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Vol. 11 June 14, 1963 No. 11

ADMINISTRATIVE DIVISION

Administrative Assistant Attorney General S. A. Andretta

WITNESSES - ARMED FORCES

We have received inquiries concerning the use of subpoenas on members of the Armed Forces when Forms DJ-49 are sent to the Department in accordance with the United States Attorneys' Manual, Title 8, page 122. We wish to emphasize that process of temporary duty orders for Armed Forces personnel through headquarters in Washington does not preclude the issuance of a subpoena at the same time. (See United States Attorneys Bulletin, Vol. 3, No. 20, dated September 30, 1955, page 18.) This is desirable if there is doubt that the witness will appear and the United States Attorney wishes to answer any inquiry from the court about service on the witness.

Also, please note that requests on Forms DJ-49 must carry the date and source of the address of the military witness. Many times the Washington records reflect a different address, and the only way we can determine the correct address is to know the date and source of your information.

MEMOS AND ORDERS

The following memoranda applicable to United States Attorney Offices have been issued since the list published in Bulletin No. 10, Vol. 11 dated May 31, 1963.

MEMOS	DATED	DISTRIBUTION	SUBJECT
348	5-22-63	U.S. Marshals	Personal Certification of Standard Form 1219 by United States Marshals.
342	6-3-63	U.S. Attorneys & Marshals	Overtime Regulations

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ANTITRUST DIVISION

Assistant Attorney General Lee Loevinger

SHERMAN ACT

Price Fixing - Economy Bread; Court Returns Verdict of Guilty. United States v. Ward Baking Company, et al. (E. D. Pa.). After a four week nonjury trial ending on May 16, 1963, Judge Van Dusen returned a verdict of guilty as to defendants Theo Staab, Executive Secretary, Pennsylvania Bakers Association, and Frankford-Quaker Grocery Co. and its President, Herman Heim, on charges of violation of Section 1 of the Sherman Act. A verdict of not guilty was returned as to Ward Baking Company and its Philadelphia Sales Manager, Oscar Doyle.

The following eight other defendants in this case pleaded nolo contendere prior to trial: Fleischmann's Vienna Model Bakery; Leo Rossi Baking Co.: Schulz Baking Co.; Stroehmann Bros. Co.; F. W. McCarthy; Theresa Rossi; Charles Schulz, Sr.; and Leonard V. Thompson.

The indictment returned June 27, 1962 charged that six area bakers and an officer of each, together with the executive secretary of the Pennsylvania Bakers Association, conspired to increase, fix, and maintain at all levels of distribution the prices of economy bread sold in the Philadelphia, Pennsylvania-Trenton, New Jersey area. Economy bread is a class of white loaf bread sold at prices lower than regular bread. The indictment further charged that defendants made concerted efforts to require an independent distributor, New Century Bread Distributors, to sell economy bread in the Philadelphia-Trenton area at the agreed-upon prices.

Defendants were arraigned on August 15, 1962, at which time three corporate defendants and two individual defendants proffered pleas of nolo contendere, which were refused from the Bench. Defendant Staab offered a plea of nolo contendere on that date, but hearing thereon was postponed until August 29, 1962, at which time Staab's plea was also rejected.

On April 11, 1963, the Court, over the opposition of the Government, accepted pleas of nolo contendere by four corporate defendants and four individual defendants. The acceptance of these pleas was based in part upon the fact that the remaining defendants waived a jury trial. Defendant Staab did not proffer a plea of nolo contendere as he had earlier.

Trial of the case as to the remaining five defendants commenced April 22, 1963, and the Government completed its presentation on May 3. All defendants filed motions for acquittal and, after argument thereon, the Court denied all motions. Defendants Ward and Oscar Doyle presented no defense but rested their case after denial of the motion for judgment of acquittal. Defendants Frankford, Heim, and Staab presented their defense, and final argument was had on May 15 and 16, 1963.

Staff: John E. Sarbaugh, Walter L. Devany, Carl J. Melone and Richard M. Walker. (Antitrust Division)

Portion Of Government's Partial Bill Of Particulars Sealed by Court. United States v. Anaconda American Brass Co., et al. (D. Conn.). In an opinion dated May 23, 1963, Judge Blumenfeld ordered that paragraph 4(c) of the partial bill of particulars be sealed. Bridgeport Brass Company, a defendant which had previously pleaded nolo contendere, moved for an order sealing this portion of the bill of particulars upon the grounds that documents described therein had been obtained from it and other corporate defendants by grand jury subpoena duces tecum and were still subject to grand jury secrecy. The motion for particulars had been made by the remaining defendants and the partial bill of particulars had been furnished by the Government on a voluntary basis prior to any hearing on the motion. The Government opposed the motion on the grounds that public policy called for public access to all proceedings in criminal antitrust cases and denied that grand jury secrecy was involved since the bill of particulars did not describe the documents as having been obtained by grand jury subpoenas.

The opinion concedes that Rule 6(e) F.R.Cr. P. "does not bar the information furnished by the Government in its partial bill from the remaining defendants." However, the opinion went on to say it does not "... require that the disclosure be expanded beyond the sole justification for its being made, i.e. the needs of the defendants in preparing for trial." Relying upon U.S. v. Interstate Dress Carriers, Inc., 280 F.2d 52 (C.A.2, 1960) the opinion recognizes" ... the existence of interests in the owner of the documents to object to their disclosure.... Here, the owner of the documents, who made them available in response to a Grand Jury subpoena duces tecum, objects to their being made public beyond that disclosure necessitated by the defendants' use of them in order to preserve whatever rights he may have to object to their disclosure to possible claimants who may institute civil proceedings against it.... Though the need for protection of secrecy arose at a different stage of Grand Jury proceedings, relief of this nature was granted in In Re April 1956 Term Grand Jury, [239 F.2d 263 (7 Cir. 1956) cert. denied sub nom. Shotwell Mfg. Co. v. U. S. 352 U. S. 998] supra, pp. 272-3; see also Federal Rules of Civil Procedure 30(b)."

Staff: John J. Galgay, Donald Ferguson, Edwin Weiss, Ralph S. Goodman Ronald E. Sommer and Bernard Mindich (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General John W. Douglas

COURTS OF APPEALS

FEDERAL TORT CLAIMS ACT

Government's Failure to Warn Purchaser of War Surplus Instrument That It Was Dangerous to Test Instrument in Certain Manner Held Not Negligent Since It Was Not Foreseeable He Would Test Instrument in That Manner. Rivers v. L. Leitman (C.A. 4, April 25, 1963). Plaintiff brought suit to recover for personal injuries suffered when a "gyro-horizon indicator" exploded in his face while he was visiting the store of the defendant Leitman Brothers. The instrument which exploded had been manufactured by the defendant Sperry Rand and Sperry Gyroscope Corporations, had been sold to the United States, and, in turn, had been sold by the United States to the Leitmans as war surplus. Plaintiff brought suit against the Leitmans, the Sperry Corporations, and the Government. The Leitmans cross-claimed against the Government. The district court held that the defendant Joe Leitman had been grossly negligent in testing the instrument by applying compressed air pressure to it, and, the court found, this gross negligence was the sole proximate cause of the explosion and plaintiff's resultant injury. The court found that neither the manufacturer nor the Government had been negligent.

On appeal from the denial of the Leitmans' cross-claim against the manufacturer and the Government, the Court of Appeals affirmed. The Court expressed full agreement with the conclusion of the district court that neither the Government nor the manufacturer was bound to warn the Leitmans that the subject instrument should not be tested with compressed air since it was not "reasonably foreseeable" that they would test the instrument in this manner.

Staff: United States Attorney C. V. Spratley, Jr.; Assistant United States Attorney Roger T. Williams (E.D. Va.)

GOVERNMENT CONTRACTS

Measure of Damages for Failure to Perform Government Contract Is Cost Differential of Having Work Performed by Another Contractor Even Though Second Contract Differs from First, if Differences Are Immaterial and Do Not Affect Contract Price; Contractor's Surety Not Entitled to Notice of Contractor's Breach in Absence of Provision in Surety Bond Expressly Requiring Such Notice. American Surety Company of New York v. United States (C.A. 8, May 28, 1963). The United States brought suit against the surety of the Hawthorne Manufacturing Company for Hawthorne's breach of a defense contract for the supply of bomb rack releases to the Air Force. Hawthorne never delivered any of the bomb rack releases and the Government claimed damages in excess of $29,000, which was the increased cost incurred by the Government in procuring the releases from another source. The second contract differed from the contract with Hawthorne in that it called for an increased delivery rate and for

a different maximum number of units to be furnished. Appellant surety company's bond did not expressly require any notice to be given it in the event of default by the contractor. The district court held that the surety company was liable for the amount claimed.

The Court of Appeals affirmed. The Court first held that, since neither the performance bond nor Hawthorne's contract with the Government required notice to the surety of Hawthorne's default, any lack of notice to the surety "did not release it from its obligation under the performance bond." The Court went on to hold that, while there were some differences between the Hawthorne contract and the contract which the Government entered into in procuring the releases from another source, these differences could not be held to be material since they had been necessitated by Hawthorne's default.

Staff: John C. Eldridge (Civil Division)

LONGSHOREMEN'S AND HARBOR WORKERS' ACT

Deputy Commissioner's Determination of Disability Held Supported by Substantial Evidence. Charles Einbinder v. Novinger Co. (C.A. D.C., May 29, 1962). Plaintiff brought suit to set aside a workman's compensation award by the deputy commissioner. The principal dispute concerned the deputy commissioner's findings of reduced earnings capacity despite post-injury wages which equalled or exceeded pre-injury wages. The second question involved the extent of the injury. The district court set aside the award on the ground that it was not supported by substantial evidence.

The Court of Appeals reinstated the award. The Court held that the administrative record contained sufficient evidence to support the deputy commissioner's determinations. After noting that the district court had filed no opinion, no findings of fact, and no conclusions of law, the Court indicated that, where an award is set aside on the ground that it is unsupported by substantial evidence, the district court should "at least state which findings are unsupported."

Staff: Barbara W. Deutsch (Civil Division)

DISTRICT COURT

FEDERAL TORT CLAIMS ACT

Dancer Injured by Fall on Stage Floor Held To Have Assumed Risk; Government Had No Duty to Warn Dancer of Condition of Floor Since She Was Licensee Rather Than Invitee. Leslie Eisenhower v. United States (E.D. N.Y., May 6, 1963). Plaintiff was a member of the Gypsy Markoff troupe which had been engaged by the USO to entertain troops overseas. Before embarking, the troupe requested an opportunity to give a dress rehearsal performance at the Brooklyn Navy Yard and permission was granted. During the course of the performance plaintiff was injured when she fell, allegedly because the stage, which had been waxed and highly polished shortly before the performance, was in a dangerously slippery condition. Plaintiff was aware of the dangerous condition of

the stage but elected to proceed with her act because of the show business tradition that "the show must go on."

After a trial, the District Court held that plaintiff could not recover because, knowing of the dangerous condition of the stage, she elected to proceed with her act and thus assumed the risk. The Court rejected plaintiff's contention that she had a duty to assume the risk because of the show business tradition that "the show must go on." The Court noted that "she cannot rely upon any stage tradition to exculpate her from the consequences of her own choice if such tradition contradicts the legal principles applicable." The Court went on to hold that, in any event, plaintiff was a "licensee" rather than an "invitee" since the Gypsy Markoff troup had requested permission to use the Government's premises for the dress rehearsal and were not there by invitation or pursuant to any contract with the Government. The Court ruled that, as a licensee, plaintiff was bound to take the premises as she found them and the Government's duty was limited to warning her of any hidden dangers.

Staff: United States Attorney Joseph P. Hoey; Assistant United States Attorneys Vincent T. McCarthy and Carl Golden (E.D. N.Y.)

STATE COURT

AIR FORCE RADIO ASTRONOMY INSTALLATION

Proposed Power Line Must Be Relocated or Placed Underground Because It Threatened Interference With Air Force Radio Astronomy Installation. United States v. Department of Public Utilities (Supreme Judicial Court of Massachusetts, May 17, 1963). Several years ago, the Merrimack-Essex Electric Company (now merged with the Massachusetts Electric Company) petitioned the Massachusetts Department of Public Utilities for an order and determination that the construction of a 23,000 volt transmission line between three cities on the north shore of Massachusetts would serve the public interest and convenience. The route of the proposed power line passed within 1/2 mile of a radio astronomy installation operated by the Air Force at Sagamore Hill. The Air Force intervened in the administrative proceedings and adduced evidence to the effect that, if located less than two miles from the installation, the power line, in all likelihood, would interfere with its vital national defense activities (which include the tracking of solar bodies, satellites and missiles as well as experimentation in the field of space communications). Notwithstanding this evidence, the DPU authorized the construction of the power line on the proposed route, reserving the right to order a relocation of the portion of the line passing close to Sagamore Hill in the event that interference actually developed.

The United States, as well as several towns and individuals, appealed the DPU order to the Supreme Judicial Court of Massachusetts. Accepting most of the Government's contentions, that Court directed the DPU to conduct further proceedings and to redetermine, inter alia, whether so much of the authorized line as will pass within three miles of the radio astronomy installation should be placed underground, or in another location, or both. The Court pointed out that the evidence before the DPU reflected that, at the very least, there was

a good possibility that the power line would interfere with the radio astronomy installation. It further noted that, as we had stressed, the reservation of jurisdiction to order a relocation of the line would not adequately protect the Government's interests since even a relatively short interruption in the operation of the Sagamore Hill facility could have dire consequences.

Staff: Alan S. Rosenthal (Civil Division)

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CIVIL RIGHTS DIVISION

Assistant Attorney General Burke Marshall

Governor of Alabama Enjoined From Interfering With Desegregation of University. United States v. Wallace (N.D. Ala., June 5, 1963.) The United States, on May 24, 1963, filed a complaint and motion for preliminary injunction alleging that Governor George C. Wallace was threatening to bar Negroes from entering the University of Alabama under the terms of an order previously entered by the district court in the case of Lucy v. Adams, 134 F. Supp. 235 (N.D. Ala. 1955).

A hearing on the motion for preliminary injunction was held on June 10. The evidence established that on May 21, 1963, immediately following a ruling by the District Court in the Lucy case requiring the admission of two Negroes to the University of Alabama, the Governor called a press conference, at which he expressed his disagreement with the Court's ruling and announced his purpose to personally bar the entrance of the Negroes to the University.

On June 5, 1963, the District Court rendered its decision granting the preliminary injunction. The Court relied upon prior cases in which federal courts in Arkansas, Louisiana and Mississippi had enjoined governors of those states from interfering with the implementation of school desegregation decrees. In sustaining the standing of the United States to seek relief, the Court stated that:

> It clearly appears that unless an injunction is issued pending submission of this action on the prayer for final relief in a trial of the merits, the plaintiff will suffer irreparable injury resulting from obstruction of the lawful orders of this court and the consequent impairment of the judicial process of the United States.

Under the terms of the Court's order Governor Wallace is enjoined from blocking the entry of either of the two named Negro students from the campus of the University of Alabama on the opening day of the Summer Session, June 10, 1963, or any day thereafter, and from otherwise preventing, or seeking to prevent, the enrollment or attendance of persons entitled to enroll or attend the University under the Lucy decree.

Staff: Assistant Attorney General Burke Marshall (Civil Rights Division); United States Attorney Macon L. Weaver (N.D. Ala.); St. John Barrett and Harold H. Greene (Civil Rights Division).

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

MAIL FRAUD

Advance Fee Scheme; Sufficiency of Indictment; Limitation of Time for Argument of Counsel Within Discretion of Trial Judge; "Stand-in Representation" During Temporary Absence of Counsel Agreed to by Accused and Other Counsel; Trial of Multiple Defendants. United States v. Butler, et al (C.A. 8, May 10, 1963). The Court of Appeals affirmed the conviction of 17 officers and employees of the Lenders Service Company, Inc., for violations of the mail fraud statute, 18 U.S.C. 1341, in an advance fee swindle.

Appellants challenged the sufficiency of the indictment to charge a violation of the mail fraud statute. The Court concluded that any doubt as to the sufficiency of the indictment to charge a violation of the mail fraud statute was completely and with finality dispelled by the opinion of the Supreme Court in United States v. Sampson, 371 U.S. 75 (Bulletin, December 14, 1962, pp. 690-691), the indictment there being similar to that here involved.

Most of the alleged errors on appeal related to the lengthy trial and the number of defendants. Trial of 30 defendants commenced on March 14, 1961 and the case was submitted to the jury on July 31, 1961. Verdicts were returned on August 9, 1961, finding 10 defendants not guilty and 20 defendants guilty. Appellants claim the time limit placed upon their attorneys' summation argument to the jury was unduly restricted, that the time allotment was discriminatory as between defendants themselves and that such limitations infringed upon their constitutional right to be represented by counsel in a full presentation of their case to the jury. The Court held that the limitation of time for arguments of counsel is within the sound discretion of the trial judge, which was not abused, especially when counsel for appellants agreed to the time allocations for summation.

Appellants also claimed that certain "stand-in-representation" during trial violated the Sixth Amendment, because of the failure of counsel to be present at all trial sessions. The Court pointed out that, during pre-trial conferences, it was agreed that where counsel was temporarily absent, and with consent of both accused and other counsel, arrangements were made for representation of accused by counsel who were present during such absences. The Court concluded that the constitutional safeguards were jealously preserved for the benefit of all defendants, that the trial judge fully discharged his duty of seeing that the trial was conducted with solicitude for the essential rights of the accused and that appellants' claim of prejudice was clearly an afterthought.

Finally, appellants claimed they were deprived of due process by virtue of the fact they were tried in a "mass trial." In affirming the

conviction, the Court held that protracted criminal trials involving multiple defendants or complicated issues, or both, have occurred in the past, citing cases. Although difficult questions were presented, the trial court's conduct of the case was exemplary, and without error. Nor was the jury hopelessly bewildered. The verdict was reached after eight days' deliberation, and 10 defendants were acquitted. The results indicated that the jury carefully and meticulously sifted, examined, and considered the evidence and with discernment reached verdicts which are not now assailable.

Staff: Former United States Attorney Robert Vogel (N. Dak.).

FALSE BOMB REPORT

Remark Made in Jest Concerning Bomb in Luggage to Be Placed Aboard Aircraft Within Prohibition of Bomb Hoax Statute. United States v. Bruce Wesley Allen (C.A. 2, May 17, 1963). Defendant was charged in a one count information with violation of 18 U.S.C. 35 in that he wilfully and knowingly imparted false information concerning an alleged attempt to damage, destroy, disable and wreck a civil aircraft operated in interstate air commerce. He was convicted on trial to the court, jury waived, and sentenced to imprisonment for one year, suspended after six months, with two years' probation and a $250 fine. On appeal, the conviction was affirmed by the Court of Appeals for the Second Circuit.

Defendant accompanied a friend to the airport in Windsor Locks, Connecticut to meet a flight originating in Boston, Massachusetts and bound for Chicago, Illinois. As the friend's luggage was being processed long before the aircraft's arrival, defendant made the remark "Is that the bag with the bomb in it?" The question was overheard by an airlines attendant and led to a search of luggage but did not disrupt air-carrier service.

On appeal, it was urged (1) that an evil purpose must be found to constitute wilfulness within the meaning of the statute, and (2) that the information filed and the proof were defective for failure to include an intent to destroy the plane. The Court of Appeals construed "wilfully" as used in §35 to mean "knowingly, intentionally or voluntarily," noting that the legislative history of the 1956 Act is persuasive that specific criminal intent is not required. Words spoken in jest are covered by the statute since it reaches fictitious as well as false reports. Appellant's reliance on Carlson v. United States, 296 F. 2d 909 (C.A. 9, 1961), to show that an actual intent to destroy was an element of the offense was held negated by the legislative history which clearly reflects that such reports are prohibited whether "the work of pranksters or of subversive or other malicious elements."

The instant case arose under §35 prior to its amendment on October 3, 1961, (Public Law 87-338) removing "wilfully" from the misdemeanor provision and creating a felony when such false information is conveyed

wilfully and maliciously or with reckless disregard for human life. The 1961 amendment was not regarded as an indication that practical jokers were not covered by the earlier act, the Court stating in part that "we cannot say that prohibition of all such false reports to protect the traffic from interruption was an excessive exercise of Congressional power."

Staff: United States Attorney Robert C. Zampano (D. Conn.); John Nicoll, Criminal Division.

AIRCRAFT PIRACY

Prosecutions. In a seven page memorandum captioned "Aircraft Piracy, P. L. 87-197," circulated to all United States Attorneys late in 1961, it was stated on page seven: "Determinations to decline prosecution under any of the provisions of this statute must be submitted to the Criminal Division for prior approval." The above-quoted general instruction is rescinded. However, the United States Attorneys are requested to continue to submit to the Criminal Division all declinations involving piracy hoaxes under subsection (m) of 49 U.S.C. 1472 ("false information"). The instruction in the memorandum that cases "under any of the subsections of the statute which are committed by aliens outside the United States must be promptly reported to the Criminal Division and the case processed only upon instructions issued for the particular case" remains in force. Experience with the new legislation has indicated that offenses (other than those under subsection (m)) committed by citizens no longer require reporting to the Division. Any need for assistance, and prosecutions of unusual cases, should continue to be brought to the attention of the Division in the manner normal for all statutes.

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

IMMIGRATION

Deportation Held to Break Continuity of Residence of Alien Seeking Adjustment of Status to Permanent Resident; Ivan Mrvica v. Esperdy (C.A. 2, May 14, 1963.) Appellant, an alien, entered the United States in January 1940 as a crewman and was ordered deported on September 4, 1942 for overstaying his shore leave. He departed on October 6, 1942 as a crewman on a vessel and returned to the United States on the same vessel in December 1942. After being again ordered deported, he applied to the Immigration and Naturalization Service for adjustment of his status to that of a permanent resident pursuant to Section 249 of the Immigration and Nationality Act, 8 U.S.C. 1259, a requirement of which is that the alien must have resided continuously in the United States since prior to June 28, 1940. The Service denied his application on the ground that when he departed in 1942 he executed the order for his deportation and that his deportation interrupted the continuity of his residence. By a declaratory judgment action in the United States District Court for the Southern District of New York, appellant challenged unsuccessfully the denial of his Section 249 application.

On appeal the Second Circuit upheld the lower Court. Observing that under Section 101(g) of the Immigration and Nationality Act, 8 U.S.C. 1101(g), appellant did execute the order of deportation by departing as a crewman, the Court found it difficult to credit an intent to the Congress to hold the voyage not an interruption of continuous residence when it operated as a statutory deportation. The Court agreed with the interpretation of the Attorney General in Matter of P--, VIII I & N Dec. 167, 169 (Comm. 1958), and the Courts in Sit Jay Sing v. Nice, 182 F. Supp. 292 (N.D. Calif. 1960), aff'd 287 F.2d 561 (C.A. 9, 1961); Lum Chong v. Esperdy, 191 F. Supp. 935 (S.D. N.Y. 1961), that departure while under expulsion proceedings breaks the continuity of residence required by Section 249.

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

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INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Subversive Activities Control Act of 1950; Registration as Communist-front Organization. Patricia Blau (Colorado Committee To Protect Civil Liberties) v. Subversive Activities Control Board (C.A.D.C.). Subsequent to the filing of the petition by the Attorney General in the registration proceedings before the Subversive Activities Control Board, Patricia Blau intervened, claiming that the Colorado Committee to Protect Civil Liberties had been dissolved after the filing of the Attorney General's petition. Upon entry of the Board's order requiring registration, Patricia Blau filed a petition for review in the Court of Appeals for the District of Columbia Circuit. Later, petitioner moved to have the petition for review dismissed and the Board's order vacated for mootness. On remand to the Board for the purpose of determining whether there had been any change in circumstances as to the Committee's existence subsequent to the order, the Board held a hearing to take evidence and issued a Report on Remand and re-affirmed its original order to register. Oral argument on the motion was heard before the Court of Appeals last October. On June 6, 1963 the Court of Appeals rendered its decision, refusing to vacate the Board's order requiring the Colorado Committee to register as a Communist-front organization. Instead, the Court remanded the case to the Board with instructions that the case be put in a status of indefinite abeyance subject to further order of the Board, so that if further activities on the part of the Committee warrant revival of the action, the Board may take evidence as to these activities and enter such order as then seems appropriate. The Court's order in effect upholds the Government's position in the case.

Staff: Lee B. Anderson (Internal Security Division) argued in opposition to the motion. With her on respondent's answer were Frank R. Hunter, Jr., General Counsel, Subversive Activities Control Board, and Kevin T. Maroney (Internal Security Division).

Subversive Activities Control Act of 1950; Registration as Communist-front Organization. Washington Pension Union v. Subversive Activities Control Board (C.A.D.C.). Subsequent to filing a petition for review of the order of the Subversive Activities Control Board requiring it to register as a Communist-front organization, the Washington Pension Union, a non-profit, benevolent corporation of the State of Washington, took steps to dissolve under state law; and thereafter moved the Court to dismiss the petition for review and vacate the Board's order for mootness. Upon remand to the Board for findings with respect to the alleged dissolution, and hearings before the Board, the Board issued a report on remand re-affirming its order to register. Oral argument on the motions to dismiss and vacate was heard by the Court last October. On June 6, 1963, the Court of Appeals handed down its decision and dismissed the petition for review for lack of a party-petitioner. The Court was of the opinion that the petition should be dismissed in view of the fact that the Union is no longer in existence, having terminated its corporate existence subsequent to the filing of its petition for review. The Court explains the difference in its disposition of Labor Youth League v. Subversive Activities Control Board, decided on

April 25, 1963, pointing out that the status of a disbanded unincorporated association presents problems totally different from those of a dissolved corporation--the former may be dormant; the latter is dead--and the Board orders a named organization to register. The Court cites Walling v. Reuter Co., 321 U.S. 671, as authority in principle and in substance, for the course followed in this case.

Staff: Robert L. Keuch (Internal Security Division) argued in opposition to the motion for respondent. On respondent's answer were Frank R. Hunter, Jr., General Counsel, Subversive Activities Control Board, and Kevin T. Maroney (Internal Security Division).

Subversive Activities Control Act of 1950; Registration as Communist-front Organization. Betty Haufrecht (American Peace Crusade) v. Subversive Activities Control Board (C.A.D.C.). Upon petition by the Attorney General the Subversive Activities Control Board entered an order requiring the American Peace Crusade to register as a Communist-front organization. In the proceedings before the Board, Betty Haufrecht had been permitted to intervene upon her allegation that the Peace Crusade had been dissolved subsequent to the filing of the Attorney General's petition and that she had been its last active Administrative Secretary. Mrs. Haufrecht petitioned the Court of Appeals for review of the Board's order; and she subsequently moved to vacate the Board's order and dismiss the proceedings as moot. After remand to the Board for the purpose of determining whether there had been any change in circumstances as to the Crusade's existence subsequent to the order; and re-affirmance by the Board of its original order to register, oral argument on the motion was heard before the Court of Appeals last October. On June 6 the Court rendered its decision. The Court pointed out that the record in the case showed that there had been no activities, no officers, no offices or assets of the Crusade, an unincorporated association, in almost eight years. The Court did not feel that under such circumstances it should finalize an order requiring a presently non-existent organization to register; and the Court remanded the case to the Board with permissive direction to place it in an indefinite abeyance pending further order of the Board.

Staff: Robert S. Brady, (Internal Security Division), argued in opposition to the motion for respondent. On respondent's answer were Frank R. Hunter, Jr., General Counsel, Subversive Activities Control Board, Kevin T. Maroney (Internal Security Division) and George B. Searls (Internal Security Division).

Internal Security Act of 1950; Defense Facility (50 U.S.C. 784(a)(1)(D). United States v. Eugene Frank Robel (W. D. Wash.) On May 21, 1963 a grand jury in Seattle, Washington returned a one-count indictment against Eugene Frank Robel, charging him with engaging in employment in a defense facility while concurrently maintaining membership in the Communist Party. Robel was arrested on a bench warrant and bail was set at $10,000. He was subsequently released on $10,000 personal recognizance. Arraignment has been set for June 3, 1963.

This case represents the first prosecution brought under the provisions of the Internal Security Act of 1950 which proscribe certain activities by members of Communist organizations. It is also the first prosecution which has been brought under the specific sanctions set forth in Section 5 of the Act.

Staff: United States Attorney Brockman Adams (W. D. Washington)
Brandon Alvey and James P. Morris (Internal Security Division)

Suit to Compel Secretary of State to Validate Passport for Travel to Cuba. Alan M. MacEwan, et al. v. Dean Rusk, Secretary of State, (E.D. Pa.). On January 16, 1961, the Secretary of State announced publicly that travel to Cuba by American citizens was thereafter forbidden unless the 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.

Plaintiffs desiring to travel to Cuba for reasons not within the policy set by the State Department for such travel, were adjudged by the Secretary to be ineligible to have the passports validated for such travel. Plaintiffs thereafter, on March 12, 1963, brought this civil action, seeking, inter alia, a declaration that under the Constitution and laws of the United States, they are entitled to travel to Cuba and to have their passports properly validated for that purpose.

The answer by the defendant to the complaint was filed on May 9, 1963.

Staff: F. Kirk Maddrix and Benjamin C. Flannagan (Internal Security Division)

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LANDS DIVISION

Assistant Attorney General Ramsey Clark

Public Lands; Mineral Leasing Act; Secretary of Interior Has Authority to Cancel Administratively Mineral Lease Which Has Been Invalidly Issued; Broad Discretion of Secretary in Public Land Matters Reaffirmed; Helpful Material for Defending Suits and Public Law 87-748 Secured. Boesche v. Udall (S.Ct. No. 332, May 27, 1963). This is the second case of the current term in which the Supreme Court has reaffirmed the broad sweep of the Secretary of the Interior's authority to administer public lands. In the Boesche case, as in Best v. Humboldt Placer Mining Co., 371 U.S. 334, the court has reiterated the language of Cameron v. United States, 252 U.S. 450, that the Secretary's jurisdiction to cancel invalid interests in public lands does not depend on any express provision of the statute which authorizes the grant. This authority, in the absence of directions to the contrary, is in the Department of the Interior under the statutes which vest general managerial powers over public lands.

This case should also stop what was threatening to become a flood of litigation flowing from the Tenth Circuit's erroneous interpretation of public land law in Pan American Petroleum Corp. v. Pierson, 284 F. 2d 649. In the present case, the Supreme Court emphasized the great volume of activity represented by the mineral leasing program. The Tenth Circuit had indicated the Secretary had no authority at all to cancel a lease, once issued, because of actions which preceded such issuance. In so doing, the Tenth Circuit had relied heavily on its analogy of the mineral lease and the fee patent, which can only be cancelled in a judicial proceeding once it has been issued. The Supreme Court decisively rejected this analogy. The question is whether all authority or control over the lands has passed from the Executive Department. This is true in the case of the fee patent, but the mineral lease continues to be the subject of extensive control by the Department of the Interior. Also, since this represents an affirmance of the Court of Appeals for the District of Columbia, it tends to fortify that Court's many recent refusals to interfere with the discretionary authority of the Secretary of the Interior in public land matters. This decision should furnish helpful material in the handling of cases throughout the country under the new statute, Pub. L. 87-748, 76 Stat. 744.

The facts and rulings are as follows:

Boesche applied for an 80-acre noncompetitive lease of public domain land. At the time, there was an adjoining 40 acres of public land also available for leasing which Boesche did not include in his application. Shortly after, Cuccia and Conley applied for the same 80 acres and included the adjoining 40 acres as well in their application. A lease was issued to Boesche. Cuccia and Conley took an administrative appeal from the rejection of their application, maintaining that the Boesche application violated the departmental regulation that no lease offer should be made for less than 640 acres except where surrounded by

lands not available for leasing. The Secretary of the Interior ultimately agreed with Cuccia and Conley that Boesche's application was invalid for failure to include the 40 acres, thus leaving Cuccia and Conley the first qualified applicants under Sec. 17 of the Mineral Leasing Act, 30 U.S.C. 226.

Boesche brought this action to review the administrative decision, contending that the Secretary had no administrative authority to cancel his lease, but that such cancellation could only be accomplished by a judicial proceeding, and also claiming the Secretary's ruling was wrong. The Supreme Court upheld the authority of the Secretary to proceed with the administrative cancellation under the circumstances of this case, certiorari having been limited to this issue.

The Supreme Court held that the Secretary, under his general powers of management over the public lands, had authority to cancel this lease for invalidity at its inception unless the authority had been withdrawn by the Mineral Leasing Act. The Court based its holding on the many previous cases upholding a similar authority with respect to other interests in public lands, such as mining claims, homestead entries, surveys, selection lists, timber land entry and lieu land selections. The Court expressly rejected the theory that mineral leases are governed by the rule applied to land patents that once delivered they may only be cancelled by judicial proceedings.

It was next held that both the statutory language and the legislative history show that Section 31 of the Act reaches only cancellations based on post-lease events and leaves unaffected the Secretary's traditional administrative authority to cancel. It was Boesche's argument that the exclusive authority to cancel a lease issued under Sec. 17 of the Mineral Leasing Act is contained in Sec. 31 of the Act, 30 U.S.C sec. 188. The Court held that the purpose of the Mineral Leasing Act was to expand, not contract, the Secretary's control over the mineral lands of the United States. The Court pointed to the long administrative interpretation by the Secretary that he had the power drawn into question here, and noted that Congress had never interfered with its exercise. Congress, if it did not ratify the Secretary's conduct, at least did not regard it as inconsistent with the Act.

Finally, the Court noted that the present case was peculiarly appropriate for administrative determination in the first instance. The large scope of the mineral leasing programs would cause an unduly heavy burden both on the Interior Department and the Courts if all defective leases had to be cancelled by the courts. The Court added a caveat that "We hold only that the Secretary has the power to correct administrative errors of the sort involved here by cancellation of leases in proceedings timely instituted by competing applicants for the same land." This will not open the door to administrative abuses, because Interior regulations provide for adversary proceedings and the Secretary's final action is subject to judicial review.

Staff: Archibald Cox, Solicitor General.

Condemnation - Successful Trial. United States v. Certain Parcels of Land in the County of Prince Georges, State of Maryland, Oxen Hill Estates, Inc., et al. (Civil No. 10546, D. Md., D.J. File No. 33-21-404). - The United States condemned approximately one-half of a 184-acre tract for the Woodrow Wilson Memorial Bridge access road project. Trial commenced April 22, 1963, and was completed April 30, 1963. The Government testimony ranged from $302,000 to $321,500. The defendants' testimony ranged from $505,000 to $592,202. Verdict - $324,000.00.)

The highest and best use of the property was for residential subdivision purposes. The greater part of defendants' claim was for severance damage to the remainder by reason of the Government project. Defendants claimed that the embankment for the road blocked the view of the remaining property of the Potomac River and left the property in an irregular shape, thereby reducing its desirability for residential subdivision purposes.

It is interesting to note that the trial court refused to allow defendants to project hypothetical subdivision of this acreage and then testify to comparable sales of subdivided lots.

Staff: Messrs. Daniel Moylan and Daniel MacMullen, Jr., Assistant United States Attorneys (D.Md.) and Anthony C. Liotta, Attorney, Lands Division.

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CIVIL TAX MATTERS

Appellate Decision

Priority of Liens: General State Tax Lien Versus Later Assessed Federal Tax Lien. United States v. State of Vermont (May 9, 1963, C.A. 2; CCH 63-1 U.S.T.C. par. 9472). The Vermont statutes provide (32 V.S.A. Section 5765) that if an employer fails to pay over withheld taxes under the state income tax law the amount shall be a lien in favor of the State of Vermont "upon all property and rights to property" of the employer as taxpayer and that such lien "shall arise at the time of the assessment and demand". In this case Vermont made an assessment and demand against an employer, Cutting & Trimming, Inc., on October 21, 1958. Before the state had taken any action to enforce its lien, a federal tax was assessed against Cutting & Trimming on February 9, 1959, giving rise to a lien in favor of the United States upon all property and rights to property of the taxpayer, pursuant to Section 6321 and 6322 of the Internal Revenue Code of 1954. On May 29, 1959, the state instituted a suit in the state court to collect the tax and enforce its lien and attached a bank account belonging to the employer. Later in 1961, the United States brought its suit against the employer to reduce its tax to judgment and also to foreclose its lien against the same bank account. The Government contended that the rule first in time -- first in right did not here favor the Vermont lien, because the state's general lien was not a choate or specific and perfected lien. In the Government's view, a federal tax lien cannot be defeated by a prior lien, unless the prior lien meets the test of a choate lien, that it must be definite and specific in at least three particulars i.e., (1) the identity of the lienor (2) the amount of the lien and (3) the property to which it attaches.

The Government contended that the Vermont lien here involved while definite in two respects, as to the identity of the lienor and the amount of the lien, failed to meet the third essential element of a choate lien, since it had not, at the time the federal lien arose, attached to any specific property of the taxpayer. The Government relied upon the decisions squarely holding that a general state tax lien could not defeat the federal priority under R.S. 3466 (31 U.S.C. 191) because, whatever might be the full scope of the R.S. 3466 priority, it was not defeated by a general state tax lien lacking choateness because it had not attached to any specific property. Illinois v. Campbell, 329 U.S. 362; United States v. Texas, 314 U.S. 480; New York v. Maclay, 288 U.S. 290; Spokane County v. United States, 279 U.S. 80. The Government further argued that in United States v. New Britain, 347 U.S. 81, the court relying upon United States v. Security Trust & Savings Bank, 340 U.S. 47, had applied the same definition of a choate lien to determine priorities with respect to the federal tax lien, absent insolvency, and that this same basic test of a choate lien was the foundation of federal tax lien law. The Court of

Appeals has rejected the Government's view of the decided cases. It has conceded that the Supreme Court decisions would grant the United States priority in the event of insolvency over an earlier assessed general state tax lien. It has rejected the Government's contention that the same test applies absent insolvency, at least with regard to a state tax lien. In its view, state revenue measures should be accorded equality with federal revenue measures, and the state's declaration of a general tax lien upon assessment ought to be given the same force as the general federal tax lien. The decision raises a basic issue in federal tax lien law which has rested, to a large extent upon the premise that the federal revenue statutes are paramount, and the federal government by its necessarily general lien law has armed itself with a perfected lien on all property of a taxpayer, which cannot be defeated except by a prior lien, perfected in fact, not by any general declaration, either of a contract or state statute.

Staff: Joseph Kovner and Fred Youngman (Tax Division).

District Court Decisions

Federal Tax Lien Against Grain Harvested by Delinquent Taxpayer Accorded Priority Over Creditor's Subsequently Arising Claim to Extent of Crop Owned by Taxpayer But Not Over Taxpayer's Landlord, Who Held An Ownership Interest in His Agreed Share of Crop. Claude Berdoll v. Emzy Barker. (December 31, 1962, Texas Dist. Ct., 126th Dist., Travis County, Texas), CCH 63-1 USTC Par.9436. Pursuant to an oral contract entered into in 1960 to lease farmland from plaintiff Berdoll, taxpayer Barker agreed to cultivate the land and to pay as rent one-third of the harvested crops for 1961 or one-third of the proceeds of sale of these crops. The crops were subsequently delivered to one of taxpayer's creditors who had advanced funds to taxpayer for use in raising them, and plaintiff sued for breach of contract. The United States intervened to enforce its tax liens filed in 1958 and 1959. The issue turned initially on whether the plaintiff-landlord held an ownership interest in one-third of the crop with the taxpayer-tenant or whether he held merely a landlord's lien, subordinate to the prior federal tax liens. Texas law rests the distinction on the facts of each particular case as to the agreement between landlord and tenant, and the Court found here that there was a share-cropper's agreement under which the landlord owned one-third of the crop. The Court held, accordingly, that the federal tax liens could not attach to plaintiff's undivided one-third interest in the harvested crops. With respect to taxpayer's two-thirds interest, however, the federal tax liens attached and were entitled to priority over subsequently arising claims of taxpayer's creditors.

Staff: United States Attorney Ernest Morgan and Assistant United States Attorney William O. Murray, Jr. (W.D. Tex.); Charlotte P. Faircloth (Tax Division).

Priority of Liens; Federal Tax Liens Have Priority Over Judgment Lien on Proceeds of Sale in Execution of Judgment. Harris Equipment & Service Co. v. Samson Trailer Mfg. Corp. (April 5, 1963, County Ct., N.J.), CCH 63-1 USTC Par. 9448. Subsequent to the filing of federal tax liens against

the Samson Trailer Manufacturing Corporation, the plaintiff, Harris Equipment Service Co., obtained a money judgment against the corporation. Pursuant to a writ of execution, the sheriff levied on certain of the taxpayer-corporation's chattels and sold them at public auction. According to the terms of sale, the property was sold "subject to existing liens." Immediately upon the conclusion of the sale, the sheriff was served with a Notice of Levy and Final Demand, demanding the proceeds of sale in payment of federal taxes. In the face of this demand, the sheriff deposited the money with the court pending a determination of the rightful owner.

In a proceeding commenced by plaintiff to obtain the fund, plaintiff argued that since the property was sold subject to existing liens, the federal tax liens followed the chattels and could be enforced against them. From this, plaintiff concluded that the Government is limited to its right to go after the property and that the proceeds of sale were his exclusive property. In support of its position plaintiff cited the New Jersey rule that the proceeds of an execution sale shall be payed only to the moving judgment creditor and not in satisfaction of any other prior liens.

The Court rejected plaintiff's argument, finding that although it has been held that an execution sale in satisfaction of a subsequent judgment does not extinguish a prior federal tax lien on the property, this does not limit the Government to the remedy of following the property. The proceeds of sale were held to be property of the taxpayer albeit subject to the judgment lien. The federal tax lien, attaching to all of taxpayer's property, and being prior in time primed plaintiff's lien. The Court took especial note of the fact that the property involved consisted of chattels which would be hard to trace. It found that to require the Government to pursue these chattels would place an unwarranted burden on the Government in its efforts to collect taxes.

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

Priority of Liens: Federal Tax Lien Filed in County Where Taxpayer Domiciled Entitled to Priority on Proceeds of Judgment Obtained by Taxpayer as Against Lien of Judgment Creditor Subsequently Perfected Even Though Tax Lien Not Recorded in County Where Taxpayer's Judgment Obtained. Spade v. The Salvatorian Fathers, et al. (April 2, 1963, Superior Ct., N.J.), CCH 63-1 USTC Par. 9450. The United States filed a tax lien in Camden County against taxpayer on April 20, 1960. Interstate Iron and Supply Company secured a judgment against the taxpayer on May 1, 1960. Taxpayer then brought an action against The Salvatorian Fathers under a construction contract. The Salvatorian Fathers filed an interpleader action naming taxpayer as a party, and deposited certain funds with the Clerk of Court in Trenton, New Jersey. On December 1, 1961 taxpayer recovered a judgment for $2,000. Interstate levied on the fund deposited with the Clerk of Court on September 27, 1961. Taxpayer and The Salvatorian Fathers were both domiciled in Camden County and the construction contract was to be performed in said county. The Court held that when taxpayer brought suit against The Salvatorian Fathers he was possessed of

a chose in action to which the federal tax lien attached. Disposing of Interstate's contention that prior to the date of judgment taxpayer had only an inchoate right to the fund to which the federal tax lien could not attach, the Court pointed out that assuming this to be true, then Interstate's levy on September 27, 1961 would also be defective. Turning next to the question of the situs of the property, the Court held that the situs of personal property and intangibles is the domicile of the owner thereof. Consequently, since the federal tax lien was filed in the domicile of the taxpayer, it was entitled to priority over the lien of the judgment creditor Interstate. However, the Court went on to say that even if the property be given a situs in Trenton, the United States would still be entitled to priority over Interstate. The Court's reasoning appears to be based on the theory that since the federal tax lien attached to taxpayer's right to the property (the chose in action), a subsequent transfer of the property to another county had the effect merely of passing the property cum onere. This aspect of the Court's decision is not as sweeping as might first appear, when it is remembered that the construction contract was to be performed in the county of taxpayer's domicile.

Staff: United States Attorney David M. Satz, Jr.; Assistant United States Attorney Herbert S. Jacobs (D. N.J.).

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