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DEPARTMENT OF JUSTICE

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UNITED STATES ATTORNEYS
BULLETIN

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Vol. 9 May 5, 1961 No. 9

NEW APPOINTEES

The nomination of the following United States Attorney has been confirmed by the Senate:

District of Columbia - David C. Acheson

Mr. Acheson was born November 4, 1921 in Washington, D. C., is married and has three children. He attended Yale University from September 1939 to December 1942 when he received his A.B. degree and Harvard Law School from February 25, 1946 to May 22, 1948 when he received his LL.B. degree. He was admitted to the Bar of the District of Columbia in 1949. He served in the United States Navy from December 19, 1942 to January 18, 1946 when he was honorably discharged as a Lieutenant. From September 9, 1948 to November 10, 1949 he was legal adviser and later attorney in the Office of General Counsel, U.S. Atomic Energy Commission and since November 11, 1949 he has been a partner in the Washington firm of Covington & Burling.

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

California, Northern - Cecil F. Poole
Illinois, Eastern - Carl W. Feickert
Michigan, Western - George E. Hill
Oklahoma, Eastern - Edwin Langley
Utah - William T. Thurman

As of April 28, 1961, the score on new appointees is: Confirmed - 16 Nominated - 13.

DISTRICTS IN CURRENT STATUS

As of March 31, 1961, the districts meeting the standards of currency were:

CASES

Criminal

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

CASES

Civil

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

MATTERS

Criminal

Ala., N.	Colo.	La., W.	N. M.	P. R.
Ala., M.	Ga., M.	Me.	N. Y., E.	S. D.
Ala., S.	Hawaii	Md.	N. C., M.	Utah
Ariz.	Ind., N.	Mich., W.	Ohio, S.	W. Va., N.
Ark., E.	Ind., S.	Miss., N.	Okla., N.	W. Va., S.
Ark., W.	Iowa, N.	Miss., S.	Okla., E.	Wis., E.
Calif., N.	Ky., E.	Mont.	Okla., W.	Wyo.
Calif., S.	Ky., W.	Neb.	Pa., M.	C. Z.
		Nev.	Pa., W.	Guam

MATTERS

Civil

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

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JOB WELL DONE

The Superintendent, National Park Service, has commended Assistant United States Attorney Richard A. Murphy, Southern District of California, for his outstanding work in obtaining a conviction in a recent case. The letter stated that although Mr. Murphy had only a short time to prepare the case, he was able to grasp the facts and present them in a manner which was very impressive to the jury and the National Park Service rangers involved, and that it was a pleasure to know that men of such caliber are available to present National Park Service cases in the courts.

Assistant United States Attorney Averill Williams, Eastern District of New York, has been commended by the FBI Special Agent in Charge for the very efficient manner in which he handled the prosecution of a recent case which resulted in jail sentences for all three of the defendants. The letter stated that Mr. Williams' continued interest in, and very vigorous cooperation with, the FBI during the course of the investigation contributed materially to the successful disposition of the matter.

The FBI Special Agent in Charge has commended Assistant United States Attorney David R. Hyde, Southern District of New York, for the highly capable manner in which he conducted the prosecution of a recent case involving interstate transportation of stolen property and fraud by wire, which resulted in five year sentences for three defendants, and one year sentences for two other defendants who pleaded guilty. The letter stated that throughout the exhaustive two week trial Mr. Hyde's presentation of the Government's case was exemplary and his proficient examination of witnesses and defendants highlighted to the jury the pertinent points of the case.

Assistant United States Attorney Irving Younger, Southern District of New York, has been congratulated by the Director, House Committee on Un-American Activities, for the fine manner in which a recent case was handled, and with the results achieved.

Assistant General Counsel, Fraud and Mailability Division, Post Office Department, has expressed sincere appreciation for the efforts of Assistant United States Attorney Donald Smith, District of Columbia, in successfully defending the Government's position in a recent case involving obscenity, and stated that the decision by the Court of Appeals will be extremely helpful in the prosecution of future cases since there has been an increasing traffic in this type of case.

Assistant United States Attorney Joseph M. Hannon, District of Columbia, whose duties included that of legal advisor to the United States Marshal, has been commended by the Marshal for his fine personal traits, outstanding legal ability, and his cooperation, understanding and high intelligence in dealing with matters involving problems of a general nature. The letter stated that Mr. Hannon's conduct and ability have reflected great credit upon the United States Attorney's office.

The Chief of Police, National Park Service, has expressed gratitude for the cooperative assistance rendered in a recent recruit training program by Assistant United States Attorneys Nathan J. Paulson, Edmond T. Daly, William Greenhalgh, and Timothy Murphy, District of Columbia, all of whom gave lectures to the class. The letter stated that the lectures were all expertly prepared, interestingly presented, and were truly enjoyed by the members of the class, that their warm spirit of helpful cooperation and continued interest in the program is sincerely appreciated, and that the Park Service is looking forward to working with them on many future occasions.

United States Attorney Clifford M. Raemer and Assistant United States Attorney James B. Moses, Eastern District of Illinois, have been commended by the Regional Attorney, HEW, for the effective handling of a recent case in which the Government's motion for summary judgment was granted by the court. The letter stated that the agency recognizes the precedent value of the case and has recommended that the opinion be published in the Federal Supplement.

The General Counsel, SEC, has commended and congratulated Assistant United States Attorney Jerome J. Londin, Southern District of New York, for the successful disposition of a recent case. The letter stated that the entry of guilty pleas was a fitting tribute to the masterful manner in which Mr. Londin conducted the prosecution of a difficult and complicated case; that it could never have been achieved so expeditiously and so thoroughly without the exceptional skill, insight and perseverance which he brought to bear during the investigation and prosecution; and, that the Commission is deeply indebted to him for his accomplishments in this and other difficult matters which he has so capably and successfully handled.

Assistant United States Attorney Jordan A. Dreifus, Southern District of California, has been commended by the Solicitor, Department of Labor, for his excellent work in a recent case in which the issues revolved around certain actions taken by the Department of Labor in the administration of the Migrant Labor Agreement. A very delicate situation in this country's relationship with the Republic of Mexico developed as an outgrowth of the injunctive proceedings, and because of the sensitive international implications, it was extremely important that many of the aspects of this case be handled with the utmost tact. The letter stated that Mr. Dreifus, having had no previous knowledge of the case, spent many hours in acquainting himself with the subject matter, and that the effective manner in which he handled certain aspects of the case, as well as his general representation of the Department of Labor is a credit to him and to the Department of Justice.

The District Engineer of the Chicago District, Corps of Engineers, has expressed appreciation for the "unusual aggressiveness" of Assistant United States Attorney Howard C. Equitz, Eastern District of Wisconsin, in the recent handling of a condemnation trial which produced a result quite favorable to the Government.

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ANTITRUST DIVISION

Assistant Attorney General Lee Loevinger

Government Required to Furnish Information Concerning Decision to Bring Civil Action. United States v. Carter Products Inc., et al., (S.D. N.Y.). On March 29, 1961, Judge Dawson overruled the Government's objections to interrogatories propounded by defendants which sought information concerning the time of, and the personnel involved in, the Government's decision to bring a civil action only in this case and not to seek an indictment. The Court ordered the Government to answer interrogatories asking for the name and address of each person responsible for making the decision not to seek an indictment and of each person who assisted in the preparation of the complaint. Other interrogatories seeking to provide a basis for later discovery motions were also ordered answered.

The Government had filed an affidavit of the attorney who had handled the grand jury investigation which showed when the decision was first made to proceed only by civil action and that no use was made of the grand jury after that time. The Government took the position that this affidavit and the presumption of regularity in the discharge by public officers of their duty was a valid basis for objection to defendants' interrogatories. The Court, however, noting particularly that the Government's "carefully drawn and voluminous civil complaint" was drawn up, properly filed and served only two days after the date cited by the Government as the first time the decision had been made not to proceed criminally, ruled that defendants were entitled, as a result of the Procter & Gamble decision, to inquire further concerning the decision not to proceed criminally. The Court's ruling is based upon the possibility that the decision not to proceed criminally might have been made before termination of the grand jury proceeding. The Court said: "If that is the case, defendants might be entitled to any such improperly obtained evidence in the grand jury minutes. This question [i.e. time] has been made crucial by the Procter & Gamble cases."

Staff: John D. Swartz, John J. Galgay, Bernard Wehrmann and J. Paul McQueen (Antitrust Division)

SHERMAN ACT

Price Fixing-Drugs; Judgment For Government. United States v. Parke, Davis & Company, et al., (District of Columbia). Originally this case, charging price-fixing violations of the Sherman Act, was dismissed by the court at the conclusion of the Government's evidence. Appeal was taken to the Supreme Court which reversed and ordered the District Court to enter a judgment for the Government on the merits unless the defendants elected to put in a defense. Parke, Davis decided to go to trial and produced one witness, its Vice President in charge of sales. His testimony generally was that Parke, Davis had ceased its resale price maintenance

activities without regard to the Government's investigation and had no intention of resuming them. The Court thereupon again found for the defendant and ruled that no injunction would issue and no finding of liability would be made against Parke, Davis. The Government noted another appeal and the Supreme Court, without a hearing, vacated the District Court's judgment and ordered the lower court to enter a judgment in favor of the Government which would be in conformance with the Supreme Court's opinion. In its second appeal the Government did not attack the District Court's ruling on the question of injunctive relief. The Supreme Court, however, ordered the District Court to keep this case open on the docket in the event that the Government desired to present evidence in the future should Parke, Davis resume its illegal activities.

After the second reversal the Government presented a proposed judgment to the Court which contained findings of fact and conclusions of law. It was felt that this type of judgment should be filed in this case due to the fact that under the District Court's decision there would be no injunctive relief. The judgment was bitterly opposed by defense counsel on the grounds that there was no precedent for this type of decree. After a hearing in the judge's chambers, defense counsel and the Government both filed legal memoranda at the Court's request. On April 19, 1961 the District Court entered the judgment which had been submitted by the Government.

Staff: Edward R. Kenny, Herbert F. Peters and Marshall C. Gardner (Antitrust Division)

Monopoly-Locomotives; Indictment Filed Under Section 2. United States v. General Motors Corporation, (S.D. N.Y.). On April 12, 1961, a Federal grand jury returned an indictment charging defendant with monopolizing the manufacture and sale of railroad locomotives in the United States in violation of Section 2 of the Sherman Act.

According to the indictment, General Motors, the largest manufacturing company in the United States, entered the railroad locomotive industry in 1930 by acquiring the Electro-Motive Corporation and the Winton Engine Company. The indictment defines a railroad locomotive as being "a locomotive of the type used primarily by railroads. Locomotives of this type have a minimum of 600 horsepower, and weigh over 100 tons". The indictment charges that General Motors had manufactured approximately 84% of the railroad locomotives sold in the United States in 1960 and that General Motors had sold 17,343 railroad locomotives in the United States since 1946 with a dollar value of approximately $2.6 billion.

During the period from 1946 to 1960, General Motors has excluded two competitors from the industry, the indictment charges. In addition, it is alleged that General Motors has received an average return on sales of its locomotives since 1946 of 20.2% as compared to a return of 1.9% by its closest competitor. It is further alleged that in 1951 General Motors had a return of 269% in its net investment in plant and equipment primarily

devoted to the manufacture of railroad locomotives.

The indictment charges that General Motors has power over price and power to exclude its competitors in the railroad locomotive market. It also charges that General Motors has exercised the power it "unlawfully acquired and maintains." According to the indictment, General Motors derives its alleged power over price and power to exclude from many sources including: (a) its ability to sell railroad locomotives at a loss where it has competition, (b) its ability to make investments in manufacturing facilities for railroad locomotives so as to place an impossible burden on the competition to meet them, (c) its position as one of the largest shippers, and probably the largest shipper, of freight in the United States.

The indictment charges that General Motors has exercised its power in various ways including:

(a) By routing its freight traffic so as to remove or reduce the freight traffic shipped over the lines of railroads which purchased all or a substantial part of their railroad locomotives from General Motors' competitors with the purpose or effect of inducing purchases of railroad locomotives from General Motors.

(b) By using the building or placing of its plants, warehouses and storage areas on or near the lines of United States railroads for the purpose or with the effect of inducing the purchase of railroad locomotives by said railroads from General Motors.

(c) By financing the sale or lease of railroad locomotives on terms its competitors could not profitably match.

(d) By selling some railroad locomotives at a loss in segments of the market where it had competition.

Staff: George D. Reycraft and Sanford M. Litvack (Antitrust Division)

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C I V I L D I V I S I O N

Assistant Attorney General William H. Orrick, Jr.

COURTS OF APPEALS

AGRICULTURE ADJUSTMENT ACT

Tobacco Marketing Quotas: Absent Joint Tortfeasorship, Joint Producers of Tobacco Are Liable for Excess Marketing Penalties Only to Extent of Respective Interests in Crop. United States v. Whittle, et al. (C.A. 4, March 27, 1961). Suit was brought by the Government against the owner and tenant of a tobacco farm to recover penalties for excess marketing of tobacco under Section 314 of the Agriculture Adjustment Act of 1938, as amended, 7 U.S.C. 1314. The tenant operated the farm and received three-quarters of all the crops raised; the owner received the balance. Without the owner's knowledge, the tenant exceeded the farm's acreage allotment by planting a hidden field and marketed all the tobacco produced, thus exceeding the farm's marketing quota. The statute provides for the deduction by buyers of the penalties due on excess marketings; but since the tenant held a within-quota marketing card for the farm on the basis of the acreage reported by him, no deductions were made at the time of the sales. All proceeds were divided between the tenant and owner. Subsequently, the Government became apprised of the excess marketing.

Contending that each defendant was liable as a "producer" of the entire crop within the meaning of regulations, the United States sought the imposition of the penalties against defendants jointly and severally. The district court, concluding that defendants were "producers" only to the extent of their respective interests in the crop, apportioned the total penalty between them accordingly.

The Court of Appeals affirmed. While agreeing with the Government that each was a "producer" of the entire crop and that the imposition of the penalty was on the producer, the Court refused to hold defendants jointly and severally liable on the ground that, unlike the statutory and regulatory provisions pertaining to cotton and peanuts, neither the statute nor the regulations applicable to tobacco contain an express provision subjecting producers to joint and several liability. The Court also rejected the Government's argument that defendants were joint tortfeasors and therefore subject to joint and several liability. It held that, since the owner had no knowledge of the excess planting, her liability could be based solely on her status as a "producer" under the regulations, and in these circumstances she should be subject to no greater liability than that which she would have incurred had the penalty been collected by the buyer, viz., one-quarter of the penalty.

Staff: Katheryn H. Baldwin and Mark R. Joelson (Civil Division)

FEDERAL PROCEDURE

Dismissal of Suit by District Court for Failure of Plaintiff to Prosecute Reversed as Abuse of Discretion. Sykes v. United States (C.A. 9, April 3, 1961). Plaintiff brought suit against the United States on January 16, 1957. On January 8, 1959, plaintiff filed answers to the Government's interrogatories. This was the last step taken in the case until August 5, 1959, when the district court placed the action on its dismissal calendar pursuant to its local rule providing for such action in cases in which no steps have been taken for six months. On August 12, 1959, the district court dismissed the case.

The Court of Appeals reversed, holding that while plaintiff had failed to present a good excuse for her failure to prosecute the case, there was no evidence of an intent to abandon the case. The Court noted, however, that if the Government could show that it had been prejudiced by the delay, the district court might again consider whether to dismiss the action.

Staff: United States Attorney Laurence E. Dayton and Assistant United States Attorney Frederick J. Woelflen (N.D. Calif.)

FEDERAL RULES OF CIVIL PROCEDURE

Summary Judgment Improperly Entered Against Government in Suit for Insurance Proceeds Where Genuine Issues of Material Fact Were Presented. United States v. Farmers Mutual Insurance Association (C.A. 8, April 3, 1961). The Government brought suit against defendant, an Iowa insurance company, based upon a claim of the Commodity Credit Corporation. The Government alleged that defendant had insured the corn of a Mr. North, that subsequently Commodity Credit Corporation made loans to Mr. North secured by a chattel mortgage on the corn, that the corn was thereafter destroyed by fire, and that Mr. North had assigned to Commodity Credit Corporation his rights against defendant. Defendant moved to dismiss on the ground that North's giving of a chattel mortgage on the insured property constituted a forfeiture of the insurance pursuant to a policy provision which prohibited a change in "interest" regarding the corn. The district court entered summary judgment against the Government.

The Court of Appeals reversed, holding that there were genuine issues of material fact which remained unresolved. It indicated that, in its view, the giving of a chattel mortgage did not constitute a change in "interest" regarding the corn under Iowa law, and that, in any event, the Government was entitled to introduce parol evidence as to the proper meaning of the word "interest," which the court found ambiguous. In addition, the Court held that the Government should be allowed to introduce evidence in support of its defense that defendant had waived its right to interpose the forfeiture defense.

Staff: United States Attorney Francis E. Van Alstine and Assistant United States Attorney William R. Crary (N.D. Iowa)

FEDERAL TORT CLAIMS ACT

Failure to Effect Service of Process Upon United States Within Two-year Limitations Period Not Jurisdictional Defect. Rollins v. United States (C.A. 9, January 18, 1961). Plaintiff's cause of action against the Government under the Tort Claims Act arose on August 18, 1954. His complaint was filed in the district court on August 18, 1955. A summons was issued on the same date, but returned unserved. On February 17, 1958, the district court directed the issuance of an alias summons, and service thereof was then made upon the United States. Thereafter, the Government moved to dismiss for lack of prosecution under Rule 41(b), F.R.C.P., and for lack of jurisdiction because of the failure to serve the United States within the two-year limitations period provided in 28 U.S.C. 2401(b). The district court ruled that the action was barred by plaintiff's laches, and that under such circumstances laches was a jurisdictional defect.

The Court of Appeals reversed. It held that the failure to effect service of process within two years was not a jurisdictional defect. The Court reasoned that the pendency of the action on February 17, 1958, gave the district court incipient jurisdiction to issue the alias summons in the exercise of its discretion, and that the incipient jurisdiction ripened into plenary jurisdiction upon the completion of service. The Court also rejected the Government's argument that the dismissal should be upheld as a proper exercise of the district court's discretion under Rule 41(b) to dismiss for failure diligently to prosecute.

Staff: Arnold R. Petralia (Civil Division)

GOVERNMENT CONTRACTS

General Power of Postmaster General to Enter Into Leases of Real Property Held Authorization for Twenty-year Lease. Millet v. United States (C.A. 2, March 23, 1961). The owners of real property subject to a twenty-year lease to the Post Office Department which commenced in January 1954 brought suit to annul the lease. They argued that the Postmaster General was not authorized to enter into such an agreement prior to July 1954 when he received specific authority to so contract, 39 U.S.C. 2103-2116. The Government argued (1) that the Postmaster General was authorized to enter into a twenty-year lease by the Post Office Department Financial Control Act of 1950, 39 U.S.C. 794f which provides that he may "enter into such leases of real property as may be necessary * * *"; and (2) that performance by the Department under the lease for more than six years after the enactment of the 1954 Act constituted ratification of the lease.

The district court first noted its disagreement with the Government's second contention, stating "that if authority is lacking in the first instance, there is no ratification by subsequent occupation." It then went on to uphold the authority of the Postmaster General under

the 1950 Act, and dismissed the complaint. 189 F. Supp. 88. The Court of Appeals affirmed per curiam on the basis of the district court's opinion.

Staff: United States Attorney Cornelius W. Wickersham, Jr., and Assistant United States Attorney Richard S. Harrell (E.D. N.Y.)

United States Entitled to Interest on Amounts Determined to Be Due Government for Period Between Contracting Officer's Determination and Affirmance by Board of Contract Appeals. Swartzbaugh Manufacturing Co. v. United States (C.A. 6, April 14, 1961). A Government contracting officer determined that plaintiff had been overpaid $60,929.60 on a 1947 Government contract. Plaintiff appealed to the Armed Services Board of Contract Appeals, exercising a right granted by the contract. The Board affirmed the contracting officer's decision that the company had been overpaid, but held that the company owed only $45,547.46. Following the contracting officer's decision, the Government withheld payments due the company on other government contracts, treating these withheld payments as offsets against the amount due on the 1947 contract. In sum, the Government withheld $49,063.10, which was the total of the principal debt found owing by the Board and interest upon that debt figured at five percent per annum from the date of the contracting officer's decision.

The company brought an action under the Tucker Act, 28 U.S.C. 1346(a), asserting that the Government had no right to charge interest for the period between the contracting officer's determination and the Board's decision. No attack was made on the principal debt itself. The district court granted the Government's motion for summary judgment, rejecting the company's theory that there was nothing owed the Government until the Board had liquidated the amount due on the contract.

The Court of Appeals affirmed, holding that, as the contracting officer had the contract right to determine amounts due the Government, interest could be charged from the time of that determination, notwithstanding the absence of any contract or statutory provision to that effect. The Court noted that no equitable principle was offended by the allowance of interest because plaintiff had the use of the Government's money for the period for which it was required to pay interest.

Staff: Sherman L. Cohn (Civil Division)

GOVERNMENT EMPLOYEES

Lloyd-LaFollette Act Not Applicable to Removal of Government Employee Whose Indefinite Appointment Was Made Subject to Investigation, Despite Conversion of His Indefinite Appointment to Career Appointment. Hicks v. Day (C.A. D.C., April 6, 1961). On October 25, 1954, plaintiff was given an indefinite appointment with the Post Office which was

subject to a character investigation under Civil Service regulations, 5 C.F.R. 2.112. On January 23, 1955, his appointment was converted to career appointment pursuant to Executive Order No. 10577, 5 U.S.C. 631, note. Thereafter, he was suspended without pay, and on October 7, 1955, he was notified of his removal. The grounds for removal were stated to be "[b]ecause of the nature of the offenses leading up to the issuance of charges against you by the Veterans Administration [where plaintiff had been previously employed] and evidence of difficulties in previous Government employments * * *."

Plaintiff brought suit for reinstatement, claiming that he was entitled to Lloyd-LaFollette procedural rights, 5 U.S.C. 652, which had not been afforded him. The Government filed a motion to dismiss the complaint on three grounds: (1) mootness; (2) laches; and (3) that plaintiff was not protected by the Lloyd-LaFollette Act. The district court granted the motion and dismissed the complaint without stating its grounds.

On appeal, the Government urged the same three grounds in support of the decision of the district court. The Court of Appeals, passing over the first two grounds, affirmed, holding that, since plaintiff's appointment was made subject to investigation, and his suspension and ultimate removal were made within eighteen months of the appointment, plaintiff was not entitled to the protection of the Lloyd-LaFollette Act, despite his career appointment status.

Staff: Robert E. Powell (Civil Division)

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

Deputy Commissioner's Decisions to Determine Average Annual Earnings on Basis of Previous Year's Actual Earnings and to Deny Recovery of Medical Expenses Upheld by Court of Appeals. Johnson v. Britton (C.A. D.C., March 30, 1961). Plaintiff was injured in the course of his employment in the construction industry. He received treatment from his own physician which was not reported to his employer. When injured, plaintiff had been employed on a five-day week basis, but had worked only 180 days in the preceding year. The deputy commissioner found, and the parties agreed, that that year was a typical one in the industry as there were days when plaintiff did not work because of inclement weather and unavailability of work. In computing the award due plaintiff, the deputy commissioner declined to determine plaintiff's average annual earnings under Section 10(a) of the Act, 33 U.S.C. 910(a), which provides that such earnings in the case of a five-day worker shall be 260 times the average daily wage. Instead, the deputy commissioner invoked Section 10(c) and found that his average annual earnings were the amount he had actually earned in the previous year. In addition, plaintiff was held not to be entitled to reimbursement for his expense in obtaining private medical care because he had not given his employer the notice required under Section 7 of the Act. The district court affirmed the deputy commissioner's order.

The Court of Appeals affirmed, one judge dissenting in part. As to the failure to apply Section 10(a), the Court stated that it would be inequitable to employ that theoretical method of computing average earnings when there was substantial evidence to show actual earnings. The Court stated that the consistent administrative practice to invoke 10(c) in cases where work is seasonal and intermittent because of inclement weather "while not controlling, is entitled to weight as an aid to the courts in construing such statute." The denial of medical expenses was also affirmed, the Court noting that while the deputy commissioner could have excused the failure to notify plaintiff's employer, the matter was within his discretion.

Judge Fahy agreed with the rejection of plaintiff's claim for medical expenses, but dissented regarding the Court's approval of the use of Section 10(c). He reasoned that since 10(a) could reasonably and fairly be applied there was no occasion for resort to 10(c), and noted that doubts should be resolved in favor of the employee.

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

District Court Lacks Jurisdiction Over Action to Review Order of Deputy Commissioner Re Injury Occurring in Another District and Is Therefore Without Power to Transfer Action to Correct District. Atlantic Ship Rigging Co. v. McLellan (C.A. 3, April 6, 1961). Suit was brought in the United States District Court for the Eastern District of New York to review a compensation order of defendant deputy commissioner. Since the place of injury was apparently in New Jersey, that Court transferred the action to the District of New Jersey pursuant to 28 U.S.C. 1406(a). The latter Court, however, dismissed the action, holding that the Eastern District of New York lacked jurisdiction over the subject matter and was, therefore, without power to transfer the action.

The Court of Appeals affirmed. It agreed with the district court that Section 21(b) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 921(b), which provides that review of a compensation order may be had in the judicial district in which the injury occurred is jurisdictional, and that a district court could not transfer an action over which it did not have jurisdiction.

Staff: United States Attorney Chester A. Weidenburner and Assistant United States Attorney Charles H. Hoens, Jr. (D. N.J.)

Employees Working in Tunnel Which Carried Portion of Waters of Navigable River Held Engaged in Maritime Pursuits on Navigable Waters. Morrison-Knudsen Co. v. O'Leary (C.A. 9, March 20, 1961). Four workmen employed by plaintiff drowned in a diversion tunnel while they were engaged in activities intended to eliminate the seepage of Snake River

water into the tunnel which was then carrying one-twentieth of the waters of the Snake River. The tunnel had been built to divert the Snake River in order to permit the construction of a dam on the river in the interests of navigation. The deputy commissioner held that, since waters from the navigable Snake River were flowing through the tunnel, the deaths occurred upon navigable waters of the United States. He therefore awarded payments under the Longshoremen's and Harbor Workers' Compensation Act.

Plaintiff filed suit seeking a decree enjoining enforcement of the award. The district court denied plaintiff's motion for a trial de novo, and affirmed the award as supported by substantial evidence. The Court of Appeals affirmed. It held that, in view of the fact that the record before the deputy commissioner contained all the evidence that could be adduced at any hearing on the case, there was no purpose in holding a de novo hearing, and that therefore the district court correctly declined to hold one. The Court then noted its approval of the conclusions reached below that the water in the tunnel was navigable and that the men were engaged in maritime employment.

Staff: Donald H. Green (Civil Division)

Findings of Deputy Commissioner Regarding Continuance of Disability Upheld; Complaint Filed 32 Days After Date of Order Held in Compliance With 30-day Requirement of Act. Seigler v. O'Keeffe (C.A. 5, March 30, 1961). Plaintiff was injured in the course of his employment at a defense base to which the Longshoremen's and Harbor Workers' Compensation Act had been made applicable. The deputy commissioner entered an award on April 9, 1959, for disability prior to October 1958, but found no disability thereafter. On May 8, 1959, plaintiff mailed a complaint to the clerk of the district court. May 9 was a Saturday. The clerk's office was not open on that day or on Sunday, May 10. The complaint was filed on May 11.

The deputy commissioner moved to dismiss for lack of jurisdiction because the complaint had not been filed within the thirty-day period prescribed by Section 21(a) of the Act, 33 U.S.C. 921(a), and, in the alternative, for affirmance of the order as supported by substantial evidence. The district court entered summary judgment in favor of the deputy commissioner.

The Court of Appeals affirmed. It agreed that the order was supported by substantial evidence. The court, however, declared that in the circumstances of this case the requirements of Section 21(a) were satisfied.

Staff: United States Attorney E. Coleman Madsen and Assistant United States Attorney John L. Briggs (S.D. Fla.)

Findings of Deputy Commissioner That Employee's Death Arose out of and in Course of Employment and Was Not Occasioned Solely by Intoxication Upheld. Phoenix Assurance Co. v. Britton (C.A. D.C., April 6, 1961). Plaintiff's employee was authorized to use plaintiff's truck to transport himself to and from the homes of plaintiff's customers where the employee performed services, to and from another employment during the night hours, and to and from his home. The employee left the home of his last customer at 6:00 p.m. At 11:30 p.m., he crashed through the railing of a bridge which was on a direct route between the customer's home and the employee's home, sustaining injuries which resulted in his death. An examination following his death showed that his blood contained alcohol. The deputy commissioner found that the death arose out of and in the course of employment, and that it was not occasioned solely by intoxication. The district court entered summary judgment in favor of the deputy commissioner.

The Court of Appeals affirmed. It noted that workmen's compensation laws are construed liberally in favor of the employee, and emphasized the sharply limited review function of the courts.

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

SOCIAL SECURITY ACT

District Court Decision Upholding Administrative Determination That Claimant Had Not Proven Inability to Engage in Substantial Gainful Activity Reversed by Court of Appeals. Butler v. Flemming (C.A. 5, April 5, 1961). Claimant's application in 1958 for disability benefits was denied by the Secretary. The record indicated claimant had only a fourth-grade education; that in 1958 he had earned $800 from the operation of a domino parlor, which he sold that year because of a severe back impairment; that he had thereafter been unemployed; and that while he could not engage in heavy manual labor, he was able to engage in occupations which involved little movement. The district court entered summary judgment in favor of the Secretary, holding that there was substantial evidence to support the conclusion that claimant could engage in substantial gainful activity.

The Court of Appeals reversed, holding that the possibility that claimant might obtain sedentary work was insufficient to support the denial of benefits in view of claimant's limited education and experience.

Staff: United States Attorney Paul N. Brown and Assistant United States Attorney Lloyd W. Perkins (E.D. Tex.)

Farm Owner Held Entitled to Old Age Benefits on Basis of Earnings from Farm Managed by Agent and Farmed by Tenants. Harper v. Flemming (C.A. 4, March 25, 1961). Plaintiff, the owner of a farm which was worked by sharecroppers and managed by plaintiff's bank, was denied old-age benefits by the Secretary on the ground that her earnings from the farm were not derived from "material participation by the owner * * * in the production or the management of the production" on her farm within the meaning of 42 U.S.C. 411(a)(1)(A). The district court reversed the Secretary's determination, holding that the conceded material participation of her agent, the bank, to her benefit as "material participation by the owner."

The Court of Appeals affirmed. The Court rejected the Government's argument that the term "material participation" was intended to limit old-age benefits only to those farm owners who could establish that prior to reaching retirement age they had personally performed work either of a managerial or a physical character. It concluded that the Government's restrictive interpretation was contrary to the congressional purposes of equating the treatment of farm owners with that accorded other self-employed persons, who are permitted to rely on income derived from businesses carried on through agents, and of making coverage "as nearly universal as practicable."

Staff: United States Attorney Julian T. Gaskill and Assistant United States Attorney Irvin B. Tucker, Jr. (E.D. N.C.)

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CIVIL RIGHTS DIVISION

Assistant Attorney General Burke Marshall

State Action, Governmental Facilities, Fourteenth Amendment. Burton v. Wilmington Parking Authority and Eagle Coffee Shoppe, Inc. (U. S. Supreme Court, No. 164.) In this case the Negro plaintiff was refused service in a Wilmington, Delaware restaurant leased by a private corporation from the Wilmington Parking Authority, a body corporate and politic of the State of Delaware. Reversing a lower court judgment in favor of the plaintiff, the Supreme Court of Delaware held that the Parking Authority's lease of the restaurant space to a private corporation did not represent "state action" and that the acts of the private restaurant corporation therefore did not violate the Fourteenth Amendment.

Upon appeal to the Supreme Court, the United States filed a brief amicus curiae, and Solicitor General Cox participated in the oral argument. The Government took the position that the leasing arrangements of the Authority represent an integral part of its activity and are therefore within the scope of the Fourteenth Amendment interdictions.

On April 17, 1961, the Court, in a six to three opinion, reversed the Supreme Court of Delaware, holding that "The State has so far insinuated itself into a position of interdependence with [the restaurant] that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment." The Court made clear, however, that its decision was limited to the specific circumstances of this case.

In dissenting opinions Justices Frankfurter, Harlan, and Whittaker recommended resubmission of the case to the Delaware Supreme Court for clarification as to the precise basis of its decision. The Delaware Court relied upon a state statute whereby a restaurateur may refuse to serve "persons whose reception or entertainment by him would be offensive to the major part of his customers. . . ." 24 Del. Code 1501. In a concurring opinion, Justice Stewart expressed the view that the Supreme Court of Delaware had actually held that the statute permitted racial discrimination and that the statute itself therefore constituted state action violative of the Fourteenth Amendment.

Staff: Solicitor General Archibald Cox; Harold H. Greene, Howard Glickstein (Civil Rights Division)

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

EXTORTION

Extortion Letters; Letter from Officer of Loan Company to Debtor. United States v. Leo F. Sutherland (D. Idaho, March 28, 1961). Defendant, an official of a finance company, mailed a letter to one of its debtors threatening to attempt to block approval by adoption authorities of the final adoption of the debtor's child if she did not take immediate steps to pay her debts to the company. The District Court denied a defense motion to dismiss the indictment on the grounds that it did not state a violation of 18 U.S.C. 876 (Mailing threatening communications). Defendant thereupon withdrew his plea of not guilty; and the Court accepted his plea of nolo contendere and placed defendant on probation for eight months.

The instant decision is significant: 1) because it construes such a letter as "threatening" within the meaning of 18 U.S.C. 876, and 2) because it demonstrates that there can be an intent to extort money which may constitute a lawful debt. The United States Attorney at Boise, Idaho reports that he has received indications that this case has already had a significant and desirable effect in modifying the kinds of communications sent out by loan companies.

Staff: United States Attorney Kenneth G. Bergquist; Assistant United States Attorney Scott W. Reed (D. Idaho)

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Joseph M. Swing

DEPORTATION

Stay of Deportation - Physical Persecution; Judicial Review of Denial; Evidence Dehors the Record. Milutin v. Bouchard (D. N.J.) After entry of an order of deportation against him, plaintiff sought judicial review of the denial of his application for a stay of deportation to Yugoslavia on the grounds of possible physical persecution there, pursuant to 8 U.S.C. 1253(h). The Special Inquiry Officer who heard his application recommended that the stay be granted but the Regional Commissioner denied it.

After examining the record the Court concluded that plaintiff's application was exhaustively considered and that the disagreement between the two officials as to the probability of plaintiff's physical persecution suggested conscientious consideration and reflection by each and that the Court had no power to disturb the determination of the Regional Commissioner, in whom the decision-making power resides under the regulations (8 CFR 243.3(b)(2)).

Consideration by the Regional Commissioner of factual information, albeit dehors the record, conforms to the same regulation and in this type of proceeding, which results in the exercise of administrative discretion, it is not violative of procedural due process.

Stay of Deportation - Physical Persecution; Persecution versus Prosecution; Discretion. Blazina v. Bouchard (286 F.2d 507, 1961). This was an appeal from a District Court order permanently enjoining the District Director from deporting the appellee, a Yugoslav national who jumped ship in the United States and in whose case a stay of deportation on grounds that he would be physically persecuted if deported to his native country, (8 U.S.C. 1253(h)) was denied by the Attorney General's delegate.

The court of appeals held that whether an alien would be physically persecuted in the country to which he is to be deported is a matter committed by Congress solely to the Attorney General's discretion and where he considered the application for a stay in conformity with the regulations and granted procedural due process the district court erred in substituting its judgment for the Attorney General's.

It went on to define "physical persecution" under 8 U.S.C. 1253(h) as confinement, torture or death inflicted on account of race, religion or political viewpoint, but not imprisonment for jumping ship.

Reversed and remanded with directions to dismiss the complaint.

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INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Conspiracy to Send Military Expedition Against Cuba. United States v. Rolando Masferrer Rojas. (S.D. Fla.) An indictment returned April 10, 1961 in Miami charged Rolando Masferrer Rojas, former Cuban Senator in the regime of Fulgencio Batista, with conspiring to violate 18 U.S C. 960. Six other Cubans and one American were named as co-conspirators but not defendants.

The indictment arose out of Masferrer's activities in connection with the planning and outfitting of an expedition which met disaster in an attempt to invade Cuba on October 4, 1960. The landing force was captured and ten of them, including three Americans - Dale Thompson, Robert Otis Fuller and Anthony Zarba - were executed by the Cuban Government.

The indictment named Masferrer as one of the principal organizers of the expedition and accuses him of soliciting and receiving $2,000 from one of the co-conspirators. The indictment also charges the purchase of arms and ammunition in Miami by the conspirators.

Masferrer has been in the custody of the Immigration and Naturalization Service since immediately before the return of the indictment. He has not been arraigned but a bench warrant has been issued and bond set at $1,000.

Staff: Assistant United States Attorney Edith House (S.D. Fla.); Walter T. Barnes and DeWitt White (Internal Security Division)

District Court Applies Stricter Laches Rule. Collart v. Gates, et al. (D.D.C.) In November of 1959 a former non-classified civil service employee brought an action to have expunged from her Department of the Army records all derogatory evidence concerning her association with Nazis. In 1941 she had been dismissed from her employment without charges or a hearing because of such associations. The matter came before the Court on defendants' motion for summary judgment or, in the alternative, for dismissal of the complaint. After hearing oral argument, District Judge Walsh dismissed her action and in a memorandum opinion handed down on March 29, 1961 stated:

> "Despite letters written to Government officials, the plaintiff here was clearly not diligent in pursuing her claim. Jones v. Summerfield, 105 U.S. App. D. C. 142, 265 F. 2d 124 (1959), cert. den. 361 U.S. 841. The action is in the opinion of the Court barred by laches. Evans v. Leedom, 105 U.S. App. D. C. 141, 265 F. ed (1959), cert. den. 361 U.S. 935. Furthermore, the reasons given for the delay are not a sufficient excuse for laches;

Levis v. Kengla, 8 App. D. C. 230 (1896), Affirmed, 169 U.S. 234."

Staff: Oran H. Waterman and Dewitt White (Internal Security Division)

Exportation of Arms. United States v. Fotios Afentoulidis (D.Me.) On March 3, 1961, an information was filed charging the defendant, a Greek national, with violation of 22 U.S.C. 1934(b) for knowingly engaging in the business of exporting arms, ammunition and implements of war without registering with the appropriate United States Government agency. The defendant, a seaman on a Greek ship running between the State of Maine and Venezuela, had, for a considerable period of time, used this means to transport arms purchased in the United States to Venezuela.

The defendant entered a plea of guilty on the same date, was sentenced to the number of days already served in jail and was ordered turned over to the Immigration and Naturalization Service upon their detainer for having violated his status as an alien seaman. With permission of the Immigration Service, defendant voluntarily departed from the United States on the same date.

Staff: United States Attorney Peter Mills (D.Me.)

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LANDS DIVISION

Assistant Attorney General Ramsey Clark

Congressional Reference - Legal or Equitable Claim for Taxes Assessed Against Property on Which Government Had Prior Mortgage Lien. Borough of Ringwood v. United States (No. Cong. 8-58, C. Cls., April 7, 1961). In this congressional reference case, originating pursuant to 28 U.S.C. 1492 and 2509, plaintiff sought to recover $146,133.08, representing taxes which plaintiff claimed the United States should have paid. In 1942, Defense Plant Corporation, a subsidiary of Reconstruction Finance Corporation, bought the Ringwood Iron Mines, in the Borough of Ringwood, New Jersey. Real estate taxes were paid by Reconstruction Finance Corporation until 1950, when the property was declared surplus and title was transferred to the United States. In 1951, the United States sold the property to Ringwood Iron Mines, Inc., a private corporation, for $1,500,000. The corporation paid $100,000 cash and executed a mortgage in favor of the United States to secure the remainder. The mortgage provided, among other things, that the United States would have a prior lien on all property of the corporation to secure the indebtedness.

Ringwood Iron Mines, Inc., paid taxes assessed for 1951, 1952 and part of 1953. It failed to pay taxes for part of 1953 and for the years 1954 through 1957. Those taxes amount to $146,133.08.

Ringwood Iron Mines, Inc., was unable to pay installments due on the note and mortgage and the United States granted several extensions of time to permit the company to obtain new financing. The Company, however, was unable to carry on operations and the United States instituted foreclosure proceedings and the property was sold to the United States at the foreclosure sale. The Borough of Ringwood was a party to the foreclosure proceedings and asserted its claim for taxes. The United States District Court for the District of New Jersey and the Court of Appeals held that the Government's mortgage lien was prior to the lien for taxes. See United States v. Ringwood Iron Mines, 251 F.2d 145 (C.A. 3, 1957), 5 U.S. Attys. Bull. No. 11, p. 534.

In the present proceedings, plaintiff asserted that it had a legal claim against the United States for the amount of the taxes by virtue of the Act of August 12, 1955, 69 Stat. 722, which provides for payment of sums in lieu of taxes on property transferred after January 1, 1946, from the Reconstruction Finance Corporation to another Government department and where the title to such property has been held by the United States continuously since the transfer. The Court of Claims decided that the Government's mortgage lien was not a title sufficient to permit the operation of the foregoing statute and on the facts decided that the United States was not to blame for the failure of Ringwood Iron Mines, Inc., and its inability to pay taxes. It therefore decided that plaintiff had neither a legal nor an equitable claim against the United States.

Staff: Herbert Pittle (Lands Division)

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CIVIL TAX MATTERS
Appellate Decisions

Depletions Percentage- So-called Shut-in Gas Royalties Not Subject to 27-1/2 Per Cent Depletion Allowance. Flora I. Johnson, et al. v. Phinney (C.A. 5, March 15, 1961.) The taxpayers leased an 8000 acre tract to the Superior Oil Company for a primary term of five years and as long thereafter as oil and gas are produced in paying quantities. The lease provided, however, that if a gas well was shut-in for lack of a satisfactory market it could be extended by the annual payment of $5 per acre "royalty" during the shut-in period for each of 320 selected acres around the gas well. The lease on remainder of the acreage could also be extended during the shut-in period by the payment of an annual $5 per acre "rental". The lessee, Superior Oil Company, brought in gas wells which were shut-in for lack of a satisfactory market and paid the taxpayers both the "rental" and the "royalty". The taxpayers claimed a 27-1/2 per cent depletion allowance on both such payments, but the district court allowed depletion only with respect to the so-called shut-in royalties, holding that the "rentals" were not depletable. Both parties appealed.

The Court of Appeals reversed on the Government's appeal and affirmed on the taxpayer's. Neither payment, it said, was related to the exhaustion of a mineral asset by production, but depended on non-production and was, therefore, not depletable under the Code.

Staff: Assistant United States Attorney Arthur M. Moller (S.D. Tex.); Melva M. Graney and James P. Turner (Tax Division).

Liens; Bankruptcy; Reorganization; Lien Claim for Penalties on Unpaid Taxes Against Properties of Bankrupt Estate; Validity of Tax Lien Against Trustee in Bankruptcy Where Notice of Tax Lien was Not Filed Until After Petition in Bankruptcy. Simonson, Trustee in Bankruptcy of Estate of Druxman, Bankrupt v. Granquist, Director (C.A. 9, February 1, 1961, rehearing denied, March 13, 1961); United States v. Harris, Trustee for Alaska Telephone Corp., Debtor (C.A. 9, February 1, 1961, rehearing denied, March 13, 1961). In both cases tax liens of the United States for unpaid taxes and penalties owed by the taxpayers arose prior to the filing of the petition in bankruptcy in Simonson and prior to the filing of the petition in reorganization in Harris. The common question in both cases is whether the tax lien claim securing the penalties is barred by Section 57j of the Bankruptcy Act, as

amended, which provides that debts owed to the United States or to any state or subdivision as a penalty or forfeiture shall not be allowed except for the amount of the pecuniary loss sustained by the transaction out of which the penalty or forfeiture arose. Previously the Ninth Circuit had held in In re Knox-Powell-Stockton Co., 100 F. 2d 979, that Section 57j does not apply to secured claims. In the present two cases the Ninth Circuit adhered to its ruling in In re Knox-Powell-Stockton Co., and rejected the trustees' contention that Section 57j invalidated the secured claims of the United States for penalties. Other Court of Appeals decisions to the same effect, and which have upheld the Government's position are Commonwealth of Kentucky v. Farmers Bank & Trust Co., 139 F. 2d 266 (C.A. 6); Grimland v. United States, 206 F. 2d 599 (C.A. 10), and United States v. Mighell, 273 F. 2d 682 (C.A. 10). Court of Appeals decisions to the contrary, and which have invalidated the Government's tax lien to the extent it covered penalties, are United States v. Harrington, 269 F. 2d 719 (C.A. 4), and United States v. Phillips, 267 F. 2d 374 (C.A. 5).

Simonson also presented an additional issue, i.e., whether a tax lien of the United States is invalid against a trustee in bankruptcy where notice of the lien was not filed until after the filing of the petition in bankruptcy notwithstanding that the lien arose prior to bankruptcy. The trustee contended that under Section 70c of the Bankruptcy Act, as amended, he is by operation of law made a judgment creditor of, or a purchaser from, the bankrupt, as of the time of bankruptcy. Section 6323 of the Internal Revenue Code of 1954 holds that a tax lien of the United States is not valid against a judgment creditor, purchaser, mortgagee or pledgee until notice of the lien had been filed. Accordingly, the trustee urged that notice of the tax lien must be filed prior to bankruptcy in order to be valid against him. Previously, in United States v. England, 226 F. 2d 205, the Ninth Circuit had held that the Supreme Court had limited the classes of persons who take priority over the unrecorded tax liens of the United States to judgment creditors, purchasers, mortgagees or pledgees in the conventional and ordinary sense of the words. In England the Ninth Circuit had held that, in the light of the Supreme Court's construction, a trustee in bankruptcy was not a judgment creditor in the conventional and ordinary sense of that term and, hence, could not claim such a status. In Simonson the Court adhered to its previous ruling. Other circuit court decisions which have reached the same result are Brust v. Sturr, 237 F. 2d 135 (C.A. 2); Matter of Fidelity Tube Corp., decided by the court en banc, 278 F. 2d 776 (C.A. 3), certiorari denied, sub. nom Borough of East Newark v. United States, 364 U.S. 828, rehearing denied, 364 U.S. 944.

Staff: Karl Schmeidler and I. Henry Kutz (Tax Division)

Jury Trial; Taxpayer Entitled to Jury Trial in Tax Collection Suit Seeking Only Personal Judgment; No Jury in Lien Foreclosure Suit as to Foreclosure and Sale and Personal Judgments Related to Foreclosure. Damsky v. Zavatt (C.A. 2, April 3, 1961). This is a suit based on tax assessments against Bernard Damsky and his wife Olga Damsky, the

assessments being separate for some years and joint for others. The suit sought foreclosure of the tax lien on two parcels of real property owned, or formerly owned, by Olga, and in the alternative to set aside alleged conveyances by her, and for a sale of the properties. It also sought personal judgments against both. This mandamus action was brought in the Court of Appeals to review the district court's granting of the Government's motion to strike the defendants' demand for a jury trial.

The Court held that the prayers for the establishment of the tax liens against Olga's property and to disregard the conveyances to third parties were equitable in nature, and there was no right to a jury trial. It held that the claim for a personal judgment against her and against Bernard on his joint liability with her also fell within equity jurisdiction, so there was no right to a jury trial as to these issues.

As to the separate liability of Bernard for taxes for years other than those in which he was jointly liable with Olga, the Court held that the Government's claim was not in equity, Bernard having no interest in the real property against which foreclosure was sought. As to his liability for those years, the claim against Bernard, there being no foreclosure of a lien, was an ordinary tax collection suit. As to this suit, the Court held that Bernard had a right to a jury trial, the suit being considered one at common law. The Court reserved decision on the question whether Congress could constitutionally provide for an action in personam to secure a judgment for taxes without a jury trial, holding that Congress had not done so. Judge Clark dissented as to this issue, on the ground that a taxpayer has neither a constitutional nor a statutory right to a jury trial in a tax collection suit.

Staff: David O. Walter (Tax Division)

Priority of Liens; Enforcement as Against Judgment Creditor Whose Judgment Was Obtained in State Court; Injunctive Relief Granted Government to Prevent Disbursement of Bank Deposit to Judgment Creditor Pending Determination by Federal Court of Government's Claimed Priority. United States v. Webster Record Corp. (S.D. N.Y.) A creditor of the taxpayer corporation obtained a judgment against the taxpayer in the New York State Supreme Court. Thereafter, the judgment creditor instituted supplementary proceedings under which a bank (holding on deposit certain funds of the taxpayer) was restrained from paying out the deposit. The judgment creditor then moved (under the provisions of state law) to compel the bank to disburse the deposit to it in partial satisfaction of the judgment. The Government was not made a party to the original state action, nor did it appear in the supplementary proceedings.

Subsequently, notice of tax levy was served on the bank with a demand for surrender of the deposit. At this point the judgment creditor

served on the United States a copy of its motion for the turn-over order which was then still pending. Rather than appear, the Government commenced an action to enforce its asserted lien priority for unpaid taxes with respect to the bank deposit. The Government's action named as defendants all interested parties to determine its right to the deposit and to foreclose its lien.

The Government then filed a motion under Rule 65 (F.R.C.P.) to restrain the bank from disbursing the deposited funds to the judgment creditor and to enjoin the judgment creditor from taking any steps with respect to the fund until final determination of the action.

In granting the Government's application for injunctive relief the Court observed that the Government had not been named in the original state action and had declined to appear in the supplementary proceedings. Hence, any order by a state court directing the bank to release the deposit to the judgment creditor could not bind the Government, would not resolve the controversy as to priority and would only lead to further litigation. Moreover, even if the Government were to intervene in the supplementary proceedings the priority issue could not be disposed of there. The Court went on to point out that since there was a substantial dispute as to priority to the fund, the issue would have to be resolved in a proceeding where the Government was named a party in order to make any determination of priorities binding on it. Such a proceeding could be brought in a state court under 28 U.S.C. 2410. However, in such event since the Government would be entitled to remove the state action to the federal court and would undoubtedly do so, the Court concluded that granting injunctive relief was a proper exercise of its equitable power to protect or effectuate any judgment which it might be called on to enter in respect to the priority issue.

Staff: United States Attorney S. Hazard Gillespie, Jr.; Assistant United States Attorney Joseph M. Field (S.D. N.Y.) Clarence J. Nickman (Tax Division)

Liens; Jurisdiction; Tax Lien Can Be Enforced Against Royalties Owed Taxpayer by Corporation Incorporated Within District of Court and Against Cash Surrender Value of Insurance Policy Over Which Taxpayer Retained Right to Change Beneficiary When Insurer Authorized To Do Business in District of Court. United States v. Hopkins, et al. (S.D. N.Y. December 29, 1960) 61-1 U.S.T.C. 9187. A corporation incorporated in New York owed royalties to the taxpayer. An insurance company authorized to do business in New York had issued a policy on the life of the taxpayer over which he retained the right to change the beneficiary. The policy had a cash surrender value. An action to foreclose a tax lien was brought in the District Court for the Southern District of New York. The taxpayer defaulted.

The Court held that it had jurisdiction to enforce the tax lien against the royalties and the cash surrender value of the policy because they both had a situs within the district of the Court. For the proposition that a tax lien was enforceable against the cash surrender value of an insurance policy when the taxpayer had defaulted, the Court cited United States v. Bess, 357 U.S. 51; United States v. Behrens, 230 F. 2d 504; United States v. Metropolitan Life Insurance Co., 256 F. 2d 17.

Staff: United States Attorney S. Hazard Gillespie, Jr. and Assistant United States Attorney Myron J. Wiess (S.D. N.Y.) Edward A. Bogdan, Jr. (Tax Division)

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I N D E X