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POINTS TO REMEMBER

BANK ROBBERY

FALSE PRETENSES NOT EMBRACED BY BANK ROBBERY STATUTE - 18 U.S.C. 2113(b).

A recurring problem in bank robbery prosecution has been transactions involving coin roll artists, short change schemes, and misrepresentations of identity. A taking by false pretenses is not a form of common law larceny, as is larceny by trick. False pretenses is characterized by false representations to induce a willing transfer of possession and of title, whereas larceny by trick induces only a willing transfer of possession and not of title.

A recent incident in Kentucky illustrated just this difference. Bank A has at times requested a transfer of money from Bank B when the former did not have sufficient cash on hand for normal operations.

A man using the name E. Curren bought a $20 cashier's check from Bank A. Subsequently, a caller, identifying himself as an employee of Bank A, telephoned Bank B and asked for $20,000. Afterwards, a man appeared at Bank B and presented a cashier's check for $20,000 drawn on the first bank. It was later discovered that the check number was the same as the one bought the week before from Bank A. The amount had been altered to $20,000, as had the name to E. Currency.

The United States Attorney's office for the Western District of Kentucky correctly advised that this was not a violation of the Federal bank robbery statute. Since it is clear that Bank B intended to transfer both possession and title to the money in exchange for the cashier's check, the offense was not larceny by trick but, rather, false pretenses. This is the type of crime with which the local authorities can adequately deal.

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ANTITRUST DIVISION

Assistant Attorney General Richard W. McLaren

DISTRICT COURT

SHERMAN ACT

CT. DENIES MOTION FOR SUMMARY JUDGMENT OF BOTH PARTIES IN LAMP CASE.

United States v. General Electric Co. (S.D. N.Y., No. 66 CIV 3118; August 18, 1969; D.J. 60-9-172)

On August 18, 1969, Judge Tyler denied both plaintiff's and defendant's motions for summary judgment, which had been argued on April 9, 1969. This case represents the Government's third challenge of the legality of General Electric's system of fixing the retail prices of its lamps by consignment to agents. The theory of the Government's motion was that Simpson v. Union Oil Co., 377 U.S. 13 (1964), changed the law of the 1926 General Electric decision by the Supreme Court, which held that genuineness of the agency relationship determines legality. General Electric cross moved for summary judgment on the ground that res judicata bars this suit and on the further ground that, in the light of Schwinn, the rule of reason should apply.

In denying the Government's motion Judge Tyler concluded that he was bound by the majority opinion in Simpson, which distinguished the 1926 General Electric decision on the ground that there were patents in that case. He held that, since the majority in Simpson had the opportunity to overrule General Electric but did not do so, he "must regard the 1926 decision as binding law, at least on its own facts".

Judge Tyler did not adopt General Electric's argument that the rule of reason is applicable to its consignment system of price fixing. He noted that Schwinn applied the rule of reason to territorial and customer restrictions where price fixing was absent. He held that that rule is not applicable to vertical price fixing on resales by competing consignees and stated "that absent patents, the price fixing in this case is a per se violation of the Sherman Act, and that for this reason alone summary judgment cannot be granted in favor of GE". Judge Tyler added that his second reason for denying summary judgment to defendant rests on uncertainty concerning the relevant patent facts. General Electric may have controlling patents on only some of its lamps distributed by consignment and may be found to be linking the distribution of unpatented lamps to that of those controlled by patents. He concluded that if General Electric has either no patent control or patents controlling only some of the lamps distributed, the factual situation would be legally different from that existing when the 1926 case was decided and under those circumstances the doctrine of res judicata would not apply.

Defendant has moved for reargument.

Staff: Edna Lingreen, George J. Luberda
(Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General William D. Ruckelshaus

COURTS OF APPEALS

FEDERAL TORT CLAIMS ACT

GOVT. NOT LIABLE FOR DEATH OF CONTRACTOR'S EMPLOYEE DUE TO SAFETY HAZARD ON JOB.

Market Insurance Co. v. Killion (C.A. 5, No. 26,410; decided September 8, 1969; D.J. 157-41-4)

Plaintiffs' decedent was an employee of a company which had a contract with the Corps of Engineers to remove brush, logs and stumps from Tchula Lake to accelerate the flow of water during flood conditions. While returning to camp in a motor boat, another employee was thrown into the water when the boat struck a submerged highway bridge turntable. Plaintiffs' decedent had a heart attack and died from shock while attempting to rescue the other employee. The district court dismissed his widow's action under the Tort Claims Act, finding that it was the sole duty of the contractor to warn its employees of any hidden hazards on the job. The court rejected plaintiffs' contention that the Corps of Engineers had a non-delegable duty to give warning of latent hazards.

The Court of Appeals affirmed. It rejected the contention that the provisions of the contract required the Corps of Engineers to communicate safety information to the contractor's employees. The contract in question was a standard form. It required the contractor to comply with the Corps of Engineers Safety Manual and with any other safety directions the contracting officer might give. It also provided that the Government would have inspectors on the job. The Corps of Engineers Safety Manual required the contractor to place warning signs where necessary for the protection of workmen or the public. The Court of Appeals rejected the contention that these contractual provisions created a duty on the part of the Government: "Issuance of regulations and a manual relating to a safety program does not render the government liable for the death of an employee of an independent contractor under the Federal Tort Claims Act." Further, the Court concluded: "Under the circumstances of this case, the Corps of Engineers' safety inspection activities did not amount to the undertaking of a duty to the plaintiffs' deceased."

Staff: United States Attorney Robert E. Hauberg;
Assistant United States Attorney Joseph E.
Brown, Jr. (S.D. Miss.)

RESERVISTS

RESERVIST WHOSE UNIT HAS BEEN DE-ACTIVATED IS SUBJECT TO CALL TO ACTIVE DUTY UNDER 10 U.S.C. 673a.

Dix v. Rollins (C.A. 8, No. 19,724; decided July 29, 1969; D.J. 25-43-668)

James Dix was a member of the Army Reserve. His reserve unit was de-activated in January, 1966. In October, 1966 Congress passed Public Law 89-687, later codified as 10 U.S.C. 673a, authorizing the President to activate any reservist "not assigned to, or participating satisfactorily in, a unit of the Ready Reserve". The Secretary of Defense then issued a Directive, published in the Federal Register (32 C.F.R. Part 100), which (1) stated that reservists are expected to participate satisfactorily in Ready Reserve units unless their unit has been de-activated, and (2) prescribed procedures for the activation of reservists who do not participate satisfactorily. On March 12, 1967, the Army sent out letters to all members of the Mobilization Pool, including Dix, advising the recipients that they would be vulnerable to activation if they did not establish their ineligibility. Dix provided information that his unit had been de-activated, and then received a reply stating: "You are not subject to call to active duty under the provisions of Public Law 89-687." At that time, Dix had been looking for a Reserve Unit connection, but abandoned these efforts after receiving the letter.

On March 30, 1968, a memorandum was issued by the Deputy Secretary of Defense, permitting activation of reservists who were not assigned to a unit. This memorandum was not published in the Federal Register, and Dix did not have notice of it. Pursuant to this memorandum, on May 15, 1968, Dix was sent a notice of call to active duty pursuant to 10 U.S.C. 673a. He reported for duty and brought this petition for habeas corpus, contending that the unpublished memorandum was ineffective to amend the prior directive which had been published in the Federal Register, and that the letter he received notifying him that he was not subject to active duty estopped the Government from ordering him to active duty. The district court dismissed the petition. Dix appealed.

The Court of Appeals affirmed. It read 32 C.F.R. Part 100 to establish a policy only for those reservists not participating satisfactorily in the unit they are assigned to. Thus the subsequent unpublished memorandum did not modify 32 C.F.R. Part 100; it merely established a new policy to implement that part of 10 U.S.C. 673a pertaining to the call up of reservists not assigned to a unit of the Ready Reserve. The Court of Appeals also read the letter which Dix received as merely informing him that he was not to be penalized or activated for failure to perform reserve duties. The Court concluded that there was nothing in the letter or the various regulations to support the conclusion that Dix would forever be exempt from a call-up.

Staff: United States Attorney Calvin K. Hamilton; Assistant United States Attorney Vernon A. Poschel (W.D. Mo.)

NATIONAL HOUSING ACT LOAN INSURANCE

MORTGAGEE OF DEFAULTED LOAN INSURED BY FHA AT 100% CANNOT RETAIN FUND OBTAINED FROM THIRD PARTY TO AVOID STATUTORY 1% DEDUCTION REQUIREMENT.

New York State Teachers' Retirement System v. George Romney, Secretary of Housing & Urban Development (C.A. 2, No. 33,347; September 11, 1969; D.J. 130-50-1996)

FHA insured a $12.4 million mortgage made by Teachers' Retirement for the construction of an Arizona retirement project under 12 U.S.C. 1713v, the insurance covering 100% of the outstanding balance of the loan. In connection with making this loan, Teachers' Retirement's assignor entered into an agreement designed to circumvent the deduction by FHA of 1% of the outstanding balance of the loan from the insurance proceeds in the event of default. This deduction is required by 12 U.S.C. 1713(g) when a mortgagee assigns the defaulted mortgage to FHA rather than foreclosing itself and transferring title to FHA in return for the insurance proceeds. Pursuant to this agreement, Teachers' Retirement obtained $124,104, representing 1% of the face amount of the loan, from the building contractor acting on behalf of the mortgagor. When, after default, FHA issued its debentures in satisfaction of its insurance commitment, it deducted $124,104 from the settlement (in addition to the statutory 1%) to offset this fund held by Teachers' Retirement. As a result, Teachers' Retirement's total recovery was 99%, the percentage permitted by statute to a mortgagee who does not undertake the expenses of foreclosure. Teachers' Retirement then brought this action, arguing that it was entitled to keep the money and that, at any rate, FHA was estopped from claiming the fund since it had knowledge of the agreement.

Judge Ryan entered summary judgment for the Government, in an opinion reported at 290 F.Supp. 346. He held that Teachers' Retirement should have transferred the fund to FHA under 12 U.S.C. 1713(g)(1), (g)(2), (g)(3), (g)(5) or (g)(6). Section 1713(g)(2) requires that a mortgagee prior to receiving the insurance proceeds assign to FHA "all claims of the mortgagee against the mortgagor or others, arising out of the mortgage transactions". Further, he noted the Government's argument that these provisions consistently "have been interpreted by FHA as applying to all manner of agreements designed to permit a mortgagee to avoid the 1% statutory discount", adding that "/s/uch a construction is compelled by the very broad wording of the statute". He rejected the estoppel argument sub silentio. The Court of Appeals for the Second Circuit affirmed from the bench.

Staff: Judith S. Seplowitz (Civil Division)

DISTRICT COURT

CONFLICT OF INTEREST

GOVT. MAY RECOVER SECRET GRATUITIES ACCEPTED BY EMPLOYEE ON GROUNDS OF CONFLICT OF INTEREST.

United States v. Melville A. Drisko (E.D. Va., September 15, 1969; D.J. 51-48-338)

Defendant, a former official of the Department of Agriculture, was found to have accepted cash in the net sum of $40,564.50, together with other gifts, from Anthony DeAngelis, the erstwhile "salad oil king". Also, defendant was found to have provided DeAngelis with confidential information and to have interceded on DeAngelis' behalf in dealings he was having with the Department of Agriculture.

Judge Oren R. Lewis held that the Government is entitled to recover the sum of such payments on a breach of agency or conflict of interest theory, and in addition, interest from the dates of the prohibited remissions. The court discounted defendant's contention that he was not in the same branch of the Department of Agriculture with which DeAngelis regularly dealt, and rejected the argument that the Government has other remedies available, such as criminal prosecution or tax claims.

The leading authorities cited by the court as entitling the Government to recover any undisclosed profits, commissions, gratuities or other emoluments received by a Government agent in such circumstances were United States v. Carter, 217 U.S. 286 (1910); United States v. Drumm, 329 F.2d 109 (C.A. 1, 1964), and United States v. Bowen, 290 F.2d 40 (C.A. 5, 1961).

Staff: Assistant United States Attorney C. P. Montgomery (E.D. Va.); L. Stanley Paige and Herbert B. Hoffman (Civil Division)

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CRIMINAL DIVISION

Assistant Attorney General Will Wilson

DISTRICT COURT

NARCOTICS AND DANGEROUS DRUGS

21 U.S.C. 176a DESIGNED TO DEAL WITH SMUGGLING AND TRANSPORTATION AND CONCEALMENT OF SMUGGLED MARIHUANA INDEPENDENT OF TRANSFER TAX PROVISIONS OF TITLE 26, U.S.C., AND DOES NOT CONSTITUTE VIOLATION OF FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION.

United States v. Santos Orosco Castro (E.D. Wisc., August 19, 1969; D.J. 12-85-22)

Defendant was indicted for receiving, concealing and facilitating the transportation and concealment of marihuana after importation in the U.S. contrary to law, knowingly and with intent to defraud the U.S. in violation of 21 U.S.C. 176a.

He moved to dismiss the indictment on the ground that the statute violates the constitutional privilege against self-incrimination. His argument rests on the premise that Section 176a is essentially a tax statute because of the inclusion of the words "with intent to defraud the United States" and that an intent not to pay the tax (transfer tax imposed by 26 U.S.C. 4741, et seq.) must be present.

The district judge in dismissing the motion pointed out that it was the obvious intent of Congress to deal with the smuggling of marihuana under Section 176a and not as a violation of any of the provisions of the general smuggling statute (18 U.S.C. 545) rather than intending to have two statutes punishing failure to pay the tax, since 26 U.S.C. 4744 already covers this problem.

The opinion points out that the decision in Leary v. United States, 395 U.S. 6 (1969), does not preclude a conviction under Section 176a if actual knowledge of importation can be established, and that Covington v. United States, 395 U.S. 57 (1969), deals only with the transfer tax statutes and is not relevant.

The court, therefore, concluded that Section 176a is independent of the marihuana tax provisions contained in Title 26, U.S.C., and hence does not require a person charged thereunder to incriminate himself.

Staff: United States Attorney David J. Cannon and Assistant United States Attorney Robert J. Lerner (E.D. Wisc.)

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TAX DIVISION

Assistant Attorney General Johnnie M. Walters

COURTS OF APPEALS

FEDERAL TAX LIENS

CT. HOLDS (1) THAT SENIOR FED. TAX LIEN MAY NOT BE FORECLOSED IN STATE PROCEEDING BROUGHT BY JUNIOR LIENOR WHEN U.S. HAS NOT BEEN NAMED AS A PARTY, AND (2) THAT SUPER-PRIORITY PROVISION OF FED. TAX LIEN ACT OF 1966 DOES NOT CONVERT INTO A SUPERIOR LIEN A JUNIOR LOCAL LIEN WHICH CEASED TO EXIST BECAUSE OF FORECLOSURE.

United States v. Jerome B. Bluhm (C.A. 7, No. 17,228; July 25, 1969; rehearing denied September 5, 1969; D.J. 5-23-4625)

In 1958, the Government assessed taxes against taxpayers for unpaid income taxes and filed proper notice of federal tax liens against them. They had also not paid 1960 local real estate taxes on their residence, 831 Ashland Avenue, Wilmette, Illinois, so the property was sold at a tax sale and a certificate of sale issued in 1962. When no redemption occurred within the statutory period, in November, 1964, an action for the issuance of a tax deed was begun, with notice to the Government which, however, had not been made a party under 28 U.S.C. 2410. Bluhm, the intervening defendant, acquired the property through the tax deed which was issued in June, 1965.

The Government brought an action to reduce taxpayer's liability to judgment and to foreclose the tax liens against 831 Ashland. Following a decision for the Government, Bluhm appealed to the Seventh Circuit.

The Court held that when the Government is a senior lienor, it is an indispensable party to any proceeding affecting its interest in the property. Thus, United States v. Brosnan, 363 U.S. 237 (1960), which held that the junior lien of the Government could be foreclosed without joining the Government as a party, does not allow the Government's senior lien to be foreclosed unless it is a party to the proceeding.

Under Section 6323(b)(6) of the 1954 Code as added by the 1966 Tax Lien Act, local real estate tax liens were granted a priority over previously filed federal tax liens. The Seventh Circuit held that this provision, however, was not intended by Congress to include within such super-priority provision liens which had ceased to exist because of previous foreclosure in 1964, since the state court in 1964 could not adjudicate the rights of the Government based on its senior lien under a law which did not exist until 1966.

Staff: United States Attorney Thomas A. Foran; Assistant United States Attorney Richard A. Makarski (N.D. Ill.); Crombie J.D. Garrett; Stephen H. Hutzelman & Thomas H. Boerschinger (Tax Division)

DISTRICT COURTS

INJUNCTION

TAXPAYERS' REQUEST FOR AN INJUNCTION TO RESTRAIN ENFORCEMENT OF SUMMONS ISSUED BY IRS TO BANK IS SUBJECT TO DISMISSAL FOR WANT OF EQUITY.

Leon S. Poirier & Southland Inns. Inc. v. Commissioner of IRS and Albert C. Fritz, Internal Revenue Agent (E. D. La., April 30, 1969; 299 F. Supp. 465; D. J. 5-32-906)

As part of an Internal Revenue investigation of the taxpayers, an Internal Revenue Agent issued a summons on April 18, 1969 to the National American Bank to appear and produce bank ledger sheets, deposit tickets, cancelled checks, loan accounts, credit accounts and financial statements of Leon S. Poirier concerning the period from January 1, 1969 until April 18, 1969.

On April 25, 1969, the taxpayers brought this suit to restrain the Commissioner and Revenue Agent Fritz from enforcing the summons against the witness-bank. The National American Bank was not a party to the action. The taxpayers contended that the Commissioner had no right to the records for a taxable year in which the returns were not yet due. The United States moved to dismiss the suit on the ground of lack of jurisdiction in that the petitioners had no standing to maintain this action.

The court did not reach the merits of the petitioner-taxpayers' contention, but dismissed the petition for want of equity. The court ruled that the petitioners had an adequate remedy at law by appearing or intervening at the point in time when the United States moved to enforce the summons in the district court. Reisman v. Caplin, 375 U.S. 440, 54 S. Ct. 508, 11 L. Ed. 2d 459 (1964). The court stated that if the Bank had indicated it would voluntarily comply with summons, then the petitioners could obtain an injunction against enforcement until the court ordered compliance pursuant to an action initiated by the United States. No such findings or conclusions were sought by the petitioners here.

The court also pointed out that it could not enjoin the enforcement of the summons because the witness-bank had not been made a party-defendant to the action. The court, citing Fitzmartin v. Bingler, 244 F. Supp. 541 (W. D. Pa. 1965), indicated that it could restrain the bank from complying until the United States initiated action to enforce the summons.

In a passing reference, the petitioners sought relief under the Administrative Procedure Act for review of their contention. However, the court pointed out that there was an adequate remedy available in court under Reisman v. Caplin and that if that procedure is followed no irreparable injury would result.

Staff: United States Attorney Louis C. LaCour; Assistant United States Attorney Charles H. White; and George F. Lynch (Tax Division)

ENFORCEMENT OF INTERNAL REVENUE SUMMONS

SUMMONSES WERE LEGALLY ISSUED WITHIN SCOPE OF 26 U.S.C. 7602; COEXISTENCE OF CRIMINAL AND CIVIL INVESTIGATIONS DOES NOT RENDER ILLEGAL A SUMMONS ISSUED PURSUANT TO SUCH INVESTIGATIONS.

United States & Bruce B. Miller v. E. J. Mothe, et al., Kevin L. Donaldson, Intervenor (E.D. La., Nos. 68-2172, 68-2173, 68-2174; August 21, 1969; D.J. 5-32-882, 5-32-883, 5-32-884)

Three Internal Revenue summonses were issued by Special Agent Miller in his investigation of the taxpayer, Kevin L. Donaldson. The taxpayer obtained temporary restraining order enjoining the summoned parties from complying with the summonses until they had been so ordered by the court. Thus, it became necessary to institute these enforcement proceedings. The taxpayer was permitted to intervene in these actions which were consolidated.

The court granted the taxpayer-intervenor's request to take the oral depositions of various IRS agents. No documents were demanded at the depositions. Prior to the hearing, the taxpayer issued subpoenaes duces tecum directed to various IRS agents requiring the production of certain IRS manuals, handbooks, and investigative files. At the hearing, court granted the Government's motion to quash the subpoenaes, accepting the Government's argument that the intervenor's only purpose is seeking evidence of an immaterial fact, namely, that the special agent is seeking evidence of a criminal violation. United States v. Learner, 298 F.Supp. 1104 (S.D. Ill., 1969) (Bulletin, Vol. 17, No. 19, p. 522).

With regard to the merits, the court found that although Special Agent Miller admitted his responsibility is primarily in the criminal field and that his primary purpose in determining tax liability is to use it as a foundation in a criminal case, nevertheless the determination of civil tax liability is a part of Special Agent Miller's duties in assisting a revenue agent assigned to work with him.

It was held that the coexistence of criminal and civil investigations does not render illegal a summons issued pursuant to such investigations. Wild v. United States, 362 F.2d 206 (C.A. 9, 1966); Venn v. United States, 400 F.2d 207 (C.A. 5, 1968); Stanford v. United States, 358 F.2d 685 (C.A. 5, 1966). The court stated it would not express any opinion as to the admissibility of evidence obtained pursuant to these summonses in a possible future criminal prosecution of the taxpayer.

The taxpayer-intervenor has filed a notice of appeal.

Staff: United States Attorney Louis C. LaCour; Assistant United States Attorney Charles H. White; and Earl Kaplan (Tax Division)

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