Published by Executive Office for United States Attorneys, Department of Justice, Washington, D. C.

August 9, 1963

United States

DEPARTMENT OF JUSTICE

Vol. 11 No. 15

UNITED STATES ATTORNEYS

BULLETIN

UNITED STATES ATTORNEYS BULLETIN

Vol. XI. August 9, 1963 No. 15

IMPORTANT NOTICE

Parking placards for use by United States Attorneys and their Assistants are available upon request. Please direct your request to the Executive Office for United States Attorneys, room 4222.

DISTRICTS IN CURRENT STATUS

As of June 30, 1963, the districts meeting standards of currency were:

CASES

Criminal

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

CASES

Civil

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

MATTERS

Criminal

Ala., N.	Ill., S.	Miss., S.	Okla., W.	Tex., E.
Ala., S.	Ind., N.	Mont.	Pa., M.	Tex., S.
Ariz.,	Ind., S.	Neb.	Pa., W.	Tex., W.
Ark., E.	Iowa, N.	Nev.	P. R.	Utah
Ark., W.	Iowa, S.	N. H.	R. I.	Vt.
Colo.	Ky., E.	N. J.	S. C., E.	Va., W.
Del.	Ky., W.	N.Mex.	S. C., W.	W.Va., N.
Dist.of Col.	La., W.	N. C., M.	S. D.	W.Va., S.
Ga., S.	Me.	N. C., W.	Tenn., M.	Wis., W.
Idaho	Md.	Okla., N.	Tenn., W.	Wyo.
Ill., E.	Miss., N.	Okla., E.	Tex., N.	C. Z.
				Guam

MATTERS

Civil

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

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ADMINISTRATIVE DIVISION

Administrative Assistant Attorney General S. A. Andretta

MEMOS AND ORDERS

The following Memoranda applicable to United States Attorney Offices have been issued since the list published in Bulletin No. 11, Vol. 11 dated June 14, 1963:

MEMOS	DATED	DISTRIBUTION	SUBJECT
349	6-11-63	U.S. Attorneys & Marshals	Report of Outstanding Obligations
350	6-26-63	U.S. Attorneys	Criminal Prosecutions under 12 USC 95a or 18 USC 371 involving violations of Executive Orders & Regulations re Gold.

ORDERS	DATED	DISTRIBUTION	SUBJECT
295-63	6-4-63	U.S. Attorneys & Marshals	Title 28--Judicial Administration Chapter I--Dept. of Justice - Amending The Regulations Relating to Equal Employment Opportunity With Respect to Policy & Procedures.
296-63	6-10-63	U.S. Attorneys & Marshals	Designating James A. Carr As Chairman of the Youth Correction Div. Within the Board of Parole and Naming Members to Serve Therein.
297-63	6-12-63	U.S. Attorneys & Marshals	Authority of James J. P. McShane to Designate Officers and Employees of the Dept. of Justice to Perform the Functions of Deputy Marshals in the Northern District of Alabama and to Administer Oaths of Office.

ORDERS	DATED	DISTRIBUTION	SUBJECT
298-63	7-15-63	U.S. Attorneys & Marshals	TITLE 28 JUDICIAL ADMIN. CHAPTER I DEPT. OF JUSTICE - REGULATIONS RELATING TO DOCUMENTARY EVIDENCE PRODUCED PURSUANT TO THE ANTITRUST CIVIL PROCESS ACT.
299-63	7-19-63	U.S. Attorneys & Marshals	ASSIGNMENT OF FUNCTIONS RE TO THE PRESIDENT'S COMMITTEE ON EQUAL EMPLOYMENT OPPORTUNITY.
300-63	7-22-63	U.S. Attorneys & Marshals	STANDARDS OF CONDUCT - PART 45 OF TITLE 28--JUDICIAL ADMINISTRATION, CHAPTER I DEPT. OF JUSTICE.
301-63	7-26-63	U.S. Attorneys & Marshals	AMENDING ORDER NO. 103-55, REVISION NO. 2 AS SUPPLEMENTED & AMENDED, WHICH DELEGATED AUTHORITY TO THE US ATTORNEYS WITH RESPECT TO CERTAIN CASES & CLAIMS UNDER THE SUPERVISION OF THE CIVIL DIVISION.

* * *

ANTITRUST DIVISION

Assistant Attorney General William H. Orrick, Jr.

Indictment Under Section 2 Of Sherman Act Returned - United States v. United Fruit Company, et al. (S.D. Calif.). A special Grand Jury in Los Angeles returned a three-count indictment on July 16, 1963, charging United Fruit Company, United Fruit Sales Corporation, Joseph H. Roddy, Vice-President of United, and Marion E. Wynne, formerly Western Division Manager for Banana Sales, with violations of Section 2 of the Sherman Act. The indictment alleges that the defendants conspired, attempted and actually monopolized the imporation and sale of bananas in the States of California, Oregon, Washington, Idaho, Utah, Montana and Nevada.

United Fruit Company has been the only consistent importer by water of bananas into the West Coast ports for many years. During this period of exclusivity, its sales subsidiary, presently known as United Fruit Sales Corporation, existed as the only source of satisfactory quality of bananas in the 7-state western market. During the period 1958 through 1960, the indictment notes that defendants' percentage of the market ranged between 73 and 100 per cent in various submarket areas. The indictment contends that defendants exploited their monopoly power in this market by charging wholesalers substantially higher prices for bananas than the prices charged in other markets where defendants faced competition by other importers. The indictment also charges that defendants perpetuated their control in this market by various devices such as selling only to a limited number of wholesalers in the market, limiting the quantity of bananas imported into this market in order to shelter it from oversupply which might have adversely affected the prices, and also by utilizing an allocation system in their distribution of supply to wholesalers for purposes of maintaining the loyalty of these purchasers during rare periods when other importers attempted to distribute water-borne bananas in this market.

In July of 1960, Standard Fruit and Steamship Company and Ecuadorian Fruit Import Corporation, banana importers in the Gulf and Eastern markets of the United States, formed a cooperative venture so as to commence importing into West Coast ports and distributing in the seven western states. The indictment charges that defendants conspired and attempted to eliminate this competitive threat to their monopoly position in the west and further that defendants engaged in the following predatory behavior:

(1) Increased their imports, in order to flood the area with an over-supply of bananas;

(2) Maintained their customers' inventories at maximum capacity to forestall purchases from Standard-EFIC;

(3) Deliberately reduced wholesale prices, starting in July 1960 in order to keep Standard-EFIC from making any profit;

(4) Caused the port of Los Angeles to deny Standard-EFIC pier assignment for its banana cargoes; and

(5) Punished customers who purchased from defendants' competitors by depriving them of banana supplies which they had ordered.

Arraignment of the defendants is presently scheduled to take place on August 19, 1963.

Staff: Andrew J. Kilcarr and Donald J. Williamson (Antitrust Division)

Verdict Of Not Guilty Does Not Bar Government's Right To Use Grand Jury Transcript In Civil Case. United States v. Morton Salt Company, et al. (D. Minn.). On July 15, 1963, Judge Nordbye sustained the Government's objections to interrogatories propounded by defendant International Salt Company.

The interrogatories inquired as to the use the Government was making, or intended to make, of grand jury transcripts in preparation for trial and at trial, in this companion civil case to the criminal case which terminated in a verdict of not guilty. They also sought the identification of the grand jury witnesses whose transcripts were being used and of individuals who testified before the grand jury and would be called as witnesses at the trial.

Defendants made it clear that they sought this information to lay the foundation for a motion to either deny government counsel's access to the grand jury transcripts on the ground that the criminal acquittal created a retroactive abuse of the grand jury process or that defendants were equally entitled to the use of the transcripts.

The court held that a verdict of not guilty does not bar the government from using grand jury transcripts in the civil case. The court also held that the mere fact that the government was using such transcripts did not change the rule of secrecy to permit access by the defendants.

Judge Nordbye indicated that defendant must show good cause with specificity to gain access to the grand jury minutes and the use the government was making of the transcripts was irrelevant to such a showing.

The court further held that the identity of grand jury witnesses who would testify at trial need not be disclosed "if for no other reason than that the government is not required at this time to disclose its list of witnesses."

Staff: John W. Neville, Herbert F. Peters, and Jerome A. Hochberg (Antitrust Division)

* * *

CIVIL DIVISION

Assistant Attorney General John W. Douglas

COURT OF APPEALS

FEDERAL PROCEDURE

Neither Permitting Counsel for Impleaded Parties to Participate at Trial and Cross-Examine Witnesses Nor Allowing a Witness To Testify Who Had Remained in the Courtroom in Violation of an Order Excluding Witness Constitutes Reversible Error. Henry Scates v. Isthmian Lines, Inc., (C.A. 9, July 8, 1963). The plaintiff sought damages for injuries allegedly sustained aboard the defendant's vessel when a hatch cover collapsed. The defendant impleaded the United States (the charterer) and California Stevedore & Ballast Co. (the stevedoring company that unloaded the vessel). The issue of seaworthiness was submitted to the jury and was resolved in favor of the shipowner.

The opinion is of significance in that it makes clear that the district court may properly permit counsel for impleaded parties to participate at the trial and to cross-examine witnesses. Further, the court of appeals makes clear that it is not reversible error to allow testimony by a witness who had sat in the courtroom in violation of an order excluding witnesses. Plaintiff's counsel was aware of the fact that the witness was present but claimed on appeal that he did not know that he would be calling the witness.

Staff: Keith R. Ferguson (Civil Division).

SOCIAL SECURITY ACT

"Tax Return of * * * Self-Employment Income," As Provided by Section 205(c)(4)(c) of the Act, 42 U.S.C. 405(c)(4)(c), with Respect to the Correction of Records of Self-Employment Income, Means a Form 1040 Income Tax Return, Including a Completed Schedule C or its Substantive Equivalent. Martlew v. Celebrezze, (C.A. 5, No. 19995, July 18, 1958). This appeal was from a decision of the district court which upheld the Secretary's decision that the appellant was not entitled to old-age insurance benefits. It was undisputed that appellant had derived partnership earnings which would have been creditable as covered self-employment income had they been timely and properly reported. However, appellant did not report these earnings as self-employment income; rather he reported them on his Form 1040 income tax return as "wages" from the partnership. Consequently, the Social Security Administration had no record of covered earnings for him. Six or more years later an Internal Revenue Service audit disclosed the derivation of self-employment income and delinquent Social Security taxes were assessed. After payment of these taxes, appellant applied for benefits, asserting that the Secretary should then correct his records.

The Secretary refused, and he was upheld by both the district court and court of appeals, The Secretary held, and the court of appeals agreed, that claimant was barred by the Social Security Act's time limitation (Section 205(c)(1)(B), 42 U.S.C. 405(c)(1)(B)) from adding covered self-employment income to his records more than 3 years, 3 months and 15 days following each of the years in question. The court upheld the Secretary's determination that, after expiration of the time limitation, he could correct his records only to reflect a timely-filed "tax-return of * * * self-employment income" (Section 205(c)(4)(C)), 42 U.S.C. 405(c)(4)(C)), which was defined by regulation as a Form 1040 income tax return including a completed Schedule (c). Since Appellant had filed neither a Schedule C nor its substantive equivalent, he was held not entitled to a correction of his records.

This decision is beneficial in two respects. First, the court rejected as "patently unfounded" appellant's assertion that he was free completely to substitute his judgment for the Secretary's as to the sufficiency of his reporting; the court held, at least implicitly, that the recognized administrative expertise extends beyond purely factual determinations to basic construction of the Act and regulations. Secondly, the court upheld the administrative definition of a "tax return of * * * self-employment income" as a Form 1040 income tax return accompanied by a Schedule C or the substantive equivalent. This is the first court of appeals decision on the point.

Staff: Stephen B. Swartz (Civil Division).

TEMPORARY RESTRAINING ORDERS

TRO Extended Beyond 20 Days Is Preliminary Injunction Which Must Be Supported by Findings and Conclusions. National Mediation Board, v. Air Line Pilots Association, (C.A. D.C., July 12, 1963). On June 18, 1963, the District Court issued a temporary restraining order to prevent the National Mediation Board from conducting a scheduled election among pilots and co-pilots of American Airlines. This order was extended on June 27, 1963, for another 10 days, but a hearing on plaintiffs' motion for preliminary injunction was not scheduled until nearly a month later. On July 5, 1963, over the Government's vigorous objection, the District Court extended the TRO for a third 10-day period.

On appeal by the Government, the TRO was ordered dissolved. The Court of Appeals held that an order extending a TRO beyond the 20 days provided in F.R.C.P. 65(b) is tantamount to a preliminary injunction. Such an injunction must be supported by findings of fact and conclusions of law and is not valid without them. F.R.C.P. 52(a). See Pan American World Airways v. Flight Engineers, 306 F. 2d 840 (C.A. 2); Sims v. Greene, 160 F. 2d 512 (C.A. 3).

Staff: Howard E. Shapiro (Civil Division).

DISTRICT COURT DECISIONS

FALSE CLAIMS ACT

Application for Assistance Under Emergency Feed Program Is a "Claim"; Criminal Conviction on Same Issues of Fact As Exist in Civil Action Is Res Judicata; Pendency of Appeal from Conviction Does Not Alter the Binding Effect in Civil Cases of Findings of Fact Made in Criminal Action. United States v. Aaron Sell (D. Colo., June 19, 1963). In a civil suit under the False Claims Act (31 U.S.C. 231) predicated upon a conviction in the Kansas District Court under an indictment charging that the making of a false statement for the purpose of obtaining emergency feed and the use of purchase orders to obtain such feed, the Court found that all material issues of fact were the same and concluded, as a matter of law, that the determination in the criminal case of such issues of fact is res judicata and binding upon the Court. The Court also held that the pendency of an appeal from the judgment of conviction does not alter the binding effect of the findings of fact made in the criminal case. More importantly, the Court reviewed the decision in United States v. Robbins, 207 F. Supp. 799, which held that an application for assistance under the Emergency Feed Program is not a claim within the meaning of the False Claims Act and concluded, as a matter of law, that the facts as found in the criminal action constituted a false claim within the purview of Section 231. The Government's Motion for summary judgment was granted.

Staff: United States Attorney Lawrence M. Henry, Assistant United States Attorney Arthur L. Fine (D. Colo.); Betty E. Dudik (Civil Division).

Government Subcontractor's False Certifications of Compliance with Davis-Bacon Act Minimum Wage Requirements Constitute False "Claims" Within False Claims Act. United States v. Anniccharico (D. N.J., June 26, 1963). Defendant was a subcontractor on a Navy procurement contract. The subcontract contained the minimum wage schedules payable to laborers and mechanics as provided by the Davis-Bacon Act (40 U.S.C. 276a). Defendant pleaded guilty to one count of a criminal indictment under 18 U.S.C. 1001 charging him with false certifications on weekly payrolls presented to the Navy in relation to the wages paid his employees, and was fined $500. In a civil suit under the provisions of the False Claims Act, 31 U.S.C. 231, the complaint sought recovery only of the statutory $2,000 forfeiture since it was conceded that the Government sustained no monetary damage as a result of the fraud and that the only ones who were pecuniarily damaged were the underpaid employees. Defendant contended that, inasmuch as restitution of the underpayment had been made to the workmen and he had paid the criminal fine, the United States was in effect exacting a double penalty for the same offense. The Court held that the statute expressly allows such an action to be maintained regardless of the existence or absence of provable pecuniary damage to the United States. In rendering judgment for the United States in the amount of $2,000, the Court expressed its agreement with United States v. Sanders, 194 F. Supp. 955 (E.D. Ark., 1961), which held that false payroll certifications constituted "claims" cognizable under the False Claims Act.

The Court further observed that the $2,000 statutory forfeiture may be somewhat harsh in relation to the facts of the particular offense but it concluded that "The judiciary is constrained to follow validly enacted legislation."

Staff: United States Attorney David M. Satz, Jr.; Assistant United States Attorney Richard A. Levin(D. N.J.).

Negotiation and Collection of a Government Check with Knowledge That It Was Issued by Mistake Constitutes a Violation of the False Claims Act. United States v. Scolnick (D. Mass., June 20, 1963). The prime contractor under a Government procurement contract was another Government agency (Small Defense Plants Administration) and the subcontractor was Production, Inc., its president being Aaron Scolnick. By mistake of the procurement agency, Government checks in payments for certain shipments were issued and made payable to Production, Inc., instead of to the prime contractor as the proper recipient. With knowledge that the Government checks were issued to Production, Inc., by mistake and that the named payee was not entitled to the money represented thereby, Scolnick nevertheless deposited the checks in the corporation's bank account for collection. The court held that such action by Scolnick was a violation of the False Claims Act, 31 U.S.C. 231, subjecting him to liability for double damages and forfeitures. This is the first judicial decision on the applicability of the False Claims Act to one who negotiates and collects an erroneously issued Government check with knowledge that the designated payee is not entitled to the payment. See Civil Frauds Practice Manual, page 362.

Staff: W. Arthur Garrity, Jr., United States Attorney; William C. Madden, Assistant United States Attorney (D. Mass.); Bernard W. Friedman (Civil Division).

PRE-TRIAL DISCOVERY

Extensive Interrogatories Stricken As Abuse of Discovery Rules. Public Affairs Associates, Inc. v. Admiral Rickover (D. D.C., July 3,1963). This case involves an action by a publisher seeking to establish that copyrights on certain speeches delivered by Admiral Rickover were invalid since they constituted publications of the United States Government within the copyright law, 17 U.S.C. 8, which cannot be copyrighted. In addition to defendant Rickover, the Register of Copyrights, the Librarian of Congress, the Secretary of Defense, the Secretary of Navy, and the Atomic Energy Commissioners were named as defendants. Plaintiff served 110 pages of interrogatories upon the Government and 33 pages of interrogatories upon Admiral Rickover. The suit originally involved 24 speeches, but Admiral Rickover abandoned his copyright interest in all but two of these.

The Government objected to approximately one-half of the interrogatories principally on the grounds that they pertained to the first 22 speeches, or to other copyrighted material not relevant to this case, or were oppressive.

The court sustained every objection of the Government, indicating that the scope of the interrogatories was a clear abuse of the discovery provisions of the federal rules.

Staff: Carl Eardley, Paul J. Grumbly, William E. Nelson, (Civil Division).

TARIFF COMMISSION

Tariff Commission Not Required To Include Paragraph Covering "Waterproof Cloth" In New Tariff Schedule. Amity Fabrics, Inc. v. Ben Dorfman, et al. (D. D.C., July 1, 1963; C.A. D.C., July 29, 1963). This was an action in the nature of mandamus brought by an importer of cotton velveteen fabrics to compel members of the United States Tariff Commission to include a provision for "waterproof cloth" in the revised tariff schedules, soon to be proclaimed. Congress passed the Tariff Classification Act of 1962 incorporating entirely new schedules as the tariff schedules of the United States and eliminating the previous schedules enacted as part of the Tariff Act of 1930 and now out-dated. Because of complication involved in the proclamation of new schedules, including revision of our foreign trade agreements, Congress set forth a procedure to keep the schedules current during the time lag between the original recommendations of the Commission on November 15, 1960, and final proclamation of the new schedules, which the President has announced will take place on August 21, 1963. During this time period, Congress provided in the Tariff Classification Act that certain changes in Schedules were to be made by the Commission in order to reflect acts of Congress, among other things.

In September of 1960, Congress passed Public Law 87-795 defining the meaning of the term "waterproof cloth." Plaintiff contended that the Act was a change in tariff treatment which the Tariff Commission was required to reflect in the new schedules. The new schedules eliminated any provision for waterproof cloth, so that plaintiff will be required to pay at the rate of 22½% for cotton velveteen fabrics instead of the 11% rate provided for waterproof cloth.

The Government moved to dismiss on the grounds that Congress had left to the Commission's discretion what revisions in the schedules were necessary to reflect Congressional will, that plaintiff had no standing since it is currently litigating the question whether it is entitled to a 11% waterproof cloth rate before the Customs Court and that the Customs Court had exclusive jurisdiction of the action. The Government also moved for summary judgment on the ground that the statute did not involve a change in tariff treatment as to plaintiff, and, if it did, that such change was authorized by Congress. The court granted the Government's motion for summary judgment, stating that Public Law 87-795 was simply a declaration by Congress as to the true intent and meaning of the waterproof cloth provision in the former tariff schedules, and was not a change which the Tariff Commission was required to reflect in the new schedules. In granting the motion for summary judgment, the court did not pass upon the

Government's defenses of exclusive jurisdiction in the Customs Court and plaintiff's standing to use, and substantially rejected our contention that the Tariff Commission had discretion whether to include the change made by statute since 1930.

On July 29, 1963, the Court of Appeals denied plaintiff's motion for summary reversal or, in the alternative, for an injunction of the issuance of the proclamation pending disposition of the appeal. The Court intimated the view that Congress granted the Commission the discretion to include only those changes in law that would result in a logical, simple tariff schedule unhampered by anomolies.

Staff: Paul J. Grumbly, William E. Nelson (Civil Division) Sherman L. Cohn, Frederick B. Abramson, on appeal (Civil Division).

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CIVIL RIGHTS DIVISION

Assistant Attorney General Burke Marshall

Voting and Elections; Civil Rights Act of 1957. United States v. Ashford, et al. (S.D. Miss.). This action brought under the Civil Rights Act of 1957 (42 U.S.C. 1971 (a)(b)(c)) was filed on July 13, 1963, against H. T. Ashford, Jr., Circuit Clerk and Registrar of Hinds County (Jackson), Mississippi; and the State of Mississippi, seeking to reopen registration for voting in Hinds County.

The complaint alleged that Mr. Ashford had closed registration, pursuant to an order of the Circuit Court of Hinds County, from July 5, 1963, until after the scheduled elections in Hinds County in November, 1963. This was done at the height of a Negro registration drive and the complaint alleged that the purpose and effect of the closing was to frustrate the Negro registration drive and to perpetuate the imbalance between the percentage of Negro and white persons of voting age registered to vote in Hinds County.

On July 13 the United States presented an application for a temporary restraining order at which time the Court set plaintiff's motion for a preliminary injunction for a hearing on July 20, 1963.

A hearing was held on July 20, 1963. The evidence established that the Hinds County Circuit Court had amended its order permitting the closing of registration only from July 5, 1963, to August 6, 1963. Mr. Ashford testified he was very busy during this period preparing the poll books for the August 6th primary election. He also testified that about 86% of the eligible white persons and 14% of the eligible Negro persons in Hinds County were registered to vote.

The evidence further established segregated registration facilities -- different chairs for whites and Negroes, and delays in registration of Negroes prior to July 5 -- Negroes were required to stand in line even though there were vacant white chairs while white persons did not have to stand in line.

On July 26, 1963, the District Court made findings of fact and conclusions of law. The Court found that State law required that the registration books always remain open even though a person would not be eligible under State law to vote in the August primary or November election if he registered after July 5. However, the Court found that "the closing of these books was not done for the purpose and with the intention of discriminating against Negroes," and thus the Court held it had "no power or authority to issue an injunction."

With respect to registration practices when registration is resumed after August 6, 1963, the Court said:

> "He should have only one line and all registrants alike should be served on a first come basis."

The Court held open plaintiff's application for an injunction to allow for any supplemental evidence which plaintiff may wish to proffer after registrations are resumed.

Staff: United States Attorney Robert E. Hauberg (S.D. Miss.); John Doar, Gerald Stern (Civil Rights Division).

Voting and Elections; Illegal Expenditures in Connection with Federal Election; 18 U.S.C. 610. United States v. Lewis Food Company, Inc. (S.D. Cal.) On July 17, 1963, a four-count indictment was returned against the Lewis Food Company, a California corporation which produces Ross Pet Foods.

On June 5, 1962, a primary election was held in California in which candidates for the office of United States Senator and candidates for the office of Member in the United States House of Representatives were to be selected. The day before this election, the defendant corporation, through an advertising agency, placed in thirty-five different California newspapers a political advertisement entitled "Important Notice to Voters." The Notice contained a purported Congressional Rating Index, showing the percentage of votes cast by California Senators and Representatives "in favor of constitutional principles." Percentages in the index ranged from 100% for Congressman Utt to 95% for Congressman Rousselot to 22% for Senator Kuchel to 6% for Senator Engle, to 0% for Congressmen Roosevelt and Hollifield -- to cite only a few examples.

The approximate total cost of the political advertisement paid by the defendant corporation was $11,000. The corporation made payments to an advertising company on four separate dates, each payment being covered by a separate count of the indictment.

18 U.S.C. 610, under which the indictment was returned, forbids corporations or labor unions to make political contributions or expenditures in connection with federal elections.

Staff: United States Attorney Francis C. Whelan and Assistant United States Attorney John Van de Kamp; (S.D. Cal.) Henry Putzel, Jr., Edgar N. Brown (Civil Rights Division).

* * *

CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

SENTENCING FOR WAGERING TAX VIOLATIONS 26 U.S.C. 7203, 7262

The United States Attorney in the Southern District of New York recently submitted a memorandum to the Court in a Wagering Tax case asserting that 26 U.S.C. 7262, although not exempt from the requirements of 18 U.S.C. 3651, is clearly a minimum sentence under the wilful failure to register provisions of 26 U.S.C. 7203. The memorandum is as follows:

Argument

Point I

Title 26, U.S.C. § 7262, falls within the purview of Title 18 U.S.C. § 3651, and the mandatory nature of the sentence requires only that sentence be imposed, but does not prohibit the suspension of execution

After considerable research, it appears that when the Congressional intent is such that it desires to prohibit the use of the suspension or imposition of sentence under Title 18, U.S.C. § 3651, its intent will be clearly set forth and enacted into legislation. This appears clear from an analysis of the Narcotics Control Act, Title 26 U.S.C. Section 174, and more particularly from the explanation of that section in Title 26, U.S.C., Sec. 7237(d). That section provides that with respect to convictions under the Narcotics Control Act:

> ". . . the imposition or execution of sentence shall not be suspended, probation shall not be granted, Section 4202 of Title 18 of the United States Code shall not apply, and the Act of July 15, 1932 (47 Stat. 696; D.C. Code 24-201 and following), as amended shall not apply."

Since this section which clearly prohibits the use of the suspension provisions of Title 18 is itself a part of the Internal Revenue Code of 1954, it appears beyond a peradventure that if the provisions of Title 26, U.S.C. Sec. 7262, which provides for a penalty of "... not less than $1,000 and not more than $5,000." was to carry with it the same type of restrictions, then in fact they would be spelled out in the statute.

The distinction between this type of legislation and those sections without the "not less" penalties is that in this situation the sentence must be imposed and that Title 18, U.S.C. § 3651 comes into play after the imposition of sentence and may be used to suspend execution of the mandatory penalty.

Point II

Regardless of the Court's prerogative in suspending imposition of sentence under Sec. 7262, decisional law makes it plain that a wilful violation, such as the defendants pleaded to in the second count of the information, which in effect was a violation of Title 26, U.S.C. Sec. 7203, requires a sentence at least as stringent as that set out in Title 26, U.S.C. Sec. 7262.

Only two reported cases have interpreted the legislative intent behind the sentences provided in Title 26, U.S.C. § 7262, and Title 26 U.S.C. § 7203. The earlier of the two cases - United States v. Wilson, 116 F. Supp. 911 (U.S.D.C., D. New Mex. 1953), decided prior to the current Code; and United States v. Lewis, 143 F. Supp. 103 (U.S.D.C., D. Mass. 1956), decided after the passage of the new code, come to substantially the same conclusions.

In the Wilson case, supra, the court at p. 914 held:

". . . Further, that if the act is committed wilfully the punishment should be at least equal and probably should be in excess of the penalties absolutely required by subdivision (a) /This is Title 26, U.S.C. § 7262 where the penalty proscribed is not less than $1,000 fine and not more than $5,000./ The legislative intent must have been that penalties under subdivision (c) /This is the misdemeanor section - Title 26 U.S.C. § 7203./ should range upward - not downward - from those made mandatory by subdivision (a). Certainly, a most strange and unusual intention would have to be attributed to the legislative body if the law be interpreted to permit a less penalty for the more guilty than it makes mandatory for the less guilty."

After this interpretation of the two sections, the court goes on with respect to the requisite penalties to say at p. 914:

". . . I interpret the will of Congress to be that no penalty should be less than prescribed in subdivision (a). Therefore and notwithstanding that Section 2707(b) provides no minimum penalty, the requirement of assessing at least the penalty in subdivision (a) is just as effective as

> though it were written into subdivision (c) and, in turn, into Section 2707(b).... It further removes all ambiguity and provides sane and sensible legislation, rather than an absurd and incongruous law which could impose heavy penalties upon the less guilty than might be inflicted on the more guilty."

In the Lewis case, supra, Judge Aldrich, although advancing a somewhat different construction of the two sections, reaches the same result as the New Mexico decision with regard to sentencing for a violation of Title 26, U.S.C. Section 7203, juxtaposed with Title 26 U.S.C. § 7262, and says at p. 104:

> ". . . the primary purpose of a stated minimum is to advise the court not to take the offense lightly. I cannot believe that Congress would be content to see willful violators taken more lightly than more innocent ones. . . ."

On the basis of these decisions it is clear that once the defendants have pleaded guilty or been convicted for a willful violation of the failure to register provision, that is, Title 26, United States Code, Section 7203, regardless of the penalty meted out by the court under Count 1 of the information, and regardless of whether imposition of that penalty is suspended, the sentence under the willful section - Title 26, U.S.C. § 7203 - must be at least as great or greater.

The importance of encouraging more severe sentences in wagering cases was also argued with significant support being cited from Crime and Delinquency, Vol. 8, No. 4.

Staff: United States Attorney Robert M. Morgenthau; Assistant United States Attorney Harold Baer, Jr. (S.D. N.Y.).

MAIL FRAUD

Evidence of Scheme After Plea of Nolo Contendere. United States v. Bobby Lee McElroy (N.D. Okla.). The defendant was charged with operating a scheme involving the solicitation of funds for the purpose of purchasing Bibles and other religious materials for distribution to prisoners, and visiting the prisoners in penitentiaries. He entered a plea of nolo contendere on May 27, 1963, to six counts of a thirteen-count indictment charging violations of the mail fraud statute (18 U.S.C. 1341). The court accepted the plea and also granted the United States Attorney's motion to permit the introduction of evidence to show the extent and complexity of the fraudulent scheme. After the evidence had been presented the defendant was sentenced to imprisonment for one year, probation thereafter for two years, and fined $5,000.

The inspectors who investigated the case have advised that it is their opinion that the defendant would have received only a probationary sentence if the evidence of the fraudulent scheme had not been presented to the court.

It is suggested that when circumstances of this nature arise attempts be made to follow this procedure.

Staff: United States Attorney John M. Imel, Jr. (N.D. Okla.).

PRODUCTION OF STATEMENTS UNDER JENCKS ACT (18 U.S.C. 3500)

Procedure. In a recent case defense counsel obtained copies of statements of witnesses under the so-called Jencks Act but refused to return them upon demand to the United States Attorney. A motion for an order that the statements be returned was denied, defense counsel advising the court that the documents were needed for appellate purposes.

Statements are produced pursuant to order under section 3500 solely for the purpose of impeachment and do not become the property of the defendant or defense counsel. Therefore, to insure that these statements remain in the custody of the court it is requested that government attorneys have any such statement marked by the Clerk as "Government document No. . . ." or "Government paper No. . . ." before production thereof. This will insure that the statements become a part of the files of the Clerk whether they may or may not be a part of the record in any particular case, and will also provide a simple method of identification. If a defendant has need of the statement for appellate purposes, he can file a motion for permission to withdraw the same but the ultimate decision in that respect rests with the court.

FRAUD

Securities Violations; Proof of Participation in Boiler Room Operation. United States v. Howard Ross and Paul Gordon (C.A. 2, July 5, 1963). The defendants, salesmen for Kimball Securities, Inc., and numerous other persons were indicted for the fraudulent sale of securities. On appeal from their convictions, the Court of Appeals for the Second Circuit affirmed.

The Court of Appeals described the operation as a typical "boiler room." Gordon, who did not take the stand, was identified as the maker of misrepresentations concerning stock by the use of a telephone toll ticket, which showed that he made a call from his home to the victim at a specified time, and that the call was charged to the Kimball number. The Court of Appeals found the toll ticket was "ample evidence" to support the finding that he was the man who made the call. The Court also held that, although Gordon had worked for Kimball only seven days, his previous securities experience and the fact that the sales literature was suspicious on its face would indicate that he knew what was going on.

At the trial, to prove that Ross made certain telephone calls, the victim testified that the caller identified himself as Ross. Telephone records disclosed a call from Kimball Securities to the victim, and confirmation slips were introduced showing that the salesman was number "24". An SEC investigator testified that he called at the Kimball office, asked concerning salesmen's numbers, had a list pointed out to him, and saw on the list Ross' number as 24. On appeal, it was contended that this evidence violated the best evidence and hearsay rules. The Court held that, under the circumstances, the probabilities were that the list was no longer in existence at the time of trial and its production was not feasible, and that any hearsay error would therefore not be prejudicial. It was noted that Ross, in his testimony, did not question that 24 was his number.

Gordon had previously been sentenced to six months in prison and Ross received a sentence of one year.

Staff: United States Attorney Robert M. Morgenthau; Assistant United States Attorneys Thomas J. Cahill and Arnold N. Enker (S.D. N.Y.).

NATURALIZATION

Revocation; Naturalization Granted on Basis of Military Service Revoked Because of Defendant's Subsequent Dishonorable Discharge. United States v. Richard Robert Wagner (D. N.J., June 26, 1963). In this action the Government sought the cancellation of defendant's naturalization, which he had obtained in December 1955 pursuant to the accelerated procedure of 8 U.S.C. § 1440a for aliens serving in the armed forces of the United States. Section 1440c authorized revocation of naturalization granted pursuant to Section 1440a if at any time subsequent to the naturalization the person naturalized was separated from the armed forces under other than honorable conditions. In January 1958, the defendant was given a dishonorable discharge from the Army on the ground that he had been absent from his unit without proper authority. Defendant answered the complaint, but did not appear or respond to a specific notice from the court as to when the hearing would be held. Upon consideration of the evidence produced by the Government, including a certified copy of the defendant's Court Martial record, and of defendant's failure to appear or make known his desire to contest the action, the court ordered the revocation of defendant's naturalization. The court stated that the statute provided for revocation under certain conditions, that those conditions had occurred in this case, and the facts warranted the imposition of the penalty of loss of citizenship.

Staff: United States Attorney David M. Satz, Jr.; Assistant United States Attorney Jerome D. Schwitzer (D. N.J.).

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

IMMIGRATION

Denial of Alien's Adjustment of Status Upheld. Lum Wan v. Esperdy (C.A. 2, July 5, 1963.) Appellant is an alien, native of China and naturalized citizen of Canada, who brought this action to challenge the denial by the Immigration and Naturalization Service of his application under Section 249 of the Immigration and Nationality Act 8, U.S.C. 1259, to have his status adjusted to that of a permanent resident. He appealed from the dismissal of his complaint by the lower Court.

Appellant's attack was aimed primarily at the decision of the Regional Commissioner dismissing his appeal from the denial of his Section 249 application by the District Director. The Regional Commissioner had concluded from the record before him that appellant fraudulently obtained naturalization in Canada, and considered this as a factor in his refusal to exercise the Attorney General's discretion in appellant's behalf. Appellant argued that since the District Director had not found the Canadian naturalization to be fraudulent, the Regional Commissioner could not do so without giving appellant the opportunity to answer the charge.

Judge Moore writing for the majority affirmed the judgment of the lower court. While he agreed with appellant that he should have been informed of the charge, and that the charge should have been established by proof, he also recognized the principle that an appellate court is entitled to examine the entire record before concluding whether the result reached below is correct or erroneous. He found that the record disclosed all the facts essential for the exercise of administrative judgment. He noted that appellant's conduct included three smugglings into the United States and a more than casual attitude toward the acquisition of Canadian citizenship. He concluded that the record amply supported the lower Court's decision that there was no basis for interfering with the Attorney General's exercise of discretion.

Circuit Judge Hays dissented, finding the administrative handling of this case to be inadequate to support the Attorney General's determination. He would have remanded the case for reconsideration.

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

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LANDS DIVISION

Assistant Attorney General Ramsey Clark

Public Property: National Forest Lands; Successor to Railroad Timber Grant Forfeited Timber Not Removed Within a Reasonable Time; Federal, Not State, Law Governs Construction of Federal Grant. State Box Co. v. United States (C.A. 9, No. 18263, July 22, 1963). - The facts are detailed at 10 U.S. Attys. Bull. 447. Briefly, timber rights on reserved mineral lands were granted in 1862 by Congress to State Box' predecessor, a railroad. Neither the grantee nor its successors ever removed timber under the grant after 1912. The Government instituted this quiet title action after State Box asserted a timber claim in 1958 and filed actions in three different courts. State Box appealed from the district court's judgment for the United States.

The court of appeals affirmed, agreeing with the district court's opinion which is not yet reported. It held that federal law must apply in construing the grant, since the "Federal interest in having the construction of identical transactions uniform would be defeated by varied application of the different real property laws of the five states in which the Central Pacific Railroad was constructed." The 1862 statute was construed as not granting timber rights in perpetuity and as requiring removal within a reasonable period of time which, under the facts, the district court found had lapsed, resulting in a forfeiture.

Staff: Raymond N. Zagone (Lands Division).

Indians; Declaratory Judgment; Right to Share Tribal Assets; Lack of Justiciable Controversy. Christobal Pinto v. Cecelia Tampo Largo, et al. (S.D. Cal. July 15, 1963). - This action was brought to obtain a determination of the rights of an Indian to share in tribal assets under trust patents issued by the United States and a determination as to whether the rights of individual beneficiaries under the trust patents are to be determined by the inheritance laws of the State of California or otherwise. The United States was named a party defendant. The complaint was dismissed for failure to state a cause of action upon which relief could be granted. 205 F.Supp. 129. Thereafter, the Court permitted the plaintiff to file an amended complaint and the Government moved for summary judgment. The motion was denied. The Government then filed an answer alleging that the Secretary of the Interior has not recognized a roll of membership of the Campo Band of Indians and does not intend to prepare such a roll or plan to distribute tribal assets; that there is no allotment program for the Campo Reservation at the present time or in the foreseeable future and there is no intent on the part of the United States to cause elections to be held; that no action has been taken or is contemplated by the Secretary to determine the members of the Campo Band and that no elections or other procedures have been ordered by the Secretary for the purpose of creating a tribal organization and establishing procedural rules for the distribution of trust lands as alleged in the amended complaint.

Subsequently, the Government renewed its motion for summary judgment supported by an affidavit of the Area Director of the Bureau of Indian Affairs. The court granted the motion for summary judgment, holding that nothing has been done or is threatened to be done adversely to affect the rights of the plaintiff; that the case does not present a justiciable controversy and that the Court lacks jurisdiction.

Staff: Francis C. Whelan, United States Attorney;
Dennis F. Donovan, Jr., Assistant United States Attorney.

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CRIMINAL TAX MATTERS
District Court Decision

Defense Motions (1) to Dismiss, For Failure to Allege a Crime or Offense, an Indictment Alleging Defendant's Violation of 26 U.S.C. §7201, for Wilfully Attempting to Evade and Defeat the Payment of Income Taxes by Defendant and For Co-defendant's Aiding and Abetting Therein, (2) For Severance and (3) For Bills of Particulars, Denied, Except as to Minor Portion of Demand For a Bill of Particulars. In United States v. Lawrence (Larry) Knohl et al. (E.D. N.Y., July 2, 1963), the court denied defendants' motion to dismiss a seven (7) count indictment, charging Larry Knohl with wilfully and knowingly attempting to evade and defeat the payment of income taxes due and owing by concealing and attempting to conceal the nature and extent of his assets. The court stated, in a brief opinion, that the statutory language of §7201 of Title 26 U.S.C. made it clear that it is a felony for any person "'to wilfully attempt in any manner to evade or defeat any tax imposed by this title or the payment thereof .....' And it is obvious that one of the ways to defeat the payment of tax is to conceal the assets. See Spies v. United States, 1943, 317 U.S. 492, 499; United States v. Mollet, 2 Cir. 1961, 290 F. 2d 273; United States v. Bardin, 7 Cir. 224 F. 2d 255, cert. denied, 1955, 350 U.S. 883."

Larry Knohl had been filing individual returns for over ten years, setting forth a minimal income and a correspondingly modest tax due thereon, but never paid the taxes. The form of the indictment employed by the Government in this case read, in each count, substantially as follows:

> On or about the 15th day of April 1959 and continuing to the date of the return of this indictment, within the jurisdiction of the Eastern District of New York, the defendant LAWRENCE KNOHL, also known as Larry Knohl, of Long Beach, New York, who subsequently filed and caused to be filed with the District Director of Internal Revenue for the Internal Revenue District of Brooklyn, New York, on the 15th of October 1959, an individual income tax return for the calendar year 1958 wherein he stated that his taxable income for said calendar year was the sum of Thirty Three Thousand Eight Hundred Dollars ($33,800.00) and that the amount of the tax due thereon was the sum of Fifteen Thousand Six Hundred Thirty Dollars ($15,630.00), said defendant LAWRENCE KNOHL, also known as Larry Knohl, and defendant IRWIN KNOHL, of Island Park, New York, wilfully and knowingly attempted to evade and defeat the payment of the income tax due and owing by the said LAWRENCE KNOHL, also known

as Larry Knohl, to the United States of America for the calendar year 1958, by concealing and attempting to conceal from the District Director for the Internal Revenue District of Brooklyn, New York, the nature and extent of the assets of the said LAWRENCE KNOHL, also known as Larry Knohl, and the location thereof, by various means, including the use of the name of Irwin Knohl and the use of the names of other nominees in the purchasing, acquiring, disposing of, and otherwise dealing in assets of the said LAWRENCE KNOHL, also known as Larry Knohl.

In violation of §7201 Internal Revenue Code of 1954; Title 26 United States Code, §7201.

Defendants, father and son, had also moved for a severance and separate trials on the grounds, in essence, (1) that Larry Knohl was a notorious person, thus prejudicial to Irwin Knohl and (2) indirectly, that blood relatives (in this instance, father and son) should not be tried together. The court denied this motion, summarily, without citation.

Larry Knohl attempted to obtain a broad bill of particulars requiring the Government to state what property it was claimed he concealed, what assets he possessed during the pertinent years of the indictment, the manner in which the title to any property, money, goods or things was in him during the pertinent years, the names of nominees used by him in purchasing, acquiring, disposing and otherwise dealing in assets, what efforts were made by the Government to compel collection of the tax due, and the names and designations of the persons who made such efforts.

Irwin Knohl's demand, even broader in scope, sought to compel the Government to state whether he participated in the preparing of the filing of the returns of Lawrence Knohl, and if so, when, where and what manner, whether it was claimed he had any knowledge of the contents, the amount reported, or the amount of tax due on Larry Knohl's return, the manner in which he obtained such knowledge, whether or not the Government ever called upon him to make any payments for Lawrence Knohl's taxes, and the manner in which the Government would claim that he attempted to evade the payment of the income tax due by Lawrence Knohl, the manner in which he attempted to defeat the payment of said taxes, the manner in which such was a violation of law stating the statute involved, the manner in which he concealed or attempted to conceal the nature and extent of assets of Lawrence Knohl, what assets of Lawrence Knohl, what assets were concealed, the location of said assets, the time when the assets were acquired, the names of the persons from whom acquired, a description of the transactions, the dates when and where the transactions took place, the names of the nominees, description of the specific transactions wherein Lawrence Knohl's assets were purchased in the names of other nominees, whether the Government would claim that he had any knowledge of the transactions and the manner in which the Government would claim he had obtained such knowledge, together with the place when and where and the circumstances under which such knowledge was acquired, the statement by the Government of any affirmative act committed by him, when and where.

All of the requests were denied except that the Government was required, as to Larry Knohl, to state (1) what property he concealed from the Internal Revenue Service; and (2) the names of the nominees used by him in concealing assets. With respect to the particulars demanded by Irwin Knohl, all were denied except to the extent that the Government was directed to state in what manner Irwin Knohl aided and abetted Lawrence Knohl in attempting to evade or defeat any tax or the payment thereof by the concealment of assets, including a description of the assets and their approximate value.

Staff: United States Attorney, Joseph P. Hoey; Assistant United States Attorney Raymond Bernhard Grunewald.

CIVIL TAX MATTERS
District Court Decisions

Lien Foreclosure Under 28 U.S.C. 2410; Real Estate Taxes; Local Taxes Accruing and Paid By Holder of Prior Mortgage Subsequent to Recording of Federal Tax Lien Constituted Part of Mortgage Debt and Were Entitled to Priority Over Federal Tax Lien. Hans A Fischer v. Martin Hoyer, et al. (Sup. Ct. of N.D.). Decided May 16, 1963. (CCH 63-2 USTC ¶9554). Plaintiff sued in state court to foreclose a first mortgage held by him, recorded July 20, 1953, and a second mortgage held by him, recorded December 10, 1958, on property owned by the taxpayers. The United States was named a party-defendant by reason of notice of tax lien filed April 2, 1954. The trial court gave first priority to the indebtedness due under the first mortgage, second priority to the federal tax lien and third priority to the indebtedness due under the second mortgage. However, the trial court included as part of the first mortgage indebtedness real estate taxes advanced and paid by plaintiff-mortgagee on October 3, 1958, in the amount of $996.81 plus interest. In affirming the trial court's decision, the North Dakota Supreme Court was at pains to distinguish United States v. City of New Britain, 347 U.S. 81 and United States v. Buffalo Savings Bank, 371 U.S. 228 as involving "statutory liens" which did not come within the definition of a "mortgagee" in Section 6323(a) of the Internal Revenue Code of 1954. The decision is in direct conflict with United States v. Christensen, 269 F. 2d 624 (C.A. 9th); United States v. Bond, 279 F. 2d 837, certiorari denied 364 U.S. 895; Union Central Life Insurance Co. v. Peters, 361 Mich. 283; and Bank of America National Trust & Savings Association v. Embry, 10 Cal Rep. 602, all of which cases the Court rejected as "erroneously decided." In light of the United States Supreme Court's subsequent decision of United States v. Pioneer American Insurance Company, 31 L.W. 4603 (June 10, 1963), it is now overridingly clear that New Britain, Bond, Christensen and Buffalo Savings are controlling of this issue, leaving no doubt that subsequently accruing taxes, even if paid by the mortgagee, do not thereby become a prior mortgage indebtedness. Accordingly, filing of a petition for writ of certiorari in the instant case is presently under consideration by the Department.

Staff: United States Attorney John O. Garaas (D. N.D.).

Statute of Limitations; Motion to Strike; Matters Outside Pleadings May Not Be Considered On Government's Motion to Strike Statute of Limitations As Defense. United States v. Joseph G. Lease, et al. (S.D. N.Y.) Decided May 21, 1963. (CCH 63-2 USTC ¶9503). This is an action to foreclose federal tax liens against certain property of the defendant-taxpayers who answered and set up the statute of limitations as a defense and asserted a counterclaim to recover amounts collected and applied against the tax assessments made against them. The Government moved to strike the defense and to dismiss the counterclaim. In support of its motion, the Government relied upon the affidavit of a United States Attorney to which was annexed an agreement on Internal Revenue Form 900, signed by the taxpayers, extending the statute of limitations beyond the date the suit was filed. On the face of the pleadings, the statute of limitations had run.

In denying the Government's motion, the court ruled that affidavits may not be considered on a motion to strike a defense for insufficiency. In support of its motion to dismiss the counterclaim, the Government alleged that the prerequisites to such a suit, namely the paying of the tax and the filing of a claim for refund, had not been effectuated by the taxpayer. Since the motion was premised on facts outside the pleadings, the court treated it as a motion for partial summary judgment under Rule 12 of the Federal Rules of Civil Procedure. The court denied the motion rationalizing that if this were a suit by the taxpayer it would be necessary to meet the statutory prerequisites of filing a claim for refund. However, since the taxpayer's claim is by way of counterclaim, the court can examine the transaction "in all its aspects" under the rationale of Bull v. United States, 295 U.S. 247.

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

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