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UNITED STATES ATTORNEYS

BULLETIN

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MONTHLY TOTALS

Totals in all categories of work pending in United States Attorneys' offices rose during the month of September, with the exception of pending criminal matters which dropped slightly as the items progressed from the status of matters to the status of cases. The consequent rise in criminal cases offset this drop in criminal matters. The aggregate of pending cases and matters shows the largest total for any month in the last four years. The following analysis shows the number of items pending in each category as compared with the total for the previous month:

	August 31, 1961	September 30, 1961		
Triable Criminal	7,441	8,062	+	621
Civil Cases Inc. Civil Less Tax Lien & Cond.	14,965	15,088	+	123
Total	22,406	23,150	+	744
All Criminal	9,038	9,664	+	626
Civil Cases Inc. Civil Tax & Cond. Less Tax Lien	17,831	18,032	+	201
Criminal Matters	11,946	11,539	-	407
Civil Matters	14,040	14,125	+	85
Total Cases & Matters	52,855	53,360	+	505

Both filings and terminations continue to show a decrease from the comparable period of the previous fiscal year. As of September 30, the pending caseload was 7.5 per cent above the same period in fiscal 1961. Triable criminal cases pending registered a higher total than at the beginning of the backlog drive in August 1954. Pending civil cases including condemnation but less tax lien, showed the highest total of any month in the past five years. After seven years of consistent reduction, the pending caseload is now higher than it was at the beginning of the backlog drive. The breakdown below shows the pending totals on the same date in fiscal 1961 and 1962.

	First Quarter F.Y. 1961	First Quarter F.Y. 1962	Increase or Decrease Number	%
Filed				
Criminal	7,256	6,892	- 364	- 5.0
Civil	6,064	6,001	- 63	- 1.0
Total	13,320	12,893	- 427	- 3.2
Terminated				
Criminal	5,700	5,624	- 76	- 1.3
Civil	5,167	4,745	- 422	- 8.2
Total	10,867	10,369	- 498	- 4.6
Pending				
Criminal	9,221	9,664	+ 443	+ 4.8
Civil	20,160	21,933	+ 1,173	+ 8.8
Total	29,381	31,597	+ 2,216	+ 7.5

Total criminal case filings and terminations during September exceeded those for the preceding month. Civil case terminations also rose. As a result, total filings and terminations reached the highest total of the first quarter of the fiscal year. Set out below is an analysis by months of the number of cases filed and terminated.

	Filed			Terminated		
	Crim.	Civ.	Total	Crim.	Civ.	Total
July	1,819	1,886	3,705	1,732	1,500	3,232
Aug.	2,163	2,126	4,289	1,629	1,595	3,224
Sept.	2,910	1,989	4,899	2,263	1,650	3,913

During the month of September 1961, United States Attorneys reported collections of $1,902,525. This brings the total for the first three months of fiscal 1962 to $8,364,777. This is $630,834 or 8.2 per cent more than the $7,733,943 collected in the first quarter of fiscal 1961.

During September $2,778,722 was saved in 77 suits in which the government as defendant was sued for $3,374,919. 39 of them involving $1,173,457 were closed by compromises amounting to $377,743 and 15 of them involving $673,948 were closed by judgments against the United States amounting to $218,454. The remaining 23 suits involving $1,527,514 were won by the government. The total saved for the first three months of the current fiscal year was $10,737,290 and is an increase of $5,657,455 over the $5,079,835 saved in the first 3 months of fiscal year 1961.

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JOB WELL DONE

United States Attorney Cecil F. Poole and Assistant United States Attorney F. J. Woeflen, Northern District of California, have been commended by the Chief Postal Inspector for their prompt action in

obtaining the arrest of an individual charged with use of the mails in the furtherance of fraudulent work-at-home schemes and vending machine franchises. The letter stated that the defendant's various criminal activities date back forty years, and that if he had been allowed to continue, his operations would have relieved additional victims of many more thousands of dollars. The Chief Postal Inspector termed the action taken a noteworthy public service.

The FBI Special Agent in Charge has expressed appreciation for the very excellent presentation made by Assistant United States Attorney Robert F. Monaghan, Northern District of Illinois, at a recent series of Bank Robbery Conferences. The letter stated that Mr. Monaghan left no doubt in the minds of those assembled that he was well prepared to discuss the prosecutive aspects of bank robbery violations and related matters, that at all of the conferences there were many favorable comments as to his ability, and that his presence on the program contributed greatly to the success of each meeting.

The Acting Superintendent, Nevada Indian Agency, has expressed thanks to United States Attorney William T. Thurman, and Assistant United States Attorney Gerald R. Miller, District of Utah, for their work in successfully prosecuting three individuals who had interfered with the performance of duties by agents of the Bureau of Indian Affairs. All three defendants were found guilty by the jury and later sentenced.

The Police Advisory Committee Association of American Railroads, has expressed sincere thanks for the participation by Assistant United States Attorney John P. Lulinski, Northern District of Illinois, in the Eleventh Session of the International Railroad Police Academy. In expressing appreciation for Mr. Lulinski's fine cooperation, the letter stated that his handling of the subject "Federal Court Decisions", and his participation in the Moot Court as Prosecuting Attorney contributed a great deal to the success of the Academy.

The Assistant Supervisor in Charge, Alcohol and Tobacco Tax Division, has commended Assistant United States Attorneys Richmond F. Allan and Clifford Schleusner, District of Montana, on the fine job done by them in two recent cases. The letter stated that Mr. Allan's brilliant presentation, assisted by Mr. Schleusner, was largely responsible for the verdicts of guilty in both cases, that they worked hard and diligently, and that they won the case over the many objections of the very able defense attorneys.

Assistant United States Attorney Sullivan Cistone, Eastern District of Pennsylvania, has been commended by the FBI Special Agent in Charge for the outstanding manner in which he recently presented six cases involving a well-known Philadelphia receiver of stolen goods. The letter noted that the investigations into the cases covered months of work and are reflected in voluminous files and numerous exhibits and statements, and that the efficient, intelligent, and thorough manner in which Mr. Cistone presented the facts of these cases indicted many hours of organizing and planning.

The Judge Advocate General has expressed appreciation for the outstanding work of Assistant United States Attorney Joseph M. Hannon, District of Columbia, in a recent case in which the Army had considerable interest. The case was dismissed upon agreement of both parties after the voluntary retirement of the plaintiff. In commending the fine way in which the case was handled, the letter stated that Mr. Hannon spent long hours on the case, much of it at night and on weekends, and that he proved himself a most able advocate in the court hearings.

The Chief Postal Inspector has expressed appreciation to United States Attorney F. Russell Millin and Assistant United States Attorney Clifford M. Spottsville, Western District of Missouri, for a recent mail fraud indictment obtained against three individuals who have been promoting an "advance fee" scheme since 1955. In commending the prompt authorization of prosecution and presentation to the grand jury, the Chief Postal Inspector stated that the case is the first of its kind to be prosecuted in the district.

Assistant United States Attorney Elmer Enstrom, Jr., Southern District of California, has been commended and congratulated by the FBI Special Agent in Charge on his recent success in handling the appeal of an embezzling case. The letter stated that Mr. Enstrom spent many hours of hard work in preparing the case on appeal, that his efforts are greatly appreciated, and that his success in the case has established a precedent for embezzlement cases which will be of assistance in the future investigation of this type of violation.

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ADMINISTRATIVE DIVISION

Administrative Assistant Attorney General S. A. Andretta

ARMED FORCES WITNESSES AND GOVERNMENT-EMPLOYEE WITNESSES

For the benefit of many new members of the United States Attorneys' offices it is important that the following procedures be carefully observed when requesting members of the Armed Forces or Government employees as witnesses:

1. Submit your request on Form DJ-49, original only, with as much identification of the witness as possible. Because of the increased activities of the military establishments, it is very difficult to locate a witness unless you give the full name, serial number, rank, location, and any other helpful information you may have.

2. When summoning servicemen from overseas, please furnish complete justification. The Armed Forces are becoming more reluctant to make exceptions to their regulations against returning military personnel located out of the country.

3. Government-employee witnesses are now entitled to $16 per diem in lieu of subsistence. See Memo No. 174, second revision of November 1, 1961. Page 120, Title 8, of the U. S. Attorneys' Manual will be amended in the near future.

4. Attendance of Government-employee witnesses stationed in Washington should be cleared through the Office of the Administrative Assistant Attorney General. This eliminates confusion over payment of travel expenses, expedites the witness's attendance, and makes for better relations with the agency involved.

Please refer to the "Procedural Guide for Incurring Expenses" (April 12, 1961) for details and reference to the appropriate portions of the Manual involved.

MEMOS AND ORDERS

The following Memoranda and Orders applicable to United States Attorneys Offices have been issued since the list published in Bulletin No. 20 Vol. 9 dated October 6, 1961.

MEMO	DATED	DISTRIBUTION	SUBJECT
165 1st Rev	9-25-61	U.S. Marshals	Traveling Guards
301	9-29-61	U.S. Attys and Marshals	Non-deferments for active military duty.

MEMO	DATED	DISTRIBUTION	SUBJECT
302	9-28-61	U.S. Attys & Marshals	Travel Allowances. (Except in Alaska, Canal Zone, Guam, Hawaii, Puerto Rico and Virgin Islands).
174 Sec Rev.	11-1-61	U.S. Attys & Marshals	Government Employee Witness Allowances

ORDER	DATED	DISTRIBUTION	SUBJECT
250-61	10-3-61	U.S. Attys & Marshals	Registration of Communist Organizations and Members thereof.
252-61	10-27-61	U.S. Attys & Marshals	Travel expenses and subsistence of Federal Officers and Employees summoned as witnesses for the Government
253-61	11-2-61	U.S. Attys & Marshals	Amending Section 17(e) of Order No. 175-59 Delegating responsibility for the performance of certain functions relating to the compensation of Federal Prisoners for injuries

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ANTITRUST DIVISION

Assistant Attorney General Lee Loevinger

Price Fixing - Flush Wooden Doors; Indictment Filed Under Section 1 of Sherman Act and Section 14 of Clayton Act. United States v. Packard-Bell Electronics Corporation, et al. (S.D. Calif.) On October 25, 1961 a two-count indictment was filed, which named as defendants nine corporations engaged in the manufacturing of wooden doors, two individuals acting as partners in door manufacturing companies, and four officials of corporate defendants. Named as defendants in Count One were Packard-Bell Electronics Corporation and Robert J. Weston, general manager of its Bellwood Division; Artesia Door Co., Inc. and Indalecio L. Vasquez, its president; Perry International Corporation, and Harry A. Perry, its president; Strait Door & Plywood Corporation and Charles E. Strait, its president; Regal Door Company; Glen-Mar Door Manufacturing Company; Simpson Timber Company; Seattle Door Company, Inc.; Nicolai Door Manufacturing Co.; Jack Carlow, partner in the Carlow Company; and Francis Haley, partner in Haley Brothers. Ostling Manufacturing Company, a corporation, and Southern California Door Institute, an unincorporated trade association, were named as co-conspirators.

Count One of the indictment charges the nine corporations and six individuals located in California, Arizona, Washington and Oregon with violation of Section 1 of the Sherman Act by engaging in a combination and conspiracy to raise and stabilize prices of flush doors, beginning in the summer of 1960 and continuing to about January 1961. Flush doors are flat unpaneled doors, the sides of which are made with veneered hardwood or hardboard, and are the mass production doors used in residential buildings. Sales of these doors by the defendants and co-conspirator Ostling Manufacturing Company amounted to $26 million. The indictment charges that the defendant entered into an agreement, the substantial terms of which were (a) to raise prices for the sale of flush doors; (b) to adopt a formula for pricing flush doors; (c) to price flush doors on a delivered price basis; and (d) to adopt uniform quantity discounts in the sale of flush doors. The indictment charges that, as a result of the alleged combination and conspiracy, price competition among the defendants and co-conspirators in the sale of flush doors was suppressed, that prices of flush doors sold by them were raised, and that customers were deprived of the opportunity to purchase flush doors at competitive prices.

Count Two of the indictment names as individuals the four corporate officials also named in Count One and charges them with a violation of Section 14 of the Clayton Act in that they authorized and did acts constituting in part the violation of the Sherman Act by the defendant corporations with whom they were associated.

Staff: Lawrence W. Somerville, Malcolm D. MacArthur and John D. Gaffey. (Antitrust Division).

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CIVIL DIVISION

Assistant Attorney General William H. Orrick, Jr.

COURTS OF APPEALS

ABUSE OF PROCESS

Investigator Who Issues Subpoena Is Immune from Charge That His Actions Were Improperly Motivated, Provided Subpoena Is Valid. Donald Wheeldin and Admiral Dawson v. William Wheeler (C.A. 9, October 23, 1961). Wheeler and Dawson were subpoenaed to appear before the House Un-American Activities Committee which was then proposing to conduct a hearing in Los Angeles. Thereafter they brought this action in the district court for money damages against Wheeler, a Committee investigator who had been instrumental in issuing the subpoena. The gravamen of their complaint was that the subpoena was maliciously and mischievously issued for the sole purpose of exposing them to public scorn with consequent loss of employment and of esteem. They admitted on the appellate level, however, that the subpoena was validly issued.

The district court dismissed the action for failure to state a claim for which relief could be granted. The Court of Appeals affirmed, on the theory that, since the subpoena was valid, the investigator had governmental immunity from charges that his actions were improperly motivated, citing Barr v. Matteo, 360 U.S. 564.

Staff: United States Attorney Francis C. Whelan; Assistant United States Attorneys Donald A. Fareed and Clarke A. Knicely (S.D. Calif.)

AGRICULTURAL ACT OF 1949

United States Cannot Be Estopped to Recover Payments Made Under Invalid Regulation. United States v. Zenith-Godley Co., et al. (C.A. 2, October 30, 1961). The Agricultural Act of 1949, 7 U.S.C. 1421 et seq., directs that the Secretary of Agriculture make available price supports for the producers of milk and milk products through "loans on, or purchases of, the products of milk and butter fats". 7 U.S.C. 1446. To effectuate this section the Department of Agriculture issues certain regulations known as Departmental Announcements. Until March 1954, applicable procedures were set forth in two such Announcements, DA-99 and DA-107. The former was a standing invitation for offers to sell milk or milk products to the Commodity Credit Corporation at varying prices, depending upon the place of sale and the grade of such products. The latter was a standing offer to purchase the same product back at three cents below the purchase price. In this manner, handlers could show a gain which would reflect in the price paid their suppliers.

This procedure was changed by issuance of DA-112 in March 1954. Handlers could still "sell and repurchase" their products, but were no longer required to ship the actual product to the Commodity Credit Corporation. In effect, DA-112 made the entire operation a paper transaction, still resulting in a three cent gain to the shippers. The eight handlers here involved were among those persons who took advantage of this regulation. In August 1955, the Comptroller General of the United States issued an opinion holding that DA-112 transactions were not "purchases" for purposes of 7 U.S.C. 1446, and that any payments made under DA-112 were invalid. The United States, therefore, demanded repayment of all moneys distributed, and instituted this action among others against these eight handlers. The cases were consolidated for trial.

The district court agreed with the Fourth, Fifth and Seventh Circuits that DA-112 was not authorized by the Agricultural Act of 1949. It further decided that defendants could not avail themselves of any defense of estoppel against the Government. The Court of Appeals affirmed per curiam on the authority of Federal Crop Ins. Corporation v. Merrill, 322 U.S. 380.

Staff: Marvin C. Taylor (Civil Division)

DAMAGES

Findings on Damages Upheld as Meeting Specificity Requirement of Rule 52(a), F.R.C.P. Perry George v. United States (C.A. 7, October 18, 1961). This action was brought under the Tort Claims Act for personal injuries incurred by plaintiff while a passenger on a commercial plane involved in a near-collision with a United States military aircraft. The Government did not seriously contest liability, but the issue of damages was sharply disputed. The district court entered a judgment of $12,000, and while describing some of the injuries and listing the elements of damage on which it relied to reach that figure, made no attempt, in specific findings of fact, to relate the total sum awarded to those elements of damages. The United States appealed, contending that under Rule 52(a), F.R.C.P., the district court's duty to make specific findings of fact applied to the question of damages as well as to the issue of liability, and that the duty in this case was to break down the $12,000 general award into its component parts.

The Seventh Circuit affirmed, noting, however, that Rule 52(a) did contemplate specific findings as to damages. See also, United States v. Horsfall, 270 F. 2d 107 (C.A. 10); Hatahley v. United States, 351 U.S. 173. The Court of Appeals concluded that the findings here were specific enough, particularly in light of the fact that the record involved was not cumbersome and could readily be examined by the reviewing court to determine whether the damage award was supported.

Staff: United States Attorney James P. O'Brien; Assistant United States Attorneys John Peter Lulinski and Thomas W. James (N.D. Ill.)

FEDERAL TORT CLAIMS ACT

Serviceman's Great Deviation from Designated Travel Distance While Transferring Assignments Held Not Within Scope of Employment Under Florida Law. Edwin A. Kunkler and Evelyn Kunkler v. United States (C.A. 5, October 24, 1961). On March 17, 1959, an airman left Keesler Air Force Base in Mississippi pursuant to orders on official "delay enroute" status to report not later than midnight, April 2, 1959, at an Air Force school in Montgomery, Alabama, 250 miles away. He traveled to Vermont where he purchased an automobile and drove to DeLand, Florida to visit his grandparents. On April 1, 1959, while driving to his new base he collided with another automobile near Quincy, Florida, 193 miles southeast of Montgomery, and was killed. The driver of the other automobile, and the owner thereof, brought suit against the United States.

The district court granted summary judgment in favor of the United States on the theory that, under Florida law, the airman was not within the scope of his employment. The Court of Appeals affirmed both the decision and reasoning of the trial judge. It expressed the view that the airman's deviation, ten times the amount fixed by the United States as his travel distance, was more than slight with respect both to distance and to time.

Staff: Acting United States Attorney C. W. Eggart, Jr.;
Assistant United States Attorney Edward L. Stahley (N.D. Fla.)

NAVIGATION AND NAVIGABLE WATERS

United States Authorized by Applicable Regulation to Remove Buoys and Stakes from Navigable Waters Even Though Evidence Failed to Show That Owner Had Actual Knowledge of Regulation; Provided General Interests of Navigation Are Served, United States May Remove Obstructions in Navigation Without Compensation to Owner. Edward P. Blake v. United States; Odell M. Blake v. United States; Eldridge Cook v. United States (C.A. 4, October 2, 1961). The libellants, Cook and the two Blakes, leased from the State of Virginia in 1946 and 1948 certain oyster grounds in the York River near the Yorktown, Va., Naval Mine Warfare School. In 1955, the District Engineer of the Army Engineers Corps, acting pursuant to 33 U.S.C. 1, issued a public notice stating that the Navy had requested the permanent establishment of a Naval Mine Sweeping Practice Area and a Naval Drill Mine Field Area in the York River. The notice contained a proposed regulation which would restrict the use of this area for fish traps, buoys, piles, etc., unless such were approved by the Commandant of the School. The notice was widely distributed and a public meeting was held where the proposed regulation was discussed. On May 24, 1955, the regulation was printed as an amendment to 33 C.F.R. 207.128, and became effective 30 days thereafter. There is no evidence that libellants had notice of the meeting or that they actually received notice of the new regulation.

Libellants' oyster grounds, a small part of which were within the practice area, were marked principally by numerous large stakes and buoys within and without the natural navigable channel of the river and the Naval operating areas. In 1956, certain mine sweeping equipment was damaged by libellants' stakes, and the stakes were removed by the Navy. Libellants were given notice of the Naval area and the applicable restrictive regulation, but they replaced a few stakes and buoys without authority. These later were also removed and some effort was made by the Government to locate the owners, although the lower court found that such attempts were inadequate.

Libellants brought suit for the value of the stakes and buoys removed and for injuries caused to the operation of the oyster grounds by their removal. The district court dismissed the libels, being of the opinion that the Government was acting within its rights in establishing the Naval area and in removing the stakes and buoys from the navigable channel. The Court of Appeals affirmed. It decided that 33 C.F.R. 207.128 was controlling, and that no special notice of this regulation had to be given to libellants, since the public notice, discussion, and wide publicity accorded it were all that is required by 33 U.S.C. 1. The Court rejected libellants' contention that compensation should be paid them since the buoys were removed not to aid navigation but to protect the mine field. It could not be doubted, the Court held, that the stakes hindered navigation, and so long as the general interests of navigation were served by their removal, it was irrelevant that special interests of the United States were also advanced.

Staff: William E. Gwatkin, III (Civil Division)

SOCIAL SECURITY ACT

Existence of Bona Fide Employer-Employee Relationship Between Sisters. Myrtle H. Barron v. Ribicoff (C.A. 4, October 17, 1961). Myrtle Barron owned a house in which she and her sister Margaret lived. Margaret worked, and Myrtle remained at home doing the household chores. Margaret contributed $35 a month to their joint needs, for groceries, utilities, etc. In 1956, Margaret agreed to give Myrtle $7 a week for spending money, and continued to buy the groceries and pay the utilities.

Myrtle applied for old age insurance benefits on the grounds that Margaret was her employer, and that the $7 a week constituted wages. The hearing examiner found that the two sisters were sharing their assets and contributing to their joint needs according to their ability. The Appeals Council declined to review this decision. The district court found that plaintiff's testimony that she was an employee was undisputed and that there was nothing inconsistent between Myrtle's ownership of the house and her status as an employee. It therefore reversed the administrative determination on the ground that it was "not supported by the record" and "contrary to record".

On appeal by the Secretary, the Fourth Circuit reversed. It pointed out that while the district court believed the administrative determination

erroneous, the Social Security Act (42 U.S.C. 405(g)) provides that the findings of the hearing examiner must be upheld if supported by substantial evidence. The Court found that there was substantial evidence in the record supporting those findings and therefore reinstated the administrative decision.

Staff: David L. Rose (Civil Division)

Inability to Engage in Substantial Gainful Employment. Willie Varnado v. Ribicoff (C.A. 5, October 13, 1961). Claimant was born in 1900 and received an eighth grade education. He originally injured his back in 1945 while working in New Orleans as a driver salesman for a brewing company. In 1956 he reinjured it at the same job and had to be operated on for a herniated disc. This left him with slight pains in his legs, partial paralysis and atrophy of the right leg and foot, lessened sensation therein, and a right "drop foot", a condition in which the foot dangles or drops rather than extending perpendicular to the leg. Neurotic symptoms were also present in his clinical history. Unable to resume his former occupation, he undertook some work for his nephew driving cars and clerking in a grocery store, but was unable to remain in these positions because of pain or inability caused by his injury. The Louisiana Division of Vocational Rehabilitation concluded that there was no hope for his rehabilitation.

Claimant applied to HEW for disability benefits but the referee found him capable of engaging in substantial gainful employment, although there was evidence that he could not do work requiring prolonged sitting, standing, lifting, or walking. On appeal to the district court the case was remanded to the Secretary for taking of additional evidence. HEW again rejected his claim on grounds that while he was disabled from any work involving sitting, walking or lifting, he could still do light and sedentary work, although it was admitted that there was virtually no market for his services in the rural Kenwood area, to which he had moved after his injury.

The district court found substantial evidence for this decision and granted summary judgment for the Secretary. The Court of Appeals reversed and remanded the case for entry of judgment in favor of plaintiff. The Court held that there was no showing of any area of work in which plaintiff could engage, and therefore the case was governed by Butler v. Flemming, 288 F. 2d 591 (C.A. 5) and Flemming v. Booker, 283 F. 2d 321 (C.A. 5). The Court did not pass on the question whether claimant could raise the question of positions available in his locale for persons doing what he could do, or could move to a rural area after his injury and then claim that there was no work available to him.

Staff: United States Attorney H. Hepburn Many; Assistant United States Attorney Francis G. Weller (E.D. La.)

DISTRICT COURT

FALSE CLAIMS ACT

Since False Claims Act is Remedial in Nature and Not Penal, Action Does Not Abate On Death of Defendant; Amendment of Complaint to Include Claim for Actual Damages Relates Back to Date Complaint Filed. United States v. Harry C. Templeton, Administrator (E.D. Tenn., October 30, 1961). In a civil suit under the False Claims Act (31 U.S.C. 231) filed in 1952, defendant was charged with fraudulent procurement of 21 Commodity Credit Corporation cotton price support loans during 1949. The complaint alleged no damages and prayed only for 21 $2,000 forfeitures. Trial was delayed by defendant's illness, and after his death in 1960 the administrator of his estate was substituted as defendant. The Government then amended its complaint setting up two counts; the first sought recovery of single damages relating to the pledging of 524 ineligible bales of cotton during 1949, and the second count set forth the identical 21 false claims included in the original complaint but amended the prayer for damages to seek recovery of double damages resulting from these claims, in addition to the forfeitures.

Defendant attacked the amended complaint and contended: 1. the count under the False Claims Act was penal and did not survive the death of the defendant; 2. the Government had abandoned its original complaint by filing an amended complaint; and 3. that the complaint as amended was barred by the six year statute of limitations contained in the False Claims Act and the CCC Charter Act, 15 U.S.C. 714.

The District Court ruled that the decision in U.S. ex rel Marcus v. Hess, 317 U.S. 537, which held the forfeiture provision of the False Claims Act to be a civil sanction and remedial, was controlling, and, therefore, liability under the Act survived the death of the defendant. It also held that the second count of the amended complaint, which made reference to the allegations in the original complaint and set out the identical transaction although varying the prayer for relief, did not state a new cause of action, and so the amended count related back to the date of the original complaint. The Court sustained the defendant's contention in part by holding that the first count of the amended complaint, seeking single damages relating to all 524 bales of cotton pledged, set out a new cause of action and was barred by the CCC statute of limitations. The action will therefore come to trial on the amended second count only.

Staff: United States Attorney J. H. Reddy (E.D. Tenn.).

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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.).

This case, involving the indictment of nine persons for the burning of a Greyhound bus in interstate travel at Anniston, Alabama on May 14, 1961, was previously discussed at Bulletin, Vol. 9, No. 20, page 598.

On October 31, 1961, eight defendants were tried in the Northern District of Alabama (the ninth was deemed physically unable to stand trial). The Court directed a verdict of acquittal as to one of the defendants. The jury could not reach a verdict as to the other seven defendants and a mistrial was declared.

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

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

IMPORTANT NOTICE

Aliens; Judicial Review of Deportation and Exclusion Orders. Section 5 of Public Law 87-301 (75 Stat. 650) added a new Section 106 to the Immigration and Nationality Act of 1952 to govern judicial review of deportation and exclusion orders. Under Section 106, the Act of December 29, 1950 (5 U.S.C. 1031 et seq.), making certain agency decisions reviewable in the courts of appeals, became the exclusive procedure for the review of deportation orders, except where an alien is in custody for deportation and except where review is sought incident to criminal prosecutions. All such judicial review proceedings not within these exceptions "pending unheard" on the effective date of Section 106 (October 26, 1961) are required to be transferred to the appropriate courts of appeals. Instructions are presently being issued to United States Attorneys with respect to the impact of Section 106 on individual deportation cases. This notice is intended to summarize the Department's position with regard to Section 106.

The procedure for review by courts of appeals applies to "all final orders of deportation heretofore or hereafter made . . . pursuant to administrative proceedings under Section 242(b) of [the 1952] Act or comparable provisions of any prior Act . . ." There seems to be no doubt but that this language covers attacks on deportation orders as such, including attacks on the basis for the findings of deportability and on the fairness of hearings. As determination of alienage is a prerequisite to the entry of a deportation order, we are of the opinion that actions for declaratory judgments of United States nationality by persons who have been found deportable are subject to the procedures specified in Section 106 and that no other statute, including Section 360(a) of the 1952 law (8 U.S.C. 1503(a)), can be invoked, regardless of whether there is a specific attack on the deportation order.

Although rulings on applications for suspension of deportation and voluntary departure in lieu of deportation are not specifically mentioned in Section 242(b), that Section authorizes the Attorney General to delegate authority to special inquiry officers to "make determinations, including orders of deportation", and authority has been delegated to special inquiry officers to determine applications for suspension and voluntary departure in the course of deportation proceedings. A deportation order is not issued if such an application is granted. Therefore, we think that a denial of an application for suspension or voluntary departure is actually a part of a determination of deportability and, as such, is subject to review in a court of appeals under Section 106, regardless of whether there is also an attack on the deportation order.

Some determinations ancillary to the deportation process have not, under prevailing regulations, been made on the record in the deportation process. Such ancillary determinations not on the record include determinations of the country of deportation under Section 243(a) of the Immigration and Nationality Act of 1952 (8 U.S.C. 1253(a)) and denials of applications for stay of deportation on the ground of physical persecution under Section 243(h) of the 1952 Act (8 U.S.C. 1253(h)), for adjustment of status to permanent resident under Section 245 of the 1952 law (8 U.S.C. 1255), and for the creation of a record of lawful entry under Section 249 thereof (8 U.S.C. 1259). Even though a deportation order has been issued against the alien involved, the limitation in Section 106 to deportation orders "pursuant to administrative proceedings under Section 242(b)" appears to preclude consideration by a court of appeals under Section 106 of a case in which the sole attack is on such an ancillary determination outside the deportation proceeding. However, under the pendent jurisdiction principle exemplified by Hurn v. Oursler, 289 U.S. 238, it is our opinion that a suit for the review of such an ancillary administrative determination not otherwise within the jurisdiction of a court of appeals under Section 106 is to be heard by a court of appeals under that Section if a review of a deportation order or denial of suspension of deportation or voluntary departure is also sought in the suit.

For the purpose of determining whether a pending case should be transferred to a court of appeals, we consider a case "heard" if it has been submitted to the district court on the merits, either after oral argument or trial or on brief, and the court has the matter under advisement, even though further briefs are to be submitted. Venue under Section 106 is in the circuit in which the deportation hearing was conducted in whole or in part or in the circuit where the petitioner resides, but not in more than one circuit. The United States Attorney for the district in which a case to be transferred was pending on October 26, 1961, is responsible for arranging for the transfer of the case to the appropriate court of appeals by motion or on stipulation with opposing counsel. That United States Attorney is to continue to represent the Government in the case if it is transferred to the circuit in which his district is located. If the case is transferred to the court of appeals of another circuit, or in any new case filed in a court of appeals under Section 106, the United States Attorney for the district in which the office of the clerk of the court of appeals is located is responsible for handling the case for the Government.

Under Section 106(b), habeas corpus is the sole procedure for the review of exclusion orders in cases filed on or after October 26, 1961. Any judicial proceeding for the review of such an order pending unheard that day is to be expedited in the same manner as is required in habeas corpus.

There has been some laxity on the part of United States Attorneys in reporting to the Criminal Division decisions under the immigration and nationality laws as required by the United States Attorneys' Manual, Title 2, p. 77. It is especially imperative that prompt report be made in accordance with that instruction in cases construing the scope of Section 106.

MURDER

Evidence of Defendant's Failure to Answer Questions at Time of Arrest and Request for Lawyer and a Cigarette Admitted to Show State of Defendant's Mind at Time of Commission of Crime. Jones v. United States (C.A. D.C., 1961). Immediately after shooting one person and wounding another, the defendant was questioned by the police but declined to answer all questions, said he wanted to talk to a lawyer, and asked for a cigarette. When questioned several hours later he again refused to answer questions and requested a lawyer. The prosecution cross-examined Jones concerning these statements, and in its summation to the jury adverted to these statements by defendant as evidence of Jones' calm, cool, and deliberate state of mind at the time the crime was committed. Defendant was convicted and sentenced for first degree murder and assault with intent to kill. An appeal was taken to determine whether the prosecution's use of the defendant's statements constituted prejudicial error.

The Court of Appeals, by a 5-4 decision, affirmed the conviction, holding that the use of the statements was proper as evidence which would show the deliberation and premediation necessary to first degree murder, and tend to refute the contention that defendant had blacked-out during the crime. The Court, viewing the statements as part of the incidents which occurred at or about the time of the crime, considered them to be direct evidence of Jones' state of mind and hence admissible. The Court dismissed the contention that the statements were self-incriminatory and took the position that defendant had waived his constitutional rights in that regard by voluntarily taking the stand. The Court also rejected the argument that the prosecution's disclosure at trial of the accused's expression of a desire to have an attorney unlawfully impinged upon his right to counsel. Finding that the statements were made voluntarily, and finding no rule to exclude them, the Court held them to be admissible as probative of Jones' state of mind.

The dissent took the position that the statements were used by the prosecution solely for the purpose of proving the deliberation necessary for first degree murder and not for combatting the defense of black-out or sanity, and as such held them to be inadmissible. The dissent held that such use of the statements impinged on the constitutional right to counsel and the right to remain silent under questioning. Furthermore, the dissenting judges were of the view that the statements were not part of the description of the events of the crime, and were too remote to be admissible as probative of defendant's state of mind at the time of the crime.

Staff: Former United States Attorney Oliver Gasch;
Former Assistant United States Attorneys
John D. Lane and Carl W. Belcher (C.A. D.C.).

CONTEMPT

Action for Contempt in Which Elements of Personal Contempt Toward Judge Are Present Should Be Heard Under Rule 42(b) by Different Judge Unless Immediacy of Incident Prevents Such Action. In United States v. Bradt and United States v. Albert (C.A. 6, September 25, 1961), there was before the Court of Appeals the question of how to properly prosecute contempt charges which had arisen during the course of a trial in the Western District of Michigan.

During the preliminary motion stage in a civil action, in which the brother of respondent Albert was one of the parties, and respondents Bradt and Albert were attorneys for plaintiffs, an altercation had arisen in the course of a telephone conversation between Bradt and the judge assigned to hear the matter. The argument related to procedures which were required on motions in the Western District of Michigan. As a result, the respondents filed an appropriate affidavit of bias or prejudice against the judge, and requested assignment of another judge to hear the case. (28 U.S.C. 144.) The motion was denied and a heated discussion at the time resulted in both Albert and Bradt walking out of the courtroom in defiance of the judge's order to them not to do so.

After a short recess, the Court cited the two attorneys for contempt in facie curiae under Rule 42(a), F.R. Cr. P. and, although the judge apparently preferred to settle the matter then and there, he agreed to wait until the following day to hear the matter. Both attorneys were on that day found guilty of contempt and each appealed.

The Sixth Circuit Court of Appeals noted the distinction between Rule 42(a), the summary contempt proceeding, and Rule 42(b), which requires notice and hearing, and observed a variance in the treatment of situations such as the instant one by decisions of the Supreme Court. The trial judge had acted under the precedent established in Sacher v. United States, 343 U.S. 1 (Rule 42(a)), instead of Offutt v. United States, 348 U.S. 11 (Rule 42(b)). It was pointed out that the initial question was whether the judge, himself involved in appellants' misconduct, should have heard the matter, or whether it would have been preferable to have another judge not so involved hear the cases.

It was observed by this Court that, as in Sacher, supra, there are occasions where the misconduct of attorneys or others in the court's presence calls for immediate arrest of the conduct lest it break up the trial. However, aside from this consideration, the animosity engendering the contemptuous conduct, as it may be directed at the judge himself, called, in Offutt, supra, for application of the rule of Cooke v. United States, 267 U.S. 517, i.e., a ruling by

another judge after hearing under Rule 42(b). (Compare: Brown v. United States, 359 U.S. 41, which explained the difference between Sacher and Offutt, and held that the element of personal contempt to the judge did not appear, justifying application of the summary proceeding under Rule 42(a) in that case).

The Court of Appeals did not decide the factual issues, but limited itself to holding that the background circumstances in this matter, including the personal affront to the trial judge, but lacking the urgency of decision present in Sacher, supra, necessitated the use of Rule 42(b), under precedent established in Offutt v. United States, supra, and Cooke v. United States, supra, and directed a rehearing before a different judge to dispose of the matter.

CONSPIRACY AND COUNTERFEITING
18 U.S.C. 371 and 472

Inadmissibility of Co-conspirator's Extra-Judicial Declarations and Admissions to Prove Existence of Conspiracy as to Other Alleged Co-conspirators. United States v. Samuel Elvin Tripp and Charles Clarence Tripp, Jr. (C.A. 10, September 18, 1961). Appellants, two brothers, were indicted with five other co-defendants in the Eastern District of Oklahoma on nine counts, one of violating 18 U.S.C. 371 and eight of violating 18 U.S.C. 472. They were convicted on all counts and received concurrent five year sentences on each of nine counts. The Tripps appealed their conviction to the Tenth Circuit Court of Appeals on several grounds, only one of which was considered by the appellate court. The Tenth Circuit reversed the District Court and found that the Tripps' motion for a directed verdict of acquittal should have been granted since the admissible evidence against them was not sufficient to warrant a guilty verdict.

The evidence which the Court of Appeals found admissible revealed that in July, 1960, the Tripps had left Missouri to visit their uncle, a co-defendant, in Oklahoma. During the three-day visit appellants and their uncle travelled to Dallas, Texas, where they met and associated with the other co-defendants. It was shown that the Tripps registered in a Dallas hotel under an assumed name. While in Dallas the Tripps and other co-defendants had gathered in a tavern from which all, except the Tripps, had left temporarily to attempt to pass counterfeit bills. Testimony revealed that a month prior to the Tripps' arrival in Oklahoma, their uncle had discussed with two of the other co-defendants the possibility of getting counterfeit money. It was also shown that none of the co-defendants had passed counterfeit money until the Tripps arrival in Oklahoma and Texas. On the last day of the Tripps' visit one of the co-defendants, who had been talking to the Tripps at their uncle's home, told another co-defendant, as they were driving from the uncle's home, that he had purchased some counterfeit money and was supposed to get more. Two of the co-defendants, who were arrested after

the Tripps returned to Missouri, made oral admissions and a written statement to Secret Service officials, in which they said the Tripps had brought the counterfeit bills with them and had given them to the other co-defendants. The truth of these statements was, however, repudiated by them on cross-examination.

The appellate court ruled that such extra-judicial statements were not admissible against the Tripps to prove their connection with the conspiracy. It said that the existence of a conspiracy cannot be proved against an alleged co-conspirator by evidence of the acts or declarations of his alleged co-conspirators done or made in his absence, unless there was proof aliunde of the alleged co-conspirator's connection with the conspiracy. The Court ruled that the facts as stated above were not aliunde proof sufficient to justify admitting either the statements or the conversation between the co-defendants in the car. The Court ruled further, that the written statement was also inadmissible as to the Tripps because it was made after the conspiracy had terminated and, therefore, was not in furtherance of the conspiracy. Apprehension of the co-defendant, who made the statement, terminated the conspiracy as to him and any confession made by him subsequent to his arrest and not in furtherance of the conspiracy was, consequently, admissible only against him. The Court also pointed out that the lower court erred in not so instructing the jury at the time the statement was admitted. Its later charge to that effect was not sufficient in time to protect the Tripps.

The Government's argument that the statements were admissible as substantial evidence against the Tripps was found defective on the additional ground that the makers of such statements contradicted them on direct and cross-examination. The Court ruled that they were admissible only to impeach the ones who made them and not as substantive evidence, particularly since the makers denied the truth of such statements. The Court found that the admissible substantive evidence against the Tripps proved only that they were travelling or associating with the other co-defendants during the period the offenses were being committed and such evidence was not sufficient to warrant a jury finding of guilty beyond a reasonable doubt.

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

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Joseph M. Swing

DEPORTATION

Administrative Subpoena - Enforcement of; Constitutional Rights. Sherman v. Hamilton, (C.A. 1, October 30, 1961). This was an appeal from an order of the United States District Court for the District of Massachusetts entered on May 12, 1961 upon application of the appellee for the enforcement of an administrative subpoena under the provisions of section 235(a) of the I & N Act of 1952 (8 U.S.C. 1225(a)).

The District Court distinguished U. S. v. Minker, 350 U.S. 179, and held that it would be an extremely futile thing for Congress to authorize the Service to interrogate, examine, and cross-examine an alien, as it did in 8 U.S.C. 1226 and 1252, and simultaneously to withhold the power to subpoena him. It also held that, on the record as it then stood, the fears expressed by plaintiff concerning his constitutional rights were premature. (See: Hamilton v. Sherman, Bulletin: Vol. 9, No. 11, p. 336; June 2, 1961).

The Court of Appeals affirmed the District Court's order.

Staff: Assistant United States Attorney James C. Heighman. With him on the brief was United States Attorney W. Arthur Garrity (D. Mass.)

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LANDS DIVISION

Assistant Attorney General Ramsey Clark

State Recording Statutes and Rules Not Applicable to Post Office Leasing Procedure; Specific Performance; Bona Fide Encumbrance; Issues Defined in Pre-Trial Order. First Federal Savings & Loan Association of Bremerton v. United States (C.A. 9, October 17, 1961). Pursuant to its usual procedure, the Post Office Department accepted an unacknowledged bid or proposal to construct and to lease a post office facility. The bidder conveyed the property to his construction contractor as security for construction costs. The contractor, in turn, acquired from appellant a construction loan secured by a mortgage covering the property. The Government went into possession after appellant had refused to subordinate formally its mortgage to the unrecorded proposal to lease. Appellant foreclosed its mortgage. The contractor sued the United States seeking damages for an alleged unlawful taking. That action was consolidated for trial with this action by the Government seeking a declaratory judgment and specific performance. Appellant obtained title to the property at a foreclosure sale and demanded rental in an amount greater than that provided in the proposal to lease. A detailed pre-trial order was entered.

The district court held that the nature, validity and enforceability of the proposal to lease is governed by federal and not state law. In an opinion not yet reported, it reasoned that the Government was engaged in an essential governmental function specifically empowered by the Constitution and that adherence to state law would yield varied results in an area where uniformity is desirable. Decreeing specific performance, the district court found that the proposal to lease constituted an agreement to execute a lease in the future, that the Government was under no duty to record the proposal, and that the Government's equitable right under the proposal was superior to the contractor's and appellant's rights since under the facts both acquired their interests with actual notice of the Government's right. The contractor's action was dismissed.

On appeal, appellant urged the applicability of state law (under which it may have been held that the Government was a tenant at will), contested the findings, and argued that specific performance should not be granted since the rental was inequitable. The Court of Appeals affirmed per curiam, "for the reasons and upon the grounds stated in the opinion of the District Court * * *." Citing the absence of an issue concerning the adequacy of consideration in the comprehensive pre-trial order, it declined to consider appellant's argument that the rental was inequitable. It also declared that the district court for the same reason was not obliged to consider that matter on appellant's suggestion after findings had been filed.

Staff: Raymond N. Zagone (Lands Division).

Condemnation: Admission or Rejection of Evidence and Action on Motion for New Trial Are Matters for Discretion of Trial Court. Robert Jayson v. United States (C.A. 5, October 13, 1961). This proceeding involved property for a federal building in downtown Dallas, Texas. A tract improved by a five-story building with basement, estimated to be 40 to 75 years old, was owned by appellants. They had purchased it three and one-half years prior to the taking for $200,000 and had spent about $150,000 in remodeling it. A small portion of the building had been leased at the time of taking. The Government valued the property at $326,000, and the landowners at $750,000. The jury verdict was $380,000. A motion for new trial was denied. It was based on exclusion of evidence, misconduct of the jury, and the refusal of the court to permit the landowners to show to the jury that a syndicate of individuals had executed a contract of indemnity to the Government protecting it against the cost of the property in excess of a certain amount, and refusal to make these individuals parties to the proceeding. The United States was represented at the trial by W. B. West III, then United States Attorney for the Northern District of Texas and now Executive Assistant in the Lands Division.

The Court of Appeals affirmed the judgment, holding: Rulings of evidence as to offers for the property prior to the taking, offers for portions of the building for office space, sales in the area which occurred after the date of taking, and questions in regard to the purchase of the subject property were matters for the trial court's discretion, and would not be reversed except for a clear abuse of discretion. Most of the acts of the jury complained of occurred in the jury room, and related largely to discussion between the jurors. The trial court would be presumed to have considered the affidavits of the jurors and to have applied correct legal standards in passing upon their admissibility and weight. The Court correctly declined to bring in as parties the individuals who indemnified the Government against the cost of the property above a certain figure. The only question involved was the value of the condemned property, and the only proper parties are the Government and the owners of the property. A motion for a new trial is directed to the judicial discretion of the trial court and its ruling will not be disturbed in the absence of a clear abuse of discretion. The verdict was based upon substantial evidence and would not be disturbed.

The Court of Appeals further held that there was no error in the court's sustaining objections to certain oral depositions and interrogatories of appellants, as that was also a matter for its discretion.

Staff: In the lower court, for the Government, former United States Attorney W. B. West III (N.D. Texas), now Executive Assistant (Lands Division); In the court of Appeals, Elizabeth Dudley (Lands Division)

Priority of Liens; Waiver of Immunity from Local Taxation; Interest Against United States. United States v. City of Springfield (C.A. 1); City of Springfield v. United States (C.A. 1 October 20, 1961). This suit was instituted by the United States to eliminate certain tax liens imposed by

the City of Springfield upon real property which had been mortgaged by the private owner to the Reconstruction Finance Corporation to secure a loan made to him by the RFC. Subsequent to the date of the mortgage, the mortgagor failed to pay local real estate taxes on the mortgaged property, whereupon tax title for the unpaid taxes passed to the City subject to a right of redemption. In 1955, the RFC assigned the note and mortgage securing the loan to the Secretary of the Treasury. Subsequent default by the mortgagor resulted in foreclosure of the mortgage and full title passed to the United States leaving a large unpaid balance on the loan. The district court held, (190 F. Supp. 817) that the tax liens had priority over the Government's interest as mortgagee because the RFC Act of January 22, 1932, 47 Stat. 8, as amended, 15 U.S.C. 607, provides that real property of the RFC was subject to local taxation; and that under Massachusetts law, a mortgagee's interest in realty is considered real property for tax purposes. The court refused to allow imposition of interest not specifically included in the tax.

Both the City and the United States appealed. The Federal Government contended that, although the RFC Act waived tax immunity on real property, "loans" made by the RFC were specifically excepted from the waiver in the statute. It was argued that a mortgagee's interest was included within the broad term "loans", and the exception showed an intent by Congress to preserve the priority of RFC's mortgage liens over local tax liens. It was also argued by the Government that the mortgagee's interest lost any pretense of taxability when it was assigned by the RFC to the Secretary of the Treasury because the applicable statute did not waive tax immunity but provided only that payments in lieu of taxes were to be made, and the interest of the Government could not be made subject after such transfer to local tax liens inferior in time. The Court of Appeals, however, affirmed the district court's judgment in all respects, stating that nothing could be added to the lower court's opinion.

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

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CIVIL TAX MATTER
District Court Decision

Federal Tax Lien Accorded Priority Over Competing Liens Asserted by Surety, Materialman, and Judgment Creditors. Board of Education of the City of Pleasantville v. Aiken, et al. (Superior Court, N. J., August 2, 1961) 61-2 USTC § 9676. An assessment was made for unpaid withholding taxes against the taxpayer, Aiken, on January 31, 1958, and notice of the tax lien was duly filed on March 21, 1958. On June 21, 1958, Aiken entered into a contract with the Board of Education under which he was to perform certain work. Pursuant to New Jersey law, Aiken obtained a surety bond in favor of the Board of Education, materialmen and laborers. A, a materialman, furnished Aiken with materials necessary for completion of Aiken's contract. As security for payment of the materials, Aiken executed an assignment to A on August 9, 1958, of $1,350 due him from the Board of Education on completion of his contract. On August 29, 1958, after notice from the Board of Education of Aiken's imminent default, the surety advanced $425 to Aiken and B, another materialman, jointly, to enable Aiken to complete the contract. On August 4, 1958, and August 25, 1958, judgment creditors of Aiken had attempted to make execution on their respective judgments of the Board of Education for the money due Aiken. The Board of Education accepted the work in September of 1958 and determined that the balance due to Aiken under the contract was $3,350. The Board of Education then brought an interpleader suit to determine the various rights of the claimants to the fund.

The lien of the United States arose under Section 6321, Internal Revenue Code of 1954, and the Court, therefore, first determined under the United States Supreme Court decisions in Aquilino and Durham Lumber Co. whether Aiken had any "property" or "rights to property" in the fund in question to which the tax lien could attach. The Court then referred to New Jersey law to resolve the priority issues.

With respect to the claim of the surety, the Court found that it had the right of subrogation where it had paid out claims which it was obligated to do under the terms of the surety bond. The Court pointed out that the surety's advancement was made jointly to Aiken and B and, therefore, the surety was subrogated only to the rights of B and not to the rights of the Board of Education, there having been no actual default by Aiken as evidenced by the Board's acceptance of the work.

As to the claim of A based upon the assignment made to it, the Court found the assignment was not executed until four months after the notice of tax lien had been duly filed and the tax lien was accorded priority.

The Court then discussed the claim of A and the surety (as subrogee of B) based on their rights as materialmen. Neither had filed notice as provided

by New Jersey law. The claimants contended the money due Aiken constituted an equitable trust fund from which all unpaid materialmen were to be paid. The Court, is discussing several New Jersey decisions wherein the courts had found an equitable trust existed, distinguished those cases from the instant case on the ground that (1) the funds to be used by the Board of Education for payment of the contract to Aiken had not been physically segregated from the general municipal funds; (2) the funds herein involved were part of the Board of Education's general appropriations to be spent for any purpose the Board saw fit and there were no limitations placed upon their disbursement of the money.

Further, the Court found that there was no default by the contractor, Aiken, in the instant case and he was therefore entitled to the fund under general contract principles, due to the failure of A and the surety (as subrogee of B) to follow statutory procedure provided to protect such claims.

As to the judgment creditors, the Court found no judgment lien arose under the respective judgments until delivery of the writ of execution to the sheriff which was done subsequent to the filing of the notice of federal tax lien. Therefore, the claim of the United States was granted priority over all competing claims.

Staff: United States Attorney David M. Satz, Jr. (D.N.J.); and Norman E. Bayles (Tax Division)

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