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Vol. 10 No. 9

UNITED STATES ATTORNEYS

BULLETIN

UNITED STATES ATTORNEYS BULLETIN

Vol. 10 May 4, 1962 No. 9

MONTHLY TOTALS

Workload figures for the month of March are rather encouraging. Totals in criminal cases pending, and criminal and civil matters pending dropped below those for the previous month. The aggregate of pending cases and matters also dropped, by a substantial amount. Civil cases pending continued to rise, but by a reduced amount. The pending workload, however, is still over 6,700 items higher than it was at the outset of this fiscal year. The following analysis shows the number of items pending in each category as compared with the total for the previous month.

	February 28, 1962	March 31, 1962	
Taxable Criminal	8,660	8,286	- 374
Civil Cases Inc. Civil Less Tax Lien & Cond.	15,552	15,630	+ 78
Total	24,212	23,916	- 296
All Criminal	10,293	9,865	- 428
Civil Cases Inc. Civil Tax & Cond. Less Tax Lien	18,518	18,612	+ 94
Criminal Matters	12,813	12,500	- 313
Civil Matters	15,058	14,948	- 110
Total Cases & Matters	56,682	55,925	- 757

The breakdown below shows the pending caseload on the same date in fiscal 1961 and 1962. Filings, especially in civil cases, show a substantial increase, but terminations continue to lag behind. The percentage of decrease in terminations, however, is only one-fourth of last month's figure, which indicates that progress, however small, is being made. During March, the average Assistant filed 8.7 cases and terminated 8.8 cases. If the number of Terminations could be raised to twice the number of filings during the remaining two months of the fiscal year, the present increase of 3,515 cases over last year could be wiped out.

	First 9 Mos. F.Y. 1961	First 9 Mos. F.Y. 1962	Increase or Decrease Number	%
Filed				
Criminal	23,260	23,506	+ 246	+ 1.06
Civil	17,587	18,700	+ 1,113	+ 6.33
Total	40,847	42,206	+ 1,359	+ 3.33
Terminated				
Criminal	22,044	21,922	- 122	- .55
Civil	16,208	16,140	- 68	- .42
Total	38,252	38,062	- 190	- .50

	First 9 Mos. F.Y. 1961	First 9 Mos. F.Y. 1962	Increase or Decrease Number	%
Pending				
Criminal	8,839	9,865	+ 1,026	+ 11.61
Civil	20,498	22,987	+ 2,489	+ 12.14
Total	29,337	32,852	+ 3,515	+ 11.98

The month of March was the most productive month of the present fiscal year, from the standpoint of filings and terminations. More criminal and civil cases were filed and terminated during March than in any of the preceding eight months. Unlike the usual pattern, terminations exceeded filings. This has happened only once previously this year. The greatest activity occurred in criminal cases which far outdistanced civil cases in both filings and terminations.

	Filed			Terminated		
	Crim.	Civ.	Total	Crim.	Civ.	Total
July	1,819	1,886	3,705	1,732	1,500	3,232
Aug.	2,163	2,126	4,289	1,629	1,595	3,224
Sept.	2,910	1,989	4,899	2,263	1,650	3,913
Oct.	2,715	2,259	4,974	2,709	1,951	4,660
Nov.	2,806	2,002	4,808	2,702	1,800	4,502
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
March	3,108	2,383	5,491	3,457	2,101	5,558

For the month of March 1962, United States Attorneys reported collections of $5,769,633. This brings the total for the first nine months of fiscal year 1962 to $40,277,153. Compared with the first nine months of the previous fiscal year this is an increase of $13,515,502 or 50.50 per cent over the $26,761,651 collected during that period.

During March $6,689,360 was saved in 124 suits in which the government as defendant was sued for $7,828,712. 73 of them involving $3,712,996 were closed by compromises amounting to $494,063 and 23 of them involving $1,669,624 were closed by judgments amounting to $645,289. The remaining 28 suits involving $2,446,092 were won by the government. The total saved for the first nine months of the current fiscal year aggregated $43,666,744 and is an increase of $18,131,073 over the $25,535,671 saved in the first nine months of fiscal year 1961.

DISTRICTS IN CURRENT STATUS

As of March 31, 1962, the districts meeting the standards of currency were:

CASES

Criminal

Ala., N.	Ala., S.	Ariz.	Ark., W.	Colo.
Ala., M.	Alaska	Ark., E.	Calif., S.	Conn.

CASES

Criminal

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

CASES

Civil

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

MATTERS

Criminal

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

MATTERS

Civil

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

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ANTITRUST DIVISION

Assistant Attorney General Lee Loevinger

Sherman Act

Restraint of Trade - TV Broadcasting; Complaint Under Section 1. United States v. Columbia Broadcasting System, Inc. (S.D. N.Y.) On April 12, 1962, a civil antitrust complaint was filed against Columbia Broadcasting System, Inc., charging that contracts entered into between CBS and its affiliates since January 1961 were in unreasonable restraint of trade and thus violated Section 1 of the Sherman Act. The complaint alleges that prior to 1961, most CBS affiliates operated under "standard" CBS affiliation agreements, pursuant to the terms of which the affiliate was compensated at the rate of 30% of the hourly charge to advertisers for broadcast time during which the station carried CBS network programs. It was further charged that CBS was replacing as many as possible of these old agreements with new affiliation contracts, a number of which it has already entered into, which alter the method of compensation as follows:

1. On the first 60% of broadcast hours requested by CBS, the station is compensated at a rate of 10% of the charges to advertisers for each hour broadcast;
2. For each additional hour broadcast by the station, its rate of compensation is 60% of such charges.

The new CBS affiliation agreements are allegedly designed to coerce or induce CBS affiliates to take virtually all of their requirements of afternoon and evening television programs from CBS, and thus to foreclose independent program suppliers, non-network advertisers, station representatives and other networks from access to CBS affiliated television stations during the most desirable hours of the day, with the effect of eliminating competition in the production and sale of television programs, the sale of broadcast advertising, and the use of CBS affiliates by other networks during afternoon and evening broadcast hours.

The complaint seeks a determination that the new affiliation agreements violate Section 1 of the Sherman Act and asks that CBS be enjoined from enforcing these affiliation agreements or negotiating similar agreements with its affiliates in the future.

Staff: Bernard M. Hollander and Jennie M. Crowley. (Antitrust Division)

Venetian Blind Manufacturer Indicted Under Sherman Act & Taft-Hartley Act. United States v. M. Klahr, Inc., et al. (S.D. N.Y.) On April 11, 1962, a twenty-three count indictment was returned by a grand jury against a corporate defendant and its two principals and a labor union official who represented the corporation's employees. M. Klahr, Inc., the largest venetian blind manufacturer in the Northeast, Jerome Klahr and Solomon Klahr, President and Vice President, respectively of M. Klahr, Inc., and John E. Pessolano, the President of Local 2710 of the United Brotherhood of Carpenters and Joiners of America were charged with violations of 15 U.S.C. 1 and 2, and of Section 302 of the Taft-Hartley Act (29 U.S.C. 186).

This is the Division's first prosecution founded jointly on the Sherman and Taft-Hartley Acts.

Seven manufacturers and eight individuals were named as co-conspirators but not defendants in the twenty-three count indictment. M. Klahr and the co-conspirator companies have done more than $6,000,000 in business since 1957, principally with builders, and M. Klahr accounted for 60 per cent of that business.

All of the defendants were accused of having conspired since 1957 to fix prices, rig bids, allocate customers under the guise of a credit rating system and monopolize the venetian blind business in New York, New Jersey, and Connecticut in violation of the Clayton and Sherman Acts.

Their business involved assembling component parts - slats, tapes, cords and gears - into venetian blinds cut to order and installing the completed blinds on new construction sites. Builders and contractors generally buy the blinds on the basis of competitive bids, the indictment said.

The indictment charged that monopolistic conditions resulted, and that defendants "are in possession of the power to establish and maintain prices and to exclude anyone who fails to agree or adhere to those prices."

M. Klahr, Inc., Jerome Klahr and Solomon Klahr were charged with violating the Taft-Hartley Act by illegally paying approximately $10,000 to Pessolano to obtain his cooperation as a union official. Pessolano was charged with both illegal receipt of the money in violation of the Taft-Hartley Act and policing the industry arrangements in violation of the Sherman Act.

The indictment charges that the $10,000 was the accumulation of nine separate payments, described in the indictment in eighteen separate counts, nine pleading the illegal payment against M. Klahr, Inc., Jerome Klahr and Solomon Klahr and nine pleading illegal receipt against Pessolano.

The indictment also contains a count charging the Klahrs and their corporation with a violation of the Federal criminal conspiracy statute (18 U.S.C. 371) in that they conspired to violate the Taft-Hartley Act.

On April 18, the defendants pleaded not guilty. Judge Archie O. Dawson directed that each of the individual defendants be held in bail in the amount of $3,000 and be finger printed.

Staff: John J. Galgay, Joseph T. Maioriello, Richard L. Shanley and James J. Farrell, Jr. (Antitrust Division)

* * *

CIVIL DIVISION

Assistant Attorney General William H. Orrick, Jr.

COURTS OF APPEALS

FEDERAL RULES OF CIVIL PROCEDURE

Applicant May Intervene As of Right Under Rule 24(a)(2), F.R.C.P., Even Though Final Judgment Will Not Be Res Judicata as to Intervenors' Rights. International Mortgage and Investment Corporation v. Von Clemm (C.A. 2, April 5, 1962). This suit was commenced to recover property vested under the Trading with the Enemy Act. Appellants, two groups of stockholders of a corporation which also had claimed ownership of the property, sought to intervene in the action both as parties-plaintiff and as parties-defendant. The district court denied their motion to intervene, and appellants appealed only from that part of the order denying their right to intervene as parties-defendant. No appeal was taken from the order denying their right to intervene as parties-plaintiff because appellants could not have instituted an action under the Act since they had not filed notice of their claim within the prescribed time.

The Court of Appeals held that an order denying intervention as of right clearly is appealable, and that the appellants were entitled to intervene as parties-defendant. The Court noted that a party has a right to intervene under Rule 24(a)(2), F.R.C.P., when the representation of its interests by the existing parties is or may be inadequate and when "the applicant is or may be bound by the judgment." The Court found that both of these conditions had been satisfied in this case, even though the judgment would not be res judicata as to the appellants' rights to the property and, therefore, would not be binding upon them. The Court held that "it is enough under Rule 24(a)(2) that an adverse judgment would seriously prejudice those who seek to intervene, particularly where allowance of intervention will not introduce extraneous issues into the suit, threaten to disrupt the action, or run counter to the policy of the statute under which the action is brought."

The Court also held that the appellants had a right to intervene under Rule 24(a)(3), which grants a right to intervene where the party will be adversely affected by the disposition of property "which is in the custody or subject to the control or disposition of the court." The Court ruled that the fact that the district court did not have custody of the property did not affect the right to intervene under this Rule since the property was subject to the court's disposition. Finally, the Court held that appellants could intervene as parties-defendant even though they could not intervene as parties-plaintiff or could not sue the Government in their own right.

Staff: United States Attorney Robert M. Morgenthau; Assistant United States Attorney Michael A. Berch (S.D. N.Y.)

LABOR

Secretary of Labor, in Order to Subpoena Union Records Under Labor-Management Reporting and Disclosure Act of 1959, Need Not Have Prior Belief That Act Has Been Violated; Act Is Not Unconstitutional as Beyond Congress' Power Under the Commerce Clause to Constitution. International Brotherhood of Teamsters, etc. v. Goldberg (C.A. D.C., April 5, 1962). In resisting enforcement of a subpoena issued pursuant to the Labor-Management Reporting and Disclosure Act of 1951, the Union argued that the subpoena was invalid because the Secretary did not assert that there was "probable cause" to believe, or that he had a "prior belief" that the Union had violated or was about to violate the Act. The Union also attacked the subpoena on the ground that its scope was too broad in several respects. Finally, the Union argued that the reporting provisions of the Act were unconstitutional as beyond Congress' power under the commerce clause of the Constitution. The district court rejected these defenses and entered an order of enforcement.

The Court of Appeals for the District of Columbia Circuit, agreeing with the Sixth Circuit in Goldberg v. Truck Drivers Local Union 299, 293 F. 2d 807, certiorari denied, 368 U.S. 938, held that the Secretary need not have "probable cause" for believing, or even a "prior belief," that the Act had been violated in order to subpoena records, and also upheld the constitutionality of the Act. Moreover, in all respects except one, the Court upheld the subpoena against the charge of excessive broadness. With regard to the subpoenaing of membership lists, however, the Court withheld entry of its order of affirmance for 15 days to give the Union an opportunity to move for a remand to the district court, so that there could be an amplification of the record. The Court was of the view that further facts should be adduced in regard to the type of membership list kept by the Union and the necessity for inspecting them. The court of appeals ordered the Union to "forthwith" comply with all portions of the subpoena except for that relating to membership lists.

Staff: Assistant Attorney General Orrick; Alan S. Rosenthal; John C. Eldridge (Civil Division)

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

Claimant Entitled to Death Benefits Under Longshoremen's Act as Common Law Wife. Matthews v. Britton (C.A. D.C., April 19, 1962). Appellant brought this suit for death benefits under the Longshoremen's and Harbor Workers' Act on the ground that the Deputy Commissioner incorrectly determined that she was not the common law wife of the decedent. Appellant began to live with decedent as his "wife" while she was legally married to another man, and, therefore, while she was under a legal impediment to the consummation of a common law marriage. She subsequently was divorced by her husband. The district court upheld the Deputy Commissioner's determination. The Court of Appeals held that a common law marriage may be consummated as soon as such a legal impediment is removed, provided that the parties who are living together as man and wife have agreed to such a union. It therefore reversed and remanded to the Deputy Commissioner with

directions to make findings with respect to whether appellant and the decedent had made such an agreement either before or after appellant's divorce, and, if so, to award appellant death benefits under the Act.

Staff: Herbert P. Miller (Department of Labor)

Deputy Commissioner's Denial of Disability Benefits Sustained. Leblanc v. Henderson (C.A. 5, April 10, 1962). This action was brought by a claimant who was denied permanent partial disability payments under the Longshoremen's and Harbor Workers' Compensation Act. The claimant worked as a "roughneck" on a drilling platform, and his work brought him into frequent contact with drilling mud mixed with caustic soda. After a considerable period of time during which he had been exposed to the caustic soda, claimant developed a skin disease which forced him to lay off work on three separate occasions. The Deputy Commissioner awarded the claimant temporary disability payments for the periods that he was forced to stop work, but found that the claimant had not acquired a sensitivity to caustic soda during the period of his employment as an occupational disease resulting in permanent disability.

The district court sustained this finding by the Deputy Commissioner. On appeal, the Court of Appeals affirmed, holding that the Deputy Commissioner's finding must stand because it was supported by "substantial evidence on the record considered as a whole." The Court noted that the medical experts testified that caustic soda will produce a skin condition in most or all people, but that their testimony was uncertain as to whether claimant had developed the condition as a result of his employment. The Court also noted that claimant had been completely cured of his last outbreak and was presently able to do strenuous work. Under these circumstances, the Court held that the Deputy Commissioner properly found that claimant failed to carry his burden of proof and establish a compensable injury.

Staff: Former United States Attorney M. Hepburn Many; Assistant United States Attorney Gene S. Palmisano (E.D. La.).

SOCIAL SECURITY ACT

Secretary's Finding That House Companion Not Entitled to Benefits Held Supported by Substantial Evidence. Sherrick v. Ribicoff (C.A. 7, April 3, 1962). Claimant, a widow who had never worked for wages, moved into the home of a close friend where the two women shared the household tasks for many years. During the last two years of her friend's life claimant assumed more of the household tasks and rendered nursing care as well. When the friend died, she left claimant a $6000 legacy. Claiming to have been nurse, companion and maid for her friend, claimant filed a claim against the estate, which was at first disallowed, and later settled by a compromise agreement under which plaintiff was paid $4000.08 in six quarterly installments. The compromise agreement stated that the payments covered services for the last 2 years of the "employer's" life. On the basis of these payments, plaintiff filed a claim for social security benefits. It was undisputed that, during the lifetime of the alleged

employer, there had been no arrangement for remuneration, salary or wages; no wages had been paid; no returns had been filed; and plaintiff had had no social security number. The Secretary denied social security benefits on the ground that plaintiff was not an "employee," had not received "wages" and did not have the six qualifying "quarters of coverage" within the meaning of the statute. The district court granted summary judgment for plaintiff. The Court of Appeals reversed on the ground that the undisputed facts supported the conclusion of the Secretary that the services were rendered, not on the basis of a paid employment relationship, but on the basis of friendship and mutual companionship. The Court also sustained the Secretary on the ground that the Act does not permit the court to make its own appraisal of the evidence.

Staff: Pauline B. Heller (Civil Division)

SURPLUS PROPERTY ACT

Government Awarded Twice Amount of Purchase Price as Liquidated Damages Under Surplus Property Act, But Interest on Award Held to Run From Date When District Court on Remand From Supreme Court Entered Judgment For Government and Not From Date of Reversed District Court Judgment. United States v. E. B. Hougham (C.A. 9, March 29, 1962). This action was brought by the Government under the Surplus Property Act to recover damages from the defendants on the ground that they had fraudulently obtained Government surplus property. On October 18, 1957, the district court found that the Act had been violated and that the Government was entitled to recover, but denied the right of the Government to elect its remedy under the Act and recover under Section 26(b)(2) of the Act. It therefore awarded the Government damages in the amount of $8,000 under Section 26(b)(1). On appeal, the Supreme Court reversed and held that the Government could elect its remedies under the Act. It remanded the cause and directed the district court to enter judgment for the Government under Section 26(b)(2). On April 11, 1962, the district court entered judgment for the Government for $150,000, or twice the amount of the original purchase price of the property. It also awarded the Government interest on the judgment from the date of that judgment.

The Government and the defendant filed cross-appeals from this judgment. The Government contended that it was entitled, under 28 U.S.C. 1691, to have the interest on the judgment run from the date the district court first entered a judgment in the action, or from October 18, 1957. Defendant urged that it was entitled to set off against the judgment the original purchase price which it had paid for the property. The Court of Appeals rejected both of these contentions. The Court held that interest under 28 U.S.C. 1691 runs from the date of the entry of the judgment in which the money damages are in fact awarded, even though the trial court may have erred in its original decision denying the claimed damages and the Government had been forced to appeal that decision in order to vindicate its rights. With respect to defendant's claim that it is entitled to set off the amount of the original purchase price, the Court stated that Section 26(b)(2) of the Act expressly provides that the amount of the judgment shall be a sum "equal to twice the consideration agreed to be given"

Staff: Anthony L. Mondello (Civil Division)

DISTRICT COURTS

GOVERNMENT CONTRACTS

Government Held to Have Acquired Title to Parts Produced by Subcontractor and Delivered to Government by Prime Contractor Under Contract Between Government and Prime Contractor. Empire Electronics Co. v. United States (E.D. N.Y., January 5, 1962). Plaintiff, a subcontractor under a Department of the Army contract, agreed to manufacture seven different cable assemblies according to Government specifications. The original contract between the Army and the prime contractor subsequently was modified to provide for progress payments to the prime contractor. Upon such payments, title to all parts, materials, inventories, and work in progress which the prime contractor had either produced or acquired was to vest in the Government. The prime contractor thereafter acquired and delivered to the Government two types of cables produced by plaintiff. These cables complied with the Government specifications except that they did not contain identification tags designed to facilitate the assembling of the completed products. The Government made progress payments to the prime contractor for the cables.

Plaintiff brought this suit against the Government for conversion. It alleged that title to the completed cables had not passed to the Government because they were not in a deliverable state since they did not contain the identification tags. It also argued that the cables were not in a deliverable state because its subcontact was not severable and all seven cable assemblies had not been manufactured. The district court granted the Government's motion for summary judgment, holding that the mere absence of the identification tags did not prevent the passage of title and that the Government could acquire title to the two types of cables delivered to it under its amended contract with the prime contractor.

Staff: United States Attorney Joseph P. Hoey; Assistant United States Attorney Peter H. Ruvolo (E.D. N.Y.)

RIVERS AND HARBORS ACT

United States Entitled to Recover Under Strict Liability Provisions of Rivers and Harbors Act For Damages to Navigational Buoy Maintained by Coast Guard. United States v. S.S. AMERICAN HUNTER and United States Lines Co. (and related consolidated cases) (S.D. N.Y., January 2, 1962). Following a collision between the S.S. QUEEN ELIZABETH and the S.S. AMERICAN HUNTER, the AMERICAN HUNTER collided with and sank Ambrose Channel lighted whistle buoy No. 17. The Government brought suit in rem against the AMERICAN HUNTER to recover for damages to the buoy on two causes of action. The first cause of action was premised on negligence under the general maritime law; the second, in which the Government sought to recover damages as well as prescribed penalties, was based on the strict liability provisions of the Rivers and Harbors Act. Respondent excepted to the second cause of action on the theory that the buoy was not within the

purview of the strict liability provisions of the Act. Its reasoning was that the statute was intended to encompass only construction buoys maintained by the Army Corps of Engineers in connection with public works under the Rivers and Harbors Act, and not navigational aid buoys maintained by the Coast Guard. The District Court held that neither the language of the Act nor its legislative history supported this contention, stating that "* * * there is plainly no basis for holding that * * * Congress did not mean to include within the provisions of the Act all buoys whether under the Department of War or under any other executive department." Accordingly, the Court overruled the respondent's exception.

Staff: George M. Bates (Civil Division)

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CIVIL RIGHTS DIVISION

Assistant Attorney General Burke Marshall

Voting and Elections; Civil Rights Acts of 1957 and 1960. United States v. Eldred W. Green, Circuit Court Clerk and Registrar George County, Mississippi; State of Mississippi (S.D. Miss.) On April 16, 1962, the Department of Justice filed suit in the Southern District of Mississippi under the Civil Rights Acts of 1957 and 1960. Named as defendants are the Circuit Court Clerk and Registrar of George County, Mississippi, and the State of Mississippi.

The complaint alleges that defendants have deprived Negroes, on account of their race, of the right to register to vote (1) by applying different and more stringent standards to Negro applicants for registration than to white applicants in determining whether Negroes are qualified to vote; (2) by arbitrarily denying Negroes the opportunity to register to vote; (3) failing and refusing to afford to Negro applicants for registration the same or equal opportunity to register to vote as is afforded to white applicants; (4) unreasonably delaying the receipt of applications for registration from Negro applicants; and (5) failing and refusing to register Negroes who possess the same or similar qualifications as white applicants who have been deemed qualified and who have registered. The prayer, in addition to seeking a general injunction and a finding of a pattern and practice of discrimination, asks the Court to order the defendants to cease their discriminatory practices.

Staff: United States Attorney Robert C. Hauberg (S.D. Miss.)
John Doar and D. Robert Owen (Civil Rights Division).

* * *

CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

JENCKS ACT

Government Agent as Witness; Producibility of Agent's Prior Written Reports. In the item published in the April 6, 1962 issue of the United States Attorneys' Bulletin (Vol. 10, No. 7, p. 204) under the referenced topic heading, the last paragraph was inadvertently phrased too broadly and hence may be subject to misinterpretation. The paragraph is therefore corrected to read as follows:

> This same procedure should be followed if two or more agents perform an investigative act jointly (i.e. - conduct an interview, carry out a surveillance, examine records, etc.), and 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. (Added matter underlined.)

Additionally, all material which, with the court's approval, is deleted prior to production to defendant should be made the court's exhibit so as to be available to the Court of Appeals in the event the defendant should appeal.

BANK ROBBERY

Unintentional Withholding from Defendant of Information Acquired by FBI Not Prejudicial; Submission to Jury of Indictment Charging in Several Counts Different Degrees of Offense of Bank Robbery Under 18 U.S.C. 2113 Not Improper, But Cumulative Sentences May Not Lawfully Be Imposed Thereunder. United States v. Charles Edward Lawrenson (C.A. 4). On January 9, 1962, the Court of Appeals affirmed the order of the trial court denying, inter alia, defendant's motions for new trial on grounds of newly discovered evidence, and for correction of an illegal sentence. Defendant had been convicted, on the corroborated testimony of his co-defendant, on four counts of an indictment charging them with various degrees of bank robbery under 18 U.S.C. 2113. He was sentenced to twenty years' imprisonment on only one count which charged a non-aggravated form of robbery, even though another count of the indictment charged the more aggravated offense of placing human life in jeopardy while committing the robbery for which a maximum penalty of twenty-five years' imprisonment could have been imposed.

Defendant's motion for new trial was based on the claim that at the trial the Government improperly withheld from him information concerning a certain parole violator's involvement in the bank robbery for which defendant was tried, and information concerning the whereabouts of that individual. At the trial, defendant's counsel tried to suggest on

cross-examination of Government witnesses and in his closing argument that one Robert Cutler, a parolee from Ohio prison who had been with the co-defendant a few days before the robbery, was actually the co-defendant's partner in the robbery. Following the trial, defendant's counsel learned that sometime prior to the trial Cutler had been arrested and returned to Ohio as a parole violator. An FBI agent in Washington was notified of this arrest but, since neither the Government nor defendant had requested further information, the agent did not pass the information to the FBI office in Baltimore, where defendant was on trial. In an affidavit given defendant's counsel, Cutler stated that two days before the robbery he procured some equipment for the co-defendant in preparation for the robbery and that after the robbery the co-defendant paid back to Cutler a loan of $350 and showed him a suitcase full of money from the "bank job." Cutler also stated in the affidavit that when questioned by the FBI following this arrest for parole violation the agents told him that his fingerprints were found on the co-defendant's car, pistols and some license plates used in the robbery.

The appellate court concluded that the record shows abundant support for the trial court's finding that counsel for neither side knew where Cutler was at the time of the trial and also that defendant never asked the Government for help in finding Cutler, thus exonerating the prosecution of knowingly withholding information from defendant. The Court held that Pyle v. State, 317 U.S.C. 213 and Curran v. State, 259 F. 2d 707 (C.A. 3), certiorari denied, 358 U.S.C. 948, which cases reversed convictions where police officers withheld information even though the prosecutor was unaware of it, do not apply here because the passive withholding of the information from the FBI office in Baltimore was not motivated by a desire on the part of the FBI agent in Washington to insure defendant's conviction at all costs.

Concerning defendant's motion attacking the validity of the sentence, the Court of Appeals held that, since defendant was convicted under all four counts, it was proper for the trial court to choose to impose sentence under any one of the counts provided it did not exceed the maximum penalty set forth in the statute for that offense. The Court reasoned that, since defendant was sentenced under one count only, it was not a general or aggregate sentence and that therefore there were no problems such as were involved in Prince v. United States, 352 U.S.C. 322, where consecutive sentences were imposed under two counts similar to those here involved, or in Milanovich v. United States, 365 U.S.C. 551, where a defendant was convicted and sentenced on inconsistent counts. In the Prince case, it was held that consecutive sentences under Section 2113 for entering a bank with intent to commit a felony and for robbery of the bank were illegal, because Congress in defining an offense less serious than robbery in the statute did not intend to pyramid the authorized penalties. Since the gravamen of unlawful entry is the intent to commit a felony, such intent is merged into the robbery when robbery is consumated so that there is only one crime, which should not be fragmented for purposes of punishment. Compare Green v. United States, 365 U.S.C. 301.

In the Milanovich case, it was held that the trial court erred in submitting to the jury an indictment which charged a defendant with stealing Government property and with receiving and concealing such property without instructing the jury that it could convict of either larceny or receiving, but not both, because the offenses are inconsistent. In the instant case, the offenses are not inconsistent but the same offense differing in gravity depending upon facts showing additional characteristics of aggravation. Thus, although it would be improper for the trial court to impose cumulative sentences for the different degrees of the offenses under Section 2113, it was proper to submit to the jury and for the jury to find defendant guilty of different degrees of the related offenses under the statute. See Green v. United States, 365 U. S. 301.

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

BANK ROBBERY ACT

Theft from Night Depositories. In an item concerning theft from night depositories which appeared in the March 23, 1962 issue of the United States Attorneys' Bulletin, Vol. 10, No. 6, pp. 171-2, reference was made to the case of United States v. Jeff Collins (N.D. Ga., No. 22, 764). The United States Attorney for the Northern District of Georgia has now advised that this case was tried before a jury on November 21, 1961, and a verdict of guilty was returned on November 22, 1961. Collins was sentenced to two years in the custody of the Attorney General. He did not appeal and is now serving his sentence.

BOMB HOAX
18 U.S.C. 35

Sufficiency of Information; Suggestions for Future Prosecutions. Stanley Wallace Carlson v. United States, 296 F. 2d 909 (C.A. 9, November 8, 1961). The case arose out of an amended information charging that on or about June 16, 1960, in violation of 18 U.S.C. 35 (as it existed prior to the October 3, 1961, amendment) appellant:

> ". . . did wilfully impart and convey to Gayle Zimmer, a stewardess, false information concerning an alleged attempt being made to wilfully place a destructive substance, to wit: explosives, upon American Airlines Flight number 8, a civil aircraft used, operated and employed in interstate commerce, well knowing such information to be false."

Carlson was convicted and on appeal argued for the first time that the amended information failed to state an offense.

The Court reasoned that "the act concerning which false information was given, as alleged in the information (the wilful placing of explosives upon an aircraft) finds its counterpart only in the third paragraph

of section 32. . . ." It then read the language of paragraph three requiring "an intent to damage, destroy, disable, or wreck any such aircraft" (incorporated by reference from paragraph two of section 32) to spell out an essential aspect of the criminality of the crimes described by that paragraph. The Court concluded that failure of the information also to charge such intent prevented the act charged as the subject of the false report from being a crime proscribed by Chapter 2, 18 U.S.C. as Section 35 of that chapter requires.

It is apparent this decision requires precision in pleading the elements of the offense stated in 18 U.S.C. 35. However, dismissal of the information rather than a remand for its amendment was based upon a failure to claim that the facts would support a conviction based upon a properly drafted information. In short, the Carlson case is authoritative on the question of pleading not on the question of proof. The matter of proof of the several elements required to be contained in such a pleading was not discussed in any detail by the Court nor were any of the facts constituting the offense narrated or otherwise described in its opinion.

In this connection two observations appear in order. First, with regard to proof of intent (where the offense is pleaded so as to require it as in the Carlson case) the prior instructions of this Division relative to 18 U.S.C. 35 are re-emphasized. The intent which must be considered as an element of this offense is not the subjective frame of mind claimed by an accused, but that which must be attributed to him as a result of the natural import of his words and the face value of his actions in the context in which they are made. As the Court said in the Carlson case at page 912:

> ". . . Circumstances may be stated which would warrant the recipient of such false information in inferring that the informant intended to convey the idea that he had such purpose [to damage or destroy an aircraft]. If the jury agrees that this was a reasonable inference, the offense is proved."

The second and more important consideration is that the Carlson holding does not foreclose the possibility of proceeding under paragraphs one and six of Section 32 of Title 18 U.S.C. in a proper case by charging an attempt to destroy the aircraft itself. This approach avoids the necessity to plead an explicit intent. Characterization of the subject's intended act as an "attempt to destroy", as well as "wilful", can be "inferred" from surrounding circumstances.

The availability of this approach results from the fact that there is duplication in Section 32 as enacted. The acts proscribed in paragraphs two, three, and four, are no more than specific instances of what would in most cases amount to an "attempt" to accomplish the crime specified in paragraph one. Where the statute makes both methods of charging a crime available no rule of construction would appear to limit the government to one or the other. The difficulty in the Carlson case

was that having chosen one the Government did not fully comply with its terms.

Use of paragraphs one and six depends upon a jury's willingness to characterize the subject's course of conduct as an "attempt to destroy" an airplane, rather than a part or facility used in connection with it. It also requires an inference that the presence of a "bomb" on board a plane does in and of itself connote detonation. The word "bomb" in common parlance connotes an explosive which is armed with a means of detonation. It therefore has a broader meaning than the word "explosive". Use of the word "bomb" in the context of air travel referring either to planes or facilities used in connection with them is tantamount to conveying information that detonation is to be intentionally timed in the same context, i.e. air travel and its facilities.

For these reasons the approach under paragraphs one and six offers sufficient jury appeal to endorse it as a method of charging the offense separate and apart from other paragraphs of Section 32. It eliminates the added burden of pleading and proving the specific intent necessary to the type of charge which utilizes paragraphs two, three, and four of Section 32. Use of paragraphs one and six is preferable in those instances where the facts involved definitely identify the subject or the individual to whom he refers as an actual or prospective passenger on a plane (for example, one in the act of buying a ticket or otherwise demonstrating an intent to obtain passage) or in any other way demonstrate that the plane itself is the object of the false bomb report. Examples of those incidents which would not lend themselves to a charge under paragraphs one and six are false threats clearly directed to any part or facility mentioned in the statute where physical circumstances make an inference of harm encompassing a civil aircraft covered by the statute strained or impossible to draw, i.e. a reference to a bomb in an empty and little used hangar.

A final reminder worthy of note is that any reference to the charge contained in the information set out in the Carlson opinion or the only other Circuit Court decision under this statute, Smith v. United States (C.A. 6), 283 F. 2d 16, must be made in the light of the October 3, 1961, amendment of 18 U.S.C. 35. Section 35(a) no longer contains the requirement that false information be imparted or conveyed "wilfully".

BOMB HOAX
18 U.S.C. 35

Construction of Act. United States v. Israel M. Golden (S.D. Fla., November, 1961). This case involving a false bomb report was heard by a District Court judge in a jury waived trial. Defendant had been processed for a flight from Miami to Boston and his baggage had been placed on a conveyor belt to be placed on flight 86. Successive delays of this 10:00 P.M. flight occurred. Defendant was informed of these delays by several ticket agents. Finally about 1:00 A.M. the defendant

notified a ticket agent if the flight did not take off in ten minutes he would have to "rewind my bomb". This agent and another who had also contacted the defendant about prior delays testified they were confident his statement was made in anger.

Defendant admitted substantially the same facts with the exception that he claimed to have stated, "If you delay this flight another ten minutes I will have to rewind my clock." Search of his luggage disclosed no bomb and no clock. The false report occasioned a further eighty-three minute delay of the flight.

Counsel for Golden in moving for a judgment of acquittal argued that the Government was obliged to prove a violation of 18 U.S.C. 32, the actual damage provisions of Chapter 2, in order to convict anyone of a violation of Section 35 of that Chapter, the false report provision. The Government insisted no such evidence was required.

The Court agreed with the Government and in denying the motion for acquittal and finding the defendant guilty, stated:

> To place any such construction on Section 35, would be to destroy its purpose and usefulness. It is clearly intended to reach and to prohibit conduct such as the evidence reveals in this case. We have been suffering from too many bomb scares perpetrated by persons who loose their temper as did this defendant or who planted false rumors for numerous other reasons. This act was badly needed when it was enacted by Congress and it deserves reasonable construction by the Courts to make it fully effective. I give to it such construction and hold it prohibits all false rumors about bombs made in connection with airplane travel.

Staff: United States Attorney Edward F. Boardman; Assistant United States Attorney Daniel S. Pearson (S.D. Fla.).

NATIONAL STOLEN PROPERTY ACT
18 U.S.C. 2314

Credit Card Cases; Application of Section 2314 to Transportation of Credit Cards in Interstate Commerce; Suggestions re Prosecutions. The increasing frequency of unauthorized use of credit cards in interstate transportation has suggested prosecution primarily under two possible theories, mail fraud and interstate transportation of stolen property, specifically Title 18, United States Code, Sections 1341 and 2314 respectively.

The mail fraud theory has not been tested, for a suitable case involving substantial violations and a factual situation appropriate for use as a test case has not as yet become available. However, several district courts and one recent court of appeals decision have been handed down considering the applicability of Section 2314 to credit card situations.

The issues considered in the reported cases are (1) whether a credit card can be considered an "evidence of indebtedness" so as to constitute a "security," and (2) whether a sales, credit, invoice or charge slip made by use of a credit card can be considered "evidence of indebtedness" so as to constitute "security" within the meaning of 18 U.S.C. 2311.

As the cases have developed, it becomes clear that a credit card itself is not a "security" in the sense of an evidence of indebtedness, within the meaning of Sections 2311 and 2314. It has been agreed that "A credit card is nothing more than an indication to sellers of commodities that the person who has received a credit card from the issuer thereof has a satisfactory credit rating and that, if credit is extended, the issuer of the credit card will pay (or see to it that the seller of the commodity receives payment) for the merchandise delivered." Williams v. United States, 192 F. Supp. 97 (S.D. Calif., 1961). In light of the foregoing, charges prepared under paragraph three of 18 U.S.C. 2314 alleging that a credit card is the "falsely made, forged, altered or counterfeited" security, appear unlikely to be prosecuted successfully.

However, a much stronger argument has been successfully extended utilizing paragraph four of 18 U.S.C. 2314, "Whoever, with unlawful or fraudulent intent, transports in interstate commerce, . . . any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security, or . . . any part thereof." In United States v. Rhea, No. 5765, W.D. Ark., Nov. 29, 1961 (unreported opinion), the prosecution charged in one information that a stolen oil company credit card was transported in interstate commerce and was used as a "tool, implement or thing" in falsely making, forging and altering of a credit purchase slip. The Court stated that while the statute does not specifically mention a credit card, a credit card is a "thing" fitted to be used in falsely making a credit purchase and obtaining the issuance of an "evidence of indebtedness". It should be noted that in using paragraph four it is necessary to allege that the credit card was actually used in processing "a credit sales slip" in order to anticipate the argument used in United States v. Fordyce, 192 F. Supp. 93 (S.D. Calif., 1961), at p. 97.

Notably, the weight of reported opinions support the proposition that a charge slip is an "evidence of indebtedness" and therefore a security within Section 2311 of 18 U.S.C. As stated in Williams v. United States, at p. 100 (supra):

> After merchandise is sold . . . the only evidence of indebtedness possessed by the seller is the charge slip. He has parted with his merchandise to the credit card holder. In place thereof he has the signed charge slip, evidencing that the purchaser is indebted to the seller in the amount shown. . . .

Perhaps the most significant case is the recent decision by the United States Court of Appeals for the Tenth Circuit in United States v. Robert Lee Lewis, decided March 20, 1962. In this case defendant

was charged with unlawfully and fraudulently transporting in interstate commerce, a tool, implement and thing used and fitted to be used in falsely making, forging, altering and counterfeiting a security. An Esso credit card was identified as the tool, device or thing, which when used in a credit card machine, left a mechanical impression on a form of invoice, the security, an evidence of indebtedness.

In affirming the conviction the Court of Appeals for the Tenth Circuit indicated that the credit card was capable of making an "evidence of indebtedness," in the instant case a "form of invoice," and concluded by stating that in absence of authority to the contrary it is proper to consider that an "invoice" is an "evidence of indebtedness." The dissent lent support to the majority opinion by stating that "When sustained by the facts, § 2314 may well be used in credit card cases. . ." The dissent's principal objection was the use of the word "invoice" as synonymous with "evidence of indebtedness" when the word "invoice" is not included within the statutory definition.

A word of caution in considering prosecution of credit card cases: It should be remembered that the Government should not become the collection agency in a multitude of petty cases for the various oil companies, hotels and store chains who distribute credit cards. Therefore, prosecution of credit card violations by local authorities is encouraged where feasible. Further, in determining the proper jurisdiction for prosecution of credit card violations consideration should be given to whether another federal district is proceeding against the same offender, and whether in a series of multiple offenses another district could prove a greater amount involved. Assistance on problems arising in this area should be directed to the General Crimes Section of the Criminal Division.

MOTION TO VACATE

Proceedings under 28 U. S. C. 2255. Trial Court Need Not Entertain Successive Motions in Absence of Allegation of New or Dissimilar Grounds for Relief. Robert Edward Lipscomb v. United States (C.A. 8). On January 18, 1962, the Court of Appeals affirmed an order of the trial court denying without a hearing petitioner's motion under 28 U.S.C. 2255 to set aside his sentence on the ground that due to his alleged drug addiction he was mentally incompetent to waive indictment and right to counsel, and to enter a valid plea of guilty. On three former occasions petitioner had unsuccessfully filed substantially similar motions. On his first such motion he had been accorded a plenary hearing during which he testified and was represented by counsel. In his latest motion he asserted that his alleged incompetency at the time of arraignment was due to the use of different drugs than those to which he stated in his first motion he had been addicted.

The Court of Appeals held that the trial court was justified in denying the latest motion, because it sought a redetermination of a question which had previously been determined adequately, even though the latest motion was predicated upon a claim of petitioner's addiction

to different drugs than those claimed in his prior motions as the cause of his condition at time of arraignment. It appears that the Court correctly concluded that a new allegation of addiction to different types of drugs than those previously alleged as the cause of mental incompetency upon which relief under Section 2255 had been sought does not constitute a new or dissimilar ground for relief to require the trial court to entertain the new motion. Basically, the issue concerned petitioner's mental condition at the time of his arraignment. This issue the Court had previously determined, after a full hearing, against petitioner.

The Court specifically corrected its mistaken reference to the doctrine of res judicata in its prior decision (226 F. 2d 812) disposing of petitioner's appeal from an order denying his earlier successive motion on the same grounds. The Court pointed out that since res judicata does not apply to successive motions under Section 2255 any more than it does to successive applications for writs of habeas corpus, the trial court should ordinarily entertain successive motions under Section 2255 if they set up new or dissimilar grounds for relief which are within the purview of the grounds enumerated in the third paragraph of the statute, and the motion and the records and files in the case do not conclusively show that petitioner is entitled to no relief. This rule comports with the decision in Price v. Johnston, 334 U.S.C. 266, 291, and Salinger v. Loisel, 265 U.S.C. 224, 230, but it appears to be at variance with the rule announced by courts of appeals in other circuits that a trial court does not abuse its discretion by refusing to entertain a successive motion under Section 2255, if it contains "allegations which could have been, but were not, raised in the earlier proceeding, unless the petitioner has 'some justifiable reason he was previously unable to assert his rights,' or unless he was 'unaware of the significance of relevant facts.'" See Turner v. United States, 258 F. 2d 165, 166-167 (C.A. D.C.); Trumblay v. United States, 278 F. 2d 229, 233 (C.A. 7), certiorari denied 364 U.S.C. 840. However, correct results were obtained in such cases where, as in Turner, the denial of the motion under Section 2255 was based, alternatively, on the ground that the files and records conclusively showed that petitioner was entitled to no relief.

Staff: United States Attorney D. Jeff Lance; Assistant United States Attorney Lee J. Placio, Jr. (E.D. Mo.).

MOTION TO VACATE

Narcotics Conviction; Motion Denied; Reference to Parole in Original Judgment Considered Surplusage. Bailey v. United States (C.A. 7, April 6, 1962). Appellant was found guilty after trial on a two count indictment which charged narcotics violations under 26 U.S.C. 4704(a) and 21 U.S.C. 174. Judgment was entered sentencing Bailey to serve a term of imprisonment and to pay a fine on each count. The original judgment and commitment contained the following provision: "IT IS FURTHER ORDERED that pursuant to the provisions of Title 18,

Sec. 4208(a)(2) the defendant may become eligible for parole at such time as the board of parole may determine."

On appeal Bailey's conviction under the first count was reversed and his conviction under the second count was affirmed. An amended judgment and commitment, which contained no reference to parole, was entered by the trial judge.

Subsequently, Bailey sought to vacate and set aside the sentence on the second count on the ground that under 26 U.S.C. 7237(d) and 72 Stat. 845, Section 7, he was not eligible for parole, and that the reference to parole in the original judgment and commitment rendered the sentence void. The trial judge denied the motion. However, in granting appellant's motion to appeal in forma pauperis, the trial judge filed a memorandum in which he stated in regard to the reference to parole that "The Court . . . intended merely to give the defendant whatever benefit the law might allow him with respect to possible parole . . . . /T/he Court views this language in the sentence as surplusage."

The Seventh Circuit held that the above statement of the trial judge revealing his intent in regard to parole was dispositive of the issue, and therefore affirmed the denial of appellant's motion.

Staff: United States Attorney Kenneth C. Raub (N.D. Ind.); Howard P. Willens, Marilyn Cohen (Criminal Division).

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

DEPORTATION

Judicial Review of Deportation Order; Jurisdiction - Non-Exhaustion of Administrative Remedies. Siaba-Fernandez v. Rosenberg (C.A. 9, April 11, 1962.) Petitioner was ordered deported by a Special Inquiry Officer on November 17, 1960 and from that order did not appeal, thereby permitting it to become final.

On March 29, 1961 he filed a complaint in the District Court, (S.D. Calif.) seeking a judgment vacating the order of deportation, injunctive relief, and a remand of the case to the Service.

On November 7, 1961 the District Court ordered the case transferred to the Court of Appeals (9) pursuant to section 5(b) of P.L. 87-301 (75 Stat. 653).

The Court of Appeals held that it has no jurisdiction to review the administrative order since section 106(c) of the I & N Act (8 U.S.C. 1105a(c)) precludes such a review where petitioner has not exhausted the administrative remedies available to him; in this case such a remedy was an administrative appeal from the order to the Board of Immigration Appeals.

The Court cited as precedents Batista v. Nicolls, 213 F. 2d 20 and Olinger v. Partridge, 196 F. 2d 982. The latter held that, "The theory of exhaustion of administrative remedies by default is without support in precedent or in reasoning. The authorities are all to the effect that the judicial machinery may not be invoked until all administrative remedies have been unsuccessfully pursued."

Judicial Review of Deportation Order; Psychopathic Personality - Sexual Deviate; Constitutionality of 8 U.S.C. 1182(a)(4). Fleuti v. Rosenberg (C.A. 9, April 17, 1962.) This is an appeal from a district court judgment upholding an order of deportation and the constitutionality of the statute (See Bulletin: Vol. 9, No. 3, p. 86; Fleuti v. Hoy, S.D., Calif., No. 1275-59-K, Jan. 9, 1961).

The Court of Appeals held that the statute here involved (8 U.S.C. 1182(a)(4)) failed to advise appellant that homosexual practices conclusively evidence a "psychopathic personality" and that he was therefore substantially prejudiced. As in the case of a vague criminal statute, he would thereby be deprived of notice that unless he refrained from such conduct harsh results (exclusion or deportation) might follow.

To the Court the conclusion was inescapable that the statutory phrase "psychopathic personality", when measured by common understanding and practices, does not convey sufficiently definite warning that homosexuality and sex perversion are embraced therein.

Since that statutory term fails to meet the test to be applied in determining whether a statute is vague in the constitutional sense it held the statute to be void for vagueness.

But, cv., Harb-Quiroz v. Neelly, C.A. 5, No. 18724, June 23, 1961; Bulletin: Vol. 9, No. 14, p. 445.

* * *

INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Foreign Agents Registration Act (22 U.S.C. 612 - 618). U. S. v. Prensa Latina Agencia Informatia Sociedad Anonima; Francisco V. Portela (D. D.C.). A federal grand jury in the District of Columbia returned a three count indictment on December 8, 1961, charging defendants with violations of the Foreign Agents Registration Act of 1938, as amended. Prensa Latina, Agencia Informativa Latino Americana, Sociedad Anonima, a corporation organized under the laws of Cuba for the purpose of engaging in the business of an international news service, was charged with failure to register as an agent of the Cuban Government within the United States. Francisco V. Portela, who has acted as Prensa Latina's general manager in the United States since May 1961, was charged with failure to cause Prensa Latina to register under the Act as well as with failure to register himself as an agent of Prensa Latina, a foreign principal as defined in the Act. The indictment alleged that Portela was not entitled to the exemption from the registration requirements of the Act since his foreign principal was subsidized, and its activities were controlled by the Cuban Government. Both defendants entered a plea of not guilty when arraigned on January 5, 1962.

On April 18, 1962, the Court (McGarraghy, J.) granted the motion of Prensa Latina for withdrawal of its plea of "not guilty" and substitution of a plea of "nolo contendere." The Court was informed by Government counsel that a registration statement had been filed by both defendants and that the requirements of the Act having been satisfied and its purpose accomplished, the Government would not object to a substitution of the plea. The Court was further informed that the counts against the individual defendant were being dismissed by the Government. A fine of $2,000 was imposed on Prensa Latina.

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

Immigration and Nationality Act - Traveling Without Passport. United States v. William Worthy, Jr. On April 24, 1962, a grand jury in the Southern District of Florida at Miami returned an indictment against William Worthy, Jr. charging that he entered the United States from Cuba without a valid passport in violation of 8 U.S.C. 1185b.

Worthy departed from the United States without a passport on July 21, 1961, aboard the vessel SS Guadalupe and debarked at Havana, Cuba on July 25, 1961. He remained in Cuba until his return to the United States on October 10, 1961, entering at Miami, Florida.

Section 1185 which is a part of the Immigration and Nationality Act was enacted to control departure and entry of aliens and citizens

by means of permit and passport requirements during times of war and also during times of national emergency. Subsection (b) of Section 1185 makes it unlawful for a citizen to depart or enter the United States without a valid passport, except as provided in the regulations promulgated under the statute. Since January 19, 1961, a passport has been required for departure from the United States for travel to Cuba and for entry into the United States following travel to Cuba. Contemporaneously with this action, the Secretary of State made a pronouncement that in view of conditions existing in Cuba, the country had been determined to be a restricted geographical area and that all United States passports were invalid for travel to Cuba unless specifically validated for such travel. The penalty provisions under Section 1185 provide in subsection (c) for a maximum penalty of $5,000 and 5 years.

This case marks the first prosecution initiated under this statute since its enactment.

Staff: United States Attorney Edward F. Boardman (S.D. Fla.); Alta M. Beatty (Internal Security Division)

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LANDS DIVISION

Assistant Attorney General Ramsey Clark

Eminent Domain; Cotton Allotment Not Taken When Land Condemned; Evidence as to Value Excluded. United States v. 3,296.82 Acres of Land in Maricopa County, Arizona, Citrus Valley Farms, et al. This condemnation action involves the acquisition of the fee title to considerable acreage, a portion of which was impressed with a cotton allotment which had substantial value. Title 7, U.S.C., Section 1378(a) provides that any allotment for controlled crops attaching to land taken by an authority vested with the power of eminent domain shall be placed in a pool subject to removal by the displaced allottee any time within three years provided other lands are acquired by the allottee during the interim period upon which the transfer can be made. Because of this Section, the Department has taken the position that any enhancement of value attaching to land by reason of existence of the allotment should not be considered in determining the compensation to be paid as a result of the condemnation. This position is contrary to the value which would be realized on an open market sale in which event the allotment would be transferred to the buyer with the selling price including the value of the allotment. As a result of a pretrial conference in the above-entitled case where this position was urged, the Court entered an order ruling that the cotton allotment should be excluded from consideration in arriving at the value of the land since the allotment was not condemned and could not be taken. The Court further ruled the land should be valued as agricultural land, suitable for the growing of cotton, but excluding, however, any value attaching thereto by reason of the existence of an allotment at the time of taking. This is the first judicial ruling on the question of allotments in an eminent domain proceeding.

Staff: Assistant United States Attorney Arthur E. Ross, (D. Arizona).

Indian Lands; State Jurisdiction Over Crime Committed by Non-Indian Against Non-Indian on Indian Reservation. State of Minnesota v. Holthusen (Supreme Court of Minnesota, January 26, 1962). The grand jury of Beltrami County, Minnesota, returned an indictment for second-degree murder against Holthusen, a non-Indian resident on the Red Lake Indian Reservation in Beltrami County, for the death of a non-Indian killed within the reservation. Holthusen demurred to the indictment on the ground that the State of Minnesota has no jurisdiction over crimes committed on the Red Lake Reservation, no such jurisdiction ever having passed from the United States to the state. He argued that all criminal jurisdiction on Chippewa lands had been reserved to the Chippewas in a 1789 Treaty, and further that the Chippewas had never ceded the land within the Red Lake Reservation to the United States. He therefore concluded that the United States had never obtained criminal jurisdiction over the Red Lake Reservation and thus never could have transferred it to the state. The district court overruled the demurrer but certified the jurisdictional question to the state Supreme Court.

The Supreme Court held that the case was controlled by this principle from United States v. McBratney, 104 U.S. 621, 623-624 (1881): "Whenever, upon the admission of a State into the Union, Congress has intended to except out of it an Indian reservation, or the sole and exclusive jurisdiction over that reservation, it has done so by express words." The United States, in admitting Minnesota to the union, did not manifest any intention to reserve to itself or to the Indians jurisdiction over non-Indian crimes on the Red Lake Indian Reservation. As for the argument that, where Indian territory has not been ceded to the United States, sovereignty or jurisdiction over it remains in the Indians by virtue of aboriginal occupancy, the Court said: "This contention is in conflict with the historical concept of sovereignty over Indian lands adhered to by the United States and based upon conquest or exploration of such lands or their transfer to the United States from other nations claiming such sovereignty over them." The United States' sovereignty over the Red Lake Reservation relates back to the Louisiana Purchase. Lack of formal cession by the Chippewas to the United States would have no bearing or effect on the establishment of the United States' sovereignty by that purchase. Thus the United States had jurisdiction over the reservation which it transferred to the State of Minnesota upon its admission into the union.

Staff: Hugh Nugent (Lands Division).

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CRIMINAL TAX MATTERS

PRESENCE OF COURT STENOGRAPHER ON RE-PRESENTATION OF A CRIMINAL TAX CASE TO A GRAND JURY

When a grand jury has no-billed a criminal tax case and it is to be re-presented to the same or a different grand jury it has been the uniform Tax Division practice to request that a court stenographer be present to take the second presentation. In some districts it is customary to use a stenographer in all grand jury proceedings, in which case such a request from this office has not been necessary. The purpose of this announcement is to request that in the future in all representations of criminal tax cases a stenographer be present to take the testimony of the witnesses. Publication of this standing instruction will make unnecessary future individual requests. Whether a transcript should be ordered will be resolved on a case by case basis.

Appellate Court Decisions

Evasion; Wilful Attempt to Evade Client's Tax by Lawyer --C.P.A. Who Prepared Client's Tax Returns; Argument, Presented For First Time on Appeal, That Funds Involved Were Embezzled Before Decision in James v. United States, 366 U. S. 213, and Are Governed by Decision in Wilcox v. United States, 327 U. S. 404 Holding That Such Funds Are Not Income Was Without Merit. United States v. Wallace (C. A. 4, March 8, 1962). Defendant, a lawyer and certified public accountant, was convicted of wilfully attempting to defeat and evade the taxes of his client, Puckett, for the years 1951 through 1953, inclusive, in violation of Section 145 (b), Internal Revenue Code of 1939. Defendant prepared the income tax returns for Puckett and his various business enterprises, including Puckett's wholly owned Savannah Hotel Operating Company (SHOC). The Government proved: (1) That certain funds of SHOC were used to pay the personal expenses of Puckett and his family; (2) the funds were accounted for on SHOC books by charging them to the hotel's operating accounts rather than to Puckett's personal account; and (3) that defendant, as the financial overseer of Puckett's business interests and preparer of his tax returns, knew of the transactions yet wilfully failed to include in Puckett's income tax returns as gross income the expenditures made by SHOC for Puckett's personal benefit. The Government also proved that defendant knew of an arrangement whereby Puckett purchased room air conditioners in his own name, charged the hotel a rental fee for each day's use of the machines and failed to report this rental income on his returns.

Defendant's primary contention on appeal was that these funds received by Puckett were "embezzled" from SHOC, and therefor were not taxable under the decision in Wilcox v. United States, supra. Defendant argued that James v. United States, supra, decided two weeks after his conviction, conclusively established that funds "embezzled, stolen, or

otherwise unlawfully taken", prior to the James decision (May 15, 1961) were to be governed by Wilcox, which held that "such funds" were not income. The Court in rejecting this argument, held that the unreported receipts of Puckett from SHOC were "more in the nature of constructive dividends", and that, in any event, since the issue of embezzlement, a question of fact, was not raised or presented for jury determination in the lower court, the issue could not be raised for the time on appeal.

The Court also noted that Wilcox held only that embezzled funds were not income, and did not apply, as defendant urged, to all funds "unlawfully taken". The James decision, in overruling Wilcox, has made it clear that not only embezzled funds but all "unlawful" gains are comprehended within the term "gross income"; however a taxpayer cannot be convicted of evading taxes on funds embezzled prior to the James decision because of the confusion in the law existing up to that point. See also Cohen v. United States, 297 F. 2d 760 (C. A. 9), reported in Volume 10, United States Attorneys Bulletin, No. 4, p. 124.

Staff: United States Attorney John C. Williams and Assistant United States Attorney James D. Jefferies (W. D. S. C.)

Transfer Under Rule 20, F. R. Crim. P.; Motion to Dismiss Indictment in District to Which Case Transferred; Finality of Order Retransferring case to Original District. United States v. Sanford W. Brown (C. A. 4, March 30, 1962). Taxpayer was indicted for failure to file income tax returns in the Middle District of North Carolina. He requested a transfer to the Western District for entry of a plea of guilty under Rule 20, F. R. Crim. P. Both United States Attorneys consented and the case was transferred.

Taxpayer then filed in the Western District a motion to dismiss the indictment. The judge thereupon ordered the case retransferred to the Middle District on the ground that he had no jurisdiction to take any action in the case other than acceptance of a plea and imposition of sentence. Upon appeal the Court of Appeals dismissed the appeal in reliance on Berman v. United States, 302 U. S. 211, on the ground that the order appealed from was not final.

Note: United States Attorneys are reminded that authorization for a transfer under Rule 20 should be secured from the Tax Division in criminal cases which come under the jurisdiction of the Tax Division. See United States Attorneys Manual, Title 4, p. 44.1

Staff: United States Attorney William Medford (W.D. N.C.); Joseph M. Howard and Burton Berkley (Tax Division)

CIVIL TAX MATTERS
District Court Decisions

Liens: Federal Tax Lien Superior to State Tax Lien When Federal Assessment Made Prior to State Assessment; Costs and Attorney's Fees

Considered Part of Original Secured Mortgage Debt and Superior to Federal Tax Lien. Streeter Bros. v. Overfelt, United States, et al. (D. Mont. Nov. 30, 1961) P.H. 62-477, 9 AFTR 2d 938.

The questions presented in this action for foreclosure of a real estate mortgage were the relative priorities between tax liens of the United States and State property taxes paid by plaintiff, costs and attorney's fees incurred by plaintiff in this action, and costs of the abstract of title.

Although the mortgage authorized payment of State property taxes by plaintiff mortgagee in the event of default, the Court determined the Federal tax liens to be superior to State taxes which were not specific, perfected, or choate prior to date of assessment of Federal taxes. United States v. Christensen (C.A. 9), 269 F. 2d 624. Rejecting United States v. Bond (C.A. 4), 279 F. 2d 837, certiorari denied, 364 U.S. 895, and relying on provisions within the mortgage expressly providing for payment of costs, attorney's fees and title abstract, the court concluded that these expenses were part of the secured mortgage debt, entitled to collection as such, and therefore entitled to priority over Federal tax liens. Local taxes were therefore construed as separate and distinct liens while attorney's fees were construed as integral parts of the original debt.

Although no appeal was taken, the Government does not concur with the portion of the opinion awarding priority to attorney's fees. The Government will continue to assert priority of the Federal tax lien over attorney's fees as granted in United States v. Bond, supra.

Staff: United States Attorney Moody Brickett (D. Mont.)

Liens: Effect of Subsequent Loans to Chattel Mortgagor on Government's Lien for Taxes. Edison Bank v. Joseph J. Mayer (D. N.J. Feb. 27, 1962) CCH 62-1 U.S.T.C. ¶9348. This was an action to determine priority of claims to three motor vehicles. The taxpayer executed a chattel mortgage on the vehicles to the plaintiff (bank) as security for a loan of $10,000. The mortgage was recorded on March 6, 1959 prior to any assessment for taxes against the mortgagee-taxpayer. Subsequent to the recordation of the mortgage but prior to the filing of any tax liens, the bank made an additional loan to the taxpayer of $700. The note given in exchange for the loan contained recitals to the alleged effect that this debt was secured by the previously executed mortgage. Notes given in exchange for two later loans contained the same recital. On May 25, 1960, the balance due on the original loan was $3,500 and on that date the taxpayer gave a new note in the amount of $3,500 in "payment" of the balance due. This note also contained a recital to the effect that it was secured by the previously executed chattel mortgage. Upon the taxpayer-mortgagor's default the plaintiff-bank placed the three vehicles up for public sale, and received proceeds of $7,900. The parties agreed to place the proceeds in escrow pending a judicial determination of the priority questions involved.

Plaintiffs contended that the above-mentioned recitals in the four notes given subsequent to the filing of the chattel mortgage had the effect of incorporating the underlying debts into the mortgage, thus giving them the priority status of the original mortgage debt.

The Court held that the bank had priority over the Government's liens for taxes only to the extent of the balance outstanding on May 25, 1960. The Court reasoned that a chattel mortgage under New Jersey law is void as to creditors unless properly executed and recorded. The original mortgage created a lien to secure payment of the $10,000 loan. The new note given by the taxpayer to cover the balance due on this original loan was not such payment as would discharge the mortgage security. As to the other notes, the recital of the intent to add these sums to the mortgage debt was of no effect in the absence of a provision in the original mortgage purporting to secure subsequent loans. Whatever the effect of these notes might have been, they would have to have been recorded in their own right to be effective as against creditors of the mortgagor generally, and specifically as against the United States.

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

Liens: State Law Determines Whether Taxpayer Has Property Interest to Which Federal Tax Lien Can Attach; Federal Tax Lien Did Not Attach to Funds Retained Under Contract by Contractors Since Retained Funds Were Trust Funds Under New York Lien Law and Were Not Property of Taxpayer. United States v. Mark Alpha Brickworks Co., (E.D. N.Y. March 15, 1962) 9 A.F.T.R. 2d 1124. The United States brought suit to foreclose a lien for withholding taxes due and owing from the taxpayer, a subcontractor. The principal contractors were engaged in the construction of certain buildings and hired the predecessor of the taxpayer as subcontractor. Taxpayer placed orders with certain materialmen and suppliers in order to fulfill its contractual obligations. The subcontract contained several provisions purporting to hold the contractor harmless from claims against the subcontractor and authorizing the withholding of payments to the taxpayer until payments were made to the materialmen and suppliers.

Thereafter, the Government filed a notice of tax lien with the contractors for taxes owed by taxpayer. On the date the notice of lien was filed the contractors owed the taxpayer certain sums of money, but after service of the notice of lien and levy by the Government, both contractors made payments to Taxpayer's materialmen and suppliers and it was these sums which the Government claimed were Taxpayer's property and therefore due the Government by reason of the notice of lien for taxes owed by taxpayer.

The Court found that the only issue in the case was whether at the time the Government served notice of lien upon them, the contractors had any assets or property of taxpayer to which the lien could attach. The Court held that it was not necessary to consider the various provisions contained in the contract relating to this question since it was satisfied that Sections 36-a and 36-b of the New York Lien Law were sufficient to dispose of the issues. Those sections in substance provide that the funds

received by a contractor constitute a trust fund to be applied first to the claims of materialmen and suppliers, among others, arising out of the contract. The Government contended that the pertinent sections did not authorize payments to taxpayer's materialmen and suppliers in this case because at the time notice of lien was filed, the liens of the materialmen and suppliers were not perfected. The Court held that under the decisions made in Aquilino v. United States, 363 U.S. 509 and United States v. Durham Lumber Co., 363 U.S. 522, state law and not federal law determined whether or not taxpayer had a property right to which a Federal tax lien might attach. The Court cited the decision made in Aquilino v. United States, 10, N.Y. 2d 271 after that case had been remanded by the Supreme Court back to the state court which held that Section 36-a of the New York Lien Law impresses a trust upon funds due from a prime contractor to the extent of money owing from the subcontractor to materialmen and suppliers. The Court held that based upon the above decision, taxpayer in this case had no property in the funds paid over by the contractors to the materialmen and suppliers to which the Government's lien for taxes could have attached. No decision as to appeal has been made by the Government.

Staff: United States Attorney Joseph P. Hoey and
Assistant United States Attorney Philip Silverman (E.D. N.Y.)

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