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ANTITRUST DIVISION

Assistant Attorney General William H. Orrick, Jr.

Court Denies Motion to Require Government to Produce Grand Jury Testimony of Deceased Officer of Company Under Indictment. United States v. Johns-Manville Corporation, et al. (E.D. Pa.). On October 28, 1963, Judge Van Dusen denied a motion of defendant Keasbey and Mattison Company to require the Government to produce for inspection the grand jury testimony of Daniel W. Widmayer, a deceased former officer of that company. Defendant had argued inter alia that it believed the Government during trial might offer certain documents in evidence and that defendant might want to use the grand jury testimony of the decedent to explain language in certain documents.

In denying the motion, the Court found (1) that the motion was premature; (2) that there was no showing that the grand jury transcript is evidentiary within the rule of the Bowman Dairy case, 341 U.S. 220, 221 (1951); (3) that the Third Circuit has emphasized the policy behind encouraging free and untrammeled disclosure to the grand jury; and (4) that in the present state of the record the defendant's arguments that a "particularized need" exists had lost much of its force since the defendant, through tactics of its own choosing, may have created the "particularized need."

Staff: Raymond K. Carson, Kenneth R. Lindsay, Rodney O. Thorson and Roy C. Cook (Antitrust Division)

Court Denies Government Motion For Preliminary Injunction in Bank Case. United States v. Crocker-Anglo National Bank, et al. (N.D. Calif.). On November 1, 1963, a three-judge district court convened under Section 1 of the Expediting Act (12 U.S.C. 28) denied the Government's motion for a preliminary injunction to prohibit the proposed merger of the defendant banks.

Crocker-Anglo was California's fifth largest bank, composed of 124 branches located primarily in Northern and Central California, and possessed approximately 7.5% of the commercial banking business in the state. Citizens was California's eighth largest bank, composed of 78 branches located primarily in Southern California, and had approximately 2.5% of the commercial banking business in the state. Combination of the two created the State's fourth largest bank with assets of over three billion dollars and approximately 10% of the commercial banking business in the state.

At the hearing on the motion it was the Government's main contention that banking in California was already highly concentrated and that while the respective banks had heretofore operated primarily in differing areas, each was rapidly approaching the other through branching and were now in confrontation through newly opened branches in Ventura County in Southern California. Each represented a nucleus which could expand into a state-wide system by such branching, as permitted by California law. Consummation of the merger would thus not only eliminate the potential competition between the participating banks, particularly in the Los Angeles area toward which Crocker-Anglo was now rapidly moving, but would also substantially reduce the competitive potential which each had in the state-wide banking market in the rapidly growing California economy.

In its per curiam opinion the Court concluded that on the basis of the evidence presented at the hearing the Government had failed to establish a prima facie case of violation of Section 7 of the Clayton Act or Section 1 of the Sherman Act. Pointing out that the merger struck down by the Supreme Court in the Philadelphia National Bank case involved banks which were direct competitors in the same city, and would have held at least 30% of the banking business there, the Court noted that - although the percentage of total deposits and of total loans of all the banks in California held by the five largest banks was approximately 78% - the 9% to 10% represented by the combined defendant banks in this instance did not, in its opinion, constitute an undue percentage share nor result in a significant increase in banking concentration. The Court noted further that since each bank had heretofore operated in essentially differing areas, the actual competition between them was de minimis.

With respect to the issue of "potential competition," which was the main thrust of the Government's case, the Court held that the evidence presented with respect to Crocker-Anglo's heretofore Southward expansion toward the Los Angeles area was insufficient in itself to show that Crocker-Anglo, absent this merger, would probably have established multiple branches in Los Angeles and have become a substantial competitive factor along with Citizens and other banks in that area. In this respect the Court noted that where the question of "potential competition" is an issue, it is necessary to show a reasonable probability of the proscribed competitive effects and not merely a possibility. In support of its finding of no such reasonable probability of movement by Crocker-Anglo into the Los Angeles competitive area of Citizens, the Court cited among other reasons: 1. That, although there was evidence of a general desire, there was little evidence that Crocker-Anglo had thus far actually attempted or made plans to open de novo branches in the Los Angeles area; 2. That to become a substantial competitive factor in Los Angeles it would be necessary for it to establish not just one but a number of branches there; and 3. That it was doubtful the Comptroller of the Currency who had approved this merger would be disposed to permit Crocker-Anglo to open such a number of new branch offices in Los Angeles since he "obviously" considered the area already overbanked.

The Court also held that the merger would enable the resultant bank which would then have offices in both Northern and Southern California to provide additional competition to the Bank of America, United California Bank and First Western Bank and Trust Company, the three existing California state-wide banking systems.

Staff: Robert L. Wright, Herbert G. Schoepke, Charles A. Degnan, Robert J. Staal, John D. Gaffey and Frank Taylor (Antitrust Division)

Fertilizer Companies Indicted For Sherman Act Violations. United States v. International Ore & Fertilizer Corporation, et al. (E.D. Pa.). United States v. International Minerals & Chemical Corporation, et al. (E.D. Pa.). A federal grand jury in New York City indicted four phosphatic fertilizer producers and an export corporation with illegally fixing prices and allocating sales to export customers. The charges were made in two antitrust indictments. The exporter is International Ore and Fertilizer Corporation (Interore) of New York City. The four fertilizer companies, charged in the indictments, are: Virginia-Carolina Chemical Corp., Richmond, Va.; W. R. Grace & Co., New York City; International Minerals & Chemical Corp., Skokie, Ill.; and Tennessee Corporation, New York City, recently acquired by Cities Service Company. The individuals indicted were: Edward A. Shelton, former vice-president of Tennessee Corporation; Hugh S. Ten Eyck, president of Interore; and Ronald P. Stanton, vice-president of Interore.

Both indictments charged violations of section 1 of the Sherman Antitrust Act. The first indictment said Interore, Tennessee, and the three individual defendants conspired to eliminate price competition and to allocate export sales of triple superphosphate to AID-financed purchasers in Korea. Triple superphosphate is a highly concentrated fertilizer made by treating phosphate rock with phosphoric acid. Sales covered by the indictment totalled nearly $33,500,000, the indictment said.

The second indictment charged that International Minerals, which produces and exports Florida phosphate rock, entered into a price-fixing agreement with Interore, Grace and Virginia-Carolina. They assertedly established artificial prices for phosphate rock exports, particularly to Western Europe and Japan. Phosphate rock is used to manufacture fertilizer and also for direct application. This indictment involved annual sales of approximately $23,700,000.

Staff: Charles R. Esherick, E. Leo Backus, L. David Cole, Albert P. Lindemann and Lawrence M. Jolliffe. (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General John W. Douglas

COURT OF APPEALS

RAILWAY LABOR ACT

Question of Proper Representation of Airline Pilots Committed by Railway Labor Act to Decision by National Mediation Board; Courts Will Not Intervene in Such Determinations. Ruby, et al. v. American Airlines, Inc., et al. (C.A. 2, September 16, 1963). This is an action for injunctive relief brought by the Air Line Pilots Association seeking to prevent American Airlines from negotiating directly with its employees and with a new employee union and to compel the company to negotiate with the ALPA. Brief on behalf of the National Mediation Board as amicus curiae was filed by the Department. The district court dismissed the action as inappropriate for judicial relief and the Second Circuit affirmed. That Court, after describing the controversy in detail, held that the essential question was one of "proper representation of American's pilots, a subject which Congress has given the Mediation Board the duty to determine."

Staff: Howard E. Shapiro (Civil Division)

SUGGESTION OF INTEREST

Suggestion of Interest of United States, Filed in Support of Sealing of Depositions Containing Matters Potentially Harmful to Conduct of Foreign Policy, Authorized by 5 U.S.C. 316. International Products Corp. v. Koons, et al. (C.A. 2, October 28, 1963). This is a libel action in which depositions taken contained material suggesting corruption in the government of a South American nation. One of the parties moved the court to seal the depositions and the United States filed a suggestion of interest indicating that limiting disclosure of the depositions "would further the foreign policy objectives of the United States." The district court ordered the deposition sealed and further ordered the parties and their counsel to refrain from disclosing to third persons anything on the subject.

The Second Circuit held that (1) the order was not appealable under 28 U.S.C. 1292(a)(1) as an injunction pendente lite, and therefore that appellate relief is available only by mandamus; (2) the suggestion of interest was fully authorized by 5 U.S.C. 316; and (3) the order, insofar as it sealed the depositions, did not infringe upon the parties' constitutional rights, but that it should be modified so as not to restrain the parties or their counsel from communicating matters otherwise known to them.

Staff: United States Attorney Robert M. Morgenthau; Assistant United States Attorney Arthur S. Olick (S.D. N.Y.)

TORT CLAIMS ACT

Claims of Over $10,000, Purportedly for Trespass and Waste, Are Actually for Taking of Property Without Just Compensation, and Thus District Court Is Without Jurisdiction Under Tort Claims Act; Proper Forum Is Court of Claims, to Which District Court May Transfer Case Pursuant to 28 U.S.C. 1406(c). Myers, et al. v. United States (C.A. 9, October 16, 1963). This action was brought in the district court under the Tort Claims Act. Plaintiffs claimed entitlement to damages of over $10,000 as a result of "trespass" and "waste" purportedly committed by the United States and another in connection with the construction of a road which ran across portions of plaintiffs' property. The district court held for the Government on the merits. But on appeal the Ninth Circuit refused to reach the merits, holding that, with respect to the suit against the United States, jurisdiction would not lie under the Tort Claims Act because the claim was actually one for just compensation for the taking of property. Since the claim was for over $10,000, the Court of Appeals held that exclusive jurisdiction was in the Court of Claims, and that, under 28 U.S.C. 1406(c), the district court had authority to transfer the case to the appropriate forum.

Staff: United States Attorney Warren C. Colver (D. Alaska)

DISTRICT COURT

MORTGAGE FORECLOSURES

Rent Collected by Receiver in Foreclosure of FHA Mortgage Not Taxable by State Because of Clause Assigning Rents to Mortgagee Upon Default. United States v. Academy Apartments, Inc. (D. Minn., Oct. 22, 1963). A real estate mortgage which had been insured by the FHA pursuant to the National Housing Act was assigned to the Commissioner upon default. An action was filed in the name of the United States to foreclose the mortgage and, at the Government's request, the Court appointed a receiver to collect the rents. The mortgage contained a clause assigning all rents, in the event of default, to the mortgagee. At the foreclosure sale the Commissioner was high bidder, leaving a deficiency on the mortgage debt of approximately $96,000. The receiver, up to date of foreclosure sale, collected rents of almost $20,000. After payment of his fee and expenses, he had a net of approximately $15,000, against which the state filed a claim for income tax pursuant to a state statute providing for payment of the tax by a Receiver who has charge of the business of a taxpayer. The Government opposed on the ground that the money in the hands of the receiver belonged to the United States pursuant to the rent assignment clause of the mortgage. The Court held that (1) in authorizing the insurance of mortgage loans Congress was exercising a constitutional function, and the rights of the United States thereunder must necessarily be decided by federal law, and (2) no income taxable by the state had resulted, since under federal law the Receiver collected the rents, as agent of the Government, as additional security for the mortgage loan pursuant to the rent assignment clause.

Staff: Assistant United States Attorney Patrick J. Foley (D. Minn.); George H. Vaillancourt (Civil Division)

TORT CLAIMS ACT

Double Parking of Postal Vehicle Considered Necessary in Heavy Traffic and Was Not Proximate Cause of Accident. Moran, etc. v. United States (E.D. N.Y.). Plaintiffs sued for personal injuries sustained by their six year old son who was injured when he ran out into traffic on a conjested street in Brooklyn, New York. The street was for one way traffic only; vehicles were parked all along the curb area. A postal truck was double parked temporarily while the driver alighted to deliver a parcel post package. The child crossed in front of the postal truck and was struck by a vehicle which was in the process of passing the postal vehicle.

The District Court, noting that the local traffic regulation prohibiting double parking contained an exception for temporary unloading, concluded that the double parking here did not violate the regulation, since there was no parking available to the postal truck, and since the distribution of mail would be seriously hampered if double parking was prohibited. The Court held that, in any event, violation of this regulation could not alone establish liability. The Court concluded that the proximate cause of the accident was the action of the private vehicle.

Staff: United States Attorney Joseph P. Hoey; Assistant United States Attorney Carl Golden (E.D. N.Y.); Alice K. Helm (Civil Division)

Under Texas Law of Respondeat Superior, Serviceman Driving Private Vehicle on Leave Status Not Acting Within Course or Scope of His Employment. Canal Insurance Co. v. United States (E.D. Tex., September 30, 1963). Plaintiff sued under the Federal Tort Claims Act for restitution of the amount paid out on an insurance policy. The suit arose out of a collision between the private vehicle of an Air Force enlisted man and a van trailer. The accident occurred on May 1, 1962. Prior to April 16, 1962, the airman was assigned to Travis Air Force Base, California. On April 16, 1962, an order was issued assigning him to an Air Force base in Spain and requiring him to report to McGuire Air Force Base, New Jersey, on or before June 1, 1962. The order further provided that he could travel by private automobile and, if so, twelve days traveling time was authorized. He was given thirty days leave which was referred to in his orders as a delay in route. The collision occurred while he was enroute to Brunswick, Georgia, to leave his wife and child who were not permitted to travel to Spain with him. The Government contended that at the time of the collision in question he was not acting in the course or scope of his employment with the Air Force.

The Court held that, if the airman had been involved in the collision in question while traveling in a direct route from Travis Air Force Base to McGuire Air Force Base, there would be little doubt but that, under the

holding in Hinson v. United States, 257 F. 2d 178 (C.A. 5, 1958), he would have been in the course of his employment. However, the Court stated that in the instant case the airman was not on a direct route between Air Force bases, but was in fact going to Brunswick, Georgia, to settle his family. The Court therefore held that the airman was engaged in a purely personal mission and was not performing any act in the furtherance of the business of the Air Force, citing United States v. Eleazer, 177 F. 2d 914 (C.A. 4, 1949); and J. C. Penny Co. v. Oberpriller, 170 S.W. 2d 607 (Tex. Com. App., 1943).

Staff: United States Attorney William Justice; Assistant United States Attorney Lloyd Perkins (E.D. Tex.); Vincent H. Cohen (Civil Division)

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CIVIL RIGHTS DIVISION

Assistant Attorney General Burke Marshall

Voting and Elections: Civil Rights Acts of 1957, 1960. United States v. Quitman Crouch, et al., (E.D. La.). This suit instituted under the Civil Rights Act of 1957, as amended, was filed on October 22, 1963 against the registrar of St. Helena Parish, Louisiana and against the State of Louisiana. The complaint alleges that the defendants have engaged in racially discriminatory acts and practices in the registration process in St. Helena Parish which have deprived Negro citizens of the right to register to vote without distinction of race or color. These include applying to Negroes more stringent registration procedures, requirements and standards than are applied to white applicants in determining whether such applicants are qualified to register and vote. The Government seeks an injunction forbidding such acts and practices and a finding of a pattern and practice of discrimination.

Staff: United States Attorney Louis C. LaCour: John Doar, Frank M. Dunbaugh, Richard K. Parsons (Civil Rights Division)

Voting and Elections: Civil Rights Acts of 1957, 1960. United States v. Fletcher Harvey, et al., (E.D. La.). This suit instituted under the Civil Rights Act of 1957, as amended, was filed on October 29, 1963 against the registrar of West Feliciana Parish, Louisiana and against the State of Louisiana. The complaint alleges that the defendants have engaged in racially discriminatory acts and practices in the registration process in West Feliciana Parish which have deprived Negro citizens of the right to register to vote without distinction of race or color. No Negroes were registered to vote in West Feliciana Parish from 1904 until October 17, 1963. The discriminatory acts and practices include unreasonably requiring Negroes as a prerequisite to making application for registration to vote to prove that they meet the residency requirements under Louisiana law by producing documents or two voters registered in their precinct. The Government seeks an injunction forbidding such acts and practices and a finding of a pattern and practice of discrimination.

Staff: United States Attorney Louis C. LaCour: John Doar, Frank M. Dunbaugh (Civil Rights Division)

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

RACKETEERING

Interstate Travel in Aid of Racketeering; Announcement Prior to Forcible Entry; Suppression of Evidence; Pre-indictment Pre-statutory Evidence; Co-conspirators' Declarations. United States v. George Barrow, et al. (E.D. Pa.). Fifteen defendants were indicted under 18 U.S.C. 1952 and 371 for the operation of a dice game in Reading, Pennsylvania. Some of the defendants traveled from New Jersey to Pennsylvania to work in the game while others regularly transported players from New Jersey to Pennsylvania to the game. The Court denied a motion to dismiss, construing 18 U.S.C. 1952 to require only that the travel be with the intent to facilitate the unlawful activity, rejecting defendants' contention that the travel itself must facilitate the activity. The Court also sustained the basic constitutionality of the statute, affirming the power of Congress under the commerce clause to outlaw interstate travel in aid of unlawful activity. The Court, however, granted a motion to suppress evidence seized in an FBI raid on the game, construing Miller v. United States, 357 U.S. 301 (1958), as having extended to arrests the application of 18 U.S.C. 3109, which deals with the execution of search warrants. The Court found that the FBI agents illegally broke into the dice game when they entered without sufficiently announcing their identity and purpose and without waiting for a refusal of admission. The Court further found that there was no bona fide fear of danger warranting an absence of such announcement and that the operators of the game were not aware of the purpose of the agents' entry even though an announcement of identity was made. The Court's pre-trial opinion is reported at 212 F. Supp. 837 (E.D. Pa., 1962).

The indictment charged a conspiracy beginning on November 17, 1961 and continuing to January 20, 1962. Section 1952 became law on September 13, 1961. At trial, the Court permitted the Government to introduce evidence establishing the operation of the dice game and the participation of the defendants relating to a period beginning in the Spring of 1960 and continuing until January 20, 1962. These rulings were based on Heike v. United States, 227 U.S. 131 (1913), which sustained the admissibility of pre-indictment evidence; Standard Oil Co. v. United States, 221 U.S. 1 (1911), which sustained the admission of such pre-statutory evidence; and United States v. Dennis, 183 F. 2d 201 (C.A.2, 1950), affirmed on other grounds, 341 U.S. 494 (1951), which indicates both types of evidence are fully admissible subject only to a test of remoteness.

Because of the pre-trial order of suppression, a major problem in the trial of the case was the doctrine of the "fruit of the poisonous tree" under Nardone v. United States, 308 U.S. 338, 340 (1939). The Court took the position that the Government had the burden of coming forward with evidence showing that what it sought to introduce at trial was not "tainted"; it also felt, however, that the ultimate burden of persuasion

on the question of derivative suppression lay on the defendants. Here United States v. Goldstein, 120 F. 2d 485, 488 (C.A.2, 1941), affirmed on other grounds, 316 U.S. 114 (1942) and United States v. Coplon, 185 F. 2d 629, 636 (C.A.2, 1950), cert. denied, 342 U.S. 920 (1952), must be compared with Harlow v. United States, 301 F. 2d 361,372-73 (C.A.5), cert. denied, 371 U.S. 814 (1962). There seems to be no general agreement on the proper procedure to follow in this situation. Although Lawn v. United States, 355 U.S. 339, 355 (1958) (see also United States v. Giglio, 263 F. 2d 410, 412-13 (C.A.2, 1959)), indicates that a defendant may have a right to cross-examine witnesses on the issue of derivative suppression, the Court exercised its discretion under Nardone v. United States, supra, at 341-42 and accepted the Government's statements of facts surrounding the acquisition of the evidence used at trial. Here the Court followed United States v. Krulewitch, 167 F. 2d 943 (C.A.2, 1948), reversed on other grounds, 336 U.S. 440 (1949). The defendants acknowledged the propriety of this procedure. Hence extensive hearings on the factual questions surrounding the scope of the suppression order were avoided. The chief question in this area was the right of the Government to call as witnesses individuals discovered on the premises at the time of the illegal raid. The Court permitted the Government to call every witness which it had identified prior to the raid through auto license number surveillance of the dice game and of whom the Government had pre-raid surveillance movies. These rulings were based on the "independent source" doctrine of Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920). The Government was also permitted to call two individuals who had been detained the night of the raid just outside of the premises prior to the illegal entry. See here McGuire v. United States, 273 U.S. 95, 99 (1927).

The Court also followed Carbo v. United States, 314 F. 2d 718, 735-38 (C.A.9, 1963), in instructing the jury on its duty in considering the statements of alleged co-conspirators. It instructed the jury, in effect, that the use against any individual of such a statement did not depend on a prior determination by the jury that the conspiracy existed and that the declarant and the individual were both members of the conspiracy. Instead the Court itself determined that the statements were admissible, finding that the Government had made out a prima facie case of conspiracy involving both individuals; hence the evidence relating to the statements was admissible and could be used by the jury like any other evidence.

The Court also followed Zambito v. United States, 315 F. 2d 266 (C.A.4, 1963), cert. denied 373 U.S. 924, and held that to prove a violation of 18 U.S.C. 1952 and 371 the Government had to show, at least circumstantially, that the defendants were aware of the interstate aspects of the unlawful activity.

On October 9, 1963, the jury returned a guilty verdict as to twelve of the defendants.

Staff: Thomas F. McBride and G. Robert Blakey (Criminal Division)

WAGERING TAX LAW FORFEITURE

Forfeiture of Currency and Checks Not Barred by Unlawful Seizure. United States v. $1,058 in United States Currency, etc., Nathan Granoff, Claimant; United States v. $2,007.43 in United States Currency, etc., Meyer Sigal, Claimant, and United States v. $395.96 in United States Currency, etc., Abe Rabinovitz, Claimant (W.D. Pa.) C.A. 3, October 7, 1963. A special agent of the Internal Revenue Service, Intelligence Division, who had a "numbers" operation under surveillance, obtained a warrant to search the premises, a combination restaurant and poolroom, for gambling paraphernalia and also warrants to arrest the three above-named claimants. In addition to numbers slips and adding machine tapes found on the premises the agent in arresting the claimants during the search found in their pockets and seized over $3,400 in currency and checks and money orders totalling over $460. Following trial on three forfeiture libels the District Court found that none of the claimants had paid the special tax of $50 imposed by the revenue laws on persons engaged in receiving wagers and that they had not registered their place of business; that the seized currecy and check "were guilty instrumentalities that had been used in an illegal numbers operation, i.e., wagers, and were intended to be so used therein," and ordered their forfeiture.

On appeal to the United States Court of Appeals for the Third Circuit the claimants challenged only the District Court's holding that the special agent was authorized to execute the arrest warrants. They contended that he lacked statutory authority to execute the arrest warrants and for that reason the arrests and seizures were unlawful and that under the Third Circuit's holding in United States v. Plymouth Coupe, 182 F. 2d 180 (1950), property unlawfully seized cannot be forfeited and the orders of forfeiture should be reversed.

Not until 1962 (see 26 U.S.C. 7608(b)), about a year after the arrest in this case, did Congress in specific terms extend to investigating agents of the IRS Intelligence Division the right to execute warrants, thus setting at rest any prior or future doubts in that respect. However the Court found it unnecessary to reach the question of the agent's authority to make the arrests in this case. In a well-reasoned opinion buttressed by Supreme Court and circuit court decisions, it concluded that although the res had been unlawfully seized, it may nevertheless be forfeited. It stated that "Since we held to the contrary in United States v. Plymouth Coupe . . . that decision is now overruled," and the forfeiture decrees were affirmed.

The decision in this case is of particular significance because the Third Circuit was the only circuit which had previously held that an unlawful seizure of the res itself would bar the right of the Government to obtain forfeiture of the property even though it had been used or was intended for use in violation of the Internal Revenue Laws.

Staff: Assistant United States Attorney Samuel J. Reich (W.D. Pa.).

FALSE STATEMENTS

Causing Tobacco Grown on One Farm to Be Sold Under Department of Agriculture "Within Quota Marketing Card" Applicable to Another Farm; Materiality Question of Law. United States v. Marion Ivey and J.R. Owen, 322 F. 2d 523 (C.A. 4, 1963). The Fourth Circuit has held cognizable under the first clause of 18 U.S.C. 1001, proscribing concealments of material facts, a situation involving misuse of a "within quota marketing card" in the sale of tobacco, notwithstanding the fact that defendants never submitted or made entries on said card, never made false representations with respect thereto, and never communicated with any Government agency in consummation of said sale.

Each defendant was convicted in the Middle District of North Carolina on two counts of an indictment charging violations of 18 U.S.C. 1001 in that they knowingly and willfully falsified, concealed and covered up by trick, scheme and device a material fact in a matter within the jurisdiction of the Department of Agriculture, in that they falsely identified and marketed or caused the false identification and marketing of flue-cured tobacco through warehouse facilities on a "within quota marketing card" for such type tobacco issued to Ivey for use in identifying flue-cured tobacco produced on a particular farm when, in truth and in fact, defendants knew the tobacco was not produced on said farm. The defendants neither testified nor introduced evidence in their own behalf.

The Court of Appeals first reviewed the program for marketing tobacco under the Agricultural Adjustment Act of 1938, as amended, one of the facets of which was allocating a particular quota for each farm which when marketed was to be evidenced by a card identifying it as a product of that farm. The quota system and correct use of the cards were important elements in the administration of the program. It then reviewed the Government's evidence, concluding that the facts amply justified a finding that defendants falsely identified and marketed the tobacco in question. The Court held that the misuse in question was in a matter within the jurisdiction of a department or agency, notwithstanding the defendants' arguments that there was no evidence that they had:

1) submitted the quota card to anyone in connection with either sale,

2) ever made any entry of any kind thereon or on any card, bill or other paper, whether true or false,

3) made any statement or representation, true or false, verbal or written, to any person with respect thereto,

4) used any card, entry or paper notation of any kind during the course of either sale,

5) ever came in contact with any Government employee at any time during the course of either sale, or that anyone on their behalf had such contact,

6) made any statement or representation of any kind to any Government employee or representative about any matter pertaining to either sale,

7) concealed any facts, material or otherwise, from any Government employee or representative.

The Court of Appeals also concluded contrary to defendants' contention that the question of materiality of the alleged falsifications and concealments was one of law for the District Court rather than one of fact for the jury, citing Sinclair v. United States, 279 U. S. 263, 298 (1929); Weinstock v. United States, 231 F. 2d 699, 701 (D.C. Cir. 1956); United States v. Clancy, 276 F. 2d 617, 635 (C.A. 7, 1960). Finally, the Court held that the evidence sustained a finding of materiality because the honest and accurate use of the quota card was an important and material factor in the administration of the flue-cured tobacco marketing program.

A petition for writ of certiorari has been filed by Ivey and Owen.

Staff: United States Attorney William H. Murdock; Assistant United States Attorney Roy G. Hall, Jr. (M.D. N. Car.).

FALSE STATEMENTS

Denial of Arrest Record in Application for Christmas Employment With Post Office. Samuel Blake v. United States (C.A. 8, 1963). Blake was convicted on a charge of making false statements proscribed by 18 U.S.C. 1001 in a Christmas employment application to the Post Office wherein he denied any arrest record. In fact he had been arrested for assault to commit murder, possession of narcotics, frequenting a gambling game and drunkenness. He served time on the narcotics charge.

On appeal Blake contended his denial of a criminal record was not material because it was not reasonably likely to influence nor was it capable of influencing the decision of the Post Office. Blake argued that his denial was not material because it was not relied upon since all applicants' records were routinely checked at the Kansas City Police Department and the clerk had revealed the same before any action was taken on Blake's appointment. The Court of Appeals, noting the trial court's instruction that materiality was an essential element of the offense charged and referring to opposing authorities on this question, Gonzales v. United States, 286 F. 2d 118, 120 (C.A. 10); United States v. Quirk, 167 F. Supp. 462, 464 (E.D. Pa.), properly assumed this to be a correct statement of the law. It then restated the long recognized test of materiality to be whether a statement "has a natural tendency to influence, or was capable of influencing, the decision of the tribunal in making a determination required to be made" Gonzales, supra; Weinstock v. United States, 231 F. 2d 699, 701-702 (D.C. Cir.), and cited authorities holding falsifications regarding prior criminal records in employment applications were material within the statute, including Alire v. United States, 313 F. 2d 31 (C.A. 10) holding inter alia, the statute was not limited in its scope to matters of great national concern.

The Court of Appeals also dismissed as irrelevant the contention that the Government must rely upon the false statement Gonzales, supra and Brandow v. United States, 268 F. 2d 559 (C.A. 9), the latter adopting Judge Kraft's language in Quirk to the effect:

> /W/e believe that the conduct Congress intended to prevent by §1001 was the willful submission to federal agencies of false statements calculated to induce agency reliance or action, irrespective of whether actual favorable agency action was, for other reasons, impossible. We think the test is the intrinsic capabilities of the false statement itself, rather than the possibility of the actual attainment of its end as measured by collateral circumstances.

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

NATURALIZATION

Alien Not Ineligible to Naturalization if Civilian Work Performed in Lieu of Military Service. Petition of Ekkehard Gustav Lichti, (N.D. Ind., October 7, 1963.) This case involves a German national who filed a petition to be naturalized a citizen of the United States. It was brought out in the naturalization proceedings that in 1953 he requested and was relieved from military service in the United States upon the basis of a treaty between the United States and Germany; that upon the termination of the treaty in 1954 he was reclassified 1-A; and that, being a conscientious objector, he was required by the Selective Service authorities to perform two years of civilian work in lieu of military service.

The Naturalization Examiner recommended to the Court that the petition be denied under Section 315 of the Immigration and Nationality Act, 8 U.S.C. 1426, because the petitioner had applied for and been granted relief from military service. The Court declined to follow the recommendation of the Naturalization Examiner, being of the opinion that the petitioner had not been relieved from military service within the meaning of Section 315. The Court felt that the bar of Section 315 should not apply to aliens who have fulfilled their responsibilities under the Universal Military Training and Service Act by serving as did the petitioner in the National Security Training Corps.

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INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Conspiracy to Defraud United States by Means of Filing False Non-Communist Affidavits. United States v. Dennis et al. 18 U.S.C. 371 (D. Colo.). The conviction of the defendants in this case was reported in Vol. II, No. 20 of the United States Attorneys Bulletin, dated October 18, 1963. Motions for a new trial, acquittal, and arrest of judgment were denied November 7, 1963, and each of the defendants was sentenced to three years' imprisonment and fined $2,000. A notice of appeal has been filed.

Staff: Assistant United States Attorney Donald McDonald (D. Colo.) and Lafayette E. Broome, F. Kirk Maddrox, and Francis X. Worthington (Internal Security Division)

Subversive Activities Control Act of 1950; Registration of Communist Party Members. Attorney General v. Michael Saunders et al. On November 19, 1963, the Attorney General filed ten additional petitions with the Subversive Activities Control Board at Washington, D.C., pursuant to Section 8(a) of the Subversive Activities Control Act, against leading functionaries of the Communist Party, USA, seeking orders of the Board requiring the respondents to register as members of the Party. The respondents are Michael Saunders and Daniel Lieber Queen of Chicago, Illinois; Ralph William Taylor and Betty Mae Smith of Minneapolis, Minnesota; Marvin Joel Markman and Meyer Jacob Stein of New York City; Norman Haaland and Benjamin Gerald Jacobson of Portland, Oregon; and Milford Adolf Sutherland and Donald Andrew Hamerquist of Seattle, Washington.

Staff: Oran H. Waterman, James A. Cronin, Jr., Earl Kaplan, Thomas C. Nugent, John E. Ryan, Joseph D. Moore (Internal Security Division)

Internal Security Act of 1950, Passport (50 U.S.C. 785(a)(1); False Statement in Passport Application (18 U.S.C. 1542). United States v. Zena Druckman (N.D. Calif.). On October 30, 1963 a federal grand jury in San Francisco returned a two-count indictment against Zena Druckman. The first count charged her with violating Section 785(a)(1) of Title 50, U.S.C., which makes it unlawful for a member of the Communist Party, who has knowledge or notice of the entry of the final order of the Subversive Activities Control Board requiring the Communist Party to register, to apply for or use a passport. This is the first prosecution brought under this specific sanction of the Internal Security Act.

The second count charges that violation of 18 U.S.C. 1542, in that in her application for a passport defendant falsely stated that she was not then nor had she been in the preceding twelve months a member of the Communist Party.

She was released on $1,000 bail. No trial date has been set.

Staff: United States Attorney Cecil Poole (N.D. Calif.); James L. Weldon, Jr., and Brandon Alvey (Internal Security Division)

Transmitting Defense Information to Aid Foreign Government (18 U.S.C. 794); Acting as Agent of Foreign Government Without Notification to Secretary of State (18 U.S.C. 951). United States v. John William Butenko and Igor A. Ivanov. (D. N.J.). On November 7, 1963, a federal grand jury returned a three-count indictment against Butenko and Ivanov charging them in Count I with having conspired with each other and with three named Soviet nationals, members of the Soviet Mission to the United Nations, to transmit information relating to the national defense of the United States to the Union of Soviet Socialist Republics in violation of 18 U.S.C. 794(c). Count II charges the defendants and the Soviet nationals with having conspired to have Butenko act as an agent of the Union of Soviet Socialist Republics without prior notification to the Secretary of State. Count III charges Butenko with having acted as an agent of the Union of Soviet Socialist Republics without prior notification to the Secretary of State. The defendants have previously been arrested on a complaint charging them with conspiracy to commit espionage and they are being held without bail.

Staff: United States Attorney David M. Satz, Jr. and Assistant United States Attorney Sanford Jaffee (D. N.J.); Paul C. Vincent (Internal Security Division)

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LANDS DIVISION

Assistant Attorney General Ramsey Clark

Court Reporters - Extra Charge For Use On Appeal Of Filed Copy Abolished

In United States v. Benning, 295 F. 2d 705 (C.A. 9, 1961), the Court sustained imposition of a charge of 25 cents per page to be paid to the court reporter for use for appeal purposes of the copy which the reporter is required to file when a party buys the original, based upon a 1951 resolution of the Judicial Conference. At the September meeting of the Judicial Conference, a district judge proposed that the fee be increased to 30 cents.

After consideration by Committees of the Conference, the authorization was withdrawn, based on the conclusion that 28 U.S.C. 753(b) precluded such a charge. By memorandum of November 7, 1963, the Administrative Office of the Courts has notified all district courts and reporters that no such charge may be imposed for use of transcripts after September 19, 1963, for preparation of appeals.

Public Lands; Mineral Leasing Act; Executive Withdrawal of Public Land; Administrative Construction of Executive Order; Statute of Limitations; Cross Appeal. Tallman v. Udall (C.A. D.C.). A 1941 Executive Order created a moose range in Alaska and removed the land from "settlement, location, sale, or entry, or other disposition." The Secretary of the Interior construed this as not removing the land from the operation of the Mineral Leasing Act, and allowed the filing of applications and the issuance of leases thereunder. Pending a study of feasibility, the issuance of leases was suspended from 1953 until 1958, when the southern half of the range was closed to leasing and the northern half opened. Pending applications were granted. Tallman applied for a lease on the opened portion after 1958 but was rejected because a lease had been issued on the land applied for pursuant to an application filed in 1955. The Secretary decided that the land had at all times been open to application because the withdrawal order prohibited only disposition involving alienation of title of the United States. Tallman's petition for exercise of supervisory authority, filed some five months after the decision, was denied.

The district court affirmed the Secretary's decision, but stated that the 90-day statute of limitations relied on by the Government formed no part of the basis of its decision. The Court of Appeals reversed and declared that leases issued pursuant to applications filed prior to 1958 were "nullities." The Court concluded that (1) the 1941 order withdrew the land from all forms of disposition including the Mineral Leasing Act and the Secretary's decision to the contrary was unreasonable, and (2) the statute of limitations did not start to run until the denial of the petition for supervisory authority, since the denial was on the merits. Two judges in a concurring opinion concluded that the Government could not raise the statute of limitations on appeal because no cross-appeal had been filed. A petition for rehearing was denied and a further motion for reconsideration was also denied.

Subsequent developments have disclosed that the opinion casts doubt on the validity of some 400 leases issued on applications filed prior to 1958. Many of these are producing leases with total production exceeding $56,000,000 to date. Several of the interested lessees, including those whose leases were declared nullities, attempted, without success, to file briefs as amicus curiae after the decision. The decision is considered wrong and will pose serious difficulties for Interior and the producing lessees. The desirability of a petition for certiorari is being studied.

Staff: Edmund B. Clark (Lands Division)

Taylor Grazing Act; Exchanges; Rights of Licensees; Necessity for Hearings; Administrative Procedure Act; Administrative Discretion. LaRue v. Udall (C.A. D.C.). North American Aviation, pursuant to Section 8(b) of the Taylor Grazing Act, 43 U.S.C. 315g(b), offered 20,000 acres of land in a grazing district near Reno, Nevada, in exchange for 10,000 acres of equal value within a different grazing district. The purpose was to consolidate North American's holdings for a rocket fuel test program. Section 8(b) authorizes such exchanges "when public interests will be benefited." LaRue held grazing permits on the public land sought in the exchange. The Secretary of the Interior, without formal hearings and over LaRue's protests, accepted the offered land in exchange on the grounds that "public interests" under Section 8(b) included national defense and were not limited to grazing purposes.

The district court, in a mandamus action filed by LaRue, affirmed the Secretary's decision. The Court of Appeals also affirmed, holding that (1) the "public interests" in Section 8(b) included national defense; (2) a licensee under the Taylor Grazing Act has no interest under the Fifth Amendment requiring a hearing; (3) the Administrative Procedure Act does not require a hearing because the Taylor Grazing Act requires none for exchange proceedings; and (4) the prohibition in the Act against denying a renewal of a permit when the grazing unit was mortgaged (as it was here) did not create a vested right against the United States prohibiting the exchange. One judge concurred in the result, reasoning that "public interests" meant grazing interests but that they would be served by the exchange.

Staff: Edmund B. Clark (Lands Division)

Appeal and Error; Points Not Briefed Are Waived; Appeal From Wrong Order Is Harmless Error; Motion Under Rule 59(e) Extends Time for Appeal; Condemnation; Effect Upon Mortgage; Right of Mortgagee to Contract Interest Continues Until Principal Is Paid. United States v. Certain Land In City of Paterson, N. J., 322 U.S. 866 (C.A. 3, 1963). In December 1961, the United States brought proceedings to condemn land owned by Three Hundred, a corporation. A declaration of taking was filed and estimated compensation deposited but possession was not delivered until January 26, 1962. Eastwood, et al., trustees, were holders of a mortgage on the property but were not named as defendants by the United States. On March 8, Three Hundred moved for withdrawal of most of the deposit, while the next day the Trustees appeared and sought withdrawal of the mortgage principal with interest from January 1, 1962, until paid.

A hearing was had on March 26, at which Three Hundred objected to the interest claim. An order for payment of the principal was made on June 6, 1962, and actual payment was made June 11. On October 18, the district court ordered payment of interest at the mortgage rate to June 11. Three Hundred filed a timely motion to amend that order. It was denied by letter opinion filed December 4, and order thereon was filed January 14, 1963. Three Hundred appealed from that order.

The Court of Appeals affirmed. It first noticed sua sponte the fact that the notice of appeal was directed at the January 14 order, whereas the disposition order was that of October 18. This, it held, was harmless error since it did not go to the jurisdiction of the court. It then rejected Three Hundred's argument that the appeal was not timely, holding that the Trustees' timely motion to alter or amend the order under Rule 59(e) tolled the time for appeal. A claim by Three Hundred, that the United States was responsible for the delay from March to June because its attorney insisted that a security bond for any deficiency judgment be posted, was rejected by the trial court. This, the Court of Appeals said, was not before it because not embraced in the "Statement of Questions Involved" which, it noted, is, under its rules, "in the highest degree mandatory."

On the merits, the opinion first emphasizes the discretion as to distribution conferred on the district court by the Declaration of Taking Act and that the issue as to interest is to be decided by federal law. It reasoned that a mortgage is simply security for payment of a note which the mortgagor must pay regardless of possession of the premises. Losing of possession by condemnation produces no inequity to the landowner, who can secure any deposit made or who receives interest if no deposit is made.

Either party, the Court held, can petition for distribution and normally there is little delay between petition and payment. On the record, the Court concluded that the district court did not abuse its discretion in charging Three Hundred with interest until June.

Staff: Roger P. Marquis (Lands Division).

Condemnation; Valuation of Land Condemned in Fee Which Had Been Leased by United States; Exclusion of Evidence from Government Files as to Negotiations in Leasehold. United States v. Certain Land, Together With Improvements Thereon Located at 400 Lee Street, Montgomery, Alabama, and the Security Life and Accident Company, et al. (M.D. Ala.) The case was previously tried before a jury, and a verdict of $118,000 was returned. The Government filed a motion for new trial, and the motion was granted unless defendant would agree to a remittitur down to an award of $83,200.

Defendant refused to consent to the remittitur, and filed a motion to produce, seeking information from the files of the General Services Administration concerning negotiations conducted in 1957. Apparently, this data indicated a higher rental for a one-year lease than was the rental provided for in the executed voluntary leasing for five years.

Defendant sought to introduce a memorandum found in the acquiring agency's file which showed that the negotiating authorities in that agency admitted that the rental figures, including the one-year rental, were fair and reasonable.

The Government objected to the admission of any documents from the agency's file on the ground that the negotiations in 1957 were too far removed from the taking in 1962, that negotiations (the same as offers) are not admissible as evidence of value, that the negotiations were hearsay, that the negotiations were made by an agent and would not be binding on the principal, and that the negotiations culminated in a voluntary lease which is the best evidence. Although the Court excluded this evidence, it did not designate the ground for the exclusion.

At the trial, the Government's testimony ranged from $40,732 to $47,083 and defendant's testimony ranged from $141,900 to $270,000. The jury returned a verdict in the amount of $75,000. Although the verdict is in excess of the Government's testimony, it is considerably less than the previous verdict of $118,000 and even less than the judgment on remittitur entered in the sum of $83,200.

Staff: United States Attorney Ben Hardeman and Assistant United States Attorney Rodney R. Steele (M.D. Ala.)

Public Lands; Lack of Binding Effect of Mandamus Judgment By Non-Party; Legal Effect of Cash Certificate Under Small Tract Act. Garigan v. Udall and Megna (D. Ariz.) In January 1958, a former Secretary of the Interior declared an individual named Garigan to be the purchaser of a piece of public land near Phoenix, Arizona, which had been offered for sale under the Small Tract Act, 43 U.S.C. 1171. Another bidder named Megna successfully challenged that decision in a suit in the United States District Court for the District of Columbia in which Garigan was not named a party. The Court directed that a cash certificate previously issued to Garigan be cancelled and that further proceedings be held leading to a division of the land between Garigan and Megna. No appeal was taken.

At about this time, a congressional investigation developed the fact that appraisals of public lands in the burgeoning Phoenix area had been entirely unrealistic and that market values far exceeded appraised values. Following the Court's decree, the former Secretary did not cancel the certificate as directed but did order the land reappraised--apparently intending to convey to Megna and Garigan if the appraisal held up, or to cancel the sale if gross error were discovered. An initial review of the land value at the time the certificate was issued (some two years after the sale) showed a gross discrepancy. The holder of the cash certificate, Garigan, then instituted this suit, seeking relief in the nature of mandamus requiring the present Secretary to issue him a patent. Later, Megna was named a party. Garigan and Megna then worked out an amicable arrangement of their differences and Garigan, with Megna's approval, filed a motion for summary judgment. In the meantime, the Secretary had given notice that a hearing would be held in December of this year to look into the validity of the appraisal--as of the date of the sale. There was then

filed on behalf of defendant a motion seeking to have the case postponed until this hearing could be completed. On November 2, 1963, plaintiff's motion for summary judgment was overruled and defendant's motion to suspend proceedings granted.

The case presents the anomalous situation of the Secretary of the Interior being sued to issue a patent on the basis of a cash certificate that a district court in another district had previously directed him to cancel. The Secretary's delay in this respect was occasioned to a great extent by the fact that Garigan had not been named a party in the District of Columbia. The principal significance of the Court's ruling, however, lies in its indication that a cash certificate is not to be equated with a contract and that issuance of such a certificate does not cut off the long-recognized authority of the Secretary of the Interior to review the propriety of the action of his subordinates as long as legal title remains in the United States.

Staff: Assistant United States Attorney Jo Ann D. Diamos (D. Ariz.) and Thos. L. McKevitt (Lands Division).

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CRIMINAL TAX MATTERS
Appellate Decisions

Attempt to Evade and Defeat Taxes; Specific Intent; Instruction That It Is Reasonable to Infer That Man Intends Natural Consequences of His Acts. Sherwin v. United States, 320 F. 2d 137 (C.A. 9); Mann v. United States, 319 F. 2d 404 (C.A. 5). The reviewing courts in each of these cases held that the evidence was sufficient to support the jury's verdict of guilty. One of the other errors alleged in Sherwin, and the only other error alleged in Mann, was the giving of the following instruction:

> It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. So unless the contrary appears from the evidence, the jury may draw the inference that the accused intended all the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused.

In the Sherwin case the defendant had objected to this instruction, which was taken from Mathes, Jury Instructions and Forms for Federal Criminal Cases, 27 F.R.D. 39, 78. The Ninth Circuit did not pass upon the correctness of the instruction, but held that even if its use in an evasion case were erroneous, the charge considered as a whole correctly informed the jury of the necessity of their finding specific intent in order to convict.

In the Mann case the defendant in effect requested this exact instruction, and did not object to its use. On appeal, however, he contended this was plain error under Rule 52(b), Federal Rules of Criminal Procedure. The Fifth Circuit agreed, holding that:

> 1. The words "unless the contrary appears from the evidence" improperly shifted the burden to the defendant; and
>
> 2. The words "one standing in like circumstances and possessing like knowledge" invited the jury to speculate hypothetically on what another man's intent might have been.

The Fifth Circuit conceded that the lower court gave a proper charge as to the necessity of intent and burden of proof, but held that the instant instruction was not cured by the remainder of the charge.

It appears that the instant instruction was given in the same context in each case. Because of this apparent conflict, the Department is currently considering applying for certiorari in Mann, and acquiescing in certiorari as to this point in Sherwin. In view of the Fifth Circuit's holding that the giving of this instruction constitutes plain error, United States Attorneys are cautioned to avoid all use of this instruction until further notice from the Department.

Sherwin

Staff: United States Attorney Cecil F. Poole and Assistant United States Attorney David R. Urdan (N.D. Calif.); Lawrence K. Bailey (Tax Division).

Mann

Staff: United States Attorney Woodrow Seals and Assistant United States Attorney William L. Bowers, Jr. (S.D. Texas)

Income Tax; Willful Evasion; Personal Expenses of Sole Stockholder Paid by Corporation, Not Reported as Income by Stockholder; Evidence Held Sufficient to Show Willfulness, Not Mere Negligent Error. United States v. Durant (C.A. 7, November 6, 1963). Conviction for willful attempt to evade tax (Section 7201 of the Internal Revenue Code of 1954) was affirmed, as against taxpayer's contentions (1) that the evidence showed, at most, only negligence, not willfulness, and (2) that the payments of his expenses were intended as loans from his controlled corporation to him. During the three indictment years, the corporation paid more than $212,000 of taxpayer's personal bills for gifts to his lady friends, and other personal bills, issuing 686 corporate checks for the purpose. Taxpayer reported none of this on his tax returns. Taxpayer had a personal account in which various other corporate disbursements were charged to him, but the payments in question were charged by the corporation to travel, selling, office expense, etc., and taken as deductions on the corporate returns. Taxpayer's claim of negligent error or laxity in supervision was contradicted by the surrounding circumstances. Revenue agents had warned him as to similar errors in prior years, yet taxpayer took no effective corrective action, and received daily and weekly reports indicating that these disbursements were not being charged to his personal account. The contention that the payments were intended as loans was refuted by all the circumstances.

The corporate surplus exceeded the amounts disbursed for personal expenses, so that the disbursements could be regarded as dividends, but the Court of Appeals made no mention of this aspect of the case. The Government's position at the trial and on appeal was that such disbursements constitute income whether or not they may be designated as dividends. See Davis v. United States, 226 F. 2d 331, 335 (C.A. 6); Hartman v. United States, 245 F. 2d 349, 352-353 (C.A. 8).

Staff: John P. Burke (Tax Division)
Assistant United States Attorney John Crowley (N.D. Ill.)

District Court Decision

Production of Documents - Privilege. United States v. San Antonio Portland Cement Co. (W.D. Tex., September 19, 1963.) (CCH 63-2 USTC ¶9784). In this suit the United States seeks to recover a refund of taxes erroneously paid to defendant. The allegedly erroneous refund had been made after review and approval by various administrative levels of the Internal Revenue Service and by the Joint Committee on Internal Revenue Taxation of Congress. Defendant moved for production of certain inter-office reports, memoranda, and other documents of Internal Revenue Service reasoning that these documents are needed to determine the exact factual and legal basis on which the refunds were made. The Government opposed the motion on the grounds that the documents occupy an executive or attorney-client "privileged" status or come under the attorney's "work-product" doctrine.

Observing that the Government was the plaintiff in this litigation the Court ordered production of the documents stating:

> The documents sought by the defendant appear to be relevant to the issues involved in this lawsuit; they are, or may lead to, admissible evidence; they have already been furnished to the Joint Committee on Internal Revenue Taxation; and they are not otherwise available to the defendant. An in camera examination reflects that these documents do not reveal any military or state secrets, nor would their production threaten the National Security in any way.

This decision has received considerable publicity in the Tax Services. While the Department decided not to seek interlocutory appeal, it does not agree with the decision of the Court. Any similar effort to reach Government documents should be resisted and the Tax Division should be consulted prior to production.

Staff: United States Attorney Ernest Morgan; (W.D. Tex.)
Robert L. Handros (Tax Division).

State Court Decision

Proceeds From Sale of Property - Priority of Liens. Gramercy Escrow Co. v. 7208 Broadway Corp., et al. (Cal. Sup. Ct., June 5, 1963.) (CCH 63-2 USTC ¶9792). In this interpleader suit a fund of money was available to the creditors of a delinquent taxpayer. The fund represented proceeds from the sale of certain furniture and fixtures owned by taxpayer. The United States claimed the fund by reason of a tax lien. One defendant's claim was based on a chattel mortgage on the furniture and fixtures which predated the tax lien. Los Angeles County claimed the fund by reason of a tax lien based on a tax on real property. The county reasoned the fixtures were improvements and thus were real property to which the county tax lien affixed.

The United States was given first priority because its tax lien attached to "all property and rights to property." The lien of the chattel mortgagee did not under California law transfer to the proceeds from the sale of the mortgaged property. By the same token, the state tax lien was limited by statute to the "property assessed" and did not transfer to the proceeds.

Staff: United States Attorney Francis C. Whelan; Assistant United States Attorney Herbert D. Sturman (S.D. Cal.).

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