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UNITED STATES ATTORNEYS

BULLETIN

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Vol. 10 January 12, 1962 No. 1

COOPERATION AMONG LAW ENFORCEMENT OFFICIALS

One of the most important adjuncts to the successful operation of a United States Attorney's office is the goodwill and cooperation of State and local law enforcement officials. This is true in all types of cases but particularly so in the handling of organized crime matters where such officials' broad experience and knowledge of the local situation can be of invaluable assistance to United States Attorneys. The Attorney General is most interested in establishing cordial and mutually helpful working relationships not only among Federal enforcement agencies in the field, but more importantly, between the United States Attorneys' offices and those of State and local law enforcement officials. Accordingly, he desires that all United States Attorneys maintain close liaison with the heads of all State and local enforcement agencies in their districts.

MONTHLY TOTALS

Totals in all categories of work pending in United States Attorneys' offices rose during the month of November. The aggregate of pending cases and matters shows the largest total for any month in the last five and one half years. The following analysis shows the number of items pending in each category as compared with the total for the previous month:

	October 31, 1961	November 30, 1961	
Triable Criminal	8,004	8,100	+ 96
Civil Cases Inc. Civil Less Tax Lien & Cond.	15,338	15,443	+ 105
Total	23,342	23,543	+ 201
All Criminal	9,608	9,712	+ 104
Civil Cases Inc. Civil Tax & Cond. Less Tax Lien	18,274	18,374	+ 100
Criminal Matters	11,773	12,039	+ 266
Civil Matters	14,379	14,597	+ 218
Total Cases & Matters	54,934	54,722	+ 688

Criminal and civil filings showed an increase over the comparable period of the previous fiscal year. Civil filings, particularly, showed an upturn of 319 cases, or 3.2 per cent. As of November 30, the pending case load was almost 12 per cent above the same period in fiscal 1961. Triable criminal cases pending were 8.7 per cent higher than at the beginning of the backlog drive in August 1954. Pending civil cases

including condemnation but less tax lien continued to show the highest total for the past five and one half years. The pending case load is now 11 per cent higher than for the first five months of fiscal 1961. The breakdown below shows the pending totals on the same date in fiscal 1961 and 1962.

	First 5 Mos. F.Y. 1961	First 5 Mos. F.Y. 1962	Increase or Decrease Number	%
Filed				
Criminal	12,286	12,413	+ 127	+ 1.03
Civil	9,943	10,262	+ 319	+ 3.21
Total	22,229	22,675	+ 446	+ 2.01
Terminated				
Criminal	11,409	11,035	- 374	- 3.28
Civil	8,799	8,496	- 303	- 3.44
Total	20,208	19,531	- 677	- 3.35
Pending				
Criminal	8,498	9,712	+ 1,214	+ 14.29
Civil	20,383	22,400	+ 2,017	+ 9.90
Total	28,881	32,112	+ 3,231	+ 11.19

Total case filings and terminations during November fell below those for the preceding month, with the exception of criminal case filings which rose 91 above the previous month. 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
Oct.	2,715	2,259	4,974	2,709	1,951	4,660
Nov.	2,806	2,002	4,808	2,702	1,800	4,502

For the month of November 1961, United States Attorneys reported collections of $2,890,741. This brings the total for the first five months of fiscal year 1962 to $15,026,718. Compared with the first five months of the previous fiscal year this is an increase of $2,214,891 or 17.29 per cent over the $12,811,827 collected during that period.

During November $2,214,421 was saved in 60 suits in which the Government as defendant was sued for $2,417,826. 32 of them involving $803,065 were closed by compromises amounting to $119,664 and 13 of them involving $325,415 were closed by judgments against the United States amounting to $83,741. The remaining 15 suits involving $1,289,346 were won by the government. The total saved for the first five months of the current fiscal year was $14,515,332 and is an increase of $3,168,976 over the $11,346,356 saved in the first five months of fiscal year 1961.

DISTRICTS IN CURRENT STATUS

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

CASES

Criminal

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

CASES

Civil

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

MATTERS

Criminal

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

MATTERS

Civil

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

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ANTITRUST DIVISION

Assistant Attorney General Lee Loevinger

SHERMAN ACT

Monopoly; Restraint of Trade; Nine Count Indictment Filed Under Sections 1 and 2. United States v. Minnesota Mining and Manufacturing Company. (E.D. Ill.) On December 13, 1961, a grand jury in Danville, Illinois returned a nine-count indictment against Minnesota Mining and Manufacturing Company charging the firm with attempting to monopolize and conspiring to restrain and to monopolize trade in three different industries--pressure sensitive tape, magnetic recording tape or media, and aluminum presensitized lithographic plates, in violation of Sections 1 and 2 of the Sherman Act. It further alleged that, in the pressure sensitive tape industry, Minnesota and others conspired to fix prices and entered into agreements to divide markets.

No other defendants were named; however, the following were named as co-conspirators: in the tape industry--Johnson & Johnson and four of its subsidiaries which made tape, the Kendall Company (Bauer & Black Division), Norton Company (Behr-Manning Division), and the Seamless Rubber Company, and Johns-Manville Corporation; in magnetic recording media--Armour Research Foundation of Illinois Institute of Technology; and in aluminum presensitized lithographic plates--A. B. Dick Company.

It was alleged that Minnesota, a widely diversified company located in St. Paul, Minnesota, had in 1960 sales totalling approximately $549,000,000 and total assets of about $447,000,000. The gist of the charge is that Minnesota employed its patents as weapons to coerce its competitors into signing highly restrictive patent license agreements with Minnesota under which Minnesota would control the price, the manufacturing, and the manner of distribution of the products made by its competitors. During the period of time from 1931 to 1960, it was charged that Minnesota came to account for more than 57 per cent of the total sales in the pressure sensitive tape industry--for about 62 per cent of the sales in the magnetic recording media industry--and for about 63 per cent of the sales in the aluminum presensitized lithographic plate industry. Of the total sales of $232,500,000 in the three industries, Minnesota represented over $136,000,000.

Staff: Earl A. Jinkinson, Raymond P. Hernacki, Theodore T. Peck, Harry H. Faris, Leon E. Lindenbaum and Elliott B. Woolley. (Antitrust Division).

Monopoly; Restraint of Trade; Nolo Pleas Entered and Fines Imposed. United States v. Consolidated Laundries Corporation, et al. (S.D. N.Y.). On November 30, 1961, all defendants, with the permission of the Court

and the consent of the Government, changed their pleas from not guilty to nolo contendere. The indictment returned on January 31, 1957, charged defendants in two counts with a combination and conspiracy to restrain and to monopolize interstate trade and commerce in linen supplies in New York and New Jersey. Chief Judge Sylvester J. Ryan imposed sentences in accordance with the recommendations of the Government in the amount of $319,000.

Staff: John J. Galgay, Morris F. Klein, Paul D. Sapienza, Bernard Wehrmann and Ronald S. Daniels. (Antitrust Division).

Amended Complaint as to General Electric Company. United States v. Westinghouse Electric Corporation, et al. (E.D. Pa.). On December 22, 1961, an amendment to the complaint as to defendant General Electric Company in this case was filed asking for broader relief than was prayed for in the original complaint and alleging the additional facts on which the need for broader relief is based. The amended complaint sets forth facts showing the size and economic power of General Electric Company. It points out that General Electric's annual sales amount to over $4,000,000,000 with domestic annual sales of heavy electrical equipment amounting to over $500,000,000; and that General Electric manufactures and sells a wide range of products from household appliances to atomic reactors.

The necessity for broader relief is asserted in the amended complaint because of "General Electric's proclivity for persistent and frequent involvement in antitrust violations and the scope, nature, and breadth of its long continued willful conspiratorial activities in the heavy electrical equipment industry." The amended complaint lists 39 separate antitrust actions against General Electric, 36 of those since 1941 comprising 29 convictions, seven consent decrees, and three adverse findings by the Federal Trade Commission.

The amended prayer for relief, among other things, asks the Court to enjoin General Electric perpetually with respect to any product from (1) entering into any agreement with its competitors to eliminate or suppress competition; allocate territories or markets; fix prices; submit noncompetitive, collusive, or rigged bids or quotations; exchange information concerning bids, prices, or conditions of sale; or limit, restrict, or prevent sales by any manufacturer to any person or class of persons; and (2) communicating to or exchanging with any competitor its prices, terms or conditions of sale in advance of the release of such information to the trade generally; or its intent to submit or not submit a bid, the fact that it has or has not submitted a bid, or the contents of a bid prior to the official bid opening.

The amended prayer also asks for orders applying to heavy electrical equipment which (1) forbid General Electric from refusing to sell and from discriminating in the offering for sale and in the sale of

heavy electrical equipment or components thereof to manufacturers or assemblers engaged in the manufacture, distribution or sale of such equipment; from belonging to or participating in any trade association or other organization with objectives or activities which are inconsistent with the terms of the judgment entered; or from using any cost or pricing formulae not independently arrived at; and (2) require General Electric to withdraw and review its current prices and issue new price lists based on its individual cost figures and judgment as to profits; and submit reports to the court, the Department of Justice and to public agencies to show and attest to its adherence to the injunction prayed for.

This amended complaint against General Electric does not involve other defendants in the civil cases stemming from the Philadelphia electrical conspiracies.

Staff: George D. Reycraft, Baddia J. Rashid, Donald G. Balthis, John E. Sarbaugh, Gordon B. Spivack and Morton M. Fine. (Antitrust Division).

Fines Imposed in Contempt Case. United States v. General Dynamics Corporation, et al. (E.D. N.Y.). On December 15, 1961, the Court sentenced the eight respondents in the amount of $186,000.

On June 8, 1961, Olin and Chemetron had moved under Rules 2, 12(b)(4) and 14, F.R. Crim. P., for a separate advance trial of the question whether they had the requisite notice of the final judgment of March 7, 1952 to hold them, non-parties, for criminal contempt. The Government opposed this motion on the grounds that (1) it improperly sought a pretrial determination of a part of the general issue in the case; (2) the granting of such motion would prejudice the Government's trial (a) by forcing it to conform its order of proof to the mold determined by the respondents, (b) by revealing in advance of trial many of the Government's witnesses, and (c) because there would be a serious question in any attempt to limit cross-examination by the other six respondents in the case, if a witness testifying about notice gave direct testimony as to the conspiracy; (3) granting of the motion would have increased the burden on the Court due to the overlapping nature of the testimony required to show notice and to prove the conspiracy, because it would require a number of witnesses to be called twice; and (4) because an insufficient showing of necessity had been made to outweigh the prejudice to the Government's case. The Court denied the motion without opinion on June 19, 1961.

On November 14, 1961, the Court accepted pleas of guilty by General Dynamics and Air Reduction Company and pleas of nolo contendere from their four officials, which were changed from their former pleas of not guilty. Thereupon, Olin and Chemetron sought to have the court fix the Government's order of proof so that the issue of knowledge would be tried in advance of the issue of the violations alleged in the petition.

The Government opposed this motion on the grounds that (1) it sought to lay the groundwork for permitting a motion to acquit prior to the close of the Government's case, contrary to Rule 29, F. R. Crim. P., which permits a motion for acquittal only after all the evidence is in; (2) that it sought to have the Court adopt in advance of trial an erroneous theory as to the requisite notice in a criminal contempt action, namely, that Chemetron and Olin had to know not only of the provisions of the judgment but that the judgment applied to them, contrary to the plain language of Rule 65(d), F. R. C. P.; (3) that until the Court had heard the evidence as to Chemetron's and Olin's illegal relationship with Pure and Liquid, it could not properly determine their liability, because it was the participation with Pure and Liquid in disobeying the Court's order with knowledge of its existence, that made Chemetron and Olin liable under Rule 65(d), and (4) that this was merely a reargument of the motion for a separate trial. The Court denied this motion on November 14, 1961, and on November 21, 1961, Olin and Chemetron, over the Government's objection, were permitted to change their pleas of not guilty to nolo contendere.

Staff: Bernard M. Hollander, Alfred Karsted and Allen E. McAllester. (Antitrust Division)

CLAYTON ACT

Indictment Filed Against Two Individuals Under Section 14. United States v. Victor D. Kniss and Alton K. Marsters. (E.D. Wis.). On December 11, 1961, the grand jury returned an indictment against Victor D. Kniss, Executive Vice President of the American Optical Company and Alton K. Marsters, Vice President of Bausch & Lomb, Inc., charging each in two counts with violations of Section 14 of the Clayton Act. This charge is based on these individuals having authorized, ordered or done the acts involved in the effectuation of the terms of the conspiracies in violation of the Sherman Act which were entered into by American Optical and Bausch & Lomb, respectively. The return of this indictment was necessitated by the fact that the same individual defendants were named as defendants, along with their respective corporate principals American Optical and Bausch & Lomb, in United States v. American Optical Company, et al., 61 Cr. 82, charging a violation of Sections 1 and 2 of the Sherman Act, with that indictment being dismissed by the Court as to the individual defendants on the ground that the penal provisions of the Sherman Act were not applicable to them when they were acting in a representative capacity.

This Section 14 indictment is the first superseding one filed separately against individuals as to whom a Sherman Act indictment had been previously dismissed.

Staff: Earl A. Jinkinson, Willis L. Hotchkiss, Theodore T. Peck and Harold E. Baily. (Antitrust Division).

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CIVIL DIVISION

Assistant Attorney General William H. Orrick, Jr.

COURT OF APPEALS

JUDICIAL REVIEW

Review by Air Force Board for Correction of Military Records Not Necessary Step in Exhaustion of Administrative Remedies Preliminary to Judicial Review. William B. Ogden v. Eugene M. Zuckert, Secretary of Air Force, (C.A.D.C., December 14, 1961). Ogden, a commissioned Air Force Officer with 16 years of service, was discharged from the Air Force for medical reasons after review by a Medical Board consisting of three Medical Officers of the Air Force, The Physical Evaluation Board, the Air Force Review Counsel, and the Air Force Disability Appeal Board. He then instituted an action in the district court seeking a declaratory judgment that he was entitled to be put on a permanent disability retired list of the Air Force rather than being discharged.

The district court granted the Government's motion to dismiss the complaint holding that plaintiff, by failing to resort to the Air Force Board for Correction of Military Records, had not exhausted his administrative remedies. The Court of Appeals reversed and remanded holding that jurisdiction of the district court was not precluded by plaintiff's failure to seek relief through the Board. The Court noted that the statute, under which the Board was established, obviously was intended by Congress to take the place of private bills for relief from error or injustice at the hands of the Armed Services but that the Congressional plan was not designed to bring the Board into the original administrative process of making the record nor to affect judicial jurisdiction. In remanding the case, however, the Court stated that the court below, in the exercise of its discretion, could refrain from exercising jurisdiction to decide the case pending plaintiff's pursuit of relief through the Board, the district court retaining jurisdiction in the meantime.

Staff: United States Attorney David C. Acheson;
Principal Assistant Charles T. Duncan;
Assistant United States Attorney Arnold T. Aikens (Dist. Col.)

FEDERAL TORT CLAIMS ACT

Serviceman Negligently Examined During Pre-induction Medical Examination and Found Qualified for Military Service, Despite Existence of Heart Condition, Cannot Maintain Action Against Government for Aggravation of Heart Condition During Basic Training. Healy v. United States, (C.A. 2, November 30, 1961). John P. Healy brought suit seeking damages for negligence of the Government in certifying him for active duty at a

pre-induction physical examination in spite of a heart condition which was later aggravated during basic training. The district court dismissed the complaint on the ground that the action was barred by the rule of Feres v. United States, 340 U. S. 135, holding the Government immune from suits by servicemen for injuries that arise in the course of activity incident to military service. The district court rejected plaintiff's argument that since the alleged negligence occurred at the pre-induction medical examination, he should be allowed to maintain the suit. While not ruling on a situation where both the negligent act and the injury occurred at the pre-induction examination, the court held that because the injury occurred after induction, the action could not be maintained. The Court of Appeals affirmed, per curiam, holding that the Feres rule precluded the suit.

Staff: John C. Eldridge (Civil Division)

In Absence of Control Over Details of Work, United States Owes No Duty to Employees of Independent Contractor to Provide for Taking of Safety Precautions in Manufacture of Explosive Component of Rocket by Contractor in His Own Plant. Galbraith v. United States, and Three Other Cases (C.A. 2, December 1, 1961). In awarding a procurement contract to Spencer Explosives, Inc., for the manufacture of a highly sensitive initiating explosive, the Government made no provision in the contract, or otherwise, for safety precautions to be taken by the contractor. The work was done at the contractor's plant, with its own tools and equipment, and under its supervision and control. In three separate explosions which occurred during the mixing process, and which resulted in part from the contractor's negligence in failing to provide adequate protection and supervision, one employee of the contractor was killed and three were injured. In four separate suits, which were consolidated for trial, plaintiffs maintained that (1) the Government was negligent in the award of the contract to an incompetent contractor, and (2) because of the "inherently dangerous" character of the work, the Government owed a non-delegable duty, which it did not perform, to provide in the contract or otherwise that the contractor take reasonable safety precautions.

The district court found that the Government was not negligent in making the award to Spencer and that Spencer was competent; and, relying upon Dalehite v. United States, 346 U.S. 15, it held that liability on the part of the United States under either of plaintiffs' contentions was precluded by the "discretionary function" exclusionary provision of the Federal Tort Claims Act (28 U.S.C. 2680(a)), for the reasons that both the award of the contract and the determination as to what provision, if any, the Government would make in the contract, or otherwise, for the taking of safety precautions by the contractor were matters of discretion decided at the planning level.

The Court of Appeals affirmed. However, it avoided any discussion of the "discretionary function" provision by holding that the findings of

the district court of no negligence in the award and of the competence of the contractor were not "clearly erroneous", and by agreeing with the Government's position that neither under New York law, nor, did it appear, under the law of any other state, was such a non-delegable duty imposed upon the hirer of an independent contractor in the circumstances of this case in favor of the contractor's employees. In connection with this latter holding, the Court pointed out that while New York places upon the hirer of an independent contractor the duty to supervise inherently dangerous work, this duty applies only where the hirer controls the land upon which the work is performed or exercises supervision and control over the particular project; that, in addition, the law makes a distinction between the public at large and business invitees on the one hand and employees of the independent contractor on the other; and that the New York cases, and cases from other jurisdictions, bear out this distinction.

Staff: Kathryn H. Baldwin (Civil Division)

COURT OF APPEALS

CIVIL SERVICE

Employee Entitled to Trial on Question Whether Resignation Had Been Coerced. Ernest Paroczay v. Luther H. Hodges, (C.A.D.C., December 28, 1961.) Appellant brought suit in the District Court for the District of Columbia seeking a declaratory judgment that his resignation from the Weather Bureau, Department of Commerce, was not legally effective, and an order restoring him to his position. The District Court granted the Government's motion for summary judgment on the ground that the resignation was voluntary. The Court of Appeals reversed holding that appellant's affidavit stating that he resigned when confronted with a threat that serious charges of misconduct would be immediately instituted if he did not immediately resign, presented a question of fact as to whether the resignation was voluntary and, therefore, precluded the grant of summary judgment. The Court distinguished Rich v. Mitchell, 106 U.S. App. D.C. 343, 273 F. 2d 78, certiorari denied, 368 U.S. 854 on the ground that, in Rich, there was no demand for an "immediate resignation under threat of immediate charges"; Rich was given three days within which to consider the course which he would adopt; and a request for an opportunity to consult family and friends was not rejected, (as appellant's affidavit states occurred in the instant case).

Staff: United States Attorney David C. Acheson, and Assistant United States Attorney Charles T. Duncan (D.D.C.)

CONTRACTS

Contracting Agency's Determination Under Standard Disputes Clause Upheld. United States v. Hamden Cooperative Creamery Company, Inc. (C.A. 2, December 14, 1961). The Commodity Credit Corporation entered

into a contract with Hamden for delivery of extra grade milk powder fit for human consumption. The milk powder was delivered to and accepted by the Government in May and June of 1950. Subsequently, inspections by the New York State officials discovered that Hamden's plant was infested with larvae. In September, 1950, the Government reinspected the May and June shipment and found that they were infested with larvae. The Government, therefore, requested Hamden to accept return of the shipments and upon Hamden's refusal the infested powder was sold as animal feed at a loss to the United States of $12,386.60. The Government demanded payment of the above sum as damages.

Hamden appealed to the Contract Disputes Board which determined that the milk powder was infested at the time of delivery and that the defect was a latent one. Upon Hamden's refusal to pay the $12,386.60, the Government brought this action to recover the sum. The district court granted the Government's motion for summary judgment. The Court of Appeals affirmed, holding that the questions of when and how the milk became infested were questions of fact; that the questions having been resolved by the Disputes Board, Hamden would not be heard to say that the Disputes Clause did not apply to an executed contract; that there was substantial evidence supporting the Board's determination; and its determination, by the terms of the Disputes Clause and the Wunderlich Act (41 U.S.C. 321), was conclusive on the court. Further, the Court of Appeals held that on the facts as found by the Board, Hamden had breached its implied warranty that its milk was fit for human consumption; that whether the notice to Hamden of the breach was timely and adequate was a factual matter for the Board, and its decision, supported by substantial evidence, was not to be disturbed by the district court or the Court of Appeals.

Staff: John G. Laughlin (Civil Division)

SOCIAL SECURITY ACT

Inadequate Evidentiary Basis for Administrative Decision That Claimant Will Be Able to Engage in Substantial Gainful Activity After Undergoing Spinal Fusion Operation. Ribicoff v. Ira Hughes. (C.A. 8, December 1, 1961). Hughes, who had a sixth grade education and experience in various manual occupations, applied for disability insurance and a period of disability pursuant to Sections 216 and 223 of the Social Security Act, 42 U.S.C. 416, 423, claiming that he was disabled by a serious back impairment. His applications were denied by a Social Security Administration referee, whose decision became the final decision of the Secretary, on the grounds that (1) claimant's condition was remediable by surgery, and (2) he was not presently unable to engage in any substantial gainful activity. Claimant brought suit in the district court to review the Secretary's decision. The district court reversed, ruling that the fact that an impairment is remediable by operation does not preclude the finding of a disability and that there was no substantial evidence to support the finding that claimant could presently engage in a substantial gainful activity.

On appeal the Secretary urged reversal only on the basis that the district court had erroneously disregarded 20 C.F.R. 404.1501 (g), which precludes the grant of disability benefits to one who "with reasonable effort and safety" can diminish his impairment to the extent that he can then engage in substantial gainful activity. Although the Court of Appeals did not question the validity of the regulation, it affirmed the decision below. The Court concluded that, in view of claimant's limited educational and work background, there was an inadequate evidentiary basis for a finding that claimant would be able to engage in a substantial gainful activity even after undergoing the spinal fusion operation which several doctors had recommended.

Staff: Marvin S. Shapiro (Civil Division)

DISTRICT COURT

ADMIRALTY

Failure to Serve Attorney General With Copy of Libel "Forthwith" in Public Vessels Act Suit Requires Dismissal of Libel Under 46 U.S.C. 742 and 782. Battaglia v. United States. (S.D. N.Y., December 1, 1961). On October 15, 1959 libelant was injured while working as a longshoreman aboard the USNS FRANCIS X. McGRAW. His libel was filed with the Clerk of the Southern District of New York and served on the United States Attorney on June 8, 1961. By October 25, 1961 libelant had not yet served a copy of his libel by registered mail on the Attorney General as required by 46 U.S.C. 742 and 782. The Government on the latter date moved to dismiss the libel for failure to effect service of process upon the United States within the two-year period of the Admiralty Claims Act. On October 26, 1961 libelant mailed a copy of the libel to the Attorney General. Libelant opposed on the allegations that various representations had been made to his proctor during the period between the filing of the libel and the expiration of the statutory limitations period that an answer would be filed. The Government filed an affidavit denying any such representations. The Court granted the motion and dismissed the libel on the grounds that the requirement of "forthwith" service upon the Attorney General had not been complied with by making such service on October 26, 1961. The Court rejected libelant's defense of representations by the Government on the grounds that libelant's opposing affidavit admitted no such representations were made until 6 weeks after the libel was filed and that by that time libelant had failed to comply with the "forthwith" requirement. The Court did not discuss the Government's contention that under Munro v. United States, 303 U.S. 36 (1937) any such representations, if made, would not preclude the Government's assertion of the defense of lack of service of process.

Staff: Walter L. Hopkins (Civil Division)

FEDERAL TORT CLAIMS ACT

Malpractice - Local Standard of Care; Wrong or Mistaken Diagnosis; Res Ipsa Loquitur. Debby Pilkay v. United States. (N.D. Ill. December 12, 1961.) Suit was brought for negligence, lack of care, and improper diagnosis and treatment of the infant, plaintiff, at the Naval Hospital, Portsmouth, Virginia. The infant was brought to the Morrell Pediatric Clinic, Norfolk, Virginia, on December 20, 1957, for treatment as a Navy dependent. The child had been ill for three days with upper respiratory infection, dry cough and fever, was irritable, refused to eat, and exhibited general lack of interest in her surroundings. The infant had a temperature of 102 degrees and a provisional diagnosis was made of early pneumonia or meningitis. She was later that day transferred to the Naval Hospital, where she remained under treatment until discharged on January 3, 1958. While at that hospital the infant was examined and treated by various doctors who performed subdural taps, spinal taps and treated the child generally with anti-convulsant drugs because of convulsive symptoms resembling epilepsy. The hospital was unable to reach an etiologic diagnosis of the child's illness and reached a provisional diagnosis of status epilepticus convulsivus. When discharged from the hospital on January 3, 1958 the child was blind and paralyzed with no control over her extremities, urinary or bowel functions. The Court made findings of fact and conclusions of law on November 27, 1961 dismissing the complaint pursuant to Rule 41 (d), F.R.C.P. Specifically, the Court concluded that (1) plaintiff failed to prove the standard of care of physicians in the same or similar communities; (2) an acceptable standard of care was followed in 1957 and 1958 which was that of physicians and surgeons of ordinary skill and learning in the Portsmouth, Virginia area; (3) the infant had obscure symptoms which led to several provisional diagnoses, and the existing condition could have been due to a number of causes, including viral encephalitis, most of which causes were eliminated by study of various tests and the exercise of ordinary care and judgment. The Court stated that a wrong diagnosis or a mistake in diagnosis does not prove that it was a negligent one: "Where the symptoms are obscure there is no liability for a mistake in diagnosis." The Court held the doctrine of res ipsa loquitur to be inapplicable under the circumstances.

Staff: United States Attorney James P. O'Brien and Assistant United States Attorney D. Arthur Connelly (N.D. Ill.) Irvin M. Gottlieb (Civil Division)

LIMITATION OF LIABILITY ACT

Exceptions and Exceptive Allegations to Government's Petition for Limitation of Liability Consisting of Factual Matter Not of Record or of Which Court May Not Take Judicial Notice, Overruled. Petition of United States of America, As Owner of Air Force Texas Tower No. 4 for Exoneration From or Limitation of Liability (S.D.N.Y. November 14, 1961.) The United States as owner of Texas Tower No. 4 petitioned for limitation

of liability pursuant to 46 U.S.C. 183-89. The petition alleges that the Tower was "a public vessel of the United States", "a vessel consisting of a multi-decked platform in the shape of an equilateral triangle stationed 80 miles east of Barnegat Inlet, N. J. bearing 84 miles southeast of Coney Island, N.Y." and alleges that "petitioner used due diligence to make The No. 4 seaworthy, and at all times hereinafter mentioned it was tight, staunch, strong, fully and properly manned, equipped and supplied and was in all respects seaworthy and fit for the service in which it was engaged." Claimants filed exceptions and exceptive allegations to this petition, asking that it be dismissed on the ground that the petition and exceptive allegations prove that the Tower was not a "vessel" within the meaning of the limitation of liability statute. The Government contended that the exceptive allegations should be overruled since they consist of factual matter regarding the construction, characteristics, and purpose of a Texas Tower and that in effect, claimant had moved for summary judgment. In addition, one claimant had moved for dismissal on the ground that the petition did not sufficiently set forth facts showing that the Tower was a "vessel."

The Court overruled the exceptions and exceptive allegations holding that (1) exceptive allegations are properly used to bring to the attention of the Court matters of record or of which the Court may take judicial notice but that they may not be used to assert facts that may be disputed by the petitioner, and thus to obtain summary judgment; and (2) the allegations in the petition that the Tower was a "vessel" were sufficient to withstand the exception of the face of the petition.

Staff: Gilbert S. Fleischer (Civil Division)

SUPREME COURT OF LOUISIANA

HOUSING

Local Housing Authority Precluded From Placing Fire Insurance Policy With Mutual Insurance Company by Louisiana State Constitution. Public Housing Administration v. Housing Authority of City of Bogalusa. (Supreme Court of Louisiana, December 11, 1961). Public Housing Administration entered into a contract with the Housing Authority of the City of Bogalusa to provide financial assistance for the development of low-rent housing. As part of the contract, the Housing Authority was to provide fire insurance on the project and award the policy to the lowest responsible bidder, taking into account the past dividend policy of the competing insurance companies. The Housing Authority refused to place a policy with a mutual insurance company despite the fact that, considering its dividend policy, the mutual company was the lowest bidder. The assigned reason was that to do so would constitute an investment by the State in a private enterprise, an act which is prohibited by the State Constitution.

In an action for declaratory judgment, the Louisiana Supreme Court affirmed a lower appellate court's reversal of the trial court's decision that placing the policy with a mutual company did not violate the State Constitution. The State Supreme Court held that a member of a mutual insurance company becomes entitled to a dividend only by virtue of his part ownership of the company's assets and therefore such membership by the housing authority would constitute an investment in a private enterprise which is prohibited by the Louisiana State Constitution.

Staff: United States Attorney M. Hepburn Many

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C I V I L R I G H T S D I V I S I O N

Assistant Attorney General Burke Marshall

Interstate Commerce; Motor Carrier Act of 1935; Racial Discrimination in Vehicles and Terminals; Suit to Enjoin Enforcement of Commission's Rules Prohibiting Segregation of Bus Passengers. State of Georgia and Georgia Public Utilities Commission v. United States and Interstate Commerce Commission, (N.D. Ga.) This was an action to enjoin the enforcement of a regulation of the Interstate Commerce Commission, effective November 1, 1961, entitled Discrimination in Operations of Interstate Motor Carriers of Passengers, No. M-C-C-3358, 49 C.F.R. 180(a), in which the Commission prohibited motor common carriers of passengers from operating a motor vehicle in interstate or foreign commerce on which the seating of passengers is based upon race, and similarly prohibited such carriers from utilizing any terminal facility in which racial segregation is practiced. The Commission found that because segregation of intrastate passengers could not be effected without necessarily discriminating against interstate passengers, carriers must be prohibited from utilizing vehicles and facilities of interstate commerce in which either class of traveler is segregated on the basis of race. The State of Georgia and the Georgia Public Service Commission asserted that the regulations are invalid because their effect is to control the seating of intrastate passengers, over whom the Commission, it was contended, has no jurisdiction under the Motor Carrier Act. The State also alleged that the anti-discrimination provision of the Act (Section 216(d)) could not be enforced by a general rule and that, in any event, the Commission had failed to make necessary findings of fact. The case was argued before a three-judge District Court, which found the regulations to be valid. The Court held that the Commission may regulate the vehicles and facilities of interstate commerce regardless of the incidental effect upon intrastate commerce. The Court also held that the Commission was empowered to move by general rule and that its findings were adequate.

Staff: United States Attorney Charles L. Goodson; Robert W. Ginnane, General Counsel, Interstate Commerce Commission; Harold H. Greene, Richard A. Solomon, and Alan G. Marer (Civil Rights Division); Leonard S. Goodman, Attorney, Interstate Commerce Commission.

Injunctive Proceedings to Restrain State from Prosecuting Negro Active in Voting Movement. U.S. v. John Q. Wood, Registrar of Voters, et al., (C.A. 5). This case, discussed in the Bulletin for October 6, 1961, involves interference with Negro voting rights by "trumped-up" state prosecution and the appealability of a district court refusal to issue a temporary restraining order against the state proceedings.

The case was argued by Assistant Attorney General Marshall. The Court of Appeals for the Fifth Circuit held, in a 2 to 1 decision, that the district court had erred in refusing to grant the temporary restraining order.

The substantive issue involved the Government's contention that the very trial of John Hardy on false charges would, in itself, constitute a violation of the Civil Rights Act of 1957, 42 U.S.C. 1971, because if the state trial were allowed to proceed, Negroes who might otherwise desire to vote, but who believe they would be put to the expense, difficulty, and risk of a state criminal proceeding, would be thereby intimidated. The Court of Appeals held that the Government's complaint stated a claim for relief under section 1971, and that jurisdiction under the statute was mandatory, precluding the exercise of equitable discretion to refuse to entertain the claim on the grounds of the normal reluctance of federal courts to interfere with pending state criminal proceedings.

On the procedural issue, the Court held that because the case would become moot if the trial were allowed to proceed, the order of the district court refusing to issue a temporary restraining order was a "final judgment" within the meaning of 28 U.S.C. 1291(a) and therefore appealable.

The decision is especially significant because federal power to protect Negroes from intimidation in the voting area is held to cover intimidation effected by criminal law enforcement, and it is also novel in that for the first time a federal court has enjoined a pending state criminal trial begun prior to the federal action.

The case was remanded to the district court for a full hearing, with orders to grant the temporary restraining order unless the state agreed to further delay of Hardy's prosecution. A motion for rehearing is pending.

Staff: Assistant Attorney General Burke Marshall, John Doar, Harold H. Greene, Alan G. Marer, Isabel L. Blair (Civil Rights Division).

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

FALL-OUT SHELTER PROGRAM

Inspection and Approval Requirements for FHA Loans for Fall-out Shelters. In his letter dated November 16, 1961, Assistant Attorney General Miller alerted United States Attorneys to the fact that the Department was cooperating with the Federal Housing Administration to tighten controls over the issuance of home improvement loans for fall-out shelters. As a result of recent discussions with the Criminal Division, the FHA has announced special inspection and approval requirements for these loans. The new regulations require banks, savings and loan firms and other lenders to inspect completed shelters, prior to disbursement, and certify that the construction conforms with FHA and Defense Department standards.

Before granting a loan, the lender must submit plans for a proposed shelter to the nearest FHA office for approval. Only after the FHA office issues a "Statement of Eligibility" can a lender authorize a homeowner or contractor to proceed with construction. When the shelter is completed, the lender must conduct an inspection and certify to FHA that the finished structure is in substantial conformance with the plans and specifications which were the basis for the issuance of the "Statement of Eligibility." Inspection by the lender must precede disbursement of the loan.

This new policy will provide a broader area for criminal prosecution under 18 U.S.C. 1010 since it requires the lenders to take direct responsibility and thereby brings them more sharply within the purview of that section.

BRIBERY

Electronic Eavesdropping; Admissibility of Tape Recordings Where No Trespass Occurred; Question of Entrapment for Jury. In Todisco v. United States (C.A. 9, November 6, 1961), the Court affirmed appellant's conviction of attempting to bribe an internal revenue agent. At the trial, over objection by the appellant, recordings of conversations between the appellant and the internal revenue agent concerning the bribe offer were admitted into evidence. The recordings had been made in the defendant's office by the use of a receiver and tape recorder tuned to a portable Fargoe radio transmitter secreted on the agent's person.

On appeal the argument was made that the recording of appellant's conversations violated the Fourth and Fifth Amendments. The Court ruled, however, that no constitutional right of the appellant was violated by the manner in which the tapes were obtained since no trespass had occurred, the agent having been in the appellant's office with his consent.

The Court also overruled appellant's contention that the tapes were inadmissible because operation of the Fargoe device without a license violated the provisions of 47 U.S.C. 301. The Court stated that the purpose of the licensing law was to prevent interference with radio communications, and concluded that no right of the defendant was violated by the lack of license.

The Court further disagreed with appellant's argument that the issue of entrapment should have been ruled upon by the judge as a matter of law. Inasmuch as the record did not conclusively show that the internal revenue agent first planted the idea of a bribe in the appellant's mind, the Court found the issue of entrapment was one for the jury to pass upon.

Another point raised by appellant concerned the claim that the admission of the tapes violated his right against self-incrimination. This contention was found to be without merit since, as the Court stated, appellant was not confessing to a crime but was committing one.

No reversible error was found in the denial of appellant's motion for a bill of particulars. Appellant had requested the bill of particulars because of alleged uncertainty as to the scope of the transactions or conversations upon which the Government intended to rely arising out of the fact that a complaint charging attempted bribery was filed against him on March 31, 1960 and he was subsequently indicted on one count charging an offense committed "on or about April 6, 1960." The denial was upheld on the ground that the appellant was at all times fully aware of the agent's participation and the potential scope of his testimony; and furthermore, that the appellant had listened to the recordings before the first witness was called.

A petition for rehearing has been filed by appellant.

Staff: United States Attorney Francis C. Whelan; Assistant United States Attorney Thomas R. Sheridan and Timothy M. Thorton (S.D. Calif.).

WIRETAPPING
47 U.S.C. 605

Nolo Contendere Plea by Private Investigator. United States v. Manney M. Clark (N.D. Ga.). Clark, a private investigator, was hired by the estranged wife of Dr. J. Gordon Brackett to tap the doctor's phone and monitor his conversations. The Court accepted Clark's plea of nolo contendere to one count of a two-count indictment. The indictment was based upon the fact that Clark divulged and published the substance of the intercepted conversations to the judge and jury when he testified in a divorce proceeding between the Bracketts. He was given a one-year suspended sentence and was placed on probation for two years.

Staff: United States Attorney Charles L. Goodson and former United States Attorney Charles D. Read, Jr. (N.D. Ga.).

CONTEMPT

Successful Contempt Proceedings for Violation of Food and Drug Injunction; Partially Owned Subsidiary Corporation, Not Party to Original Injunction, Nevertheless Bound by Its Terms. United States v. United Pharmacal Corp. et al. (D. Mass.). On November 6, 1961, United Pharmacal Corporation, Cambridge, Massachusetts, was fined $2,000 and its officers, Donald R. Sohn and Vernon A. Barr, were fined $1,000 each for interstate shipment of "Urex," a drug labeled and sold for treatment of prostatic hypertrophy and prevention of cancer of the prostate in men, but actually having no therapeutic value. Previously, the Government, charging that this product was ineffective in an action against Metabolic Products Corporation, Boston, Mass., promoters of "Urex" under other brand names and sole supplier of such product to United Pharmacal Corp., had obtained a consent decree of preliminary injunction, pending hearing on a permanent injunction. United Pharmacal Corp., a partially owned subsidiary of Metabolic Products Corp., whose sole activity was the distribution of "Urex," was served with a copy of the court order. Thereafter, United Pharmacal continued to ship "Urex" interstate, obtaining it, however, from another firm. In the instant action, the defendants were declared bound by and guilty of contempt of the court order and were assessed the above fines. The conviction is being appealed.

Staff: United States Attorney W. Arthur Garrity, Jr.; Assistant United States Attorney Daniel B. Bickford (D. Mass.).

FRAUD

Pretending to Be Duly Licensed Attorney. United States v. Daniel Jackson Oliver Wendel Holmes Morgan (D.C. D.C., November 1961). Defendant was indicted by a federal grand jury on 23 counts for fraud against the Government, as a result of his assuming the name, identity and qualifications of one L. A. Harris, a duly licensed attorney admitted to practice law before the United States District Court for the District of Columbia. To expedite the trial the Government elected to proceed on only 14 counts. On November 22, 1961, the jury returned a verdict of guilty on all 14 counts. On November 24, 1961, defendant was sentenced as follows: three to ten years on counts 13, 15, 16 (18 U.S.C. 494, forgery), 20 (22 D.C. Code 2501, perjury) and 21 (22 D.C. Code 1401, forgery); one to three years on counts 22 and 23 (22 D.C. Code 1301, false pretenses); and from 18 months to 5 years on counts 1, 3, 4 (18 U.S.C. 1001, fraud against the Government), 7, 9, 10 and 19 (22 D.C. Code 1303, false personation). All sentences are concurrent. The Court denied Morgan's motion for a new trial and denied a reduction of his $40,000 bond. Defendant has filed an appeal.

Staff: United States Attorney David C. Acheson; Principal Assistant United States Attorney Charles T. Duncan; Assistant United States Attorney Luke C. Moore (D. Col.)

Misuse of Name to Indicate Federal Agency. United States v. Wacksman (Mun. Ct. of Appeals, D.C.). The previous history of this case was reported in the December 30, 1960 issue of the Bulletin, Vol. 8, No. 27, p. 806.

Mrs. Wacksman, who operated a debt collection agency under the name National Deposit System, was convicted on December 6, 1960, receiving a sentence of 90 days in jail or a fine of $500 from which she appealed.

The Municipal Court of Appeals in affirming said conviction on December 7, 1961 reviewed the operations of Mrs. Wacksman, as discussed in the earlier issue of the Bulletin. Defendant-appellant denied that she deliberately sought to create and trade upon the impression that "National Deposit System" was a branch of the Federal Government. It was argued that her lack of specific intent was evidenced by correspondence with her brother, an attorney in Atlanta, Georgia, who assured her that placing a legend to the effect it was not a branch of the Federal Government on the form would be adequate protection. However, the Court sustained the Government's position that good faith reliance upon advice of counsel could be attacked by showing on cross-examination the defendant knew her brother had once been convicted and disbarred for the crime of receiving stolen property. It was noted that an accused's knowledge of his attorney's background and reputation may be a significant factor in determining whether the consultation was arranged with an honest motive or as a contrivance to escape possible prosecution. The character and qualifications of the attorney can be shown under the theory that one honestly seeking advice is unlikely to confide in one he knows or even suspects is professionally incompetent, unreliable, or dishonest.

Appellant also contended it was error for the prosecution to show specific intent by evidence that in promising to pay "up to $100" she only remitted 2 cents, while it costs the obliging party 4 cents to mail the completed questionnaire. In renouncing this argument the Court said the fact of these inconsequential payments coupled with representations that appellant had money "on deposit" were deliberate deceptions to entice cooperation of the debtor recipients. Appellant's sales materials disclosed the lure of money was only one persuasive feature of her plan, another being the authoritative appearance of the card. Each was an integral part of a single plan for a single purpose, namely, to procure information, and the intent to deceive manifested by the false promise of money was competent to show the authoritative appearance of the card was also intended to deceive, just as one crime will be allowed to prove another when it tends to show intent.

Staff: United States Attorney David C. Acheson; Assistant United States Attorneys Frank Q. Nebeker and Nathan J. Paulson; Former Assistant United States Attorneys Carl W. Belcher and Charles Thomas McCally (District of Columbia).

MAIL FRAUD STATUTE
(18 U.S.C. 1341)

Franchise Racket; Alleged Misjoinder of Defendants. Harding L. Cacy, Daniel W. Campbell, Bart Grant and Sherwin J. Shoen v. United States (C.A. 9). On November 6, 1961, the Court of Appeals affirmed the conviction of the appellants who were jointly indicted with five others in an indictment containing nine counts charging violations of the mail fraud statute and one count charging conspiracy. The substantive counts related to an over-all scheme to defraud involving the sale of supposedly exclusive

distribution rights for various products. Each substantive count dealt with a separate act of mailing in connection with the scheme. Appellants, although jointly charged in all counts, were each found guilty upon only one separate count and none was found guilty of conspiracy.

The principal question on appeal was whether the jury verdict demonstrated misjoinder of defendants by determining that each appellant was independently guilty of a separate offense with which the others were not connected. Appellants contended that the jury verdict appeared to establish that they were not collaborating but were instead competing. Appellants also emphasized that they had been found not guilty of conspiracy. In rejecting this argument, the Court indicated that each count detailed the fraudulent scheme in identical language and that without a finding that the scheme existed there could have been no finding of guilt on any substantive count. While the verdict was found to be inconsistent, the Court stated that inconsistency is no reason for denying the verdict any effectiveness.

The Court further stated that this was not a case in which misjoinder appeared on the face of the indictment. There was evidence from which the jury could find that all appellants were engaged in pursuing the overall scheme. In concluding there was no misjoinder the Court held that where there is evidence from which a jury may find a connection, joint activity and conspiracy, the jury's failure to convict in such fashion will not retroactively establish misjoinder.

Appellants also urged that the mailings were not in furtherance of the scheme since the mailings followed receipt by appellants of the purchase price of the franchise. The Court stated, however, that the scheme was not so limited but required continuity and that the writings were dispatched to reassure those from whom money had already been obtained so that the scheme might be practiced on others.

Staff: Acting United States Attorney Sidney I. Lezak (D. Oregon).

PERJURY

Materiality; Entrapment; Inadvertent Mistake; Duplicity. Mathew Joseph Masinia v. United States (C.A. 8). On November 22, 1961, the Eighth Circuit upheld the judgment of the District Court for the Western District of Missouri, which sentenced Masinia to ten years' imprisonment (two consecutive and one concurrent sentence of five years each) after his conviction on three counts charging perjury before the grand jury. The grand jury had been investigating to determine if jewelry which had been stolen in Nevada in March 1958, had been transported into the Western District of Missouri. Masinia, who was suspected of being one of the thieves, was called and questioned concerning both the theft itself and the possible transportation of the proceeds. He denied having been in Reno, and in two separate instances denied having been in the jewelry store, at the time of the robbery. The indictment was based upon this perjurious testimony (as well as upon a fourth allegedly perjurious statement concerning which the jury found him not guilty.)

The Court of Appeals first held that materiality is a question of law for the Court rather than of fact for the jury, but that defendant was not prejudiced because the question was erroneously submitted to the jury inasmuch as the Court thereafter itself made an independent finding of materiality. The Court then upheld the trial court's finding. It held that since the grand jury was investigating a possible Federal offense within its jurisdiction (transportation of the jewelry), it could inquire concerning acts which related to such offense but took place outside its jurisdiction (theft of the jewelry), and therefore the questions which Masinia answered perjuriously were material to a matter within its competency. The Court further held that since the testimony sought was material, it could not be said on the face of the record that Masinia was subpoenaed in order to entrap him into perjury.

Masinia claimed inadvertent mistake, rather than perjury, in regard to one of his answers because, although he was questioned as to whether he was in Reno in March 1958, the Assistant U.S. Attorney, in explaining the purpose of the inquiry, had mistakenly stated that the robbery took place in May. The Court held, however, both that the issue was properly submitted to the jury, and that the usual instruction on wilfulness was sufficient and a special instruction on inadvertent mistake was not required. Finally, although the Court held that the two counts dealing with Masinia's denial of having been in the jewelry store were duplicitous, the error was harmless as he received equal concurrent sentences on the two counts. Milanovich v. United States, 365 U.S. 551, it held, requires a new trial only if the concurrent sentences are unequal.

Staff: United States Attorney F. Russell Millin; Assistant United States Attorney Clark A. Ridpath (W.D. Mo.).

NATIONAL FIREARMS ACT

Violation of National Firearms Act. United States v. Valmore Forgett, Jr., dba Service Armament Company - Bogota, New Jersey (N.D. Ohio). On December 4, 1961, defendant pleaded guilty to an indictment charging him with violations of the National Firearms Act (26 U.S.C. 5855, 5861) in that he was in possession of unregistered firearms including machine guns, and transferred these machine guns in interstate shipment from the Eastern District of Wisconsin to the Northern District of Ohio.

Mr. Clarence E. Price, Cincinnati Regional Counsel of the Treasury Department informed the Department of Justice that the conviction of this well known dealer should have a substantial deterrent effect upon those in the firearms industry who might be inclined to disregard the lawful requirements of the Act.

Staff: United States Attorney Merle M. McCurdy; Assistant United States Attorney Dominic J. Cimino (N.D. Ohio).

FEDERAL FOOD, DRUG, AND COSMETIC ACT

"Royal Jelly" Product Found Ineffective for Declared Therapeutic Purposes; Protection of Consumers; Misbranding of Drug. United States v. 47 Bottles . . . of Jenasol RJ Formula "60" (D. N.J.). On December 13, 1961, after a trial on the merits, the District Court ruled that "Jenasol", a vitamin preparation, was misbranded in violation of the Federal Food, Drug, and Cosmetic Act and therefore subject to condemnation. The drug labeling (which included accompanying leaflets) claimed therapeutic effectiveness with respect to sexual vitality, irritability, headaches, insomnia, "physical and spiritual convulsions", depression, "vitality", ills of old age, memory, appetite, etc. The Court, in a written opinion, concluded that the Government had discharged its burden of proof under the statute to show that the labeling in question was "false or (note disjunctive) misleading in any particular." The Court found "ample evidence" that the drug was not an effective agent in the treatment of the mentioned conditions and ordered condemnation of the seized lot. It is of interest that the claimed active or effective ingredient in Jenasol is "Royal Jelly", a substance that has been found by modern science to have no usefulness in the human diet or for human ills, regardless of what value it may have for bees.

Staff: United States Attorney David M. Satz, Jr.; Assistant United States Attorney Jerome D. Schwitzer (D. N.J.).

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INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

False Affidavit in Violation 18 U.S.C.1001; Production of "Statements" made to F.B.I.; 18 U.S.C. 3500, "Jencks" Statute. John Joseph Killian v. United States. (N.D. Ill.) On December 11, 1961 the United States Supreme Court vacated the judgment of the District Court and remanded for further proceedings consistent with the opinion. Mr. Justice Whittaker wrote the opinion of the Court.

Killian was indicted for violation of 18 U.S.C. 1001, in two counts, for falsely denying membership in and affiliation with the Communist Party in an affidavit on Non-Communist Union Officer filed with the N.L.R.B. under Sec. 9(h) of the Taft-Hartley Act. A first conviction was reversed by the court of appeals. A second conviction was affirmed by the court of appeals, and the Supreme Court granted certiorari limited to questions 3 and 6 of the petition. Question 3 was, "Whether the instructions to the jury properly defined membership in and affiliation with the Communist Party". Question 6 was; "Whether the production of statements which represent payments to those witnesses, as informers, is excused after a complete foundation for their production under 18 U.S.C. 3500 is laid, when all that the Government has offered to produce at trial is a list of the amounts and dates of payments and there is no evidence as to what other facts are reported in those statements."

At the trial the Government had produced narrative statements of the witnesses to the F.B.I., but did not produce "receipts" signed by the witnesses acknowledging payments received as FBI informants, and the prosecutor erroneously but inadvertently represented to the trial court that the receipts did not itemize expenses, when, in fact nine out of a total 124 did contain some itemization, a fact that was not discovered until the brief on the merits in the Supreme Court was being prepared.

In its brief on the merits the Government conceded that as to one of the witnesses the FBI agent's notes of oral reports may have been "statements" within the meaning of 18 U.S.C. 3500(e)(2); however, the Government contended that on the actual facts petitioner was not entitled to a new trial because the FBI agent's notes covering the oral reports of expenses were not in existence at the time of trial, having been destroyed by the agent "in ordinary course"; and the receipts do not "relate to" the witness's direct testimony; or, if they do relate, that the same information was given to petitioner in the witness's narrative statements that were produced at the trial; and hence, if there was any error, it was harmless. The Government recognized that petitioner need not accept the Government's representations, but that petitioner should be permitted an opportunity to examine the receipts and to examine the FBI agents and other responsible Government officials on these matters. The Government's position was that the judgment should be vacated and the case should be remanded to the district court for consideration whether the Government's failure to produce

the receipts given to the FBI by Government witnesses constituted error; and, if so, whether this error requires a new trial. It was the Government's position further that the Court should not order a new trial because the error, if any was harmless.

In reaching a conclusion in accord with the Government's recommendation, the Supreme Court expressed the views that petitioner would not be entitled to a new trial because of non-production of the agent's notes if those notes were destroyed in the ordinary course and not in existence at time of trial; and, notwithstanding the receipts were "statements" within Section 3500 and were demanded under that section, petitioner would not be entitled to a new trial if the receipts do not relate to the direct testimony of the witness, mentioning the 115 receipts that contained no itemization. However, if the information in the receipts was the same as that contained in statements already produced, then the district court could find the error in failing to produce was harmless (referring to Rosenberg v. United States, 360 U.S. 367).

Accordingly the Supreme Court vacated the judgment and remanded the case to the district court for a hearing confined to the issues raised by the Government's representations, directing that if it is found that those representations are true in all material respects, it shall enter a new final judgment based upon the record as supplemented by its findings, thereby preserving to petitioner the right to appeal to the Court of Appeals, or, if it finds the representations are untrue in any material respect, it shall grant petitioner a new trial.

Furthermore, the Court said that, in any event, the questions respecting the court's instructions to the jury would not be "mooted" and should be decided. The Court found no merit in petitioner's contentions as to the inadequacy of the instructions on "membership" and "affiliation". The Court spelled out certain "tests" in determining adequacy, i.e., whether they gave the jury a fair statement of the issues, that is, whether petitioner was a member of or affiliated with the Communist Party on the date of his affidavit, give a reasonable definition of the terms and outline the various criteria, shown in the evidence, which the jury may consider in determining the ultimate issues. The Court concluded that "the instructions in this case, which are consistent with all the judicial precedents under Section 9(h), adequately met those tests."

Staff: The case was argued in the Supreme Court by Kevin T. Maroney (Internal Security Division), with him on the brief were Solicitor General Archibald Cox; Assistant Attorney General J. Walter Yeagley; Bruce J. Terris, George B. Searls and Lee B. Anderson, (Internal Security Division).

Foreign Agents Registration Act. United States v. Prensa Latina, Agencia Informativa Latinoamericana, Sociedad Anonima; Francisco V. Portela. (D. D.C.) A federal grand jury in the District of Columbia returned a three-count indictment on December 8, 1961, charging defendants with violations of the Foreign Agents Registration Act of 1938, as amended.

Prensa Latina, Angencia Informativa Latinoamericana, Sociedad Anonima, a corporation organized under the laws of Cuba for the purpose of engaging in the business of an international news service, was charged with failure to register as an agent of the Cuban Government within the United States. Francisco V. Portela, who has acted as Prensa Latina's general manager in the United States since May 1961, was charged with failure to cause Prensa Latina to register himself as an agent of Prensa Latina, a foreign principal as defined in the Act. The indictment alleged that Portela was not entitled to the exemption from the registration requirements of the Act since his foreign principal was subsidized, and its activities were controlled by the Cuban Government.

Staff: Nathan B. Lenvin and Roger P. Bernique (Internal Security Division)

Action for Declaratory Judgment and for Money Damages. Grant W. Leago v. United States, et al (W.D. Wash.). On November 27, 1961, plaintiff filed a complaint alleging he is a longshoreman employed by a stevedoring firm furnishing longshore work at the U.S. Naval Supply Depot, Seattle, Washington; that during 1961 defendants United States and Captain B. H. Bieri, Jr., USN, Commanding Officer of the Depot, acting through the Security Officer, refused to renew or re-issue plaintiff's pass for access to the Depot, issuance of which is a condition precedent to plaintiff's employment at the Depot; and that defendants have refused to assign any reason for their action, in violation of plaintiff's constitutional rights of due process of law and equal protection of the laws. Plaintiff alleges damages in the form of being branded a security risk, and further that he has been damaged monetarily by inability to accept job assignments to defendants' installation. Plaintiff seeks an order of the Court enjoining defendants from further refusing issuance of the pass without assigning reasons therefor; and further offering plaintiff an opportunity to confront and refute such reasons. Plaintiff further seeks a declaration of his rights and such other relief as may be necessary to implement the court's order, and money damages in the amount of $10,000.

Staff: Benjamin C. Flannagan & David H. Hopkins, Jr. (Internal Security Division)

Espionage. United States v. Harry Carl Schoeneman and Garlan Euel Markham, Jr. (D.C.). On December 15, 1961, a five-count indictment was returned against Harry Carl Schoeneman, a former Business Analyst and Procurement Specialist, Office of Small Business, Bureau of Weapons, Dept. of the Navy, Washington, D. C. and Garlan Euel Markham, Jr., a manufacturers' representative under his own name and under the name of Washington Procurement Consultants, Fairfax, Virginia. The first count charges defendant Schoeneman with receiving compensation for services rendered by him for defendant Markham in relation to proposed Government contracts, in violation of 18 U.S.C. 281. Count two charges defendant Markham with unlawfully promising and offering money and other things of value to defendant Schoeneman, then a Government employee, with intent to induce him to do acts in violation of his lawful duty, in violation of 18 U.S.C. 201.

Count three charges defendant Schoeneman with converting to his own use and to the use of defendant Markham copies of certain documents being the property of the Department of the Navy and having a value in excess of $100, in violation of 18 U.S.C. 641. Count four charges defendants with conspiring to violate 18 U.S.C. 281, 201 and 641 and conspiring to deprive the Government of its right to have its affairs conducted honestly and impartially, in violation of 18 U.S.C. 371. Count five charges defendants with conspiring to violate 18 U.S.C. 793(d) in that defendant Schoeneman as a Navy employee having lawful control over a certain document containing information relating to the national defense and knowing that defendant Markham was not entitled to receive it, did deliver it to Markham. A bench warrant was issued for Schoeneman who was apprehended by F.B.I. agents in Virginia and released under $5000 bail. Markham, who was already under $5000 bond (See Bulletin Vol. 9, No. 24, U.S. v. George William Sawyer and Garlan Euel Markham, Jr.) surrendered in Washington, D.C. and posted bond in an additional amount of $1000. No trial date has as yet been set.

Staff: Victor C. Woerheide and Robert J. Stubbs (Internal Security Division)

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LANDS DIVISION

Assistant Attorney General Ramsey Clark

Condemnation; Wherry Housing Project; Preservation of Error for Appeal; Discretion of Court Concerning Scope of Cross-Examination, Qualifications of Witnesses, Admissibility of Comparable Sales Evidence, Refusal to Permit Jury View. United States v. Johnson, 285 F. 2d 35 (C.A. 9). In a Wherry Housing condemnation case the jury returned a verdict for $1,820,000 from which the United States appealed. In this particular case the sponsor owned the site for the project. The Court of Appeals said that much of the Government's brief and argument was "completely immaterial and borders on the frivolous because it deals with problems which simply do not exist in this case." The Government had claimed that the restrictions under the Wherry Act had not been given proper consideration but the Court of Appeals said that the appellees' experts appraised the property in the light of all the restrictions that existed.

Turning to specific objections, the Court held that objections to limitation of cross-examination about Wherry controls and the exclusion of evidence of actual operating expenses were not preserved in the record. The Court also held that admission of evidence of reproduction cost was not objected to and that, in fact, such evidence was given also by the Government's expert. No mention was made of United States v. Benning Housing Corporation, 276 F. 2d 248 (C.A. 5, 1960), and other cases holding that, because of the controls, reproduction evidence is inadmissible in Wherry cases. In a footnote the Court remarked, without stating the significance of it, that such evidence was offered not "as the measure of value" but as one approach the experts used.

Turning to the issues which it considered to be properly presented, the Court held: (1) Objections to limitation of cross-examination of the builder of the project did not show an abuse of discretion since the subject (cost in 1951) had little or no bearing on the direct examination (cost of reproduction in 1957). (2) Admission of sales of comparable housing in the area and sales of individual houses on a theory of selling the project piece-meal was not error, the Court holding that a lesser foundation of comparability is required when the sales are used as matters relied upon by the expert to support his opinion rather than as direct evidence of value. No authority was cited for this innovation. (3) Exclusion of the opinion of an offered expert as disqualified was not an abuse of discretion. (4) Refusal to permit a jury view was not an abuse of discretion. (5) The verdict was not excessive. (6) There was not such bias as to deprive the United States of a fair trial and, in any event, no such claim was made in the trial court.

Because of the state of the record certiorari was not sought.

Staff: Roger P. Marquis (Lands Division).

Avigation Easement; Claim for Just Compensation; When Taking Occurs for Purpose of Statute of Limitations. Kate Mock Bacon, et al., v. United States (C.Cls., November 1, 1961.) Plaintiffs, owners of ten tracts of land and improvements located in the immediate vicinity of Turner Air Force Base, brought suit to recover just compensation for the taking of an easement of flight over their properties.

Turner Air Force Base, established in 1941, was deactivated in 1946, but was reactivated in September 1947. Shortly thereafter, F84 type jet aircraft were assigned to the base. By the end of 1948, 75 such jet fighters were in regular operation and made numerous takeoffs and landings to and from the base. In doing so they flew frequently at low elevations over plaintiffs' properties.

In 1951, F84s were replaced by later models, which likewise flew frequently and low over plaintiffs' properties. In the late fall of 1954 and early 1955, a newer type, the F84F, which was heavier and more powerful than previous models, was assigned to the base. In 1956, a number of F100s, another later model single-engine jet fighter, was put into operation, and in 1958, after the mission of the base was changed from the Tactical Air Command to the Strategic Air Command, a number of B52s were assigned to the base and began operations. The B52 is an eight-engine jet bomber.

In view of the fact that suit was filed in July 1958, the Government pleaded as its principal defense the fact that the claim was barred by the statute of limitations, 28 U.S.C. 2501, having been instituted more than six years after the first jet aircraft commenced low and frequent flights over plaintiffs' properties. Plaintiffs contended that although jet aircraft had been operating for more than six years before suit was brought, and although the aircraft had been making low and frequent flights over plaintiffs' properties, it was not until August 1955 that the operation of the noisier F84Fs made conditions intolerable to plaintiffs. The Court agreed with plaintiffs' contentions, holding that while the earlier low and frequent flights by other jet aircraft caused some diminution in the value of plaintiffs' property, were annoying and disturbing, and interfered to some extent with the use and enjoyment of the property, it was not until the noisier "intolerable" conditions came about that the taking of an easement occurred.

The matter of seeking review by certiorari is now under consideration.

Staff: Herbert Pittle (Lands Division)

Avigation Easement; Claim for Just Compensation: When Cause of Action Accrues for Purpose of Statute of Limitations. Lester B. Davis, et al., v. United States (C.Cls., November 1, 1961.) Plaintiffs, who were the owners of a tract of farmland and improvements on the outskirts of Spokane, Washington, and in the vicinity of Fairchild Air Force Base, brought suit in February 1959 to recover just compensation for the taking of an easement of flight over their property.

In 1951, after the present main runway was constructed at Fairchild Air Force Base, a number of B-36 bombers were assigned to the base and began regular operations. By the fall of 1952 a full complement of 65 were carrying on full-scale operations. The B-36s contain ten engines -- six reciprocating engines and four jet engines. When taking off from or landing on the main runway, the aircraft flew over plaintiffs' property frequently at elevations as low as 200 feet. They continued to do so until 1957. In that year the B-36 was replaced by the B-52, which is an eight-engine jet bomber. In addition, KC-135s, which are four-engine jet tankers, were assigned to the base at that time.

After the B-52s and the KC-135s began operations, the noise and frequency of the flights were increased and plaintiffs contended that the flights by the B-52s and the KC-135s at low elevations over their property constituted the taking of an avigation easement. The Government asserted that the claim was barred by the statute of limitations, 28 U.S.C. 2501, and argued that under the holdings in United States v. Causby, 328 U.S. 256; Highland Park v. United States, 142 C. Cls. 269, and Watson v. United States, 171 F. Supp. 283, an avigation easement was acquired by the United States when the first jet aircraft started low and frequent flights over the premises and this was more than six years before suit was instituted.

The Court noted that plaintiffs conceded that a claim for the taking of an avigation easement by low and frequent flights by B-36s was barred by limitations. The Court decided, however, that plaintiffs' claim for a taking of an avigation easement by the B-52s and KC-135s was not barred by limitations. The Court stated that the flights by the latter two types of aircraft were more frequent and noisier, and even though the flights by these aircraft were no lower than the previous flights by B-36s, and notwithstanding that the flights by B-36s caused some diminution in the value of plaintiffs' property, the present claim for the additional taking was not barred.

The matter of obtaining review by certiorari to the Supreme Court is now under consideration.

Staff: Herbert Pittle (Lands Division)

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CIVIL TAX MATTERS
Appellate Court Decisions

Assessment and Collection; Priority of Liens; Effect of State Law Filing Requirements. United States v. Union Central Life Insurance Co. (S.Ct. December 18, 1961.) Taxpayers, husband and wife residing in the State of Michigan, failed to pay 1952 income taxes which were duly assessed against them on January 11, 1954, and on that date such taxes, together with any additional tax, interest, penalty, or costs which might accrue became a lien under Sec. 3670 (I.R.C. 1939) in favor of the United States "upon all property and rights to property, whether real or personal, belonging to" such taxpayers, including any after acquired property. On July 2, 1954, a notice of this tax lien was filed, pursuant to Sec. 3672 (a) (2), 1939 Code, with the Clerk of the United States District Court for the Eastern District of Michigan, Southern Division, the judicial district in which the property in issue was situated. At that time the law of the State of Michigan purporting to authorize the filing of notices of federal tax liens pursuant to Sec. 3672 (a) (1) expressly required that any such notice must contain a description of the real property upon which a lien was claimed, and the Attorney General of the State had ruled that the official form of notice of federal tax lien (Treasury Dept. Form No. 668) long used for the filing of such notices was not entitled to recordation in the office of any county register of deeds in the State because the form used "claims a lien on all property of the taxpayer and does not contain a description of any land." Accordingly, no notice of lien was filed with the county recorder under Sec. 3672 (a) (1) on the ground that Michigan had not by law provided for the filing of such notice in any office in the State within the meaning of Sec. 3672 (a) (1); and the notice filed with the Clerk of the District Court did not contain any description of real property as required by Michigan law. On November 10, 1954, taxpayers executed a mortgage in favor of the Union Central Life Insurance Company upon the property here in issue, located in Oakland County, Michigan, which was duly recorded in the office of the County Register of Deeds of Oakland County on November 24, 1954. In this mortgage foreclosure proceeding brought by Union Central Life Insurance Co. against taxpayers, naming the United States a party under 28 U.S.C. 2410, because of its tax lien, the Circuit Court for Oakland County and the Supreme Court of Michigan both held the lien of the United States was not valid under Sec. 3672 (a) as against the subsequent mortgagee because notice of lien had not been filed as provided by Michigan law. The Supreme Court of the United States reversed, holding that a state may not, in purporting to authorize the filing of notices of lien in a state office, impose such conditions, and that the notice filed in the office of the Clerk of the District Court was valid in this case under Sec. 3672(a)(2)

against the subsequent mortgagee because the State had not by law authorized the filing of such notice in an office in the State within the meaning of Sec. 3672 (a) (1).

Staff: Fred E. Youngman and I. Henry Kutz (Tax Division)

Gain or Loss; Gain Recognized in Full. Grover D. Turnbow and Ruth H. Turnbow v. Commissioner (S. Ct., December 18, 1961.) The Supreme Court, affirming the Court of Appeals for the Ninth Circuit (286 F. 2d 669), and rejecting a contrary conclusion in Howard v. Commissioner, 238 F. 2d 943, 948 (C.A. 7), held that in the absence of a "reorganization" as defined in Section 112 (g)(1)(B), I.R.C. 1939, the gain realized upon an exchange of all the stock of a corporation, owned entirely by taxpayer, for stock of another corporation plus cash was taxable in full under the general rule laid down in Section 112(a) of the 1939 Code rather than to the extent only of the amount of money received under Section 112(c)(1). Taxpayer, as owner, transferred all of the 5,000 outstanding shares of International Dairy Supply Company to Foremost Dairies, Inc., in 1952, in exchange for 82,375 shares (a minor percentage) of Foremost's common (voting) stock of the fair market value of $15 per share, or $1,235,625, plus cash in the amount of $3,000,000--a total gain of $4,163,691.94--and reported the $3,000,000 in his 1952 return. The transaction admittedly was not a "reorganization" within the statutory definition, but taxpayer argued that since the transaction would have been a reorganization if he had received only stock in Foremost, rather than stock and cash, Section 112(c)(1), authorizing recognition in the case of a reorganization only to the extent of money or other property (other than stock in a corporation a party to the reorganization), should be construed to permit the court to indulge in an assumption that the transaction was a reorganization. The Supreme Court held that the statute did not permit a hypothetical reorganization.

Staff: Arthur I. Gould (Tax Division).
Wayne G. Barnett (Solicitor General's Office).

Priority of Liens. Crest Finance Co., Inc. v. United States, (Sup. Ct., December 18, 1961.) Taxpayer, a subcontractor, entered into a contract with Standard, the prime contractor, for hauling and compacting excavated dirt in connection with the construction of a portion of an Illinois toll road. Under the terms of the contract, Standard agreed to make progress payments to taxpayer for work performed, based upon estimates covered by weekly reports or invoices, predicated on a count of the number of loads of fill carried to the site of the construction. All the invoices contained the statement that the estimates were subject to revision as to exact quantity by the section engineer. Thereafter, Crest made nine loans to taxpayer evidenced by taxpayer's notes and secured by concurrent assignments of taxpayer's right to payment from Standard for the work performed up to the date of each assignment, as estimated by the weekly invoices. Standard repaid a substantial part of the loans to Crest, but there remained due a balance of $17,000, plus interest, which both Crest and the United States claimed.

At various periods after the assignments to Crest, the Commissioner of Internal Revenue made assessments against taxpayer for amounts deducted and withheld by it from wages of its employees for withholding and social security taxes. Notices of liens for these taxes aggregating over $22,000, plus interest, were filed.

The Seventh Circuit, affirming the United States District Court for the Northern District of Illinois, held that the federal tax liens were superior to the prior assignments of the accounts receivable.

The Court of Appeals held that this case was controlled by United States v. Ball Construction Co., 355 U.S. 587, and that under that decision Crest's liens upon the taxpayer's accounts receivable were inchoate and therefore ineffective against a subsequently-arising federal tax lien. In response to Crest's petition for a writ of certiorari, the United States filed a memorandum in which it conceded that, on the facts of this case, Crest's liens were choate at the time of the tax assessments unless, as a matter of state law (not resolved by the Court of Appeals), the failure to record the assignments made them ineffective against third parties, including the United States.

With respect to its concession, the Government acknowledged (a) that the assignments were of amounts due under the terms of a specific contract for work already performed; (b) that they were made to secure payment of notes in specific amounts for loans made contemporaneously with the assignments, and (c) that by the time the tax assessments were made, taxpayer had completed performance of the contract, and all that remained to be done was the final computation of the precise amount due. Accordingly, the Government conceded that Crest's liens fully met the requirements enunciated by the Supreme Court in United States v. New Britain, 347 U.S. 81, that in order to be choate, liens must be perfected and definite in three respects: (1) the identity of the lienholder (Crest); (2) the amount of the liens (the notes); and (3) the property to which it attaches (the accounts receivable for the work already performed under the specific contract).

As to (c) and (3) above, the Government acknowledged that the fact that the amount owing to taxpayer by Standard was, at the time of the tax assessments, still subject to final computation and revision, did not affect the definiteness of Crest's lien, since the property subject to the lien was the specific right to payment for work performed and the indefiniteness of the amount due for that work went, not to the definiteness of the lien (which was for the liquidated amount of the notes evidencing the loans from Crest to the taxpayer), but to the value of the property subject to this lien. In other words, the requirement of definiteness of amount goes only to the debt secured by the lien, not to the value of the property (otherwise specifically identified) that is subject to the lien.

Accepting and agreeing with the Government's concession, the Supreme Court in a per curiam opinion, granted certiorari, vacated the judgment below, and remanded the case to the Court of Appeals for further proceedings consistent with its opinion.

Staff: Joseph Kovner and George F. Lynch (Tax Division)

Bankruptcy: Tax Claims Allowed Against After-Acquired Assets of Bankrupt Where Government Failed to Assert Full Amount of Taxes Due in Bankruptcy Proceeding. Newberg v. United States (C.A. 2, November 21, 1961). Taxpayer filed a bankruptcy petition in June, 1947. The District Director filed a proof of claim for taxes approximating $200 in the bankruptcy proceeding. Taxpayer was discharged, the Government was paid the amount of its claim and the bankruptcy proceeding was closed. In March, 1950, the District Director assessed taxpayer $2,826 for taxes due prior to bankruptcy. Taxpayer paid the assessment and brought suit for refund on the theory that the Government's failure to assert in the bankruptcy proceedings the full amount of taxes due barred it from asserting the additional amount against after-acquired assets of the bankrupt. The District Court dismissed the complaint.

The Court of Appeals affirmed, per curiam, on the opinion of the District Court (187 F. Supp. 158 (S.D. N.Y.)), holding that while failure of the Government to file a tax claim against a bankrupt estate will prevent it sharing in that estate, yet the personal liability of the taxpayer remains and is not affected by discharge. (Bankruptcy Act, Sec. 17a, 11 U.S.C., 1952 ed., Sec. 35a.) The statute is explicit and there is no room for estoppel or other defense. The Ninth Circuit has reached the same result in the case of a state tax claim. California State Board of Equal. v. Coast Radio Prod., 228 F. 2d 520.

Staff: United States Attorney Robert M. Morgenthau and Assistant United States Attorney Robert M. Hausman (S.D. N.Y.)

Partnership: Joint Venture for Practice of Law Constitutes Partnership for Income Tax Purposes; Taxpayer May Not Disclaim Validity of Partnership Which He Represents to Tax Authorities Was Actual. Halstead v. Commissioner (C.A. 2, November 15, 1961). Taxpayer made annual written agreements with another lawyer to form a partnership for the practice of law. Taxpayer intended to create a partnership, thought he had done so, and for nine years filed partnership tax returns. For the year 1953, however, he asserted that the partnership was non-existent, although the facts did not differ from the prior years.

The Court of Appeals affirmed, per curiam, the Tax Court's conclusion that taxpayer had not sustained the burden proving the Commissioner's determination wrong. The Court of Appeals agreed also with two additional arguments advanced by the Commissioner: (1) If a common-law partnership was not created, the arrangement between taxpayer and the other lawyer constituted a "joint venture" which, for income tax purposes, is included in the terms "partnership" and "partner" (Section 3797(a)(2) of 1939 Code). (2) Since taxpayer represented to the taxing authorities that the form of business he set up was an actual partnership, he may not now disclaim its validity. See Higgins v. Smith, 308 U.S. 473, 477.

Staff: Assistant United States Attorney Frank Q. Nebeker (D. Col.)

CRIMINAL TAX MATTERS
Appellate Court Decisions

Pre-indictment Suit to Enjoin United States Attorney from Presenting to Federal Grand Jury Certain Evidence Allegedly Obtained by Internal Revenue Agents in Violation of Constitutional Rights Under 4th and 5th Amendments. Austin v. United States, et al, (C.A. 4, November 21, 1961.) Taxpayer filed a petition seeking to enjoin the Government and the United States Attorney for the Middle District of North Carolina from presenting to a federal grand jury certain evidence allegedly obtained by internal revenue agents in violation of taxpayer's rights under the 4th and 5th amendments to the Constitution. In summary, petitioner (who was in the insurance business and for a fee prepared income tax returns) alleged that she was fraudulently induced to turn over certain records and information to internal revenue agents in that she was led by them to believe that the civil tax liability of herself and husband was being investigated, when in fact the agents were looking for evidence of petitioner's criminal violation of Section 7206(2) (aiding and assisting in the preparation and presentation of false income tax returns) of the Internal Revenue Code of 1954. The petition further alleged the use of coercive methods in that petitioner was told by the agent "that she had better let him see those records or else he would get them without her permission". The Government filed a motion to dismiss on the grounds that the facts alleged in the petition even if true failed to justify the relief sought (in that petitioner had voluntarily turned over the information, see Turner v. United States, 222 F. 2d 926 (C.A. 4)), and that petitioner had an adequate remedy at law to suppress the evidence after indictment under Rule 41(e), F. R. Crim. P. The district judge declined to hear oral testimony in support of petitioner's claim and confined the hearing to the question of whether the facts alleged in the petition and supporting affidavits even if true would justify the relief sought. The court ruled that petitioner had not made a sufficient showing to warrant the court, in the exercise of its discretion, in restraining the presentation of the evidence to a grand jury. The court reserved the right to petitioner to file a motion under Rule 41(e) to suppress the evidence after an indictment if any was returned.

The Court of Appeals, with one dissent, reversed and remanded holding inter alia that: (1) "Enough has been alleged to require a hearing with findings of fact and conclusions of law." (2) That notwithstanding Rule 41(e), petitioner could maintain an independent civil action to enjoin criminal prosecution in a pre-indictment proceeding. (3) That enjoining the United States Attorney in advance of indictment was not discretionary with the district court.

The case raises an important question relating to the procedure to be followed by United States Attorneys in dealing with such pre-indictment motions. We believe that the decision was correct insofar as it held that a taxpayer can maintain such a pre-indictment suit as either an independent civil action to enjoin the United States Attorney or as a

motion under Rule 41(e), F. R. Crim. P. which has been interpreted as being broad enough to cover pre-indictment motions. See Centracchio v. Garrity, 198 F. 2d 382 (C.A. 1) cert. denied 344 U.S. 866. We believe, however, that the Court of Appeals was incorrect in its holding that enjoining the United States Attorney at the pre-indictment stage was not discretionary with the district judge but rather required him to make a decision on the merits after a full hearing. This holding is not in accord with the rationale of the prior case law on the subject, (see cases cited in footnotes 13 and 14 of Judge Haynsworth's dissent and Grant v. United States, 282 F. 2d 165 (C.A. 2), and merits some comment.

In determining the proper procedure to be utilized in such pre-indictment motions, the Government is faced with two conflicting considerations. One is that of permitting a taxpayer to promptly redress a violation of his constitutional rights. The other is that grand jury investigations, traditionally afforded a wide scope, and the presentation of criminal indictments should not be unduly hampered or delayed. This latter factor becomes more significant when it is realized that an order disposing of a pre-indictment motion has traditionally been considered to be "final" and hence appealable, Perlman v. United States, 247 U.S. 7, thereby creating additional delays in bringing an indictment. We believe that a fair rule striking a balance between these two competing considerations would be for United States Attorneys (on the authority of the cases previously mentioned in Judge Haynsworth's dissent) to urge upon the trial courts in such pre-indictment proceedings that nothing short of a strong showing of alleged constitutional violations would warrant the court in restraining the presentation of evidence to a grand jury. Taxpayers would be protected by reserving to them the right to bring a motion to suppress after an indictment if any was returned.

It should be noted that our position in this matter is closely related to the previously mentioned question of the appealability of orders disposing of pre-indictment motions. There is currently pending in the Supreme Court (No. 21) the case of Di Bella v. United States, where the Government is taking the position that orders in pre-indictment proceedings should not be appealable where the motion is primarily directed towards the suppression of evidence for use at a grand jury investigation or criminal trial rather than the return of property in which the movant has a substantial property interest. If such orders are held to be nonappealable (thereby eliminating the additional delays so caused), a reconsideration of our views may become necessary in the interest of maintaining the proper balance between the two considerations previously discussed.

Staff: Former United States Attorney James E. Holshouser (M.D. North Carolina)

Attorney-Client Privilege Held Applicable to Communications Made to Accountant Employed by Law Firm. Kovel v. United States (C.A. 2, December 5, 1961.) Kovel, an accountant employed by a law firm specializing in tax law, was sentenced by the district court for criminal contempt when he refused to answer questions asked by the United States Attorney in the course of a

grand jury investigation of alleged tax evasion by a client of the law firm. The questions Kovel refused to answer related to certain communications concerning federal income tax matters made to him by the client. Kovel took the position that his status as an employee of a law firm made the communications privileged. The Government argued that the attorney-client privilege did not extend to an accountant, even though employed by a law firm. The district court agreed with the Government, ordered Kovel to answer, and when he refused, held him in criminal contempt. The Court of Appeals reversed and remanded, holding that in appropriate circumstances the attorney-client privilege extended to communications made to an accountant employed by a lawyer. The Court, after pointing out that the privilege clearly covered communications to secretaries and clerks employed by the law firm, saw no policy reason for not extending the privilege to an accountant so employed, especially in view of the complexity of the tax law where lawyers almost inevitably must look to accountants for advice. The Court noted, however, that the privilege would arise only when the communications are made in confidence for the purpose of obtaining legal rather than accounting advice, as e.g., where the lawyer directed the client to communicate first with his accountant employee as a preliminary to giving legal advice. Since the record did not reveal for which purpose the communications were made, the Court remanded the matter to determine whether the basis of the privilege existed, holding that the accountant had the burden of going forward with evidence supporting the claim of privilege, at which time the ultimate burden of persuasion on the issue of privilege would shift to the Government.

While this decision is in conflict with other courts that have considered the matter, Himmelfarb v. United States, 175 F. 2d 924 (C.A. 9), certiorari denied, 338 U. S. 860; Gariepy v. United States, 189 F. 2d 459 (C.A. 6), the Solicitor General has decided against certiorari. The implications of the decision in terms of securing evidence on which to base a criminal indictment for tax evasion are obvious, and the difficulties are compounded when it is considered that the court itself (see footnote 4 of the opinion) mentioned another area of possible privilege which defense counsel will no doubt not leave unexplored, i.e., where communications are made (presumably without any prior consultation with the attorney) to the accountant as the client's "agent" for the purpose of subsequent communication by the accountant to the lawyer. It is apparent that the need for a uniform and consistent policy in this troublesome area requires that subsequent cases dealing with the scope of this privilege be closely coordinated with this Division before any action is taken. See United States Attorneys Bulletin, Vol. 9, No. 13, p. 418 (June 30, 1961.)

Staff: United States Attorney Robert M. Morgenthau and Assistant United States Attorneys Gerald Walpin and David Klingsberg (S.D. N.Y.)

CIVIL TAX MATTERS
District Court Decision

Government Enjoined From Examining Taxpayers, Their Records or Third Parties With Respect to Taxable Years Barred by Statute of Limitations Without Showing of Fraud. Arend, et al. v. DeMasters, et al. (D. Ore., November 11, 1961, 61-2 U.S.T.C. Par. 9737.) The Plaintiffs-taxpayers brought suit to enjoin an internal revenue agent from conducting an investigation into their affairs pursuant to Section 7602, IR.C. 1954, with respect to taxable years barred by the statute of limitations. The agent had issued a summons to plaintiffs' bank requiring the bank to furnish him with all records pertaining to plaintiffs' financial transactions for the years involved. An investigation had previously been made for two of the taxable years. The Court found that the Government failed to establish that there were reasonable grounds or probable cause to suspect fraud on the part of the plaintiffs and that without such proof of fraud the agent acted in excess of his authority under Section 7602. The Court granted the plaintiffs an injunction restraining the Government from examining the plaintiffs, their records or any third party with respect to financial dealings or transactions the plaintiffs had with such third parties. The Court further enjoined the bank to whom the summons was directed from disclosing any information or records concerning the plaintiffs' transactions with it.

Staff: Acting United States Attorney Sidney I. Lezak and Assistant United States Attorney Edward J. Georgeff (D. Ore.); Stanley F. Krysa (Tax Division).

Liens; Arising Despite Partial Payments of Tax Liability - Enforceable Against Cash Values of Life Insurance Paid to Beneficiary Upon Death of Taxpayer-Insured, Despite Assignment to Bank; United States v. Lillian Wintner, et al. (N.D. Ohio, Dec. 11, 1961.) Taxpayer died in 1954, owing income tax for 1946, which with interest amounted to more than $26,000 at the time of trial, and which had been assessed prior to death. At the time of his death, there were eight insurance policies on his life in the total face amount of $80,500. The cash values of the policies at the time of death totaled approximately $34,500. The policies were assigned to a bank as security for loans of $34,000. The assignments took priority over the tax liens, because no notice of tax lien was filed. After taxpayer's death, $34,000 was paid out of the policies to the bank, which then released the assignments, and the balance of the proceeds was paid to taxpayer's widow, as beneficiary of the policies. The Government first sought to hold the widow liable for the taxes as a transferee, but pursuant to stipulation, the Tax Court entered a decision that she was not thus liable. In this action, the Government sought to hold the widow liable on the theory set forth in United States v. Bess, 357 U.S. 51, that she received the cash values of the policies, as part of the proceeds, subject to tax liens thereon.

The Court first held that the prior Tax Court decision was not res judicata, since it involved a different cause of action, for transferee

liability, while this action was to enforce federal tax liens. Secondly, the Court held that federal tax liens had attached to the cash values of the policies prior to taxpayer's death, and that the liens followed the proceeds into the hands of the beneficiary. In the Bess case, the Supreme Court had reserved the question of whether there was a neglect or refusal to pay under Section 3670, I.R.C. 1939, where the taxpayer has made periodic partial payments on account of the tax liability. Here, the question was squarely presented, and the Court held that a lien does arise under these circumstances, since there has been a failure to pay the balance of the tax.

Thirdly, the Court held that, despite assignment of the policies to the bank, taxpayer still had an interest in the cash values, since he had a right to them upon payment of the bank, and federal tax liens attached to this right. Following United States v. Behrens, 230 F. 2d 504 (C.A. 2), the Court held that the liens of the bank must be marshalled against the proceeds of the policies in excess of the cash values, thereby leaving the whole cash values for satisfaction of the tax liens.

Accordingly, the Court held that the Government is entitled to judgment against the beneficiary for the full amount of the tax liability with interest and costs, not to exceed the cash values at the time of death. Since the cash values at the time of death exceed the tax liability with interest and costs, the Government will recover the whole amount thereof from the widow.

Staff: United States Attorney Merle M. McCurdy (N.D. Ohio), and Robert L. Handros (Tax Division).

Liens; Priority; Choateness; Extinguishment of Federal Tax Liens. United States v. Paul Meyer, et al, 61-2 U.S.T.C. Par. 9747 (C.C.H.) (S.D. Ill., 1961.) The United States brought suit to foreclose tax liens arising out of Section 6321, I.R.C. 1954, on realty, the title to which was in taxpayer at the time of federal tax liens arose on April 8, 1955. Prior to the arising of the federal tax liens, defendant acquired a certificate of purchase to the involved realty at a state property tax foreclosure sale and, after the two year period of redemption expired, received tax deeds on October 24, 1957. Defendant-purchaser complied with all applicable provisions of state law, including giving notice of the impending expiration of the period of redemption to the taxpayer, the United States and other interested parties. Defendant-purchaser moved for summary judgment on the grounds that at the time the tax lien of the United States arose, it was inferior to his interest arising out of the certificate of purchase and that the tax lien of the United States was extinguished by the issuance of the tax deeds to him. The Court granted summary judgment in favor of defendant-purchaser.

The Government contended first of all that the interest of defendant-purchaser was inchoate at the time the federal tax lien arose, which would entitle the United States to priority. United States v. City of New Britain, 347 U.S. 81 (1954). The Government argued that the interest of defendant-purchaser under the certificate of purchase was then inchoate

because neither title nor possession had been taken by him at the time the federal tax liens arose (such title and possession being in the taxpayer), United States v. Gilbert Associates, Inc., 345 U.S. 361 (1953), and because numerous contingencies might arise that would prevent the interest of defendant-purchaser under the certificate from ever becoming perfected into title, United States v. Security Trust & Savings Bank, 340 U.S. 47 (1950). However, the Court in rejecting the foregoing contentions of the United States, held that the certificate of purchase interest of defendant-purchaser was choate within the rules set out in the City of New Britain decision, supra: 1) identity of the lienor, 2) certainty of the amount of the lien, and 3) identity of the property subject to the lien.

Secondly, the Government contended that even though the interest of the defendant-purchaser may have been choate at the time the federal tax lien arose, and thus entitled to priority, the interest of the United States could not be divested by the termination of the taxpayer's interest under state law by the issuance of the tax deeds to the defendant-purchaser. United States v. Brosnan, 363 U.S. 237, 240 (1959). The Brosnan case involved the question whether a junior federal tax lien could be foreclosed in either of the following proceedings in which the United States was not a party: sale of the mortgaged property under a writ of fieri facias and sale of the mortgaged property pursuant to powers of sale contained in the mortgage. The Supreme Court set out the general rule that in the situation where a fee is owned by a taxpayer subject to an encumbrance senior under state law, the federal tax lien does not necessarily attach subject to that lien and the "property" to which the federal tax lien attaches is not diminished by the particular means of enforcement possessed by a competing lienor entitled to priority. However, the Supreme Court in the Brosnan case held that the federal tax liens were extinguished by the involved foreclosure sales and did not follow the foregoing general rule, on the ground that to hold the involved foreclosure sales not effective to extinguish the federal tax lien would dislocate long-standing non-judicial means of enforcing liens under state law. The Government contended that the exception set out in the Brosnan decision was not applicable to divest the Government of its rights in property by a procedure which negates any possibility of the Government's realizing any proceeds for its lien interest. (There was a possibility under the termination procedures in Brosnan that the Government would realize some proceeds, in that foreclosure sales were involved in that case.) However, the Court rejected the foregoing contention of the Government, holding that in the instant case the federal tax lien was extinguished under the exception set out in the Brosnan case, since to hold otherwise would disrupt long-accepted state procedures.

Staff: United States Attorney Edward R. Phelps and Assistant United States Attorney Marks Alexander (S.D. Ill.); Lorence L. Bravenec, (Tax Division).

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