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ANTITRUST DIVISION

Assistant Attorney General Lee Loevinger

Witness Before Grand Jury Not Permitted to Write Down Questions. High Temperature Insulation Grand Jury Investigation (W.D. Wash.). During the course of a recent grand jury investigation at Seattle, a witness, on instruction of his attorney, refused to testify unless he was permitted to "briefly and as speedily as possible" write down in longhand each question put to him and each answer given. Staff attorneys conducting the investigation together with United States Attorney Brockman Adams, considered the proposed procedure improper. When the foreman of the grand jury instructed the witness to answer a question without writing it down, the witness refused. The matter was reported to Chief Judge William J. Lindberg, who ordered the grand jury, the reporter, the witness, Government attorneys and the witness' attorney to his courtroom. He thereupon had the reporter read the proceedings. He asked the witness and the foreman if what had transpired before the grand jury was correct. He then instructed those present to return to the grand jury room, instructed the witness to answer questions propounded to him without writing down the questions or his answers; and told him that if he refused, the judge would instruct the Marshal to return the witness to the courtroom whereupon the Court would find him in contempt and inflict a jail sentence.

At the conclusion of the Court hearing, the assembled group returned to the grand jury room and the witness stated that, on advice of counsel, he was prepared to answer the questions without writing them down.

Staff: Lyle L. Jones, Don Banks and Edwin Shiver. (Antitrust Division)
United States Attorney Brockman Adams (W.D. Wash.)

SHERMAN ACT

Price Fixing-Open Die Steel Forgings; Five Steel Corporations Indicted. United States v. Bethlehem Steel Company, et al. (S.D. N.Y.). On April 26, 1962, upon the completion of hearings which began on December 5, 1961, a federal grand jury returned an indictment against five corporations and five individuals. They were charged with engaging in a combination and conspiracy, beginning at least as early as 1948 and continuing to at least March 1961, to eliminate price competition in the sale of open die steel forgings, in violation of Section 1 of the Sherman Act.

The indictment alleged that various corporations and persons not named as defendants participated as co-conspirators in the offense charged, and that the combined sales of defendants and co-conspirators averaged approximately $100,000,000 per year out of an industry total of approximately $220,000,000.

According to the indictment, defendants (a) Fixed and maintained identical prices, on a per customer basis, for turbine rotors and generator

shafts sold to General Electric Manufacturing Company, Westinghouse Electric Corporation, Allis-Chalmers Manufacturing Company, and other purchasers of such shafts, except in unusual circumstances when the low bidder was agreed upon; (b) Agreed on the low bidder, or on who would submit the low cost estimate, on open die steel forgings sold to the United States, such as shipshafting sold to the Bureau of Ships of the Navy Department and ordnance sold to the Army; (c) Reported all requests from private customers for quotations on open die steel forgings of a value in excess of $500 to the Open Die Forging Institute, Inc.; whereupon the manufacturer who reported a particular inquiry received from the Institute the names of the other manufacturers who reported receipt of the same inquiry; and thereafter those manufacturers receiving the same inquiry communicated with each other, usually by telephone but sometimes at meetings, and agreed on the price to be quoted; except as noted in subparagraph (d) below; (d) In the case of the defendant United States Steel Corporation, in lieu of the Corporation reporting inquiries from private customers for quotations on open die steel forgings of a value in excess of $500 directly to the Institute, the Corporation reported such inquiries to the defendant Bethlehem Steel Company, which Company reported the inquiries received by the Corporation to the Institute, and the other reporting manufacturers ascertained through Bethlehem Steel whether United States Steel had been invited to bid on the same inquiry; (e) Bethlehem Steel acted as liaison between the other defendants and co-conspirators and United States Steel in reaching agreement on the price for open die steel forgings; (f) Agreed on the low bidder, on sales of shipshafting to private shipyards, except in the case of tailshafting for standard cargo vessels where usually identical prices established by Bethlehem Steel were agreed upon; (g) Agreed on price schedules or price tables and base prices and extras for various open die steel forging products, such as turbine rotors and generator shafts and rough turned bars, for internal use, and thus facilitated agreement among the defendants and co-conspirators on the prices quoted on particular inquiries as they were received from potential customers; (h) Used the Open Die Forging Institute, Inc., as a vehicle for facilitating price agreements among the defendants on open die steel forgings, through the above described reporting system administered by the Institute, and through price discussions held at meetings of the Institute; and (i) Excused the paid Institute secretary from all price discussions at meetings of the Institute with the result that the minutes did not reflect such discussions.

It was alleged that as a result of the combination and conspiracy, prices for open die steel forgings were artificially fixed at noncompetitive levels.

Meetings of the defendants and co-conspirators at which prices were agreed upon were alleged to have occurred at the Park Lane Hotel and at other places in New York City, within the statutory period.

Staff: Allen A. Dobey, Louis Perlmutter and S. Robert Mitchell. (Antitrust Division).

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CIVIL DIVISION

Assistant Attorney General William H. Orrick, Jr.

COURTS OF APPEALS

ADMIRALTY - PREFERRED SHIP MORTGAGE ACT

Judicial Sale by United States of Defending Vessel to Enforce Payment of Statutory Penalties Not Forfeiture Within Meaning of 46 U.S.C. 961(b); New Mortgage Provisions of 46 U.S.C. 961(c) Held Inapplicable. Moore v. United States (C.A.D.C., April 26, 1962). Appellant, as the holder of a duly recorded preferred ship mortgage, appealed from the order of the district court confirming the judicial sale of the mortgaged vessel by the United States under Admiralty Rule 11 to enforce the payment of certain statutory penalties. Appellant asserted a continuing security interest in the vessel under 46 U.S.C. 961(b) which provides that the interest of a preferred ship mortgagee shall not terminate upon the "forfeiture" of the vessel to the United States for violation of law. Further, he asserted that the district court had erred in denying his request to have the purchaser of the vessel make a new mortgage to appellant pursuant to the provisions of 46 U.S.C. 961(c). The Court of Appeals held that the judicial sale of the vessel herein was not a forfeiture of the vessel to the United States, and that appellant was not entitled to invoke new mortgage provision of Section 961(c) because the claim of the United States for the costs of maintaining the vessel in the jurisdiction of the court was superior to appellant's claim and was sufficient to absorb the entire purchase price of the vessel. Therefore, appellant was unable to demonstrate a preference to any portion of the purchase price which he could exercise by taking a new mortgage. To award appellant a new mortgage in these circumstances would be to grant him a preferred status not authorized by law.

Staff: John W. Boult (Civil Division)

AGRICULTURAL ADJUSTMENT ACT

Administrative Denial of Wheat Acreage Allotment for "New Farm" Sustained Where Producer Did Not Comply With Regulation Requiring Established Rotation System. Fowler v. Gage (C.A. 10, March 23, 1962, rehearing en banc denied, May 1, 1962). Appellee applied to his local county committee for a wheat acreage allotment for the year 1959 under the Agricultural Adjustment Act. A regulation promulgated under the Act provided in successive subdivisions of the same paragraph that in order to secure a wheat acreage allotment for a farm without a wheat acreage history the producer must establish either that he will, inter alia, derive 50% of his livelihood from his farming operations, or that the established rotation system followed on the farm will include wheat for 1959. The review committee of the county committee found that the producer failed to establish compliance with these requirements. The district court also found that the producer would not comply with either of these provisions, but reversed and remanded to

the county committee on the ground that that part of the regulation requiring that the producer earn more than 50% of his livelihood from his farming operations was invalid for want of statutory authorization or basis.

The Court of Appeals, one judge dissenting, reversed. Assuming that the district court was correct in holding the 50% earning provision invalid, the Court held that the rotation requirement of the regulation was valid because it was not inconsistent with the Act and that the producer had failed to establish compliance with that provision. The Court further held that the fact that the 50% might be invalid did not invalidate the entire regulation because the two successive subdivisions are separable.

Staff: John C. Laughlin, Marvin S. Shapiro (Civil Division)

SOCIAL SECURITY ACT

Court Distinguishes Between Permanent Disability Benefits and Unemployment Compensation. Hicks v. Flemming (C.A. 5, April 19, 1962). The Court of Appeals in this case upheld an administrative determination that appellant was not entitled to permanent disability benefits under the Social Security Act. Appellant had developed a lung condition which disabled him from his former employment involving heavy mechanical labor, but not from light work. Following his discharge from the hospital, appellant received vocational rehabilitation training and thereafter secured two jobs performing light work for which he received more than $1,200 a year. He was laid off by both employers because of lack of work.

In sustaining the Secretary's determination, the Court first noted the test emunciated in Kerner v. Flemming, 283 F. 2d 916 (C.A. 2), and followed in other circuits, that before the Secretary can deny a disability claim on the ground that the claimant still can engage in other work, there must be evidence as to "what the applicant can do, and what employment opportunities there are for a man who can do only what the applicant can do." The Court, however, affirmed on the ground that appellant was still able to perform substantial gainful employment, even though the evidence indicated that there were no employment opportunities presently available for appellant. Thus, the Court stated: "The hardship here seems to lie more in Hicks' inability to find employment than in his incapacity to work. Despite our natural sympathy for Hicks' plight, we can not order unemployment compensation under the guise of disability insurance."

Staff: Assistant United States Attorney Gene A. Palmisano (E.D. La.)

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CIVIL RIGHTS DIVISION

Assistant Attorney General Burke Marshall

Motion to Intervene and Request for Declaratory Judgement to Prevent Racial Discrimination in Hospital Receiving Funds Under Hill-Burton Act (42 U.S.C. 291 et seq.). Simpkins, et al. v. Moses Cone Memorial Hospital (M.D.N.C.) On May 8, 1962, the United States moved to intervene in this case pursuant to 28 U.S.C. 2403 on the grounds that plaintiff's complaint drew into question the constitutionality of an Act of Congress, to wit; the "separate but equal" proviso of Section 291 e (f) of the Hill-Burton Act. Plaintiffs are Negro doctors, dentist and persons needing hospitalization who allege that they are denied the use of the two defendant hospitals on the same basis as persons of the white race. Plaintiffs seek injunctive relief and a declaratory judgement that the proviso which authorizes the Department of Health, Education and Welfare to pay funds under the Hill-Burton Act to hospitals which practice racial discrimination is violative of the Fifth and Fourteenth Amendments.

The United States, in its Pleading in Intervention and Memoranda in support thereof, contends that the "separate but equal" proviso is unconstitutional and prays for a declaratory judgement so holding.

Staff: United States Attorney William H. Murdock (M.D.N.C.); Assistant Attorney General Burke Marshall; St. John Barrett, Theodore R. Newman, Jr., Howard A. Glickstein (Civil Rights Division)

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

IMMUNITY

Criminal Contempt Conviction for Refusal to Testify After Grant of Immunity Under Federal Communications Act. United States v. Arthur Marcus (D. Del.). A witness before a grand jury in Wilmington, Delaware investigating into possible violations of 18 U.S.C. 1084 (Transmission of Wagering Information) and the Communications Act of 1934, 47 U.S.C. 151 et seq., claimed the privilege against self-incrimination. After being ordered by the Court to testify pursuant to 47 U.S.C. 409(1), he continued to invoke the Fifth Amendment. He was charged with criminal contempt under Rule 42(b), Rules of Criminal Procedure. On April 19, 1962, after offering no defense to the charge, he was found guilty of criminal contempt and sentenced to six months, with the opportunity to request modification of this sentence if within sixty days he decides to testify before the grand jury.

Staff: Joseph Corey (Criminal Division)

BOMB HOAX
18 U.S.C. 35(a)

False Bomb Report. United States v. Jim Lee Wade (S.D. Ohio, April 11, 1962); United States v. Roger Thomas Fleishman (N.D. Calif., April 12, 1962). In each of these cases conviction was had pursuant to defendant's plea of guilty to violation of the false bomb report provision of 18 U.S.C. 35(a). Each defendant incurred a period of confinement as part of his sentence.

In the Wade case defendant made an anonymous telephone call to a municipal airport. He stated he had information about a bomb being placed on board an airplane that afternoon, but did not know what flight or what time. He identified the maker of the bomb as one Jim Wade of a certain address. Inexplicably, the individual he so identified was in fact himself, and the address, his own home address.

Wade was subsequently located and admitted making the false bomb report call. He was later indicted by the grand jury. After entering a plea of guilty at the time of his arraignment he was sentenced to seven months' confinement. The investigative reports reveal that Wade, who is nineteen years old, has a prior two year history of juvenile delinquency, running to serious charges, including a prior false bomb report about a local high school.

The Fleishman case was much less aggravated in nature, standing almost entirely on the technical element of the offense. Defendant boarded a plane with two cardboard boxes in his arms. He then asked the stewardess where he could put his luggage, or else handed the two packages to the stewardess.

The evidence is conflicting on this point. It is established, however, that the stewardess then asked him what was in the packages. To this Fleishman replied, "a mechanical woman [or lady] and a bomb."

Both the passenger-witnesses who heard defendant stated this statement was made in a light manner as a joke. The stewardess stated she so regarded it. Yet, a Ramp Serviceman for the airline who also heard the statement, and originally reported it, stated he was alarmed by the remark.

Fleishman was a twenty year old youth who was otherwise well behaved on the plane, gave no evidence of having been drinking, and was without a prior record. He pleaded guilty to an information charging him with a violation of 18 U.S.C. 35(a). On April 12, 1962, he was sentenced to eight months' confinement, suspended except for the first sixty days, and a fine of $500.

Staff: United States v. Wade,
United States Attorney Joseph P. Kinneary;
Assistant United States Attorney Ronald G. Logan (S.D. Ohio).
United States v. Fleishman,
United States Attorney Cecil F. Poole;
Assistant United States Attorney Frederick J. Woelflen (N.D. Calif.).

NARCOTICS

Although State Court Judge, in Narcotics Case, Suppressed Evidence on Grounds That Contraband Was Not Visible to Eye, Federal District Court Refused to Suppress on Two Separate Motions to Suppress; Two District Court Judges Found Different Reasons for Their Refusals. United States v. William A. Sorenson. On January 7, 1959, at about 3:30 A.M. the defendant, William A. Sorenson, after shooting and killing another man, fled from the scene of the crime, a bar in Brooklyn. Sorenson had a record of being a vicious armed criminal. Using eye-witnesses' identification, police officers from the City Police Department continued operations all night, until at 11:00 A.M. that morning it was discovered that Sorenson had rented a basement apartment in a neighborhood some distance from the crime, under an assumed name.

Having obtained a key from the landlord, the police officers entered the apartment and arrested Sorenson. At the time of entrance he was asleep on the bed. The search for the murder weapon that was used in the slaying led to the discovery of some seven pounds of isonipecaine ("demerol"), which incidently proved to be the largest seizure ever made of this drug.

Sorenson was tried for first degree murder in the Kings County Court, found guilty of first degree manslaughter and was sentenced to ten to thirty years. The character of the defendant is evidenced by the fact that he attempted to intimidate witnesses in open court.

Before trial began in this narcotics case in the State Court, there was a motion brought to suppress the evidence. The Court granted the motion and found that the contraband was not visible to the eye. The Court there concluded:

> Even though uncovered in a perfectly lawful search it represents with respect to that contraband only - an unreasonable search within the provisions of the Constitution.

Incidentally, Judge Nathan Sobel, Chief Judge of the County Court, who handed down that decision just published an extensive treatise on search and seizure.

Sorenson was indicted in the Federal Court for the possession of these narcotics. A similar motion to suppress the evidence was brought in the Federal Court and the motion was denied. The Court relied heavily on the Harris case, 331 U.S. 145 (1947), finding that the search here was reasonable and the contraband was visible to the naked eye. Sorenson was brought to trial and again at the trial, before another Judge, a new hearing on a motion to suppress was held. The Court at this time was concerned with the fact that the police officers did not knock, announce themselves or have a warrant. The Court here dispensed with the requirement of a peace officer to announce himself set forth in Miller v. United States, 357 U.S. 301 (1958), holding that the requirement of a warrant and announcement of their identity is not necessary if the officers have reasonable grounds to believe that their life would be endangered by so doing. The Court found this to be the situation of the time of the entrance of the officers into the apartment. Reference is made to this exception in the Miller case.

The trial proceeded and Sorenson was found guilty of possession of the narcotics and sentenced on April 13, 1962 to ten years in jail, sentence to begin at the conclusion of the State sentence.

THEFT OF GOVERNMENT PROPERTY

Slightest Asportation of Goods Sufficient to Sustain Violation of 18 U.S.C. 641. United States v. Nicholas J. Conte (N.D. N.Y., April, 1962). A successful prosecution was obtained in a case involving violation of 18 U.S.C. 641, where the theft of Government property on a military installation involved the transportation of goods only a few feet from their location. The goods at no time left the installation. The Government relied on the following cases in support of the position that "stealing" has no common law definition to restrict its meaning. Lyda v. United States, 279 F. 2d 461 (C.A. 5, 1960); Smith v. United States, 233 F. 2d 744 (C.A. 9, 1956); United States v. Handler, 142 F. 2d 351 (C.A. 2, 1944).

Staff: United States Attorney Justin J. Mahoney; Assistant United States Attorney Dante M. Scaccia (N.D. N.Y.).

NATIONAL MOTOR VEHICLE THEFT ACT

Venue. As a result of the increasing request for clarification as to the proper jurisdiction for prosecution of Dyer Act violations your attention is directed to the United States Attorneys' Manual Title 2, pp. 89-90 which reads as follows:

> In all cases arising under this Act, prosecution should be instituted in the district into which the stolen motor vehicle is last brought unless it should appear that by reason of unusual circumstances it is inexpedient to institute prosecution in that district. In the event that unusual circumstances should exist, the United States Attorney in the district into which the motor vehicle has been brought will at once communicate by telegram with the United States Attorney in the district from which the car was originally brought, advising of the facts in the case and requesting him to institute prosecution, at the same time stating the circumstances by reason of which it is inexpedient to prosecute in the district into which the motor vehicle has been brought. The facts and the reason for requesting that such action be taken must be reported promptly to the Criminal Division . . . .

* * *

INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Labor-Management Reporting & Disclosure Act of 1959; Communist Party Membership. United States v. Archie Brown (N.D. Calif.). (See Bulletins Nos. 11, 22, Vol. 9 and No. 8, Vol. 10). On May 4, 1962 the defendant's Motions in Arrest of Judgment, For a Judgment of Acquittal and For a New Trial were denied and on the same date the defendant was sentenced to six months in jail. No fine was imposed. The defendant has given oral notice of intention to appeal and has been allowed to remain at large on $5,000 bail.

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

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LANDS DIVISION

Assistant Attorney General Ramsey Clark

United States Scope of Consent to Suit Under 28 U.S.C. 666; No Necessity for joinder of U. S. to Suit to Enjoin Executive Action; Secretary of Interior Not Necessary Party; Eminent Domain; Mode of Exercise. Dugan v. Rank (S.Ct. No. 366); City of Fresno v. State of California, United States, et al. (S.Ct. No. 606). This case has become famous since it was filed in 1947 and various phases have been the subject of several trial and appellate court decisions. However, for present purposes, the issues are now relatively simple. The case involves the Central Valley project in California which is described in some detail in Ivanhoe Irr. Dist. v. McCracken, 357 U.S. 275. The Court of Appeals described the suit as follows:

> Suit was brought by these appellees in 1947 to enjoin Bureau officials from the impounding of water at Friant Dam on the San Joaquin River in contravention of the rights of appellees to the beneficial use of the waters of the San Joaquin below Friant. Since commencement of this suit by individual water users, the City of Fresno has intervened as a plaintiff also asserting rights to San Joaquin waters. We shall hereafter refer to appellees as plaintiffs.

It describes the issues as follows:

> The jurisdictional issues are presented by the contentions of the defendants that the United States is an indispensable party; that it has not consented to suit and has been improperly joined; that in its absence the district court was without jurisdiction to entertain the dispute with reference to the operation of the Friant Dam by the Bureau.
>
> Upon the merits, the issue is whether it is permissible for these plaintiffs to interfere by injunction with the public use which the Central Valley project represents. More specific issues are presented by the contention of defendants that the water rights of the plaintiffs, to the extent to which they claim injury, have been taken by the United States through exercise of its power of eminent domain and that the remedy of the plaintiffs is to seek compensation in the Court of Claims.

The Court of Appeals describes this decree entered as follows:

> The decree entered June 20, 1957, enjoined the defendants from "impounding, or diverting, or storing for diversion, or otherwise impeding or obstructing the full natural flow of the San Joaquin River." It

> was provided that this injunction should not go into effect should the United States or the defendant irrigation districts place in operation, maintain and operate the prescribed physical solution.
>
> The solution as decreed consisted of a series of ten ponds in the natural channel of the river created by ten collapsible check dams to be so operated as to provide releases of water sufficient to flush and scour the aquifers by which river water found its way to the underground reservoirs from which the claimants of overlying rights received their water. By this means it was felt that a flow less than the full natural flow could simulate the full natural flow effectively. It was provided that a sufficient flow of water be released from Friant Dam to provide a minimum flow of five second feet over the last check dam downstream. Thus it was assured that the quantity of water released would, with a surplus of five second feet, be sufficient to meet the demands of all water users.

On March 31, 1961, this decree was affirmed except that the United States was dismissed as a defendant and the decision was reversed as to certain issues relating to the City of Fresno. The Court of Appeals' holdings were briefly these:

(1) The United States has not consented to be sued in this action in 43 U.S.C. 666.

(2) This is not a suit against the United States. After discussing Ickes v. Fox, 300 U.S. 82, which it said is limited by Larson v. Domestic & Foreign Corp., 337 U.S. 682, it distinguished Larson "upon the same ground as was" West Coast Exploration Co. v. McKay, 213 F.2d 582 (C.A. D.C.). The opinion said:

> As we shall discuss later, the defendants contend that these rights have been acquired by the United States through exercise of its power of eminent domain. If such were the case, defendants would, in the operation of the project, have been acting within their statutory authority. Ogden River Water Users Association vs. Weber Basin Water Conservancy, 10 Cir., 238 F.2d 936. Our ruling upon this contention, infra, is that these rights have not been acquired by the United States. Such being the case, these defendants, in disregarding and impairing the vested rights of these plaintiffs, were acting beyond their statutory authority. The United States is not then an indispensable party to this proceeding.

(3) A claim of the City of Fresno that the defendant officials of the

Bureau of Reclamation were making unreasonable monetary demands for the charge for water the city had requested from the project was held to be an attempt to sue the United States without its consent. The City claimed, and the District Court held, that the City was entitled to receive water for its purposes at the same price as that allowed irrigators, despite the statute authorizing the Secretary of the Interior to fix such prices.

(4) The Secretary of the Interior is not a necessary party. No affirmative action is required of him. The court said:

> This contention misconceives the nature of the decree of physical solution. The decree does not require anyone to take action; it is simply a declaration of a means whereby those seeking to appropriate waters of a stream may do so. The position of the United States in relation to waters of the San Joaquin is not simply that of a prospective condemnor. It is also an applicant for appropriative rights under California law. So far as this case is concerned, the decree of physical solution tells these defendants (and the Bureau) that by this means they may secure the right to divert waters of the San Joaquin (which otherwise are not available for appropriation) without the necessity for condemnation of vested rights. A right to diversion by the specified means can coexist with existing vested rights.
>
> The decree of physical solution is not then a detriment imposed upon the Bureau. It is a grant of right to the Bureau and a detriment or limitation upon the rights of the plaintiffs to the full natural flow of the river. The judgment of the Bureau to accept the physical solution or, in the alternative, to reject it and resort to condemnation remains available.

(5) The agents of the United States may acquire rights necessary to operations of the project by "inverse condemnation," i.e., without instituting condemnation proceedings. The Court concluded:

> We conclude that the District Court was in error in ruling that the only means, other than purchase, by which the United States may acquire title to water rights for the Central Valley Project is through judicial proceedings in condemnation.

(6) Rights of the plaintiffs were not acquired by the United States here because operation of the dam is "wholly consistent" with continuing recognition of the rights of the plaintiffs to make reasonable use of the waters of the river. The essence of the decision is stated as follows:

> The peculiar characteristics of a water right as property are such as to demonstrate that seizure of such a right requires something more of a condemnor

than would be necessary in the seizure of other types of property. This case is thus distinguishable from United States v. Dow, 1958, 357 U.S. 17, and Hurley v. Kincaid, 1932, 285 U. S. 95.

* * * * * *

If one's sole remedy for such a "taking" is to be an action for compensation in the Court of Claims, he must know what of his right has been taken: as to amounts, as to flows, as to methods of diversion. And he must have this knowledge not after the fact but at the time the interference occurs. Otherwise, the interference is more consistent with a transitory trespass upon his water rights than with a physical seizure of them.

* * * * * *

In an exercise of its power of eminent domain, then, the United States must commit itself as to what is taken and as to what remains untaken. That which remains untaken and continues vested in the owner, the officers of the United States must continue to respect.

In the case at bar, the operation of Friant Dam was not of such a character as to notify these plaintiffs as to the extent of the seizure of their rights. Nor was it accompanied by any sufficiently definite uttered or written notification.

(7) An injunction should be granted on the facts. The Court said:

The question is as to the extent of freedom which the Bureau should enjoy in operating Friant Dam for project purposes. We are concerned here with a balancing of the public interest which this project represents and the private interests represented by these plaintiffs. We cannot say that the District Court was in error in determining the balance to fall in favor of the plaintiffs.

* * * * * *

The Supreme Court in No. 366 has granted the petition for certiorari filed on behalf of the defendant Reclamation officials raising both the issue of the court's jurisdiction and the question whether there has been an exercise of the federal eminent domain power.

In No. 606 the petition of the City of Fresno was also granted.

Staff: William H. Veeder, Roger P. Marquis (Lands Division)

Condemnation; Wherry Housing Projects; Market Value as Measure of Compensation; Original Cost Admissible; Capitalization of Income Process; Sale Price to Income Ratios of Other Wherry Projects for Capitalization Rate Excluded; Reserve Fund for Replacement of Short-lived Equipment Not Deducted from Award; Bonus Value in Low-interest Mortgage; Testimony That Specific Customer Would Pay Certain Sum Admissible; Appeal and Error; Necessity of Timely Objections; Need for Offer of Proof. United States v. 190.71 Acres of Land in Lake County, Illinois, 300 F.2d 52 (C.A. 5, 1962). The Government condemned the interest of the sponsors subject to the mortgage in Forrestal Village, a Wherry Housing project at the Great Lakes Naval Training Station near Chicago. The Government's valuations ranged from $500,000 to $725,000, the sponsors' values were from $2,814,000 to $3,000,000. The jury awarded $2,509,000. On appeal by the Government, the Seventh Circuit held as follows:

1. Notwithstanding statements by the sponsors' counsel that they were entitled to get back their investment and a court instruction that market value is "generally" the standard of just compensation, that over-all rulings, instructions and the testimony show that the market value standard was not abandoned.

2. The court sustained the admission of evidence of actual original cost, even though a Wherry owner's earnings are a fixed percentage of FHA's advance estimate of construction cost, because actual cost was offered and considered not as a direct measure of value, but merely for general information purposes and because the Government's objection to it was made too late.

3. It sustained the exclusion of evidence of the ratio of income to sale price in the sales of three other Wherry projects, offered as an aid to establish a realistic rate for capitalizing income, because there was no proof or offer of proof that the properties were comparably located, etc.

4. It approved the District Court's refusal to reduce the award by the amount of the reserve fund for replacement of short-lived equipment which had been withdrawn by the sponsors. The reduction was urged because the fund represented the depreciation of the equipment. The court ruled that the Government did not condemn the fund and that the valuations reflected a deduction of that item because the estimated annual incomes capitalized by the witnesses were reduced by the annual payments to the fund.

5. It approved admission of testimony that there is a large "bonus value" in having a 4% mortgage in a 5% market, even though the sponsors' allowable return was a fixed percentage of estimated original cost so that the low-interest mortgage rate had no transferable value.

6. It approved receipt of redirect testimony that a witness had a specific customer who would pay $2,800,000 for the sponsors' interest.

The Lands Division strongly believes that this decision is erroneous.

However, due to complications in the manner in which the various issues arose, the Department has decided not to petition for Supreme Court review.

Staff: S. Billingsley Hill (Lands Division)

Indians; Fishing Rights; Regulation; Effect of Admission of Alaska; Reservation; Injunction; Stay Pending Adjustment to Decision. Metlakatla Indian Community v. Egan; Organized Village of Kake, et al. v. Egan (S.Ct. Nos. 2 & 3). Before Alaska was admitted to the Union, the Secretary of the Interior permitted the use of fish traps for the Alaskan salmon industry by both whites and natives. The traps are large structures fixed in place which capture the salmon as they move in large schools near the shores of Alaskan islands and inlets. The Constitution of Alaska has outlawed fish traps. The Secretary of the Interior has contended that because of the terms of admission of Alaska as a State, that prohibition does not apply to traps of native villages on Annette Island and at other locations. The Department of Justice has supported that position and has three times appeared amicus curiae to urge it.

The history of the case is briefly this. In 1959, when the State threatened enforcement of the fish trap bar, three native villages brought injunction proceedings. The District Court denied all relief. Appeal was taken to the United States Supreme Court since the Supreme Court of Alaska was not then functioning. Mr. Justice Brennan granted an injunction pending appeal. After full argument, in which the United States participated as amicus curiae, an opinion was announced in Metlakatla Indians v. Egan, 363 U. S. 555. It stated that there were present issues of state law as well as federal questions, and that the Supreme Court of Alaska had been organized and the appellants had taken action to preserve a right to appeal to that court. The Court concluded that the present cases should be held in abeyance pending those proceedings. The Chief Justice, Mr. Justice Black and Mr. Justice Douglas dissented from remitting the parties to the Alaska Supreme Court, being of the view that the controlling questions were federal to be resolved by the Supreme Court.

After argument, in which the United States participated as amicus curiae, the Supreme Court of Alaska sustained application of the prohibition to native fishing in a lengthy (63 printed pages) opinion discussing many subjects relating to the rights of the State of Alaska upon admission to the Union and to the rights of natives in Alaska. Upon appeal, the United States Supreme Court reversed the judgment in the Metlakatla case (No. 2) but affirmed as to the Villages of Kake and Angoon (No. 3).

As to the Metlakatla case, the opinion first traced the histroy of salmon fishing in Alaska and especially the objections to use of the large fixed fish traps, which, located at a strategic spot, can capture salmon in large numbers moving along parallel to the shore. Turning to the Metlakatla Indians, the opinion described their movement to Alaska from British Columbia in 1887 and the subsequent development of a reservation for them. It then described the difference in history as to Alaskan Indians and those in other

States and the unusual provision as to the Metlakatla Reservation as compared to other Indian Reservations. With this background, the Court held that the special provision as to Metlakatla empowered the Secretary of the Interior to make regulations permitting fish traps there without regard to limitations on his general fishing regulatory authority. The Court then turned to the Statehood Act which, in Section 6, provided for the transfer to the State of the general fishing control as exercised by other States but, in Section 4, required the State to disdain "all right and title to any United States property not granted her by the statute, and also 'to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives." Drawing a distinction between compensable rights and those of mere possession or occupancy, the Court held that Section 4 preserves the federal authority over the Metlakatla Reservation.

The Villages of Kake and Angoon organized under federal statute--the Wheeler-Howard Act--were not located on reservations and there was no statute authorizing special regulations as in the Metlakatla case. The Court held that the purpose of Section 4 of the Statehood Act was "to preserve the status quo with respect to aboriginal and possessory Indian claims so that statehood would neither extinguish them nor recognize them as compensable. After some discussion, the Court concluded that this disclaimer by the State was "of proprietary rather than governmental interest." The opinion then traced at some length the history and developments of Indian law with regard to increasing permission for application of State laws within Indian reservations and to Indians off the reservation, as here. The Court concluded that Congress had not authorized the use of fish traps at these villages nor empowered the Secretary of Interior to do so.

The stay granted by Mr. Justice Brennan pending appeal was continued in force until the end of the 1962 season "in view of all the circumstances and in order to avoid hardship." A similar continuance was ordered in Metlakatla so that the Secretary might decide how to exercise the discretion the Court held he possessed. Mr. Justice Douglas dissented from continuance of the Stay in the Kake and Angoon cases on the ground that, unlike the Metlakatla case, a stay is not needed to protect rights the Indians may have and that "A stay that continues in use for another season a device as nefarious as the fish trap need potent reasons."

Staff: For the United States as amicus curiae, Former First Assistant to the Solicitor General, Oscar H. Davis.

Condemnation; Wherry Housing Project. United States v. 114.61 acres in Kern County, California, Naval Ordnance Test Station, China Lake. (S.D. Calif., April 13, 1962). This condemnation proceeding was instituted December 23, 1960, effective as of January 1, 1961, at the request of the Department of the Navy for the acquisition of 600 Wherry housing units adjoining the military installation at China Lake, California. The action was made mandatory under the provisions of the Act of August 7, 1956,

70 Stat. 1091, since the Department of the Navy planned the construction of Capehart housing at the base. A deposit of estimated compensation in the amount of $730,000 was made in the registry of the court of which $530,000 was disbursed.

The case came on for trial March 27, 1962, after extensive negotiations had failed to produce a satisfactory settlement. Defendant utilized the services of five witnesses, two of which qualified as experts in estimating values of real property and all related interests therein. The estimated values as claimed by these experts were in the respective amounts of $1,835,919 and $1,985,000. The United States also introduced the testimony of five witnesses, only two of whom were experts in evaluating the leasehold interests condemned in the proceeding and who testified to values of $450,000 and $500,000, respectively. The jury, after deliberating exactly two hours, returned a verdict of $500,000, an amount consistent with the Government's high testimony. The excess disbursement of $30,000 was ordered to be redeposited into the registry of the court with interest thereon at the rate of 4% from the date of disbursement to the date of redeposit.

Staff: Assistant United States Attorney Charles W. Renda (N.D. Calif.).

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CIVIL TAX MATTERS
Appellate Decision

Medical Deduction -- Ordinary Living Expenses Incurred by Taxpayer While on Trip Prescribed by Physician. Commissioner v. Sally L. Bilder, Etc. (Sup. Ct., decided April 30, 1962). Having been advised by his physician to spend the winter months in a warm climate, taxpayer sought to deduct as a cost of his "medical care", under Section 213 of the Internal Revenue Code of 1954, the personal living expenses (here, the cost of lodging) of himself, his wife, and their young child while in Florida. The deduction was disallowed by the Commissioner. The Tax Court reversed this determination to the extent that the deduction related to the taxpayer's personal living expenses, finding that the balance of the deduction was not a cost of medical care because the presence of the taxpayer's wife and child had not been shown to be necessary to the treatment of his illness. On cross-appeals the Court of Appeals for the Third Circuit held, by a 2-1 vote, that the full amount of the personal family living expenses was a deductible medical expense.

The Supreme Court reversed the judgment of the Court of Appeals on the basis that the statute and the legislative history make the "Commissioner's position unassailable" and "foreclose any reading" of Section 213 which would permit a taxpayer to take personal living expenses as a medical care deduction. The Court held that it was the "unmistakable" purpose of Congress in enacting Section 213 to deny deduction for all personal or living expenses incidental to medical treatment, other than the cost of transportation.

Staff: Joseph Kovner and Michael I. Smith (Tax Division).

District Court Decisions

Summons -- Internal Revenue Service Summons Directed to Third Party Quashed Where There Was Showing That Purpose For Issuance Was to Aid Government in Criminal Prosecution of Taxpayer Under Indictment. In re Application of Albert Meyers, etc. (E.D. Pa.) February 28, 1962 (1962-1 USTC, ¶9328). This suit involved an Internal Revenue Service summons issued pursuant to 26 U.S.C., 7602, to one Albert Meyers directing him to appear and give testimony before a Special Agent of the Internal Revenue Service on March 2, 1962, regarding the alleged tax liability of one Nathan Sherman, who was under criminal indictment and scheduled for trial on March 5, 1962.

The Court found that "the Government's purpose, openly avowed," was to circumvent the Federal Rules of Criminal Procedure which deny to it the advantage of pre-trial discovery. The Court refused to permit what it

considered an evasion of the traditional procedure in criminal trials by use of the broad administrative powers available to the Government under the Internal Revenue laws. In support of its holding the Court cited United States v. O'Connor, 118 F. Supp. 248 (DC Mass. 1953), where an Internal Revenue Service summons was quashed under similar circumstances.

PRECAUTIONARY NOTE TO ALL UNITED STATES ATTORNEYS

While the Meyers and O'Connor cases do not stand for the proposition that one under indictment for a crime is immune from tax investigation, they illustrate that extreme care must be used to insure that the administrative summonses are not used to elicit evidence for a criminal case already pending in the court. A similar warning applies to the use of Internal Revenue Service summonses in aid of civil discovery. Pacific Mills v. Kenefick, 90 F. 2d 188 (C.A. 1, 1938). However, since discovery permitted in civil cases is so broad the Kenefick holding should present no real problem.

Staff: United States Attorney Drew J. T. O'Keefe (E.D. Pa.)

Liens -- Summary Judgment for Equitable Owner in Suit to Enforce Tax Lien on Real Property. United States v. William Johnson, et al. (D. Ariz.) 62-1 USTC, ¶9335. The United States sought to foreclose its tax lien on certain real property. Although title to the property was recorded in the names of the taxpayers, William and June Johnson, Violet McAfee stated in an affidavit that: (1) prior to June 1, 1955, she was the sole owner of the property; (2) on June 1, 1955, she conveyed the property in question to her son William Johnson and his wife, June Johnson, for the sole purpose of permitting them to use the property as security for borrowing money; (3) her conveyance was without consideration; (4) a new mortgage for $6,295 was executed by William and June Johnson, some of which was used to pay off the existing mortgage and the remainder was used by William Johnson in his business; (5) Violet McAfee always made her share of the monthly payments on the new mortgage; (6) Violet McAfee occupied the premises at all time rent-free; (7) William and June Johnson did not live on the premises; (8) Violet McAfee paid the taxes on the property while title thereto was in the name of William and June Johnson; (9) at the time of the conveyance William and June Johnson agreed to reconvey the property to Violet McAfee at her request; and (10) they did this on April 30, 1958, without consideration.

Although federal law determines whether a tax lien exists on a taxpayer's property, state law, in this case the law of Arizona, determines what interest a taxpayer has in the property in question. The Court ruled that this case paralleled Kingsbury v. Christy, 21 Ariz. 559, and that the superior right to the property remained in the original transferor.

Summary judgment was granted to Violet McAfee on the theory that there was no issue of fact and that the uncontroverted affidavit and supporting depositions were sufficient for determination in her behalf.

The Court rejected the Government's contention that there was some evidence that defendants had an interest in the property and that the United States was entitled to a trial.

Staff: United States Attorney Charles A. Muecke (Ariz.)

Liens: Relative Priority of Federal Tax Lien; Mortgage Lien Included Real Estate Taxes Paid After Filing of Federal Tax Lien. First Federal Savings and Loan Association of Port Jervis v. Benjamin Levy et al. (Sullivan County Ct., N.Y., December 19, 1961) 9 AFTR 2d 929. This was an action to foreclose a mortgage recorded prior to filing of a notice of federal tax lien. The mortgage contained a convenant that payments by the mortgagee of taxes, water rents, assessments, and insurance premiums, etc., shall be part of the indebtedness secured by the mortgage. In its notice of appearance the defendant United States stated objection to any judgment not according priority to the federal tax lien over advances for local taxes, etc., which only became choate liens subsequent to filing of the federal lien. In holding that local taxes were a part of the mortgage debt and, therefore, prior to the federal lien, the Court rejected the federal standard of choateness set out in United States v. City of New Britain, 347 U.S. 81, and instead followed the directive of Aquilino v. United States, 363 U.S. 509. Accordingly, it found that under state law the lien of the mortgage diminished the taxpayer-mortgagor's "property" or "right to property" by the amount of the mortgage and by the amount of taxes which the mortgagee was required to pay. On that basis the Court concluded that the mortgagee's lien was choate when the mortgage was given, even though the exact amount to be due thereon was not then finally ascertained -- or, alternatively, that the mortgage amount was definite but the mortgagor's "property" or "right to property" was uncertain because subject to diminution by payment of taxes pursuant to the lien of the mortgage. The Court's decision, therefore, effectively subordinated the federal tax lien to the combined total of the prior mortgage and the subsequent local taxes.

The Department does not agree with the result in this case but the amount involved was too small to justify an appeal. Note, however, that a similar issue as to subsequently accruing local taxes is involved in United States v. Buffalo Savings Bank in which the Department has petitioned for certiorari to the Supreme Court (No. 922, October Term, 1961).

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

CRIMINAL TAX MATTERS
Appellate Decision

Appealable Order -- Overruling Motion for Acquittal and Granting New Trial, After Jury Has Been Unable to Agree Upon Verdict, Is Not Final and Appealable Order. Allen E. Northern, Jr. v. United States (C.A. 6,

March 14, 1962)(62-1 U.S.T.C. Par. 9331). Defendant was indicted for violating the Internal Revenue laws. A jury trial was held, at the conclusion of which the defendant renewed his earlier motion for an acquittal. The court reserved its ruling on this motion, and submitted the case to the jury. The jury was unable to agree upon a verdict, whereupon the court declared a mistrial, denied the motion for acquittal, and ordered a new trial. Defendant appealed from this order.

The Government moved to docket and dismiss the appeal, on the ground that this order was not final, and so was non-appealable. The Court granted the Government's motion, holding that except for exceptional orders (e.g., the denial of a motion to reduce bail, Stack v. Boyle, 342 U.S. 1, or the dismissal of a stockholder's derivative suit for failure to post the security required under state law, Cohen v. Beneficial Loan Corp., 337 U.S. 541), the usual rule is that the "final decision" in a criminal case is the imposition of a sentence. Berman v. United States, 302 U.S. 211. The order here appealed from was held to be governed by this general rule.

In this opinion, the Sixth Circuit expressly agreed with the other three circuits which have previously considered this question and reached the same result, to wit, the Third (United States v. Swidler, 207 F. 2d 47), the Fifth (Gilmore v. United States, 264 F. 2d 44) and the District of Columbia (Mack v. United States, 274 F. 2d 582).

Staff: United States Attorney Kenneth Harwell and Assistant United States Attorney Elmer L. Cooke (M.D. Tenn.)

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