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BULLETIN

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LAW BOOKS AND CONTINUATION SERVICES

The Administrative Division maintains a mailing list for continuation services and pocket parts for existing sets of books in the United States Attorneys' offices and automatically orders these continuations from year to year.

Some offices have more than two sets of books. In the past few years there have been a number of changes in the places where United States Attorneys maintain permanent personnel, with the result that continuation services are probably being delivered to places where no personnel is stationed.

It will be appreciated if you will review your requirements for these continuation services, and advise the Administrative Division of any changes in your district that should be reflected in our mailing list. It is also requested that where more than one set of books is maintained in a district that you advise whether there is a continuing need for these books.

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ANTITRUST DIVISION

Assistant Attorney General William H. Orrick, Jr.

SHERMAN ACT

Price Fixing-Steel Castings; Steel Castings Companies Indicted. United States v. Blaw-Knox Company, et al. (S.D.N.Y.). On July 2, 1963 the grand jury returned an indictment charging eight steel companies and nine steel executives with a violation of Section 1 of the Sherman Act. The indictment charged that the defendants and co-conspirators, beginning as early as 1956 and continuing to at least 1961, combined and conspired to stabilize the prices of steel castings. Steel castings are produced by pouring molten steel into molds designed to produce a finished product in the shape desired after solidification. They have numerous applications in many industries, including, among others, construction, metal working, mining, electrical, shipbuilding, petroleum and cement. The defendant corporations and co-conspirators' total annual sales of steel castings average approximately $75,000,000. They are among the nation's largest producers of heavy steel castings accounting for approximately 80% of national heavy steel castings sales.

The following corporations and individuals are named as defendants:

Corporation	Individual	Capacity
Blaw-Knox Company	Sylvester J. Moran	Vice President and General Manager - Equipment Division
	Benjamin P. Hammond	Vice President - Eastern Casting Sales
Textron Inc.	Thomas F. Dorsey	President, Pittsburgh Steel Foundry Company, a Division of Textron Inc.
	Clyde L. Hassel	Vice President - Sales, Pittsburgh Steel Foundry Company a Division of Textron, Inc.
General Steel Industries, Inc.	Howard F. Park, Jr.	Vice President - Sales
Erie Forge & Steel Corporation	Emil Lang	Chairman of the Board
Bethlehem Steel Company	Erb Gurney	Manager of Sales Forgings, Castings and Special Products

Birdsboro Corporation	G. Clymer Brooke	Chairman of the Board
The Penn Steel Castings Company	Alvin M. Andorn	Chairman of the Board and President
Baldwin-Lima-Hamilton Corporation		

Named as co-conspirators are the E. W. Bliss Company and the Falk Corporation.

The indictment charged that the defendants and co-conspirators effectuated general price increases; revised price schedules pursuant to an agreed-upon formula; drafted a comprehensive steel castings price catalogue; agreed upon special price schedules for certain types of steel castings; agreed upon the prices for steel castings extras, such as alloy additions; agreed to quote prices for steel castings no lower than established prices; exchanged information helpful to maintaining identical f.o.b. prices; policed errors in pricing; and to accomplish the foregoing, held monthly meetings at various hotels and clubs in New York, Pittsburgh, Philadelphia and Absecon, New Jersey and made telephone calls between meetings.

As a result of the conspiracy, prices for steel castings were stabilized at non-competitive levels and purchasers thereof were deprived of the benefit of free and open competition.

Staff: John C. Fricano, Walter W. Dosh and S. Robert Mitchell. (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General John W. Douglas

COURT OF APPEALS

FEDERAL CIVIL SERVICE

Civilian Personnel Not Entitled To Be Transferred Together With Military Contingent When Airbase Deactivated. Edward S. Enos v. John Macy, Jr., (C.A.D.C., June 27, 1963). Appellant, a veteran preference eligible, was employed overseas as a civilian auditor, GS-9, by the Air Force and was stationed at Etain Air Force Base, France. In 1960, that base was deactivated and the Fighter Bomber Wing which had been stationed there was transferred to Germany. Appellant's function was abolished and reduction-in-force procedures applied within his competitive area, which included the whole of France. As appellant was lowest on the retention register he was reached by the reduction-in-force and separated from the civil service. He appealed his separation to the Civil Service Commission, claiming that his function was transferred together with the Fighter Bomber Wing to Germany and that he was entitled to be transferred along with it. The Commission, being of the view that appellant had been attached not to the Bomber Wing but to the base and that his function was to provide services for whatever military organization happened to be located thereon, sustained his separation. The District Court and the Court of Appeals agreed.

Staff: United States Attorney David C. Acheson; Assistant United States Attorneys Frank Q. Nebeker and William H. Wilcox (D.C.)

Removal of Civilian Air Force Employee Upheld. Woodrow Studemeyer v. John W. Macy, Jr., (C.A.D.C., June 26, 1963). The Court of Appeals -- finding no procedural irregularities -- refused to upset the removal of appellant from his former position with the Department of the Air Force. The Court indicated that, though there might "be ground for reasonable differences of opinion as to whether the cause for which the personnel action was taken was grave enough to warrant depriving appellant of his position," this inquiry is primarily for the removing agency and the Civil Service Commission and not the courts. Additionally, the Court reiterated that there is no violation of due process merely because an employee's removal is eventually effected by the same officer who had initially lodged the critical charges against him.

Staff: United States Attorney David C. Acheson; Assistant United States Attorneys Frank Q. Nebeker, Barry I. Fredericks, and Robert B. Norris (D.C.).

FEDERAL TORT CLAIMS ACT

United States Held Liable for Negligence of National Guardsman Also Acting as "Caretaker"; Damages for Loss of Airplane Limited to Fair Market Value. United States v. State of Maryland, for the use of Meyer, (C.A.D.C., June 15, 1963). These cases arose out of a mid-air collision between a jet trainer owned by the United States and assigned to the Maryland Air National Guard, and a passenger airplane of Capital Airlines. The pilot of the trainer was the only survivor. These actions were brought for the deaths of the pilot and co-pilot of the Capital Airplane, and by Capital Airlines for the loss of its airplane. The district court found that the crash was caused by the negligence of the pilot of the National Guard airplane, who was an officer of the Maryland Air National Guard and was also a civilian air technician, employed pursuant to the "caretaker" statute, 32 U.S.C. 709. Following United States v. Holly, 192 F. 2d 229 (C.A. 10), and three other appellate decisions, the district court held that in his capacity as a caretaker the pilot was an employee of the United States within the meaning of the Tort Claims Act. It also ruled that, in that capacity, he was acting within the scope of his federal employment under the respondeat superior rules of Maryland law, and, therefore, held the United States liable for his negligence. Although the Capital airplane had cost approximately $1,000,000 when new, and similar airplanes had been sold by Capital for $725,000, the district court awarded Capital $1,210,000 for the loss of its airplane. It ruled that, since there were no used Viscount Airplanes on the market in the United States, it would cost that much to replace the destroyed airplane with a new airplane of the same kind.

On appeal, the Government urged that, since the flight in question was a training flight, and the training of the National Guard is committed to the State, the pilot was acting exclusively under the control of State officials in the performance of his flight, and that in all activities caretakers are subject to the exclusive control of State officials and that, in the absence of the right of control the United States was not liable for their actions under the State respondeat superior law. It also contended that Congress never intended "caretakers" to be federal employees, and expressly rejected attempts to broaden the Tort Claims Act to cover them. H. Rept. 1928, 86th Cong., 2d Sess. 32 U.S.C. (Supp - 1962) 715. On the question of damages it was argued that the district court had erred in assessing damages on the basis of replacement cost rather than fair market value.

The Court of Appeals affirmed the district court on the question of liability, holding that the employment relationship between a caretaker and the Federal Government was itself sufficient to give the United States the "right of control" necessary to impose respondeat superior liability. On that issue the decision appears to be in conflict with Pattno v. United States, 311 F. 2d 604 (C.A. 10), certiorari denied. On the question of damages to Capital Airlines, however, the Court reversed, holding that the proper measure of damages for the airplane was fair market value, and replacement value is not the equivalent of market value.

Staff: David L. Rose (Civil Division)

SOCIAL SECURITY ACT

Courts Are Without Jurisdiction to Review Denial of Disability Benefits Where Suit Was Not Filed Within Sixty Days of Final Administrative Action; Decision of Secretary Refusing to Reopen Prior Final Decision Not Subject to Judicial Review. Frank H. Filice v. Celebrezze, (C.A. 9, June 26, 1963). On April 26, 1960, the Appeals Council of the Social Security Administration denied appellant's application for disability benefits. Appellant filed a petition to reopen that decision on December 22, 1961, which petition was denied on January 8, 1962. On March 7, 1962, appellant instituted suit to review both the denial of his claim for benefits and the propriety of the Appeals Council's refusal to reconsider its prior determination. The district court dismissed the complaint for lack of jurisdiction.

The Court of Appeals affirmed holding: (1) under 42 U.S.C. 405(g), suits challenging decisions of the Secretary must be instituted within sixty days of the final administrative action, (April 26, 1960 here), and (2) Congress has not authorized judicial review of orders of the Secretary refusing to reopen prior final decisions. With respect to the latter the Court noted that it could not even afford equitable relief though it was of the view that, under the governing administrative regulations, the Appeals Council should properly have granted appellant's petition to reopen.

It should be noted that this issue has also been decided favorably to the Government's position in the Third Circuit. See Blanche Phillips v. Celebrezze, (C.A. 3, decided June 20, 1963.)

Staff: United States Attorney Cecil F. Poole (N.D. Calif.)

TRANSPORTATION

Intrastate Government Shipments Made Pursuant to Quotation Filed With United States Are Subject to Interstate Commerce Act; Carrier Has Burden of Proving Propriety of Tariffs Charged. United States v. Jess E. Francis, (C.A. 9, June 28, 1963). This suit was instituted by the United States, seeking restitution under Section 322 of the Transportation Act of 1940, 49 U.S.C. 66, of tariff overpayments made on several freight shipments between points in California consigned pursuant to Government bills of lading. The shipments were carried under a Government Quotation (Loretz Quotation), to which appellee was a party. That quotation was filed with the United States pursuant to Section 22 of the Interstate Commerce Act, 49 U.S.C. 22. The shipments in question fell into three different categories. First are the shipments described on the appropriate bills of lading as "Scrap Noibn [not otherwise indexed by name] Having use for Resmelting, NMFC #11 [National Motor Freight Classification No. 11] Item #13850." Although "Scrap, Noibn" was indicated as the articles being shipped on each of the bills of lading, the Government contended that the article actually shipped was empty cartridge cases and that, notwithstanding the bill of lading classification, freight charges had to be determined and

collected according to the proper classification. The rate for empty cartridge cases is lower than that applicable to scrap, noibn. The district court disagreed. It held that the description on the bills of lading constituted offers by the United States to pay according to the noted classifications which offers were thereafter accepted by the carrier. The second category consisted of bills of lading covering mixed shipments calling for varying rates. The bills of lading contained the actual weight of each item in each shipment and in addition noted the rate applicable to the higher-rated item. Again the district court concluded that the notation constituted an offer by the United States to pay at the noted rate with regard to all articles shipped under those bills of lading. The third group raised an issue involving exclusive use of the carrier's equipment. The district court agreed with the carrier that the request for what amounted to one set of 20 foot doubles, chargeable at minimum weight of 40,000 pounds, and two 35 foot semis, chargeable at 36,000 pounds each, sufficiently evidenced requests for exclusive use under the appropriate Loretz Quotation paragraph.

On the Government's appeal the Court affirmed the district court with respect to the first and third groups, reversing as to the second. It noted that the decisive inquires were factual in nature -- i.e, (1) whether the items in the first group were returned cartridge cases or compacted cartridge cases (Scrap, Noibn); (2) whether the parties "agreed" that the higher rate should be charged for all items in the mixed shipments; and, (3) whether the bills of lading covering the third group of shipments demonstrated a request for exclusive use -- and concluded that the district court's findings were clearly erroneous only with respect to the second category.

While resolving most of the factual issues adverse to the Government the opinion does enunciate three general principles which should be of assistance in future litigation. First, a party to a quotation concerned with tariffs to be charged the United States, which quotation is filed with the United States, is a "common carrier subject to the Interstate Commerce Act" within the meaning of 49 U.S.C. 322 and is subject to an action for restitution of overpayments notwithstanding that all of the critical shipments were entirely intrastate. Secondly, the court's opinion makes clear that the carrier must bear the burden of proving the propriety of the rates charged irrespective of who is the moving litigant. And, thirdly, the tariff is to be figured at the rate applicable to the item actually shipped and not to the item described on the bill of lading.

Staff: Sherman L. Cohn (Civil Division)

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

CONFLICT OF INTEREST

Attached to the July 12, 1963 issue of the Bulletin was a resume of the rulings of the District Court for the District of Maryland dated February 28, 1963 (215 F. Supp. 300) and March 29, 1963 (not yet reported) in the case of United States v. Thomas F. Johnson, Frank W. Boykin, J. Kenneth Edlin, and William L. Robinson, involving conspiracy to defraud the United States in the making of a speech on the floor of the House of Representatives and intervening with the Department of Justice, and conflict of interest in dealings with the Department of Justice by Congressmen.

GOLD RESERVE ACT

Current Applicability of 12 U.S.C. 95a and Executive Order No. 6260, as Amended, Dealing With Violations Involving Gold, Upheld. United States v. Lane (S.D. N.Y.). On June 6, Judge Sugarman denied a motion to dismiss two counts of an indictment charging violations of 12 U.S.C. 95a and Executive Order No. 6260. The attack on the indictment was based largely on United States v. Briddle, 212 F. Supp. 584 (S.D. Cal., 1962). In that case it was held that the Executive Order, which in substance is the same as when it was originally promulgated by President Roosevelt in 1933 for purposes of the depression emergency, was not currently in effect. The statute authorizes regulation of gold and imposes criminal penalties for violations only "during the time of war or during any other period of national emergency declared by the President."

Judge Sugarman, unlike the Court in Briddle, took cognizance of, and held valid, action taken by President Eisenhower in 1960 and 1961 to continue in effect and further amend the provisions of Executive Order No. 6260. This action was based on the Korean-Cold War emergency declared in 1950 by President Truman in Proclamation No. 2914, which remains in effect. It is expected that the opinion in the instant case will be of considerable value in persuading other District Courts to repudiate the Briddle decision and thus aid in effectively enforcing the Federal restrictions on the handling of gold.

Staff: Assistant United States Attorney Richard C. Casey (S.D. N.Y.).

CONFLICT OF INTEREST

Separate Counts of Indictment Each of Which Charges Defendant With Separate Receipt of Compensation in Violation of 18 U.S.C. 281 Are Not Fatally Duplicative as Charging Several Violations Where Only One Has Occurred. United States v. Addison R. Ketchum (C.A. 2, June 25, 1963).

Eight counts of the indictment charged defendant with violation of 18 U.S.C. 281, now superseded by 18 U.S.C. 203, 76 Stat. 1121 (1962); the ninth count charged him with conspiracy. The charges grew out of defendant's activity, while an employee of an agency of the Department of State, in relation to a contract between that agency and the National Economic Council of the Philippines. The pertinent language of 18 U.S.C. 281 interdicts the receipt of "any compensation for any services rendered . . . "

The first eight counts of the indictment were presented as a three column table with the columns respectively headed "Count", "Date Compensation Received", and "Compensation". The "Counts" were numbered 1 through 8, each with a separate date and amount received. The District Court granted defendant's motion to dismiss Counts 2-8 as mere "duplications" of Count 1 not stating separate offenses.

The Government appealed to the United States Court of Appeals under 18 U.S.C. 3731, contending inter alia that the District Judge misconstrued both 18 U.S.C. 281 and the indictment. Defendant argued that 18 U.S.C. 281 proscribes an overall course of conduct, and that the District Judge properly refused to make a separate offense out of each passive receipt of compensation by defendant.

In reversing the District Court's dismissal, the Court of Appeals upheld the Government's argument that the language of the indictment was broad enough to permit the prosecution (which had not yet given any bill of particulars) to prove that each of the eight counts referred to a separate payment for a separate and distinct service by defendant. Moreover, the Court stated that, even if the evidence at trial should show only one act of service by defendant, the District Court's dismissal was premature, since at the close of the Government's case the defendant may successfully insist that all of the counts are merely variants of a single offense. United States v. Universal C.I.T. Credit Corp., 344 U.S. 218 (1952). Defendant is not forced to face multiple sentences, since the decision as to the unit of punishment is not controlled by the form of the indictment.

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

IMMIGRATION PROSECUTIONS

Sham Marriages to United States Citizens to Enable Aliens to Obtain Permanent Residence in United States; Effect of Citizen Spouse's Lack of Knowledge of Alien's Fraudulent Objective; Necessity of Establishing Invalidity of Marriage Under State Law. United States v. Jose Diogo et al. (C.A. 2, June 28, 1963). In this case, the Second Circuit, in an opinion by Judge Waterman with Judge Friendly concurring, set aside appellants' convictions in the Southern District of New York (a) on separate

charges that each had conspired with one Adria Gonzalez and others to make false statements in violation of 18 U.S.C. 1001 and to make and present false statements under oath in visa matters in violation of 18 U.S.C. 1546 and to defraud the United States in the exercise of its governmental function of administering the immigration laws and (b) of substantive charges under 18 U.S.C. §§1001 and 1546. The theory of the prosecution was that appellants had conspired to enter into and had entered into, sham marriages with United States citizens for the purpose of obtaining permanent-resident status in this country. The court read the indictment as charging the basic substantive offense of making false representations with respect to marital status.

The reversal as to appellant Costa was grounded on the conclusion that the woman he married went into the marriage in good faith and with no knowledge of his ulterior motives and, therefore, that the marriage was valid when he made his representations to the immigration authorities.

As to appellants Diogo and Gonzalez, the Court argued that, in a prosecution for misrepresentation, the Government has the burden of proving that the representations were literally false and were known by defendant to be false when they were made and that the Government had not fulfilled its burden in this case of proving that the marriages were void at the time appellants' representations were made. In the latter connection, the Court held (a) that it was reasonable to suppose that Diogo's and Gonzalez' statements were made with New York law in mind, since their marriages were arranged in that jurisdiction, they were domiciliaries thereof when the representations were made, and Gonzalez' marriage was celebrated there, and (b) that the New York courts had repeatedly held that allegedly "sham" or "limited purpose" marriages were neither void nor voidable and, thus, were dissolvable only by a decree of divorce. The Court further held that no different conclusion would be justified as to Diogo if the law of New Jersey, where he was married, were held to be controlling. The Court rejected the Government's argument, based on Lutwak v. United States, 344 U.S. 604, involving prosecutions based on sham marriages to enable aliens to obtain permanent residence under the War Brides Act, that the validity of appellants' marriages was immaterial. In rejecting the argument, the Court concluded that the Supreme Court relied in Lutwak on defendants' concealment of the agreement to separate and that the holding was not controlling where, as here, misrepresentation is the basis of the prosecution.

Judge Clark dissented on the ground that the case was controlled by Lutwak and the Second Circuit's earlier holding United States v. Rubenstein, 151 F. 2d 915, certiorari denied 326 U.S. 766.

Staff: United States Attorney Robert M. Morgenthau; Assistant United States Attorneys John W. Mills and Andrew T. McEvoy, Jr. (S.D. N.Y.).

IMMIGRATION PROSECUTION

Conspiracy to Defraud United States by Corruptly Procuring Legal Residence for Alien Through Sham Marriage With United States Citizen; Surplusage in Indictment; Fatal Variance Where Proof Reflected That Citizen Wife Was Not Aware That Marriage Was Sham. United States v. Vazquez et al. (C.A. 3, June 26, 1963, opinion by Ganey, C.J., with Judges Kalodner and Hastie, concurring.) Appellants Vazquez and Elespe were convicted in the District of New Jersey on count one of a three-count indictment, which count charged them with conspiring with Miguel Martins and Maximina Rivera Martins and others to the grand jury unknown "to commit certain offenses against the United States, to wit, to defraud the United States of and concerning its governmental function in the administration of the Immigration Laws" by corruptly procuring legal residence for Miguel, an alien, through a sham marriage with Maximina, a United States citizen. Appellants contended that count one did not properly charge an offense because (a) it was drawn under the first clause of the conspiracy statute, 18 U.S.C. 371, prohibiting conspiracies to commit offenses against the United States, rather than the second clause, prohibiting conspiracies to defraud the Government; (b) there is no substantive offense to defraud the United States of a governmental function; and (c) the indictment did not cite the particular statute with respect to which the conspiracy was formulated. While agreeing with appellants that, independent of the second type of conspiracy under Section 371, there is no substantive offense of defrauding the Government, the Court concluded that the words "to commit certain offenses against the United States, to wit," were surplusage, and disregarding those words, the indictment properly charged an offense of conspiracy to defraud the United States. However, the Court set aside Vazquez' and Elespe's convictions on the ground that there was a fatal variance between the indictment and the proof in that the indictment charged that it was part of the conspiracy that the marriage between Miguel and Maximina would be in form only and that they would not live together as husband and wife and the proof did not establish that Maximina was aware that the marriage was to be in form only. To the contrary, she testified that she wanted to be married, that she would have been happy to have lived with Miguel at the time of their marriage, but that she would not do so now because she had since learned that the marriage was a false one.

Staff: United States Attorney David M. Satz, Jr.; Assistant United States Attorney John H. Yauch, Jr. (D. N.J.).

IMMIGRATION PROSECUTION

Conspiracy; Validity of One-Count Conspiracy Indictment Held Not Affected by Allegation of Substantive Offenses in Same Count; Contention of Duplicity Rejected; Charge of Conspiracy Where Agreement Is Element of Substantive Crime. Reno v. United States, (C.A. 5), 317 F. 2d 499. The one-count indictment in this case charged that the "defendants herein, did willfully, feloniously and knowingly conspire, combine, confederate and agree together . . . to commit an offense against the United States,

to wit: to violate Title 8, United States Code, Section 1324, that is to say, they did knowingly and willfully conceal, harbor and shield from detection, and did knowingly and willfully attempt to conceal, harbor and shield from detection . . . EMANUELE NICOSIA, an alien not lawfully entitled to enter or reside within the United States, well knowing and having reasonable grounds to believe that the entry of the said EMANUELE NICOSIA into the United States occurred less than three years prior thereto and they did transport and move, and did attempt to transport and move within the United States by means of transportation or otherwise, the said EMANUELE NICOSIA, in violation of Title 18, United States Code, Section 371." (Emphasis added.) Seven overt acts committed in furtherance of the conspiracy were alleged in the indictment.

Two days prior to the trial, a motion was made to dismiss the indictment on the grounds that the indictment did not charge an offense, was duplicitous, and was vague and ambiguous. The motion was denied by the trial court. Both the United States Attorney in his opening statement to the jury and the trial court in its charge explained to the jury that the defendants were charged solely with the crime of conspiracy.

On appeal, the Fifth Circuit sustained the validity of the indictment. After averting to the rule that duplicity is not a fatal defect, the majority held that the indictment charged defendants solely with the crime of conspiracy and that the allegations of acts which would constitute violations of 8 U.S.C. 1324 were merely descriptive of the conspiracy.

The Court rejected appellant's contention that, under the general rule that conspiracy may not be added to a substantive charge where an agreement of two parties is necessary for the completion of the substantive crime and there is no ingredient in the conspiracy which is not present in the completed crime, this indictment did not charge an offense inasmuch as the object of the conspiracy was the commission of the substantive crime of harboring, concealing, shielding, and transporting an alien not authorized to enter the United States and the agreement of two or more persons is necessary for the completion of the crime. According to the Court, there were two answers to the contention: (1) the alien would not be guilty under the substantive statute of harboring himself, and (2) while only two persons are necessary for the completion of the substantive crime, the indictment charged a conspiracy between four defendants and others. Thus, there was an ingredient not present in the completed crime, the participation of at least one of defendant's co-conspirators in addition to the participation of the alien.

The majority pointed out that the test of an indictment is not whether it could have been more definite and certain, but whether it sufficiently apprises the defendant of what he must be prepared to meet, and in the event other proceedings are taken against him on similar charges, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction. The majority concluded that this indictment set forth the three requirements of a conspiracy charge: (1) the agreement to commit the specific offense, (2) the object of the offense, and (3) an overt act.

Staff: United States Attorney William A. Meadows, Jr.; Assistant United States Attorney Alfred E. Sapp (S.D. Fla.).

OBSCENITY

Timeliness of Challenge to Array; Bill of Particulars; Motion to Transfer. United States v. West Coast News Company, Inc., et al (W.D. Mich., April 19, 1963). In an omnibus opinion, District Judge Noel P. Fox granted the Government's motion to strike defendants' motion to dismiss the indictment on a challenge to the array, and denied, inter alia, defendants' motion for a bill of particulars and their renewal motion to transfer to the Southern District of California pursuant to Rule 21(b), F.R. Crim. P. The decision is reported at 216 F. Supp. 911.

The Court found both implied and express waiver by defendants of their jury challenge. Implied waiver, on the authority of Agnew v. United States, 165 U.S. 36, was based on the facts that (1) although defendants knew of the exact nature and extent of the charges which the grand jury was considering against them more than a month before return of the indictment (as demonstrated by a letter written by their attorney to the grand jury giving his opinion that the books under investigation were not obscene and hence no indictment should be returned), the motion challenging the array was not filed until one year, ten months and three days after return of the indictment; and (2) defendants delayed filing their jury challenge until after a previously filed motion to transfer was denied, the Court noting that the nature of a transfer motion is to place the case in a posture for trial, since, had the motion been granted, a challenge in the transferee district to grand jury selection practices in the indictment district would have been precluded. Express waiver was found because defendants' counsel, during argument on the original motion to transfer, had stated that he was not asking the court to quash the indictment, but only asking to have the trial in a place where the defendants would have a fair opportunity to defend themselves.

The Government's motion to strike was not filed until the day before hearing was set on the jury challenge, almost one year after the filing of the latter. Although not set forth in the opinion, the Court stated on the record in chambers, on March 29, 1963, that timeliness is a matter of substance which the party challenging the array must affirmatively prove, and that although it is good practice to raise lack of timeliness by a motion to strike, the issue can be raised at any time, by brief or oral argument, as part of the answer to the challenge motion. The Government's motion to strike was, therefore, not filed untimely.

The Court also held that defendants were not entitled to a bill of particulars setting forth the standards and geographical limits of the "community" under whose standards the books which are the subject of the indictment are deemed obscene, setting forth specific references to the dominant theme of the books or to the parts of the books which are charged to be obscene, defining the terms "obscene," "lewd," "lascivious" and "filthy," setting forth which of the defendants caused the mails to be used or the name of the common carriers used to convey the books in commerce, or stating whether or how it is claimed that defendants knew the books were obscene and non-mailable.

Defendants' renewal of their motion to transfer was predicated in part upon a contention that Justice Harlan's opinion in Manual Enterprises v. Day, 370, U.S. 478, indicated a change in law, i.e., that obscenity is to be judged by a "national" rather than by a "local" standard. The Court noted, however, that Justice Harlan's opinion was on behalf of himself and Justice Stewart only, and that, in any event, there is no contradiction between saying that a "national" standard must be applied and saying that its application is to be made by a jury drawn from the district into which allegedly obscene material has been sent.

Staff: United States Attorney George E. Hill and Assistant United States Attorney Robert G. Quinn, Jr. (W.D. Mich.); Marshall Tamor Golding (Criminal Division).

* * *

IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

DEPORTATION

Possible Incarceration for One or Two Years for Desertion of Vessel Is Not Physical Persecution for Purpose of Withholding Deportation. Attilio Zupicich v. Esperdy (C.A. 2, June 28, 1963.) Appellant brought this action in the district court to review the Attorney General's order denying his application to have his deportation to Yugoslavia withheld under Section 243(h) of the Immigration and Nationality Act, 8 U.S.C. 1253(h), on the ground that he would be subject to physical persecution. He contended unsuccesfully in the district court that such order was arbitrary and capricious.

The Second Circuit affirmed the judgment of the lower court holding that the evidence in the record did not support appellant's claim that he would be physically persecuted because of his Catholic religion, and that his possible incarceration for one or two years for deserting a Yugoslav vessel was not the physical persecution contemplated by Section 243(h).

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

Formosa Properly Designated as Country of Nationality Under Deportation Statute for Natives of Mainland of China. Ng Kam Fook v. Esperdy and Au Tong v. Esperdy (C.A. 2, July 2, 1963.) In the above cases the Second Circuit ruled, as have all other circuits presented with the issue, that the Attorney General may, under Section 243(a) of the Immigration and Nationality Act, 8 U.S.C. 1253(a), designate Formosa as the country of nationality for deportation of natives of the mainland of China. See Dai Ming Shih et al. v. Kennedy, 297 F.2d 791 (C.A., D.C.), cert. den. 369 U.S. 844; Liang v. United States Dept. of Justice, 290 F.2d 614 (C.A. 9); Chao Ling Wang v. Pilliod, 285 F. 2d 517 (C.A. 4); Rogers v. Cheng Fu Sheng, 280 F.2d 663 (C.A., D.C.), cert. den. 364 U.S. 891; Leong Leun Do v. Esperdy, 309 F.2d 467 (C.A. 2); Lee Wei Fang, Wang Siang-Ken, et al. v. Kennedy, 317 F.2d 180, cert pend. (C.A., D.C.).

Appellants contended that by reason of their birth in the territory now controlled by Communist China they should have been found by the Attorney General to be nationals of and ordered deported to Communist China. The Court concluded that the designation of the Attorney General was justified by reason of the fact that our Government recognizes Formosa as the de jure government of China and in the light of the purpose of Section 243(a) to facilitate deportations. The Court said that even assuming Communist China to be a country within the meaning of the statute, appellants presented no evidence that actually they were nationals of Communist China. The Court

pointed out that their original allegiance was to the Nationalist Government of Formosa and that the record failed to show a change in such allegiance.

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

* * *

INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Passports; Three-judge District Court Sustains Constitutionality of Section 6 of Internal Security Act of 1950. Flynn v. Secretary of State (D. D.C.); Aptheker v. Secretary of State (D. D.C.). On October 20, 1961, the Communist Party of the United States was finally ordered to register as a Communist-action organization pursuant to Section 7 of the Internal Security Act of 1950, 50 U.S.C. 786. At that time the provisions of Section 6 of the same Act, 50 U.S.C. 785, became operative. Section 6 provides that when there is in effect a final order of the Subversive Activities Control Board requiring a Communist organization to register with the Attorney General, it shall be unlawful for any member of such Communist organization, with knowledge and notice that such order has become final, to use or attempt to use a United States passport.

The Secretary of State had reason to believe that Elizabeth Gurley Flynn was the National Chairman of the Communist Party of the United States and that Herbert Aptheker was a member of the Communist Party and editor of the Party's self-described theoretical organ, "Political Affairs." Accordingly, on January 22, 1962, the Secretary of State tentatively revoked their passports on the ground that use by them of a United States passport would violate the provisions of Section 6 of the Act. Following an administrative hearing and appeal to the State Department's Board of Passport Appeals, the Secretary found that there was a preponderance of evidence in the record to show that at all material times each plaintiff was a member of the Communist Party with knowledge or notice that such organization had been required to register, and confirmed the revocation of each plaintiff's passport.

Plaintiffs filed separate suits contending that Section 6 of the Act was unconstitutional as applied to them, for the following reasons: (1) Plaintiffs are deprived without due process of law of their constitutional liberty to travel abroad, in violation of the Fifth Amendment to the Constitution; (2) Plaintiffs' rights to freedom of speech, press, and assembly are abridged in violation of the First Amendment; (3) A penalty is imposed on plaintiffs without a judicial trial and, therefore, constitutes a bill of attainder in violation of Article I, Section 9 of the Constitution; (4) Plaintiffs are deprived of the right to trial by jury as required by the Fifth and Sixth Amendments and Article III, Section 2, Clause 3 of the Constitution; and (5) The action of the Secretary of State under Section 6 constitutes imposition of a cruel and unusual punishment in violation of the Eighth Amendment. Because of the similarity of issues, the cases were joined, and because the suits attacked the constitutionality of an Act of Congress, the consolidated cases were referred to a statutory three-judge court composed of Circuit Judge Burger and District Judges Hart and Walsh.

The cause came before the Court on cross-motions of the parties for summary judgment, and the Court, in an opinion written by Judge Walsh, sustained the constitutionality of Section 6 of the Act. The Court ruled that the congressional findings of fact set forth in the 1950 Act, 50 U.S.C. 781, as to the nature of the world Communist movement and the threat it poses to the internal security of the United States, were binding on the Court. In response to plaintiffs' objections that the findings were made some thirteen years ago, the Court noted that no evidence had been adduced that the "leopard" of the world Communist movement had changed a single spot in the past thirteen years, "nor would common sense nor common knowledge indicate any such change." The Court also noted that the Communist Party had not petitioned the Attorney General for an order seeking cancellation of the registration order.

The Court observed that the terms of Section 6 apply only to present members of the Communist Party who possess the requisite knowledge required by the statute. Recognizing that the statute did deprive plaintiffs of their liberty to travel to those areas of the world where passports are needed, the Court nevertheless held that the passport ban bore a reasonable relation to the evil which the statute was designed to reach. The Court also ruled that the intended purpose of plaintiffs' travel did not have to be established at the administrative hearing, for the Congress could reasonably presume that the purpose of such travel by present members would be to further the purposes of the world Communist movement. The Court also ruled that the travel restriction was not punishment but a legitimate exercise of the authority of Congress to regulate the travel of members of Communist organizations based on the legislative determination that such travel would be inimical and dangerous to the security of the United States. Accepting the Government's contention that Section 6 is a valid regulatory device, reasonably drawn to meet the dangers of foreign subversion, and necessary to the preservation of government, the Court ruled that the Constitution does not prohibit the denial of passports to plaintiffs as present members of a Communist organization under Section 6 of the Act.

Staff: Benjamin C. Flannagan (Internal Security Division) argued the cause for defendant. With him on the brief were Assistant Attorney General J. Walter Yeagley and Oran H. Waterman (Internal Security Division).

Immigration and Nationality Act - Traveling Without Passport. United States v. Helen Maxine Levi Travis (S.D. Calif.). On June 26, 1963, a grand jury returned a two-count indictment against Helen Maxine Levi Travis charging that she departed from the United States for Cuba via Mexico on two separate occasions without bearing a valid passport in violation of 8 U.S.C. 1185(b).

Travis departed from the United States without having a valid passport on January 22 and August 18, 1962 for Havana, Cuba, by way of Mexico. Travis surrendered herself to the United States Marshal on June 27, 1963, and was released on $2,500 bail by the United States Commissioner. Her arraignment was set for July 15th.

This case marks the first prosecution under this statute for unlawful departure from the United States. One previous case, United States v. William Worthy, Jr., was tried under this statute. However, that prosecution was for unlawful entry into the United States from Cuba.

Staff: United States Attorney Francis C. Whelan (S.D. Calif.)
Alta M. Beatty and Paul C. Vincent (Internal Security Division)

Unlawful Exportation of Arms and Ammunition. United States v. Pedro Rosales Pavon. (22 U.S.C. 1934) A four count indictment was returned on April 4, 1963 against the subject, a merchant seaman and a citizen of Honduras (See Bulletin, Vol. 11, No. 8.) At trial the two counts charging failure to register with the State Department as a person "in the business" of exporting arms and ammunition were dismissed by the court because the evidence failed to establish the defendant was "in the business" within the meaning of the statute and regulations. On June 13, 1963 the jury returned a verdict of guilty as to the other two counts and on June 17, 1963 the court sentenced the defendant to imprisonment for a period of two years then suspended the imposition of sentence and placed the defendant on probation for a period of two years.

Staff: First Assistant United States Attorney Walter F. Gemeinhardt (E.D. La.)

Transmitting Defense Information to Aid Foreign Government (18 U.S.C. 794); Acting as Agent of Foreign Government Without Notification to Secretary of State (18 U.S.C. 951). United States v. Ivan Dmitrievich Egorov, Et Al. (E.D. N.Y.) On July 15, 1963, a Federal grand Jury returned a two-count indictment against Egorov, his wife and Robert K. Baltch and his wife, charging them in Count I with having conspired with each other and with two named Soviet nationals, both former members of the Soviet Mission to the United Nations, to transmit information relating to the national defense of the United States to the Union of Soviet Socialist Republics in violation of 18 U.S.C. 794(c). Count II charges defendants with having conspired to have the Baltches act as agents of a foreign government without prior notification to the Secretary of State. Egorov, who is a Soviet national, was employed in the United Nations Secretariat. All four defendants were held without bail.

Staff: United States Attorney Joseph P. Hoey (E.D. N.Y.) and Paul C. Vincent (Internal Security Division)

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LANDS DIVISION

Assistant Attorney General Ramsey Clark

Water Rights; Interstate Stream; Colorado; River Construction of Boulder Canyon Act; Discretion of Secretary of Interior to Allocate Water; Irrelevance of State Water Law; Reservation of Water Needed for Federal Reservation, Indian or Otherwise. Arizona v. California, et al., S.Ct. No. 8 Original. Nearly 11 years after the suit was filed, and some 40 years after the controversy became real, the Supreme Court on June 3, 1963, announced the rules governing allocation of the waters of the main Colorado River between California, Arizona, and Nevada.

In terms of significance to an entire region and to the entire Nation, and in terms of the quantity of life-giving water involved, the Colorado River litigation is by far the largest and most important interstate water controversy which the Supreme Court has yet been called on to decide. In the arid land which comprises the Lower Basin of the Colorado River and the adjoining areas in Southern California which look to this river for all or substantial parts of their water supplies, the main Colorado is of the greatest importance to the maintenance of existing economies as well as to the expansion of those economies. While the flow of the North Platte River, which was the subject for division in Nebraska v. Wyoming (the largest interstate water case previously decided) averages in the neighborhood of 1,000,000 acre feet of water per year, the quantity of water on an annual basis up for division in this case was more than seven and a half times that figure. Here the difference in allocations to California and Arizona dependent upon the basis for division adopted was equal to or greater than the total flow being divided in Nebraska v. Wyoming.

With a sweeping reaffirmation of Congress' powers under the commerce and property clauses of the Constitution, the Court held that the criteria for equitable apportionment of interstate waters which it had applied in earlier cases were not applicable here because Congress had exercised those powers to provide a different basis for allocation. The holding is that when Congress enacted the Boulder Canyon Project Act in 1928 Congress intended not only to authorize construction of Hoover Dam and related projects and operation of those projects by the Secretary of the Interior--Congress likewise intended to and did authorize the Secretary of the Interior, in accordance with guidelines laid down in the Act and in the course of his administration and operation of the authorized projects, to make an interstate allocation of the mainstream waters available for use in the States of the Lower Basin, 1/

1/ The Colorado River Compact, agreed to by all of the States of the Colorado River Basin except Arizona before passage of the Boulder Canyon Project Act and by Arizona in 1944, allocates the waters of the river system for use in the Upper and Lower Basins. The Lower Basin consists of most of Arizona, and parts of California, Nevada, Utah, and New Mexico. Utah and New Mexico, in their Lower Basin capacities (these states have much greater interests in the Upper Basin) make no demand on the mainstream.

if the States of the Basin were unable to agree on their own. Under this authority, the Secretary has made contracts consistent with the provisions of the Project Act which are the basis for allocating the use of the mainstream waters 4,400,000 acre feet per annum to California, 2,800,000 acre feet per annum to Arizona, and 300,000 acre feet per annum to Nevada, with surplus over 7,500,000 acre feet per year divisible one-half to California and the other one-half primarily to Arizona. Although the Special Master had recommended that in case of shortage below 7,500,000 acre feet the available mainstream waters be prorated in proportions of 4.4, 2.8, and .3, the Court held that this was a matter for determination in the first instance by the Secretary under his authority to administer the Boulder Canyon Project and that until the Secretary makes a determination of the appropriate rule in case of shortage there is nothing for the Court to consider.

Probably the main point of controversy between California and Arizona was the question whether, in determining the waters available for use in the Lower Basin, there are to be taken into account uses of water from the Lower Basin tributaries or whether waters actually flowing in the mainstream are the only waters subject to allocation between the States. If tributary water were included, California's share from the mainstream would be much greater because there would be more surplus, water in excess of 7,500,000 acre feet, in the mainstream. The Court held, however, that when Congress authorized an allocation by contracts for the delivery of stored water made with the Secretary of the Interior it was thinking only in terms of mainstream water. Therefore, tributary uses in the several states are not to be taken into account.

Consistent with its determination that the Secretary was authorized by the Project Act to effectuate an interstate allocation by the making of contracts for the delivery of water from the mainstream, the Court held that the Special Master was wrong in declaring that the Secretary is obliged to adhere to determinations under state law in deciding how the mainstream waters controlled by the Boulder Canyon and related projects are to be distributed within a State. Neither Section 8 of the Reclamation Act of 1902 nor the similar language of Section 18 of the Project Act imposes any such requirement. Respecting the effect of those provisions the Court said:

> When the Government, as here, has exercised [its] power and undertaken a comprehensive project for the improvement of a great river and for the orderly and beneficial distribution of water, there is no room for inconsistent state laws. * * * We hold that the general saving language of § 18 cannot bind the Secretary by state law and thereby nullify the contract power expressly conferred upon him by § 5. * * *

Although it is the holding in this connection to which Mr. Justice Douglas' separate dissent is primarily directed, the majority's rationale with which it concluded its summation at the end of Point I in its opinion is unanswerable:

> * * * All this vast, interlocking machinery--a dozen major works delivering water according to congressionally fixed priorities for home, agricultural, and industrial uses to people spread over thousands of square miles--could function efficiently only under unitary management, able to formulate and supervise a coordinated plan that could take account of the diverse, often conflicting, interests of the people and communities of the Lower Basin States. Recognizing this, Congress put the Secretary of the Interior in charge of these works and entrusted him with sufficient power, principally the § 5 contract power, to direct, manage, and coordinate their operation. Subjecting the Secretary to the varying, possibly inconsistent, commands of the different state legislatures could frustrate efficient operation of the project and thwart full realization of the benefits Congress intended this national project to bestow. * * *

In addition to the Court's nearly complete agreement with, and vindication of, the Government's analysis of the considerations relevant to the interstate allocation and our interpretation of the relevant statutes and contracts, the Court also upheld the Government's claims of rights to use the waters of the mainstream on its Indian and other reservations located along the mainstream. The Special Master had recommended a decree awarding to the United States rights to divert in the aggregate about 1,000,000 acre feet annually from the mainstream for use on five Indian reservations, two wildlife refuges and a national recreation area. He had also recognized a federally reserved right to divert from the mainstream of the Gila River for use on a national forest. All these reservations were created by the withdrawal of land from the public domain and the reservation of such lands for the specified federal purposes.

The Court adopted the Master's recommendations with respect to the recognition of rights owned by the United States consumptively to use water on the reservations. Referring to its 1908 decision of Winters v. United States, 207 U.S. 564, the Court with no express dissent on this point, held that when the Government creates a reservation by the withdrawal from entry of public lands in arid country there is reserved also the right to use the unappropriated waters on the withdrawn lands in quantity at least sufficient to achieve the purposes of the reservation. The Court upheld the Master's determination that with respect to the Indian reservations here involved the quantity of water needed to irrigate all the irrigable lands on the reservations is a proper measure of the reserved right; the number of Indians on a reservation at any particular time is not.

In upholding the Government's claims of reserved rights the Court also rejected a number of contentions with which Arizona, primarily, challenged them. Most of the reservations are in Arizona and the Court held federal uses chargeable to the allocations of the States in which the uses are made. The contention on which Arizona seemed most strongly to rely was that, whatever power the United States may have to reserve rights to use nonnavigable waters on the public domain, the power does not extend to navigable waters after the State wherein the use is made has been admitted to the Union. With respect to the contention the Court said simply:

> We have no doubt about the power of the United States under [the commerce and property clauses of the Constitution] to reserve water rights for its reservations and its property.

While it discussed only the Indian Reservations in explaining its decision with respect to the reservation of water rights by the United States, the Court expressly stated that it approved also the Special Master's application of the Winters doctrine to the other reservations with respect to which he concluded adjudication was necessary. The logic of this decision has always been apparent. However, this is the first case in which the Supreme Court has actually held that the creation of a reservation for purposes other than as an Indian reservation effectuates a reservation by the Government of the right to use water on the reserved lands. Whether the decision will revitalize efforts which have been made for years to persuade Congress to relinquish many of its reserved rights to use water remains to be seen. Even if it does, it should at least put an end for all who will read to the claims so often heard that the United States reserved rights to use water are a figment of the imagination of Government lawyers and that they are not legally supportable.

The Chief Justice did not participate and the majority opinion, written by Mr. Justice Black, was concurred in by Justices Clark, Brennan, White and Goldberg. Mr. Justice Harlan, with whom Mr. Justice Douglas and Mr. Justice Stewart joined, filed an opinion dissenting in part. The burden of this opinion is an attempt to show that principles of equitable apportionment, rather than the statutory scheme for interstate allocation which the majority ascertained, should govern division of the mainstream water between the States. This opinion also disagrees with the majority's holding that the Secretary of the Interior has authority to determine in the first instance the applicable rule for interstate allocation in case of shortage of mainstream water under 7,500,000 acre feet. In a separate dissent, Mr. Justice Douglas expressed broader disagreement with the majority. However, as above indicated, his dissent is directed only to the Court's reasoning respecting the interstate allocation; he expressed no disagreement with the decision recognizing the reserved rights of the United States.

Staff: Archibald Cox, Solicitor General; David R. Warner and Walter Kiechel, Jr., Lands Division; and Warren R. Wise, Tax, formerly Lands Division.

Indians and Water Rights; Denial of Injunction Against Forceful Interference With Government Agents; Application of Winters Doctrine Against United States' Supervision of Indian Water Rights. United States v. George Knight, et al. (D. Utah). This action arose as the result of defendants' interference, by threats of force and violence, with activities of personnel of the Bureau of Indian Affairs on the Goshute Reservation in western Utah. With one exception, defendants are members of the Goshute Tribe. At the request of the Goshute Tribal Council, and pursuant to directions of the superintendent of the Nevada Indian Agency, B.I.A. personnel were on the reservation to clean out an irrigation ditch to allow the diversion of water from the main portion of the reservation to another noncontiguous part thereof. The main portion of the reservation consists of public lands reserved and set aside for the Goshute Indians by a 1914 Executive Order. These lands are part of a larger area in which the Goshute Indians had agreed to remain under the terms of a treaty of peace and friendship of 1863. The smaller, noncontiguous portion of the reservation is composed of lands purchased by the United States in 1936 and 1937 in trust for the same Indian tribe. Suit was filed for a permanent injunction against further interference. In defense, the defendants asserted that the Secretary of the Interior and his subordinates were without authority to enter upon the reservation to clean the irrigation ditch for the purpose of diverting water from the main portion of the reservation. All pertinent facts were stipulated to, and the case was submitted to the Court on written briefs and oral arguments. On May 8, 1963, the Court rendered an oral opinion denying the injunction and dismissing the action, and on May 28 entered a written order to that effect.

In passing on a previous motion by the United States, the Court had held that the defendants, as individual Indians, had no title or right to the use of the waters in question. See 11 U.S. Attys. Bull. No. 3, pp. 75-77. In his opinion of May 8, Judge A. Sherman Christenson rejected the Government's contention, based on the previous ruling, that the defendants did not have the requisite standing to question the authority of the Secretary of the Interior and his subordinates to undertake this ditch-cleaning by holding that the defendants "do have sufficient right and standing to question the equity of any such injunction."

In addition, the Court stated that the Treaty of 1863 vested in the Goshute Tribe rights to the waters arising on the main portion of the reservation under the doctrine of Winters v. United States, 207 U.S. 564. The Court then held that the agents of the United States could divert water from the main portion of the reservation to the smaller acquired portion thereof only when there is surplus water available which is not needed on the main portion. Although the Court stated that defendants had no right to forcibly interfere with B.I.A. personnel who are supervising the distribution of the waters on the reservation, it also expressed the opinion that should the water be diverted to the acquired lands when it could be beneficially used on the main portion of the reservation, the individual Indians could resort to various degrees of help and resistance which the Court did not specify.

As a final ground, the Court declined to grant the injunctive relief sought because, as the Court reasoned, the Government was attempting to do no more than enjoin a crime, i.e., interference with federal officers in the performance of their duties. Therefore, the Court stated, the Government has a complete and adequate remedy at law.

The Department is now considering an appeal from this decision.

Staff: United States Attorney William T. Thurman (D. Utah). Arthur Ayers (Lands Division).

United States; Immunity from Suit; No Waiver in School Land Provision of Enabling Act. State of Arizona, Trustee, ex rel., State Land Department by Obed M. Lassen, State Land Commissioner v. State of Arizona, through its Arizona Highway Department, et al., Civil No. 4517-Phx. This action was brought to obtain a determination of the rights of the various agencies of the State of Arizona to the use of lands and products therefrom held in trust for the common schools under the terms of the Enabling Act of the States of New Mexico and Arizona (Act of June 20, 1910, 36 Stat. 557, 568). Section 10 of the Act with respect to New Mexico and section 28 of the Act with respect to Arizona set forth the conditions under which the states may dispose of lands granted to the states under the Act which include appraisal, advertising, competitive bidding, etc. These sections also provide that disposition of the lands or money derived therefrom contrary to the provisions of the Act shall be deemed a breach of trust, and it shall be the duty of the Attorney General of the United States to prosecute in the name of the United States such proceedings as may be necessary and appropriate to enforce the provisions of the Act. The United States was named a party defendant in the action.

The Government filed a motion to dismiss the United States on the ground that it had not consented to be sued and the Court lacks jurisdiction. Plaintiffs contended (1) that the Enabling Act imposed upon the United States a duty to enforce the provisions of the trust and thus constituted consent to suit for the enforcement of the trust and (2) that the terms and conditions of the Enabling Act and the Constitution of the State of Arizona created an express or implied contract and that consent to suit exists under 28 U.S.C. 1346(a)(2). The Court granted the Government's motion to dismiss the United States as a party defendant.

Staff: United States Attorney Charles A. Muecke and Assistant United States Attorney Arthur E. Ross (D. Ariz.).

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CIVIL TAX MATTERS
Appellate Decision

Priority of Liens. Crest Finance Co., Inc. v. United States (368 U.S. 47, decided December 18, 1961.) Questions on the part of United States Attorneys concerning Crest Finance Co. recur, inasmuch as the Supreme Court's per curiam opinion does not explain the basis for the decision. A full explanation, virtually incorporating the Government's memorandum brief filed in that case, is to be found in the United States Attorneys Bulletin, Vol. 10, No. 1, pp. 34-35. It is to be noted that the Government conceded that the lien of the Crest Finance Company was choate because it was for advances made for work already performed, represented by invoices for progress payments due at the time the advances were made, before the federal tax lien arose -- thereby satisfying the three elements of a choate lien -- identity of the lienor, amount of the lien and the property to which its lien attached. The Crest Finance decision is therefore applicable only to similar factual situations. Compare the recent decision of the Supreme Court in United States v. Pioneer American Ins. Co. (No. 405, October Term, 1962), decided June 10, 1963, digested in the last issue (Vol. 11, No. 12, pp. 349-351) of this Bulletin.

Staff: Attorneys George Lynch and Joseph Kovner (Tax Division)

District Court Decisions

Injunctions Against Collection of Income Tax Denied; Coercion to Sign Returns Not Proven; No Exceptional Circumstances Proven. McClure v. Rountree. (E.D. Tenn., April 10, 1963.) (CCH 63-1 USTC ¶9472). Plaintiffs, husband and wife, brought this suit to enjoin defendant from selling their home for income taxes due for the years 1949, 1950 and 1951. The taxes due were reported by the taxpayers on returns filed by them for these years. Plaintiffs alleged that they signed the tax returns, which reflected an amount of tax greater than that owed, because they were told that the husband could be sent to prison for failing to file tax returns. It was admitted that the husband had not filed tax returns for 1949 and 1950. The evidence failed to show that the husband was coerced into signing the returns and did show that the wife signed the returns to gain such advantage as was available from a joint return.

The Court denied the injunctive relief and entered judgment for defendant, stating that it was clear that plaintiffs had filed the returns and had made payments thereon for more than ten years without ever having raised a question as to the validity of the debt owed. They had never sought administrative relief, and had admitted owing some tax, although they questioned the amount owed without stating what the correct tax should be. The Court found that there were no exceptional or extraordinary

circumstances present which would warrant an exception to Section 7421(a) of the Internal Revenue Code.

Staff: United States Attorney John H. Reddy; Assistant United States Attorney Ottis B. Meredith (E.D. Tenn.); and Wallace E. Maloney (Tax Division).

Subpoena to Take Deposition Prior to Service of Summons and Complaint. United States v. The Montreal Trust Company and Tillie V. Lechtzier, Executors of the Estate of Isidore J. Klein, Deceased. (S.D. N.Y., June 20, 1963.) Taxpayer died a resident of Canada and defendants were appointed executors of his estate by a Canadian court. The Government filed this action to obtain judgment for $9,862,053.34 in income taxes assessed against taxpayer prior to his death. The co-executor, Tillie V. Lechtzier, is a resident of Canada. The co-executor, Montreal Trust Company, does not have an agent in the United States, but Royal Bank of Canada, which has an agent within the District of the Court, owns Montreal Trust Company and is its principal correspondent in the United States.

After the complaint was filed, summons was issued but not placed in the hands of the Marshal for service. The Government filed a notice to take the deposition of the New York agent of Royal Bank and served a subpoena on such agent, in order to determine whether service could be made on Montreal Trust by serving Royal Bank. Royal Bank moved to quash the subpoena. The Court granted the motion, holding that a deposition could not be taken until service had been made on at least one of the defendants.

Staff: United States Attorney Robert M. Morgenthau; Assistant United States Attorney Thomas H. Baer (S.D.N.Y.).

Requisite Grounds for Preliminary Injunction Found Lacking. Aaron Waldman v. Church. (S.D.N.Y., May 17, 1963.) (CCH 63-1 USTC ¶9487). Plaintiff sought to permanently enjoin the District Director from proceeding against him for the collection of deficiencies in income taxes for the year 1944 and sought to have the assessment declared invalid. The assessment was based on a partnership return showing plaintiff as a partner and stating his share of income for the year 1944 to have been $6,468.40. Plaintiff's address on the return was indicated as being United States Army. A statutory notice of deficiency was sent to plaintiff in care of his brother, the other partner who filed the return, but the notice was returned unopened to the District Collector. The Court found plaintiff had actual notice of the assessment made against him.

In this opinion which deals solely with the issue of whether the granting of a motion for a preliminary injunction was proper, the Court held that the issues could be determined either at a trial on the permanent injunction or in a collection action brought by the Government. Plaintiff failed to show grounds for the granting of the extraordinary remedy of a preliminary injunction. The Court found that it was not clear that defendant might not prevail at the trial on the issue of the correctness of the mailing of the statutory notice, and under the holding in the

case of Enochs v. Williams Packing Company, 370 U.S. 1(1962), one of the grounds for an injunction is thus lacking. Further, in view of plaintiff's bonding in 1957 of the lien, the irreparability of injury cannot be shown. The Court therefore denied the motion for preliminary injunction.

Staff: United States Attorney Robert M. Morgenthau; Assistant United States Attorney Patricia A. Garfinkel (S.D.N.Y.).

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