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BULLETIN

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JOB WELL DONE

Assistant United States Attorney Joseph S. Mitchell, Jr., District of Massachusetts, has been commended by the General Counsel, SEC, for the splendid job he has done on cases referred by the Commission. The letter stated that the Commission was extremely pleased with the fine result obtained by Mr. Mitchell in a recent case on appeal, and that the decision in this case will contribute greatly to the effective enforcement of the Federal securities laws throughout the country.

The Investigator in Charge, IRS, has commended Assistant United States Attorney Michael Lacagnina, District of Arizona, for the splendid job he did in a recent case involving two counts of transportation of stolen firearms in foreign commerce. The letter stated that it was a very difficult case to prosecute as most of the evidence was circumstantial, but that Mr. Lacagnina won a conviction on both counts of the indictment. The Investigator in Charge stated that in his twenty-two years of enforcement and investigative work he had never seen a better presentation of a case.

The Director of Personnel of the Office of the Chief of Engineers, Department of the Army, has commended United States Attorney Hartwell Davis and Assistant United States Attorney Paul L. Millirons, Middle District of Alabama, for their diligent efforts in the preparation and presentation of condemnation cases relating to the Walter F. George Lock and Dam Project in Alabama.

The Chief of Engineers, Department of the Army, has expressed appreciation for the outstanding performance of, among others, United States Attorney Donald G. Brotzman and Assistant United States Attorney H. Lawrence Hinkley, District of Colorado; United States Attorney William C. Spire and Assistant United States Attorney Guy Birch, District of Nebraska; United States Attorney Wilbur Leonard, District of Kansas; and United States Attorney John F. Raper, Jr., and Assistant United States Attorney Alfred G. Kaufman, Jr., District of Wyoming in connection with the prompt acquisition of rights of entry for the construction of a high priority communication cable line project extending through Kansas, Colorado, Wyoming and Nebraska.

United States Attorney Rowland K. Hazard, District of the Canal Zone, has been commended by the Acting Magistrate at Cristobal, Canal Zone, for successfully defending the Magistrate in a recent mandamus action. The letter stated that Mr. Hazard's "able handling" of the case established "an important legal precedent" which in the opinion of the Magistrate would "greatly aid the Magistrate's courts of both our subdivisions in the orderly handling of their civil and criminal matters."

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ANTITRUST DIVISION

Assistant Attorney General Robert A. Bicks

Government Required to Turn Over Grand Jury Transcript. United States v. The Procter & Gamble Co., (D. N.J.). On September 22, 1960 Judge Richard Hartshorne rendered a decision on the issue of grand jury "abuse" which has been pending for some time. Judge Hartshorne found that the Department did "abuse" the grand jury and will order that the transcript of testimony taken by the grand jury be turned over to the defendants.

The court stated that prior to the decision in United States v. Procter & Gamble, 356 U. S. 677, the Department believed that it could use grand juries to gain evidence solely for civil cases. The court thought that three hypothetical situations were possible: (1) the Department might have intended to seek an indictment because its prior investigation indicated an indictment was appropriate and, if so, there would be no abuse; (2) the Department could have had an "open mind" depending upon the evidence produced, and, if so, there was no abuse; (3) the Department could have intended to seek a civil remedy only because its previous investigation indicated that only a civil remedy would be appropriate, and, if so, there would be an abuse. The court further stated that if the sole intent and desire, not to say expectation, was that a civil remedy should eventuate with evidence calling for an indictment as merely an "unexpected bare possibility," then a misuse of the grand jury would occur.

The court thought that more credence must be given to evidence contained in contemporaneous writings than is given to current testimony. With this in mind the court found that memoranda of former members of the Antitrust Division, written at the time, show that the Department had the same intent in the beginning of the grand jury as it had at the end; that this intent was to have a civil case only. He stated that all the entire Department intended, expected and desired when it impanelled the grand jury was to obtain such testimony as would justify divestiture or dissolution. The court also based its opinion on the fact that this is a monopolization case and that it was apparently the policy of the Department to proceed civilly against monopolies.

The court held that it is the actual misuse of the grand jury and not an undisclosed and unacted upon intent which constitutes subversion.

The court denied the motion to impound and suppress the evidence, holding that this would completely frustrate the intent of Congress in enacting the Sherman Act. The opinion indicates, however, that if a misuse of a grand jury were to occur at the present time (subsequent to the Supreme Court's opinion in the Procter & Gamble Case), he believed more stringent relief than turning over the grand jury transcript might be appropriate.

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

Indictment and Complaint Filed Under Section 1 of the Sherman Act. United States v. Cornell-Dubilier Electric Corporation, et al., (E.D. Pa.) An indictment was returned at Philadelphia on September 15, charging six manufacturers of electrical equipment with violations of the Sherman Act in connection with the sale of electrical devices called "power capacitors." These devices, which are used to correct voltage fluctuations and thereby assist in the efficient transmission and distribution of electrical energy, are sold by the defendants to electric utility companies, other electrical manufacturers, industrial companies, and to governmental agencies. Total yearly sales of power capacitors by the defendants amount to approximately $24,000,000.

Defendants are charged with conspiring, at least as early as 1958, and continuing thereafter until about October 1959, to restrain commerce in power capacitors by fixing and maintaining prices, terms and conditions for the sale of such products, and by quoting to electric utilities and public agencies, in submitting bids and quotations to such customers, only the prices for power capacitors as agreed upon.

The indictment sets forth some of the actions taken by the defendants to carry out the alleged conspiracy. For example, the indictment describes various meetings held by defendants, including meetings in Chicago, Illinois; Pittsburgh, Pennsylvania; and Atlantic City, New Jersey, at which they agreed to increase prices for power capacitors. Further, it is alleged that representatives of the defendants have discussed and agreed upon discounts from the published prices to be allowed specific customers; discussed and agreed upon rules to be used in pricing power capacitors; and discussed and agreed upon prices for new types of power capacitors before they published such prices or marketed such products.

A companion civil action was also filed today against the same companies seeking injunctive relief against the practices alleged. The prayer for relief in this suit seeks to require the defendants to issue new price lists based on costs independently arrived at, and to prevent any communications among the defendants with respect to future prices.

Staff: William L. Maher, Donald G. Balthis, John E. Sarbaugh, Stewart Miller (Antitrust Division)

Indictment and Complaint Filed Under Section 1 of the Sherman Act. United States v. Durable Building Materials Council, Inc., et al., (W.D. Tenn.). An indictment was returned at Memphis, Tennessee on September 19, 1960 against a trade association and seven building material dealers on charges of violating the Sherman Antitrust Act in connection with the sale and distribution of cement.

This indictment charged that defendants, since at least 1955, conspired to fix prices for the sale of cement; to quote identical prices to the City of Memphis, Memphis City Schools, Shelby County Board of Education, and other governmental agencies; to publish and circulate through defendant Council cement price lists; and to establish a bid registration system in

the Council on bids to public awarding authorities.

According to the indictment, the effects of these practices have been to increase the price of cement and to eliminate competition among building material dealers in the Memphis area in the sale and distribution of cement.

A companion civil action was filed against the same defendants alleging an identical violation of the Sherman Act. Relief is sought to require the dealers to issue new prices based upon cost, independently arrived at, and to prevent communications among defendants with respect to future bids to public awarding authorities and other purchasers. In addition the complaint seeks the dissolution of the Council.

Staff: Wilford L. Whitley, Jr., John F. Hughes and Sidney Harris (Antitrust Division)

Indictment and Complaint Filed Under Section 1 of the Sherman Act. United States v. Fischer Lime & Cement Company, et al., (W.D. Tenn.). An indictment was returned at Memphis, Tennessee on September 19, 1960 against three building material dealers on charges of violating the Sherman Antitrust Act in connection with the sale and distribution of ready mixed concrete. According to the indictment, annual sales of ready mixed concrete affected by the charged violation total approximately $7,500,000 in the Memphis area.

The defendants were charged with conspiring, since at least 1958, to fix, stabilize and control prices for the sale and distribution of ready mixed concrete in the Memphis area.

According to the indictment, the effects of these practices have been to increase the price of ready mixed concrete and to eliminate competition among building material dealers in the Memphis area in the sale and distribution of this product.

A companion civil action was filed against the same defendants alleging an identical violation of the Sherman Act. Relief is sought to require the dealers to issue new prices based upon cost, independently arrived at, and to prevent communications among defendants with respect to future bids to public awarding authorities and other purchasers.

Staff: Wilford L. Whitley, Jr., John F. Hughes and Sidney Harris (Antitrust Division)

CIVIL DIVISION

Assistant Attorney General George Cochran Doub

COURTS OF APPEALS

ADMISSIBILITY OF EVIDENCE

Statement Made While Startling Event in Progress, not "Spontaneous Declaration" Because Not Made at Outset of Event. United States v. Mountain State Fabricating Co., et al. (C.A. 4, August 8, 1960). In 1952, $2.3 million's worth of Government rubber was destroyed in a warehouse fire. The Government brought suit against the warehouseman, the owner of the building in which the rubber was stored and a construction firm which had been erecting a new building adjacent to the warehouse at the time of the fire. It was the Government's theory that sparks from the construction firm's welding operation caused the fire and that all parties were negligent in failing to take proper steps to prevent the loss from occurring. The warehouseman and owner of the building were also charged with negligence in failing to provide adequate fire-fighting equipment, thus allowing the fire to spread.

During the course of the jury trial, the Government sought to introduce certain testimony relating to a conversation which a Government witness had with an unidentified workman at the scene of the fire while it was in progress. According to the Government witness, the declarant stated that earlier in the morning he was up on the roof welding when he noticed a fire down in the rubber and tried unsuccessfully to put it out. The Government offered this evidence under the hearsay exception for "spontaneous declarations", but the district court refused to admit it. After a lengthy trial the jury returned a verdict absolving all defendants from liability.

On appeal the Government assigned the district court's refusal to admit the evidence in question as the primary basis for a reversal and new trial. It argued that this statement, made while a startling event was in progress and the declarant was obviously under its influence, constituted a "spontaneous declaration" under both state and federal law. However, the Fourth Circuit affirmed the exclusion below, holding that the evidence in question did not constitute a "spontaneous declaration". The court reasoned that since the declaration was made at least one-half hour after the fire had begun, it lost the essential ingredient of spontaneity and became, in the court's words, a mere "narration of past events". The court dismissed the fact that the fire was in progress at the time the statement was made as being "not determinative" of spontaneity.

Staff: Ronald A. Jacks, Civil Division

BANKRUPTCY ACT

Anticipatory Breach of Government Contract Established by Filing of Petition Constitutes "Provable Claim" Since Liability Then Established, Even Though Amount Not Determined Until Later Date. United States v. Brunner (C.A. 10, September 3, 1960). Bankrupts contracted with the Government to manufacture certain goods and deliver on specified time schedules. Under the default clause, the Government could terminate the contract if goods were not delivered on schedule and charge bankrupts with excess costs of procuring similar items elsewhere to fulfill contract quantity. In June of 1958 bankrupts filed a petition in bankruptcy at a time when the Government owed them approximately $4,000 for goods already delivered under the contract. The Government thereupon notified bankrupts that filing of the petition constituted default as they would be unable to complete delivery within the contractual deadlines. The Government was then forced to purchase the remainder of the order elsewhere at a higher cost. A claim was filed against the bankrupts for the amount of these excess costs less the $4,000 then owing to the bankrupts. The referee refused to allow the Government to set-off its larger claim for breach of contract and recover the excess as a priority. In his view, the Government was not entitled to a priority or set-off because it had no "provable claim" at the time of the filing of the petition. This ruling was based on the theory that the Government's claim did not arise until it was forced to procure goods elsewhere. The district court adopted the referee findings and conclusions, and affirmed his action.

On appeal the Tenth Circuit reversed. It held that the Government had a "provable claim" to use in set-off at the time the petition was filed. The court reasoned that the anticipatory breach of contract caused by filing the petition in bankruptcy established liability at that time and thus was a "provable claim" within the meaning of the Act even though the amount of liability was not determined until a later date. The court ordered that the set-off be allowed and the Government be given statutory priority for the balance of its claim.

Staff: Kathryn Baldwin, Civil Division

SOIL BANK ACT

The Term "Crop" as Used in Acreage Reserve Agreements, Not Limited to Commodities Harvested Within One Year. United States v. Arakelian (C.A. 9, September 22, 1960). Plaintiff planted grapevine cuttings on land which he had agreed to withdraw from cotton production under a 1957 Acreage Reserve Agreement. The California Agricultural and Stabilization Review Committee ruled that this planting constituted a violation of the agreement and ordered plaintiff to forfeit all compensation which had been paid to him under the agreement. Plaintiff brought suit in district court to review that determination. The district court held that plaintiff's planting of grapevines which would not mature for years did not constitute a violation of the agreement.

On appeal the Government argued that there was no indication that Congress intended to allow the raising of any crops on land diverted under the Soil Bank Act. The Government further argued that the regulations and agreement clearly indicated that this prohibition applied to the planting of any crops regardless of when they were harvested, with the sole exception being crops which were planted in the fall of the year of the agreement for harvesting in later years, not covered by agreements. Plaintiff countered with the assertion that the term "crop" was limited to those commodities which could be harvested within one year and since he had testified that the vines would not mature for years, there had been no violation of the agreement.

The Ninth Circuit reversed. It held that the term "crop" includes any commodity which is planted before the fall of the year of the agreement in question regardless of the date of eventual harvesting. Since plaintiff did not fall within this exception because he had planted his grapevines in the spring of 1957, he was found to have violated the agreement and thereby lost the right to retain Soil Bank payments which he had received for supposedly withdrawing the land from production.

Staff: Alan S. Rosenthal, William E. Mullen, Civil Division

STATUTES

ANTI-KICKBACK ACT AMENDMENT

Public Law 86-695, approved September 2, 1960, amends the Anti-Kickback Act (41 U.S.C. 51, et seq.) by substituting for the phrase "cost-plus-a-fixed-fee or other cost reimbursable basis" (which phrase designates the type of prime contracts covered by the Act), the words "negotiated contract". The new phrase is defined as a contract made without formal advertising. Accordingly it is no longer necessary for the United States to show that the pertinent prime contract was "cost reimbursable" to sustain a claim under the Anti-Kickback Act.

The elimination of the cost reimbursability requirement undoubtedly will precipitate questions as to the validity of the "conclusive presumption" in the Act of injury to the United States resulting from the prohibited payments by a subcontractor to the prime contractor or to a higher tier subcontractor. The argument which will undoubtedly be made is that except in those instances where cost reimbursability is proved, there can be no conclusive presumption. The Civil Division's Frauds Section will assist United States Attorneys in meeting this contention whenever it is raised in civil litigation.

It should be noted that the 1960 amendment retains the provision of the statute (as originally enacted in 1946) which prohibits kickbacks "whether heretofore or hereafter paid or incurred by the subcontractor." The position should be taken that the change effected by the 1960 amendment has retrospective application coextensive with that of the statute as originally enacted.

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CIVIL RIGHTS DIVISION

Assistant Attorney General Harold R. Tyler, Jr.

Court of Appeals Remand with Disapproval of Sentence Imposed by District Court. United States v. Wiley (C.A. 7, April 23, 1960). Defendant Wiley was one of five co-defendants sentenced by District Court for the Northern District of Illinois, for theft from interstate commerce. Four co-defendants who pleaded guilty and had prior "bad" records were sentenced to terms of two years as to one co-defendant, and one year and one day as to the others. Wiley had virtually no prior record, stood trial and was sentenced to three years imprisonment. Prior to imposition of sentence the court made the following comments: "Had there been a plea of guilty in this case probably probation might have been considered under certain terms, but you are well aware of the standing policy here that once a defendant stands trial that element of grace is removed from the consideration of the Court in the imposition of sentence." Upon appeal, the judgment of conviction was affirmed, but the cause was remanded for consideration of defendant's application for probation because of the announced policy of the District Court.

The District Court considering all the factors, reimposed the sentence of imprisonment for a period of three years. On a second appeal, the sentence was set aside and the cause remanded with directions to place this defendant on probation because: "The District Court has, without any justification, arbitrarily singled out a minor defendant for the imposition of a more severe sentence than that imposed upon the co-defendants." The District Court, while challenging the right of the Court of Appeals to review a criminal sentence, nevertheless suspended execution of the sentence pursuant to the mandate.

Staff: United States Attorney Robert Tieken and Assistant United States Attorneys Charles R. Purcell, Jr., and John Peter Lulinski (N.D. Illinois)

CRIMINAL DIVISION

Assistant Attorney General Malcolm Richard Wilkey

MAIL FRAUD
(18 U.S.C. 1341)

Advance Fee Racket. United States v. Clarence Brown, et al, d/b/a Midwest Business Service (N.D. Iowa). The scheme to defraud in this case featured the obtaining of fees in advance from businessmen on the basis of purported services to be rendered by Midwest Business Service in obtaining purchasers of the business enterprises. The false representations by which the fees were secured ran the usual gamut, including promises that the property would be extensively advertised, that Midwest would finance buyers, that buyers had already been obtained and that the fees would be refunded if sales were not effected. The principal defendants were Clarence Brown and Albert E. Chapman who operated the scheme through seven salesmen-defendants. Chapman and three of the defendants were convicted by jury verdict. Brown and four others pleaded guilty. Brown was sentenced to two years' imprisonment; Chapmen to 21 months and the remaining defendants to 18 months each.

Three of the defendants appealed - Chapman, Merle E. Wood and Richard B. Gurney. In affirming the convictions of Wood and Gurney the Court of Appeals for the Eighth Circuit (279 F. 2d 359) complimented the handling of the case at trial, stating that "The remarkable thing about this case is that counsel for the defendants can find so little to complain about." The Court also observed that the trial judge was meticulously careful to keep error out of the record and was scrupulously fair to all the defendants. Chapman, who was tried separately and convicted after a severance due to a heart attack, has indicated a desire to dismiss his appeal and seek probation based on medical diagnosis of incurable illness, for which he is presently hospitalized. Thus a final chapter is about to be written in this pioneering prosecution of one of the pilot advance fee cases.

The indictment used in this case has been furnished to United States Attorneys and has proved helpful in drafting indictments in similar mail fraud promotions. It is hoped that copies of the Court's instructions can also be made available.

Staff: United States Attorney Francis E. Van Alstine; Assistant United States Attorney Philip C. Lovrien (N.D. Iowa).

THREE-JUDGE COURTS

Refusal of Single District Court Judge to Convene; Method of Review. Schneider v. Herter, Guerrieri v. Herter (C.A. D.C., Sept. 8, 1960). Plaintiffs are citizenship claimants residing abroad, who, the State Department has concluded, have become expatriated by protracted foreign residence under Section 352(a) of the Immigration and Nationality Act of

1952 (8 U.S.C. 1484). In these suits against the Secretary of State, brought in the United States District Court for the District of Columbia, they sought declaratory and injunctive relief on the ground that the statute is unconstitutional, and they applied for convocation of a three-judge court pursuant to 28 U.S.C. 2282 and 2284. Judge Matthews concluded that no substantial constitutional question is presented and denied the application. Without appealing or applying to the Court of Appeals for any extraordinary remedy, plaintiffs filed a motion with the Chief Judge of the Court of Appeals to convene a three-judge court. On August 12, 1960, Acting Chief Judge Fahy denied the motion, stating his reasons for so doing in an opinion filed September 8, 1960.

Without ruling whether Judge Matthews was in error in denying the application, Judge Fahy concluded that a motion to the Chief Judge is not an authorized method of correcting such an error. He stated that: "The ordinary method of correcting trial court error is by appeal under applicable statutory provisions; and when an extraordinary method is appropriate it is by application to an appellate court, either the Supreme Court or the Court of Appeals, I do not in the abstract decide which, for a writ."

Staff: United States Attorney Oliver Gasch; Assistant United States Attorney Harold D. Rhynedance, Jr. (Dist. Col.).

EXPATRIATION

Section 352(a)(2) of Immigration and Nationality Act of 1952; Continuity of Foreign Residence. Guerrieri v. Herter (D.C., D.C., Sept. 14, 1960). Plaintiff, born in Switzerland, was brought to the United States as a child by her parents and derived American citizenship through their naturalization in 1944. In March 1953 she went to Europe in connection with theatrical activities and in October of that year married a citizen of Italy. She has lived with him there since, with the exception of two brief visits to the United States, in 1956 for almost three months and in 1957 for almost a month. In 1958, the State Department refused to renew her American passport, concluding that she had been expatriated under Section 352(a)(2) of the Immigration and Nationality Act of 1952 (8 U.S.C. 1184(a)(2)) by continuous residence abroad for over five years. In this suit against the Secretary of State for declaratory and injunctive relief, brought while still in Italy, plaintiff attacked the constitutionality of the statute and, in the alternative, the State Department's finding that she had five years' continuous residence abroad.

On cross-motions for summary judgment, based on affidavits and the administrative record, Judge Holtzoff granted plaintiff's motion and denied that of the Government. Preliminarily, the Court held that the special statutory remedy provided by Section 360(b) and (c) of the 1952 Act to citizenship claimants abroad is not exclusive and does not supersede the remedy generally available under the Declaratory Judgment Act. On the merits, the Court ruled that intent was not an element, since the statutory definition of residence in Section 101(a)(33) of the 1952 Act

expressly eliminated it. He concluded that the Government has the burden of proving expatriation by clear, convincing and unequivocal evidence; therefore the Government must meet this burden in proving continuous foreign residence for five years. In view of plaintiff's two trips to the United States for substantial periods within the five-year span, the Court held that the Government had failed in its burden of proving continuity of foreign residence for five years.

Staff: United States Attorney Oliver Gasch; Assistant United States Attorney Harold D. Rhynedance, Jr. (Dist. Col.).

Judicial Review of State Department Expatriation Decision by citizenship Claimant Abroad; Constitutionality of Section 352(a)(1) of Immigration and Nationality Act of 1952. Schneider v. Herter (D.C., D.C., August 17, 1960). Plaintiff is a native of Germany who came to the United States as a child with her parents and derived American citizenship through their naturalization in 1950. In 1956 she returned to Germany, married a German attorney and has lived there since with her husband. In 1959 the State Department concluded that she had lost her American nationality by her three years' continuous residence in the country of her former nationality, as provided in Section 352(a)(1) of the Immigration and Nationality Act of 1952 (8 U.S.C. 1484(a)(1)), and her American passport was cancelled. Still residing in Germany, she filed this suit against the Secretary of State for declaratory and injunctive relief, contending that Section 352(a)(1) is unconstitutional and requesting that a three-judge court be convened pursuant to 28 U.S.C. 2282 and 2284.

The Government moved to dismiss the complaint for lack of jurisdiction, arguing that Section 360(b) and (c) of the 1952 Act (8 U.S.C. 1503(b) and (c)) provides the exclusive remedy for a citizenship claimant abroad in such a situation. The plaintiff moved for convocation of a three-judge court. On July 19, 1960, Judge Matthews denied the Government's motion to dismiss and also denied plaintiff's motion for a three-judge court, holding that no substantial constitutional question is presented, the constitutionality of the parallel provision of the predecessor 1940 statute having been sustained by the Court of Appeals for the District of Columbia Circuit in Lapides v. Clark, 176 F. 2d 619. Since the facts were not in dispute, on August 17, 1960 the Court granted the Government's motion for judgment on the pleadings. Plaintiff has appealed.

Staff: United States Attorney Oliver Gasch; Assistant United States Attorney Harold D. Rhynedance, Jr. (Dist. Col.).

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TAX DIVISION

Assistant Attorney General Charles K. Rice

CRIMINAL TAX MATTERS
Appellate Decision

Compromise -- Alleged Settlement of Criminal Tax Case. Reid G. Jonson v. United States (C.A. 9th), decided August 24, 1960. Appellant, convicted on two counts of income tax evasion for the years 1955 and 1956, argued on appeal that (1) his motion for acquittal should have been granted on the ground that the Government had compromised the criminal case before trial, and (2) that at least the question of whether there had been a compromise should have been submitted to the jury. Appellant, while employed as a construction engineer by the federal Government, entered into a contract with a private firm engaged in government contracting under which appellant would do architectural work for the firm on a percentage fee basis. He received substantial income under this contract which he failed to report on his tax returns. The Treasury agents' investigation began in 1957. Early in 1958 appellant wrote a letter to the Director of Internal Revenue accompanied by amended returns and a check for $4,830.88 to cover the tax deficiencies plus interest and a "5% penalty for failure to pay on account of negligence." The letter stated that appellant was filing the amended returns "so that the matter may be terminated." The Director, in the absence of an assessment, accepted the check and credited it to his "Advance Payments" account.

The trial judge instructed the jury as to the difference between the civil and criminal aspects of a tax case, and stated that the fact that payment had been made was not to be considered "except as it may throw some light on the intent of the defendant." This instruction was not objected to. On appeal the appellant argued that the matter had been compromised under Section 7122 of the Internal Revenue Code of 1954, which authorizes the Secretary or his delegate to "compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense", and authorizes the Attorney General to compromise any such case after such referral. The Court of Appeals affirmed the conviction, holding that there was no substantial evidence of any compromise, and that the Director's receipt and deposit of the check in the "general tax funds do not by themselves represent an accord and satisfaction, or any similar final determination binding upon the Government as the recipients of the funds." The court deemed appropriate here certain language used by Judge Augustus Hand in United States v. McCormick, 67 F. 2d 867 (C.A. 2d):

> But we find nothing in the present record to indicate that the payment was made to compromise claims for criminal liability. The most that can be said for defendant on account of his disclosures and payment of taxes is that such acts tended to show innocence. The

argument is stronger that they only showed a desire to place himself in a safer position when it had become certain that his illegal acts were about to be discovered. * * *

Staff: United States Attorney Dale M. Green; Assistant United States Attorney Robert L. Fraser (E.D. Wash.)

CIVIL TAX MATTERS
District Court Decisions

Forfeiture - Seizure - Internal Revenue Agents Authorized to Carry Out Enforcement Provisions of Code Without Notice or Application to Bankruptcy Court in the Event Debtor-in-Possession Fails to Prepay Federal Wine Taxes in Accordance with Regulations. In the Matter of San Benito Co., Inc., Debtor-in-Possession. San Benito Co., Inc., a winery authorized to continue in business as a debtor-in-possession under an order entered in Chapter 11 Arrangement Proceedings, (11 U.S.C. § 742), was found to have removed quantities of wines from bonded premises without having prepaid federal wine taxes due upon such removals. Prior to the arrangement proceedings, the winery's checks for wine taxes had not been paid upon presentment, and the prepayment requirement was imposed in accordance with regulations. (Formerly 26 C.F.R. 170.456 and 170.457; since July 1, 1960, 26 C.F.R. 240.595 and 240.594). The Referee's order permitting San Benito to continue in business contained no provision as to the payment of federal wine taxes on removals necessary for the continued business operations of San Benito which it authorized.

Within 48 hours after the United States Attorney was advised of the removals without prepayment of wine taxes, the Referee in Bankruptcy, on the contested show cause application of the United States Attorney, entered an injunction order, not only enjoining removals except after prepayment in accordance with the regulations, but also authorizing representatives of the Internal Revenue Service, without notice or application to the Court, to take such action as was authorized under the Internal Revenue Code, including seizure of removal wine as forfeit (I.R.C. 5661, 7321), in the event of removals from bonded premises without prepayment. We are aware of no precedent for the relief granted here insofar as it authorized Revenue Agents to proceed, without notice or recourse to the courts, to enforce the revenue laws against a concern while it is actually engaged in conducting business transactions under the supervision and jurisdiction of a Bankruptcy Court.

Staff: United States Attorney S. Hazard Gillespie, Jr., and Assistant United States Attorneys Arthur V. Savage and Julius Rolnitsky, (S.D. N.Y.)

Assessment Jurisdiction; Suit to Reduce Assessment to Judgment; Filing of a Proof of Claim in a State Court Proceeding Brought to Dissolve a Partnership Does Not Deprive a Federal District Court of Jurisdiction in

a Subsequent Action to Reduce Assessments Against One of the Partners to Judgment. United States v. Veltri, 6 A.F.T.R. 2d 5439 (N.D. W.Va.). An uncle brought an action against his nephew in a state court alleging that he was an equal partner in a certain business and asked for an accounting. The state court held that the two were in fact equal partners and referred the cause to a Commissioner in Chancery for an accounting. In the interim, tax assessments had been made against the nephew, and the District Director filed a proof of claim with the Commissioner in Chancery.

While the accounting proceeding was still pending, the Government brought an action in the federal district court to reduce the assessments to judgment. The taxpayer defended on the ground that the federal court could not entertain this action since the filing of the claim with the Commissioner in Chancery constituted a submission of the claim to the jurisdiction of the state court and thereby deprived the federal court from taking jurisdiction.

In granting the Government's motion for summary judgment, the Court rejected the taxpayer's claim of lack of jurisdiction for three reasons: (a) the filing in the state court was not a submission of the facts and amounts of the tax claims for adjudication since the failure to object to the assessments within the statutory period causes the assessments to be final and liquidated; (b) filing in the state court simply put the parties on notice that any amount decreed to the taxpayer is subject to tax liens; (c) even if the filing in the state court constituted a submission of the claims to that court for adjudication, the federal court would nevertheless have concurrent jurisdiction to enter judgment on the assessments. The Court cited United States v. Peoples Trust & Savings Co., 97 F. 2d 771 (C.A. 7th), in support of its last reason.

A major portion of the cases dealing with this problem involve probate matters. Although possession and custody of property by one court may not be disturbed by another court having concurrent jurisdiction (In re Tyler, 149 U.S. 164), the Peoples Trust case, supra, held that the federal district court has concurrent jurisdiction with the state court to decide the validity of a federal tax claim. Thus, in the instant case, the Government may not bring an action in the federal court to enforce its lien so long as the assets are in the hands of the Commissioner in Chancery; however, since the tax claims have now been reduced to judgment, the state court may not question their validity.

Staff: United States Attorney Albert M. Morgan (N.D. W.Va.); Martin A. Coleman (Tax Division)

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