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# UNITED STATES ATTORNEYS
# BULLETIN

UNITED STATES ATTORNEYS BULLETIN

Vol. 11 February 22, 1963 No. 4

## ANTITRUST DIVISION

Assistant Attorney General Lee Loevinger

Defendants Motion to Quash Denied in Grand Jury Investigation of Bag Industry. (E.D. Mo.). In a memorandum filed on February 5, 1963, Judge James H. Meredith ruled on the Government's petition for a show cause order and a cross motion to quash relating to two paragraphs of a subpoena duces tecum served on the St. Regis Paper Company. These paragraphs of the subpoena sought a list of the company's ten largest customers, in order of rank, for multiwall paper shipping sacks, and all market studies relating to multiwall paper shipping sacks. St. Regis moved to quash on grounds of confidentiality, relevance and unreasonableness and on the ground that a Federal Trade Commission consent decree entered in 1959 precluded the subpoena's demand for documents dated in 1958. The Court denied the motion to quash and ordered prompt production of all of the documents described in the subpoena.

The Court's comments on the question of the issuance of a protective order are of particular interest. He stated:

> The court recognizes that the information called for is valuable, highly confidential information. *** St. Regis has suggested that it may ask the court for a protective order if compliance is ordered. The Government has served notice that it will oppose such an order if sought. While the question is not squarely before us, we will note that while this court has wide discretion for protecting trade secrets, Segal Lock & H. Co., v. F.T.C., (2nd C.A., 1944), 143 F. 2d 935, extreme good cause coupled with a showing of greater particularity than has been offered here would be required for such an order to issue in view of the obligations of the attorneys and the grand jurors and the court's power in regard to violation of those obligations.

Staff: Charles D. Mahaffie, Jr., Richard J. Wertheimer, William J. H. Smith and Julius Tolton (Antitrust Division)

## SHERMAN ACT

Restraint of Trade--Watches. United States v. The Watchmakers of Switzerland Information Center, Inc., et al. (S.D. N.Y.). On December 20, 1962, Judge John M. Cashin found that the Bulova Watch Co., Benrus Co., Gruen Watch Co. and Longines-Wittnauer Watch Co. had conspired with Swiss associations of watch and watch parts manufacturers and various Swiss watch manufacturers to violate Section 1 of the Sherman Act and Section 73 of the Wilson Tariff Act. The case, which was instituted in October 1954, had involved 22 defendants of which 12 agreed to the entry of consent judgments in 1959. Trial against the remaining 10 defendants commenced in November 1960 and final arguments were held in December 1961.

In his 115 page decision, consisting of 247 findings of fact and 46 conclusions of law, Judge Cashin found that the four American watch manufacturers had conspired with five Swiss defendants, Federation Suisse des Associations de Fabricants d'Horlogerie (FH), Ebauches, S.A., Wittnauer et Cie., S.A., Gruen Watch Manufacturing Company, S.A., and Eterna A.G. to eliminate competition in the United States production, import, export and sale of watches, watch parts and watchmaking machinery. The conspiracy, which commenced in 1931, was effectuated through the defendants' industry-wide agreements known as the Collective Conventions which were designed to prevent the development and growth of competitive watch industries outside of Switzerland, particularly in the United States.

The Court held that through the Collective Conventions, defendants had restricted and limited the manufacture of watches and watch parts in the United States and the United States import and export of watches, watch parts and watchmaking machinery; that the conspiracy was further implemented through agreements among various organizations restricting the import into the United States of Swiss watchmaking machinery and through cartel agreements with the British, French and German watch industries restricting the United States import and export of watch machinery and watch parts; that the American defendants Bulova, Benrus, Gruen and Longines-Wittnauer actively participated in the conspiracy through their adherence to these agreements and through their execution of individual contracts restricting the volume of watches produced in the United States and limiting the United States export of domestically produced watches and the re-export of Swiss watches; that these agreements were also intended to protect American importers from price competition and to eliminate the sale of non-Swiss watches in the United States; and that defendants had boycotted and blacklisted companies engaged in the sale of Swiss watches in the United States who did not comply with the "regulations" promulgated by the Swiss defendants.

Among the specific findings made by Judge Cashin were that Benrus had agreed to terminate its production of watches in the United States and to dismantle its Waterbury, Conn. plant so that it could not be utilized by any potential competitor in the production of watches; Bulova agreed to limit its United States watch production to one-third of its Swiss watch imports and Gruen agreed not to manufacture more than 75,000 watches a year in the United States.

The Court dismissed The Watchmakers of Switzerland Information Center, Inc. as a defendant. Watchmakers is a New York corporation which is the joint subsidiary of FH, the Swiss watch manufacturers association, and of Ebauches, S.A., a Swiss holding corporation which owns or controls the stock of other Swiss corporations which manufacture watch parts known as ebauches (the chassis of a watch movement). The Government had charged that Watchmakers was the policing agent in the United States for the Swiss defendant's restrictive measures; but the court in rejecting this charge, found that Watchmakers appeared to be merely a clearing house to the United States watch repair trade and a center for the distribution of information concerning Swiss watches.

Also rejected by the Court, were the Government's charges that the defendants had conspired to establish minimum sales prices and uniform guarantees for Swiss watches sold in the United States and to fix the price at which Swiss repair parts were to be sold by certain repair parts dealers in the United States.

As to the agreements which were found to be illegal, the Court rejected the argument of the American defendants that they were forced to become members of the Swiss watch cartel as a matter of economic necessity, stating that: "If such arguments were accepted by the courts, the American antitrust laws would become a 'dead letter.'"

The Court also rejected the argument of the Swiss defendants that the agreements which were attacked by the Government were conceived and effectuated in Switzerland and were immune from the reach of United States law, and the argument of the Swiss Government, which appeared as amicus curiae, that the case involved an attack upon the legislation and policies of the Swiss Government in violation of international law. The Court stated:

> In the present case . . . the defendants' activities were not required by the laws of Switzerland. There were agreements formulated privately without compulsion on the part of the Swiss Government. It is clear that these private agreements were then recognized as facts of economic and industrial life by that nation's government. Nonetheless, the fact that the Swiss Government may, as a practical matter, approve of the effects of this private activity cannot convert what is essentially a vulnerable private conspiracy into an unassailable system resulting from foreign governmental mandate. In the absence of direct foreign governmental action compelling the defendants' activities, a United States court may exercise its jurisdiction as to acts and contracts abroad, if, as in the case at bar, such acts and contracts have a substantial and material effect upon our foreign and domestic commerce.

The Court indicated that it would hold relief hearings to work out the form of the final decree.

Staff: John J. Galgay, John Sirignano, Jr., and Jean D. Brown (Antitrust Division)

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# CIVIL DIVISION

Acting Assistant Attorney General John W. Douglas

## COURTS OF APPEALS

### EVIDENCE

Evidence of Other Offers Made for Real Property Competent Evidence in Determining if Sale Made in Good Faith. United States v. Joseph E. Hart (C.A. 6, January 15, 1963). As assignee of a loan guaranteed under the First War Powers Act of 1941, the United States brought this action against defendants for the deficiency remaining on a loan after sale of the security, payment of the loan had been guaranteed by defendants. Defendants alleged that they were released from their obligations because the foreclosure sale of the property was made in bad faith at a price drastically below actual value. As evidence of the actual value of the property, defendants introduced testimony of two persons who had made offers for the property in excess of the sale price. However, one of these offers was not a cash price, but a management contract; the other was withdrawn after extensive deliberation by the offeror. The district court interpreted these offers and other evidence as indicative of the unstable market conditions at the time of the sale, concluded that the sale price was fair and equitable, and entered judgment against defendants.

The Court of Appeals affirmed, holding that the evidence of other offers was competent and could be considered by the court. The Court reasoned that the usual reasons for refusing to consider such evidence, i.e., that they were not made for purposes of valuation and are not subject to cross-examination, were not present in this case. Defendants themselves had offered the evidence, it was subject to cross-examination, and it was not tendered primarily for valuation purposes. There was, therefore, no reversible error in the finding of the district court.

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

### HOBBS ACT

Neither Letter Nor Regulation Are Final Orders Reviewable Under Hobbs Act. Earl Mustain v. United States (C.A. 10, January 29, 1963). Petitioners brought this original action in the Court of Appeals under the Hobbs Act, seeking a declaration that they were not required to be licensed under the Perishable Agricultural Commodities Act and that certain regulations of the Department of Agriculture requiring plaintiffs to be licensed were invalid. The Court of Appeals dismissed the petition for lack of jurisdiction.

The Court found the petition deficient as to the jurisdictional requirements of the Hobbs Act, holding that (1) neither the advisory

letters sent to petitioners by Agriculture threatening to enforce license obligations nor the challenged regulation were "final orders" within the meaning of the Act; and (2) the Act required review petitions to be filed within 60 days and the challenged regulation and all but one of the letters were promulgated more than 60 days before this action.

Staff: Barbara W. Deutsch (Civil Division)

## LABOR RELATIONS ACT

Jurisdiction Declined in Suit to Enjoin NLRB Certification of Union as Bargaining Representative Because Plaintiffs, Officers of Competing Union, Failed to Raise Issue Before Board, and Suit, Therefore, Lacked Equity. Jack T. Cox v. Frank W. McCullock (C.A.D.C., January 24, 1963). Plaintiffs, individually and on behalf of the Orange District Council of Painters, brought this action to enjoin the Board's certification of District 50, UMW, winner in a representation election with plaintiffs' union and a third union. Plaintiffs contended that District 50 is not a "labor organization" within the meaning of the Act because (1) its officers are appointed by the UMW, not elected by the District 50 members, and (2) member election of officers is the minimum "employee participation" required for a "labor organization" by the Labor Relations Act. The District Court dismissed plaintiffs' action. The Court of Appeals affirmed. The Court noted that the issue of what minimum employee participation is required to constitute a labor organization is an important one and the court's jurisdiction in such a situation should be determined. Here, however, the Court declined to exercise jurisdiction, holding that plaintiffs' action lacked equity because plaintiffs failed to raise the issue before the Board until three days before the election.

Staff: James C. Paras (N.L.R.B.)

## NATIONAL SERVICE LIFE INSURANCE

Veterans Administration Immune from Suit; Failure to Prove Facts Sufficient to Toll Statute of Limitations Against Suits Against U.S.; VA Determination Conclusive That Veteran Never Applied for National Service Life Insurance and Suffered no Compensable Service-connected Disability. Frederick C. Fermin v. Veterans Administration (C.A. 9, January 30, 1963); Frederick Collins Fermin v. Army Board (C.A. 9, January 30, 1963). Plaintiff brought the former of these companion actions against the Veterans Administration seeking payment of National Service Life Insurance to him or his mother. Plaintiff's father made application for $5,000 Yearly Renewable Term Insurance in 1917 while he was a member of the United States Army. The policy lapsed for nonpayment of premium in 1920. Plaintiff's father remained in the Army until 1925 when he died. Plaintiff contended that the payment of premium was waived because his father was totally and permanently disabled between 1920 and 1925. Moreover, plaintiff argued that the statute of limitations was tolled between 1925 and 1946 by plaintiff's infancy and between 1945 and

1963 because plaintiff was mentally disabled, despite his military service during the latter period. The district court dismissed plaintiff's claim. The Court of Appeals affirmed, holding that (1) the Veterans Administration is immune from suit, and (2) the statute of limitations had run against a suit against the United States.

Plaintiff brought the latter action on behalf of his grandmother, mother of the deceased veteran who was plaintiff's uncle, seeking payment of National Service Life Insurance and disability benefits. The Veterans Administration found that the deceased veteran had never applied for National Service Life Insurance and had suffered no service-connected disability. The district court dismissed plaintiff's complaint. The Court of Appeals affirmed. The Court again held that plaintiff was not the proper party to sue and defendants were not the proper parties to be sued. Moreover, the Court concluded that the findings of fact by the Veterans Administration were conclusive.

Staff: United States Attorney Cecil F. Poole; Assistant United States Attorney Robert S. Marder; (N.D. Calif.)

## SOCIAL SECURITY ACT

Secretary's Determination That Retired Claimant Engaged in Scheme of Shifting Wages Whereby He Received Remuneration, Which Was in Effect Wages, Upheld as Based on Substantial Evidence. Francis J. Dondero v. Celebrezze (C.A. 2, January 18, 1963). Plaintiff brought this action to review a determination of the Secretary that plaintiff was not entitled to old-age insurance benefits which had previously been paid to him. Prior to retirement, plaintiff was the president, general manager, and principal shareholder of a real estate corporation. His salary was $4,200 per year at this time. Plaintiff's apartment served as his office and his wife performed part-time secretarial duties without pay. After his retirement, the duties performed by plaintiff and his wife remained substantially unchanged, but plaintiff's salary was reduced to $900 per year and his wife was paid a salary of $3,000 per year. The Secretary found that these circumstances established a "scheme of shifting wages" whereby plaintiff indirectly received "remuneration which is, in effect, wages to him" in excess of $2,080, the amount at which retirement benefits are totally suspended under Section 203(b) and 203(e) of the Act. The district court dismissed plaintiff's complaint.

The Court of Appeals affirmed, holding that the Secretary's determination was based on substantial evidence. However, the Court noted that the decision was without prejudice to plaintiff's right to file a new application for benefits since the money here paid out in the form of wages was potentially payable as non-wages in the form of rents, dividends, and interest.

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

Secretary's Determination That Claimant Was Not So Disabled as to be Unable to Engage in Any Substantial Gainful Activity Reversed for Secretary's Failure to Prove What Employment Opportunities Were Available to an Individual With Claimant's Capabilities. Odist Jarvis v. Ribicoff (C.A. 6, February 4, 1963). Plaintiff brought this action under Section 205(g) of the Social Security Act, 42 U.S.C. 405(g), to review a final administrative determination that he was not so disabled as to be unable to engage in any substantial gainful activity within the meaning of the Act. Plaintiff was born in 1904 and has a fifth grade education. He has worked in heavy industry all his life. Medical evidence showed that he was suffering from intervertebral disc damage. The district court granted the Secretary's motion for summary judgment. The Court of Appeals reversed, holding that plaintiff's condition was not remediable and that the Secretary had failed to offer any evidence of what employment actually was available to a man with plaintiff's limited capabilities and experience.

Staff: Stanley M. Kolber (Civil Division)

Administrative Determination That Income Received by Claimants Was Not Self-employment Income Upheld. Lessin v. Celebrezze (C.A. D.C., February 7, 1963). Claimants, husband and wife, brought this suit under the Social Security Act seeking review of the decision of the Secretary revising their social security earnings record. The Secretary had determined that certain income received by them was not derived from carrying on any trade or business, and thus was not self-employment income. Claimants had owned and rented to others certain parcels of real estate since 1946. In 1954, one of the parcels was sold, the claimants receiving for it an interest-bearing promissory note. They attempted to treat the interest from the note as self-employment income, contending that the interest should be credited to their social security earnings accounts. The social security administration, however, struck these sums from the claimants' earnings accounts, finding that the claimants were not engaged in any trade or business during the years in question, and that the interest from the note was merely investment income. The district court upheld the administrative determination, and its decision was in turn affirmed by the Court of Appeals. The Court of Appeals held that the question of whether income was derived from a trade or business was one of fact for the administrative agency; that the Secretary's decision here was supported by substantial evidence; and that the appeal "thus presents no non-frivolous question."

Staff: John C. Eldridge (Civil Division)

## TORT CLAIMS ACT

Suit Against U.S. for Breach of Fiduciary Duty Not Within Purview of Tort Claims Act. Ray B. Woodbury v. United States (C.A. 9, January 28, 1963). Plaintiff brought this action against the United States under the Tort Claims Act, claiming over $850,000 in damages for an alleged breach by HHFA of an implied fiduciary obligation to arrange for and provide long-term financing for a housing project plaintiff was constructing. The district

court dismissed plaintiff's action for lack of jurisdiction under the Tort Act. The Court of Appeals affirmed. The Court held that, although breach of a fiduciary duty may be cognizable as an action in tort under state law, it is not within the purview of the Tort Claims Act where, as here, the claim arises entirely out of an alleged breach of contract. The Court reasoned that Congress, in the Tucker Act, had vested exclusive jurisdiction in the Court of Claims over contractual claims for over $10,000 against the United States. This is entirely separate from jurisdiction over tort claims vested in the district court under the Tort Claims Act. Moreover, the law applicable to the two types of claims may differ substantially -- federal law controls government contract claims and state law, under the terms of the Tort Claims Act, determines tort claims. Therefore, the Court concluded that to allow plaintiff to bring this essentially contractual suit as one sounding in tort would give him an unwarranted choice of law as well as a choice of forum. The Court also found the present case analogous to Feres v. United States, 340 U.S. 135, which held that, despite the Tort Act's failure to make specific exception for such claims, service-incident claims of military personnel were not within the Act. The rationale of the Supreme Court's decision in that case, i.e., that the Tort Claims Act must be construed as part of the entire structure of statutory remedies against the United States, was equally applicable to the present case. Viewed as part of the statutory scheme, the proper remedy for an action which is based essentially upon a contractual undertaking is provided by the Tucker Act, not the Tort Claims Act. The Court, therefore, affirmed the district court's dismissal for lack of jurisdiction without prejudice to plaintiff's right to proceed with his action under the Tucker Act in the Court of Claims.

Staff: John G. Laughlin (Civil Division)

## FEDERAL TORT CLAIMS ACT

Collision Due to Brake Failure of Government Automobile Gives Rise to Prima Facie Case of Negligence Under Maryland Law. Currie v. United States (C.A. 4, January 4, 1963). Suit was brought under the Tort Claims Act by persons injured in an automobile accident between a Government vehicle and a vehicle in which plaintiffs were passengers. The cause of the accident was the sudden failure of the brakes on the Government automobile. The district court held that under the law of Maryland, where the accident occurred, the mere fact of a brake failure causing an accident gave rise to a prima facie case of negligence on the part of the owner of the vehicle, thereby shifting the burden to the owner to show that the brake failure was due to a latent defect that could not be discovered by reasonable inspection. The court further held that the Government's evidence failed to establish that the brake failure was due to a latent defect that was not reasonably discoverable. On appeal, the Court of Appeals affirmed, upholding both the district court's interpretation of state law and also its findings of fact. Since the case concerned Maryland law, its holding should not, of course, constitute a serious adverse precedent with respect to brake failure on Government vehicles in other jurisdictions.

Staff: John C. Eldridge (Civil Division)

DISTRICT COURTS

ANTI-KICKBACK ACT

Recipients and Payors of Kickbacks Held Jointly Liable for Full Sum Thereof; Payments Are Recoverable From Business in Which Employees of Government Subcontractor Were Principals. United States v. Maystead (S.D. Calif., January 7, 1963). Between 1949 and 1952, the Pacific Airmotive Corporation was a subcontractor to the Lockheed Aircraft Corporation under various Air Force cost-plus-fixed fee or other cost reimbursable prime contracts. Three supervisory employees of Pacific Airmotive engaged in a scheme to receive secret commissions from several supplier firms. These suppliers remitted a prescribed percentage of the value of purchase orders awarded to them by Pacific Airmotive under various fictitious business names utilized by the aforementioned employees. The remittances aggregated $73,909.74. Civil suit was instituted under the Anti-Kickback Act, 41 U.S.C. 51, to recover this sum from these employees and suppliers.

Settlements were reached with five of the defendants and the case proceeded to trial against the three remaining defendants, two suppliers and the corporation in which two of the Pacific Airmotive employees were among the principal stockholders. The Court found that all of the payments made by the supplier firms and received by the corporation were inducements for or acknowledgements of the award of purchase orders under prime contracts within the scope of the Anti-Kickback Act. Judgment was entered against one of the suppliers and the recipient corporation in the sum of $16,881.81, against the other supplier and the recipient corporation in the sum of $34,692.44, and against the recipient corporation alone for $3,835.49, plus interest. The latter figure represents the difference between the sums paid the recipient corporation by other suppliers and the amounts received through settlements.

Most significant is the Court's decision that payments to a partnership or corporation in which employees of a Government subcontractor are principals may be fully recovered under the Act even though innocent persons have interests in the partnership or corporation. This conclusion enables recovery of kickbacks traced to business entity subterfuges -- a common device for secreting such transactions. It is also to be noted that the Court allowed interest from the date of the prohibited payments rather than from the date of the entry of judgment.

Staff: United States Attorney Francis C. Whelan; Assistant United States Attorney James R. Dooley; (S.D. Calif.) and Louis S. Paige (Civil Division)

FEDERAL RULES OF CIVIL PROCEDURE

Citizens of U.S. and Foreign Countries Have No Standing to Enjoin Nuclear Testing; Previous Suit Res Judicata Pauling, et al. v. McNamara, et al. (D. D.C., January 16, 1963). A class action was instituted by a

total of 255 individuals, citizens of 27 countries, against the Secretary of Defense and the Atomic Energy Commissioners seeking a declaratory judgment establishing that nuclear testing is not authorized by the Atomic Energy Act of 1954, or, if so authorized, that the Act is unconstitutional. Plaintiffs also contended that nuclear testing is a violation of the Human Rights provisions of the Charter of the United Nations, and sought to enjoin further nuclear testing.

The District Court granted the Government's motion to dismiss the action on the grounds that plaintiffs had no standing to sue, the complaint failed to state a justiciable controversy, and a previous action seeking similar relief /Pauling v. McElroy, 278 F. 2d 252 (D.C. Cir., 1960) cert. den. 364 U.S. 835/ operated as res judicata so as to bar the present action.

The previous suit was brought by 18 individuals including 11 who were plaintiffs in the current action. While the previous suit was not designated as a class action, it was treated by the court as a class action on behalf of humanity and was held to bar both the individuals who were plaintiffs previously and those joining with them in the present litigation.

Staff: William E. Nelson (Civil Division)

## NATIONAL SERVICE LIFE INSURANCE
## VETERANS BENEFITS

Suit Cannot Be Maintained for Insurance Benefits Withheld as Offset Against Death Compensation Overpayment. Welan v. United States (D. D.C., January 17, 1963). Shortly after World War II, the Veterans Administration awarded plaintiff National Service Life Insurance and death compensation benefits as the widow of a serviceman. Although her insurance award has remained continuously in effect, plaintiff's compensation benefits were later retroactively terminated on the basis of a finding that her husband's death was not service-connected. The Veterans Administration applied subsequently accruing insurance installments as administrative offsets against the resulting compensation overpayment indebtedness. After a substantial amount of insurance benefits had been withheld, plaintiff sued for a resumption of her insurance payments. The Government's main defense was that plaintiff in reality sought compensation benefits rather than insurance benefits. Suits against the United States are permitted for insurance benefits, 38 U.S.C. 784, but the Government argued that suits for compensation benefits are not permitted. The District Court accepted the Government's argument that the Court lacked jurisdiction and dismissed plaintiff's action.

Staff: David V. Seaman (Civil Division)

## TORT CLAIMS ACT

Suit Against U.S. Under Tort Claims Act Must Be Brought in Judicial District Where Plaintiff Resides or Where Negligent Act Occurred. George R. Blue v. Carl N. Maico, Fulton Air Service, Inc., and United States

(N.D. Ga., January 4, 1963). Plaintiffs brought this action against the United States in the Northern District of Georgia, claiming damages as a result of an aircraft accident which occurred in Pennsylvania. Plaintiff administrator alleged that he was a resident of Tennessee. The complaint was filed on the date the statute of limitations expired.

The United States filed a motion to dismiss for lack of jurisdiction in the Georgia court. The motion was based on plaintiff's failure to comply with 28 U.S.C. 1402(b), pursuant to which the United States consents to be sued on tort claims only "in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred." To avoid transfer by the court, it was urged that the defect was jurisdictional and hence the action could not be transferred. The District Court granted the motion and dismissed the complaint. The Court held that the United States stands upon a different footing than the ordinary defendant in a tort action, since a suit in tort may be lodged against the United States only with its consent and Congress alone has power to say where the United States may be sued.

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

U.S. Not Liable for Injuries Received on Property Before It Took Possession Under Declaration of Taking; Pond Is Not Attractive Nuisance Under Oklahoma Law. Randolph A. Ogden v. United States (N.D. Texas, January 4, 1963). Plaintiffs brought this action under the Tort Claims Act seeking damages for the death of their four year old son. The boy drowned in a pond adjacent to a United States Air Force base. Plaintiffs sought to recover upon the theories that (1) the United States had such an interest in the land and knowledge about the hazard of the pond as to impose upon it the duty of care; (2) the pond constituted an attractive nuisance, and (3) the United States was negligent in its failure to warn against, fence, or fill the pond, and it is thus liable in damages to plaintiffs for the death of their son.

The Court, in dismissing the complaint, rejected plaintiffs' theories and held that the United States, under its Declaration of Taking (Condemnation) by virtue of 40 U.S.C. 258(a), did not come into possession of the premises in question before the fatal accident. Moreover, even if the United States had acquired possession before the drowning, the Government had neither actual nor constructive knowledge of the alleged attractive nuisance in time to have remedied it before the accident.

In addition, the District Court held that the status of the deceased was that of a trespasser since the law of the state of Oklahoma does not regard a pond of water of the type here involved as an attractive nuisance.

Staff: United States Attorney Barefoot Sanders; Assistant United States Attorney T. Gary Cole, Jr.; (N.D. Texas)

U.S. Not Liable for Conversion of Chattels Recovered from Contractor Pursuant to Contract Permitting Vesting of Title to Chattel for Which Partial Payment Had Been Made. William M. Silverman, Trustee in Bankruptcy v. United States (D. Mass., January 27, 1963). Plaintiff, the Gray Television and Research Corporation, was successful bidder on two large supply contracts with Air Force. Both of the contracts contained standard partial payment clauses permitting partial payments to the contractor, prior to delivery, on work in progress. These clauses vest title forthwith in the Government to all parts, materials, inventories, work in progress and non-durable tools theretofore acquired or produced by the contractor for the performance of the contract, as well as all like property thereafter acquired or produced by the contractor for the performance of the work to the extent of payments made. The contractor failed to meet the scheduled delivery requirements after many extensions of time and the Air Force became aware that its operations had been suspended and that it was in imminent danger of bankruptcy. On October 19, 1951, the Air Force discovered that the bank financing the contractor's activities was tagging equipment and parts in preparation of foreclosure of its chattel mortgage. With this knowledge, an officer of the Air Force, accompanied by the contractor's president, entered upon the premises of the corporation and tagged inventory designated by the president as pertaining to the two Air Force contracts. At 3:00 p.m. on that date the Air Force sent a telegram to Gray Television notifying them of the immediate termination of the contracts for default, invoking the default clauses requiring the contract or to transfer and deliver to the Government all inventory, parts and equipment acquired, used and produced in the performance of the contracts. This telegram was misaddressed and received by Gray four or five days later. In the meantime, various Air Force personnel entered the premises of the Gray Television and removed the contractor's inventory items attributable to the Air Force contracts.

Because of this action the contractor's trustee in bankruptcy brought this action for conversion against the United States. The District Court denied plaintiff's charges of trespass and conversion since the contract itself provided for entry on part of Air Force personnel and the vesting of title in defendant to inventory for which partial payment had been made.

Staff: Irwin M. Gottlieb (Civil Division)

## STATE COURTS

### PUBLIC UTILITIES

Court Sustains Regulatory Commission's Determination of Fair Value Based Primarily on Original Cost Evidence and Its Disallowance of Income Taxes Paid for Benefit of Its Parent Corporation. Chesapeake and Potomac Telephone Company v. Public Service Commission (Md. Court of Appeals, January 28, 1963). The Telephone Company requested a substantial increase in rates, based upon an increase in fair value of the plant and equipment used in rendering interstate telephone service. The United States, through

GSA, intervened before the Commission as a consumer and rate payer, opposing the increase. Although granting the company a small increase in its rate of return upon invested capital, the Commission rejected the company's contention that the fair value of its rate base should be determined in accordance with cost appraisals which were based primarily upon the cost of reproducing existing plants. The Commission relied for fair value primarily upon the original cost of such property less depreciation.

The Court of Appeals affirmed the Commission's order, holding that the determination of fair value was primarily a matter for the Commission, and that the Commission had given due consideration to the Company's evidence. The Court also sustained the Commission's disallowance of certain federal income taxes paid by the Maryland Telephone Company which were in fact for the benefit of its parent corporation (A. T. & T.). Although the only two appellate decisions of other states which were in point were to the contrary, the Court agreed with the Commission that the expense was unnecessary and should be disallowed. The Court also sustained the Commission's disallowance of all charitable contributions as unnecessary.

Staff: David L. Rose (Civil Division)

## SUGGESTION OF IMMUNITY

Suggestion of Immunity Filed Subsequent to Execution Sale Held Not Timely Filed Despite Fact That Proceeds of Such Sale Held in Registry of Court. United States v. Harris and Co. (Florida District Court of Appeals, February 5, 1963). A judgment creditor of the Republic of Cuba caused a levy to be made on three Cuban airplanes and a sale thereof. After the sales, the United States, on behalf of the Republic of Cuba, petitioned to intervene for the purpose of filing suggestions of sovereign immunity to the various airplanes and the proceeds of the execution sale. The trial court denied both petitions. On appeal, the Florida District Court of Appeals affirmed. The intermediate appellate court held that a timely filed suggestion of immunity should be recognized, but found that the suggestion filed after execution sale was untimely. The Court reasoned that the proceeds of the execution sale are the property of the judgment creditor and the considerations underlying the doctrine of immunity ceased to exist with the sale of the property.

Staff: Morton Hollander; Edward A. Groobert (Civil Division)

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# CIVIL RIGHTS DIVISION

Assistant Attorney General Burke Marshall

Voting and Elections: Civil Rights Acts of 1957, 1960. United States v. Cecil C. Campbell, et al. (N.D. Miss.). This suit instituted under the Civil Rights Act of 1957, as amended, was filed on January 22, 1963 against the registrar of Sunflower County, Mississippi, and against the State of Mississippi. The complaint alleges that defendants have engaged in racially discriminatory acts and practices in the registration process in Sunflower County which have deprived Negro citizens of the right to register to vote without distinction of race or color. The Government seeks an injunction forbidding such acts and practices and a finding of a pattern and practice of discrimination.

Staff: United States Attorney H.M. Ray; John Doar, D. Robert Owen (Civil Rights Division)

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# CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

## MAIL FRAUD

Chain Referral Selling Schemes. The Post Office Department has advised the Department of its program to rid the mails of material pertaining to endless chain referral selling schemes. Basically, these schemes involve the sale of products, such as automobiles, vacuum cleaning systems, household appliances, intercom systems and burglar alarms, by offering the purchaser a sum of money for each subsequent sale made to a person referred by him. The subsequent purchaser is then promised a lesser sum of money for sales made to his referrals. The Post Office Department has found that many victims have signed mortgages on their houses without realizing what they were signing and did not discover the circumstances until they attempted to sell or refinance their houses. It is believed that millions of dollars annually are being filched in these operations.

It is urged that all United States Attorneys cooperate with the Postal Inspectors in an effort to stop these vicious schemes and prosecute those who are engaging in them.

## HARBORING AND CONCEALING DESERTER

Military Determination of Mental Disorder of Alleged Deserter Not Conclusive in Criminal Prosecution for Harboring and Concealing Deserter. United States v. John Robert Harrell, et al. (E.D. Ill., December 31, 1962). Defendants moved to dismiss the indictment on the grounds that the alleged deserter, convicted by court-martial for his absence, was not in fact or law a deserter because the military had determined that he was suffering from an emotional and mental disorder at the time of the alleged offense, and as a result the military had discharged him and restored all of his rights and privileges. They urged that they therefore could not be guilty of assisting a deserter, since one cannot assist in a crime which never took place.

The Court held that the fact that subsequent to the occurrence out of which this action arose, the Acting Commandant of the Fourth Naval District had relieved the alleged deserter of the status of deserter and held him not accountable for his acts because of his mental incapacity, did not relieve defendants of their criminal action at the time of the facts alleged in the indictment. Recognizing that the issue of legal insanity of the alleged deserter is for the jury in a criminal prosecution, the Court concluded that whether the charges contained in the indictment are true is a matter for the jury to determine upon the presentation of the evidence and not for the Court to decide on a motion to dismiss the indictment.

In the course of its opinion the Court observed that in federal criminal jurisdiction it is not necessary that the principal be first convicted, quoting

from Beauchamp v. United States, 154 F. 2d 413 (C.A. 6, 1946). Thus the Government can proceed to trial first against those who harbored and concealed the deserter without then bringing the alleged deserter to trial for related offenses of conspiracy to interfere with and assaulting the arresting Federal officers. The Government under these latter circumstances has the burden of proving, among other facts, the necessary fact that the military person involved was a deserter from the military service of the United States.

Staff: United States Attorney Carl W. Feickert; Assistant United States Attorney Robert F. Quinn (D. Ill.).

## CONTEMPT

Contempt Proceedings Under 28 U.S.C. 1784 for Failure to Appear Before Federal Grand Jury in Answer to Subpoena Served in Foreign Country Under 28 U.S.C. 1783. United States v. Roland Thompson (S.D. N.Y.). A federal grand jury in the Southern District of New York was investigating the activities of Messrs. Ketchum and Thompson who were United States citizens residing in the Philippines, a country with which we do not have an extradition treaty. To obtain Thompson's appearance before the grand jury, a subpoena was served upon him in the Philippines under 28 U.S.C. 1783. He failed to appear before the grand jury on the designated date. A bench warrant was issued for his arrest, and an order was issued pursuant to 28 U.S.C. 1784 for him to show cause why he should not be held in contempt. The known assets of Thompson and his company were attached, and depositions were taken relative to Thompson's reasons for not appearing. On January 21, 1963, Thompson was adjudged guilty of contempt and fined $50,000 in the Southern District of New York for his failure to appear before the grand jury. The criminal charges against Ketchum and Thompson resulting from the grand jury's investigations are still pending in the Southern District of New York.

Staff: Assistant United States Attorney Arthur I. Rosett (S.D. N.Y.).

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# IMMIGRATION AND NATURALIZATION SERVICE

Raymond F. Farrell, Commissioner

## DEPORTATION

Recommendation Against Deportation Effective When Made At Second Prosecution of Alien for Same Offense; Single Scheme of Criminal Misconduct Not Proved By Substantial Evidence. Sawkow v. INS. (C.A. 3, January 29, 1963.) This action was brought to review a deportation order for the petitioner based on his three convictions for crimes involving moral turpitude.

Petitioner contended that his conviction for the crime of robbery in 1960 could not be used to support a deportation order because at the time of sentencing the Court recommended to the Attorney General that he not be deported. Under Section 241(b) of the Immigration and Nationality Act, 8 U.S.C. 1251(b), such a recommendation prevents deportation if made at the time of the first sentencing. The Board of Immigration Appeals had rejected this contention of the petitioner finding that the recommendation was made on the second sentencing of the petitioner.

In April 1960 the petitioner was convicted and sentenced on an indictment charging robbery. On motion of the petitioner, the Court in November 1960 set his conviction aside. An accusation charging the same offense was then filed on which he was convicted and sentenced on a plea of non vult. When sentencing the petitioner, the Court recommended against deportation and on the same day dismissed the indictment on which the petitioner had previously been sentenced.

In contending that the recommendation against deportation was not made at the first sentencing of the alien, the respondent, the Immigration and Naturalization Service, relied on Piperkoff v. Esperdy, 267 F. 2d 72, in which the Second Circuit ruled that a vacation of a judgment for purposes of resentencing of an alien and making a recommendation against deportation was ineffective to prevent deportation under Section 241(b). The Court reasoned that to sanction such a procedure would defeat the plain command of the statute requiring the recommendation at time of the first sentence.

The Third Circuit ruled for the petitioner concluding that the recommendation against deportation was made at the time of first sentencing within the meaning of the statute. Congress, the Court reasoned, when using the phrase "at the time of first imposing judgment or passing sentence" was referring to a valid sentence and since the indictment was dismissed, the only valid sentence was that imposed on the accusation. Piperkoff was distinguished on the ground that here there was not one but two distinct criminal actions although the factual basis for the indictment and accusation was the same.

As to the remaining two convictions, petitioner argued that they would not serve as a basis for deportation because they arose out of a single scheme of criminal misconduct. The Board of Immigration Appeals had ruled that since the evidence established that the crimes were committed at different times against different persons, an inference might be drawn that they did not result from a single scheme. The Court agreed with the Board on this point but held that since the evidence would also permit an inference of a single scheme in that the crimes were of the same nature and could have been committed within a few minutes of each other the required test of substantial evidence had not been met.

The order of the Board of Immigration Appeals was reversed and the cause remanded to terminate the deportation proceedings.

* * *

# INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Immunity Act of 1954. In re Bart (D.D.C.) On February 11, 1963, the Government filed a verified application seeking an order instructing Philip Bart, National Organizational Secretary of the Communist Party, to answer, under an appropriate grant of immunity, questions previously put to him before a Grand Jury of the District of Columbia on October 15, 1962. The Grand Jury is investigating possible violations of the Internal Security Act of 1950.

On October 15, 1962, Philip Bart refused to answer questions relative to the failure of the many responsible officers of the Party to register and to file a registration for and on behalf of the Party as required by Section 7(h) of the Act.

Gus Hall, General Secretary, and Benjamin J. Davis, National Secretary of the Communist Party, have already been separately indicted by this Grand Jury under Section 7(h) of Act for their failure to register and to file a registration statement for and on behalf of the Party as required by the Act. Both Hall and Davis are free on bond awaiting trial in the District of Columbia (See Bulletin, Vol. 10, No. 6, dated March 23, 1962, at page 181).

Bart based his refusal to testify before the Grand Jury on his right of free speech under the First Amendment and his privilege under the Fifth Amendment not to be a witness against himself. Under the application, Bart will be granted immunity from prosecution in exchange for his compelled testimony, an exchange which was held constitutionally permissible by the Supreme Court in 1956 in the case of Ullman v. United States.

This is the second immunity proceeding involving Philip Bart. The first involved a grant of immunity following Bart's refusal to testify before this same Grand Jury on February 7, 1962. The Court of Appeals for the District of Columbia Circuit, on June 7, 1962, reversed for procedural error the order of the District Court, holding Bart in civil contempt for his refusal to answer the questions after immunity had been granted (See Bulletin, Vol. 10, No. 13, dated June 29, 1962, at page 381).

Staff: United States Attorney David C. Acheson (Dist. of Columbia) and Oran H. Waterman and Benjamin C. Flannagan (Internal Security Division)

Internal Security Act of 1950. Civil Action for Relief From Revocation of Passport. Elizabeth Gurley Flynn v. Secretary of State (D.D.C.) and Herbert Aptheker v. Secretary of State (D.D.C.). Two separate cases. In each case, on January 22, 1962, the Acting Director of the Passport Office of the Department of State notified plaintiff that by direction of the defendant plaintiff's passport was revoked because the Department of State believed that use by plaintiff of a United States passport would be in violation of Section 6 of the Internal Security Act of 1950, 50 U.S.C. 785. Thereafter, at the

request of each plaintiff and pursuant to regulations issued by the defendant, a full-confrontation administrative hearing was held. The hearing examiner recommended that each revocation be made final, and the Director of the Passport Office so ruled. Following a hearing before the Board of Passport Appeals of the Department of State, on appeal from the decision of the Director of the Passport Office, the Board found that "there is a preponderance of evidence in the record to show that at all material times [each plaintiff] was a member of the Communist Party of the United States with knowledge or notice that such organization has been required to register as a Communist organization under the [Internal Security] Act." On the basis of this finding, the Board recommended to the defendant that he affirm the decision of the Passport Office to revoke each plaintiff's passport, and he did on October 18, 1962, and November 23, 1962, respectively.

Thereafter, on November 6, 1962, and December 14, 1962, respectively, each plaintiff filed suit seeking that judgment be entered (1) declaring Section 6 of the Act to be repugnant to the United States Constitution; (2) enjoining and restraining the defendant from enforcing and executing against each plaintiff Section 6 of the Act by reason of such alleged repugnance, from continuing in effect his revocation of each plaintiff's passport, and from denying to each plaintiff the issuance or renewal of a passport; and ordering the defendant to reissue to each plaintiff a valid United States passport of standard form and duration.

The defendant filed his answer to each complaint on February 4, 1963, and February 15, 1963, respectively.

Staff: Benjamin C. Flannagan (Internal Security Division)

Suit to Compel Secretary of State to Validate Passport for Travel to Cuba. Louis Zemel v. Secretary of State (D. Conn.). On January 16, 1961, the Secretary of State announced publicly that travel to Cuba by American citizens was thereafter forbidden unless their passports were specifically endorsed or validated for such travel. Under the policy of the State Department only newsmen, certain businessmen, and those on humanitarian missions would qualify for such endorsements. Plaintiff, who desires to go to Cuba on pleasure, was adjudged by the Secretary on April 18, 1962, to be ineligible to have his passport validated for such travel. On December 7, 1962, plaintiff brought this civil action seeking, inter alia, a declaration that he is entitled under the Constitution and laws of the United States to travel to Cuba and to have his passport properly validated for that purpose. The defendant filed his answer to the complaint on February 6, 1963.

Staff: Benjamin C. Flannagan (Internal Security Division)

Motion to Suppress (Rule 41(e), F.R. Cr. D.); Insufficiency of Affidavit in Support of Application for Search Warrant. United States v. Sawyer and Markham (E.D. Pa.) Defendant Markham was indicted in the District of Columbia and in the Eastern District of Pennsylvania for conspiring with Navy Department employees to obtain classified and advance procurement information dealing with defense contracts.

Prior to his trial in the District of Columbia, Markham filed in the Court a petition to suppress evidence consisting of Government documents and publications relating to equipment involved in proposed and future Navy procurement contracts which were seized and removed in execution of a search warrant on June 3, 1961.

Two supporting affidavits had been executed on June 2, 1961, before the U.S. Commissioner for the Eastern District of Virginia. One by a Special Agent of the FBI, recited that a confidential informant, formerly a Justice Department employee and at the time a business executive and believed to be reliable, furnished an affidavit to a Special Agent of the FBI stating, in substance, that on February 15, 1961, he had met the defendant pursuant to a previous appointment and visited with him at his home; that the defendant had stated that he had formed a corporation with offices in his home for the purpose of handling payoffs to Government personnel and that he had access to information from the various defense agencies of the U.S. Government; that he (informant) had observed in the defendant's home various Government documents some of which were classified. The second affidavit, executed by an agent of the Office of Naval Intelligence, stated that he observed the meeting between the informant and the defendant and that the two drove off in the defendant's car.

Before District Judge Holtzoff (District of Columbia) Markham contended, inter alia, that the search warrant was issued without probable cause, in that, the affidavits in support of the application for the warrant failed to afford a logical basis for believing that stolen Government documents and publications were still present at the premises 107 days after they had been seen. The Government argued that the affidavits reflected a continuing business, with implications that documents from Government agencies would continue to be on hand at the place of business, his home; that the situation was different from liquor and narcotics cases, the traffic in which is usually a "floating" operation. Additionally, it was pointed out that the profitable utilization of the documents which the defendant had in his possession would require considerable time. Judge Holtzoff agreed with the Government and denied the motion to suppress, holding that a reasonable time may be of considerable duration where the articles involved are documents, manuals, and written information which are not themselves the subject of sale but rather the concomitants of a personal-services consulting business based in one particular location. Defendant renewed his motion during the course of his trial before Judge Leonard P. Walsh (District of Columbia) where it was again denied. Defendant was convicted and has appealed.

Subsequent to his conviction in the District of Columbia, defendant filed the same pre-trial motion to suppress in the Eastern District of Pennsylvania wherein he was scheduled for trial in the companion case. The same facts and arguments advanced to the Court in the District of Columbia were presented to the Court in Philadelphia, Pennsylvania. There, District Judge Joseph S. Lord III decided that the affidavit submitted by the FBI agent did not establish probable cause for issuance of the warrant, stating ".....if the informant here had been the actual

affiant and had given an affidavit on Feb. 15, that affidavit would not support a warrant issued on June 2." (Citing Sgro v. U.S. 287 U.S. 206).

The Court stated further that "the fact that defendant had formed a business as of February 15, furnishes no reasonable ground for belief that he was still in it on June 3, or, if he was, that it was still illegal, or, if it was, that he still had illegal possession of Government documents."

The Court also discounted the informant's reliability on the grounds that there was no allegation that the informant had given previously reliable information (citing Jones v. U.S. 362 U.S. 257), and no allegation that defendant was a known briber or payoff man.

In light of the Supreme Court's decision in Carroll v. U.S., 354 U.S. 404 (1957), holding that an order granting of a motion to suppress is interlocutory, no appeal from Judge Lord's decision is contemplated.

Staff: Edwin C. Brown, Jr., Robert J. Stubbs (Internal Security Division)

Foreign Agents Registration Act; Conspiracy. United States v. Igor Cassini and R. Paul Englander (D. D.C.) A Federal grand jury in the District of Columbia returned a four-count indictment on February 8, 1963 charging defendants with violation of the Foreign Agents Registration Act of 1938, as amended, and with conspiracy to violate the registration requirements of this Act. Count I charges Igor Cassini and R. Paul Englander with failure to file a registration statement with the Attorney General as agents of the Government of the Dominican Republic during the period between June 1959 and June 1960. Both defendants are charged in Count III with conspiracy to violate the registration requirements of the Act. In Count II Cassini is charged with failure to register under the Act as an agent of the Dominican Government during the period from June to December 1961. He is charged in Count IV with conspiracy to violate the registration requirements of the Act.

Staff: Kevin T. Maroney, Roger Bernique, Robert L. Keuch, George L. Fricker (Internal Security Division)

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# LANDS DIVISION

Assistant Attorney General Ramsey Clark

## MORE ON THE SMALL TRACTS PROGRAM

In the first phase of a small tracts program commenced only recently in the Eastern District of Texas, 204 tracts were set for trial during the week of January 7, and 191 (or approximately 93%) were adjudicated and closed in two days of hearings. Adverse testimony was offered as to 16 tracts, and awards were returned in the amount of the Government's testimony. Many of these tracts involved the subordination of mineral interests and thus presented difficulties not inherent in the average small tract.

## CONDEMNATION RECORDS

Adequate records are essential to the efficient management of condemnation litigation, and especially to an effective small tracts program. If records are not sufficient to provide an "instant inventory" of pending tracts and their status, the only realistic solution is to lay aside less pressing matters and, by a concentrated effort, put your records in order and bring them up to date. A "task force" operation, like that recently undertaken in the Southern District of Ohio, is the most practical way to do it. There, additional personnel were diverted for one week to the job of getting condemnation records set up on a current basis, and other responsibilities were temporarily set aside. The job thus was accomplished quickly and an obstacle to the efficient management of the condemnation workload which had existed for some time was overcome. In the long run, an operation of this sort is the most economical from the standpoint of both time and personnel. Other United States Attorneys are urged to consider such a crash program as a means of getting their condemnation records in order and current.

Eminent Domain; Admission of Aerial Photograph Within Discretion of Trial Court; Lack of Prejudicial Error. A. S. Moyer and Nita Moyer, et al. v. United States (C.A. 9, Jan. 23, 1963). This action was brought by the United States to condemn easements for Bonneville Power Authority for the construction of a new electric power transmission line across defendants' property. The United States proceeded on the theory that the highest and best use of defendants' property was for timber and forest reproduction and defendants contended that such use was as a residential subdivision. During the trial, the Government introduced an aerial photograph taken two years prior to the date of taking and portraying defendants' property and the surrounding area. Defendants objected to the photograph's admission and contended that the admission was prejudicial to their theory of the case because the photograph (1) portrayed the property at too remote a point of time; (2) did not show recent access roads constructed by defendants on the property; and (3) did not show recent improvements in the area bordering the property. The jury returned a verdict of $2,993, for

which amount judgment was entered. The award was $1,000 more than the Government's highest testimony and over $500,000 less than defendants' testimony. At the post-trial hearings, defendants renewed the objection to the admission of the aerial photograph and also contended for the first time that maps of the "take" furnished defendants by the Government did not coincide with maps introduced by the Government at the trial. The trial court held an additional hearing to allow defendants to present supporting evidence for the contention of inconsistent maps, but none was introduced at the special hearing.

On appeal, the judgment of the trial court was affirmed. The Court stated that the admission of photographs is within the sound discretion of the trial court; that the trial court accompanied the admission of the aerial photograph with a "thoroughly protective admonition to the jury"; that defendants introduced detailed testimony and numerous exhibits which illustrated any changes that had occurred in the area since the photograph was taken; that defendants had adequate opportunity to request witnesses to locate roads and other changes they deemed material on the aerial photograph; and that they did not take advantage of such opportunity.

The Court found no prejudice in regard to the claim of inconsistent maps, noting that defendants were given a special hearing to substantiate the claim and failed to do so.

Staff: Richard N. Countiss (Lands Division).

Public Property; Right of United States to Impose Reasonable Conditions on Its Use; Violation of Regulation of Secretary of Interior Properly Enjoined by District Court. Gray Line Water Tours of Charleston v. United States (C.A. 4, December 20, 1962). In an action by the United States, the district court enjoined Gray Line from engaging in business by embarking and disembarking fee paying passengers at the pier at Ft. Sumter National Monument without a valid permit issued by the National Park Service, pursuant to a regulation issued by the Secretary of the Interior. In 1948, Congress had directed the transfer of Fort Sumter by the Secretary of the Army to the Secretary of the Interior, and it became a national monument. Gray Line was issued annual permits from 1949 until 1961. In January 1961, the Park Service issued invitations for offers for concession facilities and service for the transportation of passengers to the Fort. Gray Line and four others made offers, and on June 30, a preferential concession contract was awarded to George Campsen, the contract to become effective January 1, 1962. The other bidders were so notified. In spite of notice that it would not be allowed to dock at the pier after December 31, 1961, Gray Line continued to use the pier daily until enjoined by the district court in February 1962. Gray Line appealed.

The Court of Appeals affirmed the judgment. Gray Line made three principal contentions which the Court rejected in the following manner:

1. "Neither the Park Service, nor the Secretary, nor the United States has the power to bar the landing of any other fee-carrier at the pier, because it is not on or within the monument." The Court held that the Secretary's regulation regarding a permit to engage in business within any park or monument was made pursuant to congressional authority. It further held that the pier was within the 125-acre tract in Charleston Harbor which the State of South Carolina conveyed to the United States in 1840. Hence, the pier, even if it extended beyond the fort and walls, was over the property of the United States. It stated that Congress directed the transfer by Army to Interior of all "buildings and other improvements ....appurtenant" to the fort. Since it was accessible only by water, the pier is by necessary implication an appurtenance to the fort.

2. "There is no authority for the award of a preferential concession of this kind." The Court stated that the concession was quite within the purpose and intendment of the Act setting Fort Sumter apart as a national monument. Congress declared it should be for the benefit and enjoyment of the people of the United States, but, obviously, to be made available to the public, water craft of some kind had to be provided. The inducement of the Government tendered to an entrepreneur took the form of a preference in the use of the pier. This was a legitimate property-use regulation. The right of the United States to control the use of its property is not debatable.

3. Gray Line charged that the Secretary acted arbitrarily and capriciously in awarding the contract, and that it was not given a fair opportunity to obtain it. The Court stated that the facts of record refuted the accusation. The Court pointed out that the invitation to bid stipulated that the Park Service reserved the right to discard any and all offers, to make counter-offers, or to negotiate a contract with any other party, if that was considered to be in the public interest. Gray Line declined to make an offer on several of the vital items of the invitation. Gray Line had no standing to attack the award of a contract with the Government.

Staff: Elizabeth Dudley (Lands Division).

Indians; United States Lacks Capacity to Sue on Behalf of Indian for Fraudulent Acts Perpetrated on Indian After Issuance of Fee Patent. United States v. Moore Mill & Lumber Co. (C.A. 9, January 23, 1963). The United States brought suit on behalf of a Coquille Indian in the District Court of Oregon, to recover damages for the conversion of logs belonging to her. It was alleged that the appellee purchased the logs from Fred Marsh in 1952 with full knowledge that he was not the owner thereof. The District Court dismissed the action on motion of the defendant on the ground that the United States lacked capacity to sue on behalf of the Indian since she received a fee patent to the land in August 1951. In a prior suit by the Government on behalf of the Indian against Marsh, et al., the District Court held that the land and timber had been obtained through conspiracy and fraud, for a price considerably

below the real value. Marsh had procured a deed from the Indian prior to the issuance of the patent, and another after the patent. The Court set aside both deeds and gave a judgment against Marsh et al. for $50,000, the value of the logs at the time they were sold, trebled, under the Oregon statute providing for treble damages for the cutting of timber by trespass.

On appeal, the United States contended that it had the right to bring the action on the ground that the whole purpose of the fraudulent transactions prior to the issuance of the patent was to obtain the timber, and the cutting and sale of it to appellee were an integral part of the transaction and represented the securing of the fruits of the fraud. The Court of Appeals rejected this contention and affirmed the judgment in a per curiam opinion, adopting the District Court's opinion.

Staff: Elizabeth Dudley (Lands Division).

Water Rights; Justiciable Controversy; Standing to Sue; Declaratory Judgment; Sovereign Immunity Under 43 U.S.C. 666. In re Price River (District Court of Carbon County, Utah, January 10, 1963). Petitioners who are the owners of certain water rights in the Price River sought an interlocutory order declaring that a contract between the United States and certain other defendants will not limit the flow of water to petitioners, and also declaring that the United States contractual right to store or divert water for use in the proposed watershed project planned under authority of the Watershed Protection and Flood Prevention Act, 68 Stat. 666, 16 U.S.C. 1001, could not interfere with the water rights of the petitioners. The United States was served with the interlocutory petition, but was not served in the general adjudication of all water rights in the Price River to which the action was ancillary.

The Utah Court held that petitioners raised no issues ripe for judicial determination and presented no justiciable controversy, because the project was only in the planning stage and the contract provided that, within the limits of water supply available, enough water would be released to satisfy existing rights if the water could be beneficially used. The Court also stated that petitioners, who were not parties to the contract, had no standing to sue for declaratory relief interpreting it, because they had no interest in it. It was further decided that petitioners presented no adverse interest or real controversy between the parties and, thus, had no basis for declaratory judgment. In dismissing the petition on the justiciable issue the Court made no ruling on the alternative position argued by the United States that there also was no jurisdiction because 43 U.S.C. 666 was not intended to waive sovereign immunity in these circumstances.

Staff: United States Attorney, William T. Thurman; Assistant United States Attorney, Parker M. Nielson (Utah); John Schimmenti (Lands Division).

Avigation Easements; Claims for Just Compensation; When Cause of Action Accrues for Purpose of Statute of Limitations; Flights Above 500 Feet Over Noncongested Areas Do Not Constitute Taking Notwithstanding Some Inconvenience and Annoyance. Aaron, et al. v. United States (No. 489-58); Andersen, et al. v. United States (No. 113-59) Court of Claims, January 11, 1963. These actions were brought to recover just compensation for the taking of avigation easements over 16 parcels in the Andersen case and 38 parcels in the Aaron case.

Military aircraft were first put into operation at Palmdale Airport in February 1952 by test pilots employed by contractors who manufactured aircraft for the Air Force. Since the Aaron case was commenced more than six years after that date, the Government pleaded the six-year statute of limitations as a defense. While the Court recognized that under Griggs v. Allegheny County, 369 U.S. 84, the flights by employees of private contractors operating from a military base owned by the United States would be "action by the United States" and thus start the statute of limitations to run, it concluded here that the use and enjoyment of plaintiffs' properties during 1952 were not substantially interfered with and thus the statute did not bar the action.

The Court adopted the commissioner's findings that the flights first by contractors' test pilots and subsequently by both Air Force and contractors' test pilots by August 1953 were so low and so frequent as to constitute a taking over nine parcels involved in the Aaron case. The Court adopted the trial commissioner's findings also that the flights over the remaining parcels, while causing inconvenience and annoyance, were more than 500 feet above the properties and since the properties are in noncongested areas the Court held that any incidental injury done to the properties is unavoidably attendant in the use of the navigable air space. Matson v. United States, 145 C.Cls.225, 171 F. Supp. 283.

Staff: Herbert Pittle (Lands Division).

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# TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

## CIVIL TAX MATTERS
## Appellate Decision

Suit to Enjoin Enforcement of Internal Revenue Summonses Is in Fact One Against United States to Which It Has Not Consented, and Hence Barred Under Doctrine of Sovereign Immunity. Reisman v. Caplin (C.A. D.C., February 7, 1963). Internal Revenue summonses were served upon the accounting firm of Peat, Marwick, Mitchell and Company, calling upon the firm to give testimony and produce certain records pertaining to the taxpayer and certain organizations controlled by him. Plaintiffs, who are attorneys, sought to enjoin enforcement of the summonses, alleging that they had employed the accounting firm to assist in the preparation of cases pending in the Tax Court against taxpayers, and also to assist them in connection with a criminal investigation the Commissioner was about to institute. The complaint alleged that the summonses called for the production of privileged matter, including the work product of counsel, and were not issued for the purpose of assessing taxes or of ascertaining the correctness of any return, but to obtain evidence for use in pending tax cases or to prosecute taxpayers criminally. The district court dismissed the complaint, holding that production of the records sought would violate neither the attorney-client privilege or the work-product rule.

The Court of Appeals affirmed the dismissal of the complaint, but on a different ground. After noting that the complaint was against the Commissioner of Internal Revenue in his official capacity, the Court held that the suit was in substance one against the United States to which it had not consented, and therefore prohibited under the doctrine of sovereign immunity. While recognizing the line of cases which confers the right to sue an officer of the United States as an individual where the acts complained of are beyond the scope of his authority, the Court held that Section 7602 of the Internal Revenue Code, pursuant to which the instant summonses were issued, clearly authorized the Commissioner to proceed as he did in this case. In so holding, the Court of Appeals noted that plaintiffs were not without a remedy, since further proceedings by the Government to enforce the summonses, under Section 7604(b) of the Internal Revenue Code, would be required before anyone could be compelled to produce the documents. At that time, it would still be open to plaintiffs to interpose any objections and assert any privileges which they might have. The Court further noted that such a hearing would be a necessary preliminary to citing a summoned party for contempt for failing to comply with the summons, and that a good faith refusal to comply with a revenue summons would preclude prosecution of a taxpayer under Section 7210 of the Internal Revenue Code. (Compare Application of Colton, 291 F. 2d 487 (C.A. 2).)

Staff: Richard M. Roberts, Joseph M. Howard, Burton Berkley, Norman Sepenuk (Tax Division)

## District Court Decisions

Attorney's Fee for Collecting and Preserving Fund for Payment of Taxes Entitled to Priority Over Federal Tax Liens as Expense of Administering Trust; State Tax Lien as Opposed to Federal Tax Liens Was Inchoate. James E. Brown v. Andrew Fasseas, et al. (N.D. Ill., October 31, 1962), 63-1 USTC ¶9104. Taxpayer, Black Orchid, Inc., on August 6, 1956, contracted to sell its night club business to Rafdo Enterprises, Inc., the sale to be effective September 5, 1958. As payment for the night club fixtures, Rafdo executed an installment promissory note to taxpayer dated September 5, 1956, and gave a chattel mortgage as security for the note. Both the note and chattel mortgage were placed in the hands of Brown, an attorney for the taxpayer, for collection.

Brown was also authorized on September 12, 1956, to retain the monies collected until such time as a final clearance was obtained from the State of Illinois respecting a Retailers' Occupation Tax claim being made against taxpayer. The state taxes were finally assessed on February 27, 1959, and notice of lien respecting same was filed April 30, 1959. Approximately $18,000 in federal tax assessments were made against taxpayer during the year 1956. Of this sum, $8,639.20 was assessed before Brown had received instructions to hold the proceeds collected for the payment of the state taxes. Notice of federal tax liens was filed April 2, 1957.

Because of the conflicting claims of the United States and the State of Illinois, Brown filed an interpleader suit. He deposited $12,000 with the court and retained the additional sum of $3,500 as his fee for services rendered in collecting the installment note payments. The United States filed a complaint in intervention, and after the interpleader suit was dismissed (because Brown was claiming an interest in the fund and because of lack of diversity), Brown filed an answer claiming the $3,500 as a reasonable fee for his services in "creating and preserving the fund."

The Court held that the state tax lien was inchoate at the time the federal tax lien arose, and awarded the $12,000 in its custody to the United States. As to Brown's claim, the Court held that a "constructive trust was established by law with Brown as trustee and the State of Illinois and the United States of America as beneficiaries." The Court concluded that Brown was entitled to the $3,500 as his fee for extensive services rendered in collecting and preserving the trust fund and that it was deductible as an expense incurred "in administering and preserving the trust."

There was certainly no constructive trust involved. Nevertheless, it is evident the Court believed it imperative that Brown, an attorney, be compensated for his services in collecting the money. The question of an appeal from this portion of the judgment is being considered by the Department.

Staff: United States Attorney James P. O'Brien; Assistant United States Attorney Henry T. Sanders (N.D. Ill.); and Louis J. Lombardo (Tax Division).

Reorganization Proceedings; Chapter X of Bankruptcy Act; Liability of Subcontractor Under Section 3401 of Internal Revenue Code for Withholding and FICA Taxes Regarding Its Employees Where Prime Contractor Advanced Employees' Wages; Government's Contention Upheld. In re Hill Dredging Corp. (D.N.J., October 9, 1962), 63-1 USTC ¶9202. The debtor, a subcontractor on a public highway construction job in Virginia, entered into an agreement with the prime contractor in January, 1961, whereunder, due to financial difficulties of the debtor, the contractor agreed to advance the debtor's expenses in completing the debtor's portion of the job, including the advance of the "net wages" of the debtor's employees. The referee held in the reorganization proceedings that the debtor's estate, and not the prime contractor, was liable for federal withholding and FICA taxes with respect to the debtor's employees for the first two quarters of 1961 in question, since the control over the employees in all material respects remained with the debtor during this period and it was not until July, 1961, that the prime contractor took over the completion of debtor's portion of the job.

Staff: United States Attorney David M. Satz, Jr. and Assistant United States Attorney Frederick H. Martin (N.J.).

Proceeds of Highway Construction Contract Held by State Until Completion and Acceptance of Work Are Property of Defaulting Taxpayer Subject to Federal Tax Liens; Assignment to Surety and Payment Thereafter of Claims Against Taxpayer Do Not Entitle Surety to Status of Mortgagee or Purchaser Pursuant to Section 6323, I.R.C. United States v. Damrow, et al. (Wyoming, December 19, 1962), 63-1 USTC ¶9144. Taxpayer contracted to perform certain highway construction work for the State of Wyoming. A performance and payment bond in conjunction with the contract was issued by Travelers Indemnity Company, as surety. Prior thereto taxpayer had executed a general indemnity agreement wherein taxpayer, upon default, automatically assigned his interest in the contract to Travelers. The contract, pursuant to statute, required that five percent of the proceeds for monthly estimates of work done be retained by the State Highway Commission until completion and final acceptance of the work. The retainage was also to be held for the purpose of satisfying any unpaid labor and material claims arising out of the project. On September 13, 1960, Travelers notified the State Highway

Commission that taxpayer had failed to pay numerous claims and was in default. Travelers thereupon discharged the claims, the total of which exceeded the amount of the fund. Assessments for federal withholding taxes were made in November and December of 1960. On January 31, 1961, Travelers notified the State Highway Commission it was invoking the automatic assignment clause in the indemnity agreement and demanded all the funds in its possession owing to the taxpayer. Notice of the federal tax liens was filed on February 7, 1961. Contrary to Travelers' contention, the Court found that there was no unfinished work to be performed and no claims remaining unpaid and in view of the state notification that the taxpayer "was entitled to final settlement under the contract and that full amount due him would be paid on July 19, 1961," the fund was property belonging to the taxpayer. The Court further held that Travelers' claim was not choate or perfected and therefore it was neither a mortgage nor a purchaser under the provisions of Section 6323 of the Internal Revenue Code, requiring notice of lien to be filed so as to affect the rights of persons in those categories. The Court relied on United States v. R. F. Ball Construction Co., Inc., et al., 355 U.S. 587. An appeal has been filed by Travelers from this decision.

Staff: United States Attorney Robert N. Chaffin (Wyoming); and Louis J. Lombardo (Tax Division).

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