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Vol. 10 August 10, 1962 No. 16

UNITED STATES ATTORNEYS

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ADMINISTRATIVE DIVISION

Administrative Assistant Attorney General S. A. Andretta

MEMOS AND ORDERS

The following Memoranda and Orders applicable to United States Attorneys' Offices have been issued since the list published in Bulletin No. 12, Vol. 10 dated June 15, 1962:

MEMO	DATED	DISTRIBUTION	SUBJECT
233,Supp.1	6-7-62	U.S. Attorneys & Marshals	Airline Penalties for No-Shows.
317	6-25-62	U.S. Attorneys & Marshals	Report of Outstanding Obligations for 1962.
318	7-23-62	U. S. Attorneys	The United States Attorneys are hereby instructed that, before authorizing the filing of a complaint or presenting any matter to a grand jury relating to a violation of 18 U.S.C. 1001 based upon any false statement or representation, oral or written, volunteered or otherwise, made to any agent or investigator of any department or agency of the Government, permission to so proceed should first be obtained from the appropriate Assistant Attorney General having jurisdiction of the case in which the false statement was made.

ORDER	DATED	DISTRIBUTION	SUBJECT
273-62	6-14-62	U.S. Attorneys & Marshals	TITLE 28--JUDICIAL ADMINISTRATION, Chapter I--Dept. of Justice, Part O--ORGANIZATION OF THE DEPT. OF JUSTICE, Subpart M--Lands Div., Delegation of Authority to the Asst. Atty. Gen. in charge of Lands Div. with respect to conveyances for Public-Airport Purposes.

ORDER	DATED	DISTRIBUTION	SUBJECT
274-62	6-14-62	U.S. Attorneys & Marshals	Title 28--JUDICIAL ADMINISTRATION, Chapter I--Dept. of Justice, Part 0--Organization of the Dept. of Justice, Amending Provisions respecting Delegations of Authority for Allowance of Subsistence expenses.
275-62	7-10-62	U.S. Attorneys & Marshals	TITLE 28--JUDICIAL ADMINISTRATION, Chapter I--Department of Justice, PART 0--ORGANIZATION OF THE DEPARTMENT OF JUSTICE--MISCELLANEOUS AMENDMENTS TO THE DEPARTMENT OF JUSTICE ORGANIZATION ORDER (NO. 271-62).
276-62	7-11-62	U.S. Attorneys & Marshals	TITLE 28--JUDICIAL ADMINISTRATION, Chapter I--Department of Justice, PART 0--ORGANIZATION OF THE DEPARTMENT OF JUSTICE--Subpart B--Office of the Attorney General - AMENDMENT TO THE DEPARTMENT OF JUSTICE ORGANIZATION ORDER (NO. 271-62) DELEGATING TO THE DEPUTY ATTORNEY GENERAL, THE SOLICITOR GENERAL, AND THE ASSISTANT ATTORNEY GENERAL IN CHARGE OF THE OFFICE OF LEGAL COUNSEL THE AUTHORITY OF THE ATTORNEY GENERAL TO APPROVE EXECUTIVE ORDERS AND PROCLAMATIONS AS TO FORM AND LEGALITY.
277-62	7-25-62	U.S. Attorneys & Marshals	TITLE 8--ALIENS AND NATIONALITY, CHAPTER I--IMMIGRATION AND NATURALIZATION - SUBCHAPTER A--GENERAL PROVISIONS PART 3--BOARD OF IMMIGRATION APPEALS - AMENDMENT OF REGULATIONS RELATING TO MOTIONS TO REOPEN OR RECONSIDER MATTERS BEFORE THE BOARD OF IMMIGRATION APPEALS.

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ANTITRUST DIVISION

Assistant Attorney General Lee Loevinger

CLAYTON - SHERMAN ACT

Complaint Under Sherman and Clayton Acts. United States v. MCA Inc. (S.D. Calif.) The complaint in this case was filed July 13, 1962, naming MCA Inc. as defendant and certain of its subsidiaries as co-conspirators. The Screen Actors Guild and the Writers Guild of America, West, Inc. were also named co-conspirators. The complaint charges a conspiracy whereby the defendants entered into contracts in violation of Sections 1 and 2 of the Sherman Act by restraining and monopolizing the talent agency business and the production and sale of television programs. The complaint also charges that MCA Inc. violated Section 7 of the Clayton Act by acquiring Decca Records, Inc. and Universal Pictures Co. Inc., a subsidiary of Decca Records. On July 13, 1962, the Government obtained a temporary restraining order valid until July 23, 1962, enjoining MCA Inc. from disposing of certain of its talent agency business. The affidavit supporting the motion for the temporary restraining order alleged that such disposal would remove the assets from the jurisdiction of the court and prevent the Government from obtaining adequate relief assuming it won the case on its final determination.

On July 16, 1962, the Government filed a motion for a preliminary injunction seeking to continue the temporary restraining order from July 23, 1962, until the trial of the case and also seeking to enjoin MCA Inc. from merging the assets of Decca and Universal with its own assets, pending final determination of the case. On July 16, 1962, the defendant filed a motion to vacate the Government's temporary restraining order and this was argued the same day. On July 17, 1962, the court denied defendant's motion and left the temporary restraining order in effect.

Following four days of negotiation, the Government and the defendant entered a stipulation under which MCA Inc. agreed to cancel its talent union franchises throughout the world, and to cancel all of its talent representation contracts and package agency contracts, thereby going out of the talent agency business.

The hearing on the motion for the preliminary injunction, insofar as it pertains to mingling of assets, has been continued from July 23, 1962, until August 27, 1962, under a stipulation which provides that in the interim the assets concerned will not be mingled. The defendant has been granted until August 20, 1962, to answer the complaint.

Staff: Leonard R. Posner and Malcolm D. MacArthur (Antitrust Division)

Court Rules For Government In Gas Case. United States v. American Natural Gas Company, et al. (N.D. Ill.) On July 24, 1962, Judge Will handed down a memorandum opinion denying the motions of the corporate and individual defendants to dismiss the indictment on primary jurisdiction grounds, and denying the motions of the individual defendants to dismiss the indictment on

the ground that the indictment did not charge an offense cognizable under Sections 1 and 2 of the Sherman Act.

Judge Will found the Supreme Court decision in the Wise case dispositive of the individual motions to dismiss. With respect to the motions of all defendants to dismiss on primary jurisdiction grounds, the Court stated that "the natural gas industry is not pervasively regulated..." citing California v. Federal Power Commission, et al., 369 U.S. 482. In addition, Judge Will held that the concerted activities charged in the indictment were the type of practices customarily condemned in Sherman Act cases.

Staff: Fred D. Turnage (Antitrust Division)

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CIVIL DIVISION

Acting Assistant Attorney General Joseph D. Guilfoyle

COURT OF APPEALS

CHATTEL MORTGAGES

Chattel Mortgage of Small Business Administration Void For Failure to Comply With State Bulk Sales Act. Ernest R. Utley v. United States (C.A. 9, June 28, 1962). Plaintiff, a trustee in bankruptcy, brought this suit to avoid a secured claim of the United States on the ground that its chattel mortgage was void for failure to comply with the applicable provisions of the California Bulk Sales Act, California Civil Code, §3440.1. Prior to bankruptcy, the now bankrupt corporation was engaged in the business of furnishing precision machining of metal stock and castings. On June 25, 1956, the corporation executed and delivered to the SBA its promissory note, together with a chattel mortgage on all its personalty. On June 28, 1956, the SBA recorded a notice of intention to chattel mortgage, stating that the consideration therefore would be paid on July 16, 1956; the mortgage was recorded the following day. On July 5, 1956, the notice was published. The loans were made in the form of five checks to the corporation and each of five creditors. The referee in bankruptcy held the chattel mortgage void for failure to comply with the Bulk Sales Act which required a chattel mortgage of a machinist to be recorded and notice given of the character of the property mortgaged and the time and place the purchase money or consideration is to be paid. The district court reversed the referee's ruling, finding that the bankrupt was not a machinist within the meaning of the Act.

On appeal, the court of appeals reversed the district court and held that a machine shop operator such as the bankrupt was a machinist within the meaning of the Act. Moreover, the court ruled that, by failing to state that the consideration would be paid the mortgagor in the form of checks drawn on the Treasury of the United States, the notice of intention to mortgage was defective. The court reasoned that the purpose of the notice requirement was to allow previous unsecured creditors to attach the property or garnish the consideration to be paid. Since United States checks may not be subject to attachment, and were, moreover, made out jointly to the bankrupt and his creditors, a prior unsecured creditor was not properly notified of the transaction. In addition, the court found that the execution, delivery and recordation of the chattel mortgage prior to the actual consummation of the transaction might mislead creditors by causing them to forego execution or might endanger them by imposing upon them the burden of establishing the mortgage invalid for lack of consideration.

Staff: United States Attorney Francis C. Whelan, Assistant United States Attorney Donald A. Fareed, Assistant United States Attorney Robert A. Smith (S.D. Calif.)

EVIDENCE

Accident Report Prepared Pursuant to Requirements of Federal Employees' Compensation Act Admissible Under Federal Business Records Act. United States v. New York Foreign Trade Zone Operations, Inc. (C.A. 2, June 20, 1962). The United States brought this action as assignee of a personal injury claim of one of its employees. An official report of the accident giving rise to the injury was prepared by the employee's supervisors as required by the Federal Employees' Compensation Act. The report recited that the injury was due to the icy condition of defendant's pier. The report was offered in evidence and accepted, over objection, under the exception to the hearsay rule provided by the Federal Business Records Act. Subsequently, the trial court reversed its prior ruling and excluded the report. The jury returned a verdict for the defendant and the Government appealed. The court of appeals reversed and remanded the case for a new trial, holding that the exclusion of the report was prejudicial error. The report required by the Employees' Compensation Act, the court reasoned, was made in the ordinary course of business for the primary purpose of determining whether the employee was entitled to compensation; its possible use in litigation was, at most, a secondary consideration. Therefore, the trial court was not permitted to make an independent evalution of the trustworthiness of such a report, but was required to accept it into evidence, subject, of course, to comment and cross-examination. In a separate concurring opinion, Judge Clark expressed the opinion that the Federal Business Records Act required that any regular business report made by a person not a party to the litigation should be admitted into evidence. Judge Moore, in another concurring opinion, agreed only with the majority's result. He concluded that the Act merely gave the trial court discretion to all admission if he determines that, under the circumstances, a report is trustworthy and, hence, admissible under the fundamental rules of evidence.

Staff: Ronald Jacks (Civil Division)

FEDERAL OFFICERS

Official Immunity Does Not Extend to Acts Violative of Constitutional Rights. George A. Hughes, et al. v. James Johnson, et al. (C.A. 9, June 27, 1962). This suit was brought against federal game wardens for trespass, false imprisonment and unlawful search and seizure. Plaintiffs operated a poultry market engaged in the business of storing wild game birds for hunters. Defendants entered the store and inspected the business records plaintiffs were required by law to keep and exhibit. The officers also inspected the processing and storage area of the store and there discovered forty-six improperly tagged fowl. Several hours later the officers left, taking with them plaintiffs' records and the improperly tagged birds. No arrests were made and the property was never returned. The district court granted defendants' motion to dismiss on the ground that

the defendants were acting within the scope of their authority as federal officers and, hence, were immune from civil liability for their acts. The court of appeals agreed that the complaint failed to state a cause of action, but reversed and remanded to allow plaintiffs to amend their complaint, holding that if plaintiffs should allege with particularity a violation of their constitutional rights, the defendants would not then be entitled to the protection of absolute immunity.

Staff: Former Assistant Attorney General William H. Orrick, Jr., and Terence N. Doyle (Civil Division)

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

Coverage: The Act Applies, Upon the Employee's Election, to Workers Injured While Standing on Land Repairing Vessels on Marine Railways. Holland, et al. v. Harrison Bros. Dry Dock and Repair Yard (C.A. 5, June 28, 1962). Holland was employed by the appellee as a laborer. He was totally disabled by an injury which occurred while he was standing on land directly beneath the edge of a barge which had been drawn up a marine railway for repairs. His injury arose out of his efforts to remove a heavy rubber hose from underneath the barge so that it could be sand blasted. He applied for compensation benefits under the Longshoremen's Act, which were more liberal than those provided by the State compensation act. The employer resisted primarily on the grounds that an injury had occurred on land and was, therefore, within the exclusive coverage of the State act. The Deputy Commissioner found that the removal of the hose was an integral part of the repair of the barge, and awarded Holland benefits under the Federal Compensation Act. The district court set the award aside on the ground that injuries on land are compensable exclusively under State law.

The court of appeals reversed, holding that this case was within the "twilight zone" of overlapping state and federal coverage, where the employee's election of remedy will be sustained. The court noted that marine railways were dry docks within the meaning of the Act (Avondale Marine Ways v. Henderson, 201 F. 2d 437, affirmed 346 U.S. 366) and that a meaningful definition of "marine railway" would include the land adjacent to the tracks which must be used in the course of repairing the ship on the railway.

Staff: David L. Rose (Civil Division)

Injuries Arising Out of and in The Course of Employment - Injuries Suffered During Recreational Activities at Isolated Construction Site. Self v. United States (C.A. 9, June 29, 1962). Plaintiff claimed compensation for injuries received when an Air Force weapons carrier went out of control and struck the parked car in which she was sitting. At the time of the accident, plaintiff was parked in a car in a turn-around area of a shore line highway on the Island of Guam. She was employed as a stenographer by a private contractor on the island, and given room and board

by the company. No public transportation was available in the area, and the company provided its employees with automobiles for business and recreational use. The car in which plaintiff was parked at the time of the accident was a company car operated by her supervisor who had a permanent trip ticket to use the car. Plaintiff's claim for compensation was rejected by the Deputy Commissioner, whose determination was upheld by the district court.

On appeal, the court of appeals reversed, holding that this was a situation where an employee "had no life but the company's life." The company had sponsored cars for unsupervised recreation and the place where the injury occurred was one of the few places employees were authorized to go for recreation. Therefore, the injury was one "arising out of and in the course of employment" within the Longshoremen's Act.

Staff: Herbert P. Miller (Department of Labor)

PORTAL TO PORTAL ACT

Reliance: Contractor's Good Faith Reliance Upon a Written Statement of the Field Office Supervisor of the Department of Labor Held not Sufficient for Exoneration of Walsh-Healey Act Obligations. Walsh-Healey Act Applies to Contracts for Maintenance and Service of Automobiles and Trucks. United States v. Stocks Lincoln-Mercury (C.A. 10, July 2, 1962). Stocks entered into a contract with the United States to maintain and repair Air Force automobiles, station wagons and trucks at Ogden Air Force Base for the period of a year. The contract, which was in the face amount of $110,000, contained the standard contract provision concerning the Walsh-Healey Act. In the course of the negotiations for the contract, the Air Force contracting officer advised Stocks' manager that the Department of Labor had determined that the Walsh-Healey Act did not apply to an earlier contract between the Air Force and another automobile dealer for the maintenance of the automobile equipment. The terms of the earlier contract were not materially different from the proposed Stocks' contract. The contracting officer's information was based upon a letter from the Salt Lake City Field Office supervisor to counsel for the other contractor. The letter stated that "our study" of the contract indicated that it was a service contract which was not subject to the Act.

An administrative proceeding was instituted within the Department of Labor, on the ground that Stocks had failed to pay time and a half for overtime work on the contract. The hearing examiner so found, and found further that the contract was for the furnishing of automotive parts and equipment as well as labor, and was therefore not exclusively a service contract. Upon Stocks refusal to pay its employees, the United States brought an action pursuant to the Walsh-Healey Act (41 U.S.C. 36) for recovery of the underpayments to the employees, for the benefit of the employees. The district court held that the letter of the Field Office Supervisor constituted a written ruling of an agency reliance upon which exoneration the employer under the Portal to Portal Act (29 U.S.C. 259).

The court of appeals reversed, holding that Congress intended to restrict the agency rulings upon which contractors are entitled to rely to the official vested with the primary or final authority to administer the Act in question. Although Congress defined the term agency, in the case of the Walsh-Healey Act as "the Secretary of Labor or any Federal officer utilized by him in the administration of such act" under existing orders of the Department of Labor, the official designed to administer the Act is the Administrator of the Wage and Hour and Public Contracts Divisions of the Department of Labor. The court ruled that only he has authority to issue rulings and interpretations upon which contractors are entitled to rely, and that the Field Office Supervisor, who performs his duties under the supervision and direction of the Administrator, has no such authority. The court also ruled that since the contract in question was not exclusively for the furnishing of services but included the furnishing of materials, supplies and equipment, it was within the coverage of the Walsh-Healey Act.

Staff: David L. Rose (Civil Division)

SOCIAL SECURITY ACT

Material Participation - Making of Farm Plan at Beginning of Season not Sufficient to Establish "Material Participation" in Production of Commodities on Farm. Ivan M. Hoffman v. Ribicoff (C.A. 8, June 30, 1962). This suit was instituted to review a decision of the Secretary of Health, Education and Welfare that the appellant, who had an insured status under the Social Security Act, was not entitled to a recalculation of his old-age insurance benefits on the basis of certain income he derived from leased farm land. The Secretary held that this income did not constitute "self-employment income," as defined in 22 U.S.C. 411(a)(1), because appellant had not "materially participated," within the meaning of that Section, in the production of agricultural commodities on this land. The district court affirmed the decision of the Secretary.

The court of appeals, accepting the Government's arguments, affirmed and held that appellant's "* * * making of a farm plan at the beginning of the season [was] not sufficient in itself to establish the 'periodical' * * * 'material participation' which the Congress had in mind before income derived from farm operations should be considered as self-employment income." The court also held that appellant's payment of part of the farm expenses was not enough to meet the requirements of the Act. Finally, the court noted " * * * that whether there is 'material participation' [within the meaning of 42 U.S.C. 411(a)(1)] * * * is a factual determination that can only be made on a case to case consideration."

We were particularly gratified by the decision in this case in view of the three prior adverse decisions interpreting the material participation exception, Conley v. Ribicoff, 294 F. 2d 190 (C.A. 9); Harper v. Flemming, 288 F. 2d 61 (C.A. 4); and Henderson v. Flemming, 283 F. 2d 882 (C.A. 5).

Staff: Jerry C. Straus (Civil Division)

TORT CLAIMS ACT

Government did not Exercise Sufficient Control Over Independent Contractor maintaining Government Owned Arsenal to Impose Liability Under Tort Claims Act for Injury to an Employee of the Independent Contractor. Peter Buchanan v. United States (C.A. 8, June 30, 1962). Plaintiff sued for damages incurred when he fell from a hoist on the premises of a Government owned arsenal. At the time of his injury, plaintiff was employed by an independent contractor under contract with the Government to provide standby maintenance at the arsenal. At the conclusion of all the evidence, the district court dismissed plaintiff's complaint on the grounds that the Government was not responsible for the negligence of the independent contractor and that plaintiff was contributorily negligent.

The court of appeals affirmed. The court held that, although the Government exercised an overriding general control of the premises, the total situation did not evidence sufficient control over the independent contractor to make the Government liable for any negligence on the part of the independent contractor. The court of appeals also rejected plaintiff's claim that the Government had a non-delegable duty to him as an employee of its independent contractor and further found that plaintiff's conduct in riding on the hoist was contributory negligence as a matter of law.

Staff: United States Attorney Miles W. Lord, Assistant United States Attorney John V. Connelly (D. Minn.)

State Workmen's Compensation Act Prescribing One Year Limitation on Suits by Injured Employee Against Third Party Held to be as Assignment of Security Interest to the Employer and, After One Year, Employee was Still Real Party in Interest. Kimbrell v. United States, (C.A. 6, July 13, 1962). Plaintiff was injured in a collision with an army vehicle. He received compensation from his employer under the Tennessee Workmen's Compensation Act for his injuries and medical expenses. Thirteen months after the injury, plaintiff commenced this action against the United States. The United States pleaded that under the applicable provisions of the Workmen's Compensation Act, Tenn. Code Ann. § 50-914, twelve months after the injury plaintiff's cause of action had been assigned to his employer who was the real party in

interest. The district court rejected this defense and awarded plaintiff damages for his injuries and his expenses which had been reimbursed by his employer. The court of appeals affirmed (Judge Miller dissenting). It read § 50-914 as assigning to the employer only a security interest to the extent of the amount of its compensation liability. It concluded that the remainder of the claim against the third party still belongs to the employee. The court also suggested that, under Tennessee law, the wrongdoer cannot raise the question as to whether the cause of action against him is in the employee or his employer.

Staff: Herbert E. Morris (Civil Division)

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CIVIL RIGHTS DIVISION

Assistant Attorney General Burke Marshall

School Desegregation-Louisiana. Angel v. Louisiana State Board of Education (E.D. La.) This is one of the Louisiana school desegregation cases in which the Department on March 17, 1961 was granted leave to appear as amicus curiae with privileges of extensive and active participation, reported in the Bulletin, Volume 9, page 183. On May 25, 1960 the District Court for the Eastern District of Louisiana had issued an order calling for the end of segregation in a number of public schools, including the Southwest Louisiana Trade School, Lake Charles, which is here involved. The Court of Appeals for the Fifth Circuit affirmed the order on February 9, 1961.

On July 27, 1962, District Court Judge Gordon West granted the Department's motion and issued an order requiring the State Superintendent of Education, the members of the State Board of Education and the Director of the Trade School to show cause why they should not be held in civil and criminal contempt for failing to comply with the 1960 desegregation order. A hearing is set for September 20.

Staff: United States Attorney Louis C. LaCour
St. John Barrett (Civil Rights Division)

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

FRAUD BY WIRE - CONSPIRACY

For Purposes of Wire Fraud Statute Fraud and Extortion Not Mutually Exclusive. Robert Frederick Huff and William Constantine Nicholson v. United States (C.A. 5, April 19, 1962, 301 F. 2d 760). The Court affirmed appellants' convictions for violating the fraud by wire (18 U.S.C. 1343) and conspiracy (18 U.S.C. 371) statutes. The facts indicated that Huff, upon discovering that his apartment had been burglarized, called Nazry Abraham, a gambling companion, who worked at a furniture store, to deliver an air conditioner. When Nazry arrived at Huff's apartment Huff and Nicholson accused him of the burglary. He denied the theft and promised to help recover the stolen property.

Three years later, Nazry received a series of telephone calls from Antonio Duran in Mexico concerning jewelry which he alleged had been stolen from Huff. The message was relayed to Huff, who persuaded Nazry to go to Mexico and act as his agent to retrieve the jewelry. Upon arrival in Mexico, Nazry was taken by Mexican Federal Judicial Police Officers to a tenement house, detained there, and forced to sign a confession to the effect that he had robbed Huff's apartment. Nazry's father, Salim Abraham, was then called by Huff and told to go to Mexico to ascertain the whereabouts of Nazry. When Salim Abraham arrived in Mexico, he was told by Huff that Nazry had robbed his apartment and was in the custody of Mexican Police. Huff demanded $22,000 for Nazry's release. Subsequently, Huff, Nicholson, and the Mexican Federal Police Officers were arrested.

In appealing their convictions, the defendants argued that since the scheme was to extort money and no fraud was shown, conviction under Section 1343 could not stand, citing Fasulo v. United States, 272 U.S. 620 (1926) for the proposition that extortion as such does not amount to a scheme to defraud under the Mail Fraud statute. The Fifth Circuit in affirming the convictions, ruled that in Fasulo it had been the presence of threats alone which the Court regarded as distinctive and decisive while in the instant case, the actions of Huff and Nicholson were much more since a fraudulent scheme of implied or expressed misrepresentations could also be found, citing Muench v. United States, 8 Cir., 1938, 96 F. 2d 332. In the opinion of the Court fraud and extortion are not mutually exclusive for purposes of the Wire Fraud Statute. "The mere fact that extortion may constitute one aspect of the transaction does not insulate the fraudulent representations and plan from prosecution as a scheme to defraud."

Staff: United States Attorney Ernest Morgan; Special Assistant United States Attorney Lawrence L. Fuller (W.D. Texas).

FORGERY

Endorsement on Government Check Ostensibly Made for Payee by Trustee, without Authority, Held Not Forgery Under 18 U.S.C. 495. R. Milo Gilbert v. United States, No. 478, Oct. Term, 1961 (June 25, 1962). Conviction of petitioner, an accountant whose business included acting for others in federal income tax matters, under 18 U.S.C. 495 in two counts was affirmed by the Ninth Circuit. The Supreme Court, in accord with a 1961 decision of the Tenth Circuit (Selvidge v. United States, 290 F. 2d 894), held that forgery under Section 495 does not embrace a purported, but misrepresented, agency endorsement.

Evidence tended to show that Gilbert, who was not an agent for the purpose of endorsing the checks, payable to Daniel H. Bartfield and Charlene R. Bartfield, without any authority endorsed the checks in his own hand: "Daniel H. Bartfield
Charlene R. Bartfield
R. Milo Gilbert, Trustee".
The Ninth Circuit took the view that one who endorses a Government check by signing the name of the payee followed by his own signature as trustee or agent, when in fact he has no authority to endorse as trustee or agent, is guilty of forgery under Section 495.

The Supreme Court, noting that the antecedent of Section 495 was a statute enacted in 1823, sought the common law interpretation of forgery in relation to the instant circumstances. At common law, forgery denoted a false making (including any alteration of or addition to a true instrument) of any instrument for the purpose of fraud and deceit; but an endorsement made under a false assumption of authority to endorse per procuration had been held at common law to be not a false making, but rather a false statement of authority.

The decision in this case does not conflict with that of the Court of Military Appeals in United States v. A 3C Marion C. Jackson (treated elsewhere in this Bulletin issue), which held that filling in the names of payor and payee on a stolen Postal money order issued in blank, and subsequent endorsement by the thief, constituted forgery in accord with the familiar common law concept of forgery as including the alteration or filling in without authority (or contrary to the authority given) of an instrument genuinely issued.

Forgery of Blank Postal Money Orders Under Article 123. Uniform Code of Military Justice (Civil Counterpart - 18 U.S.C. 500) - United States v. A 3C Marion C. Jackson. The United States Court of Military Appeals on May 4, 1962 held that the filling in of the blanks for the names of purchaser and payee with the actual names of the participants on a blank postal money order stolen from another and with intent to defraud constituted forgery.

On September 3, 1960 Airman Joseph Moore, Jr. purchased a United States postal money order in the amount of $48.00. The money order, in accordance with current post office practices, was delivered to him with the spaces for insertion of the purchaser's name and the payee's name left blank. He returned to his room and placed the money order, still incomplete, in a desk drawer. Airman Jackson, Moore's roommate, removed the money order from the drawer, and induced a friend to insert his name as purchaser and that of accused as payee upon the representation that he had purchased the money order to send home but had changed his mind and wanted to cash it instead. Airman Jackson was subsequently tried by general court-martial on charges of larceny and of uttering a forged instrument.

On appeal Jackson's appointed defense counsel argued that there is a legal distinction between the false making of a writing and the genuine making of a false writing, concluding that if the writing is not false in its execution, it is not a forgery, even though its contents may be false in fact. (Emphasis added.) They contended that the making of the writing must falsely purport to be the writing of another, and since the names of Jackson and his friend were genuine, Jackson could not be guilty of forgery.

The Court of Military Appeals rejected the above contention, holding that the money order was falsely made when, though genuinely executed, blanks were filled in by another without authority. Accepting the theory that the blank money order was fully executed by the official stamp of the Post Office Department and the initials of the issuing clerk in the lower right-hand corner at the time it was delivered to the real purchaser with authority to him to complete its terms by filling in the purchaser and payee blanks, the court analogized this to a situation where a drawer gives signed, blank checks to a person for certain specific uses with authority to fill in the payee's name for these uses, and the person fills in his name as payee and a large sum in each check, which he converts to his own use. In so holding, the court applied to the blank postal money order the universally recognized principle that forgery of the contents of a genuinely executed instrument is committed by filling up blanks therein without authority or contrary to the authority given. The unauthorized filling up of blanks constitutes forgery in the making because the instrument in its completed state, as in the case of an altered instrument, purports on its face to show a relationship which does not in fact exist. In support of its holding the court cited several cases involving agents, where the agent had signed his own name as payee and otherwise filled in blanks contrary to his authority, and concluded that in the instant case the record presented a much stronger case of the false writing of an executed instrument than those involving acts by an agent in derogation of his authority.

This case is regarded as significant because to our knowledge it is the first holding that forgery is committed by a thief who steals a blank postal money order and then procures or fills in himself his true name as the payee. The decision appears sound and provides precedent for prosecution in similar factual circumstances under 18 U.S.C. 500 where appropriate.

NATIONAL STOLEN PROPERTY ACT
18 U.S.C. 659

Questionable Discretion of Trial Judge in Refusing Witness Defendant Opportunity to Explain Prior Conviction Not Prejudicial Error Where Defense Counsel Succeeded in Getting Intended Explanation to Jury. United States v. Crisafi and Guglielmini (C.A. 2, 1962, Docket No. 27525). The Second Circuit, in a per curiam opinion, affirmed the convictions of defendants for having in their possession goods stolen in interstate commerce in violation of 18 U.S.C. 659. At the trial, defendant Guglielmini's credibility was attacked by the showing of a prior conviction for possessing counterfeit ration stamps. On his direct examination Guglielmini testified with respect to his arrest for the offense. The trial court, however, refused to allow defendant to explain his plea of guilty in the prior case. Defense counsel did, however, get the information before the jury by stating the reasons for defendant's plea. The Second Circuit noted that it is questionable whether the trial judge exercised the discretion required of him in refusing to allow defendant to explain his conviction. Since defense counsel succeeded in getting the information to the jury, however, the error was held not to be prejudicial and the judgments were affirmed.

Staff: United States Attorney Joseph P. Hoey;
Assistant United States Attorney Jerome F. Matedero (E.D. N.Y.).

CONFLICT OF INTEREST

Scope of Language "Employed or Acts as an Officer or Agent of the United States for the Transaction of Business" Under 18 U.S.C. 434. L. M. Smith and Earl C. Corey v. United States (C.A. 9, June 27, 1962). The defendants were jointly tried and convicted on charges involving the Commodity Credit Corporation Charter Act, the Conflict of Interest and Conspiracy statutes. (15 U.S.C. 714m(a) and 18 U.S.C. 434 and 371) The defendant Corey, formerly director of the Portland Commodity Office, Commodity Stabilization Service, United States Department of Agriculture was charged in Count X with being a partner, member officer, and agent of Three State Warehouse Company, between April 26, 1956 and May 1, 1959, and with being directly and indirectly interested in the profits and contracts of that partnership while he was employed and acted as an officer and agent of the United States for the transaction of business with that company, in violation of 18 U.S.C. 434. Count XI charged Smith and Corey, and a co-conspirator, not indicted, with conspiring to cause Corey to have a conflict of interest and to defraud the United States of Corey's fair and impartial services.

On appeal Corey contended that the trial court erred in instructing the jury that he could be convicted if he were a partner in Three State Warehouse Company, was employed as an officer or agent of the United States as head of an office which did business with that

company, and if he knew that the company was doing business with the office over which he had charge; also that it was not necessary for the Government to show that Corey physically executed one or more of the contracts between Commodity and the warehouse company, or that he engaged in negotiations looking towards the execution of these contracts. Corey further contended that the Court erred in refusing to charge that to violate the statute it is necessary that an officer or agent of the Government himself be employed to transact business with a concern in which he has an interest or act in the transaction of the business, and that if the business is conducted by others in the department to whom he does not give any particular instructions with regard to that business, then, he has removed himself from the vice intended to be prohibited by the statute.

In affirming Corey's conviction and in approving the trial court's instruction the Court of Appeals relied heavily upon the decision of the Supreme Court in United States v. Mississippi Valley Co., 364 U.S. 520, 548-549 (1961), to the effect that "Section 434 'speaks in very comprehensive terms' unrestricted 'by numerous provisions and exceptions, as is true of many penal statutes'; that the 'obvious purpose of the statute is to insure honesty in the Government's business dealings by preventing federal agents who have interests adverse to those of the Government from advancing their own interests at the expense of public welfare'; and, that the 'statute is thus directed not only at dishonor, but also at conduct that tempts dishonor.'" The Court of Appeals concluded that in view of the legislative objectives of the statute the words "the transaction of business" were intended to include any official role played by an officer or agent of the United States, in connection with dealings between a Government agency and a business entity, which reasonably could be utilized for pecuniary gain to the disadvantage of the United States. The Court pointed out some actions that Corey took or failed to take which might be said to "tempt dishonor". However, the Court did not rest its decision on the actual role played by Corey but stated that the administrative head of a Government office who knows that subordinates in the office, subject to his control, are dealing with a particular business entity, is in a position to benefit that company to the detriment of the Government, by the giving or withholding of general or specific instructions. The Court emphasized that whether the head of a Government office actually gives or withholds instructions for that purpose is immaterial and stated that the holding of a personal pecuniary interest may operate to deprive the Government of supervisory service, the lack of which would benefit the private company to the disadvantage of the Government. The Court also observed that the wisdom of Corey's personal action in these matters would be immaterial.

Petitions for rehearing en banc have been filed by Smith and Corey.

Staff: United States Attorney C. E. Luckey; Assistant United States Attorney David Robinson, Jr. (D. Ore.).

OBSCENITY

Mail Obscenity Investigations, Arrests, and Convictions During Fiscal Year 1962. Postmaster General J. Edward Day announced that more obscenity investigations were conducted by the Post Office Department during fiscal year 1962 than in any previous year in postal history. These investigations resulted in 605 arrests and 503 convictions, with a number of trials still pending.

The Postmaster General credited cooperation between the Justice Department, the Postal Inspection Service and state law enforcement agencies with a major role in this unprecedented success. In particular, he praised the United States Attorneys throughout the nation, "without whose dedicated assistance this record could not have been attained."

NATIONAL MOTOR VEHICLE THEFT ACT

Motor Vehicle Obtained by Giving an Insufficient Funds Check Is no Less "Stolen" than One Acquired By the Giving of a Check on a Non-existent Account. William B. Landwehr v. United States (C.A. 8, June 21, 1962). Defendant was convicted by jury trial in the Eastern District of Missouri for violation of 18 U.S.C. 2312. On or about February 3, 1961, defendant selected for purchase an automobile priced at $325. In payment he gave a check. There is dispute in the evidence as to whether the defendant indicated that he would deposit necessary funds but the salesman testified that there was no request to hold the check. Defendant received possession of the automobile on February 3. On February 10 he picked up title to the car and two days later the check was returned marked "insufficient funds". Testimony further revealed an account was opened in the City National Bank of Centralia, Illinois, on January 3 with a deposit of $163.71. The largest amount ever in the account was $193.87. On the date the check was drawn the balance was $50. When the check was presented for payment on February 5, 1961, there was a balance of $23.74 which was subsequently reduced until on February 18 the account was closed for charges incurred because of insufficient funds checks.

The pertinent assignment of error concerned instructions to the jury defining the word "stolen" as used in the National Motor Vehicle Theft Act.

Contending that the District Court's broad definition of "stolen" was inapplicable to a check returned for lack of sufficient funds, the appellant sought to draw a distinction between a "worthless" check on a non-existent account and one returned because of insufficient funds. (See Scott v. United States, 4 Cir. 1958, 255 F. 2d 18, certiorari denied 357 U.S. 942, affirming conviction involving checks drawn on non-existent account.)

The Eighth Circuit, relying on the language of United States v. Turley, 1957, 352 U.S. 407, held that a motor vehicle obtained by giving an insufficient fund check is no less "stolen" than one acquired by giving a check on a non-existent account as both are worthless and neither can be cashed. The same evil intent may accompany each. The Court said that in each case the property is acquired by false pretenses. Whether or not the appellant was guilty of false pretenses was a question of fact for the jury.

Staff: United States Attorney D. Jeff Lance;
Assistant United States Attorney Frederick H. Mayer (N.D. Ohio).

MOTION TO VACATE - HABEAS CORPUS

Admission of Trial Lawyer's Testimony at Hearing to Determine Competency of Defendant at Trial; Alleged Violation of Sixth Amendment and Attorney Client Privilege; Need to Exhaust 2255 Remedy. Breaton v. United States (C.A. 8, 1962). Defendant, who was convicted of bank robbery in the Northern District of Ohio, was sentenced to serve a term of twenty-five years' imprisonment. While imprisoned at Alcatraz he was found to be incompetent and was transferred to the Medical Center at Springfield, Missouri. Thereupon, he filed his 28 U.S.C. 2255 motion in the sentencing court asserting he was insane at the time of trial and at the time the alleged offense was committed. He also claimed that he did not have effective assistance of counsel at the bank robbery trial. At the hearing on the 2255 motion defendant's counsel at the earlier trial testified as to his competency. The District Court denied the motion and the Sixth Circuit Court of Appeals affirmed.

Rather than petition for a writ of certiorari from the decision of the Sixth Circuit Breaton applied for a writ of habeas corpus. On appeal to the Court of Appeals for the Eighth Circuit from the order denying his petition for writ of habeas corpus, appellant raised for the first time the ground that the testimony given by his trial lawyer at the 2255 hearing concerning his competency violated the Sixth Amendment and the attorney client privilege, thus depriving the hearing of due process under the Fifth Amendment. This, it was claimed, made a motion under 2255 ineffective to test his conviction and entitled him to the writ of habeas corpus.

The Eighth Circuit disposed of the motion by noting that "Section 2255 by its terms provides that habeas corpus shall not be entertained before all ordinary remedies are exhausted"; and that appellant by failing to apply for certiorari on the Sixth Circuit decision failed to exhaust his remedy under Section 2255.

Breaton, in arguing that the testimony of his lawyer at the 2255 hearing was a violation of the Sixth Amendment and the attorney client privilege, relied upon Gunther v. United States, D.C. 230 F. 2d 222 (1956), where the court had expressly stated that in a 4244 hearing to determine the competency of the defendant, it was a violation of the above two safeguards to permit the attorney at the earlier trial to testify at the hearing concerning competency. The Eighth Circuit brushed this reliance aside with three strokes; first, that the remarks in Gunther pertaining to the lawyer's testimony were mere dicta; second, that Judge Holtzoff, in United States v. Wiggins, 184 F. Supp. 673, 678 (D.C. 1960), in deciding to permit the attorney to testify had criticized the handling of the problem in the Gunther case; and third, and most important, the Court said that if it was a mistake to admit the testimony of the lawyer "The error urged is one that should have been raised in the Ohio court, and by appropriate appellate proceedings from the Ohio court's decision"; since it was not so raised, the Eighth Circuit was without jurisdiction in this type of "collateral proceeding . . . to review the decision of the Ohio court and the affirming opinion of the Sixth Circuit with relation to any error of law that might have been occasioned by the reception" of the attorney's testimony.

In its holding that denial of the motion for a writ of habeas corpus did not mean that the appellant had no further recourse, the Court observed that the reason relief could not be given in the Ohio court was that:

> There was no evidence before the Ohio court to support a finding of incompetency at the time of trial. Without evidence to support a claim of incompetency, no basis exists in the § 2255 proceeding for granting appellant relief . . . . If appellant has any valid basis for asserting such insanity, he is required under § 2255 to seek relief by motion in the sentencing court. Res judicata does not apply to § 2255 proceedings. See Lipscomb v. United States, 8 Cir., 298 F. 2d 9. Thus, § 2255 relief in the sentencing court is not completely foreclosed.

It is possible the proscription which the Gunther case erects in the way of admitting the attorney's testimony may be avoided by a further look at Wiggins, supra. The latter case stated that a 2255 motion to set aside a conviction because of incompetency of defendant at the time of the trial is actually an attack on the trial counsel's conduct of the case for failing to raise the matter at trial. This may result in injury to the attorney's professional reputation thereby entitling him to testify at the hearing so as to give him a chance to explain his apparent dereliction of duty.

Staff: United States Attorney F. Russell Millin; Assistant United States Attorney Clifford Spottsville (W.D. Mo.).

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

DEPORTATION

Judicial Review of Deportation Order; Original Jurisdiction of Court of Appeals - Ancillary Matter. Mai Kai Fong aka Yee Wing Young v. INS, C.A. 9, No. 17,723, June 28, 1962. The petitioner sought judicial review pursuant to 8 U.S.C. 1105(a) of a deportation order and notices by the Immigration and Naturalization Service that he was to be deported to Hong Kong.

The petition was denied on three grounds: (1) that the deportation order had been ruled valid in prior litigation, (c) that the petitioner had not exhausted his administrative remedies by appeal from the deportation order of the Special Inquiry to the Board of Immigration Appeals and (3) that review of notices of the place of deportation is not available under 8 U.S.C. 1105(a).

* * *

LANDS DIVISION

Assistant Attorney General Ramsey Clark

Eminent Domain: No Taking of Air Space Absent Invasion Above Owners' Property; Diminution in Value Due to Noise and Smoke Non-compensable. William J. Batten, et al. v. United States (C.A. 10, July 10, 1962). - In this case several residents of a subdivision adjacent to an Air Force Base sought compensation for the alleged taking of property as a result of the noise, fumes and vibration. After trial, the district court did not make findings but held, on the basis of the allegations of the complaint, that since there were no flights over the property compensation could not be recovered.

On appeal, the United States, while contending that the decision was correct, urged the Court to remand the case for findings as to the actual facts. The Court of Appeals did so, stating that an important question of constitutional law ought to be resolved on the established facts and should not be disposed of on the bare averments of the complaint. The case was remanded for findings. See 9 U.S. Attys.' Bull., pp.451-452.

The district court made findings which were in brief that operations at the jet base were conducted at distances of from 650 feet to a mile and a half from a small subdivision built after the World War II base was deactivated and before an enlarged jet base started operations. The court did not find physical damage but concluded that the interference by noise and smoke diminished the value of the residence properties ranging from 55% to 40%.

The Court of Appeals affirmed by a 2 - 1 vote. It emphasized the fact that this was not a tort or nuisance case but one under the Tucker Act for a taking under the Fifth Amendment. It reiterated the long-settled distinction between taking and consequential damage pointing out that because of this rule many state constitutions require payment of compensation when property is damaged as well as when it is taken. But the federal obligation has not been so enlarged.

The case of United States v. Causby, 328 U.S. 265 was one of invasion of superadjacent air space and after referring to other cases the Court said:

> In the instant case there is no total destruction and no deprivation of "all or most" of the plaintiffs' interests. The plaintiffs do not suggest that any home has been made uninhabitable or that any plaintiff has moved because of the activities at the Base. The record shows nothing more than an interference with use and enjoyment.

Pointing out that in Causby the flights involved the air space less than 500 feet above plaintiff's property the court said:

> In the situation confronting us the warm-ups occur 2,000 feet, the take-offs 2,280 feet, and the maintenance 1-1/2 miles from the nearest property of the plaintiffs. Causby contains nothing indicating that recovery could be had for noise, vibration, or smoke coming from the same vertical distances.

It concluded:

> The vibrations which cause the windows and dishes to rattle, the smoke which blows into the homes during the summer months when the wind is from the east, and the noise which interrupts ordinary home activities do interfere with the use and enjoyment by the plaintiffs of their properties. Such interference is not a taking. The damages are no more than a consequence of the operations of the Base and as said in United States v. Willow River Power Co., supra, they "may be compensated by legislative authority, not by force of the Constitution alone." As we see the case at bar, the distinctions which the Supreme Court has consistently made between "damages" and "taking" control and compel denial of recovery.

Chief Judge Murrah dissented.

Staff: Roger P. Marquis (Lands Division).

Condemnation: Inter-State Highway Program; Authority of State Officials to Invoke Federal Assistance when State Law Prevents Acquisition of Land, Federal Condemnation, Condition of Continuance on Waiver of Interest; D.J. File No. 33-5-2178. Eden Memorial Park Association v. United States. - The appropriate officials of the State of California sought to condemn cemetery lands for use as part of the Inter-State Highway System under the Federal-Aid Highways Act, 23 U.S.C. 1001. The state court held that authority had not been given for such condemnation. Proceedings were then brought by the United States in the federal court as provided in the Highway Act, 23 U.S.C. 107. A declaration of taking was filed and immediate possession was sought. The landowner answered, challenging the right to take primarily on the ground that, being unable to condemn the property, the state officials were not authorized to secure its condemnation by the United States and to revieve it back after condemnation for execution of the project as provided by the Act. The court granted immediate possession and denied motions designed to stay the federal court proceedings.

In the meantime, the landowners had filed suit in the state court against the state officials alleging lack of authority and seeking an injunction against execution of the project. The state court denied a preliminary injunction, but enjoined construction of permanent facilities upon the land while permitting construction of temporary facilities. Thereupon, the United States moved in the condemnation proceeding to enjoin the landowners and their attorneys from prosecuting the state court action and to take affirmative action to secure vacation of the temporary restraining order. The district court granted the relief sought.

An interlocutory appeal was taken under 28 U.S.C. 1292(a) and a stay was sought of the condemnation proceedings pending disposition of the appeal. The application for a stay was orally argued, at which time both parties asked the Court to consider the matter on the merits without further briefing and argument. The Court did so after having entered a limited stay pending consideration. It reversed the injunction order and directed vacation because it was not warranted, without passing upon the validity of the taking. The Court of Appeals held, in effect, that there was no sufficient interference with federal rights to justify an injunction and that both proceedings could proceed. See 10 U.S. Attys' Bull. No. 5, pp. 146-147.

The issues thus raised were resolved by a recent opinion of the Superior Court of the State of California for the County of Los Angeles. Upon an order of the state court, the preliminary injunction was dissolved, and it was found that the state officials acted properly in seeking Federal assistance where they were unable to obtain the necessary interests in the land under state law.

As a prelude to all of this legal maneuvering, the defendant, although amply notified of the Government's desire for an early trial in the federal case, reported not ready when the case was called and sought a continuance. The district court granted an eight-month continuance but imposed a condition that no interest would run during the period of such continuance of any sum found to be owing by the plaintiff over the amount of its deposit.

Staff: Assistant United States Attorney John B. Read, Southern District of California.

Eminent Domain: Right to Take; Authority to Take Land Not Flooded for Economic Reasons; D.J. File No. 33-44-239-544. United States v. 235.0 acres of Land in Sumner and Wilson Counties, Tennessee, and William Reese, et al., Civil No. 1769. - This condemnation action involves the acquisition of a considerable acreage for development of the Old Hickory Dam and Reservoir on the Cumberland River, a multi-purpose project duly authorized by Congress for the improvement of river and harbor works and navigation and the manufacture of hydro-electric

power. Included in the Government's taking line is a tract containing 57.6 acres, a portion of which is below the high water mark and is subject to inundation. The remaining portion, about 33 acres, is above the high water mark and will not be affected by the impoundment. The defendant landowners challenged the Government's right to take that part of the land which lies above the high water mark and insist that the unaffected portion of the tract was not needed for the project, that it was not taken for a public use, and that the determination by the Secretary of the Army that it should be taken for the project was arbitrary, capricious, in bad faith, and based upon error of law and fact.

District Judge William E. Miller considered the cases cited by the Government and ruled that the decisions leave no doubt that the scope of judicial review of administrative determinations of what lands are required for an authorized project is extremely narrow, especially where questions as to necessity or expediency of taking a particular piece of property raise factual issues as to such necessity or expediency. However, he considered none of the authorities cited to be applicable to the facts of this case, where the Government officials who testified in the case virtually conceded that the entire tract was not actually needed for the project or for uses incident thereto. The evidence conclusively established that the portion of the tract above the maximum effects of the reservoir was included in the taking for the reason that the only convenient access to the property would be flooded and the cost of providing other access would, in the opinion of the Corps of Engineers, exceed the value of the land.

The court cited, with approval, the case of United States ex rel. T.V.A. v. Welch, 327 U.S. 546 (1946), and especially the language at p. 554 that "The cost of public projects is a relevant element in all of them, and the Government, just as anyone else, is not required to proceed oblivious to elements of cost." The court further cited the language in the concurring opinion in the Welch case (at p. 555) that the "United States is not barred from the exercise of good business judgment in its construction work."

The Welch case was considered to reach the facts of this case and the court held that adoption and pursuit of such a policy by the Corps of Engineers was not arbitrary, capricious or unlawful. While a road connecting the property taken with another public road has since been constructed, the court ruled that the developments which were not foreseen or foreseeable at the time the property was condemned are immaterial.

Staff: United States Attorney Kenneth Harwell, M.D. Tenn.

Public Lands: Mineral Leasing Act; Secretary of the Interior is Vested With Discretion to Lease or Not to Lease and May Refuse to Issue Lease Even After "inviting" Offers. Bert F. Duesing v. Stewart L. Udall, Secretary of the Interior (Civil No. 290-62, U.S.D.C., D.C. July 17, 1962).

This was a suit to compel the Secretary of the Interior to issue a lease to plaintiff on public lands within the Kenai National Moose Range, Alaska. Plaintiff submitted an offer for a noncompetitive oil and gas lease on such lands in August 1957. At the time the offers were submitted, the lands were open to oil and gas leasing under the Mineral Leasing Act, 30 U.S.C. sec. 226. About a year after the lease offers were submitted the Secretary published notice in the Federal Register, 23 F.R. 5883, closing certain portions of the Kenai National Moose Range to oil and gas leasing. The portions closed included the areas sought to be leased by the plaintiff.

Thereafter, the plaintiff's offers were rejected and this suit was brought to compel a lease on the ground that since the plaintiff was the first applicant qualified to hold a lease and since the offers to lease were filed before the lands were closed to leasing the plaintiff was entitled to a lease. The plaintiff contended that Section 17 of the Mineral Leasing Act, 30 U.S.C. sec. 226, "mandatorily required" the Secretary to issue a noncompetitive lease to the first qualified applicant.

The Court granted the Secretary's motion for summary judgment stating that the Secretary is vested with discretion to lease or not to lease such lands and even after leasing applications or offers are received for lands which are open the Secretary may change his mind and announce that he will not issue a lease. In reaching this conclusion the Court relied upon the decisions in Haley v. Seaton, 108 U.S.APP.D.C. 257, 281 F.2d 620, and McKay v. Wahlenmaier, 96 U.S.App.D.C. 313, 226 F.2d 35.

Staff: Herbert Pittle (Lands Division).

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CRIMINAL MATTER

NOTICE

The Department's attention has been called to the fact that some United States Attorneys have, without adequate explanation, declined excise tax cases referred directly to them for prosecution of alleged violations of the Internal Revenue Code. In some instances it has been said that the particular case lacks jury appeal. This, of course, does not provide much of a guide to Internal Revenue Service lawyers and investigators in handling future cases.

It is, accordingly, requested that United States Attorneys be as explicit as possible in their reasons for declining prosecution. This will be a real help to the Regional Counsel and to the personnel of the Intelligence Division of Internal Revenue Service.

CIVIL TAX MATTERS

Appellate Decisions

Husband held to have realized taxable gain on transfer of appreciated stock to his wife in divorce settlement. United States v. Davis. (S. Ct., June 4, 1962.) The taxpayer, Davis, transferred appreciated stock to his divorced wife in return for the release of her marital claims. Reversing the Court of Claims, the Supreme Court held that he realized taxable gain on the transfer. The transfer was a taxable event, i.e., it marked the realization of the appreciation in value of the stock, and was an appropriate occasion for taxing the accretion. It was neither a gift nor a division of property held in common. The court rejected the taxpayer's contention that since, according to the statute, gain on the sale or disposition of property is to be measured by the difference between the adjusted basis and the amount of money plus the fair market value of other property received, and since marital rights have no fair market value, there is no way to measure the gain. It adopted the assumption that the parties acted at arm's length and that they judged the marital rights to be equal in value to the property for which they were exchanged.

Husband may not deduct amounts paid to divorced wife's attorneys for tax advice to her. Davis v. United States. (S. Ct., June 4, 1962.) In the companion case to the foregoing the Court held that amounts paid by the husband to the wife's attorney in the divorce, pursuant to Delaware practice, for tax advice in relation to the property settlement were not deductible by the husband under Section 212(3) of the 1954

Code. Assuming, but expressly not deciding, that amounts paid to his own attorney for tax advice were expenses paid "in connection with the determination, collection, or refund of any tax", the Court held that that provision is applicable only to a taxpayer's expenses in connection with his own taxes.

Staff: I. Henry Kutz, Sharon L. King, Arthur I. Gould, Harold Wilkenfeld (Tax Division) and Wayne G. Barnett (Solicitor General).

District Court Decisions

Presumption of Regularity; Authority of Head of Collection Division to Make Assessments. United States v. Walter H. Buschman (ED New York, June 5, 1962), 62-2 CCH ¶9552. On April 15, 1953 the head of the Collection Division for the Internal Revenue District, Brooklyn, New York signed an assessment list which included assessments against the defendant-taxpayer for income taxes, fraud penalties and interest for the years 1946 and 1947. An action to collect these assessments was commenced on April 8, 1959. The defendant contended that he was not liable for these taxes because the assessment was defective. This was allegedly due to the fact that the assessment list was not signed by the Commissioner of Internal Revenue as required by Section 3647 of the Internal Revenue Code of 1939. The defendant's argument continues that if the April 1953 assessment was improper, then the statute of limitations on assessments for the years 1946 and 1947 bars any claim for taxes for those years. At trial neither the taxpayer nor the Government introduced any evidence bearing on the authority of the head of the Collection Division to make assessments. The Government relied on the presumption that the introduction of certified assessment lists and account cards established a prima facie case. Defendant contended that the failure to prove that the Commissioner delegated authority to sign assessment lists and thus make assessments was fatal to the Government's case.

The Court, on the authority of Donaldson v. United States, 264 F.2d 804 (C.A. 6th), held that the burden of proving that the assessment was properly made was not on the Government, but rather it was defendant's duty to prove that the person making the assessment was not authorized to do so.

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

Liens; Relative Priority of Federal Tax Liens. An Attaching Creditor Will Not Prevail Over the United States When the Latter Holds a Valid Tax Lien Recorded After the Date of the Attachment Lien, but Before the Creditor Has Obtained Judgment. United States v. Proctor Reels, Inc. (DC Vermont, June 26, 1962). The United States brought this action on July 14, 1961 to effect collection of the outstanding tax liability of the taxpayer. The

Government sought in particular to foreclose its liens on funds of the taxpayer deposited in a bank. An attorney who claimed a lien as the result of services rendered the taxpayer over a period of years was joined as a defendant. After the action was commenced, a corporation, which claimed a lien as the result of a writ of attachment issued against the taxpayer's property, was allowed to intervene.

The basic facts in this case were not disputed. The taxpayer was indebted to the intervenor for materials supplied up to November, 1957. On March 13, 1958, the intervenor caused a writ of attachment to issue out of a Vermont county court on all real estate of the taxpayer. The taxpayer at that time owned certain cutting rights on timber. The first assessment for federal tax was made in February, 1958, all others were subsequent to the issuance of the writ of attachment. Notices of federal tax liens were also filed after the writ of attachment. The cutting rights on the timber were due to expire in early 1960 and the taxpayer and its creditors, including the Government, made an arrangement that the taxpayer would be allowed to cut and sell the timber and deposit the proceeds in a bank for the benefit of the lien holders and the attaching creditor who would then share in the proceeds on the basis of priority to the same extent as though their lien had continued on the timber lot. The timber was cut and the proceeds duly deposited with a bank. The intervenor was awarded judgment in the county court action on May 11, 1962, the same day the trial was held in this case.

The Court found that there was no attorney's lien on the property of the taxpayer involved in this action, therefore the only remaining issue was the relative priority of the federal tax lien and the claim of the intervenor. The Court held that the lien of the Government was entitled to priority over the claim of the intervenor since the Supreme Court had held in United States v. Security Trust & Savings Bank, 340 U.S. 47 (1950), that an attaching creditor will not prevail over the United States when the latter holds a valid tax lien recorded after the date of the attachment lien, but before the creditor has obtained judgment. In this case, the intervenor did not obtain judgment against the taxpayer until May 12, 1962 long after the federal tax liens had been filed. The Court also cited United States v. Acri, 348 U.S. 211 (1955), as additional authority in support of its decision. Judgment was accordingly entered for the Government.

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

Administrator of taxpayer's Estate Transferred Taxpayer's Stock to Himself, Reducing Assets of the Estate, the Court Held the Transfer Invalid and Ordered a Sale of the Stocks to Satisfy the Government's Claim for taxes. United States v. Peter J. Schmidt, Jr. (ED Missouri). Peter Schmidt, Sr., the taxpayer held 258 shares of capital stock in Pork House Super Market, Inc. He died on August 2, 1954 leaving a tax liability of

$17,947.45 for which a claim was filed in the Probate Court of St. Louis City. However, the administrator of his estate, Peter Schmidt, Jr., had the above-mentioned stock certificates transferred to himself, under signatures which proved to be forgeries. The total remaining assets in the estate after administration costs amounted to only $376.67.

The United States filed suit against Peter Schmidt, Jr. to have the stock returned on the theory of either a fraudulent transfer or no transfer at all. Peter Schmidt, Jr. moved to dismiss on the grounds that this amounted to a discovery of assets proceeding which should have been brought in the Probate Court. The District Court overruled this and found that the Probate Courts do not have exclusive jurisdiction of discovery of assets proceedings. The Court further found that there was no valid transfer of the stocks, since the signatures on the certificates were forged and the stock was owned by Peter Schmidt, Sr. at his death and so became a part of his estate. Therefore, it was subject to the Government's lien for taxes in the amount of $17,131.24 plus interest. The Court then ordered that this property be sold and any money paid in dividends to Peter Schmidt, Jr. be accounted for to the Court.

Staff: United States Attorney D. Jeff Lance (ED Mo.).

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