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UNITED STATES ATTORNEYS
BULLETIN

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WORK OF UNITED STATES ATTORNEYS

JULY, 1962

For the month of July, 1962 United States Attorneys reported collections of $4,620,982. This is $2,204,279 or 91.2 per cent more than the $2,416,703 collected in July of 1961.

	July 1961	July 1962	Increase or Decrease Number	%
Filed				
Criminal	1,819	2,143	+ 324	+ 17.8
Civil	1,886	2,145	+ 259	+ 13.7
Total	3,705	4,288	+ 583	+ 15.7
Terminated				
Criminal	1,732	2,041	+ 309	+ 17.8
Civil	1,500	1,793	+ 293	+ 19.5
Total	3,232	3,834	+ 602	+ 18.6
Pending				
Criminal	8,449	9,417	+ 968	+ 11.5
Civil	21,114	23,253	+ 2,139	+ 10.1
Total	29,563	32,670	+ 3,107	+ 10.5

During July $3,404,990 was saved in 124 suits in which the government as defendant was sued for $4,303,804. 54 of them involving $1,703,139 were closed by compromises amounting to $289,978 and 34 of them involving $1,135,133 were closed by judgments amounting to $608,836. The remaining 36 suits involving $1,465,532 were won by the government. Compared to July, 1961 the amount saved increased by $105,491 or 3.2 per cent from the $3,299,499 saved in that month.

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ADMINISTRATIVE DIVISION

Administrative Assistant Attorney General S. A. Andretta

COLLECTION OF CLAIMS

At the suggestion of the United States Attorney's Office in New York, Southern, Form USA-28 has been revised. The Notice of Overdue Installment Payment now requests transmission of the current payment as well as the overdue payment. Heretofore the debtor has often forwarded only the overdue payment, and by the time the notice had been sent out and the back-payment received another payment would be overdue. The change in language should prevent the account from continuing in arrears.

The title of the United States Attorney has been added at the end of the form. However, this is not intended to impose additional work by requiring the signature of the United States Attorney on the form.

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ANTITRUST DIVISION

Assistant Attorney General Lee Loevinger

Clayton Act Section 7 and 8 Case Brought Against Drug Company. United States v. Thrifty Drug Stores Company, Inc., et al. (S.D. Calif.). On August 13, 1962, the United States filed a complaint in the Southern District of California against Thrifty Drug Stores Co., Inc. of Los Angeles and Leonard H. Straus, alleging that said company's acquisition of 28.75 per cent of the outstanding common stock of Sav-On Drugs, Inc. violated Section 7 of the Clayton Act, and that the election of Leonard H. Straus, President and Director of Thrifty, as a director of Sav-On was a violation of Section 8 of the Clayton Act by Thrifty and by Straus.

Thrifty with 120 stores and Sav-On with 28 stores are the largest and second largest drug store chains in the Los Angeles area. The line of commerce in the complaint is defined as prescription drugs, dispensed by pharmacies, and excluding drugs dispensed by hospitals. Thrifty had total sales in 1961 of approximately $100,000,000 (22 per cent of all merchandise sold in pharmacies) and of $8,200,000 of prescription drugs (10 per cent of the total prescription drug sales). Sav-On had total sales of $71,000,000 (15 per cent of all merchandise) and of prescription drug sales of $5,000,000 (about 6 per cent of the prescription drug total).

The complaint alleges that pharmacy chains in the Los Angeles area have important competitive advantages over small pharmacies, such as large scale buying, private brands, advertising rebates, warehousing, credit and ability to obtain favorable locations in shopping centers. The complaint alleges that Thrifty acquired the Sav-On stock pursuant to a continuing plan to obtain control of Sav-On; that the acquisition may substantially lessen competition or tend to create a monopoly in the retail sale of prescription drugs in the Los Angeles area, and that the actual and potential competition of Sav-On may be substantially lessened.

The complaint further alleges that Thrifty violated Section 8 by voting its stock in Sav-On to elect Straus as a director of Sav-On; and that Straus violated Section 8 by serving as a director of Sav-On.

The complaint prays that the court order Thrifty to divest itself of its Sav-On stock; that Straus be ordered to resign immediately from the Sav-On board of directors.

Staff: Stanley E. Disney, Maxwell M. Blecher, John D. Gaffey and Anthony E. Desmond. (Antitrust Division)

Defendants' Motion For Bill Of Particulars Denied By Court. United States v. M. Klahr, Inc., et al. (S.D. N.Y.). On June 25, Judge Noonan disposed of two complicated motions for particulars in this case by partially granting 3, denying 109 and denying 4 pro tem pending movants' recourse to Rules 16 and 17 of the Criminal Rules.

On August 20, the defendant union official (charged with illegal receipt under the Taft-Hartley Act and conspiracy under the Sherman Act) renewed 2 important demands for particulars, claiming that the documents inspected had revealed no information relevant to these two demands. The defendant sought particularization of the term of the conspiracy relating to his "cooperation in the establishment, maintenance and effective performance" of the bid-rigging scheme and of the allegation that by "various devices and practices" [other than by secret codes], he had concealed the conspiracy. The Government did not dispute the accuracy of the claim but opposed the motion on legal grounds.

Judge Dimock, despite seemingly contrary rulings made by him previously in United States v. J. M. Huber Corporation, et al. and United States v. Greater Blouse Contractors Ass'n., et al. (both antitrust cases), denied all particulars on the basis that overt acts were evidentiary to the conspiracy charge and that the indictment's allegation was clear enough to indicate that the defendant was being charged with agreeing to use his power over labor to assist the conspiracy.

James J. Farrell, Jr. argued the motion on behalf of the Government and was assisted by Joseph T. Maioriello and Richard L. Shanley. At the same time other trial matters were argued by Richard L. Shanley.

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

Court Refuses To Accept Nolo Pleas. United States v. Ward Baking Company, et al. (E.D. Pa.). On August 15, 1962, Judge C. William Kraft, Jr. rejected from the bench pleas of nolo contendere offered by three of the corporate and two of the individual defendants. Thereafter such defendants entered pleas of not guilty. Another individual defendant also offered a plea of nolo contendere, but the court postponed hearing thereon until August 29, 1962.

The indictment returned on June 27, 1962, charged the defendants with price fixing of economy bread and concerted efforts to force an independent distributor to sell economy bread at the agreed-upon prices. Involved were annual sales of economy bread of approximately $4,500,000.

The Government's opposition was based upon the serious nature of the violations charged, the fact the conspiracy was entered into in the Philadelphia area during the height of the publicity given the price-fixing indictments in the heavy electrical industry cases, the concerted attempt by conspirators to force nonwilling participants to agree to the terms of the conspiracy, and the fact the conspiracy was aimed at increasing prices of economy bread which was sold in low-income neighborhoods where the people were least able to bear a price increase.

This is the first time since the heavy electrical industry cases, and so far as known, the second time that the District Court, E.D. Pa., has rejected pleas of nolo contendere in any criminal antitrust case.

Staff: Donald G. Balthis, John E. Sarbaugh and Walter L. Devany (Antitrust Division)

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CIVIL DIVISION

Acting Assistant Attorney General Joseph D. Guilfoyle

COURTS OF APPEALS

ADMIRALTY

Government, as Mortgagee, Held to have Elected to Continue the Operation of Vessel, While Foreclosure Proceedings were Pending, at It's Own Risk. Northwest Marine Works, et al. v. United States (C.A. 9, August 17, 1962). On August 27, 1954, the Government filed a foreclosure libel alleging that the entire unpaid principal and interest on a note and preferred ship mortgage upon the Audrey II, given by Universal Oil Carriers, had become due. At the time the ship was in Los Angeles harbor, carrying a cargo of coal destined for Japan and had been chartered to the Navy following the completion of the voyage. Notice was not published until September 2, 1954 pursuant to Admiralty Rules 10 and 123.

On September 1, 1954, the Government and Universal filed a stipulation. Pursuant thereto the district court entered a consent order providing that Universal was to "undertake to continue operations of the vessel" subject to the continuing jurisdiction of the court. The consent order further provided that charter hire and earnings were to be paid to the shoreside custodian who could make withdrawals for current expenses and that Universal was to advance $17,000 to pay for crew's wages, the advance to be repaid by the custodian out of the next available funds. Subsequently, the vessel proceeded to Japan, but Universal failed to advance any of the $17,000 for payment of crew's wages. On November 18, 1954, the district court made an ex parte determination that immediate action was necessary to maintain the vessel and accepted an offer of the Maritime Administration to advance monies to be used exclusively for wages of the crew and operating expenses. The order provided that the advance up to $150,000 should be a lien on the vessel. Thereafter, in June 1955, the Audrey II returned to the United States and the cause was transferred to the District Court for the Northern District of California. Foreclosure was ordered, and the ship was sold for $430,000, of which $345,510, representing the principal of the mortgage, was paid off by the purchasers giving the Government a new note and mortgage. A net sum of $87,731.72 was deposited in the court's registry. The district court held that the Government's advances for the voyage under the order of November, 1954, amounted to $142,860.08 and that they took priority over the appellant's maritime liens.

The court of appeals reversed. It held that "when the Government, as mortgagee, elected, instead of foreclosing, to continue the operation of the vessel, for its own purposes and benefit, it did so at its own risk, and not at that of appellant lien holders."

Staff: Keith Ferguson (Admiralty and Shipping Section, San Francisco)

FEDERAL TORT CLAIMS ACT

Search and Rescue at Sea: The United States is not Liable for Failure to Rescue a Person in Distress at Sea Unless it Worsens his Position. United States v. DeVane (C.A. 5, August 15, 1952, No. 19,300). This suit was brought under the Federal Tort Claims Act and the Death on the High Seas Act to recover for the death of DeVane, who was the captain of a fishing vessel which sank in a storm off the Western Coast of Florida. The claim was based upon the unsuccessful efforts of the Coast Guard to rescue him from the raft upon which he was floating. The district court found that the United States was negligent in carrying out the search and rescue operations in misinterpreting some messages as to his location, and that this mistake caused a 12-hour delay in the search, which in turn was the proximate cause of the captain's death. Relying upon United States v. Gavagan, 280 F. 2d 319 (C.A. 5), certiorari denied, 364 U.S. 933, the court found the United States liable for this negligence, without making any determination as to whether or not the Coast Guard's rescue efforts had worsened the decedent's position. The district court apparently believed that Gavagan had held that the United States was under an affirmative duty to rescue those in peril at sea, and that it was therefore liable for any negligence in the performance of this duty. The district court also refused to make any findings of any negligence by DeVane, on the ground that the Gavagan case had excluded contributory negligence from consideration in search and rescue cases of this kind.

On appeal, the Government urged that the liability of the United States should be equated to that of the private person who voluntarily undertakes a rescue, i.e., the Good Samaritan; and that the Good Samaritan is not liable for an unsuccessful rescue unless the attempted rescue worsens the position of the person in distress. The court of appeals agreed, holding that Gavagan merely reiterated that the liability of the United States in rescue cases was equated to that of the Good Samaritan. It therefore remanded the case for a district court determination as to whether or not the search in this case worsened the position of the decedent.

On the question of comparative negligence, the court affirmed the ruling of the district court as to negligence which occurred prior to the negligence of the Coast Guard, on the ground that the Coast Guard's negligence was a supervening cause. As to subsequent negligence, however, the court agreed with the Government that the district court should make findings as to the decedent's contributory negligence, to be taken into consideration in the award of damages. 46 U.S.C. 761.

Judge Simpson, the district court judge who had decided Gavagan and who was sitting by designation, concurred in the result on the comparative negligence point, but would have affirmed the district court's ruling on liability, stating that, "The net effect of the majority opinion seems to me * * *, to be to overrule, rather than to follow Gavagan."

Staff: Sherman L. Cohn, David L. Rose (Civil Division)

Statute of Limitations Does not Begin to Run on Malpractice Claim Until Claimant Discovers the Act Constituting the Alleged Malpractice. Victor M. Hungerford, Jr. v. United States of America (C.A. 9, August 8, 1962). Suit was brought by an army veteran in 1960, based on malpractice occurring at a Veterans Administration hospital in 1957. Under 28 U.S.C. 2401(b) "a tort claim against the United States * * * [is] * * * forever barred unless action is begun within two years after such claim accrues." The Government urged that the state law which governs the claim under 28 U.S.C. 1346(b), determines when the claim accrues and that under applicable state law, that of the State of Washington, the claim accrued more than two years before suit was brought. Alternatively the Government argued that, as a matter of federal law, a claim for malpractice accrues at the time of the coincidence of negligence and injury, which in the instant case, was similarly more than two years before suit was brought. In the district court, the Government also urged that plaintiff's claim was barred by the misrepresentation exception to the Federal Tort Claims Act, 28 U.S.C. 2680(h). This section provides that the provisions of the Act do not apply to "* * * any claim arising out of * * * misrepresentation."

On appeal the court of appeals, rejecting the Government's contentions, held that the rule that state law determines when a "claim accrues" works against the congressional policy of "achiev[ing] uniformity with respect to the time limit on bringing * * * suits * * *" under the Federal Tort Claims Act. The court disavowed the earlier decision of the First Circuit in Tessier v. United States which adopted a state law rule and followed the decision of the Fifth Circuit in Quinton v. United States (decided June 14, 1962) in which the Fifth Circuit similarly rejected a state law rule. The court went on to hold that as a matter of federal law a claim accrues "* * * when the claimant discovers, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged malpractice."

Finally, the court held that appellant's claim was not barred by the misrepresentation exception, 28 U.S.C. 2680(h), because "* * * under the allegations of the complaint, the Government had not only the duty to communicate to Hungerford, but also to render proper care for the treatment of the physical condition from which he was actually suffering."

Judge Duniway dissented on the choice of law question.

Staff: John G. Laughlin, Jerry C. Straus (Civil Division)

VETERANS AFFAIRS

Retroactive Seniority Denied Reemployed Veterans. Tilton, et al. v. Missouri Pacific Railroad Co. (C.A. 8, No. 16814), decided August 17, 1962. These were actions by veterans to establish seniority rights assertedly arising under the Universal Military Training and Service Act, 50 U.S.C. App. §459. Plaintiffs were employed as "carmen helpers" and by the terms of their employment they were required to serve a 1040-day work period before being permanently upgraded to carmen status. Prior

to the completion of the 1040-day period plaintiffs entered military service; upon their return from service they resumed their civilian employment, completed the required work period and elected to become carmen. They were accorded a seniority date as of the date of the completion of the 1040 days' service. By these actions the plaintiffs sought to obtain carmen seniority as of the date they would have completed the 1040-day work period but for the intervention of their military service. The Court of Appeals, affirming the judgment of the district court adverse to plaintiffs, held that since plaintiffs' advancement to carmen status was not "automatic" (see, McKinney v. Missouri-Kansas-Texas R.R. Co., 357 U.S. 265), plaintiffs were not entitled to the retroactive seniority date which they claimed. In agreement with the district court, the Court of Appeals was of the view that the advancement to carmen status was not automatic because it depended on a number of variable factors not within the plaintiffs' control. In effect, the court held that the date upon which plaintiffs would have qualified as carmen, but for their military service, was uncertain and depended on a number of variables such as the possibility of lay-offs due to illness or reduction in force, the continued satisfactory performance of their work as carmen helpers, and the continuing need of the railroad of permanent carmen. The Court rejected plaintiffs' argument that their seniority claim was controlled by the Supreme Court's decision in Diehl v. Lehigh Valley Railroad Co., 348 U.S. 960.

Staff: Harry M. Leet, Department of Labor.

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CIVIL RIGHTS DIVISION

Assistant Attorney General Burke Marshall

Voting and Elections; Civil Rights Acts of 1957 and 1960; Attack on Constitutionality of Provisions of the Mississippi Constitution and Mississippi Statutes. U.S. v. Mississippi, et al., (S.D. Miss.). This civil action brought under the Civil Rights Acts of 1957 and 1960 (42 U.S.C. 1971(e)) was filed in the District Court for the Southern District of Mississippi on August 28, 1962 against the State of Mississippi, the State Board of Election Commissioners, and six county registrars of voters.

The Complaint has four separate claims. The first claim attacks the constitutionality of the requirement in the Mississippi Constitution that any citizen in order to become a registered voter must be able to interpret any of the sections of that Constitution. The background alleged in the Complaint leading up to the adoption of the requirement in 1953 details continuous efforts and techniques to exclude Negroes from the polls and that the interpretation test was designed "To perpetuate in Mississippi white political supremacy, a racially segregated society, and the disfranchisement of Negroes." The constitutional attack seeks to invalidate the interpretation requirement because no objective standards are provided for the administration of the test; it freezes a previously existing discriminatory situation; it lacks any reasonable basis or relation to a legitimate state interest; and, in a state where Negroes have been and are provided inferior public educational facilities, any interpretation test bearing a direct relationship to the quality of public education afforded the applicant is a violation of the Fifteenth Amendment.

The second claim attacks the constitutional provision establishing the so-called "good moral character" requirement for registration. This requirement is also alleged to be vague and indefinite with no objective standards provided for its administration and it is an attempt to provide the registrar with an additional device for discrimination.

The third claim attacks a 1960 Mississippi law allowing registrars of voters to destroy their registration records. This statute is in direct conflict with Title III of the Civil Rights Act of 1960 which requires the registrar to retain such records, hence it is in violation of Article VI (supremacy clause) of the Federal Constitution.

The fourth claim attacks a package of legislation adopted in Mississippi in May, 1962. The statutes require that the names of all applicants must be published in a newspaper for two weeks and allow any qualified elector to challenge the good moral character or other qualifications of any applicant. The statutes allow the registrar to delay the registration of any applicant indefinitely and in effect turn the registration process into a court proceeding of providing that the registrar sit as a judge in a hearing to determine the validity of any challenge. The costs of the full administrative hearing are to be borne by the losing party. Other of the statutes convert the application form into a hypertechnical

examination by requiring the registrar to grade the form strictly and to give no assistance to an applicant. These statutes followed Federal registration suits which demonstrated the aid given to white applicants and the easy (or no) grading of their application. The statutes are alleged to be further devices to prevent Negroes from voting in Mississippi.

The Complaint requests that a three-judge court be convened to declare the good moral character test, the interpretation test, the records destruction statute, and the package legislation unconstitutional; and to enjoin the defendant registrars from enforcing them further.

This suit is similar to one filed by the Government in Louisiana in December, 1961.

Staff: United States Attorney Robert Hauberg; Assistant Attorney General Burke Marshall, John Doar, (Civil Rights Division)

Voting and Elections: Civil Rights Acts of 1957 and 1960. United States v. Neely B. Mayton, et al., (S.D. Alabama). This suit, instituted under the Civil Rights Act of 1957, as amended, was filed on August 27, 1962. The defendants are the State of Alabama and the members of the Board of Registrars of Perry County, Alabama. The complaint alleges that the defendants have engaged in racially discriminatory acts and practices in conducting registration of voters in Perry County. The complaint seeks an injunction against the defendants.

Staff: United States Attorney Vernol R. Jansen (S.D. Alabama); John Doar, David L. Norman, Arvid A. Sather (Civil Rights Division).

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

FEDERAL FOOD, DRUG AND COSMETICS ACT

Labeling of Drug by Best Seller "Calories Don't Count"; Denial of Motions for Summary Judgment; Contempt Proceedings Against Author. United States v. "CDC Capsules . . .," (E.D. N.Y.) (204 F. Supp. 280 and 204 F. Supp. 283). This was a civil in rem seizure action brought pursuant to the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 301 et seq. The libel alleged that the seized product "CDC Capsules" was a misbranded drug in that its labeling, which included the best selling book, "Calories Don't Count" by Dr. Herman Taller, contained statements which represented that the product is effective to control body weight even though consuming thousands of calories daily, to lower and control the cholesterol level of the blood, for treatment of arteriosclerosis, to increase sexual drive, and for other purposes which statements were false and misleading.

Claimant moved for partial summary judgment under the theory that it adopted the book as labeling for its product only insofar as the weight control program of the book is concerned and that it did not adopt other portions of the book. In denying this motion (204 F. Supp. 280) the Court ruled that the record supported the inference that "Calories Don't Count" was in fact completely adopted as labeling of CDC Capsules. Thus, no decision was made as to the novel proposition advanced by claimant that a portion of a single book or writing could in any instance be "labeling" under the Food, Drug, and Cosmetic Act, i.e., material accompanying the product, without the complete work also being labeling.

Claimant then moved for complete summary judgment on the ground that the libel charged that the misbranding of the capsules consisted in representing that the product itself was efficacious as a weight reducing agent whereas, claimant contended, the capsules were labelled only as a supplement for use with the CDC Weight Control Program. The motion was denied (204 F. Supp. 283) on the grounds that the claims attached to the product and what was said of the regimen was said of the capsules.

Discovery proceedings were instituted, and the Government petitioned the Court for an order to hold the author of the book, Dr. Herman Taller, in contempt of court for his failure to answer court-directed questions asked at his depositions. The night before the contempt proceedings were to be heard, the claimant, Cove Vitamin & Pharmaceutical Inc., withdrew its claim of ownership and answer. The withdrawal led to the issuance of a default decree of condemnation on June 27, 1962. This order provided that the drug was misbranded as alleged; that the seized articles be condemned and forfeited to the United States; and that the drug be destroyed by the United States Marshal.

Staff: United States Attorney Joseph E. Hoey; Assistant United States Attorney Martin R. Pollner (E.D. N.Y.).

SEARCH AND SEIZURE

Illegal Search and Seizure; Motion to Suppress Evidence. United States v. Sykes (C.A. 6, July 23, 1962). Appellants Sykes, Preston and Strunk, were discovered by police officers of Newport, Kentucky, sitting in a car near a nightclub in a business section at 3 o'clock in the morning. When questioned by police on their reasons for being there, the three defendants gave vague and evasive answers and subsequently were arrested for vagrancy, the car being impounded. A search of the vehicle revealed two loaded revolvers, resulting in an additional local charge of carrying concealed deadly weapons. Also discovered were two ladies' stockings with the upper half tied in a knot at the end, a change of license plates, rope, gloves, and four caps, two of which had been cut so that they could be pulled down over the face.

In addition to the articles found in the car, a bartender in the area advised that the three men were occasionally seen together in the cafe and on one occasion told him while he was serving them that a "job was planned." There was also evidence that Sykes and Preston had been driving around the small town of Berry, observing whatever they could. Based on these factors, the Federal Government adopted the case and charged appellants with conspiring to rob the Union Bank of Berry, Berry, Kentucky, a state bank insured by the Federal Deposit Insurance Corporation, in violation of 18 U.S.C. 371 and 2113. A motion to suppress the evidence concerning the articles found in the car was made in the district court on the ground that it was obtained through an illegal search of the automobile. The district court ruled that the circumstances of the arrest, namely, the time of day and the evasive and vague answers given in response to questions by the police, justified the arrest for vagrancy and that the search was properly made as an incident of a lawful arrest. The defendants were convicted.

On appeal, defendants contended the trial court erred in denying their motion to suppress the evidence obtained from the search of the car. The Chief Judge in the opinion for the Court held that the contents of the car were properly received, relying upon the same rationale as used by the trial judge, and affirmed the convictions.

Staff: United States Attorney Bernard T. Moynahan, Jr.; Assistant United States Attorney N. Mitchell Meade (E.D. Ky.).

ARREST

Probable Cause for Arrest. Samuel J. D. Williams v. United States (C.A. D.C., August 2, 1962). In this case the arresting officer knew that a certain housebreaking and assault had been committed and that a fellow officer wanted the defendant for this crime. A private citizen who had identified the defendant based on the description furnished by the complainant had helped the fellow officer to look for the defendant. When the fellow officer was called away on another matter, the private citizen continued the search under directions to call the police if he located the defendant. Upon locating the defendant, the private citizen

contacted the arresting officer, who took the defendant into custody without knowing the details of the crime or why he was suspected of the crime.

The defendant urged that the arresting officer lacked personal knowledge sufficient to establish probable cause for the arrest and challenged the admissibility of evidence obtained from the search incident to the arrest. While conceding that the fellow officer would have had probable cause for the arrest, defendant claimed that the arresting officer did not have adequate first hand information and was acting only on the fellow officer's instructions.

Finding the claims relatively novel, the Court of Appeals expressed the view that the collective knowledge of a large Metropolitan police department can be imputed to an individual officer who acts under orders from his superior or upon the request of associates. The Court emphasized that the entire complex of modern communication in a large police establishment would be a futility if the authority of an individual officer was limited by the scope of his first hand information concerning a crime. The Court concluded that the test is "whether a prudent and cautious officer in those circumstances would have reasonable grounds - not proof or actual knowledge - to believe that a crime had been committed" and that the person to be arrested was the offender.

Staff: United States Attorney David C. Acheson; Assistant United States Attorneys Nathan J. Paulson and Judah Best (Dist. of Col.).

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LANDS DIVISION

Assistant Attorney General Ramsey Clark

Indians; Navajo Tribal Regulation; Lack of Jurisdiction to Enjoin Secretary of the Interior From Enforcement. Oliver v. Udall (C.A. D.C.). - In 1940, the Navajo Indian Reservation was policed under a Law and Order Code approved by the Secretary of the Interior. In that year, at the request of the Tribal Council, there was added a prohibition against use of peyote, a substance obtained from cactus, the request reciting that the use of peyote was not connected with any Navajo religious practice. In 1959, the Federal Code was adopted by the Navajo Tribal Council as tribal law as authorized by a regulation.

The Native American Church of North America, claiming a right to use peyote for Navajo religious ceremonies, brought suit against the Tribal Council to enjoin enforcement of the prohibition. This suit was dismissed on various grounds and the Tenth Circuit affirmed on the ground that the first ten amendments of the Constitution did not restrict actions of Indian tribal authorities. Native American Church v. Navajo Tribal Council, 272 F. 2d 131 (1959). See 7 U. S. Attys' Bull. No. 25, p. 703.

The present suit was brought by the same group to enjoin the Secretary of the Interior from enforcing the regulation. The court of appeals affirmed dismissal of the case. It held that there was no case or controversy as to the 1940 regulation because it has been superseded. It held that, as to the 1959 Regulation of the Tribal Council, the Secretary could not be sued because he was not threatening to do anything, enforcement being left to tribal authority.

Staff: Floyd France (Lands Division).

Eminent Domain; Right to Take; Finality of Administrative Determination of Quantity and Location of Land Needed; Amount of Deposit Not Subject to Judicial Review. United States v. 4.236 Acres of Land in Siskiyou County, California (N.D. Cal., D.J. File No. 33-5-2202). - In connection with the Shasta National Forest Project, a condemnation proceeding was instituted on October 25, 1961, at the request of the Secretary of Agriculture to acquire a highway easement in 4.236 acres of land in Siskiyou County, California. The property was owned by John A. and Margaret Voegtle, who filed an answer denying the Government's right to maintain its suit and seeking the dismissal thereof, or in the alternative, that the Government be required "to erect such fencing and safeguards along said contemplated route so that said route would not endanger the lives of the said defendants and their minor children; that the United States Government be further required to construct such drainage and drainage facilities that the water and the overflow from said contemplated route would in no way endanger the defendants' residence and health."; and further, "that the United States Government be required to construct said route in such a

manner that said route would not isolate the defendants' property from the balance of the defendants' property."

The answer alleged that the condemnation of the property was not "for a public use and necessity" and further that the contemplated roadway would endanger the lives of the defendants' children, create dust, debris and noise and interfere with the enjoyment of the property. Further, it was alleged that such taking in drainage of unusual amounts of water upon the defendants' land from the road caused damage thereto and creates health hazards. It was also alleged that the United States could use "other and more convenient routes" which would avoid the isolation of a portion of the defendants' property and would render unnecessary the institution of the condemnation action. The defendants also moved to set aside an order of possession granted by the court at the outset of this case, alleging as a principal ground therefor the inadequacy of the deposit of the estimated compensation upon the filing of the declaration of taking, which was in this instance $225.00, characterized by the defendants as being "nominal." The Government filed a timely motion to strike the objectionable portions of the answer and also made a formal objection to the defendants' motion to set aside the order of possession.

The district court ruled with the United States on each point.

In brief, its opinion held:

1. The deposit with the declaration of taking was not unreasonably low, and further, that the allegation made by the defendants regarding the same is not "the equivalent of an allegation of bad faith;"

2. The proposed construction of the road and its effect on the adjacent land was at best only a "potential hazard" and properly an issue as to the amount of the just compensation to be awarded to the defendants; and

3. The question of the Government's necessity for the condemnation of the road easement was one as to which "this court may not at this time, or in the future, substitute its judgment for that of the Secretary."

Staff: A. Lawrence Burbank, Assistant United States Attorney (N. D. Cal.).

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

NOTICE

Revision of the Tax Division's handbook, "The Trial of Criminal Income Tax Cases", has been completed. All United States Attorneys' offices will be supplied with a stock of the 1962 edition. Each copy carries a serial number and it is expected that these numbers will be recorded and a record kept also of the personnel in the United States Attorneys' offices to whom copies of the Manual are assigned.

To prevent the old editions of the Criminal Tax Manual (as revised in 1957) from falling into private hands, all old issues are to be returned to the Department on receipt of the new edition.

Any notes or private sheets embodying the research of Assistants in the old manuals should be transcribed by the Assistants in the new copies, where appropriate, before the old copies are sent to the Department.

Finally, it should be especially noted that the Manual is classified as "Restricted to the Use of Department of Justice Personnel".

CRIMINAL TAX MATTERS
Appellate Decision

Evasion--Wilful Attempt to Evade Income Taxes--Court of Appeals Holds that "Leads" Rule is Inapplicable in a "Specific Items" Case. Government's Use of Summaries Approved; Discussion of Defense of Good Faith Reliance Upon Accountants. Swallow v. United States (C.A. 10th, July 11, 1962). Taxpayer was convicted on two counts of wilfully attempting to evade his income tax for the years 1953 and 1954, by filing false and fraudulent income tax returns. The Government, in utilizing the "specific items" method, proved that taxpayer had omitted from gross income certain funds which taxpayer had received from a corporation controlled by him. Taxpayer asserted in defense that there was in fact no tax deficiency since the omissions from gross income were more than offset by amounts allegedly spent by him on behalf of the corporation, out of his own personal funds, which therefore represented deductions from gross income, though not claimed as such on his personal income tax returns. Taxpayer contended at trial that he had provided "leads" to the special agent to check out these alleged expenditures, and that the special agent had failed to do so. On appeal, taxpayer, relying upon Holland v. United States, 348 U. S. 121, argued that the failure to investigate such "leads" constituted reversible error. The Court of Appeals rejected this contention, holding that the "leads" rule has applicability only in a "net worth", and not in a "specific items" case. This is so,

of course, since the "specific items" method involves merely the proving of omissions from gross income by direct evidence of the omissions. In net worth cases, however, since an indirect method of proof is involved, the cogency of the Government's case depends upon its effective negation of reasonable explanations furnished by the taxpayer, who seeks to attribute the net worth increase to a non-taxable source of income. In the instant case, taxpayer, by arguing that the agent should have investigated the expenditures allegedly made by him on behalf of the corporation, in effect was contending that the Government, in making a prima facie case, is required to prove that taxpayer did not have any deductions other than those claimed by him on his returns. This is not the law. See Elwert v. United States, 231 F. 2d 928, and cases cited therein.

It should further be noted that the Court of Appeals reaffirmed the long established case law which permits the use of summaries, based upon the documentary and testimonial evidence in the case, to visually portray a taxpayer's omissions from gross income. The jury charge given by the lower court with respect to these summaries is set out verbatim in the opinion (fn. 8) and can be used as a guide in future cases.

Taxpayer had also offered the defense that he had relied in good faith upon the accountants who prepared his income tax returns. If proved, of course, this is a valid defense, and such a contention will, in all probability, occur in future cases with increasing frequency, due to the current efforts of the Internal Revenue Service to apply the law more vigorously against corporate executives and others in the higher income brackets. As the Court of Appeals noted, the question of good faith reliance presents only a question of fact for the jury, and if the evidence, viewed in the light most favorable to the Government, supports the jury verdict, it will not be disturbed on appeal.

Staff: United States Attorney Lawrence M. Henry (Dist. Colorado); Robert H. Purl and Norman Sepenuk (Tax Division).

CIVIL TAX MATTERS
District Court Decisions

Claim for Refund of Amounts Paid to Obtain a Certificate of Discharge of Tax Liens From Property Purchased at a Foreclosure Sale Prior to the Brosnan and Bank of America Cases Denied. Linwood H. and Lucille J. Brittle v. United States (S.D. Calif.). Bonnie Hill Homes, Inc. acquired a parcel of real property through purchase at a foreclosure sale held under the third deed of trust. As a result of the sale all encumbrances and liens upon the property were extinguished unless the Government liens, aggregating $10,670.18, were not affected. The day following the sale Bonnie Hill Homes, Inc. made application for discharge of the Government

liens from the property pursuant to Section 6325(b)(2) of the Internal Revenue Code of 1954. While the application was pending, plaintiff entered into an escrow to purchase the property from Bonnie Hill Homes, Inc. The application for discharge was granted subsequently upon the payment of $3,015, which sum plaintiff paid through the escrow. Subsequent to the granting of the discharge, the Supreme Court entered its decision in the Brosnan and Bank of America cases, which, in effect, meant that the plaintiff here would have owed the Government nothing since its liens, being junior, would have been extinguished by the foreclosure. The Court granted summary judgment for the Government rejecting the plaintiff's claim here for refund of the amount paid to the Government for the discharge. The Court stated that the plaintiff chose voluntarily to pay the Government the amount specified and that such payment was the quid pro quo for the issuance of the certificate.

Staff: United States Attorney Francis C. Whelan (S. D. Calif.).

Injunctions: Taxpayers' Application for Preliminary Injunction Against Collecting Assessment Pending Appeal From Tax Court to Circuit Court of Appeals Denied. Long, et al. v. Wood, 62-2 USTC ¶9566 (DC Arizona). Taxpayers instituted an action seeking an injunction against the collection of certain tax liabilities for 1951 and 1953 and a money judgment for overassessments for 1952. Taxpayers had consented to entry of judgment in the Tax Court in the amount of the deficiencies as originally determined against them and the Commissioner subsequently filed a motion for leave to file an amendment to his answer claiming increased deficiencies, which was denied. The Commissioner then filed a motion to vacate the decision, which was also denied, and he then filed a petition for review of the Tax Court's decision.

The Court ruled that the Commissioner's motions had been timely filed and that the time in which a petition for review must be filed did not begin to run until the last motion was denied. Further, because the taxpayers did not file a petition for review of the Tax Court decision or a bond, by reason of the provisions of Section 7485(a) of the Internal Revenue Code of 1954, the fact that the case was on appeal did not operate to stay the assessment or collection of the deficiencies, and, on this basis, the taxpayers' application for a preliminary injunction was denied.

Staff: United States Attorney Charles A. Muecke (Ariz.) and John F. Beggan (Tax Division).

Court Orders Foreclosure of Tax Lien on Note Owed to the Taxpayers Held as Tenants by the Entireties and Applies Proceeds First to the Joint Liabilities and the Remaining Balance to be Retained in the Registry of the Court Until the Death of Mr. or Mrs. Ragsdale, the Taxpayers. United States v. Lonnie Marion Ragsdale, et al. (WD Tenn.). This is a suit filed by the United States to reduce to judgment income tax deficiencies of Mr. and Mrs. Ragsdale, husband and wife, and to foreclose tax liens on a note owed to

them. The tax deficiencies were assessed against them jointly for the years 1943 and 1954 and against Mr. Ragsdale, individually, for the years 1945, 1946, and 1947. The correctness of the assessments was not contested. The principal issue dealt with the Government's effort to foreclose its lien on the note given to the taxpayers when they sold a parcel of real estate in 1954. The Court ordered the Government's lien foreclosed and the note sold, but held that the proceeds constituted property of the taxpayers held as tenants by the entireties. With respect to the application of the proceeds, the Court ordered that the joint liability of Mr. and Mrs. Ragsdale be first satisfied and the balance then held in the registry of the court pending the death of Mr. or Mrs. Ragsdale. If Mr. Ragsdale survives, the Government will be entitled to the entire fund to the extent necessary to satisfy his individual liability. The Clerk is authorized to invest the fund in Government bonds and the Government is entitled to one-half of the income as it is received in payment of the individual liability.

Staff: United States Attorney Thomas L. Robinson (WD Tenn.).

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