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BULLETIN

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Vol. 10 June 15, 1962 No. 12

ADMINISTRATIVE DIVISION

Administrative Assistant Attorney General S. A. Andretta

MEMOS AND ORDERS

The following Memoranda applicable to United States Attorneys' Offices have been issued since the list published in Bulletin No. 8, Vol. 10, dated April 20, 1962:

ORDER	DATED	DISTRIBUTION	SUBJECT
267-62	4-12-62	U.S. Attorneys & Marshals	Designating Assistant Attorney General Nicholas deB. Katzenbach as Acting Deputy Attorney General.
268-62	5-4-62	U.S. Attorneys & Marshals	Assignment of functions relating to the President's Committee on Equal Employment Opportunity.
269-62	5-8-62	U.S. Attorneys & Marshals	Regulations of Department of Justice with respect to advance and evacuation payments and special allowances pursuant to Public Law 87-304 and Executive Order No. 10982 of December 25, 1961.
270-62	5-8-62	U.S. Attorneys & Marshals	Further Amendment of Section 22 of Order No. 175-59, assigning functions with respect to advance and evacuation payments and special allowances pursuant to Public Law 87-304 and Executive Order No. 10983.
271-62	6-1-62	U.S. Attorneys & Marshals	Department of Justice Statement of Organization.

MEMO	DATED	DISTRIBUTION	SUBJECT
315	4-24-62	U.S. Attorneys & Marshals	Employee Identification Numbers

MEMO	DATED	DISTRIBUTION	SUBJECT
316	5-22-62	U.S. Attorneys & Marshals	Committing Juveniles for Study and Observation Under Provisions of Sec. 5034, Title 18, U.S. Code, as amended March 31, 1962.

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ANTITRUST DIVISION

Assistant Attorney General Lee Loevinger

SHERMAN ACT

Price Fixing - Intoxicating Liquor; Motion to Dismiss Denied. U.S. v. Connecticut Package Stores Association, et al. (D. Conn., May 28, 1962) Judge Blumenfeld completely denied the motions of the defendants to dismiss the indictment in this case. The indictment charged two associations of retailers and 6 individual retailers with combining to fix retail prices and markups on intoxicating liquor by coercing manufacturers and wholesalers.

The defendants raised two major points: (1) That since state law was supreme under the 21st Amendment, the enactment of the comprehensive Liquor Control Act by Connecticut pre-empted the Sherman Act in the field of intoxicating liquors even if a conflict between the Liquor Control Act and the Sherman Act could not be shown; and (2) That the mandatory price posting laws enacted by Connecticut together with mandatory wholesale markup provisions (for wine only) and the tight licensing system set up by Connecticut revealed state policy hostile to price competition and to the enforcement of the Sherman Act and that the 21st Amendment caused this "eliminating-of-competition" policy to prevail over the indictment.

Judge Blumenfeld summarily disposed of the pre-emption theory by pointing out that "Resolution of a constitutional question by a district court should be avoided if possible" and further by pointing out that no court had ever applied such a theory "in reverse," i.e., to pre-empt federal law by state law passed pursuant to the 21st Amendment.

On the question of conflict, Judge Blumenfeld stated that he would not rely on the holdings of the prior decisions in this field such as the Maryland Beverage case (138 F. Supp. 685) since Connecticut law differed from the state liquor codes involved in those previous cases. He held that a mandatory price posting system which compelled wholesalers and manufacturers to register the wholesale and minimum retail prices of their brands and which compelled retailers to abide by such registered prices for a three-month period did not set any particular price to be posted and did not delegate any power to a retailer combination to establish any such price.

On the latter point, Judge Blumenfeld has gone further than previous cases since the price posting type of liquor control goes further to eliminate price competition than did the permissive type of "fair trade" laws involved in the prior cases.

One of the association defendants, the New Haven Package Stores Association, also filed a motion to dismiss on the ground that it was not a "competent party defendant" since it was a "division" of the Connecticut Package Stores Association, Inc., a co-defendant. Judge Blumenfeld held

that such an unincorporated association as the New Haven Package Stores Association was a "person" under Section 8 of the Sherman Act and he denied that branch of the motion to dismiss.

The motion was orally argued by Joseph T. Maioriello and Richard L. Shanley who were assisted at the argument by Frank E. Dugan.

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

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CIVIL DIVISION

Acting Assistant Attorney General Joseph D. Guilfoyle

COURTS OF APPEALS

BANKRUPTCY

Government Entitled to Recover, from Money It Paid to Assignee of Bankrupt, Losses It Sustained from Bankrupt's Breach of Contract. In the Matter of Tailortowne, Inc. (C.A 3, May 23, 1962). A Government contract with the bankrupt for the manufacture of coats had been partially performed when the bankrupt had to close its plant and bankruptcy proceedings were instituted. At that time the Government owed the bankrupt $15,879.38 for coats previously delivered, but had a set-off against the bankrupt for breach of the contract. As part of an agreement devised for the purpose of reopening the bankrupt's plant, the Government paid the amount which it owed for the coats previously delivered to a bank to which the bankrupt had assigned its claim against the Government. This plan was approved by the court, and it was understood by all parties that the Government paid the money only so that the plant could be reopened. The plant could not be reopened, however, and the Government brought this suit to recover from the assignee bank the money paid pursuant to the above plan.

The referee ordered that the Government be reimbursed out of its partial payment ($15,789.38) for the actual losses which it sustained as a result of the breach of contract, holding that the money was paid as a part of a general plan to reopen the plant and secure completion of its contracts. The district court affirmed. On appeal, the Court of Appeals, in a per curiam opinion, affirmed on the grounds that the referee's disposition of the Government's claim was substantially supported by the record and was a proper solution of the problem involved.

Staff: United States Attorney David M. Satz, Jr.; Assistant United States Attorney Frederick H. Martin (D. N.J.)

FEDERAL EMPLOYEES' GROUP LIFE INSURANCE ACT

Government Has No Duty Re Conversion of Policy of Group Life Insurance Under Federal Employees' Group Life Insurance Act. Barnes v. United States (C.A. D.C., May 24, 1962). Barnes was a Government employee whose life was insured under the program established by the Federal Employees' Group Life Insurance Act. This insurance expires upon the employee's separation from the service, unless within 31 days after his separation he converts his group life insurance to an individual policy of life insurance.

Barnes retired from the service on April 4, 1959. He did not convert his policy. He died on October 9, 1959. This action was brought by his wife to recover the proceeds of his group life insurance policy. The gravamen of her complaint was that Barnes was physically and mentally disabled on April 4, 1959, and, therefore, was incapable of making an application for conversion of his insurance.

The district court granted the Government's motion for summary judgment and the Court of Appeals affirmed. Relying upon the facts that the Government had no knowledge of Barnes' alleged disability and that it had explained to him the possibility of converting his policy, the Court held that the Government had not failed in the performance of any duty under the Act. The Court stated: "There is no requirement, explicit or otherwise, that any Government officer or agent act in behalf of the employee to secure for him the protection which, under applicable law, he should have secured either by himself or through one lawfully acting in his behalf."

Staff: United States Attorney David C. Acheson; Assistant United States Attorney Robert Brewer Norris (C.A. D.C.)

POSTAL MATTERS

Publication Containing Only Crossword Puzzles Held Not Entitled to Second Class Mailing Privileges. Dell Publishing Co. v. Day (C.A. D.C., May 31, 1962). Appellant brought this action to set aside a ruling by the Postmaster General that a book containing only crossword puzzles was not a "periodical" within the meaning of 39 U.S.C. 224, and, therefore, was not entitled to second class mailing privileges. The district court granted the Postmaster General's motion for summary judgment. It noted that a periodical had previously been defined as a publication containing matter on a variety of topics, and that the Postmaster General's ruling was, therefore, not without a rational basis. The Court of Appeals, agreeing that the Postmaster General's ruling was based on a reasonable interpretation of the controlling statute, affirmed in a per curiam opinion.

Staff: United States Attorney David C. Acheson; Assistant United States Attorney John R. Schmertz, Jr. (C.A. D.C.)

DISTRICT COURT

PROPERTY DISPOSAL

Conditions Upon Disposal of Surplus Government Property; Equitable Allocation of Cost of Municipal Services. Oakwood Corp. v. United States (E. D. Tenn., May 25, 1962). Oak Ridge, Tennessee, built and operated as

a federally owned city by the Atomic Energy Commission, has been converted to an ordinary municipality. Most of the real property was sold to private owners, and a new municipal government was set up. The new municipality began operation in 1960 but had no tax revenues or other funds, and the AEC underwrote the cost of municipal services to the end of 1960. The above plaintiff bought certain property and received a conveyance June 1, 1960. As a condition of receiving its conveyance, plaintiff was required to agree to pay to AEC an amount equivalent to taxes for the last half of 1960. It paid but sued for refund, alleging (1) that its contract of purchase did not require it to pay a tax equivalent, (2) that if the contract did so require, it was contrary to the applicable statute, and (3) if the statute did authorize such a requirement, it was unconstitutional. The district court overruled all these contentions and granted summary judgment in favor of the Government.

Staff: United States Attorney J. H. Reddy;
Assistant United States Attorney Ottis B. Meredith
(E.D. Tenn.); Robert Mandel (Civil Division)

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CIVIL RIGHTS DIVISION

Assistant Attorney General Burke Marshall

Civil Rights; Violation of 18 U.S.C. 242, Police Brutality. United States v. George Carl Sartin and John Sartin (E.D. Tenn.) Defendants, brothers, were deputy sheriffs of Roane County, Tennessee. In August, 1960, George Sartin had been defeated as a candidate for sheriff. Suspecting that one Ferguson, who was custodian of the voting machines in the County, had rigged the machines so as to cause Sartin to lose the election, the brothers arrested Ferguson at his place of business, took him out in the country, and there physically abused him to force him to confess. After extorting an oral confession from him, they took Ferguson to a motel where they made him repeat it into a tape recorder. They held him a total of twelve hours driving him through three counties and repeatedly subjecting him to physical abuse. George Sartin then obtained a warrant for Ferguson's arrest, charging him with violating Tennessee's election laws. A local grand jury refused to indict Ferguson.

The Sartin brothers were charged in a three count indictment with having violated Section 242 of Title 18, United States Code, in that they had wilfully deprived Ferguson of a constitutional right. The case went to trial on May 10, 11 and 12 before Judge Robert L. Taylor and a jury sitting at Knoxville. A verdict of guilty was returned on all three counts.

After the verdict was returned, Judge Taylor expressed shock at the revelations disclosed by the testimony. A pre-sentence probation report was ordered and the defendants await sentence.

Staff: United States Attorney John H. Reddy;
Assistant United States Attorney David E. Smith (E.D. Tenn.)

Voting and Elections: Civil Rights Acts of 1957 and 1960. United States v. Bibb County Democratic Executive Committee, et al. (M.D. Georgia). Suit was filed on May 16, 1962, to eliminate racial segregation in the voting process in Bibb County, Georgia (see Bulletin: Vol. 10, No. 11, p. 318). Following a hearing on the Government's motion for a preliminary injunction, which was held on May 23 and 24, the Court, on June 1, 1962, issued an injunction enjoining racial distinctions in the voting process, to take effect immediately in six militia districts and to become effective in one year in the three remaining most densely populated militia districts.

Staff: United States Attorney Floyd M. Buford (M.D. Ga.);
Jerome Heilbron (Civil Rights Division)

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

MURDER

Evidence Obtained from Arrest Without Warrant Admissible; Evidence of Reenactment of Crime Inadmissible Because of Delay in Taking Accused Before Commissioner; Rulings on Defense of Insanity; Remarks of Trial Judge. John A. Naples v. United States (C.A. D.C., May 8, 1962). After waiver of a jury trial, appellant was found guilty of murder in the first degree in that he killed another in perpetrating a housebreaking while armed with or using a dangerous weapon. Appellant was also found guilty of murder in the second degree, housebreaking, and petit larceny. Sentence was imposed on the first degree murder conviction only. Several assignments of error were made by appellant's counsel.

It was urged that there was no probable cause for appellant's arrest and that evidence obtained from the search and seizure accompanying the arrest was inadmissible. The day after the fatal stabbing, the police received a call from appellant's brother requesting the police to meet him at a certain movie theater. At the theater, appellant's brother advised the police that appellant carried a knife in his overnight bag and that appellant might have been involved in the homicide. The victim was appellant's next door neighbor. Acting on this information, the police arrested appellant as he entered the theater, and searched the canvas bag which he was carrying. The Court of Appeals held there was probable cause for arrest without a warrant, and that the police were therefore justified in examining the canvas bag.

Counsel also urged that error had been committed in admitting statements made by appellant shortly after arrest and before he had been presented before a magistrate; evidence obtained during a reenactment of the crime, because of an unreasonable delay in so presenting the accused; and statements made at the jail, after appellant had been so presented. a) Following the arrest of appellant at 1:15 p.m. he was taken to police headquarters, arriving at 1:30 p.m. He was advised that he need not make a statement; however, appellant explained to the police how he had committed the crime. Since the entire conversation at this point took only 5 to 10 minutes and was apparently voluntary and spontaneous, the Court of Appeals held that appellant's admissions were properly received. b) After these admissions by appellant, the police took appellant back to the scene of the crime where he reenacted the homicide. He was not presented to a magistrate until 4:30 p.m. or 5:00 p.m. The Court of Appeals held the procedure to be in violation of Rule 5, Federal Rules of Criminal Procedure and hence held evidence of the reenactment inadmissible. c) Two days after appellant had been presented to the magistrate, appellant was questioned at the jail by a police officer. Although appellant had been told of his right to

remain silent and to have counsel, no counsel had yet been appointed for him. Finding the record on this phase of the case inadequate to predicate a determinative ruling, and finding grounds for reversal on other grounds, the Court of Appeals withheld its decision on whether the interview at the jail violated the appellant's rights.

Shortly after appellant's arrest, the District Court, on the Government's motion, ordered a mental examination of appellant. Appellant's counsel subsequently requested that appellant be allowed to employ a psychiatrist of his own choice at Government expense. This request was denied. Since the trial judge found the defendant incompetent to stand trial, and since the medical evidence adduced by the Government was utilized by the defense at the trial, the Court of Appeals refused to say that appellant was prejudiced by the refusal to permit him to call his own psychiatrist.

Counsel also urged that the court erred in concluding that appellant had competently waived a jury trial. Approximately two years after the crime was committed, as the trial was about to go forward, trial counsel and appellant waived the right to trial by jury. Finding the record inadequate on whether appellant was in fact competent, and finding other grounds for reversal, the Court of Appeals did not undertake to resolve the question. The Court noted, however, that since this was a capital case, with a two-year pretrial record indicating the possible presence of a substantial mental disorder, it might have been expected that the judge's determination to approve the waiver of a jury trial would have been supported by findings adequate to sustain his ruling.

Counsel further urged that the trial court erred in various conclusions and rulings relating to the appellant's defense of insanity. On this point, the Court of Appeals found that it was impossible to discern to what extent the trial judge's conclusions were colored by his own views.

The Court of Appeals also noted that the trial judge pronounced sentence on only one count, imposing the death penalty as required by the D. C. statute in existence at the time. The trial judge, believing however, that the death sentence should not be carried out, desired that counsel file an application for executive clemency. When counsel chose to go forward with an appeal before seeking executive clemency, the trial judge stated that he felt he should appoint new counsel to represent appellant. In light of all the above details the Court of Appeals held that appellant should have a new trial and that the trial should be before a different judge. Both the concurring and dissenting opinions objected to requiring that the new trial be conducted by a different judge.

Staff: United States Attorney David C. Acheson; Principal Assistant United States Attorney Charles T. Duncan; Assistant United States Attorneys Nathan J. Paulson, Frederick G. Smithson and Arnold T. Aikens (Dist. Col.).

MOTION TO VACATE
28 U.S.C. 2255

Hearing Under Section 2255 May Be Had in Any Division of District Where Court Authorized to Sit; Prior Adverse Ruling of District Judge Not Proper Ground for Disqualification in Subsequent Proceeding; Request for Witnesses at Hearing Denied Where No Showing Made of Materiality of Expected Testimony; Validity of Judgment Upheld Despite Appellant's Failure to Accept Services of Court Appointed Counsel and to Proceed Without Attorney Claimed to Have Been Retained But Who Did Not Appeal and Appellant's Refusal to Offer Any Testimony. Robert Earl Deitle v. United States (C.A. 7, April 27, 1962). On a motion filed pursuant to 28 U.S.C. 2255, appellant challenged four judgments of conviction entered on pleas of guilty to causing forged securities to be transported in interstate commerce in violation of 18 U.S.C. 2314. His motion was denied by the district court, and on appeal the Seventh Circuit affirmed. The Supreme Court vacated and remanded the case to the district court for a hearing at which petitioner should be present. The district judge then set a hearing on appellant's motion and appointed counsel to represent appellant. Appellant, acting pro se and without the advice of his court appointed counsel, filed a written motion: (1) protesting setting the hearing at Wausau, Wisconsin and moving that it be held at Madison, Wisconsin, where he was originally sentenced; (2) moving the disqualification of the district court judge on account of alleged bias and prejudice; and (3) moving that 22 named witnesses be subpoenaed under Rule 17(b), F. R. Crim. P., as witnesses at the hearing and that 4 of them produce voluminous records not in their legal custody. The district court denied defendant's motion and the Seventh Circuit affirmed.

The Court stated as to point (1) that a trial, and hence a hearing on a Section 2255 motion, may be had in any location in the district where the court is authorized to sit and Wausau was such a place. As to point (2) the Court found that appellant failed to comply with the provisions of 28 U.S.C. 144 and did not have a certificate of his counsel of record stating that the motion was made in good faith. Furthermore, the district judge's prior adverse ruling was not a proper ground for disqualification. Point (3) was found insufficient in that the motion did not state the testimony appellant expected the witnesses to give nor the materiality of such testimony.

At the hearing on the Section 2255 motion, appellant refused to accept the services of his court appointed counsel and would not proceed without an attorney he claimed he had retained the previous day. The attorney had not entered an appearance in the case, had not contacted the court, and had not asked for a continuance. After appellant's continued refusal to offer any testimony, the district court found that no constitutional right of appellant had been violated and held that the judgment entered in the case was valid. On appellant's motion the court filed findings of fact, conclusions of law, and a final order denying appellant's motion to vacate the judgments of conviction.

On appeal the Seventh Circuit found that the district court had fully complied with the mandate of the Supreme Court "for a hearing at which petitioner should be present."

Staff: United States Attorney N. S. Heffernan;
Special Assistant to the United States Attorney
George E. Rapp (W.D. Wisc.).

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INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Foreign Agents Registration Act; Conspiracy to Violate FAA Regulations. United States v. William J. Shergalis (S.D. Fla.). William J. Shergalis was indicted in two separate indictments on May 3, 1960, the first charging him with having acted as an agent of a foreign principal without having registered under the Foreign Agents Registration Act, and the second with having conspired to violate certain regulations of the Federal Aviation Act of 1958. It was alleged in the first indictment that Shergalis was an agent of a foreign principal (1) in that he collected information for and reported information to the Cuban Government concerning persons in the United States opposed to that government; (2) in that he solicited compensation from the Cuban Government; and (3) in that he acted under the direction of the said Government in arranging and taking part in an airplane flight to Cuba on March 21, 1960.

At the time these indictments were returned, Shergalis was being held a prisoner by the Cuban Government. He was released December 6, 1961, and on January 12, 1962, returned to Miami where he was arrested by the FBI. He was arraigned January 19, 1962, and entered a plea of not guilty to both indictments.

On May 28, 1962, at the time set for his trial, Shergalis withdrew his plea of not guilty to the indictment charging him with violation of the Foreign Agents Registration Act and entered a plea of guilty. The Court was informed that the Government would file a dismissal of the conspiracy indictment at the time of sentencing.

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

Espionage. United States v. Harry Carl Schoeneman and Garlan Euel Markham, Jr. (D.D.C.) On December 15, 1961, a five-count indictment was returned against Harry Carl Schoeneman, and Garlan Euel Markham, Jr. (See Bulletin No. 1, Vol. 10)

The trial of this case commenced on May 1, 1962, before Judge Leonard P. Walsh and on May 18, 1962, the jury returned a verdict of guilty on the first four counts. The defendants were adjudged not guilty on the fifth count. No date for sentencing has been set by the court.

Staff: Edwin C. Brown, Jr. and Earl Kaplan (Internal Security Division)

Foreign Agents Registration Act (22 U.S.C. 612-618). Victor Rabinowitz and Leonard B. Boudin v. The Attorney General of the United States (D.D.C.). By letter dated August 31, 1961, the Registration Section requested the registration of the plaintiffs under the Foreign Agents Registration Act, on the basis of information that they have signed a general retainer agreement with the Government of the Republic of Cuba to act as its legal representative in the United States. On November 15, 1961 the plaintiffs filed a complaint seeking a declaratory judgment that their activities as legal representatives for the Republic of Cuba do not require their registration under the above Act.

The defendant answered on January 10, 1962, and filed its motion for judgment on the pleadings on January 17, 1962. In its motion the defendant averred that a declaratory judgment will not lie for the reason that there is at present no justiciable controversy and further, that Congress has provided an adequate remedy at law.

By an order filed April 4, 1962, District Judge Edward A. Curran denied the defendant's motion; on April 13, 1962, on motion of the defendant Judge Curran signed an amended order, which denied the motion and included the certification required by 28 U.S.C. 1292 (b) that the order involved a controlling question of law as to whether the obligation to register may be adjudicated in a declaratory judgment suit, that there is substantial ground for difference of opinion thereon, and that an immediate appeal might materially advance the termination of the litigation.

Thereafter the Solicitor General approved a recommendation for an appeal from the order of April 13, an application for leave to take an interlocutory appeal was filed with the Court of Appeals, under 28 U.S.C. 1292(b) and Rule 9-1/2 of the Court and that Court granted the application by an order dated May 11, 1962. On May 15 a notice of appeal was filed in District Court.

Staff: George B. Searls, Nathan B. Lenvin, Irene A. Bowman and Kathleen M. Malone (Internal Security Division)

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LANDS DIVISION

Assistant Attorney General Ramsey Clark

Courts; Pendency of District Court Suits as Bar to Court of Claims Actions. Adams v. United States and Audet v. United States (C.Cls. May 25, 1962.) Plaintiffs are landowners in California whose properties were flooded on December 23, 1955, as a result of alleged errors in the design of a Corps of Engineers flood control project. Plaintiffs first filed twenty-one different actions under the Tort Claims Act in the United States District Court for the Northern District of California, seeking recovery of approximately $13,000,000. After a number of years of legal maneuvering, it became apparent that recovery might be barred in the tort cases because of applicable exceptions in the Tort Claims Act and because of 33 U.S.C. 702(c).

In November, 1961, shortly before expiration of the six-year statute of limitations, the same plaintiffs brought these two cases in the Court of Claims. They alleged that, as a result of the flooding, their lands had been "taken" by the United States. As required by Rule 12 of the Court of Claims, each petition contained an allegation that actions were pending in the United States District Court for the Northern District of California "for the same damage herein and arising out of the same facts * * * the sole difference being that the actions there pending are claims based on negligence, whereas this Petition is in inverse condemnation." Motions to dismiss were filed on the ground that the cases fell within the jurisdictional prohibition of 28 U.S.C. 1500.

In response to the motions, plaintiffs contended that they were entitled to file the Court of Claims suits in order to toll the statute of limitations pending the outcome of the district court cases, that 28 U.S.C. 1500 applied only to identical actions based on the same cause of action and that a pending suit founded in tort did not bar the filing of a suit based on a contract "taking" theory. In the alternative, they asserted that 28 U.S.C. 1500 was unconstitutional because it discriminated against claimants whose losses exceeded $10,000, i.e., it prevented such claimants from filing simultaneous suits on different theories while one with a claim for less than $10,000 is able to sue on two counts in a district court action.

On May 25, 1962, an order was entered dismissing both suits. No opinion was written. Apparently the Court agreed with the Government's position that plaintiffs' first contention was controlled by Corona Co. v. United States, 263 U.S. 537, 540, that their second contention was contrary to the result in British American Tobacco Co. v. United States, 89 C.Cls. 438, and that the constitutional point was of no legal significance since the right to sue the United States is a privilege which may be conditioned as Congress may dictate. United States v. Sherwood, 312 U.S. 584; Lynch v. United States, 292 U.S. 571.

Staff: Thos. L. McKevitt (Lands Division).

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

REMINDER NOTICE

Policy of Opposing Pleas of Nolo Contendere. The Department's policy to object to the entry of pleas of nolo contendere in criminal cases remains unchanged. As it respects criminal tax cases the policy is set forth in the United States Attorneys' Manual, Title 4:46 as follows:

> United States Attorneys are instructed not to consent to a plea of nolo contendere in tax cases except in the most unusual circumstances and then only after their recommendation for so doing has been reviewed and approved by the Assistant Attorney General in charge of the Tax Division or by the Office of the Attorney General.

Recent court reactions in criminal tax cases in which the United States Attorneys have objected to the entry of nolo pleas indicates that the reasons for the opposition to nolos in criminal tax matters are largely misunderstood. They are, accordingly, restated here. Whenever possible, these reasons should be made known to the court when opposition to a plea of nolo contendere is advanced.

When the policy of opposing nolo contendere pleas was announced, one ground then assigned was that such pleas were used to avoid certain indirect consequences of pleading guilty, such as loss of license or sentencing as a multiple offender. Another reason for the Department's opposition was that nolo pleas served as an excuse to seek and to impose over-lenient sentences. Analysis of the results of opposing nolos tends in some measure to bear this latter out. But in criminal tax cases, more cogent reasons exist.

Criminal tax offenses (with unimportant exceptions) involve crimes of wilfulness, not crimes of mala prohibita. Accordingly, it does not seem proper for a defendant to attempt to create the impression by his plea of nolo that the Government has only a "technically" adequate case which he will not contest. Wilful tax crimes are not "technical". If the defendant is competent to stand trial and assist his counsel in the preparation of his defense, he can produce evidence to refute the element of wilfulness.

Judgments of conviction of tax crimes based upon pleas of nolo contendere are generally held to be inadmissible in subsequent civil tax litigation as evidence to support the existence of civil fraud. It is the Tax Division's position that an individual who has conceded the commission of wilful misconduct with respect to his tax liabilities for the

purposes of a criminal prosecution should not again be permitted to contest the issue of his fraud in the Tax Court, or in the District Court, in civil refund suits. And even though the conviction in the criminal case does not estop a taxpayer from contesting the amount of his civil liability in court, the conviction in the criminal case should be admissible evidence against the taxpayer on the fraud issue. In this connection, it should be pointed out that criminal tax cases are not proceedings to determine the tax liability - they only determine the existence of criminal activity. A sentence on a verdict of guilty or a plea of guilty does not foreclose a taxpayer's rights to contest the amount of his civil liability as provided by the Internal Revenue Code.

The concern of tax defendants who are licensed to engage in professional occupations that they may lose their licenses if they are convicted on a plea of guilty as opposed to a plea of nolo does not seem to the Department to be a valid consideration for a "double standard" in criminal tax cases. Accountants and lawyers should indeed be held to the highest standard of tax conduct. But whether disciplinary action against medical practitioners and others engaged in licensed occupations should follow on a tax conviction should be a matter for the state licensing agencies - not for the federal courts or the federal prosecutors.

CRIMINAL TAX MATTERS
Appellate Court Decision

False Statements: Applicability of 18 U.S.C. 1001 to Voluntary Sworn Oral Statements Made to Revenue Agents; Corroboration Required for Conviction; Requirement of Materiality: Compromise and Estoppel: Requirement of Knowledge of District Judge. United States v. McCue (Jr. & Sr.) (C.A. 2, March 20, 1962). The Second Circuit unanimously affirmed each of appellants' jury convictions on counts charging violation of 18 U.S.C. 1001 by making, in the presence of counsel, false voluntary sworn oral statements to Internal Revenue Agents.

J. O. McCue, Sr. and his son were indicted in 1957 for income tax evasion. In direct disobedience of the explicit order of the Department of Justice, the United States Attorney agreed to and did accept McCue, Sr.'s plea of nolo contendere as to the misdemeanor of failing to supply correct information in consideration of procuring the dismissal of the evasion charges as to both defendants. Both defendants were thereafter reindicted for giving false sworn testimony to Internal Revenue Agents during the course of the pre-evasion indictment investigations, in violation of 18 U.S.C. 1001.

In affirming the jury's verdict, the Court of Appeals reviewed the legislative history of 18 U.S.C. 1001 and held that false voluntary sworn oral statements are within the purview of this statute, that the two-witness perjury rule of corroboration of Weiler v. United States, 323 U.S. 606 is not applicable to prosecution thereunder and that ample factual evidence of falsity appeared in the record. The Court further

indicated it would continue to adhere to its view that there is no separate requirement of materiality regarding such false statements.

In rejecting appellants' contention that the acceptance of McCue, Sr.'s nolo contendere plea constituted a compromise of all of the McCue's liability to the Government, the Court held that the failure of the parties to inform the District Judge of the false statements or of all of the circumstances surrounding the motion for dismissal precluded the possibility of a compromise or estoppel. Attention is invited to the fact that a forthcoming Department Order will require prior Department approval before criminal prosecution can be instituted for violation of 18 U.S.C. 1001.

Staff: John P. Burke and Eldon F. Hawley (Tax Division)

CIVIL TAX MATTERS

Delivery of Checks by U. S. Attorneys to Opposing Counsel and Taxpayer in Civil Tax Refund Cases

Some four years ago the Treasury Department approved the procedure of mailing refund checks to U.S. Attorneys for delivery to taxpayers or their attorneys of record. The checks are made to the order of taxpayers who had obtained judgments against the Government in civil tax refund cases, or who had been authorized a refund through a settlement of pending court cases. This procedure, which is set out in T.D. 6292 (published in 23 Federal Register number 280) effected a substantial change in the former procedure (see e.g., U. S. Attorneys' Bulletin, February 28, 1958).

In accordance with this procedure all U.S. Attorneys should be sure to (1) tender the checks immediately to counsel of record, or to the taxpayers if counsel has so indicated, in order to avoid any question with respect to the Government's liability for additional interest; (2) obtain in exchange for the checks the appropriate document for terminating each case (a dismissal, if the case has been settled, or a satisfaction if the case went to judgment); and (3) file the documents in court, close the case on your records and advise the Tax Division immediately in order that the case may be closed on the Department's records. Until the Tax Division is so advised, the case remains open on its records and charged to your office. If the taxpayer's counsel refuses to furnish the appropriate document for reasons which appear to be without foundation, please advise the Tax Division immediately and we will instruct you as to the filing of an appropriate motion to dismiss or motion to enter satisfaction of judgment.

Some questions have arisen as to the tender of refund checks in situations where opposing counsel will not agree to the filing of a dismissal (if the case has been settled) or a satisfaction (if the case went to judgment). If opposing counsel raises the objection that the amount of the check is insufficient, you should tender the check immediately and

specifically advise that acceptance of the refund check is without prejudice to his right to claim additional amounts. (Section 6611(b)(2), Internal Revenue Code of 1954.) This will avoid any question with respect to the Government's liability with respect to additional interest. The District Director usually sends a notice of adjustment with the check, but the check should be tendered whether or not the notice of adjustment (Form 1331-B) has been received.

Where a dispute has arisen with respect to the statutory interest computation, counsel should be advised to take this matter up directly with the District Director. For your information, the computation of the refundable amount made by the National Office of the Internal Revenue Service covers only the principal amount of the overpayment. All statutory interest computations are made by the District Director concerned.

Appellate Decision

Warrant of Distraint Unnecessary Under 1954 Code. J. Morton Rosenblum v. United States (C.A. 1, April 4, 1962.) The Internal Revenue Service issued notices of levy to four debtors of a delinquent taxpayer. Prior to a response to these levies, taxpayer was placed in bankruptcy. Upon the debtors' continued failure to pay over under the levies the United States brought an action against them to enforce the levies under Section 6332(c) of the 1954 Code. The trustee in bankruptcy moved to intervene in that action and the court denied his motion on the ground that the United States had "possession" of the debt prior to bankruptcy within the meaning of Section 67(c) of the Bankruptcy Act. This appeal was from that order.

The trustee claimed on appeal: (1) that the debt was an intangible not subject to be taken into possession prior to bankruptcy as contemplated by Section 67(c) and thus must be turned over to the trustee; and (2) that even if the debts were subject to levy, each levy was faulty because a warrant of distraint had not been issued. The Court of Appeals dismissed the appeal on the ground that the trustee had not made out an intervention of right within Rule 24(a), F.R.C.P., because: (1) the federal tax lien affixed to intangibles such as debts and (2) the 1954 Code clarified a previous split of authority on the necessity of a warrant of distraint, obviating such warrants as a procedural requirement. The practical effect of this decision is that all the monies due from the debtors will be paid over to the Government whereas if these monies were processed through bankruptcy they would be subjected to administrative costs and certain claims which might prime the tax liens.

Staff: Joseph Kovner and John J. Gobel (Tax Division).

District Court Decisions

Retailers Taxes: Jewelry Sold to Companies for Distribution to Employees as Awards and to Customers as Gifts Were Not "Sold at Retail" and Were Not, Therefore, Subject to Retailers Excise Tax on Jewelry. United States v. Marvin Redmond, d/b/a Redmond's Jewelers, 62-1 U.S.T.C. 15,409 (E.D. Mich.). This action was brought to recover an erroneous refund made to defendant, who ran a retail jewelry store and made sales of items at less than retail prices to various industrial concerns to be used as prizes and awards. The Court concluded that defendant appeared to be engaged in a retail business mainly, but rejected the Government's contention, based on Revenue Ruling 58-125, 1958-1 Cum. Bull. 561, that the application of the retailers excise tax to sales is not to be determined solely by reference to the particular sale without regard to the nature of the seller's business and that, to qualify as wholesale sales not subject to the tax, the sales must be made as part of a regularly established wholesale business.

In ruling that the defendant's "industrial sales" were not subject to tax, the Court relied on Gellman v. United States, 235 F. 2d 87 (C.A. 8), and Torti v. United States, 249 F. 2d 623 (C.A. 7), and it rejected Laufman v. United States, 61-2 U.S.T.C. 15,375. A motion for new trial based on a decision for the Government in Worrell's Ltd. v. United States (Ct. Cls.), 9 A.F.T.R. 2d 198, 154 is now under advisement by the Court.

Staff: United States Attorney Lawrence Gubow (E.D. Mich.)

Liens; Bankruptcy: Surety Held to Have No Secured Claim Under Unrecorded General Assignment of Bankrupt Contractor's Assets Contained in Bond Application and Under Chattel Mortgages Executed Within 4 Months of Bankruptcy. In re Collins & Kiser Construction Co., 9 A.F.T.R. 2d 1471 (S.D. Iowa, March 21, 1962). The Government filed a petition to review the order of the referee in bankruptcy allowing, as totally secured, a $27,000 claim of the surety of the bankrupt construction company. The bankruptcy estate had a liquidated value of approximately $30,000 and the federal tax claims (a major portion of which were secured by liens arising prior to bankruptcy) totalled in excess of $7,000.

The referee had found that chattel mortgages taken by the surety on certain of the bankrupt's construction equipment within four months of bankruptcy did not constitute voidable preferences because the surety had no "reasonable cause to believe" the bankrupt insolvent at the time the mortgages were executed and the mortgages were not on account of antecedent debts. The referee had further held that provisions of surety bond applications executed by the bankrupt contractor more than four months before bankruptcy and providing for a general assignment of all assets of the contractor to the surety to secure future liability under the bonds created an "equitable lien" in favor of the surety, good against the claims of the Government and the trustee in bankruptcy, in spite of the fact that the general assignments were never recorded.

In reversing the referee's order, the District Court held the referee's finding, that the surety had no reasonable cause to believe the bankrupt insolvent at the time of taking the chattel mortgages, to be clearly erroneous on the basis of the transcripts of testimony before the referee, that the mortgages were unquestionably on account of antecedent debts since the surety was subrogated to the creditors claims against the bankrupt which it paid, and that the mortgages were therefore void as preferences. The Court also held that regardless of whether or not the general assignments created a so-called "equitable lien," such assignments were tantamount to chattel mortgages under Iowa law and were of no effect against the trustee since not recorded as required under Section 556.3 of the Iowa Code and under Section 70c of the Bankruptcy Act, citing the court's decision in In re Production Aids Co., 193 F. Supp. 180 (S.D. Iowa, 1961). The Court ordered the surety's total claim allowed only as unsecured, and further ordered that the Government's tax claims be satisfied in full in the order of priority provided by Section 64a of the Bankruptcy Act.

Staff: United States Attorney Donald A. Wine (S.D. Iowa) and John M. Youngquist (Tax Division).

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