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DEPARTMENT OF JUSTICE

Vol. 9 No. 20

UNITED STATES ATTORNEYS
BULLETIN

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Vol. 9 October 6, 1961 No. 20

IMPORTANT NOTICE

The attention of all United States Attorneys is directed to the Transfer Procedure under Rule 20, Federal Rules of Criminal Procedure, discussed in the Appendix to this issue of the Bulletin, Vol. 9, No. 20, under Rule 20.

NEW APPOINTMENTS

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

Maine - Alton A. Lessard

Mr. Lessard was born August 2, 1909 at Rumford, Maine, is married and has two children. He attended Georgetown University Law School in Washington, D. C. from September 1926 to November 1932. He was admitted to the Bar of the State of Maine in 1933. He engaged in the practice of law in Lewiston from 1932 to July 21, 1947 when he was appointed United States Attorney for the District of Maine. He held this post until his voluntary resignation on August 16, 1953 and then re-entered the practice of his profession in Lewiston. He also served as Corporation Counsel for Lewiston in 1933-34-35; Municipal Judge from 1936 thru 1940; Judge of the Probate Court from 1941 thru 1944; Mayor of Lewiston in 1945 and 1946; and State Senator from 1955 thru 1960.

Nevada - John W. Bonner

Mr. Bonner was born on March 29, 1904 at Bortonport, Donegal County, Ireland and is a naturalized citizen of the United States. He is married and has eight children. He was educated in the public schools of Milford, Utah and read law with several attorneys in Ely and Elko, Nevada. He was admitted to the Bar of the State of Nevada in 1938. He was a deputy collector for the U.S. Bureau of Internal Revenue from August 23, 1933 to January 31, 1938. From January 17 to July 18, 1938 he was a field representative for the Nevada Employment Security Department and since that time he has engaged in the private practice of law in Ely and Las Vegas, Nevada. He also served as District Attorney for White Pine County from 1939 to 1946 and since 1957 has been a Special Assistant Attorney General for the Colorado River Commission of the State of Nevada.

North Carolina, Middle - William H. Murdock

Mr. Murdock was born September 29, 1904 at Durham, North Carolina, is a widower and has three children. He attended the University of North Carolina from 1921 to 1923; Duke University in 1923-1924; and the University of North Carolina Law School from 1924 to 1927 when he received his LL.B. degree. He was admitted to the Bar of the State of North Carolina that same year. From 1927 to 1938 he was Judge of the Recorder's Court in Durham, North Carolina and since that time he has been Solicitor of the Superior Court in Durham with the the exception of the period from August 25, 1944 to January 25, 1946 when he served in the United States Navy.

North Carolina, Western - William Medford

Mr. Medford was born January 29, 1909 at Bryson City, North Carolina, is married and has one son. He entered the University of North Carolina in 1927 and received his A.B. degree in 1931 and his LL.B. degree in 1933. He was admitted to the Bar of the State of North Carolina in 1932. He served in the United States Navy from October 5, 1942 to October 27, 1945 when he was honorably discharged as a Lieutenant. He has engaged in the practice of law in Waynesville, North Carolina continuously since 1933 with the exception of his military duty. He also served as a State Senator in the North Carolina General Assembly in the 1947-51-55-59 sessions.

Ohio, Northern - Merle M. McCurdy

Mr. McCurdy was born July 12, 1912, at Conneaut, Ohio, is married and has two children. He attended Adelbert College from February, 1944, to June, 1945, and Western Reserve University School of Law from June, 1945 to June, 1947, when he received his LL.B. degree. He was admitted to the Bar of the State of Ohio in 1947. He was engaged in the practice of law in Cleveland from 1947 to 1952, when he became Assistant County Prosecutor for Cuyahoga County, Ohio. He served in this position until March, 1960, when he was chosen to be Attorney in Charge of the Legal Aid Defender's Office of the Legal Aid Society of Cleveland.

Tennessee, Western - Thomas L. Robinson

Mr. Robinson was born June 11, 1906, at Memphis, Tennessee, is married and has two daughters. He attended Memphis University Law School from 1924-1926 and Cumberland University Law School from 1928 to June 1929, when he received his LL.B. degree. He was admitted to the Bar of the State of Tennessee in 1929. From 1929 to 1961 he was engaged in the practice of law in Memphis. On July 1, 1961, he was Court appointed as United States Attorney for the Western District of Tennessee.

West Virginia, Southern - Harry G. Camper, Jr.

Mr. Camper was born on January 22, 1924, at Kansas City, Missouri, is married and has three children. He entered the Kentucky Military Institute at Lyndon, Kentucky on September 13, 1938 and received a Scientific Diploma on June 3, 1941, and a Post Graduate Diploma

on June 2, 1942. He served in the United States Army from April 7, 1943 to December 8, 1946 when he was honorably discharged as a Captain. He attended Centre College at Danville, Kentucky in 1947 and Washington and Lee University from September 23, 1949 to February 2, 1952 when he received his LL.B. degree. He was admitted to the Bar of the State of Virginia in 1951 and to that of the State of West Virginia in 1952. From 1952 to 1958 he engaged in the private practice of law in Welch, West Virginia. On October 1, 1958 he was appointed Assistant Prosecuting Attorney for McDowell County, West Virginia and on November 14, 1958 he was elected Prosecuting Attorney.

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

Connecticut - Robert C. Zampano
Florida, Northern - Clinton L. Ashmore
Oklahoma, Northern - John M. Imel

As of September 29, the score on new appointees is: Confirmed - 73; Nominated - 5.

MONTHLY TOTALS

Totals in all categories of work pending in United States Attorneys' offices rose during the month of July. The following analysis shows the number of items pending in each category as compared with the totals for the previous month:

	June 30, 1961	July 31, 1961	
Triable Criminal	6,724	6,873	/ 149
Civil Cases Inc. Civil Less Tax Lien & Cond.	14,179	14,495	/ 316
Total	20,903	21,368	/ 465
All Criminal	8,319	8,449	/ 130
Civil Cases Inc. Civil Tax & Cond. Less Tax Lien	17,088	17,383	/ 295
Criminal Matters	10,498	11,197	/ 699
Civil Matters	13,240	13,528	/ 288
Total Cases & Matters	49,145	50,557	/ 412

Both filings and terminations show an increase over the comparable period of the previous fiscal year. The pending caseload shows an increase of 1,986 cases, or over seven percent. This is not an auspicious beginning for the new fiscal year but it is hoped that terminations will be stepped up in the coming months so that the increase will be whittled down, and the case backlog reduced considerably. The breakdown below shows the pending totals on the same date in fiscal 1960 and 1961:

	July 1960	July 1961	Increase or Decrease Number	%
Filed				
Criminal	1,709	1,819	/ 110	/ 6.4
Civil	1,863	1,886	/ 23	/ 1.2
Total	3,572	3,705	/ 133	/ 3.7
Terminated				
Criminal	1,600	1,732	/ 132	/ 8.3
Civil	1,463	1,500	/ 37	/ 2.5
Total	3,063	3,232	/ 169	/ 5.5
Pending				
Criminal	7,920	8,449	/ 529	/ 6.7
Civil	19,657	21,114	/ 1,457	/ 7.4
Total	27,577	29,563	/ 1,986	/ 7.2

During the month of July, United States Attorneys reported collections of $2,416,703. This is $445,872, or 15.6 percent less than the $2,862,575 collected in July of 1960.

During July $3,299,499 was saved in 84 suits in which the Government as defendant was sued for $3,791,910. 51 of them involving $2,335,693 were closed by compromises amounting to $283,443 and 26 of them involving $894,017 were closed by judgments against the United States amounting to $208,625. The remaining 7 suits involving $562,200 were won by the Government. Compared to July 1960, the amount saved increased by $1,888,832 or 133.9 percent from the $1,410,667 saved in that month.

DISTRICTS IN CURRENT STATUS

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

CASES

Criminal

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

CASES

Civil

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

MATTERS

Criminal

Ala., N.	Ga., M.	Ky., W.	N.C., W.	Vt.
Ala., M.	Ga., S.	La., W.	Ohio, S.	Va., E.
Ala., S.	Hawaii	Me.	Okla., N.	Wash., E.
Ariz.	Idaho	Md.	Okla., E.	Wash., W.
Ark., E.	Ill., N.	Miss., N.	Okla., W.	W. Va., N.
Calif., N.	Ill., E.	Mont.	Pa., W.	W. Va., S.
Calif., S.	Ill., S.	Neb.	R.I.	Wis., E.
Colo.	Ind., N.	Nev.	Tenn., W.	Wis., W.
Conn.	Iowa, S.	N.J.	Tex., S.	Wyo.
Dist. of Col.	Ky., E.	N.C., M.	Utah	C.Z.
Fla., N.				

MATTERS

Civil

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

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ADMINISTRATIVE DIVISION

Administrative Assistant Attorney General S. A. Andretta

LAND COMMISSIONERS

There is misunderstanding in some districts in applying Memo 173, Supplement 13 (increasing per diem in lieu of subsistence to $16) to land commissioners. Land commissioners are not Government employees as such and do not fall within the provisions of the Government travel regulations. Land commissioners' fees and expenses are fixed by court order which includes determination of the traveling expenses to be allowed.

United States Attorneys are reminded that, when submitting Forms 25B for the employment of land commissioners, they should clearly indicate the rates and expenses allowed by the court. In those instances where amounts are not fixed until the conclusion of the services, the Form 25B can show the customary rates allowed by the court so that an estimated amount can be obligated.

PRINTING OR REPRODUCTION OF SPECIAL FORMS

Recent requisitions for printing of special forms have not been submitted on the proper requisition form. All requests for printing of special forms should be submitted on Form DJ-3 (Rev. 2-10-60) in accordance with instructions on Pages 86 and 86a, Title 8, United States Attorneys Manual. Submission of requisition Form DJ-20 is unnecessary for special forms; the DJ-3 requisition is sufficient.

You are also reminded of the requirement in Bulletin No. 7, Page 188, of March 25, 1960 that forms identification should have been included on all locally mimeographed forms by December 31, 1960.

MEMOS AND ORDERS

The following Memoranda and Orders applicable to United States Attorneys Offices have been issued since the list published in Bulletin No. 18, Vol. 9, dated September 8, 1961:

ORDER	DATED	DISTRIBUTION	SUBJECT
249-61	9-1-61	U.S. Attys & Marshals	Amendment of Order No. 175-59, as amended, to provide for the transfer of the Office of Alien Property to the Civil Division

MEMO	DATED	DISTRIBUTION	SUBJECT
300	9-11-61	U.S. Attys	Consolidation of General Litigation, Government Claims, and Veterans Affairs and Insurance Sections of the Civil Division

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ANTITRUST DIVISION

Assistant Attorney General Lee Loevinger

CLAYTON ACT - SHERMAN ACT

Complaint Filed Against Oil Companies To Block Merger. United States v. Standard Oil Company (Indiana), et al. (N.D. Calif.) On September 19, 1961, a complaint was filed in San Francisco, California, to block the proposed sale of the Honolulu Oil Corporation to Tidewater Oil Company and Pan American Petroleum Corporation. In addition to Honolulu, Tidewater and Pan American, Standard Oil Company (Indiana) and Getty Oil Company were also named as defendants. The complaint charges that the acquisition of Honolulu by Tidewater, part of the Getty interests, and Pan American, a wholly-owned subsidiary of Standard, would violate Section 7 of the Clayton Act; and that agreements between Tidewater and Pan American, between Honolulu and Tidewater, and between Honolulu and Pan American violate Section 1 of the Sherman Act.

The complaint alleges that Getty, including Tidewater, and Standard, including Pan American, are two of the largest integrated petroleum companies in the United States, and that Honolulu is the third largest domestic non-integrated producer of crude oil.

Among the effects listed by the complaint as flowing from the Clayton and Sherman Act violations are: (1) the elimination of competition between Honolulu and Tidewater and between Honolulu and Standard in the production and sale of crude oil, natural gas and natural gas liquids; (2) the elimination of Honolulu as a substantial independent source of supply for refiner-competitors of Tidewater and Standard; and (3) an increase in concentration in or control by the major integrated petroleum companies of the production and sale of crude oil, natural gas and natural gas liquids in the United States.

The complaint has asked that injunctive relief be granted against the proposed acquisition.

Staff: Lyle L. Jones, Marquis L. Smith, Rodney O. Thorson, David R. Melincoff and Seymour Farber (Antitrust Division)

CLAYTON ACT

Damage Case Filed. United States & TVA v. Ohio Brass Company, et al. (E.D. Pa.) On September 22, 1961, a civil damage suit was filed against nine manufacturers of insulators. The complaint is based on the indictment returned in Philadelphia, Pennsylvania on February 17, 1960, charging the same defendants with engaging in a continuing conspiracy to fix prices on insulators and to submit the prices as agreed upon to public organizations, including Federal organizations. On December 8, 1960, the defendants named in the indictment entered pleas of nolo contendere.

The complaint seeks to recover damages based upon Federal Government and TVA purchases of insulators at prices which were alleged to be non-competitive and higher than would have prevailed in absence of the alleged conspiracy. Due to the incompleteness of the Department's study of purchase date and price patterns, the amount of damages is not specified.

The complaint is in five counts. The first count seeks treble damages for TVA, under Section 4 of the Clayton Act. The second count seeks double damages for other Government purchases, under the False Claims Act. Count III is alternative to Count II and seeks single damages under Section 4A of the Clayton Act. Counts IV and V are alternative to Count I and seek, respectively, double damages under the False Claims Act or single damages under Section 4A of the Clayton Act, for the benefit of TVA.

Staff: Fred D. Turnage, H. Robert Halper, Donald G. Balthis, John J. Hughes, Lewis Markus, Floyd Holmes and Charles Helppie. (Antitrust Division)

SHERMAN ACT

Opinion Dismissing Individual Defendants Indicted Under Section 3. United States v. A. P. Woodson Company, et al. (D. D.C.) On September 21, 1961 Judge Charles F. McLaughlin filed three memorandum opinions disposing of three out of six pending motions in this case. The Court denied defendants' request for a Bill of Particulars on the basis of the decision in United States v. Ford Motor Co., 24 F.R.D. 65 (D. D.C. 1959). The Court observed that this was a relatively small case and that the particulars sought by defendants called for disclosure of evidentiary matter.

The Court denied defendants' motions to dismiss the indictment for failure to state essential facts on the basis of decisions argued by the Government orally and by brief. The Court was of the opinion that the indictment contained the essential elements of time, place, and the manner and means of effecting the object of the conspiracy, and that the requirements of Rule 7(c) F. R. Crim. P. had been satisfied.

The Court dismissed the indictment as to the individual defendants Nelson Woodson, Joseph Hill, Warren S. Gruber, Joseph H. Deckman, Jack A. Richardson and John Cissel on the grounds that they were improperly indicted under Section 3 of the Sherman Act and should have been indicted under Section 14 of the Clayton Act. In dismissing the defendants, the Court followed Judge Smith's recent decision in the National Dairies case as the best authority on the subject and rejected the Government's contentions that, notwithstanding an adverse decision on the merits, defendants had suffered no prejudice. The Court went on to say that having determined that Section 14 of the Clayton Act governed the indictment of corporate agents, the indictment in its present form was bad by reason of duplicity. In reaching his decision on the merits, the Court found that both the legislative history of the Sherman Act and of the Clayton Act reflected doubt and uncertainty concerning the indictment of corporate agents and that Congress enacted Section 14 of the Clayton Act as the measure of individual

guilt of corporate agents. In addition, the Court went on to say that a review of the legislative history was unnecessary for the reason that the purpose of Section 14 of the Clayton Act was clear on its face.

The motion by defendant Deckman, scheduled for hearing on Friday, September 22, 1961, to dismiss by reason of immunity accruing in the course of his testimony before the grand jury, became moot on the basis of the Court's decision.

Defendants' discovery motion under Rules 16 and 17(c) F. R. Crim. P. will not be heard by reason that the Government will voluntarily submit those documents not obtained by process as a basis for stipulation. Documents obtained by process will be made available to the defendants upon entry of an appropriate order by the Court.

Staff: Wilford L. Whitley, Jr., Sidney Harris, Bruce L. Montgomery, Michael Miller and Ernest T. Hays. (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General William H. Orrick, Jr.

COURTS OF APPEALS

FEDERAL EMPLOYEES COMPENSATION ACT

United States Not Required to Contribute to Payment of Tort Claim to Government Employee in Division of Damages Resulting from Mutual Fault Collision at Sea Between Government and Private Vessels Where Government Has Paid Employee Under Federal Employees Compensation Act. United States v. Weyerhaeuser Steamship Co. (C.A. 9, August 30, 1961). A dredge belonging to the United States collided with a Liberty ship belonging to Weyerhaeuser off the coast of Oregon. There was serious property damage, but the only personal injury was sustained by an employee of the Government aboard the dredge. The Government paid the employee $329.01 as compensation under the Federal Employees Compensation Act, 5 U.S.C. 751, et seq. Weyerhaeuser settled the employee's tort suit for $16,000. In the cross-libels filed as a result of the collision, the United States and Weyerhaeuser were found to be mutually at fault. The district court upheld Weyerhaeuser's contention that, notwithstanding the exclusive liability provision of the FECA, 5 U.S.C. 757(b), the United States must reimburse Weyerhaeuser for one-half the $16,000 paid to the Government employee, such division of damages being customary in mutual at fault collisions.

The Court of Appeals reversed. While agreeing that, however it decided the case, violence would be done to either the ancient admiralty rule of divided damages or the exclusive liability provision of the FECA, the Court thought the latter should prevail. The Court pointed out that the Government surrendered absolute immunity from liability to its employees when the FECA was enacted, and that the usual division of damages rule in mutual fault collisions could not be applied had there been no such surrender. Therefore the Court refused to read into the FECA a surrender of immunity from liability to third parties which the Act clearly does not contemplate. The Court further distinguished the Harter Act (46 U.S.C. 192) line of cases which hold that a carrying vessel must share the damages paid to cargo interests by a non-carrying vessel with which it collides even though the cargo interests could not hold the carrying vessel liable directly. The Court said that the Harter Act did not affect the liability of one vessel to the other, but the FECA excludes liability of the United States for injuries to its employee, to anyone other than the employee.

Staff: Assistant Attorney General William H. Orrick, Jr.; W. Harold Bigham (Civil Division)

LONGSHOREMEN'S HARBOR WORKERS' COMPENSATION ACT

Unsuccessful Suit Under Jones Act Held Not to Bar Subsequent Action Under Longshoremen and Harbor Workers' Compensation Act. Willie J. Teichman and C. D. Calbeck v. Loffland Brothers Company, et al. (August 16, 1961,

C.A. 5). Teichman was employed by Loffland Brothers as a "floorman" oil driller in the Gulf of Mexico. It was necessary for him to board a tugboat to get from shore to the drilling rig. When he jumped from the tug to a supply ship moored to the drilling rig, he felt severe back pains. He complained of these pains several hours later, and it was determined that he should be returned to shore. Accordingly, he was placed in a heavy metal basket attached to a crane and moved back to the tug. The basket struck the tug with considerable force and Teichman suffered serious back injuries disabling him for over three years. Teichman filed a claim under the Longshoremen's Act, 33 U.S.C. 901, et seq., and gave notice of election to recover damages against a third person pursuant to 33 U.S.C. 933. He then filed a suit against the employer under the Jones Act, 46 U.S.C. 688, and against the owner of the two vessels, alleging unseaworthiness and negligence, and injury from the first (jumping) incident. The case was submitted to a jury which found, on a special verdict, that he received no injury from this incident.

The Deputy Commissioner then held a hearing on Teichman's claim for benefits under the Longshoremen's Act. He concluded that Teichman was injured as a result of the second (basket-lowering) incident and based the award on those grounds. Loffland Brothers appealed to the district court which found that the Deputy Commissioner's findings were supported by substantial evidence, but held that Teichman was barred from receiving compensation because of his civil action under the Jones Act, since he could not take the inconsistent position that he was a seaman under the Jones Act but not a seaman under the Longshoremen's Act.

The Court of Appeals reversed the district court's decision. It found that the claim for compensation under the Longshoremen's Act is not barred by an unsuccessful action in a Jones Act case. The Court relied upon precedents which have permitted awards of compensation under the Longshoremen's Act despite prior (and inconsistent) receipt of benefits under State compensation acts. The Court also pointed out that in 33 U.S.C. 933(f) Congress provided that if an employee elected to recover damages against a third person and recovered less than that to which he would have been entitled under the Longshoremen's Act, the employer must pay the difference. The Court further found no validity to the defense of estoppel by judgment, since Teichman's first suit concerned only the first incident, and his award under the Longshoremen's Act was based on the second incident.

Staff: David L. Rose (Civil Division)

FOREIGN COURTS

SOVEREIGN IMMUNITY

Members of Visiting Forces Immune from Local Jurisdiction for Official Duty Acts. GEMA (Gesellschaft fur musikalische Auffuhrungs-und mechanische Vervielfaltigungsrechte) v. Kale, et al. (Court of Appeals, Frankfurt, Germany, November 3, 1960*). GEMA (a German "Society for Musical Production and Mechanical Reproduction Rights") filed suit on behalf of ASCAP (American Society of Composers, Authors and Publishers), BMI (Broadcast Music, Inc.) and BIEM (Bureau International de l'Edition Mecanique) against the Armed Forces

Network (AFN), naming as defendants individuals connected with the operation of AFN. The complaint alleged that AFN broadcast copyrighted music administered by GEMA; that such broadcasts were unlicensed; that plaintiff has the exclusive right to authorize broadcasts of such music; and that therefore AFN is liable to GEMA for the licensing fees. GEMA sought $62,500 in damages, or alternative relief in the form of an injunctive against future broadcasts, or a declaratory judgment that broadcasts of the musical repertory of GEMA are subject to licensing. The Government moved to dismiss for lack of jurisdiction. The Landgericht dismissed the suit against the individual defendants on the ground that they could not be held individually responsible for their acts in the performance of official duty. The Court also dismissed the suit against AFN, considering itself incompetent by reason of sovereign immunity. The Oberlandesgericht (Court of Appeals) affirmed, holding that claims arising out of official duties may not be asserted against individual members of the Forces. The Court recognized as a general principle the immunity of visiting forces from local jurisdiction. However, under the Finance Convention (T.I.A.S. 3425, 6 U.S.T. 4377, May 5, 1955), claims arising out of acts or omissions of members of the Forces may be asserted administratively and even judicially against the Federal Republic and, under the express terms of the Convention, this remedy is exclusive. Thus the Convention affords relief otherwise unavailable and, as the court concluded, the Federal Republic of Germany was the only proper party defendant.

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* Opinion received recently.

Staff: Geo. S. Leonard and Joan T. Berry (Civil Division); Gerhard Weisner (Frankfurt, Germany)

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

IMPORTANT NOTICE

Judicial Review of Deportation and Exclusion Orders.

S. 2237, 87th Congress, makes substantial changes in the procedures relative to judicial review of deportation and exclusion orders, including actions presently pending. The Department is studying the law, and it is expected that instructions will shortly be issued with regard thereto. United States Attorneys are requested to check the next two or three issues of the Bulletin for those instructions.

POULTRY PRODUCTS INSPECTION ACT CASES

Referral Procedures; Department of Agriculture. It has been agreed with the Department of Agriculture that, effective immediately, criminal cases under the Poultry Products Inspection Act (21 U.S.C. 451-469, particularly Sections 458-461) will be referred directly from the Department of Agriculture to the appropriate United States Attorneys. This new procedure will accelerate the preparation and prosecution of these cases. The effectiveness of prosecution, both with respect to the offender specifically and the trade generally, is believed to be greatly enhanced by prompt action. The new referral procedure should contribute toward promptness.

The Department of Agriculture is authorized under the agreement to submit to the Criminal Division any cases under the Act concerning which it may desire initial examination and review by the Criminal Division. Such cases may include those which involve novel or difficult questions of law or unusual facts or circumstances.

The Department of Agriculture will furnish to the Criminal Division copies of its initial referral letters and of all subsequent correspondence with the United States Attorneys in these cases, and it is requested that copies of all correspondence from United States Attorneys to the Department of Agriculture be furnished to the Criminal Division. The Division will follow developments in the cases and will continue to exercise its supervisory jurisdiction. The new procedure does not mean that there has been any change in emphasis or attitude toward these cases. They are deemed an important part of the administration and enforcement of the Department of Agriculture's over-all program.

Although the Department of Agriculture will bring to the attention of the Criminal Division any Poultry Products Inspection Act cases which are deemed unusually important or which may involve unusual issues or problems, it is nevertheless requested that the United States Attorneys also bear in mind the need for keeping the Criminal Division informed of major criminal

matters and of important questions or developments in criminal cases pending in their offices. The United States Attorneys should, of course, feel free to request advice and assistance from the Criminal Division on any problem which may arise. Any questions concerning the sufficiency or form of criminal informations or indictments, or matters involving the Federal Rules of Criminal Procedure, should be called to the attention of the Criminal Division.

Cases under the Poultry Products Inspection Act will continue to be handled in conformity with existing policies and procedures applicable to other criminal cases under the supervisory jurisdiction of the Criminal Division, as set out in published instructions, particularly the United States Attorneys Manual.

OBSCENITY

Standard Applicable to Private Letters. United States v. Forest James Ackerman (C.A. 9). In an opinion of August 18, 1961, the Court of Appeals rejected appellant's argument that the Roth test was not intended for cases of non-commercial private correspondence between adults and that the test to be applied to such correspondence is whether the material was an appeal to the prurient interest of the particular addressee, who is the only person likely to view its contents.

The Court, while acknowledging that the principal object of the statute was to prevent the commercial exploitation of psychosexual tension, stated that the statute contains no limitation and is entitled to the presumption that Congress either had other, broader social objectives in mind or considered that the attainment of its main objective would be unreasonably frustrated by any limitation, such as the exclusion of non-commercial private letters. That the statute includes private correspondence is also clear from its history. The original statute was amended on September 26, 1888 to include letters, after the Supreme Court in United States v. Chase, 135 U.S. 255 (1880), had held that they were excluded. The amendment of June 28, 1955, which substituted the general language "article, matter, thing, device or substance" for the previous specification of "letters" and other items, was intended, not to narrow, but to broaden the scope of the statute to include all matter. (Court's emphasis.)

Recognizing that the potential harm to public dignity and morals is less in the case of the private letter than in the case of the commercial book or pamphlet, the Court emphasized that gravity of harm has been rejected as a test in obscenity cases under the theory that obscenity is so anti-social and devoid of any social value as to be outside of the protection of the First Amendment. The Court observed that to qualify the Roth standard as appellant suggests would permit the mailing of private letters by "crackpots or perverts whose convictions would be made to depend, not upon any general standard of obscenity, but upon the reactions and views of the particular addressees." Some writers of such letters would escape conviction while others would not, depending on whether the particular reader of the letter "reacts with prurient interest, or instead

with disgust or resentment." On the other hand, serious writers of letters which might be susceptible to misconstruction by their recipients, would be exposed to prosecution, depending upon the reaction of the addressee.

This opinion by the Court of Appeals is regarded as significant because of its soundness and practicality in the administration of the criminal law in obscenity cases. The case itself is one involving an aggravated fact-situation.

Staff: Former United States Attorney Laughlin E. Waters; Assistant United States Attorney Edward M. Medvene (S.D. Calif.).

BANK ROBBERY

Offenses Under Subsections (a) and (b) of 18 U.S.C. 2113 May Be Charged by Information. In McGehee v. United States (C.A. 10), F. 2d (decided September 2, 1961), the Court of Appeals in a per curiam opinion upheld the decision of the district court denying relief under 28 U.S.C. 2255 to defendant who had brought a motion under that statute. He had been charged with violating subsections (a), (b) and (d) of Section 2113 of Title 18, United States Code, and had waived indictment in open court. Subsequently he pleaded guilty to subsections (a) and (b) and the remaining charge was dismissed. He then brought this action grounding his claim on the argument that since Section 2113(e) carries a possible death penalty, all accusations under every part of the statute must be initiated by indictment (see Rule 7(a) F.R. Cr. P.), and the information to which he had pleaded guilty was an unconstitutional deprivation of due process, violative of the Fifth Amendment.

The Court observed that it had recently decided that Section 2113 was an aggregation of separate offenses, each subject to prosecution by information unless containing the elements set forth in Section 2113(e), Young v. United States (C.A. 10) decided 1961). They here affirmed the trial court's holding that since defendant was not charged under subsection (e), he was not denied due process by prosecution under the information after his waiver (Rule 7(b) F.R. Cr. P.).

Staff: United States Attorney Edwin Langley; Assistant United States Attorney Harry G. Fender (E.D. Okla.).

* * *

CIVIL RIGHTS DIVISION

Assistant Attorney General Burke Marshall

Destruction of Motor Vehicle Engaged in Interstate Commerce, Alabama. United States v. William O. Chappell, et al. (N.D. Ala.). On August 31, 1961, the Federal Grand Jury at Birmingham, Alabama, returned a true bill of indictment against nine residents of Anniston, Alabama, and vicinity, charging them with the violation of two federal statutes as a result of a bus burning at Anniston on May 14, 1961.

The bus involved was one belonging to the Greyhound Corporation, en-route from Atlanta, Georgia, to Birmingham, Alabama, and carrying, among other passengers, a group of individuals traveling through southern states testing segregation practices in interstate bus transportation and facilities. When the bus arrived at Anniston, Alabama, it was met by a crowd of persons, among whom were the defendants. Its windows were broken and its tires were slashed. The crowd followed the bus as it left Anniston and, after the bus was forced to stop because of flat tires, further damage was inflicted upon it with the result that it was completely destroyed by fire. No one was seriously injured.

The indictment, in two counts, charged all nine defendants with conspiracy under 18 U.S.C. 371 to commit an offense against the United States, namely, to damage and destroy a motor vehicle engaged in interstate commerce in violation of 18 U.S.C. 33. The other count charged the nine defendants with the substantive offense under 18 U.S.C. 33.

Trials are set for the week of October 30, 1961.

Staff: United States Attorney Macon L. Weaver (N.D. Ala.); John Doar (Civil Rights Division).

Voting and Elections; Civil Rights Act of 1957; Injunctive Proceedings to Restrain State from Prosecuting Negro Active in Voting Movement. United States v. John Q. Wood, Registrar of Voters, et al. (S.D. Miss.). On September 20, 1961, the Department of Justice filed a suit under 42 U.S.C. 1971(b), (c) against four Walthall County, Mississippi, public officials. Named as defendants were John Q. Wood, the registrar of voters; Breed O. Mounger, the Tylertown City Attorney; County Sheriff Edd Craft; and Michael Carr, attorney for the State judicial district which includes Walthall County.

The Government's complaint charges that, on September 7, 1961, the defendant Wood struck a Negro, John Hardy, with a gun, for the purpose of interfering with the right of Walthall County Negroes to register to vote. The complaint charged further that the proposed State criminal prosecution of Hardy for disturbing the peace was a part of the organized effort to deter voting by Negroes. The Government asked that the trial of Hardy be enjoined and that the defendants be ordered to cease all acts and practices designed to interfere with the right of Negroes to register to vote.

On September 21, the United States District Court (per Judge W. H. Cox) denied the Government's application for a temporary restraining order against the State criminal trial of Hardy, scheduled for September 22.

The Government applied immediately to Judge Rives of the Court of Appeals (C.A. 5) for an order to stay the effect of the district court's denial of the Government's application.

Mississippi's representatives agreed to postpone the trial and the Court of Appeals has set October 3 as the date for a hearing on the issue of whether it should order postponement of Hardy's trial pending a hearing on the Government's motion for a preliminary injunction.

Staff: John Doar, David R. Owen and Paul A. Renne (Civil Rights Division)

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IMMIGRATION AND NATURALIZATION SERVICE

Joseph M. Swing, Commissioner

DEPORTATION

Habeas Corpus; Release Pending Judicial Review of Deportation Order - Excessive Administrative Bail. Hernandez-Avila v. Boyd and Kennedy (C.A. 9, September 1, 1961.) This appeal was from the denial by the district court of appellant's motion in habeas corpus proceedings for his immediate release from custody or for reduction of his administrative bail. He contended on his appeal that having established prima facie United States citizenship by naturalization he is entitled to be released from custody or if not so entitled that the amount of his administrative bail is excessive.

He is a native of Mexico who became a citizen of the United States by naturalization in 1944. He left the United States in 1951 and resided in Mexico until January 1961 when he was re-admitted to this country as a nonimmigrant alien visitor for pleasure. The following month the Service instituted deportation proceedings against him and in that connection took him into custody and fixed his administrative bail at $25,000. From the order fixing the amount of bail he did not appeal.

In the deportation proceedings the Government contended that he lost his citizenship by his residence in Mexico from 1951 to 1961 under 8 U.S.C. 1484(a)(1) and that he was deportable under 8 U.S.C. 1252(a)(9) for having failed to maintain his nonimmigrant visitor's status by seeking gainful employment. The proceedings resulted in an order for his deportation which became final when his appeal from it was dismissed by the Board of Immigration Appeals on April 4, 1961.

Subsequently he filed his petition for habeas corpus in the district court and an order to show cause was issued and answered. Thereupon he filed (1) an amended complaint for a declaratory judgment on the issue of his citizenship and (2) a motion for his immediate release from custody or for reduction of bail. It is from the denial of (2) that this appeal was taken, (1) having been answered but not heard on the merits.

The Court of Appeals held that while appellant is entitled to a judicial determination on the issue of his citizenship he may be held in custody pending such determination (Ng Fung Ho v. White, 259 U.S. 276 and cases cited therein) and found no error in the district court's denial of the petition for a writ of habeas corpus.

On the question of whether the administrative bail of $25,000 is unreasonably high there was evidence that appellant had fled from Texas to Mexico in 1951 to avoid prosecution on an embezzlement charge and that when he returned to the United States in 1961 he was being sought by Mexican authorities in connection with an $80,000 embezzlement in that country. Additionally he had on two other occasions fled a jurisdiction when he was

threatened with prosecution; these facts indicated to the Court of Appeals that he is a poor bail risk.

The determination of the Attorney General and his authorized representative with respect to bail can be overturned only when there is an abuse of discretion (Carlson v. Landon, 342 U.S. 524) and the Court of Appeals found no such abuse in this case in setting the appellant's bail at $25,000, nor could it find that the district judge abused his discretion in refusing to fix bail at a lesser amount.

Affirmed.

Habeas Corpus; Detained to Effect Deportation; Acceptance by Country of Deportation. U. S. ex rel. Wong Kan Wong et al v. Esperdy (S.D. N.Y., September 8, 1961.) Relators were detained under 8 U.S.C. 1252(c) for the purpose of effecting their departure from the United States pursuant to final orders of deportation.

At their deportation hearings, relators designated the mainland of China as the country to which they wished to be sent in the event they were ordered deported. That designation was in accordance with the provisions of 8 U.S.C. 1253(a).

Without inquiring of the Government of mainland China whether it would accept relators as deportees, since we have no diplomatic relations with that country, respondent proposed to deport them there via Hong Kong with the understanding that they would be returned to the United States should they be refused admission into China. The Hong Kong Government had confirmed that upon their arrival there in possession of Hong Kong documentation, their deportation to the mainland of China could be completed.

Relators contended that since they designated the mainland of China their deportation cannot be effected there because respondent has not inquired of that government as to whether it will accept them into its territory, such inquiry being demanded by 8 U.S.C. 1253(a), and since it cannot be done because of the absence of diplomatic relations they cannot be deported and, therefore, there is no basis for holding them in custody.

Relying principally on Tom Man v. Murff, 264 F. 2d 926 and Lu v. Rogers, 164 F. Supp. 320; aff., per curiam, 262 F. 2d 471, the Court concluded that the determination as to whether the country to which an alien is to be sent is willing to accept him must be made prior to the time of his deportation, such preliminary inquiry being a condition precedent to the acceptance required in the case of the country of the alien's choice.

The Court held that unless and until the respondent makes that preliminary inquiry and within the statutory period receives an expression of a "willingness to accept," the relators may not be deported to the mainland of China; but that since they are clearly deportable they cannot be unconditionally released and the writ should be held in abeyance pending action by respondent in conformity with the Court's opinion.

* * *

LANDS DIVISION

Assistant Attorney General Ramsey Clark

Accretion to Government Land - Ownership Determined by Federal Law - "high water mark" Defined. United States v. State of Washington (C.A. 9, Sept. 1, 1961). Certain previously public land on the Washington coast is now held by the United States in trust for Indians. On behalf of itself and the Indians, the United States sued the State to quiet title to alluvion formed by gradual natural accretion over what had been state-owned tideland. (For former opinion sustaining the Government's standing to sue, see 233 F. 2d 811.) The district court held that the boundary between littoral land and the State tideland should be determined by state law, and that under Washington law it was fixed at the ordinary high-water mark defined as the line which the water impressed on the soil as of November 11, 1889 (the date of statehood), by covering it for sufficient periods to deprive it of vegetation and destroy its agricultural value. It quieted title in the United States only to alluvion landward of the 1889 high-water mark so defined. On the Government's appeal, the Court of Appeals reversed.

The Court of Appeals held that where littoral land is owned by the United States or its grantees, the ownership of accretions must be determined by federal law, that under federal law accretions above the ordinary high-water mark belong to the littoral owner, and that federal law defines the "ordinary high water mark" on tidal waters as the line where the land, as it may exist at any given time, meets the permanent elevation of the mean of all the high tides occurring there through a complete tidal cycle of 18.6 years. The definition used by the district court was distinguished as being applicable only to non-tidal waters. Cases relied on by the State as holding state law to be controlling were distinguished as involving either (1) titles not held by or derived from the United States, or (2) sudden or artificial changes in the water line, or (3) rights of riparian owners in adjacent waters or in lands that were still below the high-water line.

Staff: George S. Swarth (Lands Division).

Sovereign Immunity; Disposal by Government of Fire-Damaged and Insect-Menaced Timber on Unpatented Mining Claims in National Forest. Bradley-Turner Mines, Inc. v. Henry E. Branagh, et al. (C.A. 9, Sept. 13, 1961). Plaintiff sought damages and an injunction restraining forest service officers in their official capacities from conveying or contracting to convey any rights in timber on unpatented mining claims in a national forest. It was not alleged that the officers were acting in excess of their statutory authority or unconstitutionally and were not exercising powers delegated to them by the United States.

A preliminary injunction was denied on the grounds, inter alia, that plaintiff's claims are unpatented mining locations which are subject to

the paramount title of the United States and that the dead and fire-damaged timber exposed living timber to severe hazards of fire and insect infestation, the sale of such timber being authorized under applicable statutes and regulations. The action was then dismissed for lack of jurisdiction, as a suit against the United States without its consent. 187 F. Supp. 665. Dismissal was affirmed on appeal, the Court expressly relying on Larson v. Domestic & Foreign Corp., 337 U.S. 682 (1949).

Staff: Raymond N. Zagone (Lands Division).

Condemnation; Reference to Commission; Setting Aside Commission's Report; Admissibility of Evidence; Effect of Failure to Object to Reception of Testimony. Claude Parks, et al. v. United States (C.A. 5, July 19, 1961). In this condemnation action, the original commission's report was set aside by the district court which thereafter affirmed a report and award of a different commission. The second award was within the range of the valuation testimony though nearly $20,000 less than the first award. Appellants attacked the setting aside of the original award, the adequacy of the approved award, and the second commission's consideration of allegedly incompetent evidence.

The Court of Appeals affirmed, holding that the setting aside of the first award could have been based upon an unwarranted reference to a commission (as urged by the Government in the district court), upon excessiveness, or upon erroneously admitted evidence which permeated the record, including the condition of the condemned property after the taking and the cost to the county for other land taken many years after this taking. The second award was found to be amply supported by substantial evidence. The admission of evidence relating to appellants' gratuitous use of the land after the taking - invited in part by appellants' own testimony and observed by the commission on its view without objection - was not reversible error. Appellants' failures to object to a commissioner's questioning of a witness regarding other land and to show the alleged dissimilarity of that land were held to foreclose assignment of those matters on the appeal as prejudicial error.

Staff: Raymond N. Zagone (Lands Division).

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

Briefing and Argument of Appeals in Criminal Tax Cases

REPUBLICATION

Attention is invited to the following item which was originally published in United States Attorneys Bulletin, Vol. 9, No. 13, p. 418, dated June 30, 1961. Because substantial compliance with this announcement has not yet been effected, it is requested that all United States Attorneys instruct their staffs to comply with the policy set forth. It is noted that the time for review suggested is a minimum, and more time should be provided at the departmental level where possible.

Except when specifically advised to the contrary, the United States Attorneys will brief and argue criminal tax cases in the Courts of Appeals. The Manual (Title 6, p. 8.1) states:

> "In all such instances, a draft of the Government's brief should be submitted to the Department far enough ahead of the due date to give sufficient time for adequate review by the Tax Division."

This sentence has been quoted in full since in the past it has been frequently overlooked. For the future, it is hoped that all United States Attorneys will impress upon their staffs the necessity of complying with the instruction. The review by the Department will have three objectives: First, to avoid, if possible, the occasional embarrassment which has occurred in the past of confession of error in the Supreme Court of the United States by earlier admission of error. Second, to coordinate the Government's position on points of law in the several courts of appeal. Third, to identify those cases where the Government's statement of the facts is thought to be inadequate and, hopefully, to put the Department in a position to make any helpful suggestions it may have. Five points should be borne in mind: (1) The Department should be notified immediately when an appeal is taken. (2) A copy of the transcript should be sent promptly to the Department. (3) If the circuit is one which requires a printed record, a copy of the printed record should be transmitted to the Department as soon as received. (4) A copy of the appellant's brief should be sent to the Department upon its receipt. (5) The draft of brief prepared by the United States Attorney should be submitted in "sufficient time for adequate review" prior to the due date of the brief. What is "sufficient time for adequate review"? That will vary with the individual case, but as a general rule two days in addition to mailing time would appear to be the minimum. Where necessary, an extension of time should be requested from the court of appeals.

CRIMINAL TAX MATTERS
APPELLATE DECISION

Wilful Attempt to Evade Income Tax of Corporation by Corporate Officers; Sufficiency of Evidence; Siphoning Off of Corporate Income; Conspiracy to

Defraud United States of Income Tax by Officers of Corporation With That Corporation and Others. Blauner v. United States (C.A. 8, August 18, 1961). Appellant was indicted on three counts, attempted evasion of corporate income tax for the calendar year 1950 (Count 1) and calendar year 1951 (Count 2) in violation of Section 145(b), 1939 I.R.C., and (Count 3) with conspiracy to defraud the United States of income taxes due and owing by American Lithofold Corporation for the years 1950 and 1951 in violation of 18 U.S.C. 371. The statute of limitations barred Count 1 of the indictment, and Blauner was convicted of Counts 2 and 3.

Appellant's principal contention on appeal was that the evidence was insufficient for the jury to find that he "filed" or "caused to be filed" the 1951 income tax return of Lithofold. The Court reviewed the entire record in detail to consider whether the evidence in its most favorable aspect to the Government was legally capable of allowing a jury to become persuaded of guilt. The evidence disclosed that Lithofold overstated the cost of goods sold pursuant to an agreement with certain owned or controlled entities paying excessive prices for carbon paper purchased by Lithofold; the excess payments less one-sixth of the excess, was passed to appellant's son. Lithofold's books failed to correctly reflect the excess payments, and failed to reflect the payments to Blauner's son. One accounting firm withdrew from the handling of Lithofold's matters as a result of disagreement over these devices; another accounting firm employed thereafter, while aware of the situation, understood that the arrangement had to be continued in order to obtain Government contracts.

In addition to the excess cost device, excessive expenses for personal expenditures of Blauner and his son were claimed on the corporations' income tax returns. The bulk of the expenditures represented personal expenses of R. J. Blauner and his wife.

Appellant did not testify; the evidence disclosed that the accounting firms had brought these matters to appellant's attention, and that at the time he was president, treasurer and manager of Lithofold and had admittedly devised the excess cost device for reducing corporate income. The Court concluded that the evidence was sufficient to support the jury's verdict.

Summary disposition of appellant's other allegations of error was made by the Court. The Court held it was not error for the district judge to permit the Government attorney to read the conspiracy count of the indictment to the jury, and that argument outside the evidence of record was not error when cured by court instruction to the jury. The district judge's refusal to give an instruction emphasizing one particular item of defense evidence was also held no error.

Staff: Assistant United States Attorney William C. Dale, Jr. (E.D. Mo.); (Former United States Attorney William H. Webster, with him on brief)

CIVIL TAX MATTERS
District Court Decision

Summons - Administrative; Production of Books and Records Under Section 7602, 1954 I.R.C.; Privilege Against Self-Incrimination Cannot Be Raised by

Attorneys for Person Summoned; Attorneys Have No Standing to Quash Summons Issued to Accountants. Samuel Reisman and Charles M. Trammell, et al. v. Caplin, Commr., (D.C. D.C. 1961). In connection with an investigation of a taxpayer, the Commissioner of Internal Revenue, pursuant to the authority contended in Section 7602, 1954 I.R.C., issued summonses to taxpayer's accounting firm to produce original books and records of various foreign corporations and for work papers, audit reports and correspondence prepared by the accountants. Plaintiffs are the attorneys for the taxpayer. Plaintiff Reisman, having represented the taxpayer since the early fifties, and Trammell's firm having been brought into the case by Reisman after notices of deficiencies had been issued to taxpayer. Plaintiffs contended that the accountants were hired by them to assist them in their preparation for certain Tax Court cases and any criminal action which might have been instituted against the taxpayer.

In dismissing the complaint, the District Court held that plaintiffs were not the proper parties, finding that the records sought were not the work production of the attorneys but that any work product involved was the product of the accountants. Plaintiffs are expected to perfect an appeal.

Staff: United States Attorney David C. Acheson;
Richard M. Roberts, John M. Burzio and Frank J. Violanti
(Tax Division)

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