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Vol. 10 No. 21

UNITED STATES ATTORNEYS

BULLETIN

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BOOK ON WHITE HOUSE

Some of the United States Attorneys, whose wives did not accompany them to the Conference, requested information as to how the descriptive booklets which are available at the White House may be obtained. The books may be obtained by writing to:

White House Historical Association
718 Jackson Place, N.W.
Washington, D. C.

The charge of $1.00 for the book includes the cost of mailing. Payment should be made by check or money order, and the letter of request should clearly state the address to which the book is to be sent.

UNITED STATES ATTORNEYS CONFERENCE

The Executive Office for United States Attorneys wishes to express its appreciation to all of the United States Attorneys whose cooperation made the recent Conference a very successful one. The Attorneys' promptness in attending all seminars and general assemblies, and their informed participation in such meetings were responsible, in large part, for the success of the Conference. The Executive Office has received a number of helpful suggestions as to how the next Conference might be improved and made more responsive to the United States Attorneys' needs. If you have any ideas along this line, we will be very pleased to receive them.

STATISTICAL SUMMARIES AND CURRENCY LISTS

If you are late in forwarding your "Mark-Sense" cards to the Department at the end of each month and if such cards are received in the Department after the 5th of the following month, the figures on such cards will not be reflected in the statistical summary for the month in question. United States Attorneys should keep this in mind when inquiring about the figures in their statistical summaries. If their figures have been submitted late, they should wait until the following month's summary is received, before writing to the Department about a discrepancy in figures. Where reports are received late, the correct figures are generally shown in the next statistical summary. By waiting a month before writing, by which time the mistake usually has been rectified, much unnecessary correspondence can be eliminated.

Before writing to inquire as to why their districts do not appear in the list of districts which are current in their work, United States Attorneys should have their caseloads checked to ascertain how many civil cases have been pending over one year, and how many criminal cases have

been pending over six months. It is these cases which form the basis on which districts are rated for currency. If these cases total more than 10% of the caseload (with certain exceptions which appear in the item "Standards of Currency" which appeared in Vol. 10, No. 11, dated June 1, 1962, p. 306 of the Bulletin) the district is not current.

MONTHLY TOTALS

During the month of August, the totals in all categories of work increased. The aggregate of pending cases and matters rose again, and is now over 3,100 items higher than it was at the outset of this fiscal year, and represents the highest such total since February, 1956. The following analysis shows the number of items pending in each category as compared with the total for the previous month.

	July 31, 1962	August 31, 1962	
Taxable Criminal	7,838	8,330	+ 492
Civil Cases Inc. Civil Less Tax Lien & Cond.	15,809	16,102	+ 293
Total	23,647	24,432	+ 785
All Criminal	9,417	9,910	+ 493
Civil Cases Inc. Civil Tax & Cond. Less Tax Lien	18,881	19,120	+ 239
Criminal Matters	13,228	13,544	+ 316
Civil Matters	15,028	15,028	
Total Cases & Matters	56,554	57,602	+ 1,048

The breakdown below shows the pending caseload on the same date in fiscal 1962 and 1963. Both filings and terminations of criminal and civil cases totaled more than for the same period in fiscal 1962. Over 1,200 more cases were filed than were terminated. As a result, the pending caseload, which of course includes the carry-over from last year, shows an increase of 2,767 cases over the same date in the previous fiscal year, which represents an encouraging drop from the preceding month, when the increase totaled 3,107 cases.

	First 2 Mos. F.Y. 1962	First 2 Mos. F.Y. 1963	Increase or Decrease Number	%
Filed				
Criminal	3,982	4,597	+ 615	+ 15.44
Civil	4,012	4,499*	+ 487	+ 12.14
Total	7,994	9,096	+ 1,102	+ 13.79
Terminated				
Criminal	3,861	4,005	+ 644	+ 19.16
Civil	3,095	3,833*	+ 738	+ 23.84
Total	6,456	7,838	+ 1,382	+ 21.41
Pending				
Criminal	9,038	9,909	+ 871	+ 9.64
Civil	21,650	23,546	+ 1,896	+ 8.76
Total	30,688	33,455	+ 2,767	+ 9.02

*Does not include August, 1962 land condemnation cases filed or terminated for Florida Southern, Indiana Southern, Minnesota, Oklahoma Northern and Texas Western.

Case terminations continue to fall below case filings. The totals for both filings and terminations, however, increased substantially during August. Criminal terminations fell below the total for July, but the increase in civil terminations offset this, and brought total terminations for August ahead of those for July.

	Filed			Terminated		
	Crim.	Civ.	Total	Crim.	Civ.	Total
July	2,143	2,145	4,288	2,041	1,793	3,834
Aug.	2,454	2,354	4,808	1,964	2,040	4,004

For the month of August, 1962 United States Attorneys reported collections of $3,574,311. This brings the total for the first two months of this fiscal year to $8,196,843. This is $1,734,592 or 26.84 per cent more than the $6,462,251 collected in July and August of fiscal year 1962.

During August $5,563,042 was saved in 90 suits in which the government as defendant was sued for $6,382,305. 52 of them involving $2,845,348 were closed by compromises amounting to $227,267 and 21 involving $2,817,067 resulted in judgments against the government amounting to $591,996. The remaining 17 suits involving $719,890 were won by the Government. The total saved for the first two months of the current fiscal year was $8,968,032 and is an increase of $1,009,464 or 12.68 per cent from the $7,958,568 saved in July and August of fiscal year 1962.

DISTRICTS IN CURRENT STATUS

As of August 31, 1962, the districts meeting the standards of currency were:

CASES

Criminal

Ala., N.	Ga., S.	Mass.	N. C., E.	Tenn., W.
Ala., M.	Idaho	Mich., E.	N. C., M.	Tex., S.
Alaska	Ill., N.	Minn.	N. C., W.	Tex., W.
Ariz.	Ill., E.	Miss., N.	Ohio, N.	Utah
Ark., E.	Ill., S.	Miss., S.	Ohio, S.	Vt.
Ark., W.	Ind., N.	Mo., E.	Okla., N.	Va., E.
Calif., S.	Ind., S.	Mo., W.	Okla., E.	Wash., E.
Colo.	Iowa, N.	Mont.	Okla., W.	Wash., W.
Conn.	Iowa, S.	Neb.	Pa., E.	W. Va., N.
Dist. of Col.	Kan.	N. J.	Pa., M.	Wis., E.
Fla., N.	Ky., E.	N. Y., N.	Pa., W.	Wis., W.
Fla., S.	Ky., W.	N. Y., E.	R. I.	Wyo.
Ga., N.	La., E.	N. Y., S.	S. D.	Guam
Ga., M.	Maine	N. Y., W.	Tenn., E.	V. I.

CASES

Civil

Ala., N.	Ind., S.	N. H.	Pa., W.	Va., E.
Ala., S.	Iowa, N.	N. J.	P. R.	Va., W.
Alaska	Kan.	N. Y., E.	S. C., W.	Wash., E.
Ariz.	Ky., E.	N. C., M.	S. D.	Wash., W.
Ark., E.	Ky., W.	N. C., W.	Tenn., E.	W. Va., N.
Colo.	Mass.	N. D.	Tenn., W.	W. Va., S.
Dist. of Col.	Mich., E.	Ohio, N.	Tex., N.	Wis., E.
Fla., N.	Mich., W.	Okla., N.	Tex., E.	Wis., W.
Ga., N.	Miss., N.	Okla., E.	Tex., S.	Wyo.
Ga., M.	Mo., E.	Okla., W.	Tex., W.	C. Z.
Ga., S.	Mo., W.	Ore.	Utah	Guam
Hawaii	Neb.	Pa., M.	Vt.	V. I.

MATTERS

Criminal

Ala., N.	Idaho	Mo., E.	Okla., E.	Tex., S.
Ala., S.	Ill., N.	Mont.	Okla., W.	Tex., W.
Alaska	Ill., E.	Neb.	Pa., E.	Utah
Ariz.	Ill., S.	Nev.	Pa., M.	Vt.
Ark., E.	Ind., N.	N. H.	Pa., W.	Va., E.
Ark., W.	Ind., S.	N. M.	P. R.	Va., W.
Calif., N.	Iowa, N.	N. Y., N.	R. I.	Wash., E.
Calif., S.	Iowa, S.	N. Y., W.	S. C., E.	W. Va., N.
Colo.	Ky., E.	N. C., E.	S. D.	Wis., E.
Conn.	Ky., W.	N. C., M.	Tenn., M.	Wyo.
Fla., N.	Maine	N. C., W.	Tenn., W.	C. Z.
Ga., M.	Md.	Ohio, S.	Tex., N.	Guam
Ga., S.	Miss., S.	Okla., N.	Tex., E.	V. I.
Hawaii				

MATTERS

Civil

Ala., N.	Ill., E.	Miss., N.	Ohio, N.	Tex., S.
Ala., M.	Ill., S.	Miss., S.	Okla., N.	Tex., W.
Ala., S.	Ind., N.	Mo., E.	Okla., E.	Utah
Alaska	Ind., S.	Mont.	Okla., W.	Vt.
Ariz.	Iowa, N.	Neb.	Ore.	Va., E.
Ark., E.	Iowa, S.	Nev.	Pa., E.	Va., W.
Ark., W.	Ky., E.	N. H.	Pa., M.	Wash., E.
Calif., N.	Ky., W.	N. J.	Pa., W.	Wash., W.
Calif., S.	La., W.	N. Y., E.	P. R.	W. Va., N.
Colo.	Maine	N. Y., S.	R. I.	W. Va., S.
Dist. of Col.	Md.	N. Y., W.	S. C., E.	Wis., W.
Fla., N.	Mass.	N. C., E.	S. D.	Wyo.
Ga., S.	Mich., E.	N. C., M.	Tenn., W.	C. Z.
Hawaii	Mich., W.	N. C., W.	Tex., N.	Guam
Idaho	Minn.	N. D.	Tex., E.	V. I.
Ill., N.				

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ANTITRUST DIVISION

Assistant Attorney General Lee Loevinger

Sherman Act

Restraint of Trade - Automobiles United States v. Lone Star Cadillac Company, (N.D. Texas) On September 24, 1962, a complaint was filed charging that the Lone Star Cadillac Company of Dallas, Texas, had violated Section 1 of the Sherman Act. The complaint alleged that Lone Star, which is both a Cadillac wholesale distributor and retail dealer, would sell cars to the many Cadillac dealers surrounding Dallas County only if the dealers agreed not to sell such cars to residents of Dallas County.

Cadillac Motor Car Division of General Motors Corporation is the only major automobile manufacturer which still extensively utilizes independent distributors in the distribution of cars to dealers. Lone Star is the only Cadillac distributor in the Dallas area, wholesaling Cadillacs to 22 dealers located in northeast Texas. It has the sole power of allocating the number of cars each dealer is to receive. In 1961 Lone Star had total sales of approximately $12 millon, including $4.2 million in retail sales of Cadillacs and $4.3 million in wholesale of Cadillacs. Dallas County is one of the largest counties in the United States in the number of automobiles registered. In 1961, 999 new Cadillacs were registered in the County, having an aggregate retail value in excess of $6 million.

The complaint alleges that for many years Lone Star has sold new Cadillacs to its dealers on the condition that such dealers agree not to sell at retail to residents of Dallas County. In order to enforce compliance with this conspiracy, Lone Star threatened to and did in fact reduce the number of Cadillacs it sold to dealers who sold to Dallas residents.

The complaint alleges that this conspiracy had the effect of preventing dealers supplied by Lone Star from competing in the Dallas market, that competition in the sale of Cadillac automobiles in Dallas has been restrained, and that residents of Dallas County have been prevented from purchasing Cadillacs from dealers supplied by Lone Star.

The complaint asks that Lone Star be enjoined from imposing any restriction on any automobile dealer with respect to the persons to whom, the prices at which, or the area within which such dealer may resell automobiles, and specifically, that it be enjoined from continuing any practices which have the purpose or effect of preventing the independent dealers to whom it sells from selling in Dallas County.

Staff: William C. McPike, Eugene Driker, and Lawrence F. Noble (Antitrust Division)

Sherman Act and Clayton Act

Elimination of Competition - Chemicals and Rayon Products. United States v. Stauffer Chemical Company, et al. (E.D. Pa.) On October 3, 1962, a complaint was filed alleging that the proposed acquisition by the Stauffer Chemical Company of most of the assets and properties of the American Viscose Corporation will violate Section 7 of the Clayton Act. The complaint also alleges that the agreement to effectuate the sale violates Section 1 of the Sherman Act.

Stauffer is a major producer of various industrial chemicals, including those used in the manufacture of rayon and cellophane. It annually has sold about 58% of the carbon bisulfide sold in the United States and, by means of a joint venture with duPont, Stauffer supplements this share of the market by another 16%. The company sells about one-fourth of the national sales of sulfuric acid; about 4% of the caustic soda and has a productive capacity for salt cake equally about 14% of the total domestic capacity. Total sales of the company in 1961 exceeded $225,000,000.

American Viscose is the largest producer of viscose rayon and the second largest cellophane manufacturer. Sales in 1961 totalled almost $220,000,000. The corporation is the largest purchaser of carbon bisulfide in the United States (about 26% of total sales) and buys about 2½% of the sales of sulfuric acid and about 1% of the national sales of caustic soda. Also, the corporation has the largest capacity for the production of salt cake in the nation which is about 1% of total domestic capacity. Salt cake is used in the manufacture of kraft paper and paperboard.

The complaint, which seeks preliminary injunctive relief, charges, among other things, that competing producers of carbon bisulfide, caustic soda and sulfuric acid will be deprived of a fair opportunity to compete for the market represented by American Viscose; that competition in the production and sale of salt cake may be substantially lessened and eliminated as between Stauffer and American Viscose; that Stauffer will gain certain competitive advantages over other producers of these chemicals and over other rayon producers.

Staff: Nicolaus Bruns, Jr., Allen E. McAllester, Carl Lobell and Richard Duke (Antitrust Division)

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CIVIL DIVISION

Acting Assistant Attorney General Joseph D. Guilfoyle

COURT OF APPEALS

NATIONAL SERVICE LIFE INSURANCE

No Meeting of Minds on Terms of Insurance Contract During Lifetime of Veteran; Veterans Administration Should Issue Policy Without Named Beneficiary. Ted H. Taylor v. Elsie A. Roberts, etc. (C.A. 10, July 12, 1962). This was an action under 38 U.S.C. 784, by the widow, individually, and as administratrix of the estate of a deceased Navy veteran to recover the proceeds of a $10,000 National Service Life Insurance Policy. The veteran's father also filed a cross-complaint by which he sought to recover the policy proceeds. The Government admitted liability and prayed that the court determine the rights of the adverse claimants. The veteran applied for a life insurance policy under Section 621 of the National Service Life Insurance Act of 1940. The Veterans Administration rejected the application since it was not made within 120 days after separation from the service as required by the statute. The veteran, however, would have been entitled to a policy under the provisions of Section 620 had he made application under that Section. Following his death, the veteran's widow filed a claim for insurance benefits with the Veterans Administration. The claim was disallowed and she appealed to the Board of Veteran Appeals. Subsequently, it was determined that insurance should be granted under Section 620 on the veteran's application under Section 621 but that the policy proceeds were payable to the father since he was named as beneficiary of the insurance for which application had been made.

The district court set aside the action of the Veterans Administration and awarded the administratrix judgment for the entire unpaid proceeds of the policy. The Court of Appeals affirmed. It rejected appellant's claim that the case should be disposed of according to principles of contract law. The Court of Appeals reasoned that Sections 620 and 621 merely provided a right to apply for a policy of insurance, that application therefor constituted an offer which was accepted when the Veterans Administration issued a policy, and that, consequently, there had not been any meeting of minds between the United States and the veteran during his lifetime on a 620 contract of insurance. Accordingly, the Court concluded, assuming that instead of rejecting the veteran's application, the Veterans Administration should have tendered a 620 policy, "restitution [could] be best accomplished by the issuance of a policy without a named beneficiary."

Judge Pickett dissented since he did not think that "the liability of the Government [could] be disassociated from the application filed by the veteran during his lifetime, which named his father as the beneficiary of the insurance for which application was made."

Staff: United States Attorney Lawrence M. Henry (D. Colo.)

DISTRICT COURT

LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959

Judicial Enforcement of Administrative Subpoena Duces Tecum under LMRDA; Respondent Must Support Claim of Non-existence of Document Sought by Sworn Testimony of Its Officers Upon Return of Subpoena. Goldberg v. Sewell Manufacturing Company (N.D. Ga., September 20, 1962). This action was brought by the Secretary of Labor to enforce an administrative subpoena duces tecum issued in connection with an investigation pursuant to the LMRDA to determine whether Sewell had violated the Act's reporting requirements. On the date set for the return of the subpoena before a Labor Department investigator, an attorney for the corporation appeared and moved to quash the subpoena on the ground that the documents specified therein were not in existence. Since the Government took the position that the corporation was required to produce its officers before the Labor Department investigators to give sworn testimony relative to the existence of the documents sought, a petition for enforcement was filed in the District Court. Respondent then moved for summary judgment filing sworn affidavits of its officers to the effect that the documents called for in the subpoena were not in existence. The corporation also denied that the Secretary had reasonable grounds for believing that respondent had violated or was about to violate the Act.

Stating that the effect of respondent's action on the return of the subpoena was to deny the Labor Department an opportunity to determine, upon the basis of sworn testimony, whether the records subpoenaed do in fact exist, the Court ordered enforcement. Relying on the familiar principle of "exhaustion of administrative remedies" laid down in such cases as United States v. Ruzicha, 329 U.S. 287 (1946), the Court held that the issue of "existence" of documents sought had to be determined in the first instance by the administrative officials. Respondent's officers were accordingly ordered to appear to testify before the Labor Department. In passing, the Court also noted that investigations by the Secretary under the LMRDA need not be predicated upon reasonable cause to believe that a violation of the Act has occurred, an issue that was decided in Goldberg v. Truckdrivers' Local Union #299, 293 F. 2d 807, (C.A. 6, 1961) certiorari denied, 368 U.S. 938; International Brotherhood of Teamsters v. Goldberg, 303 F. 2d 402 (C.A. D.C., 1962) certiorari denied, ___U.S.___.

Staff: United States Attorney Charles L. Goodson (N.D. Ga.); Charles Donnenfeld (Civil Division)

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

WHITE SLAVE TRAFFIC ACT

Change in Procedure in Prosecution of Non-commercial Cases. In order to insure more uniform applicability of the White Slave Traffic Act, the United States Attorneys are instructed to institute prosecution against defendants not involved in commercial prostitution activities only upon approval by the Criminal Division. It has long been the policy to concentrate enforcement activity under the Act on cases involving commercial exploiters of women and girls. There is no change in this policy.

As stated in the United States Attorneys Manual (T. 2, pp. 108-109), as a general rule prosecution should not be instituted in the so-called "non-commercial" cases. As explained in the Manual, the Criminal Division must rely primarily upon the first-hand knowledge and discretion of the United States Attorneys. United States Attorneys are expected to decline prosecution in such cases where in their judgment aggravated circumstances warranting a deviation from the general practice are not present. When, however, the United States Attorney believes that prosecution is warranted, a report should be forwarded to the Criminal Division setting forth the reasons why it is believed that action should be taken. Prosecutive action in "non-commercial" cases is not to be undertaken without the approval of the Criminal Division. The United States Attorneys Manual will be amended in the near future to conform with the foregoing.

ARREST WARRANTS

Authority of Revenue Agents to Execute Arrest Warrants; Motion to Suppress. United States v. $1,058.00 in United States Currency (W.D. Pa.). An extensive surveillance continuing over a period of one month established that Abe Rabinovitz, Nathan Granoff and Meyer Sigal were conducting a numbers operation in a restaurant and poolroom in Pittsburgh, Pennsylvania. These observations led the surveillant revenue agents to secure a search warrant for the premises and arrest warrants for the three suspects. During the hours immediately preceding the raid and execution of the warrants further observations traced bundles of money from various writers and pick-up men to the pockets of the three suspects. A search of defendants' pockets made in conjunction with their arrest yielded $3,508.49 and $418.00 more was taken from Granoff's wallet.

Defendants filed motions to suppress the use of this evidence and resisted libels of forfeiture filed against the property by the Government. By stipulation of counsel the record of the forfeiture proceedings was also used in the motions to suppress, and both disputes were argued and decided as one.

In urging suppression defendants argued that the search of their persons had to be based upon an arrest rather than upon a search warrant. Because the arresting agents had no statutory authority to execute arrest warrants, defendants claimed that the arrests were invalid and the property taken in conjunction therewith was seized illegally.

The court held that Special Agents of the Internal Revenue Service are employed to enforce the Internal Revenue Laws (26 U.S.C. 7803(a)). Inherent in this employment is the power to arrest. United States v. Jones, 204 F. 2d 745 (C.A. 7), cert. denied, 346 U.S. 854 (1953). The arrests were thus valid and the searches and seizures made in conjunction with them were lawful. Since observation had traced the tainted money to defendants' pockets and not to any wallet, the cash extracted from Granoff's wallet was suppressed and ordered returned. In all other respects the motion to suppress was denied and forfeiture was granted.

Staff: United States Attorney Joseph S. Ammerman (W.D. Pa.); John J. Mullaney, Criminal Division

NARCOTIC CONTROL ACT

Sentence as Second Offender; Inclusion of Count Upon Which Defendant Cannot Be Sentenced as Second Offender Does Not Preclude Court from Sentencing Defendant as Second Offender on Remaining Counts of Indictment to Which Increased Penalties Are Applicable. United States v. Martin Ayala (C.A. 2, September 11, 1962). A three count indictment charged defendant with possession of narcotics on July 30, August 12, and September 15, 1958, respectively. On August 1, 1958, defendant was convicted of another unrelated Federal narcotics offense. Following his conviction on the three count indictment Ayala was sentenced to serve five years for his possession on July 30, 1958 and concurrent sentences of ten years on the remaining counts.

On appeal defendant contended that an indictment must be considered as a unit for the purposes of sentencing under the Narcotic Control Act. He claimed that since one count not subject to the second offender penalties of that Act had been included in the indictment, he could not be sentenced as a second offender under the remaining counts.

The Court noted that the sentencing as a second offender would concededly have been valid had the first count been omitted from the indictment. From this fact the Court concluded that the counts of an indictment are clearly separable for the purpose of sentencing.

Staff: Former United States Attorney Robert M. Morgenthau; Assistant United States Attorneys Ned D. Frank and Arthur I. Rosett (S.D. N.Y.)

BOMB HOAX

Maximum Sentence Imposed Even Though Defendant Was Inebriated When Fales Information Was Given to Airlines. United States v. Sidney Wilborn Haislip (N.D. Calif., April 30, 1962). On two occasions on

the same day, defendant while under the influence of alcohol called American Airlines and advised that a bomb was aboard one of their aircraft. In return for information regarding its location, defendant demanded that $5,000 be delivered to a designated location. When interviewed, the suspect admitted making the calls but because of his inebriated condition was unable to recall the content of his conversation with the airline agent. Defendant pleaded guilty to an information charging violation of 18 U.S.C. 35(a), and the court in spite of defendant's inebriated and incoherent state imposed the maximum sentence of one year imprisonment.

The decision is consistent with the intention and desire of Congress in enacting Section 35(a) of Title 18, United States Code to impose a penalty for the punishment of bomb hoax offenders where there is an absence of willfulness. In this respect, Congress intended to create an offense most closely akin to one malum prohibitum. The mere fact that the remark may have been inadvertent, or the result of an honest, if poor, attempt at humor, or the fruit of annoyance or fatigue will not avoid the application of Section 35(a). In the instant case, the defendant's drunken state and lack of recollection of the events will not allay the use of this section.

MOTION TO VACATE
28 U.S.C. 2255

Some issues of Constitutional Dimensions Cannot Be Relitigated by Section 2255 Proceeding. Tom Don Franano v. United States (C.A.8, June 13, 1962, 303 F. 2d 740). Prior to trial appellant filed a motion to "inspect and copy grand jury minutes" and a "motion to dismiss" his indictment on the ground that an inspection of the grand jury minutes and transcript would reveal there was insufficient evidence before the grand jury to sustain his indictment and that he and a codefendant "were subpoenaed and forced to testify before the grand jury in violation of their constitutional rights." The trial court denied both motions. The Court of Appeals on direct appeal found appellant's assignment of error on the denial of the motion to inspect and copy grand jury minutes to be "wholly without merit," and his conviction was affirmed. Appellant then filed a petition under 28 U.S.C. 2255 asserting that he was subpoenaed and compelled to testify before the Grand Jury that indicted him "without having signed a waiver of immunity as required by law." The sentencing court denied the petition and he appealed.

The Court of Appeals, observing that it is no longer open to question that a petition under Section 2255 cannot serve the office of an appeal, emphasized that a trial court ruling relating to a constitutional question not going to the jurisdiction of that court to give sentence, or to one which does not "result in a complete miscarriage of justice nor an omission inconsistent with the rudimentary demands of fair procedure," even if wrong, cannot be made the subject matter of a Section 2255 proceeding. Thus, whether a

constitutional question can be raised in a Section 2255 proceeding depends on a case by case approach involving considerations of jurisdiction of the sentencing court and due process of law.

MENTAL HEALTH

Admissibility of Testimony of Psychiatrists Whose Diagnostic Opinions Were Based in Part on Psychologists' Reports; Admissibility of Psychologists' Testimony as to Mental Disease or Defect. Vincent E. Jenkins v. United States (C.A. D.C., June 7, 1962). The trial court sua sponte, excluded testimony as to revised diagnoses of two defense psychiatrists who originally diagnosed the defendant to have a mental defect, a basic unchanging deficiency in brain function. Psychologists at the mental institution conducted a series of tests from time to time and a year after the original diagnoses the psychiatrists revised their diagnoses to reflect that, "appellant is psychotic and schizophrenic." The further tests had shown an improvement in I.Q. inconsistent with mental disease.

The trial court excluded the psychiatrists' revised diagnoses which were primarily based on the reports of the tests by psychologists. The trial court also instructed the jury that a psychologist is not competent to give a medical opinion as to a mental disease or defect and that any testimony by the psychologists that defendant was suffering from a mental disease or mental defect was not to be considered.

The Court of Appeals (on rehearing in banc) rejected these rulings and held that the psychiatrist's testimony that he considered undifferentiated psychosis as a possibility when he first examined the appellant and that improvement in appellant's I.Q. scores was inconsistent with mental defect, which induced him to abandon the original diagnoses to the later diagnoses which was consistent both with his earlier clinical observations and later test reports, is an admissible formulated opinion. The failure to re-examine the appellant would go to the weight and not to admissibility of his opinion.

As to the testimony of psychologists the court said:

> ". . . We hold only that the lack of a medical degree, and the lesser degree of responsibility for patient care which mental hospitals usually assign to psychologists, are not automatic disqualifications. Where relevant, these matters may be shown to affect the weight of their testimony, even though it be admitted in evidence. The critical factor in respect to admissibility is the actual experience of the witness and the probable probative value of his opinion. The trial judge should make a finding in respect to the individual qualifications of each challenged expert . . . The weight to be given any expert opinion admitted in evidence by the judge is exclusively for the jury. They should be so instructed."

Staff: United States Attorney David C. Acheson
Assistant United States Attorney Anthony G. Amsterdam
(District of Columbia)

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IMMIGRATION AND NATURALIZATION SERVICE

Raymond F. Farrell, Commissioner

JUDICIAL REVIEW

Refusal to Review, Under Sec. 106(a) of Immigration and Nationality Act, 8 U.S.C. 1105(a). Denial of Application for Suspension of Deportation. Francesco Foti aka Frank Foti v. INS, (C.A. 2, September 21, 1962.) An alien filed a petition in the Second Circuit seeking review under Sec. 106(a) of the Immigration and Nationality Act, 8 U.S.C. 1105(a) of the denial by the respondent, the Immigration and Naturalization Service, of his application for suspension of deportation under Sec. 244(a)(5) of the same Act, 8 U.S.C. 1253(a)(5). Both the petitioner and the respondent urged a panel of three judges to take jurisdiction of the cause which it did by a 2 to 1 vote. The dissenting judge sought and obtained an order for en banc consideration of the cause.

By a 5 to 4 vote the full Court held that review under Sec. 106(a) was limited to final orders of deportation and did not encompass review of discretionary orders, as here, to suspend deportation. The Court reasoned in part as follows:

> While the courts of appeals should give full effect to the change in pattern made by the Act of September 26, 1961, with respect to "final orders of deportation," they should not be astute to attribute to Congress a purpose to require them also to review in the first instance discretionary orders refusing to suspend or withhold deportation or to permit voluntary departure or to grant visas - a result that would represent a further deviation from the established pattern, would go beyond the fair intendment of the words that Congress used, and, by imposing on the courts of appeals a quantity of petitions presenting no truly justiciable issue, would impair the "viability" of the new legislation.

The decision here is in direct conflict with the decisions of the Seventh Circuit in Blagaic v. Flagg, 304 F.2d 623 and Roumeliotis v. INS, 304 F.2d 453, but is in agreement with the decision of the Ninth Circuit in Giova v. Rosenberg, No. 17655, 6-15-62 which decisions were reported in United States Attorneys Bulletin, July 13, 1962.

Staff: United States Attorney Robert M. Morgenthau and Special Assistant United States Attorney Roy Babitt (S.D.N.Y.)

IMMIGRATION

First Preference Quota Immigrant Status Denied Alien Tailors Not Having Five Years Journeyman Experience After Reaching Majority. Bergen Dress Co., Inc. v. Blouchard (C.A. 3, June 6, 1962, 30 LW 2601. Appellant petitioned the respondent under Sec. 204(b) of the Immigration and Nationality Act (8 U.S.C. 1154(b)) for the first preference status in behalf of a prospective quota immigrant, a tailor by occupation. Respondent denied the petition on the ground that the immigrant had not met a standard set by the Immigration and Naturalization Service of having completed at least five years journeyman experience as a tailor subsequent to attaining the age of twenty-one. The denial was affirmed by the United States District Court for the District of New Jersey on appellee's motion for summary judgment in a declaratory judgment action brought by appellant.

The appellate court affirmed the judgment of the lower court finding a rational basis for the tailoring experience standard in that the Immigration and Naturalization Service had found that many young alien tailors who acquired their occupation experience in their teens deserted the tailor trade shortly after their entry for employment in more lucrative fields.

Staff: United States Attorney David M. Satz, Jr. and Assistant United States Attorneys Barbara A. Morris and Sidney E. Zion (D. N.J.)

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INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Delivering Defense Information to Aid Foreign Government (18 U.S.C. 794). United States v. Nelson Cornelious Drummond (S.D.N.Y.) On September 28, 1962, Drummond, a yeoman first class in the United States Navy, stationed at the United States Naval Base, Newport, Rhode Island, was arrested by Special Agents of the F.B.I. at a meeting with two Soviet nationals in Larchmont, New York. At the time of his arrest, Drummond had in his possession a number of classified documents which are the property of the United States Navy. The two Soviet representatives subsequently were identified as a Second and Third Secretary of the Soviet Mission to the United Nations. Shortly after his arrest, Drummond was brought before a United States Commissioner in New York City and bail was set at $100,000.

On October 5, 1962, a Federal grand jury in the Southern District of New York returned a two count indictment against Drummond charging him in count one with having conspired with four named Soviet nationals, all former members of the Soviet Mission to the United Nations, to deliver information relating to the national defense of the United States, to the Union of Soviet Socialist Republics in violation of 18 U.S.C. 794(c). Count two charged that Drummond had attempted to deliver certain classified documents relating to the national defense of the United States to two named Soviet Nationals on or about September 28, 1962, in violation of 18 U.S.C. 794(a).

Drummond was arraigned on October 9, 1962, and entered a plea of not guilty.

Staff: United States Attorney Vincent L. Broderick (S.D.N.Y.); and Paul C. Vincent (Internal Security Division)

Action for Declaratory Judgment and for Money Damages. Francis E. Converse v. Fred Korth, Secretary of the Navy, et al. (W.D. Wash.). In an action arising subsequent to Cafeteria and Restaurant Workers v. McElroy (see Bulletin Vol. 9, No. 13, p. 409), on May 29, 1962 plaintiff filed a complaint alleging that without assigning reasons therefor his United States Supply Depot waterfront pass was removed by defendants, damaging him by branding him a security risk and making him ineligible for jobs at defendant's installation. Plaintiff sought damages and an order enjoining the withholding of the pass without charges and without affording an opportunity to refute these charges. Prior to the filing of an answer, compromise was reached by which plaintiff received an expired pass, which was to be returned within 48 hours. An executed stipulation and final judgment of dismissal was obtained wherein plaintiff waived his entire claim to damages with prejudice and without costs. No provision was made in the settlement for redetermination of plaintiff's eligibility for a Supply Depot pass.

Staff: Benjamin C. Flannagan; David H. Hopkins, Jr. (Internal Security Division).

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LANDS DIVISION

Assistant Attorney General Ramsey Clark

Public Domain; Mining Location; Property Acquired by United States for Specific Purpose Is Not Open to Mining Location; Measure of Damages for Trespass; Absence of Jurisdiction to Determine Income Tax Consequences of Judgment. Thompson v. United States, (C.A. 9, September 25, 1962). This was an action by the Government to quiet title to about 25,000 acres of land in Idaho, to enjoin appellant from removing minerals therefrom, and to recover damages for minerals removed during his occupancy. Appellant and his predecessor mined the property under a permit from 1942 until 1955, when it was terminated at his request. Despite information from the Government's agents that the land was not open to entry under the general mining laws, appellant made locations on advice of his attorney, and removed a large quantity of garnets. The district court held that the mineral locations were void and of no force and that appellant's entry upon the premises and removal of minerals was done knowingly and intentionally. The court gave a judgment for the difference in the price at which the garnets were sold and the cost of removal, plus an amount for damage to the land and rental on the property.

The Court of Appeals affirmed the judgment. Appellant urged that the lands are "public lands" within the meaning of the Forest Service Act, 16 U.S.C. 471, et seq., and are subject to mineral entry. The Court sustained the trial court's holding that the lands were acquired by donation pursuant to the provisions of Sec. 7 of the Act of June 7, 1924, 16 U.S.C. 569, which provides that lands acquired pursuant thereto would be subject to all laws applicable to lands acquired under the Act of March 1, 1911, which is commonly known as the Weeks Act, 36 Stat. 961. The Weeks Act declared its primary purpose to be the protection of watersheds of navigable streams and authority was given to acquire lands for such purpose, but there is nothing in it which would permit the location of mineral claims on lands acquired under its provisions. The Court stated that it is obvious that the lands in question were donated to the Government for the specific purpose of preserving the timber and that the recognition of a mining location under the general mining laws would be wholly inconsistent with the purpose of the acquisition. The Court stated further that at the time of the passage of the Weeks Act, and the 1924 Act, and at the time of the acceptance of the donation deeds, the Secretary of Agriculture had absolute control of lands acquired for forest conservation purposes. It was not until the 1947 Reorganization Plan that the Secretary of Interior received authority to grant mineral leases on acquired lands. 30 U.S.C. 351-352. The Court stated that "Public lands, as distinguished from acquired lands, have always been administered by the Department of the Interior." In 1916, the Secretary of Agriculture was authorized to issue a permit for prospecting, developing and utilizing the mineral resources on lands acquired under the Weeks Act, 16 U.S.C. 520, and it was pursuant to this authority that appellant was leasing the lands prior to his filing of a mining claim.

The Court of Appeals upheld the trial court's measure of damages. It refused to allow appellant's claim for the reasonable value of his personal services rendered in connection with the extraction of the minerals, as permitting such a recovery would be placing a premium on the commission of a wrongful act, and would thus encourage, rather than discourage, similar transgressions. The Court also held that the district court lacked jurisdiction in this proceeding to determine questions relating to any additional income tax which might be due as a result of the judgment against appellant in this case. It stated that the Internal Revenue Act provides for complete and exclusive relief to taxpayers who feel aggrieved by the rulings of the Commissioner.

Staff: Elizabeth Dudley (Lands Division).

Jurisdiction; Service of Process on Federal Officer Outside State; Failure to Allege Requisite Jurisdictional Amount Against Local Defendant. M. J. Alfonso, et al. v. Hillsborough County Aviation Authority and Najeeb Halaby, Administrator of Federal Aviation Agency (C.A. 5, October 2, 1962). More than 200 property owners in the vicinity of Tampa International Airport filed suit in the Federal district court for the Southern District of Florida for a declaratory judgment that the expansion of the airport by the County Aviation Authority, with the aid of plans and funds furnished by the Federal Aviation Agency, the extension of the runways in the direction of the plaintiffs' properties for the take-off and landing of commercial jet aircraft, and the frequent operation of such aircraft at low altitudes over their premises constituted a deprivation of property under the Fifth and Fourteenth Amendments. Plaintiffs also sought an injunction restraining defendants from using the properties as an approach way for the take-off and landing of jet passenger aircraft until appropriate condemnation proceedings were instituted to compensate them for their losses, which were alleged to be in excess of $4,000 as to each plaintiff, and restraining the FAA Administrator from making any further payments to the County Aviation Authority. The FAA Administrator was served with process in Washington, D. C.

The District Court dismissed the action for lack of jurisdiction, and plaintiffs appealed. In affirming the judgment of dismissal, the Court of Appeals held that the attempted service upon the Administrator in Washington, D. C. was ineffective and properly quashed. "Jurisdiction of the person of the defendant is essential in an in personam action and without it no relief can be granted. * * * In any event, the recent decision in Griggs v. Allegheny County, 1962, 369 U.S. 84, clearly absolves the United States and the Federal Aviation Agency from liability even if the court should reach the merits of the claim."

The Court also held that an allegation in the complaint that plaintiffs' homes have been damaged "in excess of $4,000" did not meet the jurisdictional requirement of 28 U.S.C. 1331 providing that the amount

in controversy must be in excess of $10,000. The Court stated that although the suit was a "spurious" class action, the claims of plaintiffs were separate and distinct and could not be aggregated to meet the jurisdictional requirement. Accordingly, the Court held that the action was properly dismissed as to the County Aviation Authority for lack of jurisdiction of the subject matter.

Staff: David D. Hochstein (Lands)

Public Domain; Mineral Leasing Act of 1920; Administrative Law; Application of Regulation Requiring Filing of Maps Showing Lands on Known Geological Structure. Udall v. King (C.A. D.C.). Under Section 17 of the Mineral Leasing Act of 1920, 30 U.S.C. 226, the Secretary of the Interior is authorized to issue oil and gas leases on public lands after first making a determination that the lands are or are not on a known geological structure of a producing oil or gas field. Lands found to be on a structure are to be leased competitively while lands not on a structure may be leased noncompetitively to the first qualified applicant. By regulation, the Secretary (a) delegated to the Director of the Geological Survey the responsibility for determining the boundaries of known geological structures and (b) required that maps or diagrams showing the boundaries of geological structures be "placed on file in the appropriate land office, and office of the oil and gas supervisor."

In Barash v. Seaton, 103 U.S. App. D.C. 159, 256 F. 2d 714 (1958) 6 U.S. Attys Bull. No. 12, p. 354, the court of appeals held that the Secretary had erred in issuing a competitive oil and gas lease on lands that the Director had said he "believed" to be within the confines of a geological structure. In that opinion, the court also indicated that lands were required to be leased noncompetitively if, at the time a noncompetitive application was filed, no maps were on file in the district land office showing the property to be on a structure.

In July, 1959, King filed a noncompetitive lease application covering certain public lands in Wyoming. Although no maps delineating the structure were on file at that time the land office manager, following a long-standing custom, requested the Director of the Geological Survey to report on the status of the lands. The Director, on the basis of information relating to a producing well available to his subordinates before the application was filed, held that at the time of the application the lands were on a known geologic structure and therefore not available for noncompetitive leasing. On appeal, both the Secretary and the Director affirmed. The Secretary noted the Barash case but held that the reference to the necessity of filing maps in that decision should not be extended beyond the factual situation presented in that case.

This suit was brought under the Administrative Procedure Act on the theory that the Secretary had acted illegally in refusing to issue a noncompetitive oil and gas lease to the first qualified applicant at a time when no maps were on file. The district court held that the Secretary was bound by the Barash decision, and granted plaintiff's motion for summary judgment.

On September 27, 1962, the Court of Appeals reversed, holding that it would not extend the Barash case beyond its particular facts, that the Director of the Geological Survey had acted promptly in making a determination with respect to the status of the land, leaving King with an opportunity to bid on a competitive lease, that the Director's determination was based on information available before the noncompetitive application was filed and that the Secretary had not erred in construing his own regulation. Although the opinion is relatively short, the Court was doubtless persuaded by the fact that the day-by-day development of information indicating the outlines of an oil and gas field makes it impossible to have definitive maps on file at all times and that the Secretary must be free to make determinations on an ad hoc basis in order to comply with the command of the statute that lands within the boundaries of a geological structure of a producing oil or gas field be leased on a competitive basis.

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

Public Land; Patents; Reserved Rights for Canals; Only Nominal Compensation Payable in Condemnation by United States to Construct Canal Right of Way by Virtue of Reservation in Original Patent from State of Utah to United States of Right of Way for "ditches * * * that might have been constructed." United States v. 3.08 acres of land, more or less, situated in Box Elder County, Utah, Utah Power and Light Company, et al. (D. Utah). This condemnation proceeding was instituted by the United States to condemn a right of way across a parcel of land owned by the defendant, Utah Power and Light Company, for the purpose of constructing a canal. The land was originally conveyed by patent by the State of Utah with a reservation to the United States of "all rights of way for ditches * * * that might have been constructed by authority of the United States." The Government contended that, because of this reservation, only nominal compensation was owing to defendant and, also, that the right of way contemplates the right to make eight-foot banks along the ditches or canals and the use of a 50-foot boom in connection with the cleaning of the ditches and canals every 10 years.

Defendant contended that the reservation to the United States applied only to canals that had been constructed at the time of the issuance of the patent and, further, even if the United States had a right of way, the use as contemplated by the United States was an enlargement of that right. Thus, defendant contended the United States would be liable for the increased costs which would have to be expended by the company if it erects its transmission lines higher than originally planned so as not to interfere with the Government's use.

The district court, although noting the expenses which would necessarily be incurred by defendant if its proposed transmission lines were constructed to adjust to the extra height caused by the Government's use, ruled in favor of the Government's position, stating:

> I conclude that the Government without reference to the condemnation proceedings had, and has, an existing right of way to establish and maintain the canal in question together with all appurtenances reasonably necessary for such canals.
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> * * * * *
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> The right reasonably to maintain such a canal, including the right to operate the fifty foot boom if reasonably necessary under existing conditions, must be considered to be included in the reserved easement. The general rule is that while an easement holder may not increase the servitude upon the grantor's property by enlarging on the easement itself, it is entitled to do what is reasonably necessary for full and proper enjoyment of the rights granted under the easement in the normal development of the dominant tenement.

Staff: Assistant United States Attorney Craig T. Vincent (D. Utah); and Dollie Smith (Lands Division).

Eminent Domain; Aircraft; Sporadic or Occasional Flights Over Privately-owned Land at Altitude of 800 feet Above Ground Do Not Constitute Taking. Joseph Lange, et ux. v. United States (W.D. Wash. September 10, 1962). Plaintiffs in this action are the owners of approximately 43 acres of land with considerable improvements on it which is located adjacent to the Whidbey Island Naval Air Station, Whidbey Island, Oak Harbor, Washington, and which has been operating since September 22, 1942. Jet aircraft began to operate from the station in September 1953. Plaintiffs' property is not located within any of the approach zones of the three runways. The southern boundary of plaintiffs' property runs parallel to one of the runways at the station at distances from the center line of the nearest runway ranging from 920 to 1,000 feet. The aircraft operating from the station occasionally have been flying over plaintiffs' property at an altitude of 800 feet above ground level.

Plaintiffs instituted this action against the United States to recover compensation for the alleged taking of an interest in their property resulting from the frequent and low flights allegedly made over the property by naval aircraft.

The United States filed a motion for summary judgment in support of which it submitted affidavits of the undisputed facts as above stated. The Court after having heard the Government's argument in support of its motion, which was unopposed by plaintiffs, ruled in favor of the Government. The Court in its oral opinion stated that the airspace, apart

from the immediate reaches above the land, is a part of the public domain, and flights over land are not a taking unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land. The Court further stated that such flights as may have been made over plaintiffs' property were not of a frequent character and that flights at an altitude of 800 feet above ground were within the navigable airspace and did not constitute an invasion of plaintiffs' land or an interference with the enjoyment and use of it.

Staff: United States Attorney Brockman Adams and Assistant United States Attorney Philip H. DeBurk (W.D. Wash.).

Public Domain; Mining Law; Administrative Law; Review of Findings Declaring Mining Claim Invalid. The Dredge Corporation v. E. J. Palmer, et al., and The Dredge Corporation v. J. Russell Penny, et al. (D. Nev.). These two cases, which involved practically identical issues, were instituted by the locator of placer mining claims in the Las Vegas area to challenge the validity of a finding by the Secretary of the Interior that the claims were invalid. All of plaintiff's claims were based on the alleged discovery of sand and gravel. The area around Las Vegas, however, is dotted with sand and gravel claims and already has a sufficient number of pits producing sand and gravel for the local market. The question in all cases of this type is whether the locations were actually based on a "discovery" of minerals, i.e., whether "a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine." The question is not merely whether any mineral has been found on the claims but whether the quality and quantity of the mineral located and the state of the market will justify the development of a mine. When the validity of the location was challenged by the Department of the Interior, an Administrative Procedure Act hearing was held. The Hearing Examiner concluded that plaintiff had not carried its burden of proof to establish validity of the location. This conclusion was affirmed on appeal by the Director, Bureau of Land Management, and by the Secretary of the Interior.

Defendants in these two actions were the Manager of the Las Vegas Land Office and the State Supervisor for Nevada. Motions for summary judgment were filed on the ground that the Secretary of the Interior was an indispensable party and on the further ground that the Secretary's decisions were based on substantial evidence making them not subject to judicial review.

On September 25, 1962, Chief Judge Ross sustained the motion in each case. He rejected the contention that the Secretary was an indispensable party, citing Adams v. Witmer, 271 F. 2d 29 (C.A. 9, 1958), but concluded that the Secretary's decisions were correct, citing Foster v. Seaton, 271 F. 2d 836 (C.A. D.C. 1959). With the passage of Pub. L. 87-748 in this Congress (extending the venue provisions in suits against public officials), it can be expected that this type of suit will be brought increasingly hereafter in the Ninth and Tenth Circuits.

Staff: Assistant United States Attorney Melvin D. Close, Jr. (D. Nev.) and Thos. L. McKevitt (Lands Division).

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CIVIL TAX MATTERS
Appellate Decision

Validity of Election by Corporation Under Subchapter S of 1954 Code Made at Time When Corporation Is Insolvent or Contemplates Bankruptcy. Hauptman, Trustee v. Director (In Matter of Novo-Plas Mfg. Co., Inc. Bankrupt) (C.A. 2, September 18, 1962). In May 1958, Z became the sole stockholder of Novo-Plas Mfg. Co., Inc. which in that calendar year suffered a net operating loss of $184,535. On September 2, 1958 the Internal Revenue Code was amended to create Subchapter S, Sections 1371-1377, which granted any corporation qualifying as a small business corporation 90 days within which to elect to receive the treatment permissible under these amendments. Novo-Plas, having only one stockholder, was eligible and in November, 1958 elected to receive small business tax treatment under Subchapter S. In January, 1959, Novo-Plas assigned its assets for the benefit of creditors and in March, 1959 was adjudged a bankrupt. The District Director filed a claim against the bankrupt estate for $7,155 in unpaid taxes, which the trustee sought to offset by a net operating loss carry-back based upon the bankrupt's net operating loss for 1958. However, Z asserted that the net operating loss of the corporation was allowable to him personally rather than to the corporation because of its election pursuant to Subchapter S, arguing that Section 1374 allows shareholders of a corporation qualifying under that subchapter to deduct on personal income tax returns for the net operating loss incurred by the corporation.

The trustee argued that an otherwise qualifying corporation may not elect Subchapter S tax treatment, when the corporation is insolvent or when bankruptcy is imminent. However, the Court of Appeals overruled this contention, and affirmed the holding of the district court and the bankruptcy referee. The Court reasoned that the language of the Code warranted no such limitation, as the trustee's contention proposed.

It is to be noted, however, that here the trustee moved in the bankruptcy proceeding itself for an order recognizing only the trustee to the exclusion of Z, as the one entitled to the bankrupt's operating loss and to restrain Z from utilizing the operating loss as a basis for his personal tax loss carry-back. In this procedural context, the Director pointed out in his brief that a contention that the Subchapter S election might be set aside as a fraudulent transfer or a voidable preference under Sections 60, 67 or 70 of the Bankruptcy Act was not properly before the Court, but must await the institution of a plenary action by the trustee against the corporate shareholder.

Staff: United States Attorney Joseph P. Hoey (E.D. N.Y.)

District Court Decisions

Internal Revenue Service Summons Addressed to Accountant; Injunction Against Enforcement Denied; Power of United States Commissioner to Enforce Is Specific Under Section 7604, of the Internal Revenue Code of 1954; Taxpayer Without Standing to Assert Defense of Fourth Amendment as to Accountant's Workpapers; However, Taxpayer Allowed to Intervene in Enforcement Proceedings Before Commissioner. Dorothy Hinchcliff v. James M. Clarke, et al. (N.D. Ohio, 1961), CCH 62-2 USTC ¶9666. This is an action brought by plaintiff, individually and as executrix of her late husband's estate to restrain the Internal Revenue Service from conducting any further investigation of the income tax matters of her and her late husband's estate. The Internal Revenue Service in the course of conducting an examination into the tax liability of plaintiff and her late husband issued an administrative summons to their accountant, Donald J. Graf, directing him to appear and produce certain records, including his workpapers, and give testimony relating to the liability of the Hinchcliffs for the period 1945 through 1960. Graf appeared before the Internal Revenue Service with the designated records but refused to turn them over. An action to judicially enforce the summons was brought under Section 7604 of the Internal Revenue Code of 1954 before a United States Commissioner. The Commissioner issued a writ of attachment directing the appearance of the accountant before him in a hearing on May 24, 1961, and ordered Graf restrained from dispossessing himself of the records designated in the summons. The hearing was continued for various reasons until June 23, 1961, at which time Mrs. Hinchcliff filed a motion to quash and vacate the writ of attachment and the restraining order. This motion was overruled. On July 31, 1961, prior to the time set for the hearing on the summons before the Commissioner, Mrs. Hinchcliff filed the complaint in the instant action.

The principal reasons for which plaintiff contends she is entitled to an injunction are: (1) that the United States Commissioner is without jurisdiction to enforce a summons, and (2) that to permit the summons to be enforced would violate her rights under the Fourth and Fifth Amendments of the United States Constitution. The Court quickly disposed of the first contention by referring to the specific authority conferred upon United States Commissioners under Section 7604(b) of the Internal Revenue Code of 1954 to enforce summonses. This Court, while it felt it need not consider whether final orders of a United States Commissioner are appealable, nevertheless, was of the opinion that such orders are appealable. As to the accountant's workpapers and other papers of his, plaintiff was without standing to claim that their production would constitute an unreasonable search and seizure. McMaun v. S.E.C., 87 F.2d 377 (C.A. 2, 1937); Zimmerman v. Wilson, 105 F.2d 583 (C.A. 3, 1939). However, the Court held that plaintiff is not precluded from asserting her rights and privileges under the Constitution, as well as under the Internal Revenue Code "with respect to property which belongs to her individually, or as executrix, merely because such property has been placed in the hands of a third person, Graf."

The Court ordered the resumption of the proceedings before the United States Commissioner and that plaintiff if she desires, be permitted to intervene in those proceedings and that all questions raised in the instant proceeding be heard and determined by the United States Commissioner under Rules 24 and 81(a) (3) of the Federal Rules of Civil Procedure.

Staff: United States Attorney Merle M. McCurdy (N.D. Ohio)

Enforcement of Federal Tax Liens: Contractor Upon Whom Levies Were Served Was Permitted to Offset Non-liquidated Losses on Current Subcontract Against Sums Owed Subcontractor-Taxpayer for Previously Completed Work. United States v. Raley Contracting Co. (N.D. Miss.), CCH 62-2 USTC ¶9706. Taxpayer W. L. Wells, was subcontractor to defendant on six separate jobs. Taxpayer completed five of the jobs and defaulted on the sixth. Levies were served on defendant on February 25, 1959 and May 4, 1959. Under the terms of the five completed contracts, taxpayer was entitled to payment within 15 days of payment to defendant. Defendant was paid on February 12, May 2, December 8, and December 31, 1959. In December of 1958, taxpayer talked with defendant about possible default on the sixth job and in January of 1959, defendant visited the job and estimated that it would take forty to fifty thousand dollars to complete the job. On February 11, 1959, taxpayer sent unpaid bills to defendant for payment out of earned retainage on the sixth project. On March 13, 1959, defendant notified taxpayer that it would take over this job and defendant took over the project on June 1, 1959. The written contract on this project required that after written notice, the default must continue for ten days before defendant could take over the job.

The Court found that it was obvious on February 11, 1959 that taxpayer could not complete the job and since it appeared certain that defendant would lose between $40,000 to $50,000 on this job, that there never was a time when taxpayer could have maintained a suit against defendant for the collection of the money due on the completed contracts. Since taxpayer never had an enforceable right against defendant, the levies served by the United States never attached to any sum. The Court concluded that the United States could gain no greater right than the taxpayer and dismissed the complaint.

Staff: United States Attorney Hosea M. Ray (N.D. Miss.); and Wallace E. Maloney (Tax Division).

Liens: Property and Rights to Property; Bankrupt's Ohio D-5 Liquor Permit Is Subject to Federal Tax Liens. In the Matter of A. & A. Tavern, Inc. (N.D. Ohio, August 12, 1962). This is an opinion of the District Court sitting in Bankruptcy. Prior to bankruptcy the Internal Revenue Service seized personal property of taxpayer including an Ohio D-5 liquor permit, which was removed from the walls of his place of business. On August 4, 1959, taxpayer was petitioned into bankruptcy. The United States sold the seized personal property including the permit but later stipulated that the Bankruptcy Court should determine

the validity of the Government's rights to the seized property. The Bankruptcy Court determined that absent the Government's claim the Trustee would succeed to the liquor permit under Section 70(a) of the Bankruptcy Act basing this determination largely on the fact that the permit may be "transferred." The Court further noted the substantial body of law to the effect that similar permissive licenses were deemed "property" within the ambit of Section 70(a). The Court then turned its attention to whether the permit was "property" or "rights to property" under Section 6321 of the Code and therefore subject to the prior tax liens and levy. The Court noted that state law is determinative of this question. A recent Ohio Supreme Court decision, Abraham v. Fioramonte, 158 O.S. 213, held that a liquor permit was not "property" but held it to be a mere personal license; but the Court in the instant case stated:

> However, even though the (Ohio) Supreme Court had held a Liquor Permit not to be property, despite the rules of the Liquor Control Board providing for a transfer of such permits under certain circumstances, such decisions would not be followed in a bankruptcy proceeding nor in any other proceeding in which the United States Government claimed a lien under Section 6361 (sic) of the Internal Revenue Code (1954).

The Court also pointed out that the Ohio Supreme Court had ignored the rules of the Liquor Control Board which allow the transfer of such permits. For these reasons the Court found that the tax liens affixed to the liquor license.

Staff: United States Attorney Merle M. McCurdy; and Assistant United States Attorney Dominic J. Cimino (N.D. Ohio).

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