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NOTICE

While this issue of the Bulletin is dated in 1959, it is the first issue of the New Year 1960. This marks the halfway point in the fiscal year. The last half of the fiscal year is the period in which last year's achievements will be equalled or exceeded. Needless to say, all of us will feel immensely proud if our concerted efforts result in the establishment of new records of accomplishment in fiscal 1961.

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JOB WELL DONE

The Commissioner of Customs has commended United States Attorney S. Hazard Gillespie, Jr. and Assistant United States Attorney Robert Fiske, Southern District of New York, for their work in a recent smuggling case in which seven defendants, including five customs inspectors, were found guilty. The letter stated that Mr. Fiske, who actually conducted the case, worked long and hard in making a thorough study of the whole matter and that this bore fruit in the very fine presentation he made in court.

The Regional Counsel, Small Business Administration, in expressing to United States Attorney Chester A. Weidenburner, District of New Jersey, appreciation for the time and effort devoted to a recent matter, stated that the cooperation and service received from Mr. Weidenburner's office exceeds that of any other office with which the Regional Counsel deals.

Assistant United States Attorney Donald A. Fareed, Southern District of California, has been commended by The Chief Regional Attorney, Veterans Administration, for his cooperation in a recent matter.

The Postal Inspector in Charge has commended Assistant United States Attorney Robert Hornbaker, Southern District of California, on the very admirable manner in which he handled a recent mail fraud prosecution. The letter stated that, although the Government's principal witness was ill and unable to testify, Mr. Hornbaker made a magnificent presentation of the Government's case.

Appreciation has been expressed by the General Counsel, Securities and Exchange Commission, for the very prompt attention which United States Attorney S. Hazard Gillespie, Jr. and his staff, Southern District of New York, have given to a recent case, in which an indictment was obtained less than a month after reference of the case. The General Counsel stated that everyone at the Commission is delighted with the manner in which Mr. Gillespie and his staff are moving the cases referred to them.

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ANTITRUST DIVISION

Acting Assistant Attorney General Robert A. Bicks

SHERMAN ACT

Opinion on Use of Grand Jury Transcript. United States v. Procter and Gamble Company, et al., (D. N.J.). On December 10, 1959, Judge Richard Hartshorne rendered an opinion denying three defense motions relating to the grand jury, and ruled in part upon a fourth motion for access to the grand jury testimony of certain specific witnesses. The three grand jury motions were: (1) to suppress the grand jury transcript, related documents, documentary evidence and all leads obtained through the grand jury; (2) to impound the grand jury transcript and all notes, memoranda, etc., made therefrom, the same to be available to the parties only upon a showing of particularized need; (3) to disclose the entire grand jury transcript to the defendants. These three motions were based upon an alleged misuse of the grand jury process. The Court had previously found that on November 14, 1952 the then Attorney General decided not to ask for the return of an indictment by the grand jury upon the basis of the evidence previously taken before that body. The testimony of two grand jury witnesses who testified after that date was given to the defendants upon order of the Court. The fourth motion, for access to certain testimony, was based upon an allegation of particularized need within the meaning of United States v. Procter & Gamble, 356 U. S. 677.

The Court observed that either suppression or impoundment of all information obtained through the grand jury or leads obtained therefrom would make it practically impossible for the Government to prosecute the case and to carry out the Congressional mandate to enforce the antitrust laws. Second, it noted that the wiser procedure is to make the grand jury transcript available to both sides rather than to suppress or impound it if misuse of the grand jury is established, to the extent that the criminal procedure is subverted.

1. Motion to Suppress the Grand Jury Transcript. All Notes, Memoranda, etc., Made Therefrom, the Documentary Evidence, and All Leads Derived Therefrom

The Court held that suppression is generally confined as a remedy to punish violation of the Fourth Amendment to the Constitution for unreasonable search and seizure or wire tapping; that the issuance of subpoenas and everything done in this case has been done by valid judicial process; and therefore there has been not even a constructive search and seizure. The Court rejected defendants' argument that suppression would lie because a deposition would be suppressed if the parties were not given proper notice and permitted to cross-examine. He found the analogy to suppression of such deposition a false one.

2. Motion to Impound the Grand Jury Transcript, Notes, and Memoranda Made Therefrom, etc.

The Court stated that impoundment would not be a wise exercise of discretion in that (a) the grand jury proceedings have been shown to have been begun for a criminal as well as a civil purpose; (b) the transcript is taken to assist Government counsel; (3) the Sherman Act is primarily a criminal statute, and therefore Criminal Rule 6 (e) should not be so narrowly construed as to prevent use of the transcript by Government attorneys in the performance of their duties in a civil antitrust proceeding; (d) if there had been a subversion of the grand jury by using it for a purely civil purpose, the appropriate remedy was not to impound the evidence but to equalize the position of the parties by turning over "so much of such testimony as was a subversion to the other side as well."

3. Motion for Disclosure of the Entire Grand Jury Transcript

The Court rejected the contention that defendants were entitled to full disclosure of the grand jury transcript if any misuse of the grand jury occurred. It found that no clear evidence had been introduced to rebut the Government's answer to the interrogatories that the then Attorney General's decision, not to have a criminal case, was made on November 14, 1952. He observed that if it is later shown that the decision to have a civil case only occurred at an earlier date than November 14, 1952, the defendants would be entitled to receive the grand jury transcript from that day on. The Court further stated that if the Government's use of the grand jury has been completely wrong from the beginning the entire transcript would be discoverable without showing of other good cause; but if there is subversion by partial unlawful use of the grand jury then that portion of the transcript is to be discovered "wholesale" without the showing of other particularized good cause.

4. Motion for Access to Specific Grand Jury Testimony

This motion sought production of the grand jury testimony of: (1) the deceased witness Riley; (2) Neil McElroy, formerly Secretary of Defense; and (3) all grand jury witnesses who will be called at trial. With respect to the deceased witness, the Court held that "Barring the fact that this witness has made available to defendants a really complete memorandum of all his grand jury testimony, which, if subject to question, must be decided impartially, his grand jury testimony should therefore be made available to the defendants who desire it, in order that they be placed on a substantial parity with plaintiff." The decision does not mention the request for Neil McElroy's testimony, the Secretary of Defense having meanwhile resigned his post. The decision also does not mention the portion of the motion which relates to testimony of the witnesses who will be called as trial witnesses.

The opinion did not rule upon the Government's objection to defendants' interrogatory which seeks the verbatim text of an internal memorandum from the Acting Assistant Attorney General to the Attorney General dated November 13, 1952. But the Court has advised the parties that since the Government

furnished the defendants with such portions of the memorandum which disclosed the nature of the Assistant Attorney General's recommendation to the Attorney General, he would consider the interrogatory as withdrawn and the objection moot unless the parties further pursue their motion for the text of the balance of the memorandum which was not disclosed by the Government.

At the hearing on October 27, 1959, the Court granted a temporary stay of the taking of the deposition of former Attorney General McGranery by written interrogatories addressed to Mr. McGranery, by which defendants sought to obtain disclosure of the verbatim text of a status report from the then Acting Assistant Attorney General to the Attorney General dated September 1, 1952. This report is also the subject of a Rule 34 motion before the Court demanding production of this document from the Government. The Court refused to hear the Rule 34 motion at the November 11 hearing and directed the parties to first confine their efforts to securing oral testimony before seeking production of documents on the grand jury subject. Following the hearing, the defendants noticed the oral deposition of Mr. McGranery. Pursuant to a motion to limit the deposition filed by the Government, the Court ruled that the deposition proceed under certain limitations. These will permit refreshing Mr. McGranery's recollection with the documents (without showing them to the defendants), but preclude defense efforts to ascertain the contents of such documents. It is anticipated that the deposition will proceed shortly.

Staff: Margaret H. Brass, Raymond K. Carson, Jennie M. Crowley, Kenneth L. Anderson, Nicolaus Bruns, Jr., Charles D. Mahaffie, Jr., and Harry Bender. (Antitrust Division)

Defendants Motion for Acquittal Granted. United States v. Eli Lilly and Company, et al., (D. N.J.). On November 30, 1959, after five weeks of trial and following conclusion of the Government's case, Judge Forman, in a three-hour oral opinion, granted the motions of the five defendants for judgment of acquittal under Rule 29(a) of the Federal Rules of Criminal Procedure. The jury had been excused by Judge Forman for two weeks during which the Court heard four days of argument by counsel and then held the matter under advisement.

In its opinion, the Court declared that the Government had failed to sustain its burden of proving beyond a reasonable doubt that an illegal agreement was to be inferred from the circumstances of the defendants' conduct. The Court concluded that the evidence "presented a reasonable hypothesis other than guilt which may be inferred from all of the Government's evidence" and that therefore "the case should not be allowed to go to the jury because any inference drawn by the jury would be no more than the jury's determination as to which of two reasonable hypotheses be the correct one, and defendants in criminal cases based upon circumstantial evidence alone are entitled to have their presumption of innocence sustained as a matter of law when the inference of innocence is a reasonable one under the evidence."

In reaching its conclusion, the Court rejected the Government's argument that the conduct of all of the defendants viewed in its entirety was such that the jury could lawfully infer an agreement beyond all reasonable doubt, notwithstanding the fact that some of the conduct of some of the defendants when viewed singly could be consistent with innocence as well as with guilt.

Staff: Lewis Bernstein, Bernard M. Hollander, Stephen R. Lang, Allan J. Reniche and Les J. Weinstein. (Antitrust Division)

CLAYTON ACT

Opinion for Government in Section 7 Case. United States v. Brown Shoe Company and G. R. Kinney Company, Inc., (E.D. Mo.). In an opinion filed on November 20, 1959, District Judge Randolph H. Weber found that Brown Shoe Company's acquisition of G. R. Kinney Company, Inc., violated Section 7 of the Clayton Act. In finding a violation of the law, Judge Weber stated:

> The court shall enter judgment requiring defendant Brown to relinquish and dispose of the acquired stock of defendant Kinney, and thereafter enjoining Brown and Kinney, their agents, servants, officers, and employees from acquiring any interest in the stock or assets of the other defendant.

According to the Court's findings, prior to the merger Brown was the fourth largest shoe manufacturer in the United States. In 1955 it produced 25,000,000 pairs of shoes or 3.97% of the nation's total production. In 1957, when combined with Kinney, Brown's production increased to 29,000,000 pairs of shoes or 5% of the national shoe production and placed it third in the industry. The Court also pointed out that between 1950 and 1955 Brown's total dollar sales increased from $89,000,000 to $159,000,000.

Kinney is primarily a retailer, although it operates four factories which manufacture shoes. Kinney produced 0.5% of all shoes manufactured in 1955 and had 0.9% of all national retail sales. Kinney's net sales had increased from $35,000,000 in 1950 to $51,000,000 in 1955. Kinney obtains about 80% of all the shoes which it sells from manufacturing sources other than its own four factories. In 1954, Kinney purchased no shoes from Brown or its affiliates. By 1957, 7.9% of all its purchases were from Brown and Regal (one of Brown's subsidiaries). This made Brown Kinney's largest single supplier of shoes.

In finding a violation of Section 7, the Court held that the three issues which a court must decide in any Section 7 proceeding are: (1) the line of commerce; (2) the section of the country; and (3) the impact of the merger.

The Court sustained the Government's contention that men's, women's and children's shoes considered separately are each lines of commerce and rejected the defendants' contention that it is necessary to classify shoes even further into categories such as "play," "work" and "dress." The Court also rejected the defendants' contention that shoes should be classified according to price brackets. The Court, however, refused to accept the Government's contention that the three lines of commerce proposed by the Government were all part of a broader line of commerce--shoes generally.

The Court adopted the nation as a whole as the relevant section of the country for determining the effects of the merger on the manufacturing level. On the retail level, the Court concluded that the relevant sections of the country are the cities of 10,000 or more population and their immediate and continuous surrounding area, in which a Kinney store and a Brown store are located. The Court used the 10,000 or more population criterion because Kinney stores are located in cities of such size and the evidence in the case dealt with such size cities.

The Court finally concluded that the impact of the merger would be to substantially lessen competition or tend to create a monopoly with respect to the relevant lines of commerce in the relevant sections of the country because the Brown-Kinney merger was part of a series of mergers engaged in by the few large shoe manufacturers which would result in the foreclosure of independent manufacturers from the acquired retail outlets. The Court also held that independent retailers were finding it increasingly difficult to compete with large integrated manufacturer-retailer combinations and that the Brown-Kinney merger would add substantially to the difficulties of the independent retailer as well as the independent manufacturer.

In support of its holding the Court made a thorough analysis of the history of Section 7 and the decided cases and concluded as follows:

> Certainly it is evident that Congress intended to encompass minute acquisitions which tend toward monopoly and to do so in their incipiency. Courts have recognized the necessity to act toward violations as they begin, rather than wait until it has become fait accompli.

Based upon this premise, the Court stated that it was "not so much concerned with percentages, as such, but with what these percentages mean in examination under the light of the facts of the case and the economic realities involved." The Court further stated that in view of Brown's history of mergers and the marked trend in the industry, there was no question that the merger came within the purview of the statute. In this connection, the Court made the following statement:

> We can only eat an apple a bite at a time. The end result of consumption is the same whether it be done by quarters, halves,

three-quarters, or the whole, and is finally determined by our own appetites. A nibbler can soon consume the whole with a bite here and bite there. So, whether we nibble delicately or gobble ravenously, the end result is, or can be, the same.

The Court's final conclusion was that the merger "would eliminate Kinney as a substantial competitive factor to Brown in the shoe retailing field . . . that the most aggressive retail chain in the nation, now a potent competitor of Brown, would become but another adoptive child of an already big family. . . . that the merger would establish a manufacturer-retailer relationship which deprives all but the top firms in the industry of a fair opportunity to compete . . . /that/ Kinney's already powerful position in the retail field is made more powerful by the proposed affinity with Brown . . . /that/ other manufacturers have already suffered; other retailers have felt the effect; the reasonable probability is the further substantial lessening of competition and the increased tendency toward monopoly."

Staff: James J. Coyle, Bill G. Andrews, Lewis J. Ottaviani, Nicolaus Bruns, Jr., Edward M. Medvene, Julius H. Tolton and Harrison F. Houghton.
(Antitrust Division)

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CIVIL RIGHTS DIVISION

Acting Assistant Attorney General Joseph M. F. Ryan, Jr.

Voting & Elections; Civil Rights Act of 1957. United States v. Fayette County Democratic Committee, et al., C. A. 3835 (W. D. Tenn.) This, the fourth case filed under the Civil Rights Act of 1957, seeks to enjoin the Democratic Executive Committee of Fayette County, Tennessee, and others from prohibiting qualified Negroes from voting.

The complaint, filed on November 16, 1959, charges defendants with violating the Constitution and laws of the United States in conducting a "white primary" on August 1, 1959, to choose candidates for local offices in Fayette County. About five weeks before the election, defendants adopted a resolution excluding Negroes and, on election day, a letter from defendants was placed in each ballot box instructing the officials to prevent Negroes from voting. "Only WHITE DEMOCRATS are authorized to vote in this Primary," the letter said. "If any Negroes should ask to vote in your district, they are to be informed that this is a White Democratic Primary and not a General Election." Several Negroes who tried to vote in the primary were turned away by election officials.

The relief prayed for includes a declaration of the illegality of the white primary practice and an injunction which would put a stop to that practice.

Defendants have been allowed until February 1, 1960, to file responsive pleadings.

Staff: United States Attorney Rives A. Manker (W.D. Tenn.); Henry Putzel, Jr., David L. Norman, and J. Harold Flannery, (Civil Rights Division)

Interpretation of Public Law 85-752, 18 U.S.C. 4208 (b)

Inquiries have been made regarding the necessity for a prisoner to be present in open court when final sentence is imposed based upon the reports and recommendations of the Bureau of Prisons as provided in 18 U.S.C. 4208 (b). The legislative history (H.R. Report No. 1946) clearly indicates that it was the intention of Congress that the prisoner would not have to be present when final action on his sentence was taken.

This, of course, does not mean that the court, in its discretion, cannot order a prisoner's return for such proceedings and a defendant is always free to convince the sentencing court that such return is in the interest of justice. However, in view of the Congressional reports, the administrative burdens and the expense involved, the United States Attorney on his own initiative should not arrange for the defendant's production in court.

A second question concerns the applicability of Rule 35 of the Federal Rules of Criminal Procedure to such commitment. The legislative history also indicates that Congress intended in some cases to extend the period authorized by Rule 35 (H.R. Report No. 1946, pp. 9 and 10; Senate Report No. 2103, p. 4). It is our view that the 60-day period under Rule 35 commences to run from the date of commitment under Section 4208 (b). Therefore, if final judgment is imposed prior to the termination of that period, the court could reduce its sentence during the balance of such period. However, no reduction could be made where the final judgment is imposed after the 60-day period has elasped.

Juvenile Delinquency Proceedings

Whenever it is felt that a juvenile delinquent should be prosecuted as an adult it is necessary that you obtain the authorization of the Assistant Attorney General in charge of the Civil Rights Division before proceeding. This is required by Section 5032 of Title 18, U. S. Code. In this connection the Attorney General has delegated his authority to the Assistant Attorney General in charge of that Division.

Recently several cases have come to our attention where this provision of the law had been overlooked. Consequently the charges had to be dismissed and the United States Attorneys were required to re-institute criminal prosecution after obtaining the necessary authorization. Also, if you have reason to believe the defendant is a juvenile, his status should be clarified before instituting prosecution.

Labor Organization Expenditures in Connection with Alaska General Election--18 U. S. C. 610. United States v. The Anchorage Central Labor Council,Anchorage, Alaska (AFL-CIO) (D.Alaska). This case is reported at 7 United States Attorneys' Bulletin No. 26, page 719. The defendant filed a motion to dismiss the indictment, alleging defects in the institution of the prosecution and challenging the array of the grand jury panel on the ground that the grand jury was chosen in conformance with the laws of the State of Alaska rather than as prescribed by Title 28, United States Code. The District Court denied the motion on December 2, 1959.

Staff: United States Attorney William T. Plummer, Assistant United States Attorney George N. Hayes (D. Alaska).

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CRIMINAL DIVISION

Acting Assistant Attorney General William E. Foley

FEDERAL HOUSING ADMINISTRATION - TITLE I HOME MODERNIZATION FRAUDS

A recent publication by the National Better Business Bureau, Inc., New York City, illustrates the fine deterrent effect of United States Attorneys' vigorous prosecution of Title I frauds under 18 U.S.C. 1010 these past five years. In a published letter to the Federal Housing Administration detailing the result of a survey of 84 Better Business Bureaus, 79 of these bureaus report no known instances of "gyp salesmen" or unethical operators seeking to capitalize on or misuse the FHA program for insuring home modernization loans in their areas. While gratifying to receive reports of a substantial containment of these frauds, we are aware that it is solely the result of vigorous prosecutive action. For this reason we urge your continued attention to such cases to assure a high standard of compliance with the law in these programs. The reports of the other five bureaus in the survey indicate clearly that abuses still exist and that recurrence of widespread illegal activity is a possibility.

OBSCENITY

Strip Tease Photos as Obscenity. United States v. Sununu (S.D. N.Y.). Atallah Sununu and Dolores Dankel were indicted for violations of the postal obscenity statute, 18 U.S.C. 1461. The defendants were charged with sending advertisements through the mail as to where and how to obtain obscene pictures; with sending obscene pictures through the mail; and with a conspiracy to violate the postal obscenity statute. Defendants waived trial by jury and the Honorable Sidney Sugarman convicted them on 19 of the 20 counts in the indictment.

The case is of particular interest because this was the first time in the Southern District of New York, and apparently in the northeast section of the United States, that a case involving so-called pinup, girlie or strip tease photos ever reached the trial stage. These photographs and films did not portray sexual activity, nor did they show nudity, nor did they disclose the pubic area. It was the Judge's opinion, however, that the unwholesome and provocative poses assumed by the models in the photos and their "gyrations" in the movies could only be classified as filth or obscenity. The defendant Sununu was sentenced to one year and one day imprisonment. The defendant Dankel was placed on probation for two years.

Staff: United States Attorney S. Hazard Gillespie, Jr.; Assistant United States Attorney Kevin Thomas Duffy (S.D. N.Y.)

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Joseph M. Swing

NATURALIZATION

Seaman May Claim Time in Hospital as Part of Required Period of Service on Vessel for Naturalization Purposes. Cawley v. United States (C.A. 2, November 23, 1959). Appeal from decision denying petition for naturalization. Reversed.

The district court denied this petition for naturalization upon the recommendation of the Naturalization Examiner. The petition was filed under section 330(a)(2) of the Immigration and Nationality Act (8 U.S.C. 1441(a)(2)). That statute permits a petitioner to count as the necessary residence and physical presence within the United States required for naturalization those periods of time prior to September 23, 1950 during which he served honorably or with good conduct on vessels described in section 325(a) of the Nationality Act of 1940, i.e., certain United States Government civilian vessels or other described vessels, not foreign, whose home port is in the United States. This petitioner, a native of the Philippine Islands, at the time of filing his petition had served as a seaman on six American ships for an aggregate of four years, two months and three days.

The district court on rehearing permitted him to show that he had additional service on an American motor vessel on an "inbound" voyage from Manila to San Francisco for two months and one day, which gave him an aggregate of four years, four months and four days but still left a deficit of seven months and 26 days to comply with the five-year service requirement. The evidence showed that shortly before the vessel reached San Francisco the petitioner became ill and was unable any longer to discharge his duties as junior engineer. Upon the arrival of the vessel at San Francisco, he was hospitalized and remained under hospital treatment until his discharge on November 7, 1944. It was argued on his behalf that this illness was tuberculosis, already latent when he signed on the vessel at Manila. The appellate court assumed, arguendo, that this contention was correct although the petitioner was able to discharge his duties until shortly before his ship reached San Francisco. The Court said there was no evidence that when the alien signed on at Manila he supposed that he would be disabled on the "inbound" voyage or that he did not mean to help work the ship back to Manila.

The appellate court stated that while it is true that a seaman is not entitled to "maintenance and cure" when he signs on if he knows he will not be able to perform his duties during the voyage, he does not warrant his physical soundness. The Court said, therefore, that the question to be decided was whether under the statute, if a seaman has become incapacitated by illness during the voyage and is entitled to

maintenance and cure, he may add the time of his detention in hospitals as part of the aggregate of five years during which he has "served honorably and with good conduct." The Court concluded that a seaman retained in a United States hospital is "exposed" to a "scrutiny" as likely to disclose whether he is a person of good moral character, attached to the principles of the Constitution and well disposed to the good order and happiness of the United States, as though he were on shipboard for the same period. The Court felt that no one would maintain that a sick seaman while on board is not "serving", though he cannot literally do so, and that it does not make any difference if the voyage ends before the cure is completed. The privilege accorded seamen in this respect is of very ancient origin and the Court said that so far as it had found, such part of the "cure" that may extend beyond the end of the voyage has never been considered different from that which precedes it. Concluding that there was no reason to make an exception in this respect in the case of naturalization, the appellate court reversed the action of the district court and granted the petition.

Circuit Judge Waterman dissented, expressing the view that the majority opinion went beyond the statutory provision, which was that the applicant for citizenship shall have five years of service on a vessel.

Staff: United States Attorney Cornelius W. Wickersham, Jr. (E.D. N.Y.)

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TAX DIVISION

Assistant Attorney General Charles K. Rice

CIVIL TAX MATTERS
Appellate Decisions

Tax Liens: Priority of Federal Tax Liens Over Mechanics Liens. United States v. Peden Iron & Steel Company (Court of Civil Appeals for the Sixth Supreme Judicial District of Texas, at Texarkana), decided November 10, 1959, rehearing denied December 8, 1959. A sum representing the balance due on a construction contract was withheld by the City of Houston because the taxpayer-contractor had failed to pay the claims of various laborers and materialmen who had furnished materials and performed work under the contract. Suit was instituted in a state (Texas) court by one of the materialmen against the City and the taxpayer-contractor. The United States intervened in the action. Some of the federal taxes were assessed and notices of liens filed prior to the time the contract was executed; other taxes were assessed and lien notices filed after the contract was executed but before work was completed. The Court of Civil Appeals did not reach the question of priorities, because in its view the taxpayer-contractor had no property interest in the fund (which the City had paid into the registry of court) within the meaning of Section 3670 of the Internal Revenue Code of 1939, to which the federal tax liens could attach, and the claims of the laborers and materialmen, and a surety to whom some of the claims had been assigned, exceeded the amount of the fund. In so holding, it relied upon provisions of state law Article 5472 (a) and (b), 16 Vernon's Texas Civil Statutes), as well as the decisions of Texas courts. The issue involved in the case is substantially the same as the issues involved in Aquilino v. United States, 3 N.Y. 2d 511, 146 N.E. 2d 774, and United States v. Durham Lumber Co., 257 F. 2d 570 (C.A. 4), both of which have been argued and are awaiting decision by the Supreme Court on writs of certiorari.

Staff: George F. Lynch (Tax Division)

Enforcement of Subpoena to Produce Records "For the Purpose of Ascertaining the Correctness of Any Return": Held Presence of Other Purposes Does Not Vitiate Subpoena, and That Where Examination Relates to Statute-Barred Years Secretary Need Only Demonstrate Reasonable Basis for Suspecting Fraud. David Lash v. Laurence A. Nighosian, Agent (C.A. 1, December 4, 1959). Following charges of improper conduct between the Treasurer of the taxpayer corporation, one David Lash, and various Internal Revenue agents in the Boston Region, the Regional Commissioner, who is concerned primarily with the determination and collection of taxes, and the Regional Inspector, who reports directly to Washington on the operation of the Internal Revenue Service, established a joint investigation to determine possible violations of the Internal Revenue Code and possible misconduct on the part of Internal Revenue agents. The investigation revealed certain business and private relations between Lash and two

Revenue agents who had audited the returns of the taxpayer for the taxable years 1952-1954 (three of which years were "closed" by the statute of limitations save upon a showing of fraud). The taxpayer refused to obey a summons to produce its books and records, and following a trial, the district court issued an order enforcing the summons.

Section 7602 of the Internal Revenue Code of 1954 authorizes the Secretary or his delegate to issue a summons "For the purpose of ascertaining the correctness of any return." The district court found that the investigation was undertaken for both this purpose and that of determining possible misconduct on the part of Revenue agents. The taxpayer then argued that the statute requires the investigation to be for the sole purpose of ascertaining the correctness of any return and that the presence of any other purpose will vitiate the summons. The Court of Appeals upheld the district court's ruling that the statute does not require this soleness of purpose and, for that matter, did not require a showing that the purpose of ascertaining the correctness of any return, when in conjunction with any other purpose, be the primary one. As long as one of the purposes behind the investigation is that of ascertaining the correctness of any return, the First Circuit concluded that the statutory requirements had been met and, consequently, the investigation was not "improper."

The second issue in the case related to the extent to which the Secretary or his delegate must show the possibility of fraud when seeking enforcement of a subpoena to examine records for what are otherwise "statute-barred" years. The many courts of appeals which have passed on this question have held that the Secretary or his delegate need not prove actual fraud, but need only demonstrate that there is a reasonable basis for suspecting fraud. See, e.g., Zimmerman v. Wilson, 105 F 2d 583, 586 (C.A.3). The taxpayer asserted that this test was insufficient and that the Secretary must prove the possibility of fraud to the enforcing court in a de novo hearing. The taxpayer relied on language in an earlier First Circuit opinion, O'Connor v. O'Connell, 253 F. 2d 365, 370, to the effect that the Secretary must "be required to establish to the court's satisfaction that there is probable cause for an investigation into such a year." The First Circuit here upheld the District Court's determination that these words did not require a de novo hearing, and that if the Secretary showed a reasonable basis for suspecting fraud, the enforcing court "would not substitute itself for the Regional Commissioner in resolving the issue of fact presented." As a result of this decision, the First Circuit now stands squarely in line with similar holdings in the Third, Fifth, Sixth and Ninth Circuits.

Staff: Rita E. Hauser (Tax Division)

District Court Decisions

Tax Liens: Filing At Domicile of Taxpayer Good Personal Property Belonging to Taxpayer Physically Located in Another State on Date of Sale to Third Person. Solomon v. Gross (D. N.J. September 1, 1959.) This suit was brought to enjoin a tax sale of seven Fruehauf trailers

by the Internal Revenue Service. Plaintiff had purchased these trailers from the delinquent taxpayer in Pennsylvania without actual notice of the federal tax liens. He claimed that the filing of the liens in New Jersey, the domicile of the taxpayer, was insufficient because the trailers were located in Pennsylvania on the date of the sale. The Court stated that these trailers were personal property the situs of which is determined by the domicile of the owner. Therefore properly filed tax liens at the domicile of the delinquent taxpayer gave the Government priority over the claims of the subsequent purchaser for value. The Court was mindful of the hardships placed on innocent purchasers of highly mobile personal property such as the trailers in issue. However, reciting the axiom of caveat emptor the Court stated that the purchaser should have searched the records of the county of the seller's domicile.

Staff: United States Attorney Chester A. Weidenburner and Assistant United States Attorney John H. Mohrfeld, III (D. N.J.)

Tax Liens: Lien Foreclosure Suit, Taxpayer's Transfer of Certain Assets to Trustee for Benefit of Creditors Does Not Limit United States' Collection Action to Suit Against Such Trustee, Independent Lien Foreclosure Suit Directed at Other Assets May Be Maintained. United States v. Lanathan, Inc., et al. (N.D. Ill., Oct. 28, 1959.) This action was brought to reduce to judgment assessments made by the Commissioner of Internal Revenue against Lanathan, Inc., and against Louis A. Nathan and Eleanor B. Nathan for FUTA and witholding taxes, penalties and interest and to foreclose the tax liens arising from such assessments. Although defendants entered no appearance nor were they represented at the trial, they alleged in their answer that they had transferred certain assets to a trustee for the purpose of paying creditors and that, therefore, the United States, having a lien on said assets in the hands of the trustee, should collect their indebtedness from said trustee. The Court rejected defendants' argument stating that, although alternative collection methods are provided by the statutes, the Commissioner is not obligated to resort to one particular enforcement measure rather than another, provided the enforcement action was properly commenced, as was here the case.

Staff: United States Attorney Robert Tieken and Assistant United States Attorney Harvey M. Silets (N.D. Ill.)

CRIMINAL TAX MATTERS
Appellate Decisions

Instructions in Criminal Case Given To Jury Outside Presence of Defense Counsel. McClanahan v. United States (C.A. 5, December 8, 1959). The Court of Appeals reversed appellant's conviction on a one-count indictment--alleging the wilful attempted evasion of income tax--on the ground that the trial court erred in sending "secret instructions" to the jury after it had retired to deliberate. The Government's evidence showed that appellant had received large-scale gambling winnings

which he failed to report as income; appellant contended that these winnings had been fully offset by gambling losses not claimed on the tax return. The instructions to the jury did not adequately define the crucial issue thus posed, and appellant's objections to the charge were overruled. During its deliberations the jury sent to the judge--via the court crier--the following written question: "Should the defendant have reported his gambling gains and losses on his income tax return, whether he won or lost?" The judge wrote in reply, "Mandatory that report all gains, tho he may have lost. In case of loss, he reports both." He did not advise counsel for either side of this exchange of notes between himself and the jury. Shortly thereafter, the verdict of guilty was returned. Later, defense counsel was advised of the incident by "bystanders", and contended that it was reversible error. The district court overruled his motion for new trial, holding that the error was harmless. The Court of Appeals, strongly implying that the giving of such "secret instructions" was reversible error per se (Shields v. United States, 273 U. S. 583, 588-589), held that the jury's written query pointed clearly to the need for clarification of the sketchy original instruction, and that counsel for both sides should have been consulted before it was answered.

Staff: United States Attorney William B. West, III; Assistant United States Attorney William N. Hamilton (N.D. Texas)

Filing Fictitious Refund Claims: Insanity As Defense. Kitchens v. United States (C. A. 10, November 5, 1959.) Appellant was convicted of filing a number of income tax returns in fictitious names (falsely claiming refunds) and of forging and uttering Government checks. He introduced substantial evidence in support of his defense that he had been insane at the time the returns were filed and the checks negotiated. The Government, bearing the burden of establishing appellant's sanity, adduced testimony by a number of psychiatrists and other witnesses to the effect that appellant was sane at the time the offenses were committed and at the time of trial. The Government also showed that on several occasions appellant had boasted that he was able to feign insanity so convincingly that he had fooled doctors into finding him insane--when it suited his convenience--but that he had admitted that those doctors had examined him only rather superficially, and that whenever he was subjected to observation over a period of time the doctors were able to see through his fakery. The Court of Appeals, affirming the conviction, held that the evidence of sanity introduced by the Government "meets the reasonable doubt test" and hence that the jury was justified in resolving the conflicting evidence against appellant. The Court found no merit in the contention that the trial judge erred in failing to instruct the jury as to the presumption that after a finding of insanity is made the condition is presumed to continue, pointing out that no objection to the instruction was raised at the trial. Appellant's petition for rehearing was denied on December 10, 1959.

Staff: United States Attorney John F. Raper, Jr. (D. Wyo.)

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DO NOT DESTROY
This and All Subsequent Issues
Should be Retained

A P P E N D I X

FEDERAL RULES OF CRIMINAL PROCEDURE

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