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ANTITRUST DIVISION

Assistant Attorney General Lee Loevinger

SHERMAN ACT

General Motors Charged With Violating Sec. 1. United States v. General Motors Corporation, et al. (S.D. Calif.) A civil action was filed on August 30, 1962 charging General Motors Corporation, and three associations composed of Chevrolet dealers in the Los Angeles metropolitan area with a violation of Section 1 of the Sherman Act. The three defendant associations are: Losor Chevrolet Dealers Association, Dealers' Service, Inc. and Foothill Chevrolet Dealers Association.

The complaint alleged that defendants and certain co-conspirators entered into a combination and conspiracy beginning in or about the summer of 1960 to eliminate sales of Chevrolet automobiles by Chevrolet dealers through discount houses or referral services in the Southern California area. Chevrolet dealers since about 1953 have sold Chevrolets pursuant to written, oral, or implied agreements or understandings with discount houses and referral services. The complaint charges that the conspiracy consisted of agreements to induce and persuade Chevrolet dealers to refrain from selling Chevrolet automobiles pursuant to such agreements or understandings, to utilize "shoppers" for the purpose of identifying Chevrolet dealers who were selling Chevrolets pursuant to such agreements or understandings and to induce and persuade Chevrolet dealers to repurchase Chevrolet automobiles purchased by shoppers from such dealers.

In 1960, Chevrolet dealers in the Southern California area sold over 2,000 Chevrolets pursuant to agreements or understandings with discount houses or referral services. This number represented a substantial growth since this method of merchandising began in or about 1953, and the complaint alleges such sales threaten to lower the retail prices of Chevrolet automobiles in the Southern California area.

The complaint asks that General Motors be enjoined from (1) imposing or attempting to impose any limitation or restriction on the persons or classes of persons with whom their dealers may deal; (2) inducing or persuading or attempting to induce or persuade any of their dealers to refrain from dealing with any person or classes of persons; (3) controlling or attempting to control the prices at which any of its dealers may resell, and (4) exercising or attempting to exercise any restraint on the resale of cars or trucks by any of their dealers.

The complaint is essentially a companion case to a criminal indictment returned on October 12, 1961, set for trial on November 20, 1962. While the offense charged is limited to Chevrolets in the Southern California area, the complaint seeks injunctive relief against General Motors with respect to all models of cars and trucks throughout the United States.

Staff: Maxwell M. Blecher (Antitrust Division)

Plastic Pipe Industry Charged With Section 1 Violation. United States v. Carlon Products Corp., et al. (S.D. Ohio E.D.), United States v. Triangle Conduit & Cable Co., et al. (S.D. Ohio E.D.), & United States v. The B. F. Goodrich Company, et al. (S.D. Ohio E.D.). On September 5, 1962, a grand jury in Columbus, Ohio returned three one count indictments charging fifteen corporations and twelve individuals with conspiring to fix prices for plastic pipe in violation of Section 1 of the Sherman Act. The indictments related to three different types of plastic pipe respectively, acrylonitrile-butadiene-styrene, or ABS plastic pipe, polyethylene plastic pipe and polyvinyl chloride, or PVC plastic pipe.

The ABS plastic pipe indictment charged a conspiracy, beginning in 1957 and continuing until late 1958, and named as defendants the following corporations and individuals:

Republic Steel Corporation, Cleveland, Ohio and Howard M. McDaniel, Assistant Sales Manager, Pipe Sales Division;

Triangle Conduit & Cable Co., Inc., New Brunswick, New Jersey and Judd E. Winick, Director of Sales, Plastic Division;

Yardley Plastic Co., Columbus, Ohio and Robert W. Rosel, Vice President, Sales;

Southwestern Plastic Pipe Co., Mineral Wells, Texas and J.F. Bailey, Secretary; and

Carlon Products Corp., Aurora, Ohio and William Abramowitz, President.

Sales of ABS plastic pipe by the corporate defendants in 1958 were approximately $4,265,000.

The polyethylene indictment charged a conspiracy from 1959 through 1960 and named the following corporations and individuals as defendants:

Triangle Conduit and Cable Co., Inc., New Brunswick, New Jersey and Judd E. Winick, Director of Sales, Plastic Division;

Carlon Products Corporation, Aurora, Ohio and William Abramowitz, President and Chairman of the Board;

Consolidated Pipe Company of America, Akron, Ohio and Carl D. Pearl, President;

Crescent Plastics, Inc., Evansville, Indiana and John J. Schroeder, President;

Yardley Plastics Company, Columbus, Ohio and Robert W. Rosel, Vice President, Sales; and

The Zimmerman Company, Columbus, Ohio and Richard S. Zimmerman, President.

Sales by the corporate defendants of polyethylene plastic pipe and second grade polyethylene plastic pipe exceeded $8,000,000 per year in each of the years 1959 through 1960.

The PVC plastic pipe indictment charged a conspiracy beginning in 1956 and continuing through 1960 and named as defendants the following corporations and individuals:

The B. F. Goodrich Co., Akron, Ohio and David T. Skowlund, Senior Sales Development, Plastics Products Division;

United States Steel Corporation, Pittsburgh, Pa.;

United States Rubber Company, New York, N. Y.;

Carlon Products Company, Aurora, Ohio and William Abramowitz, President and Chairman of the Board;

Joseph T. Ryerson & Son, Inc., Chicago, Illinois and J. L. McDermott, Manager, Industrial Plastics and Bearings Division;

Mannesmann-Easton Plastic Products Co., Inc., Easton, Pa. and Harvey Wismer, Vice President;

The Colonial Plastics Mfg. Co., Cleveland, Ohio and William Hatfield, Jr., Vice President and General Manager; and

Alpha Plastics, Inc., Livingston, New Jersey.

Sales by the corporate defendants in PVC plastic pipe exceed $3,500,000 annually.

Judge Underwood set the arraignment for October 2, 1962.

Staff: Norman H. Seidler, Frank Moore and Dwight B. Moore (Antitrust Division)

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CIVIL DIVISION

Acting Assistant Attorney General Joseph D. Guilfoyle

COURT OF APPEALS

FEDERAL TORT CLAIMS ACT

Expenses Incurred by States in Fighting Fire Allegedly Negligently Set by United States Not "Injury or Loss of Property" Within Meaning of Federal Tort Claims Act. People of State of California v. United States (No. 17,534), Oregon, et al. v. United States (No. 15,574) (C.A. 9, September 20, 1962). These actions arose out of a forest fire, allegedly negligently set by the United States, which burned from California into Oregon. Both States sought to recover under the Federal Tort Claims Act the expenses they incurred in suppressing the fires, premising their rights on state statutory remedies. The district courts dismissed these actions for lack of subject matter jurisdiction. The Court of Appeals affirmed, holding that, since the complaints were not grounded upon damage to state property as a result of the fire, the claims were not for "an injury or loss of property" within the meaning of 28 U.S.C. 1346(b). The Court agreed with the Government's contention that Section 1346(b) limits Tort Claims Act jurisdiction to such claims.

Staff: Stanley M. Kolber (Civil Division)

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CIVIL RIGHTS DIVISION

Assistant Attorney General Burke Marshall

United States v. County School Board of Prince George County, Virginia, et al., (E.D. Va.). On September 17, 1962, the Department filed a suit against the County School Board of Prince George County, Virginia, James O. Moorehead, Division Superintendent of Schools of the County and the Commonwealth of Virginia.

This suit is the first brought by the Government as plaintiff to prevent racially segregated public schools in districts which are recipients of federal impacted aid funds. These funds provide aid for the construction and maintenance of schools in districts in which reside school-age dependents of federal servicemen and employees.

The complaint alleges that defendants are violating the Fourteenth Amendment by discriminating against and segregating on account of race or color Negro dependents of members and civilian employees of plaintiff's Armed Services stationed or employed at Fort Lee, Virginia, and asserts that this practice is detrimental to the morale of the servicemen and employees. The Government seeks an injunction to prevent such discrimination.

Fort Lee is the home of the United States Army Quartermaster School, the Logistical Management Center and eleven other military units. At Fort Lee are approximately 5,678 military personnel and 2,088 civilian employees.

Defendants maintain eleven public schools in Prince George County and plan to construct an additional two schools. Five of the schools are for white children only and six are for Negro children only. There are 117 children who live in Government housing on Fort Lee who are assigned by the Prince George County School Board to schools in the City of Petersburg in neighboring Dinwiddie County. Eight of these children have applied for admission to Prince George County schools for the 1962-63 school year and their applications have been denied.

The Government has contributed $1,405,951.50 to Prince George County for the construction of schools and $1,150,596.58 for the maintenance of schools under the impacted funds program. The Government, through the Commissioner of Education, has also reserved funds to pay the projected total cost of the construction of the two additional county schools.

Staff: United States Attorney Claude V. Spratley, Jr.;
Assistant Attorney General Burke Marshall,
St. John Barrett, David H. Marlin, (Civil Rights Division)

United States v. Wayne Henry Gray (D. Colo). A federal grand jury in Denver, Colorado, returned a ten count indictment on November 20, 1961, charging defendant with violation of 18 U.S.C. 1581(a) and 1584 by forcing a number of Navajo Indians to work in a pinon nut camp in Colorado operated by him. The Indians had been transported from the City Jail in Gallup, New Mexico, where defendant had made arrangements with them in return for paying their fines of $5.00 for being drunk and disorderly.

Defendant became a fugitive after the return of the indictment. He was apprehended by United States Marshals in the State of Washington and returned to Colorado.

On September 7, 1962, the Court accepted defendant's plea of nolo contendere on Count 7 of the indictment and dismissed the other nine counts. The Court suspended the imposition of sentence and placed the defendant on probation for three and one-half years.

Staff: United States Attorney Lawrence M. Henry; Assistant United States Attorney James P. McGruder, (D. Colo.)

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

ANTI-CRIME STATUTES

Indictments. Several indictments brought under the anticrime statutes passed by the 87th Congress, First Session, have withstood motions to dismiss. Three counts are set forth below which were held valid under 18 U.S.C. 1952, 1953, and 1084.

In an indictment in the Western District of Washington (Northern Division) against Turf Smoke Shop, Inc. and others, the following two counts were upheld:

COUNT I

That on or about May 14, 1962, at Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this Court, the defendants, TURF SMOKE SHOP, INC., a Washington corporation, and JOHN A. WIKLUND, did use a facility in interstate commerce, to wit, the wire facilities of the Western Union Telegraph Company, which facilities operate between Chicago, Illinois, and Seattle, Washington, with the intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of an unlawful activity, to wit, a business enterprise involving gambling offenses, that is to say, gambling, betting and wagering on sporting events in violation of the laws of the State of Washington, namely, Title 9, Revised Code of Washington, Sections 9.47.010, 9.47.020, 9.47.030, 9.47.060 and 9.47.070, and in addition, the laws of the United States, namely, Title 18, United States Code, Section 1084, and that said defendants did thereafter perform and attempt to perform acts in the Western District of Washington to promote, manage, carry on and establish the said unlawful activity, all in violation of Title 18, United States Code, Sections 1952 and 2.

The Grand Jury Further Charges:

COUNT II

That on or about May 14, 1962, at Seattle, in the Northern Division of the Western District of Washington and within the jurisdiction of this Court, the defendants, TURF SMOKE SHOP, INC., and JOHN A. WIKLUND, being engaged in the business of betting and wagering, did knowingly use a wire communication facility, to wit, a Western Union Telegraph Company ticker, for the transmission in interstate commerce, to wit, from Chicago, Illinois, to Seattle, Washington, of information assisting in the placing of bets and wagers on sporting events and contests, in violation of Title 18, United States Code, Sections 1084 and 2.

In an indictment in the Northern District of West Virginia against Anthony Joseph Zambito and others, the following count was upheld:

COUNT THREE

The Grand Jury further charges that on or about December 13, 1961, ANTHONY JOSEPH ZAMBITO and ARTHUR C. HALE, defendants herein, did knowingly carry and did knowingly cause others to carry in interstate commerce, to wit from Bellaire, Ohio to Wheeling, West Virginia, in the Northern District of West Virginia and within the jurisdiction of this court, tickets, slips, papers and writings, to wit numbers slips, knowing that said slips were used, to be used, and designed and devised for use in a numbers, policy, bolita or similar game, all in violation of Title 18, United States Code, Section 1953, and Section 2.

TELECOMMUNICATIONS

Admissibility of Telephone Recording; Recording Made by Placing Device on Extension Telephone Violates Neither 47 U.S.C. 605 Nor the 4th Amendment, and Is Admissible Evidence When Done With Consent of One Party to Conversation. Waldo Kent Ferguson et al. v. United States (C.A. 10). Recordings of telephone conversations were made by attaching a recording device to the receiver of a specially installed extension telephone at the residence of two prostitutes. One of the prostitutes became a special employee of the Government for the purpose of obtaining evidence of illegal narcotic transactions. Both the special employee and the Federal agents attached the recording device whenever a possibly incriminating call was sent or received at her apartment.

The trial court decided the issue of admissibility of the recordings on the basis of Rathbun v. United States, 355 U.S. 107. Appellants contended the case is distinguishable from Rathbun wherein the contents of conversations overheard by Federal agents, using an extension telephone with the consent of the receiver, were held to be admissible. The distinguishing factors relied on are as follows:

1. The extension was specially installed as an aid to eavesdropping;

2. The conversations were intercepted in that the device was placed between the ear of the receiver and the sender;

3. The term extension is misleading since only one telephone was actually used;

4. The special employee could not legally consent to the recording since such an act would violate Oklahoma statutory law.

The Court of Appeals rejected these contentions stating that the evidence obtained and used in the case was obtained in substantially the same manner as that approved in Rathbun; that the recording of a telephone conversation

is not distinguishable from permitting the entire conversation to be overheard; that Government agents may create an opportunity for lawful eavesdropping; and that the course of a Federal criminal prosecution cannot be controlled by state law.

Staff: United States Attorney B. Andrew Potter;
Assistant United States Attorney Jack R. Parr
(D. Okla.).

MAIL FRAUD

Fraudulent Music Promotion Scheme. On August 27, 1962, Mortimer Singer was sentenced to 18 months and fined a total of $4,500 upon 29 counts of an indictment charging mail fraud violations in connection with a fraudulent music promotion scheme. Defendant had, over a long period of time, under fictitious firm names, operated schemes to defraud unwary would-be song writers by luring them into advancing sums of money to have their songs published and receive royalty payments from the songs. Victims were defrauded of an estimated $150,000.

Staff: Assistant United States Attorney Timothy Thornton
(S.D. Calif.).

FINGERPRINTS

Motion for Return and Expunction of Fingerprints Denied. Jules Chopak v. United States (E.D. N.Y., August 14, 1962). In this case, petitioner had been arraigned before a United States Commissioner on a charge of mailing a post card on which was written libelous and scurrilous language. The United States Attorney subsequently declined prosecution and the complaint against petitioner was dismissed. Petitioner then moved for an order directing the return or expunction of his fingerprints taken by the United States Marshal after his arraignment. The Court denied the motion.

The power of the Attorney General through his delegate, the United States Marshal, to require offenders against Federal law to submit to fingerprinting was recently upheld in United States v. Krapf, 285 F. 2d 647 (C.A. 3, 1961). The decision in the instant case appears to be the first Federal decision upholding Government retention of fingerprint records, when the complaint which formed the basis for securing the fingerprints has been dismissed. As was stated in United States v. Krapf, supra, at pp. 650-51: "Initially, it should be pointed out that fingerprinting is not a punishment. It is a means of identification which is useful in many circumstances some of which relate to the enforcement of our laws. Unless the burdens that this procedure places on the individual are unreasonable, therefore, it will be upheld as one of those annoyances that must be suffered for the common good."

Staff: United States Attorney Joseph P. Hoey;
Assistant United States Attorney Raymond B. Grunewald
(E.D. N.Y.).

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IMMIGRATION AND NATURALIZATION SERVICE

Raymond F. Farrell, Commissioner

DEPORTATION

Test Used in Smith Act Criminal Cases to Determine Whether Organization Advocates Violent Overthrow of United States Government Used in Deportation Case. George Albert Scythes v. Richard L. Webb (C.A. 7, September 13, 1962.) Petitioner sought review under the provisions of Sec. 106 of the Immigration and Nationality Act, 8 U.S.C. 1105(a), of an order for his deportation based on his membership in the Socialist Workers Party. It had been administratively determined that such organization taught and advocated the overthrow of the United States Government by force and violence.

The Court ruled that in determining in deportation proceeding whether an organization advocates or teaches the violent overthrow of the United States Government the evidence should meet the test used in Smith Act prosecutions. The Court then found no substantial evidence in the record that the Socialist Workers Party advocates or teaches by its "Declaration of Principles and Constitution" the violent overthrow of the United States Government within the meaning of Smith Act cases or that there is a party line within the organization which advocates or teaches such overthrow.

Staff: Assistant United States Attorney John P. Crowley,
Northern District of Illinois

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INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

False Statement (18 U.S.C. 1001). United States v. James W. McCoo, Jr. (D.C.). On August 6, 1962, a federal grand jury at Washington, D. C. returned a 2 count indictment against James W. McCoo, Jr. (see Bulletin No. 19, Vol. 10).

Following the postponement of McCoo's hearing on August 15, 1962 before the United States Commissioner at Chicago, Illinois, defendant waived the hearing and elected to proceed under Rule 20 of the Federal Rules of Criminal Procedure. On September 7, 1962, defendant entered a plea of guilty to both counts of the indictment in the United States District Court at Chicago. Sentencing was set for October 9, 1962.

Staff: United States Attorney James P. O'Brien (N.D. Ill.); Vincent P. MacQueeney (Internal Security Division)

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LANDS DIVISION

Assistant Attorney General Ramsey Clark

Ejectment-Deeds-Construction-Exclusion From Evidence of Deed and Map by Grantee Under Deed in Dispute Held Reversible Error. Cline v. United States (C.A. 4, August 22, 1962). This action in ejectment was brought against Cline by the United States as trustee for the Eastern Band of Cherokee Indians. The district court held for the United States and Cline appealed. The Fourth Circuit reversed and remanded the case for a new trial.

Cline claimed that the land he was occupying did not belong to the Indians but was included in a grant from the Indians to Bryson City, North Carolina, in 1924. In designating the property conveyed, the deed set it forth as "approximately 25 acres of land * * * as per survey of Chas. Waddell, Civil Engineer." Witnesses for both parties had referred to the Waddell survey. The defendant, Cline, sought to introduce the deed by which Bryson City had subsequently granted the 25 acres to Nantahala Power and Light Company. To this deed was attached the Waddell survey. The district court excluded the deed and attached survey as irrelevant because neither party claimed under that deed. Although the opinion does not so state, there was no attempt to introduce the Waddell survey separately. Nor was it even mentioned that the Waddell Survey was attached to the deed from Bryson City to Nantahala at the time the deed was offered in evidence. Nonetheless, the Court of Appeals held the refusal of the district court to admit the deed and attached survey was error.

Staff: Edmund B. Clark and A. Donald Mileur (Lands Division).

Condemnation Following Leasehold by Government-Cross-claim for Restoration Costs. United States v. Certain land, together with improvements thereon located at 400 Lee Street, Montgomery, Alabama, and the Security Life and Accident Company, et al. (M.D. Ala.). The property involved in this proceeding (regional office of Veterans Administration, Montgomery, Ala.) was occupied previously by the Government under lease. The lease expired and a condemnation proceeding was instituted because of the inability to negotiate a new lease. The landowner filed an answer and cross-claim in the condemnation action objecting to the authority of the United States to condemn because of its previous occupancy under a voluntary lease and seeking restoration costs by way of the cross-claim. The owner also alleged that the taking was arbitrary and in bad faith. The Government filed a motion to strike the answer on the ground that the administrative determination is not subject to judicial review, and to strike the cross-claim on the ground that the United States cannot be sued without its consent, including a cross-claim, and because restoration costs are paid as a part of the condemnation proceedings.

The District Court granted the Government's motion to strike the cross-claim stating inter alia: "It is fundamental that no suit may be brought against the United States without its consent. United States v. Shaw, 309 U.S. 495; In re Greenstreet, Inc., 209 F.2d 660; and United States v. Gill, 156 F.Supp. 955." The District Court also denied defendant's objections to the Government's taking, stating inter alia:

> As to the contention on the part of the Security Life and Accident Insurance Company that the taking was arbitrary and in bad faith, this Court, upon this submission, concludes that the evidence is totally inadequate to sustain such a contention. It is a basic proposition in eminent domain cases that the question of determining public necessity is vested solely in the discretion of the taking authority and is not a question to be inquired into in the ordinary case by the courts. United States v. Carmack, 329 U.S. 230, 1946; United States v. 6.74 Acres of Land, 148 F.2d 618, CCA 5, 1945; In re United States, 257 F.2d 844, CCA 5, 1958; and United States v. Mischke, 285 F.2d 628, CCA 8, 1961.

Staff: Assistant United States Attorney Rodney R. Steele, (M.D. Ala.) and D. M. Smith (Lands Division).

Statute of Limitations; United States Not Barred From Common Law Cause of Action for Conversion of Timber by State Statute of Limitations But Is Barred from Recovering Penalty Under State Statute Awarding Treble Damages for Wilful Trespass. United States v. Magnolia Motor and Logging Company, et al., (N.D. Cal.). This action was brought for the recovery of treble damages for a wilful trespass under sec. 3346, Cal.C.C., or in the alternative, for the recovery of damages for the wrongful conversion of the timber. On defendant's motion to dismiss, the Court held that the United States is not barred by the state statute of limitations from its common law action for the recovery of damages for the conversion of the timber, but it is barred by a state statute of limitations from recovering treble damages for a wilful trespass since the damages represent a penalty and state statutes of limitation on state-created statutory causes of action apply to the United States.

The Court held that the United States was not barred by the five year statute of limitations contained in sec. 3346, since it was added to the statute in 1957 and cannot be applied retroactively to trespasses committed before that date, but that it is barred by either sec. 340(1) of the Cal. Code of Civ. Proc., providing for a one year period of limitations in actions for penalties, or sec. 338, providing for a three year period of limitation upon actions for trespass upon injury to real property. It was further held that the United States is not barred by the five year statute of limitations contained in 28 U.S.C. 2462, since this applies only to

fines, penalties or pecuniary forfeitures prescribed for the violation of an Act of Congress. The adverse ruling respecting limitations on the claim for treble damages is not presently appealable. Consideration of whether it will be appealed must be deferred until a final judgment is entered.

Staff: Assistant United States Attorney E. Richard Walker (N. D. Calif.).

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CRIMINAL TAX MATTERS
Appellate Decision

Wilful Attempt to Evade Income Taxes; Court of Appeals Reverses on Ground of Improper Argument by United States Attorney. United States v. J. Monroe Dunn (C.A. 5, September 12, 1962). Defendant was convicted by a jury on two counts of wilful evasion of income taxes for the years 1955 and 1956. The Government introduced evidence to show that defendant, who was then Mayor of the City of Baxley, Georgia, received funds from the City of Baxley and from contractors performing construction work in and around that city, which he did not report for the years involved. In his opening argument to the jury, the United States Attorney declared that "This is one of the most flagrant cases ever tried in the Southern District of Georgia." Defense counsel objected to this statement, and the trial court instructed the jury to disregard it. In closing argument, the United States Attorney intimated that certain payments received by defendant from a contractor doing work for the city were in the nature of "kickbacks." There was no basis for such a statement in the record, and the Court, after defense counsel had objected to the argument, directed the jury to disregard the statement. The United States Attorney also stated in closing argument that a certain Government exhibit, which had been prepared by defendant's accountant, constituted an admission by defendant of his guilt. In fact, this exhibit constituted no such admission, and though defense counsel did not object to the argument when made, he included this as one of the grounds in the motion for a new trial. On the basis of these comments by the prosecuting attorney, the Court of Appeals reversed.

On appeal, the Government, while conceding that the statements were improper, sought affirmance of the conviction on the grounds that no prejudice had been shown since the Court had directed the jury to disregard the prosecutor's improper statements. The Government also argued that the evidence of guilt was so strong as to preclude reversal on the grounds of improper argument. See Traxler v. United States, 293 F. 2d 327 (C.A. 5). The Court of Appeals, while noting that the trial court had instructed the jury to disregard the improper comments, concluded that "if you throw a skunk into the jury box, you can't instruct the jury not to smell it." As was observed by the Court of Appeals, the issue presented in every case involving improper argument of counsel is whether "zeal outruns fairness." The Court of Appeals concluded that it did in this case.

This case was otherwise well tried, and the United States Attorney amply demonstrated defendant's guilt in his forceful presentation. However, the case may serve as a timely reminder of the admonition contained in Berger v. United States, 295 U.S. 78, 88, wherein the Supreme Court observed as follows:

"The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor--indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

"It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none."

Staff: Joseph M. Howard, Norman Sepenuk (Tax Division).

CIVIL TAX MATTERS
District Court Decisions

Injunction Against Collection of Taxes; Collection of Wagering Taxes Could Not Be Restrained Where Taxpayer Himself Negated His Allegations That Assessment Was Founded Upon Suspicious Conjecture and Where Special or Extraordinary Circumstances Not Present. Marcus Hackerman v. J. M. Rountree, District Director (M.D. Tenn., 1962), CCH, Federal Excise Tax Reporter, ¶15,433. This was an action to enjoin the collection of wagering taxes assessed against plaintiff. Plaintiff's complaint alleged that the assessment was grounded wholly upon defendant's unfounded and suspicious conjecture, that the tax was not due, and that it amounted to more than all of plaintiff's worldly goods. An exhibit attached to plaintiff's complaint disclosed that more than six months before the assessment, defendant notified plaintiff of the basis of the proposed assessment. The explanation was that records had been obtained in a raid showing plaintiff's wagering receipts for a six-day period and showing that the business had been operating for over five months. The assessment was based on a projection of the known six-day figures for all days on which the stock market was in session during the five-month period, since the wagering was based on stock market fluctuations.

The United States moved to dismiss, contending, inter alia, that the suit was one for an injunction against the collection of taxes which is barred by Section 7421(a), Internal Revenue Code of 1954. The Court granted the Government's motion on the authority of Enochs v. Williams Packing & Navigation Co., Inc., ____U.S.____, 62-2 USTC ¶9545 (1962).

Staff: United States Attorney Kenneth Harwell and Assistant United States Attorney Carrol D. Kilgore (M.D. Tenn).

Tenancies by the Entireties: Effect of Conveyance by Taxpayer to Spouse After Attachment of Liens for Taxes. Housing Authority of the City of Newark v. Carol F. Coffee, et al. (Superior Ct., N.J., July 18, 1962). On July 7, 1955 the District Director, Internal Revenue Service, filed a notice of tax lien in the amount of $5,146.44 plus interest and penalties against Perry F. Coffee. At the time Coffee and his wife held as tenants by the entireties a parcel of real estate, subject to a first mortgage. On July 22, 1955 the State of New Jersey obtained a judgment against Coffee. On November 2, 1955 he conveyed all of his rights, title, and interest in the mentioned real estate to his wife. Subsequently, the City of Newark filed liens against the property for unpaid real estate taxes. The Housing Authority filed a complaint in condemnation against the property and paid an award of $13,000 into Court on June 1, 1960. The first mortgage was paid leaving a fund of $11,864.18 to be distributed to claimants.

Carol F. Coffee, the record owner, applied for the payment of her portion of the fund. She claimed that the property was still entirety property at the time of the condemnation and the award was likewise entirety property. The result of this theory was that the fund was not portionable without her consent. Alternatively, she claimed that the United States stood in the shoes of the taxpayer and thus should bear the burden of city real estate taxes on his half of the property if partition should be granted.

The Court held that the conveyance by the taxpayer to his wife effectively terminated the tenancy by the entireties, citing N.J.S.A. 37:2-18, King v. Greene, 30 N.J. 395, 412 (1959). However the liens of the United States, State of New Jersey, and the City of Newark remained attached to the property; the former two attaching to one-half of the property and the lien of the City attaching to the entire property. The lien of the United States being prior in time took precedence over the state and local liens. Since the amount of the lien, including unused interest and penalties, was greater than one-half of the fund, the United States took a full half of the fund. The city's lien for real estate taxes remained a claim against the remaining half.

Staff: United States Attorney David M. Satz and Assistant United States Attorney Robert D. Carroll (D. N.J.).

Tax Court and Affirming Court of Appeals Decision Held Res Judicata as to Merits of Tax; Tax Liens Enforced Against United States Savings Bonds Registered in Several Names Where Evidence Established Taxpayers Purchased Bonds. United States v. Mitchell S. Millikin, et al. 62-2 USTC ¶9641 (M.D. N. Car., July 12, 1962). This action was brought against Mitchell S. Millikin, Dorothy P. Millikin, and the Bank of Catawba County to obtain judgment against Mr. and Mrs. Millikin for a joint income tax assessment for the year 1950 and against Mr. Millikin for the years 1946 and 1947. Although taxpayers raised the question of their tax liabilities, the Court ruled that a prior Tax

Court decision was res judicata as to the liabilities in issue. The Government further sought enforcement of its tax liens against certain United States Savings Bonds, Series E, located in a safety deposit box at the Catawba Bank in the name of Dorothy Millikin. Most of the bonds were registered in the name of "Mrs. Dorothy P. Millikin or Mitchell S. Millikin." The Court found that the Government established that these were purchased by Mr. Millikin and, therefore, subject to the tax liens against him. (See Title 31, C.F.R. ¶315.21(a).) As to the remaining bonds in the name of Mrs. Dorothy Millikin or "Mrs. Dorothy Millikin or Barbara Sue Millikin," the Court found that these were purchased by Mrs. Dorothy Millikin and were, therefore, subject to the liens arising from the joint assessment.

After the trial the Millikins filed a "Cross Action" seeking $2,500,000 damages against the Government. The Court found this action to be in the nature of a suit for malicious prosecution, holding that it would fall within the rule of immunity of the United States from suit without its consent.

Staff: United States Attorney William H. Murdock (M.D. N. Car.); and Paul T. O'Donoghue (Tax Division).

Liens for Personal Property Taxes of Iowa County Are Inchoate and Inferior to Federal Tax Liens; Special Assessment Tax Liens Which Attach to Real Estate Under Iowa Law Prior to Federal Liens Entitled to Priority in Lien Foreclosure Action Under Section 7403, I.R.C. 1954; Where Government's Liens Prior to County Tax Liens and Where Mortgagee Liable for County Taxes but Held Lien Prior to Federal Liens, Mortgagee Must Pay County Tax Liens to U.S. out of Funds Set Aside for Satisfaction of Mortgage; Taxes Accruing During Receivership Payable as Administration Expenses; Appointment of Special Receiver Under Section 7403(d), I.R.C. 1954 Not Act of Bankruptcy and Section 3466, R.S. (31 U.S.C. 191) Inapplicable in Case and Priorities Accorded Government Under That Statute Not Applicable But Must Be Determined by Government's Lien Rights Without Regard to Section 3466. United States v. Harry Schroeder, et al. (S.D. Iowa). The United States filed an action under Section 7403, Internal Revenue Code of 1954 against Harry and Amanda Schroeder to foreclose income tax liens for over $1,100,000, and a receiver was appointed under Section 7403(d) to enforce the liens of the United States against real and personal properties of the taxpayers consisting principally of farm lands in Iowa and personal property used in connection therewith. Controversies arose between certain Iowa counties and the Government over priority of their respective tax liens. One of the counties claimed a lien for personal property taxes, which the Court held was too general and therefore inchoate and inferior to the tax liens of the United States even though state law provided that such state tax liens attached to any and all real estate owned by taxpayer or to which he may acquire title situated in the particular county. The Court cited United States v. Security Trust & Savings Bank, 340 U.S. 47. One of the counties held a special assessment lien for taxes, which the Court held was a specific lien since it covered all premises against which the taxes were assessed.

The identity of the lienor, the amount of the lien and the nature of the property was known at the time the lien arose and it was hence choate. The fact that taxpayer under Iowa law had elected to pay the assessment over a period of years did not prevent the lien from being specific. The Court further held that although the Metropolitan Life Insurance Company held a mortgage lien on real estate prior to the liens of the United States, the amount set aside to pay the liens of the mortgagee should be used in part to pay state taxes for which the mortgagee was liable where such state tax liens were inferior to the liens of the United States. The Court cited United States v. City of New Britain, 347 U.S. 81.

The Court ruled that even though taxpayers were actually insolvent the Government was not entitled to the benefit of Section 3466, Revised Statutes (31 U.S.C. 191) which provided that where persons indebted to the United States are insolvent, debts due the United States shall be first satisfied. This statute applies only to the four modes of insolvency specifically named in the Act. Section 3(a) of the Bankruptcy Act provides that an Act of Bankruptcy which is one of the examples set out includes the voluntary or involuntary appointment of a receiver. The Court held that this provision contemplated a general receiver and not a special receiver to enforce the tax liens of the United States. The mere filing of the tax lien itself did not give rise to an Act of Bankruptcy since the lien was not obtained through legal proceedings, as provided in Section 3 of the Bankruptcy Act.

The Court further held that state and county taxes accruing during the period of receivership constitute expenses of administration and should be paid as part of current operating expenses. The Court cited 28 U.S.C. 959(b) and 960 and the cases of Palmer v. Webster & Atlas National Bank of Boston, 312 U.S. 156 and Borock v. City of New York, 268 F.2d 412 (C.A. 2).

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