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ANTITRUST DIVISION

Assistant Attorney General William H. Orrick, Jr.

Supreme Court Reverses District Court In Bank Merger Case. United States v. The Philadelphia National Bank, et al. (No. 83, October Term, 1962.) On June 17, 1963, the Supreme Court decided that the proposed merger of The Philadelphia National Bank and Girard Trust Corn Exchange Bank would violate Section 7 of the Clayton Act.

In agreement with the district court, the Court found that the "congeries" of products and services denominated "commercial banking" was a relevant "line of commerce" and that nothing in the bank regulatory statutes or the doctrine of primary jurisdiction operated to exempt commercial bank mergers from the antitrust laws. The Court reversed the district court's determinations (1) that Section 7 of the Clayton Act as amended in 1950 did not apply to statutory merger of banks because such mergers were not "stock" acquisitions; and (2) that even if Section 7 did cover such transactions, the government had not established that the merger would violate the statute. On the latter point, the district court had found that the four-county Philadelphia area was not a relevant market because the Philadelphia banks competed with one another in a much broader area, viz., the entire northeastern part of the United States. The court had also found that even if the four-county area were a relevant market, the merger would not substantially lessen competition since there would still be 40 banks left in that area.

The Supreme Court held that even though a statutory merger does not fit the Section 7 language as a "stock" acquisition, the legislative history of the 1950 amendment to the Act clearly showed Congress' intent to cover all types of corporate mergers and consolidations, and there was nothing to show Congress intended to exempt banks. On the geographic market point, the Court held that the proper question was not where the parties compete but "where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate". The Court found that banking was essentially a local business, that the bulk of the merging banks' business was located in the four-county area (which constituted the area in which the banks were permitted under Pennsylvania law to establish branches) and that that area seemed "roughly to delineate the area in which bank customers who were neither very large nor very small find it practical to do their banking business". The Court accordingly held that the four-county area was an appropriate section of the country in which to appraise the merger and, indeed, was a more appropriate geographic market than any other area.

On the ultimate question presented, the Court held that the issue of competitive effect was "not the kind of question which is susceptible of a ready and precise answer in most cases", that the Court "must be alert to the danger of subverting Congressional intent by permitting a too-broad economic investigation" and that wherever possible, the Court ought "to simplify the test of illegality . . . in the interest of sound and practical judicial administration." That simplified approach was appropriate in this case, the Court found, because the merger would produce a firm controlling "an undue percentage share of the relevant market" (30%) and would result "in a significant increase" (33%) in market concentration and on those facts the merger was "so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anti-competitive effects."

The Court rejected defense testimony by bank officers and others to the effect that competition would not be lessened. It said that this "lay evidence on so complex an economic-legal problem . . . was entitled to little weight, in view of the witnesses' failure to give concrete reasons for their conclusions." The Court thought there was little significance in the fact that there would still be 40 banking alternatives in the area after the merger since "the fundamental purpose of amending Section 7 was to arrest the trend towards concentration, the tendency to monopoly, before the consumers' alternatives disappeared through merger, and that purpose would be ill served if the law stayed its hand until ten, or twenty, or thirty more Philadelphia banks were absorbed."

The Court also rejected the contention that the merger was justified in order to permit the banks to compete with larger New York banks. The Court deemed this contention an "application of the concept of 'countervailing power' " and said: "If anti-competitive effects in one market could be justified by pro-competitive consequence in another, the logical upshot would be that every firm in an industry could, without violating Section 7, embark on a series of mergers that would make it in the end as large as the industry leader."

Finally, the Court rejected the banks' contention that a larger bank was needed in Philadelphia. It said that a merger whose effect may be substantially to lessen competition "is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence, and in any event has been made for us already, by Congress when it enacted the amended Section 7."

Judge Loevinger argued the case for the government. The decision was written by Justice Brennan; Justices Harlan, Stewart and Goldberg dissented. Justice White did not participate.

Staff: Charles H. Weston, Lionel Kestenbaum and Melvin Spaeth. (Antitrust Division)

Court Of Appeals Affirms Ruling Of District Court Granting Government's Motion For A Preliminary Injunction. United States v. Ingersoll-Rand Co., et al. (W.D. Pa.) On June 5, 1963, the United States Court of Appeals for the Third Circuit decided United States v. Ingersoll-Rand Co., affirming a preliminary injunction which prevents Ingersoll-Rand Co. from acquiring three firms in the field of coal mining machinery, pending the determination of the validity of the acquisitions under Section 7 of the Clayton Act. This is one of the rare cases in which we have succeeded in obtaining a preliminary injunction to prevent consummation of a proposed merger. The Third Circuit reviewed the voluminous findings of the district court and held that they were supported by the record. It also held that the lower court had properly applied the standards governing issuance of a preliminary injunction, having determined that it was likely the government would succeed on the merits, and having weighed the possibility of injury to defendants from an injunction, and the government's need for injunction as contrasted with the adequacy of subsequent divestiture. A novel point decided by the Third Circuit was that it had jurisdiction to review the preliminary injunction under 28 U.S.C. 1292(a)(1) even though the final judgment in the case would be directly appealed to the Supreme Court. We had proposed to the court that it did have such jurisdiction on the basis of a full study of the legislative history of the relevant statutes; up to now it was generally assumed that such interlocutory injunction orders were unreviewable. In our view, establishing such review jurisdiction will do much to assist us in persuading district courts to grant injunctions in appropriate cases. Note that this decision affects only interlocutory orders on injunctions; other intelocutory orders in Expediting Act cases remain unreviewable except by prerogative writ from the Supreme Court.

Staff: Lionel Kestenbaum, Donald F. Melchior, John M. O'Donnell, P. Jay Flocken, Joel E. Hoffman and Arthur J. Murphy, Jr. (Antitrust Division)

Court Overrules Motions To Dismiss Indictments And Suppress Evidence. United States v. Carlon Products Corp., et al., United States v. Triangle Conduit & Cable Co., et al., and United States v. The B. F. Goodrich Co., et al. (S.D. Ohio). On June 6, 1963, Judge Mel G. Underwood, District Judge for the Southern District of Ohio, at Columbus, denied without opinion defense motions to dismiss the indictments and suppress the evidence on the grounds that grand jury subpoenas duces tecum were issued and served prior to the convening and swearing-in of the grand jury, and consequently the subpoenas were invalid and amounted to an illegal search and seizure. Oral argument on the motions to dismiss and suppress evidence was held February 26, 1963.

The Government opposed the motions on the grounds that:

(1) The subpoenas were a process of the court which counsel for the Government had every right to apply for and have served;

(2) The service was proper because it called for production only after the grand jury was impaneled;

(3) This was legitimate action by Government counsel as part of the authority to conduct the grand jury investigation;

(4) There could be no illegal search and seizure here because there was, in fact, no seizure until after the grand jury was impaneled; and

(5) By virtue of their production, the defendants consented to the propriety of the process and thereby waived any right to claim irregularities.

In addition, in United States v. The B. F. Goodrich Co., et al., Criminal No. 8148, the court overruled the motion of the defendants Colonial Plastics and William Hatfield to transfer to the District Court in Cleveland on the grounds of inconvenience, expense, and the inability to get a fair trial in Columbus. All other defendants in this action filed statements with the court consenting to transfer. Government opposed on the grounds that the crowded condition of the docket in Cleveland made an early trial unlikely and that the defendants' claim of inconvenience and expense was not sufficient to warrant transfer.

Staff: Norman H. Seidler, Frank B. Moore, Dwight B. Moore and Tom Ford (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General John W. Douglas

SUPREME COURT

GOVERNMENT CONTRACTS

Courts Are Limited to Review of Administrative Record Under Wunderlich Act (41 U.S.C. 321), and Cannot Receive New Evidence on Issue of Fact Submitted to Administrative Determination Pursuant to Standard Disputes Clause of Government Contracts. United States v. Carlo Bianchi and Company, (June 3, 1963). Respondent entered into a contract with the Army Corps of Engineers for the construction of a flood control dam. In connection with the construction of a tunnel that was a part of the project, the contractor claimed that unforeseen conditions required additional work for which it should be compensated pursuant to the standard "changed conditions" clause of the contract. The contracting officer denied the claim, and respondent took a timely appeal to the Board of Claims and Appeals of the Corps of Engineers, where an adversary hearing was held and each side offered its evidence and had an opportunity for cross-examination. The Board ruled against the contractor, resolving certain conflicts in the evidence in favor of the Government, and holding that there were no unforeseen conditions requiring the additional work. Respondent brought suit in the Court of Claims under the Wunderlich Act (41 U.S.C. 321) asserting that the administrative decision was arbitrary, capricious, and not supported by substantial evidence. A Commissioner of the Court of Claims received evidence de novo, much of which had not been before the Board. The Court of Claims "on consideration of all the evidence," including that not before the Board, ruled that the Board's decision was not supported by substantial evidence. It held (following Volentine & Littleton v. United States, 136 Ct. Cl. 638) that in passing the Wunderlich Act Congress intended that the Court of Claims should receive new evidence in determining whether or not the administrative decisions pursuant to the standard disputes clause were supported by substantial evidence. The Government petitioned for certiorari on the basis of a conflict with decisions of courts of appeals.

The Supreme Court reversed, holding that, in the absence of allegations of fraud, judicial review under the Wunderlich Act was limited to review of the administrative record. The Court noted that terms such as "review," "arbitrary," "capricious," and "not supported by substantial evidence" have frequently been used by Congress in legislation and have consistently been associated with a review limited to the administrative record. Similarly, the Court found from the legislative history that the Congress had used these terms deliberately, with the intention that both sides produce all of their evidence at the administrative level.

The Court rejected respondent's contention that review limited to the administrative record would not be feasible in the Court of Claims because of its lack of power to remand a case to the administrative tribunal. The Court held that there would be some situations in which the reviewing court would be warranted in granting judgment for the contractor on the basis of the administrative record; and that, where the record did not warrant such a result, the Court could stay its own proceedings pending further administrative action, as it presently does in primary jurisdiction cases under the Interstate Commerce Act. Pennsylvania Railroad Company v. United States, 363 U.S. 202. The Court therefore remanded the case for further proceedings before the Court of Claims on the basis of the administrative record.

Mr. Justice Douglas, joined by Justice Stewart, dissented on the ground that there was a procedural irregularity before the Board, which warranted the Court in considering that decision arbitrary, and that in such circumstances the Court should be able to take new evidence.

This decision, of course, has application outside the Court of Claims in actions instituted in district courts under 28 U.S.C. 1346(a). Although district courts and courts of appeals have on the whole been receptive to our position that review must be had on the administrative record, this decision should make that point conclusive.

Staff: David L. Rose (Civil Division)

COURT OF APPEALS

FALSE CLAIMS ACT

False Understatements of Gross Receipts Held Not Claimed Within Meaning of Act; United States Entitled to Sue on Behalf of Army and Air Force Exchanges. United States v. Howell (C.A. 9, May 27, 1963). Appellees, operating firms of laundry and dry cleaning establishments, obtained and held concessionaire agreements with post exchanges, which granted them the privilege of performing dry cleaning and laundry services at Government military installations in the San Francisco Bay area, for which appellees agreed to pay to the Exchange specified percentages of their gross receipts. Appellees knowingly submitted false statements of their gross receipts to the Bay Area Exchange, substantially understating their gross receipts, and thereby paying smaller amounts to the Exchange than were actually due. In addition, appellees entered into a conspiracy with the general manager of the Exchange and bribed him to secure preferential treatment and favorable terms.

The United States brought a complaint against appellees. Two claims of the complaint were brought under the False Claims Act, alleging the submission of false claims, and a conspiracy to defraud the United States by the submission of such claims. In another claim the United States sought money wrongfully withheld, that is, recovery of the unpaid commissions. The district court dismissed the complaint on the ground that it failed to state claims upon which relief could be granted.

On an appeal by the United States, the Ninth Circuit held that the submission of understatements of gross receipts in these circumstances did not constitute the submission of claims within the meaning of the Act. Relying upon United States ex rel. Kessler v. Mercur Corp., 83 F. 2d 178 (C.A. 2), and United States v. Cohn, 270 U.S. 339, the Court held that the term "claim" was restricted to demands for money or property against the Government, based upon the Government's liability to the claimant. The Court rejected our contention that by submitting false statements of their monthly receipts, appellees were claiming the right under their contracts to continue to hold the laundry and dry cleaning concessions. It therefore held that the United States was not entitled to recover damages and a $2,000 forfeiture, for each submission of false receipts.

In regard to the claim of the United States for single damages, however, the Court held that a valid claim was stated under the agreements. It rejected appellees' contention that the United States could not sue to recover damages to the post exchanges, holding that the exchanges were an integral part of the Government of the United States; and remanded for trial on the Government's claim for single damages.

Staff: David L. Rose (Civil Division)

FEDERAL TORT CLAIMS ACT

United States Held Liable for Formation of Ice on Highway Due to Defective Drainage. Jennings, et al. v. United States (C.A. 4, June 3, 1963). Stewart Jennings was killed and his brother seriously injured when the car in which they were driving hit a patch of ice on a Government owned and maintained highway in the State of Maryland. The district court held the United States liable on the theory that it should have discovered and sanded or removed the patch of ice during the 8 to 10 hours of its existence prior to the accident. On appeal by the Government, the Court of Appeals reversed, holding that the mere existence of the ice for 8 to 10 hours did not impose notice upon the United States and did not impose any duty to remove or sand the ice within such a short period of time. The Court remanded the case, however, for findings by the district court as to whether the ice was naturally formed, or whether its existence was due to a defective condition in the drainage of the highway. 291 F. 2d 880. On remand the district court found that the ice was caused by defects in the drainage system of which the United States had notice. 207 F. Supp. 143.

On the second appeal the United States contended that there was no expert testimony by engineers or other qualified persons as to any defect in the highway, and that such testimony was required by the law of Maryland. In addition, we contended that plaintiff had not made a showing sufficient under the Maryland law and the prior decision of the Court of Appeals to permit the district court to find that the ice on the highway had been caused by defects in drainage, rather than from

natural causes. The Court of Appeals, however, affirmed, holding that the district court's findings that the drainage system was defective and that this caused the formation of the ice, were not clearly erroneous.

Staff: David L. Rose (Civil Division)

HOUSING ACT OF 1949

Private Persons Not Parties to Contract Between Housing and Home Finance Agency and Local Redevelopment Agency Lack Standing to Challenge in Federal Court Urban Renewal Project Pursuant to Contract. Johnson, et al. v. Redevelopment Agency of City of Oakland, et al. (C.A. 9, May 17, 1963). Pursuant to the Housing Act of 1949, the United States Housing and Home Finance Agency and the Redevelopment Agency of the City of Oakland, California, entered into a contract whereby the federal agency agreed to give financial assistance for an urban renewal project to be carried out by the local agency. Both the federal statute, and the contract between the agencies, required that, as a condition for federal aid, there should be a feasible plan for relocating families displaced from the urban renewal area. Plaintiffs, residents of the urban renewal area, brought this action against both the federal and the local agencies, seeking to enjoin the carrying out of the project and the payment of federal funds on the ground that there was, allegedly, no feasible plan for relocating residents of the area. The district court, however, granted defendants' motion for summary judgment, and the Court of Appeals affirmed, holding that plaintiffs had no standing to bring the action. The Court pointed out that there was no indication in the statute that Congress intended to give private persons the right to enforce the provisions of the Act and contracts entered pursuant to the Act; but, rather, the Administrator of the Housing and Home Finance Agency was delegated the duty of enforcing the conditions of the loan contracts. The Court also held that plaintiffs had no standing to sue as third-party beneficiaries of the contract.

Staff: United States Attorney Cecil F. Poole; Assistant United States Attorney Charles Elmer Calett (N.D. Calif.)

SOCIAL SECURITY ACT

Denial of Disability Benefits to Claimant Upheld Where He Failed to Present Evidence of Disability at Time He Last Met Coverage Requirements of the Act. Seitz v. Secretary of Health, Education and Welfare (C.A. 9, May 24, 1963). The administrative denial of plaintiff's application for disability benefits under the Social Security Act was here upheld by both the district court and the Court of Appeals. The Ninth Circuit pointed out that, although the application for disability benefits was filed in 1957, plaintiff last met the quarters-of-coverage requirements of the Social Security Act ten years earlier, in 1947.

Therefore, as the Court stated, the plaintiff had the burden of proving that he had been disabled since 1947. The Court of Appeals then held that there was no evidence showing inability to work as of the earlier date.

Staff: United States Attorney Herman T. F. Lum; Assistant United States Attorney Joseph M. Gedan (D. Hawaii)

Claimant's Contention, That Certified Administrative Record Contained Errors, Rejected as Basis for Reversing Administrative Decision. Degner v. Celebrezze (C.A. 7, May 28, 1963). Plaintiff filed an action for judicial review of a decision of the Secretary of Health, Education and Welfare, denying after a hearing her claim for disability benefits under the Social Security Act. One of her contentions was that the administrative transcript inaccurately presented the testimony at the administrative hearing. The district court, however, rejected this contention, went on to hold that the administrative decision was supported by substantial evidence, and granted summary judgment for the Government. The Court of Appeals affirmed. With respect to the allegation of errors in the administrative transcript, the Court indicated that, as the administrative officials had certified it to be accurate, the presumption of regularity of official acts would support the district court's conclusion that the transcript was properly prepared. The Court of Appeals further held that even if plaintiff's version of what was testified to at the administrative hearing were accepted, she could not prevail because the administrative decision would still be supported by substantial evidence.

Staff: United States Attorney James P. O'Brien; Assistant United States Attorney John Peter Lulinski (N.D. Ill.)

WALSH-HEALEY PUBLIC CONTRACTS ACT

Regular Dealer Not Responsible for Labor Standards of Those Who Supply Him With Commodity to Be Furnished Government Under His Contract. United States v. New England Coal and Coke Co. (C.A. 1, June 4, 1963). Appellee is a regular dealer in coal, purchasing coal from mines in coal mining states, and delivering coal from its stockpiles to industrial and commercial consumers in New England. It entered into several contracts with the Government to supply Government installations with coal. Each contract contained appellee's representation that it was a regular dealer in coal, and the Walsh-Healey stipulations (41 U.S.C. 35). In addition, each contract specified that the coal was to be obtained from a specified mine in West Virginia. That mine complied with the minimum wage, hour and safety standards of the Walsh-Healey Act. Although appellee issued purchase orders to the mine for the amount of coal in the contract, the mine obtained approximately half its coal on the contract from small nearby mines which did not meet those labor standards. After full scale administrative hearing, the

Administrator of the Wage and Hour and Public Contracts Division of the Department of Labor held that appellee was responsible for compliance with the labor standards of the Act by those who supply it with the commodity to be furnished the Government under its contract. The United States brought suit under 41 U.S.C. 36 to recover liquidated damages for the benefit of the affected employees. On cross motions for summary judgment on the administrative record, the district court held that the prime contract is not responsible for the labor standards of those who produce the commodity when he is a regular dealer.

The Court of Appeals affirmed, 2 to 1. Although the majority recognized that its interpretation did not further the general policy of the Act, which was to use the leverage of the Government's purchasing power to raise labor standards, it felt compelled by the language and legislative history of the Act to read it narrowly, and to confine its stipulations to employees of the prime contractor, with limited exceptions. Judge Hartigan dissented on the ground that the majority decision would frustrate the purpose of the Act and facilitate avoidance of fundamental policy of fair wages and safe working conditions on Government contracts.

Staff: David L. Rose (Civil Division)

DISTRICT COURT

FEDERAL TORT CLAIMS ACT

Suit Against Government Dismissed Where Plaintiff Receives Satisfaction of State Court Judgment Against Joint Tortfeasor. L. R. Presser v. United States (E.D. Wis., June 4, 1963). In this action under the Federal Tort Claims Act instituted to recover damages in the amount of $450,000 for permanent and disabling injuries, the Court granted a motion for summary judgment filed by the Government following satisfaction of a state court judgment for $83,000 against the Government's prime contractor. The Court held that the state court judgment, determining that under the facts certain safety orders issued by the State Industrial Commission were inapplicable to the Government facility, barred plaintiff from proceeding on the same theory against the Government and that satisfaction of this state court judgment, which reflected a 40 per cent reduction by reason of plaintiff's contributory negligence, barred further action against a joint tortfeasor.

Staff: William A. Gershuny (Civil Division)

RAILWAY LABOR ACT

Railroad's Action in Effectuating New Work Rules Without Notice to National Mediation Board and Resulting Strike Notices Promulgated by Unions Held to Violate Railway Labor Act. United States v. Florida

East Coast (D. Col., May 7, 1963). In November 1959 a large group of the Nation's railroads, including defendant, announced intended changes in work rules under § 6 of the Railway Labor Act, 45 U.S.C. 151. A dispute immediately developed when unions representing railroad employees expressed their opposition to the changes and indicated there might be a nationwide rail strike if the changes were effectuated as planned. After consideration of the dispute by a Presidential Railroad Commission, unsuccessful mediatory efforts by the National Mediation Board, and an unsuccessful suit by the unions challenging the proposed changes, the National Mediation Board recommended the immediate creation of a Presidential Emergency Board under Section 10 of the Railway Labor Act. In so recommending, the Board relied on a statement by the agent representing the railroads that the proposed changes would not be made effective until April 8, 1963. However, on April 2, 1963, defendant Florida issued a notice to its employees that the proposed changes would go into effect as to them at 12:01 a.m., April 3, 1963. It later developed that Florida had actually withdrawn from the national handling of the dispute in March 1963, but had failed to give notice of the withdrawal to the Mediation Board. At 6:00 p.m. on April 3, 1963, the President created an Emergency Board to investigate and report on the dispute. The executive order creating the Board also prohibited any party to the dispute to institute any change in the conditions out of which it arose until 30 days after the time the Emergency Board would make its report to the President. Nevertheless, because of Florida's action, on April 4, 1963, the unions issued a strike notice against Florida to be effective April 5, 1963. Believing that the actions of Florida and the unions were in violation of the Railway Labor Act, and that they would adversely affect the possibility of settling the issues in the national dispute, the United States on behalf of the National Mediation Board filed an action in the District Court for the District of Columbia seeking an injunction against Florida and the unions. The unions indicated they would withdraw their strike notice if the changes instituted by Florida were suspended.

The district court found that the National Mediation Board during the period in which it was performing its statutory functions resulting in a recommendation to the President to appoint an Emergency Board under § 10 of the Railway Labor Act had no reason to believe that Florida had withdrawn from national handling with respect to the dispute and Florida knew or should have known that the Mediation Board had a direct and vital interest in such information by reason if its duties under the Railway Labor Act. Florida was found to have a responsibility to notify the Mediation Board of Florida's action so that the Board could act timely under § 10 of the Act, and Florida failed to discharge that responsibility. The Court held that Florida's action in issuing the notice of April 2, 1963, putting the changes in work rules in effect on April 3, 1963, and the resulting strike notices issued by the unions, violated the purposes, provisions and operation of the Railway Labor Act, particularly § 10. The Court granted the Government's motion for a preliminary injunction.

Staff: Harland F. Leathers, Paul J. Grumbly, and Frederick B. Abramson (Civil Division)

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CIVIL RIGHTS DIVISION

Assistant Attorney General Burke Marshall

Voting and Elections; Civil Rights Acts of 1957 and 1960. United States v. Jones County [Georgia] Democratic Executive Committee, et al. (M.D. Ga.). The Department of Justice, on June 18, 1963, filed suit in the United States District Court for the Middle District of Georgia under the Civil Rights Acts of 1957 and 1960. The defendants named in this action are: the Jones County Democratic Executive Committee, its chairman and eight members, who are responsible for conducting county primary elections; the county ordinary, who is responsible for conducting county general and special elections; and the board of registrars, its chief registrar and two members, who perform registration functions, including compilation of the qualified voters' list.

The complaint, the second one filed by the Department to eliminate racial voting distinctions in Georgia, alleges the maintenance of separate polling places for white persons and Negroes; tabulation of election returns on a racially designated basis; and compilation of the qualified voters' list by use of separate racial designations. The suit is designed to secure elimination of these practices in connection with a special election for county commissioner which is set for July 10, 1963, and for all future elections.

Staff: United States Attorney Floyd M. Buford (M.D. Ga.); Jerome Heilbron and Henry Putzel, Jr. (Civil Rights Division)

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

EXTRADITION

Political Offense; Murder by Torture by Military Officer Purportedly Acting Pursuant to Orders of Superiors in Dictatorial Regime Held Extraditable Offense. In the Matter of the Extradition of Clodoveo Ortiz Gonzalez (S.D. N.Y., May 23, 1963.) The United States Attorney, acting on behalf of the Dominican Republic, sought the extradition from this country of Ortiz, a Dominican national and a former military intelligence officer under the regime of the late Generalissimo Rafael Trujillo. Ortiz was charged with the murder by torture of two prisoners on August 12, 1960, in a house of detention, called the "40," in the Dominican Republic. After holding that there was sufficient evidence to show that Ortiz had actively participated in the killing of the two prisoners, District Judge D. J. Tyler proceeded to meet the following two contentions of Ortiz: (1) that the alleged murders were crimes of a political character and were thus non-extraditable under the terms of the extradition treaty between the United States and the Dominican Republic; and (2) that since he was acting under the orders of superiors in killing the prisoners, his conduct could not be considered criminal.

In holding that the alleged murders were not crimes of a political character, Judge Tyler applied the traditional definition of political offense in Anglo-American law, first formulated in the leading English case, In re Castioni, [1891] 1 Q.B. 149 (1890). According to the Castioni case, those offenses are political in character which are committed in furtherance of or as incident to a political uprising or disturbance. Since the evidence produced at the extradition hearing did not establish that there was a political uprising or disturbance at the time of the killings, the Court held the "political offense" exception was not applicable to the facts of the instant case. The Court, moreover, stated:

> [N]othing in the record before us suggests that Ortiz acted with such essentially political motives or political ends as might justify substantial relaxation of the 'political disturbance' requirement . . . Indeed, any other conclusion would be contrary to a second contention of Ortiz here, which is that his acts were those of a military subordinate obeying the orders of a superior, and hence were essentially incidents of a system of military discipline.

In meeting Ortiz' second contention the Court stated that it was satisfied that under Dominican law, as well as under the law of the United States, Ortiz would be criminally liable for the extraordinary homicidal Acts ascribed to him. Thus, a prima facie case of murder had been established, and Ortiz was subject to extradition under the treaty between the United States and the Dominican Republic.

The Court concluded that, although the danger was present in this case of a foreign regime using an extradition treaty as an instrument of reprisal against its domestic political opponents, such matters were for the Department of State, and it was not incumbent upon the Court in this proceeding "to exercise discretion as to whether the criminal charge is a cloak for political action."

A United States Commissioner had earlier denied the extradition of Ortiz for the same killings on the ground that they were political offenses. The United States Attorney was granted a rehearing of the case by Judge Tyler. Judge Tyler stated that the determination of the United States Commissioner in the former proceeding was not binding in this proceeding.

Staff: United States Attorney Robert M. Morgenthau;
Assistant United States Attorney Peter K. Leisure (S.D. N.Y.);
Joseph C. Weixel and Eric J. Byrne (Criminal Division)

SECURITIES ACT OF 1933 - CONSPIRACY

Sufficiency of Instructions Where Defendant Had Been Acquitted by Court on Certain Counts; No Error in Trial Court Informing Jury of Guilty Plea of Co-defendant Who Testified for Government; Denial of Motion for Change of Venue. United States v. Milton R. Aronson (C.A. 2, June 6, 1963). On June 6, 1963, the Second Circuit affirmed the conviction of appellant Milton R. Aronson for violations of the Securities Act of 1933, 15 U.S.C. 77q(a), and for conspiracy to violate the Act in the sale of securities of Great Western Enterprises, Inc.

Appellant did not challenge the sufficiency of the evidence to establish the fraudulent scheme, or the use of the mails in furtherance thereof. However, he claimed error in the failure of the trial court to advise the jury that appellant had been acquitted by the court on certain counts of the indictment.

The indictment charged fraud in the sale of stock of Great Western Enterprises, Inc., Mark, Inc., and the Perry Oil Company. At trial, the Government elected to present proof only on the transactions involving Great Western Enterprises, Inc. sales. At the request of defense counsel the remaining counts were dismissed and a judgment of acquittal granted as to them because the Government had offered no proof thereon. In charging the jury, the trial court commented that "In order to keep this case within reasonable bounds, the Government has elected to . . . ." proceed only on those counts involving sales of Great Western stock, and "We are, therefore, in this trial, concerned solely with the guilt or innocence of the defendants . . ." as to those counts. Counsel for appellant contended that the court's reference to the limitation of the trial to the Great Western counts" . . . to keep this case within reasonable bounds . . ." called for the inescapable inference in the minds of the jury that the Government had an abundance of evidence as to the other counts which it withheld merely to shorten the trial. Appellant further contended that the court should have advised the jury of the acquittal on the other counts.

The Court of Appeals held that the trial court had meticulously informed the jury of the issues to be determined by them and of the restriction to transactions in Great Western stock, no issues as to Mark, Inc., and Perry Oil stock being presented to the jury for decision. The issues were kept in clear focus by the court at all times, and the implications of possible improper inferences by the jury as a result of the court's comments were unwarranted.

The Court also held that no error can be attributed to the trial court's informing the jury of the guilty plea of a co-defendant who testified for the Government. Citing Davenport v. United States, 260 F. 2d 591 (C.A.9, 1958) and United States v. Crosby, 294 F.2d, 294 F.2d 928 (C.A.2, 1961), the Court held it was not error to inform the jury that one or more defendants, either before or during trial, have pleaded guilty to the indictment, provided that precautionary instructions are given, as were given here, that such pleas are no proof whatsoever of the guilt of the defendants on trial.

Appellant also claimed that denial of his motion for a change of venue was an abuse of discretion. Noting that the true test is whether the defendants were deprived of a fair trial because of the denial, the Court concluded there was no abuse of discretion; that there were many compelling reasons for New York venue, since appellant utilized a New York distributor to sell the Great Western stock to the public. Further, an examination of the record disclosed that no prejudice to appellant resulted from a New York trial.

Staff: United States Attorney Robert M. Morgenthau;
Assistant United States Attorney Peter H. Morrison (S.D. N.Y.).

POSTAL OFFENSE
(18 U.S.C. 1702)

Obstruction of Correspondence; Mail Considered Delivered When Picked Up at Post Office by Employee; Subsequent Theft of Such Mail Not Federal Offense. United States v. Frank Edward Bebbs (E.D. Va., May 31, 1963). The District Court held that when an employee of an organization picks up mail at the post office, the mail has been "delivered" as that word is used in 18 U.S.C. 1702. A subsequent theft of the mail therefore is not a Federal offense, but rather is an offense under state laws.

In the Bebbs case, an officer of a bank was also treasurer of the Easter Seals Fund of Virginia. Mail addressed to him as treasurer of the fund was sent directly to the bank. Bebbs, an employee of the bank who was authorized to receive mail addressed to the bank, picked up the letters addressed to the treasurer along with the regular bank mail. He then opened the letters addressed to the treasurer and kept the money enclosed therein.

The Court's decision that the mail had been "delivered" prior to the time Bebbs appropriated the funds is in line with the cases previously

decided under Section 1702. See e.g. United States v. Chapman, 179 F. Supp. 447 (E.D. N.Y., 1959). Therefore if similar cases arise they should not be prosecuted under Federal law.

Staff: United States Attorney C. Vernon Spratley, Jr.; Assistant United States Attorney Samuel W. Phillips (E.D. Va.).

BANKING
(18 U.S.C. 656)

Sufficiency of Indictment. Eva Ramirez v. United States (C.A. 9, May 21, 1963). In this case the appellant contended, inter alia, that an indictment charging her with misapplication in violation of 18 U.S.C. 656 was defective because it failed to allege an "intent to injure and defraud the bank.

The appellate court sustained the indictment and held that while an intent to injure or defraud the bank must be proven, the words "did wilfully misapply" in the indictment, considered with the factual allegations, sufficiently imported this intent.

A similar holding may be found in Logsdon v. United States, 253 F. 2d 12 (C.A. 6, 1958).

Staff: United States Attorney Charles A. Muecke; Assistant United States Attorney Jo Ann D. Diamos (D. Ariz.).

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

IMMIGRATION

Deportation Order Based on Membership in Communist Party Not Supported by Substantial Evidence. Jose Maria Gastelum-Quinones v. Kennedy (U. S. Supreme Court, Nos. 39 and 293, June 17, 1963.) Petitioner is an alien, native and national of Mexico, who was ordered deported under Section 241(a) (6) of the Immigration and Nationality Act, 8 U.S.C. 1251(a) (6), because of his membership in the Communist Party in the United States during the period 1948 or 1949 to 1950. By an action filed in the United States District Court for the District of Columbia, contested the deportation order on the ground that the evidence of his membership did not show a meaningful association with the Communist Party as required by Rowoldt v. Perfetto, 355 U.S. 115. He was unsuccessful in the District Court, on appeal 286 F. 2d 824, and in seeking certiorari, 365 U.S. 871. The District and Circuit Court took the position that the Government, having proved petitioner's membership in the Communist Party, it was his duty under the reasoning of Rowoldt and Galvin v. Press, 347 U.S. 522, to come forward with an explanation showing his membership to be devoid of political implications.

After being denied reopening of his case by the Board of Immigration Appeals, petitioner started a second round of litigation which culminated in this divided opinion of the Supreme Court. Justice Goldberg, speaking for the majority of the Court, found the evidence in the deportation record to be extremely insubstantial in demonstrating petitioner's awareness of the political nature of the Communist Party, and declined to construe Galvin and Rowoldt as requiring an alien to speak up and disclaim knowledge of the political aspects of the Party. He stated that a holding of deportation must be premised on evidence of meaningful association more directly probative than a mere inference based on an alien's silence.

Justice White wrote a dissent in which he was joined by Justices Clark, Harlan and Stewart. He reasoned that by passing on the issue of deportability the Court resurrected an issue settled in the first round of litigation and that the only issue properly before the Court was a review of the decision of the Court of Appeals dismissing an appeal from the District Court's decision that the Board of Immigration Appeals did not err in declining to reopen petitioner's deportation case. It was his opinion that the evidence in the deportation record met the test of substantiality, finding from the evidence of the petitioner's attendance at Party meetings and functions and regular financial support for its activities that it was rather fanciful to believe that the petitioner was still unaware of the political nature of the Communist Party.

Staff: Archibald Cox, Solicitor General, Herbert J. Miller, Jr., Assistant Attorney General, Criminal Division, Bruce J. Terris, Assistant to the Solicitor General, Beatrice Rosenberg and Julia P. Cooper, Criminal Division

Return to United States by Resident Alien After Brief Foreign Visit May Not Be Entry Under Immigration Laws. Rosenberg v. George Fleuti; U.S. Supreme Court, No. 248, June 17, 1963. Respondent is an alien, native and citizen of Switzerland, who was admitted for permanent residence in 1952. In 1956 he visited in Mexico for a few hours and was readmitted for permanent residence. In 1959 he was charged with being deportable in that at time of his readmission in 1956 he was afflicted with psychopathic personality, being a homosexual. After being ordered deported on the charge, he sought relief in the Courts claiming that the deportation statute was unconstitutional for vagueness. The district court ruled against him, but he was sustained on appeal to the Ninth Circuit.

The respondent sought and was granted certiorari. By a five to four decision the case was remanded to the district court. Justice Goldberg who wrote the majority opinion found it unnecessary to pass on the issue of constitutionality of the deportation statute. After analysis of the provisions of Section 101(a) (13) of the Immigration and Nationality Act, 8 U.S.C. 1101(a) (13), which defines entry, its legislative history, and interpretation by the federal courts of the term entry, the court ruled that an innocent, casual and brief absence by a resident alien outside this country's borders may not have been intended as a departure disruptive of his resident alien status and, therefore, may not subject him to the consequences of an entry into the country on his return. The case was remanded for further consideration of whether in the light of the discussion in the decision the respondent did not intend to depart in the sense contemplated by the statute.

Justice Clark wrote the dissent and was joined by Justices Harlan, Stewart and White. Justice Clark was firmly convinced that Congress in defining entry in Section 101(a) (13) intended to include within the definition a re-entry such as respondent's. He felt that the Court should have passed on the only question the parties sought to be resolved, that is, the constitutionality of the deportation statute.

Staff: Archibald Cox, Solicitor General
Herbert J. Miller, Jr., Assistant Attorney General, Criminal Division, Philip R. Monahan and Maurice A. Roberts, Criminal Division.

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INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Motions to Vacate Order of Subversive Activities Control Board on Ground of Mootness. William L. Patterson v. Subversive Activities Control Board. Pursuant to the Attorney General's petition of April 22, 1953, and after extensive hearings, the SACB issued an order under Section 7 of the Subversive Activities Control Act of 1950, requiring the Civil Rights Congress to register as a Communist-front organization. Prior to final order of the Board, the Congress filed a motion to dismiss the proceedings on the ground that it had dissolved after the Board's recommended decision. The Board denied the motion, and subsequent to its final order, William L. Patterson, former Executive Secretary of the Congress, identifying himself as the Liquidator of the Congress, petitioned the Court of Appeals for the District of Columbia for review of the final order. He renewed in that Court his motion to dismiss and asked the Court to vacate the order of the Board for mootness. The Court remanded the case to the Board for findings as to the alleged dissolution.

On May 23, 1963, the Court ruled on the Board's report on remand, denying Patterson's motion to vacate the registration order of the Board for mootness. Distinguishing its decision in a similar case (Labor Youth League v. SACB 11 Bull. 9) where it held that a court should not finalize an order directed to an unincorporated organization which has been actually and fully dissolved, the Court held that the Civil Rights Congress and its Liquidator had failed, at the hearing on remand, to prove to any satisfactory degree that the organization was dissolved. The Court pointed out that only 3 persons attended the Convention which purported to dissolve the Congress, and that the Liquidator had no satisfactory recollection of where the books and records of the organization had been stored.

The Court set forth a briefing schedule for the merits of the petition to review and stated that if the order of the Board were eventually affirmed, the practical problem of accomplishing the ordered registration would remain for other proceedings.

The California Labor School case was also before the Court on a report of the Board on remand from the Court. Incorporated in 1944 as a non-profit corporation under the laws of California, the School had been ordered by the SACB to register as a Communist-front in 1957. After the petition to review this order was filed in the Court of Appeals, the School moved the Court to vacate the order for mootness, claiming that it had ceased to exist in June or July of 1957.

The Court of Appeals denied that motion on May 23, 1963, holding that the record of the Board's hearing on remand showed that no steps had been taken to dissolve the corporation. The Court cited the California Corporation Code and noted that not only did the School fail to take the formal procedural steps therein but that it also failed even to pass a

resolution of dissolution. All possible steps to dissolve had been taken by the Labor Youth League, supra - an unincorporated association, the Court held, but in the case at bar the organization exists, cessation of active business not being equivalent to cessation of existence.

The case remains before the Court upon the petition to review.

Staff: Carol Mary Brennan (Internal Security) argued the cases. With her on the briefs were Frank R. Hunter, Jr. (General Counsel, Subversive Activities Control Board), and Kevin T. Maroney, George B. Searls, and Benjamin F. Pollack (Internal Security).

Contempt of Congress; Rule of House Un-American Activities Committee Providing for Determination as to Taking of Witness' Testimony in Executive Session Held to Be for Protection of Witness and Its Breach to Be Defense to Indictment for Refusal to Answer Committee's Questions. Edward Yellin v. United States (Sup. Ct. No. 35; June 17, 1963). Yellin was indicted in the Northern District of Indiana on five counts of wilfully refusing to answer questions put to him by a Subcommittee of the House Un-American Activities Committee which was investigating the so-called colonization by the Communist Party in the steel industry in Gary, Indiana. He was convicted under 2 U.S.C. 192 on four of the counts, the Court of Appeals affirming. In a 5-4 decision, the Supreme Court reversed without reaching the constitutional questions raised, and held that the Committee's action, in failing to consider Yellin's request after his subpoena that he be heard in executive session, was at variance with its rules.

Rule IV-A of the Rules of the Committee, which were adopted pursuant to enabling resolutions of the House of Representatives, provides that "if a majority of the Committee or Subcommittee . . . believes that the interrogation of a witness in a public hearing might endanger national security or unjustly injure his reputation, or the reputation of other individuals, the Committee shall interrogate such witness in an Executive Session for the purpose of determining the necessity or advisability of conducting such interrogation thereafter in a public hearing."

Subsequent to the Committee members' departure for Gary to conduct the public hearings, Yellin's counsel telegraphed a request to the Committee's counsel in Washington to hear Yellin in executive session. The Committee's staff director replied from Washington that the request was denied. At the hearing itself, Yellin's counsel tried unsuccessfully to make a part of the record the exchange of telegrams. In his refusal to answer certain of the questions posed by the Committee, however, Yellin did not raise any objection concerning the denial of his request.

On the basis of this factual background, the Chief Justice, writing for the majority, held that Rule IV was designed to confer upon witnesses (1) the right to request an executive session; and (2) the right to have the Committee act on the holding of an executive session, either by virtue of that request or sua sponte, in accordance with the standards set forth in the Rule. These standards, the Court said, while possibly

calling for and evoking an executive session in a particular case, do not preclude a subsequent public hearing, for the Rule allows the Committee to determine in its discretion after the executive session that there is the "necessity" or "advisability" of a public hearing despite the circumstances which supported the holding of the executive session.

Concerning Yellin's right to have the Committee act, the Court held that (1) the Committee failed to act upon his request, since the Staff Director responded in the Committee's stead and he was unauthorized to do so; and (2) the Committee failed to apply the Rule properly, since it did not appear from Chairman Walter's testimony at trial that a particular standard enunciated in the Rule, injury to the witness' reputation, was considered in making the initial determination to subpoena Yellin for a public rather than an executive session.

The Court concluded that Yellin's only redress for this loss of his rights was the course he took, i.e., refusal to testify, and it found that his failure to specify that ground at the time he was questioned as the basis for his refusal, did not forfeit his defense to a conviction, since he did not know until later that his rights had been violated.

In a lengthy dissent, Mr. Justice White emphasized that Yellin's failure to base his refusal to testify at the hearing on the ground that it was a public rather than a private session, made unavailable, under settled law (e.g., U.S. v. Bryan 339 U.S. 323, 332-333), that ground as a defense in a contempt of Congress trial. The four dissenters also felt that, in any event, the Committee did apply its executive session rule to Yellin, since, in addition to the presumption of regularity which attaches to Congressional proceedings, there was trial testimony to the effect that unjust injury to Yellin's character was considered by the Committee in its determination to call him in public session, the Committee deciding that there would be no such injury since Yellin was a known Communist and the Committee had sworn testimony to this effect.

Staff: The Solicitor General argued the case. With him on the brief were Assistant Attorney General Yeagley; Assistant to the Solicitor General Bruce J. Terris; and Kevin T. Maroney and Lee B. Anderson (Internal Security).

Subversive Activities Control Act of 1950; Registration of Communist Party Members. Attorney General v. John William Stanford, Jr., et al. On June 13, 1963, the Attorney General filed seven additional petitions with the Subversive Activities Control Board at Washington, D. C., pursuant to Section 8(a) of the Subversive Activities Control Act, against national leaders and leading functionaries of the Communist Party, USA, seeking orders of the Board requiring the respondents to register as members of the Party. The respondents are John William Stanford, Jr., of San Antonio, Texas; William Cottle Taylor

and Benjamin Dobbs, of Los Angeles, California; Frances Gabow and Aaron Libson, of Philadelphia, Pennsylvania; and James Joseph Tormey and Lionel Joseph Libson, of New York City.

Staff: James A. Cronin, Jr., Robert A. Crandall, Earl Kaplan, Earl H. Miller, Thomas C. Nugent and John E. Ryan (Internal Security Division)

Attack on Conviction Under 28 U.S.C. 2255 on Ground of Errors at Trial Twelve Years Ago; Supreme Court Denies Certiorari. Sobell v. United States (Sup. Ct. No. 1333 Misc., June 17, 1963). On April 5, 1951, Morton Sobell, together with Julius and Ethel Rosenberg, was convicted in the United States District Court for the Southern District of New York of conspiracy to commit espionage in violation of former 50 U.S.C. 32 and 34 (now 18 U.S.C. 794). Sobell was sentenced to thirty years' imprisonment. The judgment was affirmed in the Court of Appeals, and the Supreme Court denied certiorari.

Sobell subsequently made a series of collateral attacks on his conviction. The present motion, seeking to vacate sentence under 28 U.S.C. 2255, or, alternatively, to correct sentence under Rule 35 (F.R. Crim. P.), was filed over ten years after sentencing and attacked the conviction on the grounds that (1) the cross-examination of Ethel Rosenberg improperly elicited the fact that she had invoked her Fifth Amendment privilege before the grand jury; and (2) the trial judge failed to charge the jury that they must find that Sobell joined the conspiracy "in time of war."

The district court denied the motion, and the Court of Appeals affirmed in a lengthy and exhaustive opinion.

The Supreme Court denied the petition for a writ of certiorari on June 17.

Staff: On the brief in opposition were the Solicitor General; and Assistant Attorney General Yeagley, Kevin T. Maroney, and Lee B. Anderson (Internal Security Division)

Suit to Restrain Enforcement of Non-Communist Party Membership Oath in Passport Application Forms. Milton Mayer v. Secretary of State (D.C.C.). Plaintiff, in applying for a passport, refused to affirm as is required in the application form that he is not a member of the Communist Party, USA. As a consequence of this refusal the Passport Office declined to process his application.

Plaintiff contends that Section 6 of the Internal Security Act of 1950, 50 U.S.C. 785, which forbids the issuance of passports to Communists and upon which the non-membership oath is predicated, is unconstitutional. Plaintiff also contends that the oath requirement in the passport application form "is contrary to the requirements of due process which command that in proceedings which restrict liberty the government must bear the burden of producing the evidence to convince the fact finder of the plaintiff's guilt.

The answer by the defendant to the complaint was served on June 21, 1963.

Staff: Benjamin C. Flannagan (Internal Security Division)

Supreme Court Denies Petition for Certiorari to Review Espionage Conviction. Irvin C. Scarbeck v. United States (Sup. Ct. No. 1256 Misc.; June 17, 1963). Scarbeck was indicted on July 20, 1961, in the District Court for the District of Columbia, charged in three counts with communicating, as Second Secretary of the U.S. Embassy in Warsaw, classified information to representatives of the People's Republic of Poland, in violation of 50 U.S.C. §783(b). He was found guilty by the jury on these three counts, and not guilty on a fourth count which charged violation of 18 U.S.C. 2071. He was sentenced to imprisonment for ten years on each count, the sentences to run consecutively. The Court of Appeals affirmed.

Scarbeck raised the following questions concerning his conviction:

1. Whether the language of §783(b), "classified by the President (or by the head of any such department, agency or corporation with the approval of the President)," includes documents classified by an Ambassador pursuant to power delegated by the Secretary of State under a presidential Executive Order;

2. Whether he should have been allowed to challenge the propriety of the classification of the documents;

3. Whether the Government failed to prove that he was not authorized to make the disclosures;

4. Whether his written and oral confessions were made during a period of involuntary detention;

5. Whether the evidence sufficiently corroborated the essential facts of his confessions as to establish their trustworthiness.

The Supreme Court denied the petition for a writ of certiorari on June 17.

Staff: On the brief in opposition were the Solicitor General; and Assistant Attorney General Yeagley, Kevin T. Maroney, and Robert S. Brady (Internal Security Division)

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LANDS DIVISION

Assistant Attorney General Ramsey Clark

Public Lands: Mining Claims; Administrative Procedure Act; Scope of Review. United States v. Adams (C.A. 9, June 10, 1963). The Secretary of the Interior declared Adams' 1936 mining claim invalid for want of discovery because the claim was not valuable for mineral content at the time of the hearings in 1954. Adams sued a subordinate Interior official to obtain a review of the Secretary's decision. Dismissal of this suit for lack of jurisdiction was reversed by the Court of Appeals which directed a review of the Secretary's decision under Section 10 of the Administrative Procedure Act. See Adams v. Witmer, 271 F. 2d 29 (C.A. 9, 1958). The Department believes this decision to be wrong, particularly in its invocation of the Administrative Procedure Act as applied to decisions of the Interior Department. See 7 U.S. Attys. Bull. No. 3, pp. 75, 655.

This suit was dismissed without prejudice when the United States sued to enjoin Adams from use and occupancy of the claim. The district court granted the injunction on a motion for summary judgment.

The Court of Appeals affirmed on the grounds that (1) summary judgment was the proper disposition, (2) the review was properly limited to the administrative record, (3) the Secretary's decision was supported by substantial evidence and (4) the Secretary applied the proper standards to determine the validity of the claim. In treating this suit as a continuation of the original action by Adams, the Court of Appeals reiterated its holding that the Administrative Procedure Act standards of review governed direct review of the Secretary's decision but indicated that in a collateral attack the scope of review is probably more restricted.

Staff: Edmund B. Clark (Lands Division).

Indian Claims Commission; Standing to Assert Claims; Intervention. Blackfeet and Gros Ventre Tribes, Petitioners; Assiniboine Tribes of Indians, Intervenors and Appellants v. United States (C.Cls., June 7, 1963). This was an appeal by the intervenors, the Assiniboine Tribe of Indians of Montana, from a decision by the Indian Claims Commission which denied them the right to intervene as petitioners in a claim brought by the Blackfeet and Gros Ventre Tribes.

Under the Act of May 1, 1888, 14,000,000 acres of land were ceded to the United States by both the petitioners and intervenors who were living within the same reservation at the time of the cession. The amount of consideration paid by defendant was 28 cents per acre. Defendant alleged, before the Commission, that the intervenors should not be allowed to intervene because their land claim was historically different from that of the petitioners and to allow a community of interest of the two claimants would amount to a new claim by two new tribes which would enlarge, complicate, and delay the litigation of the claim by the petitioners.

The Court of Claims said that the Assiniboines had been driven off their own reservation in 1868 and 1870 and settled on the Blackfeet and Gros Ventre reservation when the treaty of cession was signed, and that the Assiniboines were a signatory to the treaty. The petitioners are asserting that the 28 cents per acre which defendant paid under the agreement of 1888 was an unconscionably small consideration, and the intervenors sought to join in this claim.

In reversing and remanding the decision of the Commission, the Court of Claims held that the intervenors may have a proportionate claim in the subject matter of petitioners' claim as a result of their joint participation as parties to the 1888 agreement. Such a common interest would be sufficient to entitle them to intervene and such an intervention is allowed.

Staff: William D. McFarlane (Lands Division).

Water Rights: Use by Individual of Water on National Forest Does Not Give Vested Property Right. Glenn v. United States (D. Utah, March 5, 1963). Plaintiff sought $25,000 under the Tort Claims Act for water diverted by the United States for use at a recreation area near Flaming Gorge Dam. Plaintiff alleged ownership of the right to use the water on the basis of a 1933 certificate of appropriation issued by the State Engineer for the State of Utah. The water involved was from a spring located within the Ashley National Forest upon lands reserved from entry in 1897. Among other defenses, the United States asserted it had a reserved right to the water dating from the time of reservation. Plaintiff directed attention to 16 U.S.C. 481, which provides that waters within national forests "may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such national forests are situated, or under the laws of the United States and the rules and regulations established thereunder." The United States, however, asserted that section 481 merely allowed a permissive use of the waters within a national forest, such as revocable permits granted by the Government for grazing on the public domain. Judge Ritter held for the United States.

In his oral ruling, Judge Ritter cited Special Master Simon H. Rifkind in his report to the Supreme Court in Arizona v. California, No. 9, Original. In that report, the Special Master had observed, among other things, with respect to the Gila National Forest, that the "finding is warranted that the United States intended, when it withdrew this forest [Gila] from entry, to reserve the water necessary to fulfill the purpose for which the Forest was created. * * * The power of the United States to make such a reservation with respect to the Forest cannot logically be differentiated from the power of the United States with respect to Indian Reservations and Recreation Areas."

Among other things, Judge Ritter, in his conclusions of law, said the rights of the United States "include the right to increased use in the future in order to accomplish the purposes of the forest reserve." He also said section 481 granted only a right to permissive use of waters within the forest.

Upon the point in issue, the Special Master was affirmed on June 3, 1963, Arizona v. California.

Staff: Assistant United States Attorney Parker M. Nielson (D. Utah), and Charles G. Luellman (Lands Division).

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

IMPORTANT NOTICE - ENFORCEMENT OF SUMMONSES

Recently, the United States District Court for the Northern District of California held that an attorney summoned to give testimony regarding the tax liability of his client was entitled to have a qualified court reporter present to take notes of his testimony even though a Government stenographer was also present to record the testimony. Mott v. MacMahon. After noting that the record indicated the "exemplary cooperation" of the attorney "in the interest of reaching the truth", the District Court concluded that "the truth as to exactly what was said in such a hearing is much more likely to be shown by a transcript prepared by a qualified court reporter who certifies it and does so under the penalties provided by law for inaccuracy or untruthfulness." While the District Court's decision may be in conflict with In re Neil, 209 F. Supp. 76 (S.D. W. Va.) and Torras v. Stradley, 103 F. Supp. 737 (N.D. Ga.), the Government has decided not to take an appeal in this case because of certain aspects of the record.

In all future instances where the Revenue Service requests a U. S. Attorney's office to enforce a summons where the refusal to obey the summons is based on a claim of the party that he desires a qualified court reporter to be present and therefore will not go forward with giving testimony in the absence of one, authority should first be obtained from the Tax Division prior to institution of the enforcement proceedings.

CIVIL TAX MATTERS
Appellate Decisions

SPECIAL ATTENTION

LIEN FORECLOSURE--------ATTORNEY'S FEES TO PRIOR MORTGAGEE-------- SPECIAL ATTENTION SHOULD BE GIVEN TO INSURE THAT TAX LIENS ARE AFFORDED PRIORITY OVER ATTORNEY'S FEES INCURRED IN LIEN FORECLOSURES UNDER 24 U.S.C. 2410. SEE UNITED STATES v. PIONEER AMERICAN INS. CO. BELOW WHICH CLARIFIES THE CONFLICT WHICH HERETOFORE EXISTED IN VARIOUS DISTRICTS.

Priority of Liens; Mortgagees-attorney's fees; Attorney's Fees Incurred in Mortgage Foreclosure Action Were Not Choate and Perfected Liens at Time Federal Tax Liens Arose and Therefore Not Entitled to Priority Over Them, Notwithstanding That Mortgage Lien Was Superior to Tax Liens. United States v. Pioneer American Ins. Co. (Sup. Ct. October Term, 1962, June 10, 1963.) A note secured by a first mortgage on real estate obligated the taxpayer-mortgagors to pay a reasonable attorney's fee in the event there was default and the note was either placed in the hands of an attorney for collection or was collected through court proceedings. The real estate was also burdened with a

second mortgage and a mechanic's lien. Default occurred and thereupon the first mortgagee, Pioneer American, filed suit to foreclose its mortgage claiming, in addition to principal and interest, a reasonable attorney's fee. The United States, as the holder of two tax liens, notices of which were filed after the mortgages were executed but before suit was filed, was named a party defendant. In its answer, it admitted that its liens were subordinate to the claims of the mortgagees for principal and interest, but asserted that its liens were superior to the claim of the first mortgagee for an attorney's fee. After the foreclosure suit was commenced, but before the foreclosure decree was entered, notices of three additional federal tax liens were filed, and the Government amended its answer to bring these liens into the case. Thereafter, the Chancery Court entered its decree of foreclosure which also fixed the amount of the attorney's fee and determined the priorities of the various claimants as follows: after satisfaction of court and foreclosure sale costs, (1) Pioneer American was accorded first priority for principal, interest and the attorney's fee; (2) second mortgage, principal and interest; (3) the mechanic's lienor, whose priority was not contested; (4) the United States. The proceeds from the sale of the property were sufficient to satisfy all claims except the three last federal tax liens, notices of which were filed after the foreclosure suit was commenced.

The United States appealed to the Supreme Court of Arkansas asserting that it was entitled to priority over the attorney's fee, and that the amount allowed for such fee should have been applied to reduce the unpaid federal taxes. With one judge dissenting, the contention was rejected and the superiority of the attorney's fee sustained.

In an opinion which reaffirms several basic and fundamental principles of federal tax lien law established in its prior decisions, the Supreme Court, Justice Douglas dissenting, reversed the decision of the Supreme Court of Arkansas. Specifically, the Court reiterated that the priority of a lien created by state law depends on the time it attaches to the property and becomes choate; that when such a lien has acquired sufficient substance and has become so perfected as to defeat a later-arising or later-filed federal tax lien, is a matter of federal law; and that the federal rule is that liens are perfected in the sense that there is nothing more to be done to have a choate lien, when the identity of the lienor, the property subject to the lien, and the amount of the lien are established. Measuring the choateness of the mortgagee's lien for a reasonable attorney's fee against this rule, the Court held that, while the identity of the lien holder and the property subject to the lien were definite, the amount of the lien for attorney's fee was undetermined and indefinite when the notices of the federal tax liens in question were filed, and, indeed, had not been reduced to a liquidated amount until the Chancery Court entered its decree.

The decision makes plain that in order to be protected against a federal tax lien under the provisions of Section 6323(a) of the Internal Revenue Code of 1954, a claim secured by a mortgage must be choate prior to the time notice of the tax lien is filed. In general, the decision

makes it clear that the choateness rule applies to mortgagees, and removes any doubt that the prior, and much criticized, per curiam opinion in United States v. Ball Construction Co., 355 U.S. 587, rehearing denied, 356 U.S. 934, stands for just that proposition. The Pioneer American decision, taken together with the earlier decision of the Supreme Court this term in United States v. Buffalo Savings Bank, 371 U.S. 228, should assist in disposing of cases involving the priority of the federal tax lien over later-arising local tax liens and attorneys' foreclosure fees, and also afford substantial support to the priority of the federal tax lien in other cases.

Staff: Argued by: Richard M. Roberts, Second Assistant to the Assistant Attorney General, Tax Division.
Reviewed by: Daniel M. Friedman, Assistant to the Solicitor General; and Joseph Kovner, Attorney, Tax Division.
Briefed by: George F. Lynch, Attorney, Tax Division.

Recordation of Federal Tax Liens; Taxpayer's Residence Situs of Debt Due Taxpayer for Purpose of Recordation of Federal Tax Lien. Mintz v. Fischer - United States, Claimant (S. Ct. N.Y., App. Div., First Dept., June 11, 1963). Liens for federal income taxes against taxpayer, Fischer, a resident of Queens County, were filed on October 17, 1961, and November 1, 1961, in the office of the Register of Queens County. The property of taxpayer in question was a debt due him from Robert P. Sheldon, Inc., a corporation engaged in the real estate brokerage business in New York County. The competing claimant, a judgment creditor of the taxpayer, served a third party subpoena in execution of his judgment on Sheldon on January 30, 1962, after the federal tax liens were recorded. Pursuant to Revenue Code Section 6323, New York has designated the office of the city or county register as the place to file notices of federal tax liens affecting personal property. The statute further requires the notice of a lien against personalty to be filed in the county of residence of the owner and, if the property is in existence at the time the lien arises, in the county where the property is situated. The judgment creditor contended that under New York law, a debt is deemed to be situated at the debtor's residence for purposes of the filing statutes, and therefore the federal liens had not been properly filed. His position had been sustained by the Municipal Court, but upon appeal, the Appellate Division, First Department, reversed, holding that Section 6323, providing for the filing of federal tax liens in the county in which "the property subject to the lien is situated", is controlling and requires a uniform federal interpretation. As a practical matter, the Federal Government cannot be required to file its tax liens at "the residence of an unknown debtor of the taxpayer," hence, to reach his intangible property, no filing is required other than at the place of residence of the taxpayer. The Court also noted that in this case the property in question was after-acquired property of the taxpayer, which was not in existence at the time the federal tax lien arose, and therefore, however construed, the state law requirement of filing where the property was situated in addition to the taxpayer's residence was not applicable.

Staff: United States Attorney Robert M. Morgenthau and Assistant United States Attorney John Paul Reiner (S.D. N.Y.).

Assignments for Benefit of Creditors; Prior Approval for Employment of Attorney Required; Attorney Ordinarily Not to Be Hired Where Assignee Himself Is Experienced Attorney. United States v. Paul R. Kleinberg (Super. Ct. N. J., App. Div., June 5, 1963). On June 26, 1959, the taxpayer, Holiday Inn, made a general assignment for the benefit of creditors, designating an attorney, Kleinberg, as assignee. Following his appointment, the assignee, without prior approval of the court, engaged the services of two attorneys. $17,050 was realized from the public sale of the assignor's assets to meet priority claims totaling $31,753.98, of which $28,258.02 represented the Government's tax claim, and unsecured claims of $9,105.94. Over the objection of the United States, the court granted an allowance to the attorneys for the assignee of $2,000 for services rendered and $53.85 for expenses. The decision has been reversed by the Appellate Division, enforcing strictly the New Jersey statutory rule R.R. 4:68 (1953) providing that no receiver shall employ an attorney except upon an order of the court supported by an affidavit setting forth the necessity for the employment.

Staff: Assistant United States Attorney Vincent J. Commisa (D. N.J.), United States Attorney David M. Satz, Jr., and Assistant United States Attorney Raymond W. Young (on brief).

District Court Decisions

Partial Summary Judgment Entered Against Taxpayers in Suit for Taxes Previously Considered and Passed on by United States Tax Court, Court Holding Earlier Determination Res Judicata. United States v. Daniel J. Leary, et al. (Conn., 5/22/62.) (CCH 63-1 USTC Par. 9480). A jeopardy assessment was made against husband and wife in 1940 for taxes, penalties and interest due for the years 1933, 1934 and 1935. The husband was convicted in 1940 for his part in defrauding the City of Waterbury, Connecticut, of over $2 million during the 1930's. A notice of deficiency (commonly referred to as a "90-day letter") was mailed to taxpayers and they filed a petition in the United States Tax Court (then the Board of Tax Appeals) for a redetermination of the deficiencies. No bond was posted under Section 273(f), Internal Revenue Code of 1939, to stay collection of the assessment pending a final determination by the Tax Court, therefore United States v. Daniel J. Leary, et al, Civil No. 626, was instituted in 1941 to reduce assessment to judgment and foreclose tax liens. Although the wife was represented at the trial in the Tax Court the husband was not, his attorney refusing to appear after the Court denied his withdrawal. The Tax Court's decision entered May, 1945, determined the deficiencies to be greater than the original assessment, hence, in 1945, a second assessment was made and Civil Actions Nos. 1707 and 1708 were instituted in 1946 to collect it.

These cases were delayed by the submission of numerous offers in compromise, several changes of counsel due to deaths, and the husband's incarceration from 1945 to 1952. The three cases were consolidated and the Government moved for partial summary judgment as to the liability;

this motion premised on the theory that the earlier consideration by the Tax Court of these same taxes was res judicata. Taxpayers countered by attacking the jurisdiction of the Tax Court arguing, one, that the Tax Court, if it ever did have jurisdiction, was divested of it upon the filing of Civil No. 626, and two, that the Tax Court had no jurisdiction because the petition was not timely filed, and, in any event, should have dismissed the petition when the husband's attorney failed to appear.

The District Court disposed of taxpayer's first contention by citing United States v. O'Connor, 291 F. 2d 520, 525 (C.A. 2, 1961), which stands for the proposition that filing a collection suit in the district court after a petition filed in the Tax Court involving the same taxes will not divest the Tax Court of its jurisdiction over the petition. With respect to timeliness of the petition, the Court pointed out that the notice of deficiency was mailed June 7, 1940 and the petition filed September 5, within 90 days of the mailing. (Since September 5, 1940, was the 90th day after mailing, the Court held that the date of mailing is excluded when computing the period for filing a petition.) The Court held that the Tax Court was warranted in proceeding with the trial without taxpayer's counsel after notice of the trial had been given to the counsel. Such proceeding was provided for by Rule 27(c)(3), established in accordance with Section 1111 of the 1939 Internal Revenue Code, Katz v. C.I.R., 188 F. 2d 957 (C.A. 2, 1951). Furthermore, an attack upon proceedings of the Tax Court cannot be launched in the District Court but must be raised on a petition for review to the Court of Appeals. The Tax Court's decision had become final and that decision is res judicata on the same issues involved in these subsequent suits. The Court entered judgment for the Government in the amount of $988,679.89.

Staff: United States Attorney Robert C. Zampano and Assistant United States Attorney James D. O'Connor (D. Conn.); Raymond L. McGuire (Tax Division).

Bankruptcy; Voidable Preference; Bankrupt's Assignment of Accounts Receivable to Internal Revenue Service. Moskowitz v. Nelson (E.D. Wis., 3/25/63.) (CCH 63-1 USTC Par. 9411). Plaintiff, trustee in bankruptcy of the taxpayer, commenced this action to avoid a preference and recover property transferred to the United States, allegedly in violation of Section 60 of the Bankruptcy Act. It was alleged that taxpayer made assignments of accounts receivable and a chattel mortgage for past consideration within four months of the filing of the petition in bankruptcy. At the time the assignments were made, there were tax liens outstanding against taxpayer. The proceeds of those assignments were applied in partial satisfaction of these liens.

A motion to dismiss the complaint was filed on the following grounds: (1) there has been no waiver of the Government's sovereign immunity permitting an action such as this; and (2) the complaint failed to state a cause of action.

The Court found that it is implied in the Bankruptcy Act that the United States would be bound by its provisions and therefore liable to this type of action. However, the complaint was dismissed on a finding that the transfers to the United States were not voidable preferences. The Court stated the six elements necessary to constitute a transfer a voidable preference, one of which is that the transfer must be for an antecedent debt and result in a depletion of the estate. It was held that the transfer of property in total or partial satisfaction of an outstanding lien, recognizable in bankruptcy, is not a preference because it does not diminish the assets available for distribution to general, (as distinguished from secured) creditors. As the proceeds of the assignments were applied in satisfaction of the tax liens of the United States, they were beyond the reach of the trustee in bankruptcy.

Staff: United States Attorney James B. Brennan (E.D. Wis.).

Assessment of Penalties; Partition of Realty; Deficiency Notice Not Required in Connection With Assessment of Section 6672, Internal Revenue Code, Penalties; Partition of Realty May Not Be Maintained Pursuant to 28 U.S.C. 2410. Shaw v. United States, et al. (S.D. Cal., 5/29/63.) (CCH 63-1 USTC Par. 9496) Plaintiffs, husband and wife, instituted a suit to enjoin the collection of penalties assessed against the husband under Section 6672 of the Internal Revenue Code of 1954 on the ground that the District Director failed to provide the husband with a notice of deficiency as required by Sections 6212 and 6213 of the Internal Revenue Code of 1954. As a second claim for relief, the wife sought to quiet title to real property held by plaintiffs as joint tenants. The Court in granting defendants' motion to dismiss held that the statutory notice of deficiency provided for in Sections 6212 and 6213 is not necessary in situations involving the imposition of penalties under Sections 6671 and 6672. Therefore, plaintiffs were not entitled to enjoin the District Director due to their failure to show that the Government could not under any circumstances prevail as to the ultimate tax liability. The Court further found that the wife's quiet title claim was in reality an action to partition real property and enjoin the District Director from levying thereon. The Court held that it lacked jurisdiction over said claim on the ground that partition actions are not within the purview of 28 U.S.C. 2410.

Staff: United States Attorney Francis C. Whelan; Assistant United States Attorney Walter S. Weiss, Chief, Tax Section; and Assistant United States Attorney Herbert D. Sturman (S.D.Cal.).

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