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DEPARTMENT OF JUSTICE

Vol. 9 No. 8

UNITED STATES ATTORNEYS

BULLETIN

UNITED STATES ATTORNEYS BULLETIN

Vol. 9 April 21, 1961 No. 8

NEW APPOINTEES

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

California, Southern - Francis C. Whelan

Mr. Whelan was born December 11, 1907 at O'Neill, Nebraska, is married and has two children. He attended San Diego State College from 1925 to 1928 and received his LL.B. degree from the University of California in 1932. He was admitted to the Bar of the State of California that same year. From 1932 to 1935 he practiced law with his father and brother in San Diego. On August 19, 1935 he was appointed an Assistant United States Attorney for the Southern District of California and served until his voluntary resignation on July 23, 1948. Since that time he has engaged in the private practice of law in Los Angeles. He has also been a member of the Commission for Land Condemnation Proceedings in the United States District Court for the Southern District of California since 1959.

Florida, Southern - Edward F. Boardman

Mr. Boardman was born August 23, 1912 in New York City, is married and has two children. He entered the University of Florida at Gainesville on September 12, 1932 and received his B.S. in Business Administration on May 30, 1938 and his LL.B. degree on July 23, 1938. He was admitted to the Bar of the State of Florida that same year. From 1938 to 1942 he was engaged as an attorney with the Miami firms of Knight, Pace and Paine; Worley and Gautier; and Robert C. Lane, successively. He served in the United States Army from April 7, 1942 to January 7, 1946 when he was honorably discharged as a Major. He then returned to Miami and for the next three years was again associated with Robert C. Lane. In 1949 he formed the law partnership of Boardman and Kates and has since remained with its successor firms, the present one being known as Boardman, Bolles and Prunty. He also served as Judge of the Night Traffic Court for the City of Miami from November 1949 to November 1951 and since that time has been attorney for the Dade County School Board.

Massachusetts - W. Arthur Garrity, Jr.

Mr. Garrity was born June 20, 1920 at Worcester, Massachusetts, is married and has four children. He attended Holy Cross College from September 18, 1937 to June 11, 1941 when he received his A.B. degree, cum laude, and Harvard University from September 1941 to May 1943 and again from October 1945 to June 1946 when he received his LL.B. degree. He was admitted to the Bar of the State of Massachusetts in 1946. He served in the United States Army from November 6, 1942 to October 29, 1945 when he was honorably discharged as a Technician, Third Grade. From September 10, 1946 to September 6, 1947 he was law clerk to the Honorable

Francis J. W. Ford, United States District Judge in Boston. He then engaged in the private practice of law in Worcester until March 12, 1948 when he was appointed an Assistant United States Attorney for the District of Massachusetts. He served in this capacity until February 18, 1950 when he voluntarily resigned and entered the law firm of Roche, Maguire and Leen in Boston, where he is still employed. He also was a part time lecturer at the Boston College Law School from September 1950 to June 1952.

Minnesota - Miles W. Lord

Mr. Lord was born November 6, 1919 at Dean Lake, Minnesota, is married and has four children. He received an A.A. degree from Crosby-Ironton Junior College in 1940 and an LL.B. degree from the University of Minnesota on August 26, 1948. He was admitted to the Bar of the State of Minnesota that same year. He served in the United States Army from February 24, 1944 to November 10, 1945 when he was honorably discharged as a Corporal. From 1948 to 1951 he engaged in the practice of law in Minneapolis and on January 16, 1951 he was appointed an Assistant United States Attorney for the District of Minnesota. He served until November 10, 1952 when he voluntarily resigned to re-enter the private practice of law. In November 1954 he was elected Attorney General of the State of Minnesota and took office on January 3, 1955. He held this post until May 5, 1960. Since that time he has been associated with the firm of Murphy, Sullivan and Garrity in Minneapolis.

New Mexico - John F. Quinn, Jr.

Mr. Quinn was born January 3, 1918 at Bald Hill, Oklahoma and is married. He attended Northeastern State College at Tahloquah, Oklahoma from 1935 to 1937. He received his A.B. degree from the University of Oklahoma on June 2, 1948 and his LL.B. degree on February 15, 1949. He was admitted to the Bar of the State of New Mexico in 1948. He served in the United States Army from April 28, 1942 to April 3, 1946 when he was honorably discharged as a First Lieutenant. From 1948 to 1958 he was in law partnership with Mr. Mack Easley and Mr. Lowell Stout in Hobbs, New Mexico and since that time has engaged in the private practice of law in Hobbs.

New York, Southern - Robert M. Morganthau

Mr. Morganthau was born July 31, 1919 at New York, New York, is married and has four children. He attended Amherst College from September 1937 to June 1941 when he received his A.B. degree and Yale University from February 18, 1946 to February 28, 1948 when he received his LL.B. degree. He was admitted to the Bar of the State of New York in 1949. He served in the United States Navy from July 11, 1940 to November 26, 1945 when he was honorably discharged as a Lieutenant Commander. Since 1948 he has been an attorney with Patterson, Belknap and Webb in New York City.

New York, Eastern - Joseph P. Hoey

Mr. Hoey was born October 21, 1912 at Brooklyn, New York, is married and has four children. He attended Fordham University from 1931 to 1934 when he received his A.B. degree, and received his LL.B. degree from St. Johns University in 1937. He was admitted to the Bar of the State of New York in 1938. He served in the United States Navy from May 22, 1942 to October 31, 1945 when he was honorably discharged as a Lieutenant. From 1940 to 1942 Mr. Hoey was an Attorney in the office of the District Attorney of Kings County, New York, and from 1946 until his appointment as United States Attorney he was Assistant District Attorney of Kings County.

Rhode Island - Raymond J. Pettine

Mr. Pettine was born July 7, 1912 at Providence, Rhode Island, is married and has one child. He attended Providence College from 1931 to 1934. He entered Boston University Law School on September 18, 1934 and received his LL.B. degree on June 14, 1937 and his LL.M. degree on August 6, 1940. He was admitted to the Bar of the State of Rhode Island in 1940. He served in the United States Army from March 13, 1941 to December 1, 1946 when he was honorably discharged as a Major. Since that time he has engaged in the practice of law in Providence and during the period 1956 to 1959 he was in partnership with Mr. Frank Cappalli. He has also served with the Attorney General's Department of the State of Rhode Island as Special Counsel from February 1, 1948 to August 2, 1952 and as Assistant Attorney General since August 3, 1952.

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

Colorado - Lawrence M. Henry
District of Columbia - David C. Acheson
New York, Northern - Justin J. Mahoney
North Dakota - John O. Garaas
South Dakota - Harold C. Doyle

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DISTRICTS IN CURRENT STATUS

As of February 28, 1961, the districts meeting the standards of currency were:

CASES

Criminal

Ala., N.	Hawaii	Mich., W.	N. C., M.	Tex., N.
Ala., M.	Idaho	Minn.	N. C., W.	Tex., E.
Ala., S.	Ill., E.	Miss., N.	N. D.	Tex., S.
Alaska	Ill., N.	Mo., E.	Ohio, N.	Utah
Ariz.	Ill., S.	Mo., W.	Ohio, S.	Va., W.
Ark., E.	Ind., N.	Mont.	Okla., N.	Wash., E.
Ark., W.	Ind., S.	Nev.	Okla., E.	Wash., W.
Calif., S.	Iowa, N.	N. H.	Okla., W.	W. Va., N.
Colo.	Iowa, S.	N. J.	Ore.	W. Va., S.
Del.	Kan.	N. M.	Pa., E.	Wis., E.
Dist. of Col.	Ky., E.	N. Y., E.	Pa., W.	Wis., W.
Fla., N.	La., W.	N. Y., N.	P. R.	Wyo.
Fla., S.	Maine	N. Y., S.	R. I.	C. Z.
Ga., S.	Mass.	N. Y., W.	S. D.	Guam
	Mich., E.	N. C., E.	Tenn., W.	V. I.

CASES

Civil

Ala., N.	Ill., N.	Miss., S.	Ohio, S.	Tex., W.
Ala., M.	Ill., E.	Mo., E.	Okla., N.	Utah
Ala., S.	Ind., N.	Mo., W.	Okla., E.	Vt.
Ariz.	Ind., S.	Neb.	Okla., W.	Va., E.
Ark., E.	Iowa, N.	N. H.	Ore.	Va., W.
Ark., W.	Iowa, S.	N. J.	Pa., E.	Wash., E.
Colo.	Kan.	N. M.	Pa., M.	Wash., W.
Dist. of Col.	Ky., W.	N. Y., N.	Pa., W.	W. Va., N.
Fla., N.	La., W.	N. Y., E.	P. R.	W. Va., S.
Fla., S.	Me.	N. Y., W.	S. C., W.	Wis., E.
Ga., M.	Md.	N. C., M.	S. D.	Wyo.
Ga., S.	Mass.	N. C., W.	Tenn., W.	C. Z.
Hawaii	Mich., E.	N. D.	Tex., N.	Guam
	Miss., N.	Ohio, N.	Tex., E.	V. I.

MATTERS

Criminal

Ala., N.	Ga., M.	Me.	N. Y., E.	S. D.
Ala., M.	Ga., S.	Md.	N. C., M.	Tex., E.
Ala., S.	Hawaii	Mass.	N. C., W.	Tex., S.
Ariz.	Idaho	Mich., W.	N. D.	Utah
Ark., E.	Ind., N.	Miss., N.	Ohio, S.	Va., E.
Ark., W.	Ind., S.	Miss., S.	Okla., E.	W. Va., N.
Calif., N.	Iowa, N.	Mo., E.	Okla., W.	W. Va., S.
Colo.	Iowa, S.	Mont.	Pa., M.	Wis., E.
Conn.	Ky., E.	Neb.	Pa., W.	Wyo.
Del.	Ky., W.	N. J.	P. R.	C. Z.
Fla., N.	La., W.	N. M.	R. I.	Guam
				V. I.

MATTERS

Civil

Ala., N.	Idaho	Mich., E.	N. C., M.	Texas, E.
Ala., M.	Ill., N.	Mich., W.	N. C., W.	Texas, S.
Ala., S.	Ill., E.	Minn.	N. D.	Texas, W.
Ariz.	Ill., S.	Miss., N.	Ohio, N.	Utah
Ark., E.	Ind., N.	Miss., S.	Ohio, S.	Vt.
Ark., W.	Ind., S.	Mo., E.	Okla., N.	Va., E.
Calif., N.	Iowa, N.	Mont.	Okla., E.	Va., W.
Calif., S.	Iowa, S.	Neb.	Okla., W.	Wash., E.
Colo.	Kan.	Nev.	Pa. E.	Wash., W.
Dist. of Col.	Ky., E.	N. J.	Pa., W.	W. Va., N.
Fla., N.	Ky., W.	N. M.	P. R.	Wis., E.
Ga., N.	La., W.	N. Y., E.	R. I.	Wis., W.
Ga., M.	Me.	N. Y., S.	S. C., W.	Wyo.
Ga., S.	Md.	N. Y., W.	S. D.	C. Z.
Hawaii	Mass.	N. C., E.	Texas, N.	Guam
				V. I.

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JOB WELL DONE

The Chief Postal Inspector has congratulated Assistant United States Attorney Sheldon H. Elsen, Southern District of New York, on his successful handling of a recent prosecution which resulted in a conviction.

Assistant United States Attorney D. Arthur Connelly, Northern District of Illinois, has been commended by the District Supervisor, Bureau of Narcotics, for his outstanding work in a recent narcotics case. The six-weeks trial concluded with the conviction of six of the ten defendants. The letter stated that from the inception of the investigation, Mr. Connelly exhibited keen interest throughout, and worked long and unusual hours in preparing the case for trial; that his presentation was excellent and his recollection of the evidence and analysis of the testimony were outstanding; and that the District Supervisor had never heard a finer closing argument delivered to a jury. The District Supervisor further stated that it was a most rewarding experience to work with Mr. Connelly, and that the Department of Justice is indeed fortunate in having men of such outstanding ability and dedication.

The Director, General Regulatory Division, Department of Agriculture, has expressed appreciation for the capable handling of a recent case by Assistant United States Attorney George F. Roberts, Southern District of New York. The letter stated that the Department of Agriculture is most pleased with the results obtained in which defendants pleaded guilty and were fined on various counts.

The members of the March, 1961, Grand Jury for the Eastern District of New York have commended Assistant United States Attorney Margaret E. Millus and personnel of the Criminal Division, Department of Justice for their excellent presentation of matters pertinent and relative to the prosecution of a recent case. The letter stated that these complex matters required extensive preparation, outstanding ability and devotion to duty, and congratulated the Department of Justice for having personnel of this calibre on its staff.

The news editor of an Iowa radio station has expressed appreciation for the excellent cooperation given reporters by United States Attorney F. E. Van Alstine, Northern District of Iowa. The editor stated that while relations had always been highly satisfactory over past years, the station is deeply appreciative of the recent consideration afforded them in the coverage of a recent embezzlement case at a time when the United States Attorney's office was extremely busy with matters pertaining to the case.

United States Attorney Elliott Kahaner, Eastern District of New York, spoke recently at the Round Table Conference on Post Legal Education of the Queens County Bar Association, on the Federal Rules of Civil Procedure. The meeting was well attended by many young practitioners and older practitioners who had little or no familiarity with Federal litigation. The Chairman of the Committee stated that "only through meetings such as this could the practicing lawyer become familiar with phases of law other than those with which he comes in contact."

The District Supervisor, Bureau of Narcotics, has commended United States Attorney Harry W. Hultgren, Jr., District of Connecticut, for the excellent manner in which a recent case was handled. The letter stated that successful prosecution in this case and the substantial sentences imposed on the international narcotic traffickers involved will have a marked effect on the narcotic traffic, not only in Connecticut but also in other areas.

Assistant United States Attorney John Kaplan, Northern District of California, has been commended by the Acting Supervisor in Charge, IRS, for the successful prosecution of a recent case involving violations of the Internal Revenue liquor laws. The letter stated that Mr. Kaplan is a very able prosecutor who will not shun a fight, and has demonstrated his ability in several recent difficult cases, all of which he has won. The letter further stated that in view of the delicate nature of the case, the interests of justice have been well served by the conviction of the defendant on the misdemeanor charge of the indictment.

United States Attorney William B. West, III, and Assistant United States Attorney William N. Hamilton, Northern District of Texas, have been commended by General Counsel, SEC, for the exceptionally competent and dedicated services they skillfully brought to bear in the prosecution of a recent criminal case. In expressing gratitude and thanks for their able and devoted services in numerous other important Commission

enforcement matters, the General Counsel stated that the successful results obtained in the instant case could not have been obtained without the excellent teamwork and cooperation existing between the staff members of the SEC and of the United States Attorney's office.

The Foreman of the Federal Grand Jury for the Northern District of California, Northern Division, has expressed appreciation of the services rendered by Assistant United States Attorney Robert E. Woodward, Northern District of California. The letter stated that Mr. Woodward was both a competent attorney and a gentleman with a deep understanding of the complexities of human nature, and that he was a valued factor in the excellent work being done by the Federal District Court in Sacramento.

The Chief Postal Inspector has commended Acting United States Attorney Charles W. Eggart, Jr., and Assistant United States Attorney Edward L. Stahley, Northern District of Florida, on their excellent work in a recent series of mail fraud trials involving a group of defendants charged with the staging of fake automobile wrecks for the purpose of collecting insurance. All of the defendants, who had obtained an estimated $250,000 from insurance firms, were found guilty. The letter stated that Messrs. Eggart and Stahley handled the prosecutions in an outstanding manner and were very impressive in their interrogation of witnesses, many of whom attempted to slant their testimony in favor of the defendants.

Assistant United States Attorney Arnold M. Weiner, District of Maryland, has been commended for his outstanding work in the recent trial of a complicated and ingenious fraud case in which the actual trial took four months, and the period of preparation preceded the trial by many months. The commendation stated that Mr. Weiner, during most of the trial, worked at least sixty and sometimes eighty hours per week; that he had every facet of the complex matter in mind; and that he was able to present it in a manner worthy of the most experienced trial lawyer.

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PERFORMANCE OF DUTY

United States Attorney William B. West, III, Northern District of Texas has expressed appreciation for the courtesy and assistance extended by United States Attorney Donald G. Brotzman, and his staff, District of Colorado, during Mr. West's recent trip to Denver in connection with a criminal case. The letter stated that as a result of the evidence obtained in Denver and Los Angeles in the case, the court denied the defendants' applications asking leave to proceed in forma pauperis.

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ADMINISTRATIVE DIVISION

Administrative Assistant Attorney General S. A. Andretta

MEMOS & ORDERS

The following Memoranda and Orders applicable to United States Attorneys Offices have been issued since the list published in Bulletin No. 6, Vol. 9, dated March 24, 1961.

ORDER	DATED	DISTRIBUTION	SUBJECT
238-61	3-17-61	U.S. Attys & Marshals	Amendment of Section 10(a) of Order No. 175-59, Relating to Recommendations Referred to Department by President's Committee on Equal Employment Opportunity.
239-61	3-17-61	U.S. Attys & Marshals	Assignment of Functions Relating to President's Committee on Equal Employment Opportunity.
240-61	3-21-61	U.S. Attys & Marshals	Placing Assistant Attorney General Lee Loevinger in Charge of Antitrust Division.
241-61	3-29-61	U.S. Attys & Marshals	Further Amendment of Section 23(a) of Order No. 175-59, Authorizing Assistant Attorneys General to Accept Offers in Compromise.
242-61	4-6-61	U.S. Attys & Marshals	Assignment of Functions Relating to President's Committee on Equal Employment Opportunity.

MEMO	DATED	DISTRIBUTION	SUBJECT
193-4	3-22-61	U.S. Attys & Marshals	Absentee Voting Assistance and Information Program.
292	3-21-61	U.S. Attys & Marshals	Revised Payroll Procedures.
293	3-28-61	U.S. Attys & Marshals	Revised Nondiscrimination in Employment Clause.

GUIDE FOR INCURRING EXPENSES

In an effort to assist all members of United States Attorneys' and Marshals' offices, particularly the new employees, with procedures for incurring administrative, litigative, and witness expenses, we have

forwarded to all offices a Procedural Guide dated April 12, 1961. Although this does not include all instances it is intended to cover the types of expenses most frequently incurred.

It is suggested that the administrative assistants in each office be responsible for distribution of a guide to each Assistant United States Attorney and for obtaining the cooperation of the staff in complying with the regulations. If additional copies are needed, please forward your request to the Administrative Assistant Attorney General, Attention: Records Administration Office.

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ANTITRUST DIVISION

Assistant Attorney General Lee Loevinger

SHERMAN ACT

Indictment Filed Under Section 1. United States v. Milk Distributors Association, Inc., et al., (D. Md.) An indictment was returned on March 22, 1961, by a grand jury sitting in Baltimore, charging, in two counts, violations of Section 1 of the Sherman Act. The defendants, it was charged, fixed prices and allocated among themselves districts established by local governments for competitive sealed bids in the supply of milk for school use.

The indictment named 7 defendants and a co-conspirator in Count I, relating to bids for Baltimore City schools between 1946 and 1957. Count II, relating to bids submitted to Baltimore City and to surrounding Baltimore County for the 1959-60 school year, named thirteen defendants. Also indicted were five individuals, who are charged with key roles in the conspiracy.

Count I charged that the eight school districts established by the City of Baltimore for bidding purposes were allocated each year among the defendants and co-conspirator. A "break price" was established each year so that losing bids could be submitted (above the "break price") by those not allocated the district without interfering with the bid below the "break price" which was submitted by the designated winner.

Count II charged that, as a result of an agreement reached through a series of meetings held at Baltimore's Sheraton-Belvedere Hotel and at the offices of Sealtest, one of the defendants, the bids for the eight City school districts and ten County school areas were allocated among the defendant dairies and their co-conspirators. Once more, a "break price" was established for that year.

Count II further charged that the conspirators met the situation of a cancellation of County contracts in November of 1959, by conspiring to submit new bids at fixed prices in such a manner that each of the conspirators would win, on the re-bids, in the area won in the original bidding in August for the 1959-1960 school year.

The dollar volume of school milk amounts annually to approximately $550,000 in the City of Baltimore and approximately $650,000 in Baltimore County. The school milk business is extremely desirable because of its advertising value.

The case has been assigned to Chief Judge Thomsen and arraignments were held April 14, 1961, when all defendants pleaded not guilty.

Staff: Paul A. Owens, Lewis A. Rivlin and Jacob Silverman
(Antitrust Division)

CLAYTON ACT - FALSE CLAIMS ACT

Complaints Filed Under Section 4 and 4A of Clayton Act and False Claims Act. United States and Tennessee Valley Authority v. Westinghouse Electric Corp., et al., (E.D. Pa.), United States and Tennessee Valley Authority v. General Electric Company, et al., (E.D. Pa.), United States and Tennessee Valley Authority v. Westinghouse Electric Corp., et al., (E.D. Pa.), United States v. General Electric Company, et al., (E.D. Pa.), United States v. I-T-E Circuit Breaker Company, et al., (E.D. Pa.), United States v. Cutler-Hammer, Inc., et al., (E.D. Pa.). On April 11, 1961, the Department of Justice filed six more civil complaints seeking to recover damages from the manufacturers of heavy electrical equipment who were involved as defendants in corresponding indictments returned during the early portion of 1960. The products involved are power switchgear assemblies, turbine generators, power transformers, distribution transformers, low voltage power circuit breakers and low voltage distribution equipment.

The complaints allege that beginning as early as 1956, defendant companies engaged in conspiracies to fix prices, to allocate governmental business and to submit rigged bids to governmental organizations and agencies. It is alleged that as a result of the conspiracies, governmental organizations and agencies purchased the electrical equipment involved at high and artificial prices. The Department has not completed its analysis of government purchase data, so the complaints do not include a damage theory nor a claim for specific damages.

In three of the cases the United States is the plaintiff. In the other three cases, the United States and the Tennessee Valley Authority (TVA) filed suit jointly.

The joint complaints contain five counts each. In Counts I, the TVA is seeking treble damages under Section 4 of the Clayton Act. Under Counts II, the United States seeks double damages plus forfeitures on purchases by the Federal agencies, excluding TVA, under the False Claims Act. Counts III are alternative to Counts II and seek single damages under Section 4A of the Clayton Act. Counts IV are alternative to Counts I and ask for double damages plus forfeitures under the False Claims Act in connection with TVA purchases. Counts V are further alternatives to Counts I and seek single damages under Section 4A of the Clayton Act with respect to purchases by TVA.

The other three complaints contain two counts each. Under Counts I, the United States is seeking double damages plus forfeitures under the False Claims Act. Counts II are alternative to Counts I and seek single damages under Section 4A of the Clayton Act.

In three of the earlier criminal cases (power switchgear assemblies, power transformers and turbine generators), the defendant companies

pleaded guilty to the indictments. In the other three corresponding criminal cases (distribution transformers, low voltage distribution equipment and low voltage power circuit breakers), the defendant companies entered pleas of nolo contendere.

Staff: Fred D. Turnage, Robert H. Halper, Lewis J. Ottaviani, Jennie M. Crowley, Herbert G. Schoepke, John W. Martin, Jr., Donald C. Balthis, Morton M. Fine, John E. Sarbaugh, Walter L. Devany, Stewart J. Miller, Lewis Markus, Floyd C. Holmes and Charles E. Helppie. (Antitrust Division).

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CIVIL DIVISION

Assistant Attorney General William H. Orrick, Jr.

COURTS OF APPEALS

CARRIERS

Carmack Amendment to Interstate Commerce Act: Stipulation That United States Is Entitled to Recover for Damage to Perishable Goods Only if Carrier Had Duty to Re-ice Under Applicable Tariff Held Tantamount to Stipulation That Carrier Had Not Been Guilty of Negligence; Carrier Liable for Damage Occasioned by Perishability of Goods Only if It Failed to Exercise Reasonable Care. United States v. Reading Company (C.A. 3, March 28, 1961). Three carloads of Government beef spoiled in defendant's terminal because of a failure to re-ice the cars while they were awaiting further shipment. When sued for the resulting damage, defendant carrier relied on a tariff provision which excused it from its normal duty of re-icing under these particular circumstances. The United States argued that the exculpatory tariff provision was void under the Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. 20(11), as an illegal attempt to escape its common law duty as a carrier. The district court held that the Carmack Amendment was inapplicable because the loss was caused not by the carrier, but by the Government's failure to provide for re-icing.

The Third Circuit affirmed, but on a different ground. The court indicated that it agreed with the Government that the Carmack Amendment applied to such a situation. It held, however, that a stipulation entered into in the district court which provided that the Government was entitled to recover only if defendant had a duty under the applicable tariff provision to re-ice at the terminal had the effect of excluding the Carmack Amendment as a basis for recovery. The Court concluded that the stipulation was designed to preclude a recovery based on negligence, and that under the Carmack Amendment, which codified the common law of carrier liability, a carrier was liable for the spoilage of perishables only upon a theory of negligence. The Court declared that the stipulation was not being employed to determine the controlling law, rather, it was merely being given the effect intended by the parties, i.e., to eliminate all bases for recovery other than the tariff.

Staff: W. Harold Bigham (Civil Division)

CONSTITUTIONAL LAW

Statutory Provision Limiting Working Hours of Crews on Tugs Navigating Great Lakes Held Constitutional as Reasonable Legislative Classification. United States v. Buckeye Steamship Co. (C.A. 6, March 21, 1961). The 1938 amendment to the Act of March 4, 1915, 46 U.S.C. 673, provides, in substance, that, with certain exceptions, no licensed officer or seaman in the deck or engine department of any tug documented under the laws of the United

States navigating the Great Lakes "shall be required or permitted to work more than eight hours in one day except in case of extraordinary emergency affecting the safety of the vessel and/or life or property." Defendant admitted that it had violated this provision, but contended that the statute discriminates arbitrarily against the operation of Great Lakes tugs and in favor of the operation of tugs elsewhere in violation of the due process clause of the Fifth Amendment.

The United States brought suit to recover the statutory penalty. The district court entered summary judgment for the Government, holding that the legislation was valid. 183 F. Supp. 644 (N.D. Ohio). The Court of Appeals affirmed. It agreed with the district court that Congress has a broad discretion in establishing legislative classifications, and that Congress had not acted without a rational basis in making this regulatory provision applicable only to tugs on the Great Lakes.

Staff: Mark R. Joelson (Civil Division)

GOVERNMENT CONTRACTS

Provision in Government Contract That Title to All Materials Used in Contractual Undertaking Vests in Government Upon Making of Partial Payment Held Binding on Subcontractor Notwithstanding Inconsistent Provision in Subcontract. Shepard Engineering Co. v. United States (C.A. 8, March 16, 1961). The Government contracted with Diamond Building Products Corporation (the prime contractor) for the production of aluminum napalm bombs. The contract provided for subcontracts to be subject to the terms of the prime contract. Diamond entered into a subcontract with defendant for the production of certain component parts, and in which Diamond agreed to furnish the materials to be used. Subsequently, the prime contract was amended to provide that "upon the making of any partial payment * * * title to all parts, materials, inventories, work in process * * * shall forthwith vest in the government; and title to all like property thereafter acquired * * * shall vest in the government * * *." Diamond ordered aluminum circles from Kaiser Aluminum Company, and had them sent to defendant's warehouse. The Government made partial payments to Diamond prior to the date that it was adjudicated a bankrupt. Thereafter, the Government brought suit to recover the value of the aluminum circles in defendant's possession.

The district court granted the Government's motion for summary judgment. It held that the Government had title to the aluminum circles because of the partial payments it had made, and that the amendment to the prime contract was binding upon defendant regardless of any agreement between defendant and the prime contractor.

The Court of Appeals affirmed. It first rejected defendant's argument that the Government lacked the authority to make the amendment to the prime contract because, defendant asserted, 10 U.S.C. 2307 and 41 U.S.C. 255, which were relied upon by the Government, related only to amendments to negotiated contracts, whereas the prime contract in this case had been awarded on bidding. The Court then stated its

agreement with the district court's view that the amended prime contract was binding on defendant and superseded any agreement between defendant and the prime contractor whereby defendant purported to purchase the aluminum circles.

Staff: United States Attorney William H. Webster; Assistant United States Attorney W. Francis Murrell (E.D. Mo.)

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

Finding of Deputy Commissioner That Claimant Had Permanent Partial Disability Even Though He Returned to His Former Job After Injury at Higher Salary Upheld on Review. Travelers Insurance Company v. McLellan, Deputy Commissioner (C.A. 2, March 21, 1961). Claimant injured his back in the course of his employment. After undergoing partially successful remedial surgery, he returned to the same job and at a higher salary because of a general appreciation in wages. Claimant then filed a claim under the Act, and a hearing was held. The Deputy Commissioner, pursuant to 33 U.S.C. 908(h), found that claimant's post-injury earnings were not truly representative of his earning capacity and awarded him compensation for permanent partial disability. The district court, emphasizing claimant's increased earnings, set aside this award.

The Court of Appeals reversed, holding that the award was supported by substantial evidence. The Court was impressed by evidence in the record that claimant now needed assistance to perform many tasks which he could do alone prior to his injury, and medical testimony that his continuing impairment and occupation were incompatible and that serious disability in the future could result. The Court noted that if claimant were obliged to wait until his condition became aggravated before he could file a claim, he might well find the one-year limitation in Section 22 of the Act, 33 U.S.C. 922, to be a bar.

Staff: Morton Hollander and W. Harold Bigham (Civil Division)

OBSCENITY

Post Office Determination That Magazines Were Non-Mailable as Obscene Because They Aroused Prurient Interest in Homosexuals Upheld on Review. Manual Enterprises, Inc. v. Day (C.A. D.C., March 23, 1961). In April, 1960, postal officials determined that plaintiff's magazines were obscene and conveyed information as to where obscene matter might be obtained, and that these magazines were therefore non-mailable under 18 U.S.C. 1461. Shortly thereafter an administrative hearing was conducted. At this hearing psychiatrists testified that the poses of the nearly nude male models appearing in plaintiffs' magazines, the clothing that they did wear, and certain objects (swords and chains) used in some of the pictures were designed to arouse prurient interest in homosexuals. There was also testimony that one could obtain from plaintiffs' advertisers even more lascivious photographs, and that investigations at the

studios of these advertisers resulted in the discovery of what was termed "hard core pornography." The hearing resulted in a decision adverse to plaintiffs. They then brought suit in the district court. Summary judgment was entered in favor of the Government.

The Court of Appeals affirmed. It concluded that the psychiatric testimony constituted substantial evidence in the record to support the administrative finding that the magazines were intended for homosexuals. The Court rejected plaintiffs' arguments based on Roth v. United States, 354 U.S. 476, that the effect on the "average person in the community" would not be adverse. The Court noted that the average person would be an atypical reader of the magazines, and held that the proper inquiry in this case went to "the reaction of the average member of the class for which the magazines were intended, homosexuals." Since the record indicated that the magazines "aroused prurient interest in the average homosexual," the Court affirmed the finding that the magazines were obscene. On the basis of what had been obtained from plaintiffs' advertisers and what was found in the advertisers' studios, the Court also affirmed the finding that the magazine gave information as to where obscene matter could be obtained.

Staff: United States Attorney Oliver Gasch;
Assistant United States Attorney Donald Smith
(D. D.C.)

TEXTILE FIBER PRODUCTS IDENTIFICATION ACT

FTC Decision to Determine Generic Names of Fibers on Basis of Chemical Composition Rather Than Performance Characteristics Held Reasonable. Bigelow-Sanford Carpet Co. v. Federal Trade Commission (C.A. D.C., March 23, 1961). Pursuant to rules issued by the FTC under the Textile Fiber Products Identification Act, 15 U.S.C. 70-70k, plaintiff applied to the FTC for the establishment of a new generic name "polynosic" for a fiber which it produced. Plaintiff submitted evidence that although its fiber, like rayon, was reconstituted cellulose, the fiber possessed substantial performance advantages over rayon. Because of the lack of public acceptance of rayon, plaintiff wished to be able to refer to its product by a different generic name. The Commission denied the application, holding that plaintiff's "polynosic" fiber was rayon because it was of identical chemical composition. The Commission noted, however, that plaintiff was still entitled to make representations as to the superiority of its fiber over other types of rayon.

Plaintiff's rayper for relief in the district court was denied. The Court of Appeals affirmed. It held that the Commission's decision to utilize as its basic criterion the chemical composition of the fiber, rather than its performance characteristics, was not unreasonable and was "well within the wide latitude with which the Commission is invested."

Staff: United States Attorney Oliver Gasch;
Assistant United States Attorney Frank Q. Nebeker
(D. D.C.)

COURT OF CLAIMS

BOOTY

Horses Seized on Battlefield Are War Booty and Obligation Exists to Compensate Owners Under Hague Regulations or Accepted Principles of International Law. Hartmann H. Pauly v. United States (C. Cls., March 1, 1961). Pursuant to a resolution of the House of Representatives, the Court of Claims considered a bill providing compensation to the alleged owner or authorized agent of other owners for thoroughbred horses captured by the U. S. Army in Germany in 1945. The Army, during the course of an attack, had overrun a German Army remount station where several hundred horses were located. Some of the horses had been transported to the remount station from Hungary to evade capture by the Russian Army, and some were privately owned by the Hungarian Government whose Army was opposing the American advance.

The Court noted that any legal claim was barred by the statute of limitations, but passed upon the merits of the claim because of the expressed desire of the House of Representatives that the Court do so. The Court held that the United States owed no duty of compensation because "the seizure, which occurred while the war was flagrant, was an act of war occurring within the limits of military operations." Under accepted principles of international law, horses taken on the battlefield are objects of booty, and constitute an exception to Article 46 of The Hague Regulations respecting the laws and customs of war, 36 Stat. 2277, which provides that "private property cannot be confiscated."

The Court also held there was no moral obligation to pay plaintiff because had it not been for the American seizure the German Army would probably have destroyed or appropriated the horses. In addition, the Court noted that the Treaty of Peace with Hungary provided that Hungary would compensate its own nationals, and that plaintiff was a Hungarian national on the date of the treaty.

Staff: James F. Merow (Civil Division)

GOVERNMENT CONTRACTS

Agreement Not to Sell Surplus Aluminum Plants to Others on More Favorable Basis Held Not Violated Except With Respect to Backdating Date of Sale Causing Unequal Forgiveness of Rent. Kaiser Aluminum & Chemical Corp. v. United States (C. Cls., March 1, 1961). Plaintiff purchased three surplus aluminum plants from the War Assets Administration which agreed to adjust the price if the same type of plant were sold to others "on a more favorable basis." Reynolds Metals later purchased four similar plants. Plaintiff claimed that Reynolds had purchased the plants "on a more favorable basis."

The Court of Claims found against plaintiff on its claims that Reynolds had received more favorable treatment with respect to, inter alia,

assistance in constructing a fume control system and in obtaining sufficient carbon-electrode capacity. The Court agreed with plaintiff, however, that there had been an unequal forgiveness of rent by reason of provisions in the Administration's contracts with plaintiff and Reynolds backdating the date of sale to the same date even though Reynolds had purchased its plants almost five months later.

Staff: Kendall M. Barnes (Civil Division)

GOVERNMENT OFFICIALS

Unauthorized Letters of Intent Issued by Agent of National Capital Sesquicentennial Commission Held Not Binding on Government. Byrne Organization, Inc., et al. v. United States (C. Cls., March 1, 1961). A joint resolution of Congress created the National Capital Sesquicentennial Commission, empowering an executive committee to act for the Commission. Plaintiffs submitted plans to the Commission for a Freedom Fair with the expectation of obtaining contracts. Without the approval of the executive committee, and despite advice that he lacked the necessary authority, the executive vice-chairman of the Commission executed letters of intent addressed to plaintiffs stating that they would be awarded contracts by the Commission and that they should commence activities in anticipation of such contracts. The committee never took any action to approve these letters and the contemplated contracts were never executed. A month after becoming apprised of the letters of intent, the executive committee notified plaintiffs to discontinue their activities.

Plaintiffs brought suits against the United States, basing their claims alternatively upon either the terms of written unexecuted contracts or on the reasonable value of the services rendered under the letters of intent. The Court of Claims denied recovery, holding (1) that since the definitive terms of the contracts contemplated by the letters of intent were never agreed upon, the Government could not be bound by such contracts, and (2) that the Government was not liable for services performed pursuant to the letters of intent because the letters were sent by an official who lacked the authority to bind the Commission. Rejecting plaintiffs' arguments, the Court noted "that estoppel cannot be set up against the Government on the basis of an unauthorized representation or act of an officer or employee who is without authority in his individual capacity to bind the Government." The Court, however, denied the Government's counterclaim for funds which had been paid for services rendered pursuant to the unauthorized letters of intent. Its decision was motivated by a desire to serve "the ends of justice," and because the Government had received the benefits of plaintiffs efforts and there had been a substantial delay in notifying plaintiffs to cease working.

Staff: M. Morton Weinstein and Laurence H. Axman (Civil Division)

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CIVIL RIGHTS DIVISION

Assistant Attorney General Burke Marshall

Civil Rights Act of 1957. United States v. State of Alabama. (M.D. Ala.) This action by the Department challenged the practice of the voting registrars of Bullock County of requiring a voucher (a registered voter of the County) to swear to the applicant's character and residence. The registrars have permitted one voucher to act for only two applicants. This practice severely curtails Negro voting registration, as evidenced by the fact that only five of the 5,000 Negroes of voting age in the county are registered, as against 2,200 of 2,500 whites.

The case was tried before Judge Frank M. Johnson, Jr. in Montgomery, Alabama on March 29 and 30, 1961. The Court declared the limitation on the number of times a registered voter may vouch for applicants as unconstitutional and enjoined the enforcement of this practice by defendants. The Court deferred decision with respect to the other issues in the case - whether specific Negroes should be ordered placed on voting rolls - whether other forms of discrimination should be enjoined - whether there should be a declaration of "pattern or practice" of discrimination and the appointment of a federal voting referee. The Court directed that defendants report in writing on specified dates in April, May, and June, the names and number of Negroes who have applied as of those dates, the names of the persons (if any) "vouching" for them, the name and race of each voucher, and the action taken upon each application. Briefs are to be filed by both sides no later than June 1, 1961.

Staff: United States Attorney Hartwell Davis (M.D. Ala.); David L. Norman (Civil Rights Division)

Voting and Elections; Civil Rights Act of 1957. United States v. A. T. Beaty, et al; United States v. Barcroft, et al. (C.A. 6). These cases, previously reported in the Bulletin, Vol. 9, No. 1, p. 9, involved Negro sharecroppers in Haywood County, Tennessee, who were told to move from their respective farms because they had registered to vote. The district court had denied the Government's motion for a preliminary injunction with respect to landowner defendants who had evicted these tenants. On April 6, 1961 the Court of Appeals entered an order reversing the district court and remanding the cases with direction to enter a preliminary injunction. The Court of Appeals held that 42 U.S.C. 1971(b) had been violated, even though the form which the intimidation had taken related to land or contracts with Negro sharecroppers. The Court directed the district court to enter an injunction restraining defendants from "engaging in any threats, intimidations or coercion or attempted threats, intimidations or coercion, whether by eviction or threatened eviction or refusal to deal in good faith with them concerning their tenancies, in keeping with the usage and customs heretofore prevailing in Haywood County, Tennessee of any of their Negro sharecropping tenants for the purpose of interfering with the right

of such Negro sharecroppers, or other persons, to become registered to vote in Haywood County, Tennessee and to vote for candidates for federal office or punishment for having previously registered or voted, or engaging in any act or practice which would deprive the tenants of any such right or privilege." The Court made it clear that persistence on the part of any landowner defendant to evict any tenant for the above purposes would subject him to punishment for contempt.

Staff: John Doar, Harold H. Greene, D. Robert Owen, Rupert L. Groh, J. Harold Flannery, Jr. (Civil Rights Division)

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

MAIL FRAUD

Savings and Loan Association Fraud. United States v. Suchman, et al.; Commercial Savings and Loan Association (D. Md.). After four months trial a hung jury ended a major mail fraud prosecution stemming from the operation of Commercial Savings and Loan Association of Baltimore, Maryland. In the scheme alleged, depositors were lured into placing their savings in Commercial by advertisements of large current dividends, commercial insurance of deposits, and statements as to the sound and prudent management of the association. Evidence was produced to show that dividends were not actually earned but were paid out of capital, that a trust fund of the insurance carrier set up for the benefit of those insured was subject to large claims and that the management of the association's affairs particularly in the making of its loans, 88% of the total value of which was to other business enterprises owned by one of the defendants, was of such a nature as to subject the depositors' funds to undue hazard and risk. This complex matter was tried against the backdrop of state legislative efforts to obtain regulation of savings and loan associations in Maryland.

A mistrial was declared when the jury was found to be hopelessly deadlocked, one lone juror holding out against conviction. United States Attorney Leon H. A. Pierson praised the assistance rendered by James W. Knapp and the excellent performance of Assistant United States Attorney Arnold M. Weiner.

Staff: United States Attorney Leon H. A. Pierson; Assistant United States Attorney Arnold M. Weiner (D. Md.); James W. Knapp (Staff Assistant to Assistant Attorney General, Criminal Division)

Advance Fee Swindle. United States v. Robert Kimball, et al. (N.D. Ga.). In an indictment recently returned, Robert Kimball and four associates were charged with mail fraud in their operation of Metropolitan Investment Service Corporation, a company purportedly engaged in the business of obtaining loans for businessmen and falsely represented as being affiliated with Metropolitan Life Insurance Company. Several of the salesmen of Metropolitan Investment Service Corporation had formerly worked for other advance fee firms such as Lenders Service Corporation, which case is awaiting trial in Atlanta, and Beneficial Business Loan Service Corporation, in which the principals were recently convicted and sentenced in the District of Colorado.

Staff: United States Attorney Charles D. Read, Jr.; Assistant United States Attorney John W. Stokes (N.D. Ga.).

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Joseph M. Swing

DEPORTATION

Declaratory Judgment; Dismissal of Action With Prejudice; Notice of Deposition in Administrative Hearing; Opportunity to Cross-Examine Deponent. McConney v. Rogers & Boyd (C.A. 9, March 10, 1961). McConney appealed from the dismissal with prejudice of his claim for a declaratory judgment, questioning the fairness of his deportation hearing and the sufficiency of the evidence to support the administrative finding that he was an alien.

He was born in Panama or the Panama Canal Zone in 1911 and during his deportation hearing in the State of Washington the question arose as to whether his parents, or one of them, were citizens of the United States when he was born, a fact which might have conferred United States citizenship on him at birth. The hearing was continued by the Special Inquiry Officer to afford the Government an opportunity to take a deposition from his mother in New York City.

The Special Inquiry Officer, however, did not advise McConney of the time and place of the taking of the deposition from his mother so that he might, if he so desired, be present or arrange for representation at the taking of it; nor did the officer advise him that he could present written interrogatories to be propounded to his mother when the deposition was taken.

The Court of Appeals held that this deficiency was inconsistent with the provisions in the statute and its regulation (8 U.S.C. 1252(b) and 8 CFR 242.16(a)) which require that in a deportation hearing the respondent shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government. It concluded that in this case there was a violation of procedural statutes and regulations resulting in substantial prejudice which deprive McConney of a fair hearing and due process of law.

The Court said, "The reception in evidence of these depositions makes it necessary to reverse the judgment of the district court and set aside as void the order of deportation. In our view appellant's motion for the dismissal without prejudice of his claim for declaratory relief, made prior to the district court trial, should have been granted. It was therefore error in the final judgment to dismiss that claim with prejudice."

Reversed and remanded.

IMMIGRATION

Declaratory Judgment; Review of Denial of Application to Create Record of Permanent Residence; Administrative Procedure Act; Depositions of

Administrative Officials. Weiss v. Esperdy (S.D. N.Y., March 7, 1961). Plaintiff brought this action for a declaratory judgment to review the defendant District Director's denial of her application for the creation of a record of arrival for permanent residence (8 U.S.C. 1259). She contended that the decision signed by defendant was arbitrary and a gross abuse of discretion and was not reached in accordance with the Administrative Procedure Act (5 U.S.C. 1009); that if the decision was made by defendant the ex parte submission to him of the recommendations of the Immigrant Inspector who heard the application was improper under Morgan v. United States, (304 U.S. 1); and that if the decision was made by the Inspector it was prejudiced by instructions from defendant and his superiors. She served notices to take depositions of defendant and the Inspector.

The Court found that the only matter advanced by plaintiff that the decision was arbitrary was the fact that it was in practically the identical words used by another official of the Service in denying her request for oral argument on an appeal from the denial of an administrative relief from deportation in another proceeding, as found in the file to which the Service was referred by plaintiff in the application out of which this suit arose. The Court said it was natural that the decision here under review should be couched in the same language that had expressed the decision on a prior application governed by similar considerations.

As to the applicability of the Administrative Procedure Act, the Court said that neither 8 U.S.C. 1259 nor its regulation (8 CFR 249) require or provide for a hearing, and consequently section 5 of the Administrative Procedure Act does not apply. The Court added that while a hearing may be required under the Fifth Amendment and though not required by the statute one may have been afforded under circumstances that entitled plaintiff to due process, the fact that she may possibly be able to prove either or both of the above does not mean that she is entitled to take the depositions of the defendant and the Inspector. (The Court was guided by the rule in U. S. v. Morgan, 313 U.S. 409, 422: "Just as a judge cannot be subjected to such a scrutiny (as to his mental processes) . . . . so the integrity of the administrative process must be equally respected.")

In view of that holding and because no need was shown for examination as to the procedural points sufficient to warrant relaxation of the rule in Morgan, defendant's motion to vacate the notice to take depositions was granted.

* * *

LANDS DIVISION

Assistant Attorney General Ramsey Clark

Federal Servitude on Navigable Stream; Valuation of Flowage Easement; Easement Imposed on Prior Easement. United States v. Virginia Electric and Power Company (S. Ct., No. 49). The factual situation and prior rulings in earlier aspects of this case are set out in 3 U.S. Attorneys Bulletin, No. 3, pp. 32-33, 4 U.S. Attorneys Bulletin, No. 19, pp. 636-637, and 7 U.S. Attorneys Bulletin, No. 23, pp. 655-656. Briefly, the United States condemned a flowage easement over a tract of land riparian to an interstate navigable stream over which a power company held a long dormant flowage easement. Following the earlier reversal of its judgment (by the Supreme Court) based on testimony of the fee simple value of the land, the Court of Appeals affirmed an even greater award and held that "the market value of the interest of the Power Company may nevertheless be measured by what it would cost to acquire it, and this necessarily included not only the value of the land for agricultural and forestry purposes but also the damages to the remainder of the tract."

The Supreme Court again granted certiorari and, following briefing and oral argument, it again vacated the judgment and remanded the case for further proceedings. The opinion of the Court, a concurring opinion and a dissenting opinion on behalf of three members of the Court were filed. Noting that such a finding "might be warranted", the Court remanded the case to the District Court for a determination as to "whether the respondent's [power company] easement might be found to have value other than in connection with the flow of the stream." Summarizing the views of the majority, the opinion of the Court states: "In a word, the value of the easement is the nonriparian value of the servient land discounted by the improbability of the easement's exercise."

Mr. Justice Douglas filed a concurring opinion spelling out the view, inter alia, that "The owner of the easement is entitled, as the Court holds, to no water-power value. The owner is in other words entitled to nothing that gains value from the flow of the stream, from any head of water, or from the strategic location of his land for hydroelectric development of the river. But the owner of the easement and the owner of the subservient fee have all the other parts of the bundle of rights that represent 'property' within the meaning of the Fifth Amendment."

A dissenting opinion by Mr. Justice Whittaker, with whom Mr. Chief Justice Warren and Mr. Justice Black join, expresses, in some detail, their views that "as a matter of fact and of law" the power company's flowage easement "did not have any value whatever" at the time of its acquisition by the Government.

Staff: Harold S. Harrison (Lands Division). Former Assistant Attorney General Perry W. Morton presented the Government's argument in the Supreme Court.

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CIVIL TAX MATTERS
Appellate Decision

Suit to Quiet Title to Property as Against Asserted Tax Lien; District Court Held to Have Jurisdiction Pursuant to 28 U.S.C. 1340, and Suit Against United States Allowed Pursuant to 28 U.S.C. 2410; Lien Invalidated for Procedural Defects. United States v. James R. Coson (C.A. 9, January 23, 1961). The Moulin Rouge was a proposed limited partnership to operate a hotel and gambling casino in Las Vegas, Nevada, with Bisno and Rubin as general partners. However, agreement was never reached with respect to a limited partnership agreement and no articles of limited partnership were filed. The district court found that the Moulin Rouge was not in fact a limited partnership.

Between March and August, 1955, plaintiff obtained a 1.70 per cent interest in the Moulin Rouge for $31,000, thinking that he was investing as a limited partner. The Moulin Rouge failed to pay cabaret, withholding, and F.I.C.A. taxes, and the Commissioner assessed them in the amount of $133,691.80 against the Moulin Rouge, Bisno, and Rubin. Notice and demand were served in the names of the Moulin Rouge, Bisno, and Rubin at the address of the Moulin Rouge. Shortly thereafter plaintiff learned that the Moulin Rouge was not in fact a limited partnership, and renounced his interest pursuant to Section 11 of the Uniform Limited Partnership Act (Nevada Revised Statutes, Section 88.120). A tax lien was filed against plaintiff's property on the theory that he was a general partner in the Moulin Rouge when notice and demand were served on it, and that, payment not having been made, a lien arose against the separate property of the general partners.

Plaintiff sued the United States to quiet title to his property and to have the notice of lien declared null and void. The district court held that it had jurisdiction under 28 U.S.C. 1340, and that the suit could be maintained against the United States pursuant to 28 U.S.C. 2410. The Court of Appeals affirmed. The suit was held to be one arising under an act of Congress providing for internal revenue, as required by Section 1340, on the ground that the result depended upon the meaning of Section 6321 of the Internal Revenue Code of 1954 which provides for a lien in favor of the United States against the property of a person liable for a tax who neglects or refuses to pay the same after demand. The Court also held that the suit was not one to enjoin the collection of a tax, but only to quiet title as against a lien as permitted by Section 2410.

Having decided that the suit was maintainable, the Court held that plaintiff was not a general partner in the Moulin Rouge, first because he never had the necessary intent to join a partnership in that capacity, and second because his renunciation under Section 11 of the Uniform

Limited Partnership Act was fully effective. The asserted lien was nullified for failure to serve the statutory notice and demand on plaintiff and for failure to comply with required procedures. While not basing its decision on the point, the Court also suggested that the assessment itself appeared to be insufficient for failure to comply with the statutory requirements regarding identification of the taxpayer.

Staff: Kenneth E. Levin and A. F. Prescott (Tax Division)

District Court Decision

Issuance of "Ninety-Day Letter" Not Required as Condition Precedent to Suit to Collect Erroneous Refund. United States v. A. F. Smith Chevrolet Co., Inc. (N.D. Ga., February 24, 1961). This action was tried on a stipulation of fact after having been remanded to the District Court, for decision of the sole question of whether or not the Government was required to issue a 90-day letter as a prerequisite to suit to collect an erroneous refund. The substantive tax issue in the case had been whether credits to a dealer reserve of defendant's were income, and had been disposed of in favor of the Government by the Fifth Circuit, on the strength of the Supreme Court decision in Commissioner v. Hanson, 360 U.S. 446, after the trial court had ruled in favor of taxpayer.

After payment by the Government of the refunds, it issued a Form 1905 letter to taxpayer, advising of contemplated adjustments in its tax liability. This letter stated taxpayer could apply, within ten days, for an informal conference, and this was done, but the results of the conference were unsatisfactory to taxpayer. The Government thereafter mailed to defendant a Form 1200, with a copy of the Government's examination report, commonly known as a 30-day letter. After this mailing, and within the allotted time, taxpayer filed a protest of the results of the examination report, and requested an oral conference with the Appellate Staff of the Internal Revenue Service. No conference was granted and no statutory notice of deficiency (90-day letter) was ever mailed.

Taxpayer contended that the claim of the Government for the amount erroneously refunded constituted a deficiency within the statutory definition of the term and that therefore it was entitled to receive a 90-day letter. It further contended that although the Commissioner of Internal Revenue usually might authorize an erroneous refund action independent of the assessment of a deficiency, he could not in this case do so, because in issuing the 30-day letter, he chose a course of action to which he must adhere.

The Court, citing the cases of United States v. Curd, 257 F. 2d (C.A. 5), cert. denied, 358 U.S. 920 and Merlin v. Saunders, 243 F. 2d 821 (C.A. 5), held that an erroneous refund suit was not based on a deficiency and that therefore no 90-day letter had to be issued. The Court further held that in sending the 30-day letter, the Government

was not estopped from proceeding as in any other erroneous refund suit.

Staff: United States Attorney Charles D. Read, Jr. and Assistant United States Attorney Slaton Clemmons (N.D. Ga.); Robert A. Mills (Tax Division)

CRIMINAL TAX MATTERS
District Court Decision

Tax Offenses; Sentencing Policy; Deterrent Effect. United States v. Philip R. Scamman (D. Maine, March 30, 1961). Defendant, the proprietor of a wholesale auto parts business of Saco, Maine, pleaded guilty to a three count indictment charging him with willfully attempting to evade and defeat a total of $20,619.39 in income taxes. In addition to omitted business income, the case involved substantial amounts of omitted dividends. In imposing a sentence of four months imprisonment and fines totaling $15,000, the Court remarked as follows:

> Now, as this Court has said before, its experience -- as has been the experience of other courts -- has been that there is probably no type of criminal case which more severely taxes the conscience of the Court than that of the convicted income tax evader. In almost every case, as in yours, the offender is otherwise non-criminal and prior to conviction the bulk of tax violators have had good reputations and high community acceptance. When the day of judgment arrives and it is necessary for this Court to impose sentence upon such a person, there is inevitably regret, remorse and heart-breaking hardship involved for the defendant as an individual which is not sometimes as difficult, but more importantly for his wife, for his family, and for his friends and this Court states that your case has been no exception in this respect, but this Court has concluded in your case, as it has in others, that it cannot in discharge of the solemn oath which it has taken to dispense equal justice among all those who come before it, permit individual considerations of this nature to affect its judgment to the detriment of the obligation which this Court has as a Federal Court sitting in the District of Maine to protect the public security and the national well-being, particularly in a period of national and international crisis such as we are now experiencing, and to deal fairly both with the millions of honest taxpayers who are supporting this great Government of ours and with other tax offenders who have been imprisoned and substantially fined in comparable circumstances. Public confidence in the integrity of our tax system and of its enforcement is essential to the security of this Government and today to the security of the free

world; and this Court is convinced that if tax frauds such as that of which you stand convicted go unpunished or are dealt with too leniently by the Courts, the only result can be to undermine the efficacy of that system and eventually the democracy under which we now live. Difficult as they have been, these, then, are the considerations which have led this Court to the decision at which it has arrived. The Court will add only that in the sentence which it has imposed, it has given consideration to the fact of your cooperation during the period of this investigation and the fact that you did not require the Government to be put to the expense and time involved in an extended trial to establish your guilt.

Staff: United States Attorney Peter Mills and Assistant United States Attorney Elmer Runyon (D. Maine).

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I N D E X