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UNITED STATES ATTORNEYS
BULLETIN

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MONTHLY TOTALS

During the month of February, the totals in all categories of work increased, with the exception of criminal matters pending. The reduction in criminal matters showed up as an increase in triable criminal cases pending, as the matters were filed in court and became cases. The increase of 1,648 items in the aggregate of cases and matters pending brought this total to the highest it has been since January, 1956, a period of seven years. Triable criminal cases reached a new high also--almost 20% higher than at the beginning of the backlog drive in 1954. The following analysis shows the number of items pending in each category as compared to the total of the previous month.

	January 31, 1963	February 28, 1963	
Triable Criminal	8,631	9,265	+ 634
Civil Cases Inc. Civil Less Tax Lien & Cond.	15,889	15,959	+ 70
Total	24,520	25,224	+ 704
All Criminal	10,159	10,822	+ 663
Civil Cases Inc. Civil Tax & Cond. Less Tax Lien	18,815	18,822	+ 07
Criminal Matters	13,089	12,734	- 355
Civil Matters	15,052	16,385	+ 1,333
Total Cases & Matters	57,115	58,763	+ 1,648

As the figures below show the pending caseload has increased almost 4% since the same date in fiscal 1962. Compared with last month, the caseload increased by 741 cases. Almost of all of this increase was in criminal cases. The caseload is now 5,498, or 19%, higher than it was on January 31, 1960 when the present force of United States Attorneys took office. The gap between filings and terminations has again risen--from 5.3% in January to 6.6% in February.

	First 8 Mos. F.Y. 1962	First 8 Mos. F.Y. 1963	Increase or Decrease Number	%
Filed				
Criminal	20,398	21,793	+ 1,395	+ 6.84
Civil	16,315	17,265	+ 950	+ 5.82
Total	36,713	39,058	+ 2,345	+ 6.39
Terminated				
Criminal	18,465	20,278	+ 1,813	+ 9.82
Civil	14,038	16,157	+ 2,119	+ 15.10
Total	32,503	36,435	+ 3,932	+ 12.10

Pending				
Criminal	10,293	10,762	+ 469	+ 4.56
Civil	22,788	23,613	+ 825	+ 3.62
Total	33,081	34,375	+ 1,294	+ 3.91

The following figures for filings and terminations show that during the month of February civil cases filed and criminal and civil cases terminated dropped below the previous month. Criminal terminations decreased 18% from the previous month, and civil terminations decreased 20.7%. The total decrease in filings during February was 19.2%. The number of criminal cases filed during February was the highest since last September.

	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	1,887	5,211	2,456	1,740	4,196
Oct.	2,973	2,393	5,366	3,199	2,338	5,537
Nov.	2,783	2,238	5,021	3,073	2,157	5,230
Dec.	2,179	1,795	3,974	2,273	1,764	4,037
Jan.	2,864	2,351	5,215	2,897	2,413	5,310
Feb.	3,073	2,102	5,175	2,375	1,912	4,287

For the month of February, 1963, United States Attorneys reported collections of $3,621,952. This brings the total for the first eight months of fiscal year 1963 to $38,528,299. Compared with the first eight months of the previous fiscal year this is an increase of $4,020,780 or 11.65 per cent over the $34,507,519 collected during that period.

During February $2,601,600 was saved in 96 suits in which the government as defendant was sued for $3,519,303. 59 of them involving $2,176,155 were closed by compromises amounting to $529,965 and 17 of them involving $477,659 were closed by judgments against the United States amounting to $387,738. The remaining 20 suits involving $865,489 were won by the government. The total saved for the first eight months of the current fiscal year aggregated $32,501,334 and is a decrease of $4,476,050 from the $36,977,384 saved in the first eight months of fiscal year 1963.

DISTRICTS IN CURRENT STATUS

As of February 28, 1963, the districts meeting standards of currency were:

CASES

Criminal

Ala., N.	Alaska	Ark., W.	Colo.	Dist. of Col.
Ala., M.	Ariz.	Calif., N.	Conn.	Fla., N.
Ala., S.	Ark., E.	Calif., S.	Del.	Fla., M.

CASES (Contd.)

Criminal (Contd.)

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

CASES

Civil

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

MATTERS

Criminal

Ala., N.	Ga., M.	Iowa, S.	Neb.	Pa., E.
Ala., S.	Ga., S.	Ky., E.	N.H.	Pa., W.
Alaska	Hawaii	Ky., W.	N.J.	P.R.
Ariz.	Idaho	La., W.	N.C., E.	R.I.
Ark., E.	Ill., N.	Md.	N.C., M.	S.C., E.
Ark., W.	Ill., E.	Mich., W.	N.D.	S.D.
Calif., S.	Ill., S.	Miss., N.	Ohio, S.	Tenn., E.
Colo.	Ind., N.	Miss., S.	Okla., N.	Tenn., M.
Dist. of Col.	Ind., S.	Mo., W.	Okla., E.	Tenn., W.
Fla., M.	Iowa, N.	Mont.	Okla., W.	Tex., N.

MATTERS (Contd.)

Criminal (Contd.)

Tex., E.	Utah	Wash., E.	W.Va., S.	Wyo.
Tex., S.	Va., E.	Wash., W.	Wis., E.	V.I.
Tex., W.	Va., W.	W.Va., N.	Wis., W.	

MATTERS

Civil

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

IMPORTANT NOTICE

If Credit Union facilities are not locally available to the employees of any United States Attorney's office they may be interested to know that they are eligible for membership in the Department of Justice Credit Union in Washington. Please direct inquiries, or application for membership to Mr. James W. Grant, Assistant Treasurer, Manager, Department of Justice Credit Union, Room 1644, Department of Justice Building, 9th and Pennsylvania Avenue, Northwest, Washington, D.C.

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ANTITRUST DIVISION

Assistant Attorney General Lee Loevinger

SHERMAN ACT

Common Law Writ Of Certiorari Denied By Circuit Court Of Appeals In - North American Van Lines, Inc., et al. v. United States (S.D. Ind.). On March 20, 1963, an order was entered by the Court of Appeals for the Seventh Circuit denying the petition for a common law writ of certiorari of North American Van Lines, three other household goods carriers, their officers, and a rate bureau. The Court of Appeals did not write an opinion. Petitioners had sought to review an order of the District Court for the Southern District of Indiana denying their motions to dismiss or stay a pending criminal trial because of the asserted "primary jurisdiction" of the Interstate Commerce Commission and the Federal Maritime Board.

Petitioners are defendants currently awaiting trial under an indictment charging violations of Sections 1 and 3 of the Sherman Act involving agreements relating to price-fixing, group boycotts, and other predatory practices. The basis for their primary jurisdiction motion was the regulation of some of their activities by the two named agencies. Petitioners contended that the activities alleged in the indictment were immunized from antitrust prosecution because the activities were within the scope of a rate-bureau agreement approved by the Interstate Commerce Commission pursuant to Section 5(b) of the Interstate Commerce Act, 49 U.S.C. 5(a). Similar contentions were made regarding agreements approved by the Federal Maritime Board pursuant to Section 15 of the Shipping Act, 46 U.S.C. 814.

Following the procedure established by its rules for extraordinary writs, the Seventh Circuit first considered the petition for certiorari alone and then issued a rule to show cause to the United States requiring it to respond to the petition. The brief of the United States was filed March 8, 1963 and asserted that interlocutory review of this matter by common law writ of certiorari was inappropriate; and that the decision of the District Court in refusing to defer to either agency was correct because the acts charged in the indictment were clearly not immune and a determination on that issue did not call for administrative expertise. Without awaiting oral argument (which had been tentatively scheduled for April), the Court of Appeals then entered its order denying the petition for certiorari on the basis of the briefs submitted by the parties.

Trial of the case was continued during the consideration of the petition for certiorari by the Court of Appeals, and it is now anticipated that trial will commence before May 1, 1963.

Staff: Lionel Kestenbaum and Michael I. Miller (Antitrust Division)

Government Denied Right to Take Grand Jury Transcript Obtained in Investigation in Baltimore to Another Jurisdiction For Use There in Investigating Same Industry. In The Matter Of The Banana Grand Jury Investigation. (D.Md.). On March 8, 1963, Judge Thomsen filed an opinion denying the Government's request for an order permitting it to take the transcript of testimony taken during the grand jury investigation in Baltimore to Los Angeles for use there in a grand jury investigation of the same industry. United Fruit, upon notice given pursuant to the Court's instructions, objected to use of the documents as well as the transcript but withdrew its objection to use of the documents. The only issue remaining before the Court was the right of the Government to use the Baltimore transcript in the Los Angeles proceeding.

United objected to any order which would have permitted the Government to disclose to the Los Angeles grand jury the contents of the transcripts of oral testimony given in Maryland except that the entire transcript of the testimony of any witness who is now dead, ill or otherwise unavailable could be presented.

The Court noted in its opinion that no decision directly in point had been found and stated that the Government has the undoubted right to present the same matter to more than one grand jury and to take the transcript out of the District for that purpose. It held, however, that "it does not follow that the Division has the right to disclose all or any part of the contents of the transcripts to a grand jury in California without the approval of this court, which has jurisdiction over the grand jury which received the testimony."

The Court rejected United's contention that the Government must show particularized need before it can use the transcripts in another jurisdiction but also rejected the Government's contention that such use would not constitute disclosure within the meaning of Rule 6(e).

The Court reasoned that it might be unfair to the persons under investigation to permit the use of a summary of the Baltimore testimony before the Los Angeles grand jury or to permit the use of selected portions of a witness' testimony since other portions of his testimony might explain or contradict such testimony. The Court also leaned toward the view that live testimony is better than recorded testimony.

Based on these premises the Court held that (1) the Government could use the transcripts of testimony of such witnesses as may be dead, ill or otherwise incapacitated, or prevented from attending when subpoenaed by absence from the country; (2) the Court would rule liberally on "any requests which may be made by the Division for disclosure because of unavailability of a witness for other reasons;" and (3) the transcript of testimony of any Baltimore witness may be used to refresh his recollection if he is called in California or to show that he testified differently.

The Court concluded that he was not attempting to supervise the proceedings of the grand jury in California.

No order has yet been entered in accordance with this opinion. A memorandum in opposition to the entry of such an order has been filed on the ground that no basis for these restrictions on the presentation of evidence to the Los Angeles grand jury presently exists and that only the Los Angeles District Court would have jurisdiction to impose such restrictions. The Baltimore Court has been informed that the Department intends to lay before the Los Angeles grand jury independent evidence warranting indictment before asking that grand jury to indict anyone but that the fairness of that grand jury's procedure cannot be maintained unless that grand jury is permitted access to whatever portions of the Baltimore transcript it may ask to inspect.

Staff: Andrew J. Kilcarr, Donald J. Williamson and Jerome A. Hochberg (Antitrust Division)

Circuit Court Grants Motion To Transfer. Minnesota Mining & Manufacturing Company v. Honorable Casper Platt. (E.D. Ill.). Petitioner, Minnesota Mining & Manufacturing Co., made a motion in the District Court for the Eastern District of Illinois, under Rule 21 (b), F.R. Cr. P. to transfer a criminal antitrust action pending in that district to the District of Minnesota, where it has its home office. Chief Judge Platt refused to grant the transfer, holding that petitioner had not established that the "interest of justice" would be promoted thereby. In reaching his decision, Judge Platt enumerated and analyzed nine specific factors and several additional elements that he considered pertinent. One of these elements was: "It would be more difficult to get a fair and impartial jury in the Minnesota District than in the Eastern District of Illinois". Petitioner filed with the Seventh Circuit a petition for a writ of mandamus commanding Judge Platt to vacate his order and to enter an order directing transfer. The Court of Appeals issued the writ.

At the outset of its opinion the Court emphasized that a criminal defendant should be tried in its home district whenever possible, and that, in this case, transfer was requested to the petitioner's home district. Since one of the "material" factors in Judge Platt's denial of transfer was that the United States would find it "more difficult" to obtain an "impartial jury" in Minnesota the Court reversed, holding that Judge Platt grossly abused his discretion by taking into consideration the question whether a fair trial could be had in a district other than the one in which he presided.

Chief Judge Hastings of the Seventh Circuit dissented on the ground that the majority gave no weight to Judge Platt's consideration of the other nine factors listed in his memorandum and order, and that upon evaluating all of these factors no abuse of discretion was shown. Judge Hastings also concluded that the majority

should have remanded the case for further consideration by Judge Platt, and that they had no "authority to direct the transfer."

Staff: Earl A. Jinkinson, Raymond P. Hernacki, Theodore T. Peck and Leon E. Lindenbaum (Antitrust Division)

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CIVIL DIVISION

Acting Assistant Attorney General John W. Douglas

COURT OF APPEALS

AGRICULTURAL MARKETING AGREEMENT ACT

District Court Decision Invalidating Federal Milk Marketing Order Reversed. United States v. Mills (C.A. 4, March 11, 1963). Mills Dairy Products Company and Willow Farms Dairy, Inc., are milk companies ("handlers") subject to regulation under the "Upper Chesapeake Bay Area Milk Marketing Order," promulgated by the Secretary of Agriculture pursuant to the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601, et seq. Among its other provisions, the Secretary's Order established minimum prices for milk which milk companies doing business in the marketing area were required to pay to farmers. Mills and Willow Farms declined to pay those prices and sought judicial review of the Order pursuant to 7 U.S.C. 608c(15), while the United States sought court enforcement of the Order under 7 U.S.C. 608(a)(6). On June 13, 1962, the District Court held the milk order to be invalid and refused enforcement because the Secretary (1) did not "find" the "parity price" of milk before he set the minimum prices under the Order; (2) included within the same Order the City of Baltimore and surrounding rural counties, including those on the "Eastern Shore" of Chesapeake Bay; and (3) improperly restricted the class of dairy farmers entitled to vote in a statutory referendum held to determine whether to place the milk order into effect. Willow Farms Dairy, Inc. v. Freeman, 206 F. Supp. 239 (D. Md.).

The Government appealed to the Fourth Circuit and, on December 6, 1962, was successful in getting the district court's decree of invalidity stayed and the Milk Order enforced pending the disposition of the appeal. On March 11, 1963, the Court of Appeals rendered a decision reversing the District Court. The appellate court held that, before issuing a Milk Order, the Secretary did not have to "find" the parity price of milk on evidence taken at a hearing, but rather here correctly "ascertained" the parity price by computation pursuant to the formula set out in the Act itself, 7 U.S.C. 1301(a). The Court of Appeals further held that the inclusion of rural and urban areas in one milk marketing area was not improper, pointing out that, as the Secretary found, the entire area had a common "milk surplus" problem and that the Supreme Court in such circumstances had itself approved an urban-rural milk market in United States v. Rock Royal Co-op., 307 U.S. 533. The Court also rejected the lower court's finding that the farmer referendum had been improperly conducted. It noted that every dairy farmer whose milk would be subject to regulation was permitted to vote under the Secretary's regulations. Since the Act itself did not specifically define the electorate, the Court held that the Secretary's qualifications for voting were permissible ones.

Finally, the Court of Appeals held that judicial review of the validity of a Milk Marketing Order under 7 U.S.C. 608c(15)(B) does not afford a de novo

trial, and must be based solely upon the record made before the Secretary in promulgating the Order. In the words of the Fourth Circuit, "to allow [additional] evidence would be to reopen, rather than to judge, the promulgation proceeding."

Staff: Alan S. Rosenthal and Richard S. Salzman (Civil Division).

FEDERAL CONTRACTS

Federal Law Governs Enforceability Against Married Woman of FHA Home Improvement Contract; Rule of Federal Law Is That Such Contract Is Enforceable; Common Law Disabilities Disapproved. United States v. Mary Helz (C.A. 6, March 7, 1963). Appellee and her husband borrowed money from a bank for an FHA-insured improvement of their jointly-owned home. When the borrowers defaulted on the promissory note they had given the bank, the United States, under its insurance obligation, paid off the bank which then assigned the note to the United States. Appellee's husband was later discharged in bankruptcy and the United States therefore brought suit against appellee individually to recover the amounts the United States had paid to the bank. The district court held for the appellee, dismissing the suit on the ground that, under the law of Michigan (where the transaction took place), a married woman could not be held individually liable on a debt jointly incurred with her husband for the benefit of joint property. The District Court relied on the Sixth Circuit's earlier decision in Fetter v. United States, 269 F. 2d 467. Neither in Fetter nor in the district court in this case had the Government contended that federal law, rather than state law, was controlling.

The Court of Appeals reversed. It disposed of Fetter by noting that, although Fetter "settles this case should it be that Michigan law applies," the Government "presents in this case a question that was not raised or decided in the Fetter case," namely, that federal law should apply. The Court ruled, in sweeping language, that "in cases arising under federal statutes" or "in cases affecting government money and the credit of the government" remedies are governed by the directive of the federal statutes or, if no directive exists, then by rules fashioned by the federal courts. The Court then went ahead, at our suggestion, to fashion a rule of federal law to govern the issue before it, as no direct precedent existed. This rule, the Court agreed, was that the old state or local common law defense of coverture to an action on a note executed by a married woman under the Federal or National Housing Act, cannot be "a valid defense" to a suit by the United States.

This case is a significant application of the rule of Clearfield Trust Company v. United States, 318 U.S. 363, that federal law will apply to a determination of validity, effect, and enforceability of a federal contract. It is important because it applies this rule to a contract between two private persons (appellee and the Bank) entered into under a federal program and then assigned to the Federal Government. See United States v. Viewcrest Garden Apartments, 268 F. 2d 380 (C.A. 9). It is also important because this is the

first ruling on whether the rule of federal law concerning the binding force on contracts on married women, state law should be adopted or a new rule of federal law should be written.

Staff: Sherman L. Cohn (Civil Division).

FEDERAL TORT CLAIMS ACT

United States Not Obligated Under Tort Act to Indemnity or Exonerate Employee, or His Insurer, for Liability Resulting From Driving During Course of Employment. Burnell Keath Uptagrafft v. United States (C.A. 4, March 7, 1963). A Government employee and his insurer impleaded the United States as a third-party defendant in a suit brought against the employee based on his allegedly negligent driving in the course of his employment. After the insurer had paid the injured party a sum in settlement, it claimed -- relying on the provisions of the Tort Claims Act and the decision in United States v. Gilman, 347 U.S. 507 -- a right to recover "exoneration and/or indemnity" from the United States.

The District Court entered summary judgment for the Government. The Court of Appeals affirmed per curiam, holding that the Government's liability under the Tort Claims Act was governed by the Virginia doctrine of respondeat superior and that, under that doctrine, the employee, as the primary wrongdoer, has no right of exoneration and/or indemnity against his employer. The Court also pointed out that the Gilman case, if relevant at all, militated in favor of the Government and against the extension of the Act urged by the appellants. Finally, it noted that Public Law 87-258, enacted September 21, 1961, which provides for the assumption by the United States of exclusive liability for claims against federal employees arising out of their operation of motor vehicles within the scope of their employment, had not been in effect during the operative events of this case.

Staff: Mark R. Joelson (Civil Division).

GOVERNMENTAL PRIVILEGE

Secretary of Air Force May Not Determine Ex Parte What Portions of Mechanic's Report Are Unprivileged "Factual Findings" and What Portions Are Privileged Expressions of Opinion. Machin v. Zuckert (Supplemental Opinion, C.A. 9, March 9, 1963). In an opinion dated January 17, 1963, the Court of Appeals held privileged the Air Force Report of Aircraft Accident Investigation on the ground that information given by private parties to the Board must remain confidential in the interests of the proper operation of the flying safety program of the Air Force, and that the portions of the report reflecting Air Force deliberation or recommendations as to policies are also subject to a recognized privilege. It held, however, that the "factual findings of Air Force mechanics who examine the wreckage" of the plane did not appear to be within the scope of the privilege asserted, and gave the

Secretary an opportunity to show why such reports should be immune from subpoena. Concluding that disclosure of "factual findings" of the mechanics would not be inimicable to the interest of the United States, the Secretary submitted the reports, with deletions, however, of all expressions of opinion, speculation and conjecture.

In a supplemental opinion dated March 9, 1963, the Court, adhering to its opinion of privilege, rejected appellant's contentions that the entire investigation report should be submitted to the court for in camera examination; but it agreed with appellant that the Secretary's interpretation of "factual findings" in the mechanics' reports was too narrow and that the Secretary could not, himself, decide what portions of those reports were or were not privileged. Accordingly, the Court required that the mechanics' reports be submitted in their entirety to the district court on remand for examination.

Appellant has now moved the Court for clarification of the term "mechanic" on the ground that the construction of this term by the Secretary is likewise too narrow and has again renewed his contention that the entire investigation report should be submitted for examination. No determination of the Secretary's position on this motion has as yet been made.

Staff: Kathryn H. Baldwin (Civil Division).

LABOR-MANAGEMENT RELATIONS ACT OF 1947

Injunction Issued Under Section 208 of Act Should Normally Require Continuation of Status Quo Existing When Dispute Arose, Including Continuation of Maintenance of Union Membership Practices Pursuant to Expired Contract. International Association of Machinists, AFL-CIO, et al. v. The Boeing Company, et al. (C.A. 9, March 15, 1963). The Government obtained a temporary restraining order and subsequently a preliminary injunction under the National Emergency Provisions of Section 208 of the Taft-Hartley Act, 29 U.S.C. 178, enjoining the unions and management from engaging in a strike or lockout for the duration of the statutory period. The unions moved to amend the preliminary injunction to incorporate by reference specifically the terms and conditions of the most recent collective bargaining contract, so that management would be bound to honor, during the injunctive period, the maintenance of membership provisions in the prior contract. The Government supported the union's motion, contending that the Taft-Hartley Act required the status quo to be maintained during the 80-day cooling-off period.

The district court refused to grant the unions' motion on the ground that the NLRB had primary jurisdiction over the legal relationships between employer and employee, and that the district court's duty under the Act was solely to prevent a work stoppage.

The Court of Appeals vacated the district court's order denying the unions' motion, and remanded to the district court with directions to amend

the preliminary injunction to continue the terms and conditions of the pre-existing collective bargaining agreements.

Staff: Acting Assistant Attorney General John W. Douglas, and David C. Katz (Civil Division).

SOCIAL SECURITY ACT

Farm Landlord Activity Held to Constitute Material Participation Under Act. Anthony J. Celebrezze v. Wifstad (C.A. 8, March 6, 1963). This was an action for old-age insurance benefits under the Social Security Act. The Act provides that such benefits are only to be paid to claimants who have had creditable self-employment income. Under 42 U.S.C. 411(a)(1), farm rental income is creditable under the Act only if the landlord has an arrangement with his tenant contemplating "material participation" by the landlord in the production of agricultural commodities and such "material participation" does, in fact, take place. The Secretary denied appellee's claim on the ground that he made no significant contribution to the production on his farm other than making out a farm plan at the beginning of the growing season. The district court held that the Secretary had misapplied the applicable law in reaching this decision and that the making of a farm plan was sufficient to constitute material participation.

The Court of Appeals affirmed. While not adopting the district court's reasoning to the effect that the making of a farm plan is in itself sufficient, the Court held that the Secretary's conclusion that appellee's activities were insignificant was not supported by substantial evidence.

Staff: Jerry C. Straus (Civil Division).

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

ORGANIZED CRIME PROGRAM

Maximum Utilization of Bankruptcy and Mail Fraud Statutes in Organized Crime Program. Recent bankruptcy and mail fraud investigations conducted in various parts of the country have reflected that organized crime groups and individuals have been active in the setting up and financing of "planned bankruptcies", in which mail fraud facets have occasionally also been present. In essence, the organized criminal combination, operating through a "front man", obtains goods and merchandise from suppliers with no intention of paying for same, and with the intention of converting the merchandise into cash, or otherwise disposing of it to the profit of the criminal group. It has been our experience that, because of the covert and veiled nature of organized crime's relationship to these fraudulent operations, the investigative reports in most cases contain only rumor or innuendo as to the participation of organized crime combinations or individuals in such frauds, and affirmative direction and guidance in both the pre-grand jury and grand jury stages, on the part of United States Attorneys and their Assistants, may be required to tie such individuals in with the statutory violations. It is evident that organized crime is active in bankruptcy and mail fraud areas, and that these statutes should be regarded as additional weapons to be utilized in this Department's organized crime program. It is therefore requested that information received relative to the participation of organized crime figures in such violations, however sketchy initially, should be developed to the greatest degree possible from a prosecutive standpoint.

Of possible assistance to you in this regard, there are set forth below composite listings of techniques recently utilized by organized crime elements in the bankruptcy and mail fraud areas.

I

Planned Bankruptcy Financed With Criminal Syndicate Funds

1. Criminal syndicate advances a substantial sum of money to a "front man" for initial deposit in commercial account of the fraudulent enterprise, to be used for initial expenses and to reflect the bona fides of the enterprise as to prospective creditors, but which is to be drawn on as little as possible against such time as the balance will be withdrawn and returned to the syndicate just prior to the agreed upon "fold up" date of the enterprise.

2. The enterprise registers a business style.

3. The enterprise through its front man or front men furnishes false and misleading information to merchantile credit agencies, such as Dun & Bradstreet and to merchandisers and suppliers.

4. The enterprise, by means of phone calls, letters and post cards, through the mails and verbal requests to visiting salesmen, requests catalogs, price lists etc. from wholesalers throughout the country.

5. The enterprise orders from suppliers through the mails and otherwise, merchandise of various kinds, limiting orders in the beginning to amounts less than $1000, and making small part payments on these orders to facilitate the extension of future credit on larger amounts.

6. Those operating the enterprise adopt assumed names to conceal their true identity, and their past business records.

7. The enterprise rents warehouse space in addition to store space to make its operation appear to be of larger scope, and thus to add to the appearance of legitimacy. In most cases a covert warehouse is also obtained where goods and merchandise can be concealed prior to the previously arranged "fold up" date for future disposition.

8. The enterprise obtains as much merchandise of all types as possible on open account.

9. The merchandise thus obtained is sold, or otherwise disposed of to the profit of the participants in the fraud, or transported elsewhere for future disposition.

10. Statements of account and other requests for payment of money due are ignored, and all merchandise on the premises is transported elsewhere just prior to the prearranged "fold up" date which is usually a period of approximately three months.

II

Securing Merchandise Through
Bad Check Technique

1. A new business is initiated and a bank account opened;

2. Deposits of large checks drawn on out-of-state or Canadian banks are made (the makers of these checks are non-existent);

3. The new business orders merchandise from suppliers all over the country usually accompanying the order with a check;

4. The suppliers usually ship the goods in reliance on the checks;

5. Until the deposit checks are returned to the bank, the checks issued by the new business are usually honored by the bank, but within a few days it begins dishonoring the checks and they are returned to the suppliers;

6. The goods shipped by the suppliers are received by the new business, some of them are sold at that location, the rest stored or sent to other businesses connected with the scheme for re-sale.

BANKING VIOLATIONS

Prompt Report by National Banks of Peculations Involving Bank Funds. There has recently come to our attention an increasing number of instances in which banks that are federally examined have failed to report immediately peculations involving bank funds to the proper authorities. The Comptroller of the Currency, Treasury Department, after being advised by the Criminal Division of the serious effect of this laxity on investigation and prosecution, has issued a letter to all National Banks reminding them of their responsibility in this regard. If, in the future, United States Attorneys notice continued disregard of these instructions, they are requested to notify the Criminal Division.

BANK ROBBERY - CONSPIRACY

Where Object of Conspiracy Does Not Constitute Federal Offense There Is No Federally Prosecutable Conspiracy; Conviction Reversed. Eli Lubin and Glenn M. Tharp, Jr. v. United States (C.A. 9, February 11, 1963). The Ninth Circuit reversed the conviction of defendants in the Southern District of California under a one count indictment charging them with conspiracy in violation of 18 U.S.C. 371 to steal property belonging to banks (18 U.S.C. 2113(b)).

Prosecution was based on conspiracy to take from the possession of Armored Transport (AT) money and other property belonging to federally protected banks. The Government offered proof sufficient to prove only one conspiracy, that being to rob truck No. 31 of AT while the latter's employee Tharp was driving it from the Bank of America to the Los Angeles County Hospital for the purpose of "check cashing." Check cashing is the activity whereby AT customarily took cash from a bank to a firm to provide facilities for cashing payroll checks for the firm's employees. When AT received check cashing money from a bank, AT's agent executed and delivered its note to the bank for the amount received. The payroll checks cashed and any excess cash were returned to the bank and treated as in payment of the note. The Court held that when such money was delivered by the bank to AT's truck, title to the money passed from the bank to AT.

Since the money carried in truck No. 31 was not in fact money belonging to the bank, the Ninth Circuit held that a scheme to take the money is not sufficient to show the federal offense, even though defendants believed it was bank money. Relying, in part on Ventimiglia v. United States, 242 F. 2d 620, and cases therein cited, the Court said that although federal conviction for conspiracy may be upheld when the offense which is the object of the conspiracy be forestalled or interrupted or otherwise not physically completed, there is no federally prosecutable conspiracy where the object of the conspiracy as alleged is not or cannot under the facts constitute a federal offense.

Staff: United States Attorney Francis C. Whelan; Assistant United States Attorney Timothy W. Thornton (S.D. Calif.).

GAMBLING DEVICES

Forfeiture For Non-Payment of Tax Imposed by 26 U.S.C. 4461. United States Attorneys are requested to advise the Organized Crime and Racketeering Section immediately upon institution of any proceeding to forfeit gambling devices based upon Revenue Ruling 59-294. The Section should also be advised of any action instituted by owners of such devices either to enjoin enforcement of the Ruling or for refund of any taxes paid under protest under the Ruling. Copies of all pleadings should be forwarded at the time of such notification.

ELKINS ACT

Credit Extension by Carrier to Shipper for Freight Charges. United States v. Continental Shippers' Association, Inc., and United States v. Southern Pacific Company (S.D. Calif.). The practice of extending unauthorized credit for freight charges by a carrier to a favored shipper is the equivalent of providing the shipper with working capital. The purpose of the Elkins Act (49 U.S.C. 41(1)) that all shippers be treated alike is defeated when a shipper obtains this advantage or concession.

The freight charges due to Southern Pacific in the instant matter averaged over $30,000 a month during a 6 months' period and although Interstate Commerce Commission Credit Regulations required Continental to make payment within 96 hours of presentation of the bill, investigation established delays in payment for as many as 167 days. When Southern Pacific had suggested suspension of Continental's credit privileges, the latter had countered with a threat to boycott shipments over Southern Pacific lines and the carrier succumbed to the threat and allowed the objectionable practice to continue.

The carrier and the shipper were charged in separate informations with respectively granting and receiving unlawful concessions. The carrier pleaded guilty to two counts and was fined $1,000 on each. The Shippers' Association was found guilty by a jury following a three-day trial at Los Angeles on all 30 counts filed against it. The Court imposed a fine of $1,000 on each count and suspended execution of the sentence on 10 counts, thus making the amount payable $20,000. This was the first case ever tried in which extensions of credit were prosecuted under the Elkins Act.

Staff: Assistant United States Attorney David Nissen (S.D. Calif.).

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

DEPORTATION

In Absence of Showing of Allegiance to Communist China, Natives of China May, for Deportation Purposes, Be Regarded as Citizens of Formosan Government. Lee Wei Fang et al v. Kennedy; and Wang Siang-Ken, et al v. Kennedy (C.A. D.C. March 25, 1963.) Appellants, thirty-four in number, were born on the Chinese mainland prior to the expulsion by the Chinese Communists of the Nationalist Chinese Government which is recognized by the United States as the legal government of China. Appellants left the Chinese mainland years before their entry into the United States for temporary stays. All conceded that they were subject to deportation and contested only the designation of their place of deportation under section 243(a) of the Immigration and Nationality Act, 8 U.S.C. 1253(a). This section provides, inter alia, that an alien shall be deported to the country of his nationality and that in the event such country will not accept him, then to any one of several described countries. The Service had inquired of the Formosan Government as to whether they would accept appellants as deportees. The Formosan Government accepted thirteen and rejected the remaining twenty-one. The thirteen were ordered deported to Formosa and the remainder to other countries found willing to accept them.

Appellants contended in the District Court that they were nationals of Communist China and that the Service was obliged under section 243(a) to ask that Government to accept them before asking the Formosan or any other Government to do so. The Service contended and was sustained by the lower Court that for immigration purposes, appellants were citizens of the Nationalist Chinese Government on Formosa.

After review of other cases on this issue, the Court of Appeals concluded that nationality for the purposes of section 243(a) is not determined exclusively by the geographical spot where one was born but that political matters must be considered. It further concluded that in the cases of citizens of China, for purposes of deportation from the United States, they are properly regarded as citizens of the government of their country which the United States recognizes, at least in the absence of a showing that they in fact support and give allegiance to their government not recognized by the United States. After examination of the evidence in the case of each appellant the Court found that the evidence before the Attorney General warranted, if it did not compel, the conclusion that the thirty-four were, and regarded themselves as, nationals of the Republic of China on Formosa rather than of Red China. The Court dismissed the appeals concluding as follows:

It is amply plain from the record and from counsel's statements in oral argument that plaintiffs-appellants do not desire to be deported to Communist China, and would resist any such action if it were ordered. They thus are in no position to ask relief from a court of equity. Cf. Chao Chin Chen v. Murff, 168 F. Supp. 349 (S.D. N.Y. 1958). The extraordinary remedies of equity are available to those who have a real grievance -- not to those who are asking relief for purposes of delay, and relief which if granted they would promptly repudiate. We adopt the statement made in similar circumstances in Ng Kam Fook v. Esperdy, 209 F. Supp. at 638, that:

> "Plaintiff cannot subvert the purpose of section 243(a) with this 'tongue-in-cheek' contention."

A dissent was noted on the basis that the conclusion that appellants were citizens of Nationalist China was not supported by the record evidence.

Staff: United States Attorney David C. Acheson and Assistant United States Attorneys Paul A. Renne, Nathan J. Paulson, and Gil Zimmerman.

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INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

False Statement (18 U.S.C. 1001). U.S. v. Robert M. Ackerson. On February 18, 1963 a Federal grand jury at Denver, Colorado, returned an eleven count indictment charging that Ackerson had falsified Applications for a Bonus Payment filed with the Atomic Energy Commission in Grand Junction, Colorado over a period from June 1958 to May 1960. Specifically, Ackerson represented that the uranium ore upon which he based his Applications for a Bonus Payment came from one certified mining claim when he knew that all or a portion of the uranium ore on which his claims were based had been derived from another source, in violation of 18 U.S.C. 1001. The defendant entered a plea of not guilty on March 15, 1963 and the case was continued for a trial setting.

Staff: United States Attorney Lawrence M. Henry
Vincent P. MacQueeney (Internal Security Division)

Industrial Security; Validity of Suspension from Access to Classified Information. James J. Taglia v. Secretary of Defense, et al. (D. D.C.). Plaintiff was placed on leave without pay by his employer following the emergency suspension of his access authorization to classified defense information on January 24, 1963, by the Department of the Navy, pursuant to a Department of Defense Regulation. No Statement of Reasons was furnished Taglia at the time of this suspension.

On March 7, 1963, Taglia filed suit for an order restraining the defendants from continuing the suspension in effect on the ground that such action was not authorized by an act of Congress or by an executive order. The defendants on March 21 furnished the plaintiff with a Statement of Reasons and offered plaintiff an opportunity for a hearing thereon. Counsel for plaintiff, on March 22, 1963, acknowledging receipt of the Statement of Reasons, withdrew his motion for a preliminary injunction and was granted a voluntary dismissal with the consent of the defendants.

Staff: Benjamin C. Flannagan (Internal Security Division)

* * *

LANDS DIVISION

Assistant Attorney General Ramsey Clark

Eminent Domain; Right to Take; Federal Aid Highways Act; Right of United States to Condemn Land Devoted to Local Public Use. United States v. Pleasure Driveway and Park District of Peoria, Illinois, et al. (March 13, 1963 (C.A. 7)). The United States filed this action for the condemnation of certain lands for highway purposes. The defendant owner, Pleasure Driveway and Park District of Peoria, Illinois, answered averring that the land was devoted to a public use as part of Bradley Park in Peoria and that the United States had no authority under the provisions of Section 107(a) of the Federal Aid Highways Act, 72 Stat. 885, 892, 23 U.S.C. 107(a), to condemn the property for highway purposes. Accordingly, defendant moved for dismissal of the complaint and obtained a temporary restraining order against possession by the United States. Defendant's argument was that the Department of Public Works and Buildings had not been given authority by the Illinois General Assembly to request the United States to condemn land which is municipally owned; that because the Department of Public Works and Buildings did not have authority to condemn municipally-owned land already devoted to a public use as a park, the United States did not have authority to do so; and that the federal act is merely a grant-in-aid statute designed to enable Illinois and other states to provide suitable highways.

The district court denied defendant's motion to dismiss, vacated the temporary restraining order and reinstated a prior order for delivery of possession. In doing so, the district court wrote a comprehensive opinion upholding the authority of the United States to condemn property devoted to a public use. 209 F. Supp. 483. The court took judicial notice of the fact that:

> Only chaos can result if local law or municipal corporations across the nation may block the progress of construction, and prevent the logical and planned extension and connection of those completed projects to achieve the interstate system envisioned by Congress.
>
> This case presents one of the unavoidable areas of conflict of purposes inherent in our federal form of government. As the Court suggests in Carmack, supra [329 U.S. 230], at 237, either the federal purpose is supreme or the federal sovereignty may be reduced below the minimum allowable limits of sovereign existence. Since here the federal purpose requires the use of a part of Bradley Park, the power to acquire that property transcends the public purpose of retention of the property as a park. I hold that the federal power of eminent domain has been properly

invoked in this case, and that that power can not be limited by the law of Illinois which denies to the State the authority to condemn the property in suit.

On appeal by the defendant, the Seventh Circuit, after reciting the facts, affirmed, stating that the district court opinion "sets forth the issues and facts surrounding the taking, and is a well reasoned analysis of the provisions of applicable law. We fully approve of and concur in the determination of the case on the grounds and for the reasons well stated by the District Court."

Staff: S. Billingsley Hill (Lands Division).

Public Lands; Desert Land Act, 43 U.S.C. 321; Conclusiveness of Decision by Secretary of Interior Affirming Decision of Manager Denying Application for Entry. Noren v. Beck (S.D. Calif., March 8, 1963.) This action was brought to review a decision by the Bureau of Land Management denying plaintiffs' applications for entry upon certain lands pursuant to the Desert Land Act. From a decision of the Director of the Bureau of Land Management which affirmed the decision of the Manager of the Sacramento Land Office which rejected plaintiffs' applications, plaintiffs appealed to the Secretary of the Interior. The cases were remanded by the Secretary to the Bureau of Land Management with instructions to allow plaintiffs an opportunity to submit evidence to disprove a classification of the lands as being unsuitable for agricultural development and to reconsider the classification in the light of such evidence.

The Secretary's decision at that time remanding the cases was based upon a showing made that two other applicants in the same vicinity were successful in reclaiming the lands they had entered. After remand, plaintiffs' applications were again rejected on the ground that the lands were not suitable for agricultural purposes. That decision was affirmed by the Director, Bureau of Land Management, and affirmed by the Secretary of the Interior.

Administrative remedies having been exhausted, the present suit was instituted and the Court, in a previous interlocutory decision, November 21, 1961, 199 F. Supp. 708, held that the case should be submitted upon the administrative record and not tried de novo.

After review of the administrative record, the Court concluded that the Secretary's decision affirming the Manager's decision was fully supported by the evidence and is conclusive in the absence of fraud or imposition. The Court stated that it could not substitute its judgment for that of the Department of the Interior, citing Ickes v. Underwood, 141 F. 2d 546.

Staff: Assistant United States Attorney Melvin C. Blum (S.D. Cal.), and Herbert Pittle (Lands Division)

Mining Claims; Necessity for Discovery of Presently Marketable Mineral Deposit. G. C. (Tom) Mulkern v. Harold C. Hammitt (D. Nev., February 25, 1963.) Plaintiff brought an action to enjoin the manager of the Nevada Land Office of the Bureau of Land Management from cancelling plaintiff's unpatented placer mining claims said to be founded upon discovery of silica sand and gypsum. The lands within plaintiff's claims are situated within the Lake Mead Recreational Area but plaintiff contended that his claims had been established before the lands were withdrawn and placed within the Recreational Area. Since the decision by the manager to cancel plaintiff's claims for lack of an adequate discovery of mineral had been affirmed by the Acting Director of the Bureau of Land Management and by the Deputy Solicitor of the Department of the Interior as the delegate of the Secretary of the Interior on appeals taken by plaintiff, plaintiff also sought a declaratory judgment that their decisions were invalid and without force or effect.

The administrative officials had held that the minerals discovered within the claims were insufficient in quantity, quality and marketability to constitute an adequate basis to support plaintiff's claims.

In ordering the entry of judgment for defendant, the Court wrote a brief opinion in which it is said:

> Plaintiff contends that the Secretary did not apply the proper standard of marketability in determining whether his claims constituted a valuable mineral deposit. Plaintiff asserts that the Secretary based his decision upon the ground that there was no present market value for the gypsum in question, whereas the proper test is "would a person of ordinary prudence be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine?"
>
> A similar contention was made in Foster v. Seaton, 271 F. 2d 836 (D.C. 1959), and the court quoted therein the above test which plaintiff asserts to be the correct one. However, the Court went on to note that with respect to widespread non-metallic minerals such as sand and gravel the Department of the Interior has stressed the additional requirement of present marketability in order to prevent the misappropriation of lands containing these materials by persons seeking to acquire such lands for purposes other than mining.

Staff: United States Attorney John W. Bonner (D. Nev.).

Indians; Validity of Unapproved Side Agreement Between Indian and Lessee of Restricted Land; Injunction to Restrain Enforcement of Side Agreement in State Court. United States v. Palm Springs Paint Co., et al. (S.D. Cal., March 12, 1963). A member of the Palm Springs Band

of Mission Indians entered into a 5-year business lease with one Sheklow on September 26, 1955, for the period February 1, 1956 - January 31, 1961, covering a portion of his restricted allotment in Palm Springs, California, at a rental of $1,000 a year. This lease was approved by the Department of the Interior. On the same date, September 26, 1955, the Indian executed a written agreement with Sheklow and the Paint Company of which Sheklow was president, in which the Indian agreed to purchase all improvements placed on the land by the lessee, if the lease was not extended for a period of 20 years. This agreement, commonly called a "side agreement," was not approved by Interior.

At the expiration of the business lease on January 31, 1961, the Indian's restricted allotment was leased to a third party with the approval of Interior. Thereupon the Paint Company filed suit in the state court against the Indian and his guardian to recover damages of $40,000 and attorneys' fees for the failure of the Indian to purchase the buildings and improvements placed on the land by the lessee during the term of the lease.

The United States, as fee owner of the allotment in trust for the Indian, brought an action in the federal court for a judgment setting aside and declaring the side agreement to be null and void for any purpose, and for an injunction restraining the defendants from proceeding any further with the state court action. On March 12, 1963, the Court granted the Government sweeping relief. It held the side agreement to be null and void for all purposes under Section 5 of the Mission Indian Act, 26 Stat. 712, which provides that any contract "touching" restricted allotments shall be "absolutely null and void." The Court enjoined defendants from asserting any rights under the agreement in the state court action and awarded title to the buildings and improvements to the United States.

Staff: Assistant United States Attorney Melvin C. Blum (S. D. Cal.).

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CIVIL TAX MATTERS
Appellate Decisions

Attorney's Fees for Stakeholder Denied in Interpleader Action. Ellicott Paint Co. v. Buffalo Evening News, et al. (Supreme Court, Appellate Div., Fourth Dept., Erie County, New York, October 26, 1962), 63-1 USTC ¶9127. This is an appeal from a decision of a trial justice of the Supreme Court in which he awarded a counsel fee to the attorney for the stakeholder in an interpleader action. The fees were to be paid out of the balance of the fund against which the Government claimed a tax lien. Plaintiff had instituted this action to foreclose its mechanic's lien. No appeal was taken from any other part of the decree. Relying on United States v. Liverpool & London & Globe Ins. Co., 348 U.S. 215; United States v. Ball Construction Co., 356 U.S. 934; and Seaboard Surety Co. v. United States, 201 F. Supp. 603, the appellate court held that counsel for the stakeholder could not recover his fees from the balance of the fund held by the stakeholder once the materialmen's lien was satisfied.

Staff: United States Attorney John T. Curtin (W.D. N.Y.).

Priority of Liens; Federal Tax Lien Against Accounts Receivable Owed to Delinquent Taxpayer Accorded Priority Over Prior Assignee of Accounts Receivable Who Failed to Comply With State Recording Statute and Over Prior Garnishment Lien of State for Unpaid Taxes. South Main State Bank v. State of Texas, et al. (March 6, 1963, Tex. Civ. App., 3d Supreme Judicial Dist., Austin). The State of Texas sued Refinery Construction Company in May, 1961 in a State Court to recover delinquent unemployment taxes, and simultaneously filed garnishment suit against Rohm & Haas Company, a debtor, which filed an answer admitting indebtedness of $26,146.89, and impleaded South Main State Bank, the United States, W. D. Gunnels Company, and other named creditors not involved in the appeal. South Main State Bank answered, pleading assignments from Refinery Construction Company under dates of January 17, 1961, January 19, 1961, and March 25, 1961, of accounts owing by Rohm & Haas to Refinery Construction Company. The United States answered, claiming lien for taxes in the sum of $10,782.29 assessed May 19, 1961 notice of lien filed May 22, 1961. The State of Texas obtained judgment against Refinery Construction Company on June 14, 1961. The Texas Court of Civil Appeals, Austin, affirmed the decision of the District Court of Travis, County, denying priority to the assignment claims of the South Main State Bank, both as to federal tax liens and State tax claim, because it failed to comply with the recording statutes of the State of Texas, and also holding that the prior attachment lien of the State of Texas was inferior to the federal tax lien.

Staff: William O. Murray, Jr., Assistant United States Attorney
Fred E. Youngman (Tax Division).

District Court Decisions

Federal Tax Lien Attached to Property Taxpayer Held in Joint Tenancy With Wife Before Separate Maintenance Decree Vested Title to Property in Her. Winifred D. Edwards v. United States (D. Kan., Feb. 8, 1963), 63-1 USTC ¶9299. Prior to imposition in 1960 of federal tax liabilities against the taxpayer, he and his wife obtained title to certain real and personal property as joint tenants with the right of survivorship and not as tenants in common. Subsequently, pursuant to a decree of separate maintenance awarded the wife in 1961, title to this property was vested in her. She brought an action to quiet title to the property. The United States counterclaimed to foreclose the tax lien. The Court held that taxpayer and his wife created a joint tenancy in themselves by contract, which was terminated by their later contract of separation and that the Kansas statute providing for creation of joint tenancies by contract did not intend to place property so held beyond the reach of creditors of one joint tenant. When taxpayer then encumbered his interest with a federal tax lien, the court order terminating the joint tenancy and vesting title to the property in the wife alone did so subject to the lien of the United States. Accordingly, the Court held that the federal tax lien attached to an undivided one-half interest in the property and should be foreclosed by judicial sale of such interest, the Government to bear the expense of sale and distribute any surplus to plaintiff. The Court further quieted plaintiff's title as against the United States to an undivided one-half interest in the "jointly held" property.

Staff: United States Attorney Newell George and Assistant United States Attorney Robert M. Green (D. Kan.).

Evidence: Proof of Tax Lien Under Internal Revenue Code of 1939. In re: Milwaukee Crate & Lumber Company, Bankrupt (E.D. Wis.), 62-2 USTC ¶9832. The City of Milwaukee and the Industrial Commission of Wisconsin, both petitioned for review of the order of the referee in bankruptcy which adjudged that the United States held a valid, subsisting, and prior lien on the property of taxpayer. Petitioners contended that the United States had failed to prove its lien because it had not shown that the assessment certificate was sent to the Commissioner, certified by him, and returned to the Collector. (Under the 1939 Code the lien arose "at the time assessment list was received by the collector".). The Court rejected this contention and affirmed the referee's order stating that the tax lien had been proved by uncontroverted evidence that the assessment certificate was signed by the Acting Commissioner and was received by the Collector on February 23, 1951. The Court also stated that the assessment certificate and list were admissible under 28 U.S.C. 1732 and 1733 and that it was not necessary to prove that the assessment certificate was sent to the Commissioner.

Staff: United States Attorney James B. Brennan (E.D. Wis.).

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