South Carolina Law Review

Volume 24 | Issue 4 Article 10

1972

# Miscellaneous

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# MISCELLANEOUS

## I. DISCIPLINARY PROCEEDINGS

A majority of the Board of Commissioners on Grievances and Discipline found attorney Stanley B. Crosby guilty of unethical conduct consisting of two separate acts of business solicitation in violation of Canon 28 of the Canons of Professional Ethics, Supreme Court Rule 33. The board recommended to the South Carolina Supreme Court that Crosby be indefinitely suspended from the practice of law in South Carolina.

In *In re Crosby*[1] the court refused to follow the board's recommendation, holding a public reprimand and formal warning against further similar professional misconduct to be the appropriate sanction. While concurring in the court's determination of Crosby's guilt, two members of the court dissented, expressing agreement with the board's proposal.

The attorney in *In re Donelan*[2] had been formally charged with the misappropriation of trust funds. At his hearing Donelan responded to the charges first by exhibiting evidence of his having given a secured note for the major portion of the missing funds and second by simply admitting mismanagement of the trust funds. The hearing panel ascertained Donelan "had been guilty of misconduct tending to pollute the administration of justice in the misappropriation of funds entrusted to him by his client."[3] The panel recognized extenuating circumstances which impelled it to recommend indefinite suspension rather than disbarment. The full board reviewed the findings and adopted the facts as discovered but divided on the appropriate sanction. The majority believed disbarment proper while the minority concurred with the panel's recommendation.

The only matter remaining to be considered by the supreme court was designation of the penalty. After remarking that the attorney's misconduct had not been repetitious, that the injured parties had been fully compensated and that the

1. 256 S.C. 325, 182 S.E.2d 289 (1971).
2. 257 S.C. 405, 185 S.E.2d 893 (1972).
3. *Id.* at 406, 185 S.E.2d at 893.

extenuating circumstances deserved some weight, the court suspended the respondent indefinitely.

In *In re Dawsey*[4] an attorney had been accused of having twice misappropriated money held in relation to the closing of real estate transactions. The hearing panel and the board unanimously agreed to recommend indefinite suspension of M. Ellis Dawsey. Prior to the supreme court's review of the case, the respondent had reimbursed the proper parties. Noting Dawsey's refusal to contest the findings of the board and his acceptance of the indefinite suspension recommendation, the court forthrightly concurred in the board's determination and directed that Dawsey be indefinitely suspended from South Carolina law practice.

*In re Hartzog*[5] concerned the final disposition of two complaints against attorney B. Gerald Hartzog. The first alleged he had solicited employment in the settlement of a tort claim and the second charged him with having passed two worthless checks in Florida. The hearing panel concluded that Hartzog had breached the ethics of the profession by committing the following acts:

(1) improperly soliciting and obtaining employment as an attorney,
(2) charging a grossly excessive fee,
(3) imposing his own will on his client to settle a claim,
(4) converting his client's funds to his own use, and
(5) frequently issuing worthless checks in his own community and in the state of Florida, where he held himself out to the public as an attorney.[6]

The board unanimously adopted the panel's recommendation of disbarment. Upon final review, the supreme court, holding the findings and recommendations of the board supported by the evidence, directed that Hartzog be disbarred.[7]

A fifth action[8] resulted from a complaint lodged against John Howard Wrighten which "specified a number of instances during the period 1964-1969 in which respondent withheld, failed to account for or misappropriated funds belonging to clients."[9] Wrighten denied the charges. After enter-

4. 257 S.C. 411, 186 S.E.2d 250 (1972).
5. 257 S.C. 84, 184 S.E.2d 116 (1971).
6. *Id.* at 85, 184 S.E.2d at 117.
7. The court noted in passing that Hartzog had failed to appear before the hearing panel, the board and before it on final review.
8. *In re* Wrighten, 257 S.C. 184, 184 S.E.2d 717 (1971).
9. *Id.* at 184, 184 S.E.2d at 718.

taining all the evidence, the panel concluded Wrighten "had been guilty of flagrant and repeated misconduct in failing to remit or account for funds due to his clients."[10] The panel's report advised disbarment.

Prior to the full board's consideration, the respondent submitted his resignation as a member of the Bar. With the panel's findings standing undisputed, the board recommended acceptance of the resignation, provided "that the court determine that (the resignation is) legally binding upon him in terms of his promise not to apply for readmission and secondly, that the court be informed that the board considered this to be the only alternative to disbarment."[11] The dissenting members believed disbarment to be the appropriate sanction. The sole question before the supreme court was whether to disbar him or accept his resignation. Noting that the offer to resign came late in the proceedings, the court disbarred Wrighten.

The Fourth Circuit Court of Appeals in *In re Chipley*[12] held that in a proceeding for the suspension of an attorney from federal practice "[p]rocedural due process . . . does not require that a hearing be given to the attorney involved, but he must be given fair notice of the charge against him and an opportunity to explain and defend his actions."[13] Chipley argued that the court could not rely on the findings of the South Carolina Supreme Court in the state disbarment proceedings, thereby constraining the district court to conduct an evidentiary hearing. Responding to this contention, the court recognized that the state's disbarment action did not dictate a similar result but that "it [was] entitled to respect, and reliance on such action is not error,"[14] in light of the state court's "full evidentiary hearing,"[15] the record of which adequately illustrated Chipley's infirmity.

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10. *Id.*

11. *Id.* at 185, 184 S.E.2d at 718.

12. 448 F.2d 1234 (4th Cir. 1971). *In re* Chipley, 254 S.C. 588, 176 S.E.2d 412 (1970), *cert. denied,* 401 U.S. 1010 (1971), is the decision suspending Chipley from South Carolina law practice for reasons of mental illness.

13. 448 F.2d at 1235. *See In re* Ruffalo, 390 U.S. 544 (1967).

14. 448 F.2d at 1235. *See* Theard v. United States, 354 U.S. 278, 282 (1957) (dictum).

15. 448 F.2d at 1235.

## II. SOCIAL SECURITY AND PUBLIC WELFARE

*Holden v. Richardson*[16] involved a claimant's suit against the Secretary of Health, Education and Welfare requesting judicial review of a hearing examiner's denial of a disability claim under the Social Security Act. Plaintiff's benefits under the Act had expired March 31, 1957, and when she applied on February 7, 1966, the request was denied by citing the 1957 expiration date as the date she last qualified for compensation. After the denial was reconsidered in accordance with her request, the decision was affirmed on June 16, 1966, and she sought no further review.

On August 19, 1969, the plaintiff reapplied, but another denial issued which was affirmed on February 5, 1970, after reconsideration. Plaintiff then employed counsel. On February 16, 1970, a hearing was requested but subsequently denied on grounds of res judicata. At plaintiff's request the appeals council reviewed the dismissal but found it accurate and stated the "determination dated June 16, 1966, stands as the final determination of this Department."[17]

Upon review by the United States District Court for the District of South Carolina, the court found no material change in the facts in the second application. Citing *Leviner v. Richardson*[18] as dispositive of the issue in the fourth circuit, the court in dismissing the action held that when a claimant bypasses the opportunity to have a hearing, the doctrine of res judicata applies to any subsequent application when the benefits requested and the grounds for such benefits are the same as in the first application.

In *Peoples v. Richardson*[19] the Fourth Circuit Court of Appeals reached a similar conclusion. Roy H. Peoples sued the Secretary of Health, Education and Welfare to secure benefits under the Social Security Act. After a hearing, his first application was denied by the examiner and by the appeals council on review. A subsequent claim was refused also, and he failed to request a hearing. Peoples finally sought judicial review on this third rejected application. The United

16. 331 F. Supp. 364 (D.S.C. 1971).
17. *Id.* at 365.
18. 443 F.2d 1338 (4th Cir. 1971).
19. 455 F.2d 924 (4th Cir. 1972).

States District Court for the District of South Carolina remanded the case for an evidentiary hearing, holding res judicata to be no defense when the claimant had not been afforded a hearing on his second application. On the defendant's appeal, reversing the district court decision, the Fourth Circuit Court of Appeals held res judicata in proceedings under the Social Security Act to be a valid defense to a claim based on the same facts, rights and issues as prior claims, when judicial review has not been sought after the final administrative determination.

*Harris v. Richardson*[20] involved an appeal by the defendant Secretary of Health, Education and Welfare requesting reversal of a decision by the United States District Court for the District of South Carolina awarding benefits to plaintiff Arelevia R. Harris, whose administrative claim had been denied. The case turned on the lower court's handling of the "substantial evidence test"[21] applicable to such administrative decisions. The test requires affirmance of the Secretary's judgment if it is supported by substantial evidence in the record.

The court of appeals found error in the lower court's reliance on case authority[22] which had been subsequently overturned by a 1967 amendment[23] to the Social Security Act. The new ruling meant that, even though competent medical evidence established the disability of a claimant, he was not disabled within the meaning[24] of the Act if he was still capable of maintaining gainful employment. The court further held that the district court had erred in attaching little weight to the vocational expert's testimony. Again, case law[25] had been modified by an amendment,[26] rendering the vocational expert's testimony a decisive factor in a claim under the Act. The lower court's failure to regard the medical advisor's opinion as substantial evidence also constituted error. The district court's decision was rendered in reliance on authority[27]

20. 450 F.2d 1099 (4th Cir. 1971).

21. *See* Thomas v. Celebrezze, 331 F.2d 541, 543 (4th Cir. 1964).

22. *See* Leftwich v. Gardner, 377 F.2d 287 (4th Cir. 1967).

23. 42 U.S.C. §423(d)(4) (1970).

24. *See* U.S. CODE CONG. & AD. NEWS 2883 (1967).

25. Gardner v. Earnest, 371 F.2d 606 (4th Cir. 1967).

26. 42 U.S.C. §423(d)(2)(A) (1970).

27. Cohen v. Perales, 412 F.2d 44 (5th Cir. 1969), *rev'd sub nom.* Richardson v. Perales, 402 U.S. 389 (1971).

which had been later reversed by *Richardson v. Perales*,[28] a United States Supreme Court decision commenting approvingly on the use of medical advisors.

The plaintiff in *Collins v. Richardson*[29] brought his action to contest the final administrative denial of his application for benefits under the Act. After reviewing the medical history of the plaintiff and the administrative handling of the claim, the United States District Court for the District of South Carolina declared:

> The record in this case is incomplete in three respects: the selection of an unqualified medical advisor; failure to receive and consider a report of the Oteen hospitalization of 1969, alluded to by the plaintiff at the hearing; and failure to submit vocational information to an accredited vocational expert.[30]

A psychiatrist had served as the medical advisor during the hearing examiner's review. At a hearing on a social security claim, an advisor, acting as a neutral party,[31] interprets other physicians' reports and the medical evidence to give the examiner an understanding of the problems involved. In this instance, the advisor had been called on to analyze the reports of internists and neurologists. The court found the use of a psychiatrist for this purpose an impropriety and commented that "the pedagogic role to be played by a medical advisor can be best performed by one who is more closely involved in that specialty."[32]

The court also took issue with the hearing examiner's reliance on the medical advisor's testimony on the availability of employment suitable for the claimant. After indicating that inquiries into actual job availability were no longer required since the recent amendments, the court, in light of the particular physical handicaps of the plaintiff, was "not convinced that proper testimony was adduced with regard to whether such work exists *anywhere*."[33] The court then held that the hearing examiner had erred in failing to secure an opinion of a qualified vocational expert who could fairly determine

28. 402 U.S. 389 (1971).
29. 334 F. Supp. 1333 (D.S.C. 1971).
30. *Id.* at 1335.
31. *See* 402 U.S. at 408.
32. 334 F. Supp. at 1336.
33. *Id.* at 1337.

whether the jobs suggested by the psychiatrist could in fact exist.

In *Edgens v. Richardson*[34] attorney James B. Stephen sought reversal of a district court decision disallowing his request for legal fees amounting to twenty-five per cent of an award of $15,584.20 given his client under the Social Security Act. Twenty-five per cent of a social security award is the maximum permitted under statutory law.[35] In affirming the district court's allowance of $2,500.00 as reasonable legal fees, the Fourth Circuit Court of Appeals held that the district court's discretionary authority to make fee adjustments had not been abused.

## III. ARMED SERVICES

Frank J. Lupo, a soldier in basic training at Fort Jackson, South Carolina, alleged that a severed achilles tendon disabled him for duty. In a petition for a writ of habeas corpus he sought discharge from the United States Army. In *Lupo v. Laird*[36] the United States District Court for the District of South Carolina considered the plaintiff's claim. The evidence before the court indicated that the report of Lupo's private podiatrist had been evaluated and consistently respected by the army. Lupo had been examined twice after induction, and the last report noted that the duty restrictions previously assigned were in fact generous. The court recognized that a substantial factual basis must exist to warrant judicial interference in military affairs. Language from Mr. Justice Jackson's opinion for the United States Supreme Court in *Orloff v. Willoughby*[37] was cited for the general proposition that the judiciary has only limited authority over the military. In matters of discrimination, capriciousness or violation of due process, the courts are fully able to grant redress to servicemen. Relying chiefly on an opinion[38] of the Third Circuit Court of Appeals, the court refused to disturb the army's authority over the matter.

34. 455 F.2d 508 (4th Cir. 1972).
35. 42 U.S.C. §406(b)(1) (1970).
36. 329 F. Supp. 732 (D.S.C. 1971).
37. 345 U.S. 83 (1953).
38. Byrne v. Resor, 412 F.2d 774 (3d Cir. 1969).

*Ehlert v. United States*[39] was held to be controlling in *United States v. McKee.*[40] William E. McKee, after receiving his induction notice, applied for a conscientious objector's classification. His draft board refused to consider it, and he ignored his induction orders. After conviction for failure to report, McKee argued on appeal that his application for a new status should have been evaluated. The Fourth Circuit Court of Appeals held, in accordance with *Ehlert,* "that a registrant whose conscientious objection crystallizes only after his induction notice is mailed has no right to have his classification reopened, and that he must submit his claim through military channels."[41]

## IV. Labor Relations

In *Isaacson v. Penn Community Services, Inc.,*[42] the Fourth Circuit Court of Appeals examined the narrow issue of whether a conscientious objector performing civilian work of national importance in lieu of military obligation is entitled to minimum and overtime wages as outlined in the Fair Labor Standards Act of 1938.[43] The plaintiff had prevailed in the United States District Court for the District of South Carolina, and the defendant appealed.

Plaintiff Brian Isaacson became acquainted with Penn Community Services, Inc., through its circulars advertising the availability of positions which would qualify as substitute service of national importance for conscientious objectors. The jobs had been created exclusively for qualified unmarried conscientious objectors. The draft board approved the plaintiff's work application, and he remained employed for thirty days beyond the twenty-four month mandatory period.

The circular particularized the work involved. Concerning remuneration the circular stated:

> A subsistence salary of $100.00 a month is offered, room and utilities provided, together with hospitalization insurance and a three-week vacation annually. Traveling to and from Penn at the beginning and end of the period will be provided. Board is provided during conferences.[44]

39. 402 U.S. 99 (1971).
40. 446 F.2d 974 (4th Cir. 1971).
41. *Id.*
42. 450 F.2d 1306 (4th Cir. 1971).
43. 29 U.S.C. §§201-219 (1970).
44. 450 F.2d at 1307.

Isaacson's initial monthly salary was $108.34; however, in less than a year, his monthly salary increased first to $150.00, then to $183.00. For the thirty days beyond the twenty-four month period, he earned $2.00 per hour. Besides claiming the difference between his actual salary and the standard minimum wages, he requested overtime pay as computed under the Act.

The critical issue involved the interpretation of the word "employee"[45] as used in the Fair Labor Standards Act. *Walling v. Portland Terminal Co.*[46] shed light on the problem. In *Walling* the United States Supreme Court held that railroad brakeman trainees learning the skill under supervision were not employees as defined in the Act because "the railroads receive no 'immediate advantage' from any work done by the trainees."[47] Conceding that the plaintiff had not been a trainee for two years, the court reasoned that the circumstances under which he had served created a relationship chiefly beneficial to him and held that he was not an "employee" under the Act.

An opinion[48] by the Wage-Hour Administrator posed an obstacle to the court's reasoning. Even though one interpretation of the opinion clearly contradicts its rationale, the court, considering the goals of the Selective Service Act, chose to rely on its construction of *Walling* for authority. The last sentence of the opinion synopsizes the conclusion of the court:

> But here, where a special position was created to provide plaintiff with a means of performing work of national importance, where plaintiff did not displace another member of the general labor market, and where plaintiff voluntarily entered upon his work of national importance in fulfillment of his obligation to serve with full knowledge

45. 29 U.S.C. §§203(d), (e), and (g) (1970) define "employer," "employee," and "employ" as follows:

> (d) "Employer" includes any person acting directly or indirectly in the interest of an employer . . . .
>
> (e) "Employee" includes any individual employed by an employer . . . .
>
> (g) "Employ" includes to suffer or permit to work.

46. 330 U.S. 148 (1947).

47. *Id.* at 153.

48. *Id.*, 450 F.2d 1310-11.

of the limited subsistence to be provided him, we cannot conclude that he has a right to judgment under the Act.[49]

*Haworth v. White Stack Towing Co.*[50] was an action to recover wages lost as a result of an alleged wrongful discharge from employment. On appeal to the South Carolina Supreme Court, the defendant contended as a complete defense that pursuant to a collective bargaining agreement between the plaintiff's labor union and the defendant "the factual issues with respect to plaintiff's discharge were submitted to a final and binding arbitration which resulted in a finding that his discharge was for just cause."[51]

The only issue before the court was whether the arbitrator's decision constituted a defense to the action. The evidence before the court corresponded to that before the arbitrator. Overturning the lower court's decision, the supreme court held that the binding character of the arbitration under the circumstances precluded "the relitigation of that issue in this action."[52]

The plaintiff in *Tolbert v. Daniel Construction Co.*[53] pressed a multi-faceted claim in his amended complaint. Originally, the plaintiff alleged that since the defendant had refused to employ him his rights under Title VII of the Civil Rights Act of 1964[54] had been violated. The amended complaint averred in addition to the Title VII claim an action under section 1981[55] of the Civil Rights Act of 1866. Tolbert also asserted that the suit was brought as a class action and that the defendant employed him at a later date but released him because of his race. Counsel representing the Equal Employment Opportunity Commission participated in the case as amicus curiae. Arguments were heard before the United States District Court for the District of South Carolina.

The evidence revealed that by letter dated January 17, 1967, Tolbert notified the Commission of the alleged hiring discrimination which occurred in December, 1966. The Com-

49. *Id.* at 1311.
50. 256 S.C. 542, 183 S.E.2d 320 (1971).
51. *Id.* at 543, 183 S.E.2d at 320.
52. *Id.* at 545, 183 S.E.2d at 321.
53. 332 F. Supp. 772 (D.S.C. 1971).
54. 42 U.S.C. §§1971, 1975a-1975d, 2000a-2000h-6 (1970).
55. 42 U.S.C. §1981 (1970).

mission, being unable to persuade the defendant to voluntarily comply, answered Tolbert by letter dated November 16, 1967, informing him of his right to sue within thirty days. At plaintiff's request counsel was appointed on December 11, 1967; however, the suit was not filed until March 22, 1971.

The Title VII claim was first considered. The Commission argued that the thirty-day statute of limitations[56] had been tolled by Tolbert's request for counsel within that period. The court opined that the decisions[57] relied upon for support of that argument could not be extended and held the long delay in filing suit to be a bar to the Title VII claim.

The recovery theory under section 1981 of the 1866 Act was next discussed. Despite authority[58] allowing unreserved access to a section 1981 claim, the court, following the reasoning of a Seventh Circuit Court of Appeals decision,[59] held that the Act "creates for the plaintiff a separate and independent cause of action, which is, without doubt, available to him since he has established a 'reasonable excuse' for his failure to comply with the jurisdictional prerequisites under Title VII."[60]

The viability of the class action allegation depended on its merits under Rule 23 of the Federal Rules of Civil Procedure. The evidence revealed that the plaintiff's last association with the defendant occurred approximately three years earlier, at which time he had been employed for only one week. The evidence further demonstrated that Tolbert had worked only in the brick mason crews. Dismissing the Rule 23 allegation, the court held that Tolbert failed to "fairly and adequately protect the interests of the class."[61]

Finally, plaintiff argued that the defendant had later hired him and discharged him for racial reasons. Refusing to strike this allegation, the court held that the defendant's

56. 42 U.S.C. §2000e—5(e) (1970).

57. Prescod v. Ludwig Indus., 325 F. Supp. 414 (N.D.Ill. 1971); Reyes v. Missouri-Kansas-Texas R.R., 53 F.R.D. 293 (D.Kan. 1971); McQueen v. E.M.C. Plastic Co., 302 F. Supp. 881 (E.D.Tex. 1969).

58. Young v. International Tel. & Tel. Co., 438 F.2d 757 (3d Cir. 1971); Caldwell v. National Brewing Co., 443 F.2d 1044 (5th Cir. 1970).

59. Waters v. Wisconsin Steel Works, 427 F.2d 476 (7th Cir. 1970).

60. 332 F. Supp. at 774.

61. FED. R. CIV. P. 23(a).

argument that the charge transcended the scope of the Commission's alleged discrimination was inapplicable, since the claim now proceeded solely under the 1866 Act.

## V. Judicial Review of Administrative Decisions

*Dew v. Hardin*[62] was an action commenced in United States District Court, District of South Carolina, seeking review of a decision by the Secretary of Agriculture denying plaintiff's request for additional tobacco inspectors for his auction warehouse. The gravamen of plaintiff's argument was that the Secretary had based his decision "upon his knowledge of conditions or actions affecting the industry as a whole, conditions and actions not reflected in the record of the hearing."[63] The defendant denied the allegation but contended that consideration of factors outside the record would be permissible.

Relying on statutory directives[64] and case law[65] as authority, the court concluded that the Secretary's prerogatives were broad and discretionary. Finding that compliance with departmental administrative regulations[66] had been accomplished, the court held that factors and conditions outside the record may properly be considered by the Secretary in ruling on an application for additional tobacco inspectors.

Plaintiffs in *Pitts v. Camp*[67] sued in the United States District Court for the District of South Carolina requesting reversal of the final judgment of the Comptroller of the Currency denying their application for the formation of a new national bank in Hartsville, South Carolina. The evidence revealed that a field investigation had been initially conducted by the defendant and that following the first denial, at plaintiffs' request, an additional field analysis was accomplished, after which the final denial was rendered. The plain-

62. 329 F. Supp. 593 (D.S.C. 1971).
63. *Id.* at 595.
64. 7 U.S.C. §511d (1970).
65. Danville Tobacco Ass'n v. Freeman, 275 F. Supp. 350, 352 (W.D.Va. 1952).
66. 7 C.F.R. §§29.2(a)(2), 29.3(i) (1971).
67. 329 F. Supp. 1302 (D.S.C. 1971).

tiffs' first contention[68] that the omission of a hearing constituted error was readily dismissed by the court on the grounds that the plantiffs' failure to timely request a hearing in the administrative stages deprived them of their right to complain of its absence on judicial review.[69]

Plaintiffs argued additionally that since they had satisfied the statutory requirements[70] the Comptroller should have granted the charter. The Comptroller responded to that argument by alleging that his authority to grant charters was discretionary to the extent that he could consider a community's need for a bank in his decision.[71] The court observed that the statutory scheme did not authorize the Comptroller to weigh the factor of a community's need for a bank in deciding whether to grant the charter. Nevertheless, the court favored the defendant's position. The court found persuasive the defendant's "long and continued practice"[72] of considering the community's need for a bank because the procedure was based on the sound policy of protection of the community through minimization of bank failures and was supported by the weight of authority.[73] Following this reasoning, the court decided that it should not interfere with the decision denying the charter because the Comptroller had not erred in weighing the factor of the community's need for a bank in his decision.

## VI. SURETY

*United States v. Algernon Blair, Inc.*[74] was an action in the United States District Court for the District of South Carolina brought by a building materials supplier to recover under a subcontractor's payment bond. The suit grew out of a network of contractual agreements among companies in-

68. It relied on First Nat'l Bank v. Saxon, 352 F.2d 267 (4th Cir. 1965) and Bank of Haw River v. Saxon, 257 F. Supp. 74 (M.D.N.C. 1966). Both cases offered little weight to this facet of plaintiffs' argument because in each case hearings had been timely requested and granted. Regulations relevant to hearings cited by the court are found at 12 C.F.R. §§412(d), (e) (1971).

69. *See* First-Citizens Bank & Trust Co. v. Camp, 409 F.2d 1086 (4th Cir. 1969).

70. 12 U.S.C. §§21-27 (1970).

71. The Comptroller's final denial letter evidenced reliance on the community's need for a bank. 329 F. Supp. at 1306.

72. 329 F. Supp. at 1307.

73. Sterling Nat'l Bank v. Camp. 431 F.2d 514 (5th Cir. 1970).

74. 329 F. Supp. 1360 (D.S.C. 1971).

volved directly or indirectly in the construction of military barracks. The general contractor, J. W. Bateson, Inc., contracted with the United States for the project. Bateson subcontracted with Phillips Air Devices, Inc., for the work involving the lockers and shelves. Bateson as general contractor was obliged to comply with Miller Act specifications[75] requiring payment and performance bonds. In controversy here was a separate bond which Bateson required the subcontractor Phillips to furnish. In this action plaintiff Wheeling-Pittsburgh Steel Corporation, which had supplied materials to Phillips, sought to recover the cost of the materials from Aetna Insurance Company, surety on the subcontractor's bond.

The controversy centered around the interpretation of a portion of the subcontractor's bond which provided:

> NOW, THEREFORE, the condition of this obligation is such . . . that if the Subcontractor shall make payment to all claimants for all costs and expenses resulting from the performance of this Subcontract and for all labor and material used or reasonably required for use in the performance of the Subcontract *for all or any part of which the General Contractor or Owner is liable,* failing which such claimants shall have a direct right of action against the Subcontractor and Surety under this obligation, subject to the General Contractor's priority, and/or the General Contractor shall have the right to bring an action against the Subcontractor and Surety on behalf of unpaid claimants, then this obligation shall be null and void; otherwise, it shall remain in full force and effect . . . . (emphasis added)[76]

Aetna alleged that the bond's clause "for all or any part of which the General Contractor or Owner is liable" meant the surety's liability went no further than the general contractor's liability, which was circumscribed by the Miller Act.[77] Labor and material suppliers who wish to claim against the surety of the general contractor's bond must commence their actions within one year,[78] and if no express or implied contract exists with the general contractor, as in the instant case, they must also give ninety-day notice[79] of their claims. Wheeling-Pittsburgh had clearly not conformed to these Miller Act requirements, thus exempting Bateson from responsibility.

75. 40 U.S.C. §270a(a)(1), (2) (1970).
76. 329 F. Supp. at 1361.
77. 40 U.S.C. §§270a-d (1970).
78. 40 U.S.C. §270b(b) (1970).
79. 40 U.S.C. §270b(a) (1970).

The plaintiff argued that the disputed clause served only to identify the class of items covered by the bond. Under this interpretation the clause simply restricted Aetna's liability to items for which the subcontractor would have been liable under the Miller Act. The plaintiff re-enforced this position by further asserting that had the parties to the subcontract bond intended to allow compensation only to those who perfected Miller Act claims, as Aetna contended, they would have specified such limitations in the section of the subcontract bond dealing with claim-filing deadlines. That section of the bond prescribed that claims be submitted "four years from the day on which the final payment under the contract falls due."[80]

The court found itself in substantial agreement with the plaintiff, primarily because the parties to the bond had failed to design a document unambiguously expressing their intentions. The court resolved the problem of interpreting the bond by ruling that the ambiguities reflected by the contract of a compensated surety are to be strongly construed against the surety. The court found the document to be ambiguous notwithstanding the explanation offered in an affidavit by the Bateson officer who prepared the disputed bond form. The parties were bound to vest the document itself with clear language indicating their purposes. While the court admitted that the plaintiff's interpretation was somewhat tenuous, it found that if the parties had intended claims against the payment bond to be conditioned on observance of the Miller Act they should have clearly worded the contract to reflect that meaning. In conclusion, the court held that the plaintiff was not required under the ambiguous language of the bond to perfect its claim under the Miller Act as a condition precedent to coverage under the surety agreement.

## VII. CORPORATIONS

*Swinney v. Keebler*[81] held that the controlling shareholders owe a fiduciary duty to the corporation for the benefit of the holders of the corporation's subordinated debentures to exercise due care in order to prevent "the acquisition of the stock and control by any who would loot the corporate

80. 329 F. Supp. at 1361.
81. 329 F. Supp. 216 (D.S.C. 1971).

assets."[82] The action was instituted in the United States District Court for the District of South Carolina by the holders of subordinated debentures issued by Meadors, Inc., a candy manufacturer which had through a series of transfers become an "uncollectible account receivable."[83] Keebler Company first purchased Meadors from its twenty-eight shareholders, the majority of whom were also the holders of its convertible subordinated debentures. In the transfer to Keebler the holders agreed to exchange their convertible subordinated debentures for subordinated debentures. Keebler no doubt extracted this concession in order to protect its future investment because Meadors was in fact in dire financial need at the time of the sale to Keebler.

Several years later, Keebler decided to discontinue involvement in the candy manufacturing business and consequently arranged to sell Meadors for $230,000.00 to Atlantic Services, Inc., a business inexperienced in candy. Atlantic financed the purchase by negotiating a one-day loan for the entire purchase price from Meadors' bank. No collateral was demanded because the bank depended on its understanding with Atlantic that the loan would be repaid from funds withdrawn from the account of the newly acquired Meadors after the completion of the transaction. Keebler representatives had not been participants in the negotiations leading to the "one-day loan" purchase plan. After the closing of the Keebler-Atlantic transfer, Atlantic withdrew $310,000.00 from the Meadors account, which left Meadors with a sizable account receivable. After depositing the $310,000.00 in its own account, Atlantic repaid the loan of $230,000.00 and apparently retained and utilized the remaining $80,000.00 for purposes unrelated to Meadors.

Only four months after acquisition, Atlantic contracted to sell Meadors for $352,000.00 to Flora Mir Distributing Company, Inc., an inactive and negligibly capitalized subsidiary of Flora Mir Candy Corporation. The eventual sale was consummated similarly to the Keebler-Atlantic transaction in that at the end of the paper-shuffling, Meadors' account was again the purchase money source. The major and most noteworthy difference between the two transactions

82. *Id.* at 224.
83. *Id.* at 217.

is that in the second Atlantic, as the seller, plotted the financing scheme. Keebler had in fact warned Atlantic that Meadors' money could not be used as purchase money when Atlantic had suggested investigating the possibility of doing so. Nevertheless, the net result of the two transactions was that Meadors emerged with a $352,000.00 account receivable from a corporation with no assets.

Shortly after the last transfer the debentures came into default. The holders sought relief against Keebler, which cross-claimed on an indemnity agreement against Atlantic, which in turn claimed against Flora Mir Candy and Flora Mir Distributing on a similar indemnity agreement. Both indemnity agreements included guarantees of the debentures, rendering the order of liabilities such that Flora Mir Candy and Flora Mir Distributing were the first liable to Meadors, upon which lay the primary obligation, and Atlantic and Keebler were second and third respectively.

Plaintiffs' main theory of recovery against Keebler rested on an alleged breach of fiduciary duty. The court recognized as a "general rule . . . shares of corporate stock are property and may be disposed of as the owner sees fit,"[84] but further reasoned that plaintiffs' claim constituted an exception. The plaintiffs argued that *Insuranshares Corp. v. Northern Fiscal Corp.*[85] imposed the standard of care to which Keebler had to conform. The following passage from *Insuranshares* impressed the court:

> Without attempting any general definition, and stating the duty in minimum terms as applicable to the facts of this case, it may be said that the owners of control are under a duty not to transfer it to outsiders if the circumstances surrounding the proposed transfer are such as to awaken suspicion and put a prudent man on his guard—unless a reasonably adequate investigation discloses such facts as would convince a reasonable person that no fraud is intended or likely to result. Thus, whatever the extent of the primary duty may be, circumstances may be sufficient to call into being the duty of active vigilance and inquiry.[86]

Keebler argued that even though its conduct conformed to the standards of *Insuranshares,* that case did not properly

84. *Id.* at 222.
85. 35 F. Supp. 22 (E.D.Pa. 1940).
86. 329 F. Supp. at 223, *quoting from* 35 F. Supp. at 25.

state the law. Citing a New York case[87] which criticized *Insuranshares*, Keebler contended that anything short of actual notice of foul play imposed no liability on it. The defendant further declared that the policy favoring a free market demanded such a rule.

The court concluded that the standard of care imposed by *Insuranshares* was not burdensome. Several circumstances[88] of the sale should have aroused suspicion among Keebler's officers. The extent of Keebler's investigation of Atlantic was a requested report from Dun and Bradstreet which gave no relevant information. The court distinguished the possible situation in which a seller's inquiries produced deceptive results which might in turn lead to reliance. The court also conceded that perhaps "the Keebler failure to conduct reasonable investigation of the purchaser was not a *sine qua non* to plaintiff's damage,"[89] but added that "the sale itself was such cause."[90] Considering all the circumstances of the transfer, the court ruled that Keebler's duty was to exercise due care in the transfer of the corporation, a breach of which rendered it liable to the corporation for the benefit of the debenture holders or to the debenture holders directly.[91]

## VIII. BANKRUPTCY

*In re Perry*[92] was an action initiated on an involuntary petition in bankruptcy filed in the United States District Court for the District of South Carolina by the alleged cred-

87. Levy v. American Beverage Corp., 265 App. Div. 208, 38 N.Y.S.2d 517 (1942).

88. The court noted the following: (1) Atlantic's inexperience in the candy trade; (2) Atlantic's failure to inspect Meadors' operations at the time the contract of sale was executed; (3) the fact that only one of Atlantic's accountants examined Meadors in depth; (4) Meadors' lack of an established market and its unconvincing profits; and (5) Atlantic's failure to contact Meadors' key personnel to discuss continuation of the business. See 329 F. Supp. at 220.

89. *Id.* at 224.

90. *Id.*

91. The decision included judgments concerning the various liabilities among the parties arising from the indemnity agreements and guarantees. Essentially, the court found Meadors primarily liable to the debenture holders and Flora Mir Distributing, Atlantic, and Keebler jointly and severally liable to Meadors. Flora Mir Candy was found to be the alter ego of Flora Mir Distributing and thus responsible for the accounts owed Meadors by its subsidiary.

92. 336 F. Supp. 420 (D.S.C. 1972).

itors of Ed Perry. The court referred the matter to the Referee in Bankruptcy whose report resolving all issues of fact and law was wholly adopted. The creditors alleged Perry had committed the second, fifth and sixth acts[93] of bankruptcy under the Bankruptcy Act. In an involuntary bankruptcy proceeding, the creditors must "show by a preponderance of the evidence that the debtor is subject to adjudication."[94]

The second act of bankruptcy provides that the alleged bankrupt must have "made or suffered a preferential transfer, as defined in subdivision (a) of section 96 of this title."[95] An essential element of a second act violation is proof of the debtor's insolvency at the time of the transfer.[96] All records, documents and accounts indicated Perry's financial viability, and consequently the prerequisite to the charge remained unsubstantiated. The alleged "preferential transfer" was in fact a transaction by which Perry's bank removed $50,000.00 from his deposits and applied the sum to a note not yet due. The referee observed authority[97] holding that the act of a bank withdrawing funds and applying them against a debt does not constitute a "preferential transfer" within the meaning of the Act.

To have committed the fifth act of bankruptcy, Perry must have "while insolvent or unable to pay his debts as they mature, procured, permitted, or suffered voluntarily or involuntarily the appointment of a receiver or trustee to take charge of his property."[98] The creditors eight days before filing this action had without Perry's knowledge obtained on *ex parte* petition an order from the Court of Common Pleas, Spartanburg County, placing Perry's property in receivership. Because Perry had not received notice, the referee readily dismissed any suggestion of his having "procured" or "permitted" receivership, leaving for consideration the question of whether he had "suffered" receivership. The referee held that the word "implies knowledge of the thing

93. *See* 11 U.S.C. §§21(a)(1)-(6) (1970).

94. 336 F. Supp. at 423.

95. 11 U.S.C. §21(a)(2) (1970).

96. *See* 11 U.S.C. §96(a)(1) (1970).

97. Joseph F. Hughes & Co. v. Machen, 164 F.2d 983, 986 (4th Cir. 1947); *see* Citizens' Nat'l Bank v. Lineberger, 45 F.2d 522, 527 (4th Cir. 1930).

98. 11 U.S.C. §21(a)(5) (1970).

suffered or done; and a forfeiture for suffering a thing to be done cannot be sustained without proof of knowledge."[99] Because Perry had promptly opposed and responded to the proceedings in both courts, the referee concluded that he had not "suffered" receivership of his property and disallowed the creditors' fifth act charge.

The sixth act of bankruptcy necessitates proof that the alleged bankrupt "admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt."[100] The creditors based this charge on a letter mailed to Perry's creditors which summoned them to a meeting to discuss Perry's inability to pay his debts.[101] A sixth act offense requires additionally a writing confessing the bankrupt's "willingness to to be adjudged a bankrupt," and the referee held that the creditors failed to submit proof of this element.

## IX. AUTOMOBILES

The respondents in *Jones v. Grissett*[102] instituted their suits to recover damages resulting from injuries received in an intersection collision with the appellant Grissett. The respondents occupied an automobile which was the third of twenty cars following a "family car" to the funeral home. The appellant testified that he and the co-defendant had entered the intersection after the signal facing them turned green, while the respondent-driver explained that even though she was in the intersection during the caution light she had entered on a green light. The jury returned a verdict against Grissett and he appealed.

The appellant contended the trial judge had erred by refusing to grant his motion for a directed verdict and urged the supreme court to review the evidence and to conclude that it supported the motion. Finding discrepancies in the testimony at trial, the court rejected the appellant's contention by relying on the well-settled rule that resolution of factual disputes is a function of the jury. This ruling by the court

99. 336 F. Supp. at 426.

100. 11 U.S.C. §21(a)(6) (1970).

101. Perry's attorney signed this letter which generally confessed the existence of Perry's financial difficulties. The meeting the creditors were requested to attend was only for informal discussions. See 336 F. Supp. at 427.

102. 258 S.C. 22, 186 S.E.2d 829 (1972).

effectively disposed of the appellant's argument that the failure of the jury to render a verdict against his co-defendant at trial acted also to relieve him of liability. The evidence relevant to the co-defendant's role in the accident revealed that she had been proceeding approximately parallel to Grissett before the defendants' automobiles struck the respondent's automobile. Finding the evidence as to the two not "identical," the court believed it unnecessary to search for similarities in the evidence and held that the jury had properly exercised its delegated power to decide disputed factual issues.

Grissett also argued that the trial judge had erred in refusing to grant his motion for a new trial. The basis for the alleged error was the trial judge's failure to charge the statute[103] respecting observance of traffic-control devices. The court agreed with the appellant that since the collision occurred at an intersection regulated by traffic signal, the statute should have been charged. The court also found itself in accordance with the appellant's view that the trial judge had erred in instructing the jury that if an "ordinary and reasonably prudent driver"[104] in the defendant's position had known or had reason to believe the cars passing were connected with a funeral *"then common decency would require a person to yield and not to break up or disturb something of such a sacred nature . . . ."*[105] This conclusion dismissed any notion that the statutorily prescribed standard of care was subordinate to any general law of "common decency."

Finally, the court elected to dismiss any suggestion that the twenty-car motorcade constituted a lawful "funeral procession." No statute or pertinent city ordinance defined "funeral procession," and the court believed it unnecessary to resort to a judicial definition of the term and found it sufficient to simply deny that status to the motorcade in the

103. S.C. CODE ANN. §46-304 (1962) provides:
> The driver of any vehicle shall obey the instructions of any official traffic-control device applicable thereto placed in accordance with the provisions of this chapter unless otherwise directed by a traffic or police officer, subject to the exceptions granted the driver of an authorized emergency vehicle in this chapter.

104. 258 S.C. at 26, 186 S.E.2d at 830.

105. *Id.* at 26, 186 S.E.2d at 831.

instant case. The factors mentioned in reaching this conclusion were the absence of a police escort, or hearse, the failure of the drivers to burn their headlights, and the lack of an authorized traffic permit.

The issue in *Rabon v. South Carolina State Highway Department*[106] was whether the word "violation," as used in the state statute[107] which provides for license suspensions of intoxicated motor vehicle operators, referred to the actual conviction of the offense or to the act of committing it, for the purpose of determining "the date of last violation." The statute reads in part as follows:

> Only those violations which occurred within a period of ten years including and immediately preceding the date of the last violation shall constitute prior violations within the meaning of this section.[108]

Respondent Rabon hoped to have his license suspended for six months instead of twelve. The longer penalty is designed for offenders who have twice violated the driving-under-the-influence law within a ten-year period. The facts revealed that Rabon's second conviction occurred more than ten years after the dates of the first chargeable act and conviction; however, the date of the second chargeable act was within ten years of the date of the first chargeable act. The trial court had ruled the word "violation" in the statutory scheme meant "conviction" and reduced the suspension period to six months. On defendant's appeal, the South Carolina Supreme Court, following the "ordinary and popular"[109] meaning test, defined "violation" as "the act of breaking, infringing, or transgressing the law—in this instance, the law prohibiting one from driving under the influence of intoxicants, etc."[110] Reversing the lower court decision, the court held that the word "violation" within the statutory context referred to the act of driving under the influence, rather than the subsequent conviction, for purposes of determining "the date of last violation."

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106. 187 S.E.2d 652 (S.C. 1972).
107. S.C. CODE ANN. §46-348 (1962).
108. *Id.*
109. 187 S.E.2d at 654.
110. *Id.*

## X. PARTNERSHIP

*Teague v. Workman*[111] was an action to settle affairs after the dissolution of a business partnership. The Articles of Partnership provided upon termination for a division of assets, one-fourth to Teague and three-fourths to Workman. The defendant Workman appealed to the South Carolina Supreme Court from the trial court's adoption of the report of the Master in Equity.

The supreme court found that aside from failing to resolve disputed factual issues and to state the account between the parties the trial court had granted Teague the option to accept five items of property and pay Workman $350.00 or to take one-fourth of the proceeds from a public sale of the assets. The court objected to this arrangement, and its holding may be ascertained from the following passage:

> It was error plain on the record for the Master to fashion a division of the partnership property (without any supportive findings) to be implemented as a final settlement of partnership affairs, or not, at the pleasure of one party. The alternative disposition ordered by the court—the sale of assets and ratable division of the proceeds—cannot be accomplished until an account between the parties has been stated, which is the essence of this action to settle and wind up the affairs of the partnership.[112]

## XI. MUNICIPAL CORPORATIONS

The plaintiffs in *Lathem v. City of Greenville*[113] owned land abutting Sagamore Lane in Greenville, South Carolina. Two-thirds of the Sagamore Lane homeowners had earlier petitioned the city under section 33-71[114] of the Greenville City Code for the paving of the street, the cost of which was

111. 256 S.C. 535. 183 S.E.2d 340 (1971).

112. *Id.* at 538, 183 S.E.2d at 342.

113. 256 S.C. 586, 183 S.E.2d 455 (1971).

114. This ordinance allows two-thirds of the property owners whose land abuts the street to petition the city manager for improvements. Part of the section states:

> The City Manager shall then have (it) determined whether (two-thirds) have signed, and, if so, he shall then have determined an estimate of the costs of the improvements. This information, with the petition, shall be presented by the City Manager to the Council at its next regular or special meeting. The Council shall then consider the petition and the accompanying information and take such action thereon as it may deem advisable. 256 S.C. at 589, 183 S.E.2d 456-57.

to be shared by the property owners. Eighteen months after the filing of the petition, the plaintiffs enjoined the city from paving the street, on the grounds that the section 33-71 procedure for processing the petition had not been followed. The defendants appealed from the injunction to the Supreme Court of South Carolina.

The respondents alleged the following irregularities: (1) that the petition was filed with the city engineer rather than the city manager; (2) that the city manager failed to submit the petition to city council; and (3) that the council meeting which approved the petition took place two weeks after "its next regular or special meeting"—each of which constituted a variance with established procedure[115] in the city code. Respectively, the court responded to these claims with the following explanations: (1) the city manager could properly delegate this duty to the city engineer; (2) the petition was presented in the form of a general street proposal; and (3) the slight delay was inconsequential in light of the purposes for such an approval deadline.

In reversing the lower court, the supreme court relied on the following principle for authority:

> Nonobservance of mere directory provisions, slight irregularities, immaterial variances, and minor departures from the letter of the requirement which are not fundamental to the initiation and progress of the improvement, or the levying, confirmation and validity of the assessment, and which are not injurious or prejudicial to the landowners who are called upon to pay, will be disregarded, where there is substantial compliance with requirements.[116]

## XII. COUNTIES

The Gantt Fire, Sewer and Police District in Greenville County, South Carolina, during past years had accumulated a sizable surplus in the accounts receiving the taxes collected for the retirement of bonds and for general operating expenses. The amount of both taxes had been in the past solely determined by the district. The plaintiff-taxpayer in *Edgcomb Steel Co. v. Gantt Fire, Sewer & Police District*[117] chal-

115. *Id.*

116. *Id.* at 590, 183 S.E.2d at 457, *quoting from* 14 E. McQUILLIN, LAW OF MUNICIPAL CORPORATIONS §38.175 (3d ed. rev. vol. 1970).

117. 257 S.C. 21, 183 S.E.2d 567 (1971).

lenged the tax and by mandamus sought "to require the commissioners to annually submit to the auditor of Greenville County a budget or estimate of the district's financial needs for the ensuing year, together with a statement of anticipated receipts and any existing surplus, as the basis for a determination by the auditor of the amount of the tax levy to be imposed."[118] The trial court agreed with the petitioner, and the defendant appealed.

The main issue before the South Carolina Supreme Court was whether the commissioners were required to submit an annual report to the county auditor for his approval. The plaintiff's argument relied on the general public works statute,[119] the provisions of which had previously been ruled[120] permissive rather than mandatory. That statute requires commissioners of the districts created under it to submit a budget to the county supervisor for approval. The defendant-district, however, had been created by special act,[121] which failed to require the commissioners to file a proposed budget with the county. In light of the provisions in the special act, the court ruled that the specific relief requested by the plaintiff must be denied; however, the court sought to clarify for the benefit of the commissioners their obligations to the district taxpayers under the act.

The act provided for the creation of a debt retirement tax and an operating expense tax. The debt retirement tax set forth in the act[122] makes the auditor and treasurer of Greenville County responsible for its levy and collection; however, the tax is subject to the following provision:

> The annual ad valorem tax herein directed to be levied may be reduced in each year by the amount of net revenues as aforesaid actually in the hands of the Treasurer of Greenville County at the time the tax for such year is required to be levied, and the tax may be entirely suspended for any year in case such moneys on hand, applicable as aforesaid, are sufficient to pay both principal and interest then due or falling due in such year and remaining unpaid.[123]

The court in view of this language concluded that any sur-

118. *Id.* at 23, 183 S.E.2d at 567.
119. S.C. CODE ANN. §59-623 (1962).
120. Mills Mill v. Hawkins, 232 S.C. 515, 103 S.E.2d 14 (1957).
121. 48 S.C. STAT. AT LARGE 2215 (1954).
122. *Id.* §21(e), at 2223.
123 *Id.*

plus in the debt retirement account should clearly be considered by the county in determining the amount of the tax. The operating expense tax under the act[124] vested the district commission with sole discretion in assigning the amount of the tax; however, such funds were to be raised for "discharging the duties vested in it."[125]

Therefore, in summary, the supreme court held that the commissioners were not required to submit a budget to county authority for approval, "but that the duties and responsibilities of the officials involved with respect to the assessment of taxes for the district are governed by the provisions of the special act creating the district."[126]

## XIII. RIVERS AND HARBORS

*Mitchell v. Tenneco Chemicals, Inc.*,[127] was an action instituted in the United States District Court for the District of South Carolina by the plaintiff on behalf of himself and for the use of the United States for alleged violations of the Rivers and Harbors Appropriation Act of 1899.[128] Pursuant to the Act and other statutory provisions,[129] the plaintiff sought a money judgment, styling his complaint as a *qui tam* action which "is one brought by an informer under a statute which establishes a penalty or forfeiture for the commission or omission of some act, and which additionally provides for the recovery of the same in a civil action with part of the recovery to go to the person bringing the action."[130]

The issue was whether the Act supported such an action, and the court decided it did not. Section 411[131] established

124. *Id.* §24, at 2225.
125. *Id.*
126. 257 S.C. at 28, 183 S.E.2d at 570.
127. 331 F. Supp. 1031 (D.S.C. 1971).
128. 33 U.S.C. §§401, 403, 404, 406-09, 411-14, 418 (1970).
129. 28 U.S.C. §§1331, 1355, 2461 (1970).
130. 331 F. Supp. at 1032.
131. 33 U.S.C. §411 (1970) states:

> Every person and every corporation that shall violate, or that shall knowingly aid, abet, authorize, or instigate a violation of the provisions of sections 407, 408, and 409 of this title shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $2,500.00 nor less than $500.00, or by imprisonment (in the case of a natural person) for not

the fines for violations of the Act but also left private recovery of a portion of the fines to the discretion of the trial court. A condition precedent to any possible private recovery under section 411 is a conviction for violation of the Act, and that requisite remained unsatisfied, the Act having been adjudged criminal in nature and enforceable only by the Department of Justice.[132]

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less than thirty days nor more than one year, or by both such fine and imprisonment, in the discretion of the court, one-half of said fine to be paid to the person or persons giving information which shall lead to conviction.

132. 33 U.S.C. §413 (1970).