United States Attorneys

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UNITED STATES DEPARTMENT OF JUSTICE

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POINTS TO REMEMBER

New Minimum Set on Claims Referrals

The Attorney General and the Comptroller General have signed an amendment to the joint regulations implementing the Federal Claims Collection Act (31 U.S.C. 951-953) which, for most purposes, raises the minimum dollar amount on claims referrals for collection or litigation from $250 to $400. See 35 F.R. 16397, October 21, 1970, amending 4 C.F.R. 105.6. Claims of less than $400 referred subsequent to October 21, 1970, which fail to meet the standards set by 4 C.F.R. 105.6 as amended, may be returned to the referring agency.

(Civil Division)

"Certified Mail" to be Used in Returning Internal Revenue Service Files

As you know, the report and exhibit files prepared by the Internal Revenue Service generally contain original documents which cannot be replaced. For this reason, when returning a case file to the Regional Counsel or to the Tax Division in either a civil or a criminal tax matter, you are requested to send the file by "certified mail, return receipt requested".

(Tax Division)

Canadian Bank Records

After repeated unsuccessful attempts by the Department to obtain Canadian bank records, the Fraud Section requested the assistance of the State Department in connection with a Small Business Investment Corporation fraud investigation and obtained the desired records.

The Canadian authorities advised that under a recent amendment to the Canadian Evidence Act the Royal Canadian Mounted Police are authorized to institute a search to obtain records on behalf of a foreign authority when the violation, being investigated or prosecuted by the foreign authority, would constitute a violation of the Canadian Criminal Code. See Crankshaw's Criminal Code of Canada, C. 51, Section 299.

If a United States Attorney requires Canadian bank records, it is suggested that he contact the Criminal Division which will process the request.

(Criminal Division)

Direct Referral of Fraud Matters By the Farm Credit Administration

An understanding has been reached with the Farm Credit Administration to the effect that all matters under the jurisdiction of the Fraud Section, Criminal Division will be referred directly to the appropriate United States Attorney. This revised procedure is not intended to preclude the Farm Credit Administration from referring to the Criminal Division, for initial consideration, any matters which in the Administration's opinion may involve Constitutional issues, a new or important question of law, policy or interpretation of regulations, a complicated or unusual factual situation, or a question of venue. Also, it is not intended that this procedure will alter the existing requirement that matters involving violations of Federal criminal statutes be referred to the Department of Justice, but merely that they be referred directly to United States Attorneys.

While it will not be necessary for United States Attorneys to advise the Fraud Section of the action taken in these matters, assistance and advice will be rendered upon request. Appropriate changes will be made in the United States Attorneys Manual concerning this change in referral procedure.

(Criminal Division)

Collections

U.S. Attorney James L. Browning, Jr. (N.D. Calif.) and his staff have collected and accounted for $825,185.95 for the first three quarters of the calendar year 1970. This more than doubles collections in the Northern District of California for the same period in 1969.

Such collections are handled by Assistant U.S. Attorney Michael C. D'Amelio, Chief of the Claims and Collections Unit. Mr. D'Amelio believes that collections in the N.D. Calif. will probably reach the million dollar mark this year for the first time in history.

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ANTITRUST DIVISION

Assistant Attorney General Richard W. McLaren

COURT OF APPEALS

SHERMAN ACT

CIRCUIT COURT AFFIRMS IN PLUMBING CASE.

United States v. American Radiator & Standard Sanitary Corp., et al. (C.A. 3, Nos. 18,182-18,187; September 23, 1970; D.J. 60-3-152)

On September 23, 1970, the Court of Appeals for the Third Circuit issued its opinion and judgments in the above consolidated appeals, affirming judgments of conviction, entered after jury trial, against all defendants in the plumbing fixtures price-fixing conspiracy case. The Court of Appeals' decision came four months after submission of the case, on briefs from both sides which exceeded 200 pages, and following two days of oral argument before the Court. The opinion of the Court was written by Circuit Judge Seitz, fully concurred in by District Judge Higginbotham. Circuit Judge Aldisert filed a partial dissent. Affirmance as to corporate defendants American Standard and Borg-Warner and individual defendants Joseph J. Decker and Daniel J. Quinn was unanimous. Judge Aldisert would have granted a new trial for Kohler Co. and its executive, Norman R. Held.

Petitions for rehearing, on behalf of all appellants except Decker, were filed October 7, 1970.

The issue which divided the Court was the cross-examination of defendant Held who testified in detail as to the history of Kohler, with emphasis on its role as a benevolent employer in the company town of Kohler, Wisconsin. The asserted purpose of this testimony was to establish that Kohler's pricing policies were based in large part upon a desire to maintain full employment in the community for which it accepted responsibility. The underlying purpose, it seemed apparent, was to invoke the sympathies of a "union jury". Significantly, Held did not mention the infamous Kohler strike of the 1950's. On cross-examination, Mr. Fricano, making use of the official NLRB reports, dealt at some length, in the face of Held's denials of personal knowledge, with the bitterness of that strike, including plans by the company to stockpile guns and ammunition, and evictions of strikers from company-owned homes. Appellants contended the cross-examination was irrelevant, inflammatory and fatally prejudicial.

The Court of Appeals majority concluded that Kohler and Held had "opened the door" to the line of inquiry on direct, and that Kohler's counsel had in fact conceded this point at trial. It believed, however, that the line of questioning was emotional and potentially inflammatory, and on that ground should have been terminated by the trial judge. It found such error to be nonprejudicial nevertheless; the cross-examination occupied less than one hour of sixteen-week trial, the Kohler strike was not mentioned by the prosecutor during his summation, and the Government's evidence on the criminal charge was exceptionally strong. Judge Aldisert, admitting that where to draw the line posed a close question, believed that the potential for prejudice to Kohler and Held was too strong, and would have granted these defendants a new trial. He agreed with his colleagues, however, that there was no possible prejudice to the other defendants.

The long-range significance of this issue may lie in the fact that this is the first case in which a Court of Appeals has sanctioned an attack on the character of a corporation after the corporation has put its character in issue.

Otherwise the Court's decision was unanimous. Carefully reciting, in some detail, the Government's evidence, the Court characterized it as "compelling", in cumulative effect "overwhelming". Against this background, the Court viewed the few instances of error it found during the protracted trial, whether viewed in isolation or cumulatively, as not depriving defendants of a fair trial or operating to their substantial prejudice. The Court concluded that the conduct of the trial judge (Rosenburg, J., W.D. Pa.) had not been motivated by prejudice in favor of the Government, and had not been unfair to defendants; it expressly absolved the prosecutors of misconduct, and of violations of their duties of candor and fairness under the Canons of Ethics; and it found no important error in events surrounding preparation of the Court's charge, the charge itself, or submission of the case to the jury. No attempt will be made here to detail the myriad of errors claimed by appellants. Most relate only to the particular facts of this case. What follows here is a capsule summary of some of the Court's holdings which may have application in future cases.

Reference by the prosecutor to the fact that a local grand jury had indicted the defendants was held by the Court to be without substance. The Court did not make clear whether such reference should be considered error, but plainly thought it nonprejudicial. Compare Weaver v. United States, 379 F.2d 799 (8th Cir., 1967), wherein such reference was expressly held to be error, though nonprejudicial. The Court here likened the reference to defense counsel's advising the jury that they were local attorneys.

The Government's use of tape recordings, played in open court but through earphones so not heard by the jury, to refresh witness recollections, was held to be permissible, and the Court's decision to permit it was not an abuse of discretion. Accord United States v. McKeever, 271 F. 2d 699 (2nd Cir. 1959).

An important part of the Government's case was a set of six handwritten, unsigned notes, obtained stapled together from the files of co-defendant Crane Co. The Government alleged that they were written by Raymond A. Pape, a Crane official, at a conspiratorial meeting, and that they memorialized key agreements as to one phase of the conspiracy. Pape had testified before the grand jury, admitting authorship and conceding that he might have written them at the meeting, but he was not called at trial by the Government because he was seriously ill with a heart ailment from which he subsequently died. Four of the pages were identified as being in Pape's handwriting by Pape's secretary, who could not identify the other two. Defendants argued, inter alia, that genuineness was not sufficiently established to permit the jury to consider them and the four pages were not adequately identified to serve as a standard of comparison for testing the authorship of the other two. The Court held that an adequate prima facie identification was made to support the trial judge's initial determination of genuineness. The test adopted by the Court was that there was sufficient evidence so that jury findings of genuineness could not be reversed as against the weight of the evidence. In an interesting dictum the Court hinted that it might support a rule, proposed by some commentators, which would eliminate the judge's role as an initial determiner, and leave solely to the jury the question of genuineness of all documents.

An important part of the Court's opinion is its sanctioning of the use of "leading" questions by the Government in examining its own witnesses who were defense-oriented and generally uncooperative. Thus, when a witness responded initially with vagueness or a claimed loss of memory, the Government was permitted to pursue the questioning to obtain at least general and conclusory testimony of conspiratorial meetings and agreements. Specifically the Government could solicit testimony of "agreement" from witnesses who could not recall precisely what was said at conspiratorial meetings or attribute statements to particular speakers.

The Court reaffirmed that the co-conspirator exception to the hearsay rule does not deprive a defendant in a conspiracy trial of his Sixth Amendment right to confrontation. It went on to hold, however, that even should the Supreme Court ultimately overturn this long-settled rule, use of hearsay testimony in this case was so slight, and cumulative, as to amount to harmless error. The Court also reaffirmed

the trial court's discretion concerning order of proof in a conspiracy case and the admissibility of hearsay on a conditional basis before the conspiracy and participation by the defendants in it has been established.

Two evidentiary rulings are noteworthy. The Court found error, although not prejudicial in the circumstances, in the trial judge's rejection as irrelevant of charts offered by Kohler to show pricing trends in the two years preceding and one year following the indictment period. The Court considered this permissible and not too remote from the main issues. The lower court was upheld, however, in its exclusion of American Standard field reports, recording information gathered in the field to show the existence of discounting by competitors. These reports were made and kept by American Standard in the regular course of business, and were offered as business records under 28 U.S.C. 1732. Because the trustworthiness or accuracy of the information could not be ascertained from the documents, the regularity of the record keeping did not establish the accuracy of the facts recorded. Therefore, the Court held that the business records exception to the hearsay rule was not applicable. The Court thus adopted the rule of the Ninth Circuit in Standard Oil Co. of California v. Moore, 251 F.2d 188 (9th Cir. 1957).

With respect to the charge and submission of the case to the jury, the appeals court affirmed generally the trial court's right to reject specific requests for charges which are unduly prolix and argumentative and, instead of ruling on such requests, to inform the parties in general terms as to the nature of his charge. The trial judge's broad discretion in a complex case to charge generally on the applicable law, leaving to the parties the discussion and argument of the facts, was also upheld. Some specific rulings on the judge's charge which may be of general interest are the following:

The Court found no error in a charge that "the things the defendants did and said at the time ... may be weightier than the things they say thereafter" and that "assertions of innocence by such officers may reflect partly legal as well as factual contentions". This apparently puts the Court at odds with the Second Circuit which found reversible error in such a charge in United States v. Chas. Pfizer & Co., on which our petition for rehearing is pending. The Court characterized that case as "clearly distinguishable on its facts" but did not attempt to spell this out.

The Court affirmed a charge that a corporation bears responsibility for the acts of its agent acting "on behalf of the corporation and within the scope of his employment or his apparent authority" where "scope of employment" was defined as acts done on behalf of the corporation and directly related to the types of duties which the

employee has general authority to perform. Specifically rejected was an argument that Kohler could not be held accountable for agreements made by its sales manager, Held, since he was acting in violation of a company rule against meeting with competitors to discuss prices and therefore outside the scope of his authority and employment.

The Court upheld a charge giving general guidance to the jury on inferences to be drawn from the failure of a party to call a witness who might have been expected to have knowledge of disputed facts and to be available and favorable to the party. The Government and most of the defendants, including Borg-Warner, had called to the attention of a jury the failure of the other side to call certain witnesses. Borg-Warner argued, however, that the Government's reference to its failure to call its own officer, Koelch, was a violation of its right to a presumption of innocence, since it had elected not to put on a case, but to rely instead on the Government's alleged failure to carry the burden of proof. The Court held that a missing witness charge is appropriate in a criminal case, and that Borg-Warner's presumption of innocence had been adequately preserved by another part of the charge. This precedent should be used with caution, however. The crucial factor here, not clearly stated by the Court, was that Borg-Warner did put on a case, through introduction of documents and taking a witness as its own on cross-examination.

Finally the Court ruled for the Government on charges that failure to disclose certain grand jury testimony and witness statements violated the prosecutor's obligation under Brady v. Maryland, and the Jencks Act. The Court reviewed the grand jury testimony of Raymond Pape, made available during the appeal by the Government voluntarily, and found it "extremely incriminating" and not containing any "material exculpatory evidence". The Court examined in camera statements from the Government's files by witness William Kramer, and found them not exculpatory and not relevant, with one exception, to Kramer's trial testimony. That exception being merely cumulative and confirmatory of the testimony, failure to produce it at trial was harmless error. Based upon its own in camera review, the Court refused to order the Kramer material produced for appellants, upon their mere speculation that they might find something material and useful therein.

Staff: Gregory B. Hovendon, W. Richard Haddad, George Edelstein, Robert B. Nicholson, John C. Fricano, Rodney O. Thorson and C. Coleman Bird (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General William D. Ruckelshaus

COURTS OF APPEALS

DRAFT

APPEAL OF HABEAS CORPUS APPLICANT SOLELY BECAUSE HE IS ABSENT WITHOUT LEAVE AND OUT OF THE COUNTRY, DISMISSED.

Zels B. Johnson v. Melvin Laird, et al. (C.A. 9, No. 25,383; September 29, 1970; D.J. 25-82-772)

This case establishes an important precedent which should enable us to obtain the dismissal of military and draft cases prosecuted by persons who are deserters or absent without leave and have left the country.

Appellant was a member of the State of Washington National Guard, who was ordered to report for active duty because of his failure to attend a number of unit meetings. Prior to the date he was ordered to report, he instituted a habeas corpus proceeding, alleging that the National Guard had failed to process his application for discharge as a conscientious objector. The district court dismissed the complaint on the ground that appellant failed to exhaust his administrative remedies. While his appeal to the Ninth Circuit was pending, appellant went AWOL, and at the time of the oral argument he was being sought by the military as a deserter and was last heard from in Canada.

The Court stated that

> ***we feel compelled to express our strong displeasure with appellant's attempts at "self-help" by voluntarily absenting himself from the military and from the country. By his actions, he is telling this court that he will submit to its decree only if it is to his liking.
>
> We do not believe that any court is compelled to adjudicate the right of a litigant on his own terms.

The Court then indicated that "we do not see how our decision could be carried out should we proceed to rule on the merits"--the reason for this is that, while appellant might return from Canada if

the Court ruled in his favor, there is no indication that he would surrender to the military authorities if it ruled against him. Accordingly, the Court ordered the appeal dismissed unless appellant surrendered to the military authorities at Ft. Lewis, Washington within 30 days.

Thus, this case provides us with a square precedent for obtaining the dismissal of litigation being conducted by deserters who have fled the country.

Staff: United States Attorney Stan Pitkin and
Assistant U.S. Attorney Charles A. Schaaf
(W.D. Washington)

ESTABLISHMENT OF RELIGION

USE OF PHRASE "IN GOD WE TRUST" ON COINS, CURRENCY, STAMPS AND OFFICIAL DOCUMENTS DOES NOT VIOLATE ESTABLISHMENT CLAUSE.

Stefan Ray Aronow v. United States (C.A. 9, No. 23,444; October 6, 1970; D.J. 78-11-123)

Plaintiff brought an action for declaratory and injunctive relief, seeking to have a three-judge court convened pursuant to 28 U.S.C. 2282; he contended that the Government's use of the words "In God We Trust" on currency, coins, stamps and official documents violated the Establishment of Religion Clause. A single district judge held that plaintiff, suing in his capacity as a taxpayer and citizen, lacked standing to bring the action and that because the complaint did not present a substantial Federal question the convening of a three-judge court was not required.

On appeal, the Ninth Circuit by-passed the standing question but affirmed the district court on the ground that the constitutional question presented was insubstantial. The Court ruled, in essence, that the use of the phrase served a "patriotic" or "ceremonial" instead of a religious function. Stated otherwise, the phrase has "spiritual or psychological value" but no theological or ritualistic import.

Staff: Robert V. Zener and Raymond D. Battocchi
(Civil Division)

EVIDENCE

REPORTS PREPARED BY DEFENDANT FOR OWN USE ARE ADMISSIBLE AGAINST HIM AS ADMISSIONS AND DOCUMENTS PREPARED BY KOREAN OFFICIALS FOR U.S. PURSUANT TO AN OFFICIAL DUTY ARE ADMISSIBLE AS OFFICIAL RECORDS, HELD.

United States v. Lykes Bros. (C.A. 5, No. 27,717; October 6, 1970; D.J. 61-32-635)

Pursuant to the AID program, the United States shipped large quantities of wheat and corn flower to Korea on a ship owned by Lykes Bros. When small quantities of the cargo arrived in Korea in damaged condition, we sued and attempted to establish a prima facie case of cargo damage solely through the use of documentary evidence. The evidence consisted of (1) reports prepared by Lykes by its own agents, (2) certain cargo boat notes, (3) documents prepared by Korean officials and certified by the Secretary of Agriculture as official U.S. documents, and (4) reports prepared by an Agriculture official.

The district court held that none of the documents was admissible. On appeal the Fifth Circuit reversed. Its opinion should make it substantially easier for the Government to prove cargo damage; this is especially so in small cases in which we must rely solely on documentary evidence because the production of witnesses (some of whom might still be in Korea) would be prohibitively expensive.

First, the Court held admissible as admissions the reports prepared by Lykes' agents, solely for its use. While acknowledging that in some circuits it might be necessary to show that the principal authorized his agent to speak to third persons for him, the Court, relying on some of its own earlier opinions, held that in the Fifth Circuit it was only necessary to demonstrate that the agent had authority to report to his principal. Consequently, in future cases we will be able to introduce against a defendant his own reports obtained during discovery. This will place the defendant in the position of having to explain away his own report.

Next, the Court held that the cargo boat notes were not admissible because they did not indicate "when they were prepared, by whom they were prepared, for whom they were prepared, or from what source of information they drew". However, the Court held that on remand we could remedy these deficiencies through further proof of authenticity.

Regarding the documents prepared by Korean officials, the Court held them admissible as official records under 28 U.S.C. 1733. Noting that the documents were prepared pursuant to U.S. Government regulations, the Court held that these documents were no less admissible than similar documents prepared by American officials. In this regard, the instant decision is significant because it is the first case of which we are aware holding that a document prepared by a functionary of a foreign nation may be admitted as an official record of the United States.

Finally, the Court held that the reports prepared by the Agriculture official were squarely within the ambit of Sec. 1733 and therefore admissible as official records.

Staff: Alan S. Rosenthal and Raymond D. Battocchi
(Civil Division)

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CRIMINAL DIVISION

Assistant Attorney General Will Wilson

DISTRICT COURT

POLLUTION

NEW JERSEY DIST. CT. REJECTS CONTENTION THAT NEW YORK HARBOR ACT OF 1888 (33 U.S.C. 441) IS NOT AN ANTI-POLLUTION STATUTE AND THAT FED. WATER QUALITY ACT REPEALED PROHIBITION AGAINST DUMPING REFUSE.

United States v. Verona-Pharma Corp. (Cr. No. 32-70, D. N.J.); United States v. Vulcan Materials Co. (Cr. Nos. 25-70, 196-70; D. N.J.; D.J. 62-40-286)

The district court denied motions to dismiss the criminal informations in these three cases. The three informations charged that defendants on 13 separate occasions discharged into the waters of New York Harbor acid, alkaline and oil waste and refuse in violation of 33 U.S.C. 441. This statute provides:

> The placing, discharging, or depositing, by any process or in any manner, of refuse, dirt, ashes, cinders, mud, sand, dredgings, sludge, acid, or any other matter of any kind, other than that flowing from streets, sewers, and passing therefrom in a liquid state, in the tidal waters of the harbor of New York * * * is strictly forbidden***.

Defendants moved to dismiss the information on various grounds: (1) the discharges were within the exception of the statute since the discharge was through a sewer line; (2) the statute applies only to obstructions and hazards to navigation and not to water pollution; and (3) the New York Harbor Act has been repealed by implication by the Federal Water Pollution Control Act (now called the Federal Water Quality Act), 33 U.S.C. 466, et seq.

The district court rejected these contentions. The court held that under the definition of sewage in United States v. Republic Steel Corp., 362 U.S. 482 (1960), the acid, alkaline, and oil waste in the cases at bar are not sewage. As to the contention that the statute does not apply to water pollution, the court said, "There is no doubt that the discharge of acide, alkaline and oil waste and refuse, in addition to polluting the harbor, has a highly injurious effect upon ships and docks as well as

on the fish and animal life therein", and pointed out that the courts have consistently held that discharging oil in New York Habor is a violation of 33 U.S.C. 441. As to the third ground for dismissal urged, the court held that the New York Harbor Act was not repealed by implication by the Federal Water Pollution Control Act: first, because the Water Pollution Control Act specifically states that it shall not be construed as superseding or limiting the functions, under any other law, of any officer or agency of the United States, relating to water pollution; second, because "it is inconceivable that Congress intended to repeal a criminal statute by implication with a civil statute"; and, finally, because the two acts do not conflict but are completely separate and distinguishable.

In addition, the court rejected as not relevant the defendants' contentions that it is procedurally unfair for the Government to prosecute them criminally when the state has also instituted civil proceedings, and that defendants have expended "millions to cure the problems" by constructing a new facility in another area, pointing out that the local civil proceedings have no bearing on the separate criminal violations charged in the criminal informations and that moving from the jurisdiction is no reason to withhold criminal sanctions for criminal acts already committed in New Jersey. As to the argument that a criminal prosecution is unfair since they are taking steps to remedy water pollution problems, the court said that defendants' plans are, at best, speculative, and criminal prosecutions are predicated upon statutory violations, not on after-the-fact assurances of future good conduct.

Staff: United States Attorney Frederick B. Lacey and
Assistant U.S. Attorney Jerome D. Schwitzer
(D. N.J.)

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IMMIGRATION AND NATURALIZATION SERVICE
Commissioner Raymond F. Farrell

COURT OF APPEALS

DEPORTATION - ALIEN CREWMEN - DUE PROCESS

CREWMAN NOT ENTITLED TO DELAY OF DEPORTATION ORDER PENDING DISPOSITION OF COLLATERAL APPLICATION FOR PREFERENCE AS TO NUMERICAL LIMITATIONS FOR IMMIGRANTS.

Luen Kwan Fu v. INS (C.A. 2, No. 34061; September 14, 1970; D.J. 39-51-3361)

At the time the special inquiry officer denied the crewman's motion to reopen the deportation proceeding, there was pending before a different immigration official an application for classification as a refugee under section 203(a)(7) of the Immigration and Nationality Act, 8 U.S.C. 1153(a)(7). Petitioner claimed this denied him due process and also attacked as unconstitutional a regulation prescribing that adjustment of status within the United States under section 203(a)(7) is governed by section 245 of the Act, 8 U.S.C. 1255 (which is unavailable to crewmen).

The Court of Appeals denied the petition, holding that there was no merit to the contention that failure to act on the classification application deprived the alien of due process in the deportation proceeding. Previous decisions had authoritatively explicated the validity of the statutory pattern which allows some resident aliens, but not crewmen, to adjustment of status within the United States. Since a crewman, whether or not he has a preference classification within the numerical limitations for immigrants, is ineligible for status adjustment, the special inquiry officer was not obliged to delay the disposition of the deportation case in order to await the outcome of the classification application.

Staff: United States Attorney Whitney N. Seymour, Jr.; Assistant U.S. Attorneys T. Gorman Reilly and Stanley H. Wallenstein (S.D. N.Y.)

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LAND AND NATURAL RESOURCES DIVISION
Assistant Attorney General Shiro Kashiwa

COURTS OF APPEALS

APPEALS; SOVEREIGN IMMUNITY

TIMELINESS OF APPEAL; DISMISSAL OF ACTION--SUABLE ENTITIES; TORT CLAIMS ACT; TUCKER ACT STATUTE OF LIMITATIONS AND JURISDICTIONAL AMOUNT; CIVIL RIGHTS CLAIMS LACK MERIT.

Vigil v. United States (C.A. 10, No. 175-69; August 27, 1970; D.J. 90-1-23-1375)

This class action on behalf of descendants of Spanish-named Americans sought damages and title to certain lands ceded to the United States after the Mexican War.

In an opinion reported at 293 F.Supp. 1176, the district court dismissed the action, as one barred by sovereign immunity, holding (1) various Federal agencies (Justice, Interior and BLM, Agriculture, IRS, and the Civil Rights Commission) are not suable entities; (2) the vague, general allegations do not specify a cognizable action under the Tort Claims Act; (3) if there was a taking not barred by six-year limitations, Tucker Act jurisdiction was lacking to grant specific relief and damages exceeding $10,000; and (4) alleged violations of civil rights are without merit.

The Court of Appeals affirmed, per curiam, and also held that the notice of appeal was timely where seasonably "received" but not "filed" by the clerk and that appellate jurisdiction existed to consider the merits even though the notice purported to appeal from a discretionary order (denying leave to file an amended complaint) rather than the dismissal.

Staff: Frank B. Friedman (formerly of the Land & Natural Resources Division)

INDIANS

STATUTES GIVING INDIANS PREFERENCE IN EMPLOYMENT WITH BUREAU OF INDIAN AFFAIRS DO NOT CONFER ANY RETENTION PREFERENCE ON INDIANS DURING REDUCTIONS IN FORCE.

Mescalero Apache Tribe v. Hickel (C.A. 10, No. 40-70; October 5, 1970; D.J. 90-2-4-142)

25 U.S.C. 44, 46 and 472 give Indians preference in hiring to vacancies in the B.I.A. The Indians claimed that logically this meant that they must also have a preference during reductions in force.

The Court of Appeals, in this case of first impression, disagreed. The Court relied on both the plain language of the acts, and the legislative history. In passing, the Court noted that a partial preference was in fact being given Indians during reductions in force, and that even such a partial preference was improper. Finally, the Court was careful to note that the constitutionality of the employment preference acts was not at issue, and was not being passed upon.

Staff: Carl Strass (Land & Natural Resources Division)

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TAX DIVISION

Assistant Attorney General Johnnie M. Walters

DISTRICT COURT

VALIDITY OF LEVY

NOTICE OF LEVY SERVED UPON TRIAL ATTORNEY REPRESENTING TAXPAYER'S DEBTOR IN ACTION WHERE TAXPAYER WAS SEEKING TO RECOVER JUDGMENT AGAINST HIS DEBTOR WAS HELD TO HAVE BEEN SERVED UPON DEBTOR.

Fannie Rickie Bynum v. United States (N.D. Ala., No. 70-1825; D.J. 5-1-1110)

The taxpayer, S. O. Bynum, asserted claims in the amount of $33,500 against its debtor, Pittman Construction Co., Inc., for work he performed under a subcontract with Pittman Construction Co., Inc. Following a redetermination of the taxpayer's income tax liability for the years 1944, 1945, 1946 and 1948 by the Tax Court, the District Director, on August 22, 1958, made assessments against the taxpayer for the liability determined by the Tax Court. When Pittman Construction Co. was contacted by representatives of the Internal Revenue Service and advised that notice of levy against the debt due from Pittman would be served upon it, Pittman's president directed the Service to serve the notice of levy upon the trial attorney defending it against the taxpayer. The testimony of the debtor's president also established that prior to service of notice of levy, he had, on behalf of the debtor, directed its attorney to accept service of the notice of levy. Notice of levy was then served upon the debtor's trial attorney.

The taxpayer contended: (1) that service of the notice of levy upon the trial attorney was not service of the notice of levy upon the taxpayer's debtor; (2) that the levy was a wrongful and illegal collection of taxes; and (3) that he was entitled to a refund of the taxes so collected.

The court held as a matter of law that the trial attorney was a duly authorized agent of the debtor for the purpose of receiving service of the notice of levy and directed a verdict for the Government.

Staff: United States Attorney Wayman G. Sherrer; Assistant U.S. Attorney Ray Acton (N.D. Ala.); and Robert E. Noel (Tax Division)

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