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UNITED STATES DEPARTMENT OF JUSTICE

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ANTITRUST DIVISION

Assistant Attorney General Donald F. Turner

DISTRICT COURT

CLAYTON ACT

VIOLATION OF SECTION 7 OF THE CLAYTON ACT CHARGED

United States v. The Gillette Co. (D. Mass., Civ. 68-141-W; February 14, 1968; D. J. 60-0-37-977)

On February 14, 1968, a complaint was filed in the District Court for the District of Massachusetts alleging that The Gillette Company's acquisition of all of the shares of ordinary stock and 37.5 percent of the preference stock of Braun Aktiengesellschaft on December 19, 1967, violated Section 7 of the Clayton Act. On February 16, 1968, Judge Charles E. Wyzanski entered a "Stipulated Order" pursuant to which Gillette will operate the electric shaver business of Braun separate from Gillette's own operation and will give the Government 60 days notice of any intended change in status of the non-electric razor product lines of Braun.

The complaint alleges that the acquisition of the stock of Braun, the third largest European seller of electric razors, by Gillette, the nation's and the world's largest producer and seller of safety razors and blades, may substantially lessen competition or tend to create a monopoly in shaving instruments generally and will have the effect of substantially lessening actual and potential competition between the producers of safety razors and blades and between the producers of electric razors.

The shaving instrument industry is highly concentrated. Four companies account for some 99 percent of all domestic sales of safety razors and blades. Gillette accounts for some 54 percent; Eversharp for 25 percent; American for 14 percent and Wilkinson for 6 percent. In the electric razor field five companies account for some 96 percent of all domestic sales. Remington accounts for 31 percent; Norelco, 29 percent; Sunbeam, 18 percent; Schick, 13 percent and Ronson, 5 percent. The complaint states that a 1954 licensing and distribution agreement between Ronson Corporation and Braun granted Ronson the exclusive right to manufacture and distribute the Braun-type electric razor in the United States (and other specified nations) until January 1, 1976. Braun unsuccessfully attempted to void that contract in 1967 when it attempted to expand its electric razor sales into new markets, specifically those exclusively assigned to Ronson by the licensing agreement. Had Braun succeeded in voiding the 1954 agreement it would have been in a position

to enter the American shaving instrument market. However, Braun could not enter the American market because the worldwide division of markets agreement was upheld by an International Arbitration Board.

The complaint alleges that Braun is a potential entrant into the American shaving instrument industry and that its acquisition by Gillette eliminates Braun as a potential independent competitor. Braun, the largest electric razor producer not now marketing in the United States, indicated its desire to enter the United States market when it attempted to cancel its 1954 agreement with Ronson.

The complaint also alleges that competition will be lessened between Gillette and Ronson because of the 1954 agreement's provision that Braun and Ronson are to share all technology, knowhow and patents in the electric razor field until January 1, 1971.

Staff: John F. Hughes and Armand George Skol (Antitrust Division)

SHERMAN ACT

SECTION 1 OF THE SHERMAN ACT CASE FILED AGAINST BRITISH DRUG COMPANIES.

United States v. Glaxo Group Limited, et al. (D. D. C., Civ. 558-68; March 4, 1968; D. J. 60-21-142)

On March 4, 1968, a civil suit was filed in the Federal District Court for the District of Columbia against Glaxo Group Industries Limited and Imperial Chemical Industries, Limited, alleging a violation of §1 of the Sherman Act. Both defendants are British companies. The complaint challenges as unlawful three license agreements under certain patents pooled by the defendants. These patents relate to an antibiotic known generically as griseofulvin. The drug is used in the cure of fungus infections of the skin. In 1966 total griseofulvin sales for the defendants' three American licensees amounted to approximately $7 million.

In 1959 Glaxo granted substantially identical licenses to Johnson & Johnson, Inc., and Schering Corporation, to make, use and sell griseofulvin. Each agreement expressly provided that the licensees undertook not to sell griseofulvin in bulk to any independent third party without Glaxo's express consent in writing. In 1962 Imperial granted a similar license to American Home Products Corporation, under the same patents. None of the American licensees manufactures griseofulvin itself. They all buy from the British companies in bulk form, and package the product into pills or the like in the United States and resell for pharmaceutical use.

The complaint charges, as did the similar drug complaints filed in February, that the effect of the agreement is to prevent competition between the defendants and licensees in the sale of the drug in bulk, to prevent competition among the licensees in the sale of the drug in bulk, to control and restrain the licensees in respect to the manner to which they market the drug, to foreclose third persons from access to bulk sources of the drug and thus prevent such third persons from packaging bulk-form griseofulvin into dosage form for resale to the public -- and also, to place restrictions on the resale of griseofulvin which defendants sell to the licensees. The latter effect involves a restraint on alienation not involved in the other cases.

The present case differs from the two prior cases in an additional respect. The complaint alleges that the patents are invalid for failure to comply with the requirements of certain provisions of the patent laws and would, therefore, seek an adjudication of invalidity, in addition to injunctive relief against the challenged restrictions. Two bases of invalidity are alleged. First, Imperial's patent claims the method of curing fungus infections by internal administration of "an effective amount of griseofulvin". The patent does not disclose what amount is "effective". The complaint asserts that the patent is, therefore, invalid under 35 U. S. C. 112 which requires the patentee to disclose to the public the manner to practice the method on which a statutory monopoly is granted. The Imperial patent, unlike any of the other drug patents involved in these cases, also claims griseofulvin in tablet form. But the product griseofulvin has long been known and used for other purposes. According to the complaint, the attempt to secure a statutory monopoly of the product in tablet form is contrary to 35 U. S. C. §§100-101, which permits a new use of an old product to be protected only by a claim on the method, rather than the product.

Jurisdiction of the defendants is based on 35 U. S. C. §293, a special long-arm statute for patent cases, which permits the District Court for the District of Columbia to assert personal jurisdiction of foreign patentees.

Staff: Richard H. Stern and James H. Wallace (Antitrust Division)

DRUG FIRMS FOUND GUILTY BY JURY OF SHERMAN ACT VIOLATIONS.

United States v. Chas. Pfizer & Co., Inc., et al. (S. D. N. Y., 61 CR 772; February 28, 1968; D. J. 60-21-108)

The above indictment filed August 17, 1961, charged Chas. Pfizer & Co., Inc., American Cyanamid Company and Bristol-Myers Company with conspiracy to restrain, conspiracy to monopolize and monopolization in the manufacture, sale and distribution of broad spectrum antibiotics, commencing

in November 1953. The indictment charged that the defendants had agreed to confine the manufacture of tetracycline to themselves and the sale thereof to themselves and two co-conspirators, Squibb and Upjohn; and that sales were to be at substantially identical prices. It was charged that this scheme was effectuated by patent licensing arrangements under a patent obtained by Pfizer as a result of the withholding of pertinent information from, and otherwise misleading the Patent Office; suppression of litigation involving the validity of that patent; refusals to license others or to sell bulk to others; the use of all-requirements contracts; and maintenance by all defendants and co-conspirators of substantially identical and unreasonably high prices.

Trial commenced on October 23, 1967, before Judge Marvin E. Frankel and a jury. On December 29, 1967, after 36 trial days (exclusive of argument on interim motions) the jury returned a verdict of guilty against all three defendants on all three counts.

The Government's case consisted principally of the testimony of the chief executive officers of the defendant companies and documents from defendants' files. After denial of defendants' motions for judgment of acquittal at the end of our case, the defense rested after putting on one witness.

After trial, defendants moved for a judgment of acquittal and/or a new trial. They argued that they could not receive a fair trial because of continued publicity reflecting adversely on drug manufacturers; that the court had erred in permitting the Government to introduce "partial costs", i.e., manufacturing costs, without simultaneously admitting "total costs", i.e., allocated costs; and that the court erred in not charging the jury that they must either believe all of the testimony of the defendants' officers, including their denials of having entered into any conspiracy, and therefore acquit, or in effect, hold that they had perjured themselves. The court had charged, in effect, that the jury could believe all or part of their testimony.

On February 14, 1968, Judge Frankel denied all motions. He held there was sufficient evidence on which a jury could convict; that the jury panel had been carefully screened to keep out anyone who might possibly be prejudiced and defense counsel had accepted the jury; that the admission of cost and profit data was proper; that it was open to defendants to show that prices were reasonable in the light of lawful individual decisions based on economic factors rather than agreement, which they did not do; that enjoyment of substantial profits can be given consideration by the jury in assessing the existence of monopoly power; and reaffirmed his charge to the jury that, while the jury could give to defendants' officers denials of conspiracy such weight as they believed they merited, the "final answer...must be based on the actual conduct of the defendants."

On February 28, 1968, Judge Frankel fined each of the three companies the maximum of $50,000 on each count, i.e., $150,000 for each defendant, for a total of $450,000. In imposing sentence the court stated:

> I agree with the judgment of the Government that in the light of the nature of the penalty, which is for Congress in its wisdom, and the nature of the offense, the maximum is appropriate here and I will impose it.

Payment was stayed pending appeal.

Staff: Norman H. Seidler, Harry G. Sklarsky, Herman Gelfand and Ira Postel (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General Edwin L. Weisl, Jr.

SUPREME COURT

FALSE CLAIMS ACT

FALSE CLAIMS ACT APPLICABLE TO INFORMATION SUPPLIED TO OBTAIN GOVERNMENT LOAN.

United States v. Neifert-White Co. (No. 267, March 5, 1968; D. J. 120-44-88)

On the invoices of twelve grain storage bins sold to farmers, an officer of the respondent company deliberately overstated the bin prices, knowing that these inflated invoices would be used by farmers to obtain loans from the Commodity Credit Corporation. The C. C. C. is authorized by statute to make loans to finance construction of grain storage facilities, and C. C. C. grants loans based upon 80% of the actual purchase price of the bins. The inflated invoices were used by farmers to obtain loans larger than they were otherwise entitled.

The United States brought the present action against the respondent company under the False Claims Act, 31 U. S. C. 231, which provides for civil penalties of $2,000 for each false claim plus double actual damages to the United States from anyone who "makes or causes to be made, or presents or causes to be presented for payment or approval . . . any claim upon or against the United States . . ., or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, [etc]. . . ".

The district court dismissed the action on the ground that an application for a C. C. C. loan, as distinguished from a claim for payment of an obligation owed by the United States, is not a "claim" within the meaning of the Act. The Ninth Circuit affirmed, declaring that the Act applied only to claims based upon assertions of legal right against the Government.

The Supreme Court reversed. The Court noted the statute was remedial, was to be broadly construed, and was designed to reach "beyond claims which might be legally enforced, to all fraudulent attempts to cause the Government to pay out sums of money." In support of this interpretation, the Court reviewed the history of the statute, which was passed to curtail frauds perpetrated against the Government during the Civil War and quoted its earlier holding in Rainwater v. United States, 356 U. S. 590, 592, where the Court remarked the objective of Congress in enacting the False Claims Act "was

broadly to protect the funds and property of the Government regardless of the particular form, or function of the government instrumentality upon which such claims were made" and that "by any ordinary standard the language of the Act is certainly comprehensive enough to achieve that purpose."

Staff: John S. Martin (Office of the Solicitor General); Robert V. Zener and Daniel Joseph (Civil Division)

COURT OF APPEALS

BANKRUPTCY

RECOVERY BY GOVERNMENT OF ALL FEES PAID WAREHOUSEMEN ON GRAIN NOT LOADED OUT ON DEMAND CONSTITUTES "PENALTY" TO EXTENT FEES REPRESENT SERVICES ACTUALLY PERFORMED.

United States v. Wagner (C. A. 10, No. 9,464, February 27, 1968; D. J. 120-13-196)

Cheyenne Wells Elevator Corporation entered into a "uniform grain storage agreement" with the Commodity Credit Corporation pursuant to which the C. C. C. deposited large amounts of wheat with Cheyenne Wells. Payments were made periodically by C. C. C. on the basis of the warehouse receipts held by it, although the agreement provided that, if the grain were disposed of contrary to the terms of the agreement, no charges of any kind would be payable on the quantity of grain not loaded out. Subsequently, the C.C. C. discovered that Cheyenne was short, and issued load out orders on its grain. Unable to meet these orders, Cheyenne filed a voluntary petition for bankruptcy.

The Government filed a claim for the value of the grain converted and for a refund of all warehouse charges paid on that grain. The referee determined that C. C. C. would be paid in full for the value of the grain, and held that recovery of any warehouse storage charges would be a penalty under section 57(j) of the Bankruptcy Act, and thus would not be enforceable. The district court affirmed.

On our appeal, the Tenth Circuit held that Cheyenne was not entitled to any warehouse storage charges which accrued after the date of conversion of the grain, but that recovery by the Government of the charges which had accrued prior to the date of conversion would constitute a penalty under the Bankruptcy Act. Consequently the case was remanded so that the district court could determine what portion of the charges had accrued after the date of conversion and allow the Government those charges on its claim.

Staff: Robert C. McDiarmid (Civil Division)

LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT

SECRETARY OF LABOR MAY INCLUDE IN SUIT ATTACKING UNION ELECTION AN ALLEGATION THAT CANDIDATE FOR SECRETARY-TREASURER BENEFITED FROM DISCRIMINATORY APPLICATION OF CANDIDACY REQUIREMENTS, EVEN THOUGH INTERNAL COMPLAINT WAS CONFINED TO CHARGE OF DISCRIMINATION IN RACE FOR VICE PRESIDENT.

Wirtz v. Local Union No. 705, Hotel and Restaurant Employees, etc. (C. A. 6, No. 17,920; February 14, 1968; D. J. 156-37-210)

Under Title IV of the Labor-Management Reporting and Disclosure Act of 1959, 29 U. S. C. 481 et seq. (LMRDA), the Secretary of Labor may bring suit to set aside a union election if he finds that a violation of Title IV has occurred at the election. However, the Secretary may not sue unless he first receives a complaint from a union member who has exhausted his internal remedies. The Secretary brought this suit alleging that there had been a violation of the requirement that all union members in good standing be eligible to run for office, subject only to reasonable qualifications "uniformly imposed", 29 U. S. C. 481(e). The constitution and by-laws of the defendant union require that all candidates for union office maintained good standing for a period of two years. It was alleged in the Secretary of Labor's complaint that the incumbent Secretary-Treasurer ran for re-election to that office despite the fact that she had not met the good standing requirement, although such requirement was applied to other candidates. The union's defense was that this alleged violation had not been raised in an internal complaint preceding the suit. The internal complaint in this case was brought by a union member who had been disqualified from running for vice president on the ground of failure to maintain good standing. The complainant had charged in his internal complaint that the "real reason" for his disqualification was that "contrary to the wishes of Secretary-Treasurer Wolfgang, I accepted nomination for the office of vice president in opposition to her favorite candidate, incumbent vice president Furay-- whose own circumstances relative to the alleged dues provisions have, in fact, been no different from my own". An additional allegation in the Secretary's complaint was that the union had altered its dues records to conceal Secretary-Treasurer Wolfgang's ineligibility to run for re-election.

The district court initially overruled a motion to dismiss the complaint, on the ground that the internal complaint should have put the union on notice of the violation involved in Secretary-Treasurer Wolfgang's candidacy. However, the decision of the Tenth Circuit in Wirtz v. Local Unions Nos. 9, 9-A and 9-B, International Union of Operating Engineers, 366 F. 2d 911, vacated for mootness, 387 U. S. 96, was then handed down. In reliance on this decision, the district court granted the union's motion to dismiss. On the Secretary's appeal, the Sixth Circuit Court of Appeals reversed on the

authority of the Supreme Court's decision in Wirtz v. Local 125, Laborers' International Union, 36 L. W. 4118 (January 15, 1968). The Court of Appeals concluded that the internal complaint was "adequate to give the union an opportunity to correct the violation" and was therefore sufficient to comply with the exhaustion of remedies required by the LMRDA.

Staff: Robert V. Zener (Civil Division)

SELECTIVE SERVICE

FEDERAL COURT HAS NO JURISDICTION TO REVIEW SELECTIVE SERVICE CLASSIFICATION PRIOR TO REGISTRANT'S INDUCTION.

Oestereich v. Selective Service System, Local Board No. 11, et al. (C. A. 10, No. 9,902; February 21, 1968; D. J. 25-87-135)

James Oestereich had a IV-D classification, as a theology student exempt from the draft. In October 1967, he turned in his Selective Service registration card in protest to the involvement of the United States in the Vietnam conflict. Shortly thereafter, his draft board re-classified him as a delinquent and placed him in I-A. Under Selective Service regulations, 32 C. F. R. 1642.4(a), any registrant who "has failed to perform any duty or duties required of him under the Selective Service Law" may be reclassified as a delinquent and placed in the highest priority for induction. See 32 C. F. R. 1631.7(b)(1). One of a registrant's duties is to carry his registration card at all times. 32 C. F. R. 1617.1. Failure to comply with this regulation is a felony. 50 U. S. C. App. 462(b)(60).

After exhausting his administrative remedies, Oestereich brought suit in the Federal district court in Cheyenne, Wyoming, seeking to enjoin his induction, which was ordered after the administrative appeal board had approved his I-A classification. The district court dismissed the suit, primarily on the basis of Public Law 90-40, 81 Stat. 100, amending 50 U. S. C. App. 460(b) (3). That statute provides in relevant part:

> No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction * * *.

On appeal to the Court of Appeals for the Tenth Circuit, Oestereich contended that the requirement of possessing the registration card was a violation of the First Amendment, as applied to cases in which relinquishment

of possession was intended as a form of "symbolic speech". He also contended that reclassification and induction as a consequence of violating the possession requirement constituted the imposition of a penalty without the Constitutional safeguards applicable to criminal prosecutions. With respect to Public Law 90-40, he contended that it was either inapplicable or unconstitutional as applied to a case in which First Amendment contentions are made. Relying on Dombrowski v. Pfister, 380 U.S. 479, he argued that pre-induction review in an injunctive suit was the only adequate remedy, and that there would be a "chilling effect" on First Amendment rights if they could be vindicated only by means of their assertion in defense to a criminal prosecution for failure to submit to induction, or in a habeas corpus proceeding brought after induction.

The Tenth Circuit in a brief per curium opinion, citing the jurisdictional restrictions contained in 50 App. U.S.C. § 460(b)(3), affirmed the dismissal. The Court noted that ultimate judicial review was not foreclosed by statute and further stated that orderly classification of a registrant for military service is not punitive in nature.

The Solicitor General has acquiesced in a stay application in the Supreme Court, conditioned on the filing of a certiorari petition by Oestereich within two weeks.

Staff: Robert V. Zener (Civil Division)

DISTRICT COURT

FEDERAL HOUSING ADMINISTRATION

FORECLOSURE OF MORTGAGES - FEDERAL LAW GOVERNS RIGHT OF REDEMPTION.

United States v. New Western Manor, Inc. (Civil No. 658, D. Mont., February 7, 1968; D.J. 130-44-330)

In an action to foreclose a mortgage held by the Federal Housing Administration, a foreclosure judgment and decree were entered in favor of the FHA which, despite the Montana one-year redemption period, barred all equitable or statutory right of redemption "except that the defendants shall have the right to redeem the real property for a period of 60 days after the foreclosure sale". The District Court held that federal law applied to the question of redemption and thus disregarded the redemption period established under state law. In support of its position, the Court cited United States v. Forest Glen Senior Residence (Civil Action No. 66-412, D. Ore. Oct. 26, 1967) (United States Attorneys' Bulletin, Vol. 15, No. 22, page 662, October 27, 1967), and United States v. Montgomery, 268 F. Supp. 787, 790 E.D. Kan.

1967). While the District Court adopted the Department's position that federal law governed redemption rights, the Court rejected the Department's contention, accepted in Forest Glen, that Federal law permits no redemption. Instead, the Court followed Montgomery which allowed a 60 day redemption period as a matter of Federal law.

Staff: United States Attorney Moody Brickett and Assistant United States Attorney Robert T. O'Leary (D. Montana); Preston L. Campbell (Civil Division)

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CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

SPECIAL NOTICE

PROSECUTIVE POLICY IN FALSE PERSONATION CASES (18 U. S. C. 912)

Based upon a recent experience it appears that not all United States Attorneys and their Assistants are aware of the Department's revised prosecutive policy under 18 U. S. C. 912.

In 1966 notice was given that, as presently interpreted by the courts, there is no violation of 18 U. S. C. 912 unless the impersonator pretends to be "acting under the authority of the United States" when he obtains in the guise of an officer or employee of the United States money or a thing of value. Consequently, the Department of Justice cannot prosecute the person who in applying for credit, registering for lodging, or cashing a personal check, merely represents that he is a Government employee or member of the military and does not pretend to be acting under color of authority or indicate that the valuable thing obtained was necessary for the performance of his "official" or "authorized" duty. United States Attorneys' Bulletin, Vol. 14, No. 26, p. 522.

It is requested that all United States Attorneys and their Assistants familiarize themselves with the prosecutive policy under 18 U. S. C. 912 and review pending cases with a view to determining whether there is sufficient evidence to prove all of the elements of the offense. If there are any cases in which it appears that the defendant did not pretend to be "acting under the authority of the United States" when he obtained money or a thing of value, a request for authorization to dismiss should be submitted. In such cases, consideration should be given to the possibility of prosecuting for a violation of 18 U. S. C. 702 if the defendant wore the uniform or a distinctive part thereof of any of the armed forces of the United States. In addition, you may wish to apprise the local authorities of the defendant's fraudulent activity for whatever action they deem appropriate.

Any questions as to application of the Department's prosecutive policy in specific instances should be directed to the General Crimes Section, Criminal Division.

DISTRICT COURTS

BAIL JUMPING

18 U. S. C. 3150 HELD NOT TO COVER DEFENDANT, PLACED ON BAIL BETWEEN SENTENCE AND DEFERRED EXECUTION DATE, FOR HIS WILFUL FAILURE TO APPEAR.

United States v. Andrews (N. D. Ga., No. 25330, January 23, 1968, D.J. 26-19-476)

The defendant was convicted of a Dyer Act violation and admitted to bail between conviction and date of sentencing. On April 7, 1967, sentence was imposed committing the defendant to custody. However, at the defendant's request execution of the sentence was deferred until May 1, 1967, and he was released on personal recognizance. He failed to appear. Some months later he surrendered and indictment under 18 U.S.C. 3150 followed. The District Court dismissed the indictment holding that the language "released in connection with a charge of felony" as used in §3150 related to pretrial release and could not under the principles of strict construction of criminal statutes cover all periods prior to incarceration in which a court has an opportunity and discretion to release a defendant. The Court recognized that it was common practice to give defendants some time after sentence to put their affairs in order and stated: "Obviously, if such beneficial practice is to continue, the Courts must have some power to punish . . . Until the statute in question is amended to cover such situations, the only remedy appears to be under the powers of contempt . . ."

The Department does not adhere to the narrow interpretation given by the District Court to §3150. The Solicitor General has decided against appeal under 18 U.S.C. 3731 (par. 1) feeling that this decision is localized and there is no indication that other courts will follow this precedent. However, as long as some doubt persists on the correct interpretation of this section, district courts should be reminded not to be too generous in the time allowed to defendants in this regard. Any cases similar to United States v. Andrews, which may have occurred or which should arise in the future, should be brought to the attention of the Criminal Division.

CONTEMPT

CONTEMPT OF COURT, FOR REFUSAL TO TESTIFY BEFORE GRAND JURY, PROSECUTED BY INDICTMENT.

United States v. Hyman Sternman (E. D. Ohio, February 1968; D.J. 165-57-34)

Hyman Sternman was called before the grand jury in Toledo, Ohio on August 23, 1967, to testify with respect to the use of the telephone in connection with gambling operations in Canada and the United States. Sternman refused to testify, invoking, his Fifth Amendment privileges.

On February 14, 1968, Sternman, who was confined in the Federal Prison at Terre Haute serving an 18-month sentence for income tax evasion,

was called before the grand jury. He again refused to testify and was brought before the District Court. Sternman was ordered by United States District Judge Young to testify fully and completely before the grand jury. He was informed that, if he so testified, he would be immune from prosecution under the provisions of the Federal Communications Act, 47 U. S. C. 409(1).

Sternman refused to testify after returning to the grand jury. He was permitted to return to the local jail overnight, and the following morning persisted in his refusal to comply with the order of the Court. He was thereupon indicted by the grand jury for contempt of court (18 U. S. C. 401). On February 19 Sternman, upon being informed of his right to a jury trial and his right to have counsel, pleaded guilty to the indictment. On February 21 he was informed by the Court that the Court would permit him to withdraw his plea of guilty and try the indictment to the jury. Sternman refused the offer and he was then sentenced to three years imprisonment for refusal to testify.

The Court made the three-year sentence consecutive to the 18-month sentence he is now serving for income tax evasion, but inserted a purge clause in the sentence. This clause gave Sternman 120 days time within which he could again appear before the grand jury, testify, and purge himself of contempt.

Staff: United States Attorney Merle M. McCurdy and Assistant United States Attorney John Mattimoe (E. D. Ohio); and Edward T. Joyce (Criminal Division)

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EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

Assistant to the Deputy Attorney General John W. Kern, III

APPOINTMENTS

ASSISTANT UNITED STATES ATTORNEYS

California, Eastern - RICHARD W. NICHOLS; University of California Law School, LL.B., and formerly in private practice.

California, Central - GEORGE G. RAYBORN, JR.; Rutgers University School of Law, LL.B., and formerly an attorney with the Department of Justice.

Illinois, Northern - WILLIAM P. CAGNEY; Georgetown University Law Center, J.D., and formerly in private practice.

Illinois, Southern - HERMAN C. RUNGE, JR.; University of Wisconsin Law School, LL.B., and formerly an attorney with the Department of Justice.

New York, Southern - JAMES W. BRANNIGAN, JR.; University of San Diego Law School, J.D., and formerly in private practice.

Ohio, Southern - CHARLES R. DERSOM; Franklin University Law School, J.D., and formerly an Assistant Attorney General for the State of Ohio.

Oregon - WILLIAM B. BORGESON; Georgetown University Law Center, LL.B., and formerly in private practice and an Assistant United States Attorney for the District of Oregon.

LAND AND NATURAL RESOURCES DIVISION

Assistant Attorney General Clyde O. Martz

DISTRICT COURT

PUBLIC LANDS

JURISDICTION TO REVIEW DISCRETIONARY DECISIONS OF SECRETARY OF INTERIOR.

Richard Dean Lance v. Udall (D. Nev., Civ. No. 1864-N, Jan. 23, 1968, D. J. 90-1-4-141)

Richard Lance applied for patent to public land in Nevada pursuant to the Homestead Act, 43 U.S.C. 161 (1964). The Bureau of Land Management refused the patent on the basis that the final proof of the applicant showed that there had been insufficient cultivation during the entry. Lance was granted a hearing before an examiner, and at the conclusion of the hearing Lance asked the Director of the Bureau of Land Management for relief under the "equity and justice" provisions of 43 U.S.C. 1161. The Director denied the request, and this was affirmed by the Assistant Solicitor on behalf of the Secretary (73 I.D. 218). Lance then sought judicial review of the Secretary's decision.

The District Court of Nevada held that the action taken by the Secretary pursuant to the Act of August 3, 1846, 43 U.S.C. 1161, was "committed to agency discretion by law." The Government's motion for summary judgment was granted on the basis of the exception expressed in the Administrative Procedure Act, 5 U.S.C. 701 (a) (2).

The hardships involved in land cultivation in the arid West apparently caught the Court's interest. In a memorandum opinion, the Court stated that, under broad equitable principles, the plaintiff had made out a proper case for relief. But for the discretionary language of 43 U.S.C. 1161, the Secretary's decision would have been reversed.

The courts have been reluctant to accept the Department's position that the Secretary of the Interior has nonreviewable discretion in classifying public land under the Taylor Grazing Act, 43 U.S.C. §315. E.g., Richardson v. Udall, 253 F. Supp. 72 (S.D. Idaho 1966).

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

UNITED STATES IS OWNER OF MATERIAL SITES RESERVED IN PUBLIC LAND PATENTS PURSUANT TO ACT OF NOVEMBER 9, 1921; OWNERS OF LAND PATENTED SUBJECT TO SUCH RESERVATIONS MAY NOT LIMIT OR CONTROL GOVERNMENT'S USE OF MATERIAL SITE.

United States v. Southern Idaho Conference Association of Seventh Day Adventists, et al. (D. Idaho, Dec. 11, 1967; D.J. 90-1-3-1496)

Certain land was patented under the Desert Land Act to the predecessor in interest of the defendant; the patent contained a reservation for a material site under the Act of November 9, 1921, 42 Stat. 212, 23 U.S.C. 317. The material site is used by the State of Idaho and its permittees as a source of building material for highways constructed under the federal aid road system. The defendant sought to restrain the State of Idaho from removing materials from the material site. To prevent this, the Government brought an action to quiet its title to the material site, and to enjoin interference with its utilization. The Court held that the United States owns the material site reserved from the patent of the desert land entry; that the right of the State to take materials from the site is a matter to be settled between the United States and the State (and thus a matter of no concern to the defendant); that material from the site may be used for road construction ten miles from the site; that the defendant has no right to take materials from the site for its own use; and that the defendant's right to use the land is subordinate to the right of the Government and its permittees, even though such use precludes any use of the land by the defendant.

Staff: Assistant United States Attorney Clarence D. Suiter (D. Idaho)

OIL AND GAS LEASES

ACQUIRED LAND LEASES: DISCRETION OF SECRETARY TO LEASE: MINERAL LEASING ACT FOR ACQUIRED LANDS: MILITARY PURPOSES EXCEPTION; LIMITED PURPOSE OF TEMPORARY TRANSFER.

McKenna v. Udall (D.C., Civ. No. 2001-67, Feb. 7, 1968, D.J. 90-1-18-797)

In the 1940's, the United States acquired by purchase and condemnation about 35,000 acres of land in Kentucky for the establishment of a military reservation, Camp Breckenridge. Oil and gas began to be produced from adjacent lands and it was feared the Government land would be subject to drainage. After discussions between the Department of the Army and the Department of the Interior, it was concluded that the United States could not protect its interests in any oil and gas under the acquired lands by issuing leases under the Mineral Leasing Act For Acquired Lands, 30 U.S.C. 351, because Section 3 of the Act specifically excludes from its operation land set apart for

military purposes. By an opinion of the Attorney General, 40 Op. A.G. 41 (1941), it had been decided that such lands were leasable to protect the Government's interests by virtue of the inherent authority of the administering agency.

Accordingly, the Department of the Army, the administering agency, and the Department of the Interior agreed that the interests of the United States could best be protected by having the Secretary of the Interior lease the land under the authority of Executive Order No. 9337, April 24, 1943, 8 Fed. Reg. 5516. The bases for this determination were that the Department of the Interior, by virtue of its expertise in issuing leases for oil and gas on public lands and for acquired lands, could better administer the lease and that it would be more convenient for it to do so. Accordingly, the Secretary of the Interior issued Public Land Order No. 729, dated June 19, 1951, 16 Fed. Reg. 6132, which transferred jurisdiction over the oil and gas deposits from the Department of the Army to the Department of the Interior for the purpose of preventing drainage. Thereafter, two oil and gas leases, covering a small area, approximately 900 acres, were issued.

On December 5, 1962, the Department of the Army, no longer having need for Camp Breckenridge, reported all of it to the General Services Administration as excess property, pursuant to the Federal Property and Administrative Services Act, 63 Stat. 384, as amended, 40 U.S.C. 483. GSA declared the property to be surplus February 7, 1963, and in August 1964, GSA requested Interior not to issue any more oil and gas leases under authority of PLO 729. Interior agreed not to issue any further leases but at that time asserted that the oil and gas deposits were still under its jurisdiction and could not be declared surplus by GSA until Interior had reported them to be excess. GSA did not accept the statement of the position of Interior and on December 21, 1964, offered the land, including the mineral interests in all of the property (except the two previously issued leases), for sale by sealed bids to be opened April 15, 1965. Although Interior still adhered to its previously stated position, that PLO 729 had transferred the oil and gas deposits to that Department, and that they could not be disposed of until that Department had reported them to be excess, Interior, in an attempt to reconcile the divergent views, concluded that if PLO 729 were revoked, it would terminate that Department's jurisdiction over the minerals. To remove any possible legal barrier to the efforts of GSA to dispose of the minerals by reason of the previously advertised sale, Interior issued PLO 3706 on June 11, 1965, 30 Fed. Reg. 7754. PLO 3706 expressly revoked PLO 729.

In the meantime, P.A. McKenna, now deceased, and presently represented by his executrix, Mrs. Elgin A. McKenna, filed 19 offers to lease the land for oil and gas in March 1965. Those offers were filed under the non-competitive provisions of the Mineral Leasing Act For Acquired Lands. The

Manager of the Eastern States Land Office, Bureau of Land Management, rejected the bids on the ground that Interior no longer had jurisdiction over the oil and gas deposits. On July 9, 1965, GSA announced the acceptance of bids and the names of the successful bidders who had responded to its advertisements for sale. Quitclaim deeds were executed by GSA on behalf of the United States to the successful bidders and the United States received approximately $24,500,000 for the property.

Thereafter, McKenna appealed the decision of the Manager of the Eastern States Land Office to the Director, BLM, who, on December 17, 1965, affirmed the rejection of McKenna's offers. McKenna then appealed to the Secretary and, by an opinion dated May 12, 1967, the Secretary affirmed the previous decisions rejecting the offers.

On August 1, 1967, the plaintiff filed the present action on behalf of her testator, requesting review of the decision rejecting the offers to lease and requesting a declaratory judgment determining that the Secretary of the Interior erred in concluding that the oil and gas deposits covered by McKenna's offers were excepted from leasing under the Mineral Leasing Act For Acquired Lands, that the Secretary has a duty and responsibility to adjudicate the offers on the basis of existing law as interpreted by the plaintiff, which is to the effect that the lands are leasable under the Mineral Leasing Act For Acquired Lands, that the plaintiff, as the first qualified applicant, is entitled to a lease and that the Secretary is required to issue leases accordingly.

A motion for summary judgment was filed on behalf of the Secretary and a cross-motion for summary judgment was filed by the plaintiff. Texaco, Inc. one of the purchasers at the GSA sale, filed a brief amicus curiae. On behalf of the Secretary, we argued that even if the Secretary was authorized to lease the land under the Mineral Leasing Act For Acquired Lands, as contended by plaintiff, he may, in the exercise of his discretionary authority, reject all offers and decide not to lease the lands at all. The plaintiff contended that PLO 729 transferred jurisdiction over the minerals to the Secretary and that such control still remains in that officer, notwithstanding PLO 3706, which purports to revoke PLO 729. Plaintiff contended further that in the absence of an express declaration of excess by Interior, GSA had no authority to convey an estate in the minerals.

On February 7, 1968, the Court entered an order denying plaintiff's motion for summary judgment and granting defendant's motion for summary judgment. The Court, in a memorandum opinion, expressly held that the plaintiff had no standing to bring an action in this case even if GSA's sale were otherwise unauthorized or improper. In addition, the Court stated that PLO 729 transferred jurisdiction over the minerals to Interior for a very limited purpose to prevent drainage and that once the property was declared excess

by the Army and reported as such to GSA, Interior no longer had any authority to execute leases.

Staff: Herbert Pittle (Land and Natural Re sources Division)

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TAX DIVISION

Assistant Attorney General Mitchell Rogovin

DISTRICT COURT - CIVIL CASE

SUMMONS ENFORCEMENT

ACCOUNTANT'S NOTES USED IN PREPARATION OF RETURNS WERE "WORK PAPERS" AND PROPERTY OF ACCOUNTANT. TRANSFER OF ACCOUNTANT'S WORK PAPERS TO TAXPAYER WAS MERE ATTEMPT TO THWART GOVERNMENT'S INVESTIGATION; TAXPAYER DID NOT RECEIVE "RIGHTFUL POSSESSION" OF PAPERS.

United States & Andersen, Special Agent v. Zakutansky & Johnston (N. D. Ind., January 12, 1968, D. J. 5-26-829) (68-1 U.S.T.C. Par. 9205)

This action was commenced by the United States seeking to enforce internal revenue summonses against the named respondents pursuant to 26 U.S.C. 7602. The summonses directed the production of certain accountant's work papers used by the respondent, Zakutansky, a C.P.A., in preparing the income tax returns of the respondent-taxpayer, Johnston, for the years 1960 through 1965. Three summonses were issued by Special Agent Andersen to the accountant, Zakutansky, during the course of this investigation.

In response to the first summons issued on May 11, 1966, Zakutansky admitted that he had work papers relating to the investigation but refused to produce them. A second summons, limited only to the accountant's work papers, was issued on June 28, 1966. Zakutansky appeared on return date of the second summons but again refused to comply. Subsequently, the legality of the second summons was questioned since the issuance date was incorrectly written as "July 28" instead of "June 28," 1966.

On July 21 or 22, 1966 Zakutansky delivered all the papers in his possession to the taxpayer, Johnston.

On July 25, 1966, the third summons was issued. Zakutansky appeared at the time requested but was unable to comply since the work papers were no longer in his possession.

A summons was issued to the taxpayer Johnston on December 30, 1966, requesting the production of the accountant's work papers. Johnston refused to turn over the papers stating that they were his and invoked his privilege under the Fifth Amendment.

The respondents contended that (1) the documents in question were not the kind of accountant's work papers customarily retained as part of an accountant's files, and belonged to the taxpayer, and (2) the accountant relinquished any claim he had to the papers by giving the taxpayer indefinite and rightful possession to them.

The Court relying in part on United States v. Pizzo, 260 F. Supp. 216 (S. D. N. Y. 1966), found that the papers, consisting of notes taken by Zakutansky on sheets of columnar paper and notes written on the backs of adding machine tapes were used by Zakutansky in the preparation of Johnston's tax returns and constituted accountant's work papers. The Court found that the legal character of papers does not depend upon the type of paper used. Furthermore, even if the papers were not the usual type kept by an accountant to support a certified public audit, such papers nevertheless were work papers which could be used in support of the information put on a return by an accountant.

The Court stated that it was not bound by either the taxpayer's or accountant's assertions concerning the ownership of the papers sought. Deck v. United States, 339 F. 2d 739 (D. C. Cir. 1965), cert. den. 379 U.S. 967 (1965); Bourschor v. United States, 316 F. 2d 451 (8th Cir. 1963); United States v. Boccuto, 175 F. Supp. 886 (D. N. J. 1959), App. dism. 274 F. 2d 860 (3d Cir. 1960). The Court found that the accountant's previously uninterrupted possession of the papers was an important factor in determining their ownership and that the transfer of the papers, after an apparent error in the second summons provided an excuse, was a mere attempt to thwart the Government's investigation.

It was held that the "rightful possession" test did not apply since at the time the papers were transferred the transferor was under a moral, if not legal, obligation to provide them to the Government. The taxpayer therefore had no right to assert his privilege under the Fifth Amendment.

Zakutansky was ordered to produce the work papers and testify as required by the summons.

Staff: United States Attorney Alfred W. Moellering; Assistant United States Attorney Alfred R. Uzis (N. D. Ind.); Carl H. Miller and Earl Kaplan (Tax Division)

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