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UNITED STATES ATTORNEYS

BULLETIN

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NEW APPOINTMENTS

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

Indiana, Northern - Alfred W. Moellering

Mr. Moellering was born December 13, 1926 at Fort Wayne, Indiana and is married. He served in the United States Army from June 26, 1945 to September 5, 1948 when he was honorably discharged as a Technician, Fourth Grade. He attended the Indiana University Center in Fort Wayne from August 28, 1947 to 1949 and transferred to Indiana University at Bloomington on September 15, 1949. He received his B.S. degree on September 1, 1951 and his LL.B. degree on June 15, 1953. He was admitted to the Bar of the State of Indiana that same year. He was an instructor at the Indiana University Extension from September 1956 to June 1961 and has been a member of the Allen County Board of Elections since February 8, 1960. From 1954 to 1962 when he was appointed United States Attorney, Mr. Moellering was in private practice in Fort Wayne.

Mississippi, Southern - Robert E. Hauberg

Mr. Hauberg was born November 20, 1910 at Brookhaven, Mississippi, is married and has one child. He attended Millsaps College, Jackson, Mississippi, from 1928 to 1930, and the Mississippi School of Law at Jackson from 1930 to 1932, when he received his LL.B. degree. He was admitted to the Bar of the State of Mississippi in 1932. From 1933 to 1944 he was in private practice in Jackson. From 1940 to 1944 he was a member of the Mississippi State Senate, was an instructor at Jackson Commercial College, and was Substitute City Prosecutor and City Judge in Jackson. From 1944 to 1953 he was an Assistant United States Attorney in the Southern District of Mississippi. In 1953 he received a recess appointment as United States Attorney and his appointment was confirmed in 1954. He was reappointed as United States Attorney in 1958.

As of April 13, 1962, the score on new appointees is: Confirmed - 82; Pending - 4.

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ADMINISTRATIVE DIVISION

Administrative Assistant Attorney General S. A. Andretta

CURTAILMENT OF EXPENSES

We are delighted to learn that one United States Attorney is doing something about curtailing expenditures.

The United States Attorney at Houston, Texas has sent a memorandum to his staff suggesting that long distance telephone communications could be reduced by making better use of air mail service. He also has circularized time schedules between his office and other key cities to expedite the flow of mail.

This is an excellent suggestion and its adoption should be considered by all United States Attorneys.

Postal schedules between your office and key cities to which most of your mail is directed may be obtained from your local post office.

Any further ideas on how to save money and improve operations will be most welcome.

MEMOS AND ORDERS

The following Memoranda applicable to United States Attorneys' Offices have been issued since the list published in Bulletin No. 7 Vol. 10 dated April 6, 1962.

ORDER	DATE	DISTRIBUTION	SUBJECT
266-62	3-30-62	U.S. Attorneys	Amending Order No. 103-55, Revision No. 1 as Supplemented, which delegated authority to the United States Attorneys with respect to Claims arising in cases under the supervision of the Civil Division.

MEMO	DATE	DISTRIBUTION	SUBJECT
180 S-5	3-30-62	U.S. Attorneys	Delegation of Authority to United States Attorneys in Civil Division Cases per Order 266-62.

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ANTITRUST DIVISION

Assistant Attorney General Lee Loevinger

Denial of Petition to Intervene in du Pont-General Motors Case for Purpose of Modifying Final Judgment. United States v. E. I. du Pont de Nemours & Company, et al. (N.D. Ill.) On March 13, 1962, argument was held on the motion of John W. Giesecke, a stockholder of Christiana Securities Company, for leave to intervene in this case for the purpose of having the final judgment entered by Judge LaBuy on March 1, 1962 modified so as to order that the voting rights to Christiana's directly held General Motors stock and its allocable share of du Pont's holdings of General Motors stock be passed through the non-control stockholders of Christiana during the three year period in which the required devestitures are being effected. The petition for intervention was filed under Rule 24(a) (2) and (3), F.R.C.P., in a representative capacity on behalf of the petitioner and all other Christiana stockholders who were not subjected to an order to divest themselves of any General Motors stock received on a distribution by Christiana. Petitioner contended that the sterilization of the voting rights to Christiana, General Motors and its allocable shares of du Pont holdings constituted a denial of due process of law. The Government as well as all the defendants opposed the petition to intervene. The Government argued that petitioner was not the owner of any General Motors stock and consequently had no right to vote the stock. Accordingly, there was no right of which it was being deprived. The Government argued in essence that petitioner was requesting the Court to create a right which did not presently exist.

The Government further contended that: (1) there was a well-established and judicially recognized public policy against permitting intervention by private parties in Government antitrust litigation; (2) any interest in the claimed right to vote certain shares of General Motors stock during the three year divestiture period was more than counter-balanced by the costs which voting pass-through mechanisms would necessitate; (3) that the intervenor's claim of inadequate representation by Christiana had not been established, since Christiana had long and vigorously opposed the application of the decree of Christiana. On this last point, the Government argued that the intervenor was attempting to substitute his judgment for that of Christiana's defense counsel as to the proper means of protecting the corporate interests. In any large, publicly-held corporation, there will always be stockholders who by reason of their peculiar circumstances will prefer a different course of action than that taken by the corporations' attorney; and (4) that to permit intervention here, contrary to the well-established and soundly based public policy against it, would be to greatly expand and complicate antitrust litigation involving important public interests.

Du Pont opposed the petition for intervention on the ground that it was not timely since intervention may be granted under Rule 24(a) only upon "timely application." Christiana likewise opposed the petition on the ground that it was "untimely", and that the petitioner was not deprived

of any right because it does not presently own any General Motors stock and was consequently not entitled to any relief.

After considering the various memoranda submitted by the parties and after hearing oral argument, the Court, per Judge Walter J. LaBuy, denied the motion from the Bench.

Staff: Paul A. Owens and Eugene J. Metzger. (Antitrust Division)

* * *

CIVIL DIVISION

Assistant Attorney General William H. Orrick, Jr.

COURTS OF APPEALS

CIVIL SERVICE

Central Intelligence Employee Not Entitled to Hearing Before Employment Review Board Prior to Dismissal. Torpats v. McCone (C.A.D.C., March 23, 1962). Appellant, an employee of the Central Intelligence Agency was dismissed by the Agency pursuant to the National Security Act of 1947. Under this Act and the regulations promulgated thereunder by the Agency, the Director of the Agency may, in his discretion, summarily terminate the employment of any employee of the Agency whenever he shall deem such action "advisable in the interests of the United States." The Director must, however, review the record relied upon in discharging the employee, and he may appoint an Employment Review Board. The Court of Appeals upheld the discharge because the Director averred that he "thoroughly reviewed the case" and consulted with other senior officials, although no Review Board was convened.

Staff: United States Attorney David C. Acheson and Assistant United States Attorney Judah Best (D.D.C.)

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

Compensation Award for Death May Be apportioned Between Two Employers Where Death Has Been Caused Equally By Separate Injuries Occurring During Separate and Successive Employments. United Painters & Decorators v. Britton (C.A.D.C., March 22, 1962). In 1943, the deceased, while employed by United Painters, suffered a serious injury which resulted in a chronic infection of the kidneys and an arteriosclerotic heart disease. He received health and compensation benefits under the Longshoremen's and Harbor Wrokers' Compensation Act for these injuries. He thereafter was employed by Perry & Willis, and while so employed suffered a fatal heart attack in 1959. The Deputy Commissioner found that decedent's arteriosclerotic heart condition, received as a result of the 1943 injury, was aggravated by his activities while employed by Perry & Willis, and that such aggravation constituted an injury arising out of and in the course of this employment. The Deputy Commissioner further found that the death also was equally attributable to the 1943 injury, and, consequently, apportioned the death and related awards between the two employers. The Court of Appeals sustained the award against both employers and held that the Deputy Commissioner could apportion liability between employers "where the death is factually found to have been caused equally by separate injuries occurring during separate and successive employments." Although the statute does not expressly authorize such an apportionment, the Court held that it was equitable to place proportionate responsibility upon those whose employments causally combine to produce the death.

Staff: United States Attorney David C. Acheson, Assistant United States Attorney Charles T. Duncan (D.D.C.); Herbert P. Miller (Department of Labor)

Medical Evidence Held Not Necessary to Establish Causation Between Trauma and Subsequent Injury or Death. Todd Shipyards Corporation v. Donovan (C.A. 5, March 13, 1962). This action was brought by a shipyard corporation and its employer to set aside a disability compensation award under the Longshoremen's and Harbor Workers' Act, made to an employee who suffered a heart attack. The Court of Appeals sustained the award, holding that the Deputy Commissioner's finding that there was a causal connection between the disability and the claimant's employment was supported by substantial evidence even though the medical testimony was inconclusive. The Court ruled that medical evidence is not necessary to establish causation between trauma and subsequent injury or death, stating that "fact-finders are not bound to decide according to doctors' opinions if rational inferences lead in the other direction."

Staff: United States Attorney Kathleen Ruddell and Assistant United States Attorney Gene S. Palmisano (E.D. La.)

TORT CLAIMS ACT

Trial Court's Findings That Government Not Negligent Upheld. Barryhill v. United States (C.A. 8, March 23, 1962). A Post Office truck ran over and killed a child of the plaintiff. The trial court found that the driver of the truck looked through his rear and side-view mirrors before moving the truck, and that the child, who was apparently standing at the side of the truck, could not be seen through these mirrors. The trial court therefore held that the Government was not negligent. On appeal, plaintiff argued that there was no evidence in the record supporting the trial court's finding that the child could not be seen through the truck's mirrors. The Court of Appeals affirmed. It held that the only question before it was whether there was any evidence that the child could or should have been seen by the driver, since the plaintiff has the burden of proving that the Government was negligent and that the driver did not maintain a proper look-out. The Court concluded that there was no such evidence.

Staff: United States Attorney Donald E. O'Brien (N.D. Iowa)

DISTRICT COURT

LIMITATION OF ACTIONS

28 U.S.C. 2462 Not Applicable to Contract Actions for Liquidated Damages. United States v. O. G. Innes Corp. (S.D. N.Y., March 26, 1962). Defendant agreed to import and deliver crude rubber for the Government stockpile. Some deliveries were late, or short weight, and for these breaches the Government sued to recover under a liquidated damage clause in the contract. Defendant contended that the liquidated damage clause was so unreasonable as to constitute a penalty and that the action was barred therefore because it was not filed within the 5-year limitation period under 28 U.S.C. 2462. The District Court (Weinfeld, D.J.) held that the limitations provision of this statute was applicable only to "something imposed in a punitive way for an infraction of public law" and not to an action for liquidated damages. The Court further ruled

that, even if the liquidated damage clause here in question was held to be invalid because it imposed a penalty, the Court still would not dismiss the action but would instead refuse to enforce the clause and would require the Government to prove its actual damages.

Staff: United States Attorney Robert M. Morgenthau and Assistant United States Attorney Eugene R. Anderson (S.D. N.Y.); Robert Mandel (Civil Division)

CIVIL RIGHTS DIVISION

Assistant Attorney General Burke Marshall

Voting; Civil Rights Act of 1957 as amended. United States v. Lynd; (S.D. Miss.) This case, which was previously written up in the Bulletin on July 28, 1961 (Vol 9, No. 15) finally came on for a hearing on the Government's motion for a preliminary injunction on March 5, 6, and 7, 1962. During the time between the filing of the suit on July 6, 1961 and this hearing the Government experienced a series of delays caused by disputes over the specificity with which the Government had to plead its case and its right to inspect the voting records in the course of preparing its case. The District Court required the Government to amend its pleadings so as to include the names and testimony of all of its witnesses and at the same time deferred ruling on the Government's request for an order to inspect the voting records. It finally authorized inspection of some of the records covering the period during the incumbency of the present registrar, at the close of the Government's case in chief. Despite this, the Government was able to obtain 17 white witnesses who could testify that they were given either no test or easier tests than those given Negroes that attempted to register. Although defendants knew several weeks in advance of the hearing that some of these witnesses would be called, the Court permitted defendants to defer the cross examination of all of the white witnesses until another hearing could be had some 45 days after the March 5-7 hearing. Defendants also deferred presenting their witness at the close of the Government's case, although the Court called on them to do so. The Government specifically requested the issuance of a temporary injunction at the close of the hearing on March 7, 1962, but the Court refused to either grant or deny the Government's request. This was despite the fact that the Government had produced undisputed proof as to two of the discriminatory practices of the registrar.

The Government noted its appeal from the refusal of the District Court to grant the preliminary injunction requested and moved in the Court of Appeals for the Fifth Circuit for an injunction pending appeal. The motion of the Government was heard on April 6, 1962 and the Court of Appeals allowed the appeal and granted the injunction that same date. In its opinion dated April 10, 1962, the Court held that the refusal of the trial court to grant the preliminary injunction was an appealable order under 28 U.S.C. 1291 in the circumstances of this case. The Court further commented that the action of the District Court in requiring the Government to amend its complaint to allege specific details of voter discrimination was not justifiable and reiterated its holding in Dinkens v. Attorney General and Kennedy v. Bruce that the Government is entitled to an order to inspect voting records upon the simple assertion by the Attorney General that there are reasonable grounds to believe that certain voters are being discriminatorily denied their voting rights in a given county and that such assertion need not be enlarged or expanded by supplying detailed information.

Staff: John Doar, Harold H. Greene, D. Robert Owen, Gerald P. Choppin (Civil Rights Division)

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

VENUE

Policy for Determining Venue in Veterans Administration Cases. Relying upon Travis v. United States, 364 U.S. 631, the Veterans Administration issued an Information Bulletin dated February 24, 1961 providing, inter alia, for referral of all cases involving falsification of applications to the district of receipt thereby foregoing prosecutive consideration in districts from which questioned documents may have been mailed. On March 1, 1962, as a result of discussions had with the Department, that policy was rescinded and the one currently in effect stipulates:

> . . . the Chief Attorney to whom the operating division submits matters involving false, fictitious and fraudulent statements which are appropriate for direct reference to a United States Attorney will submit such cases to the United States Attorney in his area who is charged with the responsibility for determining the question of venue. If the United States Attorney determines that venue lies in another district, the Chief Attorney, upon request of the United States Attorney, will transfer the matter to the apporpriate Chief Attorney having VA jurisdiction in that district . . .

When United States Attorneys consider returning cases to the Administration's Chief Attorneys, they should keep in mind that the Department does not construe the holding in Travis as a general prohibition against false statement prosecutions in districts other than the place of their receipt. That case is "sui generis" turning squarely on the precise requirements of the Taft Hartley Act which specifically required a filing with the National Labor Relations Board, 29 U.S.C. 159(h). Thus, the factual situation in Travis falls within the exception to the applicability of Section 3237(a), Title 18 U.S.C., relating to venue, that Section providing that offenses involving the use of the mails is a continuing one and "except as otherwise expressly provided by enactment of Congress" (emphasis supplied) may be prosecuted in any district where such mail matter moves. Accordingly, while venue would certainly lie in the district where documents are received, venue also lies in those districts where the documents were executed and mailed, and where the subject lost control over them. In re Palliser, 136 U.S. 257, De Rosier v. United States, 218 F. 2d 420.

In those cases in which it is concluded that venue does not lie in a particular district, the United States Attorney should include appropriate referral instructions when returning cases to the Chief Attorneys.

OBSCENITY

Prosecution of Receivers of Obscene Material for Personal Use Without Dissemination. The Criminal Division has recently conducted a study on whether a person who solicits and receives obscene material for his own personal use and edification can be prosecuted. It has been concluded that the language in Paragraph 8 of Section 1461, Title 18, United States Code, "or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by a person to whom it is addressed" is authority for prosecution of receivers.

An examination of the legislative history reveals that the quoted language was added in 1958 as part of the new venue provision and that it is derived from identical language in the mail fraud statute, Section 1341, Title 18, United States Code. An examination of the cases under the identical clause in the mail fraud statute indicates that the purpose of the statute is to prohibit the use of the mails in furtherance of a scheme to defraud and to punish one who procures such use. See Linden v. United States, 254 F. 2d 560 (C.A. 4, 1958); United States v. Guest, 74 F. 2d 730 (C.A. 2), cert. den. 295 U.S. 742 (1935); and, United States v. Reese, 96 F. Supp. 913 (E.D. Pa., 1951). Also see Pereira v. United States, 347 U.S. 1 (1954), and Marvin v. United States, 279 F. 2d 451 (C.A. 10, 1960). As applied to the obscenity statute, it would appear that the purpose of this language is to preclude the use of the mails to convey obscene matter, regardless of who initiates the use. If a person who causes a letter to be delivered according to the direction thereon to himself is guilty of mail fraud under this clause, United States v. Guest, 74 F. 2d 730 (C.A. 2), cert. den. 295 U.S. 742 (1935), it would appear equally that a person who causes a letter containing obscene matter to be delivered to himself would be guilty of a violation under 18 U.S.C. 1461.

Of special interest in this connection is the opinion in United States v. Norman V. Blantz, Criminal No. 13,394 (as yet unreported by the District Court in the Middle District of Pennsylvania, filed on March 20, 1962. The indictment in six (6) counts charged the defendant with knowingly causing delivery to himself by mail according to the direction thereon envelopes containing obscene matter. The Court in granting defendant's motion for judgment of acquittal stated that the six counts charged mailings from six different sources and that there were no reorders or remailings averred in the indictment. The Court further emphasized that there was no proof as to what was ordered with respect to each mailing, nor was there any proof of any particular picture being received in any particular envelope. The Court observed that it was not here dealing with an innocent unsuspecting person who may have been shocked by what he received in response to a mail order and that it was significant that each one of the six orders produced the same kind of stuff. The Court stated that furthermore, it was more than a coincidence that the defendant readily handed to the investigating officer a group of playing cards carrying on the reverse side pictures of male and female nudes together in the vilest and most repulsive poses imaginable, of which there could be absolutely no question of their appeal to prurient interest. It is significant to note, as did

the Court, that the defendant is employed as a high school teacher, obviously dealing with impressionable teen-agers, although there was no evidence that any of the exhibits were ever used by the defendant in his school work. The Court concluded its opinion with the observation: "It is to be regretted that the Government's case here was so lacking in the essential ingredients of proof where all of the surrounding facts and circumstances so clearly point to guilt."

This case is significant in that it is the first written opinion filed under the clause in question, which expressly recognizes that one who orders obscene matter through the mail may be guilty of a violation under 18 U.S.C. 1461. An examination of the Department's files and an inquiry of the Post Office Department have revealed four cases under the clause which have resulted in guilty pleas and one case which resulted in a conviction after a jury trial in the United States District Court for the District of New Jersey on January 26, 1962, after a motion for judgment of acquittal was denied by the court.

The Blantz case also emphasizes the problems of proof in such a case. It is noted that the clause speaks in terms of "knowingly causes to be delivered" obscene matter. (Emphasis added.) The Court's comments seem to suggest that if the defendant had obtained similar pictures from the same source on prior occasions, this would have been sufficient to show knowledge. Thus, it may be possible to establish a receiver's knowledge in those instances in which several order blanks from the receiver are discovered among the wares of a dealer in pornography and the receipt of obscene matter from the dealer in response to second and subsequent orders, after the first order was filled, can be established. An even stronger case of knowledge could be established if, in a given case, the Government could show that the defendant had reordered additional obscene pictures identical to those he had received on a prior occasion. Likewise, in those instances in which the defendant had received a circular or advertisement containing picture samples of male or female models in obscene poses, and thereafter ordered the actual pictures illustrated by the samples, a strong case of knowledge could be established. Cf. Glanzman v. Christenberry, 175 F. Supp. 485 (S.D. N.Y., 1958), involving circulars containing obscene samples or sketches of the pictures to be sent in which the Court stated that it cannot be said that the circulars here promised the customer anything more obscene than the samples which they reproduced. Also cf. United States v. Perkins, 286 F. 2d 150 (C.A. 6, 1961), in which the Court held that the material in the possession of the defendant from the same sources named in the circulars he sent to others was admissible on the question of his knowledge of the kind of material that his sources were purported dealing in and upon his intent to furnish that kind of information in his mailings to others.

In view of the difficulties of proof and the widespread applicability of this statutory interpretation, the Criminal Division recommends that considerable discretion be exercised in determining whether to prosecute a receiver under 18 U.S.C. 1461. One important factor is the amenability to criminal prosecution of the manufacturer or distributor of the obscene material, since effective prosecution against these parties can clearly serve to attack the problem at its source. Other relevant factors include

the existence of any pattern of conduct by the receiver, the volume of material received, the subsequent use or dissemination of such material, the age and emotional health of the receiver, and similar considerations which may appropriately be weighed in deciding whether such a criminal prosecution is in the public interest. It would be appreciated if all United States Attorneys would correspond with the General Crimes Section on all cases involving receivers in which they think criminal prosecution should be undertaken so that uniform standards may be developed with regard to this matter.

THEFT AND FORGERY OF TREASURY CHECKS

Last July each United States Attorney received a letter stating the Department's support of the request by the Postmaster General for increased vigor in the prosecution of mail theft cases. The letter pointed to the preventive measures taken by the Post Office Department to insure that all mail, particularly U. S. Treasury checks, was safely received by the addressee, and also to its close cooperation with Secret Service agents, Federal Narcotic Agents, as well as state and local law enforcement agencies. The Secret Service has formally requested that this program be extended to prosecution of forgery cases involving U. S. Treasury checks.

Since July the deterrent value of severe sentences which follow presentation by the United States Attorney of statistics and other information concerning mail thefts locally has been substantially realized as the courts have appreciated the magnitude and seriousness of the problem. All United States Attorneys are to be congratulated for this large measure of success.

Many United States Attorneys have submitted suggestions for making this program more effective. Representatives of the various divisions of the Post Office Department, Veterans Administration, Social Security Administration, Secret Service, Disbursing Office, Office of Administrative Services, Government Printing Office and the Criminal Division of the Justice Department have considered these suggestions for improvement.

One suggestion made by several United States Attorneys was to replace the brown conventional style check envelopes. Since it is thought that such a change might reduce the identifiability of United States Treasury checks and thereby reduce thefts, this suggestion is soon to be tested in Chicago for six months. Also, dates of issuance of checks are being staggered where practical. Other suggestions are being disseminated by repeated notices in bulletins distributed within the various agencies, and the "know your endorser" campaign is continuing.

FEDERAL FOOD, DRUG, AND COSMETIC ACT

Injunction Against Shipment of Fraudulent Diagnostic Device Sustained; Court Upholds Finding that "Micro-Dynameter" Is of No Diagnostic Value. United States v. Ellis Research Laboratories, Inc., and Robert W. Ellis (C.A. 7 March 22, 1962). The Court of Appeals affirmed the judgment of the District Court (N.D. Ill.) enjoining defendants from shipping in interstate commerce a misbranded device intended for use by physicians in

the diagnosis of disease. The District Court found, in effect, that the device, the "Micro-Dynameter," was no more than a highly sensitive galvanometer which would measure slight amounts of electric current flow on a surface, but would not reflect in any way the health, internal state, or disease condition of the body or any of its organs. This device was therefore found not to be adequate or effective for diagnosing practically all disease conditions (55 were listed by defendants) or the health status of man, as claimed, and such broad claims or representations were found to be false and misleading. The Court of Appeals confirmed the findings and conclusions of the trial court and held, in addition, that the Federal Food, Drug, and Cosmetic Act is a constitutional exercise of the commerce power; that defendants were not entitled to a jury trial, this being an equity case in which plaintiff sought only injunctive relief; and that the comprehensive injunction was valid and binding even if it puts defendants out of business.

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

NATIONAL STOLEN PROPERTY ACT

Forged Travelers Checks Under 18 U.S.C. 2314; Foreseeability of Interstate Transportation. We are advised that a new form of American Express Company travelers check is being issued, to be offered for sale about April 20, 1962. The new form reads "American Express Company at 65 Broadway, New York, New York Pay this Cheque to the Order of . . ." The previous form stated "American Express Company at its paying agencies, Pay this Cheque from our Balance to the Order of . . ."

It is believed that the new form will provide sufficient foreseeability of interstate transportation in the ordinary course of payment that one who negotiates such a forged check will be amenable to prosecution for causing interstate transportation of a forged and falsely made security pursuant to 18 U.S.C. 2314.

In this regard, reference is made to the memorandum entitled "Interstate Transportation of Forged Travelers Checks under 18 U.S.C. 2314", transmitted to all United States Attorneys with the Bulletin, Vol. 4, No. 22, October 26, 1956. There, in addition to outlining Department policy in the prosecution of these violations, the requirement of knowledge or foreseeability of interstate transportation and proof of knowledge is discussed. At page 3 of that memorandum we referred to an unreported Florida District Court decision which held, in dismissing an information, that the previous form of American Express Company travelers checks failed to provide sufficient notice.

[American Express Company money orders have been held to provide notice of interstate transportation. United States v. Nelson, 273 F. 2d 459, reported in the Bulletin, Vol. 8, No. 15, July 15, 1960, page 479.]

MOTION TO VACATE

Requirements for Hearings Under 28 U.S.C. 2255. Machibroda v. United States, 368 U.S. 487 (1962); Malone v. United States (C.A. 6, 1962); Jeulich v. United States (C.A. 5, 1962). In three recent decisions, the Supreme Court and two United States courts of appeal considered the application of 28 U.S.C. 2255. In each instance a motion to vacate and set aside the sentence was filed by the defendant and subsequently denied without a hearing by the district courts. It was to the propriety of the denial of the motion without a hearing that the courts directed their attention.

In Machibroda v. United States, 368 U.S. 487 (1962), the defendant, three years after sentencing, petitioned the court to vacate and set aside his sentence on grounds, among others, that his plea of guilty was not voluntarily made but had been induced by promises of consideration by the Assistant United States Attorney. Without a hearing the district court dismissed defendant's allegation as false and unsupported. On review the Supreme Court overruled both the district court and the court of appeals and held that Section 2255 of Title 28 U.S.C. requires a district court to "grant a prompt hearing" unless "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." Here, the Court continued, the motion, files and record could not form the basis of a conclusive determination, as the factual allegations related primarily to purported occurrences outside the courtroom upon which the record could cast no real light. Moreover, the Government's contention that defendant's allegations are improbable and unbelievable can not serve to deny defendant the opportunity to support them by evidence.

The dissent objected to the Court's rejection of the inferences drawn from the files and records by the courts below and substitution of its own findings that these materials do not conclusively belie defendant's story. The dissent remonstrated that such action represents not only a failure to give due deference to the inferences drawn by the two lower courts, but imposes an unwarranted restriction on the court's summary disposition of the motions filed under Section 2255, which will encourage persons to concoct fantastic tales to reap the benefit of a complete review of their sentences. (For a complete discussion of Machibroda see Department of Justice letter to all United States Attorneys, dated March 26, 1962.)

In Malone v. United States (C.A. 6, 1962), defendant filed a motion to vacate his sentence under authority of 28 U.S.C. 2255, claiming he was not adequately represented by counsel. This motion was denied by the district court without a hearing and defendant took an appeal.

The Court of Appeals sustained the lower court after a review of the bizarre facts related by defendant in two sworn affidavits. Defendant claimed that while confined in jail awaiting trial he had concealed on his person one and one-half ounces of opium, which he administered to himself during the course of his five-day trial, and

that the fact that he was under the influence of narcotics and later suffering from withdrawal symptoms rendered him unable to cooperate completely with his attorney. He informed his counsel of this fact and asked him to obtain a continuance of the case, but he claimed the attorney refused. Defendant requested a hearing at which he could be personally present. The Court held that the law does not require an oral hearing in every case in which the movant sets forth a claim seemingly valid on paper although manifestly false and frivolous in fact. The movant must substantiate his conclusions by alleging facts with some probability of truth.

In Jeulich v. United States (C.A. 5, 1962), defendant in 1958 filed a motion to vacate sentence under 28 U.S.C. 2255 which was denied. In 1961 he filed the present motion to vacate sentence under Section 2255. Noting that this second motion was entirely different from the allegations and arguments of the 1958 motion, the district court denied it without a hearing stating, the court ". . . was not required to and . . . would not, entertain a second motion to vacate the judgment of conviction based on unsubstantiated allegations of such nature made nearly seven years after trial."

In reversing the lower court, the Court of Appeals stated that the court's discretion to refuse to entertain successive motions is limited by statute to motions which are "for similar relief." Since essentially only one relief, modification of sentence, is available under the statute, it would seem that the meaning of the term "similar relief" should be taken to mean "on similar grounds." It is clear that the motion in question is not on the same grounds as the early 1958 motion. Thus the judge would have no discretion to refuse to entertain the motion unless he found from the motion and the files and records of the case that it was conclusively shown that defendant was entitled to no relief.

MOTION TO VACATE
28 U.S.C. 2255

Incompetency During Trial. Catalano v. United States, 298 F. 2d 616 (C.A. 2, January 17, 1962). The District Court for the Eastern District of New York had denied without hearing appellant's motion under 28 U.S.C. 2255 to vacate a judgment of conviction. The motion alleged incompetency to stand trial resulting from daily administration of drugs by a prison physician. This denial was reversed and the case remanded for a hearing by the Second Circuit Court of Appeals.

Reasserting the principle that a petitioner's competency during trial may be challenged by motion under 28 U.S.C. 2255, the Court found the petitioner's detailed allegations, citing dates and names of participants and witnesses, sufficiently posed the question of his competency during the trial. Since it also found the affidavit in opposition insufficient to show petitioner's assertions to be frivolous, the Court held that, despite the fact that his allegations might be improbable, petitioner was entitled to a hearing at which he might be present and

both call and examine witnesses. The Court specifically stated that abuse of process in connection with collateral procedures must be risked rather than a denial of fundamental rights. At the same time, the Court noted possible use of the perjury statute in a suitable instance.

In a footnote to its opinion in connection with raising the issue of competency during trial via 28 U.S.C. 2255, the Court adverted to the procedure under 18 U.S.C. 4245 whereby, upon certification by the Director of the Bureau of Prisons, a prisoner's competency during trial may be investigated after conviction. It explicitly excluded from the ambit of its opinion the effect of that section on motions under 28 U.S.C. 2255 based on incompetency during trial resulting from a mental disease or defect. Specifically disavowing any implication that it would so hold, the Court said that even if 18 U.S.C. 4245 were regarded as the exclusive means for pressing such a claim, it was plainly not devised for inquiry into a temporary incapacity without residual effect, citing Johnson v. United States 292 F. 2d 51 (C.A. 10, 1961).

On the basis of this decision it appears that in the Second Circuit a post conviction claim of incompetency during trial of a temporary nature without residual effect, as contrasted with one based upon a mental disease or defect where certification is not obtainable, can nonetheless be pursued under 28 U.S.C. 2255.

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

BRIBERY

Sixteen Months' Delay Between Arrest and Indictment and Year's Delay Between Indictment and Trial Does Not Constitute Denial of Speedy Trial Where Defendant Failed to Assert Right to Speedy Trial; Refusal to Submit to Jury Question of Entrapment. In United States v. Abraham Kabot, 295 F. 2d 848 (C.A. 2, 1961), Kabot, an accountant for a group of diamond merchants, the van Bergs, had received information from IRS Agent Keyser that based upon his investigation, a substantial increase in income taxes was to be assessed against the van Bergs and their affiliated companies for years prior to 1958. Kabot suggested to Keyser that favorable consideration could result in a reward for Keyser. During the course of negotiations, many of which were recorded by use of concealed portable recorders on the agent's person, or in his hotel room $25,000 was agreed on as the payment which was scheduled to be delivered in a taxi. When delivery was made IRS agents who had observed the exchange arrested Kabot. This arrest occurred November 19, 1958. Subsequent proceedings were delayed without Kabot's objection for other extensive investigation to determine possible involvement of others, if any. On March 8, 1960 he was finally indicted for bribery (18 U.S.C. 201) but trial did not commence until March 8, 1961, because of several postponements at the behest of Kabot's counsel. On March 24, 1961, he was found guilty.

The Second Circuit held that defendant acquiesced in the obvious delay before his indictment by failing to move for hearing before the

Commissioner as he might have done; that having failed to assert his right to a speedy trial, that right was deemed waived. United States v. Lustman (C.A. 2), 258 F. 2d 475, 478, cert. denied 358 U.S. 880 (1958). The further one year's delay between indictment and trial was caused by defendant and was not considered unreasonable by the Court.

The refusal of the trial court to submit the issue of entrapment or enticement to the jury as requested was also raised. The Court found that no entrapment of Kabot was suggested by the evidence, but at most a possible extortion by Keyser and another agent, one Gillis; and that failure to present the issue of entrapment to the jury was not error, because no facts existed on which to ground it. United States v. DiDonna (C.A. 2), 276 F. 2d 956.

Two minor points concerned (1) the admission in evidence of recordings of conversations between Keyser and Kabot obtained by the use of a concealed microphone, which the Court allowed on the authority of On Lee v. United States (1952), 343 U.S. 747, distinguishing Silverman v. United States (1961), 365 U.S. 505; and, (2) the refusal of the trial court to admit transcripted wire-recorded evidence, or allow inspection of the grand jury minutes relating to the testimony of two IRS Agents (Gillis and Sweeney) who did not testify at the trial. There was a collateral question of whether or not Gillis was implicated in the bribe scheme by reason of a certain recorded conversation between Gillis and Keyser. However, neither side saw fit to raise this point at trial, nor to have Gillis called as a witness, although he was present. Therefore, the Court found no error in the refusal of the trial court to let defendant inspect the grand jury minutes as to Gillis, nor to hear the recording which brought Gillis under suspicion. The minutes as to Sweeney would not be producible since he was not a trial witness. Production of grand jury minutes is allowed solely for impeachment of witness, based upon previous inconsistent statements under oath. Jencks v. United States (1959), 353 U.S. 657; Palermo v. United States (1959), 360 U.S. 343, 349.

Staff: United States Attorney Robert M. Morgenthau; Assistant United States Attorneys Edward R. Cunniffe and Arnold N. Enker (S.D. N.Y.).

JURY INSTRUCTIONS AND FORMS FOR FEDERAL CRIMINAL CASES

Honorable William C. Mathes, Judge, United States District Court for the Southern District of California, has compiled "Some Suggested General Instructions for Federal Criminal Cases" and "Some Suggested Instructions for Particular Federal Criminal Cases", as well as "Some Suggested Forms for Use in Criminal Cases". Pamphlet copies of these instructions and forms are not available for distribution to the United States Attorneys but may be found in Volume 27 of the Federal Rules Decisions at pages 39-220.

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INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Foreign Agents Registration Act (22 U.S.C. 612 - 618); Conspiracy to Violate Certain Provisions of Federal Aviation Act of 1958. U.S. v. William J. Shergalis (S.D. Fla.) Two indictments were returned by the grand jury against William J. Shergalis, the first charging him with having acted as an agent of the Cuban Government without having filed a registration statement with the Attorney General as required under the Foreign Agents Registration Act, and the second charging him and another with conspiracy to violate certain regulations promulgated under the Federal Aviation Act of 1958. At the time of the return of these indictments, defendant was being held a prisoner by the Cuban Government as a result of his having flown to Cuba on March 21, 1960 by private aircraft allegedly to smuggle out a former official of the Batista regime. Defendant returned to the United States on January 12, 1962 shortly after his release by the Cuban Government. He was arraigned January 19, 1962 and entered a plea of not guilty to both indictments. The indictments have been consolidated for trial which was set for May 28, 1962. At a hearing on March 9, 1962 the Court denied defendant's motion to dismiss the indictment charging a violation of the Foreign Agents Registration Act but granted his motion to inspect or copy his signed statement given to agents of the Federal Bureau of Investigation shortly after his arrest on January 12, 1962.

Staff: United States Attorney Edward F. Boardman (S.D. Fla.); Nathan B. Lenvin and Roger P. Bernique (Internal Security Division)

Employee Discharge. Rachael Johnson v. John W. Macy et al. (D.D.C.) Plaintiff was dismissed from her employment at the direction of the Civil Service Commission because she had falsely denied on her application for Federal employment that she had ever been a member of the Communist Party of the United States. The District Court found no factual issues in dispute and dismissed the complaint against the Commissioners of the Civil Service Commission on the motion of the Government.

Staff: DeWitt White (Internal Security Division)

Action for Money Damages. Robert O. Wilbur v. United States (D.D.C.) On April 10, 1962 the District Court granted the Government's motion to dismiss for lack of jurisdiction. Plaintiff contended that Government agents had made a surveillance of him which had resulted in the circulation by the United States Government of denunciatory remarks of a security nature against him, had destroyed his business and his character in the business community and had prevented his obtaining gainful employment. The United States denied these allegations in its answer served November 6, 1961. (See Bulletin Vol. 9, pp. 701-702, dated December 1, 1961.)

In its motion to dismiss, the Government successfully contended that this was a suit against the United States in its sovereign capacity to which the United States had not consented.

Staff: Benjamin C. Flannagan (Internal Security Division)

Trading With the Enemy. United States v. Kwong On Lung Company (S.D. Calif.) In December 1961 an eleven count indictment was returned charging the Corporation and its President, Peter F. Lew, with violations of the Trading With the Enemy Act and the Customs laws.

On January 15, 1962 defendant Peter F. Lew pleaded guilty to Count One of the indictment which charged him with conspiring to violate 50 U.S.C. App. 5(b) and 18 U.S.C. 545 by knowingly importing Chinese-type foodstuffs into the United States contrary to law. Defendant corporation pleaded guilty to Count One which charged it as a party to the aforesaid conspiracy. Defendant corporation also pleaded guilty to Count Three which charged it with knowingly importing Chinese-type foodstuffs into the United States in violation of 50 U.S.C, App. 5(b), and Count Eleven which charged that defendant corporation by means of a false and fraudulent invoice, attempted to introduce into the commerce of the United States Chinese-type foodstuffs, in violation of 18 U.S.C. 542. The value of the merchandise covered by the indictment was approximately $27,000.

On February 6, 1962, the Court (Byrne, J.) sentenced Peter F. Lew to imprisonment for a period of one year. The execution of the sentence was suspended and Lew was placed on probation for a period of three years on the condition that he pay a fine of $500. Defendant Kwong On Lung Company was sentenced to pay a $1,000 fine on Count One, $1,000 fine on Count Three, and $500 fine on Count Eleven, for a total fine of $2500. The other counts of the indictment were dismissed as to both defendants.

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

Atomic Energy Act and Internal Security Act of 1950. United States v. George John Gessner. Following the filing of a complaint on March 16, 1962 (See Bulletin, Vol. 10, No. 6, p. 182) and the arrest of the defendant on March 19, 1962, a six-count indictment was returned at Kansas City, Kansas on March 30, 1962 charging defendant in five counts with violations of 42 U.S.C. 2274(a) for unlawfully transmitting restricted data to a representative of the Soviet Union and in one count with violating 50 U.S.C. 783(b) by unlawfully communicating classified information to a representative of the Soviet Union.

Defendant was formerly a member of the U.S. Army who had been trained as a specialist in nuclear weapons maintenance. The indictment alleges that, inter alia, he furnished to the Soviets information relating to the design, construction and firing system of several nuclear weapons.

No plea has been entered pending the results of a mental examination to determine defendant's fitness to stand trial. The Court ordered defendant committed for the examination upon motion of defense counsel on March 28, 1962. Defendant is expected to be committed for at least 60 days.

Staff: United States Attorney Newell A. George (D. Kansas), James L. Weldon, Jr. and Joseph T. Eddins (Internal Security Division).

Labor-Management Reporting and Disclosure Act of 1959; Communist Party Membership; United States v. Archie Brown (N.D. Cal.) (See Bulletins Nos. 11 and 22, Vol. 9). On May 24, 1961, a grand jury in the Northern District of California returned a one count indictment against Brown charging that he served as a member of the Executive Board of Local 10, ILWU, while a member of the Communist Party, in violation of 29 U.S.C. 504.

The trial began on March 28, 1962 and on April 5, 1962 the jury returned a verdict of guilty. No date has yet been set for sentencing.

This case marks the first prosecution under the anti-Communist provisions of Section 504.

Staff: United States Attorney Cecil F. Poole; Paul C. Vincent (Internal Security Division).

* * *

LANDS DIVISION

Assistant Attorney General Ramsey Clark

Condemnation - Interest Not Due on Award Until Property Is Taken. Kingdon Gould v. United States (C.A. D.C., March 15, 1962). This condemnation proceeding by the United States was for the acquisition of a tract of land in Northwest Washington for use as a site for the Pan American Health Organization Building. Congress specified this site and appropriated $875,000 for its acquisition. On June 30, 1961, a judgment on a jury verdict of $1,092,150 was entered. The judgment provided that the award was "inclusive of interest," and that upon the payment of the award into the registry of the court the fee simple title absolute to the property would vest in the United States. Thereafter, the deficiency was appropriated, and on October 20, 1961, $1,092,150 was deposited as provided by the judgment. The landowners appealed and contended that because Congress had made an appropriation for the property that amount should have been deposited, and since it was not they should receive interest thereon, as a part of just compensation.

The Court of Appeals affirmed the judgment, holding that when interest is included as a part of just compensation it is payable only from the time of taking to the date of payment of the award. It held that the taking in this case did not occur before the award was deposited in the registry of the court, and until then the owners continued to hold title as well as possession of the property and received the income from it. The Court stated that it was immaterial that the income received was less than the amount which would have been received had interest been added to the amount of the award from the date of the judgment until the deposit was made, as contended by appellants. The Court further held that there was no legal obligation on the part of those acting for the United States to file a declaration of taking and deposit the $875,000 in the registry of the court prior to appropriation of the additional amount necessary to pay the full compensation required, stating: "It is possible, even if not probable, that Congress might have withdrawn the authority it had given for acquisition of the land upon learning that the jury had fixed a higher value than the amount of the original appropriation."

Staff: Elizabeth Dudley (Lands Division).

National Parks and Monuments: Injunction Against Unauthorized Business Activities in Violation of Department of Interior Regulations. United States v. Gray Line Water Tours of Charleston. (E.D. S.C., March 2, 1962). This action was brought to enjoin defendant from the continued use of docking facilities at the pier of the Fort Sumter National Monument located in the Charleston harbor, South Carolina, under the jurisdiction of the National Park Service, Department of the Interior, in the absence of a permit as required by Department of Interior regulations, 36 C.F.R. 1.31(a)(a).

Pursuant to an act of Congress authorizing the establishment of the Fort Sumter National Monument, the Secretary of the Army transferred to the Secretary of the Interior the Fort Sumter Military Reservation containing 2.4 acres, together with the buildings and other appurtenances. The plat which accompanied the letter of transfer showed that in addition to the buildings within the walls of the fort there were improvements outside the walls including the pier which extended into the water. The plat further showed that the area to high water mark contained 3.8 acres and that the boundary extended 100 yards beyond mean low water.

Defendant admitted that the United States has title to land on which the Fort Sumter National Monument is located but contended that the letter of transfer to the Secretary of the Interior conveyed only 2.4 acres, the area covered by the fort and its walls, and that the Secretary does not have exclusive jurisdiction over the water.

The Court found that Congress in creating the Fort Sumter National Monument and in authorizing a transfer of the Fort Sumter Military Reservation to the Secretary of the Interior for that purpose had specifically provided that appurtenances be included, that since Fort Sumter is an island completely surrounded by water, Congress intended that an adequate area be transferred to afford proper means of ingress and egress; that the pier is well within the limits of the area transferred and is under the exclusive jurisdiction of the Secretary. The Court entered an order enjoining the defendant from embarking and disembarking fee paying passengers at the Fort Sumter pier in the absence of a permit from the National Park Service.

Staff: United States Attorney Terrell L. Glenn; Assistant United States Attorney Thomas P. Simpson (E.D. S.C.)

Administrative Law; Eminent Domain; Aircraft. Basil M. Western, Sr. v. James C. McGehee (D. Md., Feb. 19, 1962). This injunction suit was instituted by a group of individuals who own land adjacent to one of the principal runways at Andrews Air Force Base, Prince Georges County, Maryland, close to Washington, D. C. Defendants were the Commanding Officer and the Deputy Commander at Andrews. At the time it was filed, the United States had pending in the same court a condemnation action brought to acquire a "clearance" easement over plaintiffs' lands. This easement, sought primarily for safety purposes, gives the United States the right to control the height of objects constructed or grown on plaintiffs' properties. It does not relate to the right to fly aircraft over any areas. In the captioned suit, plaintiffs sought to have defendants restrained from permitting any further flights at low levels over their lands in the absence of the filing of a condemnation action to acquire avigation easements. Thus, the case sought much the same relief previously denied by Judge Holtzoff in an action brought against the Secretary of the Air Force in the United States District Court for the District of Columbia (10 U.S. Attorneys' Bull. No. 3, p. 94).

Defendants moved to dismiss. On February 19, 1962, Chief Judge Thomsen sustained that motion and also rejected a motion, in the pending condemnation case, that the United States be required to amend its complaint to take an avigation easement. In an excellent opinion, Judge Thomsen pointed out (a) that the court is without jurisdiction to control the type of interest that the United States may choose to condemn in any particular land, (b) that if the alleged low flights of airplanes from Andrews over plaintiffs' property did amount to the taking of an avigation easement plaintiffs had an adequate remedy at law by filing suit in the Court of Claims and (c) that since plaintiffs' main purpose was to require the United States to condemn an avigation easement the Secretary of the Air Force was a necessary party.

Staff: Assistant United States Attorney Stephen H. Sachs (D. Md.)
Thos. L. McKevitt (Lands Division)

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CRIMINAL TAX MATTERS

INSTRUCTIONS; DEFENDANT CHARGED WITH WILLFUL ATTEMPTED INCOME TAX EVASION NOT ENTITLED TO INSTRUCTION ON LESSER INCLUDED OFFENSES

Reprints of 27 F.R.D. 39, "Jury Instructions and Forms for Federal Criminal Cases" written by Hon. William C. Mathes, United States District Judge for the Southern District of California, have been distributed to all United States Attorneys' offices. Attention is called to the fact that an Instruction on "Lesser Included Offenses" is included at page 181.

This lesser offense instruction states, in part, that the crime of willfully attempting to evade and defeat a tax under Section 7201 of the Internal Revenue Code of 1954 "necessarily includes the lesser offense of willful failure to supply information for the purposes of the computation, assessment or collection of any income tax imposed by law, both of which lesser offenses are defined in §7203 of the Internal Revenue Code /26 U.S.C.A. (I.R.C. 1954) §7203/ * * *." Inquiries to the Tax Division prompt a review of the Department's position on the propriety of the instruction.

The Department disagrees and vigorously opposes the giving of such an instruction on the theory that there are no lesser included offenses within the offense of willful attempt to evade taxes, Section 7201 of the Internal Revenue Code of 1954. See the discussion relative to United States v. McCue, 160 F. Supp. 460 (D.C. Conn.) in the United States Attorneys' Bulletin for August 15, 1958, Vol. 6, No. 17, page 528.

As noted in the Bulletin over two years ago, a lesser included offense instruction was given in United States v. Chaifetz, 181 Fed.Supp. 57 (D.C. D.C.), see United States Attorneys' Bulletin of March 11, 1960, No. 6, page 183. On appeal (288 F. 2d 133 (C.A.D.C.)) the Court of Appeals refused to pass on the lesser included offense instruction as the sentence on the Count in question, Count IV, ran concurrently with the sentence on the other count which involved an evasion conviction. In answering a petition for certiorari the Solicitor General suggested that the misdemeanor conviction on the Count IV evasion charge be set aside on the ground that a failure to supply information (Sec. 7203, 26 U.S.C.) is not an offense necessarily included within attempted evasion (Sec. 7201, 26 U.S.C.). The Supreme Court granted certiorari, 366 U.S. 209, rehearing denied, 366 U.S. 955, limiting the grant to the issue raised as to Count IV. Certiorari was denied on the straight evasion conviction on Count III. (See United States Attorneys' Bulletin, May 19, 1961, Vol. 9, No. 10, page 312.) The Court directed per curiam that conviction on Count IV be set aside, pursuant to the Solicitor General's suggestion.

Whenever the question arises in the settling of instructions the United States Attorneys are asked to resist any and all attempts to inject

lesser included offense instructions in charges to the jury in evasion cases.

CIVIL TAX MATTERS
Appellate Court Decisions

Liens: Property Rights; Priority of Liens. J. K. & W. H. Gilcrest Co. v. A. & R. Concrete Co., (S. Ct. Iowa, December 12, 1961.) This case involves the relative priority between federal tax liens and the mechanic's liens of a subcontractor in the balance due the taxpayer (the prime contractor) under a construction contract. The federal tax liens arose after the subcontractor completed his work, but prior to the time he filed and served notice of his lien upon the owner of the improved property. Under Iowa law, and insofar as material here, a subcontractor may perfect his lien by filing his claim and giving written notice thereof to the owner within sixty days from the completion of the work by the principal contractor. If he fails to do so, he may still foreclose his lien provided notice thereof is filed and served within two years following lapse of this sixty-day period; in the latter event, however, his lien is enforceable against the property only to the extent of the balance due the contractor (taxpayer) at the time of service of such notice. The subcontractor here filed and served notice of his lien after the sixty-day period but within the two year period.

During the sixty-day period no "debt" was due the taxpayer-contractor to which the federal liens could attach. Hence, whether the taxpayer-contractor had any property rights to which the federal lien attached depended upon when the contract was completed and whether the subcontractor had served notice of his lien within sixty days thereafter. If he did not, the Government contended that a debt came into being between the owner and the taxpayer-contractor to which its liens attached. The Supreme Court of Iowa agreed with the Government's contention, but pointed out that the stipulated facts upon which the case was tried failed to disclose the date on which the prime contractor completed the contract. It therefore reversed and remanded the case for a determination of this fact, and for entry of such decree as was proper in view of that determination.

Staff: George F. Lynch (Tax Division).

District Court Decisions

Third Party Beneficiary; United States Not Intended to be Third Party Beneficiary of Performance Bonds and Not Entitled to Recover for Payroll Taxes, Where Bonds Did Not Specifically State They Were for Benefit of Taxing Authorities. United States v. Maryland Casualty Company, CCH 62-1 U.S.T.C. Par. 9302 (N.D. Tex., 1962). The United States instituted suit to recover from defendant surety company, surety on five separate construction subcontract performance bonds for the taxpayer-subcontractor, for payroll taxes owing by the taxpayer-subcontractor and arising out of the performance of the involved sub-contracts.

Whether the United States was intended to be a third party beneficiary entitled to recover is to be determined with reference to state law and the surety bonds are to be construed in connection with the subcontracts to which such bonds relate.

Two of the involved bonds were merely conditioned on the performance of all provisions of the subcontracts to which they related. Such subcontracts contained an express promise by the taxpayer-subcontractor to the prime contractor to pay the payroll taxes. The Court held the surety not liable under the terms of the foregoing bonds and subcontracts. The subcontractor's express promise to pay the payroll taxes, the Court held, was merely declaratory of the subcontractor's existing liability. Moreover, the surety bond did not contain any evidence of intent to make the United States a third party beneficiary, the mere conditioning of the bond upon the performance of all provisions of the subcontracts not being sufficient.

The other three sets of bonds and the related subcontracts contained provisions in addition to those in the first two sets. Each of the three bonds provided that the bond "shall inure to and be for the direct benefit of all laborers, materialmen and other creditors whose indebtedness arises out of said contract." In addition, each of the subcontracts to which these bonds related provided that the contractor could withhold final payment pending satisfactory evidence that the payroll taxes had been paid. The Court held the surety not liable under the terms of the foregoing bonds and subcontracts on the basis of the Supreme Court's decision in Central Bank v. United States, 345 U.S. 639 (1953). The Central Bank case held that payroll taxes arise independently of a contract within the meaning of the Assignment of Claims Act.

Staff: United States Attorney Harold B. Sanders, Jr. (N. D. Tex.), Lorence L. Bravenec (Tax Division).

Bankruptcy; Attorney Fees Incurred by Trustee Resulting in Creation or Preservation of Tax Trust Funds Are Payable Out of Trust Fund. Matter of S. T. Foods, Inc., Bankrupt, CCH 62-1 U.S.T.C. Par. 9306 (S.D. N.Y. 1962). This bankruptcy proceeding involved two main issues, i.e. (1) whether federal income and social security taxes withheld by a debtor in possession were trust funds which primed costs and administrative expenses incurred during an arrangement proceeding and (2) if so, whether the trustee could claim costs and expenses incurred in creating or preserving these trust funds.

The Court stated that it was settled in the Second Circuit that such withheld taxes were trust funds which primed administrative expenses. However, relying on the court's equitable powers and citing certain practical considerations, the Court held that the trustee should be given an opportunity to present his claim for costs and expenses "directly resulting in the creation or preservation of the trust fund." If such costs are found to have been incurred, they will be an equitable charge on the funds which

would be payable prior to payment to the United States. The Court cautioned that a careful differentiation must be made between these costs and general administrative costs and expenses, and that the determination of the former is not governed by the consent of the parties but is within the sound discretion of the referee. Therefore, the matter was remanded to the referee for further proceedings.

Staff: United States Attorney Robert M. Morgenthau; Assistant United States Attorney Julius Rolnitsky (S.D. N.Y.)

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