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ANTITRUST DIVISION

Assistant Attorney General William H. Orrick, Jr.

Court Upholds The Civil Investigative Demand Statute. In The Matter Of Petition Of Gold Bond Stamp Company. (D. Minn.). On August 9, 1963, the first court opinion was rendered interpreting the Antitrust Civil Process Act, known as the CID statute, Judge Gunnar Nordbye denied the petition of the Gold Bond Stamp Company to modify or stay Civil Investigative Demand No. 0016.

The court rejected the attack upon the constitutionality of the statute. It stated that the Act constitutes an innovation in the civil investigative powers of the Attorney General. It noted that at this posture of the proceeding the Attorney General cannot assure anyone that there has been a violation of law and that to the extent that the investigation is being made to determine whether a violation has occurred the proceeding may be considered in one sense a "fishing expedition." It is no different in this respect, the court noted, from a grand jury investigation, and the grand jury likewise in issuing subpoenas cannot assume that the antitrust laws have been violated. The court observed that "no fishing" signs, by the clear intent of Congress, seem to have been virtually eliminated as to a proceeding under the Antitrust Civil Process Act. It added:

> If the proceeding is within the purview of authority vested in the Attorney General by Congress and if the nature of the inquiry under the antitrust laws, as required by the Act, is made known to the person investigated and the list of documents demanded is reasonably relevant to the investigation, the Court should recognize that this legislation comes within the broad powers of Congress.

The court likened the CID to a subpoena, holding that the CID should not contain any requirement which would be considered unreasonable if contained in a grand jury subpoena.

The petition had also attacked the adequacy of the description of the conduct, namely: "Restrictive practices and acquisitions involving the dispensing, supplying, sale of furnishing of trading stamps and the purchase and sale of goods and services in connection therewith." The court stated that it was evident that the short and "somewhat terse statement" of the conduct did not specify the particular offense under investigation. However, in considering the sufficiency of the designation one must remember, the court said, that the purpose of the statute is twofold: (1) to enable the Attorney General to determine whether there has been a violation of

the antitrust laws, and if so (2) to enable him to allege properly the violations in a civil complaint. Therefore, the court added, the nature of the conduct must be stated in general terms, and "To insist upon too much specificity with regard to the requirement of this section would defeat the purpose of the Act, and an overly strict interpretation of this section would only breed litigation and encourage everyone investigated to challenge the sufficiency of the notice." On this score the court pointed out that the test only requires that the person to whom the demand is directed is sufficiently informed of the conduct and that he is sufficiently informed to determine the relevancy of the documents demanded for inspection.

The court refused to stay the Demand, holding that cumulative remedies afforded governmental agencies to ferret out activities detrimental to competition are consistent with constitutional powers. Petitioner had urged a stay because the FTC has in progress an investigation of conduct of other stamp companies.

Finally, the court held that the Demand is reasonable and that the burden is the same as though an action had been instituted and discovery proceedings had been utilized. Any documents on which the petitioner claims privilege are to be submitted to the court in camera for a ruling thereon.

Staff: Morton Maneker and Donald Williamson (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General John W. Douglas

COURT OF APPEALS

LABOR-MANAGEMENT REPORTS AND DISCLOSURES ACT

Secretary Has Plenary Power Under Section 601 of LMRDA to Investigate Union Compliance With Act's Election Provisions Whether or Not Union Member Files Complaint. W. Willard Wirtz v. Local 191, International Bhd. of Teamsters (C.A. 2, July 26, 1963). The Court of Appeals, in affirming an order of the district court enforcing the Secretary's administrative subpoena duces tecum, ruled that the issuance of the subpoena was a proper exercise of the Secretary's power under Section 601 of the LMRDA to investigate compliance by a labor union with Title IV of the Act, 29 U.S.C. 481, in conducting union elections. The Court held further that the Secretary's investigatory power under Section 601 is not dependent upon a member's filing a complaint with the Secretary under Section 402, 29 U.S.C. 482, nor is the scope of his investigation limited to those aspects of the member's complaint which had previously been subject to exhaustion of internal union remedies. This ruling removes one more legal stumbling block that had been placed in the way of complete effectuation of the LMRDA.

Staff: David J. McCarthy, Jr. (Civil Division).

TORT CLAIMS ACT

Civil Rule 52(a); Causal Connection Between Antibiotic Injection and Subsequent Paralysis Not Established; Creditability to Be Accorded Conflicting Medical Testimony Rests With Trial Court. Joanne Marie Evans v. United States (C.A. 1, July 2, 1963). In this action damages were sought for injuries allegedly sustained by a female infant as an aftermath of an antibiotic injection which she received from a nurse while being treated in an Army hospital. It was the plaintiff's contention that the injection was given in a negligent manner causing serious sciatic nerve injury to her leg. Shortly after receiving the injection the infant suffered marked paralysis of that leg. The United States stipulated that, if the injection in fact caused injury to the sciatic nerve, such injection did constitute medical malpractice. Thus, the only issue before the trial court was whether there was a causal connection between the injection and the paralysis. After considering conflicting medical testimony the court resolved the critical issue in favor of the United States. The trial court was impressed by the testimony of the only doctor who had significant experience with sciatic nerve injuries. He testified that the scarring which generally accompanies such injuries was not here present.

The Court of Appeals affirmed. It recognized that the testimony at bar "abounded in conflicting and divergent hypothesis from which competing differences might well be drawn" noting that where such is the case "it is the very essence of the trial court's function to choose from among the competing and conflicting inferences and conclusions that which it deems most

reasonable." Additionally, the Court made clear that "where, as here, the question turns largely on the testimony of experts, the trial court has the right to decide which set of experts -- plaintiff's or defendant's -- will be credited."

Staff: United States Attorney W. Arthur Garrity, Jr., and Assistant United States Attorney Eugene X. Giroux (D. Mass.)

United States Not Liable for Negligence of National Guard Member Enroute to Summer Training Exercises. Rebecca B. Blackwell v. United States (C.A. 5, July 30, 1963). Plaintiffs brought this action against the United States under the Tort Claims Act for injuries arising out of an accident allegedly caused by the negligence of a member of the Louisiana National Guard. At the time of the accident, the guardsman was operating a truck as part of a National Guard convoy proceeding to summer training exercises pursuant to orders from the Governor of Louisiana. The district court granted the Government's motion for summary judgment.

The Court of Appeals affirmed. The Court held that a member of the National Guard engaged in summer training exercises has not been called into federal service and, consequently, is not an employee of the United States within the meaning of the Tort Claims Act. Moreover, the Court held that the question as to who is a federal employee is governed by a federal, not state, law.

Staff: Terence N. Doyle (Civil Division).

VETERANS' ADMINISTRATION

Decision by Veterans' Administrator on Question of Law or Fact Concerning Claim for Benefits or Payments Under VA Program Is Final and Not Subject to Judicial Review. Barefield v. Byrd (C.A. 5, July 26, 1963). The Court of Appeals affirmed the dismissal, for lack of jurisdiction over the subject matter, of a complaint brought to obtain judicial review of several decisions of Veterans Administration officials respecting the payment of service-connected disability compensation to an insane veteran. The Court of Appeals held that such review was precluded by 38 U.S.C. 211(a) which provides that, with certain exceptions not pertinent to this case, the decision of the Veterans Administrator "on any question of law or fact concerning a claim for benefits or payments under any law administered by the Veterans' Administration shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision." The Court rejected the contention that the Administrator was bound to follow the provisions of the Administrative Procedure Act and that, notwithstanding 38 U.S.C. 211(a), the Court may inquire at least into whether there has been conformity with those provisions. Noting that Section 5 of the APA is limited in application to adjudications "required by statute to be determined on the record after opportunity for an agency hearing," the Court pointed out that there is no such requirement in Title 38 respecting Veterans Administration determinations. On the contrary, 38 U.S.C. 210(c) and 102(a)(1) leave to the Administrator's discretion the procedure to be followed in reaching his decisions.

Staff: Jerry C. Straus (Civil Division).

DISTRICT COURT DECISIONS

CIVIL PROCEDURE

Summary Judgment Obtained on Claim for Return of Planning Advance. United States v. City of Greeley, Kansas (D. Kans., July 19, 1963). This was an action to recover an advance for planning preparation which, under the applicable statute as well as an agreement with the recipient, was to be repaid when construction of the project was undertaken. As is usual in such cases, the City denied liability on the ground that it had not used the plans; this defense has repeatedly been overruled. Previous decisions in cases involving planning advances have all been obtained only after a plenary trial, e.g. United States v. Wendell, 237 F. 2d 51 (C.A. 9, 1956); United States v. Bismarck, 126 F. Supp. 338 (D. N.Dak., 1954). In the instant case the United States Attorney suggested that a motion for summary judgment be attempted. His suggestion was approved and he did file such a motion. He has been advised that the motion will be granted and that he should submit an appropriate order. It is not anticipated that the Court will write an opinion. Nevertheless, this outcome should encourage efforts to dispose of other cases in this field by motion.

Staff: United States Attorney Newell A. George and Assistant United States Attorney Elmer Hoge (D. Kansas); Robert Mandel (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. Theron C. Lynd, Circuit Clerk and Registrar of Forrest County, Mississippi (C.A. 5). This case reached the Court of Appeals following a hearing on March 5-7, 1962, on plaintiff's motion for a preliminary injunction. At the close of the hearing the District Court for the Southern District of Mississippi refused to grant the plaintiff's motion and an appeal was taken. On April 10, 1962, after a hearing, the United States was granted an injunction by the Court of Appeals pending the appeal from the District Court's denial of an injunction.

On April 30, 1962, the United States filed an application for an order to show cause why Theron C. Lynd should not be adjudged guilty of civil and criminal contempt for violating the injunction of the Court of Appeals. A panel of three judges of the Court of Appeals sat in Hattiesburg, Mississippi from September 17 - September 21, 1962, to hear the evidence on the contempt charges. After the conclusion of the hearing the Government submitted detailed proposed findings of fact, conclusions of law, and proposed judgment.

On July 15, 1963, after further oral argument on July 8, 1963, the Court of Appeals adjudged Theron C. Lynd in civil contempt, and ordered him to place upon the current voter registration rolls, within ten days, forty-three Negroes who were illegally denied registration. Theron C. Lynd was given five days thereafter to purge himself of civil contempt by filing with the Clerk of the Court of Appeals a written signed statement showing he had registered the named Negroes, and would faithfully abide by the orders of the Court of Appeals and the judgment of the Court of Appeals of July 15, 1963, which lists specific sections of the Constitution to be used in administering the Mississippi Constitutional Interpretation Test and orders Theron C. Lynd not to reject Negroes for errors or omissions on their application forms but to allow applicants to correct such errors or omissions at the time they complete their application forms. The Court also taxed costs against Theron C. Lynd.

On July 26, 1963, the Court granted a stay for ten days of its civil contempt judgment pending a decision on the defendants' motion for an en-banc rehearing.

Criminal contempt proceedings were deferred pending decisions on the question of the right to jury trial. Theron C. Lynd was tried in Hattiesburg, Mississippi before three judges of the Court of Appeals sitting without a jury.

The District Court's denial of a preliminary injunction was reversed and remanded with the injunction which the Court of Appeals issued pending the appeal to be continued in full force and effect until such time as the District Court finally disposes of the case. Further, the Court

of Appeals held there was no justification for the District Court's requiring the Government to amend its complaint to allege specific details of voter discrimination as if this were an action for fraud under Rule 9 F.R.C.P.. Further, the Court of Appeals held that the evidence to establish a pattern and practice of discrimination is not confined to the incumbency of the present registrar, and is not limited as to the State by the effective date of the 1960 amendments to the Civil Rights Act.

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

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

NATIONAL BANKRUPTCY ACT

Reporting Violations to United States Attorneys; Determination by United States Attorney of Necessity of FBI Investigation; Instituting or Declining Criminal Action. In view of recent inquiries, we believe it essential to clarify the applicability of Title 18, United States Code, Section 3057(a) and (b) and the recent amendment of the Bankruptcy Section of the United States Attorneys' Manual, Title II, page 61.

Title 18, United States Code, Section 3057(a) requires the referee, receiver or trustee having reasonable grounds for believing that any violation of the National Bankruptcy Act has been committed to report all the facts and circumstances to the appropriate United States Attorney. This report has been made mandatory in order that the United States Attorney be apprised of possible violations which ordinarily would not come to his attention. Upon receipt of this report, the United States Attorney determines whether an FBI investigation should be commenced; and upon completion of this investigation decides whether criminal action is warranted. The referee's report of possible violations is not a condition precedent to the initiation of an FBI investigation.

Investigations are often begun as the result of information furnished by creditors or other interested parties, rather than by report pursuant to Section 3057(a), and it is thus immaterial, when prosecuting an offender under any of the criminal provisions of the National Bankruptcy Act, whether the procedure set forth in Section 3057(a) has or has not been followed. Dean v. United States, 51 F. 2d 481 (C.A. 9, 1931); Collier on Bankruptcy (14th ed., Vol. 2, p. 1236).

The Bankruptcy Section of the United States Attorneys' Manual, as recently amended, requires the United States Attorney, in declining prosecution, to furnish the Department with a cogent and reasonably detailed explanation of his reasons for declination, together with specific reference to the facts of the case. It is our opinion that the mere conclusion that the facts of the case do not warrant criminal prosecution or that the facts do not indicate that an offense has been committed does not satisfy the requirements as set forth in the Manual. This requirement is applicable regardless of the method by which the investigation was initiated and as well to those cases in which a report is received pursuant to Section 3057(a) and the United States Attorney determines that no investigation is necessary.

It is to be noted that the personal opinion of the referee, receiver or trustee as to whether a criminal offense has occurred or as to whether criminal proceedings should or should not be commenced is in no way binding on the United States Attorney or determinative of the issues involved. Similarly, the decision of an officer of the Bankruptcy Court not to refer a matter to the United States Attorney should not be determinative in any prosecutive analysis.

PUBLIC HEALTH SERVICE ACT

Conviction for Unlicensed Processing, Mislabeling, and Sale of Human Blood Plasma. United States v. Sidney Steinschreiber, John P. Calise, Westchester Blood Service, Inc., Harold H. Fisher, Kemworth Laboratories, Inc. and Norman Cappel (S.D. N.Y.). On June 28, 1963, Judge Harold R. Tyler, Jr. found Sidney Steinschreiber and several other defendants guilty of conspiring to process human blood plasma without a license in violation of the Public Health Service Act. Steinschreiber was also found guilty of violating the Act by falsely labeling plasma containers and transporting in interstate commerce for sale to Cuba plasma not processed at a licensed establishment. This is the first criminal conviction under the "biological products" provisions of the Public Health Service Act (42 U.S.C. 262). Briefly, it involved the following: In November 1960, Sidney Steinschreiber, a pharmaceutical dealer, received an order from a New York City export firm for a quantity of dried human plasma for shipment overseas. Thereafter, he consulted John P. Calise, president of Westchester Blood Service, Inc. (New Rochelle, N.Y.), who was unable to supply him with dried plasma but agreed to furnish liquid plasma which could then be dried at a laboratory. Calise then had his drivers pick up expired blood from hospitals and various laboratory technicians. He separated the liquid plasma from the blood and placed it in glass containers. He then transported it to Kemworth Laboratories in New Jersey where, by an arrangement previously made by Steinschreiber with that firm, it was dried. Subsequently, Steinschreiber himself transported the dried plasma to a Westchester Blood Service depot in New York City where, with the assistance of others, he packed it into units for shipment. The label he placed on the units bore his firm's name ("Sidcaps Laboratories"), a license number issued by the National Institutes of Health to a New York "blood bank" for which Calise was a franchised distributor, and a statement that the plasma had been irradiated in accordance with NIH recommended standards and procedures. (The license number had been issued by NIH to the "blood bank" only as authority for the taking of whole human blood from a qualified donor. The irradiation process did not comply with NIH standards.) Before paying for the plasma, the exporter demanded a letter verifying the NIH license number. Steinschreiber wrote an ambiguous letter certifying that the plasma met all NIH requirements. The exporter accepted the letter, paid for the plasma, and shipped it to Cuba. In February and March 1961, Steinschreiber had more plasma dried at Kemworth Laboratories which he then personally delivered to British Overseas Airlines Corp. at Idlewild Airport for shipment overseas. Judge Tyler, relying on expert testimony and regulations issued by the Public Health Service, rejected defendants' contention that dried human blood plasma was not within the coverage of the Act (42 U.S.C. 262), and found the defendants guilty. On August 2, 1963, he imposed the following sentences: Steinschreiber - 90 days; John P. Calise - 60 days; Westchester Blood Service, Inc. - $500 fine. The other two defendants will be sentenced on December 5.

Staff: United States Attorney Robert M. Morgenthau; Assistant United States Attorneys Albert J. Gaynor and Richard A. Givens (S.D. N.Y.).

FEDERAL FIREARMS ACT
(15 USC 902)

Determination or Guilt in Juvenile Delinquency Proceeding Not "Conviction" Upon Which Prosecution Under Federal Firearms Act May Be Based. Recently a case arose in New Mexico in which the defendant was charged with a violation of 15 U.S.C. 902. The violation was based upon transportation of firearms interstate by an individual who had a previous conviction. The alleged previous conviction was in fact a determination of guilt under Vernon Anno. Stat. Tex., art. 2338-1, sec. 13, a juvenile delinquency proceeding. It is the opinion of the Criminal Division that such a determination of guilt is not a "conviction" upon which a prosecution under 15 U.S.C. 902 may be based. The Texas statute follows the policy of the Federal law relating to juvenile delinquency, 18 U.S.C. 5031-5037, pursuant to which juvenile offenders are not regarded as criminals.

HANDWRITING EVIDENCE

Procedure for Introducing Defendant's Known Handwriting Specimens Yet Excluding from Jury's Consideration Prejudicial Portions of Documents Containing Specimens. In United States v. Edward Smith (W. D. Mich.), the following procedure was considered but not employed because defendant changed his plea to guilty. Where identification of a defendant's handwriting is necessary and where the only known specimens available are contained in records of past criminality, the jury's knowledge of the context of the specimens and the identity of the witnesses introducing them may well constitute grounds for reversal of a conviction. For example, the known handwriting could be on fingerprint cards and probation reports, and the witnesses could be policemen and probation officers. It is therefore useful that testimony and argument relating to the admissibility and authenticity of such evidence be heard only by the judge, in the absence of the jury. The judge would then allow the specimens (likely to be from official documents not apt to be attacked as to authenticity) to be submitted to the jury as standards for comparison, with the prejudicial portions blocked out. Thus the judge would actually be ruling conclusively on the genuineness of the specimens and the credibility of the introducing witnesses, in addition to admissibility in the strict sense. The jury would evaluate only the subsequent testimony of a handwriting expert. Ample argument and authority for this procedure is found in Wigmore, Sections 2000, 2020, and 2550. See also Citizens' Bank & Trust Co. v. Allen, 43 F. 2d 549 (C.A. 4, 1930).

Staff: United States Attorney George E. Hill;
Assistant United States Attorney H. David Soet (W.D. Mich.).

NARCOTICS

Indictment May Be Collaterally Attacked by Motion Under 28 U.S.C. 2255 If So Defective on Its Face As Not To Charge Offense; Failure To Name Purchaser in Indictment Charging Sale of Narcotics Under 26 U.S.C. 4705 Is Defect Which May Be So Attacked; Conflicts and Inconsistencies in

Testimony Insufficient to Prove Knowing Use of Perjured Testimony. Lauer v. United States (C.A. 7, July 17, 1963). The defendant, Arnold George Lauer, was convicted under 26 U.S.C. 4705(a), for unlawful sales of narcotics, and was sentenced to pay a fine of $3,000 on the first count and to serve a term of seven and one-half years in prison on each of the two counts, the terms to run concurrently. This conviction was affirmed in United States v. Lauer, 287 F. 2d 633 (C.A. 7, 1961), cert. den. 368 U.S. 818. Defendant filed a motion to vacate and set aside the sentences pursuant to 28 U.S.C. 2255. Upon denial of this motion by district court, defendant appealed, raising two questions which had not been considered on the prior direct appeal. First, he asserted a constitutional infirmity in the convictions because of alleged knowing use of perjured testimony by the prosecution. The Court of Appeals overruled this contention on the ground that there was no averment of the existence of any fact which supported a conclusion that perjury was committed as to any material evidence. Mere conflicts and inconsistencies in testimony are insufficient.

Secondly, defendant asserted the insufficiency of the indictment to charge an offense because of the failure of each of the counts to set forth the name of the person to whom the alleged unlawful sale of narcotics was made. The Government challenged defendant's right to raise the question collaterally since it was not raised on the prior, direct appeal, and it asserted that naming the purchaser in the indictment is unnecessary to charge the offense. The Court of Appeals was of the opinion "that where an indictment fails to charge an offense under any reasonable construction, neglect to present that issue by or on appeal does not preclude its assertion by proper motion under 28 USCA Section 2255." The Court held that it is essential in order to validly charge the offense of an unlawful sale of a narcotic in violation of 26 U.S.C. 4705(a) that the indictment name the purchaser. The Court distinguished Rivera v. United States, (May 28, 1963, C.A. 9), which held that naming the purchaser is not required in an indictment charging sale of marihuana with knowledge of its unlawful importation under 21 U.S.C. 176a in order to withstand a motion under 28 U.S.C. 2255. Thus, the order of the district court was reversed and defendant's motion was granted.

Staff: United States Attorney Richard P. Stein; Assistant United States Attorney Robert W. Geddes (S.D. Ind.).

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LANDS DIVISION

Assistant Attorney General Ramsey Clark

Contracts; Admissibility of Parol or Extrinsic Evidence May Be Considered to Ascertain the True Intent of the Parties; Land, Comprising the Site Furnished By the Government, Does Not "Depreciate" and a Contract Provision Held Not Intended to Apply a Depreciation Formula to Land As an Item. United States v. Bethlehem Steel Company (C.A. 4, June 24, 1963, reversing D.Md., 215 F.Supp. 621). - In January 1942, the United States and Bethlehem Steel Company entered into a contract which provided, among other things, as follows: that the Government would acquire certain lands and shipyard facilities adjacent to a shipyard owned by Bethlehem in Baltimore, Maryland; Bethlehem agreed to construct at government expense and subsequently to operate shipyard facilities on the government land so acquired and on its adjoining land; Bethlehem agreed to repair government ships (under separate series of contracts not here involved) and pay to the United States as charges and rental for the use of the government land and shipyard facilities amounts to be computed in accordance with a specified formula.

Article 14 of the contract provided:

> (a) * * * the Contractor, if it desires to purchase the [government-owned] Facilities, may request the Department [of the Navy] to obtain a determination of the purchase price thereof. Within thirty (30) days after the receipt of any such request by the Department, the Bureau of Supplies and Accounts shall certify such purchase price to the Department and to the Contractor. The price so certified shall be equal to the Acquisition Costs of the Facilities, less depreciation on each item of the Facilities at the rate of six percent (6%) per annum from the date upon which such item was installed and available for use, to the date of the Contractor's request for the determination made hereunder * * *. Provided, however, That such price shall never be less than fifteen percent (15%) of the Acquisition Costs of the Facilities. The Contractor, for a period of thirty (30) days from the receipt of any such certification, shall have the right to purchase the Facilities at the price so certified, by making a payment to the Government of an amount equal to such price, or by giving notice to the Department of its election to purchase the same at such price and entering into a contract with the Government specifying the terms of such purchase: * * *.

In August 1957, Bethlehem, pursuant to the option, informed the Government it wished to purchase the Facilities and requested the Government to determine the purchase price in accordance with Article 14. As

noted, Article 14 provided that the Government would supply the purchase price within 30 days of receipt of such a request. However, the Government failed to do that because the Department of the Navy, the interested agency, at that time determined that legislation enacted by Congress subsequent to the execution of the contract prohibited the sale of property by that Department pursuant to the option. As a result, negotiations ensued for about ten months, whereupon in July 1958, the Navy, having changed its position, informed Bethlehem that on June 26, 1958, the purchase price of the Facilities had been certified in accordance with Article 14 to be $781,660.72. Bethlehem made its own calculation and informed the Government that the correct purchase price was $477,207. The calculation made by Bethlehem applied the 6% per annum depreciation rate and the 15% minimum to each item of the Facilities, including the government land, whereas the calculation made by the Government excluded the land from the depreciation formula. In the meantime, in September 1957, when Bethlehem first informed the Government that it did desire to purchase the government Facilities, it discontinued the payment of rental and charges under the contract, taking the position that it had exercised the option as of that date and had become the equitable owner of the Facilities.

This action was brought by the United States for a declaratory judgment determining that the option to purchase contained in Article 14 has never been exercised by Bethlehem and that Bethlehem is indebted to the Government for rental charges from September 1957. In its answer Bethlehem joined in the request for a declaratory judgment but asked that the court determine that the Government had breached the contract by failing to certify the purchase price within the 30 days and by erroneously demanding a purchase price of $781,660.72 instead of $477,207.

After a trial, during which the Government offered testimony and documentary evidence on the basis of which it contended that the government land is not an item of the Facilities subject to the depreciation formula, the trial court held that the plain terms of the agreement, listing as it did "Site (three tracts of land, including two marine railways thereon)" as the "SCHEDULE 1 FACILITIES," demonstrated that the government land was an item of the Facilities subject to the depreciation formula. In addition, the court referred to many other provisions of the agreement in support of its conclusion.

The Court of Appeals reversed, one judge dissenting, holding that

> This case essentially involves the problem of the lawyer who drafts a contract and, in the beginning, provides that, when used in the contract, the word "black" shall mean "white" and vice versa. Of course the law will accord him the same privilege that Humpty-Dumpty claimed in "Alice in Wonderland" when he said: "When I use a word it means just what I choose it to mean -- neither more nor less." But suppose our lawyer forgets his definition and later, obviously quite accidentally, uses white as meaning white or black as

> meaning black on their ordinary sense. What do we do then? Well, if we can be sure that he is using the word in its ordinary sense, we think that we must forget his definition and construe the word to mean what we are sure he intended it to mean. And this we think we should do here.

To support that conclusion, the Court acknowledged that, literally construed, Article 14 seemed to provide for the depreciation of the Site but pointed out that "depreciation," as applied to a Site, is not an apt term and before giving it effect the Court should be satisfied that it was actually intended that the land be subject to the formula. The Court, therefore, referred to the contract as a whole and pointed out that the term "Facilities" was used sometimes to include the Site and sometimes to refer to items other than the Site. In addition, the Court specifically held that it was proper to consider parol evidence to ascertain the true intent of the parties and, on the basis of the evidence, it was clear that the parties never intended that the Site be subject to "depreciation." Accordingly, the Court concluded that the option had never been validly exercised by Bethlehem but the case was remanded for further proceedings to determine the amount of rental or other charges due to the United States since September 1957, which, under the contract, averaged $144,000 per annum.

Rehearing before the full bench of the Fourth Circuit has been granted.

Staff: Herbert Pittle (Lands Division).

Reclamation; Repayment Contracts; Provision In Statute and Contracts For Execution of Contracts By All Landowners in Project Is Not Condition Precedent Voiding Executed Contracts on Failure of Government to Obtain Contracts From All Landowners; Provision Is For Benefit of Government Only. United States v. George Schaeffer, Jr., et al. (C.A. 9, No. 18,291, July 17, 1963). - This action against a number of landowners sought to recover construction and maintenance costs, enforce covenants running with the land, and foreclose liens, pursuant to repayment contracts executed by the landowners or their predecessors in title, in 1928, in connection with the Lummi Diking Project, in Washington. The purpose of the project was the construction of dikes for the protection of lands within the Lummi Indian Reservation, and those of private owners adjoining the reservation on the east, which included the subject lands, from overflow of rivers bordering the lands. The Act which authorized the project provided that no part of the appropriation for the project should be expended until repayment contracts were "executed by the landowners whose lands may be benefited by the project." The contracts quoted the statute, and provided that the parties executing them agreed "to and with the Secretary of the Interior and with all other landowners whose lands may be included within the project, in consideration of the premises, the promises of said other landowners, and the work to be done by the United States in connection with the project, that if the Secretary * * * shall construct dikes for the purpose contemplated in the Act," the lands "shall at once be and become burdened with and subject to a first lien" to secure "the full payment of a pro rata share of the entire cost of said project and all of the

betterment, operation and maintenance charges and penalties in connection therewith." All owners of land outside the reservation, except one, executed contracts covering their lands, and appellees executed supplemental agreements to assume their respective share of the cost assessable against the nonsigning owner. Several private owners within the reservation did not execute contracts. The dikes were completed in 1930, and assessments were made against the landowners. They made some payments from that time to the filing of the action, but refused to make others.

The district court entered a summary judgment in favor of the landowners, holding that the contracts contained a condition precedent which the Government had not fulfilled, as contracts were not obtained from all private landowners. The court of appeals held that obtaining repayment contracts from all of the private landowners was not a condition precedent to the validity of the contracts with appellees, and that under the Act and the contracts the Government has an enforceable lien against the properties of appellees. It reversed the judgment and remanded the cause for further proceedings consistent with the opinion. The court held that the provision was not a condition with respect to the other landowners whose lands may be included in the project, but was a promise of said other landowners as a part of the consideration for the contract, and that their failure to sign repayment contracts is an insubstantial failure of consideration. The primary and fundamental consideration for the liens and promises to repay is the work to be done by the Government, and the provision in the contract and Act was solely for its benefit. The dikes having been constructed, the appellees had received what they contracted to pay for, and the execution of repayment contracts by other landowners was not material since their costs were not increased.

Staff: Elizabeth Dudley (Lands Division).

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

SPECIAL NOTE

In the previous issue of the Bulletin, August 9, 1963, Vol. 11, No. 15, page 437, a report was made of the decision of the North Dakota Supreme Court in Fischer v. Hoyer, which, by a three to two decision, held that later-arising local real estate taxes secured priority over the federal tax lien when paid by the first mortgagee, though after notice of the federal tax lien. It was pointed out that the decision was handed down before United States v. Pioneer American Ins. Co., 31 U.S. Law Week 4603, which leaves no doubt that a mortgage lien for later-accruing taxes is an inchoate lien for future advances, like the provision for future attorneys' fees in the event of foreclosure. It was further stated that a petition for a writ of certiorari was under consideration by the Department. It has now been determined not to petition for a writ of certiorari, solely on the ground that the decision is so plainly erroneous that certiorari does not seem necessary, and that the Supreme Court should not be asked to review the ruling unless it should be followed by any court despite Pioneer American.

CIVIL TAX MATTERS
Appellate Decision

Enforcement of Internal Revenue Service Summons; Tax Years Barred Except in Case of Fraud; Held, Government Need Not Prove Probable Cause to Suspect Fraud. United States v. Bayard Edward Ryan (C.A. 6th), August 1, 1963.

An Internal Revenue Agent served a summons on an individual taxpayer, requiring production of records for years barred by the statute of limitations unless the tax returns were fraudulent. On taxpayer's refusal to comply, the government sought enforcement pursuant to Internal Revenue Code of 1954, Sec. 7604. The agent testified that he suspected fraud, but the District Court did not require him to give any detailed facts sufficient to enable the Court to determine whether there was a reasonable basis for the agent's suspicion. On appeal from an order for compliance the Sixth Circuit affirmed, holding that the government need not prove probable cause or the like. It is for the Secretary or his delegate to decide whether an examination is justified or necessary, although the court would have power to inquire as to whether an investigation is in good faith and for the statutory purpose of discovering possible tax liability. The court thus followed (and cited) its own prior decision, Peoples Deposit Bank & Trust Co. v. United States, 212 F. 2d 86 (C.A. 6th), as well as decisions of the Second, Fifth, and other Circuits, and expressly rejected the decisions of the First Circuit, e.g., O'Connor v. O'Connell, 253 F. 2d 365 (C.A. 1st). The court also rejected the argument that the investigation was unnecessary because the original tax returns for the barred years were no longer available.

Staff: John M. Brant, Joseph M. Howard (Tax Division); Bernard T. Moynahan, Jr., United States Attorney, (E. Ky.)

District Court Decisions

Injunction Denied - Disallowance of Tentative Carryback Adjustment May Be Assessed As If It Were Due To a Mathematical Error Appearing On the Return. Lion Manufacturing Corporation v. Coyle. (N.D. Ill.). Decided June 26, 1963.

Plaintiff brought this suit to permanently enjoin the defendant, District Director of Internal Revenue, from making any collection of an assessed income tax and to declare the assessment void. The plaintiff filed a paid corporate income tax return for 1956 showing a tax due of $316,447.36. The 1959 tax return of plaintiff showed a net operating loss of $151,340. Plaintiff applied for and received a tentative carryback adjustment to the year 1956 and received a refund of $78,697. Later, the defendant gave plaintiff a notice of deficiency for the year 1956, for the reason that defendant had disallowed certain bad debt deductions claimed on the 1956 return. The plaintiff then filed a petition for redetermination in the Tax Court. While the plaintiff's petition to the Tax Court with regard to the 1956 deficiency was still pending, the defendant disallowed the tentative carryback adjustment and immediately assessed the tax due pursuant to the provisions of Section 6213(b)(1) and (2) of the 1954 Code. Plaintiff contended that since it was already before the Tax Court with regard to the year 1956, that Section 6212(c)(1) of the Code was a bar to the latter assessment and thus Section 7421(a) was not applicable and Section 6213(a) gave plaintiff the right to a statutory injunction.

The Court held that Section 7421(a) was a bar to the injunctive relief sought and dismissed the complaint. The Court decided that the Congressional intent of Section 6213(b)(2) was clear and that the defendant had the authority to make the assessment as he did.

The effect of the decision is to accord the wording of Sections 6213(b)(1) and (2) their plain meaning so that an assessment arising out of the disallowance of a tentative carryback adjustment may be made without regard to the restrictions on assessment contained in Section 6212(c)(1) and 6213(a) of the Code.

Staff: James P. O'Brien, United States Attorney; Aaron Cohen, Assistant United States Attorney (N.D. Ill.); and Wallace E. Maloney (Tax Division).

Suit Against the United States By a Nontaxpayer To Recover Monies Seized From a Third Party By a Levy Issued By the District Director of Internal Revenue. Phillips v. United States (S.D. N.Y.). Decided June 18, 1963. (CCH 63-2 USTC ¶9573). Plaintiff brought this action against the United States to recover certain monies which had been seized by levy by the District Director from a third party, alleging that he was the owner of such monies rather than the taxpayer. Jurisdiction was alleged pursuant to 28 U.S.C. Section 1346(a)(1). The United States moved for summary judgment on the ground of lack of jurisdiction and the plaintiff cross-moved for summary judgment.

The Court granted the Government's motion for summary judgment, holding that the action had been improperly brought against the United States and dismissed the complaint on the ground of lack of jurisdiction. The Court held

that 28 U.S.C. 1346(a)(1) relinquished sovereign immunity with respect to refund suits brought by taxpayers and since the plaintiff was a nontaxpayer he could not avail himself of this section.

Staff: Robert M. Morgenthau, United States Attorney; and Robert E. Kushner, Assistant United States Attorney (S.D. N.Y.).

Computation of Statute Limitations. United States v. Jerome D. Shanman. (E.D. S.C.). Decided April 23, 1963. (CCH 63-2 USTC ¶9556). The United States instituted this suit against Jerome D. Shanman to collect income tax deficiencies, penalties and interest for the years 1943, 1944, 1945, and 1946, in the amount of $44,897.56 plus interest. The aforementioned taxes were assessed on March 11, 1949 by the Commissioner of Internal Revenue and the United States instituted the collection suit on April 6, 1962. Subsequent to the assessments, but prior to the expiration of the six-year period of limitations for collection, the taxpayer executed three offers in compromise on Treasury Form 656 and all three offers were rejected by the Commissioner of Internal Revenue. The taxpayer contended at trial that the one additional year suspension of the statute of limitations under Paragraph 2 of the offer in compromise which reads "agrees to the suspension of the running of the statutory period of limitations on assessment and/or collection for the period during which this offer is pending, or the period during which any installment remains unpaid, and for one year thereafter" applies only to "the period during which any installment remains unpaid." The Government argued that the additional one year suspension of the period of limitations applied both to the period during which the offer is pending and the period during which any installment remained unpaid and for one year thereafter. Thereupon, the court computed the statute of limitations by adding to the ordinary six-year limitations the amount of time each offer was pending and adding in each case the "one year thereafter" which was called for in the waiver of the offer.

Staff: Terrell L. Glenn, United States Attorney (E.D. S.C.); and James N. McCune (Tax Division).

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