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DEPARTMENT OF JUSTICE

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UNITED STATES ATTORNEYS

BULLETIN

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Vol. 10 February 23, 1962 No. 4

NEW APPOINTMENTS

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

Delaware - Alexander Greenfeld

Mr. Greenfeld was born January 19, 1929 at Wilmington, Delaware and is single. He attended the University of Delaware from September 19, 1946 to September 29, 1949 when he received his A.B. degree; Harvard University Law School from September 1949 to April 1950; and the University of Pennsylvania Law School from September 5, 1950 to June 10, 1953 when he received his LL.B. degree. He was admitted to the Bar of the State of Delaware and the District of Columbia in 1953. He served in the United States Army from January 1, 1954 to December 31, 1955 when he was honorably discharged as a First Lieutenant. From January 1956 to February 1957 he was a legal associate of Mr. Albert Simon in Wilmington and from February 1957 to January 15, 1959 he was Deputy Attorney General of the State of Delaware. He returned to the private practice of law in Wilmington until October 25, 1960 when he was appointed an attorney-adviser of the Complaints and Compliance Division, Broadcast Bureau, Federal Communications Commission in Washington, D. C. which position he held until his appointment as United States Attorney.

Virgin Islands - Almeric L. Christian

Mr. Christian was born November 23, 1919 at Christiansted, St. Croix, Virgin Islands, is married and has one child. He attended the University of Puerto Rico from August 1937 to June 1938 and Columbia University from September 1938 to June 2, 1942 when he received his A.B. degree. He served in the United States Army from April 17, 1942 to March 24, 1946 when he was honorably discharged as a First Lieutenant. He returned to Columbia University Law School in February 1946 and received his LL.B. degree on June 3, 1947. He was admitted to the Bar of the Virgin Islands that same year. Since that time he has engaged in the private practice of law in St. Croix.

The nomination of the following appointee as United States Attorney has been submitted to the Senate:

Louisiana, Western - Edward L. Shaheen

As of February 15, 1962, the score on new appointees is: Confirmed - 80; Nominated - 4.

REQUESTS FOR NEW MANUALS OR CORRECTION SHEETS

Considerable time will be saved and requests can be filled more quickly if all requests for additional United States Attorneys Manuals or copies of correction sheets are directed to the Executive Office for United States Attorneys, Room 4218.

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ANTITRUST DIVISION

Assistant Attorney General Lee Loevinger

SHERMAN ACT

Package Store Liquor Dealers in Connecticut Defendants in Indictment And Complaint in Sherman Act Cases. United States v. Connecticut Package Stores Association, Inc., et al. (D. Conn.) On January 30, 1962, an indictment was returned against both a state and local trade association of retail store operators and six officials of the state association. A companion civil complaint named as defendants the associations only. The membership of the Connecticut Package Stores Association comprises a substantial part of all retail liquor store owners who own and operate package stores in Connecticut. The New Haven Association is one of many local associations which belong to the State Association. The combined sales of package store owners in Connecticut are estimated at $100 million annually. The Connecticut State Liquor Control Act of 1933 requires that minimum wholesale and retail prices of all alcoholic beverages sold in Connecticut be posted with the State Liquor Commission and prohibits sales at less than posted prices.

Count One of the indictment charged defendants and co-conspirators with engaging, since at least January 1, 1950, in a combination and conspiracy in violation of Section 1 of the Sherman Act, the substantial terms of which were: (a) to raise the posted minimum retail price of alcoholic beverages; (b) to lower the posted minimum wholesale price of alcoholic beverages; (c) to raise, fix and stabilize the retail markups on the retail sale of alcoholic beverages; (d) to induce and coerce manufacturers and wholesalers to post minimum wholesale and retail prices to fix retail markups "approved by defendants" and to boycott those who refuse to do so; and (e) to adopt secret and coded plans to carry out the conspiracy.

The indictment charged that, as a result of the alleged combination and conspiracy, the retail markups on alcoholic beverages have been raised, and competition among manufacturers and wholesalers in the sale and distribution of alcoholic beverages has been suppressed and eliminated.

Count Two of the indictment named the six individuals also named in Count One and charges them with a violation of Section 14 of the Clayton Act in that they, acting as officers and agents of said associations authorized and did acts constituting in part the violation of the Sherman Act by defendant associations as charged in Count One.

The relief prayed for in the civil complaint includes, among others, injunctive relief that all committees of defendant association which participated in the conspiracy be dissolved.

Staff: John J. Galgay, Joseph T. Maioriello, Francis E. Dugan, Donald A. Kinkaid and Richard L. Shanley. (Antitrust Division).

Amended Complaint Filed in Standard Oil Case. United States v. Standard Oil Company (Indiana), et al. (N.D. Calif.). On January 31, 1962, an amended complaint was filed in this action. The original complaint, filed September 19, 1961, sought to prevent and restrain the acquisition of the assets of Honolulu Oil Corporation by Pan American Petroleum Corporation and Tidewater Oil Company, alleging that such acquisition would be violative of Section 1 of the Sherman Act and Section 7 of the Clayton Act. Also named as parties to the defendant were Standard of Indiana and Getty Oil Company. Pan American is a wholly owned subsidiary of Standard and Getty owns a controlling interest in Tidewater. On October 11, 1961, the court denied the Government's motion for a preliminary injunction and soon thereafter the merger was consumated.

In the amended complaint Getty has been dropped as a party defendant since it is considered that this company is not a necessary party for adjudicating the merits of the case or for obtaining effective relief.

The charging paragraphs of the complaint have been changed to reflect a completed transaction and the prayer for relief has been altered to ask for divestiture.

Staff: Lyle L. Jones, Marquis L. Smith, Melvin J. Duvall, Jr., Rodney O. Thorson and David R. Melincoff (Antitrust Division).

CLAYTON ACT

Acquisition of Malt Plant by Brewer; Complaint Under Section 7. United States v. Anheuser-Busch, Incorporated, et al. (E.D. Mo.). On January 31, 1962, a complaint was filed against Anheuser-Busch, Incorporated, and Rahr Malting Co. Alleging that the acquisition by Anheuser of the assets of the Rahr malting plant in Manitowoc, Wisconsin would have the proscribed effects of Section 7 of the Clayton Act on the production, distribution and sale of malt and beer. On February 1, 1962, Anheuser acquired Rahr's malting plant in Manitowoc, Wisconsin, thereby enabling Anheuser to supply all of its requirements of malt, the primary ingredient of beer. The complaint states that Anheuser is the No. 1 brewer in the nation and it already possessed a malting plant which supplied a substantial portion of its malt requirements. Anheuser has traditionally purchased the greater share of its malt requirements from independent commercial maltsters.

Among the effects of this acquisition, the complaint alleges that Rahr, which prior to February 1, 1962, was the second largest independent commercial maltster in the country, will be greatly curtailed as a source of supply for many brewers which had purchased, or had the opportunity to purchase, from it in the past. Although Rahr will continue to operate a malting plant at Shakopee, Minnesota, Rahr's capacity will be less than half of what it was before this acquisition.

The complaint also alleges that some 13 independent commercial maltsters which had previously sold to Anheuser no longer had that substantial brewer as a customer. It is also alleged that this acquisition will give

Anheuser the largest malting capacity among the brewers and is a step towards concentration in the production, distribution and sale of malt. The complaint alleges that Anheuser's advantages over its brewery competitors may be enhanced by this acquisition.

The prayer asks that Anheuser be required to divest itself of the Manitowoc properties and assets which it acquired from Rahr.

Staff: John F. Hughes and Richard P. Delaney (Antitrust Division)

* * *

CIVIL DIVISION

Assistant Attorney General William H. Orrick, Jr.

DISTRICT COURT

SOCIAL SECURITY

Plaintiff Not Disabled Engage in Substantial Gainful Employment Where for Unemployment Compensation Purposes Psychiatrist Certified Him Capable of Engaging in Profession and Plaintiff Admits Ability to do Household Chores. Thone v. Ribicoff (E.D. N.Y., January 31, 1962.) Plaintiff, a mechanical engineer, was discharged in 1957 from his position as an assistant project engineer with a construction company after nearly 12 years of service, on grounds that his psychiatric condition rendered continued employment impossible. He had been under treatment since 1950 for a condition variously diagnosed as "paranoic personality characterized by schizoid traits, psychoneurosis-obsessive compulsive type" and as "APA #000 - X26 schizophrenic reaction, chronic undifferentiated type."

Almost immediately after discharge plaintiff applied for, and received, unemployment compensation payments upon his psychiatrist's certification that he was capable of working 8 hours a day, 5 days a week, in his usual occupation; that he was employable and should return to his former profession. Unable to locate suitable employment, plaintiff exhausted 39 weeks of unemployment benefits.

Thereafter, he filed a claim for social security benefits. He claimed disability as a result of 4 recurrent hernias which had been repaired but which left him unable to climb or lift anything. The combination of physical and psychiatric complaints, according to plaintiff, constituted a disability so severe and indefinite in duration as to prevent him from engaging in any substantial employment. The claim was denied by the Secretary, whereupon plaintiff brought this action.

The district court found that the Examiner's decision that plaintiff was capable of substantial gainful employment was supported by substantial evidence and therefore granted summary judgment for the Secretary. The evidence relied on was the unemployment compensation application based upon the psychiatrist's certification that plaintiff could engage in his profession and plaintiff's own admission that he was capable of such household tasks as gardening and woodworking.

Staff: United States Attorney Joseph P. Hoey; Assistant United States Attorney Jerome F. Matedero (E.D. N.Y.)

COURT OF APPEALS

ADMIRALTY

Libel Claim for Overtime Wages Dismissed on Ground of Laches. McMahon v. Pan American Airways, Inc. et al. (C.A. 5, January 2, 1962.) McMahon filed

a libel in personam against Pan American and United States, claiming that as an employee of Pan American he had worked on a vessel owned by the United States and was entitled to damages for unpaid overtime and wrongful discharge. The libel was filed on March 24, 1959, and alleged that appellant had been discharged on August 24, 1957. The Court of Appeals held that in determining laches, the federal court is guided by the state statute of limitations where the claim arose, in this case Florida. As the Florida statute of limitations governing overtime claims was one year, the appellate court affirmed the district court's dismissal of the overtime claim on the ground of laches.

Staff: William Gwatkin (Admiralty)

AGRICULTURAL ADJUSTMENT ACT OF 1938

Regulations Establishing Method for Determining Wheat Acreage Allotments for 1960 Crop Year Upheld. Bishop, et al. v. Review Committee (C.A. 8, January 24, 1962.) Plaintiffs were 31 wheat farmers operating farms in Perkins and Keith Counties in a wheat growing region of western Nebraska. Each of the plaintiffs had knowingly overplanted his wheat allotment in one or more of the crop years from 1955 through 1957. Approximately half of them, however, had stored the resulting excess of wheat in compliance with the Secretary of Agriculture's regulations, thereby avoiding the payment of any penalties under the quota provisions of the Act.

From 1954 through 1958 the County Committees in western Kansas, as in some other parts of the country, had carried over the base acreages of farmers from year to year regardless of overplanting, so that farmers who had overplanted their allotment in 1954 and thereafter, did not receive smaller allotments as a result of their lack of compliance.

Unlike the regulations for prior years, the 1960 wheat acreage allotment regulations provided for computations of allotments on the historical acreage method only, thereby eliminating the carry over method and preventing the County Committees from carrying over allotments from one year to the next. As a result of the new regulations, plaintiffs received smaller acreage allotments for the 1960 crop year because they have overplanted their allotments between 1955 and 1957. Plaintiffs attacked the regulation on the ground that it was retroactive in effect, imposing on them a sanction for overplanting which did not exist at the time of the overplanting. Plaintiffs also contended that the 1958 amendment to the Act (P.L. 85-366, 7 U.S.C. 1334) which provided that overplanting for 1958 and subsequent years should not result in lower acreage allotments if the farmer complied with the Secretary's storage requirements, and which adopted for the 1958 crop history the Secretary's regulations for that year, precluded the Secretary from changing the 1960 regulations to reduce the allotment fees of those who had overplanted prior to 1958 but had stored their wheat in compliance with the Secretary's storage regulations.

The Court of Appeals rejected plaintiffs' contentions, and upheld the 1960 regulations. The Court held that the pre-1960 regulations had allowed the use of the "carry over" provisions only where that method of computation would result in substantially the same acreage as the historical acreage method (Rigby v. Rasmussen, 275 F. 2d 861); and held that the erroneous use by the County Committees of the carry over provisions under the former regulations gave plaintiffs no vested right, because the Secretary is authorized to correct mistakes of law made by him or his subordinates (Automobile Club of Michigan v. Commissioner, 352 U.S. 180). The Court also noted that regulations of prospective force are not retroactive merely because they call for determinations based upon past events.

The Court also ruled that Public Law 85-366 was not intended to freeze the carry over provisions of the former regulations as a permanent method for determining allotments, and also noted that even where a statute is reenacted without change, earlier administrative interpretations are not necessarily binding. Helvering v. Wilshire Oil Co., 308 U.S. 90.

Staff: David L. Rose (Civil Division)

FARMERS HOME ADMINISTRATION

State Law Controls Liability of Auctioneer to United States For Sale of Chattels Subject to Farmers Home Administration Mortgage. United States v. Union Livestock Sales Company, Inc., (C.A. 4, January 12, 1962). An auctioneer sold two cows at Parkersburg, West Virginia, which were covered by a chattel mortgage recorded in Ohio in favor of the Farmers Home Administration. The principal question was whether the liability of the auctioneer was governed by state law, see United States v. Kramel, 234 F. 2d 577, (C.A. 8) or by federal law, see United States v. Matthews, 244 F. 2d 626 (C.A. 9). The Fourth Circuit concluded that state law should control in a case like this where "transfers of private property are made by the owners in accordance with State law in the course of business transactions." It further concluded that under the law of West Virginia, as under the federal rule of the Matthews case, the auctioneer is liable for the sale of the mortgaged property without the consent of the mortgagee, and therefore affirmed the district court's judgment in favor of the Government.

Staff: United States Attorney Robert C. Maxwell (N.D. W.Va.)
Former United States Attorney Albert M. Morgan on brief).

MANDAMUS

Denial of Petition for Writ of Mandamus, Seeking to Compel Secretary of Navy to Grant Navy Civilian Employee Third Grade Stage Grievance Hearing. Weiss v. Korth, (C.A. D.C., February 1, 1962). The Court of Appeals held, per curiam, that the extraordinary writ of mandamus would not issue to compel the Secretary of the Navy to grant a Navy civilian employee a third stage grievance hearing. Appellant had brought a grievance proceeding, within the Department, principally based on the Navy's failure over a period of years to give him a promotion. After the first two stages of the proceeding had been completed, appellant sought a third stage review

at a higher level. He was denied a third stage hearing on the ground that he had not stated specifically why he was aggrieved and what corrective action he sought, as required by Navy Civilian Personnel Instruction 770.2-1. The Court of Appeals noted that the controlling regulation made it clear that reasonable "* * * requirements of specificity must be observed * * *" and held that, in the circumstances, there was "* * * no abuse of discretion on the part of the district court in declining to issue the extraordinary writ."

Staff: Jerry C. Straus (Civil Division)

SOCIAL SECURITY ACT

Failure to Establish Medically Determinable Ailment Rendering Plaintiff Incapable of Engaging in Substantial Gainful Employment. Bradley v. Ribicoff, (C.A. 4, January 4, 1962). Claimant was a 61 year old textile worker who left work in 1954 and has not been employed since. She applied for Social Security benefits alleging disability by virtue of heart disease and frequent urination as a result of neurosis and menopause syndrome. The Court of Appeals reversed the district court's order reversing the Secretary's finding that plaintiff was not entitled to a period of disability or to disability benefits. It found "sharp conflicts" in the objective medical findings and diagnosis: It noted that there was no evidence of X-ray or laboratory tests to support Dr. Black's finding of heart disease while the contrary finding of no heart disease was based upon extensive X-ray and fluroscopic examination; two urologists found no kidney involvement in claimant's urinary condition; and there was no evidence to link the frequent urination to the neurosis and menopause syndrome. The Court observed that although the evidence showed a bladder ailment, there had been no "reasonable showing of the permanence of the disability" nor of the impossibility of remedying the condition as required by 20 C.F.R. 4021.1501(g).

The Court explicitly noted that this case was different on the record from Underwood v. Ribicoff, No. 8458, decided the same date, for there, the evidence established a medically determinable ailment and the Secretary had failed to consider that ailment in light of claimant's work history, age, and education.

Staff: Marvin S. Shapiro (Civil Division)

Administrative Determination of Ability to Engage in Substantial Gainful Employment Partially Supported by Record, and Partially Unsupported by Substantial Evidence. Bramlett v. Ribicoff, (C.A. 4, January 4, 1962). Claimant was a 60 year old lead or head welder in charge of supervising a team of welders and planning and organizing their activities, as well as welding himself. He had a 10th grade education, and attended a business school for a few months. During World War II he had been a civilian employee of the Navy and an inspector and assistant supervisor of inspectors. In July 1957, he quit his

job because of emotional problems. Thereafter he filed a claim for Social Security disability benefits.

The medical evidence submitted by claimant indicated that he had organic vascular brain disease (arteriosclerosis) which resulted in a convulsion or attack in December, 1958. Because of this condition, his physician considered him physically disabled. Claimant testified to a long history of headaches and dizziness, more severe since the convulsion of 1958. A report of a neuro-psychiatrist of the Veterans Administration in April, 1959, assessed the claimant's degree of incapacity from arteriosclerosis as "severe." A psychiatric report indicated that he had only a mild anxiety reaction. The hearing examiner concluded that claimant had only frequent headaches and dizziness due to the cerebral arteriosclerosis, but that such headaches and dizziness did not disable him from engaging in substantial gainful employment as an inspector or supervisor.

The district court reversed, holding in effect that claimant had been unable to engage in substantial gainful activity since July, 1957. This decision of the district court was one of 18 in a period of less than two years in which the district court had reversed the findings of the administrative determination in Social Security disability cases.

The Court of Appeals, in one of three Social Security disability cases (See also Underwood v. Ribicoff and Bradey v. Ribicoff) decided on the same date, affirmed in part and reversed in part. The Court held that the frequent headaches caused by the arteriosclerosis constituted a disability; and that the hearing examiner failed to base his decision on all the evidence in the case, but overemphasized the objective clinical findings at the expense of the claimant's testimony. See Underwood v. Ribicoff, infra. However, the Court found that there was substantial evidence to support the administrative determination that claimant was not disabled from July, 1957, to December, 1958, and therefore remanded the case to the district court with instructions to modify its judgment.

Staff: David L. Rose (Civil Division)

Administrative Determination of Ability to Engage in Substantial Gainful Employment Not Supported by Substantial Evidence. Underwood v. Ribicoff (C.A. 4, January 4, 1962). Claimant was a 65 year old former construction foreman and lecturer on heat treating of bed sheet steel, with a high school education. He applied for Social Security disability benefits. In affirming the district court's reversal of the Secretary's decision finding claimant capable of engaging in substantial gainful employment, the Court of Appeals observed that there are four elements of interrelated proof to be considered: (1) the objective medical facts, which are the clinical findings of treating or examining physicians divorced from their expert judgments or opinion as to the significance of these clinical findings, (2) the diagnoses, and expert medical opinions of the treating and examining physicians on subsidiary questions of fact, (3) the subjective evidence of pain and disability testified to by claimant, and corroborated by his wife and his neighbors, (4) Claimant's educational background, work history, and present age.

With respect to the first two categories the Court found that the medical evidence revealed discrepancies only as to the severity of claimant's ailments but all agreed that claimant suffered from heart disease, arthritis, lung disease, and orthopedic disorder. The subjective evidence indicated that he was subject to general weakness, throbbing headaches, pain in the left chest, dizzy spells, and shortness of breath. The Court concluded that claimant's construction work background and education equipped him only for work which involved a considerable amount of physical exertion.

Staff: David Rose and Jerome I. Levinson (Civil Division)

SOIL BANK ACT

In Absence of State Committee Determination That Grazing Violation Warranted Termination of Contract State Committee Decision Ordering Forfeiture and Refund of Payments Reversed. Shay v. Agricultural and Conservation State Committee for Arizona (C.A. 9, January 24, 1962). A State Agriculture Stabilization and Conservation Committee determined that plaintiffs "knowingly and willfully" grazed their land in violation of their Soil Bank Contract and therefore pursuant to 6 C.F.R. 485.286 of the Secretary's regulations ordered forfeiture and refund of the entire compensation received under the contract. In reversing the district court's affirmance of the State Committee decision, the Ninth Circuit held that 6 C.F.R. 485.286 was invalid because it provided for forfeiture of the entire compensation received upon a determination that there had been a "willful and knowing" grazing violation. The Court held that 7 U.S.C. 1821 and 1831(d) required a determination that there be not only a violation of the contract but that the violation must be of such a character as to warrant termination of the contract and here there was no such determination.

After judgment in the district court was entered, plaintiffs obtained an order, purporting to stay proceedings for the enforcement of the judgment, pending appeal, and directing the immediate release of any lien claim by the Department of Agriculture, based upon its judgment, on the proceeds of certain crops grown in 1960 and afterwards. The Court of Appeals held that the Government's motion to vacate the order should have been granted. The Court held that under 7 U.S.C. 1831(d) the district court's jurisdiction was limited to a "review" of the determination of the committee and expressly observed that nothing prevents the Government from asserting its right of set-off in such a case as this.

Staff: Marvin Shapiro (Civil Division)

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CIVIL RIGHTS DIVISION

Assistant Attorney General Burke Marshall

Demand for Voting Records Under Title III of Civil Rights Act of 1960, 42 U.S.C. 1974(b) and 1974(d). Robert F. Kennedy, etc., et al. v. William H. Bruce, etc., et al., (C.A. 5). This was an application by the Attorney General to obtain access to the voting records of Wilcox County, Alabama. Also involved in this appeal was a state court injunction to prevent the Attorney General from obtaining access to those same records. The state court case was transferred to federal court and a motion to dismiss the state court suit was filed by the Attorney General. A motion to dismiss the Attorney General's application was made by the registrars. The matter was pending before the District Court for the Southern District of Alabama for some 12 months before there was a hearing in June 1961 and in September 1961 the District Court denied the Attorney General's motion to dismiss and granted the registrars' motion to dismiss. Although the District Court did not issue an opinion, its decision may have turned on the only aspect of this case which caused it to differ in any respect from the case of State of Alabama v. Rogers, Attorney General, and In Re Crum Dinkins, 285 F. 2d 430 (C.A. 5, 1961), affirmed 187 F. 2d 848 (M.D. Ala. 1960); namely, affidavits filed by the registrars purporting to show that no Negroes had attempted to register to vote in Wilcox County.

The District Court certified an appeal from its denial of the Government's motion to dismiss, and the Court of Appeals issued an order permitting the entire case to go up on appeal.

On February 5, 1962 the Court of Appeals handed down its opinion and order reversing the judgment of the District Court in both instances, dismissing the action which had been removed from the state court and remanding the application proceeding with directions to enter an order granting the relief shown therein. Further, the Court of Appeals directed that because of the long delay which had occurred since the filing of the application that should have been granted "as a matter of course", its order was to be transmitted "forthwith" to the District Court. In its opinion, the Court pointed out that both the state court action and the application of the Attorney General were controlled by its decision in the Dinkens case, supra, in which it had adopted the reasoning and decision of the District Court for the Middle District of Alabama. It found the attempt of the registrars, by their affidavits, to frustrate an investigation into the manner of the discharge of the duties to be a "complete non sequitur." It held that the procedure established under Title III does not amount "to the filing of a suit of any kind", and reaffirmed the Dinkens decision, pointing out that Title III "permits the application by the Attorney General to be made without identifying the nature of the information upon which the Attorney General is acting", and concluding that "the request of the Attorney General was sufficient to require the respondents, members of the Board of Registrars, to make their

records available as requested, and upon their failure to do so to entitle the Attorney General to a prompt order of the court requesting such compliance."

Staff: Assistant Attorney General Burke Marshall; United States Attorney Vernol R. Jansen, Jr.(S.D. Ala.); Harold H. Greene, Howard A. Glickstein, Gerald P. Choppin (Civil Rights Division).

Publication and Distribution of Unlabeled Political Literature. On February 8, 1962, a Grand Jury in Chicago, Illinois, returned a one-count indictment charging Maurice Henry Lee Williams, with wilfully causing to be published and distributed copies of an anonymous political pamphlet concerning John F. Kennedy, the Democratic candidate for President of the United States, at the November 8, 1960, general election in violation of 18 U.S.C. 612. Williams was to be arraigned on February 12, 1962.

Staff: United States Attorney James P. O'Brien, and Assistant United States Attorney James Ward (N.D. Ill.).

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT, 1959

(29 U.S.C. 401-531)

Notification of Regional Attorney, Department of Labor, of Referrals from Federal Bureau of Investigation. Title 2 of the United States Attorneys Manual at pages 85-86.1 sets forth the investigative jurisdiction of the Bureau of Labor-Management Reports and the Federal Bureau of Investigation over offenses under the LMRDA, 1959. Attention is invited to Supplement No. 2 of Memo No. 277 (July 31, 1961) which advises that the F.B.I. has been instructed to furnish United States Attorneys with duplicate copies of investigative reports of violations of the captioned acts, which, upon completion of the investigation, are to be furnished to the Regional Attorney, Department of Labor, with notification of the United States Attorney's intended action. We have been requested to bring to the attention of the United States Attorneys the necessity for compliance with these instructions. Failure to advise the Department of Labor of these referrals creates a serious impediment to the proper operation of that Department.

In addition we are advised that the Regional Attorney will soon be seeking a personal interview with each United States Attorney in his Region for the purpose of extablishing liaison and effecting cooperative action in the administration and enforcement of the Labor Laws. We are confident that the United States Attorneys will extend to the Regional Attorneys every courtesy and will endeavor to cooperate and coordinate their activities to whatever extent is possible.

It should also be noted that violations of 29 U.S.C. 186 which are investigated by the Federal Bureau of Investigation may also be violations of the LMRDA, if the reports required by Title II have not been filed. Title II violations are investigated by the Bureau of Labor-Management Reports. Accordingly, when reports concerning possible Section 186 violations are received from the F.B.I., they should be reviewed with respect to possible reporting violations under the LMRDA. At the conclusion of the F.B.I. investigation, such facts as are relevant to any possible reporting violation should be transmitted to the Office of the Regional Attorney with advice as to the United States Attorney's intended action with respect thereto or with a request for such further investigation as the United States Attorney may think necessary.

In making the facts of the matter available to the BLMR there is no objection to permitting examination of the United States Attorney's file if the United States Attorney believes that such examination can be made

consistently with the law (especially Rule 6(e), Rules of Cr. Proc.) and the policies of the Department.

HORSE RACE TOUT SERVICES AND THE USE OF THE MAILS

Investigations conducted under the recent antiracketeering legislation reveal that there are a number of individuals operating as "tout" services through use of the mails. A typical operation is conducted as follows:

> An individual will regularly mail to various persons a printed paper in which he claims to be able to forecast the winner of future horse races. His ability to predict may be ostensibly based upon his capacity as a handicapper or on "inside information". He urges the recipient to send a certain sum of money to him which will entitle the remitter to the name of the winning horse or requests the recipient to place an additional wager on the outcome of the race for the benefit of the "Tout". In the latter situation the bettor is requested to remit the winnings on the race to the "Tout".

The Criminal Division has examined this situation in the light of the new anti-racketeering statutes (18 U.S.C. 1952, 1953 and 1084) and is satisfied that a prosecution cannot be brought under any of these statutes unless other elements are present. A prosecution, however, under the provisions of the mail fraud statute (18 U.S.C. 1341) may well be possible.

It is suggested that whenever cases of this type, produced as a result of the investigative efforts of the postal authorities are received, serious consideration be given to the possibility of prosecution under the mail fraud statute. It may be that if some prosecutions were to be brought against the large-scale flagrant operators, the deterrent effect on other "tout" services would be widespread. This would offer a valuable contribution to our organized crime program.

These situations can be distinguished on the facts from the landmark "gambling" mail fraud case, Stockton v. United States, 205 F. 462 (C.A. 7, 1913). You are referred to the memorandum "Study of the Phrase 'Scheme and Artifice to Defraud'" sent with the Bulletin dated December 1, 1961 (Vol. 9, No. 24, p. 698) pages 11 et seq. The basis for mail fraud can be more readily ascertained by referring to Linden v. United States, 254 F. 2d 560 (C.A. 4, 1958). See, also, Gregory v. United States, 253 F. 2d 104 (C.A. 5, 1958), a football contest fraud case, for a discussion of the standards of dealing with the public as criteria of a scheme to defraud.

Should it be decided that the facts submitted by the postal authorities warrant prosecution under the mail fraud statute, the United States Attorneys are requested to present an analysis of these facts to the Department for consideration prior to the commencement of any action.

NARCOTICS

(18 U.S.C. 1403; 21 U.S.C. 174;26 U.S.C. 4705(a) and 4704(a); 18 U.S.C. 371)

Conspiracy to Violate Narcotics Laws; Penalties; Single Count Charging General Conspiracy to Violate Several Statutes; Advisability of Separate Counts or Request for Special Verdict. John T. Brown v. United States (C.A. D.C.). Defendants Brown and Carlton Bryant were each convicted under a single count of conspiracy to violate 18 U.S.C. 1403, 26 U.S.C. 4705(a) and 4704(a) and 21 U.S.C. 174. Each was sentenced to 18 years' imprisonment. On appeal, defendants alleged that it was error for the lower court to refuse to allow special verdicts on the general conspiracy and also alleged that the sentences imposed were excessive. In sustaining these contentions the Court pointed out that 26 U.S.C. 4705(a) and 4704(a) and 21 U.S.C. 174 define and interdict not only substantive offenses but conspiracies as well. Section 1403 of Title 18, on the other hand, is limited to outlawing a substantive offense only and conspiracy to violate that statute is governed by 18 U.S.C. 371.

Citing United States v. Galgano, 281 F. 2d 908, cert. den. 366 U.S. 960, and Rule 7(c), F.R. Crim. P., the Court pointed out that conviction for a general conspiracy to violate any of the three combination conspiracy-substantive offense statutes "ipso facto insurs the penalty for conspiracy contemplated by the particular statute found violated among these, which at maximum will be heavier than the five years that can be given under 18 U.S.C. 371.... But if the conspiracy found under 18 U.S.C. 371 had as its sole object the violation of 18 U.S.C. 1403, the maximum penalty can be no more than five years. The crux of our problem is that in finding Brown and Bryant guilty as charged under Count 1 of the instant indictment, there being no special verdict as requested, the jury did not say whether this meant Brown and Bryant conspired to violate one or more of the three heavy penalty conspiracy statutes, or merely to commit the substantive offense set forth in 18 U.S.C. 1403. Of course, the jury may have found that the conspiracy existed as to all the statutes named in the count. The important point is that under the instruction given it the jury may have found guilt only as to the conspiracy to commit acts prohibited by 18 U.S.C. 1403. Only a special verdict would reveal to us this essential information."

The Court noted that in United States v. Shackelford, 180 F. Supp. 857 (S.D. N.Y. 1957), the same situation was met by a holding to sentence the defendant under the least severe of the statutes involved. In the instant case, however, since the record contained evidence from which a jury might appropriately find guilt as to offenses punishable by more than five years, the Court withheld entry of judgment to permit the Government to consider whether the consent to resentencing of the defendants under 18 U.S.C. 371. In the event the Government did not so consent, the Court indicated it would reverse the judgments of conviction and remand the cases for a new trial.

It is the view of the Criminal Division that the result reached here under all of the circumstances of the case is an entirely appropriate one. However, the case points up the necessity of requesting special verdicts with regard to counts of an indictment which allege conspiracy to violate several statutes which have incompatible sentencing provisions. In the alternative, of course, conspiracy to violate each statute could be charged separately but where conviction is had on more than one count and the evidence indicates a single conspiracy, care should be taken to so advise the court in order that the sentences imposed be made concurrent and not consecutive. (See Braverman v. United States, 317 U.S. 49, 54 (1942).)

Staff: United States Attorney David C. Acheson; Assistant United States Attorneys Daniel J. McTague and Charles T. Duncan (Dist of Col.)

DEPORTATION

Petition for Review under Section 106; Failure to Exhaust Administrative Remedy. James Joseph Noone v. United States Immigration and Naturalization Service (C.A. 3, January 11, 1962). In this petition for review of a deportation order, filed under Section 106 of the Immigration and Nationality Act as recently added by Section 5(a) of P.L. 87-301, petitioner alleged that he was an alien who had been admitted for permanent residence in 1958. Later that year deportation proceedings were started against him on the ground of inadmissibility at entry, in that he had procured his visa by fraud, etc. He was ordered deported and on October 27, 1961 his appeal was dismissed by the Borad of Immigration Appeals. On November 25, 1961 he married a citizen of the United States. In this petition for review, after attacking the deportation order on various grounds, he alleged his marriage eliminates the grounds for deportation under Section 16 of P.L. 87-301 and proposed to submit evidence of his marriage.

The United States Attorney moved to dismiss the petition for failure to exhaust administrative remedies, pointing out that the alleged marriage took place after the administrative proceedings had closed and that petitioner had a remedy available by seeking administrative reopening so that he could establish his claim to relief under Section 16. The United States Attorney pointed out that Section 106(a)(4) restricted judicial review to the administrative record and that Section 106(c) precluded judicial review if the petitioner had not exhausted his administrative remedies. Petitioner cross-moved to have the court retain jurisdiction and to grant petitioner leave to adduce additional evidence as to the marriage before the Immigration and Naturalization Service, citing 5 U.S.C. 1037(e).

On January 11, 1962, in a per curiam order, the Court of Appeals dismissed the petition for want of jurisdiction.

Staff: United States Attorney Drew J. T. O'Keefe; Assistant United States Attorney Merna F. Bearman (E.D. Pa.).

FORMA PAUPERIS

Evidence Sufficient Under 28 U.S.C. 1915 and 753(f) to Support Denial of

Transcript of Testimony Sought for Prosecution of Appeal. United States v. Robert Nevelle Stone (C.A. 4, January 25, 1962). Appellant attacked on appeal the admissibility of certain evidence and the court's charge to the jury in a trial for conspiracy to steal Government property. He also contested the subsequent order of the trial court which denied both an appeal in forma pauperis and a transcript of the testimony in the trial, which was sought for purposes of the appeal. The cost of the transcript amounted to some six or seven hundred dollars. The trial court had relied upon petitioner's annual income of approximately $2,400 and in addition the annual income of petitioner's wife in the amount of $4,390, and concluded appellant was not unable to pay the cost of his appeal. The Court of Appeals affirmed the conviction with the additional holding that the Court of Appeals found no error in the denial of forma pauperis and the transcript.

COUNTERFEITING

Trial; Error for Prosecutor in Summation to Say Witness Has No Criminal Record After He Has Pleaded Guilty. United States v. Sebastion Della Universita (C.A. 2, January 19, 1962.) Appellant was convicted of unlawful possession of counterfeit $20 Federal Reserve notes under 18 U.S.C. 472. The principal witnesses against appellant were his two accomplices. In referring to the credibility of the testimony of one of these witnesses the prosecutor told the jury that "he is not a convict, there is nothing in this record to indicate that he has a criminal background." At the time this statement was made the prosecution was aware that the witness in question had pleaded guilty to the same possession of counterfeit notes charge. Defense counsel had chosen not to impeach the credibility of this witness by exposing the guilty plea on cross-examination because the same witness had given testimony favorable to defendant under another count of the indictment.

In affirming the conviction the appellate court noted that notwithstanding the prosecutor's statement the jury was not misled because it was apparent from the testimony of this same witness that he had engaged in criminal activities. Moreover, when appellant's counsel called the misstatement to the judge's attention and the judge offered to correct the statement in his charge, counsel refused the offer. Nevertheless, the Court makes it clear that although it may have been true that the record did not in fact disclose the witness' plea of guilty, the prosecutor exceeded the great latitude allowed trial counsel in the exercise of trial strategy by affirmatively attempting to build up the witness on summation as being free from crime when he had information to the contrary.

Staff: United States Attorney Robert Morgenthau; Assistant United States Attorneys Andrew T. McEvoy, Jr., and Irving Younger (S.D. N.Y.)

CORRESPONDENCE

Replies to Criminal Division. In the upper left hand corner of letters addressed to United States Attorneys by the Criminal Division there appear above the file number the initials of both the Assistant Attorney General and the Division attorney to whom the particular matter is assigned. It has been

noted that frequently letters in response to Department correspondence refer only to the file number and do not include the initials. In order to facilitate the handling of incoming mail, it is urged that the initials, as well as the Department file number, be included in replies to the Criminal Division.

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

DEPORTATION

Physical Persecution; Judicial Review of Order Denying Application for Stay of Deportation. Dunat v. Hurney (C.A. 3, Jan. 24, 1962). This was an appeal from the order of the District Court (E.D., Pa.) granting respondent's motion for summary judgment (See Bulletin: Vol. 8, No. 13, p. 413, sub nom Dunat v. Holland). On May 29, 1961 the Court of Appeals held that appellant should be granted an indefinite stay of deportation, and reversed and remanded for the entry of an appropriate order below (One dissenter, Forman, S.J., would affirm). Because of the impact of that ruling a petition for rehearing en banc was authorized and filed. The Court of Appeals granted it and the full Court heard reargument on November 14, 1961.

In a per curiam opinion the Court noted that it was evenly divided (4 - 4) on the question of whether the views expressed by the majority of the panel which first heard the case were correct. It was unanimous, however, that economic proscription so severe as to deprive a person of all means of earning a livelihood may amount to physical persecution for purposes of 8 U.S.C. 1253(h). But in the circumstances the Court agreed that the judgment below must be reversed and the case remanded to the Attorney General who will be free to reopen the administrative proceedings for further consideration based upon evidence or information not heretofore considered.

Judicial Review of Order of Deportation; Transfer to Court of Appeals as "Pending Unheard" Case. Fusaro v. Pilliod, (N.D., Ill., Jan. 3, 1962). This is an action seeking review of a deportation order and a temporary restraining order against the threatened deportation. After a hearing on the merits had commenced and testimony taken, the case was remanded to the Service for a clarification of the record. After that had been done the defendant moved, pursuant to section 5(b) of P.L. 87-301 (75 Stat. 650), for transfer of the cause to the court of appeals on the ground that it was "pending unheard" on the effective date of that section. He contended that a case is "pending unheard" until it has been submitted for final determination or decision.

The Court said that to adopt that interpretation would mean that a case in which substantial testimony has been taken would be subject to transfer to a court of appeals where, presumably, the taking of testimony would have to be commenced ab initio; in the absence of a clear indication that Congress intended to require such duplication of testimony, it may be presumed that the phrase "pending unheard" was meant to apply only to cases which were not in process of hearing and determination.

Motion to transfer denied.

* * *

LANDS DIVISION

Assistant Attorney General Ramsey Clark

Federal Tort Claims Act - Discretionary Function Exception; Tucker Act Monetary Limitation. United States v. Frederick K. Gregory (C.A. 10, February 1, 1962). This is an action against the United States for alleged damages resulting from work done by the Bureau of Reclamation in rehabilitating and maintaining ditches and canals surrounding plaintiff's property. Several ponds had been created on the property by the seepage of water from the ditches and canals into hollows dug by the landowner, and they had been stocked with fish and frogs in order to carry on a licensed commercial business. As a consequence of dredging and removing from the ditches the silt and deposits which had accumulated therein over the years, the water in the ponds seeped back into the ditches, and the ponds were emptied, resulting in the loss of the fish and frogs.

The jurisdiction alleged in the complaint was the Tucker Act, 28, U.S.C. 1346 (a)(2), but during the trial the complaint was amended by striking the reference to that Act and substituting the Federal Tort Claims Act, 28 U.S.C. 1346 (b). The case was heard by the court without a jury, and a judgment for $33,401 was entered. The court filed findings of fact and conclusions of law, in which it cited a New Mexico statute making it a misdemeanor to lessen or divert the flow of water so as to detrimentally affect the game fish in a body of water, and concluded that the Government's acts in draining plaintiff's property of water, "constituted negligence per se and offends the Constitutional rights of the plaintiff"; and further that "property is taken by the Government in the sense of the provision of the Fifth Amendment that private property shall not be taken for public use without just compensation, when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude would have been created."

On appeal by the Government, the judgment was vacated, and the case was remanded for further proceedings not inconsistent with the opinion. The Court of Appeals stated that it is not readily discernible from the trial court's conclusions whether the judgment is based upon its jurisdiction under the Federal Tort Claims Act, or upon a theory of condemnation under the Tucker Act, or upon a combination of both. The Court stated that the Tort Claims Act was designed to render the United States liable for its torts essentially in the same manner and to the same extent as an individual, in like circumstances, under the law of the place where the wrong occurred, but it is liable, as an individual, only in the manner and to the extent to which it has consented, and added: "Indeed, the consensual provisions of the Act are made expressly inapplicable to any claim '* * * based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.'" 28 U.S.C. 2680(a). The Court held that the acts in this case fall clearly within the area of the exempted "discretionary function," as the renovation of the canals, in its purest sense, was entirely "discretionary" within the meaning of the exemption.

The Court held that if the trial court's conclusion that the drainage of the ponds amounted to a constitutionally compensable taking, the procedure for obtaining the "just compensation" vouchsafed by the Fifth Amendment is set forth in the Tucker Act, but the jurisdiction of that court under this Act is confined to claims not exceeding $10,000.

Staff: Elizabeth Dudley (Lands Division).

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CRIMINAL TAX MATTERS
Appellate Court Decision

Evasion of Payment After Prior Conviction for Evasion of Same Taxes; Double Jeopardy; -- Newspaper Publicity during Trial; Evidence of Income Obtained by Misrepresentation of Religious Belief. Meyer Harris (Mickey) Cohen v. United States (C.A. 9, January 12, 1962). In 1951, Cohen, notorious West Coast hoodlum, was convicted of attempted evasion of his income taxes for 1946, 1947 and 1948. Cohen v. United States, 201 F. 2d 386. After release from prison he gave every appearance of affluence, but the Government was unable to obtain payment of the tax deficiencies for 1946 - 1948 or to locate any assets upon which to levy. Cohen insisted that he was living on the proceeds of loans or gifts received from friends. He was reindicted in thirteen counts, the most important of which charged wilful attempted evasion of the payment of the taxes due for the 1946 - 1948 period, and wilful attempted evasion of his income taxes for the years 1957 and 1958. The Government adduced proof to show that the alleged "loans and gifts" were actually obtained by various acts of fraud and extortion, and that Cohen had deliberately adopted this scheme in order to prevent the Government from recovery of taxes due and owing for the earlier years. The Court of Appeals found the Government's evidence amply supported the conviction.

The Court held that the present conviction for attempted evasion of the payment of the 1946 - 1948 taxes did not constitute double jeopardy since Section 7201, Internal Revenue Code of 1954, condemning attempts to evade "any tax * * * or the payment thereof", describes two distinct offenses. And even if it did not describe distinct offenses, there can be repeated attempts to evade the taxes for a single year, and in this instance the acts alleged occurred after Cohen had been released from prison on the original conviction.

Because of Cohen's notoriety, the trial was attended by a vast amount of lurid newspaper publicity. However, the trial judge carefully instructed the jury practically every time it left the court room as to its duty not to read, see or look at anything relating to the trial. There was nothing to show that these explicit instructions were disobeyed, and the Court of Appeals held that it must be presumed that the jurors followed orders.

Some of the money obtained by Cohen came from religious figures to whom he had represented that he was about to become a convert. He objected to this evidence as a violation of his First Amendment right to freedom of religion. The Court of Appeals held that it was proper to present evidence of wilfully false pretenses of religious belief made for the purpose of obtaining money from others.

Cohen contended that, under the Supreme Court's decision in the James case (366 U.S. 213), he could not be convicted for wilful attempted evasion of income taxes on money obtained by fraud, and he asked that the jury be instructed as to the California law governing theft. (His contention was that, even if the jury rejected his loan-gift evidence and accepted the Government's fraud theory, he still could not be convicted under the holding in James.) The trial court refused the requested instructions as to California law on theft and instructed the jury that they could find Cohen guilty if he had failed to report any income obtained illegally, with the single exception of funds obtained by embezzlement. The Court of Appeals upheld the trial court's rulings.

Cohen requested that the jury be instructed that they could find him guilty, on the counts charging evasion of taxes, of the "lesser included offense" of wilful failure to report income or pay taxes (Section 7203). The trial court refused to give such instruction, but told the jury that they should acquit Cohen if they simply found that he had violated Section 7203 without specific intent to evade taxes. The Court of Appeals refused to rule on the point on the ground that it had not been preserved by proper objection in the trial court. The Tax Division has consistently taken the position that a violation of Section 7203 does not necessarily constitute a "lesser included offense" under Section 7201. See Tax Division's Manual, The Trial of Criminal Income Tax Cases, p. 11.

Staff: United States Attorney, Francis C. Whelan and Assistant United States Attorney Thomas R. Sheridan (S.D. Calif.); Charles A. McNelis, (Tax Division).

CIVIL TAX MATTERS
District Court Decisions

Compromise of Taxes; Effect of Bankruptcy discharge; Government's Motion for Summary Judgment Granted in That Taxes Are Not Discharged by Bankruptcy Proceedings and There Was No Compromise Agreement. United States v. Ernest O. Piper, et al. (E.D. Ill., 1962), 62-1 U.S.T.C. Par. 9194. The United States brought suit to reduce to judgment the outstanding tax liability of taxpayers. Taxpayers contended that they had obtained a discharge in bankruptcy and that such discharge extended to their tax liabilities. Taxpayers also contended that they had previously entered into an agreement with the Government compromising their liability. The Court held for the Government.

In deciding for the Government, the Court held that taxes are not affected by a discharge in bankruptcy, 11 U.S.C. 35 (Section 17, Bankruptcy Act), and that there was no evidence that a compromise had been

entered into between the taxpayers and the Government pursuant to Section 7122, Internal Revenue Code of 1954.

Staff: United States Attorney Carl W. Feickert
(E.D. Ill.)

Disallowance of Interest on Money Obtained by Internal Revenue Service and Ordered Returned to Taxpayer Because Assessment Was Not Legal. Harold G. and Ollie Mae Steiner v. Emil Nelson. (E.D. Wisc., December 1, 1961) CCH 62-1 U.S.T.C., Section 9152. This decision is the culmination of long and involved litigation and this order concerns the denial of interest claimed by plaintiffs and the dismissal of this action. This particular action, one aspect of the overall litigation, was brought by plaintiffs to enjoin collection efforts on an illegal tax assessment and return of monies collected. The then defendant (defendant Nelson's predecessor in office) made a motion to dismiss the complaint. This motion was denied. Steiner v. Reisimer, 158 F. Supp. 192 (1957). Thereafter plaintiffs moved for summary judgment, which motion was granted--151 F. Supp. 849 (1957). This judgment was affirmed in Steiner v. Nelson, 259 F. 2d 853 (C.A. 7, 1958). The illegality of the assessment was predicated upon the fact that the Commissioner was required to send a 90-day deficiency notice where a waiver on restrictions on assessment (Form 870) was not accepted by the Commissioner which was not done here. Payment was made to plaintiff of the $19,271.41 held to have been illegally obtained from plaintiffs.

Plaintiffs later demanded interest on the $19,271.41 item which demand was denied by defendant. This principal sum having been paid and plaintiffs refusing to stipulate that the action be dismissed, defendant filed a motion that the action be dismissed. The Court ordered that a motion of plaintiffs for an order directing the defendant to pay interest be denied and granted defendant's motion to dismiss this action.

The Court pointed out that plaintiffs rely upon 26 U.S.C.A.,Section 6611, and 28 U.S.C.A., Section 2411. These sections both relate to interest on overpayment in respect to any internal revenue tax. The cases decided under these statutes are ordinary tax refund suits in which there is a determination by the court or by the Commissioner of Internal Revenue that the taxpayer had paid more than was owed and was entitled to a refund with interest.

In this action this Court did not determine that there was any such overpayment of tax. The Court determined that there was an illegal levy and granted the only relief asked for; namely, an injunction against future illegal levies and return of the money already obtained on an illegal assessment. There was no determination and no issue as to whether plaintiffs had overpaid their taxes. It is the general rule that the Government is not liable for interest in the

absence of contract or congressional enactment so providing. Dresser v. United States, 180 F. 2d 410 (C.A. 10, 1950).

Defendant, in his motion to dismiss, relied upon the well-settled rule that an inferior court cannot alter or modify its judgment by providing for interest after the original judgment, which did not provide for interest, has been affirmed by the appellate court. Plaintiffs' counsel sought to distinguish the line of cases relied upon by defendant in his brief on the ground that they are not tax cases. Plaintiffs' counsel cites 26 U.S.C.A., Section 6611, above referred to, and the case of Girard Trust Company v. United States, 270 U.S. 163 (1926). In the Girard case, plaintiffs filed a claim for refund of taxes overpaid. The Commissioner determined there was an overpayment and allowed the refund. That is not the situation here. In this action, no interest was demanded in the pleadings or provided for in the judgment which was affirmed on appeal. As stated in Rice v. Eisner, 16 F. 2d 358 (C.A. 2, 1926), at page 361:

> * * * The complaint did not ask for interest upon the sum which the Commissioner of Internal Revenue refunded before suit brought, nor was there a motion to amend the pleading during the trial. That would in our judgment be final in any case, * * *.

Notice of appeal was filed by plaintiffs on January 29, 1962.

Staff: United States Attorney James B. Brennan (E.D. Wisc.); Paul T. O'Donoghue (Tax Division)

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