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ERRATA

On page 49 of the Bulletin issue of January 29, 1960, the combined rate of retired pay and civilian compensation referred to in the first paragraph should be $10,000 rather than $3,000.

On page 93 of the Bulletin issue of February 12, 1960, the word "not" should be deleted from line two of the second full paragraph.

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JOB WELL DONE

Assistant United States Attorney Richard H. Pennington, Southern District of Ohio, has been commended by the Divisional Inspector in Charge, Post Office Department, for his fine work and the excellent cooperation he rendered in obtaining the dismissal of a recent civil suit brought against two postal inspectors.

The Chairman of the House of Representatives Subcommittee on Elections has expressed to United States Attorney Osro Cobb, Eastern District of Arkansas, his sincere appreciation for the cooperation extended by Mr. Cobb and his staff during the several phases of an election investigation in Little Rock. In conveying his thanks for such assistance in a difficult situation, the Chairman stated that Mr. Cobb was not only non-partisan but wise, fair and just in all of his suggestions.

The General Counsel, Securities and Exchange Commission, has expressed thanks for the very competent work done by Assistant United States Attorneys John R. Green and Andrew J. Shepherd, Southern District of Texas in the prosecution of a recent case. In conveying the Commission's great satisfaction with the results, the Chairman observed that the conviction was particularly noteworthy in view of the defendant's past medical history and the insanity defense which he raised at the trial.

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OFFICE OF ALIEN PROPERTY

Assistant Attorney General Dallas S. Townsend

Trading with the Enemy Act; Statute of Limitations Re Actions for Return under Section 9(a). Loomis v. Priest (C.A. 5, February 8, 1960.) Plaintiff sued under Section 9(a) of the Act for the return of the proceeds of a cargo of oil once on board the Italian-owned vessel, the S. S. BRENNARO, claiming that by reason of a pre-war oral contract with the Italian Government he had been given a lien on the cargo as security for the payment of legal services to be rendered on behalf of said Government.

The Custodian in July 1942 had vested the right, title and interest of the Italian Government in the oil cargo on board the S. S. BRENNARO. Thereafter in 1942, litigation ensued between the Custodian and plaintiff with respect to their respective rights to the proceeds of the cargo which had been sold pursuant to order of the court. The litigation arose in a libel proceeding brought by the United States in which it sought to have the S. S. BRENNARO forfeited, during which the Custodian and the plaintiff each claimed ownership of the proceeds of the oil cargo. The district court held (The Brennaro, 53 F. Supp. 441) that the Custodian was entitled to the proceeds pursuant to his vesting order and that plaintiff's claim could be asserted only in accordance with the provisions of the Trading with the Enemy Act. Thereafter, in accordance with a lawful order of the district court, the proceeds were turned over to the Custodian. The Court of Appeals affirmed (United States v. The Antoinetta, 153 F. 2d 138, 144) and plaintiff's petition for a writ of certiorari was denied by the Supreme Court, 328 U. S. 864, rehearing denied 329 U. S. 821.

In April 1947 plaintiff filed his claim for return in accordance with the provisions of the Trading with the Enemy Act. The claim was finally denied administratively by the Attorney General on March 14, 1957. Thereafter on March 14, 1959, plaintiff commenced his action under Section 9(a) of the Act for the return of the vested proceeds. Before answer the Custodian moved for summary judgment on three grounds, one of which was that the action was barred by the limitations period prescribed in Section 33 of the Act. The district court granted the Custodian's motion.

The Court of Appeals affirmed. It pointed out that despite plaintiff's contention that the property had not been effectively vested until the Attorney General's final denial on March 14, 1957 and that therefore his action was timely brought within the limitations period of Section 33, the property had in fact been vested in July 1942 when the Custodian's instrument of seizure was issued. Accordingly, the Court held that plaintiff was, under the terms of Section 33, required to file his suit for return within two years after the vesting in July 1942 or by April 30, 1949, whichever date was later. Since suit was not commenced until March 1959, the action was not timely and the district court correctly held that it had no jurisdiction to entertain the suit.

Staff: The case was argued by Max Wilfand (Office of Alien Property); on the brief was Irving Jaffe.

Suit for Return Under Section 9(a) of Trading With the Enemy Act. Stevens et al. v. Rogers et al., (D.C.) On a suit brought under Section 9(a) of the Trading with the Enemy Act, as amended, by the domiciliary executors of a deceased British national for the return of vested property, the Court upon an agreed statement of facts found for the Attorney General. During the course of the proceedings ancillary administration was undertaken in the District of Columbia and the ancillary administrator, c.t.a. was made a co-party plaintiff after the Government raised issue on jurisdictional grounds as to the propriety of foreign fiduciaries appearing as plaintiffs in an action in the District of Columbia.

Decedent died leaving personalty in the State of New York and other assets in England. Under his will four-tenths of the residue was bequeathed to a niece who was a resident and national of Germany. By various licenses issued by the Secretary of the Treasury, a total of six-tenths of the personal property in the United States, which consisted principally of securities and in small part a bank account, was permitted to be transferred to the British fiduciaries, the licenses in each instance providing that the property unblocked represented the interests of the non-enemy beneficiaries.

Plaintiffs contended that since the residue could not be ascertained until administration had been fully completed and the proceeds ready for distribution, no allocation of any part of the estate could be made to any of the residuary legatees and the vested property should be returned to the fiduciaries for administration. The Government argued that an allocation had been affected by the licenses and the acceptance of the property by the British executors thereunder. Alternatively, it was argued that plaintiffs were not the proper parties to bring suit for return since they did not have an equitable interest in the property sought to be returned and that Section 9(a) grants relief only to those beneficially interested in the subject matter of an action under the Trading with the Enemy Act.

Plaintiffs further argued that if they were not entitled to a return in full the Attorney General should be permitted to retain property representing in value only four-tenths of the net residue of the American assets after deducting an allocable portion therefrom of all the expenses of administration (including British estate taxes). The Government argued that upon the death of decedent the enemy national obtained an undivided interest in the entire estate, that the vested property represented assets in which an enemy had an interest and that since Section 39 of the Act prohibited the return of enemy property to any German national, no portion of the vested property could be returned to the fiduciaries for distribution in violation of that section.

Staff: William H. Arkin (Office of Alien Property)

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ANTITRUST DIVISION

Acting Assistant Attorney General Robert A. Bicks

CLAYTON ACT

Acquisition of Competitor: Complaint Filed Under Section 7. United States v. National Steel Corporation, et al., (S. D. Texas). A civil antitrust complaint was filed on February 15, 1960, charging that the acquisition by National Steel Corporation's subsidiary of 75% of the capital stock of Metallic Building Company of Houston, Texas, violated Section 7 of the Clayton Act. Named as defendants in the complaint were National Steel Corporation of Pittsburgh, Pennsylvania, its subsidiary Stran-Steel Corporation of Detroit, Michigan, Metallic Building Company, and Charles R. McDaniel, Gilbert Leach, and Brinkley B. Brown, the sellers of the Metallic stock.

National, according to the complaint, is the fifth largest steel producer in the United States and with its subsidiaries and affiliates constitutes a fully integrated unit for the manufacture and sale of a diversified line of iron and steel products; its over-all net sales in 1958 were in excess of $500,000,000; as of December 31, 1958, its assets were about $680,000,000; its subsidiary, Stran-Steel, is one of the leading manufacturers of prefabricated metal buildings in the United States; and in 1958 Stran-Steel's sales of prefabricated metal buildings were in excess of $15,000,000.

The suit alleged that prior to the acquisition of 75% of its stock, Metallic had attained a leading position in the manufacture and sale of prefabricated metal buildings in the southwestern area of the United States. It was an independent manufacturer, not associated in any way with an integrated steel producer, and purchased its steel requirements on a competitive basis. In 1958 Metallic's total sales of prefabricated metal buildings were in excess of $7,000,000.

The complaint charged that the acquisition may have the effect of substantially lessening competition or creating a tendency to monopoly in the following ways, among others: (a) Actual and potential competition between Stran-Steel and Metallic in the production and sale of prefabricated metal buildings in the United States and in various sections thereof has been eliminated; (b) Metallic has been eliminated as an independent competitive factor in the production and sale of prefabricated metal buildings; (c) Industry concentration in the production and sale of prefabricated metal buildings has been increased; (d) Stran-Steel's competitive advantages over independent manufacturers of prefabricated metal buildings may be enhanced to the detriment of actual and potential competition; and (e) Steel producers in competition with National and its subsidiaries may be foreclosed from selling steel to Metallic to the detriment of actual and potential competition.

The complaint seeks rescission of the purchase agreement and additional forms of injunctive relief designed to eliminate the alleged anti-competitive effects.

Staff: Allen A. Dobey and John C. Fricano (Antitrust Division)

SHERMAN ACT

Price Fixing and Allocation of Bids: Indictments and Civil Suits Under Section 1. United States v. Westinghouse Electric Corporation, et al., (Cr. & Civ., E.D. Pa.), United States v. General Electric Company, et al., (Cr. & Civ., E.D. Pa.), United States v. I-T-E Circuit Breaker Company, et al., (Cr. & Civ., E.D. Pa.). Three indictments were returned on February 16, 1960 charging General Electric Company, Westinghouse Electric Corporation, Allis-Chalmers Manufacturing Company, I-T-E Circuit Breaker Company, Federal Pacific Electric Company, and eighteen individuals from these companies, with violations of the Sherman Antitrust Act in connection with the sale and distribution of various heavy electrical products.

The indictments involved (1) power switchgear assemblies, (2) oil and air circuit breakers, and (3) low voltage power circuit breakers--all are used in the generation, conversion, transmission and distribution of electric energy. These products are sold to various Federal, State and local governmental agencies throughout the United States as well as to electric utility companies and private concerns. Industry sales of these products, covered by the indictments, mount up to $209,000,000 each year.

The first indictment relating to power switchgear charges that at least as early as 1956, defendants conspired to fix and maintain prices, terms, and conditions for the sale of power switchgear assemblies; to allocate among themselves the business of supplying power switchgear assemblies to Federal, State, and local governmental agencies; to submit noncompetitive, collusive, and rigged bids for supplying power switchgear assemblies to electric utility companies, Federal, State, and local governmental agencies, private industrial corporations and contractors throughout the United States; to refrain from selling certain types of power switchgear assemblies or components thereof to other manufacturers of electrical equipment; and to raise the prices of certain types of components purchased by non-defendant manufacturers of electrical equipment for use by them in power switchgear assemblies to be sold in competition with defendant manufacturers, so as to eliminate and suppress competition from them.

The second indictment relating to oil and air circuit breakers charges that at least as early as 1951, defendants conspired to fix and maintain prices, terms and conditions for the sale of circuit breakers; to allocate among themselves the business of supplying circuit breakers to Federal, State, and local governmental agencies; to submit noncompetitive, collusive, and rigged bids for supplying circuit breakers to Federal, State and local governmental agencies; and to submit noncompetitive, collusive and rigged price quotations for supplying circuit breakers to electric utility companies.

According to the third indictment concerning low voltage power circuit breakers the defendants, at least as early as 1956, conspired to fix and maintain prices, terms, and conditions for the sale of low voltage power circuit breakers.

As a result of these alleged conspiracies, the indictments charge that price competition has been eliminated in the sale and distribution of these products, and that various governmental agencies "have been denied the right to receive competitive sealed bids" and "have been forced to pay high, artifically-fixed prices" for the products. Such agencies include Tennessee Valley Authority, U. S. Department of Interior, United States Army Corps of Engineers, United States Air Force, United States Navy, and General Services Administration.

Companion civil actions were also filed charging the defendant companies with violations of the Sherman Act, and seeking injunctive relief against the various practices alleged. The prayers for relief in these suits seek to require the companies to issue new price lists based upon costs independently arrived at, to submit affidavits of non-collusion with future bids to governmental agencies, and to prevent any communications among the defendants with respect to future bids and price quotations.

Staff: William L. Maher, Donald G. Balthis and
Morton M. Fine (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General George Cochran Doub

COURTS OF APPEALS

AGRICULTURAL MARKETING AGREEMENT ACT

Excess Shipment Made in Good-Faith Reliance on Advice of Counsel. United States v. Lo Bue Bros. (C.A. 9, December 21, 1959). This was a suit for civil forfeitures, under Section 8a(5) of the Agricultural Marketing Agreement Act of 1937, as amended, against handlers of oranges who were subject to a marketing order. Section 8c(14) of the Act provides criminal penalties for violations of marketing orders but excepts violations occurring after a petition for modification of or exemption from the order has been filed in good faith with the Secretary of Agriculture. Section 8a(5) permits the Government to recover a civil forfeiture from a person "willfully exceeding" a quota or allotment fixed for him under a marketing order. According to defendants' testimony, during the early part of April 1956 a quantity of oranges grown in their area, in excess of their shipping allotment, would have perished if it had not been shipped. Defendants were advised by their attorney that, if they filed a petition under Section 8c(15)(A), they would not be liable civilly or criminally for any excessive shipments made after filing. They airmailed a petition to the Secretary of Agriculture on Thursday, and, on the advice of the attorney that the petition would be filed on Friday, shipped in excess of their allotments on Saturday and Sunday. The attorney's advice as to when the petition would be received and filed by the Secretary was based on his previous experience in filing similar papers with the Department of Agriculture. However, defendants' petition was not in fact filed until Monday, after the excess shipments were made.

The district court dismissed the Government's complaint and the Court of Appeals affirmed. The appellate court expressly declined to decide whether the timely filing of a petition under Section 8c(15)(A) permits a handler to escape civil liability under Section 8a(5), as well as criminal liability under Section 8c(14). It held that in no event were defendants liable under Section 8a(5) because, having sought and relied on the reasonable opinion of competent counsel, they had not "willfully" exceeded their marketing allotment. This holding was based on a Supreme Court definition of "willfully" as referring to "conduct marked by careless disregard whether or not one has the right so to act." United States v. Illinois Central R.R., 303 U.S. 239, 242-243.

Staff: Neil Brooks, Assistant General Counsel, John S. Griffin, Donald A. Campbell, Attorneys (Department of Agriculture)

BANKRUPTCY

Administrative Expenses Incurred in Unsuccessful Chapter X Reorganization Proceeding. United States v. James C. Henderson, Trustee, et al. (C.A. 5, December 29, 1959). The Small Business Administration held a

mortgage on nearly all the tangible assets of Southwest Casket, the debtor in an unsuccessful reorganization proceeding under Chapter X of the Bankruptcy Act. At the end of this proceeding, the district court ordered certain administrative expenses incurred as a result of the attempted reorganization to be paid out of the mortgaged assets, "in the event the proceeds of the unencumbered assets are not sufficient to pay the claims." From this order the Government appealed, claiming that no part of the expenses could be charged against the assets subject to S.B.A.'s mortgage.

The Court of Appeals reversed, holding that the Government, despite its failure actively to oppose the reorganization, had not impliedly consented to have the costs of the proceeding charged against the property subject to its lien, and such administrative expenses, in the discretion of the district Court, may be ordered to be paid out of encumbered assets, but only to the extent that the expenses have benefited the mortgagee, or might reasonably be expected to benefit him. This holding was based on the conclusion that Section 246 of the Bankruptcy Act, 11 U.S.C. 646, continues the judicially-developed rule that administrative expenses incurred for the preservation and benefit of mortgaged property may be charged against that property, whether or not the secured creditor consents. Finally, the court rejected the Government's argument that the general provisions of the Bankruptcy Act, such as Section 246, do not apply to the United States unless it is specifically mentioned.

Since the record did not clearly reflect the extent to which the contested expenses were incurred for S.B.A.'s benefit, and since the discretion in charging them rested in the district court, the Court of Appeals remanded the case for further proceedings.

Staff: Morton Hollander (Civil Division)

FEDERAL TORT CLAIMS ACT

United States Held Liable for Contribution to Joint Tortfeasor Even Though Injured Party's Claim Against United States Was Barred by Statute of Limitations. Keleket X-Ray Corp. v. United States (C.A.D.C., January 28, 1960). Plaintiff sued Keleket and the United States to recover for injuries incurred during an X-ray examination made in a Government hospital. Her claim against the United States, filed two years and four days after it accrued, was dismissed as barred by the two-year limitation provision of the Tort Claims Act. 28 U.S.C. 2401(b). Keleket nevertheless filed a cross-claim against the United States for contribution. The district court also dismissed this claim, on the ground that, in the District of Columbia, a joint tortfeasor is not liable for contribution unless he is directly liable to the injured party. See United States Attorneys' Bulletin, Vol. 7, No. 14, p. 411.

The District of Columbia Circuit reversed the dismissal of Keleket's claim for contribution. It held, first, that this claim was not barred by limitations because it did not accrue before the injured party brought suit against Keleket, and second, that contribution may be obtained in the

District of Columbia notwithstanding the fact that the party against whom it is sought has a valid defense to the principal claim. If that party was liable to the injured party at some point of time, the right of contribution may arise.

Staff: United States Attorney Oliver Gasch; Assistant United States Attorney Lewis Carroll (D.D.C.)

Virginia Wrongful Death Statute; Satisfaction of Larger Judgment Against Joint Tortfeasor Releases Smaller Judgment Against United States. Walter H. Cook, et al. v. United States (C.A. 2, January 19, 1960). In 1949 decedent was killed when an Eastern Airlines plane in which she was a passenger was struck by a Bolivian military type plane, while both were attempting to land at Washington National Airport in Virginia. Decedent's executors brought two wrongful death actions in the District Court for the District of Connecticut. One, in which Eastern Airlines and the Bolivian pilot were named defendants, charged that negligence of both pilots was a contributing cause of the accident. The other - this action, in which the United States was sued under the Tort Claims Act - charged that negligence of Government employees in the control tower at the Airport was also a contributing cause.

By stipulation, the parties in both of these actions agreed to be bound by the determination of the issue of liability in certain test cases pending in the District of Columbia. These cases established liability of the United States under the Virginia wrongful death statute because the negligence of the Government employees occurred in that state, and liability of Eastern under the District of Columbia wrongful death statute because the negligence of Eastern's pilot occurred there. After these decisions, nothing but damages was left to be determined in the Connecticut cases.

Under the District of Columbia statute, damages are measured only by pecuniary loss sustained by the decedent's next of kin and are unrestricted in amount. In the action against Eastern, judgment was entered against the airline, pursuant to this statute, for $37,820. Under the Virginia statute, damages may include not only pecuniary loss sustained by the statutory beneficiary, but also compensation for loss of society and for mental anguish. At the time of the accident, however, Virginia imposed a $15,000 limitation on death recoveries. In the suit against the United States, judgment was entered for the $15,000 maximum.

Plaintiffs obtained full satisfaction of their judgment against Eastern. Under normal tort principles, this satisfaction from a joint tortfeasor would have released the United States as well. But plaintiffs sought to have the items of damage comprising the judgment against the Government separately listed, on the theory that payment by Eastern did not satisfy that portion of their judgment against the United States which was for consortium and solatium. On the district court's refusal to break down the $15,000 judgment in this fashion, plaintiffs appealed.

The Court of Appeals affirmed, 2-1. The majority held that the Virginia statute was intended to limit recovery to an absolute maximum of $15,000, and that, since plaintiffs had already received more than that amount, they were not in any event entitled to added compensation for loss of society and solatium. The dissent thought that plaintiffs were entitled to recover, from the United States, those items not recoverable under the District of Columbia statute.

Staff: Alan S. Rosenthal (Civil Division)

IMMUNITY OF GOVERNMENTAL OFFICERS

Statements by Federal Officials Sued for Libel Held Absolutely Privileged. George Preble v. J. B. Johnson, et al. (C.A. 10, January 15, 1960). Plaintiff was made director of a new maintenance control program on a Naval Base. The program was such that severe morale problems and personnel friction accompanied its effectuation. Plaintiff soon became convinced that his efforts were not receiving proper support from his superiors, and commenced an authorized grievance proceeding in the hope of improving this situation. Subsequently, as a result of the findings of a grievance committee appointed by the Base commanding officer, plaintiff was discharged.

He then brought separate suits against seven Base employees, alleging that each had made a libelous statement about him in the course of the grievance proceeding. Six of the defendants had made reports, which reflected upon plaintiff's fitness and efficiency in the discharge of his official duties, to civil service personnel authorized to investigate plaintiff's grievance. The seventh, who was the commanding officer, made his allegedly libelous statement in notifying plaintiff of his discharge. The district court granted summary judgment to each defendant on the ground that his statement was absolutely privileged.

In the Court of Appeals, where the cases were consolidated, the judgments were affirmed. Citing Howard v. Lyons, 360 U.S. 593, and noting at the outset that federal law governed the privilege issue, the Court held that in each case defendant had a "clear duty" to make his report or statement. Accordingly, it found the cases to be well within the standards for federal officials' immunity from liability for defamation which were recently laid down by the Supreme Court in Howard and in Barr v. Matteo, 360 U.S. 564.

Staff: United States Attorney Paul W. Cress; Assistant United States Attorney Leonard L. Ralston (N.D. Okla.)

JURISDICTION

State May Not Sue as Parens Patriae to Enforce Rights of Citizens in Their Relations With Federal Government. State of Minnesota ex rel. Miles Lord, Attorney General v. Ezra T. Benson, Secretary of Agriculture. (C.A. D.C. January 21, 1960). The State of Minnesota, on relation of her Attorney General, sued the Secretary of Agriculture and sought a declaratory judgment that a milk marketing order of the Secretary, regulating

the marketing of milk in the Mississippi Gulf Coast Marketing Area, was unlawful. Minnesota claimed standing to maintain the action on the ground that she is entitled to sue as parens patriae on behalf of her citizens and as representative of her dairy industry, allegedly adversely affected by the Secretary's order. She asserted no proprietary interest which is adversely affected, or any impact of the order upon her apart from her position as parens patriae. The district court granted the Secretary's motion to dismiss the complaint on the ground that Minnesota lacked standing to sue in that capacity.

The Court of Appeals affirmed on the authority of Massachusetts v. Mellon, 262 U.S. 447, and Florida v. Mellon, 273 U.S. 12, which held that states have no standing to enforce the rights of their citizens in respect of their relations with the Federal Government. In that area, only the United States may represent the citizens in the role of parens patriae.

Staff: Seymour Farber (Civil Division)

PRACTICE AND PROCEDURE

Extensively Amended Cross-Complaint Properly Dismissed for Failure to Comply with Rule 8(a) of F. R. Civ. P. Fred B. Collier, et al. v. First Michigan Cooperative Assn. and Federal Housing Administration, et al. (C.A. 6 February 4, 1960). In this action initiated between private parties, defendants in 1952 filed a cross-bill of complaint against the FHA and others. Between that date and 1956 they filed three extensive amendments to the cross-bill. After the last of these amendments was filed, the Government moved to dismiss for violation of F.R.C.P. 8(a), which requires a pleading to contain "a short and plain statement of the claim * * *." The district court granted this motion.

The Court of Appeals affirmed, noting that the cross-bill, as amended, was "prolix and muddled", that it had been difficult for the district judge to ascertain the cross-complainants' position which seemed to vary with each amendment, and that, therefore, the requirements of Rule 8(a) had not been met.

Staff: Arthur H. Fribourg (Civil Division)

SOCIAL SECURITY ACT

Adequacy of Evidence to Support Administrative Determination of failure to Establish Statutory Period of Disability. Dollie Kohrs v. Flemming (C.A. 8 December 18, 1959). Plaintiff applied to the Secretary of Health, Education and Welfare for a "disability freeze" under 42 U.S.C. 416(i) which establishes a "disability freeze," i.e., a period during which neither the time elapsed nor the low wages or complete lack thereof will be taken into account in determining insured status or the amount of benefits payable at the age of 65. In order to qualify, an applicant must show inability "to engage in any substantial gainful activity by reason of (a) medically determinable physical * * * impairment * * *."

After administrative denial of her claim, plaintiff brought an actic for review, pursuant to 42 U.S.C. 405(g). The district court affirmed the Secretary's action as supported by substantial evidence. It ruled that, although plaintiff had sustained a serious arm and shoulder injury which completely precluded use of that arm and left her with much pain, the injury had not resulted in the total disability required by the statutory formulation of "inability to engage in any substantial gainful activity."

The Court of Appeals reversed. Finding that the statute required total disability, it nevertheless determined that there was no substantial evidence to show that plaintiff had failed to meet this stringent standard. The court noted that plaintiff's left arm was held in a brace, completely useless, and was the source of continued, severe pain. Pointing to her lack of education and adaptable work experience, it ruled that she was unable to engage in any substantial gainful activity and thus was eligible for a "disability freeze."

Staff: United States Attorney William C. Spire; Assistant United States Attorney Thomas J. Skutt (D. Neb.)

DISTRICT COURTS

ADMIRALTY

Requests for Depositions under F.R.C.P. 30(a) Must Specifically Refer to Persons Sought to Be Examined; Production of Documents Cannot Be Compelled Through Direction in Notice of Depositions. Maxwell Shenker v. United States (E.D. N.Y. January 26, 1960). In an admiralty action for personal injuries sustained aboard a naval vessel, both libelant and the respondent-impleaded noticed the deposition of the respondent United States "by the Captain or other officer of the USNS LT. CRAIG familiar with the facts." The notices further directed the Government to produce, at the time of the deposition, "all papers, records and books concerning the matter."

Upon the Government's motion to vacate the notices, the Court held (1) that the Government like any other litigant, is subject to the Federal Rules of Civil Procedure and its discovery provisions (the applicable admiralty rules provided that the Federal Rules govern the taking of depositions in admiralty cases); (2) that the Government could be examined through the captain of the vessel as its "managing agent"; (3) that it could not be examined through any unnamed "other officer familiar with the facts," since F.R.C.P. 30(a) does not permit a party to require an adversary to determine the identify of the individuals to be examined; and (4) that the production of books and documents may not be compelled by a deposition notice.

Staff: Capt. Morris G. Duchin, USN (Civil Division)

FEDERAL TORT CLAIMS ACT

Claim for Erosion or Avulsion of Land Bordering Colorado River Allegedly Due to Government's Improvement of River Channel Held Within Discretionary Function Exception. Arthur E. Graham, a/k/a Bud E. Graham v. United States (D. Arizona November 27, 1959). In order to improve the power output of the Parker Dam, the Bureau of Reclamation, Department of Interior, caused a portion of the Colorado River to be dredged and river spoil to be placed on the California side of the river adjacent to the bank. The plans and specifications for the work were approved by the Secretary of Interior acting through one of his assistant secretaries.

Sloughing along the Arizona bank, which had previously occurred, continued to some extent after the dredging. Plaintiff, who owned land along the Arizona bank, sued for damages for erosion, sloughing and avulsion of its water-front land. He claimed that the dredging and placing of spoil had caused the river to flow against his property with greater velocity. The district court found that the dredging operation had actually reduced the velocity of the river flow and that the work had been done in a reasonable and prudent manner after careful planning; that the plaintiff had proved no negligence; that the act complained of resulted from the exercise of a discretionary function by the Department of Interior acting through an Assistant Secretary of Interior; and that the case therefore fell within the discretionary function exception of the Tort Claims Act, 28 U.S.C. 2680(a).

Staff: United States Attorney Jack D. H. Hays; Assistant United States Attorney William A. Holohan (D. Arizona); Irvin M. Gottlieb (Civil Division)

United States Held Not Liable for Explosion, on Portion of Naval Base Reserved for Maneuvers, Where Trespassers Had Adequate Notice of Dangerous Conditions. Maria Soto de Legrand and Miguel Angel Legrand v. United States (D. Puerto Rico, December 28, 1959). This suit was instituted to recover for the wrongful death of a 13-year-old boy, and for personal injuries suffered by his older brother, resulting from the detonation of an "explosive contrivance or device" on a naval reservation. Because of disruption to local economy (the reservation comprises 80% of the island), inhabitants were permitted to graze their cattle on the reservation, subject to the Navy's needs in conducting maneuvers. In August 1952, the boys' mother was officially apprised that permission to graze her cow in the area where the explosion occurred was withdrawn. Maneuvers were thereafter held on this portion of the reservation.

Subsequently, plaintiffs' cow escaped from its enclosed pasture. The brothers, accompanied by two companions, entered the maneuver area despite numerous posted signs indicating that trespassing was prohibited. The younger brother either kicked or stepped on the explosive object and the resulting explosion caused the death and injuries complained of.

The District Court dismissed the action, finding that the brothers were trespassing, that the Government was not negligent because of the extensive precautions taken, and that the younger brother's act was the proximate cause of the explosion.

Staff: United States Attorney Francisco A. Gil, Jr. (D. Puerto Rico)

COURT OF CLAIMS

FEDERAL TORT CLAIMS ACT

United States Held Not Liable for Injuries Sustained in Barroom Explosion Caused by Servicemen on Leave. Edward Gordon, et al. v. United States (Ct. Cls., January 20, 1960). At issue in this Congressional Reference case (see 28 U.S.C. 1492 and 2509) were plaintiffs' claims for injuries sustained from an intentional explosion of grenades in a New York City barroom by three members of the armed forces on leave. The servicemen, who entered the barroom in an intoxicated condition, had in their possession incendiary grenades manufactured for use by the armed forces. One of them, a marine, had apparently brought the grenades with him from his base in North Carolina, in violation of a specific Marine regulation. To show their dislike of the persons in the bar and the neighborhood, the servicemen deliberately exploded two grenades, causing severe injuries to plaintiffs and damage to the premises. Plaintiffs contended that the marine was acting within the "scope of his office or employment," within the meaning of the Tort Claims Act, in taking the grenades from his base; that the United States was negligent in permitting him to do so; and that this negligence was the proximate cause of their injuries. The Court rejected these contentions, and reported to Congress that plaintiffs had neither a legal nor an equitable claim against the United States.

Staff: Martin E. Rendelman (Civil Division)

GOVERNMENT EMPLOYEES

Dismissal of Prior District Court Suit for Reinstatement on Ground of Laches Does Not Bar Subsequent Suit for Salary in Court of Claims. Joseph F. O'Brien v. United States (Ct. Cls., January 20, 1960). Plaintiff brought suit in the District Court for the District of Columbia for reinstatement to his position as an attorney in the Department of Justice, claiming that he had been illegally removed. The District Court's dismissal was affirmed by the Court of Appeals, which held that the claim was barred by laches.

Plaintiff then instituted this suit for his salary, based on the same contention of illegal removal, in the Court of Claims. That Court denied the Government's motion to dismiss on the ground of estoppel by judgment. It stated that the factors determining the availability of the equitable defense of laches in the Court of Claims, in an action for salary, are different from those applicable in the district court in a suit for reinstatement. Accordingly, the prior judgment was held not to bar this suit.

Staff: Edward L. Metzler (Civil Division)

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CIVIL RIGHTS DIVISION

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

Arrangement Between United States and Maine to House State Prisoners in Federal Penitentiary Challenged by Maine Prisoner. Thomas Pratt v. Charles R. Hagan, Warden, United States Penitentiary, Lewisburg, Pennsylvania (C.A. 3, January 29, 1960). Petitioner was confined in the Lewisburg penitentiary pursuant to an agreement between the United States and the State of Maine dated April 17, 1957. This agreement had for its statutory authority the Act of May 9, 1952, 18 U.S.C. 5003, which authorized the Attorney General to accept state prisoners as boarders in federal penitentiaries; and Chapter 27 of the Revised Statutes of Maine, section 32-A (1957 Cum. Supp.), which gave the Commissioner of Institutional Service the power to transfer Maine prisoners to federal penitentiaries.

Petitioner challenged his confinement in the penitentiary at Lewisburg on the grounds that his transfer was conducted in an illegal and unconstitutional manner and that his confinement in a federal penitentiary was unconstitutional since he had not been convicted of a crime against the United States. The United States District Court for the Middle District of Pennsylvania denied his petition for writ of habeas corpus, stating in its opinion that the Act of May 9, 1952, constituted no invasion of the rights of state prisoners and was not unconstitutional.

The Third Circuit noted in its per curiam opinion affirming the District Court's decision that petitioner had not exhausted his state remedies and stated that this alone was sufficient to require affirmance.

Staff: United States Attorney Daniel H. Jenkins (M.D. Pa.); Harold H. Greene and Gerald P. Choppin, Attorneys, Department of Justice. George A. Wathen, Assistant Attorney General of the State of Maine, was of counsel.

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CRIMINAL DIVISION

Assistant Attorney General Malcolm R. Wilkey

MEMORANDUM OF UNDERSTANDING

Between Attorney General and Secretary of Defense; Violations of Federal Law by Military Personnel; Prosecution. United States v. Alton Ray Love (W.D. Ky.). Pursuant to the "Memorandum of Understanding" entered into between the Attorney General and Secretary of Defense in 1955, the Federal Bureau of Investigation conducted an investigation into a shortage of $5,665.70 in the Ration Breakdown Funds of the 6th Armored Cavalry Regiment at Fort Knox, Kentucky. The investigation, involving only military personnel, led to the prosecution under 18 U.S.C. 641 of Sergeant Alton Ray Love. The defendant, upon a plea of guilty to all counts of the information, was sentenced to serve a period of 3 years, 2 1/2 of which was suspended with the defendant placed on probation for that period upon his release from confinement.

FRAUD

False Statements; Conspiracy. United States v. Charles Emil Kinsing and John F. Sherwood (W.D. Pa.). A three-count indictment was returned against the defendants on December 7, 1959. The first two counts charged Kinsing with making false statements to the Civil Aeronautics Administration (18 U.S.C. 1001) and the third count charged both defendants with conspiracy (18 U.S.C. 371). The indictment grew out of the activities of Kinsing, a Radio Corporation of America employee who was representing the Civil Aeronautics Administration in the negotiation of a contract for the removal of trees from a tract of 4.8 acres for a price of $1,490, and in the representations to the Civil Aeronautics Administration that the work had been performed by the contractor. Investigation disclosed that only 1.6 acres were cleared, and that the subcontractor, Sherwood, received $840 of the $1,490 and paid $150 to the persons actually performing the services.

Staff: United States Attorney Hubert I. Teitelbaum; Assistant United States Attorney John F. Potter (W.D. Pa.)

Federal Housing Administration; Home Modernization Frauds; Kickbacks. Kem Home Improvement Corporation, et al. (E.D. N.Y.). Twenty-four individuals were recently arrested by FBI Agents and arraigned before the United States Commissioner in Brooklyn, in connection with false statements in applications for loans under the Federal Housing Administration home improvement program.

The alleged fraud involves approximately $4,000,000 in insured loans. Those arrested including Nathan Harold Schickler, president of Kem Home Improvement Corporation, Freeport, Long Island, New York, nineteen salesmen and four real estate operators, engaged in an operation of selling home

improvements. The principal scheme was to promise to home owners cash kickbacks as inducements for signing the loan documents. The kickbacks approximated $1,300,000, and were added to the cost of the improvements. Thus, the amounts of the loans were inflated and false information was submitted in connection with the loans.

The real estate operators participated in the scheme by falsifying credit information as to existing mortgage indebtednesses of the home owners, particularly where the debt burdens were heavy. Already over $500,000 of these loans have been defaulted.

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

False Statements in Payroll Affidavits Submitted Under Davis-Bacon Act. United States v. August Annicchiarico (D. N.J.) On November 25, 1959, an indictment in three counts was returned against August Annicchiarico charging him with violation of 18 U.S.C. 1001. Defendant was a subcontractor on a Navy contract, which was subject to the provisions of the Davis-Bacon Act (40 U.S.C. 276a). Certified payrolls submitted in accordance with the Act indicated that four employees had been paid $2.60 per hour whereas in fact they had only received $1.75 per hour. The investigation indicated that defendant knew the proper rate, since the payroll and pay envelopes indicated this rate, and three employees had been paid the proper amount. Defendant has entered a plea of not guilty.

Staff: United States Attorney Chester A. Weidenburner; Assistant United States Attorney Frederic C. Ritger, Jr. (D. N.J.)

MAIL FRAUD

Advance Fee Swindles. United States v. Frank Edward Siemens (D. Idaho); United States v. Raymond Effinger, (S.D. Ind.); United States v. Garford E. Pinson, (D. Ariz.); United States v. Max Tauchner, et al, (N.D. Ga.) Three different variations of the advance fee racket have culminated in mail fraud convictions in as many districts. In the District of Idaho after a five day trial a jury found Frank E. Siemens guilty of two counts of mail fraud in operation of a scheme by which he obtained advance fees totalling $19,000 from several groups of church members on the basis of false representations that he could obtain mortgage loans for the building of their churches. Ministers of six Idaho church groups which had been defrauded testified for the Government as well as six bankers who testified that no arrangements had been made with their institutions for procurement of loans.

In the Southern District of Indiana Raymond T. Effinger, indicted with Saul E. Weisstein for mail fraud in their operation of Business Sales Agencies and Associates, changed his plea to guilty. Weisstein, reported seriously ill, has not yet been arraigned. The scheme charged was the

original version of the advance fee swindle, featuring the obtaining of substantial payments in advance from businessmen for purported services in selling their enterprises on false representations that buyers were immediately available and that the fees would be refunded if the sales were not consummated.

In the February 12, 1960, issue, there was reported the arrest of Garford E. Pinson, based on a complaint charging him with mail fraud in his operation styled Kon-Tax and Associates, Phoenix, Arizona. In Pinson's scheme advance fees were reportedly obtained from businessmen in need of additional capital on the representation that loans to suit their needs were readily obtainable; that the fees would be refunded less certain expenses, if the loan was not obtained; and that the victim's check would not be cashed until the loan had been secured. The checks, of course, were promptly negotiated and the loans were not forthcoming. Pinson's reported variation of the "loans-for-business" scheme also featured the obtaining of additional non-refundable "service fees" from the victim. Pinson entered a plea of guilty to an information charging him with use of the mails in operation of this scheme and has been sentenced to five years' imprisonment on each of six counts, service of the sentences to be concurrent.

A 16-count indictment was returned on February 16, 1960, charging Max Tauchner, President of Trade Consultants of America, Inc., and Money Finders of America, Inc., as well as both corporations and nine other defendants with mail fraud in a scheme for securing advance fees on false representations concerning services to be rendered in negotiating sales of business enterprises, and in other instances loans for their operation. Further reports of this case, a nationwide operation reported to have netted $500,000 in advance fees, will be made.

Staff: United States Attorney Kenneth G. Bergquist (D. Idaho); United States Attorney Don A. Tabbert (S.D. Ind.); United States Attorney Jack D. H. Hays (D. Ariz.); United States Attorney Charles D. Read, Jr. and Assistant United States Attorney John W. Stokes, Jr. (N.D. Ga.).

SECURITIES EXCHANGE ACT - CONSPIRACY

Failure to File Information Concerning Stock Transactions. United States v. Alexander Guterma, Robert J. Eveleigh, F. L. Jacobs Company, Comficor Inc., and Chatham Corporation. On March 16, 1959, the Federal Grand Jury in the Southern District of New York returned a twenty-one count indictment charging the above subjects with substantive violations of the Securities Exchange Act of 1934 and one count of conspiracy to violate the Act. The substantive counts related to the failure to file with the Securities Exchange Commission and the New York Stock Exchange information concerning certain stock transactions. Prior to trial, the F. L. Jacobs Company entered a plea of guilty. After an extended trial the other

defendants were found guilty. Alexander Guterma was sentenced to four years and eleven months in prison and fined $160,000 on February 17, 1960. Robert Eveleigh received a sentence of two years and eleven months and a $10,000 fine. Comficor Inc. and Chatham Corporation were fined $120,000 and $10,000, respectively. The F. L. Jacobs Company has not yet been sentenced.

Staff: Assistant United States Attorneys Jerome J. Londin, Leonard Glass and David Bicks (S.D. N.Y.)

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Joseph M. Swing

DEPORTATION

Hong Kong a Country Within Meaning of Deportation Provisions of Immigration and Nationality Act. Peter Ying and Wong Chai Liang v. Rogers. (D.C.D.C., February 10, 1960). This was an action for a declaratory judgment. Plaintiffs, nationals and citizens of China, entered the United States as nonimmigrant crewmen and overstayed their authorized time resulting in an administrative order of deportation. They contended that the warrants of deportation were defective for not stating the place to which they were to be deported and that the place to which they were to be sent, Hong Kong, was not a country within the meaning of the Immigration and Nationality Act. Questions of law being the only issues to be resolved, defendant moved for summary judgment and plaintiffs likewise so moved.

Upon the first point the Court said it had been conceded that each plaintiff had received formal notice that his deportation had been directed to Hong Kong. The fact that the warrant of deportation itself did not specify that place but directed deportation only "pursuant to law" had not prejudiced the plaintiffs.

On the point the Court observed that among the countries to which aliens may be deported pursuant to the Immigration and Nationality Act (8 U.S.C.A. 1253) is the "country from which such alien last entered the United States". Though the Act does not define the word "country", plaintiffs entered from Hong Kong, a British Crown Colony, where they had resided for years. Moreover, the British authorities there advised that consent had been granted for the acceptance of plaintiffs as deportees.

Plaintiffs supported their claim that Hong Kong is not a country within the meaning of the Act by citing Cheng Fu Sheng v. Rogers, 177 F. Supp. 281, D.C.D.C. (See Bulletin, Vol. 7, No. 22, p. 623). Plaintiffs in that case also were natives and citizens of China under orders of deportation to Formosa, the Government in charge of that island having indicated its willingness to receive them. In that case the court found that although the United States recognizes the Government of the Republic of China (Nationalist) as the legal Government of China which exercises authority over Formosa, the Department of State does not regard Formosa as part of China as a country. Therefore the plaintiffs could not be deported to Formosa.

In the instant case, the Court dismissed the Sheng ruling as not being persuasive. The court pointed out that statutes should be construed, if possible, so as to effectuate the purpose intended and to avoid absurd consequences. Delany v. Moraitis (C.A. 4) 136 F. 2d 129, 131. Where language can be construed so as to preserve the usefulness of the statute, it is the judicial duty to give expression to the intendment of the law. Armstrong Co. v. Nu-Enamel Corp., 305 U.S. 315, 333. United States v. American Trucking

Association, 310 U.S. 534, 543. If Hong Kong is a "country" within the meaning of the applicable immigration statute, the proposed deportation may be carried out. Citing a definition of the word "country" by the Supreme Court in Burnet v. Chicago Portrait Co., 285 U.S. 1 (1932) and applying its rationale to the case at bar, the Court concluded that Hong Kong is a country within the meaning of the Act and that plaintiffs may be deported to that place.

Accordingly, motion of defendant for summary judgment was granted and motion of plaintiffs for summary judgment was denied.

Staff: Assistant United States Attorney Robert J. Asman (Dist. Col.) (United States Attorney Oliver Gasch, Assistant United States Attorneys Edward P. Troxell and John F. Doyle on the brief).

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INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Conspiracy to File False Non-Communist Affidavits: Production of Documents under 18 U.S.C. 3500. West, et al. v. United States (C.A. 6, February 15, 1960). James West, the Communist Party chairman for Ohio, Fred Haug, Marie Reed Haug and five others were indicted under 18 U.S.C. 371 and 18 U.S.C. 1001 for conspiracy to have the Haugs, who were officers of local labor unions, file non-Communist affidavits while retaining concealed membership in the Communist Party. The Haugs made and filed the affidavits, while West and the others participated by maintaining "Party contact" with the Haugs, transmitting instructions, collecting dues and contributions, etc. All of the defendants were officers or functionaries of the Party in Ohio. As to one defendant, the indictment was dismissed during the trial. The jury returned a verdict of guilty as to the other seven (see United States Attorneys Bulletin, Vol. 4, No. 4), and the Court of Appeals affirmed in a per curiam opinion. The appeal covered a wide range of questions: whether there was substantial evidence to sustain the verdict as to each defendant; whether the "two witness" rule applied in prosecutions under Section 1001; whether the district court had properly applied 18 U.S.C. 3500 in ordering the production of statements of Government witnesses, and in excising portions of them before delivering them to defense counsel; whether a new trial should be granted on the ground of perjury by a Government witness (see United States Attorneys Bulletin, Vol. 7, No. 6); and whether the indictment infringed rights of the defendants under the First and Fifth Amendments. The Court of Appeals approved as to practically all of these points the opinion of the district judge denying the motion for a new trial. See, United States v. West, 170 F. Supp. 200 (N.D. Ohio).

Staff: The appeal was argued by George B. Searls and Bruno A. Ristau (Internal Security Division) With them on the brief were Russell Ake (United States Attorney, N.D. Ohio), Jerome L. Avedon and Doris H. Spangenburg (Internal Security Division)

Contempt of Congress. United States v. Donald Wheeldin (S.D. Cal.) On February 9, 1960, Judge Ernest A. Tolin sentenced Donald Wheeldin to 30 days in jail and a fine of $100 for contempt of Congress. On December 10, 1959, Judge Tolin, sitting without a jury, found Wheeldin guilty of contempt for knowingly and willfully failing to respond to a subpoena of the House Committee on Un-American Activities (See Bulletin, Vol. 7, No. 26, p. 732). Stay of execution of the sentence was granted to defendant until February 23, 1960.

Staff: Assistant United States Attorney Leila Bulgrin (S.D. Cal.)

Contempt of Congress. United States v. Paul Rosenkrantz (D. Mass.). On February 3, 1960, Judge Charles E. Wyzanski sentenced Paul Rosenkrantz, a former functionary of the Communist Party in New England, to three months in jail for contempt of Congress. Following Judge Wyzanski's acceptance of a plea of nolo contendere in this case on December 9, 1959 (See Bulletin, Vol. 7, No. 26, p. 730), sentencing was deferred to give Rosenkrantz an opportunity to purge himself of the contempt.

Staff: Assistant United States Attorney George H. Lewald (D. Mass.)

Suits Against the Government. Paul Mark Patterson v. Boyd Leedom, et al. (D. D.C.) Plaintiff was removed on July 15, 1954, under the security procedures of Executive Order 10450, from his then non-sensitive position of Field Examiner, National Labor Relations Board. He brought suit on July 21, 1959, contending that his removal was unauthorized because the security procedures were improperly extended to cover his non-sensitive employment and demanding that an order be entered declaring his separation invalid and ordering his reinstatement to his former position, citing Cole v. Young and Duncan v. Summerfield. Defendants asserted the affirmative defense of laches. On December 23, 1959, plaintiff moved the District Court to enter an order directing his reinstatement to the title, grade and position from which he was suspended and separated upon the condition that his claim to back pay for the period of his suspension and separation to the date of his reinstatement be denied and that he be enjoined, restrained and prohibited from filing any futher claim for such back pay with any agency or tribunal, citing Cepeda v. Summerfield (D. D.C.) as precedent for the disposition of his case. Inasmuch as such a solution would cause no disruption to the service and since the injunction would protect the Government from monetary detriment of over $9,000 upon reinstatement, defendants consented to the granting of plaintiff's motion. Accordingly, the Court entered an Order on December 29, 1959, ordering plaintiff's reinstatement upon the terms and conditions contained in the consent motion.

Staff: Benjamin C. Flannagan and Homer H. Kirby
(Internal Security Division)

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TAX DIVISION

Assistant Attorney General Charles K. Rice

CRIMINAL TAX MATTER
Appellate Decision

Confession of Error Because of False Testimony by Important Government Witness. Linger v. United States (C. A. 6, February 4, 1960). The Court of Appeals reversed appellant's conviction on three counts of wilfully attempting to evade his individual income taxes and remanded the cause for a new trial "on motion of the Government and its confession of error." Appellant, in addition to a substantial salary, received a 5% commission from his employer on all sales made to the Firestone Tire and Rubber Co. The commissions were paid over to two fake partnerships organized by appellant, deposited in the partnership bank accounts and finally (after the payment of income taxes on the commissions by the ostensible partners) turned over to appellant in the form of $10 and $20 bills. Appellant, testifying in his own defense at the trial, admitted receipt of the money and failure to report it on his tax returns, but claimed that he had turned all but $8,000 of the currency over to Firestone's head purchasing agent at the particular plant, Harold G. Kellogg--who consistently bought the entire output of appellant's employer--pursuant to a secret agreement between himself and Kellogg; and that the other $8,000 was invested on behalf of Kellogg in a corporation known as Indiana Stamping. Kellogg, testifying as the Government's rebuttal witness, denied that he had ever received any of the commissions from appellant; or that he had ever owned--directly or indirectly--any interest in Indiana Stamping; or that he had received any income during 1951 which was not reported on his income tax return for that year.

In the course of an exhaustive investigation of Kellogg's financial affairs by Treasury agents subsequent to appellant's trial it was learned that the above testimony by Kellogg was false. Kellogg had received substantial unreported income in 1951 from another Firestone supplier, under circumstances similar to those described by appellant at his trial (i.e., under an arrangement whereby the funds were to come into Kellogg's hands with the income tax prepaid). Kellogg had owned (in the name of his brother-in-law) a substantial interest in Indiana Stamping, which--taken together with other evidence--showed almost conclusively that he had received at least a part of the commissions he had denied receiving. The Department concluded that, in the circumstances, it was impossible to assess the impact of Kellogg's false testimony upon the jury and that the Government was required to confess error and move for a new trial in the light of Mesarosh v. United States, 352 U. S. 1, 9-12 and Communist Party v. Control Board, 351 U.S. 115, 124.

Staff: United States Attorney Hugh K. Martin, Assistant United States Attorney Thomas S. Schattenfield (S.D. Ohio); Richard B. Buhrman (Tax Division)

CIVIL TAX MATTERS
District Court Decisions

State Statute of Limitations; Fraudulent Conveyance. United States v. Joseph Anderson Schofield, III, et al. (Taxpayer: Lemuel B. Schofield, deceased.) (E.D. Pa., December 23, 1959). Under the will of his mother taxpayer had a lifetime estate in a farm known as Anderson Place, the remainderman being taxpayer's son. For the period 1947 until his death in July, 1955, taxpayer failed to file returns or pay any federal income taxes. During that period he expended sums amounting to approximately $100,000 for buildings and other improvements of a capital nature to the farm. In August, 1955, jeopardy assessments of income taxes, fraud penalties and other penalties and interest were made against taxpayer in a total of approximately $900,000. Taxpayer's estate was less than $300,000 and insufficient to satisfy the tax claim.

Since the assessments were made after taxpayer's death, the tax lien did not attach to the farm then in the hands of the remainderman. This suit was instituted on July 2, 1956, on the theory that the expenditures made by the taxpayer on the farm improvements at a time when he was not paying his tax liabilities and allegedly was insolvent constituted a "fraudulent conveyance" as to the United States, both under the common law and under the Pennsylvania Uniform Fraudulent Conveyance Act (39 Purdon's Pa. Statutes, Sections 351-363). In this action the Government seeks to have the value of the improvements in question subjected to the payment of the tax claim, and to subject the farm property, or the proceeds of its sale, to the tax lien.

Among other developments since the suit was filed, defendants filed a motion for summary judgment, primarily on the grounds (1) that the Pennsylvania Statute of Repose (12 Purdon's statutes, Sec. 83) is a bar to recovery for all claims arising out of sums expended by the taxpayer prior to July 2, 1951 (which date was five years prior to the institution of this action); and (2) that the federal tax liabilities here involved cannot be taken into consideration in determining whether the taxpayer was insolvent at the time the expenditures were made by him. It is reported that approximately three-fourths or more of the improvements were made prior to July 2, 1951.

In a decree on the summary judgment, entered on December 23, 1959, the Court held that the Pennsylvania Statute of Repose bars recovery for all claims arising out of expenditures made prior to July 2, 1951, but denied defendant's motion in all other respects. In a memorandum entered separately from the decree, the Court stated that in view of the ruling on the first ground, it might not be necessary to rule on the insolvency question, since defendants may concede insolvency as of July 2, 1951.

The question of appeal from this decree is now under consideration.

Staff: United States Attorney Walter E. Alessandroni and Assistant United States Attorney Richard Reifsnyder (E.D. Pa.); Mamie S. Price (Tax Division)

Liens; Party Other Than Taxpayer, Cannot Contest Federal Tax Assessments. Paul Pipola and Julia Pipola v. Mae Chicco, United States, et al. (S.D. N.Y., Jan. 6, 1960). After notice of federal tax lien, based upon assessed wagering taxes had been filed, taxpayer sold real estate to plaintiffs. Plaintiffs brought quiet title action and asserted that through inadvertence their title search failed to disclose the recorded federal tax lien, and that plaintiffs had relied upon taxpayer's affidavit stating that the property was free and clear of all liens and encumbrances. Plaintiffs further contended that the taxpayer was not subject to the wagering tax and hence the Commissioner was without jurisdiction to impose the tax.

The Court held that, in an action brought pursuant to 28 U.S.C. 2410, a third party could not contest a federal tax assessment; that even so the assessments were based upon substantial evidence that taxpayer was engaged in the occupation of wagering; that the federal lien on the subject real estate is valid as against plaintiffs' claim as a purchaser, but subordinate to a portion of a mortgage lien held by another party. Plaintiffs' complaint was dismissed with prejudice and costs and the United States was granted a judgment of foreclosure of its lien on its counterclaim and cross-claim.

Staff: United States Attorney Arthur H. Christy,
Assistant United States Attorney William F. Suglia
(S.D. N.Y.)
Alben E. Carpens (Tax Division)

Bankruptcy: Priority of Taxes; Priority of Lien for Taxes on Property Seized Prior to Bankruptcy by Government. In the Matter of Eden Equipment Corporation (S.D. N.Y., 60-1 U.S.T.C., par. 9149.) Federal taxes were assessed and notices of liens were filed on November 21, 1958, and August 12, 1959. On January 14, 1959, a judgment was recovered against the alleged bankrupt. An execution was delivered to the Marshal who seized certain assets. However, pursuant to an arrangement with the alleged bankrupt, the Marshal released his levy and accepted installment payments in consideration thereof. On August 31, 1959, taxpayer made an assignment for the benefit of creditors. The assignee took possession of the assets of the alleged bankrupt. On September 2, 1959, a seizure of the assets of the alleged bankrupt located at its place of business was made by the Internal Revenue Service pursuant to Section 6331 of the Internal Revenue Code of 1954. An involuntary petition in bankruptcy was thereafter filed on September 3, 1959.

The receiver moved for a show cause order directing that the property of the alleged bankrupt be turned over to him for the purpose of sale and for a further order transferring the liens, if any, of a judgment creditor and the Director of Internal Revenue to the proceeds of sale pending a further determination of the court as to the validity of the liens. The receiver contended under Section 2(a)(21) of the Bankruptcy Act that the Court had authority to order delivery of property to him. The court

pointed out that under this section the bankruptcy court could only compel the delivery by third parties to the receiver of property in the possession or under the control of the third parties. Thus, the Court could not order the assignee for the benefit of creditors to turn over the property as he had already lost possession and control of the assets to the United States.

The receiver also relied on Section 67(c) of the Bankruptcy Act asserting that "although the Director's lien may be valid as against the assignee for the benefit of creditors, said lien is invalid as against the receiver herein under Section 67(c) of the Bankruptcy Act." The receiver contended that "where the United States has failed to hold a sale prior to a petition in bankruptcy and has failed to acquire property of the assets of the alleged bankrupt prior to the petition in bankruptcy, that said lien is subordinate to administration claims and wage claims." The Court pointed out that the receiver's reliance was in error because (1) the receiver is not a trustee in bankruptcy and (2) the United States did acquire possession of the personal property by actual seizure before the involuntary petition. The receiver's motion was thus denied.

Staff: United States Attorney S. Hazard Gillespie, Jr., and Assistant United States Attorney Paul L. Meaders (S.D. N.Y.)

State Court Decision

Federal Tax Liens; Effect of Service of Notice of Levy. Glenn O. Lee v. Ernest W. Mack and Helen R. Legg. Supreme Court, Tompkins County, New York. 182 N.Y.S. (2d) 391 (1959). This is an action brought by Lee against defendants Mack and Legg for amounts due for work, labor, services, and materials furnished in connection with repairs to real property. Defendants asserted as an affirmative defense that because they had been served with a Notice of Levy notifying them of taxes assessed against Lee in excess of the amount owed by them to him and demanding that they discharge their obligation to Lee by payment of the amount owed to the District Director of Internal Revenue, the United States had seized the debt and acquired full title and ownership of the plaintiff's claim so that plaintiff is neither the real party in interest nor possessed of the capacity to sue on the claims. The Court granted plaintiff's motion to strike this affirmative defense. It was held that although the existence of the tax lien could serve to make the Government a proper party to the action, it does not assign or transfer ipso facto to the United States the plaintiff's recognized property interests in the alleged debt or to the right of action thereon. The Court refers to the service of a Notice of Tax Lien but, from the context of the opinion, obviously refers to a Notice of Levy since reference is made to a Final Demand and the directions contained in a Notice of Levy demanding payment. It is to be noted that the Court in its opinion refers only to the effect of the "lien's existence," and none of the cases cited by it deal with the particular issue involved here. It is also to be noted

that the Court does not mention United States v. Eiland 223 F. 2d 118 (C.A. 4, 1955) in which Chief Judge Parker states (at p. 121) "the service of such notice (of levy) results in what is virtually a transfer to the government of the indebtedness, or the amount thereof necessary to pay the tax..." and (at p. 123) "...indebtedness which has been levied upon with notice to the debtor... is to all intents and purposes assigned to the United States." For authority to the effect that the creation of a tax lien with subsequent service of notice of levy on the taxpayer's debtor in effect operates as an assignment or transfer of the debt to the United States permitting it to bring an action against the taxpayer's debtor, see United States v. Jacobs 155 F. Supp. 182 (D. N.J., 1958) and United States v. Metropolitan Life Insurance Company, 256 F. 2d 17 (C.A. 4, 1958). If the decision is interpreted as holding that the Government, through seizure of a debt under notice of levy does not acquire the right to bring an action on the debt (to the extent of the tax liability) in its own behalf, it is clearly against the weight of authority.

Staff: United States Attorney Theodore F. Bowes (N.D. N.Y.); Harrison B. McCawley, Jr. (Tax Division)

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