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UNITED STATES ATTORNEYS

BULLETIN

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Vol. 9 April 7, 1961 No. 7

NEW APPOINTEES

The nominations of the following United States Attorneys have been confirmed by the Senate:

Illinois, Northern - James P. O'Brien

Mr. O'Brien, born in Chicago, Illinois, attended Northwestern University and received his LL.B. degree from National University Law School. He entered Government service in 1938 as an attorney in the Department of Justice, and rose to be Chief of the General Crimes Section, Criminal Division. During World War II, he served as a Lieutenant in the United States Navy. Mr. O'Brien is married and has four children.

Kansas - Newell A. George

Mr. George, a native of Kansas City, Missouri, attended Kansas City University and received the degrees of LL.B., LL.M., and M.P.L. from the National University Law School. His previous Government experience was with the Reconstruction Finance Corporation in Washington, D.C., and with the Social Security Administration in Kansas City, Missouri. From 1953-1958 he was First Assistant County Prosecutor for Wyandotte County, Kansas, and from 1959-1961 he served in the United States Congress as a Representative. Mr. George is married.

Maryland - Joseph D. Tydings

Mr. Tydings was born in Asheville, North Carolina, and received his A.B. and LL.B. degrees from the University of Maryland. From 1946 to 1948 he served in the United States Army. He has been a partner in the firm of Tydings and Rosenberg, Baltimore, Maryland, since 1953, and since 1955 has served as a Member of the Maryland House of Delegates. From 1955 to 1960, he was City Attorney for Aberdeen, Maryland. Mr. Tydings is married and has three children.

Michigan, Eastern - Lawrence Gubow

Mr. Gubow, a native of Detroit, Michigan, received his A.B. and LL.B. degrees from the University of Michigan. During World War II, he served in the United States Army with the rank of Captain. From 1951 to 1953, he was an attorney with the firm of Rosin and Kobel in Detroit. In 1953, he became Deputy Commissioner of the Michigan Corporation and Securities Commission, and since 1956 has been Commissioner of that body. Mr. Gubow is married and has three children. He was sworn in as United States Attorney on March 23, 1961.

Missouri, Eastern - D. Jeff Lance

Mr. Lance, born in Oregon County, Missouri, attended Southeast Missouri State College, and received his LL.B. degree from the University of Missouri. He served during World War II as a Lieutenant in the United States Navy. Mr. Lance served as Legal Secretary to Governor Forrest Smith of Missouri, and since 1957, has been associated with the law firm of Cook, Murphy, Lance and English, St. Louis, Missouri, as a partner. Mr. Lance is married and has one child.

Missouri, Western - F. Russell Millin

Mr. Millin, born in Kansas City, Missouri, attended Washington State College, and received his LL.B. degree from the University of Kansas City. During World War II, he served in the United States Army Air Corps. Since 1952, he has been associated with the law firm of Popham, Thompson, Popham, Trusty & Conway, Kansas City, Missouri, more recently as a partner. Mr. Millin is married and has four children.

West Virginia, Northern - Robert E. Maxwell

Mr. Maxwell, born in South Bend, Indiana, attended Davis-Elkins College, Elkins, West Virginia, and received his LL.B. degree from West Virginia University. During World War II, he served in the United States Army Air Corps. From 1949 until the present time, he has been engaged in the private practice of law in Elkins, West Virginia, and since 1953, he has been Prosecuting Attorney of Randolph County, West Virginia. Mr. Maxwell is married and has three children.

The names of the following appointees as United States Attorneys have been submitted to the Senate:

Arizona - Charles A. Muecke
California, Southern - Francis C. Whelan
Florida, Southern - Edward F. Boardman
Georgia, Middle - Floyd M. Buford
Massachusetts - W. Arthur Garrity, Jr.
Minnesota - Miles W. Lord
New Hampshire - William H. Craig, Jr.
New Mexico - John F. Quinn, Jr.
New York, Eastern - Joseph P. Hoey
Rhode Island - Raymond J. Pettine
Wisconsin, Eastern - James B. Brennan

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MONTHLY TOTALS

During the month of February, totals in all categories of work, with the exception of civil cases and criminal matters, rose above those for the preceding month. Total cases and matters also rose for the second successive month.

	January 31, 1961	February 28, 1961	
Triable Criminal	6,937	7,397	+ 460
Civil Cases Inc. Civil Tax Less Tax Lien & Cond.	14,089	14,064	- 25
Total	21,026	21,461	+ 435
All Criminal	8,458	8,977	+ 519
Civil Cases Inc. Civil Tax & Cond. Less Tax Lien	16,962	16,920	- 42
Criminal Matters	10,780	10,445	- 335
Civil Matters	12,264	12,324	+ 60
Total Cases & Matters	48,464	48,666	+ 202

The number of civil and criminal cases filed and terminated during the first eight months of the fiscal year is down from the same period for fiscal 1960. The greatest decline has been registered in civil cases filed and terminated. Increased activity in criminal cases has brought both filings and terminations in this field almost level with last year's totals. As a result of the increase in the number of criminal cases filed and the decrease in the number of civil cases terminated, the total pending case-load rose 929 cases, or 3.26 per cent, during February.

	1st 8 Months F.Y. 1960	1st 8 Months F.Y. 1961	Increase or Decrease Number	%
Filed				
Criminal	20,303	20,277	- 26	- 0.13
Civil	16,101	15,450	- 651	- 4.04
Total	36,404	35,727	- 677	- 1.86
Terminated				
Criminal	18,844	18,885	+ 41	+ 0.22
Civil	14,342	14,163	- 179	- 1.25
Total	33,186	33,048	- 138	- 0.42
Pending				
Criminal	8,753	8,977	+ 224	+ 2.56
Civil	19,759	20,464	+ 705	+ 3.57
Total	28,512	29,441	+ 929	+ 3.26

In terms of the number of cases filed, February registered the second highest total since the beginning of the fiscal year. This was due solely

to the upsurge in criminal filings, as civil filings were the second lowest in the last eight months. The decrease in terminations continues the gradual decline that began in November, 1960.

	July	Aug.	Sept.	Oct.	Nov.	Dec.	Jan.	Feb.
Filed								
Criminal	1,709	2,346	3,201	2,551	2,479	2,534	2,574	2,883
Civil	1,863	2,304	1,897	1,990	1,889	1,753	1,914	1,840
Total	3,572	4,650	5,098	4,541	4,368	4,287	4,488	4,723
Terminated								
Criminal	1,600	1,772	2,328	2,977	2,832	2,617	2,513	2,346
Civil	1,463	1,906	1,798	2,005	1,627	1,816	1,797	1,751
Total	3,063	3,678	4,126	4,982	4,459	4,433	4,310	4,097

Collections during February amounted to less than half the total collected during the preceding month of January. As a result, the per cent of increase over the same period of the preceding fiscal year dropped from 31.9 to 26.8. Total collections of $2,601,772 were reported by the United States Attorneys during February, thus bringing the total for the first eight months of fiscal 1961 to $24,656,338. This represented an increase of $5,211,967 or 26.8 per cent over the $19,444,371 collected during the first eight months of 1960.

During February $3,886,190 was saved in 115 suits in which the government as defendant was sued for $4,958,697. 53 of them involving $1,412,042 were closed by compromises amounting to $436,212 and 31 of them involving $1,479,641 were closed by judgments against the United States amounting to $636,295. The remaining 31 suits involving $2,067,014 were won by the government. The total saved for the first eight months of the fiscal year amounted to $19,680,160. This is a decrease of $4,751,796 or 19.4 per cent from the $24,431,956 saved during the first eight months of fiscal year 1960.

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JOB WELL DONE

The Chief, United States Secret Service, has expressed his personal appreciation and that of the Service to Assistant United States Attorney Robert W. Rust, Southern District of Florida, for the excellent cooperation he rendered and for his timely judicious advice and participation in bringing about the confinement of an individual who represented a very personal danger to the President-elect and to the Nation. The defendant, arrested and charged with threatening the life of President Kennedy, was found to have in his possession when arrested several sticks of dynamite. It was

his avowed purpose to strap the dynamite to his body and blow himself up in the immediate proximity of the President when the latter would be attending church services. The defendant was committed to the Medical Center for Federal Prisoners, Springfield, Missouri, under 18 U.S.C. 4244 and 4246.

Assistant United States Attorney Robert E. Woodward, Northern District of California, has been commended by the District Postal Inspector in Charge for the excellent manner in which a recent case involving embezzlement of letter mail was conducted. The letter stated that while the Service was particularly appreciative of the fine manner in which the trial in this case was conducted, it is also grateful for many similar instances in the past when Mr. Woodward has capably prosecuted inspection service cases.

The Deputy Commander, United States Army Transportation Terminal Command, has expressed appreciation for the excellent cooperation and assistance rendered by Assistant United States Attorney Averill Williams, Eastern District of New York, in connection with a magistrates' court proceeding involving two employees of the Command, and has conveyed thanks for the manner in which the case was handled.

Assistant United States Attorney William P. Clancey, Jr., Northern District of California, has been commended by the Chief Postal Inspector for the competent manner in which a recent mail fraud case was prepared and presented to the grand jury, resulting in an indictment. The Inspector stated that upon presentation, Mr. Clancey authorized the filing of a complaint, thus effectively suppressing the operation and limiting the loss to the public to less than $1,000. The Inspector further stated that this indictment brings the national total of advance fee racketeers indicted for mail fraud to 144 since the program was instituted in the fall of 1958, and that the success in the prosecution of these cases is most encouraging.

United States Attorney Paul W. Cress and Assistant United States Attorney George Camp, Western District of Oklahoma, have been commended by the Field Solicitor, Department of Interior, for the vigorous manner in which the defense of a recent law suit is handled. The letter stated that when the depositions were taken, one of the plaintiffs appeared and requested that his complaint be dismissed, and that some of the plaintiffs reduced their claims at the time, indicating that the claims were exaggerated. The letter further stated that Mr. Camp did a very thorough job with regard to the deposition-taking, and that the Field Solicitor's office is pleased that no stones have been left unturned in the case.

The General Counsel, SEC, has expressed congratulations and appreciation to Assistant United States Attorney William Maynard, District of New Hampshire, for his outstanding work in a recent case which successfully disposed of numerous defendants. The letter stated that Mr. Maynard's preparation and vigorous approach to the many problems involved were in large measure responsible for the capitulation of the defendants, and that the Commission is deeply indebted to him and to the United States Attorney's office for the excellent cooperation extended in this prosecution.

Assistant United States Attorney Clark A. Ridpath, Western District of Missouri, has been commended for his very effective trial of a recent case involving a daylight theft of some $30,000 from a large department store. The case resulted in defendant's conviction for perjury on three counts.

Assistant United States Attorney Robert W. Rust, Southern District of Florida, has been commended by the Chairman, Civil Aeronautics Board, on his handling from inception to successful conclusion of a recent case involving violation by a major air line of a cease and desist order issued by the Board. The case which represented the first litigated criminal prosecution under 49 U.S.C. 1472 for violation of a Board order, resulted in a finding of guilty on fourteen counts, and assessment of a $16,100 fine. The Chairman stated that Mr. Rust demonstrated a very thorough knowledge of the law, was fluent and skillful during the trial, and in the preparation of the case, was tireless, working on several occasions past midnight as well as on weekends and on a legal holiday.

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ANTITRUST DIVISION

Assistant Attorney General Lee Loevinger

Use in Criminal Contempt Action of Evidence Adduced Before Antitrust Grand Jury Investigating Related Matters in Another District Held no Misuse of Grand Jury Process. In the Matter of Grand Jury Proceedings in This District (General Dynamics Corp. et al.) (S.D. N.Y.). On March 20, 1961, Chief Judge Ryan handed down a memorandum opinion in which he denied a motion by respondents General Dynamics Corporation and Air Reduction Company, Inc., to impound and suppress all documents and testimony presented to a grand jury in the Southern District. The motion was based upon the contention that the Government had misused grand jury process because it had used evidence adduced before the grand jury as a basis for a criminal contempt action in the Eastern District of New York and had not sought an indictment from the grand jury in the Southern District of New York. Judge Ryan also refused to vacate two orders of Judge Metzner in the Southern District, the first of which permitted Government counsel to impound and remove from the District the documents and records produced before the grand jury, and the second of which permitted the Government, pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure, to breach grand jury secrecy to the extent necessary in connection with the filing of a criminal contempt action in the Eastern District of New York. He also refused to order a hearing or permit interrogatories to determine any issues of fact in connection with the use of the grand jury by the Government.

Judge Ryan found that the Government had made no use of grand jury process since it had obtained the Rule 6(e) order from Judge Metzner and had filed the criminal contempt action in the Eastern District, and he therefore held that there was no subversion of the grand jury process, citing United States v. Procter & Gamble, 356 U.S. 667.

However, Judge Ryan considered the motions as pre-trial applications under Rule 16 of the Federal Rules of Criminal Procedure for inspection of grand jury minutes and of the records and documents produced before the grand jury. He refused to grant pre-trial inspection of grand jury testimony, citing Pittsburgh Plate Glass v. United States, 360 U.S. 395, holding that the question of whether any part of the grand jury transcript should be disclosed was a matter to be determined by the trial judge upon a showing of "compelling necessity" or "particularized need." The Government was therefore ordered to make the grand jury transcript available to the Eastern District trial judge. In addition, the Court ordered the Government to permit inspection and copying by respondents of the records and documents produced before the grand jury, and ordered respondents to provide the Government with copies of the documents during the inspection and copying so that the Government's trial preparation would not be interrupted. In so doing, Judge Ryan concluded that the Southern District, rather than the Eastern District where the criminal contempt action was pending, was the proper forum for the making of this pre-trial motion under Rule 16.

Staff: Bernard M. Hollander, Stephen R. Lang, Alfred Karsted, Allen A. McAllester and Robert J. Wager (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General William H. Orrick, Jr.

COURTS OF APPEAL

AGRICULTURAL MARKETING AGREEMENT ACT

Milk Marketing Order No. 27: Regulated Handler Must Pay Skim Milk Differential Where Unable to Establish That Its Skim Milk Did Not Ultimately Enter Marketing Area. Newark Milk and Cream Co. v. Benson. (C.A. 3, February 27, 1961.) Milk Marketing Order No. 27, issued pursuant to the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. 601, et seq., regulated, prior to August 1, 1957, the "handling" of milk in the New York Metropolitan Marketing Area (on that date, the Order was amended to extend also to northern New Jersey and additional areas in New York.) Plaintiff corporation, a milk handler, operated two "pool" plants (subject to the Order) in New York, and a "nonpool" plant (not regulated by the Order) in New Jersey.

The Order provides that a handler is to pay a differential for skim milk which enters the marketing area in fluid form and is there utilized or disposed of in such form, and for all other skim milk "which is not established to have been otherwise utilized or disposed of * * *." The burden of showing that skim milk received by him should not be subject to the differential is placed on the handler. In 1954 and 1955, plaintiff received quantities of skim milk at its pool plants which it then shipped to its nonpool plant. The Market Administrator conducted an audit of the records of the nonpool plant which, while indicating the receipt of the skim milk, did not disclose what ultimate disposition had been made thereof. Thereupon the Administrator imposed on plaintiff the obligation of paying into the producer settlement fund a differential for this quantity of milk.

Plaintiff paid the differential and filed a petition with the Secretary of Agriculture, pursuant to 7 U.S.C. 608c (15) (A), on the ground that the imposition of the differential had not been in accordance with law. Plaintiff urged that, to escape the differential, the Order required it only to account for the disposition of the skim milk by its pool plants. After the Secretary ruled that the imposition of the differential had been proper, plaintiff instituted a suit for review of the Secretary's ruling, pursuant to 7 U.S.C. 608c (15) (B). The district court granted the Secretary's motion for summary judgment, agreeing with his interpretation of the Order.

On plaintiff's appeal, the Court of Appeals affirmed. The Court held that the Order placed on plaintiff, as the regulated pool plant handler, the burden of proving that the skim milk received by it had not ultimately been utilized or disposed of inside the marketing area.

The Court emphasized that the limited reading of the Order urged by plaintiff would tend to frustrate the purpose of the Act and the Order.

Staff: Mark R. Joelson (Civil Division)

CIVIL PROCEDURE

Appeal to Kentucky Court of Appeals from Judgment Affixing Tobacco Acreage Allotment Dismissed for Failure to Establish Jurisdictional Dollar Amount. Michael v. Stratton Stinnett, et al., etc. (Court of Appeals of Kentucky, February 10, 1961). Appellant sought review of a judgment of the state circuit court affirming the action of the Fayette County Agricultural Soil Conservation Review Committee fixing the tobacco acreage allotment on appellant's farm at 2.05 acres. Although appeal to the state courts is authorized by 7 U.S.C. 1365, the Committee moved to dismiss the appeal on the ground that neither the pleadings nor the judgment in the court below showed an amount in controversy sufficient to give the Court of Appeals of Kentucky jurisdiction under K.R.S. 21.060 or 21.080.

The Court ruled that it is necessary for an appellant to establish a sufficient jurisdictional amount in controversy to give the court appellate jurisdiction. Although appellant claimed to come within the exception which provides that, where the thing in controversy is not translatable in or to a monetary value the jurisdictional amount need not be alleged, the Court noted that he attempted to have the court below fix the jurisdictional amount by affidavit that the additional acreage allotment in controversy had an ascertainable monetary value. However, appellant did not take steps to have the jurisdictional amount fixed under the Kentucky statutes until after he had filed his notice of appeal, which was too late under those statutes. The appeal was dismissed.

Staff: United States Attorney Jean L. Auxier;
Assistant United States Attorney Moss Noble
(E.D. Ky.)

Complaint Alleging That Corporate Officer Converted Drafts to Use of Corporation States Cause of Action Against the Individual Officer; Copies of Negotiable Instruments Need Not Be Attached to Complaint for Conversion of Same. United States v. George Goodman (C.A. 5, March 16, 1961). By mistake, a Navy disbursing officer forwarded duplicate drafts in payment of a prior contractual obligation to a corporation of which defendant was president. The complaint alleged that defendant knew when he received the drafts that the corporation had been fully paid and had furnished no materials or services warranting this duplicate payment. It was further alleged that defendant converted his second group of drafts to the use of the corporation and to his own use. The complaint was dismissed by the district court for failure to state a claim upon which relief could be granted, as were two subsequent complaints containing essentially the same allegations. Further the court in dismissing the

second amended complaint conditioned the filing of a third amended complaint on the Government's attaching photostatic copies of the drafts alleged to have been converted. The Government declined to plead further and appealed.

The Court of Appeals reversed, holding that complaint did state a cause of action for conversion of the drafts, even if the proceeds went to the corporation, and that the corporation was not an indispensable party. The Court further held that the drafts themselves were only evidence and that the Government could not be required to attach them to its complaint for conversion.

Staff: W. Harold Bigham (Civil Division)

FEDERAL DEFENSE TRAINING PROGRAM ACT

Federal Funds Provided Under Federal Emergency Defense Program for Rental Purposes Cannot Be Diverted to Unauthorized Uses Through Fiction of Leasehold Payments. Utah State Board for Vocational Education and State of Utah v. United States (C.A. 10, March 15, 1961). In this action the United States sought to recover from appellants the sum of $17,500 paid to them under the Federal Emergency Defense Program (55 Stat. 476; 56 Stat. 578; 57 Stat. 503; 58 Stat. 554). A vocational school in Provo, Utah, was selected by the Utah State Board for Vocational Education as one of the schools to receive federal funds. A Provo City Board of Education leased two county buildings from the Utah County Fair Association for $500 per month. The lease provided that the lessor would return to the lessee (1) such sums as were needed to repair the buildings and to install necessary equipment and (2) the entire balance of the sum paid as rent. During the life of the leases involved, $17,500 of federal funds was paid to the lessor as rent for the buildings.

When the money was repaid to the lessee, it was expended by the Board of Education for purposes not authorized by the Federal Defense Training Program Act. The Court of Appeals ruled that the ultimate use of federal funds for unauthorized purposes could not be "sheltered only by a shell of a lease" providing for payment of rent in one paragraph but return of the rent in the next. The Court affirmed the judgment of the district court in favor of the United States.

Staff: Bernard W. Friedman (Civil Division)

LONGSHOREMEN'S AND HARBOR WORKER'S ACT

Findings of Deputy Commissioner That Injury Arose out of Course of Performance of Employee's Duty and That Claimant Was Common Law Wife of Employee Upheld on Review. National Union Fire Insurance Co. of Pittsburgh, et al. v. Theodore Britton, Deputy Commissioner, etc. (C.A.D.C. March 23, 1961). An employee ejected a patron from his employer's place of business and the patron, when the employee was later on his way home, shot and fatally injured the employee. The Deputy Commissioner found that the injury occurred in the course of performance of the

employee's duty and in protection of the employer's property. The Commissioner further found that claimant was the common law wife of the employee. Both of these findings were challenged in the district court and in this appeal to the Court of Appeals.

The Court, in a per curiam opinion, ruled that the district judge properly granted summary judgment for the Commissioner. The Court ruled that the findings did not lack support by substantial evidence on the record considered as a whole and affirmed the judgment below.

Staff: Herbert P. Miller (Department of Labor);
United States Attorney Oliver Gasch
and Assistant United States Attorney Carl Belcher
(D.C.)

NEGLIGENCE

Jury Trial -- Court's Discretion to Exclude Alleged Rebuttal Testimony, and to Reconcile Jury's Inconsistent Responses to Special Interrogatories. McVey, et al. v. Phillips Petroleum Company (C.A. 5, March 10, 1961). Plaintiffs were employed in a nuclear products plant of M. W. Kellogg Company, which received radioactive materials from Phillips, the Government's cost-plus contractor. Plaintiffs claimed they were injured by an unexpected and uncontrolled discharge of radioactive dust (i.e., a single, massive exposure incident) resulting from Phillip's negligent processing of a radioactive iridium. The district court entered judgment for defendant after reconciling various inconsistencies in a series of special jury findings.

On appeal, plaintiffs urged inter alia that the district court erred in refusing to admit rebuttal evidence put in by them, which showed subsequent exposure to radiation in addition to that proved during their presentation of their case in chief. The Court of Appeals ruled that the district court did not abuse its discretion in this respect since the rebuttal evidence went to the question of whether the plaintiffs were exposed to an amount of radioactivity sufficient to cause injury, whereas the defense was that (1) the alleged incident never occurred and (2) the injuries of which plaintiffs complained were not the result of radiation exposure.

Plaintiffs also urged that the court erred in entering judgment on a conflicting jury verdict. The Court of Appeals held that the interrogatories giving rise to the conflicting answers were ambiguous and easily misunderstood whereas the basic interrogatories answered by the jury, finding that plaintiffs were not injured as the result of the incident, were unambiguous. The Court ruled that it had the duty to reconcile or harmonize such answers and that under all of the circumstances the intent of the jury was reasonably clear and ascertainable and that the inconsistencies were more apparent than real.

Staff: Anthony L. Mondello (Civil Division)

SOCIAL SECURITY ACT

Congress May Constitutionally Deny Eligibility for Survivors Benefits Arising out of the Military Service of One Who was Executed Pursuant to Approved Sentence of Court-Martial. Amerlia Reyes v. Flemming (C.A. 1, March 14, 1961). Claimant instituted this action under Section 205(g) to recover survivor benefits on the basis of the World War II military service of her son. Her claim was based on Section 217 of the Social Security Act, added in 1950, which provided wage credits for "World War II veterans." Claimant's son was inducted into the Army on April 28, 1941, and was executed pursuant to an approved sentence of a court-martial at Le Mans, France, on June 21, 1945. The contention of claimant was that Congress lacked constitutional power to define "World War II veterans" so as to exclude individuals whose death was inflicted as lawful punishment for a military or naval offense (See Section 217 of the Act). The district court affirmed the administrative determination that it was within the constitutional powers of Congress to define "World War II veterans" as it did and that claimant's son was not entitled to wage credits on the basis of his military service. Accordingly, it dismissed the complaint.

The Court of Appeals citing Flemming v. Nestor, 363 U.S. 603, affirmed, holding that it was within Congress' power to deny eligibility for survivor benefits arising out of the military service of one who was executed according to military law for a military offense.

Staff: Alan S. Rosenthal, Robert Powell
(Civil Division)

DISTRICT COURTS

NATIONAL BANK ACT

Comptroller of Currency's Discretion in Approving Branch Bank Applications Under 12 U.S.C. 36(c) Held Exclusive and Unreviewable. Community National Bank of Pontiac v. Ray M. Gidney, et al. (E. D. Mich., March 10, 1961). Plaintiff brought this action to require revocation of the Comptroller of the Currency's approval of an application by the defendant bank to establish a branch bank in Bloomfield Township, Oakland County, Michigan, and to enjoin its further operation. Plaintiff contended that the approval violated 12 U.S.C. 36(c) in that there was no necessity for such branch at the particular location and in that the branch is not located in a village or city, in violation of the location restrictions of Michigan law.

Plaintiff filed a motion to require the Comptroller to produce certain documents. The Comptroller opposed this motion on the grounds that, insofar as the material sought went to the issue of necessity, that question was not within the Court's jurisdiction, and that, insofar as it went to the question of location, the material was not relevant and plaintiff had not shown good cause for its production. In

addition, the Comptroller contended that the material sought (i.e., bank examiner reports and internal memoranda relating to the branch application in issue) was privileged.

The Court concluded that "Congress intended that the Comptroller have an exclusive and unreviewable power of discretion in determining whether or not to approve the establishment of branch banks pursuant to 12 U.S.C. 36(c)" and denied the motion.

Staff: Donald B. MacGuineas and
Andrew P. Vance (Civil Division)

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CIVIL RIGHTS DIVISION

Assistant Attorney General Burke Marshall

Falsely Labeled Political Circulars Relating to Candidate for United States House of Representatives. United States v. Lyons, et al. (W.D. La.) On March 20, 1961, a grand jury in Shreveport, Louisiana, returned an indictment in three counts charging Horace Herschel Lyons, Kenneth L. Dixon and Teddy Kenneth Stitzlein with the willful publication and distribution of political campaign material, concerning a candidate in the Democratic primary election held on August 27, 1960, to select a party nominee for the United States House of Representatives from the Seventh District of Louisiana, falsely labeled under the name of Joseph Broussard, who had nothing to do with the publication or distribution of the material in violation of 18 U.S.C. 612. The law makes it unlawful for anyone to willfully publish or distribute political campaign material which does not contain the names of the sponsors.

Staff: United States Attorney T. Fitzhugh Wilson and Assistant United States Attorney E. V. Boagni, (W.D. La.)

Nolo Contendere plea by Labor Union to Charge of Making Political Contribution to Senator Wayne Morse Committee in Connection With November 6, 1956 General Election. United States v. Taxicab Drivers' Local 405, et al. (E.D. Mo.) On March 13, 1961, Judge Randolph H. Weber accepted a nolo contendere plea to an information charging Taxicab Drivers' Local 405, an affiliate of the Teamsters Union, with making a political contribution out of union treasury funds to Senator Wayne Morse's campaign for election to the United States Senate in 1956 in violation of 18 U.S.C. 610. The Court assessed a fine of $1,000 and $50 costs against the union. A second count in the information, charging defendants Philip C. Reichardt and Joseph Bommarito, officers of Local 405, with consenting to such contribution, was dismissed on motion of defendants without objection by the Government.

Staff: United States Attorney William H. Webster, (E.D. Mo.)

Voting; Reapportionment. Baker v. Carr (U.S. Sup. Ct. No. 103). A complaint filed by private citizens in the District Court for the Middle District of Tennessee, in May 1959, under 42 U.S.C. 1983, alleged denials of constitutional rights resulting from gross malapportionment of the Tennessee legislature.

Specifically, it was claimed that, under the existing apportionment, "a minority of approximately 37 percent of the voting population of the State now controls twenty of the thirty-three members of the Senate," and "a minority of 40 percent of the voting population of the State now controls sixty-three of the ninety-nine members of the House of Representatives."

On February 4, 1960, the three-judge Court dismissed the complaint on the grounds that the Court lacked jurisdiction of the subject matter and

the complaint failed to state a claim upon which relief could be granted. The Court held that "the federal rule, as enunciated and applied by the Supreme Court, is that the federal courts, whether from a lack of jurisdiction or from the inappropriateness of the subject matter for judicial consideration, will not intervene in cases of this type to compel legislative reapportionment."

Plaintiffs appealed to the Supreme Court. On March 17, 1961, the Government filed a brief amicus curiae, in which the Department, for the first time in its history, took the position that gross underrepresentation of certain segments of the population in the legislature constitutes a denial of due process of law and the equal protection of the laws, and that the courts can and should provide a remedy. This is expected to be one of the major cases before the Supreme Court this year.

Staff: Harold H. Greene, David Rubin, and Howard A. Glickstein (Civil Rights Division)

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

FOOD, DRUG, AND COSMETIC ACT

Packaged Food Held Misbranded if Packed so as to be Misleading to Ordinary Purchasers Unless the Deception Results from Safety Features Which Outweigh Deceptive Qualities. United States v. 174 Cases * * * Delson Thin Mints (C.A. 3). On February 28, 1961, the Court of Appeals reversed the district court's judgment and remanded the case for further proceedings. The case, a seizure action brought under 21 U.S.C. 334, involves candy, packaged in a box containing hollow cardboard dividers, claimed to be misbranded under 21 U.S.C. 343(d). It is not apparent from viewing the exterior of the box that approximately 25 percent of the practically usable space is taken up by the dividers rather than candy. Although the Government produced both expert and consumer evidence--which was uncontroverted--that the container was deceptive, the district court ruled that it had not sufficiently proved deceptiveness.

The Court of Appeals held that in order to hold for the claimant in such a case, a court would have to find either (1) that the package is not so made, formed, or filled as to deceive the ordinary purchaser as to the quantity of its contents or (2) that the form and filling of the package is justified by considerations of safety and is reasonable in the light of available alternative safety features. On the latter issue, the evidence was in conflict, but the trial court did not make findings which could support its judgement for the claimant. Accordingly, the case was remanded for further proceedings.

This case is the first reported judicial decision favorable to the Government under the deceptive packaging provisions of the Act. The opinion will serve as a guide for the trial of future cases in this area. Increased enforcement activity against deceptively packaged food, drugs, and cosmetics is anticipated.

Staff: Assistant United States Attorney William E. Sallinger (D. N.J.) argued the case.
Duane L. Nelson (Criminal Division) participated in preparation of the brief.

POULTRY PRODUCTS INSPECTION ACT

Substantial Fines Assessed in Pioneer Case Under Act. United States v. Pine Valley Poultry Distributors Corp., et al. (S.D. N.Y.). On March 1, 1961, all defendants (three corporations and five individuals) pleaded guilty to one or more counts of the information and were fined a total of $10,500. The three corporations were fined $3,000, $2,500 and $1,500. The fines as to the individuals ranged from $1,000 to $250. Defendants in this case--the first referred for prosecution under the Act--were involved in

various capacities in large-scale interstate shipments of uninspected slaughtered poultry in the metropolitan New York area. Earlier, the Court had denied a defense motion to suppress evidence obtained under authority of the Act (United States Attorneys Bulletin, November 18, 1960, Vol. 8, No. 24, p. 718; 187 F. Supp. 455 (S.D. N.Y., 1960)).

Staff: Assistant United States Attorney George F. Roberts (S.D. N.Y.).

* * *

IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Joseph M. Swing

DEPORTATION

Declaratory Judgment; Review of Deportation Order; Dismissal of Prior Complaint Res Judicata. Frisina v. Esperdy, (S.D. N.Y., March 9, 1961).

Plaintiff filed a complaint on January 18, 1961 in an action for declaratory judgment attacking the validity of a deportation order. It was almost word for word the same as a complaint filed on October 27, 1960 in the same court by the same plaintiff against the same defendant and seeking the same relief, but with no notice thereon that the prior complaint had been dismissed and summary judgment granted to the defendant on January 3, 1961.

In denying plaintiff's motion for a preliminary injunction and granting defendant's motion for a summary judgment dismissing the second complaint the Court said, "There must be some finality to litigation. The plaintiff had his opportunity in court; his complaint was dismissed. He did not move for reargument; he did not take an appeal. He cannot now file substantially the same complaint and ask the court again to consider the matter. The dismissal of the former complaint is res judicata. See Rule 41(b) of the Rules of Civil Procedure."

IMMIGRATION

Declaratory Judgment; Review of Denial of Application to Adjust Immigration Status; Amendment of Statute Prior to Denial; Deposition. Fassilis v. Esperdy, (S.D. N.Y., March 2, 1961). This was an action seeking judicial review of the Attorney General's denial of plaintiff's application to adjust his immigration status under section 245 of the 1952 Act (8 U.S.C. 1255) and for a judgment under the Declaratory Judgment Act (28 U.S.C. 2201) declaring the Attorney General's decision to be invalid.

Plaintiff entered the United States as an alien crewman on January 29, 1960 and five days later he married a United States citizen. Almost immediately thereafter he filed application for a change of status to that of permanent resident which was denied by the District Director on June 2, 1960. The Regional Commissioner, on appeal, affirmed the denial on August 23, 1960. The denial and affirmation were on the ground that the applicant was not eligible for relief under 8 U.S.C. 1255, being a crewman who was not a bona-fide non-immigrant and not such a case as to warrant favorable discretionary action under the statute.

The Court found that it was perfectly reasonable to conclude, as did the District Director and the Regional Commissioner, that plaintiff's marriage and application for adjustment of status, coming so soon after his arrival here, together with his admitted intention to leave work as a crewman,

were facts indicative of a preconceived intent on his part to seek permanent residence. On those facts the denial of his application was a reasonable exercise of statutory discretion.

However, the Court disposed of the case on other grounds. On July 14, 1960, subsequent to the District Director's denial of the application, but prior to the Regional Commissioner's affirmance, 8 U.S.C. 1255 was amended specifically to preclude its application to a crewman. It held, following Ziffrin, Inc., v. United States, 318 U.S. 73, that the denial of plaintiff's application was compelled by the amended statute.

Plaintiff's notice to take defendant's deposition was vacated since the law compelled the denial of the application and the taking of the deposition would not affect the outcome of the case.

NATURALIZATION

Good Moral Character-Cohabitation Out of Wedlock. Petition of Nick George, (N.D. Calif., March 3, 1961). This petition for naturalization was filed on August 26, 1960 under the general provisions of 8 U.S.C. 1427 (a) which requires, inter alia, that petitioner establish that during the five years immediately preceding the filing of his petition he has been a person of good moral character.

From 1937 on, the petitioner, a single man, lived with a single woman, openly introducing her and holding her out to the world as his wife, and fully supporting her. On May 27, 1960 they were married and continued to maintain the same relationship as previously existed. During the entire period prior to this marriage they were reputed to be husband and wife in the communities where they lived and among all their friends and acquaintances.

The Court found that this couple, by openly living together as husband and wife, created a relationship free from moral stigma; that in any State recognizing a common law marriage they would be considered to be man and wife; and that although their State of residence (California) does not recognize common law marriage, that fact does not make their relationship of over twenty-five years meretricious.

Accordingly, it held that petitioner had established good moral character for the period required by law and may be naturalized. (See Posusta v. United States, 285 F. 2d 533, petition for certiorari declined by S.G., 3-4-61; Bulletin, Vol. 8, No. 2, p. 37).

Ineligible to Citizenship - Relief from Military Service; Intelligent Election by Registrant. Petition of Rodrigues, (N.D. Calif., March 8, 1961). Rodrigues, a national of Portugal, petitioned for naturalization on February 18, 1960. On December 7, 1942 he filed with his Local Draft Board an Application for Relief from Military Service. On December 12, 1942 his Board granted the requested relief and placed him in class IV-C (Neutral alien).

His petition for naturalization was opposed on the ground that the grant of relief in 1942 made him ineligible to citizenship under 8 U.S.C. 1426. He contended that he was never informed of the consequences of his 1942 act in requesting relief from military service but the Court found that the forms he executed then plainly stated upon their face that the making of such a claim for relief would debar the person making it from becoming a citizen of the United States. He failed to submit any evidence except his general statement that he did not understand the consequences of his act. The Court also noted his unequivocal statement to the Draft Board at that time that he did not intend to remain in this country but would return to Portugal at the end of the war.

The Court said that such an expression of his intention controverted his present contention and that he had an opportunity to make an intelligent election (Moser v. United States, 341 U.S. 41), and that he chose to claim exemption from military service with knowledge of the resultant disability placed upon him.

Petition denied.

ERRATUM

Kokkosis v. Esperdy, Vol. 9, No. 6, p. 188.

The date of the Immigration Act in the last sentence of paragraph (1) should read "February 20, 1907" instead of "March 26, 1910."

* * *

INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Conspiracy to Deprive Plaintiffs of Constitutional Rights to Disseminate Neo-Nazi Political Philosophy. Rockwell et al. v. Seaton, et al. (D. D.C.) George Lincoln Rockwell and four of his "storm troopers" filed an action on November 30, 1960 for declaratory relief, relief in the nature of mandamus, and for money damages under the Civil Rights Act, 42 U.S.C. 1981-1986, against the Secretary of the Interior, the Superintendent of the National Capital Parks, the Chief of the National Capital Parks Police, the Commissioners of the District of Columbia, and the Anti-Defamation League of B'nai Brith and some of its officials. Plaintiffs alleged they had been denied certain constitutional rights of speech and assembly. The Department of Justice representing the Secretary of the Interior and other Government officials on January 27, 1961 filed a motion to dismiss the complaint on the grounds that; the complaint failed to state a claim upon which relief could be granted, in that the things defendants are alleged to have done, (as distinguished from the conclusions of the pleader with respect to them) did not constitute a deprivation of their civil rights; the Interior Department defendants acting within the scope of their authority could not be made to respond in damages; and mandamus will not issue to compel an official to perform a non-ministerial act, the performance of which lies within his judgment and discretion. After argument Judge Walsh on March 24, 1961 granted defendants' motion and dismissed the complaint.

Staff: F. Kirk Maddrix, Herbert E. Bates, and
Anthony F. Cafferky (Internal Security Division)

Contempt of Congress: United States v. Pete Seeger (S.D. N.Y.) On March 29, 1961, after a three day jury trial, Pete Seeger was found guilty on all ten counts of an indictment charging a violation of 2 U.S.C. 192 (contempt of Congress). Seeger, a singer of folk songs, was indicted on March 26, 1957 for refusing to answer questions propounded to him by a subcommittee of the House Committee on Un-American Activities in New York City in August 1955. The subcommittee at that time was inquiring into Communist infiltration in the field of entertainment in New York. Seeger was convicted for refusing to answer questions concerning his membership in the Communist Party and his activities on behalf of the Communist Party. He based his refusals to answer on his rights under the First Amendment to the Constitution. Seeger will be sentenced on April 4, 1961.

Staff: Assistant United States Attorney Irving Younger
(S.D. N.Y.)

* * *

LANDS DIVISION

Assistant Attorney General Ramsey Clark

Land Patents; Authority of Secretary of Interior to Prescribe Administrative Procedures to Be Followed in Patent Application Case. Union Oil Company of California v. Stewart L. Udall, Secretary of Interior, (C.A. D.C.). An oil and gas lessee filed a document requesting that a subsequently filed mineral patent application by the Union Oil Company of California for the same land not be processed until (a) the procedure specified in section 7 of the Multiple Mineral Development Act of August 13, 1954, 68 Stat. 708, 711-715, 30 U.S.C. sec. 527, had been performed, or (b) a hearing had been ordered "in which there may be decided the manner in which the respective rights" of the parties may be administratively presented. The Secretary of the Interior established what procedure should be followed. Rather than complying with the procedure established, the Union Oil Company of California filed an action in which it sought to have the Court direct the issuance of a patent to it and the cancellation of the oil and gas lease which had been issued. The District Court held that it could not properly direct the issuance of the patent and the cancellation of the oil and gas lease; that there must be a resolution of the conflicting claims; and that "The court is unable to say that defendant's /Secretary of the Interior/ ruling as to procedure is arbitrary or violative of plaintiff's rights."

The Court of Appeals affirmed. In doing so it took occasion to spell out (1) that it is well established that until legal title has passed to the applicant for a patent, the Secretary may require further inquiry into the validity of claimed rights to public land; (2) that the courts generally will not interfere with interlocutory action taken by the Secretary in the administration and disposal of public lands; and (3) that the mere conduct of such proceedings as involved in the instant case does not threaten the sort of irreparable injury required for judicial intervention before completion of the administrative process.

Staff: Harold S. Harrison (Lands Division).

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CIVIL TAX MATTERS
Appellate Decisions

Enforcement of Treasury Summons Calling for Production of Corporate Records and for Testimony of Corporate Official Re Years for Deficiency Assessments Are Barred by Limitations in Absence of Fraud. Wall v. Mitchell (C.A. 4, February 10, 1961). A revenue agent issued a summons to the president of the taxpayer corporation, calling upon him to appear before the agent, give testimony, and produce certain corporate audit reports and inventory records covering the years 1944-1958. The president refused to comply upon the grounds that most of the years involved were barred, as to assessments, by the statute of limitations and that certain of them had been subjected to previous examination. He contended that the agent was embarked upon an unnecessary examination which was prohibited by Section 7605(b) of the Internal Revenue Code of 1954. Thereupon, a petition for enforcement of the summons was filed in the district court, as provided by Section 7604 of the 1954 Code. The agent appeared at the hearing on the petition and testified that a summary of certain financial statements filed with a bank by the taxpayer corporation (the summary had been prepared by the bank for the agent) showed corporate net profits substantially in excess of those reported on the corporate returns for the years 1947-1952 as well as reflecting inventories substantially greater than those shown on the returns for 1945-1946. He cited these as the basis for his belief that the audit reports requested in the summons would show variations from the corporate books and tax returns of such nature as to evidence civil fraud. He also testified regarding a pattern, discovered by him in the corporate records for 1955-1957, of corporate payments of the personal expenses of the president and his family which were deducted by the corporation as business expenses. The district court held this testimony to constitute a sufficient showing of the possibility of fraud (which, when proven, takes a case out of the coverage of the statute of limitations) to justify the investigation and ordered the president to comply with the summons. The president appealed.

The Court of Appeals affirmed the district court order, per curiam, without passing upon the question of the proper standard by which to measure the showing of fraud (see discussion of the decision of the Seventh Circuit in McDermott v. John Baumgarth Co., Bulletin, March 24, 1961, p. 192), holding that there was substantial evidence to support the district court's finding. It seems reasonable to interpret this as meaning that the evidence was sufficient to meet even the most rigid of the tests established in the several Circuits.

Staff: William A. Friedlander and Meyer Rothwacks

Injunction Restraining District Director from Determining Income Tax Deficiencies by Bank Deposits Method. Campbell v. Guetersloh (C.A. 5, March 16, 1961). In this case the Circuit Court reversed the decision of the district court and vacated a permanent injunction restraining the District Director from determining taxpayers' income tax deficiencies by the bank deposits method, but permitting him to determine such deficiencies on the basis of taxpayers' "books of account or based upon proper and lawful use of the net worth method." The Government argued that (1) the injunction is expressly prohibited by Section 7421(a) of the 1954 Code; (2) taxpayers have an adequate remedy at law by permitting the administrative process to take its normal course as charted by the statutes which provide for the issuance of deficiency letters and prohibit the Director from assessing the tax within 90 days of its issuance so that taxpayers will have ample time to file a petition for review in the Tax Court; and (3) the key findings of fact are either unsupported by the record or refuted by the record. The Court of Appeals, characterizing the injunction as "unprecedented", agreed with all three contentions. The Court stated:

> Necessarily [the Commissioner's] inquiry would have to be outside of the books, because they supported the returns as filed. There is no restriction on the method or theory by which the Commissioner tests his belief that unreported income exists * * * ' The existence of unreported income may be demonstrated by any practicable proof that is available in the circumstances of the particular situation' [citing Davis v. United States, 266 F. 2d 331, 336 (C.A. 6th)] * * *
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> Moreover, such an injunction violates the precept of the anti-injunction statute, Section 7421 * * *. It does not fall within the recognized exception found by the Supreme Court to exist in Miller v. Standard Nut Margarine Company of Florida, 284 U.S. 498, or in Hill v. Wallace, 259 U.S. 44. Here there is no allegation that the proposed tax is "illegal" in any sense other than that it is too great in amount. * * *
>
> Here the court has prevented the administrative investigation and determination necessary to the assessment of an additional tax, thus making impossible any legal determination by the Tax Court or the District Court whether available proof shows that a deficiency exists. All questions touching on the weakness of the Director's case and the difficulty of proof will be before the courts for their review once the administrative function is completed. That is when the court may first come upon the scene; not before the investigation has been completed.

Staff: William Friedlander, A. F. Prescott, Richard B. Buhrman (Tax Division)

Liens; Assessment and Collection; Priority of. United States v. Automatic Heating & Equipment Co. (C.A. 6, February 21, 1961, affirming, per curiam, 181 F. Supp. 924 (E.D. Tenn.)). The District Court decision gave to the United States tax lien priority to the balance of proceeds from the sale of property subject to a prior mortgage. The mortgage, given to secure loans evidenced by a promissory note for $24,939.60, repayable over a five-year period at the rate of $415.66 per month, contained the further proviso that--

> In addition to the above described indebtedness, this deed of trust shall also secure any and all other indebtedness due from first party [mortgagor taxpayer], or either of them, whether directly or indirectly to the beneficiary herein [mortgagee Bank], its successor or assigns, up to an amount not exceeding $24,939.60, whether evidenced by note or notes, draft, check, or otherwise, and any and all renewals thereof, in whole or in part which may be now or hereafter held by or become due to the beneficiary herein, its successors and assigns within a period of ten years from the date of this instrument.

Subsequent to execution of this mortgage, but before assessment of taxes and filing of notice of lien, the Bank made additional advances to taxpayer, specifically secured by assigned accounts receivable but without reference to the mortgage, the unpaid balance of which was $69,123.08 at time of foreclosure. Mortgagee contended that by reason of the above provision the mortgaged property also served as security for these subsequent loans. In the District Court the United States, on the premise that the mortgage provision intended to bring the property as security for limited future loans, took the position that it did not apply to the particular subsequent loans in issue. On the other hand, the District Court construed the mortgage provision as applying only to outstanding indebtedness owed by the taxpayer to the mortgagee at the time of execution of the mortgage, and not to any future advances.

Staff: Fred E. Youngman (Tax Division).

District Court Decisions

Lien Priority; Taxpayer's Wife, Taking His Interest in Jointly Held Property Pursuant to Separation Agreement, Given Priority Over Tax Lien Not Filed at Time of Conveyance. United States v. Arnold B. Carlson, et al. (N.D. Ill., Feb. 13, 1961, 61-1 U.S.C.T. Par. 9263). This was a collection and foreclosure action brought against taxpayer and his former wife. The Government's case was based on a contention that Mr. and Mrs. Carlson had filed a joint income tax return for one of the years involved, 1951, and that therefore their liability was joint. An alternative contention was that certain realty which had been conveyed by taxpayer to his wife in

connection with their 1953 divorce settlement, was, because of prior tax assessments, subject to the federal tax lien. When the conveyance was made, the lien had not been recorded. To sustain the contention of joint liability, the Government attempted to show that although taxpayer had signed his wife's name to the joint return without her express authorization, she "tacitly consented" to this by statements made in the agreement of separation executed between her and taxpayer, in which he agreed to save her harmless for tax liabilities for various years, including 1951.

The Court held that the former wife neither knew of, nor condoned, the filing of a joint return, and further held that, because she gave consideration in the agreement under which the realty was conveyed to her, she was a purchaser under Section 6323 of the Internal Revenue Code of 1954, and protected from the Government's unrecorded tax lien.

Staff: United States Attorney Robert Tieken (N.D. Ill.)

Lien Foreclosure; Cash Surrender Value of Life Insurance Policies; Insurance Companies Directed to Pay Cash Surrender Values Without Deductions for Attorneys' Fees or Any Transactions Between Insurers, Insured, and Beneficiary After Date Lien Arose. United States v. Wilson, et al., 61-1 U.S.T.C. Par. 9268 CCH (D. N.J.). The Court, after granting a summary judgment for tax liability against taxpayer, ordered defendants to show cause why the defendant insurance companies should not pay to plaintiff the cash surrender value of certain life insurance policies. A jury had previously returned a verdict that taxpayer was the owner of the life insurance policies on the date on which the tax lien arose.

After hearing, the Court directed the insurance companies to pay the gross value of the policies to the Government without deductions. Costs and counsel fees were denied because this was a foreclosure action and not an interpleader action brought by the insurers, and because reductions of the cash surrender value would reduce the lien pro tanto.

The provisions for automatic premium loans as well as those which required the insured and beneficiary to request and consent to payment of the cash surrender value and to deliver the policies to the insurer for cancellation were found to be solely for the protection of the insurer, and since under all policies the insurer, the insured and the beneficiary were parties to the action, they were subject to the order of the Court and this protection would be unnecessary because it would be afforded by the judgment of the Court. The Court could compel the beneficiary to consent to payment of the cash surrender or it could compel the insured-taxpayer to substitute the United States as beneficiary as allowed by the policies.

The Court also concluded that the tax lien attached to the cash surrender value of the policies as of the tax assessment date and that the burden of the lien attached to successive increments of the cash surrender value (which would result from the automatic premium loans) from the date of the accrual of the lien until foreclosure thereof, since the

lien could not be impaired by any transactions between the taxpayer-insured, the beneficiary and the insurer.

Staff: United States Attorney Chester A. Weidenburner and Assistant United States Attorney Raymond W. Young (D. N.J.).

Liens; Priority Between Assignment Made by Taxpayer and Federal Tax Lien; Proper Place of Filing Tax Lien. T. R. Elliott, et al. v. Sioux Oil Co., et al.; Sioux Oil Co., Interpleader; Youngstown Sheet And Tube Co., and United States, Intervenors. (D. Wyoming, December 9, 1960.) Sioux Oil Company was a principal purchaser of crude oil produced on various oil and gas leases operated by taxpayer, C. M. & W. Drilling Company, Inc. (now a bankrupt). Sioux Oil interpleaded in this action funds due for the purchase of such oil. The question was whether the assignment of these oil proceeds entitled the assignee (Youngstown Sheet and Tube Co.) to priority over a federal tax lien, where the tax lien arose and notice thereof was recorded in a county in Colorado (taxpayer's principal place of business) prior to the assignment, but the assignment was recorded in a county in Wyoming, where the oil well was located, prior to the filing of the federal tax lien in Wyoming.

The Court held in substance that the assignment constituted a mortgage in favor of Youngstown Sheet and Tube Company; that the proper place for filing the "mortgage" and also the federal tax lien was the county in Wyoming where the real property from which the oil was produced was located; and that since the assignment was filed in that Wyoming county prior to the filing there of the federal tax lien, the assignment was entitled to priority.

It was the position of the Government that the proceeds in question constituted personal property (a chose in action) which was covered by the prior notice of tax lien filed in the county wherein taxpayer's principal place of business was located. While it was the view of the Department that the decision was wrong, the Solicitor General determined that no appeal would be taken, based on practical reasons. The amount here involved was small, about $2,924. Taxpayer is now in bankruptcy where fairly substantial assets are involved; and further litigation in the instant case would deplete the bankruptcy assets that might be available for payment of the tax liability. Therefore, it was deemed advisable to terminate the present litigation without further delay.

Staff: United States Attorney John F. Raper, Jr. (D. Wyoming); Mamie S. Price (Tax Division)

CRIMINAL TAX MATTERS
District Court Decision

Use of Lay Evidence To Rebut Psychiatric Testimony. United States v. Allan C. Cain and Margaret S. Cain (E.D. Wis.) Criminal prosecution

of husband and wife for attempted evasion of income taxes as to the years 1953 through 1956 resulting in conviction of both defendants on March 24, 1961 after a non jury trial. The defense was gross negligence and lack of wilfulness. Through testimony of a psychologist, a neurologist, and two psychiatrists, defendant Allan Cain, a prominent Appleton, Wisconsin attorney, attempted to show that a factor involved in lack of wilfulness was his mental condition which was diagnosed as an organic brain disorder causing "diffuse and localized wasting away of the brain." The medical witnesses testified in rather strong terms as to the deteriorating mental condition of defendant during the prosecution years and up to the present date. /Whether such testimony is admissible on the issue of wilfulness is the subject of a separate study and will be discussed in a later United States Attorneys Bulletin./

By the time the medical witnesses took the stand, Government attorneys had assembled rebuttal evidence in the form of testimony of twelve attorneys and two judges who had observed Cain in courtroom situations and other legal proceedings over a period of years, and were prepared to testify that Cain was an intelligent and resourceful practicing lawyer. In fact, many of the lawyers and judges were in the courtroom during the medical testimony concerning Cain. On cross-examination the medical witnesses were asked whether they had talked with any of the attorneys and judges or obtained information from disinterested third party sources as to the activities of Cain and as to his intelligence, lack of intelligence or general mental condition. They admitted they had not and conceded that they had obtained the history on which they based their opinion primarily from Cain and from testimony of a medical doctor who was an old friend of the defendant and who emphasized the emotional problems of Cain rather than his active practice as a lawyer. On cross-examination and examination by the Court, therefore, the medical witnesses in effect testified that even though Cain might give the appearance of being a successful practicing lawyer he would have difficulty telling right from wrong as to the act of filing a false return in the years alleged in the indictment.

Apparently in anticipation of the rebuttal he knew was coming, defendant took the stand in his own behalf and, under questioning by defense counsel, among other things, contradicted the medical testimony by saying he knew right from wrong and always had, and no irresistible impulse was involved. He further contradicted some of the implications of the medical testimony by saying he was competent to practice law.

The judges and attorneys then testified in rebuttal for the prosecution as to the large volume of important and involved cases handled by defendant during the years involved and that he was a highly intelligent and resourceful attorney.

In a written memorandum and in argument the Government emphasized that opinions and judgments or inferences of experts, even when unanimous and uncontroverted, are not conclusive on the trier of facts, citing United States v. Pollard, 171 F. Supp. 474, and Holloway v. United States, 148 F. 2d 665. The Government argued that this is particularly true if the evidence shows the experts have not considered all the facts in forming their

opinions, citing United States v. Hopkins, 169 F. Supp. 187, 195-196, and United States v. Williams, 250 F. 2d 19, 23-25.

The following language from page 26 of "Forensic Psychiatry" by Dr. Henry A. Davidson, a recognized authority in this field, was read to the Court in the Government's argument:

> The examiner's next step is to obtain the facts of the case. A psychiatrist will certainly be embarrassed if he examines a defendant in the absence of the whole story. He then has to rely on the patient's own explanation of events, and, as often as not this explanation is factually incorrect. Many defendants are psychopaths, and many psychopaths tell untruths with glibness and assurance, so that only a naive examiner accepts as fact the information furnished by the patient.

Among other comments, the Court stated that it was incredible the way some of the medical witnesses attempted to isolate the particular conduct of the defendant regarding his tax matters and attempted to persuade the Court that was the only manifestation of mental incompetence. He characterized such medical testimony as preposterous.

Staff: Assistant United States Attorney Matthew Corry (E.D. Wis.); Harlow M. Huckabee (Tax Division).

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