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ANTITRUST DIVISION

Assistant Attorney General Donald F. Turner

DISTRICT COURT

SHERMAN ACT

COURT RULES ON DISCOVERY MOTIONS.

United States v. Aeroquip Corp., et al. (E. D. Mich Cr. 41312; November 20, 1967; D. J. 60-182-87)

On November 20, 1967, a hearing was held in the above criminal case before Judge Thaddeus M. Machrowicz in Detroit. At issue was our motion filed pursuant to Fed. R. Crim. P. 17(c) for pretrial production of sales statistics and price lists which we had subpoenaed from six non-party hose manufacturers and from a seventh hose manufacturer who is a division of a defendant in the case, and for pretrial production of minutes of the defendant trade association in the defendants' possession. Also at issue was our second motion, filed pursuant to no specific rule, calling for the corporate and association defendants (but not the individual defendants) to make pretrial production of the documents which they intended to introduce at the trial.

A hearing was also held on the defendant's motion to compel us, within two weeks of the entry of an order, to disclose the names of our trial witnesses and to give the defendants all the grand jury transcripts of our witnesses and all of the Jencks Act statements of both witnesses and non-witnesses. The defendants' principal reliance was on Brady v. Maryland, 373 U. S. 83 (1963), although they generally contended that they needed this information prior to trial in order to make proper preparations.

At the hearing defendants did not object to our motion to produce documents under Rule 17(c), but one hose manufacturer appeared to ask for a modification. After some discussion, a compromise was worked out so that the material could be made available at an alternate location in Detroit for pretrial inspection. A consent order will be entered calling for pretrial production of the other materials before the Clerk.

On our motion to have the corporate and association defendants make pretrial production of their trial documents, the defendants vaguely argued that such an order would violate the Fifth Amendment's "Due Process of Law" requirement. We pointed out that newly amended Rule 16(c) permits the court to condition discovery by a defendant upon discovery by the Government, and that the Supreme Court would not have permitted this rule to go into effect if pretrial disclosure of documents by defendants was unconstitutional as such.

We also pointed out that other courts had required defendants in criminal antitrust cases to designate their documents at least as early as the close of the Government's case and that we requested the earlier designation in order not to be swamped at the later time. The court said he would enter an order requiring the defendants to disclose their documents at the close of the Government's case, and would give us two weeks to examine them with leave to request more time, if necessary.

With respect to the defendants' motion for discovery, because of the current Division policy regarding disclosure of grand jury transcripts of trial witnesses we stated that we would disclose a given transcript no earlier than the close of the trial day the given witness was to testify. The court, however, ordered that we do so 48 hours before the witness was to testify. We made the same proposal as to Jencks Act statements of our witnesses, but the court again placed the 48 hour requirement on them also.

As to disclosure of the names of our witnesses and Jencks Act statements of non-witnesses, we stated that the defendants' request was completely outside the discovery which cases heretofore had allowed, and that the Jencks Act specifically prohibited disclosure of such statements prior to the time that the witness had testified. We argued that the Brady case does not overrule the Jencks Act and existing Federal Rules of Criminal Procedure regarding discovery.

The court pressed us very hard on our reasoning for not disclosing the names of our witnesses, which was to prevent witness tampering. The defendants stated that they needed this information in order to make proper trial preparation. Later, we said that we did not think the court should order us to disclose our witnesses but that, if he did so, he should condition such an order upon the defendants' willingness to disclose their witnesses. When the defendants said they were willing, the court said he would enter an order requiring us to disclose our witnesses 14 days before trial and the defendants to disclose their witnesses at the close of the Government's case (which will give us two weeks also to have the names).

As for discovery of the Jencks Act statements of non-witnesses and perhaps the grand jury transcripts of non-witnesses also, the court was impressed by our argument that the defendants' motion for any such materials was premature prior to trial. Thereupon the defendants withdrew their motion in this regard, stating that they would renew it later.

The trial of this case will commence on February 6, 1968.

Staff: Dwight B. Moore, John A. Weedon, and Mary Coleen T. Sewell (Antitrust Division)

SHERMAN ACT - CLAYTON ACT - FALSE CLAIMS ACT

GOVERNMENT SETTLES PIPE CASES AND DAMAGES PAID BY DEFENDANTS.

United States v. American Pipe & Construction Co., et al. (Civ. 64-832; December 8, 1967; D. J. 60-16-59)

United States v. Kaiser Steel Corporation, et al. (Civ. 64-833; December 8, 1967; D. J. 60-16-60)

United States v. United Concrete Pipe Corp., et al. (Civ. 64-834; December 8, 1967; D. J. 60-16-61)

United States v. U. S. Industries, Inc., et al (Civ. 64-835; December 8, 1967; D. J. 60-16-62)

United States v. United States Steel Corporation, et al. (Civ. 64-836; December 8, 1967; D. J. 60-16-63)

On December 8, 1967, Judge Martin Pence, Honolulu, Hawaii, signed identical final judgments in cases 64-833 and 64-836 and identical partial final judgments in cases 64-832, 64-834 and 64-835. The judgments terminate the cases for all defendants except American Pipe and Construction Co. as to Count III of the complaints which prays for injunctive relief under Section 4 of the Sherman Act. The judgments enjoin the settling defendants from fixing prices and rigging bids on the sale of concrete and steel pipe used for the conveyance of water or sewage. They also restrain the allocation of orders, territories or customers and the restriction of production.

In consideration for a monetary settlement with all the defendants, except American Pipe and Construction Co., dismissals of Counts I and II were entered on September 28, 1967. Count I of the complaints prays for damages under the False Claims Act and Count II sues for damages under Section 4A of the Clayton Act.

The five cases were consolidated for pretrial procedures before Judge Pence with numerous other private damage suits filed in the western states. An overall monetary settlement was reached between practically all of the consolidated plaintiffs and all of the defendants except American. The total amount of damages paid by the settling defendants to all plaintiffs was $21,275,000. Of this amount the share for the United States is $1,455,295.87 in cash and $215,447.49 in notes for a total settlement of $1,670,743.36. This overall agreement was reached with the following defendants.

United States Industries, Inc.
United Concrete Pipe Corp.
Kaiser Steel Corporation
United States Steel Corporation
Smith Scott Co. Inc.

Staff: Lyle L. Jones, Stanley E. Disney, Barbara J. Svedberg, Anthony E. Desmond, John D. Gaffey, and William D. Kilgore (Antitrust Division)

DAMAGES PAID IN SETTLEMENT IN MILK CASE.

United States v. Carnation Co. of Washington, et al. (E. D. Wash., Civ. 2297; December 12, 1967; D. J. 60-139-143)

After payment of $163,000 in damages to the Government to the defendants, the above civil action was concluded when an Order of Dismissal With Prejudice, signed by Judge Charles L. Powell, was filed in the United States District Court, for the Eastern District of Washington at Spokane on December 12, 1967.

The civil complaint in this action was filed against the two named corporate defendants on Tuesday, August 28, 1962 in Spokane. The complaint charged that the defendants had engaged in a conspiracy covering the period October 1, 1956 to December 31, 1960, to fix prices, to allocate the market and to submit rigged and collusive bids to a governmental agency, Fairchild Air Force Base, located near Spokane, Washington. It was alleged that as a result of the conspiracy and agreement between the defendants, Fairchild Air Force Base purchased milk and milk products involved during the period at high and artificial prices to the damage of the Government.

The complaint contained two counts. In Count I the United States sought double damages plus forfeitures on purchases by Fairchild Air Force Base under the False Claims Act. In the alternative, Count II sought single damages under Section 4A of the Clayton Act.

During the ensuing litigation and discovery the Government sought to take the deposition of its chief witness, Robert E. Rutherford, general manager of defendant Carnation Company of Washington, who had testified before the grand jury. Mr. Rutherford declined to answer questions asked during the deposition and invoked his Fifth Amendment privilege on the grounds

that his answers might incriminate him. The court then ordered Mr. Rutherford to answer the questions on the basis that he received immunity from prosecution under the Antitrust Immunity Statute (15 U.S.C. Sec. 32) when called by the Government. Upon Rutherford's refusal to comply with the court's order, the court held Rutherford in contempt on June 23, 1965, but gave him 60 days in which to purge himself of contempt.

Rutherford gave notice of appeal from the contempt conviction and the court continued the above case until disposition of the contempt appeal.

On August 11, 1966 the Ninth Circuit upheld the sentence of contempt in Robert E. Rutherford v. United States, 365 F. 2d 353. Rutherford then petitioned the Supreme Court for certiorari. The petition was denied on January 19, 1967, 385 U.S. 987. Rutherford's deposition was then again taken by the Government on March 2, 1967 at which time Rutherford answered the questions propounded by the Government. Defense counsel did not cross-examine.

After Rutherford had answered the Government's questions on deposition, defendants approached the Government regarding settlement, and after lengthy negotiations the settlement basis of $163,000 was reached.

Both corporate defendants named in the above civil action plus one individual, Joseph Click, general manager of defendant Inland Empire Dairy Association, had been indicted previously on March 16, 1962 in the companion criminal case, United States v. Carnation Company of Washington, et al., Cr. C-8752. In the criminal case each corporate defendant was fined $20,000 and the individual defendant $2,500. Thus the total recovery to the Government, under both the criminal and civil companion cases amounted to $205,500.

Staff: Gerald F. McLaughlin and Luzerne E. Hufford, Jr.
(Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General Edwin L. Weisl, Jr.

COURTS OF APPEALS

IMMIGRATION

DEPARTMENT OF LABOR'S CERTIFICATION THAT ADMISSION OF ALIEN WILL ADVERSELY AFFECT WAGES AND WORKING CONDITIONS OF DOMESTIC LABOR NOT REVIEWABLE.

Cobb v. Murrell (C. A. 5, No. 23, 916; November 27, 1967; D. J. 145-10-81)

Under Section 212 of the Immigration and Nationality Act of 1952, a non-quota immigrant was excluded from admission to the United States if the Secretary of Labor determined that sufficient workers in the United States were available at the place at which the alien is destined to perform the work he plans to perform, or that his employment would adversely affect domestic wages and working conditions. 8 U. S. C. 1182(a) (14) (1953). (The present Section 212 is similar, except that now, in order to obtain admission, the Secretary of Labor must certify that sufficient domestic workers are not available and that the aliens' employment will not adversely affect domestic wages and working conditions.) The plaintiff in this case employed a Mexican alien as a live-in maid while she was illegally in the country. After she was apprehended and deported, he alleged that he could not find adequate help elsewhere and thus he filed an application with the Department of Labor for permission to bring her back into the United States. The application was rejected on the grounds that her employment would adversely affect domestic wages and working conditions and that sufficient workers in the United States were available for the job. Plaintiff brought this action to obtain review of the administrative determination. The district court dismissed the action for lack of jurisdiction, and the Court of Appeals affirmed.

While the Mexican maid was not a party to the action, the Court of Appeals nevertheless discussed her rights and, following a Ninth Circuit decision, Braude v. Wirtz, 350 F. 2d 702, held that she would have had no standing to review the Secretary of Labor's determination. The court concluded that the purpose of Section 212(a)(14) was to protect the domestic labor market, and not to confer any rights on aliens. The court also noted that the only provision in the Immigration and Nationality Act for judicial review is Section 106(b), 8 U. S. C. 1105(b), which allows a habeas corpus petition following an exclusion order. For habeas corpus relief to be applicable, the alien must already be at the border or on a ship headed for the United States. In addition, the court concluded that the Secretary of Labor's certification was

a matter "committed to agency discretion" within the meaning of Section 10 of the Administrative Procedure Act. In this connection, the court made the following comments: "Courts are not universal monitors or ombundsmen [sic] of the administrative apparatus of government. When constitutional rights will not be violated, Congress can make an administrative officer the apogee of finality * * *."

Proceeding to the question directly presented by the case, the court held that plaintiff also had no standing to review the denial of admission to his prospective maid. The court noted that in one section of the Act, Section 204(b), 8 U.S.C. 1154(b), Congress had exhibited a concern for certain classes of prospective employers of aliens, by allowing them to file administrative visa petitions. However, plaintiff was not in this class of employers, and the only purpose of Section 212(a)(14), as noted, was to protect the domestic labor market, not to confer rights on prospective employers. In denying the prospective employer standing to sue, the court again followed the Ninth Circuit's decision in Braude v. Wirtz, 350 F. 2d 702. In closing the court made the following comment with respect to the asserted harm that plaintiff had suffered because he could not employ this Mexican maid:

> Wounded or bruised feelings may be painful, but we do not have a legal right to be free of all insensitive, illogical, or unreasonable hurts. Not all wounds are nursed by courts. Standing to seek judicial dispensation of curative justice is controlled by the accumulated wisdom of case and statutory law which here commands finality in administrative adjudication.

Staff: Robert V. Zener (Civil Division)

INSURANCE

SERVICEMAN WHO TAKES OUT NATIONAL SERVICE LIFE INSURANCE POLICY WITH WIFE AS BENEFICIARY DOES NOT CHANGE HER AS BENEFICIARY BY SUBSEQUENTLY ANSWERING "NONE" ON "RECORD OF EMERGENCY DATA" CARD TO QUESTION OF WHETHER HE HAD ANY INSURANCE POLICIES IN FORCE.

Baker v. United States, et al. (C.A. 5, No. 24,000; November 13, 1967; D.J. 146-55-3724)

This action was brought by the divorced wife of a deceased serviceman to recover the proceeds of a National Service Life Insurance policy. The insurance policy had at one time properly designated the wife as beneficiary. However, the insured, after he had divorced his wife, had executed Air Force Form 246-3, "Record of Emergency Data". On this form, the insured

had designated his mother as beneficiary for certain gratuity pay, unpaid pay and allowances, and allotment, if any. In the space on the form where he was to have listed "Insurance Policies in Force -- Including NSLI . . .", he entered the word "NONE". The Veterans Administration had determined that he had thus changed the beneficiary, and the mother was entitled to the proceeds. The district court agreed, and ruled as a matter of law that the insured had changed the beneficiary.

The Court of Appeals reversed, holding that the wife was entitled to the proceeds. The Court relied upon the regulation, issued under 38 U. S. C. 717(a), which provides that "a change in beneficiary to be effective must be made by notice in writing signed by the insured and forwarded to the Veterans' Administration by the insured or his agent . . . . Whenever practicable such notices shall be given on blanks prescribed by the Veterans Administration." The Fifth Circuit pointed out that under this regulation, a mere intent to change the beneficiary was not enough, and there must be "some affirmative action directed toward implementing the intent." The Court then ruled that the insured's actions here did not constitute such affirmative action. The Court stated that his filling out the Emergency Data Form did not constitute "an affirmative act which was designed to and reasonably thought by him to effectuate a change in beneficiary of his National Service Life Insurance policy." In the Court's view, his placing the word "NONE" on that form did not show any intent to change a beneficiary but merely showed that he did not remember having any insurance.

Staff: United States Attorney Donald H. Fraser;
Assistant United States Attorney W. Reeves Lewis (S. D. Ga.)

LONGSHOREMEN'S AND HARBOR WORKERS' ACT

WORKMEN'S COMPENSATION AWARD UNDER ACT NOT TO BE TERMINATED ON GROUND THAT EMPLOYEE HAD BECOME ELIGIBLE FOR AND WAS RECEIVING PENSION BENEFITS UNDER CONTRIBUTORY PENSION SYSTEM.

William Massey v. D. C. Transit System, Inc. (C. A. D. C., No. 20, 898; December 8, 1967; D. J. 83-16-284)

This action was originally brought by the employer to obtain judicial review of a compensation order issued under the Longshoremen's and Harbor Compensation Act, 33 U. S. C. 921. The district court upheld the Deputy Commissioner's finding of disability but directed the termination of the employee's workmen's compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act on the ground that the employee received a pension allowance from a contributory pension scheme. On our appeal,

the Court of Appeals reversed.

The Court of Appeals held that the receipt of a pension allowance from a contributory pension fund is not a ground for the termination of a workmen's compensation award. The Court relied upon Section 15 of the Act, 33 U. S. C. 915, which provides that the cost of workmen's compensation is to be borne by the employer and that it is invalid for the employee to "waive his right to compensation" or contribute to a fund maintained for the purpose of providing compensation. The Court further noted that the pension plan itself expressly provided that "Allowances are in addition to any other income which an employee may have, especially in addition to . . . any benefits received under Workmen's compensation."

Staff: Jack H. Weiner (Civil Division)

NATIONAL BANKING ACT

COMPTROLLER NEED NOT HOLD FORMAL ADVERSARY HEARING IN DETERMINING WHETHER TO APPROVE CHARTERING OF NEW NATIONAL BANK; ACTION OF COMPTROLLER NOT SUBJECT TO REVIEW BY TRIAL DE NOVO.

Citizens Bank of Hattiesburg v. Camp (C. A. 5, No. 24, 568; December 4, 1967; D. J. 145-3-754)

The Fifth Circuit affirmed the district court decision upholding the action of the Comptroller in authorizing the chartering of a new national bank in Hattiesburg, Mississippi. The Court followed the earlier ruling of the Eighth Circuit in Webster Groves Trust Co. v. Saxon, 370 F. 2d 381, that the Comptroller is not required to hold a formal adversary hearing before approving a new bank charter, and that the Comptroller's action is not subject to review by trial de novo. The Court further ruled that the present record revealed no arbitrary or otherwise illegal action of the Comptroller, and that it could not "substitute its judgment for that of the Comptroller." The Fifth Circuit did not reach the question of whether a competing bank had standing to challenge the chartering of the new national bank.

Staff: Walter H. Fleischer (Civil Division)

SOCIAL SECURITY ACT -- DEATH BENEFITS

SECRETARY'S DETERMINATION THAT SEVEN-YEAR PRESUMPTION OF DEATH WAS INAPPLICABLE WHERE WAGE-EARNER'S ABSENCE WAS EXPLAINED UPHELD BY COURT OF APPEALS, NOTWITHSTANDING STATE PROBATE COURT DECREE THAT WAGE-EARNER WAS PRESUMED TO BE DEAD.

Dowell v. Gardner (C. A. 6, No. 17369; November 30, 1967; D. J. 137-58-220)

This action concerned the application for Social Security survivors' benefits on behalf of the four children of John B. Dowell. The father deserted his family in 1957 and was never seen by his family again. This application for benefits was filed with the Secretary more than seven years after Dowell's desertion, on the theory that the wage-earner was presumed dead after the seven years' absence. In 1964, at the instance of the wife, a state probate court had entered a decree finding a legal presumption of death.

The Secretary of Health, Education and Welfare denied benefits on the ground that the wage earner was not "unexplainedly" absent for seven years (20 C. F. R. 404. 705), notwithstanding the state court decree of death. In 1957 Dowell's wife had sought a divorce against him on the ground of physical assault, extreme cruelty, and gross neglect of duty. During the divorce proceedings, he had burned the house trailer in which the family was residing, containing all the family's food and clothing. He had been adjudged guilty of contempt of court for nonsupport and sentenced to 10 days in jail. It was upon his release from jail that he left his family and his family never heard from him since. Meanwhile, a new warrant was issued against him, and he was ordered by the Divorce Court to pay for the support of his children, but he never made any contributions in compliance with this decree. A final decree of divorce was entered in December, 1957, reserving the issue of support until such time as Dowell could be brought before the court. He was later discovered to have been employed from July 1957 to February 1958 in Detroit, Michigan, without word to his family. On the basis of this record, the Secretary ruled that Dowell's absence was not unexplained because he would want to keep his whereabouts unknown in order to avoid the problem of support for his children.

The district court set aside the Secretary's decision, characterizing the absence as unexplained. The Court of Appeals reversed and directed summary judgment in favor of the Secretary, holding that substantial evidence in explanation of the disappearance was presented. The Court of Appeals went on to rule that the decree of presumed death entered by the State court "is not binding" on the Secretary for purposes of the claim of social security benefits, citing, inter alia, Cain v. Gardner, 377 F. 2d 55 (C. A. 4).

Staff: J. F. Bishop (Civil Division)

TORT CLAIMS ACT -- MEDICAL MALPRACTICE

FEDERAL EMPLOYEE'S EXCLUSIVE REMEDY AGAINST UNITED STATES FOR ALLEGED MEDICAL MALPRACTICE FOLLOWING WORK INJURY IS UNDER FEDERAL EMPLOYEES COMPENSATION ACT.

Walter R. Sanders v. United States (C. A. 5, No. 24,731; December 7, 1967; D. J. 157-19M-22)

A federal employee brought this action against the United States under the Tort Claims Act alleging that after he had been injured in the course of his employment, he was further damaged by negligent treatment of his work injury at a Government hospital. The district court granted the Government's motion to dismiss, holding that the employee's exclusive remedy was under the Federal Employees' Compensation Act.

The Court of Appeals affirmed in a per curiam decision, citing the decision of the Second Circuit Court of Appeals in Balancio v. United States, 267 F. 2d 135, certiorari denied, 361 U. S. 875.

Staff: Jack H. Weiner (Civil Division)

* * *

CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

SPECIAL NOTICE

NARCOTIC ADDICT REHABILITATION ACT

Attention is called to the provisions for commitment for purposes of an examination contained in Titles I and III of the Narcotic Addict Rehabilitation Act of 1966 (Pub. Law 89-793). Under Title I, an eligible defendant may be committed to the custody of either the Attorney General or the Surgeon General. Under Title III, commitment for examination purposes is not required; however, commitment may be made to the Surgeon General.

It is preferable that defendants committed for an examination under Title I be committed to the custody of the Surgeon General, since it is the Surgeon General who will conduct the examination. Under Title III, all persons to be examined should be committed to the custody of the Surgeon General. The Surgeon General prefers the latter procedure because it permits those who will have the responsibility for treatment to pass on the question of amenability to treatment.

For the time being, all persons committed to the Surgeon General for examination purposes will be examined at a Public Health Service Clinical Research Center (at either Lexington, Kentucky, or Fort Worth, Texas).

COURTS OF APPEAL

ADMISSIONS

SPECIFIC WAIVER OF RIGHTS DURING CUSTODIAL INTERROGATION NOT NECESSARY.

United States v. Hayes (C. A. 4, November 2, 1967; D. J. 122-35-76)

Appellant was convicted on four counts of transporting falsely made checks in interstate commerce in violation of 18 U. S. C. A. § 2314. On appeal he argued that incriminating statements which he had made while he was being interrogated by the F. B. I. agents who arrested him were erroneously admitted into evidence because he had not explicitly waived his Fifth and Sixth Amendment rights after the "Miranda Warning" was given.

The arresting officers had given full and sufficient warning to appellant and had allowed him to make a phone call. After the phone call was completed

they began to question him without asking whether or not he intended to waive the rights of which he had previously been apprised. After he had been interrogated for approximately one-half hour the appellant refused to answer any more questions and demanded that he be allowed to consult with an attorney. It was during this period that the incriminatory statements were elicited. Appellant maintains that an express statement of waiver was required from him in order to render these answers admissible.

The Court rejected this contention holding that a statement by defendant to the effect he fully understood and voluntarily waived his rights after receiving appropriate warnings was not an essential link in the chain of proof of waiver. It ruled that the circumstances in this situation sufficiently demonstrated that appellant had knowingly and voluntarily waived his rights thereby rendering his statements admissible. Quoting the language of the Miranda decision itself where the Supreme Court said that, "The warnings required and the waiver necessary in accordance with our opinion today, are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement made by a defendant", the Court stated that in this case it was simply deciding that strong and unmistakable circumstances, upon occasion, may establish such an equivalent.

Staff: United States Attorney Stephen H. Sachs; Assistant United States Attorney Alan I. Baron (D. Md.)

PUNISHMENT - SECOND OFFENDER

PARDON DOES NOT PREVENT USE OF CONVICTION FOR PURPOSES OF SECOND OFFENDER PROVISIONS OF TITLE 26, SECTION 7237(b).

United States v. George Silva Salas and Pappy Fuentes (C. A. 2, No. 30348; December 19, 1967; D.J. 12-51-1114)

Appellant Salas was convicted on three counts of an indictment charging violation of 26 U.S.C. §§ 4705(a) and 7237(b). On appeal he and his co-defendant, Fuentes, argued that the Government had failed to establish beyond a reasonable doubt that they were not entrapped and that the court failed to charge the jury concerning the special interest of the informant. Appellant Salas also argued that, because his first conviction had been pardoned, he should not have been sentenced as a second offender.

The Court of Appeals rejected the first two arguments and with respect to the third argument relied on various state cases in holding that a presidential pardon not grounded on a finding of innocence does not prevent sentencing under the second offender provisions of 26 U.S.C. § 7237(b).

Staff: Assistant United States Attorney Roger J. Hawke and Former Assistant United States Attorney John A. Stichter (S.D.N.Y.)

SELECTIVE SERVICE ACT

CONSCIENTIOUS OBJECTOR CLAIM FILED SUBSEQUENT TO MAILING OF ORDER TO REPORT FOR INDUCTION NOT SUCH CHANGE IN REGISTRANT'S STATUS WHICH RESULTS FROM CIRCUMSTANCES BEYOND HIS CONTROL THAT BOARD REQUIRED TO REOPEN CLASSIFICATION.

United States v. Starling Gene Helm (C. A. 4, No. 11,551, November 10, 1967; D. J. 25-47M-436)

The United States Court of Appeals for the Fourth Circuit refused to follow the Second Circuit (Gearey) in the situation where a registrant first claims to be a conscientious objector after the order to report for induction has been mailed. The Court stated:

> Our review of the record discloses that appellant, during the five and one-half years that he was registered with his Local Board prior to receiving a notice of induction, never made a claim that he was a conscientious objector or a farmer, and that such claim came only after he had received a notice to report for induction, and five months before he would have attained the age of twenty-six years and have been draft-exempt under current policy. There was thus no reason to afford him a hearing before the order to report for induction; and after the order to report for induction, there was no factual basis on which it may be concluded that there was such a "change in registrant's status resulting from circumstances beyond his control" within the meaning of 32 C. F. R. § 1625.2(b), such as to require the Board to reopen his case after the order to report for induction.

To date the only circuit which requires the local board to consider a registrant's claim after the order to report for induction has been mailed is the Second Circuit. United States v. Gearey, 368 F. 2d 144 (C. A. 2, 1966).

Staff: United States Attorney William H. Murdock; Assistant United States Attorney R. Bruce White, Jr. (M. D. N. C.)

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LAND AND NATURAL RESOURCES DIVISION

Assistant Attorney General Clyde O. Martz

COURTS OF APPEALS

INDIANS; PUBLIC DOMAIN

DISCRETION OF SECRETARY OF INTERIOR TO CLASSIFY WITHDRAWN LANDS FOR ENTRY UNDER TAYLOR GRAZING ACT; GENERAL ALLOTMENT ACT DOES NOT CONFER ON INDIANS ABSOLUTE RIGHT TO ALLOTMENT OF LANDS SELECTED; LANDS SELECTED MUST BE AGRICULTURAL AND CAPABLE OF SUSTAINING INDIAN.

Finch v. United States & Udall (C. A. 10, No. 9474, Dec. 20, 1967; D. J. 90-2-11-6873)

This action was instituted by the Indian appellants to compel allotment to them of public lands under the General Allotment Act. The lands involved had been withdrawn from entry by executive order and reserved for classification, as recognized and authorized by Section 7 of the Taylor Grazing Act. Appellants' applications had been rejected because the lands selected would not support an Indian family, based on facts relating to location, topography, vegetation, land tenure pattern, and general economy of the area. The district court sustained the Secretary of the Interior's rejection. (263 F. Supp. 309)

The Court of Appeals affirmed. Answering appellants' contention that Indian allotment rights have been "sterilized" because substantially all remaining public lands have been withdrawn from entry and may not be settled without prior favorable classification in the discretion of the Secretary, the Court stated that "Such an argument abounds with political overtones and must be directed to Congress unless the acts of the Secretary find no justification in existent congressional mandates which do not extinguish rights once conferred."

The Court of Appeals declared that Congress, in enacting the General Allotment Act, did not "place the public domain beyond discretionary control [of the Executive] and vest in individual Indian applicants an absolute right to the land of their choice." In this connection, it concluded that the "General Allotment Act never did and does not now vest a right to particular lands to a particular Indian upon selection. Approval of his selection and location never was and is not now a mere ministerial duty of the Secretary." The Court also emphasized that the Taylor Grazing Act "gave the Secretary of the Interior express discretionary authority to classify withdrawn lands

and proscribed disposition, settlement or occupation until after such classification." A right to particular lands does not vest, the Court held, until the Secretary, in his discretion, determines the agricultural suitability of the land and that allotment will be in the best interest of the Indian, and issues a patent. The regulation (now 43 C.F.R. (1967 rev.) sec. 2212.0-7), providing that an application for allotment of unreserved lands, actually settled upon in good faith, cannot be denied on the ground that the lands are "too poor in quality," was ruled patently inapplicable. Since "the question of value relates to agricultural value in keeping with the intent of the Allotment Act to provide, in effect, a homestead which would sustain an Indian family," appellants' assertion that the lands involved have great potential as oil-producing lands was considered irrelevant.

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

PUBLIC DOMAIN

DEPENDENT RESURVEY RE-ESTABLISHING ORIGINAL SURVEY ON GROUND; BURDEN OF PROOF; DISMISSAL WITHOUT PREJUDICE.

United States v. John Hudspeth; John Hudspeth v. United States (C.A. 9, Nos. 20,905; 20,906, Sept. 11, 1967; D.J. 90-1-11-1172)

This action was instituted by the United States for triple damages resulting from a series of timber trespasses on public domain land in Oregon. The Hudspeths owned land adjacent to the public domain land and claimed title to the property on which they cut the timber. The issue presented was the proper location of the boundary between the properties.

As the basis for its claim, the United States relied upon dependent resurveys conducted by the Department of the Interior in 1958 and 1962 to reestablish, on the ground, the original 1872 survey establishing the boundaries. The pretrial order stated as the critical issue of fact: "Did plaintiff accurately resurvey the lines in question in accordance with the original surveys?" The defense presented was that the dependent resurveys were inaccurate. The district court rules that the burden of proof was on the United States and that burden was not met. The case was dismissed without prejudice. Both sides appealed.

The United States argued that the district court improperly rejected the dependent resurveys. The legal standards for conducting resurveys were set forth in the Manual of Surveying Instructions (Dept. of the Interior, 1947). When so properly conducted, earlier vested rights in land are not altered or changed but simply are re-established. The test of a valid dependent resurvey is whether it was properly conducted and is not a comparison with field

notes or plats. A survey is what the surveyor in fact marks on the ground. Field notes and plats are only secondary evidence of the survey. Only the dependent resurvey reconstructs the existing indications of the original survey in order to arrive at the re-establishment of the original boundaries on the ground. The Government also argued that defendants did not exhaust their administrative remedies by appeal to the Secretary of the Interior and that review of the administrative determination, i.e., approval of the resurveys, should have been limited to the arbitrary or capricious standard.

The Court of Appeals, without passing upon the merits of the Government's argument, affirmed the district court. The Court said that the case below was treated by both parties as a simple factual determination of accuracy. It would be inappropriate to reverse upon standards not presented to the district court. The Court further observed: "Remand for consideration of new issues, rather than dismissal may be appropriate where dismissal 'would obviously result in a plain miscarriage of justice.' * * * But this is not such a case, for the dismissal was without prejudice to a new trial."

The Hudspeths, in their cross-appeal, argued that dismissal should have been with prejudice. The Court responded that the public interest in obtaining redress justified the result where it appeared that some trespass had occurred, but the Government failed in its burden of proof.

Staff: William M. Cohen (Land and Natural Resources Division)

TUCKER AND TORT CLAIMS ACT

CONSENT OF UNITED STATES TO BE SUED; JURISDICTIONAL TIME PERIOD UNDER TUCKER ACT; DISCRETIONARY FUNCTION OR DUTY EXCEPTION OF FEDERAL TORT CLAIMS ACT.

Konecny v. United States (C.A. 8, No. 18789, Dec. 12, 1967; D.J. 90-1-23-1107)

Appellant, a riparian landowner, brought this action for a taking of and damages to his land resulting from flooding caused by the construction, control and operation of a dam by the United States. He relied upon the Tucker Act (28 U.S.C. secs. 1346(a) (2)) and the Federal Tort Claims Act (28 U.S.C. sec. 1346(b)) for jurisdiction. The district court dismissed the action for lack of jurisdiction.

The Court of Appeals affirmed. As to the taking, the Court stated that Tucker Act jurisdiction is limited to actions commenced within six years after the right of action first accrues. (28 U.S.C. 2401 (a).) A cause of

action accrues when facts exist which enable one party to maintain an action against another. Here the dam was completed and the flood conditions stabilized more than six years before the action was brought. Thus, the jurisdictional time period expired. As to damages, the Court stated that the United States did not consent to suit under the Federal Tort Claims Act. The decision to construct, maintain and operate the dam fell within the "discretionary function or duty" exception. (28 U.S.C. 2680 (a).)

Staff: William M. Cohen (Land and Natural Resources Division)

COURT OF CLAIMS

RIPARIAN LANDS

COMPENSABLE TAKINGS; EXERCISE OF "BATTURE" SERVITUDE WITHOUT LIABILITY TO LANDOWNER.

Merle Bazer v. United States and William Vercher v. United States (C. Cls. Nos. 94-66 and 95-66, Dec. 11, 1967; D.J. 90-1-23-1212 and 90-1-23-1211)

Under Louisiana law it is well settled that batture lands riparian to navigable waters may be used by the State for constructing and maintaining levees, without payment of compensation to the riparian owner. In General Box Co. v. United States, 351 U.S. 159 (1956), the Supreme Court held that the State may have the servitude exercised by the United States and that the United States, in using the batture for levee purposes, does not become liable to the landowner.

Here, the plaintiffs, who owned farmland riparian to the Atchafalaya River, in Pointe Coupee Parish, Louisiana, filed petitions alleging that the United States Corps of Engineers, in improving and enlarging the levee along the Atchafalaya River, went upon plaintiffs' property between the levee and the River, and cut timber and removed it, along with topsoil, from approximately 50 acres of their land, and that such action constituted a taking of their property for which they demanded compensation.

The United States moved for summary judgment, relying upon Article 457 of Louisiana Civil Code, which provides that on navigable streams, where there are levees, the levees shall form the banks of the streams. Since, under Louisiana law, the banks of a navigable stream are batture, land between the levee along a navigable river and the ordinary low water mark, by statute, is designated as batture.

The Court of Claims agreed with the Government's contention, granted the motions for summary judgment and dismissed plaintiffs' petitions on the ground that plaintiffs' land, used by the United States Corps of Engineers for the improvement of levees along the Atchafalaya River, is batture land under the Louisiana Constitution of 1921 (Art. 16 sec. 6), and Article 457 of the Louisiana Civil Code, which may be taken by the United States as a donee of the State without compensation to plaintiffs.

Staff: Glen E. Taylor (Land and Natural Resources Division)

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TAX DIVISION

Assistant Attorney General Mitchell Rogovin

DISTRICT COURT - Civil Cases

BANKRUPTCY JURISDICTION

BANKRUPTCY COURT DOES NOT HAVE JURISDICTION TO CONDUCT ANCILLARY PROCEEDINGS TO DETERMINE DISCHARGEABILITY OF TAX CLAIMS OF UNITED STATES.

In the Matter of Warren W. Vest (W.D. Mo., November 30, 1967, D.J. 5-43-792)

In this bankruptcy proceeding the United States timely filed a proof of claim asserted against the bankrupt as a responsible officer under the provisions of Section 6672 of the Internal Revenue Code. The bankrupt, after discharge, filed with the Referee both an Objection to the claim and an Application for an Order Restraining Collection on grounds that the claim was discharged in bankruptcy. The United States asserted that the Referee does not have jurisdiction to determine dischargeability; that the provisions of Section 7421 of the Internal Revenue Code preclude the issuance of an order restraining the collection of tax, and, in any event, that the claim asserted by the United States is not dischargeable in bankruptcy. The Referee agreed with the two jurisdictional arguments of the United States and did not rule upon the dischargeability of the tax.

In his petition for review filed with the District Court the bankrupt asserted that the Court had jurisdiction to determine dischargeability, relying upon Local Loan Co. v. Hunt, 292 U.S. 234 (1934), which upheld the right of a bankruptcy court to conduct ancillary proceedings where the bankrupt was handicapped in asserting in a non-bankruptcy forum his defense of discharge against the suit of a creditor who claims his debt to be nondischargeable.

The Court, in upholding the decision of the Referee, cited 1 Collier on Bankruptcy, 2.62 (14th ed., 1964), stating that the ancillary jurisdiction envisioned by Local Loan Co. is strictly limited to instances where lack of a remedy at law gives rise to a right to equitable relief and does not grant general jurisdiction to the bankruptcy court to determine dischargeability. The Court then cited Kelly v. Lethert, 362 F. 2d 629 (C.A. 8th 1966), finding that an adequate legal remedy was available to the taxpayer to test the

legality of an assessment under Section 6672. The existence of an opportunity to bring a refund suit in which the dischargeability of a claim in bankruptcy might be raised denies to the bankrupt the right to determine dischargeability in the bankruptcy forum. Having determined that its ruling the bankruptcy court had no jurisdiction to conduct ancillary proceedings was dispositive, the Court vacated the decision of the Referee that he was equally without jurisdiction to issue a restraining order.

Staff: Assistant United States Attorney John L. Kapnistos (W.D. Mo.); David H. Hopkins, Jr. (Tax Division)

STATE COURT

LIENS

STATUTORY LIEN FOR PERSONAL PROPERTY TAXES AND JUDGMENT LIEN HELD PRIOR TO SUBSEQUENT FEDERAL TAX LIENS.

Cleora K. Cohron, a/k/a Cle Ora Cohron, and James Derwin Cohron, Plaintiffs v. Debra Kathlyn Cohron, et al., Defendants v. United States of America, Intervenor (D. C. Iowa, Appanoose County, Iowa, June 21, 1967; 67-2 U.S.T.C. par. 9627; D.J. 5-28-737)

Plaintiffs brought this action for partition and sale of a tract of realty. The United States intervened, pursuant to leave of court, to obtain a judgment against the plaintiffs for outstanding tax liabilities and to foreclose tax liens against the subject real property.

Among other competing claims to the proceeds resulting from partition and sale of the realty were (1) a judgment duly filed in the county wherein the property is located (Appanoose County) prior to the filing of the federal tax liens, and (2) a claim by Appanoose County for unpaid personal property taxes arising prior to the federal tax assessments. Such unpaid personal property taxes are liens "upon any and all real estate owned by . . . [the taxpayer] . . . and situated in the county in which the tax is levied," pursuant to Section 445.29, Iowa Code Annotated.

The questions involved were governed by Section 6323(a) of the Internal Revenue Code of 1954, as well as the principles relating to the relative priority of state statutory liens and federal tax liens posited in United States v. State of Vermont, 377 U.S. 351 (1964).

The Court, without stating particular decidendi rationes, held that both

the judgment lien and the County's statutory lien for taxes were entitled to priority vis-a-vis the federal tax liens.

Staff: United States Attorney James P. Reilly (S. D. Iowa); Robert E. Ferguson (Tax Division)

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