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UNITED STATES ATTORNEYS
BULLETIN

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Vol. 9 November 3, 1961 No. 22

IMPORTANT NOTICE

The White House has issued the following regulations governing travel abroad:

"Whenever any Department or Agency head plans to travel abroad on official business, notification should be provided to the State Department, attention the Secretariat. That agency is anxious to be of assistance in notifying embassy and chancery officials so that they can provide on-the-scene help, and to suggest itinerary possibilities which would be timely in the Department's work.

"The State Department will also provide an escort officer if that is desired, and a briefing immediately prior to departure.

"Any public statement made during or in connection with the trip shall be cleared by the State Department."

All requests for foreign travel on official business by Departmental officials should clear through the Administrative Assistant Attorney General.

PAY VOUCHERS

All pay vouchers should be submitted to the Department on the new forms DJ-94a and b. All copies of the old form 5 1/2 D.C. should be destroyed. Forms DJ-94a and b should be submitted in sets of one original and three copies.

DISTRICTS IN CURRENT STATUS

As of September 30, 1961, the districts meeting the standards of currency were:

CASES

Criminal

Ala., M.	Ark., W.	Del.	Ga., N.	Ill., E.
Ala., S.	Calif., S.	Dist. of Col.	Ga., M.	Ill., S.
Ariz.	Colo.	Fla., N.	Idaho	Ind., N.
Ark., E.	Conn.	Fla., S.	Ill., N.	Iowa, N.

CASES

Criminal (Cont'd.)

Iowa, S.	Miss., N.	N.C., E.	S.D.	Wash., E.
Kan.	Mo., E.	N.C., M.	Tenn., E.	Wash., W.
Ky., E.	Mo., W.	Ohio, N.	Tenn., W.	W.Va., N.
Ky., W.	Mont.	Ohio, S.	Tex., E.	W.Va., S.
La., W.	Neb.	Okla., N.	Tex., S.	Wis., E.
Maine	Nev.	Pa., E.	Tex., W.	Wis., W.
Md.	N.H.	Pa., M.	Utah	Wyo.
Mass.	N.J.	Pa., W.	Vt.	C.Z.
Mich., E.	N.M.,	P.R.	Va., E.	Guam
Mich., W.	N.Y., E.	R.I.	Va., W.	V.I.
Minn.	N.Y., S.			
	N.Y., W.			

CASES

Civil

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

MATTERS

Criminal

Ala., M.	Ga., S.	Mich., E.	Ohio, S.	Tex., W.
Ala., S.	Ill., N.	Miss., N.	Okla., N.	Utah
Ariz.	Ind., N.	Miss., S.	Okla., E.	Va., E.
Ark., E.	Ind., S.	Mont.	Okla., W.	Wash., W.
Ark., W.	Iowa, N.	Neb.	Pa., E.	W.Va., N.
Calif., N.	Iowa, S.	Nev.	Pa., W.	W.Va., S.
Calif., S.	Ky., E.	N.J.	P.R.	Wis., E.
Colo.	Ky., W.	N.M.	R.I.	Wis., W.
Conn.	La., W.	N.C., E.	Tenn., W.	Wyo.
Fla., N.	Maine	N.C., M.	Tex., E.	C.Z.
Ga., M.	Md.	N.C., W.	Tex., S.	Guam

MATTERS

Civil

Ala., N.	Ala., S.	Ark., E.	Calif., S.	Conn.
Ala., M.	Ariz.	Ark., W.	Colo.	Dist.of Col.

MATTERS

Civil (Cont'd.)

Fla., N.	La., W.	N.J.	Okla., W.	Va., E.
Ga., M.	Maine	N.Y., N.	Pa., E.	Va., W.
Ga., S.	Md.	N.Y., E.	Pa., W.	Wash., E.
Hawaii	Mass.	N.Y., S.	P.R.	Wash., W.
Idaho	Mich., E.	N.Y., W.	R.I.	W.Va., N.
Ill., N.	Mich., W.	N.C., M.	S.D.	Wis., E.
Ill., S.	Miss., N.	N.C., W.	Tex., N.	Wis., W.
Ind., N.	Miss., S.	N.D.	Tex., E.	Wyo.
Ind., S.	Mo., E.	Ohio, N.	Tex., S.	C.Z.
Iowa, N.	Mont.	Okla., N.	Tex., W.	Guam
Iowa, S.	Neb.	Okla., E.	Utah	V.I.
Ky., E.	Nev.			

JOB WELL DONE

Assistant United States Attorneys Daniel A. Becco and Raymond F. Zvetina, Northern District of Illinois, have been commended by the District Supervisor, Bureau of Narcotics, on a splendid job done in a recent narcotics case in which three of the four defendants were convicted. The District Supervisor stated that he considered this particular group of violators to be among the most important convicted in several years as they represented higher eschelon hoodlums that operated on a national scale with connections to persons in the international traffic of narcotics. The letter further stated that the pre-trial work and subsequent presentation of evidence in court were outstanding and that the gratifying results achieved in the case were, in great measure, due to the excellent work of Messrs. Becco and Zvetina.

The State Director, Selective Service System, has commended Assistant United States Attorney William O. Bittman, Northern District of Illinois, for his effective and vigorous efforts in the successful prosecution of two recent cases involving draft evasion by members of a particular sect. The letter stated that cases involving this sect have caused undue trouble and expense to the System, and the Department of Justice for many years, and it is believed that the two recent convictions will not only help dispose of the problem, but will also prove extremely beneficial as a deterrent to other potential violators of the Universal Military Training and Service Act.

The Chief, Intelligence Division, and the Special Agents who investigated the case joined the District Director, IRS, in commending Assistant United States Attorney Gerald Walpin, Southern District of New York, for his fine and lucid presentation of a complex criminal income tax case. The letter stated that the involved and complicated case so ably and excellently presented by Mr. Walpin resulted in the indictment of four individuals, among whom was a notorious swindler and fugitive from justice. The proceedings further resulted in one of the defendants being remanded to jail for one year for contempt of court.

Assistant United States Attorneys Thomas J. Cahill and Peter H. Morrison, Southern District of New York, have been commended by a member of the special grand jury before whom they presented a number of matters. In commenting on the very fine work done by Messrs. Cahill and Morrison, the letter stated that their presentation to the grand jury was clear, concise, and well arranged, and that the language and explanations could readily be understood by both expert and layman.

The Regional Attorney, USDA, has commended the fine work done by Assistant United States Attorney Robert A. Bell, Southern District of Ohio, in a recent bankruptcy case in which the Government mortgage was endangered by the actions of the receiver. Mr. Bell was called into the case at the last minute and, through prompt and persuasive negotiations, succeeded in obtaining full payment of the balance due on the Government's loan including interest. The letter stated that Mr. Bell's effective handling of the matter saved the Government from loss, and avoided expensive and time consuming litigation.

United States Attorney Charles L. Goodson and Assistant United States Attorney John W. Stokes, Jr., Northern District of Georgia, have been commended by the Chief Postal Inspector on their successful and noteworthy prosecution of the first "advance fee" mail fraud case to be tried in that district. The trial, which resulted in the conviction of the three principal defendants, was a sharply contested one and could have resulted in the Government's defeat had it not been for Mr. Stokes' advance planning and competent prosecutive strategy. The Postal Inspector pointed out that Mr. Goodson took time from his heavy work schedule to attend the trial in order to acquaint himself with the advance fee frauds, and that he has advised that he will diligently prosecute cases of this type which are presented to his office. In expressing deep appreciation for Mr. Goodson's general interest in cases presented by the Post Office Department, the Chief Inspector stated that he looks forward to a cordial and fruitful relationship in the interest of effective law enforcement to protect the public.

* * *

EXPRESSION OF GRATITUDE BY MEMBER OF MINORITY GROUP

Paul P. Chien, a native of Shanghai, China, who is now a permanent resident of the United States under Concurrent Resolution No. 167 approved by Congress on July 30, 1955, was recently acquitted in the Eastern District of Michigan of conspiring to misapply bank funds.

Chien's recent letter to the Attorney General is believed worthy of quotation:

> "As an immigrant from a minority group, I do not know how to express my deep gratitude for the unprejudiced and undiscriminatory treatment I received from the United States Attorney, the agents of the Federal Bureau of Investigation, the distinguished jurists, the Honorable Judge Wallace Kent and most of all your jury system. It is indeed a fine judicial system this great nation has.
>
> "It did not impress me because I proved I was innocent, but it strengthened in me the essence of democracy and the fair opportunity of an innocent party regardless of his race or national origin.
>
> "May I pledge myself to the United States of America to render any kind of services if I am called upon to do so, to tell the world there is no discrimination or prejudice against an Asiatic immigrant who once was unfortunately accused."

* * *

ANTITRUST DIVISION

Assistant Attorney General Lee Loevinger

CLAYTON ACT - SHERMAN ACT

Chevrolet Dealers Indicted Under Section 1 of Sherman Act And Section 14 of Clayton Act. United States v. General Motors Corporation, et al. (S.D. of Calif.) On October 12, 1961, an indictment was returned by a federal grand jury in Los Angeles against General Motors Corporation, four Chevrolet sales executives, and three Chevrolet dealers associations in the Los Angeles area. Defendants were charged with engaging in a conspiracy to stop Los Angeles area Chevrolet dealers from selling cars through discount houses and referral services. All eight defendants were charged with violating section 1 of the Sherman Act, and in an additional count, the four individual defendants were charged with violating section 14 of the Clayton Act.

The indictment alleges that from the summer of 1960 to the present, defendants engaged in a campaign to suppress dealer sales through discount house and referral service outlets. Discount houses and referral services entered the Los Angeles Chevrolet sales picture in about 1953 and by 1960 they accounted for over 2000 cars per year with retail value of about $5,000,000, according to the indictment. Automobiles were sold to discount houses at slightly over the dealer's invoice price and the rapid increase in sales through discount houses "threatened to lower retail prices of Chevrolet automobiles in the Southern California area."

According to the grand jury, the defendants entered into an agreement to "induce and persuade" Chevrolet dealers to refrain from selling to discount houses. In addition, they employed "shoppers" to identify nonconforming dealers and then persuaded the dealers to repurchase the automobiles sold to these "shoppers". The indictment charged that one of the effects of the conspiracy has been to deprive Chevrolet buyers in Southern California of a free and unrestricted competitive market.

The individual defendants were charged in a separate count with authorizing and doing acts constituting in part the violation by General Motors of section 1 of the Sherman Act, while acting as agents of General Motors, in violation of section 14 of the Clayton Act. The indictment charged that each of the named individuals, (a) induced and persuaded Chevrolet dealers to refrain from selling Chevrolet automobiles pursuant to agreements with discount houses, (b) authorized subordinates to persuade dealers from so selling; and (c) authorized subordinates to utilize "shoppers" to identify non-complying dealers.

This is the first case in which an indictment has been filed charging individuals under both section 1 of the Sherman Act and section 14 of the Clayton Act. The practice of indicting individuals under both sections of the antitrust laws is being utilized pending the Supreme Court's decision on the Department's appeal from the dismissal of a section 1 Sherman Act charge against an individual officer acting on behalf of a corporation in the case of

United States v. National Dairy Products Corporation.

Staff: James M. McGrath and Maxwell M. Blecher (Antitrust Division)

Restraint of Commerce and Monoply - Lockbolts; indictment and Complaint Filed Under Sections 1 and 2 of Sherman Act and Section 14 of Clayton Act. U. S. v. Huck Manufacturing Company, et al. (E. D. Mich.) On October 24, 1961, a grand jury sitting in Detroit returned an indictment charging two corporations, Huck Manufacturing Company and Townsend Company, and their respective presidents, A. Watson Armour III and Fred R. Dickenson, with violating Sections 1 and 2 of the Sherman Act. The individuals were also indicted in two counts for violating Section 14 of the Clayton Act. It was charged that the defendants conspired to restrain commerce and to monopolize the manufacture and sale of lockbolts.

Lockbolts are a patented type of metal fastener used to hold together two pieces of metal in a permanent grip. They are used most extensively in the manufacture of airplanes, and are also used in manufacturing and repairing trailers, railroad cars, ships and buses.

The indictment charges that defendants agreed to fix and maintain prices for the sale of lockbolts; to limit the number of licensees permitted to manufacture lockbolts; to require the mutual consent of defendant corporations before any other firms could be licensed to manufacture lockbolts; and to cross license each other for all improvements and substitutes they might develop. The indictment charged, among other things, that these agreements were made at a secret meeting from which defendant's lawyers were specifically excluded. Although defendant Huck held patents on the lockbolt, the indictment charged that their agreement to restrain trade and monopolize the manufacture of lockbolts went beyond the legitimate exercise of patent rights.

A companion civil action was filed seeking equitable relief to dissipate the conspiracy and restore competition.

Staff: Charles R. Esherick and Jack L. Lipson (Antitrust Division)

SHERMAN ACT

Rate Fixing and Customer Allocation - Motor Carriers; Complaint and Proposed Final Judgment Filed Under Sec. 1. United States v. Greater New York Tailors Expressmen's Association. (S.D. N.Y.). On October 16, 1961, the above-captioned complaint was filed simultaneously with a Final Judgment attached to a Stipulation which suspended the entry of the consent decree for a 30-day period. This procedure represents a departure from previous procedures and sets the pattern for future consent decree procedures in accordance with the Attorney General's Order No. 246-61, dated June 29, 1961, and with the Assistant Attorney General's memorandum, dated August 30, 1961.

This civil action charged the defendant trade association with maintaining customer-allocation and rate-fixing arrangements with and among its member motor carriers. These motor carriers specialized in the transportation of men's clothing between jobbers and contractors manufacturing that product.

Simultaneously with the filing of the complaint there was filed a Final Judgment attached to a Stipulation between the parties agreeing that the Final Judgment might be entered by the Court at any time after 30 days on the motion of the Government, without notice to the defendant. The Stipulation also empowers the Government, upon notice to the defendant, to withdraw the Final Judgment within the 30-day period.

The decree provides for the entry of the usual injunctions against price fixing and customer allocation and, in addition thereto, requires the Association to destroy certain records in its possession which were useful in the maintenance of the customer allocation scheme, to conform its charter and by-laws to the decree's provisions so that membership and tenure of office are subject to adherence to the decree, and to give industry factors notice of the decree.

Staff: John J. Galgay, John D. Swartz, Joseph T. Maioriello, Donald A Kinkaid and James J. Farrell, Jr. (Antitrust Division)

* * *

CIVIL DIVISION

Assistant Attorney General William H. Orrick, Jr.

COURTS OF APPEALS

FEDERAL TORT CLAIMS ACT

Suit Based on Death of Inactive National Guardsmen While Engaged in Training Flight Not Maintainable Under Act. Margaret Layne v. United States (C.A. 7, October 16, 1961). This action was brought to recover damages under the Tort Claims Act for the death of an officer of the Indiana Air National Guard whose jet fighter aircraft crashed while on a training flight. The complaint alleged that the accident was occasioned by the negligence of civilian Government employees in the control tower at the air field from which the aircraft was taking off. At the time of the accident, the Air Guard unit had not been activated and the Air Force had no direct control over the training flight. The Veterans Administration determined, however, that the death was "service-connected" and the officer's widow has been receiving compensation under the provisions of the Veterans' Benefits Act. The Government moved for summary judgment on the ground that the death was "incident to service" within the meaning of Feres v. United States, 340 U. S. 135, and that, as a consequence, recovery under the Tort Claims Act was precluded. The district court granted the motion and the Court of Appeals affirmed. Both courts held, after an examination of the constitutional and statutory provisions relating to the National Guard, that, at the time of his death, the officer held a dual legal relationship to the United States and the State of Indiana and was serving both governments. Of particular significance, the courts found distinguishable the cases in which it was held that the Goverument may not be sued under the Tort Claims Act for the negligence of National Guardsmen on inactive duty (see, e.g., Williams v. United States, 189 F. 2d 607 (C.A. 10)). As the Court of Appeals pointed out, those cases turned upon the lack of a respondeat superior relationship between the United States and the inactive National Guardsman. It then went on to agree with the view of the Ninth Circuit in Callaway v. Garber, 289 F. 2d 181, that the Feres test (i.e., whether the injured serviceman was engaged in "activity incident to service" at the time he was injured) is a much broader test than the "scope of employment" test used for respondeat superior purposes.

Staff: Alan S. Rosenthal and Mark R. Joelson (Civil Division)

PRIORITY OF LIENS

Federal Lien. Stemming from Mortgage Obtained by Reconstruction Finance Corporation Under Defense Production Act of 1950, Which Was Prior in Time to County Tax Lien, Was Prior in Right. United States v. County of Iowa (C.A. 7, October 5, 1961). This was an action by the United States to forclose a mortgage executed to R.F.C. as security for a loan made under

the Defense Production Act of 1950. The mortgagor defaulted, but the County of Iowa, Wisconsin, brought in as a defendant because of its tax lien on the property, asserted that under Wisconsin law its tax lien took precedence over the federal mortgage lien even though the latter was prior in time. The County also contended that even if a mortgage lien of the United States prior in time would be prior in right, such principle was inapplicable here, since R.F.C. and not the United States was the mortgagee, and R.F.C. has no immunity from taxation under 15 U.S.C. 607. The district court held that the federal lien was prior in right, ruling that the mortgage lien was that of the United States and that under federal law "prior in time is prior in right".

On appeal, the Seventh Circuit affirmed. The crux of its decision, in accord with the district court holding, was that when R.F.C. acted under the Defense Production Act of 1950, it was acting as an agent of the United States, along with other federal agencies negotiating loans under the Act, rather than in its corporate capacity. Accordingly, the loan here and the mortgage securing it were actually held by the United States, and the federal lien was entitled to priority. See also, In re Peoria Consolidated Manufacturers, Inc., 286 F. 2d 642 (C.A. 7).

Staff: Herbert E. Morris (Civil Division)

SOVEREIGN IMMUNITY

State Department's Recognition of Cuban Government's Claim for Immunity of Cuban Vessel Conclusive on Courts; Court's Refusal to Inquire Behind State Department Certification of Sovereign Immunity and State Department's Refusal to Enforce Prior Waiver of Sovereign Immunity by Cuban Government Does Not Violate Fifth Amendment Rights. James Rich and Walter Precha v. Naviera Vacuba S.A. and Republic of Cuba; Mayan Lines S.A. v. Republic of Cuba and M/V Bahia de Nipe, et al.; The United Fruit Sugar Company v. 5,000 Tons of Sugar and Augustin Albella; Jorge Navarro, et al. v. M/V Bahia de Nipe (C.A. 4, September 7, 1961). While on route to a Russian port with a cargo of sugar, the Cuban-owned vessel, Bahia de Nipe, was seized by her master and ten crewmen and taken to the port of Norfolk, Virginia. Libels against the vessel were filed by longshoremen who had earlier recovered judgments against the Republic of Cuba and Naveria Vacuba S.A., the owner of the vessel before she was taken over by the Cuban Government. Another libel was filed by Mayan Lines S.A., which had previously obtained a consent judgment in a Louisiana state court against the Republic of Cuba in the sum of $500,000. United Fruit Sugar Company libeled the ship and cargo on grounds that the sugar cargo was in actuality its property, wrongfully expropriated by the Cuban government. Libels were also filed by the defecting master and the ten crewmen for wages. The United States marshals attempted to serve the ship and cargo, in accord with admiralty practice, but were prevented from doing so by the Coast Guard, which acted in reliance on 50 U.S.C. 191. The district court by orders addressed to the Coast Guard prevented the sailing of the vessel. Through diplomatic channels, the Cuban Government formally claimed that the vessel and cargo were immune from the processes of the courts; this claim of sovereign

immunity was recognized and allowed by the State Department. At the State Department's request, the Department of Justice filed in the district court a "suggestion" of Sovereign Immunity, whereupon, after extensive hearings, the district court decreed that the ship and cargo were immune and should be released. The Court of Appeals affirmed this order. The Court of Appeals held that the State Department's recognition of the immunity of the vessel should be accepted by the Court without inquiry and that the Court could not examine into the considerations prompting the issuance of the certificate and grant of immunity by the State Department. The Court held that the doctrine of separation of powers under the Constitution required it to assume that the Secretary of State had considered all pertinent factors in reaching his conclusion to grant the certificate. The Court also refused to make any distinction in regard to the Mayan Lines although its libel was based upon a state court judgment and proceeding in which the Republic of Cuba has specifically waived in futuro its sovereign immunity. It likewise refused to accept the contention that release of the ship violated libellants' rights guaranteed by the Fifth Amendment.

Successive applications to the Supreme Court for a stay of the appellate mandate, pending the filing of certiorari petitions, were denied by Chief Justice Warren, and the vessel departed Norfolk on September 15, 1961.

Staff: Assistant Attorney General William H. Orrick, Jr.; Morton Hollander, John G. Laughlin, Jr. and Edward A. Groobert (Civil Division)

District Court

POST OFFICE

Court Upholds Revocation of Second Class Mail Privileges of Certain Crossword Puzzle Magazines as Within Bounds of Postmaster General's Discretion. Dell Publishing Co., Inc. v. J. Edward Day (D.D.C., October 12, 1961). Following administrative hearings, the Post Office Department revoked the second class mail privileges of Dell Crossword Puzzles, Official Crossword Puzzles, and Pocket Crossword Puzzles on the grounds: (1) the publications were not "periodical publications" within the meaning of 39 U.S.C. 224 and 226; (2) the publications were not originated and published for the dissemination of information of a public character, nor were they devoted to literature, the sciences, arts or some special industry, 39 U.S.C. 226; and (3) the publications consisted primarily of novelty pages within the meaning of Section 132.483(c) of the Postal Manual. The publisher of these publications brought this test action for injunctive and declaratory relief to set aside the revocations on the ground they were arbitrary and capricious. Similar action has been taken against other crossword puzzle publications.

On the authority of Houghton v. Payne, 194 U.S. 88, 97 and Smith v. Hitchcock, 226 U.S. 53, 59, the Court concluded that the Postmaster

General's ruling was not lacking in rational basis and therefore was not arbitrary and capricious. Since it found that the Postmaster General had acted within the bounds of his discretion, the Court refused to substitute its judgment for his in these matters, and granted the defendant's cross-motion for summary judgment.

Staff: Assistant United States Attorney Sylvia A. Bacon (D.D.C.); Andrew P. Vance (Civil Division)

State Court

SOVEREIGN IMMUNITY

Plea of Sovereign Immunity Upheld. Republic of Cuba v. Arcade Building of Savannah, Inc., et al.; Republic of Cuba v. Dixie Paint and Varnish Co., Inc., et al. (Georgia Court of Appeals, September 22, 1961). In this action, as in the case of the Bahia de Nipe, supra, p. , a plea of sovereign immunity for the Republic of Cuba was upheld. Arcade and Dixie Paint, claiming indebtedness totalling almost $10,000, obtained writs of attachment against the Republic of Cuba on grounds that the Republic of Cuba was about to remove its property beyond the boundaries of Georgia. These writs were levied by the issuance of summons of garnishment against the Savannah Bank and Trust Company on January 6, 1961. On March 6, 1961, the two creditors filed declarations in attachment. The Republic of Cuba appeared specially at trial in the City Court of Savannah to raise the plea of sovereign immunity. That Court refused to honor the claim of sovereign immunity, and a judgment was entered distributing the attached funds to the plaintiffs.

After the case was filed and docketed in the Georgia Court of Appeals, the United States Attorney filed for the first time a suggestion on behalf of the Secretary of State that the funds garnished were immune from attachment. The Court refused to consider this suggestion since it had not been filed in the lower court, but decided that the plea of sovereign immunity which was raised below was sufficient to establish that defense, and reversed the judgment of the trial court. The Court found it immaterial that the actions may have been commenced in rem instead of directly against the sovereign.

Staff: United States Attorney Charles L. Goodson (N.D. Ga.)

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CIVIL RIGHTS DIVISION

Assistant Attorney General Burke Marshall

Voting and Elections; Civil Rights Act of 1957. United States v. Mary Ethel Fox (E.D. La.) The United States seeks injunctive relief against the Registrar and Deputy Registrar of Plaquemines Parish and the State of Louisiana to end discrimination against Negroes in the registration of voters in that Parish.

The complaint, filed October 16, 1961, alleges that Negroes have had to meet different and more stringent standards than white persons in order to meet the requirements for voter registration that they be able to interpret reasonably any section of the United States or Louisiana Constitutions; that Negroes are rejected for errors on their applications and interpretation tests while white persons are assisted with them; and that qualified Negroes have been denied registration.

In Plaquemines Parish there are approximately 45 Negroes registered to vote out of about 2,897 eligible and approximately 6,714 white persons registered out of about 8,633 eligible. The special feature of this case is that a purportedly impartial method of selecting sections of the Constitution for applicants to interpret as a step in the registration process has, in practice, resulted in 84 percent of white applicants getting substantially the same interpretation test while an insignificant number of Negro applicants received this test.

Staff: United States Attorney M. Hepburn Many; John Doar, Richard K. Parsons (Civil Rights Division).

Voting and Elections; Civil Rights Acts of 1957 and 1960. United States v. Katherine Ward, Registrar of Voters of Madison Parish, Louisiana; and the State of Louisiana (W.D. La.) This case was brought under the Civil Rights Act of 1957 (42 U.S.C. 1971(a)) and the Civil Rights Act of 1960, against Katherine Ward, the Registrar of Voters of Madison Parish, Louisiana, and against the State of Louisiana. It was filed on October 26, 1961.

The complaint alleges that no Negro has been registered in this parish for at least the last 36 years, and that the defendants discriminated against prospective voters by requiring them, as a prerequisite to applying for registration, to be identified by registered voters of their precincts. It also alleges that the white voters have not, and will not, identify Negro applicants for registration.

This suit seeks to enjoin the practice of requiring Negro applicants for registration to be identified by registered voters. It also seeks a finding of a pattern and practice of discrimination under the referee provisions of the Civil Rights Act of 1960.

Staff: United States Attorney T. Fitzhugh Wilson; John Doar, Frank M. Dunbaugh (Civil Rights Division).

Voting and Elections; Civil Rights Acts of 1957 and 1960. United States v. Leonard C. Duke, Circuit Court Clerk and Registrar, Panola County, Mississippi; and State of Mississippi (N.D. Miss.) The Government on October 16, 1961 filed suit under the Civil Rights Acts of 1957 and 1960 against the Circuit Court Clerk and Registrar and the State of Mississippi for racially discriminatory acts and practices against Negroes seeking to register as voters in Panola County. The complaint states that about 7,250 Negroes and 7,639 white persons of voting age reside in that County, but that only about 10 Negroes are registered to vote there while there are over 5,000 white registrants.

The complaint alleges, among other things, that defendants have applied different and more stringent standards to Negro applicants than to white applicants in determining whether the applicants are qualified to register to vote; that they have rejected or have taken no action upon qualified Negroes' applications; that they have failed and refused to afford Negro applicants equal opportunities to register; and have discouraged Negroes from attempting to register to vote.

The suit seeks a preliminary and permanent injunction against the discriminatory acts and practices. The Court is also requested to make a finding that the deprivations were pursuant to a pattern and practice.

Staff: United States Attorney Hosea M. Ray;
John Doar, D. Robert Owen (Civil Rights Division).

School Desegregation, New Orleans. Gremillion v. United States (U.S. Sup. Ct., No. 200, October Term 1961). On October 16, 1960, the Supreme Court affirmed the most recent district court holding in the case of Bush v. Orleans Parish, striking down Acts 3 and 5 of the Second Extraordinary Session of 1961, the so-called "paid informer" statutes which penalized persons cooperating with desegregation of schools. The Court has consistently affirmed a series of district court orders overthrowing legislation designed to evade court-ordered school desegregation, much of which the State of Louisiana enacted in special legislative sessions from November 1960 through the spring of 1961. During this time the Attorney General, as amicus curiae, has repeatedly acted as the sole moving party in seeking judicial relief against these circumventive measures. Although State Attorney General Gremillion and other defendant state officials have repeatedly attached the standing of the Government to bring these actions, the Supreme Court has in every instance affirmed the decisions of the district court as to the right of the United States to bring these actions.

The October 16 holding of the Supreme Court once again makes clear the standing of the United States as amicus to bring independent actions, to file pleadings and to introduce evidence, to prevent circumvention of federal court orders.

Staff: Solicitor General Archibald Cox;
Harold H. Greene, Gerald P. Choppin
(Civil Rights Division).

* * *

CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

FORGERY

Motion to Dismiss Indictment on Grounds of Statute of Limitations, Laches, Double Jeopardy, Denial of Right to Speedy Trial Denied. United States v. Stephen Kramer and Edward Ryan (E.D. N.Y.). On July 19, 1961, defendant Kramer was indicted in the Eastern District of New York on charges of forging a material signature on a United States money order, passing a forged money order and conspiring with defendant Ryan to forge money orders with intent to defraud and pass said forged money orders. Kramer moved to dismiss on the grounds of statute of limitations, laches, double jeopardy, denial of right to a speedy trial and denial of due process. The Court denied the motion.

Prior to this indictment, in 1958, Kramer had been tried and acquitted in the District of Connecticut for burglarizing the United States Post Offices of Wilton and Orange, Connecticut. The Government failed to prove Kramer participated in these burglaries. Subsequently in 1959, prior to the decision in Petite v. United States, (361 U.S. 529), and announcement of the Department's policy against multiple prosecutions after the Abbate decision (358 U.S. 187), he was indicted, tried and convicted in the Eastern District of New York for conspiracy to commit the Connecticut burglaries and for receiving and conspiring to receive property stolen in those burglaries. Some of the money orders stolen in the burglary of the Orange Post Office were forged and passed in New York. Despite the fact that the testimony in both trials was substantially the same, pleas of double jeopardy and res adjudicata were unsuccessful both at the trial and upon appeal. The Court of Appeals, however, reversed the conviction for conspiracy to commit the burglaries holding that under the principle of collateral estoppel the Government was barred from offering proof that Kramer participated in the burglaries. A new trial was ordered on the remaining counts. No petition for certiorari was filed because the Department agreed with the Court of Appeals and concluded that the latter prosecution contravened the policy against multiple prosecutions based upon a single transaction. The Department also questioned whether there should be a retrial on the remaining counts because of their close connection with the charges upon which Kramer had been acquitted in Connecticut. It was suggested that, since evidence was now available, Kramer be indicted for forging and uttering rather than retried for receiving and conspiring to receive, the stolen money orders.

In denying the instant motion to dismiss the indictment returned in July 1961, the United States District Court for the Eastern District of New York disposed of the arguments of res adjudicata, collateral estoppel and double jeopardy by pointing out that the charges in that indictment involving the forging and uttering of stolen money orders are completely separate in law and fact, from either the Connecticut case or the 1959 indictment in the Eastern District of New York, hence "the Government is

not foreclosed from using evidence of forging, passing and uttering money orders solely by reason of their prior use in a previous proceeding." The Court was of the opinion that the delay in proceeding under the new indictment and the resultant subjecting of defendant to another trial do not constitute denial of right to a speedy trial, denial of due process or laches and that since the Court of Appeals had directed a new trial the defendant cannot complain of another trial. The Government had explained that sufficient evidence to support the present indictment became available only subsequent to obtaining the prior indictments and the Court was satisfied that there was no unnecessary or oppressive delay in presenting the evidence to the Grand Jury. The crimes alleged are within the five year period and no proof that the statute of limitations had expired was submitted.

Staff: United States Attorney Joseph P. Hoey;
Assistant United States Attorney Joseph J. Marcheso
(E.D. N.Y.).

MEDICAL QUACKERY

There was held in Washington, D. C., on October 6 and 7, 1961, a National Congress on Medical Quackery sponsored jointly by the Food and Drug Administration and the American Medical Association. In addition to the FDA and the AMA, there were represented at this Congress the Post Office Department, the Federal Trade Commission, the Department of Justice, the American Cancer Society, the National Better Business Bureau and various other organizations and agencies, private and public. The Secretary of Health, Education, and Welfare, the Postmaster General, the Chairman of the Federal Trade Commission, and Assistant Attorney General Herbert J. Miller, among others, addressed the meeting.

The purpose of the Congress was to discuss, disseminate, and exchange information and views concerning this serious national problem, medical quackery. It is estimated that the public needlessly spends over one billion dollars annually on falsely represented and quack foods, drugs, cosmetics, and health care. In many instances health is needlessly impaired, and even lives lost, because of useless, or worse, drugs, devices, and cures. Medical quackery includes "device quackery," such as electrical gadgets supposed to diagnose all ills; "nutritutional quackery," such as ordinary or worthless foods or vitamins represented as cure-alls; and "drug and cosmetic quackery," such as totally ineffective cancer cures, body builders or restorers, and wrinkle removers.

It was emphasized to the Congress that the Department of Justice, particularly the Criminal Division, will continue to exert its best efforts and to employ all its resources and facilities in the drive to render medical quackery ineffective. The Attorney General is in full accord with this determination.

It is urged that all United States Attorneys give close and prompt attention to cases involving medical quackery: whether seizure, civil penalty,

injunction, or criminal; whether referred directly by the Food and Drug Administration or other administrative agency, or submitted through the Criminal Division in Washington. The best efforts of the Food and Drug Administration, the Federal Trade Commission, the Post Office Department, etc. would be of little value if our Department did not proceed with vigor to translate the prosecutive or other recommendation to appropriate litigation and judgment. The Criminal Division will be pleased to be of help in all cases in this law enforcement drive against medical quackery.

COMMERCIAL FRAUD

Mail Fraud; Securities Violations. United States v. Carl A. Pruett and Gertrude M. Pruett (N.D. Ga.). On September 5, 1961, Carl A. Pruett and his wife, Gertude M. Pruett, were each sentenced to nine years' imprisonment on pleas of guilty to three counts of an indictment charging violations of the anti-fraud provisions of the Securities Act of 1933 and the mail fraud statute.

The indictment arose out of a shortage to customers of Pruett and Company, Inc. of over $2,000,000. The defendants misappropriated funds and securities of the customers, forged the endorsements of customers on stock certificates and checks issued in their names, and countefeited stock certicates which were sold and delivered to customers.

At the time the defendants were apprehended, they were found with luggage apparently packed for a trip to a tropical climate. Pleas of not guilty were entered and counsel for the defendants moved for an immediate trial, since Carl Pruett was unable to post $100,000 bail. The Government subpoenaed 120 witnesses, with records from at least 38 mutual funds, banks, and other corporations. After three and a half days of trial, the defendants each changed their pleas to guilty on three counts.

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

LARCENY

Theft of Government Property; Receiving Stolen Property; Request for Instructions to Jury Urged. Milanovich v. United States (E.D. Va.). On retrial, defendant Virginia Milanovich was convicted on September 29, 1961 of stealing Government property and was sentenced to 10 years' imprisonment. Notice of appeal has been filed.

In 1959 defendant was prosecuted under 18 U.S.C. 641 on a two count indictment charging (1) the theft of Government property and (2) receiving the stolen property with an intent to convert it to her own use. Defendant was found guilty and sentenced to 10 years on the larceny count and 5 years on the receiving count, to run concurrently. The acts of defendant consisted

of bringing the thieves to the scene of the crime, although she departed prior to the perpetration of the theft, and then taking possession of the fruits of the crime 17 days later. The Supreme Court in a 5-4 decision (365 U.S. 55) held that the trial judge committed error in not charging that the jury could only convict defendant of either larceny or receiving, but not of both. On the grounds that it would be impossible to say what verdict would have been returned by a properly instructed jury, the Court set aside the conviction on both counts and remanded the case for a new trial.

The Supreme Court's decision in Milanovich goes considerably beyond Heflin v. United States, 358 U.S. 415, and is significant for several reasons. First, the principle that a person who steals and receives property in a single transaction cannot be convicted of both stealing and receiving stolen property is extended to a situation where the theft and receipt of the property do not constitute a contemporaneous transaction. Secondly, the Court's holding that the jury can convict on only one of the two grounds is an extension of the holding in Heflin that the trial judge, after the jury's verdict is in on all counts, cannot impose cumulative sentences for stealing and receiving.

In light of the Supreme Court's ruling in Milanovich it is suggested that United States Attorneys request the judge to instruct the jury that if it finds that the defendant committed larceny it cannot find the defendant guilty of receiving the same property; but if the jury does not find the defendant guilty of larceny of the property, it can then consider whether defendant is guilty of receiving the property.

Staff: Joseph S. Bambacus, Special Assistant to the Attorney General.

SEARCH AND SEIZURE

On September 29, 1961, the Court of Appeals for the Ninth Circuit affirmed the judgment of conviction in Fraker v. United States, in which it was contended inter alia that certain evidence introduced at the trial was the product of an illegal search and seizure. The appellant's argument was grounded upon a short delay between his arrest and search of his person by local officers and a subsequent search of the vehicle by the Federal Bureau of Investigation.

Acting upon a radio message, officers of the Pomona, California, police department arrested the defendant the day after the robbery of a messenger of a branch of the Bank of America National Trust and Savings Association located in Pasadena, California. The radio message had included a description of appellant and his car. At police headquarters, appellant was searched. In his wallet were discovered some proceeds of the robbery, and on his person was a key to the trunk of his car. About one and one-half hours later FBI agents arrived and using the key, made a search of the trunk of the automobile, there discovering other money taken from the bank messenger who had been robbed the previous day. Appellant urged that the search without his permission and without a search warrant was an

unreasonable and illegal search and seizure, not incident to any lawful arrest.

Pointing out that neither a pretrial motion to suppress the evidence under Rule 41(e), nor timely objection to introduction of the evidence at the trial, were made, the Court reaffirmed the rule in Hill v. United States (C.A. 9), 261 F. 2d 483, 489, that matters not in some way brought to the attention of the trial court will not be considered on appeal except when so prejudicial as to deny a fair trial to defendant. The Court further decided the substance of the allegation, and found the facts of the search not to have sustained the objection raised. Steering a course between Rabinowitz v. United States, 339 U.S. 56, 61, holding that search incident to arrest was valid and Trupiano v. United States, 334 U.S. 699, 705, requiring a search warrant when not incident to arrest, this Court followed Bartlett v. United States (C. A. 5), 232 F. 2d 135, 139, and held that no search warrant was required under the facts in the instant case, that the search of the vehicle, and seizure of the funds, ". . .was substantially contemporaneous with appellant's arrest. . .," (emphasis added) despite the time lag involved in these facts.

Staff: Former United States Attorney Laughlin E. Waters;
Former Assistant United States Attorney Robert John Jensen;
Assistant United States Attorney Ernest A. Long (S.D. Calif.).

FEDERAL FIREARMS ACT

Burglary as Crime of Violence. Tony Jake Martinez v. United States (C.A. 10). In an opinion filed September 18, 1961, the Court of Appeals affirmed the conviction of Martinez who had been convicted in the District Court for the District of New Mexico for transporting in interstate commerce a firearm after he had been convicted of a crime of violence, in violation of 15 U.S.C. 902(e). Martinez contended that his prior conviction in a New Mexico State court in October 1959, for breaking and entering in the nighttime a shop with the intent to commit larceny was not a crime of violence within the meaning of 15 U.S.C. 902(e). (Emphasis added.) "Crime of Violence" is defined in 15 U.S.C. 901 (6) as including "burglary". (Emphasis added.)

The Court of Appeals stated that the offense of burglary under the State law of New Mexico is broader than the common law definition and has been expanded to include breaking and entering offices, shops and warehouses. The Court found that Congress did not intend the word "burglary" as used in 15 U.S.C. 901(6) to be restricted in its meaning to common law burglary, but, rather, it intended to embrace burglary under state statutes, which have expanded the common law offense to include breaking and entering of buildings other than dwelling houses and other forms of burglary defined in state statutes. In so holding, the Tenth Circuit cited Costello v. United States, 255 F. 2d 389 (C.A. 8), certiorari denied 358 U.S. 830 (1958), and Cases v. United States, 131 F. 2d 916 (C.A. 1), certiorari denied 319 U.S. 770 (1942), and implicitly recognized that the act's

reliance upon state law for definition of the crime of burglary does not make it unconstitutional as constituting a discriminatory classification because the definition of burglary may vary from state to state.

This case is significant in its application to all cases pending or arising before October 3, 1961, the effective date of Public Law 87-342, 87th Congress, 75 Stat. 757, which amended the Federal Firearms Act by substituting for "crime of violence" the phrase, "crime punishable by imprisonment for a term exceeding one year."

Staff: United States Attorney John Quinn;
Assistant United States Attorney Ruth C. Streeter
(D. N. Mexico).

WITNESSES

Confidential Relations and Privileged Communications; Disclosure by Government of Identity of Informant. United States v. Arthur Abraham Peisner and Morris Disman (D. Md., September 26, 1961). The District Court held that the Government was not obliged to disclose the identity of its informant where the information supplied merely furnished a time element as to a probable offense, and federal officers possessed information sufficient to provide probable cause for arrest and search without a warrant, apart from the informer's information.

Peisner was already under investigation by the FBI as a suspected manufacturer and seller of obscene books. In addition, in May, 1958, a deputy chief of police in Washington, D. C. determined that allegedly obscene books had been seen and a printing press had been heard operating in a certain building, and that on the same day of his investigation the printing press had been removed from the building by two persons, one of whom was later identified from photographs as Peisner.

In October, 1958, the FBI received a "tip" from an informer of known previous reliability, to the effect that on a certain weekend Peisner was expected to transport obscene material from Maryland to New York City. As a result of the tip, the FBI on November 1, 1958 observed the defendants in Maryland to load packages wrapped in brown paper into Peisner's car, to drive to Baltimore to a book store whose proprietor was known to have been arrested for sale of obscene books and one of whose clerks had been convicted of the sale of such books, and to drive north out of Baltimore by such a circuitous route that contact with defendants was lost. Contact with defendants was reestablished in Delaware, and as defendants proceeded into New Jersey they were stopped by the New Jersey Turnpike Police, who had been alerted by the FBI. Defendants were stopped partly because of the alert and partly because of a traffic violation, at which time the policeman through the car window saw loose books lying in the rear of the car, and upon examination of one of the books, arrested defendants for possession of obscene material. That day, the FBI in New Jersey with consent of the New Jersey police took defendants into custody and shortly

thereafter executed affidavits upon which Federal arrest warrants were issued.

The Court held that under the test of Elkins v. United States (1960), 364 U. S. 206, the search and seizure by State officers were not unreasonable, because both the FBI and the State officers had probable cause to arrest defendants. Cf. Roviaro v. United States (1957), 353 U.S. 53, 60-61, wherein the Court stated that when the disclosure of an informer's identity or of the contents of his communication is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, as where the informant helps set up the commission of the crime and is present at its occurrence, the Government's privilege to withhold identity of the informant must give way. As in Scher v. United States (1938), 305 U. S. 251, 254, and in Miller v. United States (C.A. 5, 1959), 273 F. 2d 279, 281, certiori denied 362 U.S. 928, the Court decided that here the tip merely triggered action, and of itself was insignificant on the question of probable cause. Federal and State officers had probable cause for arrest, and incident search and seizure, upon the basis of what they had observed, rather than upon information furnished.

Staff: United States Attorney Joseph D. Tydings;
Assistant United States Attorney John R. Hargrove
(D. Md.)

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Jospeh M. Swing

DEPORTATION

Adjustment of Status Under Refugee Relief Act of 1953 - Judicial Review of Denial; Definition of Residence; Country of Deportation. Leong Leun Do v. Esperdy (S.D. N.Y., September 25, 1961.) A native of China (mainland) went to the Dominican Republic in 1949 to establish a business, and while there he obtained a certificate of residence and a re-entry permit. In 1950 he came to the United States as a temporary visitor to take care of matters involved in the estate of a deceased brother, and was ordered deported after he had overstayed the time for which he was admitted.

He then applied for an adjustment of his status to that of a permanent resident under section 6 of the Refugee Relief Act of 1953, as amended (50 U.S.C. App. 1971(d)), but his application was denied after findings that his last foreign residence was in the Dominican Republic and that he had failed to show that he was unable to return there because of persecution or fear of persecution. For that showing he relied merely on the fact that the Dominican Republic declined to receive him as a deportee from the United States. (Formosa also declined but Hong Kong accepted him after he had declined to designate a country of his choice.)

This declaratory judgment action followed to review the denial of his application and the order directing his deportation to Hong Kong. He contended that China was the country of his last residence but even assuming that he was last a resident of the Dominican Republic he should have the benefits of 50 U.S.C. App. 1971(d) because that country has refused permission for his return; and that his proposed deportation to Hong Kong is void because no attempt was first made to return him to mainland China.

The Court found that the definition of the term "residence" in the Immigration and Nationality Act (8 U.S.C. 1101(a)(33)) is applicable to the Refugee Relief Act of 1953 and that plaintiff's indicia of residence and the announced purpose of his visit to this country were substantial evidence to sustain the determination that the Dominican Republic was his last residence. While that definition states that intention is not to be considered in determining residence the Court assumed this to mean that the plaintiff cannot give evidence of his intention as to residence, but that the Government is not prevented from showing intention on his part to establish residence based on his actions.

It also found that Congress was quite precise when it allowed for adjustment of status under the Refugee Relief Act because of inability to return to certain specified countries. That inability had to be

based on persecution or fear of persecution and not, as in this case, because the countries refused to accept the alien as a deportee. (Cheng Lee King v. Carnahan, 253 F.2d 893, C.A. 9, contra).

As to the final contention, the Court could not believe that it was serious but if serious the Court could not take it seriously. The most favorable result that plaintiff could obtain, in proceeding as he contended, would be deportation, as now ordered, and the Court could see no reason for affording him additional time to stay in this country.

Summary judgment for defendant.

Staff: United States Attorney Robert M. Morgenthau;
Special Assistant United States Attorney
Roy Babitt (S.D.,N.Y.).

* * *

INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Registration of Communist Organizations Under Subversive Activities Control Act of 1950. Communist Party v. Subversive Activities Control Board. As previously reported in the Bulletin, (see issue of June 16, 1961), the Supreme Court on June 5, 1961 affirmed the order of the Subversive Activities Control Board requiring the Communist Party to register with the Attorney General as a Communist action organization. A petition for rehearing filed by the Party was denied by the Supreme Court on October 9, 1961. The Court's mandate issued on October 10, 1961 and the Order of the Board became "final", within the meaning of the statute, on October 20, 1961. See the notice to that effect in the Federal Register of October 21, p. 9923. The Communist Party now has until November 20 to register and file its registration statement, after which certain designated officers of the Party are criminally liable to cause the Party's registration in the event of a default by the organization itself. Revised regulations governing registration under the Act were promulgated by the Attorney General on October 3, 1961 and were published in the Federal Register on October 7, 1961 at pages 9509-10.

Sabotage; Destruction of Communication Systems Operated or Controlled by United States. United States v. Bernard Jerome Brous and Dale Christian Jensen. (D. Nev.). On May 28, 1961 two microwave stations and a K-repeater underground cable station located in Nevada and Utah were destroyed by the use of high explosives. The destruction of these facilities resulted in damages estimated between one and two million dollars. Suspects Brous and Jensen were located in Ensenada, Mexico and on June 18, 1961 were arrested in San Diego, California by Agents of the FBI.

On June 29, 1961 a federal grand jury in the District of Nevada returned a two-count indictment charging defendants with violations of 18 U.S.C. 2153 of the sabotage statutes. The installations involved are "war utilities" within the meaning of these provisions. On September 29, 1961 a federal grand jury in the District of Nevada returned a three-count indictment against defendants, charging violations of 18 U.S.C. 1362, which relates to the destruction of or interference with communication facilities "operated or controlled by the United States." On October 19 defendant Brous entered a plea of guilty to the three counts of the September 29 indictment relating to Section 1362 and Defendant Jensen entered a plea of guilty to two counts of the same indictment. Sentencing has been scheduled for November 2, at which time the Government will file an appropriate motion to dismiss the remaining charges.

Staff: Former United States Attorney Howard W. Babcock; James A. Cronin, Jr., Victor C. Woerheide and Alta M. Beatty (Internal Security Division)

Labor-Management Reporting and Disclosure Act, 1959; Communist Party Membership. United States v. Archie Brown (N.D. Calif.). The defendant was indicted on May 24, 1961 for violating 29 U.S.C. 504, which is the anti-Communist provision of the Labor Management Reporting and Disclosure Act,

in that he served in a proscribed union position, that is, as a member of the Executive Board of Local 10, International Longshoremen's and Warehousemen's Union while concurrently maintaining membership in the Communist Party. (See U.S. Atty. Bull. June 2, 1961, Vol. 9, No. 11).

Defendant filed a number of pre-trial motions, including a motion to dismiss the indictment, which attacked the constitutionality of Section 504 of the Act. Extensive briefs were filed by both parties on this constitutional issue and oral arguments were heard by the Court on October 25, 1961. On the same date the Court denied the motion to dismiss the indictment as well as the other defense motions for a Bill of Particulars and Discovery and Inspection under Rules 16 and 17(c), Federal Rules of Criminal Procedure.

The decision of the Court in denying the motion to dismiss the indictment marks the first instance where the constitutionality of Section 504 has been subjected to judicial scrutiny and decision.

Staff: United States Attorney Cecil F. Poole (N.D. Calif.);
Paul C. Vincent and Brandon Alvey
(Internal Security Division)

Subversive Activities Control Act of 1950 (50 U.S.C. 783(b)); Communication of Classified Information by Government Officer or Employee. United States v. Irvin C. Scarbeck (D.C. D.C.) - (See Bulletin, Vol. 9, No. 13, dated June 30, 1961 and Bulletin, Vol. 9, No. 15, dated July 28, 1961). On July 20, 1961, a grand jury in the District of Columbia returned a superseding indictment against Scarbeck. The first three counts of the four count indictment returned charged Scarbeck with a violation of 50 U.S.C. 783(b) and the fourth count charged a violation of 18 U.S.C. 2071.

The trial commenced on October 3, 1961 before Judge Leonard P. Walsh and on October 27 the jury returned a verdict of guilty on the first three counts, each count carrying a maximum sentence of ten years and $10,000 fine. Defendant was adjudged not guilty on the fourth count. No date for sentencing has been set by the Court.

This case marks the first prosecution undertaken pursuant to the provisions of this statute.

Staff: Paul C. Vincent and Earl Kaplan
(Internal Security Division)

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LANDS DIVISION

Assistant Attorney General Ramsey Clark

Condemnation; Date of Taking. United States v. McCrory Holding Company (C.A. 5). This was an interlocutory appeal under 28 U.S.C. 1292(b) to establish the date of the fee taking of property condemned. The United States originally took possession of some 500 acres in 1942 for the Orlando Air Force Base in Florida under a voluntary lease. Subsequently temporary use was acquired by condemnation. The terms were extended up to June 30, 1957. The United States remained in possession and on July 2, 1957, this proceeding was instituted to condemn fee title. A declaration of taking was filed on November 20, 1959. Rejecting the Government's contention, based upon United States v. Dow, 357 U.S. 17, that the date of taking was July 2, 1957, the district court held that it was November 20, 1959. The Court of Appeals affirmed on the ground that no order of possession had been obtained. The question whether certiorari should be sought is now under consideration.

Staff: Roger P. Marquis (Lands Division)

Reporters' Transcript; Extra Charge When Used on Appeal. United States v. A. R. Benning, et al., and United States v. Jack T. Morrison, et al. (C.A. 9). In connection with a condemnation case the United States had purchased the original of the transcript of testimony at the price established by the Judicial Conference, totaling $4,946. Pursuant to the requirements of the court reporters' statute, a copy was filed with the court. The United States took an appeal and designated the transcript for inclusion in the original record to be transmitted to the Court of Appeals under Rule 75(o), F.R.Civ.P. The district court held that under a local rule an additional 25 cents per page, or more than $2,000, would have to be paid to the reporter.

The Court of Appeals affirmed that ruling. It held that under the statute establishing the reporters' system, 28 U.S.C. 753, no charge could be made for the copy filed with the court, the payment for the original including compensation for that copy. It held, however, that under an action of the Judicial Conference in 1951 and a district court rule adopted pursuant thereto, an additional charge must be paid to the reporter unless the appellant delivers his original to the court clerk to be transmitted as part of the record on appeal. The Department took the position that the Judicial Conference rules only applied to cases where no original transcript had been purchased and did not warrant extra payment to reporters simply because an appeal was taken. The question of what further proceedings should be taken is now under consideration.

Staff: Roger P. Marquis (Lands Division)

Condemnation; Findings of Fact Conclusive on Appellate Court Where Supported by Substantial Evidence; Division of Condemnation Award. Onego Corporation v. United States, et al. (C.A. 10, September 27, 1961.) This is a proceeding in condemnation wherein hearings were held before commissioners to establish just compensation for the taking of the entire mineral interests in two tracts of land which had been producing oil in limited quantities. The mineral interests had been divided between the fee owner, who held a royalty interest, and the lessor, who held the working interest. Extensive evidence was introduced by both the Government and the condemnees through testimony by expert oil well appraisers who based their opinions of market value of the mineral interests primarily on their estimates of reserves of oil economically recoverable from the tracts involved. An award was returned favoring the Government's estimate of value, whereupon the court divided the award on the basis of evidence which showed the value of the royalty interest to be greater than the working interest. The holder of the working interest appealed on the grounds that the amount of the award was grossly inadequate and that the court erred in its division of the award.

In affirming, the Court of Appeals stated that fair market value is the objective, and the best evidence of that value is comparable sales. However, the absence of evidence of comparable sales in this case was noted; therefore, value was sought to be established by other competent evidence, primarily estimates of recoverable reserves. Following the rule that an appellate court will not set aside findings of fact, unless there is in its judgment no substantial evidence in support of the findings, the Court held that the only way it could find no substantial evidence would be to hold the testimony of the Government's witness entitled to no credence, "and that we cannot do." The division of the award, though disproportionate, was held to be reasonable under the circumstances, and therefore, it also presented no reversible error.

Staff: Robert S. Griswold, Jr. (Lands Division)

Condemnation; Uncontradicted Evidence of Rezoning Probability; Review of Commission's Reports; Substantial Evidence; Fact Finder's View. Rapid Transit Co. v. United States (C.A. 10, October 10, 1961). In this condemnation action, the district court recommitted the first report to the commission on appellant's motion which asserted that the report was inadequate in not disclosing the basis for the award and that the commission failed to consider evidence as to a sale of adjoining property alleged to be comparable and to make findings in accordance with evidence of the probability of rezoning. In its supplemental report, the commission reviewed all of the valuation testimony and found that (1) the sale of adjoining property was not comparable; (2) rezoning for multiple-family dwellings in the near future was not shown to be reasonably probable; and (3) the highest and best use was single-family dwellings, the zoning at the date of taking. The commission specified that its view of the property was a significant factor in its determination of market value. The district court affirmed the award, ruling that the findings

were supported by substantial evidence and not clearly erroneous, even though it was quite likely that it would have found market value in a larger amount on the same conflicting evidence.

On appeal, appellant contended that its uncontradicted evidence of the probability of rezoning could not be disregarded. In attacking the amount of the award as not being supported by substantial evidence, appellant intimated that its valuation experts were better qualified than the Government's experts.

Refusing to reweigh the evidence or retry facts and to reverse because the award was closer to the Government's valuation testimony and noting that the award was well within the range of credible testimony, the Court of Appeals affirmed. It stated that a commission's findings must be upheld by a trial or appellate court unless clearly erroneous and that evidence which is considered and expressly found unpersuasive does not compel acceptance even though uncontradicted. The weight to be given a view as against opinion evidence was emphasized as a matter exclusively for the trier of facts.

Staff: Raymond N. Zagone (Lands Division)

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CIVIL TAX MATTERS
District Court Decisions

Liens; In Foreclosure Action Against Cash Surrender Values of Insurance Policies, Federal Tax Liens Given Priority Over Premium Loans Made By Insurer, and Such Liens Foreclosed Upon Gross Cash Surrender Values Undiminished by Any Premium Loans. United States v. Anthony J. J. A. Wilson, 195 F. Supp. 332 (D.N.J.). The taxpayer-insured owned certain life insurance policies which contained automatic premium loan provisions requiring the insurer to automatically lend the amount required to pay the premium in the event of default in payment by the insured. Automatic premium loans were made by the insurer after the tax liens had arisen and after notice of levy had been served upon the insurer.

In ordering the foreclosure of the tax liens, the Court rejected the contention of the insurer that the insured had no property right until he elected to avail himself of the cash surrender value or until a judgment of foreclosure was entered. The Court ruled that there was a property right in the insured to which the tax lien attached by virtue of assessment of the taxes, and that the insurer was not a pledgee, mortgagee, purchaser or judgment creditor protected by the predecessor of Section 6323 of the Internal Revenue Code of 1954. In addition, the tax liens attached to the increased cash surrender values of the policies resulting from the payment of the premiums by operation of the automatic premium loan provisions, and the insurer's contract rights to offset the insured's indebtedness arising from such loans did not create a choate lien. Therefore, the insurer could not deduct the amount of such loans from the gross cash surrender values in computing the cash surrender values against which the tax liens were being foreclosed.

Staff: United States Attorney David M. Satz, Jr.; Assistant United States Attorney Raymond W. Young (N.J.); and John F. Beggan (Tax Division)

Preliminary Injunction; Government's Motion for Preliminary Injunction Granted Where Government Established Probable Irreparable Injury if Status Quo Not Maintained, Lack of Hardship on Opposing Party, Probability of Ultimate Success by Government, and Balance of Equities in Favor of Granting Preliminary Injunction. United States v. Stanford Pavenick, CCH 61-2 USTC Par. 9679 (D.N.J., 1961). The United States brought suit to foreclose tax liens arising out of Section 3670, Internal Revenue Code of 1939, on certain shares of stock formerly held by the taxpayer and presently held in the name of his wife. The United States sought a preliminary injunction against the transfer of this stock by the taxpayer or his wife, on the ground that the balance of equities was in favor of the granting of the motion for preliminary injunction.

Under Section 3672, Internal Revenue Code of 1939, the Government's tax liens would not be entitled to priority over the interest acquired by a mortgagee, pledgee, or purchaser without notice and for adequate and full consideration. Thus, if the Government had tax liens on the involved stock, the Government would be irreparably injured by the transfer of such stock to a party qualifying under Section 3672.

In order to establish that it has a lien for outstanding taxes, the Government must establish that it has made an assessment for these taxes and that a demand for payment was made upon the taxpayer. The taxpayer filed an affidavit to the effect that a demand for payment had not been made upon him. As proof that a demand for payment had been made, the Government introduced certified copies of Forms 17, Treasury Department, and the certification form stated that Forms 17 were true copies of the Forms 17. Although the Court held that such certified copies were not in compliance with 28 U.S.C. 1733, it did not rule against the Government because it held that it was not required to adjudicate all issues of fact involved in this case in the present motion and because it assumed that competent evidence on the mailing of the Forms 17 would be presented at trial.

The Court also held that the injunction would not work any particular hardship against the taxpayer and his wife, in that the affidavit submitted by the taxpayer's wife indicated that she did not intend to transfer said shares of stock.

The Court held that the balance of equities existed in favor of the granting of the Government's motion for preliminary injunction, in that irreparable injury would result to the Government if the status quo were not maintained, in that there would be no apparent hardship on the taxpayer and his wife from the granting of the motion, and in that there was a probability of ultimate success by the Government in this action.

Staff: David M. Satz, United States Attorney and Assistant United States Attorney Barbara A. Morris (D. N.J.); Lorence L. Bravenec (Tax Division).

CRIMINAL TAX MATTERS
District Court Decision

Pre-trial Inspection of Statements, Both Written and Oral, Latter Being Transcribed But Not Signed, Given by Defendant to Government. United States v. Fancher, 195 F. Supp. 448 (Conn.). See discussion of this case under Rules 16 and 17 (c) in this issue of Bulletin.

Staff: Former United States Attorney Harry W. Hultgren, Jr.

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