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UNITED STATES ATTORNEYS
BULLETIN

UNITED STATES ATTORNEYS BULLETIN

Vol. 10 December 14, 1962 No. 25

MONTHLY TOTALS

During October, a slight drop in the number of triable criminal cases pending brought a corresponding decrease in the number of all criminal cases pending and in the total of all cases, criminal and civil, pending. Totals in all other categories rose, but the increases were much less than at the end of September, and the rise in total cases and matters pending was less than half that for the preceding month. The following analysis shows the number of items pending in each category as compared to the total for the previous month.

	September 30, 1962	October 31, 1962	
Triable Criminal	9,177	8,937	- 240
Civil Cases Inc. Civil Less Tax Lien & Cond.	16,190	16,211	+ 21
Total	25,367	25,148	- 219
All Criminal	10,780	10,531	- 249
Civil Cases Inc. Civil Tax & Cond. Less Tax Lien	19,172	19,176	+ 4
Criminal Matters	12,988	13,205	+ 217
Civil Matters	15,064	15,245	+ 181
Total Cases & Matters	58,004	58,157	+ 153

The cumulative totals for the first four months of the fiscal year show that case terminations continue to lag behind case filings. During the month of October, however, the gap was narrowed slightly. Both filings and terminations are substantially higher than for the first four months of fiscal 1961. The pending caseload also shows an encouraging 2% decrease from the same period in fiscal 1961. If any appreciable dent in the pending caseload is to be made, however, the number of terminations must rise considerably and must show a very appreciable increase over case filings each month.

	First 4 Mos. F.Y. 1962	First 4 Mos. F.Y. 1963	Increase or Decrease Number	%
Filed				
Criminal	9,604	10,894	+ 1,290	+ 13.43
Civil	8,260	8,779	+ 519	+ 6.28
Total	17,864	19,673	+ 1,809	+ 10.12
Terminated				
Criminal	8,333	9,660	+ 1,327	+ 15.92
Civil	6,698	7,911	+ 1,213	+ 18.11
Total	15,031	17,571	+ 2,540	+ 16.90

Pending	First 4 Mos. F.Y. 1962	First 4 Mos. F.Y. 1963	Increase or Decrease Number	%
Criminal	9,608	10,508	+ 900	+ 9.37
Civil	22,214	23,698	+ 1,484	+ 6.68
Total	31,822	34,206	+ 2,384	+ 7.49

The analysis below shows, that for the first month in the present fiscal year, case terminations exceeded case filings. In both criminal and civil terminations the totals set a new high for the year. The increase of 1,341 terminations over the preceding month set a new high for the year. The most encouraging aspect of this increase is that much of it occurred in civil case terminations, where it is most needed. Civil cases comprise approximately 70% of the pending caseload, whereas criminal cases make up only 30% of it. These figures point up the need for increased activity in civil case terminations.

	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
Sept.	3,324	1,857	5,211	2,456	1,740	4,196
Oct.	2,973	2,393	5,366	3,199	2,338	5,537

For the month of October, 1962, United States Attorneys reported collections of $10,520,284. This brings the total for the first four months of fiscal year 1963 to $22,284,736. Compared with the first four months of the previous fiscal year this is an increase of $10,148,759 or 83.6 per cent over the $12,135,977 collected during that period.

During October $5,564,129 was saved in 122 suits in which the government as defendant was sued for $6,730,777. 67 of them involving $2,537,590 were closed by compromises amounting to $438,412 and 34 of them involving $3,251,613 were closed by judgments against the United States amounting to $728,236. The remaining 21 suits involving $941,574 were won by the government. The total saved for the first four months of the current fiscal year was $16,035,461 and is an increase of $3,734,550 over the $12,300,911 saved in the first four months of fiscal year 1962.

DISTRICTS IN CURRENT STATUS

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

CASES

Criminal

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

CASES

Civil

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

MATTERS

Criminal

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

MATTERS

Civil

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

ERRATA

In the last issue of the Bulletin (Vol. 10, No. 24, dated November 30, 1962), pages 665-668 were assembled incorrectly. The following corrections should be made:

At bottom of page 665, write "continued on page 668"
At bottom of page 667, write "continued on page 669"
At bottom of page 668, write "continued on page 666".

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ANTITRUST DIVISION

Assistant Attorney General Lee Loevinger

SHERMAN ACT

Restraint of Trade - Yellow Grease; Supreme Court Upholds Government. Los Angeles Meat and Provision Drivers Union, Local 626, et al. v. United States (No. 38, October Term, 1962.) In 1959, the United States brought a civil antitrust action in the Southern District of California against Local 626 of the Los Angeles Meat and Provision Drivers Union, one of its business agents, and four self-employed independent contract grease peddlers who were members of the Union. A judgment was entered upon findings based upon a detailed stipulation of facts in which the appellants admitted all allegations of the complaint, agreed that they had unlawfully combined and conspired in unreasonable restraint of foreign trade and commerce in yellow grease, and also agreed to the issuance of a broad injunction against them. In addition, the union was ordered to terminate the union membership of all self-employed grease peddlers. The appellants attacked the judgment upon the sole ground that the District Court was in error in ordering termination of the union membership of these independent businessmen.

The Supreme Court, in an opinion written by Justice Stewart, affirmed the judgment. It held that "there is nothing in the Norris-LaGuardia Act nor in the Clayton Act, nor in the federal policy which these statutes reflect, to prevent a court from dissolving the ties which bound these businessmen together, and which bound them to the appellant Union in the circumstances of this case." While these acts ensure that antitrust laws cannot be used as a vehicle to stifle legitimate labor union activities, the stipulated facts in this case show "that there was no job or wage competition or economic inter-relationship of any kind between the grease peddlers and other members of the appellant union."

Justice Goldberg, with whom Justice Brennan joined, concurred with the majority, expressing their view that since "[t]he import of the entire stipulated factual record is that the union neither had nor pursed any legitimate present interest in organizing the grease peddlers" the remedy was appropriate. They noted, however, that this remedy is appropriate "only in the most compelling of circumstances" so that it may not "become a device for unfairly and improperly fractionalizing or decimating unions."

Justice Douglas dissented. The Court, he believed, was not bound by stipulation of what is essentially a question of law, i.e., whether a "labor dispute" existed. In his view, the grease peddlers and the union members did compete, and hence under the Norris-LaGuardia the federal courts have no power to compel grease peddlers to resign as members of the union.

Staff: Robert B. Hummel, Maxwell M. Blecher and Gerald Kadish (Antitrust Division)

CLAYTON ACT

Title Insurance Company Charged With Violating Section 7 of Clayton Act. United States v. Chicago Title and Trust Company, et al. (W.D. Mo.) On November 9, 1962, a complaint was filed alleging that the acquisition in August 1961 of Kansas City Title Insurance Company by Chicago Title and Trust Company was in violation of section 7 of the Clayton Act.

Chicago Title is the second largest title insurance company in the United States. Chicago Title and its subsidiaries had, in 1960, a gross income of over $22,000,000 and assets of over $90,000,000. Chicago Title and its subsidiaries write title insurance in some forty-two States. In 1960 title insurance amounting to over $15,000,000 was written in Illinois of which Chicago Title wrote over 95 per cent of the total. For years past Chicago Title has controlled all of the title insurance business in Cook County, Illinois.

Prior to 1957 Chicago Title had acquired a substantial stock interest in the Lake County Title Company, a title insurance company having its principal place of business in Crown Point, Indiana, and in the early part of 1957 Chicago Title acquired the outstanding stock interest in the Lake County Title Company. In December 1957, Chicago Title acquired substantially all of the outstanding stock of the Title Insurance Corporation of St. Louis having its principal place of business in St. Louis, Missouri. In March 1960 Chicago Title acquired all of the capital stock of the Title Guaranty Company in Wisconsin, a Wisconsin corporation. In November 1960 Chicago Title acquired over 90 per cent of the capital stock of the Home Title Guaranty Company of New York, a New York corporation. About August 1961 Chicago Title completed the acquisition of substantially all of the capital stock of the Kansas City Title Insurance Company.

Kansas City Title, at the time of its acquisition by Chicago Title, had assets of approximately $7,000,000 and an annual premium income of over $3,800,000. At the time of its acquisition by Chicago Title, Kansas City Title was engaged in writing title insurance in twenty-five States, in ten of which Chicago Title and its subsidiaries were also writing title insurance.

Kansas City Title and St. Louis Title, at the time of their acquisition by Chicago Title, had over 70 per cent of the title insurance business in Missouri, and Kansas City Title and Wisconsin Title at the time of their acquisition by Chicago Title had over 70 per cent of the title insurance business in Wisconsin.

The complaint asks, among other things, that Chicago Title be required to dispose of its stock interest in Kansas City Title and be enjoined from acquiring any stock interest or ownership in any firm engaged in the writing of title insurance without prior approval by the court.

Staff: Earl A. Jinkinson and Ralph M. McCareins (Antitrust Division)

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CIVIL DIVISION

Acting Assistant Attorney General Joseph D. Guilfoyle

COURTS OF APPEALS

BANKRUPTCY ACT - Ch. XI

Notice or Knowledge of Arrangement Proceedings on Part of One Government Agency Not Enough to Discharge Unscheduled Debts Within Province of Another Government Agency. Hermetic Seal Products Company, P.R. v. United States of America (C.A. 1, August 30 and November 13, 1962). Appellant was a defense subcontractor wholly owned and controlled by residents of New Jersey but incorporated in Puerto Rico and having its manufacturing plant there. While the Renegotiation Board was in the last stages of determining that it had received large amounts of excessive profits, appellant entered into arrangement proceedings under Chapter 11 of the Bankruptcy Act. The United States was named as a creditor in those proceedings on account of certain tax claims and claims being administered by the Department of the Navy. Although appellant's officers were aware of the renegotiation proceedings, they did not list the Renegotiation Board as a creditor, and did not schedule the large claims of the United States arising under the Renegotiation Act. In collection proceedings brought by the United States in the district court, appellant claimed that since the United States participated in the Chapter 11 proceedings and had notice and knowledge of them, the renegotiation claims were discharged by the final order in those proceedings. The district court found that the renegotiation claims were not scheduled, that appellant had deliberately concealed the proceedings under the Bankruptcy Act from the Renegotiation Board, and that since the Renegotiation Board (as distinguished from other agencies of the Government) did not have timely notice or knowledge of the proceedings, the claims arising under the Renegotiation Act were not discharged. The district court also rejected a contention by appellant that the claims were invalid because the Renegotiation Act does not apply to contracts performed in Puerto Rico, on the ground that this defense could be raised only in Tax Court proceedings. Accordingly, it entered judgments in favor of the United States in the amount of $975,000 plus interest.

The Court of Appeals affirmed, holding that in order to discharge unscheduled claims the Bankruptcy Act (11 U.S.C. 94(e)) requires notice or knowledge on the part of the particular governmental agency primarily concerned with the claims, and that knowledge on the part of other Government agencies would not suffice. It also ruled that the agency involved must have had knowledge of the arrangement proceedings in time to afford it an opportunity to participate in those proceedings equally with other creditors, and that the actual knowledge of the proceedings by the Renegotiation Board in this case was not timely.

In its initial opinion, the Court ruled, however, that it would stay the district court's judgment in one of these cases until the

termination of the Tax Court proceedings. Upon our motion for rehearing, however, the Court vacated its stay as being "ill advised", and affirmed the district court judgment, because of the provisions of Section 108 of the Renegotiation Act (50 U.S.C. App. 1218), which provide for a stay of collection proceedings "only" if the contractor files a bond with the Tax Court.

Staff: David L. Rose (Civil Division)

CONTRACTS

Cancellation of Supply Aspect of Contract Constitutes "Partial Termination" and Not "Change"; Mistaken Payment Based Upon Interpretation of Contract Not Final. J. W. Bateson Company, Inc. v. United States (C.A. 5, September 26, 1962). The United States brought this suit to recover $42,264.93 which it claimed was erroneously paid to appellant. The dispute involved the method of computing the contract price for the construction of 250 houses and other buildings at Camp Pickett, Virginia. On May 8, 1953, the Government partially terminated a contract under which appellant was to construct 430 houses at Camp Breckinridge, Kentucky. Appellant was advised to complete only 81 units at Camp Breckinridge, to cancel its subcontract for prefabricated building materials to be used at Camp Pickett, and to ship 250 of the Breckinridge units to Camp Pickett. Final settlement of the Breckinridge contract was consummated and appellant received a profit on all the prefabricated materials furnished under the contract. Additionally, the Camp Pickett contract was modified since the prefabricated materials used there were being provided by the Government from the surplus units it had purchased for Camp Breckinridge. Accordingly, the Government received a credit for these prefabricated materials. However, the reduction in the Pickett contract price did not include a credit for appellant's profit on such materials. As a result, appellant collected a profit on all units which it furnished under the Breckinridge contract and then received a second profit on the 250 units which were not used at Breckinridge but were shipped instead to Pickett. The district court entered judgment in favor of the Government.

In affirming, the Court of Appeals rejected appellant's claim that the modification of the Pickett contract was merely a "change" pursuant to General Condition 9 and that therefore under the contract the Government was only entitled to a credit for "net cost without overhead or profit." The Court noted that whatever may have been their original status, the two contracts had to be considered together and that the effect of the modification was a "partial termination of the construction aspect at Breckinridge and a corresponding termination of the supply aspect at Pickett, and not merely a "change". Finally, the Court ruled that the determination of the contracting officer that appellant was entitled to public money could not be final as against the United States under the "Disputes Article", since the payment was made under a mistaken interpretation of the contract.

Staff: United States Attorney Barefoot Sanders; Assistant United States Attorney Joseph McElroy (N.D. Texas)

Government's Claim for Payments to Employee for Maintenance and Cure Arises Out of Tug Operator's Breach of Obligation to Perform Towing Contract and Furnish Seaworthy Vessel and Not Subrogation. United States v. Tug Manzanillo, et al. and Tug Manzanillo, et al. v. United States (C.A. 9, November 16, 1962). This suit was brought by the United States against Shaver Transportation Company to recover payments which the Government had made to one of its employees, Peters, for maintenance and cure. The Government entered into a contract with Shaver whereby the latter undertook to tow one of its vessels. The payments in question where occasioned by an injury sustained by Peters while boarding one of Shaver's tugs. Peters brought suit against Shaver in the state court to recover damages for his injuries. That suit was settled for $16,000, Peters executing a release discharging Shaver from any further liability. The district court held that the Government was entitled to recover but that recovery should be limited to the $1,400 paid to Peters subsequent to the settlement of the state court action.

In reversing, the Court of Appeals agreed with the district court. It accordingly held that a tug boat operator, who permits an unsafe condition to exist, violates his contract with the shipowner who may institute an action on the contract for the amount paid to a third party because of such hazardous conditions. See, Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124. The Court held, however, that the district court had erred in limiting the Government's award to the amounts paid Peters subsequent to the settlement, and remanded the cause with directions to enter judgment for the full amount paid. In that connection, it noted that the Government's claim did not arise through subrogation but was based upon Shaver's breach of contract.

Staff: W. Harold Bigham (Formerly of Civil Division)

FEDERAL HOUSING ADMINISTRATION

Appellant's Status Held That of Unsecured General Creditor; District Court's Findings Amply Supported by Record. United States v. Ivy Hall Apartments, Inc. and Leon Sidell (C.A. 3, November 19, 1962). On June 13, 1957, appellant purchased the stock of Flamingo Apartments, Inc. whose principal asset was a fifteen story apartment house encumbered by an FHA insured mortgage. When the Corporation defaulted, FHA took over the mortgage and instituted foreclosure proceedings. The district court appointed a receiver pending the litigation and subsequently ordered a public sale of the property. On March 1, 1960, the property was purchased by FHA at the sale for $500,000 less than the principal and interest due under the mortgage. The receivers then petitioned the district court for leave to pay appellant for advances made by him to the corporation prior to the receivership. In addition, they also proposed to pay appellant for the value of certain furniture contained in the apartment which he claimed was his personal property and not covered by the mortgage, and for the rental value thereof. The district court disallowed appellant's claims.

The Court of Appeals affirmed. It held that appellant's status was that of an unsecured general creditor of the corporation as far as his claims for advances and rental of the furniture up to the time of the receivership were concerned. With respect to appellant's claims for the value of the furniture and for its rental after the appointment of the receivers, the Court of Appeals noted that the district court had carefully reviewed the evidence and found that appellant had failed to establish his title to the furniture. It concluded that the record disclosed no clearly erroneous finding upon the part of the district court and that, accordingly, its determination had to be upheld.

Staff: Assistant United States Attorney Sullivan Cistone (E.D. Pa.)

FEDERAL TORT CLAIMS ACT

United States Not Liable for Negligence of Civilian Air Technician in Conduct of Training Flight Under Control of Wyoming Air National Guard. John W. Pattno, Admr. v. United States (C.A. 10, November 19, 1962). This action was commenced under the Federal Tort Claims Act to recover for the death of the pilot-owner of a private plane in collision with a jet fighter plane loaned by the United States to the Wyoming Air National Guard and flown by a civilian air technician in the process of evaluating the flying proficiency of an officer of the Wyoming Guard in another jet. The civilian air technician was hired as a flying training instructor under the basic authority of the so-called "caretaker" statute, 32 U.S.C. 709, and was paid by the United States. However, responsibility for the employment, assignment, promotion, demotion, and separation of civilian personnel of the Guard was delegated to the states, and in Wyoming was lodged in the Adjutant General, and the particular flight was authorized, commanded and controlled by the Wyoming Guard.

The district court entered judgment for the United States on two grounds: (1) that neither of the jet pilots was an employee of the United States at the time of the accident, and (2) that neither was negligent.

The Court of Appeals affirmed. With respect to the applicable law, the Court determined that federal law is controlling on the question of who is a federal employee, and that the state law of respondeat superior determines whether a federal employee is acting within the scope of his employment. The Court then held that (1) as an air technician, the training instructor was an employee of the United States, but that he was also an employee of the Wyoming Air National Guard training pilots for a Guard unit; (2) under the Constitution of the United States (Art. I, Section 8, Cl. 16) and statutes (32 U.S.C. §101(6)(B) and 10 U.S.C. §8379) training of the Guard is reserved to the states, and the particular flight was authorized and controlled by the Wyoming Air National Guard and not by the United States or any agency thereof; and (3) that, since the federal government had neither the requisite control of the officers nor was it federal business in which they were engaged at the time of the accident, neither officer was acting as an employee of the United States at the

time under the Wyoming law of respondeat superior. The Court found it unnecessary to consider the question of negligence.

The decision is important because it turns upon the question of control in fact by the state and pursuit of state business, notwithstanding that the training procedures had to meet federal standards, that the officers were paid by the United States, and that the equipment used was owned by the United States; and it distinguishes on this basis the Tenth Circuit's earlier decision in Holly v. United States, 192 F. 2d 221, a "caretaker" case in which the Government was held liable and which was subsequently followed by the Second, Fifth and Ninth Circuits.

Staff: Kathryn H. Baldwin (Civil Division)

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

Death from Aggravation of Heart Disease in Course of Usual and Ordinary Work Compensable; Deputy Commissioner's Rejection of Claim Not Supported by Substantial Evidence. Hancock v. Einbinder (C.A.D.C., November 15, 1962). Appellant, widow of deceased employee, sought review of the deputy commissioner's rejection of a claim for death benefits. The deputy commissioner found that the employee died of heart failure, which was unrelated to his employment, that prior to the time of death the employee had been performing duties consistent with his normal job -- wrapping bundles of magazines for mailing.

The Court of Appeals reversed. It noted the deputy commissioner's failure to consider the evidence that the employee's job involved the lifting of 80-pound sacks and the medical testimony relating to the effect of such exertion on one suffering from angina pectoris. The Court emphasized the Act's presumption in favor of the coverage of all claims and pointed out that aggravation of pre-existing illness in the course of normal employment activities is compensable under the Act unless the aggravation is shown by substantial evidence to be unrelated to the employment.

Staff: Assistant United States Attorney Charles T. Duncan (District of Columbia)

RAILWAY LABOR ACT

District Court Without Jurisdiction Over Representation Dispute Where National Mediation Board Does Not Act in Excess of Authority or Nullify Statutory Rights of Employees. WES Chapter, Flight Engineers' International Association, AFL-CIO v. National Mediation Board, et al. (C.A.D.C., November 15, 1962). Appellant brought this action to invalidate a certifying election held by the National Mediation Board pursuant to Section 2, Ninth, of the Railroad Labor Act (45 U.S.C.A. 152 (1961 Supp.)) to determine what organization was to represent the flight engineers of Western Airlines. As a result of the election, the Second Officer's Association replaced the appellant as the designated representative of the employees of the carrier. Appellant contended that

the Board had illegally excluded 123 of its members from voting in the election and had failed to fully investigate the charge that SQA was dominated and assisted by the employer. The district court dismissed the action for failure to state a claim.

The Court of Appeals affirmed. It noted the settled principle that the court would take jurisdiction of representation disputes only where the Board had violated an express statutory mandate or limitation. Against this background, the Court concluded that it could not assume jurisdiction since the "Board ha/d/ not refused to act on the one hand, nor * * * exceeded the express commands of Congress on the other." In that connection, the Court noted that the Board had determined that the excluded engineers were not eligible to vote under its rules, that it had investigated appellant's charges of company assistance, and that due process of law would not appear to require more in the circumstances.

Staff: Assistant United States Attorney Frank Q. Nebeker (District of Columbia)

DISTRICT COURTS

FEDERAL TORT CLAIMS ACT

Feres Doctrine Bars Suit for Wrongful Death of Serviceman Injured While on Leave. Isabel Tumenas, etc. v. United States (S.D. Fla., November 19, 1962). Plaintiff, the widow of a deceased serviceman, filed the instant action for the wrongful death of her husband allegedly as the result of malpractice at the U. S. Naval Hospital, Key West, Florida. On December 3, 1960, plaintiff's decedent took thirty days leave while being transferred from the U. S. Naval Air Station, Key West, Florida, to the U. S. Naval Air Station, Jacksonville, Florida. On December 9, 1960, after being on leave for approximately six days, he became ill. On December 10, he was taken by his wife to the Naval Hospital at Key West, Florida, for the purpose of examination and treatment. The complaint alleges malpractice at the hospital (i.e., improper diagnosis of the deceased's true condition) prior to his actual admission and while he was still in a leave status. The Government moved for summary judgment relying on Feres v. United States, 340 U.S. 135. While the Government's negligence was alleged to have occurred at a time when the deceased was on leave the Government urged that an activity "incident to service" within the meaning of the Feres doctrine is any activity in which the serviceman is engaged solely by virtue of his military status.

The district court granted the Government's motion for summary judgment. Thus, the decision is in line with several earlier holdings refusing to allow recovery for a soldier's service incident injuries even though they were incurred on leave. See, e.g., Preferred Insurance Co. v. United States, 222 F. 2d 942 (C.A. 9); Zoula v. United States, 217 F. 2d 81 (C.A. 5); Archer v. United States, 217 F. 2d 548 (C.A. 9).

Staff: Thomas L. Young (Civil Division)

Release of Employee Also Releases Employer Since in Missouri They Are Not Joint Tortfeasors. Bacon v. United States (E.D. Missouri, October 4, 1962). Plaintiffs sued the Government under the Federal Tort Claims Act for injuries sustained in a collision with a Corps of Engineers employee. The driver had been sued in the state court and his insurance carrier paid plaintiffs $2,287.80 and plaintiffs gave a covenant not to sue. The Government claimed that a complete satisfaction had been achieved by the settlement and moved for summary judgment. The Court granted the motion, holding that the basis for any governmental responsibility was on the theory of respondeat superior; that by virtue of a holding in the recent case of Max v. Spaeth, 349 S.W. 2d 1 (1961) a respondeat superior relationship was not a joint tortfeasor relationship so that any release of an employee would release the employer also. The Court made no determination on the satisfaction issue since it found the Government and its employee were not joint tortfeasors and it is only in such case that satisfaction becomes important.

Staff: United States Attorney D. Jeff Lance and Assistant United States Attorney Donald L. Schmidt (E.D. Missouri) Alice K. Helm (Civil Division)

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

PROSECUTION OF NARCOTIC VIOLATIONS

Effective and equitable administration of the narcotic control laws in large measure depends upon the discretion of the United States Attorney in selecting the statutes appropriate to the offenses. A review of prosecutions in this area reveals that this discretion is not being exercised in all cases.

Selection of the statute appropriate to the prosecution in this area is a task requiring penetrating analysis of the factual situation and keen judgment. It is the task of the United States Attorney to determine the actual nature of the offense and, in many cases, the penalty due the offender.

The Department's review reveals that the Title 21 provisions relating to narcotics and marihuana are being considerably overused. The United States Attorney should bear in mind that these sections were aimed primarily at imported narcotic or canabial substances. Absent some indication of importation, their use is never justified. This required indication could be derived from the nature of the substance. Heroin, for instance, is not produced in the United States. It could also be derived from the facts of the case or assurances from agents familiar with the offender's source of supply.

The United States Attorney should also remember that the sentences possible for many narcotics offenders are inflexible after conviction. Use of code sections carrying a mandatory minimum penalty is fully justified in many cases, but these sections were not intended for use against the casual first offender found in possession of a very small quantity of contraband. Only the good judgment of the United States Attorney stands between the defendant and injustice in these situations. Such factors as the prior record of the offender, the quantity involved, the depth of the offender's involvement, the offender's position in any organizational hierarchy and his addiction or freedom from it should be carefully considered in determining if use of a statute carrying a mandatory minimum sentence is warranted.

MAIL FRAUD

Advance Fee Scheme; Mailings After Money Has Been Obtained. United States v. Sampson, et al. (U. S. Sup. Ct.). The return of the indictment in this case was previously reported in Volume 8 of the United States Attorneys Bulletin at page 333, as Lenders Service Corporation. On March 30, 1961, the District Court, Northern District of Georgia, dismissed 34 substantive counts and the conspiracy count of the indictment. The

District Court, relying on Kann v. United States, 323 U.S. 88, and Parr v. United States, 363 U.S. 370, held that since the mailings upon which the substantive counts were based were made after the money had been obtained from the victims, they were not for the purpose of executing the scheme to defraud. The Government appealed, and the Court of Appeals for the Fifth Circuit certified the case to the Supreme Court.

The Supreme Court reversed the dismissal of the substantive and conspiracy counts, in a clear holdings that the Kann and Parr cases were not to be construed as "laying down an automatic rule that deliberate, planned use of the mails after the victims' money had been obtained can never be 'for the purpose of executing' the defendants' scheme. Rather the Court found only that under the facts in those cases the schemes had been fully executed before the mails were used".

The Sampson decision should not be read as a blanket license to use all mailings made after a victim's money has been obtained. It should be carefully noted that the mailings involved in Sampson were made by the defendants themselves and not by innocent third parties as in Kann and Parr, and that the Supreme Court found that these lulling mailings were a planned step in the execution of the overall scheme. It is therefore necessary to continue to scrutinize carefully all mailings in proposed indictments with great care and, in case of doubt, to consult with the Department prior to returning an indictment.

Staff: Howard P. Willens, Executive Assistant,
Criminal Division, argued the case;
Louis F. Claiborne, Assistant to the Solicitor General
and Philip R. Monahan, Criminal Division, on the brief.

GAMBLING DEVICE ACT OF 1962
(P.L. 87-840 64 Stat. 1134, 1135)

Request for Opinion on State Gambling Laws. The amendment made by the captioned Act will take effect on the 17th day of December, 1962. The Act provides in part: "That it shall not be unlawful to transport in interstate or foreign commerce any gambling device into any state in which the transported gambling device is specifically enumerated as lawful in a statute of that state." Your assistance is requested in determining whether the state in which you are located has passed a law excepting any devices from the operation of its gambling laws.

It will be appreciated if at your earliest convenience you forward to the Criminal Division a short memorandum analyzing the gambling statutes of your state with respect to this particular subdivision.

KIDNAPPING

Information Charging Defendant Released Unharmed. William Wesley Oliphant v. United States (W.D. Mo. November 1, 1962.) On January 15, 1948, defendant waived indictment and entered a plea of guilty to an information charging him with kidnapping. Subsequently he filed a motion under 18 U.S.C. 2255 to vacate and set aside the sentence on the ground that the crime of kidnapping may result in the imposition of the death penalty, and therefore, under the Fifth Amendment, he could only be proceeded against by indictment, and not by information. Defendant relied upon Smith v. United States, 360 U.S. 1, wherein the conviction of the defendant, who had been proceeded against by information for the crime of kidnapping was set aside. The Court also took notice of the case of Charles Edward Hearn v. United States (E.D. Mo. September 21, 1962), in which that Court similarly set aside a conviction for kidnapping where the crime was charged by information rather than indictment. Distinguishing the cases, the Court observed that in both the Smith and Hearn cases, the information was silent as to that provision of the statute which authorizes imposition of the death penalty, "if the kidnaped person has not been liberated unharmed", so that had there been a trial, the Government could have introduced evidence showing that the victim was not released unharmed, and thus afforded the jury the opportunity of recommending for or against imposition of the death penalty.

In the Oliphant case the Court found that the information affirmatively stated that the victim was released unharmed, hence the death penalty could not have been imposed. The Court concluded, therefore, that defendant's constitutional rights were not violated when he waived the right to have the facts upon which the charge was based submitted to a grand jury, and consented to prosecution by information. Accordingly, the motion to vacate judgment and sentence was overruled.

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

CENSUS

Refusal to Answer Questions on Bureau of Census Schedule. United States v. Rickenbacker (C.A. 2, October 29, 1962). Appellant was convicted for refusing to answer a census schedule, entitled "Household Questionnaire for the 1960 Census of Population and Housing," in violation of 13 U.S.C. 221(a). As his defense, appellant asserted: (a) that Congress did not intend the statute to be applied to persons who refuse to answer questions relating to the contents, construction and conveniences of the houses in which they live, but only answers immediately relating to members of the household; (b) that the statute in its present form does not require written answers; (c) that the household questionnaire was arbitrary and violated the search and seizure provisions of the Fourth Amendment; and (d) that the Government was discriminately prosecuting him when others who had refused to execute the household form were not being prosecuted.

The Court of Appeals overruled all of appellant's contentions and held that many of the inquiries on the questionnaire were immediately related to household individuals, and that simply because some experts might regard the questionnaire as more comprehensive than necessary, the questions "related to important federal concerns, such as housing, labor, and health," and were not unduly broad or sweeping in scope to be arbitrary or in violation of the Fourth Amendment.

As to appellant's contention of discriminatory prosecution, the Court held that contention fell short of the bad faith test laid down in Yick Wo v. Hopkins, 118 U.S. 356.

A similar conviction was upheld by the Second Circuit Court of Appeals in United States v. Sharrow, reported in the November 16, 1962 issue of the Bulletin (Vol. 10, No. 23, p. 643). The issues raised in the Sharrow case related to disfranchisement.

Staff: United States Attorney Vincent L. Broderick; Assistant United States Attorneys Sheldon H. Elsen, Arthur I. Rosett and Michael F. Armstrong (S.D. N.Y.).

* * *

INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Destruction of War Material, War Premises, or War Utilities (18 U.S.C. 2155); Failure to Register as Agents of Foreign Government (18 U.S.C. 951). United States v. Roberto Santiesteban Casanova, Marino Antonio Esteban Del Carmen Sueiro Y Cabrera and Jose Garcia Orellana (S.D. N.Y.) On November 16, 1962 the defendants were arrested by Special Agents of the Federal Bureau of Investigation in New York City on a complaint charging them with conspiracy to violate Sections 951 and 2155 of Title 18, U.S.C. At the time of the arrests the FBI seized a cache of hand grenades, incendiary devices and pistols. The Commissioner set bail in the amount of $250,000 for Santiesteban and $100,000 each for Sueiro and Garcia.

On November 21, a grand jury returned a two count indictment charging defendants with a conspiracy to injure and destroy national defense materials, premises and utilities and a conspiracy to act as agents of the Revolutionary Government of Cuba, without prior notification to the Secretary of State. Santiesteban is an attache in the Cuban Mission to the United Nations who had not been granted diplomatic immunity. Named as co-conspirators but not defendants were two other members of the Cuban Mission to the United Nations, Jose Gomez Abad and his wife Elsa Montero de Gomez. These two individuals had diplomatic immunity and the Government demanded their immediate removal from the United States. They departed this country on November 19, 1962.

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

Perjury (18 U.S.C. 1621). United States v. Mark Zborowski (S.D. N.Y.) The retrial of the perjury case against Mark Zborowski commenced on November 19, 1962 in the Southern District of New York before Judge Richard Levet. Zborowski had originally been indicted in 1958 for perjury before the grand jury in denying that he had ever met Jack Soble, a confessed agent of the Soviet Union. In November, 1959, the United States Court of Appeals for the Second Circuit reversed and remanded the case for a new trial on the grounds that the trial court had erred in refusing to disclose to the defendant the grand jury testimony of Jack Soble, who was the Government's chief witness against Zborowski.

In the retrial of this case the jury returned a verdict of guilty against Zborowski on November 29, 1962 and sentencing has been set for December 13, 1962.

Staff: United States Attorney Vincent Broderick and Assistant United States Attorney Richard Casey (S.D. N.Y.)

Subversive Activities Control Act of 1950; Registration of Communist Party Members. Attorney General v. Arnold Johnson and other cases. On November 27, 1962, the Subversive Activities Control Board issued an order directing respondent Arnold Johnson to register as a member of the Communist Party (See United States Attorneys Bulletin, Vol 10, No. 24, November 30, 1962).

On November 16, 1962, Hearing Examiner Robert L. Irwin issued his recommended decision to the Board that respondent William L. Patterson register under the Act (See United States Attorneys Bulletin, Vol. 10, No. 13, June 29, 1962).

Hearings have been completed in the proceedings involving the respondents Burt Gale Nelson, Roscoe Quincy Proctor, Albert Jason Lima, Louis Weinstock, and Dorothy Healey (See United States Attorneys Bulletin, Vol 10, No. 13, June 29, 1962).

On December 6, 1962, petitions seeking registration orders were filed against Claude Lightfoot, of Illinois; Samuel Krass Davis of Minnesota; and Flora Hall and Samuel Kushner, of California, all members of the Party's National Committee.

Staff: Oran H. Waterman, James A. Cronin, Jr.,
Robert A. Crandall, Earl Kaplan,
Carl H. Miller, and Thomas C. Nugent.
(Internal Security Division).

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LANDS DIVISION

Assistant Attorney General Ramsey Clark

Public Lands; Resurveys; Effect on Title to School Sections; Presumption of Congressional Knowledge of Administrative Practice. State of Wyoming and Richfield Oil Corporation v. United States (C.A. 10, October 12, 1962). In 1883, large areas in the Territory of Wyoming were surveyed by the United States. The Act of 1890, admitting Wyoming to statehood, granted it every section of land numbered 16 and 36 for the support of schools. Thereafter, because the original surveys were found to be erroneous or obliterated, Congress, by several acts between 1903 and 1908, directed resurveys covering over 12,000,000 acres. The lines on the new surveys varied considerably from the original lines. Now, after 50 years, the State and Richfield Oil Corporation claim that the State has title to all lands in sections 16 and 36 under both surveys. The United States instituted this suit to establish its title.

The Court of Appeals, affirming the district court, pointed out that (a) at the time of the resurveys, the state and federal officials worked together in locating for the state one, but not both, areas; (b) when the state selected the resurveyed section, the federal officials required a waiver of the original section, but it assumed that no waiver of the resurveyed section was necessary when the state selected the original section; (c) the selected areas were given school section numbers; (d) the areas of the resurveys outside of the selected original sections were given lot numbers; and (e) the areas not selected were included in acreage listings of "public lands." On the basis of those factors; the long administrative practice of the state in asserting dominion over only one of the two areas; the chaos to private titles that would ensue if the situation were now changed; and the fact that Congress, when it passed the later resurveying acts without change in the relevant parts, must be presumed to have known about and approved the "selecting method" which was then in operation under the earlier statutes, the Court upheld the status quo. It distinguished United States v. Aikins, 84 F. Supp. 260 (S.D. Cal. 1949), aff'd sub nom. United States v. Livingston, et al., 183 F. 2d 192 (C.A. 9, 1950), on the ground that the second survey in that case actually surveyed the particular area involved for the first time.

Staff: S. Billingsley Hill (Lands Division)

Report on Small Tract Program in New Jersey

On November 21, 1962, the Office of the United States Attorney in New Jersey set and disposed of 221 small condemnation tracts before the district judge. Landowners or attorneys appeared in only 7 tracts (3% of the total set) and deficiencies of $225 were adjudged. Thus, in one day the United States Attorney closed 221 of 277 pending condemnation tracts (80% of all pending tracts) by means of a small tract program. The tracts closed had been pending for nearly two years.

* * *

TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CRIMINAL TAX MATTERS
Appellate Court Decision

Wilful Attempt to Evade Income Taxes; Decision Reversed for Erroneous Admission of Evidence, Purporting to Prove Intent or Consciousness of Guilt, of Defendant's Conduct in Opposing Disclosure to Internal Revenue Service of His Own and Certain Corporate Records. United States v. Grant Foster (C.A. 4, October 9, 1962). Defendant was convicted by a jury on two counts of wilful evasion of income taxes for the years 1952 and 1953. Defendant was in the building construction business and was the controlling stockholder of a corporation, which maintained a bank account with the New York Branch of the Bank of London and South America. During the Internal Revenue investigation, a summons was served on this bank requesting the production of certain books and records relating to the tax liability of defendant and the corporation. Defendant instructed the bank to "question the legality" of the summons, and to "delay investigation" until proper legal action could be taken. Defendant's subsequent attempts to quash the summons were denied by the district court (159 F. Supp. 444), and affirmed by the Court of Appeals (265 F. 2d 183, certiorari denied, 360 U.S. 912). At the trial, the Government introduced into evidence defendant's cablegram instructions to the bank to resist compliance with the summons. It was the Government's theory that this evidence was relevant to show defendant's "consciousness of guilt," and the trial court instructed the jury that an attempt to "impede" the Internal Revenue investigation, if so found, may be considered "as bearing on the intention" of the defendant. The Court of Appeals held that the admission of such evidence, together with the charge of the trial court relating thereto, was erroneous. The Court of Appeals declared:

> In our opinion this evidence was incompetent and should not have been received. Under Int. Rev. Code of 1954 §§ 7602, 7604, supra, a hearing to test the legality of the summoned production is afforded. The record discloses no evidence from which the jury could draw a conclusion that Foster's participation in the test was in bad faith. That it incidentally delayed the investigation would not alone warrant such an inference. Unsuccessful recourse to remedies provided by law should not carry a connotation different from that of successful resort. This is not to say that admissions in testimony or pleadings attributable to the defendant in that proceeding may not be introduced as substantive proof of intent to evade the tax. We merely hold that lawful resistance to investigation does not generate an inference of guilt. The District Court in New York made no finding that Foster's contentions were altogether frivolous or dilatory. One of the grounds of defense was termed by the court "in the abstract, sound". We do not think a jury able or entitled to appraise the nature and effect of a judicial proceeding.

* * * * *

What the appellant did, in the instances already enumerated, undoubtedly impeded the investigation. But as the impeding was entirely permissible, the jury should not be allowed to draw from it an inference of misdoing on the part of the accused. In the circumstances we think the charge in that regard was erroneous.

We feel that the Court's holding in this regard should be narrowly construed. The relevant inquiry in this case, as the Court intimated, was whether the defendant's resistance of the investigation was in "bad faith." The Court simply held that there was no evidence in this case to support such a finding. We note also that the Court refused to reconsider its decision in Beard v. United States, 222 F. 2d 84 (C.A. 4), which held that a taxpayer's refusal to produce his personal records for inspection, absent a claim of the Fifth Amendment, was relevant on the issue of intent. We believe, therefore, that the Beard decision, together with similar holdings in other cases (Myers v. United States, 174 F. 2d 329 (C.A. 8); Olsen v. United States, 191 F. 2d 985 (C.A. 8)) are not impaired by the instant decision, and should be followed by United States Attorneys in the presentation of tax evasion cases.

Staff: United States Attorney Joseph D. Tydings and Assistant United States Attorney Stephen H. Sachs (D. Md.)

CIVIL TAX MATTERS
District Court Decisions

Internal Revenue Service Summons; Motion to Quash Denied; Indictment of Taxpayer Does Not Destroy Government's Right to Enforce; Fourth Amendment Not Violated in Requiring Corporation to Disclose Business Activities With Its President and Principal Shareholders; Requirement of Notice of Second Examination of Taxpayer's Books of Account Not Applicable to Examination of Third Party. In re Magnus, Mabee & Reynard, Inc., et al. (S.D. N.Y., September 19, 1962), 62-2 USTC ¶9733. Magnus, Mabee & Reynard, Inc. filed a motion to quash an Internal Revenue Service summons issued in connection with the tax liability of Percy C. and Margaret A. Magnus. Percy C. Magnus is president and 80 percent stockholder of the corporation. He had moved unsuccessfully in a previous proceeding to quash the same summons, 196 F. Supp. 127; 299 F. 2d 335, certiorari denied, 370 U.S. 918.

Plaintiff's motion is based upon two principal grounds: (1) that the real purpose of the summons is not that set forth under Section 7602 of the Internal Revenue Code of 1954, but rather to obtain information to assist in the prosecution of the criminal case against Percy C. Magnus; (2) that there has been a violation of Section 7605(b) of the Internal Revenue Code of 1954 in that the Internal Revenue Service failed to give the corporate taxpayer notice in writing of a second inspection of its books of account. The original summons was issued on June 19, 1961, and the indictment of Percy C. Magnus was not handed up until April 10, 1962. Percy C. Magnus' motion to quash the summons of June 19, 1961 was denied

on July 14, 1961. The Court of Appeals for the Second Circuit affirmed that denial on February 3, 1962, and on June 11, 1962, the Supreme Court denied the application for certiorari. On July 13, 1962, the Government moved to enforce the original summons.

Petitioner's position was that once an indictment is handed up, the right to enforce an administrative summons ceases, citing in support thereof: United States v. O'Connor (D. Mass.), 118 F. Supp. 248, and Boren v. Tucker (C.A. 9), 239 F. 2d 767. The Court made very quick disposition of that argument by pointing out that by no stretch of the principles in O'Connor and Boren can it be said that they constitute a precedent for the proposition that the summons is unenforceable "because of an indictment which comes after nine months of frustration and enforcement of a summons duly issued and served." Briefly, the proposition stated in O'Connor was that the Internal Revenue Service would not be permitted to obtain evidence pursuant to a summons issued under 26 U.S.C. 7602 to assist in the criminal prosecution of a taxpayer who is already scheduled for trial. It should be noted that this proposition was restated in In re Meyers, 62-1 USTC ¶9328. Boren v. Tucker, supra, distinguishes the O'Connor case and generally points out that a taxpayer under indictment is not insulated from criminal investigation; in short, it does not necessarily follow that the Government cannot investigate a person for several different crimes.

The corporation next cites Section 7605(b) of the Internal Revenue Code of 1954 as not having been complied with since the corporation's books have already been examined. The Court held that this statute refers only to plural examinations of a taxpayer's books of account relating to the taxpayer's tax liability. It was not the Congressional intent to require the giving of a notice of second examination of a taxpayer's books of account where that examination was being conducted in connection with the tax liability of a third party.

Two additional objections were raised by the corporation, one being that the demand in the summons was so broad as to constitute an unreasonable search and seizure. The summons demanded the following: general ledger, general journal, cash receipts book, cash disbursements book, bank statements and cancelled checks, stock certificate book, and minute book. The Court recognized the broad sweep of the summons and pointed out that an investigation of tax liability is not a mere law suit over an isolated question. In re Albert Lindley Lee Memorial Hospital (C.A. 2), 209 F. 2d 122, certiorari denied, 347 U.S. 960. The Court then went on to hold that the summons would not constitute an unreasonable search and seizure and that the parties should work out a satisfactory arrangement which will produce a minimum of interference with business and to the Government; if they are unable to do this, then an application should be made to the Court for directions.

The final point raised by the corporation was that the Government has the burden of proof to show probable cause as to the necessity of an examination of the books and records. This argument was rejected in that

under the case of Foster v. United States (C.A. 2), 365 F. 2d 183, certiorari denied 360 U.S. 912, all that the Government need do "is to show that the inspection sought might throw light upon the correctness of the taxpayer's returns."

Staff: United States Attorney Robert M. Morgenthau; Assistant United States Attorney Morton L. Ginsberg (S.D. N.Y.); and Frank J. Violanti (Tax Division).

Internal Revenue Service Summons: General Partner in Limited Partnership Not Entitled to Invoke Privilege Against Self-Incrimination in Refusing to Produce Partnership Books and Records Where Acting Primarily in Representative Capacity Rather Than as Owner; Limited Partnership Has Quasi-Corporate Qualities and Is Subject to Same Visitorial Powers That State Has Over Corporation. United States v. Harry G. Silverstein (S.D. N.Y., October 30, 1962), C.C.H. 52-2 USTC ¶9814. This is an application by the Government under Sections 7402(b) and 7604, I.R.C. 1954, to judicially enforce an Internal Revenue Service summons duces tecum addressed to Harry G. Silverstein, directing him to produce specified books and records of five partnerships in connection with his and two other general partners' tax liabilities. Silverstein, a general partner in all of these partnerships, appeared before the Internal Revenue Service in response to the summons and invoked the privilege against self-incrimination in refusing to produce the records demanded of him.

The primary question presented for determination in this case is whether or not the Government may require the production of partnership records through a general partner, which records that partner maintains incriminate him. All of the partnerships involved were organized under the laws of New York State. The respondent was a general partner in each partnership with his son and son-in-law. Four of the partnerships owned, respectively, a unit of real estate in New York State and the fifth, now defunct, owned real property located in Norfolk, Virginia. The smallest partnership had a membership of 25 limited partners with a capitalization of $225,000. The Court found that none of them fell within the classification of a "small family partnership" which would bring them within the principle set down in United States v. White, 322 U.S. 694 (1944) where it could be said that the respondent's membership therein was such as to represent his purely private or personal interest and thereby entitle him to invoke the privilege against self-incrimination.

The Court traced the modern historical basis for the privilege against self-incrimination, citing Boyd v. United States, 115 U.S. 616 (1886); Counselman v. Hitchcock, 142 U.S. 547 (1892); Wilson v. United States, 221 U.S. 361 (1911; and Watts v. Indiana, 33 U.S. 49 (1949). Respondent sought to show that the books and records he was directed to produce, while they were those of the partnership, nevertheless, were his personal records and held by him in a purely personal capacity. The Government, on the other hand, sought to equate the partnership's records with those of a corporation whose ownership is separate and apart from that of the individual.

The Court also observed that a limited partnership is a creature of the state and in this respect is subject to the same visitorial powers that a state has with respect to a corporation. In effect, this limited liability given to a limited partnership imparts to it a quasi-corporate identity, thereby divorcing the books and records of the partnership from individual personal ownership or interest. To further emphasize the limited control a general partner exercises over partnership records, the Court pointed out that "he does have a property interest in the records as tenant-in-partnership and has the right of access to them; but he has no right to exclusive possession, nor may he assign them without consent of all the partners." United States v. Onassis, S.D. N.Y., 133 F. Supp. 327, pp. 331-332.

The Court found that respondent's role in these partnerships was that "of an executive or agent acting for and representing the interest of a substantial body of limited partners." Moreover, the limited partners had priority over respondent in his capacities, both as a limited partner and as a general partner, with respect to the distribution of income and the proceeds of liquidation. The partnership agreements of at least three of the partnerships contained a provision that the general partners not undertake to "sell, assign or convey the partnership property" without first securing the written consent of 60 percent of the limited partners, "and, of much greater significance here in the light of the membership of these five partnerships, the limited partners have the right to have the firm records kept at the principal place of business, readily available for their inspection and copying."

In granting the Government's petition, the Court concluded by saying that respondent's connection with the books and papers of these five partnerships was sufficiently limited, derivative and impersonal as to preclude any assertion of the Fifth Amendment privilege with respect to them.

Staff: United States Attorney Vincent L. Broderick; Assistant United States Attorney Anthony H. Atlas (S.D. N.Y.); and Frank J. Violanti (Tax Division).

Liens: Priority of Federal Tax Liens Over After-Acquired County School Tax Liens; Payment of School Tax Liens as "Expenses" of Foreclosure Sale. United States v. Dwyer, CCH 62-2 USTC ¶9796 (E.D. N.Y.). The only question presented on the Government's motion for summary judgment was the priority of federal tax liens over after-acquired county school tax liens. The Court held that the federal tax liens were entitled to priority over the school tax liens under the doctrine of "the first in time is the first in right" and that the laws of New York State which provide that local taxes shall be considered as "expenses of the sale" of the property against which the federal tax liens were being foreclosed which must be paid before a surplus shall be deemed to exist do not change this doctrine as applied to federal tax liens. In so holding, the Court distinguished Buffalo Savings Bank v. Victory, 11 N.Y. 2d 31, both on the law and on the facts.

Staff: United States Attorney Joseph P. Hoey and Assistant United States Attorney Kalman V. Gallop (E.D. N.Y.)

* * *