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UNITED STATES ATTORNEYS
BULLETIN

UNITED STATES ATTORNEYS BULLETIN

Vol. 13 October 1, 1965 No. 20

BAIL

The following districts are commended on having achieved the lowest percentage rate for defendants detained, and the best record for release of defendants on their own recognizance or personal bond:

Hawaii
Delaware
Michigan (E)
Arkansas (W)
Massachusetts
Connecticut
Virginia (E)
Wisconsin (W)
Vermont
Illinois (N)
Wisconsin (E)

APPOINTMENTS - UNITED STATES ATTORNEYS

The nominations of the following United States Attorneys to new four-year terms were pending before the Senate as of September 27, 1965:

California, Northern--Cecil F. Poole
Iowa, Northern--Donald E. O'Brien
Mississippi, Northern--H.M. Ray
North Carolina, Eastern--Robert H. Cowen
North Carolina, Middle--William H. Murdock
North Carolina, Western--William Medford
Ohio, Northern--Merle M. McCurdy
Tennessee, Western--Thomas L. Robinson

The nominations of the following United States Attorneys to new four-year terms have been confirmed by the Senate:

Alabama, Northern--Macon L. Weaver
Alabama, Southern--Vernol R. Jansen

* * *

ANTITRUST DIVISION

Assistant Attorney General Donald F. Turner

Court Dismisses Individual Defendants on Grounds of Immunity. United States v. Chas. Pfizer & Co., Inc., et al., (S.D. N.Y.) D.J. File 60-21-108. On September 9, 1965, Chief Judge Sylvester Ryan granted motions by the three individual defendants herein, filed February 25, 1965, to dismiss this indictment as to each of them on the ground that each had obtained immunity under Sections 32 and 33 of Title 15 by virtue of their testimony in the Spring of 1962 before a grand jury in the District of Columbia investigating possible violations of the bribery, conflict of interest, false statements and conspiracy statutes of title 18. The indictment herein was returned in the Southern District of New York on August 17, 1961, and charges of conspiracy to restrain and to monopolize, and monopolization of, the manufacture and sale of broad spectrum antibiotics.

The District of Columbia grand jury was impanelled in January 1962 at the request of the Criminal Division to investigate allegations that one Henry Welch, a former director of the Antibiotics Division of the Food and Drug Administration, had improperly used his office to further the sale of reprints of articles concerning antibiotics appearing in medical publications in which he had a substantial financial interest or profit sharing arrangement. Among the chief purchasers of these reprints were the three defendant companies herein, and the three individual defendants, the chief executive officers of their respective companies, were among the large number of witnesses subpoenaed to appear before that grand jury. Attorneys of both the Criminal and Antitrust Divisions submitted affidavits averring that there had been no communication between the two Divisions in connection with the impanelling of that grand jury or any matters occurring before it, nor was there any intent on the part of the Criminal Division to elicit any evidence of antitrust violations. Each of the three individual defendants had been advised of his rights under the Fifth Amendment prior to testifying.

We contended that to obtain immunity under the Sherman Act, it was necessary for the defendants to show that the District of Columbia grand jury in question was a proceeding under the Sherman Act and in order for it to be such, the testimony had to be substantially related to the charges herein; and that link in the chain type of testimony which might tend to incriminate or furnish leads to incriminating evidence would not suffice. While link in the chain evidence may serve to confer immunity upon a witness testifying in a proceeding already determined to be under the Sherman Act, it could not furnish the basis for determining whether the immunity statute applies to the proceeding in question.

The Court held, however, that because the testimony of the three defendants before the District of Columbia grand jury "concerned transactions, matters, and things for which they are being prosecuted" and "involved circumstances from which an element of the crimes here charged could be inferred or

which might furnish leads that could have uncovered evidence of these crimes," such testimony constituted a link in the chain of evidence needed to prosecute the defendants under this indictment, and they thereby acquired immunity. He held, further, that the substantial relation test is really the same as the link in the chain test applied in Fifth Amendment cases. He concluded, therefore, that because the subject matter of the testimony before the District of Columbia grand jury was germane to the subject matter of the instant indictment, or, alternatively, to a possible Sherman Act violation, that proceeding thereby became one under the Sherman Act, and the defendants thereby acquired immunity under Section 32.

The question of an appeal is pending.

Staff: John J. Galgay, John D. Swartz, Harry G. Sklarsky, Herman C. Gelfand and Gerald R. Dicker (Antitrust Division)

Government Dismisses Case as Defendants Abandon Merger. United States v. Abbott Laboratories, et al. (N.D. Ill.) D.J. File 60-0-37-817. On September 7, 1965, this case which had been scheduled to go to trial on September 13, 1965, was dismissed (without prejudice) by stipulation of all parties. The complaint filed on December 8, 1964, alleged that the proposed acquisition of Nuclear-Chicago by Abbott would violate Section 7 of the Clayton Act. On December 23, 1964, a stipulated order had been entered providing that the merger would not be consummated pending a trial and entry of final judgment. That order set May 13, 1965, as the trial date. A subsequent order reset the trial date for September 13.

Prior to the entry of the dismissal order on September 7, counsel for Abbott in a letter to the Assistant Attorney General dated September 3, 1965, stated that Abbott on that date terminated its agreement to acquire Nuclear-Chicago. In the same letter, counsel for Abbott stated that for a period of four years from the date of the dismissal order, Abbott would give at least thirty days notice of any stock or asset acquisition or merger involving any company engaged in the manufacture and sale of nuclear instruments in the United States. In the same letter, counsel committed Abbott not to enter into any agreement to acquire any stock or assets of Nuclear-Chicago for a period of four years.

Staff: Jerome A. Hochberg, John F. Graybeal, Patricia M. Lines and Stephen A. Aronow (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General John W. Douglas

COURT OF APPEALS

ADMINISTRATIVE PROCEDURE ACT

Aliens Outside United States and Their Prospective Employers Here Have no Standing to Obtain Judicial Review of Determinations of Secretary of Labor With Respect to Aliens' Eligibility for Visas. Braude et al. v. Wirtz et al. (C.A. 9, No. 19,491, September 14, 1965) D.J. File 145-10-64. Under the Immigration and Nationality Act, aliens seeking visas are ineligible if the Secretary of Labor has certified that their employment will adversely affect wages and working conditions of domestic workers similarly employed. 8 U.S.C. 1182 (14). The Act also provides that aliens who, in the opinion of the consular officer, are likely to become public charges, may not receive visas. 8 U.S.C. 1182 (15). The administrative practice has been to accept offers of employment from domestic firms as showing that the visa applicant is not likely to become a public charge.

In this case, plaintiffs fell into two groups: (1) 181 Mexican aliens seeking visas, and (2) growers in California who had submitted offers of employment to these aliens, and grower associations. Plaintiffs attacked two determinations of the Secretary of Labor: (1) that the employment of plaintiff aliens would adversely affect domestic wages and working conditions, and (2) that certain of the plaintiff grower associations cannot submit valid offers of employment for purposes of determining whether visa applicants will become public charges.

The Court of Appeals affirmed the district court's dismissal of the action, holding that neither group of plaintiffs had standing to obtain judicial review of the Secretary's determinations. As to the plaintiff aliens, the Court held that aliens outside the country may not obtain judicial review of determinations resulting in their exclusion. As to the plaintiff growers and grower associations, the Court held that they had no legal right to the immigration of prospective employees. The opinion contains the first clear pronouncement by the Ninth Circuit of the necessity, under Section 10 of the Administrative Procedure Act, for a person seeking review of an administrative determination to show violation of a legal right or an adverse affect upon him within the meaning of a relevant statute, and not merely the existence of adverse economic effect to plaintiff's business flowing from the administrative action.

Staff: Robert V. Zener (Civil Division).

EVIDENCE

District Court Did Not Abuse Its Discretion in Limiting Cross Examination by Plaintiffs of Government's Expert Witness; Claim of Privilege by Plaintiff May Defeat His Cause. F. H. Harries et al. v. United States (C.A. 9, No. 19345, August 20, 1965) D.J. No. 157-8-136.

Plaintiff brought suit alleging that he had contracted post vaccinal encephalitis from a smallpox vaccination given him by border officials when he returned to this country from a trip into Mexico.

The Government denied that the illness suffered had been caused by the action of Government employees, and asserted that it had been caused by exposure to mumps virus elsewhere. After fairly lengthy cross examination of the Government's expert witness, and after several indications to counsel that the cross examination should be speeded up, the court finally gave counsel ten minutes to complete his cross examination. No offer of proof was made by counsel, although his objection was preserved. The ten minute limitation was enforced. On appeal, this was claimed to be reversible error by plaintiffs. The Ninth Circuit noted the cases pointing to the importance of the right to cross-examine, but held that under all the circumstances the trial court did not abuse its discretion in so limiting the cross-examination.

Also during the trial, plaintiff claimed a physician-patient privilege when the Government sought to depose his attending physician. The Ninth Circuit, in a footnote to its opinion, noted that there was authority for the proposition that a litigant may not obtain affirmative relief in a civil action while withholding, on a claim of privilege, evidence relevant to the claim. As an alternative sanction, it suggested that the asserted privilege would be held waived in such circumstances.

Staff: Robert C. McDiarmid (Civil Division).

FEDERAL TORT CLAIMS ACT

United States Reservation of Right to Inspect Work And Facilities of Independent Contractor Does Not Create Duties Toward Contractor's Employees; United States Not Supplier of Inherently Dangerous Chattel When It Has Only Bare Title to Chattel; Tort Claims Act Does Not Embrace Liability Based on Supplier Theory; Independent Contractor's Negligence in Performance of Inherently Dangerous Activity Cannot Be Imputed to United States. United States v. Delora Huff Page, etc. (C.A. 10, No. 7880, August 18, 1965). D.J. File 157-77-109. The district court awarded plaintiff a judgment of $100,000 against the United States under the Tort Claims Act for the death of her husband. Decedent, an employee of a cost-plus-fixed-fee research and development contractor with the Government, had been killed in an explosion of rocket propellant. At the time of his death, the deceased, together with two fellow employees of the Hercules Powder Company, had been moving molds containing solid rocket propellant from the curing building to a trailer outside the building.

In reversing, the Court of Appeals held: (1) the fact that the United States reserved in the contract with its independent contractor the right to inspect the work and facilities of the contractor, and the right to stop the work, did not create any duties to employees of the contractor or third parties; (2) the fact that the Government undertook to administer a safety program could not result in liability for its negligence in carrying out that program, since

the safety of Hercules' employees was under the latter's exclusive control and supervision; (3) liability could not be imposed on the United States on the theory that it was the "supplier" of an inherently dangerous chattel because (a) the Government had only bare ownership of the propellant molds and was not, therefore, a supplier, and (b) in any event, the Tort Claims Act does not embrace liability based on a "supplier" doctrine; and (4) liability could not be imposed on the United States on the theory that one who employs a contractor to do inherently dangerous work is liable to third parties for harm caused them by the contractor's failure to exercise reasonable care to prevent harm since (a) the Government cannot be held liable under the Tort Claims Act for its contractor's negligence, and (b) in any event, it is doubtful whether the doctrine of nondelegable duties applies to injuries to employees of an independent contractor.

Staff: Martin Jacobs (Civil Division).

DISTRICT COURT

AGRICULTURE

Warehouseman Liable Under Uniform Grain Storage Agreement For Unearned Storage Charges; CCC Loadout Deficiency Claim Properly Computed on Basis of "Official" Destination Weights. United States v. Iowa City Grain & Feed (S.D. Iowa, Civil No. 3-642-D, August 20, 1965). D.J. No. 120-28-319. Defendant warehouseman stored Commodity Credit Corporation-owned corn pursuant to the terms of a Uniform Grain Storage Agreement. CCC ordered loadout of the elevator facilities, and the warehouseman failed to deliver over 11,000 bushels of corn. The Court held the warehouseman and his surety liable for the full amount of the CCC loadout claim plus accrued interest. The warehouseman contended that he was not liable to return storage charges previously paid by CCC on the undelivered grain inasmuch as there was no evidence as to when the grain inventory shortages occurred. The Court rejected this contention and held that unearned storage charges were clearly owed to CCC under the terms of the Uniform Agreement. The Court also held that the loadout claim was properly computed on the basis of destination weights, despite in transit losses inasmuch as there was no "official" weighmaster at the warehouse site.

Staff: United States Attorney Phillip T. Riley (S.D. Iowa).

CONVERSION

Prior Criminal Convictions Bar Relitigation of Findings Essential Thereto; Demonstrative Evidence of Simulated Manufacturing Process to Prove Conversion And Amount of Damages Deemed Admissible and Reliable. United States v. Fabric Garment Co., Inc., Joseph Abrams, et al. (E.D. N.Y., Civil No. 20391, August 17, 1965). D.J. File 52-51-192. During 1951 and 1952, Fabric Garment Company, Inc. manufactured 454,000 Eisenhower jackets from wool serge cloth supplied by the Quartermaster Corps. The four relevant contracts provided that all such Government-furnished cloth was to be accounted for and returned either in the form

of completed jackets, unused bolts, or scraps and remnants. In this action the Government asserted that the contractor and its officers converted a substantial quantity of this serge, and that certain of the defendants, principally Abrams, sold 19,000 yards of it to a third party.

Some of the defendants had been convicted previously of making false statements as to the quantity of goods remaining upon the completion of each contract and of the theft of the aforesaid 19,000 yards. The Government's motion for summary judgment predicated on these convictions was denied prior to trial on the ground that the convictions were not determinative as to the actual quantity and value of the goods stolen. This motion was renewed at the commencement of trial. The Court ruled that prior convictions conclusively proved that false statements had been made as to the closing inventories and that cloth belonging to the United States had been stolen and sold, the only two findings which the Court considered essential to the guilty verdicts.

At trial the United States proved the amount of the missing cloth by use of a test which in effect simulated the manufacturing process. Each of the jacket sizes was cut out from preconditioned paper, and, through a series of laboratory and mathematical procedures, the quantity of wool theoretically consumed in the manufacture of the 454,000 jackets was computed. This proof was received, over defendants' strenuous objections, the Court having been convinced that the "paper test" was scientifically reliable and logically sound as evidence of the loss.

After making allowances for certain manufacturing variables shown by defendants, the Court found that 39,822 yards had been converted by defendants. It was held further that 19,000 yards of this cloth had been sold by Abrams to a third party. The Court rejected defendants' affirmative defenses of the statute of limitations and account stated.

Staff: United States Attorney Joseph P. Hoey, Assistant United States Attorneys Carl Golden, Barry M. Bloom and Michael Rosen (E.D.N.Y.); and Louis S. Paige (Civil Division).

FEDERAL TORT CLAIMS ACT

Government Held Not Negligent in Suit by Federal Prisoner Assaulted by Another Prisoner. Fleishour v. United States (N.D. Ill., Civil No. 62 C 2270, August 26, 1965). D.J. File 157-23-694. Plaintiff, a Federal prisoner, brought suit to recover damages for injuries sustained when another prisoner struck him with a fire extinguisher while plaintiff was sleeping in a dormitory-type room at McNeil Island Penitentiary. Plaintiff alleged that the Government was negligent in allowing approximately 40 prisoners to sleep in a dormitory-type room, in not segregating the prisoner who committed the assault because of his record of assaults and misconduct, and in not providing sufficient number of guards. The district court, while deciding that the assault and battery exception, 28 U.S.C. 2680(h), and the exceptions of 28 U.S.C. 2680(a) relating to discretionary functions and acts or omissions in the execution of a statute or regulation did not bar the suit, held that the Government's conduct was

reasonable. The Court held that the goals of rehabilitation and responsible conduct by prisoners involve taking calculated risks and that as long as the Bureau of Prisons officials act reasonably and in a manner consistent with accepted prison practices the Government is not liable for injuries to prisoners.

Staff: Assistant U. S. Attorney Thomas W. James (N.D. Ill.) and J. Charles Kruse (Civil Division).

Government Driver's Act Suit Commenced in State Court More Than Two Years After Accident Is Barred Under Controlling Two-year Federal Statute of Limitations, 28 U.S.C. 2401(b). Hoch, et al. v. Carter (242 F. Supp. 863 (S.D. N.Y.)). D.J. No. 145-5-2891. Two infant school children were injured when the school bus in which they were riding as passengers was struck by a U. S. mail truck being operated on official business. The incident occurred on November 2, 1962, in Bronx County, New York. This action by the two infant children and their mothers was commenced on January 25, 1965, against the Government driver individually in the Supreme Court, Bronx County [under the New York three-year statute of limitations].

Following a certification by the Attorney General that the Government driver was acting within the scope of his federal employment at the time of the accident, the action was removed to the Federal District Court pursuant to the mandate of 28 U.S.C. 2679(d) of the "Government Driver's Act." Subsequently, the United States was formally substituted for its driver as party defendant.

The United States moved for summary judgment on the ground that since this action was commenced more than two years after the claim accrued, it is "forever barred" under the provisions of 28 U.S.C. 2401(b). The Court granted the Government's motion and ordered plaintiffs' action dismissed. The Court noted that plaintiffs never had a rightful remedy in the state court or any other court against the Government driver personally; that their sole and exclusive remedy was one against the United States; and that their "remedy against the only party amenable to suit-- the United States--was concededly barred as untimely." The Court further commented, "When the proper party is substituted for the wrong party and the proper party then asserts rights which would have been obviously and concededly available had the proper party been sued originally, plaintiffs cannot be heard to complain."

Plaintiffs argued, in the alternative, that if the Court should find that suit against the United States is "forever barred" because of the two-year limitation, then, pursuant to 28 U.S.C. 2679(d), the Court must remand the action to the state court because "the case--is one in which a remedy by suit within the meaning of subsection (b) of this section is not available against the United States." The Court stated the "obvious answer to plaintiffs' last argument is that a remedy against the United States was available; plaintiffs merely failed to avail themselves of it."

Staff: United States Attorney Robert M. Morgenthau and Assistant United States Attorney Edward L. Smith (S.D. N.Y.); James B. Spell (Civil Division)

United States Has no Duty to Warn Independent Contractor's Employee's of Danger of High Voltage Lines. Navarro v. United States (W.D. Texas, Civil No. 2642, August 25, 1965). D.J. File 157-76-272. Plaintiff, an employee of an independent contractor who had contracted to paint several smokestacks on an Air Force Base, was approximately 30 feet off the ground on a bosun's chair when he suffered electrical burns from contact with a high voltage line approximately 3 feet from the smokestack. Plaintiff alleged as negligence (1) the failure to warn him of the danger of the high voltage line, (2) failure to insulate the line, (3) failure to shut off the current while plaintiff was painting near the line, and (4) the construction of the line so close to the smokestack. The Court found that plaintiff was accustomed to working in high places and had worked around high voltage lines and knew that they were dangerous. The Court held that since the high voltage lines were open and obvious to a prudent person, plaintiff knew or should have known of the dangers and therefore the United States had no duty to warn him. The judgment for the United States was based upon the further finding that plaintiff was contributorily negligent in swinging into the high voltage line.

Staff: United States Attorney Ernest Morgan (W.D. Texas)

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CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

GOLD RESERVE ACT

Forfeiture of U.S. Gold Coins Imported Contrary to Executive Order 11037 of July 20, 1962; Government's Burden of Proof Held to Be Preponderance of Evidence; Admissions of Respondent, Contradicted by Him at Trial, Used With Circumstantial Evidence to Sustain Burden of Proof. United States v. 594 Gold Coins, United States Mintage, and Stephen Juskewycz (W.D. Pa.). D.J. File 54-53-114. The respondent Stephen Juskewycz was arrested on August 26, 1963, at the Peace Bridge in Buffalo, New York, trying to smuggle in from Canada a quantity of United States gold coins. During questioning, Juskewycz, a coin dealer, told of having illegally imported gold coins on previous occasions. Using these statements, Customs agents secured a search warrant for Juskewycz's home at Erie, Pennsylvania, and seized 594 U.S. gold coins. The Government then instituted a libel under the Gold Reserve Act (31 U.S.C. 440 et seq.), asking forfeiture of the 594 coins and assessment of a penalty equal to twice the value of the gold content. In defense, Juskewycz claimed he had accumulated the coins over a period of years and that the part he acquired in Canada had been imported prior to July 20, 1962, when importation was legal. The District Court ordered 477 of the gold coins forfeited but would assess no penalty. Citing United States v. Regan, 232 U.S. 37 (1914), the Court held that, despite the highly penal nature of the statute, the Government needed to prove its case only by a preponderance of the evidence and had done so as to the 477 coins. Forfeiture was based largely upon the admissions Juskewycz made when he was arrested, his failure to produce business records showing acquisition of the coins, and the fact that no customs declarations were found to support his story of seasonable importation. Since Juskewycz was a very active dealer in coins and possessed a mimeographed copy of Executive Order 11037 at the time of his arrest, the Court found an intent to violate the law. The 477 gold coins forfeited have been appraised at a value of over $19,400.

Staff: United States Attorney Gustave Diamond; Assistant United States Attorney James P. McKenna, Jr., (W.D. Pa.).

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LANDS DIVISION

Assistant Attorney General Edwin L. Weisl, Jr.

Oil and Gas Leases; Wife Who Is Applicant For Non-competitive Lease Not Disqualified in Drawing as First Qualified Applicant Because Husband Simultaneously Filed Lease Offer For Same Tract. Samuel W. McIntosh v. Stewart L. Udall (Civil No. 1522-64, D.C.) D.J. File 90-1-18-622. Jacob and Rita Wasserman, husband and wife, the plaintiff, and another married couple, Mr. and Mrs. Philip Rodsky, each filed a simultaneous offer to lease a tract made available for noncompetitive oil and gas leasing pursuant to the Mineral Leasing Act For Acquired Lands, 30 U.S.C. 351, et seq. At the time offers to lease were filed, regulations of the Secretary of the Interior required that each person filing an application for an oil and gas lease execute a statement that he or she was or was not the sole party in interest in the offer to lease. 43 C.F.R. 200.4, incorporating by reference 43 C.F.R. 192.42(e)(e)(iii).

The plaintiff, the Wassermans and the Rodskys each executed the statement that he or she was the sole party in interest in the offers to lease. The offer of Rita Wasserman was drawn first and the lease was awarded to her. The offer of Phil Rodsky was drawn second and the offer of the plaintiff was drawn third.

The lease was awarded to Rita Wasserman, who was considered the first qualified applicant, and the plaintiff protested, contending that the offers of the husband and wife should not have been considered because neither of those persons could be a qualified applicant since, as a matter of law, each husband and wife has an interest in the property of the other. The Department of the Interior disallowed the protest and this action was brought to require the Secretary to cancel the lease and award it to plaintiff.

Both parties filed motions for summary judgment. The Court accepted the contentions on behalf of the Secretary that under the provisions of the Mineral Leasing Act any person who is a citizen of the United States may be a qualified applicant for a noncompetitive oil and gas lease; that husbands and wives are each persons within the meaning of the statute; that both may file simultaneous offers and, in the absence of any showing of collusion in their statements that each is the sole party in interest in the lease, if issued, the Secretary did not err in accepting and acting upon those statements.

Staff: Herbert Pittle (Lands Division).

Sovereign Immunity; Action For Mandatory Injunction Requiring United States And Officials of Department of Interior to Comply With Local Zoning Laws Before Selling or Negotiating For Sale of Government-owned Lands; Dismissal For Lack of Jurisdiction. Board of County Commissioners of the County of Summit v. United States, et al., Civil No. 9137 (D. Colo., August 26, 1965) D.J. File No. 90-1-4-123. This action was brought to obtain a mandatory injunction compelling the United States and the individual defendants who were sued in their official capacity to submit plans or plats of subdivisions consisting of five or more building sites, tracts and lots to the Summit County Zoning Commission for approval and recording before selling or negotiating for the sale of

Government-owned lands. Plaintiff also sought a mandatory order restraining defendants from transferring, selling or negotiating for the dale of the properties before a plan or plat of the properties was recorded in the office of the County Clerk and Recorder of Summit County, Colorado, as required by the Colorado Zoning Laws.

The Court granted a motion by defendants to dismiss the complaint for lack of jurisdiction, holding that it had no jurisdiction to enjoin the United States and that the complaint contained no allegations that the individual officers were acting beyond the scope of their authority or in an unconstitutional manner.

Staff: Assistant United States Attorney Richard T. Spriggs (D. Colo.).

Water Resources; Declaratory Judgments; Scope of 43 U.S.C. 666; United States Has Not Consented to Be Sued For Declaration of Effect of City Council's Resolution to Ask For Reservation of Water Storage in Proposed Reservoir. C.O. Depuy, et al. v. United States (Civil No. 65-76, W.D. Okla., Aug. 3, 1965) D.J. File 90-1-2-760. Congress has authorized the construction of a reservoir on the North Canadian River near Guymon, Oklahoma, pursuant to the Flood Control Act of 1936, 49 Stat. 1570; the Flood Control Act of 1958, 72 Stat. 297; and the Federal Water Pollution Control Act amendments of 1961, 75 Stat. 204. In September 1964, the city council of Guymon passed a resolution requesting the Corps of Engineers to reserve water supply storage for the city in the new reservoir. In March 1965, several taxpayers of the City of Guymon filed a class action against the United States for a declaratory judgment as to whether the resolution created a binding obligation upon the city to pay for the water supply storage until water is actually requested or taken by the city. The complaint did not indicate that the dam had been constructed or even that funds had been appropriated for its construction.

Defendant based its motion to dismiss upon plaintiffs' failure to show that there had been a waiver of sovereign immunity; that they were interested parties within the meaning of 28 U.S.C. 2201; that they were the real parties in interest; that they had standing to sue; and that there was a case or controversy. While their complaint had cited only the declaratory judgment act as grounds for jurisdiction, plaintiffs' response to the motion to dismiss alleged an additional jurisdictional basis, i.e., 43 U.S.C. 666.

The Court signed a two-page order on August 3, 1965, dismissing the case on the basis of sovereign immunity and indicating that 43 U.S.C. 666 was not applicable since it "* * * deals with adjudication of water rights and the rights to the use of water. We are not concerned herein with conflicting claims to the use of water as is envisioned in that statute."

Staff: Assistant United States Attorney John W. Raley, Jr., (W.D. Okla.) and Charles B. Lennahan (Lands Division).

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TAX DIVISION

Acting Assistant Attorney General Richard M. Roberts

CIVIL TAX MATTERS

District Court Decisions

Community Property; Community Property Laws of State of Washington Held to No Longer Provide Exemption From Enforcement of Federal Tax Liabilities Which Arose Prior to Marriage. Delmar H. Draper, Jr., et ux. v. United States. (W.D. Wash., July 19, 1965). (CCH 65-2 U.S.T.C. ¶9604). This action was brought by the taxpayer, Shirley Draper, and her husband to quiet title in a fund of money which represented the proceeds of a levy made by the District Director on one-half of taxpayer's weekly wages. The tax liability was the premarital obligation of Mrs. Draper while the wages levied upon by the District Director represented taxpayer's community property interest in her own salary. Thus, the Court was faced with the question of whether the community property laws of the State of Washington provide an exemption against the federal tax lien for liabilities which arise prior to marriage. This issue is the identical one which was decided in Stone v. United States, 225 F. Supp. 201 (W.D. Wash.). In that case, the Court held that community property was exempt from liability for premarital tax obligations. The United States did not appeal that decision because the statute of limitations for the enforcement and collection of the individual tax liability had expired.

The Court disagreed with the holding in Stone and held that the community property laws of Washington do not provide an exemption against premarital federal tax liability. The Court referred to the "marital bankruptcy" existing in the State of Washington, whereby it is possible to discharge premarital obligations upon marriage by asserting that community property is exempt from such liability. The Court analogized this situation with that in Fisch v. Larler, 1 Wash. 2d 698, 97 P. 2d 147, wherein a divorced wife tried to enforce the payment of alimony against her former husband, then remarried. The Supreme Court of Washington, in the Fisch case, held that applying the community property exemption to discharge an obligation for alimony payments would be against the public policy of that state. In comparing these situations the Court held that in both instances allowance of the imposition of an exemption would be against sound public policy. The Court also noted that the liabilities in these cases were similar because the Fisch liability was for the support of the family while the instant liability was for the support of the Nation.

Staff: United States Attorney William N. Goodwin and
Assistant United States Attorney Gerald W. Hess (W.D. Wash.)

Immunity of Internal Revenue Agent From Civil Liability; Revenue Agent Operating in Pursuit of Statutory Duty in Examining Books and Records Held Immune From Civil Liability For Alleged Willful and Malicious Harrassment. Milton Josephson v. Julius Y. Joslin. (N.J., July 7, 1965). (CCH 65-2 U.S.T.C. ¶9557). In this civil action, taxpayer sought to recover damages of $300,000 against a Revenue Agent because of his alleged actions and conduct in the examination of taxpayer's tax returns. The allegations were that the Agent had exhibited bad

faith in proposing a tax deficiency and that the Agent had subjected taxpayer to cruel, unusual and unreasonable apprehension, harassment and expense respecting the examination of the involved tax returns.

The Court, citing Barr v. Matteo, 360 U.S. 564, dismissed the suit after finding that the questioned conduct and activity fell within the delegated scope of the Agent's authority and occurred while he was exercising that authority, and after finding that the allegations of malice and harassment were irrelevant. The Court reasoned that the fact that the Agent was, on the occasions complained of, examining taxpayer's books and records was sufficient to invoke the principle of absolute privilege from civil liability and judicial inquiry and the Agent was accordingly immune from the further prosecution of this suit.

Staff: United States Attorney David M. Satz, Jr.; Assistant United States Attorney Mark E. Litowitz (N.J.); and Arnold Miller (Tax Division)

Internal Revenue Summons; Attorney's Copies of Records Reflecting Upon Transactions of Taxpayer Held Protected by Attorney's Personal Claim of Fifth Amendment Privilege Against Self-incrimination And State Rather Than Federal Law Held Determinative of Whether Attorney-client Privilege Was Applicable to Federal Tax Matters. United States v. Oscar B. Ladner. (S.D. Miss., January 7, 1965). (CCH 65-1 U.S.T.C. ¶9194). In order to obtain information relative to an income tax investigation of the taxpayer, two summonses were served upon taxpayer's attorney, Oscar B. Ladner, requesting that he testify and produce records of transactions, in the first instance, relative to an individual thought to be a straw man for taxpayer, and, in the second instance, reflecting upon business transactions conducted by taxpayer. The attorney refused to comply with either of the summonses and the Government sought an order requiring compliance with the summonses involved.

During the course of the proceeding, the attorney raised the attorney-client privilege and his personal Fifth Amendment privilege against self-incrimination in response to approximately 30 questions that he had previously refused to answer. In response to the first 27 questions, the District Court upheld the attorney-respondent's Fifth Amendment privilege against self-incrimination on the grounds that he had made some showing that he might be involved in a possible criminal prosecution. In response to the last three questions, Judge Cox upheld respondent's assertion of the attorney-client privilege, thereby finding that state and not federal law was determinative of whether or not the attorney-client privilege was applicable in federal tax litigation.

Although the second ruling is against the weight of authority, the Solicitor General has decided against appeal on the grounds that the information would still be protected by the attorney's assertion of his personal Fifth Amendment privilege against self-incrimination.

Staff: United States Attorney Robert E. Hauberg; Assistant United States Attorney Jack McDill (S.D. Miss.); and Carl H. Miller (Tax Division).

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