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Assistant Attorney General Edwin M. Zimmerman

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United States v. Ford Motor Co., et al. (Civ. 21911; June 7, 1968; D.J. 60-0-37-562)

On June 7, 1968, Chief Judge Ralph M. Freeman issued his opinion holding that the 1961 acquisition by Ford of certain assets of Electric Autolite Co. violated Clayton Act Section 7. The acquired assets consisted essentially of a spark plug manufacturing plant located at Fostoria, Ohio; an automotive battery plant located at Owosso, Michigan; and the trade name "Autolite." The case was tried in January-February, 1967.

1. Lines of Commerce and Section of the Country

The court found that the acquisition involved four lines of commerce: spark plugs, automotive batteries, automobiles, and ignition parts. All but ignition parts had been stipulated to by the parties. The court also found that the United States was the appropriate section of the country with respect to each of the four lines of commerce. This was also stipulated to by the parties with respect to spark plugs, automotive batteries, and automobiles.

In holding ignition parts to be an appropriate line of commerce, the court found that although there was some disagreement as to specifically which engine parts should be included and which excluded from that classification, there was sufficient industry recognition of the classification to make it meaningful. Furthermore, the court found that however precisely defined in terms of included and excluded parts, the effect of the acquisition would be essentially the same. So holding, the court rejected defendant Ford's argument that ignition parts were not an appropriate line of commerce because 1) it lacked economic identity and 2) the various parts included within that classification, e.g., condensors, contact points, voltage regulators, coils, are not interchangeable with each other. The court defined the ignition parts line of commerce as including essentially the following items and the companies (whether manufacturers or mere cataloguers and branders) which advertise them for sale to the trade: generator brushes, coils, regulators and distributor rotors, points (contact sets), caps and condensers.

2. Spark Plugs

With respect to the spark plug line of commerce, the court held the acquisition illegal primarily because of the substantial vertical foreclosure effected thereby. By the acquisition, Ford, which did not previously manufacture any spark plugs, became completely integrated, supplying all of its spark plug requirements, both for original equipment factory installation in new cars and for aftermarket sales to Ford dealers and other outlets. The foreclosure of Ford as a spark plug customer meant that approximately 9.6% of the total spark plug market had been foreclosed. Measured by the standards of the Supreme Court's Brown Shoe opinion, this degree of foreclosure was sufficiently substantial to invalidate the acquisition. This degree of foreclosure was judged to be especially anticompetitive in view of the extremely high concentration in the sparks plug manufacturing industry, where only three firms have historically accounted for over 90% of industry sales, and in view of the fact that the largest customer, GM, was already totally foreclosed. The Court found that attaining original equipment status on the products of a major vehicle maker, i.e., the automobile manufacturers, was virtually the only way a small spark plug producer could expand or a new entrant into the spark plug industry succeed. Thus, the foreclosure of a customer as important as Ford tightened the existing oligopoly in the spark plug industry and raised the existing barriers to entry. The court noted that while internal integration by Ford would have brought about the same anticompetitive result, under those circumstances it could not be condemned, not because it would not be equally anticompetitive but simply because it has not been proscribed.

On the question of whether the acquisition was illegal with respect to the spark plug line of commerce because it eliminated the potential competition represented by Ford, the court held that in one respect it was and in another it was not.

The Government contended that at the time of the acquisition, Ford was a potential de novo entrant into the spark plug manufacturing industry. This argument was based on evidence which seemed to satisfy the criteria for judging the existence of a potential entrant announced in the Supreme Court's Procter & Gamble decision. However, the court found such evidence unconvincing, primarily because there was no evidence of a Ford management decision at any time to proceed on a de novo basis. The only relevant internal evidence from Ford's files was a preliminary study done by its Integration Committee in 1960. Management consideration of this study was precluded, however, by the intervening negotiations which immediately preceded the Autolite acquisition. The proposal to acquire the Autolite assets was presented to and approved by Ford's management without it ever having considered the de novo study. The court, however, did not find this sequence of events persuasive. It held that the Government had the burden of proving what

Ford would have done absent the acquisition, and that the circumstances recited above were not a sufficient basis on which to infer that Ford's management would have gone on to approve de novo entry if entry by acquisition had not been achieved.

On the second aspect of the potential competition question, the court held that by virtue of its long-standing posture on the edge of the spark plug market prior to the acquisition, Ford had had a substantial and beneficial effect on the market price of spark plugs and that the acquisition had eliminated that effect. For 40 years before the acquisition, Ford's spark plug requirements had been supplied entirely by the dominant factor in the spark plug industry, Champion Spark Plug Co. Beginning at an early date in that relationship, Champion priced its original equipment plugs to Ford at 6 cents per plug. This price was less than Champion's manufacturing cost and was offered by Champion primarily for the purpose of discouraging Ford from manufacturing its own plugs. Champion recouped its losses from such original equipment sales and earned substantial profits besides by means of its aftermarket plug sales. It was found that original equipment status had an important influence on aftermarket plug sales. Thus, Champion deemed it essential to retain original equipment status for its plugs on as large a volume of automobiles as possible. Because GM, with its AC Spark Plug Division, was already completely foreclosed to outside plug suppliers, the largest volume make of automobiles available to Champion was Ford. Consequently, Champion did all it could to retain the Ford account. Over the years, Champion maintained the 6 cent price to Ford, and as the cost of manufacturing plugs increased, the loss on each original equipment plug sold also increased. By the 1960's the loss on each original equipment plug amounted to two-thirds of the manufacturing cost, or about 18 cents. The other major spark plug suppliers, GM's AC Division and Electric Autolite, followed Champion's pricing policies, so that the 6 cent original equipment price prevailed throughout the industry.

The court also found that Ford influenced Champion's spark plug prices in another way. Ford purchased substantial quantities of plugs from Champion for resale to Ford dealers and other aftermarket outlets. Because Champion was so eager to retain its original equipment status on Ford cars, Ford was in a strong bargaining position with regard to the price at which it purchased these aftermarket plugs. And the price Champion charged Ford on these plugs was passed on by Champion to other aftermarket sellers competing with Ford because of the pricing dictates of the Robinson-Patman Act and a specific outstanding FTC cease and desist order thereunder against Champion. Because of Champion's strong position in the aftermarket and particularly among the independent aftermarket outlets, i.e., outlets other than franchised automobile dealers, its aftermarket prices tended to be followed by its competitors, Electric Autolite Co. and GM's AC Division.

3. Automotive Batteries

With respect to the automotive battery line of commerce, the court held the acquisition illegal because of the resultant substantial vertical foreclosure. The court found that, as a result of the acquisition, Ford, which did not previously manufacture any batteries, would be foreclosed as a substantial customer to battery suppliers, and that the foreclosure would amount to approximately 6% of the total automotive battery market. While the acquisition did not immediately effect the total foreclosure of Ford -- Ford continued to obtain a substantial volume of batteries from outside suppliers -- the court found that the acquisition would very likely precipitate such total foreclosure in the near future. The acquisition of the Owosso battery plant, the court stated, would soon "spawn" other de novo battery manufacturing plants within the Ford organization with sufficient capacity to supply all, or nearly all, of Ford's requirements. The causal relationship between the acquired battery plant and plants to be built by Ford in the future was that selling batteries under the acquired trade name "Autolite" assured Ford of a sufficient immediate aftermarket volume to make further expansion of its battery manufacturing capacity immediately profitable. Ford's post-acquisition purchases of batteries from outside suppliers were primarily for the purpose of supplying Ford's aftermarket distribution outlets and particularly the independent warehouse-distributors who had traditionally handled "Autolite" brand batteries. Because of the relatively strong position of "Autolite" batteries in this independent aftermarket, it was likely that Ford would continue to hold this business. Eventually supplying these outlets from its own battery plants seemed to the court to be an attractive prospect for Ford and therefore a logical course of action to expect Ford to take. Thus, the court concluded that "Foreclosure is clearly in sight."

The court went on to find that in the highly concentrated automotive battery manufacturing industry (5 firms had 80%), the foreclosure of a customer as significant as Ford was substantially detrimental to competition. Particularly was this so in view of the already-foreclosed GM battery requirements. The court found the automotive battery market to be a stagnant one, showing no appreciable growth and being highly dependent on the fluctuations of automobile production. In such circumstances, competitive vigor in the battery industry, in the form of new entrants, new technology, or lower prices, was crucially dependent on the opportunity to sell to high volume customers such as Ford had been prior to the acquisition.

4. Automobiles

With respect to the automobile line of commerce, the court held that the acquisition had not had the requisite illegal anticompetitive effects. The Government contended that the acquisition had effected an illegal vertical foreclosure of Autolite batteries and spark plugs with respect to both Chrysler

and American Motors (AMC). Each of these two companies had, in years prior to the acquisition, purchased a substantial part of its total battery and spark plug requirements from the Electric Autolite Company under the "Autolite" trade name, both for installation as original equipment and for resale to its aftermarket outlets. Consequently, it was argued, Chrysler and AMC had built up over the years a substantial amount of consumer goodwill towards "Autolite" branded products as used in their respective makes of automobiles. It was shown that as a matter of industry practice, 1) automobile manufacturers do not, in the ordinary course of business, buy batteries or spark plugs manufactured by their competitors, especially when those parts bear a trade name associated with their competitors, and 2) automobile manufacturers do not manufacture parts bearing any trade name other than their own. The acquisition by Ford of the Autolite assets, therefore, totally foreclosed Chrysler and AMC from any further purchases of or use of "Autolite" branded parts, thereby depriving them of an important established source of consumer goodwill. The court found, however, that automobile original equipment parts branding practices generally, including the branding of original equipment spark plugs and batteries, was not a significant factor in automobile sales competition. Thus, Chrysler and AMC were not likely to suffer any significant competitive disadvantages because of their inability to use the "Autolite" brand on parts contained in their automobiles.

The court also found that neither were Chrysler and AMC illegally foreclosed by the acquisition from an alternative source of supply for spark plugs or batteries. After the acquisition, Chrysler and AMC could purchase spark plugs from either of two capable suppliers, Champion and Eltra (the post-acquisition successor to Electric Autolite Co.). Thus, Chrysler and AMC had as many alternative suppliers after the acquisition as before. The court found that Eltra, although no longer the significant factor in the spark plug industry that Electric Autolite Co. had been before the acquisition, was nevertheless a capable and satisfactory alternative spark plug supplier should any of the automobile companies choose to deal with it. With respect to batteries, the court found that Eltra was also a capable and satisfactory post-acquisition alternative source of supply for Chrysler and AMC. Thus, with respect to neither spark plugs nor batteries had Chrysler and AMC suffered a diminution of alternative sources of supply as a result of the acquisition.

5. Ignition Parts

The court held that the acquisition did not have the requisite illegal anti-competitive effects in the ignition parts line of commerce.

The Government had contended that the spark plug and battery production capacity and the "Autolite" trade name acquired by Ford gave it a substantial competitive advantage over the many small single-product-line ignition parts manufacturers in marketing such parts to the independent aftermarket trade,

i.e., warehouse distributors, jobbers, etc. Having spark plugs and batteries to sell, it was contended, gave Ford a "wedge" in selling ignition parts to this market. Furthermore, it was argued, the well established trade name "Autolite" gave Ford a further advantage in that its make of ignition parts had immediate and widespread acceptance. The court found, however, to the contrary. It held, first, that Ford's post-acquisition position in the ignition parts field was unrelated to the acquisition, since Ford did not acquire any ignition parts producing assets and the "Autolite" trade name did not, prior to the acquisition, have a strong standing in the ignition parts business. Second, the court found that branding was not a significant element in the competition between ignition parts manufacturers, and therefore possessing the "Autolite" brand did not give Ford a significant advantage. Third, the court held that the ability to combine ignition parts with spark plugs and batteries into a combined sales package was not an important competitive advantage; there was evidence that many apparently successful single-product-line companies did not so regard it. Finally, the court found that, in any event, whatever competitive advantages in the ignition parts industry Ford had acquired, because its market position was insufficiently shown, no conclusion could be drawn as to how the acquisition had affected Ford's position in the market.

With respect to defendant Eltra Corporation, the successor to the selling corporation Electric Autolite Co., the court kept under advisement Eltra's motion for dismissal, made during the course of trial.

The court has not yet made an order with respect to relief.

Staff: William H. McManus, Lawrence M. Jolliffe and Julius H. Tolton (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General Edwin L. Weisl, Jr.

COURTS OF APPEAL

FEDERAL TORT CLAIMS ACT -- WHEN CLAIM ACCRUES IN WRONGFUL DEATH SUIT

SIXTH CIRCUIT HOLDS THAT IN WRONGFUL DEATH SUIT UNDER FEDERAL TORT CLAIMS ACT CLAIM ACCRUES FOR STATUTE OF LIMITATION PURPOSES UPON DATE OF DEATH, AND NOT WHEN PLAINTIFF LEARNS CAUSE OF DEATH.

Helen Jenkins Kington, Widow of Joe D. Kington, Jr. v. United States (C.A. 6, No. 17,949; June 11, 1968; D.J. 157-70249)

In a wrongful death suit brought under the Federal Tort Claims Act, plaintiff alleged that the decedent died on July 6, 1964, as the result of being subjected to beryllium while working at a federally owned facility. The action was commenced on August 29, 1966, more than two years after death. Seeking to avoid the bar of the two-year statute of limitations under 28 U.S.C. 2401(b), plaintiff alleged that the cause of death was discovered on September 1, 1964, and that the claim accrued for purposes of the statute of limitations at the time of discovery of the cause of death, and not on the date of death. The district court granted the Government's motion for summary judgment, accepting the Government's contention that the claim accrued, for limitations purposes, on the date of death. The Sixth Circuit affirmed, with a dissent by Judge Edwards.

The majority of the Court of Appeals refused to apply to wrongful death cases the decisions in personal injury actions involving malpractice and occupational disease which hold that the statute of limitations does not begin to run until plaintiff discovered or, in the exercise of reasonable diligence, should have discovered the negligent or wrongful acts. The Court stated that there was no need to apply this equitable principle to wrongful death suits since the cause of death is generally known at the time of death or shortly thereafter. In the instant case, the Court pointed out, plaintiff did not sue until twenty-two months after she claimed to have discovered the cause of death.

Staff: John C. Eldridge (Civil Division)

POSTAL REFUNDS

SIXTH CIRCUIT HOLDS DISTRICT COURT HAS NO JURISDICTION TO GRANT POSTAL REFUND OR TO REVIEW POST OFFICE'S DENIAL OF POSTAL REFUND.

Knight Newspapers, Inc. v. United States, et al. (C. A. 6, No. 17,563; May 31, 1968; D. J. 145-5-2933)

Plaintiff newspaper publisher claimed that over a five-year period it had erroneously determined the weight of newspapers it sent through the mails so that more postage was paid than was actually required. Pursuant to 39 U. S. C. 4055, which provides that the Postmaster-General "may" refund out of postal receipts postage "which he is satisfied" has been collected in excess of the lawful rate or for services not rendered, plaintiff applied for a $19,839.57 refund of postage. Upon the administrative denial of the refund claim, plaintiff commenced this action in the district court seeking a refund. Plaintiff asserted that the district court had jurisdiction to award a postage refund under the Tucker Act, 28 U. S. C. 1346. Plaintiff also claimed the Administrative Procedure Act, 5 U. S. C. 551, et seq., conferred jurisdiction upon the district court to judicially review the administrative denial of a refund under 39 U. S. C. 4055. The district court dismissed the action and the Court of Appeals affirmed.

The Court of Appeals held that the Tucker Act did not confer jurisdiction upon the district court to grant a refund. The Court reasoned that plaintiff's claim was based upon a contract implied in law or quasi-contract, whereas the Tucker Act permitted recovery only for express contracts or contracts implied in fact. Similarly, the Court rejected plaintiff's contention that the Administrative Procedure Act conferred jurisdiction upon the district court to judicially review the denial of a refund. The Court noted that under 39 U. S. C. 4055 postage refunds were discretionary with the Postmaster General, and therefore the denial of a refund came within the provision of the Administrative Procedure Act exempting from judicial review agency action confided to agency discretion. Alternatively, the Court held that even if the district court did have jurisdiction to review the Postmaster General's decision, the action was properly dismissed for failure to state a claim upon which relief can be granted since the facts alleged by plaintiff showed no arbitrary action by the Postmaster General in denying a refund but merely that excess postage was paid due to plaintiff's own error.

Staff: Norman Knopf (Civil Division)

PRODUCTION OF DOCUMENTS

WHERE SECRETARY OF AGRICULTURE CLAIMS THAT SUBPOENA ISSUED IN ANCILLARY BANKRUPTCY PROCEEDINGS FOR PRODUCTION OF DOCUMENTS IS UNREASONABLE AND OPPRESSIVE AND THAT TRUSTEE HAS NOT SHOWN "GOOD CAUSE", HE IS ENTITLED TO HAVE DISTRICT COURT PASS UPON SUCH ISSUES ON PETITION FOR REVIEW BEFORE BEING REQUIRED TO FILE CLAIM OF PRIVILEGE.

Orville L. Freeman, Secretary of Agriculture v. Charles Seligson, Trustee in Bankruptcy of Estate of Ira Haupt & Company (C. A. D. C., No. 21,478; June 28, 1968; D. J. 56-16-7)

In 1963 Ira Haupt & Company, a limited partnership engaged in a general securities and commodity brokerage and commission business, sustained large financial losses in brokerage transactions in cottonseed oil and soy bean oil futures on the New York Produce Exchange and the Chicago Board of Trade; and shortly thereafter was adjudicated a bankrupt. The Trustee commenced ancillary bankruptcy proceedings in the district court for the District of Columbia, and petitioned for an exploratory examination of the Secretary of Agriculture under Section 21(a) of the Bankruptcy Act, 11 U.S.C. 44(a), together with the production of documents. The Trustee also obtained a subpoena duces tecum for production of the same documents.

The demand of the Trustee contained 19 separate classifications, covering about half a million items, and including daily reports of trading in cottonseed oil and soy bean oil futures, investigative reports of market conditions, and communications between the Commodity Exchange Authority and the commodity exchanges. The Secretary moved to quash or to modify on the grounds that the subpoena was too broad and sweeping in scope and was unreasonable and oppressive, that no "good cause" had been shown, and that Section 8 of the Commodity Exchange Act, 7 U.S.C. 12, protected reports of traders and commission merchants from outside scrutiny. Upon the Referee's denial of the motion, the Secretary filed a petition for review in the district court. The court, without passing upon the legal issues raised, denied the petition "without prejudice to petitioner's contention herein".

On appeal the Court of Appeals reversed and remanded. The Court unanimously held that the same restrictions on compelled documentary productions obtained whether the documents were sought in a Section 21(a) proceeding in bankruptcy or on pre-trial discovery; that with so large a demand as the subpoena made, a determination on good cause required that the case be remanded for consideration by the district court of all reasonable alternatives; that on the Secretary's affidavits his claims of unreasonableness and oppressiveness must also be reconsidered; that matters for a formal claim of privilege could appropriately be deferred until the other matters set forth above

had been disposed of; and that certain guidelines for a claim of privilege already exist, which guidelines the Court enumerated.

On the question of whether Section 8 of the Commodity Exchange Act afforded protection from disclosure to reports filed under the Act by traders and commission merchants, Judges Leventhal and Bazelon in a separate opinion held that while the Secretary could not "publish" such information except in certain circumstances, the statute did not afford protection from disclosure in judicial proceedings.

Staff: Kathryn H. Baldwin (Civil Division)

STANDING TO SUE

DISPLACED FORMER RESIDENTS OF REDEVELOPMENT AREA HAVE STANDING TO ASSERT THAT HOUSING ACT'S RELOCATION PROVISIONS HAVE BEEN VIOLATED.

Norwalk CORE, et al. v. Norwalk Redevelopment Agency, et al. (C. A. 2, No. 31,761; June 7, 1968; D. J. No. 145-17-10)

Plaintiffs, who represent members of minority groups who formerly resided within an urban redevelopment area, asserted that the provisions of the redevelopment plan for relocating former residents were inadequate and that consequently those former residents who were members of minority groups were unable to secure adequate relocation housing. The plaintiffs asserted that local governmental officials knew of the inadequacy of the plan in this respect and that their actions deprived the plaintiffs of the equal protection of the laws. The plaintiffs further asserted that both the local and the federal officials, in establishing the redevelopment plan, violated the standards for relocation set by Section 105(c) of the Housing Act, 42 U.S.C. 1455(c). The district court dismissed the complaint as to all defendants, primarily on the basis of the plaintiffs' lack of standing.

The Court of Appeals found that the plaintiffs had standing to assert the equal protection claim (which was not asserted against the federal officials). The Court of Appeals also reversed, as to all defendants, the dismissal of the claim under the Housing Act, relying on Hardin v. Kentucky Utilities Co., 390 U.S. 1, 5-7. Applying the Hardin test, the Court of Appeals found that the precise Congressional purpose in enacting the relocation provisions of the Housing Act was to protect the interests of those in plaintiffs' position, and accordingly held that they had standing to seek enforcement of those provisions.

Staff: Michael C. Farrar (Civil Division)

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CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

SPECIAL NOTICE

SEARCHES AND SEIZURES

Title IX of the "Omnibus Crime Control and Safe Streets Act of 1968" (P. L. 90-351, signed June 19, 1968) adds a new section 3103a to Title 18 of the United States Code. The new section authorizes the issuance of a search warrant for "any property that constitutes evidence of a criminal offense in violation of the laws of the United States."

Title IX thus codifies the holding of Warden v. Hayden, 387 U. S. 294 (1967).

It should also be noted that Title IX has the effect of adding a fourth subsection to Federal Rule of Criminal Procedure 41(b).

SUPREME COURT

INFORMANTS

DISCLOSURE OF IDENTITY.

Eugene L. Jackson v. United States (Sup. Ct. No. 928, October term 1967)

See discussion of the Third Circuit Court of Appeals' decision on this case in United States Attorneys Bulletin, Vol. 16, No. 1, January 5, 1968, regarding the necessity of disclosing an informant's identity. The defendant appealed this decision to the Supreme Court which has denied his petition for a writ of certiorari.

COURT OF APPEALS

NARCOTICS

CONSTITUTIONALITY OF STATUTE REGULATING LOCAL TRAFFIC IN DEPRESSANT OR STIMULANT DRUGS UPHELD.

Dennis C. Deyo v. United States (C. A. 9, June 5, 1968; D. J. 21-12C-12)

The defendant was convicted of the illegal possession and sale of lysergic

acid diethylamide (LSD) in violation of 21 U. S. C. 331(q)(2) and 331 (q)(3). In appealing his conviction, the defendant claims the statutes are unconstitutional in that they make the possession and sale of LSD a crime without regard to whether the drug crossed state lines or international boundaries.

Affirming the judgment of conviction, the Court of Appeals noted that the Supreme Court has in the past upheld the regulation of purely local traffic where intrastate transactions are so commingled with and have such an economic effect upon interstate transactions that regulation of both types of commerce is required if there is to be effective regulation of either. The court found that there is a legitimate medical research interest in LSD as an aid in alchoholic and prisoner rehabilitation and other forms of psychotherapy which legitimately affects interstate commerce. Noting that the adverse publicity on the promiscuous use of this drug has curtailed legitimate research, the Court concluded, "In our judgment a drying up of the legitimate sources of an experimental drug and the discouragement of research attributable to interstate activities may be said to constitute a sufficiently adverse effect upon the legitimate interstate commerce involved in research to justify federal regulation of intrastate transactions in that drug."

Staff: United States Attorney Wm. Matthew Byrne, Jr.
Assistant United States Attorneys Robert L. Brosio and
William J. Gargaro, Jr. (C. D. California)

N. B. In White v. United States, decided May 17, 1968 and reported in United States Attorneys Bulletin Vol. 16, No. 14, the constitutionality of 21 U. S. C. 331(q)(2) was also upheld by the Court of Appeals for the First Circuit.

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

SUPREME COURT

DEPORTATION

SUPREME COURT SETTLES CONFLICT IN CIRCUITS AS TO INTERPRETATION OF STATUTE PROVIDING FOR REVIEW OF DEPORTATION CASES BY CIRCUIT COURTS OF APPEAL.

Cheng Fan Kwok v. INS (Sup. Ct. No. 638, Oct. Term 1967, Decided June 10, 1968)

There was reported in the September 1, 1967 issue of the United States Attorneys Bulletin the decision of the Third Circuit in Cheng Fan Kwok v. INS, and Chan Kwan Chung v. INS, 381 F. 2d 542, which concerned the construction of section 106(a) of the Immigration and Nationality Act, 8 U.S.C. 1105a(a) which vested in Courts of Appeals the authority to review final orders of deportation. The Supreme Court had construed Section 106(a) in Foti v. INS, 375 U.S. 217 (1963), and in Giova v. Rosenberg, 379 U.S. 18 (1964), which decisions made it clear that all determinations made in a deportation hearing pursuant to section 242 (b) of the Immigration and Nationality Act (8 U.S.C. 1252(b)) were reviewable by Courts of Appeals under section 106(a) but left open the question as to whether a Court of Appeals under section 106(a) could review determinations made outside the deportation hearing which could delay or nullify deportation orders such as decisions on visa petitions, applications for refugee classification, applications by exchange visitors for waiver of the foreign residence requirements, and applications to district directors for stays of deportation. Cheng Fan Kwok v. INS and Chan Kwan Chung v. INS involved petitions to review the denial by a district director of applications for stays of deportation by the petitioners. The Third Circuit noted the conflict in the circuits and decided that under Foti and Giova only determinations made in deportation hearings by special inquiry officers where reviewable under section 106(a). The petitions were dismissed by the Third Circuit for lack of jurisdiction. The Government petitioned for certiorari in both Chen Fan Kwok and Chan Kwok Chung and certiorari was granted in Cheng Fan Kwok.

The Supreme Court by an 8 to 1 decision adopted the narrow interpretation placed on section 106(a) by the Third Circuit and affirmed its decision. The opinion concedes that the result reached will doubtless mean that on occasion, review of denials of discretionary relief will be conducted separately from the review of an order of deportation involving the same alien but suggested that this onerous burden might be avoided by appropriate action of

the Immigration and Naturalization Service, presumably to regulate that all determinations which might effect the deportability of an alien are to be made by special inquiry officers in deportation hearings.

Justice White dissented on the ground that section 106(a) could be construed to confer review of all orders against aliens acting or done in consequence of section 242(b) deportation proceedings.

Staff: Erwin N. Griswold, Solicitor General; Fred M. Vinson, Jr., Assistant Attorney General; Francis X. Beytagh, Jr., Assistant to the Solicitor General; Charles Gordon, General Counsel, Immigration and Naturalization Service

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LAND AND NATURAL RESOURCES DIVISION

Assistant Attorney General Clyde O. Martz

COURT OF APPEALS

PUBLIC LANDS

REQUEST OF RESIDENCE ON MINING CLAIMS UNDER 30 U. S. C. 701-702; LIMITATION OF REVIEW TO ARBITRARY ACTION

Coral V. Funderberg v. Stewart L. Udall, Secretary of the Interior, et al. (C. A. 9, No. 21,884; June 11, 1968, D. J. 90-1-18-759)

Appellant was a resident of an unpatented mining claim from 1933 to 1958. From 1958 through 1963, he spent no more than one month of each year on the claim and not more than 10 days per year during 1964 and 1965. The reasons for his spending so little time on the claim were his advancing years, business pressures and a heart attack. During the years from 1958 to the present time, he has lived in his house trailer in various places in California.

On October 22, 1964, the Department of the Interior notified the appellant that his mining claims "were believed to be invalid." On December 21, 1964, the appellant filed an application under the Act of October 23, 1962, 76 Stat. 1127, 30 U. S. C. 701-702, requesting conveyance to him of an interest in that portion of his mining claim, not to exceed five acres, on which he had constructed improvements. That Act allows an occupant of an unpatented mining claim to apply for an interest in a portion of that claim on which improvements had been constructed, providing that the claim was a principal place of residence for not less than seven years prior to July 23, 1962. The Secretary rejected the appellant's application on the ground that the mining claim had not since 1958, been a principal place of residence of the appellant as required by 30 U. S. C. 702. The district court affirmed.

The Court of Appeals upheld the Secretary, noting that a statute in 1955 called for a "crackdown" upon unauthorized uses of unpatented mining claims and that the purpose of the Act of October 23, 1962, was to relieve "the hardship which would be visited upon persons who were living on their unpatented claim, but would be evicted * * * and would have no place to go if the relief proposed in the 1962 bill was not granted" because of the crackdown. The Court held that the appellant's situation "did not fall within either the letter or purpose of the statute." The Court also stated that the "Secretary, in order to put the statute into effect was obliged to interpret

it," and that interpretation should not be disturbed unless it was arbitrary, capricious, or erroneous as a matter of law.

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

COURT OF CLAIMS

CIVIL DISORDERS

TEMPORARY OCCUPANCY OF BUILDINGS BY TROOPS AS AN IMMEDIATELY NECESSARY MEASURE FOR THEIR SAFETY IN FACE OF MOB OF RIOTERS DOES NOT RENDER GOVERNMENT LIABLE FOR TAKING OR FOR DAMAGE THEREAFTER INFLICTED UPON THE BUILDING BY RIOTERS.

National Board of the Young Men's Christian Associations, et al. v. The United States (C. Cls. No. 344-66, June 14, 1968, D. J. 90-1-23-1281)

On the evening of January 9, 1964, citizens of Panama, incensed over supposed insults to their flag occurring in the Canal Zone, flocked in mobs across the border between the Republic of Panama and the Canal Zone, destroyed much property, and broke into and looted many buildings, including the Masonic Temple and the YMCA. American troops were called out to quell the mob, but were under orders not to shoot. The troops ejected looters from the YMCA and Masonic Temple, and lined up along the street in front of those buildings, which street marks the boundary between Panama and the Canal Zone. The troops were subjected to heavy sniper fire originating from across the street. Four soldiers were wounded, and one killed by sniper fire. The troops withdrew into the YMCA. Sniper fire continued: two more soldiers were killed, and another wounded. The next morning, mobs attacked the YMCA with Molotov cocktails, and set it on fire. The troops were forced by the fire to leave the building. The riots continued for three days; the Masonic Temple, also occupied by troops, was set on fire on January 12.

The owners of the YMCA and of the Masonic Temple brought an action in the Court of Claims to recover from the United States the cost of the damages inflicted upon their buildings by the rioters after the buildings had been entered by the troops. The issue argued by the parties was whether or not the occupancy of the buildings by the troops constituted a compensable taking. The Court of Claims granted the motion for summary judgment filed by the United States, and dismissed the petition. The Court's opinion reviewed the decisions relied upon by both parties, and concluded that those decisions "have rather consistently placed on the opposite sides of that line [between

sovereign immunity and governmental liability] a temporary occupancy of private property which is immediately necessary for the safety of troops or to meet an emergency threatening great public danger and a voluntary appropriation of private property under conditions where there is no compulsive use or occupancy in the face of imminent danger. When the facts of this case are viewed in their entirety, it is our conclusion that they fall more nearly in the first category and, therefore, necessarily place the case on the sovereign immunity side of that fine judicial line."

Staff: Martin Green (Land and Natural Resources Division)

DISTRICT COURTS

PUBLIC LANDS

ERRONEOUS DESIGNATION OF COUNTY WHEREIN PUBLIC LANDS ARE LOCATED DOES NOT INVALIDATE WITHDRAWAL ORDER DESCRIBING SUCH LANDS BY LEGAL SUBDIVISIONS.

Earl M. Lutzenhiser, et al. v. Udall, et al. (D. Mont., June 7, 1968, D. J. 90-1-18-753)

In 1961, the Bureau of Land Management issued an order classifying certain lands as suitable for transfer under the Small Tract Act, and segregating those lands from all appropriations, including locations under the mining laws. The lands covered by the order were correctly described by township and range, but were incorrectly designated as being in Lewis and Clark County, Montana, when in fact they are in Jefferson County. Sometime after the order was published in the Federal Register, the plaintiffs located a mining claim on the lands involved, the claim was declared void by the Department of the Interior, and this action was brought for the review of the Department's decision.

The court held that the erroneous designation of the county did not render the withdrawal order void, for there is but one tract of land with the legal description set forth in the order, and those dealing with it would have no trouble identifying it. The court also held that since there is no requirement that notice be given of withdrawals of land for transfer under the Small Tract Act, the fact that the notice designated the wrong county as the location of the lands did not invalidate the withdrawal order.

Staff: Assistant United States Attorney Robert T. O'Leary (D. Mont.)

WATER RESOURCES

LOWER COLORADO DIVERSIONS OF WATER BY PERSONS HAVING NEITHER PRESENT PERFECTED RIGHTS NOR CONTRACTS WITH SECRETARY OF INTERIOR ARE UNLAWFUL, AND MAY BE ENJOINED.

United States v. Milpitas Cattle Co., Inc. (S. D. Cal., May 28, 1968, D. J. 90-1-2-722)

The Colorado River Compact, which established a scheme for the construction of a large dam on the Colorado River, and the utilization by and division among the several states of the waters thus stored, specified that "present perfected rights" to the beneficial use of the waters of the Colorado River were to remain unimpaired by the Compact. The Boulder Canyon Project Act, authorizing the construction of the dam, stated that no person shall have the use for any purposes of water stored therein except pursuant to a contract with the Secretary of the Interior. Under the provisions of the Supreme Court decree in Arizona v. California, 376 U. S. 340 (1964), a list of present perfected rights is being prepared by the States of Arizona, California, and Nevada, and by the United States.

The Milpitas Cattle Company, in the State of California, was diverting water from the Colorado River. It did not have a contract with the Secretary of the Interior, nor did the list prepared by the State of California of persons and entities within the State possessing present perfected rights to the use of the waters of the Colorado River show that it had a right covering its diversion. An action was initiated by the United States to enjoin the diversion. The court held, on motion for summary judgment, that the defendant's diversion was unauthorized and unlawful, and accordingly issued the prayed-for injunction.

Staff: Assistant United States Attorney Thomas H. Coleman (S. D. Cal.)

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TAX DIVISION

Assistant Attorney General Mitchell Rogovin

DISTRICT COURT

COLLECTION OF TAXES

FEDERAL TAX LIEN HAS PRIORITY OVER CONTRACTUAL LANDLORDS LIEN WHICH HAS NOT BEEN PROPERLY RECORDED IN PLACE DESIGNATED BY LAW OF STATE OF TEXAS.

United States v. Truss Tite, Inc., et al. (Civil No. 66-G-110; March 13, 1968; D. J. 5-74-1152) (CCH 68-1, U.S. T. C. Par. 9296)

On October 10, 1967, the United States was awarded a default judgment against the taxpayer, Truss Tite, Inc., for unpaid employment taxes. The claim of the United States arose by reason of an assessment which was made against the taxpayer for the unpaid employment taxes in December 1964, and notice of the federal tax lien was properly recorded on December 11, 1965. The only other claimant in this action was Alvin State Bank, which in March 1964, entered into a one-year lease agreement with the taxpayer which provided that the lessor would have a lien as security for the rent on all personal property and fixtures on the premises. On November 10, 1964, the taxpayer was in default and failed to pay any further rent, causing the bank to bring suit against the taxpayer, and to sell the subject personal property located in the leased premises for the total amount of $3,203.02. This fund was placed in escrow pending the outcome of the instant suit.

The court determined in the instant suit that the bank was the holder of a contractual landlords lien which has the same status as a chattel mortgage under the applicable Texas law. Shwiff v. City of Dallas, 327 S. W. 2d 598. Since there was no dispute that the contractual landlords lien of the bank was never filed under the State Mortgage Recording Statutes, the federal tax lien, which was fully protected when assessed and the notice of lien filed, was found to have priority over the lien of the bank to the $3,203.02 fund derived from the sale of the subject personal property.

Staff: United States Attorney Morton L. Susman and Assistant United States Attorney Joel P. Kay (S. D. Texas)

STATE COURT

PROPERTY OF TAXPAYER

LIFE INSURANCE PROCEEDS ARE NOT ASSETS OF TAXPAYER'S

ESTATE WHERE TAXPAYER HAD NOT PERFORMED HIS OBLIGATION TO NAME HIS FORMER WIFE AS BENEFICIARY; ESTATE, ALTHOUGH NAMED AS BENEFICIARY, HELD PROCEEDS IN CONSTRUCTIVE TRUST FOR HER AND THEY WERE NOT SUBJECT TO FEDERAL CLAIMS FOR TAXES OWED BY DECEDENT.

In the Matter of the Estate of Kenneth J. Gleason, Deceased (D. C. Montgomery County, Kansas, No. 63,299; April 11, 1968; D. J. 5-29-1777) (68-1 U.S.T.C. Par. 9416)

The taxpayer had been divorced in 1959. One of the terms of the court-approved settlement was that he would provide term insurance on his own life payable to his divorced wife in order to secure payment of the alimony upon his death. After the divorce he procured insurance in the amount of the alimony but named his estate as beneficiary. He died in 1965 without changing the beneficiary.

The United States filed a claim against his estate and sought the entire proceeds of the policy on the grounds that, since the estate was insolvent, 31 U.S.C. 191 gave it priority to the assets of the estate over all other claimants except burial expenses, widow's allowance and administration costs. The Government argued that the proceeds were assets of the estate due to the terms of the contract of insurance. The former wife claimed that proceeds were not assets of the estate on the basis that hers was an equitable lien on the proceeds and that the estate merely held such in constructive trust for her.

The court determined that the evidence showed that the policy came into being to comply with the divorce settlement and decree; that it was related to the monthly alimony payments; and that the taxpayer had intended for the policy proceeds to be paid to the former wife. The court concluded that the taxpayer was under a legal duty to procure the insurance, which duty did not cease upon his death; that obligation could be enforced against his estate which had no greater rights to the proceeds than he did. The court cited Lovinger v. Garvan, 270 F. 298 (S. D. N. Y., 1920) as authority in holding that a promise made by an insured and based upon consideration, to name an individual as beneficiary, can be enforced after the insured's death. The court here held that the proceeds, to the extent of the former wife's claim, were not assets of the estate but were held in constructive trust for her.

The Government has decided not to appeal this decision despite the indirect inroad made on the absolute priority position held by the United States under 31 U.S.C. 191 inasmuch as the equities clearly lie with the former

wife and inasmuch as Government success could only be based on the taxpayer's violation of his obligations.

Staff: Former United States Attorney Newell A. George and Assistant United States Attorney Elmer Hoge (Kansas); George W. Shaffer, Jr. (Tax Division)

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