal to grant him a 15-day vacation, Edwards brought this action in the district court. The district court held for Edwards on the grounds that his longer vacation was a seniority right protected by Section 9 of the Universal Military Training and Service Act, 50 U.S.C. App. 459, which provides that a veteran shall be re-employed "without loss of seniority". The Court of Appeals affirmed on the basis of the opinion of the district court judge. In doing so, the Court of Appeals reached the same result as was reached on virtually identical facts in Morton v. Gulf Mobile & Ohio Railroad Co., ___F.2d ___ (C.A. 8) (decided January 2, 1969).

Staff: Robert E. Kopp (Civil Division)

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CRIMINAL DIVISION
Assistant Attorney General Will Wilson

COURTS OF APPEALS

MILITARY SELECTIVE SERVICE ACT

CONSTITUTIONALITY OF 1967 ACT UPHELD.

United States v. Daniel Thomas Fallon (C.A. 7, March 5, 1969; D.J. 25-23-3398)

The Court of Appeals, affirming Fallon's conviction for refusing induction, upheld the constitutionality of the Military Selective Service Act of 1967 against the claim that conscription, absent a declaration of war, violated the Thirteenth Amendment prohibition against involuntary servitude. The Court also rejected the argument that exemption of women from registration and service, the exemption of ministers and divinity students (IV-D), the deferments of fathers (III-A), students (II-S), and persons over 26 (V-A), were unrelated to the purposes of the Act and hence deprived him of equal protection of the law in violation of the Due Process clause of the Fifth Amendment. The Court also refused to hold imposition of a five-year sentence an abuse of discretion although it stated "We would have been better pleased had the sentence not exceeded three years", the maximum imposed by the U.S. District Court for the Northern District of Illinois, in the first eight months of 1968.

Staff: United States Attorney Thomas A. Foran; Assistant United States Attorneys John P. Lulinski, Michael B. Nash and David M. Hartigan (N.D. Ill.)

NOTICE TO PROCESSING OFFICER AT INDUCTION STATION IS NOT SUFFICIENT NOTICE TO LOCAL BOARD OF CONSCIENTIOUS OBJECTOR CLAIM.

Benjamin Parker Blades v. United States (C.A. 9, No. 23,190; February 28, 1969; D.J. 25-012)

Refusing to follow United States v. Stafford, 389 F.2d 215 (C.A. 2), the Court held that notice to the processing officer at the induction station is not sufficient notice of a conscientious objector claim. Citing Billings v. Truesdale, 321 U.S. 542 (also cited in Stafford) to the effect that the Selective Service System "is designed to operate as one continuous

process ... in which the civil and military agencies perform integrated functions", the Court pointed out that the induction officer is not an agent of the draft board and he has no power to reopen a draft classification. The Court said that the local board must have actual knowledge of the conscientious objector claim in time to at least consider whether the classification should be reopened. The Court also held that a claim of conscientious objection made on the required form (SSS 150) which was received by the registrant's local board one day after he was required to submit to induction came too late.

Staff: United States Attorney Cecil F. Poole
(N.D. Calif.)

NARCOTICS AND DANGEROUS DRUGS

USE OF FORMER GOVERNMENT AGENT, UNDER STATE INDICTMENT, AS WITNESS WITHOUT DISCLOSURE TO COURT AND DEFENSE COUNSEL WHILE CONSTITUTING FAULTY JUDGMENT IS NOT SUFFICIENTLY PREJUDICIAL SO AS TO REQUIRE NEW TRIAL.

United States v. Anthony Acarino (C.A. 2, No. 32421; March 18, 1969; D.J. 12-52-279)

Appellant was convicted after a jury trial of purchasing and concealing heroin in violation of 26 U.S.C. 4704(a) and 21 U.S.C. 174. The conviction was challenged on the ground, among others, that the prosecution suppressed material evidence.

One of the principal Government witnesses, a former narcotics agent, had at the time he testified been indicted by the state for crimes relating to the sale of a stolen car. He had so advised the prosecutor who did not inform the Court or defense counsel on the assumption it was of no relevance to the proceeding. After discovery of this fact, appellant moved for a new trial which was denied.

The Court agreed that such evidence of misconduct is not normally admissible for impeachment purposes and, further, found no merit in appellant's claim that even absent a showing of prejudice suppression of the information was a violation of due process. It pointed out, however, that while the conduct of the prosecutor was not deliberate but resulted from faulty judgment, it would have been wiser to disclose it regardless of the probability that it would have been inadmissible.

Staff: Former United States Attorney Joseph P. Hoey;
Assistant U.S. Attorney Jerome C. Ditore (E.D. N.Y.)

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LAND AND NATURAL RESOURCES DIVISION
Acting Assistant Attorney General Glen E. Taylor

COURTS OF APPEALS

PUBLIC LANDS

ASSERTION OF RIGHTS UNDER MINING CLAIMS OCCUPANCY ACT DISCRETIONARY EXCEPTION OF ADMINISTRATIVE PROCEDURE ACT; LIMITATION ON JURISDICTION UNDER MANDAMUS STATUTE, 28 U.S.C. 1361; ABSENT DUE PROCESS STATUTORY REQUIREMENT, HEARING NOT ESSENTIAL.

United States v. Walker (C.A. 9, No. 22,379; March 27, 1969; D.J. 90-1-18-764)

The Mining Claim Occupancy Act empowers the Secretary of the Interior to grant up to five acres in fee, or some lesser interest, in lands occupied for seven years prior to passage of the Act under invalid mining claims. Walker's application was denied on the ground that sporadic occupation of a cabin on the claim did not satisfy the Act, the facts being established by his application and a report of the Regional Forester. Asserting jurisdiction to review the administrative decision under the Administrative Procedure Act, 5 U.S.C. 701 et seq, the district court held that Walker was entitled to a formal hearing, undertook to set aside the order of the Secretary and directed such a hearing.

Reversing, the Court of Appeals held that the trial court lacked jurisdiction under A.P.A. because the exemption of agency action committed by law to agency discretion applied to the Mining Claim Occupancy Act and, the Court held, gave the Secretary complete discretion to make a conveyance. The Court then rejected jurisdiction under the mandamus statute, 28 U.S.C. 1361, adopting the Tenth Circuit holding that "An act is ministerial only if it is a command and so plainly prescribed as to be free of doubt".

As an independent ground for decision, that Court held that Walker was not entitled to a hearing, since the Mining Act gave no such right and the Administrative Procedure Act merely provided the procedure to be followed when some other statute gave a right to a hearing.

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

CONDEMNATION

LIABILITY OF FORMER OWNER REMAINING IN POSSESSION FOR WASTE AFTER TITLE HAS PASSED ON CONDEMNATION; TITLE DISPUTES; TAKING OF FEE INCLUDES GRAVEL INTEREST; FINALITY OF JUDGMENT QUESTIONED.

Garrett v. United States (C.A. 8, No. 18,758, February 12, 1969; D.J. 33-16-220-120, 33-16-220-235)

Appeals were taken by the Garretts from final judgments entered in two condemnation proceedings involving two tracts of land. The judgments were affirmed on the merits, the court specifically leaving open questions of finality. First, judgment for waste by cutting of timber after title vested upon filing of a declaration of taking was affirmed, as was the ruling on a boundary dispute with Slyhuise, both rulings being held to be not clearly erroneous. The judgment rendered in a title dispute as to another tract with the DeHaans was likewise sustained against Garretts' claim of adverse possession. These issues had been determined years prior to entry of judgment of compensation. The United States contended they were final when entered and, hence, that the appeals came too late. The Court of Appeals said that literally under Rule 54(b) no judgment in a condemnation case would be final and appealable until all matters relating to all tracts had been adjudicated. In a lengthy footnote, the Court recognized the practical difficulties that such literal application of Rule 54(b) would pose and said that, since neither party had briefed the issue, "we leave the resolution of the Rule 54(b) problem in condemnation to a more appropriate occasion". In view of this result, the Department does not believe that any departure from present judgment practices in condemnation cases is required.

As to compensation, the Court said:

> It is argued that the taking of a "fee simple" as specified in each complaint in these actions does not include the taking of an interest in a gravel lease, which appellants denominate "personal property". The Garretts are patently in error here. They rely principally on Comstock v. Iowa State Highway Comm'n., 254 Iowa 1301, 121 N.W.2d 205 (1963), which involved a taking under Iowa condemnation law of only a leasehold interest in property underlaid with sand and gravel. Such taking was of less than a fee. The Iowa court properly considered the lease interest as a separate item of property. Comstock, however, has no application to the present controversy where the fee simple is taken. A taking of the fee includes lesser interests such as a gravel lease on the property.

A. W. Duckett & Co. v. United States, 266 U.S. 149 (1924); Burkhart v. United States, 227 F.2d 659 (9th Cir. 1955).

> The parties had agreed that the commission should separately value the gravel leases. Accordingly, the commission made such valuation, which was confirmed by the court. In allocating the award for the fee, it was proper for the court, in this case, to deduct the value of the particular gravel lease from the value of the fee.

A claim for interest on funds deposited because of alleged misrepresentation of Government attorneys concerning rights thereto was rejected because not raised below.

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

GOVERNMENT IS NOT CONCERNED WITH DISTRIBUTION OF AWARD TO LESSOR AND LESSEE; LESSEE ONLY ENTITLED TO COMPENSATION FOR LEGAL RIGHTS NOT FOR PERIOD HE MIGHT HAVE REMAINED IN POSSESSION.

Scully v. United States (C.A. 10, No. 10,144, March 28, 1969; D.J. 33-17-224-61)

A farm owned by Scully, but leased to Meisinger, was condemned by the United States. A commission made an award for the land taken and then apportioned it between lessor and lessee. The district court entered judgment on the report.

The Court of Appeals reversed upon appeal by Scully. The Court first recognized that, since the parties did not attack the total award, the United States had no interest in division of it.

The facts showed that Scully had leased many farms to many tenants for long periods of years under one-year leases (Meisinger had been there since 1936, while the taking occurred in June 1965). This factor was reflected in a local market for the leased lands. The trial court had told the commission that, in determining the lessee's award, the commission could consider the custom reflected in the market. The Court of Appeals held this was erroneous, saying:

> Although a determination of the type and extent of the property interests taken upon an exercise of the federal power of eminent domain is governed by federal law, the

courts will normally look to the law of the state where the property is located in order to ascertain the relative rights of a lessor and lessee.

Considering a Kansas case, it concluded:

It is abundantly clear that to read a right of renewal into the present lease would not be a fair interpretation, even in view of an understandable sympathy for the lessee in this context. It is one thing to rely upon custom and usage to clarify incidental problems of lease interpretation, but it is quite another to extend the term or duration of the tenancy through such dubious means.

After considering United States v. Petty Motor Co., 327 U.S. 372 (1946), and Emery v. Boston Terminal Co., 59 N.E. 763 (Mass. 1901), quoted therein, the court said;

We conclude that the lessee of a one year term is not entitled to recover the market value added by a mere expectation that the lease will be renewed.

It concluded that the value placed upon tenants' improvements was affected by the erroneous leasehold valuation and said "to avoid even the possibility that the misconceived leasehold evaluation may have contributed to an improper appraisal of the worth of the improvements, both the leasehold and the improvements should be reevaluated".

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

DISTRICT COURTS

INDIANS

CIVIL RIGHTS ACT OF 1968; VALIDITY OF COUNCIL ORDER BANNING NON-INDIAN FROM RESERVATION.

John Dodge, et al. v. Raymond Nakai, et al. (D. Ariz., No. 1209 Pct., February 28, 1969; D.J. 90-2-0-648)

This suit was instituted by a representative of a legal aid organization to enjoin the Chairman of the Navajo Tribal Council, and others, from enforcing a Council order permanently barring Theodore R. Mitchell, a nonmember of the Tribe, from access to the Reservation. At an earlier

date, the court rejected a motion to dismiss, holding, among other things, that the Civil Rights Act of 1968 applied to non-Indians. The court later ordered that the Area Director, an employee of the Department of the Interior, be dismissed as a defendant.

After a lengthy trial, entry of judgment was directed in favor of the plaintiffs enjoining enforcement of the removal order. In an opinion supporting the order, Judge Craig held primarily that, although Article II of the Treaty of 1968 between the United States and the Navajo Tribe gave the Tribe power to exclude non-Navajos from the Reservation (with the exception of federal employees or those authorized by federal law), this authority was modified by Congress when it enacted Title II of the Civil Rights Act of 1968, 25 U.S.C. 1301-1303. In particular, the court held that the threatened action of the defendants was unlawful (a) under 25 U.S.C. 1302(8) as lacking in due process, (b) under 25 U.S.C. 1302(1) as abridging freedom of speech, and (c) under 25 U.S.C. 1302(9) as a bill of attainder.

Staff: Thomas L. McKevitt (Land and Natural Resources Division)

PUBLIC LANDS

TAYLOR GRAZING ACT; SCHEDULE OF HIGHER FEES; FEES TO BE PAID BY PUBLIC LAND GRAZING PERMITTEES HELD WITHIN AUTHORITY OF SECRETARY OF INTERIOR.

J. R. Broadbent v. Walter J. Hickel (D. Utah, No. C 3-69, March 12, 1969; D.J. 90-1-12-408)

The original Taylor Grazing Act of June 28, 1934, 48 Stat. 1269, authorized the Secretary of the Interior to issue permits "upon the payment annually of reasonable fees in each case to be fixed or determined from time to time". Fees established at the rate of $.05 per A.U.M. survived a challenge to their validity in Brooks v. Dewar, 313 U.S. 354 (1941). The uniform fee rose slowly over the years, reaching the sum of $.33 per A.U.M. in 1968. In 1951, Congress enacted general legislation requiring all branches of the Government to achieve a higher rate of return on the use of Government facilities, 31 U.S.C. 483(a).

In the early 1960's, the Department of the Interior and the Department of Agriculture conducted an extensive investigation of public and private grazing costs and, as a result, concluded that a uniform charge of $1.23 per A.U.M. should be made for all Forest Service and B.L.M. grazing permits. Because of the impact of this substantial raise, it was determined that the fees would be raised over a 10-year period, reaching $1.23

per A.U.M. in 1979. When the Secretary of the Interior published regulations in January of this year, announcing this policy and establishing a $.43 fee for 1969, this suit was instituted by a group of sheep ranchers challenging the validity of the proposed increase.

The charge of invalidity was based primarily on the following grounds: (a) That the impact of the increase on the cattle industry would be so great that the new regulation was clearly "unreasonable"; (b) that the new regulation did not take into account "public benefits over and above those accruing to the users of the forage resources for livestock purposes", as required by a 1947 amendment to the Taylor Grazing Act; (c) that the legislative history of the Taylor Grazing Act established that it was not intended to be a revenue-producing measure; (d) that the increase would violate one of the purposes of the Act, i.e., to provide stability for the livestock industry; and (e) that failure to recognize the permittee's capital investment in his permit as a cost in determining public land grazing costs was unreasonable and confiscatory.

After an extended hearing, a preliminary injunction was denied on February 3, 1969. The case was brought on for trial on March 7, 1969. At the conclusion of the trial, the court, in a lengthy oral opinion, upheld the action of the Secretary and directed the entry of judgment in favor of the defendant. Judge Christensen's opinion reviewed the history of the Taylor Grazing Act and its amendments, reviewed the extent of consultation with the industry before the new regulations were announced and reached the conclusion that the Secretary did not act beyond his authority.

At the same time this suit was instituted, two basically similar actions were filed in the U.S. District Court for the District of New Mexico. Both suits were filed as class actions. The second suit was brought against the Secretary of Agriculture and involves a different legal and historical background. Trial of these cases (which were consolidated) was completed on March 18, 1969. No decision has been announced pending the submission of briefs.

Staff: Assistant United States Attorney Ralph Klemm (D. Utah); Thomas L. McKevitt (Land and Natural Resources Division)

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TAX DIVISION

Assistant Attorney General Johnnie M. Walters

SUPREME COURT

RULE 11 INTERROGATION OF DEFENDANTS

TAX EVASION CONVICTION REVERSED BECAUSE RULE 11 QUESTIONS BY JUDGE DID NOT COVER DEFENDANT'S UNDERSTANDING OF CHARGE.

William J. McCarthy v. United States (Sup. Ct., No. 43, October Term. 1968; decided April 2, 1969; 37 Law Week 4285)

The defendant entered a plea of guilty in the Northern District of Illinois to one of three counts of tax evasion on July 15, 1966, after the commencement of his trial had been adjourned from June 30 to that date due to his illness. Before accepting the plea the trial court addressed the defendant and determined from him that he wanted to plead guilty and understood the consequences. On prompting from the prosecutor the court further elicited from the defendant that no threats or promises had been made and his plea was entered on his "own volition". At the sentencing two months later, the defendant denied deliberation and said he was neglectful and inadvertent. The trial court nonetheless imposed a one-year sentence and a $2500 fine. The defendant appealed his conviction on the ground that Rule 11 of the Federal Rules of Criminal Procedure had not been complied with by the sentencing judge because he did not, as the Rule requires, either (1) ascertain from the defendant personally that he understood the nature of the charge, or (2) determine that there was a factual basis for the charge. The Court of Appeals for the Seventh Circuit affirmed.

The Supreme Court reversed because Rule 11 had not been strictly complied with in that the trial judge did not inquire personally of the defendant whether he understood the nature of the charge. In the process of underlining the ways in which the defendant might thereby have been misled, the Court conjectured that had he fully understood the charge, he could have concluded he was guilty only of one of two lesser included offenses, citing 26 U.S.C. 7207 and 7203, both misdemeanors.

In the light of the McCarthy opinion, the United States Attorneys should exercise particular care that the record made in cases disposed of by pleas reflect full and precise compliance with each requirement of Rule 11.

The Supreme Court's reference to the two misdemeanor provisions as available lesser included offenses of 26 U.S.C. 7201 (see Sansone v. United States, 380 U.S. 343) necessitates three caveats to United States Attorneys.

First, the districts courts may not properly accept pleas of guilty or nolo contendere to lesser included offenses over the prosecutor's objection; the Government is entitled to a trial of the offense charged. The Department's policy is to firmly oppose this kind of compromise of evasion or other felony tax charges.

Second, the United States Attorneys are reminded that there has been a long-standing directive of the Department that the Government will not invoke Section 7207 for any purpose; its repeal has been repeatedly sought by the Treasury Department because it inappropriately "laps" the area of the major felony sanctions, 7201 and 7206(1), and is an invitation to water down these serious charges.

Third, Section 7203 could be a lesser offense within the felony of evasion only if no return were filed or a tax unpaid, but not when a false return or other affirmative evasion conduct is alleged. And Section 7207 is, in the usual case, not the lesser included offense of Section 7201, but the least included offense; in most evasion cases charging the filing of a false return there is no challenge to the signing of the return by the defendant, hence Section 7206(1) is proved before Section 7207 is reached. Cf. Berra v. United States, 351 U.S. 131.

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