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DISPOSITION OF OBSOLETE LIBRARY MATERIALS

The Librarian of the Department has advised that the following library materials should be removed from the shelves and destroyed:

1. 1960 pocket parts from the old Federal Digest through volume 68.
2. 10-volume bound cumulative supplement from the same set.
3. Cumulative bound supplements to volumes 66-68 inclusive from the same set. Retain the basic volumes 66-68. Retain also volumes 69, 70, 71 and 72 and the bound cumulative supplements with pocket parts to each of these four volumes.

The above list is not exclusive. There may be other obsolete materials which could be disposed of, thus affording additional space. For example, United States Attorneys may find that the first edition of the Code of Federal Regulations, while not obsolete, is not used sufficiently to justify the space it occupies.

MANUAL CORRECTION SHEETS

A master file of all correction sheets of the United States Attorneys Manual, as well as audit sheets therefor, is maintained in the Executive Office for United States Attorneys. Accordingly, all obsolete correction sheets and audit sheets may be destroyed.

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ANTITRUST DIVISION

Assistant Attorney General Lee Loevinger

SHERMAN ACT

Court of Appeals affirms Judgment in Pharmaceutical Case. Northern California Pharmaceutical Association v. United States, (N.D. Calif.). On June 27, 1962, the Ninth Circuit Court of Appeals affirmed the conviction of a pharmaceutical association and one of its officers under Section 1 for fixing the price of prescription drugs by means of a suggested pricing schedule.

The main issues raised by defendants' appeal were whether the drugs were in the flow of interstate commerce at the time of the alleged restraint, and whether the status of pharmacy as a profession exempted their conduct from the Sherman Act. In its opinion the Circuit Court held that the evidence supported the jury's finding that the prescription drugs, which were shipped in interstate commerce directly from the manufacturer to the pharmacist, remained in the flow of interstate commerce until they reached the consumer. The evidence relied on by the Court was the large volume of direct shipments to the pharmacies, the fact that 90 percent of the drugs were sold as manufactured without further compounding by the pharmacist, and the efforts by representatives of the drug manufacturers to induce physicians to prescribe, and pharmacists to order, their drugs. Although there was no evidence of interstate shipments pursuant to "prior orders" by consumers, the Court held that "the undivided attention of manufacturer, warehouseman, wholesaler, and retailer is upon the ultimate consumer and his immediate aides, the physician and pharmacist, and that there is a 'practical continuity of movement' here."

In denying defendants' claim of a professional exemption for pharmacy, the Court held that the indictment charged "an agreement to fix prices in a commodity, to wit, a prescription drug" and therefore the reasonableness of the price regulation or the professional status of the defendants was no defense. The Court concluded that: "We do not decide that every action of professionals is within the reach of the Sherman Act. We do decide that an agreement among professionals to fix a commodity price is."

Staff: Lyle L. Jones, Don H. Banks, Gilbert Pavlovsky and Patrick M. Ryan. (Antitrust Division)

Major Pulpwood Firms Charged With Sherman Act Violation. U.S. v. Packaging Corporation of America, et al. (W.D. Mich.) On July 11, 1962 a grand jury in the Western District of Michigan returned an indictment charging seven major pulp and paper firms and three of their officers with violation of Section 1 of the Sherman Act by anti-competitive activities in the purchase of pulpwood for use in their Michigan mills.

Named as defendants were Packaging Corporation of America and its vice-president and director, Gordon Bonfield; American Excelsior Corporation and its vice-president and director, Edgar Habighorst; Menasha Wooden

Ware Corporation and the manager of its Otsego mill, Roman Suess; Scott Paper Company; Hammermill Paper Company; S. D. Warren Co.; and Abitibi Corporation.

The defendants, who constitute the sole market for Lower Michigan pulpwood, were alleged to have combined to maintain Pulpwood prices at artificially low levels. To accomplish this, they are alleged to have conducted meetings at various locations in Michigan for the purpose of exchanging complete current and future data on their comsumption and pricing of pulpwood and to insure that future price levels would remain non-competitive. Meetings were supplemented by a continuing exchange of information. In addition, it is alleged that the defendants combined to exclude out-of-state firms from competition for Michigan pulpwood.

The companion complaint names six other defendants, each of whom was, to some degree, responsible for the purchase of pulpwood for one of the defendant companies. It seeks to enjoin further meetings, exchange of pulpwood consumption or price information among the defendants, and to enjoin the individual defendants from representing any pulp or paper company in associations concerned with the purchase or use of pulpwood.

These cases parallel the three cases against Upper Michigan and Wisconsin pulp mills which were filed on June 28, 1962 in the Eastern and Western Districts of Wisconsin.

Staff: Joseph J. O'Malley and Kevin L. Carroll (Antitrust Division)

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CIVIL RIGHTS DIVISION

Assistant Attorney General Burke Marshall

Voting and Elections: Civil Rights Acts of 1957 and 1960; Voting Referee Provision / 42 U.S.C. 1971(e) /. U.S. v. Manning, et al. (W.D. La.) This case was filed under the Civil Rights Act of 1957, as amended, against Cecil Manning, Registrar of Voters of East Carroll Parish, Louisiana, and against the State of Louisiana. The complaint alleged that of the 4,183 Negroes of voting age in the Parish, none was registered and that the defendants discriminated against prospective Negro voters by requiring them, as a prerequisite to applying for registration, to be identified by registered voters of their precincts. It was also alleged that white voters would not identify Negro applicants for that purpose. The case was tried in November of 1961. The Court granted the relief sought by the Government. Judge Dawkins found a pattern or practice of racial discrimination and enjoined the registrar from engaging in any act or practice which involves or results in distinctions based on race or color. He specifically enjoined the registrar from refusing to accept Negro applicants' reasonable proof of their identity, and in addition, required the registrar to file monthly progress reports with the Court.

Thereafter, the Registrar of Voters resigned his office. Because of the absence of a registrar, about 78 Negroes applied to the U.S. District Court for an order qualifying them as voters under the procedure established by Title VI of the Civil Rights Act of 1960. The qualifications of 53 of these applicants were tested by Judge Hunter in Monroe, Louisiana, after which he issued an interlocutory order qualifying 28 of them to vote in East Carroll Parish. (A primary election is to be held in that Parish on July 28, 1962.) Subsequently, the defendants obtained a temporary restraining order in the state court enjoining Judge Hunter from issuing any registration certificates and from permitting voting by use of such certificates in the July 28 election. The state proceeding is based on the allegation that the referee procedure of the Civil Rights Act of 1960 is unconstitutional. Removal proceedings are being initiated.

This is the first occasion on which the referee provision of the 1960 Act has been employed.

Staff: United States Attorney Edward J. Shaheen;
Assistant Attorney General Burke Marshall,
Joan Doar, St. John Barrett, David L. Norman
and Frank M. Dunbaugh (Civil Rights Division)

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

FALSE PERSONATION

18 U.S.C. 912 Construed as Defining Two or Three Separate Offenses. United States v. York, 202 F. Supp. 275 (E.D. Va., Feb. 7, 1962). In this case the Court held that 18 U.S.C. 912 has been construed as defining two and even three separate offenses. It must be shown that (1) one assumes or pretends to be an officer or an employee acting under the authority of the United States or any department, agency or officer thereof, and acts as such, or (2) in such pretense the person must demand or obtain any money, paper, document or thing of value. The opinion states that if it is not proved that the defendant "acts as such" pretended or assumed officer or employee, the offense may be proved by showing that in addition to such assumption or pretense the defendant "in such pretended character demands or obtains any money, paper, document, or thing of value." The Court further stated that if the quoted phrase is split into two parts, one based on demanding and the other based merely on obtaining a thing of value, Section 912 may be considered as setting up three separate offenses.

In this case the defendant, a teen-age girl, applied to the Lerner Shop in Norfolk, Virginia for credit. On her application she stated she was employed by the FBI. Credit was granted. When defendant failed to pay her bill the Credit Manager at Lerner's called the FBI to check on defendant's employment and was informed that defendant had never been employed by the FBI.

The Government admitted that defendant had not acted as an agent or employee of the United States but argued that in her pretended character she obtained a thing of value under the second branch of the statute. The Court disagreed with this contention and held that she did not obtain the merchandise in her pretended character since she did not ask for credit because she was an employee of the FBI and she was not acting in the pretended character of an employee of the FBI. Credit had been sought before the question of employment arose.

The Court stated that to sustain the Government's position the statute would have to read that "if a person falsely represents that he is an employee of the United States, and, after having done so, procures from the person to whom such representation was made anything of value he is guilty of a crime. But this is to read out of the statute the required pretense of 'acting under the authority of the . . . agency' and also the words 'in such pretended character.'" Judgment for the defendant was entered.

Staff: Assistant United States Attorney Roger T. Williams (E.D. Va.)

WAGERING
26 U.S.C. 7203, 7262

Motion to Suppress (Rule 41(e), F.R.Cr. P.); Sufficiency of Affidavit in Support of Application for Search Warrant; Validity of Execution of Search Warrant. United States v. Gorman, et al. (E.D. Mich.). On June 15, 1962, Judge Thaddeus M. Machrowicz denied a motion to quash a search warrant and suppress and return certain gambling paraphernalia seized pursuant to the execution of a search warrant. The motion raised two grounds: (1) the insufficiency of the affidavit upon which the search warrant was based (Rule 41(e) (4)), and (2) the execution of the warrant was improper and illegal (Rule 41(e)(5)).

Judge Machrowicz first held that the affidavit was sufficient to issue a search warrant. The affiant stated the following in support of the warrant: (1) reasonable belief that the premises were under the control of defendant and that named gambling paraphernalia were present in violation of law; (2) defendant had been previously advised of the Federal wagering tax laws; (3) defendant's prior criminal record; (4) presence of two telephones and of at least 161 long distance calls to or from a known convicted hand-book operator in another city; (5) regular entry and departure to and from premises by defendant and others, regarding whom confidential reliable information was received that they are engaged in hand-book activities, at normal book-making hours, and (6) no wagering stamp was issued; defendant had not registered and no excise tax returns were filed. The same court (although a different judge) had earlier suppressed a warrant based on an affidavit given by the same affiant on the same day for similar circumstances. The difference in the result, according to Judge Machrowicz, was that the other affidavit did not contain (3), (4) and (5) above. The Judge based his ruling on two recent holdings of the Court of Appeals for the Sixth Circuit, United States v. Woodson, et al. (C.A. 6, May 15, 1962) and United States v. Nicholson (C.A. 6, May 24, 1962). The Woodson case relied on the presence of known gamblers around the premises, and the Nicholson case relied on numerous phone calls from a known bookmaker, to sustain the warrant. The Woodson and Nicholson cases are discussed in the July 13, 1962 issue of the Bulletin (Vol. 10, No. 14, pp. 409 and 410). It appears, therefore, that these factors should be included in an affidavit whenever possible.

The second ground for the motion to suppress was that the execution of the warrant was improper. According to the testimony, the FBI agent knocked on the outer front door of the premises, announced that he was a federal officer with a search warrant and after getting no response for twenty-five or thirty seconds, knocked the door in and entered. Other officers entered by a rear door and an upper window at about the same time or shortly thereafter using force. Defendant was found inside. Judge Machrowicz stated that the period of time an officer must wait after announcing his presence and purpose must be determined by the facts and circumstances of each case, and since only substantial compliance is necessary, breaking into the premises after this period of time cannot be said to be improper.

MAIL FRAUD

Advance Fee Scheme; Testimony of Victims Not Named in Indictment, and of "Eavesdropper." Anspach, et al. v. United States (C.A. 10, June 27, 1962). Appellants were convicted and sentenced to two-year terms to run concurrently on twelve counts of an indictment charging a scheme to defraud by the use of the mails involving an advance fee operation to obtain loans for businessmen.

On appeal, appellants claimed error in the admission of testimony of two witnesses concerning transactions with one of the appellants, although the witnesses had not been named as victims in the indictment. The Court of Appeals held that the evidence was within the charge of the indictment relating to a scheme to defraud certain named victims and "divers other persons to the grand jury unknown"; that the testimony could not be said to be a surprise to the appellants; and that the evidence was important to the prosecution to show the intent and motive of the appellant involved in the transaction.

Appellants also claimed error in the admission of testimony of a postal inspector, who had listened to a conversation of one of the appellants from an adjoining hotel room. No mechanical devices had been employed. On this point the Court held that there was no violation of the Fourth Amendment, since there was no physical intrusion upon the domain of another; that while "eavesdropping in any form carries with it the stigma of impoliteness . . . the prevention and detection of crime is not a polite business"; and that the conduct of the inspector was not considered to violate the compulsion of the Fourth Amendment or to be subject to criticism. The Court relied on the discussion in Silverman v. United States, 365 U.S. 505.

Staff: United States Attorney Lawrence M. Henry;
Assistant United States Attorney Yale Huffman
(D. Colo.)

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CIVIL DIVISION

Acting Assistant Attorney General Joseph D. Guilfoyle

COURT OF APPEALS

FEDERAL TORT CLAIMS ACT

Federal Prisoners May Sue United States for Damages Resulting from Injuries Received as Result of Negligence of Prison Officials. Winston v. United States and Muniz v. United States (C.A. 2, June 28, 1962, en banc). These suits, under the Tort Claims Act, arise out of injuries suffered by plaintiffs while imprisoned in Federal penal institutions. Winston, who became blind, alleged negligence on the part of prison medical officials. Muniz, who was beaten by fellow inmates, alleged negligence on the part of the Warden and other officials in failing to maintain order and discipline. The district court dismissed both cases. After a panel decision reversed the district court, the Second Circuit ordered an en banc rehearing because of a conflict with decisions of two other circuits, /Lack v. United States, 262 F. 2d 167 (C.A. 8); Jones v. United States, 249 F. 2d 86 (C.A. 7)_/ The Court then by a 5-4 vote reversed the district court.

The Court declined to apply the rationale of Feres v. United States, 340 U.S. 135 (1950), in which the Supreme Court held that the Tort Claims Act does not extend to suits by military personnel for injuries incident to their military service. It held that since (1) suits by prisoners were not excluded under any of the enumerated exceptions to the Act, and (2) under like circumstances, private persons would be liable under the applicable state laws (a prisoner may sue his jailer in Indiana, where Winston was confined, and physicians and hospitals are liable to their patients for negligent malpractice) these suits were permitted by the Act.

The four dissenting judges, in an opinion by Judge Kaufman, thought Feres was controlling and would have dismissed the actions. They noted that in United States v. Brown, 348 U.S. 110, the Supreme Court had explained that the decision in Feres had resulted from the special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline and the extreme results which might obtain if such suits were allowed. This rationale, they believed, applied a fortiori to the prisoner--jailor situation.

Staff: Jerome I. Levinson (Civil Division)

Liability of Government Measured by Law of "Place" Wherein Improperly Maintained or Inspected Airplane Is Operating; Findings Liberally Construed to Maintain Judgment if Judgment Is Supported by Evidence in Record. Blumenthal v. United States, (C.A. 3, July 12, 1962). Libellant sued under

the Federal Tort Claims Act for damages arising out of the death of Donald W. Eastridge as the result of the crash of a Marine Corps airplane in the Sea of Japan. The plane was based in Japan. Libellant alleged, and the district court found, negligence (1) in the installation, maintenance, or inspection of the left propeller, the malfunctioning of which resulted in the crash, (2) in allowing the plane restricted to flying freight, to carry passengers over water, and (3) in furnishing erroneous information in Korea during the rescue operations. The district court, applying the Death on the High Seas Act as the applicable substantive tort law, held the Government to be negligent, and awarded damages.

The Court of Appeals affirmed, rejecting the Government's main contention that, as to the acts of negligence alleged and found to have occurred in Japan and Korea, the Government's liability was to be measured by the laws of those countries under Richards v. United States, 369 U.S. 1, and that the application of foreign law brought the matter within the foreign country exception to the Federal Tort Claims Act, 28 U.S.C. 2680(k), as interpreted in United States v. Spelar, 338 U.S. 217. The appellate court held that the improper inspection, installation, and maintenance of the aircraft "could not form the basis for an act of negligence unless the aircraft had been operated. Thus, it is clear that the district court found that the subsequent operation of the aircraft on which the left engine and propeller were improperly installed, maintained, or inspected, constituted culpable negligence. Indeed, the evidence convincingly established that defendant should have known of these derelictions, and that operating the aircraft under such circumstances probably would result in disaster." The Court's conclusion is premised upon its holding that it was not limited to the "specific words" of the district court's findings and conclusions in its review of the judgment, but instead it would construe those findings liberally and find them to be in consonance with the judgment "so long as that judgment is supported by the evidence in the record." Two judges of the Court, in a separate opinion, stated that the doctrine of res ipsa loquitur required the Government to show that the accident was not caused by any act of negligence over the high seas, a burden which they held the Government had not sustained.

Staff: Sherman L. Cohn (Civil Division)

SOCIAL SECURITY ACT

Disability Freeze - Evidence Insufficient on Issue of Claimant's Ability to Perform Gainful Activity. Holbrook v. Ribicoff (C.A. 6, July 6, 1962). Plaintiff appealed from the entry of summary judgment by the district court against him, in his action seeking review of a denial by the Secretary of Health Education and Welfare of his application for a period of disability. The Court of Appeals reversed. It held that in view of appellant's impairments--diabetes, bronchiectasis and pulmonary emphysema--the evidence was insufficient to support the

Secretary's determination that appellant could engage in some gainful activity.

Staff: Stanley M. Kolber (Civil Division)

Disability Freeze - Industrial Studies as Showing Employment Opportunities. Rinaldi v. Ribicoff (C.A. 2, July 3, 1962). This appeal was taken by plaintiff from a summary judgment entered against him by the district court in his action seeking review of a denial by the Secretary of Health, Education and Welfare of his application to establish a period of disability, after he had been forced to give up his job as a truck driver. The Court of Appeals affirmed. It held that the Secretary's determination that appellant could engage in some other form of gainful activity, notwithstanding his back impairment, was supported by substantial evidence. That determination was based upon the citation by the hearing examiner in part, of a 1947 Labor Department Study showing the range of employment opportunities generally available to physically impaired workers in manufacturing industries. The decision here shows that the Second Circuit will accept this type of evidence in satisfaction of its rule enunicated in Kerner v. Flemming, 283 F. 2d 916 (C.A. 2), requiring the Secretary--in order to justify disallowance of disability benefits--to show employment opportunities for those claimants concededly suffering from a physical disability.

Staff: Assistant United States Attorney Eugene R. Anderson (S.D.N.Y.)

UNITED STATES GOVERNMENT LIFE INSURANCE

Insured Veteran May Not Contract Away His Right to Change Beneficiary. Kimball v. United States (C.A. 6, July 6, 1962). The deceased veteran was divorced from his first wife, and, as a part of the separation agreement which was incorporated in the decree, was required to surrender his policy of United States Government Life Insurance to her and to maintain it in force thereafter. Subsequently, the veteran remarried and designated his second wife as beneficiary of the policy. At his death, the first wife unsuccessfully sought the proceeds of the policy from the Veterans Administration and then commenced this action against the United States which then interpleaded the second wife. The district court held that the statutory right to change the beneficiary of the policy at any time (38 U.S.C. 749, 3101(a) could not be effectively contracted away and that, therefore, the second wife was entitled to the proceeds. The Court of Appeals affirmed, approving the opinion of the district court reported at 197 F. Supp. 124.

Staff: Alan S. Rosenthal and Marvin S. Shapiro (Civil Division)

DISTRICT COURT

BANKRUPTCY

Federal Law Applicable to Determine Lien Priorities; Government Granted Priority Under 31 U.S.C. 191 Although Debtor Not in Receivership or Bankruptcy. W. T. Jones, Inc. v. Foodco Realty, Inc. (W.D. Va., June 15, 1962). In this action to foreclose mechanics; liens against an insolvent debtor the United States intervened to assert its lien arising from a deed of trust securing a Small Business Administration loan arranged in participation with a local bank.

The Court held that Federal law controlled the priority question and that under Federal law first in time was first in right. This entitled the Government's claim (including the share of the participating bank, which had been assigned to the United States while the action was pending), to a priority.

In SBA v. McClellan, 364 U.S. 446, the Government was granted priority only in the part of the loan originally furnished by the Government, but in that case it was necessary to apply the Government priority statute, 31 U.S.C. 191, in order for the SBA lien to have priority. In this case, application of Federal law alone gave priority both to the Government's and the bank's share of the funds.

In the alternative, the Court held that even if Federal law were not applicable, the Government's claims would have priority to the extent of the portion furnished by the Government by the application of the priority statute, 31 U.S.C. 191. The Court held that where the debtor was insolvent and had committed an act of bankruptcy by permitting judgments against it to remain unsatisfied for over 30 days, the priority statute was applicable even though there had been no formal assignment of the assets, or commencement of any bankruptcy.

Staff: United States Attorney Thomas B. Mason and Assistant United States Attorney Lawrence C. Musgrove (W.D. Va.); Robert Kaplan, Preston L. Campbell, and William E. Nelson (Civil Division)

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

DEPORTATION

Judicial Review of Order - Denial of Suspension of Deportation; Physical Presence Requirement of 8 U.S.C. 1254(a)(5). Louie King Fong v. INS (C.A. 9, June 27, 1962) This alien has been a continuous resident of the United States since 1943 when he was rescued after the sinking in the Atlantic of a British tanker on which he was a seaman. He was admitted in order to enable him to reship but he failed to do so. In 1960 he was found deportable for having failed to furnish notification of his address in 1953 (8 U.S.C. 1251(a)(5) pursuant to the alien registration provisions of the law.

During his deportation hearing Fong filed a timely application for suspension of deportation under 8 U.S.C. 1254(a)(5). The Special Inquiry Officer, in denying that application and ordering the alien's deportation, found that he had become deportable in 1944 for accepting unauthorized employment ashore and for overstaying as a non-immigrant crewman. Neither of those charges, however, was urged at the hearing.

In denying the suspension application the Special Inquiry Officer interpreted the language of 8 U.S.C. 1254(a)(5) to mean that applicant's ten years of physical presence in the United States must follow the act or status constituting the ground for deportation upon which the finding of deportability is based. In this case the alien could not acquire such presence until 1963 since the only sustainable ground of deportation was the failure to file a 1953 alien address report. A deportation order was entered and the case certified to the Board of Immigration Appeals which sustained the Special Inquiry Officer and affirmed the order.

Thereafter Fong sought a judicial review of the order in the District Court (W.D., Wash.). Before the case came on for hearing P.L. 87-301 was enacted and the litigation was transferred to the Court of Appeals under section 5 of that Act.

With respect to the interpretation of the statutory language, that Court found the case to be one of first impression and that the manner in which the paragraph in question is worded (1254(a)(5)) left it open to two possible constructions. It did not agree with the administrative interpretation and said that to give the language such a meaning would make it appear irrational and lacking in common sense, for the statute does not state that the physical presence must follow the time when the alien last became deportable; that in employing the indefinite articles in the phrase "immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation..." Congress could not have intended to give that paragraph the meaning given to it by the Special Inquiry Officer. If it had such an intent, the Court said, it would have been a simple matter to have made this language read: "immediately following the commission of the act, or

the assumption of the status, constituting the ground upon which deportation is ordered..."

Accordingly, the Court found the holding that the alien is ineligible for suspension of deportation to be invalid and set it aside since he had acquired more than ten years' continuous physical presence in the United States immediately following the acts which made him deportable in 1944. It remanded the case to the Service with directions to modify its order in conformity with the Court's opinion.

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INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Atomic Energy Act; Motions to Stay Preliminary Injunctions Restraining Crew of Ketch "Everyman II" from Sailing Into Nuclear Testing Area of Johnston and Christmas Islands Denied by Court of Appeals Monte Gregg Steadman et al. v. United States (C.A. 9). On June 22, 1962 the United States obtained a preliminary injunction restraining Monte Gregg Steadman, George Bennello and Franklin Zahn and all other persons in active concert or participation with them from entering, or attempting to or conspiring to enter, or remaining in the danger area established by the Atomic Energy Commission encompassing Christmas and Johnston Islands where the United States is currently conducting the Dominic Nuclear Test Series. Following the promulgation of a second regulation by the Atomic Energy Commission enlarging the area of the danger test zone, the United States on July 6, 1962 obtained a second preliminary injunction against appellants restraining them from entering, etc., the enlarged danger area.

Appellants moved for a stay of the two preliminary injunctions pending the hearing of their appeals on the merits. Appellants contended, inter alia, that the regulations proscribing the danger test area, the violation of which would carry no criminal sanction, were invalid as applied to appellants in that under the section of the Atomic Energy Act relied on, the Commission had no authority to issue regulations binding on persons not within its internal affairs and in that the regulations, which prohibited United States citizens from entering the danger area, abridged the guarantee of freedom of the seas.

Following oral argument on July 9, 1962 the Court of Appeals on July 10, 1962 denied the motions to stay.

Staff: United States Attorney Herman T. F. Lum (D. Hawaii) and Benjamin C. Flannagan (Internal Security Division).

Atomic Energy Act; Contempt of Court by Crew of Ketch "Everyman II" in Entering Enlarged Nuclear Test Area in Violation of Temporary Restraining Order. United States v. Monte Gregg Steadman et al. (D. Hawaii.) On June 28, 1962, the United States obtained a temporary restraining order enjoining Monte Gregg Steadman, George Bennello and Franklin Zahn from entering, attempting to enter or conspiring to enter an enlarged danger area established by the Atomic Energy Commission in connection with the current Dominic Nuclear Test Series which extended danger test area covered a circle of 530 miles radius at the surface from Johnston Island in the Pacific. On June 29, 1962, the defendants, who were then in the Ketch "Everyman II" anchored just outside the enlarged danger area, were served with the order. They immediately sailed into the prohibited area and were ordered to show cause why they should not be adjudged in contempt of court. On July 14, 1962 the District Court held the defendants in contempt and fined Steadman $600 and Bennello

and Zahn each $200. Upon their refusal to pay, they were ordered to jail until the fines are paid.

Staff: United States Attorney Herman T. F. Lum (D. Hawaii.)

Forfeiture of Veterans Benefits. Robert G. Thompson v. John S. Gleason, Jr., Administrator of Veterans Affairs (C.A.D.C.) Thompson, one of the national leaders of the Communist Party who was convicted in the Dennis case in 1949 for violation of the Smith Act, filed suit seeking restoration of his veterans disability compensation payments which had been forfeited by the Administrator under 38 U.S.C. 3504 on the ground that Thompson had rendered assistance to the enemy during the Korean conflict. The lower court holding that the finality statute 38 U.S.C. 211(a) barred judicial review of the Veterans Administration action, granted the Government's motion for summary judgment and Thompson appealed. (See Bulletin Vol. 8, p. 487). On appeal, the primary question concerned the proper interpretation of the statutory phrase "rendering assistance to the enemy". The Government's brief presented three possible constructions of the disputed phrase: (1) that it referred to the offense described by Article 104 of the military code; (2) that Congress left to the Administrator the power to determine what conduct amounted to "rendering assistance to the enemy"; and (3) that the phrase included all offenses defined as crimes by a statute, which can be committed in time of war and which render assistance to the enemy. The appellant Thompson urged construction (1), the Administrator had adopted construction (2), and the Department of Justice supported construction (3). The Court of Appeals speaking through Judge Prettyman agreed with the Department that appellant's view of the phrase was too narrow and that the broad interpretation adopted by the Administrator raised serious constitutional questions. The Court then adopted the Department's interpretation of the statute and remanded the case for a redetermination by the Administrator in view of that interpretation. Appellant had argued that the statute constituted a bill of attainder, but the Court refused to so hold, citing Fleming v. Nestor, 363 U.S. 603. The Government had urged that the Court had no jurisdiction because the Tucker Act and the veterans' laws deny such jurisdiction, and that the suit constituted a suit against the United States without its consent. The Court rejected this contention relying on their decision in Wellman v. Whittier, 259 F. 2d 163.

Staff: Robert L. Keuch (Internal Security Division) argued the appeal, with him on the brief were Kevin T. Maroney and George B. Searls.

* * *

LANDS DIVISION

Assistant Attorney General Ramsey Clark

Condemnation; Adequacy and Review of Findings of Fact of Commissioners Appointed Under Rule 71A(h), F.R.Civ.P.; Necessity for Reporter's Transcript; Bias of Commissioners; Separate Valuation of Gravel. United States v. Jesse A. S. Lewis, et al.; United States v. Clemmie Gill, et al.; United States v. A. R. Benning, et al.; United States v. Jack T. Morrison, etc., et al.; United States v. V-R Ranch Company, et al. (C.A. 9, July 10, 1962). These five cases were in the Southern District of California and were before the same district judge. Because of the similarity of issues on appeal, they were argued and decided together. The properties taken were for use in connection with two dam and reservoir projects. Commissioners under Rule 71A(h), F.R.Civ.P., were appointed to determine just compensation, over objection of the Government. There were separate hearings in all cases, except in Benning and Morrison. In the Lewis and Gill cases, reports were filed which were little more than jury verdicts. In the other three cases, long reports were filed which contained a recital of irrelevant matters. The District Court overruled the Government's objections to the various reports and approved and confirmed each report.

The Court of Appeals stated that it agreed with the principles expressed in United States v. Cunningham, 246 F.2d 330 (C.A. 4, 1957). It reversed and remanded each case with instructions that the judgments be vacated. In the Lewis and Gill cases, the Court held that the findings were inadequate, and ordered that they be referred back to the commission for findings or clarification and, when that was done, the District Court was ordered to conduct further hearings on the objections heretofore made by the Government.

In these two cases the Court stated that prior association of the commissioners with expert witnesses for the landowners "would not as a matter of law constitute implied bias either in the case of a judge or a juror. Nor can it be said that actual bias has been demonstrated beyond reasonable possibility of disagreement." The Court found no abuse of discretion in the failure of the district court to remand the matter for hearing before the other commissioners on this ground.

The Court also held that the valuation which was arrived at by ascertaining the going price of gravel per ton, multiplying it by the estimated number of tons in the ground, and adding this figure to an appraisal of the property for agricultural purposes, was erroneous. The Court stated further that the commission must show what the highest and best use of the property is, the value it attached to the property as ranching property, the value, if any, which it attached to the property or to any portion of it by virtue of the gravel deposit, the evaluation methods by which it found both values, and what, if any, other elements of value were taken into consideration.

In the other three cases, the Court of Appeals held that it was not an abuse of discretion for the District Court to refuse to allow the Government an extension of time to obtain the transcript of the proceedings before making objections to the reports. It held that the reports in these cases were sufficient. It stated that generally findings should show how material factual disputes relating to value were resolved, but that this requirement relates to a showing of the result and not to detailed itemization of the proof relied upon in order to reach that result. The Court held that it is not necessary for the district court to be supplied with a transcript in order to ascertain whether the commission's findings are clearly erroneous, and stated: "It is the function of the district court to review the commission's report and findings in the light of objections made to it and to resolve the issues presented by such objections. It certainly need not, sua sponte, conduct its own research for error." However, the Court stated that due to the Government's position that regional transition of the property from agricultural to residential is still too remote from these particular lands, and because of the disputed evidence as to an adequate water supply, the existence of present willing buyers, and other matters concerning such use of the property, the transcripts in these cases were necessary for the District Court to determine whether or not the findings in this regard are clearly erroneous. The Court held that the District Court's action in ruling upon the Government's objections without awaiting the transcripts, when the Government had ordered them, was an abuse of discretion. These three cases were reversed and the matters remanded with instructions that the judgments be set aside and that further hearings be conducted upon the objections of the Government as heretofore filed.

Staff: Roger P. Marquis and Elizabeth Dudley (Lands Division).

Condemnation: Adequacy of Commission's Report; Lack of Prejudicial Error in Admission of Valuation Formula; Admissibility of Managerial Skill as Valuation Factor. United States v. Merz, et al. (C.A. 10, July 7, 1962). In this condemnation action, the landowners' expert over objection used a complicated formula, developed by him, for evaluating the damage to land by the taking of clearance easements, and considered managerial skill of the individual landowners. The commission's report recited, inter alia, the estate taken, that the award was the difference between the market value of the lands before and after the taking, and that the parties stipulated that the highest and best use of the lands involved was for agricultural purposes. The award was within the range of the Government's and landowners' valuation testimony. The Government challenged the sufficiency of the report on the grounds of the commission's failure to make specific findings as to the bases for the award and to show the application of pertinent legal principles. The district court overruled the objections.

The Court of Appeals affirmed, declaring that "/t/he extent of exactness which is required in findings depends upon the nature of the matter involved." Distinguishing cases requiring commissions to make detailed findings, the Court stressed the absence in this case of "numerous elements

to be considered in arriving at just compensation" and stated that "[t]he issues in this case are not complicated, however, and the findings are entirely adequate to permit us to review them and conclude that they are not clearly erroneous." The Court conceded, arguendo, the formula's irrelevancy, but concluded that prejudicial error had not been demonstrated because "the commission did not consider the formula testimony in arriving at its awards." The testimony concerning "managerial skill which had contributed to the future profitability of the property" was held to be "admissible as a factor in determining the value of the property taken." The decision as to whether certiorari will be sought has not yet been made.

Staff: Raymond N. Zagone (Lands Division).

Tort Claims: Damage Caused by Vibration from Testing of X-15 Rocket Motors; Exclusion of Punitive Damages; Government Contractor Does Not Enjoy Sovereign Immunity. Berg v. Reaction Motors Division Thiokol Chemical Corp. (Sup.Ct. N.J.). Reaction manufactured and tested the X-15 rocket engine under contracts with the Air Force. Property owners in the vicinity recovered $25,605 actual damage representing the costs of repairs, and punitive damages of $75,000.

The Supreme Court of New Jersey affirmed the actual damage award but reversed the award of punitive damages. It first held, after considerable discussion, that the rule of liability without fault for extra hazardous activity such as blasting applied here. It next held that the reasonable cost of repairs was the proper measure of damage. It rejected the punitive damage award on the ground that the evidence which it detailed at length did not show deliberate or reckless disregard of the plaintiffs' rights.

It rejected defendant's contention that, absent negligence, it was not liable for damage resulting from the performance of its contract with the United States. It said "For present purposes we may assume that if the tests had been conducted by the Government itself, the plaintiffs' damage claims would be forestalled by the Government's sovereign immunity and that the Federal Tort Claims Act would be restrictively construed as insufficient to cover them." Here, the Court said, the suit was against the private contractor, not the sovereign. It noted that there was nothing to show that the Government had prescribed the site of the tests or the location of the test stands, or the manner of conducting the tests and the contract was not even in evidence. It held that on this record the defendant was in no position to rely on the defense of sovereign immunity.

Staff: Roger B. Marquis (Lands Division)
for the United States as amicus curiae

Indians; Constitutionality of Klamath Termination Act; Validity of Trust Created by Secretary of Interior. Furman Crain, Sr. v. First National Bank of Portland, United States, Intervenor (D. Oregon, June 21, 1962.) By the Act of August 13, 1954, 68 Stat. 718, Congress provided for termination of federal supervision over the Indians of the Klamath Reservation in Oregon. In doing so, it provided that the Indians could elect to remain with the tribe or could withdraw and receive their shares of the tribal assets in cash. Congress further provided that as to the withdrawing members, the Secretary of the Interior should decide which might be in need of further assistance in managing their affairs and should make provision for their protection through the creation of a trust or otherwise. Any Indian found to be in need of assistance could appeal to a naturalization court.

Plaintiff, a withdrawing member, filed an action alleging that the Secretary had found him to be in need of assistance and had conveyed his share of the tribal assets to a private trustee. He alleged that the Klamath Termination Act was unconstitutional in that it violated his civil rights by restricting his use of his share of the tribal assets, solely because he was an Indian, which amounted to a taking of his property without due process. He also alleged that the terms of the trust were not authorized by the Act. The constitutional question was certified to the Attorney General pursuant to 28 U.S.C. 2403 and the United States intervened.

The Court held that the United States had broad powers with respect to its Indian wards and their property. The manner and time of termination of this relationship presents a political and not a judicial question. Congress could provide for termination of federal supervision and at the same time provide for some protection after termination for those Indians found to be in need of further assistance. The Court reviewed the terms of the trust under which plaintiff's property was conveyed to the private trustee, particularly the provision permitting the trustee to terminate the trust when it found the beneficiary capable and willing to manage his own affairs, and found all provisions of the trust authorized by the Klamath Termination Act.

Staff: Acting United States Attorney Sidney I. Lezak (D. Ore.)

National Forest Lands; Railroad Land Grants; Removal of Timber; Application of Federal Law; Estoppel. United States v. State Box Company (N.D. Cal., May 23, 1962). In the Act of July 1, 1862, 12 Stat. 489, as amended, the Central Pacific Railroad Company was granted the timber on all alternate section "mineral lands" within ten miles of its right-of-way. In 1906, the railroad company conveyed the timber on a tract of land within such a section to two individuals. By 1912, this interest had been acquired by the Central Mill Company, a California corporation. However, only a few trees were ever cut by the timber purchasers. In 1902, the land was withdrawn for national forest purposes and is now within the confines of the Tahoe Forest Reserve. The United States, through the Forest Service, sold the timber on this tract

in 1937, but the purchaser did not go through with his contract. The timber was again sold by the Forest Service in 1955 at public sale. This time the purchaser, the Grizzly Creek Lumber Company, removed approximately $90,000 worth of timber.

Shortly thereafter, the State Box Company, the sole surviving stockholder of the Central Mill Company, when it dissolved in 1944, filed (a) an action in tort in a state court against the Grizzly Creek Lumber Company, (b) a suit against the United States in the Court of Claims for the alleged "taking" of the timber and (c) a suit in the United States District Court for the District of Columbia against the Secretary of Agriculture to enjoin him from selling or removing the remaining timber on the land. This quiet title suit was then instituted in the United States District Court for the Northern District of California, seeking an adjudication that the United States owned not only the remaining timber but also had title to the timber removed by its purchaser. The defendant contended that under California law the grantee in a timber deed is not required to remove the timber until a specific demand that this be done has been made by the owner of the fee. No such demand had ever been made. The United States contended that the law of California should not be applied to interpretation of a federal grant and that the general common-law principle should be applied which requires removal of timber within a reasonable time. It was also contended that the defendant was estopped to assert title to timber.

On May 23, 1962, Judge Halbert handed down an opinion sustaining the Government's contentions. The Court held in particular that the common-law rule applied and that the defendant and its predecessors in title had failed to remove the timber within a reasonable time even though adequate markets and adequate road facilities for removal had existed at various times since 1902. The Court also upheld the Government's position on the estoppel issue.

The 1862 grant to the Central Pacific (and to the Union Pacific) was unusual in that it conveyed the timber on mineral lands within a specified distance from the right-of-way. All other railroad grants made after that time excluded mineral lands entirely. There are a number of other tracts ofland in this same general area in California from which timber granted by the same Act has not been removed. It is believed that this case will effectively establish the rights of the United States in all such lands.

Staff: Assistant United States Attorney Charles E. Collett (N.D. Calif.); Thos. L. McKevitt (Lands Division).

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CRIMINAL TAX MATTERS
Appellate Decisions

Evasion; Willful Attempt to Evade Tax; In Net Worth Prosecution, Where Defendant Was on Cash Basis, Trial Court Correctly Refused to Allow Proof of Defendant's Accounts Payable to Reduce His Net Worth; Judgment of Conviction Reversed in Part Due to Errors in Government's Net Worth Statement. George W. Vardine v. United States (C.A. 2, July 11, 1962). Defendant was convicted by a jury on two counts of willful evasion of income taxes for the years 1953 and 1954. The Government used the net worth method to prove the amount of unreported income. The conviction was affirmed by the Court of Appeals as to the year 1954, but reversed as to 1953.

Defendant operated, as a sole proprietorship, an industrial laundry business which rented and laundered overalls and uniforms. At the trial, defendant attempted to offer proof of his accounts payable for overalls and uniforms purchased which would have reduced his net worth. In upholding the trial court's rejection of such proof, the Court of Appeals noted that the purpose of the net worth computation is not "to determine the taxpayer's true worth but rather to verify the accuracy of his income tax return for a particular year." Accordingly, the Court held that where, as here, taxpayer is on a cash basis, and therefore disregards accounts payable in reporting income on his annual tax return, the Government must also disregard accounts payable in verifying reported income through the net worth computation. See also Scanlon v. United States, 223 F. 2d 382, 389 (C.A.1).

The Court of Appeals based its reversal for the year 1953 on two errors which it found in the Government's net worth statement for that year. The first error concerned the figure used by the Government to show the year-end bank balance in defendant's checking account. The Government failed to reduce this figure by the amount of checks outstanding at the end of each prosecution year. See Clark v. Commissioner, 234 F. 2d 745 (C.A. 3). The second error concerned the figure used for the machinery and equipment account. During the prosecution years defendant purchased new machinery and trucks for his business. As part payment of the purchase price, he traded in used machinery and trucks. The Government included the new equipment at its cost price in the net worth statement, instead of reducing the cost price by the amount of gain realized on the trade-in, in accordance with Section 1031 of the Internal Revenue Code of 1954. The net result of both of these errors was to erroneously increase the defendant's net worth in 1953 by $1,999. While this amount was small in comparison to the over-all 1953 bulge of

$13,922 shown on the Government's net worth statement, the Court of Appeals felt it necessary to reverse as to that year since the jury could have based its verdict solely on the erroneous net worth bulge of $1,999.

Staff: United States Attorney Justin J. Mahoney and Assistant United States Attorney Dante M. Scaccia (N.D. N.Y.); Joseph M. Howard, Norman Sepenuk (Tax Division)

Concealment of Property Subject to Levy: Indictment Charging Unlawful Concealment of Property Subject to Levy Proved by Evidence Showing Making of Book Entry Falsely Reflecting Change in Right to Possession of Property. United States v. Rudolph R. Bregman and Milton H. L. Schwartz (C.A. 3, July 2, 1962). A one-count indictment charged defendants with violating Section 7206(4), Code of 1954, by removing and concealing eighteen Strick Trailers upon which a levy was authorized by Section 6331, Code of 1954.

Bregman was president of Rudolph Motor Service, Inc. and Schwartz was Rudolph's counsel. In the fall of 1953 Rudolph owed various federal taxes and revenue agents demanded their payment. Rudolph then had possession of, and record title to, the 18 Strick Trailers referred to in the indictment. Bregman and Schwartz, acting for Rudolph, promised to pay the taxes in arrears and urged the Government not to file liens against Rudolph's property, including the trailers. The promise to pay was not fulfilled, and on October 30, 1954, Bregman made false entries in Rudolph's records showing that the trailers had been "repossessed" as of that date. The jury found Bregman guilty, and failed to reach a verdict as to Schwartz. Bregman brought this appeal, urging that (1) the making of a false book entry which changes the right to possession does not violate Section 7206(4); and (2) if it does, the proofs are at a fatal variance with the indictment, for he was charged with removal and concealment of the trailers, not with making a false book entry with respect to them.

As to the first ground, the Court held that Section 7206(4) is not limited merely to physical removal and concealment. The cases cited by Bregman which arose under the predecessor of this section were not in point, for the present section has extended the prohibition to acts committed to avoid levy. The Court also rejected his contention that the trailers were not Rudolph's "property" in the common law sense, because Rudolph did not have the right to dispose of them. Under the Pennsylvania Uniform Commercial Code Rudolph had this right, and the trailers could be reached by levy, and so the false entries violated Section 7206(4).

As to Bregman's second contention, the Court held that "it must be borne in mind that the word 'conceal' does not mean merely to secrete or hide away. It also means, 'to prevent the discovery of or to withhold knowledge of'." United States v. Schireson, 116 F. 2d 881, 884 (C.A. 3). Thus there was no variance between the indictment and the proof.

This case is the first Court of Appeals decision under Section 7206(4) of the 1954 Code, and it effectuates the intent of Congress to extend this crime to encompass more than mere physical concealment.

Staff: Assistant United States Attorneys J. Shane Creamer and Edmond E. DePaul (E.D. Pa.)

CIVIL TAX MATTERS
District Court Decisions

Evidence; Taxpayer's Motion to Suppress Use in Evidence of Property Illegally Obtained by Third Party Not Acting Under Color of Official Authority Denied. Cosmos Geniviva and Helen V. Geniviva v. John N. Bingler, District Director (W.D. Pa., October 9, 1961). Plaintiff's residence was illegally entered by a burglar and money in possession of the plaintiff was stolen. The thief was apprehended and the stolen money was turned over to local police officials. The Court had, at a previous hearing, denied plaintiff's motion to quash an Internal Revenue Service summons served on the local officials and had ordered the property produced for inspection by the Internal Revenue Service Agents and then returned to plaintiff-taxpayer.

The Court, in denying plaintiff's motion to suppress the use of the property as evidence, held that evidence obtained illegally by persons not acting in concert with either state or federal officials did not come within the rule of exclusion of evidence obtained by an unreasonable search and seizure in violation of the Fourth or the Fourteenth Amendment.

Staff: United States Attorney Joseph S. Ammerman (W.D. Pa.).

Liens; Federal Tax Liens Held Subordinate to Labor and Materialmen's Claims to Retained Fund Under Wisconsin Statute. Marquette Cement Manufacturing Co. v. Schmidt Ready Mix, Inc., et al. (E.D. Wis., May 18, 1962). Plaintiff brought this action to foreclose its lien as a materialman against certain funds in the hands of the defendant Village of Brown Deer and owing to the principal contractor, the defendant Schmidt Service, Inc. These funds had been retained by the village until the completion by the principal contractor of certain road projects. The United States was named a party-defendant because it had asserted liens for withholding and FICA taxes against Schmidt Services. The United States was dismissed as a party-defendant and subsequently filed a complaint in intervention. The United States contended that its liens had priority in the funds paid into the court by the village and that it was entitled to a judgment against the defendant American Insurance Co., the surety, for withholding and social security taxes withheld by the surety when it was completing the project. The Court held that state law established property rights in laborers and materialmen and citing Aquilino v. United States, 363 U.S. 509 and United States v. Durham Lumber Co., 363 U.S. 522, held that under the Wisconsin statute the claims of the materialmen took priority over the tax liens and

that the rights of the general contractor are subject to these rights. The Court also held that the United States' claim against the surety was a claim for taxes and not wages and therefore the claim could only attach to the property and rights to property of the taxpayer. The Court also said that claims for taxes were not included within the purview of the Wisconsin statute governing this situation. The Court held that the claim of the United States for taxes against amounts due to Schmidt Ready Mix, Inc., from Schmidt Services was subject to the federal tax lien. The Court established a list of priorities among lienholders and declared that attorneys' fees should await the payment of monies to the lienable claimants.

The question of appeal is presently under consideration.

Staff: United States Attorney James B. Brennan and Assistant United States Attorney Philip L. Padden (E.D. Wisc.)

Liens; Relative Priority of Federal Tax Liens; State's Lien for State Withholding Taxes Assessed Prior to Date of Assessment of Federal Taxes Entitled to Priority Under Rule "First in Time, First in Right." United States v. Cutting and Trimming, Inc. (D. Vt., June 6, 1962), 9 A.F.T.R. 2d 1762. The United States brought suit on March 10, 1961, to foreclose its liens for withholding and FUTA taxes due and owing from taxpayer. The Government was seeking in particular to foreclose its liens on a sum of money belonging to the taxpayer which was deposited in a bank. The State of Vermont was joined as a party defendant, in addition to the bank, because it asserted a claim against the fund deposited with the bank as the result of an assessment for state withholding taxes.

The facts involved were not disputed. The State made an assessment and demand on taxpayer for a state withholding tax on October 21, 1958. The State filed notice of lien for the tax on October 30, 1958, pursuant to 32 U.S.A., Section 5765. The pertinent provisions of the Vermont Statutes Annotated dealing with state withholding taxes were admittedly copied from and are almost identical in language to Sections 6321, 6322, and 6323 of the Internal Revenue Code of 1954. The assessment for the federal tax was made on February 6, 1959 (incorrectly stated in the Court's decision as February 9, 1959). Notice of federal tax lien was filed on June 2, 1959, pursuant to 26 U.S.C. 6323. There were other assessments made by both the State and the Government but they were not involved in the instant issue since the amount on deposit with the bank was less than the total of the first assessments made by the State and the Government. The State instituted suit in a state court against taxpayer on May 21, 1959, and was awarded judgment on October 23, 1959.

Taxpayer, in its answer to the Government's complaint, admitted liability for federal taxes to the extent of the amount on deposit with the bank. The Government thereafter filed motions for judgment on the pleadings against the State and the taxpayer. In its argument on the motions the Government contended that it was entitled to the money deposited with the bank under the decision in United States v. City of New Britain, 347 U.S. 81 (1954), because on

the date the federal taxes were assessed, the lien for the state withholding tax, which had been assessed in October, 1958 was general and inchoate, did not attach to any specific property, and therefore did not meet the New Britain test that a lien to be choate must identify not only the lienor and the amount of the lien but the property subject to the lien. In addition, since the State was not one of the classes of claimants protected under 26 U.S.C. 6323 against an unfiled federal tax lien, the effective date of the Government's lien was the date on which the tax was assessed and since the State's lien was inchoate at that time and because the State did not obtain judgment until after the date notice of federal tax lien was filed the Government was entitled to priority. The State argued that the pertinent sections of the Internal Revenue Code did not establish any priority in the Government, that the test of choateness was only to be applied in cases of insolvency under 31 U.S.C. 191, and that since there was no evidence of insolvency in the present case, the applicable test was that set forth in New Britain, namely, "first in time, first in right." In view of the fact that both the lien of the State and the Government were general in nature, the State urged it was entitled to priority since its tax was assessed prior to the federal tax.

The Court agreed with the State's contention and held that since both liens were similar and created under almost identical statutes and further since both parties were sovereigns, the date of assessment of the respective taxes, were the dates on which the liens became effective. Since the State's tax was assessed prior to the federal tax, it was first in time and therefore first in right. The Court in making its decision said "to hold that the State cannot do what the United States can do under statutes using identical language simply doesn't make sense."

The Court accordingly entered judgment for the State and ordered that the funds retained by the bank be paid to the State and that the bank be thereafter discharged as a defendant in this case. No decision was made as to the liability of the taxpayer. No decision as to appeal has been made by the Government.

Staff: United States Attorney Joseph F. Radigan and Assistant United States Attorney John H. Carnahan (D. Vt.); John G. Penn (Tax Division)

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