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# United States

# DEPARTMENT OF JUSTICE

Vol. 10 No. 7

# UNITED STATES ATTORNEYS

# BULLETIN

# UNITED STATES ATTORNEYS BULLETIN

Vol. 10 April 6, 1962 No. 7


## NEW APPOINTEES

The nominations of the following United States Attorneys have been submitted to the Senate:

Mississippi, Southern - Robert E. Hauberg

Indiana, Northern - Alfred W. Moellering

As of March 30, 1962, the score on new appointees is: Confirmed - 80; Pending - 6.

## MONTHLY TOTALS

During the past twelve months the number of cases pending, excluding condemnation cases, has risen from 26,585 to 30,115, an increase of 3,530 cases, or 13.2 per cent. Civil cases have risen from 17,608 to 19,822, or 12.5 per cent, and criminal cases have increased from 8,977 to 10,293, or 14.6 per cent. Of the 91 districts, 64 have increased in civil cases, and 61 have increased in criminal cases. Of these, 16 have registered increases of over 20 per cent or 50 cases in both civil and criminal cases, 19 have had increases of over 20 per cent or 50 cases in civil cases, and 25 have risen by over 20 per cent or over 50 cases in criminal cases.

A glance at the February 28 comparative listings will show each United States Attorney the category in which his district has registered increases during the past year. Individual letters have been sent to those districts where the increase has exceeded 20 per cent or 50 cases in either civil or criminal cases or both.

The following analysis shows the number of items pending in each category as compared with the total for the previous month. It will be seen that the totals in all categories, except criminal and civil matters, have increased. The sharp drop in criminal and civil matters, from a 1,717 increase during January to a 445 decrease during February, served to offset the rise in pending cases. As a result the aggregate of pending cases and matters rose by only 180 items, as compared with 2,291 items last month.

| | January 31, 1962 | February 28, 1962 | |
|---|---|---|---|
| Taxable Criminal | 8,218 | 8,660 | + 442 |
| Civil Cases Inc. Civil Less Tax Lien & Cond. | 15,416 | 15,552 | + 136 |
| Total | 23,634 | 24,212 | + 578 |
| All Criminal | 9,807 | 10,293 | + 486 |
| Civil Cases Inc. Civil Tax & Cond. Less Tax Lien | 18,379 | 18,518 | + 139 |
| Criminal Matters | 12,955 | 12,813 | - 142 |
| Civil Matters | 15,361 | 15,058 | - 303 |
| Total Cases & Matters | 56,502 | 56,682 | + 180 |

The breakdown below shows the pending caseload on the same date in fiscal 1961 and 1962. Filings show a small increase over last year but terminations are down by 682 cases. This has brought the increase in the pending caseload to an all-time high of 4,569 cases. If each district disposed of a minimum of 16 cases each month for the remaining three months of the year, this increase would be wiped out.

| | First 8 Mos. F.Y. 1961 | First 8 Mos. F.Y. 1962 | Increase or Decrease Number | % |
|---|---|---|---|---|
| Filed | | | | |
| Criminal | 20,303 | 20,398 | + 95 | + .47 |
| Civil | 16,101 | 16,317 | + 216 | + 1.34 |
| Total | 36,404 | 36,715 | + 311 | + .85 |
| Terminated | | | | |
| Criminal | 18,844 | 18,465 | - 379 | - 2.01 |
| Civil | 14,342 | 14,039 | - 303 | - 2.11 |
| Total | 33,186 | 32,504 | - 682 | - 2.06 |
| Pending | | | | |
| Criminal | 8,753 | 10,293 | + 1,540 | + 17.59 |
| Civil | 19,759 | 22,788 | + 3,029 | + 15.33 |
| Total | 28,512 | 33,081 | + 4,569 | + 16.02 |

Criminal filings and terminations increased during the month but civil filings and terminations fell off. Criminal filings reached the highest total of the fiscal year and brought total filings to a new record for the year. Criminal terminations increased over January's but were still far below those in the second quarter of the year. Total filings also were higher than during the previous month but were well below those for the second quarter.

| | Filed | | | Terminated | | |
|---|---|---|---|---|---|---|
| | Crim. | Civ. | Total | Crim. | Civ. | Total |
| July | 1,819 | 1,886 | 3,705 | 1,732 | 1,500 | 3,232 |
| Aug. | 2,16_ | 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 |

| | Filed | | | Terminated | | |
|---|---|---|---|---|---|---|
| | Crim. | Civ. | Total | Crim. | Civ. | Total |
| Nov. | 2,806 | 2,002 | 4,808 | 2,702 | 1,800 | 4,502 |
| Dec. | 2,429 | 1,821 | 4,250 | 2,766 | 1,841 | 4,607 |
| Jan. | 2,601 | 2,127 | 4,728 | 2,258 | 1,852 | 4,110 |
| Feb. | 2,955 | 2,107 | 5,062 | 2,406 | 1,850 | 4,256 |

For the month of February 1962, United States Attorneys reported collections of $5,428,519. This brings the total for the first eight months of fiscal year 1962 to $34,507,519. Compared with the first eight months of the previous fiscal year this is an increase of $9,854,583 or 39.97 per cent over the $24,652,936 collected during that period.

During February $2,635,945 was saved in 100 suits in which the government as defendant was sued for $3,860,867. 58 of them involving $2,361,264 were closed by compromises amounting to $470,406 and 19 of them involving $900,013 were closed by judgments amounting to $754,516. The remaining 23 suits involving $599,590 were won by the government. The total saved for the first eight months of the current fiscal year aggregated $36,977,384 and is an increase of $17,297,224 over the $19,680,160 saved in the first eight months of fiscal year 1961.

## DISTRICTS IN CURRENT STATUS

As of February 28, 1962, the districts meeting the standards of currency were:

### CASES

### Criminal

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

### CASES

### Civil

| | | | | |
|---|---|---|---|---|
| Ala., N. | Ala., S. | Ark., E. | Colo. | Fla., N. |
| Ala., M. | Alaska | Ark., W. | Dist. of Col. | Fla., S. |

## CASES

### Civil (Cont'd.)

| | | | | |
|---|---|---|---|---|
| Ga., M. | Mich., E. | N.C., W. | S.D. | Va., W. |
| Hawaii | Miss., N. | Ohio, N. | Tenn., W. | Wash., E. |
| Idaho | Miss., S. | Okla., N. | Tex., N. | Wash., W. |
| Ind., S. | Mo., E. | Okla., E. | Tex., E. | W.Va., N. |
| Iowa, N. | Mo., W. | Okla., W. | Tex., S. | W.Va., S. |
| Iowa, S. | Neb. | Ore. | Tex., W. | Wyo. |
| Kan. | N.H. | Pa., M. | Utah | C.Z. |
| Ky., W. | N.M. | Pa., W. | Vt. | Guam |
| La., W. | N.Y., E. | P.R. | Va., E. | V.I. |
| Maine | N.C., M. | S.C., W. | | |

## MATTERS

### Criminal

| | | | | |
|---|---|---|---|---|
| Ala., N. | Ga., M. | Ky., E. | N.M. | Tex., W. |
| Ala., M. | Ga., S. | Ky., W. | N.C., M | Utah |
| Ala., S. | Hawaii | La., W. | N.D. | Vt. |
| Alaska | Idaho | Maine | Ohio, S. | Va., W. |
| Ariz. | Ill., E. | Md. | Okla., N. | W.Va., N. |
| Ark., E. | Ill., S. | Mich., E. | Okla., E. | W.Va., S. |
| Ark., W. | Ind., N. | Miss., S. | Pa., W. | Wis., E. |
| Calif., N. | Ind., S. | Mo., E. | S.D. | Wyo. |
| Calif., S. | Iowa, N. | Mo., W. | Tenn., E. | C.Z. |
| Colo. | Iowa, S. | Mont. | Tex., S. | Guam |
| Del. | Kan. | Nev. | | |

## MATTERS

### Civil

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

AUDIT SHEET NO. 9 FOR THE UNITED STATES ATTORNEYS MANUAL LISTS ALL PAGES 8 TITLE 11, INDEX, AS APRIL 1, 1962. THESE PAGES WILL BE SENT OUT WITHIN THE NEXT WEEK OR SO. TITLE 2, PAGE 109, SHOULD READ "109-110 (6/1/61-3/1/62)."

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# ADMINISTRATIVE DIVISION

Administrative Assistant Attorney General S. A. Andretta

## TRAVEL AUTHORIZATIONS

There still appears to be some confusion over the requirement of obtaining advance authority to incur expenses of travel outside of districts or outside of the country. The tacit "approval" of a Department attorney is not proper authority. All it means is that there is no objection to the travel. However, authority to incur an expense is another matter and must be secured in advance in accordance with established regulations.

If time does not permit receipt of the approved Form 25B prior to travel, please telegraph or telephone the Executive Office for United States Attorneys or the Administrative Assistant Attorney General for clearance.

There is no intention to delay operations and we try to take care of such emergencies as occur now and then. It is extremely important from a monetary standpoint that all expenses, particularly for travel, be carefully controlled if we are to avoid a lack of funds near the end of the fiscal year or a violation of the Anti-Deficiency Act. Please ask your staff to review the United States Attorneys' Manual, Title 8, pages 102(2) and 109. Also see the "Procedural Guide for Incurring Expenses" dated April 12, 1961, item I, A 1.

## MEMOS AND ORDERS

The following Memoranda applicable to United States Attorneys' Offices have been issued since the list published in Bulletin No. 6, Vol. 10, dated March 23, 1962.

| ORDER | DATE | DISTRIBUTION | SUBJECT |
|---|---|---|---|
| 264-62 | 3-19-62 | U.S. Attys & Marshals | Amending Section 26 of Order No. 175-59 to provide for resolution of Disagreements Concerning the Assignment of Mail and Cases. |
| 265-62 | 3-19-62 | U.S. Attys & Marshals | Regulations Effectuating the Policy Expressed in Executive Order No. 10590 and Executive Order No. 10925, and Prohibiting Discrimination against any Employee or Applicant for Employment in The Department of Justice because of Race, Color, Creed, or National Origin. |

| MEMO | DATE | DISTRIBUTION | SUBJECT |
|---|---|---|---|
| 313 | 3-14-62 | U.S. Attorneys | Defense of suits against Federal employees arising out of their operation of motor vehicles. |

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# ANTITRUST DIVISION

Assistant Attorney General Lee Loevinger

## SHERMAN ACT

Monopoly; Winter Sports Goods. United States v. Western Winter Sports Representatives Association, Inc. (N.D. Calif.) On March 7, 1962, a civil complaint was filed against the Western Winter Sports Representatives Association, Inc. charging the Association with conspiring to restrain and attempting to monopolize interstate and foreign commerce in winter sports goods in eleven western states in violation of Sections 1 and 2 of the Sherman Act. Winter sports goods are defined as "clothing, equipment and gear which are used in connection with active ice and snow sports," and includes skis, ski clothing, toboggans, sleds, mountain boots, parkas, etc.

The Association is composed of manufacturers' representatives, salesmen and manufacturers, importers and jobbers who sell or who have employees who sell and distribute winter sports goods. The Association holds four trade shows during the months of April and May of each year in San Francisco, Los Angeles, Seattle and Denver. Local retailers are invited to attend the shows at which only members of the Association are permitted to exhibit and take orders for winter sports goods.

The complaint charges the Association and its members with conspiring and agreeing to prevent nonmembers from exhibiting and selling winter sports goods at trade shows sponsored by the Association; to restrict membership in the Association for the purpose of excluding potential competitors; to bar manufacturers and principals from attending the shows to prevent price cutting, and to admit to the shows only those retailers specifically invited. The agreements are enforced by threats of termination or termination of membership of any member failing to abide by the aforesaid agreements.

The complaint prays that the Association be ordered to rescind all of its bylaws, rules and regulations which limit the right to exhibit winter sports goods at trade shows to its members only. The complaint also asks that the Association be enjoined from (a) prohibiting the attendance of any licensed retailer or principal at trade shows sponsored by the Association; (b) refusing to permit manufacturers, manufacturers' representatives, importers, wholesalers, and importers to exhibit and participate in the shows; and (c) discriminating unreasonably among exhibitors in the allocation of space, dues and costs of the shows.

Staff: Lyle L. Jones, Marquis L. Smith, William B. Richardson, and Gerald V. Barron (Antitrust Division)

Price Fixing; Collusive Bidding; Dairy Products. United States v. Carnation Company of Washington, et al. (E.D. Wash.) On March 16, 1962, a two-count indictment was returned by the grand jury against two corporate

defendants, Carnation Company of Washington and Inland Empire Dairy Association, and one individual defendant, Joseph M. Click. The two corporate defendants are the largest dairies operating in Eastern Washington, and the individual defendant is the manager of Inland Empire Dairy Association.

Count One of the indictment charges that, beginning sometime prior to July 1956, and extending through December 1960, defendants, in violation of 15 U.S.C. 1, engaged in a combination and conspiracy to eliminate and suppress competition in bidding for the milk and dairy products contracts of the Fairchild Air Force Base which is located near Spokane.

Specifically, this count of the indictment alleges that defendants through rigged and collusive bidding (1) regularly alternated between themselves the dairy business with Fairchild, and (2) fixed and established noncompetitive prices for milk and other dairy products sold to Fairchild.

Count Two of the indictment names one individual defendant, Joseph M. Click, also named in Count One, and charges him with a violation of Section 14 of the Clayton Act in that he authorized and did acts constituting in part the violation of the Sherman Act by the defendant corporation, Inland Empire Dairy Association, with which he was associated.

The total value of milk and other milk products sold by defendants in the market area for the years 1956 through 1961 was approximately $10,000,000 annually, and the dollar volume of such products sold and delivered by the defendants to Fairchild has been approximately $400,000 a year.

Staff: Lyle L. Jones, Gerald McLaughlin, Seymour Farber and Edwin Shiver (Antitrust Division)

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# CIVIL DIVISION

Assistant Attorney General William H. Orrick, Jr.

## COURT OF APPEALS

### ALIEN PROPERTY

Enemies Under Trading With Enemy Act Precluded from Recovering Interests in Trusts Vested After Claimants Had Moved to Neutral Country. Kennedy v. Selina Rommel, et al.; Kennedy v. Laura Irene de Courten; Kennedy v. Erna Christiani-Onken (C.A.D.C., March 15, 1962). Appellees sued to recover interests in trusts which had been vested by five vesting orders issued between 1947 and 1951 by the United States under the Trading With The Enemy Act. The Government claimed that appellees were precluded from recovery under Section 9(a) of the Act because they were enemies by reason of the fact that they were citizens and residents of Germany during World War II and until 1946. Claimants contended that, in 1946, before the vesting orders issued, they lost their enemy status because at that time they left Germany permanently and thereafter resided in Switzerland, a neutral country. The district court ruled in favor of claimants. On the authority of N. V. Handelsbureau La Mola v. Kennedy, not yet reported, the Court of Appeals reversed and remanded with directions to dismiss for lack of jurisdiction. It held that the fact that appellees permanently left Germany before the issuance of the vesting order was not dispositive where the appellees were residents of Germany during the war, and, hence, were "enemies" within the meaning of the Act.

Staff: Pauline B. Heller (Civil Division)

### FEDERAL TORT CLAIMS ACT

Government's Liability Measured by Entire Law of Place Where "Act or Omission Occurred," Including its Conflict-of-Law Principles, Rather Than Only Substantive Tort Law of That Place or of Place of Injury. Richards v. United States (U.S. Sup. Ct., February 26, 1962). An American Airlines plane crashed in Missouri while on a flight from Tulsa, Oklahoma, to New York City. Plaintiffs, survivors or legal representatives of passengers on the plane, instituted this action under the Federal Tort Claims Act, alleging (1) negligence on the part of Government inspectors in allowing American Airlines to employ and use unsafe practices and procedures at its overhaul depot in Tulsa in overhauling and inspecting its aircraft, aircraft engines, and component parts; and (2) that, as a result of this negligence, the crash occurred. Plaintiffs asserted a right to recover under the wrongful death act of Oklahoma which placed no maximum on the amount of permissible recovery. Each plaintiff had already received $15,000 from American Airlines, the maximum amount recoverable under the law of Missouri.

The district court dismissed each of the complaints, holding that under either the law of Oklahoma, the place where occurred the act or omission resulting in the injury, or that of Missouri, the place where

the injury occurred, plaintiffs possessed no cause of action. As for the law of Oklahoma, the court held that its wrongful death act (the only portion of Oklahoma substantive tort law applicable) provided no relief for a death resulting from an injury occurring outside of Oklahoma. Missouri law provided no basis for relief as plaintiffs had already received the maximum amount recoverable thereunder.

The court of appeals affirmed, holding that the Tort Claims Act subjects the Government to liability according to the entire law of the place where the act or omission occurred, including its principles of conflict of laws. Applying the entire law of Oklahoma, the court found that that law would apply the substantive tort law of Missouri, which provided no basis for further relief.

The Supreme Court affirmed. It first rejected the argument of American Airlines that the law of the place of injury should govern, holding that it could not be squared with the express terms of 28 U.S.C. 1346(b). Having concluded that the law of the place where the act or omission occurred must be used to determine the Government's liability, the Court went on to determine the applicable content of that law. After examining the extensive utilization of state law in the scheme of the Tort Claims Act, the Court concluded "that a reading of the statute as a whole, with due regard to its purpose, requires application of the whole law of the State where the act or omission occurred." This rule, the Court stated, would best result in treating the United States "as a 'private individual under like circumstances,'" (28 U.S.C. 2674), another basic aim of the statute considered as a whole. Finally, the Court stated that this rule would allow a certain flexibility in the Tort Act so that the law applicable can follow whatever shifts in conflicts principles develop through the years.

Staff: Richard J. Medalie (Office of the Solicitor General)
Sherman L. Cohn (Civil Division)

## FOREIGN LITIGATION

French Courts Lack Jurisdiction Over United States in Suit on Construction Contract With U.S. Embassy in Paris. Enterprise Perignon v. United States of America (Paris Court of Appeals, February 7, 1962). The United States Embassy in Paris entered into two contracts with the Enterprise Perignon to construct housing for U.S. personnel assigned to Paris to administer the "Marshall Plan" (European Economic Cooperation Agreement). The Embassy's Contracting Officer terminated the contracts for delay and generally unsatisfactory performance, and Perignon was paid for its partial performance. Perignon thereafter filed suit against the U.S. Embassy in the Tribunal de Grande Instance of the Seine claiming nearly $300,000 in damages for breach of contract. The Tribunal, of its own motion, dismissed the action for lack of jurisdiction by reason of sovereign immunity. The Court of Appeals agreed with the position urged on behalf of the United States and affirmed the decision of the trial court. The Court concluded that the contracts were made with a public as

opposed to a private objective, and that the United States and the Embassy were therefore entitled to sovereign immunity.

Staff: Joan T. Berry (Civil Division)
John J. Hutchins and Maitre Yves Merle (Paris, France)

## SERVICEMAN'S BENEFITS

Allotments Paid to Divorced Wife of Serviceman After His Discharge from Service Are Recoverable Even Though Wife Believed Husband Was in Service at Time. Vander Weiss v. United States (C.A. 5, December 18, 1961). This suit was brought to recover allotments paid to the divorced wife of a serviceman after he had been discharged from the military service. In her defense, the wife asserted that she had received the payments in good faith, believing that her husband was still in the service, and that she had already expended the money for the maintenance of her home. The district court entered summary judgment for the United States, and the Fifth Circuit affirmed. The Court held that while a payment by an individual made under no mistake of fact ordinarily is not recoverable, public officials may not make payments of public money except as authorized by law. Moreover, the party receiving an illegal payment is required to know the law, and, therefore, is liable to refund the illegal payments. The Court further ruled that the long continuance of overpayments does not prevent this recovery, even though there has been a change of condition based upon good faith reliance on the conduct or representations of the public officials making the payment.

Staff: United States Attorney Edward F. Boardman (S.D. Fla.)

## SOCIAL SECURITY

District Court Has No Jurisdiction to Entertain Petition for Mandamus to Compel Secretary of HEW to Pay Old Age Insurance Benefits Where Proceedings for Reconsideration Are Pending Before Secretary. Wellens v. Dillon (C.A. 9, March 6, 1962). The Secretary of Health, Education and Welfare determined that plaintiff was not entitled to old age insurance benefits for the years 1959 and 1960 because of the extent of his employment or self-employment during those years. Plaintiff then instituted administrative proceedings for reconsideration and review of this determination under Section 205(b) of the Social Security Act. While these administrative proceedings were still pending, plaintiff petitioned the district court for a writ of mandamus compelling the Secretary to pay him old age benefits. The district court dismissed the action, and the Court of Appeals affirmed. The Court stated that Section 205(g) of the Social Security Act provides that where a proceeding for reconsideration has been instituted, direct judicial review may be obtained only after the Secretary has made a final decision.

Staff: United States Attorney Cecil F. Poole; Assistant United States Attorney Robert S. Marder (N.D. Cal.)

Disallowance by Secretary of HEW of Application for Disability Benefits Reversed Because of Lack of Evidence in Administrative Record as to What Work Applicant Could Do and Employment Opportunities Available to Him. Pollak v. Ribicoff (C.A. 2, March 9, 1962). This suit was brought under the Social Security Act, 42 U.S.C. 405(g), to review a final administrative determination that appellant was not entitled to the establishment of a period of disability under 42 U.S.C. 416(i) of the Act because she was not so disabled as to be unable to engage in any substantial gainful employment. Appellant was born in Austria in 1899, graduated from a commercial school there in 1915, and immigrated to the United States in 1938. Until 1956, she was engaged as a housekeeper and companion, and thereafter leased a work bench where she made jewelry and earned some $500 a year working part time. She also held a part-time clerical job at a bank during 1957. Since 1956, appellant had suffered from progressive rheumatoid arthritis, and the medical testimony was to the effect that this was a permanent physical impairment and that appellant was disabled from work. The Secretary of Health, Education and Welfare, however, denied appellant's claim for a period of disability and for disability payments. The Secretary held that appellant still could perform light sedentary work, or could teach languages. The Secretary also found that appellant could earn more if she devoted more time to her jewelry craft, and that the evidence did not establish that her inability to earn more in this craft was caused by her disability. Appellant then instituted this action, and the District Court for the Eastern District of New York granted the Government's motion for summary judgment.

The Court of Appeals reversed and remanded to the Secretary. On the authority of Kerner v. Flemming, 283 F. 2d 916 (C.A. 2), the Court held that the determination of the question of an applicant's ability to engage in a substantial gainful activity requires resolution of two questions -- what the applicant can do, and what employment opportunities are there for a person who can do only what the applicant can do. The Court found that appellant could no longer work as a housekeeper, and that she was not qualified to be a language teacher. Since there was no evidence in the administrative record establishing the type of light sedentary work that she could do, the Court rejected the Secretary's finding that appellant could engage in substantial, gainful work based upon this ground. With respect to the Secretary's finding that appellant could earn more in the jewelry trade, the Court held that the evidence was not sufficient to support this finding. Accordingly, the Court reversed and remanded to the Secretary for the taking of further evidence with respect to appellant's ability to expand her jewelry activity to a substantially gainful level.

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

* * *

# CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

## WAGERING TAX CASES

Prosecutive Policy. Recent review of wagering tax cases has indicated that enforcement of these statutes, at least in some districts, has not been pressed as vigorously as would seem desirable. This situation appears to have stemmed in equal part from the attitude of some United States Attorneys that wagering tax cases are essentially police court matters which should be handled at the local level, and from the fact that the Internal Revenue Service has on many occasions presented cases for prosecution which were poorly developed or which were unattractive from a prosecutive point of view.

The wagering tax statutes should be vigorously and effectively enforced. Accordingly, it is suggested that conferences be arranged with local Internal Revenue Service agents requesting vigorous enforcement of the wagering tax statutes with a view toward developing selected cases calculated to make substantial inroads into the gambling situation in the area and which will also serve as deterrents to future violations of these statutes.

It is suggested that the following prosecutive policy should be followed wherever possible.

1. Cases in which the evidence is equivocal should be avoided. In addition to evidence of the acceptance of wagers and evidence of failure to pay the requisite tax, there must be probative proof that the person who accepted the wager was engaged in the business of accepting wagers or accepted the wager on behalf of an individual who was engaged in such a business (26 U.S.C. 4401(c); 26 U.S.C. 4411). In order to establish the latter element there should be evidence of wagering activity on at least two different occasions or other evidence which would establish a course of conduct or intent, profit, consumption of time, occupation of attention, etc. (Kahn v. United States, 251 F. 2d 160; United States v. Simon, 241 F. 2d 308).

2. Investigative agents should be impressed with the necessity of complying with due process requirements. Prosecutive discretion should be exercised in cases in which it is obvious that the evidence was obtained as the result of unlawful searches, unlawful arrests, trespasses or the like. On the other hand, investigative agents should be instructed to seize any and all money or other personal property which is found at the time the arrest or search is made. Such seizures should be reported to the United States Attorney as soon as possible with a complete report regarding the circumstances of the seizure in order that an immediate decision can be made regarding whether there is sufficient evidence to retain such money or property either as evidence and/or for forfeiture pursuant to 26 U.S.C. 7302. In the event the United States Attorney

determines that no such evidence is available, the agents should be directed to return such money or property forthwith.

3. Investigative agents should also be instructed that registration or payment of taxes on the part of defendants, subsequent to arrest, should be made known to the United States Attorney as soon as feasible.

4. Inasmuch as knowledge of the requirements of the statutes is most often determinative as to whether a failure to register and pay the tax is wilful, United States Attorneys are urged to confer with the local chief of the I.R.S. Intelligence Division regarding the possibility of circularizing every known and suspected gambler in the area by registered or certified mail concerning the requirements of the statute. This procedure was followed immediately subsequent to the passage of the wagering tax laws with considerable effect.

5. Effective enforcement of the wagering tax statute is not possible unless, and until, the Courts impose realistic sentences for such offenses. Accordingly, United States Attorneys should, wherever possible, recommend the imposition of jail sentences. Where the court is disposed to impose probation, it should be urged, as a condition of probation that the defendant make a full disclosure of his wagering activity and pay the requisite taxes and penalties, or in the alternative that the defendant disclose the true identity of his principal.

6. The investigative agency should also be requested to make periodic checks of probationers in order to determine whether they have resumed their wagering activity. In all cases in which it is found that wagering activity has been resumed, and especially in cases in which the defendant persists in his failure to register and pay the tax, such facts should be immediately transmitted to the court with an application to revoke probation.

7. The investigative agency should be urged to make frequent checks on suspected major violators.

8. Finally, United States Attorneys are urged to refer to the Criminal Division for inclusion in the United States Attorneys Bulletin all decisions, prosecutive techniques, and other matters occurring in their districts, which may be of interest and useful to other United States Attorneys.

JENCKS ACT

Destruction of Agent's Notes; Transportation and Receipt of Stolen Property in Foreign Commerce; Sufficiency of Evidence of Theft; Evidence of Prior Similar Transactions; Property Stolen in Foreign Country; Sixth Amendment, Writ of Compulsory Process in Foreign Country. United States v. John D. Greco (C.A. 2, January 12, 1962). The Court of Appeals upheld the conviction of defendant Greco in the United States District Court for the Southern District of New York on an indictment tried by the Court without a jury charging him with transporting and receiving stolen Canadian

securities in violation of 18 U.S.C. 2314 and 2315 and with conspiring to commit these offenses. This case involved one aspect of a complex scheme to dispose of stolen bearer bonds issued by the Canadian Government, other indictments in regard to which have been prosecuted in the Northern District of Illinois, the Southern District of Florida, and the Districts of Connecticut and of Maine.

The Court first held that where the Government had produced to defendant memoranda which reflected notes taken by FBI agents of interviews with a witness, and where the notes themselves had been destroyed prior to trial, it was not error that the notes themselves were not produced. It held that there is no legislative requirement that all notes be preserved after transcriptions have been made from them and checked for accuracy, and where there is neither evidence nor claim that the notes were destroyed with intent to suppress evidence their destruction is not tantamount to a refusal to produce statements "in the possession of the United States."

The Court then held that a hole cut in a bank vault wall, an acetylene torch lying nearby, and testimony by stipulation that the bonds involved in the case were among those missing, was sufficient evidence to support an inference that the bonds had been stolen.

Next the Court held that testimony that Greco had previously attempted to dispose of Series E bonds not in his name through a private individual for less than one-half of their face value was sufficient to support an inference that he was attempting in that instance to dispose of bonds he knew to be stolen, and thus make the testimony admissible as relating to a prior similar transaction which was evidence that he knew the bonds here in question were stolen.

The Court also held that in the absence of citation of statutes or decisional authority to the contrary it could be presumed that the bonds would be considered stolen under Canadian law, and as such were thus stolen property within the meaning of 18 U.S.C. 2314 and 2315.

Finally, the Court held that the Sixth Amendment can give the right to compulsory process only where it is within the power of the Federal Government to provide it, and in the absence of an application by defendant to bring witnesses from Canada or a motion to take testimony abroad it could not be said that he was denied his constitutional right to compulsory process because hypothetical unnamed witnesses to the theft which occurred in Canada were not amenable to American process.

Staff: United States Attorney Robert M. Morgenthau; Assistant United States Attorneys Gerald E. Paley and Arthur I. Rosett (S.D. N.Y.)

## JENCKS ACT

Government Agent as Witness; Producibility of Agent's Prior Written Reports. There appears to be some confusion concerning the producibility, under 18 U.S.C. 3500 (the Jencks Act), of prior written reports of Government

agents who appear as witnesses in Federal criminal trials. Although their reports may contain summaries of information given them by other persons, the reports nevertheless constitute prior statements made by a witness and not recordings of oral statements made to a Government agent, and thus are governed by paragraph (1) of subsection (e) of the Act rather than by paragraph (2). To the extent, therefore, that the reports relate to the agent-witness' direct testimony they are producible under the Act.

Thus, where the agent testifies concerning admissions or other statements made to him by a defendant, that part of his report which reflects his interview with the defendant, including his own impressions, is producible. However, if the same report also reflects statements made by persons other than the defendant, the part dealing with these latter matters should be deleted prior to production, since these are matters concerning which the agent will not have testified because of the hearsay rule.

This same procedure should be followed if the agent, who testifies as a witness, is not the agent who wrote the report, but the report is based upon his notes as well as the notes of the agent who prepared it and he checks it for accuracy before it is submitted. In such case, the report will be in effect the joint statement of both agents.

## SEARCH AND SEIZURE

Validity of Affidavit in Support of Search Warrant; Seizure of Property Other Than That Described in Warrant. United States v. Samson Eisner (C.A. 6, January 10, 1962). The Court of Appeals upheld the conviction of Samson Eisner in the United States District Court for the Western District of Kentucky for receiving and concealing stolen property which had been transported in interstate commerce, against an appeal which contended that the District Court had erred in overruling his petition to suppress relevant evidence. Eisner was charged with receiving and concealing stolen furs which were found in the trunk of his automobile after the vehicle was searched under a search warrant issued by the United States Commissioner. He attacked both the validity of the warrant and the manner of its execution.

His main contention in regard to the validity of the warrant was that the affidavit in its support did not charge that any Federal law was being violated. The affidavit set forth that the affiant had information that Eisner received stolen furs in Kentucky "after they had been transported from Indianapolis," Indiana. The Court held that the use of the word "after" did not negative the fact that the furs were moving in interstate commerce at the time they were received and concealed, and that the affidavit was thus sufficient in this respect.

The furs actually found in Eisner's automobile, upon which the indictment was based, were not those described in the affidavit and warrant but were other furs stolen in South Dakota. The Court held that although a warrant must particularly describe the things to be seized and the seizure of one thing when another is described is unlawful, there in an exception when an officer making a valid search with respect to a particular crime discovers that another crime is being committed. In such case, under a long

standing rule enunciated in Harris v. United States, 331 U.S. 145, and numerous courts of appeals decisions, the fruits of the second crime may be seized as soon as the officer becomes aware that the offense is being committed.

Staff: United States Attorney William E. Scent; Assistant United States Attorney Robert D. Simmons (W.D. Ky.).

## NEW TRIAL

Testimony of Complaining Witness at Another and Later Trial Qualified as Newly Discovered Evidence. Clarence C. Johnson v. United States (C.A. D.C., March 8, 1962). In an appeal from a conviction of housebreaking and larceny under the D.C. Code, appellant contended that he was arrested on an invalid search warrant and that the evidence seized as a result of this arrest was inadmissible. The ground for appellant's assertion was that subsequent to his conviction, the complaining witness testified in an unconnected trial involving the appellant that he did not suspect appellant of the housebreaking, did not designate him as the person for whom he wanted a warrant, and that when he signed the complaint, he signed it in blank. The Court of Appeals in Johnson v. United States, 290 F. 2d 384 (1961), affirmed the lower court on the ground that appellant did not object below to the admission of the evidence. However, the Court of Appeals decision was without prejudice to the right of appellant to file a motion for a new trial in the District Court on the ground of newly discovered evidence.

Appellant then filed a motion for a new trial which was denied by the District Court. The District Court held that the evidence proffered in support of the motion, which consisted solely of the testimony of the complaining witness in the later trial, qualified as newly discovered. However, in light of the testimony of the Assistant United States Attorney and the Assistant Warrant Clerk in the Municipal Court regarding the procedures employed in issuing a warrant, the District Court held that the arrest warrant application which resulted in the arrest was in fact and in law that of the complaining witness, and that the arrest accordingly was valid. The Court of Appeals, in a per curiam opinion, affirmed the lower court's decision.

Staff: United States Attorney David C. Acheson; Assistant United States Attorneys Nathan J. Paulson, Joel D. Blackwell, and Arnold T. Aikens (Dist. of Col.).

## OBSCENITY

Conspiracy; Simultaneous Bench and Jury Trial. United States v. Charles J. Anctil, et al. (N.D. Ill.). Thirty-nine individuals were tried under an indictment charging them with a single conspiracy to use the United States mails for the transmission of obscene material. An additional forty-two persons were named as non-defendant co-conspirators. The indictment was based on an investigation of the Adonis Male Club, a pen pal organization catering to homosexuals. The evidence in the case

was essentially documentary. It consisted of obscene letters, pictures and drawings between club members, Adonis Male Club membership cards, magazines in which the Adonis Male Club was advertised, etc. Ten of the original thirty-nine defendants went to trial, one died after return of the indictment and the others pleaded guilty. Of the ten who went to trial, two were tried by a jury and the remaining eight defendants elected to be tried by the Court. The jury found both defendants guilty. Of the eight defendants tried before the court, five were found guilty, one changed his plea to guilty during the first week of trial and two were found not guilty. Thus of the original thirty-nine defendants, thirty-six were convicted.

Three highlights of the case are particularly noteworthy:

(1) The bench and jury trial were presented in a simultaneous proceeding;

(2) The conspiracy proved was conducted almost exclusively by mail, as only in few instances had any of the club members met each other personally; and

(3) On motion of the defendants with the consent of the Government, the public and press were banned from the courtroom at the time the letters were read to the jury.

Staff: United States Attorney James P. O'Brien; Assistant United States Attorneys S. John Templeton, Jr. and William O. Bittman (N.D. Ill.).

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# CIVIL RIGHTS DIVISION

Assistant Attorney General Burke Marshall

Voting; Reapportionment. Baker v. Carr (U.S. Sup. Ct. No. 6, O.T. 1961). This case was previously reported at Bulletin, Vol. 9, p. 210. Appellants brought suit under 42 U.S.C. 1983, alleging that a 1901 Tennessee statute apportioning the Tennessee legislature denied them, and others similarly situated, the equal protection of the laws guaranteed by the Fourteenth Amendment. Specifically, they claimed that under the existing apportionment "a minority of approximately 37 percent of the voting population of the State now controls twenty of the thirty-three members of the Senate," and "a minority of 40 percent of the voting population of the State now controls sixty-three of the ninety-nine members of the House of Representatives." They sought, inter alia, a declaration that the 1901 statute was unconstitutional and an injunction restraining appellees (state election officials) from conducting further elections under it.

A three-judge court, convened under 28 U.S.C. 2281 in the Middle District of Tennessee, dismissed the complaint on the grounds that it lacked jurisdiction of the subject matter and that no claim was stated upon which relief could be granted. After the United States Supreme Court noted probable jurisdiction, the United States filed a brief amicus curiae and the Solicitor General argued as a friend of the Court, urging reversal. On March 26, 1962, the Supreme Court, in an opinion by Mr. Justice Brennan, held that the dismissal was error, and remanded the case to the District Court for trial and for further proceedings consistent with its opinion. Justices Clark, Douglas and Stewart, joining in the opinion of the Court, filed separate concurring opinions. Justices Harlan and Frankfurter each filed dissenting opinions. Justice Whittaker did not participate. The Court held (a) that the district court had jurisdiction of the subject matter; (b) that the complaint stated a justiciable cause of action upon which the appellants would be entitled to appropriate relief, and (c) that appellants had standing to challenge the Tennessee apportionment statute.

On the question of jurisdiction of the subject matter, the Court decided that since the complaint set forth a case arising under the Constitution, the subject matter was within the federal judicial power defined in Article III, §2, and so within the power of Congress to assign to the jurisdiction of the district courts, and that Congress had exercised that power under 28 U.S.C. 1343(3). Since the Court held that the federal constitutional claim asserted obviously was not frivolous (see Bell v. Hood, 327 U.S. 678, 683), it said that the District Court should not have dismissed the complaint for want of jurisdiction of the subject matter.

After discussing the issue of standing, and concluding that appellants had alleged a sufficient personal stake in the outcome of the controversy, the Court, on the issue of justiciability, stated that the claim did not involve the clause, of the Constitution stating that the United States shall guarantee to each state a republican form of government, that the claim was justiciable, and that if "discrimination is sufficiently shown, the right

to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights". Snowden v. Hughes, 321 U.S. 1, 11. Exhaustively reviewing the cases involving claims of a federal constitution right under the Guaranty Clause, and other "political question" cases, the Court concluded that it is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the "political question", and that "the nonjusticiability of a political question is primarily a function of the separation of powers". The Court found that the cases before it shared none of the characteristics of the "political question" cases, and said that claims touching matters of state governmental organization are not nonjusticiable for that reason alone. The Court cited, among other cases, Gomillion v. Lightfoot, 364 U.S. 339, where the Court applied the Fifteenth Amendment to strike down a redrafting of municipal boundaries which resulted in a discriminatory impairment of the voting rights of Negroes.

The Court further pointed out that Colegrove v. Green[1/] did not hold congressional redistricting problems nonjusticiable, but was grounded only upon want of equity, and said that no subsequent case contained anything to the contrary. The Court ended its opinion by stating: "We conclude that the complaint's allegations of a denial of equal protection present a justiciable constitutional cause of action upon which appellants are entitled to a trial and a decision. The right asserted is within the reach of judicial protection under the Fourteenth Amendment."

The thrust of Mr. Justice Harlan's dissenting opinion was that the complaint did not state a claim upon which relief should be granted. He thought that the Equal Protection Clause did not require "that state legislatures must be so structured so as to reflect with approximate equality the voice of every voter". Nor did he think that the complaint stated a tenable and judicially cognizable claim that the Tennessee legislature had acted irrationally in failing to reapportion since 1901. Mr. Justice Frankfurter, in an opinion relying on political history, the political question cases, the asserted difficulty of setting appropriate standards for determining whether a particular apportionment violates the equal protection clause, and the problems of federal judicial intervention in state political institutions, thought the issue nonjusticiable.

Staff: Solicitor General Archibald Cox; Assistant Attorney General Burke Marshall; Assistant to the Solicitor General Bruce Terris; Harold H. Greene, David Rubin and Howard A. Glickstein (Civil Rights Division).

Injunctive Action Against Interstate Carriers and Local Officials to Prevent Racial Discrimination in Terminal Facilities. United States and Interstate Commerce Commission v. Albin P. Lassiter, et al., (W.D. La.). In three separate actions filed in the Western District of Louisiana the Department and the Interstate Commerce Commission sought to enjoin racial

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1/ 328 U.S. 549.

discrimination in the operation of bus terminals in Monroe, Alexandria, and Ruston, Louisiana, and in a railroad terminal in Alexandria. The complaints alleged that the state district attorneys in each of the three communities had sought and obtained from state court a restraining order which required the carriers to maintain racial segregation signs, in violation of federal law and regulation. Right to relief was asserted under the Interstate Commerce laws and directly under the Commerce Clause of the Constitution.

On January 25, 1962, after a consolidated hearing, a three-judge district court, in each of the three cases, entered the final decree against the carriers and the state district attorneys requiring that the racial signs be removed, that racial discrimination be discontinued in the terminals, and that the local district attorneys take no further steps to enforce the state court orders. The Court concluded that the United States had authority to bring the action, both by virtue of federal statute and by virtue of the Commerce Clause.

Staff: United States Attorney T. Fitzhugh Wilson; Bernard A. Gould, Interstate Commerce Commission, and St. John Barrett, (Civil Rights Division).

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# IMMIGRATION AND NATURALIZATION SERVICE

Raymond F. Farrell, Commissioner

## DEPORTATION

Judicial Review of Deportation Order; Transfer of Case "Pending Unheard". Ramasauskas v. Flagg, (N.D. Ill., March 2, 1962.)

The plaintiff's action seeks judicial review of an order of deportation. Section 5(b) of P.L. 87-301, effective October 26, 1961, provides for the transfer of such a case to the appropriate court of appeals if it is pending unheard in the district court on that date.

On that date the defendant's motion for summary judgment and his supporting brief was on file with the Court but no answering brief had been filed nor had the Court considered or ruled on the motion.

The defendant contended that this case was heard when his motion and brief was filed and that therefore this is a case which should not be transferred.

The Court held that the case was "pending unheard" on October 26, 1961 and should be transferred since neither a hearing had been had on the merits nor had consideration been given by the Court to the pending motion and brief.

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# INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Soliciting on Air Force Base; 18 U.S.C. 1382. United States v. Walter C. Nelson and John K. Womble (W.D. Mo.) The information filed in this case charged John K. Womble with going upon a military reservation contrary to Air Force Regulation 34-21, Section 2(i), which prohibits the solicitation of persons in barracks occupied as quarters by airmen, in violation of Section 1382, Title 18 United States Code. Walter C. Nelson was charged with the same offense and also with reentering a military reservation after having been removed therefrom and ordered not to reenter, in violation of 18 U.S.C. 1382.

Investigation prior to the filing of the suit revealed that the two defendants were representing the Advance Distributors, Inc., Orlando, Florida, and that at the time they were taken into custody at Whiteman Air Force Base, they were in an airman's barracks attempting to sell Bibles. They had previously been removed from a number of air bases because the Strategic Air Command had previously cancelled the solicitation privileges of the Advance Distributors, Inc. In the order cancelling the privileges, these two individuals, along with a number of other salesmen of this company were specifically named. After the cancellation order was disseminated to all SAC bases, these individuals continued to solicit on air bases. They would obtain entry to the base on the pretense that they had an appointment to meet a certain individual at the Service Club or some other place on the base, and as soon as they had gained admission, they would again go to the barracks and commence the solicitation of the sale of Bibles. In one instance, they gained admittance to the Base on the pretense they were to repair a record player. After gaining entrance to the base and entering the barracks, they would then approach young airmen. Their pitch would be that the airmen were away from home for the first time and that no doubt their parents were afraid that they were "going to the dogs" and to show their parents that they were doing right they should purchase a Bible and have it mailed home to the parents. The Bibles sold for $39.95 and the postage charges for mailing a Bible from the company to the parents was $2.00, making an overall cost of $41.95. The advised the purchaser that a $5.00 down payment was required but if they purchaser did not have the five dollars they would make the payment for him and he could later mail them the down payment. The Bibles could be purchased at bookstores for $8.00 to $12.00.

According to information furnished the United States Attorney's office, prior to February 2, 1958 defendant Nelson had been ejected from seven air bases and defendant Womble had been escorted from five air bases. One of the bases from which Nelson had previously been removed was Whiteman Air Force Base, which removal occurred on September 26, 1961.

On February 16, 1962, defendants entered a plea of guilty to the charges contained in the information. The Court imposed a sentence of six

months in jail and a fine of $500 against both defendants. Execution of sentence and collection of the fine were suspended and defendants were placed on probation for five years upon the special condition that they not go upon any military reservation during that time except in connection with any active duty to which they may be called, and that they furnish the Federal Government with all the information they have concerning Advance Distributors, Inc., and in the event it should bring an injunction action against the Advance Distributors, Inc. that they testify in a court of law on behalf of the Government.

Staff: United States Attorney F. Russell Millin; Assistant United States Attorney Calvin K. Hamilton (W.D. Mo.)

Internal Security Act of 1950; Remand to Adduce Additional Evidence. Kennedy v. American Peace Crusade (Betty Haufrecht, Intervenor) (S.A.C.B., March 23, 1962). The Subversive Activities Control Board ordered the American Peace Crusade to register under the Internal Security Act of 1950 as a "Communist-front organization" on July 26, 1957. On appeal the case was remanded to the Board to determine whether there has been any change in the circumstances of petitioner's existence and operation subsequent to the Board's order. At the hearing, counsel for the intervenor requested that the Attorney General be requested to recall the witness William A. Wallace for cross-examination on his testimony given at the original hearing and to produce Wallace's reports to the Federal Bureau of Investigation. The original testimony of Wallace was given in April of 1956. Intervenor and her counsel had voluntarily absented themselves from the original hearing except to present the testimony of intervenor subsequent to the testimoney of Wallace and the other witnesses for the Attorney General.

The Board found that intervenor and her counsel voluntarily elected not to cross-examine Wallace at the time of the original hearing; that no adequate showing had been made to justify ordering the Attorney General to produce Wallace for cross-examination, and that the request to require the recall of Wallace is outside the limited terms of the remand. Accordingly it was ordered that the requests to compel the recall of Wallace and to produce Wallace's reports to the Federal Bureau of Investigation are denied.

Staff: Robert S. Brady (George B. Searls with him) (Internal Security Division)

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## TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

### CIVIL TAX MATTERS
### Appellate Court Decisions

Claims for Tax Penalties Not Allowed in Bankruptcy Even Though Liens. On March 5 the Supreme Court, in an opinion by Justice Black, in Simonson v. Granquist, construed Section 57(j) of the Bankruptcy Act as not allowing claims against the estate of a bankrupt by the United States based on tax penalties even though they were perfected liens, and even though Section 67(b) declares statutory liens for taxes to be valid against the trustee. The Court found the language of Section 57(j) broad enough to bar all penalties, whether secured by lien or not, and held that the history of the Bankruptcy Act did not lead to a contrary interpretation. Justices Frankfurter and Harlan, dissenting, stressed the fact that these penalties had become liens and that lien creditors are outside the scope of the Bankruptcy Act and are unaffected by it.

Staff: Richard J. Medalie (Solicitor General's Office); Karl Schmeidler (Tax Division)

Liens: Relative priority of Federal Tax Lien, Claim of Bank Claiming Under Assignment Given as Security for Debt, and Inchoate Liens of Surety. United States v. Foy Construction Co., Inc., (C.A. 10, February 15, 1962.) Taxpayer, a subcontractor under a City construction contract, assigned his interest in the subcontract to a bank which had agreed to finance his payroll; the assignment was made subject to the condition that it was to be void if taxpayer repaid the bank the moneys borrowed. Thereafter, taxpayer also assigned his right, title, and interest in the subcontract to a surety which had executed a performance bond. Subsequently, federal taxes were assessed against the taxpayer for which notices of lien were filed.

At the time the first notice of tax lien was filed, taxpayer was indebted to the Bank, and thereafter, pursuant to its bond, the surety made payments on behalf of the taxpayer in connection with the performance of his subcontract. The surety and the Bank agreed that, as between the two, the latter's claim was entitled to priority. The district court entered judgment awarding first priority to the Bank for the total debt which it claimed, thus exhausting the total sum due from the principal contractor (Foy Construction Company) to the taxpayer.

The United States appealed contending (1) that the Bank was not a "purchaser" within the meaning of Section 6323(a) of the 1954 Code; (2) that although the bank, by virtue of the assignment to it as security for advances made and to be made, qualified as a "mortgagee" within the meaning of that Section, it was entitled to priority only to the extent of the indebtedness actually incurred up to the time the first notice of federal tax lien was filed; and (3) that the federal tax liens were superior to any claim of the surety. The Tenth Circuit upheld the

contentions of the United States in all respects, although it differed with the United States as to the amount due the United States at the time the first notice of federal tax lien was filed.

Staff: George F. Lynch (Tax Division)

## District Court Decisions

Taxpayer Estopped to Deny Ownership of Business by Admission State Court Action That He Was Holder of Liquor "On Sale" License Which Could Not Be Transferred Without State Approval. United States v. John A. Collins, (S.D. Calif., January 22, 1962) 9 A.F.T.R.2d 874. Assessments were made against the defendant, John A. Collins, doing business as Stan's Bar and/or Stan's Stage Coach Stop, for withholding and employment taxes, penalties and interest in the amount of $3,158.71 for the second, third and fourth quarters of 1953 and the third and fourth quarters of 1954. Defendant paid $1,377.62 on these assessments, and counterclaimed against the United States for a refund in that amount. The United States by this action sought to reduce the assessments to a judgment. The matter was submitted to the Court on a motion for summary judgment on the pleadings, stipulations and admissions of the parties, such motion being made by the United States.

In a prior state court proceeding, Collins brought an action against a third party in which he alleged that the third party was "manager" and Collins was the "owner" of the business by virtue of an oral contract, that on January 4, 1953, the State Board of Equalization issued a general retailer's "on sale" license to Collins and that the third party caused all of the bills of business to be charged to Collins.

The Court found that the third party was either the employee or the partner of Collins during the periods for which the taxes were assessed, and thus Collins was liable to pay the taxes. The Court denied jurisdiction to Collins' counterclaim for refund, for the reason that no written claim for refund had been filed with the District Director of Internal Revenue as provided by Section 7422 of the Internal Revenue Code of 1954 (Section 3772 of Internal Revenue Code of 1939).

The Court held that Collins was estopped to deny that he was the owner of the business by virtue of the allegations made in the complaint filed in the state court, which the Court held were admissions. Under the provisions of the California Business and Professions Code, Section 23300 et seq, the holder of the liquor license must be the owner of the business and such license cannot be transferred without the consent of the State Board of Equalization. All these matters estopped Collins from denying that he owned the business.

Summary judgment was entered in favor of the United States.

Staff: United States Attorney Francis C. Whelan (S.D. Calif.)

Examination of Books and Witnesses; Third Parties; Taxpayers Did Not Have Right, Under Either Fourth Amendment or Section 7605(b) of Code to Enjoin Examination by Internal Revenue Service of Third Parties or Their Records. Hotel Roosevelt, Inc. v. Jackson, 62-1 U.S.T.C. par. 9305 (E.D. Wis.). Taxpayers here sought to enjoin the Internal Revenue Service from examining them and their records and from examining third parties with respect to dealings with them insofar as the examinations involved years for which the returns were filed over three years ago.

The Court found that the complaints could properly have been dismissed without a hearing, but, because conflicting affidavits had been filed with respect to the existence of reasonable grounds to warrant the belief that the taxpayers had filed fraudulent returns for the years which they claimed were barred, a hearing on this point was held, so that a complete record could be had if an appeal were to be taken.

The Court found that, with respect to third parties, the taxpayers did not have the right, under either the Fourth Amendment or Section 7605(b) of the Code, to enjoin the examination of third parties or their records since the taxpayers had no property rights in the information sought by the Internal Revenue Service and no standing to complain of the attempts to obtain such information. Even if they did have such a right, the relief sought could not be granted, because the Court found that there was probable cause to believe that they filed fraudulent returns for the years involved.

Also, because of the existence of this "probable cause", the taxpayers were not entitled, under either the Fourth Amendment or Section 7605(b), to an injunction restraining the Internal Revenue Service from examining them and their records for the years which they claimed were closed. In addition, with respect to the individual taxpayer, probable cause existed to believe that amounts in excess of 25% of the reported gross income were omitted from the returns.

Staff: United States Attorney James B. Brennan (E.D. Wis.)

Treasury Summons: Attorney-Client Privilege Does Not Attach To Taxpayer's Books, Documents and Records in the Possession of His Attorney; Fact of Employment of Attorney Not Within Attorney-Client Privilege; Taxpayer Could Not Assert Any Privilege in Proceeding Where He Was Not Party. Kelly v. Simon (S.D. Calif.) February 12, 1962 (9 A.F.T.R. 2d 888). This was a suit brought by the Government to judicially enforce administrative summonses issued by the Internal Revenue Service to Sanford Simon, an attorney for a taxpayer whose tax liability was under investigation, directing him to appear before the Internal Revenue Service and bring with him certain books, documents and records of taxpayer which were in his possession relating to various commercial interests of taxpayer. Included among the summoned data was correspondence between the attorney and taxpayer. Sanford Simon responded to the summons but refused to produce the files, books, records and documents for examination by the petitioner. However, subsequent to the hearing of this cause, Simon voluntarily delivered certain of the materials from the files of petitioner's counsel and removed from the files those documents which he believed came within the attorney-client privilege.

The Court made a number of findings, among which was that documents which are not privileged in the hands of a client do not become privileged when turned over to an attorney. It also found that the following do not come within the attorney-client privilege: (1) the fact of the attorney's employment as an attorney for taxpayer; (2) the fact that the attorney had conferences with taxpayer; (3) that Simon was acting as a business manager for taxpayer; and (4) communications between Simon as an attorney for taxpayer and a third party who is not an attorney. Furthermore, it was held that the mere addition of a confidential communication to an otherwise unprivileged file does not make the entire file privileged, nor do unprivileged documents become privileged by the mere addition of notations thereon by the attorney.

However, the attorney-client privilege did attach to correspondence between the attorney and taxpayer, and to memoranda from taxpayer containing instructions to the attorney.

It is also pertinent to note that one of the conclusions of law provided that taxpayer not being a party to this proceeding had no standing to assert any privilege in this proceeding.

Staff: United States Attorney Francis C. Whelan; Assistant United States Attorneys Robert H. Wyshak and Lillian Wyshak and Frank J. Violanti (Tax Division)

## CRIMINAL TAX MATTERS

### REMINDER NOTICE

For many years it has been the policy of the Tax Division to oppose discussion of a criminal tax defendant's civil tax liability until after conviction or after a plea of guilty is entered (or a nolo contendere entered and accepted by the Court). See United States Attorneys Manual, Title 4:45-46, under both headings EFFECT OF PAYMENT OF TAX AND DISPOSITION OF CASE BY PLEA.

One practical reason for not permitting discussions looking to the settlement of the civil liability, is that it will necessarily involve a disclosure of the Government's evidence with the attendant dangers that evidence may be tampered with or the defense tailored to meet the Government's case. In addition, negotiations on the civil liability tend to be protracted. In times past, such negotiations have been used as a device for delaying the criminal prosecution. And, as a final practical consideration, the civil negotiations would have to be conducted primarily by the Revenue Service personnel rather than by officials of the Department of Justice. This division of responsibility would inevitably lead to confusion, e. g., negotiated concessions on the civil side which undermine vital allegations in the criminal case.

Philosophically, it is considered improper for the Government to negotiate with a taxpayer regarding his civil liabilities while the club of a criminal prosecution is held over his head. As a corollary, the

prosecutor's functions should be concerned only with the consideration of criminal justice unmixed by questions relating to the necessity to collect specific revenue. To do the former offers the possibility that the taxpayer's liabilities will be distorted improperly; the latter runs the risk of prejudicing the Department's efforts to make prosecution policy uniform without irritations or favoritisms stemming from the civil negotiations.

## District Court Decision

Pre-trial Motions; Motion for Change of Venue; Motion to Dismiss; Statute of Limitations. United States v. Grant Foster (D. Md. 1961) 197 F. Supp. 387; 9 A.F.T.R. 2nd 970. Defendant, an American citizen, was a resident of Venezuela in 1952 and 1953 and of Costa Rica in 1954 and 1955. On January 10, 1961, a four-count indictment was filed charging him with tax evasion for the years 1952 and 1953, and with wilful failure to file for the years 1954 and 1955. His tax returns for the years 1952 and 1953 were filed with the District Director of Internal Revenue at Baltimore, Maryland. The defendant filed a series of motions of which the Court discussed only four.

Defendant moved under Rule 21(b), F.R. Crim. P., to have the entire case transferred to the Southern District of Florida. The Court, choosing to be governed by the majority opinion in United States v. Choate, C.A. 5, 276 F. 2d 724, rather than the dictum of Judge Coleman in United States v. Erie Basin Metal Products Co., D. Md. 79 F. Supp. 880, held that under Rule 21(b) the facts showing "that the offense was committed in more than one district" shall appear "from the indictment or information or from a bill of particulars". Defendant attempted to show by admission in open Court, through counsel and by third party affidavits that the return was placed in the mail at Miami. The Court expressed doubt that the mailing of the return at Miami was a part of the offense charged in the indictment and consequently doubted that the offense was committed in the Southern District of Florida.

With respect to defendant's failure to file returns the Court held that prosecution for failure to file can only be brought in the judicial district where the return should have been filed and he concluded that Rule 21(b) does not authorize the transfer of the entire case when some counts are transferable and some are not.

The motion to dismiss was based upon the technicality of an Internal Revenue Ruling. The Court in upholding the validity of the indictment pointed out that defendant did not comply with the Ruling, and that in any event the Ruling did not have the force of law and did not change the statute.

Defendant's motion to dismiss counts 1 and 2 of the indictment on the ground of the bar of the statute of limitation was also denied. The Court held that even if Section 3748 of the 1939 Code, as it read prior to its amendment by the 1954 Code applied to count 1, that section, in its original form, tolled the statute on that count. The statute, before its amendment, tolled the statute while the person "is absent

from the district in which the crime is committed". Sec. 3748, as amended and Sec. 6531 of the 1954 Code tolled the statute while the person is "outside the United States". The Court held that the period of limitations was suspended while the person was living beyond the process of the Court, absent from the country as well as the district, especially where, as in this case, such absence seriously interfered with the investigation of the matter by the Internal Revenue Service.

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

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